The Politics of Labor Policy Reform

Dorian T. Warren
Columbia University

November 2011

Prepared for Conference on The Politics of Major Policy Change
Miller Center of Public Affairs
University of Virginia, Charlottesville

Introduction[i]

For more than sixty years, since Congress passed the Taft-Hartley Act in 1947 over President Truman's veto, organized labor has sought major labor law reform to shift the industrial playing field on which unions and employers play. In five attempts over six decades, the American labor movement has failed every time to achieve reform of national labor policy, including most recently in the first two years of the Obama Administration (Warren 2011). In addition to failing to win new legislative enactments, organized labor has also failed to prevent policy drift (Hacker 2002, 2004) in labor law to respond to significant changes in the American economy and increasingly hostile employer behavior towards unions over the last half of the 20th century (Goldfield 1987; Weiler 1990; Bronfenbrenner 1994, 2009).

This failure of the American labor movement over six decades—at moments of both organizational strength and weakness—to enact its most important legislative priority and respond to shifting environmental conditions raises a puzzle. Why and how has organized labor, the largest and strongest mass membership interest group in American politics, failed repeatedly over sixty years to win labor policy reform through the political system? And how is it that the Democratic Party has failed to deliver reform for its core constituency of the 20th Century, especially at moments of party control over Congress and the White House? These two questions are even more puzzling considering the unique position of the labor movement within the Democratic Party in the U.S., especially considering the absence of a labor party (Lipset & Marks 1994). One cannot understand the politics of the Democratic Party without understanding the central role of organized labor. Indeed, since the 1930s New Deal era, organized labor has been the most powerful core constituency of the national Democratic Party by several measures, including campaign contributions, grassroots mobilization efforts of the Party's key voters,

lobbying, and setting the Party's legislative agenda (Greenstone 1969; Dark 1999; Gottschalk 2000; Francia 2006). The 1932 critical election sparked a political realignment that permanently incorporated the labor movement as a core constituency of the 20th century Democratic Party, so much so that J. David Greenstone proclaimed organized labor as the "national electoral organization of the national Democratic Party" (Greenstone 1969: xiii). And after eight years of Republican rule of the Executive Branch at the beginning of the 21st century, the labor movement spent more money than ever to get a Democrat successfully elected to the White House in 2008 (Mayer 2009).[ii]

In this paper, I analyze organized labor's attempts at labor law reform since the 1940s. To account for failure, I argue that several long-term institutional and political obstacles present throughout 20th century American politics including the geographical concentration of labor, the conservative coalition in Congress, combined with antimajoritarian features of the American state, have been and continue to be insurmountable for the labor movement. However, in lieu of the continuing and unsurprising failure of labor law reform, pro-labor Democratic presidents do offer inducements and advance some labor policy reforms through administrative politics—appointments and rulemaking—with the potential to strengthen unions politically. Yet these minor reforms and redirection of labor policy have not been enough to change organized labor's overall post-war trajectory, with short- and long-term political implications for labor, the Democratic Party and American politics.

American Inequality and The Crisis of Organized Labor

Why are attempts at labor policy reform important for the American labor movement and American politics? The severe decline in union membership over the latter half of the 20th century and the related rise in economic inequality are two reasons why labor law reform is and

has been the most important national legislative priority for organized labor, especially over the last twenty years. With membership numbers peaking in the mid-1950s when roughly 1 in 3 American workers was a member of a labor union, unions have lost millions of members in the subsequent decades with ramifications for both the labor movement and patterns of inequality in the United States. Today, only 1 in 10 American workers are members of a union, the lowest level in more than 70 years with union density now at just 11.9 percent overall and 6.9 percent in the private sector, historic lows not seen since the previous Gilded Age (BLS 2011; Greenhouse 2011).[iii] And in 2009 unionized workers in the *public sector* became the majority of all union workers for the first time in American history. This shift became consequential in 2010-2011 as public sector employees in several states, most notably Wisconsin, lost significant rights to organize and engage in collective bargaining, a development taken up in more detail later. This steep decline of union membership rates over the post-war period resulted in a subsequent decline in organized labor's economic bargaining power vis-à-vis employers, and a potential decline in political bargaining power vis-à-vis elected officials.

The long-term loss of union members and labor's declining economic and political power raises the question of the future survival of the labor movement. Without some kind of national labor policy reform and a modernization of labor law that adapts to the new economic and political context and decades of policy drift, private sector unionization and the overall power of labor will continue to decline. Labor decline is even more likely with the subtraction of rights and added constraints on unions in the public sector more recently. The decline in union membership numbers and bargaining power has implications for both labor market and political outcomes. Deunionization since the 1970s explains at least a third of the rise in wage inequality among men and a fifth of the rise in wage inequality among women (Western & Rosenfeld

2011). In addition, many unions argue that labor law reform that encourages union organization would be a significant, if indirect, policy solution to the problem of growing economic inequality and the catastrophe of the Great Recession (AFL-CIO 2009). Insofar as unions rectify the inequality in bargaining power between workers and employers, one of the original aims of the 1935 Wagner Act[iv], higher union density decreases wage inequality in the American labor market while increasing purchasing power of consumers (Freeman 2007; Western & Rosenfeld 2011). Yet, relative to other advanced industrialized democracies, organized labor is weakest in the United States, partly explaining the cross-national variation in labor market outcomes and government redistribution (Bradley, et. al. 2003). The organizational structure of American labor is less encompassing, less centralized, and less powerful absent the institutional conditions for strong unions and an effective labor party (Levi 2003; Thelen 2001; Wallerstein and Western 2000). This matters for issues of economic inequality; in industrial and post-industrial democracies, labor unions are often the necessary and decisive actors in efforts to reduce pre-tax and transfer inequality in the labor market as well as inequality through government redistribution (Bradley, et. al. 2004; Esping-Anderson 1990; Korpi 1983; Wallerstein 1989, 1999; Western 1997).

The steep loss of union members over the last four decades is also consequential for political outcomes. Rising economic inequality has been coupled with political inequality in American politics, affecting the political voice of middle- and working-class citizens, government responsiveness, and public policy outcomes (Jacobs & Skocpol 2005; Bartels 2008; Schlozman and Burch 2009). Organized labor has often served as a countervailing force against economic power in American politics, giving voice to less powerful constituents in the political system (Rosenstone & Hansen 1993; Levi 2003; Winters and Page 2009). Yet with the stark

decline in union economic and political power, “big business” and the affluent have regained power vis-à-vis “little labor” and the economically disadvantaged in the contemporary politics of “organizational combat” (Hacker and Pierson 2010). Across political issues the labor movement is the strongest organizational force in the Democratic Party, and unions still wield power through electoral campaigns as well as lobbying and pressure in the national political system (Francia 2006; Hacker & Pierson 2010). As Larry Jacobs and Des King argue, analysts must take into account the central fact of imbalances in *organized forces* that pressure Congress and the White House on a range of issues (Jacobs 2010; Jacobs and King 2010). Absent a strong countervailing political constituency like organized labor, well-organized and more powerful stakeholders like business, industry groups and the wealthy are able to exert undue influence in American democracy (Lindblom 1977; Bartels 2008; Winters and Page 2009; Hacker and Pierson 2010). Measured by both members and money, the labor movement is the most powerful and resourceful political constituency on the political left in American politics. This is increasingly true relative to the decline in mass membership organizations over the last half-century (Skocpol 2003). Thus, the political implications of union decline are clear: if the labor movement does not stop the continued hemorrhaging of union members and spark a widespread renewal, it loses its ability to deliver votes and resources for the Democratic Party in future elections, and affect policy outcomes in national politics.

The Politics of Union Decline & Labor Policy

The organizational strength and power of the American labor movement is political, not economic, and labor policy is decisive in shaping its trajectory. Labor policy is a broad and expansive area comprising regulation of the American workplace as well as the promotion of

international labor standards often through trade policy. At the federal level, labor and employment policies are monitored and enforced by a plethora of agencies such as the National Labor Relations Board, the National Mediation Board, the Equal Employment Opportunity Commission, the Departments of Commerce and State, and the Department of Labor (which includes the Occupational Safety and Health Administration). These agencies are sometimes mutually reinforcing, yet often come into conflict (Frymer 2008). Workplace regulation encompasses over 150 laws focused on setting workplace standards and protections for *individual* workers such as minimum wage, anti-discrimination, and health and safety standards. Labor and employment policy also includes enabling laws that govern labor relations for *collectives* of workers via union organization and representation, as well as class-action lawsuits in the judicial system. Several aspects of trade policy also fall under labor policy, with implications for labor standards around the world.

The economic and political strength of organized labor is strongly shaped by the state and its role in structuring labor market institutions and the rules of the game for labor-business interactions (Hattam 1993; Olson 1965; Robertson 2000). Political conflicts around labor policy within American political economy are often characterized by organized capital and business interests attempting to shape markets to their benefit by lobbying for favorable rules and subsidies, while labor, on the other hand, often responds to the vicissitudes of market outcomes in capitalist democracies by pushing for what T.H. Marshall called “social citizenship”: social protections for workers and the disadvantaged, whether through social welfare legislation, through favorable rules for organizing and collective bargaining, or other mechanisms advancing economic rights (Polanyi 1944; Marshall 1949; Lindblom 1977; Block 2003; Silver 2003; Hacker and Pierson 2002, 2010). Yet these political contests do not occur in a vacuum; the

political construction of racial and economic orders directly shapes social groups' rights and the political opportunities they have to organize and mobilize (King and Smith 2005, 2011; Warren 2010). As sociologist Fred Block writes: "Labor markets, in short, are politically structured institutions in which the relative power of the participants is shaped by legal institutions that grant or deny certain baskets of rights to employers and employees. And this, in turn, generates an ongoing process of political contestation to shape and reshape these ground rules to improve the relative position of the different actors" (2003: 6). This central insight describes the always-contentious politics of labor law and policy in the United States, from slave codes in the 18th century, anti-conspiracy legal reforms in the 19th, the Wagner Act and Taft-Hartley in the 20th, to EFCA[v] in the 21st (Forbath 1991; Orren 1991; Hattam 1993 Dubofsky 1994; Godard 2009). Labor law strongly shapes the development of labor movements as economic and political actors (Collier and Collier 1979, 1991), but in racially specific ways in the case of the United States (Hill 1985; Frymer 2008). Thus, the politics of labor policy in democracies means that both organized labor and organized capital always attempt to shape this legal framework—the rules of governing the industrial playing field—to their respective advantage. But whether political elites offer inducements or constraints to labor is a function of the power of organized labor and its opponent, organized capital, at any given historical moment and under specific political conditions (Collier and Collier 1979; Hacker & Pierson 2002; Farhang & Katznelson 2005).

With a brief and temporary exception during World War I, the American labor movement did not gain explicit and positive rights to form and act on behalf of workers until the 1930s. And from the moment the union-enabling 1935 National Labor Relations Act (NLRA) was ruled constitutional two years after its passage[vi], the inducements labor won for the right to organize, the right to collective bargaining, and the right to strike have each been under attack and

successfully curtailed by organized capital and its political allies. After recovering their temporarily displaced structural and instrumental power caused by the Great Depression (Hacker & Pierson 2002), employers fought for and won several significant victories from the 1940s and throughout the latter half of the twentieth century, from legislative reforms encoding their backlash to New Deal labor reforms which constrained the power of workers (1947 Taft-Hartley and 1959 Landrum-Griffin bills), to successful attempts to block pro-labor labor law reforms meant to address policy drift in the 1960s, 1970s, 1990s and 2000s (Dark 1999; Farhang & Katznelson 2005; Warren 2011).

Now over seventy-five years old, the Wagner Act is a relic of the industrial economic and political New Deal orders under which it was enacted (Plotke 1996). Scholars have described its "ossification" and inability to address the major challenges facing workers under a new economic regime with new norms and practices (Estlund 2002). Job instability and insecurity caused by increased global competition for goods and services, contingent and part-time work, short-term contracts and employment attachments, and volatile and frequent shifts in consumer demand requiring flexible management practices, characterize the dominant features of the contemporary post-industrial, service-based, "digital" workplace (Stone 2004). But while these economic factors might account for many of the challenges facing organized labor and describe its decline (Clawson & Clawson 1999), political explanations far better explain the plight of the labor movement (Hattam 1993; Hacker and Pierson 2010).

Taking advantage of such ossification of the Wagner Act over the last decades of the 20th century, employers have become much more aggressive at violating workers' rights to organize under a much less protective labor law regime which, contrary to the intent of the NLRA, now provides perverse incentives for employers to break the law (Weiler 1990; Bronfenbrenner

2009). While American employers have always been "exceptionally" hostile to workers and broader issues of workplace democracy (Jacoby 1997), since the 1970s firms have increased their "union avoidance" practices, particularly illegal ones, with drastic consequences for labor. Economists Richard Freeman and James Medoff first described this shift its effects in their classic 1984 book, *What Do Unions Do?*.[vii] In 1984, they estimated 25% to 50% of the decline in union density was due to increased management opposition, as opposed to deindustrialization for workers' preferences. By 1994, the Clinton-appointed Dunlop Commission confirmed the increase in employer opposition and illegal conduct during union organizing drives (U.S. Commission 1994). The Commission found that, "In the early 1950s, approximately 600 workers were reinstated each year because of a discriminatory discharge during a certification campaign. By the late 1980s, this number was near 2,000 a year" (U.S. Commission 1994). From the mid-1950s to 1990, the Commission concluded "the probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time" (U.S Commission 1994). A more recent study with data through 2003 finds that when workers attempt to unionize through National Labor Relations Board elections, 57% of employers threaten to close the worksite, 47% threaten to cut wages and benefits, and most egregious, employers illegally fire pro-union workers in thirty-four percent of union election campaigns (Bronfenbrenner 2009). Even when workers are able to overcome intense employer hostility and vote successfully for union representation, a year after the election, more than half (52%) are still without a collective bargaining agreement due to employer resistance to bargaining in good faith (Bronfenbrenner 2009).

What explains this increased and effective employer hostility to unions in the contemporary post-industrial economic era? The identification of the plausible factors to answer

this question determines the range of labor policy responses and illuminate the core assumptions behind key provisions of labor law reforms since the 1970s including the most recent the Employee Free Choice Act. Scholars have advanced four explanations, each unsatisfactory alone: exceptionality of American employers; breaking of the post-war social contract; weak administrative state capacity; and regulatory capture by big business. The first explanation for the increased and effective hostility of employers is that management in the United States is "exceptionally" hostile toward workers exercising collective action via unionization. But this is not new. Historically, American employers have always been exceptionally antagonistic toward organized workers, often with the state on their side (Hattam 1993; Jacoby 1997). What the framing of employer hostility to unions in most accounts today imply (as do the data) is that there was an immediate post-war détente between labor and management, where employers implicitly agreed to a labor-management "accord". It is the breaking of this post-war social contract that scholars offer as the second explanation for employer behavior today (Fraser and Gerstle 1989; Fantasia and Voss 2004;Clawson and Clawson 1999; Piven and Cloward 1997). Yet, as Nelson Lichtenstein argues, maybe there was never such a post-war labor-management accord (Lichtenstein 2002). Instead, after their short-lived victory winning the 1935 Wagner Act permitting them the rights to exist and engage in collective bargaining, unions simply got beat back by employers, as symbolized by the passage of Taft-Hartley at the height of union power (Farhang and Katznelson 2005).

Although they advance this argument to explain the financial collapse and economic crisis of 2008 leading to our current Great Recession, the third and fourth explanations for increased employer opposition to unions both reflect "a political crisis of the American state", to borrow from Jacobs and King (Jacobs and King 2009: 3). It is true that the federal government

did itself become more hostile to organized labor, as infamously symbolized by former Screen Actors Guild President Ronald Reagan's firing of the PATCO workers in 1981. But the larger and longer-standing issue of the American state is its comparatively weak administrative capacity (Jacobs and King 2009). From its inception, the National Labor Relations Board (NLRB) lacked the adequate enforcement power to monitor and enforce labor law effectively (Gross 1974, 1985).[viii] This might not have been as problematic in the early years when employers were still on the defensive and in some ways did adhere to certain norms as the social contract proponents might argue.[ix] But beginning in the immediate post-war period and accelerating in the 1970s and 1980s, NLRB remedies for employer violations of the law have been ineffectual at best, and provide perverse incentives for employers to break the law at worst (Weiler 1990). Indeed, as early as the 1950s, unions were noting the rise of employer violations of labor law. Several labor officials testified about willful employer violations and the lack of strong enough penalties to discourage such behavior at a House subcommittee on the NLRB (known as the "Pucinski Committee") in 1961 (Gross 1995: 153-156).

Weak administrative capacity is related to the fourth explanation: regulatory capture. Even if the NLRB had the capacity to monitor and enforce labor law effectively, it would still be prone to regulatory capture by business interests, as we have seen during periods of conservative governance (Gross 1995). Initiated by the sharp change in enforcement of the Eisenhower-appointed NLRB, the Labor Board has been a fundamentally partisan agency, swinging back and forth between pro- and anti-labor rulings depending on the party controlling the presidency (Gross 1995).

Taken together, all four of these explanations for effective management opposition under the ossified late 20th century labor law regime capture partial empirical truths. Each factor alone,

but especially their interaction with each other, creates enormous historical, institutional and policy constraints on the ability of the labor movement to halt the decline in unionization and rebuild itself as a real countervailing power to business and corporate interests. It is in this context of increasing hostility to workers' rights and unionization efforts that labor organizations have advocated for labor law reform since the 1970s to fix what they consider a broken system. The hope for such reforms has been that they would reverse labor's organizational fortunes by changing the rules to make it easier to overcome management opposition in organizing drives to recruit new workers and increase the penalties on employers for violating the law.

The Unsurprising Failure: Labor Law Reform in Historical Perspective

For over sixty years, organized labor has attempted to reform labor laws that circumscribe and limit its strategies, tactics, and power. Labor advocates have attempted major labor policy reforms throughout American political history, with successes coming at rare and exceptional moments (Skocpol and Finegold 1982; Goldfield 1989; Hacker and Pierson 2002). Employer hostility to organized labor, with the national legal regime on its side, has been the more normal and routine state of affairs (Orren 1991; Hattam 1993; Jacoby 1997). Yet the story of labor law reform failure has deep historical roots and familiar political dynamics.

The business countermovement to retract the Wagner Act, labor's "Magna Carta" began in 1939, when the powerful anti-New Dealer, anti-Communist and anti-labor Rep. Howard Smith (D-VA), a leader of the conservative coalition of Southern Democrats and Republicans, led a Congressional investigation of the National Labor Relations Board (Gross 1981, 1985).[x] Several of the resulting recommendations from the Smith Committee in 1940 found their way into Rep. Fred Hartley's House bill in 1947, which became law after a Republican-led Congress overrode President Truman's veto of Taft-Hartley (Gross 1985). The passage of Taft-Hartley, enacted by

the political alignment of the "conservative coalition" of Southern Democrats with a majority of Republicans, many of whom had voted previously for the Wagner Act (Farhang & Katznelson 2005), contained several provisions weakening the rules of the game for organized labor. Even the National Labor Relations Board, the administrative agency responsible for enforcing labor law, took an usually active role in opposing its passage (Gross 1995: 15-25).

In 1947, exactly a decade after the Wagner Act was ruled constitutional by the Supreme Court, business interests were finally able to accomplish their decade-long campaign to roll back the rights of workers and the national government's explicit encouragement of collective bargaining. Discontent with an inflationary economy and a strike wave in 1945 and 1946 propelled Republicans to gain control of Congress for the first time since 1928 in the midterm elections. Both chambers quickly went to work on legislation aimed at reversing much of the Wagner Act passed in 1935, the top domestic policy issue of the 80th Congress. Arguably the most important element of Taft-Hartley was Section 14(b), giving states the right to pass "right-to-work" laws that forbade "closed" and "union" shops.[xi] Closed shops, workplaces where one is required to become a union member before becoming employed, and union shops, where one is required to pay union dues whether or not they support the union, are two institutional mechanisms on which unions rely to overcome the "free-rider" problem (Olson 1965). This provision, along with the other aspects of the law including anti-Communist affidavits for union leaders and a ban on secondary boycotts, would have far-reaching implications for the development of the American labor movement. The new legal framework under Taft-Hartley would ensure that organized labor would remain geographically, economically and politically contained in a minority of states in the North and far West for the rest of the 20th century.

Thus was borne the first effort to reform labor law. President Truman ran and was re-elected on a platform of repealing Taft-Hartley in 1948. Organized labor was as confident then as it would be sixty years later; William Green, President of the American Federation of Labor, proclaimed a few weeks after election day that Taft-Hartley would be "past history" by March 1, 1949 (Stark 1948b; Stark 1948a). In the Truman Administration in 1949-1950, labor failed to muster the necessary votes in both the House and Senate. In every attempt at labor law reform since—in the Johnson, Carter, Clinton and Obama Administrations—the political alignment of the conservative coalition (of Southern and moderate Democrats with a majority of Republicans), and the supermajoritarian Senate have been the primarily stumbling block for labor, despite unions garnering majority support for reform efforts in both chambers. Ironically, it was the Senate that previously served as the stumbling block for employers to reform labor law to their liking from 1935 until Taft-Hartley in 1947.

In the Johnson Administration, labor had more access to the White House since the Roosevelt Administration, playing a coordinating role on many of Johnson's most ambitious social policy successes including civil rights and broad social welfare policies like Medicare and War on Poverty programs (Greenstone 1969; Draper 1994; Dark 1999). But after acquiescing to Johnson's demand to get his Great Society programs passed before labor law reform, he finally gave the green light in mid-1965. Labor law reform—to repeal Taft-Hartley—did pass the House in the summer by a vote of 221-203 over the opposition of the conservative coalition; Southern Democrats, in contrast to their Northern and Western counterparts, voted overwhelmingly along with a majority of Republicans against the reform bill (Dark 1999). In late 1965, when labor law reform arrived in the Senate, a first cloture vote failed to reach a supermajority of two-thirds needed to invoke cloture. Again in 1966, the bill would suffer the fate of a successful filibuster

even though labor did reach a majority for cloture. Political scientist Taylor Dark foreshadows the first two years of the Obama Administration and labor in describing unions and the Johnson Administration: "ultimately, the grand sweep of liberal accomplishment during the Johnson presidency would bypass a long-standing goal of the labor movement [to win labor law reform via repeal of Taft-Hartley]" (Dark 1999: 59).

With the election of Jimmy Carter in 1976 and strong Democratic majorities in the House and Senate in the immediate post-Watergate era, organized labor again saw a short political opportunity to achieve labor law reform. After first losing a more narrow "common situs" labor law reform bill in the House aimed at reversing a 1951 Supreme Court ruling limiting the ability and effectiveness of picketing and strikes, unions regrouped and proposed a broader reform bill. The Labor Law Reform Bill of 1978 dropped labor's previous goal of repealing Taft-Hartley it had pursued since the Truman Administration in favor of a bill that included several provisions aimed at addressing several of the causes of union decline as the labor movement then perceived it. The bill included: faster elections (to be held within thirty days of requesting one with the requisite number of membership cards from workers in a bargaining unit); stronger remedy power for the Board including increased penalties for employer violations of the law; expansion of the NLRB from five to seven members to expedite case handling to deal with delays; denial of federal contracts to employers who violated labor laws; backpay for workers in cases where the company refused to negotiate a first contract with a union after a successful certification election; and equal access to company property for unions during election campaigns (Gross 1995: 236-241; Dark 1999). While this labor reform bill passed the House in late 1977 by a wide margin, it stalled in the Senate during 1978 despite majority support, where Senator Orrin Hatch (R-UT) successfully led a nineteen-day filibuster, defeating six attempted cloture votes that brought

passage to within two votes (Gross 1995: 239). Again, the regionally-based conservative coalition of Southern Democrats and a majority of Republicans were able to use the supermajority rules in the Senate to block labor law reform over a majority in favor as well as lobbying by President Carter.

Table 1: Labor Law Reform, 1950-2010

Year-Administration	Reform	House	Senate	Reason
1949-1950: Truman	Repeal Taft-Hartley	Fail	Fail	Conservative Coalition deny repeal
1965-1966: Johnson	Repeal Taft-Hartley	Pass	Fail	Senate filibuster
1977-1978: Carter	Labor Law Reform Act	Pass	Fail	Senate filibuster
1993-1994: Clinton	Striker Replacement	Pass	Fail	Senate filibuster
2009-2010: Obama	Employee Free Choice Act	-------	Fail	Senate filibuster

The next opportunity for labor law reform was the 1992 election of Bill Clinton, the first Democrat to occupy the White House since Carter. With control of Congress, labor pushed a reform bill focused on ending the practice of the permanent replacement of strikers (as opposed to the second broader reform bill that was defeated under Carter). This proposed reform would help restore the greatly weakened strike tool for labor by banning the use of permanent replacement workers during economic strikes. While the striker replacement bill won majority support in the House during the summer of 1993, it stalled and was ultimately defeated by filibuster over in the Senate. In the meantime, President Clinton appointed the Dunlop Commission to study the problems with labor law and make recommendations for legislative remedies. Unfortunately, although the Commission described in detail the ineffectiveness of the national labor regime in protecting workers' rights and encouraging collective bargaining (as reported earlier), because of the unforeseen Republican takeover of Congress in the fall of 1994,

"the work of the Commission was dead on arrival" in the words of Wilma Liebman, the current Chair of the NLRB (Liebman 2010).

Close, But No Cigar: The Failure of EFCA

The 2008 election of Barack Obama with Democratic Congressional majorities opened the door for labor law reform for the first time since 1992. First introduced in 2003 and re-introduced in the 111th Congress in early March 2009 by Senator Tom Harkin (D-IA) and Rep. George Miller (D-CA), the Employee Free Choice Act (EFCA), the labor movement's number one legislative priority, is the most significant labor law reform legislation in decades. EFCA is seen by many as the 21st century version of the Wagner Act, which could alter the rules of the game for organizing workers into unions.[xii] Based on the core assumptions of the problems leading to increased and effective management opposition to unionization described above, the Employee Free Choice Act would amend the National Labor Relations Act in three ways. First, it would allow union certification by the NLRB on the basis of a majority of signed authorization cards by employees in a bargaining unit. Often called "card-check" or "majority sign-up", this mechanism for union recognition would be in addition to the traditional NLRB-sponsored secret-ballot elections, which most unions view as favoring employers. Second, the Act would mandate first-contract mediation and arbitration through the Federal Mediation and Conciliation Service (FMCS) if a union and employer are unable to reach agreement on a contract within ninety days. This provision is meant to address the failure of almost half of newly unionized firms to reach a first contract a year after certification (Bronfenbrenner 1994, 2009; Ferguson 2009). Third, the Act would increase penalties for employer violations of workers' rights under the NLRA. These would include treble backpay for workers illegally fired during an organizing or first-contract

campaign, and for the first time, civil penalties against employers of up to $20,000 per violation of the law.[xiii]

EFCA seemed to have momentum toward passage at various moments during the first two years of the Obama Administration. At the start of the Obama Administration in January 2009, there was no foreseeable path to 60 votes in the Senate, with Sen. Tom Harkin (D-IA) proclaiming "We're waiting for Mr. Franken to arrive. There's no doubt that has a bearing on it" (Cain 2009). But once Pennsylvania Senator Arlen Specter switched parties and Al Franken (D-MN) was finally seated after sustained business opposition delayed his arrival for months, efforts around the bill began to heat up. A path to the sixty votes needed to overcome Southern and conservative Democratic opposition and a threatened Republican filibuster in the Senate seemed possible. At one point during the summer of 2009, Senator Harkin, chair of the Senate Labor Committee and the chief sponsor in that chamber, claimed he would force a vote on the bill before the August recess, only to later backtrack: "I was wrong", he said in one interview. "I think we're 80 [percent] to 90 percent there" (Bureau of National Affairs 2009a). But in September, hopes were again revived that labor law reform had enough votes to pass when Sen. Specter (D-PA) announced to delegates at the AFL-CIO convention that a compromise deal had been reached on EFCA that he thought would "bring 60 votes for cloture", allowing passage "before the year is up" (Amber 2009b). The compromise would drop the card check provision from the bill, replacing it with measures for quick or "snap" NLRB elections, meant to speed up the process to rectify the issue of often illegal employer opposition during lengthy election campaigns. While many union leaders privately agreed with Sen. Specter's assessment of the possibility of a compromise garnering the requisite supermajority in the Senate, very few said so publicly (Confidential Interviews). In fact, there was no compromise according to top labor

leaders; the AFL-CIO is "still on card check" proclaimed the newly elected head of the labor federation, Richard Trumka, in response (Amber 2009b; Confidential Interview).

Labor's strategy to advance EFCA was two-fold: first to work with the Obama Administration's policy priorities of the economic stimulus and health and financial reform to secure quick victories while waiting for the "right time" for the president to push labor law reform (Confidential Interviews).[xiv] The second element of the strategy was to reach the magic and necessary number of 60 pro-reform senators by continuing to apply grassroots pressure for EFCA on targeted Democratic moderates in sixteen states through letters, telephone calls, and civil demonstrations (Confidential Interviews; Cain 2009). For example, in July of 2009, the AFL-CIO coordinated a rally of about 1500 union activists and their allies at Senator Blanche Lincoln's Arkansas office to pressure her into supporting EFCA (Confidential Interview).[xv]

But the short window of opportunity to pass labor law reform in late 2009 would come to an abrupt and surprising end at around the one-year mark of the Obama Administration. With an already very narrow path to sixty votes in the supermajoritarian Senate, a nail in the coffin for EFCA was the surprise election in January 2010 of Republican candidate Scott Brown to Edward Kennedy's old senate seat in Massachusetts, ending Democrats' short-lived 60-vote majority in the chamber. When asked about the prospects for labor law reform in response, Sen. Harkin replied, "Well, it's, it's, it's there. But it doesn't look too good. I'm not going to give up on it. I'll never give up on it" (Cummings 2010). Even Karen Ackerman, the AFL-CIO's political director, admitted that "there has not yet been laid out a clear strategy of how to win on the Employee Free Choice Act" (Cummings 2010). Proclaiming EFCA "dead" as a result a month later, a prominent liberal journalist declared that "for American labor, year one of Barack Obama's presidency has been close to an unmitigated disaster" (Meyerson 2010).

By early spring, the Obama Administration sought to reassure unions that labor issues were still vitally important. Meeting with the AFL-CIO Executive Council in March 2010, Vice-President Joe Biden assuaged angry labor leaders, telling them that the Administration had not given up on labor's priorities (Amber 2010a; Confidential Interviews). Just a couple of weeks later after a year-long battle with strong union support, President Obama signed health reform into law, renewing labor's hopes that such a huge victory change the tenor of American politics and shift focus to EFCA, a second stimulus, and financial reform legislation (Confidential Interviews). Said one labor leader, "we expected the Administration and Congress to pursue these other issues that had been on hold during the fight over health care. At that point, jobs and the economy, and a second stimulus to deal with unemployment and economic misery was a priority. And of course EFCA" (Confidential Interview). By late spring, as the President was still publicly supporting EFCA by proclaiming his Administration was doing all it could "to make sure that people just get the fair chance to organize", the AFL-CIO was still trying to mobilize around labor law reform by "continuing to move the campaign on the field", according to one labor official (Cain 2009b). Yet organized labor was at a loss strategically as to how to score a victory. Fred Azcarate, an AFL-CIO official, hinted at defeat when he said that the labor federation was "investigating other ways to get it done. We are exploring lots of options" [for passage]… "this Congress or next" (Cain 2009b).

By early summer of 2010, Senator Harkin admitted what many knew but were reluctant to admit publicly: EFCA was dead (Confidential Interviews). Admitting he didn't have the votes to get to the supermajority sixty needed to invoke cloture, Harkin told a group of management attorneys that he was "within one vote, but something happened in Massachusetts" (Cain 2010a). By July, even AFL-CIO President Trumka acknowledged the death of EFCA in this Congress,

yet still held out hope telling a reporter, “We’re looking for methods to pass it” (Rose 2010b). Senator Harkin, trying to keep the labor law reform flame alive, claimed EFCA could still potentially be passed during the lame duck session after the November midterm elections. “To those who think it’s dead, I say think again. …a lot can happen before Election Day, or maybe in lame duck too” (Cain 2010b). In August, Barack Obama again sought to reassure organized labor when speaking to the AFL-CIO Executive Council for his first time ever as President (on the day of his 49th birthday). Recommitting to fighting for and signing labor law reform, the President acknowledged that getting EFCA “through a Senate is going to be tough. It’s always been tough, it will continue to be tough, but we’ll keep on pushing” (Obama 2010).

Despite its death in the Senate, EFCA went further than expected according to some in the labor movement.[xvi] “The theory we had in 2005 that building our capacity in individual unions, rallying to elect a president in 2008, and then passing” labor law reform was a “totally thoughtful strategic plan that we got really far down the line,” according to Andy Stern, the former president of the politically powerful Service Employees International Union (SEIU) and the most frequent visitor to the Obama White House during the first year of the Administration (Amber 2009b). At least publicly, Stern didn’t doubt the strategy labor took, “We did a good job of setting up EFCA that would have allowed that energy to be channeled in a new context that had a lot of possibility. I think we made the right decision, allocated the resources, chose the strategy, and tried to change the environment” (Amber 2009b). External factors such as the protracted struggle over health care reform—another one of labor’s top legislative priorities—and the loss of 60 votes in the Senate with the election of Scott Brown (R-MA) in January of 2010 were his attributed sources of failure (Amber 2009b).

But privately, others in the labor movement were more critical of labor's strategy (Confidential Interviews). One official at a national union explained "the labor movement never really had a realistic nor coordinated strategy for getting to 60 independent of the President. It's not clear we ever really had Lincoln (D-AR) or Nelson (D-NE). And none of us could foresee, even though we should have, the backlash to the President's agenda, especially health care reform" (Confidential Interview). Another top official at another union described how acquiescing to the Administration's policy priorities and sequencing was possibly a mistake: "we should have gone along when it made sense, like on health care, but really pushed hard early on to force EFCA on the agenda…especially during those first 100 days" (Confidential Interview).

Labor's Historic Foe: the Filibuster

What explains organized labor's continued failure to win labor policy reforms over six decades? Is it organizational strength and power, public opinion, Congressional alliances, strategic mistakes, or institutional variables? Several institutional and political obstacles including the supermajoritarian rules of the Senate, the role of interest groups, especially the Chamber of Commerce's intense opposition and organized labor's strategic choices, explain labor law reform failure over the last sixty years. One factor is uniquely important in defeating labor law reform over time: the filibuster. Every serious reform effort since 1950 has been defeated by the use of the filibuster in the Senate, which requires a supermajority of 60 senators to invoke cloture.[xvii] There are few issues that arouse such persistent obstruction throughout the last sixty years of American politics as labor law reform. Why? Obviously, as discussed earlier, the stakes are high for shaping the rules of the game for labor-business interaction. But over the last decade, the number of filibusters has increased dramatically, with the 111th Congress setting the all time record for cloture motions with 136 (U.S. Senate 2010). This is even more

remarkable considering the change in Senate rule 22 in 1975, lowering the threshold for the number of senators required to overcome a filibuster. A quick summary of successful filibusters over labor law reform illuminates its importance:

- In fall of 1965 and again in 1966, Senate Minority Leader Everett Dirksen (R-IL) led successful filibusters against labor law reform (Dark 1999: 47-75).
- After fighting for two decades for filibuster reform, the labor movement rejoiced with the change in Senate Rule 22 in 1975, reducing of the necessary number of votes for invoking cloture from two-thirds (67) to three-fifths (60).
- Yet in 1978, organized labor was stymied again by a Senate filibuster despite the change which lowered the supermajority requirement for cloture, when they came within two votes of defeating and winning on a labor law reform package that substantively is very similar to the current EFCA.
- In 1993, feeling hopeful from the Democratic presidential and congressional victories, organized labor pushed labor law reform in the form of a striker replacement bill. After passing the House, it was defeated by a Republican filibuster in 1994, led again by Senator Orrin Hatch (R-UT) and joined by Bob Dole (R-KS) and Don Nickles (R-OK) (Logan 2007).
- In 2007, the Employee Free Choice Act passed the House, but stalled in the Senate. Its fate in 2009, when hopes were high, was similar: no action in the Senate due to a threatened filibuster and not enough votes to invoke cloture (the House decided this time around to wait until the Senate voted successfully to pass the bill before taking action).

Sen. Tom Harkin explained in plain language why the more recent EFCA failed as a result of the inability to reach a supermajority in the Senate: “What happened? We had an election in

Massachusetts. We lost our 60th vote", he said to a union audience in May of 2010 (Bureau of National Affairs 2010b). As it had before in response to its failure to overcome filibusters of labor law reform in the 1950s and 1960s, the AFL-CIO again recently advocated for yet another change in Senate Rule 22 to "end legislative gridlock" (AFL-CIO 2010). One national union, the Communication Workers of America, went further than the vague AFL-CIO language by passing a resolution at their convention demanding that the "filibuster must be eliminated and the use of holds to deny the appointment of qualified individuals must come to an end" (Amber 2010d). By the beginning of the new 112th Congress in January 2011, these efforts by the AFL-CIO and CWA (along with the Sierra Club and fifty other liberal national organizations) had coalesced into an official coalition advocating for filibuster reform called "Fix the Senate Now".[xviii]

Public Opinion, Union Density & Divided Labor Movement?

Low union density, public opinion and a divided labor movement are three popular explanations offered repeatedly for organized labor's inability to achieve labor law reform since the 1950s. While each important determinants of the fate of reform in their own right, these factors are often advanced in lieu of the more durable and longer-term obstacles such as the geographical concentration of labor, the conservative coalition in Congress, and the antimajoritarian features of the American state. The decline in union membership numbers, the argument goes, has resulted in a decline in labor political power (Confidential Interviews). Where unions are strongest in numbers, particularly in the Northeast and Midwest, the bluer the state. There is an obvious correlation between levels of union density and whether a state tends to vote Democratic or Republican. Thus, many labor activists and scholars argue that as unions have lost members and overall density since their peak in 1955, so too have they lost political

power and the ability to win labor law reform. As one labor leader told me, "Until we have higher union density, we won't have the political power we need to win EFCA" (Confidential Interview).

This explanation makes sense, and is even a seductive mantra for those hoping to build a stronger labor movement. But on closer inspection, it is not as convincing as other factors for explaining the failure of labor law reform. For instance, the logic of higher union density as the necessary condition for labor law reform does not explain the failures of reform efforts under Presidents Truman, Johnson and Carter (compared to Clinton and Obama). Under Johnson, union density was double what it is currently, with strong Democratic majorities in Congress. This argument also can't explain how labor reforms unfavorable to labor were successful over labor opposition at the moments of highest union density in American history: most notably Taft-Hartley in 1947 (31.9% union density) and Landrum-Griffin in 1959 (union density of 28.9%) (Troy 1965). Indeed, union density was low at the moment of the passage of the Wagner Act itself seventy-five years ago at only 13.3 percent, statistically insignificant from the union density rate of 12.7% in 2009.

A second popular explanation offered for labor's failing fortunes is public opinion. Unions have fallen out of favor with the public and therefore can't muster enough public support to convince Congress to pass labor law reform. Recognizing the role of public opinion on labor's influence, one union leader explained "we have to make a better argument to the American people why they should care about reforming our labor laws…we're losing the framing battle to the Chamber" (Confidential Interview). It is true that on many issues, politicians tends to follow public opinion over time (Page and Shapiro 1992), and attempts by business to tar unions in the public's mind have long been an explicit strategy in their efforts to win employer-friendly labor

reforms (Gross 1995). And recent evidence suggests business is winning; Americans' current attitudes about unions, in particular, do not bode well for significant support for labor policy reform. For the first time since Gallup first took a poll asking Americans their opinions about organized labor in 1936 (the year after the NLRA was passed), a majority did **not** approve of unions in the first year of the Obama Administration. In 2009, only 48 percent of Americans approved of labor unions, down from 59 percent in 2008, 72 percent when the poll was first conducted in 1936, and the high of 75 percent registered in 1953 and 1957 (Gallup 2010).[xix] And public approval of unions has declined overall since the first poll in 1936, supporting the thesis of a relationship between public opinion and labor law reform. In addition, public sector unions have declined in the public's eyes, with many Americans even becoming resentful at the perceived luxurious health and pension benefits many government employees are much more likely to have relative to their private sector counterparts. Add the fiscal crises of most state and local governments to this mix, brought on by the economic downturn and partly due to pension obligations, and public sector union members, now the majority of all unionized workers, begin to look like the much reviled "labor insiders" in Western European countries.[xx] Indeed, in the wake of the November 2010 elections, newly elected governors and state legislators have proclaimed their goals of demanding wage and benefit cuts from state and local government employees to address budget deficits. This targeting of public sector union contracts is a bipartisan affair, as both Republican and Democratic governors have taken nearly identical—and popular—policy stances (Braun & Rosenkrantz 2011).

Yet, it is important to note that public opinion of the labor movement is far from determinative of labor's political fate; approval of unions was much higher during periods of labor law reforms unions opposed: 64% of the public approved of unions in 1947 when Taft-

Hartley passed, while 68% and 73% approved of unions in January and August of 1959, respectively, the year Landrum-Griffin passed. What is important in the relationship between public opinion and efforts at labor law reform is the timing of the public's souring on unions. For instance, during the Johnson-era reform effort, a two-week strike of transportation workers in New York City in January 1966 provoked a backlash in public approval of unions and especially public sector workers (Dark 1999: 60). Similarly during the Carter-era reform effort, a 110-day strike by United Mine Workers members from late 1977 through 1978 also irritated the broad public about the pending labor law reform, providing political material for the National Association of Manufacturers and the Business Roundtable to lobby moderate Congressional leaders to vote against the bill (Dark 1999: 110).

A third and final often-advanced explanation for the failure of labor law reform is internal divisions within the labor movement. These internal divisions, it is argued, prevent a unified and coordinated strategy to garner all of the resources of the labor movement to advance a unified approach to winning reform. A divided labor movement has in fact proved ruinous in previous labor law reform efforts. During the 1949-1950 reform effort under Truman, the American Federation of Labor explicitly refused to coordinate with the Congress of Industrial Organizations the legislative campaign to repeal Taft-Hartley (Gross 1995: 42-57). The AFL-CIO Executive Council was divided on its approach to reform during the Johnson Administration, while there was broad "institutional disarray" in the House of Labor during the Carter Administration (Dark 1999: 113). The most recent division, during the Clinton Administration, was between what John Logan calls "traditionalists", who advocated for a limited reform in the guise of the striker replacement bill, vs. "modernizers" who wanted a much broader package of reform, similar in content to EFCA (Logan 2007).

Some labor movement officials attributed the failure of labor law reform in 2009-2010 to the divisions in the contemporary labor movement between the two rival federations, the AFL-CIO and Change to Win (Confidential Interviews; Hamburger 2009). In particular, several national officials pointed to the highly contentious internal fight within SEIU over the national union's controversial trusteeship of its west coast local of health care workers, the internal fight and divorce within UNITE-HERE, and the inter-union squabble between SEIU and UNITE-HERE. While true that many resources used to wage these internal battles might have been allocated towards a political strategy for advancing EFCA in Congress (via grassroots lobbying in targeted states and districts, or public opinion, etc.), it is unlikely that a unified labor movement could have overcome the deeper and longer-term structural obstacles including the use of the filibuster and the Chamber of Commerce's lobbying effort to defeat reform.

Conclusion

At the end of his final book in his trilogy on 20th century labor policy, historian James Gross describes the lukewarm relationship between the Presidency and workers' rights in this way:

> In the White House, no matter who the occupant, courageous leadership has been lacking. No president has been willing to risk pursuing a clear statement of the rights of workers or delineating statutory solutions to serious labor relations problems. Instead, administrations have done the minimum necessary to respond, or at least appear to be responding, to political pressure, to gain political backing, or to reward business or organized labor for its support in election campaigns. They then go through the motions of seeking reform while manipulating the situation for maximum political gain. (Gross 1995: 276).

This historic pattern was on display yet again as President Obama addressed the AFL-CIO Executive Council, outlining his accomplishments but recommitting to labor's most important legislative priority. "We passed the Fair Pay Act to help put a stop to pay discrimination. We've reversed the executive orders of the last administration that were designed to undermine

organized labor. I've appointed folks who actually are fulfilling their responsibilities to make sure our workplaces our safe, whether in a mine or in an office, a factory or anyplace else. And we are going to keep on fighting to pass the Employee Free Choice Act." These Executive actions are vitally important, if small, victories for the labor movement (Confidential Interviews). Indeed, in an attempt to educate its leaders and members in the lead-up to the midterm elections in November 2010, the AFL-CIO highlighted the important accomplishments of labor reforms through administrative politics, in addition to the significant legislative victories it supported such as health care reform, financial re-regulation and the stimulus package (AFL-CIO 2010a).

But suppose EFCA had passed successfully, while maybe necessary, it is doubtful it would be sufficient to spark a wholesale revitalization of the labor movement. Even the Chair of the NLRB is not sanguine on this particular labor law reform, arguing that "EFCA does not represent comprehensive labor-law reform. What is represents, rather, is the prospect of an end to the ossification of our law" (Liebman 2010). Yet labor has always known that changing the law, by itself, is a necessary but not sufficient condition toward revitalizing the union movement. As one leader put it, "to change the plight of workers in this country, we can't just rely on the law. Unions themselves must change. Unions have to commit to organizing on a massive scale in spite of the law. We have to change the internal organizational cultures of unions to get them to support organizing. That way, we'll make gains while waiting for the law to come back on our side, but we'll also be ready to organize once it does." (Confidential Interview)

REFERENCES

AFL-CIO. 2009. "AFL-CIO Legislative Guide 2009". On file with author.

AFL-CIO. 2010a. "Obama Administration Accomplishments". July. On file with author.

AFL-CIO. 2010b. "Senate Procedural Changes Needed to End Legislative Gridlock." Executive Council Statement. August 5. http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec08052010d.cfm

Alter, Jonathan. 2010. *The Promise: President Obama, Year One.* New York: Simon & Schuster.

Amber, Michelle. 2009a. "Sweeney Says Process for Joining Unions Needs to Be Fair, Not Necessarily Card Check." *Labor Relations Week.* September 10. 23 LRW 1429.

Amber, Michelle. 2009b. "Specter Says Compromise Reached on EFCA, But AFL-CIO Says No Deal Yet." *Labor Relations Week.* September 17. 23 LRW 1478.

Amber, Michelle. 2010a. "Biden Tells Labor Chiefs That Administration is Not Abandoning Their Priorities Like EFCA." *Labor Relations Week.* March 4. 24 LRW 334.

Amber, Michelle. 2010b. "Labor Backs Arkansas Lieutenant Governor in Challenge to Sen. Lincoln's Re-Election Bid." *Labor Relations Week.* March 4. 24 LRW 336.

Amber, Michelle. 2010c. "As Retirement Nears, SEIU's Stern Says Shift in Work Processes is Top Issue Facing Unions." *Labor Relations Week.* April 22. 24 LRW 639.

Amber, Michelle. 2010d. "AFL-CIO Joins One Nation, Calls on Senate To Change Rules to End Legislative Gridlock." *Daily Labor Report.* August 6. 151 DLR B-2.

Bartels, Larry M. 2008. *Unequal Democracy: The Political Economy of the New Gilded Age.* New York & Princeton: Russell Sage Foundation & Princeton University Press.

Block, Fred. 2003. "Karl Polanyi and the writing of The Great Transformation." *Theory and Society.* 32 (3): 275-306.

Bologna, Michael. 2009. "Solis Says Labor Department Focus Must Be on Strong, Safe, Sustainable Jobs." *Labor Relations Week.* September 10. 23 LRW 1432.

Bradley, David and Evelyne Huber, Stephanie Moller, Francois Nielsen and John D. Stephens. 2003. "Distribution and Redistribution in Postindustrial Societies." *World Politics.* 55 (2): 193-228.

Braun, Martin Z. and Holly Rosenkrantz. 2011. "Public-Worker Unions Confront U.S.

Governors Over Benefits in Role Switch." *Bloomberg News.* http://www.bloomberg.com/news/2011-01-20/public-worker-unions-battle-governors-on-benefits-in-role-shift.html (accessed January 20, 2011).

Bronfenbrenner, Kate. 1994. "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform." in S. Friedman, R. Hurd, R. Oswald, & R. Seeber, eds., *Restoring the Promise of American Labor Law*. Ithaca, NY: Cornell University Press, pp. 75-89.

Bronfenbrenner, Kate. 2009. "No Holds Barred: The Intensification of Employer Opposition to Union Organizing." *EPI Briefing Paper # 235*, Washington, D.C.: Economic Policy Institute.

Bureau of Labor Statistics. 2010. Current Population Survey, News Release. Union Members in 2009. Washington, D.C.: U.S. Department of Labor. Available at http://www.bls.gov/news.release/pdf/union2.pdf. Accessed 5 April 2010.

Bureau of National Affairs. 2009a. "EFCA Vote Slips Until After August Recess, 'May Be Longer Than That', Harkin Says." *Labor Relations Week.* July 30. 23 LRW 1212.

Bureau of National Affairs. 2009b. "Business Groups Reject Alternatives to Proposed Employee Free Choice Act." *Labor Relations Week.* July 30. 23 LRW 1228.

Bureau of National Affairs. 2009c. "Consideration of EFCA on Hold in Senate As Health Care, Other Bills Given Priority." *Labor Relations Week.* September 10. 23 LRW 1411.

Bureau of National Affairs. 2010a. "'No Higher Priority' Than Passage of EFCA, Harkin Tells IAM Legislative Conference". *Labor Relations Week.* May 13. 24 LRW 781.

Bureau of National Affairs. 2010b. "NAM Report Outlines Proposals On Growth, Opposes Labor Law Changes." *Labor Relations Week.* July 8. 24 LRW 1138.

Cain, Derrick. 2009a. "EFCA Introduced in Both House, Senate; Senate to Take Up Bill After Easter Recess." *Labor Relations Week.* 23 LRW 385. March 12.

Cain, Derrick. 2009b. "AFL-CIO Continues EFCA Pursuit Despite Lack of Votes in Senate." *Labor Relations Week.* May 6. 24 LRW 729.

Cain, Derrick. 2010a. "Harkin Says He Does Not Have Enough Votes to Approve EFCA." *Labor Relations Week.* May 20. 24 LRW 820.

Cain, Derrick. 2010b. "EFCA Could Be Taken Up in Congress After November Elections, Harkin Says." *Labor Relations Week.* July 1. 24 LRW 1084.

Chamber of Commerce. 2010a. "EFCA Comes Tumbling Down." http://www.chamberpost.com/2010/04/efca-comes-tumbling-down.html

Chamber of Commerce. 2010b. "Bearing Down on Employers: The New Labor and Immigration Landscape." September 2. http://www.uschamber.com/reports/bearing-down-employers-new-labor-and-immigration-landscape

Chamber of Commerce. 2010c. "The 'Obama' National Labor Relations Board: The Potential Use of Rulemaking to Enhance Union Organizing." Labor, Immigration & Employee Benefits Division. August. http://www.uschamber.com/sites/default/files/reports/1008_obamanlrb.pdf

Collier, Ruth Berins and David Collier. 1979. "Inducements versus Constraints: Disaggregating 'Corporatism'". *American Political Science Review.* 73 (4): 967-986.

Cummings, Jeanne. 2010. "Labor Helps Kill Its Own Top Priority." *Politico.* January 26. http://dyn.politico.com/printstory.cfm?uuid=6CD9C06C-18FE-70B2-A8F39148A7BC8614

Dahrendorf, Ralf. 1959. *Class and Class Conflict in Industrial Society.* Palo Alto, CA: Stanford University Press.

Dark, Taylor. 1999. *The Unions and the Democrats: An Enduring Alliance.* Ithaca: Cornell University Press.

Draper, Alan. 1994. *Conflict of Interests: Organized Labor and the Civil Rights Movement In the South, 1954-1968.* Ithaca: Cornell University Press.

Dube, Lawrence E. 2009. "ABA Speakers Continue EFCA Debate, Differing on Evidence of Need for Change." *Labor Relations Week.* August 6. 23 LRW 1259.

Dubofsky, Melvyn. 1994. *The State and Labor in Modern America.* Chapel Hill, NC: University of North Carolina Press.

Estlund, Cynthia L. 2002. "The Ossification of American Labor Law." *Columbia Law Review.* 102.

Farhang, Sean and Ira Katznelson. 2005. "The Southern Imposition: Congress and Labor in the New Deal and Fair Deal." *Studies in American Political Development.* 19 (Spring): 1-30.

Ferguson, John-Paul. 2009. "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004." *Industrial & Labor Relations Review.* vol. 62, no. 1. 3-21.

Forbath, William E. 1991. *Law and the Shaping of the American Labor Movement.* Cambridge, MA: Harvard University Press.

Francia, Peter L. 2006. *The Future of Organized Labor in American Politics.* New York: Columbia University Press.

Freeman, Richard B. 2007. *America Works: Critical Thoughts on the Exceptional U.S. Labor Market.* New York: Russell Sage Foundation.

Frymer, Paul. 2008. *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party.* Princeton: Princeton University Press.

Gottschalk, Marie. 2000. *The Shadow Welfare State: Labor, Business, and the Politics of Health Care.* Ithaca: Cornell University Press.

Greenstone, J. David. 1969. *Labor in American Politics.* New York: Alfred A. Knopf.

Gross, James A. 1981. *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947.* Albany: State University of New York Press).

Gross, James A. 1985. "Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making." *Industrial and Labor Relations Review.* v. 39, no. 1. October.

Gross, James. A. 1995. *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994.* Philadelphia: Temple University Press.

Hacker, Jacob S. 2004. "Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States." *American Political Science Review.* vol. 98, no. 2, 243-260.

Hacker, Jacob S. and Paul Pierson. 2002. "Business Power and Social Policy: Employers and the Formation of the American Welfare State." *Politics and Society.* 30 (2): 277-326.

Hacker, Jacob S. and Paul Pierson. 2006. *Off Center: The Republican Revolution and the Erosion of American Democracy.* New Haven: Yale University Press.

Hacker, Jacob S. and Paul Pierson. 2010. "Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States." *Politics & Society.* 38 (2): 152-204.

Hamburger, Tom. 2009. "Labor Unions Find Themselves Card-Checked." *L.A. Times.* May 19. http://articles.latimes.com/2009/may/19/nation/na-unions19

Hattam, Victoria C. 1993. *Labor Visions and State Power: The Origins of Business Unionism in the United States.* Princeton: Princeton University Press.

Hill, Herbert.1985. *Black Labor and the American Legal System: Race, Work and the Law.* Madison: University of Wisconsin Press.

Hobbs, Susan R. 2011. "'Unionization Through Regulation' Decried As End-Run in Favor of Union Organizing". *Labor Relations Week.* 25 LRW 103. January 20.

Jacobs, Lawrence R. and Theda Skocpol. 2005. *Inequality and American Democracy: What We Know and What We Need to Learn.* New York: Russell Sage Foundation.

Jacobs, Lawrence R. and Joe Soss. 2010. "The Politics of Inequality in America: A Political Economy Framework." *Annual Review of Political Science.* 13: 341-64.

Kane, Paul, Chris Cillizza and Shailagh Murray. 2009. "Specter Leaves GOP, Shifting Senate Balance." *Washington Post.* April 29. http://www.washingtonpost.com/wp-dyn/content/article/2009/04/28/AR2009042801523.html

King, Desmond and Rogers M. Smith. 2005. "Racial Orders in American Political Development." *American Political Science Review.* 99 (1): 75-92.

Korpi, Walter. 1983. *The Democratic Class Struggle.* London: Routledge and Kegan Paul.

Levi, Margaret. 2003. "Organizing Power: The Prospects for An American Labor Movement." *Perspectives on Politics.* 1: 45-68.

Liebman, Wilma B. 2010. "The Revival of American Labor Law." Comments prepared for Access to Justice Lecture Series, Washington University Law School. February 17. On file with author.

Lindblom, Charles. 1977. *Politics and Markets: The World's Political Economic Systems.* New York: Basic Books.

Logan, John. 2007. "The Clinton Administration and Labor Law: Was Comprehensive Reform Ever a Realistic Possibility?" *Journal of Labor Research.* 28: 609-628.

Los Angeles Times. 2008. "Obama Focused On Economic Stimulus." December 10. http://articles.latimes.com/2008/dec/10/nation/na-obama-excerpts10

MacGillis, Alec. 2008. "Labor Leaders Stress Unions' Importance for Obama." *Washington Post.* August 29. http://www.washingtonpost.com/wp-dyn/content/article/2008/08/28/AR2008082804003.html

MacGillis, Alec. 2009a. "Executives Detail Labor Bill Compromise." *Washington Post.* March 22. http://www.washingtonpost.com/wp-dyn/content/article/2009/03/21/AR2009032101449.html

MacGillis, Alec. 2009b. "Specter Will Vote to Block Union Bill." *Washington Post.* March 25. http://www.washingtonpost.com/wpdyn/content/article/2009/03/24/AR2009032401648.html

MacGillis, Alec. 2009c. "Union Bill's Declining Chances Give Rise to Alternatives." *Washington Post.* March 29. http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032801753.html

Mayer, Lindsay Renick. 2009. "Labor and Business Spend Big on Looming Unionization Issue." www.*opensecrets.org.* http://www.opensecrets.org/news/2009/02/labor-and-business-spend-big-o.html

McGowan, Kevin P. 2009. "Congress May Turn to ENDA, Equal Pay Bill After Long Health Care Battle, Speakers Say." *Labor Relations Week.* April 1. 24 LRW 502.

McKinney, Amber. 2008. Obama Win Start of New Era for Workers, Unions Say; Management Fears Policy Shifts." *Labor Relations Week.* November 13. 22 LRW 1603.

Meyerson, Harold. 2010. "Under Obama, Labor Should Have Made More Progress." *Washington Post.* February 10. http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020902465.html

Obama, Barack. 2008. "Obama '08: Economy". Available at: http://www.barackobama.com/issues/economy/index_campaign.php

Obama, Barack. 2010. "Remarks by the President to the AFL-CIO Executive Council." August 4. http://www.whitehouse.gov/the-press-office/remarks-president-afl-cio-executive-council

Orren, Karen. 1991. *Belated Feudalism: Labor, the Law, and Liberal Development in the United States.* Cambridge: Cambridge University Press.

Page, Benjamin I. and Robert Y. Shapiro. 1992. *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences.* Chicago: University of Chicago Press.

Pierson, Paul and Theda Skocpol. Eds. 2007. *The Transformation of American Politics: Activist Government and the Rise of Conservatism.* Princeton: Princeton University Press.

Polanyi, Karl. 1944 (2001). *The Great Transformation: The Political and Economic Origins of Our Time.* Boston: Beacon.

Raupe, Bebe. 2009a. "Obama Affirms Support of Public Option, EFCA Legislation at Ohio Labor Day Picnic." *Labor Relations Week.* September 10. 23 LRW 1431.

Raupe, Bebe. 2009b. "Solis Touts Changed DOL, Urges Passage of Health Care Overhaul Legislation, EFCA." *Labor Relations Week.* September 17. 23 LRW 1481.

Robertson, David Brian. 2000. *Capital, Labor & State: The Battle for American Labor Markets from the Civil War to the New Deal.* Lanham, MD: Rowman & Littlefield.

Rose, Michael. 2010a. “Speakers Say Organizing, Economic Issues Key to Electing Worker-Friendly Candidates.” *Labor Relations Week.* June 10. 24 LRW 955.

Rose, Michael. 2010b. “Trumka Says AFL-CIO’s Focus on Economy Sets His Administration Apart From Others.” *Labor Relations Week.* July 1. 24 LRW 1092.

Rosenfeld, Jake. 2010. “Little Labor: How Union Decline is Changing the American Landscape.” *Pathways: A Magazine on Poverty, Inequality, and Social Policy.* Spring. 3-6. http://stanford.edu/group/scspi-dev/media_magazines.html

Rosenstone, Steven J. and John Mark Hansen. 1993. *Mobilization, Participation and Democracy in America.* New York: MacMillan.

Sachs, Benjamin I. 2007. “Labor Law Renewal.” *Harvard Law & Policy Review.* 375-400.

Skocpol, Theda. 2003. *Diminished Democracy.* Norman, OK: University of Oklahoma Press.

Stark, Louis. 1948a. “Labor Chiefs Hail Vote as ‘Mandate’”. *New York Times.* November 4.

Stark, Louis. 1948b. “Quick Return to Wagner Act Pressed on Congress by AFL.” *New York Times.* November 15.

Stone, Katherine V.W. 2004. *From Widgets to Digits: Employment Regulation for a Changing Workplace.* Cambridge: Cambridge University Press.

Swisher, Larry. 2010. “NMB’s Change in 75-Year-Old Policy Complies with RLA, APA, Court Finds.” *Daily Labor Report.* June 30. 124 DLR A-9.

Thelen, Kathleen. 2001. “Varieties of Labor Politics in the Developed Democracies.” in Peter A. Hall and David Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage.* New York: Oxford University Press.

United States Senate. 2010. “Cloture Motions-111th Congress.”. www.senate.gov.pagelayout/reference/cloture_motions/111.htm. Accessed January 3, 2011.

Wallerstein, Michael. 1989. “Union Organization in Advanced Industrial Democracies.” *American Political Science Review.* 83 (2): 481-501.

Wallerstein, Michael. 1999. “Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies.” *American Journal of Political Science.* 43 (3): 649-680.

Wallerstein, Michael and Bruce Western. 2000. “Unions in Decline? What Has Changed

and Why." *Annual Review of Political Science.* Vol. 3: 355-377.

Wells, Miriam J. 2002. "When Urban Policy Becomes Labor Policy: State Structures, Local Initiatives, and Union Representation at the Turn of the Century." *Theory and Society.* Vol. 31, No. 1: February.

Western, Bruce. 1997. *Between Class and Market.* Princeton: Princeton University Press.

Western, Bruce and Jake Rosenfield. 2010. "Unions, Norms, and the Rise in American Wage Inequality." Unpublished manuscript.

White House. 2010. "Annual Report of the White House Task Force on the Middle Class." http://www.whitehouse.gov/sites/default/files/microsites/100226-annual-report-middle-class.pdf

[i] Much of the material for this paper on the recent labor policy reforms over 2009-2010 draws on Warren (2011).
[ii] According to opensecrets.org, the "labor sector" spent more than $150 million during the 2008 election cycle, although business spending was more than double that amount (Mayer 2009). Another source puts the number at $250 million labor spent (MacGillis 2008).
[iii] Union density in 2010 was 11.9% compared to 10.5% in 1929. Union density reached a post-war high in 1955 at 31.8%.
[iv] The National Labor Relations Act is also often referred to as the Wagner Act, after its champion and chief sponsor, Senator Robert Wagner (D-NY).
[v] EFCA is the Employee Free Choice Act, organized labor's labor reform legislation drafted in the mid 2000s.
[vi] *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937).
[vii] Freeman strongly defends this argument 20 years later in a reassessment of the 1984 book (Freeman 2007).
[viii] Compare the remedies available to the NLRB versus its just as weak sister workplace agency, the EEOC. At least the EEOC has the ability to impose punitive damages on employers for violating employment law (Frymer 2008).
[ix] See also Western and Rosenfield 2009 for a recent iteration of the norms/social contract argument.
[x] Smith, also a staunch segregationist, would later become Chair of the House Rules committee, where he often successfully stymied civil rights legislation in the 1950s and 1960s.
[xi] There were of course several other provisions of Taft-Hartley aimed at undercutting the power of unions.
[xii] Although many scholars see EFCA has not going nearly far enough.
[xiii] Unlike most employment regulations such as the 1964 Civil Rights Act, labor law has not allowed civil penalties for violators of the law, creating perverse incentives for employers to violate the law in union organizing or contract campaigns. According to recent research (Bronfenbrenner 2009), employers fire workers engaged in union activity in 34% of NLRB election campaigns.
[xiv] For more on labor's role in the health care battle, including pushing for a "public option" while protecting their members' existing health insurance plans, see Jacobs and Skocpol 2010.
[xv] A year later, the AFL-CIO funded a primary challenger to Sen. Lincoln to the tune of $10 million, only to lose.
[xvi] Having passed EFCA by a strong majority in the previous Congress, the House always had a majority of votes to pass the bill, but decided to wait for the supermajority Senate to pass it first this time around.
[xvii] Before a change in Rule 22 in 1975, the required number to invoke cloture was two-thirds, or 67.
[xviii] The coalition's website is: http://fixthesenatenow.org/ (accessed January 3, 2011).
[xix] Fifty-two percent of Americans approve of labor unions in the most recent gallup poll in August 2010.
[xx] Teachers' unions are also driving this increasingly negative image of the labor movement, as both Republican and Democratic Parties, including President Obama, have targeted education unions as the chief obstacles to public school reform.