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## Caught in a Vicious Cycle: A Weak Labor Movement Emboldens the Ruling Class

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ARTICLE

CAUGHT IN A VICIOUS CYCLE: A WEAK  
LABOR MOVEMENT EMBOLDENS  
THE RULING CLASS

ANDREW STROM\*

|                   |    |
|-------------------|----|
| INTRODUCTION..... | 20 |
| CONGRESS.....     | 23 |
| COURTS.....       | 28 |
| THE NLRB.....     | 37 |
| CONCLUSION.....   | 43 |

*I think that the [NLRA] is of vital importance to the United States. . . . And the reason why I think it is of vital importance is I believe very strongly in the free enterprise system. . . . The one issue, though, in modern capitalism: there is no inherent operating code in there . . . that guarantees that an employer is not going to treat employees badly. The National Labor Relations Act at least provides a process for those employees to become involved in discussing their own terms and conditions of employment. And I think that that is a very good thing because at the end of the day we don't want to wake up and live in a United States of America that looks like late-stage Imperial Rome where you have a bunch of oligarchic plutocrats on the one hand and serfs on the other hand and that's it. Because at that point nobody has any stake in society and we're not America anymore.*

—Harry I. Johnson, III, Member,  
National Labor Relations Board, 2013–2015<sup>1</sup>

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1. Charles A. Shanor et al., *A Conversation with Members of the National Labor Relations Board and the General Counsel*, 64 EMORY L.J. 1553, 1576 (2015).

## INTRODUCTION

In 2011, the Occupy Wall Street movement called attention to the alarming concentration of wealth in this country. Notably, the outsized influence of billionaires is one of the few issues where people on the left and the right find common ground. While the right's most prominent villains are George Soros and Tom Steyer, the left's are the Koch Brothers and to a lesser extent, Sheldon Adelson. In 2015, the Koch Brothers announced that the political network they built planned to spend close to \$900 million on the 2016 election campaign.<sup>2</sup> Sheldon Adelson, whose fortune is estimated (by Forbes) at \$35.5 billion,<sup>3</sup> and his wife, Miriam Adelson, donated at least \$113 million toward Republican congressional campaigns in the 2018 midterm elections.<sup>4</sup>

We've always had rich people in this country, but wealth is far more concentrated at the top than it was thirty-five years ago. In 1982, it *only* took \$75 million in wealth to get a place on the *Forbes* list of 400 wealthiest Americans.<sup>5</sup> In 2017, it took \$2 billion.<sup>6</sup> And, inflation alone does not account for that difference: \$75 million in 1982 is the equivalent of \$189 million in 2017.<sup>7</sup> Using current dollars, in 1982, the combined wealth of the Forbes 400 was about \$231 billion.<sup>8</sup> In 2017, the combined wealth of the 400 was \$2.68 trillion!<sup>9</sup>

Similarly, CEOs have always been paid much more than workers, but the gap between the average worker's pay and CEO pay has increased ten-fold over the last forty years.<sup>10</sup> In 1978, CEOs at the largest firms were paid 30 times more than the average worker.<sup>11</sup> Today, CEOs are paid 300 times more than the average worker.<sup>12</sup>

During this same period, the percentage of workers who belong to unions has declined precipitously. In 1979, 24.4 percent of nonagricultural

2. Nicholas Confessore, *Koch Brothers' Budget of \$889 Million for 2016 Is on Par With Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>.

3. Luisa Kroll & Kerry A. Dolan, *The Forbes 400: The Definitive Ranking of the Wealthiest Americans*, FORBES (Oct. 2, 2018, 7:00 AM), <https://www.forbes.com/forbes-400>.

4. Emily Kopp, *Sheldon Adelson Breaks All Time Spending Records on Midterm Elections, Surpassing \$100M*, ROLL CALL (Oct. 22, 2018, 8:59 AM), <https://www.rollcall.com/news/politics/sheldon-adelson-breaks-all-time-spending-records-on-the-midterm-elections-surpassing-100-million>.

5. See Chuck Collins & Josh Hoxie, *Billionaire Bonanza: The Forbes 400 and the Rest of Us*, INST. FOR POL'Y STUD. 4 (Nov. 2017), <https://inequality.org/wp-content/uploads/2017/11/BILLIONAIRE-BONANZA-2017-Embargoed.pdf>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See Lawrence Mishel & Jessica Schieder, *CEO Compensation Surged in 2017*, ECON. POL'Y INST. (Aug. 16, 2018), <https://www.epi.org/publication/ceo-compensation-surged-in-2017/>.

11. *Id.*

12. *Id.*

workers were union members. In 2017, that number had dropped to 10.8 percent,<sup>13</sup> and, in the private sector, it was only 6.5 percent.<sup>14</sup> When union membership was strong, worker pay would rise when productivity increased. Productivity rose 95.7 percent from 1948 to 1973, and during that same time, hourly compensation for non-supervisory workers in the private sector increased by 90.8 percent.<sup>15</sup> By contrast, from 1973 to 2017, productivity increased by 77.0 percent, but hourly compensation for this same group of workers only increased by 12.4 percent.<sup>16</sup>

It is hard to imagine how an objective observer could look at the United States' economy and draw the conclusion that workers have too much bargaining power. And yet, the business lobby has somehow convinced the Republican establishment that they need to make it harder for workers to organize.

There is no obvious, simple explanation for how we reached this state of affairs. The "Powell Memo,"<sup>17</sup> written in 1971 by future Supreme Court Justice Lewis Powell to the Chairman of the Education Committee of the U.S. Chamber of Commerce, offers a starting point. Powell argued that the free enterprise system was under attack, and in response the Chamber of Commerce should develop its own staff of scholars, and should fund articles, books, pamphlets, and paid advertisements "to inform and enlighten the American people."<sup>18</sup> A web of pro-corporate think tanks have arisen in the years after the Powell Memo, and perhaps in direct response to the Memo.<sup>19</sup> The Heritage Foundation, which describes itself as "the nation's largest, most broadly-supported conservative research and educational institution," was founded in 1973.<sup>20</sup> The Federalist Society, a self-described group of "conservatives and libertarians dedicated to reforming the current

13. Barry T. Hirsch, David A. Macpherson, & Wayne G. Vroman, *State Union Density Estimates by State, 1964-2018*, UNIONSTATS.com, [http://unionstats.gsu.edu/State\\_Union\\_Membership\\_Density\\_1964-2018.xlsx](http://unionstats.gsu.edu/State_Union_Membership_Density_1964-2018.xlsx) (last visited Sept. 3, 2019).

14. U.S. Dep't of Labor, Bureau of Labor Statistics, *Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry* (Jan. 18, 2019), <https://www.bls.gov/news.release/union2.t03.htm>.

15. See *The Productivity-Pay Gap*, ECON. POL'Y INST. (Aug. 2018), <https://www.epi.org/productivity-pay-gap> [<https://web.archive.org/web/2018111235030/https://www.epi.org/productivity-pay-gap>].

16. See *id.*

17. *The Powell Memo (also known as the Powell Manifesto)*, RECLAIM DEMOCRACY!, [http://reclaimdemocracy.org/powell\\_memo\\_lewis/](http://reclaimdemocracy.org/powell_memo_lewis/) (last visited Sept. 9, 2019).

18. *Id.*

19. See Mark Schmitt, *The Legend of the Powell Memo*, THE AM. PROSPECT (Apr. 27, 2005), <https://prospect.org/article/legend-powell-memo> (arguing "while the Powell Memo had some impact," it is a mistake to treat it as the blueprint for what he refers to as "the conservative intellectual infrastructure built in the 1970s and 1980s," while still noting that "some of Powell's recommendations do bear an uncanny resemblance to the institutions of the modern right," and admitting that other sources give Powell more credit than he does).

20. *About Heritage*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> (last visited Sept. 3, 2019).

legal order,” was founded in 1982.<sup>21</sup> The Pacific Legal Foundation, the Competitive Enterprise Institute, the Buckeye Institute for Public Policy Solutions, the Mackinac Center for Public Policy, all founded in the 1970s and 80s, are just some of the other groups that now regularly churn out legal briefs and other materials in support of a free market agenda.<sup>22</sup>

But, in the memo that gave birth to this movement, Powell was not advocating for business to crush unions.<sup>23</sup> Rather, Powell noted that the heads of national labor organizations “have been respected—where it counts the most—by politicians, on the campus, and among the media,” and he just wanted the same respect for business leaders.<sup>24</sup> Powell ended his memo with the hopeful observation that in the United States, “most of the essential freedoms remain,” including both labor unions and collective bargaining.<sup>25</sup>

Unfortunately, in the years that followed the “Powell Memo,” as the Chamber of Commerce and other trade associations and pro-business think tanks have stepped up their advocacy, the result has been a vicious cycle for workers and unions: each attack has weakened unions and thus made it harder for the labor movement to resist further attacks. Moreover, as the Chamber of Commerce and other trade associations and pro-business think tanks have stepped up their advocacy, they have also shifted the terms of the debate so that they no longer even concede that collective bargaining is an essential element of freedom.

Donald Trump was elected by painting himself as a different kind of Republican. While a standard-issue Republican like Senator Lamar Alexander, Chairman of the Senate Health, Education & Labor Committee, has publicly stated that he would abolish the minimum wage,<sup>26</sup> during the campaign Trump gave one of his classic salesman answers when asked about raising minimum wage: “I’m looking at that, I’m very different from most Republicans. . . You have to have something you can live on. But what I’m really looking to do is get people great jobs so they make much more money than that, much more money than the \$15.”<sup>27</sup>

21. *Our Background*, FEDERALIST SOC’Y, <https://fedsoc.org/our-background> (last visited Sept. 3, 2019).

22. See *Janus v. Am. Fed’n of State, Cty., & Mun. Employees*, Council 31, 138 S. Ct. 2448 (2018) (each of these four organizations filed an amicus brief).

23. See Andrew Strom, *Justice Powell Wouldn’t Recognize the Monster He Created*, ON LABOR (Dec. 13, 2018), <https://onlabor.org/justice-powell-wouldnt-recognize-the-monster-he-created>.

24. *The Powell Memo*, *supra* note 17.

25. *Id.*

26. Dave Jamieson, *Lamar Alexander Says Minimum Wage Should be Abolished*, HUFFPOST POLITICS (June 25, 2013), [https://www.huffingtonpost.com/2013/06/25/lamar-alexander-minimum-wage\\_n\\_3498975.html](https://www.huffingtonpost.com/2013/06/25/lamar-alexander-minimum-wage_n_3498975.html).

27. Ben Kamisar, *In Reversal, Trump Expresses Openness to Raising Minimum Wage*, THE HILL (May 4, 2016, 6:16 PM), <https://thehill.com/policy/finance/278778-trump-expresses-openness-to-raising-minimum-wage>.

Even after he was elected, Trump continued giving lip service to the idea that he would depart from traditional Republican economic policies. Soon after he took office, he declared, “The GOP will be, from now on, the party also of the American worker.”<sup>28</sup> But despite Trump’s rhetoric, since he has taken office, the Republican Party has continued on its path of pursuing policies that favor management at the expense of workers.

In Congress, in the courts, and at the National Labor Relations Board (“NLRB” and/or “Board”), employers have aggressively pushed for policies that tilt the balance of power even further in their direction, and they have found a willing partner in the Republican Party. As explained below, over the last few years, Republicans have introduced a series of bills that would weaken labor laws, the Supreme Court has issued two major anti-worker decisions; and the NLRB has reversed even modest gains made by workers during the Obama years.

#### CONGRESS

The attitude of the Republican leadership in Congress was illuminated by a tweet sent out by then House Majority Leader Eric Cantor on Labor Day in 2012: “Today we celebrate those who have taken a risk, worked hard, built a business and earned their own success.”<sup>29</sup> In other words, he wanted to turn it into Boss’s Day. And while Cantor is gone, Republicans in Congress today are equally dismissive of workers’ interests, invariably repeating the Chamber of Commerce’s talking points right down to the Chamber’s catch-phrases. For instance, in 2015, Senator Lamar Alexander co-sponsored a bill that would have overturned the NLRB’s *Specialty Healthcare* decision.<sup>30</sup> When the bill was introduced, Alexander issued a statement that could have been, and perhaps was, written by the Chamber declaring that “the NLRB’s decision to allow micro-unions divides workplaces and makes it harder and more expensive for employers to manage their workplace and do business.”<sup>31</sup>

On June 29, 2017, the House Committee on Education and the Workforce approved three bills that would have made it harder for workers to organize. The three bills are H.R. 986, the Tribal Labor Sovereignty Act of 2017;<sup>32</sup> H.R. 2776, the Workforce Democracy and Fairness Act;<sup>33</sup> and

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28. President Donald J. Trump, Remarks by President Trump at the Conservative Political Action Conference, WHITEHOUSE.GOV (Feb. 24, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-conservative-political-action-conference/>.

29. Eric Cantor (@EricCantor), TWITTER (Sept. 3, 2012, 9:06 AM), <https://twitter.com/EricCantor/status/242654833218293760>.

30. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934 (2011), *enforced sub nom.* Kindred Nursing Ctrs. E., LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013).

31. Tim Devaney, *Senate GOP Tackles Controversial ‘Micro-Unions,’* HILL (Mar. 20, 2015, 1:41 PM), <https://thehill.com/regulation/labor/236440-senate-gop-tackles-controversial-micro-unions>.

32. H.R. REP. NO. 115-324 (2017).

H.R. 2775, the Employee Privacy Protection Act.<sup>34</sup> Following the vote, Committee Chairwoman Virginia Foxx issued a press release declaring that the bills would “restore fairness and balance to federal labor policies.”<sup>35</sup> Chairwoman Foxx had previously asserted that organized labor has “sort of lost its reason for being.”<sup>36</sup> As I explain below, these bills do little more than remove some workers from the protections of the NLRA and make it harder for workers covered by the NLRA to organize.

The Tribal Labor Sovereignty Act (“TLSA”) would strip the NLRB’s jurisdiction over any enterprise on tribal land operated by Indian tribes.<sup>37</sup> According to the AFL-CIO, the TLSA would affect 600,000 workers.<sup>38</sup> The most significant impact of this bill would be on casinos, which often employ large numbers of workers who are not Native American, and likewise cater to customers who are primarily not Native American.<sup>39</sup>

The so-called “Workforce Democracy and Fairness Act” (WDAF<sup>40</sup>) was designed to undo some aspects of a rule adopted by the NLRB.<sup>41</sup> In 2014, after receiving extensive public comment on a proposed rule, the NLRB announced a series of changes to its election case handling procedures.<sup>42</sup> The new rules were designed in part to modernize procedures that had not been updated in decades—for example, since 1966, once an election had been scheduled, the Board gave the employer seven calendar days to compile and submit a list of eligible voters, along with their home addresses.<sup>43</sup> That time frame arose in an era when someone would need to type up the list by hand and employers would need to mail the list to the

33. H.R. REP. NO. 115-326 (2017).

34. H.R. REP. NO. 115-325 (2017).

35. Press Release, Comm. on Educ. & Labor Republicans, Committee Approves Three Bills to Restore Fairness and Balance to Labor Policies (June 29, 2017), <https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=401818>.

36. Robert Iafoffa, *Virginia Foxx Questions Need for Unions as She Preps to Chair U.S. House Labor Committee*, NORTH STATE JOURNAL (Dec. 6, 2016), <https://nsjonline.com/article/2016/12/virginia-foxx-questions-need-for-unions-as-she-preps-to-chair-u-s-house-labor-committee/>.

37. H.R. REP. NO. 115-324 (2017) (the bill would amend the definition of employers excluded from the National Labor Relations Act to add an exclusion for “any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands.”).

38. AFL-CIO Staff, *Tribal Labor Sovereignty Act Would Strip Working People of Freedoms*, AFL-CIO (Feb. 14, 2018), <https://aflcio.org/2018/2/14/tribal-labor-sovereignty-act-would-strip-working-people-freedoms>.

39. *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1308 (D.C. Cir. 2007) (affirming NLRB’s exercise of jurisdiction over tribal casino based in part on finding that “[t]he casino employs many non-Indians and caters primarily to non-Indians.”).

40. I’ll use the acronym WDAF because I can’t bring myself to continuously use the Orwellian title the Republicans have given their bill.

41. H.R. REP. NO. 115-326 (2017) (The WDAF included a separate provision overturning the Board’s *Specialty Healthcare* decision; that portion of the bill is now moot).

42. Representation—Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101, 102, 103).

43. *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966).

Board.<sup>44</sup> The new rule gives the employer two business days to compile and electronically serve the list.<sup>45</sup> The new rule also acknowledges the new forms of communication that have developed over the last fifty years, and accordingly, requires the employer to provide additional contact information for employees such as telephone numbers and e-mail addresses, if it has them.<sup>46</sup>

The Board's 2014 election rule also attempted to streamline some procedures and to eliminate certain practices that had evolved without any apparent rationale for their existence. For instance, in *Barre-National, Inc.*, the Board had held that an employer was entitled to a pre-election hearing regarding the eligibility of certain voters even though the Board was not required to decide eligibility issues prior to an election.<sup>47</sup> In issuing the new election rule, the Board described the result in *Barre-National* as "not administratively rational."<sup>48</sup> The Board explained that "it serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results."<sup>49</sup> The new rule clarified that parties at a pre-election hearing only have a right to litigate matters that are relevant to "the existence of a question of representation."<sup>50</sup> The Board explained that this limitation was necessary because otherwise "the possibility of using unnecessary litigation to gain strategic advantage existed in every case."<sup>51</sup> The Board found that "some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself."<sup>52</sup> Another procedural change the Board made in 2014 was to eliminate an automatic twenty-five day delay in scheduling an election after a Regional Director's decision in a contested case.<sup>53</sup> The built-in delay was supposed to give the parties time to file a request for review with the Board, but the

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44. See generally *Regional Offices*, NAT'L LAB. REL. BD., <https://www.nlr.gov/about-nlr/who-we-are/regional-offices> (last visited Sept. 5, 2019) (the Board had regional offices in major cities across the country, but some employers would need to drive several hours to hand deliver the list).

45. 29 C.F.R. § 102.67(l) (2019).

46. *Id.*

47. 316 N.L.R.B. 877, 878 n.9 (1995) ("We also note that our ruling concerns only the entitlement to a preelection hearing, which is a matter distinct from any claim of entitlement to a final agency decision on any issue raised in such a hearing.")

48. Representation—Case Procedures, 79 Fed. Reg. 74308, 74385 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101, 102, 103).

49. *Id.*

50. 29 C.F.R. § 102.66(a) (2017).

51. Representation—Case Procedures, 79 Fed. Reg. at 74318.

52. *Id.* at 74387.

53. *Id.* at 74409–10.



delay served no purpose because the Board was not required to rule on the request for review within the twenty-five day period.<sup>54</sup>

The WDAF undermined the 2014 election rule in several ways. First, it would require that no election take place until thirty-five days after a petition is filed. In addition, it would restore the opportunity to use the threat of litigation for strategic advantage by automatically postponing any initial hearing until fourteen days after a petition is filed and by requiring the hearing officer to take evidence on any issue that “may reasonably be expected to impact the outcome of the election.” Thus, even in cases where there is no need for a hearing, an employer could threaten to further delay the election by demanding a hearing in order to wrest concessions from the union regarding the election details or the scope of the bargaining unit. It’s hard to think of any way in which expanding the opportunities for pre-election litigation could possibly serve to advance the organizing rights of workers.

The Employee Privacy Protection Act would require each worker to tell the employer which form of contact information (telephone number, email address, or mailing address) the worker wants the employer to share with the petitioning union.<sup>55</sup> In theory, the bill is designed to promote employee privacy, but if that were the true rationale, then the bill would allow each worker to decide how many different forms of contact information they wished to share with a petitioning union. But the bill is so transparently designed to thwart union organizing rather than to actually promote worker privacy that it doesn’t even give workers the option of providing more than one form of contact information.

Labor bills proposed by the Republicans in 2017 are part-and-parcel with the Republicans’ labor agenda throughout the decade. In 2011, the House passed the “Protecting Jobs from Government Interference Act,” which would have taken away the power of the NLRB to restore or reinstate any work, or to rescind any relocation, transfer, subcontracting, or outsourcing, regardless of the circumstances.<sup>56</sup> While the impetus for this bill was the NLRB General Counsel’s decision to issue a complaint against Boeing, accusing it of relocating work in retaliation for its workers’ union activity, the bill swept much further, eliminating one of the few meaningful reme-

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54. *See id.* at 74410 (explaining that the Board often did not rule on a request for review during the twenty-five-day waiting period).

55. H.R. 2775, 115th Cong. (2017) (proposing to amend 29 U.S.C. § 159(c)(1) by providing that any list of eligible voters in an NLRB election would include not more than one form of personal contact information “such as a telephone number, an email address, or a mailing address [ ] chosen by the employee”).

56. H.R. 2587, 112th Cong. (2011).

dies available under the National Labor Relations Act (NLRA)—one that had been upheld by a unanimous Supreme Court.<sup>57</sup>

To understand the impact of this bill, consider the case *Healthcare Emp.'s Union v. NLRB*.<sup>58</sup> After the technical workers at a hospital filed a petition seeking a union election, the hospital subcontracted out the entire respiratory care department.<sup>59</sup> The respiratory care employees were the core of the union's supporters in the hospital.<sup>60</sup> The Ninth Circuit found that "the inference of anti-union animus raised by the timing of [the] decision to subcontract [was] 'stunningly obvious.'"<sup>61</sup> The court concluded that "we would need to ignore a powerful string of coincidences to conclude that [the hospital] would have implemented subcontracting, *when and as it did*, in the absence of union activity."<sup>62</sup> On remand, the Board ordered the employer to restore its respiratory care department and reinstate the twenty-seven employees who lost their jobs as a result of the illegal subcontracting.<sup>63</sup> The Republican bill would have barred the Board from ordering restoration of the respiratory care department, leaving the workers without any meaningful remedy.

When the Protecting Jobs from Government Interference Act was voted out of committee, then Speaker John Boehner expressed no concern about depriving workers of a meaningful remedy for illegal conduct by their employer, but instead said, "I appreciate the committee's efforts to help get the government out of the way and to promote a better environment for private-sector job creation."<sup>64</sup> Representative Mike Kelly of Pennsylvania declared, "[w]e can't compete in the global market if government boards like the NLRB try to dictate what employers can and can't do, creating a level of uncertainty that flies in the face of our nation's free market principles."<sup>65</sup>

What's remarkable is how much more openly anti-labor the Republicans are now than they were even in the 1990s. In 1995, the major labor bill passed by the Republican Congress was the Teamwork for Employees and

57. See *Fibreboard Paper Prod.'s Corp. v. NLRB*, 379 U.S. 203, 215–16 (1964) (upholding an NLRB order requiring an employer to restore maintenance operations that had been improperly subcontracted).

58. 463 F.3d 909 (9th Cir. 2005).

59. *Id.* at 920.

60. *Id.* at 914.

61. *Id.* at 920 (citing *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970)).

62. *Id.* at 924.

63. *St. Vincent Med. Ctr.*, 349 N.L.R.B. 365, 367 (2007).

64. Press Release, Educ. & the Workforce Comm., Committee Approves Legislation to Protect American Jobs, Remove Barriers to U.S. Investment (July 21, 2011), <https://web.archive.org/web/20120916063205/http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=253099>.

65. *Id.*

Managers Act, known as the TEAM Act.<sup>66</sup> The bill would have amended the section of the NLRA outlawing company unions by authorizing “employee involvement” programs where managers select workers to meet and discuss issues of quality, productivity, efficiency, safety, health. While the TEAM Act might have been a wolf in sheep’s clothing,<sup>67</sup> at least the Republicans felt the need to give the impression that they were addressing a problem that might be of concern to workers.

## COURTS

Even when the Republicans controlled both houses of Congress during the first two years of Trump’s term, the Senate filibuster prevented them from enacting the Chamber of Commerce’s wish list of anti-labor legislation. But the Chamber has been far more successful in the courts. For all his pro-worker rhetoric, Trump figured out that most working people don’t pay attention to how judges rule on workplace issues. So, even before the election, he floated a list of potential Supreme Court nominees that made clear his intention to nominate judges who could be counted on to favor management on workplace issues.<sup>68</sup> Neil Gorsuch was one of the potential nominees on Trump’s pre-election list, and when Trump followed through by nominating him to the Court, the AFL-CIO came out strongly against the nomination.<sup>69</sup> In a letter to Senators, AFL-CIO President Richard Trumka declared, “[a] thorough review of Judge Neil Gorsuch’s record on the U.S. Court of Appeal for the Tenth Circuit demonstrates that he is far more likely to rule in favor of corporate interests and against the interests of

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66. S. REP. NO. 105-12, at 55 (1997) (amended Section 8(a)(2) of the National Labor Relations Act by striking the semicolon and inserting the following: “Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees [who] participate[ ] to at least the same extent practicable as representatives of management participate[ ] to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply;”).

67. To those inside the labor movement, the employee involvement programs authorized by the TEAM Act recalled company unions used to defeat organizing in the 1920s. See IRVING BERNSTEIN, *THE LEAN YEARS*, 170–74 (1960), for a discussion of that history.

68. Trump said that he was taking advice from the Federalist Society and the Heritage Foundation regarding potential Supreme Court nominees. See, e.g., Bob Woodward & Robert Costa, *In a Revealing Interview, Trump Predicts a ‘Massive Recession’ but Intends to Eliminate the National Debt in 8 Years*, WASH. POST (Apr. 2, 2016), [https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33\\_story.html?horedirect=on](https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html?horedirect=on).

69. Richard L. Trumka, *Letter to Senators Opposing the Supreme Court Nomination of Neil Gorsuch*, AFL-CIO (Mar. 23, 2017), <https://aflcio.org/about/advocacy/legislative-alerts/letter-senators-opposing-supreme-court-nomination-neil-gorsuch>.

working men and women.”<sup>70</sup> But, the AFL-CIO’s opposition carried little weight with the Republican majority in the U.S. Senate.<sup>71</sup> And, in his very first Term on the Supreme Court, Gorsuch provided the decisive vote in two major labor cases, ruling against workers and unions.

In *Epic Systems Corp. v. Lewis*, by a five-to-four vote, the Supreme Court eviscerated the right of workers to band together to engage in collective legal action.<sup>72</sup> In that case, the Court held that an employer may require employees to waive their right to join with their co-workers to pursue their legal claims.<sup>73</sup> *Epic Systems* was the culmination of a multi-year project by employers to channel employment disputes into private arbitration proceedings.

One of the early steps in this project was the Court’s holding in *Gilmer v. Interstate/Johnson Lane Corp.* that a claim under the Age Discrimination in Employment Act may be subject to compulsory arbitration.<sup>74</sup> The arbitration clause was contained in Gilmer’s securities registration application with the New York Stock Exchange, so the case left open the question of whether the Federal Arbitration Act (“FAA”) applies to employment contracts.<sup>75</sup> This should never have been a question in the first place because the FAA provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>76</sup> But, then in 2001, in a five-to-four decision, the Supreme Court held in *Circuit City Stores, Inc. v. Adams* that only contracts of employment of transportation workers are ex-

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70. *Id.*

71. The AFL-CIO also opposed Trump’s nomination of Brett Kavanaugh to the Court, but there is no evidence that any Republican Senators feared that a vote for Kavanaugh would harm them politically. To the contrary, many political observers thought that some Democratic Senators were hurt by their votes against Kavanaugh. *See, e.g.,* Michael Barone, Opinion, *Michael Barone: The Kavanaugh Effect was Senate Democrats’ Undoing*, WASH. EXAMINER (Sept. 8, 2019, 10:31 AM), <https://www.washingtonexaminer.com/opinion/michael-barone-the-kavanaugh-effect-was-senate-democrats-undoing>; Christal Hayes & William Cummings, *Democratic Senators Lost in Battleground States After Voting Against Kavanaugh*, USA TODAY (Nov. 7, 2018, 6:28 PM), <https://www.usatoday.com/story/news/politics/elections/2018/11/07/kavanaugh-effect-midterm-elections/1915457002>; Kevin Breuninger, *Republicans Credit the ‘Kavanaugh Effect’ for Senate Wins Against Red-state Democrats*, CNBC (Nov. 7, 2018, 4:18 PM), <https://www.cnn.com/2018/11/07/gop-credits-kavanaugh-effect-for-senate-wins-against-red-state-democrats.html>; Jessica Kwong, *Brett Kavanaugh Could Rescue Donald Trump, Republicans in Midterm Elections, Polls Suggest*, NEWSWEEK (Oct. 4, 2018, 2:16 PM), <https://www.newsweek.com/brett-kavanaugh-donald-trump-republicans-midterm-1153344>; Press Release, AFL-CIO, Judge Brett Kavanaugh Puts Rights of Working People at Serious Risk (July 9, 2018), <https://aflcio.org/press/releases/judge-brett-kavanaugh-puts-rights-working-people-serious-risk>.

72. 138 S. Ct. 1612 (2018).

73. *Id.* at 1619.

74. 500 U.S. 20 (1991).

75. *Id.* at 25 n.2.

76. 9 U.S.C. § 1.

empted from the FAA's coverage.<sup>77</sup> The legislative history showed that the FAA was never intended to cover any employment contracts, but the Court's majority declared there was no need to assess the legislative history.<sup>78</sup> This led Justice Stevens to observe that "[a] method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case."<sup>79</sup>

After the *Circuit City* decision, more and more employers began to require employees to submit all disputes to arbitration.<sup>80</sup> In *Epic Systems*, Justice Gorsuch began the majority opinion with the question, "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"<sup>81</sup> In her dissent, Justice Ginsburg pointed out that these were not agreements that were subject to negotiation.<sup>82</sup> Instead, two of the three employers in the case, Epic Systems and Ernst & Young, emailed the arbitration agreements to employees and informed the employees that by continuing to show up at work, they would be accepting the terms of the agreements.<sup>83</sup>

From the time the NLRA became law, the Board and the courts held that when workers join together to file a lawsuit, the workers are exercising their rights under Section 7 of the Act to engage in "concerted activities for . . . mutual aid or protection."<sup>84</sup> Section 8(a)(1) of the NLRA makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this article."<sup>85</sup> *Epic Systems* should have been an easy case. If an employer e-mailed workers telling them that by continuing to work, they were agreeing to waive their right to strike, the resulting "agreement" would clearly be unenforceable.<sup>86</sup>

77. 532 U.S. 105 (2001); See Andrew Strom, *If the Supreme Court is Going to Start Overturning Precedent*, ONLABOR (Feb. 5, 2016), <https://onlabor.org/if-the-supreme-court-is-going-to-start-overturning-precedent/> (discussing *Circuit City* in greater length).

78. See *Circuit City*, 523 U.S. at 119 ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision." (citing *Ratzlaf v. United States*, 510 U.S. 135, 147–148 (1994))).

79. *Id.* at 133 (Stevens, J., dissenting).

80. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INSR. (Apr. 6, 2018), [epi.org/144131](http://epi.org/144131) (describing a study conducted by the Economic Policy Institute in 2017 and 2018 finding that the share of workers subjected to mandatory arbitration had risen from just over two percent in 1992 to over fifty-five percent).

81. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

82. *Id.* at 1636 n.2 (Ginsburg, J., dissenting) (explaining that the "employees . . . faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.").

83. *Id.* ("Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms.").

84. *Id.* at 1637–38.

85. 29 U.S.C. §158(a)(1) (1974).

86. *Mandel Security Bureau*, 202 N.L.R.B. 117, 119 (1973) (finding that employer's conditioning of reinstatement on employee's forbearance from future concerted activities was unlaw-

Shortly after the NLRA was enacted, the Supreme Court asserted that “[o]bviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes. . . .”<sup>87</sup> Following this logic, it should have been clear that an employer may not insist that its employees prospectively waive their right to engage in collective legal action. Yet, the five-Justice majority described the NLRA as a mere “mousehole,”<sup>88</sup> that was easily subordinate to the Federal Arbitration Act.

It is hard to view *Epic Systems* as anything more than a case where the majority worked backward from their preferred result. One explanation for how the majority was able to justify the result is that the Justices and their clerks have very little familiarity with the NLRA. Prior to the 1970s, cases involving the interpretation of the NLRA were a regular part of the Supreme Court’s docket. But now the Court rarely hears cases involving the interpretation of the Act.<sup>89</sup> A study published in 1999 found that judges who had experience representing management before the NLRB were “more than twice as likely as a judge without that experience to reverse a pro-employer. . .” NLRB decision.<sup>90</sup> The authors of that study theorized that “familiarity with the [NLRA] breeds greater respect for its protective doctrinal scope—even if the familiarity is developed while representing employer interests.”<sup>91</sup> The Justices lack of familiarity with the NLRA was illustrated by the majority’s assertion that the Act sets up a “careful regime” providing “specific guidance” about the obligation to bargain collectively and other matters covered by the Act.<sup>92</sup> The majority claimed that “it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn’t speak to class and collective action procedures in the first place.”<sup>93</sup> But, anyone with passing familiarity with the NLRA would know that this description of the Act is simply untrue.<sup>94</sup>

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ful); *See* *Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175, 175–76 (2001) (finding that separation agreement between employer and employee was unlawful where it, *inter alia*, required employee not to “influence, or otherwise direct any employee of the Company to . . . engage in any dispute or work disruption with the Company” for twelve months).

87. *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940).

88. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018).

89. Before *Epic Systems*, the last time the Court decided a case involving the scope of the NLRA’s protections was in 2001. *See* *NLRB v. Kentucky River Cmty. Care Inc.*, 532 U.S. 706 (2001).

90. James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1720 (1999).

91. *Id.* at 1745.

92. *Epic Systems*, 138 S. Ct. at 1625.

93. *Id.* at 1625–26.

94. I don’t know to what extent the different Justices delegate work to their law clerks, but only a small fraction of law students currently take a traditional labor law class. Yale Law School, one of the top feeder schools for the Court, is not even offering a traditional labor law class in

The Act itself is written in broad terms—it gives workers the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection,”<sup>95</sup> and it makes it illegal for employers “to interfere with, restrain, or coerce employees in the exercise of those rights.”<sup>96</sup> But the Act provides little or no “specific guidance” about any issue, and as a result, the scope of the protections afforded by the NLRA has been developed through case law. For instance, Congress provided that employers must “meet at reasonable times and confer in good faith,” but it provides no further details about an employer’s bargaining obligation.<sup>97</sup> Thus, the NLRB and the courts have had to establish that in certain circumstances the obligation to bargain imposes on an employer the obligation to provide information to the union.<sup>98</sup> A brief review of the U.S. Reports would have demonstrated that again and again, the Court has been called upon to address the scope of Section 7 protections precisely because Congress has not provided specific guidance.<sup>99</sup>

While the decision in *Epic Systems* narrowed the scope of the protections afforded by the NLRA, it did not directly weaken unions. But, shortly after the Court announced its decision in *Epic Systems*, it leveled a direct attack on unions in *Janus v. American Federation of State, City, & Municipal Employees, Council 31*.<sup>100</sup> Like *Epic Systems*, *Janus* was the culmination of a multi-year project. The Court in *Janus* addressed whether state law may require public employees who are covered by a collective bargaining agreement to pay a fee to the union for the cost of bargaining the contract and representing workers under the contract.

In 1977, in *Abod v. Detroit Board of Education*,<sup>101</sup> the Court held that public employees may be compelled to financially support their collective bargaining representative as long as the fees only cover matters germane to

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2018-19. See YLS:COURSES, <https://courses.law.yale.edu/> (last visited Sept. 11, 2019). Thus, the clerks for the dissenting Justices in *Epic Systems* would have been unlikely to realize the full extent of this glaring mistake.

95. 29 U.S.C. § 157 (2017).

96. 29 U.S.C. § 158(a)(1) (1974).

97. 29 U.S.C. § 158(d) (1974).

98. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (affirming Board’s ruling that an employer did not bargain in good faith where it refused to provide information substantiating a claim that it was unable to pay higher wages).

99. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 13 (1962) (finding that Section 7 protects the right to strike even where the workers do not make a specific demand on the employer, and further finding that employers may not require employees to seek permission from a foreman before engaging in a collective walkout); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978) (finding that workers had a right under Section 7 to distribute newsletter at the workplace criticizing a presidential veto of a bill to raise the minimum wage). See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (finding that Section 7 protects the right to distribute union literature and wear union insignia at the workplace).

100. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps, Council 31*, 138 S. Ct. 2448, 2456 (2018).

101. 431 U.S. 209, 224 (1977).

bargaining and representation. The Court in *Abood* recognized that the principle of exclusive representation is a central element in labor relations in this country. Instead of having multiple groups each competing to speak for the same workforce, the group selected by the majority must speak for all workers in a bargaining unit. This requirement to act on behalf of the entire workforce-imposed costs on the union, and it also imposed an obligation to represent all workers fairly and equitably, whether or not workers chose to belong to the union. The requirement that nonmembers pay a fair-share fee is a means of assuring that nonmembers do not gain the benefits of union representation without sharing some of the costs of providing that representation.<sup>102</sup> The Court recognized in *Abood* that compelling employees to financially support their collective bargaining representative could be considered an “impingement” on their First Amendment rights, but it is justified by the important government interests in supporting a model of labor relations based on exclusive representation.<sup>103</sup> In *Abood*, the Court also held that unions could not use mandatory fees to express political views or support ideological causes that were not germane to collective bargaining.<sup>104</sup>

*Abood* was decided at a time when one-fourth of all workers in this country belonged to unions.<sup>105</sup> This meant that even individuals who did not belong to unions likely had friends and family members who were union members. Thus, the concept of exclusive representation and the dangers of free-riding were familiar to the public. After *Abood*, over the next thirty-five years, the Court decided a series of cases addressing the line between germane and non-germane expenses, but it did not question the basic framework.<sup>106</sup>

Then, in 2012, in *Knox v. Service Employees International Union, Local 1000*, the Court addressed whether a union had given nonmembers an adequate opportunity to object to a special temporary increase in fees to fund opposition to two ballot propositions.<sup>107</sup> As Justices Sotomayor and Ginsburg noted in their concurring opinion, the case could have been decided with a short opinion stating that unions must provide a new notice and opportunity to object whenever they levy a special assessment or dues increase to fund political activities.<sup>108</sup> But, Justices Alito, Roberts, Scalia,

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102. See *Lehnert v. Ferris Faculty Ass’n.*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring and dissenting) (“Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost”).

103. *Abood*, 431 U.S. at 225.

104. *Id.* at 235–36.

105. See Hirsch, *supra* note 13.

106. As recently as 2009, in *Locke v. Karass*, 555 U.S. 207, 220 (2009), the Supreme Court unanimously applied *Abood* to hold that certain litigation expenses were chargeable to nonmembers.

107. 567 U.S. 298, 321 (2012).

108. *Id.* at 305 (Sotomayor, J. concurring).



Kennedy, and Thomas took the opportunity to call into question the very legitimacy of *Abood*. They described the holding in *Abood* as an “anomaly,” and they asserted that concerns about free-riding are “generally insufficient to overcome First Amendment objections.”<sup>109</sup> Showing a lack of understanding about the obligations imposed on a union acting as an exclusive bargaining representative, the majority offered the analogy of a parent-teacher association raising money for the school library.<sup>110</sup> Of course, a parent-teacher association is free to direct money only to causes supported by those who contribute funds, and it has no obligation to pursue the grievances of parents who choose not to contribute. After *Knox*, anti-union advocacy groups began looking for a test case to ask the Supreme Court to overturn *Abood*.

*Harris v. Quinn* seemed to provide that opportunity.<sup>111</sup> *Harris* involved a challenge to fair share fees for personal assistants who were paid by the State of Illinois to provide in-home support services for individuals who could not otherwise live on their own due to age, illness, or injury.<sup>112</sup> The petitioners in *Harris* argued that the Court should overturn *Abood*.<sup>113</sup> The majority in *Harris* came close to accepting the invitation, declaring the Court’s analysis in *Abood* “questionable on several grounds.”<sup>114</sup> Nevertheless, the Court left *Abood* standing. Instead, the majority declared that because the personal assistants were not full-fledged public employees, but rather, at minimum, jointly employed by their customers, the Court was unwilling to “extend *Abood* to the new situation.”<sup>115</sup>

In 2015, the Court heard *Friedrichs v. California Teachers Ass’n*, and appeared ready to overturn *Abood*. But before the Court had a chance to issue its opinion, Justice Antonin Scalia died suddenly, and then the Court deadlocked four–four.<sup>116</sup> When the Senate confirmed Gorsuch to replace Scalia, it seemed inevitable that the Court would finally overrule *Abood*. But, while the decision in *Janus* surprised nobody, the case demonstrates how the Court’s conservatives are willing to disregard originalism when it becomes inconvenient.<sup>117</sup> Justice Thomas often receives attention for his

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109. *Id.* at 311.

110. *Id.*

111. *Harris v. Quinn*, 573 U.S. 616, 617 (2014).

112. *Id.* at 623.

113. Brief of Petitioners at 16, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/11-681\\_pet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-681_pet.authcheckdam.pdf).

114. *Harris*, 573 U.S. at 635.

115. *Id.* at 645.

116. *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (affirming judgment by an equally divided Court).

117. I have addressed this issue before in Andrew Strom, *In Janus, the Court’s ‘Originalists’ Show Their True Colors*, ONLABOR (June 29, 2018), <https://onlabor.org/in-janus-the-courts-originalists-show-their-true-colors/> and Andrew Strom, *Will Justice Thomas Bring His Brand of*

commitment to originalism.<sup>118</sup> As part of a collection of essays in the Yale Law Journal commemorating Thomas's first twenty-five years on the Court, Judge William Pryor wrote that Thomas had "advanced originalism as a respected methodology."<sup>119</sup> When Justice Thomas's politics do not get in the way, he is willing to stake out positions that call for overturning long-settled doctrines if those doctrines are at odds with his understanding of the original meaning of the Constitution.<sup>120</sup> In 2007, in *Morse v. Frederick*,<sup>121</sup> a case involving the free speech rights of high school students, Justice Thomas wrote separately to argue that "the First Amendment, as originally understood, does not protect student speech in public schools."<sup>122</sup> He reached this conclusion based on his observation that "[i]f students in public schools were originally understood as having free-speech rights, one would have expected nineteenth century public schools to have respected those rights and courts to have enforced them. They did not."<sup>123</sup> But, the same could be said regarding the free speech rights of public employees. In an 1892 Massachusetts Supreme Judicial Court decision, the future U.S. Supreme Court Justice Oliver Wendell Holmes wrote that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>124</sup> In 1983, the Supreme Court asserted that "[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."<sup>125</sup>

The majority opinion in *Janus* was utterly dismissive of any originalist argument. Notably, the majority started its discussion of the issue with the observation that "we doubt that the Union—or its members—actually want us to hold that public employees have no free speech rights."<sup>126</sup> Whether or not this is true, it ought to be irrelevant. If the original meaning of the

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*Originalism to Friedrichs?*, ONLABOR (Dec. 10, 2015), <https://onlabor.org/will-justice-thomas-bring-his-brand-of-originalism-to-friedrichs/>.

118. See, e.g., Richard Primus, *The Unexpected Importance of Clarence Thomas*, POLITICO (Oct. 4, 2016), <https://www.politico.com/magazine/story/2016/10/supreme-court-2016-clarence-thomas-legacy-214319> (asserting that both Thomas and Scalia shared a commitment to originalism, "[b]ut Scalia was more willing than Thomas to temper his originalism with respect for established precedent.").

119. William H. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J.F. (COLLECTION) 173 (2017), <http://www.yalelawjournal.org/forum/justice-thomas-criminal-justice-and-originalisms-legitimacy>.

120. See, e.g., *United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("I would discard the Court's negative Commerce Clause jurisprudence").

121. *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007).

122. *Id.* at 410–11 (Thomas, J., concurring).

123. *Id.* at 411.

124. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

125. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

126. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2469 (2018).

Constitution controls, it should control regardless of the party making the argument, and regardless of whether that party might be expected to make a different argument in other circumstances.<sup>127</sup> The methodology the Court utilized in *Janus* was in sharp contrast to Justice Thomas's approach in *Morse*. Whereas in *Morse*, Justice Thomas focused on the absence of early cases enforcing the free speech rights of students, in *Janus*, the majority placed the burden on AFSCME to show sufficient examples of early laws restricting the speech of public employees.<sup>128</sup> Although AFSCME had pointed to founding-era laws barring government employees from electioneering and prohibiting military personnel from using disrespectful words against the President or Congress, the Court majority deemed these insufficient without pointing to any affirmative evidence that public employees were considered to have free speech rights during the founding era.<sup>129</sup> In light of the short-shrift given to originalism in *Janus*, it is hard to avoid the conclusion that the Court's self-proclaimed originalists were happy with the result reached by Justice Alito's majority opinion and saw no need to jeopardize that outcome.

*Epic Systems* and *Janus* were two huge gifts to the Chamber of Commerce and its allies. *Epic Systems* gives large corporations the green light to channel all workplace litigation into individual cases that happen behind closed doors. As Justice Ginsburg pointed out in her dissent, the "inevitable result" of the decision will be the underenforcement of worker protection statutes because "[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries."<sup>130</sup> And, while the full impact of *Janus* is yet to be seen, one study conducted before the decision anticipated that the decision would reduce union membership among state and local government employees by 8.2 percent and would drive down wages for public sector workers.<sup>131</sup> As usual, Donald Trump wasn't shy about what he hoped would be the effect of the decision. On the day the Court issued its

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127. For instance, if a conservative "law-and-order" politician were a criminal defendant in a case before a court, one would expect the court to address any constitutional issues on the merits without any snide commentary about the politician's hypocrisy.

128. See *Janus*, 138 S. Ct. at 2470 ("The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections.").

129. *Id.* ("The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using 'contemptuous or disrespectful words against the President' and other officials, and an 1801 directive limiting electioneering by top government employees. [cite om.] But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected."). Notably, the Court did not address the assertion in AFSCME's brief that "[w]ith the first presidential administration change, the government removed public employees based on their political speech." Brief for Respondent at 3, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

130. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1646–47 (2018) (Ginsburg, J., dissenting).

131. FRANK MANZO AND ROBERT BRUNO, ILL. ECON. POLICY INST., *After Janus: The Impending Effects on Public Sector Workers from a Decision Against Fair Share* 4 (2018), <https://illinois.epi.files.wordpress.com/2018/05/ilepi-pmcr-after-janus-final.pdf>.

decision, he tweeted “Big loss for the coffers of the Democrats.”<sup>132</sup> The expectation was that weakened unions would have less money to spend on politics, further entrenching the power of the corporate interests.

### THE NLRB

In response to an outburst by President Trump, Chief Justice Roberts recently declared, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>133</sup> By contrast, when it comes to the NLRB, observers have long referred to the “Reagan Board,” or the “Clinton Board,” or the “Bush Board.”<sup>134</sup> This is by design because, unlike judges who have life tenure, Board Members are members of the executive branch who serve staggered five-year terms, and each President eventually gets to appoint a new majority. While the D.C. Circuit once observed that “[i]t is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing composition of the Board,”<sup>135</sup> there are actually surprisingly few examples of this type of fluctuation.<sup>136</sup>

Board law has remained relatively stable over the years because procedural norms have limited the ability of Board Members to overturn decisions they disagree with. For instance, Board Members may apply a precedent they have doubts about where no party has asked that it be overturned.<sup>137</sup> Or a party fearing an adverse decision may settle a case before the Board has a chance to decide the issue.<sup>138</sup> In September 2007, the Bush

132. Donald Trump (@realDonaldTrump), TWITTER (June 27, 2018, 7:11 AM), <https://twitter.com/realDonaldTrump/status/1011975204778729474>.

133. William Cummings, *US Does Have ‘Obama judges’: Trump Responds to Supreme Court Justice John Roberts Rebuke*, USA TODAY (Nov. 21, 2018, 6:37 PM), <https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/>.

134. See, e.g., Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 219 (2010).

135. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001).

136. While it is not unusual for the Board to overrule an earlier decision, it is rare for the Board to go back and forth repeatedly. One example where the Board reversed itself multiple times involved the extent to which it would police misrepresentations by employers and unions during election campaigns. The Board overruled *Hollywood Ceramics*, 140 N.L.R.B. 221 (1962) in *Shopping Kart Food Mkt.*, 228 N.L.R.B. 1311 (1977), and then reversed itself again in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), and once more in *Midland Life Insurance Co.*, 263 N.L.R.B. 127 (1982). But the Board has not revisited this question since 1982.

137. See, e.g., *St. George Warehouse*, 355 N.L.R.B. 474 n.3 (2010) (“Member Becker notes that no exceptions were filed to the judge’s application of the job search requirements set forth in *Grosvenor Resort*, 350 NLRB 1197 (2007)”); *U-Haul Co. of Nev., Inc.*, 341 N.L.R.B. 195, 196 n.4 (2004) (Chairman Battista and Member Schaumber suggest that “it may be prudent” for the Board to prohibit election observers from wearing campaign insignia, but “as no party expressly seeks to overrule extant Board precedent, they apply that precedent here.”).

138. For example, on September 11, 2018, the Board announced that it was inviting amicus briefs in a case, *Loshaw Thermal Technology, LLC*, Case 05-CA-158650, on whether it should reconsider its holding in *Staunton Fuel & Material*, 335 N.L.R.B. 717 (2001). *Board Invites Briefs Regarding Whether Section 9(a) Bargaining Relationships in the Construction Industry May Be Established by Contract Language Alone*, NLRB (Sept. 11, 2018), <https://www.nlr.gov/news-outreach/news-story/board-invites-briefs-regarding-whether-section-9a-bargaining-relationships>.

NLRB issued sixty-one decisions that collectively came to be known inside the labor movement as the “September Massacre.”<sup>139</sup> While the labor movement was eager to overturn those decisions, many of them are still on the books today.

During a single week in December 2017, the new Trump Board sent notice that it had no intention of adhering to those longstanding procedural norms; instead, it issued three decisions overturning precedent even though no party had challenged the existing precedent.<sup>140</sup> *PCC Structural, Inc.*,<sup>141</sup> a fourth decision issued that week, is notable because it represents the culmination of a multi-year campaign by the Chamber of Commerce and its allies to overturn the Board’s 2011 decision in *Specialty Healthcare & Rehabilitation Center of Mobile*.<sup>142</sup>

The attack on *Specialty Healthcare* illustrates how the business lobby and its Republican allies have been willing to aggressively challenge any measure that makes it even the slightest bit easier for workers to organize. In *Specialty Healthcare*, the Board attempted to rationalize an area of labor law that had previously been a source of confusion.<sup>143</sup> The NLRA provides that workers may organize in an “appropriate” unit, but it does not define what makes a particular bargaining unit “appropriate.”<sup>144</sup> The Board adopted a rule to define appropriate bargaining units in acute care hospitals,

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After that, the union in *Loshaw* asked to withdraw its charge, and the Board granted the request and rescinded the amicus invitation. *Board Rescinds Invitation to File Briefs in Loshaw Thermal Technology*, NLRB (Dec. 14, 2018), <https://www.nlr.gov/news-outreach/news-story/board-rescinds-invitation-file-briefs-loshaw-thermal-technology>.

139. Lofaso, *supra* note 134, at 201–02.

140. In *UPMC*, 365 N.L.R.B. No. 153 (Dec. 11, 2017), the Board overturned *U.S. Postal Serv.*, 364 N.L.R.B. No. 116 (Aug. 27, 2016) even though, as Board Member Pearce pointed out in his dissent, “[n]one of the parties has asked the Board to overrule *Postal Service*. . . .” In *Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017), the Board overruled *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), even though, as Board Member McFerran pointed out “[n]o party and no participant in this case . . . has asked the Board to overrule *Lutheran Heritage*.” Flouting an additional procedural norm, the only rule at issue in *Boeing* was a rule prohibiting employee photography, but the Board used the case to overturn precedent regarding rules promoting civility at the workplace. Finally, in *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017), the Board overruled *Browning-Ferris Industries of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), even though no party had asked it to reconsider *Browning-Ferris*. The Board later vacated the decision in *Hy-Brand* based on a determination by the agency’s Ethics Official that Board Member Emanuel should have been disqualified from participating in the proceeding. *See Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26 (Feb. 26, 2018).

141. 365 N.L.R.B. No. 160 (Dec. 15, 2017).

142. 357 N.L.R.B. 934 (2011), *enforced sub nom.* *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

143. *Id.* at 944 (“We acknowledge that the Board has sometimes used different words to describe this standard and has sometimes decided cases such as this without articulating any clear standard.”).

144. *See* 29 U.S.C. §159(b) (2012) (“The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .”).

but it has not defined appropriate units in other settings.<sup>145</sup> The result has been that when a particular group of workers seek union representation, their employer is free to challenge the proposed bargaining unit on the grounds that it ought to also include an additional group of workers.<sup>146</sup> When employers challenge the proposed bargaining unit, they are generally focused on “winning” the election, rather than on some abstract notion of an ideal unit for collective bargaining.<sup>147</sup> So, employers will often argue for the inclusion of a group of anti-union workers in the bargaining unit.<sup>148</sup>

For any given employer, there may be multiple appropriate bargaining units,<sup>149</sup> and as long as a union petitions for an election in an appropriate unit, the Board will not deny the petition on the grounds that another unit would be more appropriate.<sup>150</sup> But, before *Specialty Healthcare*, the Board had not announced a clear standard for the test it would use when an employer insisted that a proposed bargaining unit must also include an additional group of workers.<sup>151</sup> In one case, the Board asked “whether the interests of the group sought are sufficiently distinct from those of other employees.”<sup>152</sup> In another case, the Board rejected a proposed unit because it “excludes employees who share a substantial community of interest with the employees in the unit sought.”<sup>153</sup> In other cases, the Board stated the test as “whether the community of interest they share . . . is so strong that it requires or mandates their inclusion in the unit.”<sup>154</sup> There were also several

145. 29 C.F.R. §103.30 (2012). In acute care hospitals, the Board has established eight separate appropriate units. As an example, one of these units consists of all registered nurses. Thus, when the registered nurses at a hospital seek to organize, the Board does not need to decide whether the unit also needs to include other professional employees, such as pharmacists. But, in other settings, the Board makes a case-by-case determination as to whether a particular group of workers shares a “community of interest.” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985).

146. See *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. at 943 (explaining that question presented is what showing is required to demonstrate that a proposed unit is not appropriate because the smallest appropriate unit contains additional employees).

147. When the Board conducts a representation election, the question is whether workers want union representation. The employer is not on the ballot, but colloquially people often talk about the employer winning the election when workers vote against representation.

148. See Representation—Case Procedures, 79 Fed. Reg. 74308, 74393 n.398 (Dec. 14, 2015) (to be codified at 29 C.F.R. pt. 101, 102, 103) (referring to a union comment that negotiations over unit inclusion issues before an election involve “maneuvering to exclude or include particular workers to skew the election results.”).

149. See *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (“[M]ore than one appropriate bargaining unit logically can be defined in any particular factual setting.” (quoting *Local 627, Int’l Union of Operating Eng’rs v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979))).

150. See *P.J. Dick Contracting*, 290 N.L.R.B. 150, 151 (1988) (“Board inquiry pursues not the most appropriate or comprehensive unit but simply *an* appropriate unit.”).

151. *Specialty Healthcare*, 357 N.L.R.B. at 944.

152. *Wheeling Island Gaming*, 355 N.L.R.B. 637, 637 n.2 (2010) (quoting *Newton-Wellesley Hospital*, 250 N.L.R.B. 409, 411–412 (1980)).

153. *Colorado National Bank of Denver*, 204 N.L.R.B. 243 (1973).

154. *Engineered Storage Prods Co.*, 334 N.L.R.B. 1063 (2001); *Accord J.C. Penney Co.*, 328 N.L.R.B. 766, 766 (1999).

other formulations the Board used when confronting this question, but all pointed to some heightened showing in order for the Board to find that an otherwise appropriate unit is inappropriate because it does not also include an additional group of employees.

In *Specialty Healthcare*, the Board decided that the time had come to announce a clearer test to replace all these varying verbal formulations. The test the Board adopted was used by a unanimous D.C. Circuit panel that happened to include three judges appointed by Republican Presidents.<sup>155</sup> Under this test, if a petitioning union proposes a unit consisting of employees readily identifiable as a group who share a community of interest, an employer proposing a larger unit “must demonstrate that employees in the more encompassing unit share an overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it.”<sup>156</sup>

As soon as *Specialty Healthcare* was announced, the business lobby started shouting that the sky was falling.<sup>157</sup> Someone cleverly coined the term “micro-units” to describe the bargaining units that would result from the decision, even though the median size of bargaining units remained unchanged after *Specialty Healthcare*.<sup>158</sup> Republican members of Congress denounced the decision and introduced legislation to overturn it.<sup>159</sup> Employers also aggressively challenged the decision in the circuit courts, bringing cases in eight different circuits. Each circuit to consider the issue upheld *Specialty Healthcare*.<sup>160</sup> The Sixth Circuit was the first to consider

155. See *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008) (The judges appointed were Ginsburg, Brown, and Griffith).

156. *Specialty Healthcare*, 357 N.L.R.B. at 944.

157. See e.g., Jason Klindt, *Micro-unions a problem for small businesses*, SOUTHEAST MISSOURIAN (Sept. 13, 2012), <https://www.semissourian.com/story/1893453.html>. The author of this piece is identified as the director of the Coalition to Protect Missouri Jobs. The website of that organization states that the Coalition is a project of the Workplace Fairness Institute, which is “funded by and advocates on behalf of business owners who enjoy good working relationships with their employees and would like to maintain those good relationships without the unfair interference of government bureaucrats, union organizers, and special interests.” See *About Us*, COALITION TO PROTECT MISSOURI JOBS, <http://www.protectmojobs.com/content.aspx?page=about> (last visited Sept. 7, 2019).

158. The median size of bargaining units was twenty-four in Fiscal Year 2009 and twenty-seven in Fiscal Year 2010. In the years since then, the median size has fluctuated between twenty-four and twenty-eight. See *Median Size of Bargaining Units in Elections*, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections> (last visited Sept. 7, 2019).

159. I described some of this Republican overreaction in Andrew Strom, *When Will the Republicans in Congress Stop Crying Wolf?*, ON LABOR (June 10, 2016), <https://onlabor.org/when-will-the-republicans-in-congress-stop-crying-wolf>.

160. *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy’s, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); and *Rhino Nw., LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017).

the issue. In response to the employer's argument that "this overwhelming community-of-interest standard represents a 'material change in the law,'" the court responded, "this is just not so."<sup>161</sup> Instead, the Sixth Circuit found that the new test simply represented a clarification of the standard.<sup>162</sup> The Eighth Circuit similarly found that *Specialty Healthcare* was "not a material departure from past precedent,"<sup>163</sup> and the D.C. Circuit likewise concluded that "the Board in *Specialty Healthcare* simply took a fitting opportunity to make clear the exact language it would employ going forward and . . . its formulation was drawn from Board precedent."<sup>164</sup>

Once Trump was elected, it was almost a foregone conclusion that the Board would overturn *Specialty Healthcare*, simply because the business lobby had invested so much energy into ranting about it. When Trump took office there were two vacancies on the Board. Trump nominated Marvin Kaplan, who had spent most of his short career as a Republican staffer in the House,<sup>165</sup> and William Emanuel, who had spent his career at a law firm representing employers.<sup>166</sup> Just three months after Emanuel took office, the Board decided *PCC Structural, Inc.* The employer in *PCC Structural, Inc.* manufactured steel, superalloy, and titanium castings for use in aircraft and other industrial purposes.<sup>167</sup> The Machinists Union had petitioned to represent a unit of approximately 100 welders, but the employer insisted that the smallest appropriate unit would consist of all of its approximately 2,500 production and maintenance employees.<sup>168</sup> If the Trump Board was not chomping at the bit to overturn *Specialty Healthcare*, it could have decided the case on much narrower grounds. As Members McFerran and Pearce pointed out in dissent, "welders-only units in this exact industry have been approved by the Board in the past."<sup>169</sup>

Despite the findings of the circuit courts, the majority rejected as "implausible" the notion that *Specialty Healthcare* was merely "restating and clarifying the Board's traditional test."<sup>170</sup> The majority further declared that

161. *Kindred Nursing*, 727 F.3d at 561.

162. *Id.*

163. *FedEx Freight, Inc.*, 816 F.3d at 525.

164. *Rhino Nw., LLC*, 867 F.3d at 100.

165. See *Statement of Marvin Kaplan Nominee for Member, National Labor Relations Board Before the Committee on Health, Education, Labor and Pensions of the United States Senate*, HELP.SENATE.GOV (July 13, 2017), <https://www.help.senate.gov/imo/media/doc/Kaplan1.pdf>.

166. See *Statement of William J. Emanuel Nominee for Member of the National Relations Board Before the Committee on Health, Education, Labor and Pensions of the United States Senate*, HELP.SENATE.GOV (July 13, 2017), <https://www.help.senate.gov/imo/media/doc/Emanuel.pdf>.

167. 365 N.L.R.B. No. 160, at 1 (Dec. 15, 2017).

168. *Id.*

169. *Id.* at 14 n.1 (citing *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966)). In fact, after remanding the case to the Regional Director, the Board ultimately issued an unpublished Order finding that the Union's proposed unit was appropriate. See *PCC Structural, Inc.*, Case No.19-RC-202188 (Nat'l Labor Relations Bd. Nov. 28, 2018).

170. *PCC Structural, Inc.*, Case No.19-RC-202188, at 7.



it “respectfully disagree[d]” with the assessment of the eight circuit courts that *Specialty Healthcare* represented a permissible construction of the Act.<sup>171</sup> The Trump majority announced a new test that gives no deference to the petitioned-for unit, and instead asks “whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.”<sup>172</sup> Of course, as the Board explained in *Specialty Healthcare*, this language “leaves open the question of what degree of difference renders the groups’ interests ‘sufficiently distinct.’”<sup>173</sup>

The *PCC Structurals, Inc.* majority does not even attempt to provide guidance as to how to define “sufficiently distinct.” The majority insists that “nothing in today’s decision provides for the Board to reject an appropriate petitioned-for bargaining unit on the basis that a larger unit is *more* appropriate.”<sup>174</sup> But, elsewhere, it criticizes the Board for applying *Specialty Healthcare* to approve a bargaining unit consisting of a single department in a retail store because the Board had previously declared a storewide unit to be “the optimum unit for the purposes of collective bargaining” in the retail industry.<sup>175</sup> The Board stated that under the new test it will consider the Section 7 rights of employees who are excluded from the proposed bargaining unit, but it does not explain how.<sup>176</sup> Taking the Board at its word, it would not be enough to say that including the additional workers would create a “more appropriate” unit, but the Board provides no further explanation as to the circumstances when excluded employees must be added to the unit.

In a less polarized era, employers would have conceded that *Specialty Healthcare* represented a reasonable attempt to clarify a confusing standard. But, under our current system, an ambiguous standard works to the advantage of employers. As the dissenters pointed out, “[t]he more subjective the standard is, the greater the opportunity to litigate the appropriateness of the unit, and consequently, the greater the opportunity to delay and frustrate employees’ right to organize.”<sup>177</sup> The threat of this litigation and delay will be a bargaining chip that employers can deploy when workers file for an election.<sup>178</sup> In order to avoid protracted litigation over the scope of the bar-

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171. *Id.* at 11 n.44.

172. *Id.* at 7.

173. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934, 945 (2011).

174. *PCC Structurals, Inc.*, Case No.19-RC-202188, at 12.

175. *Id.* at 10 n.36.

176. *Id.* at 8 (“Henceforth, the Board’s determination of unit appropriateness will consider the Section 7 rights of employees *excluded* from the proposed unit *and* those included in that unit, regardless of whether there are ‘overwhelming’ interests between the two groups.”).

177. *PCC Structurals, Inc.*, Case No.19-RC-202188, at 24 (Nat’l Labor Relations Bd. Dec. 15, 2017).

178. *See Representation—Case Procedures* 79 Fed. Reg. 74308, 74387 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101, 102, 103), where the Board observed in its 2014 rulemaking that

gaining unit, the union would likely need to make concessions either about the bargaining unit, or perhaps about another contested issue.

*PCC Structural, Inc.* illustrates how the apparatus created as a result of the Powell Memo, combined with the weakened political power of the labor movement, serves to keep moving the legal terrain in a direction that makes it harder for workers to organize. As recently as 2008, three very conservative D.C. Circuit judges<sup>179</sup> embraced the “overwhelming community of interest” test to determine when a proposed bargaining unit must also include an additional group of workers.<sup>180</sup> But, now Republicans in Congress describe that same standard as “job-crushing,”<sup>181</sup> and the Republican appointees on the Board will not even concede that it represents a permissible construction of the Act.<sup>182</sup>

### CONCLUSION

To return to the quote from Harry Johnson, we are fast reaching a point where we should ask, “Are we still America?” In 1932, Congress recognized that, given the rise of large corporations, “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”<sup>183</sup> That statement is just as true today as it was then. And, if the United States has any chance of living up to its best ideals, then we need to enact and enforce policies that make it easier for workers to organize. Yet, there is no clear road map to reach a place where that will happen. The business lobby may even be too powerful for its own good, but it is certainly too powerful for the good of the country.

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employers often use this opportunity for litigation to extract concessions from unions regarding the election details.

179. Douglas Ginsburg (nominated by Ronald Reagan to serve on the U.S. Supreme Court); Thomas Griffith (gave a lecture in 2015 entitled *Who’s the Activist Now? What It Means to Be a Conservative Judge*, (Mar. 5, 2015)); Janice Rogers Brown (advocated for overturning New Deal era decisions, such as *Nebbia v. New York*, that allow state and local jurisdictions to “adopt whatever economic policy may reasonably be deemed to promote public welfare,” *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) (quoting *Nebbia v. New York*, 291 U.S. 502, 516 (1934)).

180. *See Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

181. *See The National Labor Relations Board Starting Off on the Right Foot in 2018*, COMM. ON EDUC. & LAB. REPUBLICANS (Jan. 5, 2018), <https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=402372>.

182. *See PCC Structural, Inc.*, Case No.19-RC-202188, at 24 (Nat’l Labor Relations Bd. Dec. 15, 2017).

183. Norris-LaGuardia Act, 29 U.S.C. § 102 (2017).