

**REPRESENTING LABOR IN CONGRESS:
THE ENDURING QUEST FOR LABOR LAW REFORM**

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ABSTRACT

Unions have repeatedly attempted to reform federal labor law in a pro-union direction since the passage of the Taft-Hartley Act in 1947. These recurrent efforts have generated a recognizable pattern. Labor law reform bills pass in the House of Representatives, and then are defeated in the Senate, almost always by use of the filibuster to require a super-majority of 60 votes (or two-thirds prior to 1975). Unions have attempted to overcome this problem by expanding Democratic numbers in Congress, and encouraging a realignment of the Democratic party in the direction of a more cohesive liberal agenda. Over time, the congressional Democrats have, in fact, become far more unified in their support for labor law reform legislation. In this sense, the overall political strategy adopted by organized labor after World War II has slowly come to bear fruit. The implications of this development for American politics and our evaluation of doctrines of responsible government is explored.

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INTRODUCTION

Since the passage of the Taft-Hartley Act in 1945, the American labor movement has repeatedly sought to reform federal labor law in a more pro-union direction. And on numerous occasions, a majority of the House of Representatives has voted to endorse labor's position, supporting bills intended to facilitate union organizing and enhance the effectiveness of collective bargaining. Yet, despite such majority support, unions have consistently failed to achieve their desired reforms. The main culprit has been the United States Senate, where labor bills have typically met their demise due to use of the filibuster to require super-majorities well beyond the reach of union supporters. The pattern of success in the House, and failure in the Senate, was manifest as early as 1949, in an early effort to repeal the Taft-Hartley Act, and recapitulated as recently as 2007, when the Employee Free Choice Act failed in similar fashion. Despite the many changes in American politics since the end of World War II, the resistance of the federal state to enactments that would enhance labor organization has continued unabated. For organized labor, perhaps more so than any other interest group, the American system of balanced bicameralism, combined with anti-majoritarian rules in the upper house, has proven catastrophic. With legislative change paralyzed by these arrangements, unions have been unable to alter labor law in response to adverse circumstances; the decline of the labor movement has continued unabated.

The challenge posed by America's distinctively fragmented and anti-majoritarian political institutions has long presented a strategic conundrum for union leaders and activists.

Constitutional change in the direction of a unicameral system, involving the abolition of the Senate or the weakening of its legislative powers, has hardly seemed realistic. Even the abolition of the filibuster, despite its lack of grounding in the Constitution itself, has seemed radical and unpromising. Instead, union leaders have sought to overwhelm the debilitating constraints of the constitutional framework by employing a different American innovation, the political party. It was, of course, recognized early in American history that partisanship was a force that could bring together what the Framers placed apart, enabling collective responsibility for the actions of formally separated legislative and executive institutions. For unions, and liberals more generally, this has been the preferred means for making a set of antiquated institutional arrangements, originally designed for an agrarian society of the late eighteenth-century, responsive to the demands of a modern industrial nation. By force of partisanship, the branches could be brought together, and even the filibuster overcome – as long as labor’s allies were present in sufficient numbers.

A partisan strategy requires, however, a proper partisan ally. The obvious strategy was for organized labor to form its own political party, running candidates under the union label for elective office. But by the late-nineteenth century, with two mass political parties already deeply entrenched in the minds of voters and the institutions of government, leaders of the emerging union movement realized they had little chance of establishing their own independent partisan vehicle. America’s electoral arrangements, with their bias against third party formation and survival, likewise hindered the formation of a union-dominated political party. Thus, labor through fits and starts eventually made its way into the Democratic party, where in the early

twentieth century it would have to share power with agrarian interests, urban party machines, ethnic factions, powerful business interests, and, most importantly, Southern elites who were as hostile to union power as they were to racial equality. The situation was far from ideal, and union leaders were constantly frustrated by the presence of anti-union conservatives among their partisan brethren, and the loss of many Northern liberals and moderates to the Republican party. Still, reasonable hope could be maintained that under the right circumstances, the Democrats could deliver pro-union public policy. And so it was that under conditions of economic depression and mass industrial unrest, congressional Democrats would pass, and President Franklin Roosevelt would sign, the National Labor Relations Act of 1935, creating a new set of labor protections and employer restrictions that finally enlisted the power of the federal government on the side of organized workers. The story of labor's entry into the Democratic Party had now arrived, it seemed, at a happy ending.

In the aftermath of World War II, however, the problem of conservatism within the Democratic party only worsened. The "conservative coalition" of southern Democrats with conservative northern Republicans began to appear more often, and was a powerful force in facilitating passage of a new set of anti-union restrictions in the Taft-Hartley Act of 1947, enacted over the veto of President Harry Truman but with the support of a majority of House Democrats. The conservative coalition proved a persistent force in the decades to come, often providing the numbers that made the filibuster such an effective instrument for blocking liberal initiatives. The costs of labor's subordinate place within the Democratic party were now once again apparent, but

the means and energy for reconfiguring the parties along more consistent liberal/conservative lines had yet to be found.

In response to these circumstances, many union leaders, especially those seeking an expanded welfare state and stronger protections for industrial unionism, forcefully advocated major change in the coalition structure that undergird the two party-system. Asked in the early 1960s to describe the political strategy of organized labor, United Auto Workers president Walter Reuther said: “The American labor movement is essentially trying to work within the two-party structure, but to bring about a basic realignment so that the two parties really stand for distinct points of view.”¹ To achieve the required level of ideological unity would clearly require a reshuffling of partisan alignments. Conservative congressional Democrats based mainly in the South would have to be replaced by more liberal politicians, or forced to leave the party altogether for the more congenial offerings of the Republicans. Conversely, liberal and moderate Republicans in the Northeast and West would have to eventually make their way to the Democratic party.

The great catalyst to achieve this realignment, it would turn out, was not the direct actions of labor, but rather the embrace of the cause of civil rights by the national Democratic party, an accommodation that would finally culminate in the passage of the civil rights legislation of the 1960s. Andrew Biemiller, the AFL-CIO’s Director of Legislation during this period, explained

¹ Quoted in B.J. Widick, *Labor Today: The Triumphs and Failures of Unionism in the United States* (Boston: Houghton Mifflin, 1964), p. 116.

the deeper political logic behind the federation's support for civil rights reforms. "The 1964 Civil Rights Act and 1965 Voting Rights bill will greatly increase the voting strength of Negroes in some of the previously uncontested, conservative districts in the South, bringing new forces into play in this long dormant area," Biemiller said.² "We would have no objection to seeing a strong Republican party appear in the South. It might turn Southern Democrats into a more liberal group."³ By these means, the two parties would be made more distinct, and a more meaningful partisan differentiation achieved.

As many political scientists have observed, the long-term realignment envisioned by Biemiller and Reuther is now largely complete, and in much the way that these union leaders had foreseen.⁴ The South has become an arena of two-party competition in which Democratic officeholders evince policy commitments similar to those of their national counterparts. While this has meant fewer southern Democrats in Congress, it has also contributed markedly to a homogenization of preferences within the congressional party. At the same time, the Democrats have made gains in the Northeast and the West – a reflection, in part, of the disaffection of liberal and moderate Republicans weary of the growing influence of Southern conservatives and

²Speech by Andrew Biemiller, no date, Andrew Biemiller Papers, Box 1/85/54, George Meany Memorial Archives, Silver Spring, Maryland.

³ AFL-CIO News Release, January 6, 1964, "Congress, 88th" folder, AFL-CIO Library, Washington, D.C.

⁴For but two examples, see Jacob S. Hacker and Paul Pierson, *Off Center: The Republican Revolution and the Erosion of American Democracy* (New Haven: Yale University Press, 2005), p. 185-187, and the essays in John C. Green and Paul S. Herrnson, eds., *Responsible Partisanship? The Evolution of American Political Parties Since 1950* (Lawrence: University Press of Kansas, 2002).

fundamentalist Christians within their own party. The result of this reversal in the geographic bases of the parties has been a polarization of congressional politics that is entirely in keeping with what union strategists had seen as the desired state of the American party system. Labor's worst enemies are now concentrated in a single party, exactly as unionists had hoped for some four decades earlier. Voters are thus offered something resembling a real choice between opposing "points of view," as Reuther put it, albeit one that does not include the wholehearted expression of a social democratic agenda that many unionists had anticipated.

In theory, the new dispensation is one that ought to be favorable to union interests. The obvious problem, however, has been that as the Democratic party has become purer, it has also become smaller. The loss of the "solid South" has made it far more difficult for Democrats to retain majorities in the House and Senate and to put together a majority coalition in presidential elections, even as it has facilitated the rise of liberals to positions of leadership in Congress and the national party apparatus. Was this trade-off worth it? Labor lost on labor law reform issues under the old regime, and still does so today. And as the experience of the new Democratic majorities in the 110th Congress shows, the Senate remains a killing zone for liberal legislation. Perhaps then, the polarization and purification of the two parties has all been for nought? To address this question, a closer look at historical and more recent patterns of voting on labor law issues is advised.

REVISITING THE POST-WAR STRUGGLES OVER LABOR LAW REFORM

The passage of the National Labor Relations Act (NLRA, also known as the Wagner Act) seemed to decisively settle what was once known as “the labor question” in American politics, namely, the appropriate status of workers and worker organizations in the political economy of the United States. The act forthrightly declared in its preamble that its purpose was to facilitate commerce by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” To realize these goals, it established the National Labor Relations Board (NLRB) as a federal agency with the power to investigate and punish charges of unfair labor practices, and to conduct secret-ballot elections in which workers would have the opportunity to choose or reject union representation. While unions could still be recognized by employers unilaterally or through other procedures negotiated with union representatives, the expectation was that most new organizing would occur through an official NLRB-sponsored vote and the support of a majority of the relevant employees. The act made it illegal for employers to interfere with employee rights as designated under the act, to refuse to bargain in good faith, to establish a “company union” run by management, and to engage in discrimination or retaliation against employees for union activity. Through such provisions, the Wagner Act seemed to provide a robust and, presumably, permanent set of protections for the right to organize.

And, indeed, in the years following passage, unions experienced a major growth spurt, expanding from about ten percent of the workforce in the early 1930s to nearly a third by the end of World War II. However, along with this increased size also came greater aggressiveness in collective bargaining, including a massive and for some, frightening, post-war strike wave, as well as charges of communist infiltration of some unions. In response to perceptions that the union movement had come to abuse its newfound power, conservatives succeeded in enacting the Taft-Hartley Act, a set of amendments to the NLRA passed by a Republican-controlled Congress in 1947 over a veto by President Harry Truman. The law changed the emphasis of federal policy away from protecting the rights of unions as institutions to protecting the employee's right to free choice in either supporting or *opposing* unionization. Based on this new orientation, the act created a new class of unfair labor practices that could be committed by unions, including the coercion or restraint of employees, jurisdictional strikes, wildcat strikes, solidarity or political strikes, secondary boycotts, and "common situs" picketing. It also required union officers to sign non-communist affidavits with the government, and outlawed monetary donations from union treasuries directly to federal political campaigns. The executive branch of the federal government was empowered to obtain legal strikebreaking injunctions if an impending or current strike "imperiled the national health or safety." To encourage more debate within the workplace over the desirability of unions, the law codified an earlier Supreme Court ruling that employers have a constitutional right to express their opposition to unions, so long as they do not threaten employees with reprisals or promise benefits as inducements. Perhaps most notoriously, the law not only prohibited the "closed shop," where union membership was required as a pre-condition for employment, but also, in Section 14(b), specified the right of state governments to pass laws

banning the “union shop,” in which union membership is required after an employee has been hired. This “right-to-work” provision was particularly galling to union leaders, as it struck directly at the means that unions have used to maintain their membership and overcome recurring problems of collective action.

The first response of organized labor to passage of the Taft-Hartley Act was to try to repeal it entirely. An opportunity to do so arose in 1949, after Democratic successes in the 1948 elections brought a Democratic majority in Congress as well as the return of Harry Truman to the White House. Labor did succeed in pushing a repeal measure through the House of Representatives by a vote of 211 to 209, gaining the support of 75 percent of congressional Democrats (Table 1). Hopes for reform were dashed, however, when Republicans allied with southern Democrats in the Senate, leading to defeat by a vote of 53 to 43; among Democrats, 29 voted in favor of reform and 22 against. The inability of union supporters to garner more than 43 votes meant that this was only time in the post-war period when labor law reform would be blocked in the Senate by a simple majority vote.

The next attempt to alter labor law in a pro-union direction was initiated by organized labor at the height of the Great Society. The massive congressional majorities achieved by Democrats in the 1964 election, as well as the landslide reelection of Lyndon Johnson, presented unions with a new opportunity to improve their legal status. Rather than a repeal of the Taft-Hartley Act in its entirety, the AFL-CIO chose to concentrate its efforts on the abolition of section 14(b) alone. In July, 1965, a bill repealing the right-to-work provision was approved in

the full House by a vote of 221 to 203. Northern and western Democrats voted overwhelmingly in favor of repeal, while southern Democrats were almost uniform in their opposition. With the Democratic party divided, the support of Republicans from northern industrial states was crucial in the final House victory. The outcome in the Senate, however, would be far less fortunate for labor. Consideration of the bill was delayed, as the Johnson administration worked on other items on its agenda and Senate Majority Leader Michael Mansfield postponed the scheduling of floor debate. By the time the bill arrived on the floor for consideration in fall of 1965, a major lobbying effort by the employer-backed National Right-to-Work Committee had stimulated hundreds of anti-repeal newspaper editorials around the country and new grassroots pressure on wavering Senators. Sensing the possibility of blocking repeal altogether, Senate Minority Leader Everett Dirksen chose to lead a filibuster. With Majority Leader Mansfield unwilling to schedule the around-the-clock sessions needed to help bring the filibuster to an end, a cloture vote in October 1965 garnered the support of only 45 senators, far short of the two-thirds margin needed at that time to end debate. In February 1966, the labor movement and its Senate supporters again sought to achieve passage of the repeal legislation, but were defeated once more by a filibuster led by Dirksen and supported by Republicans and conservative Democrats. The labor movement did secure a pro-cloture majority, but the final tally was still only 50 to 49. Despite a major effort by organized labor, the bill was defeated in the classic pattern: a Senate filibuster buttressed by southern Democrats.

During the 1970s, the quest for revisions in the labor law became increasingly important to union activists. By the middle of the decade, it was obvious that the decline in union density was

continuing through both recession and prosperity, and was likely to be ongoing. Yet, the legal framework developed in the NLRA and amended by Taft-Hartley was becoming progressively less effective in protecting union organizing efforts. Unions began to voice many complaints about the existing system, all of which would turn out to be of continued relevance into the twenty-first century. A recurring problem was delays – employers would utilize legal action and other techniques to postpone certification elections and to avoid negotiation of a first contract. Illegal firings and harassment of employees for union activity became more common, with employers either willing to absorb the cost of NLRB fines, or successful in avoiding them altogether. The growth of professional anti-union consultants enabled employers to more effectively avoid unionization and thus subvert the very principles that animated the NLRA and still remained enshrined in the nation’s legal code.

In response to these concerns, unions were eager to again advance some kind of labor law reform as soon as political conditions allowed. The election of Jimmy Carter in 1976, along with the persistence of sizable Democratic majorities in both the House and Senate, presented an opportunity to pursue change once more. The AFL-CIO endorsed legislation implementing an inter-related set of reforms in the nation’s labor laws, designed to ameliorate at least some of the causes of union decline. As introduced in the House in July 1977, with White House support, the Labor Law Reform Act contained provisions to: 1. Expand the National Labor Relations Board from five to seven members in order to expedite the processing of unfair labor-practice cases; 2. Mandate representation elections within 30 days after a union presented membership cards signed by a majority of employees; 3. Grant back pay of up to 150 percent to workers illegally fired for

union activity; 4. Allow union organizers equal time to address any workers forced by management to attend anti-union meetings; 5. Deny federal contracts to companies found guilty of violating labor laws; and, 6. Award workers back-pay if the NLRB found that a company refused to negotiate in “good faith” with a newly certified union. Unionists believed that this package of reforms would directly address problems of employer intransigence, and prevent the recurrent delays in both scheduling representation elections and considering unfair labor charges.

Unfortunately for labor, the outcome of the struggle proved to be remarkably similar to what had happened during the Johnson administration. The bill easily passed in the House of Representatives in October 1977 by a vote of 257-163, with 36 Republicans voting in support. A total of 59 Democrats, all but six of whom were from the South, voted against the bill, leaving 221 Democrats (and 29 southern Democrats) in the majority. Once the bill moved to the Senate, however, labor’s fortunes dimmed. The intensity of employer opposition encouraged Senators Orrin Hatch (R. Utah) and Richard Lugar (R. Indiana) to lead a filibuster. After several roll calls failed to achieve the sixty votes needed to invoke cloture, a compromise proposal was put forth by Senators Harrison Williams (D. New Jersey) and Jacob Javitz (D. New York). Although this significantly more moderate proposal was greeted with a mixed reaction by organized labor, it gained only a few more votes for reform, and the final effort on June 15, 1978 to invoke cloture failed, gaining only 58 votes (two less than the 60 needed). Labor law reform had once again been defeated, despite labor’s best efforts and formal Democratic control of Congress and the presidency.

It would not be until the arrival of Bill Clinton in the White House in 1993 that labor was again in a position to pursue a labor law reform bill. With the encouragement of the AFL-CIO, President Clinton endorsed the Workplace Fairness Act, a bill intended to prevent employers from hiring permanent replacements during strikes. The legislation was designed to overturn a 1938 Supreme Court decision which held that during strikes over *economic* issues (i.e., not unfair labor practices) employers could choose to retain replacements hired during the strike as permanent employees. Union leaders argued that if they were to regain the initiative in collective bargaining and reestablish their credibility among non-union workers, the use of permanent replacements would have to be banned. Not surprisingly, the classic pattern of voting on labor issues was evident. In June 1993, the Workplace Fairness Act passed the House by a vote of 239 to 190, but was blocked in the Senate by a filibuster supported by the conservative coalition. A move to invoke cloture was defeated on July 13, 1994, with labor only garnering a 53-46 vote. The vote in the Senate revealed the same old pattern: six southern Democrats – Dale Bumpers and David Pryor of Arkansas, Ernest F. Hollings of South Carolina, Harlan Mathews of Tennessee and Sam Nunn of Georgia – joined border-state Democrat David Boren of Oklahoma to vote with 40 Republicans against labor. Not surprisingly, the three GOP votes for cloture came from outside the South: Alfonse D’Amato of New York, Arlen Specter of Pennsylvania, and Mark Hatfield of Oregon.

With Republicans in firm control of the House of Representatives from 1995 to 2007, pro-union labor law bills were blocked from even committee consideration. However, with the impressive success of the Democrats in regaining majorities in both the House and Senate in 2006,

the opportunity for movement on labor issues again appeared. By 2007, the partisan context had shifted considerably from what it had been when labor first started pushing reform bills during the presidency of Harry Truman. The slow process of purifying the two parties of renegade ideological elements had largely been completed. Most southern conservatives had left the Democrats, and northern liberals were truly an endangered species among Republicans. In 2006, this tendency was only reinforced, as the elections confirmed an ongoing regional realignment, with Democrats gaining about 30 percent of previously GOP-held House seats in the Northeast, about 15 percent in the Midwest, 10 percent in the Far West, but only 6 percent in the South.⁵ Among the six Senate seats that flipped to the Democrats, only one was in the South. This disparity meant that the incoming congressional majority was the first in fifty years not based on the control of a majority of Southern seats in the House and Senate. The historic dependence of the Democratic party on the South as the foundation for congressional rule had been irrevocably broken. During the 1990s and early 2000s, the polarization and associated increase in party discipline seemed to redound only to the benefit of the Republicans as they retained their congressional majority in election after election. After the results of the 2006 congressional elections, however, the possibility that a more polarized and disciplined party system might benefit labor, liberals, and the Democrats no longer seemed far-fetched.

In this context, the unions and their congressional allies immediately pursued a new labor law reform effort once the Democrats were back in charge on Capitol Hill. Their chosen vehicle

⁵Thomas Schaller, "Do Democrats Need the South?" *Salon*, Nov. 14, 2006 (www.salon.com), accessed Nov. 20, 2006.

was the Employee Free Choice Act (EFCA), an amendment to the National Labor Relations Act intended to facilitate new union organizing and collective bargaining, and prevent unfair labor practices. First introduced in 2003, the 2007 version was sponsored by Rep. George Miller and Sen. Edward Kennedy, both of whom were the senior Democrats on the House and Senate labor committees. The most important controversial feature of the bill was its change in the provisions for union recognition. For over 70 years, the NLRA has specified a two-step procedure for recognition in which workers first signed petitions indicating union support, followed by a secret ballot election held by the NLRB. As unions started to observe in the 1960s, however, legalistic maneuvers and bureaucratic problems at the NLRB have produced very long delays in the holding of these elections, thus facilitating employer opposition. In order to speed up the process, EFCA proposed to eliminate the NLRB-held election entirely. Instead, when employees signed a card designating the union as their bargaining representative, the NLRB would investigate the authorizations, and if they were declared valid, the union would be immediately certified without an official election. The change toward a “majority sign-up” certification procedure would constitute a major departure from the current system, dramatically simplifying the unionization process and potentially increasing the success rate of organizing efforts.

The bill also contained provisions to facilitate the negotiation of initial collective bargaining agreements. Within ten days of the certification of a union as a bargaining representative, management and the union would be required to meet and “make every reasonable effort to conclude and sign a collective bargaining agreement.” If an agreement is not achieved within 90 days, either party may ask the Federal Mediation and Conciliation Service (FMCS) to supervise negotiations. If 30 days of supervised mediation fails to bring agreement, the service will refer the dispute to an arbitration board (established by FMCS) with the power to establish a

binding decision lasting for two years (or longer, if the parties agree). These measures would make it vastly easier for newly recognized unions to achieve a first contract, an accomplishment presently often delayed or never achieved at all, and often cited as a major obstacle in achieving stable union representation.

Lastly, the bill would strengthen enforcement of existing provisions in the NLRA that outlaw firing or others forms of discrimination against employees for legitimate union activity during an organizing or first contract drive. The bill would require that the NLRB give priority to charges of unfair labor practices by employers, and mandate that the board seek a federal court injunction against an employer whenever there is reasonable cause to believe that employees have been discharged for union activity, or employers have interfered with employee rights. It also requires that an employer must pay three times backpay when an employee is unlawfully discharged or discriminated against. In addition, the NLRB may impose civil fines of up to \$20,000 per violation against employers violating employees' rights during an organizing or first contract campaign. Unionists argue that these measures will return balance to the workplace and reduce the amount of unfair and illegal discrimination against union supporters.

Unsurprisingly, EFCA was strongly opposed by the business community and congressional Republicans. Opponents attacked the bill for removing the secret ballot procedures required in existing NLRB-sponsored elections, arguing that the use of authorization cards would encourage coercion and intimidation. Republicans on the House Labor Committee said the legislation would bring "wholesale and unprecedented change to federal labor law" and was "an open invitation to subject workers to intimidation, harassment, and deception." The bill's provisions increasing damages, penalties, and remedies were also, in their view, unwarranted and one-sided, unfairly

tipping the balance of labor law in the direction of one party. The White House put forth similar criticisms, stating that “it is a fundamental tenet of democracy that individuals are able to vote their conscience, privately, free from the threat of reprisal. Substituting a ‘card check’ mechanism for private ballots would turn back the clock 60 years to and return us to a failed system.”⁶ In support of their Republican allies, the United States Chamber of Commerce, the National Retail Federation and other business groups initiated a major campaign to stop the bill, generating more than 10,000 e-mail messages and letters to Congress.⁷

For its part, the union movement worked closely with the congressional Democratic leadership to advance EFCA. Speaker Nancy Pelosi called the bill “the most important labor law reform legislation of this generation,” asserting that “this legislation is about more than labor law. It’s about basic workers’ rights. It’s about majority rule.”⁸ Unions succeeded in gaining support for the bill from all of the 2008 candidates for the Democratic presidential nomination, fourteen Democratic governors, and dozens of traditional liberal groups as diverse as Human Rights Watch, the NAACP, and the Sierra Club. Even the Democratic Leadership Council, long considered a supporter of more conservative economic policies in the party, strongly endorsed the bill, arguing that “it would help ensure that the basic right to freely choose collective bargaining is maintained, instead of being contingent on the wealth and resources of the contending parties in

⁶Michael Sandler, “House Passes Labor Organizing Bill,” *Congressional Quarterly Weekly Report*, March 5, 2007, p. 666.

⁷Steven Greenhouse, “Labor Seeks Boost From Pro-Union Measure,” *The New York Times*, February 23, 2007.

⁸Steven Greenhouse, “House Passes Top Priority of Unions,” *The New York Times*, March 2, 2007.

any one situation.”⁹ To buttress these endorsements, labor organized a major lobbying campaign, including demonstrations, conferences and meetings in nearly 100 cities, and the generation of more than 300,000 faxes and e-mails to Congress. “This is absolutely, without a doubt, the largest grass-roots legislative mobilization the American labor movement has had in decades,” said Stewart Acuff, the federation’s organizing director. “We didn’t start it when this Congress was elected. The momentum has been building for four years.” Of course, the fact that in 2006 unions gave \$66,302,308 to federal candidates, and that 87 percent of that went to Democrats, was no doubt a comparably important factor in setting the stage for labor’s overall lobbying effort.¹⁰

Notwithstanding the labor enthusiasm, the classic pattern was soon to appear. As in earlier episodes of labor law reform, the bill met with great success in the House of Representatives, passing by a healthy margin of 241 to 185 in March 2007 (although far short of the two-thirds needed to overturn a presidential veto). In the Senate, however, the bill encountered a Republican-led filibuster. On June 26, 2007, an effort to defeat the filibuster failed, with only 51 votes in favor and only one Republican (Arlen Specter of Pennsylvania) voting with labor (Democratic Senator Timothy Johnson of South Dakota was unable to vote for medical reasons). Of course, had cloture somehow been achieved and the bill passed, it was certain to be vetoed by President George W. Bush.

While the defeat of EFCA was predictable, the details of the failure were somewhat different than in the usual post-war pattern. As Table 1 shows, in previous battles over labor law

⁹*New Dem Dispatch*, Sept. 6, 2006
(http://www.dlc.org/ndol_ci.cfm?contentid=254029&kaid=131&subid=207).

¹⁰Jeff Patch, “Labor and Business Battle Over Worker Rights,” April 10, 2007, *Politico.com* (<http://www.politico.com/news/stories/0407/3470.html>).

reform, unions always had to deal with major Democratic defections in both the House and Senate (thus creating the notorious “conservative coalition” that so often blocked liberal reforms). The percentage of Democrats voting against labor has, however, been steadily declining since the 1940s. This trend reached its culmination in 2007, when only *two* House Democrats (both from southern states) voted against labor (despite the affiliation of 44 Democrats with the Blue Dog caucus of self-identified moderates and conservatives), and *not a single Democratic senator voted against labor*. In the House, the total number of *Democratic* votes in favor of labor law reform was the highest recorded in the postwar period. The number of Republican votes, in contrast, was the lowest (and virtually all came from northeastern members). The biggest problem for labor in 2007, then, was not Democratic defections, but rather the simple fact of Republican unity in a Senate where Democrats had a bare majority to begin with. This is a very different pattern of partisanship on labor issues than that seen in the mid-twentieth century.

Despite the remarkable level of Democratic unity, some liberal critics have still argued that the Democratic congressional leadership could have done more to push the bill through Congress, forcing a presidential veto that could be used to mobilize the left politically. Author and activist David Sirota complained that the Democrats did not attach the bill as a rider to other, more popular legislation, thus pressuring Senate Republicans into voting for it as part of a larger legislative package.¹¹ Labor historian Nelson Lichtenstein likewise complained that Democrats did not put EFCA “on their hundred-hour checklist of top legislative priorities.”¹² Nonetheless, the bill did eventually pass the House by a large margin. The real question is whether

¹¹David Sirota, “Do Dems Lack Strategery, Or Are They Avoiding It?” *Sirotablog*, June 26, 2007 (http://action.credomobile.com/sirota/2007/06/do_dems_lack_strategery_or_are.html).

¹²Nelson Lichtenstein, “Labor and the New Congress: A Strategy for Winning,” *Dissent* (Spring 2007).

congressional Democrats could have found a way to coerce Republicans into voting for the bill by using parliamentary maneuvers, much as Republicans has allegedly pushed legislation “off-center” during the preceding years of GOP majorities. Conference committees, for example, might have been used in the same fashion as they were during the period of Republican rule, as a means of bypassing Senate opposition and presenting the Senate with a *fait accompli*. The problem with these criticisms, though, is that Democrats, unlike the Republicans of recent years, did not have a friendly president ready to sign any bill that might eventually emerge out of the legislative branch. In this context, the logic of using vast amounts of political capital to gain merely symbolic victories, useful only for future political mobilization, can certainly be disputed. In any case, the interesting fact from a historical perspective remains the astonishing degree of Democratic unity in support of labor’s position.

THE POSSIBILITIES OF PARTISAN DISCIPLINE

The story told here is, in essence, quite repetitive: labor success in the House followed by failure in the Senate due to the super-majority requirement produced by use of the filibuster (the one exception being the 1949 failure to repeal Taft-Hartley). This points to a primarily institutional explanation for persistent failure, where locked-in institutional rules generate outcomes contrary to what societal and political coalitions alone would predict. To be sure, the elimination of the filibuster would be no guarantee of labor success, as it might simply lead to new alignments that would produce the same negative outcome for labor as before. In the absence of the filibuster, for example, some Senators currently voting for cloture would be in the uncomfortable position of having to vote on an actual bill, thus placing them under greater pressure than they might be currently. In short, the removal of the more obvious institutional

blockages might only serve to reveal deeper political constraints that are currently obscured. Nonetheless, it is hard not to conclude that the institutional structure of American government – balanced bicameralism buttressed by an anti-majoritarian upper house – has been a profound obstacle for organized labor (although also a source of protection in the more conservative climate of recent years). The result of this structure has been what law professor Cynthia Estlund has appropriately called “the ossification of American labor law.”¹³ This ossification is not, however, neutral in its effects. As changes occur in industrial relations and the larger economic environment, unions may be at a disadvantage if the law is not adjusted in response to changing circumstances. Or, as the Democratic Leadership Council put, labor law reform bills such as EFCA are examples “of how it is sometimes essential to amend the letter of the law to preserve its spirit.”¹⁴

What, then, of the political party as an instrument for overcoming the obstacles to labor success? As Table I shows, labor has achieved far greater unity within the Democratic party, yet has not generated a notably higher percentage of support within Congress. It is revealing that the total number of votes in favor of labor law reform (including in the tally Republicans as well as Democrats) reached a highpoint in 1977 and 1978, and that the count in both the House and Senate was actually lower on the EFCA vote in 2007. In this sense, the reshuffling of party coalitions has not really provide labor with a fundamentally improved situation. Perhaps, then, the real test of the new system of increased partisanship will come when a new period of unified Democratic party government commences. In 2009, the Democrats may gain control of the

¹³Cynthia L. Estlund, “The Ossification of American Labor Law,” *Columbia Law Review*, Vol. 102, No. 6 (2002).

¹⁴*New Dem Dispatch*, Sept. 6, 2006 (http://www.dlc.org/ndol_ci.cfm?contentid=254029&kaid=131&subid=207).

presidency, and are likely to expand their majorities in the House and Senate. There are two key questions that arise. First, can the Democrats expand their majority in the Senate to 60 votes, or close enough to it that a few votes from Republican moderates can end a filibuster? Second, if that larger majority is achieved, can party discipline on labor issues still be maintained? If Democrats gain, say, 58 seats in the Senate, and then actually see those 58 voting for a labor law reform bill, that could legitimately be seen as a very impressive instance of party discipline operating on behalf of the labor agenda. After all, if members were purely voting on the basis of state politics, as opposed to party affiliation, it would seem unlikely that 58 Democratic Senators would really hold together in support of a labor law bill like EFCA. If they do, a working hypothesis would be that party discipline is a key factor in producing such unity. Thus, it will be fascinating to watch what may unfold on labor issues should the Democrats be successful in the elections of 2008. If labor were to actually succeed in seeing a labor law reform bill through Congress and onto the desk of a Democratic president in 2009, that would be a stunning outcome that would illustrate the importance and value of a partisan strategy by organized labor. It would, in fact, confirm the basic choice of several generations of labor leaders (including Reuther and Biemiller) to try to achieve a purification and realignment of the party system.

The possibility that strong party discipline may be a crucial and necessary prerequisite to the achievement of a goal long on the agenda of American liberals – labor law reform – also has some implications for how political scientists think about issues related to party responsibility, discipline, and polarization. The famous 1950 report of the American Political Science Association Committee on Political Parties expressed support for a two-party system in which voters were “offered a proper range of choice between alternatives of action.” Distinctive choices could best be achieved, the Committee argued, by the development of disciplined parties based on

comprehensive platforms that were widely publicized and to which politicians were held accountable. In considering the probable response of interest groups to such an initiative, the Committee predicted that “large-membership organizations with wise leadership will generally support the turn toward more responsible parties.” The report noted that the growth of one such “large-membership” group – national labor unions – had already contributed to a nationalization of issues and alignments that was conducive to the long-run development of more ideologically coherent, issue-based parties.¹⁵ From the perspective of the APSA report, then, it should come as no surprise that union leaders in subsequent decades continued to support a rationalization of the national party system along more coherent ideological lines.

What is more troubling is that so many political scientists have come to see the current era of more internally homogeneous and disciplined parties, especially in the US Congress, as an unfortunate development. The polarization of parties has been blamed for many adverse developments, including increased corruption on Capitol Hill (as in the Abramoff case), a major decline in the quality and amount of deliberation according to legislation, the enactment of extremist legislation that is far from the preferences of the median voter, and a tendency towards stalemate and lack of cooperation on pressing national issues. This is not the place to assess these diverse claims (except perhaps to note that they are frequently contradictory, and are based on a rather rosy view of how Congress worked in decades past). What should be noted here is that these claims frequently ignore the question of who actually benefits in the long run from a regime of more disciplined and ideologically coherent parties. Insofar as this issue has been addressed at all, the usual suggestion has been that polarized parties have benefitted right-wing Republicans by

¹⁵American Political Science Association, *Toward a More Responsible Two Party System*, (Washington, D.C.: American Political Science Association, 1950), p. 13 and p. 34.

enabling “off-center” policy outcomes that would otherwise have not occurred.¹⁶ While this claim is itself questionable, the story of labor law reform suggests an alternative possibility, namely, that in a system of separated powers and balanced bicameralism, the disciplined political party is a necessary tool for achieving progressive policy change over the long term. In fact, given the dependence of liberalism on *active government* (dedicated to, among other things, protecting the right to organize in the workplace), the long-run effect of stronger parties is to facilitate liberalism, not its opposite. While disciplined parties can also be used by conservatives to try to undo the success of liberals in the past, the difficulty in abolishing governmental programs once they have been created suggests that the net effect of stronger parties is to benefit government expansion and liberal social policy goals.

Insofar as the above is true, the current antipathy of portions of the discipline to the evolving regime of disciplined and polarized parties should not be seen as ideologically or politically neutral. And an endorsement of efforts to weaken or de-polarize parties cannot be seen as merely a technical advance toward good government.¹⁷ It is quite possible that such proposals will have definite political consequences. Specifically, to advocate a weakening of party discipline and differentiation at a moment when American liberalism seems on the cusp of a notable revival in which party discipline may be a crucial component, is to engage in a political intervention. Let us recognize it as such.

¹⁶See Hacker and Pierson, *Off Center*.

¹⁷Criticisms of the current regime of stronger parties can be found in Pierson and Hacker, *Off-Center*; Thomas Mann and Norman Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford University Press, 2006); Nicol Rae, “Be Careful What You Wish For: The Rise of Responsible Parties in American National Politics,” *Annual Review of Political Science*, Vol. 10 (2007); and Nelson Polsby, *How Congress Evolves: Social Bases of Institutional Change* (Oxford University Press, 2005).

**TABLE 1: HISTORICAL COMPARISON OF VOTING ON LABOR LAW BILLS
WITH PERCENTAGE OF DEMOCRATS VOTING WITH LABOR**

Employee Free Choice Act, 2007 (failed)

House (March 1, 2007)

Democrats: **228 yes (99%), 2 no**

Republicans: 13 yes, 183 no

Total: 241 yes, 185 no

Senate (June 26, 2007 cloture vote)

Democrats: **48 yes (100%), 0 no**

Independents: 2 yes

Republicans: 1 yes, 48 no

Total: 51 yes, 48 no

Workplace Fairness Act (Striker Replacement Bill), 1993 (failed)

House

Democrats: **221 yes (87%), 33 no**

Independents: 1 yes

Republicans: 17 yes, 157 no

Total: 239 yes, 190 no

Senate (cloture vote)

Democrats: **50 yes (89%), 6 no**

Republicans: 3 yes, 40 no

Total: 53 yes, 46 no

Labor Law Reform Act, 1977-1978 (failed)

House

Democrats: **221 yes (79%), 59 no**

Republicans: 31 yes, 104 no

Total: 252 yes, 163 no

Senate (1978 cloture vote)

Democrats: **44 yes (72%), 17 no**

Republicans: 14 yes, 22 no

Total: 58 yes, 39 no

Repeal of Section 14(b) of Taft-Hartley Act, 1965-1966 (failed)

House

Democrats: **200 yes (70%), 86 no**

Republicans: 21 yes, 117 no

Total: 221 yes, 203 no

Senate (1966 cloture vote)

Democrats: **45 yes (67%), 22 no**

Republicans: 6 yes, 26 no

Total: 51 yes, 48 no

Repeal of Taft-Hartley Act, 1949 (failed)

House

Democrats: **193 yes (75%), 62 no**

Republicans: 18 yes, 147 no

Total: 211 yes, 209 no

Senate

Democrats: **29 yes (56%), 23 no**

Republicans: 12 yes, 30 no

Total: 43 yes, 53 no

Initial Passage of Taft-Hartley Act, 1947 (passed over labor opposition)

House

Democrats: **93 yes, 84 no (47%)**

Republicans: 215 yes, 22 no

Total: 308 yes, 96 no

Senate

Democrats: **21 yes, 21 no (50%)**

Republicans: 47 yes, 3no

Total: 68 yes, 24 no