

Gathering Moss: The NLRA’s Resistance to Legislative Change

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INTRODUCTION

It has become commonplace to refer to the National Labor Relations Act (NLRA) as ossified.¹ To be sure, Congress does not typically revisit on a frequent basis statutes that are transformative of the surrounding legal landscape. Still, compare the national law of labor-management relations to major statutes governing telecommunications, securities, banking, civil rights, education, health care, or the environment. In stark contrast to these other regulatory schemes, Congress has made virtually no changes in the NLRA since Jackie Robinson integrated major league baseball, since television arrived in American homes, or since well before creation of the interstate highway system.

Why has the NLRA been so intensely resistant to change for over six decades? How was Congress able to enact two major laws within a twelve-year period but then unable to approve proposed reforms in the years since 1947? In an effort to identify salient factors that contributed to congressional action and inaction, I reviewed contemporaneous accounts from major newspapers that described and analyzed our two key legislative “successes”—in 1935 and 1947—and also two more recent congressional “failures”—in 1978 and 1992.²

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¹ See e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Wilma Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007).

² Given prescribed space limits, not all reform efforts are discussed: I have omitted the successful 1974 amendments extending NLRA coverage to employees of nonprofit hospitals, and the failed 1996 effort to amend section 8(a)(2) of the Act. In addition, my operative definition of “success” is based on congressional enactment rather than ideological valence, although in contemplating future legislative reform I focus on change that would facilitate union recognition and collective bargaining. In that regard, I briefly address the status of the proposed Employee Free Choice Act in Part II.

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My focus was on stories and columns appearing in the months preceding the crucial legislative events: House and Senate approval of the Wagner and Taft-Hartley Acts, and Senate filibuster votes that signaled the demise of the 1978 Labor Law Reform Act and the 1992 Workplace Fairness Act.³ These newspaper accounts are in one sense simply a snapshot; they cannot substitute for the depth and perspective available from historical and other scholarly analyses. At the same time, quantity and quality of press coverage tend to reflect the urgency associated with reform efforts during Congress's critical review period. Moreover, while newspaper owners as employers may be presumed to oppose pro-union changes in the NLRA, the tone and content of coverage is not invariably unfavorable to organized labor's position.⁴ In any event, news stories, opinion columns, and editorials capture how issues and arguments were framed and understood at the time key legislative decisions were being made, thereby shedding light on factors that influenced Congress either to approve a major law reform effort or to decline to do so.

In examining the four legislative campaigns, I borrow from political scientist John Kingdon's view of Congress as a form of organized anarchy.⁵ Kingdon's model of lawmaking, as dynamic and discontinuous yet also coherent, largely comports with my own experience over seven years as a committee counsel in the U.S. Senate. Kingdon posits a recurring interplay among three separately developing process streams: *problems* that capture the attention of the policy community working in and around Congress; *proposals* generated and refined as potential

³ For the Wagner and Taft-Hartley Acts, I examined reports and columns appearing in the New York Times, Washington Post, Chicago Tribune, Pittsburgh Post-Gazette, Cleveland Plain Dealer, St. Louis Post-Dispatch, and Los Angeles Times. For the Labor Law Reform and Workplace Fairness Acts, I focused on the New York, Washington, and Chicago newspapers, and in addition reviewed stories from the Wall Street Journal, U.S. News & World Report, and several smaller local papers. I am grateful to Melanie Luthern, Moritz College of Law Class of 2012, for her exceptionally diligent and thoughtful research into these newspapers.

⁴ See Part I.A, *infra*, discussing favorable coverage of Wagner-Connery Act. More generally, the Court has upheld journalists' right to organize under the NLRA (see *Associated Press v. NLRB*, 301 U.S. 103 (1937)), and journalists at many major newspapers are covered by collective bargaining agreements.

⁵ See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 84-89 (2d. ed. 1995).

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solutions to the problems; and a *political climate* that allows for or discourages openings in the legislative process to enact the possible solutions.⁶

All four legislative campaigns featured potentially enactable proposals that were concrete, feasible, and sufficiently refined by policy participants so that they might have ripened into statutory solutions. What separates success from failure, however, are the magnitude and resonance of the perceived policy problems and also certain distinctive aspects of the political environment before and during floor consideration.

The problems identified in 1935 and 1947, manifested through a series of strikes and confrontations, commanded exceptionally broad and intense attention from the public at large as well as the labor-management policy community. This attentiveness and sense of immediacy was the essential predicate for legislative success; in both 1935 and 1947, bills moved through House and Senate in virtual lockstep over a period of less than two months. Further, the political climate in these two instances featured unusual extrinsic circumstances that helped generate vital momentum for each bill's congressional supporters. In 1935, a pivotal factor was two Supreme Court decisions, invalidating the Railway Pension Act and the National Industrial Recovery Act, that came down during Senate and House floor consideration of the NLRA. In 1947, an important development was the fear of spreading communism at the dawn of the Cold War era.

By contrast, the bills defeated in 1978 and 1992 involved far less public awareness of or investment in the policy problems identified by members of Congress and their staffs. Whether due to a lack of dramatic and disruptive tactics, or to the absence of a compelling substantive message, the proposed reforms never generated sufficient urgency with key policymakers or the public at large. Relatedly, House passage in these cases was followed by a delay of eight to

⁶ *See id.* For more extended discussion of Kingdon's approach, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 24-26 (1994).

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eleven months before the Senate turned to floor consideration. This prolonged period may well have aided bill opponents at a time when recently revised Senate rules on filibusters were becoming a serious obstacle to enactment of majority-favored legislation.

Part I relies primarily on newspaper accounts to describe key factors contributing to legislative success and failure in the labor-management relations area. Part II discusses possible lessons for the future.

I. LEGISLATIVE SUCCESSES AND FAILURES

A. *The 1935 Wagner-Connery Act*

The bills that became the NLRA moved from committee report to presidential signature in a two-month period between early May and early July 1935.⁷ During 1934 and early 1935, the country had been gripped by strike activity that stemmed primarily from workers' efforts to secure union recognition and collective bargaining.⁸ Organized labor and its supporters in Congress had warned that workers' patience in pursuit of these basic protections was running out.⁹ Reports of strike activity across the country accompanied the decisive stages of the legislation, creating a heightened sense of urgency as to the need for congressional action.

By May, 1935, news articles reflected the growing prospect of a national labor emergency.¹⁰

⁷ See Calendars of the United States House of Representatives and History of Legislation, Final Edition, 245 (74th Cong. 1936) (recounting bill reported by Senate Committee May 2, 1935; passed Senate May 16; reported by House Committee May 21 and June 10; passed House June 16; conference report agreed to by both Houses June 27; signed by President July 5).

⁸ See *Industrial Labor Disputes*, 41 MONTHLY LAB. REV. 655 (1935) (reporting between 121 and 326 strikes in progress during every month from January 1934 through July 1935, with 1.2 million man days lost due to 281 strikes in progress during April 1935); *id.* at 657-58 (describing strike begun in May 1935 by over 30,000 lumber workers in Oregon and Washington seeking union recognition); *id.* at 665 (reporting that for 153 strikes and lockouts begun in May 1935, matters related to union organization were the major issues in 47 percent); *Industrial Disputes*, 41 MONTHLY LAB. REV. 83, 91 (July 1935) (reporting that for 135 strikes and lockouts begun in March 1935, matters related to union organization were the major issues in 60 percent).

⁹ See, e.g., Louis Stark, *Green Says Labor is Losing Patience*, N.Y. TIMES, March 15, 1935 at 7; Stuart Chase, *New Hope of Labor Seen in Strike Wave*, WASH. POST, July 22, 1934 at B5; David I. Walsh, *To Combat the Strike Crisis, Walsh Urges the Wagner Bill*, N.Y. TIMES, June 3, 1934, §XX at 2.

¹⁰ See, e.g., Louis Stark, *Coal Parley Fails in Final Stage*, N.Y. TIMES, May 29, 1935 at 12; Franklyn Waltman, Jr., *Appalachian Pay Parley Fails; President Steps In*, WASH. POST, May 29, 1935 at 1.

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A major strike idled 4,000 shipbuilding workers in New Jersey immediately before the Senate floor vote on May 16, delaying \$50 million worth of production.¹¹ Days prior to the House floor vote in June, a strike date was announced for some 400,000 coal miners.¹² A Washington Post article at the end of May addressed a litany of current or imminent work stoppages—by longshoremen on the Pacific Coast, lumber workers in the Northwest, steelworkers in Ohio, and textile workers in the Southeast.¹³

Strike activity and related violent clashes appeared to intensify in June 1935, following the Supreme Court decision in *Schechter Poultry*.¹⁴ Prior to the Court decision, it was understood that labor and its supporters had come to view the National Industrial Recovery Act as inadequate—due mainly to failed enforcement of the law’s collective bargaining provision and also the Act’s toleration if not encouragement of company unions.¹⁵ But the Court’s invalidation of the Act on May 28 unleashed a new wave of strikes and protests. Unions and workers feared that companies would take advantage of the law’s removal to reduce wages and living standards in already-desperate times.¹⁶

On June 7, 1935, American Federation of Labor (AFL) President Green delivered a national radio speech that was reported in full the next day by the New York Times.¹⁷ He emphasized that with the invalidation of the industrial codes of fair practice, “working people will be

¹¹ See *Strike Bars Work on \$50,000,000 Ships*, N.Y. TIMES, May 14, 1935 at 41.

¹² See Stark, *supra* note 10.

¹³ See *Strike Threat on Coast Adds to NRA Crisis*, WASH. POST, May 31, 1935 at 4.

¹⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (decided May 27, 1935).

¹⁵ See Louis Stark, *New Chapter Opening in History of Unions*, N.Y. TIMES, May 19, 1935 at E7 (discussing failed enforcement); *6000 Join Protest Against the NRA*, N.Y. TIMES, May 24, 1935 at 2 (same); *Organized Labor is Put at 6,700,000*, N.Y. TIMES, May 5, 1935 at E12 (reporting that nearly 40 percent of organized workers were under company union plans as of February 1935); *Industrial Disputes*, 41 MONTHLY LAB. REV. 1277, 1286 (1935) (discussing labor strike in textile mill employing 1200 workers that was divided between company union and independent trade union).

¹⁶ See, e.g., *Green Calls Aids in NRA Emergency*, CLEV. PLAIN DEALER, June 2, 1935 at ___ [?]; Ghads O. Skinner, *Gas Fogs Issues in Canton Strike*, CLEV. PLAIN DEALER, June 1, 1935 at ___ [?]; *15,000 March in N.Y. Threat to ‘Chiselers,’* WASH. POST, June 9, 1935 at 7; *Strike Threat on Coast*, *supra* note 13.

¹⁷ See *Text of Green’s Address Urging Amendment to Curb Supreme Court*, N.Y. TIMES, June 8, 1935 at 8.

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compelled to fight as never before for the right to organize into independent trade unions of their own choosing” and that the Wagner-Connery bill was vital to the attainment of this right.¹⁸

Throughout June 1935, newspapers across the country reported on a breathtaking array of violent strikes and demonstrations. There were several days of riots during a streetcar workers strike in Omaha that ended with the Governor declaring martial law.¹⁹ Troops and tear gas were used during violent picketing by lumber workers in Tacoma that threatened to turn into a general strike.²⁰ A steelworkers’ strike in Canton involved tear gas, shotguns, and casualties,²¹ while city power lines were cut during a major electrical workers’ strike in Toledo.²² Even Ohio State University students battled police during a strike at a packing plant in Columbus.²³

The scope and intensity of worker protests continued into late June, as the House approved the bill on June 16 and both houses agreed to the conference report on June 27. Many newspaper stories in this period simply reported *seriatim* on strikes from around the country.²⁴ While the reporters did not condone strike-related violence, they at times appeared to sympathize with striking workers and bystanders who endured tear gas barrages or shotgun fire from company personnel and National Guardsmen.²⁵ One reporter, recounting the fear experienced by picketers, observed: “You forget the equities of the situation and wonder what kind of persons they are who can fire gas projectiles and toss tear grenades with such uncanny precision.”²⁶

¹⁸ *Id.*

¹⁹ *See Martial Law in Omaha Ends Violence After Three Nights of Strike Riots*, ST. LOUIS POST DISPATCH, June 16, 1935 at 1; *Entire National Guard Called Out to End Strike Violence*, CLEV. PLAIN DEALER, June 16, 1935 at 1.

²⁰ *See General Strike Threat; Troops Use Gas, Clubs*, CHIC. TRIBUNE, June 25, 1935 at 11; *Troops, Tear Gas End Strike Riot*, N.Y. TIMES, June 25, 1935 at 3.

²¹ *See Skinner*, *supra* note 16.

²² *See Another Strike Begins in Toledo Power Plants*, ST. LOUIS POST DISPATCH, June 14, 1935 at 4B; *Hopes for Peace Grow at Toledo*, CLEV. PLAIN DEALER, June 16, 1935 at 10.

²³ *See Airs O.S.U. Students’ Part in Strike Clash*, CLEV. PLAIN DEALER, June 1, 1935 at __[?].

²⁴ *See, e.g., General Strike Threat*, *supra* note 20 (reporting major strikes in Tacoma, Cleveland and Providence); *Strike Gunfire Takes Two Lives at Textile Mill*, CHIC. TRIBUNE, June 20, 1935 at 3 (reporting on major strike activity in South Carolina, Wisconsin, and Nebraska).

²⁵ *See generally*, *Skinner supra* note 16; *Troops, Tear Gas*, *supra* note 20.

²⁶ *Skinner, supra* note 16.

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These accounts of workers risking their jobs, their health, and even their lives to secure rights to organize and bargain collectively seemed to frame the magnitude of the policy issues at stake during the last weeks of congressional deliberations. The timing of the Supreme Court decision, removing any prospect that the Industrial Recovery Act could deliver employee protections, helped to galvanize organized labor for its final push toward enactment. In addition, the Court's skeptical constitutional stance had a quirkier positive effect on the political climate, by tacitly inviting Republican legislators and business leaders to give the proposed law a free pass.

The Senate approved the Wagner bill with “unexpected speed”²⁷ twelve days before *Schechter Poultry* was announced. A New York Times story reported the “change from determined, delaying opposition to the mere making of a record against the proposals” following a Court decision in early May that had invalidated the Railway Pension Act.²⁸ The story went on to summarize this “new Republican attitude” as follows: “If there is a good chance of knocking out all these things in the courts, and they are going to be put through anyhow, it is a wise policy to put no particular legislative obstacles in their path.”²⁹

Right after *Schechter Poultry* was decided, the Washington Post described the Wagner-Connery measure as “heading into the validity maelstrom.”³⁰ An article in the Pittsburgh Post Gazette suggested that some legislators voted for the bill knowing it did not meet the Court's constitutional test.³¹ In July, the Democratic Senate Leader wryly observed that a speech by the Republican National Committee Chairman challenging the Wagner Act's constitutionality was in

²⁷ Arthur Krock, *Wagner Labor Bill Passed by Senate by Vote of 63-12*, N.Y. TIMES, May 17, 1935 at 1.

²⁸ See Arthur Krock, *Sudden Senate Spurt Speeds Adjournment*, N.Y. TIMES, May 19, 1935 at E3. The decision, *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) had been issued May 6.

²⁹ *Id.*

³⁰ See *Leaders Drop Plan to Finish Session Soon*, WASH. POST, May 31, 1935 at 1.

³¹ See David Lawrence, *Today in Washington: Passage of Unconstitutional Acts Likely to be in Next Year's Election*, PITTS. POST GAZETTE, June 13, 1935 at 23. See also David Lawrence, *Today in Washington: Congress Intends to Go Ahead Passing Laws Which Are Unconstitutional*, PITTS. POST GAZETTE, June 25, 1935 at 19.

effect criticizing leading Republican Senators who had voted for final passage.³² In sum, the Republican Party, along with top business leaders, evidently concluded that a bruising floor fight was unnecessary because the Wagner Act would fall under the Court's constitutional test.³³

B. The 1947 Taft-Hartley Act

The bills that became the Labor Management Relations Act (LMRA) traveled from initial committee report to veto override between mid April and late June 1947.³⁴ The backdrop once again involved a prolonged period of intense strike activity beginning in early 1946, just a few months after victory was declared over Japan. But whereas the strikes in 1934-35 had focused primarily on demands for union recognition and efforts to resist employer cutbacks, the strikes in 1946 were mainly about wage increases for those who had union contracts. With the post-War rise in prices, millions of workers expressed frustration over the decline in their real income. Strikes during 1946 set a record for lost worktime, and the resultant disruptions to vital services helped generate hostile reactions from large portions of the public.³⁵

Press coverage of the Wagner-era strikes had reported on the violence but also had addressed the labor movement's substantive demands and priorities. By contrast, press coverage of Taft-Hartley-era strikes focused more heavily on adverse consequences to the public. During

³² See *Robinson in Reply Gibes at Fletcher*, N.Y. TIMES, July 30, 1935 at 10. Twelve Republican senators had voted for final passage. See *The Wagner Bill Votes*, N.Y. TIMES, May 17, 1935 at 4.

³³ For the business community position, see, for example, *Business Men Hold Wagner Bills Faulty*, N.Y. TIMES, July 18, 1935 at 31. See generally, IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 120-23 (1950); PETER H. IRONS, *THE NEW DEAL LAWYERS* 231 (1982).

³⁴ See *Calendars of the United States House of Representatives and History of Legislation*, Final Edition 139 (80th Cong. 1948) (recounting LMRA reported by House committee April 12, 1947; passed House April 17; passed Senate May 13; conference report agreed to by House June 4, and by Senate June 6; vetoed by President June 20; veto overridden by House June 20, and by Senate June 23).

³⁵ See *Work Stoppages Caused by Labor-Management Disputes in 1946*, 64 MONTHLY LAB. REV. 780-81 (May 1947) (reporting 4.6 million workers were involved in work stoppages in 1946, a larger number than in any previous year: 116 million man days were lost. See generally, DAVID L. STEBENNE, ARTHUR J. GOLDBERG: *NEW DEAL LIBERAL* 58 (1996); A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 39 STAN. L. REV. 945, 949 (1986). These strikes also mobilized voters to support anti-labor candidates; the 1946 elections yielded Republican majorities in both houses for the first time since 1930.

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May and June 1947, newspaper stories were regularly critical of union-initiated strikes that undermined economic growth and frustrated Americans in their daily lives.

A number of articles addressed the negative impact of strikes on the nation's economic health even as that health was noticeably improving. A Los Angeles Times front-page article reported on record employment growth as well as increases in personal income and consumption of goods, but added that "fear—generated by confused politics, works stoppages and the excessive demands of labor—may topple the future into a recession through hysteria."³⁶ The New York Times reported that lost strike days had peaked in April 1947,³⁷ adding in a separate story that although industrial profits were robust, "had not a third of the [1946] production been lost to strikes, the year's earnings would have surpassed all records."³⁸ Additional articles discussed the adverse effects of strikes on particular industries such as building construction in New York and film production in Los Angeles.³⁹

Many articles also described the disruption and hardship experienced by the American public from strikes and related labor protests. A strike by telephone service workers was reported to have reduced nationwide long-distance phone service by 80 percent and deprived six million subscribers of all services.⁴⁰ Other strikes deprived the public of bus services, curtailed urban food supplies, halted rail freight shipments, and scaled back the creation of movies.⁴¹ One

³⁶ *Prosperity Seen Periled by Unions*, L.A. TIMES, June 12, 1947 at 1.

³⁷ *See Strike Time Lost in April at Peak Since May 1946*, N.Y. TIMES, May 28, 1947 at 15.

³⁸ C. M. Reckert, *Industrial Profit at Record Level*, N.Y. TIMES, May 25, 1947 at F1.

³⁹ *See Building Hit Hard by Cement Strike*, N.Y. TIMES, May 15, 1947 at 2; *Hollywood Labor Squabbles Drive Films Elsewhere*, L.A. TIMES, June 21, 1947 at 4.

⁴⁰ *See Sam Stavisky, Long Lines Are Crippled by Walkout of 300,000*, WASH. POST, April 8, 1947 at 1.

⁴¹ *See 100,000 Bus Riders Hit By Strikes*, L.A. TIMES, June 7, 1947 at 1; *Warehouse Strike May Cut City Food*, N.Y. TIMES, May 27, 1947 at 21; *Railroad Shipments Halted to Strikebound U.S. Ports*, L.A. TIMES, June 18, 1947 at 1; *Unions Peril Us, Film Man Says*, L.A. TIMES, June 19, 1947 at 1 [?]. *See also Johnson Kanady, 1946 Bus Tie-Up Called Proof of Need for Curbs*, CHIC. TRIBUNE, May 25, 1947 at 12 (describing how agriculture suffers from strikes because machines wear out and farmers "can't even get baling wire to fix the old ones up").

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emotionally charged story described how a minister and his brothers braved threats from union picketers to dig their own mother's grave at a strike-ridden cemetery.⁴²

Press coverage in the late spring of 1947 reflected a perception of unions as having substantially overreached; this in turn helped frame the importance of policy changes that would restrict unions' statutory authority and their economic power. Organized labor's legislative strategy may have contributed to the momentum for reform. A New York Times article reported that by resisting all proposed adjustments and offering no proposals of their own, union leaders and their principal congressional spokesmen had become isolated in the face of public demands for change.⁴³ One additional factor that intensified the political climate favoring enactment of Taft-Hartley was growing national concern about the spread of communism and the labor movement's possible role in this development.

During May and June 1947, there was heavy coverage of the threat posed by communist expansion abroad and infiltration at home. The Cold War had begun, and newspapers across the country reported on communism's movement across Europe as well as the continuing size of Soviet military forces.⁴⁴ The press also focused on the possible influence exerted by communist organizations and sympathizers in the U.S., often reporting on charges made by the House Un-American Activities Committee.⁴⁵ In an April 1947 opinion poll, 67 percent responded that communism should be prohibited by law.⁴⁶

⁴² See *3 Men Dig Mother's Grave in Strike-Bound Cemetery*, WASH. POST, May 28, 1947 at 5.

⁴³ See Arthur Krock, *In the Nation: Labor Leaders Offer a Blank Page as Alternative*, N.Y. TIMES, June 6, 1947 at 22.

⁴⁴ See, e.g., Jack Guinn, *'Hungary Lost to West,' Reds in Full Control, Official Says*, ST. L. POST DISPATCH, May 31, 1947 at 1; *Reds Reported Demanding Complete Control Over Austria*, June 8, 1947 at 1; C. L. Sulzberger, *Communists Widen Control in Russia*, N.Y. TIMES, May 1, 1947 at 12; William Fulton, *Soviet Retains 4,350,000 Under Arms For Peace*, CHIC. TRIBUNE, May 15, 1947 at 3.

⁴⁵ See, e.g., *Thomas Asserts He Finds Pro-Reds in Atomic Plants*, ST. L. POST DISPATCH, June 5, 1947 at 8C; Joseph A. Loftus, *House Body Calls Southern Group Communist Front*, N.Y. TIMES, June 15, 1947 at 1; Rev. John Evans, *U.S. Reds Few But Effective, Sheen Asserts*, CHIC. TRIBUNE, May 31, 1947 at 6.

⁴⁶ See 11 PUBLIC OPINION QUARTERLY, no. 2, p. 281 (Summer 1947).

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Numerous newspaper reports identified unions as an alleged refuge for communists and fellow travelers.⁴⁷ One prominently featured story in the weeks preceding Taft-Hartley enactment involved allegations that the Communist party had directed a union to engage in a major strike in 1941 at an Allis-Chalmers plant in Milwaukee. A House labor subcommittee concluded that the CIO-UAW local union president had been “a tool of the communist party,” and that the strike was called because the plant was doing important work for the Navy at a time when Soviet Russia had a non-aggression pact with Germany.⁴⁸ The subcommittee went on to assert that “the Communist influence at Allis-Chalmers during the past ten years has created friction between this employer and its employees,” and stated that no employer should be required to bargain collectively with a union representative who either is a communist party member or reasonably can be regarded as affiliated with the party.⁴⁹ The LMRA included a provision barring unions from receiving Labor Board certification or assistance until its officers swore they were not Communists or Communist sympathizers.⁵⁰

Newspapers in June 1947 captured the views of individual citizens, columnists, and editorial writers that “the Communists in labor unions are too numerous,”⁵¹ that “their foothold in the labor movement is the most valued Communist asset,”⁵² and that “union bosses [stand] elbow to elbow with the Communists” in assailing the act.⁵³ The national anxiety about communism and its alleged strength within the union movement during the spring of 1947 was

⁴⁷ See, e.g., Loftus, *supra* note 45 (reporting on alleged communist sympathies of United Mine Workers district president and also UMW attorney); Evans, *supra* note 45 (reporting assertion that communist party has “many front organizations” in this country, including some labor unions).

⁴⁸ See *Brands Allis Strike Chiefs Tools of Reds*, CHIC. TRIBUNE, June 1, 1947 at 1; John D. Morris, *Communist Party Blamed for Strike at Allis in 1941*, N.Y. TIMES, June 1, 1947 at 1. For a contrary analysis, see Yu Takeda, *The Allis-Chalmers Strike in 1941 and the Issue of Communism*, (June 25, 1982) (on file with Osaka Kyoiku University) (copy also available from author).

⁴⁹ See Morris, *supra* note 48.

⁵⁰ See *Most Important Provisions of Taft-Hartley Act*, CHIC. TRIBUNE, June 24, 1947 at 1 (item no. 11, “Communists”).

⁵¹ Magnus Bjorndal, *Communists and Unions* (Letter to Editor), N.Y. TIMES, June 2, 1947 at 24.

⁵² Joseph and Stewart Alsop, *Matter of Fact: Labor Bill Veto?*, WASH. POST, June 2, 1947 at 9.

⁵³ *Senate is Crux of Union Bill Fight* (Editorial), L.A. TIMES (?), June 18, 1947 at 4.

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probably not a decisive factor given Congress's overwhelming support for Taft-Hartley. Still, the public and congressional focus on communist threats further undermined the image and political influence of unions as the LMRA was being considered.

C. Failure of Legislative Reform Efforts in 1978 and 1992

At one level, it may seem harsh to label these two efforts failures. In both cases, bills passed the House and enjoyed majority support in the Senate, but proponents could not garner enough votes to end Senate filibusters. In the legislative arena, however, "almost" has a hollow ring. And in these two instances, newspaper coverage offers some insight into key shortcomings that resulted in an inability to secure Senate passage.

1. The 1978 Labor Law Reform Act

The Labor Law Reform bill sought to alter NLRA procedures and remedies aimed at existing violators; it did not address substantive definitions of legal or illegal conduct. The bill's objectives were speedier union representation elections, greater union access during organizing campaigns, and stronger monetary relief for illegally fired workers. The House passed its version in October 1977, but the Senate bill failed to surmount a filibuster in June 1978.⁵⁴

Press coverage in the weeks preceding the Senate floor fight focused more on the struggle between labor and business interest groups than on the underlying policy problem of significantly increased unlawful activity by employers during the 1970s. One editorial opined that "Both unions and employers have loaded this bill with symbolic freight far out of proportion to anything that it will accomplish."⁵⁵ Other articles emphasized that "[s]eldom has the Capitol

⁵⁴ See Cong. Res. Serv., *Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501-02* (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; Failure of four cloture motions in Senate from June 13-22, 1978; closest votes 58-41 on June 14 and 58-39 on June 15).

⁵⁵ *The Labor Bill*, WASH. POST, May 19, 1978 at A18.

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seen such a variety of pressure tactics from lobbyists,”⁵⁶ and predicted that “[r]esults of the impending confrontation...are expected to deal the loser a major setback in credibility and influence on Capitol Hill for years to come.”⁵⁷ Consistent with this theme, a Washington Post story featured a pivotal undecided senator who expressed concern about the deluge of “grass roots” efforts directed at him; he worried that the heavy volume of cards, letters, phone calls and telegrams could shut down his daily office operations.⁵⁸ A single pro-business organization estimated it had sent out 12 million pieces of mail—and that was more than two weeks before the first Senate cloture vote in mid-June.⁵⁹

A major story line in contemporaneous accounts was the unprecedented mobilization of diverse business interests into a united political front on labor issues. Notably, large unionized firms that had long adjusted to the NLRA joined the anti-union coalition.⁶⁰ Corporate political action committees and “grass roots” campaigns involving local businesses had proliferated starting in the mid-1970s.⁶¹ The defeat of organized labor’s principal congressional objective was viewed as a vindication of these new techniques, evidence that “the business community has developed an effective lobbying capacity exceeding any influence it has exercised in Washington in past years.”⁶²

⁵⁶ *The Battle Heats Up Over a New Labor Law*, U.S. NEWS & WORLD REPORT, June 5, 1978 at 89.

⁵⁷ James Strong, *Foes Gird for Labor Law Fight*, CHIC. TRIBUNE, May 3, 1978 at C9. See also A. H. Raskin, *Behind Labor Law Fight*, CLEV. PLAIN DEALER, June 13, 1978 at 21A (“the fierce emotionalism underlying the polarized positions taken...makes it plain that the vote’s significance transcends the specific legislation.”).

⁵⁸ See Helen Dewar, *‘Grass Roots’ Lobbying in Full Flower*, WASH. POST, May 28, 1978 at A2.

⁵⁹ See *id.*

⁶⁰ See *Hard Times for Labor*, U.S. NEWS & WORLD REPORT, July 10, 1978 at 23 (reporting labor leaders’ concern that the Business Roundtable was joining with other business groups in an attempt to “crush labor’s pet bills”). See also Patrick Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOCIOLOGICAL REV. 597, 605 (1992) (discussing importance of decision by Business Roundtable to join coalition).

⁶¹ See Akard, *supra* note 60, at 602; Dewar, *supra* note 58.

⁶² Philip Shabecoff, *Momentum is Seen Shifting to Labor Bill Opponents*, N.Y. TIMES, June 18, 1978 at 35.

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Conversely, coverage of the 1978 Senate floor fight also referred to the waning influence of the labor movement in Washington.⁶³ President Carter and Secretary of Labor Marshall decried the “grossly distorted” lobbying effort against the bill itself.⁶⁴ But apart from describing allegations that the proposal’s relatively moderate provisions were being mischaracterized, the press reported frequently on the image problems of unions. Stories and columns routinely referred to the labor movement as “big labor” and to its leaders as “union bosses,”⁶⁵ even as Secretary Marshall responded that this type of commentary centered on the “mythical enemy of the working man—union bosses.”⁶⁶ In addition, numerous stories during these weeks discussed both the union movement’s role in fostering inflation and union leaders’ ties to organized crime.⁶⁷ Labor leaders acknowledged that the old clichés about union officials as power brokers or hoodlums were hurting them when they sought congressional action on behalf of workers.⁶⁸

The print media’s seeming passion to frame a gladiatorial battle between Business and Labor, rather than devote attention to the underlying policy issues, may reflect in part the evolving priorities of their audience. In the aftermath of Watergate, lobbyists, interest groups, and the role of money on Capitol Hill became more important and intriguing to readers. Ultimately, however, labor’s inability to generate sufficient public recognition and concern about the burgeoning anti-union lawlessness among employers severely damaged its legislative reform effort. As one Senate supporter reportedly observed at the time, many conservatives “smell

⁶³ See, e.g., *id.*; *Filibuster Defeats Union Organizing Bill*, CHIC. TRIBUNE, June 23, 1978 at 1.

⁶⁴ See *Carter Rips ‘Distorted’ Opposition to Labor Bill*, CHIC. TRIBUNE, May 10, 1978 at B2.

⁶⁵ See, e.g., CHIC. TRIBUNE, *supra* note 63; Arch Puddington, *Performing Labor Law*, N.Y. TIMES, June 14, 1978 at A25.

⁶⁶ See Jeffrey St. John, *On Labor-Law Reform*, N.Y. TIMES, May 18, 1978 at A23 (quoting Secretary Marshall).

⁶⁷ On unions and inflation see for instance Helen Dewar, *Marshall Prods Business and Labor Over Inflation*, WASH. POST, June 14, 1978 at A6; Michael C. Jensen, *Inflation and the Small Businessman*, N.Y. TIMES, June 11, 1978 at F2; Herbert Rowen, *Unions as Stumbling Block in the Inflation Fight*, WASH. POST, June 22, 1978 at A27. On unions and organized crime, see for example *Organized Crime: How Big a Role in Unions?*, U.S. NEWS & WORLD REPORT, May 8, 1978 at 83; Arthur Siddon, *FBI Infiltrates Mafia*, CHIC. TRIBUNE, May 7, 1978 at 1; Walter H. Waggoner, *Ex-Teamster Aide from Paramus Pleads Guilty on Illegal Payments*, N.Y. TIMES, June 9, 1978 at 17.

⁶⁸ See *Hard Times for Labor*, *supra* note 60.

blood in the water”); these opponents viewed the labor-reform measure “as a convenient vehicle to discredit labor’s validity as a major social institution.”⁶⁹

One additional factor influencing Senate timing and perhaps outcome was consideration of the Panama Canal Treaties of 1977. Following months of heated debate, the Senate narrowly ratified the two treaties in March and April 1978.⁷⁰ A number of moderate Republicans and conservative Democrats were key supporters of ratification, and there was heavy criticism from conservatives for this treaty support.⁷¹ Two months later, target votes to secure cloture for labor law reform included many of these same senators, who were understandably reluctant to “walk the plank” twice in such a short period. Instead, some senators may well have used opposition to labor law reform to try to resurrect their standing in conservative circles.⁷²

2. The 1992 Workplace Fairness Act

Unlike the procedural focus of the 1978 reform measure, the 1992 Workplace Fairness bill was straightforwardly substantive. The bill’s objective was to expand the definition of illegal employer conduct by prohibiting the use of permanent replacements for economic strikers. The House passed its version in July 1991, but the Senate bill was withdrawn following a filibuster in June 1992.⁷³

⁶⁹ See Puddington, *supra* note 65 (quoting Sen. Jacob Javits on “blood in the water”).

⁷⁰ See 124 Cong. Rec. 7187, 10540-41 (1978) (reporting ratification by 68-32 margin for first Treaty on March 16 and second Treaty on April 18).

⁷¹ See e.g., ADAM CLYMER, *DRAWING THE LINE AT THE BIG DITCH: THE PANAMA CANAL TREATY AND THE RISE OF THE RIGHT* 53-69, 180-96 (2008); Martin Tolchin, *Congress Democrats Running Scared*, N.Y. TIMES, June 9, 1980 at B13; John Herbers, *Thunder on the Right Has Turned into an Insistent Rumble*, N.Y. TIMES, JUNE 4, 1978 at E4.

⁷² Moderate Republicans who voted for the Canal Treaties but against cloture on labor law reform include Senators Baker (Tenn.), Bellmon (Oklahoma), Danforth (Missouri), and Hayakawa (California). Conservative Democrats who supported the Carter Administration on the Canal ratification votes but not labor law reform include Senators Bentsen (Tex.), Bumpers (Ark.), Cannon (Nev.), Chiles (Fla.), Hollings (S.Car.), Long (La.), and Talmadge (Ga.). See 124 Cong. Rec. 17568, 17749 (1978) (reporting failure of cloture by 58-31 on June 14 and 58-39 on June 15).

⁷³ See Calendars of the United States House of Representatives and History of Legislation, Final Edition, 8-1 and 12-2 (102d Cong. 1993) (recounting bill passed by House July 17, 1991; considered by Senate June 9-16, 1993). The second and final cloture vote failed by 57-42 on June 16. See 138 Cong. Rec. 14,875 (1992). As Chief Counsel to the Senate Subcommittee on Labor, I participated in the legislative processes that culminated in the June 1992 filibuster. The bill was taken up in the 103d Congress as well, where it again passed the House but this time the

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The 1992 effort received considerably less ink than the 1978 reform bill, and far less coverage than occurred in 1935 and 1947. News stories reporting on the bill suggest that unions had difficulty communicating the depth of the problem and the persuasiveness of labor's proposed solution. During the 1980s and early 1990s, employers used or threatened to use permanent replacements to defeat numerous high-profile strikes; not surprisingly, this period witnessed a dramatic decline in the number of strikes.⁷⁴ But despite union efforts to explain why the demise of the strike as a meaningful self-help weapon was undermining wage levels and economic welfare for millions of employees, a number of stories cast doubt on this narrative by presenting replacement workers in a relatively sympathetic light.

A front-page Wall Street Journal story followed a 48 year old man who quit his union job at a different company and crossed a picket line to become a millwright—and a permanent replacement—during a prolonged strike at International Paper.⁷⁵ Although angry strikers slashed his tires, the replacement worker was unmoved: “I didn’t feel bad—I considered myself lucky...Unions were needed when they started, but they’ve come to a stopping point.”⁷⁶ After invoking national polls that revealed surprisingly low visibility for the American labor movement, the reporter observed: “For many workers, crossing a picket line just doesn’t carry the severe stigma it once did. Fewer Americans have family or friends in unions. And, particularly when unemployment is high, an honest day’s work—or any work—can have more appeal than solidarity and brotherhood.”⁷⁷

Senate cloture vote secured only 53 votes. *See* 140 Cong. Rec. S. 8844 (daily ed. July 13, 1994) (cloture vote fails 53-46).

⁷⁴ *See* James J. Brudney, Book Review: *To Strike or Not to Strike*, 1999 WISC. L. REV. 65, 80-81 (1999) (citing sources reporting that overall strike activity declined by more than 50 percent from the 1970s to the 1980s, and major strikes—involving 1000 workers or more—declined by nearly 90 percent from the 1970s to the mid 1990s).

⁷⁵ *See* Dana Milbank, *On the Ropes: Unions’ Woes Suggest How the Labor Force in U.S. is Shifting*, WALL ST. J., May 5, 1992 at A1.

⁷⁶ *Id.*

⁷⁷ *Id.*

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Another story in a West Virginia paper described the travails of four anonymous and fearful replacement workers.⁷⁸ The story quoted the four as saying they took the jobs to feed their families adding “[a] fourteen dollar an hour job is hard to find.”⁷⁹ The reporter also highlighted the replacement workers’ assertion that they had out-produced union workers and “done a safer and more efficient job at the plant.”⁸⁰

To be sure, there were stories and opinion columns, including in local papers, that developed the policy arguments in favor of banning permanent replacements. Newspapers reported on the concern that collective bargaining was severely undermined without an effective right to strike, and that the threat as well as reality of permanent replacements was having a chilling impact on the protected rights of unions and their members.⁸¹ Yet on the other side (apart from stories about replacement workers trying to make ends meet) some newspapers seemed to view the key policy issue from the standpoint of big business and big labor more than NLRA purposes or priorities. Thus, a Washington Post editorial suggested that permanent replacements had increased at a time when unionized U.S. industries were under heavy global pressure to reduce labor costs, and that it wasn’t necessarily Congress’s job to outlaw this development in order to help restore some of labor’s lost clout.⁸²

In the end as was the case in 1978, Senate consideration did not occur until many months after House passage, and a pro-business anti-union minority thwarted the bill by using Senate procedures.⁸³ But the presence of 57 Senate votes favoring cloture should not obscure the fact

⁷⁸ See *RAC Replacement Workers Want Support of Company*, PARKERSBURG SENTINEL, May 5, 1992 at 1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g. Joseph P. Ritz, *Loss of Ability to Strike Ends Bargaining Process: Religions Should Aid Workers’ Causes*, BUFFALO NEWS, May 1, 1992 at B-7; Jeffrey F. Brown, Editorial: *Striker-replacement Ban Would Balance Labor Law*, BLOOMINGTON PANTAGRAPH, May 8, 1992 at A10.

⁸² See *Sidetracking the Striker Bill*, WASH. POST, June 28, 1992 at C6.

⁸³ See *Senate Debate Kills Limits on Replacing Striking Workers*, WASH. POST, June 17, 1992 at A9; Clifford Kraus, *Senate Won’t Ban the Tactic of Replacing Strikers*, N.Y. TIMES, June 12, 1992 at A13.

that an issue of enormous concern to unionized workers never really grabbed the American public.

II. POSSIBLE LESSONS FOR THE FUTURE

A. *The Special Force of the Filibuster*

One obvious difference between legislative success and failure involves the impact of Senate supermajority requirements: the 1978 and 1992 filibusters are part of a dramatic change in overall Senate operations. Since the mid 1970s, when the Senate adopted its two-track system for handling legislative debate, it has been easier to mount a filibuster because other floor business can move forward while cloture proceedings are pursued simultaneously on a separate track.⁸⁴ Between 1917 and 1971, filibusters were a genuinely rare occurrence, with an average of just over one cloture motion filed each year.⁸⁵ That average number has increased exponentially—to nearly twenty cloture motions per year from 1971-1993, and to forty-two cloture motions per year from 1993 to 2009.⁸⁶

The proliferation of filibusters and the resultant increase in Senate gridlock have triggered numerous calls for reform.⁸⁷ Compelling filibustering senators to occupy the floor full-time and block all other business might well disrupt or interfere with these members' ability to accomplish important tasks such as interacting with their staff and with interest groups on other legislative matters, meeting with local constituents, and raising money for their re-election

⁸⁴ See SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE, 13-16 (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 201-05 (1997).

⁸⁵ See Scott Lilly, *From Deliberation to Dysfunction: It is Time for Procedural Reform in the U.S. Senate* 8 (March 11, 2010), available at www.americanprogress.org/issues/2010/03/filibuster_report.html (last visited August 16, 2010).

⁸⁶ See *id.* at 8-9. I calculated the annual average of forty-two for 1993-2009 by combining two sets of figures presented in Lilly's article. The number of cloture motions does not capture the full effect of this culture change; many Senate bills die without reaching the filibuster stage because Senate scheduling pressures are too great to justify even initiating an effort to secure 60 votes.

⁸⁷ See e.g., Joan Indiana Rigdon, *Filibuster Reform?*, WASH. LAWYER, Sept. 2010 at 24, 26, 29 (discussing various reform proposals including one requiring production of 41 votes to *continue* a filibuster, rather than current practice of having to produce 60 votes to secure cloture).

campaigns. Returning to some form of the one-track system also would render the process of obstruction reasonably transparent and hence politically more costly with respect to an impatient or cynical public. And a reversion to old ways would again make filibusters physically taxing and uncomfortable, presumably one reason they were so rare prior to the 1970s.

Regrettably or not, most congressional observers regard the prospect of major reform in the near future as improbable. Although critics also have raised intriguing constitutional challenges to the filibuster,⁸⁸ those challenges too seem unlikely to move forward any time soon. Indeed, it is well-understood that representation in the Senate is an “undemocratic” aspect of our Constitution, designed to over-represent less populous states that are predominantly rural in composition.⁸⁹ Rural-dominated states tend to have a minimal labor-movement presence, and their senators are predictably disinclined to support pro-union policy proposals. This structural reality, combined with the virtually unlimited ability of corporations to influence senators under the Court’s campaign finance rulings, create daunting challenges to legislative movement in the Senate.

But apart from the difficulty of altering Senate rules and practices, the significant increase in filibusters is also due to a more ideologically polarized party structure and the concomitant decline in moderate or centrist members. This polarization is especially evident in the case of NLRA reform, an issue on which the business community has been fiercely united since the late 1970s. In diverse policy areas addressing health care, financial institutions, and unemployment benefits, the increase in filibusters has often resulted in delayed or modified

⁸⁸ See e.g., Thomas Geohagen, *Mr. Smith Rewrites the Constitution*, N.Y. TIMES, Jan. 11, 2010 at A 17 (contending that Senate’s rule-based supermajority requirement is constitutionally suspect for several reasons: (i) it flaunts the Constitution’s identification of supermajority requirements for only a few special cases; (ii) it circumvents the presumption that for closely contested bills the vice president should cast the deciding vote; and (iii) it undermines the constitutionally mandated rule that a majority of senators will constitute a quorum for doing business).

⁸⁹ See generally ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 159-63 (2d ed. 1972); FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 162, 183-85, 220-28 (1999) .

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enactments but it has not foreclosed all chance of success. Even for policy proposals affecting workplace law, real and threatened filibusters have not prevented the Senate from approving significant new regulation on employment discrimination, plant closings, or family and medical leave.⁹⁰ What makes labor law reform unusual is the unrelenting opposition of a unanimous business community, encompassing large employers and small firms, manufacturers and service providers, companies with liberal as well as conservative reputations on social justice matters. While unions and their members have prevailed in the Senate since 1970 on bills where “business opposition is divided or less than fully committed,”⁹¹ NLRA reform does not belong in that universe.

The business community’s uncompromising stance is not terribly surprising when one considers the shift in power between unions and management over four decades. A series of labor market developments—primarily stemming from globalization, advances in technology, and growth in immigration—have produced substantial changes in how terms and conditions of employment are defined and structured.⁹² These changes have greatly enhanced management’s ability to evade or defy NLRA requirements and aspirations. Given the direction and magnitude of the shift, unions and employers are fundamentally at odds regarding the desirability of NLRA reform. Unions want and probably need such reform in order to lessen the risk that there will be further losses in majority representation and collective bargaining, whereas the employer community seems entirely comfortable with that risk.⁹³

⁹⁰ See 1988 WARN Act, 1991 Civil Rights Act, 1993 Family and Medical Leave Act.

⁹¹ James Gray Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 945 (1999).

⁹² See, e.g., THOMAS I. PALLEY, PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM 29-30, 156-75 (1998); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 1-14 (1992) [DUNLOP COMMISSION REPORT].

⁹³ As succinctly expressed by Professor Estlund: “Unions cannot live if they kill their “hosts;” they cannot thrive if employers do not. But employers can thrive without unions; indeed many would prefer to see unions die out altogether, and are willing to do their part to bring that about.” Estlund, *supra* note 1, at 1543.

B. Building the Case for Urgency

Although the special role of the filibuster on NLRA matters has diminished chances for legislative success, Kingdon's model suggests the central challenge is to render a policy problem sufficiently compelling to justify urgent congressional consideration. In 1935 and 1947, the pervasive presence of strikes and disruptive worker protests was essential to establishing the broadly perceived need for an immediate legislative solution. In 1978 and 1992, that prevailing sense of urgency never materialized. Indeed, the lack of felt urgency even after House approval resulted in long delays (as more urgent policy issues took priority on the Senate floor) that effectively facilitated the filibuster efforts of bill opponents.

There is some irony in the fact that widespread resort to strikes is unlikely to produce such urgency in the future, given the adverse impact of the permanent replacement weapon on legal protections for and public attitudes toward strikers. But the union movement has developed other channels for visible and forceful group action, notably comprehensive campaigns aimed at investors, consumers, regulators, community groups, and the media. These campaigns, like the strike in earlier times, may be seen as efforts to generate economic pressure while educating broader segments of the public.⁹⁴ When directed at employers, the new techniques and strategies have often proved effective in securing union recognition and in establishing and enforcing collective bargaining relationships. Additionally, worker centers, focused on the diverse needs of low-wage and especially immigrant employees, have succeeded in pressuring employers to modify working conditions and in educating a wider community.⁹⁵ It seems at least plausible that

⁹⁴ See generally James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 737-44 (2010); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-40 (2005); Estlund, *supra* note 1, at 1604-07.

⁹⁵ See generally JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 48-71, 103-119, 157-179, 249-252 (2006); Jennifer Gordan, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 9 U. PA. J. LAB. & EMPL. L. 1, 55-

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the new approaches, having achieved results with employers, can be harnessed to convey to policymakers and the public an urgent need for congressional action.

That brings us to the core question: whether NLRA reform really is urgently needed. What must the public—as well as policy communities in and around Congress—understand and believe in order to conclude that the Act requires immediate attention? Without delving into specific reform proposals, I see at least three distinct ways to develop the case for urgency; I will merely outline them here.

One approach stems from the substantial growth of inequality in our labor market since the early 1970s, and the fact that a sharply diminished role for unions has accompanied these increasing disparities in wealth. A central premise of the NLRA was that the growth of collective bargaining would promote a fairer distribution of economic resources and enhance mass purchasing power.⁹⁶ We have endured several decades of stagnant earnings for non-supervisory workers and several years of economic crisis in which consumers have become less willing and able to spend. The general public, and especially working families below the top income tier, need a firmer conception of and appreciation for the relationship that collective bargaining can have to economic fairness and a healthier economy.

A second approach stems from the dwindling sense of community in the employment setting, and the role unions can play in rebuilding that sense. By providing for employees' voice to be an integral part of workplace decisionmaking, the NLRA aimed to further the inherently American concept of democratic self-government.⁹⁷ Decades later, “bowling alone” has become a metaphor for the decline in our social interaction, political participation, and community

64 (2005); Jennifer Gordan, *We Make the Road By Walking, Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428-37 (1995).

⁹⁶ See generally James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N. CAR. L. REV. 939, 949-50 (1996) (citing numerous sources).

⁹⁷ See generally *id.* at 950 (citing numerous sources).

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orientation.⁹⁸ Workers and policymakers need to become more familiar and comfortable with how the NLRA can promote workplace values and civic virtues like solidarity and selflessness.⁹⁹

A third dimension of the case for urgency stems from the looming pressure for alternative solutions. Absent meaningful congressional renewal of the Act, courts will continue to distrust and circumscribe its core values,¹⁰⁰ and the NLRB will continue to function as a largely isolated and too-often politicized agency.¹⁰¹ In the meantime, unions and workers will increasingly contract around NLRA standards and processes and will look more often to state and local government initiatives.¹⁰² American business and its supporters in the policy community need a clearer understanding of the growing balkanization in labor-management relations norms and practices, a trend likely to increase without substantial updating of the federal law that fosters a uniform national approach.

The legislative reform narratives set forth in this article indicate that developments in the political climate usually occur independently of whether a policy problem is perceived as sufficiently salient and urgent to warrant congressional consideration. Yet while extrinsic developments in Supreme Court jurisprudence or American foreign policy may be difficult to anticipate, they cannot become enabling factors unless the case for urgency is already in place. Conversely, without sufficiently broad-based perceptions of a policy problem's immediate importance, such extrinsic developments can delay and perhaps derail majority-supported

⁹⁸ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 15-28, 134-44 (2000). THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 171-74, 219-46 (2003).

⁹⁹ See generally James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 *BUFF. L. REV.* 653, 653-55 (2010).

¹⁰⁰ See generally James J. Brudney *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563, 1572-88 (1996).

¹⁰¹ See generally James J. Brudney *Isolated and Politicized: The NLRB's Uncertain Future*, 26 *COMP. LAB. LAW & POL'Y J.* 221, 227-31, 241-52 (2005).

¹⁰² See generally Brudney, *Neutrality Agreements*, *supra* note 94; Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States*, (forthcoming 2011, Harvard L. Rev.?).

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legislation. In this context, supporters of the pending Employee Free Choice Act have some cause for concern. Notwithstanding House approval in 2009, Senate floor consideration has been delayed for over a year—initially by protracted attention to the “more urgent” proposal for health care reform, and recently due to a mix of Congress’s competing policy priorities and the labor movement’s internal political calculations. Supporters have expended great effort and energy to promote a stronger public awareness and appreciation for why NLRA reform is so important, but there remains work to be done.

It may be that the next presidential campaign will feature an extended and educative focus on how to address the acute inequalities that persist in our economy. It also seems possible that emerging Supreme Court doctrine on federalism and dual sovereignty may further undermine the NLRA’s presumed aspiration for a uniform legal approach. And it is even conceivable that political pressures will result in some structural adjustment to the vastly overused filibuster procedure. Still, the lesson of past legislative efforts is that socio-economic conditions, extrinsic developments in foreign policy or the courts, and Senate rules or practices—however important—are not the decisive factors distinguishing success from failure. If labor law reform is to take place in the foreseeable future, proponents must generate a more robust and compelling case for urgency—both within the relevant policymaking community and in the public imagination.