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Introduction

To make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit.

*Bailey v. Alabama*¹

Long ago we stated the reason for labor organizations. We said they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

*NLRB v. Jones & Laughlin Steel Corp.*²

[T]he trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence.

*American Federation of Labor v. American Sash & Door Co.*³

The thesis and underlying assumption throughout this book is that democracy in the workforce is an essential part of democracy itself, a valuable legacy of the antislavery cause in the War of the Rebellion, or Civil War. Through the ratification of the great post-Civil War amendments, both the role of government and the promotion of rights were expanded. This was in contrast to the idea of a limited government reflected in the Bill of Rights itself in 1787. My judgment is that government has a significant role to play in this process. Government policy should not proceed upon the assumption that unions are focused only upon wages, employment conditions, but rather that they can address a wide variety of issues beyond the imagination of labor and management in previous centuries, as well as play the critical role of fashioning a voice and dignity for workers.

¹ 219 U.S. 219, 241 (1911).

² 301 U.S. 1, 33 (1937) (Chief Justice Hughes for a 5–4 majority).

³ 335 U.S. 538, 542–43 (1949) (Frankfurter, J., concurring).

In essence, democracy in the workplace and the promotion of trade union representation are central to the survival of a democratic society.⁴ As a labor lawyer, I tend to think that law has a special role to play in this process. Yet my experience derived from Washington and Sacramento, both as a scholar and a practicing lawyer, convinces me of the limits of law. Law is subordinate to other factors, including union devotion to resources, the necessary expenditures involved, and the creation of strategic tactics and vision in organizing the unorganized – as well as foreign competition, American investment abroad, and technological innovation. Law is subordinate and can only play a symbiotic role in the proper promotion of collective bargaining by a reorganized movement. Law, however worthy of reform, has never been the solution in the past and is unlikely to be so now.

The forty years of union organizational success between the 1930s and the 1970s are rooted in and the result of vigorous union organization manifested in resources, vision, and tactics – in short, much more than public policy and law are prerequisites to success, alongside unusual circumstances such as the calamities of the Great Depression and the Second World War. The 2020–21 COVID-19 pandemic, exacerbating inequality in its initial wake, could play a role in the resurgence, but the unions need to bestir themselves if they are to prosper in a more congenial contemporary political environment.

History, perhaps not always dispositive as a lesson for the future,⁵ provides some guidance. In the 1930s, the Congress of Industrial Organizations (CIO), a new federation of unions representing unskilled, semi-skilled, and craft workers as well, pushed their way on to the stage, using the strike and even sit-down stoppages to bring employers to the bargaining table.⁶ The American Federation of Labor, established in the 1880s and representing skilled tradesmen, with which the CIO merged in 1955, was jostled and pushed by this new competition during the Great Depression.

Though frequently flawed on more than an intermittent basis by racism, corruption, and lethargy, the idea of union-provided workplace representation and voice is basic, enshrined by international labor law⁷ as well as its national law counterpart. It remains as vital as representative government. Notwithstanding public policy reflecting the promotion of this concept for more than eight and a half decades,

⁴ “We don’t need strong unions just to level the economic playing field. We also need them to level the political playing field.” Paul Krugman, *America Needs to Empower Workers Again*, N.Y. TIMES, Apr. 12, 2021, at A4.

⁵ “Those who cannot remember the past are condemned to repeat it.” GEORGE SANTAYANA, *THE LIFE OF REASON* (1905).

⁶ SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937* (1969); WALTER GALENSON, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935–1941*, at 611 (1960). Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

⁷ ALAIN SUPLOT, *THE SPIRIT OF PHILADELPHIA: SOCIAL JUSTICE VS. THE TOTAL MARKET* (2012); William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 684 (2003).

implementation has been sporadic, uneven, and deficient in the United States. As twenty-first century stirrings in California tech companies like Google and Facebook⁸ (and now Amazon too⁹) make clear, the movement may yet take new forms in responding to unprecedented circumstances. Surely, given the white collar, educated, or professional composition of this workforce,¹⁰ in addition to the marginalized, new union organizers, sometimes emanating from new financial sources,¹¹ or new unions, will be as necessary as the industrial unions were in the 1930s. Meanwhile, at the juncture of this writing, government policy fluctuates dramatically between former President Trump's opposition to unions (nonetheless reflected in some rank-and-file support because of his populist policies) and President Biden's acceptance of and support for them.¹²

⁸ Chase DiFelicianantonio, *Alphabet Workers Move to Unionize*, S.F. CHRON., Jan. 5, 2021, at C1, C3. Kate Conger, *In Silicon Valley Rarity, Hundreds of Google Employees Unionize*, N.Y. TIMES, Jan. 5, 2021, at B1, B5; Sarah E. Needleman, *Google Employees Launch Union to Push for Changes*, WALL ST. J. Jan. 5, 2021, at B1, B4; Chase DiFelicianantonio, *Unions Gaining Traction in Tech*, S.F. CHRON. Jan. 10, 2021, at D1, D4. As the last article demonstrates, it is generally not understood that minority unions may enter into contracts with employers as well as majority status unions so long as they represent "members only." *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) (finding "members only" contracts have long been recognized"); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 n.5 (1964) (noting that "[t]he fact that the Union does not represent a majority of an appropriate bargaining unit ... does not prevent it from representing those employees who are covered by the agreement ..."); *Dana Corp.*, 356 NLRB 256, 259 (2010) (explaining that "employers and unions may enter into 'members-only' agreements, which establish terms and conditions of employment only for those employees who are members of the union"); see *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197 (1938). Recognition and bargaining by a union as exclusive bargaining representative with less than a majority is unlawful. *Int'l Ladies' Garment WKRS v. NLRB*, 366 U.S. 731 (1961).

⁹ Michael Corkery and Karen Weise, *Amazon Workers In Alabama Near Vote on a Union*, N.Y. TIMES, Dec. 23, 2020; *Surprising Soil for Union Roots*, N.Y. TIMES, Jan. 24, 2021; Erika Hayasaki, *Amazon's Great Labor Awakening*, N.Y. TIMES, Feb. 22, 2021. Cf. ALEC MACGILLIS, *FULFILLMENT: WINNING AND LOSING IN ONE-CLICK AMERICA* (2021).

¹⁰ Recent years have seen waves of labor organizing in newsrooms. Ben Smith, *How a New Breed of Union Activists Is Changing the Rules (and Newsrooms)*, N.Y. TIMES (May 3, 2020), www.nytimes.com/2020/05/03/business/media/coronavirus-union-newsrooms.html (describing a "a frenzy of organizing" in U.S. newsrooms); Steven Greenhouse, *Why Newsrooms Are Unionizing Now*, NIEMAN REPS. (Mar. 21, 2019), <https://niemanreports.org/articles/why-newsrooms-are-unionizing-now/> ("The recent burst of media unionization is one of the bright spots in a labor movement that has been declining for decades."). The COVID-19 pandemic has triggered a "massive uptick" in these rising tides. Sarah Fischer, *Record Number of Journalists Unionize During COVID Pandemic*, AXIOS (Apr. 20, 2021), www.axios.com/journalists-unionize-digital-media-5f38770c-e398-4a18-8e6a-7f8374caaa80.html. Josh Eidelson, *MSNBC Votes to Unionize in Latest Media Victory for Labor*, DAILY LABOR REPORT (Aug. 24, 2021). Cf. Dan Papszun and Paige Smith, *Hit Hard by the Pandemic, Museum Workers Redouble Union Efforts*, BLOOMBERG LAW, July 13, 2021. Some of the employer and union dynamics remain the same or similar to what existed previously. William B. Gould IV, *Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized*, 13 LABOR L.J. 348 (1962); William E. Fulmer, *Step by Step Through a Union Campaign*, HARV. BUS. REV. (July 1981).

¹¹ Chase DiFelicianantonio, *Tech Fund Helps Labor Organizing*, S.F. CHRON., Aug. 19, 2021, at C1, C5.

¹² Ben Penn, *Biden Rapport With Labor Pick Raises Workers' Political Sway*, BLOOMBERG NEWS, Jan. 8, 2021; William B. Gould IV, *Legal Issues Surrounding the Firing of NLRB General Counsel*,

Indeed, President Biden, in language more direct and unqualified than that of President Franklin D. Roosevelt himself,¹³ (1) stated that unions “lift up workers”;¹⁴ (2) expressed support for the right to organize and engage in collective bargaining; and (3) stated that decisions about unions were properly for the workers themselves and not employers.

In the middle of the last century, the contrast between Democratic and Republican administrations was more blurred. When Dwight D. Eisenhower brought the Republican Party back to the White House after twenty years in exile by decisively defeating Adlai Stevenson in 1952, he reached across the aisle to select Martin Durkin, one of the most prominent AFL craft union leaders, as Secretary of Labor. But the appointment was greeted by derisive commentary, characterizing it as consisting of “Nine millionaires . . . and a plumber” (today, both the size of the cabinet and its wealth are bloated far beyond this).¹⁵ When Durkin was unable to get revisions to the Taft-Hartley amendments to the National Labor Relations Act (Stevenson had pledged to revise these restrictions placed upon organized labor rather than to repeal them¹⁶), he quickly departed after serving only eight months.¹⁷

BLOOMBERG LAW (Jan. 28, 2021); Robert Iafolla, *New Top NLRB Lawyer Kills Predecessor’s Union Neutrality Case*, BLOOMBERG LAW, Jan. 29, 2021.

- ¹³ President Roosevelt said: “If I were a factory worker, I would join a union.” NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR* 61 (1995). A CIO poster also attributed this quote to Roosevelt. *FDR Quote*, LABOR ARTS, www.laborarts.org/exhibits/iron/exhibit.cfm?id=10 (last visited Mar. 25, 2021). “The President wants to join a union.” John Logan, *The President Wants Amazon Workers to Join a Union*, THE HILL (Feb. 10, 2021), <https://thehill.com/blogs/congress-blog/labor/538300-the-president-wants-amazon-workers-to-join-a-union>. While these quotes and their variants are widely attributed to Roosevelt, labor historian John Logan has called such an attribution “probably apocryphal.”
- ¹⁴ Joe Biden (@POTUS), TWITTER (Feb. 28, 2021, 05:01 PM), <https://twitter.com/POTUS/status/136619190196644354>; Jay Greene and Eli Rosenberg, *Biden Hails Amazon Workers Pressing to Unionize in Alabama in Unusual Sign of Support*, WASH. POST (Feb. 28, 2021), www.washingtonpost.com/technology/2021/02/28/amazon-biden-union-alabama (last updated Apr. 8, 2021); WILLIAM B. GOULD IV, Q&A WITH SHARON DRISCOLL, *STANFORD’S BILL GOULD ON AMAZON WORKERS’ VOTE TO UNIONIZE AND BIDEN’S SUPPORT OF UNIONS* (Stanford Law School Report, Mar. 2, 2021).
- ¹⁵ “To carry out his mandate for moderation he [Eisenhower] appointed a Cabinet composed largely of pragmatic businessmen. A notable exception was his Secretary of Labor, Martin P. Durkin, a Democrat and president of the plumbers and steamfitters union. This Cabinet became known as ‘nine millionaires and a plumber.’” U.S. Dep’t of Labor, *Chapter 5: Eisenhower Administration 1953–1961*, U.S. DEPARTMENT OF LABOR, www.dol.gov/general/aboutdol/history/dolchpo5 (last visited June 8, 2021).
- ¹⁶ Actually, after receiving the Democratic nomination, Governor Stevenson retreated to the rhetoric of repeal, but his speeches and press conference comments reveal acceptance of some of Taft-Hartley’s provisions. See Adlai Stevenson, *MAJOR CAMPAIGN SPEECHES OF ADLAI E. STEVENSON* (1952), 46, 157; N.Y. TIMES, July 31, 1952, 9. William B. Gould IV, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L. REV. 1421, 1422 n.8 (1972).
- ¹⁷ Joseph A. Loftus, *Durkin Quits Cabinet Post: Charges Breach of Accord to Seek Taft Law Changes*, N.Y. TIMES (Sept. 11, 1953), 1, www.nytimes.com/1953/09/11/archives/durkin-quits-cabinet-post-charges-breach-of-accord-to-seek-taft-law.html.

My American history high-school teacher opined that the deaths of Phillip Murray and William Green (leaders of the major labor federations), shortly after Eisenhower's election, were triggered by broken hearts. In fact, Eisenhower made conservative appointments to the National Labor Relations Board (NLRB).¹⁸ Yet he sought a moderate accommodation with the New Deal. In that era and its immediate aftermath, business and its Republican allies fought over the *timing* of minimum wage issues¹⁹ rather than their existence at all, and safety and pension legislation was pursued by Nixon and Ford,²⁰ a position subsequently abandoned by their party's profound rightward shift simultaneous with the advent of the so-called Gingrich revolution.²¹ The somewhat close relationship between some Republicans and labor leaders through the 1970s was also motivated by other factors, such as Vietnam, with the merged AFL-CIO supporting the war effort,²² and disputes between Black workers and construction unions, which gave Nixon the space needed to exploit divisions between the two.²³

But, against the grain of some other earlier Republican presidents before Eisenhower, an ever-expanding demarcation divide between Democrats and Republicans followed Taft-Hartley – the product of an 80th Republican Congress – passed over President Truman's veto, and called a “slave labor act” by the unions. Their restrictions were strengthened in 1959 through the so-called

¹⁸ William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015).

¹⁹ *Labouring with LBJ*, ECONOMIST (LONDON), Sept. 10, 1966, at 1015.

²⁰ Steven Greenhouse, *Hey, GOP, Labor Has an Opening*, N.Y. TIMES, Sept. 7, 2020, at A21.

²¹ JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY (2020).

²² William B. Gould IV, *Labor & Nixon Moving the Hard-Hats In*, THE NATION, Jan. 8, 1973, 41; *Labour's Party*, ECONOMIST, Sept. 12, 1970, at 44.

No Democratic President ever celebrated Labour Day as President Nixon did on Monday, by inviting over a hundred trade union leaders and their wives to dinner at the White House and nearly 3,000 trade union employees to a military tattoo by torchlight on the lawns outside afterwards. The entertainment was suitable for the only really influential group of Americans that have backed the Administration's policies in Vietnam and Cambodia and, in some cases, have even demonstrated in favour of patriotism and of the war. Mr. Nixon was rewarding the trade unions for this but even more he was trying to win them away from their traditional Democratic loyalties.

It is a good time to try. Mr. Meany, the conservative old head of the American Federation of Labour-Congress of Industrial Organizations, the largest group of unions, has just announced the Democratic party has disintegrated under the influence of left-wing extremists. And the New York State branch of the AFL-CIO has just endorsed the Republican candidate for Governor, the multi-millionaire Mr. Nelson Rockefeller. This is the first time that it has backed a Republican and it did so in preference to Mr. Arthur Goldberg, one of labour's most distinguished elder statesmen, with a long career in trade unionism and government, who could hardly be called extremist even by Mr. Meany. *Id.* at 44, 47.

²³ WILLIAM B GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES (1977).

Landrum-Griffin amendments, which created more union unfair labor practices that weakened labor's hand again. Democrats continuously failed to make the law more amenable to organized labor. And in the 1980s, the NLRB descended into a pit of partisan warfare, a process that has endured for four decades, diminishing and demeaning the appointment process system itself and sometimes paralyzing the work of board appointees²⁴ as the political parties, as well as labor and management, became more polarized.²⁵ Indeed, in recent years, the Trump NLRB has taken one-sided ideologically driven statutory interpretations to new levels of naked antilabor partisanship.²⁶

Contrarily, Republican senator Mark Hatfield of Oregon literally kept the Clinton NLRB afloat during the Gingrich 1990s, rowing alone against the tide of GOP hostility, as chairman of the Senate Appropriations Committee. With no support on his side of the aisle, his was a role of solitary valiance.²⁷

Joe Klein summed up the political divide at that time and during those past thirty to forty years when he wrote:

As long as the South was solidly Democratic, the two political parties remained broad coalitions. The Democrats were a mixture of conservative Southerners and urban Northerners (both groups supported Franklin Roosevelt's populist economic activism, but they agreed on little else); the Republicans represented Wall Street and Main Street, the Eastern elite and the Western middle class (who agreed on preference for limited government, and little else). In the fifties,

²⁴ "Equally ominous was the unwillingness of Board members to produce decisions unacceptable to important members of Congress, and thus jeopardize their reappointment prospects. I was able to move cases in the final weeks and days by identifying for inquiring members of Congress the location of the delay, a practice which I regretted not using earlier." William B. Gould IV, *The National Labor Relations Board In the Twenty-First Century*, in *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY* 40 (Richard Bales & Charlotte Garden eds., 2019). See also, William B. Gould IV, *The Labor Board's Even Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505 (1999).

²⁵ Professor G. Calvin Mackenzie has done the best writing on these developments. See his comments about the NLRB:

What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnati, in-and-outers, noncareer managers – with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president's team would assume its place and impose the people's wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups – not from across the country but across the street: interchangeable public elites, engaged in an insider's game.

Quoted in WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB – A MEMOIR* 9 (2000). See also, more extensive comment *Id.* at 40.

²⁶ Michelle Chen, *An Agency Against Itself*, NATION, Sept. 21–28, 2020, 17.

²⁷ GOULD, *supra* note 25, at xiv, 163–64, 195–96, 221–241, 218, 220, 235, 253, 320.

and the first half of the sixties, the Southern Democrats, who by seniority controlled many of the significant congressional committees – joined with Republicans to prevent much of anything from happening except appropriations for highways and defense.

But the “solid South” was shattered over civil rights. When Northern Democrats decided to support desegregation – a new generation of Southerners emerged within two decades and became Republicans. [They became the House Managers who impeached and sought to remove President Clinton from office for a dalliance with a White House intern.] At the same time, many of the liberal children of the eastern Republican elite joined the Democrats, as did southern blacks when they gained the right to vote. As the parties grew more ideologically “responsible,” debate became more abrasive and partisan . . . The musty, ornate rituals of collegiality, the respectful parliamentary language, the staff and privileges granted to the minority were gradually abandoned or severely modified to the Republicans’ “disadvantage.”²⁸

In its wake, today, a new precariat has emerged from a two-tier labor force formed by temporary assignment agencies and other forms of alternate recruitment, whereby workers are characterized and frequently misclassified as independent contractors rather than employees. These workers are not infrequently part of the new gig economy, have little or no sick pay, paid leave, health care, or pension protection, and symbolize the growing American inequality, dramatized by the 2020 COVID-19 pandemic, which has exposed the fraying safety net so vividly. As the *Economist* reported:

The pandemic has also exposed and accentuated inequities in the economic system. Those in white-collar jobs can work from home, but “essential” workers – the delivery drivers, the rubbish cleaners – must continue to work, and are therefore at greater risk of contracting covid-19, all the while for poor pay. Those in industries such as hospitality (disproportionately young, female and with black or brown skin) have borne the brunt of job losses.²⁹

Both because of the way work is done and *where* it is done now and in the future, the legacy of the pandemic worsens the plight and status of low-income workers. Automation’s more short-range impact may disproportionately displace hotel and service workers,³⁰ while the ranks of the educated are more likely to

²⁸ Joe Klein, *The Town That Ate Itself*, NEW YORKER, Nov. 23, 1998, 79, 80–81.

²⁹ *Starting Over Again*, ECONOMIST (LONDON), July 25, 2020, 13–14. See also, Delphine Strauss, *Pandemic Knocks One-Tenth Off Incomes of Workers Worldwide*, FIN. TIMES (LONDON), Sept. 24, 2020, 1; *Unequal Protection*, ECONOMIST, Apr. 18, 2020, at 17; Nick Timiraos, *Low-Wage Workers Said Hardest Hit by Virus*, WALL ST. J., June 13–14, 2020, at A2.

³⁰ SHARING THE FUTURE: WORKERS AND TECHNOLOGY IN THE 2020S, THE FINAL REPORT OF THE COMMISSION ON WORKERS AND TECHNOLOGY (2020), at 10.

“Some employers will simply outsource remote work to eager contractors in a lower cost location or hand it to uncomplaining machines. The acceleration of workplace automation is already putting jobs in hard-hit sectors of the UK such as retail and hospitality in jeopardy, according to a recent report

work at home away from the burden of office transit.³¹ As Autor and Reynolds have said:

The current COVID crisis makes the trajectory or automation's impact on employment more readily discernible, and what we see provides no grounds for setting aside our concerns. The COVID crisis appears poised to reshape labor markets along at least four axes: telepresence, urban de-densification, employment concentration in large firms, and general automation forcing. Although these changes will have long-run efficiency benefits, they will exacerbate economic pain in the short and medium terms for the least economically secure workers in our economy, particularly those in the rapidly growing but never highly paid personal services sector.³²

All of this has triggered a greater awareness of fundamental deficiencies in the social contract, which had withstood the 1950s and 1960s and began to erode in the 1970s,³³ leaving the United States on matters like sick pay, pensions, maternity benefits and health care as twenty-fourth among twenty-five members of the Organisation for Economic Co-operation and Development (OECD), the so-called “rich man's club.”³⁴ As market power was enhanced for the favored corporations unconcerned with competition,³⁵ unions and workers stood alone, surrounded by dynamics that made capital superior to labor. The COVID crisis provided a pushback of sorts, with Congress enacting sick

by the trade union Community and the Fabian Society, a think-tank. Workers cannot, though, easily shift to areas of great demand, such as social care or cyber security. A concerted effort is needed to train them in new skills and to design the jobs of the future so they are not just better paid, but more fulfilling.”

“Hybrid” Working Calls for Patience and Ingenuity, *FIN. TIMES* (LONDON), Jan. 2, 2020, at 6. See generally Ben Casselman, *Pandemic Wave of Automation May Erase Jobs*, *N.Y. TIMES*, July 4, 2021, 13; Tahsin Saadi Sedik and Jiae Yoo, *IMF Working Paper: Pandemics and Automation: Will the Lost Jobs Come Back?* INT'L MONETARY FUND (Jan. 2021).

³¹ Stephanie Stamm, *Is a Home Office More Productive? Some Workers Think So*, *WALL ST. J.*, Jan. 2, 2021, 2.

³² DAVID AUTOR & ELISABETH REYNOLDS, *THE NATURE OF WORK AFTER THE COVID CRISIS: TOO FEW LOW-WAGE JOBS*, HAMILTON PROJECT (July 16, 2020).

³³ MINOUCHE SHAFIK, *WHAT WE OWE EACH OTHER: A NEW SOCIAL CONTRACT FOR A BETTER SOCIETY* (2021).

³⁴ “The divergence between the elite and the rest has happened not only in the United States but in many other advanced countries too. But while the decline in growth was similar in the U.S. and other rich countries, the increase in inequality was not. Several advanced countries – Germany, France, and Japan, for example – managed to have little increase in income inequality until quite recently. On top of this, the level of inequality was much higher in the U.S. to start with.” ANNE CASE & ANGUS DEATON, *DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM* 151 (2020).

³⁵ See JAN ECKHOUT, *THE PROFIT PARADOX: HOW THRIVING FIRMS THREATEN THE FUTURE OF WORK* (2021); JERROLD NADLER & DAVID N. CICILLINE, *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS*, S. COMM. ON ANTITRUST, COMM. AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY (2020); Rana Foroohar, *Biden Puts Workers Ahead of Consumers*, *FIN. TIMES* (LONDON), Aug. 2, 2021, 17.

and personal leave to protect workers in the crisis.³⁶ The jury is out on the lasting nature of such reforms.³⁷

In any event, these developments left a rigid partisan divide in their wake, and the law reflected the mirror image of such. They discouraged any revival of a *modus vivendi* between labor and management, worker and employer, in turn emphasizing a “them and us” adversarial³⁸ divide between labor whose precipitous decline in terms of employees represented and promoted corporate self-aggrandizement by expanding employer opposition to organized labor’s organizing efforts.

Illustrative of this, as Yale scholar and former *New York Times* Supreme Court reporter, Linda Greenhouse, has so eloquently noted in the context of her treatment of some Supreme Court labor jurisprudence, was a “retreat from the notion of the collective good within the framework of civil society . . . a constitutional culture that entitles individuals to opt out of duties they find disagreeable . . . [the erosion of] . . . the expectation of collective obligation that civil society requires if it is to thrive.”³⁹ This tendency ran smack up against the principle of solidarity,⁴⁰ which is the heart

³⁶ See Families First Coronavirus Response Act § 5102, Pub. L. No. 116–27, 134 Stat. 178, 195–96 (for certain public employers and private employers with fewer than 500 employees, requiring paid sick leave to employees who are unable to work for reasons related to COVID-19). Other legislators proposed legislation that would subsidize employers to keep employees on their payroll, but these proposals did not turn into law successfully. *Jayapal Announces the Paycheck Guarantee Act*, PRAMILA JAYAPAL: CONGRESSWOMAN FOR WA-07 (Apr. 20, 2020), <https://jayapal.house.gov/2020/04/10/jayapal-announces-the-paycheck-guarantee-act/>; *The Hawley-Gardner Coronavirus Relief Plan: Rehire America*, JOSH HAWLEY: U.S. SENATOR FOR MISSOURI (May 14, 2020), www.hawley.senate.gov/rehire-america. For similar policies in Europe, see Peter S. Goodman et al., *European Workers Draw Paychecks, American Workers Scrounge for Food*, N.Y. TIMES (July 3, 2020), www.nytimes.com/2020/07/03/business/economy/europe-us-jobless-coronavirus.html. More recently, several states and cities, including California and Nevada, have passed “recall” laws that require employers to offer laid-off workers their jobs back before hiring other applicants. Chris Marr, *Pandemic “Recall” Laws Give Nonunion Workers Union-Style Rights*, BLOOMBERG LAW (Aug. 4, 2021), <https://news.bloomberglaw.com/daily-labor-report/pandemic-recall-laws-give-nonunion-workers-union-style-rights>.

³⁷ Catherine R. Albiston & Catherine L. Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 BERKELEY J. EMP. & LAB. L. 257 (2021); Daiquiri J. Steele, *Preserving Pandemic Protection*, 42 BERKELEY J. EMP. & LAB. L. 321 (2021).

³⁸ Cf. *NLRB v. Insurance Agents’ Intern. Union*, 361 U.S. 477 (1960) (in which Justice Brennan, without addressing the yet to emerge deep NLRB divide, stressed the adversarial nature of the collective-bargaining process). But see *Keeler Brass Automotive Group*, 317 NLRB 1110, 1116–19 (1995) (Chairman Gould, concurring).

³⁹ Linda Greenhouse, *The Supreme Court’s Challenge to Civil Society*, 2019 SUP. CT. REV. 335, 336 (2019).

⁴⁰ See Ralph Chaplin, *Solidarity Forever*, INDUSTRIAL WORKERS OF THE WORLD: A UNION FOR ALL WORKERS, https://archive.iww.org/history/icons/solidarity_forever/ (last visited June 22, 2021):

When the Union’s inspiration through the worker’s blood shall run
 There can be no power greater anywhere beneath the sun
 Yet what force on Earth is weaker than the feeble force of one but
 The Union makes us strong
 Chorus:
 Solidarity Forever
 Solidarity Forever
 Solidarity Forever
 For the union makes us strong

and soul of all ideological shades of the labor movement and its promotion of the collective interest. “Solidarity Forever” was the union anthem and, on the eve of the Reagan administration’s inception through this century, I was of the view that it might be “hardly ever.”⁴¹

In 2020, this new constitutional culture, to paraphrase Ms. Greenhouse, was demonstrated most graphically in connection with the unwillingness of many to abide by public health strictures to wear masks, accept vaccinations, and engage in social distancing, etc. during the 2020–21 pandemic⁴² – as well as the Supreme Court’s sleight of hand to the vital constitutional right to vote, so integral to reform.⁴³ In a sense, this reluctance was presaged in the labor context, representing the first sharp philosophical shift in presidentially appointed NLRB members in the 1980s (on a more moderate basis in the 1970s), and formalized the line between labor and capital as one that was nearly synonymous with Democrats and Republicans, the latter enhancing the interests of management and individual employees, frequently promoting the false mantra of self-sufficiency, at odds with the practice and processes of collective bargaining favored by the public policy promoted in national labor legislation.

Thus, the next two chapters highlight some of the practices involved in the promotion and obstruction of collective bargaining, the historic relationship between politics and the unions, and the ways in which union policy views have impacted the process of union organizing itself.

⁴¹ William B. Gould, *Solidarity Forever – or Hardly Ever: Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980). Cf. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967); William B. Gould IV, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067 (1970).

⁴² “For four decades, America has largely been run by people who openly pledge to destroy the very government they lead. Is it any wonder they have succeeded? To these factors, add American federalism. Many of America’s dysfunctions are multiplied because they are replicated at state and local levels. The creation of a national strategy for the pandemic, for example, was complicated by the existence of 2,684 state, local, and tribal health departments, each jealously guarding its independence. To make matters even messier, the U.S. has 90,126 units of state and local government, many of which were tasked with devising their own rules on mask-wearing and public gatherings. Unemployment payments were similarly delayed by the many varying state requirements. We like to celebrate American federalism Some countries with deep traditions of consensual government and strong social capital – Germany, Switzerland, and the Netherlands most prominently – have managed decentralized government well. In the United States, that has rarely been achieved.” FAREED ZAKARIA, *TEN LESSONS FOR A POST-PANDEMIC WORLD* 46–47 (2020). Cf. Eduardo Porter, *U.S. System for Helping the Jobless Is Outdated*, N.Y. TIMES, Jan. 22, 2021, at B1, B4.

⁴³ *Brnovich v. Democratic National Comm.*, 594 U.S. __ (2021).