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

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Congress enacted the National Labor Relations Act 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" electoral process for ascertaining worker attitudes toward union representation that would be free from employer pressures or dishonest statements by employers or unions. If workers chose a union to represent them, the law obligated employers to bargain in good faith with the union but it did require the employer to reach a collective agreement with it. A firm could reject unions demands and reduce wages and benefits if it deemed that in its interests.[1] When President Franklin Delano Roosevelt signed the NLRA bill, he said that it "should serve as an important step toward the achievement of just and peaceful labor relations in industry."[2] Keynes in his February 1, 1938 letter to Roosevelt endorsed collective bargaining as a mode for restoring full employment, presumably by putting a floor on deflation and raising consumer spending.[3] 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", which unions used in 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 rights to influence the NLRB process. The 1947 Taft-Hartley Act added secondary boycotts and mass picketing by unions as unfair practices and introduced the "right to work" amendment that allowed states to outlaw union shop security clauses from collective agreements. The right to work provision weakened union organizing efforts[4] but even in right to work states the vast majority of workers in firms with collective bargaining join the union. Most American workers accept the majority decision to unionize even when unions win by a bit over half of the votes. This contrasts with the situation in the United Kingdom where a substantial proportion of workers free ride on the recognized union at their workplace. Taft-Hartley also excluded supervisors from the protections of the Act. This allows employers to fire supervisors who express pro-union or neutral sentiments in organizing campaigns or who refuse to carry out their orders about how to conduct the campaign. The 1959 Landrum-Griffin Act added protections to strengthen union democracy and the rights of members and provisions outlawing secondary boycotts and hot cargo provisions. The 1974 Amendment to the Act did not change the law but extended its coverage to health care institutions such as non-profit hospitals.

For thirty or so years after enactment the NLRA largely succeeded in its goals. The Act moved US labor relations and practices from an employer-dominated system to one in which workers had some say on wages and working conditions through elected union representatives. Huge organizing

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1 Bronfenbrenner (2009) estimates that between 1999 and 2003 48% of newly certified unions had no a contract one year after election, 37% had no contract after two years, 30% had no contract after three years, and 25% had no contract more than three years post election. Ferguson reports that 44% of unions newly certified between 1999 and 2004 did not have a first contract within a year of certification. Earlier, Weiler (1985) estimated that about one-third of elections failed to produce contracts in the 1980s.

2 http://docs.fdrlibrary.marist.edu/odnlra.html

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

4 Ellwood and Fine, 1987 but see also Moore 1996.

strikes disappeared as the law took hold and 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 nearly 40% of eligible private sector workers were covered by collective bargaining contracts. Large nonunion employers who wanted to remain nonunion paid attention to what their union competitors paid their workers, which many believed produced positive spillovers from union contracts to nonunion wages and benefits. When AFL and CIO unified in 1955 "Big Labor" seemed to be a permanent part of the US economic system. The decline of private sector union density almost immediately after the formation of the AFL-CIO did not greatly alarm union leaders. Following President John F. Kennedy's 1962 Executive Order 10988, 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. In 1972 George Meany, President of the AFL-CIO, dismissed concerns over the decline 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."[5] In the 1970s and 1980s public sector unionism and collective bargaining grew rapidly (Freeman and Ichniowski, 1988). The historically nonunion National Education Association began to bargain collectively for its members and transformed itself into the country's largest union.

It is perhaps harsh and impolitic at the NLRA's 75th 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 dropped to 7%, comparable to what it was before the NLRA. NRLB elections have turned into massive employer campaigns against unions, in which supervisors unprotected by the law play a critical role in pressuring 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 numbers of persons fired for union activity divided by the number of persons voting union in an NLRB election. In the early 1950s firms fired about 0.5 workers for every 100 workers who voted in NLRB elections. In the 1960s and 1970s firings increased relative to the number of workers voting union so that by the 1980s/early 1990s firms fired 4.5 fired for every 100 union voters – nearly 5% of those who favored the union (Kleiner and Weil, 2010, figure 2). 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 vote union in the NLRB elections (Freeman, 1985).

Far from a laboratory condition experiment in democracy, the NLRB election process turned into the same costly fight between unions and firms that union organizing was before the Act, albeit in a different venue and with different weapons. The NLRB process failed to make it easy or natural for workers who want union representation to achieve this goal. The evidence for this is in the sizable "representation-participation" gap, on the order of 20% to 30%, between workers saying they want union representation at their workplace and those who have unions (Freeman and Rogers 2002 and 2007; Freeman 2007). The gap between what workers want and what they get in labor representation is larger in the US than in Canada (Lipset and Meltz) and other advanced English-speaking countries

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5 *U.S. Needs "30,000 New Jobs a Week Just to Break Even"*, U.S. NEWS & WORLD REP., Feb. 21, 1972, at 27–28.

(Freeman, Boxall, Haynes, 2007).

Godard and Frege's 2009 survey of 1000 employed Americans working fifteen hours or more a week for the same employer for at least six months provides a remarkable new picture of the failure of the NLRA to fulfill its goals in today's economy. Fifteen percent of the workers in a sample that excludes government and related workers said that were represented by a union at their workplace. But nearly **twice** as many -- 28% of the total sample (30% of the non-union sample) – said that they had a "non-union management established system, where worker representatives meet with management" at their workplace (Godard, communication, table 1App). Asked if "their representatives actively consult with management over wages and benefits", 37% of those covered by non-union management established systems reported that they did "to a great extent" while 42% said their representatives did "to some extent"(Godard and Frege, 2010, table 1). Almost the same proportion 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" as did workers in collective bargaining union systems (Godard and Frege, 2010 table 2). So much for the section 8a2 ban on company unions. And so much for the view that non-union management established systems do nothing for workers.

The NLRA was designed to resolve depression era labor relations problems faced by factory workers. While the Board and courts interpret the law to deal with today's problems, the depression legacy has produced a disconnect between some of the detailed issues covered by the Act and current problems facing many firms and workers. This disconnect first impressed itself upon me in 1994 when, as a member of the Clinton Administration's Commission for the Future of Labor and Management Relations, I went with Dan Yager and Jeff McGuiness of the Labor Policy Association (which was monitoring the Commission for the employers community) to meet with Silicon Valley HR managers about the deliberations of the Commission. The Silicon Valley HR managers showed little interest in many of the "arcane" NLRA issues that exercised Washington – differences between NLRA and the Railway Labor Act, card check vs fast elections, captive audience speeches, 8a2 restrictions, and so on. Their employees were knowledge workers concerned with non-compete agreements, stock options, team work and group incentives. They were not the factory workers seeking to unionize for whom the NLRA had been written. If the NLRA disappeared tomorrow, neither these firms nor their workers would be much affected.

Many union organizers and unions have similar feelings about the relevance of the NLRA to their efforts to help low skill workers who seek to organize. They cannot honestly tell the workers that the Act protects them from employer unfair practices nor that the remediation will truly make them whole. Many unions now organize more outside the Act through corporate or other campaigns that seek to neutralize management opposition to union organizing than rely on the NLRA.[6] Brudnoy (2005) has estimated that 80% of new organizing in the late 1980s-1990s occurred outside the NLRB process. That so many unions believe they can strike a better deal for a fair election outside of the Act is perhaps the strongest sign that the Act has failed to do what it intended.

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6 See Joe Crump LET'S GET MOVING! ORGANIZING FOR THE '90'S The pressure is On: Organizing Without the NLRB Labor Research Review Volume 1, Number 18 1991 Article 8 for a discussion of United Food and Commercial Worker policies and experiences during the 1980s.

2- What went wrong?

Some analysts believe that the shift in the structure of US jobs from blue collar to white collar , the increased education of workers, and the increase in the female share of the workforce has contributed to the decline in the relevance of the NLRA model of labor relations and unionism. The changes in the structure of the work force are important but the argument that they have caused the failure of NLRA to deliver on its promise is unpersuasive. Many states have enacted NLRA-type statutes for public sector workers, who are disproportionately white collar, educated, and female, and found that the NLRA-type processes work reasonably well, with workers choosing to unionize or not through elections with little employer intervention. As a result, public sector density has stabilized at 35% or so even as private sector density keeps falling.

State NLRA type regulations are not carbon copies of the national law, but they are sufficiently similar to it that we can view workers in the public and private sectors of a state with such regulations as being effectively covered by the same legal regime.7 How does union density differ in such situations? Current Population Survey data shows that *within the same state* union density is higher occupation by occupation for public sector workers covered by NLRB state laws than for private sector workers covered by the national law rejects any simple structural story (Freeman, 2006*).* The problem is not the NLRA per se nor the composition of the work force or of jobs but the different way employers respond to the Act across sectors.

The main reason private sector employers respond negatively to the spirit as well as to the letter of the NLRA is that they have sizable monetary incentives to oppose unionism. The penalties the Board has at its disposal are too limited to offset these incentives. By raising pay and benefits in the organized firm relative to the non-organized firm, private sector unions raise labor costs and shift profits to workers. This makes it more difficult for unionized operations to compete successfully with nonunion firms. It leads many managements 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 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 collective activity.

The main reason public sector officials have not responded negatively to NLRA type legislation in their state is that they have little to gain and much to lose from fighting unions. In some cases 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. In other cases unions are an important political force turning out their members to vote and to campaign in elections. The politician who attacks them risks arousing the ire of politically active constituents. The

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7 For some types of workers the NLRA makes unionization more difficult. In higher education about a quarter of professors, a large proportion of graduate student teaching assistants, and some post-doctoral employees in the public sector have chosen unions. In the private sector, unionization of all three groups is rare. The Board's Yeshiva Doctrine deters faculty unionization; the Board's 2004 Brown University reversal of the New York University (332 NLRBA 1205(2000) decision that gave graduate student teaching assistants protection under the Act effectively destroyed the unionization of TAs in private universities, though the Board did not extend this to postdocs or interns.

public official who breaks the law to prevent workers from unionizing or who commits large sums of taxpayer moneys for expensive anti-union campaigns risks even greater political backlash.

Given the monetary incentives to firms to oppose union organizing drives the effectiveness of the NLRA depends on the penalties the Board can impose on firms for committing 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.8 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. Workers cannot file class action law suits to gain recompense for employer intimidation and the loss of the benefits of union representation. Comparing the back pay remedies to the benefits of remaining nonunion, Freeman and Kleiner (1999) concluded that the economic calculus was an important factor in inducing firms to engage in the continual law-breaking found in NLRB data.

As an alternative model of penalizing firms for unfair labor practices consider what happened in 2007 when the arbitrator in the Yale-New Haven Hospital union organizing dispute reviewed how the election campaign had proceeded. 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 a neutral arbitrator with the understanding "that the National Labor Relations Act would generally be the governing standard to be applied in those disputes" while giving the arbitrator "broad discretion to fashion broad remedies" to ensure compliance with the terms, intent, and content of the agreement (Kern, p 4). After investigating the facts, independent arbitrator Margaret 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. (Kern, p. 42-43) … 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 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." (Kern, p. 46).

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

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8 In addition to the back-pay penalty, the Board regularly orders employers to reinstate workers discharged for union activity to their previous job. Analysts have long noted that this is almost always an ineffective form of remediation (Aspin, 1996). Reinstated workers rarely stay long at their job.

ran the anti-union campaign that the Hospital had promised not to run. The Arbitrator further ordered that Yale repay the union its $2,297,676 organizing expenses. Had this case gone to the NLRB, it is almost unimaginable that the Board would have ordered the firm to pay 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.

To put the $4.5 million penalty in context, consider how it compares to typical NLRB back pay penalties. Kleiner and Weil (2010, tables 2 and 3) present data that shows that in 2000-2009 the Board awarded back pay to workers for **all** section 8(a)(3) discrimination for taking part in union activities violations of the act by **all** employers over the ten years of $35.9 million. This amounts to $3.6 million per year[9], which is 20% less than the arbitrator penalized Yale-New Haven Hospital. The Board also gave back pay of $41 million for **all** violations by **all** employers for section 8(a)(5) bargain in good faith violations over the ten years – or $4.1million dollars per year, which also falls short of what the arbitrator penalized Yale-New Haven Hospital.

The result is that "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 Act both labor and management were not bothered by the costs relative to the benefits of violating the Act." (Kleiner and Weil, p 45)

Recognizing that the NLRA no longer serves its intended purpose, Congress has sought unsuccessfully to amend the law. During the Carter Administration, the House passed a labor law reform bill to better protect organizing rights but the Senate could not shut down the Orrin Hatch led filibuster, and the bill died. During the Clinton Administration, the Dunlop Commission's recommendations for labor reform 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. 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 2006 Congress enacted the Teamwork for Employees and Managers Act 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.

The failure of the US to modernize its labor code contrasts with the changes that most other countries have made and continue to make as the needs of their workers and employers change. Korea, China, Canada, the UK and many other EU countries have altered their labor codes in diverse ways to reflect economic change. Rather than battling to legislative gridlock, Europe's "social partners" -- employer federations and unions – work out many of their differences together and develop reforms that each can live with and that governments adopt if legislation is needed.

3) Should we care?

The failure of the NLRA process to meet the needs of workers and firms moved the US close to the union-free world that many opponents of trade unions have long desired. If low and falling private

9 Brudney (2010) argues that for 43% of all employees receiving back pay, the awards are lower than they should be based on NLRB case files

sector union density was associated with full employment, rising real wages, improved productivity and benefits, we would judge the experiment a success. Before the onset of the Great Recession, the US's flexible near union-free labor market produced a high rate of employment, with most workers obtaining full-time jobs, and a rapid growth of productivity, which contrasted with the sluggish job growth of most EU countries and Japan. But there were skeletons in the economic closet: 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 was boosted by stock options and bonuses associated with capital income; as well as the representation/participation gap for workers.[10]

The Wall Street meltdown and ensuing recession tested the belief that a near union-free labor market would operate like some ideal textbook model, helping restore full employment rapidly. Instead of clearing supply and demand, the labor market produced the longest jobless recovery and longest period of high joblessness since the Great Depression. Efforts to reform the financial sector that had caused the problem foundered as the bankers and financiers, bailed out with taxpayers money, used their influence and power to try to rebuild the same old financial order. While it is possible that the country would have avoided some of the disaster if the unions had had sufficient power to push back against the pressures to let "Wall Street be Wall Street" in the Democratic Party, even the highly unionized Scandinavian countries bought enough of the deregulation mantra to have experienced their own financial crisis in the early 1990s. A stronger case is that the weakness of trade unions has contributed to the failure of the Administration and Congress to radically reform finance in ways that would avoid potential future disasters. Unions have joined over 250 other organizations in the Americans for Financial Reform coalition (http://ourfinancialsecurity.org/) "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." But this group has had at most a modest effect in the debate over financial reforms. If unions had a larger percentage of the work force or connected more closely with nonunion workers, the Americans for Financial Reform coalition would presumably have greater countervailing power to that of the big banks, credit card companies, Wall Street insiders, and be more likely to reform finance in ways that would benefit most Americans.

Looking beyond labor market and economy to broader societal impacts of unions, there are other reasons to care about the loss of union or other worker organization. The Godard and Frege surveys reports some suggestive statistics that unionized employees' see it more likely that "something will be done to make things right" when workers are mistreated in various ways than workers with a non-union management established system (table 4). But in their relatively small sample, patterns vary depending on what else enters the regressions and seem to work mostly through the firm introducing formal bureaucratic HR practices. Aaron Sojourners' (2010) analysis of the occupational background of state legislators suggests another way in which unions may affect the broader society: he finds that states with greater unionization elect relatively more legislators from occupations such as teaching rather than from law and other politically related fields. This fits with evidence that union members are more likely to vote and to be involved in political activity than otherwise comparable persons outside of unions (Freeman, 2003). Finally, Flavin, Pacek, and Benjamin's (2010) analysis of the 2005 World Values Survey shows that in the 14 countries for which they have data, self-reported life satisfaction rises with union density (table 1) and that union members have higher life satisfaction than

10 For both the positives and negatives of the US experience prior to the Great Recession see Richard Freeman, America Works: a critical view (Russell Sage, 2007).

nonmembers (table 2). While the US is one of their 14 countries, Flavin et al do not give separate data for the US nor for workers in the private as opposed to the public sector. As many analysts have found that union workers are less satisfied with their job than non-members, possibly because unions alert them to shortcomings and give ways to express concerns, further analysis of the Work Values Survey and of other surveys is necessary before we can accept this result as more than suggestive.

In sum, the evidence that the deterioration of the rights of employees to form organizations under the NLRA is something that the US should care about is strong in some areas and suggestive in others. Whtle there are many more factors behind the country's economic and social problems than the failure of the NLRA to protect the right to form unions, that failure has weakened the forces of economic reform when they are in greatest need. Yes, we should care.

4) Conclusion: Lessons for the future

One of my favorite questions in the Workplace Representation and Participation Survey that sought to find out what forms of collective organization, if any, workers wanted at their workplace (Freeman and Rogers, 2002, 2007) asked workers how they would like an employee organization to work "if it was your decision alone and everybody went along with it." Transformed to the 75th Anniversario symposium, the question would be if it was your decision alone and everybody went along with it, how would you modernize the NLRA and rebuild the US labor relations system? Here is my response in terms of 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. What is needed are punitive damages against firms for egregious law-breaking. One way to do this is to add punitive penalties for illegal activities in which the amounts charged rise sharply with the number and severity of offenses by the firm or union. Commit one or two unfair practices and the guilty party must pay X. Commit a lot of charges in a particular campaign or in other campaigns and the the guilty party must pay 2X, 3X 4X, or 10X and so on. Another way make the penalties more effective would be to allow the NLRB to have the "broad discretion to fashion broad remedies" 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 individual acts of law-breaking. The firm or union might cover the costs of individual penalties but having their law-breaking reported in the public record would likely have some deterrent effect.

2. Provide legal protection for supervisors to act neutrally in the NLRB election. Supervisors are the front-line in firm's campaigns to convince employees, many of whom signed cards asking for a union election, to oppose unions**.** A supervisor who strongly opposes unions should be free to express his or her views but so too should a supervisor who strongly favors unions be free to express their views or at the minimum to remain silent. Neither they or any other American should be forced with the threat of loss of their job to undertake actions against the legally protected rights of other citizens or to take a position against their own views. Just as Landrum-Griffin added a bill of rights for union members, NLRA should add a bill of rights and protection for supervisors in organizing campaigns. If an employer knows that supervisors can say "no" to a particularly egregious anti-union campaign, they are less likely to undertake such action. While it is always difficult to protect persons who speak out against the organization where they work the US has sought to give whistle-blower protections to those who speak out and should do something to develop some form of whistle-blower protection for

supervisors. Had a manager in Yale-New Haven been free to speak up early on its "methodical dismantling of the terms and commitments of the election principles agreement", that could have saved the Hospital 7-8 million dollars (the penalties it paid plus the payments to the consultants to run the anti-union campaign) and produced that genuine election 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. This is Professor Benjamin Sachs's plan to try to fix the broken election process (Sachs 2010). The plan borrows "from the model of early voting in U.S. political elections … (in which) voters cast their ballot by mail, or they go to a polling place and cast a ballot in the weeks leading up to election day." (Sachs 2009, p 2) The should reduce intimidation or pressure from management and union activists on workers to vote for or against union representation by allowing employees to vote outside the confines of the workplace at a time of their own choosing. It seems readily implementable: "The union would then give the National Labor Relations Board (or some neutral third-party established for this purpose) a list of the relevant employees. 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"[11] (Sachs, 2009, p2). There are likely to be some problems with such changes in voting venue, as the American Hospital Association has noted in its objection to the Board's considering the use of remote electronic voting technology,[12] but they must be weighed against the problems with current electoral process, which is far from the laboratory condition ideal.

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 it is legal for employers to set up committees that deal with issues related to productivity and profits but not about issues that improve the well-being of workers may have made sense in the 1930s but does not fit current reality. 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. American companies are practicing nonunion representation in the presence of legal restrictions. It is hard to imagine them doing otherwise. 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 (Rogers and Streeck, 1995). The country closest to the US in labor relations is Canada. Canada allows management may deal openly with groups of nonunion employees on any issue of concern, including the terms and conditions of employment, as long as they do not interfere with collective bargaining (Kaufman and Taras, 1999). The Canadian system works reasonably well (Taras, 1999). American employers who want their workers to have some

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11 Sachs also suggests using the voting technology used in union elections for airlines and railroads in these elections. Employees get a confidential voter identification number and then vote in their homes by either phone or the Internet. This also deserves attention from NLRB and Congress.

12 American Hospital Association (with other organizations) *www.aha.org/aha/letter/2010/100630-let-secureelecvoting.pdf*

representation at their workplace that falls short of collective bargaining and set up such systems should not have to break the law to do so. Make them 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 any 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 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, there would likely be wide variation in what states try, just as there has been wide variation in enacting right-to-work laws and in enacting state little LMRA laws. 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 and copy those and the labor system of the entire country would benefit. By tossing a perpetual "hot potato" to the states where people work and where managers run businesses, the Congress would do a better job in modernizing US labor law than it has done over the last half century and is likely to do in the next half century.

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