Prospects for

Labor Law Reform

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For over five decades, the labor movement has regularly sought to reform the nation's labor laws in a more liberal direction. And with equal regularity, such efforts have been defeated. When unions represented about a third of the workforce, they were unable to block the passage of the Taft-Hartley Act, nor to act quickly to achieve its repeal. When Democrats had massive majorities in the House and Senate in the mid-1960s, and a strong liberal president in the form of Lyndon Johnson, unions also failed. When Jimmy Carter was president, labor failed, and unions experienced no more success when Bill Clinton was in office. Thus, the last major pro-union piece of labor legislation to be signed into law was in 1935, when the Wagner Act established a right to organize and codified a set of procedures to empower workers seeking union representation. Since then, all legislative efforts at the federal level to enhance union power have failed. Indeed, since the passage of Taft-Hartley in 1947 and the Landrum-Griffin Act in 1959, both of which were opposed by labor, there has been virtually no updating or reform of federal labor statutes.

Why, then, do so many unionists foresee an opportunity in the 2008 elections for unions to make political gains sufficient to allow passage of a new labor law reform bill? How could the possibility of a major union success in labor law reform even be contemplated, considering that unions now represent a scant 12 percent of the workforce?[1]

Patterns in Labor Law Voting

The answer to such questions can be found by considering how and why labor law reform has failed in the past. For most of the twentieth century, union influence in the United States Congress was sharply constrained by the presence of a "conservative coalition" of southern Democrats and conservative Republicans. This coalition reflected the persistence of a one-party South where Democrats monopolized almost all elected offices, and thus included among their ranks conservative politicians who would elsewhere be more likely to be found in the Republican Party.

> Conservative Democrats posed a major problem for enactment of pro-union legislation.

Even when Democrats held large congressional majorities, the defection of conservative, typically southern, Democrats posed a major problem for the enactment of pro-union legislation. This was especially true in the Senate, where the use of the filibuster required a two-thirds majority (or three-fifths after a 1975 rules change) to achieve cloture and

bring legislation to the floor for a simple majority vote. The need to achieve such an extraordinary super-majority would ultimately prove devastating for union hopes to advance a pro-labor agenda.

The problem for labor is evident if we examine the three major efforts to change labor law during periods of unified Democratic party government in the 1960s, 1970s, and 1990s. Following the massive successes of the Democrats in the 1964 elections, unions sought in 1965–1966 to repeal section 14(b) of the Taft-Hartley Act, the provision protecting state authority to ban union security agreements. The repeal bill passed the House with 221 votes, but a cloture vote in the Senate secured only 51 votes, far from the necessary two-thirds. During the Carter Administration, unions pushed a broader labor law reform bill designed to speed up procedures for union recognition and better protect organizing rights. Passed in the House with 252 votes, the bill gained the support of 58 Senators, still two short of the number required to shut down a Republican-led filibuster. With the election of Bill Clinton, unionists pushed a bill to outlaw the permanent replacement of economic strikers (thus overturning the Supreme Court's Mackay Radio decision of 1938). This bill also passed the House easily, with 241 votes, but garnered the support of only 51 Senators, again far from the super-majority needed.

The pattern, then, is quite clear: labor law reform efforts can pass the House, but are unable to obtain the votes necessary to overcome a Senate filibuster. The persistence of this pattern over many decades would suggest little reason to believe that labor's position is likely to improve. However, closer inspection of congressional voting patterns indicates that changes in a direction favorable to labor are slowly unfolding. Table 1 shows the level of Democratic Party unity on labor law reform bills from the 1960s to 2007 (including voting on the Employee Free Choice Act, to be described below). Most important are changes in the Senate, where labor bills traditionally fail. In the 1960s and 1970s, Democrats held more seats in the Senate, but party unity on labor bills was relatively low (67 percent in 1966, and 72 percent in 1978). In the 1990s and 2000s, the Democrats had fewer seats, but considerably greater unity (89 percent in 1993, and a remarkable 100 percent by 2007). Indeed, by 2007 the old pattern of Democratic defections on Senate labor bills had completely disappeared. Still, this impressive Democratic unity had only given labor a total of 51 votes, the same number it had obtained in 1966 on 14(b) repeal—hardly a transformative change.

Where, then, lies the ground for labor optimism? Under what circumstances could the Senate expect to vote any better than it did in, say, 1978, when 58 Senators supported labor's position? Here, union activists look to the gains that may occur in 2008. As of early summer, political analysts expected Democrats to almost certainly pick up new seats in Virginia, New Hampshire, Colorado, and New Mexico. In addition, Alaska and Mississippi seemed surprisingly favorable to the Democrats, and it was conceivable that Democrats could gain one or more seats in Maine, Minnesota, North Carolina, and Oregon. If things went perfectly, Democrats might gain as many as ten new seats, which combined with the votes of the two independent Senators who currently caucus with the Democrats, would give the party a total of 61 votes in the Senate—more than enough to overcome a filibuster. Moreover, most of these new members would be from non-Southern states—indeed, only three of the possible ten are from the South. The possibility, then, is that the Democrats may achieve a sixty-vote majority that could actually cohere in support of labor law reform—in notable contrast to the pattern of the 1960s. Even if Democrats did less well than expected in 2008, gaining only six or seven seats, labor strategists foresaw

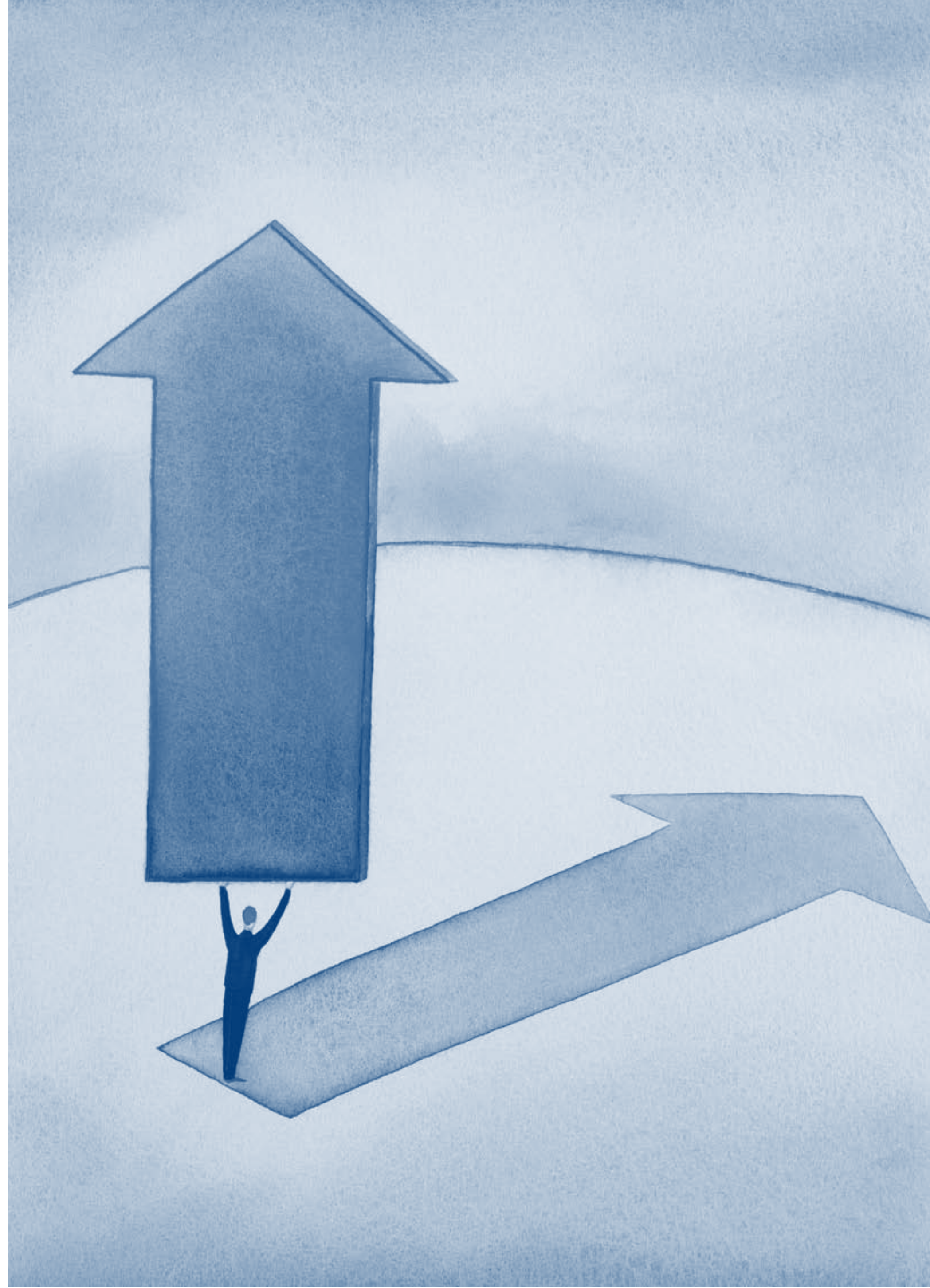
Table 1. Congressional Voting on Labor Law Reform, 1965–2007

Employee Free Choice Act, 2007 (failed)	
House (March 1, 2007)	**Senate** (June 26, 2007 cloture vote)
Democrats: **228 yes (99%), 2 no**	Democrats: **48 yes (100%), 0 no**
Republicans: 13 yes, 183 no	Independents: 2 yes
Total: 241 yes, 185 no	Republicans: 1 yes, 48 no
	Total: 51 yes, 48 no
Workplace Fairness Act (Striker Replacement Bill), 1993 (failed)	
House	**Senate** (cloture vote)
Democrats: **221 yes (87%), 33 no**	Democrats: **50 yes (89%), 6 no**
Independents: 1 yes	Republicans: 3 yes, 40 no
Republicans: 17 yes, 157 no	Total: 53 yes, 46 no
Total: 239 yes, 190 no	
Labor Law Reform Act, 1977–1978 (failed)	
House	**Senate** (1978 cloture vote)
Democrats: **221 yes (79%), 59 no**	Democrats: **44 yes (72%), 17 no**
Republicans: 31 yes, 104 no	Republicans: 14 yes, 22 no
Total: 252 yes, 163 no	Total: 58 yes, 39 no
Repeal of Section 14(b) of Taft-Hartley Act, 1965–1966 (failed)	
House	**Senate** (1966 cloture vote)
Democrats: **200 yes (70%), 86 no**	Democrats: **45 yes (67%), 22 no**
Republicans: 21 yes, 117 no	Republicans: 6 yes, 26 no
Total: 221 yes, 203 no	Total: 51 yes, 48 no

Source: Gilbert J. Gall, *The Politics of Right to Work: The Labor Federations as Special Interests, 1943–1979* (New York: Greenwood, 1988), and http://www.thomas.gov.

the possibility of sufficient support from moderate Republicans to still reach the sixty votes needed to bring debate to a close.

There are, of course, many "ifs" in this scenario, but the basic pattern of increased Democratic Party unity in both the House and Senate in favor of labor law reform seems likely to endure. Ironically, therefore, labor may be in a position to "do more with less." A shrunken labor movement, and a congressional Democratic Party that under any foreseeable outcome will still be smaller than it was in the 1960s, may yet be able to deliver policy change that was long stymied under the prevailing political conditions of post-war America. Party unity is, in this sense, a force-multiplier in America's complex (arguably baroque) system of multiple checks and balances.



The Employee Free Choice Act

When Democrats regained majorities in Congress in 2006, unions and their congressional allies immediately pursued a new labor law reform effort. The Employee Free Choice Act (EFCA) was an amendment to the National Labor Relations Act intended to facilitate new union organizing and collective bargaining, and prevent unfair labor practices. The most important feature of the bill was its establishment of a "card-check" procedure for union recognition. EFCA provided that when a majority of employees signed a card designating the union as their bargaining representative, the National Labor Relations Board would investigate the authorizations and, if they were declared valid, immediately certify the union without proceeding to a formal, secret-ballot 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 included a provision to facilitate the negotiation of initial collective bargaining agreements by requiring a form of binding arbitration (when a contract cannot be negotiated voluntarily), and increased penalties on employers who fire or punish employees for legitimate union activity.

> Labor may be in a position to "do more with less."

As in earlier episodes of the labor law reform struggle, the bill met with great success in the House of Representatives, passing by a healthy margin of 241 to 185 in March 2007, only to be blocked by a Republican-led filibuster in the Senate. On June 26, 2007, an effort to defeat the filibuster failed, with 51 votes in favor and only one Republican (Arlen Specter of Pennsylvania) voting with labor. Of course, even if cloture had somehow been achieved and the bill passed, it was certain to be vetoed by President George W. Bush. While the defeat of

EFCA was therefore predictable, the level of Democratic unity was not, and it was this fact that enlivened union hopes for a better outcome in the aftermath of the 2008 elections.

> While the defeat was predictable, the Democratic unity was not.

Prospects for 2009

The history of congressional conflict over labor law reform suggests some predictions for the period following the inauguration of a new Congress and president in 2009. If John McCain wins the presidency, the likelihood of EFCA passing is virtually nil. If Barack Obama wins, but Democrats control less than 60 seats in the Senate, the possibility of passage rises, but is far from certain. In this scenario, much will depend on the intensity and skill with which a President Obama would support such legislation, as well as the strategies adopted by congressional leaders to pressure Republican moderates and any wavering Democrats.

If Obama wins handily, and Democrats obtain as many as sixty seats in the Senate, passage of EFCA will be likely, but not a certainty. The main peril for labor even in this scenario is that a few moderate Democrats, in all probability from the South, may choose to vote against cloture, with the result being that labor may still fall short of the needed sixty-vote margin. Thus, even if labor and the Democrats do remarkably well in the November elections, passage of labor law reform will remain a challenge. The filibuster rule, and the American system of separated powers more generally, are likely to continue to pose major problems for labor unless and until that time when unqualifiedly liberal Democrats control a super-majority in the Senate of at least 60 votes.[2]

NOTES

1. Given the references to the 2008 elections, it should be noted that this article was submitted to *Perspectives on Work* in June 2008.
2. For details on past labor law reform efforts and on the dynamics of labor's relationship to the American political system since the 1960s, see Dark, T.E. *The Unions and the Democrats: An Enduring Alliance* (Ithaca: Cornell University Press, 2001)

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