The Heavy Burden of the State: Revisiting the History of Labor Law in the Interwar Period

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Labor law history has been one of American legal history's success stories. Appearing at the beginning of the 1980s from more or less nothing, not only has the historical study of labor law since then demonstrated levels of scholarly output and quality that fully entitles its practitioners to assume the coveted mantle of a subfield, it has also proved hospitable to scholars from a variety of disciplinary backgrounds: historians, legal scholars, political scientists, and sociologists have all left their marks.[1] More importantly, labor law history, considered as a field of scholarly practice, has actually managed to have a noticeable impact on research trends evidenced in its two most cognate components, history and law. As to the first, mainstream labor historians are actually engaging with, and in, legal history.[2] As to law, it seems quite defensible to claim that labor law history has come closer than any other genre of legal-historical scholarship to achieving consistently the goal of an historically-informed critical analysis of legal

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1. The wave of interest in modern labor law history, of which this symposium is an example, is most conveniently dated from the appearance of Karl E. Klare's germinal article, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978). For periodic updates on the field's essential literature and trajectory, see Raymond Hogler, *Labor History and Critical Labor Law: An Interdisciplinary Approach to Workers' Control*, 30 LAB. HIST. 165 (1989); Wythe Holt, *The New American Labor Law History*, 30 LAB. HIST. 275 (1989) (including a useful assessment of scattered precursors); Christopher L. Tomlins, *How Who Rides Whom: Recent 'New' Histories of American Labour Law and What They May Signify*, 20 SOC. HIST. 1 (1995). *See also* works cited *infra* note 8; Christopher L. Tomlins, *'Of the Old Time Entombed': The Resurrection of the American Working Class and the Emerging Critique of American Industrial Relations*, 10 INDUS. REL. L. J. 426 (1988) (reviewing David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925 (1983)).

2. *See, e.g.*, MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA (1994); DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY (1993).

institutions and practices that Robert W. Gordon and other Critical Legal Studies savants long ago advocated.[3]

The four articles in this symposium on labor law in the interwar period reflect labor law history's influence and attest to its successes. The subject matter of the articles—union organizing and injunctions, court decisions and juridical ideologies, bargaining institutions, state administrative practices, and labor standards—will all be familiar to its practitioners. At the same time, each author indicates a desire to extend the field's investigative ambit: to new and broadened perspectives on labor standards, in Edward Lorenz's case;[4] to elements of a familiar law left inadequately examined, in John Logan's;[5] to new contexts that alter our perception of the law's development, in Douglas Feeney-Gallagher's contribution;[6] or to contexts that suggest the need for a new understanding of the realm and the content of both "law" and "labor," in Joseph Slater's.[7] Separately, each essay offers new grist for the subfield's mill; each suggests in its own way that the mill needs some adjustment if it is to perform satisfactorily. Together they bring us new levels of contact with and, hence, knowledge about, the operations of "the state" in all its legal and administrative forms, and at all levels—local, regional, and national. They help us pose new questions about the nature of the New Deal state, whose activities shaped so much of the modern era's labor law, and about that state's perception of the role of law in modern society.

I. LESSONS FROM SEATTLE

In this symposium, Joseph Slater's essay, "Petting the Infamous Yellow Dog: The Seattle High School Teachers' Union and the State," performs, albeit involuntarily, as "forerunner" to the 1930s. In 1927, underpaid Seattle teachers organized a local of the American Federation of Teachers (AFT). Unable to engage its members' employer, the school board, in bargaining (as Slater points out, courts considered collective bargaining in the public sector to involve "an impermissible delegation of public power to a private body"), the teachers' union instead chose to press its case by campaigning for the

3. *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

4. Edward C. Lorenz, *The Search for Constitutional Protection of Labor Standards, 1924–1941: From Interstate Compacts to Treaties*, 23 SEATTLE U. L. REV 569.

5. John Logan, *Representatives of Their Own Choosing?: Certification, Elections, and Employer Free Speech, 1935–1959*, 23 SEATTLE U. L. REV 549.

6. Douglas J. Feeney-Gallagher, *Battle on the Benches: The Wagner Act and the Federal Circuit Courts of Appeals, 1935–1942*, 23 SEATTLE U. L. REV 503.

7. Joseph Slater, *Petting the Infamous Yellow Dog: The Seattle High School Teachers Union and the State, 1928–1931*, 23 SEATTLE U. L. REV 485.

election of a school board that would be sympathetic to its wage claim. The tactic was supported enthusiastically by the Seattle labor movement, but aroused the hostility of the school board, which retaliated with a "yellow dog" rule declaring membership in the American Federation of Teachers incompatible with holding a position as teacher within the district. The union's campaign thus became one not merely for a wage increase, but for its own survival. The campaign was undertaken both in the courts and in local electoral politics, where the union now aimed at winning a school board majority sympathetic to the teachers' right to organize. The union was unsuccessful in the courts, where decisions sustained the school board. The union's political strategy, however, was sufficiently wearing on the school board that, after three years, the board rescinded the rule. By this time, however, the union was little more than a shadow of its former self.

Slater's essay illustrates many features of pre-New Deal labor relations: the protracted nature of disputes; the distinctly conditional legitimacy accorded unions; the absence of legal restraint on employers' capacity to force renunciation of union membership as a condition of employment; and the focus, in the absence of a federal statutory law of labor organization and collective bargaining, of legal decision-making at the local level and on the application of case law. But none of these features, as such, provides Slater's analytic point of departure. All are quite subsidiary to his main interest, namely, what the experience of a union facing the distinct legal circumstances operative in the public sector tells us about the merits of labor law history's main story lines to date. Slater argues that labor law historians have by and large neglected public sector unions in their analyses. That neglect has resulted in a skewed perception both of the state and of labor. By adding in the public sector, he argues, we gain a very different perspective on American labor's organizational strategies and ideologies. We also gain a very different perspective on the state, both on its structure and on the conventional historical account of the "rhythm of reform" that the state has allegedly pursued in its dealings with labor.

Slater's essay is hence a corrective. What precisely is he correcting? First, he wants to correct our perception of the significance of political activity to the pre-New Deal labor movement. Historians concentrating on private sector labor law have concluded that the courts' lack of receptivity to labor reform during the early twentieth century, combined with their uniquely powerful position vis-à-vis other segments of the American state, pushed unions into "voluntarism," that is, into an ideological commitment to economic activity and organizational self-reliance and, especially, to avoidance of politics

and involvement with the state.[8] But, Slater points out, public sector unions had to respond to a legal environment that refused public employees even the limited toleration for strikes and bargaining that courts evinced in the private sector. Public sector labor law hence tended to drive public sector unions into political action, not away from it. Public sector unions had nowhere else to go.

Second, Slater wants to correct our perception of the state and its rhythm of reform. In the public sector, the state is not a distinct decision-making entity sitting outside the realm of employer-employee confrontation; the state is an interested party, the employer. The employer-state is not a monolith—the Seattle case reveals a "highly diffused state."[9] But the case also reveals considerable "court deference to local administrative bodies."[10] That is, diffusion was managed by a structure of accommodations between different elements of the state that, in this case, resulted in an agent of the local state (the school board) effectively granted the ultimate in advantages: "the law was made by the actual employers."[11] Examination of the public sector thus reveals an aspect of state activity—an unwillingness to check itself when employer, or structural incapacity to do so fairly—that should alter analyses of the state's role in labor conflicts founded on examinations of the private sector.

Examination of the public sector also calls into question the conventional narrative rhythm of swings from reform to reaction derived from historians' concentration on great national legal events addressing private sector labor relations—for example, the perennial sequence of Norris-LaGuardia, Wagner, and Taft-Hartley.[12] That rhythm does not encompass the chronology or the substance of the state's dealings with public sector unions; nor does it encompass their pat-

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8. *Id.* at 486-87. Slater cites the work of WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991), and VICTORIA HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES (1993). For discussion of Forbath's and Hattam's work in historiographical context, see Carol Chomsky, *Voluntarism Triumphant: Forbath on Law and Labor*, 18 L. & SOC. INQUIRY 319 (1993) (book review); Catherine L. Fisk , *Still 'Learning Something of Legislation': The Judiciary in the History of Labor Law*, 19 L. & SOC. INQUIRY 151 (1994) (book review); Christopher L. Tomlins, *How Who Rides Whom: Recent 'New' Histories of American Labour Law and What They May Signify*, 20 SOC. HIST. 1 (1995).

9. Slater, *supra* note 7, at 487.

10. *Id.*

11. *Id.* at 501.

12. Norris-LaGuardia Act, Pub. L. No. 65, 47 Stat. 70 (1932) (correct version at 29 U.S.C. §§ 101-115 (1994)); National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935) (correct version at 29 U.S.C. §§ 151-169 (1994)); Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136 (1947) (correct version at 29 U.S.C. §§ 141-197 (1994)).

terns of growth and decline. What Slater uncovers, then, is a sector of activity that brings us a revised image of the labor movement; that requires us to think of labor law as a more continuous, less cyclical phenomenon; and that shows the state up as a more self-interested participant in setting the conditions of legality, one that is also active at many levels and in many guises.

Slater's critique of the mainstream has real validity, and the particular case he relies upon is a good vehicle for making his point. What of his conclusions? First, politics clearly matters. Labor law historians have perhaps over-formalized "voluntarism" as an antipolitical doctrine, or at least have not investigated voluntarism's politics with enough seriousness.[13] Whether this results from their neglect of the distinct historical practices of public sector workers (in itself also a valid criticism) is less clear. More likely, it arises from a tendency to think too exclusively of politics as activity occurring within a "national" frame. Even at the national level, the American Federation of Labor (AFL) was not apolitical, but it did try to avoid being whipsawed by partisan alignments. Hence, after 1900, the AFL increasingly avoided partisan, particularly third party, commitments, and pursued instead political strategies designed to support "friends" and punish "enemies" on both sides of the aisle, strategies represented by the AFL's critics as a retreat from politics, but that in practice tended to lead it into alliances with the Democrats. At the local level, particularly in cities where unions had real presence—Chicago, New York, San Francisco, Seattle—there is ample evidence of union involvement in local politics, and close ties to local political parties, without distinction between private and public sector affiliations.[14] It is not surprising to me, then, that Seattle's teachers behaved as they did, nor that the Seattle AFL supported them in their choice. Their political involvement was not, per se, out of the ordinary.[15] Slater's real

13. For a classic discussion of the politics of voluntarism, see Michael Rogin, *Voluntarism: The Political Functions of an Antipolitical Doctrine*, 15 INDUS. & LAB. REL. REV. 521 (1962). *See also* RUTH O'BRIEN, WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886–1935, at 7-9, 19-38 (1998).

14. On politics at the national level, see DUBOFSKY, *supra* note 2, at 49-60, 97-105. For explorations of local involvements, see DANA FRANK, PURCHASING POWER: CONSUMER ORGANIZING, GENDER AND THE SEATTLE LABOR MOVEMENT, 1919–1929 (1994); MICHAEL KAZIN, BARONS OF LABOR: THE SAN FRANCISCO BUILDING TRADES AND UNION POWER IN THE PROGRESSIVE ERA (1987); Georg Leidenberger, *"The Public is the Labor Union": Working-Class Progressivism in Turn-of-the-Century Chicago*, 36 LAB. HIST. 187 (1995); ANDREW STROUGHOUS, US LABOR AND POLITICAL ACTION, 1918–1924: A COMPARISON OF INDEPENDENT POLITICAL ACTION IN NEW YORK, CHICAGO AND SEATTLE (2000) Andrew Wender Cohen, State, Civil Society, and Labor Union Development in Chicago, 1900-40 (1998) (unpublished paper, on file with the author).

15. As Dana Frank indicates, this was not the first time the Seattle AFL had involved itself

achievement in this aspect of his essay is somewhat different: he ensures that we not forget that politics is also significant legal activity. In that sense he adds to our appreciation of what are the determinants and forums of legality germane to the field of labor law history's inquiry.

What of the state and the rhythm of reform? Here, Slater is clearly correct. The distinct legal context of public sector unionism has not informed the conventional story of twentieth century labor law reform, in which, for example, yellow dog contracts are dealt a terminal blow by the Norris-LaGuardia Act and expire with the Wagner Act.[16] That the Wagner Act excludes "the United States, or any State or political subdivision thereof" from its definition of "employer," to whom the provisions of the act shall apply, has never had much impact on historians' perceptions of the legislation.[17] Labor law historians have seen the state as regulator, not as employer, and have debated its structure and practices as such. Here, by introducing the state as employer *and* regulator, Slater underscores the existence of a legal environment in public sector employment quite distinct from that which labor law history treats as typical, hence by example inviting us to reevaluate "the typical" in all its other aspects, too. Slater also succeeds in drawing to our attention the salience of the local state in the public sector, as distinct from the national focus characteristic of much labor law history. Given that the future of public sector unionism remains highly dependent upon its performance relative to a U.S. state structure that, notwithstanding federal growth, continues to be highly diffused and localistic, the observation underscores how the public sector case complicates the analytic relationship between state and labor upon which twentieth century labor law history is premised.

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in school board elections. FRANK, *supra* note 14, at 110-11. Nor is it per se surprising that Seattle's teachers considered themselves workers rather than middle-class professionals, or that the local labor movement agreed, or that the state, in the shape of the local school board, fought them with such vociferous class-consciousness. Historically, there is nothing necessarily middle-class about teaching as a pursuit, and even if there were, teachers have long been and are still capable of militant and determined unionism. So, indeed, have other public employees, such as police and firefighters, whose strikes and organizations have been chronicled by labor historians. As to a supportive local labor movement and class-conscious state actors, again neither seems anomalous, particularly in Seattle where, we must appreciate, this protracted dispute was occurring only a few years after one of the most highly organized examples of coordinated collective action by an urban labor movement anywhere in 20th century America—namely, the Seattle general strike. Should one suppose every vestige of that militancy and tradition of local solidarity and corresponding state antagonism had vanished? Should one not expect action in the teachers' dispute to be informed in some part by both sides' memories of what had happened less than ten years before?

16. *See, e.g.*, DUBOFSKY, *supra* note 2, at 104, 130.

17. Wagner Act, Pub. L. No. 198, 49 Stat. 449 (1935), § 2(2) (current version at 29 U.S.C. § 152 (1994)).

As organizing trends increasingly identify the public sector, not the private, as the core of organized labor in the U.S., it becomes clear that this is a sector whose history must be studied more carefully, both in its own right and for what it tells us about the accuracy of our assumptions of typicality.

II. DUELING CIRCUITS

While Joseph Slater's essay describes, as we have seen, a state that is "highly diffused" but also characterized by "court deference to local administrative bodies," the state that Douglas Feeney-Gallagher brings to our attention, though also diffused, is characterized by a profound lack of accommodation among its different elements, in particular over the extent to which courts should defer to administrative bodies. The subject of Feeney-Gallagher's essay—the reception of the Wagner Act in the U.S. Circuit Courts of Appeal—is, of course, very different than Slater's, one that lies more clearly within the "traditional" ambit of twentieth century labor law history. But like Slater, Feeney-Gallagher claims to offer us a not dissimilar lesson: a neglected subject, once examined, forces a revision in a field's accepted understandings and perspectives.

By making the National Labor Relations Board (NLRB) dependent upon the federal courts for enforcement of its orders, Feeney-Gallagher tells us, the Wagner Act from the outset accorded the courts "a vital position"[18] in the new structure of federal labor law that it created. The courts' strategic role was clearly recognized by the Board's first general counsel, Charles Fahy: they could "either make the Act work or destroy it."[19] But Fahy's observation has not been followed up by historians of labor law, Feeney-Gallagher tells us. They have preferred to concentrate their attention on how the Supreme Court shaped the operation of the Act. Feeney-Gallagher seeks to remedy the deficiency through a comparative investigation of the reception of the Wagner Act in two federal circuits—the Fifth and the Eighth—during the first six years of the Act's administration. Both circuits, he finds, exercised considerable influence over the administration of the Act within their respective jurisdictions. Strikingly, however, there was little uniformity in their respective approaches: the Eighth Circuit was accommodating, the Fifth harshly critical. The main factor influencing their divergence, Feeney-Gallagher finds, was a major difference in attitude over the degree to which courts owed deference to administrative agencies.

18. Feeney-Gallagher, *supra* note 6, at 506 (quoting Charles Fahy).
19. *Id.* (quoting Charles Fahy).

Feeney-Gallagher's claim that the circuit courts have been neglected by historians of labor law is justified to some extent. There *has* been some tendency among these scholars to assume that the decisions of the court sitting at the peak of the hierarchy of formal decisional authority will carry the most interpretive influence on what the "law" of this or that matter is. As Slater has already shown, reality is more complicated. Legalities and illegalities are created in a whole variety of forums. Feeney-Gallagher complicates matters further by demonstrating how fragmented the federal state is; in this case, we encounter an administrative agency charged with implementing federal legislation under the inspection of eleven federal circuit courts, at least two of which we can observe differing substantially in their assessments of whether or not the agency is fulfilling the legislation's intent. Indeed, complication can be taken further. Although all these institutions are components of what is, formally, a single state structure, all are to varying degrees institutionally at cross-purposes with each other; all are also internally fragmented by disputes that create opportunities for cross-institutional alliances, uniting fragments of one institution with like-minded fragments of another—political cleavages within Congress, distinct divisions of function and opinion within agencies, and majorities and minorities on court benches.

Some of Feeney-Gallagher's discoveries, however, are already familiar to us. The circuit courts have been given a little more attention in accounts of the development of New Deal labor relations policy than he implies,[20] though certainly that attention has not been as systematic as he might desire. The existence of disputes over the extent of the power of the circuit courts to review decisions of any administrative agency is not a novelty as such, and certainly not in the case of the NLRB. The NLRB was in the eye of the New Deal administrative law a storm virtually from its inception, and it is already generally clear that the circuit courts were a crucial forum in which that storm played out.[21]

What is more original here is Feeney-Gallagher's account of the determinants of the differences between the two circuits he has iso-

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20. *See, e. g.*, RAYMAN L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT, 1891–1941, at 159-68 (1981). Some attention is given to individual circuit court decisions in CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 238-41, 258-62 (1985) [hereinafter TOMLINS, THE STATE AND THE UNIONS].

21. *See* TOMLINS, THE STATE AND THE UNIONS, *supra* note 20, at 287. On reactions to the New Deal's innovations in administrative procedure, see generally RICHARD N. CHAPMAN, CONTOURS OF PUBLIC POLICY, 1939–1945, at 92-105 (1981). On the place of the NLRB at the eye of the controversy, see generally JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947 (1981).

lated for study on the question of the appropriate role for administrative agencies in the American system of governance. He proposes that differences between the circuits can be explained by the differing levels of sympathy felt by their respective benches for diverging philosophies of legal decision-making: "realist" in the case of the Eighth Circuit, a modified conceptualist in the case of the Fifth.[22] Feeney-Gallagher defines realists as those judges committed to see law evolve with changing social and economic conditions and, indeed, willing to tolerate law's use "as a tool for transforming rather than merely reflecting contemporary social conditions."[23] Realists were inclined to be sympathetic to the purposes of the New Deal, which Feeney-Gallagher sees as itself, indirectly, a manifestation of legal realism. Realists were inclined to allow administrative and regulatory agencies considerable latitude to exercise their jurisdiction purposively and actively. Modified conceptualists, in contrast, were much more inclined to view that administrative activism with suspicion. Though not simple-minded adherents of the classic conceptualist view of law as timeless principles—"determinate, objective, and value-free"[24]—they were, nevertheless, much less willing than the realists to accommodate administrative ascendancy, preferring the rule of law and preservation of "the integrity of the judicial branch" to the dangerous alternative that perceived legality to be simply another form of politics.[25] Hence modified conceptualists set their sights on checking "the rise of powerful administrative agencies seemingly operating outside of the Constitution and traditional law."[26] In the case of the NLRB, they "used the law . . . aggressively" to limit the intrusion of federal administrative power into the employment relationship.[27] "These judges believed that property rights and the separation of powers were at the heart of the American system, and they were not willing to cede their constitutionally derived powers to administrative/adjudicative bodies which subverted these very ideals."[28]

Clearly the Eighth and Fifth Circuits were very different in their approach to the National Labor Relations Act (NLRA), and Feeney-Gallagher has found materials to support his contention that their differences reflected variant jurisprudential solidarities, notably the published commentaries of Joseph Hutcheson, chief judge of the Fifth

22. Feeney-Gallagher, *supra* note 6, at 517, 533.
23. *Id.* at 511.
24. *Id.* at 514.
25. *Id.*
26. *Id.* at 508.
27. *Id.* at 546.
28. *Id.*

Circuit, and of his colleague, Samuel Sibley. But before we can accept his argument, certain concerns must be discounted. For example, although contiguous along one border, the Eighth and Fifth Circuits in the late 1930s were regionally very distinct, one comprising largely the upper midwest and plains states, the other the deep South.[29] To what extent did the two circuits' distinct receptions of federal legislation reflect the impact of distinct regional influences on their personnel—distinct economies, cultures, traditions—rather than different intellectual commitments? Two other contributors to this symposium, John Logan and Edward Lorenz, both suggest that the South represents distinct territory in labor law for reasons that have much more to do with the economics of comparative regional advantage than jurisprudential conviction.[30]

Second, can one infer intellectual sympathies from legal outcomes? What one encounters in the work of the scholars upon whom Feeney-Gallagher relies, such as Neil Duxbury, is less a history of American legal decision-making than an intellectual history of American jurisprudence.[31] Such histories impute styles or modes of thought by abstraction not from the particulars of what courts do, but from the reflective writings of legal intellectuals. Feeney-Gallagher possesses such material in the case of Fifth Circuit judges. He can draw on Hutcheson's and Sibley's writings to determine their intellectual predilections independently, rather than extrapolate from their legal opinions. He does not offer such material in the case of the Eighth Circuit, however, which means that the reader is required to assume what needs to be proved—that the tenor of the circuit's opinions resulted from the manifestation among its personnel of a particular intellectual tendency.

Finally, to what extent are the jurisprudential tendencies that Feeney-Gallagher delineates consistent enough in their distinctiveness to predict distinct legal outcomes? Feeney-Gallagher's choices of

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29. The Eighth Circuit included Minnesota, Iowa, the Dakotas, Nebraska, Missouri, and Arkansas. The Fifth Circuit included Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida.

30. *See* Logan, *supra* note 5, at 558 n.54; Lorenz, *supra* note 4, at 576-80. Senatorial courtesy in the judicial appointments process, of course, enables regional distinctiveness to gain expression in court decisions. For a useful comparative investigation of the federal circuit court judiciary that explores the parameters of its cohesion and shared norms, see J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981). *See also* Rayman L. Solomon, *U.S. Courts of Appeals and Their Judges: Howard's* Courts of Appeals in the Federal Judicial System, 1983 AM. B. FOUND. RES. J. 761 (1983) (book review of Howard, *supra*). On the long-term political context of the Eighth Circuit's judicial progressivism, see O'BRIEN, *supra* note 13, at 12-18, 163-205.

31. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

exemplary envelope-pushing realist are Roscoe Pound and Felix Frankfurter. Neither is an obvious choice to serve that role. Was Pound a realist? Adopting a broad definition of the term, Pound's sociological jurisprudence can certainly be seen as a progenitor of "Legal Realism." But he was neither lender nor even participant in the movement as it had come to be understood by the late 1920s, and by the middle of the 1930s Pound had long ceased to be any sort of realist. He would share the Fifth Circuit's views on administrative agencies far more avidly than those of the Eighth.[32]

Was Frankfurter a realist? If the measure of realism is to show respect for ideals of administrative expertise and to treat law as an instrument of reformist social policy, then yes. Yet, Frankfurter tempered his respect with an equal measure of determination to ensure that lawyers, not experts of any other stripe, furnished the core supervisory personnel of the administrative-regulatory state.[33] And, like Pound, his trajectory was one that separated him from that of the state: by the late 1940s, he was publicly professing a profound, and Poundian, suspicion of administrative governance.[34] Both of Feeney-Gallagher's exemplary realists, in short, wind up on the Fifth Circuit's side of the "battle of the benches" rather than the Eighth's, leaving the intellectual substance of the Eighth Circuit's "realism" vis-à-vis the administrative state mysterious. One is left in some doubt what the "battle of the benches," considered as a jurisprudential tale, is really about.

These objections notwithstanding, Feeney-Gallagher has clearly encountered a struggle of some importance. With a little reframing we can accept his argument that the struggle reflected profound differences over the nature of the administrative state and law's place in it.

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32. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 219-20 (1992). *See also* John Henry Schlegel, *A Tasty Tidbit*, 41 BUFF. L. REV. 1045 (1993). Schlegel criticizes Horwitz for paying insufficient attention to Pound despite Horwitz's apparent interest in defining Realism as a broadly progressive tendency in American law and politics rather than as a jurisprudential tendency in legal academia. *See id.* at 1064-69; *see also* N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997).

33. Schlegel implies that Frankfurter should be included in the same "broad church" definition of Realism that encourages him to consider the early Pound a realist. *See* Schlegel, *supra* note 32, at 1064-69. Peter Irons, in contrast, flatly denies that Harvard, where Frankfurter taught, harbored any Realists at all. Irons sees Frankfurter as never anything other than a technocrat who "preached the ideals of administrative expertise" but always saw the lawyer as "indispendable adjunct to the legislative and administrative process," responsible for "putting at the disposal of government that ascertainable body of knowledge on which the choice of policies must be based." *See* PETER H. IRONS, THE NEW DEAL LAWYERS 7-9 (1982).

34. *See* HORWITZ, *supra* note 32, at 237.

First, it is clear that Feeney-Gallagher is aware of his problem. Throughout he has to struggle to maintain the intellectual distinction that he embraces at the outset and, eventually, he gives up, referring to his Fifth Circuit judges as "realist" critics of the New Deal administrative state.[35] Necessarily, this undermines his jurisprudential contrast between the circuits, but his purpose is to acknowledge that the Fifth Circuit's judges—or, at any rate, its chief judge, Joseph Hutcheson—in fact accepted much of the "realist" critique of legal formalism. What they did not accept, however, was the further conclusion that law per se should cede legitimate authority over human behavior to other modes of decision-making. Hence their insistence that the courts actively and aggressively "perserve fundamental constitutional principles from subversive social, economic, and political forces such as administrative agencies."[36] That stance, of course, put them on exactly the same trajectory as Pound and Frankfurter, a trajectory that Pound articulated in his 1938 attack on administrative absolutism;[37] that congressional proponents of the Walter-Logan bill (1940),[38] the Administrative Procedure Act (1946),[39] and the Taft-Hartley Act (1947)[40] were determined to realize; and that Felix Frankfurter eventually helped to set in stone in *Universal Camera*.[41] But as such they were taking sides not in a struggle internal to law between different jurisprudential philosophies—the common "realism" of Hutcheson and the Eighth Circuit muddies that argument—so much as in the much more important conflict over the appropriate balance between law and other forms of expertise in authoritative state decision-making.[42]

"Realism" was not the enemy in that battle. Neither Pound nor Frankfurter had ever ceded law's ascendancy in the state. Both embraced expertise only to the extent that it rejuvenated law—added to its capacity to maintain its ascendancy. But their realist credentials

35. Feeney-Gallagher, *supra* note 6, at 545-47.

36. *Id.* at 545.

37. Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 REP. A.B.A. 331 (1938)

38. H.R. 6324, 76th Cong., 2d Sess. (1940); S. 915, 76th Cong., 2d Sess. (1940).

39. Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521 (1994)).

40. Pub. L. No. 101, 61 Stat 136 (1947) (correct version at 29 U.S.C. §§ 141-97 (1994)).

41. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

42. There is an important prehistory both to the general question of courts' deference to decision-making by administrative agencies, and to the particular opinions of Frankfurter and Pound on the matter, that Feeney-Gallagher could usefully integrate with his observations on the later evolution of administrative law during the New Deal. For both see LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE MAKING OF MODERN IMMIGRATION LAW (1995), 26-30, 108-10, 97-98, 176-77, 182-83, 194-216, 238, 245-52.

are in doubt. Neither, however, did those more conventionally identified as "realists" embrace abandonment of law for the authority of expertise. Rather, they warned of the danger of lawyers becoming merely "guardians of outworn ideas," and spoke of the necessity that "lawmen" take sufficient advantage of other forms of social knowledge to maintain law's ascendancy, or see law passed by altogether by "a new type of public servant—a *real* social engineer."[43]

The post-Depression administrative order would prove to be closer to that embraced by the Fifth Circuit than the Eighth. Battling jurisprudential philosophies do not help us explain this outcome. Both the Fifth and the Eighth Circuits were "realist" in their jurisprudential sympathies. Both also were aggressive in using law instrumentally to pursue their objectives. What counted was the greater success of one perception of how to maintain law's ascendancy in the state—by restraining expertise—than another—by co-opting it. That debate was a constant within the fragmented state. It went on not simply between circuits, but within them and, indeed, within the very agency that was the focus of their attention. Were we to judge him on the basis of where he worked and what he did, we might consider that NLRB General Counsel Charles Fahy, who noted the circuit courts' strategic capacities vis-à-vis the Wagner Act, was a "realist." He was not, of course. He was "narrow, legalistic and single-minded"—a legal craftsman.[44] But whether or not he was a realist is irrelevant to his performance as general counsel. What was not irrelevant to his performance, or to the future of the NLRB as an administrative entity, was his deep antagonism as a lawyer to other languages of decision-making, of expertise, abroad in his agency. "Persons may not be found to have committed unlawful acts by some [people] called a Board going off by themselves and having a nice social and economic research party, whatever that is."[45] Ironically, Fahy the lawyer was probably in closer agreement with the Fifth Circuit's judges on the

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43. Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L. J. 266-67 (1934) (emphasis added).

44. IRONS, *supra* note 33, at 235.

45. TOMLINS, THE STATE AND THE UNIONS, *supra* note 20, at 210-11 (quoting Charles Fahy). In correspondence with John R. Commons, Board member William Leiserson, Fahy's chief adversary on the Division of Economic Research, had earlier written that throughout the New Deal agencies, lawyers were threatening "the whole idea of scientific investigation and administrative control as it was thought out and worked out in Wisconsin years ago." *Id.* at 209. "Lawyers," he continued,

> seem to have the notion that the only way of arriving at the truth is by two opposing lawyers trying to keep things out of the record and whatever gets in that is the truth. They have no understanding of the method of investigation that we call economic or social research.

Id. at 211 n.35. Fahy retorted that Leiserson's views were "fantastic" nonsense. *Id.* at 210.

necessity for law's ascendancy in the state than with the judges of the indulgent Eighth.

III. THE PRICE OF SPEECH

Though Feeney-Gallagher's characterization of circuit court struggles over administrative procedure is thus open to comment, there is no doubt that the struggles themselves offer us crucial insights into the juridical context in which New Deal labor law developed between 1936 and 1948. The fight over the bargaining unit and the determination of union representativeness within it offer just as crucial a key to understanding the industrial relations context. At the same time, exploring that fight allows us further insight into the tensions that prevailed among the actual administrators of the National Labor Relations Act, and within the statute they administered.

To lodge determination of the bargaining unit and the bargaining representative in the hands of state bureaucrats is emblematic of the reliance on administrative procedure that so exercised critics of New Deal labor law—it is, of course, a classic progressive move to hand "problems" to "disinterested experts" for administrative resolution. In his essay, "Representatives of Their Own Choosing?" John Logan discusses some of the implications of that move with particular reference to the union certification election and to the insertion of the employer into the election as, in effect, the other candidate, through recognition of the employer's free speech claims. That insertion, Logan argues, has made a major difference to unions' ability to win representation rights. As soon as employers gained significant access to employee decision-making in representation proceedings in the mid-1940s, unions' success rates in certification elections began to drop. By the mid-1970s, unions were winning fewer than half of all elections.[46]

This is a very interesting and important topic. As in the case of Slater and Feeney-Gallagher, Logan's claims of novelty are justified, but should perhaps be advanced a little more cautiously. For example, Craig Becker's lengthy *Minnesota Law Review* article on union representation elections, referenced by Logan, deserves more consideration than it gets here, given that one of Becker's principal concerns is to explore the historical processes through which elections became the NLRB's chosen instrument in its administrative determinations of representation and through which, in turn, employers gained rights to participate.[47] Nevertheless, Logan sheds new light on several matters.

46. Logan, *supra* note 5, at 549.

47. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Fed-*

On the NLRB's abandonment of card certification, for example, while Becker points to external pressures—employer antagonism, campaigns in the press, and criticism of the Board in Congress—Logan draws to our attention the results of an internal NLRB review of certification processes initiated by General Counsel Charles Fahy, in consultation with the Board's regional attorneys.[48] The addition is important, for it underlines the extent to which debates internal to the Board over appropriate modes of operation, not simply external pressures, had significant impact on the course of New Deal labor relations policy. In this matter, as in others, those debates tended to fragment the Board along an axis that put its Legal Division at odds with other departments and personnel. Fahy, the legal craftsman, did not propose abandonment of card certification simply in response to outside pressures. In this, as in other aspects of the Board's internal operations, his intent was to improve its procedures by "legalizing" them.[49]

The consequences of legalizing the Board's election and employer free speech policy were profound, as Logan's review of its twists and turns underlines. Crudely, American unions were able to compile a formidable track record in unit elections only as long as the Board was their ally and only because they were protected from employer interference with employee organizing efforts by its "strict neutrality" rules. Obviously, strict neutrality was a laudable goal—employers have no business engaging in actions that impinge upon employees' exercise of organizing rights. Yet, legally, the Board clearly found the imposition of strict neutrality difficult to defend against free speech claims advanced in the same discourse of legalities that it had chosen as its language.[50] This raises the question whether, in the structure of New Deal labor law, the law itself bears some of the responsibility for the creation of this country's comparatively weak labor movement—weak because fatally dependent upon state processes themselves always open to an antagonistic, rather than a supportive, application; weak also, however, not simply because of its vulnerability to a changed political-administrative climate, but because of something integral to the law itself, and its purposes.

In 1936 one of the key figures in the drafting of the original National Labor Relations Act, Leon Keyserling, alluded indirectly to the first possibility—that is, to the possibility that well-meaning administrative attempts to will into existence patterns of representa-

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eral Labor Law, 77 MINN. L. REV. 495 (1993).

48. Logan, *supra* note 5, at 551.

49. *See generally* TOMLINS, THE STATE AND THE UNIONS, *supra* note 20, at 148-243.

50. *See generally* Becker, *supra* note 47, at 532-47.

tion would not be conducive to the development of long-term union stability absent independent, self-sustaining strength.[51] We should note that the Congress of Industrial Organizations (CIO) in particular was deeply dependent on the NLRB for support for its organizations.[52]

Yet, Keyserling's cautionary words do not get to the heart of the second possibility, that at least some of the problems that Logan's

ication, Elections, 998) (unpublished

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51. *See* John Logan, Representatives of Their Own Choosing?: Cert and Employer Free Speech in the United States and Canada, 5-6 (October, paper, on file with author).

52. *See* TOMLINS, THE STATE AND THE UNIONS, *supra* note 20, at 18

53. *See id.* at 136-8; Becker, *supra* note 47, at 527-32.

54. Logan, *supra* note 5, at 567 (quoting J. Warren Madden).

55. *Id.* at 554 (quoting David Saposs).

56. *See supra* note 44 and accompanying text.

years the NLRB was an agency fighting bitterly inside itself over the meaning of its commission.

The door, then, was open a crack from the beginning. Free speech was the cat that pushed through it. Why? Because of the Act's second flaw: its attempt to use what Keyserling had called distorted political analogies to legitimize administrative intervention in labor relations for the purpose of creating structures of worker representation.[57] Wagner sold the Act not primarily as a bill of immunities and protections—means to ensure that unions could approach and organize workers without harassment—but more grandly, as a visitation of law and democracy upon American industry.[58] Hence the comparative ease with which the representation election became analogized to a political campaign in which opposing parties, employer and union, slugged it out with the full panoply of constitutional freedoms to express their opinion of each other's merits and demerits, culminating in a free and democratic expression of choice between them by an "electorate" of employees.

One must acknowledge that the opportunity to exploit these flaws was a creature of political climate, not an inevitable development. Nevertheless the flaws were there, and not by accident, but because the authors and administrators of the Act itself conceived of labor organization and collective bargaining as legal processes to be administered by an expert agency exercising a quasi-judicial jurisdiction in the public interest, not as a process of expedited self-activity.

IV. MUGGING FEDERALISM

Why, we might ask, did the New Deal state put so much faith in expertise and administrative process? The answer is to be found less in the particulars of any single policy arena than in progressive elite ideologies of state action whose impact was felt in all of the arenas to which the New Deal state gave its attention. Of the four essays in this symposium, Edward Lorenz's investigation of the historical background to New Deal attempts to establish a national labor standards regime gives us the most complete access to that ideology.

Like the other contributors to this symposium, Lorenz explores an area left relatively neglected by most recent labor law historians.[59]

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57. *See generally* Becker, *supra* note 47, at 532-47.

58. *See* Becker, *supra* note 47, at 501-07. *See generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

59. See, however, EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES (1994); VIVIEN HART, BOUND BY OUR CONSTITUTUION: WOMEN, WORKERS, AND THE MINIMUM WAGE (1994); SUZANNE MET-

Lorenz takes us away from the realms of union organizing and collective bargaining that have provided most of the "labor law" we have been concerned with so far, and into the world of labor standards, where he addresses in particular crucial aspects of the history of labor standards policy formation and advocacy.

"World" is an appropriate way to describe the ambit of Lorenz's discussion here, because his particular goal is to delineate the opportunities that the Constitution's treaty-making provisions have offered for enlarging federal regulatory capacities by methods that are immune from the checks that federalism ordinarily imposes on the national state.[60] The story begins with the implicit rationality of taking labor standards out of competition, a position embraced (not surprisingly) by representatives of established industrial regions—here the post-World War One textile industry of New England—confronted by competition from low-wage newcomers, in this case mills in the South. Historically, labor standards (like other economic regulation) have always proved vulnerable to federalism's fragmented regulatory jurisdictions. Standards adopted in a single state tempt employers into evasion, or flight from "unfair hardship."[61] In New England, interstate compacts became a means to establish regional uniformity of condition among the established producers, a recognition of their common interest in taking standards out of competition, but regional compacts could do nothing to insulate established producers from southern competition. To prevent capital flight, the region's political leaders hence strove for interregional parity. Naturally, southern interests, seeking capital infusions, industrial growth, and competitive advantage, resisted. With the onset of the Depression, the drive to the bottom quickened. Interstate compacts were broadened to include southern states, but failed. The National Recovery Administration (NRA), in whose evolution chronic competition in textiles featured prominently, also failed.[62]

The issue, Lorenz tells us, is more than of historical interest. His saga of individual producers and regions is a case study, "an empirical test of federal diversity in social policy in the era of global manufacturing."[63] He uses the career of John Winant—blueblood wasp, pro-

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LER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998); Bruce Goldstein et al. *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1078-1102 (1999).

60. *See, e.g.*, Lorenz, *supra* note 4, at 592-93.

61. *Id.* at 574 (quoting O.P. Hussey).

62. On the history of competition in cotton textiles and the NRA, see STANLEY VITTOZ, NEW DEAL LABOR POLICY AND THE AMERICAN INDUSTRIAL ECONOMY 21-33, 119-34 (1987).

63. Lorenz, *supra* note 4, at 575.

gressive Republican governor of New Hampshire, elite liberal networker, U.S. Industrial Labor Organization (ILO) observer, eventual ILO President—to illustrate the logical progression in taking standards out of competition in response to that diversity: from interstate to interregional, from interregional to international.

It is always interesting, in today's more conservative climate, to encounter those voices from the 1920s and 1930s, Republican and Democrat alike, talking about forms and structures of government in dynamic terms, of the Constitution as something other than a static script imbued with no spirit other than original intent, something (like the realists' law) that instead had to move flexibly with the times.[64] In the same vein, it is also always interesting to encounter (as we did in Feeney-Gallagher's and Logan's essays) the New Deal in full flight—there totally convinced of the efficacy of legal-administrative expertise in shaping labor relations, here so dedicated to besting federalism's restraints on its freedom of action that it would resort to the rather questionable strategy of, as Lorenz tells it, first joining an international organization by subterfuge and then planning to render state law irrelevant on matters of labor standards by using national political power to adopt and implement that organization's international compacts.[65] An expeditious solution to the tedious problem that one's plans have attracted political opposition, no doubt about it. Yet, there is a smugness in the conviction of these New Deal elites that their own rectitude relieves them from the necessity of obedience to constitutional niceties that is, frankly, irritating. As Michael Parrish has put it, writing of Felix Frankfurter, a "certain insouciance . . . characterized his belief that these intellectual mandarins would remain subject to popular, democratic controls."[66] In his insouciance Frankfurter had much company.

It seems to me that the constitutional implications of the ILO strategy require some comment from Lorenz. The only remarks he offers that specifically evaluate the constitutionality of the administration's treaty-power strategy are those of the secretary of the hand-picked committee that Winant created to proselytize for it.[67] I do not detect any sense in this essay that Lorenz thinks the political practices he is recounting are anything other than business as usual; or, if this indeed *was* business as usual at the time, that he recognizes this in itself is worthy of remark. Perhaps it is unfair to ask him. However, the

64. *See id*
65. *See id* at 593-96.
66. MICHAEL PARRISH, FELIX FRANKFURTER AND HIS TIMES 201 (1982).
67. Lorenz, *supra* note 4, at 596-97 (quoting William Lonsdale Taylor).

principal reason I draw attention to this aspect of Lorenz's essay—to the general rectitude of New Deal elites, as well as to the particular ILO strategy that illustrates it—is that it clarifies, to an extent that none of the other essays quite manages, and certainly to an extent that none of the liberal historiography of the New Deal ever has done, just what was being put up for grabs in the 1930s, just how instrumentally whole forms and philosophies of government and adjudication were being, apparently, tossed aside, and by whom. Talking of social security, for example, Winant poses the matter as "a great national necessity" that the Constitution, itself described as "a living instrument of national government," must be pressed to accommodate.[68] Could we talk in that way today? Substitute, say, school prayer or right-to-life legislation for social security, and would we want to?

By "great national necessities," one assumes, Winant meant then, as one would now, major questions of great public moment, worthy of widespread attention and discussion. How did the Roosevelt administration propose to put the great national necessity of its labor standards regime into public play? It turns out here by subterfuge and concealment. After reading this essay, I am inclined to be somewhat less dismissive than I used to be of the question of whether there existed any rational basis for conservative political rage and fear during the later 1930s. The most famous cause of conservative concern—the court-packing drama—is, of course, something of a historical cliché.[69] Nevertheless, Lorenz's illustration of manipulation of the treaty power, and due process concerns about administrative government gleaned from Feeney-Gallagher's essay, complement court-packing in a catalog of apparent malpractice that invites a broad and critical reexamination of the liberal legal history of the 1930s.

The reason for the absence of any critical perspective on New Deal legal history here, I think, is the same that pervades the historiography in general: namely, that the author shares the values of his subject. Lorenz is disappointed that the Roosevelt Administration did not ultimately implement its ILO stealth strategy, and that postwar attempts met with successful opposition. He is simultaneously annoyed by and, I think, contemptuous of what he sees as a wholesale right-wing assault on the New Deal/War Deal welfare state, an

68. *Id.* at 592 (quoting John Winant).

69. Though one recently reinterpreted in ways that suggest Roosevelt's assault on the Supreme court was hasty, arrogant, ill-judged, and unjustified. *See, e.g.*, Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994). Commenting on Cushman, Eben Moglen observes that Roosevelt "was not prevented by principle or scruple from directing public ire at the Court as a device for relieving pressure on his administration." Eben Moglen, *Toward a New Deal Legal History*, 80 VA. L. REV. 263, 267 (1994).

assault that he represents as a triumph of classical liberalism.[70] I agree with many elements of Lorenz's "roll-back" analysis, but it is difficult to accept the overall picture of the postwar period offered here, at least through the early 1970s. No allowance is made for the constraints that a Keynesian, not classical liberal, consensus in economics and economic policy put on conservative roll-back, nor for welfare legislation, such as the GI Bill, that does not fit with a right wing in full flight, looting and burning indiscriminately. Even in the case of Taft-Hartley, the story was more one of containment than evisceration. Passage of that Act was not an occasion for right-wing celebration, but attended by real disappointment that the Republican Congress had not gone further.[71] We can certainly agree that the American conception of the welfare state has always been badly stunted in comparison with Western European social democracy, but not that the postwar period saw it stoned to death. And when Lorenz writes of the 1950s that "this was no longer an era when American business and labor shared a common view of the world,"[72] I have to disagree. If there is any era of which one could write that American business and labor shared something approaching a common view of their interests, it was surely those twenty-five years after World War Two.

Lorenz's view of the postwar becomes more recognizable as one enters the 1970s, when the globalization of competition in American product and labor markets caused the breakup of the conditions that sustained prior consensus, and in these conditions he sees the last best hope for realizing Winant's dream, albeit half a century late. I want to address this, because I think arguments for and against international labor standards are more complex than Lorenz's story of social justice frustrated by reactionary economics allows.[73]

Lorenz, like Winant, identifies with an internationalist position in labor standards debates, which argues that standards, like the incoming tide, will raise all boats to the same level and take labor costs out of global competition.[74] By contrast, neoclassical economists fault

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70. *See* Lorenz, *supra* note 4, at 597-602.

71. TOMLINS, THE STATE AND THE UNIONS, *supra* note 20, at 279-81.

72. Lorenz, *supra* note 4, at 600-01.

73. The next four paragraphs draw upon Christopher L. Tomlins, Labor's Contemporary Plight: A Comment (1995) (unpublished paper, on file with author). In turn, that paper is heavily indebted to Jeffrey Clark, The Internationalist Case for International Labour Standards (1995) (unpublished paper, copy on file with author). This paper appears in shortened and revised form as Jeffrey Clark, *Labour and the Globalization of Production: A Pragmatic Case for International Standards*, 20 CANADIAN J. OF DEV. STUD. 731 (1999).

74. *See, e.g.*, Economic Policy Council of the United Nations Association of the U.S.A., THE INTERNATIONAL LABOR ORGANIZATION AND THE GLOBAL ECONOMY: NEW OPTIONS FOR THE UNITED STATES IN THE 1990s (1991), as cited in Clark, *Labour and the Glo-*

standards as interference with international trade's principle of comparative advantage, but still treat labor as a homogenous factor, notwithstanding the widely varying conditions of developed, as opposed to developing, economies.[75] Labor, like other inputs, is taken to have a factor cost that adjusts to market-clearing levels as long as obstructions are not built in. Neither side in this debate takes into account the effects of the heterogeneity of labor—the divergence in conditions between core developed and peripheral developing economies. Core labor is high cost, but highly productive because it works in relatively more capitalized enterprises that produce high value-added goods. Peripheral labor is low-cost and low-wage and produces low value-added goods in under-capitalized conditions. Historically, core and peripheral labor have demonstrated distinct interests, because core labor benefits directly from the concentration of low-cost, low-wage jobs in peripheral economies and from cheap peripheral goods. One might analogize to the regionally-differentiated American economy prior to World War One. Cheap southern agricultural produce was one of the conditions of Amoskeag's prosperity.[76]

Internationalists dwell on the rise of unprecedented feed-back effects from capital mobility breeding a "new" international division of labor that uses cheap peripheral workers to undermine high-cost core workers, just as the rise of southern textiles in Lorenz's story earlier undermined New England. Core-periphery labor interests are not distinct, they say.[77] Hence, internationalists seek to use standards to protect workers in low-wage peripheral economies from exploitation by core corporations looking for cheap labor.[78] In Lorenz's story, the current international situation simply replays what happened earlier in the United States, and Winant becomes a convenient device that links one to the other. Nonconservative critics of this analysis argue, however, that while capital flight is disciplining some core workers, it is not devastating all of them. Unlike both neoclassical economists and

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balization of Production, *supra* note 73, at 733.

75. For discussion and critique of this position, see MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990).

76. For description and analysis of the conditions suggesting distinct interests between core and peripheral labor, see Clark, *supra* note 73, at 734-38. On the general relationship among the different regions of the American economy prior to World War One, and on the particular tendency for wealth to drain from regions concentrating upon the production of agricultural or industrial raw materials (the South, and to a lesser extent the West) to the industrial core in the Midwest and Northeast, see RICHARD F. BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877, 427-29 (1990).

77. For discussion of the "new international division of labor" analysis, see Clark, *supra* note 73, at 734, 739.

78. *Id.* at 733, 734-35.

internationalists, they argue that labor is not homogenous, that the core-periphery division is actually a stable one based on profound divergences—factor distributions, cultural conditions and so forth—that resist "standardization." Core investment is steady. Indeed, even as bits of the old industrial core are dismantled and shipped out, a new "third-wave" core is steaming ahead.[79] Again we find an earlier parallel in the U.S. story. Textiles may have collapsed in New England, but after that came not regional devastation but electronics, defense industries, and a whole range of service industries—financial, health, education.

There is a case for standards, but like a strong union movement, it cannot be made on the basis of social justice generalizations, or implemented by subterfuge. Take the social justice argument. One goal of standards, after all, is to dampen motivation to export high-wage jobs from developed economies to peripheral ones, thus obstructing capital flows that are shifting productivity-enhancing facilities to the low-wage periphery. Do advocates of standards care that their proposals may keep peripheral economies under-capitalized, with all the attendant impacts on living standards in those economies?

International labor standards can only be supported if they can protect productive workers in core economies from low-cost competitors, while also encouraging the distributive flow-on in peripheral economies of the productivity effects of enhanced capital investment in those economies.[80] The argument is a pragmatic one precisely because it does *not* rely on the universalistic social justice motivations for labor standards that were developed by people like Winant, but rather ties them to a foundational justification that stresses productivity, which is the only real basis for a rising standard of living, and organization, which is the only guaranteed means of ensuring that productivity gains are distributed. In addition, arguments for standards must address the structural division of interests between core and peripheral workers. Standards should protect productive enterprises against less productive enterprises because labor conditions in productive enterprises—that is, capitalized enterprises—tend to be relatively less inhumane and attended by relatively greater recognition of collective bargaining rights than those in sweatshops. Standards should promote productivity and the improvement of working conditions by including provisions for raised capital and technical thresholds for the operation of peripheral industries. Standards, in short, should seek less to inhibit than to manage capital movements. Simultaneously,

79. *Id.* at 735.
80. *Id.* at 741-48.

they should seek to advance workers' rights in order to enhance the chances for a flow-on of productivity effects into the wider standard of living.[81]

What is the chance for international standards to play this role? What are the bases upon which substantially different national legal cultures with distinct economic interests can negotiate meaningful implementation of standards, particularly when their negotiations are overlaid by a distinct set of national and international capital interests? On all this, the only remotely relevant American empirical instance with which I am familiar, the formulation and passage of the Fair Labor Standards Act in 1938,[82] helped achieve certain minimum standards. But combinations of institutional and ideological imperatives (for example, conformity with contemporary understandings of the commerce clause) with political circumstance—notably, resistance in the South to erosion of regional advantages, differential union reactions to mandated minimum standards based on membership profiles, regional strengths, capacity to rely on collective bargaining, and so forth—resulted in a very patchy and porous statute. This story is not in Lorenz's account. But if we are looking for historical analogies it seems to me that its messy reality, its accomplishments, and its grievous failures, are probably just as relevant to strategies for the achievement of both American and international labor standards as the Roosevelt Administration's rather arrogant and unrealized dream of imposing labor standards on reluctant peripheral economies by constitutionally dubious maneuvering.

V. CONCLUSION: THE HEAVY BURDEN OF THE STATE

What can we conclude from this symposium? Individually, these authors have demonstrated the returns to be gained by pushing labor law history into new empirical and conceptual areas. Collectively, however, their achievement is somewhat different, for collectively they recommend that we revisit what is ostensibly familiar to us. The many questions they raise, directly and indirectly, about the structure, ideology, methods, and purposes of the New Deal state persuade me that labor law historians should undertake a rigorous reevaluation of that state's legal history.

To argue that the most important contribution of this symposium is the stimulus it offers to a renewed critical engagement with the New Deal state reflects what in my case has always been a disinclina-

81. *Id.*

82. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 201-94 (1994)).

tion to take the era's liberal legalism on its own terms,[83] a disinclination in which I am certainly not alone, but also to resist accepting its statism, in which, once reinterpreted as radicalism or empowerment, other critics of liberal legalism have found a certain reconstituted comfort.[84] For labor historians and labor law historians both, the 1930s has always been that precious moment of promise when, if only for a second, the cloud cover broke and the state smiled down on our side. But I have always been something of a skeptic on that front. Promises culled from the past are artifacts of faith, not of history. At the turn of the century, over sixty years beyond the New Deal, it is surely past time to grow beyond unrequited hopes and, as historians, seek the truth. Whether one agrees with their conclusions or not, one can find in these essays substantial hints of themes that can be followed productively in that exercise to new generalizations and new insights. I applaud their authors for that achievement.

83. *See, e.g.*, TOMLINS, THE STATE AND THE UNIONS, *supra* note 20; Christopher L. Tomlins, *The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism*, 39 INDUS. & LAB. REL. REV. 19 (1985).

84. Hence Karl Klare's trenchant critique of the New Deal's liberal legalism can still begin with the statement that when passed, the Wagner Act "was perhaps the most radical piece of legislation ever enacted by the United States Congress." Klare, *supra* note 1, at 265. *See also* DUBOFSKY, *supra* note 2, at 131 ("For the labor movement of July 1935, the Wagner Act cost nothing and promised vast gains") and, in more anodyne vein, at xvi ("workers and their unions have gained from positive state intervention at particular junctures."). For a more balanced reading of the Wagner Act, see ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES 166-86 (1990).