

LABOR LAW AND THE NLRB: FRIEND OR FOE TO LABOR AND NON-UNION WORKERS?

WILMA B. LIEBMAN[∞]

*NYU Law School Review of Law and Social Change 2016 Symposium:
Dishwashers, Domestic Workers, and Day Laborers: Can Alternative Organizing
Revive the Labor Movement?
Panel II: Friend or Foe: Labor Law and Non-Union Workers
March 25, 2016*

Is the Depression-era National Labor Relations Act (“NLRA”)—enacted in 1935 as part of President Franklin Roosevelt’s New Deal—still a force for positive change in the lives of American workers? What, if anything, remains of its promise to achieve “common justice and economic advance”?¹ How well (or not) is our labor law protecting workers’ rights to act collectively to improve their working conditions, to join unions, and to bargain with their employers? Is it adaptable to the evolving workplace and economy, or is it truly a marginalized endeavor? Even worse, is it a failed experiment?

Academics have long declared labor law dead or dying. In 1982, Harvard Law Professor Paul Weiler portrayed labor law as “an elegant tombstone for a dying institution.”² Thirty years later, NYU Law Professor Cynthia Estlund described the “ossification” of American labor law.³ And, on the occasion of the NLRA’s seventy-fifth anniversary, Harvard labor economist Richard Freeman wrote that “[i]t is perhaps harsh and impolitic at the NLRA’s seventy-fifth birthday symposium to declare that in 2010 the law no longer fits American economic reality and has become an anachronism irrelevant for most workers and firms. But that is the case.”⁴

For those committed to economic fairness and workplace democracy, these questions warrant close examination in post-election America. At this uncertain historical moment, it would be easy to abandon hope, but that would be a mistake. Doing so would relinquish an opportunity to reinvigorate the nation’s understanding of collective action and its value as both a policy goal and an aspect of social change. We would do well to heed the eloquent words of Eleanor Roosevelt written over fifty years ago:

[∞] Former Member and Chairman, National Labor Relations Board, 1997-2011; visiting distinguished scholar Rutgers University School of Management and Labor Relations 2015-17; adjunct faculty, NYU Law School, spring 2015 and 2016. This article is based on remarks at the 2016 Symposium and updated for publication. I wish to thank Mason Pesek, a second year NYU School of Law student, for his very valuable help.

¹ 79 CONG. REC. 10,720 (1935) (statement of President Franklin D. Roosevelt upon signing the National Labor Relations Act, on July 5, 1935), *reprinted in* NLRB LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3269 (1949).

² Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

³ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

⁴ Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 330 (2011).

One thing I believe profoundly: *We make our own history*. The course of history is directed by the choices we make and our choices grow out of the ideas, the beliefs, the values, the dreams of the people. It is not so much the powerful leaders that determine our destiny as the much more powerful influence of the combined voices of the people themselves.⁵

The history of American labor argues for maintaining hope. Unions were formed, grew, and survived despite a complete lack of legal protection--indeed, in a legal order that was actively hostile.⁶ State-sanctioned oppression and violence continued well into the twentieth century.⁷ The labor law, for all its shortcomings, was the product of tremendous struggle. And despite persistent challenges, the fundamental values of our labor law endure: the rule of law as a substitute for often-bloody labor battles; the principle of freedom of association; the goal of economic advance through collective bargaining; and commitment to a system of industrial democracy. These values are recognized as core principles of a democracy. Whatever its flaws and whatever the lapses made by the NLRB in applying it, this law is, at its heart, a law grounded in the international human rights regime.⁸ The concept of fundamental rights at work is now part of the international legal order, and the NLRA is the foundation of our commitment to these values recognized around the world, even if they are sometimes more often ignored than honored.

A few years back, a *Washington Post* reporter deftly explained why the economy was not doomed: "One reason we should be more optimistic is that we've finally become aware of just how lousy the past several decades have been for the average U.S. worker"⁹ There are many reasons for this growing awareness, but the revival of worker activism,¹⁰ after years of marginalization and more than three decades of stagnant wages,¹¹ has certainly brought the tough realities to the public eye. Steven

⁵ ELEANOR ROOSEVELT, *TOMORROW IS NOW: IT IS TODAY THAT WE MUST CREATE THE WORLD OF THE FUTURE* 4 (1963).

⁶ See, e.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908) (applying antitrust law to unions). In 1914, Congress passed the Clayton Antitrust Act exempting labor unions from antitrust law.

⁷ During the 1892 Homestead Strike, the governor of Pennsylvania sent 8,500 National Guard troops to break a strike at the insistence of owner Henry Clay Frick. See, e.g. *Homestead Strike*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Homestead-Strike> (last visited Jul. 26, 2017).

⁸ *Declaration on Fundamental Principles and Rights at Work*, INTERNAT'L LABOUR ORG. (Jun. 18, 1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

⁹ Zachary A. Goldfarb, Opinion, *Why the Economy Isn't Doomed*, WASH. POST (Feb. 15, 2014), https://www.washingtonpost.com/opinions/why-the-economy-isnt-doomed/2014/02/14/afabb292-8c84-11e3-95dd-36ff657a4dae_story.html.

¹⁰ See, e.g., Steven Greenhouse, *How the \$15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html?_r=0.

¹¹ Drew Desilver, *For Most Workers, Real Wages Have Barely Budged for Decades*, PEW RESEARCH CENTER (Oct. 9, 2014), <http://www.pewresearch.org/fact-tank/2014/10/09/for-most-workers-real-wages-have-barely-budged-for-decades/>; Elise Gould, *2014 Continues a 35-Year Trend of Broad-Based Wage Stagnation*, ECONOMIC POLICY INSTITUTE (February 19, 2015), www.epi.org/publication/stagnant-wages-in-2014.

Greenhouse, the veteran *New York Times* labor reporter (also on this panel), has relentlessly told the stories of American workers, their economic hardships, and their struggles for economic justice.¹² A new generation of journalists is also emerging, passionately bringing these stories to life in an array of media outlets.¹³

The struggles of fast-food workers for livable wages and their one-day strikes in cities across the nation and abroad exemplify this rising discontent.¹⁴ Their campaign has triggered a wave of state and local minimum wage hikes around the country. It has also, little by little, introduced thousands of workers to collective action and organizing for improved working conditions.¹⁵

Gradually, people in all different types of workplaces and occupations are joining together, with and without unions, to improve life on the job. In just the last five years, drivers who transport Silicon Valley entrepreneurs have voted to join the Teamsters Union,¹⁶ a striking symbol of confronting inequality. Workers have struck at West Coast ports,¹⁷ Texas oil refineries and pipelines,¹⁸ and a New England telephone company.¹⁹ On campuses across the nation, college football players, adjunct faculty and graduate teaching assistants have sought to unionize.²⁰ And workers excluded from the basic labor law's coverage, including farmworkers,²¹

¹² See, e.g., STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* (2008).

¹³ Adam DeRose, *10 Labor Reporters to Follow on Twitter*, NAT'L CENTER FOR BUS. JOURNALISM (Dec. 9, 2015), <http://businessjournalism.org/2015/12/10-labor-reporters-follow-twitter/>; Micah Uetrict, *Steven Greenhouse on Keeping the Labor Beat Alive*, IN THESE TIMES (January 18, 2015), http://inthesetimes.com/article/17634/keeping_the_labor_beat_alive.

¹⁴ Sam Thielman, *Fight for 15 Plans 'Most Disruptive' Wage Protest and Strike After Thanksgiving*, THE GUARDIAN (Nov. 21, 2016), <https://www.theguardian.com/us-news/2016/nov/21/fight-for-15-protest-strike-thanksgiving-trump>.

¹⁵ Noam Scheiber, *Eyeing the Trump Voter, "Fight for \$15" Widens Its Focus*, N.Y. TIMES, Nov. 29, 2016, at B1 ("Many of the movement's successes came in cities and states, where its pressure helped enact new minimum wage laws, and with individual employers whom the movement helped persuade to lift wages voluntarily"); Eric Morath, *Minimum Wages Set to Increase in Many States in 2017*, WALL ST. J. (ONLINE) (Dec. 30, 2016), <https://www.wsj.com/articles/minimum-wages-set-to-increase-in-many-states-in-2017-1483093806>.

¹⁶ Vindu Goel, *Silicon Valley Shuttle Drivers Vote to Join Union*, N.Y. TIMES BITS BLOG (February 28, 2015, 2:04 PM), bits.blogs.nytimes.com/2015/02/28/silicon-valley-shuttle-drivers-vote-to-join-union.

¹⁷ Chris Kirkham, *Imports Plunged at West Coast Ports Amid Labor Dispute*, L.A. TIMES (March 18, 2015), <http://www.latimes.com/business/la-fi-west-coast-port-decline-20150317-story.html>; Tim Logan & Andrew Khouri, *Small but Powerful Union is at Center of Port Dispute*, L.A. TIMES (Feb. 17, 2015), <http://www.latimes.com/business/la-fi-ports-labor-20150218-story.html>.

¹⁸ *Largest Oil Refinery Strike in 30 Years Expands*, CBS NEWS (Feb. 22, 2015, 9:08 AM), <http://www.cbsnews.com/news/largest-nationwide-oil-refinery-strike-in-30-years-expands/>.

¹⁹ Cole Stangler, *FairPoint Strike: CWA, IBEW Reach Tentative Agreement to End 5-Month Work Stoppage*, INT'L BUS. TIMES (Feb. 20, 2015), <http://www.ibetimes.com/fairpoint-strike-cwa-ibew-reach-tentative-agreement-fairpoint-end-5-month-work-1822966>.

²⁰ Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern football union nearly came to be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <http://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured>. See also Justin Miller, *When Adjuncts Go Union*, AM. PROSPECT (Jun. 30, 2015), <http://prospect.org/article/when-adjuncts-go-union>.

²¹ Farmworkers remain perhaps the most vulnerable workers in this country. Their efforts to achieve improved conditions demonstrate an array of strategies. The United Farm Workers organizes and bargains with growers in California, in a regulated environment, under the 1975 California Agricultural Labor Relations Law, modeled on the NLRA and administered by a public agency. The Farm Labor

home healthcare workers,²² fashion models,²³ and others treated as independent contractors have mobilized for better pay and improved working conditions, some joining traditional labor unions and some allying with “alt-labor” groups.²⁴

The latest display of innovative collective action is by Uber drivers, who have embraced a range of different strategies. Some have engaged in protest demonstrations,²⁵ some have sought to unionize as “employees,”²⁶ others are seeking to deal or bargain with Uber as “independent contractors,”²⁷ and some are pursuing claims in litigation.²⁸ Worker-focused app-based platforms and online forums are also arising, providing a meeting place where Uber drivers and other workers can build community and organize.²⁹ These groups are beginning to

Organizing Committee operates in a wholly unregulated environment. Through boycotts and other economic pressure, it has managed to enter into collective bargaining agreements covering farmworkers in Ohio and Michigan with growers (and food producers, like Campbell Soup and Heinz). It has also entered into a collective bargaining relationship with a North Carolina growers’ association, on behalf of about 10,000 H-2A visa agricultural workers. Its agreements include a private tri-partite dispute resolution body. Also operating in an unregulated setting, the Coalition of Immokalee Workers, a self-styled human rights movement (and not a labor organization), has pressured fast food brands and supermarket chains to join its Fair Food Program, a monitoring and certification program to improve conditions of tomato pickers in Florida. *See, e.g.,* Steven Greenhouse, *Farm Labor Groups Make Progress on Wages and Working Conditions*, N.Y. TIMES (Jul. 3, 2015), <http://www.nytimes.com/2015/07/04/business/economy/farm-labor-groups-make-progress-on-wages-and-working-conditions.html>; DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 259-262 (2014); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (Econ. Policy Inst. ed., 2006).

²² *See, e.g.,* Eileen Boris & Jennifer Klein, *Labor on the Home Front: Unionizing Home-Based Care Workers*, 17:2 NEW LABOR FORUM 32-41 (2008); Laura Dresser, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities?*, in *THE GLOVES OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* (Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilly eds., 2008).

²³ Sara Ziff founded The Model Alliance to “work with progressive modeling agencies to give models in the U.S. a voice in their workplace and organize to improve their basic working conditions in what is now an almost entirely unregulated industry.” Sara Ziff, *Introductory Note*, MODEL ALLIANCE, <http://modelalliance.org/introductory-note> (last visited Apr. 30, 2017).

²⁴ *See* Josh Eidelson, *Alt-Labor*, AM. PROSPECT, Jan./Feb. 2013, at 15.

²⁵ *See* Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), <http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html>.

²⁶ *See* Cole Stangler, *A Union Turf War Is Snuffing Out the Campaign to Organize Uber Drivers at LaGuardia Airport*, INT’L BUS. TIMES (Feb. 22, 2016), www.ibtimes.com/union-turf-war-snuffing-out-campaign-organize-uber-drivers-laguardia-airport-2303877.

²⁷ *See* Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html>; *Uber Drivers in New York Form Labor Association*, REUTERS (May 1, 2016), www.reuters.com/article/new-york-uber-idUSL2N17Y0H7.

²⁸ *See, e.g.,* O’Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015); Cotter v. Lyft, Inc., 176 F. Supp. 3d 930 (N.D. Cal. 2016); Curt Woodward, *Uber lawsuit could shed drivers after settlement rejected*, BOS. GLOBE, Aug. 16, 2016, <https://www.bostonglobe.com/business/2016/08/19/uber-lawsuit-could-shed-drivers-after-settlement-rejected/G0zhHjOsjqpt7LoOZ3vjKJ/story.html>; Joel Rosenblatt & Edvard Pettersson, *Uber Deal Offers Drivers \$1 Each to Wipe Away Labor Threats Valued in Billions*, BLOOMBERG (Feb. 1, 2017), <https://www.bloomberg.com/news/articles/2017-02-02/uber-to-pay-7-75-million-to-settle-california-drivers-suit>.

²⁹ Roisin Kiberd, *Newbie Drivers Meet Embittered Veterans on the UberPeople Forum*, VICE (May 27,

actualize a vision of “open source unionism”—extending the advantages that technology offers for expanding communication and building networks.³⁰ Impressive experimentation in worker organizing and collective action is occurring, even outside the framework of federal labor law and traditional collective bargaining, but—in my view—consistent with its promise. Although some initiatives are limited in scale, resource capacity, and long-term sustainability, they perhaps foretell opportunities that we cannot today anticipate.³¹

Modest perhaps by comparison with labor struggles of the 1930s or civil rights protests of the 1960s, this worker restiveness is nonetheless widespread and genuine and increasingly cannot be ignored. This is underscored by the unexpected and lasting appeal of both Donald Trump and Bernie Sanders. While they differed sharply in style and politics, the support for both reflected unprecedented levels of frustration with the prevailing political and economic order.

Whether labor law is a “friend or foe” of labor and non-union workers—as this symposium inquires—depends on a variety of external circumstances and organizational strategies. I once asked the creative and dynamic leaders of two workers’ organizations whether they viewed the labor law (and the NLRB) as merely unhelpful or an actual obstacle. Saket Soni, the director of the National Guest Worker Alliance,³² answered that it is sometimes helpful—“we use it when we can.” David Rolf, president of the Seattle-based Local 775 of the Service Employees International Union,³³ and an international union vice-president, answered unequivocally that the law is an obstacle. Instead, he advocates seeding innovative models of worker power.³⁴

Both Soni and Rolf would no doubt agree, however, that labor law strategies should never be a “substitute for organizing more power in more communities.”³⁵ Nor should labor law reform be the prime focus. As history teaches us, a stronger labor law would follow from a stronger labor movement, not the other way around, and creative new approaches are essential. Still, preserving labor law is important as

2016), https://motherboard.vice.com/en_us/article/newbie-drivers-meet-embittered-veterans-on-the-uberpeople-forum; Steven Greenhouse, *On Demand, and Demanding Their Rights*, AM. PROSPECT, Jun. 28, 2016, prospect.org/article/demand-and-demanding-their-rights.

³⁰ See, e.g., Richard. B. Freeman & Joel Rogers, *Open Source Unionism*, WORKING USA, Apr. 2002, at 8; Richard. B. Freeman & Joel Rogers, *A Proposal to American Labor*, THE NATION, Jun. 24, 2002, at 18.

³¹ Press Release, City of Seattle, Council Unanimously Adopts First-of-Its-Kind Legislation to Give Drivers a Voice on the Job (Dec. 14, 2015) (available at <https://www.seattle.gov/council/issues/giving-drivers-a-voice/>).

³² *About NGA*, NAT’L GUESTWORKER ALLIANCE, <http://www.guestworkeralliance.org/about-nga/>.

³³ *About Us*, SEIU 775, <http://seiu775.org/about-us-2/>.

³⁴ See also David Rolf, *Trump, Sunk Cost Fallacies, and the Next Labor Movement*, ON LABOR (Nov. 16, 2016), <https://onlabor.org/2016/11/16/guest-post-trump-sunk-cost-fallacies-and-the-next-labor-movement/> (“Perhaps this election could finally put to rest the union movement’s own sunk cost fallacies: the increasingly hallucinatory idea that a future Democratic-controlled Federal government is going to come riding to the rescue of America’s existing unions before it’s too late ...”); Harold Meyerson, *The Seeds of a New Labor Movement*, AM. PROSPECT (Oct. 30, 2014), <http://prospect.org/article/labor-crossroads-seeds-new-movement>.

³⁵ Nathan Schneider, *Why the Tech Elite is Getting Behind Universal Basic Income*, VICE (Jan. 6, 2015, 12:41 PM), www.vice.com/read/something-for-everyone-0000546-v22n1.

it embodies a public commitment to its underlying values.³⁶ A challenge going forward will be keeping these values alive, and channeling obvious worker discontent into positive forces for democratic and economic advance.

To be sure, even an NLRB firmly committed to a dynamic application of the law is limited in what it can do. A variety of forces constrain its discretion, such as an arguably antique statute, written for the industrial era and totally resistant to legislative change; eighty years of accumulated precedent that must be navigated; dramatic changes in the American economy and society that are beyond the Board's control; and a judicial, political, and economic climate indifferent or even hostile to collective bargaining, with recurrent controversy and battles over appointments to the Board, its budget, and activities.

Notwithstanding these constraints, modest but meaningful efforts can be made to keep the law living and to adapt it to changing economic and workplace realities. Constrained or not, as an administrative agency responsible for enforcing Congressional policy, the Board does have discretion--indeed it has a fundamental duty--to adapt rules and practices to a volatile changing economy. As recent decisions of the NLRB have shown, there is some elasticity in the statute to permit its dynamic interpretation,³⁷ and rigorous enforcement of workers' rights is possible--assuming, of course, an NLRB that is willing to exercise its limited but available discretion.

Even allowing for its limited power, the Board has at times made things worse, not better, by making little effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy.³⁸ Its perceived obsolescence is linked in considerable part to its seeming lack of administrative will,³⁹ and there is little reason to expect that a newly constituted Board will have that will. But, as the recent sweep of minimum wage hikes around the country has shown, re-energized worker power can catalyze political will.⁴⁰

Labor law is of course no panacea for all of our economic inequities, but it is a piece of the mosaic of our democracy. As President Obama reminded us on

³⁶ Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1, 9 (2016) (“[O]ne of labor law’s most fundamental commitments [is] to help achieve greater economic and political equality in society.”).

³⁷ See, e.g., *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sep. 30, 2014) (clarifying definition of “independent contractor”), *enf. denied*, *FedEx Home Delivery v. N.L.R.B.*, No. 14-1196 (D.C. Cir. March 3, 2017); *Browning Ferris Industries, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), *appeal filed*, *Browning Ferris Industries, Inc. v. N.L.R.B.*, No. 16-1028 (D.C. Cir. Jan. 20, 2016) (refining test for joint employer status); *Columbia University*, 364 N.L.R.B. No. 90 (holding that graduate teaching assistants are statutory employees); *Pacific Lutheran University*, 361 N.L.R.B. No. 157 (2014) (refining the standard for determining the managerial status of faculty); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014), *review granted in pertinent part*, *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (concluding that class action waivers in mandatory arbitration agreements unlawfully interfere with right to engage in protected concerted activity).

³⁸ Victor Tan Chen, *The Spiritual Crisis of the Modern Economy*, THE ATLANTIC (Dec. 21, 2016), <https://www.theatlantic.com/business/archive/2016/12/spiritual-crisis-modern-economy/511067/>.

³⁹ Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 579-588 (2007).

⁴⁰ Jonathan Rosenblum, *The Fight for \$15 is a Fight for Power: What Corporations Really stand to lose when minimum wage increases*, SALON (Mar. 11, 2017), <http://www.salon.com/2017/03/11/the-fight-for-15-is-a-fight-for-power-what-corporations-really-stand-to-lose-when-minimum-wage-increases/>.

November 9, 2016, progress has never been a straight line.⁴¹ It zigs and zags with conflicting winds, and advances bring new problems.⁴² Ultimately, progress evolves from sustained grassroots struggles. While we cannot realistically expect much at the federal level over the next four years, “as history teaches us, most social and economic shifts that improve lives don’t actually begin with a national policy.”⁴³ The public policy challenges we face call for multi-tiered experimentation,⁴⁴ with both public and private strategies,⁴⁵ especially at the state and local level, where “innovations and social movements are born and tested for their ability to address emerging tensions.”⁴⁶

In closing, I circle back to Eleanor Roosevelt, whose inspiring words I cannot exceed:

Once more we are in a period of uncertainty, of danger, in which not only our own safety but that of all mankind is threatened. Once more we need the qualities that inspired the development of the democratic way of life. We need imagination and integrity, courage and a high heart. We need to fan the spark of conviction, which may again inspire the world as we did with our new idea of the dignity and worth of free men. But first we must learn to cast out fear. People who “view with alarm” never build anything.⁴⁷

⁴¹ President Barack Obama, Statement After the 2016 Election (Nov. 9, 2016), <https://www.whitehouse.gov/the-press-office/2016/11/09/statement-president>.

⁴² “[W]hile invention and discovery created the possibility of releasing men and women from the thralldom of drudgery, there actually came, with the introduction of the factory system and the development of the business corporation, new dangers to liberty.” Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 463 (1916).

⁴³ Thomas Kochan, *Election Rage Shows Why America Needs a New Social Contract to Ensure the Economy Works for All*, THE CONVERSATION (Nov. 16, 2016, 10:32 PM), <https://theconversation.com/election-rage-shows-why-america-needs-a-new-social-contract-to-ensure-the-economy-works-for-all-68296>.

⁴⁴ Moshe Z. Marvit, *Guest Post: In This Moment, Labor Must Become a Movement*, ON LABOR (Nov. 21, 2016), <https://onlabor.org/2016/11/21/guest-post-in-this-moment-labor-must-become-a-movement/> (arguing that union locals are best empowered to build relationships with community organizations to confront shared problems and propose new ideas).

⁴⁵ Ben Seigel and Brooks Rainwater, *Preemption Prevents Innovation*, U.S. NEWS & WORLD REPORT (Mar. 6, 2017) (arguing that state preemption prevents local and county governments from pursuing important innovations, such as Salt Lake County’s expansion of early childhood education through “privately guaranteed funding mechanisms”). See also Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009).

⁴⁶ Kochan, *supra* note 45.

⁴⁷ Roosevelt, *supra* note 6, ch. xvii.