Statement of Matthew W. Finkin

Before the Subcommittee on Health, Employment, Labor and Pensions of the House Committee on Education and Labor and the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions.

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My name is Matthew W. Finkin. I hold the Harno-Cleary Chair in Law at the University of Illinois College of Law in Champaign, Illinois. For more than three decades I have researched, published, and taught labor and employment law in both the domestic and international context. A brief biographical entry is appended to these remarks.

I have been invited to address the impact of recent decisions of the National Labor Relations Board on worker rights. That, to paraphrase Justice Frankfurter, is a horse soon curried.[1] I should think it might be helpful to this body if I situate the Board's decisions on the larger legal, social, and economic landscape; and respectfully to suggest at the close what areas have call for legislative correction.

I. The Pattern of NLRB Decisions 2004–2007

The current Labor Board has charted an historically unprecedented course, overturning doctrine—some of long standing, some of recent vintage—and charting new legal ground altogether, limiting the scope of those to whom the protections of the Labor Act extend,[2] making it more difficult for employees to institute or maintain a collective bargaining relationship with

[1] Olberding v. Ill. Cent. Rr. Co., 346 U.S. 338, 340 (1953).
[2] *E.g.*, Brown University, 342 NLRB No. 42 (2004) *overruling* New York University, 332 NLRB 1205 (2000). *See also Pennsylvania Academy of Fine Arts*, discussed in note 42, *infra.*

an employer,[3] limiting the remedies that otherwise might be due to persons whose statutory rights have been violated,[4] limiting the rights of economic strikers,[5] limiting the General Counsel's ability to vindicate the Act,[6] and narrowing or eliminating other statutory protections.[7]

As the latter is of particular professional interest, please bear with me as I draw the Committees' attention to the Board's readoption of the rule that an individual faced with disciplinary interrogation in a non-unionized workplace has no right of accommodation to the requested presence of a coworker.[8] In much the same spirit, but in a case of first impression, the Board held that an employee on his break time on a customer's parking lot can be forbidden by his employer to talk to a union organizer when the organizer's presence in the parking lot was unauthorized by the customer, *i.e.*, to refashion the *customer*'s property-based right to exclude union organizers from speaking into a *contractor*'s non-property based right to forbid its

[3] *E.g.*, Dana Corp., 352 NLRB No. 28 (2007) *overruling* Keller Plastics Eastern, Inc., 157 NLRB No. 55 (1966); Oakwood Care Center, 343 NLRB No. 76 (2004) *overruling* M.B. Sturgis, 331 NLRB 1298 (2000); Truserve Corp., 349 NLRB No. 23 (2007) *overruling* Douglas-Randall, Inc., 320 NLRB 431 (1995); Crown Bolt, Inc., 343 NLRB No. 86 (2004) *overruling* General Stencils, 195 NLRB 1109 (1972). *Cf.* Haborside Healthcare, Inc., 343 NLRB 906 (2004) *limiting* Stevenson Equipment Co., 174 NLRB 865 (1969).

[4] St. George Warehouse, 351 NLRB No. 42 (2007) *overruling* Lloyd's Ornamental & Steel Fabricators, Inc., 211 NLRB 217 (1974) (and its predecessors). The decision shifts the burden of proof on to the General Counsel to show due diligence in the employee's obligation to mitigate back pay for an employee dismissed for exercising her statutory rights. The Board relies on the proposition that the employee, not the employer, is in possession of that information. The Board does not note that in labor arbitration, where back pay for a wrongful discharge is the universal remedy and where it, too, is limited by a duty to mitigate, "the burden of proving lack of diligence or an honest, good faith effort on the employee's part is on management." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1225 (Alan Ruben ed., 6th ed. 2003) *quoting* HILL & SINICROPI, REMEDIES IN ARBITRATION 216 (2d ed. 1991). *I.e.*, that the Board's longstanding rule merely reflected the accepted norm of industrial justice.

[5] Jones Plastic & Engineering Co., 351 NLRB No. 11 (2007) *overruling* Target Rock Corp., 324 NLRB 373 (1997).

[6] In Toering Electric Co., 351 NLRB No. 18 (2007), breaking new ground, the Board held that "an applicant for employment is entitled to protection as a . . . [statutory] employee is someone genuinely interested in seeking to establish an employment relationship with an employer." Accordingly, in order to prove that an employer had a policy or practice of refusing to hire on the basis of union membership or activity the General Counsel must prove that an identifiable applicant would in fact have accepted to work. *See supra* note 29.

[7] *See*, *e.g.*, William Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERK. J. EMP. & LAB. L. 23 (2006).

[8] IBM Corp., 341 NLRB No. 148 (2004) *overruling* Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000). The disposition of this issue has reflected the political shifts in the composition of the Board since 1980. *See* Matthew Finkin, *Labor Law by Boz—A Theory of Meyers Industries, Sears Roebuck & Co., and Bird Engineering*, 71 IOWA L. REV. 155 (1985).

employees from listening.[9] The Board has held that an employee who seeks the aid of a co-worker in pursuing a complaint of sexual harassment was not acting for "mutual aid or protection" because her individual claim advanced no group interest, despite the unmistakable weight of authority to the contrary.[10] And the Board has held that a collective protest by school bus drivers, to save their unionized jobs by adverting to a non-union competitor's record of hiring unsafe drivers, was unprotected—indeed "disloyal" to a company to whom no common law duty of loyalty is owed[11]—because the text of their protest "implicate[d] the safety of children, not the common concern of employees,"[12] *i.e.*, that school bus drivers have no work-related interest in the safety of the children they transport. The Board could rest on this counter-intuitive proposition because the text of the drivers' protest drew no connection to their interest in saving their unionized jobs; but that their petition had to do so was not heretofore the law, a fact the Board neglected to mention.[13]

The Board has also proven itself capable of maintaining two inconsistent policies simultaneously. In BE&K Construction Co.,[14] the Board held that an employer's maintaining an eventually unsuccessful lawsuit for no purpose other than one violative of the Act, *e.g.*, simply to impose high litigation costs on a union, is nevertheless not an unfair labor practice if the suit was

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[9] North Hills Office Services, Inc., 345 NLRB No. 107 (2005).

[10] Holling Press, Inc., 343 NLRB No. 45 (2004). The dissent noted that the majority's reasoning confronted unequivocal precedent to the contrary, *i.e.*, NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503 (2d Cir. 1942) (per Hand, J.) *cited as authority* in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). The majority responded to this criticism by ignoring these precedents.

[11] *See generally* Matthew Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERK. J. EMP. & LAB. L. 541 (2007).

[12] Five Star Transp. Inc., 349 NLRB No. 8 (2007).

[13] *See*, *e.g.*, Petrochem Insulation v. NLRB, 240 F.3d 26 (D.C. Cir. 2001). To similar effect, *see* Wurtland Nursing & Rehab. Center, 351 NLRB No. 50 (2007), in which the Board held that a petition signed by over half the employees stating their "wish for a vote to remove the [incumbent] Union" justified the employer's withdrawal of recognition of the union. The Board majority acknowledged that under well established precedent the demand for an election would not be sufficient to justify withdrawal; but here the demand was conjoined with a desire to remove the union—and that, the Board maintained, was dispositive. Why it should be so is not explained—for what would a demanded vote be about if *not* to remove the union?

[14] 351 NLRB No. 29 (2007).

"reasonably based." The Board justified this rule out of its professed commitment to the First Amendment. But that commitment has not manifested itself in a similar protective solicitude toward the display by unions of an inflated rat in conjunction with a labor dispute or to union performance of "street theater" critical of an employer even though the teaching of the Supreme Court that such is free speech seems beyond peradventure.[15]

The Chairman of the NLRB has defended the Board's decisions by adverting to the availability of judicial review as a corrective to any administrative excess[16] and by adverting to the role of the Board as a "neutral arbiter of disputes."[17] The former supplies no justification for the course the Board has charted. The latter obscures the Board's decisions by a profound mischaracterization of its role.

II. The Context of Administrative Law

Let us first consider judicial review. The United States Supreme Court has repeatedly stressed the role of the Labor Board in the making of national labor policy;[18] and general

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[15] Sheet Metal Workers' v. NLRB, 491 F.3d 429 (D.C. Cir. 2007); Overstreet v. United Brotherhood of Carpenters, 409 F.3d 1199 (9th Cir. 2005).

[16] Susan McGolrick, *Battista Says NLRB Did "Very Credible Job" of Meeting Goals During His Five-Year Term*, DAILY LABOR REPORT No. 218 (Nov. 13, 2007).

[17] Toering Electric Co., 351 NLRB No. 18 (2007) discussed further in the text accompanying notes 29–30, *infra*.

[18] NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy." (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)). In *Beth Israel Hospital* the Court states:

> Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," that body, if it is to accomplish the task which Congress set of it, necessarily must have authority to formulate rules *to fill the interstices of the broad statutory provisions*.

Beth Israel Hosp., *supra*, at 500–01 (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)). In *Curtin Mathenson Scientific*, the Court declared:

principles of administrative law require the courts to defer to an agency's policy decisions so long as they are within the area of discretion reserved. The Board may modify antecedent doctrine or abandon it altogether; it may fashion novel doctrine interstitial to the Act, that is at its margins even if it is at the margins where the law might most importantly be felt in the face of changed circumstances. In principle, an agency may not alter the basic focus or function of its organic law,[19] but that principle fails to address the systematic narrowing of the organic statute's mission by a combination of numerous decisions no one of which, taken only on its own, can be said to lie outside the ambit of administrative decision. The appearance of legal continuity is thus maintained even as the Act's stated purpose, of "encouraging the practice . . . of collective bargaining,"[20] is transformed or the rights of employees are curtailed or eviscerated. That is just what has happened in the course of the past few years. Accordingly, it will not due to refer to judicial review—and rate of judicial affirmance—as any indication that the Board is performing responsibly.

III. The Politicization of the Labor Board

> This Court therefore has accorded Board rules considerable deference. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. Iron Workers*, 482 U.S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, *Fall River*, *supra*, at 42, even if we would have formulated a different rule had we sat on the Board, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 413, 418 (1982). Furthermore, a Board rules is entitled to deference even if it represents a departure from the Board's prior policy. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.") Accord, *Iron Workers*, *supra*, at 351.
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> *Curtin Mathenson*, *supra*, at 786–87 (internal citations abbreviated) (emphasis added).

[19] *Cf.* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 495 ("It is not merely the largeness of the change being effected, but also that accepting it will entail accepting that an agency can be empowered to change its mandate.").

[20] 29 U.S.C. § 151 (2000).

The Board's activist posture has been explained in part by the failure of Congress to attend to national labor policy which vacuum has accordingly been filled by the Board's refashioning of it. That potential has long existed but, as Professor Joan Flynn has observed, it was muted in early practice:[21] Presidents Roosevelt and Truman drew their appointees from the ranks of the Board's bureaucracy and from the academy. President Eisenhower appointed persons who had represented management, but from professional backgrounds completely comfortable with the institutional role of unions. Thereafter, Presidents Kennedy, Johnson, and Carter continued the tradition of appointing only career bureaucrats and academics; Presidents Nixon and Ford continued the Eisenhower practice of also appointing established management lawyers.

Even so, the change from the "Eisenhower Board" to the "Kennedy Board" was accompanied by a swift recasting of the Board's doctrinal gloss on the then newly-enacted provision of the Landrum-Griffin Act dealing with organizational picketing. This shift, which the late Bernard Meltzer referred to as *Five on a Seesaw*, was thought extraordinary at the time and elicited his critical observation that, "The Board's changes were too rapid to be ascribed to institutional developments or to new insights produced by a maturing expertise; they reflected the different value preferences of new appointees interacting with loose statutory provisions."[22]

The Reagan administration broke with the past: "Whereas his predecessors had appointed management lawyers from well-known law firms—solid members of the labor-management 'club'—Reagan went wholly outside the mainstream labor relations community in his early appointments." He appointed persons known as "anti-union crusaders," putting, as

[21] Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L. REV. 1363 (2000).
[22] Bernard Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 78 (1962).

Professor Flynn put it, " 'the proverbial fox [or foxes] in the chicken coop.'"[23] Scholars debated the magnitude and significance of the shifts in policy the Reagan Board effected;[24] but these shifts pale in comparison with the current Board's record.

President Clinton was the first Democratic President to appoint a union lawyer to the Board and its politicization has now become institutionalized. A Canadian observer put the current situation in a nutshell. "In the United States where, because of legislative paralysis, there has been no major labour law reform for 50 years, the government in power influences the direction of labour relations policy through its appointments."[25] Consequently, as Professor James Brudney has pointed out, this Labor Board, now heavily freighted politically, is at a remove from constructive engagement with the Act's application in the contemporary context.[26]

Note that the Board's decision in *Dana Corp.*[27] abandoned Board policy of almost forty years duration, remaking voluntary recognition of a union into an unstable decision. Note that *Oakwood Care Center*[28] abandoned a Board decision of only a few years' duration and returned to a state of the law making bargaining rights unavailable to an increasing number of workers who are caught up in trilateral employment networks. To echo Bernard Meltzer, the former was the product of no new insight produced by a maturing expertise; nor was the latter a reaction to some institutional development that challenged the prior policy predicate. Indeed that predicate—the growth of trilateral employment networks—remains and the decision the Board abrogated was too new to for the Board to learn whether it was responsive to enabling those

[23] Flynn, *supra* note 21, at 1384.
[24] *Compare* Terry Bethel, *Recent Decisions of the NLRB—The Reagan Influence*, 60 IND. L.J. 227 (1984) *with* Lee Modjiska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95 (1985).
[25] Kevin Burkett, *The Politicization of the Ontario Labour Relations Framework in the 1990s*, 6 CANADIAN LAB. & EMP. L.J. 161 (1998).
[26] James Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005).
[27] *Supra* note 3.
[28] *Id.*

workers to be represented. To draw on Meltzer's observation, these and the like decisions reflect nothing more than the value preferences of those who decided them.

IV. The NLRB as a Political Institution

It would blink at reality to ignore the fact that the Labor Board is embedded in a political matrix. Nor were those who fashioned the Act so foolish as to believe otherwise. In my research in the National Archives on the drafting of the Act I encountered an exchange between Philip Levy, a young New Deal lawyer fresh out of the Harvard Law School, and Calvert Magruder, on leave from the Harvard Law School as General Counsel of the "old" National Labor Relations Act to whom Levy reported, both deeply engaged in the drafting of the Act. The Act's provision allowing the Labor Board the power to certify a representative without a secret ballot election had been criticized as giving the Board the power by that choice to "freeze out independent or progressive groups," given the display of radical labor organizations contending with established, politically conservative unions. Levy defended the draft, which became law, on two grounds:

> [F]irst, it is extremely important that the Board have the power to certify or to determine representation in any manner it sees fit, and secondly, if the Board is going to be pro-employer, the jig is up.

Nevertheless, the Board Chairman has maintained that the Board's "intended statutory role [is] as [a] neutral arbiter of disputes."[29] As Clyde Summers observed more than fifty years ago, responding to the very same profession of neutrality made by a sitting Board Chairman:

[29] Toering Electric Co., *supra* note 6. The characterization was made in the context of his stating that the Board

> The critical issues before the Board represent underlying disputes between unions and management. No matter how the Board decides these issues, it can not avoid aiding one and hindering the other. Impartiality is impossible. There can be no impartial rules governing the relationship between a tree and the woodsman's ax, even though we let the chips fall where they may.[30]

Summers defended the need for administrative discretion: legislation is always imprecise, new or unforeseen circumstances always arise, the sentiment of the country shifts, times change; and it is impractical for the legislature to sit in constant readjustment of labor policy. Thus,

> The duty of the agency is to discern the threads of purpose which run through the statute and to feel the thrusts of policy which the statute represents. These should then become the chief guideposts for the exercise of discretion, and policy making should be confined within these broad bounds.[31]

But, just as an agency may be valuable because it is responsive, "it can be dangerous because it is not responsible."[32] The danger of irresponsibility, the danger

> of administrative legislation lies not in the open flaunting of statutory language. It lies rather in the failure to adhere to the underlying purposes of the statute. Through lack of either insight or self-restraint, the members of the agency may unconsciously substitute their personal judgment of values for those premised by the statute.[33]

> does not serve its *intended statutory role as neutral arbiter of disputes* if it must litigate hiring discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise with a targeted employer. [Emphasis added.]

The Board also rejected any analogy to Title VII which is sometimes vindicated by "testers" who have no actual interest in the job. "Hiring discrimination under the [Labor] Act simply cannot occur unless the individual actually was seeking an employment opportunity with the employer."

This makes two fundamental mistakes. First, the Board's prosecutorial function is instigated by any person, including a morally repugnant person; it does not require that the charging party be injured in any way. The Board acts on the public's behalf, not on behalf of the charging party even if morally miscreant. Second, it is quite possible for an employer to maintain a policy or practice of discrimination in hire without there being an identifiable discriminatee, just as it is possible for an employer to have a policy against the hiring of women or minorities without the EEOC being able to identify an individual discriminatee. Consequently, *Toering Electric Co.* would hinder the General Counsel's ability to pursue § 8(a)(1) complaints where testers have revealed an anti-union hiring policy that no disappointed applicant has been found to complain of.

[30] Clyde Summers, *Politics, Policy Making, and the NLRB*, 6 SYR. L. REV. 92, 97 (1954).
[31] *Id.* at 101.
[32] *Id.* at 100.
[33] *Id.* at 101.

And the premise—the stated premise—of the statute is the protection of unionization and the promotion of collective bargaining.[34]

> Although there is deep-seated disagreement as to the worth and rightness of unionization, that issue has been decided by the statute. The government is not neutral in the establishment of collective bargaining, but has charged the Board with the function of lending the power and prestige of government to protect the process of unionization. To "make a fetish of impartiality" in this area is to compromise one of the central purposes of the statute.[35]

I do not believe that any disinterested reader of the contemporary Board's record could characterize the pattern of Board decisions as the product of impartiality or could conceive of the Board as a neutral arbiter.

To reiterate: the Board is summoned to fine tune national labor policy, consistent with the purpose of the law, in the face of changed circumstances and demonstrable need. But the Board's recent decisions are antithetical to the statutory end and are oblivious to both changed circumstances and demonstrable need.

V. The Need for Legislation

The Canadian observer's point bears re-emphasis: we address the workplace of the 21st century with a labor relations law fashioned in the 1930s and which received its last major legislative reconsideration almost a half century ago. At that time, the United States' economy stood astride the world as a dominant supplier of manufactured goods; unions had achieved their highest historical density, of 35% to 37% of the civilian non-agricultural labor force; and a major

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[34] *Id.* at 102:

> Section 1 of Taft-Hartley, like the Wagner Act before it, finds that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury," and declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions from commerce . . . by encouraging the practice and procedure of full freedom of association." Section 7 still guarantees the "Right to self organization . . . to bargain collectively through representatives of their own choosing."

[35] *Id.* at 103, (quoting NLRB Chairman Farmer, "We intend to make a fetish of impartiality.").

concern was of whether unions had "too much" economic and even political power even as the legitimacy of collective bargaining was a given.[36]

Today, the United States is overwhelmingly a service economy. Work is being performed in a variety of ways that resonate against the model of a full-time worker with an expectation of a lifetime career with a single employer—by part-time workers, leased workers, temporary workers, and workers categorized as independent contractors or "own account" workers. A much larger percentage of the workforce are professionals who function not as true independent contractors but as employees in highly bureaucraticized work settings. Corporate managers are under global competitive pressure and pressure from investors for a return that constrains their ability to reward labor commensurate even with its contribution to increased productivity, as a result of which the nation is experiencing an ever widening inequality of income;[37] and the risk of medical need during employment and of maintaining a decent level of

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[36] DEREK BOK & JOHN DUNLOP, LABOR AND THE AMERICAN COMMUNITY 25 (1970) (references omitted):

> Despite the determined campaigns by many managements to keep labor unions out of their plants, businessmen do not proclaim hostility toward the principle of unionism. Quite the contrary. If anything, executives are slightly more inclined than is the public as a whole to accept the legitimacy of unions and the employee's right to join the organization of his choice. . . .
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> In part this attitude may reflect the strong belief among businessmen in individual freedom and the right to associate for lawful purposes. But many executives now concede, as they rarely did several decades ago, that unions can play a valuable role in protecting employees against abuses. To quote Lemuel Boulware, of General Electric, a management representative renowned for developing a "hard line" toward unions:
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> > We believe in the union idea. We think unions are here to stay. We think some among even the best of employers might occasionally fall into short-sighted or careless employee practices if it were not for the presence or distant threat of unions.

[37] *E.g.*, Note, for example, the data set out below:

income after employment is being shifted inexorably on to the employee.[38] But today, union density in the private sector is below 8% and employers commonly, and aggressively, challenge the legitimacy of collective bargaining.[39]

The adaptation of our labor market institutions to the economy of this and the immediately ensuing decades has occupied many serious scholars.[40] They put large questions; but, fortunately, we need be concerned here with only one more manageable aspect—how employees can secure representation and effective enforcement of their statutory rights. These questions have drawn the attention of labor law scholars for decades[41] and I believe there to be a consensus that the most pressing problems are of coverage, ready access to representation, and

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Annual Growth in U.S. Productivity and Wage Levels
(1967–2002)

Year	Annual Productivity Growth	Average Annual Wage Growth
1967–73	2.5%	2.5%
1973–79	1.2	0.1
1979–89	1.4	0.9
1989–95	1.5	0.5
1995–2000	2.5	2.4
2000–02	3.6	-0.3

SOURCE: LAWRENCE MICHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, THE STATE OF WORKING AMERICA 2004/05, tbl. 2.1 (2005).

[38] Matthew Finkin, *Bearing the Burden of Decisions Made by Others: The Corporate Reallocation of Employee Risk in the United States*, *in* PERSPEKTIVEN DER CORPORATE GOVERNANCE 501 (Ulrich Jürgens et al. eds., 2007).

[39] RICHARD BLOCK, JOHN BECK & DANIEL KRUGER, LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE (1996). When the Canadian industrialist, Frank Stonach, urged his 18,000 employees to join the Canadian Auto Workers Union, the event was news-making. Ian Austen, *Industrialist Urges Workers to Join Union*, N.Y. TIMES, Oct. 16, 2007, at C-10.

[40] Most recently, THOMAS KOCHAN, RESTORING THE AMERICAN DREAM: A WORKING FAMILIES' AGENDA FOR AMERICA (2006). *See also* PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT (1999).

[41] Among the more recent and thoughtful are Stephen Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 63 B.C. L. REV. 351 (2002) and Charles Carver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); collections of papers in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION (Matthew Finkin ed., 1994); RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994); and the earlier work of Paul Weiler summarized in his GOVERNING THE WORKPLACE (1990). As these remarks were being written I was informed that a petition was being drafted by Professors James Brudney and Cynthia Estlund to be circulated to the academic labor law community and presented to the Congress. I expect that their summary of the current state of affairs and their call for legislative reform would be concordant with the views expressed here.

remedies to effect the law's purpose, which problems have only been exacerbated by the Board's recent decisions.

1. *Coverage*. The Board has constrained the Act's reach by excluding persons found to be independent contractors, oblivious to the economic realities of their relationship to the employer,[42] or otherwise to be statutory non-employees under the guise of being supervisory, managerial, or in some other exempting category. These exemptions call for statutory readjustment to the unfolding realities of the modern labor market.

2. *Ready Access*. What was thought a matter of routine, almost a matter of course, in the 50s and 60s has now become a struggle for institutional legitimacy. The impressive Freeman-Rogers study indicates that at least 23% of American workers want union representation as such.[43] *I.e.*, about 14% of the workforce, at least fifteen million workers, want but do not have union representation. The Labor Act was meant to facilitate that demand but the Board's recent decisions are to an opposite effect.

3. *Remedies*. The Act depends almost entirely on voluntary compliance, especially in its imposition of a duty to bargain in "good faith." In other unfair labor practices, Congress chose to give the Board limited "make whole" power to avoid the delay of jury trials: swiftness of redress was the trade-off for the lack of full compensatory relief.[44] Today, justice is not swift,[45]

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[42] I doubt the Board was correct in holding the artists' models of the Pennsylvania Academy of Fine Arts to be ineligible to bargain collectively. Pennsylvania Academy of Fine Arts, 343 NLRB No. 93 (2004). But surely something is fundamentally amiss when that question turns on whether they supply their own loin cloths and have discretion on how to position their arms. *Id.*

[43] RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 178–79 (2006). This rises to 31% if the word "union" is omitted and respondents are asked if they want to be represented by an independent employee organization that negotiates with their employers.

[44] This is explored by Michael Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

[45] In FY2006, on average it took over two years for the Board to dispose of contested unfair labor practice cases.

relief is not compensatory, and the law has little or no deterrent effect. *Something* needs to be done.[46]

[46] Over thirty years ago, the Committee on Labor and Social Security Legislation of the Association of the Bar of the City of New York, composed of leading practitioners on both the labor and management sides as well as academics, and chaired by one of the country's most prominent labor arbitrators, recommended the greater utilization of section 10(j) injunctions and the strengthening of the remedial power of the Board "especially with respect to discriminatory discharge and refusal to bargain" by authorizing the Board to impose civil money penalties. Committee Report, *National Labor Relations Board Remedies: 10(j) Injunctions, Make-Whole Orders and Civil Monetary Penalties*, 29 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 674, 686 (1974). That was thirty-three years ago and the committee's proposals remain as immanently sensible and even more urgently needed today.