

Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies

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I. INTRODUCTION

A. Yes . . .

Are U.S. labor and employment law regimes constructed in the twentieth century viable for the twenty-first century? Yes.

I feel like a defector saying this in a symposium featuring bold new thinking on radical alternatives to the Wagner Act and to the traditional employment law standards-cum-sanctions model of labor law enforcement, which are not living up to their promise. Scholars and advocates *should* be thinking creatively, testing critiques and ideas to move the boundaries of legal analysis and policy choices.

The failings of the current system are manifest. The level of trade union density in the labor force stands at 11.3% of the labor force, down from one-third

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in the 1950s and 20% in 1983.¹ Exploitation of workers is up and employment law enforcement is failing.²

Taft-Hartley reforms and court decisions favoring employers have betrayed the promise of the Wagner Act.³ Corporate lobbyists water down tough legislative and regulatory proposals and enlist an army of lawyers to blunt enforcement efforts.⁴ Nonstandard employment relationships make it difficult to assign responsibility and apply enforcement actions.⁵ Court decisions on class actions make it harder to win justice through litigation.⁶

B. But . . .

Scholars should consider and propose new approaches, and significant contributions are mounting.⁷ But a labor and employment law system cannot be wrenched from its historical moorings. Ours correctly places the inherent conflict between workers and owners in a capitalist economy at the heart of the labor-management relationship.⁸ Labor and employment laws reflect decades of workers' struggles to defend their livelihoods and working conditions.⁹ They can

1. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2013 (Jan. 23, 2013), <http://www.bls.gov/news.release/pdf/union2.pdf>.

2. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 50 (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>; KIM BOBO, WAGE THEFT IN AMERICA 6–22 (rev. ed. 2011). For recent discussion, see EUNICE HYUNHYE CHO ET AL., NAT'L EMP'T LAW PROJECT, HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS 4 (2013), available at http://nelp.3cdn.net/f6fc363a30266f0cd3_pzm6id1xa.pdf.

3. For extensive discussion, see JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994, at 8–11 (1995); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533–40 (2002).

4. See COALITION FOR SENSIBLE SAFEGUARDS, DOWN THE REGULATORY RABBIT HOLE: HOW CORPORATE INFLUENCE, JUDICIAL REVIEW AND A LACK OF TRANSPARENCY DELAY CRUCIAL RULES AND HARM THE PUBLIC 7 (2013), available at <http://sensiblesafeguards.org/assets/documents/down-the-regulatory-rabbit-hole.pdf>; Peter Dreier & Donald Cohen, *The Texas Fertilizer Plant Explosion Wasn't an Accident*, HUFFINGTON POST, June 4, 2013, http://www.huffingtonpost.com/peter-dreier/texas-fertilizer-plant-explosion_b_3384739.html.

5. See, e.g., RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W. Stone & Harry Arthurs eds., 2013) (an edited volume with essays comparing nonstandard employment in the United States and other countries).

6. See Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 79–81 (2012); Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 455–60 (2012); Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 145 (2013).

7. See, e.g., Cynthia L. Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 377–83 (2005); Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2700 (2008).

8. For extensive discussion, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 87–96 (1983).

9. For a compelling historical account, see generally IRVING BERNSTEIN, THE LEAN YEARS:

only ever be partial gains, not final solutions, in a political economy in which capital wields so much power. They will not be changed easily or summarily, but only with difficulty and incrementally.

Sounds uninspiring, I know. We all want to do trail-cutting work rather than plow old ground. Our symposium is subtitled “After the Wagner Act.” But the NLRA is not going to go away. Nor are OSHA, FLSA, Title VII, and other laws setting labor standards and their enforcement mechanisms. They have deep roots that are not easily yanked up.

A decisive change favoring labor or management in the current labor law system is not likely. Labor advocates cannot get the Employee Free Choice Act (EFCA) and its “card check” certification method.¹⁰ Nor can they achieve repeal of the “Right-to-Work” provision of the NLRA, which allows states to outlaw freely negotiated contract clauses requiring dues-equivalent payments by nonmembers covered by a union’s collective bargaining agreement with an employer.¹¹ Same for the “employer free speech” clause, which lets management launch aggressive, intimidating campaigns against employees’ union-organizing efforts,¹² and for the “secondary boycott” provision prohibiting interunion solidarity action.¹³

Management can’t get its prizes, like a ban on voluntary card-check certification¹⁴ or a national right-to-work law¹⁵ or nullifying the union’s role as employees’ exclusive representative.¹⁶ Labor can’t get a cost-of-living escalator in the federal minimum wage;¹⁷ management can’t change overtime laws to

A HISTORY OF THE AMERICAN WORKER, 1920–1933 (1960) (describing the weakness of the American labor movement in the 1920s); IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–41* (1970) (highlighting the labor movement’s eventual gains under the New Deal).

10. Partisans for and against EFCA created a mountain of advocacy literature. For examples of literature from the Pro-EFCA side, see *Employee Free Choice Act (EFCA)*, LEADERSHIP CONF., <http://www.civilrights.org/workers/efca/> (last visited Apr. 7, 2014); *Turn Around America: Enact the Employee Free Choice Act*, AFL-CIO (Nov. 13, 2008), <http://www.aflcio.org/About/Exec-Council/EC-Statements/Turn-Around-America-Enact-the-Employee-Free-Choice-Act>. On the anti-EFCA side, see LITTLER MENDELSON, P.C., *THE EMPLOYEE FREE CHOICE ACT: A CRITICAL ANALYSIS* (Robert J. Battista et al. eds., 2008), available at <http://www.shrm.org/hrdisciplines/laborrelations/articles/Documents/Free%20Choice%20Act.pdf>; *Card-Check Agreements: Bad for Employees and Small Business*, NAT’L FED’N INDEP. BUS., <http://www.nfib.com/advocacy/item?cmsid=48840> (last visited July 22, 2013). For a dispassionate account, see JON O. SHIMABUKURO, CONG. RESEARCH SERV., *THE EMPLOYEE FREE CHOICE ACT* (2011), available at http://assets.opencrs.com/rpts/RS21887_20110112.pdf.

11. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (2012); see, e.g., Estlund, *supra* note 3, at 1532–40; Sachs, *supra* note 7, at 2685–86.

12. 29 U.S.C. § 158(c).

13. *Id.* § 158(b)(4).

14. See Union Coercion Prevention Act, H.R. 1815, 113th Cong. (2013).

15. See National Right-to-Work Act, H.R. 946, 113th Cong. (2013).

16. See Rewarding Achievement and Incentivizing Successful Employees Act, H.R. 4385, 113th Cong. (2013).

17. See Fair Minimum Wage Act of 2013, H.R. 1010, 113th Cong. (2013).

substitute compensatory time off in place of overtime pay for nonexempt employees.¹⁸ All these are perennial proposals with high-sounding titles that go nowhere. For better or worse, we are stuck with the infrastructure of the current labor and employment law system.

But we must be careful not to be so frustrated with problems and so enamored of novelty that we undermine hard-won foundations in our labor law system. Scrapping the NLRA and sanctions-based employment laws for untested alternatives could put workers and unions in a deeper hole. Instead of giant leaps in reforming labor and employment laws, we have the hard, unromantic job of making small steps forward.

Senator Wagner and the Congress elected in 1934 put labor law on solid pillars: the right to organize and bargain, the *protection* of these rights by defining and prohibiting unfair labor practices, trade union independence from management, exclusive representation, employers' duty to bargain, the right to strike, and other core features of the NLRA.¹⁹ In the employment law arena, statutes setting strong standards and backing them up with tough enforcement must remain part of a system designed to deter would-be violators and punish wrongdoers. Let's talk about how to restore their effectiveness rather than jettisoning them.

Section II of this Essay discusses labor advocates' unsuccessful effort to have Congress adopt the Employee Free Choice Act. EFCA would replace (at unions' option) NLRB secret ballot elections with the "card check" method of union certification. Under card check, employers would be compelled to recognize and bargain with unions when a majority of workers in a bargaining unit signed cards authorizing the union to bargain on their behalf. This Section also describes significant union organizing victories using the NLRB election system. Finally, it makes suggestions for "half-a-loaf" administrative and legislative reforms in place of EFCA's all-or-nothing allure.

Section III offers a contrarian, "glass-half-full" account of the state of the labor movement. It cautions against a too-dire analysis, which risks becoming a self-fulfilling prophecy. Instead, this section suggests that the labor movement is stronger than it appears to be, and proposes strategies for more successful organizing. Section IV concludes the Essay with a discussion of the relationship between the established labor movement and the myriad new worker advocacy groups taking shape in industries and regions around the country.

18. See Working Families Flexibility Act of 2013, H.R. 1406, 113th Cong. (2013).

19. This is not to say that everything in the Wagner Act was right. For example, the exclusion of farmworkers from the Act's protections was something wrong at the beginning.

II. THE EFCA DETOUR AND GETTING BACK ON TRACK

A. Card Check Versus NLRB Elections

Pushing for the EFCA was a strategic error. The needed sixty votes in the Senate were never going to materialize, even with sixty Democrats. Labor insiders understood the problem with the NLRB system. But it was impossible to sway public opinion to favor card-check certification over secret ballot elections, no matter how chilling the horror stories about employers' intimidation that advocates could muster and no matter how clearly they explained why labor board elections are not analogous to political elections.²⁰ The aura of a secret-ballot election gave the employer side an undeserved but unshakeable advantage in the hearts-and-minds battle.²¹

Unions prevail in well over half of all NLRB elections, so the system is not totally stacked. In the past five years union, win rates in NLRB elections have ranged from 56% to 69% (63% in 2012).²² And despite a modest increase in nonstandard employment relationships, we are not looking at a new precarious labor market engulfing twenty-first-century workers.

Temporary agency staff employment in the United States was the same in 2012 as it was fifteen years earlier in 1997.²³ Employee tenure in 2012 (defined as median years on the job with current employer), at 4.6 years, was 25% longer than it was ten years earlier in 2002, at 3.7 years.²⁴ There were 14.6 million self-employed workers in the United States in 2013 (10% of the labor force), fewer than the 15.25 million in 2003 (11% of the labor force).²⁵ In sum, the vast majority of American employees still show up at work for a single employer at their usual worksite for a regularly scheduled workweek. If they are going to join unions, it will mostly be through an NLRB election under the NLRA.

20. See GORDON LAFER, AMERICAN RIGHTS AT WORK, NEITHER FREE NOR FAIR: THE SUBVERSION OF DEMOCRACY UNDER NATIONAL LABOR RELATIONS BOARD ELECTIONS 10–12 (July 2007), available at <http://pages.uoregon.edu/lerc/public/pdfs/NeitherFreeNorFair.pdf>; James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IND. L.J. 147, 152–53 (2012).

21. Even a prominent liberal, prolabor former senator and 1972 Democratic Party presidential candidate, George McGovern, expressed opposition to EFCA because it allowed unions to avoid secret ballot elections. See George McGovern, *My Party Should Respect Secret Union Ballots*, WALL STREET J., Aug. 8, 2008, at A13.

22. See Michelle Amber, *Number of NLRB Elections Held in 2012 Increased Somewhat from Previous Year*, DAILY LAB. REP. (BNA) No. 98, at C1 (May 21, 2013).

23. See *Data and Research: Annual Trends in Temporary Help Services*, AM. STAFFING ASS'N, <http://www.americanstaffing.net/statistics/staffingsurvey.cfm> (last visited July 23, 2013).

24. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure in 2012* (Sept. 18, 2012), <http://www.bls.gov/news.release/pdf/tenure.pdf>.

25. See STEVEN F. HIPPLE, *SELF-EMPLOYMENT IN THE UNITED STATES*, (forthcoming) (on file with author).

B. Organizing Success in NLRB Elections

Instead of mandatory card check, unions should push employers for agreements on fair ground rules for elections—then go ahead with secret ballots. This is how 30,000 school bus drivers around the country gained bargaining rights with the Teamsters in the past four years in First Student, the nation's biggest private school bus contractor.

First Student is the American subsidiary of UK-based FirstGroup plc, that country's largest private transport company. It is the largest private school bus transportation contractor in the United States, serving hundreds of local school districts who choose to contract out with private firms for student transportation between their homes and schools. FirstGroup entered the U.S. market in the late 1990s when it bought a U.S.-based school bus contractor and established First Student, Inc.

FirstGroup's domestic workforce was represented by the Transport and General Workers Union (T&G). Under pressure from the T&G, FirstGroup had adopted a corporate social responsibility policy that referenced international human and labor rights. Top company management made declarations at Annual General Meetings (AGMs—annual shareholders' meetings) pledging full support for International Labour Organization (ILO) core labor standards and ILO conventions on freedom of association.

But in the United States, First Student management failed to apply these principles. Instead, they launched aggressive, threat-filled antiunion campaigns wherever First Student drivers and mechanics tried to organize, contrary to international standards and to UK management's policy and often in violation of the NLRA.²⁶

A key part of the Teamster campaign to organize the bus drivers at First Student was to convince the parent company to honor its corporate responsibility policy in the United States. Working closely with the T&G, the Teamsters engaged in an extensive campaign that included meetings, public forums, and other activities involving financial backers of the company, members of Parliament, and others. The activities took place in both the United States and England and helped focus attention on problems with First Student's operations in the United States, including management's failure to live up to the company's corporate responsibility policy.²⁷

In 2008, First Student changed course. The company pledged noninterference and no reprisals in employees' organizing efforts, and compelled

26. See LANCE COMPA ET AL., INT'L BROTHERHOOD OF TEAMSTERS, FIRSTGROUP'S NEUTRALITY POLICY: FAILED IMPLEMENTATION 2 (2007), available at <http://www.schoolbusworkersunited.org/storage/FirstGroupNeutralityReport.pdf>.

27. For a description of the international trade union campaign, see Martin Mayer, *Transatlantic Winning Formula*, TRANSPORT INT'L., July–Sept. 2009 (U.K.), at 22, 23, available at [http://www.itfglobal.org/files/extranet/-1/15834/T136Eng inside.pdf](http://www.itfglobal.org/files/extranet/-1/15834/T136Eng%20inside.pdf).

local managers to behave accordingly. An effective enforcement mechanism accompanied this strong neutrality policy.²⁸ Since then, more than 30,000 bus drivers in First Student locations around the United States have chosen union representation in secret-ballot elections conducted by the NLRB. In 2011, the company and the union negotiated a nationwide master collective agreement setting basic conditions of employment for all workers and guaranteeing freedom of association.²⁹

Other unions have made organizing breakthroughs using the NLRB election system. More than 10,000 nurses in eighteen Florida hospitals won NLRB elections with the National Nurses United (NNU) and Service Employees International Union (SEIU). The organizing victories came pursuant to agreements between the unions and two large hospital systems, Hotel Corporation of America (HCA) and Tenet hospitals, that set ground rules on neutrality and time limits to file for NLRB elections.³⁰

Through a sustained “Justice at Smithfield” campaign, bringing together labor, civil rights, human rights, workplace safety, and other community voices, the United Food and Commercial Workers (UFCW) reached a historic agreement in 2008 with Smithfield Foods to hold an NLRB election that would end a decade of organizing drives being smashed by unfair labor practices.³¹ The agreement allowed workers at the company’s Tar Heel, North Carolina plant to exercise organizing rights in a climate free of intimidation.³²

Negotiating ground rules for an election, Smithfield and the union agreed to run a positive campaign, free of attacks and invective. The company allowed employees to hear from union representatives inside the factory in nonwork areas. Management’s acceptance of previously vilified UFCW representatives on company property sent a powerful psychological message to workers that the company could live with the union, not shut down because of the union.

Under these conditions, a majority of the 5000 workers voted in favor of

28. For an extended account, see William B. Gould IV, *Beyond Labor Law: Private Initiatives To Promote Employee Freedom of Association in the Obama Era*, 87 IND. L.J. 69, 79–90 (2012). Professor Gould was the Independent Monitor engaged by FirstGroup to administer its freedom of association policy. *Id.* at 84.

29. See Ryan Gray, *Teamsters, First Student Sign ‘Historic Agreement’ for School Bus Driver Labor*, SCH. TRANSP. NEWS (June 6, 2011), <http://www.stnonline.com/home/latest-news/3417-teamsters-first-student-sign-historic-agreement-for-school-bus-driver-labor>.

30. See Micah Heilbrun, *Florida Healthcare Providers See Dramatic Rise in Organizing Activity*, LITTLER HEALTHCARE EMP. COUNS. BLOG (Feb. 23, 2012), <http://www.healthcareemploymentcounsel.com/2012/02/23/florida-healthcare-providers-see-dramatic-rise-in-organizing-activity>.

31. For a detailed account of Smithfield management’s antiunion campaign and labor law violations, see HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS* 88–100 (2005), available at <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

32. See Steven Greenhouse, *Plant and Union Settle Lawsuit*, N.Y. TIMES, Oct. 28, 2008, at A13.

UFCW representation in a secret-ballot NLRB election in December 2008.³³ Good faith bargaining ensued, and the parties reached a collective bargaining agreement in 2009 with no further disputes.³⁴

In another example, U.S. management at an IKEA supplier factory in Virginia first launched an aggressive antiunion campaign when the plant's 300 workers tried to form a union in 2009. Management's tactics included captive-audience meetings, one-on-one supervisor pressure sessions, and antiunion films and videos. Working with the BWI, UNI and IndustriALL global unions, along with Swedish unions, the workers and their machinists union (IAM) built an international support alliance invoking ILO standards.³⁵

Under the pressure of the global alliance and its demands for adherence to international labor standards, IKEA's top leadership instructed its American management to halt the antiunion campaigning. In 2011, workers won an NLRB election by a 3-1 margin.³⁶ In 2012, protected by the same application of international standards, hundreds more workers at three IKEA distribution centers in Maryland, New Jersey, and Georgia joined them, voting by a solid majority in NLRB elections in favor of IAM representation.³⁷

C. Organizing the Old-Fashioned Way

They key to union success in NLRB elections is making the vote a simple ratification of a union that workers have already formed and put into action, not a speculative vote to see if they have a union or not. This means that the main task of unions is not changing the law, but being better organizers in the time-tested sense. They have to understand that workers organize unions; unions don't organize workers. In this way, organizers can concentrate on identifying and nurturing inside worker leaders, not imposing their version of leadership from the outside.

One place for unions to start is by hiring and developing effective people as staff organizers, people who can build workers' confidence through home visits and personal relationships rather than better-crafted leaflets (or e-mail blasts, in

33. For an account of the election, see David Bacon, *Unions Come to Smithfield*, AM. PROSPECT (Dec. 17, 2008), <http://prospect.org/article/unions-come-smithfield>.

34. See Catherine Pritchard, *Union, Smithfield Put Differences in the Past*, FAYOBSERVER.COM (Sept. 2, 2012, 7:45 AM), <http://www.ellinghuysen.com/news/articles/136324.shtml>.

35. For a description of the international campaign, see Norm Gleichman, *A Union Perspective on Global Framework Agreements and Corporate Social Responsibility Codes* 11–12 (2012) (unpublished paper), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2012/05/international_labor_employment_law_committee_midyear_meeting/mw2012int_gleichman.authcheckdam.pdf (prepared for the May 2012 Midyear Meeting of the ABA Committee on International Labor and Employment Law). A personal note: a friend and colleague of many years, a great labor lawyer, and a wonderful community theater actor, Norm Gleichman died accidentally in January 2013.

36. See Stuart Pfeifer, *Workers at IKEA Factory OK Union*, L.A. TIMES, July 29, 2011, at B2.

37. See Bruce Vail, *Machinists Rapidly Unionizing Ikea Warehouses: 3 Down, 2 To Go*, WORKING THESE TIMES (Dec. 10, 2012, 1:15 PM), http://inthesetimes.com/working/entry/14275/machinists_union_scores_new_victories_in_ikea_warehouse_organizing_campaign.

this day and age) or bombastic oratory at meetings.³⁸ Effective organizing unions also recruit a good mix of organizers from the workplace floor and organizers with a university background.³⁹

Building a strong inside-the-workplace committee and making the union visible and active inside the workplace shows hesitant employees that they'll have strong leadership. In the period leading up to an NLRB election, unions should make more use of "section 7 rights" at the workplace. Section 7 of the NLRA protects all workers covered by the Act, whether or not they have a union, from management retaliation because of actions "for mutual aid or protection." This means employees can engage in collective actions, such as lunchtime meetings, presenting group-based demands to managers, even brief work stoppages to create a "we are the union" spirit.⁴⁰ Just as important in the age of social media, the same protections extend to workers' online communications, as long as they involve collective workplace concerns.⁴¹

Building alliances is equally vital for union organizing. Workers cannot achieve their goals alone, even with high degrees of union strength and solidarity, in a political and economic system stacked against them. It's also important now to develop a network of community support and pressure coming from human rights, civil rights, immigrant rights, religious, feminist, and other movements in support of organizing efforts.⁴² And increasingly, with the growing presence of foreign-based multinational companies operating in the United States, unions and workers have to build international coalitions of labor rights advocates.⁴³

38. Veteran California-based trade unionist Jon Lepie makes a powerful case for the importance of union organizers' personal qualities and relationships of trust with workers for successful organizing. See Jonathan Lepie, *Is There a Winning Formula for Union Organizing?*, 26 EMP. RESPS. & RTS. J. 137 (2014).

39. For an account of the positive dynamic between "indigenous" trade union leaders and university-trained counterparts, see JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 50–52 (2010). For an exchange on the merits of university-educated organizers, see Lance Compa, *More Thoughts on the Worker-Student Alliance: A Reply to Steve Early*, 1 LAB.: STUD. WORKING-CLASS HIST. AM. 15, 16–24 (2004).

40. See Steven Greenhouse, *Fast-Food Workers Plan Second Strike for More Pay*, N.Y. TIMES, Apr. 4, 2013, at A22; Josh Eidelson, *Walmart Strikes Spread to More States*, SALON (Oct. 9, 2012, 6:40 AM), http://www.salon.com/2012/10/09/walmart_strikes_spread_to_more_states.

41. See OFFICE OF THE GEN. COUNSEL., NAT'L LABOR RELATIONS BD., MEMORANDUM OM 12–59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 4–5 (2012).

42. For discussion of alliance building in union organizing, see Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in *REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT* 62, 62–84 (Ruth Milkman & Kim Voss eds., 2004).

43. For a discussion of global labor organizing strategies, see generally Cathy Feingold, *Building Global Worker Power in a Time of Crisis*, 22 NEW LAB. F. 45 (2013) (providing examples of organizing that has occurred over borders, between formal and informal work sectors, in transitioning countries, and in the global workplace).

D. A Modest Reform Package

Instead of the political impossibility of radically supplanting the Wagner Act, a tight package of modest reforms within the Act's existing framework is more feasible. They can also lead to real gains for unions. Employers have enormous power and they are not going to cede anything except by dint of patient, persistent political struggle linking social movements to legislative reforms. "Half a loaf!" is not the most stirring slogan, but if we keep questing for the whole baguette, we are doomed to thin gruel.

We can start with a General Counsel and an NLRB that consistently enforce workers' rights under existing law. They can make expanded use of NLRA section 10(j), which authorizes the Board to seek immediate injunctive relief to get fired workers quickly back on the job, and expanded use of *Gissel* bargaining orders when employers' intimidation undermines unions' majority status.⁴⁴ They can expand the concept of the "bargaining unit" to encompass the rights and interests of contingent workers, temp-agency workers, contract workers, dependent contractors, and others involved in new occupations and industries.

Legislative reforms can be cast as measures providing fairness for workers rather than payoffs to unions. They might include:

- Access opportunities for workers to hear from union representatives inside the workplace under the same "nonwork area, nonwork time" principle that applies to employee activists, and proportional access when employers force workers into captive-audience meetings at the workplace, letting union representatives meet workers under equivalent circumstances.
- Tougher remedies giving victimized workers full back pay regardless of interim earnings, and substantial fines for repeat NLRA violators.
- First-contract arbitration where the employer is found to bargain in bad faith (not just when no contract is reached in good-faith bargaining—that was an overreach in EFCA).

We cannot separate this agenda from the politics. It will take a prolabor President willing to spend political capital, more than sixty Democrats in the Senate, and Democrats' retaking the House of Representatives to have a chance. And most important, a sustained movement from the base that creatively wields its "half-a-loaf" strategy.

III. STOP THE SELF-FLAGELLATION

A. The Allure of Pessimism

Labor advocates and scholar-advocates often feel like we won't be taken seriously unless we argue how awful things are. The more calamitous our analysis, the more our listeners will somberly nod and say we must be right, because we

44. NLRB v. Gissel Packing Co., 395 U.S. 575, 617–20 (1969).

appear so thoughtful and self-critical.⁴⁵ But we should cut back on the sky-is-falling discourse. It only feeds a defeatist dynamic.

Workers won't join a movement that constantly proclaims it is going down the tubes and going to disappear in ten years. Legislators won't pass proworker laws because they feel sorry for unions. Workers want to see power, and legislators need to feel power. We won't regain it by complaining.

B. A Glass Half-Full

We can't deny or minimize problems, challenges, and setbacks. But we often go too far in decrying unions' fate. The labor movement is stronger than it looks. Unions are a force in important regions and industrial sectors, still politically potent, and still bringing new groups of workers into their ranks.

For starters, a lot of good organizing is going on—see the discussion above about First Student, Florida nurses, Smithfield Foods, and IKEA. In 2012, 300,000 workers gained union representation through NLRB elections, among the million who have organized through NLRB elections in the past five years.⁴⁶ Many thousands have also organized under neutrality and card-check agreements that unions negotiated with employers willing to countenance such arrangements.⁴⁷

Most unions are doing an effective job at the bargaining table. Collective bargaining is still deeply rooted in transportation, communications, food processing, health care, manufacturing, retail, service, entertainment, hospitality, and many other sectors—even the public sector, notwithstanding recent travails in Wisconsin and elsewhere. The union wage premium—the percentage-higher wage earned by workers covered by a collective bargaining agreement—is 13.6 percent overall.⁴⁸ More than 83% of union members have health insurance at work, compared with 62% for nonunion workers.⁴⁹ More than 72% of union-

45. See, e.g., Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT, Sept.–Oct. 2012, at 18, 19–20, 28–29 (citing pessimistic views among several unnamed labor leaders while offering his own ideas for labor's rebirth); Richard Yeselson, *Not with a Bang, but a Whimper: The Long, Slow Death Spiral of America's Labor Movement*, NEW REPUBLIC: PLANK BLOG (June 6, 2012), <http://www.newrepublic.com/blog/plank/103928/not-bang-whimper-the-long-slow-death-spiral-americas-labor-movement>.

46. See Amber, *supra* note 22. The one million figure reflects the cumulative union organizing results reported annually by the BNA *Daily Labor Report*.

47. Exact numbers of workers organized under neutrality and card-check agreements cannot be determined because there is no systematic, authoritative source for such information, unlike with NLRB elections. Some analysts assert that more workers organize through such agreements than through NLRB elections; others argue that such agreements yield only a small portion of new union members. For a discussion, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 825–27 & nn.24–37 (2005); Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 171 (2009).

48. See LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 270 tbl.4.33 (12th ed. 2012).

49. *Id.* at 271 tbl.4.34.

represented employees have a pension plan, compared with 44% of unorganized workers.⁵⁰

The United States is a big country. Union density is in many ways a regional phenomenon. In New England, around the Great Lakes, on the West Coast, and in other states, union density is substantially greater than the national average of 11.3%. In thirteen states, including California, Illinois, Massachusetts, Michigan, New York, Pennsylvania, and Washington, the range is 15–25%.⁵¹

Official union density data are also skewed by counting in the labor force the millions of workers excluded by labor and employment laws from even the possibility of organizing and collective bargaining—self-employed workers, household domestic workers, low-level supervisors and managers, independent contractors who are really dependent on a single employer for their livelihoods, public employees in states that prohibit collective bargaining, employees of religious bodies, temporary labor supply agency employees dispersed among many workplaces (who nominally can organize but practically cannot), and others—even college professors who are “Yeshivaed.”⁵²

Taking these out of the 140 million employees in the denominator would substantially increase union-represented workers’ percentage of employees who *can* organize.⁵³ If excluded workers could form unions even at the same suppressed rate as workers covered by labor laws protecting the right to organize, at least three million new union members would enter the labor movement. For unions, attacking the “exclusions” problem holds more promise than trying to revive the Employee Free Choice Act.

Most headlines cited a further slight decline in union density after the BLS released its January 2013 report.⁵⁴ But California saw a substantial increase, led largely by health care employees and Latino workers.⁵⁵ Federal employee unions

50. *Id.*

51. See Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Affiliation of Employed Wage and Salary Workers by State (Jan. 23, 2013), <http://www.bls.gov/news.release/union2.t05.htm>.

52. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (ruling that private university faculty are “managers” excluded from NLR protection of organizing and collective bargaining rights).

53. An exact figure cannot be established. Estimates include fifteen million self-employed workers, ten million managers and supervisors, five million public employees in states that prohibit collective bargaining, 4.6 million temporary agency workers, one million farmworkers in states that do not protect their organizing rights, and millions more scattered in other occupations and sectors. The last comprehensive effort at calculating excluded employees put the number at thirty-two million, probably an underestimate. See U.S. GEN. ACCOUNTING OFFICE, GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS (2002), available at <http://www.gao.gov/new items/d02835.pdf>.

54. See, e.g., Melanie Trottman & Kris Maher, *Organized Labor Loses Members*, WALL ST. J., Jan. 24, 2013, at A6.

55. See Alana Semuels, *California Unions Grow, Bucking U.S. Trend*, L.A. TIMES, Jan. 24, 2013, at A1.

grew, too, surely helped by a union-sympathetic Obama administration.⁵⁶ As the health care sector continues to grow and policy changes increasingly squeeze health care workers—including doctors—the organizing option will grow in importance. As the Latino population grows, so will union membership.⁵⁷ And immigration reform that brings millions of undocumented workers out of legal shadows could lead to solid union growth.⁵⁸

Unions are a political force in many states, too. President Obama owes his re-election in part to on-the-ground efforts of trade unionists in Ohio, Pennsylvania, Florida, and other battleground states. Unions are also a fighting force for social policies benefiting all workers, not just union members. They are leading movements to raise the minimum wage, protect pensions, secure universal health insurance, reform corporate governance, ensure labor protections in trade agreements, and more.

This is not meant to minimize the challenges unions face. Obviously there is no going back to a Golden Age of stable jobs in huge mass production sites making union organizing easy. Unions have to respond to workers' need for "somebody to back me up" in a more fluid economic environment.

IV. CONSERVING THE CORE AND BUILDING ALLIANCES FOR LABOR REVIVAL

The labor movement's embrace of nontraditional sectors of the workforce is a starting point for trade union revival. Dozens of "worker centers" have sprung up around the country in the past decade to serve needs of immigrant workers and other precarious/nonstandard employees.⁵⁹ The dynamic of their organizing and advocacy efforts within and outside the traditional labor law system has given rise to creative new scholarship and proposals for labor law reforms.⁶⁰

New forms of collective action have emerged around the country with a dizzying array of names and acronyms: Freelancers' Union, National Day

56. See Joe Davidson, *Federal Unions Grow as Other Labor Organizations Decline*, WASH. POST, Jan. 29, 2013, at B4.

57. See Kathleen Miles, *Unions Gain Latino Members, Could Be Unions' Saving Grace*, HUFFINGTON POST (Jan. 25, 2013, 3:01 AM), http://www.huffingtonpost.com/2013/01/25/unions-latino-members-saving-grace_n_2543486.html.

58. See Beth Reinhard, *Why Labor Has Learned to Love Immigration Reform*, NAT'L J. (Jan. 31, 2013), <http://www.nationaljournal.com/politics/why-labor-has-learned-to-love-immigration-reform-20130131>.

59. See JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 49–51 (2006); see also Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, 20 NEW LAB. F. 44, 46–51 (2011).

60. See, e.g., Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325, 328–52 (2013); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 272–323 (2009); Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 467–70 (2006); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 400–02 (2004).

Laborers' Organizing Network (NDLON), National Domestic Workers Alliance (NDWA), National Guestworkers Alliance (NGA), Food Chain Workers Alliance (FCWA), United Workers Congress (UWC, formerly Excluded Workers Congress), and local and regionally based groups like Restaurant Opportunities Centers (ROCs) in many cities, Coalition of Immokalee Workers (CIW), New Orleans Workers' Center for Racial Justice (NOWCRJ), Southwest Workers Union, and more.

Many of these organizations are still in a stage between fledgling and full flight, but they have already made important marks and won impressive victories. And they are moving from analysis and criticism to action: witness the surge of collective action by fast-food workers, warehouse workers, Wal-Mart workers, and others around the country.

These are exciting new developments. But they should not lead us to write off trade unions built by workers over the past century as dinosaurs in a romantic search for new species of protounions.⁶¹ The new forms of collective action still have major challenges becoming enduring organizations with experienced leadership and secure financing.

Unions recognize the importance of nourishing these new formations. The AFL-CIO and much of the established labor movement are a major source of support, notwithstanding their own financial constraints. All the more reason to preserve the strengths of a labor law system that gets unions to the bargaining table to negotiate with stable employers for good wages, benefits, and working conditions, and that allows unions to act politically to protect hard-won legislative gains.

American history reflects a long cycle of trade union decline and growth. We hear regular reports of the death of the labor movement, usually with some variation of the argument that unions were needed in the bad old days, but modern, enlightened management and the need for economic competitiveness make them obsolete. Then workers fed up with bosses' overreaching decide to find new ways to defend themselves.

An oft-quoted example is the declaration in 1932 by George Barnett, the incoming president of the American Economics Association, that he saw "no reason to believe that American trade unionism will so revolutionize itself . . . as to become in the next decade a more potent social influence than it has been in the past decade."⁶² Instead, the labor movement tripled in size in the next decade.

61. See, e.g., Arun Gupta, *What Occupy Taught the Union: SEIU and Others Are Embracing the Movement that Has Succeeded as They Have Faded*, SALON (Feb 2, 2012, 5:30 PM), http://www.salon.com/2012/02/02/occupys_challenge_to_big_labor.

62. See, e.g., Eduardo Porter, *Unions' Past May Hold Key to Their Future*, N.Y. TIMES, July 18, 2012, at B1; see also Bruce E. Kaufman, *The Future of U.S. Private Sector Unionism: Did George Barnett Get It Right After All?*, 22 J. LAB. RES. 433, 434 (2001) (using the Barnett quote as the basis for a thoughtful analysis concluding that Barnett was "half right" in the long run, and that trade union

History does not repeat itself, and conditions now are not the same as those spurring the great organizing drives of the 1930s and 1940s. Still, American workers have shown deep resourcefulness over long cycles of trade union growth, decline, and regeneration. The importance of freedom of association, the impulse to stick together, and the need for “somebody to back me up” in the face of employer power never disappear. The labor movement built by workers over the past century is still a strong base for working class advances in years to come.

resurgence depends on “a fundamental shift in government labor policy favorable to organized labor”).

