

Reframing the New Deal: The Past and Future of American Labor and the Law

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This Article reinterprets the period from 1935 to 1973 as a “long exception” to the sustained pattern of legal hostility to labor organizing in the United States. While the National Labor Relations Act (Wagner Act) and the broader New Deal were once regarded as secure solutions to the “labor question” in America, in retrospect they only offered a partial, temporary, and extraordinary respite from state and corporate opposition to the collective interests of working people. The decades from the thirties through the seventies witnessed the rise and fall of union density as well as the fall and rise of inequality that stands out in contrast to the rest of American history since the industrial revolution. However, because of the extraordinary circumstances of that era (which are connected to important sociopolitical variables including the economic emergency, immigration, the state, unions, individualism, and cultural politics), the New Deal serves as a poor historical metaphor for those interested in labor’s revival. The circumstances that created the New Deal are unlikely to be repeated, thus the future of labor organizing and the law will look more like the deep and difficult past of American history prior to the 1930s than like the “modern” age of organizing and collective bargaining.

INTRODUCTION

Labor relations in the United States have returned to the bad old days. Private sector union density stands at a fraction of its former glory, having fallen to only 6.6% of all non-agricultural workers from its glory days of over one-

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third.¹ There are few signs of revival for traditional unionism. Concomitantly, inequality is at record levels and wages have stagnated for well over a generation. The staggering levels of inequality correlate closely with a wide variety of social ills, including increased rates of homicide, illiteracy, teen pregnancy, unhappiness, shorter life expectancy (even for the affluent), obesity, mental illness, loss of trust, incarceration, and other negative social outcomes. While most countries are facing a decline in the collective economic rights of workers, the United States is at the extreme comparative edge of union decline, inequality, and social problems. Moreover, it is a socioeconomic model that is being exported to other countries, foreshadowing equally ill effects for other nations who adopt the U.S. model.²

Struggles with the question of organizing and the law in the United States — and, by extension, in much of the world, given the United States' overdetermined role in economic affairs — must begin by coming to terms, one way or another, with the ramifications of one central problem: for only one sustained period in U.S. history did the progressive impulse *successfully* center on the collective economic security of American working people. Overcoming a century of legal hostility to the collective rights of workers, the cluster of legislation known as the New Deal, but especially the creation of the National Labor Relations Act (NLRA) (or Wagner Act) in 1935,³ promised workers voice and representation on the job. While the success of the Wagner Act in reducing inequality and increasing bargaining power for mostly white, male, industrial workers in the postwar era was indisputable, the one-time massive federal breakthrough in union rights has since been reduced to an industrial artifact. Labor law has been eviscerated by case law, and by increasingly aggressive employers who began to regard fines for unfair labor practices not as deterrents, but as simply the cost of doing business.⁴ Meaningful labor law, in essence, has been contained in a specific moment in history. As labor law professor Cynthia Estlund put it, “[t]he core of American labor law has essentially been sealed off — to a remarkably complete extent and for a remarkably long time — from both democratic revision and renewal and from experimentation and innovation,” leaving it

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- 1 LEO TROY, *TRADE UNION MEMBERSHIP, 1897-1962* (1965); CONG. RES. SERVICE, *UNION MEMBERSHIP TRENDS IN THE UNITED STATES* (2004); *UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS*, UNIONSTATS.COM (last visited June 5, 2015).
 - 2 RICHARD WILKINSON & KATE PICKET, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2009).
 - 3 National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169.
 - 4 JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (1995).

“frozen, or ossified, for over fifty years.”⁵ With serious, but failed, attempts to reform labor law under every Democratic administration between those of Truman and Obama, the Act has proved impervious to reform in the postwar era and irrelevant to much of the new politics of the 1970s and beyond. While the Civil Rights Act’s Equal Employment Opportunity Commission was doing a swimming business in fighting discrimination on the job, the Depression Era laws that protected the collective economic mechanisms for workers, as Estlund described it as early as 1983, had already been reduced to an “elegant tombstone.”⁶

Any renewed battle for collective economic rights in the United States needs to build on a clear understanding of how, and at what cost, this singular historical achievement was won — and how it ultimately succumbed to its own internal contradictions and to the pull of much deeper patterns of U.S. history from which it emerged. It also suggests that, as the entire history of Democratic politics since the New Deal demonstrates, advancing large-scale federal labor law reform has been and will probably continue to be a failure. The recent move toward the so-called “alt labor” movement (worker centers,⁷ municipal regulation, social pressure coalitions, etc.) that lie outside the federal government’s purview is therefore not only good experimentation, but probably the most likely, perhaps the only, path to success. Those interested in renewing the struggle for economic rights in the United States are therefore right to look to a deeper, pre-New Deal past, for their models. The one-time breakthrough of the New Deal has proven to be a problematic political metaphor for the future. Rather than lean on the wreckage of the New Deal, advocates of collective economic rights might be better off clearing the decks of the twentieth century and looking for ideas from the deeper past of American organizing.

What follows is a historical sketch of the idea of the New Deal order as an exceptional period in American history (Part I). I then break the argument down into its five constituent parts: immigration, culture wars, race relations, individualism, and the state. Each of these elements shows a clear break with historical patterns that came before or succeeded the period from the 1930s

5 Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). For an alternative view that argues for the remaining power of the old paradigm, see Lance Compa, *Careful What You Wish for: A Critical Appraisal of Proposals to Rebuild the Labor Movement*, 24 NEW LAB. F. 11 (2015).

6 Estlund, *supra* note 5; Paul Weiler, *Promises to Keep: Securing Workers’ Rights Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

7 Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQUIRIES L. 101 (2016).

to the 1970s. Turning toward a discussion of how the postwar era worked in a distinct way with regard to labor, politics, and the law (Part II), the Article ends with a discussion of the problematic nature of using the New Deal as a political model or metaphor for thinking about the future of organizing and the law (Part III).

I. REFRAMING THE NEW DEAL ORDER AS THE “GREAT EXCEPTION”

The political era between the inauguration of Franklin Delano Roosevelt and the 1970s marks what might be called a “great exception” — a sustained deviation, an extended detour — from the main contours of American political practice, economic structure, and cultural outlook. At the center of this story is the singular moment of organized labor’s only meteoric rise in power and private sector density in U.S. history — before or since — during the period 1936-1945. Prodded by the *only major progressive advance* in private sector labor law in U.S. history, namely the NLRA, the postwar governments utilized their considerable resources in systematic, if hardly consistent, fashion on behalf of the economic interest of non-elite Americans in ways not achieved before or since. The depth of the Depression and the crisis of World War II forced clear realignments of American politics and class relations, but those changes were less the linear triumph of the welfare state than the product of very specific, and short-lived, historical circumstances. Pulling back the lens to capture the broadest panorama of American history, one sees more striking continuities in American politics when comparing the periods before and after the New Deal and the postwar era than when comparing the 1935-1973 era with much of the rest of American history.⁸

The exceptional period of the New Deal order (roughly the 1930s to the 1970s) is clear in the Figure below, which charts the rise and fall of the economic enfranchisement of American workers. A variety of measures form an anomalous historical hump or trough that rises in the forties and declines in the seventies: economic equality improves then tumbles, union density climbs then falls, working people’s income goes up before dwindling, and the percentage of wealth possessed by the most affluent dips before roaring

8 The longer version of this argument will be developed in JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* (forthcoming 2016); see also Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the New Deal in American History*, 74 *INT’L LAB. & WORKING-CLASS HIST.* 3 (2008) (including five commentaries and our response, all of which sharpened this argument).

back with a vengeance. There is even a unique and measureable pattern of bipartisanship — the “liberal consensus” — in the postwar era that appears neither before nor since. The minimum wage, created under the New Deal, follows the same pattern, rising to a useful figure in the late sixties before fading.⁹ Seen in statistical form, the New Deal order stands out clearly as a sort of “interregnum between gilded ages.”¹⁰

Private Sector Union Density as a Share of the Non-Agricultural Workforce (1902-2014)



9 *U.S. Minimum Wage in 2012 Dollars*, U.S. DEP'T OF LAB., <https://www.dol.gov/minwage/chart1.htm> (last visited Nov. 12, 2015).

10 Paul Krugman, *For Richer*, N.Y. TIMES MAG., Oct. 20, 2002, <http://www.nytimes.com/2002/10/20/magazine/for-richer.html>. The “interregnum” largely rested on the foundation of the massive narrowing of wage inequality during the 1940s, which drifted apart slowly in the fifties and sixties. Income inequality then grew rapidly after the 1970s. See Claudia Goldin & Robert A. Margo, *The Great Compression: The U.S. Wage Structure at Mid-Century*, 107 Q.J. ECON. 1 (1992); see also Colin Gordon, *Growing Apart: A Political History of American Inequality*, THE ALLIANCE FOR NETWORKING VISUAL CULTURE (last updated Sept. 9, 2014), <http://scalar.usc.edu/works/growing-apart-a-political-history-of-american-inequality/index>.

The uniqueness of the moment of the 1930s has been recognized by figures past and present, but the significance of that singularity has been underappreciated. The dire need of the Depression years catalyzed many important social and political trends in such a way as to overcome the nation's historical ambivalence about using the state as a champion for the interests of working people. Harry Hopkins, one of FDR's closest advisors, suggested the extreme degree of this departure when he described the unprecedented process of creating national relief as being "almost as if the Aztecs had been asked suddenly to build an aeroplane [sic]."¹¹ Even as partisan a champion of the New Deal as Arthur Schlesinger, Jr. described its dawning as a "unique episode" in the nation's history "which grew out of a unique crisis,"¹² historian Richard Hofstadter echoed this tone when he noted that it marked a "drastic departure" from the anti-statist, anti-monopoly traditions of American reform.¹³ The contemporary political scientist Ira Katznelson argues that the policies of the 1930s had previously been "outside the scope of imagined possibilities" of Washington insiders.¹⁴

Nothing emerges completely *de novo*, of course, and the New Dealers built upon a number of historical trends: the Progressive reform impulse, Theodore Roosevelt's demand for the regulation of big corporations, and, above all, the massive federal mobilization during World War I. The new corporate paternalism of the 1920s, known as "welfare capitalism," raised expectations of what the employment relationship could and should offer, just before it all collapsed following the economic crash of 1929.¹⁵ All that said, and it is admittedly not a short list, the New Deal made as clear a break with policy tradition as any in American history. Herbert Croly had, after all, already declared as early as 1920 "the eclipse of liberalism or progressivism as a force in American politics."¹⁶ Most of those trends, it can be imagined,

11 Hopkins is cited in ANTHONY J. BADGER, *FDR: THE FIRST HUNDRED DAYS* 61 (2008).

12 Schlesinger is cited *id.* at xv.

13 RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* 303, 316-17 (1955).

14 IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 162 (2013); accord BADGER, *supra* note 11.

15 LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939* (2008) (explaining the role of welfare capitalism and the rise of the New Deal). For the best single essay on the power of corporate paternalism, see David Brody, *The Rise and Decline of Welfare Capitalism*, in *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE 20TH CENTURY STRUGGLE* 48 (2d ed. 1993). The often overlooked power of welfare capitalism is covered in SANFORD JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997).

16 Herbert Croly, *The Eclipse of Progressivism*, *NEW REPUBLIC*, Oct. 27, 1920, at 210.

never would have found traction within American politics without the massive structural crisis of the Great Depression or the subsequent wartime emergency.

While the break with American political traditions in the thirties and forties was profound, the changes it wrought were both short-lived and fundamentally compromised by the very historical patterns that they appeared to overcome. The uniqueness of the political moment also suggests something of the political fragility that limited the New Deal's long-term viability. The absolute period of legislative breakthrough was remarkably bold but brief, arguably less than three years. Marbled throughout the very creation of New Deal policies were a series of social and political fissures that help to explain why the ultimate crumbling of the New Deal order, almost three decades after World War II, might be seen as axiomatic to its creation.

The historian Robert Zieger once referred to the labor movement that burst upon the national stage during the 1930s and 1940s as a "fragile juggernaut."¹⁷ No better metaphor could describe the broader political culture that came of age under Franklin Roosevelt. Liberalism would continue indefinitely in its many mutable forms, but the version generated by the trauma of the Depression and war years proved distinct and powerful, but brittle.¹⁸ The New Deal alliances seemed to come together in an all-powerful force capable of implementing progressive liberal policies with no regard for conservative opposition. Yet when challenged, this same juggernaut shattered, its internal contradictions pushed to the breaking point by the compromises it made with the very real complexities of American history and politics. The power of the New Deal order gave it an illusion of permanence, but its political edifice contained a web of internal fractures that, when stressed, broke open barely two generations later.

Thus questions about organizing and the law cannot be separated from some of the core themes in American history. Political culture shapes politics, and politics shapes policy. "Essentially cultural commitments are prior to factual beliefs on highly charged political issues," argue two scholars analyzing the politics of cultural cognition.¹⁹ To understand how a number of issues may come before economic interest, they explain that "culture is prior to facts in the cognitive sense that what citizens believe about the empirical consequences of those policies derives from their cultural worldviews."²⁰ Understanding

17 ROBERT ZIEGER, *THE CIO: 1935-1955*, at 1 (1995).

18 Gary Gerstle, *The Protean Character of American Liberalism*, 99 *AM. HIST. REV.* 1043 (1994).

19 Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 147 (2006).

20 *Id.*

the rise and decline of the New Deal within the broader context of these core themes in American history requires keeping two seemingly contradictory ideas in mind: that the politics of the Depression decade ruptured key patterns in American history, and simultaneously, that those changes were never permanent. The incomplete suspension, the mitigation, of key variables that explains the rise of the New Deal can also explain its fall.²¹

Specifically, the following Sections briefly examine several themes: the massive but temporary transformation of the role of the state; the historic fragility of organized labor even at the height of its power; the tensions between native-born and immigrant workers; the profound racial costs and complications of the New Deal; and the broader issues of culture and religious politics. Wrapping around all of these issues were the complex ideologies of a Jeffersonian individualism, which were limited but never resolved by the New Deal. On the surface, these issues might seem far from the technicalities of labor law, but it was only when they were in a unique and transitory moment that labor law and the rest of the New Deal legislation managed to get passed.

Table 1: Schematic Overview of the New Deal Order as Sociopolitical Exception

	Pre New Deal 1877-1933	New Deal Order 1933-1978	Post New Deal 1978-2015
Immigration	large and racialized	restricted	large and racialized
Culture Wars	defining	“religious truce”	defining
Race Relations	politics of exclusion	mixed	politics of inclusion
Individualism	strong social Darwinist	checked	revived rights consciousness
State and Labor	state repression of labor	labor legitimate but contained	repression within labor rights regime

21 *Id.* See the application of these ideas in Raymond L. Hogler, Herbert G. Hunt & Steph Weiler, *Killing Unions with Culture: Institutions, Inequality, and the Effects of Labor’s Decline in the United States*, 27 EMP. RESP. & RTS. J. 63 (2015).

A. Immigration Patterns

While many historians have examined the role of immigration in American history, few have paid adequate attention to the political workings of the *absence* of immigration from 1924 to 1965. Tensions around nativism predate the birth of the Republic, of course, but the absence of them played a silent role in the Depression era. In 1753 Benjamin Franklin lamented about Germans coming to America:

Few of their children in the country learn English. . . . The signs in our streets have inscriptions in both languages. . . . Unless the stream of their importation could be turned they will soon so outnumber us that all the advantages we have will not be able to preserve our language, and even our government will become precarious²²

After more than a century and a half of open immigration (with significant Asian exclusions), the 1924 suspension of immigration from anywhere other than Northern Europe and the Americas meant that tensions between native-born and immigrant, long embedded in the DNA of American politics, had been temporarily relieved.

The result of racial and ethnic divisions was a staggeringly complicated jigsaw puzzle that trumped hope for anything more than a temporary multiethnic working-class solidarity. Skilled, native stock, Protestant workers tended to be Republican and often carried cards in the craft unions of the old American Federation of Labor (AFL). Old Irish and German Catholics might also be in the skilled trades, but were most likely in the Democratic Party. The new immigrants from Southern and Eastern Europe were often unskilled workers; they not only joined different political parties than their skilled brethren, but invoked their sharp opposition with sporadic attempts to build broad-based industrial unions. Black workers in the North tended to be Republicans, which placed them at political odds with those Northern workers who were closest to them economically. At the same time, they encountered systematic exclusion by working-class whites who typically favored uncontested whiteness over interracial solidarity. If there was one thing uniting the working people of both parties, it was their mutual distaste — and demand for exclusion — of yet another segment of the working class, Chinese immigrant laborers brought to the United States in near-slave-like conditions to build the infrastructures of the West. Continue to tally up American workers' responses to the host of other political, racial, regional, ideological, and ethnic differences that

22 3 BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 139-41 (Albert Henry Smyth ed., 1907).

characterized the United States at the start of the industrial age, and one finds something that resembles less a coherent working-class political force, pursuing shared class interests, and far more a splintered series of votes based on ethno-political antagonisms.²³

Yet from 1924 until 1965, the spigot of immigration was shut, allowing for more cultural political cohesion to develop around the New Deal agenda. In less flattering terms, Matthew Frye Jacobsen's description of what some have called "a culture of unity" between the immigration reforms of 1924 and 1965 might better be understood as an era of "monolithic whiteness."²⁴ When the 1929 crash hit, nativism was largely at bay and the workers living in this country were presumed to be here to stay. This in itself was not enough to engender a sense of unity among working people, but it did effectively neutralize one of the most common reasons why any sense of unity or shared economic destiny had been blocked in the past. With an increased sense of homogeneity, the notoriously meddling moral impulse to reform immigrant ways turned instead more toward economic uplift.

When immigration resurfaced slowly in the generation after the 1965 immigration reforms, so did neo-Know Nothings and the militant nativism of an earlier age, returning "the" working class to historical patterns of internecine hostilities and political divisions reminiscent of the pre-New Deal era. As throughout much of the twentieth century, few issues generate more visceral and divisive political reactions among native-born citizens than immigration — be it the immigrant cauldron of Five Points in New York in the 1830s or tensions along the militarized Arizona border today. To put it plainly, for most

23 JOHN R. COMMONS, *RACES AND IMMIGRANTS IN AMERICA* 150 (1907); MIKE DAVIS, *PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE HISTORY OF THE U.S. WORKING CLASS* (1986); DAVID GORDON, RICHARD EDWARDS & MICHAEL REICH, *SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES* (1982); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* (2001); RICHARD JULES OESTREICHER, *SOLIDARITY AND FRAGMENTATION: WORKING PEOPLE AND CLASS CONSCIOUSNESS IN DETROIT 1875-1900* (1986); GWENDOLYN MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE 1875-1920* (1986); DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971).

24 JACOBSON, *supra* note 23, at 93, 109.

of American history, battle lines have been drawn around immigration law and practice — except during the period of the New Deal order.²⁵

B. Religion and the Culture Wars

The respite in the next theme, the divisiveness of religion, revivalism, and cultural values, also played a central role in making space for New Deal politics. As so many historians are aware, American religious identity “has not merely been epiphenomenal, simply an analytical category separable from the *real* class identity at the core of all social life, but has instead been a central, constitutive component of American culture from the seventeenth century to the present.”²⁶ Salience and centrality has also meant conflict. The term “culture wars” may be a contemporary one, but it defined the nineteenth and early twentieth centuries as well as post-1960s America.²⁷

These ethno-racial tensions were defined — and compounded — by attitudes about religious faith. Catholicism, in particular, challenged the idea of a Protestant nation. In the nineteenth century, Republicans attacked Democrats for “Rum, Romanism, and Rebellion,” striking at the core of the Democrats’ coalition that was as improbable as it was awkward: Southern Protestants (rebellion), Catholic immigrants (Romanism), and those against prohibition (rum) — all of which were seen in different capacities to be a threat to upright Nordic moral character. Protestant Northern Republicans, in contrast, emphasized the government’s role in reforming and removing sin from the nation, stressing their piety, their temperance, and their interest in moral reform.

Populist “culture war” challenges to the rise of the New Deal were evident, but even the most devoted Christian believers and moralists embraced the new role of the state in the midst of the economic crisis. Religious moralism, a powerful, central, theme in American political history, declined so dramatically during the New Deal period as to make it, as James A. Morone put it in *Hellfire Nation*, “the great American alternative” to the long conflicted political history of Puritan morality.²⁸

25 DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 219-41 (2002).

26 James T. Kloppenberg, *In Retrospect: Louis Hartz’s The Liberal Tradition in America*, 29 *REV. AM. HIST.* 460, 464 (2001).

27 *Id.*

28 JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 350 (2003); accord JAMES GARRY WILLS, *HEAD AND HEART: AMERICAN CHRISTIANITIES* 451-53 (2007); Kloppenberg, *supra* note 26.

During the 1930s, religious frictions within the American community subsided, making way for broader understandings of the worldly needs of the broadest version of congregation. A vague Judeo-Christian faith, even at a time of high church attendance and declared religiosity, was enough to define Cold War Americanism. The great exception maps onto what the historian of religion, Garry Wills, calls the “Great Religious Truce” of the postwar era. Although evangelicals, Catholics, and even Jews would chip away at that consensus in the postwar era, it would finally fall apart in the 1970s as cultural issues like abortion, busing, prayer in school, pornography, and birth control once more began to repoliticize religion’s place in American life and undermine the coherence of the New Deal coalition. The death rattle of economic liberalism arrived hand-in-glove with the return of Protestant revivalism of the Moral Majority and other Christian groups, which fueled the rise of Reaganism, as echoes of earlier crusades against secularism and evolution in the early twentieth century reverberated into the new millennium.²⁹

C. Race Relations

Black-white race relations, another central theme, worked differently than the other historical problems addressed here. U.S. politics, with the exception of Reconstruction, historically rested on a systematic exclusion of African-Americans. The New Deal’s political survival also rested, not surprisingly, on the explicit repression of African-Americans’ right to participate in most of its programs. The role of the Solid South in shaping the New Deal did not mean some minor set of small accommodations to Jim Crow, but was fully constitutive, part of the very DNA, of the New Deal order. Three familiar things account for this: Southern political apportionment inflated by African Americans who were counted as citizens but could not vote; the extraordinary longevity of Southern Congressmen in a one-party system that allowed the region to control the all-important Congressional committee structure; and, finally, a militant commitment to racial hierarchy that ran deeper than their opponents’ commitment to most anything else. The tragic irony of the New Deal was how the advance in economic democracy it achieved required compromise with “the most violent and illiberal part of the political system.”³⁰ Race is therefore the most salient example of both how politically important — and how politically expendable — the New Deal’s idealistic veneer really was.³¹

Yet racial politics were more complex than just exclusion — it was a tenuous moment of transition. The power of the Roosevelt coalition depended

29 WILLS, *supra* note 28, at 451-53.

30 KATZNELSON, *supra* note 14, at 149.

31 *Id.*

in part on the vast number of African-American voters who, for good reasons, began to switch their allegiances from the party of Lincoln to that of FDR in the 1930s. And while the Congress of Industrial Organizations (CIO) devoted itself to a massive organizing drive in the North, boldly challenging workers to move forward together without regard to race, its project was at times hamstrung on the racism of the white rank and file. Yet once the civil rights questions moved more centrally into the Democratic Party, the white South proved a tenuous ally to the New Deal coalition. The 1930s marked a very rare moment of racial politics when Democrats could have it both ways — simultaneously embracing segregation and gaining traction with African-American voters. It was not a balance that could long last.

The burden and the reality of America's racist history, in sum, forms one of the most fatal cracks built into the New Deal juggernaut. When pressure was applied to this fracture, as when the Democrats introduced a civil rights plank in 1948 or when African-Americans rose up across the South and the urban North in the postwar era — the entire Democratic edifice cracked, as the white South splintered from the Party and politics in the urban North split along racial lines. The fragile unity crumbled and many whites abandoned the politics of their class for those of their race. Left behind in the process was the hope of a shared economic identity. Simply put, the New Deal would not have happened without the white South, but, at the same time, the white South would not remain in the coalition when racial justice moved to the center of the Party's agenda.

D. Individualism

As for the final theme, the ideology, though hardly the reality, of individualism penetrated and shaped the entire New Deal story. For centuries, the United States has embraced a reflexive, complicated, and ongoing commitment to various incarnations of Jeffersonian individualism. This preindustrial ideal is arguably archaic in a mass industrial or postindustrial society, but its ideological persistence has meant that the collective dimensions of the New Deal, however limited they may have been to begin with, were never able to take root in the uniquely challenging political soil of the United States.

If this collection of historical circumstances made possible a limited sense of unity, the most remarkable story of the New Deal is how that unity galvanized around the question of labor rights. Here, too, the successes of the New Deal era stand in marked contrast to the rest of American history. For most of the United States' past, the courts, and the state, local, and federal governments, have been largely anti-labor, often militantly so. The "law in

spirit is individualistic” triumphantly proclaimed an economist in 1923,³² but that individualism was highly selective. As one contemporary put it in the *Harvard Law Review*:

In these days of huge and powerful corporations, which form in the eyes of the law single persons . . . why should the law be such that if two steel workers plan a certain act which the law regards as tortuous, they should be subject to fine and imprisonment; but if, let us say, the United States steel Corporation plans and executes the self-same act, the criminal law should be unable to touch it.³³

It was a question that had haunted labor relations for decades, a period that became known as the “Lochner Era” for the 1905 ruling in *Lochner v. New York* that upheld an individual’s liberty of contract over collective economic regulation.³⁴

Individualism mapped onto labor’s anti-statism. Many scholars have puzzled over the conservatism of the AFL, which sought not to change the system, but simply to bargain for “more” for its own members — skilled, white, male, native-born workers. Rather than merely defending a subgroup of American workers, however, the AFL’s “pure and simple” ideology can also be seen as a tactical, survivalist response to a repressive state. Founding AFL president Samuel Gompers began his career believing in the class struggle, but drew back his ambitions dramatically as the years went by, ultimately giving up the struggle to change the system in favor of bargaining through narrow, craft-based trade unions with a form of anti-statism known as “voluntarism.” The system as a whole remained relatively untouched, but the AFL unions survived and its members enjoyed the fruits of collective bargaining. “Voluntarism is labor’s version of laissez-faire,” explains legal scholar William Forbath. It is “an anti-statist philosophy” that, as Sam Gompers put it, argues that the “best thing the State can do for Labor is to leave labor alone.” Add to this the naked repression and violence that resulted when workers altercated with the state, and the problem of “government by injunction” appears as a key factor in determining the tactical conservatism of the American labor movement.³⁵

32 CHRISTOPHER TOMLINS, *THE STATE AND THE UNIONS* 32 (1985) (quoting Robert F. Hoxie).

33 Francis B. Sayre, *Criminal Conspiracy*, 35 *HARV. L. REV.* 420 (1921-1922), *quoted in* TOMLINS, *supra* note 32, at 32.

34 *Lochner v. New York*, 198 U.S. 45, *quoted in* TOMLINS, *supra* note 32, at 32.

35 WILLIAM E. FORBATH, *LABOR AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 2 n.3 (1991); Eric Foner, *Why Is There No Socialism in the United States?*, 17 *HIST. WORKSHOP* 57 (1984).

Even Roosevelt, despite being the architect of the regulatory state, never offered a clear alternative to the individualist ethos so deeply embedded in himself or America's public culture. In fact, so persuasive were FDR's evocations of that American ideology that brain truster Rexford Tugwell thought that even when Roosevelt tried to construct a new vision of individualism suitable for modern, corporate society, those efforts "too had not been immune to our national myths." Bristling at the limits on policy and politics, Tugwell "learned that there would be no quick change from an individualist to a more collectivized society, that the New Deal would comprise measures which, from his standpoint, were essentially superficial." Still, the revival of "Jefferson and Jesus" in the postwar era, as Darren Dochuk put it, would have astounded even those who struggled to make sense of the durability of the ideas of individualism even in the midst of the collective crisis of the 1930s.³⁶

The new social movements of the sixties and seventies expanded the individual rights tradition, gaining long-denied individual rights and opportunities for uplift rather than advancing the type of collective economic rights promised by the New Deal. Less about redistributing the economic pie, post-sixties liberalism was more about providing people with the skills to compete for a decent slice — even as the competition grew more desperate in the new millennium. Leaders from Nixon to George W. Bush would continue to call upon the same stark gods of nineteenth century individualism as they avidly sought to steer and enlarge a mammoth governmental entity that, partnered with massive corporations, overtly betrayed the quaint picture of individual uplift they so often campaigned upon.³⁷

As a result, while gender and racial struggles fostered a fundamental transformation in equality and access on the job — however imperfectly — for the full diversity of the American working class, inequality increased within the overall society. The wealth pyramid became more diverse but ever more skewed in structure. The access of people and occupations outside the New Deal paradigm grew at extraordinary rates, while much of organized labor failed to expand beyond its geographic or sectoral boundaries set in

36 Tugwell is quoted in LAWRENCE W. LEVINE & CORNELIA R. LEVINE, *THE PEOPLE AND THE PRESIDENT: AMERICA'S CONVERSATION WITH FDR* 219-20 (Lawrence W. Levine ed., 2002). For the analysis of Tugwell, see Richard S. Kirkendall, *The New Deal as Watershed: The Recent Literature*, 54 *J. AM. HIST.* 839, 846 (1968). FDR also rhetorically evoked a more collective vision, but without consistent effort. For a recent effort to revive it, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

37 See NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2008).

the 1940s.³⁸ Men and women have become more equal in their abilities to negotiate the labor market, but that equality of access to the labor market competition took place in a context of growing overall inequality. Even the measure of women's earnings — often communicated as a percentage of men's earnings — hid the fact that women's wages were benchmarked to a declining standard.³⁹ Despite the advances, wealth remained highly unequal by race and by gender. Most everything seemed to be politicized in the 1970s and beyond, except, perhaps, capitalism itself.

E. Changes in the State

All of these variables added up to radical transformations in the politics of the state as the Roosevelt administration embraced a number of regulations and laws that favored the economics of working people. Under the Roosevelt administration, an unprecedented coalition emerged out of political fragmentation. Industrial workers, farmers, white Southerners, African-Americans, Progressives, and radicals united into one voting bloc. Even in the moment of greatest legislative possibility, however, the achievements of the New Deal were more tenuous and brief than most tend to recognize. What historians call the "first" New Deal (1933-1935) basically turned the project of recovery over to business itself (along with some substantial relief interventions and dramatic planning efforts like the Tennessee Valley Authority (TVA)). Those early reforms ended quickly, due to their internal contradictions or the decisions of the Supreme Court or both. With the notable exception of banking regulation and the TVA, the first New Deal failed to have a lasting impact. After 1935, the true breakthroughs, known as the "second" New Deal (1935-1938), offered a more cohesive, proto-Keynesian, vision for reform. They also established the most substantive parts of Roosevelt's legacy: the NLRA, the Social Security Act, the Fair Labor Standards Act, and, perhaps most unprecedented, the empowerment of industrial unionism as both social movement and federal policy.

Yet as much as Roosevelt famously "betrayed his class" by wagging his finger at the "economic royalists" in the middle of the decade, he did so only briefly. The opportunity for substantive collective economic policies opened in 1935, but it closed less than three years later. The 1938-1939 period made up the forgotten years of the Roosevelt administration: the years of defeat and

38 BARBARA S. GRIFFITH, *THE CRISIS OF AMERICAN LABOR: OPERATION DIXIE AND THE DEFEAT OF THE CIO* (1988).

39 Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, *J. ECON. PERSP.*, Fall 2000, at 75, 84-85.

retreat; then the return of hard times; then the possibility that the 1936-1937 industrial organizing and strike wave would be just another noble failure. Yet a failure it was not, as the events of the mid-1930s laid the foundation for incorporating workers into the economic and political life of the United States in such a way as to help foster one of the largest — and certainly best shared — economic expansions in U.S. history. FDR's 1936 landslide election documents the overwhelming affirmation of these political reforms by the "Roosevelt coalition," a new consensus that emerged from a historically fragmented working class vote.

Yet the 1935 Wagner Act suddenly burst through the fog and made it federal law to "encourage" the act of collective bargaining. The subsequent rise of industrial unionism created the most powerful change in American political and economic organizations since the industrial revolution itself. For three years between the passage of the NLRA and the conclusion of the CIO's heroic period of industrial organizing, labor won and won big. Bringing the steel, auto, electrical, rubber, and numerous other core industries into the union fold, the CIO successfully did what many thought was the impossible by organizing workers regardless of race, creed, skill, and gender. Yet, this "culture of unity" rested on some unstable alliances — not the least of which was federal policy that recognized labor rights primarily as a means of boosting consumption.⁴⁰

"With the shock of war," wrote Randolph Bourne during World War I, "the State comes into its own again."⁴¹ The return of one of the greatest continuities with the old order, war, revived the New Deal. World War II not only resurrected the economy in a way the New Deal could not, it also saved the Democratic Party and organized labor from the late-thirties attacks on them. The analogy of war had informed FDR's administration from the inauguration forward, but beginning in 1939 with the massive defense build-up through the allied victory in 1945, war was no longer an analogy. It was a political reality.

The war created a ravenous appetite for labor — all of which flowed into the preexisting labor institutions and policy mechanisms created by the New Deal. From collective bargaining to social security to fair labor standards to the political power of the New Deal coalition itself, working people went from underemployment and insecurity to a system that promised a secure future. It could be considered the "third New Deal." It also forced the creation of a radically progressive tax structure. Despite lingering fears that the entire

40 On the culture of unity during the 1930s, see COHEN, *supra* note 15.

41 RANDOLPH BOURNE, *THE STATE* (1918), <http://fair-use.org/randolph-bourne/the-state/>.

reform edifice might crumble into another depression or a political reaction like after World War I, it was not so. This time, although there were dramatic setbacks, unlike World War I, working people would win the peace. As a result, the New Deal state created the foundation for the most equitable American economy since the beginning of the industrial age.

Still, it took World War II to consolidate these achievements, especially then-vulnerable union strength, while simultaneously marking an end to the most vibrant era of experimentation and reform. As the war ended, macroeconomic planning for mass consumption and full employment began to overtake the chaotic inventiveness of the Progressives and the New Dealers. Though New Deal reforms continued to play a transformative role in working people's lives, the nation ended up with a postwar politics that Alan Brinkley calls "more coherent, less diverse, and on the whole less challenging to the existing structure of corporate capitalism than some of the ideas it supplanted."⁴²

Postwar working-class affluence proved real, but also limited and quite tenuous. Organized labor, one of the great redistributive agents in the postwar era, was less empowered than contained; capital proved less committed to embracing workers' rights than engaging in a tactical and temporary recognition of them. By the time the Vietnam War pushed Lyndon Johnson's Great Society off the national stage, the political vision that had defined New Deal politics gave ground to a revived anti-statist conservative movement on the right, as well as a revived concern for expanding individual rights on the left.

II. THE BRIEF ASCENDENCY OF THE GOLDEN AGE

"Labor did it!" President Harry Truman famously exclaimed to the press about the secret behind his improbable 1948 victory. Indeed, the unions suddenly seemed capable of most anything in the late 1940s. While the new industrial unions formed the political backbone of the New Deal coalition and transformed the distribution of wealth in the country for decades to come, the real story is labor's legislative game of defense for most of the postwar era, relying almost exclusively on its one-time massive breakthrough during the Depression and World War II. Contained by the restrictions of the Taft-Hartley Act,⁴³ the unions were never able to reclaim the offensive — in terms of organizing workers or winning labor law reform. Labor proved unable

42 ALAN BRINKLEY, *END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 3-4 (1996).

43 The Taft-Hartley Act is formally known as the Labor Management Relations Act of 1947, 29 U.S.C. §§ 401-531.

to reform the rickety labor relations machinery, failed to gain more than constituency status in the Democratic Party, and could not advance their numbers in private employment sectors beyond their great industrial leap forward in the 1930s.⁴⁴ Labor then found itself trapped in a declining and dysfunctional industrial relations system by the 1970s. As illustrated in Table 2, attempts to revitalize labor law failed under every single Democratic administration from Truman in the forties to Obama in 2009. By the end of the twentieth century, the once vaunted Wagner Act had become worse than null and void from the standpoint of labor — it had become, in the words of David Brody, a “tool of management.” Union density, and thus the redistributive function unions played, slipped back to levels comparable to the bad old days before the Wagner Act, suggesting less labor’s postwar triumph than its temporary legitimacy.⁴⁵

Table 2: The Failure of Labor Law Reform in the Postwar Era⁴⁶

	Administration	Act	House	Senate
1949-1950	Truman	Repeal Taft-Hartley	Fail	Fail
1965-1966	Johnson	Repeal Taft-Hartley	Pass	Fail
1977-1978	Carter	Labor Law Reform	Pass	Fail
1993-1994	Clinton	Striker Replacement	Pass	Fail
2007-2010	Bush/Obama	Employee Free Choice Act	Pass	Fail

In the long arc of the twentieth century, the 1970s stand as a sort of “anti-thirties” bookend to the New Deal order. Labor declined, individualism became central to all things, race animated and divided politics, tensions over immigration returned, and the state flipped toward doing the corporations’ work instead of the people’s. Liberal political efforts descended into defensive battles, trying to shield and protect key elements of the New Deal legacy,

44 NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (rev. ed. 2013).

45 David Brody, *Labor vs. the Law: How the Wagner Act Became a Management Tool*, *NEW LAB. F.*, Spring 2004, at 9.

46 Adopted from Dorian T. Warren, *The Unsurprising Failure of Labor Law Reform and the Turn to Administrative Action*, in *REACHING FOR A NEW DEAL* 191 tbl. 5.1 (Theda Skocpol & Lawrence R. Jacobs eds., 2011).

including Social Security and the NLRA, from further attack. More typically, they have surrendered issues of collective economic justice in order to focus on their commitment to progressive pushes for social issues and the expansion and democratization of individual rights. Of the many liberal and even leftist victories of the late twentieth century, very few have emphasized the collective economic needs of the nation's citizens. Framed in this light, conservative achievements seem all the more understandable and postwar liberal economic victories seem all the more precious.⁴⁷

While key social transformations had been underway for most of the previous decade, the late 1970s marked *the* "turning point in modern American political history," as political scientists Jacob Hacker and Paul Pierson put it, defining the return of the economics of inequality.⁴⁸ After 1978, economic gains became concentrated at the top in a sustained way, limited benefits and raises accrued to the non-rich, income flat-lined for working people, and the promise of upward mobility stagnated. Given the intense brevity of the New Deal's "fragile juggernaut," it might therefore be more accurate to think of the ensuing "Reagan revolution" as the "Reagan restoration," a return to a more sharply conservative, individualistic reading of constitutional rights and liberties, a return to economic policies in which the state looks after the corporation, and the return to a working class fragmented by race, religion, immigration, and culture. Liberals of the seventies and eighties hoped for a return to what they regarded as the normality of the New Deal order, but the nation was drifting back to a contemporary version of Grover Cleveland's America, not FDR's.

It is very important to note that this "restoration" was in no sense a return to small government, as Ronald Reagan and others had so forcefully advertised. The issue was never really — and rarely ever is — whether that ever-expanding government was large or small, as political rhetoric might have us believe. The real issue is toward what ends and whose interest those massive institutions are to be driven.⁴⁹

The unique cultural homogeneity of the postwar era, though it was unquestionably both flawed and forced, brought the United States just a bit closer to northern European-style politics, providing, in Hofstadter's terms, a "social democratic tinge" where none existed either before or after.⁵⁰ In short,

47 JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2010).

48 JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER — AND TURNED ITS BACK ON THE MIDDLE CLASS* 99 (2010).

49 *Id.*

50 HOFSTADTER, *supra* note 13, at 308.

the postwar era can be understood to stand apart from the United States' own peculiar brand of politics. This is not to say that all of American politics can be defined by any one thing or set of things. But in the vigorous, sometimes violent, contest of ideas in American politics, the values of collective economic security tended to lose rather consistently to other forces. Except once.

The New Deal's emphasis on collective economic rights also makes it unique even as compared within the list of major American political achievements. The most important democratic advances of U.S. history, for instance, the Emancipation Proclamation and the Civil Rights and Voting Rights Acts, stand as milestones in a continuing struggle to expand individual rights in a way that resonates with a deep and enduring national ethos of individualism.⁵¹ Although collective economic rights were part of the debate that led to these achievements, they were ultimately absent from the policies that passed the U.S. Congress. Eric Foner titled his short book on emancipation and Reconstruction after the remarks of a contemporary observer that the slaves received "nothing but freedom." Such is the great tradition of American liberty — a history of rights without economic security.⁵²

III. THE NEW DEAL AS POLITICAL METAPHOR

Spilled across the pages of journals of opinion are demands for a new New Deal, a global New Deal, a New and improved Deal, to reNew the Deal, and even New Deal 2.0.⁵³ The excitement following Barack Obama's first election, just after the nation slipped into the abyss of yet another massive financial crisis, generated further New Deal analogies. Political cartoons with the new president posing as FDR sprang forth — most notably on the cover of *Time Magazine*, featuring a jubilant, toothy Barack Obama with cigarette holder posing confidently in an open limousine.⁵⁴ Elsewhere, otherwise sober

51 Abraham Lincoln, Executive Order, Jan. 1, 1863; The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (enacted July 2, 1964).

52 See ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (1983). This is not to criticize the fact that abolition is what David Brion called the "greatest landmark of willed moral progress in human history," in DAVID BRION, THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION (2014).

53 See, e.g., MICHAEL GRUNWALK, THE NEW NEW DEAL: THE HIDDEN STORY OF CHANGE IN THE OBAMA ERA (2013); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

54 *The New New Deal*, TIME MAG., Nov. 24, 2008, <http://content.time.com/time/covers/0,16641,20081124,00.html>.

commentators began speaking of “Franklin Delano Obama.”⁵⁵ Meantime, among union watchers, minor twists of the labor movement seem to generate unrestrained analyses of the second coming of the union movement that swept across the nation during the Great Depression. Even before the coming of the Great Recession, but accelerating ever since, the era of Roosevelt has become metaphor, political principle, and guiding light for all that must be returned to the progressive side of American politics.

Then, inevitably, came the shock of reality: the new Gilded Age seems to have a lot more traction in American political culture than did the hope of a new New Deal. The return of nineteenth-century style plutocracy, crony capitalism, and shocking levels of inequality, continuing after the excitement of Obama’s presidency, suggest a conscious, confident, and powerful ruling class that has largely separated itself from the concerns of the nation’s working people. The polity, in turn, has returned to a state of social and political fragmentation, choosing fights over individual rights, ethnic and racial hostility, immigrant versus native, and moralism and piety over collective economic interest.

Obama appeared to be playing with political fire when he oversimplified the relationship between social values and decades of economic decline:

You go into these small towns in Pennsylvania and, like a lot of small towns in the Midwest, the jobs have been gone now for 25 years and nothing’s replaced them. And they fell through the Clinton administration, and the Bush administration, and each successive administration has said that somehow these communities are gonna regenerate and they have not. And it’s not surprising then they get bitter, they cling to guns or religion or antipathy toward people who aren’t like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustration.⁵⁶

The tragedy of that now infamous quote lies not in its condescension per se, but in the fact that the Obama administration ultimately offered precious little to rebuild politics on a material foundation. Part of that was President Obama’s unwillingness to make a bold, decisive break from previous decades and make the case to the American people that the state could help build economic security and opportunity for all. The first two years of the Obama administration was a lost opportunity for the American reform tradition — not just on policy grounds, but in making the argument that government had a role in helping regular people. Seemingly insecure in his position, the new

55 Paul Krugman, *Franklin Delano Obama?*, N.Y. TIMES, Nov. 10, 2008, at A29.

56 Katherine Q. Seelye & Jeff Zeleny, *On the Defensive, Obama Calls His Words Ill-Chosen*, N.Y. TIMES, Apr. 13, 2008, at A1.

president appointed economic insiders, many of whom had played a role in creating the crisis, while shying away from larger stimulus packages or initiatives that would halt the decades-long growth in inequality and wage stagnation. Banking, finance, and important industries like auto were saved. Meanwhile, working people continued to inhabit the exact same economy they always had. It has become frighteningly commonplace, even in mainstream political discussions, to invoke our time as the “new Gilded Age.”

An understanding of the New Deal order as an exceptional period returns us to one of the thorniest and notoriously complex issues in U.S. historiography: the weakness of social democratic traditions in the United States, or what some more awkwardly call “American exceptionalism.” Within the diverse spectrum of comparative national political cultures (all of which could be regarded as “exceptional” in different ways), the United States’ distinction is the lack of a labor-based or social democratic party tradition, the absence of a complete national healthcare system, and the historical weakness of working-class mobilization or representation. As Daniel Rodgers has noted, the United States has no major modern party with the word “labor” or “socialist” in it.⁵⁷ Many, though not all, commentators on this puzzle point to the challenges to collective mobilization fostered by this country’s cultural, racial, and ethnic heterogeneity, by its deep tradition of individualism, and by the diffuse nature of U.S. working-class identity.

The irony of American history may be that its most successful economic era for the nation’s working people came concurrently with the suspension

57 The use of the term “exception” in this title is not to imply American exceptionalism. “Difference,” Daniel T. Rodgers writes, “requires contrast; exceptionalism requires a rule. Difference claims feed on polarities and diversity; exceptionalist claims pin one’s own nation’s distinctiveness to every other people’s sameness — to general laws and conditions governing everything but the special case at hand.” What makes the United States different was mollified during the New Deal. Daniel T. Rodgers, *Exceptionalism*, in *IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST* 21, 22-23 (Anthony Molho & Gordon S. Wood eds., 1998). On the use of “labor” and “socialist,” see Daniel T. Rodgers, *Contesting Inequality*, *RARITAN: Q. REV.*, Spring 2014, at 19, 24. The phrase “social democratic tinge” belongs to HOFSTADTER, *supra* note 13, at 308. Indeed, in the United States, as in all societies across the globe, the process of economic concentration, class strife, racial divisions, and religious struggle are all too evident within each national culture. Like all nations, the circumstances of the founding of the United States and subsequent history do differentiate it from the national histories of many other industrialized countries. What makes the United States different, interestingly, is also what prevented it from having a strong social democratic tradition, factors that were mitigated during the New Deal.

of some of the most defining aspects of U.S. history. For just one period, Americans found sources of unity, however distasteful elements of them were. Finding another source, hopefully one not based on exclusion, is necessary if we are to once again challenge the problem of economic inequality.⁵⁸

Thus, we are left with a puzzle: on the one hand, we have massive economic inequality; on the other hand, we have the argument that inequality has been tamed only under very rare circumstances. The path forward is not clear, but whatever successful incarnation of a liberal “social imaginary” might follow, it will not look like the New Deal, and it might be best to free ourselves from the notion that it will. Recognizing a “great exception” allows us to look beyond the static political solutions that emerged in the uniquely traumatic circumstances of the Roosevelt years and begin to consider what Barrington Moore has called “suppressed historical alternatives” that might help to (re)imagine contemporary bridges between the individualist strains in our public culture and a vision of the common good.⁵⁹

The future for organizing and the law will most likely remain outside the definitions of the processes shaped by postwar American history. The call for a new New Deal will most likely prove unproductive. Moving forward may well require moving into the pre-new Deal past. The future most likely lies neither with the NLRA nor with attempts to reform or revitalize federal labor law. In a political world reconstituted by controversies that divide the polity by race, immigration, cultural and religious values, and the ideologies of individualism, the prospects for labor law assisting the organizing project are very slim. Other initiatives, like worker centers, municipal minimum wage campaigns, immigrant rights struggles, consumer boycotts, and state law, might prove more effective in a society whose politics are shaped more by group animosity than political solidarity.

Today, labor activists, for instance, succeed, when they do at all, by using tactics that stay far away from the once-promising mechanisms of the NLRA. The workers’ collective economic voice, gone from the state, has returned to the immigrant ethnic enclave, the church, the workers’ center, and the occasional union. Hopes of decent pay for the working poor no longer lie in Congress but have turned toward local living wage coalitions, city ordinances for higher minimum wages, immigrant rights groups, and workers’ centers. Many of these efforts have been put under the heading “alt labor,” the name of which alone is telling. The vibrant Occupy movement, with its wide ideological net, helped change the national discussion about inequality in the United States

58 HOFSTADTER, *supra* note 13, at 308.

59 BARRINGTON MOORE, *INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT* 376 (1978).

and the world, but had a hard time — or refused to try — making the leap to formal policy or politics.⁶⁰

Looking beyond the New Deal, modern-day reformers might find more potent historical analogies for contemporary dilemmas in the fluid alliances of the Progressive Era rather than in the administration of FDR. The ill-defined “kaleidoscopic” nature of local and state actions, shifting alliances, diffuse leadership, cross-class identifications, and general social ferment might be a more useful model or historical analogue for the future. A return to the pre-Depression, pre-trauma outlines of progressive-style politics, albeit updated for the global age, would suggest a politics of reform and regulation both moral and pragmatic; spurred by local and state sites of innovation; bolstered by cross-class alliances and enlightened elite leadership; focused on immigrant rights, consumer safety, corporate regulation, and occupational justice; advocating gas and water (and perhaps healthcare) socialism; and even promoting the types of militant voluntarism that originally grew in the shadow of a state hostile to the collective interests of workers. This neo-progressivism is obvious in labor organizing, where debates have even turned toward a renewed anarcho-Gomperism once thought forever vanquished by the broader vision of the CIO in the 1930s. While criticized for being vague, individualistic, fluid, and lacking a core of class-based vision, the Progressive Era’s strengths may have rested in the exact sort of things for which it has been criticized.⁶¹

At their best, the progressive reformers made the best of the power of individualism in American political culture, affirmed a vision of democratic life across class (if decidedly not always racial) lines, and sought a bridge between that individualism and a common good. That approach, with all of its potential for mixed results, is worth revisiting to consider whether, and how, it might provide insight on the new problems of our own time. Obviously, the racial politics of the Progressive Era offer nothing but descent into some of the most heinous aspects of American political culture, but in the messy and often irresolute politics of the first decades of the twentieth century, might

60 On the relevance of pre-New Deal tactics, see Dorothy Sue Cobble, *Lost Ways of Organizing: Reviving the AFL’s Direct Affiliate Strategy*, 36 *INDUS. REL.* 278 (1997); Dorothy Sue Cobble, *Pure and Simple Radicalism: Putting the Progressive Era AFL in Its Time*, *LAB.*, Winter 2013, at 61; and Clayton Sinyai, *Change to Win: A Gomperism for the Twenty-First Century?*, *NEW LAB. F.*, Spring 2007, at 73. On unions’ future as coalition partners, see Rebecca Kolins Givan, *Side by Side We Battle Onward? Representing Workers in Contemporary America*, 45 *BRIT. J. INDUS. REL.* 829 (2007).

61 Nelson Lichtenstein, *Two Roads Forward for Labor: The AFL-CIO’s New Agenda*, *DISSENT*, Winter 2014, at 54.

actually be the most promising historical analogy — if they are necessary at all — for the future of progressive politics.

CONCLUSION

Despite the New Deal's many flaws and fissures, the programs of the 1930s represent the best of what the United States can be as a nation — caring, sharing, secure, and occasionally visionary. Few issues seem more important today than the need to bring the concerns of working people out of the shadows and into the political and economic light. But bad history makes for weak political strategy. While it is useful and hopeful to imagine that the United States can take the issue of collective economic rights as seriously as it did in the 1930s and 1940s, our present politics ought not be misled by freewheeling historical analogies based on an extraordinarily unique period in American history. Yet this critical gallop through a century and a half of history should not be taken as an exercise in cynicism, but as a project to strengthen the imagination for the work that lies ahead. It is my belief that the strongest political commitments are those that embrace the challenge of clear historical analysis. There is more hope to be found in historical clarity, after all, than there is in chasing ghosts.