The High Road to a Competitive Economy: A Labor Law Strategy

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INTRODUCTION

Nelta Moline and Marie Suprinat both worked hard at demanding, low-wage jobs in nursing homes, all too typical of the women and men working in this industry in South Florida. Nonetheless, Nelta and Marie, both Certified Nursing Assistants, took pride in what they did and sought to make their jobs better by organizing a union. For their efforts, Nelta was suspended and Marie was fired along with 12 of her colleagues (Maxwell and Nissen, 2003: 1-2). Are these just rare South Florida cases? Not by a long shot. According to Fred Feinstein, the National Labor Relations Board (NLRB) General Counsel from 1994 to 1999, "such stories typify what workers experience when they try to improve working conditions by seeking union representation" and, in fact, "one need look no further than NLRB cases to find tens of thousands of stories" like these (Feinstein, 2003: 15). These aggressive tactics undermine workers' freedom to form unions and have contributed to the steep slide of union density from a peak of 35 percent of the workforce – overwhelmingly in the private sector – in 1954 to only 8.2 percent in the private sector in 2003 and 12.9 percent overall (BLS, 2004a; U.S. Bureau of the Census, 1976).

Should this sharp decline matter to most Americans? In this report, I argue that it should matter a great deal for two broad reasons: first, unions play a vital economic role and, second, they are the cornerstone of a democratic society. Economically, U.S. success over the last century has been based on more than competitive firms; it has also been fueled by the ability of workers to buy the products they produce. In postwar America the labor movement forged the link between economic growth and rising wages, paving the road to the middle class for many millions of working families. Unions did benefit their members, but union wage and benefit gains coursed their way through the economy aiding those who did not belong as well. The result was a more vibrant economy in which strong consumer-led growth led to a virtuous circle of prosperity and jobs. At the lower end of the pay scale, unions have been particularly critical in winning decent compensation for low-skilled workers who often have had few opportunities and less hope. Union housekeepers in Las Vegas, for example, move into the middle class while their nonunion counterparts elsewhere often remain part of the working poor. Unions, in effect, function as a strong antipoverty program, challenging growing inequality in the society. When unions weaken, working families become more vulnerable.

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The contribution of unions goes well beyond the paycheck: a strong labor movement is essential in a democratic society. As former Secretary of State George P. Schultz put it, "free societies and free trade unions go together" (Silk, 991). While this may be easiest to see in totalitarian states, the contribution of unions is as important in democratic

societies. At a time of unfettered globalization and fierce competition, what other institution has at the heart of its mission speaking for the values and future of working Americans? On the job, it means winning dignity and respect; pushing employers towards the high road to competitiveness. Schultz, who began his career as an economist and labor-management arbitrator, concurred that in "a healthy workplace, it is very important that there be some system of checks and balances" (Silk, 1991). In politics, unions provide critical pathways for their members to participate in political life. What are these pathways? Three stand out: unions provide independent information about a whole host of complex public policy issues that impact average-wage Americans from health care to pension reform; they provide voice by engaging their members in the political process itself as activists and as voters; and, finally, they have spurred legislation that has benefited all working families from Social Security in the 1930s to Medicare in the 1960s. These and other vital safety net programs are now under unprecedented attack, due in no small way to the suppression of workers' freedom to form unions and the labor movement's resulting decline. Without a strong labor movement, the voice, the interests, and the direct participation of working Americans fade from political debate and legislative action. The result overturns the balance Schultz talks about in the workplace and in the society thereby corroding democratic values in both.

Congress affirmed in no uncertain terms the right of American workers to join unions and bargain collectively in the midst of the Great Depression with the passage of the National Labor Relations Act (NLRA), popularly known as the Wagner Act. 1935 was hardly the best of economic times, but the Act's supporters viewed it as laying the basis for a return to a broadly shared prosperity as well as underscoring a basic right. The Act was meant to facilitate choice for workers free of coercion "on representatives of their own choosing." Instead, that choice has become framed by money, fear, and intimidation, as Human Rights Watch (2000) among others has concluded. Kenneth Roth, the Executive Director of Human Rights Watch, commented that "legal obstacles tilt the playing field so steeply against freedom of association that the United States is in violation of international human rights standards for workers" (Roth, 2001: 19-20). According to labor historian David Brody, the Wagner Act itself "has been hijacked by its natural enemies" (Brody, 2004: 1). Ironically, at a moment of unprecedented focus on democracy internationally, the loss of democracy in U.S. workplaces has received little public attention. It is not simply time for reform; there is a crisis in the workplace and reform is long overdue.

How might we restore balance and choice to the labor relations system? The Employee Free Choice Act (EFCA), which has been proposed in the U.S. Congress, offers needed change that first and foremost restores a basic democratic right and also lays the basis for important economic and social benefits for the entire society. At its core, EFCA allows workers to make a free choice on whether or not they want to join a union by signing an authorization card or a petition. This streamlined process

gauges worker sentiment and avoids an employer-dominated context that often precludes real choice. In contrast, workers today are subject to a prolonged and divisive anti-union campaign in which the employer is allowed to exploit physical control of the workplace and economic power to pressure workers into withdrawing their support for the union. "In no advanced democracy," according to labor economist Richard Freeman, "do unions face as bleak a future as in the U.S." (Freeman, 2003).

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The ways in which EFCA underscores democratic choice is fairly straightforward but how does it spur broader economic and social benefits? Consider progressive public policies such as the minimum wage, the living wage, expanded health care coverage, pension reform, and job training, among others. All are particularly critical at a time of rapid economic transition and globalization. Unions and their members have been critical in introducing the perspective of working Americans – union and nonunion alike – into debates and are often central to the enactment of the legislation. Without labor law reform, however, the ability of workers who want to join unions is severely curtailed and this public policy input is diminished if not throttled. Moreover, as union density declines, unions also become less able to bargain effectively for their members or to set economic standards that aid nonmembers. Ultimately, labor law reform is a policy issue that is vital to ensure broad economic gains for working families and to sustain a social safety net for all Americans. With weaker unions, according to labor economist Richard Freeman, "the U.S. will be slower in developing policies to help the disadvantaged and poor on the one hand and to protect consumers, workers, and shareholders from business crime and dishonesty on the other hand" (Freeman, 2003: 13).

In this report, I first look at the economic role of unions and the impact of the erosion of the freedom to form unions, and then I examine the consequences of the "hijacking" of the Wagner Act more directly. I conclude with a discussion of the Employee Free Choice Act itself.

THE ECONOMIC CHALLENGE

These are tough times for America's working families. At a time of renewed economic growth, many continue to fear job loss and declining wages, while their neighbors experience disappearing health insurance and imploding pensions. Real wages of American workers trail 1973 levels despite a two-thirds jump in worker productivity and a modest upturn in wages during the late 1990s (Bernstein and Mishel, 2004; Council of Economic Advisors, 2004). 2003 was the worst year for wage growth since 1998 for middle- and low-wage workers (Bernstein and Mishel, 2004). Those at the bottom are particularly hard hit. More than 28 million workers – about a quarter of the workforce between 18 and 64 – earn less than $9.04 an hour, placing them below

the $18,800 poverty threshold for a family of four (Conlin and Bernstein, 2004).

Insecurity also pervades employee benefits and the social safety net, or more accurately, the absence of a social safety net. Forty-four million Americans do not have health insurance, a number that continues to rise. In addition, many millions either lack guaranteed pensions or are in danger of losing them; 43 percent of the nation's private-sector workers have no job-related retirement plan coverage at all while the share with employer-provided guaranteed pensions (defined benefits plans) has fallen to only 24 percent (BLS 2004a, 2004b).

Meanwhile inequality is growing. The share of wages and salaries in the economy has slid to just above 50 percent, the lowest proportion in at least a half century (Mandel and Dunham, 2004). Productivity gains are translating into wealth rather than moving into paychecks. In the three years since the peak of the last recovery in early 2001, corporate profits have jumped over 62 percent while labor compensation grew by an anemic 2.8 percent. As a point of comparison, during the last eight recoveries corporate profits rose by about 14 percent while labor compensation grew by 10 percent (Bernstein, 2004). "This recovery is upside-down in terms of the distribution of economic gains, compared to previous recoveries," according to economist Christian E. Weller (2004: 13).

It is a great time to be rich and an even better time to be super-rich. In 1998, the 13,000 wealthiest families in the country just about matched the income of the poorest 20 million households (Krugman, 2002). Asset ownership is even more concentrated than income. The top 1 percent of families own 30 percent of the country's assets compared to receiving half that share in income, itself a hefty premium. The top 10 percent of families account for 65 percent of assets and the top 50 percent lock-in almost 95 percent of assets. In other words, the other 50 percent of the nation's families are stuck dividing a bit more than 5 percent of the nation's wealth (Mandel and Dunham, 2004). For those who missed the 1920s we now essentially have that decade's income distribution.

THE ECONOMIC BENEFITS OF UNIONS

When it comes to wages and benefits, unions play a critical role. The story is unambiguous if somewhat expected: unions raise wages and benefits. Economists Lawrence Mishel and Matthew Walters, in a survey of the recent scholarly literature, concluded that unions raise their members' wages – the union premium – by about 20 percent over comparable non-union workers (Mishel and Walters, 2003: 1).[1] More surprisingly, nonunion workers also benefit from union gains, particularly in industries in which union density is high. Employers pump up the wages and benefits of their nonunion employees to avoid unionization in what is often called the "union threat effect." While measuring the threat effect is complex, Farber (2002, 2003) found that the overall impact on nonunion wages –

[1] Mishel and Walters (2003: 4) note that "a variety of sources show a union wage premium of between 15and 20 percent.

the combined premium that all nonunion workers receive – approaches the total gains for union members, a major boost for consumer demand throughout the economy (cited in Mishel and Walters, 2003: 10). The corollary is that as unions decline so does this payout. According to Farber (2002: 1), "more than half of the decline in the average wage paid to workers with a high school education or less can be accounted for by the decline in union density."

The story is similar for employee benefits, an area in which unions played a pioneering role. "Benefits under union contracts are generally superior to benefit packages for nonunion workers," the American Management Association (1998: 22) admits. Union workers are 53 percent more likely than their nonunion counterparts to receive employer-paid health insurance, and are nearly five times more likely to have guaranteed, defined-benefit pension plan coverage (BLS, 2004b).[2] Moreover, the union-based plans tend to be far more generous than their nonunion counterparts. Once again, when union density declines, so do worker benefits. Over the period 1983-1997 the proportion of workers receiving employer-provided health insurance slid by 8.3 percentage points to 62.8 percent and the drop in union density explains about 20 percent of this decline (Buchmueller et al., 1999: 8). The growth of nonunion, low-wage employers such as Wal-Mart shifts the costs of these benefits either directly to employees or to more responsible employers and the public. A recent study concluded that if all jobs in California provided health benefits the state would save $2.1 billion (Zabin et al., 2004). "Low-wage employers are essentially shifting their labor costs onto the public," according to lead author economist Carol Zabin.[3]

"Beyond the benefits that show up on a pay stub, unions have helped to weave a broader social safety net for all workers."

Unions can be a lifeline for those at the bottom end of the wage scale. Blanchflower and Bryson (2003: 30) underscored this claim, finding in their research that "unions are particularly good at protecting the wages of the most vulnerable workers." *Business Week* concurred, commenting that "because unions boost workers' bargaining power and help them win a greater share of productivity gains, any resurgence would give low-wage workers more clout to deal with the effects of factors such as globalization, immigration, and technology" (Conlin and Bernstein, 2004). For many of those stuck in low-wage jobs, union membership is the difference between barely surviving above the poverty line or greater desperation below it. Consider unionized farm workers. In 2000, their earnings were almost $4,400 above the

[2] Depending on the data source estimates of the union premium in benefits vary, although all point to a significant union difference. Pierce using data from the employer survey (the ECI), for example, found that union members are 18 percent more likely than their non-union colleagues to receive health insurance coverage, and 22.5 percent more likely to have employer-provided pension plans (Mishel and Walters, 2003: 6).

[3] The study concluded that in 2002 $10.1 billion--almost half of public assistance dollars--went to families in which as least one member worked 45 or more weeks per year (Zabin et al., 2004).

poverty line for a four-person family, while their nonunion counterparts earned almost $1,400 below it. Union cashiers found themselves in a similar position. Their earnings brought them $3,400 above the poverty line while nonunion cashiers earned almost $2,200 below it (AFL-CIO, 2002: 14). Card's (1991) research found that the lowest fifth of the wage distribution enjoyed a 28 percent union wage premium. Moreover, unions address race and gender pay gaps. The union wage advantage was 33 percent for women workers, 35 percent for African-American workers and 51 percent for Latino workers compared with 27 percent for workers overall in 2003 (BLS, 2004a: 5).

Beyond the benefits that show up on a pay stub, unions have helped to weave a broader social safety net for all workers. Labor has championed state-level programs such as Workers' Compensation and Unemployment Insurance. These programs tend to be stronger and more inclusive for all workers – union and nonunion alike – in states where unions are stronger, reflecting the political strength of the labor movement. And research underscores the fact that unionized workers have better access to social safety net programs such as these (Weil, 2003: 15).[4] Labor has also been central in the passage of workplace-based legislation such as the Occupational Safety and Health Act (OSHA). OSHA, however, is no better than its effective enforcement, something the Senate itself foresaw as OSHA was passed. In manufacturing, Weil found a 45 percent higher probability that worker complaints would trigger OSHA inspections in union compared to nonunion workplaces" (cited in Mishel and Walters, 2003: 13).

In addition to their economic role, unions ensure worker rights on the job. To begin with, the employer in a unionized workplace must have a good reason to fire or discipline someone and then workers have a grievance process to ensure they are treated fairly. In contrast, workers are "employees at will" in almost all nonunion workplaces, giving the employer the right to fire someone for good reason or for little more than a whim. As Henry Ford II reportedly told Lee Iacocca when the latter asked why he was being fired: "I just don't like you." While Iacocca landed with a golden parachute, most workers simply land on the street. These rights on the job lay the basis for something less tangible but pivotal for all human beings: a sense of dignity and worth. In contrast, low-wage workers are caught in "a netherworld of maximum insecurity," *Business Week* reports. "Complain, and there is always someone younger, cheaper, and newer to the U.S. willing to do the work for less" (Conlin and Bernstein, 2004).

PRODUCTIVITY

[4] In the case of unemployment insurance, Budd and McCall (1997) estimate that unionized unemployed workers in blue-collar occupations are 23 percent more likely to receive these benefits than their nonunion counterparts (Mishel and Walters, 2003: 12). A similar situation exists for workers' compensation benefits. "Union workers are far more likely than nonunion workers," Hirsch et al. (1997) write, "to receive benefits from workers' compensation, and the likelihood of a claim is more responsive to differences in benefit levels among union than nonunion workers."

Can the United States afford a strong union movement in a take-no-prisoners global economy? A more appropriate question might be whether the U.S. can afford not to have a strong union movement, given the pressures of that economy. Consider the issue of unions and productivity. The economics literature points to the fact that unionization and high productivity are certainly compatible. A recent study surveyed a broad swath of the literature, concluding "a positive association [of unions on productivity] is established for the United States in general and for U.S. manufacturing" (Doucouliagos and Laroche, 2003: 1).[5] Earlier research also came to similar conclusions. Brown and Medoff (1978: 373) found in looking at manufacturing industries that "unionized establishments are about 22 percent more productive than those that are not." In much of the postwar period, this higher productivity underwrote the higher wages that unions were able to win.

Freeman and Medoff (1984) sought to explore why unionized firms are more productive in *What Do Unions Do*? They found that about one-fifth of the union productivity effect stemmed from lower worker turnover. Unions improve communication channels giving workers the ability to improve their conditions short of "exiting." Lower turnover means lower training costs, and the experience of more seasoned workers translates into higher productivity and quality. Probably most important, higher compensation focuses the managerial mind: employers need to plan more effectively and pay more attention to the efficiency of their operations.

In recent years, many employers have adopted new ways of organizing work that emphasize employee involvement. Black and Lynch (1997) concluded that these systems can work more effectively in a unionized environment. "…[U]nionized establishments that [have] adopted what have been called new or 'transformed' industrial relations practices that promote joint decision making…have higher productivity than other similar nonunion plants," according to Black and Lynch (1997: 1). They found that unionized plants with these new approaches to organizing work had a 9.4 percent higher productivity than nonunion plants with similar high performance work systems.

The real productivity story is best understood on the level of the individual firm and union. An innovative employer working with a progressive union can achieve high levels of productivity and world-class competitiveness. Examples such as the New United Motor Manufacturing plant (NUMMI) – a joint partnership of General Motors and Toyota in which workers are represented by the United Auto Workers--illustrate the strong results possible in a unionized environment (Appelbaum et al, 2000, 7). In the service sector, *Business Week* compared non-union, low-wage Sam's Club – a unit of Wal-Mart – with high-wage Costco, one fifth-of whose workers belong to unions (Holmes and Zellner, 2004). *Business Week* found that "Costco's high-wage approach actually

[5] The authors reviewed 73 independent studies on unions and productivity written in English and French, utilizing meta-analysis and meta-regression analysis which seeks to make quantitative comparisons. Not all the studies referred to productivity and unions in the U.S.

beats Wal-Mart at its own game on many measures." Costco, as Freeman and Medoff (1984) found in unionized firms, has lower turnover – 6 percent annually compared to 21 percent for Sam's Club. "Bottom line," according to *Business Week*, "Costco pulled in $13,647 in U.S. operating profit per hourly employee last year vs. $11,039 at Sam's" (Holmes and Zellner, 2004).

In Las Vegas, Culinary Local 226, organizes 90 percent of the hotel workers on the Strip. As a result, unionized housekeepers earn almost $12 an hour – 50 percent more than their nonunion counterparts in Reno – and enjoy fully paid health care. The union and the hospitality industry jointly put a heavy emphasis on training and operate the Las Vegas Culinary Training Academy, one of the most comprehensive training centers of its type in the country. "Our union's goal and the training center's goal is you can come in as a non-English-speaking worker, come in as a low-level kitchen worker, and if you have the desire, you can leave as a gourmet food server, sous-chef or master sommelier" according to D. Taylor, the secretary-treasurer of the local (Greenhouse, 2004a, A22). The high wages and extensive training are a very successful combination in a service industry, according to management officials such as J. Terrence Lanni, chairman of MGM Mirage (Greenhouse, 2004b: A22). The companies benefit and so do the union members, in this case, a group that is 70 percent female and 65 percent nonwhite.

Clearly, a short-sighted management can lead a unionized firm into the ground and a recalcitrant union can put a brake on productivity. What the literature and the case studies underscore, however, is that unionization can foster higher productivity. A firm can succeed in the short run by cracking the economic whip, but what might work for the firm in the short run can undermine the economy over the long haul. Unions press in the direction of the high-road to competitiveness, relying on a motivated and engaged workforce. As Bruce Stokes (2004: 825), a writer for *National Journal*, put it "a stronger labor movement could help stem job losses by improving productivity and by raising workers' skill levels."

DEMOCRATIC RIGHTS

Beyond the economic benefits they provide, unions are at the heart of a democratic society. As Jack Getman and former Labor Secretary Ray Marshall (2003) write, "The rights of workers to organize, to strike and to bargain collectively are essential attributes of human liberty, recognized as such by treaties, court opinions, papal encyclical, government officials and every major international rights treaty." George Schultz reflected that "as a society, we have a great stake in freedom and a lot of that is anchored somehow, historically, [in the labor movement]" (Silk, 1991). Clark Kerr, writing in the 1950s, observed that workers share a set of concerns that are different from those of corporations and that the ability to express those interests through unions is integral to a democratic society (Kerr, 1958).

Unions are central to democracy in two intertwined ways: in the political process and at the bargaining table. "[Labor] is

the major institutional counter-force to widening economic and social inequality," Paula B. Voos commented in her Presidential Address to the Industrial Relations Research Association (IRRA) earlier this year (Voos, 2004: 4). Clearly in the political arena unions have pressed for improved minimum wages, health care coverage, retirement plan protections, overtime pay, and social programs that bring us together rather than pull us apart as a society. Labor's work at the bargaining table has moved in the same direction, raising wages and benefits for its members, particularly those at the bottom of the wage scale. In the workplace, as Voos pointed out, "unions also contribute to workplace democracy by increasing individual liberty on the job."

As democratic membership organizations, unions foster the political participation of their members. A critical dimension of voice in the political process comes through voting. Radcliff estimates that each percentage point decline in union density triggers a 0.4 percentage point decline in voter participation. If these estimates are correct, an additional 17 million Americans would have voted in the 2000 presidential election if union density in 2000 had been at the 35 percent level recorded in 1954 (Radcliff, 2001).

HISTORICAL SNAPSHOT

Today the system of checks and balances that George Schultz extols is absent for over 90 percent of private-sector employees. How did we arrive at this state of affairs? A brief historical note is in order. Almost seventy years ago, the Wagner Act transformed U.S. labor history by placing the federal government squarely on the side of collective bargaining and the right of workers to join a union. "The Wagner Act was not neutral," Professor James A.Gross (2002: 186) observed. "The Act sought to counteract the inequality of bargaining power inherent in an employer-employee relationship by promoting collective bargaining and protecting employees in the exercise of collective power." The law affirmed for workers the right to "full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (cited in Gross, 2002: 186). The Act did not simply affirm the right to designate "representatives of their own choosing" in the abstract, it sought to facilitate workers acting on that right if they so chose and to prevent employer interference in the process.

Consistent with that purpose, the National Labor Relations Board's (NLRB) original interpretation of the Act was that an employer's duty in a representation election was to maintain complete neutrality. Any employer attempt to participate in or influence employee choice on whether to unionize was an unlawful interference with workers' right to choose their own representatives. Underlying the neutrality requirement was an express recognition by the Board that employer "persuasion" could not be separated from employer coercion, given the economic dependence of employees on their employer. In a famous earlier judicial ruling in 1941, Judge Learned

Hand commented on the role of context and the inherent power an employer possessed in relation to employees who were subject to discipline or even firing. "What to an outsider will be no more than the vigorous presentation of a conviction," Hand wrote, "to an employee may be the manifestation of a determination which is not safe to thwart" (cited in Gross, 2002: 191).

From the early days of the Act it was also recognized that an NLRB-supervised election was only one of the ways that employees could demonstrate majority support for union representation. In fact, during this early period the NLRB and the courts found it illegal for an employer presented with signed authorization cards or other such evidence of majority support not to recognize the union.[6] The Board directed elections only when a genuine question arose as to whether a majority of employees supported a union. Without a legitimate question, employees would have a union.

"When the Reagan administration cracked the whip over the PATCO strike in the 1980s, it laid the basis for an emboldened anti-union managerial culture that defines labor relations today."

Under these legal rules, millions of workers joined unions, exercising their basic democratic right to do so. In the aftermath of World War II, more than one out of four workers in the labor force belonged to a union and, despite the emerging tensions of the cold war, the U.S. economy was well on its way to a period of unparalleled economic success and the creation of a broad middle class. Strong productivity growth fueled economic success and the surge in union membership ensured a fairer distribution of that growth. Unions translated corporate economic success into strong wage gains, which, in turn, boosted purchasing power, underwrote consumer confidence, and sparked more economic growth. Unions also extended the social safety net, pioneering benefits such as pensions and health care at the bargaining table.

Starting in the mid-1940s, however, the principle that employers had no business involving themselves in workers' self-organization decisions underwent a complete transformation. A series of Board and court decisions made NLRB representational elections analogous to political elections. Under this reconceptualization, the employer, who had previously been required to stay completely out of the process, came to be regarded as the equivalent of a candidate on the ballot. And employer campaigning, which previously had been banned as an unfair labor practice, came to be accorded the status of "free speech," affirmatively protected by both the First Amendment and the new Section 8(c) introduced in the Taft-Hartley Act.

Alarmed by the rapid rise of unions, labor's adversaries managed to pass the Taft-Hartley Act over President

[6] Under current law, the employer has the option of recognizing the union based on signed cards from a majority of employees but has the right to refuse recognition and insist that workers file a petition for an NLRB-supervised election.

Truman's veto in 1947 in the hopes of unwinding union gains. In addition to introducing the "free speech" right of employers, Taft-Hartley took away the NLRB's right to certify unions without an election. Employers could still voluntarily recognize unions on the basis of authorization cards, but for the first time employers were also given the right to petition for NLRB elections. Recasting the process of employee self-organization as an electoral contest between the union and the employer set the stage for the modern anti-union campaign.

Although Taft-Hartley was a blow, labor had already achieved critical mass when it was enacted – unparalleled strength in the key mass-production industries of the economy and a political voice that was broadly acknowledged to speak for working people more generally. The causes of labor's decline in subsequent decades are complex and reflect a number of factors, from the changing character of the domestic economy to globalization. There is little question, however, that an increasingly unfavorable legal landscape and aggressive, antiunion employers have played a major role. In the decades following the Taft-Hartley Act, employers developed and deployed an effective arsenal of strategies that have gutted the original intent of the Wagner Act – to give employees the right to form unions and bargain collectively (Logan 2002). The Supreme Court and other appellate courts have contributed a string of decisions that further eroded the position of unions and administrative regulations did their part. While Taft-Hartley certainly represented a turning point, David Brody points out, "in key ways it merely ratified or completed a case law already assaulting Wagner's defenses of self-organization. And, with virtually no further legislation, the work of interpreting labor's rights out of existence has steadily proceeded. The incremental dismantling of the duty to bargain…can be replicated many times over in the case law governing interrogations, captive audience meetings, union access, coercive speech, you name it" (Brody, 2004: 6). When the Reagan administration cracked the whip over the PATCO strike in the 1980s, it laid the basis for an emboldened antiunion managerial culture that defines labor relations today.

The net result for millions of American workers is the unraveling on the ground of the basic rights enshrined in the Wagner Act. In effect, savvy, powerful employers have used the legal and regulatory climate to repeal large parts of the Wagner Act in practice without Congress ever voting to do so. The rules of winning union bargaining rights give employers effective veto power over their employees' decision. For many workers, joining a union has become a major hazard rather than a basic right. "The reality of NLRA enforcement falls far short of its goals," the Human Rights Watch report (2002: 9) concluded. "Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association." "If you are not brave, you cannot get a union," commented Marie Suprinat, the Certified Nursing Aide this paper began with. She might also have said that "If you are

brave, you could very well find yourself fired." The number of workers eligible for back pay for employer misconduct soared by 1600 percent over the last four decades – from 1,368 in 1958 to 23,682 in 1998 (Levin, 2001). One study indicated that more than 125,000 workers were awarded back pay in the five years between 1992 and 1997 as a result of reprisals for associational activity (Human Rights Watch, 2000: 73). The author of the study, Professor Charles Morris, concluded that "a substantial number of employers involved in union organizational campaigns deliberately use employment discrimination against employees as a device to remove union activists and thereby inject an element of fear in the process of selecting or rejecting union representation." By the late 1990s, according to Morris, one out of every eighteen workers seeking to organize a union was a victim of discrimination for their efforts (Human Rights Watch, 2000: 74).

In seeking to form a union, context and delay can be decisive. Under current law, if the great majority of the employees in a workplace sign authorization cards for a union, the employer legally can recognize the union but is far more likely to insist on an NLRB election, despite knowing that the sentiment is overwhelmingly for a labor organization. Why would an employer insist on an election? Antiunion employers have learned that this strategy buys time during which economic power and control over the workplace can serve to pressure workers to vote against a union, precisely what Judge Hand and Senator Wagner were concerned about in the first place. Consider what happens during the intervening period between the moment when employees petition for an election and the date when the voting actually takes place. Kate Bronfenbrenner (2000), a labor relations scholar at Cornell University, has documented the types of tactics that workers are subjected to in organizing drives. A drive of this kind is like an election campaign in which one side never gets to speak and the voters are often led to believe that the wrong vote can cost them their jobs. In over 90 percent of campaigns, workers are required to attend mass meetings where they are subjected to one-sided, antiunion presentations, often prepared by professional antiunion consultants. Those who do not attend the 11 such meetings in an average campaign are subject to discipline and even discharge. In almost 80 percent of these drives, workers are also compelled to attend one-on-one sessions with their immediate supervisors, usually at least weekly, in which the employer once again has the opportunity to present an unchallenged message. Moreover, while there are virtually no limits to the intensity of the employers campaigning, the law allows a prohibition on union advocacy during the workday and the barring of union representatives from the work site.

Bronfenbrenner (2000) also found that firms threaten—whether directly or by implication—to move or even shutter the workplace in over half of union organizing campaigns. During periods of slow job growth, even the implication that a workplace might be closed can have a chilling effect on those seeking to form a union. The threat is even more

widespread in mobile industries, rising to more than 70 percent in manufacturing where fears of outsourcing/offshoring and globalization are particularly prevalent. Aggressive antiunion activity such as this takes place in a highly unequal context, according to Human Rights Watch. "Underlying all this employer opposition to workers' organizing is the raw power of the employment relationship—the power to assign work, to pay a wage, to impose discipline, and ultimately to dismiss the worker. Workers hear employers' views with this power in mind" (Human Rights Watch, 2000: 19).

If workers succeed in overcoming all these obstacles and actually vote a union in, their problems might just be beginning. A long tortuous road filled with potholes and dead ends exists between a successful vote and achieving a first contract. "By merely exercising available rights of appeal," Fred Feinstein (2003) writes, "the finality of a union election result can readily be delayed for more than two years and often much longer." Employers can resort to "bargaining in bad faith—going through the motions of meeting with workers and making proposals and counterproposals without any intention of reaching an agreement," according to a Human Rights Watch report. In one case Human Rights Watch (2000: 28) found that the employer managed to thwart reaching a contract for 12 years after workers voted for a union and then in the wake of this frustration workers surrendered their bargaining rights.

The growing pervasiveness of employers flouting the spirit and often the letter of the law is fueled by the fact that the penalties are minimal. For determined antiunion employers, the penalties amount to a slap on the wrist or, in some cases, merely a frown by regulatory agencies. "Sanctions for violating the legal right to seek union representation are often too little and come too late," according to Feinstein (2003: 15). In the case of illegal discharge of union activists, for example, the NLRA calls for back pay minus interim earnings. When this takes place after years of delay, the employer faces a minor penalty generally after the union campaign has long been dead. Illegal threats to move the workplace can provoke a "cease and desist" order. The employer must post a notice pledging not to engage in the prohibited activity long after the point has been made and the campaign effectively throttled. Bad-faith bargaining can result in orders to bargain in good faith, in which case a new round of bad-faith bargaining begins.

The current low percentages of unionization in the United States reflect the difficulties workers encounter when they seek to organize. These numbers, however, become even more dramatic when compared to the percentage of workers who say they want union representation when asked in a poll. In a February 2003 Peter Hart survey conducted for the AFL-CIO, 47 percent of nonunion workers said they wanted union representation (AFL-CIO, 2004). Surveys done by Richard Freeman and Joel Rogers (1999, 2002) come to similar conclusions, finding that forty-two million nonunion employees would like to have a union represent them. The difference between the high percentage of workers who say they want a union

and the low numbers who are actually able to win union representation amounts to what one might call a significant "democracy deficit" in the workplace.

TIME FOR A CHANGE

When unions decline, wages lag, inequality grows, workers at the bottom of the pay ladder suffer, and an important part of the democratic fabric of society unravels. Today unions exist in a context of fierce global pressures and bruising domestic competition. This context alone would be daunting but an important part of labor's decline is rooted in the fact that employees have lost the right to freely choose whether or not they want to be represented by a union. Brody (2004: 1) points out that "the law serves today as a bulwark of the 'union-free environment' that describes nine-tenths of our private sector economy." Ironically, rather than being labor's Magna Carta, the Wagner Act has been twisted into a vehicle to thwart unionization through delay and intimidation. Steven Pearlstein, the *Washington Post* columnist, did not mince words when he wrote that "over the years, [the right to form unions and bargain collectively] has been whittled away by legislation, poked with holes by appeals courts and reduced to irrelevancy by a well-meaning bureaucracy that has let itself be intimidated by political and legal thuggery" (Pearlstein, 2004: E01). And for those workers who happen to win a union, he continued, "any company willing to use intimidation and delaying tactics will never have to sign a first contract with a union, even if employees really want one" (Pearlstein, 2004: E01).

At issue is the right to make a choice free of coercion for "representatives of ones own choosing." To restore this right to millions of American workers, one has to go back to the future: reform the current dysfunctional labor relations system to achieve the spirit of the Wagner Act in a 21st century setting. The Employee Free Choice Act represents an important approach to redressing the lack of balance today through three main provisions: restoring the union recognition procedure that the Wagner Act initially provided; stiffer penalties to deter employer misconduct; and first contract mediation/ arbitration to thwart bad faith bargaining.

"The Employee Free Choice Act represents an important approach to redressing the lack of balance today."

EFCA provides a prompt, fair, open, and direct process to gauge employee sentiment on representation. If a majority of employees in a work place sign authorizations, the chosen union can present a petition of certification to the NLRB. As it did in the early years of the Act, the Board would investigate the petition and, if warranted, would certify the union without an election. Employers would still have the option, as they do today, to simply recognize the union voluntarily, but would no longer be able to insist on an election if the NLRB has ascertained that the union has majority support. There are clear benefits to this approach. Workers who do not want a union simply don't have to sign the authorization card. Those who do want a union have the opportunity to see their

wishes recognized without a divisive, polarizing battle. But, isn't an election a more democratic approach? Not in a framework that itself is profoundly undemocratic. Today that framework involves a vast imbalance of power that is further exacerbated by one side lacking the right to campaign in the workplace, having its supporters subject to discipline and dismissal, and fearing economic coercion or retaliation.

To ensure the exercise of free choice, EFCA provides both monetary penalties and the possibility of injunctions to limit coercion and restore fairness to the process. Currently, an employer who threatens to fire union supporters or to shut a plant if the union wins does not incur any monetary penalties. Those fines that can be levied against illegal firing are minimal and not much of a deterrent. EFCA allows meaningful fines – triple the amount of back pay in case of discharge – and the possibility of union injunctions in the face of significant violations of worker rights. Finally, EFCA seeks to deter bad-faith bargaining through mediation and arbitration. After 90 days of bargaining on a first agreement, either an employer or a newly certified union can request mediation by the Federal Mediation and Conciliation Service. If an agreement is not reached after 30 days of mediation, either party can call for binding arbitration. This process eliminates the incentive of stalling at the bargaining table to provoke the decertification of a union down the road.

EFCA restores needed balance to a process that has become increasingly dysfunctional. As we have seen, denying workers the right to form a union has important consequences for the economy and the political process. That said, workers' freedom to form unions is, and should be, considered a fundamental human right. All Americans lose – in fact, democracy itself is weakened – if the right is formally recognized but undermined in practice. Strengthening free choice in the workplace lays the basis for insuring a more prosperous economy and a healthier society.

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