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How The National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process

Charles J. Morris[†]

This article challenges and refutes the conventional wisdom that the Taft-Hartley Act changed the basic policy of the National Labor Relations Act (NLRA or Act). It identifies two interrelated phenomena as factors primarily responsible for the longstanding inability of the National Labor Relations Board (NLRB or Board) to adequately protect employees in their right to unionize and engage in collective bargaining. One phenomenon is the historical revisionism that distorted perception of the Act's policy. The other is the repetitive abuse of the Board's appointment process. The article also demonstrates that the NLRB's failings resulted primarily from the agency's reluctance to vigorously enforce existing law and to utilize innovative measures currently available under the Act rather than from the Act's insufficiencies, despite the fact that the statute has many shortcomings.

The article points out that although Taft-Hartley in its substantive content is a union-regulatory statute that severely reduced the power of

[†] Professor Emeritus, Dedman School of Law, Southern Methodist University. The author expresses his special appreciation to Professors Kenneth Dau-Schmidt, Theodore St. Antoine, James Gross, and Charles Craver for their valuable and supportive comments, and to Professor Joan Flynn for her excellent historical study of NLRB appointments on which he prominently relied, and also to Sarah Ruhlen, a student at the University of Indiana School of Law, for her helpful assistance.

unions in the collective bargaining process and in their relationship to their members, the Taft-Hartley Congress nevertheless reenacted—and even enhanced—the Wagner Act’s basic policy of encouraging and protecting union organizing and collective bargaining. That unambiguous declaration of policy and retention of all of the original Wagner Act’s pro-union and pro-collective-bargaining substantive provisions was the price that Taft-Hartley’s sponsors had to pay to garner sufficient votes to override President Truman’s anticipated veto. Yet, notwithstanding the textual clarity of that policy, its consistent legislative history, and its later reenactment with stronger language in the Landrum-Griffin Act, organized management and their political allies have deliberately disseminated false and revisionist de facto versions of that policy. Those versions assert that Taft-Hartley changed the Act’s policy to emphasize employee free-choice—a concept allegedly based on Taft-Hartley’s limited requirement that a union not “restrain or coerce” employees regarding their “right to refrain” from union activity—even though Congress expressly excluded that minor feature from each of its three declarations of national labor policy.

The phenomenon of abuse of the appointment process was the practice by every Republican President of appointing a critical number of Board Members and General Counsels who were opposed to the NLRA’s basic policy. This resulted in Boards that were highly successful in protecting employers from disruptive union economic power—such as secondary boycotts and economic strikes without permanent replacements—but were deliberately impotent in providing strong protection for employees in their right to join unions and engage in meaningful collective bargaining in accordance with the Act’s underlying policy.

The article recommends a corrective program of intensive truth-telling that might produce Labor Boards willing to use the broad and flexible text of the Act to accomplish effective enforcement.

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I.

LABOR RELATIONS UNDER THE NLRA TODAY

Can the Indostani elephant and its blind men tell us something about the National Labor Relations Act (NLRA)?² What is really wrong with that Act? And/or, what is wrong with the National Labor Relations Board (NLRB, Labor Board, or Board)?³ Can what appears to be a failed law and a failed agency once again create a legal environment that will effectively encourage union organizing and collective bargaining and thereby help rebuild an economically strong middle class at a time when the gap between rich and poor in the United States has never been wider?⁴ This goal was generally achieved in earlier years but certainly not in recent decades. Can it be achieved again?

2. National Labor Relations Act, §§1-19, 29 U.S.C. §§ 151-169 (2006). Throughout this article, "NLRA" refers to the National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935), and its amendments, the Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), and the Labor-Management Reporting & Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).

3. 29 U.S.C. § 153.

4. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 1968 to 2010 Annual Social and Economic Supplements. It has been reported:

In recent years, the middle class accounted for the smallest share of the nation's income ever since the end of World War II, when this data was first collected. The middle three income quintiles, representing 60 percent of all Americans, received only 46 percent of the nation's income in 2009, the most recent year data is available, down from highs of around 53 percent in 1969.

The middle class weakened over the past several decades because the rich secured the lion's share of the economy's gains. The share of pretax income earned by the richest 1 percent of Americans more than doubled between 1974 and 2007, climbing to 18 percent from 8 percent. And for the richest of the rich—the top 0.1 percent—the gains have been even more astronomical—quadrupling over this period, rising to 12.3 percent of all income from 2.7 percent.

In contrast, incomes for most Americans have been nearly flat over this same time period, and median income after accounting for inflation actually fell for working-age households during the supposedly good economy in the recovery between 2001 and 2007.

DAVID MADLAND ET AL., CTR. FOR AM. PROGRESS ACTION FUND, UNIONS MAKE THE MIDDLE CLASS: WITHOUT UNIONS, THE MIDDLE CLASS WITHERS 2 (2011) (citations omitted), available at <http://www.americanprogressaction.org/issues/2011/04/pdf/unionsmakethemiddleclass.pdf>; see also Jacob Hacker & Paul Pierson, *Winner Takes All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152 (2010); ECON. POL'Y INST. (EPI), THE STATE OF WORKING AMERICA: REAL MEDIAN HOUSEHOLD INCOME 1979-2009, available at <http://www.stateofworkingamerica.org/charts/view/23>; EPI, THE STATE OF WORKING AMERICAN: REAL WAGES AS THE HIGH END ARE GROWING, available at <http://www.stateofworkingamerica.org/charts/view/15>; Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise of U.S. Inequality*, 76 AM. SOC. REV. 513 (2011); Sylvia A. Allegretto, *The State of Working America's Wealth, 2011—Through Volatility and Turmoil, the Gap Widens*, ECON. POL'Y INST., EPI Briefing Paper # 292, March 23, 2011. For contrast with an economy where unions are strong, see David Leonhardt, *The German Example*, N.Y. TIMES, June 8, 2011, at B1, B9, who reports:

Unlike what happened here, German laws and regulators . . . prevented the decimation of their labor unions. The clout of German unions, at individual companies and in the political system, is one reason the middle class there has fared decently in recent decades. In fact, middle-class pay has risen at roughly the same rate as top incomes.

So I asked six blind men of Indostan—obviously mavens—“Why is it so difficult—indeed almost impossible—for most employees under the NLRA to organize into labor unions and engage in collective bargaining?” The *first* blind maven responded, “It is the unfair election process, especially employers’ captive-audience speeches and denial of union access to the workplace, and also the lengthy delays in both representation and unfair-labor-practice proceedings.” The *second* maven said, “It is because the Act fails to provide sufficiently early remedies and sufficiently strong remedies for violations, both of which would deter commission of unfair labor practices.” The *third* insisted, “It is the failure to allow recognition of unions without the delay and imbalance of an election or without the requirement of majority-union representation.” The *fourth* asserted, “It is the failure to provide clearly defined rules that would more effectively discourage, prevent, and remedy unfair labor practices.” The *fifth* stated, “It is the absence of self-enforcing administrative orders and also the absence of private-party actions, for either or both would encourage greater voluntary compliance.” And the *sixth* answered, “It is because of the absence of limitations on employers’ unqualified right to permanently replace economic strikers, which discourages unionization and makes collective bargaining relatively ineffective.”

Again, each of the six blind mavens of Indostan was partly in the right, and all were in the wrong. Most of them, however, were responding to the popular question of: What is wrong with the National Labor Relations Act? But at this point in time that is not the right question, for notwithstanding its defects—of which there are many—it is unlikely that the Act will be changed in the foreseeable future, and even if it were changed the final Congressional product would more likely be a mixture of doubtful compromises than a package of meaningful improvements. Furthermore, the problem of weak enforcement by the Labor Board would remain. Consequently, the search for an answer to what is wrong with the administration of the NLRA must focus on the NLRB, the agency charged with its enforcement. This article will therefore identify and address what I consider to be the right question, which is: what is wrong with the *Board*—not with the *Act*—and to suggest a means to correct what is wrong.

The short answer to the right question is easy. What is wrong is that the Board is simply ineffective—in other words broken. It does not adequately enforce the Act’s core provisions that were expressly designed to “guarantee[]”⁵ employees their “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities”⁶

5. 29 U.S.C. § 158(a)(1).

6. 29 U.S.C. § 157.

However, my long—and substantive—answer requires identification of the factors that caused this failure of enforcement. Based on statutory and historical sources, this article will demonstrate that the principal cause is not to be found in the Act itself—neither in its provisions nor in its lack of ideal enforcement remedies—but rather in the brutal fact that the Act was stolen. It was stolen with the aid of two inter-related non-legislative phenomena that arose following passage of the Labor Management Relations Act of 1947, better known as the Taft-Hartley Act.⁷

One of those phenomena is the longstanding and continued existence of a well-orchestrated program of *revisionist misinformation* concerning the Act's underlying purpose and policy⁸ that was disingenuously promulgated by organized management and their political allies. That version of purpose and policy, which is wholly devoid of support in either statutory text or legislative history, was not only based on selective and erroneous reading of the statute, it was also—I am sorry to say—based in part on knowingly dishonest reading of key provisions in the statute.

The other phenomenon is a longstanding practice of appointing to membership on the Board and to the position of General Counsel a critical number of persons who were opposed to the Act's statutory policy. This strategy was conceived by organized management and carried out intermittently—but effectively—by every Republican administration from Dwight D. Eisenhower to George W. Bush.

For more than half a century these two phenomena have been the principal means by which organized employers and their supporters have stolen the Act. Although this statute was originally intended to create a free and fair system of union organizing and collective bargaining—an intention Congress never changed and legislatively reaffirmed on several occasions—it became a means by which employers could prevent or discourage employees from organizing and engaging in effective collective bargaining while continuing to be the means for protecting employers from aggressive but non-violent union-sponsored collective activity, such as secondary boycotts and primary strikes without permanent replacements.⁹ Accordingly, the Act that was designed to create industrial democracy in workplaces where it was needed became an Act that generally prevented that from happening. This impotent condition was created by factors to be explored herein that ensured that the Board would not adequately enforce the Act's protective provisions.¹⁰

7. 61 Stat. 136 (1947).

8. 29 U.S.C. § 151. See *infra* notes 88-95, and accompanying text.

9. 29 U.S.C. § 158(b)(4); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

10. Principally 29 U.S.C. §§ 157, 158(a), 159(a), & 160(c), (e), (f), (j), (m). See *infra* notes 51-56 and accompanying text.

Close examination of the history of the above phenomena will reveal, contrary to some union-friendly scholarly opinion,¹¹ that the sources of most of the Board's problems are not to be found in the Act itself—although it is indeed a statue replete with serious imperfections—but rather in the Board's failure to effectively enforce the Act's protective provisions with tools presently available under existing law. This is a failure that has been mostly, though not entirely, the product of those two phenomena, i.e. dissemination of revisionist policy and the flawed appointment-process that executed that policy.

The revisionism to which I refer is the dissemination of the false impression that the Taft-Hartley Act changed the core policy of the NLRA. It did not. As this Article will show, it retained and reinforced the original policy because this was necessary to secure passage of the bill. Without retention of those basic Wagner Act protections and policy the final bill could not have passed without a veto or with sufficient votes to override President Harry S. Truman's veto. The sponsors of the bill were well aware that this was the price they had to pay to achieve its passage.¹² Consequently, the NLRA totally retained collective bargain and related union organizational activity as the official United States policy for labor-management relations.

Although Taft-Hartley drastically curtailed the economic power of unions in the collective-bargaining process and complicated the Labor Board's administrative procedures, it nevertheless preserved all of the original Act's substantive provisions that protected the right of employees to unionize and engage in collective bargaining and even added new statutory language to re-emphasize this policy.¹³ Furthermore, when Congress again revisited the NLRA in 1959 in the Labor-Management Reporting and Disclosure Act, better known as the Landrum-Griffin Act,¹⁴ it prefaced the new statute with another reaffirmation of the original policy, stressing that it continues to be "the responsibility of the federal government" to protect the right to organize and bargain collectively.¹⁵ Despite the clarity of the statutory text, over the years strong pro-management and anti-union forces have succeeded in suppressing that policy, and Republican appointments to the Board made certain that the Board would be relatively impotent in enforcing that policy. As a consequence, the Act's protective features have become largely irrelevant. Today most Americans—including workers whom the Act was intended to

11. See *infra* notes 31-37 and accompanying text.

12. See *infra* notes 95-96, 109, 117 and accompanying text.

13. See *infra* notes 59-61, 88-95 and accompanying text.

14. 73 Stat. 519 (1959) (codified as amended, 29 U.S.C. §§401-531).

15. 29 U.S.C. §401(a) (2006). See *infra* notes 95, 169-170 and accompanying text.

benefit—are totally unaware, or only vaguely aware, of even the existence of the NLRA, let alone what rights the Act is supposed to protect or how the NLRB functions.¹⁶ The fact that only 6.9 percent of private-sector employees are currently union members employed under collective-bargaining¹⁷ tells us that for most workers this law is not working.

The common assertion that Taft-Hartley changed the policy of the Act has never been adequately challenged by a full and careful analysis of what the statutory text actually says and what unambiguous history actually reveals. Nor has there been adequate legal refutation of the revisionists' purported legislative rationale for this assertion. Labor unions have been so universally opposed to the Taft-Hartley and Landrum-Griffin Acts, viewing them solely as anti-union statutes, that they never sufficiently explored or promoted the remaining positive features that could have further advanced the cause of union organizing and collective bargaining. On the other hand, their opponents in management have been well aware of those features and have made several attempts to change them legislatively; and when those efforts failed, they intensified dissemination of their revisionist view that Taft-Hartley had changed the Board's function and purpose, which resulted in widespread acceptance of that inaccurate version of the Act's policy. The synthesis of that false version of basic statutory purpose and several decades of Labor Boards whose majority-members ideologically opposed to collective bargaining contributed to the issuance of many regressive Board decisions and the absence of vigorous enforcement of the Act's core provisions. Thus, there has long been a need to dig more deeply into the issue of the Act's true purpose and policy and into the related issue of the

16. These are widely recognized facts. See, e.g., *Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act*, 75 Fed. Reg. 80410, (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104, RIN 3142-AA07 (2011) (subsequently issued on August 30, 2011, *Notification of Employee Rights under the National Labor Relations Act*, 76 Fed. Reg. 54,006, *aff'd* Nat'l Ass'n Mfr. v. NLRB, No. 11-1629, 2012 WL 691535 (DC Cir. 2012), *appeal filed*, No. 12-5068 (D.C. Cir. Apr. 17, 2012) ("In 1993, Charles J. Morris petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA."); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STETSON L. REV. 101, 107 (1993) [hereinafter Morris, *Renaissance*] ("Most American employees either have never heard of the NLRB or they do not know what it does, and very few know how to initiate Board action."); Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675-76 (1989) (commenting on the widespread ignorance of NLRA rights on the part of nonunion employees); Peter DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433 (1995). See also Tom Juravich, *Anti-Union or Unaware? Work and Labor as Understood by High School Students*, 16 LAB. STUD. J., no. 3 1991, at 16, 25; Robert J. Amann & Ronnie Silverblatt, *High School Students' Views on Unionism*, 12 LAB. STUD. J., no. 3, 1988, at 44, 58; Dana Bramel & Clemencia Ortiz, *Tomorrow's Workers and Today's Unions: A Survey of High School Students*, 12 LAB. STUD. J., no. 3, 1988, at 28, 39.

17. Bureau of Lab. Statistics (BLS) News Release, USDL-12-0094 (Jan. 27, 2012).

manner of Board appointments.¹⁸ This article is a belated attempt to fill that combined need.

Contrary to the popular notion created by years of anti-union revisionism, the membership and administration of the NLRA was never intended to be an agency balanced between pro-collective-bargaining adherents and anti-collective-bargaining (i.e., union-avoidance) adherents, just as the Equal Employment Opportunities Commission¹⁹ was never intended to be balanced between pro-employment-discrimination and anti-employment-discrimination (i.e., segregationist) adherents. Although it undoubtedly comes as a surprise to many, the central purpose of this statute, as this article will conclusively demonstrate, is to protect the right of workers to unionize and to provide the means for labor and management to engage in good-faith collective bargaining. Enforcing the law to that effect is therefore the primary function of the NLRB. Accordingly, appointees to the Board—whether drawn from management, unions, government, or academia—should be persons who recognize that purpose and intend to enforce it.

Early research and initial writing of parts of this article coincided with the seventy-fifth anniversary of the NLRA. Were it not for the adverse actions chronicled here, that event might have been viewed as a proud celebration of the roles of the NLRA and the NLRB as historic catalysts credited with substantially improving the nature of work in America and playing an important role in building an economically healthy middle class. In retrospect, however, this statute had only a short-term impact on the nation's economy. The enactment of the Wagner Act²⁰ in 1935 in the midst of the Great Depression represented an ambitious effort by Senator Robert F. Wagner and his Congressional colleagues to spread their concept of industrial democracy into the workplaces of America through the medium of collective bargaining. The statute promised workers, acting through their unions, an opportunity to participate as partners with management in determining the terms and conditions of their employment.

The reasoning that motivated Congress when it designated collective bargaining as the preferred medium for the conduct of American labor relations was concisely described by the late Clyde Summers in his 1984 testimony to a Congressional committee that ultimately characterized

18. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1362-68 (2000) provides valuable research and commentary on the latter issue.

19. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2009).

20. 49 Stat. 449 (1935).

enforcement of the NLRA as the “Failure of American Labor Law—A betrayal of American Workers.”²¹ Summers said that:

Collective bargaining was preferred because it served two basic political and social purposes. *First*, by providing more equal bargaining power, it reduced the need for government regulation to protect employees from socially destructive wages and working conditions. Free collective bargaining was the free market alternative to governmental control of the labor market. *Second*, collective bargaining provided a measure of industrial democracy by giving employees a voice in decisions which affected their working lives. It extended democracy to the workplace, thereby strengthening and enriching political democracy.²²

In fact, as labor historian Dorothy Sue Cobble reports, the Wagner Act was “in intention and effect, a decentralized, market-based policy, [where collective bargaining functions as] a highly decentralized system that relies on private sector associations to regulate the market and address the inefficiencies and inhumanities that can occur in any technical system devoid of human oversight.”²³

Indeed, during its early years the Wagner Act’s impact was of prime importance in the building of a strong labor movement, and the resulting collective bargaining was a major factor in the creation of a prosperous middle class that was the envy of the world.²⁴ Nonunion employees also

21. REPORT OF HOUSE SUBCOM. ON EDUC. & LAB., 98th Cong., 2d Sess., Rep. No 98 (1984).

22. *Has Labor Law Failed?: Hearing on 49 Stat. 449 Before the H.R. Subcomm. on Educ. & Labor*, 98th Cong. 2-3 (1984) (statement of Clyde Summers).

23. Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolution*, 26 A.B.A. J. LAB. & EMP. L. 201, 203-04 (2011).

24. As Professor Cobble records:

The newfound bargaining power of workers in the post-World War II decades was certainly among the factors contributing to the economic prosperity and the dramatic decline in economic stratification during the “long New Deal,” from the 1940s to the 1970s. [T]he close correlation between a robust labor movement and a society of lessening economic inequality was due not only to the tendency of unions to raise the wages of those at the bottom and diminish wage inequalities, including those of gender, race, region, and firm, but also to the effective political advocacy of labor unions for minimum wage standards and progressive social welfare and tax policies. In addition the union advantage was not limited to wages. [It also included] health insurance and pension coverage [plus] paid vacations, sick leave, and an array of their benefits that promote physical, emotional, and mental well-being.”

Id. at 204-05; see also STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER 74 (2008) (“GM’s generous 1948 contract with Reuther generated a cascade of large me-too raises at companies across the land. [T]hey signed a similar, even sweeter deal in 1950 [that] was pivotal in creating the world’s largest middle class”); FORTUNE MAG., FORTUNE MAGAZINE APPLAUDS THE U.S. LABOR MOVEMENT (1951), reprinted in MAJOR PROBLEMS IN THE HISTORY OF AMERICA WORKERS 507 (Eileen Boris & Nelson Lichenstein eds., 1991) (Reuther’s United Auto Workers “made the worker to an amazing degree a middle-class member of a middle-class society”); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 44-48 (2007) (from 1947 to 1973 worker productivity more than doubled and median income soared by 104%); MELVYN DUBOFSKY, THE STATE OF LABOR IN MODERN AMERICA 212 (1994) (“During the 1950s and 1960s [c]ollective bargaining between unions and management created an affluent society in which rising real wages enabled workers and their families to consume with abandon.”); RAY MARSHALL, LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD 9-10 (1987) (collective bargaining contributed to U.S. prosperity in the post-

prospered, for in areas and industries where unions were strong, many nonunion companies maintained wages and conditions somewhat comparable to unionized companies, for that was their chief means of discouraging unionization.²⁵

Since the mid-1950s, however, union membership in America steadily declined.²⁶ What caused this decline? Proffered reasons typically include some combination of the following: widespread employer opposition to unions expressed through both legal and illegal means;²⁷ decreases in rust-belt manufacturing combined with increases in the exportation of jobs to low-wage countries abroad;²⁸ major changes in the patterns of employment;²⁹ fewer employees wanting to become union members;³⁰ and some or all of the various reasons offered by the blind maven above.³¹ Although all of these reasons are somewhat correct, they fail to include what I consider the most significant cause, which is that the Act has not been fully enforced because Board majorities have not been consistently motivated to enforce the Act's declared policy. Consequently, millions of employees who would otherwise have gained union representation if the Board had made that option reasonably available remained nonunion.³²

WWII period by helping to sustain consumer demand). See *infra* note 79. For contrast with current conditions, see *supra* note 4.

25. Kate Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections*, 50 INDUS. & LAB. REL. REV.195 (1997).

26. BLS News Release, USDL-11-0063 (Jan. 21, 2011).

27. As Professor Brudney accurately observes, "There is powerful evidence that the American workplace today features widespread employer practices of lawful and unlawful resistance to unionization." James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 225 & n.17 (2005) [hereinafter Brudney]. See also Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010); Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, in ECONOMIC POLICY INSTITUTE AND AMERICAN RIGHTS AT WORK EDUCATION FUND (2009).

28. BLS, CHARTING INTERNATIONAL LABOR COMPARISONS (2010 ed.); BLS, ISSUES IN LABOR STATISTICS, AUTOMOTIVE INDUSTRIES: CONCENTRATION AND CHANGE, Summary 07-04/July 2007.

29. BLS Economic News Release, USDL-09-1503, Employment Projections: 2008-2018 Summar,(Dec. 10, 2009); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 53-55 (1986).

30. RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 89, (1999); Drew M. Simmons, BLS, *NLRB Union Representation Elections, 1997-2009* (originally posted June 30, 2010), <http://www.bls.gov/opub/cwc/cb20100628ar01p1.htm>.

31. Discussion in text following note 4.

32. Richard Freeman, *Do Workers Still Want Unions? More Than Ever*, Feb. 22, 2007, EPI Briefing Paper 182, <http://www.sharedprosperity.org/bp182.html> (citing research indicating that 30% to 32% of nonunion workers say they would vote to unionize); see also Kate Bronfenbrenner et al., *Introduction to ORGANIZING TO WIN: NEW RESEARCH UNION STRATEGIES 1, 3-4* (Kate Bronfenbrenner et al. eds., 1998) (citing e.g., Peter D. Hart Assocs. & the Mellman Group, SUMMARY OF OPINION RESEARCH ON LIVING STANDARDS (1996)); SEYMORE MARTIN LIPSET & NOAH M. MELTZ, THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS 80 (2004).

This article traces the reasons why the Act has not been so consistently and effectively enforced.

Before proceeding with those reasons, however, I want to acknowledge the credible assertions of various labor law scholars who have contended that a principal reason for the decline of the American labor movement and the absence of adequate legal protection for employees who seek union representation is that the Act's provisions are no longer adequate or relevant to cope with the varied and rapidly changing needs of present-day workers and the companies to whom they sell their services. Indeed, an impressive array of such scholars have accurately pointed to numerous deficiencies in the Act from which they deduce or imply that these are the main reasons for the law's failure. For example, Cynthia Estlund considers the Act *ossified*,³³ reporting that "private sector labor law . . . has shrunk in its reach and its significance, and is clearly ailing [and] morbidity abounds . . . It is old, in many ways anachronistic, and unusually resistant to change,"³⁴ James Brudney characterizes the Act as an "outmoded regulatory scheme,"³⁵ Benjamin Sachs considers it "ill-fitted to the contours of the contemporary economy" and "peculiarly resistant to the reinvention it so clearly needs,"³⁶ Catherine Fisk and Deborah Malamud assert that the Act is "not well suited to the regulatory task [and that] answers . . . are not to be found in the language of the statute,"³⁷ Michael Gottesman urges that we "amend the NLRA to cure its defects,"³⁸ and Paul Weiler concludes that what is needed is "major surgery on the legal procedure through which employees make their choice about union representation."³⁹

Such obituaries and recommendations for rebirth are worthy of consideration. In fact, others, including myself, have also advocated some of the same amendments suggested by those scholars,⁴⁰ but the likelihood of

33. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528-31 (2002) [hereinafter Estlund].

34. *Id.* at 1527, 1531.

35. Brudney, *supra* note 27, at 229 n.37.

36. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 375-76 (2007).

37. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2015, 2044 (2009).

38. Michael H. Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 68 (1993).

39. Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983).

40. See, e.g., Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 545-63 (1994) [hereinafter Morris, *Blueprint*]; Morris, *Renaissance*, *supra* note 16 at 109-31; Charles J. Morris, *The NLRB in the Dog House: Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 24-49 (1987) [hereinafter Morris, *Dog House*]; Charles J. Morris, *Board Procedures, Remedies, and the Enforcement Process*, in AMERICAN LABOR POLICY 235 (Charles J. Morris ed., 1987) [hereinafter Morris, *Board Procedures*]; William B. Gould IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 193 (1993) (recommending Congress amend Act to overrule *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938)); Paul

Congress enacting any of them without restrictive conditions, as history has repeatedly demonstrated⁴¹—most recently by its inability to pass the Employee Free Choice Act⁴²—is nil. I am therefore convinced that to pursue creation or advocacy of a legislative fix in today’s political climate or the foreseeable future—whether as a minor change or as a totally new concept—would be an exercise in futility. That does not mean, however, that basic Wagner Act rights of union organizing and collective bargaining are unobtainable. With proper Board membership and motivation, some if not all of those objectives can be achieved through measures already allowed by existing provisions in the Act. While attaining a Board—or Boards—so inclined will be far from easy, it is not impossible. Despite its deficiencies—including original Wagner Act deficiencies and procedural obstacles introduced by Taft-Hartley and Landrum-Griffin amendments, plus certain regressive interpretations supplied by the Supreme Court⁴³ and

Weiler, *Enhancing Worker Lives Through Fairer Labor and Worklife Law in Comparative Perspective*, 25 COMP. LAB. L. & POL’Y J. 143, 160 (2003) (same); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990) (proposing “a major overhaul of our labor laws”); Samuel Estreicher, *Collective Bargaining or “Collective Begging”?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 581 (1994) (identifying insufficient “statutory commitment” to collective bargaining); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 265-69 (2002); Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 234-36 (2005); Christopher David Ruiz Cameron, *All Over But the Shouting? Some Thoughts On Amending the Wagner Act By Adjudication Rather Than Retirement*, 26 BERKELEY J. EMP. & LAB. L. 275 (2005).

41. In 1977 the House passed the Labor Reform Act, H.R. 8410, 95th Cong. (1977), which was defeated by a filibuster in the Senate led by Senator Orrin Hatch, S. 2467, 95th Cong. (1978). See CONG. RESEARCH SERV., *Digest of Public General Bills and Resolutions*, 95th Cong. 2nd Sess., Final Issue, pt. 1, at 501-02 (1979). In 1992 the Workplace Fairness Act, H.R. 5, S. 55, 102nd Cong. (1992), passed the House but “a pro-business anti-union minority thwarted the bill by using [cloture] procedures.” James J. Brudney, *Gathering Moss: The NLR’s Resistance to Legislative Change*, 26 A.B.A. J. OF LAB & EMPL. L. 161, 175 (2011). See Estlund, *supra* note 33, at 1540-41.

42. H.R. 1409, S. 560, 111th Cong. (2009); see JON O. SHIMABUKURO, CONG. RESEARCH SERV., RS21887, THE EMPLOYEE FREE CHOICE ACT, (2011); see also Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 232-33 (2010); Alvaro Santos, *Three Transnational Discourses of Labor Law in Domestic Reforms*, 32 U. PA. J. INT’L L. 123, 124-44 (2010).

43. Although the Supreme Court over the years has been supportive of many if not most of the Board’s statutory interpretations and enforcement actions, e.g., *infra* notes 67-70, 319-322 and accompanying text, it has also produced many questionable decisions that severely limited the Board in certain critical areas, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (finding undocumented immigrant workers fired in violation of §8(a)(3) are not entitled to reinstatement or back pay); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (broad interpretation of supervisory status affecting professionals excluding them from the Act’s coverage); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (validating an employer’s right to exclude nonemployee solicitors from common public areas of its property unless extreme access requirements of *Babcox & Wilcox* are met); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (broadly defining of managerial employee status); *NLRB v. United Steelworkers (Nutone)*, 357 U.S. 357, 362 (1958) (holding employer’s imposition of no-solicitation rule need not apply to employer’s own anti-union solicitation of employees); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (distinguishing between mandatory and permissive subjects of bargaining and their effect on the duty to bargain); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (holding that denial of access to non-work areas for non-employees who would not be interfering

some of the Board's own decisions that contradict the Act's policy,⁴⁴ the NLRA is still a remarkably flexible instrument that retains the textual capacity to provide strong and effective enforcement of its unchanged protective provisions.⁴⁵ The main problem is lack of administrative intent,⁴⁶ not statutory insufficiency.

As I stated initially, asking what is wrong with the NLRA is asking the wrong question. The appropriate question today should be: What is wrong with the NLRB? A complete answer must encompass both what is wrong and the factors responsible for that condition. And two additional questions should follow: Can what is wrong be repaired without new legislation? And if so, how?

This article addresses those questions, *first*, by examining key parts of the amended Act and relevant legislative history to identify the Act's true purpose, contrasting the result of that examination with the revisionist versions of the Act's policy and noting the destructive effects of that revisionism; *second*, by examining the inter-connected change in the process of appointing and confirming Board members and General Counsels and observing how that altered process has affected the Board's enforcement of the Act; and *third*, by presenting a means by which that process can be corrected, i.e., a means to repair a broken Board and recover a stolen Act. I begin my response with an answer to the first question by repeating my initial reply, that what is wrong with the Board is that it is relatively ineffective in enforcing the core provisions of the Act. What follows is my detailed response to the substantive *how-and-why* parts of the other questions.

with operations of enterprise, absent unusual circumstances); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (*dicta*) (finding a struck employer has the right to permanently replace economic strikers).

44. *E.g.*, *Dana Corp.*, 351 N.L.R.B. 434 (2007) (reversing prior card-based voluntary recognition rule with requirement of notice and decertification option); *IBM Corp.*, 341 N.L.R.B. 1288 (2004) (denying § 7 right of unrepresented employees to have presence of fellow employee at disciplinary interview); *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004) (rejecting application of "community of interest" concept for unit inclusion of temporary employees); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982) (holding election would not be set aside for misleading campaign statements or misrepresentations of fact), *enforced*, 631 F.2d 901 (8th Cir. 1980); *Summer & Co., Linden Lumber Div.*, 190 N.L.R.B. 718 (1971) *aff'd*, 419 U.S. 301 (1974) (holding employer can require election before recognition and bargaining regardless of union's majority status); *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953) (finding captive audience speech without comparable union access not unlawful).

45. *See infra* Part II.A. and *infra* notes 327-339 and accompanying text.

46. *See infra* Part III.

II.

HOW THE POLICY OF THE NLRA WAS REVISED WITHOUT LEGISLATION

A. *The Core Provisions of the Act*

The place to begin the exploration of how the NLRA was stolen is with a review of the true policy and purpose of the Act, starting with the core terms of the Act itself. Although the Taft-Hartley and Landrum-Griffin amendments added important substantive provisions, these were primarily limitations on the exercise of economic power that unions were either employing or were deemed likely to employ in the collective-bargaining process. Those amendments, however, left totally undisturbed the core provisions of the Wagner Act. Although the latter have been routinely employed in Board decisions, their true potential still lies quietly like a sleeping giant awaiting arousal and vigorous activity. We shall now examine those provisions and also an important enforcement provision added by the Taft-Hartley Act. These comprise the bulk of available law that can be used forcefully and effectively if and when the Board acquires the will and incentive to exercise more fully the authority contained in the Act.⁴⁷

These terms—which lie at the heart of the Act—could become potent instruments that would turn this law into a truly viable statute. The core Wagner Act provisions are remarkably flexible, retaining the textual capacity to permit robust enforcement under a variety of changing conditions, and that is not coincidental. It is the intended result of insightful draftsmanship by Senator Robert F. Wagner and Leon Keyserling,⁴⁸ his able legislative assistant. It is fortunate that the Taft-Hartley and Landrum-Griffin Congresses did not tamper with the broad but clear language with which the Wagner Act Congress had infused these provisions.

In composing the final draft of the 1935 bill that eventually became law, Wagner and Keyserling had the foresight to abandoned their earlier approach of composing lengthy and detailed text intended to separately

47. The Board under the administration of President Barack Obama has begun to show such will and incentive, as in its issuance on August 30, 2011, of a substantive rule requiring the posting of workplace notices advising employees of their rights under the Act and its issuance on December 22, 2011, of another substantive rule streamlining representation election procedures. *Notification of Employee Rights Under the National Labor Relations Act*, 76 Fed. Reg. 54,006 (proposed December 22, 2011) (to be codified as 29 C.F.R. pt. 104); Representation – Case Procedures, 76 Fed. Reg. 36812-01 (proposed June 22, 2011) (to be codified 29 C.F.R. pts. 101, 102, 103); , see also Lawrence E. Dubé, *NLRB Issues Election Case Rule, Producing Controversy and a Court Challenge*, DAILY LAB. REP. (BNA) No. 245 at AA-1 (Dec. 21, 2011).

48. See Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 302-303 (1987). See also CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 42 (2005) [hereinafter MORRIS, BLUE EAGLE].

cover a multitude of situations—an approach they had employed in the numerous drafts of Wagner’s 1934 bill⁴⁹ and to a lesser extent in the draft that immediately preceded the final 1935 draft.⁵⁰ Instead, for the final draft they opted for a bill that was distinguished by the elegance of its plain but broad language. This is the bill which, except for some minor revisions and unrelated provisions, Congress enacted as the 1935 National Labor Relations Act.⁵¹ Labor historian Irving Bernstein observed the compressed format of that final draft and concluded that its authors had “sought to recast the measure in a simple conceptual pattern,”⁵² which they definitely achieved. As Bernstein explained, they produced a highly adaptable text by establishing the Board like a “Supreme Court” where:

[E]mphasis was on the *enforcement of rights* rather than the adjustment of differences; [and] they broadened administrative discretion by employing *general enabling language*. This flexibility applied to such areas as the unfair labor practices, determination of appropriate unit, and restitution to the worker for losses suffered.⁵³

Most important and illustrative of this approach was the newly composed Section 7⁵⁴—the essence of the entire statute. That provision has been aptly called the “‘heart’ of the Act.”⁵⁵ This compact section encapsulates the fundamental guarantees of each of the basic employee rights into a single sentence. That provision, along with Section 8,⁵⁶ the unfair labor practice section, which—except for the Taft-Hartley substitution of union shop for closed shop in Section 8(a)(3)⁵⁷ and the addition of the “right to refrain” from union-related activity in Section 7—together with relevant text in Section 9(a),⁵⁸ define the fundamental substantive law of the NLRA. These concise but broadly worded provisions constitute the substantive core of the continued right of employees to organize and bargain collectively. The main clauses of these basic substantive provisions are here reproduced (with *emphasis* added to key phrases):

Sec. 7. *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives*

49. MORRIS, BLUE EAGLE, *supra* note 48, at 56-58.

50. *Id.* at 59-63.

51. The unrelated provisions dealt with injunctions and arbitration. S. 1958, 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 1295 (1949) [hereinafter 1 LEGIS. HIST. NLRA]. 49 Stat. 449 (1935).

52. IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 88 (1950).

53. *Id.* (emphasis added).

54. 29 U.S.C. § 157 (2006).

55. Thomas C. Kohler, *National Labor Relations Act*, in 3 MAJOR ACTS OF CONGRESS 37 (Brian K. Landsberg, ed., MacMillan Reference USA, 2004).

56. 29 U.S.C. § 158(a).

57. 29 U.S.C. § 158(a)(3).

58. 29 U.S.C. § 159(a); *see infra* note 61 and accompanying text.

*of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*⁵⁹

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) *to interfere with, restrain, employees in the exercise of the rights guaranteed in section 7;*

(2) *to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it*

(3) *by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization*

(5) *to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).*⁶⁰

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer⁶¹

The foregoing brief clauses are the essence of what the National Labor Relations Act is all about.⁶² In addition, however, three flexible procedural and enforcement provisions are also here noted because of their critical importance in making the above substantive provisions a reality for employees who seek to exercise their rights under the Act. The first is the original rule-making clause with the addition of the Taft-Hartley amendment that expressly incorporated the applicability of the

59. 29 U.S.C. § 157. The Supreme Court characterized this as a “fundamental right.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The Taft-Hartley Act added the following to § 7: “and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).” 29 U.S.C. § 157. The limits of this amendment are treated *infra* Part II.F-G.

60. 29 U.S.C. § 158(a) (emphasis added).

61. 29 U.S.C. § 159(a). The Taft-Hartley Act added the following to § 9(a): “and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.” *Id.*; see *infra* note 158.

62. Although the union restrictions in §§ 8(b), 10(l), & Title III are important provisions, they are not directly involved in the subject of this article. And for the same reason, numerous other provisions in the amended Act, mostly procedural, are not here treated.

Administrative Procedure Act.⁶³ The second is located in the broad general remedy section (unchanged from the original Act), and the third is in a broad temporary injunction clause (added by Taft-Hartley):

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.⁶⁴

Sec. 10(c). . . . If [after receipt of proper evidence from an appropriate hearing] the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall [issue an order] requiring such person to cease and desist from such unfair labor practice, and to take *such affirmative action . . . as will effectuate the policies of this Act . . .*⁶⁵

Sec. 10(j). The Board shall have power, upon issuance of a complaint . . . charging [commission of] an unfair labor practice, to petition [a] United States district court . . . for appropriate temporary relief or restraining order . . . [T]he court shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.⁶⁶

The foregoing and related provisions provide the Board with ample authority to enforce the core provisions of the Act and obtain positive results consistent with its policy. The Supreme Court in numerous cases⁶⁷ has recognized the broad scope and adaptability of the Act's terms, expressing, for example, that it is the "the primary function and responsibility of the Board" to apply "the general provisions of the Act to the complexities of industrial life,"⁶⁸ and that the Board "may adopt rules restricting conduct that threatens to destroy the collective bargaining relationship or that may impair employees' right to engage in concerted activity."⁶⁹

The Court has emphasized that Congress did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, [the] Act left to the Board the work of applying

63. Administrative Procedures Act, 5 U.S.C. §§ 551-559 (2006).

64. 29 U.S.C. § 156. The Taft-Hartley addition is italicized.

65. 29 U.S.C. § 160(c) (emphasis added).

66. 29 U.S.C. § 160(j) (emphasis added).

67. See *infra* notes 318-322 and accompanying text.

68. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (quoting *NLRB v. Ins. Agents*, 361 U.S. 477, 499 (1960), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

69. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990).

the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.⁷⁰

By reenacting these basic provisions in both the Taft-Hartley and Landrum-Griffin Acts, Congress continued to guarantee employees the "fundamental"⁷¹ right to organize into unions and to bargain collectively, adding only a limited right of individual employees to refrain from engaging in certain union related activity and several provisions that control union conduct that Congress deemed objectionable. In spite of those limiting provisions, employees today have the same statutory right to unionize and to engage in collective bargaining as they had when the Wagner Act was enacted. Notwithstanding that the Board and the courts have too-often failed to properly construe and effectively enforce these protective provisions,⁷² under proper conditions the broad language of the above quoted statutory text can again become the active and vital core of this important statute.

B. The Revisionist Challenge

Many in the labor relations community erroneously believe that encouragement of collective bargaining and union organizing is either no longer the policy of the Act or is but one of several policies. These misunderstandings—which have been deliberately induced—have long prevailed. One of the major reasons why the Act has not been properly enforced is that for many decades management-oriented revisionists have contended that Taft-Hartley reversed or substantially altered the Act's emphasis on collective bargaining, thus creating erroneous conventional wisdom that has effectively distorted or blocked perception of the Act's real policy and purpose. These revisionist versions, which are primarily related to Taft-Hartley's recognition of the "right to refrain" from union activity in Section 7, have taken many forms, none of which are supported by statutory text or legislative history.

Illustrative of these revisionist versions are the following statements that Robert J. Battista presented to a joint session of House and Senate subcommittees on December 13, 2007, three days before the expiration of his term as Chairman of the Board:

Under the Act, the NLRB has two principal functions: to conduct secret-ballot elections among employees to determine whether or not the

70. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

71. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . is a *fundamental* right") (emphasis added).

72. Activity by the Board and Acting General Counsel in 2011 suggests the beginning of major attempts to improve the Board's performance. *See supra* note 47 and *infra* note 326.

employees wish to be represented by a union; and to prevent and remedy statutorily defined unfair labor practices by employers and unions.⁷³

[T]he Board's mission is to balance and accommodate competing interests, which typically conflict with one another, for example, although employees have the right to organize and engage in collective bargaining, employees also are assured of the right not to engage in union or concerted activity.⁷⁴

[T]he statute was amended in 1947 by the Taft-Hartley Act to give employees the equal right to refrain from union activities and representation, and to protect employees from not only employer interference but also union misconduct . . . [T]he fundamental principle of the Act is to provide for employee free choice.⁷⁵

These and other revisionist versions⁷⁶ of the core policy of the Act are palpably false. All are principally based on a minor amendment to Section 7, the "right to refrain" clause that has—and was intended to have—only a limited and relatively insignificant function and no effect whatever on the basic policy and purpose of the Act, as the discussion below will demonstrate.

Inasmuch as these false concepts of the Act's policy have seriously hindered its enforcement, exposure of the fallacies in the revisionists' conclusions is long overdue. Among the reasons why such exposure, coupled with an explanation of authentic Congressional policy, is especially needed are the following: (1) The Act's real purpose provides—or should provide—the macro standard for guidance of the Board and the reviewing courts in interpreting and enforcing the statute. Adjudication of unfair labor practices and their enforcement and the issuance of Board rules should therefore always point in the policy direction Congress intended. (2) Substituting a contrary, i.e., revisionist version, provides an inadequate rationale for deciding Board cases—a practice that has occurred too often in the past—for it deprives employees of full protection of their fundamental rights to freely join unions and engage in collective bargaining, which are the responsibility of the Federal Government to protect. (3) Identification of the Act's real purpose provides a qualifying commitment relevant to the selection and confirmation of future appointments of Board members and

73. *The National Labor Relations Board—Recent Decisions and Their Impact on Workers' Rights: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions, the S. Subcomm. on Emp't and Workplace Safety, the H. Comm. on Educ. and Labor, and the H. Subcomm. on Health, Emp't, Labor and Pensions*, 110th Cong. 2 (2007) (Testimony of Robert J. Battista, Chairman, NLRB).

74. *Id.* at 8 (emphasis in original).

75. *Id.* at 11. The assertion that "free choice" is the "fundamental value protected by the Act" was the alleged justification for the Battista Board's emasculation of the long-established doctrine that allowed employers to voluntarily grant union recognition on the basis of demonstrated card-check majorities in *Dana Corp.*, 351 N.L.R.B. 434, 441 (2007); see *infra* note 135.

76. The above three versions are but typical examples. For four other examples, see *infra* notes 147, 161, 191-195, 277 and accompanying text.

General Counsels. (4) Revisionist policies tend to deprive the Board of both legitimate authority and institutional incentive to enforce the Act's core provisions through all means available under the Act, including means that have been little used or not previously used.

C. The Substantive Taft-Hartley Act is a Union Regulatory Statute Only

Because the revisionists have based their allegations primarily on the Taft-Hartley Act—and not the Landrum-Griffin Act—exposing their misconceptions requires a close examination of the exact nature of the Taft-Hartley amendments and their relevant content. The place to begin our examination of the policy and purpose of that law is therefore with an understanding of the exact nature of the Taft-Hartley Act. This entails first a look at the background and conditions that produced that statute. Between 1935 and 1947 union membership in the United States grew from three to fifteen million, and when Taft-Hartley was being considered as many as twenty million workers may have been covered by exclusive collective bargaining contracts.⁷⁷ Some industries, including coal mining, steel, auto, construction, railroads, and trucking, were almost entirely unionized.⁷⁸ The resulting surge in collective bargaining, with its accompanying increases in wages and other benefits, ultimately produced a stronger middle class and narrowed income disparity among income earners,⁷⁹ but in the short term it produced a wave of strikes that shut down many steel mills, auto plants, seaports, and large sections of other industries, all of which generated strong opposition among much of the public.⁸⁰ Consequently, following World War II there was considerable popular criticism of union power and a widely held belief that the NLRB had become one-sided and even influenced by Communists within the agency.⁸¹ Those were the principal factors that led to passage of the Taft-Hartley Act by the Republican dominated 80th Congress.⁸²

77. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 47 (15th ed. 2011); 93 CONG. REC. A895 (daily ed. Mar. 5, 1947) (statement of Sen. Ball), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1198 (1974) [hereinafter LEGIS. HIST. T-H ACT].

78. FOSTER RHEA DULLES, *LABOR IN AMERICA* 346-54 (3rd ed. 1966).

79. *See supra* note 24.

80. JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* 251-252 (1981) [hereinafter GROSS, *RESHAPING OF THE NLRB*]; *see also* FRANK W. MCCULLOCH & TIM BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD* 35-37 (1974); FOSTER RHEA DULLES & MELVYN DUBOFSKY, *LABOR IN AMERICA* 343-48 (4th ed. 1966).

81. *See* THE CIO'S LEFT-LED UNIONS (Steve Rosswurm ed., 1992); ROGER KEERAN, *THE COMMUNIST PARTY AND THE AUTO WORKERS UNIONS* (1980); BERT COCHRAN, *LABOR AND COMMUNISM: THE CONFLICT THAT SHAPED AMERICAN UNIONS* (1977).

82. For detailed treatment of the background conditions that preceded passage of the Taft-Hartley Act, *see* GROSS, *RESHAPING OF THE NLRB*, *supra* note 80. *See also* HARRY A. MILLIS & EMILY CLARK

The Act that emerged was primarily—though not exclusively—a union regulatory statute. All of Taft-Hartley’s substantive law amendments regulated unions and union conduct. The other amendments, though numerous and important, were basically changes in procedural and remedial law—i.e., changes in administrative procedures and changes and additions to remedies contained in the original Act. Most of these changes were favorable to management. The substantive union-regulatory amendments, which were designed to curbed union economic activity within the collective bargaining process, represented a major shift in the focus of the federal government’s support for parties engaged in collective bargaining.⁸³ By this legislative decree, the government’s previously strong backing of the union side of the bargaining process, characterized by the Wagner Act’s absence of restrictions on union activity, shifted to strong backing of the employer’s side of that process, which was characterized by Taft-Hartley’s imposition of major restraints on the exercise of union economic power, especially restraints on secondary boycotts and jurisdictional disputes, and outlawing of the closed shop.⁸⁴

Taft-Hartley thus represented a major effort to weaken union bargaining power at a time when unions were widespread and strong. As Senator Taft explained in a radio address following President Truman’s veto, the intent was “to restore equality in collective bargaining,”⁸⁵ and he also explained that the bill “is based on the theory of the Wagner Act . . . on the theory that the solution of the labor problem in the United States is free, collective bargaining.”⁸⁶ As the record will show, while exhibiting a preference for management, Taft-Hartley was not intended to equate individual bargaining with collective bargaining or to lessen the *positive* right of employees to engage in union and other collective activity or to elevate the *negative* right to refrain from such activity.

BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS, 271-362 (1950); THE CIO’S LEFT-LED UNIONS, *supra* note 81; KEERAN, *supra* note 81; COCHRAN, *supra* note 81.

83. The secondary boycott and jurisdictional disputes provisions were contained in 29 U.S.C. §§ 158(b)(4) and 158(b)(6); the closed shop was outlawed, substituting in its place the union shop, 29 U.S.C. § 158(a)(3), (b)(2);. Other significant changes that were procedural and remedial included: creating an independent office of General Counsel that separated the Board’s prosecutorial and judicial functions, 29 U.S.C. § 153(d); empowering the Board with both discretionary and mandatory injunctive authority, 29 U.S.C. § 160(j), (l); creating new federal causes of action relating to secondary boycotts, 29 U.S.C. § 187, and enforcement of contracts between unions and management, 29 U.S.C. § 185; establishing an independent Federal Mediation and Conciliation Service to assist the collective bargaining process, 29 U.S.C. §§ 171-175, and devising procedures to cope with national emergency labor disputes, 29 U.S.C. §§ 176-180; allowing states to enforce their “Right-to-Work” laws, 29 U.S.C. § 164(b); and imposing certain restrictions on employer payments to union representatives, 29 U.S.C. § 186.

84. *Supra* note 83.

85. LEGIS. HIST. T-H ACT, *supra* note 77, at 1628 (emphasis added).

86. *Id.* at 1653 (emphasis added).

The economic restraints on unions imposed by Taft-Hartley—principally the prohibitions of secondary boycotts, jurisdictional disputes, and closed shops—proved successful, for those actions virtually disappeared from the labor-relations scene several decades ago.⁸⁷ Such successful enforcement, however, did not occur with regard to the Act's original core provisions and policy declarations, even though the Taft-Hartley Congress had intended that union-organizing and collective-bargaining would continue to receive encouragement and governmental protection. A significant factor in that failure was that despite the textual clarity of those original provisions, organized employers and their allies never ceased disseminating grossly inaccurate versions of certain features of Taft-Hartley, which created serious misunderstandings as to the central purpose of the NLRA and limitations of the Taft-Hartley amendments. As demonstrated by the statutory and historical record discussed below, those versions of post-Taft-Hartley statutory policy are pure acts of fiction. Congress left no doubt as to the Act's basic purpose, spelling it out repeatedly, first in unambiguous language in the original statute, then reenacting it twice in Taft-Hartley amendments and reenacting it again with new emphasis in the Landrum-Griffin Act.

*D. The Policy and Purpose of the Amended Act
as Spelled Out in Statutory Text*

Notwithstanding revisionists' views to the contrary, the NLRA has always had but one overriding purpose, which is, in the abbreviated textual version, "encouraging the practice and procedure of collective bargaining [and] protecting [workers'] full freedom of association."⁸⁸ The full version in Section 1, with its subsidiary inclusions, paraphrases each of the protected activities contained in Section 7 of the original Wagner Act⁸⁹ but conspicuously omits any reference to the Taft-Hartley addition of the right of employees "to refrain" from such activities.⁹⁰ It reads as follows:

It is hereby 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

87. As revealed and confirmed by the annual REPORTS OF THE NATIONAL LABOR RELATIONS BOARD with reference to § 8(b)(4) and § 8(b)(2) cases.

88. 29 U.S.C. § 151 (2006).

89. Quoted at *supra* note 59.

90. *See id.* Discussion *infra* notes 150-153 and accompanying text.

the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁹¹

Congress not only reenacted that declaration without any change in Title I of Taft-Hartley⁹²—which alone suffices to indicate its reconfirmation—it chose to further emphasize collective bargaining by adding a new policy provision in Title II, which established the Federal Mediation and Conciliation Service.⁹³ That provision states in pertinent part:

That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of *the best interests of employers and employees* can most satisfactorily be secured by the settlement of issues between employers and employees *through the process of conference and collective bargaining* between employers and the representatives of their employees.⁹⁴

And in 1959 Congress retained, without any change, the above policy declarations and added a third in the Landrum-Griffin Act, emphasizing the responsibility of the federal government to protect union-organizing and collective-bargaining by enacting a preface to its over-all “declaration of findings, purpose, and policy” that reads as follows:

Congress finds that, in the public interest, it continues to be *the responsibility of the Federal Government* to protect employees’ rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection⁹⁵

Despite the textual clarity of these several statutory provisions, this unequivocal Congressional purpose has been frequently ignored and non-legislative revisionist versions of the Act’s purpose have been widely substituted—with apparent success.

E. The Policy and Purpose of the Amended Act as Demonstrated in Legislative History

As I have explained, the Taft-Hartley Act was primarily designed to regulate unions and union conduct. Recognizing that unions had become a major player in the American economy, majorities in both the U.S. House and Senate were of the view that union power in the collective-bargaining process had grown excessive and was harmful to the nation. The Act’s chief sponsor, Senator Robert A. Taft, explained on the floor of the Senate

91. 29 U.S.C. § 151.

92. For description of the other titles, see *infra* note 162.

93. Labor Management Relations (Taft-Hartley) Act §§ 201-204, 29 U.S.C. §§ 171-74 (2006).

94. 29 U.S.C. § 171(a) (emphasis added).

95. 29 U.S.C. § 401(a) (emphasis added); see *infra* notes 169-170.

that the aim was “to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power If there is reasonable equality at the bargaining table, I believe that there is much more hope for labor peace.”⁹⁶ And later, in defending the final bill in response to President Harry Truman’s veto message, Taft repeated that it represented an effort “to restore *equality in collective bargaining*.”⁹⁷ There was thus considerable agreement that in order to equalize collective-bargaining power strong regulations on union conduct should be imposed, such as outlawing most secondary boycotts and jurisdictional disputes and changing closed shops into less powerful union shops. Accordingly, provisions to that effect were contained in both the House and Senate bills.⁹⁸ Yet those bills were vastly different in content. The House bill was accurately characterized as “a ‘tough’ or ‘harsh measure’ [whereas the] Senate bill was considered ‘soft’ and ‘mild’ . . . in comparison.”⁹⁹ It was recognized, however, that enactment of any bill would have to contend with the Democratic President in the White House, hence the final bill would need sufficient support in both Houses to avoid a veto or to override one should it occur (which it did).

Notwithstanding the restrictions on union conduct contained in the Senate bill, from the outset the Senate’s version expressly retained the concept of collective bargaining as the key focus of the Act.¹⁰⁰ Had that not been so, it is unlikely that moderates in the Senate, such as Republican Irving Ives of New York, would have approved of its passage. In fact, Senator Ives, founding dean of the New York School of Industrial and Labor Relations at Cornell University¹⁰¹ and long-time supporter of collective bargaining,¹⁰² was an active backer and one of the architects of the Taft bill. It is especially significant that it was an Ives amendment that removed from the bill the phrase “interfere with”¹⁰³ in Section 8(b)(1), the union unfair-labor-practice provision that was intended to be the counterpart to Section 8(a)(1), the employer unfair-labor-practice provision.

96. LEGIS. HIST. T-H ACT, *supra* note 77, at 1007.

97. Radio address, June 20, 19447, *reprinted in* T-H LEGISLATIVE HISTORY, *supra* note 77, at 1626, 1628 (emphasis added).

98. *See* MILLIS & BROWN, *supra* note 82, at 383-84.

99. *Id.* at 383.

100. LEGIS. HIST. T-H ACT, *supra* note 77, at 99-101, 109-12, 138; S. 1126, 80th Cong., 1st Sess. (1947) (as reported Apr. 26, 1947, Title I, §§ 1, 7, 8(a)(1)-(6) and Title II, § 201(a)); *see also infra* note 121.

101. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-PRESENT, <http://bioguide.congress.gov> (last visited February 27, 2012).

102. Senator Ives reminded his colleagues in the Senate of that support in recounting his earlier efforts in New York State “to do whatever could be done to bring about the self-government of industry through self-regulation.” LEGIS. HIST. T-H ACT, *supra* note 77, at 1022.

103. *Id.* at 1139.

Ives told his fellow senators that prohibiting unions from “interfering with” employee rights “may later, by interpretation and effect, defeat legitimate attempts at labor organization.”¹⁰⁴ His colleagues agreed, for his deletion-amendment was adopted without objection.¹⁰⁵

The Senate bill¹⁰⁶ not only retained the core provisions of the Wagner Act and its “Findings and Policies” in Section 1, it also established the Federal Mediation and Conciliation Service as a means to assist the collective bargaining process.¹⁰⁷ And for this it inserted a second declaratory provision that separately reconfirmed that “*the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining . . .*”¹⁰⁸

The collective-bargaining policy was further underscored by the subcommittee’s report on the Senate bill, which stated that the “bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing laws in a manner that will *encourage free collective bargaining.*”¹⁰⁹ The bill that passed the Senate made no changes in any of the foregoing provisions.

In contrast, the House bill, containing many provisions adverse to unionization and collective bargaining, passed the House without changes.¹¹⁰ It would have deleted entirely all of the Wagner Act’s “Findings and Policies,” substituting instead a platitudinous “Short Title and Declaration of Policy” that did not mention collective bargaining and deliberately omitted any express encouragement of that process.¹¹¹

When the conflicting bills were sent to conference committee, the House’s approach was rejected. Senator Ives, one of the Senate’s conference committee managers, succeeded in convincing a majority of the House managers to accept almost all of the provisions of the Senate bill, including verbatim reenactment of the Wagner Act’s core provisions¹¹² and its “Findings and Policies.” (except for three innocuous revisions in the

104. *Id.* at 1025.

105. *Id.* at 1139.

106. S. 1126.

107. Labor Management Relations (Taft-Hartley) Act, §§ 202-205, 29 U.S.C. §§171-75 (2006); *see* notes 93-94.

108. 29 U.S.C. §171(a) (emphasis added). For full text of this provision, see *supra* note 94 and accompanying text.

109. Subcommittee on Labor of Senate Committee on Labor and Public Welfare, LEGIS. HIST. T-H ACT, *supra* note 77, at 408 (emphasis added).

110. H.R. 3020 was introduced on April 10, 1947, and reported on April 11, *id.* at 591; all floor amendments were rejected, *id.* at 746, 757, & 767, and the bill was passed on April 17, *id.* at 861-63.

111. *See id.* at 301.

112. *Supra* notes 56-61.

Findings¹¹³). The bill that emerged from conference was thus essentially the Senate bill with only a few additions, none of which affected the core provisions of the Wagner Act or its findings and declaration of policy. The House conferees not only agreed to the Senate's verbatim retention of the Wagner Act policy declaration, they also agreed to the Senate's initiation of the new collective-bargaining policy declaration in Section 201(a), specifically referencing its unchanged status in the House Conference Committee Report.¹¹⁴

The Senate's victory was readily apparent to both participants and observers.¹¹⁵ After the conference committee had completed its task, Senator Taft reported to his colleagues on the Senate conferees' successful persuasion of the House conferees, proudly announcing, "that as a general proposition I can say that the Senate conferees did not yield on any . . . important matter. The bill represents substantially the Senate bill."¹¹⁶ And he reiterated that the House conferees had "[in] general . . . accepted the entire basis of the Senate bill and the Senate language."¹¹⁷

The Senate's victory was conspicuously recognized by proponents of the House bill—though unhappily. For instance, Representative C. E. Hoffman, who had been one of the House conference committee managers, was so disappointed with the resulting bill that he declined signing the House's conference committee report¹¹⁸ and during the brief debate that followed remarked "I do not like the bill . . . this was the gift of the Congress to the unions and the union leaders."¹¹⁹ Nevertheless, Hoffman

113. Those revisions consisted of insertion of "some" before "employers" twice in the first sentence of the section, thus limiting the described egregious conduct to *some* rather than to *all* employers, and insertion of a new paragraph with generic references to union conduct that impaired the public interest in the free flow of commerce, which was appropriate in view of the substantive amendments regulating certain union conduct.

114. LEGIS. HIST. T-H ACT, *supra* note 77, at 301-02.

115. As the New York Times reported, "[the] compromise labor bill . . . everywhere following the basic approach of the measure, which the Senate passed. . . . The more moderate Senate bill . . . emerged intact in principle . . . Every one of the sharpest restrictions of the House measure . . . fell in the conference. . . . *It was, in fact, the hanging threat of a veto which caused Mr. Hartley to lead his House conferees into a long retreat toward the Taft bill.*" William S. White, *Senate Terms Win*, N.Y. TIMES, May 29, 1947 (emphasis added); see also MILLIS & BROWN, *supra* note 82, at 382, 384.

116. LEGIS. HIST. T-H ACT, *supra* note 77, at 1526.

117. *Id.* at 1594. Although authoritative observers agreed that the final bill which became law was based on the Taft bill, detailed analysis indicates the presence of a little more Hartley-bill influence than Senator Taft first acknowledged; however, there was no successful House influence contradicting the centrality of collective bargaining or its declaration as policy. See White, *supra* note 115; *Supplementary Analysis of Labor Bill as Passed*, which Taft inserted in the record after the override of the President's veto; LEGIS. HIST. T-H ACT, *supra* note 77, at 1622-25; see also commentary in GROSS, *RESHAPING OF THE NLRB*, *supra* note 80, at 255, and MILLIS & BROWN, *supra* note 82, at 387.

118. LEGIS. HIST. T-H ACT, *supra* note 77, at 573.

119. *Id.* at 891.

and other disappointed House members voted in favor of the bill and the motion to override the President's veto¹²⁰—their disappointment thus underscored that Taft-Hartley did not change the core policy of the Act.

Lest there be any remaining confusion concerning Congress's clearly expressed intent to retain collective bargaining as the declared purpose of the Act, Senator Taft confirmed this fact at two key stages in the legislative process. In first recommending the Senate bill for passage, he pointed out that "the committee feels, almost unanimously, that the solution of our labor problems must rest on a *free economy and on free collective bargaining. The bill is certainly based upon that proposition.*"¹²¹ Prior to the Senate's vote to override President Truman's veto, Taft again asserted that the bill "is based on the theory that the solution of the labor problem in the United States is *free, collective bargaining.*"¹²²

The Taft-Hartley Act was certainly not designed to equate *nonunion* labor relations with *unionized* bargaining relations, as some revisionists have implied. The text of the Taft-Hartley amendments and their legislative history indicate that the 80th Congress fully agreed and accepted—however reluctantly on the part of some members—that, notwithstanding the Act's weakening of union bargaining power, *collective bargaining* would continue to be the nation's statutorily preferred means to determine wages and working conditions of employees covered by the NLRA.

While it is true that many anti-union die-hards in that Congress—particularly in the House of Representatives—preferred a bill that was silent or neutral on the subject of collective bargaining, they were outnumbered.¹²³ Although it was tilted in numerous ways to favor employers,¹²⁴ the final bill that was enacted over President Truman's veto made it absolutely clear that the policy of the Act would continue to be the encouragement of union organizing and collective bargaining.

Thus, the Wagner Act's core substantive provisions¹²⁵ and declaration of national policy in Section 1¹²⁶ not only remained fully intact, that policy was further reconfirmed by the newly enacted Section 201(a). This was the price the sponsors of the Taft-Hartley Act had to pay to obtain its passage. Thereafter, the management lobby made several efforts to change that policy through legislation, but none were successful.¹²⁷ As a consequence, organized management and their political allies turned their attention to

120. *Id.* at 922.

121. *Id.* at 1007 (emphasis added).

122. *Id.* at 1653 (emphasis added).

123. See MILLIS & BROWN, *supra* note 82, at 383-88.

124. *Id.* at 382, 384; White *supra* note 115.

125. *Supra* notes 56-61.

126. *Supra* notes 88, 91.

127. See *infra* notes 171-190.

revisionist versions of the Act's policy, which they propagated with considerable success, achieving widespread *de facto* acceptance of those policy renditions, notwithstanding their inaccuracy.

*F. The "Right to Refrain" in Section 7 is Unrelated to the
Policy of the Act*

Revisionist versions of NLRA policy are based in whole or in part on the "right to refrain" language that Taft-Hartley added to Section 7. However, statutory text and legislative history confirm that the "right to refrain"—or any of its metamorphosed "free choice" versions—is neither a replacement for the primary and statutorily described "policy of the United States [of] encouraging collective-bargaining"¹²⁸ nor a statutory coequal of that policy. Congress deliberately subordinated that *minor* right "to refrain from" collective bargaining and other concerted activities to the *major* right "to engage in" such activities.

The logical place to begin this analytical review is with the full text of Section 7 as amended. The Taft-Hartley amendment is italicized:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*

Given its placement, the italicized text obviously ties to the union unfair labor practices contained in Section 8(b) that were added by Taft-Hartley. Were it not for the misleading revisionist expressions regarding the Act's policy, no further explanation would be necessary, for as the structure of the Act reveals and as NLRA practitioners are well aware, *Section 7 is not an independently enforceable provision*. It is only a source—but an exceedingly important one—of basic rights under the Act, rights that are enforceable only through the unfair-labor-practice procedures in Sections 8 and 10.¹²⁹ Thus, the negative *refrain* portion of Section 7, which was deliberately omitted from the Act's policy declaration¹³⁰ (unlike the positive *concerted activity* portion), is narrowly confined to union conduct prohibited by Section 8(b)(1)(A), i.e., conduct that *restrains* or *coerces*

128. 29 U.S.C. § 151 (2006).

129. Section 8 contains all of the unfair labor practices proscribed by the Act. 29 U.S.C. § 158. Section 10 contains provisions for complaints and enforcement procedures, including hearings, injunctions, and judicial review. 29 U.S.C. § 160.

130. See *supra* notes 89-90 and *infra* notes 150-153 and accompanying text.

employees who choose to refrain from engaging in concerted activities protected by Section 7. This is obviously more restrictive than the positive union and concerted activities that are protected by Section 8(a)(1), which protects not only from *restraint* and *coercion* but also from *interference*.

Accordingly, the “refrain” language in Section 7 is simply the text that triggers Section 8(b)(1)(A) enforcement—just as the union-organizing and collective-bargaining text in Section 7 triggers Section 8(a)(1) enforcement. The fact that Section 7 is not independently enforceable is thus indicative of the limited purpose that Congress intended for its statutory recognition of the right of employees to refrain from engaging in concerted activity. That intent is confirmed and reinforced by the following account of undisputed legislative history and further analysis of statutory text.

To the Taft-Hartley Congress, the “refrain” addition to Section 7 was not even deemed a change in the law¹³¹ and was not intended to affect the Act’s underlying purpose. Congress carefully subordinated the *negative* right to refrain to the *positive* right to organize and engage in collective bargaining, for, as previously noted, unions at that time were recognized as natural and expected participants in labor-management relations.¹³² In fact, this addition to Section 7 was not viewed as an important amendment and was never the subject of floor discussion in either the House or the Senate.¹³³ Such legislative silence explains why the revisionists never found any quotations from contemporary members of either the House or Senate to support their fictitious contention that this minor amendment changed the Act’s basic policy.

There was, however, considerable Congressional debate about the initially broad language in Section 8(b)(1), which, as we have seen, was corrected by Senator Ives’s amendment removing the broad phrase “interfere with” from the narrower phrase, “restrain or coerce,” which remained in the bill.¹³⁴ This deletion further confirms that Congress was careful to avoid prohibiting conduct that merely *encouraged* union membership or activity or collective bargaining. Sections 7 and 8(b)(1)(A) outlawed only harsh conduct by unions that directly *coerced* or *restrained* employees, and those provisions can be activated only by the filing of specific unfair-labor-practice charges. *Means* and not *ends* are thus the target of “right to refrain” language and its enforcement through Section 8(b)(1)(A). This conclusion is supported by Congressional debate on the Ives amendment and its adoption—when, as noted above, Senator Ives stressed that *interference* with the “right to refrain” was not to be used to

131. See Senator Taft’s supplementary remarks, *infra* note 139.

132. See *supra* notes 76-80, especially Senator Ball’s comments, LEGIS. HIST. T-H ACT, *supra* note 77, at 1198.

133. See LEGIS. HIST. T-H ACT, *supra* note 77 (in its entirety).

134. *Supra* notes 103-105 and accompanying text.

fashion rules or decisions that “may later, by interpretation and effect, defeat legitimate attempts at labor organization”¹³⁵—and also by the Supreme Court’s construction of those provisions.¹³⁶

The House report on the conference-agreement bill also explains the direct relationship between the “right to refrain” text in Section 7 and the unfair labor practice proscribed by Section 8(b)(1)(A):

That provision . . . provides that employees are also to . . . have the right to refrain from joining in . . . concerted activities with their fellow employees if they choose to do so . . . Taken in conjunction with the provisions of section 8(b)(1) of the conference agreement . . . wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as . . . having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.¹³⁷

This statement was also incorporated verbatim into the Senate’s report on the agreed-upon conference bill.¹³⁸ And, after that bill was enacted over President Truman’s veto, Senator Taft made doubly clear that this was the limited purpose of the Section 7 “right to refrain,” supplying this further explanation as to why that amendment was added:

There is similar language in the Norris-LaGuardia Act . . . Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act. (See *Pittsburgh Plate Glass Co.*, 66 NLRB 1083.) *The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively.* The reason for its inclusion was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conference, made it an unfair labor practice for labor organizations to *restrain* or *coerce* employees in the rights guaranteed them in section 7, the House conferees insisted that there

135. LEGIS. HIST. T-H ACT, *supra* note 77, at 1025. This is exactly what has occurred more recently, however, in revisionist NLRB cases that did not involve any union unfair labor practice and where there was no allegation of any § 8(b)(1)(A) charges or conduct, such as in *Dana Corp.*, 351 N.L.R.B. 434 (2007) which, on the basis of the revisionist view that “free choice is, after all, the fundamental value protected by the Act,” it reversed a long-established doctrine that encouraged collective bargaining by allowing employers to voluntarily grant union recognition on the basis of demonstrated card-check majorities, thereby—in the words of Senator Ives—“defeat[ing] legitimate attempts at labor organization.” 351 N.L.R.B. at 441. For similar actions by the same Labor Board, see *Nott Co.*, 345 N.L.R.B. 396 (2005); *Diversicare Leasing Corp.*, 351 N.L.R.B. 817 (2007); *Shaw’s Supermarkets, Inc.*, 350 N.L.R.B. 585 (2007).

136. See *infra* notes 141-144 and accompanying text.

137. LEGIS. HIST. T-H ACT, *supra* note 77, at 543-44.

138. *Id.* at 1539.

be express language in section 7 which would make the prohibition contained in section 8(b)(1) apply to *coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line*.¹³⁹

Taft not only emphasized the limited significance of the “refrain” amendment, but also stressed that it was applicable only to union *restraint* or *coercion*, thus giving effect to the Ives amendment that removed the phrase “interfere with.”

Legislative history is therefore precise and unambiguous as to the limits of what Congress intended by the addition of the “right to refrain” language. Senator Taft’s statement that it was intended to protect employees from conduct such as “coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line”¹⁴⁰ conforms to the limited scope the Supreme Court later ascribed to that provision in the *Curtis Brothers* case.¹⁴¹

After examining pertinent Taft-Hartley text and legislative history in *Curtis Brothers*, the Supreme Court concluded with regard to the meaning of “the right to refrain” in Section 7¹⁴² that Section 8(b)(1)(A) “is a grant of power to the Board *limited* to authority to proceed against union tactics involving *violence, intimidation, and reprisal or threats thereof*,”¹⁴³ and nothing more. And, to further emphasize that limitation, the Court quoted with approval from the Board’s conclusion in *Perry Norvell Co.* regarding the provision’s meaning:

By *Section 8(b)(1)(A)*, Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section, *Congress was aiming at means, not at ends*.¹⁴⁴

It is notable that three years after the Court’s decision in *Curtis Brothers*, Kenneth C. McGuiness, a revisionist with considerable knowledge of the NLRA¹⁴⁵ and surely the *Curtis* decision, presented an

139. Senator Taft’s supplementary remarks, *id.* at 1623 (emphasis added).

140. *Id.*

141. *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274 (1960) (holding that prior to Landrum-Griffin’s limitations on organizational and recognition picketing in § 8 (b)(7), 29 U.S.C. § 158 (b)(7), such peaceful picketing did not violate § 8 (b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (2006)).

142. *Id.* at 275.

143. *Id.* at 290 (emphasis added).

144. *Id.* at 291 (emphasis added) (quoting *Perry Norvell Co.*, 80 N.L.R.B. 225, 239 (1948)).

145. He was chief counsel to Board Member Albert Beeson in 1954, Associate General Counsel in 1955, and Acting General Counsel in 1956. JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* 127-131 (1995) [hereinafter GROSS, *BROKEN PROMISE*]. From 1976 to 1986, McGuiness authored five editions of *HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD*.

untruthful rationale for his version of the Act's policy, which the management community readily accepted. In his book published by the Labor Policy Association, *The New Frontier NLRB*,¹⁴⁶ he wrote:

[S]pecific rights of employees . . . are contained in Section 7 of the Act. Proscriptions on the conduct of both employers and unions follow in Section 8. The restrictions on *interference, restraint and coercion, found in Section 8(a)(1) and 8(b)(1)(A)*, specifically refer to the exercise of the rights guaranteed in Section 7. *Therefore*, in interpreting the Act, Section 7 and the rights guaranteed therein, including the "right to refrain" from concerted activities, provide ample direction where the language of Section 8 is not clear.¹⁴⁷

The third and critical sentence in that statement is obviously untrue. As previously noted, *interference, restraint, and coercion* apply only in Section 8(a)(1), the employer unfair-labor-practice subsection. That phrase is not "found in . . . Section 8(b)(1)(A)," as McGuiness asserted. His statement thus fails to acknowledge the plain statutory text where deletion by the Ives amendment confined the Section 7 "right to refrain" to its intended limited purpose, i.e., to prevent unions from *restraining* or *coercing* nonunion employees who choose to refrain from engaging in union or other concerted activities spelled out in that section; the provision omits the critical "*interfere with*" phrase essential to McGuiness's contention.¹⁴⁸ The "therefore" in his last sentence is likewise false, for it is a gross distortion of statutory text to say that this deceptive and inaccurate reading of Section 8 "provide[s] ample direction" to support the revisionist conclusion that the "right to refrain" has an effect on the over-all policy of the Act. Congress carefully omitted the "right to refrain" from all of its several policy declarations in the statute, and only Congress would have the right to insert it.

With the withdrawal of the underpinning phrase of "*interfere with*" from Section 8(b)(1)(A) and the omission of the "right to refrain" from all of the statutory declarations of policy, the revisionists' house-of-cards falls like the Queen's cards in *Alice in Wonderland*.¹⁴⁹ Unambiguous text and consistent legislative history leave no doubt that the right to refrain from union activity has no force or effect beyond its limited protection against restraint or coercion.

146. KENNETH C. MCGUINESS, *THE NEW FRONTIER NLRB* (1963) [hereinafter MCGUINESS *NEW FRONTIER*]; see *infra* notes 164-72 and accompanying text.

147. *Id.* at 15 (emphasis added).

148. See *supra* notes 103-105, 134 and *infra* notes 154-156.

149. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND*, Chap. XII (1865).

G. *Statutory Text Subordinates the Negative “Right to Refrain” to the Positive Right to Form Unions and Bargain Collectively*

Analysis of additional statutory text and the placement and omission of certain provisions in the Act tell the same story. Six objective features in the text show that the negative right to “refrain” from union or other concerted activity is—and was intended to be—subordinate to the affirmative right to “engage” in such activity. These six statutory features, which represent both direct and indirect limitations on the “right to refrain,” are outlined as follows:

The *first* and dispositive limitation is the previously noted deliberate exclusion by Congress—specifically by the Senate-House conference committee—of the “right to refrain” from the text of the declaration of statutory policy in Section 1 of Title 1. Whereas the Wagner Act language describing the Act’s policy regarding union organizing and collective bargaining is a complete paraphrasing of *all* the original Section 7 rights—even including the generic “other mutual aid or protection” objective—when the Taft-Hartley Congress added the “right to refrain” to Section 7 it knowingly abstained from adding that right to the *policy* description in Section 1. This was not an oversight. During the conference committee’s two week deliberation¹⁵⁰ the conferees added, immediately preceding the Wagner-Act paragraph in Section 1 that contained the policy declaration, an entirely new paragraph taken from the Senate bill that asserted in its key part that “certain practices by some labor organizations, their officers, and members” have the effect of impairing the public’s interest in the free flow of commerce.¹⁵¹ Thus, had Congress—or more specifically the conference committee¹⁵²—intended to equate the “right to refrain” with the core policy of union-organizing and collective-bargaining, it surely would have done so with a simple addition of text to that effect when it inserted the foregoing union-impairment paragraph immediately next to the declaration of policy.¹⁵³

The *second* limitation is an explicit downgrading exception contained in the same Section 7 clause that articulated the “refrain” right. It stipulates that the “right to refrain” is applicable “except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3),” i.e., a *collectively bargained* union-shop agreement. Thus, tucked away in the very same Taft-Hartley phrase—in fact together with the “refrain”

150. LEGIS. HIST. T-H ACT, *supra* note 77, at XII.

151. 29 U.S.C. § 151 (2006).

152. See *supra* notes 112-114 and accompanying text.

153. Likewise, when Congress passed the Landrum-Griffin Act, it again carefully excluded reference to the “right to refrain” from its paraphrasing of the original Section 7 rights. See *supra* note 95; *infra* notes 169-170 and accompanying text.

amendment to Section 7—is an express statutory example of Congress subordinating the *individual* right to refrain to the *collective* right to bargain.

The *third* limiting feature is the previously noted Ives amendment¹⁵⁴ that excluded the broad phrase “interfere with” from Section 8(b)(1), thus distinguishing it from Section 8(a)(1). As a result, the prohibition applies only if a union *restrains* or *coerces* employees regarding their right to refrain under Section 7, but not if it simply *interferes with* that right; whereas employers are prohibited not only from *restraining* and *coercing* employees who seek to engage in union and other concerted activity but also from *interfering with* such rights. For example, employers unlawfully “interfere” with the right to organize when they deny employees the right to engage in union solicitation during non-working time, as in *Republic Aviation Corp. v. NLRB*,¹⁵⁵ a case of which the Taft-Hartley Congress was well aware,¹⁵⁶ whereas a similar broad presumption would not apply to conduct that might persuade nonunion employees to join or vote for a union or by indirect action provide them with union representation.

The *fourth* limitation is the retention of the provision in Section 9(a) allowing—indeed requiring—a majority union to be the *exclusive* collective bargaining representative of all the employees in an appropriate bargaining unit, thus including any nonunion employees who might wish to refrain. Needless to say, this is an essential part of the collective bargaining system that the Act was intended to foster.

The *fifth* limitation is the Taft-Hartley addition to Section 9(a) that allows employees

to have [their] grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.¹⁵⁷

This right of *individual* grievance-adjustment is thus available only in workplaces where there is a “bargaining representative,” i.e., a collective-bargaining relationship, not in nonunion workplaces where there is no such relationship. This is a stark indication of Congress’s intended statutory superiority of collective rights over individual rights, and an implicit expectation of the existence of collective-bargaining venues where this *individual* right would operate.

154. See *supra* notes 103-105, 134 and accompanying text.

155. *Supra* note 67.

156. LEGIS. HIST. T-H ACT, *supra* note 77, at 432, 560.

157. 29 U.S.C. § 159(a) (2006).

The *sixth* limiting feature is Congress's retention—without any change—of the Section 7 “right to engage in . . . *concerted* activities for the purpose of other mutual aid or protection,” which does not protect *individual* activities for such purpose. “[T]o be protected, employee activity must be “concerted,” that is, undertaken together by two or more employees, or by one on behalf of others.”¹⁵⁸ The main individual right protected by the NLRA is the individual's right to join with others in labor organizations so they can act in concert. Individual activity relating to bargaining or for other aid or protection remains wholly unprotected under this Act, which is consistent with the prevailing nonunion employment-at-will doctrine.¹⁵⁹

The foregoing six limiting features in the Act that relate to employees' Section 7 right to refrain from engaging in union or other concerted activities further establish that Congress did not elevate that negative right either to a level of superiority over or equality with the positive right to *engage* in such activity; indeed, the “right to refrain” is clearly subordinated, reaffirming that the Act's fundamental purpose and the Board's primary responsibility is to encourage and protect collective bargaining and the collateral right to engage in union activity. Because the “right to refrain” limitation is only a basis for ordinary unfair-labor-practice enforcement under Section 8(b)(1)(A) when a union *restrains* or *coerces* an employee to prevent her or him from exercising the right to refrain, it cannot be confused with a broad underlying policy or purpose of the Act. Die-hard anti-union House members of the 80th Congress may have so intended originally, but their proposed amendments and minority views were rejected.

H. The Nondescript Prefatory Declaration to all Five Taft-Hartley Titles Adds Nothing to the Policy of the NLRA

In their grasping for any straw that might detract from the pro-collective bargaining policy declaration in Section 1 of the NLRA, some revisionists have even resorted to the prefatory nondescript “Findings and Policies” applicable to all of the five titles of Taft-Hartley. For example, at a conference marking the fiftieth anniversary of the NLRA, the late former Board Chairman Edward B. Miller expressed such a revisionist view in his response to an accurate description of the Act's policy by another former Board Chairman, the late Frank McCulloch. As reported by Professor James Gross, McCulloch had stated that:

158. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 83 (JOHN E. HIGGINS, JR., ed., 5th ed., 2006); *see generally* Morris, *NLRB Protection in the Nonunion Workplace*, *supra* note 16.

159. *See generally*, KENNETH G. DAU-SCHMIDT ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE (4th ed., 2011).

it was “just flat out wrong” to say that Taft-Hartley shifted the Act’s purpose away from encouraging collective bargaining. He pointed out that the Taft-Hartley Congress “re-enacted that preamble paragraph from the Wagner Act verbatim,” as well as the Act’s Findings and Policies section “expounding the reasons for protecting employee organization and collective bargaining,” and Congress added Section 201, “which sets out a ringing affirmation of the centrality of ‘conference and collective bargaining.’”¹⁶⁰

To which Miller replied:

I say, “But Frank, you didn’t read the revision of the preface to the Act at the time of the Taft-Hartley, which now clearly sets forth two objectives. The first one is the freedom of choice of employees in deciding whether or not they want to join a union and be represented by a union, and, if so, by which union.” And that freedom of choice is to my mind the keystone of the Act. [But] once the employees choose collective bargaining, “then the Act has to see that they get the right to engage in collective bargaining and that, within some reasonable standards, bargaining takes place in a way that’s acceptable.” “But . . . the freedom of the employees to decide in the first instance interests me more than it interests Frank McCulloch.”¹⁶¹

As explained above, Congress did not revise the “preface,” i.e., the policy declaration, of the NLRA. The provision to which Miller referred was the generic over-all preface to the entire Taft-Hartley Act, which is an omnibus statute. Its broad non-specific descriptive phrases, which are applicable to all five of its titles,¹⁶² is simply a table of contents that reads as follows:

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

160. James A. Gross, *Fifty Years, Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 *INDUS. & LAB. REL. REV.* 7, 17 (1985) (footnotes omitted), available at <http://www.jstor.org/stable/2523534>.

161. *Id.* at 15 (footnote omitted).

162. The other titles: Title II, which covers the Federal Mediation and Conciliation Service and national emergency disputes, 29 U.S.C. §§ 171-83; Title III, which covers federal judicial suits by and against unions and restrictions on certain financial transactions, 29 U.S.C. §§ 185-88; Title IV, which created a joint congressional committee (now expired) to study “friendly labor relations and productivity, 29 U.S.C. §§ 191-97; and Title V, which covers certain definitions and the saving and separability provisions, 29 U.S.C. §§ 142-44.

Chairman Miller had to be looking through kaleidoscopic lenses to have seen in this provision two general objectives in a non-existent “revision” of the Act. This provision is not a policy declaration of the amended National Labor Relation Act. Regardless, it does not purport to change NLRA policy one iota. Even if it did, however, the policy declaration in Section 1 of Title I, which is *specific* in its application to the NLRA, would supersede the *general* statement applicable to the entire omnibus statute. It is a basic legal principle of statutory construction that *specific* terms of a statute override *general* terms. As the Supreme Court has held, “[h]owever inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment *Specific terms prevail over the general in the same or another statute which otherwise might be controlling.*’”¹⁶³ The *specific* policy declaration retained in the opening section of the NLRA is therefore controlling as to Title I (the NLRA); accordingly, there would be no basis to hold otherwise even if the five-title preface to which Miller referred contained general language to the contrary, which it does not.

Nevertheless, because the foregoing language has been cited as an alleged source of change in the Act’s policy,¹⁶⁴ I shall here explain its cryptic reference to protection of “the rights of individual employees in their relations with labor organizations.” That phrase refers to the previously addressed relation between employees and unions under Section 8(b) of the NLRA. Furthermore, the explicit legislative history shows that this prefatory paragraph was included in the over-all Taft-Hartley Act for the limited reason spelled out in the following excerpt from the Senate’s report on the conference committee bill:

The House bill (sec. 1(b)) contained an *over-all* declaration of policy covering all of the various matters dealt with in the bill. There was no corresponding *over-all* declaration of policy of the Senate Amendment. The conference agreement [therefore] contains the declaration of the House bill, *with one omission.*¹⁶⁵

In other words, the only reason parts of the House’s generic version became an appropriate preface for the final omnibus bill was that the Senate’s original omnibus bill lacked a preface. Moreover, the “one omission” was a clause that would have encouraged the bypassing of collective

163. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957) (citation omitted) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)) (emphasis added).

164. Not only by Battista, but also others, including Kenneth McGuinness. See MCGUINNESS, *NEW FRONTIER*, *supra* note 146, at 13.

165. LEGIS. HIST. T-H ACT, *supra* note 77, at 1536 (emphasis added). Both the Senate report and the House report used the phrase “over-all” to indicate that the prefatory provision applied to all five titles of the Act. *Id.* at 534, 536.

bargaining.¹⁶⁶ The conference committee was thus careful not to include any text or omission that would have detracted from the Act's express and repeated policy of encouraging collective bargaining.¹⁶⁷

I. In the 1959 Landrum-Griffin Act, Congress Reconfirmed the Responsibility of the Federal Government to Protect Union Organizing and Collective Bargaining

In 1959, as part of its enactment of the Landrum-Griffin Act, Congress again engaged in a comprehensive review of the NLRA, to which it added several major amendments.¹⁶⁸ Notably, in three places it re-committed the nation's labor policy to the protection and encouragement of union organizing and collective bargaining. Not only did it leave intact the NLRA policy declaration in Title I and the Section 201 policy declaration in Title II, it also provided extra prominence to that policy by enacting an even stronger hands-on declaration in its new Section 1, which stressed the continuing "*responsibility of the Federal Government*" to protect employees' collective rights of union organizing and bargaining.¹⁶⁹ As its text indicates, this new declaration was yet another paraphrased depiction of the original Wagner Act's Section 7 protection of union and other concerted activity that also conspicuously omitted Taft-Hartley's added right "to refrain" from such activity. Thus again¹⁷⁰ Congress was careful to exclude any reference to the "right to refrain" from its paraphrasing of Section 7 rights in this new and strong declaration of the Federal Government's responsibility, thereby reconfirming that the negative right of employees to refrain was not meant to dilute or to be confused with their positive right to organize into unions and engage in collective bargaining.

J. How Revisionists Have Acknowledged the Act's True Policy

Notwithstanding many years of promoting revisionist versions of the Act's policy, management-side representatives have long been aware of the Act's true policy, for they made several efforts to convince Congress to

166. The omitted clause: "to encourage the peaceful settlement of labor disputes affecting commerce by giving the employees themselves a direct voice in the bargaining arrangements with their employers." *Id.* at 159.

167. The conferees also insisted on the inclusion of the Senate's version of "Findings" in Section 1 of the NLRA, rather than the House's total omission of the Wagner Act's findings. The only changes in those findings in the Senate bill were the minor insertions described above, *supra* note 113. The Wagner Act's "Policies" were left untouched. *See supra* note 114.

168. The NLRA Amendments included changes in § 8(b), the addition of a new section 8(e), and some relatively minor changes in section 10 procedures. 29 U.S.C. §§ 158(b), 158(e), 160 (2006).

169. 29 U.S.C. § 401(a) (2006) (emphasis added).

170. *See* 29 U.S.C. § 157; *supra* notes 59, 89-90, 150-153 and accompanying text.

change that policy.¹⁷¹ I shall here highlight one of those major efforts, the campaign they conducted during the administrations of Presidents John F. Kennedy and Lynden B. Johnson, an effort that starkly revealed their knowledge of the Act's legitimate policy and the dishonesty that underlies revisionist versions of that policy.

As this article will later recount, the majority members of the NLRB during the Republican administration of President Dwight D. Eisenhower consistently failed to recognize the Act's commitment to the promotion of collective bargaining, issuing a number of decisions that limited or curtailed the rights of employees to unionize and engage in meaningful bargaining.¹⁷² The successor Board during the Democratic administrations of Presidents John F. Kennedy and Lynden B. Johnson, which was under the chairmanship of Frank McCulloch, reconsidered and reversed some of those decisions and introduced several innovative rulings and remedies favorable to unions.¹⁷³ The majority members of the latter Board were Frank McCulloch, John Fanning, and Gerald Brown, with McCulloch as chairman. Recognizing that the policy of the Act was to encourage unionism and collective bargaining, that Board often interpreted the Act in ways that aided workers in their efforts to unionize, and also required employers to bargain with unions as collective-bargaining partners on a widened range of bargaining subjects.¹⁷⁴

171. The first being the efforts to pass the Hartley and similar bills before and during the enactment of the Taft-Hartley Act. See generally GROSS, *RESHAPING OF THE NLRB*, *supra* note 80; see also discussions *infra* notes 175-190, 268, 276 and accompanying text.

172. W. Willard Wirtz, then professor of law at Northwestern University, provided the following contemporary appraisal of the early actions of the Eisenhower Board:

Every pre-election refusal to recognize has been found recently to have been "motivated by honest doubt" regarding one thing or another. Pre-election wage or similar adjustments in most cases have been found to have been made "in normal business course. . . ." [I]t does appear that there are today approved methods of circumventing most of these prohibitions which permit such close approximation of the desired effects that the difference becomes unimportant. It seems a fair conclusion that "the law" has become, in this area, a matter of relatively little significance and that economic power has re-emerged as the decisive factor in determining the result of representation elections.

W. WILLARD WIRTZ, *Board Policy and Labor-Management Relations: "Employer Persuasion,"* in *PROCEEDINGS OF NEW YORK UNIVERSITY SEVENTH ANNUAL CONFERENCE ON LABOR* 102-103 (Emanuel Stein ed., 1954); see also *infra* note 256.

173. According to Professor Gross:

The Kennedy-Johnson Board in the 1960s, convinced that it was the policy of the Taft-Hartley Act to encourage unionization and collective bargaining, did more than reverse important Eisenhower Board doctrines. McCulloch and his colleagues on the Board interpreted the act in ways intended to facilitate and protect employee organization and to require employers not only to bargain collectively but to accept the union as a joint participant in working out solutions to labor-related problems of mutual interest.

GROSS, *BROKEN PROMISE*, *supra* note 145, at 189.

174. Professor Gross provides an excellent summary of the work of the McCulloch Board, parts of which are excerpted as follows:

[T]he new majority reversed the direction the Eisenhower Board had taken in interpreting the new [Landrum-Griffin] amendments' prohibitions against recognitional and organizational

It is therefore unsurprising that many employers and their labor-policy and lobbying organizations—particularly the United States Chamber of Commerce (U.S. Chamber),¹⁷⁵ the National Association of Manufacturers (NAM),¹⁷⁶ and the Labor Policy Association (LPA)¹⁷⁷—strongly opposed the McCulloch Board’s decisions and actions. Accordingly, they reacted with an intense counter-campaign that *Newsweek* labeled “a drumfire of discontent.”¹⁷⁸ Acting in a united effort, those employer groups instituted a massive, multifaceted, well-planned, and well-funded program to reverse the direction the Board was taking.¹⁷⁹ Its most active leaders were the previously identified Kenneth McGuinness and three other Washington insiders, a “Troika”¹⁸⁰ consisting of Guy Farmer, Eisenhower’s first Board Chairman, former Board Member Gerard Reilly, who had been instrumental in the drafting of both the Taft-Hartley and Landrum-Griffin Acts, and Theodore Iserman, a Wall Street lawyer who had represented Chrysler and General Motors and had also worked on those same statutes.¹⁸¹ A seminal event in that campaign was the LPA’s publication in 1963 of McGuinness’s

picketing. . . . McCulloch, Brown, and Fanning also increased unions’ lawful opportunities to extend their disputes with primary employers to secondary sites.

.....
[The McCulloch Board] treated employer speech and union speech differently but, in contrast to the Eisenhower Board, was more likely to accept the wording of union picket signs at face value . . . while sharply restricting the lawfulness of employer speech by assessing it in full context. [T]he new majority also treated the representation election as fundamentally different from political elections and employee votes as vulnerable to coercion and manipulation. [They] regulated employer campaign activities closely and sought to impose higher standards to ensure workers a reasoned and free choice.

.....
The new majority also encouraged unionization and collective bargaining by redefining bargaining units in a way that increased the chances that labor organizations would win elections.

.....
In *Excelsior Underwear, Inc.* [156 N.L.R.B. 1236 (1966)] the McCulloch Board gave unions an assist in organizing by requiring employers to furnish . . . the names and addresses of all eligible employee voters within seven days after [designation of] a representation election.

Id. at 165-67, 171, 185. In the “Boulwareism” case, *Gen. Elec. Co.*, 150 N.L.R.B. 192, 268 (1964), that Board held that good faith bargaining “contemplates full acceptance by management of the representative status of the union” In sum, the company entered negotiations with a ‘take-it-or-leave-it’ attitude and tried to deal with the union through its employees rather than deal with its employees through their union.

175. GROSS, BROKEN PROMISE, *supra* note 145, at 200-209.

176. *Id.*

177. *Id.* Its name has since been changed to *HR Policy Association*. See *supra* note 146.

178. *NLRB or JFKLB*, NEWSWEEK, Feb. 25, 1963, at 78.

179. GROSS, BROKEN PROMISE, *supra* note 145, at 200-209; Victor Riesel, *Top Industrialists Organize to Challenge Pro-Labor Laws*, HUMAN EVENTS, Feb. 17, 1968, at 7 [hereinafter Riesel, *Top Industrialists*] (“These industrialists . . . have woven together the broadest united front of large and small businesses in history for the fight to revamp what they charge are pro-union federal labor relations laws and boards.”).

180. *Id.* at 202-205.

181. *Id.* at 202.

book, *The New Frontier NLRB*,¹⁸² which was a detailed indictment of the McCulloch Board that also contained a presentation of what was purported to be the Board's proper role, a key dishonest feature of which was examined above.¹⁸³

The stated goal of this well-coordinated management campaign, which eventually called itself the *Labor Law Reform Group* (LLRG),¹⁸⁴ was to amend the National Labor Relations Act. The Troika was given the task of preparing a draft of proposed amendments with supporting rationale, for which they produced a 165-page document entitled *Labor Law Reform Study*.¹⁸⁵ The very first part of their proposed amendments to the Act was the elimination of the familiar opening provision in Section 1 that states that it is the policy of the United States to encourage the practice and procedure of collective bargaining. As the Troika's written plan tellingly indicated, "[r]ooting out this statement of purpose . . . would make the protection of employee free choice to join or refrain from joining a union—not the encouragement of collective bargaining—the indisputable purpose of Taft-Hartley."¹⁸⁶ Here then was positive acknowledgement that organized management and their allies, including Guy Farmer, who had chaired the Board that had produced the first openly revisionist NLRB decision, *Livingston Shirt*,¹⁸⁷ were fully aware of what had been obvious since 1935 and 1947, that the central purpose of the Act was and continued to be the encouragement of collective bargaining, not protection of employee free choice to join or refrain from joining a union or some other purpose.

That same open acknowledgment surfaced again in 1981 when the Heritage Foundation, a conservative think-tank,¹⁸⁸ published Robert

182. MCGUINNESS, *NEW FRONTIER*, *supra* note 146.

183. *Supra* notes 145-149 and accompanying text.

184. GROSS, *BROKEN PROMISE*, *supra* note 145, at 201-03 (parts of the group were earlier known as the "No-Name Committee" or "No-Nothing Committee," and some as "the Twelve Apostles").

185. *Id.* at 204 (citing *Labor Law Reform Study: Amendments to the Labor Management Relations Act*, Nov. 6, 1967, pp. iv-vi, A-1-A-3, "BR-LLSG-Hill & Knowlton, " Box 6, Soutar Papers); *see also* Harry Bernstein, *Seek Changes in Present Labor Laws: Major Firms Unite to Limit Unions' Strength*, L.A. TIMES, Nov. 3, 1968; Riesel, *Top Industrialists*, *supra* note 179.

186. GROSS, *BROKEN PROMISE*, *supra* note 145 at 204-205.

187. *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953). This landmark decision reversed *Bonwit Teller, Inc.*, 197 F.2d 640, 645 (2d Cir. 1952), a case that had found denial of union solicitation unlawful when the employer had engaged in anti-union solicitation to a captive audience of employees. *Id.* at 405-07. *Livingston Shirt* was issued shortly after Farmer's appointment as chairman. *Livingston Shirt* is thus the keystone case that allows an employer to deny a union an opportunity to address the company's employees with a *pro-collective bargaining* message after they have been required—as a captive audience—to listen to the employer's *anti-collective bargaining* message. *Id.* The *revisionist* nature of that decision was specifically highlighted by the majority's noticeable failure to respond to dissenting Member Abe Murdock's explicit charge that the majority's action was not "consistent with the declared congressional policy which is not that of neutrality but of 'encouraging the practice and procedure of collective bargaining.'" *Id.* at 410-11 (emphasis added).

188. The Heritage Foundation's self-described "mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom,

Hunter's call for repeal of those same Taft-Hartley provisions, which, according to Hunter, "establish *collective rights as paramount to individual rights*."¹⁸⁹

Despite the LLRG's extensive and heavily funded attempt in the '60s to gain public support and eventually Congressional implementation,¹⁹⁰ that campaign was not successful; the Act was not amended. And similar efforts in the '80s by the Heritage Foundation and its adherents likewise never resulted in repeal of the provisions that establish "collective rights as paramount to individual rights." What is significant here, however, is that such efforts by organized management and their allies exposed their awareness that the Act does literally require the NLRB to encourage and support unionization and collective bargaining and that the only legitimate way to change that policy is to amend the Act. However, with the failure of the LLRG to achieve that result in the late 1960s, an alternative approach evolved, which consisted of fashioning and disseminating accurate-sounding—yet revisionist and inaccurate—versions of the Act's labor policy, such as "to provide freedom of choice" or "to conduct secret-ballot elections." These descriptions have been passed off as the product of Taft-Hartley legislative change, thereby achieving the desired result *de facto*. The McCulloch Board may thus have been an unintended catalyst for the successful development of this alternative approach.

K. Revisionism vs. Industrial Democracy

We have now arrived at an appropriate place to bring to a close this review of labor-policy revisionism, namely with former Board Chairman Battista's attempt to rationalize the revisionists' concept of the Act's policy by labeling it "industrial democracy." He did so by citing and highlighting a mischaracterization of the democratic objective that Senator Wagner sought to accomplish through the collective-bargaining process which the Act that bore his name was designed to foster.

Seeking to co-opt the Wagner concept of *industrial democracy*, Battista asserted that "the design and purpose of the Act is to advance

traditional American values, and a strong national defense." <http://www.heritage.org/about> (last visited Feb. 28, 2012).

189. Robert P. Hunter, *The Department of Labor*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 453, 469 (Charles I. Heatherly ed., 1981) [hereinafter Hunter, *Department of Labor*]; see *infra* notes 272-277.

190. The campaign included hiring the services of Hill & Knowlton, the world's largest public relations firm to portray unions and the NLRB in a grossly unfavorable light. T.A. Wise, *Hill & Knowlton's World of Images*, FORTUNE, Sept. 1, 1967, at 96.

industrial democracy.”¹⁹¹ While this might appear to be an accurate observation, his definition of industrial democracy was not Senator Wagner’s. Battista also asserted that “the National Labor Relations Act is the cornerstone of industrial democracy in this country,”¹⁹² which certainly should be true, but regrettably has not been true for most of the Act’s history. This is also the case regarding his asserted fantasy that “the Board has continued to serve the national interest in having a living industrial democracy.”¹⁹³ His description of industrial democracy, which comprised mostly nonunion workplaces, makes a mockery of what Senator Wagner envisioned. Battista’s redefined version of industrial democracy was “freedom of choice to be represented or not”¹⁹⁴ and “democracy in the workplace through rule of the majority,”¹⁹⁵ with “free collective bargaining” thrown in only occasionally as a contingency.¹⁹⁶ That is not what Senator Wagner and the other congressional proponents of collective bargaining had in mind.¹⁹⁷ To Wagner, “industrial democracy” was “collective bargaining”—i.e., a partnership that “presupposes equality of bargaining.”¹⁹⁸ Thus properly defined, industrial democracy was indeed “the design and purpose of the Act.”

Because Wagner’s perception of workplace democracy was entirely different from Battista’s, it is not surprising that Battista could find no quotation by Senator Wagner to support his revisionist definition of industrial democracy. Nevertheless, Battista did purport to rely on one of Wagner’s statements, the meaning of which he apparently failed to grasp, for he and most nonunion management representatives undoubtedly disagree with its message. The Wagner statement that Battista chose to quote was that:

Democracy cannot work unless it is honored in the factory as well as the polling booth; men cannot be truly free in body and in spirit unless their freedom extends into the places where they earn their daily bread.¹⁹⁹

This quotation simply states that *industrial democracy*—which Wagner perceived to be the joint control of working conditions by employers and unionized employees acting within the context of collective-bargaining—is

191. Robert J. Battista, *The NLRB at 70: Its Past and its Future*, 58th NYU Annual Conference on Labor 2-3 (May 20, 2005), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580045961> (last visited Feb. 11, 2012) (hereinafter Battista, *Past and Future*).

192. *Id.* at 9.

193. *Id.* at 16.

194. *Id.* at 2.

195. *Id.*

196. *Id.*

197. See *infra* note 200; see also Wagner statement at 1937 CONG. REC., Senate at 2940 (Mar. 31, 1937); MORRIS, BLUE EAGLE, *supra* note 48, at 7, 23-24, 222.

198. 1 LEGIS. HIST. NLRA, *supra* note 51, at 1318, 1411.

199. *Id.* at 21.

essential to the proper functioning of *political democracy*, i.e., “the polling booth,” This was Wagner’s shorthand way of saying what he spelled out in the following excerpt from an address he presented two years after passage of the Wagner Act:

The [preferred] method of coordinating industry is the democratic method Instead of control from the top, it insists upon control from within. It places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government. *That is industrial democracy*, and upon its success depends the preservation of the American way of life.

The development of a partnership between industry and labor in the solution of national problems is the indispensable complement to political democracy. And that leads us to this all-important truth: there can no more be democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote That is why the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs.²⁰⁰

Hence, the industrial democracy that the Act was meant to foster—and which Wagner was seeking—involves much more than occasional less-than-democratic elections between employers and unions²⁰¹ with only a smattering of collective bargaining here and there. Although collective bargaining through majority-union representation is the ultimate goal of the Act, and an election is one way to determine majority status, the Act’s primary emphasis is on the collective-bargaining process, not on elections. In fact, under this statute, elections can be held only if “a question of representation exists,”²⁰² and union recognition without an election is proper.²⁰³ As described by Senator Wagner, industrial democracy is the

200. Address at National Democratic Club Forum, May 8, 1937, quoted in Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS* (Louis G. Silverberg, ed. 1945), at 13 (emphasis added).

201. Elections conducted under grossly unfair conditions—such as conditions that commonly prevail under current Board procedures, where the union is denied equal access to the employee voters—cannot be equated with political democracy. See *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 917-18 & n.14 (2004) (Liebman and Walsh, dissenting) (“At the direction of their employer, supervisors—up to the highest company official—may urge their subordinates to vote against unionization. Indeed, employers are free to compel employees to listen to their antiunion message, in captive audience meetings, one-on-one encounters, and other settings, while excluding union representatives.” (citing *Frito Lay, Inc.*, 341 N.L.R.B. 515 (2004); *Andel Jewelry Corp.*, 326 NLRB 507 (1998); *Flex Products*, 280 N.L.R.B. 1117 (1986); *Electro-Wire Products*, 242 N.L.R.B. 960 (1979); *Associated Milk Producers*, 237 N.L.R.B. 879 (1978); *NVF Co.*, 210 N.L.R.B. 663 (1974); *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953))). See also *supra* note 27.

202. 29 U.S.C. § 159(c)(1)(B) (2006).

203. See *Gen. Box Co.*, 82 N.L.R.B. 678, 683 (1949); *United Mineworkers v. Ark. Flooring Co.*, 351 U.S. 62, 72 n.8 (1956) (“A Board election is not the only method by which an employer may satisfy itself as to the union’s majority status.”).

existence of a collective bargaining agreement and the active relationship of the parties under that agreement. That is the end product intended by the Act, i.e., bargaining between unionized employees and their employers functioning as partners in the determination of wages and other conditions of employment.

The foregoing review of the text and history of the policy of the National Labor Relations Act clearly confirms that the statutory declaration of national policy in Section 1 of this Act, supplemented by Section 202(a) of the Taft-Hartley Act and Section 1 of the Landrum-Griffin Act, continues to be the true "policy of the United States." There is no authority to the contrary. The central policy and purpose of the NLRA continues to be the encouragement of collective bargaining and its requisite union-organizational activity, which the Federal Government has a duty to protect. If employers and their political allies deem that purpose objectionable, they bear the burden of appealing to Congress to amend that policy. Only Congress has the authority to effect such a change, and thus far it has not chosen to do so.

III.

HOW THE REAL POLICY AND PURPOSE OF THE ACT CAME TO BE IGNORED—THE ROLE OF THE APPOINTMENT PROCESS

Although propagation of revisionist versions of the policy of the Act contributed to the Board's failure to enforce its core provisions in the manner Congress intended, that failure resulted from considerably more than just expressions of that revisionism. Such failure was the product of myriad actions and inactions by the Board over a period of several decades that too often ignored the Act's true policy. How and why that occurred is the subject of this Part III.

During the early years of the Act and during the Kennedy and Johnson administrations, the NLRB generally interpreted the Act in accordance with the statutory policy of encouraging union organizing and collective bargaining, and it did so with reasonable consistency. In the early 1950s, however, during the first Republican administration following passage of the Act, regular enforcement in accordance with that policy ceased. Hardly noticed at the time, it ended quietly, neither with a bang nor a whimper. It was on July 13, 1953, when the Senate, without debate or expressed objection, confirmed Guy Farmer as President Eisenhower's first appointment to the NLRB.²⁰⁴ Thus began the Board's downhill descent to impotence.²⁰⁵

204. *Nomination of Guy Farmer to be a Member of the National Labor Relations Board: Hearing Before the Senate Comm. on Labor and Public Welfare*, 83rd Cong. 1-4 (1953). See also Flynn, *supra* note 18, at 1361. Farmer's appointment was but the first of a long line of Board appointments of

Farmer—whom the reader will remember from his later participation in the Troika that sought to amend the Act in the late 1960s²⁰⁶—had been a prominent management-side labor lawyer for eight years prior to his Board appointment.²⁰⁷ That appointment, which was immediately followed by his being named Chairman,²⁰⁸ was but the first of many Board appointments that would repudiate the previously accepted Congressional intent and expectation that Board members not be representatives of either management or labor²⁰⁹—a practice to which the prior Democratic administrations of Roosevelt and Truman had adhered. With the appointment of Farmer, a different non-legislative appointment process began that every subsequent Republican president followed and which every Democratic president, until President Bill Clinton, stubbornly resisted. As a result—and as the historical record substantiates—since 1953 the NLRB has more often than not failed to enforce the Act with the vigor intended by Congress and afforded by its provisions. During Republican administrations none of the Board’s majority decisions acknowledged the promotion of union organizing and collective bargaining as the Board’s paramount role under the Act.

In her article, *A Quiet Revolution at the Labor Board*, Professor Joan Flynn provides a description of what Congress originally intended and expected regarding NLRB appointments.²¹⁰ She also reviews and compares the selection of NLRB members and General Counsels by every President from 1935 to 2000.²¹¹ In contrast to the pre-Wagner Act non-statutory

management-side representative. As Professor Joan Flynn notes, as of September 2000, seventeen NLRB Members and four General Counsels held management-side labor relations positions prior to their appointments. *Id.* Board Members: *Attorneys* Guy Farmer, Joseph Jenkins, Edward Miller, Peter Walther, Marshall Babson, Mary Miller Cracraft, Clifford Oviatt, John Raudabaugh, Charles Cohen, J. Robert Brame, Peter Hurtgen, Patricia Diaz Dennis, Donald Dotson, and Betty Murphy (predominantly management, but with some labor representation); *Industrial relations consultants or directors*, John Van de Water, Copeland Gray, and Albert Beeson. General Counsels: *Attorneys* Theophil Kammholz, Peter Nash, Rosemary Collyer, and Jerry Hunter. See Flynn, *supra* note 18, at 1399-1401 n.165. Board Members appointed after 2000 are noted *infra* in notes 289, 290.

205. That descent was strong and steady during the years of the Eisenhower Boards. Although it was partially reversed during the following years of the Kennedy-Johnson Boards, the descent resumed and continued during all of the subsequent Republican administrations and slowed only slightly during later Democratic administrations.

206. *Supra* notes 180-181 and accompanying text.

207. GROSS, BROKEN PROMISE, *supra* note 145, at 96.

208. NATIL LABOR RELATIONS BOARD, MEMBERS OF THE NLRB SINCE 1935, <http://www.nlr.gov/members-nlr-1935> (last visited Feb. 20, 2012).

209. “The Congress that created the Board in 1935 envisioned a body made up wholly of ‘impartial Government members.’ Flynn, *supra* note 18, at 1363. See Senate Comm. on Educ. and Lab., 74th Cong., *Comparison of S. 2926 (73rd Congress) and S. 1958 (74th Congress)* § 3, 1 LEGIS. HIST. NLRA, *supra* note 51 at 1319-20.

210. Flynn, *supra* note 18, at 1362-67; see also *supra* note 204.

211. Flynn, *supra* note 18, at 1367-99.

National Labor Board (NLB) that President Franklin D. Roosevelt created under Section 7(a) of the 1933 National Industrial Recovery Act,²¹² which had been established on a *tripartite* basis, Congress clearly intended that the Board created by the 1935 National Labor Relations Act be a nonpartisan structure. The earlier NLB had an equal number of industry and labor representatives and a chairman who represented the public interest.²¹³ Senator Wagner's unsuccessful 1934 bill retained that tripartite structure, with two Board members representing employers, two representing employees, and three representing the general public.²¹⁴ In contrast, with reference to the 1935 bill that was to become law, Professor Flynn reports:

Once it was determined . . . that the new agency—unlike the NLB and the board originally envisioned by Senator Wagner—would be an adjudicatory rather than a mediation or arbitral body, “a consensus [emerged] that only the public should be represented” . . . and it was fully understood that the new NLRB was to be staffed solely by “three impartial Government members.”²¹⁵

The Senate committee that reported the final Wagner bill related that “labor and management agree [that an] impartial board is better than a board with [members] representing respectively workers and employers.”²¹⁶ Consistent with that understanding, until Guy Farmer's appointment, “most Board members were drawn from government or academia—never from industry or labor.”²¹⁷

Professor James Brudney similarly examined the Taft-Hartley history to determine whether enlargement of the NLRB to five members was accompanied by any indication of a change in Congressional intent regarding not appointing Board members from management or union backgrounds. He concluded from the legislative record that “there was no suggestion that the Board should be anything other than nonpartisan and impartial” and “there was no mention of Board membership being anything besides neutral.”²¹⁸ To which I add that the Senate committee report expressly stated that “Congress *intended* the Board to function like a court [and that] the Board's function is largely a judicial one”²¹⁹

212. 48 Stat. 195 (1933); see IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941*, 173 (1969).

213. JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 15 & 25 (1974).

214. S. 2926, 73rd Cong., 2nd Sess., § 201 (1934); 1 LEGIS. HIST. NLRA, *supra* note 51 at 1, 4.

215. Flynn, *supra* note 18, at 1364 & nn.8-11.

216. Senate Comm. on Educ. and Labor, 74th Cong., *Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress)* § 3, 1 LEGIS. HIST. NLRA, *supra* note 51 at 1320.

217. Flynn, *supra* note 18, at 1364-65, 1454, app.

218. Brudney, *supra* note 27, at 244 & n.110.

219. LEGIS. HIST. T-H ACT, *supra* note 77, at 415 (Report No. 105, Sen. Com. on Lab. & Pub. Welfare 9) (emphasis added).

Nevertheless, despite such consensus, only six years after passage of the Taft-Hartley Act the first Republican president following that Act's inception chose to ignore Congressional intent and prior practice, establishing instead a contrary pattern of appointing persons with strong and heavily committed management-side labor relations backgrounds to the Board and to the position of General Counsel—a practice that has been followed ever since by every subsequent Republican administration. (As noted below, four decades later Democratic President Bill Clinton, and more recently Democratic President Barack Obama, finally adopted a comparable practice of including party-side attorneys among their appointments.)

Eisenhower's second Board appointment, Philip Ray Rogers, was confirmed on July 30, 1953—again without opposition.²²⁰ Rogers had been chief of the Republican led Senate Labor Committee during passage of the Taft-Hartley Act,²²¹ where he had been an advocate of the more anti-union Hartley bill pending in the House.²²² Following that appointment, an awareness of what was happening began to emerge among the Democratic opposition. On October 5, 1953, Senator Hubert Humphrey of Minnesota “accused the Eisenhower Administration of ‘packing’ the NLRB with members antagonistic toward unions,”²²³ asserting that “‘big business elements’ now provided ‘the main underpinnings of Administration labor policy.’”²²⁴ He charged that the Republicans, rather than continuing to attempt anti-union legislation “toughening” Taft-Hartley, were now seeking “to achieve the same goal by packing the Board with anti-union members and interpreting out of existence whatever protections for unions Taft-Hartley carried over from the Wagner Act.”²²⁵

Senator Humphrey's accusation proved accurate. Behind the scenes, the NAM and the U.S. Chamber had been busy developing an appointment strategy that would eventually yield what organized management was seeking from legislative proposals pending in Congress.²²⁶ Although the Farmer and Rogers appointments proved to be the initial elements of their plan, the Eisenhower administration did not expressly adopt that strategy until it was time for the next Board nomination. The principal authors of the plan were Gerard Reilly, a former NLRB member, and Theodore

220. 99 CONG. REC. pt. 8 at 10437 (July 30, 1953).

221. GROSS, BROKEN PROMISE, *supra* note 145 at 98.

222. Seymour Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. OF POL. 667, 678-79, n.28 [hereinafter Scher, *Regulatory Agency*]; see also GROSS, BROKEN PROMISE, *supra* note 145 at 98.

223. *Humphrey Charges Packing of N.L.R.B.*, N.Y. TIMES, Oct. 6, 1953.

224. *Id.*

225. *Id.*

226. See GROSS, BROKEN PROMISE, *supra* note 145 at 72-91.

Iserman, who had been counsel to the Chrysler Corporation;²²⁷ both had been advisors to the Republican Congressional majorities that conceived and passed the Taft-Hartley Act.²²⁸ As noted above, Reilly and Iserman later joined with Guy Farmer in the “Troika” that would plan another major offensive to oppose unions and collective bargaining.²²⁹ The details of the Reilly-Iserman plan for the Eisenhower administration and its execution were documented in a 1961 article entitled *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*²³⁰ by Seymour Scher, a political science professor at the University of Rochester. The following description of these events is based largely on Professor’s Scher’s carefully researched findings and conclusions.²³¹

The Reilly-Iserman plan was contained in a memorandum prepared for the NAM following the August 31, 1953, resignation of Paul Styles, a Truman-appointed Board member.²³² Recognizing that the appointments of Farmer and Rogers constituted a “start” in “curing the NLRB,” Reilly and Iserman wrote that “if the President makes a wise choice [in filling this third vacancy] it will be possible within the next few months for the new Board to accomplish a thoroughgoing reform.”²³³ The U.S. Chamber was also an important player in this lobbying process. In fact, earlier in a Senate committee hearing the Chamber’s view was expressed that the “new administration should have an opportunity for a clean sweep,”²³⁴ proposing “a complete overhaul of the agency through new Eisenhower appointments.”²³⁵ At first the NAM was split in two factions, one urging such an overhaul through Board appointments and the other contending that the proper solution was “a wholly new decentralized administrative apparatus” to be achieved through legislative action.²³⁶ Nevertheless, a group of large manufacturers that had powerful allies in the Commerce Department and among the White House staff saw their “interests best served by preserving the Board but changing the agency’s policy direction through the appointment of new members.”²³⁷ That view ultimately

227. Scher, *Regulatory Agency*, *supra* note 222, at 672 & n.12.

228. *Id.*

229. *See supra* notes 180-187 and accompanying text.

230. Scher, *Regulatory Agency*, *supra* note 222.

231. In addition to his reliance on governmental and other usual sources, his research included access to critical unpublished internal documents (both governmental and private) and oral interviews. *See Id.* at nn.4, 10, 12, 18, 22, 24, & 31.

232. *Id.* at 672 n.12; Memorandum of Legislative Questions Being Considered by the Industrial Relations Committee of the N.A.M. (Oct. 28, 1953).

233. *Id.*

234. *Id.* at 670 & n.5.

235. *Id.*

236. *Id.* at 670.

237. *Id.* at 671.

“prevailed in the NAM’s official policy.”²³⁸ “Thus,” as Professor Scher observed, “the Reilly-Iserman view that prevailed within the NAM also won out in the Commerce Department,”²³⁹ hence within the Eisenhower administration itself. Scher thus concluded that

The Reilly-Iserman analysis for the NAM indicating that the management association and industry generally could place secure reliance on Administration appointments to the Board in the absence of further structural changes *represented the dominant approach to the NLRB of the Eisenhower Administration.*²⁴⁰

As a result of that “dominant approach,” Senator Humphrey did not have long to wait to see the beginning of his prediction come true—that the Republicans would achieve their legislative ends through a Labor Board that would interpret “out of existence” the remaining protections of the NLRA. On December 17, 1953—which was even before Eisenhower made his third Board appointment—the new Board under Farmer’s chairmanship issued its blockbuster decision in *Livingston Shirt*,²⁴¹ the revisionist ruling that reversed the *Bonwit Teller*²⁴² doctrine that had prohibited employers from discriminatorily applying no-solicitation rules by making antiunion speeches to employees in captive-audience meetings during working hours without granting the union a similar opportunity to address those employees.

Organized labor was slow to respond to what was happening in the appointment process. It was not until early 1954, when Eisenhower was ready to fill his third Board vacancy with the nomination of Albert Beeson, that the unions finally mounted a strong opposition campaign.²⁴³ Beeson’s entire career had consisted of serving as an industrial relations official for several large corporations.²⁴⁴ He even boasted at his hearing that he had “free speeched employees at one point into voting against a union,” adding, “You could say, if you like, that I was a union buster.”²⁴⁵ Walter Reuther, president of the Congress of Industrial Organizations (CIO), denounced the administration’s “attempt to pack this quasi-judicial Board with representatives of industry.”²⁴⁶ George Meany, President of the American

238. *Id.* at 673.

239. *Id.* at 674.

240. *Id.* at 675 (emphasis added).

241. *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953); see *supra* notes 44, 187

242. *Bonwit Teller, Inc.* 104 N.L.R.B. 497 (1953); see *supra* note 187.

243. Flynn, *supra* note 18, at 1369 & nn.31-33.

244. He was director of industrial relations for the Food Machinery and Chemical Corporation at the time of his nomination. GROSS, BROKEN PROMISE, *supra* note 145 at 100. He also indicated his intent to serve only one term and then return to his former management position. Flynn, *supra* note 18, at 1371 n.38.

245. Clayton Knowles, *6 Democrats Seek New Beeson Study*, N.Y. TIMES, Feb. 2, 1954.

246. Flynn, *supra* note 18, at 1369 n.33.

Federation of Labor (AFL) and other prominent union officials submitted similar protests.²⁴⁷ Dave Beck, president of the Teamsters Union, contended that the Beeson nomination marked “a fork in the road where the NLRB might well be converted into a partisan agency,”²⁴⁸ a comment that prompted Professor Flynn’s accurate observation that “it was actually Farmer’s nomination that marked the turning point.”²⁴⁹ In fact, that earlier unopposed appointment of Guy Farmer provided a precedent for the Beeson appointment, and it was so noted at the time.²⁵⁰

The Senate minority-committee report on the Beeson nomination, signed by six Democrats, emphasized that the NLRB was a quasi-judicial agency whose members were intended to be impartial.²⁵¹ Similarly, Senator John F. Kennedy reminded his colleagues that the NLRB was an *independent*, not an *executive* agency, saying:

It is not a policymaking branch of the administration which should be filled by one whose philosophy of labor is in keeping with the views of the political party in power. It is not a tripartite body, to which representatives of labor and management should be appointed. Its members do not serve at the pleasure of the President, nor for a term of years concurrent with the Presidential tenure

...

...[It] is instead a quasi-judicial agency, whose primary function is to interpret and apply the basic labor relations law of the land Board members are, in effect judges²⁵²

Despite such efforts, the opposition to Beeson came too late. Notwithstanding his boastful rejection of the Act’s collective-bargaining policy, Beeson was confirmed by the full Senate by a vote of 45-42.²⁵³

Although Eisenhower continued to appoint management attorneys to the Board and to the critical position of General Counsel,²⁵⁴ he nevertheless also appointed several moderate members.²⁵⁵ Regardless, the Reilly-Iserman plan had already achieved its objective, for the Eisenhower Board’s early

247. *Beeson Scrutiny Urged*, N.Y. TIMES, Feb. 10, 1954. See also Flynn, *supra* note 18, at 1378.

248. Flynn, *supra* note 18, at 1374 n.50.

249. *Id.*

250. *Id.* at n.52 (citing SENATE COMM. ON LAB. & PUB. WELFARE, NOMINATION OF ALBERT C. BEESON TO BE A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, MINORITY VIEWS, S. Exec. Rep. No. 83-2, at 3 (1954)).

251. *Id.*

252. 100 CONG. REC. S2004 (1954).

253. 100 Cong. Rec. S1978 (1954).

254. Theophil Kammholz was appointed General Counsel in 1955. He had spent 12 and a half years as a management-side labor lawyer prior to his appointment. Flynn, *supra* note 18, at 1376 n.57. Joseph A. Jenkins was appointed to the Board in 1957. He had also been a partner in a management-side law firm prior to his appointment. *Id.* at 1378 n.66.

255. Boyd Leedom, Stephen Bean, John Fanning, and Arthur Kimball all came from government backgrounds. Flynn, *supra* note 18, at 1454, app.

rulings registered an almost immediate negative impact on unionization and collective bargaining. According to one contemporary commentator, in only eighteen months the Eisenhower Board's sweeping changes in the law amounted "to amendment of the statute in a manner more drastic than anything this administration has proposed to Congress."²⁵⁶

Those changes appear to have had a perceptible impact on the extent of unionization, for during the period of the Eisenhower Boards the percentage of union membership in the United States workforce declined from 32.5% in 1953 to 28.5% in 1961.²⁵⁷ During the following nine years—the effective period of the Kennedy and Johnson Boards under the chairmanship of Frank McCulloch—union membership regained part of that loss and essentially stabilized at a yearly average of 29.8% of the workforce. Thereafter the decline in union membership resumed.²⁵⁸

Declining to imitate Eisenhower's far-reaching change in the appointment process, Democratic Presidents Kennedy and Johnson resumed adherence to the Congressionally intended practice of not appointing anyone from either management or labor, drawing their Board appointments instead from government sources. With the election of Republican President Richard Nixon, however, the practice of appointing management lawyers and other management professionals was reinstated and the Reilly-Iserman plan was again working as intended. Nixon's first appointment was Edward B. Miller, who prior to his Board appointment had spent twenty-three years as a management-side labor lawyer.²⁵⁹

256. Mozart G. Ratner, *Policy-Making by the New "Quasi-Judicial" NLRB*, 23 U. CHI. L. REV. 12, 35 (1955-1956); see also GROSS, *BROKEN PROMISE*, *supra* note 145 at 120 ("The new Board's decisions concerning jurisdiction, speech, and economic weapons involved more than correcting the 'mistakes' of prior, Democratic administration NLRBs. Those decisions constituted major changes in national policy."). Some of the decisions of the Eisenhower Board that conflicted with the Act's policy were the following: National Furniture Mfg. Co., 106 N.L.R.B. 1300 (1953) (declining to set aside election where company lawyer had told employees employer would not recognize union regardless of the outcome); Chicopee Mfg. Co., 107 N.L.R.B. 106 (1953) (declining to set aside election where employer threatened to move the plant); Livingston Shirt Corp., 107 N.L.R.B. 400 (1953) (reversing prior prohibition of captive audience speeches where similar access was denied the union); Pacific Intermountain Express, 107 N.L.R.B. 837 (1954) (denying effect of clause in collective bargaining contract granting union authority to settle seniority disputes); Terry Poultry Co., 109 N.L.R.B. 1097 (1954) (finding meritorious concerted protest not remedied where employees violated company rule requiring notification to foreman before leaving work); Breeding Transfer Co., 110 N.L.R.B. 493 (1954) (announcing new jurisdictional standards reducing coverage of the Act); B.V.D., 110 N.L.R.B. 1412 (1954) (denying reinstatement and back pay to strikers who had not committed acts of violence to employer's property). C. A. Blinne Constr. Co., 130 N.L.R.B. 587 (1961) (prohibiting union from organizational or recognition picketing under § 8(b)(7) of Landrum-Griffin Act for more than 30 days even though picketing was protesting unfair labor practices). See *supra* note 172.

257. *Union Membership: Overall (1948-2004)*, WORKING LIFE, www.workinglife.org (citing . Union Sourcebook 1947-1983, U.S. Bureau of Labor Statistics).

258. *Id.*

259. Flynn, *supra* note 18, at 1379, 1455, app.

Organized labor strongly opposed his nomination. AFL-CIO President George Meany called attention to the fact that unions had never sought the appointment of any union lawyer or union official to the Board and that all Board members and General Counsels appointed by Democratic Presidents had come from neutral backgrounds.²⁶⁰ Nevertheless, as Professor Flynn concludes, the “Miller appointment marked the Democrats’ complete acquiescence to the appointment of management partisans to the Labor Board,”²⁶¹ for Miller was confirmed without “a single ‘no’ vote either in committee or on the floor of the Democratic Senate.”²⁶² Although President Gerald Ford continued the Republican tradition of appointing management side attorneys,²⁶³ Democratic President Jimmy Carter refrained entirely from appointing any union or management-side lawyers or officials to the Board.²⁶⁴

Republican President Ronald Reagan, however—whether from a conscious effort to follow the Reilly-Iserman program or to pursue a brand-new effort to completely turn the Board into an anti-union institution—moved further than any of his Republican predecessors in carrying out the Reilly-Iserman strategy. He began by boldly appointing several Board members who were openly opposed to collective bargaining. Professor Flynn describes those early appointments—all of whom were selected from outside the mainstream labor-relations community—as follows:

His first choice for Board chair, John Van de Water, was not a management lawyer at all—but rather a management consultant who specialized in defeating union campaigns. Van de Water’s successor as chair also came from well outside the mainstream; Donald Dotson, a corporate labor counsel turned Reagan administration official, was the proverbial fox in the chicken coop—a protégée of North Carolina Senator Jesse Helms and a

260. *Id.* at 1380.

261. *Id.* at 1382.

262. GROSS, BROKEN PROMISE, *supra* note 145 at 220. Nixon’s second Republican Board appointment was a career Board employee, Ralph E. Kennedy, a conservative Regional Director who had been appointed by General Counsel Kamholtz (*supra* note 242). Although Kennedy’s background was not that of a management-side attorney, he fit the Reilly-Iserman pattern. *Id.* at 221. In fact, according to a study of NLRB voting records between 1955 and 1979, Kennedy had the most extreme pro-management voting record of any Board Member during that period. Flynn, *supra* note 18, at 1405, based on Charles D. DeLorme, Jr. & Norman J. Wood, *Presidential Labor Relations Philosophy and the NLRB*, 12 AKRON BUS. & ECON. REV. 31 (1981); see *infra* note 275. (The “Republican Board appointment” reference above is to the established practice of Board membership being divided, with three members from the current President’s party and two members from the other party—Carter’s appointment of Don A. Zimmerman, an independent, being an exception). Nixon’s appointee for General Counsel was Peter Nash, who had spent six years in management-side labor practice and two years at the Department of Labor prior to that appointment. Flynn, *supra* note 18, at 1383 n.96.

263. Ford appointed Board members Betty Murphy, whose background included mostly management-side practice but also some union representation, and Peter D. Walthers, who had spent twelve years in management-side labor practice. *Id.*

264. The Carter appointees were John C. Truesdale, who had been an NLRB career official, and Don A. Zimmerman, who had been an aide to Senator Jacob Javits. *Id.* at 1383 n.97.

“staunchly antiunion . . . crusader for the Reagan cause.” Finally, Robert Hunter, another of Reagan’s initial appointments, was an aide to another arch-conservative senator and “labor bugbear,” Utah’s Orrin Hatch, and had ties to the Heritage Foundation, Reagan’s favorite think tank.²⁶⁵

Although representatives of organized labor strongly opposed the nominations of those anti-union opponents of collective bargaining, their efforts to block their appointments were eventually recognized as futile; whereupon, AFL President Lane Kirkland wrote a letter to Senator Hatch, chairman of the Senate Labor Committee, advising that although labor in the past had sought appointment of individuals who had not been agents of either management or labor, in the future, because the current nominees were appointed “owing to their having been good and faithful agents of management, and to no other cause . . . there will be no reciprocal restraint.” He therefore advised that “as a matter of practical self-protection we hereby renounce our prior position in this regard”²⁶⁶ and reiterated that position in a press conference in which he warned that “all the old rules are off.”²⁶⁷

The futility of organized labor’s opposition was a reflection of the revisionists’ overwhelming success in their efforts to achieve a *de facto* remake of the Act’s policy, which they accomplished despite their having failed to obtain any legitimate change through legislation.²⁶⁸ Illustrative of that success and a prime example of its result was the Senate’s handling of the Robert C. Hunter nomination. Although Hunter had not been a management-side labor lawyer, he had been closely identified with pronounced anti-union ideology. Immediately prior to his nomination he had been chief counsel to the Republican-dominated Senate Labor and Human Resources Committee; before that he had been minority Republican legislative director and advisor to that committee, and from 1974 to 1977 he was Senator Taft’s labor counsel.²⁶⁹ He was thus a familiar face to the involved Senators. Not surprisingly, a spectator at his nomination-hearing would have seen the Senate’s “old-boy” network fully in operation—indeed

265. *Id.* at 1384. Professor Flynn also colorfully noted that “Reagan was hardly interested in abiding by the ‘rules’ of the Washington establishment—as to Labor Board appointments or anything else. [He] simply ignored the usual list-generating insiders, preferring hard-right, ideologically-driven nominees . . .” *Id.* at 1423 (footnotes omitted).

266. *Id.* at 1388-89 nn.121-124.

267. *Letter from AFL-CIO President Kirkland to Sen. Hatch (R-Utah)*, DAILY LAB. REP. (BNA) No. 22, at E-1 (Feb. 1, 1983).

268. See *supra* note 111 (regarding that effort during consideration of the Taft-Hartley Act); *supra* notes 167-169 (regarding the failure to achieve any such change in the Landrum-Griffin Act); *supra* notes 174-189 (regarding the failed effort in the late 1960s); *supra* notes 188-189 (regarding the Heritage Foundation’s recorded effort to achieve change in the early 1980s).

269. GROSS, BROKEN PROMISE, *supra* note 145 at 247.

engaged in a predictable Kabuki routine of questioning, complimenting, and unanimously confirming.²⁷⁰

Although the Business Roundtable portrayed Hunter as one who accepted collective bargaining and would promote "harmony between labor and management,"²⁷¹ a thorough examination of his record would have raised serious questions. In a chapter he had recently authored for a publication of the Heritage Foundation, he had recommended several changes to the Act that evidenced a substantial bias against organized labor.²⁷² At his hearing, although he was evasive and seemed uncomfortable about the extent of his authorship of that chapter,²⁷³ his opening footnote unequivocally stated that "The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual."²⁷⁴ One of his recommended changes, as previously noted,²⁷⁵ was to "[r]epeal those National Labor Relations Act provisions which establish collective rights as paramount to individual rights."²⁷⁶ Notwithstanding that admission of the Act's true policy, for the committee's benefit, Hunter redefined the Act's policy as follows:

The purpose of the Act is to serve the public interest It seeks to do this by providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another

In its statutory assignment, the NLRB has two primary functions: (1) To determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union and, if so, by which one, and (2) to prevent and remedy unlawful acts against employees, called unfair labor practices, by either employers or unions

The opportunity to exercise a franchise on the issue to choose a collective bargaining agent or to decline representation by a labor organization . . . lies at the heart of the Taft-Hartley's statutory scheme.²⁷⁷

270. *Nomination, Robert P. Hunter, of Virginia, to be a Member of the National Labor Relations Board: Hearing Before Sen. Comm. on Lab. & Hum. Resources, 97th Cong., 1st Sess., Sept. 10, 1981* [hereinafter *Hunter Nomination Hearing*].

271. GROSS, BROKEN PROMISE, *supra* note 145 at 247 & 280 n.43, citing memorandum of April 13, 1981, from Richard F. Gibben to Douglas Soutar,

272. Hunter, *Department of Labor*, *supra* note 189 at 453-97.

273. *Hunter Nomination Hearing*, *supra* note 270 at 6-7 & 9-10.

274. Hunter, *Department of Labor*, *supra* note 189 at 453.

275. *Id.*

276. *Id.* at 469.

277. *Id.*

Nowhere in that statement of policy is there any indication of his published acknowledgement that “collective rights” are “paramount to individual rights” or that encouraging collective bargain is even a policy of the Act.

When Senator John Kennedy questioned him about some—but not all—of the adverse positions he had expressed in his Heritage Foundation piece, Hunter conceded that those positions did represent his personal views.²⁷⁸ He had stated earlier, however, that as a Board member “I would separate any personal views I might have from the state of the law as I understand it.”²⁷⁹ That evidently satisfied Senator Kennedy, for he ended his interrogation with an “old-boys’-closing,” telling Hunter:

Serving on [the] Board is both a great honor and responsibility. You have shown both by your nature, disposition, professional competency and understanding of the legislation. I am convinced of your sense of fairness and equity.”²⁸⁰

The nomination was confirmed without dissent.²⁸¹

It is indeed unfortunate that Senator Kennedy never questioned Hunter about his proposal to repeal the NLRA provisions that “establish collective rights as paramount to individual rights.” Senator Kennedy thus failed to note the inconsistency between that acknowledgement of the “paramount” status of collective rights and Hunter’s revisionist version of the Act’s policy contained in his prepared statement. Kennedy, who was not an attorney, was perhaps unaware of the explicit policy-declaration in Section 1 of the Act, and like so many others who had been repeatedly exposed to the revisionists’ version of the Act’s policy, saw no reason to question what had by then become conventional wisdom. The Hunter scenario was thus an inevitable outcome of the revisionists’ success in creating the false impression that Taft-Hartley had changed the underlying purpose of the Act and that the Board’s primary function was to referee the choice of employees expressed in Board elections and to prevent and remedy unfair labor practices consistent with such “free choice.”

As a consequence, Hunter joined his fellow Republican members of the Reagan Labor Boards chaired by John Van de Water and Donald Dotson²⁸² in their production of a plethora of pro-management decisions that wholly ignored the specific Congressional charge that it was their

278. *Id.* at 11-12.

279. *Id.* at 7.

280. *Id.* at 13.

281. GROSS, BROKEN PROMISE, *supra* note 145 at 248.

282. See *supra* note 265. Van de Water as a labor relations management consultant was the “proud victor in 125 of 130 anti-union campaigns,” Flynn, *supra* note 18, at 1386 & nn.110-12, and Dotson’s anti-union attitude was honed as labor counsel for Westinghouse, Western Electric, and Wheeling Pittsburgh Steel before his appointment as Assistant Secretary of Labor by President Reagan. *Id.* at 1384 n.102.

“responsibility . . . to protect employees’ rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection.”²⁸³

Kirkland’s threat of “no reciprocal restraint” proved meaningless. Reagan continued to appoint management-side labor lawyers both as Board members and as General Counsel,²⁸⁴ although his later appointments were less extreme in their view of the Act.²⁸⁵

The appointment of management-side labor lawyers continued during the Republican administration of President George H.W. Bush.²⁸⁶ On the Democratic side, the President who finally yielded to the “if you can’t lick ’em join ’em” syndrome was Bill Clinton. As Professor Flynn reports, his

historic appointment of Margaret Browning, the first ever union-side attorney to serve, went almost completely unremarked upon, and the unprecedented appointment of management lawyers by a Democratic President received no notice whatsoever. Obviously a sea change has taken place.²⁸⁷

A sea change had indeed taken place, but it was a slow-moving—yet powerful—sea change that actually began more than half-a-century ago with the appointment of Guy Farmer. That change endured.²⁸⁸ The practice

283. See *supra* notes 95, 169. Professor Gross recorded that “[a]t the same time that the Dotson Board was hindering implementation of the act by allowing its case backlog to grow at unprecedented rates, its Reagan-appointed majority was delivering serious blows to unionization and collective bargaining in the cases it was deciding The Dotson Board’s speedy and extensive overturning of precedents that conservatives considered pro-union brought about a shift in national labor policy that freed employers in many important ways from the constraints of workers and unions.” GROSS, BROKEN PROMISE, *supra* note 145 at 254.

284. Reagan’s other early appointments included Patricia Deiz Dennis, who had been in-house labor counsel for Pacific Lighting Co. and American Broadcasting Co., Flynn, *supra* note 18, at 1387 & n.119, and as General Counsel, Rosemary Collyer, a young lawyer with limited NLRA experience with a management-side law firm whom Reagan had appointed Chair of the Federal Mine Safety and Health Review Commission. *Id.* at 1389 & n.128. Also among his early Board appointments were Marshall Babson, who had ten years’ experience as a management-side labor lawyer, Wilford W. Johansen, an NLRB career attorney, *id.* at 1389-90 & n.130, and Mary Miller Craycraft, who had practiced management-side labor law for five years, *id.* at 1390 & n.131.

285. These were Chairman James M. Stephens, who had been counsel to Senator Hatch’s Senate Committee on Labor and Human Resources, *id.* at 1390 & n.138, and Mary M. Cracraft, a relatively inexperienced management-side labor lawyer, *id.* at 1390 & n.131, and also John E. Higgins and Dennis R. Devaney, who were appointed directly from government positions, *id.*, app. at 1455.

286. “President Bush’s appointments to the Board included two more management attorneys, Clifford Oviatt and John Raudabaugh, and his choice of General Counsel, Jerry Hunter, also had a substantial management-side background.” *Id.* at 1392 & nn.138-40.

287. Flynn, *supra* note 18, at 1397-98. Clinton’s additional appointments included union-side lawyers Sarah Fox and Wilma Liebman and management-side lawyers Charles Cohen, J. Robert Brame, and Peter Hurtgen. *Id.*, app. at 1455.

288. Although the Reilly-Iserman strategy was carried out primarily by appointments of management-side labor attorneys, see *supra* note 204, on several occasions the same concept and results were achieved by appointing government employees who were committed to the same pro-management

of filling critical Board positions with side-based appointments continued during the administration of Republican President George W. Bush.²⁸⁹ It is also continuing in the Democratic administration of President Obama, but only with recess appointments because of persistent blockage of his permanent Board appointments by Republican Senators' invocation of the 60-vote cloture rule.²⁹⁰

The foregoing description of what has occurred with the Board's appointment process provides the main reason why every Labor Board dominated by Republican appointees regularly ignored the Act's true policy and failed to aggressively and sufficiently enforce core provisions to protect union organizing and collective bargaining or to construe contested actions in accord with that policy. This is not to say, however, that those Republican-majority Boards always failed in their considerations and enforcements. The record suggests that when evidence of violations in employer unfair-labor-practice cases was strong, Republican-majority Boards usually supported the Administrative Law Judge's findings of violations, but in close cases they more often—but not always—sided with the employer, and their policy decisions were generally employer-

ideology, for example Ralph E. Kennedy, *see supra* note 262, and Robert P. Hunter, *see Hunter, Department of Labor, supra* note 189 & *Hunter Nomination Hearing, supra* note 270.

289. All of President George W. Bush's Republican appointments to the Board, with one exception—that of Member *Peter C. Schaumber* who had been a labor arbitrator—were illustrative of a strong and consistent application of the Reilly-Iserman plan. *Arthur F. Rosenfeld*, Bush's first appointment to the position of General Counsel, had been senior labor counsel to the Republicans on the Senate HELP Committee with a background in the Department of Labor and as a management-side attorney in private practice. *Ronald Meisburg*, who was appointed first as a Board Member and later as General Counsel, had been an active management-side attorney; likewise Members *William P. Cowen*, *R. Alexander Acosta*, *Robert J. Battista*, *Peter N. Kirsanow*, and *Michel J. Bartlett* (who not only had been a management-side attorney but was also director of labor law policy for the U.S. Chamber of Commerce). The foregoing information can be found seriatim in the following citations in DAILY LAB. REP. (BNA): 92 DLR AA-1 (May 13, 2002); 103 DLR AA-1 (May 29, 2001); 249 DLR A-1 (Dec. 30, 2003); 15 DLR A-13 (Jan. 23, 2002); 120 DLR A-14 (June 23, 2003); 92 DLR AA-1 (May 13, 2002); 221 DLR A-13 (Nov. 17, 2005); 15 DLR A-13 (Jan. 23, 2002).

290. President Obama's appointment of Craig Becker, a former union attorney and law professor, was defeated by Senate vote on a cloture motion, although he was later recess appointed; he served from April 5, 2010 to Jan. 3, 2011. Mark G. Pearce, a former union-side attorney, and Bryan Hayes, whose former career had been mostly as a management-side attorney, were first given recess appointments but later received Senate confirmation; both are presently serving. Sharon Block (who was formerly Senior Labor and Employment Counsel for the Senate HELP Committee), Terrence F. Flynn (who had been chief counsel to Member Hayes and was a former management-side attorney), and Richard Griffin, Jr., a former union side attorney, all received recess appointments and are presently serving. See Susan J. McGolrick, Nancy Oganovich, *Senate Defeats Motion to End Debate on Becker's Nomination to Serve on NLRB*, DAILY LAB. REP., Feb. 11, 2010, at 27 DLR AA-1; Board Members Since 1935, published by NLRB, available at <http://www.nlr.gov>. President Obama has made no permanent appointment of a General Counsel; Life Solomon, a career Board attorney, is presently serving as Acting General Counsel. See *infra* note 310.

oriented.²⁹¹ They did little or nothing to speed up the Board's election and decisional processes, for delay almost always benefited the employer.²⁹² Nor did they introduce any innovative approaches that would encourage or assist union organizing or collective bargaining. Republican-majority boards also had a collateral spill-over effect on Boards appointed during Democratic administrations, for the latter were often busy catching up on back-logged cases and trying to repair damage caused by regressive decisions of their predecessor Boards,²⁹³ and they paid little attention to the introduction or use of innovative procedures and remedies.²⁹⁴

So now come the difficult questions. Can there be a change from the above-described appointment practice? Or must the present appointment process continue? Might there be a feasible alternative? My answer to the first and last question is a cautious yes, but such sanguinity must be tempered by the possibility of unknowable political factors. Nevertheless, despite the expected obstacles, it is my view that an alternative process can be made available. It is obviously too late, however—and too unlikely—to expect appointments to be made in the manner Congress originally envisioned. Furthermore, there is no statutory requirement that Presidents refrain from appointing directly from management or labor sources, including their attorneys. So how should—or can—the appointment process proceed in the future? That is the question I address in the discussion that follows.

IV.

HOW THE STOLEN ACT CAN BE RECOVERED AND THE BROKEN BOARD REPAIRED

Although the NLRA remains a viable statute, the administrative mechanism required for its enforcement—the National Labor Relations Board—is definitely broken. Fortunately, it is not broken beyond repair, and it can be repaired without new legislation. However, achieving

291. This is an observation based on a review of the Board's Annual Reports and the relative frequency of divided opinions.

292. See description of egregious backlog under the Dotson Board in GROSS, BROKEN PROMISE, *supra* note 145 at 253; see also Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 120-21 (1990).

293. Perhaps the best known example of the see-sawing effect of policy swings between political administrations is the matter of *Weingarten* rights (NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)) for employees without union representation. In *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board extended such rights to unrepresented employees. Three years later this was reversed in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985), which reversal was later reaffirmed on other grounds in *E.I. DuPont & Co.*, 289 N.L.R.B. 627 (1988). That decision was in turn reversed, with the rights reinstated, in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676, 677 (2000), which was later overruled in *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

294. That may not be true of the Board under the Obama administration, however. See *supra* note 47 and *infra* note 326.

meaningful restoration will depend on the successful appointment of Board members and General Counsels who honestly accept the Act's true policy of encouraging union organizing and collective bargaining and who have the courage—despite likely opposition—to enforce the Act accordingly. With its broad and flexible text,²⁹⁵ the Act contains the potential means to allow the Board to become an effective enforcer of its core provisions; but as we have seen, the root of the problem lies in the appointment process. It is therefore the appointment process that must be corrected. That is a huge problem because it is obvious and inevitable that organized employers and their Republican allies will loudly and vigorously oppose any appointment litmus-test based on recognition that the encouragement and protection of union organizing and collective bargaining is the “responsibility”²⁹⁶ of the NLRB. Nonetheless, that is the test demanded by statutory policy, and it will continue to be the test unless and until changed by Congress. The legal accuracy of this assessment must be strongly emphasized notwithstanding its political unpopularity within the anti-union sectors of the Republican party.

Regarding this proposal, I am not suggesting that the prerequisite of bona fide acceptance of the Act's policy would confine the sources of suitable appointees to a limited field of fair-minded governmental employees, academics, and union-related personnel—although that list is likely to continue to be the source of future Democratic NLRB members and General Counsels. Republican appointees, however could continue to be drawn from the former usual sources, including management-side attorneys and Republican governmental personnel—but with one difference. The difference is that such appointees, notwithstanding their pronounced pro-management orientation, must recognize that the major arena for legal combat in the field of labor relations is in the “practice and procedure of collective bargaining,” for that is what the Act's policy requires.

Several decades ago when collective bargaining was widely practiced, such persons, especially among management-side attorneys, were plentiful, and their numbers can be plentiful again. I personally knew many distinguished employer-side labor lawyers who provided their clients with superb legal representation in the various areas in which lawyers functioned in the collective-bargaining system, such as in contract negotiations, representation in grievance and arbitration procedures, and representation before administrative and judicial tribunals. Some of those attorneys even demonstrated their talent for unbiased and fair-minded conflict-resolution

295. See *supra* notes 48-71; *infra* notes 319-323.

296. 29 U.S.C. § 401(a) (2006); see *supra* notes 95, 170.

by serving as jointly chosen arbitrators in labor-management disputes.²⁹⁷ Most such attorneys fought hard and well for their employer-clients within the collective-bargaining system. That was in stark contrast with the more common practice of many management attorneys today who proudly specialize in keeping their employer-clients union-free and out of the collective-bargaining arena. An expanded system of collective bargaining, both in the process of expanding and in its day-to-day functioning, will offer ample opportunities for a multitude of management-side labor lawyers to practice in an area of law that traditionally proved to be extremely interesting and satisfying in many different ways.

So how do we reach this promised land? A distinguished and respected academic colleague²⁹⁸ who had read an early version of Parts II and III of this article raised the question that focused on the critical problem in the appointment process. He said:

Your analysis of the words and legislative history of the NLRA is great [but] I am anxious to hear how we avoid subversion of the Act and return of the Board to its responsibility of encouraging collective bargaining. I agree with everything you say, but I don't see how we will prevent Republican appointments from continuing to hijack the Act in the Board and courts.

What follows is my response to that and related concerns.

Although the concerns are formidable, solutions—despite the obstacles—are not impossible. The chief ingredient in those solutions must be—in one word—*truth*. Not truth that simply lies in the eyes of the beholder, but objective truth that lies in plain-to-see unambiguous language of the statute supported by consistent legislative history. For several decades political opponents of collective bargaining have disseminated untruthful revisionist versions of the Act's policy to justify their political positions and intended actions relating to union representation—whether concerning the Senate's confirmation process, pending legislation, controversial Board decisions, or other matters affecting the Board's functions. Countering those versions will indeed be difficult, for well-articulated revisionism has evolved into *de facto* policy. Nevertheless, armed with objective facts as documented in Part II above, proponents of the Board's genuine policy—that of encouraging union organizing and collective bargaining—will have a means to turn the tables on the enemies of that policy.

297. Two examples are the late Robert G. Howlett of Grand Rapids, Michigan, and John E. Gorsuch of Denver, Colorado, both of whom were senior partners in distinguished law firms that practiced management-side labor law, and both held official positions in the National Academy of Arbitrators. See GLADYS W. GRUENBERG, ET AL., *THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK* 314-16 (1997).

298. Professor Kenneth G. Dau-Schmidt in an e-mail to the author.

Opponents of collective bargaining—and these include most of today’s Republican establishment—should now be put on notice not only of the Board’s true policy, but that this policy cannot be changed except by act of Congress. The public can thus belatedly learn that the burden of obtaining legislative change must fall on the pro-management objectors—not on the unions, as it has in recent legislative efforts. Needless to say this will not happen quietly. A strong counter-campaign of legal obscurantism can be expected. But if unions and their collective-bargaining allies will stand firm and explain clearly and regularly to the public and to the media the Act’s real policy—using the internet and such potent social media tools as Twitter, Facebook, and YouTube to convey honest information and to challenge the dishonesty of much of the opposition’s anticipated response—they should be able to have their message heard. Truth—conveyed in the form of basic, accurate facts—must repeatedly serve as the key element in this campaign for public support.

When the revisionists are thus forced on the defensive, unions will hold the high ground for a change, and hopefully a healthy and open debate will ensue. If that debate includes not only the policy of the NLRA, but also consideration of the human-rights aspect of unionism and collective bargaining²⁹⁹ and consideration of middle-class values, plus the need to increase middle-class income and numbers³⁰⁰—all of which would benefit the public at large—improvement in the quality of future Board appointments might be counted among those benefits.

I have no illusion, however, about revisionists seeing the error of their ways. The anti-union employer establishment is not likely to concede the truth about the Act’s policy, but their know-nothing attitude can now become more visible and thus less credible.

What about my colleague’s concern about Republican appointees continuing to “hijack the Act”? My response is to recommend to unions and other proponents of collective bargaining that when an appointment is

299. See JAMES A. GROSS, *A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE* (2010); *HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES*, (James A. Gross & Lance Compa ed, 2009); *WORKERS’ RIGHTS AS HUMAN RIGHTS* (James A. Gross ed.) (2003); RICHARD D. KAHLENBERG ET AL, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* (2012); Roy J. Adams, *From Statutory Rights to Human Right: Evolution and Current Status of Collective Bargaining*, 12 JUST LABOR 76 (Spring 2008); Charles J. Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner’s Promise of Democracy in the Workplace—The Blue Eagle can Fly Again*, 39 U.S.F. L. REV. 701 (2005).

300. For instance, despite shrinkage in domestic manufacturing employment, there are thousands of underpaid service-sector workers today who have and use skills comparable to that of the thousands of automobile assembly-line workers who became solid members of the middle class during the last century because they were represented by unions under collective-bargaining. With union-representation and proper enforcement of organizing and collective-bargaining rights, more of today’s service-sector employees could also become members of the middle class. See *supra* notes 4, 24 and accompanying text.

anticipated or is being considered, or perhaps being purposefully delayed, that they loudly remind the media and also the White House and members of the Senate's Health, Employment, Labor, and Pensions (HELP) Committee of the true facts that define the Act's policy³⁰¹ and urge that this policy be adhered to closely whenever a nomination, confirmation, or rejection of an appointment to the Board or position of General Counsel is in issue. These communications should be reinforced with presentations of easy-to-understand explanations to the public and the media along the lines noted above, stressing firmly that the Board's support for collective bargaining is the basic policy of the Act and no one should be appointed to a Board position who is opposed to that policy. I recognize that political opposition might be overwhelming regarding many or all of these communications, but as long as the Act's statutory policy remains unchanged, these efforts should continue until they are no longer necessary.

Truth must be the key feature in the explanatory process. Specific reference to controlling statutory provisions and legislative history—including appropriate quotations from Senators Ives³⁰² and Taft³⁰³—will be in order. Without a doubt, there will be a need to publically refute the revisionist versions of the Act's policy that will be based on the familiar phrase in Section 7 that employees have the “right to refrain” from union activity. Pro-union advocates must patiently explain that enforcement of that phrase is confined to Subsection 8(b)(1)(A) and is therefore applicable only to union *restraint* and *coercion*, because the Ives amendment—of which the concerned public has not previously been aware—deleted “*interfere with*” from that provision.³⁰⁴ It should thus be made clear that this narrowly limited unfair labor practice³⁰⁵—which was deliberately excluded from the Act's policy provisions³⁰⁶—does not in any way diminish the Board's basic “responsibility . . . to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection,”³⁰⁷ which is the mandate Congress reiterated in the Landrum-Griffin Act twelve years after it reenacted the original pro-organizing and pro-collective bargaining policy in the Taft-Hartley Act. It should be

301. See *supra* notes 88-95 and accompanying text.

302. *Supra* note 104.

303. *Supra* notes 96-97, 121-122, 139.

304. See *supra* notes 134-136, 150-158 and accompanying text.

305. See *supra* notes 137-144 and accompanying text. The reader will recall Senator Taft's explanation that the clause was included in order to “apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line.” *Supra* note 139 and accompanying text.

306. See *supra* notes 150-153, 170 and accompanying text.

307. 29 U.S.C. § 401(a) (2006). See *supra* notes 95, 169.

emphasized that it is *specific legislative language* that imposes a responsibility on the President and the Senate to be reasonably confident that every appointee to the Board embrace that objective.

Prominent anti-union revisionists have been untruthful about the Act in the past,³⁰⁸ and similar dishonesty may occur in the future. Nevertheless, with understanding and persistence, any concerned Senator can and should articulate these facts when the occasion arises, such as during interrogations at a confirmation hearing, especially when Senate Democrats are in the minority. It may even be necessary on occasion for Democratic Senators to play hardball to enforce this understanding by holding or filibustering the nomination of an appointee who openly rejects the basic policy of the Act—for which there would now be a publicly recognized policy reason, not merely a partisan political reason. Here again, truth must be the weapon. The true policy of the Act is something all concerned parties, including the media, anti-union lobbyists, and members of Congress—especially Senators—must eventually learn.

Not only will such truth-telling be appropriate when Board appointments are being considered, it may also be appropriate at other times when the NLRA or the NLRB, or a related legal issue, becomes a major public issue.³⁰⁹ This approach can be applied to a wide variety of political obstructionism that adversely affects the Board's functions, such as, for example, when Senators abuse *hold* or *filibuster* procedures to block appointment of a qualified Board nominee because she or he is committed to enforcing the Act's pro-collective bargaining policy,³¹⁰ or when Congress seeks to withhold or reduce the Board's funding or to tie legislative strings to such funding or otherwise attempt to block the Board from performing its proper duties,³¹¹ or when Congressional hearings or requests for information are used destructively to hobble the Board's carrying out its

308. Examples include the multiple misreadings discussed in accompanying text in Part II *supra* notes 73-75, 161, 186-189, 272-277, and especially 145-149.

309. As this article goes to press, which is at the beginning of the 2012 presidential election campaign, numerous major issues relating to the NLRB are pending, including the *notice-posting rule*, and the *representation-election procedures rule*, see *infra* notes 326-327. For an overview of several pending major NLRB-related issues, see Derrick Cain, *Lawmakers Still Hopeful Congress will Act on Several Employment Related Bills*, DAILY LAB. REP. April 13, 2012, at 71 DLR CC-1.

310. Professor Flynn describes examples of Senatorial holds being placed on nominations. Flynn, *supra* note 18, at 1442-43. The threat of such a hold was made for the nominations of Craig Becker as a Board Member and Lafe Solomon as General Counsel, see Lawrence E. Dubé, *GOP Senators Condemn NLRB Boeing Action, Pledge to Fight Solomon, Becker Nominations*, DAILY LAB. REP., May 5, 2011, at 11 DLR A-10, and such a hold ultimately was used to block the confirmation of Becker, who was then given a recess appointment. See *supra* note 290.

311. See, e.g., Michelle Amber, *NLRB Seeks Relief From Congressional Rider Banning Funds for Single Location Unit Rule*, DAILY LAB. REP., Feb. 7, 1997, at 97 DLR C-2.

normal functions regarding matters about which some members of Congress might disagree.³¹²

When the time comes to put these recommendations to a major test, public discussion will be a welcome ingredient, for the time is ripe for such a debate. The cliché about “union bosses” being concerned only with enriching themselves at the expense of workers is no longer likely to be convincing—though it is still often used.³¹³ And it is now common knowledge that there are huge gaps between the mega-earnings at the top of the income scale and the moderate earnings of the shrinking middle class and the poverty earnings at the bottom of the income scale, and that these gaps have steadily and indecently widened.³¹⁴ Awareness that unionized employees earn more than comparable nonunion employees³¹⁵ addresses the issue posed by those gaps. Many of these matters are already being aired in heated political debate that coincides with the appearance of this Article.

The nation-wide support of unions that began in the spring of 2011 with protests against Republican sponsored legislation to strip public employees of their collective-bargaining rights in Wisconsin, Ohio and several other states, and the aftermath of those actions, provide some indication of the public support that might be available when showdowns finally occur over the importance of protecting collective-bargaining rights for private sector employees under the NLRA. It might also dawn on some of the public that the reason a very high percentage of governmental employees have joined unions and benefited from collective bargaining with better wages and benefits is that they were able to seek and obtain union representation without fear of retaliation, unlike their private sector counterparts under the NLRA who, because of the Board’s traditional failure to provide meaningful protection, have not in recent decades been able achieve what the law promises.

312. E.g., Dubé, *GOP Lawmakers*, *supra* note 309; Lawrence E. Dubé, *House Panel Presses NLRB for Documents, Calling Boeing Case Disclosures Incomplete*, 134 DAILY LAB. REP., Jul. 13, 2011, at 11 DLR A-11.

313. Recently, for example, Senator Jim DeMint described the NLRB complaint in *Boeing, Co.*, 2011 WL 2597601 (Case 19-CA-32431) as “Using the federal government as a political weapon to protect union bosses at the expense of American jobs cannot be tolerated.” Lawrence E. Dubé, *NLRB Complaint Challenges Boeing ‘Transfer’ of Dreamliner Work to South Carolina Facility*, 77 Daily Lab. Rep., April 21, 2011, at AA-1.

314. *See supra* notes 4, 299.

315. “American workers who are members of unions earn significantly more per hour than their nonunion counterparts, according to a report from the Bureau of Labor Statistics (BLS). Data from the BLS National Compensation Survey shows that in July 2002, average hourly earnings among all union workers were \$20.65, compared with \$16.42 for nonunion workers.” Robert Longley, *Union Workers Earn More than Nonunion*, ABOUT.COM, <http://usgovinfo.about.com/cs/jobemployment/a/unionwages.htm> (last visited Jan. 29, 2012). *See also* David Card, et al., *Unions and Wage Inequality*, 25 J. LAB. RES. 519, 536 (2004); Winfried Koeniger et al., *Labor Market Institutions and Wage Inequality*, 60 INDUS. & LAB. REL. REV. 340 (2007).

I have tried here not to convey the impression that achieving the foregoing non-legislative³¹⁶ reform of the Board's appointment process will be easy or certain. Inevitably, powerful and well-funded management and political interests will fight long and hard to keep the Board relatively impotent. Nonetheless, for these efforts truth is on the side of the proponents of unions and collective bargaining. As Daniel Webster reminded us, "there is nothing so powerful as truth."³¹⁷

V.

CONCLUSION AND A GLIMPSE AT A NEW DIRECTION

As we have now observed, the National Labor Relations Act has been stolen. It was stolen through a synthesis of a long-standing policy of revisionism—which was largely unrecognized—and repetitive appointments of a critical number of Board members and General Counsels who were not committed to the Act's basic policy of encouraging union organizing and collective bargaining. Consequently, the NLRB degenerated into a broken agency that for the most part failed to accomplish its fundamental purpose of facilitating the creation of democratic workplaces where employees, through their unions, could deal with management as joint partners in a civilized interactive process that seeks to create and maintain mutually satisfactory conditions of employment.

We have also examined a prospective program of aggressive truth-telling as a means to repair this broken agency, an approach designed to ensure—or at least encourage—the appointment of Board members and General Counsels who genuinely accept the pro-collective-bargaining policy of the Act. If this reform program succeeds and if this broken Board is repaired and fully applies the law as Congress intended, what might such a rejuvenated agency accomplish? It is my belief that the broad and flexible text of this Act, which will be construed under the parameters of the Supreme Court's long-standing *Chevron*³¹⁸ doctrine—assuming its continued applicability³¹⁹—would provide a properly motivated Board with

316. Although my proposal for achieving positive change in the method of Board appointments is not dependent on legislative action, there is one area of semi-legislative action that could make the process more democratic (with a small "d"), to wit, reforming the Senate's rules on filibusters, holds, and cloture votes. See Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock*, 5 HARVARD L. & POL'Y REV. 115 (2011).

317. Daniel Webster, *Argument on the Murder of Captain White* (1830) reprinted in JOHN BARTLETT, FAMILIAR QUOTATIONS, at no. 5528 (10th ed. 1919).

318. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). See *supra* notes 67-71 and accompanying text.

319. I am not unmindful of the Supreme Court's ability to find an exception to *Chevron*, as it did in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), based on the *stare decisis* effect of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) as discussed *supra* note 41. I am hopeful, however, that following

ample authority to accomplish effective enforcement of the Act's core provisions.

The *Chevron* doctrine will be highly important, for it determines the limits of the Board's authority. *Chevron* requires that an agency's interpretations be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."³²⁰ In applying that standard to the NLRB, the Court has explicitly recognized that "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy."³²¹ Although a re-energized Board will continue to employ traditional means of interpretation and enforcement, it will likely also apply the law in innovative ways in order to better cope with ever-changing conditions and new developments in the labor market. When it does so—yet staying within the limits allowed by the statute—it will be carrying out an approach which the Supreme Court praised many years ago in the *Weingarten* case, where it stated:

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of [an] important aspect of the national labor law would misconceive the nature of administrative decision-making. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated . . ." The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.³²²

It is not my purpose in this article to explain or elaborate on specific innovative options that a properly motivated NLRB might use to advance national labor policy in accordance with that entrustment, although I have previously written about some of those options,³²³ and other Board watchers

clarification of the monolithic nature of the Act's collective-bargaining policy, the Court will be less inclined to deviate from *Chevron* and will not hesitate to yield to reasonable NLRB decision-making whenever the matter has not been determined by clear statutory text.

320. *Chevron*, 467 U.S. at 844. The quotation is from step *two* of that doctrine, which applies when a provision of a statute is either unclear or where Congress intended that the determination be made by the administering agency. *Id.* Decisions are resolved at step *one* where Congressional intent is clear, for which statutory interpretation is ultimately the role of the courts. 467 U.S. at 843. See *NLRB v. United Food and Commercial Workers*, 484 U.S. 113, 123 (1987) (applying *Chevron*'s second step to action by the NLRB) ("[W]e have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute") (citations omitted); see also *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 403 (1996) (citing step two of *Chevron* when it approved the Board's interpretation of the statutory terms "employee" and "agricultural laborer"); *Ford Motor Co. v. NLRB*, 441 U.S. at 495, 497 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978) ("Board's construction of the statute's policies would be entitled to considerable deference.").

321. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (approving the Board's no-presumption rule that rejected the employer's presumption of union-opposition by striker replacements).

322. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) (quoting from *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

323. See *Morris, Blueprint*, *supra* note 40; *Morris, Renaissance*, *supra* note 16; *Morris, Dog House*, *supra* note 40; *Morris, Board Procedures*, *supra* note 40; Charles J. Morris, *A Tale of Two Statutes*:

have also contributed important research and ideas about new directions the Board might take³²⁴ (and I am sure there will be more of these to come). I shall, however, venture a cautious forecast that future Boards—provided they are properly constituted and motivated—will address some or all of the problems that were identified at the beginning of this Article by the six blind mavens of Indostan.³²⁵ These are quoted in the following paragraphs with footnote references to possible remedies, which listings provide a glimpse at some of the problems that a properly composed and sufficiently motivated National Labor Relations Board might seek to correct, or at least change for the better.³²⁶

First, for “the unfair election process,³²⁷ especially employers’ captive-audience speeches and denial of union access to the workplace,³²⁸ and also

Discrimination for Union Activity under the NLRA and RLA, 2 EMP. RTS. & EMP. POL’Y J. 317 (1998) [hereinafter Morris, *Two Statutes*].

324. See writings cited *infra* notes 326-339.

325. See text following note 4 *supra*.

326. The present Obama Board, in the face of massive opposition, has begun to make several of these corrections. See Lawrence E. Dubé, *NLRB Final Rule Will Require Notice Posting; Action Reflects Some Changes From Proposal*, DAILY LAB. REP., Aug. 25, 2011, at 11 DLR AA-1; Representation-Case Procedures, 76 Fed. Reg. 36812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101-103); Lafe E. Solomon, Memorandum GC 10-07, DAILY LAB. REP., Sept. 30, 2010, at A-13 (NLRB acting General Counsel’s comments on effective § 10(j) remedies for unlawful discharges in organizing campaigns).

327. Representation-Case Procedures, 76 Fed. Reg. 36812; Kenneth G. Dau-Schmidt, Professor, Indiana Univ., Testimony before House Committee on Education and Workplace Hearing: Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers’ Free Choice (July 7, 2011), available at http://edworkforce.house.gov/UploadedFiles/07.07.11_dau_schmidt.pdf (commenting on foregoing proposed rule changes); Morris, *Renaissance*, *supra* note 40, at 113-15; Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 Fla. Int’l Univ. L. Rev. 361, 4-10 (2010) [hereinafter Estreicher, *Improving the Administration*].

328. Compare *Bonwit Teller, Inc.*, 197 F.2d 640 (2d Cir. 1952) (discussed *supra* note 187) with *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953), *NLRB v. United Steelworker (Nutone)*, 357 U.S. 357 (1958) (upholding employer’s right to enforce anti-solicitation rule against employees while himself engaged in anti-union solicitation, stating however that, “If, by virtue of the location . . . and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer’s ability to promote . . . his anti-union views, there is no basis for invalidating these ‘otherwise valid’ rules We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis, in the actualities of industrial relations, for such a finding.” (emphasis added)), and *Gen. Elec. Co.*, 156 N.L.R.B. 1247, 1251 (1966) (withheld making a decision on whether a union should have access to the employer’s premises for campaign purposes when the employer uses those premises to campaign against the union) (“[W]e prefer to defer reconsideration of current Board doctrine in the area until after the effects of *Excelsior* become known.”). The NLRB has yet to act on that preference. See also Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 Stanford L. Rev. 305 (1994) (discussing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)).

the lengthy delays in both representation and unfair-labor-practice proceedings,”³²⁹ improvements are definitely possible.

Second, several alternative means are available to correct what has been perceived to be the Act’s failure “to provide sufficiently early remedies³³⁰ and sufficiently strong remedies³³¹ for violations, both of which would deter commission of unfair labor practices.”³³²

Third, the Act’s existing provisions provide several means to correct the “failure to allow recognition of unions without the delay and imbalance of an election³³³ or without the requirement of majority-union representation.”³³⁴

Fourth, issuance of appropriate substantive rules could produce more effective remedies to address the “failure to provide clearly defined rules that would more effectively discourage, prevent, and remedy unfair labor practices.”³³⁵

329. Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 5 (2012) [hereinafter Morris, *How the NLRA Was Stolen*]; See Representation – Case Procedures, 76 Fed. Reg. 36812-01 (proposed June 22, 2011) (to be codified 29 C.F.R. pts. 101, 102, 103); Dau-Schmidt, *supra* note 326, Morris, *Renaissance*, *supra* note 16, at 113-15; Estreicher, *Improving the Administration*, *supra* note 327.

330. See Morris, *Two Statutes*, *supra* note 323, at 343-60; Estreicher, *Improving the Administration*, *supra* note 327, at 4-12; Solomon, *supra* note 326.

331. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969) (“[A] bargaining order [without majority representation] would be an appropriate remedy in ‘exceptional’ cases marked by ‘outrageous’ and ‘pervasive’ unfair labor practices . . . with the result that a fair and reliable election cannot be had.”) (citation omitted); Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970) (finding a pervasive refusal to bargain by the employer but denying an affirmative compensatory bargaining order as a remedy), *rev’d*, 449 F.2d 1046 (D.C. Cir. 1971), *aff’d*, 449 F.2d 1058 (D.C. Cir. 1971); see also Morris, *Dog House*, *supra* note 40, at 47-49 (discussing damage-specific remedies).

332. Morris, *How the NLRA Was Stolen*, *supra* note 329, at 5.

333. Consider application of *Chevron* doctrine, see *supra* notes 318-322, to the alteration of the Board’s adjudicatory rule in *Linden Lumber*, *supra* note 42, inasmuch as the Supreme Court’s confirmation was only of the *Chevron step-two* type, i.e., deferring to the Board’s determination because “we cannot say that the Board’s decision that the union should go forward and ask for an election on the employer’s refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.” *Linden Lumber Div.*, 419 U.S. 301, 309-10 (1974).

334. Morris, *How the NLRA Was Stolen*, *supra* note 329 at 5; see MORRIS, BLUE EAGLE, *supra* note 48; Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain With Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1 (2011); Susan J. McGolrick, *Unions File Rulemaking Petition With NLRB on Minority-Union, Members-Only Bargaining*, 157 DAILY LAB. REP. (BNA) A-1 (Aug. 15, 2007); *Change to Win Joins Other Unions Seeking Rule on Minority-Union Bargaining*, DAILY LAB. REP. (BNA) Jan. 8, 2008 at 04 DLR A-1.

335. Morris, *How the NLRA Was Stolen*, *supra* note 329, at 5; see American Hosp. Ass’n v. NLRB, 499 U.S. 606 (1991) (approving the Board’s use of rulemaking pursuant to Administrative Procedure Act, 5 U.S.C. § 551ff, and NLRA § 6, 29 U.S.C. §156); Morris, *Renaissance*, *supra* note 16, at 109-113; Morris, *Dog House*, *supra* note 17, at 27-42 and also citations therein at 27-28 n.80; Estreicher, *Improving the Administration*, *supra* note 327, at 12-14; Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991); see also rules cited *supra* notes 326, 327.

