

# Rethinking and Reframing U.S. Policy on Worker Voice and Representation

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## I. Introduction

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader labor and management community.<sup>1</sup>

As we gather to celebrate and reflect on seventy-five years of the National Labor Relations Act<sup>2</sup> (NLRA), it is time to recognize a stark reality: America's labor relations system is broken. As the above quote from the 1994 report of the Commission on the Future of Worker-Management Relations (the Dunlop Commission) indicates, the law no longer is delivering on its promise that workers who want a union would be able to get one.<sup>3</sup> Recent data provide further validation: fewer than twenty percent of organizing drives that have the level of worker support

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<sup>1</sup> U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 9–10 (1994) [hereinafter DUNLOP COMMISSION].

<sup>2</sup> 29 U.S.C. §§ 151–69 (2006).

<sup>3</sup> *Id.*

needed to petition for a representation election result in a collective bargaining contract within one year of certification.<sup>4</sup> If the union files an unfair labor practice against management, this number goes down to one in ten, and the probability of getting to an election declines by twenty-five percent.<sup>5</sup> Even after a majority of workers vote for union representation, over forty percent fail to get a first contract.<sup>6</sup> Yet a thirty-year political stalemate has blocked efforts to reform the law. If anything, the ideological divide between supporters and opponents of the law has increased over time and is not likely to diminish in the future. Thus, the institution of collective bargaining cannot reproduce itself.

The collective bargaining system has also proved incapable of reforming itself from within. Despite a flurry of innovative efforts that began in the 1980s,<sup>7</sup> the majority of collective bargaining relationships have not been transformed in ways needed to provide workers the voice they want and to drive improvements in productivity and service quality employers need to be competitive. Recent data from a national survey indicate that fewer than ten percent of bargaining relationships have transformed their practices in these ways.<sup>8</sup>

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<sup>4</sup> John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 *INDUS. & LAB. REL. REV.* 3, 5 (2008).

<sup>5</sup> *Id.* at 15.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 3–6* (Cornell University 1994) (1986).

<sup>8</sup> Joel Cutcher-Gershenfeld & Thomas A. Kochan, *Taking Stock: Collective Bargaining at the Turn of the Century*, 58 *INDUS. & LAB. REL. REV.* 3, 9 (2004).

Yet the need for a labor policy and a set of institutions that provide workers a voice at work, protect and encourage the fundamental human right of freedom of association, foster peaceful and fair resolution of disputes that arise at work, and promote a broadly shared and sustainable economic recovery and prosperity is as strong today as it was at the birth of the NLRA in the midst of the Great Depression.<sup>9</sup> These facts lead to an inescapable conclusion: we need to close the door on efforts to make just marginal changes in the NLRA and outline the design of a new, modern labor relations policy that better fits the needs of workers, employers, and the broader economy and society.

The good news is that there is no shortage of ideas and empirical evidence to draw on in proposing a new policy. Just as was the case prior to the NLRA, the last three decades have witnessed wide-ranging experimentation with alternative approaches to carrying out the functions of an effective labor relations system. Thus, just as there was a “dress rehearsal for the New Deal,”<sup>10</sup> the dress rehearsal for a twenty-first century labor relations system has been underway, evaluated, and critiqued. It is ready for a debut and further improvement and refinement if given a stage on which to play. In what follows, I outline the features of this new system and the changes in government policy, institutions, organizations, and people needed to build and nurture it.

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<sup>9</sup> See generally *id.* at 4.

<sup>10</sup> Steve Fraser, *Dress Rehearsal for the New Deal: Shop-Floor Insurgents, Political Elites, and Industrial Democracy in the Amalgamated Clothing Workers*, in *WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY* 212, 241 (Michael H. Frisch & Daniel J. Walkowitz eds., 1983).

## II. Who Still Needs a Labor Relations System? Workers, the Economy, and Society

In the face of such stark evidence that the American labor relations system is unable to reproduce itself for workers who want a union or to transform itself from within, it is not unreasonable to ask a threshold question: Does the country still need a labor relations policy?

### A. *Workers Want a Voice*

Workers express a stronger desire today than ever for a public policy that delivers on the NLRA's promise of providing workers a voice in their terms and conditions of employment. In 1977, the first time questions about union preferences were asked in a national survey, thirty percent of the nonunion workforce indicated they would join a union if given the chance to do so.<sup>11</sup> Surveys conducted in the 1990s and the first decade of this century asking the same or an equivalent question consistently report this percentage has increased to somewhere between forty-four to fifty-three percent.<sup>12</sup> Moreover, across this thirty-year time period, surveys have shown consistently that two-thirds to three-fourths of the workforce would like a direct opportunity to participate in decisions that affect how they work and how they might improve the performance of their organization.<sup>13</sup> As education levels rise, the expectation and interest in

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<sup>11</sup> Thomas A. Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV. 23, 25 (1979).

<sup>12</sup> RICHARD B. FREEMAN, ECON. POLICY INST., DO WORKERS STILL WANT UNIONS? MORE THAN EVER 2 (2007), <http://www.sharedprosperity.org/bp182.pdf>.

<sup>13</sup> RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 47–51 tbl.3.5 (1999); *see generally* KOCHAN ET AL., *supra* note 7.

having a voice in workplace affairs rises correspondingly.<sup>14</sup> Thus, the demand for worker voice and representation is stronger today than in the past and can be expected to continue to rise in the future.

*B. The Economy Needs an Innovative Labor Relations System*

There are three reasons why the economy needs to restore worker voice in ways that both rebalance power in employment relations and support long-term productivity growth.

First, unions and collective bargaining have historically been the strongest and most consistent institutions for achieving gradual improvements in worker wages and for reducing income inequality within and across industries and occupations. The passage of the NLRA as part of the New Deal laid the foundation for what became known as the post war “social contract.” From the mid-1940s through the 1970s, wages grew roughly in tandem with productivity growth.<sup>15</sup> As union membership declined precipitously after 1980, this social contract broke down. Productivity grew but ordinary workers’ wages stagnated and income inequality worsened.<sup>16</sup> Restoring workers’ ability to organize is a necessary condition for getting wages and productivity moving together again.

A second and equally large body of industry-specific research has demonstrated that major investments like those the nation is now making in infrastructure, renewable energy, and health care industries only realize their full return if combined with workplace relationships that

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<sup>14</sup> See Kochan, *supra* note 11, at 26 tbl.2.

<sup>15</sup> Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America 2* (Mass. Inst. Tech. Dep’t of Econ., Working Paper 07-17, 2007).

<sup>16</sup> See *id.* at 2–3.

foster worker engagement, teamwork, coordination, and labor-management partnerships.<sup>17</sup> These innovative workplace practices and the improvements in productivity and service quality they generate cannot be achieved if, as is the case today, conflicts, tensions, and resistance dominate in organizing processes and bargaining relationships. On the other hand, those bargaining relationships that promote these practices have been shown to outperform both traditional union and nonunion workplaces.<sup>18</sup>

A third stream of research shows that many of the core workplace standards in the United States—from health, safety, and wage and hour regulations to family medical leave practices—are most fully implemented in workplaces where there are unions.<sup>19</sup> Workplaces with unions also tend to foster more innovative methods that ensure that policy objectives like improving health and safety are achieved in ways that make firms more competitive.<sup>20</sup> Economic recovery and adherence to and improvements in core workplace standards can go hand in hand. Once the basics of labor law are fixed, government regulators can work with progressive employers and

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<sup>17</sup> See generally EILEEN APPELBAUM ET AL., *MANUFACTURING ADVANTAGE: WHY HIGH-PERFORMANCE WORK SYSTEMS PAY OFF* 229–34 (2000).

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<sup>19</sup> E.g., David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 *INDUS. REL.* 20, 21 (1991).

<sup>20</sup> See generally Phil James et al., *Regulating Supply Chains to Improve Health and Safety*, 36 *INDUS. L.J.* 163 (2007) (discussing the benefits of giving unions the ability to inspect and monitor health and safety concerns).

unions in new, more flexible ways to achieve the joint gains in performance and employment standards we know are possible.

C. *Filling the Void in Political Discourse*

Union decline and increased polarization between business and labor has also created a void in political discourse at the national, sector, and community levels. All of the national civic forums in which labor and business leaders met to discuss issues of mutual concern such as the National Planning Association, Work in America Institute, and the Collective Bargaining Forum have disappeared.<sup>21</sup> So too have the various industry-university-labor forums that were created as part of the Alfred P. Sloan Industry Studies program in the 1990s.<sup>22</sup> At one point more than twenty community-level labor-management committees were in operation,<sup>23</sup> but few of these still function. These were settings in which these leaders engaged in discussions of a broad range of topics within and beyond the scope of labor-management relations.<sup>24</sup> In doing so, personal relationships were developed, which were then often called on to help resolve problems or address crises when the need arose.<sup>25</sup> But even in the face of significant national traumas such as the terrorist attacks of September 11, 2001, or Hurricane Katrina in 2005, or the economic

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<sup>21</sup> Thomas A. Kochan, *Restoring Voice at Work and in Society*, in AMERICA AT WORK: CHOICES AND CHALLENGES 37, 40 (Edward E. Lawler III & James O'Toole eds., 2006).

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<sup>23</sup> Joel Cutcher-Gershenfeld, *Labor-Management Cooperation in American Communities: What's in It for the Unions?*, 473 ANNALS AM. ACAD. POL. & SOC. SCI. 76, 78 tbl.1 (1984).

<sup>24</sup> See, e.g., *id.* at 78–81.

<sup>25</sup> *Id.* at 80–81.

collapse following the meltdown on Wall Street in 2009, national leaders rejected calls to bring business and labor leaders together to help mobilize their collective resources to respond to the security and recovery challenges. It is not surprising that the severe and sustained hardships of the Great Recession have produced an angry, alienated, and increasingly polarized public. The only thing uniting citizens and voters today is the view that the country is headed in the wrong direction and that their children will not reach the same standard of living as their parents' generation.

*D. Restoring Internal Balance in Corporate Decision Making*

Union decline has also seriously eroded the power and influence of labor relations and human resource professionals inside American corporations. The power of “boundary spanning” executives (i.e., those responsible for monitoring and managing relations with external groups or constituencies) is a direct function of the power and threat that these external groups pose to the organization. Thus, as union power and threat of organizing declined, so too have the power and influence of labor relations and human resource managers and executives. One highly regarded human resource professional lamented in the early 1990s that his colleagues were devolving into “perfect agents” of the CEO but were unable to bring their independent professional judgment to bear on top management decisions.<sup>26</sup> Sanford M. Jacoby documented the low level of influence of human resource executives in the United States compared to their Japanese counterparts.<sup>27</sup>

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<sup>26</sup> Frank P. Doyle, *Executive Forum*, 31 HUMAN RESOURCES MGMT. 133, 136 (1992).

<sup>27</sup> SANFORD M. JACOBY, *THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN AND THE UNITED STATES* 141–42 (2005) (analyzing the



Others have documented the growing power of finance (coining the awkward term “financialization”) in corporate decisions and the clear move away from a view that corporate leaders should balance shareholder, community, and workforce interests to the view that the corporation exists primarily or even solely for maximizing shareholder wealth.<sup>28</sup> The decline in unions has also eroded the negotiating skills of the current generation of human resource professionals. Compared to prior generations, very few have had experience engaging union representatives in negotiations, grievance handling, or other professional interactions.

*E. Rebuilding the Labor Movement*

Finally, union decline has been accompanied by an increasingly divided and internally conflicted labor movement. The split between the AFL-CIO and Change to Win unions is only the most visible example.<sup>29</sup> The battle between the two leaders who fostered the merger of UNITE-HERE<sup>30</sup> and the battle between the Service Employees International Union (SEIU) and

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significant involvement of Japanese human resources professionals in strategic personnel decisions compared to the minor involvement of U.S. counterparts).

<sup>28</sup> *E.g.*, GERALD F. DAVIS, *MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA* 96 (2009); MICHAEL USEEM, *INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACE OF CORPORATE AMERICA* 2–5 (1996).

<sup>29</sup> Steven Greenhouse, *Labor Calls for Unity After Years of Division*, N.Y. TIMES, Jan. 8, 2009, at A16, *available at* 2009 WLNR 349422.

<sup>30</sup> Steven Greenhouse, *Two Unions in Marriage Now Face Divorce Talks*, N.Y. TIMES, Feb. 8, 2009, at A18, *available at* 2009 WLNR 2491069.

the National Union of Health Care Workers could not have come at a worse time.<sup>31</sup> The diversion of resources and the negative publicity associated with these battles served as a final death blow to efforts to get labor law reform taken seriously by leaders in President Barack Obama's administration and Congress. Bringing up labor law reform in this environment simply would have invited opponents to highlight the sordid details of these intra-labor battles.

*F. Strengthening the Links Between Labor and Economic Policy*

Indeed, perhaps in anticipation of the political backlash that would be associated with giving priority to labor policy or perhaps because of the views of senior Obama administration economic advisors, labor issues in the Obama administration have to date been treated more as a political problem than as a central component of the administration's economic policies and strategies. Economic policy is tightly controlled by White House advisors. The Secretary of Labor lacks the independent ability to initiate policies. Even issues like labor law reform lie outside the Secretary's assigned responsibilities. It is an ironic and sad commentary that in the time of the greatest employment crisis since the Great Depression, the Department of Labor is playing at best a marginal role in policy making on economic and labor and employment matters.

These are the reasons that lead me to conclude that a fundamental overhaul of labor policy is needed. I lay out the elements of a new approach in the sections that follow. None of the ideas are presented here for the first time, and many of them are shared or derived from the works of others.

### **III. Elements of a New Policy**

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<sup>31</sup> Chris Rauber, *Rival Unions Trade Charges on Election to Represent 45,000 Kaiser Workers*, SACRAMENTO BUS. J., July 14, 2010, available at 2010 WLNR 14113567.

A. *Fixing the Basics: A Reframed Employee Free Choice Act*

The labor movement's chosen solution to the failings of labor law is the Employee Free Choice Act (EFCA).<sup>32</sup> The bill has three sets of provisions. It would (1) allow for certification of a union if a majority of potential bargaining unit members sign a union authorization card, (2) strengthen penalties for violating the law, and (3) provide for binding arbitration if negotiations stall over a first contract.<sup>33</sup> Opposition to both card check authorization and first contract arbitration make it unlikely that the bill will be enacted in its present form. Moreover, if enacted as a stand-alone bill, it would do little to jumpstart the transformations in labor-management relations needed to address the needs of workers, employers, the economy, or society.

The basics of labor law need to be fixed in a systemic way and seen as the first, necessary part of a comprehensive modernization of employment policy. To do so, I have suggested reframing and broadening the objectives of this bill to signal the intent of a new labor policy. The nation's labor policy should have the following explicit objectives:

1. To restore workers' right to join a union and gain access to collective bargaining by reducing the degree of conflict, delay, and intimidation experienced in the organizing and first contract negotiation processes;
2. To transform labor-management relations in ways that contribute to economic recovery and shared prosperity; and
3. To encourage cooperation, innovation, and continuous improvement in labor-management relations.

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<sup>32</sup> H.R. 1409, 111th Cong. (2010); S. 560, 111th Cong. (2010).

<sup>33</sup> H.R. 1409, §§ 2–4; S. 560, §§ 2–4.

To achieve these objectives, I would add provisions to this bill to ensure the new law is used as a foundation to build the innovative and productive labor-management relations the modern workforce wants and the economy needs. The law should charge the Secretary of Labor with the responsibility and provide the resources needed to carry out three tasks:

1. To create a National Council on Workplace Relations composed of business, labor, and neutral labor relations experts to promote continuous improvements in workplace practices, relationships, and performance;
2. To monitor and evaluate the new law and progress toward improved labor-management relations and report the Secretary's findings to Congress and the current administration on a periodic basis; and
3. To offer the Secretary's suggestions regarding any further changes in labor law and policy that may be needed.

Adding these provisions would both hold labor policy to the same standards of evaluation and performance as other aspects of economic and social policy and make it clear that fixing these basics in labor law is only the first step in revitalizing our labor-management relations system and putting it on a more productive course. Moreover, it would, for the first time, give the Department of Labor responsibility for overseeing, evaluating, and working to improve the nation's labor policy.

These are only the first, necessary steps needed to build a modern labor relations system and to integrate it with other aspects of employment and economic policy. Additional steps are needed to discard outdated labor law doctrines and to open up the law to support a broader array of options for worker voice and for resolving workplace disputes.

*B. Eliminate Outdated Doctrines*

A number of the doctrines embedded in the NLRA were designed for a form of industrial organization in which there was a clear separation between worker and supervisor, between business decisions and the terms and conditions of employment, and between the firm's employees and employees of contractors or other organizations in a firm's domestic or global supply chain. All three of these lines of demarcation have been subsequently blurred by changes in the way work is carried out today.

*C. Erase Labor Distinctions Between Employees and Supervisors*

Modern forms of work organization, in part aided by the spread of information technology, decentralize greater authority to teams, team leaders, and front-line workers that render traditional distinctions between supervisors and employees obsolete. These team-based work systems have been shown to produce higher levels of productivity, product and service quality, and job satisfaction than traditional supervisor-subordinate relationships.<sup>34</sup> Drawing a legal distinction between those who have representational rights and who do not no longer makes sense.

*D. Eliminate Distinction Between Mandatory and Non-Mandatory Subjects of Bargaining*

Figure 1, taken from the Kaiser Permanente labor-management partnership, illustrates the close interconnection across workplace and organizational issues that render the traditional legal doctrines regarding mandatory, permissive, and prohibited subjects of bargaining obsolete.<sup>35</sup> Their bargaining breaks outside of the "NLRA Box" by engaging teams of union-represented

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<sup>34</sup> APPELBAUM ET AL., *supra* note 17, at 25–26.

<sup>35</sup> THOMAS A. KOCHAN ET AL., HEALING TOGETHER: THE LABOR-MANAGEMENT PARTNERSHIP AT KAISER PERMANENTE 23 fig.2.1 (2009).

employees, managers, doctors, and staff professionals in discussions of service quality, performance improvement, deployment of electronic medical records technologies, and other workplace and organizational issues.<sup>36</sup> To make intelligent recommendations on these topics, significant organizational information on costs, competitive strategies, investment plans, and budgets need to be shared.

*E. Include Contract Workers in Bargaining Units*

Following the 1989 explosion at a Phillips Chemical plant in Pasadena, Texas, that killed twenty-two contract workers, the Occupational Safety and Health Administration commissioned a study of the factors causing what appeared to be an increasing number of incidents involving contract workers in the petrochemical industry.<sup>37</sup> A central conclusion of that study was that a root cause of accidents in these facilities was the failure of the host oil or chemical company to adequately train, supervise, or control the safety practices governing contract work.<sup>38</sup> This was true even though the contract workers were doing some of the most dangerous work in the facility. A key reason for not extending the host company's comprehensive safety management program to contractors was fear of exposing the firm to co-employment responsibilities and

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<sup>36</sup> *Id.*

<sup>37</sup> See Richard Johnstone et al., *Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors Are Employed*, 22 COMP. LAB. L. & POL'Y J. 351, 383 (2001).

<sup>38</sup> See generally *id.*

liabilities.<sup>39</sup> Since then, a series of similar fatal accidents have implicated employee-contractor problems including the BP's Texas City accident in 2005 and the Gulf Coast drilling platform accident and subsequent oil spill in 2010.<sup>40</sup> Here, as in the examples above, the blurring of organizational boundaries renders the legal doctrine excluding contract workers from opportunities to interact with and engage peers, supervisors, and management systems not only obsolete but hazardous.

A similar point has been made recently in debates over whether large firms with extended supply chains should be held responsible for the employment standards and conditions of contractors in their domestic or global supply chains. The Department of Labor has experimented with use of "hot cargo" clauses to hold firms in supply chains liable for accepting goods from firms violating one or more labor standards.<sup>41</sup> Moreover, under pressure from a variety of nongovernmental organizations (NGOs), firms in a number of visible consumer products industries (garments, athletic wear, electronics, food, etc.) have established codes of conduct and are now working with NGOs and suppliers to monitor employment conditions

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<sup>39</sup> Thomas A. Kochan et al., *Human Resource Strategies and Contingent Workers: The Case of Safety and Health in the Petrochemical Industry*, 33 HUMAN RESOURCE MANAGEMENT 55, 66 (1994).

<sup>40</sup> Pam Easton, *Death Toll Rises to 15 in Refinery Explosion; FBI Rules Out Terrorism at Site*, BOS. GLOBE, Mar. 25, 2005, at A3, available at 2005 WLNR 4694024; *Deepwater BP Oil Spill*, THE WHITE HOUSE, <http://www.whitehouse.gov/deepwater-bp-oil-spill/> (last visited Feb. 19, 2011).

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across their supply chains.<sup>42</sup> Thus, the decision of whether to outsource or insource work is under increasing scrutiny, and it is a choice that should not absolve firms from responsibility for producing goods and services that meet established employment standards and terms and conditions of employment.

*F. Eliminate Exclusive Representation or No Representation*

The legacy of company-sponsored unions led the framers of the NLRA to create the doctrine of exclusive representation for an employee organization when it demonstrated a majority of employees in a particular bargaining unit authorized it to represent them.<sup>43</sup> This has evolved into a system in which no individual gets representation unless fifty percent of his or her peers also choose to join the same organization (and together they survive the organizing gauntlet described above). No rational organizational or legal scholar would invent such a system today if starting with a clean sheet of paper.

These are just some of the most outdated of the legal doctrines underlying the NLRA that have led one legal scholar to label the law as “ossified.”<sup>44</sup> These and perhaps other doctrines need to be replaced with ones that better reflect the way work is done and the shared responsibilities that stem from the interdependencies among firms in today’s economy.

*G. Open the Law to New Options for Voice, Representation, and Dispute Resolution*

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<sup>42</sup> E.g., Richard Locke et al., *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike’s Suppliers*, 146 INT’L LAB. REV. 21, 21–22 (2007).

<sup>43</sup> FREEMAN & ROGERS, *supra* note 13, at 102.

<sup>44</sup> CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 27–51 (2010).



A large number of proposals have been advanced in recent years for opening the law to different voices and representational processes.

1. *Direct Employee Participation*

One proposal for promoting direct employee participation at the workplace would involve clarifying the law to ensure that various employee involvement processes and advisory worker-employer task forces or committees are not prohibited by section 8(a)(2) of the NLRA.<sup>45</sup> This has been a great, overblown source of controversy and debate, in my view. On the one hand, employers have advocated for a surgical change in the law to eliminate any restrictions on such processes, while most labor advocates resist changes in this part of the law. The labor advocates fear that employers would use these processes to promote employer-dominated company unions as a substitute for and in avoidance of employee-chosen and governed unions. A surgical change in the law without the supporting changes proposed above and detailed below could have the effect of serving more to tighten employer control than to expand opportunities for worker voice. Yet the evidence is clear that workers want to have a greater say over the range of workplace issues. The Dunlop Commission proposed a compromise solution in which employee participation processes would be allowed, but the ban on management activities to control unions or use these processes to defeat union organizing efforts would remain in place.<sup>46</sup> This is one way to balance these two labor policy objectives.

2. *Self- or Co-Regulation and Enforcement of Employment Standards*

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<sup>45</sup> 28 U.S.C. § 158(a)(2) (2006).

<sup>46</sup> DUNLOP COMMISSION, *supra* note 1, at 21–22.

Clarifying the law regarding employee participation would open the door to a host of so-called self-governance, co-regulation, or two-track proposals that have been advanced over the past two decades.<sup>47</sup> These proposals arise out of the recognition that government enforcement agencies will never have sufficient staff or resources to inspect or incentivize compliance with employment laws. Instead, alternative strategies that leverage employees, unions, worker centers, and dominant employers in supply chains could serve as effective complements to traditional enforcement efforts. While the design features vary across these proposals, they all seek to empower groups or committees of employees to complement traditional employment law enforcement procedures (often called “command and control” models) by participating in the monitoring, enforcement, and improvement of workplace policies regulated by employment law (safety and health, wage and hour, antidiscrimination, etc.). Some go a step further and provide a role for alternative dispute resolution systems that would provide an alternative to standard litigation through the courts. Others would provide roles for external organizations such as unions, worker centers, professional associations, NGOs, or other groups. These proposals illustrate the natural linkage between labor and employment policies. Cynthia Estlund, a proponent of these alternatives, stated it best when she concluded that there should be “no self-regulation without worker representation.”<sup>48</sup>

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<sup>47</sup> E.g., Thomas A. Kochan, *Labor Policy for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 117 (1998); DAVID I. LEVINE, *REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN* 36–55 (1995).

<sup>48</sup> ESTLUND, *supra* note 44, at 237.

To be successful, these self governance and dispute resolution systems would eventually need to gain the same recognition and endorsement as grievance arbitration achieved in the 1960 *Steelworkers' Trilogy* decisions.<sup>49</sup> This will undoubtedly take time, but the time required could be expedited if complemented by focused data collection, evaluation, and oversight by the relevant agencies and by specialized judges who have up-to-date knowledge and information on workplace governance practices. If all employment disputes were referred to specialized judges (call this a labor court if you wish), a modern-day equivalent of the “common law of the shop” that built up over the years under the guidance of grievance arbitrators would likely evolve. Moreover, this would argue for standardizing the penalties for violation of all categories of labor and employment law. It would also lead the enforcement agencies to invest more in data collection, research, and evaluation of alternative enforcement practices and would make the case for more professional and less partisan appointees to board and agency positions.

### 3. *American-Style Works Councils*

A number of scholars have put forward proposals to allow employees to elect a council of peers who reflect the full spectrum of occupations in a workplace.<sup>50</sup> In principle, opening up the law to such bodies makes good sense as a means for elevating the weak-positioned employee to

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<sup>49</sup> *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>50</sup> *E.g.*, PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 191–93 (1990); Thomas A. Kochan & Robert B. McKersie, *Future Directions for American Labor and Human Resources Policy*, 44 *INDUS. REL.* 224, 240 (1989).

matters that now occupy corporate governance and strategy making bodies. So too would opening up corporate or pension boards of directors or trustees to employee representatives. Neither of these options has gained much traction in labor or management practitioner circles. As single-shot interventions, neither are likely to gain much support or have much effect. As part of a reinvigorated labor movement that sees its role, in part, as providing technical support to a variety of worker representation forums and processes, these options might have more useful roles to play and find their appropriate niche in the range of voice and representational processes outlined here.

#### 4. *Allow Minority Representation*

Over the past decade, a coalition of labor law scholars led by Professor Charles Morris has argued that the original NLRA and its early years of enforcement allowed for minority union representation and that the NLRA should reinstate this doctrine.<sup>51</sup> This would lower the threshold for achieving access to a form of negotiations and union protection without requiring legislative change and without reforming the other concepts and doctrines of the statute. As a surgical incision, this would likely produce endless litigation and shift the locus of the battle over unionization to the minority of individuals who chose to join the union and further divide the workforce. This proposal would fit well, however, as part of the comprehensive reforms proposed here, and in particular as part of the strengthening of freedom of association and workplace council rights. All individuals should have the freedom to join any union, professional association, or social network of their choice without exposure to employer (or

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<sup>51</sup> *E.g.*, CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 185 (2005).

union) retaliation. The American workplace now has a wide range of groups, networks, and organizations around which different professional, racial, sexual preference, disability, or other identities form. Protections against discrimination or retaliation against any of these should be part of a modern national employment policy. However, for any of these groups or organizations to rise to a status that affords it the right to bargain on behalf of employees, these groups must obtain majority status.

#### **IV. The Supporting Cast**

The labor relations system that was built on the foundation of the NLRA evolved over a period of time and was nurtured and supported by the emergence of labor, management, and neutral organizations and institutions. That same supportive private sector infrastructure will need to be created or adapted to foster, evolve, and improve a new system. This will require considerable change in the behavior of current professionals and the education and active involvement of a new generation of leaders and professionals.

In the early years of the NLRA, a number of supportive institutions emerged to reinforce and nurture the law's development and to invent or tailor practices to fit the changing environment. Perhaps the most important innovation encouraged and supported by the new law was the formation and growth of the industrial unions of the Congress of Industrial Organizations.<sup>52</sup> This new union form fit well with the expanding mass production industries of that era. Another important institution was the War Labor Board that guided labor-management relations during World War II and created many of the workplace principles and practices that

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<sup>52</sup> *See id.* at 102.

are taken for granted today.<sup>53</sup> In addition, the Industrial Relations Research Association was created in 1947—now called the Labor and Employment Relations Association—by scholars from multiple disciplines who recognized the need to come together with labor, management, and government professionals to study and discuss solutions to workplace issues.<sup>54</sup> The National Academy of Arbitrators,<sup>55</sup> schools of labor and industrial relations in various major universities,<sup>56</sup> and tripartite discussion forums such as the National Planning Association<sup>57</sup> also were formed in these early years of the law. Together, these institutions played key roles in nurturing and adapting the collective bargaining process to the needs of the parties and the public. A similar set of institutional adaptations and possibly the creation of new groups or networks will be needed to support a new labor policy. I review several below.

*A. Implications for the Labor Movement: Redefine “Union Membership”*

Transforming the labor relations system in the ways outlined here will require equally fundamental transformations in the strategies and structures of the American labor movement. A

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<sup>53</sup> See JACOBY, *supra* note 27, at 84.

<sup>54</sup> *About LERA*, LAB. & EMP. REL. ASS’N, <http://www.leraweb.org/about/about-lera> (last visited Feb. 19, 2011).

<sup>55</sup> *Academy History*, NAT’L ACAD. OF ARBS., <http://naarb.org/historyresearch.asp> (last visited Feb. 20, 2011) (noting that Academy was founded in 1947).

<sup>56</sup> *E.g., About the ILR School*, CORNELL UNIV. ILR SCH., <http://www.ilr.cornell.edu/about/> (last visited Feb. 20, 2011) (explain that school was founded in 1945).

<sup>57</sup>

first step would be to redefine and open up the boundaries of the labor movement to build lasting coalitions with the full range of professional associations, community groups, worker centers, and other organizations that are attempting to give voice and support workers. The AFL-CIO Department of Professional Employees has been meeting and working with a wide range of other professional associations on common interests.<sup>58</sup> The AFL-CIO has created Working America to mobilize support from people around the country who do not have union representation at their workplace.<sup>59</sup> Local coalitions have formed between worker centers and unions in many parts of the country.<sup>60</sup> In other settings, my colleagues and I argued that the labor movement should take on the features of an inclusive but loosely coupled social network, in which the network provides a broad range of labor market and social services to workers as they move across jobs and

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<sup>58</sup> *DPE Mission Statement*, DEP'T FOR PROF. EMPS., AFL-CIO, <http://dpeaflcio.org/about/12-2/> (last visited Feb. 20, 2011) (explaining that one goal of the Department is to “build[] alliances with professional associations and societies promoting the interest of professional and technical workers.”)

<sup>59</sup> *Working for America*, AFL-CIO INST., <http://www.workingforamerica.org> (last visited Feb. 19, 2011).

<sup>60</sup> *See, e.g., Procedures and Rules for Implementing the National Worker Center & AFL-CIO Partnership*, AFL-CIO, [http://www.aflcio.org/aboutus/jointheaflcio/upload/wc\\_procedures.pdf](http://www.aflcio.org/aboutus/jointheaflcio/upload/wc_procedures.pdf) (last visited Feb. 20, 2011) (nothing that in August 2006, the AFL-CIO implemented procedures to allow for coalitions between unions and worker centers).

through the different stages of their careers and family lives.<sup>61</sup> Doing so would considerably enlarge the labor movement. For one thing, it would avoid losing members when they leave union-represented jobs.

Focusing on recruiting and retaining the next generation should be an equally high priority of the labor movement. Recent evidence indicates that if workers are not exposed to union membership early in their careers, the likelihood of becoming a union member declines quickly and substantially. Moreover, a significant number of young workers do move through jobs where unions are present, so there appears to be opportunities to recruit and retain significant numbers of young workers.<sup>62</sup> Recruiting, retaining, and providing leadership development opportunities to workers early in their careers would be one of the fastest and most effective ways of transforming the labor movement. This is what helped transform the SEIU from a stagnant building service union with well-established regional fiefdoms to the fastest-growing union of the past two decades during John Sweeney's and Andy Stern's tenure.<sup>63</sup>

*B. Implications for Business Leaders and Professional Managers*

The skills of the current human resource professionals are woefully lacking to support the transformations in labor relations outlined here. There needs to be a massive retraining program for current human resource management professionals and a fundamental change in the way the

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<sup>61</sup> PAUL OSTERMAN, THOMAS A. KOCHAN, RICHARD LOCKE & MICHAEL J. PIRE, WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 131–47 (2001).

<sup>62</sup> John W. Budd, *When Do U.S. Workers First Experience Unionization? Implications for Revitalizing the Labor Movement*, 49 INDUS. REL. 209 (2010).



next generation of human resource professionals is educated, trained, and developed. Modern negotiations theory and practice should feature prominently in the education, training, and professional development process. Arm's length position bargaining grew up with the arm's length labor relations system. There was a clear delineation of the issues and rights of management and labor, and a central task of the negotiator was to work within these perimeters. What was not anticipated was that bargaining would over time become a largely subcontracted activity dominated by lawyers. But that is what has happened. The legal profession has been slow to adopt new concepts of problem solving, such as interest-based negotiation and more principled negotiation practices that allow for using data, using subcommittees or task forces to explore the root causes of problems, generating a range of options for addressing the problem, focusing on addressing all parties' core interests, and working collaboratively to implement and sustain agreements. These are the elements of a modern approach to negotiations. Human resource executives, lawyers and other third party mediators and facilitators, and current and future worker representatives all need to be trained in these modern negotiations techniques and given opportunities to test and adapt them to fit the situations encountered in their daily work.

### *C. Redefine Business School Curricula*

Very few current business school students have any exposure to labor relations. Most now take a generic negotiations course. Even though nearly all of these are built on the foundational concepts of distributive and integrative bargaining developed first by Walton and McKersie's work on labor negotiations,<sup>64</sup> few include labor-management cases or simulations in

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<sup>64</sup> RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (1965).

their course. A somewhat larger number, but a still minority of business students, take a human resource management course. Labor relations is often either ignored or, if covered, curricula tend to focus on how to avoid rather than how to work with unions. If the higher educational system is to support development of a new labor relations system, this curriculum will have to change, both for human resource specialists and for the larger community of future managers and executives who will set the labor relations strategies in organizations.

## **V. A Final Word**

The blueprint presented here departs from incremental efforts to patch up a failed labor relations system. It envisions a plurality of representational and engagement forums and processes, all of which have been tested in isolated experiments and all of which have empirical evidence to support their further expansion. It is an equal opportunity, politically offensive proposal. I have no illusions that existing labor, business, or government leaders will endorse all of the ideas. Each group will actively resist and oppose one or more of them. But that is part of the point I want to make here. For too long debates over, and recommendations for, labor law reform have failed to draw on the full body of accumulated evidence and instead have privileged more limited reforms that might be deemed acceptable to one or more of the key interest groups. This approach has only perpetuated the thirty-year stalemate. It is time to break the chains of acceptability and be true to what has been learned from the last several decades of experimentation, research, and analysis.