

2012

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Upgrading the American Labor Relations System: An Analysis of Several Alternatives

By: Zane Farr

Capstone - Spring 2012

1 Introduction

The American labor relations system does not adequately provide employee representation to the degree demanded by employee preferences. Moving to a non-exclusive representation system would extend the right to organize and collectively bargain to many workers who cannot practically exercise their rights, but should be implemented incrementally by allowing minority unions where a majority representative is not already certified. This change to the interpretation of labor law would undoubtedly increase union membership and density, but may also reduce the conflictual nature of American labor relations and lead to labor force that is more productive for employers and more stable for employees.

The National Labor Relations Act of 1935 governs labor relations in the private, non-agricultural sector (excluding the railway and airline sectors covered under the Railway Labor Act of 1926). After the NLRA's passage, millions of workers joined unions to negotiate improved compensation and working conditions with their employers. In the years before and immediately after the NLRA's passage, workers commonly joined unions by signing up for membership and collectively bargaining a contract with their employer that was applicable to only the members of the union.

The NLRA established an election system under Section 9(a) for determining which union would exclusively represent the entire group of workers if there were a conflict between multiple groups. Under this system, at least thirty percent of workers within a bargaining unit (a group of workers with similar community of interest) express support to hold a representation election, several weeks or months later an election is

held to determine if the bargaining unit is represented by a union and which union would be the exclusive representative. The “members only” unions that were commonplace during the early years of the modern American Labor movement faded away as unions turned toward an exclusive, election-based model for determining labor union representation and abandoned members only representation as a strategy. Though the NLRA still protected the rights of minority unions, their formation became less common in post-war industrial relations. With the emphasis on representation elections and majority unionism, employers gained an enormous advantage by campaigning against unions and defeating them in a certification election, effectively barring their employees from collective bargaining.

With the vast majority of Americans employed in the private sector, policymakers should care about the health of the labor relations system as a means to mitigate disputes and ensure the socially fair distribution of economic gains. Unions are the primary institutions that democratically represent workers in the workplace and the economy at-large. Their weakness in recent years has been a substantial contributing factor in widening income inequality, decreasing aggregate demand, and stagnating wages (Buchele and Christiansen 1993; Glyn 2007). Ensuring the civil right to collectively bargain is essential to reversing these negative labor market trends. An effective labor relations system is the keystone of an inclusive and productive economy and reforming our current system should be a top priority for policy makers.

2 Methods

In this paper, I will discuss the main criteria of a good system of industrial relations for which to measure the outcomes of several proposed reforms. I will discuss each alternative reform's performance by reviewing the relevant literature regarding problems in U.S. industrial relations. The literature will provide the background for both the criteria and the assessment of each model's outcomes. I will also estimate the size of the unmet demand for union representation using recent survey data from the Pew Research Center to give context to the size of this policy problem. Finally, I will discuss the preferable reform with regards to the criteria and its political feasibility within the context of National Labor Relations Board rulemaking and the literature regarding the major stakeholders.

3 What are the criteria for a well-functioning industrial relations system?

This section discusses six criteria of a good industrial relations system that will be used to assess the outcomes of proposed reforms. Each of these criteria addresses a particular reform of the dysfunctional industrial relations system. Political feasibility is addressed separately regarding the policy recommendation since the political prospects for labor law reform are very unlikely.

3.1 Freedom of Association

Under a good industrial relations system, workers who desire to collectively bargain with their employer(s) would be granted their right without unnecessary barriers. The right of workers to organize to protect their interests and collectively bargain

through their preferred representative is expressed in both the Universal Declaration of Human Rights (Section 23) and in the National Labor Relations Act of 1935 (Sec. 7). Implicit in this criterion is the promotion of workplace democracy. Workers should be free to exercise their right to elect representatives or to join the organization that best serves their preference for representation without coercion. This has been enumerated as a right in all developed countries so that employers must recognize the rights of workers as citizens and not merely an instrument of production.

Under a fair industrial relations system, the “gap” between the desired level of representation and the actual level of representation should be minimal. In the classically liberal sense, workers should not be coerced to join or not join an organization or collectively bargain. However, given that employers have substantial power over employees and an interest in reducing employees’ bargaining power, it is much more likely that the desire for collective representation outpaces the actual representation amongst workers.

3.2 Limits Free-Riding

Free riding allows non-participants to receive the benefits of collective action while not contributing to its outcome. Free riding is a persistent problem in industrial relations since workers who do not want union representation will receive the benefits of a better workplace, including higher wages, by being covered by the collective bargaining agreement or through the spillover effects of increased bargaining power of labor in general. The benefits to the individual employee to take action to join or form a union are not enough to outweigh the risks of retaliation from management if they will

get the benefits of others' organizing efforts. By limiting the ability to free ride, workers must either actively support collective bargaining or refrain from benefiting from its gains. A good industrial relations system should limit the ability of non-participants to reap the gains of collective action and thereby encourage participation.

3.3 Maintains a High Level of Aggregate Demand

Enhanced bargaining power for labor would translate to higher aggregate demand. Lowering the unemployment rate and keeping wages more closely tied to labor productivity drive consumers' purchasing power, growing the entire economy rather than just allocating a larger share of firms' expenditures to labor. Higher sales and profits would justify the higher wages and reinforce wage-led economic growth.

While this may be in the interest of most Americans, it is not in the interest of the individual enterprise to redistribute profits to workers as wages without its competitors doing the same. Employers that exploit the weak bargaining position of their employees could still profit from the increased demand for their goods and services caused by the gain sharing within other firms. Ideally, unions should take wages out of competition and maintain a consistently rising standard of living. With ample bargaining strength, unions would prevent employers from "racing to the bottom" and competing with lower wages against one another.

Real wage growth has slowed while productivity has increased substantially in the last thirty years (see figure 1). This is due to a lack of bargaining power for labor and, at least in part, the decline of unionization (Glynn 2007; Pierson and Hacker 2010). Private sector union membership in the US is currently 6.9%, the lowest it has been

since the passing of the NLRA in 1935 (See Figure 2). In addition to representing workers in the workplace, a functioning industrial relations system would help to ensure that the share of wages in the economy is at an adequate level and the increased aggregate demand will boost the economic gains for employers and employees.

3.4 Promotes Non-Conflictual Workplaces

Workers naturally have less bargaining power vis-à-vis their employers in the standard employment relationship. Though the employment relationship may always have some adversarial element, a good industrial relations system should enable workers to channel the adversarial relationships into effective cooperation in the workplace. While some would say an ideal labor relations system should solely prevent disruptions in production, it should also facilitate and incentivize cooperative relationships between labor and management that are mutually beneficial to both parties.

Research even suggests that economic gains might not be captured by either labor or management due to adverse social relations within the firm (Ash and Seago 2004; Freeman and Medoff 1984). Significant gains in productivity can be realized from workers making some of the production decisions within the firm. Buchele and Christiansen (1999) assert that earning a higher share of economic gains and strong workers' rights contribute to higher productivity of the economy overall. Instead of labor market regulation and organizations acting solely as a "cost" to firms, they can also provide benefits of productivity growth from a more cooperative and dedicated labor force.

3.5 Promotes Training and Human Capital Development

Training and professional development are costly for firms and there is no guarantee that the individual firm could benefit from training that it funds on its own. Additionally, workers without job security or the possibility of advancement and higher wages typically do not invest in their own training or job specific education, as they may not reap the benefits for higher productivity or continue in the same job. Better and more access to training solve a problem that firms face (shortage of skilled workers) and gives workers a career ladder and job security, creating a mutually beneficial relationship for both parties. Unions have long been criticized as being resistant to labor-saving innovations that threaten their job security. Training to adapt to such changes should reduce such concerns and provide firms with skilled workers adapted to their changing workplace (Buchele and Christiansen 1999).

This positive externality could be more efficiently produced if workers' organizations coordinated training and professional development for their members. A good industrial relations system promotes the development of human capital by encouraging the development of workers' skills beyond their own ability to pay for training themselves. The improved social relations and communications within the firm explains, at least in part some of the productivity gains associated with unionization (Freeman and Medoff 1984; Ash and Seago 2004).

3.6 Adaptability to the Changing Workforce

The current election-based exclusive representation system was built with large corporate employers that negotiate with workers with clear roles as employees in mind.

However, the modern workplace is very different than that of the 1930s. Today, there are few stable employers with large groups of homogeneous workers. It is increasingly difficult for the NLRB to define bargaining units based on “community of interest” as job descriptions and duties have become less standardized. To maintain effective representation and stability for workers, a good industrial relations system should allow labor unions to adapt to new workers and industries and eliminate non-standard employment arrangements (such as independent contractors) that serve only to deny an employee rights.

4 Alternatives for U.S. Labor Law Reform

There have been several major reform proposals to improve the American labor relations system. The systems proposed have elements that are common in other advanced industrial economies. Here, I examine some common proposed reforms derived from popular systems around the world. Allowing a minority of employees to form a union and bargain with the employer, allowing workers to certify a union through the “card check” process, and transitioning to a corporatist bargaining regime are possible reforms to better meet the criteria for a good industrial relations system. The consequences of and opportunities for refraining from reform and letting present trends continue are also considered in this section.

4.1 The Employee Free Choice Act model

In 2007 and again in 2009, labor advocates lobbied Congress to pass a proposed set of reforms called the “Employee Free Choice Act”. The act raises penalties for employers that break the law during organizing campaigns, mandates

binding arbitration for stalled first contract negotiations, and, chiefly, allows workers to organize unions by signing a card or petition in lieu of a certification election. This process, known as “card check”, avoids the problem of management intimidation during union elections and lowers the barriers to unionization. If a union wins the majority support of a group of workers by a petition, the union will exclusively represent all of the workers. Instead of a radical reform, the Employee Free Choice model is a “fix” to the current law that gives employers broad latitude to intimidate or delay workers seeking a union and the power to ignore their representatives without agreeing on a contract.

4.2 Non-Exclusive Unionism

Another proposed alternative is shifting the industrial relations system (majority-rule, exclusive representation) to a non-exclusive model. In a non-exclusive industrial relations system, workers can organize and collectively bargain with their employer regardless of whether their union represents the majority of workers at a company. Union elections under such a system would be superfluous; workers would be able to sign up for whichever organization represented them best, and any subset of workers could form or join a union. Workers are only covered under the collective bargaining agreement if they are members.

Multiple unions could also represent workers in the same workplace should they decide that employees have differing priorities in bargaining or do not believe that they share the same community of interest. Not only would workers have the choice of whether to be represented by a union, but also which union would represent them best.

In New Zealand, where this model is used, unions typically bargain as coalitions with their employer.

4.3 Sectoral Bargaining

Sectoral bargaining is very common in many European countries. The sectoral model would move the locus of bargaining in the American labor relations system from between the firm and a union of its employees to between associations of employers and unions representing all the workers in that industry in the whole country or region. Instead of organizing and representing workers as employees of single firms, unions would organize and represent workers of entire industries, regardless of their employer. Union membership would be optional under a sectoral bargaining system, even though the union would bargain for the entire industry and the same benefits would apply to everyone. However, in some sectoral bargaining systems, benefits such as pensions and insurance are available only to members of the union.

Under a sectoral bargaining system, an election or a majority petition of workers in an entire industry of a region would certify a union for all the workers in a defined industry; the firms of that industry would form an association to bargain with the union, and the government would compel both sides to bargain. While individual employers could harass their employees to not join the union, there would be no material benefit for them to do so since they would still be subject to the contract in the event the union won certification for the sector. The National Labor Relations Board would shift from defining bargaining units in single enterprises to defining appropriate bargaining units in whole regions or industries.

4.4 Allow Current Trends to Continue

Still another option for policymakers is to allow the present trends in American labor relations to continue. Without major reforms there is no real impetus for labor organizing on a large scale; such organizing attempts would still be met with active employer resistance and weak legal protections of workers' rights. Employers' strategic advantage over their employees in union certification elections and bargaining would remain largely unchallenged. Union membership would continue at its pace of slow gradual decline and compensation will continue to stagnate or fall.

Small progressive changes to labor law may occasionally occur from agency rulemaking or state-level policy. The National Labor Relations Board has taken some steps to update their processes within the framework of the NLRA and related laws. However, recently it is more common that states restrict labor rights, such as enacting "right-to-work" laws and restricting public employees' rights. Continuing membership declines would provoke further attempts to weaken labor organizations in the states where unions are most politically vulnerable (Delaney 1998).

5 Comparing the Alternative Models Against the Criteria of a Good Labor Relations System

To fully consider the effectiveness of each of the alternative models, each model's outcomes must be assessed for their performance against the criteria of a good labor relations system. Here, each alternative is measured by each criterion of a good labor relations system.

5.1 Freedom of Association

The Employee Free Choice model is closest to the current system of labor relations and fixes some of the current system's shortcomings. The extreme power differential between employers and employees naturally causes employer coercion during organizing elections (Bronfrenbrenner 1994). 55% of workers even report that the most significant factor in determining how they personally would vote in a union election is the attitude of management (Freeman and Rogers, 2006). The Employee Free Choice model would help close the representation gap by easing the barriers to unionization and allowing those desiring representation to seek it out more easily. However, the law would not change the basic structure of American unions other than lowering the legal barriers to union organizing. This model does better than the current system for guaranteeing the freedom of association, but the weaknesses of the status quo, such as the requirement of majority support or maintenance of membership across employers, are still unaddressed.

Under the non-exclusive representation model, workers would be free to form or join the organization of their choice and their collectively bargained contract would only apply to the members of the union. Other groups of employees could choose to join a different union if they feel that it would better represent them. The non-exclusive model returns to the original spirit of the National Labor Relations Act of 1935. Simply put, workers that wish to self-organize and collectively bargain have the right to do so. This model is liberal in the classic sense—that anyone who would like to join a union could

do so without institutional restriction. Switching to a non-exclusive representation model would substantially reduce the gap between desired and actual union representation.

The sectoral bargaining system provides a different form of “freedom of association” than the other models, but still provides more freedom than a system that obstructs association altogether. Union agreements would expand to cover entire industries, but union membership would be optional. Bargaining between unions and employers organizations within each sector would cover wages, terms, and conditions for all workers and firms within the industry, even those that did not take part in the bargaining process. On one hand, this is a severely negative proposal vis-à-vis the “freedom of association” criterion; however, with a secure position as the agent of representation, workers would not be required to join the union that represents them, similar to the sectoral bargaining systems in many European countries.

The current American labor relations system performs poorly with regards to freedom of association. The current system’s problems with freedom of association are that many workers are denied bargaining rights entirely--low-level managers, agricultural workers, public service workers (in some states), and independent contractors have no right to collectively bargain. Additionally, the enterprise-based, union election system provides employers with the incentive and legal ability to wield their influence over their employees (Brofrenbrenner 1994). This has led to many workers desirous of union membership, as high as 37% by Freeman and Rogers’ 2006 data, yet only 11.9% actually attaining it (BLS, January 2012).

5.2 Limits Free-Riding

The Employee Free Choice model would not limit the free riding by non-members that still exists in the current industrial relations system. All workers within a bargaining unit would be covered by the union contract regardless of membership status. In states with “right-to-work” laws, there would still be many free riders that receive the benefits of the union contract but refuse to become members, effectively forcing members to pay for their representation. With respect to free riding, the Employee Free Choice model performs no better than the current system.

Free riding would be greatly reduced if the benefits of the union contract no longer extended to non-member employees of the same firm under a non-exclusive representation system. If unions could switch to be a “non-exclusive” representative of workers in a firm, they would cease representing non-members. According to Delaney (1993), the majority of these “free riders” would sign up if the benefits of the union contract no longer applied to them by shifting to a non-exclusive system. Some of non-economic benefits gained by the union, such as safer working conditions, are non-excludable and would still benefit non-members.

Sector bargaining often allows for many free riders since all workers and firms in a sector would be subject to the agreement and few would be union members or party to the negotiations (Locke, Kochan, Piore, 1997). Though sectoral bargaining creates a massive “free rider” problem, unions may find it an acceptable trade-off for a more expansive influence on their industry and firms may prefer to standardize wages and take them out of competition. Labor unions could also possibly mitigate free riding by

offering auxiliary membership benefits to attract members, like insurance or discount programs.

Currently, American labor law is based around the concept of exclusive representation. Some workers that do not desire representation (or prefer a different kind of representation) are represented by the organization anyway. A “union security” clause in a typical collective bargaining agreement requires all employees to either become members of the organization or pay a “service fee” for the cost of representation. This may be coercive in one sense, but also disallows the incentive for some workers to gain the benefits of unionization without being members of the union. In “right-to-work states”, however, union security clauses are illegal and therefore allow some workers to receive the benefits of the contract without paying dues, effectively forcing their coworkers to pay for their representation. Free riders in the current system also have the legal right to the same representational procedures as members and can sue the union if they believe it did not fulfill its duty of representation. The current industrial relations system performs poorly with respect to limiting free riding, since workers can be covered under union contracts but refuse to become members.

5.3 Maintains a High Level of Aggregate Demand

The Employee Free Choice model of labor law reform does enhance workers’ bargaining power, allowing labor (in general) to capture a larger share of the gains of increased productivity. With fewer barriers to unionization, the union density of the private sector would undoubtedly rise, and, with it, collective bargaining agreements with better compensation. Godard (2003) asserts that if the United States had always

certified unions with “card check”, then the union density rate would be 12.2 percentage points higher than the current rate or slightly more than double the current density. This model would increase worker bargaining power in the short-run, but would perhaps deteriorate in the long run as the workplaces with majority support for unions became unionized.

The non-exclusive model increases worker bargaining power substantially by raising union density and removing obstacles to unionization for the low wage contingent workforce. This model allows a more strategic approach to organizing since workers could first organize in essential departments of the firm and recruit the most active members instead of building majority support in a defined bargaining unit, which may include neither the most active or strategically positioned members. This flexibility would allow employees of the country’s biggest low-wage employers to organize rapidly and negotiate as one union instead of holding elections and bargaining in thousands of independent bargaining units with large numbers of casual or part-time employees. Unionization for low wage workers could substantially raise their living standards and thereby increase their demand for goods and services.

Collectively bargaining at a supra-enterprise level would give workers a more powerful bargaining position than bargaining at the individual firm level since individual firms would be more influenced by the labor market rather than setting the terms of the market (Locke, Kochan, Piore 1997; Calmfors and Driffill 1988). Bargaining for a larger share of the profits taken from their labor and squeezing the distribution of wages are common elements of more centralized bargaining regimes as well (Finkin 1993; Buchele

and Christiansen 1999). Sectoral bargaining performs the best under this criterion since it provides unions with the “market power” of negotiating for an entire industrial sector. Additionally, firms and unions could seek national consensus agreements to maintain high levels of employment and human capital formation through their bargaining (Buchele and Christiansen 1999; Calmfors and Driffill 1988, Cobble 1994).

Allowing present trends to continue would not assuage the decline of union membership or the weakening of labor’s bargaining power. The trend of stagnating real wages and their separation from productivity growth will continue (See Figure 1). Without organizational support for workers’ bargaining power, the economy will continue to be profit-led, leading to further downward pressure on workers’ wages. Though the decline of union membership may not be entirely to blame for the separation of wages and productivity, the decline of labor’s bargaining power in the past few decades is evident and there is no sign bargaining power will increase for workers without the kind of significant policy intervention that took from them in the first place (Hacker and Pierson 2010, Glyn 2007). In light of this, the present trend performs the worst for maintaining aggregate demand.

5.4 Promotes Non-Conflictual Workplaces

Though the Employee Free Choice model allows an easier path to organizing a union and compels companies to reach an agreement with a new union, it changes little else to encourage the cooperation between labor and management. The reform could even result in a more antagonistic and legalist approach to labor relations. Companies may even conduct constant campaigns against their employees to coerce them not to

sign authorization cards. Such adversarial, legalist policies discourage participation by workers themselves and leave much of the decision making in the hands of union and company lawyers (Schatzki 1975). The prospect of constant anti-union campaigns from employers makes this model less desirable under the 'Non-Adversarial Workplace' criterion.

The non-exclusive model promotes labor-management cooperation well in comparison to the other models. Since workers could join the union of their choice and workers typically prefer a less conflictual workplace, the largest unions would most likely be the union that is best at faithful representation and workplace problem solving (Schatzki 1975; Finkin 1993; Summers 1998). Additionally, since most employers would be required to collectively bargain with a union representing at least some of their employees, bargaining regimes would develop to facilitate mutual gains across entire sectors or regions (Cobble 1994).

In the centralized bargaining between employers and unions, both parties typically acquire some of the responsibility for the performance of the labor market overall. Though collective bargaining is naturally an adversarial process, in sectoral systems both sides seek to leverage mutual gains of the relationship and direct the development of labor relations within an entire industry. Broad cooperation between labor and management provides mutual gains that translate into higher wages and more productive workforces and standardized wages for employers. Buchele and Christiansen (1999) referred to this as the gains of harmonious social relations of production.

Though cooperation between labor and management under the current system occurs at the firm level, the atomized, adversarial labor relations system does not provide an effective mechanism for building industry wide agreements or encouraging consensus. The current industrial relations system emphasizes the adversarial nature of collective bargaining and union organizing without providing conduits for broad cooperation (Freeman and Rogers 2006). Battles between employers and their workers are often fought in court. Taking workplace conflict off the shop floor and into court is a very legalist and expensive path to workplace problem solving and takes the decision making power away from the workers and managers who live with the decisions (Schatzki 1975).

5.5 Promotion of Training and Human Capital Formation

Since the Employee Free Choice model would increase union density overall, the present system of union apprenticeship and training programs would expand beyond the traditionally craft union sectors where they exist today. However, these programs may only develop in similar industries where they exist now as traditional unions expand in their core industries. In sectors with firms that would still be difficult to build majority support, especially the low-wage service sector, broad labor-management sponsored would still face the same disincentives to develop as they do under the current system. Unfortunately, workers in such sectors would benefit the most from training programs. The Employee Free Choice model does better than the current system with regards to training and human capital development since current programs are likely to expand,

but they would still leave many workers with less-than-adequate opportunities for training.

Since individual workers could decide on joining a union in the non-exclusive system, it is likely that unions would develop professional development and training programs independently to attract members (Schatzki 1975; Freeman and Rogers 2006). Surveys have shown non-union workers typically want more control over training decisions than they have (Freeman and Rogers 2006), and by signing up for membership they could access union sponsored training programs. Labor unions in a non-exclusive system could provide the coordination to match the need for job training with career ladders within the firm, similar to craft and building trades unions today. This model performs very well with regards to training and human capital development since all employees, regardless of the majority support of their coworkers, could have access to training and unions would have incentives to provide training to attract members.

Sectoral bargaining centralizes the decision-making regarding training. In countries that adopted the sectoral bargaining model, unions and employers' associations bargain for terms and conditions that affect the whole industry. These sectoral negotiations usually involve support for training, such as Germany's high quality apprenticeship programs (Summers 1998; Buchele and Christiansen 1999). Agreements regarding training enhance both worker productivity and compensation, leading to a more productive workforce for the firms and better wages and job security for employees. Since all employers and workers are covered by the agreement, there is no problem with a firm or union funding a positive externality from which they do not

receive the benefits. Though this model does very well under the “Training and Professional Development” criterion. However, human capital formation may still be lacking if unions and employers do not emphasize it in their sector wide agreements.

In the current system, sectors with high union density and secure bargaining position of workers (usually skilled craftsmen), strong apprenticeship and training programs have developed. These training programs are not as common outside the construction sector and when they do develop they do so with substantial government support. Without assurance that training programs would continue to benefit the individual firms that pay for them or the program participants continuing membership in the union, these programs are undersupplied outside of a few sectors and regions. With respect to training and human capital formation, the current system provides little incentive for unions and firms to invest in training for workers, and leaves much of the responsibility for funding human capital formation to the individual worker.

5.6 Adaptability to a Changing Workforce

The “Employee Free Choice Act” model is an adaptation of a model meant for the post-war industrial era of American labor relations; it relies on stable workforces with well-defined roles in easily definable bargaining units. When taken into the context of an increasingly casualized workforce, the Employee Free Choice model does not look like a robust solution to adapting labor relations to the modern economy. Even if organizing unions were easier, companies could circumvent union agreements by employing contingent workers and independent contractors. With this in mind, the Employee Free Choice model is barely a marginal improvement over the current system.

A non-exclusive system would not separate the individual member from their position within the firm, allowing labor organizations to better adapt to a changing economy. Regardless of the merger, sale, or restructuring of a firm, the workers would be represented as groups of individuals and not as a “bargaining unit” leaving union representation unaffected by changes in the employers’ corporate structure (Schatzki 1975). Contingent employees could also be included in unions for the purposes of representation. Instead of undermining worker organizations due to their contingent position, contingent workers would have the same rights as regular employees.

Sectoral bargaining allows for large groups of workers in industries with many small employers and low wages (such as the service sector) access to an efficient and feasible collective bargaining regime. The National Labor Relations Board could transition from defining bargaining units from within a firm to defining the sectors and regions in which unions seek recognition. By emphasizing the representation of workers in their industry and the economy, sectoral bargaining could provide at least part of the solution to two of the major problems of advanced, post-industrial economies, the separation of wages and productivity and the growth in income inequality (Hacker and Pierson 2010; Glyn 2007; Buchele and Christiansen 1999).

The present nature of the U.S.’s post-industrial economy makes organizing and collective bargaining unnecessarily difficult for many groups of workers. Firms can petition to exclude certain members of the bargaining unit, hire independent contractors, and restructure to avoid the influence of their own employees’ organizations, and they frequently do so to reduce the influence of the employee over the employer. Many

workers in low-wage, contingent, and high turnover jobs are virtually unrepresented by labor unions due to their weak bargaining position and a multitude of employers. Additionally, this already large sector is a growing share of the workforce¹ (Bureau of Labor Statistics 2010).

6 Selection: Non-Exclusive Representation

After analysis of the probable outcomes of the alternative models against the criteria, non-exclusive representation performs the best generally over the other alternative models. Ranking each model on a 1-4, worst performing to best performing scale produces this decision matrix, with the highest score being the best performing:

<u>Alternatives</u>	<u>Employee Free Choice Model</u>	<u>Non-Exclusive Model</u>	<u>Sectoral Bargaining Model</u>	<u>Let Present Trends Continue</u>
Freedom of Association	2	4	3	1
Limits Free-Riding	3	4	1	2
Maintains High Level of Aggregate Demand	2	3	4	1
Promotes Non-Conflictual Workplaces	1	3	4	2
Promotes Training and Human Capital Formation	2	4	3	1
Adaptability to the Changing Workforce	2	4	3	1
Total Rankings:	12	22	18	8

From this matrix, the Employee Free Choice model performs slightly better than letting present trends continue, however sectoral bargaining and non-exclusive representation

¹ <http://www.bls.gov/news.release/ecopro.t03.htm>

are clearly the better reforms. Non-exclusivity performs better than sectoral bargaining primarily because it 'limits free riding'. Though in a sectoral bargaining system, free riding may be less of a concern if it did not impede collective action.

Returning to the "members-only" union model that existed in the early days of the American labor movement would improve the American labor relations system in three notable ways. First, workers could organize unions and bargain with fewer institutional barriers, resulting in higher union density and increased worker bargaining power. Second, only the union members would be subject to its contract, allowing groups of workers to self-organize to negotiate for their preference of benefits and excluding those who do not wish to collectively bargain. Third, this model would more easily adapt to the changing American workplace and encourage the adaptation of industry-wide bargaining structures that could raise benefits for all workers. Lastly, the polarized political climate makes substantial labor law reform unlikely in the near future; allowing "members-only" unions would have appealing characteristics for policymakers on the right and left, making its adoption the most feasible of labor law reforms.

The strengths of the non-exclusive model rest primarily on its maximization of the freedom of association. This aspect increases union membership and lowers the barriers to collective bargaining for workers in largely non-union industries and firms that are more difficult to organize. The non-exclusive model would also effectively make the distinction between "union firms" and "non-union firms" irrelevant as most firms would bargain with labor organizations and would incentivize employers to seek multi-employer or sector wide agreements with some of the similarities of the sectoral

bargaining model (Cobble 1994). Such multi-employer agreements would be particularly important for low wage service sector workers who work for many small employers. Examples of this organizing model can already be seen in the Justice for Janitors campaign and the waitress unions from the 1930's to the 1960's (Cobble 1991). This model would also make organizing campaigns for part-time workers at large national firms more possible since online organizing and national agreements would eliminate the strategic problems of building majority support at thousands of individual worksites (Morris 2005).

The major tradeoffs associated with minority unionism are the difficulty of bargaining for employers, the difficulty of maintaining solidarity during strike actions, and the likelihood of termination for union activists. The cost of bargaining could be substantial if dozens of different organizations represented only a few employees each; however, such a case is an extreme example. In countries that operate with multi-union bargaining, unions can bargain in coalitions and most labor contracts contain similar terms across unions (Schatzki 1975). The institution of exclusivity may seem to promote solidarity amongst employees, but in practice the same problems of collective action remain unchanged. Members of different unions could still strike together, but would not be under obligation to do so. It can also be safely assumed that the workers that do not honor the strikers' picket line probably would not do so under any labor relations system (Summers 1998). As for the termination of union activists, it is not clear that any industrial relations system independent of other substantial reforms would be an improvement over the

Without the institution of exclusive representation, labor organizations may also compete against each other unnecessarily to gain members, or employers may discriminate against union members for promotion and hiring. However, this has not been the case in New Zealand, which moved from a sectoral bargaining system to a non-exclusive enterprise bargaining system. Surveys of union leadership contend that competition between labor organizations has been minimal since adopting the non-exclusive system (Harcourt and Lam 2011).

It is recommended that the National Labor Relations Board recognize minority unions as legitimate entities with which employers have a duty to bargain in the absence of a majority union. Instead of removing exclusive representation entirely, minority unionism should be a parallel path for representation when the majority of a firm's employees do not favor unionization. If the majority chooses to act as the exclusive representative, that option could still be available as it is currently. Further reforms to the labor relations system should include a more effective legal framework for sector-wide or multiple employer collective bargaining agreements and enforceable neutrality of employers regarding union organizing.

7 How many workers would join unions if majority status were no longer a barrier?

Even the transition to a hybrid, minority union system would present an opportunity for millions of American workers to form unions. Though the majority of American workers may still choose not to unionize, the higher union density would still increase bargaining power amongst all workers. Though it is difficult to surmise the effect of changes to the American industrial relations system, a “back-of-the-envelope”

estimate of the number of new members that would join unions illustrates the importance of reforming the current industrial relations system and the gap between desired and actual representation. This is a very conservative estimate of the workers likely to join or form unions and is approximate to estimates by Harcourt and Lam (2010) and Freeman and Rogers (2006).

The most recent opinion poll with a “Very Favorable” response option was from Pew in March of 2011². Of all non-union households, 14% said they held “Very Favorable” view of labor unions. Multiplied by the total “non-union” workforce of 110,824,000 (BLS, March 2012)³ is a group of 15,515,360 unrepresented workers that would be likely to join a union. It should be noted that this question asked the respondent’s opinion of labor unions, not whether they would become a member or if they were exempt as management employees or unemployed.

This is a conservative estimate because it includes only the number of non-union workers who have a “Very favorable” opinion of labor unions and are most likely to join a union by signing up for *membership* and does not include workers with only a ‘favorable’ opinion of unions. This estimate of 15,515,360 workers who would potentially join unions is more (a nearly 100% increase) than Harcourt and Lam’s (2010) estimate the numbers of union members in the United States to be 30 to 50 percent higher if the U.S. switched to a non-exclusive representation system or achieving a 16 to 18 percent union density. However, Harcourt and Lam believed their estimate to be conservative since they based it on the counterfactual estimate of New Zealand moving to an

² <http://www.people-press.org/2011/03/03/section-4-opinions-of-labor-unions/>

³ <ftp://ftp.bls.gov/pub/suppl/empstat/ceseeb1.txt>

exclusive representation system. My estimate is still less (25.8% union density) than Freeman and Rogers (2006) estimate of a 44% union density if all workers were able to freely unionize. Freeman and Rogers (2006) also used their own polling data for their estimate, but included respondents that were less enthusiastic regarding their support for unionization. Though these estimates vary greatly, all three illustrate the severe lack of employee representation and a potential opportunity for unions to organize millions of new members if this policy problem were addressed.

8 Political Obstacles and Opportunities

The enforceable duty to recognize and bargain with minority unions may be one of the few politically feasible labor policy interventions given the polarized political climate. This reform has the benefit of being recognized unambiguously by law already—no legislation would be necessary to return to the recognition and bargaining with unions on a “members-only, non-majority union”. In fact, it is only by conventional wisdom and legal tradition that exclusive representation became the emphasized section of the Wagner Act and members-only representation disappeared. A court decision or rule made by the National Labor Relations Board (NLRB) could effectively return minority unions to their protected and legal status as bargaining agents without the need for legislative action from Congress (Morris 2005; Finkin 2001; Freeman and Rogers 2006; Schatzki 1975). Furthermore, the Supreme Court has upheld the power of the NLRB “adopt rules restricting conduct that threatens to destroy the collective-bargaining relationship or that may impair employees’ right to engage in concerted activity.” (NLRB v. Curtin Matheson 1990).

In 2006, a group of workers at a Dick's Sporting Goods warehouse created a "workers' council" to represent the interests of its members as employees of Dick's Sporting Goods. The council was affiliated with the United Steelworkers, drafted a constitution, and collected dues from its members. Though neither the workers council nor Dick's Sporting Goods claimed the council represented the majority of workers of the warehouse, the council filed charges for the company's refusal to bargain with it on a members-only basis. An advice memo to the NLRB from its Associate General Counsel recommended that the board deny the council's charge that the employer refused its duty to bargain (NLRB 2006⁴).

If it had ordered the employer to bargain with the minority union based on a plain reading of Sections 7 and 8(a)5, then minority unions official status could have been legally recognized by the board, most likely occurring with a rule regarding the legal standing of minority unions. Unfortunately, the NLRB did not recognize the workers council at Dick's Sporting Goods and found the employer had no duty to bargain with them in good faith. The workers did, however, maintain their rights to self-organize and their activity was protected under Section 7 of the NLRA. They could request to meet with management or hold meetings to discuss organizing, but management was free to lawfully ignore them.

In the 2006 Dick's Sporting Goods case, the NLRB's Associate General Counsel conceded that the intent of the law regarding minority unions was that they should be recognized and protected, but the protection ceased short of ordering the employer to

⁴ NLRB Case Number - 6-CA-34821

bargain with them(NLRB Advice Memo 2006). Using Morris's The Blue Eagle at Work, NLRB counsel cited the Wagner Act's legislative history and rejected versions of Section 8(a)5 of the NLRA during the bills drafting. The committee rejected the phrasing that would make it illegal for an employer to: "...refuse to bargain collectively with employees through their chosen representative, *chosen as provided in section 9(a)*" Sec. 9(a) describes the process for recognition of a majority representative. The Counsel interpreted the spirit of the law to protect organizing activity and duty to collectively bargain as entirely separable.

The law's draft committee approved the language as follows: "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)" (NLRA Sec. 8(a)5). The final version of the act only included provisions that certified a majority representative precluded bargaining with a minority union, but did not bar minority representation entirely (Morris 2005). NLRB Counsel provided statements from the Senate drafting committee, House drafting committee, and the bill's sponsor Senator Robert Wagner specifically in support of majority-rule exclusivity in labor relations. But however unsupportive of non-exclusivity the drafters may have been, they did not specifically bar minority union representation by law or in practice in the absence of a majority union. In light of the NLRA's language that grants the right to workers to self-organize (Section 7) and the lack of a provision specifically barring collective bargaining with a members-only, minority union, minority unions are legal entities but lack official recognition from the NLRB.

The path toward legal status for collective bargaining for minority unions could be through regulatory channels (the NLRB), through legislation, or through litigation. Given the great difficulty of passing any legislation through Congress, it is unrealistic to expect any significant favorable reform through this strategy. According to Morris (2005), the NLRA already recognizes the right of minority unions to collectively bargain, but conventional wisdom has held that majority support is a prerequisite for a bargaining relationship. Unions or workers rights advocates could bring a case to the NLRB or court for a decision on the duty to bargain with minority unions. The Dick's Sporting Goods case is an excellent example to build the case for minority unionism recognized by the NLRB. The NLRB is currently composed of members with a more expansive view of the protections of the NLRA, than its members during the Bush Administration making the regulatory reform approach much more appropriate and realistic (Morris 2005; Hiatt and Becker 2005).

Though unions could potentially feel threatened by the prospect of constant internal organizing to maintain membership or rival unions raiding their membership, unions as institutions have generally been supportive of minority unions' rights. The United Steelworkers and six allied unions (IBEW, UE, UAW, IAM, CNA and CWA) petitioned the NLRB to rule in favor of bargaining rights for minority unions in the Dick's Sporting Goods case. The number of potential new members that could organize indicated by surveys, including the estimate in this analysis, would represent a great opportunity for labor to regain relevance in the economy. Minority unionism may also be

the most effective route to organize large national firms were majority support would be unlikely in a traditional organizing drive.

Though the business community is always cold toward labor policy reforms that could potentially enhance the bargaining power of their employees or threaten their firms' "management rights" (Lichtenstein 2002; Finkin 2001; Locke, Kochan, Piore 1997), conservative policy makers sympathetic to management concerns would find difficulty attacking an NLRB ruling recognizing minority unions. Members-only unions cannot compel membership as a condition of employment--eliminating the concern that workers are "forced" to join unions. Nor could detractors claim that workers are unwillingly supporting political causes with their dues money, since all would have joined individually. The demand for a secret ballot election would be made superfluous, since the union would only represent its members. Moreover, non-exclusivity in labor representation should be an issue championed by conservatives, it represents a very classical notion of individual choice (Schatzki 1975). To pitch this reform a different way—minority unionism "deregulates" barriers to union representation.

8 Conclusion and Recommendations for Further Research

A ruling from the National Labor Relations Board to recognize minority unions as official representatives of their members for the purposes of collective bargaining would close the representation gap greatly and help to reverse the decades-long decline in union density. This policy would contribute to giving workers a more effective voice in their workplace and in the economy. Furthermore, this rule may be the most progressive labor policy reform that could occur in the current political climate.

Further reforms would still be needed to protect workers' free choice to organize unions and collectively bargain. Some less-than-ethical employers will attempt to discourage their employees from collective bargaining through termination and coercion under any system. Recognizing members-only, non-majority unions frames the debate as labor organizing as an individual's right, not only as a pursuit of individual interest to improve compensation. These reforms should be built around the framework that employees are denied the practicality of exercising their rights given our restrictive labor laws, and that creating institutional pathways for greater employee voice builds a stronger more just economy.

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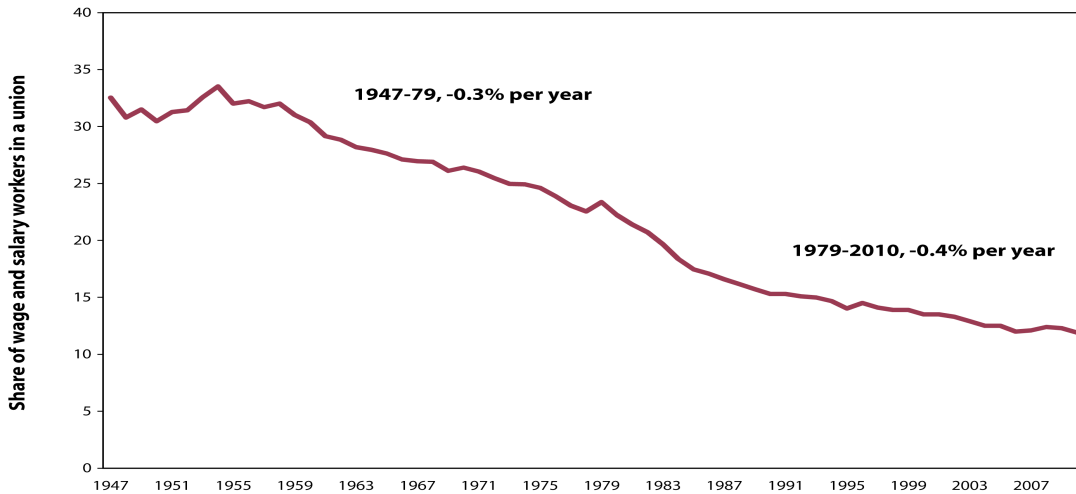
Figure 1



Reich, Robert. "The Limping Middle Class" The New York Times. September 4, 2011.

Figure 2

Unionization declines slowly and then more quickly:
 Union membership, 1947-2010



Source: John DiNardo, "The Causal Effect of Labor Unions in the U.S. Context." Powerpoint presentation.