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UNIONS, THE ECONOMY, AND EMPLOYEE FREE CHOICE

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Like the temperatures in a severe winter freeze, union membership continues to sink to record lows. The latest numbers indicate that 7.4% of working Americans in the private sector were union members in 2006 (BLS 2007), compared to over 30% in 1960 (Greenhouse 2007). If you include government workers, then the numbers inch up to a still-meager 12%, which is down from 12.5% in 2005 (BLS 2007).

Does this mean that Americans no longer want to join unions? Not according to the most recent polls. A Peter Hart poll conducted in December 2006 reports that 58% of non-managerial working Americans indicated they would join a union if they could, a record number (Peter D. Hart Research Associates 2007).[1]

The yawning gap between the robust demand to join unions and the anemic membership numbers reflects the fact that, for many Americans, joining a union has become a risk rather than a right. In 2005, over 31,000 people—one worker every 17 minutes—were disciplined or even fired for union activity, according to the National Labor Relations Board (NLRB) annual report, resulting in a big chill on labor's numbers and a "democracy deficit" for the entire society.[2]

Shrinking union membership affects all Americans. Unions paved the way to the middle class for millions, pioneering benefits along the way such as paid pensions and health care. Now, labor's decline squeezes the middle class, raises inequality, and undermines democratic values.

An effective way to address this "democracy deficit" is through the Employee Free Choice Act (EFCA). What the Act does is straightforward: it allows workers to form a union if a majority of people in a workplace sign up for one, short circuiting employer-dominated representation campaigns. In addition, it provides meaningful penalties for those who would violate workers' rights and ensures that, if workers choose a union, then collective bargaining actually results. The Act restores free choice and balance to a system that currently is driven by aggressive employers, anti-union consultants, coercion, and fear. As Studs Terkel put it, "Respect on the job and a voice at the workplace shouldn't be something Americans have to work overtime to achieve" (2006).

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Today, if workers seek to organize, the National Labor Relations Board (NLRB) sets a secret-ballot election generally a month or two following the formal request.[3] This period winds up being an "interval of intimidation." The employer has the right of free speech, the right to hold unlimited mandatory meetings with employees, the right to "predict" calamities if the union wins, and the right to bar union organizers from the premises. With these rules the playing field is not simply tilted against organizing, unions are shut out of the stadium. What's more, penalties are nearly nonexistent for violating the diminished rights workers do retain. Americans rightly hold secret-ballot elections sacred, but elections are only as democratic as the context in which they take place. These NLRB-supervised elections are often so unfair that they approximate plebiscites in a dictatorship rather than a functioning democracy. The ballots may be counted honestly but the outcome ratifies the coercive, even threatening atmosphere in which the vote occurs.

This dismal state of affairs was not always the case. Congress affirmed in ringing terms the rights of American workers to organize and bargain collectively in 1935 with the passage of the National Labor Relations Act (NLRA), or Wagner Act, hailed at the time as labor's Magna Carta. Seventy-two years later, amendments, court decisions, and administrative precedents have corroded the Act's original intent. Today, "trying to exercise those right[s] is another matter entirely," notes *Fortune* magazine, elaborating that "workers are routinely fired or discriminated against for supporting unions, most employers hire anti-union consultants to block organizing drives, and some go so far as to close down work sites when employees vote for a union" (Gunther 2006). Kenneth Roth, the executive director of Human Rights Watch, was even more direct. "Legal obstacles tilt the playing field so steeply against Freedom of Association," he stated, "that the United States is in violation of international human rights standards for workers" (Roth 2001, 19-20).

Diminishing the right to organize damages democracy. "Free societies and free trade unions go together," George P. Schultz commented, reflecting his experience as both a labor-management mediator and Secretary of State (Silk 1991). President Ronald Reagan spoke eloquently about the role of unions in a democratic society in the early 1980s. He spoke of their struggle to "sustain the fundamental human and economic rights" such as "the right to work and reap the fruit's of one's labor, the right to assemble, the right to strike, and the right to freedom of expression" (Woolsey and Gerhard). At the time, he was speaking about communist Poland, but the sentiments are just as important in the United States today. Beyond their bedrock role in a democracy, unions are the principal voice of working families in the political arena, pushing for issues such as the minimum wage, unemployment insurance, Medicare and Medicaid, and a host of other measures. As union numbers fade, this voice becomes more muted and progressive politics become weaker (Radcliff and Davis 2000).

This examination of the state of unionism in the United States is composed of four sections. In the first, titled the "Great Disconnect," I examine the broken link between the rise of productivity and stagnant or even falling real wages, a trend that has led to the growth of inequality. In the second section, "High Road," I explore the union advantage in wages and benefits and then look at the relationship between unionization and competitiveness. I argue that unions can provide a high road to competitiveness: a combination of higher productivity and better wages that result in a stronger economy. The third section is a historical snapshot that provides a brief overview of the Wagner Act, from its passage to today. Finally, I conclude this Briefing Paper with a discussion of the Employee Free Choice Act itself.

The Great Disconnect

These are tough times for America's working families. Strong economic growth, record profits, and the fastest productivity increases since the 1950s should be good news for the economy, but only a thin slice at the top is enjoying higher living standards. Business analysts across the political spectrum now widely acknowledge that the link between a strong economy and the well-being of the middle class is broken. "Amid this country's strong economic expansion, many Americans simply aren't feeling the benefits," Henry Paulson, President Bush's Treasury Secretary, admitted in August 2006. Paul Krugman agreed, stating that "All indicators of the economic status of ordinary Americans—poverty rates, family incomes, the number of people without health insurance—show that most of us were worse off in 2005 than we were in 2000, and there's little reason to think that 2006 was much better" (Krugman 2006B, 48).

We are living through the Great Disconnect: the economy is growing while wages are flat or even declining. Not since the 1920s in the United States has the link between a strong economy and the well-being of the middle class been this tenuous. Competitive success in the world market does not guarantee more jobs and higher wages; in fact, it can as easily result in the reverse. The good news is that productivity expanded by a healthy 20% between 2000 and 2006 (Mishel 2006, 2); the bad news is that most of this economic boom has bypassed workers. Real wages, whether we are talking about a median worker or a college graduate, will have edged up only 2% during this period, with all of that wage gain actually being a spillover from the late 1990s (Mishel 2006).[4] At the bottom of the economic ladder, almost one-quarter of all workers earned poverty-level hourly wages in 2005—a higher percentage than in 2001—despite more than four years of overall economic recovery (Mishel 2007). Over a longer-time period, between 1966 and 2001, only the top 10% of taxpayers saw their real labor income per hour keep up with productivity growth, according to Northwestern economists Ian Dew-Becker and Robert J. Gordon. "The bottom 90% of the income distribution fell behind or even were left out of the productivity gains entirely" (2005, 78).

The flip side of this disconnect is that corporate profits have more than doubled since 2001 and, according to Moody economist Mark Zandi, "profit margins have never been as wide" (Zandi 2007, 1). During this period, U.S. firms expanded their share of the economy more rapidly than during any period since World War II. Profits as a share of national income have jumped from 7.0% in mid-2001 to 12.2% at the beginning of 2006,[5] the highest increase since data collection began in 1947 (Swan and Guerrera 2006). It is hardly a surprise that *The Economist* magazine noted in summer 2006 that "Growth is fast, unemployment is low, and profits are fat…[Yet] only one in four Americans believes the economy is in good shape. While firms' profits have soared, wages for the typical worker have barely budged" (2006).

Inequality has become particularly troubling. While life has always been good at the top, it has become positively stellar at the very pinnacle. "The top one-tenth of one percent of the income distribution earned as much of the real 1997-2001 gain in wage and salary income *as the bottom 50%*," according to Dew-Becker and Gordon (2005, 59). This income distribution is so extreme that the top 1% may feel left behind. Even President Bush has commented on the situation. "I know some of our citizens worry about the fact that our dynamic economy is leaving working people behind," the president stated. "We have an obligation to help ensure that every citizen shares in this country's future. The fact is that income inequality is real; it's been rising for more than 25 years" (January 31, 2007).

Compare today's Great Disconnect to the period spanning the depression and World War II, an era Goldin and Margo have dubbed the "Great Compression" (1991). As Paul Krugman points out, "government policies and organized labor combined to create a broad and solid middle class" (Krugman 2006b, 46). Needless to say, the bargaining clout of unions when they represent almost one out of every three workers—as they did soon after World War II—is far greater than when they represent about one out of every 14 workers as they do today. As a result, Krugman tell us, "we're seeing the rise of a narrow oligarchy: income and wealth are becoming increasingly concentrated in the hands of a small, privileged elite" (Krugman 2006).

The decline of the labor movement dampens the ability of unions to shape public policy. Tax policy, for example, has favored the rich, leading to smaller revenues to invest in health care, education, and other public programs that benefit the middle class. Raising the minimum wage, to take a second issue, was delayed far longer as a result of labor's diminished clout. Where does this weakening lead? Alan Greenspan, former Federal Reserve Board chair, noted that growing inequality of income and wealth are "very disturbing." He added that "a free market democratic society is ill-served by an economy in which the rewards of that economy [are] distributed in a way which too many of our population do not feel is appropriate….I think it is a major issue in this country" (Greenspan 2005). For those who don't remember the 1920s, we are resurrecting that decade's income distribution.

The High Road

"Unions," the bumper sticker goes, "the folks that brought you the weekend." In fact, unions brought America much more: its first broad middle class. Even today, union wages are higher and benefits more extensive than in comparable nonunion workplaces. Union members enjoy higher compensation directly, but the far larger nonunion sector benefits as well. Organized labor's influence on wages is felt most strongly by workers at the bottom and middle of the wage scale, where it also narrows the historic gaps associated with race and ethnicity. As membership slides, however, both unions' ability to raise wages for their members and spin-off benefits for nonunion workers erodes, wiping out the middle class dreams of many Americans.

Bureau of Labor Statistics data indicate a union wage advantage of 28.1% for wages and 43.7% for total compensation (i.e., wages and benefits) (Mishel et al. 2007, 181). Another analysis that controls for factors such as experience, industry, education, and region shows a smaller but still significant 14.7% union premium (Mishel et al. 2007). This second study records a higher union premium for African Americans (20.3%), Hispanics (21.9%), and Asians (16.7%) (Mishel et al. 2007).

It is important to remember that union gains flow to nonunion workers, particularly in highly unionized industries. Simply put, employers match what unions win to avoid unionization. Farber (2002; 2003) found that the overall effect of unionization on nonunion wages—i.e., the combined extra gains that all nonunion workers receive in highly unionized industries—approaches being equal to the total gains for union members. These gains in and of themselves represent a major boost for consumer demand throughout the economy (Mishel and Walters 2003, 10). The corollary is that, as organized labor declines, so does this payout. According to Farber (2002, 1), "more than half of the decline in the average wage paid to workers with a high school education or less can be accounted for by the decline in union density."

Consider the shifting situation in the U.S. auto industry. Historically, Japanese automakers who operate plants in the United States have sought to avoid the United Auto Workers (UAW) by paying comparable wages to the Detroit Three. In fact, Toyota wages edged above UAW wages for the first time in 2006, although benefits remained less generous (Roberson 2007a). Despite announcing record sales and earnings for the third quarter 2006, an internal Toyota report reveals the company plans to slash $300 million or about one-third out of its rising labor costs by 2011. The report indicates Toyota no longer wants to "tie [itself] so closely to the U.S. auto industry, or other competitors." Instead, the company intends to benchmark the prevailing manufacturing wage in the state in which a plant is located. In Kentucky, where the company is headquartered, this wage is currently $12.64 an hour, less than half Toyota's $30 an hour wage (Roberson 2007b). "The U.S. auto industry pays among the highest manufacturing wages in the world," the report states. "Compared with Japan and France, the U.S. auto industry pays 50% higher wages" and more ominously for U.S. workers "over five times more than Mexico's auto manufacturers" (Roberson 2007b).

The union advantage for employee benefits, an area unions pioneered, is also significant. "Benefits under union contracts are generally superior to benefit packages for nonunion workers," the American Management Association admits (1998, 22). Two features characterize the union advantage for benefits: a higher percentage of unionized workers covered and richer benefits than in the nonunion sector. Take health care: 28.2% more unionized workers are covered, and they receive 15.6% higher coverage for families (Mishel et al. 2007, 184). The story for pensions is similar: 53.9% more union workers are covered, and their employers spend 36.1% more on the generally preferred defined-benefit plans (Mishel et al. 2007).[6] As union density slips, so do worker benefits. Over the 1983-97 period, the proportion of workers receiving employer-provided health insurance slid by 8.3 percentage points to 62.8%, and the drop in union density explains about 20% of this decline (Buchmueller et al. 1999, 8).

Unions are particularly important for those stuck at the bottom of the wage scale. "Because unions boost workers' bargaining power and help them win a greater share of productivity gains," according to *Business Week,* "any resurgence would give low-wage workers more clout to deal with the effects of factors such as globalization, immigration, and technology" (Conlin and Bernstein 2004). Blanchflower and Bryson (2003, 30) underscored this claim, finding in their research that "unions are particularly good at protecting the wages of the most vulnerable workers."

Few dispute that the union advantage results in organized workers earning more than their nonunion counterparts. Some, however, argue that this is precisely the problem in a fiercely competitive global economy. Competitiveness, however, is linked to productivity, quality, and innovation as well as labor costs. And, when it comes to labor costs, low *unit costs* are critical, not simply low wages. For example, a worker producing 10 widgets an hour who earns $20 has a unit labor cost of $2 a widget; a worker producing one widget an hour who earns $5 has a unit labor cost of $5 a widget. In this case, higher wages result in lower labor costs. In fact, higher wages can serve to enhance productivity, quality, and innovation. The result is a high road to competitive success that benefits workers and communities as well as shareholders.

Consider the role of productivity. When Henry Ford introduced the assembly line in 1913 in his Highland Park plant near Detroit, productivity shot up. So did turnover. In January 1914, Ford doubled the prevailing wage in the auto industry to what became the legendary five-dollar day. Many observers, including his competitors, predicted Ford's ruin. Instead, he was able to cut the price of the Model T, pay his workers substantially more, and increase his profits significantly. "A low wage business is always insecure," Ford commented. The five-dollar day "was one of the finest cost-cutting moves we ever made" (Raff and Summers 1986, 3). The rapid rise of unions later in the century served to link rising productivity to worker wages, resulting in competitive firms and a growing middle class.

The economics literature indicates that unionization and high productivity often go hand-in-hand. Fairness on the job and wages that reflect marketplace success contribute to more motivated workers. Belman points out that unions "provide opportunities for firms to better their performance by eliciting greater commitment and information-sharing effort from their employees" (2003, 3). Without unions, day-to-day competitive pressures leave workers with quitting as the only option to address serious problems, an expensive solution for all concerned. Given the pressures of globalization and competitiveness today, unions have been responsive to increasing productivity and embracing new methods. "If we don't make a profit, we don't have a plant," according to James Kaster, president of UAW Local 1714, representing the famed General Motor's plant in Lordstown, Ohio (Terlip 2007).

A broad study of the economics literature found "a positive association [of unions on productivity] is established for the United States in general and for U.S. manufacturing" in particular (Doucouliagos and Laroche 2003, 1).[7] Earlier research came to similar conclusions. Brown and Medoff (1978, 373) reported that for manufacturing "unionized establishments are about 22% more productive than those that are not." In much of the postwar period, this higher productivity underwrote the higher wages that unions achieved.

Freeman and Medoff examined why unionized firms are more productive in *What Do Unions Do*? (1984). They found that about one-fifth of the union productivity effect came from reduced turnover. Unions improve communication channels, giving workers the ability to improve their conditions short of "exiting." Lower turnover means lower training costs, and the experience of more seasoned workers translates into higher productivity and quality. Moreover, higher compensation focuses the managerial mind: employers need to plan more effectively and focus on better methods.

The real productivity story is best understood in the workplace where many complex issues converge and the proverbial rubber hits the road. An innovative employer working with a progressive union can achieve high levels of productivity and quality, pay high wages, and be competitive. Consider four examples from very different industries: retail, telecommunications, autos, and hotels.

In retailing, a high-road partially unionized Costco outperforms a low-road Sam's Club (a Wal-Mart affiliate). Costco's labor costs are 40% higher than Wal-Mart, but nonetheless Costco produced $21,805 in operating profit per hourly employee in the United States in 2005, almost double the $11,615 generated at Sam's Club (Cascio 2006, 28, 35). And, Costco sells $866 per square foot compared to $525 at Sam's Club. How does Costco do it? "It absolutely makes good business sense," CEO James Sinegal maintains. "Most people agree that we're the lowest-cost provider. Yet we pay the highest wages. So it must mean we get better productivity." Echoing Henry Ford, he points out "that's not just altruism, it's good business" (Cascio 2006, 28). Costco, as Freeman and Medoff (1984) found in unionized firms, has lower turnover—6% annually compared to 21% for Sam's Club" (Holmes and Zellner 2004).

In the telecommunications industry, Cingular, the largest wireless carrier in the nation, accepted a "neutrality agreement" with the Communications Workers of America (CWA). Both sides agreed not to attack each other, and the company agreed to majority sign up for its workers, a preview of how the Employee Free Choice Act might work. To date, 39,000 workers have joined the union, about 85% of Cingular customer service reps, technicians, and retail sales workers in 35 states. How have things worked out? Lew Walker, vice president for human resources, says that the union provides a competitive advantage for the company. "They very much recognize that we are in a competitive environment," he states. Disagreements occur, but a mechanism is in place to work them out cooperatively (Gunther 2006).

The New United Motor Manufacturing (NUMMI) plant—a joint partnership of General Motors and Toyota organized by the United Auto Workers—achieved strong results in a unionized environment (Appelbaum et al. 2000, 7). The plant produces high-quality cars and trucks and pays among the highest wages in the domestic auto industry. NUMMI ranked third in 2005 for productivity among small truck assembly plants in North America, measured by hours per vehicle required for assembly (Harbour Consulting 2006). In fact, two of the top three assembly plants in North America were UAW plants in 2005 (they ranked one and two), and the union represented six of the top 10 plants (Harbour Consulting 2006). The Detroit Three have more than their share of problems right now, but labor productivity has made major strides.

As for the hotel industry, in Las Vegas, Culinary Local 226 organizes 90% of the hotel workers on the Strip. As a result, unionized housekeepers earn 50% more than their nonunion counterparts in Reno and enjoy fully paid health care. The union and the hospitality industry jointly put a heavy emphasis on training and operate the Las Vegas Culinary Training Academy, one of the most comprehensive training centers of its kind in the country. "Our union's goal and the training center's goal is you can come in as a non-English-speaking worker, come in as a low-level kitchen worker, and if you have the desire, you can leave as a gourmet food server, sous-chef, or master sommelier," according to D. Taylor, the secretary-treasurer of the local (Greenhouse 2004, A22). The Las Vegas hospitality case is one of a growing number of regional industries in which labor has been the driving force behind the formation of multi-company labor-management high-road training partnerships.[8] These cases hark back to the central role of craft unions in the building industry, in apprenticeship training, helping workers find new jobs, and administering portable benefit plans. In today's skill-based and post-industrial economy, a renewal of labor's capacity to give middle- and low-income workers access to training, career counseling, job placement, and portable benefits is essential to broadly shared prosperity. This renewal is equally pivotal to enabling more businesses to compete through skills, high productivity, and quality service. The high wages and extensive training are a successful combination in the service industry, according to management officials such as J. Terrence Lanni, chairman of MGM Mirage (Greenhouse 2004a, A22). The companies benefit and so do the union members, in this case, a group that is 70% female and 65% nonwhite.

While short-sighted management can lead a unionized firm into the ground, and a recalcitrant union can put a brake on productivity, the literature and case studies confirm that smart employers and progressive unions can foster higher productivity and competitive success.

Historical snapshot

In "a healthy workplace," George Schultz tells us, "it is very important that there be some system of checks and balances" (Silk 1991). Today that system of checks and balances is absent for over 90% of private-sector employees. How did we wind up here? A brief historical note might be helpful.

Over 70 years ago, the Wagner Act placed the federal government squarely on the side of collective bargaining and the right to organize. "The Wagner Act was not neutral," observed Professor James A. Gross (2002, 186). The law affirmed for workers the right to "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (cited in Gross 2002, 186). Senator Wagner was clear on the stakes: "The denial or observance of this right [collective bargaining] means the difference between despotism and democracy" (Swidorski 2003, 57).

The National Labor Relations Board's (NLRB) original interpretation of the Act was that an employer's duty was complete neutrality in a representation election. Any company attempt to influence employee choice was an unlawful interference with workers' right to choose their own representatives. Underlying the neutrality requirement was the Board's express recognition that employer "persuasion" could not be separated from employer coercion, given the economic dependence that defines the relationship. "In the main it will be found that a power over a man's support is a power over his will," Alexander Hamilton noted in the *Federalist Papers* (Lafer 2005, 18). What an employer might say "so easily leads to coercion and fear," a Twentieth Century Fund representative testified during the debate over the Wagner Act (Brody 2005, 102). In a famous judicial ruling six years later, Judge Learned Hand commented on an employer's inherent power in relation to workers. "What to an outsider will be no more than the vigorous presentation of a conviction," Hand wrote, "to an employee may be the manifestation of a determination which is not safe to thwart" (cited in Gross 2002, 191). Workers, after all, are well aware that they are subject to discipline or even dismissal.

From the early days of the Act an NLRB-supervised election was considered only one of the ways that employees could demonstrate majority support for a union. In fact, during this early period, the NLRB and the courts found it illegal for an employer presented with signed authorization cards or other such evidence of majority support not to recognize the union.[9] The Board directed elections take place only when a genuine question arose as to whether a majority of employees supported a union. Without a legitimate question, employees would have a union. As a result, almost a third of all certifications took place without an election in 1938 and 1939 (Brody 2005, 103).

Under these legal rules, millions of workers poured into unions, exercising their basic democratic rights. In the aftermath of World War II, one out of three workers in the labor force belonged to a union and, despite the emerging tensions of the cold war, the U.S. economy was well on its way to a period of unparalleled economic success and the creation of a broad middle class. Unions also extended the social safety net, pioneering benefits such as pensions and health care at the bargaining table.

Starting in the mid-1940s, however, the principle that employers had no business involving themselves in workers' organizing efforts came under severe political fire. A series of Board and court decisions made NLRB-supervised elections analogous to political elections. Under this rethinking, the employer, who previously had been required to be neutral, was now thought of as a central actor in the process, the equivalent of a candidate on the ballot. And employer campaigning, previously proscribed as an unfair labor practice, came to be accorded the status of "free speech," affirmatively protected by both the First Amendment and the new Section 8(c) of the Taft-Hartley Act.

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

Although Taft-Hartley was a stinging blow, labor had already achieved critical mass. Unions had unparalleled strength in the key mass-production industries—the commanding heights of the economy—and a political voice that many acknowledged spoke for working people more generally. The causes of labor's relentless decline over the following decades are hardly a simple story, one which involves such powerful forces as the changing character of the domestic economy to globalization. There is little question, however, that an increasingly hostile legal landscape and aggressive antiunion employers have played a major role. In the decades following the Taft-Hartley Act, employers deployed a lacerating arsenal of strategies that have undercut the original intent of the Wagner Act—to give employees the right to form unions and bargain collectively (Logan 2002). The Supreme Court, other appellate courts, and administrative bodies have all issued decisions that further eroded union power. While Taft-Hartley was a turning point, "in key ways it merely ratified or completed a case law already assaulting Wagner's defenses of self-organization," David Brody points out. "And, with virtually no further legislation, the work of interpreting labor's rights out of existence has steadily proceeded. The incremental dismantling of the duty to bargain…can be replicated many times over in the case law governing interrogations, captive audience meetings, union access, coercive speech, you name it" (Brody 2004, 6). When the Reagan administration cracked the whip over the Professional Air Traffic Controllers Organization (PATCO) strike in the 1980s, it legitimated and energized an anti-union managerial culture that continues to define labor relations to this day.

The net result for millions of American workers is the unraveling of their basic rights. Savvy, powerful employers have used the legal and regulatory climate to upend large parts of the Wagner Act in practice without Congress ever voting to do so. The rules of NLRB elections give employers effective veto power over their employees' decision. For many workers, joining a union has become a major hazard rather than a basic right. "The reality of NLRA enforcement falls far short of its goals," concluded the Human Rights Watch report (2000, 9). "Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized in reprisal for their exercise of the right to freedom of association." Fred Feinstein, a former general counsel of the NLRB, observed that "the inherent power of employers, combined with the potential for delay in the enforcement of NLRA rights and procedures, makes union success in a traditional NLRA election campaign largely dependent on employer mistakes" (Feinstein 2006, 339). Studs Terkel put it more simply: "Giving breath to the union dream is the first step in what invariably becomes the long trip through employer intimidation" (Terkel 2006).

The number of workers eligible for back pay for employer misconduct soared from 1,368 in 1958 to over 31,000 in 2005 (Levin 2001; NLRB 2006). One study indicated that more than 125,000 workers were awarded back pay in the five years between 1992 and 1997 as a result of reprisals for associational activity (Human Rights Watch 2000, 73). The author of the study, Professor Charles Morris, found that "a substantial number of employers involved in union organizational campaigns deliberately use employment discrimination against employees as a device to remove union activists and thereby inject an element of fear in the process of selecting or rejecting union representation" (Human Rights Watch 2000, 74). Schmitt and Zipperer point out that in union election campaigns, one out of five organizers and activists is likely to be fired (2007).

Organizing delayed can be organizing denied. Under current law, if the great majority of workers sign authorization cards for a union, the employer legally can recognize the union but is far more likely to insist on an NLRB election. Why would an employer insist on an election knowing that sentiment is overwhelmingly pro-union? Anti-union employers have learned that the time between the filing of a petition and the holding of the election can be used to reverse employee preference, precisely what Judge Hand and Senator Wagner were concerned about in the first place. Consider what happens during this period. Kate Bronfenbrenner (2000), a labor relations scholar at Cornell University, has found that in over 90% of campaigns workers must attend meetings where they are subjected to one-sided, anti-union presentations often prepared by professional anti-union consultants. Those who do not attend these meetings—11 in an average campaign—are subject to discipline and even discharge. In almost 80% of these drives, workers are compelled to attend one-on-one sessions with their immediate supervisors, usually at least weekly, in which the employer presents an unchallenged message. Moreover, while the employer's campaign has few limits, the law allows a prohibition on union advocacy during the workday and the barring of union organizers from the work site.

Bronfenbrenner (2000) also found that firms threaten—whether directly or by implication—to move or even close the workplace during over half of union organizing campaigns. Even the hint that a workplace might be closed can derail an organizing drive. In manufacturing, 70% of campaigns experience the threat of closure. "Underlying all this employer opposition to workers' organizing is the raw power of the employment relationship—the power to assign work, to pay a wage, to impose discipline, and ultimately to dismiss the worker," according to Human Rights Watch. "Workers hear employers' views with this power in mind" (2000, 19).

A more recent report on the right to organize carried out by researchers at the University of Illinois at Chicago confirms Bronfenbrenner's findings.[10] A majority of workers—in some cases over 80%—indicated their support of a union in over 90% of the 179 petitions filed in 2002 in the metropolitan Chicago area. Yet, unions only won 31% of the elections that were held. What happened? The report found that 30% of employers fired pro-union workers, 49% threatened to shutter the workplace (only 2% actually did), 82% hired consultants to conduct their campaign, and 91% compelled their employees to attend one-on-one "chats" with their supervisor (Mehta and Theodore 2005, 5).

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

The growing pervasiveness of employers flouting the spirit and often the letter of the law is fueled by minimal or nonexistent penalties. For determined anti-union employers, they amount to little more than a slap on the wrist, a worthwhile investment in keeping the union out. "Sanctions for violating the legal right to seek union representation are often too little and come too late," according to Feinstein (2003, 15). In the case of illegal discharge of union activists, for example, the NLRA calls for back pay minus interim earnings. When this takes place after years of delay, the employer faces a minor penalty generally after the union campaign has long been dead. Illegal threats to move the workplace can provoke a "cease and desist" order. The employer must post a notice pledging not to engage in the prohibited activity long after the point has been made and the campaign throttled. Bad-faith bargaining can result in orders to bargain in good faith, in which case a new round of bad-faith bargaining begins. Not surprisingly, Julius G. Getman, a professor at the University of Texas at Austin Law School, reflects that "optimism has given way to cynicism and despair about the law's ability to protect workers and enhance collective bargaining" (2004, 135).

Time for a change

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

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

EFCA provides a prompt, fair, open, and direct process to gauge employee sentiment on representation. If a majority of employees in a work place sign authorizations, the chosen union can present a petition of certification to the NLRB. As it did in the early years of the Act, the Board would investigate the petition and, if warranted, would certify the union without an election. Employers would still have the option, as they do today, to simply recognize the union voluntarily, but would no longer be able to insist on an election if the NLRB has ascertained that the union has majority support. There are clear benefits to this approach. Workers who do not want a union simply don't have to sign the authorization card. Those who do want a union have the opportunity to see their wishes recognized without a divisive, polarizing battle. But, isn't an election a more democratic approach? Not in a framework that itself is profoundly undemocratic. Today that framework involves a vast imbalance of power that is further exacerbated by one side lacking the right to campaign in the workplace, having its supporters subject to discipline and dismissal, and fearing economic coercion or retaliation.

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

EFCA restores balance to a process that has become increasingly dysfunctional. As we have seen, denying workers the right to form a union has damaging consequences for the economy and the political process. We have a dual disconnect. First, the disconnect between the high number of workers who indicate preference for joining a union and the low number who actually belong. As a result of weakening unions, we have the second gap, the Great Disconnect between rising productivity and stagnant or even declining real wages.

Workers' freedom to form unions is, and should be, considered a fundamental human right. Seventy years ago, the LaFollette Senate Committee concluded that "The denial of this right [to organize] was the most important problem of civil liberties before the Nation." The committee emphasized that "denying workers the right to organize almost invariably meant denying them the fundamental civil rights which are the basis of our democratic system" (Swidorski 2003, 57). Strengthening free choice in the workplace lays the basis for ensuring a more prosperous economy, a healthier society, and a stronger democracy.

Endnotes

1. The poll was conducted for the AFL-CIO.
2. According to 1993-2003 NLRB Annual Reports, an average of 22,633 workers per year received backpay from their employer. The NLRB orders employers to award backpay to workers they illegally fired, demoted, laid off, suspended without pay, or denied work as a result of their union activity (American Rights at Work, 2007).
3. 94.2% of all initial representation elections took place within 56 days of petition filing in fiscal year 2006. The median time from petition filing to election was 39 days (Cohen 2007, 10).
4. Productivity rose 33.4% during the 1995-2005 period, making the economic pie substantially larger. Most of this growth, however, did not find its way into paychecks. The typical worker saw health and pension benefits rise by about half the rate of productivity growth and wages increase only one-third that rate between 1995-2005 (Mishel 2007, 112-113).
5. The measure is profits stemming from current production.

6. Another study that controls for factors such as sector and establishment size finds that union workers are 18.3% more likely to have health insurance and 22.5% more likely to enjoy pensions, still a significant premium (Ibid).

7. The authors reviewed 73 independent studies on unions and productivity written in English and French, utilizing meta-analysis and meta-regression analysis, which seeks to make quantitative comparisons. Not all the studies referred to productivity and unions in the United States.

8. Working for America Institute, *The High Road Partnerships Report*, available online at: http://www.workingforamerica.org/documents/HighRoadReport/highroadreport.htm. For a more recent set of case examples in a single state, see Keystone Research Center, *The Pennsylvania High Road Partnerships Report*, online at www.keystoneresearch.org.

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

10. The study was commissioned by American Rights at Work.

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