



# What Can We Learn from NLRA to Create Labor Law for the 21st Century?

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**What Can We Learn from NLRA to Create Labor Law for the 21<sup>st</sup> Century?**

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SYMPOSIUM: The National Labor Relations Act at 75: Its Legacy and its Future

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Congress enacted the National Labor Relations Act<sup>1</sup> in 1935 to provide private sector workers with a way to choose to unionize or not, to engage in concerted action free from employer interference, restraint, or coercion, and to bargain collectively with their employers. The NLRA intended to replace the costly organizational or recognition fights that historically marred US labor relations with a “laboratory conditions”<sup>2</sup> electoral process for ascertaining worker attitudes toward union representation. The elections were ideally to be free from employer pressures and from dishonest statements by employers or unions regarding the impact of the workers' choice. If a majority of workers voted for a union to represent them, the law obligated employers to bargain in good faith with the union but it did not require the employer to reach a collective agreement with it. A firm could reject the union’s demands and reduce wages and benefits if it deemed that in its interests.

Signing the NLRA bill, President Franklin Delano Roosevelt said that it “should serve as an important step toward the achievement of just and peaceful labor relations in industry.”<sup>3</sup> John Maynard Keynes in his February 1, 1938 letter to Roosevelt endorsed collective bargaining to help restore full employment in the Depression, presumably by putting a floor on deflation and raising consumer spending.<sup>4</sup> The main architect of the Act, Senator Robert Wagner of New York, intended the unfair labor practices provisions to prevent the egregious behavior of firms that he had seen when he was Chair of the National Labor Board under the National Industrial Relations Act. Roosevelt's famous declaration that “If I were a *factory worker* (my italics), I would join a union”<sup>5</sup>, which the United Automobile Workers union used in its 1936 organizing campaigns, specifies clearly the group on whom the Act focused.

In ensuing years Congressional amendments, administrative rulings by conservative NLRB boards, and court decisions weakened the labor protections and strengthened employer

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1 National Labor Relations Act, 29 U.S.C. §§ 151-169, Title 29, Chapter 7, Subchapter II, United States Code (1935). Available at (Dec. 23, 2010, 2:30pm) [http://www.nlr.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx)

2 The statement that voting is to occur in ‘laboratory’ conditions as closely as possible to determine the desire of employees was made in *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The NLRB says “Within 7 days of the election, any party may file objections concerning the conduct of the election asserting that the laboratory conditions necessary for holding a fair election were not met.” (December 26, 2010, 3:00pm), [http://www.nlr.gov/publications/procedures\\_guide.htm](http://www.nlr.gov/publications/procedures_guide.htm).

3 Franklin Roosevelt, *Statement on the National Labor Relations Act (The Wagner Act)*, July 5, 1935 (Dec. 10, 2010, 2:00pm), <http://docs.fdrlibrary.marist.edu/odnlra.html>

4 John Maynard Keynes (1938), “Letter of February 1 to Franklin Delano Roosevelt,” in *Collected Works XXI: Activities 1931-1939* (London: Macmillan).

5 The United Automobile Workers put this statement on their factory gate leaflets in the fall of 1936. See NELSON LIECHTENSTEIN, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT 61 (Basic Books, New York 1995). The statement has also been reported in slightly different form: “If I were a worker in a factory, the first thing I would do would be to join a union.” See Richard Trumka, *I would join a union*, THE BUILDING TRADESMAN NEWSPAPER (Jan. 6, 2010, 2:10pm), [http://www.michiganbuildingtrades.org/newspaper\\_2010/sept\\_03\\_2010.html](http://www.michiganbuildingtrades.org/newspaper_2010/sept_03_2010.html)

rights to influence the NLRB process. The 1947 Taft-Hartley Act<sup>6</sup> added secondary boycotts and mass picketing by unions as unfair practices. It introduced the “right to work”<sup>7</sup> amendment that allowed states to outlaw union shop security clauses from collective agreements. Right to work weakened union organizing efforts<sup>8</sup> but even in right to work states most workers in firms that chose union representation joined the union because they accepted the majority decision. This contrasts with the situation in the United Kingdom and New Zealand where a substantial proportion of workers free ride on the recognized union at their workplace.<sup>9</sup> Taft-Hartley also explicitly excluded supervisors from the protections of the Act.<sup>10</sup> This allows employers to fire supervisors who do not follow management dictates in an organizing drive. The 1959 Landrum-Griffin Act<sup>11</sup> added protections to strengthen union democracy and the rights of members along with provisions outlawing secondary boycotts and hot cargo provisions. The 1974 Amendment to the Act extended its coverage to health care institutions such as non-profit hospitals but did not change the operating provisions of the Act.<sup>12</sup>

For thirty or so years following its enactment the NLRA largely succeeded in its goals. The Act moved US labor relations and practices from an employer-dominated system to one in

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6 Taft-Hartley Act or Labor-Management Relations Act, 29 U.S.C.A. § 141-197, Title 29, chapter 7, United States Code (June 23, 1947).

7 See Taft-Hartley Act or Labor-Management Relations Act, Section 14(b) (29 U.S.C.A. § 164[b]), United States Code (June 23, 1947).

8 David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, Volume 95, Issue 2 J. POLIT. ECONOMY 265, 268 (April 1987). See also William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, Volume 19, Number 3 J. LAB. RES. 463 (Summer 1998).

9 See generally, Alex Bryson, *Union Free-Riding in Britain and New Zealand*, CEPDP, 713, Centre for Economic Performance, London School of Economics and Political Science (Jan. 2006)

10 Congress intended by the enactment of this act (29 USCS §§ 141 et seq.) that employers be free in the future to discharge supervisors for joining a union and to interfere with their union activities. *NLRB v Edward G. Budd Mfg. Co.* (1948, CA6) 169 F2d 571, 22 BNA LRRM 2414, 15 CCH LC P 64703, cert den (1949) 335 US 908, 93 L Ed 441, 69 S Ct 411, 23 BNA LRRM 2228. The National Labor Relations Guide to the Act states: “Supervisors are excluded from the definition of “employee” and, therefore, not covered by the Act. Whether an individual is a supervisor for purposes of the Act depends on that individual’s authority over employees and not merely a title. A supervisor is defined by the Act as any individual who has the authority, acting in the interest of an employer, to cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior; or who has the authority responsibly to direct other employees or adjust their grievances; provided, in all cases, that the exercise of authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment.” See BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 35 (USGPO, 1997).

11 Landrum-Griffin Act, or Labor-Management Reporting and Disclosure Act, 29 U.S.C.A. § 401 et seq. (1959)

12 On July 29 1974, Pub. L. No. 93-360. 88 Stat 395(1974) (codified at 29 U.S.C. § § 152m 158, 169, 183 (Supp V 1975) – the “1974 Health Care Institution Amendments” amended the National Labor Relations Act to extend coverage and protection to employees of non-profit hospitals. Nonprofit hospital workers were not mentioned in the original Wagner Act in 1935, but were excluded in 1947 with the Taft-Hartley amendments.

which workers had some say on wages and working conditions through elected union representatives. Huge organizing strikes disappeared as the law took hold. Organizing campaigns focused on convincing 50+% of workers to vote union in the NLRB representation election. Employers and unions learned what was and was not permissible and fought to gain advantage within the boundaries of the law. By the mid 1950s 36% of private sector workers<sup>13</sup> were members of unions. Large nonunion employers paid attention to what their union competitors paid their workers, which produced positive spillovers from union contracts to nonunion wages and benefits. When the AFL and CIO unified in 1955 to form a single union federation,<sup>14</sup> “Big Labor” seemed to be a permanent part of the US economic system. The decline of private sector union density that began almost immediately after the formation of the AFL-CIO did not greatly alarm union leaders. In 1972 George Meany, President of the AFL-CIO, dismissed concerns over the trend in private sector membership: “Why should we worry about organizing groups of people who do not appear to want to be organized? . . . I used to worry about the size of the membership. But quite a few years ago I just stopped worrying about it, because to me it doesn’t make any difference.”<sup>15</sup>

Following President John F. Kennedy's 1962 Executive Order 10988,<sup>16</sup> which permitted collective bargaining by federal employees, much union effort went into campaigning for states to enact NLRB-type laws that would allow state, municipal, and other public sector workers to engage in collective bargaining. The result was a sizable increase in public sector unionism and collective bargaining.<sup>17</sup> The historically nonunion National Education Association began to bargain for its members and transformed itself into the country's largest union.

It is perhaps harsh and impolitic at the NLRA's 75<sup>th</sup> birthday to declare that in 2010 the law no longer fits American economic reality and has become an anachronism irrelevant for most workers and firms. But that is the case. Union membership in the private sector has been falling since 1955. It hit 7.2% in 2009,<sup>18</sup> comparable to what it was before the NLRA, with no

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13 Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, Volume 2, No. 2 J. ECON. PERSPECT. (Spring, 1988), at 64, Exhibit 1.

14 A first-hand story of the merger is ARTHUR J. GOLDBERG, *AFL-CIO: LABOR UNITED* (McGraw Hill 1956).

15 PAUL BUHLE, *TAKING CARE OF BUSINESS: SAM GOMPERS, GEORGE MEANY, LANE KIRKLAND, AND THE TRAGEDY OF AMERICAN LABOR* 196 (Monthly Review Press, New York, 1999).

16 John F. Kennedy, *Employee-Management Cooperation in the Federal Service*, Executive Order 10988, January 17, 1962, Federal Register 27 FR 551, January 19, 1962. (Dec. 23, 2010, 4:10pm) <http://www.presidency.ucsb.edu/ws/index.php?pid=58926>

17 Richard B. Freeman, *Unionism comes to the Public Sector*, Volume 24, Issue 1 JOURNAL OF ECONOMIC LITERATURE 45 (March 1986). Figure 1 shows the increase in public sector union density and collective bargaining. *WHEN PUBLIC SECTOR WORKERS UNIONIZE* (Richard B. Freeman & Casey Ichniowski, editors) (University of Chicago Press for the NBER 1988) analyzes the causes and consequences of this change.

18 *Union Members 2009*, BUREAU OF LABOR STATISTICS, NEWS RELEASE, USDL-10-0069, page 7-8, table 3, (released Jan. 22, 2010) (accessed Jan 6, 2011, 3:29pm), <http://www.bls.gov/news.release/pdf/union2.pdf>.

sign of any rebound. NLRB elections have turned into massive employer campaigns against unions, in which the supervisors excluded from the protection of the law pressure workers to reject the organizing drive. The unfair labor practice provisions of the NLRA have failed to deter firms from illegal actions to prevent unionization. The statistic that best represents the extent of illegal activity is the ratio of the numbers of persons illegally fired for union activity who the Board ordered reinstated relative to the number of persons voting union in an NLRB election. In 1951-55 about 0.5 workers were ordered reinstated for every 100 workers who voted in NLRB elections. Firings increased relative to the number of workers voting union thereafter so that by the 1980s/early 1990s the Board ordered firms to reinstate 4.5 fired workers for every 100 union voters – nearly 5% of those who favored the union<sup>19</sup>. The ratio of firings to union voters dropped a bit thereafter but remained high through 2006-2009. Case studies and statistical analysis show that the more resources firms invest in fighting unionization, the less likely are workers to obtain a union through NLRB elections<sup>20</sup>. Even when unions win NLRB elections, on the order of 40% of the certified unions do not gain a contract within two years of NLRB certification.<sup>21</sup>

Far from a laboratory condition experiment in democracy, the NLRB election process turned into the same sort of costly fight between unions and firms that union organizing was before the Act, albeit in a different venue and with different weapons. The process of organizing through Board procedures does not make it easy for workers who want union representation to achieve this goal. Surveys show that on the order of 30% or so of nonunion workers report that they want union representation at their workplace but do not have such representation<sup>22</sup>. The

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19 Morris M. Kleiner & David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies*, National Bureau of Economic Research Working Paper 16626 (December 2010), figure 2, at 67.

20 Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR (Thomas A. Kochan, ed., 1985), 55-57, Table 3, summarizes the evidence from the 1970s and early 1980s. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, Volume 62, No.1 IND. LAB. RELAT. REV. (Oct. 2008), Page 15, Table 6 estimates that unfair labor practices reduce the chances of union success in reaching a contract by 30%, with most of the impact coming from the union drive actually leading to an election.

21 Kate Bronfenbrenner estimates that between 1999 and 2003 48% of newly certified unions had a contract one year after election, 63% had a contract after two years, 70% had a contract after three years, and 75% had a contract more than three years post election. Kate Bronfenbrenner, *No Holds Barred: the Intensification of Employer Opposition to Organizing*, Page 22, Economic Policy Institute Briefing Paper No. 235 (May 20, 2009), (Jan. 6, 2011, 3:40pm), [http://epi.3cdn.net/edc3b3dc172dd1094f\\_0ym6ii96d.pdf](http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf). Thus 37% of the newly certified unions did not manage to gain a contract after the election. John-Paul Ferguson reports that 56% of unions newly certified between 1999 and 2004 obtained a contract within two years of certification, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, Volume 62, No. 1 IND. LAB. RELAT. REV. (Oct. 2008) footnote to table 1 on page 6. This implies that 44% did not have a contract within two years. The 40% in the text is the approximate midpoint of these two estimates.

22 RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 69 (ILR Press, Ithaca, N.Y 2006), Figure 4.1 gives an estimate of 32% based on responses to the question of whether the worker would or would not vote union in an NLRB election. Estimates for the 2000s prior to the recession show higher proportions of workers, see Richard B. Freeman, *Do Workers Still Want Unions? More than Ever*, EPI Briefing Paper No. 182 (February 22, 2007), (Accessed Dec. 23, 2010), <http://www.sharedprosperity.org/bp182/bp182.pdf>. But in the aftermath of the

unfilled demand for union representation is larger in the US than in Canada<sup>23</sup> or in other advanced English-speaking countries<sup>24</sup>.

In response to the failure of NLRA elections to resemble the ideal laboratory conditions, many union organizers prefer to work outside the NLRA procedure. They seek private arrangements with management in which the firm agrees to some form of neutrality in the organizing drive rather than relying on the Board's legal protection and oversight of a representation election.<sup>25</sup> James Brudney cites AFL-CIO data that he obtained from the organizing division that shows that over 80% of the workers that AFL-CIO unions organized from 1993 to 2003 occurred outside the NLRB process.<sup>26</sup> That so many unions believe they can strike a better deal for a fair election outside of the Act and are able to pressure or convince employers to agree to sidestep the NLRB election procedure is perhaps the strongest sign that the Act has failed to do what it intended.

John Godard and Carola Frege's 2009 survey of workers provides a remarkable picture of the failure of the NLRA to fulfill its goals in today's economy.<sup>27</sup> The survey was a phone interview of 1000 employees who worked fifteen hours or more a week for the same employer for at least six months. Seventeen percent of respondents reported that a union represented them at their workplace – a larger percentage than the 7.2% in the BLS data cited earlier due to the inclusion of public sector workers and restriction of the sample to persons with the work experience specified above in the Godard-Frege survey. Asked about non-union forms of representation, 28% of the total sample (34% of the non-union sample) – said that they had a “non-union management established system, where worker representatives meet with management” at their workplace. Restricting the sample to private sector workers gives

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2008 recession attitudes became less favorable toward unions, which likely reduced the levels of support. The Pew Research Center for the People & the Press, *Favorability Ratings of Labor Unions Fall Sharply* (February 23, 2010), (Jan. 6, 2011), <http://pewresearch.org/pubs/1505/labor-unions-support-falls-public-now-evenly-split-on-purpose-power>. Mark Blumenthal, *How many would unionize?* POLLSTER.COM (March 20, 2009) (Jan. 6, 2011), [www.pollster.com/blogs/how\\_many\\_would\\_unionize.php?nr=1](http://www.pollster.com/blogs/how_many_would_unionize.php?nr=1), compares different polls about the changing attitudes toward unionization.

23 Seymour Martin Lipset and Noah Meltz address this problem, see SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, *THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO, BUT JOIN MUCH LESS* (Cornell University Press 2004), see pages 1-2, especially Figures 1.1 and 1.2.

24 RICHARD B. FREEMAN, PETER BOXALL & PETER HAYNES (editors), *WHAT WORKERS SAY: EMPLOYEE VOICE IN THE ANGLO-AMERICAN WORKPLACE* (Cornell University Press 2007), pp 211-212 and Table Concl.1, p 208-209 show the greater unfilled union demand in the US than in the other countries with comparable questions.

25 Joe Crump, *The Pressure is On: Organizing Without the NLRB*, Volume 1, No. 18 LAB. RES. REV. (1991) 33-43 discusses United Food and Commercial Worker policies and experiences during the 1980s.

26 James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, Volume 90, Issue 3 IOWA L. REV. 828 (2005).

27 John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Presented at the Annual Meetings of the Labor and Employment Relations Association, Denver (January 6-9, 2011), Table 1.

comparable results: fifteen percent in unions and twenty-eight percent in non-union management established systems.<sup>28</sup>

Do the management-established systems contravene the 8a2 restriction on company unions<sup>29</sup>? Godard and Frege asked workers covered by non-union management systems if “their representatives actively consult with management over wages and benefits”. Thirty-seven percent reported that they did “to a great extent” while 42% said their representatives did “to some extent”<sup>30</sup>. So much for the section 8a2ban on company unions.

Do the management-established systems act on workers' behalf in disagreements with management? Fifty-one percent of workers in management-established representation systems reported that their representatives “can be counted on to stand up for workers, even if this means a disagreement with management”. This roughly matched the 54% of workers in collective bargaining who reported that their representatives stood up for workers even if this meant disagreeing with management.<sup>31</sup> So much for the view that nonunion management established organizations do nothing to help the workers whom they represent.

## 2- What went wrong?

The NLRA vision of a labor relations system in which private sector workers would vote for unions to represent them through near-ideal laboratory condition elections and bargain with their employers to determine wages and working conditions exists today only in a small and declining part of the labor market. Private sector union density has fallen in virtually all industries and occupations, including the manufacturing and construction sectors which were strongholds of traditional collective bargaining.<sup>32</sup> It has failed to expand into the growing high

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28 The figures for all respondents are from table 1. Those for the private sector are from John Godard, personal communication, October 19, 2010, Table 1App.

29 See Sec. 8. [§ 158.] (a)(2) of the National Labor Relations Act, 29 U.S.C. §§ 151-169, Title 29, Chapter 7, Subchapter II, United States Code (1935). Available at (Dec. 23, 2010, 2:37pm) [http://www.nlrb.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx)

30 John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Presented at the Annual Meetings of the Labor and Employment Relations Association, Denver (January 6-9, 2011), at 11-12, 15 and Table 2App. The estimated proportion of workers whose committees discussed wages and benefits is higher than the twenty-eight percent estimate by Freeman and Rogers in RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 103 (ILR Press, Ithaca, N.Y. 2006).

31 John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Presented at the Annual Meetings of the Labor and Employment Relations Association, Denver (January 6-9, 2011), at p 14 and table 2App

32 In 2009 the percentage of wage and salary employees unionized was 10.9% in manufacturing and 14.5% in construction. *Union Members 2009*, BUREAU OF LABOR STATISTICS, NEWS RELEASE, USDL-10-0069, page 7-8, table 3, (released Jan. 22, 2010) (accessed Jan 6, 2011, 3:33pm), <http://www.bls.gov/news.release/pdf/union2.pdf>. By contrast, in 1970 the percentage of employees unionized in manufacturing was 47.4% and the percentage unionized in construction was 76.2%. Calculated from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1973*, (94th edition), (Washington, DC 1973)



tech and service industries. But unionism has not fallen everywhere. After increasing in the 1970s and 1980s, public sector density has stabilized at 35-40% of the work force. In 2009 37.4% of public sector wage and salary workers were unionized<sup>33</sup> --over five times the density in the private sector. For the first time in US labor history, the majority of union members (52%) worked for the government.<sup>34</sup> What is striking about this change is that the state-level collective bargaining statutes under which collective bargaining flourished in the public sector mimicked the federal National Labor Relations Act sufficiently that many have called them “mini-Wagner Acts”<sup>35</sup>. My analysis of Current Population Survey data on unionization by state shows that *within the same state* union density is higher for public sector workers covered by the mini-Wagner Acts than for private sector workers covered by the national law<sup>36</sup>. Why is this? What has led NLRA-type regulation of labor relations to work reasonably well in the public sector, with workers choosing to unionize or not through elections with little employer intervention,<sup>37</sup> but no longer produces the desired outcome in the private sector per its original intent?

My answer rests on the different monetary incentive that private and public sector employers have to oppose unions. By raising pay and benefits in the organized firm relative to the non-organized firm, private sector unions increase labor costs and shift profits to workers. This makes it difficult for unionized operations to compete successfully with nonunion firms. It leads many managers to view unions as an outside impediment to their running a competitive operation rather than as the legitimate representative of workers who are an integral part of the

with union membership numbers from Table 395, p 249 and employment numbers from Table 370, p 230.

- 33 *Union Members 2009*, BUREAU OF LABOR STATISTICS, NEWS RELEASE, USDL-10-0069, page 7-8, table 3, (released Jan. 22, 2010) (accessed Jan 7, 2011, 11:11am), <http://www.bls.gov/news.release/pdf/union2.pdf>.
- 34 *Union Members 2009*, BUREAU OF LABOR STATISTICS, NEWS RELEASE, USDL-10-0069, page 1 (released Jan. 22, 2010) (accessed Jan 7, 2011, 11:11am), <http://www.bls.gov/news.release/pdf/union2.pdf>, where the BLS states as its top highlight: “More public sector employees (7.9 million) belonged to a union than did private sector employees (7.4 million), despite there being 5 times more wage and salary workers in the private sector.
- 35 See for example Philip Miles, Mini-Wagners: State Labor Relations Acts, September 10, 2010 (Jan. 7, 2011, 12:09pm), <http://www.lawfficespace.com/2010/09/mini-wagners-state-labor-relations-acts.html>. Also see, *Labor Law: Labor Relations - Rationales for Regulation, Federal Structure, Union Organization and Collective Bargaining Law, Underlying Premises, Administrative Framework* (Jan. 7, 2011, 12:15pm). <http://law.jrank.org/pages/18728/Labor-Law-Labor-Relations.html>.
- 36 Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Laws?* LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES, Proceedings of the 58th Annual Meeting (Jan. 6-8, 2006 Boston) at 125-133 summarizes the analysis (Jan. 7, 2011, 12:28pm) <http://www.press.uillinois.edu/journals/lera/proceedings2006/freeman.html>. For the detailed calculations see Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Laws?*, Table 2, page 18 (Jan. 7, 2011, 12:20pm) [www.russellsage.org/sites/all/files/u4/Freeman.doc](http://www.russellsage.org/sites/all/files/u4/Freeman.doc).
- 37 See the following chapters in RICHARD B. FREEMAN & CASEY ICHNIOWSKI (editors) WHEN PUBLIC SECTOR WORKERS UNIONIZE (University of Chicago Press for NBER 1988): Casey Ichniowski, *Public Sector Union Growth and Bargaining Laws: a proportional hazards approach with time-varying treatments*, chapter 1, pp 19-40; Gregory M. Saltzman, *Public Sector Bargaining Laws Really Matter: Evidence from Ohio and Illinois*, chapter 2, pp 41-80; Richard B. Freeman and Robert G. Valletta, *The Effects of Public Sector Labor Laws on Labor Market Institutions and Outcomes*, chapter 3, pp 81-106.

firm. Many take whatever action they deem necessary to keep unions out of their business, including committing unfair practices against workers who want union representation. The same management that accepts equal employment and anti-discrimination regulations for gender or race as morally valid ways to protect individuals often rejects the morality of NLRA protections of workers for their actions to further the collective interests of workers.

Public sector officials do not respond as negatively to the mini-Wagner Acts because unlike their private sector counterpart they have little to gain and much to lose from fighting unions. In some jurisdictions unions are an important ally in helping politicians and public sector management convince voters to increase taxes or borrow money through bonds for schools, police, or other public goods. Come election time, public sector unions are often an important political force turning out their members to vote and to campaign for politicians favorable to their interests. The politician who attacks them risks arousing the ire of politically active constituents. The public official who breaks the law to prevent workers from unionizing or commits large sums of taxpayer moneys to run an expensive anti-union campaign risks even greater political backlash.

Given the monetary incentives for private sector management to oppose union organizing drives, the effectiveness of the NLRA in creating ideal laboratory condition elections depends on whether the Board can impose sufficiently large penalties on firms to deter unfair practices. Section 10(c) gives the Board the right to make the worker “whole” by requiring the firm pay for any lost compensation and by restoring the worker to his or her previous job.<sup>38</sup> Under the federal preemption doctrine states cannot add their own penalties to the federal ones nor are they free to try in other ways to enforce the law in their boundaries.<sup>39</sup> Workers cannot file class action law suits to gain recompense for employer intimidation and the loss of the benefits of union representation.

Morris Kleiner and David Weil have analyzed the magnitude and effectiveness of NLRB penalties on employers found guilty of illegally discriminating against workers for union activity or refusing to bargain in good faith. They find that from 2000 to 2009 the Board awarded an average of \$230,752 in back pay on 1,355 citations for section 8(a)(3) violations (discrimination for taking part in union activities).<sup>40</sup> The Board also gave back pay of \$499,951 per citation for

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38 Sec. 10. [§ 160.] (c) of the National Labor Relations Act, 29 U.S.C. §§ 151-169, Title 29, Chapter 7, Subchapter II, United States Code (1935). Available at (Dec. 23, 2010, 2:58pm) [http://www.nlr.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx)

39 See the section on Preemption in (Jan. 7, 2011, 12:38pm), [http://www.ipsn.org/court\\_cases/labor-management\\_relations\\_act.htm](http://www.ipsn.org/court_cases/labor-management_relations_act.htm). Stephen F. Befort, *At the Cutting Edge of Labor Law Preemption: a critique of Chamber of Commerce v. Lockyer*, discusses the importance of preemption in labor law (Jan. 7, 2011, 12:36pm), [www.bna.com/bnabooks/ababna/nlra/2004/befort.doc](http://www.bna.com/bnabooks/ababna/nlra/2004/befort.doc)

40 Tables 2 and 3, Morris M. Kleiner and David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies*, National Bureau of Economic Research Working Paper No. 16626 (Dec. 2010) page 58 table 2 lists the number of citations, while table 3, p 59 gives the mean value of the back pay awards.

section 8(a)(5)<sup>41</sup> violations (bargaining in good faith). Given the financial incentives for opposing unions, Kleiner and Weil view these sums as having little deterrent value: “the Act for decades has been ineffective in curbing behaviors that are antithetical to its fundamental aims. As the parties learned about the low penalties associated with the NLRA, neither labor or management seems to have been bothered by the costs relative to the benefits of violating the Act.”<sup>42</sup>

As an alternative model of penalizing firms for unfair labor practices consider how the neutral arbitrator, Margaret Kern, dealt with the actions of Yale New Haven Hospital in its effort to deter unionization by New England Health Care Employees, DISTRICT 1199, SEIU in 2006-2007. The union and employer had agreed to standards of conduct for Yale-New Haven Hospital workers to choose whether or not to unionize outside of the NLRB process. They agreed to submit disputes to the arbitrator with the understanding “that the National Labor Relations Act would generally be the governing standard to be applied in those disputes”<sup>43</sup> while giving the arbitrator “broad discretion to fashion broad remedies” to ensure compliance with the terms, intent, and content of the agreement.<sup>44</sup> After investigating the facts, arbitrator Kern determined that the Hospital had conducted a methodical anti-union campaign that prevented the workers from making a free and fair choice in an election:

*“This was not a situation, so familiar in heated union campaigns, where a few rogue managers lose their composure and say things they later regret. The employer’s conduct here was a methodical dismantling of the terms and commitments of the election principles agreement. ...The record before me...provides substantial evidence of the employer’s repudiation of these commitments.<sup>45</sup> ... They (the workers) were threatened with loss of overtime, wage differentials, ...prescription drug coverage, [and] scheduling flexibility....They were threatened with more onerous working conditions and even loss of their jobs if the union were selected as their collective bargaining representative ... Employees were compelled to listen to managers*

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41 See Sec. 8. [§ 158.] (a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 151-169, Title 29, Chapter 7, Subchapter II, United States Code (1935). Available at (Dec. 23, 2010, 3:08pm) [http://www.nlr.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx)

42 Morris M. Kleiner and David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies*, National Bureau of Economic Research Working Paper No. 16626 (Dec. 2010), at 49.

43 See page 4, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec. 24, 2010, 12:14pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

44 See page 4, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec. 24, 2010, 12:15pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

45 See page 42-43, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec. 24, 2010, 12:18pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

*and consultants expound on their 'feelings and fears' about the union, and then have their own views about the union recorded and entered into a central repository so that the paid consultants could earn their fee and best position the employer to win the election. Employees were deprived of the right to truthful information, the right to do their job uninterrupted by solicitation, and the right not to participate in captive audience meetings.”<sup>46</sup>*

Recognizing that the workers had been victimized, Arbitrator Kern ordered that the Hospital pay them what it spent on fees to anti-union consultants on the notion that this was a reasonable lower bound estimate of what the employer thought it could gain from sabotaging a fair election. Each of the 1,736 eligible workers thus received an equal share of the \$2,225,131 fee paid to the consultants who ran the anti-union campaign that the Hospital had promised not to run.<sup>47</sup> The Arbitrator further ordered that Yale repay the union its \$2,297,676 organizing expenses.<sup>48</sup> The approximate 4.5 million dollar penalty is 20 times the average size of NLRB penalties for citations of 8a3 violations given above and nine times the average size of NLRB penalties for 8a5 violations. Had this case gone to the NLRB, it is almost unimaginable that the Board would have ordered the firm to pay anything close to the four and half million dollars for its egregious actions. Indeed, since no one was fired for union activity perhaps the Board would have assessed no penalties at all. The arbitrators' award in Yale-New Haven exceeded typical Board awards because the arbitrator penalized the Hospital for harming **all** workers whereas the Board awards back-pay only to those who have lost their jobs or otherwise been illegally treated as an individual.

The Congress has long recognized that the NLRA no longer serves its intended purpose and sought at different times to amend the law. During the Carter Administration, the House passed a labor law reform bill<sup>49</sup> to better protect organizing rights but the Senate Senator Orrin Hatch's led filibuster killed the bill in the Senate.<sup>50</sup> The Clinton Administration established the U.S. Commission on the Future of Labor-Management Relations (popularly known as the

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46 See page 46, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU (Dec 23, 2010, 12:20pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

47 See page 47, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec 23, 2010, 12:22pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

48 See page 44, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec 23, 2010, 12:25pm), <http://www.ynhunion.org/newsletter/report-071022.pdf>.

49 See S. 2467, 95<sup>th</sup> Cong. 2d Sess., 124 Cong. Rec @874 (daily ed. Jan. 31, 1978) (introduced by Sens. Williams and Javits).

50 See *About Orrin G. Hatch: The Senator's Biography* (Jan. 7, 2011, 12:51pm), <http://hatch.senate.gov/public/index.cfm?FuseAction=Biography.Timeline>; and *Forum: Labor Law Reform*, 20 B.C.L. Rev. 1 (1978) at 1 (Jan. 7, 2011, 12:54pm), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1601&context=bclr>

Dunlop Commission after its chair John Dunlop). The Commission's recommendations for labor reform<sup>51</sup> were dead on arrival after Republicans won the House of Representatives in 1996. The Obama Administration supported the Employee Free Choice Act with its provisions for card check and first contract arbitration.<sup>52</sup> The Democratic House passed the bill but the death of Senator Ted Kennedy of Massachusetts and the surprise Republican victory for Kennedy's seat sealed its fate in the Senate. On the management side, in 1996 Congress enacted the Teamwork for Employees and Managers Act<sup>53</sup> that modified Section 8(a)(2) to allow employee involvement committees to discuss issues of mutual interest with management as long as this had no impact on collective bargaining agreements. President Clinton vetoed the bill. Failure to modernize or reform the NLRA has locked private sector US labor relations into a Depression Era legal process that has failed to deliver on its promise to workers and firms.

### 3) Should we care?

The failure of the NLRA process to meet the needs of workers and firms has moved the US close to the union-free world that many opponents of trade unions have long desired. If low private sector union density was associated with full employment, rising real wages and benefits for most workers and accelerated growth of productivity, we would judge result as an economic success, albeit at the cost of democratic and human rights. Before the onset of the Great Recession in 2008, it was possible to make the economic argument. The US's market driven labor market produced low unemployment and a high employment-population rate, with most workers obtaining full-time jobs, and rapid growth of productivity. This contrasted with the sluggish job growth of most EU countries, where collective bargaining set wages and working conditions for most workers. But there were skeletons in the US economic closet beyond its failure to give workers the representation/participation that they sought at their workplaces: the highest level of income and wealth inequality among advanced countries; falling private sector pensions and employer paid health insurance; stagnation in the proportion of young persons going to college; stagnant real earnings for all but the highest paid whose earnings were boosted by stock options and bonuses associated with capital income.<sup>54</sup>

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51 Commission on the Future of Worker-Management Relations, U.S., *The Dunlop Commission on the Future of Worker- Management Relations - Final Report*, FEDERAL PUBLICATIONS, Paper 2 (1994), (Jan. 7, 2011, 12:59pm), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace).

52 Steven Greenhouse, *Fierce Lobbying Greets Bill to Help Workers Unionize*, N.Y. TIMES, March 11, 2009, at B3, cites President Obama's view. The President was a co-sponsor of the bill when he served in the US Senate. Available at (Jan. 7, 2011, 1:04pm), <http://www.nytimes.com/2009/03/11/business/11labor.html?ref=business>.

53 See *Business-backed labor legislation - Pres Clinton vetoes Teamwork for Employees and Management Act, which would have prevented collective bargaining agreements for employees - Brief Article*. NATION'S BUSINESS (Sept 1996), (Dec 22, 2010, 2:00pm), [http://findarticles.com/p/articles/mi\\_m1154/is\\_n9\\_v84/ai\\_18624757/](http://findarticles.com/p/articles/mi_m1154/is_n9_v84/ai_18624757/).

54 For the positives and negatives of the U.S. experience prior to the Great Recession, see Richard B. Freeman, *AMERICA WORKS: CRITICAL THOUGHTS ON THE EXCEPTIONAL U.S. LABOR MARKET* (Russell Sage Foundation 2007), chapters 1 and 2, pp 7-40 lay out the successes while chapter 3, pp 51-57 examines the high level of inequality.



The Wall Street meltdown and ensuing recession gainsay the belief that in a crisis a near union-free labor market operates like an ideal textbook model. Instead of clearing supply and demand and restoring full employment rapidly, the US labor market produced the longest jobless recovery since the Great Depression, with no end in sight at this writing. To the extent that a healthy recovery requires that the gains from economic growth be shared more evenly among the population, a stronger union movement would seem to be part of the solution to the crisis, per Keynes's letter to Roosevelt during the Depression, rather than a deterrent to restoring shared prosperity for all.

Looking beyond labor market, there are other reasons to care about the loss of unions or other collective organizations representing workers in the US. Unions increase the likelihood that workers register and vote<sup>55</sup> and spur their involvement in democratic politics.<sup>56</sup> Aaron Sojourner has found that the fraction of state legislators who worked as construction workers, fire fighters, law enforcement officer, and teachers is higher in states where the relevant occupation is more highly unionized than in states with lower levels of unionization in the occupation.<sup>57</sup> There is suggestive evidence from the 2005 World Values Survey<sup>58</sup> that self-reported life satisfaction rose with union density and that union members have higher life satisfaction than nonmembers. Perhaps most important the absence of a strong union movement arguably weakened the US effort to reign in the financial excesses that produced the economic disaster. The Americans for Financial Reform coalition led by US unions with support from some 250 other organizations sought to “protect working families and responsible businesses by cracking down on the abuses and the irresponsible behavior of big banks, credit card companies, and Wall Street insiders.”<sup>59</sup> But the debate over financial reforms was largely dominated by the same thinkers and representatives of financial interests whose actions helped create the crisis, producing what many experts believe is an adequate legislative response.<sup>60</sup>

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55 Freeman B. Richard, *What do Unions Do... to Voting?*, National Bureau of Economic Research Working Paper No. 9992 (September 2003), table 4, p 43; table 5, p 44; and table 6, p 45.

56 Sidney Verba, Kay Lehman Schlozman & Henry E. Brady *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 384-387 (Harvard University Press, Cambridge 1995).

57 Aaron Sojourner, *Do Unions Promote Electoral Office Holding? Evidence from State Legislators' Occupations*, University of Minnesota Center for Human Resources and Labor Studies Working Paper (in process 2010). This is true conditional on state fixed effects and occupation fixed effects.

58 Patrick Flavin, Alexander C. Pacek, & Benjamin Radcliff, *Labor Unions and Life Satisfaction: Evidence from New Data* Volume 98, Number 3, SOC. INDIC. RES. (September 2010), table 1, p 443 and table 2, p 444. I call this suggestive because it is based on evidence for 14 countries including the US but does not distinguish the US from the group and is based on cross section correlations rather than longitudinal evidence on responses to exogenous changes in union status.

59 See *Americans for Financial Reform* (Dec. 22, 1010, 3:36pm) <http://ourfinancialsecurity.org/about/>.

60 This is the Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173) that President Barack Obama signed on July 21, 2010. Kurt Schacht, *US financial reform bill 'not enough'*, FINANCIAL TIMES, September 12 2010 (Jan. 7, 2011, 1:22pm), <http://www.ft.com/cms/s/0/ecf660aa-bd04-11df-954b-001144feab49a.html#axzz1ANInXwIX>,

#### 4) Conclusion: Lessons for the future

My favorite question from the Workplace Representation and Participation Survey asked each respondent how they would like an employee organization to work “if it was your decision alone to make and everybody went along with it.”<sup>61</sup> Transformed to this essay on the 75<sup>th</sup> Anniversary symposium on the NLRA, the question would be: “if it was my decision alone to make ..., how would I modernize the NLRA to rebuild the US labor relations system?”

Here are four reforms that I believe would go a long way to modernizing the labor law:

**1. Strengthen the penalties on illegal actions by management and unions.** Kleiner and Weil argue that remediation penalties for unfair labor practices by themselves are unlikely to reach levels that would substantively reduce unfair practices.<sup>62</sup> Accepting that penalties must go beyond “make-whole” remediation, I favor punitive damages against firms and unions for egregious law-breaking. One way to do this is to increase penalties for illegal activities so that the marginal cost of offenses rises sharply. Commit one unfair practice and the penalty could be X dollars. Commit a second unfair practice and the penalty might rise to, say 1.5X or X<sup>2</sup> for the new penalty. Commit three unfair practices and the cost might rise to 2.5X, and X<sup>3</sup>. Another way to make the penalties more effective would be to allow the NLRB to have the “broad discretion to fashion broad remedies”<sup>63</sup> that the Yale-New Haven Hospital agreement gave its arbitrator. I would further look for ways to penalize the managers or union leaders that directed or carried out the acts of law-breaking. The firm or union might cover the costs of individual penalties but having someone's law-breaking in the public record would likely have some deterrent effect itself.

**2. Provide legal protection for supervisors to be neutral in the NLRB election.** Supervisors are the front-line in firm's campaigns to convince employees that they should oppose the union. A supervisor who strongly opposes unions should, of course, be free to express his or her views but so too should a supervisor who favors unions be free to express their views. And any supervisor who wishes to remain silent in an NLRB election should have the legal right to do

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surveyed US members of the CFA Institute, the global association of investment professionals (*About CFA Institute* (Jan. 7, 2011, 1:25pm), <http://www.cfainstitute.org/ABOUT/Pages/index.aspx>). Two-thirds graded Congress's reform efforts as “poor” or a “failure” and three-quarters said the Dodd-Frank bill would not help prevent another crisis.

61 RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 175 (ILR Press Books, 2d ed. 2006), question 48.

62 Morris M. Kleiner and David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies*, National Bureau of Economic Research Working Paper No. 16626 (Dec. 2010), at 48-49.

63 See page 4, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec. 24, 2010, 12:28pm) <http://www.ynhunion.org/newsletter/report-071022.pdf>.

so. No American should face the threat of job loss to act against the legally protected rights of other citizens. Just as Landrum-Griffin added a bill of rights for union members that provides them with protection against an abusive union<sup>64</sup>, NLRA should add a bill of rights and protection for supervisors in organizing campaigns. If an employer knows that supervisors can say “no” to an egregious anti-union activity, the employer may decide against such actions. Had a manager in Yale-New Haven spoken up on its “methodical dismantling of the terms and commitments of the election principles agreement”<sup>65</sup>, that person might have saved the Hospital from violating its own agreement and from the \$2.5 million it paid consultants to run the anti-union campaign and the \$4.5 million penalties that the arbitrator placed on it. Yale-New Haven might then have produced the genuine election that the Hospital and Union had agreed on and that is the promise of the NLRA.

**3. Conduct early voting or rolling elections at neutral venues instead of having elections at the work site on a single day.** Benjamin Sachs's plan to reduce intimidation or pressure on workers in NLRB elections<sup>66</sup> is to move the location of the election outside the workplace. “The NLRB would set up a polling place, where employees could make their decision at any time during the drive, and it would set up a confidential mail-in procedure. Just as is the case under current NLRA law, the rules would prohibit union organizers from interfering with employees while they're making their choices. The NLRB would keep a running tally, and if the union won the support of 50 percent of the prospective bargaining unit (or perhaps a higher percentage if the union wanted some cushion), the NLRB would inform the union that it was entitled to demand recognition from the employer”<sup>67</sup>. Changes in the voting venue will undoubtedly run into some problems, as the American Hospital Association has noted in its objection to the Board's considering the use of remote electronic voting technology,<sup>68</sup> but those problems must be weighed against the problems with the current NLRB electoral process, and with the trend toward ballot by mail and early voting in U.S. political elections<sup>69</sup>

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64 Landrum-Griffin Act, or Labor-Management Reporting and Disclosure Act, 29 U.S.C.A. § 401 et.seq. (1959).

65 See page 43, *Arbitration Proceeding Before Margaret M. Kern, Yale-New Haven Hospital and Index Nos. 054, 061(a), 061(d), 068*, New England Health Care Employees, DISTRICT 1199, SEIU, (Dec. 24, 2010, 12:31pm) <http://www.ynhunion.org/newsletter/report-071022.pdf>.

66 Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing* 123 HARV. L. REV. 663, 723-727 (2010).

67 Sachs also suggests giving employees a confidential voter identification number and then allowing them to vote in their homes by either phone or the Internet, as unions do for union elections for airlines and railroads. E. See Benjamin I. Sachs, *Card Check 2.0 A better fix for union organizing than the Employee Free Choice Act*, (posted April 16, 2009, accessed Dec. 23, 2010, 12:34pm), <http://www.slate.com/id/2216272/>.

68 American Hospital Association (with other organizations), *Request for Information, Secure Electronic Voting Service, Solicitation Number RFI-NLRB-01* (June 9, 2010, Response Date: July 2, 2010). (Dec.23, 2010, 12:42pm), [www.aha.org/aha/letter/2010/100630-let-secureelecvtg.pdf](http://www.aha.org/aha/letter/2010/100630-let-secureelecvtg.pdf).

69 Benjamin I. Sachs, *Card Check 2.0 A better fix for union organizing than the Employee Free Choice Act*, (posted April 16, 2009, accessed Dec.23, 2010, 1:06pm), <http://www.slate.com/id/2216272/>.



**4. Remove the 8a2 restrictions on company sponsored organizations and replace them with legal protections for such organizations and the workers involved in them.** The notion that employers can set up committees that deal with issues related to productivity and profits but that cannot legally discuss issues that improve the well-being of workers makes little sense in a world in which workers have little or no chance of union representation and in which many prefer dealing with management through joint committees rather than collective bargaining.<sup>70</sup> The Godard-Frege survey makes it clear that the 8a2 restriction does not stop nonunion firms from talking with representatives from employer-initiated groups about matters of concern to employees.<sup>71</sup> The standing of the law suffers more from outlawing common practices than do firms for talking with worker representatives. Throughout the advanced world works councils perform this function, usually with members elected by employees independently of collective bargaining.<sup>72</sup> Canada, whose labor relations system is closest to the US, allows management to deal with groups of nonunion employees on any issue of concern, including the terms and conditions of employment, as long as these discussions and potential agreements do not interfere with collective bargaining.<sup>73</sup> The Canadian system works reasonably well.<sup>74</sup> American employers who want to deal with their workers as a collective group short of collective bargaining should not have to break the law to do so. Make these organizations legal and give the workers involved some legal protections, as the Canadians do.

I recognize that not everybody (perhaps no one but me) will go along with my answer to the “if it was your choice alone” question. Given the historic opposition of management to anything that would shift power toward workers and of unions to anything that would legitimize company initiated worker organizations, and the ability of each side to marshal their political supporters to say no to any but their preferred changes, I do not see Congress enacting either my list or any other labor law reforms in the foreseeable future.

But there is one way in which Congress could lay out a path to reform. This is to limit the extent of federal preemption of state efforts to modernize the NLRA. Just as the Taft-Hartley Act gave states the right to outlaw union security clauses, Congress could give states the right to try alternative solutions to accomplish the purposes of the Act. Given the huge variation in union density and attitudes toward unions across the US, this would likely produce wide

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70 RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 140-155 (ILR Press Books, 2d ed. 2006), chapter 7, in particular exhibit 7.2 and exhibit 7.4.

71 John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Presented at the Annual Meetings of the Labor and Employment Relations Association, Denver (January 6-9, 2011), at 15.

72 See generally, JOEL ROGERS & WOLFGANG STREECK (editors), *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* (University of Chicago Press by the NBER 1995).

73 Bruce E. Kaufman & Daphne Gottlieb Taras, *Nonunion Employee Representation: Introduction*, Volume 20, Number 1 *J. LAB. RES.* 3-5 (Winter 1999).

74 Daphne Gottlieb Taras, *Evolution of Nonunion Employee Representation in Canada*, Volume 20, Number 1 *J. LAB. RES.* 31, 44-47, 49 (Winter 1999).

variation in what states try. States hostile to unions might try to make it more difficult to organize than now, though that seems a difficult task. States favorable to business might enact their own versions of the TEAM bill that Clinton vetoed. States favorable to unions might raise the penalties for unfair practices, allow for card check recognition, or try some variant of the Sachs election reform. Some of these reforms would accomplish the goals of the Act. Some would not work. Ideally, states would note what succeeds in other states and copy those so that the labor system would improve over most of the entire country. By tossing a perpetual “hot potato” to the states where people work and where managers run businesses, and relying on local initiatives and federalism, the Congress would do a better job in modernizing US labor law than it has done over the last half century and seems likely to do in the next half century.