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Keynote Address

The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response

Craig Becker[†]

I want to thank the *Law Review* for sponsoring this symposium, particularly Matt Norris for bringing together such an interesting group for you to listen to today. Like the Dean, it's a particular pleasure for me to appear on this program with my own labor law professor, Jack Getman. I was going to go back and check my transcript to see what grade I got in Jack's class so I could encourage the law students in attendance today that despite the fact you don't get all As in law school, you can have a moderately successful career as a lawyer. But I've moved so many times since then that I couldn't find the box, so the evidence is lost, I'm afraid.

What I want to do today is take the long view on our question. Our question for today is the future of organized labor, and I want to try to put that question in context. I may perhaps raise more questions than I answer, but I'll leave the answers to my esteemed colleagues who will follow after me. Figure 1 represents the long view as presented by Richard Freeman in a really fascinating 1998 article called *Spurts in Union Growth: Defining Moments and Social Processes*. And what it shows, quite starkly, is that the labor movement you all know today burst into existence in a one-, basically two-decade long period in the 1930s, 1940s, and the very early 1950s.

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In 1935, of course, the National Labor Relations Act was passed. In 1937 alone, U.S. unions grew by 55%, 55% in a sin-



Fig. 8.1 Changing percentage of nonagricultural workers who are members of unions, 1880-1995
Source: See table BA.2.

Fig. 1 Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 265, 266 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998). Used with permission.

gle year. But what Professor Freeman's graph also shows is that after that extraordinary spurt, those same unions have been gradually, much more gradually, taken apart piece by piece since the early 1950s.

In 1953, union density reached its peak. In 1979, the absolute number of union members reached its peak. So density, that is, the percentage of members in the workforce, has been in decline since 1953, and the absolute number of union members in the United States has been in decline since 1979. The decline slowed somewhat in the quarter century after 1959, when approximately half the states adopted a "little" National Labor Relations Act governing the public sector. For approximately a twenty-five-year period, public-sector membership increased and slowed the decline in absolute membership by offsetting the decline in private-sector membership.

But last year, only two years after an important event—the first time that public-sector membership in absolute terms ex-

ceeded private-sector membership—public-sector membership began to fall. That is, 2010 was the first year where most union members in the United States were government employees as opposed to private-sector employees. Two years later, in 2012, public-sector membership began to decline as private-sector membership had been doing for several decades. That was obviously caused somewhat by the recession, but also, of course, by a very sharp and direct attack on the rights of public-sector workers. The latter was, in turn, I would argue, caused largely by the decline in density in the private sector.

So why does this matter? This is a fairly familiar story, although represented here in fairly stark terms. Why does it matter? Why should we care about it? Since I only have thirty minutes and not three days to answer that question, I'm going to focus on just two reasons—economic and political. Economically, from the point of the peak of that spurt, or actually slightly before that spurt in union membership, up through the 1970s, when private-sector membership began to decline dramatically in this country, wages and productivity were closely linked as shown in Figure 2. That is, as workers were more productive, their wages increased.

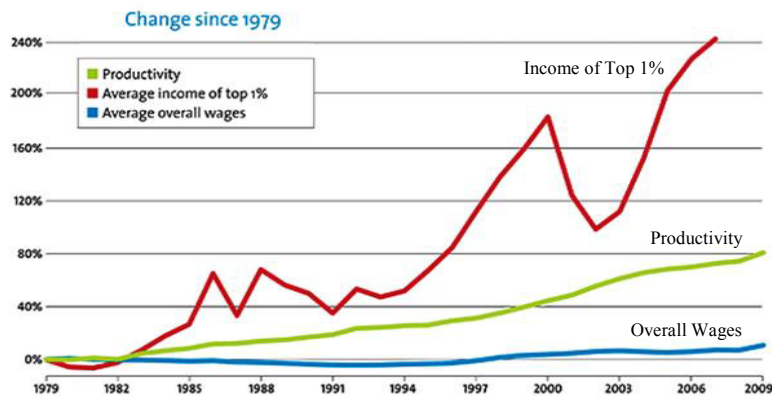


Fig. 2 Dave Gilson & Carolyn Perot, *It's the Inequality, Stupid*, MOTHER JONES, Mar./Apr. 2011, <http://www.motherjones.com/politics/2011/02/income-inequality-in-america-chart-graph>. Used with permission.

And what's happened since then, since 1979—when in absolute terms union membership began to decline, and after the 1970s witnessed the most dramatic drop in private-sector union members—is you see that the two have become detached. That is, productivity and wages have become detached as Figure 2 illustrates. American workers continue to be more productive, that's the green line, but wages have basically been flat, that's the blue line. The obvious result is the wealth has gone to the wealthiest. So if you want to understand the reasons for the explosion of inequality in this country, there are many, but

here's a very important one.

Wages have become detached from productivity, and the wealth that's being increasingly produced is going to a smaller and smaller group of people. Let me give you the numbers there. Since 1979, the median worker received a 5% raise, while productivity has increased by 75%. So where is the wealth going? That's the red line. The American middle class is celebrated by politicians, Democratic and Republican alike, but that middle class was essentially built by those unions that exploded into existence in that two-decade period between 1933 and 1953—United Auto Workers, the United Steel Workers, the International Brotherhood of Electrical Workers. All the unions that we know today created that celebrated middle class, and as those unions have been taken apart, so has the middle class.

So Figure 3 shows you just the correlation, which is obviously not causality, but it's still informative, the correlation of union membership in percentage terms and the aggregate share of income going to the middle class from the late 1960s to 2009. You see almost a perfect correlation between the drop in union membership and the share of income going to the middle class. In other words, what we see is that unions, labor organizations, played a decisive role in civilizing and, even more importantly, spreading the benefits of industrialization and mass production.

We celebrate not only the middle class but also manufacturing jobs, but it's important to remember that manufacturing jobs, when they first were created, were not the good jobs that we think of them as today. They were dirty, dangerous, low paid and in many cases segregated jobs, and it's labor organizations that civilized those jobs, which spread the benefits of the productivity of mass production and made those good jobs. The problem today, given the trend lines you see, is that labor organizations are not playing a similar role in the sectors that are expanding today—the service and retail sectors, or in what remains of the manufacturing sector.

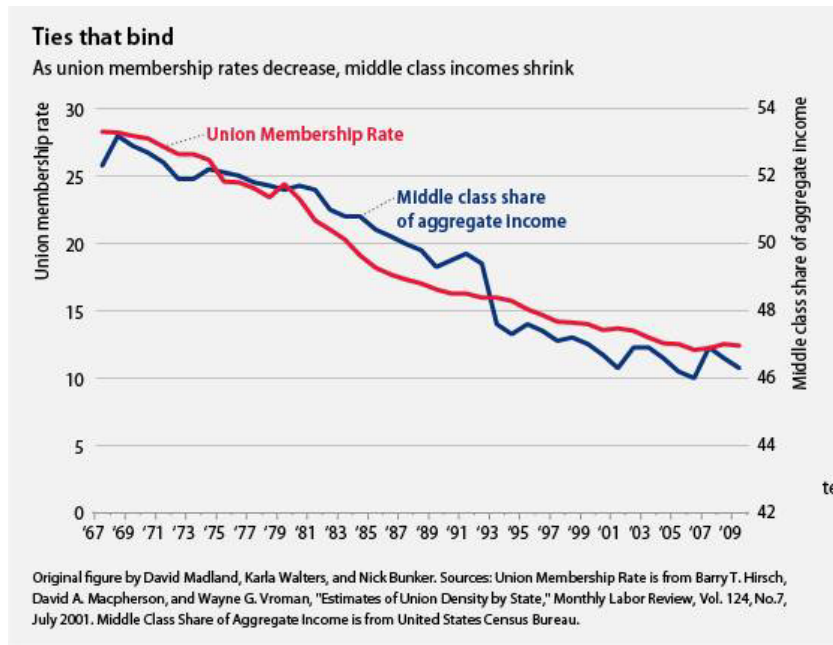


Fig. 3 Used with permission.

So let me turn to the political consequences. The weakening of organizations of working people has not only thrown our economy out of balance, it's thrown our political system out of balance. Figure 4 is a graphic depiction of spending in elections, with the top line being business, the bottom line being labor, and the line just above that being other ideological groups. What you see is that business spending is fifteen times that of unions, and the gap is widening over time, for obvious reasons. There actually always has been a disbalance in spending, but there was a time when business spending was at least countered by union members knocking on doors and talking to their neighbors. But fewer union members means fewer doors knocked on and the increasing influence of those thirty-second attack ads we're all so fond of on television in September, October and November.

After Election Day, business spends more than sixty times what labor spends and seventy-five times nonprofit spending, employing 15,000 lobbyists. So the disparate political influence is not only on Election Day, but, perhaps even more importantly, after Election Day. And the gap in spending is not only widening, but it's true of contributions to both Democrats and Republicans. Disparate spending by business and labor is not a party matter.

Now, campaign finance law, and thus the Supreme Court's campaign finance jurisprudence, traditionally has linked treatment of corporations and treatment of unions. Setting

aside the important question of whether a corporation, in the words of former Chief Justice John Marshall “an artificial being, invisible, intangible and existing only in contemplation of law,” should have First Amendment rights equal to an association of people governed by democratic rules, i.e. a labor organization.

Setting aside that question, I think the more important question at the moment, post *Citizens United*, is what are the consequences for our democracy of equating corporations and labor organizations when the law has very effectively fostered the former but, as the graphs above dramatically show, has not effectively fostered the latter? So the Supreme Court now has told us we can’t, or told Congress that it can’t, address the problem of the increasing influence of money on politics ex post, after the fact. So we have to address it ex ante, before the fact. And one important way to think about it is that the law needs to foster and truly protect organizations composed of people, real people, that is, unions, that increase the participation of working people, that pool their resources and amplify their voices in the political process.

But there is the stark challenge. The stark challenge is how do you put together these two pieces of what I’ve been talk-

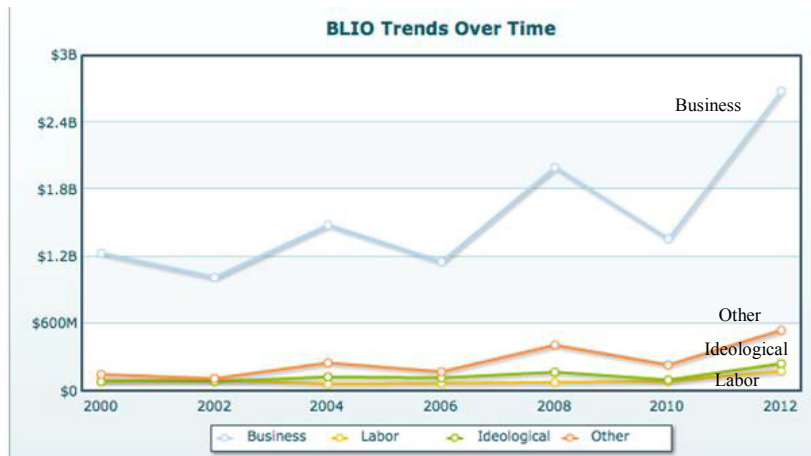


Fig. 4 Business-Labor-Ideology Split in PAC & Individual Donations, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/overview/blio.php> (last visited April 1, 2014). Used with permission.

ing about, that is the increasing need, economically and politically, for vigorous organizations of working people, and the reality displayed in Figure 4, because this political reality doesn't look very promising. That is, how do we imagine reinvigorating the labor movement and reinvigorating our labor law when the political reality is that organizations of working people are becoming weaker and weaker and corporate, business organizations are becoming stronger and stronger in the political process? And you can illustrate the challenge by looking at the states.

Just before the dawn of the New Deal, Justice Brandeis wrote in *New State Ice v. Liebmann*, that the states are laboratories of democracy, but here we can think about them a little bit as barometers, barometers that are registering a political change prior to the federal government, given the barriers to change at the federal level are much greater. So I want to talk about the states in two respects. First, I want you to consider the correlation between private-sector union membership and public employee rights. Twenty-six states have passed "little" Wagner Acts governing most public-sector employees within their borders, and they did so in a period that correlates almost exactly with the period between the peak in union density in 1953 and the peak in the absolute number of union members in 1979.

The peak in union density nationwide occurred in 1953, and in 1959, Wisconsin passed the first comprehensive public-sector collective bargaining law. The peak of union membership in absolute numbers was 1979, and in 1983, Ohio was the last state to pass a comprehensive public-sector collective bargaining law. Now, there's been considerable legislative tinkering on both sides of the borders of those states that have comprehensive public sector collective bargaining laws, and some changes at the border, but essentially since 1983 that map has stayed the same, those states that have public-sector collective bargaining and those states that do not, until the last couple years.

Figure 5 shows you what happened as a result. It shows you private-sector density since the 1970s up through 2009 and public-sector density. During that period when those laws were passed, public sector density rose as private-sector density was

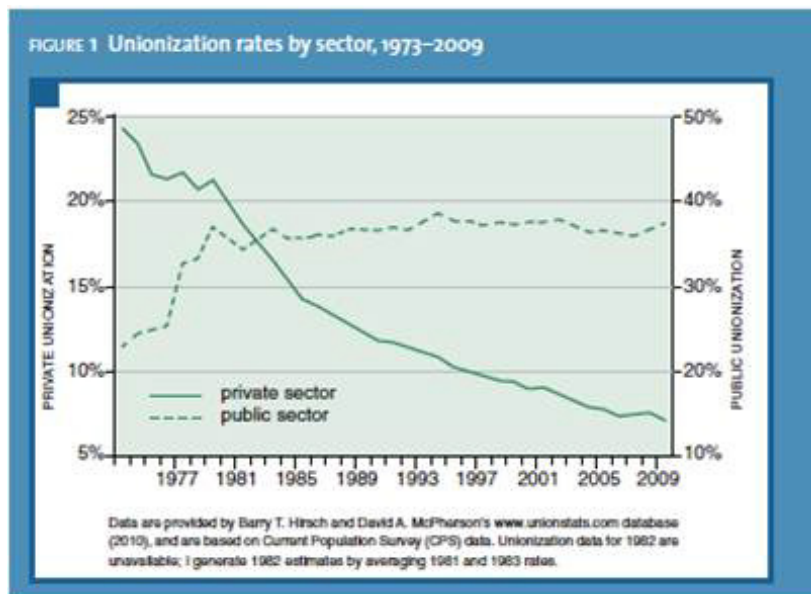


Fig. 5 Used with permission from the AFL-CIO Center for Strategic Research.

falling and so, as I said earlier, overall the fall in union density was moderated as an aggregate matter. But in 2010, as I said, for the first time, most union members in the United States became public employees, and two years later, as you all know, Wisconsin gutted its public sector bargaining law. So what does that tell us? In 1959, when Wisconsin passed its law, union density in that state was close to 40%. In 2011, when Governor Walker and the Republican legislature gutted the historic law, union density was at 7%.

So this is not a sustainable picture. That's what I'm suggesting. It's not a sustainable picture, and what Wisconsin tells us is that you can't sustain a labor movement in the public sector with public employees, essentially a set of islands in a non-union sea. That's what Wisconsin suggests.

And the political consequences of the steady disorganization of working people are registering in the states in a second way, and that's in "right to work" legislation. So, of course, you

all know private sector labor relations largely are governed by federal law—the National Labor Relations Act, but in 1947, in the Taft-Hartley Act, Congress created a somewhat peculiar one-way exception to the preemptive sweep of federal law in Section 14(b), allowing the states to adopt so-called “right to work” laws.

Now, going back to 1935, the primary innovation of the National Labor Relations Act was the principle of exclusivity, that is the majority rule. It’s like our democracy generally. You have a vote and the majority governs, and the selected representative represents everybody, union and nonunion employees alike. And that, too, has consequences. That is, the union that’s elected to represent all employees has a legal duty to do so and a legal duty to do so which extends to both union members and nonmembers.

In 1944, interestingly, twenty years before Congress prohibited employers from discriminating on the basis of race, the Supreme Court held, and I quote, that a union “representative is clothed with power, not unlike that of a legislature,” and thus has the duty “to represent nonunion or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith.” In other words, the union can’t discriminate based on union membership or other improper reasons.

When Congress amended the NLRA in 1947, it not only introduced Section 14(b), but it recognized that duty by indicating that a union and an employer could agree to a provision in their contract which spreads the cost of that representation by allowing the union to charge all employees for their representation, all members and nonmembers for that representation. The Supreme Court has since held that that charge is limited to the cost of representation. That is, the collective bargaining agreement cannot require union membership, the union cannot charge full union dues to nonmembers, but the agreement can spread the cost of representation across all employees, and the court has explained that that arrangement distributes fairly the cost among those who benefit, and it counteracts the incentive that employees might otherwise have to become free riders who refuse to contribute to the union while obtaining the benefits of union representation.

Yet it’s important to recognize that you have both of those happening in the 1947 amendments. The 1947 amendments, at the same time they recognized there was a free rider problem and the cost of union representation should be shared because of the union’s duty of fair representation, Congress essentially ripped the uniform fabric of federal labor law by allowing the states to adopt “right to work” laws. Of course, such laws don’t create a right to work. Nonunion employees have no such right. They can be fired at will, they can have their wages reduced at the will of the employer, reduced by amounts much greater

than any union dues or fees would reduce them. Rather, “right to work” laws simply prevent unions from entering into agreements with employers that spread the cost of representation across all represented employees. Twenty-four states have adopted “right to work” laws. Most of them did so immediately before or immediately after Taft-Hartley.

So what we have here is far from cooperative federalism. I’d call it combative federalism. That is, we have states adopting laws that are fundamentally inconsistent with federal labor law. The Supreme Court, in fact, has said that in “right to work” states, “There is [thus] a conflict between state and federal law; but [it is] a conflict sanctioned by Congress” So what’s the core of that conflict?

The core of the conflict, of course, is that the union has the duty to represent everyone, but it can’t spread the cost to everyone. And it has the duty to represent everyone not only in negotiations but in relation to individual grievances. A union member gets fired or a nonunion member gets fired, the union has the duty to represent that person, and the National Labor Relations Board has held that that duty is compromised if the union attempts to charge the individual for that representation outside of collection of a fair share fee, which is outlawed in “right to work” states. So it’s no different from requiring an insurance company to provide benefits to everyone in a group, whether they pay for them or not.

You may have read that a state court trial judge in Indiana recently held that the “right to work” law adopted in that state violated the state constitutional provision against taking of services without compensation. Now, there’s some fairly complicated preemption questions in that case, which will be resolved on appeal, but, in essence, that’s correct. It’s a taking of services without just compensation. So the result is that the central right guaranteed by federal labor law, the right to representatives of one’s own choosing, is compromised because union members have to pay not only for their own representation but also for others’, and the economic viability of representation is compromised.

Now, what’s the relationship of this to the whole picture? The relationship is this. As I indicated, most “right to work” laws that were adopted in the states were adopted either just before or just after 1947, and, then again, like the public-sector map, the map basically remained the same until the last few years. In 2011, Indiana adopted a “right to work” law, and in

2012 Michigan adopted a “right to work” law. And, again, the explanation of why those laws are being passed has everything to do with the whole picture.

In Michigan, as late as 1979, unions represented close to 40% of all employees. In 2012, when Michigan adopted a “right to work” law under Section 14(b), unions represented barely 17%. So the loss of union membership is leading to dramatic changes in the legislative arena at the state level, changes clearly designed to weaken labor organizations both in the public and private sectors.

At the federal level, of course, we have the opposite. That is, labor law has been marked not by change but by stasis—it has remained the same. But that also is important politically, and that also I think is explained by this same picture, because labor law, to be effective, to continue to serve the policies for which it’s adopted, has to change. It has to change in order to continue to serve its purposes, but our law has not changed. Adopted in 1935, it was significantly amended in 1947 and 1959, but not in a way, in either case, intended to strengthen labor organizations, and again in 1974, but simply to extend the law to nonprofit hospitals, not to change its basic terms.

But to be effective, the law has to change, and it has to change for two reasons. One, as we all know from our administrative law courses, parties will adapt their behavior to the law, and that’s particularly true of well-counseled and wealthy parties. Here you have a law, the National Labor Relations Act, which was expressly intended to rebalance the balance of power in the workplace. So we know what the consequences will be over time. That is, the parties who have the resources and the know-how will find the cracks in the law and they’ll widen them and they’ll work their way through them, and that’s what we’ve seen under the National Labor Relations Act. And that process was what was really behind the efforts at labor law reform under President Carter and more recently with the Employee Free Choice Act.

Second, the law has to register changes in the economy. This law was enacted in 1935. It fit the economy of General Motors, but it doesn’t fit the economy of Walmart and Manpower and McDonald’s.

Yet the NLRA has not been adjusted for over seventy-five years, and I would argue it’s not been adjusted largely because of a determined minority in the Senate. You can look at three instances to understand that. The first major effort at labor law reform during this period of steady decline was under President Carter. There was a Democratic president and Democratic majorities in both the Senate and House, yet a major effort at labor law reform was blocked in the Senate by a filibuster led by Senator Orrin Hatch that survived a record six cloture votes. So a major effort at labor law reform was blocked by a minority

in the Senate under the Senate's interesting rules of majoritarian government.

The same thing could be said of EFCA—the next major reform effort—the Employee Free Choice Act. A major effort at labor law reform that was mounted just before and after President Obama came into office. President Obama came into office, and for of the first two years of his administration, there were Democratic majorities in both chambers. But, again, the inability to get sixty votes in the Senate, after EFCA passed in the House overwhelmingly, but, again, an inability to get sixty votes in the Senate blocked labor law reform.

Even the current controversy about the National Labor Relations Board—and I don't want to minimize Roger's agency here, given that he represents Noel Canning in its case in the Supreme Court. Even that I think can be understood in the same way.

That is, President Obama came into office, and after some struggle, secures a functioning National Labor Relations Board. That National Labor Relations Board, which I was a member of for approximately two years, attempts in some modest ways to pull this law from 1935 into this century, and the reaction in the Senate is, at least within a minority in the Senate, is essentially to shut the Board down. Senator Lindsey Graham, in an oft-quoted comment, very explicitly said, "I will continue to block all nominations to NLRB. Given its recent actions, the NLRB as inoperable could be considered progress." So you have a reaction, again, it's a Democratically controlled Senate, but a reaction among a minority in the Senate to some modest steps toward reform at an administrative level—a reaction aimed at shutting the agency down by blocking appointments.

The result is that in January of 2012, President Obama is faced with the Board losing a quorum at the end of my service, and the President makes three recess appointments, and those are the three recess appointments now before the Supreme Court in *Noel Canning*. So it's a major constitutional question involving the balance of power between the Senate and the President in the appointments arena, but I would say it's no accident that it arises out of this little agency, the National Labor Relations Board, because it's another instance, along with the two prior instances, where reform of this labor law enacted in 1935 is being blocked by a minority in the Senate.

So I want to end with the question of how we escape this dilemma. That's what these graphs have shown, is that we

have a dilemma. We have a situation where the need for vigorous organizations of working people is greater than it ever has been, greater in the economic realm, greater in the political realm, but as a result of the gradual dismemberment of those organizations, the course forward, as we see in the states in both the public sector and in terms of “right to work” legislation, is increasingly difficult to see. So how do we go forward? How do we effect that change? I want to go back for a moment and think about how it happened in 1935. How did the National Labor Relations Act get passed? And the answer there I think is fairly obvious, and it’s strikes.

Just prior to the passage of the NLRA in 1935, not only was the country in the midst of the Depression, but the country was gripped by an incredible strike wave. In April of 1935 alone, 1.2 million workdays were lost to strikes, 281 strikes were ongoing, and 4,000 shipbuilding workers struck in New Jersey just before the Senate floor vote. Days before the House vote, 400,000 coal miners announced a strike date. So in that extraordinary moment, this bill basically sailed through the Congress, from the committee reports to presidential signature in less than two months, between May and July of 1935. When I cite that statistic to our legislative director, he wants to cry, given the way Congress works today. It was really extraordinary in terms of the rapidity of that enactment.

In contrast, last year just over a million workdays lost to strikes—fewer than in a single month in 1935 despite, of course, a vastly expanded workforce.

Think about that—and maybe go back and look at what the Act actually says are its purposes. The Act’s purpose was clearly to quell that industrial unrest, one, but that was not the only purpose. The Act still states, “The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead[] to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce”

But that’s only one purpose. The Act had a second purpose and still has a second purpose, and it is, and I again quote, to redress:

[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association [which] substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power

In other words, the Act was expressly intended to address exactly the divorce of productivity and wages and the increase in inequality that we all see in this country today as well as their broader implications.

So juxtaposing those two original purposes, I think we can

at least imagine the beginnings of the answer to the dilemma, the political Catch-22 that we're facing in the increased need for vigorous organizations of working people and their decreasing numbers in the strikes that we're currently seeing, the strikes that we're seeing at McDonald's and other fast food restaurants, the strikes by Walmart workers, the strikes in other low-wage industries. They're a different kind of strike. They're not shutting down the coal industry, they're not shutting down the ports, they're not causing the kind of industrial unrest that we saw in 1935.

What they're doing is they're illustrating the need for this Act or a new act to fulfill its second purpose. That is, those strikes are strikes intended to illustrate, to dramatize, the need for workers' organizations to address increasing inequality in this country, and so therein, and in the growing realization I think exists generally in the country. There is a disbalance, not only a disbalance in our economy, but a disbalance in our political system. I see some hope for a political solution to this dilemma and an answer to the question of the future of workers' organizations.

Thank you.