

# LABOR LAW—THE LAW OF A BALANCED SOCIETY: A REPLY TO PROFESSOR EPSTEIN

CRAIG BECKER\*

## I. INTRODUCTION

Thank you Professor Smith and Capital University Law School for inviting me to comment on the annual Sullivan Lecture. It is a particular pleasure for me to comment on the lecture of my friend, Richard Epstein. Because we are in Columbus where these things really matter, I should tell you that Richard and I have played basketball together for years, and on the court, Richard is truly a unique figure—a libertarian with a mean jump shot.

Commenting on Richard's lecture, I must begin with two hydraulic metaphors. First, some years ago, Professor Geoffrey Stone, the former Dean of the University of Chicago Law School and Provost of the University, was speaking at an event honoring Richard and recounted a student's comment that taking notes in Richard's class was like trying to catch Niagara Falls with a thimble. Second, around the same time, I presented a paper entitled, *Labor Law Outside the Employment Relation*,<sup>1</sup> at the University of Chicago Law School Faculty Colloquium. The paper described employer efforts to escape the employment relationship,<sup>2</sup> and with it, the corresponding legal duties and obligations as well as possible legal responses to such efforts.<sup>3</sup> When I finished, Richard raised his hand and began his comment by saying, "You are trying to get water to run uphill." So here goes, not only trying to catch Niagara Falls with a thimble, but then, again, trying to get the resulting thimble full of water to run uphill.

---

Copyright © 2013, Craig Becker.

\* Craig Becker is General Counsel to the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO). Between April 2010 and January 2012, he served as a Member of the National Labor Relations Board. He has taught labor law and other subjects at UCLA, Georgetown, and the University of Chicago law schools. He received his J.D. from Yale Law School.

<sup>1</sup> The paper was subsequently published. See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527 (1996).

<sup>2</sup> See *id.* at 1528–37.

<sup>3</sup> See *id.* at 1537–61.

## II. RESPONSE

I would like to first place Richard's critique of the National Labor Relations Act (NLRA) in the context of the ongoing, increasing vitriolic debate about the Act, drawing on my recent experience as a Member of the National Labor Relations Board (NLRB), and then add a few considerations to the discussion that appear to be missing from Richard's account.

For twenty-one months, from April 5, 2010, to January 3, 2012, I worked as a Member of the NLRB administering the law that Richard would have Congress repeal. From that vantage point, it was clear to me that while Richard may be located toward the extreme of one pole of the discussion, there is an active and highly contentious debate ongoing about the law we administered and the future course of labor relations policy both at the federal and state levels. This debate arises at a time when over 93% of American workers in the private sector are not represented in dealings with their employer.<sup>4</sup> That fact is reflected in the number of cases arising before the Board.<sup>5</sup> Since 1975, the number of cases decided by the Board has declined steadily, dropping by over 50% between 2000 and 2010 alone.<sup>6</sup> Because the Board has traditionally and almost exclusively operated through adjudication,<sup>7</sup> a declining caseload threatens the Board's ability to keep the Act aligned with changing employment relations. The Supreme Court made clear in its 1975 decision in *NLRB v. J. Weingarten, Inc.*<sup>8</sup> that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."<sup>9</sup> But the declining caseload makes administrative adaptation via adjudication increasingly difficult and unsystematic.

Despite the fact that the Board is deciding fewer and fewer cases, its membership and even its very existence have become increasingly

---

<sup>4</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE (Jan. 27, 2012), <http://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>5</sup> See generally *Board Decisions Issued*, NLRB, <http://www.nlr.gov/graphs-data/board-decisions-issued> (last visited Oct. 22, 2012) (showing the number of NLRB decisions has decreased steadily from 2000 to 2010).

<sup>6</sup> *Id.*

<sup>7</sup> Prior to my service, the Board had only promulgated one substantive rule in over seventy-five years—a rule defining appropriate bargaining units in acute care hospitals. See 29 C.F.R. § 103.30 (2012); *accord* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 619–20 (1991) (upholding § 103.30).

<sup>8</sup> 420 U.S. 251 (1975).

<sup>9</sup> *Id.* at 266.

controversial in the past few years. Consider the stalemate over appointments to the Board. During the last two decades, a practice of packaging Democrats with Republicans and former management with former labor lawyers for confirmation as Board Members emerged, with the President's party assuming the majority and chairmanship.<sup>10</sup> This practice has developed even though the statute does not require that the Board be bipartisan.<sup>11</sup> When President Obama took office, the Board had only two sitting members, one Democrat and one Republican.<sup>12</sup> Following recent tradition, in July 2009, President Obama nominated two Democrats, including me, and one Republican to seats on the Board.<sup>13</sup> In October 2009, the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) voted to send all three nominations to the full Senate.<sup>14</sup> The HELP Committee unanimously approved the other two nominees and my nomination received a bipartisan endorsement, garnering the votes of two Republican Senators, including the Ranking Republican Member, Senator Enzi.<sup>15</sup> However, Senator John McCain immediately placed a hold on my nomination.<sup>16</sup>

At that time, the Democrats still held the sixty votes in the Senate needed to lift a hold, but they were preoccupied by debate over the Patient

---

<sup>10</sup> See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1429–49 (2000).

<sup>11</sup> See 29 U.S.C. § 153(a) (2006).

<sup>12</sup> The Board had been reduced to two sitting Members as of December 28, 2007, because the Democratically controlled Senate had deliberately not recessed for a period longer than three days in a successful effort to dissuade President George W. Bush from appointing any members during a recess. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638–39 (2010); HENRY B. HOGUE, CONG. RESEARCH SERV., RS 21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 8 (2012), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>.

<sup>13</sup> See Office of the Press Sec'y, *Nominations Sent to the Senate*, WHITE HOUSE (July 9, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Presidential-Nominations-Sent-to-the-Senate-7-9-09](http://www.whitehouse.gov/the_press_office/Presidential-Nominations-Sent-to-the-Senate-7-9-09).

<sup>14</sup> *Nominations*, U.S. SENATE COMMITTEE ON HEALTH, EDUC., LABOR & PENSIONS (Oct. 21, 2009), [www.help.senate.gov/nominations/index.cfm?PageNum\\_rs=13](http://www.help.senate.gov/nominations/index.cfm?PageNum_rs=13).

<sup>15</sup> Sam Hananel, *McCain Vows to Hold up Labor Board Nominee*, SEATTLE TIMES (Oct. 21, 2009, 10:54 AM), [http://seattletimes.com/html/politics/2010108028\\_apuslaborboardnominee.html](http://seattletimes.com/html/politics/2010108028_apuslaborboardnominee.html).

<sup>16</sup> *Id.*

Protection and Affordable Care Act.<sup>17</sup> As a result, the Senate did not schedule a cloture vote. At the end of the congressional session, in December, my nomination expired as a matter of law because it failed to garner the unanimous consent necessary to hold it over to the next session.<sup>18</sup> The President then renominated me in January, and the HELP Committee revisited my nomination.<sup>19</sup> On January 19, 2010, something important happened for the fate of my nomination: Republican Scott Brown won a special election in Massachusetts to assume the seat of the deceased Democrat Edward Kennedy.<sup>20</sup> Senator McCain then insisted that a hearing be held regarding my nomination, the first such hearing concerning a Board Member other than the Chairman in over a quarter century.<sup>21</sup> After the hearing, I was again voted out of the Committee, but this time on a pure party-line vote.<sup>22</sup> In other words, I lost my two Republican supporters, even though nothing about me had changed between October and February. Only the politics had changed.

Scott Brown was then sworn in, and my nomination was the subject of the first cloture vote after the Democrats lost the sixty votes needed to end debate.<sup>23</sup> As a result, although a majority of Senators voted to lift the hold, cloture was not achieved, and no vote was held on my nomination.

---

<sup>17</sup> See *U.S. Senate Roll Call Votes 111th Congress – 1st Session*, U.S. SENATE (Dec. 24, 2009, 7:05 AM), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396).

<sup>18</sup> See generally MAEVE P. CAREY, CONG. RESEARCH SERV., R 41872, PRESIDENTIAL APPOINTMENTS, THE SENATE'S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS 4–6 (2012), <http://www.fas.org/sgp/crs/misc/R41872.pdf>.

<sup>19</sup> *Nominations*, U.S. SENATE COMMITTEE ON HEALTH, EDUC., LABOR & PENSIONS (Jan. 20, 2010), [www.help.senate.gov/nominations/index.cfm?PageNum\\_rs=11](http://www.help.senate.gov/nominations/index.cfm?PageNum_rs=11).

<sup>20</sup> Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1.

<sup>21</sup> See generally *Full Comm. Hearing on Nomination of Harold Craig Becker to Be a Member of the Nat'l Labor Relations Bd.*, U.S. SENATE COMMITTEE ON HEALTH, EDUC., LABOR, & PENSIONS, 111th Cong. (Feb. 2, 2010, 4:00 PM), available at <http://www.help.senate.gov/hearings/hearing/?id=7590d244-5056-9502-5d93-7786f53a39f2>.

<sup>22</sup> See Laurie Kellman, *Brown's Swearing-in Gives GOP Chance to Block Everything in Congress*, DETROIT FREE PRESS, Feb. 5, 2010, at A3.

<sup>23</sup> *U.S. Senate Roll Call Votes 111th Congress*, U.S. SENATE (Feb. 9, 2010), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00022](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00022).

Nevertheless, the President appointed me to the Board in March<sup>24</sup> pursuant to his constitutional authority to unilaterally make appointments during a Senate recess.<sup>25</sup> I began work as a Board Member on the first Monday in April 2010.<sup>26</sup>

After the Republicans took control of the House of Representatives following the November 2010 elections, the contest over the Board shifted to the other side of Capitol Hill. Several significant NLRB decisions and other initiatives became the subject of budget riders introduced in and passed by the House.<sup>27</sup> Through the riders, the House aimed to prevent the Board from implementing “the incumbent administration’s view of wise policy” within “gap[s] left open by Congress,” despite the Supreme Court having deemed such agency action “entirely appropriate.”<sup>28</sup> In 2011, in fact, a rider was introduced to prevent the NLRB from spending any money to enforce the NLRA.<sup>29</sup> Two bills were introduced in the House around the same time to abolish or substantially dismember the Board.<sup>30</sup> For example, the National Labor Relations Board Reorganization Act of 2011, introduced by Representative Gowdy of South Carolina, aimed “[t]o abolish the National Labor Relations Board and to transfer its enforcement authority to the Department of Justice and its oversight of elections to the Office of Labor-Management Standards of the Department of Labor.”<sup>31</sup>

The House also exercised its constitutional authority to prevent the Senate from recessing for longer than three days in an effort to prevent the President from using his recess appointment power to fill the mounting

---

<sup>24</sup> Office of the Press Sec’y, *President Obama Announces Recess Appointments to Key Administrative Positions*, WHITE HOUSE (Mar. 27, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

<sup>25</sup> U.S. CONST. art. II, § 2.

<sup>26</sup> *Board Members Since 1935*, NLRB, <https://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Nov. 24, 2012).

<sup>27</sup> *E.g.*, H.R. 3070, 112th Cong. §§ 402–406 (1st Sess. 2011) (proposing to prevent expenditures to implement changes in unit determination rules, voluntary recognition procedures, off-worksite voting and representation case procedures as well as expenditures related to requirement that employers post a notice of employees rights under the NLRA).

<sup>28</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>29</sup> *Legislative Digest for H.R. 1 Amendments*, GOP (Feb. 16, 2011), <http://www.gop.gov/bill/112/1/hr1amendments>.

<sup>30</sup> National Labor Relations Reorganization Act of 2011, H.R. 2926, 112th Cong. (2011); Protecting American Jobs Act, H.R. 2978, 112th Cong. (2011).

<sup>31</sup> H.R. 2926. *See also* H.R. 2978 (proposing amendments that would remove enforcement and substantive rulemaking authority from the Board).

vacancies on the Board.<sup>32</sup> At the same time, Republican Senators vowed to block confirmation of any Board nominee, which a single Senator could do through the system of holds in the absence of sixty votes in favor of cloture.<sup>33</sup> Senator Lindsey Graham, for example, publicly pledged, “I will continue to block all nominations to the NLRB . . . .”<sup>34</sup> “Given its recent actions, the NLRB as inoperable could be considered progress,” Graham declared.<sup>35</sup>

This partisan stalemate resulted in the Board falling from five, to four, and then to three Members during my less than two years of service and then to two with the expiration of my appointment on January 3, 2012, at the end of the congressional session.<sup>36</sup> That forced President Obama to make three recess appointments to the Board on January 4, 2012.<sup>37</sup> The President took that action simply to prevent the Board from falling to two members and thus being wholly disabled under the Supreme Court’s June 2010 *New Process Steel, L.P. v. NLRB* decision, holding that two members

---

<sup>32</sup> See U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.”); HOGUE, *supra* note 12, at 3 (discussing the argument that appointments cannot be made in a recess shorter than three days). The House was also motivated by a desire to prevent the President from appointing a Director of the newly created Consumer Financial Protection Bureau as a means of extracting concessions from the White House and the Democratically controlled Senate relating to the underlying legislation. See John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

<sup>33</sup> See generally RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL 32878, CLOTURE ATTEMPTS ON NOMINATIONS, CONG. RESEARCH SERV. 1 (2012), available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E%2C\\*P%2C%3B%3C%20P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E%2C*P%2C%3B%3C%20P%20%20%0A).

<sup>34</sup> Press Release, *Graham Calls for Investigation into NLRB-Union Collaboration*, LINDSEY GRAHAM (Dec. 9, 2011), [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=24553900-802a-23ad-4cfe-05130335b0a0](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0).

<sup>35</sup> *Id.* Graham pointed to the Board’s General Counsel’s issuance of a complaint against The Boeing Company based on its refusal to expand its production facilities in Washington State allegedly in retaliation against the Washington employees’ exercise of protected rights. *Id.* The General Counsel, however, is appointed by the President and confirmed by the Senate and is outside the control of the Board. 29 U.S.C. § 153(d) (2006). Moreover, the Boeing case was settled and never reached the Board. Bloomberg News, *Union Seeks to Dismiss Complaint Against Boeing*, N.Y. TIMES, Dec. 9, 2011, at B9.

<sup>36</sup> *Board Members Since 1935*, NLRB, <https://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Nov. 24, 2012).

<sup>37</sup> See Ezra Klein, *The Reason for Obama’s Recess Appointments*, WASH. POST, Jan. 6, 2012, at A2.

are not a quorum and cannot conduct official business.<sup>38</sup> The validity of the recess appointments is now being challenged in a growing number of cases in the federal courts of appeals.<sup>39</sup> In fact, the D.C. Circuit recently held that the appointments were invalid, not on the grounds advanced by the parties—that pro forma sessions the Senate was forced to hold every three days, because of the House’s refusal to consent to a longer recess, precluded the recess appointments—but rather on the broader grounds that such appointments can only take place during a recess between congressional sessions.<sup>40</sup> The D.C. Circuit’s holding has already prompted litigants to question the validity of my appointment<sup>41</sup> and its logic could be used in efforts to revisit hundreds of decisions issued by Boards including recess appointed members during the past thirty years.<sup>42</sup> The pending challenges and the many more sure to follow promise to cast a shadow of uncertainty over the Board’s actions for a period of time that could extend for several years.

---

<sup>38</sup> 130 S. Ct. 2635, 2638 (2010).

<sup>39</sup> There were more than a dozen cases in which the issue has been raised as of September 1, 2012. See, e.g., Brief *Amici Curiae* of the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, International Foodservice Distributors Ass’n, National Ass’n of Manufacturers, National Ass’n of Wholesaler-Distributors, National Council of Chain Restaurants, National Federation of Independent Business, National Retail Federation, and Retail Litigation Center in Support of Petitioner Seeking Reversal at 9 n.2, *Nestlé Dreyer’s Ice Cream Co. v. NLRB*, Nos. 12-1684, 12-1783 (4th Cir. filed July 10, 2012).

<sup>40</sup> *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at \*16 (D.C. Cir. Jan. 25, 2013). A majority of the panel further held that the vacancy filled by a recess appointment must also arise during a recess between congressional sessions. *Id.*

<sup>41</sup> See, e.g., Petitioner D.R. Horton, Inc.’s Rule 28(j) Letter, *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. filed Jan. 29, 2013), [http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Appellants%2028j%20Letter%20in%20light%20of%20Noel%20Canning%20--%20DR%20Horton%20v.%20NLRB%20\(Fifth%20Circuit\).pdf](http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Appellants%2028j%20Letter%20in%20light%20of%20Noel%20Canning%20--%20DR%20Horton%20v.%20NLRB%20(Fifth%20Circuit).pdf).

<sup>42</sup> Of the twenty-nine recess appointments to the Board since 1980, twenty-five would have been invalid under the reasoning of *Noel Canning*. See *The Future of the NLRB: What Noel Canning v. NLRB Means for Workers, Employers, and Unions: Testimony Before the H. Comm. on Educ. & the Workforce, Subcomm. on Health, Employment, Labor & Pensions*, 113th Cong. 5–6 (2013) (statement of N. Elizabeth Reynolds), available at <http://edworkforce.house.gov/uploadedfiles/reynolds.pdf>.

I know Richard would agree with me that this form of partisan trench warfare is not likely to result in sound labor relations policy.<sup>43</sup> I know he would also agree with me that the increasingly extreme rhetoric being employed in the debate is not conducive to reasoned deliberation.<sup>44</sup> Before the South Carolina primary in January 2012, for example, former Governor Mitt Romney repeatedly ran an ad asserting, “The National Labor Relations Board, now stacked with union stooges selected by the [P]resident, 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.’”<sup>45</sup> In reality, the Board said no such thing and issued no such order because the Boeing case never came before the Board; the case settled during trial before an administrative law judge.<sup>46</sup>

Yet, Richard is not likely to agree with me about how the ongoing debate about U.S. labor relations policy should be resolved.<sup>47</sup> So let me end with four observations.

First, the utilitarian method Richard so ably employs is, of course, not the only ethical or moral calculus. The right to organize and engage in collective bargaining is not a peculiarity of the American New Deal and cannot be reduced to the product of interest group action at a particular historical moment. The right is not only recognized in the United States, it is a fundamental right in a free society. Article 23 of the Universal Declaration of Human Rights, adopted in the wake of World War II by the United Nations General Assembly in 1948, proclaims: “Everyone has the right to form and to join trade unions . . . .”<sup>48</sup> This right has broad international recognition. One hundred sixty-one nations have ratified the

---

<sup>43</sup> See, e.g., Richard A. Epstein, *The Tussle Over Craig Becker*, FORBES (Nov. 10, 2009, 12:01 AM), <http://www.forbes.com/2009/11/09/craig-becker-nlra-nlrb-john-mccain-nomination-opinions-columnists-richard-a-epstein.html>.

<sup>44</sup> See *id.*

<sup>45</sup> Byron Tau, *Romney Slams Obama’s ‘Union Stooges’ in S.C.*, POLITICO (Jan. 5, 2012, 7:42 AM), <http://www.politico.com/politico44/2012/01/romney-slams-obamas-union-stooges-in-sc-109684.html>.

<sup>46</sup> See Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3.

<sup>47</sup> See Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1, 33 (2013).

<sup>48</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 23, § 4 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr>.

International Labour Organisation's *Right to Organise and Collective Bargaining Convention*,<sup>49</sup> which provides:

(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

(2) Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership . . . .<sup>50</sup>

These international commitments are also given force in the domestic law of most fully industrialized nations, including those capitalist democracies with whose companies U.S. employers compete and within which U.S. employers conduct large amounts of business, while fully abiding by those commitments. In fact, Freedom House, a bipartisan organization founded in 1941 to monitor and advance democracy and human rights around the world,<sup>51</sup> ranked the United States below forty-one other countries in its protection of the right to organize.<sup>52</sup> Among other fully industrialized countries, only Russia ranked lower.<sup>53</sup>

Second, if we look below Richard's probing line of vision, which is trained on the market, and into the workplace, we see the continued need to

---

<sup>49</sup> ILO, *Right to Organise and Collective Bargaining Convention*, ILO Convention No. 98 (July 1, 1949), [http://www.ilocarib.org.tt/projects/cariblex/pdfs/ILO\\_Convention\\_98.pdf](http://www.ilocarib.org.tt/projects/cariblex/pdfs/ILO_Convention_98.pdf). See also Int'l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work*, para. 2(a), Gen. Conf. (June 18, 1988), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>; *Ratifications of CO98—Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312243](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243) (last visited Nov. 25, 2012).

<sup>50</sup> *Right to Organise and Collective Bargaining Convention*, *supra* note 49, at art. 1.

<sup>51</sup> *About Us*, FREEDOM HOUSE, <http://www.freedomhouse.org/about-us> (last visited Oct. 18, 2012). The organization is currently chaired by William Howard Taft IV, who has served in high positions in several recent Republican administrations. See *Our Leadership*, FREEDOM HOUSE, <http://www.freedomhouse.org/content/our-leadership> (last visited Oct. 18, 2012).

<sup>52</sup> ARCH PUDDINGTON, FREEDOM HOUSE, *THE GLOBAL STATE OF WORKERS' RIGHTS: FREE LABOR IN A HOSTILE WORLD* 1–53 app. (Aug. 2010), [http://www.freedomhouse.org/sites/default/files/inline\\_images/The%20Global%20State%20of%20Workers%20Rights.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/The%20Global%20State%20of%20Workers%20Rights.pdf).

<sup>53</sup> *Id.*

protect unions and other forms of concerted activity. Within many workplaces, the potential for abuse of employer authority is not fully checked by the market in labor. Employees' right to quit and employers' interest in preserving their reputation in the labor market are not sufficient to prevent arbitrary action and mistreatment. What historians have called the "foreman's empire," which was a major impetus to organizing in the industrial era,<sup>54</sup> still exists at night in downtown office buildings where janitors are working, among hotel maids, and in many other workplaces. Workplace representation and the right to engage in more informal types of concerted activity, such as asking a coworker for help or even comparing wage rates,<sup>55</sup> is a necessary counter to abusive practices within the workplace.

Concerted legal action is also a necessary counter to more systematic workplace inequities. In one of the last decisions issued while I was a Member, the Board held that the NLRA bars an employer from demanding that employees, as a condition of employment, waive their right to file a class action suit and their ability to proceed collectively in arbitration, even if the compelled waiver is encased in an otherwise lawful agreement to arbitrate all workplace disputes.<sup>56</sup> The Board has long held that pursuing class and collective actions to remedy workplace wrongs is a form of concerted activity for mutual aid and protection falling within the scope of employees' rights under section seven of the NLRA.<sup>57</sup> Requiring

---

<sup>54</sup> DANIEL NELSON, *MANAGERS AND WORKERS: ORIGINS OF THE TWENTIETH-CENTURY FACTORY SYSTEM IN THE UNITED STATES 1880–1920*, at 35 (2d ed. 1995).

<sup>55</sup> *See, e.g.*, *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 10, 17–18 (1962) (recognizing unorganized workers' rights to walk out to protest cold conditions in shop); *Parexel Int'l, LLC*, 356 N.L.R.B. No. 82 (Jan. 28, 2011) (holding termination of employee to prevent discussion of wages and possible discrimination unlawful).

<sup>56</sup> *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

<sup>57</sup> *See, e.g.*, *127 Rest. Corp.*, 331 N.L.R.B. 269, 275 (2000) (applying the *Trinity Trucking* principle); *United Parcel Serv., Inc.*, 252 N.L.R.B. 1015, 1018, 1022 n.26, 1023 (1980) (holding that the filing of a class action lawsuit alleging that employer failed to provide rest periods required by state statute was protected concerted activity), *enforced*, 677 F.2d 421, 422 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 N.L.R.B. 364, 365 (1975) ("[T]he filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith."), *enforced*, 567 F.2d 391, (Table) (7th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978); *Salt River Valley Water Users Ass'n*, 99 N.L.R.B. 849, 853–854 (1952), *enforced*, 206 F.2d 325, 329 (9th Cir. 1953) (protecting employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the Fair Labor Standards Act); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, (continued)

employees to cede their statutory right to pursue collective legal action is no different than requiring them to agree not to join a union in a so-called yellow dog contract—a form of agreement that has been unlawful since before the passage of the NLRA.<sup>58</sup> Moreover, the courts have uniformly recognized that such collective legal actions are essential instruments for the enforcement of antidiscrimination laws, minimum wage laws, and other protective labor legislation because single employees lack the resources and are reluctant to proceed individually in an action against their employer.<sup>59</sup> Thus, unless one is willing to follow Richard’s reasoning to its logical conclusion (as he forthrightly is) and both permit yellow dog contracts<sup>60</sup> and eliminate all minimum workplace standards, including antidiscrimination laws,<sup>61</sup> then the right to take collective action is essential to the enforcement of the most basic guarantees of workplace fairness.

Third, at the level of the labor market, there are questions of distribution as well as efficiency. The precipitous decline of union membership since the 1970s closely correlates with growing income and

---

948–949 (1942) (holding that filing of a Fair Labor Standards Act suit by three employees was protected concerted activity).

<sup>58</sup> See 29 U.S.C. § 103 (2006) (adopted in the Norris-LaGuardia Act of 1932).

<sup>59</sup> See, e.g., *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”). The Fifth Circuit concluded that one district court “reasonably presumed that those potential class members still employed by [the employer-defendant] might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.” *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). The Tenth Circuit agreed that employees “are frequently unwilling to pioneer an undertaking of this kind since they are unsure as to whether the court will support them. Even if they do prevail, they are apprehensive about offending the employer as a result of taking a stand. These are all factors that enter into the impracticability issue.” *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977). “Absent class treatment,” one district court concluded, “each employee would have to . . . undertake the personal risk of litigating directly against his or her current or former employer. Many employees would likely be unable to bear such . . . risks.” *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001).

<sup>60</sup> See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370–75 (1983).

<sup>61</sup> See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 28 (1992).

wealth inequality.<sup>62</sup> Between 1947 and 1977, rising productivity was linked to rising wages,<sup>63</sup> but since then, they have diverged.<sup>64</sup> In fact, one study found the decline of union representation accounted for 25% of the rise of income inequality in the fifteen-year period from 1982 to 1997.<sup>65</sup> International comparisons confirm the correlation between both union membership and the coverage of collective bargaining laws and income equality.<sup>66</sup>

Finally, and closely related to the link between declining union membership and growing income inequality, looking above the market to the polity reveals that the continued existence of labor organizations ensures some balance in a political system in which ever increasing amounts of money are spent to influence both election outcomes and policy formation and implementation.<sup>67</sup> In *Citizens United v. FEC*,<sup>68</sup> the Supreme Court emphatically rejected Justice White's assertion, made three decades earlier, that "[t]he State need not permit its own creation to consume it" and, therefore, could "permissibly . . . impose limits upon the political activities of corporations."<sup>69</sup> *Citizens United* underscores the importance of considering the implications for democratic politics of removing the legal foundation for labor organization, either dramatically, as Richard would do, or gradually, by blocking legislative and administrative reform of the law to adjust it to changing economic circumstances, as has happened over the course of the last half-century. In other words, in considering the forms of economic organization the law permits, encourages, and protects, the political implications cannot simply be ignored when the Supreme Court has barred the elected branches from addressing those implications *ex post*.

---

<sup>62</sup> Martin A. Asher & Robert H. DeFina, *The Impact of Changing Union Density on Earnings Inequality: Evidence from the Private and Public Sectors*, 18 J. LAB. RES. 425, 425 (1997).

<sup>63</sup> RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT: REBUILDING A MIDDLE-CLASS DEMOCRACY BY ENHANCING WORKER VOICE 6 (2012).

<sup>64</sup> See Asher & DeFina, *supra* note 62, at 433.

<sup>65</sup> *Id.*

<sup>66</sup> KAHLENBERG & MARVIT, *supra* note 63, at 29.

<sup>67</sup> See *id.* at 112.

<sup>68</sup> 130 S. Ct. 876 (2010).

<sup>69</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 809–10 (1978) (White, J., dissenting). See *Citizens United*, 130 S. Ct. at 979 (Stevens, J., concurring in part and dissenting in part).

If we are to conduct a civil and productive debate about the future of federal labor relations policy, as we should, each of these factors, as well as those articulated in Richard's lecture, must be considered.

Perhaps such a debate would yield a conclusion that labor unions are neither "savior" nor "scourge." When I was in law school, I took torts from Professor Guido Calabresi, who later became Dean of Yale Law School and is now a judge for the United States Court of Appeals on the Second Circuit. In 1978, Judge Calabresi wrote a famous article called *Torts—The Law of a Mixed Society*<sup>70</sup> in which he argued that tort law was "the paradigmatic law of the mixed society"—one that was neither a "purely 'liberal,' *laissez-faire* polity" nor a "collective state."<sup>71</sup> My suggestion is that as we engage in this debate about the future of U.S. labor policy, labor law should be conceived of as the law of a balanced society—a law preserving the balance essential to the mixed polity celebrated by Judge Calabresi, one that combines freedom with the rights and obligations needed to prevent its abuse.

---

<sup>70</sup> Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978).

<sup>71</sup> *Id.* at 521.