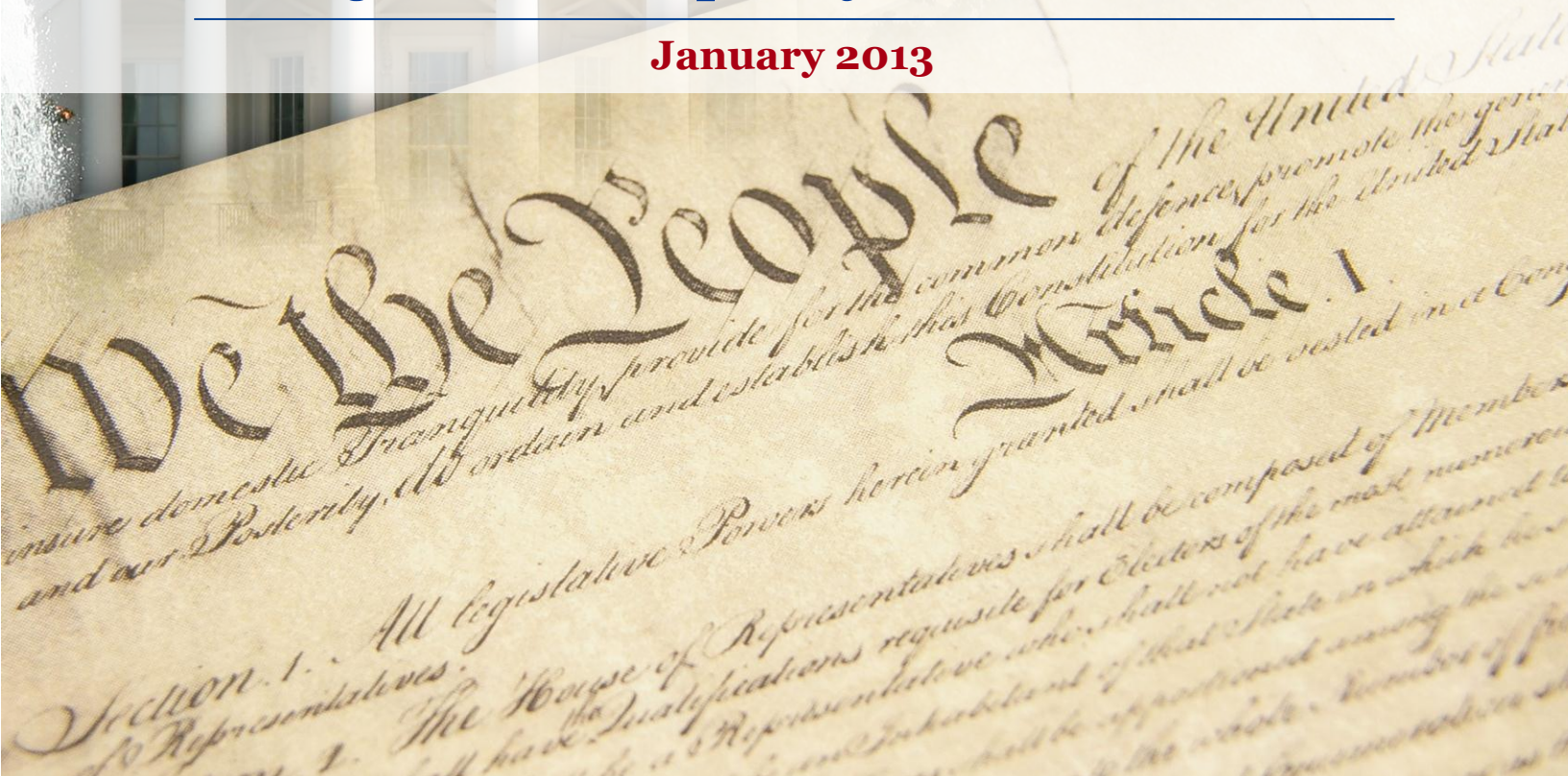




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Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

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**“We Are in this Together: The Rule of Law, the Commerce Clause,
and the Enhancement of Liberty Through Mutual Aid”**

by Anne Marie Lofaso

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

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We Are in this Together: The Rule of Law, the Commerce Clause, and the Enhancement of Liberty Through Mutual Aid

*Anne Marie Lofaso**

One of the themes of the 2012 Presidential election campaign was put as a choice to American citizens: Are we all in this together or are you on your own?¹ This stark contrast reminded me of something that constitutional law professor, the late C. Edwin Baker, lectured on back in 1988. Professor Baker explained to students in our first-year constitutional law class that much disagreement over twentieth-century interpretations of the Commerce Clause can be put as a choice between two conflicting world views: the belief that an individual's political, economic, and social choices affect others, and the belief that people are atomistic, and therefore, that their choices have no effect on others.

Those two philosophies—one viewing individuals in a society as dependent upon one another and the other viewing individuals as independent of one another—are distinct and distinctly American. These philosophies also correlate to historical policy eras: The former view underlies the New Deal (1935-present); the latter view was dominant in the *Lochner*² period (1905-1935). The competing viewpoints rage on today, and provide the context for this Issue Brief, and its policy recommendations.

As background, Congress enacted the National Labor Relations Act³ (NLRA or Act) as part of the New Deal. The NLRA, at its core, protects from employer coercion and discrimination the right of individual employees to come together for the purposes of collective bargaining and mutual aid or protection.⁴ The Supreme Court has characterized these rights as “fundamental.”⁵

The NLRA, at its core, also rejects the *Lochnerian* view of society that arrogates freedom of contract to a constitutionally cognizable liberty interest. It has been shown over and over again that freedom of contract is illusory for most workers, who in reality

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¹ Former President Bill Clinton, Address to the 2012 Democratic National Convention (Sep. 5, 2012), available at http://articles.nydailynews.com/2012-09-06/news/33623274_1_democratic-party-jobs-equal-opportunity.

² *Lochner v. N.Y.*, 198 U.S. 45 (1905).

³ 29 U.S.C. §§ 151 *et seq.* (2006).

⁴ 29 U.S.C. §§ 157, 158 (2006).

⁵ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

have limited bargaining leverage. Bargaining inequality between workers and employers means that the economically more powerful party—typically the employer—has greater leverage to obtain the better deal.⁶ During times of high unemployment rates, workers in particular are disadvantaged because there are more unemployed workers than jobs available. Additionally, the lesser skilled the worker, the more fungible the worker is and the less bargaining-leverage that worker holds because of the many other individuals who can perform unskilled labor. In other words, unskilled workers have many more substitutes than highly skilled workers. Whether or not one views this reality as a significant disadvantage, it must be acknowledged that state law amplifies these starting points by favoring the privileged position that employers hold.⁷ In states where the default rule is at-will employment,⁸ the law further privileges the employer by forcing workers to bargain to obtain job security. If employers even agree to bargain at all, workers would have to bargain away something—perhaps wages—to gain job security. Ultimately, Congress, via the NLRA, chose to chip away at the economically and legally privileged position that employers hold in the United States.

For the NLRA to be enacted and found constitutional, a majority of decision makers, such as the President, Congress, and ultimately the Supreme Court Justices, had to be convinced that the federal government *could* and *should* regulate labor relations. The “could” part of the equation was accomplished by the authority vested in Congress under the Commerce Clause.⁹ NLRA Section 1 presents several congressional findings intended to convince Supreme Court Justices that federal regulation of labor relations amounted to regulation of interstate commerce and thus, is constitutional.¹⁰ These findings focused on the extent to which denying workers the right to organize and refusing to bargain collectively with their employees’ representatives results in various forms of industrial strife, which in itself has the undesirable “effect of burdening or obstructing commerce.”¹¹

The “should” part of the equation was accomplished in three steps. First, Congress used the same findings that demonstrated that Congress had authority to act

⁶ See Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472, 496-97 (1980) (arguing that it is wrong to think of money . . . as anything other than a transactional advantage, an advantage which gives its possessor a leg up in the exchange process. Money enables an individual to acquire other transactional advantages (for example, superior information), to withstand pressures that might otherwise force him to make agreements on less favorable terms, to outbid competitors, etc.; other things equal, the more money an individual has, the better he is likely to do in his transactions with other persons.”).

⁷ See generally C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980) (giving a particularly clear and persuasive argument as to how starting points matter).

⁸ In the United States, every state except for Montana is an at-will state. See Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights To Job Security in a Collective System*, 14 EMPLOYEE RIGHTS & EMPLOYMENT POLICY J. 101 (2010).

⁹ U.S. CONST., art. I, § 8, cl. 3.

¹⁰ 29 U.S.C. § 151 (2006).

¹¹ *Id.*

also to show that it should act: when employers obstruct workers' rights to organize and refuse to bargain collectively with their employees, industrial strife results, which among other things "impair[s] the efficiency, safety, or operation of the instrumentalities of commerce."¹² Second, Congress posited that protecting the collective-labor market was akin to implementing a free-market solution to the free-market problem posited by collectivized capital¹³:

“...the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”¹⁴

Third, labor advocates had to convince at least some that, regardless of the economic consequences, allowing workers to band together for mutual aid or protection was a human rights issue. Whereas employers and neo-classical economists may have viewed individual workers as factors of production, labor advocates reminded us that workers are also human who, unlike machinery, land, and other factors of production, possess rights based in human autonomy and dignity.¹⁵

One additional rationale for maintaining the NLRA, and for protecting unions in particular, has become clearer years after that statute's enactment. The rise and fall of union fortunes seems to correlate heavily with the rise and fall of the middle class. The graph below depicts this relationship; whereas a strong union presence tends to correlate with a vibrant middle class, declining union membership has strongly correlated with growth in income inequality¹⁶:

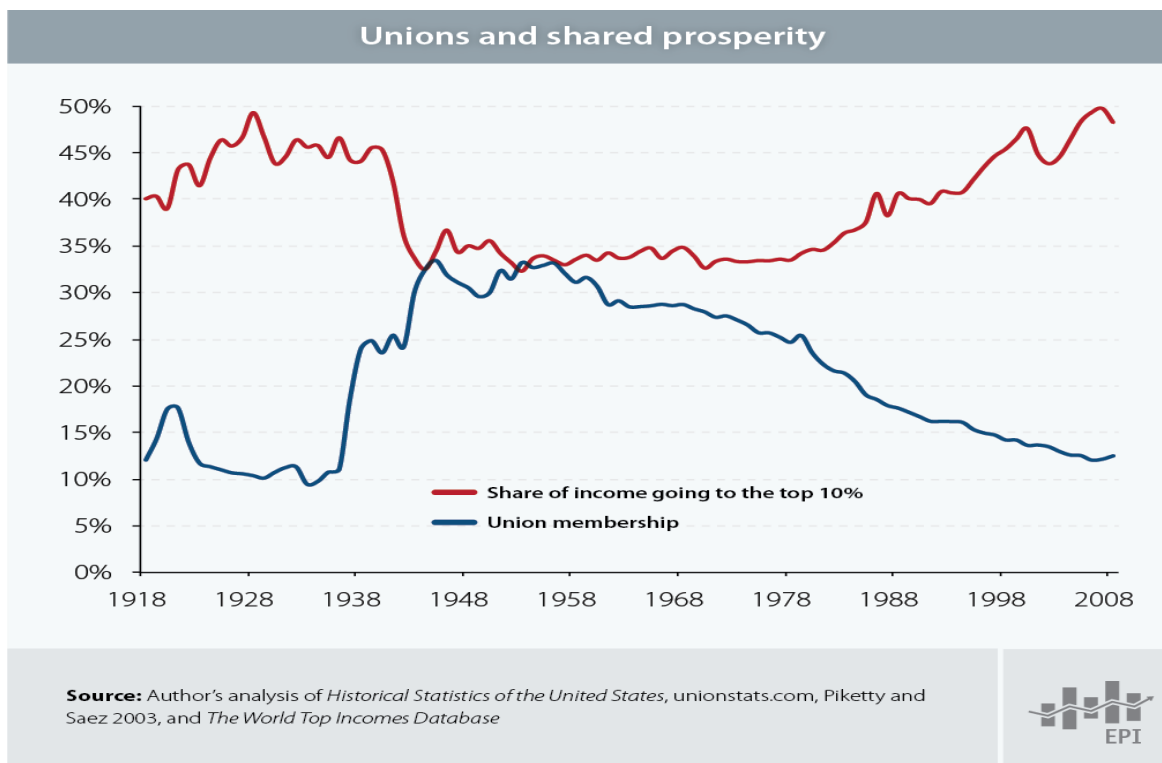
¹² *Id.*

¹³ Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights To Job Security in a Collective System*, 14 EMPLOYEE RIGHTS & EMPLOYMENT POLICY J. 101, 108 (citing Professor Clyde Summers's interpretation of NLRA Section 1) (2010).

¹⁴ 29 U.S.C. § 151 (2006).

¹⁵ See Anne Marie Lofaso, *Workers' Rights as Human Rights: Regaining Autonomy and Human Dignity at the U.S. Workplace*, work in progress on file with the author; see also *Jones & Laughlin*, 301 U.S. 1 (1937).

¹⁶ ROSS EISENBREY & COLIN GORDON, AS UNIONS DECLINE, INEQUALITY RISES, ECONOMIC POLICY INSTITUTE (June 6, 2012), available at <http://www.epi.org/publication/unions-decline-inequality-rises/>.



This result makes intuitive sense. A central purpose of protecting concerted activity is to strengthen the bargaining power of the working class. The effect of more balanced bargaining between labor and management gives workers the opportunity to capture some of those business profits.

Moreover, contrary to the views of former National Labor Relations Board (Board or NLRB) Member Peter Schaumber and other like-minded decision makers,¹⁷ these

¹⁷ For example, in a series of cases leading up to the Board's reversal of *Dana Corp.*, Member Schaumber repeatedly arrogated the Section 7 rights of a minority of workers who wished to refrain from union organizing over the Section 7 rights of the majority of workers who wished to engage in collective bargaining. Compare *UGL-UNICCO Serv. Co.*, 355 N.L.R.B. No. 155 (2010) with *Dana Corp.*, 351 N.L.R.B. 434 (2007) (requiring a non-remedial notice posting, informing workers that they have the right to file a decertification petition for the first 45 days following an employer's voluntary recognition of a majority union, notwithstanding authorization of that bargaining agent by a majority of the workers) and *UGL-UNICCO Service Co.*, 355 N.L.R.B. No. 155 (2010) (Member Schaumber, dissenting). That interpretation of the Act—that the Board must ensure that the Section 7 right to refrain is unimpaired even at the expense of the Section 7 rights of those to organize because Taft-Hartley granted employees the Section 7 right to refrain—is unreasonable because it violates long-standing principles of workplace democracy. See generally Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, AM. CONST. SOC'Y (Issue Brief, May 14, 2008), <http://secure.acslaw.org/files/ACS%20September%20Massacre.pdf>.

fundamental viewpoints did not change with the subsequent Taft-Hartley amendments to the NLRA.¹⁸ Pursuant to those amendments to the NLRA, Congress granted employees the additional Section 7 right to refrain from engaging in concerted activities including union organizing.¹⁹ While many of the opposing view, such as Member Schaumber, argued differently, that newly minted right did not include the right of refraining individuals to interfere with the rights of other workers to engage in collective action.²⁰

This conflict of views and philosophies remains relevant today. Rather than abiding by the rule of law and enforcing the NLRA and other democratically enacted laws that protect the rights of workers to engage in concerted activities, those who personally oppose those laws have simply tried to neutralize them. This strategy is antithetical to our democratic way of life. If the American people no longer wish to protect workers' rights to band together for the purposes of collective bargaining and mutual aid or protection, then Congress should respond by repealing those laws. Instead, opponents of the NLRA, realizing that they do not have majority support for that move, have reverted to the type of power moves unworthy of our democracy.

With this complex setting in mind, this Issue Brief advances ways to strengthen traditional labor laws to bring us more in line with the New Deal way of thinking that has been reaffirmed in the most recent presidential election. To be sure, those who do not ascribe to a more collaborative, less individualistic, world view are sure to balk at these ideas. But their obstinance will be grounded in ideological adversity to the majority will—an obstinance that has led some to break the rule of law rather than change it in the manner we the people have chosen to ensure majority rule. Part I of this Brief discusses proposals to the President and the Executive. Part II discusses proposals for the NLRB. Part III provides guidance for Congress. While this Issue Brief is organized to provide proposals to the various branches of government and the administrative agencies, it acknowledges that the lines inevitably blur in the policy-making arena because of the interdependency of the entities involved.

I. Messages to the President

A. Budget Cuts Are Tantamount To Circumventing the Law

One of the most pernicious ways Congress has historically acted to circumvent the rule of law is by failing to fund the administrative agencies charged with enforcing

¹⁸ Act of June 23, 1947, Pub. L. 80-101, 61 Stat. 136.

¹⁹ 29 U.S.C. § 157 (1947).

²⁰ Indeed, there has never existed an affirmative worker right to interfere with a co-worker's collective action. And it remains to this day an unfair labor practice by definition for an employer to encourage refraining employees to interfere with their co-workers' collective actions. This is because such action has the obvious effects of both broadly discouraging Section 7 rights and also of inhibiting employees in the exercise of their Section 7 rights. *See* 29 U.S.C. §§ 158(a)(3) and (1) (2006).

the law.²¹ This is especially so, now that there naturally will be cuts on the table to deal with budget deficits. Operating costs for administrative agencies are only a tiny portion of the budget as compared with defense spending, social security, and Medicaid/Medicare; it is therefore a small price to pay for ensuring a fully functioning democracy.

Perhaps lemonade can be made from these recessionary lemons. The administration should consider putting forward legislation to authorize back pay in cases where courts have refused to order such an award because those discriminated against are otherwise not entitled to it because of their undocumented status.²²

Specifically, this recommendation would serve as a productive response to *Hoffman Plastics Compounds, Inc. v. NLRB*, where the Supreme Court held that the Board lacked authority to award back pay to undocumented workers who were not legally authorized to work in the United States.²³ The Court's decision, which flies in the face of a united front put forward by the NLRB, the Department of Justice, the Department of Labor, the Immigration and Naturalization Service, and several employer groups including the U.S.-Mexico Chamber of Commerce, has had the undesirable effect of encouraging employers to compound their unlawful behavior—employing undocumented workers—with more unlawful conduct—discharging those workers for exercising their right to organize.²⁴

The administration should suggest legislation authorizing back pay in these cases. The Board could collect the back pay and rather than distributing it to the undocumented workers, it could distribute the award to the general treasury minus an administrative fee, which would go toward paying agency expenses. In cases where the Board finds that the employer knowingly hired undocumented workers, the amendment could authorize treble damages, which could be used for funding nonmilitary, discretionary expenses.

²¹ For example, in 1994, when House Republicans controlled appropriations for the first time in 50 years, they engaged in a strategy of cutting budgets and inserting legislative riders into spending bills that had the result of cutting programs or slowing down regulation. See Matthew M. Bodah, *Congressional Influence on Labor Policy: How Congress Has Influenced Outcomes Without Changing the Law*, 50 LAB. LAW. J. 223 (1999) (explaining this phenomenon); see also Harry Bernstein, *Head of Labor Board Looks Back: William B. Gould, Ending Four-Year Term, Says Goal Was To Maintain Neutrality*, L.A. TIMES, Sep. 8, 1998, available at 1998 WLNR 193160 (reporting on interview with former NLRB Chairman Gould who claimed that increased polarization between labor and management “has created an environment in which board members are sometimes intimidated by fear of losing funding for the agency if they offend some members of Congress by writing a ‘wrong’ decision.”).

²² See *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002) (holding that the Board's authority to award backpay to workers who are discriminated against under the NLRA does not extend to making such awards to undocumented workers).

²³ 535 U.S. 137 (2002).

²⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

B. Appoint Competent Officials Who Know the Law and Will Enforce the Law

There is perhaps no more core value underlying the President’s “executive Power”²⁵ than his duty to “take Care that the Laws be faithfully executed.”²⁶ To ensure that the laws of the United States are “faithfully executed,” the President must exercise his appointment-making powers. As the Supreme Court recently explained, “[a] key ‘constitutional means’ vested in the President—perhaps *the* key means—[i]s ‘the power of appointing, overseeing, and controlling those who execute the laws.’”²⁷

With these principles in mind, the administration must commit itself to appointing high-level individuals who have substantive knowledge of labor issues and the labor movement to ensure enforcement of and compliance with the law. The President did an excellent job of this during his first administration. Board members Mark Pearce, Dick Griffin, and Sharon Block, as well as former Board members Craig Becker and Wilma Liebman, have extensive labor experience and knowledge. Each has shown a commitment to the rule of law in their careers and each has proven to be a dedicated public servant. Sharon Block is particularly notable for her ability to cross party lines without hurting political relationships, a rare talent in these times of extreme political polarization. The administration should consider other knowledgeable neutrals such as career NLRB employee Peter Winkler or North Carolina labor law professor and former NLRB employee Jeff Hirsch as possible replacement members should a vacancy arise.²⁸

The President’s power and willingness to make recess appointments are also vital parts of the appointments process that the President should continue to utilize to ensure that the government continues to function during times when Congress is in recess. By way of background, under normal circumstances, the Constitution vests “Power” with the President “to appoint Officers of the United States” “by and with the Advice and Consent of the Senate.”²⁹ Under the Recess Appointments Clause, “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session.”³⁰ Further, “the main purpose of the Recess Appointments Clause [is] to enable the President to fill

²⁵ U.S. CONST., art. II, § 2, cl. 1.

²⁶ U.S. CONST., art. II, § 3. *See also* *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010).

²⁷ *See id.* at 3157 (quoting 1 *Annals of Cong.*, at 463).

²⁸ Similar praise can be lauded upon the President’s first-term Department of Labor appointments, Hilda Solis, Seth Harris, M. Patricia Smith, and Deborah Greenfield; FMCS appointees, George H. Cohen and Allison Beck; and many other well-placed appointments. These public servants have demonstrated a deep knowledge of labor law and have a commitment to enforcing the rule of law. *See* Anne Marie Lofaso, *Promises, Promises: Assessing the Obama Administration’s Record on Labor Reform*, 20 *NEW LABOR FORUM* 64-72 (2011).

²⁹ U.S. CONST., art. II, § 2, cl. 2.

³⁰ U.S. CONST., art. II, § 2, cl. 3.

vacancies to assure the proper function of our government” when the Senate is unable to render “Advice and Consent” to the President on appointments.³¹

On December 17, 2011, the Senate by unanimous consent went into recess, agreeing not to resume normal proceedings until January 23, 2012.³² During this time, the House of Representatives declined to give its consent to the Senate to adjourn for such a long period, as is normally required by the Constitution.³³ To bypass the House’s refusal to consent to the five-week recess period, the Senate designated a chair to “convene [every few days for a few seconds] for *pro forma* sessions only, with no business conducted.”³⁴

On January 3, 2012, the Board comprised two-members, a number insufficient for the quorum necessary to conduct government business.³⁵ The following day, while the Senate was in intrasession recess, President Obama made two appointments to the NLRB³⁶ to ensure the quorum necessary for the Board to lawfully issue final decisions and orders.³⁷ In other words, the President made what he thought were recess appointments “to assure the proper function of our government.”

The question whether those recess appointments were constitutional was recently decided by the United States Court of Appeals for the District of Columbia Circuit.³⁸ In that case, the court engaged in an elaborate deconstruction of the Recess Appointments Clause. It concluded that the Obama administration’s interpretation of the constitutional language—allowing appointments during “a recess” as being equivalent to making appointments during “the Recess”—was not a permissible interpretation of the

³¹ *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc).

³² See 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011) (providing that “when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following [specified] dates ... until 2 p.m. on Monday, January 23”).

³³ U.S. CONST., art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”).

³⁴ See 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011). One exception occurred on December 23, when some business was conducted. 157 CONG. REC. S8789 & 8790 (daily ed. Dec. 23, 2011). See 157 CONG. REC. S8787 (daily ed. Dec. 20, 2011) (35 seconds); *id.* at S8791 (daily ed. Dec. 27, 2011) (30 seconds); *id.* at S8793 (daily ed. Dec. 30, 2011) (32 seconds); 158 CONG. REC. S1 (daily ed. Jan. 3, 2012) (41 seconds); *id.* at S3 (daily ed. Jan. 6, 2012) (29 seconds); *id.* at S5 (daily ed. Jan. 10, 2012) (28 seconds); *id.* at S7 (daily ed. Jan. 13, 2012) (30 seconds); *id.* at S9 (daily ed. Jan. 17, 2012) (28 seconds); *id.* at S11 (daily ed. Jan. 20, 2012) (29 seconds).

³⁵ See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (holding that the Board is without authority under Section 3(b) to decide cases with only two sitting Board members); 29 U.S.C. § 153(b) (2006).

³⁶ During this time, the President appointed Dick Griffin and Sharon Block to serve as Board members.

³⁷ See *New Process Steel*, 130 S. Ct. at 2635 (2010).

³⁸ See *Noel Canning, A Div. of the Noel Corp. v. NLRB*, 2013 WL 276024, ___ F.3d ___ (D.C. Cir. Jan. 25, 2013).

constitutional language.³⁹ The court arrived at two major reasons in its determination that the Senate was not technically in “the Recess” required for the unconfirmed appointments. First, “hold[ing] that ‘the Recess’ is limited to intersession recesses,” and finding that the recess appointments here were made during intra-recess periods, the court concluded that the appointments were, by definition, unconstitutional.⁴⁰ The court noted, secondarily, that the intrasession recess appointments were suspect, in any event, because the Senate continued to have *pro forma* sessions during that period.⁴¹ In so holding, the court has cast a shadow of doubt on several NLRB decisions while limiting an historic presidential power.⁴² That ruling is likely to come before the D.C. Circuit *en banc* or the Supreme Court in the near future.⁴³

In summary, the administration must continue to appoint neutral experts—those with exceptional competence in the area of labor relations—to high-level government positions. With regard to Department of Labor appointments, the administration must make appointments with access to top White House officials to bird-dog key priorities in the labor area, ensure execution of those priorities, and ensure full and effective implementation. The President should designate a high-level official at the Department of Labor to focus on promoting collective bargaining, including working to build greater coordination among the relevant labor agencies. The President should make such appointments as part of both the normal and the recess-appointments process, assuming the latter option remains viable after the Supreme Court rules on the issue.

³⁹ *Id.* at *8.

⁴⁰ *Id.* at *16.

⁴¹ *Id.* at *18.

⁴² The recess appointment power has been utilized by presidents for nearly a century. Over the past two decades, President Obama made 32 recess appoints compared to 171 by President George W. Bush and 139 by President Clinton. See Melanie Trottman, et. al., *Court Throws Out Recess Picks*, WALL ST. J., Jan. 26, 2013, at A1.

⁴³ The people of the United States can only hope that the en banc court or the Supreme Court see the situation for what it is—a political one—and vacate the D.C. Circuit’s panel decision. See *Goldwater. v. Carter*, 444 U.S. 996, 996 (1979) (refusing to grant certiorari on a dispute between Congress and the President on grounds that the “differences . . . turn on political rather than legal considerations”); see generally *Baker v. Carr*, 369 U.S. 186 (1962) (non-justiciable political questions typically involve “a textually demonstrable constitutional commitment of the issue to a coordinate political department”). To be sure, our government has been set up, to some extent, to obstruct political progress. This deliberate check on each branch of government by each other branch demonstrates the almost uniquely American mistrust of governmental power. But government grinds to a halt (and perhaps goes into necrotic decay) when the branches fail to use good faith in exercising those checks. Accordingly if the Supreme Court decides that this question is justiciable, it is unclear which argument, the government’s—that the President lawfully exercised his recess appointment power—or the company’s—that he did not—is the better one. A fuller explanation of those arguments is beyond the scope of this paper.

II. Messages to the NLRB: Continue Rulemaking to Enhance the Basic Canons of a Well-Functioning Legal System

There are certain fundamental aspects to a well-functioning, legal system within a modern democracy. The late Harvard Law Professor Lon Fuller coined the term “inner morality of the law” to capture these fundamental aspects of the internal efficacy of the law.⁴⁴ As one Georgetown Law Professor, relying on Lon Fuller’s work, explains, “[t]he rule of law requires that lawmakers conform their handiwork to [the following eight] canons[:]

1. *Generality*: laws must take the form of general rules.
2. *Publicity*: laws must be published and cannot be secret.
3. *Clarity*: laws must be comprehensible and not overly vague.
4. *Consistency*: laws must not contradict one another.
5. *Feasibility*: it must be possible for people to comply with the law.
6. *Constancy*: the law must not change too rapidly.
7. *Prospectivity*: the law cannot be retroactive—it cannot today declare yesterday’s lawful behavior unlawful.
8. *Congruence*: the law must be administered and enforced as it is written.”⁴⁵

Simply put, democracies cannot function when the people do not know what laws they must obey.

A. Educate and Inform the Citizenry

In late 2010, the Board sought to better conform to the inner morality of the law by attempting to educate those who have rights and duties under the NLRA. On December 22, 2010, the Board issued a Notice of Proposed Rulemaking in which it sought to require employers subject to NLRA jurisdiction to “post notices informing their employees of their rights as employees under the NLRA.”⁴⁶ On August 30, 2011, the Board published the Final (Notice Posting) Rule (Member Hayes dissenting), after responding to the nearly 7,000 public comments received.⁴⁷ The Chamber of Commerce, the National Association of Manufacturers, and the National Right to Work Legal Defense and Education Foundation, among others, have lodged challenges to that rule

⁴⁴ LON L. FULLER, *THE MORALITY OF LAW* (revised ed. 1964).

⁴⁵ David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller’s Canons*, 2 HAGUE J. RULE L. 29, 31 (2010) (citing LON L. FULLER, *THE MORALITY OF LAW* (revised ed. 1964)).

⁴⁶ Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (Dec. 22, 2010).

⁴⁷ 76 Fed. Reg. 54,006, 54,007, 54,046-54,050 (Aug. 30, 2011).

based primarily on the contention that the Board is without statutory authority to issue the rule.⁴⁸

Courts will ultimately decide whether or not the Board has overstepped its authority in ordering employers under its jurisdiction to post information, notifying citizens of their rights and supervisors of their duties under the law.⁴⁹ But in the unlikely event that the courts ultimately decide that the Board is without authority to issue such an order, this administration should take corrective action by introducing legislation that authorizes the Board to issue such notices. The Board stands nearly alone among agencies administering federal labor and employment laws in not requiring such routine workplace notices informing employees of their statutory rights and the means to remedy those rights. These notices serve the Fullerian purpose of publicizing and clarifying the law—noble goals in a well-functioning legal system.

B. Continue To Streamline NLRB Election Procedures, Modernize those Procedures, and Liberalize Information Available to All Parties

The Board also engaged in rulemaking to streamline and modernize election procedures. The Final Election Rule (Rule), issued on December 22, 2011,⁵⁰ accomplished significant government goals. First, in line with Fuller’s clarity canon, the Rule indisputably makes the union election rules more readable. Second, the Rule reduced unnecessary litigation that had the effect of wasting government resources without producing any benefit for the parties. Specifically, the Rule limits the scope of pre- and post-election hearings; consolidates pre- and post-election appeals; and eliminates the required 25-day waiting period from issuance of the Regional Director’s pre-election decision before an election date can be set, thereby allowing for more efficient regulation of the election process. Moreover, the Board will only grant

⁴⁸ See, e.g., *National Association of Manufacturers v. NLRB*, No. 11-cv-01629 (D.D.C. 2011), *appeal pending*, No. 12-5068 (D.C. Cir. 2012); *Chamber of Commerce v. NLRB*, No. 11-cv-02516 (D. S.C. 2011), *appeal pending*, No. 12-1757 (4th Cir. 2012).

⁴⁹ A defense of the Board’s actions is beyond the scope of this paper. However, it should be noted that the Board has broad rulemaking authority under Section 6 of the Act, 29 U.S.C. § 156, to issue rules “necessary to carry out” the Act’s provisions. See *American Hospital Ass’n v. NLRB*, 499 U.S. 606 (1991) (upholding substantive rule on what constitutes an appropriate bargaining unit in the hospital industry); *Mourning v. Family Publ’ns Servs., Inc.*, 411 U.S. 356, 369 (1973) (holding that regulations promulgated under a general rulemaking empowering provision of an administrative law will be sustained so long as the regulations are “reasonably related to the purposes of the enabling legislation”) (citations and internal quotation marks omitted). There is no precedent to support the contention that the required notice posting is compelled speech in violation of the First Amendment for the simple reason that the notice is government not private speech. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); indeed, such an argument would prevent the government from requiring all sorts of notices on private property. See, e.g., *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (rejecting argument that the “right not to speak” exempted federal contractors from posting a notice informing employees of their right to refrain from supporting unions).

⁵⁰ 76 Fed. Reg. 80,138 (Dec. 22, 2011).

interlocutory appeals under “extraordinary circumstances where it appears that the issue will otherwise evade review.”⁵¹

Many of the Board’s other proposed amendments, however, were not ultimately adopted.⁵² These amendments would have modernized the rules and liberalized information available to all parties.⁵³ The Board originally proposed to modernize the election rules by, among other things, standardizing deadlines around the country and permitting parties to file electronically. Such modernization would be consistent with the updating projects of many federal rules and would save public and private resources. The Board also originally proposed several amendments that would have liberalized information. For example, the proposed rule would have required the employer to include with its position statement a list of employees in the petitioned-for unit and to provide e-mail addresses and phone numbers as part of the voter eligibility list. The Board should move forward on these proposals, thereby modernizing the rules and liberalizing information with an eye toward government efficiency while providing better services to the public.

III. Message to Congress: Enhancing Workplace Democracy Enhances Political Democracy

During the first Obama administration, Congress presented the following three amendments to the NLRA, which would have augmented workplace democracy: the Employee Free Choice Act (EFCA),⁵⁴ the Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers Act (RESPECT Act),⁵⁵ and repeal of Section 14(b) of the Taft-Hartley Act.⁵⁶ Congress should consider taking up at least aspects of these proposed bills, in addition to amending Section 8(b)(4).⁵⁷ Such legislation would serve the important government interest of augmenting democratic

⁵¹ 76 Fed. Reg. 80,138, 80,141 (Dec. 22, 2011).

⁵² See Representation Case Procedures: Amendments Effective April 30, 2012, slides 12-13 (May 2, 2012), available at http://www.nlr.gov/sites/default/files/documents/525/01_rules_outreach_powerpoint5-2-12.pdf (last visited Dec. 18, 2012).

⁵³ See *id.*

⁵⁴ EFCA was originally introduced in the 110th Congress. See H.R. 800 (introduced by Congressman George Miller). EFCA was reintroduced in the 111th Congress in 2009. See H.R. 1409; S.560 No action on EFCA has since been taken.

⁵⁵ H. R. Rep. No. 1644, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-1644> (last visited Dec. 24, 2012).

⁵⁶ 29 U.S.C. § 164(b) (2006).

⁵⁷ 29 U.S.C. § 158(b)(4) (2006).

participation in workplace decision making, which would help train our worker citizens in the art and craft of participating in a democratic government.⁵⁸

A. Salvage the Employee Free Choice Act's Remedies

EFCA would have accomplished three important objectives, all of which would have strengthened democracy in the workplace. First, it would have facilitated union organizing by eliminating an employer's right to insist on a secret-ballot election and requiring the NLRB to certify unions when a majority of employees signed valid authorization cards.⁵⁹ Second, EFCA would have facilitated agreement between the newly certified union and the employer on a first contract, by mandating binding arbitration upon failure to reach agreement after ninety days of bargaining and thirty days of compulsory mediation.⁶⁰ Third, EFCA would have strengthened NLRA enforcement by requiring the NLRB to request injunctive relief against employers who act unlawfully in some instances.⁶¹ Back-pay damages would have been tripled for employees discriminated against during an organizing campaign or first-contract drive.⁶²

EFCA does not have the votes to pass in its current form. EFCA's first objective has proven to be politically radioactive; antiunion proponents have successfully portrayed EFCA's first objective as eliminating an employee's right to vote. Although untrue—EFCA merely eliminated the employer's right to insist on an election even in the face of a majority of valid, union-authorization cards—this messaging was very effective. There are however salvageable portions of EFCA, starting with the goal of strengthening

⁵⁸ See generally Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L. J. 303, 309-34 (2011) (arguing that unions and workplace participation are vital to a well-functioning democratic political system).

⁵⁹ See EFCA § 2. In *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974), the Supreme Court held that the Board reasonably interpreted the NLRA as permitting an employer to “refus[e] to accept evidence of majority status other than the results of a Board election,” thereby forcing the union to request an election. See *id.* at 303 (quoting 190 N.L.R.B. 718, 71 (1971)); see also *id.* at 309-10. Given the actual holding of *Linden Lumber* – that the Board acted reasonably in interpreting the Act as permitting an employer to insist upon an election notwithstanding evidence of majority support – the Obama Board could probably accomplish what Congress sought to accomplish via EFCA §2 by construing the NLRA as requiring an employer to recognize unions when confronted with authenticated card majority. The Board would have to explain that its newly minted interpretation is not the only interpretation of the Act and give good reasons for its policy change. Such a construction of the Act should, however, be upheld as reasonable. See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 95 (1943) (“an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.”); *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947) (holding that a reviewing court may uphold an agency's action only on the rationale on which the agency relied when acting). For an excellent analysis of the *Chenery* principles, see generally Kevin Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007).

⁶⁰ See EFCA § 3.

⁶¹ See EFCA § 4(a).

⁶² See EFCA § 4(b).

remedies. One way to make the treble-damages portion of EFCA even more politically palatable is to designate that a portion of those damages goes to the U.S. Treasury for debt-reduction.

B. Consider Ways To Extend Workplace Democracy to More Workers

The NLRA exempts a large portion of the workforce from its protections. Accordingly, one way to expand workplace democracy is to eliminate those exemptions.⁶³ The RESPECT Act,⁶⁴ which would have extended NLRA coverage to many more workers simply by narrowing the definition of “supervisor,” is a step in that direction. Business opposition to the RESPECT Act—which has failed to move since Obama assumed office—derives primarily from the faulty assumption that employers are entitled to the undivided loyalty of even the lowest-level supervisors.

Another possible fix is reconsideration by Congress of its independent contractor exemption, at least with respect to dependent contractors. At present, the NLRA exempts independent contractors from the statutory definition of employee but does not define that term. Instead, the Board is required to use the common-law agency test to determine whether a worker is an employee or an independent contractor.⁶⁵ At issue here is the fact that many workers technically meet the common-law definition of independent contractor but have much more in common with the working class than with the entrepreneurial class and should be afforded working class categorization under the law. Accordingly, Congress could simply define independent contractor in such a way as to exclude those workers who otherwise meet the common-law definition but who are, in reality, economically dependent on the employer. Congress could use one of two tests. It could utilize the economic realities test, which is quite similar to the common-law agency test.⁶⁶ As an alternative, it could use the test under the Canadian Code which distinguishes between independent and dependent contractors. Under that test, dependent contractors are defined as:

any other person who, whether or not employed under a contract or employment, performs work or services for

⁶³ See generally Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous, Dignified Union Worker Back to Work*, 5 F.I.U. L. REV 495 (2010).

⁶⁴ See, e.g., S. 2168.

⁶⁵ See *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (requiring the Board to use the common-law agency test in distinguishing between statutory employees and the statutorily exempt independent contractor).

⁶⁶ See, e.g., *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006) (citing the economic realities test as the following six-factor test: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.).

another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.⁶⁷

Both tests, to different degrees, are meant to capture the economic reality between the contractor/worker and the employer.

Of course, the Board, rather than Congress, could possibly accomplish these fixes. First, the Obama-appointed Board could, for example, close a loop hole created by the Bush II Board in the *Oakwood* trilogy, where it held that supervisory status could be found in cases where individuals have served in a supervisory role in as little as 10-15 percent of their *total* work time.⁶⁸ Second, and perhaps more significantly, the Board could attempt to incorporate the principles underlying the economic dependence test into the agency standard.⁶⁹ As has been explained by several commentators, the agency test is “capacious enough to incorporate attention to the economic realities of the work relationship, including matters of economic dependence.”⁷⁰

C. Repeal Section 14(b)

Section 14(b) of the Taft-Hartley Act⁷¹ allows states to enact laws prohibiting employers and labor unions from entering into contracts requiring employees to pay union fees, which would cover expenses “germane to collective bargaining, contract administration, and grievance adjustment.”⁷² In states that have enacted these so-called right-to-work laws, unions are powerless to charge those they represent for services rendered. By repealing Section 14(b), Congress would revoke states’ authority to enact right-to-work laws thereby eliminating the “free rider” problem faced by unions in right-to-work states. A great deal of messaging explaining the fundamental unfairness of the “free rider” problem would be necessary before repealing Section 14(b) to avoid a

⁶⁷ See Judy Fudge, *A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad, and the Ugly*, 31 COMP. LAB. L.J. 253, 259-60 (2010) (quoting Canada Labour Code, R.S.C., ch. L 2, §3(1) (1985)).

⁶⁸ See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2001) (citing *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713-14 (2001)).

⁶⁹ See *St. Joseph News-Press*, 345 N.L.R.B. 474, 483-87 (2005) (Member Liebman, dissenting); see generally Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279 (2011).

⁷⁰ Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem without Redefining Employment*, 26 ABA J. LAB. & EMP. L. at 284 (citing *See St. Joseph News-Press*, 345 N.L.R.B. 474, 483-87 (2005) (Member Liebman, dissenting)). See also Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous, Dignified Union Worker Back to Work*, 5 F.I.U. L. REV. 495, 548 (2010).

⁷¹ 29 U.S.C. § 164(b) (2006).

⁷² *Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988).

radioactive reaction. In particular, citizens must understand that these laws are limiting the rights of unions and firms to freely agree on certain terms and conditions of employment, in this case, a term of employment that compels employees to pay for representation.

D. Liberalize Section 8(b)(4) to Bring it in Line with Free Speech Principles

The NLRA, as originally enacted in 1935,⁷³ did not impose any duties on unions to bolster the Section 7 rights of workers. In the immediate aftermath of World War II, however, some grew weary of organized labor’s growing economic and political power as evidenced by the wave of post-war strikes that brought the U.S. economy to a halt. “With the continued growth in the economic and political power of organized labor in the United States, the primary objective of Congress in formulating this Act was to restore sufficient equilibrium to the field of industrial relations to enable our traditional system of private enterprise to continue.”⁷⁴ In 1947, when Republicans gained control of the legislative branch for the first time in decades, Congress passed the Taft-Hartley amendments to the NLRA, which among other things imposed duties on unions, not only to employees, but also to employers.⁷⁵ In particular, newly crafted Section 8(b)(4) prohibited unions from engaging in secondary concerted activity – economic pressure in the form of striking, boycotting, picketing, or other concerted conduct placed on third-party neutral businesses or their employees for the purpose of pressuring the primary employer with whom the union has the labor dispute.⁷⁶ Later amendments clarified that the Act should not be interpreted to prohibit otherwise lawful primary activity or secondary activity that is for the purpose of publicity.⁷⁷ Simply put, these amendments prohibited labor’s three main economic weapons – the strike, the boycott, and the picket – with regard to third-party neutrals who do business with the primary employer.

Congress should consider amending NLRA Section 8(b)(4)⁷⁸ to bring it in line with free speech principles.⁷⁹ The First Amendment generally prohibits content and

⁷³ National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§151-166) (popularly known as the Wagner Act).

⁷⁴ Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 Geo. Wash. L. Rev. 285, 285 (1960).

⁷⁵ Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (2006)) (popularly known as the Taft-Hartley Act). Congress passed that Act over President Truman’s veto. See Harry S. Truman, *On the Veto of the Taft-Hartley Bill*, (June 20, 1947), available at <http://millercenter.org/president/speeches/detail/3344> (last visited Dec. 24, 2012).

⁷⁶ 29 U.S.C. § 158(b)(4) (2006). For a classic description of the differences between primary and secondary concerted activity, see generally Howard Lesnick, *The Gravaman of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

⁷⁷ Congress added the general Section 8(b)(4) provisos and the specific Section 8(b)(4)(B) proviso via the Landrum-Griffin amendments, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 158(b)(4), 158(b)(4)(B) (2006)).

⁷⁸ 29 U.S.C. § 158(b)(4) (2006).

viewpoint discrimination; content-based restrictions on messages are presumptively invalid.⁸⁰ As explained above, Section 8(b)(4) greatly limits unions from engaging in secondary boycott and other secondary concerted activity, including secondary expressive activity.⁸¹ For example, it is currently unlawful for a newspaper union, which has a labor dispute with a newspaper, to ask customers of a paper supplier to that newspaper to boycott that paper supplier. This is particularly true if the request is done by use of pickets.⁸² These limitations are based on both the content of the expression as well as the viewpoint.⁸³

Inexplicably, the Court has historically upheld Section 8(b)(4) under rational review.⁸⁴ However, more recent court precedent suggests that the Court may be changing its views. For example, in *Madsen v. Women’s Health Center, Inc.*,⁸⁵ the Court held that a ban on observable images and a 300-foot no-approach zone around an abortion clinic and staff residences were unconstitutional as overly broad, because those bans burdened more speech than was necessary to serve significant government interests. With respect to labor expressive conduct, in *Sheet Metal Workers’ Intern. Ass’n, Local 15 v. NLRB*,⁸⁶ the D.C. Circuit rejected the Board’s conclusion that a union engaged in unlawful secondary picketing where that union “staged a ‘mock funeral’” outside of a hospital, which included a person in “a ‘Grim Reaper’ costume carrying a ‘plastic sickle’ and four other people, dressed in street clothes, carrying a prop coffin and occasionally handing out leaflets outside of a hospital,” and “distributed leaflets headed ‘Going to Brandon Hospital Should Not Be a Grave Decision.’”⁸⁷ Rather than dealing with Supreme Court precedent regarding the First Amendment limitations on union secondary expressive

⁷⁹ James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950 (1999).

⁸⁰ See, e.g., *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

⁸¹ 29 U.S.C. § 158(8)(b)(4)(ii) (2006).

⁸² See *NLRB v. Retail Stores, Local 1001*, 447 U.S. 607 (1980) (observing that the statutory ban on labor picketing is constitutional because it “affects only that aspect of the union’s efforts to communicate its views that *calls for an automatic response to a signal, rather than a reasoned response to an idea*”) (Stevens, J., concurring).

⁸³ James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-51 (1999) (citing Jack Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 7 (1984); Archibald Cox, *Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 36-39 (1980); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 945 (1982)).

⁸⁴ See *Retail Store Employees Union, Local 1001*, 447 U.S. 607, 614-15 (1980). James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950 (1999) (calling for strict scrutiny).

⁸⁵ 512 U.S. 753, 764-66 (1994).

⁸⁶ 491 F.3d 429 (D.C. Cir. 2007).

⁸⁷ *Id.*

activity, the court found that the mock funeral was not picketing but “a combination of street theater and handbilling.”⁸⁸

Accordingly, Congress should amend Section 8(b)(4) to bring it in line with these important free speech principles. This likely means eliminating Section 8(b)(4), so that workers can get their message across peaceably, while allowing the states to regulate any violence or property damage that might arise from secondary activity. This is how primary activity is currently regulated. This solution allows for the maximum amount of speech while regulating the undesirable conduct that sometimes comes with speech.⁸⁹

IV. Conclusion

This Issue Brief makes recommendations for the President, the NLRB, and the Congress. It asks the President to maintain budgets and make those appointments necessary to keep the government functioning. It asks the Board to continue to do its job of enforcing the law both through rulemaking and adjudication, by focusing at least in part on educating the public on their rights as workers and by providing the public with better services by continuing to streamline its administrative processes. It asks Congress to consider legislation that will enhance workplace democracy because participating in decisions affecting employees’ working lives tends to train those employees in how to be better citizens in a democracy.

These seem like modest goals. But those who ascribe to the world view that each individual “is an island, [e]ntire of itself,”⁹⁰ may very well bastardize this message. Rather than understanding, as Clarence does when he says to George Bailey, “Strange, isn’t it? Each man’s life touches so many other lives,”⁹¹ they may claim that a philosophy, which values “[e]ach [person] [a]s a piece of the continent, [a] part of the main”⁹² is a philosophy that runs counter to liberty and economic progress. But fortunately, We the People know better. We are all in this together. We together will continue to build this democracy; we together will make sacrifices when sacrifices must be made. And as we together build that community, each person’s individuality is enhanced, each person’s liberty is augmented, and each one of us is the better. So when we ask “for whom the bell tolls,” we will know that the “bell tolls” simultaneously for each of us and for all of us.⁹³

⁸⁸ *Id.*

⁸⁹ In making this suggestion, I do not mean to imply that unions and workers are those engaging in the socially undesirable violence and property damage. Our U.S. labor history too often reminds us that violence is often perpetrated on the protestors.

⁹⁰ 3 John Donne, *Mediation XVII*, THE WORKS OF JOHN DONNE 574-575 (Henry Alford ed., London, John Parker 1839) (1623).

⁹¹ IT’S A WONDERFUL LIFE (Liberty Films 1946).

⁹² Donne, *Mediation XVII*, *supra* note 90.

⁹³ *Id.*