POLICY ESSAY

REPRESENTATION WITHOUT INTIMIDATION: SECURING WORKERS' RIGHT TO CHOOSE UNDER THE NATIONAL LABOR RELATIONS ACT

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Union representation elections are often conducted in an environment of intimidation and coercion, denying employees the freedom to choose whether they wish to be represented by a union. In the United States, both unions and employers have engaged in unfair labor practices in pursuit of their own agendas—misleading employees about the consequences of choosing union representation and, in extreme cases, threatening employees with physical harm. This Policy Essay by Senator Arlen Specter and Eric Nguyen argues that current federal labor law fails to address the problem of unfair labor practices in union representation elections. It discusses how current law provides only toothless remedies that do not deter abuses, and how implementation of these limited remedies by the National Labor Relations Board is plagued by delays. The Essay then surveys the experiences of Canada, New Zealand, and the United Kingdom to illuminate how aspects of foreign labor laws could reduce procedural delays, lead to more responsive unions, and encourage voluntary negotiation between employers and unions if implemented in the United States. The Policy Essay concludes by posing questions that Congress should address while developing new legislation to secure employees' right to choose union representation.

"American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose," warned an influential article two decades ago.[1] Although the sharp decline in union membership in the United States over the past fifty years is due in part to increases in the mobility of capital,[2] and in part to the proportion of higher-paying, white-collar jobs,[3] the ranks of American unions have been

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[1] Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983).

[2] Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 363 (2002).

[3] *Id.* at 364–65; *see also* Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 956–58 (1991).

depleted far more quickly than those in other industrialized nations.[4] Indeed, union membership has dropped from approximately thirty-three percent of workers in 1955 to only twelve percent in 2007.[5] Scholars have argued that worker organization has been suppressed by employer hostility[6] and by shortcomings in the remedies provided by the National Labor Relations Board ("NLRB" or "Board") in the face of that hostility.[7] As one of this Article's authors highlighted in his remarks on the floor of the Senate, union representation elections today are often conducted in an environment of intimidation and coercion, and federal labor law provides toothless remedies that fail to deter further abuses by union organizers and employers alike.[8] We embrace the conclusion of scholars who contend that "what we need is major surgery on the legal procedure through which employees make their choice about union representation."[9] The most critical focus of this reform should be protecting the right of employees to freely choose whether they wish to be represented.

Although unions[10] and business organizations[11] have each mobilized to cast the other in the worst possible light, they both have been guilty of coercion from time to time. Republicans and Democrats have hewn to their party lines and to overreaching rhetoric on labor law reform. Republicans have proclaimed the absolute sanctity of the secret ballot, alleging that union intimidation tactics distort the results of union authorization procedures that rely on open support.[12] Democrats have decried the unfairness of the secret

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[4] Befort, *supra* note 2, at 371; *see also* WILLIAM B. GOULD IV, AGENDA FOR REFORM 14–15 tbl.2.1 (1993) (illustrating trends of union membership in various countries beginning in the 1950s).

[5] *See* Gould, *supra* note 4; Press Release, Bureau of Labor Statistics, Union Members in 2007 (Jan. 25, 2008), http://www.bls.gov/news.release/union2.nr0.htm.

[6] *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 230–39 (1984).

[7] *See* Weiler, *supra* note 1, at 1776–81.

[8] *See* 152 CONG. REC. S8380 (daily ed. June 26, 2007) (statement of Sen. Arlen Specter).

[9] Weiler, *supra* note 1, at 1770.

[10] *See, e.g.*, James Sherk, *Secret Voters*, NAT'L REVIEW ONLINE, June 21, 2007, http://www.nationalreview.com (select "Search;" select "National Review Online;" enter "James Sherk" (including quotation marks); click on "Secret Voters") (AFL-CIO "claims employers systematically intimidate workers into voting against a union by illegally firing pro-union workers. It alleges this happens in one quarter of all organizing elections," however "[g]overnment statistics paint a completely different picture. [NLRB] records show that employers illegally fire workers in fewer than one in fifty election campaigns.").

[11] *See, e.g.*, Press Release, Nat'l Fed'n of Indep. Bus., Small Business Urges Committee to Oppose Employee 'No Choice' Act Resolution, http://www.nfib.com/object/IO_32699.html (last visited June 28, 2007) (arguing that without secret ballot elections "[e]mployees would be subject to intimidation, misinformation, coercion and other union tactics that would ultimately pressure them" into supporting the union) (quoting NFIB/Michigan State Director Charles Owens).

[12] *See, e.g.*, 152 CONG. REC. S8396 (daily ed. June 26, 2007) (statement of Sen. John Ensign (R-Nev.)) ("Ensuring that employees maintain the right to secret-ballot elections protects those who would choose to not unionize from undue peer pressure, public scrutiny, coercion, and possible retaliation.").

ballot, where employers can control what information employees receive.[13] It is our hope that common ground can be found in supporting new legislation that addresses three problems that hinder the ability of employees to choose union representation without intimidation: (1) toothless remedies that fail to deter abuses by both unions and employers; (2) administrative procedures that cause inordinate delays; and (3) an ineffectual NLRB. Clear rules and streamlined procedures will help to separate the vast majority of compliant employers who act in good faith from egregious violators of our labor laws, while effective remedies will reduce the incentive to engage in further such violations.

We present our analysis in four parts. In Part I, we outline the history of American labor law and describe the state of the law today. In Part II, we illustrate abuses under current law by both unions and employers, and the NLRB's inability to deal effectively with the resulting disputes. In Part III, we provide an overview of other countries' experiences with alternative labor laws. Finally, in Part IV, we highlight questions that must be addressed before Congress is able to pass new legislation that would secure employee rights by enhancing remedies, by reducing delays and inefficiency within the NLRB, and by deterring bad conduct by unions and employers.

I. American Labor Law

In 1935, Congress passed the National Labor Relations Act.[14] The NLRA sought to guarantee workers the "full freedom of association, self-organization, and designation of representatives of their own choosing."[15] According to one scholar, the legislation "established the most democratic procedure in United States labor history for the participation of workers in the determination of their wages, hours, and working conditions."[16] In 1937, the Supreme Court's decision that the Wagner Act passed constitutional muster[17] "inaugurated the modern era of American labor law."[18]

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[13] *See, e.g.*, 152 Cong. Rec. S8397 (daily ed. June 26, 2007) (statement of Sen. Reid (D-Nev.)) ("Big business wields tremendous power in secret balloting, and too often they use that power abusively. . . . Big business sets the work schedule and terms of employment. And, big business has a captive audience . . . .").

[14] National Labor Relations Act (NLRA) of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2000)).

[15] NLRA of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449–50 (codified as amended at 29 U.S.C. § 151 (2000)).

[16] James A. Gross, *Worker Rights as Human Values: Wagner Act Values and Moral Choices*, 4 U. Pa. J. Lab. & Emp. L. 479, 480 (2002) (citing James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 Chi.-Kent L. Rev. 351 (1998)).

[17] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the Wagner Act as within the Congress's commerce power).

[18] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1533 (2002).

A decade later, the Taft-Hartley Act[19] amended the NLRA and began to curtail the newfound freedom of unions.[20] Among other things, Taft-Hartley ensured that employers would be guaranteed free speech rights during any organizing activity,[21] it prohibited closed shops,[22] and it required the Board to conduct a secret ballot election if the employer had doubts about employees' selection of a representative.[23] The Board, without direction from Congress, also moved "to extinguish employers' obligations to bargain with unions that had not won [a majority in] Board-supervised elections."[24] Yet, union strength persisted, with membership reaching its peak in 1954.[25]

Congress subsequently passed the Labor Management Reporting and Disclosure Act of 1959,[26] often called the Landrum-Griffin Act, in order to curtail union corruption.[27] Enacted in response to hundreds of days of hearings and over 20,000 pages of testimony on union corruption,[28] the Landrum-Griffin Act gave union officials fiduciary responsibility over members' funds, increased financial transparency, and required honest internal union

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[19] Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–44, 151–167, 171–87, 557 (2000)).

[20] *See* Befort, *supra* note 2, at 357; *see generally* Michael J. Nelson, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 GEO. MASON L. REV. 527 (2000).

[21] *See* Taft-Hartley Act sec. 101, § 8(c) (codified as amended at 29 U.S.C. §§ 158(c) (2000)); Gross, *supra* note 16, at 482–83.

[22] *See* Taft-Hartley Act sec. 101, § 8(a)(3), (b)(2) (codified as amended at 29 U.S.C. § 158(a)(3), (b)(2) (2000)); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 397 (1984) (defining closed shop clauses in labor contracts as "clauses that required full union membership as the price of employment").

[23] *See* Taft-Hartley Act sec. 101, § 9(c) (codified as amended at 29 U.S.C. § 159(c) (2000)).

[24] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 513 (1993); *see id.* at 513–14 n.80 ("Initially, the Board shifted its focus from the question of whether the union was the chosen representative when the employer refused to bargain to the question of the employer's motive in refusing to recognize the union. In *Joy Silk Mills, Inc.,* 85 N.L.R.B. 1263 (1949), *enforced as modified,* 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951), the Board signalled [sic] the new direction of the law. The Board posed the question as 'whether an employer is acting in good or bad faith at the time of the refusal,' and it held that the employer could refuse to bargain based on a 'good faith doubt of the Union's majority' but not in order to 'gain time within which to undermine the Union's support.' *Id.* at 1264–65.").

[25] *See* 152 CONG. REC. S8380 (daily ed. June 26, 2007) (statement of Sen. Specter).

[26] Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401–531 (2000)).

[27] *See id.* § 2(b)–(c) (codified at 29 U.S.C. § 401(b)–(c)) ("The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility . . . as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives. . . . The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act . . . .").

[28] *See* Nelson, *supra* note 20, at 533.

elections.[29] Although important legislation affecting employees, such as laws to protect pensions[30] and worker safety,[31] has been passed since the Landrum-Griffin Act, very little has been done to respond to reports that unions and employers have taken advantage of current law in order to manipulate the workplace. Despite the clear "ineffectuality of American labor law," as one professor of labor law claims, "a longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959."[32] The "basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years."[33]

The clarity of the problem and the persistence of the political impasse have been nowhere more evident than within the halls of Congress. Employers and organized labor have each been able to block any significant amendment supported by the other.[34] Between 1961 and 1978, Congress held over sixty days of hearings on the NLRA.[35] In 1977, President Carter asked for labor law reform legislation and had his suggestions incorporated into H.R. 8410, which was debated for twenty days in 1978.[36] Yet political positioning stymied policy reform, and the bill died in the Senate after a five-week filibuster and six failed attempts at cloture.[37] That process—thirty years ago—was the last time the Senate took up the challenge of reforming the NLRA.

Within the ossified system, the Supreme Court and the Board have struggled over how best to determine whether employees have indeed selected a union to be their "exclusive representative."[38] The Wagner Act did not specify how the NLRB was to measure worker support for a union. The law simply instructs the Board to recognize a union as the employees' exclu-

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[29] *See id.* at 542–558.

[30] *E.g.*, Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

[31] *E.g.*, Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

[32] Estlund, *supra* note 18, at 1530 (referring to the 1947 passage of Taft-Hartley as the last major change).

[33] *Id.*

[34] *See id.* at 1540.

[35] *See, e.g.*, *Administration of the Labor-Management Relations Act by the NLRB: Hearings Before the Subcomm. on National Labor Relations Board of the H. Comm. on Education and Labor*, 87th Cong. (1961); *Oversight Hearings on the National Labor Relations Board: Hearing Before the Subcomm. on Labor-Management Relations of the H. Comm. on Education and Labor*, 94th Cong. (1975).

[36] *See, e.g.*, 124 CONG. REC. 6586 (1978), 124 CONG. REC. 11,808 (1978); 124 CONG. REC. 15,639 (1978); 124 CONG. REC. 16,165 (1978); *see also* 152 CONG. REC. S8382 (daily ed. June 26, 2007) (statement of Sen. Specter).

[37] Estlund, *supra* note 18, at 1540; *see, e.g.*, 124 CONG. REC. 16,187 (1978) (recording two cloture motions); 124 CONG. REC. 18,398 (1978) (recording rollcall vote on cloture).

[38] *See* 29 U.S.C. § 159(a) (2000); *see generally* Sheila Murphy, *A Comparison of the Selection of Bargaining Representatives in the United States and Canada:* Linden Lumber*,* Gissel*, and the Right to Challenge Majority Status*, 10 COMP. LAB. L. & POL'Y J. 65, 69–75 (1988).

sive representative if it has been "designated or selected" by employees.[39] In circumstances where a union or an employee petitions the NLRB alleging that an employer has declined to recognize the union in spite of a majority of employees having signed cards authorizing the union, or when an employer files a petition alleging that its employees or a union have presented a claim to be recognized, there is a "question of representation."[40] In these cases, the Board must "direct an election by secret ballot" and "certify the results."[41] In uncontested cases, however, designation or selection of a representative need not be by secret ballot. In fact, early in the history of the NLRA, authorization cards, membership cards, or even the acceptance of strike benefits were all used by the NLRB as sufficient indicia that a majority of employees supported a union.[42] Although the NLRB announced in 1939 that the secret ballot was the preferred method of selection,[43] employers still may recognize a union if a majority of employees sign union cards.[44] In addition, unions that represent one group of employees increasingly ask the employer to agree to recognize the union as the representative of other groups of employees at other locations or in other bargaining units.[45]

Nevertheless, the secret ballot has become the standard method of selection. In its 1969 decision in *NLRB v. Gissel Packing Co.*,[46] the Supreme Court explained that it would be "closing [its] eyes to obvious difficulties" if it did not recognize that organizers sometimes mislead employees into thinking a simple card check would not be final.[47] NLRB practice, which the Court upheld, recognized these difficulties and allowed an employer to insist on a secret ballot election except when it had undermined the workplace environment to such a degree that a fair election was no longer possible.[48] In 1974, the Court in *Linden Lumber v. NLRB* further held that employers do not have to recognize a union based only on a collection of authorization cards from a majority of employees; they may insist on a secret ballot elec-

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[39] 29 U.S.C. § 159(a).

[40] 29 U.S.C. § 159(c).

[41] *Id.*

[42] Murphy, *supra* note 38, at 69–70.

[43] *Id.* at 70 (citing Armour & Co., 13 N.L.R.B. 567, 572 (1939)).

[44] *Id.* at 71. Recently, however, the NLRB has emphasized that card checks are less reliable than secret ballot elections. *See* Dana Corp., 351 N.L.R.B. No. 28 (Sept. 29, 2007). *Dana Corp.* modified a long-standing recognition-bar doctrine that had made it difficult for employers or rival unions to challenge voluntary recognitions. *See id.*, slip op. at 4.

[45] *See, e.g.*, Steven Greenhouse, *Union Will Steer Members to Rite Aid in Return for Promise Not to Fight Organizing Drives*, N.Y. TIMES, Sept. 16, 1998, at B3 (describing how a union already representing Rite Aid employees at 200 nearby locations secured an agreement under which Rite Aid would recognize New York City employees using card check); Kim Martineau, *Unionizing Vote Called Off: Arbitrator Says Yale-New Haven Hospital Broke Labor Laws*, HARTFORD COURANT, Dec. 15, 2006, at B1 (describing how a union representing a hospital's food service workers asked the hospital to recognize it based on a "card check neutrality" agreement).

[46] 395 U.S. 575 (1969).

[47] *Id.* at 604.

[48] *See id.* at 594; *Murphy*, *supra* note 38, at 73–74.

tion without proving that there is a basis for doubting that the cards are an accurate indication of the employees' choices.[49] Critics have argued that *Linden Lumber* essentially permits employers to refuse to bargain even when unions are able to demonstrate overwhelming support.[50] The problem with allowing such refusals is that the time after authorization cards are signed and before an election arguably gives employers an opportunity to "impede employees in the exercise of their right to select their exclusive bargaining representative."[51] Employers argue, however, that this time is necessary because it gives them an opportunity to educate employees about union representation.[52]

The law today leaves organizers, employers, and employees in limbo during a drawn-out and combative representation contest.[53] The union must first collect authorization cards from at least thirty percent of employees in order to demonstrate that a secret ballot election is warranted.[54] Frequently there is a contentious hearing in "representation cases" regarding the appropriate bargaining unit, as only employees in the appropriate unit are permitted to vote and only employees with a commonality of interests may be in the same unit.[55] There may be disputes about which employees are supervisors, as supervisors may not be in the unit and are therefore not entitled to vote.[56] For this reason, weeks or months may pass between the filing of a petition and the election.[57] This vacuum of time invites coercion, or at least pressure, from both sides. "In these highly contentious battles," concluded one scholar, "labor law, through the Board, plays a rather marginal role,

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[49] Linden Lumber Div. v. NLRB, 419 U.S. 301, 310 (1974).

[50] Murphy, *supra* note 38, at 72.

[51] *Id.*

[52] *See* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 381–455 (1995) (detailing an employer's First Amendment rights during a representation campaign); *see also* Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. PA. J. LAB. & EMP. L. 101, 148 (2002) ("[T]he election process permits the employer and the unions to educate the employees about the benefits and detriments that the accretion would likely entail, so that employees can make an informed decision.").

[53] *See* Weiler, *supra* note 1, at 1805 ("The key feature of the current regime is that after a union has initially organized a group of employees, it must still pass through a formal certification procedure. Even if the union can present incontrovertible evidence that the vast majority of employees have signed cards authorizing the union to represent them, the employer is not required to deal with the union. Instead, the employer can insist that the union face an NLRB-conducted secret ballot vote to test, after a prolonged campaign, the true majority will about collective bargaining. The time required for the formal certification procedure gives the employer a chance to reverse the initial employee enthusiasm for union representation and presents the employer with a strong temptation to use illegal coercion for this purpose.").

[54] Murphy, *supra* note 38, at 68.

[55] *See* Collective-Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25,142-43 (July 2, 1987) (collecting cases in which the appropriate bargaining unit was at issue and tracing the various tests applied by the Board to resolve this issue).

[56] *See* 29 U.S.C. §§ 152(3), 152(11) (2000) (excluding supervisors from the definition of employees); *see also* Scott T. Silverman & Jennifer L. Watson, *Labor and Employment Law: The Impact of Recent NLRB Decisions on Supervisory Status*, 81 FLA. BAR J. 37 (2007).

[57] Estlund, *supra* note 18, at 1537 n.41.

slapping wrists and nipping at heels after the fact."[58] Commentators including former Solicitor of Labor Eugene Scalia[59] and Reagan Solicitor General Charles Fried have noted defects in the system, pointing to "the ease with which management can create delays in . . . enforcement proceedings and obstruct union representation elections."[60]

Indeed, remedies in the current law are generally toothless. Upon a finding of unfair labor practices during an organizing campaign, the Board typically offers one of two remedies. First, it may simply order a second election, but this merely repeats an already flawed process.[61] Second, in the very limited number of cases in which the Board finds that an employer has engaged in extensive unfair labor practices, the Board may order that employer to bargain with the union without holding another election[62]—an arrangement that gives employees only a "ten percent chance of obtaining an enduring collective bargaining relationship with the employer."[63] In either case, the interminable delays leading to the resolution of unfair labor practice or representation cases at the NLRB render any poll of union support virtually meaningless by the time the case is resolved—often years after the initial representation petition was filed.[64]

Recent efforts to address the shortcomings in the NLRA have gone nowhere. On one side of the aisle, Democrats have supported legislation that would mandate union recognition based on authorization cards, or a "card check" procedure.[65] On the other side, Republicans have blocked consideration of that legislation and have instead supported legislation that mandates secret ballot elections in all circumstances.[66] In the 110th Congress, the Sen-

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[58] Estlund, *supra* note 18, at 1610; *see id.* at 1537 ("In particular, the Act has been faulted for its paltry and easily delayed remedies for anti-union discharges. Those remedies—basically, reinstatement and backpay, minus wages earned in the interim—may be seen as a minor cost of doing business by an employer committed to avoiding unionization. [Thus far] legislative efforts to fortify the Act's remedies and speed up the representation process have failed.").

[59] *See* Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489 (2001). Scalia acknowledges that there is "substantial" evidence of systematic employer coercion. *Id.* at 491. He suggests, however, that presidential support of "an integrated labor and employment policy that gives management *less reason to oppose unionization*" would reduce the need to amend the NLRA. *See id.* at 492.

[60] Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1017–18 (1984); s*ee also* Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 1006 (1991) ("Even our lower estimate of the incidence of discriminatory discharges represents a potentially significant disregard by employers of the Act's statutory protections.").

[61] *See* Murphy, *supra* note 38, at 73; *see, e.g.*, NLRB v. Carry Cos. of Ill., 138 F.3d 311, 312 (7th Cir. 1998).

[62] *See* Murphy, *supra* note 38, at 73–74; *see, e.g.*, *Carry*, 138 F.3d at 312.

[63] *See* Murphy, *supra* note 38, at 77.

[64] *See generally* 152 CONG. REC. S8380 (daily ed. June 26, 2007) (statement of Sen. Specter).

[65] *See* Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (sponsored by Sen. Edward Kennedy (D-Mass.)).

[66] *See* Secret Ballot Protection Act of 2007, S. 1312, 110th Cong. (2007) (sponsored by Sen. Jim DeMint (R-S.C.)).

ate, voting almost strictly along party lines, failed to invoke cloture on S. 1041, the Employee Free Choice Act.[67] Voting for cloture would not have been a final judgment on the bill's merits, but it would have given the Senate the chance to debate the substantive issues and shown the American people that Congress recognizes that the country's labor laws are in need of reform.

We decline to join the partisan fight, which has turned into a rush to stylize the problem and to tell stories of abuses by employers and unions. As we describe below, those abuses occur on both sides. Pointing fingers is a decidedly unproductive endeavor. Instead, we propose two steps to advance legislation that truly deals with employees' freedom of choice. First, Congress must hold hearings on how to reduce the window of time during which both sides could cheat and how to increase remedies when cheating does occur. Second, it must pass legislation that focuses on securing employees' freedom of choice in the workplace, rather than on serving the interests of unions or employers.

II. Abuses and Failures

The current system does not do enough to deal with the often inherently confrontational relationship between unions and employers, making it difficult for either group to focus on the right of employees to freely choose. Although unions work to improve members' salaries and working conditions, they also want to collect dues, build power, and interpose themselves in the relationship between workers and employers. At the same time, employers want to maintain control over their labor costs and retain the right to manage their businesses and employees. Instead of respecting the free choice of employees, both sides may capitalize on the maze of procedural hurdles and related delays in the NLRA's representation process to exert pressure on employees.

One of this Article's authors has listened for nearly thirty years to constituents detail their experiences with union election campaigns. The other has researched the extensive list of complaints filed with the NLRB, especially those filed in the past ten years. Together, we present illustrations of the abuses the current permutation of the NLRA has allowed, both on the part of unions and on the part of employers.

A. Union Abuses

In February 2007, the House Subcommittee on Labor, Education, and Pensions held a hearing entitled "Strengthening America's Middle Class through the Employee Free Choice Act."[68] At the hearing, an employee at a large HMO in Oregon testified that "local union organizers had misled em-

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[67] *See* 152 Cong. Rec. S8398 (daily ed. June 26, 2007).
[68] 152 Cong. Rec. S8380 (daily ed. June 26, 2007).

ployees into signing authorization cards at an initial question-and-answer meeting"[69]:

> At the meeting, employees asked the union agents questions about the purpose of the cards. The union agents responded by telling us that signing the card only meant that the employee was expressing an interest in receiving more information about the union . . . . When we were told that 50% + 1 had signed the union's authorization cards, and that no election would be held, it did not take long for many employees to announce that they would not have signed the cards if they had known that there would be no election.[70]

At the same hearing, a former union organizer named Ricardo Torres testified that he resigned from his union because of "the ugly methods that we were encouraged to use to pressure employees into union ranks."[71] He further testified that he resigned when asked

> to threaten migrant workers by telling them they would be reported to federal immigration officials if they refused to sign check-off cards . . . . Visits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union.[72]

Another organizer testified that in her experience "the number of cards that were signed had less to do with support for the union and more to do with the effectiveness of the organizer speaking to the workers."[73] As the facts described in a number of the Board's decisions demonstrate, the methods used extend far beyond gentle persuasion and sometimes cross into violent threats.[74]

The Board's decisions illustrate the wide range of coercive tactics unions use during organizing campaigns. Examples include photographing or

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[69] *Id.*

[70] *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 5 (2007) (statement of Karen M. Mayhew, Employee, Kaiser Permanente).

[71] *Id.* at 6 (statement of Ricardo Torres, Former Union Organizer, United Steelworkers).

[72] *Id.* at 7.

[73] *Id.* at 31 (statement of Jennifer Jason, Former Organizer, UNITE HERE).

[74] *See, e.g.*, HCF Inc., 321 N.L.R.B. 1320, 1320 (1996) (describing an authorization card solicitor who "allegedly stated that [an] employee had better sign a card, because if she did not, the Union would come and get her children and it would also slash her car tires."). In his floor statement on June 26, 2007, one of the authors detailed his own experience prosecuting a violent arm of the Teamsters Union in Philadelphia in the 1960s. *See* 152 CONG. REC. S8380 (daily ed. June 26, 2007) (statement of Sen. Specter). The author's neighbor eventually decided to sell his home and relocate out of fear that the union would firebomb the wrong house. *Id.*

videotaping employees as they vote or examine campaign literature,[75] telling employees that unionization is required to prevent the outsourcing of their jobs,[76] and unlawfully promising that advantages and benefits would be available to members if the union won certification.[77] Legislating on the assumption that all organizers have pure motives would be a mistake. Instead, we must consider the realities of union organization tactics and work to reduce the opportunities and incentives to engage in coercive practices.

B. Employer Abuses

To suppress support for unions, employers, too, engage in coercive tactics. Indeed, a recent study found that employers have been able to "unlawfully threaten employees, improperly restrict employees' ability to solicit union support, and mislead union organizers through dissemination of incorrect employee home addresses."[78]

In some cases, employers threaten employees with job loss and inferior working conditions if they succeed in achieving union representation. Just last year, the Board ruled in favor of employees who charged that during an organizing campaign, their employer threatened them "with closer supervision, loss of employment and other retaliation if they selected the Union as their collective bargaining representative."[79] In one case in Pennsylvania, an employer threatened employees with the loss of their rotating schedules and flextime if they participated in union activities.[80] In another case, an employer threatened to freeze wages if the union won its representation election.[81] Some employers go beyond threats and begin mass layoffs almost as soon as they receive a pro-union petition.[82] In case after case, employers so poisoned the environment that no fair election was possible.

As with excesses by union organizers, abuses by employers sometimes create an aura of fear. In one case, a store manager threatened an employee to "watch out" and "conveyed the threatening message that union activities would place an employee in jeopardy."[83] At a February 2007 hearing, an employee at the Smithfield hog slaughter and pork processing plant testified that on the day of a representation election "deputy sheriffs, dressed in battle gear with guns, lined the long driveway leading to the plant. . . . The sheriffs

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[75] *See, e.g.*, Randell Warehouse of Ariz., Inc., 347 N.L.R.B. No. 56 (July 26, 2006); F.W. Woolworth Co., 310 N.L.R.B. 1197 (1993).

[76] *See, e.g.*, Healthcare Employees Union, Local 399, 333 N.L.R.B. 1399 (2001) (describing statements made during a decertification campaign).

[77] *See, e.g.*, Alyeska Pipeline Serv. Co., 261 N.L.R.B. 125 (1982).

[78] James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 225–26 (2005).

[79] WGE Federal Credit Union, 179 L.R.R.M. 1314, 1316 (2006).

[80] Exelon Generation Co., 347 N.L.R.B. No. 77 (July 31, 2006).

[81] United Food & Commercial Workers Union Local 204 v. NLRB, 447 F.3d 821 (D.C. Cir. 2006).

[82] *See, e.g.*, Davey Roofing, Inc., 341 N.L.R.B. 222 (2004).

[83] Jordan Marsh Stores Corp., 317 N.L.R.B. 460, 462 (1995).

created an unnecessarily intimidating and hostile atmosphere for workers going to vote . . . ."[84] Eventually, the Board concluded that Smithfield had used the police "as an intimidation tactic meant to instill fear in [its] employees."[85]

These are not isolated examples. Just as the pages of the Board's decisions are filled with cases of union abuses, so too can one find volumes about unfair labor practice violations committed by employers.[86] The law has not and will not change employers' economic motive to pressure employees to reject union representation. We should, however, aim to create a new system that not only deters unfair labor practices, but also limits employers' opportunities to engage in such bad conduct.

C. Failures of the NLRB

In light of the natural incentives for employers and unions to pressure employees in the ways described above, a functioning system of labor relations requires timely and effective enforcement of remedies. Yet the NLRB is unable to provide such remedies. Examining the effectiveness of the NLRB, one scholar remarked that "[a]s the agency principally charged with overseeing the development and retention of collective bargaining relationships, it seems incapable of halting or even responding to the movement away from such relationships."[87]

The problem appears to be twofold: first, the extraordinary delays in case processing at the NLRB; and second, the ineffectiveness of any remedy ordered by the NLRB after those long delays. Consider, for example, the delays in a case the NLRB decided earlier this year, *Homer D. Bronson Co.*[88] During a union organizing campaign in 2000, senior managers at the Bronson plant held meetings with employees where they "unlawfully threatened employees with plant closure and job loss if they chose union representation."[89] At one meeting, they presented a slide show showing job losses at thirteen area companies that were represented by the union seeking representation.[90] Among other tactics, the employer displayed posters throughout the plant highlighting five of the thirteen companies discussed during the meetings.[91] The posters contained the statement, "These are just a *few* examples

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[84] *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 23 (2007) (statement of Keith Ludlum, Employee, Smithfield Foods).

[85] *See* Smithfield Packing Co., 344 N.L.R.B. 1, 172 (2004).

[86] *See* 152 CONG. REC. S8380 (daily ed. June 26, 2007) (statement of Sen. Specter) (highlighting cases of employer abuse).

[87] Brudney, *supra* note 78, at 223.

[88] 349 N.L.R.B. No. 50 (Mar. 16, 2007).

[89] *Id.*, slip op. at 1.

[90] *Id.*, slip op. at 2.

[91] *Id.*

of plants where the [union] *used to* represent employees," and posed the question: "Is this what the [union] calls job security?"[92]

Despite these kinds of violations, the NLRB Administrative Law Judge ("ALJ") did not issue his factual findings until two years later, in October 2002.[93] The ALJ found that the company's violations of the NLRA were serious enough to warrant a so-called "*Gissel* bargaining order," an order that requires the company to begin negotiations with the union immediately and without an election to determine employee support for the union.[94] The Board agreed with the ALJ's findings, and the general counsel of the NLRB argued that it would be appropriate to issue the bargaining order.[95] Yet these determinations were not made until March 2007, more than six years after the employer threatened its workers. The Board found that "given the length of time spent in the processing of this case, it is doubtful that a *Gissel* bargaining order would be enforced" by a federal court.[96] Far from providing a robust defense of its own delay, the Board noted that "a reviewing court could reasonably conclude that the delay was unjustified."[97] Remarkably, the "special" remedy the Board prescribed in lieu of the bargaining order was to have the employer read and post a notice promising not to engage in bad conduct again.[98]

A similar delay occurred after a highway construction contractor threatened as many as thirty-five out of eighty employees eligible to vote in an August 2001 union election.[99] Although the ALJ issued his decision in July 2002, it was not until August 2005 that the Board itself affirmed that unfair labor practices had occurred.[100] In that decision, four years after the union lost the election by five votes, the Board was unwilling to affirm an order requiring the company to bargain with the union. Instead, it simply ordered a new election.[101]

In some cases delays have lasted many more years, rendering a bargaining order unenforceable and a new election a grossly ineffectual remedy. For example, union organizers at the Smithfield Packing Company in Wilson, North Carolina began an organizing campaign sometime in early 1999.[102] In June of the same year, the employer unlawfully threatened employees with job loss and unspecified reprisals, and also gave the impression that the company was conducting surveillance on organizers.[103] In 2001, an ALJ issued a

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[92] *Id.*

[93] *See id.*, slip op. at 1.

[94] *See id.*, slip op. at 4; *see also* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (upholding the NLRB's authority to issue such bargaining orders).

[95] Homer D. Bronson Co., 349 N.L.R.B. No. 50, slip op. at 4 (Mar. 16, 2007).

[96] *Id.*

[97] *Id.*

[98] *See id.*, slip op. at 4, 5–6.

[99] *See* Abramson, LLC, 345 N.L.R.B. 171, 176 (2005).

[100] *See id.* at 171.

[101] *See id.* at 172, 176–77.

[102] *See* Smithfield Foods, Inc., 347 N.L.R.B. No. 109, slip op. at 1 (Aug. 31, 2006).

[103] *Id.*, slip op. at 1.

decision in which he found against the employer. The Board did not affirm the decision until August 2006, more than seven years after the initial representation election.[104] As in *Homer D. Bronson*, the Board declined to issue a *Gissel* bargaining order "because of the delay in processing [the] case."[105] The long delay meant that "attempting to obtain enforcement of a bargaining order would be futile."[106] In another case, the U.S. Court of Appeals for the Eighth Circuit castigated the Board for "inexcusable and unfortunate" delays in concluding that the Board's orders had been "rendered pointless and obsolete by virtue of the NLRB's self-inflicted administrative delay."[107] Another case involving unfair labor practices during a campaign by the Smithfield Company took twelve years to resolve.[108]

Delays in NLRB decision making can be detrimental to employers as well. For example, in one case an employer began bargaining with striking workers at manufacturing plants in Illinois and Wisconsin in late 1977.[109] The union allegedly threatened employees with "physical harm and loss of accrued pension benefits if they returned to work during the strike."[110] More central to the ultimate disposition of the case, the union claimed that workers would not be allowed to resign from the union and subsequently continue to work at the plant. The Board did not issue a decision until 1982, and the Supreme Court did not affirm enforcement of the Board's Order until 1985.[111] This delay—five years until a Board determination and eight years until a final judicial resolution—left the employer tangled in litigation for far too long.

The burden of such extended litigation often falls on employers. In cases of alleged misconduct by the employer, as the calendar runs, the potential backpay penalty continually grows. For smaller employers, this liability may be substantial. Addressing this problem in an unfair labor practices case, the Supreme Court held that, despite the Board's "deplorable" delay and the associated costs,[112] the courts could not shift those costs to the employees.[113] The employer has to bear the full cost of the Board's administrative holdup by paying the backpay penalty that accrued while the case was pending before the Board.

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[104] *Id.*, slip op. at 8 n.31.
[105] *Id.*
[106] *Id.*
[107] NLRB v. Mountain Country Food Stores, Inc., 931 F.2d 21, 23 (8th Cir. 1991); *see also* NLRB v. Thill, Inc., 980 F.2d 1137, 1142–43 (7th Cir. 1992) (criticizing NLRB delays and describing the Board as the "Rip Van Winkle of administrative agencies.").
[108] *See* United Food & Commercial Workers Union Local 204 v. NLRB, 447 F.3d 821 (D.C. Cir. 2006); *see also* NLRB v. HQM of Bayside, LLC, No. 06-2253, 2008 U.S. App. LEXIS 5077 (4th Cir. Mar. 10, 2008) (five year delay).
[109] *See* Pattern Makers' League v. NLRB, 473 U.S. 95, 97–98 (1985).
[110] *Id.* at 98 n.3.
[111] *See id.* at 95–100.
[112] NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969).
[113] *Id.* at 266.

A Board that allows these delays is dysfunctional and is not doing its part to protect workers' rights. It is incredible that the Board issues decisions admitting that its own sluggishness precludes more effective remedies.[114] But even when a case is processed in a timely manner, as many are, the standard remedies available to protect employees are largely toothless.

Standard remedies include reinstating unlawfully discharged workers and requiring employers to compensate those employees with back pay less income earned between the firing and the decision.[115] These restitutionary remedies do not sufficiently deter violations or ensure an employee's right to choose. As illustrated in some of the cases discussed above, meritorious unfair labor practices claims also result in the NLRB ordering a second election. This remedy is also ineffective. One study found that the chance of a union winning an initial election drops from approximately forty-seven percent to less than ten percent when an employer uses delay tactics and coercion.[116] Any subsequent election ordered by the NLRB would be conducted in the shadow of the previous unfair contest.

The law has reached a point where "the incentives for employers to step across the legal line are too great to be blunted by the prospect of monetary sanctions at any feasible level. . . . [U]nfair labor practices have now reached proportions that no procedure for immediate injunctive relief could possibly handle."[117] Even now, the NLRB rarely seeks preliminary injunctions, which would prevent employees from having to wait years for relief.[118] Remedies awarded by the Board have become so weak that it has described as "extraordinary" an order requiring a violating employer to (1) cease-and-desist, (2) promise in a variety of ways not to engage in bad conduct again, and (3) provide a list of employee names and addresses to the union.[119] These are slaps on the wrist that come after the employer has enjoyed the benefits of coercing its employees.

The traditional remedies are "simply not effective deterrents to employers who are tempted to trample on their employees' rights."[120] The NLRB is limited to such weak remedies because its remedial power has been constrained by a narrow interpretation of the NLRA. In *Republic Steel Corp. v. NLRB*,[121] the Supreme Court held that the NLRB was limited to remedies designed to make employees harmed by unfair labor practices whole and

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[114] *See* Homer D. Bronson Co., 349 N.L.R.B. No. 50, slip op. at 4 (Mar. 16, 2007); *supra* text accompanying notes 88–98.

[115] *See, e.g.*, Cheney Constr., Inc., 349 N.L.R.B. No. 54, slip op. at 3 (Mar. 22, 2007) (describing reinstatement and backpay as "a traditional make-whole remedy.").

[116] Weiler, *supra* note 1, at 1786 (citing William Theodore Dickens, Union Representation Elections: Campaign and Vote 108 (Oct. 25, 1980) (unpublished Ph.D. thesis, Massachusetts Institute of Technology) (on file with Dewey Library, Massachusetts Institute of Technology)).

[117] *Id.* at 1804.

[118] *See* 152 CONG. REC. S8378 tbl.1 (daily ed. June 26, 2007) (statement of Sen. Specter) (highlighting the decline in injunctive relief).

[119] *See* Smithfield Foods, Inc., 347 N.L.R.B. No. 109, slip op. at 8 (Aug. 31, 2006).

[120] Weiler, *supra* note 1, at 1788–89.

[121] 311 U.S. 7 (1940).

could not use remedies designed to punish or deter bad conduct.[122] One labor law professor concluded that "the failure of the system to prevent unfair practices is generally attributed to the weakness of the sanctions for even the crudest forms of retaliation against union supporters, and to delays in the administration of the law."[123]

Employers and unions acting in good faith should welcome changes to the law that will result in clearer rules and effective remedies, as should employees. With serious reform, each of these groups would be less burdened by the drawn-out and expensive litigation process that delays justice under the current regime. As a source of ideas for reform in the United States, in the next section we discuss other countries' experiences with organizing campaign procedures and remedies for unfair labor practices.

III. Empirical Studies and Experiences in Other Countries

The deficiencies in our labor law regime have been apparent since at least the 1980s. As a result, a number of scholars have studied how labor law regimes have functioned in various other countries. The empirical evidence from these studies may show the way to legislative reform in American labor law.

A. Canada

We begin our discussion with Canada, a country with an economic environment and industrial relations system that is similar to ours.[124] Before the 1980s, Canada had a strong tradition of recognizing unions based on so-called "card check" procedures, in which union organizers could demonstrate support and achieve recognition by collecting signed authorization cards from employees.[125] By 2004, however, six provinces had adopted a mandatory election process for union recognition.[126] In British Columbia, there was extended debate and some desire to try different ways to balance

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[122] *See id.* at 11–12; *see also* Weiler, *supra* note 1, at 1789 n.69 ("The assumption of the law, then, is that prevention can only be the serendipitous by-product of remedies designed to redress injuries inflicted on employees.").

[123] Weiler, *supra* note 1, at 1787; *see also id.* at 1804 n.131 ("Neither the law nor NLRB practice has changed materially since the mid-1950's. What has changed is the willingness of employers to break the law when they feel they can get away with it. To some extent this trend must be caused by a growing appreciation of both the feebleness of the Board's corrective powers and the effectiveness of coercive tactics, as well as to a growing social acceptance of such tactics. When one employer is seen violating the law with impunity and with favorable results, other employers are encouraged to follow suit. The ensuing spiral of abuses demands a legal response sharply different from what might have been sufficient 25 years ago.").

[124] *See id.* at 1819.

[125] *See* Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998*, 57 Indus. & Lab. Rel. Rev. 493, 493–94 (2004).

[126] *Id.* at 494; *see, e.g.*, Labour Relations Code, R.S.A., ch. L 1, § 34(d) (2000).

protecting the secret ballot and increasing the ease of unionization.[127] The legislature instituted mandatory elections in 1984 by a vote of 24-16[128] and then repealed them in 1992 by a vote of 25-17.[129] This variation within a single province allowed scholars to test what effect such a change in labor laws had on union membership.

Unions were significantly less likely to be certified under a secret ballot regime than they were under a card check regime. At least one study identified the greater opportunity for employers to coerce employees through unfair labor practices as the key mechanism by which employers suppressed union success under a secret ballot regime.[130] Not only did unfair labor practices reduce certification success rates by about twenty percent,[131] delays before an election further suppressed union certification rates.[132] The study estimated that unfair labor practices accompanied by a delay of only twenty-five days dropped the probability of certification an additional 12.5%.[133] The average delay in the Canadian study was twenty days, compared with an average delay of over three hundred days in the United States.[134]

Canada has dealt with the problem of delayed elections by statutorily limiting the time available for employers and unions to campaign between the filing of a petition for representation and an election. In Canadian provinces with mandatory voting, balloting must take place five to ten days after a union files for certification.[135] In the United States, there is no such requirement and several months may go by before an election occurs,[136] never mind the incredible delays in resolving unfair labor practice claims after an election. Legislators must be careful not to narrow the pre-election window excessively, since it is the time during which both sides disseminate valuable information, but the Canadian experience suggests that the weeks and months that pass in the United States are far too long to be conducive to a fair election. Certainly the twelve-year, post-election delay in the Smithfield case described above[137] tells employees that the law does not necessarily protect their right to freely choose whether to be represented.

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[127] *See* Riddell, *supra* note 125, at 494.

[128] British Columbia, Legislative Assembly, *Hansard* (May 16, 1984) at 4803 (recording the vote on Bill 28).

[129] British Columbia, Legislative Assembly, *Hansard*, No. 6 (Nov. 12, 1992) at 4009 (recording the vote on Bill 84).

[130] Riddell, *supra* note 125, at 505.

[131] *See* Chris Riddell, *Union Suppression and Certification Success*, 34 CAN. J. OF ECON. 396, 404–05 (2001).

[132] *Id.* at 407 ("The larger processing time by itself does not deter certification, but it does enable [unfair labor practices] to be more effective in deterring certifications.").

[133] *See id.* at 407.

[134] *Id.* at 400.

[135] Susan Johnson, *The Impact of Mandatory Votes on the Canada-U.S. Union Density Gap: A Note*, 43 INDUS. REL. 356, 362 (2002).

[136] *Id.*

[137] *See supra* note 108 and accompanying text.

B. New Zealand

New Zealand passed major labor law reforms in 1991.[138] The new legislation dramatically shifted the country away from a system in which mandatory union representation and compulsory dues were the norm.[139] Abuses by unions under the old order taught legislators an important lesson: it is "unwise to provide a structure that allows and encourages unions to disregard the needs and desires of those they are supposed to represent."[140] The disconnect between highly protected unions and the workers they were charged with representing raised the question of whether periodic recertification was necessary.[141] Although observers often held the country's old laws up as a shining example of high union representation, they failed to realize "the deep moribundity of most unions' functioning, indeed their failure in many respects to exercise the role we think of unions as playing."[142] Most importantly, the New Zealand experience brought to light the fact that high union density is not necessarily a sign of ideal labor relations.

The new law in New Zealand opened up the workplace to competition among unions and removed supposedly inefficient government bureaucracy from the process. Individual employees could join, or decline to join, any union they pleased, regardless of which union or unions represented their fellow employees.[143] This was intended to spur an increase in inter-union competition, which may have increased unions' accountability to the workers they represented, but it would also increase transaction costs and the complexity of employment contract negotiation.[144] Union membership declined and generally employers were more satisfied with the reform than employees were.[145]

C. United Kingdom

In 2000, the United Kingdom established formal statutory recognition procedures for the first time.[146] The United Kingdom sought to reduce delays

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[138] Employment Contracts Act 1991, 1991 S.N.Z. No. 22; *see* Ellen J. Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1, 6 (1995).

[139] *See* Labour Relations Act 1987, 1987 S.N.Z. No. 77; *see also* Dannin, *supra* note 138, at 16–17 (describing the Labour Relations Act, which governed labor law before the 1991 reforms, and its impact on unions).

[140] Dannin, *supra* note 138, at 158.

[141] *See id.* at 160–64.

[142] *Id.* at 166.

[143] *See id.* at 147.

[144] *Id.* at 51, 87–88.

[145] *See id.* at 143.

[146] *See* Employment Relations Act, 1999, c. 26 (Eng.) (defining recognition framework); Trade Union Recognition (Method of Collective Bargaining Order), 2000 S.I. 2000/1300 (U.K.) (specifying bargaining procedures and bringing into force the Employment Relations Act); *see also* Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type*

in recognizing unions by approving a bill that would "encourage unions and employers to settle their differences voluntarily, rather than through administrative and judicial litigation."[147] Administrative process that is required is managed by the Central Arbitration Committee ("CAC"), which serves essentially the same function as the NLRB.[148] Yet, significant differences exist between the two independent agencies.

The United Kingdom "revised the basic North American recognition model to include specific impetus to productive labor negotiations," forcing greater cooperation between unions and employers.[149] In contrast to the United States, in the United Kingdom employers and unions cannot insist on a secret ballot election with impunity. For example, if a union has applied for statutory recognition through the CAC but must withdraw the application due to a lack of support, it must wait three years to apply a second time.[150] Employers who force the CAC to run an election may prevail, but if the union wins the election and the CAC imposes mandatory recognition, the employer must adhere to minimum collective bargaining standards.[151] At all stages, the government provides mediation and arbitration services, and the statute provides incentives for voluntary recognition.[152] Perhaps as a result of these incentives to come to agreement on recognition, one study suggests that up to ninety-four percent of union recognitions in the United Kingdom have been voluntarily accepted without the drawn-out and contentious process of an election campaign.[153]

Steps taken to reduce coercive efforts during possibly contentious election campaigns appear to result in successful collective bargaining agreements in the United States as well. Unions and employers sometimes agree to sign a "neutrality agreement," a contract through which the employer pledges not to oppose union organization efforts.[154] Indeed, these agreements "appear to have produced a much higher rate of success . . . in gaining a first

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of Union Recognition Procedure Affects Union Certification Success, 112 ECON. J. 344, 345 (2002).

[147] Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States?*, 25 COMP. LAB. L. & POL'Y J. 227, 227 (2004).

[148] *See id.* at 230–31.

[149] *Id.* at 241–42.

[150] *Id.* at 242.

[151] *Id.* at 242–43.

[152] *Id.* at 242; *see id.* at 243 ("These provisions work effectively together. Thus, for example, if an employer is confronted by a union with strong membership support, the employer must consider whether pursuing a formal process [entailing costs, work disruption, and union access] that will likely end with automatic recognition and a detailed default procedural agreement will help its management position. Similarly, the unions have a serious incentive to pursue a voluntary agreement because, should they lose a bid for statutory recognition, they risk being barred for three years from future application for recognition.").

[153] *Id.* at 236–37 (citing TRADES UNION CONGRESS, TRADE UNION TRENDS: FOCUS ON RECOGNITION (2003)).

[154] *See generally* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821 (2005).

collective bargaining agreement."[155] One of the principal goals of the Wagner Act was—and should be—the end of recognition battles so contentious that they subvert the ability of workers and employers to reach a productive agreement.[156]

D. Lessons from Other Countries

These experiences are instructive as Congress considers labor reform legislation. In Canada, New Zealand, and the United Kingdom, serious reforms—whether judged successful or not—have attempted to address shortcomings in labor laws. In Canada, some provinces experimented with card check and mandated faster elections in secret ballot provinces. New Zealand divested power over union recognition from federal agencies and gave it to individual employees and employers. In the United Kingdom, the government created mandatory recognition procedures but also created incentives for voluntary recognition of unions by employers. At the very least, serious debate about reform has taken place in each of these countries in recent decades. It is time for the United States, which has not made substantial changes to its labor laws in more than fifty years, to survey the landscape and craft its own legislative reforms.

IV. Congressional Action

Comprehensive legislation is necessary to correct the fundamental problems described in this Article. The NLRB's remedial power has been constrained by a narrow interpretation of section 10(c) of the NLRA[157] and its own delays in processing cases. Congress has engaged in decades of "conscious inaction," what one professor described as a "failure to legislate

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[155] *See* Estlund, *supra* note 18, at 1604; Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 Admin. L.J. Am. U. 517, 534 n.71 ("[M]anagement opposition and illegal behavior in election campaigns . . . reduced the probability of unions winning elections and establishing successful collective bargaining relationships.") (quoting Thomas A. Kochan et al., The Transformation of American Industrial Relations 13 (1986)).

[156] *See* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. Rev. 259, 307 (1994).

[157] *See, e.g.*, Weiler, *supra* note 1, at 1789 ("Early in the life of the Wagner Act, the principle was settled that the proper measure of the backpay award is not the wages the guilty employer failed to pay, but rather the net loss suffered by the employee after the deduction of any wages earned in the interim in another job."); *id.* at 1789 n.69 ("The net loss principle not only prevents the employee from collecting a 'windfall profit' of double earnings following his illegal dismissal, but also precludes the Board from requiring the employer to reimburse the third-party source of those interim earnings."); Republic Steel Corp. v. NLRB, 311 U.S. 7, 12–13 (1940) (holding that an employer could not be required to reimburse government agencies for unemployment relief payments made to an employee who had been unlawfully discharged); *see also supra* notes 121–22 and accompanying text.

in the face of widely perceived problems with the NLRA."[158] Congress must act to reduce delays at the NLRB and to increase the effectiveness and deterrent effect of remedies.

The reform the country needs is not as simple as instituting card check or mandating secret ballot elections. Neither of those options would cure the weak remedies or procedural delays at the NLRB. More importantly, merely changing the selection mechanism would do nothing to make unions and employers more willing to deal with each other in good faith. As early as 1983, scholars recognized that meaningful labor law reform requires changing the background legal environment in order to reduce employers' opportunities to engage in illegitimate interference with their employees' choices.[159] This is not to deny that we will always need regulation to prevent abuse of the employees' right of self-organization and that we must reform the remedies available, preferably by emphasizing the immediacy rather than the severity of remedial measures. Effective reform will require a radical change in our conception of how employees should go about making their choice for or against union representation.[160]

We understand that there are good ideas about how to make important changes to the NLRA coming from all points along the political spectrum. The first step in the process is to conduct interviews and hold hearings with members of the NLRB, employers, union representatives, and employees who have their own views on labor law. For example, the general counsel of the NLRB has already issued internal guidelines recommending ways for Regional Offices to expedite procedures[161] and seek special remedies.[162] Senator Specter's staff has begun conducting interviews in preparation for Con-

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[158] Brudney, *supra* note 78, at 230. Congressional oversight of the NLRB has also been insufficient. *See id.* at 230 n.42; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1593–94 (1996).

[159] *See, e.g.*, Weiler, *supra* note 1.

[160] *See id.* at 1804–05.

[161] *See, e.g.*, Memorandum from Ronald Meisburg, General Counsel, NLRB, to all Div. Heads, Regional Dirs., Officers-in-Chief, and Resident Officers (Apr. 12, 2007) (addressing delays and incomplete investigations), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-06%20Report%20of%20FY%202006%20Quality%20Committee.pdf; Memorandum from Ronald Meisburg, General Counsel, NLRB, to all Div. Heads, Regional Dirs., Officers-in-Chief, and Resident Officers (Sept. 13, 2006) (instructing regional offices to reduce delays by investigating and expeditiously referring to the appellate court branch cases that are likely to be appealed), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2006/GC%2006-07%20Procedural%20Initiatives%20in%20Election%20Cases.pdf.

[162] *See, e.g.*, Memorandum from Ronald Meisburd, General Counsel, NLRB, to all Div. Heads, Regional Dirs., Officers-in-Chief, and Resident Officers (May 29, 2007) (suggesting enhanced remedial measures, including an extension of the certification year during which majority status may not be challenged, the awarding of bargaining costs, and a requirement to bargain on a prescribed schedule), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-08%20Additional%20Remedies%20 in%20First%20Contract%20Bargaining%20Cases.pdf; Memorandum from Ronald Meisburg, General Counsel, NLRB, to all Div. Heads, Regional Dirs., Officers-in-Chief, and Resident Officers (Dec. 15, 2006) (instructing regional offices to consider in every case the possibility of seeking injunctive relief), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-01%20Submission%20of%20Section%2010j%20Cases%20of%20the%20Division%20of%20Advice.pdf.

gressional hearings. For Congress to be effective in addressing the problem, it must first learn the facts. Its hearings should address key aspects of the new legislation and attempt to answer, at a minimum, questions in the following areas.

A. Method of Selection

What are the likely consequences of permitting the NLRB to certify unions after a threshold percentage of employees in a given bargaining unit present signed union authorization cards?

Is it possible to secure a non-coercive selection process for employees through a process other than card check? Is the right of employers to demand a secret ballot election, in practice, a fatal flaw in the system?

B. Expeditious Proceedings and Streamlined Dispute Resolution

Would it be possible for elections to take place within two weeks of the filing of a representation petition?

Would unions and employers oppose a rule that representation cases must be filed within a week of the filing of the petition for election, or that filing of post-election challenges be barred one week after the election?

Do ALJs have the institutional capacity to review and resolve such disputes within thirty days of the election, with the exception of cases that the Board certifies as novel and complex?

What are the likely consequences of changing the Board's role so that it may grant certiorari? Under such a system, should decisions by Regional Directors in representation cases and ALJs in unfair labor practice cases become final orders reviewable by federal courts if the Board does not grant review within thirty days of the issuance of these findings?

What are the objections to the Board refusing to hear appeals in cases that involve a challenge to the scope of the bargaining unit when even a successful challenge could not result in the inclusion or exclusion of a sufficient number of impounded ballots to change the election result?

Will employers testify that they would benefit from a clearer delineation of an unchanged line separating acceptable and punishable behavior? Will bright-line rules help separate good faith employers from egregious violators of the NLRA?

To what extent will employers benefit from a reduction in the duration of litigation and its associated costs? Will streamlined procedures interfere with their ability to effectively manage the workplace and exercise their right to inform employees before a unionization vote?

C. Voluntary Recognition

What can be done to protect employees from coercion and encourage good faith conduct during campaigns by both unions and employers? How can we avoid the "gory battle" between employers and unions during a formal election campaign?[163] As described earlier, ninety-four percent of unions in the United Kingdom have been voluntarily recognized after the institution of penalties for forcing and losing a secret ballot election.[164] Would similar penalties produce similar results in the United States?

What changes would increase cooperation and voluntary resolution of disputes, thereby reducing the caseload before the NLRB? What else might reduce the case backlog at the NLRB?

D. Increasing the Cost of Bad-Faith Bargaining and Unfair Labor Practices

Would an increase in penalties for willful or repeated unfair labor practices on the part of employers actually deter bad conduct? Would an increase in penalties lessen the likelihood of prompt and informal settlement?

What are the consequences of authorizing courts to award reasonable attorneys fees for egregious violations of the NLRA, or to award liquidated damages in addition to backpay to unlawfully discharged employees?

How can the law encourage good-faith bargaining toward an initial collective bargaining agreement? Should the parties, after several months of negotiations, be required to bargain on a schedule prescribed by the Federal Mediation and Conciliation Service?[165]

What can be done to promote the effective use of injunctive relief?

E. Institutional Reform

Has the Board appropriately balanced a sparing use of rulemaking authority[166] and heavy reliance on adjudication?[167] Would the Board gain legiti-

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[163] *See Employee Free Choice Act—Restoring Economic Opportunity for Working Families: Hearing on S. 1041 Before the S. Comm. on Health, Labor, Education and Pensions*, 110th Cong. (2007) (statement of Cynthia L. Estlund, Professor of Law, New York Univ. Sch. of Law), http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf.

[164] *See supra* note 153 and accompanying text.

[165] *See* 29 U.S.C. §§ 172–73 (2000).

[166] *See* Estlund, *supra* note 18, at 1559 n.132.

[167] As early as 1990, Judge Posner remarked that "the exercise of the Board's dormant substantive rulemaking power is long overdue." American Hosp. Ass'n v. NLRB, 899 F.2d 651, 655 (7th Cir. 1990); *see also* Catherine Meeker, *Defining "Ministerial Aid": Union Decertification Under the National Labor Relations Act*, 66 U. CHI. L. REV. 999, 1003 n.20 (1999) (noting judicial and scholarly commentary in support of an NLRB shift to more rulemaking); Ursula M. McDonnell, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U. CIN. L. REV. 653, 680–83 (1989); *see generally* Brudney, *supra* note 78, at 235–36 ("Notwithstanding the advantages associated with adjudi-

macy if Board Members were more insulated from the political appointment process, perhaps through longer terms or a different appointment process? What other institutional reforms would both encourage and empower Members to act more like judges and less like political appointees?[168]

V. Conclusion

We are hopeful that these questions and their more detailed treatment at Congressional hearings, along with other questions that may flow from the hearings, will spur meaningful debate on labor law reform. On this important issue, we are empiricists and not ideologues: finding a practical solution is more important than political posturing. Congress should thoughtfully and honestly consider what major revisions to the NLRA would best secure workers' rights. In any event, new legislation is needed to change the contentious environment underlying labor relations today. Simple fixes will not do. A former chairman of the NLRB concluded in 2007 that "[t]he problems with the law and policies promoting freedom of association and collective bargaining are enormous."[169] A real debate and real solutions are required. America's workers—along with its unions and employers—deserve nothing less.

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cation, the Board's strategy has imposed certain costs. Rulemaking allows for advance planning, enabling an agency to develop a coherent agenda regarding which problems to address instead of acting exclusively in response to particular controversies as they arise. Rulemaking also encourages the collection and analysis of information at a more complete and sophisticated level. Agencies that exercise policymaking responsibilities outside the confines of individual disputes are more likely to initiate or request empirical studies, and to gather and integrate qualitative materials on their own. By declining to make use of its rulemaking powers, the Board has missed opportunities to recognize and respond when studies indicated that its laboratory conditions doctrine results in an uneven playing field, or that its remedial approach does little to deter employer misconduct.").

[168] *See* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L.J. 1361, 1378–98 (2000) (detailing the increase politicization of Board membership); *see generally* Robert Douglas Brownstone, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 Brook. L. Rev. 229 (1986).

[169] William B. Gould, IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 Ind. L.J. 461, 496 (2007).