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The Wagner Model of Labour Law Is Dead—Long Live Labour Law!

*Paul M Secunda**

The Wagner model of labour law no longer fulfills the promise of protecting and promoting employees' collective voice in the American workplace. Legislative, administrative and judicial developments under that model have subjected employees to intense employer interference in choosing whether to opt for collective bargaining, have allowed employers to practice surface bargaining without ever intending to reach agreement with unions, and have rendered the right to strike largely illusory because of the employer's right to replace strikers permanently. The Employee Free Choice Act, which purports to reform the Wagner model from within, is not likely to be passed and in any event would probably be inadequate to change the current power dynamic. Also, the "new governance" approach would likely secure little more than cosmetic employer compliance with new regulatory schemes.

The best courses of action might be to use the remaining energies of the labour movement to support an Occupy Wall Street-type movement and to forge a new labour-oriented political party, but the state of the American political environment gives little reason to believe that such an effort could come to fruition in the short term. Instead, the author advocates three other initiatives which he considers to be more promising supplements to the current Wagner model: pre-recognition framework agreements; the Coworker.org open-source service that uses social media to connect workers to each other with a view to reinforcing their bargaining positions on workplace issues; and an approach inspired by the Ghent system, which has long been in place in several northern European countries, through which unions would provide employment-related benefits to non-members in order to increase the union presence throughout the workforce.

* Associate Professor of Law, Marquette University Law School. This paper stems from a presentation given at the conference, *Faultlines and Borderlines in Labour Law: The Future of the Wagner Act in Canada and the United States*, at the University of Western Ontario on March 3, 2012. I am grateful to Michael Lynk for having invited me to participate in this conference, and for the many helpful comments I received from conference participants. I also benefitted greatly from comments at the Seventh Annual Colloquium on Labor and Employment Law at Loyola Law School and at the Marquette Law School Faculty Workshop, both in September 2012. Finally, I would like to express my gratitude particularly to Dennis Nolan, Ben Sachs, Michelle Miller and Matt Bodie for helpful comments on earlier drafts. All opinions and views herein are, however, my own.

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Introduction

Now if you think it strange that mice should elect a government made up of cats, you just look at the history of Canada for the last 90 years and maybe you'll see that they weren't any stupider than we are . . . You see, my friends, the trouble wasn't with the colour of the cat. The trouble was that they were cats. And because they were cats, they naturally looked after cats instead of mice.

—Tommy Douglas, 1944¹

The Wagner model of labour law in the United States is dead for all intents and purposes.² To invoke Tommy Douglas' metaphor quoted above, the worker mice in America continue to lose ground in labour relations as they elect corporate cats from both the Democratic and

1. "The Story of Mouseland", online: Douglas Coldwell Foundation <<http://www.dcf.ca>>.

2. By "for all intents and purposes", I mean to acknowledge from the outset that American employees will doubtlessly continue to rely on various aspects of the current Wagner model, including protections for concerted employee activities in the workplace, even if other labour law models are eventually adopted. Yet this paper's focus is on the chronic inability of the Wagner model to more broadly and effectively protect the rights to organize, bargain and engage in concerted workplace action. I am not suggesting abandoning all of that model's existing legal protections, but I do contend that the time has come to discard the more formal mechanisms surrounding organizing campaigns and representation elections, collective bargaining, and concerted activities, such as strikes and boycotts.

Republican parties to represent their interests. We should not be surprised that those cats are interpreting and promulgating a labour law scheme that is inimical to mice.³

In this age of a far-flung global economy and increased outsourcing of American jobs, the death of the Wagner model has long been heralded by the increasing lack of meaningful voice for American employees in both private and public sector workplaces. This difficulty in having themselves heard through the traditional means of collective action stems from workers' inability, under the Wagner model, to engage in effective organizing, collective bargaining or concerted activities for mutual aid and protection. This state of affairs, in turn, stems from the anachronistic and ossified nature of the *National Labor Relations Act (NLRA)*⁴ due to the political stalemate that has left the statute basically unchanged in its current form for nearly fifty-five years despite dramatic changes in the labour, capital and products markets.⁵

The *Wagner Act*, passed by the New Deal Congress in 1935, was based on the bread and butter unionism of Samuel Gompers. In Mary Ann Mason's words:

Gompers, the undisputed leader of the early trade union movement, was a special interest pragmatist. He demanded bread and butter gains for his craft union members and was

3. See Charles J Morris, "How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process" (2012) 33:1 Berkeley J Emp & Lab L 1 (noting the "longstanding practice of appointing to membership on the [National Labor Relations] Board and to the position of General Counsel a critical number of persons who were opposed to the [National Labor Relations] Act's statutory policy. This strategy was conceived by organized management and carried out intermittently—but effectively—by every Republican administration from Dwight D. Eisenhower to George W. Bush" at 6).

4. 29 USC §§ 151–169 (2011) [*Wagner Act*].

5. See generally Cynthia Estlund, "The Ossification of American Labor Law" (2002) 102:2 Colum L Rev 1527; Wilma B Liebman, "Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board" (2007) 28:2 Berkeley J Emp & Lab L 569. See also David J Doorey, "A Model of Responsive Workplace Law" 50 Osgoode Hall LJ [forthcoming]. Additionally, at least in the private sector, states cannot engage in labour law reform because of the strong federal preemption of state laws under the *NLRA*. See generally Paul M Secunda, "Towards the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States" (2008) 29:2 Comp Lab L & Pol'y J 209.

completely uninterested in redistributing wealth or challenging class structure, as compared to his European counterparts who fomented revolution in nearly all European countries.⁶

This pragmatic and peculiarly American approach is surviving in fewer and fewer industries as global competition and job insecurity take their toll. Meanwhile, corporate opponents are poised to try to stomp out the last remnants of unionism once and for all. Recent attacks on public sector unionism in Wisconsin and other states are just the most recent and notorious examples.⁷ On the private sector side, Congressional Republicans have challenged National Labor Relations Board (NLRB) administrative proceedings even while they are underway, seeking to hold the NLRB General Counsel in contempt⁸ and simultaneously attempting to pass legislation that would defund or eliminate the Board.⁹

This paper begins by focusing on three of the more significant impediments to effective workplace representation under the Wagner model in the private sector workplace: the use of captive audience meetings by employers to intimidate and coerce employees during organizing campaigns; the lack of meaningful remedies for violations of the *NLRA* (including the lack of a method for forcing first collective agreements); and the increasing use of permanent replacements for strikers, with a corresponding decrease in the use of the strike weapon.¹⁰ The cumulative

6. Mary Ann Mason, "The Burden of History Haunts Current Welfare Reform" (1996) 7:2 *Hastings Women's LJ* 339 at 340.

7. See generally Paul M Secunda, "The Wisconsin Public Sector Labor Dispute of 2011" (2012) 27:2 *ABA J Lab & Emp L* 293 [Secunda, "Wisconsin"].

8. See Mike Elk, "Issa Subpoenas NLRB, Solomon Could Face Contempt of Congress Charges", *In These Times* (9 August 2011) online: *In These Times* <<http://www.inthesetimes.com>>.

9. See Melanie Trottman, "NLRB defunding fails, but agency remains GOP target", *Washington Wire* (17 February 2011) online: *The Wall Street Journal* <<http://blogs.wsj.com>>.

10. In selecting these three specific problems with the current Wagner model, I do not suggest that they are the most important ways in which that model frustrates the rights to organize, bargain and engage in concerted activities, or that other problems could not be similarly highlighted. For instance, the lack of access to employer property by union organizers significantly interferes with employee organizational rights, as held in *National Labor Relations Board v United Steelworkers of America, CIO and NuTone, Inc.*, 357 US 357 at 363-64 (1958). The fact that exclusive representation principles preclude a greater variety of joint employee-management committees makes it difficult for workers to otherwise have their voices heard in the workplaces. See *Electromation Inc.*, 309 NLRB No 990 (1992);

impact of these problems has led to a glaring “representation gap” in the American workplace. Only about seven per cent of private sector workers are in a union, but polls have suggested that many more would like to be and that more yet would like to have some other form of effective workplace voice.¹¹ This gap suggests that the Wagner model is not giving employees the voice they want in the private sector workplace. At the same time, the ongoing employer campaign for right-to-work legislation has exacerbated these problems by making it increasingly difficult for unions to fund their operations and organize additional workers.¹² Finally, declining union representation has contributed to rising income inequality and the shrinking of the middle class.¹³

On the public sector side, recent state legislation, most prominently in Wisconsin, has sought to abolish most collective bargaining rights for most public employees.¹⁴ Anti-dues checkoff provisions and annual recertification requirements in these state laws seek to make life more difficult for public sector unions as they struggle to remain formally recognized and adequately funded.¹⁵ Most recently, their ability to collect dues in support of their political goals has been called into serious

Michael H LeRoy, “Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA” (1999) 72:6 S Cal L Rev 1651.

11. Richard B Freeman, “Do Workers Still Want Unions? More Than Ever”, *Economic Policy Institute* (22 February 2007) at 2, online: EPI <<http://www.epi.org>>:

[T]he proportion of workers who want unions has risen substantially over the last 10 years, and a majority of nonunion workers in 2005 would vote for union representation if they could. This is up from the roughly 30% who would vote for representation in the mid-1980s, and the 32% to 39% in the mid-1990s, depending on the survey . . . three-fourths of workers desire independently elected workplace committees that meet and discuss issues with management, which some see as a supplement to collective bargaining (having both) and some see as useful as a stand-alone mechanism.

12. See Adam Sorenson, “Why is Indiana’s ‘Right to Work’ Law Such a Big Deal?”, *Time Magazine* (2 February 2012) online: Time <<http://newsfeed.time.com>>. See “Michigan passes ‘right-to-work’ legislation”, *BBC News* (11 December 2012) online: BBC <<http://www.bbc.co.uk>> (Michigan recently became the 24th right-to-work state, after large worker protests, on 11 December 2012).

13. See Jillian Berman, “Alan Krueger: Rising Income Inequality Causing ‘Unhealthy Divisions In Opportunities’”, *The Huffington Post* (12 January 2012) online: The Huffington Post <<http://www.huffingtonpost.com>>.

14. See Secunda, “Wisconsin”, *supra* note 7.

15. *Ibid* at 297.

question by the United States Supreme Court in *Knox v Service Employees International Union, Local 1000*, which created the requirement that non-member employees affirmatively opt in before such dues may be collected from them.¹⁶

In response to the current crisis in labour law, many scholars have called for reform within the Wagner system. Most notably, in 2009, the proposed *Employee Free Choice Act (EFCA)* would have expanded remedies under the *NLRA*, allowed card-check recognition as an alternative to secret ballot representation elections, and provided for first contract interest arbitration.¹⁷ As it happens, none of these reforms were passed after being filibustered by Senate Republicans in 2009, and the *NLRA* remains ossified. Even if the *EFCA* had passed, a real question remains about whether it would have been sufficient to bridge the representation gap.¹⁸

Other labour and employment law scholars have looked outside the Wagner model and called for an embrace of “new governance” or “decentred” approaches to workplace relations.¹⁹ Most prominently, in her recent book Cynthia Estlund has called for “regulated self-regulation” in the workplace.²⁰ This model of workplace governance focuses on “the idea of ‘decentering the state’ and elevating the regulatory role of other nongovernmental actors, including regulated entities themselves; and [on]

16. 132 S Ct 2277 at 2296 (2012). Prior to *Knox*, unions were free to collect fees from objecting nonmembers, and upon application, to refund the portion of those funds used for political or ideological purposes. See Anne Marie Lofaso, “Judicial Activism of the Roberts Court: Anti-Union Ideology Driving the Analysis”, *ACSBlog* (2 July 2012) online: American Constitution Society <<http://www.acslaw.org>> (“[u]ntil *Knox*, the Supreme Court had never questioned the constitutionality of the opt-out method”).

17. US, Bill HR 1409, *Employee Free Choice Act of 2009*, 111th Cong, 2009; US, Bill S 560, *Employee Free Choice Act of 2009*, 111th Cong, 2009. See Matthew Dimick, “Labor Law, New Governance, and the Ghent System” (2012) 90:2 NCL Rev 319 at 339–40.

18. *Ibid* (describing the *EFCA* as not making fundamental changes to the Wagner model, but “merely ‘filling gaps’ in the current framework” at 321).

19. *Ibid*, citing Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 106–08 (traditionally, the new governance approach involves “incentive molding” in the form of “monitored self-regulation,” where the regulated entity is encouraged to adopt internal compliance mechanisms and is rewarded with less interventionist forms of oversight” at 323).

20. *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven Ct: Yale University Press, 2010).

the idea of ‘reflexivity’ in law—of replacing direct regulatory commands with efforts to shape self-regulation and self-governance within the organization”.²¹

Professor Estlund and others are to be commended for coming up with innovative ways to provide governmental incentives for employers to behave more justly towards their employees. However, like others, I remain sceptical of the new governance model and worry that it would further diminish employee rights, even though it would undoubtedly lead many employers to make cosmetic improvements.²² Without truly independent outside union representation, employees will remain essentially mute in the workplace, given a power dynamic suffused with employer control over the job.²³ Only through reforms which change that power dynamic, and offer heterodox approaches to creating opportunities for worker voice in the American economy, will employees be able to participate meaningfully in governing the workplace in partnership with their employers.

This paper proceeds in three parts. After a brief overview of the Wagner model, Part I explores the current problems with that model in the American private and public sectors. It seeks to make clear why unions and others are increasingly avoiding the use of the existing structure to address workplace issues. Part II considers suggestions made by others to reform the current model, with an emphasis on the *EFCA* and the new governance approach. Because the *EFCA* in my view represents an inadequate approach to what ails American labour law, and because the new governance approach lacks the ability to ensure independent worker representation and anything more than cosmetic compliance with new soft workplace norms, I reject both of these approaches. Part III first dismisses the likelihood of a significant American labour political party in the short term, then proposes three modest reforms which focus on innovative organizing and collective bargaining strategies outside of the current model: pre-recognition framework agreements between

21. *Ibid* at 136.

22. See Paul M Secunda, Book Review of *Regoverning the Workplace: From Self-Regulation to Co-Regulation* by Cynthia Estlund, (2010) 64:1 Indus & Lab Rel Rev 203 [Secunda, Book Review]; Adelle Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct” (2001) 8:2 Ind J Global Legal Stud 401.

23. See Secunda, Book Review, *supra* note 22 at 204.

employers and unions; the Coworker.org open-source web platform to encourage more small-scale organizing and bargaining; and approaches to labour relations inspired by the Ghent system, with a focus on mutual aid efforts involving non-union employees. In combination, these supplements to the Wagner model would start the process of once again providing American workers with a meaningful voice in the workplace, both within and outside the current Wagner framework.

This paper takes the position that the Wagner model is irretrievably broken and should be discarded or at least substantially revised. It is not time to give up on the promise of collective action, but to consider supplementary and heterodox approaches that will give meaningful opportunities for other forms of collective action and employee voice in the American workplace. Such voice is needed now more than ever, to push back against the rising tide of income inequality and excessive corporate influence over government in the United States.

I. Current Failures of the Wagner Model of Labour Relations

Any discussion of the failures of the *Wagner Act* must begin with a brief review of the law's structure and original purposes.

A. The Wagner Model of Labour Law in Brief

Section 1 of the *NLRA* states that its purpose is to reduce industrial strife and promote the flow of commerce, by creating a structure for the friendly adjustment of industrial disputes and by encouraging collective bargaining and unionization to “restor[e] equality of bargaining power between employers and employees”.²⁴ That is, if employees cannot bargain with their employers in circumstances of equal economic power, fair employment contracts are not possible.

The heart of the *NLRA* is section 7, which provides employees with the basic rights to organize, to bargain collectively through a representative of their own choosing and to engage in concerted activities for mutual

24. *Wagner Act*, *supra* note 4 § 151.

aid and protection.²⁵ Section 8 prohibits certain employer unfair labour practices that violate employees' section 7 rights²⁶—for instance, employer coercion and intimidation of employees who exercise those rights. Any such violation constitutes an unfair labour practice, which is ruled on by the NLRB and enforced through the federal appellate courts. In section 9, Congress set forth the basic methods for selecting and designating an employee collective bargaining representative such as a union, including secret ballot representation elections or the presentation to the employer of authorization cards from a majority of workers in a given bargaining unit authorizing the union to represent them in collective bargaining.²⁷

In all, the *Wagner Act* was a conscious, carefully thought out program for minimizing labour disputes without undue sacrifice of personal and economic freedom.²⁸ The Act's characteristics included the following: a concern primarily with the organizational phase of labour relations (and not with post-organizational collective bargaining); a concern only with employer wrongdoing (and not with union wrongdoing); a conscious attempt to leave the substantive provisions of collective agreements to private negotiation between the parties; acceptance of an adversarial model of labour relations, where each employee is on the side of labour or management but never both; and the idea of exclusive representation, under which a union designated or selected by a majority of workers represents all workers, whether or not all of them voted for union representation.

In short, as Senator Walsh, the Chairman of the Senate Committee on Education and Labor, stated during the legislative debates on the *NLRA* in 1935:

When the employees have chosen their organization, when they have selected their representatives, all the [*Wagner Act*] proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What

25. *Ibid.*, § 157.

26. *Ibid.*, § 158.

27. *Ibid.*, § 159. Securing voluntary recognition from an employer through use of authorization cards from a majority of bargaining unit members is almost as old as the *Act* itself. See *National Labor Relations Board v Gissel Packing Co*, 395 US 575 at 596–97 (1969).

28. See *HK Porter Co v National Labor Relations Board*, 397 US 99 (1970) (describing "the fundamental premise on which the Act is based" as "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" at 108).

happens behind those doors is not inquired into, and [the *Act*] does not seek to inquire into it.²⁹

The model presumes that employees can organize without interference by their employers, that they will be permitted to enter into a collective agreement after good faith negotiations, and that the parties will be able to engage in economic warfare (for example, strikes, lockouts, boycotts and pickets) if negotiations break down. These preconditions no longer exist.

The seeds of the Wagner model's undoing were sown in 1947 when Congress promulgated the *Labor Management Relations Act* (better known as the *Taft-Hartley Act*).³⁰ "Employee free choice" became the buzz words—the thought being that just as employees should be free to organize into a union and engage in collective bargaining, they should also be free not to. Government was no longer supposed to encourage unionization and collective bargaining, but merely to act as a neutral to ensure that employees could decide, with full information, whether to choose union representation.³¹ The *Taft-Hartley Act* also imposed "major restraints on the exercise of union economic power, especially restraints on secondary

29. US, *Cong Rec*, vol 79 at 7660 (1935). See also Michael H LeRoy, "Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA" (1996) 74:4 Wash ULQ 981 at 983–84 [LeRoy, "Lockouts"].

30. *Labor Management Relations Act*, c 120, 61 Stat 136 (1947). After the *Taft-Hartley Act*, the last major labour law reform in the US was the enactment of the 1959 *Labor Management Reporting and Disclosure Act*, *supra* note 4 §§ 401–531 [LMRDA]. The LMRDA primarily deals with the regulation of internal union affairs, but it also places substantial limitations on the ability of unions to picket for the purposes of organizing or obtaining recognition from the employer under section 8(b)(7) and adds limits on consumer appeals by unions under section 8(b)(4).

31. But see Morris, *supra* note 3 (maintaining that part of the *Wagner Act*'s problems stem from the "longstanding and continuing existence of a well-orchestrated program of revisionist misinformation concerning the Act's underlying purpose and policy that was disingenuously promulgated by organized management and their political allies" at 6) [emphasis in the original]. In short, Morris maintained that the *Taft-Hartley Act* should have never been read as undermining the *Wagner Act*'s basic policy of promoting unionization and collective bargaining (*ibid* at 19).

boycotts and jurisdictional disputes, and outlawing of the closed shop".³² Perhaps most significantly for our purposes, after the *Taft-Hartley Act*, employers were no longer mere spectators in union organizing campaigns, but began to play an active and hostile role.³³

B. Impediments to Effective Worker Voice in the Private Sector

The fact that there are vastly more workers who say they want union representation than are currently in unions suggests underlying flaws in the Wagner model.³⁴ This section of the paper focuses on three specific problems that have significantly undermined worker rights under that model: the use of captive audience meetings and other coercive employer tactics which interfere with employee free choice; the lack of meaningful remedies, including the lack of any authority to impose a first collective agreement; and the increasing use of permanent replacement workers during strikes.

(i) Captive Audience Meetings

Under the Wagner model as it now stands, employers are permitted to give captive audience speeches at mandatory workplace meetings to employees contemplating unionization.³⁵ Employees can be required to attend such meetings. They need not be allowed to question employer representatives, and they may not require that union representatives be

32. *Ibid* at 22. Other significant changes introduced by the *Taft-Hartley Act* included these: creating the independent office of the General Counsel to separate the prosecutorial and adjudicatory functions of the Board; enabling the Board to obtain injunctive relief under sections 10(j) and 10(l); creating, under section 303, a new private right of action for secondary boycott violations; establishing a Federal Mediation and Conciliation Service to help the parties with collective bargaining; and allowing states to promulgate right-to-work laws without fear of *NLRA* preemption. See *ibid* at 22, n 83.

33. Dimick, *supra* note 17 at 325.

34. Freeman, *supra* note 11 and accompanying text.

35. See *Babcock & Wilcox Co v United Stone & Allied Products Workers of America*, 77 NLRB No 577 at 578 (1948).

present to provide a different view.³⁶ Not surprisingly, these meetings have been shown to be one of the most effective anti-union weapons that employers currently have in their arsenals.³⁷

I have maintained earlier that captive audience meetings amount to coercive conduct in derogation of the employee right to organize and that they should be sanctioned as an unfair labour practice under section 8(a)(1) of the Act.³⁸ In its initial form as the *Wagner Act*, the *NLRA* did not protect employer speech rights during organizing campaigns and, at first, the NLRB took the position that employers had to remain neutral during such campaigns.³⁹ However, as a result of the provision in section 8(c) of the *Taft-Hartley Act* that employers would enjoy free speech protection for non-coercive speech,⁴⁰ the Board reversed its previous approach and specifically held that captive audience meetings did not violate section 8(a)(1).⁴¹ In my view it would be better to find that such meetings fall under an

36. See *National Labor Relations Board v Prescott Industrial Products*, 500 F (2d) 6 (8th Cir 1974) (refusing to enforce an NLRB decision holding that not allowing employee questions during a captive audience meeting constituted an unfair labour practice at 10–11); *Hicks Ponder Co v Amalgamated Clothing Workers of America*, 168 NLRB No 806 (1967) (employers may eject vocal pro-union workers who speak out during captive audience meetings at 815); *Litton Systems, Inc v Don Provost*, 173 NLRB No 1024 (1968) (employees have no statutory right to leave a mandatory anti-union captive audience meeting at 1030); *National Labor Relations Board v Babcock & Wilcox Co*, 351 US 105 (1956) (employer may prohibit union solicitation by non-employees on its property, unless the plant is so remote that the union cannot communicate with employees through its own reasonable efforts at 112).

37. See William B Gould IV, “Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board” (2007) 82:2 Ind LJ 461 at 484.

38. See Paul M Secunda, “The Contemporary ‘Fist Inside the Velvet Glove’: Employer Captive Audience Meetings Under the NLRA” (2010) 5:2 Fla Int’l UL Rev 385.

39. *National Labor Relations Act of 1935*, c 372, 49 Stat 449. See John E Higgins Jr et al, eds, *The Developing Labor Law*, 5th ed (Washington, DC: BNA Books, 2006) vol 1 at 94 (explaining that under the *Wagner Act*, the Board took the position that any partisan employer involvement would inevitably interfere with employee rights under section 7 of the *NLRA*).

40. *Supra* note 4 (“the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, *if such expression contains no threat of reprisal or force or promise of benefit*”, § 158(c)) [emphasis added].

41. *Babcock*, *supra* note 35 at 578.

exception to section 8(c) which denies protection for employer speech that “contains [a] threat of reprisal or force or promise of benefit”.⁴² However, the Board has yet to adopt that position, and captive audience meetings remain a potent weapon for employers. A recent study by Kate Bronfenbrenner found that employers used such meetings in 89% of all election campaigns—on average, 10.4 meetings per campaign.⁴³ They are so widely used because they are extremely effective. Bronfenbrenner’s finding was that unions won only 47% of elections in which captive audience meetings were held, as compared to 73% where they were not held.⁴⁴

One of the reasons why captive audience meetings have proven so effective for employers is the extensive time they have to use that tactic: a union organizing campaign is likely to run from four to eight weeks.⁴⁵ New election rules have been adopted by the NLRB which would greatly reduce the time it takes to hold a representation election, but have been

42. *Supra* note 4, § 158(c). See also Paul M Secunda, “The Future of NLRB Doctrine on Captive Audience Speeches” (2012) 87:1 Ind LJ 123 at 142–45.

43. See “No Holds Barred: The Intensification of Employer Opposition to Organizing”, *Economic Policy Institute* (20 May 2009) 10, online: EPI <<http://www.epi.org>>.

44. *Ibid.* Whether captive audience meetings by employers interfere with employee section 7 rights to organize was recently addressed by the NLRB. See *2 Sisters Food Group, Inc v United Food and Commercial Workers International Union, Local 1167*, 357 NLRB No 168 (2011) (although the majority of the Board did not reach the captive audience question, Member Becker, writing in dissent, argued for a new captive audience meeting rule which would prohibit “[a]n express or implied threat of discipline for not listening to the employer’s speech”, because such conduct “indisputably adds to the speech the element of coercion that takes it outside the protection of both the First Amendment [to the United States Constitution] and Section 8(c) and permits it to serve as grounds for overturning the results of an election” at 20). Member Becker’s view remains a minority view, and it is unclear whether further opportunities will present themselves for the NLRB to revisit the matter.

45. Currently, an average of forty-one days elapse between the filing of an election petition and the secret ballot election. See John-Paul Ferguson, “The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004” (2008) 62:1 Indus & Lab Rel Rev 3 at 10, n 9.

fought bitterly by business interests.⁴⁶ Recently, a federal court struck down the new rules on the ground that they were promulgated without a proper quorum of the Board being present.⁴⁷

(ii) Lack of Remedies and First Contracts

Even assuming that employers can be held accountable for their interference with section 7 rights, formidable obstacles still remain to promoting employee voice in the workplace. One of the most important is the fact that the *NLRA* lacks effective remedies at both the organizational and collective bargaining stages. It is difficult for employees to get their jobs back quickly after being unlawfully fired and there is no way to force an employer to enter into a first collective agreement after a union obtains bargaining rights; section 8(d) says that no party may be required to agree to any collective bargaining proposal.⁴⁸ Many employers engage in surface bargaining with unions, never intending to come to an agreement, in the hope that the union's failure to attain a contract will cause it to lose support among its members and eventually be decertified.

The lack of meaningful remedies under the *NLRA* is not a new phenomenon, and has been discussed by numerous commentators since Paul Weiler wrote a seminal article on the topic in the early 1980s.⁴⁹ Weiler pointed out a number of problems with the still-current remedial structure. One such problem was that by emphasizing reinstatement and backpay, the remedial structure focused on harm to individuals

46. In *Chamber of Commerce v National Labor Relations Board*, 11-02262 (DC Cir 2011), the Chamber of Commerce sued the NLRB over what it called the Board's "ambush election rules", which, it argued, "will make it significantly more difficult for employers, especially small employers, to respond to union campaigns". See Robin Conrad & Randy Johnson, "Federal Court Strikes Down Ambush Election Rule", *Free Enterprise* (14 May 2012) online: Free Enterprise <<http://www.freeenterprise.com>>.

47. See *Chamber of Commerce v National Labor Relations Board*, 879 F Supp (2d) 18 (DC Cir 2012). See also National Labor Relations Board, News Release, "NLRB suspends implementation of representation case amendments based on court ruling" (15 May 2012) online: NLRB <<http://www.nlr.gov>>. The NLRB is likely to appeal.

48. *Supra* note 4, § 158(d).

49. "Promises To Keep: Securing Workers' Rights To Self-Organization Under the *NLRA*" (1983) 96:8 Harv L Rev 1769 at 1777-95. See also Liebman, *supra* note 5 at 584-86.

rather than on group rights.⁵⁰ Another problem was the requirement that employees mitigate their damages.⁵¹ Because there is no cap on this requirement, an employee can lose all backpay if she earns more in a new job.⁵² As Weiler noted, even reinstatement is often not an effective remedy.⁵³ Most reinstated employees leave their jobs within a year or two, either voluntarily or as the result of another dismissal.⁵⁴ In addition, Weiler observed that it could take at least two to three years for wrongly terminated union supporters to get their job back.⁵⁵ He suggested more use of the Board's authority to grant injunctions under section 10(j),⁵⁶ which has rarely been invoked because of such obstacles as the fact that the NLRB General Counsel needs the Board's permission to apply for an injunction in federal court.⁵⁷ Interestingly, section 10(l) allows mandatory injunctions for certain types of union unfair labour practices, including secondary boycotts and unlawful recognition picketing, but a move to make such injunctions available against employer unfair labour practices failed as part of the *EFCA*.⁵⁸ In any event, Weiler did not believe that

50. See Weiler, *supra* note 49 at 1788–89.

51. See *Phelps Dodge Corp v NLRB*, 313 US 177 at 198 (1941).

52. See James J Brudney, "Private Injuries, Public Policies: Adjusting the NLRB's Approach to Backpay Remedies" (2010) 5:2 Fla Int'l UL Rev 645 (criticizing limits on current backpay awards and proposing mandatory minimum awards). In a recent 3-2 decision, the NLRB also reversed decades of precedent by shifting the burden onto employees to show that they made reasonable attempts to find new work. See *St George's Warehouse v Merchandise Drivers Local No 641, International Brotherhood of Teamsters*, 351 NLRB No 961 (2007).

53. *Supra* note 49 at 1791–92.

54. *Ibid.*

55. *Ibid* ("the question that arises, then, is how long an employer can forestall an enforceable order in an unfair labour practice proceeding. The answer is distressing: nearly 1 000 days as of 1980" at 1795).

56. *Ibid* at 1798–1801.

57. See Richard B Lapp, "A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard" (2001) 3:2 U Pa J Lab & Employment L 251 ("under section 10(j), it is within the sole discretion of the Board to determine which cases should be brought forth to the district court for injunctive relief" at 263).

58. *Supra* note 4, § 160.1.

courts could handle all of the injunction applications that would result from such a reform.⁵⁹

The absence of meaningful labour law remedies is not preordained by the language of the *NLRA*. Section 10(c) states that when the NLRB finds that an employer or union has committed an unfair labour practice, it “shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter”.⁶⁰ However, almost from the very beginning, this language has been interpreted not to permit the NLRB to levy fines or issue awards for pain or suffering, punitive damages or legal fees.⁶¹ Its remedial options are limited to “make-whole relief”, which generally consists of cease and desist orders, injunctive relief such as reinstatement, and equitable relief such as back pay.⁶²

As for remedies at the bargaining stage, the United States Supreme Court held in *HK Porter Co v NLRB* that the Board could not order a company to grant the union a dues checkoff clause.⁶³ Although the Board has the power to make the parties negotiate, the Court found that it did not have the power to compel contract provisions between the parties.⁶⁴ Nor is there any way to force them to conclude a first collective agreement. As will be discussed below, the *EFCA* would have provided such a power but that statute was not enacted.

In short, the Wagner model does not provide for necessary or timely remedies to prevent employers from engaging in unlawful conduct during organizational campaigns, nor does it give employers much incentive to

59. *Supra* note 49 (“however appealing it might be to afford the same immediate relief to employees that is now provided under section 10(l), the institutional dimensions of such a step render it unworkable” at 1803).

60. *Supra* note 4, §160(c).

61. See *Republic Steel Corp v NLRB*, 311 US 7 at 10 (1940).

62. See Paul M Secunda & Jeffrey M Hirsch, *Labor Law: A Problem-Based Approach* (LexisNexis, 2012) at 142.

63. *Supra* note 28 at 107.

64. *Ibid* (“it would be anomalous indeed to hold that while section 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining the Act permits the Board to compel agreement in that same dispute” at para 16). See also *Ex-Cell-O Corp v International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 185 NLRB No 20 (1970).

bargain in good faith and enter into collective agreements. There is no sign that the *NLRA*'s remedial provisions will be strengthened by Congress any time soon.

(iii) Permanent Replacements and the Illusory Right to Strike

Another significant reason why American unions cannot effectively wield collective power is the ability of employers, ever since *NLRB v Mackay Radio and Telegraph Co* in 1938, to permanently replace employees during an economic strike.⁶⁵

In 1968, the Board expanded the rights of permanently replaced employees by holding that their status as statutory employees under section 2(3) of the *NLRA* means that they retain their seniority, and that they go to the front of the queue if they receive an unconditional offer to return to work and an appropriate vacancy arises.⁶⁶ But if they find substantially equivalent work elsewhere, they no longer have that right.⁶⁷ Many employees will refuse to consider striking as an option if all that awaits them at the end of the strike is unemployment. Without the threat of a strike to give weight to their bargaining demands, many unions are at the employer's mercy because they have no effective way to exercise collective power in the face of employer intransigence.

Permanent replacements did not become a normal part of industrial life in the United States until the 1980s. A number of commentators believe that it was the firing of some 11 000 air traffic controllers by President

65. 304 US 333 (1938). See also *National Labor Relations Board v Transportation Co of Texas*, 438 F 2d 258 (5th Cir 1971) (an economic strike is "typically for the purpose of forcing employer compliance with union collective bargaining demands" at para 6). On the other hand, if the employees are engaged in a so-called "unfair labor practice strike" to protest an employer's illegal conduct, only temporary replacement is permitted and employees must be given their jobs back when the strike is over. See Michael H LeRoy, "Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium" (1999) 51:1 Hastings LJ 171 at 177.

66. *Laidlaw Corp v Local 861, International Brotherhood of Pulp, Sulphite and Paper Mill Workers*, 171 NLRB No 1366 at 1367 (1968).

67. *Ibid* at 1368.

Reagan in 1981 that led to frequent use of this tactic in the private sector, and to the subsequent precipitous decline in the number of strikes.⁶⁸

Over the years, several bills were introduced to overrule *Mackay Radio*, the most recent of which was defeated by congressional Republicans in 1994.⁶⁹ President Clinton sought to use his executive order authority to prohibit permanent replacements from being used where federal contracts were involved, but that executive order was ruled invalid in 1996.⁷⁰ In short, permanent replacements appear to be a permanent part of the Wagner model in the US.

C. Impediments to Effective Worker Voice in the Public Sector

Public sector workers in the US do not come under the *NLRA*,⁷¹ but more than half of the states have instituted statutory public sector labour relations regimes that in many ways replicate the Wagner model,⁷² but which have some important differences on the subjects that may be bargained over and on the right to strike.⁷³ In 1959, Wisconsin became the very first state to enact public sector bargaining laws.⁷⁴ Recently,

68. See LeRoy, "Lockouts", *supra* note 29 at 985; Joseph P Norelli, "Permanent Replacements: Time For A New Look?" (2008) 24:1 Lab Law 97 at 99; "GAO Report says quarter of struck firms announced plans to hire permanent replacements", *Daily Labor Report* (7 June 1990) A10, online: Bloomberg BNA <<http://www.bna.com>> (describing a sharp decline in strikes in the 1980s and connecting it to more frequent use of permanent replacements at A10).

69. US, Bill S 55, *Striker Replacement Bill*, 103rd Cong, 1993.

70. See *Chamber of Commerce of the United States v Reich*, 74 F (3d) 1322 (DC Cir 1996).

71. Public sector workers do not work for covered employers under 29 USC, *supra* note 4, § 152.2 (stating that the term "employer" shall not include federal, state or local governments).

72. See Mary Wisniewski, "Factbox: several states beyond Wisconsin mull union limits" Reuters (10 March 2011) online: Reuters <<http://www.reuters.com>> ("[p]ublic unions have the right to collectively bargain in about 30 states, plus the District of Columbia and Puerto Rico").

73. See generally Martin H Malin, Joseph Slater & Ann C Hodges, *Public Sector Employment*, 2d ed (St Paul, Minn: West, 2011) at 457–610. See also Catherine Phillips, "The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right" (2012) 10:3 First Amend L Rev 652 at 661.

74. See Jason Stein & Patrick Marley, "Walker budget plan would limit state unions to negotiating only on salaries", *Journal Sentinel* (10 February 2011) online: JS Online <<http://www.jsonline.com>> ("[u]nlike unions of private-sector workers, which are

however, the organizational and collective bargaining rights of public sector employees in that state have been under attack. Events in Wisconsin then set the tone for legislative movements against public sector collective bargaining in Florida, Indiana, Nevada, Michigan and Ohio, but much of the press coverage has centered on Wisconsin because it was considered a historically progressive state.⁷⁵ In 2011, Republican Governor Scott Walker introduced a “budget repair bill”, *Wisconsin Act 10*, to severely limit state public sector unions’ abilities to bargain collectively with their employers over wages, benefits and other terms and conditions of work.⁷⁶ Although *Act 10* generally permits bargaining over wages, increases are now limited to no more than the year’s inflation rate.⁷⁷ Anti-dues checkoff provisions and annual recertification requirements also make it more difficult for unions to receive funding and maintain their bargaining rights.⁷⁸

Unions have sought to have *Act 10* invalidated on federal constitutional grounds, including the guarantees of free speech under the First Amendment to the United States Constitution and “equal protection of the laws” under the Fourteenth Amendment.⁷⁹ The District Court for the Western District of Wisconsin upheld the anti-collective bargaining provisions against an “equal protection” attack, but struck down the anti-

governed by federal law, state and local unions in Wisconsin are largely governed by two 40-year-old state laws. . . . State unions are covered under the State Employment Labor Relations Act [Wis Stat §§ 111.81–111.94], and school and local government unions are covered under the Municipal Employment Relations Act [Wis Stat §§ 111.70–111.77]).

75. See “Gov. Walker’s Pretext”, Editorial, *The New York Times* (17 February 2011) online: The New York Times <<http://www.nytimes.com>>. For a survey of recent state enactments involving public-sector bargaining rights, see generally Martin H Malin, “The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements” (2012) 27:2 ABA J Lab & Emp L 149.

76. US, AB 11, 2011 *Wisconsin Act 10*, Spec Sess, Wis, 2011.

77. See Secunda, “Wisconsin”, *supra* note 7 at 296. See also Stein & Marley, *supra* note 74 (if the public employees want wage increases beyond the rate of inflation, they have to initiate a costly and time-consuming statewide referendum).

78. *Ibid* at 297. In a move that many thought was aimed to divide and conquer public sector unions, public safety officers such as police officers, firefighters, and paramedics, were exempted from *Act 10*. See Ezra Klein, “What is Actually Being Proposed in Wisconsin?”, *The Washington Post* (18 Feb 2011) online: The Washington Post <<http://voices.washingtonpost.com>>.

79. See *Wisconsin Education Association Council v Walker*, 2013 WL 203532 (7th Cir 2013) [*Wisconsin Appeal*].

dues checkoff and recertification provisions as being in breach of equal protection and free speech rights.⁸⁰ More recently, the Seventh Circuit Court of Appeals affirmed the collective bargaining portion of the district court's decision, but upheld the anti-dues checkoff and recertification provisions of the law.⁸¹ Interestingly, the unions attacking *Act 10* did not challenge the law on freedom of association grounds, because the United States, unlike Canada,⁸² has no history of protecting constitutional rights to picket or bargain collectively.⁸³

As a result of this type of legislation and the failure of litigation challenging it, public sector unions in Wisconsin and other states are finding it harder to organize, bargain collectively and engage in concerted activities for mutual aid and protection. In response to the *Act 10* debacle, a number of unions decided to become more informal associations, much as they have done in southern states where there are no public sector bargaining statutes.⁸⁴ Because governments are not required to formally

80. See *Wisconsin Education Association Council v Walker*, 824 F Supp (2d) 856 (Wis Dist Ct) (2012) [*Wisconsin Trial*] at 860:

The court finds that plaintiffs have not met their burden with respect to their Equal Protection challenge to Act 10's principal provisions limiting the collective bargaining rights of general employees and their unions. The State . . . has not articulated, and the court is now satisfied cannot articulate, a rational basis for picking and choosing from among public unions, those (1) that must annually obtain an absolute majority of its voluntary members to remain in existence or (2) that are entitled to voluntary, assistance with fundraising by automatic deduction, at least not a rational basis that does not offend the First Amendment.

See also *Madison Teachers v Walker*, No 11CV3774 (Wis Cir Ct 2012) (invalidating *Act 10* for municipal employees on association, free speech, and equal protection grounds).

81. *Wisconsin Appeal*, *supra* note 79.

82. See *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

83. See e.g. *Smith et al v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979) (*per curiam*) ("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it" at 465 & n 2); *Dorcy v Kansas*, 272 US 306 at 311 (1926) (holding that there is no absolute right to strike under the federal Constitution). But see *Madison Teachers*, *supra* note 80 (finding that *Wisconsin Act 10* violated the constitutional associational rights of municipal employees).

84. As it turned out, many unions decided not to recertify and took on a more informal association status. See Scott Bauer, "Wis. unions decide to skip recertification votes", *Boston.com* (23 Sept 2011) online: *Boston.com* <<http://www.boston.com>>. See also Martin H Malin, "Life After Act 10?: Is There a Future for Collective Representation of Wisconsin

recognize or bargain with these associations, the worker voice is less likely to be heard. Public sector workers, like their private sector counterparts, need alternatives to the Wagner model in order to reinvigorate their right to a meaningful voice in the workplace.

II. Current Proposals for Reforming the Wagner Model

Given the challenges facing private and public sector unions under the Wagner model, it is hardly surprising that proposals have been advanced—both within and outside that model—for curing what ails the present legal regime. This part of the paper focuses on one set of reforms within the Wagner model (the *Employee Free Choice Act*) and one set outside that model (the “new governance” approach to labour law).

A. The Employee Free Choice Act

The *Employee Free Choice Act* (*EFCA*) would have permitted card-check recognition, expanded remedies for employer unfair labour practices, and introduced first-contract interest arbitration.⁸⁵ The *EFCA* fell to a Republican filibuster in the Senate in 2009.⁸⁶ Its chances of being resurrected are slim as long as the Republicans hold control of the House of Representatives.⁸⁷

The goal of the *EFCA* was to address some of the more glaring inequities in the Wagner model discussed above. For instance, card-check recognition would have required an employer to recognize and bargain with a union

Public Employees?” 96 Marq L Rev [forthcoming in 2013] (discussing different approaches to employee representation in states without public sector bargaining statutes).

85. US, Bill HR 1409, *Employee Free Choice Act of 2009*, 111th Cong, 2009; David C Yamada, “Human Dignity and American Employment Law” (2009) 43:2 U Rich L Rev 523 at 558; Dimick, *supra* note 17 at 321.

86. Although the *EFCA* passed in the House of Representatives by a 241–185 vote in 2009 (see *Final Vote Results for Roll Call 118*, online: Office of the Clerk <<http://clerk.house.gov>>), it died in the Senate (see *US Senate Roll Call Votes 110th Congress—1st Session: Vote 00227*, online: United States Senate <<http://www.senate.gov>>). See Secunda & Hirsch, *supra* note 62 at 31.

87. See Anne Marie Lofaso, “What We Owe Our Coal Miners” 5:1 Harv L & Pol’y Rev 87 at 110.

where authorization cards established that more than 50% of the proposed bargaining unit wished to be represented by the union.⁸⁸ Under current law, employers are free to recognize a union in such circumstances, but are not obliged to do so and may force a secret ballot election.⁸⁹ Employers maintain that such an election is needed after an organizing campaign, both to protect the right of employers to tell employees their views on unionization and to keep employees from being coerced into voting for union representation in the more informal atmosphere of card signings.⁹⁰ Of course, unions retort that long organizational campaigns, with their inevitable captive audience meetings, intimidate employees and interfere with their choice concerning union representation.⁹¹ Unions point to the Canadian example and to certain public sector regimes in the US to show that card check recognition systems are not subject to systemic abuse and can be operated fairly.⁹²

88. *Ibid* at 109.

89. See *Linden Lumber Division, Summer & Co v National Labor Relations Board*, 419 US 301 (1974) (“we sustain the Board in holding that, unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board’s election procedure” at 310).

90. See e.g. Richard A Epstein, “The Employee Free Choice Act Is Unconstitutional”, *The Wall Street Journal* (19 December 2008) online: The Wall Street Journal <<http://online.wsj.com>>. A number of states have responded to the *EFCA* by passing state laws that would require secret ballot elections in all future union organizing campaigns; unions have challenged such laws on *NLRA* preemption grounds. See Jeffrey M Hirsch, “Judge Defers Suit on State Secret Ballot Laws”, *Workplace Prof Blog* (7 September 2012) online: Law Professor Blogs Network <<http://lawprofessors.typepad.com>>.

91. See generally *Why Workers Need the Employee Free Choice Act*, online: American Rights at Work <<http://www.americanrightsatwork.org>> (“[w]hen faced with organizing drives, 25 percent of employers fire at least one pro-union worker; 51 percent threaten to close a worksite if the union prevails; and, 91 percent force employees to attend one-on-one anti-union meetings with their supervisors”).

92. See James J Brudney, “Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms” (2005) 90:3 Iowa L Rev 819 at 879. In the US, card-check recognition currently exists in the public sector in Hawaii. See Pualani Jensen, “Hawaii Legislature Passes Card Check Over Governor’s Veto”, *Blue Maumau* (26 Aug 2009) online: Blue Maumau <<http://www.blumaumau.org>>.

The *EFCA* would have provided for first-contract interest arbitration if the parties did not come to an agreement after 130 days of negotiations.⁹³ This provision was based on the fact that many new unions can never negotiate a first contract: they are caught between “severe pressure from employees to provide quick results” and “significant resistance from employers who just failed in their recent attempt to resist unionization”.⁹⁴ The *EFCA* would have required negotiations, at the union’s request, to begin within ten days of certification, and if no agreement was reached within ninety days, either party could request mediation by the Federal Mediation and Conciliation Service.⁹⁵ If mediation failed after thirty days, a mandatory arbitration process would impose a two-year collective agreement.⁹⁶ However, even if these provisions had been enacted, it is not clear that an agreement foisted on parties in this way would have the buy-in needed to work in the long term. There would also have been the problem of securing a second contract when the first one expired after two years.

Finally, the *EFCA* would have provided for increased use of injunctions, liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees, and \$20 000 fines for serious unfair labour practices during an organizing campaign or during

93. See Catherine L Fisk & Adam R Pulver, “First Contract Arbitration and the Employee Free Choice Act” (2009) 70:1 *La L Rev* 47 at 49–50.

94. See Susan J T Johnson, “First Contract Arbitration: Effects on Bargaining and Work Stoppages” (2010) 63:4 *Indus & Lab Rel Rev* 585 at 586 (the percentage of new unions that obtained first contracts within two fiscal years of certification varied from 42% to 45% from 2000–2004); John-Paul Ferguson & Thomas A Kochan, “Sequential Failures in Workers’ Right to Organize”, *American Rights at Work* (March 2008) online: American Rights at Work <<http://www.americanrightsatwork.org>> (the percentage of new unions that obtained first contracts within one year of certification was 38%, and only 56% of unions ever negotiated a first contract from 2000–2004). See Secunda & Hirsch, *supra* note 62 at 364.

95. Fisk & Pulver, *supra* note 93 at 49–50.

96. *Ibid.* This first contract provision would replace the current law, which denies the NLRB the power to force parties to agree to anything, even as a remedy for a failure to bargain in good faith. See *HK Porter*, *supra* note 28 at 108. With respect to the *EFCA*, it is not clear that an agreement foisted on the parties in this way would have the buy-in needed to work in the long term. There would also have been the problem of securing a second contract when the first one expired after two years.

negotiations for a first contract.⁹⁷ This would have departed from current NLRB jurisprudence, which looks with disfavour on “make whole” relief during contract negotiations.⁹⁸ The efficacy of such provisions would turn on whether the Board could provide more timely relief to victims of employer unfair labour practices, especially during organizing campaigns.⁹⁹

In the end, the *EFCA* sought to provide solutions to some of the more pressing problems with the Wagner model. Yet three undeniable facts remain. First, it is highly unlikely that the law will be passed in any form in the near future, since it did not pass in 2009 with presidential support and with Democratic majorities in both Houses of Congress.¹⁰⁰ Second, the *EFCA* offers band-aids rather than a fundamental cure for what ails labour relations in the United States.¹⁰¹ *EFCA* or no *EFCA*, employer dominance will remain, given the persistence of captive audience meetings, inadequate remedies and the use of permanent replacements.¹⁰² Third, the *EFCA* reforms would likely be an inadequate response both to the virulent resistance to unions by many employers and to the difficulty of organizing an increasingly mobile, white-collar and global workforce (even apart from such resistance).¹⁰³

In short, it is time to consider reforms outside of the traditional Wagner model in order to give workers the power they need to bargain effectively for decent wages and working conditions.

97. See Christopher Kupka, “Remediation of Unfair Labor Practices and the EFCA: Justifications, Criticisms, and Alternatives”, online: (2011) 38 Rutgers L Rec 3 at 9 <<http://lawrecord.com>> .

98. See *Ex-Cell-O Corp*, *supra* note 64.

99. Some provisions of the *EFCA* would have helped make relief available to employees more quickly. See Kupka, *supra* note 97 (the “*EFCA* additionally requires that preliminary investigation of complaints against employers be given ‘priority over all other cases’ to eliminate delay during organizing campaigns and first contract negotiations” at 409–10).

100. See Dimick, *supra* note 17 (“[i]f a simple reform bill cannot pass . . . what hope is there for revitalizing the labor movement?” at 321).

101. *Ibid* (noting that the *EFCA* did not envision any fundamental changes to the basic structure of the *NLRA*, but merely filled gaps).

102. See Jeffrey M Hirsch & Barry T Hirsch, “The Rise and Fall of Private-Sector Unionism: What Next for the *NLRA*?” (2007) 34:4 Fla St UL Rev 1133 at 1134.

103. See *ibid* at 1138.

B. The New Governance Approach

In Cynthia Estlund's words, new governance theory has two "interlocking themes": first, "the idea of 'decentering the state' and elevating the regulatory role of other nongovernmental actors, including regulated entities themselves"; and second, "the idea of 'reflexivity' in law—of replacing direct regulatory commands with efforts to shape self-regulation and self-governance within organizations".¹⁰⁴

Estlund's approach can be seen as a proceduralist take on new governance theory, in that it emphasizes procedural devices to mitigate employer unfairness in the workplace. Specifically, she argues for "co-regulation", a system of joint workplace governance that would temper corporate self-governance by the use of inside employee representation and independent outside monitors. In this way, she would "condition legal benefits of self-regulation on the existence of genuine employee representation".¹⁰⁵ A combination of internal employee committees, truly independent outside monitors and a reward-and-punishment system calibrated to the bona fides of the corporate compliance system (what Estlund terms a "system of responsive regulation")¹⁰⁶ would hopefully foster employer-employee collaboration and bring a substantial employee voice back into the American workplace.¹⁰⁷

My reluctance to adopt this approach is based on a fear that employers would merely engage in cosmetic compliance in order to take advantage of government incentives. History has repeatedly shown that if employer power is constrained only by market forces and reputational costs, the result will be the worst forms of opportunistic behaviour and abuse

104. *Supra* note 20.

105. *Ibid* at 148–49.

106. See Cynthia Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation" (2005) 105:2 Colum L Rev 319 at 360.

107. See Secunda, Book Review, *supra* note 22 at 204. Others, most notably David Doorey, have written innovatively about this decentred approach to labour relations. See Doorey, *supra* note 5 (developing and assessing "a dual regulatory stream model that restricts existing rights of employers to resist their employees' efforts to unionize once they have been found in violation of targeted employment regulation"). The weakness in this approach lies in the inability of "targeted employment regulation" to ferret out employer non-compliance with these laws, especially where employers engage in cosmetic compliance in order to reap the benefit of regulatory incentives.

of employees.¹⁰⁸ Estlund acknowledges as much, and recognizes the limitations of legal incentives in the employment discrimination context. She therefore seeks to apply institutional checks against disingenuous attempts at corporate compliance: “it is possible to create and recognize a system of well-regulated self-regulation—one with built-in safeguards against bad-faith and cosmetic compliance”.¹⁰⁹

Yet the fact remains that the power dynamic in the workplace is suffused with employer control over the employee’s job.¹¹⁰ As I have written elsewhere, “what makes Estlund’s co-regulation model potentially dangerous is that . . . [e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged”.¹¹¹ My fear is that unless employees are represented by truly independent unions, co-regulation will merely amount to co-optation. In short, “[t]o hope that employers will see the business, legal, or moral case for co-regulation, and voluntarily reform their sharp practices toward employees, is to believe that employers will act ahistorically”.¹¹²

The answer to the current lack of a viable labour relations model in the United States in my view must lie elsewhere. I now turn to some possibilities.

108. See generally Samuel Estreicher, “Employer Reputation at Work” (2009) 27:1 Hofstra Lab & Empl LJ 1. See also Harry W Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation”, in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) at 471.

109. *Supra* note 20 at 211.

110. *Gissel Packing*, *supra* note 27 (“[t]he economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear” at 617).

111. Secunda, Book Review, *supra* note 22 at 204, citing *National Labor Relations Board v Exchange Parts*, 375 US 405 at 409 (1964).

112. Secunda, Book Review, *supra* note 22..

III. Alternative Models for Labour Law Reform in the United States

There would appear to be two non-mutually exclusive paths that unions, workers and their supporters could take in response to the current state of labour regulation in the United States—one political and one legal.

A political response could be based on the notion that neither the Democratic Party nor the Republican Party is adequately representing workers' interests and that a new political movement is needed.¹¹³ Such a movement would seek to abandon the bread and butter unionism of Samuel Gompers; instead it would adopt a more class-based, political approach, founded on the recognition that workers must elect labour-oriented politicians to fight for economic justice. The Occupy Wall Street movement, fueled by increasing anger over income inequality, chronic unemployment and corporate greed, has shown that in many parts of the country there is the energy and desire needed to support such a political movement.¹¹⁴

113. One of the largest public-sector strikes in recent memory occurred in September 2012, when some 30 000 Chicago public school teachers went on strike to protest class sizes, lack of job protection, and the tying of teacher evaluations to standardized test scores. See Scott Neuman, "Chicago Teachers On Strike, Affecting 350,000 Students", *The Two-Way* (10 September 2012) online: NPR <<http://www.npr.org>> (the union's primary antagonist was Rahm Emanuel, the prominent Democrat mayor of Chicago and former chief of staff to President Obama).

114. The Occupy Wall Street movement was a response to the perceived greed and outsized influence of Wall Street bankers, and to the income inequality caused by the current economic and political system in the US. See David L Hudson Jr, "Occupy the Courts: The Nationwide Movement Has Left a Mixed Bag of Legal Results", *ABA Journal* (1 July 2012) online: *ABA Journal* <<http://www.abajournal.com>> ("Occupy groups have formed across the United States, protesting social and financial inequalities, excessive corporate influence on government and overall income disparities"). Interestingly, the larger American unions did not remain unscathed by Occupy Wall Street's critique due to problems within the hierarchical, top-down organization of most of those unions. One lesson for labour is that there needs to be a grassroots approach which puts political, economic and organizational power back into the hands of everyday workers. See also Vasco Pedrina, "Rank & File Participation and International Union Democracy", *Global Labour Column* (September 2012) online: *Global Labour Column* <<http://column.global-labour-university.org>>.

The promise of such grassroots movements will only come to fruition when, like the mice in Tommy Douglas' *Mouseland*, American workers stop electing politicians who are beholden primarily to corporate donors.¹¹⁵ Unfortunately, if recent efforts are any indication of future success, the formation of an independent and effective labour party in the United States remains a distant hope.¹¹⁶ Indeed, after its initial successes, even the Occupy Wall Street movement has faced significant obstacles in keeping itself together.¹¹⁷

Given current political realities, a legally-oriented approach only partially dependent on the existing Wagner model would be more pragmatic and more likely to succeed. I will therefore conclude this paper by considering three labour law reform proposals which could easily be implemented outside that model and could instantly help to provide greater worker voice in many union and non-union workplaces: pre-recognition framework agreements; the Coworker.org Internet organizing initiative; and approaches drawing on the Ghent System, which is based on mutual aid between union and non-union workers.

A. Pre-Recognition Framework Agreements

Some larger American unions have been increasingly turning to pre-recognition framework agreements to help avoid certain pitfalls of more traditional NLRB-supervised organizing campaigns (including captive audience meetings).¹¹⁸ Such framework agreements set out ground rules

115. Part of the problem is the endless flow of corporate money that has flooded election campaigns since the US Supreme Court's ruling in *Citizens United v Federal Election Commission*, 558 US 310 (2010).

116. *About the Labor Party*, online: Labor Party <<http://www.thelaborparty.org>> (although an American Labor Party was established as recently as 1996 at a convention of 1 400 delegates "from hundreds of local and international unions as well as individual activists", the party has largely disappeared from the political landscape and there remains no viable political party for workers of either the federal or state level).

117. See e.g. Howard Steven Friedman, "Dear OWS: Y R U MIA?", *The Huffington Post* (3 September 2012) online: *The Huffington Post* <<http://www.huffingtonpost.com>>.

118. This contractual approach is in some ways similar to a recent proposal championed by Professors Zev J Eigen and David Sherwyn. See "A Moral/Contractual Approach to Labor Law Reform" (2012) 63:3 *Hastings LJ* 695 ("we propose incorporating a set of moral principles embodied in a contract to which union and management would both be incentivized to agree, which would make the process of certifying unions as agents

for recognizing a union at a specified non-union plant. Their content may include the following: appropriate employer and union behaviour during the organizing campaign; when a union will be considered to have established majority support; how bargaining will occur for a first contract once the bargaining representative has been chosen; and what procedures will be used to resolve disputes arising under the recognition agreement.¹¹⁹ The NLRB and the federal courts have generally held that the ground rules and procedures for recognition and first contract negotiation in these agreements are lawful.¹²⁰

On the other hand, there has been some important ongoing litigation over whether recognition agreements can set conditions on future collective bargaining between the parties if and when the union is accepted by a majority of workers. For instance, a recognition agreement between the Dana Corporation and the United Auto Workers identified several general conditions for establishing a competitive collective agreement in the auto parts industry.¹²¹ In *Dana II*,¹²² the NLRB dismissed the General Counsel's complaint that setting out these conditions in a recognition agreement violated the *NLRA*'s prohibition against employer

of collective bargaining significantly fair and would result in a less costly administrative system" at 697). It should be emphasized, however, that such agreements will primarily be possible for unions that already have some leverage in the workplace and who can force employers into them.

119. See Michael Nicholson & Blair Simmons, "Dana II: The Law of Pre-Recognition Framework Agreements" [unpublished, archived with the author] at 2.

120. See e.g. *AK Steel Corp v Steelworkers of America*, 163 F (3d) 403 at 407–09 (6th Cir 1998); *Verizon Information Systems v Communications Workers of America*, 335 NLRB No 558 at 560 (2001).

121. See Nicholson & Simmons, *supra* note 119, citing Letter of Agreement between the Dana Corporation and the United Auto Workers (6 August 2003) ("healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved, minimum classifications, team-based approaches, the importance of attendance to productivity and quality, Dana's idea program (two ideas per person per month and 80% implementation), continuous improvement, flexible compensation, and mandatory overtime when necessary (after qualified volunteers) to support the customer" at 3) [formatting altered].

122. *Dana Corp and International Union v Gary L Smeltzer*, 356 NLRB No 49 (2010) [*Dana II*]. A previous Dana case indicated that the parties had recognition agreements in place since 1976 to govern their conduct during organizing campaigns. See *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Dana Corp*, 278 F (3d) 548 at 551 (6th Cir 2002).

domination or assistance of labour organizations under section 8(a)(2).¹²³ More specifically, the Board did not believe that Dana had granted the union bargaining status before it obtained majority support, and held that “the UAW and Dana stayed well within the boundaries of what the Act permits”.¹²⁴ The conditions identified for future bargaining did not establish a collective bargaining relationship, but merely advanced “certain principles that would inform future bargaining on particular topics”.¹²⁵ In short, the Dana-UAW recognition agreement was lawful because “[i]t disclaimed any recognition of the union as exclusive bargaining representative, and it created, on its face, a lawful mechanism for determining if and when the union had majority support”.¹²⁶

Although it may be difficult for smaller or newer unions to make such recognition agreements, their use should be encouraged for three reasons. First, as well as circumventing the problems associated with endless adversarial organizing campaigns, they may provide assurances that employers will not engage in destructive captive audience meetings and other intimidation tactics. Second, they can address the problem of ineffective remedies and the need for a way to force first contracts. Third, because such agreements are bought into voluntarily by both the union and the company, there is less of a chance that either side will find the terms of any eventual collective agreement to be unacceptable (which was seen as one of the pitfalls of forcing first contract arbitration under the *EFCA*).

123. *Dana II*, *supra* note 122 at 8. The specific question under section 8(a)(2) was whether setting forth these conditions in the recognition agreement violated the rule that “the recognition of, and execution of a collective bargaining contract with, a minority union constitutes unlawful assistance”. See *Bernhard-Altmann Texas Corp*, 122 NLRB 1289 at 1292 (1959), *aff’d International Ladies Garment Workers’ Union v National Labor Relations Board*, 366 US 731 (1961). The Board in *Dana II* found that this rule was not violated because Dana “did not, as part of the recognition agreement, recognize a minority union as the exclusive bargaining representative of its employees”. *Supra* note 122 at 5.

124. *Ibid* at 8.

125. *Ibid* at 7.

126. *Ibid* at 8, *aff’d Montague v National Labor Relations Board*, 698 F 3d 307 (6th Cir 2012).

B. The Coworker.org Web-based Initiative

As a result of the current state of the Wagner model, a number of groups and individuals have been considering alternative ways to promote worker voice, especially in smaller or traditionally unorganized workplaces. One of the most promising initiatives is Coworker.org, a petition-based Internet service that bills itself as an open-source organizing and bargaining tool. The idea behind it is that the Wagner model remains largely inaccessible to many workers because it makes labour organizing very costly and resource-intensive.¹²⁷

The founders of Coworker.org, Jess Kutch and Michelle Miller, describe it in these terms:

*[Coworker.org] is an online platform that puts the power of collective bargaining into the hands of all workers, all over the world. It represents a scalable departure from traditional union organizing by providing ordinary people with online tools and training to organize their co-workers and advocate for changes on the job.*¹²⁸

As a point of entry to Coworker.org, workers will create a petition to their employer focusing on the changes they would like to see in the workplace. To persuade their fellow employees to sign the petition, the initiators would form an organizing committee. This would appear to give them legal protection under section 7 of the *NLRA*, because they will be engaging in protected concerted activity for mutual aid and protection. Through the use of social media “share” functions on Internet platforms such as Facebook and Twitter, they will be able to promote the workplace campaign and gather coworker interest in the issues they raise.

The organizers of Coworker.org envision that the petitions will be signed not only by employees but also by people in their social spheres, who will help them appeal to consumers and to the employer’s clients. Coworker.org will do the following: help to craft emails and social media appeals; give advice on organizing tactics and on the next steps in campaigning; connect workers with petitions alleging specific *NLRA* violations; and promote to the media those campaigns that are seen as having an appeal to broader groups of workers.

127. See Hirsch & Hirsch, *supra* note 102 at 1138.

128. Overview of Coworker.org [unpublished draft on file with author] [emphasis in original].

Eventually, Coworker.org will feature “hub pages” focusing on particular employers, geographic areas and particular industries. For example, if employees of a large electronics retailer were to search by that company’s name, they would see a list of all the campaigns involving the company across the country and could communicate with one another. The platform would also permit workers in a specific city, state or industry—for example, warehouse or call centre workers—to band together. By enabling workers to see that others are having workplace problems similar to their own, Coworker.org hopes to drive more concerted workplace action and reduce the feeling of isolation many employees experience when taking a stand against their employer.

The hope is that Coworker.org will not operate in isolation but will help to consolidate existing efforts by employees to use various Internet platforms to press workplace issues that they care deeply about. The most popular of these efforts was started by Anthony Hardwick, a Target employee who launched a petition against the company’s decision to open early for the “Black Friday” discount day in November 2011. The petition generated over 300 000 signatures and launched copycat campaigns aimed at other employers on the same issue.¹²⁹

The NLRB has recently provided guidance on how workers can lawfully use Internet platforms, such as Facebook, by releasing three memos that cover its rulings on the relationship between employee use of social media and the *NLRA*’s protection of concerted activity.¹³⁰

As other commentators have recognized, the Internet and social media permit workers from across the country to discuss common concerns and questions about wages, hours and other terms and conditions of

129. See Susanna Kim, “Retail Employees, Shoppers Fight Black Thursday Openings”, abc NEWS (16 Nov 2011) online: ABC NEWS <<http://abcnews.go.com>>.

130. National Labor Relations Board, *Report of the Acting General Counsel Concerning Social Media Cases* (18 Aug 2011, 24 Jan 2012 & 30 May 2012) online: NLRB <<http://www.nlr.gov>>. See also Christine Neylon O’Brien, “The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media” (2011) 45:1 Suffolk UL Rev 29.

employment.¹³¹ The aspiration is that in the short term, Coworker.org will lead to some smaller “wins” for employees seeking more of a voice in their workplaces and will later become part of a larger movement to rebuild the now-dormant workers’ rights movement in the US.¹³² If enough successful campaigns are initiated through the platform, a movement of smaller organizers might be built and the platform’s email list could become a powerful organizing tool in its own right.

C. The Ghent System Approach to Labour Law

Another group of scholars have looked to labour relations models around the world in search of viable alternatives to the current American model.¹³³ One such model, called the Ghent system after the Belgian town where it originated, has recently been championed in the American literature by Matthew Dimick.¹³⁴ Under that system, which is found in various forms in Denmark, Finland and Sweden (as well as Belgium), unions administer government-subsidized unemployment insurance funds and a worker must join a union in order to have access to those funds.¹³⁵ Not surprisingly, several studies have shown that union density has been higher in countries with the Ghent system than in comparable

131. See Hirsch & Hirsch, *supra* note 102 (“[t]he low cost of electronic communications has made it particularly valuable to unions and other groups attempting to organize employees, as they provide an affordable means to reach many employees, especially at small and widely dispersed job sites” at 1173).

132. Overview of Coworker.org, *supra* note 128 (stating that the service will act “as a digital organizing space for workers’ rights—where anyone can share knowledge and build power with their co-workers”).

133. See e.g. Kenneth G Dau-Schmidt, “Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform” (2011) 94:3 Marq L Rev 765 at 809–20 (discussing Japan and Germany as examples of employee voice in corporate governance and labour relations); Stephen F Befort, “A New Voice for the Workplace: A Proposal for an American Works Councils Act” (2004) 69:3 Mo L Rev 607 (maintaining that the works council model provides the best option for reinvigorating employee voice in the US).

134. Dimick, *supra* note 17.

135. In Finland, for instance, “[m]embership of an unemployment insurance fund is required in order to obtain access to earnings related unemployment benefits, which are considerably above the level of the state-guaranteed basic unemployment allowance that is paid by the Social Insurance Institution”. Aleksi Kuusisto, “Independent unemployment insurance fund ‘undermining unions’”, *European Industrial Relations Observatory On-Line* (24 October 2005) online: eironline <<http://www.eurofound.europa.eu>>.

countries that do not have it, because earnings-related unemployment benefits are an important incentive for belonging to a union under that system.¹³⁶

Dimick argues that union administration of unemployment insurance helps to overcome three problems that currently impede effective collective action in the American workplace. First, it gives employers an incentive to recognize and bargain with unions, because employees have already joined a union to get access to unemployment insurance.¹³⁷ In Dimick's words, "[t]he attention the Ghent system gives to the union-member relationship, as distinct from the union-employer relationship, helps avoid some difficulties surrounding the recognition problem that arise under the *NLRA*".¹³⁸ Second, the Ghent system provides a "selection incentive" that reduces free-riding on collective goods produced by unions, so employees are less likely to refuse to pay their fair share of the cost of union representation.¹³⁹ Third, employer-union collaboration in the unemployment insurance system generally leads to more cooperative labour relations in other contexts.¹⁴⁰ As Dimick notes, the Ghent approach already informs some of the labour relations strategies, including self-help and voluntarism, which have historically been adopted by the labour movement in the US.¹⁴¹

136. Petri Böckerman and Roope Uusitalo, "Erosion of the Ghent System and Union Membership Decline: Lessons from Finland" (2006) 44:2 *Brit J Ind Rel* 283 at 284. Those authors argue that a decline in Finnish union density after 1993 was largely due to the emergence in 1992 (and the subsequent rapid growth) of an unemployment insurance fund that was open to workers who were not union members. See also Dimick, *supra* note 17 at 332-36 (noting the relationship between union density and the Ghent system).

137. See *ibid* ("[u]nion-provided, publicly funded unemployment insurance encourages workers to become union members, and it is from the accumulation of members and their resources that unions in Denmark and Sweden are able to sustain recognition from employers without any government-supervised election process" at 324).

138. *Ibid* at 346.

139. See Kurt Vandaele, "A Report from the Homeland of the Ghent System: The Relationship Between Unemployment and Trade Union Membership in Belgium", online: (2006) 12:4 *Transfer* 647 <<http://www.newunionism.net>>.

140. Dimick, *supra* note 17 ("[u]nion participation in unemployment insurance policy promotes cooperative employment relations by generating efficiencies that reduce employer hostility" at 325).

141. *Ibid* at 327-28.

To be clear, I do not see unemployment insurance as being a promising area for the application of the Ghent approach in the US, given its mandatory, government-run unemployment compensation system. As American unions cover a mere seven per cent of the private non-agricultural workforce,¹⁴² their ability to push a union-based, voluntary system on the Ghent model is questionable, even in states with relatively high union density rates. In addition, the common adage that “if it ain’t broke, don’t fix it” has to be taken into account; most recent studies of the US unemployment compensation system suggest that it works quite well in finding jobs for those who are unemployed, in both rural and urban areas.¹⁴³

Nevertheless, the potential viability in the US of the idea that union provision of other types of employment-related benefits could help to encourage union membership is shown by the fact that a number of promising Ghent-inspired innovations already exist in that country. Among the innovations discussed by Dimick and other writers are the Freelancers Union, the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO)’s Working America Program, worker centres for immigrant workers, and instances where unions have acted as workforce intermediaries in non-unionized contexts.¹⁴⁴ As a leading example, Working America offers non-union workers and the unemployed a lower-cost form of associate union membership.¹⁴⁵ Through

142. United States Department of Labor, *Union Members Summary* (21 January 2011) online: Bureau of Labor Statistics <<http://www.bls.gov>> (the union membership rate for private sector workers was 6.6% in 2012).

143. A study financed by the US Department of Labor found that “[o]verall, work force development services in rural areas appear to be meeting the needs of the majority of rural customers”. See Kate Dunham et al, *Workforce Development in Rural Areas: Changes in Access, Service Delivery and Partnerships* (30 June 2005) at ES-7, online: US Department of Labor, Employment and Training Administration <<http://wdr.doleta.gov>>. Similarly, a study of a One-Stop Career Center in Baltimore found that “the traditional employment services were meeting the needs of inner city job seekers”. See Alan B Krueger, “The Best Way to Help the Unemployed”, *Economix* (20 October 2008) online: The New York Times <<http://economix.blogs.nytimes.com>>, citing Treva Stack & David Stevens, “Anatomy of a One Stop: Baltimore City Eastside Career Center” (2006) online: US Department of Labor, Employment and Training Administration <<http://wdr.doleta.gov>>.

144. Dimick, *supra* note 17 at 328.

145. See Katherine VW Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (New York: Cambridge University Press, 2004) at 217–18.

a program called Union Plus,¹⁴⁶ these associate members can qualify for a number of benefits, including low-interest credit cards, health care and legal services.¹⁴⁷ This program has some Ghent-type characteristics in that the benefits it offers are private, they are generally available to all workers, regardless of union membership, and they give workers an incentive to join the union rather than free-riding on union services.¹⁴⁸

Programs of this sort are clearly not panaceas for all that ails the current labour law model in the US. Working America itself may be too ensconced within traditional union hierarchies and may provide too little overall benefit to get many employees meaningfully involved in workplace governance.¹⁴⁹ Nevertheless, like other Ghent-style programs, it does provide an intriguing roadmap for innovative ways to increase workplace voice for American workers, especially non-union and unemployed workers.¹⁵⁰

Conclusion

The Wagner model of labour law no longer fulfills the promise of protecting and promoting collective employee voice in the American workplace. Legislative and administrative developments under the model have left employees subject to intense intimidation and interference by employers in choosing whether to belong to a union. Employers can too easily engage in unlawful conduct, treating the possibility of sanctions merely as a cost of doing business, and can routinely practice surface bargaining without ever intending to reach a collective agreement. Unions are helpless in counteracting such tactics because the right to strike is largely illusory in the face of the employer right to permanently replace strikers.

146. See generally *About Union Plus*, online: Union Plus <<http://www.unionplus.org>>; *Union Plus Credit Card*, online: Union Plus <<http://www.unionplus.org>>.

147. See Stone, *supra* note 145 at 217–18.

148. See Dimick, *supra* note 17 at 374–75.

149. *Ibid* at 375.

150. Jeff and Barry Hirsch have proposed a similar model based on providing mutual aid to non-union workers. See *supra* note 102 (seeking to “facilitate welfare-enhancing employee voice and participation in an economy where few private sector employees will be represented by traditional unions” at 1135).

In response to the growing void in workplace representation, some have attempted to “fix” the Wagner model from within, by seeking to pass such reforms as the *Employee Free Choice Act*. Others have argued for a shift away from Wagner-style command-and-control regulation, and toward a new governance approach that would try to give employers incentives to treat their employees justly. As I have explained above, I believe the Senate is unlikely to pass the *EFCA* in the near future; in any event, the *EFCA* would do little to change the power dynamics that deny an effective workplace voice for employees. I also believe that the traditional new governance approach would be largely ineffective in bringing about anything more than cosmetic employer compliance with new regulatory schemes and this could not offer a secure mechanism for promoting meaningful employee voice.

One solution might be to harness the remaining energies and passions of the labour movement in support of an Occupy Wall Street-type movement and to use those energies and passions to forge a new labour-oriented political party. However, history gives little reason to believe that such political reform will happen in the short term in the two-party, money-soaked political environment of the US. Instead, this paper has called attention to three more promising approaches to labour law reform that would operate largely outside of the Wagner model. The hope is that some combination of pre-recognition framework agreements, the Coworker.org open-source Internet platform, and initiatives inspired by the Ghent system will enable American workers to once again acquire the institutional voice they need to promote more just workplaces.

