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REMEDICATION OF UNFAIR LABOR PRACTICES AND THE EFCA: JUSTIFICATIONS, CRITICISMS, AND ALTERNATIVES

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Abstract

There is widespread agreement that labor relations in America are in drastic need of reform. The National Labor Relations Board has a record backlog of cases, election disputes are taking unacceptably long to resolve, and unfair labor practices abound throughout the election and recognition process. The proposed Employee Free Choice Act is meant to address many of these systemic problems. This paper critically evaluates the remedial provisions of the Act, and suggests alternatives to improve the efficacy and political viability of labor law reform.

There has been no shortage of ink spilled over the ramifications of the Republican victory in the 2010 mid-term elections. Journalists, politicians, and pundits have predicted that legislative “gridlock” will be the most likely outcome of the election, whereby split control of the legislature by opposing factions will lead to paralyzing inaction.² Republicans have promised to hold extensive oversight hearings and focus on shrinking government rather than advancing new legislative initiatives.³ Darrell Issa (R-CA), who will chair the Oversight and Government Reform Committee,

¹ A.B. 2007, Cornell University. J.D. 2010, University of Pennsylvania Law School.

² See, e.g., David Rosman, *Republican gridlock is all about image, not helping the American People*, COLUMBIA MISSOURIAN, Dec. 1, 2010, available at <http://www.columbiamissourian.com/stories/2010/12/01/david-rosman-republican-gridlock-all-about-image-not-helping-american-people> (last accessed Mar. 14, 2011) (“The country is on the road to gridlock”); Kay King, *Congress v. National Security*, N. Y. TIMES, Nov. 22, 2010, available at <http://www.nytimes.com/2010/11/23/opinion/23iht-edking.html> (last accessed Mar. 14, 2011) (calling for reform to avoid gridlock); Paul Wiseman, *Likely Gridlock in Congress Could Threaten Economy*, ASSOCIATED PRESS, Nov. 2, 2010, available at <http://abcnews.go.com/Business/wireStory?id=12028715> (last accessed Mar. 14, 2011) (observing that gridlock is the likely, if not desirable, outcome of the elections).

³ Jake Sherman and Richard Cohen, *Darrell Issa plans hundreds of hearings*, POLITICO, Nov. 8, 2010, available at <http://www.politico.com/news/stories/1110/44850.html> (last accessed Mar. 14, 2011).

has promised 176% more hearings than were conducted by Henry Waxman (D-CA) during the last two years of the Bush administration.⁴

Indeed, a significant majority of the American people foresee legislative inaction as the probable result of divided government. An ABC News/Yahoo! poll found that “81 percent of Americans overall think gridlock is likely to occur in the next Congress.”⁵ Still, President Obama has called for Congress to proceed on several matters, asserting that “[t]he American people did not vote for gridlock. . . . They're demanding cooperation and they're demanding progress.”⁶ Democratic leaders therefore remain hopeful for passage of several pending pieces of legislation during the 112th Congress.

One such bill is the Employee Free Choice Act (hereinafter “EFCA”). Proposed in the past two sessions of Congress but not yet passed in the Senate, it is characterized by its proponents as “restoring workers’ freedom to choose for themselves whether to join a union” and by its detractors as “effectively eliminat[ing] secret ballot organizing elections.”⁷ The bill’s purpose, as explained in its introduction, is to provide for an efficient unionization mechanism coupled with stiffer remedies to redress unfair labor practices (hereinafter “ULPs”) committed by employers during organizational campaigns and first contract negotiations.⁸ Supporters of the EFCA in the 111th Congress failed to secure a super-majority in the Senate,⁹ and Republican control of the House of Representatives in the upcoming 112th Congress will likely preclude passage of the EFCA in its present incarnation. Nevertheless, President Obama and congressional Democrats have previously indicated that they will push for some manner of reform of the National Labor Relations Act (hereinafter “NLRA” or “Wagner Act”).¹⁰ Given Republican opposition to past versions of the bill, substantial revisions will have to be made for it to clear the House and avoid a knee-jerk filibuster by Senate Republicans.

⁴ *Id.*

⁵ Gary Langer, *Exclusive Poll: Fans of Congressional Gridlock Cheer the Election’s Outcome*, ABC NEWS, Nov. 23, 2010, available at <http://abcnews.go.com/Politics/abc-newsyahoo-news-poll-fans-congressional-gridlock-cheer/story?id=12210748> (last accessed Mar. 14, 2011).

⁶ David Espo and Jim Kuhnhenn, *Wary meeting: Obama, GOP leaders pledge tax talks*, ASSOCIATED PRESS, Nov. 30, 2010, available at <http://www.newtribune.com/news/2010/dec/01/wary-meeting-obama-gop-leaders-pledge-tax-talks/>. Profiles of Americans who support this sentiment have been prominent. See, e.g., Kirk Johnson, *After Midterms, Even Opposites Can Sound Alike*, N.Y. TIMES, Nov. 13, 2010, available at <http://www.nytimes.com/2010/11/14/us/politics/14larimer.html> (last accessed Mar. 14, 2011) (interviewing voters who oppose gridlock during periods of divided government”).

⁷ Compare AFLCIO.org, Employee Free Choice Act, <http://www.aflcio.org/joinaunion/voiceatwork/efca/whatis.cfm> (last visited March 2, 2010) with UnionFacts.com, *EFCA Effectively Eliminates Private Ballot Elections*, http://unionfacts.org/cardcheck/EFCA_Secret_Ballots.cfm (last visited March 2, 2010).

⁸ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1409>.

⁹ In addition to the resistance of the forty Republican Senators who began the 111th Congress, Democratic Senators Blanche Lincoln and Ben Nelson voiced opposition to the EFCA’s majority sign-up provision. The victory of Republican Scott Brown over Democrat Martha Coakley in the Massachusetts special election to fill the seat of the late Senator Ted Kennedy then gave Republican’s a filibuster-proof majority, making conversion of Lincoln or Nelson a moot-point.

¹⁰ Editorial, *The Labor Agenda*, N.Y. TIMES, Dec. 28, 2008, available at <http://www.nytimes.com/2008/12/29/opinion/29mon1.html>; accord *The Truth About the Employee Free Choice Act & Card Check*, <http://thetruthaboutefca.com/tag/sen-claire-mccaskill/> (last visited Apr. 15, 2010) (predicting that, while the card-check provision will be abandoned, a bill with the EFCA’s other provisions will likely move forward).

EFCA's supporters will likely once again drop the bill's controversial majority sign-up A/K/A "card-check" provision in order to entice moderates and take away opponents' argument that the legislation eliminates the secret ballot.¹¹ Labor has remained adamant, however, that EFCA's toughened penalties for employer ULPs remain intact,¹² and it appears that the next major battle line will instead be drawn over accelerated election schedules.¹³ That is not to say that this aspect of the bill will go unopposed; indeed, management-side attorneys and employer-sponsored interest groups have consistently spoken out against the new remedies,¹⁴ and it is inevitable that the enhanced-remedies provision will be invoked by proponents and detractors alike in any upcoming debate.

While the justifications for the enhanced-remedies are valid, and many criticisms leveled against their perceived one-sidedness¹⁵ are disingenuous (see discussion section III, *infra*), it may ultimately be desirable for union advocates to abandon their inclusion in favor of more politically viable alternatives. These remedies would do much to address the concerns facing union organizers in a time of rapidly declining membership. However, their appearance as one-sided make them a politically unpopular option when other courses of action would better address deficiencies in the current state of the law.

Before taking up the substantive arguments for and against EFCA's enhanced-remedies provision, it is necessary to first discuss ULPs in America and articulate their causes and effects. Part I of this paper traces the history of ULPs during organizing campaigns from the enactment of the NLRA through the contraction of union membership in the Reagan and post-Reagan era. The current state of ULPs and the employer-union dynamic is briefly discussed in Part II, before Part III takes up the EFCA's enhanced-remedies provision, as well as criticisms of the provision and responses to these criticisms. Part IV then looks at a pair of proposed alternatives to enhancing the EFCA remedies in comparative perspective. Finally, Part V assesses the likelihood and desirability of either the EFCA remedies or alternative courses of action being adopted in the United States.

I. ULP Remedies in Historical Perspective

Mainstream antipathy towards government regulation is not a phenomenon peculiar to the late-20th/early-21st century. Prior to the Great Depression, a majority of Americans held attitudes

¹¹ Stephen Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 16, 2009, available at <http://www.nytimes.com/2009/07/17/business/17union.html>. This argument is not entirely valid, as employers would be able to force elections at 30% sign-up, but a detailed treatment of the majority sign-up provision is beyond the ambit of this paper.

¹² See generally Seth Michaels, *Workers Face Increasing Abuse in Attempts to Form Unions*, AFL-CIO NOW BLOG, May 20, 2009, available at <http://blog.aflcio.org/2009/05/20/workers-face-increasing-abuse-in-attempts-to-form-unions/> (advocating for new penalties to address increases in employer ULPs).

¹³ Greenhouse, *supra* note 11.

¹⁴ See, e.g., William P. Barrett and David C. Burton, *Employee Free Choice Act Part II – EFCA “Light”*, WILLIAMS MULLEN LABOR AND EMPLOYMENT ALERT, Sept. 2009, available at http://www.williamsmullen.com/files/Publication/71b939e9-01f0-409e-b9fa-960a037018c5/Presentation/PublicationAttachment/f5950961-ff1b-480c-9d56-989ecc171f0/Labor%20%26%20Employment%20September_2009.pdf (encouraging employer resistance to the revised EFCA); see generally, Mark Featherman, *Whither the Employee Free Choice Act*, LEGAL INTELLIGENCER, Feb. 22, 2010, available at <http://www.wwdlaw.com/articlesandnews.php?action=view&id=55> (surveying opposition to the EFCA).

¹⁵ The remedies apply only to employers and not unions and organizers.

toward government intervention that would today be characterized as “libertarian.”¹⁶ The socio-political and economic exigencies brought about by mass unemployment, together with the influence of the progressive and socialist movements and widespread perception of pure capitalism as a failed institution, transformed the nation's *laissez-faire* proclivities into widespread support for the Roosevelt administration's interventionist New Deal policies.¹⁷

Pro-union congressmen were thus able to pass the first piece of pro-labor legislation—the Norris-LaGuardia Act¹⁸—in 1932, which removed federal courts' ability to enjoin strikes, picketing, and peaceful assembly and rendered covenants not to unionize unenforceable.¹⁹ Three years later, labor-friendly legislators were able to pass the NLRA, which created the framework for recognizing ULPs and fashioning appropriate remedies.²⁰ Congress originally intended for the act's remedial provision to both redress past ULPs as well as prevent future ULPs.²¹ While the Supreme Court upheld the act's constitutionality,²² it seriously curtailed the Board's ability to issue remedies aimed at deterring future ULPs in *Republic Steel Corp. v. NLRB*.²³ The Board contended that NLRA §10(c) authorized the NLRB to issue orders aimed at “effectuat[ing] the policies of [the Wagner] Act[.]” Justice Hughes, writing for the majority, asserted that they “[did] not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. . . the power to command affirmative action is remedial, not punitive.”²⁴ The Court thus forbade any remedies aimed at deterring future ULPs, a prohibition that—although clarified and to an extent limited in future decisions—still exists today.

Following the dissolution of the National War Labor Board in 1946, unions used their renewed ability to strike to push for increased production and higher wages.²⁵ Employers capitalized on the resulting anti-union public sentiment to force passage of the Taft-Hartley Act over President Truman's veto.²⁶ Taft-Hartley enumerated ULPs that the unions could commit,²⁷ and “transformed the federal government from an active promoter of unionism to an impartial referee.”²⁸

The new election procedures and ULPs had an immediate effect, as unions' success rate in organizing elections fell from a pre-Taft Hartley average of 81.4% to 72.5% in its first year.²⁹ In another blow to the unions, Congressional investigations into union racketeering culminated in passage of the Landrum-Griffin Act³⁰ in 1959, which made picketing by union members for

¹⁶ SAR A. LEVITAN, ET AL., PROTECTING AMERICAN WORKERS: AN ASSESSMENT OF GOVERNMENT PROGRAMS 3-4 (1986).

¹⁷ *Id.* at 3-5.

¹⁸ 47 Stat. 70.

¹⁹ LEVITAN, ET AL., *supra* note 16, at 132-33.

²⁰ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2011).

²¹ Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1619-1620 (2005) (surveying the legislative history).

²² Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

²³ Republic Steel Corp. v. Nat'l Labor Relations Bd., 311 U.S. 7, 11 (1940).

²⁴ *Id.* at 11-13.

²⁵ LEVITAN ET AL., *supra* note 16, at 133-135.

²⁶ *Id.* The Taft-Hartley Act is reported at 61 Stat. 136.

²⁷ Prior to Taft-Hartley only employers could be found to have committed ULPs.

²⁸ LEVITAN ET AL., *supra* note 16, at 134.

²⁹ NLRB, THE FIRST SIXTY YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD 1935-1995, 26 (1995).

³⁰ Codified at 29 U.S.C. § 401.

recognition or organization an ULP in certain circumstances.³¹ Union membership as a percentage of non-farm employment declined from its peak of above 35% in 1945 to 32% in 1955 to less than 28% in 1965, and union advocates complained that the unavailability of punitive or deterrent remedies allowed employers to easily frustrate elections and first contract negotiations.³²

A 1967 University of Pennsylvania Law Review comment encouraged the Board to reassert a comprehensive approach to restorative injunctions as a way to “effectuate the policies of the Act[,]” even if courts had ruled out deterrent and punitive remedies.³³ It encouraged the Board to employ a remedial rerun election with a cease and desist order to cure any ULPs that were not too egregious; i.e., that did not “destroy any organizational potential in the unit[.]”³⁴ In cases of egregious employer ULPs, on the other hand, it encouraged the Board to use the type of prospective remedies it had recently employed in *Scott's Inc.*,³⁵ e.g., requiring the employer to read the Board's order to its employees, disseminating mailers informing employees of their organization rights and requiring the employer to provide for a union speech on company time.³⁶

The Court of Appeals for the D.C. Circuit, however, partially rebuked this interpretation of NLRA §10(c), echoing earlier court limitations on the powers of the Board when it wrote that it “recognize[d] the broad scope of discretion Congress has given the Board in fashioning remedies; however, that discretion is not without limits.”³⁷ The D.C. Circuit upheld the mailings and the “captive audience” speech to employees by a union representative on employer time. It declined, however, to uphold the requirement for the employer to read the order of the Board to its employees, reasoning that “[t]he ignominy of a forced public reading and a ‘confession of sins’ by any employer, any employee, or any union representative makes such a remedy incompatible with the democratic principles of the dignity of man.”³⁸ One is left to wonder how the conduct of *Scott's Inc.*—namely, interrogating employees concerning their opinion towards unions, threatening loss of jobs and existing benefits, coercing employees to vocalize their opposition to the union, promising benefits for rejection of the union, dominating the Employees' Committee, and transferring, laying off, and firing employees³⁹—was compatible with democratic principles of the dignity of man.

Shortly after the D.C. Circuit issued its opinion, the Second Circuit ruled in *Textile Workers Union of America, AFL-CIO v. N.L.R.B.*⁴⁰ It split from the D.C. and Fifth Circuits by determining that ULPs could be so serious as to require a reading of the Board order.⁴¹ However, it gave the employer the option of delegating the reading to a NLRB employee, and in the same opinion it denied enforcement of the Board's order that the employer provide the union with a list of voters

³¹ *Jones*, 301 U.S. at 29-30.

³² LEVITAN, ET AL., *supra* note 16, at 145-46 (citing Bureau of Labor Statistics, <http://www.bls.gov/cps/tables.htm#union> (last visited April 20, 2010)).

³³ Comment, *Employer Pre-Election Coercion: A Suggested Approach for Effective Remedial Action*, 115 U. PA. L. REV. 1112 (1967).

³⁴ *Id.* at 1116-18.

³⁵ *Scott's Inc.*, 159 N.L.R.B. 1795 (1966).

³⁶ Comment, *supra* note 33.

³⁷ *Int'l Union of Elec., Radio & Mach. Workers v. Nat'l Labor Relations Bd.*, 383 F.2d 230, 233 (D.C. Cir. 1967) (reversing *Scott's Inc.* in part).

³⁸ *Id.* at 234.

³⁹ *Scott's Inc.*, 159 N.L.R.B. 1795, 1812-38 (1966).

⁴⁰ 388 F.2d 896 (2d Cir. 1967).

⁴¹ *Id.* at 903-04.

who would be eligible in a representation election.⁴² Since a narrow split on whether one remedy should be diluted or altogether eliminated was all the Board had to show for its venture into expansive and comprehensive remedies, it chartered a more conservative path in the following years, shying away from remedial orders that appellate courts would be unwilling to enforce.

In 1969, the Supreme Court did offer a ray of hope to union organizers frustrated by employer-perpetrated ULPs in *NLRB v. Gissel Packing*.⁴³ *Gissel* held that, when union organizers possessed certification cards signed by a majority of employees, there is no finding of union coercion or misrepresentation, and persistent employer ULPs render a fair NLRB-supervised representation election “an unlikely possibility,” the Board could issue a bargaining order requiring the employer to recognize and bargain with the union.⁴⁴ The Board was slow, however, to embrace the new remedy. A 1989 study of *Gissel* bargaining orders issued during the 1970s found an average of only 67.5 such orders were issued per year, accounting for just 1.5% of NLRB certified union majority status recognition.⁴⁵ Even when a *Gissel* order is issued, “in a substantial number of cases unions do not obtain contracts.”⁴⁶ A study of cases from 1979-1982 found that “[i]n over 40% of the cases for which [the researchers had] data, the union never sat down at the bargaining table[.]” and that only 20% of the orders which were studied resulted in a first contract.⁴⁷

Meanwhile, union membership as a percentage of the non-farm workforce continued to decline from approximately 28% in the mid-60's to just over 25% by 1975.⁴⁸ Union calls for enhanced remedies increased, and as a result Congress took up the Labor Law Reform Act of 1977, which sought, *inter alia*, to “reduc[e] election delays and stiffen[] sanctions against violators[.]”⁴⁹ The remedies contained within the version passed by the House included: (1) double backpay in cases of wrongful discharge; (2) make-whole relief for employees when an employer refuses to bargain during first contract negotiations; and (3) union response to employer “captive audience” speeches.⁵⁰ The LLRA passed the House but was replaced by a weaker, compromise bill (the “Byrd substitute”) in the Senate. Senate Democrats moved to invoke cloture on the Byrd substitute six times, but after the last attempt failed the bill was sent back to committee, tolling the death knell of ULP reform during the Carter administration.⁵¹

When President Carter left the White House in 1981, the possibility of ULP remedy reform left with him. The Board, which had been viewed as pro-labor under Carter's appointments, underwent a substantial change of ideology as President Reagan appointed members. By 1982, Reagan appointees dominated the Board, and unions decried what they saw as a systematic erosion of the Board's willingness to implement remedies that would adequately redress employer ULPs.⁵²

⁴² *Id.* at 904-06.

⁴³ 395 U.S. 575 (1969).

⁴⁴ *Id.* at 579.

⁴⁵ Benjamin Wolkinson, et al., “The Remedial Efficacy of *Gissel* Bargaining Orders,” 10 INDUS. REL.L.J. 509 at n. 2 (1989).

⁴⁶ *Id.* at 510.

⁴⁷ Terry A. Betheland and Catherine Melfi, *The Failure of Gissel Bargaining Orders*, 14 HOFSTRA LAB. L.J. 423, 440 (1997).

⁴⁸ LEVITAN, ET AL., *supra* note 16, at 145 (citing Bureau of Labor Statistics).

⁴⁹ *Id.* at 146. The House bill can be found at H.R. REP. NO. 95-637, 95th Cong., 1st Sess. 69 (1977).

⁵⁰ Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 34-35 (1997).

⁵¹ Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 794-96 (1979).

⁵² See Bethel and Melfi, *supra* note 47, at 430-31 (noting the change in Board composition and organized labor's reaction).

While labor advocates' characterizations may have been exaggerated,⁵³ it is true that unions suffered several significant setbacks during the Reagan years. Perhaps the most significant was the crushing of the Professional Air Traffic Controllers Organization (hereinafter "PATCO") by the Reagan administration in 1981. Despite having received the union's support during the 1980 election, the administration hired replacement air traffic controllers, ultimately broke the strike, and received public accolades for its efforts. At the height of the 1981 strike an NBC/AP poll showed 64% public approval of President Reagan's handling of the strike, and after its ultimate failure, PATCO officials took to the airwaves claiming that they had lost the strike because they had lost the public's confidence in the legitimacy of union grievances.⁵⁴

Union membership continued to decrease in tandem with the fall of public confidence in unions. Labor union approval ratings, which had reached 70% in 1965, fell to 55% by 1981.⁵⁵ Non-farmworker union membership likewise plummeted to 20.1% in 1983 and 18% in 1985.⁵⁶ Union leaders feared that the election of President George H.W. Bush in 1988 would push the ideological leanings of the Board further to the right, and ULP reform seemed as unlikely as ever. In the meantime, discriminatory discharges had increased six-fold since the late 1960s.⁵⁷ Nevertheless, reform advocates began a new push for pro-labor legislation in the early 1990s. Legislation prohibiting the permanent replacement of strikers was introduced in 1989, and different iterations of the bill received majority support in both houses of Congress in both 1992 and 1994.⁵⁸ However, like other labor law reform efforts before them, these bills were successfully defeated by a Republican-led filibuster in the Senate.⁵⁹ While labor advocates in Congress were able to defeat an attempted override of President Clinton's veto of the management-friendly Teamwork for Employees and Managers Act in 1997,⁶⁰ efforts to enhance ULP remedies languished while union membership continued its free-fall from 14.9% in 1995 to 12.5% in 2004.⁶¹

II. The Current State of ULPs and the Employer-Union Dynamic

Union membership as a percentage of the non-farmworker employed population has oscillated between 12.5% and 12% since 2004, rising slightly in '07-'08 before dropping to 11.9% as of 2010.⁶² Not all of this decades-long drop can be attributed to frustration of organizational efforts by employer ULPs. Indeed, a 1986 survey of studies attributed 1/3 to 2/5 of this decline to shifting demographics and a full 1/5 to union shortcomings.⁶³ Still, the lack of adequate remedies for employer ULPs has played a significant role in frustrating worker self-organization, as observed by former Board Chairman William B. Gould IV:

⁵³ See Terry A. Bethel, *Recent Decisions of the NLRB—the Reagan Influence*, 60 IND. L.J. 227, 227–29 (1984) (noting that Board members, even under Reagan, had rarely been partisan, although the effect of their decisions on industrial-labor relations inevitably led to such criticisms).

⁵⁴ David Morgan, *Terminal Flight: the Air Traffic Controllers' Strike of 1981*, 18 J. OF AM. STUD. 165, 172, 180–81 (1984).

⁵⁵ LEVITAN, ET AL., *supra* note 16, at 146.

⁵⁶ Bureau of Labor Statistics, on file with author.

⁵⁷ *Id.* (citing a study conducted by Professors LaLonde and Meltzer).

⁵⁸ Estlund, C. "The Ossification of American Labor Law and the Decline of Self-Governance in the Workplace," 28 J. LAB. RES. 591, 595 (2007).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Bureau of Labor Statistics, on file with author.

⁶² *Id.* at Series ID #LUU0204899600.

⁶³ LEVITAN, ET AL., *supra* note 16, at 148-49.

It was and is my view that the creakiness of the [NLRB]'s administrative procedures was responsible for the new-found loopholes that allowed employers to delay realization of these rights. The lack of effective remedies and substantive decisions, which diminished the effectiveness of concerted activity generally and the right to strike in particular, undermined the statute's [promise to encourage worker self-determination and collective bargaining].⁶⁴

A persistent and significant problem that has plagued the implementation of remedial orders is delay in the grievance-remedial process. ULP cases between 1994 and 2008 took at minimum 758 days to reach the Board—at their peak in 2006, ULP cases lingered an astonishing 1,517 days before final adjudication.⁶⁵ James Sherk and Paul Kersey, of the Heritage Foundation and Mackinac Center (a free-market think tank), respectively, argue that this number is misleading, and that NLRB statistics show that the vast majority of cases are disposed of within 3-6 months.⁶⁶

Ignoring that the data which Sherk and Kersey cite show that nearly three times as many claims are filed against employers, and that only 87% of those claims are initially dismissed (as opposed to 93% of claims against unions),⁶⁷ this argument is still self-defeating. Sherk and Kersey themselves assert that “[t]he typical organizing election takes place 39 days after union organizers file a petition[.]”⁶⁸ and one need not be a math major to deduce how a 3-6 month resolution period for meritorious claims could adversely affect an election held within a single month.

As of the end of fiscal year 2009, the aforementioned lopsidedness in both the number of ULP complaints filed and the percentage of ULP claims initially dismissed persists.⁶⁹ The 74th Annual Report of the NLRB shows that ULP claims against employers outnumber claims against unions by a nearly 3:1 ratio, and only 91% of claims against employers are initially dismissed, compared to 96% of claims against unions.⁷⁰ Data describing formal and remedial action taken by the NLRB paint an even more skewed portrait of employer and union ULPs. Of 1,096 formal complaints issued in 2009, 965 were lodged against employers for §8 violations.⁷¹ 162 of 175 formal hearings concerned employer ULPs, and 217 of 258 decisions and orders of the Board in ULP cases (and 154 of 169 decisions and orders of ALJs) regarded employer ULPs.⁷²

Notice was posted as a result of 1,160 employer ULPs, compared to 275 union ULPs.⁷³ Employers paid out 14,554 backpay awards, as opposed to 271 instances in which unions paid backpay.⁷⁴ In contrast, unions recompensed employees for fees, dues, and fines in 3,476 cases; while

⁶⁴ WILLIAM B. GOULD, IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB* 22 (MIT Press 2000).

⁶⁵ William B. Gould, IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 335 fig. 1 (2008).

⁶⁶ JAMES SHERK AND PAUL KERSEY, HERITAGE FOUND., *HOW THE EMPLOYEE FREE CHOICE ACT TAKES AWAY WORKERS' RIGHTS*, (2007) available at <http://heritage.org/Research/Reports/2007/04/Full-Text-How-the-Employee-Free-Choice-Act-Takes-Away-Workers-Rights?query=How+the+Employee+Free+Choice+Act+Takes+Away+Workers%27+Rights>.

⁶⁷ 70 NLRB ANN. REP. Table 8 (2005). There is no pagination for Tables.

⁶⁸ SHERK, *supra* note 66.

⁶⁹ 74 NLRB ANN. REP. 114, Table 8 (2009).

⁷⁰ *Id.* The remaining cases result in a NLRB complaint issued by the regional office.

⁷¹ *Id.* at 96, Table 3A.

⁷² *Id.*

⁷³ *Id.* at 99, Table 4.

⁷⁴ *Id.*

employers recompensed employees in only 1,252 cases.⁷⁵ All told, unions paid out \$971,318 in monetary recovery, only \$69,774 of which was compelled by the Board or an ALJ.⁷⁶ Conversely, \$76,640,004 in monetary recovery was paid by employers, \$42,563,570 of which was only paid out as a result of an ALJ or Board order.⁷⁷

Several cases in the series of September 2007 Board decisions nicknamed the “September Massacre” by labor advocates may also have an adverse impact on remedies for ULPs. In *St. George Warehouse*, dealing with backpay awards, the Board shifted the burden to prove that the wrongly discharged employee attempted to mitigate by finding interim employment from the employer to the NLRB/employee.⁷⁸ Similarly, in *The Grosvenor Resort*, the Board held that illegally discharged employees who picketed their former employers following discharge were not to be compensated for the two weeks they spent picketing in anticipation of returning to work, as that time should have been spent trying to secure interim employment—even though the employees sought out employment following the picketing period—so as not to reward “idleness.”⁷⁹ Lastly, the Board issued its decision in *BP Amoco Chemical-Chocolate Bayou*, which upheld an agreement releasing all of the terminated employees' claims in exchange for severance pay even though the discharged employee was laid off for pro-union activity, which ordinarily would have constituted an unfair labor practice.⁸⁰ That is, a laid-off employee had to choose between receiving guaranteed severance pay or taking his chances with filing an ULP claim.⁸¹

III. The EFCA's Enhanced-Remedies Provision

Section four of the EFCA seeks to overhaul the increasingly toothless state of ULP remediation by providing for: (1) comprehensive injunctive relief; (2) treble damages for backpay awards; and (3) up to a \$20,000 fine for ULPs committed by the employer.⁸² Each of these provisions, as well as arguments for and against their implementation, are taken up here in turn.

A. Injunctive Relief

Under current labor law, the NLRB must file a complaint in certain classes of ULPs committed by unions.⁸³ No parallel requirement exists as to employer ULPs, however, and filing a complaint in such cases is left to the NLRB's discretion. The EFCA introduces a requirement that the NLRB file complaints against employers who have “illegally discharged or otherwise discriminated against an employee for protected union activity, threatened to illegally discharge or otherwise discriminate against employees for protected union activity, or engaged in any other violation of the NLRA that significantly interferes with employees' right to self-organization.”⁸⁴ The

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *St. George Warehouse*, 351 N.L.R.B. 961 (2007).

⁷⁹ *Grosvenor Resort*, 350 N.L.R.B. 1197 (2007).

⁸⁰ *BP Amoco Chemical-Chocolate Bayou & Paper*, 351 N.L.R.B. 614 (2007).

⁸¹ *Id.*

⁸² Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

⁸³ JULIE MARTINEZ ORTEGA AND ERIN JOHANSSON, AMERICAN RIGHTS AT WORK, THE FACTS BEHIND THE EMPLOYEE FREE CHOICE ACT 22–23 (2009), available at http://www.americanrightsatwork.org/dmdocuments/ARAWReports/araw_thefactsbehindefca.pdf.

⁸⁴ *Id.* at 19.

EFCA additionally requires that preliminary investigation of complaints against employers be given “priority over all other cases” to eliminate delay during organizing campaigns and first contract negotiations.⁸⁵

Critics contend that the EFCA's provision for new injunctive relief is unfairly one-sided, and ignores the problem of union coercion during organizing campaigns.⁸⁶ While such criticisms regularly overstate the severity of union ULPs vis-à-vis employer ULPs, this criticism is nonetheless valid. NLRB statistics show that thousands of allegations of union ULPs are lodged with the NLRB every year,⁸⁷ and union advocates only confuse and muddle the debate when they point to misleading statistics to give the impression that employers are the only ones committing ULPs.⁸⁸ Such rhetoric ignores that the vast majority of ULP accusations are directed at employers and at any rate, it does not benefit unions to shy away from remediation of union ULPs when they do occur. Unions concede the moral high-ground when they lobby for employer ULP investigations to receive absolute priority without a parallel provision for union ULPs. From a purely normative standpoint, ULPs breed mistrust, and it is in the long-term interest of unions to rebuild the public's lost confidence in the promise of unionization. It is impossible to accomplish this goal without absolute transparency around the comparatively few instances in which unions do commit ULPs, and insistence on one-sidedness removes from the public discourse a valid, good-faith argument against the frequency and egregiousness of employer-perpetrated ULPs.

Additionally, the EFCA injunction does nothing to eliminate the *Republic Steel* prohibition on deterrent, punitive remedies (ignoring, for the moment, the two punitive remedies the EFCA does enact, discussed presently in sections B and C *infra*). Thus, a whole spectrum of potential remedies which would “effectuate the policies of the” NLRA have been rendered unavailable to the Board, despite the NLRA's provision for only limited oversight by the courts. The EFCA should clearly and unequivocally eliminate this court-constructed barrier, and labor proponents could, in the face of pro-business opposition, claim that such a provision would merely reverse “legislation from the bench” handed down by “judicially activist” courts.

Along similar lines, the EFCA would benefit from a non-exclusive list guaranteeing the availability of remedies previously implemented by the courts which have, for one reason or another, lost their remedial force over time. Legislative reform should strengthen the current requirement that employers post notice that they have committed an ULP by requiring them to take the steps provided for in *Fieldcrest Cannon*; namely, that notices be translated into languages spoken by the workers, posted in newsletters and online bulletin boards, mailed to employees, and read by the company personnel who committed the ULP giving rise to the order.⁸⁹ Similarly, any reform effort should codify and guarantee the availability of *Gissel* bargaining orders. Commentators have repeatedly observed that this remedy is both rare and ineffective.⁹⁰ While the EFCA's provision for compulsory mediation would ensure that *Gissel* orders no longer fail to result in a contract, reform

⁸⁵ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

⁸⁶ See, e.g., SHERK *supra* note 66.

⁸⁷ See 74 NLRB ANN. REP. 114 (2009).

⁸⁸ CENTER FOR UNION FACTS, WHEN VOTING ISN'T PRIVATE: THE UNION CAMPAIGN AGAINST SECRET BALLOT ELECTIONS 19 (2007), available at <http://www.unionfacts.com/downloads/report.cardCheck.pdf>.

⁸⁹ *Fieldcrest Cannon, Inc.*, 318 N.L.R.B. 470 (1995). The force of statute would overrule the D.C. and Fifth Circuits determination that such a remedy offends the “dignity of man.”

⁹⁰ See, e.g., Bethel and Melfi, *supra* note 47, at 437 (noting the rarity of *Gissel Packing* orders); Garren, *supra* note 57, at 80 (observing that *Gissel* orders rarely result in a contract).

should make it clear that the Board will issue such orders not only in those cases in which a fair election is not possible, but in any instance where an employer repeatedly frustrates the Board's effort to establish laboratory conditions.

Indeed, reform should standardize all of the special remedies that the Board has thus far only applied in cases of severe and repeated ULPs. There is no logical reason for limiting this class of remedies to egregious cases if the point of the remedy is to ameliorate the negative effects of the ULP. The past 60 years of jurisprudence have gradually chipped away at the ability of the Board to "effectuate the policies of the Act[.]" A renewed commitment to providing for collective bargaining when a majority of employees support majority status must necessarily include a commitment to restoring the breadth and impact of remedies envisioned in the Wagner Act.

B. Treble Backpay

EFCA §4(b)(1) provides that Board-issued backpay orders "shall award the employee backpay and, in addition, 2 times that amount as liquidated damages."⁹¹ Proponents of the provision argue that it would serve two purposes: (1) compensating the wrongly discharged employee for the opportunity cost of leaving their job, since reinstatement rarely results in the discharged employee returning to work; and (2) deterring employers from committing ULPs, and thereby discouraging unionization, as a mere cost of doing business.⁹² A study by John Schmitt and Ben Zipperer at the Center for Economic and Policy Research found that pro-union employees face a 1.8% chance of being illegally fired during an organizing campaign, and that illegal discharges occur in 30% of elections.⁹³ Opponents contend that treble damages deviate from the *status quo* prohibition against punitive remedies and impose an unreasonable cost on employers, which in turn will produce a chilling effect on legitimate employer actions which toe the ULP line.⁹⁴

On the one hand, it is true that current "make whole" remedies effectively leave employees out of pocket at least a portion of the money that they would have earned had they never been discharged for pro-union activities, particularly in light of the Board's recent decision in *The Grosvenor Resort*.⁹⁵ Indeed, the duty to mitigate entails that employees either immediately seek new employment and forgo the opportunity to protest the ULP while hoping for reinstatement, or object to the ULP and receive no backpay for the time spent protesting.⁹⁶ In *St. George Warehouse*, the Board also shifted the burden of proof to the General Counsel to prove that an employee took reasonable steps to find substantially equivalent employment.⁹⁷ What is more, such replacement jobs often pay less than the positions from which employers dismiss discriminatees, and treble damages would help offset this pay differential. Contrarily, there is merit to the argument that treble

⁹¹ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

⁹² AMERICAN RIGHTS AT WORK, WHY STRONGER PENALTIES ARE NEEDED (2010) *available at* <http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/why-stronger-penalties-are-needed.html>.

⁹³ JOHN SCHMITT AND BEN ZIPPERER, CENTER FOR ECONOMIC AND POLICY RESEARCH, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS, 1951-2007, (2009) *available at* <http://www.cepr.net/documents/publications/dropping-the-ax-update-2009-03.pdf>.

⁹⁴ John S. Irving, *Don't Employers Deserve Free Speech?*, WALL STREET JOURNAL, Aug. 6, 2009, *available at* <http://online.wsj.com/article/SB10001424052970204886304574310552006266132.html>.

⁹⁵ *Grosvenor Resort*, 350 N.L.R.B. 1197 (2007).

⁹⁶ *Id.* Those employees who seek mitigating employment very rarely return to the position from which they were unfairly discharged.

⁹⁷ *St. George Warehouse*, 351 N.L.R.B. 1961 (2007).

damages will produce a chilling effect on employer actions. In many instances the employer unknowingly crosses the boundary from acceptable business decisions to proscribed anti-union activity,⁹⁸ and it is in these cases unjust to impose a bright-line rule that any ULP must necessarily entail punitive damages.

A more equitable remedy would be treble damages in cases in which the employer knowingly or recklessly discharged an employee engaged in pro-union activities. To hold employers strictly liable would be tantamount to forbidding the discharge of employees involved in any way with unions, no matter how egregious their behavior or valid the business justification. The treble damages proposal as currently constructed is over-inclusive and runs the risk of deterring legitimate employer behavior.

C. \$20,000 Fines for ULPs

The third remedy, at EFCA §4(b)(2), provides that “[a]ny employer who willfully or repeatedly commits any unfair labor practice [during an organizing campaign or first contract negotiations] shall . . . be subject to a civil penalty of [sic] not to exceed \$20,000 for each violation.”⁹⁹ Proponents argue that this measure is necessary to deter employers from committing the ULPs that they presently commit expecting to pay either no damages or paltry “make whole” damages, averaging \$5,205 per discharged employee.¹⁰⁰ Opponents argue, again, that such a bright line rule will chill legitimate employer speech aimed at discouraging employees from voting to unionize.¹⁰¹ Alternatively, they argue that a \$20,000 fine threatens to destroy any small employer that happens to commit an ULP.¹⁰²

To be sure, a \$20,000 fine—much less a succession of fines—would force many small employers out of business. However, the language of the bill leaves it to the Board to assess a fine “not to exceed \$20,000.”¹⁰³ It is the NLRB's prerogative to fine the employer whatever amount it deems appropriate, subject to the \$20,000 ceiling. The converse argument is made by labor advocates; i.e., an extraordinarily large employer might still make “a rational business decision to break the law in order to prevent union organization in the workplace.”¹⁰⁴ This position is much more persuasive, as one could easily imagine a billion dollar company choosing to pay a comparatively nominal fine instead of dealing with demands for wage increases during collective bargaining.

It would be a better course of action to implement a sliding scale of fines, assessed by the NLRB and subject to review for abuse of discretion. The Board could adopt either a mathematical formula, perhaps based on the company's earnings or profits, or a rubric with mitigating and aggravating factors such as the severity of the ULP, the size of the company, the profitability of the

⁹⁸ See, e.g., *Edward G. Budd Mfg. Co. v. Nat'l Labor Relations Bd.*, 138 F.2d 86 (3d Cir. 1942) (discharging an inappropriate drunkard for mixed motives, one of which the Board determined was union organizing).

⁹⁹ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

¹⁰⁰ 74 NLRB ANN. REP. 114, Table 4 (2009). This figure results from dividing the total amount of backpay obtained in closed cases by the number of workers receiving backpay.

¹⁰¹ LaborUnionReport.com, *The Employee Forced Choice Act*, <http://www.laborunionreport.com/efca.html>.

¹⁰² *Id.*

¹⁰³ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

¹⁰⁴ Danielle C. Beasley, *The Employee Free Choice Act: An Improper Vehicle to Remedy the Problems of Working Americans*, FED. LAWYER, July 2009, at 39.

company, the effect of the ULP on organizing or bargaining, etc. . . It would also be important to consider the employer's state of mind when it committed the ULP. Transgressions of intent—i.e., those committed with anti-union animus—should be met with harsher condemnation than ULPs that border on acceptable business activity.

IV. Proposed Alternative Labor Law Reforms

While dozens of reform proposals have been floated in the academic literature, two particularly novel suggestions stand out. The first, put forward by former Board Chairman William Gould IV, is based on the practices of “First Group, a major British multinational with 100,000 employees in the United States[.]”¹⁰⁵ First Group, which owns domestic bus companies Greyhound and BoltBus, has established Freedom of Association policies which operate side by side with the NLR mechanisms.¹⁰⁶ Because of the speed and objectivity of the Freedom of Association process, employees rarely file grievances with the NLRB.¹⁰⁷ Instead, complaints are lodged with a staff of independent monitors who investigate the allegations and make recommendations to both the company and the aggrieved employee/union within two months of the filing of the complaint, after which the company has thirty days to respond to the recommendations.¹⁰⁸

The Freedom of Association framework has three distinct advantages: (1) complaints are processed and resolved with “remarkable speed;” (2) the investigative staff obviates the need for adversarial discovery in cases of voluntary mediation; and (3) internal dispute resolution diminishes the acrimoniousness of the investigation.¹⁰⁹ Gould also notes, however, that the system is predicated on “the requirement that the employer not engage in antiunion speech, utilize captive audience speeches . . . or distribute literature of [an] antiunion tenor.”¹¹⁰ If such a requirement were imposed statutorily, it would likely run afoul of the First Amendment.¹¹¹ Moreover, independent monitors lack subpoena power or the ability to take affidavits, though “the company and the relevant unions have thus far complied with the [monitor's] inquiries”¹¹²

Such a system could achieve results unlikely to be realized by the mere implementation of enhanced remedies for ULPs. To begin with, even the EFCA's controversial requirement that investigations into employer ULPs be given absolute priority couldn't hope to resolve complaints as quickly as the Freedom of Association procedure without drastic overhauls of the organization, certification, and grievance-remedial processes. Additionally, the mere existence of the process fosters employees' confidence in their employer's willingness to do right by its workers. Implementing enhanced remedies, on the other hand, merely enables unions and employers to assail each other with heavier weapons, albeit via the NLRB acting as an intermediary.

How might the positive aspects of the Freedom of Association system be incorporated into a statute? A reform bill might provide some form of incentive, such as limited immunity from NLRB-issued ULP sanctions, tax breaks, or preference in government contract assignment, to entice

¹⁰⁵ Gould 2008, *supra* note 65, at 342.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 342–43.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 342.

employers to opt into the system.¹¹³ An opt-in regime may also cure the constitutional problem of enacting an absolute prohibition on employer anti-union speech. The bill would also have to provide a futility provision to allow employees who are able to demonstrate bad-faith or employer noncompliance access to traditional NLRB remedies.

The drawbacks to a Freedom of Association system are numerous, but not insurmountable. The potential for employer abuse would exist, but employers abuse the current system with little or no negative repercussions.¹¹⁴ Indeed, a showing of futility could trigger the availability of those remedies the NLRB reserves for egregious cases involving repeated ULPs. While the monitor staff would lack subpoena power, a bill might make it possible for the monitor to secure a subpoena from the NLRB after a showing of noncooperation. Lastly, there is the administrative difficulty of establishing an unbiased monitor and putting in place mechanisms to ensure its impartiality. Existing institutions such as the American Arbitration Association could provide a model, however, and the Freedom of Association framework could be a useful way to outsource some NLRB responsibilities, thereby allowing the Board to focus on working through its considerable backlog of cases.

The second intriguing proposal, advanced by Richard Block of Michigan State University, is a shift to tripartite negotiations involving the United States government, not unlike the War Labor Board put in place during World War II.¹¹⁵ The longevity of existing tripartite systems in Canada is *prima facie* evidence that companies are no more likely to fail in jurisdictions where government takes a proactive role than in jurisdictions, such as the present United States system, in which government steers clear of involvement in the collective bargaining process. Block points to the successes of the United States' own War Labor Board, which used ten tripartite regional boards to "equitably resolve labor disputes" without "disrupt[ing] the market forces that were affecting industry."¹¹⁶ Tripartite systems, Block concludes, "permit . . . collective bargaining to thrive while protecting the legitimate interests of employers, employees and unions."¹¹⁷

Based on the models of the War Labor Board and the Canadian system, Block proposes some significant changes to the current NLRB system, including: (1) reconstituting the NLRB as a tripartite decision making body that oversees regional boards instead of ALJs, so that all parties involved are familiar with the intricacies of labor law and industrial-labor relations; (2) making all regional board orders effective and enforceable upon issuance to cut down on delay in the process; (3) limiting judicial review to determining only whether the Board had jurisdiction and whether it afforded the parties due process of law; (4) abolishing the General Counsel, along with the initial screening function it serves, as "it can be assumed that any labor dispute brought before the Board is worthy of consideration"; (5) creating a "standing, tripartite National Labor Law Commission that would make periodic, regular recommendations to the Board and to Congress"; and (6) amending

¹¹³ It is doubtful that unions would need an incentive, given that the program's track record within First Group has provided results more favorable to employees than those they would have obtained by going through the NLRB. It is also doubtful that most companies would be willing to opt-in without some incentive, as very few modern companies have a social responsibility policy akin to First Group's.

¹¹⁴ Gould 2008, *supra* note 65.

¹¹⁵ Block, *supra* note 50, at 47.

¹¹⁶ *Id.* at 49.

¹¹⁷ *Id.*

the NLRA to allow for the Federal Mediation and Conciliation Service to mediate in case of an unlawful refusal to bargain.¹¹⁸

There are several advantages to adopting such a system. A tripartite system could eliminate all non-wildcat strikes and lockouts by decertifying non-compliant unions or imposing steep sanctions on employers who do not adhere to Board edicts. Adjudication by regional boards would ensure that only individuals with expertise in industrial-labor relations would rule on grievances. The adoption of such a system could also be defended as strictly non-partisan, since past reform efforts have been defeated by opponents who claim that the reform is either too labor-friendly or too-management friendly. Like the Freedom of Association framework, tripartite adjudication would also likely deal with ULP complaints more swiftly than the current NLRB framework, even if it is supplemented with the EFCA's enhanced remedies, as a regional board's familiarity with the types of problems brought before it greatly exceeds the expertise that many ALJs bring to the table. The formation of a standing commission would also help keep labor law current. Both management and unions complain that the Wagner Act of 1935 and Taft-Hartley Act of 1947 are ill-equipped to deal with the exigencies of the twenty-first century. A standing committee would be able to address these exigencies as they arise, without the need for statutory revisions that often come too late, if at all.

Block's proposals also have their disadvantages. Two of the suggested reforms are particularly problematic. The General Counsel's screening function eliminates over 90% of claims before they reach the first stage of adjudication (i.e., the filing of a complaint).¹¹⁹ Eliminating it would unleash a deluge of cases upon an already resource-strapped NLRB. Also, immediate implementation of board orders without the possibility of interlocutory appeal could threaten the business; employers should be able to delay implementation by showing that the orders would cause the business irreparable harm. Still, Block's other proposals could be adopted piecemeal without compromising the advantages they would afford.

Nevertheless, it may be impossible to secure support for a tripartite system, absent a national existential crisis. One need only look at union and management advocacy sites to gain an idea of how bitter the relationship between unions and employers has become.¹²⁰ Moreover, the current wave of anti-government sentiment—the likes of which have not been seen since Watergate—would threaten to sink any proposal to expand government's role in industrial relations. Any proposal to modify the NLRB so drastically would therefore need a considerable amount of bipartisan support, perhaps premised on the even-handed compositions of the boards, to clear the 60-vote hurdle in the Senate.

V. Conclusion

Unfortunately, we have reached a stage where any reform is desirable to the beleaguered *status quo*. Robert Worster points out that dissatisfaction with the present NLRB remedies is so

¹¹⁸ *Id.* at 50–54.

¹¹⁹ 74 NLRB ANN. REP. 114, Table 8 (2009).

¹²⁰ Compare UnionFacts.com, www.unionfacts.org with Employee Free Choice Act, www.aflcio.org/joinaunion/voiceatwork/efca/.

widespread that even the Supreme Court has called for congressional action.¹²¹ Congress, however, has failed to pass the EFCA in two successive legislative sessions. It is therefore necessary that any reform legislation be able to clear the Senate's supermajority requirement, as Democrats have made it clear that they will capitulate to even an edental Republican threat to filibuster without making them take to the floor. Reform legislation, therefore, cannot be biased towards either unions or management. Even if Democrats remove the majority sign-up provision prior to reintroducing the bill, Republicans will cry foul if they press forward with remedies that appear to apply only to employers, regardless of whether the current remedial scheme tips the scale in management's favor.

The next attempt at reform legislation should therefore apply the same penalties to both unions and employers. This neutrality may serve to benefit unions, as the vast majority of ULPs are committed by employers.¹²² Moreover, the list of available remedies needs to be expanded to include those with a deterrent effect, in order to dissuade businesses or unions from committing ULPs as a mere cost of doing business. Congress should not shy away from granting the NLRB authority to issue *Gissel* orders in a greater number of cases, nor should it continue to deny the Board access to monetary penalties sufficient to deter particularly egregious unions and employers from committing ULPs.

Finally, Congress should consider non-conventional proposals, such as First Group's voluntary Freedom of Association framework or introducing a tripartite commission. It is hard to imagine how any reform's adoption, no matter how radical, could be any worse than the current NLRB regime and its lack of adequate remedies. It is likely that any reform will need to be reassessed after an introductory period and substantially modified. Nevertheless, Congress must take the first step to get the ball rolling. If it does not, there is a very real possibility that private-sector unions, along with their promise of social promotion and advocacy for workers' rights, will be extinct within the next few decades.

¹²¹ Robert M. Worster, III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1077-78 (2004) (citing C.J. Rehnquist's opinion in *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 US 883, 904-05 (1984), in which he writes that "[a]ny perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by congressional action.").

¹²² 74 NLRB ANN. REP. 114 (2009).