The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States

By William B. Gould IV*

Introduction

The financial crisis and meltdown of 2008 and beyond poses the greatest economic challenge to the United States and the
world economy since the Great Depression of the 1930s. The distress experienced by workers generally,¹ and in the automobile industry in particular,² has dramatized anew the widespread public hostility toward organized labor and some of its hard-fought gains.³ As in the 1930s, when a new legal framework for labor-management relations was created out of turmoil and dislocation,⁴ once again in this century, there are both direct protests and demands to change the law in the form of amendments to the National Labor Relations Act. Once again—this time as a direct result of the 2008 experience—the imperative is that regulation must trump the market. Now, as in the 1930s, the labor market cannot be immune from this policy shift.

The National Labor Relations Act ("NLRA"),⁵ the principal statute applicable to most of the private sector in the United

Of course, I take full responsibility for errors, omissions, or other deficiencies in this Article.


Even modest increases in the share of the unionized labor force push wages upward, because nonunion workplaces must keep up with unionized ones that collectively bargain for increases. By giving employees a bigger say in compensation issues, unions also help to establish corporate norms, the absence of which has contributed to unjustifiable disparities between executive pay and rank-and-file pay.


It seems unlikely, however, that unions will be able to press the pay disparity issue at the bargaining table since the NLRB and the Supreme Court may view this as a non-mandatory or permissive subject of bargaining. See, e.g., First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (holding that a partial closing is a management prerogative and thus
States, contains a trinity of basic principles. The first is that a collective bargaining obligation exists where a majority of employees select a labor organization to represent them. The second is that the majority will must be expressed within an appropriate unit or grouping of employees who enjoy a so-called “community of interests” with one another. And the third is that this majority representative expressed in an appropriate unit provides the union with the authority to bargain on behalf of those within the appropriate unit, be they union or non-union employees, as an exclusive bargaining representative entitled to bind all within the unit.

For nearly four decades, two developments have fueled an ongoing debate about labor law reform as it relates to the NLRA. The first is the precipitous decline of the unions, a dramatic phenomenon that is linked to growing income inequality in the United States.

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non-mandatory); Curtiss-Wright Corp. v. NLRB, 347 F.2d 61 (3d Cir. 1965) (holding that employers are required to disclose data pertaining to non-unit employees only when there is a demonstrable relationship between bargaining unit and non-bargaining unit); William B. Gould IV, The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term, 53 U. COLO. L. REV. 1, 5–18 (1981) (criticizing the Court's holding in First National Maintenance that an employer's partial closure of its business operations is not a mandatory subject of bargaining within the meaning of the Act). Executive pay can be viewed as a management prerogative and thus a non-mandatory subject of bargaining.

A byproduct of the litigation which has emerged in the wake of First National Maintenance is excessive litigation. See Q-1 Motor Exp., Inc., 323 N.L.R.B. 767, 767–69 (Gould, Chairman, concurring) (pointing out that unions rarely have the information requisite to challenge employer decisions); see also id. at 769–72.


8. J. I. Case Co. v. NLRB, 321 U.S. 332, 342 (1944) (holding that individual contracts will not be enforced to forestall collective bargaining). In the same year, the Court held that a duty to represent all employees within the unit, fairly and without hostility in a non-arbitrary fashion, existed by virtue of the principle of exclusivity. See generally Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944) (holding that the Railway Labor Act implies a duty of fair representation).


This has translated into the absence of an important democratic institution in the workplace and society, one which is so much more important in Europe—with the consequent impediments that this phenomenon throws in the way of effective and mature labor management relationships and cooperative initiatives between both workers and employers.11 Though the lengthy trend of decline, which has been proceeding since 1955, was recently halted in a relatively miniscule way,12 the latter appears to be a mere blip on the screen and the general trend continues nearly unabated.

The role of labor law, as an instrument for the promotion of freedom of association amongst workers to ban together effectively to join unions and promote the collective bargaining process, has declined as well. However, many observers assume an incorrect non sequitur, i.e., that these two developments are connected with one another and that if the law can be reformed, union decline can be halted. In my judgment, this analysis is superficial, as there are numerous factors which are responsible for the union decline phenomenon.

First and foremost among them is globalization and foreign competition, initially from Japan and Europe in the 1970s and more re-

11. Keeler Brass Auto. Group, 317 N.L.R.B. 1110, 1117-19 (1995) (Gould, Chairman, concurring) (indicating that there might be some room for lawful operation of employee participation committees, even when it is the employer that creates the committee); see also WILLIAM B. GOULD IV, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 17-43 (1984); GOULD, AGENDA FOR REFORM, supra note 9, at 115-19. But see NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488-89 (1960) ("It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values.").

12. The most recent annual survey of union membership carried out by the Bureau of Labor Statistics states:

In 2007, the number of workers belonging to a union rose by 311,000 to 15.7 million, the U.S. Department of Labor's Bureau of Labor Statistics reported today. Union members accounted for 12.1 percent of employed wage and salary workers, essentially unchanged from 12.0 percent in 2006. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent.

ently from countries such as Brazil, Korea, and Vietnam, the former Eastern European bloc, and the Pacific Rim—especially China, whose slumber has now been disrupted in the twenty-first century. This is why the debate about free trade played such a major role in the 2008 presidential campaign, particularly in the Democratic primaries, arising in the form of legislative debate about free trade agreements involving countries such as Peru and Columbia and the impact and renegotiation of the North American Free Trade Agreement ("NAFTA").

A second factor is the composition of the work force, particularly because of the advent of numerous undocumented workers who do not enjoy the protection of the NLRA, notwithstanding the fact that thus far they are regarded as employees within the meaning of the law. Another related factor is the advent of the contingent tempo-


The union won by 2,041 votes to 1,879 after two years of turmoil at the plant. As a result of a federal crackdown on illegal immigrants, more than 1,500 Hispanic workers have left the plant. Its work force is now 60 percent black, up from around 20 percent two years ago.

Steven Greenhouse, After 15 Years, North Carolina Plant Unionizes, N.Y. Times, Dec. 12, 2008, at A10; cf. Smithfield Foods, Inc., 347 N.L.R.B. No. 109, at 8 (2006), enforced sub nom, United Food & Commercial Workers Union Local 204 v. NLRB, 506 F.3d 1078, 1087 (D.C. Cir. 2007) (holding that the proper remedy for employer unfair labor practices under certain circumstances is a re-run election as opposed to a Gissel bargaining order).

Sure-Tan, 467 U.S. at 891-92, and A.P.R.A. Fuel Oil Buyers Group, 320 N.L.R.B. at 408, rest upon the proposition that a failure to protect the undocumented worker undermines standards for all workers. "If you uphold workers rights, even for those here illegally, you uphold them for all working Americans. If you ignore and undercut the rights of illegal immigrants, you encourage the exploitation that erodes working conditions and job security everywhere. In a time of economic darkness, the stability and dignity of the work force are especially vital." Editorial, Getting Immigration Right, N.Y. Times, Dec. 26, 2008, at A38.
rary workers frequently referred by agencies such as Manpower,\textsuperscript{17} the growth of independent contractors who are not viewed as part of the employment relationship,\textsuperscript{18} as well as part-time\textsuperscript{19} and casual employees who, along with their spouses or partners, work more than one job to maintain an acceptable standard of living.

Third, the expanding union-nonunion wage differential\textsuperscript{20} creates a greater incentive for nonunion employers to resist unionization and places the organized sector of the economy, like the automobile industry which has negotiated health care and pension benefits,\textsuperscript{21} at a competitive disadvantage. The gamble pursued by the United Auto Workers ("UAW") and other major industrial unions in the late 1940s and early 1950s, i.e., that organized employers would join with them to create a world in which unionized employers were not at a disadvantage, never materialized.\textsuperscript{22}

Fourth, the fact that the United States and other industrialized countries are shifting from manufacturing to service industries that are more labor intensive provides another incentive for employers to resist unions. In this sector, the employer is more likely to pursue unappealing options when confronted with union-negotiated collec-

\textsuperscript{17} See generally M.B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000) (consolidating several cases involving the representational rights of a segment of the contingent work force), rev'd Oakwood Care Ctr., 343 N.L.R.B. 659 (2004).
\textsuperscript{19} See, e.g., M.B. Sturgis, 331 N.L.R.B. at 1312; Tree of Life, Inc., 336 N.L.R.B. 872, 875 (2001). Moreover, Vizzaino v. Microsoft Corp., 97 F.3d 1187 (9th Cir. 1997), held that temporary workers are entitled to the same benefits as their permanent counterparts. Id. at 1200.
\textsuperscript{21} Danny Hakim, G.M. Board Gives Union A Deadline, N.Y. TIMES, June 15, 2005, at C1.
tive bargaining agreements which provide for improved employment and living standards: (1) to either reduce profit margins; or (2) to attempt to pass the costs on to the public—in contrast to manufacturing where technological innovations have traditionally provided an avenue through which labor costs can be absorbed.

In a number of respects, however, the law has played a role in union decline. In the first place, employers, able to use the permanent replacement weapon in response to lawful strikes since 1938, have begun to use this tactic increasingly since the 1980s—perhaps in response to President Reagan's example when he fired the unlawfully striking air controllers. Employers have been able to disappear and relieve themselves of their union and contractual obligations through creating alter egos and have escaped union relationships through the successorship doctrine devised by the United States Supreme Court. Unions have been weakened by the Court's holding that union members have the right to resign from membership and obligations at any point, including the time of the use of the strike weapon itself, and thus escape contractual obligations entered into, notwith-


standing union constitutional provisions which impose limitations on this right.28

The problems which have attracted the most attention from labor law reformers are an inability to fashion punitive damages of the kind available in antitrust law,29 and the ineffectiveness of remedies, i.e., back pay minus interim earnings or those which could have been obtained with reasonable diligence.30 Comparable attention has been given to efforts to impose any kind of contractual protection, such as through union security agreements or check-off clauses under which employers are obliged to remit union dues from employee paychecks to the union.31 This approach would protect a collective bargaining relationship in its embryonic form shortly after a union has survived a certification proceeding and established majority support at the ballot box.32

Fueling the remedy crisis is the administrative quagmire that has at various times either afflicted the National Labor Relations Board ("NLRB"), or that the NLRB itself has inflicted upon the public, in both unfair labor practice and representation proceedings. In part, this problem is attributable to loopholes which employers can exploit for delay, providing for a period of time of months or years just at the NLRB alone,33 during which workers will lose interest in unions and the collective bargaining process—and the remedy will affect only the


29. See Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940) (holding that the NLRB is precluded from imposing punitive damages).

30. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (holding that the remedies of the Act provide compensation that requires mitigation of damages and the deduction of interim earnings from back pay).


32. Gould, AGENDA FOR REFORM, supra note 9, at 222–30.

33. See, e.g., Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970) (holding that the statute does not authorize an award of lost compensation attributable to an employer’s resort to administrative avenues that delay the NLRB process), modified sub nom., Int’l Union v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), modified sub nom., Ex-Cell-O Corp. v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971); cf Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997). But see Int’l Union of Elec. v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970); Gould, AGENDA FOR REFORM, supra note 9, at 221. Moreover, union lethargy and a failure to commit robust organizational efforts has both induced decline and split the labor movement into two competing entities. See Ruth Milkman, Op-Ed., A More Perfect Union, N.Y. TIMES, June 30, 2005, at A25; Ruth Milkman, Divided We Stand, 15 NEW LAB. FORUM 38 (2005). Nonetheless, the possibility that the labor movement will be re-energized as the result of labor law reform cannot be gainsaid. See William B. Gould IV, Prospects for Labor Law Reform After
individual, as opposed to the collective interests of union representation.\textsuperscript{34} Indeed, the NLRB, which had a culture of excellence since its inception in the New Deal period in 1935, has recently obtained one of the worst reputations for its long delays and consequent failure to discharge its statutory mission.\textsuperscript{35}

The last two subjects, i.e., delay in the administrative process and the ineffectiveness of remedies, has drawn much attention from labor law reformers; though the striker replacement issue was the focus of congressional interest, albeit aborted by the Senate filibuster in the 1990s.\textsuperscript{36} In 1977, the House of Representatives passed the Labor Reform Bill which touched upon these issues in legislation supported by President Jimmy Carter. But in the following year, it met the graveyard of labor law reform in the filibuster in the United States Senate.\textsuperscript{37} Most recently the issue has emerged anew in the form of the so-called Employee Free Choice Act, which has been a focal point of controversy since the House of Representatives passed it in March 2007, becoming part of the 2008 Democratic Party platform and presidential campaign.\textsuperscript{38}

In this Article, I review the Employee Free Choice Act, and, while noting that it is generally superior to the status quo contained in a broken existing system, I contend that the Act is not the best answer to the problem of labor law reform. It is the substitution of one imperfect approach with another one. Thus, I propose expedited elections

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\textsuperscript{36} Catherine S. Maingold, For 2d Time, Senators Block Bill to Bar Replacement of Strikers, N.Y. Times, July 14, 1994, at D23.
\textsuperscript{38} DNC 2008 Platform, supra note 13, at 14; Carl Hulse, Advocacy Groups, in Big Ad Campaigns, Step Up Intensity of Senate Races, N.Y. Times, Aug. 20, 2008, at A19. It is possible that the filibuster could be used—as it has been in the past—to deny a vote on the EFCA. See Robbie Brown & Carl Hulse, Republican Wins Runoff for Senator in Georgia, N.Y. Times, Dec. 3, 2008, at A17. ("Saxby Chambliss, a first-term Republican senator, was re-elected by Georgia voters on Tuesday in a substantial victory, ending Democratic hopes for a 60-vote majority in the Senate that would make it difficult for Republicans to filibuster the Obama administration’s legislative agenda."). However, it is possible that some Democrats would not have voted to break the filibuster and some Republicans would have switched to the Democratic side.
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similar to what some of the Canadian provinces have adopted as a basis for recognition, instead of authorization cards, that, in my view, contain numerous deficiencies. I note that the Canadian approach, i.e., to postpone the resolution of disputed issues, such as the eligibility of individuals to vote in the election until subsequent to the vote itself, is not unknown to the American system given the Clinton Board's use of such approaches during my Chairmanship in the 1990s.

I advocate so-called conditional recognition, which would allow employees to choose simultaneously a union and a proposed contract, because this gives employees real information about their prospective employment conditions while also giving employers a sense of the cost of the bargain, particularly in critical work rules and job classifications arenas, and thus reduces campaign propaganda and acrimony emanating from both sides during the campaign itself. I express the view that this revision can be accomplished either by NLRB reversal of precedent or as part of new legislation.

I also note that most certifications and recognition accorded unions as the exclusive bargaining representative do not result in the negotiation of collective bargaining agreement, the *sine qua non* for continued representation. I concur with the Employee Free Choice Act's acceptance of arbitration as a final measure to resolve differences between employees and employers over new contracts, in part, because of the fact that no agreement is mandated under existing law and is without the difficulties involved with duty to bargain litigation in a first contract context. Finally, I note that the overriding problem in labor law is delay—a phenomenon that affects both election machinery and the difficulty in bargaining a first contract subsequent to certification or recognition of the union. A major part of the delay problem is found in an examination of the NLRB itself and its politicized nature, and I propose that the appointment process be reformed in order to diminish this feature and make the NLRB more truly quasi-judicial. In this connection, I reiterate my earlier proposals to expedite the administrative process and to facilitate more effective law enforcement.

I note that there are a number of answers to the problem of delay beyond those stated above, including rulemaking, and suggest ways in which there can be an adherence to time limits.

Finally, I propose that procedures privately adopted in at least one corporation are superior, in some respects, to voluntarily negoti-
ated card check or recognition systems and propose that such procedures be included in amendments of the NLRA itself.

In Parts I, II, III, and IV, I develop my proposals for expedited elections, rather than authorization cards, as a basis for recognition. In Part V, I put forward my proposals for a form of conditional recognition in which employees choose both the union and a collective bargaining agreement. In Part VI, I set forth my proposals about post recognition bargaining and the arbitration process to address first contract negotiations. And in Part VII, I assess the general problem of delay in the statutory process and provide a number of proposals to remedy this.

I. The Way Forward

Canada, governed for the most part by provincial labor law in contrast to the United States, has a good deal of experience with both card checks or authorization cards as a basis for recognition and election machinery similar to that of the National Labor Relations Act. The Canadian experience seems to indicate that unions are more successful with authorization cards than election machinery, undoubtedly contributing to the labor movement's demand for card check reform in both countries. In fact, recent legislative debate in Saskatchewan has highlighted the fact that there is no obvious correlation between the extent of unionization and provincial labor law relating to card check or secret ballot. Though there have been scholarly

39. Gould, Agenda for Reform, supra note 9, at 205-34. The doctrine of preemption has made American labor law national. See generally San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that the States' jurisdiction over subject matter normally relegated to the NLRB is displaced, even when the NLRB has declined to assert jurisdiction over the dispute in question); Machinists Lodge 76 v. Wis. Employment Relations Comm., 427 U.S. 132 (1976) (noting that the States must yield to federal jurisdiction if the activities the State desires to regulate are encompassed in the NLRA).


41. The testimony of Minister Rob Norris of Saskatchewan is as follows:
commentaries on the extent to which these different legislative approaches affect union organizing and success in obtaining recognition, the reality is that any number of factors alluded to above could be responsible for them.

For a number of years, there has been an ongoing debate between unions and employers about card check as opposed to secret ballot box elections,\textsuperscript{42} with the unions favoring the former and the employers the latter. Unions have argued that with a secret ballot box election, employees are exposed to more employer self-help and one-sided propaganda and that statements and intimidation may induce employees to vote against a union.\textsuperscript{43} But employers contend that if

\textit{That is, secret ballots are used in both British Columbia and Alberta. What we see in British Columbia and Alberta are what I would refer to . . . . There's a pretty significant divergence in rates of unionization or union coverage as Stats Canada has deemed this. So the Alberta rate is just 24 per cent, British Columbia 32 per cent, 32 and a bit. So what we see is with a secret ballot in place, we have diverging numbers regarding unionization.

What I then said is we've isolated that variable, that is the variable that is a secret ballot provision resides within both jurisdictions. Therefore I would suggest that it would be through other variables or factors that we would have to begin to explain rates of unionization. That is if both Alberta and [British Columbia] have secret ballot provisions, but they still have diverging rates of unionization or union coverage, then the answer, at least as far beginning an inquiry is to turn and say how would someone go about explaining that as a sociological phenomenon or as a political phenomenon.

The second example that I offered was, if I have this correct . . . . we've got Newfoundland and Saskatchewan. The union coverage in Newfoundland is 37.7 [percent]. In Saskatchewan it's 34.8 [percent]. So what we see is a jurisdiction with a secret ballot provision that actually has a higher rate of union coverage than Saskatchewan does without that provision. So again I simply turn and say, as part of any analysis on a go-forward basis, some additional variables or factors would have to come into focus . . . . We would then turn and ask another question: are there some potential alternative explanations about what's going on here?}


\textsuperscript{42} See \textit{San Diego Gas & Elec.}, 325 N.L.R.B. 1143, 1146–47 (1998) (Gould, Chairman, concurring) (arguing that where the NLRB held that postal ballots were appropriate, the employer control of the election apparatus at its own facility formed part of the holding). The National Mediation Board, which has jurisdiction over railway and airline workers, has utilized telephone electronic voting. See \textit{In re Telephone Electronic Voting}, 29 N.M.B. No. 90, 2002 WL 31654919, at *1 (Sept. 25, 2002). The process is described in \textit{Telephone Electronic Voting}, 30 N.M.B. 481, 487–93 (2003).

\textsuperscript{43} Former NLRB Member Peter Hurtgen has argued that the win-loss record for unions disproves this point. \textit{The Employee Free Choice Act, Hearings Before the S. Comm. of Health, Education, Labor, and Pensions}, 110th Cong. 8–10 (2007) (Statement of Peter J. Hurtgen, Senior Partner, Morgan, Lewis & Bockius, LLP. The 50.8% success rate enjoyed
card check is enacted into law, employees get a one-sided view from the union’s perspective because the employer may not know about the campaign until the union has either achieved majority status through cards or is on the brink of accomplishing this. Moreover, employers say that employees will be misled, pressured, or coerced into signing authorization cards—again perhaps swayed by a one-sided view of the facts.

Yet, given the fact that the NLRB’s performance for the past decade has been one of a downward spiral of delay and failure to use the one statutory tool at the NLRB’s disposal, i.e., to obtain injunctions so as to diminish the delay problem, it is fair to say that the Employee Free Choice Act’s preference for card check, or authorization cards as the basis for recognition, would be superior to the status quo contained in the existing system. This is because the statute, as presently structured, promotes what has become a cottage industry for unions seeking certification is higher than had been the case in 1995 (50.9%), 1985 (48%), and 1975 (50.4%). Id. at 6–8. What Hurtgen fails to note is that the win-loss ratio has become increasingly unimportant as the number of elections has precipitously declined, the unions taking the easy winners to the NLRB. A more relevant comparison is contained in the First Group experience, where unions have won more than 92.4% of NLRB elections, albeit without the presence of anti-union speech of the kind present in most NLRB elections. Telephone Interview with Mary Schottmiller, Executive Vice President, First Group America (Nov. 26, 2008). Between October 2007 and November 2008, unions won 121 of 131 elections conducted at First Group. Id.

44. The text reads:
Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting [on] their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).


Some proponents of the EFCA argue that a ballot can still be used. See, e.g., Aaron T. Knapp, Restoring Common Sense to Labor Law, S.F. CHRON., Nov. 19, 2008, at B9 (“The act does not affect the option to hold a secret ballot NLRB election, except to make it the workers’ option not the employer’s.”). But since card checks are more favorable to unions, there will be no elections where unions or employees file a petition for representation. Cf. George Raine, Labor Working for Employee Free Choice Act, S.F. CHRON., Nov. 16, 2008, at C1.

ployer propaganda which, even if unlawful because of its coercive nature, cannot be effectively remedied and does not allow the union to present its side of the outstanding issues because non-employee organizers are excluded from the workplace. Moreover, unions contend that the Act's reliance upon card check mirrors what has transpired on the ground and that more workers organize through this procedure than through NLRB elections.

46. The demarcation line between permissible and coercive speech is a difficult one to draw. See Archibald Cox, Law and the National Labor Policy 42-44 (1960). The most important cases are collected in Judge Tatel's opinion in United Food & Commercial Workers Union Local 204 v. National Labor Relations Board, 506 F.3d 1078 (D.C. Cir. 2007).

47. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992). Prior to the Taft-Hartley amendments, captive audience speech was unlawful. See NLRB v. Clark Bros. Co., 163 F.2d 373, 376 (2d Cir. 1947). Contra NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946). The enactment of Taft-Hartley produced a reluctant Board shift. See Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948). However, where an imbalance in avenues of communication was present, the rule was revived so as to provide an opportunity for the union to reply. See Bonwit Teller, 96 N.L.R.B. 608, 611-12 (1951), rev'd on other grounds, 197 F.2d 640 (2d Cir. 1952). The rule was abandoned by the Eisenhower Board in Livingston Shirt Corp., 107 N.L.R.B. 400, 409 (1953), and revived by the Kennedy Board in May Dep't Stores, 136 N.L.R.B. 797, 814 (1962), enforcement denied by 316 F.2d 797 (6th Cir. 1962). Now moribund, the rationale of Livingston Shirt was left untouched by the Clinton Board. See Montgomery Ward & Co., 339 F.2d 889; see also Beverly Enterprises-Haw., Inc., 326 N.L.R.B. 335, 361 (1998) (Gould, Chairman, dissenting); cf. NLRB v. United Steelworkers of Am., 357 U.S. 357 (1957); William B. Gould IV, Union Organizational Rights and the Concept of Quasi-Public Property, 49 MINN. L. REV. 505 (1965); William B. Gould IV, The Question of Union Activity on Company Property, 18 VAND. L. REV. 73 (1964).

Union access cases frequently raise state property law issues. See, e.g., Farm Fresh, Inc., 326 N.L.R.B. 997, 1003-04 (1998) (Gould, Chairman, concurring), rev'd sub nom., United Food & Commercial Workers Int'l Union Local 400 v. NLRB, 222 F.3d 1030, 1035 (D.C. Cir. 2000). A modern departure from Lechmere and its captive audience progeny is Fashion Valley Mall, L.L.C. v. NLRB, 172 P.3d 742, 743 (Cal. 2007), cert. denied, 129 S. Ct. 94 (2008) (holding that under the free speech provision of the California Constitution, it is unlawful for a mall to enforce a rule prohibiting persons from urging customers to boycott a store in the mall by a union). Under the line of authority established in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), employer due process claims have been rejected. Id. at 82-83.

But is the Employee Free Choice Act the best answer to the problem of labor law reform? And what about the rest of the provisions in the Act, particularly those that provide for arbitration of interest disputes about the terms of a new collective bargaining agreement so as to preserve an embryonic relationship in first contract negotiations? On the latter point the Act, as presently written, does not seem to take into account the problems (discussed below) which have confronted the Canadians in their attempt to provide for a coexistence between collective bargaining and arbitration which is both peaceful and fruitful. Moreover, the juxtaposition of card check for recognition and first contract arbitration fails to take account of the fact that the well-founded challenges to the former—the majority of Canadian provinces have now switched to elections—will be harmful to arbitration efficacy. A failure to acknowledge the legitimacy of union representation status subsequent to certification can both poison the bargaining process and thus overload the volume of cases proceeding to arbitrations. It is especially important that policymakers get both


50. The text reads:

If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision setting the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.


52. I owe this insight to Mr. Gall of Heenan Blaikie, Vancouver, and Mr. Dinsdale of Heenan Blaikie, Toronto, as well as Professor McCartin of Georgetown University.
parts of the law right. Failure in recognition will harm subsequent bar-
gaining and arbitration.

Finally, there is the abiding matter of remedies, which the new
Act addresses through triple damage relief for workers who are dis-
missed unlawfully in union organizing campaigns. The Act provides a
fine of up to $20,000 for each violation, and a provision mandating
the NLRB to seek injunctive relief in federal district court against em-
ployer unfair labor practices in the same way that the NLRB is man-
dated to obtain injunctive relief in connection with a wide variety of
union unfair labor practices, particularly unlawful secondary boycotts
and organizational picketing. Unlawful coercion and intimidation by
employers cannot be remedied now because: (1) the back pay
award which constitutes the outer limits of monetary relief simply con-
stitutes a "license fee" for employer misconduct; and (2) delay in the
process simply exacerbates the difficulties employees experience in ac-
quiring adequate compensation. It is far less costly for employers to
use delay tactics, rather than negotiate enhanced wages and fringe
benefits in a collective bargaining agreement, when employees have
frequently scattered to the winds, thus making it unlikely that the col-
lective bargaining process can be resurrected.

II. Union Recognition-Card Checks and Elections

When the National Labor Relations Act was first passed in 1935,
the NLRB certified unions as exclusive representatives on the basis of
either a card check or a secret ballot box election. But in 1939, the
agency held in Cudahy Packing Co., albeit in the context of compet-
ing claims by two unions, that an election was the "more satisfactory"
process if "the doubt in disagreement of the parties regarding the
wishes of employees" was to be eliminated. Over Member Smith’s
dissent, the NLRB noted that it had certified representatives without
an election but stated that its experience manifested that the Act’s

mining the amount of any penalty under this section, the Board shall consider the gravity
of the unfair labor practice and the impact of the unfair labor practice on the charging
party, on other persons seeking to exercise rights guaranteed by this Act, or the public
interest."). Contempt sanctions are punishable "by a fine of not more than $5,000 or by
imprisonment for not more than one year, or both." Id. § 12(b). This may ease weaknesses
in Board contempt disputes. See Florian Bartosic & Ian Lanoff, Escalating the Struggle Against

54. Pucinski Hearings, supra note 9, at 22; see also Philip Ross, The Role of Government in

55. 13 N.L.R.B. 526 (1939).

56. Id. at 531.
policies would "best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot."\textsuperscript{57} A few months later, the NLRB marched forward and applied its preference to a case where the company simply contested the union's claims based upon cards and said that "any negotiations entered into pursuant to a determination of representatives by the Board will be more satisfactory if all disagreement between the parties regarding the wishes of the employees has been, as far as possible, eliminated."\textsuperscript{58} This practice seems to have been adopted in response to the threat of congressional investigations that arose out of criticism of a number of NLRB procedures.\textsuperscript{59} As former NLRB Chairman Harry A. Millis and Emily Clark Brown said in their classic work:

\begin{quote}
57. \textit{Id.} at 531–32. Member Smith dissented:

The process of certification has been wisely used by the Board to facilitate prompt collective bargaining in cases where the fact of majority adherence to a particular labor organization is made amply clear at a hearing at which all sides are free to advance their claims. I see no warrant for concluding, as does the majority opinion in this case, that "the doubt and disagreement of the parties regarding the wishes of the employees" has not been satisfactorily disposed of by the evidence in the record.

\textit{Id.} at 533.

58. Armour & Co., 13 N.L.R.B. 567, 572 (1939). Again, Member Smith dissented, concluding that "[t]he device of certification without an election seems to me particularly appropriate when there is, as in this case, only one labor organization seeking to be designated as the representative of the employees." \textit{Id.} at 575.


\textit{[T]he Board . . . made what Louis Stark [the New York Times labor reporter] called a radical departure from its previous practice of certifying bargaining representatives on the basis of membership cards without a representation election, a practice that had been severely criticized during the Senate and House Committee hearings. The NLRB had certified Harry Bridges' Longshoremen's Union in the \textit{Shipowners' Association of the Pacific Coast} case, for example, on the basis of a membership card check. Critics of this approach maintained that employees signed these cards out of fraud and coercion or simply to get rid of union solicitors. In the \textit{Cudahy} case, which was heard in March, 1939, the Board designated a bargaining unit which included 157 employees but refused to certify the United Packinghouse Workers Organizing Committee (CIO) as the bargaining representative of these employees despite the fact that the UPWOC had introduced into evidence 147 membership cards signed by employees in the unit in 1938 and petitions signed by 141 bargaining unit employees only two months before the hearing. . . . It was one of the first NLRB decisions in which William Leiserson participated, and he was assumed to have been responsible for the departure from precedent since the \textit{Cudahy} decision was consistent with the practice of the National Mediation Board, which Leiserson had chaired.}

\textit{Id.} at 105–06 (footnotes omitted).
By 1939... the Board decided that generally elections would be the best basis for certification. Thus any possible doubt would be removed as to whether the union really was the free choice of the employees. From then on elections were normally used to determine a question of representation in the formal Board-ordered cases, although occasionally a union was certified on the record when there had been agreement for a cross-check of union cards against the company pay roll, as in Carnegie-Illinois Steel in 1942. Cross-checks continued to be used by agreement in some informal cases, but there was enough doubt as to whether signed cards were a trustworthy indication of the wishes of the employees, especially in the case of certain unions, to argue strongly for the more usual practice of holding elections. In the later years it became standard practice in "consent cross-checks" for the Regional Director to post the result in the plant for five days, giving any interested party a right to raise objections, before the determination was made final.60

Under the 1947 Taft-Hartley amendments to the NLRA, the NLRB was "permitted... to resolve representation disputes by certification... only by secret ballot election"61 and thus an employer could insist upon a representation election62 rather than bargain with the union on the basis of authorization cards notwithstanding a Supreme Court holding that a duty to bargain could be imposed upon management on the basis of cards where there was employer misconduct.63 Subsequently, in this century, George W. Bush's Board ("Bush II Board") held that representation petitions would be entertained by the agency notwithstanding a voluntary recognition agreement, which though not accorded union certification status by virtue of the 1947 amendments, nonetheless had previously barred a challenge by another union or the employer to incumbent union representation status.64 (It was called the recognition bar.65) The Bush II Board held

60. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY, A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 133–34 (1950).
62. Linden Lumber v. NLRB, 419 U.S. 301, 309–10 (1974). The union argument, which failed to carry the day in Linden Lumber, was that the employer's failure to petition the NLRB—an entitlement gained through the Taft-Hartley amendments—was a basis for imposing a duty to bargain on the basis of cards. Id.
63. Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944). In subsequent case law that seems to have been of little consequence, the NLRB developed a "good faith doubt" standard that required employers to bargain with unions that presented cards establishing majority status. See Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 741 (D.C. Cir. 1950); Aaron Brothers Co. of Cal., 158 N.L.R.B. 1077, 1078 (1966). See also generally Laura Cooper & Dennis Nolan, The Story of NLRB v. Gisel Packing: The Practical Limits of Paternalism, in LABOR LAW STORIES 191–239 (Laura Cooper & Catherine Fisk eds., 2005). Linden Lumber buried this approach. Id. at 229.
64. Dana Corp., 351 N.L.R.B. No. 28 (2007).
that the parties had an obligation to notify the NLRB of such an agreement and to post a notice for forty-five days, giving a rival union or individual employees the opportunity to file a representation petition challenging the relationship if there was a 30% showing of interest amongst the employees.

This decision seems to be wrongly decided and an attack upon the Act's preference for voluntary initiatives that are not contrary to the law itself. Nonetheless, the NLRB expressed concern even prior to the Taft-Hartley amendments (even there where the parties were seeking certification, the Regional Director adopted a policy roughly analogous to the recent approach\textsuperscript{66} that voluntary recognition would not sufficiently take account of the interests of a number of employees.\textsuperscript{67}

There is an inherent concern that authorization cards may be the product of peer pressure, rather than a more pristine version of employee free choice, and are a process fundamentally different from the secrecy involved in a ballot box process.\textsuperscript{68} Where bargaining orders have been predicated upon cards—these are the so-called \textit{Gissel}

\textsuperscript{65} A recognition bar gives the parties a sense of stability and breathing space to establish their relationship and to negotiate a collective bargaining agreement. Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966). As the Supreme Court said a half-century ago: “A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.” Brooks v. NLRB, 348 U.S. 96, 100 (1954); \textit{see also} Smith's Food & Drug Ctrs., Inc., 320 N.L.R.B. 844, 847-48 (1996) (Gould, Chairman, concurring); Douglas-Randall, Inc., 320 N.L.R.B. 431, 434 (1995). I have articulated this position in the press as well: “If a union can obtain recognition without going to us, they will always be better off,” [Gould] said. “There is more delay going through us.” Frank Swoboda, \textit{To the AFL-CIO, There's No Place Like Home; Unions Increasingly Turn to Door-to-Door Organizing, Bypassing Employer Opposition}, WASH. POST, Mar. 16, 1997, at H1.

\textsuperscript{66} The decisions of the 1930s, however, were different because in these cases, the union itself was petitioning the NLRB for certification. This contrasts with the Bush II Board cases where the parties themselves have negotiated procedures without reference to the NLRB—and yet the NLRB interferes at its own initiative.

\textsuperscript{67} \textit{See generally} MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (finding that in balancing the competing goals of effectuating free choice while promoting voluntary recognition . . . the purposes of the Act are best served by finding that a reasonable time had not elapsed at the time the instant petitions were filed.”). The NLRB recognized, however, that “[t]he voluntary recognition bar extends for a reasonable period, not in perpetuity.” \textit{Id.}

\textsuperscript{68} Note, \textit{Union Authorization Cards}, 75 \textit{Yale L.J.} 805, 823-25 (1966). According to this author:

Even in the case of cards which clearly authorize the union to seek bargaining without an election, the absence of secrecy makes threats of wage and seniority reprisal and promises to waive initiation fees more than mere predictions. True, the union cannot, at the time, enforce its threats. But since his signature will be a matter of public record, the undecided employee must carefully assess the possible consequences of being counted in the minority should enough fellow em-
bargaining orders which are triggered by various forms of employer misconduct making the expression of free choice through the ballot unlikely—disputes frequently arise about whether the cards and majority status were obtained through misrepresentation, fraud, or coercion. The date at which the card is signed can raise questions about whether they are stale and therefore improperly counted towards majority status.

Frequently, workers have signed cards for more than one union. Not always a deliberate process, a compulsory card check mechanism, as a replacement for a ballot so frequently abused by employers, is the substitute of one imperfect process for another.

Thus, authorization cards or a card check procedure are going to be a very tough sell with any Congress, even among some Democrats in the heavily Democratic Congress of 2009, as well as Republicans. There are three reasons why: (1) the concerns about peer pressure just expressed and disputes about the circumstances under which cards are obtained; (2) the fact that unions will organize more employees under such procedures because it is easier to do so, thus accentuating the resistance on the part of some members of Congress.

employee sign. And, as in elections, each instance of union coercion and misrepresentation overturns only one vote.

In short, the coercive effect of union statements made during an authorization card drive is entirely different from that of statements made in a secret ballot campaign. A union organizing by means of authorization cards is in at least as effective a position to coerce as is an employer in a secret ballot campaign.

Id. at 827 (citations omitted).


70. See, e.g., Dahlstrom Metallic Door Co., 11 N.L.R.B. 408, 414 (1939). The Canadian system imposes sanctions on unions for the commission of fraud. For example, see Fabricland Pacific, Ltd. v. Int'l Ladies' Garment Workers' Union, Local 287, B.C.L.R.B. No. B55/99 (1999), where the British Columbia Board disallowed certification when a single card had been signed by one employee for another one. Id.

71. See, e.g., Belmont Stamping & Enameling Co., 1 N.L.R.B. 378, 380 (1936). Since cards have not been the basis for establishing representative status, the frequency of litigation in this area pales in comparison with employer abuses in elections. But even in relatively non-litigious Canada, there have been many controversies of this type. See Jeffrey Sack & C. Michael Mitchell, Ontario Labour Relations Board Law and Practice 176-213 (2d ed. 1985).

72. See Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945); see also id. at 1077 n.13 (“[I]t is well known that membership cards obtained during the heat of rival organizing campaigns like those of the respondent's plants, do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.”).
who are hostile to unions; and (3) the policies of the National Labor Relations Act itself.

Concern about peer pressure has led me to write that the Employee Free Choice Act should have an amendment that requires a supermajority to impose recognition through certification. A supermajority requirement would partially allay concerns, unease, or doubt about whether a majority of employees in fact supported collective bargaining. Similarly, in my judgment, my proposal that some limited dues or initiation fees be required in order to count the cards—this was adopted at one point by some Canadian provinces and continues to be the policy in the Canadian province of New Brunswick—would be evidence that the workers thought seriously about the benefits and burdens of unionization. Such a requirement would show that the worker is not simply signing the card to get the union organizer off his back. One difficulty with this approach is that it is at cross-purposes with union attempts to waive any form of dues or monetary requirement in an organizational campaign as an inducement to join. Still, if cards are to be the basis for recognition as the Employee Free Choice Act has contemplated, it seems that the payment of dues or some portion thereof is an important prerequisite so as to manifest a deliberative process.

Another concern with cards is that some of the same problems involved with delay in ballot box votes will affect this procedure. After all, in the first instance, the same disputes over the appropriate unit and eligibility of employees to vote (e.g., who is a supervisor and


75. Memorandum from the New Brunswick Labour Relations Board and Alberta Labour Relations Board (on file with author).

76. See generally NLRB v. Whitney Museum of Art, 645 F.2d 506 (5th Cir. 1980) (holding that a union's conduct is lawful if a waiver of initiation fees and a lower-than-usual dues structure are open to all employees regardless of whether they support or vote for the union); Molded Acoustical Prods., 280 N.L.R.B. 1394 (1986), enforced, 815 F.2d 934 (3d Cir. 1987) (holding that it is lawful for a union to promise it will lower initiation fees if the union wins the election because there is no improper inducement to sign authorization cards). But see NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (holding that it is unlawful for unions to waive the fees of only those employees who sign authorization cards).

who is an employee covered by the Act\textsuperscript{78}) will still arise. This has caused delay in the election machinery and will cause delay in connection with cards as well. The fact that employers have become sophisticated in exploiting NLRA loopholes and delaying the electoral process is responsible, as much as anything else, for the law's ineffectiveness in promoting freedom of association and collective bargaining as was initially intended. That problem will not evaporate in a new card check era—though with an authorization card regime there may be less incentive to delay because the votes in the form of executed cards will be in the bank already, undisturbed by anything other than the possibility of worker petitions repudiating what they have signed.

Moreover, though the EFCA is silent on this issue and the NLRB will be required to make regulations, it makes sense for the amendments to follow Canadian law and to not allow the employer to examine cards.\textsuperscript{79} However, in subsequent unfair labor practice proceedings—unless EFCA precludes them—presumably in some instances the employer might have an opportunity to examine the cards and examine witnesses, as it does under existing law, where employer misconduct triggers a bargaining order. If there is greater scope for subsequent employer examination of cards, the employer will have every incentive to litigate after the representation proceeding concludes.

Very much related to this is another problem peculiar to cards, i.e., disputes over their authenticity. The signature must always be matched against the employer payroll, though this is a relatively insignificant part of the process. This is what the NLRB does under election machinery as it determines whether there is a sufficient “showing of interest” in order to meet the 30\% threshold of employee support for an election, or collective bargaining, and thus to conduct an election at all.\textsuperscript{80} Nothing more is required—there is no hearing about whether the cards lack authenticity or whether they have been improperly produced and signed.

But, as noted above, in unfair labor practice proceedings, the issues that most often arise involve questions relating to coercion, fraud, and misrepresentation on the union’s part. Testimony about this matter, whatever the proof standards used by the NLRB to assess the validity of the cards, will be time consuming and vexatious. This

\begin{footnotes}
\item[78] Gould, Primer, \textit{supra} note 25, at 35–37.
\item[79] Sack & Mitchell, \textit{supra} note 71, at 179.
\item[80] Pursuant to its rules and regulations, the NLRB does this so as to verify bargaining unit composition—not to verify the authenticity of the signatures themselves.
\end{footnotes}
introduces a new issue, along with disputes about units and eligibility, which will create an additional barrier to expeditious resolution of representation issues. In contrast, at the vote at the secret ballot box, the NLRB resolves such issues administratively without litigation. It cannot do so when cards are a basis for recognition rather than a "showing of interest" (the prerequisite for triggering an election), introducing an element always present in unfair labor practice charges that seek recognition as a remedy\(^1\) for employer misconduct when employers and employees may challenge card validity.

Penultimately, nothing in the reforms relating to union organizational activity is designed to limit non-coercive employer anti-union speech. This issue overshadows\(^2\) all others, and it is particularly pernicious when management truthfully tells workers that they can be permanently replaced during a strike\(^3\) or that it will close the plant permanently.\(^4\)

As noted below, some employers have voluntarily refrained from speech. Not only is this beyond the policy today, but in all probability, regulation by Congress prohibiting non-coercive speech would be unconstitutional under more than six-decade-old precedent.\(^5\) It is em-


\(^2\) Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966) ("We acknowledge that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered against the background of a profound commitment to the principle that debate should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.") (footnotes and internal quotation marks omitted)); see also Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408 (2008).

\(^3\) See generally Eagle Comtronics, Inc., 263 N.L.R.B. 515 (1982) (discussing the minimal degree of detail required of an employer who informs employees that they are subject to replacement in the event of a strike).

\(^4\) See generally *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965) (holding that an employer has an absolute right under the NLRA to terminate his entire business for any reason he pleases, including antiunion motives).

ployer anti-union speech and literature, both coercive and non-coercive, which is even more important than the form of recognition. Moreover, recognition on the basis of cards will spawn a new round of litigation about the extent to which employers can interrogate employees; the previously held NLRB view that interrogations are unlawful per se is now a part of long-ago labor law history. It will also promote unlawful surveillance as employers attempt to get the jump on labor organizers and preemptively strike against the union campaign.

Finally, employer resistance will be accentuated by the need for a statutory provision that sets forth arbitration procedures subsequent to recognition, a matter discussed below. I rather doubt that employers, to whom accommodations must be made on this subject if reform proponents are to find the necessary support beyond the labor movement itself, will go quietly into the night on both issues simultaneously. And, as noted above, the fact that these two statutory provisions are closely linked together is visible when one looks at how parties operate on the ground. This means to me that there must be a very serious exploration of the electoral process itself and thought given to how this more acceptable avenue can be expedited and streamlined so that employee free choice can be realized. The same holds true for the arbitration process itself.


86. See generally Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949) (affirming the position “that Section 8(a)(1) of the Act is violated when an employer interrogates his employees concerning any aspect of union activity”), overruled by Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954).

87. See generally Nat'l Steel & Shipbuilding Co., 324 N.L.R.B. 499 (1996) (holding that while "observation of open, public union activity on or near its property doesn't constitute unlawful surveillance," photographic and videotaped observation goes beyond mere observation and creates fear among employees), enforced, 156 F.3d 1268 (D.C. Cir. 1998).
III. The Ballot Box—How Can It Be Reformed?

There are four major problems with the ballot box under American labor law as currently written. The first is that a hearing must be conducted—and for the most part, completed—before a vote is taken on issues. The hearing focuses upon appropriate unit or eligibility issues. Though approximately 80% of the representation proceedings are completed within fifty to sixty days, this is by virtue of stipulated agreements entered into, in which the union frequently must make concessions because it knows that a full-fledged hearing and an appeal to the NLRB in Washington will be extremely time consuming. The remaining 20% of them are a Bleak House-like nightmare, running on into months and years!

A second and related issue is that the appeal to the NLRB can take an extraordinary amount of time under any scenario. The parties may wish to agree to be bound by the rulings of the Regional Director and thus deny themselves an appeal, but an overwhelming percentage of parties do not. Appeals to Washington are a black hole in which the NLRB can hold the case indefinitely and frequently does. But beyond this, though representation orders are not “final” within the meaning of the Act, they can be appealed through the unfair labor practice process because an employer, when confronted with rulings in connection with such unit and eligibility issues it does not like, can simply sit back and refuse to bargain. Thus, requiring refusal to bargain charges to be filed is a phenomenon likely to increase under the Act. Notwithstanding the fact that since the 1990s, the NLRB has dealt

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88. See generally Angelica Healthcare Servs., 315 N.L.R.B. 1320 (1995) (finding that the Acting Regional Director violated the language of section 9(c)(1) of the NLRA and section 102.63(a) of the Board’s Rules by failing to provide an appropriate hearing prior to finding that a question concerning representation existed, and directing that an election be held).

89. Am. Fed’n of Labor v. NLRB, 308 U.S. 401, 409 (1940) (“[T]he entire structure of the Act emphasizes, for purposes of review, the distinction between an ‘order’ of the NLRB restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the NLRB for enforcement of the other, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other order, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10(f) is emphasized by the clauses of § 9(d), which provide for certification by the NLRB of a record of a representation proceeding only in the case when there is a petition for review of an order of the NLRB restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the NLRB prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.”).
with these in a fairly summary and expeditious fashion, they do take time.\footnote{NAT'L LABOR RELATIONS Bd., NLRB CASEHANDLING MANUAL, 1 UNFAIR LABOR PRACTICE PROCEEDINGS § 10,025 (2008), available at http://www.nlrb.gov/nlrb/legal/manuals/INITIATION%20OF%20CASES%20010%20040.pdf.} And since unfair labor practice charges may be reviewed by the circuit courts of appeal, a new layer of review which builds in a time period of two to three to four years comes into play in those cases in which the employer does not abide by the NLRB's order.\footnote{The NLRB and any party "aggrieved" may petition the relevant circuit court of appeals. Scofield v. NLRB, 394 U.S. 423, 426-27 (1969). This review can lead to appropriate unit reversals. NLRB v. Metro. Life Ins. Co., 380 U.S. 438, 444 (1965).} Even if the appeal is not taken, the threat of one affects what the union will settle for in order to commence collective bargaining.

Finally, some representation issues have been litigated again and again for as many as four decades, and under the adjudication model traditionally favored by the NLRB, they must be adjudicated each time anew.\footnote{Ever since the early 1960s, the NLRB has held that the single unit is presumptively appropriate. See Sav-on Drugs Inc., 138 N.L.R.B. 1032, 1033, 1035 (1962); Frisch's Big Boy III-Mar, Inc., 147 N.L.R.B. 551, 553 (1964), enforcement denied, 356 F.2d 895 (7th Cir. 1966); F.W. Woolworth Co., 175 N.L.R.B. 1146, 1147 (1968); Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962); Metro. Life Ins. Co., 156 N.L.R.B. 1408, 1414 & n.16 (1966); Bowie Hall Trucking, Inc., 290 N.L.R.B. 41, 42 (1988).} In the 1990s, my Board attempted to engage in rulemaking on such issues so that it could establish clear standards; for example, in disputes about whether a representation election should be held in a single location as opposed to multi-location facilities of an employer. But Congress imposed a rider on the NLRB's appropriations bill precluding us from engaging in such activity. Ultimately, over my dissent,\footnote{GOULD, LABORED RELATIONS, supra note 15, at 69-74.} the NLRB withdrew its proposed rulemaking. This matter is important not only because it has a potential for reducing unnecessary and wasteful litigation on issues that have been decided for years, but also because it may serve an important issue, addressed below, i.e., the depoliticization of the NLRB. A newly constituted Obama Board, coexisting with the Democratic Congress, could finally accomplish this and fashion a rulemaking approach to other issues for which this approach is long overdue.

IV. Election Machinery

The main election problem relates to the speed in which the process can be conducted. My Board attempted to move ahead with elections before numerous issues of eligibility were resolved, agreeing to
resolve them subsequent to the ballot if the numbers of individuals contested turned out to be determinative of the election outcome.

In a number of Canadian jurisdictions, the representation vote takes place prior to a formal hearing of any kind. This occurs in British Columbia, where an informal hearing, at which not all issues are required to be resolved, takes place within five to six days of the filing of a representation petition. A ballot is conducted on an average of seven days subsequent to the filing of the petition because the statute requires that it take place within ten days. In New Brunswick, a vote is generally taken between four to seven days of a Board’s order, which takes place simultaneously with the filing of a certification petition. In Ontario, which, like most of Canada, has now moved to elections, the Labour Board moves quickly: 80.57% of elections take place within five days or less of application for certification, 96.69% take place within seven days or less of it, and 100% take place within ten days.\(^9\) Disputes about eligibility to vote are frequently resolved afterwards, either by agreement or adjudication by the NLRB.\(^5\)

A basic difference between this and the American system is that some form of hearing leading to adjudication, which results in the ordering of an election, must take place prior to the vote. My Board held in Angelica Health Care Services Group Inc.\(^6\) that a hearing in some form is required prior to the election, though there have been many disputes about precisely what this means. For instance, during my tenure, a unanimous Board held that where an employer did not take a position about an issue in dispute in a representation hearing, the hearing officer properly refused to allow the employer to introduce evidence as to that issue thus properly denying re-litigation of the same issue through the challenge ballot process.\(^7\) Similarly, re-litigation of issues on the appropriateness of a single facility unit advanced by the same employer at a different facility was precluded so as to avoid wastefulness and delay.\(^8\) Thus, in the 1990s, the NLRB emphasized that the role of the hearing officer in a representation proceeding is to ensure that the process through which one votes now and litigates later over issues relating to unit and eligibility is much more

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95. According to recent data, the Ontario Board manages to resolve 89.4% of disputes related to certification in 168 days or less. Id. at 20.
expeditious and presumably protects against the delay that corrodes employee free choice.

But inasmuch as the American system requires a formal hearing of some kind on the merits, the American NLRB lacks the discretion that is available to their Canadian counterparts. Prior to my Chairmanship, the NLRB’s policy was to approve election agreements between parties that provided up to 10% of the voting group to be subject to challenge at the ballot box, and if necessary, because the number of employees challenged was outcome determinative, after the vote itself. Of course, where the number in dispute is not outcome determinative, once the votes initially cast are counted, there is no need to resolve these. This practice—one that has a modified version of vote now and litigate later (modified because it presupposes that some hearing must take place prior to the ballot) is engaged in where the number of people in dispute is numerous and where the issue would require detailed hearings and findings. The Sixth Circuit Court of Appeals held that the NLRB is enabled to “conduct an immediate election where . . . it is undecided about the eligibility of a relatively small number of individuals whose votes may not affect the election. The question of eligibility may be resolved after the election through the Board’s unit clarifying procedure.”

The principal line of attack on this approach is that the outcome of the election would be different if the employees knew the scope of the unit entitled to vote. The reasoning is that the inclusion or exclusion of employees may affect employee decisions about how their interests will be best represented. Said the Second Circuit Court of Appeals: “Challenges to a regional director’s eligibility determination frequently involve only the inclusion or exclusion of a few voters and, even if successful, may not change significantly the scope of the unit.”

But the court, in this case, concluded that the NLRB’s approach improperly split the work force and that employees might have voted

99. Even conservative congressman Robert Griffin of Michigan, author of the Landrum-Griffin Act of 1959, stated the following two years later: “If the controversy involves a bargaining unit, it might be one situation; but if the dispute concerns, for example, challenged ballots, the Board might be able to proceed with the election and decide the challenged ballot questions later. Different problems may call for different remedies.” Pucinski Hearings, supra note 9, at 26–27.

100. Medical Ctr. at Bowling Green v. NLRB, 712 F.2d 1091, 1093 (6th Cir. 1983).

101. Hamilton Test Sys., N.Y., Inc. v. NLRB, 743 F.2d 136, 140 (2d Cir. 1984). See also generally Diamond Walnut Growers, Inc., 308 N.L.R.B. 933 (1992) (holding that eligibility determinations were postponed because of statutory deadlines).
differently had they known the true nature of the unit; for instance: (1) they might have felt that a smaller bargaining unit would provide “insufficient strength to justify union representation”; (2) more skilled employees might not have wished to have union representation with a lower tier of employees who had less pay and opportunities for advancement so as to garner future opportunities for themselves; (3) a broader unit might establish a more unified work force and employees might have been concerned about divisiveness and “undesirable tensions”; and (4) “interpersonal relationships within the plant might have made an individual employee comfortable with a facility-wide unit but caused concern and distress over leadership in a smaller unit.”

However these decisions, especially insofar as they impose a requirement of a small number of employees in dispute as a prerequisite for the NLRB approach, improperly trump the NLRB’s expertise. The NLRB has traditionally followed a policy of allowing as much as 15% of the unit and the voting group to vote subject to challenge. Again, this is viewed as infinitely preferable to contentious and time-consuming litigation when employees must wait substantial periods of time during which employer counterattacks, lawful and otherwise, may take place for months or longer. Employees, seeing their conditions frozen in place, may grow frustrated with the idea of unionization regardless of the employer response. These considerations must be balanced against concerns about complete lack of knowledge amongst employees as to the group that they voting in. This concern was expressed by the Court of Appeals as noted above.

Where 20% were in dispute, my Board expedited the election, leaving eligibility issues to be resolved. We held that this amount did not signify a “significant change in character and scope to warrant setting aside the election . . . .” In 1994, the NLRB proceeded to

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102. Hamilton, 743 F.2d at 141.

103. NLRB v. Exchange Parts Co. held that the bestowal of benefits during a union organizational campaign is unlawful. 375 U.S. 405, 409 (1964) (“The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”). However, increases in benefits promised prior to the union organizational campaign may be granted because the test is whether an employer is proceeding “as if the union were not on the scene.” United Methodist Home of N.J., 314 N.L.R.B. 687, 687 (1994).

104. Toledo Hosp., 315 N.L.R.B. 594, 594 (1994) (Cohen, Member, dissenting). The NLRB then relied upon Toledo Hospital to say that the exclusion of one classification from a facilitywide service and maintenance unit comprised of employees in nine other specifically named classifications, rep-
ballot in units where 33% of the voters in one unit and 22% of the voters in the other were in dispute.\textsuperscript{105} Again, the same position was followed where the anticipated percentage of challenged ballots was 37.5%.\textsuperscript{106}

In 1998, the NLRB held an election where 27% of the ballots were in dispute and the challenged number was actually 700 voters.\textsuperscript{107} The hearing on those individuals would have consumed months if not years! In fact, in this particular case and in most of those alluded to above, it was not necessary to have a hearing subsequent to the vote because the numbers in dispute were not outcome determinative.\textsuperscript{108} This highlights another deficiency in the judicial approach, which is the speculative nature of decisions predicated upon the fact that a large number of voters may result in subsequent litigation about their status because they are likely to be outcome determinative.

Even the Bush II Board was comparable to the Clinton Board numbers in not allowing similar numbers of employees to vote under challenge. It adhered to the view that “[t]he challenge procedure is a well-established method through which the Board ensures the speedy running of representation elections.”\textsuperscript{109} In \textit{Northeast Iowa Telephone},\textsuperscript{110} the NLRB, while concluding that the situation was not “optimal,” allowed a vote subject to subsequent challenge of 25% of the unit under this procedure. Indeed, even where there was no occasion to resolve the issue in a ballot challenge hearing, my Board said that “the issue need not stay unresolved. If the parties do not subsequently agree on whether to add them to the unit, the matter can be resolved in a timely invoked unit clarification proceeding.”\textsuperscript{111}

One approach, which might be contained in the Employee Free Choice Act, would be to promote case law encouraging the “vote now

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\item resents a numerical change which we, contrary to the Regional Director, do not view as signifying a sufficient change in unit size to warrant setting aside of the election.
\item See \textsc{William B. Gould IV, Four-And-One Half Year Report} 22 (1998) (on file with author).
\item See id.
\item See id.
\item See id.
\item Northeast Iowa Tel. Co., 341 N.L.R.B. 670, 670–71 (2004). The NLRB stated: “While we recognize that allowing 25 percent of the electorate to vote subject to challenge is not optimal, the Employer’s opportunity to raise its supervisory issues remains preserved through appropriate challenges and objections to the election or through a subsequent unit clarification petition.” \textit{Id.} at 671.
\item \textit{Id.}
\item \textit{Id.}
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litigate later" approach to challenged ballots. The best amendment would be one that replicates statutes/policies in provinces like British Columbia and Ontario, and while promoting some kind of meeting or informal hearing on an expedited basis, i.e., five or six days subsequent to the filing of the petition, would then mandate an election within seven to ten days (perhaps one or two days subsequent to the parties initial meeting) of the petition filing. Ontario requires the vote to be held within five days, while British Columbia requires it to be held within ten days.

But there must be other changes in the law as well. As noted above, under existing law the parties can have career civil servants, the regional directors, resolve all issues relating to units, eligibility, and objections to the conduct of the election after it takes place without an appeal to Washington. Since 2005, unions and employers may enter into consent agreements that preclude an appeal to Washington of issues before or subsequent to the conduct of the election. It appears, however, that this process is infrequently used. It should be mandated by law, considering that appeals to Washington are a major part of the problem of delay. Indeed, some cases have sat in Washington for years. The NLRB should be obliged to determine why a Regional Director's decision conflicts with existing law or how it contradicts some policy before review is granted. And the statute must mandate that the NLRB act on these matters within thirty to sixty days. (The problem of inducing or assuring that the NLRB will adhere to a time guideline is something that I revisit below.)

Congress must revise existing case law that allows appeals to be taken of certification issues through the unfair labor practice machinery. The NLRB's order in this arena is deemed to be "non-final" under the National Labor Relations Act because of Congress's appropriate preference for expeditious resolution of representation cases without judicial review, which can only occur when an order is final. Yet judicial review, always available in unfair labor practice proceedings, has been obtained indirectly by allowing employers to simply refuse to bargain and to litigate issues that they have lost in the representation matter through the unfair labor practice process, taking two to three years in the process.112 At this moment, it appears that a very small

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112. See, e.g., Goya Foods of Fla., 347 N.L.R.B. No. 103 (discussing a situation where the union won an election in 1998, union leaders were dismissed in 1999, and the union ultimately obtained reinstatement in 2006); see also 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, 481 (2007).
percentage of cases are appealed to the courts. But there is no reason why the agency’s decision on such matters cannot be deemed as final and binding with no appeal allowed; the Supreme Court has never held that Congress may not act in this fashion.

V. Conditional Recognition

American labor law, particularly as interpreted by the NLRB, establishes a rather artificial demarcation line between organizational disputes and the collective bargaining process itself. Nearly five decades ago, the Supreme Court held that it was an unfair labor practice for an employer to recognize a union as the exclusive bargaining representative when the union represented only a minority of employees within the unit and it was unlawful to accord recognition even when the employer believed in good faith that the union represented a majority. Yet, the fact is that many organizing disputes arise out of employer perceptions about the impact of union demands upon work rules, job classifications, and costs as well as what the parties will likely negotiate, and employees get lost in the haze of competing propaganda. Though the NLRB has upheld as lawful some labor-management agreements about whom the union will organize and under what circumstances, it has relied upon extant Supreme Court pre-


114. But see Rodney Smolla, Is Paulson’s Bailout Constitutional?, SLATE, Sept. 24, 2008, http://www.slate.com/id/2200817/pagenum/all/. Another approach is to allow review where there is manifest inconsistency with explicit provisions of the law. See generally Lee-dom v. Kyne, 358 U.S. 184 (1958) (holding that a federal district court had jurisdiction of an original suit to set aside the determination because it was made in excess of the Board’s powers).

115. See generally Int’l Ladies Garment Union v. NLRB, 366 U.S. 731 (1961) (holding that it was an unfair labor practice for an employer to recognize a union as the exclusive bargaining representative of certain employees on a date when only a minority of those employees had authorized the union to represent their interests, and a good faith belief in the union’s majority status was not an excuse).

116. Lexington Health Care Group, L.L.C., 328 N.L.R.B. 894, 897 (1999) (holding that unions may make agreements which limit organizing). A somewhat controversial variation on the bargaining for recognition theme has emerged in the Service Employees International Union in connection with its recognition agreements negotiated in secrecy. The debate about this policy is described in Steven Greenhouse, A Leader at the Point of Union Growth and Criticism, N.Y. TIMES, Feb. 29, 2008, at A17. See also Kris Maher, Unions Forge Secret Pacts with Major Employers, WALL ST. J., May 10, 2008, at A1, A8; Kris Maher, SEIU Moves to Consolidate its Power, WALL ST. J., June 9, 2008, at A3; George Raine, SEIU May Consolidate 3 Groups, S.F. CHRON., Jan. 3, 2009, at C1 ("Opponents [of SEIU organizational plans], and in particular Sal Rosselli, the president of United Healthcare Workers-West, lambaste the international union president, Andy Stern, for what Rosselli says is a top-down manage-
cedent to hold that it is unlawful for the union and employer to bargain about wages, hours, and conditions of work prior to the time that the union attains a majority, even if the bargaining is conditioned upon the union's success in recruiting a majority of employees within the unit.  

But this conflicts with the way a number of unions and employers conduct themselves in the real world. For instance, at the GM-Toyota joint venture NUMMI in Fremont, California, recognition was accorded to the UAW at the company once the parties had negotiated with one another about the number of job classifications and other arrangements that would come into existence if statutory recognition was accorded. All of this was done sub silentio. But the arrangement through which recognition was provided to the UAW at General Motor's ("GM") new Saturn plant was done through an explicit arrangement that resulted in NLRA litigation. The NLRB has allowed the parties to negotiate substantive terms when the object of the contract clauses in question was new "greenfields," which are previously unorganized additional stores to a multi-location bargaining unit. But, it has not answered the question of whether this "greenfield" exception to the proposition that agreements cannot be negotiated prior to recognition can apply to a situation where the contract in question has been negotiated in a different bargaining unit at different locations and where the "greenfield" facility will require a separate election.

The NLRB's current approach makes no sense whatsoever. If employers know what the union is willing to agree to and vice versa, the

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119. See Memorandum from the Office of Gen. Counsel Regarding Case 7-CA-24872, 8-11 (June 2, 1986) (on file with author). Other cases dealing with issues of this kind are cited in the memorandum. Generally, they arise under section 8(a)(2) of the National Labor Relations Act.
120. See generally Houston Div. of Kroger Co., 219 N.L.R.B. 388 (1975) (finding that specific contractual language obligated the employer to bargain with the union after the employer shifted stores to a separate division and decided to forego the right to the Board election process).
inflammatory rhetoric and polarization of organizational campaigns may be diminished or reduced and, equally important, the employees permitted to know what the facts of life will be and cast their votes for the union simultaneous with their votes on the collective bargaining agreement. Though it can be argued that this resembles a "sweetheart" relationship where labor and management are excessively close at the expense of the workers, this cannot be the case where employees vote on the union, knowing what collective bargaining will provide prospectively. A "sweetheart" relationship means that workers are both ignorant and impotent. So long as all parties know what the facts are at the time that critical decisions are made about both recognition and contract, public policy promoting a competitive work force, in which unions have a role to play, is more likely to be realized. This modification of existing NLRB law could be obtained through reversal of precedent by the Obama Board or by Congress itself, by amending the NLRA.

VI. Post-Recognition Bargaining and the Arbitration Process

The Employee Free Choice Act provides that subsequent to the employer's recognition of the union, collective bargaining commences "not later than ten days" after a written request for bargaining by the union, and if no agreement is reached within ninety days, the parties may initiate third party intervention in the form of a mediator from the Federal Mediation and Conciliation Service who may refer an unresolved dispute to an interest arbitration panel which will issue an award to resolve differences between the parties. No standards for the arbitrator's decision are written into the version of the bill passed by the House of Representatives in 2007.


123. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2(h)(3) (2007). Curiously, the period of time established for bargaining prior to arbitration—four months—is incompatible with the so-called certification year in which it is assumed that bargaining should take place without concern for representative challenges. See Brooks v. NLRB, 348 U.S. 96, 98-99, 104 (1954) (holding that, in the absence of extraordinary circumstances, an employer must recognize a union for a "certification year" even if it has evidence that the union has lost majority status).

It is clear that this is a proper focus of labor law reform and that some form of first contract intervention, when the parties' relationship is embryonic and fragile, must be fashioned.\textsuperscript{125} Professor Thomas Kochan has written about how difficult it is for first contracts to be struck in a timely fashion.\textsuperscript{126} Among the bargaining units able to make the showing of support that is necessary for a certification petition to be filed, only 20\% reach a first contract, with merely 12.9\% doing so within a year of certification.\textsuperscript{127} Only 56\% of newly certified bargaining units are successful in reaching a first contract, and 38\% are able to conclude such a contract within a year.\textsuperscript{128} Moreover, the presence of unfair labor practices reduces the chances of getting to an election by 25\%\textsuperscript{129} and striking a first contract by 30\%.\textsuperscript{130} The NLRB possesses
no statistics on this matter, and the Federal Mediation and Conciliation Service has reported that it intervenes to mediate a very large number of first contract bargaining relationships where the parties are unable to resolve their differences.

The General Counsel for the NLRB has noted the following:

Initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship. As the Federal Mediation and Conciliation Service has observed, "[i]nitial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns." And when employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative. Indeed our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28%). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65%). In addition, half of the Section 10(j) cases involving unfair labor practices that undermine incumbent unions, involve parties bargaining for first contracts.

The General Counsel noted that he viewed the use of section 10(j) bargaining orders as an extension of the one-year NLRB certification year when bargaining is to take place, without any challenge to the award, the award of bargaining, and litigation expenses to remedy first contract refusals to bargain. Periodic reports on the status of bargaining have all been used in this context.

Notwithstanding the use of these remedies, the virtue of first contract arbitration, as provided for in the Employee Free Choice Act, is that the employer is aware it must enter into a collective bargaining agreement, discouraging surface bargaining, attempts to escape the strictures of the Act, or engaging in bad faith misconduct. Under these circumstances, the employer has more of an incentive to negoti-
Correspondingly, the union, if unable to conclude a collective bargaining agreement, will have declining support within the bargaining unit, because in the United States, the collective bargaining agreement and protections contained in it are the *sine qua non* for effective representation.

Yet access to arbitration should not be available at a date certain because that will allow the party that sees itself at a bargaining disadvantage to simply wait for arbitration. That diminishes incentive to negotiate. Uncertainty about the precise timing of arbitration will promote voluntary negotiations.

The British Columbia Labour Relations Board paved the way to Canadian acceptance of first contract arbitration. In so doing, the British Columbia Board and its other provincial counterparts struggled with the development of a "screen" or barrier to the process, though Manitoba has provided automatic access along the lines of the EFCA so as to expedite settlements. Generally, the Canadian focus has provided arbitration when there is a "breakdown" in negotiations, and in British Columbia, subsequent to a union strike vote.

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135. *Id.* at 23–25.
136. *Id.* at 20–21, 36–37. The factors alluded to by the NLRB are the following:
   1. First collective agreement imposition is a remedy which is designed to address the breakdown in negotiations resulting from the conduct of one of the parties. It is not simply an extension of the unfair labour practice remedies for egregious employer conduct.
   2. The process of collective bargaining itself, to whatever extent possible, is to be encouraged as the vehicle to achieve a first collective agreement.
   3. Mediators should be assigned early into first collective agreement disputes in order to facilitate and encourage the process of collective bargaining and to educate the parties in the practices and procedures of collective bargaining.
   4. The timing of the imposition of a first collective agreement (if it is deemed appropriate that one be imposed) should not be at the end of the negotiation process when the relationship has broken down and is irreparable, but rather should take place in a "timely fashion," after the mediator has identified "the stumbling blocks" in the dispute and what is needed in order to "avoid" an irreparable breakdown in the collective bargaining relationship.

*Id.* at 36–37.

137. In the United States, there is no strike vote required, and the EFCA does not make one necessary. In emergency strike cases involving the health and safety of the nation, workers are required to vote on an employer’s last offer. Taft-Hartley Act § 209, Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 179). Even in British Columbia, "[i]nterest arbitration is not automatic even if there is a strike vote. And as a practical matter, the NLRB will not impose interest arbitration if the parties engage in good faith bargaining and are far apart." Correspondence with Peter Gall of Heenan Blaikie, Jan. 8, 2009 (e-mail on file with author). The objective in Canadian first contract arbitration is similar to some of the American bargaining-order cases, that is, to ensure or make likely a vibrant labor-management relationship. See Gourmet Foods, 270 N.L.R.B. 578 (1984). But
The theory that only when workers are serious enough to strike in support of the union can there be viable collective bargaining which leads to arbitration. 138 Finally, as is true in some American public sector interest arbitration, provision is made for informal recommendations by the mediator, which may be used in a subsequent arbitration proceeding.

Another problem with the EFCA is that it does not focus upon the problem of standards alluded to above. The absence of standards in the Act, as presently written, will entice unions to seek arbitration awards which resemble or replicate the best collective bargaining agreements or master agreements which they have previously negotiated. This will mean that there is less incentive for the union to bargain and that the tables will be quickly turned as the potential for union obduracy supplants that of the employers. An incentive to bargain for the union, as well as the employer, must be part of the law. For the employers, one incentive is the reality that some kind of agreement will be imposed upon them if they do not negotiate one, and their preference to shape their own bargain will be undermined. For the unions, it must be a realization that, while they are able to obtain a collective bargaining agreement that is sufficiently attractive to make future collective bargaining worthwhile, it will be inferior to agreements they have negotiated in comparable circumstances. The EFCA must explicitly recognize this and stress the employer's peculiar economic circumstance and ability to pay 139 as the dominant characteristic to which the arbitrator is required to adhere. Amendments are needed to accomplish this objective.

see United Dairy Farmers Cooperative Ass'n v. NLRB, 633 F.2d 1054, 1070 (3rd Cir. 1980) (upholding the issuance of a non-majority NLRB bargaining order when the order was issued because the NLRB found that employer had engaged in unfair labor practices); Nabors Alaska Drilling, 325 N.L.R.B. 574, 574-77 (1998) (Gould, Chairman, dissenting in part) (holding that a new election was necessary because the employer violated section 8(a)(1) when it interfered with an election by denying union representatives access to employees who worked on remote Alaskan oil rigs).

138. In Canada, as in other countries outside the United States, striking workers cannot be permanently replaced. See Gould, Agenda for Reform, supra note 9, at 198-205, 230-32. In Ontario, however, the right to return to work is limited by the fact that it is an individual right that must be exercised within six months of the onset of the strike. Id.

139. Here, of course, the employer must be obligated to "open the books" and provide information supporting its position. Cf. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956) (holding that employers have an obligation to disclose financial data when they plead an inability to pay in collective bargaining).
VII. Delay in the Statutory Process

However, there is still the problem of delay—a problem which affects the recognition issue as well as post-certification duty to bargain cases. Many of the delay problems noted above have emerged since the 1970s because employers have become more sophisticated in exploiting the administrative process so that it lasts a considerable amount of time. Most of those matters are addressed above. Although the Employee Free Choice Act's extension of Section 10(j), i.e., the NLRB's authority to obtain injunctive relief in certain unfair labor practices cases, might be particularly useful in representation proceedings in dealing with contumacious employers. Yet another part of the problem is the agency itself and the NLRB's own reticence and reluctance to act.

The other side of the delay problem relates to the NLRB itself and its politicized nature. When enacting the National Labor Relations Act of 1935 with its broad ambiguous language and five-year appointments, Congress intended for politics and the law to come together. That is to say, notwithstanding the country's commitment to both freedom of association and the collective bargaining process, the lack of a clear consensus about unions has allowed each new White House occupant to influence (and thus indirectly politicize) the NLRB through short-term appointments. In contrast to judges who have life tenure appointments, the relatively abbreviated tenure given to Board members and to the General Counsel, along with ambiguous statutory language (i.e., "interfere, restrain, coerce" as unfair labor practices) that is susceptible to a wide variety of interpretations, highlight the fact that each new President can change the NLRB's direction by appointing new members who are sympathetic to his own philosophy.

This manifested for the first time when the Eisenhower Board began to reverse decisions of the appointees of Presidents Roosevelt and Truman. Soon thereafter the Kennedy Board did the same with those appointed by the GOP. Despite some mild back and forth between Nixon, Ford, and Carter, the Reagan-Bush era of the

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140. See Mozart G. Ratner, Policy-Making by the New Quasi-Judicial NLRB, 23 U. Chi. L. Rev. 12, 16-17 (1955); W. Willard Wirtz, New National Labor Relations Board: Heroin of Employer Persuasion, 49 Nw. U. L. Rev. 594, 594-95 (1954); see also Clyde W. Summers, Politics, Policy Making, and the NLRB, 5 Syracuse L. Rev. 93, 97 (1953) ("Seldom in the history of the Board has so much law been made so quickly by so few.").

141. See Bernard Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. Chi. L. Rev. 78, 78 (1962).
1980s was the first to provide for a relative avalanche of reversals of well-settled authority. The Clinton Board I served on provided rather incremental changes, and the Bush II Board was the most severe of all in its handling of the cases through both reversals and extraordinarily one-sided interpretations of the statute.

Beginning in the 1980s, the normal to and fro that had been expected and in large measure accepted in the 1950s, 1960s, and 1970s began to change. This seems to be attributable to two factors. One is the rather severe anti-unionism promoted by the Reagan Board in the 1980s. As my Stanford colleague Terry Moe said:

Reagan imposed on the NLRB a brand of radical anti-unionism that business leaders did not demand and, in fact, had long resisted... but, especially in an environment of economic adversity and union decline, some business leaders begun to realize over time that the reality of an anti-union NLRB was not to be feared at all—that it proved quite consistent with their own, more confrontational approaches to unions. They were, in effect, dragged kicking and screaming into the brave new world of political anti-unionism by presidential leadership and some saw that what was clearly impossible in earlier decades, was now quite possible indeed.

A second issue is the appointment process and the kind of people who were generally recruited to serve on the NLRB. It has pervaded not only the NLRB, where increased polarization between labor and management enhanced divisiveness, but also administrative agencies generally. But the NLRB drew more attention than other agencies, in part because of union involvement in the political process and the great divide between Democrats and Republicans on these policy matters.

Said G. Calvin Mackenzie:


143. Hearings on Progress of the NLRB, supra note 142, at 52–53; see also Confirmation of Professor William B. Gould IV, Hearings Before the S. Comm. on Labor and Human Resources, 103rd Cong. 23–24 (testimony of William B. Gould IV, Stanford University) (“I believe in a presumption in favor of stability. As you know, there have been shifts in doctrines by previous boards, both boards appointed by Democratic as well as by Republican Presidents. I believe in a presumption in favor of stability, and should the Board reverse what it has done previously, it should have substantial reasons for doing so.”).


145. The Republicans were particularly concerned with Beck v. Communications Workers, 487 U.S. 735 (1988), which allowed dissident workers to object to the expenditure of their dues for political purposes. Id. at 745–46.
What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, non-career managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president’s team would assume its place and impose the people’s wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the street: interchangeable public elites, engaged in an insider’s game. This process, which began to gain some steam in the ‘80s, with the appointment of those who came frequently “across the street” from Capitol Hill, produced more overtly political “inside Washington” appointments. This, in turn, ultimately led to the process of “batching,” which is the refusal to confirm one nominee until a nominee for another position had been filled, so as to assure a balance of seats between those who would support labor and management. Until 1994, when I was confirmed as Chairman and two other Board Members and a General Counsel were simultaneously appointed at Senator Nancy Kassebaum’s insistence—the Republican Board Member was a nominee acceptable to her on policy issues which might come before the NLRB, there had been no batching in fifty-one years after members Democrat Abe Murdock and Republican J. Copeland Gray took their oaths in 1947.

But in 1947, the batching occurred because the NLRB, at that time, was expanded from three to five seats by virtue of the Taft-Hartley amendments to the Act. In 1994 and again in 1997, right on through the Bush II Board of the twenty-first century, batching became commonplace in the appointment process. Said Professor Mackenzie, describing the change in the process:

The tendency to select appointees to an agency as teams and to divide up control over the choices has become the norm in Washington. The Senate, in fact, often delays confirmation until several


nominations to the same agency accumulate, thus allowing it to require that the President include some nominees who are effectively designated by powerful Senators. "This kind of batching of nominations rarely happened before the present date. Even on the regulatory commissions, whose original statutes require that an only a bare majority of appointees can be from any one party, a vacancy in an opposition party chair was usually filled by the President with an enrollee in the opposition party who supported the President. These appointments, common for most of this century, came to be known as "friendly Indians" and were routinely confirmed by the Senate even when it was controlled by the opposition party. But they allowed the incumbent President to control the appointment process and to shape the majorities on most regulatory commissions.

That is nearly impossible these days. The membership of the regulatory commissions has become little more than the sum of the set of disjointed political calculations. Concerns about fealty to leadership, effective teamwork, and intellectual fealty to leadership and intellectual or ideological coherence play almost no part in the selection of regulatory commissioners. The juggling of political interests dominates. That we as a nation often get inconsistent and incoherent regulatory policies should be no surprise to those that follow the shuffling and dealing that produces regulatory commissioners.

An additional complicating factor in "batching" is that the Republicans do not have the same incentive to make a deal regarding a group of nominees for a particular agency. This is especially so of an agency like the National Labor Relations Board which operates under statutory principles in which a large number of Republicans do not believe. Accordingly . . . all of the incentives are weighted toward crippling the agency.148

These phenomena had an unfortunate and untoward effect upon case processing and thus delay. For the first few years of the Clinton Board's work, a number of steps were designed to expedite the administrative process, diminish the delay problem, and facilitate more effective law enforcement.149 And more substantial use of section 10(j) played a role in this arena. Section 10(j) allows the NLRB, in its discretion, to obtain injunctive relief against a wide variety of unfair labor

148. Id.

149. The Clinton Board attempted to address remedies in a number of ways. It provided unions with access to private property to which they were not normally entitled. See Fieldcrest Cannon, Inc., 318 N.L.R.B. 470, 473 (1995), enforced in part, 97 F.3d 65 (4th Cir. 1996). The NLRB also obliged employers to pay both Board and union attorney fees and double costs, as well as nationwide orders and postings at all of an employer's facilities throughout the United States. Unbelievable, Inc. v. NLRB, 118 F.3d 795, 798 (1997). See also generally Beverly Cal. Corp., 326 N.L.R.B. 153, 552 (1998), enforced in part, vacated in part and remanded, 227 F.3d 817 (7th Cir. 2000) (addressing the appropriateness of a broad nationwide cease-and-desist order and nationwide posting of the order at all of a respondent employer's facilities).
practices committed by both employers and labor organizations. But the mandate given to the NLRB to seek injunctions in union unfair labor practice cases—at the regional level and without consultation with Washington—makes section 10(j) disproportionately applicable to employers, even though it involves some unions from time to time. This is because, while section 10(1) is focused exclusively on unions, section 10(j) is the only provision aimed at employer unfair labor practices and most injunctions and injunction requests are aimed at employers. This provision is particularly valuable when the NLRB attempts to address violations in the form of dismissals, discipline, and refusals to bargain where the passage of time will erode an effective remedy.

Equally important to any description of the statutory scheme is that section 10(l)'s trigger is at the regional level; it is the Regional Attorney who goes into federal district court to obtain an injunction if there is "reasonable cause to believe" that a violation has occurred making it far more expeditious. Section 10(j) must be brought to the full Board. This is a complicated and time-consuming process which involves a debate in Washington rather than swift action based upon precedent and Board policy direction in San Francisco, Detroit, or New York.

In the early 1990s, section 10(j) fell into disuse. In 1992, under the Bush I Board, the number of section 10(j) authorizations had declined to twenty-six, the lowest since the Ford Administration in 1976.

In 1994, this trend was reversed when the Clinton Board authorized section 10(j) injunctions in eighty-three cases. In 1995, section 10(j) injunctions were utilized in 104 cases. This constituted the high-water mark and the most frequent use of section 10(j) in the seventy-four-year history of the Act and the NLRB. Given the substantial delays involved in the numerous administrative layers of the American process, as well as ultimate resort to the circuit courts of appeal, section 10(j) provides the NLRB with the ability to jump over the hurdles and issue an injunction, making this provision of the statute peculiarly vital. One of the most publicized and successful uses of section 10(j) took place in connection with the 1994–95 baseball strike, which brought the strike to conclusion and resulted in the negotiation of the

150. I discussed the contrasting approaches in the mandated area from those that involve an exercise of discretionary authority in Teamsters Local No. 372, 323 N.L.R.B. 278, 280 (1997) (Gould, Chairman, concurring).
1996 collective bargaining agreement.\textsuperscript{151} It provided an object lesson to the nation about how labor law could work under proper circumstances.

Because congressional pressure diminished the number of NLRB General Counsel requests to authorize injunctions and perhaps encouraged more law-abiding conduct from employers who feared NLRB litigation authorized by the NLRB, the numbers of injunction authorizations declined somewhat after 1995. In 1996, only fifty-three authorizations were provided\textsuperscript{152} and General Counsel requests to authorize declined to fifty-nine.\textsuperscript{153} In 1997 and 1998, the number was fifty-three and forty-five respectively, while the number remained fairly constant after my departure from the NLRB in late 1998.

But in 2002, the first full year of the Bush II Board, the number was fourteen, and it was seventeen and fourteen in 2003 and 2004 respectively. The Bush II Board has made the Bush I era look like one of aggressive law enforcement.

Meanwhile, the number of cases coming before the NLRB has declined from 40,861, when the Clinton Board first came to the office in 1994, to 33,715 at the beginning of the Bush II administration. The numbers sharply declined ever since. This phenomenon may be due to union lethargy, an unwillingness and inability to recruit new members,\textsuperscript{154} the inherent difficulties in organizing under the statute, and a disillusionsment with and boycott of the Bush II Board, reminiscent of the union reaction to the Reagan Board in the 1980s.\textsuperscript{155}

But while the number of cases is declining, paradoxically, the backlog has been increasing. In 1995, the Clinton Board achieved the lowest backlog ever recorded in the more than three decades of NLRB record keeping: 330! Nine hundred and thirty-five decisions were issued. Because of administrative lethargy, turnover at the NLRB,

\begin{itemize}
  \item[152.] See NLRB Fiscal Year Summary, Memorandum from David Parker, Deputy Executive Secretary, National Labor Relations Board (2008) (on file with author).
  \item[153.] Historical Fiscal Year Summary, Memorandum from the NLRB Division of Information (2008) (on file with author).
\end{itemize}
and reluctance of NLRB members to make decisions due to fear of political consequences,\textsuperscript{156} that number more than doubled when I left office in 1998.\textsuperscript{157} Even in 1998, the number of cases produced was 709. Now, with a declining caseload, the backlog has stayed steady at nearly 600 cases, and the number of decisions produced has been between 543 in 2003, 508 in 2005, and 391 in 2007. Though my Board held elections in more than 3000 cases in 1994, that number declined to 2302 cases in 2004.

Thus, the Bush II Board has been doing considerably less in terms of case production, even with a substantially smaller number of cases, than the Clinton Board in the mid-1990's. And, as noted, the use of section 10(j) has declined appreciably, even below the level of the Bush I Board, which itself had set new records for inactivity. As the strain on Board resources has eased, the agency's energy level has dissipated. The major victims in this process are both unions and employees who use the statute disproportionately (compared to employers) for the purpose of obtaining protection in the employment relationship, recognition, and bargaining.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|c|}
\hline
 & \textbf{Clinton Board} & & & & & \textbf{Bush II Board} & & & & \\
\hline
\hline
ULP (case age in days) & 758 & 893 & 846 & 929 & 985 & 1030 & 1159 & 1232 & 1517 & 829 & - \\
\hline
Representation Case (case age in days) & 152 & 305 & 369 & 370 & 473 & 473 & 576 & 802 & 575 & 318 & - \\
\hline
Section 10(j) & 104 & 53 & 53 & 45 & 17 & 14 & 15 & 25 & 25 & 9 & \\
\hline
\hline
\end{tabular}
\caption{Intake and Delay at the NLRB}
\end{table}

Source: NLRB Annual Reports and data provided by David Parker, Associate Executive Secretary of the NLRB

\textsuperscript{156} The political problems have been chronicled in \textsc{Gould, Labored Relations, supra} note 15, at 287–305.

Figure 2. Intake and Delay at the Washington Headquarters of the NLRB

<table>
<thead>
<tr>
<th></th>
<th>Clinton Board</th>
<th>Bush II Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Intake</td>
<td>1155</td>
<td>1138</td>
</tr>
<tr>
<td>Cases Issued</td>
<td>717</td>
<td>935</td>
</tr>
<tr>
<td>Case Backlog</td>
<td>461</td>
<td>366</td>
</tr>
</tbody>
</table>

Source: NLRB Annual Reports and data provided by David Parker, Associate Executive Secretary of the NLRB

VIII. What Can Be Done

There are five answers to this delay problem. The first is to change the method of appointment of NLRB Board Members. The fundamental problem for the NLRB in the 1990s was that Board Members were frequently reluctant to act, presumably because they sought reappointment and were concerned about antagonizing a Republican Congress which itself was antagonistic to the principles of the NLRA. I began to speak publicly about the delay problem in the summer of 1998 prior to the expiration of my term as Chairman. But only when members of Congress inquired with me directly about cases,\(^\text{158}\) sought the identity of the recalcitrant Board Member, and received my permission to telephone her directly, was action produced. This problem has grown in the early part of the twenty-first century in the Bush II Board as the caseload declined and productivity declined along with it. Some of the same political considerations have been at play again a decade after my service.

If a different method of appointment was written into law, different results might follow. In my view, a key answer to this problem is to bar reappointment to the NLRB and thus reduce the incentive to maneuver in anticipation of adverse congressional reactions. If reappointment is denied, the appointee knows that there is nothing that he or she can do to extend their Washington service at the NLRB. If the term of appointment is extended to eight years, then the public gets greater benefit of experience and does not, as so often has been the case in the 1980s and 1990s and this century in particular, have to reinvent the wheel for new Board Members or for those who are carried forward in limbo out of office for relatively abbreviated periods under so-called recess appointments. And if the term is substantial, the Board Member knows that his continued service does not depend

upon pleasing either the Executive Branch or Congress—a problem that is particularly important given the fact that reappointment is predicated upon the advice and consent of a Senate which has been hostile or unduly interested in the results of particular cases.

This will go some way to the achievement of a much needed depoliticization of the NLRB. This could partially break the pattern of appointment of Washington insiders described by Professor Mackenzie and bring to Washington a geographically diverse group of the best people who are willing to serve for the very best reasons. The NLRB needs those like Cincinnatus, who will depart at the end of the day rather than cling to the trappings of office in Washington.

There is an additional avenue towards depoliticizing the NLRB. Rulemaking, of the kind that my Board proposed in the mid-1990s, is necessary. My Board, following the lead of an earlier Supreme Court decision approving rulemaking,\(^\text{159}\) sought unsuccessfully to fashion rules for disputes about single location of the multiple location facilities where, in that situation, the presumption in favor of single location had been clear since my service as a young attorney with the NLRB in the early 1960s. At that time, there was continuous litigation about how far the facilities had to be from one another and how many employees were being transferred between one facility and another. These considerations, along with common supervision, were the key ingredients for unit determination.\(^\text{160}\) The model of adjudication produced an incentive for wasteful litigation.

Rulemaking, on the other hand, would provide more stability in the sense that reversal of previous decisions would be more difficult by virtue of rulemaking's requirement for public input over a substantial period of time rather than adjudication which would facilitate easy reversals, sometimes without amicus briefs, oral argument, or the knowledge of many interested parties. If rulemaking is facilitated, the potential for a seesaw-like reversal of prior Board authority with each new President will be diminished. In this way, the public interest in principled decision making, free from immediate political passion, is more easily realized. The worst thing that can happen in 2009 is sim-

\(^\text{159}\) See generally Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (holding that the NLRB's rule that eight defined employee units are appropriate for collective bargaining in any acute care hospital is valid).

ply a substitute of the dissents rendered during Bush II along strictly party lines, as important as many of the reversals of that era.

But the fact is that time limits in which the NLRB should act will still be important as well. The Supreme Court has noted that “delay in the administrative process is . . . deplorable . . . [i]t is even more deplorable if . . . innocent employees had to live for some years on reduced incomes as a combined result of the delay and the company’s illegal [misconduct] . . .”161

Again, this is why time limits for the handling of representation petitions should be something in the order of ten days, as in some of the Canadian provinces. During my Chairmanship, time limits were established for administrative law judges for the handling of unfair labor practice charges and regional directors for the processing of representation cases.162 But I could not convince the NLRB to adopt time limits for themselves, even in the form of guidelines. Congress must do so through labor law reform because even the best members may be reticent in establishing time limits for themselves, as was the case in the 1990s.

As Judge Noonan said for the Court of Appeals for the Ninth Circuit:

No decisionmaking body is totally immune from the dilatory virus, and delay is sometimes the too human way of grappling with thorny issue of policy. Nonetheless, the Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardship it is causing. . . . We call [the doctrine that extraordinary delay is grounds for refusing to enforce an administrative order] to the Board’s attention as a reminder that, whatever its internal problems, the Board has a duty to act promptly in the discharge of its important functions.163

What are the best ways in which time limits should be implemented and what, if any, sanctions or procedures should be put in place for such a situation in light of past Board behavior? In one instance, the Court of Appeals required the NLRB to issue a decision

161. NLRB v. J.H. Rutter-Rex Mfg. Co. Inc., 396 U.S. 258, 265-66 (1969). In NLRB v. Pool Manufacturing Co., 339 U.S. 577, 582 (1950), the Court intimated that, under some circumstances, delay “through its length alone may mature into a denial of an enforcement decree or make necessary the adduction of additional evidence.” Id. at 582; cf. NLRB v. Eanet, 179 F.2d 15, 21-22 (D.C. Cir 1949) (supporting the view that the court should require some recent indication that a decree is warranted).

162. See Gould, Labored Relations, supra note 15, at 78-84.

within a specific period of time—and the decision was issued.164 For nearly four decades the courts have made it clear that they have the authority to compel agency action.165 But, this cannot be done in every instance.

What then is the best way to implement time limits? One possibility would be to deny the agency appropriations and to sanction or penalize it where it fails. But this would be counterproductive because the denial of resources would make it all the more difficult for the NLRB to meet its obligations. Some other avenue must be found.

Another approach is through publicity relating to the productivity of all Board Members.166 Offenders, exposed to the cruel light of day, might behave differently. Belatedly, shortly before my term of office expired in 1998, I found that Board Members moved to produce cases when I identified them in response to congressional inquiries. The non-producers may respond differently when revealed to the public and to Congress. Some kind of institutional record keeping that does not identify cases by name seems appropriate. Equally appropriate, it seems to me, is statutory discretion for the Chairman to do what I did without statutory authorization, which is to reveal names and cases to those who inquired. This will obviously take its toll on collegiality, and the action that I took as Chairman sacrificed this consideration.

This means that other routes should be considered and taken as well. I attempted to devise a rule which allowed for the issuance of opinions, without those who went beyond a given deadline, when the individual Board Member wished to issue a concurring or dissenting

164. In one case, a writ of mandamus was successfully sought and obtained from the Court of Appeals for the District of Columbia requiring the NLRB to issue a decision that was pending with the court for seventeen years, within only a twelve-day time period. See In re Pirlott, 2007 U.S. App. LEXIS 1352 (D.C. Cir. Jan. 18, 2007). The NLRB obeyed. Scheiber Foods, 349 N.L.R.B. No. 14 (2007).


166. A variation on this theme is set forth in the so-called “September Rule” of the D.C. Circuit Court of Appeals, which makes it such “that a judge with two unwritten opinions more than six months old cannot assume any new cases after summer recess.” Patricia M. Wald, Doctor, Lawyer, Merchant, Thief, 60 Geo. Wash. L. Rev. 1127, 1138 (1992). Also, the D.C. Circuit is in the practice of granting relief of some kind—in the form of mandates—before releasing some opinions. Teva Pharm., USA, Inc. v. Leavitt, 548 F.3d 103, 105 (D.C. Cir. 2008).
opinion or examine the opinion further with a view towards raising points that he or she felt had not been sufficiently discussed or considered. A variation on this theme would permit an opinion to be issued promptly in a per curiam fashion, as the United States Supreme Court has done in the context of national emergency disputes under Taft-Hartley when an injunction did not allow for a complete opinion because of the harm done by the strike. The Chairman could have the statutory authority to issue the decision with the understanding that an opinion or more complete opinion would come later.

A fourth answer is to reform the electoral process and to repose finality in the hands of the Regional Director with regard to both unit and eligibility pre-hearing issues, as well as post-election issues relating to the parties' conduct during and before the ballot itself. As the Employee Free Choice Act provides, the Regional Director should have authority, to seek injunctive relief against offending employers under section 10(j) in connection with union organizational activity. As noted above, the fact that the authority to seek an injunction lies in the hands of the NLRB under section 10(j) and the region under section 10(l) makes the former statutory scheme inferior to the latter because of the time it takes to get to Washington and to obtain approval. And, because institutional resources and appropriations would inevitably limit the amount of section 10(j) activity that could be undertaken, similar reform in connection with finality of representation decision making is even more important. The parties have the authority to obtain an expeditious resolution of representation matters, providing the Regional Director with final authority to decide these cases. But the parties do not use it. A new statute should mandate that the Regional Director, who is as expert as the Board Members (and probably more so, given the fact that the former are career civil servants who have more familiarity with the law and practice) be the final arbiter, absent extraordinary circumstances where new issues arise.

A fifth approach to this problem lies in adaptation of some of the procedures that have arisen in private arrangements, which have served as a surrogate or alternative to the Act and Board itself. Privately negotiated labor-management card check agreements have re-

167. See generally United States v. United Steelworkers, 361 U.S. 39 (1959) (holding that evidence of the strike's effect on specific defense projects supported a judgment that the strike endangered the nation's safety).

ceived the most attention in this area,\textsuperscript{169} though no one knows the extent to which they have been adopted and facilitated.

Notwithstanding their popularity, the privately negotiated card checks contain serious limitations, many of them identified in an important article by Professor Laura Cooper.\textsuperscript{170} She notes that more discretion is given to an NLRB hearing officer to seek out the facts on his or her own with regard to such issues as unit, eligibility to vote, and, in connection with card check itself, whether the cards are “current.” Notes Cooper:

\begin{quote} 
[T]he arbitrator [who resolves card check issues] presides over a process that is adversarial, in which responsibility for gathering and presenting evidence vests in the union and the employer. In contrast, the NLRB, as a federal administrative agency, has confidential investigatory powers that can be used to gather information in a manner that can better protect vulnerable employees from retaliation and the fear of retaliation. The ability of the NLRB, as a neutral government agency, to gather information from employees in a more protected setting is also likely to lead to more accurate testimony less influenced by fears of retaliation or the excesses of an adversarial presentation.\textsuperscript{171}
\end{quote}

Professor Cooper also notes that the NLRB frequently gives uncooperative witnesses a promise of confidentiality, has the authority to issue subpoenas, documents interviewees’ statements with sworn affidavits, and, acting as a neutral, can be more aggressive than an arbitrator who is “dependent upon the parties to investigate and present the evidence.”\textsuperscript{172} She notes that the lack of discovery in arbitration involving recognition issues, as opposed to the NLRA, puts a burden upon the arbitrator to devise discovery orders in mid-stream in the hearing itself.\textsuperscript{173}

Of course, most card check procedures presuppose some form of a hearing, thus imposing the above noted institutional strains upon the process. But, in looking to what has emerged in the private sector, which might be used as part of labor law reform, and the fact that lack of speed is the major problem, one should keep in mind that “[t]he path to systemic reform . . . probably lies not only in easing agency workloads and increasing their resources, but also in recognizing that


\textsuperscript{171} Id. at 1609.

\textsuperscript{172} Id. at 1611.

\textsuperscript{173} Id. at 1613.
trial-type procedures are not necessarily the best or only fair means of reaching administrative decisions."

First Group, a major British multinational with 100,000 employees in the United States, has attempted to fashion a process which leaves secret ballot box elections in the hands of the National Labor Relations Board and thus avoids some of the problems identified by Professor Cooper, but at the same time, establishes an independent monitor mechanism to resolve freedom of association complaints arising out of union organizational efforts. The Freedom of Association ("FOA") policies were derived from the company's social responsibility policy and explicitly state that its protection for employees is not only rooted in international law, but also is stronger than those in the National Labor Relations Act—though employees and union organizers may always file a charge with the NLRB at any point. The process does not provide for a hearing but rather an investigation conducted by the independent monitor staff with public recommendations to the company and complaining party within thirty to sixty days subsequent to the filing of the complaint. The company has an additional thirty days to respond to the recommendations and, in a substantial majority of the cases, has accepted the recommendations.

The advantages to this process are obvious. The first is the remarkable speed within which complaints are processed and, while the independent monitor does not possess affidavits or the authority to issue subpoenas, the company and the relevant unions have thus far complied with the inquiries of a neutral party who, in contrast to an arbitrator in card check cases, has an investigative staff. Thus, the discovery problem alluded to above is overridden. Additionally, in contrast to the National Labor Relations Act—which is the only modern employment statute that is not posted in company facilities, extensive publicity about freedom of association rights and procedures is provided through enclosed bulletins boards with complaint forms and related FOA information, as well as a DVD for the company's 100,000 employees.


175. I was appointed Independent Monitor in this program in November 2007 and I assumed the responsibility for it on January 1, 2008.

Why can't the first step in statutory amendments provide at least an opportunity for the parties to opt into such a process, in much the same way in which they cooperated with the settlement judge process created during my Chairmanship at the Labor Board and conducted by administrative law judges? Why can't the parties be given the option of proceeding toward immediate investigation of the kind provided by First Group's FOA policy, which is presided over by an Administrative Law Judge or respected private citizen acceptable to both the union and the company, with the investigation, proceeding for an abbreviated period of time? If both sides accept the third party recommendations, the matter is at an end in just a couple of months, as opposed to the years involved in the NLRB and the courts. Perhaps the recommendations could be taken into account in subsequent proceedings, if one side accepts and the other does not. But if the process is unsuccessful and neither side accepts, all bets are off regarding subsequent litigation; the normal process, with a charge filed process, proceeds with the abovementioned amendments promoting expeditious resolution.

First Group's policy and many of the card check arrangements, however, contain one feature which may be difficult to replicate in legislation, i.e., the requirement that the employer not engage in anti-union speech (coercive or non-coercive), utilize captive audience speeches at which employees are compelled to listen to the employer's message against unions on company time and property, or distribute literature of the same antiunion tenor. It is this feature that has proved to be so attractive to the unions and led to a high rate of organization and a more than ninety percent success rate with NLRB conducted elections.

As the Supreme Court has recently noted, however, the employer right to engage in non-coercive speech is one rooted not only in the NLRA, but more than arguably, in the First Amendment of the Constitution itself. Said the Court in Chamber of Commerce.

The NLRB took the position that §8 demanded employer neutrality during organizing campaigns, reasoning that any partisan em-

178. See sources cited supra note 47.
ployer speech about unions would interfere with the §7 rights of employees. . . . In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibited an employer from "expressing his view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amongst] the coercion within the meaning of the Act" NLRB v Virginia Elec. & Power Co. . . . We subsequently characterized Virginia Electric as recognizing the First Amendment right of employers to engage in non-coercive speech about unionization. [citing Thomas v. Collins]182

Also, the Court in Chamber of Commerce cited approvingly its comment that the free speech provision of the Act "merely implements the First Amendment."183

Though constitutional problems are presented by regulation of employer speech (in contrast to voluntary waivers), there is no constitutional issue raised by the statutory provision for more union speech. Thus, Supreme Court authority which has severely restricted non-employee union organizer access to company property,184 as well as circuit court and Board precedents disallowing non-employee union organizers the right to reply to captive audience speeches, can be reversed by the Congress as part of labor law reform. It should be done so as to promote the marketplace of ideas in the workplace by both sides, not simply the employer on its own.

Conclusion

For more than four decades, Congress has confronted, struggled with, debated, and sometimes passed legislation (as in 1977 and 2007) providing for labor law reform. The most recent version of it, the Employee Free Choice Act, which will be at the forefront of the Obama Administration policy debate, contains new and important initiatives, particularly in the areas of recognition and arbitration. The Act is a step forward inasmuch as it is predicated upon an analysis of the status quo, which is fundamentally sound. But it needs to be amended and expanded with much of its focus altered. It is important not to substitute one imperfect system for another.

The case for action is strong. Now that the opportunity exists for labor law reform, as it has not since the Carter administration, it is

182. Brown, 128 S. Ct. at 2413.
important to get it right this time around.\textsuperscript{185} As President Obama has said in a different context, it is important to speak here with “deliberate haste.”\textsuperscript{186}

\textsuperscript{185} "In the Clinton era, financial issues routinely trumped labor concerns. If Mr. Obama’s campaign promises are to be kept, that mindset cannot prevail again." \textit{The Labor Agenda, supra note 5.}
