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Achieving the Achievable: Realistic Labor Law Reform

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Achieving the Achievable: Realistic Labor Law Reform

*Leonard Bierman, Rafael Gely, & William B. Gould IV**

ABSTRACT

A common reprise among labor activists and scholars has been that for the fortunes of labor to change, the law must change. Prompted perhaps by a seeming surge in labor movement activity over the past few years, including headline-grabbing strikes and recent union victories at several U.S. Starbucks locations, various labor law activists and scholars have called to seize the moment and proposed the enactment of comprehensive labor law reform. We argue in this Article that broad-scale labor law reform is unlikely to be enacted by the current U.S. Congress or even have all its provisions pass muster when potentially challenged in the current U.S. Supreme Court. Thus, after a brief review of labor history/legislation, and an examination of the “limits of the law” in the workers’ rights area, we advance a set of three modest reform proposals that we argue have the potential of being both achievable and impactful. They are: (1) increasing the use of mail balloting in NLRB representation elections, (2) implementing NLRB-sponsored “debates” to be held at neutral locations during labor representation campaigns, and (3) exploring the potential greater use of labor neutrality agreements.

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I. INTRODUCTION

“The U.S. labor movement is in crisis.”¹ This statement, made hundreds of times during the last sixty years, is as true today as ever. Despite news reports regarding a surge in union-related activity,² a sense of increased workers’ leverage given labor shortages during the “Great Resignation,”³ and some notable organizing victories in previously unorganized workplaces, the crisis persists.⁴

¹ See WILLIAM B. GOULD IV, *FOR LABOR TO BUILD UPON: WARS, DEPRESSION AND PANDEMICS* 8–9, (2022) [hereinafter *FOR LABOR TO BUILD UPON*] (describing the various crisis faced by labor). Variations of this statements can be found in the popular press and in academic articles in each of the last six decades. For example, see Edward T. Townsend, *Is There a Crisis in the American Trade-Union Movement? Yes*, 350 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 1 (1963); Brian Heshizer & Harry Graham, *Are Unions Facing A Crisis?, Labor Officials are Divided*, 107 MONTHLY LAB. REV. 23 (August 1984); Sharon Block, *Go Big or Go Home: The Case for Clean Slate Labor Law Reform*, 41 BERKELEY. J. EMP. & LAB. L. 167 (2020).

² For instance, the fourth quarter of 2021 experienced the most picket lines in the United States as compared to any other quarter in over a decade. See Robert Combs, *Analysis: ‘Striketober’ – Fueled Q4 Capped huge Year for Walkouts*, DAILY LABOR REPORT (Jan. 18, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-striketober-fueled-q4-capped-huge-year-for-walkouts> [<https://perma.cc/K4NE-3KJX>].

³ Susik Abigail, *Could the Great Resignation Help Workers? Look at History*, N.Y. TIMES (Dec. 11, 2021), <https://www.nytimes.com/2021/12/11/opinion/great-resignation-labor-shortage.html> [<https://perma.cc/CUP9-6HUV>]. The data from 2020 and 2021 indicates that workers in the United States are leaving their jobs at record numbers. While the cause of the Great Resignation and its effects are not completely known, anecdotal evidence suggests that one of those effects is that the Covid-19 pandemic has provided workers both the awareness of their precarious position and the kind of leverage that they have not had since the WWII years. The reasons for the big resignation are varied. While the initial exodus of workers was due to the drop in demand for goods and services caused by the pandemic, data suggests that workers have been hesitant to return to work even after the demand for their services has increased. Survey results indicate that some workers are still facing health concerns, as well as child and elder care difficulties, which make it impossible for them to return to work. Yet, other workers are making more fundamental decisions regarding the need to work and consequently, the conditions under which they have been working. See *From the Great Resignation to Lying Flat, Workers Are Opting Out*, BLOOMBERG (Dec. 7, 2021), <https://www.bloomberg.com/news/features/2021-12-07/why-people-are-quitting-jobs-and-protesting-work-life-from-the-u-s-to-china> [<https://perma.cc/6RYT-BR3V>] (describing the global nature of the “great resignation” and the various rationales); Jena McGregor, *2021 Brought us the ‘Great Resignation.’ No one can agree what to call it*, FORBES (Dec. 14, 2021), <https://www.forbes.com/sites/jenamcgregor/2021/12/14/2021-brought-us-the-great-resignation-no-one-can-agree-what-to-call-it/?sh=5a3e8ac1509c> [<https://perma.cc/EH5T-67NZ>].

⁴ See *Big Business v. Big Labour*, THE ECONOMIST (Dec. 11, 2021), <https://www.economist.com/business/2021/12/11/big-business-v-big-labour> [<https://perma.cc/S44B-UEWU>] (describing organizing efforts involving Starbucks).

Union density rates have been declining since the mid-1950s, with significant drops occurring during economic downturns.⁵ While unions have become more “efficient” at organizing, in the sense that they are selecting targets where they will face less resistance and can organize at faster rates, they are also organizing less.⁶ In fact, even after the last few years, in which unions have received considerable public attention, unionization rates have not improved. Data from the U.S. Bureau of Labor Statistics show that in 2022 the share of workers belonging to labor unions dipped to a historic low of 10.1%, notably even lower than what it had been before the Covid-19 pandemic.⁷

In explaining the downward trend and in a quest for a solution, commentators, labor scholars, and supporters of the labor movement have honed in on one specific solution—labor law reform. They argue that for labor’s fortunes to be reversed, the National Labor Relations Act (“NLRA”)⁸ must be changed.⁹ The most recent manifestation of this argument comes in the form of the Protecting the Right to Organize Act (“PRO Act”), recently passed by the U.S. House of Representatives,¹⁰ which includes provisions to the like of organized labor. For example, the proposed legislation outlaws the use by employers of workplace anti-union captive audience speeches.¹¹ A different provision provides that employees be allowed to use, during union organizing drives, employer

Katia Dmitieva, *U.S. Union Membership Falls Despite High-Profile Labor Actions*, BLOOMBERG (Jan. 20, 2022), <https://www.bloomberg.com/news/articles/2022-01-20/u-s-union-membership-falls-despite-high-profile-labor-actions> [https://perma.cc/589F-35BQ].

⁵ See FOR LABOR TO BUILD UPON, *supra* note 1, at 141, discussing John-Paul Ferguson’s analysis in *Organizing Trends in CATS and Next Gen NLRB Data (2018)* (on file with authors). Union density refers to the proportion of U.S. workers covered by collective bargaining agreement. *Id.* at 17.

⁶ *Id.* at 141–44.

⁷ Ian Kullgren, *Union Membership Rate in US Dips Even Amid Economic Recovery*, BLOOMBERG, (Jan. 19, 2023), <https://news.bloomberglaw.com/daily-labor-report/union-membership-rate-in-us-dips-even-amid-economic-recovery> [https://perma.cc/YXB4-4BLC].

⁸ 29 U.S.C. §§ 151–169 (2020).

⁹ Commentators have called for the repeal of the 1947 Taft-Hartley Amendments to the National Labor Relations Act, arguing that labor law reform is the only way of producing a resurgence in trade union activity. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law is Broken*, N.Y. TIMES MAG., (Feb. 19, 2020), <https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html> [https://perma.cc/HT6B-UK42].

¹⁰ Protecting the Right to Organize Act, H.R. 2474, 116th Cong., 2d Sess. (2020) [hereinafter PRO Act].

¹¹ *Id.* § 2 (d)(3). Captive audience speeches are speeches sponsored by the employer during work hours and to which employees can be required to attend. WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 148 (6th ed. 2019) [hereinafter LABOR LAW PRIMER].

“electronic communication devices and systems” (including employer computers, internet access, cell phones, etc.) unless the employer can show a “compelling business rationale” to prevent such use.¹² Supporters have referred to the PRO Act as “the clear solution” to labor’s problems.¹³

The approach advanced by the PRO Act and its supporters follows what we describe as a “law-centric” understanding of the labor relations process. From this perspective, the basic content of the law is believed to play a determinant role in the fortunes of organized labor, and the decline in unionization rates is attributed to the inadequacy of the law in protecting the rights of employees to seek union representation.¹⁴ Under this view, PRO Act provisions, such as the banning of captive audience speeches and the requirement that employers provide union access to electronic communication devices, are the *sine qua non* in halting union decline.¹⁵

In this Article, we take a different view regarding the prospects of labor law reform. First, we argue that while the law plays a role in the state of the collective bargaining process, the law plays only a subordinate role. Other factors, such as market forces, technological developments, globalization, union initiatives and energy employed in organizing the unorganized, and the strategies employed by the actors in the system,

¹² PRO Act, *supra* note 10, § (2)(h)(2)(i). The issue of access to electronic communications has generated significant debate. In 2007, the Bush Board concluded that prohibiting employees from using the employer’s email system for all “non-job related solicitations,” was not a violation of § 8(a)(1). Register Guard, 351 NLRB 1110, 1119 (2007). In 2014, the Obama Board adopted a new standard under which there was a presumption that employees “who have rightful access to their employer’s email system in the course of their work have a right to use the email system to engage in § 7-protected communications on nonworking time” and that the employer could rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justified restricting its employees’ rights. Purple Communications, 361 NLRB 1050, 1063 (2014). In 2019, the Trump Board reversed the Obama Board holding that employers do not violate the Act by restricting the nonbusiness use of its email system. The Board held that “facially neutral restrictions on the use of employer IT resources are generally lawful to maintain, provided that they are not applied discriminatorily” and, absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other. *See* Caesars Entertainment (Rio All-Suites Hotel and Casino), 368 NLRB No. 143 (2019).

¹³ Erik Loomis, *Why the Amazon Workers Never Stood a Chance: Our system of labor law and regulations has too strongly tilted the playing field in favor of companies and against unions*, N.Y. TIMES, (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/amazon-union-alabama.html> [https://perma.cc/VE2R-EDA8].

¹⁴ For a description and critique of this perspective, see William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations in the United States*, 43 UNIV. SAN FRANCISCO L. REV. 1 293–99 (2008) [hereinafter *Free Choice Act*].

¹⁵ *Id.*

appear to be at least as important, if not more significant, than the legal landscape.¹⁶ History tells us that the great bursts in union growth that took place at the beginning of the Great Depression were due to strikes and self-help in other forms. Second, and more specifically related to the proposals in the PRO Act, we believe those efforts are unlikely to offer relief because they are unlikely to receive the support of a closely divided U.S. Senate (and, in any case, likely to face potentially successful constitutional challenges).¹⁷

Thus, in this Article we submit that, instead of focusing upon legislative changes such as those in the PRO Act, the proper focus should be on proposals that—while comparatively modest in scope—act in symbiosis with union organization activities, are practically achievable, and likely pass Supreme Court muster.¹⁸ The proposals we advance focus on issues regarding organizing, as it presents the area in which changes to regulation could arguably have the most meaningful impact on unionization trends.¹⁹ The proposals involve: (1) the expansion of the use of mail balloting in representation elections, (2) the adoption of policies that would facilitate meaningful debate in organizing campaigns, and (3) encouraging the expanded use of neutrality agreements. We believe that these proposals are achievable in that they can be instituted by the National Labor Relations Board (“NLRB”) itself through adjudication or rulemaking,²⁰ and to the extent that they require legislative action, they could receive support from centrist legislators, who will be crucial for passage regardless of which party controls the U.S. Congress. We also

¹⁶ *Id.* at 294–97. See also William B. Gould IV, *The Decline and Irrelevance of the NLRB and What Can Be Done About It: Some Reflections on Privately Devised Alternatives*, speech given to the State Bar of California Labor and Employment Law Section (Oct. 31, 2008) (on file with the authors) [hereinafter *The Irrelevance of the NLRB*].

¹⁷ A new “constitutional culture” has come to dominate the U.S. Supreme Court’s labor jurisprudence representing a shift from a focus on collective good to individualism. See Gould, *FOR LABOR TO BUILD UPON*, *supra* note 1, 9–10 (citing to Linda Greenhouse, *The Supreme Court’s Challenge to Civil Society*, 2019 SUP. CT. REV. 335, 336 (2019)).

¹⁸ William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133, 160–61 (2014) (articulating the proposition that predictions about this Supreme Court’s future rulings must be made with great caution); cf. Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/UT3X-NNZP>].

¹⁹ Gould IV, *supra* note 18, at 145–50.

²⁰ Merton C. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedures Act*, 79 YALE L.J. 571, 587–93 (1970); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 732 (1961).

believe these proposals are likely to withstand constitutional challenge, although we recognize that recent decisions of the U.S. Supreme Court might present some potential roadblocks.²¹

To illustrate the point that the law, while important, plays a subordinate role, Part II provides a brief historical overview of the development of U.S. labor law. Part II also describes other factors that have played a role in the fate of labor, which we contend one must consider when evaluating the prospects of labor law reform. In Part III, we discuss the three proposals. We aver that our proposals are achievable in that they are consistent with the current legal framework, do not raise potentially successful legal challenges, and are politically feasible.

II. LAW AS A HELPFUL BUT NOT SUFFICIENT CONDITION

We contend that in addressing the crisis faced by the U.S. labor movement, one must pay attention to the law but also, at the same time, look past it. That is, changes in the law matter, but other factors play an arguably more significant role. In Part A of this section, we provide a brief history of the development of labor law to illustrate this point. We show that increases in unionization activity in the 1900s preceded the enactment of the NLRA and the increased unionization rates that occurred after the enactment of the Act were the result not only of the pro-union nature of the original statute but also of other factors, such as the actions of the War Labor Board and the strategies of the labor movement itself. We similarly contend that the decline in unionization rates experienced since the mid-1950s has been the result not only of the clear changes in the Act's policy, as reflected in the enactment of the 1947 Taft-Hartley amendments and interpreted treatment of the statute by various NLRBs,²² but also by other factors operating outside the confines of the labor law framework. Indeed, while relevant, we assume that law is subordinate to other factors, not the least of which is union organizational lethargy and reticence in using available resources.²³ In Part B, we describe those other factors to illustrate our point about the limits of the law.

²¹ Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

²² See William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Process*, 64 EMORY L. J. 1501, 1525 (2015) [hereinafter *Politics & the NLRB*]; Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); W. Willard Wirtz, *The New National Labor Relations Board: Herein of "Employer Persuasion,"* 49 NW. U. L. REV. 594 (1954).

²³ Chris Bohner, *Now is the time for Unions to Go on the Offensive*, JACOBIN (June 5, 2022), <https://jacobin.com/2022/06/organized-labor-union-membership-finances-fortress-unionism-spending> [<https://perma.cc/PH7M-48ML>]. See also William B. Gould IV, *America's latest union push needs teeth*, BOSTON GLOBE (Jul. 25, 2022), <https://www.bostonglobe.com/2022/07/25/opinion/americas-latest-union->

A. The Role of Law

Our brief historical overview begins in the early 1930s. While the enactment of the NLRA in 1935 constitutes a watershed moment in the history of labor in the United States, equally important was a period of intense self-action unions took in the preceding years.²⁴ This period involved a series of significant work stoppages in major cities, including Minneapolis and San Francisco.²⁵ In Minneapolis, the Teamsters Union deployed tactics such as roving pickets using automobiles and communication via short-wave radios.²⁶ In San Francisco, a longshore strike had the effect of a general strike, as it impacted workers in industries across the country.²⁷ These two events were not isolated occurrences but part of a wave that saw strike totals double between 1932 and 1934.²⁸ This activity might have also set the spark that lit the movement resulting in the formation of the Congress of Industrial Organizations (“CIO”) and with it, organizing across industrial lines.²⁹

The enactment of the NLRA unquestionably accelerated the momentum created by this direct action.³⁰ As noted labor historian Walter Galenson averred:

push-needs-teeth/ [https://perma.cc/EN24-KDTK] (noting the “somnia of unions that spend an appreciably smaller percentage of their budget on organizing the unorganized than was the case during the union growth between the 1930s and the 1950s.”).

²⁴ See FOR LABOR TO BUILD UPON, *supra* note 1, at 66. Importantly, Gould also shows that a similar dynamic occurred during the World War I period, regarding the involvement of the labor movement in the war effort and the policies that were adopted by the National War Labor Board. These policies included the promotion of peaceful resolution of disputes in industries that were part of the war effort, the right of unions to exist and to bargain collectively through representatives of their own choosing (the same policy later adopted under the NLRA), and a truce regarding employers’ concerns with union security provisions such as the closed shop (which allowed unions and employers to negotiate provisions requiring that employees joined a union before obtaining employment). *Id.* at 60–62. Cf. Jane McAlevey, *Why Unions Must Recommit to Expanding their Base*, THE NATION (Jan. 4, 2021), <https://www.thenation.com/article/politics/biden-labor-unions-organizing/> [https://perma.cc/3NQZ-VUF3] (arguing for “organizing strategies that achieve both winning more and helping workers understand who and what divides and oppresses them”).

²⁵ See FOR LABOR TO BUILD UPON, *supra* note 1, at 66.

²⁶ See PAUL LE BLANC, A SHORT HISTORY OF THE U.S. WORKING CLASS: FROM COLONIAL TIMES TO THE TWENTY-FIRST CENTURY 130–31 (1999).

²⁷ See *id.* To be sure, not all strike efforts were successful, and in some instances, employers reacted forcefully with tactics involving violence and intimidation. *Id.*

²⁸ See FOR LABOR TO BUILD UPON, *supra* note 1, at 66.

²⁹ LE BLANC, *supra* note 26, at 132.

³⁰ 29 U.S.C. §§ 151–169 (2020).

In terms of importance to the labor movement, star billing must be given to the National Labor Relations Act, which was enacted in 1935 after the futile NRA attempts to safeguard the right of collective bargaining through voluntary agreement among employers. The declaration by the U.S. Supreme Court in April 1937 that the NLRA was constitutional was a major factor in making that year one of the most memorable in the annals of American labor.³¹

This New Deal legislation was unabashedly pro-union in nature, explicitly stating in section one (the Preamble) that the legislation was to promote the “right to organize” and “encourage and promote the policy and procedure of collective bargaining” in the United States, a provision which has never been amended to this very day.³² For example, to promote labor organizing, the administrative agency charged with enforcing the NLRA, the NLRB, between the period 1935 to 1941 adopted the position that *any* employer speech opposing unionization represented a violation of the NLRA.³³ Employers during this time were required to remain “strictly neutral” concerning unionization efforts at their workplaces.³⁴ The judiciary also played a role by substantially extending the right of workers,

³¹ Walter Galenson, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT 1935-1941* 611 (1960). For a concise, yet thorough history and provisions of the Act, see *LABOR LAW PRIMER*, *supra* note 11, at 29–86.

³² “It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of 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.” 29 U.S.C. § 151.

³³ *Clark Bros.*, 70 NLRB 802, 828, 831–32 (1947) (finding that it was an unfair labor practice for an employer to make a noncoercive speech to employees on the employer’s premises during working hours). *Clark Bros.* was effectively overruled by Congress with the enactment of § 8(c), which provided that “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c).

³⁴ See Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 756–58 (1979) (noting that in applying § 7 of the NLRA in the early years of the Act, the Board placed a high value on the full freedom of employees to form, join, or assist labor unions and was reluctant to permit any interference with this right and that this approach was based on the belief that an employer’s superior economic position carried with it an inherent suggestion of economic reprisal); See also Andrew M. Kramer, Lee E. Miller & Leonard Bierman, *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 B.C. L. R. 39, 58 (1981); Note, *Employer Free Speech in Union Organizing Campaigns*, 15 U. FLA. L. REV. 231 (1962).

unions, and by generally supporting the NLRB's interpretation of the Act.³⁵

The momentum created by the NLRA gained speed over the next decade.³⁶ The advent of World War II in December of 1941 brought a highly salubrious macro-socioeconomic environment for labor unions in the United States for the next four years.³⁷ The war effort dramatically increased the demand for production and labor, while conscription/military service dramatically decreased the labor supply.³⁸ This situation gave workers and labor unions during this period considerable economic power, enhanced by war-time regulations which did not completely constrain strike activity.³⁹

Aiding both the NLRA's enactment and the momentum created by the exigencies of the war effort, were the policies promoted through the second incarnation of the National War Labor Board.⁴⁰ The 1940's new War Labor Board, which was in existence for four years and composed of equal numbers of business and labor representatives, had the power to impose wage controls and resolve disputes in all industries outside of

³⁵ See Melvyn Dubofsky, *THE STATE AND LABOR IN MODERN AMERICA*, 165–66 (1994). According to Dubofsky:

What the federal judiciary had accomplished by the end of 1941 in the sphere of labor law was truly amazing. Alone among the branches of federal government, it had not retreated far, if at all, in the face of an aggressive and growing antilabor movement. Despite a few rulings partly adverse to the NLRB and trade unions, the federal judiciary – the Supreme Court especially – had substantially extended the rights of workers, unions, and the NLRB. If the New Deal had failed by 1941, to achieve a total transformation in industrial relations, the federal judiciary had indeed experienced a legal revolution with enormous implication for the American labor movement.

Id. See also William B. Gould IV, *Those Were the Days; These Are the Days: Some Reflections on the Limits of Law*, 54 *UNIV. SAN FRANCISCO L. REV.* 293 (2020) [hereinafter *Those Were the Days*] (reviewing STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* (2019)).

³⁶ STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT AND FUTURE OF AMERICAN LABOR* (2019). See also FOR LABOR TO BUILD UPON, *supra* note 1.

³⁷ See GREENHOUSE, *supra* note 36, at 82–83 (discussing union leaders' coordination with President Franklin D. Roosevelt to convert manufacturing plants to war effort production).

³⁸ *Id.*

³⁹ For example, union strikes continued despite wartime proscriptions. See FDR Library, *April 1943*, [www.fdrlibrary.marist.edu/daybyday/event_\[https://perma.cc/V58H-3VEF\]](https://www.fdrlibrary.marist.edu/daybyday/event_[https://perma.cc/V58H-3VEF]) (last visited Mar. 17, 2023). Work stoppages (which include both strikes and lockouts) involving 1,000 or more workers continued to increase until the early 1950s. See Rick Bales, *Resurrecting Labor*, 77 *MARYLAND L.R.* 1, 12 (2017).

⁴⁰ For a discussion of the first National War Labor Board during the first World War and the second incarnation in the next World War, see FOR LABOR TO BUILD UPON, *supra* note 1, at 61–73.

agriculture.⁴¹ The War Labor Board had the salutary effect of institutionalizing the “conception of routine and bureaucratic industrial relations.”⁴² Most importantly, under the watch of the War Labor Board, hundreds of thousands of new workers organized, doubling the size of the labor movement during the Second World War.⁴³

In the wake of the post-war upsurge of strikes, many observers felt U.S. labor unions had accumulated too much power.⁴⁴ As a result, there was considerable backlash against them and a desire in various quarters to legislatively cut back on union power.⁴⁵ In 1947, the Republican Congress passed, over President Truman’s veto,⁴⁶ a bill introduced by Senator Taft and Representative Hartley to achieve this objective. The so-called Taft-Hartley Act cut back on labor union organizing power in several ways. The legislation, for example, created in § 8(b),⁴⁷ a series of union unfair labor practices delineating various types of union conduct that would now be deemed illegal under the NLRA.⁴⁸ More broadly, though the statute’s Preamble was not altered and continued to promote collective bargaining and freedom of association, the NLRA was amended to clearly state that workers also had the right to “refrain” from organizing activity.⁴⁹ More specifically, and significantly, the Taft-Hartley Act in

⁴¹ RONALD W. SCHATZ, *THE LABOR BOARD REVIEW: REMAKING WORKER-EMPLOYER RELATIONS FROM PEARL HARBOR TO THE REAGAN ERA 9–10* (2021).

⁴² The War Board continued the support of union security clauses, such as maintenance of membership provisions and no strike pledges. The War Board also encouraged and developed the adoption of grievance procedures. It is important to note also that the War Board adopted positions that might have been seen as limiting the role of labor, such as the development of the concept of management prerogatives/rights. Bargaining over these provisions was later characterized by the U.S. Supreme Court as a “common collective bargaining practice.” *NLRB v. American Nat’l Insurance Co.*, 343 U.S. 395, 407 (1952). *See* FOR LABOR TO BUILD UPON, *supra* note 1, at 72 (explaining how the development of the management prerogatives concept eventually led to limiting the role of unions in negotiating over managerial decisions to close a plant or relocate a business). *But see* NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME* 51 (1982).

⁴³ *See* FOR LABOR TO BUILD UPON, *supra* note 1, at 70. *See also* LE BLANC, *supra* note 26, at 104.

⁴⁴ *See* GREENHOUSE, *supra* note 36, at 99.

⁴⁵ Or as noted by Harvard Law Professor Archibald Cox, that there were “union rights and union wrongs.” Archibald Cox, *The Uses and Abuses of Union Power*, *NOTRE DAME LAWYER* 624, 627 (1960). *See also* WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB – A MEMOIR* (2000) [hereinafter *LABORED RELATIONS*].

⁴⁶ *See* HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* (1950).

⁴⁷ *See* 29 U.S.C. § 158(b).

⁴⁸ *See* FOR LABOR TO BUILD UPON, *supra* note 1, at 33.

⁴⁹ *See* 29 U.S.C. §157.

§ 14(b) enacted a so-called “right to work” provision.⁵⁰ This legislative provision allowed individual states to pass laws prohibiting the negotiation of compulsory union membership, allegiance, or mandatory payment of union dues in cases where unions were elected as the bargaining representative.⁵¹ Today, twenty-seven states in the country have enacted legislation of this kind.⁵²

Finally, the Taft-Hartley Act in § 8(c) enacted an NLRA “free speech” provision.⁵³ This provision, in practical terms, provides that employers and unions have a right to freely speak their views about unionization so long as the said speech does not contain any “threat”⁵⁴ or promise.⁵⁵ These provisions, in conjunction with a shift in the U.S. Supreme Court’s jurisprudence regarding the speech and property rights of employers, expanded the ability of employers to engage in anti-union campaigning during organizing elections while limiting the ability of

⁵⁰ See *id.* § 164(b).

⁵¹ See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744 (1963) (holding that the amended statute eliminated closed shop agreements but permitted the employer and union to negotiate agreements requiring payment for the service provided by the union—agency shop agreements—and that to the extent that agency shop agreements require membership, they were subject to § 14(b) right-to-work provision); *NLRB v. Allis-Chalmers*, 388 U.S. 175, 196 (1967) (upholding the ability of unions to fine members for crossing a picket line). See also William B. Gould IV, *Solidarity Forever – Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980–81) (discussing *Allis-Chalmers* and providing a proposal for balancing the interests of labor unions in disciplining members and the member’s right to avoid discipline by resigning the union).

⁵² See FOR LABOR TO BUILD UPON, *supra* note 1, at 30–33. Moreover, in 2018 the U.S. Supreme Court applied the right-to-work principle to all public employee/public sector worker unions in the nation. *Janus v. AFSCME*, 585 U.S. 924, 138 S. Ct. 2448 (2018). See William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court’s Anti-Labor Policymaking*, 53 UNIV. SAN FRANCISCO L. REV. 209, 212 (2019).

⁵³ 29 U.S.C. § 158(c).

⁵⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980).

⁵⁵ An employer cannot lawfully counter a union’s organizational drive by liberalizing overtime pay and vacation benefits, even though the benefits were made irrevocable and could not be withdrawn if employees voted for union representation. *NLRB v. Exch. Parts Co.*, 375 U.S. 405 (1964). Unions enjoy more leeway in making promises. See *Acme Wire Prods. Corp.*, 224 NLRB 701 (1976) (noting that employees understand that a union cannot obtain benefits automatically by winning an election and that any such promises are dependent on the outcomes achieved through collective bargaining); *Novotel New York Hotel*, 321 NLRB 624, 627–28 (1996) (holding that financing of the employees’ FLSA lawsuit by the union was fundamentally different from conduct condemned as an objectionable grant of benefits). Cf. *Stericycle, Inc.*, 357 NLRB 582 (2011) (holding that under certain circumstances, a union engages in objectionable conduct warranting a second election by financing a lawsuit involving Federal or State wage and hour laws on behalf of employees in the unit.).

unions to do the same. For instance, in the 1941 case of *NLRB v. Virginia Electric & Power Co.*,⁵⁶ the U.S. Supreme Court held the NLRB's implementation of its "strict neutrality"⁵⁷ doctrine, which prohibited all employer anti-union speech during union representation campaigns, to be unconstitutional.⁵⁸ The Court found the NLRB's policy in this regard to illegally impinge on employer First Amendment free speech rights and held that an employer's expression of his views on labor matters could not per se be deemed to violate the NLRA.⁵⁹ Similarly, the Board's approach to regulating captive audience speeches became less protective of employee interests post-1947.⁶⁰ The early NLRB decisions on this topic held that employer speeches of this kind were per se unlawful under the NLRA.⁶¹ The NLRB then shifted its position in *Bonwit Teller*,⁶² finding that while employer captive audience speeches were not per se unlawful, if an employer chose to use its premises for such purposes, the employer then needed to give the union the same general opportunity (i.e., on

⁵⁶ 314 U.S. 469 (1941).

⁵⁷ See Comment, *supra* note 34, at 756–58.

⁵⁸ *Id.*

⁵⁹ *Id.* at 758–59. Under § 8(c) both parties could, as the Supreme Court put it in analyzing § 8(c) in the case of *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), engage in "uninhibited, robust, and wide-open debate" about unionization and labor issues. Pursuant to this provision, parties will commit NLRA unlawful practices essentially only if their speech rises to the level of being "threatening" in nature.

⁶⁰ Various observers have noted that these speeches are the most potent form of employer anti-union activity. "[W]hen an employer gathers his employees together on paid company time to listen to an anti-union speech, he's implicitly telling them that he cares more about their position on unionization than about their work." See Comment, *supra* note 34, at 780 n. 148 (citing transcript of television discussion by University of Pennsylvania Law Professor Howard Lesnick). See also Leonard Bierman, *Toward a New Model for Union Organizing: The Home Visits Doctrine and Beyond*, 27 B.C.L. REV. 1, 3 (1985) [hereinafter *Toward a New Model*]; Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L U. L. REV. 385, 388 (2010); Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123, 130 (2012). See also 2 *Sisters Food Group*, 357 NLRB 1816, 1825, n. 1 (2011) (Member Becker, *dissenting in part*) (describing a 1990 empirical study showing that employers conducted mandatory captive audience meetings in 67 percent of the elections studied, and a 2011 study showing that in 89 percent of the campaigns surveyed, employers conducted captive audience speeches and that in the majority of those campaigns, employees were required to attend as many as five such speeches.); see generally NAT'L LAB. REL. BD., GENERAL COUNSEL MEMO 22–04, THE RIGHT TO REFRAIN FROM CAPTIVE AUDIENCE AND OTHER MANDATORY MEETINGS (Apr. 7, 2022).

⁶¹ See, e.g., *Clark Bros. Co.*, 70 NLRB 802, 804–05 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

⁶² *Bonwit Teller, Inc.*, 96 NLRB 608, 618 (1951).

company premises and paid company time) to present its case.⁶³ A few years later, though, a new NLRB reversed this union “right of reply” to employer captive audience speeches (i.e., employers could give these speeches, and unions would not be able to generally reply in kind).⁶⁴

Not surprisingly, the passage of the Taft-Hartley amendments, characterized by unions as the “slave labor” act,⁶⁵ has been widely thought to have caused the beginning of the “labor crisis” we referred to above. Yet, while the provisions of the Taft-Hartley amendments clearly represented a shift from the unabashedly pro-collective bargaining/pro-union 1935 Act, union rates continued to grow through 1956.⁶⁶ Thus, just as the union up-swing of the 1930s was aided by the enactment of the 1935 Act but had clearly started before the Act and was driven by several

⁶³ NLRB v. United Steelworkers (NuTone), 357 U.S. 357, 368 (1958) (C.J. Warren, concurring).

⁶⁴ See *Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953). See also *May Department Store*, 136 NLRB 797 (1962), *enf. denied*, 316 F.2d 797 (6th Cir., 1962). The NLRB eventually developed a more nuanced approach to the subject in *Peerless Plywood*, 107 NLRB 427 (1953) (holding that while captive audience speeches were lawful, employer speeches of this kind given within 24 hours before a labor representation election (i.e., last-minute captive audience speeches) violated the NLRB’s “laboratory conditions” test.).

Lest some of the above complexities and paradoxes of modern U.S. labor law and regulation may seem a bit too abstract, one can point to the recent union organizing drive at a handful of company-owned Starbucks restaurants in Buffalo, New York. These efforts culminated, on December 9, 2021, in a 19-8 union victory in a bargaining unit consisting of baristas at the Elmwood Avenue store in Buffalo. See Matt Glynn, *NLRB Certifies Unions’ Win at Elmwood Starbucks Store*, BUFFALO NEWS (Dec. 17, 2021), https://buffalonews.com/news/local/nlr-certifies-unions-win-at-elmwood-starbucks-store/article_3007c1b6-5db9-11ec-91e1-17bfadc53fbf.html [<https://perma.cc/R3TX-2GGZ>]. Just a few weeks before the union representation election, Starbucks founder and former CEO Howard Schultz flew to Buffalo and gave all Buffalo-area Starbucks employees (who were released early from their work and paid to listen) a “captive audience” speech outlining why they should oppose unionization. He also posted on the Starbucks global website “A Message from Howard Schultz: From Buffalo With Love,” which outlined in writing what the company does for its workers and why they don’t need an “outside representative” in their relationship. See *A Message From Howard Schultz: From Buffalo With Love*, STARBUCKS CORP. (Nov. 6, 2021), <https://stories.starbucks.com/press/2021/a-message-from-howard-schultz-from-buffalo-with-love/> [<https://perma.cc/LZ6Z-FKZF>].

On April 7, 2022, the NLRB’s General Counsel issued a memorandum indicating her intention to urge the Board “to adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance [to captive audience speeches] is truly voluntary.” See NAT’L LAB. REL. BD., GENERAL COUNSEL MEMO 22–04, THE RIGHT TO REFRAIN FROM CAPTIVE AUDIENCE AND OTHER MANDATORY MEETINGS (Apr. 7, 2022).

⁶⁵ See FOR LABOR TO BUILD UPON, *supra* note 1, at 20.

⁶⁶ *Id.* at 33.

other factors, the beginning of the labor crisis might have occurred concurrently with the enactment of the Taft-Hartley amendments but was hardly per se caused by it.

This observation, which we argue is critical to understanding the role that law reform can play in addressing the labor crisis, is further confirmed by experiences with the “swings” in the Board’s policies over the last six decades. Over the last sixty to seventy years, the NLRB has become very “political” with shifting (pro-employer/pro-union) interpretations of an ambiguous statute coming with changing political membership appointments by different Presidents to the NLRB. Put more directly, Republican presidentially-appointed NLRB’s (e.g., Eisenhower, Nixon, Ford, Reagan, Bush, and Trump) have tended to reverse the often relatively pro-union and pro-collective bargaining decisions Democratic presidentially-appointed (e.g., Kennedy, Johnson, Carter, Clinton, Obama, and Biden) NLRB’s made and vice versa.⁶⁷ One would expect that to the extent legal standards are central to the fortunes of labor, we would have observed up-swings in unionization activity during Democratically-controlled Boards, and the opposite would have taken place during Republican administrations. Yet, the data shows that unionization rates have declined steadily since the mid-1950s.⁶⁸ There is no evidence that during the years of the Clinton and Obama Democratic administrations, “the needle of union growth” moved at all.⁶⁹

This analysis indicates that while labor law plays a role in potentially addressing the labor crisis, other factors play an even more significant role in explaining the fate of labor. The next section discusses those factors.

B. The Role of Other Factors

As leading labor history scholars like Professor Melvin Dubofsky have noted,⁷⁰ it is short-sighted to examine labor law or any potential labor law reforms without examining relevant surrounding circumstances. Labor law has played a role, “albeit a subordinate one.”⁷¹

⁶⁷ See *Politics & the NLRB*, *supra* note 22. See also William B. Gould IV, *Too Much Politics in Labor Law*, ST. LOUIS POST-DISPATCH (Sept. 7, 2016), https://www.stltoday.com/opinion/columnists/article_ec29cc8e-7c1f-53af-9bb3-e569328eca29.html [<https://perma.cc/89EH-9NMW>]; *The Irrelevance of the NLRB*, *supra* note 16.

⁶⁸ See FOR LABOR TO BUILD UPON, *supra* note 1, at 33.

⁶⁹ *Id.*

⁷⁰ See Dubofsky, *supra* note 35.

⁷¹ See William B. Gould IV, *Beyond Labor Law: Private Initiatives to Promote employee Freedom of Association in the Obama Era*, 87 IND. L. J. 69, 70 (2012) [hereinafter *Beyond Labor Law*]. See also William B. Gould IV, *Here’s What the Government Should do to Keep Trains Running*, BLOOMBERG LAW NEWS (Nov. 15, 2022), <https://news.bloomberglaw.com/us-law-week/heres-what-the-government->

Other factors have also played an important role. Among these other factors are globalization, deregulation, changes in the labor market, structural shifts in the economy, technological innovation, and union lethargy.⁷²

Globalization, which has resulted in foreign competition in the most heavily unionized sectors of the economy and the internationalization of financial and trade markets during the last three decades of the twentieth century, facilitated the ability of employers to move operations to environments in which goods could be produced more cheaply both inside the United States and from the United States to other countries.⁷³ The free movement of capital resulted in added competitive pressures for U.S. employers, who saw reducing labor costs as a crucial feature of their business strategies.⁷⁴ Aided by trade agreements, such as NAFTA, many manufacturing employers migrated to low-wage countries.⁷⁵ In addition, the leverage these alternatives provided employers allowed them to become much more militant and sophisticated in opposing employee organizing efforts.⁷⁶

At the same time, deregulatory policies directed at those same heavily unionized sectors, such as transportation, have increased domestic non-

should-do-to-keep-trains-running [https://perma.cc/UX9A-9XQ8] (noting in the context of the 2022 railroad dispute which prompted intervention by the Biden administration that “Law reform, however subordinate to other considerations in the union organizing arena, cannot provide a magically intoned formula in any circumstance.”).

⁷² See Gould, *Beyond Labor Law*, *supra* note 71, at 70 n.4 (2012).

⁷³ *Id.* See also WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 11–29 (1993) [hereinafter AGENDA FOR REFORM]; ROBERT E. SCOTT, ECON. POL’Y INST. BRIEFING PAPER NO. 367, *Trading Away the Manufacturing Advantage: China Trade Drives Down U.S. Wages and Benefits and Eliminates Good Jobs for U.S. Workers*, 6 (Sept. 20, 2013), <https://www.epi.org/publication/trading-manufacturing-advantage-china-trade/> [https://perma.cc/GB7B-3QLV]; Louis Uchitelle, *Globalization, Union-Style*, AM. PROSPECT (Dec. 2010), <https://prospect.org/special-report/globalization-union-style/> [https://perma.cc/PKZ9-3BLP]; see also Bales, *supra* note 39, at 13–16.

⁷⁴ See Micheline Maynard, THE SELLING OF THE AMERICAN ECONOMY: HOW FOREIGN COMPANIES ARE REMAKING THE AMERICAN DREAM 2 (2009). *Dubuque Packing Company Inc.*, 303 NLRB 386, 396 (1991), *remanded* in *Food & Commercial Workers Local 150-A v. NLRB*, 880 F.2d 1422 (DC Cir. 1989), *enforced* 1 F.3d 24 (D.C. Cir. 1993).

⁷⁵ See *Those Were the Days*, *supra* note 35, at 300; Elisabeth Malkin, *Revisiting NAFTA in Hopes to Cure Manufacturing*, N.Y. TIMES (Apr. 22, 2008), <https://www.nytimes.com/2008/04/22/business/worldbusiness/22nafta.html> [https://perma.cc/JTM3-KZK6]; *Cf.* *Q-1 Motor Express, Inc.*, 323 NLRB 767, 769–70 (1997) (Chairman Gould, concurring).

⁷⁶ See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. 1–2 (2009), <https://www.epi.org/publication/bp235/> [https://perma.cc/CMZ9-8ET3].

union competition.⁷⁷ This policy shift has increased the incentives for employers to oppose organizing efforts to keep labor costs under control.⁷⁸

Another factor relates to the changes in the demographic composition of today's U.S. labor force.⁷⁹ The labor force today is much more demographically diverse than the labor force of the 1950s.⁸⁰ Female labor force participation rates have increased, as have the participation rates of racial minorities and immigrants.⁸¹ As with other institutions in the United States, the labor movement has had difficulty adapting to this new reality and finding meaningful connections with new entrants into the labor force. The changes in demographics have become more salient in recent years with the rise to prominence of social justice movements such as Black Lives Matter and the #MeToo Movement.⁸² As was the case in the 1950s and 60s, the spotlight that civil rights groups have shined on workplace issues has revealed that while advances were made in workplace rights over the last fifty years, workplace racial inequality has grown.⁸³ This well-deserved attention has also revealed "blind spots" in the labor movement concerning diversity, equality, and inclusion issues, such as the lack of diversity among the leadership ranks of the labor movement.⁸⁴ The focus on social justice issues has also revealed that there are some underlying tensions between traditional union goals and broader civil rights concerns, including the ongoing debate about the role that

⁷⁷ In the airline industry, for example, deregulation open airline routes to low-cost competitors, putting pressure on unionized carriers to lower their labor costs. See GREENHOUSE, *supra* note 36, 143–44. Notes, Greenhouse, "In the airline industry, annual wages and benefits averaged nearly \$42,000 per worker in 1982; at the new, nonunion carriers, total compensation averaged just \$22,000. That of course fueled demands for painful concessions from labor." *Id.* at 144.

⁷⁸ See *Beyond Labor Law*, *supra* note 71, at 70 n.4.

⁷⁹ *Id.*

⁸⁰ See Mitra Toosi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV. (May 2002), <https://www.bls.gov/opub/mlr/2002/05/art2full.pdf> [<https://perma.cc/3CZV-XZF7>]. Despite this shift, the Supreme Court limited the type of remedies available to undocumented workers to the traditional Board orders such as a cease-and-desist order and the posting of a notice at the employer's facility where the violation occurred. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142–52 (2002).

⁸¹ See Toosi, *supra* note 80, at 15.

⁸² See FOR LABOR TO BUILD UPON, *supra* note 1, at 43–45.

⁸³ See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 169 (2017).

⁸⁴ See Ana Avendaño, *#MeToo Inside the Labor Movement*, NEW LABOR F. (January 2019), <https://newlaborforum.cuny.edu/2019/01/24/metoo-inside-the-labor-movement/> [<https://perma.cc/MS3E-QLRZ>]; *Shepherd Tissue, Inc.*, 326 NLRB 369, 369–73 (Chairman Gould, concurring).

unionization in general and arbitration policies in particular play in the behavior of law enforcement officers.⁸⁵

Yet another factor is the shift in the economic base of the U.S. economy. Starting around 1970, the economy experienced a dramatic shift from manufacturing to service, with total manufacturing jobs declining from about 17.5 million to 12 million between 1997 and 2013.⁸⁶ This shift to a predominantly service and information-based economy, where a tradition of unionization is absent, has also affected unionization rates.⁸⁷ Moreover, the more considerable role of labor costs in service industries has promoted a rigid stand in employer opposition to union organizing. In the search for savings and efficiencies and aided by the increased ability to manage information, employers from all different sectors are expanding the use of contractors and temporary workers. Deregulation of U.S. industries, such as trucking (once dominated by the Teamsters Union) and the accompanying increased use of independent contractor truck drivers, has also played a role in the decline in U.S. unions given that independent contract workers are specifically excluded from NLRA coverage.⁸⁸

⁸⁵ See generally Stephen Rushin, *Police Arbitration*, 74 VAND. L.R. 1023 (2021).

⁸⁶ Robert E. Scott, *The Manufacturing Footprint and the Importance of U.S. Manufacturing Jobs*, ECON. POL'Y INST. 6 (Jan. 22, 2015), <https://www.epi.org/publication/the-manufacturing-footprint-and-the-importance-of-u-s-manufacturing-jobs/> [<https://perma.cc/V7MJ-2JTL>]. See also Zachary Schaller, *Decomposing the Decline of Unions: Revisiting Sectoral and Regional Shifts*, 76 INDUSTRIAL & LAB. RELATIONS REV. 387 (2023) (calculating that as much as forty percent of the decline in union elections between 1965 and 2010 was due to employment shifts from the manufacturing sector to the service sector).

⁸⁷ See JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 11, 13 (2014).

⁸⁸ See generally STEVE VISCELLI, THE BIG RIG: TRUCKING AND THE DECLINE OF THE AMERICAN DREAM (2016); MICHAEL H. BELZER, SWEATSHOPS ON WHEELS, WINNERS AND LOSERS IN TRUCKING DEREGULATION (2000). The Board has relied primarily on the so-called “right of control” test in deciding whether a worker is an employee or an independent contractor. Under the right of control test, the Board considers the following factors: the means of payment, who assumes the risk of loss, ownership of materials used to perform work, place of work, supervision, assignment of work, length of time for which the person is employed, and manner of performing work, and whether the putative independent contractor had “significant entrepreneurial opportunity for gain or loss.” *NLRB v. United Ins. Co.*, 390 U.S. 254, 256–60 (1968); *Roadway Package Sys., Inc.*, 326 NLRB 842, 854–55 (1998) (Chairman Gould, concurring); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 894–97 (1998) (Chairman Gould, dissenting). Over time, however, some reviewing courts began to pay particular attention to the “entrepreneurial opportunity” factor, with one court noting “while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents opportunities and risks inherent in entrepreneurialism.” *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). The Obama Board pushed back against the increasing focus on entrepreneurial opportunity. *FedEx Home Delivery*, 361 NLRB 55 (2014). The

Next, technological advances such as automation in traditionally union-dominated industries have disrupted traditional employment patterns in U.S. union manufacturing jobs, as has increased globalization/free trade and the movement of labor-intensive work overseas.⁸⁹ Automating production and delivery of service has resulted in the elimination of certain types of jobs, particularly manual and routine work.⁹⁰ While automation has also created new types of jobs, these jobs have not been filled by workers with a strong history of unionization activity.⁹¹ More recently, the information revolution resulting from the ability of computers to manage massive amounts of information has impacted the world of work in ways that we are just beginning to understand.⁹²

Trump Board reaffirmed the importance of the “entrepreneurial opportunity” factor, holding a group of airport shuttle van drivers to be independent contractors rather than employees. *SuperShuttle DFW, Inc.*, 367 NLRB 75 (2019).

⁸⁹ DAVID AUTOR, DAVID MINDELL, & ELISABETH REYNOLDS, *THE WORK OF THE FUTURE: BUILDING BETTER JOBS IN AN AGE OF INTELLIGENT MACHINES* 33 (2020).

⁹⁰ Technology has led also to the creation of different kinds of jobs. “Automation will destroy some jobs but also make workers who aren’t displaced more productive, raise overall incomes and create new kinds of jobs.” Peter Coy, *Will Robots Really Destroy the Future of Work*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/opinion/unions-jobs-robots-ai.html> [https://perma.cc/CFX2-D7PT] (citing to David Autor). See also Lee Dyer & Thomas Kochan, *Giving Wisdom to the Machines: How Can We Direct the development of Future Technologies so that Robots Compliment Rather than Replace Us?*, *Indus. Equip. News* (Aug. 31, 2017), <https://www.ien.com/product-development/article/20974215/giving-wisdom-to-the-machines> [https://perma.cc/AYM7-FB9B]; Kim Moody, *US LABOR IN TROUBLE AND TRANSITION: THE FAILURE OF REFORM FROM ABOVE, THE PROMISE OF REVIVAL FROM BELOW* 28–36 (2007).

⁹¹ See Moody, *supra* note 90.

⁹² The ability of the collective bargaining process to provide an avenue for handling technological changes has been hampered by the way in which the U.S. Supreme Court has interpreted the extent of duty to bargain in good faith. Section 8(a)(5) makes it an unfair labor practice for an employer “to refuse to bargain collectively with representative of his employees” and § 8(d) defines bargaining collectively as including the obligation to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(a)(5), (d). While holding in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), that the employer was required to bargain with representatives of its maintenance employees’ union with respect to the employer’s proposal to contract out maintenance work previously performed by bargaining unit employees, an oft cited influential concurring opinion by Justice Stewart, emphasized the limited nature of the holding. Regarding technological changes, Justice Stewart noted:

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and

Finally, compared to the 1930s and 1940s, in recent decades labor unions have spent a diminished percentage of their overall budgets on worker organizing, and this lack of financial support could, in the future, arguably impede the effectiveness of even highly pro-union labor reform legislation.⁹³ Research indicates that a third of the decline in unionization rates during the 1970s and 1980s could be attributed to reduced organizing activities by labor unions.⁹⁴ During the last thirty years of the twentieth century, unions spent fewer resources on organizing than in previous years, focusing instead on institutionalizing the gains obtained in the earlier part of the century.⁹⁵ While at the turn of the twentieth century there was a challenge by the *Change to Win* union group over this issue of the AFL-CIO's lack of focus on organizing, there is little evidence indicating that the labor movement has significantly changed its view or increased its expenditures regarding organizing activity.⁹⁶

III. REALISTIC REFORMS

Our argument so far has been that while labor law has played a role in the fate of unions over the last century, other factors, such as globalization, deregulation, structural changes to the labor and product markets, technological disruptions, and the labor movement's priorities, have also played an important role. In fact, in light of these factors, we aver that even the most wide-ranging labor law reform may not lead to meaningful reform absent positive change and commitment on the part of the labor movement, and generally salubrious societal and economic conditions. That is not to say, of course, that law does not matter or that strategic legal changes could help to reverse the fate of labor. Such reform,

particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

Id. at 411 (J. Stewart, concurring). See also *First Nat. Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–82 (1981). For an analysis of *First National* decision, see William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1 (1981).

⁹³ See FOR LABOR TO BUILD UPON, *supra* note 1, 70–72.

⁹⁴ RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 229–30 (1984). These practices were furthered by the policies and attitudes of George Meany and Lane Kirkland, former presidents of the AFL-CIO, indicating a lack of concern with low unionization rates. See FOR LABOR TO BUILD UPON, *supra* note 1, at 23, 139.

⁹⁵ See FOR LABOR TO BUILD UPON, *supra* note 1, at 138–45.

⁹⁶ *Id.*

however, should fly over the treetops, be both realistic and strategic, and limited so as to attract widespread support. In this section, we discuss three such proposals.

A. Mail Balloting

We begin with a proposal that one of the authors first offered when he served as NLRB Chairman over two decades ago—expanding the use of mail balloting in NLRB representation elections.⁹⁷ While seemingly modest in scope, we believe that this proposal could have a meaningful effect in making it easier for employees to exercise their right to vote in representation elections free from coercion and employer interference.⁹⁸

The NLRA provides the Board with the authority to establish the procedures and safeguards needed to protect the ability of employees to freely select a bargaining representative of their choosing.⁹⁹ Subject to its oversight, the Board has delegated the authority to make decisions regarding the process for conducting elections to the Board's Regional Directors. One of the many decisions that Regional Directors make is whether the elections should be conducted by manual (in-person) balloting or by using mail ballots (postal elections).¹⁰⁰

While the Board has indicated a preference for manual elections,¹⁰¹ it has allowed for mail balloting where circumstances make it difficult for employees to vote in manually conducted elections.¹⁰² Under this policy, Regional Directors “may reasonably conclude that conducting the election

⁹⁷ San Diego Gas and Elec., 325 NLRB.1143, 1143 (1998).

⁹⁸ See e.g., Glynn, *supra* note 64 (describing the recent organizing drive at various Starbucks facilities); Fessler & Bowman, 341 NLRB 932 (2004) (noting that in conducting elections the Board must “maintain and protect the integrity and neutrality of its procedures.”).

⁹⁹ NLRB v. A.J. Tower Co., 329 U.S. 324, 330–31 (1946) (noting that the Board has the discretion, within the constraints of §§ 9(a) and 9(c) to “adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.”).

¹⁰⁰ Diamond Walnut Growers, Inc., 316 NLRB 36, 40 (1995); Halliburton Services, 265 NLRB 1154, 1154 (1982); Nat’l Van Lines, 120 NLRB 1343, 1346 (1958).

¹⁰¹ “The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually.” NLRB CASE HANDLING MANUAL PART II § 11301 (2020).

¹⁰² London’s Farm Dairy, Inc., 323 NLRB 1057, 1057 (1997) (citing multiple examples including, Lykes Bros. S.S. Co., 2 NLRB 102, 108, 111 (1936); United Press Assns., 3 NLRB 344, 352 (1937); Pacific Greyhound Lines, 4 NLRB 520, 539 (1937); Pacific Lumber Inspection Bureau, 7 NLRB 529, 534 (1938); Salt River Valley Water Users Ass’n., 32 NLRB 460, 472 (1941); Cont’l Bus Systems, 104 NLRB 599, 601 (1953); and Nat’l Van Lines, 120 NLRB 1343 (1958)). See also Reynolds Wheels International, 323 NLRB 1062 (1997); Willamette Industries, 322 NLRB 856 (1997).

by mail ballot or a combination of mail and manual ballots” could be appropriate.¹⁰³ Mail-ballot representation elections might be conducted in situations where employees are “scattered” due to their job duties, where their schedules vary significantly, or where they are not present at a common location at similar times.¹⁰⁴ Mail ballots are also appropriate where a strike, lockout, or picketing activity is in progress.¹⁰⁵ In deciding whether to conduct a mail-ballot election, the Board will also consider “the desires of all the parties, the likely ability of voters to read and understand mail ballots and the availability of addresses for employees.”¹⁰⁶ While the decision to order a mail-ballot election cannot be based exclusively on budgetary considerations, “the Regional Director should also consider the efficient use of the Agency’s financial resources.”¹⁰⁷ Finally, the Board has also recognized that under “extraordinary circumstances,” other factors might be considered in deciding whether to conduct an election via mail.¹⁰⁸

When conducting a mail-ballot election, written notification is sent to voters at least twenty-four hours before the time and date on which mail ballots are to be dispatched.¹⁰⁹ Employees then have a window of time to return their ballots, usually two weeks (although additional time may be given in some circumstances).¹¹⁰ Procedures are in place regarding the materials sent to eligible voters,¹¹¹ as well as the process of receiving and counting the ballots.¹¹²

During his tenure as Chairman of the NLRB, Professor Gould sought to expand the use of mail ballots in representation elections.¹¹³ Gould

¹⁰³ San Diego Gas and Elec., 325 NLRB at 1144.

¹⁰⁴ *Id.* at 1143; Reynolds Wheels Int’l, 323 NLRB at 1062; London’s Farm Dairy, Inc., 323 NLRB at 1057.

¹⁰⁵ Diamond Walnut Growers, Inc., 316 NLRB at 36.

¹⁰⁶ San Diego Gas and Electric, 325 NLRB at 1143.

¹⁰⁷ NLRB CASE HANDLING MANUAL PART II § 1130 (2020).

¹⁰⁸ *Id.*

¹⁰⁹ This notice represents the start of the election for application of the Peerless Plywood rule (prohibiting captive audience speeches within a 24-hour period from the election day). Peerless Plywood, 107 NLRB 427, 429 (1953). NLRB CASE HANDLING MANUAL PART II § 11336 (2020).

¹¹⁰ *Id.* § 11336.2(d).

¹¹¹ *Id.* § 11336.2(c).

¹¹² *Id.* §§ 1136.4(a), 1136.5.

¹¹³ See LABORED RELATIONS, *supra* note 45, at 84–85; FOR LABOR TO BUILD UPON, *supra* note 1 at 88–94. See generally Shepard Convention Services, Inc., 314 NLRB 689, 689 (1994) (permitting mail ballots for “on-call” workers whose place of work was not centralized and who routinely worked second jobs off-site during the workday); Diamond Walnut Growers, Inc., 316 NLRB 36, 39 n.15 (1995) (noting that Chairman Gould would hold that a Regional Director has abused his discretion by denying a union’s request for a mail ballot election if (1) prior to the election the union advised the Regional Director that striking workers would be unable to get to the polls

avored the use of mail ballots in all cases where the process would conserve the resources of the Board and would have the effect of enfranchising employees.¹¹⁴ Gould advanced two key points in support of mail ballots. First, in making the point that mail balloting was a familiar and well-tested process, Gould noted that mail ballots were used for years in union representation elections both by the NLRB and the National Mediation Board (“NMB”), the agency that oversees elections under the Railway Labor Act (“RLA”).¹¹⁵ Second, Gould noted also that in

to vote because they had temporarily relocated to seek interim employment, and (2) in the subsequent manual election, a significant number of eligible voters did not cast ballots); Willamette Indus., Inc., 322 NLRB 856, 856 (1997) (Chairman Gould, concurring) (reasoning that the Regional Director abused his discretion by ordering a mail ballot election on the sole basis that the employer’s facility was eighty miles from the Board’s office, but asserting that if the Regional Director had established that an on-site election would have burdened the resources of the Regional Office, the decision would not have been an abuse of discretion); London’s Farm Dairy, Inc., 323 NLRB 1057 (1997) (permitting a mail ballot election for over-the-road drivers working out of four locations that were great distances apart where two full days of in-person voting would have been necessary at each location, where one location’s distance from the Regional Office would have required at least two overnight stays by Board agents, and where that same location had no building which could be used for balloting); Reynolds Wheels Int’l, 323 NLRB 1062 (1997) (permitting a mail ballot election where eligible voters were geographically centralized but worked highly staggered shifts such that an in-person election would have required three consecutive days of manual balloting); Cedar Tree Press, Inc., 324 NLRB 26, 26 (1997) (declining to invalidate a manual election on the basis that an absentee mail ballot was not provided to an employee who was on vacation the day of the election); Sitka Sound Seafoods, Inc., 325 NLRB 685, 685 (1997) (holding that the Regional Director’s decision to send mail ballots to cyclical employees on “layoff status” was proper because many such employees were widely scattered at the time of the election and would otherwise have been unable to vote); Coast North America (Trucking) LTD, 325 NLRB 980, 982–83 (1998) (Chairman Gould, dissenting) (arguing that the Regional Director’s refusal to conduct an election by mail at a long-haul trucking business was an abuse of discretion where employees were often away from the employer’s premises on long-distance trucking assignments for extended periods); San Diego Gas and Elec., 325 NLRB 1143, 1146–49 (1998) (Chairman Gould, concurring) (arguing that the Board should find mail balloting appropriate in all situations where it is necessary to conserve agency resources or enfranchise employees).

¹¹⁴ In responding to the reluctance by other Board’s members to rely on the conservation of resources as a sole reason for allowing the use of mail balloting, Gould noted, “in this time of austerity and scarce Agency resources, it is imperative . . . that Regional Directors conserve budget resources wherever and whenever possible.” San Diego Gas and Elec., 325 NLRB at 1147 (Gould, concurring).

¹¹⁵ *Id.* at 1146; London’s Farm Dairy, Inc., 323 NLRB at 1058. Under the RLA, the NMB sends each voter, approximately five weeks prior to the tally, a ballot package consisting of a ballot, instructions, and a ballot return envelope. In a standard mail ballot election, employees cast their ballot by marking the ballot and returning it to the NMB’s offices using the postage-paid return envelope sent to them by the NMB.

regulating elections, the Board's purpose is to ensure "that employees cast an uncoerced and well-considered vote."¹¹⁶ He asserted that by that measure, the experience with mail ballots had been positive.¹¹⁷ For instance, as of 1998, there was only one reported case of election coercion or abuse in mail ballot elections under the NLRA and three cases under the RLA, none of which had resulted in setting aside the election outcome.¹¹⁸ Thus, noted Gould, there was no evidence that in-person elections were better at advancing the Board's goal of protecting the employee's franchise. In fact, Gould turned that argument on its head by noting that in-person elections are more subject to abuse by employers as they can use their control over the workplace in ways that could interfere with the employee's ability to vote.¹¹⁹

The votes are tallied manually in the NMB's offices in Washington, DC. The results of the tally are provided to the participants in writing. *Overview and FAQ*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/overview-faq [<https://perma.cc/3T34-YTC9>] (last visited Mar. 17, 2023).

¹¹⁶ San Diego Gas and Elec., 325 NLRB at 1149 (Gould, concurring).

¹¹⁷ London's Farm Dairy, Inc., 323 NLRB at 1058; San Diego Gas and Elec., 325 NLRB at 1147 (Gould, concurring).

¹¹⁸ See London's Farm Dairy, Inc., 323 NLRB at 1058. The Board cited to *Human Development Assn.*, 314 NLRB 821 (1994) as the only example of election coercion in an NLRB-conducted election. The case involved a situation where the employer directed employees to provide it with their ballots. The Board also cited to *United Air Lines*, 22 N.M.B. No. 82 (1995), as one of the three cases under the RLA involving improprieties in mail ballot elections.

¹¹⁹ Gould described a story told by M.J. Levitt in his book, *CONFESSIONS OF A UNION BUSTER*, where the author explained how he considered it a victory in a representation election when the NLRB agents agreed to drive to the polling places (which were geographically dispersed in difficult to access areas) in vehicles owned and operated by the employer. San Diego Gas and Elec., 325 NLRB at 1148 (Gould, concurring opinion). Chairwoman McFerran makes a similar argument in *Aspirus Keweenaw* noting that "holding and election at the workplace – a space controlled by the employer, one of the parties to the elections – inherently risks jeopardizing employee free choice in a way that a neutral site does not." *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) (McFerran, concurring).

A recent illustration of a situation in which the employer seems to have used the control it exercises over the workplace is the 2021 union organizing effort involving an Amazon Corporation facility in Bessemer Alabama. In that case, even when the election was conducted via mail balloting, the employer sought to influence the employee's perception of the election process by installing a postal mail collection box in the employee parking lot in a location it had selected without consulting with the union or the Board. The employer covered the collection box with a tent and created the impression that the collection box was a polling location and that it had control over the conduct of the mail ballot election. After losing the election, the union filed objections to the election results. In November 2021, the Regional Director sustained several of the objections including the complaints about the use of the collection box. The Regional Director noted that by installing the collection box, Amazon "gave the false impression that it properly had a role in the collection and

While the Board doubled the use of mail-ballot elections during Gould's Chairmanship (1994–1998),¹²⁰ succeeding Boards have continued to use the manual election as the default process. But interest in the use of mail ballots was rekindled by the Covid-19 pandemic.¹²¹ In *Aspirus Keweenaw and Michigan Nurses Association*,¹²² the Board reviewed a Regional Director's decision ordering a mail-ballot representation election. The director had ordered the election to be conducted via mail balloting "based on the extraordinary circumstances presented by the Covid-19 pandemic."¹²³ While "reaffirming the Board's longstanding policy favoring manual elections," the Board took the opportunity to provide guidelines regarding the propriety of mail-ballot elections.¹²⁴ Expanding on the conditions stated in its Casehandling Manual, the Board identified several pandemic-related situations that would justify having Regional Directors order mail-ballot elections, such as situations where the employer cannot accommodate health or social distancing guidelines,¹²⁵ where the facility was experiencing a Covid-19 outbreak, and other "similarly compelling considerations."¹²⁶

control of mail ballots" and that the employer "had superseded the Board's authority regarding the control of the election." *Amazon.com Services, LLC*, Case No. 10-RC-269250 (R.D. Supp. Decision Nov. 29, 2021).

¹²⁰ See also *LABORED RELATIONS*, *supra* note 45, at 84–88.

¹²¹ See *Daylight Transportation, LLC*, at 31 RC-262633 (Decision and Direction of Election Aug. 12, 2020); *Touchpoint Support services, LLC*, 07-RC-258867 (Board Decision May 18, 2020); *Brink's Global Services USA, Inc.*, 29-RC-260969 (Board Decision July 14, 2020); *Savage Services corp.*, 21-RD-264617 (Board Decision Oct. 1, 2020); *Atlas Pacific Engineering*, 27-RC-258742 (Board Decision May 8, 2020); *TDS Metrocom, LLC*, 18-RC-260318 (Board Decision June 23, 2020); *PACE Southeast Michigan*, 07-RC-257046, (Board Decision Aug. 7, 2020); *Perdue Foods, LLC*, 370 NLRB No. 20, *1 (2020).

¹²² 370 NLRB No. 45 (2020).

¹²³ *Id.*, slip op. at 1.

¹²⁴ *Id.*

¹²⁵ The Board recognized that employers across the states were being subject to different mandates and regulations and thus concluded that a mail ballot election would be appropriate where a manual election could not be conducted without violating mandatory restrictions related to in-person gatherings. *Id.* at 6. In response to the pandemic, the General Counsel had earlier issued a memo which suggested manual election protocols. See NAT'L LAB. REL. BD., GENERAL COUNSEL MEMO 22-10, SUGGESTED MANUAL ELECTION PROTOCOLS (Jul. 6, 2020). The memo includes an array of social distances guidelines and cleaning protocols. *Id.* Where the employer refuses to abide or fails to satisfy these obligations, a mail-ballot election can be ordered. *Aspirus Keweenaw*, 370 NLRB, slip op. at 7.

¹²⁶ According to the Board, a mail ballot election would be appropriate where either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the election site is located is increasing, or the 14-day testing positivity rate in the county is 5 percent or higher. *Id.* at 5. The Board recognized that there could be other Covid-19 related circumstances that would justify a decision to use

Concurring in the result, Member (now Chairwoman) Lauren McFerran saluted her colleagues for recognizing the importance of adapting to the pandemic.¹²⁷ As Chairman Gould had advocated earlier, McFerran called on her fellow members to “stop treating mail-ballot elections as deviations that must be justified by Regional Directors case by case.”¹²⁸ McFerran encouraged her colleagues to go farther by “expanding and normalizing other ways to conduct representation elections. . . .”¹²⁹

McFerran invited the Board to “recognize how the world ha[d] changed since the Board first began conducting elections in 1935 and how the pandemic ha[d] accelerated those changes.”¹³⁰ McFerran noted that the Board had recently considered a proposal to revise the Board’s election procedures by allowing for absentee ballots for employees on military leave. McFerran surmised that in advancing the absentee ballot proposal for employees on military leave, the Board acknowledged the need to protect the voices of employees who cannot vote in person, at least under those limited circumstances.¹³¹ Plowing ground that Gould had plowed before, McFerran pointed to the extensive use of mail balloting by the NMB and also noted the mail-ballot representation election procedures of

mail ballots and provided Regional Directors with discretion to accommodate those other circumstances. *Id.* at 7. The NLRB for example, operated under a telework order from March 15 to April 1, which is one of the circumstances under which a mail-ballot representation election would be ordered. *Id.* at 3.

¹²⁷ *Id.* at 9.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ McFerran pointed to the increase, even before the pandemic, of tele and remote work. She continued, “The pandemic has compelled many institutions to fundamentally rethink how they do business. The time is right for the Board to ask whether our ‘decisions and rules are serving their statutory purposes.’” *Id.* at 10 (citing to Specialty Healthcare & Rehabilitation Center of Mobile, 356 NLRB 289, 289 (2010)).

¹³¹ The provision was part of a rulemaking proposal. 85 Fed. Reg. 45553 (Jul. 29, 2020). The proposal sought to modify the Board’s longstanding rule of not allowing absentee ballots. NLRB CASE HANDLING MANUAL PART II § 11302.4.

The Board has recognized also that there might be other circumstances that might justify changing aspects of the election (such as changing the day of an election) to protect the right of employees to vote. For example, recognizing its goal of establishing procedures which gives all eligible employees an opportunity to vote, the Board set aside an election in a two-employee bargaining unit, where few days before the election the employer notified the Regional Director that one of the employees was out of town on a delivery. The Board found it significant that the employee was unavailable through no fault of his own. *Yerges Van Liners*, 162 NLRB 1259 (1967). *Cf. Versailles Mfg.*, 212 NLRB 592 (1974) (recognizing the *Yerges*’ principle but finding that where the employee was absent by choice, there was no need to reschedule the election).

the Federal Labor Relations Authority.¹³² McFerran additionally pointed to the increased use of alternative modes of voting in other contexts, particularly in general public elections. She noted that all states allow for absentee (mail) ballots in at least some circumstances, and most states allow for absentee ballots without limitations.¹³³

Despite the increased use of mail ballots during the pandemic,¹³⁴ mail ballots continue to be the exception, not the rule, in NLRB representation elections. Concerns about the use of mail balloting in representation elections line up along four different themes: (1) mail ballots compromise the integrity of the election;¹³⁵ (2) participation rates are lower in elections conducted by mail;¹³⁶ (3) employees tend to be less informed in elections conducted by mail;¹³⁷ and (4) mail-ballot elections diminish the

¹³² In fact, she noted that union-representation elections in the airline and railroad industries (which are administered by the NMB), are conducted primarily by phone or via the Internet. Aspirus Keweenaw, 370 NLRB, slip op. at 11 (McFerran, M., concurring). The NMB has conducted representation election via telephone since 2002. Internet voting was implemented in 2007. The NMB reports that telephone and internet voting have been the primary means of conducting the representation elections under the Railway Labor Act since that time. NATIONAL MEDIATION BOARD, *Overview & FAQ*, https://nmb.gov/NMB_Application/index.php/overview-faq/ [<https://perma.cc/Z27G-VVGS>] (last visited Mar. 7, 2023). McFerran noted that since 2010, the Federal Labor Relations Authority has given Regional Directors the discretion to decide whether to conduct representation elections in-person, by mail, or electronically. FED. LAB. REL. AUTH., *Representation Frequently Asked Questions (FAQs)*, <https://www.flra.gov/resources-training/resources/information-case-type/representation-resources/representation> [<https://perma.cc/4FUR-BHZA>] (last visited Mar. 17, 2023).

¹³³ Aspirus Keweenaw, 370 NLRB, slip op. at 11.

¹³⁴ See KMS Com. Painting, LLC, 371 NLRB No. 69, slip op. at 1 (2022) (indicating that the Board has relied on mail ballot elections during the pandemic to protect the right of employee and the safety and health of those involved in the process and noting that in the first half of Fiscal Year 2022, the Board had conducted 304 mail ballot elections); see also CenTrio Energy South LLC, 371 NLRB No. 94, slip op. at 3 (2022).

¹³⁵ As to election integrity, the argument made by opponents is that a mail-ballot election is potentially subject to abuses since there is no oversight by a Board's agent of the actual casting of votes. San Diego Gas and Elec., 325 NLRB at 1150 (Hurtgen, M. and Brame, M., dissenting).

¹³⁶ Opponents argue that participation rates at elections conducted via mail balloting tend to be lower than participation rates in manual elections. For instance, the participation rate in 508 manual elections conducted between October 1, 2019, through March 14, 2020, was 85.2%. During a similar period, the participation rate in mail-ballot elections was 55%. Aspirus Keweenaw, 370 NLRB, slip op. at 2.

¹³⁷ Voting by mail, argue opponents, has the effect of limiting the ability of employers to campaign and to present employees with information to help them made an informed choice regarding representation. See San Diego Gas and Elec., 325 NLRB at 1150 (Hurtgen, M. and Brame, M., dissenting).

“symbolism and drama” of the election process.¹³⁸ We submit that none of those arguments fully justify the continuing reluctance on the part of the Board to expand the use of mail balloting.

As both NLRB Chairs Gould and McFerran forcefully argued, albeit twenty years apart, despite decades of experience with postal ballots by the NLRB, the NMB, and the FLRA, there is simply no evidence that mail-ballot elections are in any great danger of being compromised as compared to elections conducted in person.¹³⁹ Moreover, where concerns were raised, the Board appropriately addressed them. For instance, the NLRB, addressing an issue that has also arisen in general public elections,¹⁴⁰ has held that the solicitation and collection of ballots can constitute objectionable conduct, which will result in the setting aside of an election.¹⁴¹ Similarly, the Board has procedures to deal with other issues that might be somewhat unique to postal elections, such as whether to count the votes of employees who left their jobs after the mail-ballot election had started but before it had concluded.¹⁴²

Apparent differences in participation rates between postal and in-person elections also do not seem to justify the unequal treatment afforded to the two processes. Comparing participation rates between NLRB in-person and mail-ballot elections is likely uninformative. Under existing rules, the NLRB utilizes mail ballots only in circumstances where, for some reason, employees will confront difficulties in casting an in-person ballot. That is, these are elections in which one would expect participation rates likely to be lower.¹⁴³ Thus, the fact that such elections experience lower participation rates might be related to the difficulties that employees

¹³⁸ Opponents of expansive use of mail balloting argue that mail balloting reduces the symbolic importance of the act of voting and of the role that the Board plays in guaranteeing a free and fair election. *London’s Farm Dairy*, 323 NLRB at 1059 (Higgins, dissenting).

¹³⁹ *Aspirus Keweenaw*, 370 NLRB at 10 (McFerran, concurring).

¹⁴⁰ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹⁴¹ *Fessler & Bowman, Inc.*, 341 NLRB 932, 932 (2004); *Pro. Transp., Inc.*, 370 NLRB No. 132, slip op. at 1 (2021).

¹⁴² That was the situation in *KMS Commercial Painting LLC*, 371 NLRB No. 69, slip op. at 1 (2020). The employer challenged the ballots arguing that the votes of several employees should not be counted as they were not employed in the unit on the date that the votes were counted. *Id.* The Board affirmed the Acting Regional Director’s decision denying the employer’s request, reaffirming a Board’s longstanding decision that “in mail ballot elections, individuals are deemed to be eligible voters if they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office.” *Id.* (quoting *Dredge Operators, Inc.*, 306 NLRB 924 (1992)).

¹⁴³ This point was made by Chairman Gould in *San Diego Gas and Elec.*, in response to the dissenting members’ opinion noting that participation rates in in-person elections was about twenty percentage points higher than in mail ballots elections. 325 NLRB 1143, 1147 (Gould, concurring).

were already facing and not to the type of balloting used.¹⁴⁴ A more informative comparison might be to look at participation rates in NMB-conducted elections, which are primarily conducted by means other than in-person voting (i.e., mail, telephone, and internet).¹⁴⁵ Data from a study published in 2015 show that the participation rate in NMB elections conducted between 2010 and 2013 was eighty-five percent.¹⁴⁶ The experience with NMB elections suggests that if postal elections became the norm under the NLRA, participation rates would likely increase.

Finally, concerns that mail-ballot elections will tend to reduce the flow of information available to employees before casting their votes, as employers arguably lose some ability to campaign once the ballots are mailed and concerns that mail balloting will diminish the “symbolism and drama” of the election process seem equally misplaced. As to the former, we note that the only significant difference between mail-ballot and in-person representation elections is when employers are prohibited from conducting captive audience speeches. In the manual election context, employers can conduct captive audience speeches up to twenty-four hours

¹⁴⁴ Moreover, higher participation for manual elections may result in part from implicit or explicit intimidation, akin to phenomena in authoritarian and totalitarian societies with unusually high voter participation rates. For example, a voter may cast a ballot specifically to demonstrate to the boss or the person in authority that the voter has cast a ballot for the power holder’s preferred outcome. Mail ballots, by contrast, allow workers to vote “yes or no” or not vote at all and thus vote freely—away from employer observations. Note, however, that high voter turnout is not always associated with authoritarianism. Some democracies such as Australia achieve voter participation exceeding 90% by making voting compulsory, with the option to cast a blank ballot for no candidate. See Eric Lund, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31 WIS. INT’L L.J. 90, 98–101 (2013); Tracey Rychter, *How Compulsory Voting Works: Australians Explain*, N.Y. TIMES (Nov. 4, 2018), www.nytimes.com/2018/10/22/world/australia/compulsory-voting.html [https://perma.cc/SWV9-RK98].

¹⁴⁵ Aspirus Keweenaw, 370 NLRB slip op. at 10 (McFerran, concurring).

¹⁴⁶ Michael Elsenrath, *Effects on Voter Participation and Unionization Activity from Changes in Railway Labor Act Election Rules*, J. OF TRANSP. RSCH. BD., No. 2477, 4 (2015). Until around 2010, for a union to win representation under the Railway Labor Act, a majority of the employees *in a craft or class* needed to vote for unionization. *Id.* at 1. As a result, the votes of employees who did not participate in the election, had the same effect as a vote against the union. *Id.* Thus, it was common for employers to discourage employees from participating in an election. *Id.* at 2. In 2010, the NMB adopted a new voting rule for union representation. 75 Fed. Reg. 26062 (May 11, 2010). NMB voting procedures for representation were changed by adding a ‘No’ option and by providing that the majority of votes-cast will determine the outcome of the election. *Id.* at 26082. Under the modified rule, which mirrors the procedure followed under the NLRA, unions seeking representation only needed to get “yes” votes from the majority of the votes cast. The Elsenrath’s study shows that participation rates increased after the change in rules. Elsenrath, *Effects on Voter Participation and Unionization Activity from Changes in Railway Labor Act Election Rules*, J. TRANSP. RSCH. BD. at 1 (2015).

before the start of the election—the so-called *Peerless Plywood* rule.¹⁴⁷ In postal elections, the prohibition against captive audience speeches starts on the day the ballots are mailed and continues during the election window (two weeks per regular procedure). As they do now in mail-ballot representation elections, however, employers can engage in captive audience speeches before the ballots are distributed and continue to campaign through other means, such as distributing campaign materials in hard copy or electronically, even during the balloting period.¹⁴⁸ Thus, at most, mail balloting limits the ability of employers to use one type of campaign tactic for a slightly longer period than is the case in manual elections, a limitation that does not seem to materially diminish the ability of employers to engage in campaigning and informing employees of their views.¹⁴⁹

We make two points as to the concern that mail balloting diminishes the significance (“symbolism and drama”) of the representation-election process. First, the fact that casting votes by mail has become increasingly more common in other contexts (such as general public elections) would suggest that the historical distinction between in-person and other forms of voting has become less momentous and employees will understand the significance of casting a vote in a representation election regardless of the type of process used by the Board. Second, the Board’s ultimate goal in overseeing elections is not to protect the “symbolism and drama” of a particular process but to secure the ability of employees to cast their votes. Thus, whether the “symbolism and drama” of mail-ballot elections measures up to the level of in-person elections is not the appropriate metric. Instead, the focus should be on whether the mail ballot process better protects the ability of employees to cast their votes.

In short, we recognize that mail-ballot elections are not perfect and that, as postal elections have become more common, procedures might

¹⁴⁷ *Peerless Plywood*, 107 NLRB 427, 429 (1953).

¹⁴⁸ *San Diego Gas and Elec.*, 325 NLRB at 1148–49. *See also* LABORED RELATIONS, *supra* note 45, at 85.

¹⁴⁹ The U.S. Supreme Court addressed a similar concern in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In arguing that authorization cards (cards that employees sign indicating their interest in a representation election and support for the union) were an inferior method for assessing whether the majority of employees supported unionization, the employer argued that the problem with the card-check process was that employees were being asked to decide whether to support the union before the employer could present its side to the employees. The Court astutely noted that “Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act” *Id.* at 603. Thus, employers would normally have sufficient notice of the union’s organizing drive.

have to be revised.¹⁵⁰ However, using mail-ballot representation elections seems like a step in the right direction of protecting the employees' right to participate in a representation election without fear of coercion or intimidation. It is also an achievable reform that the Board can implement on its own, and to the extent that legislative guidance might be useful, such legislation might command the support of centrist legislators, whose support will be needed for any such reform to be enacted into law.

B. Meaningful Debate

One of the cornerstones of the NLRA's framework is the notion that to protect the § 7 right of employees to choose whether to form, join, or assist a labor organization, employees need to be informed about the collective bargaining process and educated about their choices.¹⁵¹ The framework for American industrial democracy Congress envisioned in enacting the Act is contingent on the free exchange of information or ideas and general "free debate."¹⁵²

Just as an informed and educated public is a critical component of the democratic process writ large, an informed and educated workplace electorate is important in the context of a representation election in at least

¹⁵⁰ For instance, in *KMS Commercial Painting, LLC*, 371 NLRB No. 69, slip op. at 1. The Board addressed the need for extending the election period and the handling of ballots. *Id.* at 2 (Ring, M. concurring).

¹⁵¹ William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L. J. 46, 485 (2007) [hereinafter *Independent Adjudication*]. *See also* Caterpillar Inc., 321 NLRB 1178 (noting that the cases interpreting § 7 of the NLRA have "drawn sustenance from First Amendment decisions . . . all of which promote wide open and robust speech as part of good public policy.") (Gould, concurring).

¹⁵² Noted Justice Jackson, in his concurrent opinion in *Thomas v. Collins*, 323 U.S. 516, 547 (1945):

Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication.

See also Linn v. United Plant Guards, 383 U.S. 53 (1966) (outlining the general current and historic regulatory model by noting that the framework for American industrial democracy envisioned by Congress in its enactment of the National Labor Relations Act is contingent on the exchange of information/ideas and general "free debate").

three respects.¹⁵³ First, in a representation election, employees must decide whether to choose the union as their bargaining representative. Even more so than in a political election, the issues and implications of the choice employees (i.e., the voters) face are not obvious. While employees might have a general understanding of what unions are, and polling data shows that most Americans have a generally positive view of unions,¹⁵⁴ they are unlikely to understand the intricacies of the collective bargaining process.¹⁵⁵ Particularly during the last thirty years, when U.S. unionization rates have hovered around ten percent, it is significantly likely that an average employee has neither been a union member nor has first-hand knowledge of what a union does.¹⁵⁶ Second, in a representation election, the voter has to evaluate promises that parties in asymmetric positions make.¹⁵⁷ In particular, the fulfillment of promises the union makes is contingent on the employees selecting the union as the bargaining representative and on the successful negotiation of a collective bargaining agreement. Thus, employees need to understand the basic parameters of the election and representation process to evaluate the statements made by both parties. Finally, the union is an “outsider” and thus faces a natural level of skepticism,¹⁵⁸ which can be overcome primarily through conversation and personal contact.

¹⁵³ See *Independent Adjudication*, *supra* note 151, at 485 (noting that “A well informed electorate needs information, which is the product of robust speech.”).

¹⁵⁴ Survey results consistently show that in general most Americans believe that unions have had a positive impact on the economy and that the decline in unionization rates is detrimental for working people. John Gramlich, *Majorities of Americans say Unions have a Positive Effect on U.S. and that Decline in Union Membership is Bad*, PEW RSCH. CTR., (Sept. 3, 2021), <https://www.pewresearch.org/fact-tank/2021/09/03/majorities-of-americans-say-unions-have-a-positive-effect-on-u-s-and-that-decline-in-union-membership-is-bad/> [<https://perma.cc/5TJS-3A66>].

¹⁵⁵ See Ray Gibney, Marick Masters, Ozge Aybat & Thomas Amlie, “*I Know I am, But What Are You?*”: *Public Perceptions of Unions, Members and Joining Intentions*, 7 SOC. SCI. 146 (2018) (comparing the perceptions that the public has about union members and the actual composition of unions).

¹⁵⁶ *Id.*

¹⁵⁷ See *Smith Co.* 192 NLRB 1098 (1971) (“Union promises of the type involved herein are easily recognized by employees to be dependent on contingencies beyond the [u]nion’s control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.”).

¹⁵⁸ A common theme used by employers in organizing campaign emphasizes the fact that employees have the right to deal with management directly and that a union as an outsider will interfere with that relationship. See William E. Fulmer, *Step by Step Through a Union Campaign*, HARV. BUS. REV. (Jul. 1981), <https://hbr.org/1981/07/step-by-step-through-a-union-campaign> [<https://perma.cc/6ZAP-HCD4>]. Initial press reports about the independent/local union victory in the organizing effort at the Amazon Staten Island, N.Y. facility, illustrates the importance of characterizing the union as an outsider. See Karen Weise

While there is general agreement about the importance of free debate and access to information during the representation process, there is substantial controversy over what that actually means.¹⁵⁹ In particular, and not surprising given its impact on representation election outcomes, the subject of employer and union access to employees during a representation election campaign has engendered significant controversy.

Unions and labor advocates believe that rules regarding what unions can and cannot do in reaching and talking to employees are confusing and arguably tilted in favor of employers, placing labor unions at a systemic disadvantage in communicating with employees.¹⁶⁰ They point to rules limiting the ability of *non-employee organizers* to enter the workplace as illustrative.¹⁶¹ While in the early years of the Act, the Supreme Court allowed access by non-employee organizers to the workplace under limited circumstances,¹⁶² later, the Supreme Court significantly reduced such access.¹⁶³

& Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html> [<https://perma.cc/CF38-P8SZ>] (noting that the different outcomes in Staten Island, N.Y., and an earlier unsuccessful effort in Bessemer, Alabama, might in part relate to “the advantages of organizing through an independent, worker-led union, which made it difficult for the employer to characterize the union as an “interloping ‘third party.’”). See *Former NLRB Chairman on Historic Amazon Union Vote*, BLOOMBERG (Apr. 1, 2022), <https://www.bloomberg.com/news/videos/2022-04-01/former-nlrb-chairman-on-historic-amazon-union-vote-video> [<https://perma.cc/5FLB-KKC3>].

¹⁵⁹ See LABOR LAW PRIMER, *supra* note 11, at 127–48.

¹⁶⁰ Michael M. Oswalt, *ALT-Bargaining*, 82 L. & CONTEMPORARY PBS. 89, 92–101 (2019).

¹⁶¹ *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 107–08 (1956); *Lechmere, Inc. v. NLRB.*, 502 U.S. 527, 540 (1992).

¹⁶² *Babcock & Wilcox Co.*, 351 U.S. at 112. In *Babcock & Wilcox*, the Supreme Court noted that while in general employers could deny outside union (non-employee) organizers access to the workplace for organizing purposes, to the extent that to exercise their § 7 rights employees need to “learn the advantages of self-organization from others”, there may be circumstances where access to non-employee organizers cannot be prohibited. *Id.* at 106–07, 112.

¹⁶³ In 1992, in a case involving non-employee union organizers handing out leaflets in a shopping center parking lot that was open to the public on an ongoing basis, the Court significantly limited the access to the workplace by non-employee organizers. *Lechmere Inc.*, 502 U.S. at 540. In *Lechmere*, the NLRB had upheld union organizer access to the parking lot since it was freely accessible to the public and thus did not involve a direct trespassory incursion on employer property rights. *Id.* The Supreme Court, however, overruled the NLRB and held that said parking lot did constitute protected employer private property not subject to access to outside union organizers. *Id.* at 541.

In *Cedar Point*, the Supreme Court held unconstitutional a specific provision in the California Agricultural Labor Relations Act that granted union organizers access to employer property three hours per day during the 120-day season when agricultural

Labor unions also point to the rules limiting when and where *employee organizers* can talk to fellow employees,¹⁶⁴ whether employees can wear buttons advancing the union's message,¹⁶⁵ and under what conditions employees can use work phones, computers, and bulletin boards to share information about the union as examples of their limited ability to mount a vigorous organizing campaign.¹⁶⁶ These rules, unions argue, have become increasingly hyper-technical and difficult to apply, further interfering with the ability of *employee organizers* to communicate with other employees during organizing drives.

For instance, early in the development of the Act, the Supreme Court held that a rule prohibiting *all solicitation by employees on company property* constituted an unfair labor practice.¹⁶⁷ Employers, however, were allowed to prohibit *solicitation* during “*working time*” although not during “*working hours*.”¹⁶⁸ The Board subsequently distinguished *rules banning solicitation* from *rules banning distribution of literature*, sustaining a company rule that prohibited distribution of literature in working areas even during non-working time on the ground that distribution in working areas carried with it safety risks due to possible

workers are working in the fields. 141 S. Ct. at 2074. The Supreme Court held that this California legislative provision, which had been previously upheld by the California Supreme Court, violated the “takings clause” of the U.S. Constitution. *Id.* In a concurring opinion, Justice Kavanaugh explicitly noted his strong support for a broad employer property rights interpretation of the NLRA of the kind previously enunciated by the Court in its *Babcock & Wilcox* and *Lechmere* precedents. *Id.* at 2080–81. While *Cedar Point* arose under a different statute and is not directly applicable to the NLRA, further erosion of access by union organizers to the workplace does not seem far-fetched.

¹⁶⁴ *Republic Aviation v. NLRB.*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Cent. Hardware Co.*, 181 NLRB 491 (1970); *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979); *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079 (8th Cir. 2016).

¹⁶⁵ *Republic Aviation*, 324 U.S. 793; *NLRB v. Starbucks Corp.*, 379 F.3d 70 (2d Cir. 2012).

¹⁶⁶ *Purple Commc'n, Inc.*, 361 NLRB 1050 (2014); *Register Guard*, 351 NLRB 1110 (2007).

¹⁶⁷ *Republic Aviation*, 324 U.S. 793. For a discussion of the early cases on this area, see generally William B. Gould IV, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964) [hereinafter *Union Activity on Company Property*]; William B. Gould IV, *Union Organizational Rights and the Concept of Quasipublic Property*, 49 MINN. L. REV. 505 (1965).

¹⁶⁸ *Essex Int'l Inc.*, 211 NLRB 749 (1974). The distinction was based on the understanding that while the term “working time” was “sufficiently clear” in communicating to employees that the prohibition was not applicable to “solicitation during break time or other periods when employees are not actively at work”, the term “working hours” was “prima facie susceptible of the interpretation that solicitation is prohibited during all business hours.”

littering.¹⁶⁹ The Board also distinguished *solicitation* from a *conversation* or a *talk*, reasoning that solicitation “prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employers’ productivity if the individuals involved are supposed to be working.”¹⁷⁰ Based on the distinction between solicitation and conversation, the Board found that rules prohibiting employees from completely talking about unionization-related topics even during working time would be illegal unless the employer concurrently prohibited all conversations during working time.¹⁷¹ The Board has held, however, that an employer can prohibit conversations that veer into solicitation, even if the employee organizer does not present or ask the other person in the conversation to sign an authorization card.¹⁷²

In sum, the current set of rules regarding employer and union access to employees does not seem conducive to encouraging the flow of information that employees need to reach an informed decision regarding their choice to form, join, or assist the organizing effort. *Non-employee organizers* have basically no access to the workplace, and *employee organizers* are subject to rules that contain very fine distinctions which, as a result, are likely to limit rather than encourage information sharing.¹⁷³

¹⁶⁹ Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962); see also *Union Activity on Company Property*, *supra* note 167, at 77–81 (criticizing Stoddard-Quirk).

¹⁷⁰ Wal-Mart Stores, Inc., 340 NLRB 637 (2003), *overruled* by Wynn Las Vegas, 369 NLRB No. 91 (2020).

¹⁷¹ W.W. Grainger, Inc., 229 NLRB 161, 167 (1977).

¹⁷² ConAgra Foods Inc. v. NLRB 813 F.3d 1079 (8th Cir. 2016); Wynn Las Vegas, LLC, 369 NLRB No. 91 (2020) (“in determining whether a statement amounts to solicitation of union support, neither the presentation of an authorization card for signature at the time nor the duration of the conversation are determinative.”).

If these various distinctions were not difficult enough to apply, the Board has also held that the rules that derive from them are just presumptively valid or invalid, as the case might be, and that the presumptions can be overcome with contrary evidence. Thus, for example, the presumption against prohibiting solicitation in non-working spaces can be rebutted if the employer can show that the rule is necessary to maintain production or discipline, as it might be the case in workplaces such as hospitals, retail stores, and restaurants, where the patient/customers share the same workspace with employees even during non-working time. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *May Dep’t. Stores Co.*, 59 NLRB 976 (1944).

¹⁷³ In addition to the rules discussed in the text, there are a variety of other rules that present similar challenges for unions, such as rules pertaining to the use of workplace email for organizing purposes. There are also a somewhat different set of standards regarding workplace rules prohibiting the wearing of union buttons and other insignia. Under *Republic Aviation*, such rules were held to be presumptively invalid unless the employer could prove special circumstances such as safety standards or public image concerns. 324 U.S. 793 (1945). Applying that rule, the Board has protected the right of fast-food employees to wear buttons with messages like “Fight for 15”, and the right of telephone technicians to wear buttons stating, “Cut

Such a state of affairs is inconsistent with the Act's longstanding goal of promoting and securing a "free debate" before a representation election.¹⁷⁴

It is difficult to envision a scenario in which the U.S. Congress will enact the type of labor law reform necessary to correct such an imbalance. And, having held that § 8(c) amounted to an "explicit direction from Congress to leave noncoercive speech unregulated"¹⁷⁵ and that the amendment to § 7 (also part of the Taft-Hartley Act) "calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization,"¹⁷⁶ the Supreme Court, particularly with its current composition, is unlikely to uphold attempts by Congress to correct the situation. This "constitutional solicitude for employer free speech and its newfound constitutional protection of employer property against union access,"¹⁷⁷ will likely doom any major attempt to labor law reform.

As a possible solution to the access issue, we propose the use of organizing campaign debates, an idea which one of the authors explored in a series of articles several years ago.¹⁷⁸ The basic idea proposed by Professor Bierman was to encourage the Board to adopt a policy of hosting a series of pre-election debates between employers and unions at the employer's premises. The Board would have sponsored and administered the debates. Professor Bierman suggested that such debates could be

the "Crap! Not My Healthcare" and "WTF Where's The Fairness." In-N-Out Burger, Inc., 365 NLRB No. 39 (2017); Pacific Bell Telephone Co., 362 NLRB 885 (2015). On the other hand, the Board found in favor of the employer in cases in which the employees displayed a button that read "Justice NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30", and "Ma Bell is a Cheap Mother." Starwood Hotels & Resorts, 348 NLRB 372 (2006); Southwestern Bell Telephone Co., 200 NLRB 667 (1972).

¹⁷⁴ The workplace, has noted the Supreme Court, is "the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to that status as employees." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974).

¹⁷⁵ *Chamber of Com. v. Brown*, 554 U.S. at 68 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

¹⁷⁶ *Id.* at 69.

¹⁷⁷ See *FOR LABOR TO BUILD UPON*, *supra* note 1, at 29 (citing *Chamber of Com. v. Brown*, 554 U.S. 60 (2008) and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)).

¹⁷⁸ *Id.* at 785. See also *Toward a New Model*, *supra* note 60, at 34; Leonard Bierman, *Extending Excelsior*, 69 *IND. L.J.* 521, 530 (1994). The idea had its origin in a proposal included in the 1977-78 legislative proposal to reform the NLRA. See S. 2467, 95th Cong., 2d Sess., 124 *CONG. REC.* S874 (daily ed. Jan. 31, 1978) (introduced by Sens. Williams and Javits); S. 1883, 95th Cong., 1st Sess., 123 *CONG. REC.* S12,226 (daily ed. July 19, 1977) (introduced by Sens. Williams and Javits). The reform proposal included a provision adopting an approach which the Board had briefly followed in the 1950s of giving unions an in-plant "right of reply" to captive audience speeches.

integrated into the regulatory framework (1) through a congressional mandate giving the Board authority to host a series of debates on working premises during working time;¹⁷⁹ (2) through a “remedial-type” process in which a series of debates would trigger only if the employer were to deliver a captive audience speech;¹⁸⁰ or (3) simply as an option available to the parties at their discretion.¹⁸¹ Professor Bierman believed that the type of debates he was proposing “would give unions additional opportunities to present their positions to employees” and help remedy “the advantage . . . enjoyed by employers during election campaigns.”¹⁸² He surmised that the debates would serve as a substitute for the right of employers to deliver captive audience speeches and for the right of unions to engage in “home visits.”¹⁸³

We argue that a proposal along the parameters Professor Bierman outlined would serve the goal of informing and educating the workplace electorate more effectively than the current system of limited access to non-employee organizers and hyper-technical rules applicable to employee organizers. However, considering the closely divided U.S. Congress and recent Supreme Court’s jurisprudence on employer speech and property rights in the workplace, any attempts to mandate employers to host a debate on its premises or even the triggering of a debate as a remedial response to a captive audience speech, seem unlikely to be enacted into law. And even if that were to happen, it is unlikely to withstand constitutional challenge.

Thus, we advance the following modification to Bierman’s debate idea. We propose that the Board schedule, on its own initiative, a debate

¹⁷⁹ See *Toward a New Model*, *supra* note 60, at 34. Bierman noted that the precise details of the proposal, such as the question of whether employees would be compensated for the debate time, needed to be decided. Bierman also noted that the specific format and structure of the debates might have to be adjusted depending on the circumstances of specific workplaces. *Id.* For instance, he noted that in larger bargaining units the Board might have to schedule multiple debates to allow all employees to attend. *Id.*

¹⁸⁰ Under this option, debates will only occur if the employer “acted” first by delivering a captive audience speech. *Id.* at 33. Effectively, under this approach, the employer could avoid a debate by restraining from giving a captive audience speech. *Id.*

¹⁸¹ Bierman recognized various possible concerns with the debate proposal. He noted, for instance, that during the debate, the parties could engage in speech that would be outside the protection of § 8(c) and lead to protracted litigation. He also recognized that the debates could degenerate into “ideological tirades and mud-slinging”, and thus, provide little value. See Comment, *supra* note 34, at 785 (Bierman Penn Comment).

¹⁸² *Id.*

¹⁸³ Professor Bierman was concerned about the “home visits” doctrine impact on employee privacy and desire to separate their work and personal lives. See *Toward a New model*, *supra* note 60, at 33–35.

or series of debates between the employer and the union. The debate or debates could be initiated in several alternative ways. The Board could start by simply requesting the employer to allow the Board to conduct a debate on the premises during working time. This request, if acquiesced to, would circumvent the issues raised in cases like *Lechmere* and *Cedar Point Nursery* regarding interference with employers' property rights. The Board's request for access will not limit the ability of employers or unions to engage in other forms of campaigning as allowed under current law. One might wonder whether employers would ever agree to such a request. As we discuss more fully below in the context of neutrality agreements,¹⁸⁴ there are circumstances in which employers, for a variety of reasons, do not adopt an adversarial posture in organizing efforts and even agree to remain neutral during the campaign or to voluntarily recognize the union upon a showing of majority support. Those employers will likely agree to an NLRB invitation to conduct an on-the-premises debate. Similarly, companies that have built a socially progressive or conscious corporate image might find it difficult to oppose a debate request.¹⁸⁵

If the employer rejects the Board's request for access to conduct a debate or as an alternative to requesting access to the employer, the Board could, on its own, sponsor a debate or series of debates outside the workplace and outside working hours. The debates could be held in either a virtual or in-person format.

If in person, the debate would be held *at a "neutral" site* (e.g., a local auditorium, school gymnasium, concert hall, etc.).¹⁸⁶ In-person

¹⁸⁴ See *infra* notes 199–73 and accompanying text.

¹⁸⁵ For instance, in recent years there have been a number of organizing efforts at news agencies such as National Public Radio Digital, Vox Media Union, New York Daily News, and Wired, among others. See Angela Fu, *Not Just a Wave, but a Movement: Journalists Unionize at Record Numbers*, POYNTER (Apr. 21, 2022), <https://www.poynter.org/business-work/2021/not-just-a-wave-but-a-movement-journalists-unionize-at-record-numbers/> [<https://perma.cc/6U8W-WS8Z>]; Digital Media Unionization Timeline, CULTURAL WORKERS ORGANIZE, <https://culturalworkersorganize.org/digital-media-organizing-timeline/> [<https://perma.cc/J7V4-HNGN>] (last visited Mar. 17, 2023). It will seem highly dissonant for a news organization to bypass the opportunity for such a debate and to deny its employees of such a forum. While media organizations might be somewhat uniquely situated, other organizations that have adopted progressive human resources practices or that have embraced social justice causes, might face similar pressure.

¹⁸⁶ We note that holding NLRB-sponsored events outside the workplace is not a new concept for the Board. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 474 (1995). The Board's Casehandling Manual envisions that there might be situations in which an election might have to be conducted off the employer's premises. While the manual states a clear preference for elections to be held "somewhere on the employer's premises", it also recognizes that there might be good reasons for finding an alternative location. The manual goes on to note that an election can be conducted off the employer's premises "where there are egregious or pervasive employer unfair labor practice." CASEHANDLING MANUAL (PART TWO) REPRESENTATION

representation-election debates could take many forms. While we would encourage experimentation with different formats in light of specific circumstances, we suggest that in advance of the debate, the Board could provide employees with general information about the representation election and the collective bargaining process.¹⁸⁷ The Board could also elicit questions from employees in advance of the debate to make the debate more responsive to employee concerns in the particular bargaining unit.¹⁸⁸

PROCEEDINGS § 11303.2. *See Fieldcrest Cannon, Inc.*, 318 NLRB at 474 (ordering that a rerun election be conducted off the employer's premises where the employer had engaged in threats of discipline, discharge, and plant closing, coercive interrogation, discriminatory reassignments.) In deciding whether to conduct the election off premises, the Board has directed the Regional Directors to consider: (1) the reasons given by the parties for whether the election should be conducted off the premises or not; (2) the extent and nature of the employer's prior unlawful and objectionable conduct; (3) the advantages available to the employer if the election is conducted on the employer's premises; and, (4) the Regional Director's assessment of the feasibility of the alternative site. *Austal USA LLC*, 357 NLRB 329 (2011); *2 Sisters Food group, Inc.*, 357 NLRB 1816 (2011). To the extent that our proposal involves a less momentous event in the organizing process (i.e., a debate instead of an election), there should be no question as to the Board's authority to sponsor such event.

¹⁸⁷ Our proposal is informed by the work of researchers at Stanford University's Center for Deliberative Democracy (CDD). The Center for Deliberative Democracy (CDD) is "devoted to research about democracy and public opinion obtained through Deliberative Polling." *See Stanford Center for Deliberative Democracy*, STANFORD UNIV., <https://cdd.stanford.edu/> [<https://perma.cc/KPT7-33HZ>] (last visited Mar. 17, 2023). Since 2003, the CDD has used a process it refers to as "deliberative polling" as an approach to increase public awareness of important policy issues through the use of sampling, deliberation, and polling. James S. Fishkin & Robert Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284 (2005); James Fishkin et al., *Is Deliberation an Antidote to Extreme Partisan Polarization? Reflections on "America in One Room"* (Stanford Ctr. for Deliberative Democracy, Working Paper), <https://cdd.stanford.edu/mm/2020/11/A1R-for-APSA-C.pdf> [<https://perma.cc/6KWK-DRFG>]. Normally used in the context of broad public policy debates (e.g., climate policies), the process encourages participants to become better informed in policy debates before expressing an opinion on a particular matter. At the core, the deliberative polling process involves administering a questionnaire of a random and representative segment of the public; bringing a selected sample of participants to small group discussions; providing participants with briefing materials on the topics to be discussed; allowing the small groups to develop a set of questions to be presented to a panel of experts; provide the participants the experts' answers, and administer another questionnaire to capture the participant's more informed decisions. *See also Briefing Materials, Center for Deliberative Democracy at Stanford University*, STANFORD UNIV., <https://cdd.stanford.edu/briefing-materials/> [<https://perma.cc/E2U8-JD25>] (last visited Mar. 17, 2023).

¹⁸⁸ While this might seem as an unusual role for the Board, we point out that the Board, as most governmental agencies do, has an accessible website which invites the

We recognize that incentivizing employees to attend debates after working hours might present a challenge. Some employees might find it inconvenient to attend a debate about work outside of working hours or might be concerned that they might face the employer's retaliation simply by showing up. However, we believe that several factors might prompt employees to attend. First, the presence of the Board as the sponsoring entity and the legitimacy that flows from the Board's involvement might alleviate concerns about retaliation. Second, one would expect that the group of employees who initiated the organizing drive, or those who have indicated an interest in union representation by signing authorization cards, will attend and exercise some pressure on their peers to accompany them. Third, data in other contexts indicates higher public engagement in high-salience elections.¹⁸⁹ As noted above, participation rates in representation elections have been consistently robust over the history of the Act, suggesting that the "voters" in representation elections are highly

public to submit questions. See *Contact Us*, NLRB, <https://www.nlr.gov/contact-us> [<https://perma.cc/YJ7T-Q45U>] (last visited Mar. 17, 2023). The Board also has an active social media presence with pages in Facebook, Twitter, and other platforms. *NLRB*, FACEBOOK, <https://www.facebook.com/NLRBpage> [<https://perma.cc/9XV9-2D6W>] (last visited Mar. 17, 2023); *NLRB*, TWITTER, <https://twitter.com/nlr> [<https://perma.cc/JVF7-VGJ4>] (last visited Mar. 17, 2023).

One possible concern is that employers might perceive the Board's role in organizing and moderating such debates as in conflict with the Board's role in prosecuting violations of the Act. That is, the employer might be concerned that the Board might take the opportunity to gather evidence of possible unfair labor practices. A similar concern was raised in 2015, when the California Agricultural Labor Relations Board (CALRB) considered adopting a rule that would have allowed the CALRB to provide worker education on employer property. See William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U. CAL. DAVIS L. R. 1243, 1258–61 (2017). To address the concern of the dual role played by the CALRB, the proposal provided for the creation of a special unit within the agency that would be in charge of providing the education but that would be "walled off" and take no part in the investigation or prosecution of unfair labor practice complaints that might arise during the organizing campaign. *Memorandum from Thomas Sobel, Admin. Law Judge, & Eduardo Blanco, Special Legal Advisor, on Staff Proposal for an education Access Regulation for Concerted Activity to the Bd.*, 23, 37–38 (Nov. 23, 2015), <https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/StaffRecommendationWorksiteAccess.pdf> [<https://perma.cc/CZS3-BLH2>]. An alternative to creating a new division within the NLRB, as proposed by the CALRB, would be to divide the responsibilities regarding the debates to Board personnel from a region that will not be involved in prosecuting any possible unfair labor practice claim that might be filed during the organizing campaign or thereafter.

¹⁸⁹ See Linuz Aggeborn, et. al., *Does Election Salience Affect Immigrant Voter Turnout?*, COMPARATIVE POLITICS (May 29, 2020), <https://preprints.apsanet.org/engage/apsa/article-details/5ecfc00af1760a001a2eb472> [<https://perma.cc/G7BA-FXNQ>] (noting that the difference in voting rates between local and national elections has been attributed, at least in part, to the salience or importance of the election for the voter.)

engaged in the process.¹⁹⁰ It is not unreasonable to assume that a similar level of engagement will carry over to the debate stage of the process.

But to the extent that one thinks such debate will be ineffective as being poorly attended, the Board could also consider holding debates in a virtual or remote format. This alternative, which might have been considered technologically infeasible just a few years ago, is now entirely within reach given the expansive use of remote technologies during the Covid-19 pandemic.¹⁹¹ Platforms such as Zoom, Microsoft Teams, Skype, and others are readily available.¹⁹² Schools, businesses, and government have all, to some extent, experimented with conducting some operations remotely.¹⁹³ As various observers have noted, over the last two decades, the internet has replaced the old “town square” as the place where debate takes place,¹⁹⁴ and in the workplace, social media has become a virtual “union hall” where employees connect on issues of common interest.¹⁹⁵ And, while we recognize that access issues continue in some communities, internet connectivity is better now than at any point in history, suggesting that the trend will continue.

The Board could choose to conduct the debate in a synchronous format.¹⁹⁶ This would be the format closest to an in-person format. The event would take place in real-time. However, participants (the employer, the union, and the employees) could join from different locations.

The Board instead could hold the debate in an asynchronous format.¹⁹⁷ As with the in-person debate format, the Board could solicit

¹⁹⁰ See *supra* notes 132–39 and accompanying text.

¹⁹¹ For instance, workplaces of various sorts are evaluating the benefits and costs associated with allowing employees to work remotely. Educational institutions are reassessing the use of distance learning, having had the opportunity to conduct a natural experiment regarding the effectiveness of that method of instruction.

¹⁹² See Mike Yeomans, *Is Remote Work Working? 7 Insights Into the Future of Remote Work*, RAVE (Jan. 25, 2022), <https://www.ravepubs.com/7-insights-into-the-future-of-remote-work/> [<https://perma.cc/H3PM-7Y2K>].

¹⁹³ See Bryan Lufkin, *Why Zoom Fatigue Won't Last Forever*, BBC (Mar. 9, 2021), <https://www.bbc.com/worklife/article/20210308-why-zoom-fatigue-wont-last-forever> [<https://perma.cc/7MB8-DY6Z>].

¹⁹⁴ Greg Roumeliotis, *Musk Gets Twitter for \$44 Billion, to Cheers and Fears of 'Free Speech' Plan*, REUTERS (Apr. 2, 2022), <https://www.reuters.com/technology/exclusive-twitter-set-accept-musks-best-final-offer-sources-2022-04-25/> [<https://perma.cc/7XG3-HBU6>] (quoting entrepreneur Elon Musk in the occasion of his acquisition of Twitter).

¹⁹⁵ Rafael Gely and Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J. OF L. & TECH. 288 (2007).

¹⁹⁶ See *What Are the Benefits of Synchronous Online Learning*, (Mar. 12, 2021), <https://adaptika.tech/what-are-the-benefits-of-synchronous-online-learning/> [<https://perma.cc/RB2A-RVMY>].

¹⁹⁷ See *Ask MIT Experts: Understanding the Advantages of Asynchronous Learning*, (Jan. 19, 2021), <https://curve.mit.edu/ask-mit-experts-advantages-of->

questions in advance from employees and submit those questions to the employer and the union. Employees could submit questions confidentially to the Board, and the Board then could make those questions available to the employer and the union. The employer and the union could then meet virtually at an agreed-upon time and respond to the questions posed by the Board's representative, or the employer and the union could submit their responses to the Board individually. The questions and answers could be uploaded into an NLRB-controlled web page, to which employees would have access and which would be accessible for watching at a convenient time. One advantage of such asynchronous materials is that viewing would be completely discretionary and voluntary on the part of workers in the voting bargaining unit.

In addition, or as an alternative approach to incentivize attendance to the type of debates we propose, the Board might consider compensating employees for attending debates, the same way that many court systems provide members of the public a nominal amount when selected for jury duty.¹⁹⁸ For example, the monetary incentive has been proposed in other contexts as a way of incentivizing voters to become politically involved.¹⁹⁹ While not conclusive, research indicates that meaningful monetary incentives—either cash rewards or lotteries—result in higher voter turnout.²⁰⁰ We aver that monetary incentives, even if modest, could have an added positive effect in the union-representation context. First, as noted above, given the importance of the event (e.g., a union organizing campaign) in employees' lives, we expect that there would be some basic level of interest in the process. Second, it is likely that in this context, even a modest monetary incentive could have a positive effect on attendance, as the point of comparison for workers might be their hourly wage, which in many sectors is likely lower than the amount experiments show is sufficient to increase voter engagement in elections.²⁰¹

asynchronous-learning [<https://perma.cc/5ZHN-XJCT>] (defining asynchronous learning as “learning done on your own time, at your own pace.”).

¹⁹⁸ Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OREGON L. R. 898 (1995); *Jury Pay*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/jury-service/juror-pay#:~:text=Federal%20jurors%20are%20paid%20%2450,in%20lieu%20of%20this%20fee> [<https://perma.cc/H58Y-J2Y3>] (last visited Mar. 17, 2023).

¹⁹⁹ See Costas Panagopoulos, *Extrinsic Rewards, Intrinsic Motivations and Voting*, 75 THE J. OF POL. 266 (2012). See also Robert C. Pozen and Nicco Mele, *How do we get people to vote? Let's try financial incentives*, WASH. POST (Apr. 4, 2019), <https://www.washingtonpost.com/opinions/2019/04/04/how-do-we-get-people-vote-lets-try-financial-incentives/> [<https://perma.cc/5X85-2FLN>] (discussing various experiments with cash incentives in local elections).

²⁰⁰ Panagopoulos, *supra* note 199, at 277.

²⁰¹ For example, Panagopoulos showed that a \$25 reward raised turnout in municipal elections by almost 5 percent. *Id.* at 277. Wage data shows that in several occupational groups in major metropolitan areas the average hourly wage is lower

The debate proposal enjoys several advantages. First, because employers would not be required to open their property to the union, successful constitutional challenges are unlikely. Further, because the debates would be part of the Board's function in conducting and administering the representation election, an area in which the Board has broad discretion,²⁰² successful statutory challenges would also be unlikely. Second, and particularly related to the virtual or remote option, the remote format would lower the cost of attendance (since employees could watch the debate from home) and, if conducted asynchronously, would allow the employee to watch the debate whenever is convenient for the employee. This, in turn, should increase the likelihood of employee participation. Finally, the virtual debate provides an added level of anonymity and confidentiality for employees. Employees who might fear that attending an in-person debate might subject them to employer retaliation would be able to attend or listen to the debate without ever having to disclose their identity.

One would expect that unions would be supportive and willing to participate in such debates, as it presents them with an opportunity to communicate with employees under the auspices of a neutral governmental body and in a location not controlled by the employer. While employers might be less enthusiastic about participating in Board-sponsored debates, we believe they would be unlikely to skip the debate and pass on the opportunity to shape the discussion along the lines of their campaign strategy.

As with other proposals discussed above, some logistics must be addressed. For instance, it will have to be decided at what point in the organizing process the debates will be conducted. One would expect that the debates will be scheduled only after the union has filed a petition for an election, which itself requires a showing of at least thirty percent support from the employees in the appropriate bargaining unit. Second, while the debates would occur off-site and outside of working hours, there

than \$20. *See Average hourly wages for occupational groups and areas by job characteristic, civilian workers 2020*, U.S. BUREAU OF LAB. STATISTICS, <https://www.bls.gov/mwe/avg-hourly-wages-for-union-nonunion-fulltime-parttime-workers.htm> [<https://perma.cc/LDJ7-SPWM>] (last visited Mar. 17, 2023). Thus, one can surmise that relatively modest incentives could have the intended effect of encouraging workers to attend the type of debate we are proposing.

²⁰² For example, the Board exercises broad discretion regarding the selection of the appropriate election site. *Halliburton Services*, 265 NLRB 1154 (1982). *See also American Bottling Co. v. NLRB*, 992 F.3d 1129 (D.C. Cir. 2021) (noting that the Board's discretion to assess the propriety and results of representation elections is broad and that a court could overturn a Board decision to certify the election results only in the "rarest of circumstances," citing to *North of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000)).

will be some administrative costs, including the Board's resources, which will require a minor governmental budget.²⁰³

We believe that these debates would foster the uninhibited, robust, and wide-open exchange that is necessary for the labor organizing context,²⁰⁴ while not in any way directly impinging on employer property rights that the Supreme Court has recently given elevated status in its *Cedar Point Nursery* decision.²⁰⁵ Such Board-sponsored debates would seem to represent a positive reform that is, per our discussion above, both realistic and likely not to be subject to any meaningful judicial challenges.

C. Neutrality Agreements

Realizing their challenges in the NLRB-sponsored election process, unions have sought representation through neutrality agreements. Neutrality or voluntary recognition agreements can take different forms, but in general, they involve securing an agreement from the employer regarding the employer's posture toward the organizing process.²⁰⁶ Certain provisions are commonly included in these agreements, such as: (1) a commitment to neutrality by the employer and a union commitment not to engage in certain types of activities;²⁰⁷ (2) the use of authorization-card checks as the way of determining whether the union enjoys the majority of employees;²⁰⁸ (3) provisions granting the union types of access

²⁰³ We recognize that this aspect of the proposal will require a budget allocation which could raise Congressional scrutiny, as it has happened in previous administrations. See *LABORED RELATIONS*, *supra* note 45, at 195–223.

²⁰⁴ *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).

²⁰⁵ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

²⁰⁶ *AK Steel Corp. v. United Steelworkers of America*, 163 F.3d 403, 407 (6th Cir. 1998) (where the neutrality agreement stated “Neutrality means that the Company shall neither help nor hinder the Union’s conduct of an organizing campaign, nor shall it demean the Union as an organization or its representatives as individuals. Also, the Company shall not provide any support or assistance of any kind to any person or group opposed to Union organization.”).

²⁰⁷ See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *INDUS. & LAB. REL. REV.* 42, 45–47 (2001). See *Independent Adjudication*, *supra* note 151. On the union’s side, the union might agree not to engage in negative publicity against the employer. *Id.* at 484. See *e.g.*, *Hotel Emp. & Rest. Emp. Union, Local 57 v. Sage Hosp. Res.*, 390 F.3d 206 (including a no-picketing promise and a card-check provision).

²⁰⁸ The card check process, which involves voluntary recognition of the union by the employer based on a showing of majority support via representation cards provides an alternative to the NLRB-supervised election process. Rafael Gely & Timothy Chandler, *Card Check Recognition: New House Rules for Union Organizing*, 35 *FORDHAM URB. L. J.* 247, 248 (2008). See for example, *Int’l Brotherhood of Teamsters, Loc. 848 v. MV Transp., Inc.*, 2020 WL 5045284 (C.D. Cal. slip opinion, Aug. 26, 2020) (describing the card-check process as follows: “(1) a local IBT affiliate submits a written request to organize an “appropriate bargaining unit” of employees

to employees that union organizers do not have under current federal law;²⁰⁹ and (4) some form of dispute resolution process to address conflicts that may arise during the campaign.²¹⁰

Neutrality agreements have been challenged as possible violations of § 8(a)(2) and § 302 of the NLRA. Under § 8(a)(2), challenges are likely to arise when there are contending unions and the employer enters the agreement with only one of the contending unions.²¹¹ Challenges under § 302 claim that neutrality agreements represent an arguably prohibited exchange of a “thing of value” by the employer to the union as a quid pro quo for receiving something of benefit.²¹² Despite these challenges, the agreements are legally sound and provide employees and unions a less cumbersome road to representation compared to the NLRB election process.²¹³ Various courts of appeals and the Board have acknowledged that voluntary recognition is an important part of the tools available to the parties to engage in collective bargaining.²¹⁴

at MV; (2) MV must select a neutral third party and provide a list of all employees in the appropriate bargaining unit to that neutral third party; (3) the neutral third party counts and verifies the signatures of employees in the appropriate bargaining unit; and (4) if the neutral third party finds that the majority of employees in the appropriate bargaining unit have selected IBT as their local union, MV must recognize and meet with IBT to negotiate the terms of a collective bargaining agreement.”)

²⁰⁹ See, e.g., *NLRB v. Local 348–S, United Food & Com. Workers Int’l Union*, 273 F. App’x 40, 41 (2d Cir. 2008) (describing a neutrality agreement which included the right to enter employer’s premises); *Challenge Manufacturing Co. LLC v. NLRB*, 815 Fed. Appx. 33 (6th Cir. 2020) (discussing a neutrality agreement where the employer agreed to give the union a list of employees at any of the employer’s U.S. plants upon request). See also James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. R. 819 (2005).

²¹⁰ See *Eaton & Kriesky*, *supra* note 207, at 47–48. For a discussion of the potential legal issues faced by such dispute resolution processes, see *Beyond Labor Law*, *supra* note 71, at 76–77. See *AK Steel Corp. v. United Steelworkers of America*, 163 F.3d 403 (6th Cir. 1998).

²¹¹ *Independent Adjudication*, *supra* note 151, at 487.

²¹² *UNITE Here Local 355 v. Mulhall*, 571 U.S. 83 (2013). See also *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio, 2006).

²¹³ For example, in *Hotel Employees Union, Local 2 v. Marriott Corp.*, the Ninth Circuit held that the NLRA does not preclude employers from agreeing to “remain silent during a union’s organizational campaign—something the employer is certainly free to do in the absence of such an agreement” and that neutrality agreements were not inconsistent with § 8(c). 961 F.2d 1464, 1470 (9th Cir. 1992). Neutrality agreements have been upheld without contest in various circuits including *AK Steel Corp. v. United Steelworkers* and *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 163 F.3d 403, 406 (6th Cir. 1998); 996 F.2d 561, 563 (2nd Cir. 1993). See also *Springfield Terrace*, 355 NLRB 937 (2010); *Verizon Info. Sys.*, 335 NLRB 558 (2001); *Lexington House Care Grp.*, 328 NLRB 894 (1999); *In the Matter of Briggs Indiana Corp.*, 63 NLRB 1270 (1945).

²¹⁴ See *SEIU v. St. Vincent Med. Ctr.*, 344 F.3d 977 (9th Cir. 2003); *N.Y. Health & Human Serv. Union, 1199 v. NYU Hops. Ctr.*, 343 F.3d 117 (2d Cir. 2003); *Hotel*

In some instances, the neutrality agreement will go farther by including a list of the terms that the parties agree will be subjects of negotiation if the union was to obtain majority support—so-called conditional recognition agreements. This type of neutrality agreement allows the parties to concretely discuss the type of terms achievable in case the union obtains majority support and thus provides employees the opportunity to assess—at a very granular level—the advantages and disadvantages of union representation.²¹⁵ For instance, the union and the employer might agree that in addition to the employer remaining neutral during the organizing campaign and accepting the results of an authorization-card check, the employer also agrees to a framework that would govern their bargaining relationship in the event the union obtains majority support.²¹⁶ Such was the case in *Dana Corporation*,²¹⁷ where the employer and the union seeking to represent a group of employees agreed, in the context of a neutrality agreement, to several principles, including a no-strike/no-lockout commitment and a set of conditions that were to be included in any possible future collective bargaining agreement. The conditions included: healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved; minimum classifications; a team-based approach; and flexible compensation, among others.²¹⁸ The agreement was challenged as a violation of §§ 8(a)(1), 8(a)(2), and 8(b)(1) of the Act. The challenges were based on the Board's 1964 *Majestic Weaving* decision, finding unlawful an agreement between the union and employer to bargain about wages, hours, and conditions of work before the time that the union attains majority support, even if the agreement is conditioned upon the union's achieving such status.²¹⁹ In *Dana*, the Board dismissed the complaint in a 2-1 decision, distinguishing the line of cases involving premature recognition on the rationale that in the instant case, the agreement just created a framework for future collective bargaining and did not contain an exclusive representation provision.²²⁰

Despite the conflicting caselaw regarding the legality of conditional recognitional agreements, employers and unions have utilized them for decades. One example dating back to the 1980s is the United Automobile Workers Union ("UAW") and General Motors' agreement involving the

& Rest. Emp. Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993); New Otani, 331 NLRB 1078 (2000).

²¹⁵ See *The Irrelevance of the NLRB*, supra note 16 at 5; *The Free Choice Act*, supra note 14 at 34–36.

²¹⁶ See William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309 (2005).

²¹⁷ 356 NLRB 256, 257 (2010).

²¹⁸ *Id.*

²¹⁹ *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).

²²⁰ 356 NLRB at 261. See *Free Choice Act*, supra note 14 at 322–24.

New United Motor Manufacturing, Inc. (“NUMMI”) venture between General Motors and Toyota.²²¹ General Motors was closing its unionized facility in Fremont, California, which had become dysfunctional in the years before the closing.²²² On the business side, the venture benefited both General Motors and Toyota—General Motors gained experience with Toyota’s production system and Toyota could try its production system with American workers.²²³ However, Toyota was not initially interested in dealing with the union representing the plant employees—the UAW.²²⁴ The UAW, however, had “de facto control of Fremont” and General Motors feared that any effort to follow a non-union strategy at the new venture would result in a union’s backlash at other plants. Thus, about six months before the new plant opened, the UAW and NUMMI signed a letter of intent recognizing the union as the sole bargaining agent, agreeing to pay prevailing auto-industry wages and benefits and agreeing to give hiring preference to employees who were previously employed at the plant.²²⁵

Although advantages to unions can easily be identified, it may seem unclear why employers would ever agree to any form of voluntary recognition agreement. This would seem to be a particularly difficult question to answer given the longstanding employer opposition to unions that has characterized U.S. labor-management relations.²²⁶ Yet the answer

²²¹ See AGENDA FOR REFORM, *supra* note 73, at 109–41. See also Paul S. Adler, *Time-and-Motion Regained*, HARV. BUS. REV., Jan.–Feb. 1993, at 97–98; Marley S. Weiss, *Innovations in Collective Bargaining: Nummi-Driven to Excellence*, 13 HOFSTRA LAB. L. J. 433 (1996).

²²² *Id.* at 435–36. Weiss notes that there was an absenteeism rate of about twenty percent, wildcat strikes, low productivity, and a toxic labor-relations environment. *Id.*

²²³ *Id.* at 436.

²²⁴ See Adler, *supra* note 221, at 97–98.

²²⁵ *Id.* at 98–99; Weiss, *supra* note 221, at 426–37. See also Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571, 585 (1992) (noting that although management wanted to hire new workers, the union succeeded in convincing management to hire former employees by arguing that those employees could succeed under the new production system brought by Toyota).

A similar arrangement was part of the UAW-General Motors’ Saturn plant agreement, in the 1990s and involving a new General Motors’ facility. In that agreement, the parties stipulated that given that the best available contingent of fully-trained employees were General Motors’ employees, a majority of operating and skilled technicians at the new plant, would come from existing bargaining units. This provision was unsuccessfully challenged by the National Right to Work Committee. General Motors Corp., Saturn Corp. and UAW, Advice Memorandum of NLRB General Counsel, Case 7-CA-24872 (June 2, 1986).

²²⁶ See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 37–45 (1986) (describing historical trends in employers’ opposition to labor unions).

is clear and simple: employers will agree to such agreements if it is in their economic interest to do so.²²⁷

Some employers enter neutrality agreements to avoid the costs of mounting a vigorous anti-union campaign.²²⁸ These costs could include hiring consultants,²²⁹ running the campaign, lost work time, and legal expenses.²³⁰ For employers who have an existing bargaining relationship within the same or different part of their operations, an additional cost is the potential harm to the labor-management relationship associated with an anti-union campaign.²³¹ As discussed above, this was in part what motivated General Motors and Toyota. General Motors was afraid of union backlash at other unionized facilities.²³² The employers' decision to agree to a card check procedure can also be motivated by the desire to avoid the negative business consequences associated with a union-led corporate campaign.²³³ Private employers might also enter neutrality agreements to avoid potential disruption caused by a labor dispute.²³⁴

For other employers, recognition agreements might result in significant benefits.²³⁵ For instance, the presence of a union and an effective union-management collective bargaining agreement could make it easier to recruit, train, and retain employees.²³⁶ Employers who have adopted non-confrontational union strategies understand that such a strategy requires them to recognize the union's legitimate role in representing workers.²³⁷ They might also expect that embracing the

²²⁷ See Brudney, *supra* note 209, at 835–40.

²²⁸ See Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 139, 147–50 (Richard N. Block et al. eds., 2006).

²²⁹ See Dave Jamieson, *Amazon Spent \$4.3 Million on Anti-union Consultants Law Year*, THE HUFFINGTON POST (Mar. 31, 2022), https://www.huffpost.com/entry/amazon-anti-union-consultants_n_62449258e4b0742dfa5a74fb [<https://perma.cc/WS8T-RCTG>].

²³⁰ See Eaton & Kriesky, *supra* note 228, at 147–50.

²³¹ *Id.*

²³² See Adler, *supra* note 221, at 98–99.

²³³ *Id.* at 147.

²³⁴ *Metropolitan Milwaukee Ass'n. of Com. v. Milwaukee Cnty.*, 359 F. Supp. 2d 749 (2001), *rev'd in Metropolitan Milwaukee Ass'n. of Com. v. Milwaukee Cnty.*, 431 F.3d 277 (7th Cir. 2005). See also Richard M. Reice & Christopher Berner, *Unions Favor Card Check Recognition in Organizing but the NLRB May Rule, or Congress May Legislate, to Restrict this Strategy*, NAT'L L. J., 17 (Jan. 10, 2005), <https://www.law.com/nationallawjournal/almID/900005421388/> [<https://perma.cc/7HS3-J63Q>] (noting that neutrality agreements provide employer a measure of “labor peace”).

²³⁵ See Eaton & Kriesky, *supra* note 228, at 144–47.

²³⁶ *Id.* at 146.

²³⁷ *Id.* at 145.

union's role in the representation process may result in a less contentious bargaining process.²³⁸ Again, the NUMMI experience is illustrative. Part of the joint-venture plan was to pursue a non-adversarial labor relationship.²³⁹ This strategy included having the union participate in the selection process of rank-and-file and managerial employees.²⁴⁰ Implementing such a strategy after a contentious organizing campaign would have likely doomed the joint venture from the start.

Other employers may see recognition agreements as a trade-off necessary to obtain the support of unions in pursuing some other objective, such as a particular piece of legislation or other governmental action. As an example, one can point to the 1995 agreement between Local 509 of the Service Employees International Union and four Massachusetts companies that contracted with the state government to provide social services.²⁴¹ There the employers agreed to remain neutral in an organizing drive in exchange for the union's promise to advocate in the state legislature for increased funding and to engage in a cooperative relationship with their employers.²⁴²

There are some instances in which governmental authorities have made the adoption of neutrality agreements a condition for an employer to receive a government contract.²⁴³ Such contracts could, for example, contain provisions explicitly requiring the employer to remain neutral during an organizing campaign, to provide access to unions seeking to organize employees, or to voluntarily recognize unions via a card-check election.²⁴⁴ The Board has exercised jurisdiction over such employers,

²³⁸ *Id.* at 146. For example, Eaton and Kriesky note that employers signing neutrality agreements might ask the union for agreeing to more favorable terms in agreements covering new business lines or ventures which might not be profitable right away.

²³⁹ *See* Weiss, *supra* note 221, at 437.

²⁴⁰ *See* Adler, *supra* note 221, at 99.

²⁴¹ *See* James Green, *Improving Workforce Conditions in Private Human Service Agencies: A Partnership between Union and Human Service Providers*, 13 NEW ENGLAND J. OF PUB. POL'Y 187 (1997).

²⁴² *Id.*

²⁴³ *See* Brudney, *supra* note 209, at 838. In an unusual occurrence, the Coronavirus Aid, Relief and Economic Security Act [CARES Act], the legislation enacted in 2020 to address the economic dislocations caused by the Covid-19 pandemic, included a provision that made neutrality agreements a condition from obtaining low interest rate loans. Coronavirus Aid, Relief and Economic Security Act, P.L. 116–136, 116th Cong., 2d Sess. (2020).

²⁴⁴ *See* John Budd & Paul Heinz, *Union Representation Elections and Labor Law Reform: Lessons from the Minneapolis Hilton*, 20 LAB. STUD. J. 3, 10 (1996) (describing the provisions of the lease agreement between the Minneapolis Community Development Agency and a private employer). A more recent example involves the pledge by Microsoft to remain neutral in any future organizing efforts by employees at a company (Activision Blizzard) that Microsoft was trying to acquire,

thus providing unions and employees the Act's protections.²⁴⁵ While those types of provisions are likely to face challenges,²⁴⁶ at the minimum, they signal to employers that entering a neutrality agreement may be seen as a positive by the governmental contracting authority, perhaps increasing the chances of being awarded the government contract.

To be sure, the fact that employers will enter neutrality agreements if they believe it is in their economic interests to do so does not mean that unions are idle bystanders in securing such agreements. Unions frequently exert pressure in a variety of ways, including corporate campaigns. Section 7 of the NLRA protects employees who engage in concerted activity for collective bargaining, mutual aid, or protection.²⁴⁷ The most basic test for determining if concerted activity is considered also to be *protected* activity is whether it is for a group's mutual aid or protection.²⁴⁸ Generally, an activity for the "common cause" meets the threshold of being for mutual aid or protection, even if it is for the common cause of the aid or protection of other workers employed elsewhere.²⁴⁹ As such, activities in which employees seek to improve their working conditions

and which was being vetted by the Federal Trade Commission for potential antitrust concerns, including the effect that the merger would have on workers. Noam Scheiber and Kellen Browning, *Video Game Workers at Microsoft and Activision Take Steps to Unionizing*, N.Y. Times (Dec. 5, 2022), <https://www.nytimes.com/2023/01/03/business/video-game-workers-microsoft-union.html> [https://perma.cc/ZW2Y-YRCL]. After securing the neutrality agreement, the president of the Communication Workers of America, Chris Shelton, penned an opinion letter in *The Hill*, in support of the merger. Chris Shelton, *For Once the FTC is Considering a Merger that Helps the Workers*, THE HILL (Dec. 5, 2022), <https://thehill.com/opinion/technology/3762122-for-once-the-ftc-is-considering-a-merger-that-helps-the-workers/> [https://perma.cc/YDZ7-SU5M].

²⁴⁵ See *Mgmt. Training Corp.*, 317 NLRB 1355 (1995) (holding that in determining whether to assert jurisdiction over government contractors, the Board will only consider whether the employer meets the statutory definition of employer and the applicable monetary jurisdictional standards and will not inquire as to the level of control over essential terms and conditions of employment retained by the contractor or the scope and degree of control exercised by the exempt government entity over the contractor's labor relations).

²⁴⁶ See *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (holding that an executive order disqualifying from obtaining certain federal contracts employers who hire permanent replacement workers during lawful strikes was preempted by the NLRA). Cf. *Bldg. and Const. Trades Council of the Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218 (1993) (holding that a state's agency bid specification directing successful bidders to agree to abide by the terms of a labor agreement designed to assure labor stability over the length of the construction project was not preempted by the NLRA).

²⁴⁷ 129 U.S.C. § 157.

²⁴⁸ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

²⁴⁹ *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.3d 503, 505 (2d Cir. 1942).

beyond the standard employer-employee relationship may also be protected concerted activity.²⁵⁰ Included in what is clearly considered to be concerted activities for mutual aid or protection are efforts by employees to pressure employers through third-party appeals.²⁵¹

That said, while the Act protects the right of employees to engage in third-party appeals, the Board and the courts have, in certain circumstances, allowed employers to discipline employees for disloyalty.²⁵² When considering whether off-duty, off-site communications with other employees or third parties about the employer are protected concerted activity, the Board and courts have developed a two-prong test to decide if the communications are considered protected activity. Under the test, the appeals to third parties will be protected if it is (1) “related to an ongoing dispute between the employees and the employers,”²⁵³ and (2) “the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.”²⁵⁴ The Board and courts’ approach in dealing with employee appeals to third parties might be particularly relevant in situations where the union is seeking to put pressure on the employer to enter a neutrality agreement, as part of the pressure could involve public outreach in the form of a “corporate campaigns.”²⁵⁵

²⁵⁰ Allstate Insurance Co., 332 NLRB 759, 765 (2000) (holding that issuing a warning to an employee who have gave a media interview criticizing employment conditions was an unfair labor practice). See, e.g., Valley Hospital Medical Center, 351 NLRB 1250 (2007), *enfd. mem. sub nom.* Nevada Service Employees Union, Local 1107, SEIU v. NLRB, 358 Fed. Appx. 783 (9th Cir. 2009); Kinder-Care Learning Centers, 299 NLRB at 1171.

²⁵¹ Hormel & Co. v. NLRB, 962 F.2d 1061, 1065 (D.C. Cir. 1992).

²⁵² NLRB. v. Local Union No. 1229, Int’l Bhd. of Elec. Workers, 346 U.S. 464, 472 (1953) (*Jefferson Standards*).

²⁵³ American Golf Corp., 330 NLRB 1238, 1240 (2000) (*Mountain Shadows Golf*). The focus of the first prong on “whether it would be apparent to the target audience that the communication arises out of an ongoing labor dispute.” DIRECTV v. NLRB, 837 F.3d 25, 36 (2016).

²⁵⁴ American Golf Corp., 330 NLRB at 1240. The second prong has generated further litigation as various courts of appeals have differed in deciding what amounts to “disloyal, reckless or maliciously untrue” communications. Compare DirectTV, v. NLRB, 837 F.3d at 36 with MikLin Enterprises Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017).

²⁵⁵ See Food Lion v. United Food and Com. Workers Int’l Union, 103 F.3d 1007 (1997) (defining the corporate campaigns as encompassing “a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer” and noting that they “may include . . . litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer’s goodwill with employees, investors, or the general public.”); see William B. Gould IV, *Labor Law and its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667 (2003).

Applying the two-prong test, in 1992, the U.S. Court of Appeals for the District of Columbia Circuit held that an employee who participated in a parade and rally in support of a company boycott violated his duty of loyalty and thus, was not engaged in activity protected under the Act.²⁵⁶ In 2017, the Eight Circuit held that a worker campaign at a sandwich shop to demand paid sick leave in which they criticized the shop's health practices was disloyal.²⁵⁷ In both cases, the courts emphasized that a finding that the communications were "disloyal, reckless or maliciously untrue," does not require a showing of "malicious motive" by the employee. Instead, the court found that such a conclusion could be based on a finding that the "disparaging attack was 'reasonably calculated to harm the company's reputation and reduce its income.'"²⁵⁸

In several decisions since 2016, the D.C. Circuit, however, has provided employees more "breathing space" to engage in third-party appeals without losing the protection afforded under § 7 by upholding Board decisions limiting the circumstances under which communications will be found to be "disloyal, reckless or maliciously untrue."²⁵⁹ In *DirectTV v. NLRB*,²⁶⁰ the court held that employees' statements on a news broadcast in which employees stated they were given orders to "tell the customer whatever you have to tell them" to convince them to order additional equipment and which the employees reasonably understood to mean that if necessary, they should misinform customers, was protected concerted activity.²⁶¹ In analyzing the two-part test dealing with communications to third parties, the court emphasized that not all forms of disloyalty will result in the employee's communications losing § 7 protection. The court noted that the "Act *does* immunize disloyalty in a third-party appeal when it is related to an ongoing employment dispute."²⁶² Instead, the court found that an employee loses the protection of the Act only where there is a showing of "flagrant disloyalty, wholly incommensurate with any grievances which the employee might have."²⁶³ The court also upheld the Board's finding that to qualify as "maliciously untrue," the statements to third parties must be "made with knowledge of their falsity or with reckless disregard for their truth or falsity."²⁶⁴

Consistent with this more protective approach, in 2021, the D.C. Circuit similarly found that an employee was engaged in protected activity

²⁵⁶ *Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992).

²⁵⁷ *MikLin Enterprises Inc. v. NLRB*, 861 F.3d at 822–23.

²⁵⁸ *Id.* at 821 (citing to *Jefferson Standards*, 346 U.S. at 471).

²⁵⁹ *DIRECTV v. NLRB*, 837 F.3d 25, 25 (2016).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 28–32.

²⁶² *Id.* at 37.

²⁶³ *Id.*

²⁶⁴ *Id.* at 42.

when she submitted a letter to the editor of the local newspaper in which she indicated support for a group of nurses and doctors who had complained about staffing issues in a local hospital and opined that their concern about safety risks due to understaffing was warranted.²⁶⁵ The court characterized the employee's statements that the administrators gave their complete allegiance to the parent corporation, spent too much time in meetings, and inappropriately disregarded the input from doctors and nurses as "circumspect" and non-derogatory.²⁶⁶

We believe that a narrow interpretation of what constitutes disloyalty in this context, as more recently adopted by the D.C. Circuit Court of Appeals, is the appropriate route to follow as it provides protection to unions that pressure reluctant employers to enter neutrality agreements. As described above, while employers will agree to neutrality agreements when it is in their interest to do so, unions might have to try to affect that calculus through appeals to the public. Employees who engage in a campaign to pressure the employer to agree to a neutrality provision engage in § 7 activity and should be protected under the Act.²⁶⁷

Adoption of a unique alternative dispute resolution mechanism of this kind concerning U.S. labor organizing activities will still be the exception and not the rule. While we recognize that such agreements require employers' consent and that such consent might be difficult to obtain in an era of anti-union consultants, we aver that further exploration of the use of neutrality agreements is a realistic area of reform. With that goal in mind, we share the experience of one of the authors, Professor Gould, who played a crucial role in the implementation of a neutrality accord in 2008. Professor Gould's experience, we suggest, provides a helpful model for unions seeking this route.

U.S. labor unions are able to leverage the support of international trade unions and the political support they enjoy in their countries when conducting U.S. union organizing drives against divisions of UK companies based in the United States.²⁶⁸ Thus, at the turn of the century, when the Teamsters Union conducted a U.S. organizing drive with respect to the U.S. operations of the multi-billion-dollar UK bus company, FirstGroup, it joined forces with Great Britain's Transport and General

²⁶⁵ NLRB v Maine Coast Regional Health, 999 F.3d 1 (D.C. Cir. 2021).

²⁶⁶ *Id.* at 13. The court contrasted the employee's statements to the statements in *St. Luke's Episcopal-Presbyterian Hosps. Inc., v. NLRB*, where a statement that the employer was "jeopardizing the health of mothers and babies by depleting the labor and delivery staff" was held to be an unprotected statement, and to *Coca Cola Bottling Works Inc.*, where the Board found a statement by employees indicating the presence of foreign objects in the company's soft drinks to also be unprotected. 268 F.3d 575, 581 (8th Cir. 2001); 186 NLRB 1050 (1970).

²⁶⁷ For a general discussion of this issue, see LABOR LAW PRIMER, *supra* note 11, at 185–90.

²⁶⁸ See *Beyond Labor Law*, *supra* note 71, at 75.

Workers Union and the International Transport Workers' Federation to pressure FirstGroup America from abroad.²⁶⁹ FirstGroup had previously adopted a Corporate Social Responsibility Policy, which in part affirmed the right of employees "to choose whether or not to join a trade union without influence or interference from management."²⁷⁰ Using the commitment reflected in the Corporate Social Responsibility Policy, the Teamsters Union and others pressured the American branch of FirstGroup to change its anti-union stance.²⁷¹ The three labor organizations contacted British Members of Parliament and other UK government officials in support of its efforts to ensure it was able to conduct a free and fair organizing drive.²⁷² The unions also directly reached out to FirstGroup's shareholders to share their complaints.²⁷³ In response, the company developed and adopted explicit Freedom of Association ("FOA") Guidelines concerning said organizing and engaged Professor Gould to serve as an Independent Monitor for enforcing these Guidelines.²⁷⁴

The FOA policy aimed to protect employees' rights as expressed in the NLRA.²⁷⁵ Unlike most neutrality agreements, though, the policy incorporated the NLRA's recognition process. However, the policy provided that allegations that the employer had interfered with the union's organization efforts were to be handled by the Independent Monitor's office.²⁷⁶ As noted by Professor Gould, "A key assumption and consideration was that a resolution of freedom of association issues involved in union organization campaigns would reduce or eliminate impediments to free and fair elections – and would do so in a more timely manner and under standards more rigorous than those provided by the NLRA itself."²⁷⁷

Under the program, any employee or employee representative could file a complaint with the Independent Monitor alleging violations of the

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 79.

²⁷¹ *Id.*

²⁷² In 1999, FirstGroup acquired Ryder Public Transportation, one of the largest operators of school buses and transit management. Eight years later it acquired Laidlaw International Inc., the largest operator at the time of school buses. *See Beyond Labor Law*, *supra* note 71, at 80. *See also* William B. Gould, *Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: the FirstGroup Experience*, 66 DISPUTE RESOLUTION J. 46, 50 (2011).

²⁷³ *Id.* at 50.

²⁷⁴ *Id.* at 48.

²⁷⁵ *See Beyond Labor Law*, *supra* note 71, at 85.

²⁷⁶ *Id.* at 86.

²⁷⁷ *Id.*

FOA policy.²⁷⁸ Complaints needed to be filed within sixty days of the alleged violation. The complaint form was short and sought to record basic factual information about the allegation. Once the Independent Monitor received the complaint, he provided a copy to the employer and proceeded to investigate the charge.²⁷⁹ The Independent Monitor then reported his findings to the parties within thirty to sixty days. Investigations included interviews with the individuals involved in the incident.²⁸⁰ The parties were allowed, although not required, to provide additional materials.²⁸¹ In situations where the Independent Monitor concluded that the employer had violated the FOA policy, he made recommendations regarding how to correct the violation.²⁸² The employer then had thirty days to decide how to respond. The employer's decision was sent to both the Independent Monitor and the complaining party.²⁸³ During the organizing drive, the Independent Monitor received 372 alleged FOA violation complaints, issued 143 written reports with respect to these complaints, and found 67 FOA violations.²⁸⁴ In this regard, the UK First Group experience may well provide a possible model for other companies seeking a more positive relationship with labor unions and thus be a realistic and achievable labor law reform.

IV. CONCLUSION

Recent victories in organizing campaigns involving notable U.S. companies such as Amazon and Starbucks might obscure the fact that the U.S. labor movement is in crisis.²⁸⁵ Rates of union membership have steadily declined for over five decades.²⁸⁶ Observers have argued that comprehensive labor law reform is needed to ameliorate this situation, and

²⁷⁸ *Id.* Examples of the complaints that were filed include allegation of discrimination by the employer and challenges to policies that interfered with the organizing process.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 87.

²⁸⁵ Matt Day & Spencer Soper, *Amazon NYC Warehouse Workers Support Union in Historic Labor Win*, SEATTLE TIMES (Apr. 1, 2022), <https://www.seattletimes.com/business/amazon-nyc-warehouse-workers-support-union-in-historic-labor-win/> [https://perma.cc/RAD6-YRVC]; see also Glynn, *supra* note 64.

²⁸⁶ Lauren K. Gurley, *Union membership hit record low in 2022*, WASH. POST (Jan. 19, 2023), <https://www.washingtonpost.com/business/2023/01/19/union-membership-2022/> [https://perma.cc/U4WN-X98J].

the labor movement itself has spent considerable effort and political capital in seeking such reform.²⁸⁷

This tendency of looking at labor law reform as the answer to the plight of labor overlooks the fact that the rise of labor in the United States preceded the enactment of the NLRA and that the decline in the proportion of the labor force that belongs to or is represented by unions started before the Taft-Hartley Amendments were enacted into law—which critics argued is the event that initiated the labor crisis by eviscerating the original statute’s main goals. The need-for-labor-law-reform narrative ignores the fact that since the early 1960s, the labor crisis has persisted regardless of the individual in the White House or the membership of the NLRB. Finally, the law-reform narrative fails to recognize the difficulty of enacting comprehensive reform in today’s politically polarized Congress and the subsequent battle to pass constitutional muster at the now-conservative controlled Supreme Court.

Yet, labor law matters, and changes to it could impact the ability of unions to organize employees and workers to form unions. Consequently, this Article has set forth a variety of “realistic” and achievable proposals (some of which do not require legislation), including greater use of mail ballots in labor representation elections, the possible scheduling of NLRB-sponsored election debates, and the encouragement of neutrality accords. While recognizing that congressional action might be helpful with regard to all of these proposals, we note that our proposals can be implemented with minor or no legislative changes, that the NLRB itself can adopt them in the context of its wide-ranging administrative discretion, or that they can be initiated by the unions, albeit with the employer’s consent in the case of neutrality agreements. While modest, the three proposals can be potentially impactful. Nudging the Board and courts to protect neutrality agreements against possible legal challenges could encourage unions to push harder in seeking such agreements, which could expand the organizing field beyond the current union’s zone of comfort.²⁸⁸ Encouraging the Board to embrace the use of mail ballots and the adoption of election debates, which are areas squarely within the Board’s authority in administering representation elections and consistent with existing law, are achievable reforms that could have an immediate impact on the organizing process. In sum, we argue that the primary focus of the labor

²⁸⁷ *Number of workers represented by a union declined in 2021, showing why we must reform our broken labor law*, ECON. POL’Y INST. (Jan. 20, 2022), <https://www.epi.org/press/number-of-workers-represented-by-a-union-declined-in-2021-showing-why-we-must-reform-our-broken-labor-law/> [<https://perma.cc/2TYM-RTT7>].

²⁸⁸ As noted above, see *supra* notes 85–88 and accompanying text, the concern by unions to become more efficient in organizing (i.e., increase their winning rate), has had the pernicious effect of limiting the field of organizing targets, ultimately resulting in less, no more, organizing.

movement and its supporters should be on achieving “achievable” reforms rather than advancing reforms that, while grand in scope, are unlikely to be realized.

