

**Statement of John N. Raudabaugh**  
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**Before the**  
**Subcommittee on Labor, Health and**  
**Human Services, Education and Related Agencies**  
**Of the Senate Committee on Appropriations**

Chairman Harkin and Members of the Subcommittee, thank you for inviting me to testify regarding "NLRB Representation Elections and Initial Collective Bargaining Agreements: Safeguarding Workers' Rights." I commend you and the Committee for examining the "State of the Workplace."

By way of introduction, I was appointed by President George H.W. Bush, confirmed by the Senate and served as a Member of the National Labor Relations Board ("NLRB" or "Board") from August 27, 1990 until November 26, 1993. Prior to my NLRB service, I practiced labor law representing management. Before entering law school, I served four years as a U.S. Navy Supply Corps Officer and earned a Masters Degree in labor economics. Since leaving the NLRB, I returned to private practice. I am a Partner and Chair of the U.S. Labor and Employee Relations Law Practice in the global law firm of Baker & McKenzie LLP. I teach labor law as an adjunct faculty member at Northwestern University School of Law. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce and of the Labor Relations Special Expertise Panel of the Society for Human Resource Management. Today I am testifying in my personal capacity.

This Hearing examines NLRB elections and a certified representative's ability to obtain a first contract by explicitly questioning whether workers' rights are protected in the process. The form of the question reflects claims from organized labor and their supporters – "Workers' Rights Under Attack," "Middle Class at Risk," "A Human Rights Crisis," and a "September Massacre."<sup>1</sup> Of course, workers' rights and the issues of elections and first contracts would be resolved/guaranteed differently were the proposed Employee Free Choice Act ("EFCA") to become law.<sup>2</sup>

Given the rhetoric and voluminous labor-generated press, it would be understandable to add a "by-line" to today's inquiry – "Lost in the Fog? Deliberately?" Organized labor, as we know it, is fighting for its institutional life, to be the only form of worker voice in an adversarial relationship, and to recapture a density from a time not to return.<sup>3</sup>

#### NLRB Elections and Employee Rights

Are workers' rights safeguarded in the NLRB election process? Yes. In FY 2007, 2,439 RC and RM petitions were filed, 1,559 elections were conducted, and unions won 54.3 percent of those elections, the same win rate as in 1970-1974. Elections were conducted in a median of 39 days. Only 13 -- or 1.1 percent -- of the elections unions won were challenged by technical refusals to bargain.<sup>4</sup>

The notable Goldberg, Getman and Brett study, "Union Representation Elections: Law and Reality," studied 31 elections interviewed 1,000 employees and concluded that unlawful campaign tactics had no greater impact on employee voting behavior than lawful campaigning.<sup>5</sup> However, Weiler's commentaries take issue with the limited sample size of the Goldberg, Getman and Brett study and argue that Board processes and remedies are ineffective.<sup>6</sup> Weiler's ultimate complaint regarding ineffective remedies attacks H.K. Porter Co. v. NLRB, 397 U.S. 99

(1970), upholding the National Labor Relations Act's fundamental policy of the freedom of contract precluding the Board from compelling agreement to contract terms. 29 U.S.C. §158(d). Nevertheless, accepting the freedom of contract rule, Weiler argues for quicker elections and certification, increased use of §10(j) remedies, and including §8(a)(3) charges within the scope of §10(l) relief.<sup>7</sup>

Andy Stern, International President of the Service Employees International Union, when asked about the Teamwork for Employees and Managers Act (an alternative to traditional labor organizations vetoed by the President Clinton) said: "Employees' representatives should be elected. If the employers want representatives of the workplace, let them be elected. That's the American way."<sup>8</sup> So much for card-based, pressure prone alternatives to a secret ballot.<sup>9</sup>

Driving the quest for an "over the shoulder/in-your-face" card-based alternative to the secret ballot is organized labor's longstanding, institutional angst -- declining union density, a labor economist's measure of success or failure in organized labor's ability to gain representational rights. Private sector union density has steadily declined from a high of 34 percent in 1954.<sup>10</sup> In 2007, organized labor represented 7.5 percent of the private sector workforce, up from 7.4 percent in 2006.<sup>11</sup>

The reported prospects for a return to higher union densities are dim, reflecting a variety of factors, most notably the changed structure of the economy -- employment shifting away from sectors where unions were historically strongest.<sup>12</sup> And, the more competitive an industry, the less likely it can sustain a sizeable union premium.<sup>13</sup> Historically, American unions have grown during periods of extraordinary periods of upheaval -- economic depression and war. Without the upheaval and spurts in growth, private sector density will only increase by bringing the union and nonunion growth rates into rough equality.<sup>14</sup> For owners of capital to be indifferent between

investing in the union and nonunion sectors, given the union cost premiums and resulting wealth transfers, such is unlikely.<sup>15</sup>

Despite these many factors and impediments to increasing union density, can union election success be improved on the margin by changes to the Board's election processes by enhanced safeguards for workers' rights? Perhaps. Internal Board workings can be studied, election cases exceeding the present 39 day median can be examined, and "lessons learned" can be shared to the extent this is not already done. As to Regional Office and Board processing delays, consider making fully transparent on the Board's website the daily status of all C and R case matters including Board Member actions and inactions (One Member Only reports). And, to my knowledge, it has been 50 years since the Board's last investment in an outside comprehensive, consultant's study.<sup>16</sup> This too may yield marginal improvements. But let's be clear -- to suggest that the Board's secret ballot process and the applicable caselaw regarding campaign conduct is "Neither Free Nor Fair" and is a "Subversion of Democracy" is as disgusting as it is false.<sup>17</sup>

The current, calculated attack on the Board's election process was sponsored, in part, by a study funded by the U.S. Trade Deficit Review Commission updating prior research on the impact of capital mobility, plant closings and threats of plant closings on private sector union organizing campaigns.<sup>18</sup> Based on interviews of union organizers from a sample of 407 Board certification elections during 1998-1999, in units of 50 or more eligible voters, plant closings and alleged threats of closings resulted in lower union election win rates.<sup>19</sup> The unions involved filed fewer charges with the Board because: (a) they thought the case was not strong enough to win; (b) they wanted to avoid the delay where they thought they would win the election outright; (c) they thought their witnesses would not come forward; or (d) they viewed the remedy as

insufficient.<sup>20</sup> For these reasons, and based on comments of union organizers, card check recognition rather than Board elections and first contract arbitration rather than collective bargaining were recommended.<sup>21</sup>

Interestingly, in an earlier study of 261 elections during 1986 and 1987, the same researcher interviewed the corresponding union organizers but concluded only that the particular union tactics of representative leadership, personal contact, dignity and justice and an active presence used played an important role in determining election outcomes.<sup>22</sup> Rather than call for labor law reform, the study concludes "union organizing strategy and tactics matters a great deal in determining certification election outcomes."<sup>23</sup>

Another "studied" attack on the Board's undermining of employee rights to organize evaluated 62 Chicago area elections in 2002 and interviews with 25 lead organizers and 11 anonymous employees.<sup>24</sup> The findings report that 30 percent of the employers allegedly fired workers for engaging in union activities, 49 percent threatened to close or relocate, and 82 percent used consultants. Reportedly, unions were hesitant to file charges where evidence may be insufficient, the election date may be delayed, and make-whole remedies and/or 10(j) relief may be lacking.<sup>25</sup>

Importantly, the "research methodology" for these "studies" is now exposed.<sup>26</sup> From a review of 11,342 RC election cases filed between 2003 and 2005, 3,546 had a companion CA employer unfair labor practice filed. Of the CA charges, 2,008 were dismissed or withdrawn and of the remainder, 303 -- or 2.7 percent of the RC cases filed -- resulted in an offer of reinstatement.<sup>27</sup> Of equal significance, the now famous 1983 Weiler "finding" that one in 20 pro-union employees was fired during union organizing campaigns, and the 2007 Schmitt and

Zipperer's finding of one in 76 were debunked by the 2008 Wilson research finding that less than one in 340 pro-union workers is fired during an organizational campaign.<sup>28</sup>

What is interesting is that the purpose for the research, now discredited, attacking the Board's election process and calling for card-check, in lieu of secret ballot elections and interest arbitration for first contracts, rather than collective bargaining, is but "old wine in a new bottle." The same demands, without the academy's overlay, were made straightforwardly in the 1961 Congressional Hearings and rejected.<sup>29</sup>

What the academic forays into the issue of Board election procedures teach is that publicly reported Board representation case data should be made more robust which, in turn, may silence the current attacks or perhaps, launch new ones. Publicly available representation case data should report time through each procedural stage to allow computation of mean, median, mode and range. Case numbering should be expanded to facilitate correlation between C and R matters of like union and employer components. And, Kochan's five basic questions should be reviewed by any researcher prior to initiating any study: (1) Is the research question framed in a way to yield useful policy information?; (2) Is the research design adequate to answer the questions of interest?; (3) Are the data analyses appropriate for the research design?; (4) Are conclusions consistent with the result and can the policy recommendations be derived from their conclusions?; and (5) How much weight should the results and recommendations be given in shaping law and agency policy?<sup>30</sup>

Having addressed and rejected the proffered evidence to attack the Board's election process, what is left are the polemics raised by EFCA regarding employee free choice. Choice requires information to process to decision.

The decision whether or not to support a union depends fundamentally on three questions: Are the conditions within the plant unsatisfactory? To what extent can the union improve on these conditions? Will representative by the union bring countervailing disadvantages as a result of due payments, strikes, or bitterness within the plant?<sup>31</sup>

Free choice requires the absence of pressure or coercion.<sup>32</sup> Card check provides neither. Unions want to be the sole provider of information, if any, and, stand next to employee to extract the signed card. It is EFCA that fails to safeguard employee rights.<sup>33</sup>

### Initial Collective Bargaining Agreements and Employee Rights

Are workers' rights safeguarded while the institutional parties ó union and employer ó meet at reasonable times and negotiate an initial agreement in good faith? Yes, despite claims by researchers that only 56 percent of union election victories result in a first contract or only 20 percent of organizing drives end up with a labor agreement.<sup>34</sup>

Cooke's study of 118 Indiana cases where unions won Board elections in 1979 and 1980 found a greater likelihood to obtaining first contracts when firms pay wages well above the industry average, when skilled national union representatives participate in negotiations, when bargaining units are larger, and when election victories are won with larger margins.<sup>35</sup>

Detracting from achieving first contracts are NLRB delays in resolving post-election objections and challenges, post-election employer discrimination, and employer refusals to bargain.<sup>36</sup>

Notably, strikes played a role in 23 percent of negotiations ultimately resulting in agreement and in 26 percent of failed negotiations.<sup>37</sup>

Perhaps the most debated discussion of first contract negotiations is Weiler's study testing his hypothesis on the negative effect of deficiencies in the law.<sup>38</sup> In a study of 271

election certifications in units of 100 employees or more between 1979 and 1981, Weiler found 172 -- or 63 percent -- achieved a first contract. Weiler rejects interest arbitration as a remedy for bargaining impasse because it collides with the principle of free collective bargaining, but he would consider it as a special remedy for failure to bargain.<sup>39</sup> Weiler acknowledges the Supreme Court's emphasis on the fundamental policy of freedom of contract and the Act's admonition that agreement to a proposal or the making of a concession is not required.<sup>40</sup>

In response to Weiler, LaLonde and Meltzer argue that estimates of employers' refusals to bargain first contracts are too high and reject the "rogue employer" thesis.<sup>41</sup> Their research of random samples of Board decisions from 1955 and 1980 disputes the NLRB General Counsel's 1978 claim that 90 percent of §8(a)(3) charges arise out of organizing campaigns and that 1 in 20 union supporters are discharged during a campaign.<sup>42</sup> Rather, many such discharges occurred in established bargaining relationships.<sup>43</sup> Notably, LaLonde and Meltzer argue that Board statistics fail to identify the labor relations contexts out of which actual and alleged violations arise to assess refusals to bargain first contracts.<sup>44</sup> Moreover, their research concluded that only two of the then existing five studies estimating first contract success were comparable finding a success rate range of 72 to 77.65 percent.<sup>45</sup>

The question of whether employee rights are protected relative to initial collective agreements implicitly suggests that failure at obtaining first contracts violates employee rights. But the Act does not guarantee or mandate contract outcomes.

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.<sup>46</sup>

Determining initial contract outcomes is suspect given the lack of available and relevant data. I recommend that the Board engage a consulting firm or a government research agency and initiate a study mindful of all parameters ó types of petitions and charges, timing through each decisional stage and relatedness between and among petitions and charges.<sup>47</sup> Survey methodology and data must be public and available for independent research and assessment.

Apparent from all Board-related studies is that data selection, data availability and methodologies used to analyze Board case data universally result in limited and questionable findings and conclusions. Future research must give special attention to the impact of the NLRB General Counsel's First Contract Bargaining Initiative and the use of §10(j) injunctive relief and related special remedies in future Board orders.<sup>48</sup>

Additional remedies of the kind contemplated in EFCA would require amending §10(c) of the Act. 29 U.S.C. §160(c). The Board is not empowered to award punitive damages.<sup>49</sup> Furthermore, any such expansion of remedial authority would raise due process concerns given the current absence of pre-hearing discovery and power to subpoena. And, rectifying the due process issues will inevitably lead to further delays in dispute resolution, election scheduling, and/or first contracts. The recent trend for states to intrude into the arena of labor law is also problematic raising the specter of conflicting rigidities, inflexibilities and costs imposed on employers and market competitiveness.<sup>50</sup>

To do anything to force first contracts, including interest arbitration, contravenes the Act and destroys freedom of contract. It's hard to imagine such a revolutionary outcome in civil law. Even Weiler, a pro-Canadian labour law admirer, acknowledges that "if the cause of union decline is rejection by American workers of the institution, there is nothing that the law can or

should do about that verdict.<sup>51</sup> The decline of unions is largely due to economic pressures that the law can hardly control or withstand.<sup>52</sup> The explanation for union decline lies primarily in natural market forces: structural changes in the American economy, increased domestic and foreign competition; and, yes, even increased employee opposition to private unionization.<sup>53</sup>

### Safeguarding All Workers' Rights

According to one critic, labor laws have become nearly irrelevant, to the vast majority of private sector American workers.<sup>54</sup> Whether by globalization, structural economic change, increased employer resistance given decreased union density and corresponding economic leverage, unions' own complacency, or traditional adversarial unionism, 92.5 percent of the private sector workforce is not part of the legislated structure for industrial peace.<sup>55</sup>

Unions cannot survive if their employer hosts fail, yet employers can thrive without unions.<sup>56</sup> Given this economic reality for standoff, must American workers be left with what it is? Is the choice to be all-or-nothing -- full-fledged representation in an adversarial top-down paradigm or no collective representation?<sup>57</sup> The Act's §8(a)(2) prohibition on any organization of any kind which deals with employers denies millions of fellow citizens a constructive voice at work.<sup>58</sup>

Traditional union governance regularizes and codifies worker tasks within a top-down command structure. In contrast, modern workplaces typically require interaction and two-way communications between workers and supervisors, accompanied by the use of bottom-up worker and managerial discretion that takes advantage of site-specific information. In contemporary workplaces, job hierarchies are often not clear-cut and worker decision-making is essential at most levels.<sup>59</sup>

Traditional unionism under the Act serves as bargaining muscle in an adversarial model.<sup>60</sup> Even considering the assertion that 53 percent of the nonunion workforce want traditional unionism, 47 percent are left with nothing under the Act.<sup>61</sup> Certainly the 92.5 percent of the private workforce who are not unionized are not well served by the current system offering the choice of confrontationalism or nothing but rare, random opportunities for worker voice and participation.<sup>62</sup>

The Dunlop Commission's first goal for the 21<sup>st</sup> century workplace was to [e]xpand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions.<sup>63</sup> Labor policy and the Act should be modernized to offer worker/citizens what they want and what the economy needs.<sup>64</sup> The Teamwork for Employees and Managers Act would have made this positive adjustment. Unfortunately, it was vetoed by President Clinton.<sup>65</sup>

### Conclusions

The dramatically reduced role played by unions and collective bargaining in the U.S. private economy is hardly attributable solely or even primarily to the workings of the legal regime.<sup>66</sup>

Yes, workers' rights are protected in the NLRB Representation Election process. And yes, workers' rights are protected during initial contract bargaining recognizing the fundamental policy of the freedom of contract.

The current legal regime is based on a model of the employment relationship that poorly reflects modern conditions. [T]he focus of legislative efforts should be on lifting existing restrictions that limit representational options and encourage adversarial contests.<sup>67</sup>

This concludes my prepared testimony. I thank you again for directing attention to the issues of the modern workplace. I look forward to discussing my comments in greater detail during the question and answer period.

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## ENDNOTES

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<sup>1</sup> Congressman George Miller, July 13, 2006; AFL-C10 Press Releases June 9, 2005, October 24, 2005, October 23, 2006, October 25, 2007, March 27, 2008.

<sup>2</sup> S.1041/H.R. 800, 110<sup>th</sup> Congress, 1<sup>st</sup> Session.

<sup>3</sup> Andy Stern, "Labor's New Deal," *The Nation*, April 7, 2008.

<sup>4</sup> NLRB Memorandum GC 08-01, December 5, 2007; Testimony of NLRB Chairman Robert Battista, Senate and House Committees, December 13, 2007, p.5; see also, Testimony of former Member Charles Cohen, House Committee, February 8, 2007, pp. 10-13; Testimony of former Chairman Peter Hurtgen, Senate Committee, March 27, 2007, p.8; Fact Finding Report, Commission on the Future of Worker-Management Relations, May 1994, p.81; Note, since the mid-1970s, the union win rate has been steady at or slightly above 50 percent, see Henry S. Farber and Bruce Western, "Accounting for the Decline of Unions in the Private Sector, 1973-1998," *22 Journal of Labor Research* No. 3, Summer 2001, p. 467.

<sup>5</sup> Russell Sage Fnd., 1976.

<sup>6</sup> Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," *96 Harvard L. Rev.* No. 8 (June 1983), pp. 1769-1827.

<sup>7</sup> *Id.*

<sup>8</sup> Interview, PBS Online Newshour, May 14, 1996.

<sup>9</sup> Minority Views, House Report 110-23, 110<sup>th</sup> Congress, 1<sup>st</sup> Session, "Employee Free Choice Act of 2007," pp. 51-59; Note, where card-checks experience coercion, there is a lesser likelihood of coercion with secret ballot votes, see Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998," *57 ILR Review* No. 4 (July 2004), p. 498.

<sup>10</sup> NBER Working Paper 6012, Richard B. Freeman, "Spurts in Union Growth: Defining Moments and Social Processes," pp. 56-62.

<sup>11</sup> USDL 08-0092, "Union Members in 2007," Table 3.

<sup>12</sup> Farber and Western, *supra*, p. 459; Barry T. Hirsch and Edward J. Schumacher, "Private Sector Union Density and the Wage Premium: Past, Present and Future," *22 Journal of Labor Research*, No. 3, (Summer 2001), p. 495.

<sup>13</sup> Hirsch and Schumacher, *supra*, pp. 495, 498, 510; Richard Vedder and Lowell Gallaway, "The Economic Effects of Labor Unions Revisited," *23 Journal of Labor Research* No. 1, (Winter 2002), p. 128; Michael L. Wachter, "Judging Unions' Future Using a Historical Perspective: The Public Policy Choice Between Competition and Unionization," Institute for Law and Economics, Research Paper No. 03-09; Barry T. Hirsch, "Reconsidering Union Wage Effects: Surveying New Evidence on an Old Topic," Discussion Paper No. 795 (June 2003), p. 33.

<sup>14</sup> Farber and Western, *supra*, p. 482; see also, Richard B. Freeman, *supra*, p. 28.

<sup>15</sup> *Id.*

<sup>16</sup> House Report, 87<sup>th</sup> Congress, 1<sup>st</sup> Session, "Administration of the Labor-Management Relations Act by the NLRB," (Pucinski Report 1961), p. 72 referencing the McKinsey & Co., Inc. report.

<sup>17</sup> American Rights at Work Report, "Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections," Gordon Lafer, 2007.

<sup>18</sup> Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing,"

<sup>19</sup> *Id.* at 27.

<sup>20</sup> *Id.* at 32.

<sup>21</sup> *Id.* at 58.

<sup>22</sup> Kate Bronfenbrenner, "The Role of Union Strategies in NLRB Certification Elections," *50 ILR Review* No. 2 (January 1997), pp. 198-211.

<sup>23</sup> *Id.* at 211.

<sup>24</sup> Chirag Mehta and Nik Theodore, "Undermining The Right to Organize: Employer Behavior During Union Representation Campaigns," A Report for American Rights at Work, an Affiliate Group of the AFL-C10, 2005.

<sup>25</sup> *Id.* at 17.

<sup>26</sup> J. Justin Wilson, "Union Math, Union Myths," 2008.

<sup>27</sup> *Id.* at 6-7.

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- <sup>28</sup> Id; Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," 96 Harvard L. Rev. No. 8 (June 1983), pp. 1769-1827; John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research, 2007.
- <sup>29</sup> Pucinski Report, supra, p. 76.
- <sup>30</sup> Thomas A. Kochan, "Legal Nonsense, Empirical Examination and Policy Evaluation," 29 Stanford L. Rev. 1115 (1976).
- <sup>31</sup> Derek C. Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 Harvard L. Rev. p. 49 (1964).
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- <sup>33</sup> Minority Views, House Report 110-23, 110<sup>th</sup> Congress, 1<sup>st</sup>, supra, pp. 51-59.
- <sup>34</sup> John Paul Ferguson, "The Eyes of the Needle: Surviving Union Recognition Campaigns," MIT Institute for Work and Employment Research Working Paper, April 2006; "Modernizing Labor Law," The Boston Globe, June 21, 2007; Fact Finding Report, supra, p. 73; Micah Berul, "To Bargain or Not to Bargain Should Not Be the Question: Deterring Section 8(a)(5) Violations in First-Time Bargaining Situations through a Liberalized Standard for the Award of Litigation and Negotiation Costs," 18 The Labor Lawyer No. 1 (Summer 2002), p. 28.
- <sup>35</sup> William N. Cooke, "The Failure to Negotiate First Contacts: Determinants and Policy Implications," 38 ILR Review No. 2 (January 1985), p. 176.
- <sup>36</sup> Id.
- <sup>37</sup> Id.
- <sup>38</sup> Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harvard L. Rev. No. 2 (December 1984), pp. 377, 404, 408-410. For a stark contrast, see Richard A. Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," 92 Yale L.J. No. 8 (July 1983) pp. 1357-1408; Julius G. Getman and Thomas C. Kohler, "The Common Law, Labor Law, and Reality: A Response to Professor Epstein," 92 Yale L.J. 1415-1434 (1983).
- <sup>39</sup> Id.
- <sup>40</sup> Id. at 360; 29 U.S.C. §158(d).
- <sup>41</sup> Robert L. LaLonde and Bernard D. Meltzer, "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 U. Chicago L. Rev. No. 3 (Summer 1991), pp 956, 965.
- <sup>42</sup> Id. at 986.
- <sup>43</sup> Id.
- <sup>44</sup> Id. at 1007.
- <sup>45</sup> Id. at 1013.
- <sup>46</sup> Archibald Cox, "The Duty to Bargain in Good Faith," 71 Harvard L. Rev. No. 8 (June 1958), p. 1402.
- <sup>47</sup> Id. at 1010.
- <sup>48</sup> NLRB Memorandums GC 06-05, 06-07, 07-01 and 07-08.
- <sup>49</sup> "To Bargain or Not to Bargain Should Not Be the Question: Deterring Section 8(a)(5) Violations in First-Time Bargaining Situations through a Liberalized Standard for the Award of Litigation and Negotiation Costs," supra at p.38; Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-236 (1938); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); Local 60, Carpenters v. NLRB, 365 U.S. 651, 655 (1961).
- <sup>50</sup> Paul M. Secunda, "Towards the Viability of State- or Based Legislation to Address Workplace Captive Audience Meetings in the United States," 29 Comparative Labor Law & Policy J. No. 1 (2007); see also Chamber of Commerce of the U.S. v. Brown, 463 F. 3<sup>rd</sup> 1076 (9<sup>th</sup> Cir. 2006), U.S.S.C. No. 06-939; Samuel Estreicher, "The Dunlop Report and the Future of Labor Law Reform," CATO Review No. 1 (1995); Samuel Estreicher, "Labor Law Reform in a World of Competitive Product Markets," 69 Chicago-Kent L. Rev. 3-46 (1993).
- <sup>51</sup> "Hard Times for Unions: Challenging Times for Scholars," supra, p. 1018; In contrast, see Kenneth G. Dau-Schmidt, "A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace," 91 Michigan L. Rev. No. 3 (December 1992) pp. 419-514.
- <sup>52</sup> Keith N. Hylton, "Law and the Future of Organized Labor in America," Boston University School of Law, Working Paper No. 03-14 (2003).
- <sup>53</sup> Leo Troy, "Market Forces and Union Decline: A Response to Paul Weiler," 59 Univ. of Chicago L. Rev. No. 2 (Spring 1992) at p. 682.
- <sup>54</sup> Cynthia L. Estlund, "Ossification of American Labor Law," 102 Columbia L. Rev. 1527 (2002) at p. 1528.
- <sup>55</sup> Id.
- <sup>56</sup> Id.

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<sup>57</sup> Id.; see also, Jeffrey M. Hirsch and Barry T. Hirsch, "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" Discussion Paper No. 2362 (2006).

<sup>58</sup> Electromation, Inc., 309 NLRB 990 (1992); enf'd, 35 F. 3d 1148 (7<sup>th</sup> Cir. 1994).

<sup>59</sup> "The Rise and Fall of Private Sector Unionism: What Next for the NLRA?" supra, p. 9.

<sup>60</sup> Bruce E. Kaufman, "The Two Faces of Unionism: Implications for Union Growth," 23<sup>rd</sup> Economics Conference, Middlebury College (2002).

<sup>61</sup> Richard B. Freeman, "Do Workers Still Want Unions? More than Ever," EPI Briefing Paper (2007); Richard B. Freeman and Joel Rogers, What Workers Want, Cornell University Press, 1999.

<sup>62</sup> "Private Sector Union Density and Wage Premium: Past, Present, and Future," supra, pp. 11-13.

<sup>63</sup> "The Dunlop Commission on the Future of Worker-Management Relations ó Final Report," (1994), p. 20.

<sup>64</sup> Thomas A. Kochan, "Updating American Labor Law: Taking Advantage of a Window of Opportunity," 28 *Comparative Labor Law & Policy J.* 101, 113 (2007).

<sup>65</sup> Senate Report 105-12, 105th Congress, 1<sup>st</sup> Session, "Teamwork for Employees and Managers Act of 1997."

<sup>66</sup> James J. Brudney, "Isolated and Politicized: The NLRB's Uncertain Future," 26 *Comparative Labor Law & Policy J.* 221 (2005).

<sup>67</sup> "The Dunlop Report and the Future of Labor Law Reform," supra.