UPDATING AMERICAN LABOR LAW: TAKING ADVANTAGE OF A WINDOW OF OPPORTUNITY

Thomas A. Kochan†

Labor law in America is hard to change. This may be the understatement of the century. For the past thirty years efforts to update and modernize an outdated and ineffective labor law have been stymied by a political impasse between business and labor. Both want changes. To date neither has been able to muster the necessary votes in Congress to pass significant reforms and to overcome the potential of a Presidential veto. Thus, American workers, employers, and the economy languish with a law that no longer protects workers when exercising their fundamental human right of freedom of association or promotes labor management relations that are suited to the needs and desires of workers and their families, employers, or the economy.

Looking at the longer sweep of history, the past thirty years do not stand in isolation. It took work of institutional economists and Progressives thirty years from the beginning of the 20th century until 1935 to achieve the first national labor law, the National Labor Relations Act (NLRA).[1] The NLRA was one of the last big reforms ushered in by the political momentum and economic crisis of the New Deal. Then it took another twelve years and a record high number of strikes for business to recover sufficient political power to pass the Taft-Hartley amendments and another twelve years and the publicity of corrupt practices within unions to enact the Landrum Griffen amendments. Since then, despite three efforts by labor and one by business to reform labor law, the impasse over labor law has remained. In 1974–75, then Secretary of Labor John T. Dunlop had negotiated a reform bill through Congress only to have it vetoed by

† Co-Director, MIT Workplace Center, and, MIT Institute for Work and Employment Research. Prepared for a symposium issue of *The Comparative Labor Law and Policy Journal* honoring the life-time work of Professor Paul Weiler.

1. The National Labor Relations Act, http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx.

President Ford in response to pressures from the conservative leaders (Ronald Reagan in particular) in the Republican Party.[2] In 1977–78, a labor law reform bill fell one vote short in the Senate needed to break a Republican filibuster and thus died at that point in the process. It appeared that a window of opportunity to achieve reform opened up with the election of the Clinton Administration in 1992. However, that effort failed when the recommendations of the commission set up by the Administration to propose changes fell on deaf ears after the Congressional elections shifted power to the Republicans in 1994. In 1997 the Republican Congress passed a business-backed amendment to Section 8(a)(2) of labor law to legalize various forms of employee participation,[3] but failed to muster the votes needed to overcome President Clinton's veto.

There may be another window of opportunity at some point in the future. Time and political events will tell. Therefore, it is not too early to begin exploring what needs to be done and how to learn from prior failures to maximize the chances of being successful. That is the purpose of this paper.

I. LEARNING FROM THE PAST

The broad conditions that are needed to have a chance at changing labor law seem to be rather clear. First, there needs to be some significant event or events that shift the dominant ideology in society and the balance of political power in national politics and that galvanize broad-based public concern around issues of national consequence. In the 1930s it was the shift from the laissez faire "the business of America is business" climate of the 1920s to the economic and social crisis of the Depression and the election of the Roosevelt Democrats. In 1947, it was the rise in strike activity in the aftermath of World War II and the booming growth of industrial unionism in the prior decade that created a platform for business to argue labor had become too powerful that helped the new Republican majority overcome President Truman's veto of Taft-Hartley. In 1959 it was the McClellan hearings exposing corruption in the Teamsters and other big unions that provided the Republican Congress and President the fodder it needed to strengthen the individual rights of union members

2. *See* Bruce E. Kaufman, *Reflections on Six Decades of Industrial Relations: An Interview with John Dunlop*, 55 INDUS. & LAB. REL. REV. 324, 342 (2002).

3. Senate Bill 295, Teamwork for Employees and Managers was passed in the 104th Congress and vetoed by President Clinton.

and require greater financial disclosure on the part of union officers and organizations.

Second, it requires swift action. The window of opportunity does not stay open long—only as long as the new political balance of power is present. As history indicates, power shifts between parties frequently and sometimes without much prior warning. Moreover, the public's interest in and attention to work and labor issues are also rather fickle. Politicians are not likely to give these issues priority in the absence of significant and visible pressure from their constituents to address a clear and understandable problem, crisis, or deep injustice that affects a broad cross section of the workforce.

Third, successful change in labor law does not happen by achieving consensus between business and labor, except perhaps at the margins once it is clear that the balance of power has shifted significantly so that passage of some new law is imminent and the opposing party chooses to negotiate the best deal it can muster. There is only one significant exception to this generalization. One has to go back as far as the Railway Labor Act of 1926 to find a labor law that was largely shaped through negotiation among the business and labor groups directly affected.

Fourth, it helps to have a clear set of ideas guiding the reform agenda and evidence that the ideas have already demonstrated their practicality and value. The Wagner Act, and indeed, much of the labor and social legislation of the New Deal, came out of state level experiments, industries such as clothing, and the thirty years of research and policy advocacy by John R. Commons and his students and their Progressive Movement allies.[4] Social security, unemployment compensation, minimum wages, and other protections for women and children that were part of the New Deal all had their origins in state level experiments and policies advocated by one or more of these intellectuals/analysts. Collective bargaining likewise had already demonstrated its value in a number of industries, but especially in clothing. This allowed Sidney Hillman, leader of the Amalgamated Clothing Workers, to use his political influence with the Roosevelt Administration to attest to the value of this approach to resolving conflict and giving workers a voice at work.[5] Even the drafting of the NLRA was influenced by study groups populated with

4. For a review of the process leading to passage of the NLRA, see Christopher Tomlins, *The New Deal, Collective Bargaining and the Triumph of Industrial Pluralism*, 39 INDUS. & LAB. REL. REV. 19 (1985).

5. *See* STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR (1991).

scholars such as William Leiserson, Sumner Slichter, and others who had studied under or worked with Commons and his contemporaries.[6]

Finally, to make it through the labyrinth of the Congressional process, labor law reforms need a powerful and articulate champion who frames the issue as one affecting the values, interests, and concerns of a broad cross section of the American public and the nation's economic well-being. The NLRA is named after its champion Senator Robert Wagner. Taft-Hartley is the namesake of its sponsors in the Senate and House. Senator Taft saw this bill as part of his legislative portfolio he hoped would take him to the White House. Landrum-Griffen was similarly named for its lead co-sponsors. One of the reasons why labor policy has been so difficult is that it has been fairly or unfairly labeled as "special interest" politics, meaning largely driven by either labor or business interests. In contrast, these successful champions of reform were able to frame the debate to show that significant and widely shared public interest issues and policies were at stake.[7]

II. LEARNING FROM THE DUNLOP COMMISSION: 1992–94

For a fleeting moment it looked like 1992 was another opportunity. The twelve years of Republicans in the White House gave way to a Democratic President who had campaigned on an agenda emphasizing the need for a new vision and strategy for the economy.[8] Democrats controlled both houses in Congress, and the labor movement had sufficient influence to garner a general commitment from the new President to do something about labor law. From there, however, the other elements were lacking.

Instead of recognizing that time was short and that decisive action on a legislative agenda was needed, the President was persuaded to set up a national commission to study "what if anything" needed to be done.[9] Moreover, the Commission members were

6. *See* Tomlins, *supra* note 4, at 26.

7. For more on the point that social policy legislation is most likely to be successful when it appeals to the interests of a broad cross-section of the public see THEDA SKOCPOL, THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICAN SOCIAL POLICY (2000).

8. "It's the economy-stupid," was the refrain that supposedly kept the Clinton campaigners focused on the key issues. ROBERT B. REICH, LOCKED IN THE CABINET (1997).

9. The specific questions the Commission on the Future of Worker Management Relations was asked to address read as follows: "1. What (if any) new methods or institutions should be encouraged, or required to enhance work-place productivity through labor-management cooperation and employee participation? 2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity and reduce conflict and delay? 3. What (if anything) should be done to increase the

chosen in an effort to reach a consensus among the key business and labor interests and was chaired by the nation's leading scholar/mediator/policy advisor of the prior half century, John T. Dunlop. The problem was that at the outset of the Commission process, Dunlop was not convinced that a fundamental change had taken place in the economy, workforce, or nature of work requiring fundamentally new approaches to labor relations while other members of the Commission (myself included) held this view and had already made clear our views on the need for a fundamental overhaul of labor law to support the transformation process we saw underway.[10] Dunlop, on the other hand, was an outspoken proponent that the tumultuous changes of the 1980s and early 1990s were more of the cyclical variety and that could be accommodated by marginal adjustments and fixes to the prevailing law.[11] Thus, there was no shared set of ideas driving the reform process from the beginning. Moreover, Dunlop's long experience, and especially his experience in brokering the closest thing to a successful change in legislation when he was Secretary of Labor in 1974–75, led him to try to mediate quietly behind the scenes with business and labor leaders to find the consensus or middle ground proposal that all parties could accept.

As a result, the Commission's work went on largely unnoticed by the public. Dunlop was convinced by others of us on the Commission to hold regional hearings to get more local input but even these hearings were largely orchestrated from Washington with those appearing on behalf of labor approved by the AFL-CIO and those appearing for business cleared with various national business associations. By design there was limited press coverage of either the national or the regional hearings, despite some Commission members' rather humorous efforts to exhort the chairman to become a media icon. He would have none of such foolishness.

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extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?" *See* U.S. DEP'T LAB & U.S. DEP'T OF COM., COMM'N ON FUTURE WORKER-MGMT. REL., FACT FINDING REPORT OF THE COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS xi (1994) [hereinafter *Relations*].

10. *See*, *e.g.*, WILLIAM B. GOULD, AGENDA FOR REFORM: THE FUTURE OF AMERICAN LABOR AND EMPLOYMENT LAW (1993); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986); PAUL WEILER, GOVERNING THE WORKPLACE (1990); F. RAY MARSHALL & MARC TUCKER, THINKING FOR A LIVING: WORK, SKILLS, AND THE FUTURE OF THE AMERICAN ECONOMY (1992); Richard B. Freeman & Edward Lazear, *An Economic Analysis of Works Councils* (Nat'l Bureau of Econ. Res., Working Paper No. 4918, 1994); Paula B. Voos & Adrienne E. Eaton, *The Ability of Unions to Adapt to Innovative Workplace Arrangements*, 79 AM. ECON. REV. 172 (1989).

11. *See*, *e.g.*, John T. Dunlop, *Have the 1980s Changed U.S. Industrial Relations?*, 111 MONTHLY LAB. REV. 29 (1988).

The Commission took a go slow approach of first seeking to gain agreement on the facts regarding the state of labor relations, government regulations, and the economy. This took a year. Most of that year was dominated by the slow process of bringing the Chairman around to recognizing what the majority of business, labor, and academic experts who appeared before the Commission emphasized—indeed the world of work had changed and that to compete effectively at high wages and good working conditions firms needed to employee flexible or "high performance work systems" and workers wanted a more cooperative form of labor management relations and a more direct voice at work than was allowed under the NLRA doctrines as interpreted by the NLRB and the courts. So the Commission's Fact Finding Report laid out the case for a new approach to labor law as well as the need to reform the rules governing union organizing and recognition processes. Then, deliberations started in earnest to shape the Commission's recommendation but by that time the political winds were beginning to shift. In November 2004 the Gingrich revolution swept the Republicans back into a majority in Congress. This took whatever little wind was left out of the Commission's sails. The recommendations offered were indeed a compromise between the preferences of labor and business and charted, at best, a marginally new direction for labor policy.

But the compromises were not the product of a consensus. In the end, there was no deal that could be brokered between business and labor, even by the most respected, skillful, and savvy labor mediator and scholar of the day. Labor and business both criticized and in the end rejected the recommendations. Business was happy with the status quo. Labor was fearful the Republican Congress would cherry-pick the recommendations that business wanted and reject the ones labor wanted. Given the political realities, the Clinton Administration remained silent, accepted the report with gracious words, and took no action.

In summary the Clinton era reform effort failed because there was no public pressure or awareness of the need for change and, therefore, no constituency beyond the labor movement. There was a futile effort to build consensus on "what, if any changes were needed" rather than put forward an agenda that had been tried and demonstrated to be workable and appropriate beforehand and that had significant intellectual and empirical evidence to support it. Moreover updating labor law was not seen as part of the overall economic or social policy agenda and had no strong political

champion in the Administration or the Congress. Finally, the process of change dragged on for too long—light years in a political sense—so the window of opportunity closed before the design of a new policy surfaced.

These lessons need to be taken to heart if and when the next window of opportunity opens. The process must build on and respond to a crisis or clear problem that a broad cross section of the public perceives, feels connected to in a meaningful way, and recognizes as unfair or in need of action. The recommendations need to be well grounded in a clear set of theoretical ideas and empirical evidence/experience showing the reforms proposed can and have worked on a smaller scale in specific states and/or industries. The reform process needs one or more powerful champions, preferably in both Congress and in the Administration but definitely in Congress. The agenda cannot wait for nor expect a consensus between labor and management any more than a consensus was possible in the past. The reform process has to be swift in recognition that windows of opportunity can close as soon as the next election.

III. THE SUBSTANTIVE IDEAS FOR LABOR POLICY REFORM

In this section I will lay out the theoretical ideas and empirical evidence and experience that I believe provide the basis for labor policy reform if and when the next brief window of opportunity opens. Some of these build on proposals I and many others have made in the past while some reflect the changes in the economy, workforce, and employment relations that have become more visible in the past decade.

Let's start by focusing on the basic problems labor policy needs to address. At its most basic level, the failure of present labor law reflects the fact that the nature of work, the economy, and the workforce have all changed dramatically since the doctrines embedded in the NLRA were put in place in 1935. I and many others have documented and discussed these changes in detail elsewhere[12] and so they can listed briefly here.

In the 1930s the nation was adapting from its agrarian roots to an industrial economy that had expanded in scope from local to national markets. A new labor law was viewed as necessary to stabilize the labor conflicts that were impeding production (and interstate

12. *See*, *e.g.*, PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET (2001).

commerce to meet expected challenges to the constitutionality of a national law) and threatening social stability and to increase the purchasing power of workers and families to support a Keynesian inspired economic recovery. Today the country is transitioning from an industrial to a knowledge-driven economy, global in scope, in which American workers must compete with lower wage workers around the world. To do so they need to be well educated and trained, productive, innovative, mobile, and employed by firms that compete not on the basis of trying to minimize labor costs but on the basis of innovation, high productivity, and full utilization of employee skills and abilities.

In the 1930s, the prototypical worker was assumed to be a male breadwinner with a wife at home caring for family and community responsibilities and was employed by a large and stable/growing industrial firm for a long period of time. Today's workforce is more diverse in race, national origin, citizenship, gender, and family arrangements. Because most parents work, family and work life are tightly coupled. This requires more flexibility in work schedules and practices, more sharing of home and community duties and responsibilities, and more opportunities to move in and out of the labor force or to work part-time as family duties change. This implies that work and family decisions and activities are tightly coupled today. I believe this close coupling of work and family issues, more than any other single trend, offers an opportunity to reframe labor and employment policies as issues that affect the core values, interests, and needs of working families across the full socio-economic spectrum.

In the 1930s the large firms were seen as the institution through which many labor market functions, services, and benefits could be funded and managed. So out of that era came employer-funded health insurance and private pensions. Even unemployment insurance coverage and benefit formulas were tied to tenure with one's prior employer. Unemployment was assumed to be an involuntary temporary layoff with a reasonable prospect for recall when business conditions improved. Today, those unemployed are more likely to be either permanently displaced from their prior employer or are entering or reentering the labor force after taking time out for education, child rearing, or other family-related activities. Employment durations have declined somewhat (for men), and have become more uncertain for all. More workers are employed in temporary, independent, or "non-standard" jobs that fall outside the coverage of some of our basic labor regulations while still significant

portions of the labor force continue to work for large firms and establishments for long employment spells or durations. So there is greater variation in both the nature of employment and unemployment in today's economy compared to the 1930s.

In the 1930s, unions were needed as a countervailing power to large industrial employers and the central instrument for doing so was to promote orderly collective bargaining with election procedures that were firm centric and focused on giving voice to production workers. The workforce was divided into two groups: (1) workers assumed to be loyal to their own interests and to their unions, and (2) managers who were presumed to share interests with the firm and be loyal to the firm (and the firm was assumed to be loyal to them). Today, the line between workers and managers is blurred both by changes in the mix of occupations with a growing role for technical and professional employees and by changing modes of work organization that disperse managerial decision-making throughout the organization and into teams of people working side by side. Moreover, employees from multiple organizations—temporary employees, permanent employees, independent contractors and free-lancers, and others—often work side by side doing similar work. This makes it difficult to determine who is the employer to be held responsible or accountable for compliance with prevailing labor and employment laws. American employers no longer treat middle managers with the loyalty they enjoyed in the past. Instead, like their production employee counterparts, middle managers are likely to be included in layoffs and major downsizing actions. Moreover, there has been a clear shift in managerial norms regarding layoffs. Whereas in the past they were strategies of last resort in economic downturns or crises, now they are more widely implemented as part of organizational restructuring to ensure future business success.[13]

In the 1930s, strikes and the ability to take wages out of competition were seen as the major sources of power workers could draw on to upgrade their wages and working conditions. Thus, the country needed a process to regulate and reduce the highly visible and sometimes violent strikes that had come to characterize American labor history. Today workers once again need new sources of power to address the decline in labor's share of national output and to overcome two decades of little wage growth and increasing inequality of incomes. But power can no longer come mainly from the strike

13. For a good review of how and when corporate approaches to layoffs changed, see LOUIS UCHITELLE, THE DISPOSABLE AMERICAN WORKER (2006).

threat or by taking wages out of competition. The new sources of power labor needs to develop and deploy are more likely to come from efforts to bolster and support workers' mobility, education, and voice at the workplace and in the key corporate decisions that determine business strategies, location of work, and employment standards throughout their global supply chains.

In the 1930s a new labor movement needed to be built that was better fitted to the industrial economy, breaking from the narrow craft traditions of the AFL. Today, the workforce is more diverse, requiring a mix of organizational forms some of which reflect traditional occupational and industrial models and others that need more flexible, network-like, and coalition-like features to match the fluid boundaries of the firm and increased uncertainty of employment and need for labor market mobility. Moreover, a majority of today's workers want both representation and a direct voice at work and prefer to have a cooperative workplace environment and form of labor management relations than one either borne out of or perpetuated by conflict and adversarial relationships.[14]

American employers need employment relationships that do not put them at a serious competitive disadvantage by having to fund health care, retirement, or other benefits not borne by their domestic or international competitors. So the dependence on individual firms to supply or bargain for these benefits needs to be replaced with a broader sharing of these costs across competing firms and/or the public.[15] Moreover, firms need a means of overcoming a serious set of market failures that hold back those investing in human resources and organizational innovations required to create and sustain high productivity—high wage strategies in the face of competitors that remain focused on low cost and low wage strategies.

These then are the starting assumptions and problems that should be used to frame the next effort to reform and update labor policy. The failure to update labor policy for the past quarter century needs to be and can be presented as a root cause of the growing pressures working families are now feeling from two decades of stalled wages, the shifting burden of health insurance and retirement savings, increased complexities and stresses of longer working hours, and the disjuncture between rising productivity and profits and the rewards received from working harder and smarter. These facts are now

14. *See*, *e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT DO WORKERS WANT? (1999).

15. For a clear statement of the need to reform health insurance in this way see ANDY STERN, A COUNTRY THAT WORKS: GETTING AMERICA BACK ON TRACK (2006).

beginning to hit home with the majority of the public. The majority now worry that the American Dream is slipping away from them and especially from their children. A majority of the public worries that their children will not be able to achieve much less improve upon the standard of living they enjoyed growing up. No parents want to leave this legacy to their children. I believe these are the broad public concerns around which to fashion a call for a new, forward-looking labor policy that both restores trust, hope, and equity at work and provides working families with the tools they need to contribute to and prosper in a knowledge-driven, global economy. With this framing in mind we can now outline the substantive elements in a policy agenda that is responsive to these concerns.

IV. REFORMING AND MODERNIZING LABOR POLICY[16]

At its core labor policy in any democracy needs to assure that workers can exercise their right to freedom of association by having access to union representation and encourage the forms of representation and labor-management relations best suited to the contemporary and future workforce and economy. Freedom of association is a value that is widely shared by Americans and endorsed as a fundamental right of workers around the world.[17] Having a voice at work is essential to protecting individual rights, contributing to the success of the modern enterprise, and giving workers and families the tools they need to improve their standard of living. But the reality is that labor policy in America is not meeting these core objectives today and has not done so for a very long time.[18] Since as far back as 1990 it has been known that workers who try to use the election policies provided by the National Labor Relations Board (NLRB) to gain representation have a one in twenty chance of being fired, and face a long, drawn out, high risk battle to get a first contract.[19] More recently, new data tracking the full sequence from filing a petition for a representation election through the election and first contract negotiation process show that only twenty percent of organizing drives make it to the point of getting a labor agreement. If an employer

16. This section draws heavily on THOMAS A. KOCHAN, RESTORING THE AMERICAN DREAM: A WORKING FAMILIES' AGENDA FOR AMERICA (2005).

17. *See* Declaration on Fundamental Principles and Rights at Work, ILO, *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE. Freedom of Association is one of the fundamental principles and rights included in this statement by ILO Members in 1998.

18. The failures of labor law are documented in *Relations*, *supra* note 9.

19. *See* WEILER, *supra* note 10.

resists by committing an unfair labor practice—firing union supporters for example—the chance of getting a labor agreement goes down to about one in ten.[20] These are sobering results. A policy that provides workers only a one in ten chance of gaining a labor agreement if faced with employer opposition is clearly a failed policy. America is effectively denying workers a voice at work, contrary to our democratic norms, stated public policy, and widely shared values and expectations of the American public.

The policy reforms aimed at restoring workers' ability to organize and gain a voice at work need to be both remedial and forward looking. The remedial reforms, focused on fixing the most serious problems with the current law, should eliminate fear, delay, and illegal conduct from the beginning of a union organizing process through to the successful negotiation of an initial labor agreement. A bill designed to address these issues, titled The Employee Free Choice Act,[21] has been introduced in the Senate by Senator Kennedy and in the House of Representatives by Congressman George Miller and a large number of cosponsors. It provides for card check recognition, strengthening penalties for illegal actions, and arbitration of first contracts. Others have proposed variations on these basic reforms. Most of these ideas stay within the basic NLRA doctrines and seek to ensure those doctrines are implemented effectively and fairly. They serve as a necessary but not sufficient step for updating our labor relations system.

Additional steps are needed to break out of the NLRA paradigm to provide access to representation to the broad range of workers who are excluded from coverage either because they do not fit the increasingly restricted definitions of an employee covered by the law or have little hope of ever achieving the majority status or exclusive representation in a defined bargaining unit as deemed necessary under the current law to negotiate labor agreements. There is increasing recognition that labor law has become "ossified" under the weight of over seventy years of doctrines, case law, and the politics of the NLRB and that new concepts and rules will be needed to support and protect the variety of groups and voice mechanisms that are now present and active in both domestic and international labor markets.[22] Examples include, among others, NGOs engaged in dialogue with

20. John Paul Ferguson, *The Eyes of the Needle: Surviving Union Recognition Campaigns*, (MIT Sloan Sch. Mgmt., MIT Sloan Working Paper, April 2006).

21. Employee Free Choice Act, http://www.aflcio.org/joinaunion/voiceatwork/efca.

22. *See*, *e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

transnational companies over codes of conduct and monitoring of labor standards, community-based groups, and organizations advocating for immigrants and other specific groups. Opening up the traditional NLRA doctrines to allow these newer actors to find their appropriate roles represents a new frontier for labor policy, one that could best be explored through a process of experimentation and learning.

Labor policy also needs to be updated to encourage the forms of labor-management relations workers want and the economy needs. The vast majority of workers want a positive, cooperative workplace environment in which they can fully use and further develop their skills and engage with each other and their supervisors in efforts to improve customer, patient, or client services and productivity and promote innovation. This type of high-trust workplace is critical to the success of knowledge-based business strategies and organizations and a knowledge-driven economy. It is not surprising that the OECD economies that have performed best and are viewed as the most competitive in the world economy are ones that have achieved and sustained a high level of unionization *and* a high level of cooperation between labor and business.[23] Achieving this in America will require a change in mindset for labor policy. New forms of employee voice and participation will need to be encouraged to help build high trust, innovative, and productive employment relationships.

There are multiple ways to do so. Here the Europeans are way ahead of us. They have in place cooperative structures (works councils) where all employees, unionized or not, are represented in a consultative, cooperative body that receives information on the state of the business, consults on workforce adjustment and technological change processes, and monitors other human resource policies and business practices. Some version of these types of organization-wide consultation and information sharing bodies needs to be sanctioned and allowed to emerge in American organizations. Doing so would provide the type of voice workers want and the transparency in corporate strategies and actions workers need to decide whether to continue to invest and risk their human capital by staying in their current jobs or looking for work in another organization.

Some American companies and unions have built labor-management partnerships to promote and support this type of high trust relationship. The evidence is that employees prefer these to

23. Peter Auer, *In Search of the Optimal Labour Market Policies* (Working Paper, International Labour Organization, Geneva, 2006).

traditional arms length or adversarial labor management relationships. At Kaiser Permanente for example, over 70% of union members—nurses, medical technicians, and service staff agree that their partnership model is preferable to the adversarial model it replaced.[24] Yet these partnerships have proved fragile over the years in large part because they are not supported by our national policies or championed sufficiently by labor unions or employers. Indeed, a 2006 NLRB decision would further undermine them by taking away collective bargaining and union rights from charge nurses, professionals who work side by side in teams with other front line nurses and health care professionals, in delivering health care.[25] If applied across the board in other industries, this decision could not only strip a large number of professionals of their right to join a union, it would also drive a wedge between those who need to work together in improving productivity and product or service quality. This is the type of 1930s labor and employment law doctrine and thinking that divided the workforce into "workers" and "managers" or "exempt" and "non-exempt" categories. This doctrine no longer fits the structure of work in modern industrial or service sector organizations. A modern labor policy would do well to abandon this distinction and its corresponding barriers to who is eligible for collective representation.

Twentieth century labor policies and NLRB decisions like the one involving charge nurses were designed on an assumption that labor-management relations would be adversarial and therefore union and employee rights and influence had to be limited to a restricted scope of issues so management could remain free to make the strategic decisions needed to run the enterprise. Not surprisingly, America got what the law asked for. Labor relations were largely adversarial, unions limited their efforts to cooperate, and management resisted efforts by unions to either cooperate or gain a voice on the key decisions affecting the long term security of the workforce or the direction of the enterprise. This adversarial model now needs to be replaced with one better able to unleash employees' innovative potential and desires for a more cooperative but meaningful role in shaping their workplaces and contributing to organizational performance. Labor policy should eliminate the barriers to employee participation, endorse labor management

24. Adrienne Eaton et al., Dynamics of a Union Coalition in a Labor Management Partnership (Apr. 10, 2006) (unpublished manuscript, conference paper presented at University of California-Berkeley, on file with author).

25. *See* Oakwood Healthcare, Inc., 348 N.L.R.B. 37 (2006).

partnerships, and actively work with industry and labor to promote and spread productive partnerships so that they become the norm not the exception in our 21st century workplaces.

V. LINKS TO LABOR MARKET POLICIES

Labor policy reform cannot stand apart from needed reforms of other labor market policies. Unemployment compensation was designed to deal with cyclical unemployment in which recall to one's prior job was a significant possibility. Today a larger proportion of the unemployed are permanently displaced or new or reentrants to the labor market after being out of work for educational or family-related or health-related reasons. Reforms in the unemployment insurance system are needed to broaden the scope of those covered, shift away from judging eligibility based on minimum tenure with one's prior employer, and provide more opportunities to obtain retraining needed to update one's skills and/or match the job opportunities available. These reforms are especially needed to support the re-entry of women (and men) who take time out of full time work to attend to child rearing, needs of other family members, and/or to refresh or enhance their education and skill set. Moreover, new concepts such as wage insurance that would help protect families from experiencing permanent reductions in income when facing job displacement, warrant experimentation, and testing to see how they might complement (not substitute for) these other changes in unemployment insurance.[26]

Labor policy reforms also need to be in tune with efforts to address America's health care and pension crises, both of which need to move away from reliance on voluntary or negotiated funding decisions of individual firms. These two issues are clearly going to be near the top of the nation's agenda for some time to come. Labor policy makers and leaders can contribute to solutions of the problem by encouraging and facilitating broader labor management dialogue and joint efforts to address these issues on a national scale rather than on a firm-by-firm basis. It would help if those responsible for labor policy would provide the leadership needed to create and facilitate this type of dialogue on these and other challenges facing the nation.

26. *See*, *e.g.*, Lori G. Kletzer & Howard Rosen, *Reforming Unemployment Insurance for the Twenty-First Century Workforce* 10 (Brookings Institute, Hamilton Project Discussion Paper No. 2006-6, 2006), *available at* http://www1.hamiltonproject.org/views/papers/200609kletzer-rosen.pdf.

I will return to this point in the section below on strategies for those who manage and lead the nation's key labor policy agencies.

VI. LABOR POLICY ADMINISTRATION AND LEADERSHIP

Labor policy is neither self-implementing nor self-enforcing. Those in charge of labor and employment policies need a clear definition of their role and a well developed strategy attuned to today's industrial structures and organizational processes. For too long, however, leaders of the key agencies responsible for labor policy such as the Department of Labor, the Federal Mediation and Conciliation Service, and the National Mediation Board have taken largely caretaker and subordinate approaches to their roles. Their actions have been closely monitored and controlled by the White House. More active professional leadership is needed. I believe those leading our key labor policy agencies need to be catalysts for innovation and change in business strategies, employment systems, and enforcement/monitoring of employment standards. This, however, is not an easy task. Again we need to learn from past efforts to do so.

A. Diffusing Innovative Practices

The federal government has tried and failed to serve as a positive force in diffusing high performance workplace strategies in the past, dating as far back as the 1970s National Commission on Productivity and the Quality of Work, through the 1980s efforts of the Bureau of Labor-Management Relations and Cooperative Programs, and into the 1990s with the Office of the American Workplace. The common flaws in these efforts were their lack of strong private sector support and the lack of a link between these efforts and efforts to improve the performance of firms, regions, or industries.

A more successful model has been the industry studies' program at the Alfred P. Sloan Foundation.[27] That effort provides funding to link specific research-based programs at leading universities with leaders of specific industries to study and diffuse the range of production and employment practices needed to compete in their industry. That type of more focused, industry specific joint effort, with funding and staffing commitments contributed by industry participants and universities, appears to be a better and more

27. Hirsh Cohen, *Studies of Industries and their People*, 2 PERSP. ON WORK 13, (1998).

sustainable model for disseminating knowledge and diffusing innovations. At a regional level, a similar model can be seen in the decade long Wisconsin Regional Training Partnership that brings firms, unions, and educational institutions together focused on the specific education and training needs of the local economy.[28] This approach could be expanded and supported with seed funding where the parties are prepared to work together on economic and human resource development.

B. Modernizing Enforcement Strategies

Government agencies can also play a role in promoting organizational accountability and enforcement of employment standards. Here much can be learned from recent experience in efforts of NGOs, unions, and other groups seeking to hold companies accountable for meeting and enforcing labor standards in their global supply chains, from a strategy now being used to enforce and monitor compliance with wage and hour laws in the domestic apparel industry, and from internal responsibility systems used in various states and parts of Canada to enforce safety and health standards. The common feature underlying these approaches is that they rely on organizational and institutional complements to government inspections and enforcement efforts.

Global corporations with high consumer visibility and market exposure have responded to pressures from NGOs, unions, and other initiatives by establishing corporate codes of conduct reinforced by monitoring systems and transparency in reporting results of their monitoring efforts. Moreover, the evidence suggests that while monitoring alone has limited effects, monitoring combined with corporate-led advice on how to improve productivity, quality, management systems, *and* labor standards have led to significant improvements in compliance and in the economic performance of supplier plants.[29] To date, these efforts have been led by individual firms operating independently, even within the same industry. Companies such as Nike, Reebok, and Adidas, for example, all have their separate codes of conduct for monitoring labor standards in their

28. *See* LAURA DRESSER ET AL., U. WIS., CTR. ON WIS. STRATEGY, THE WISCONSIN REGIONAL TRAINING PARTNERSHIP (1999), *available at* http://www.ssc.wisc.edu/~wright/dresser.pdf.

29. Richard Locke et al., *Does Monitoring Improve Labor Standards?: Lessons from Nike* (MIT Sloan Sch. Mgmt., MIT Sloan Working Paper No. 4612-06, 2006), *available at* http://web.mit.edu/polisci/research/4612-06_Does%20Monitoring%20Improve%20Labor%20Standards_July-10-2006_MIT%20WP6.pdf.

global supply chains. Yet each has a better chance of being effective and sustained over time if common industry standards were to be adopted and implemented by all or the majority of competitors. Government policy-makers did make an effort to encourage industry-wide standards in mid-1990s[30] but this effort was not continued and therefore the initial momentum dissipated. It could be revived and build on the lessons these leading companies have learned in the interim years about how to integrate labor standards with other human resource and business practices.

In contrast to this highly visible but abandoned effort to build support for global standards in apparel, the Wage and Hour Division of the Department of Labor has continued an experiment begun in 1996 to certify that manufactured goods provided by domestic contractors are in compliance with wage and hour laws.[31] The key regulatory innovation here is to use the power of the manufacturers and the threat of invoking the hot cargo provision to block shipments of goods from contractors found in violation of minimum wage or overtime standards. Using data from the Wage and Hour Division's well-designed performance management system, David Weil estimates that use of this regulatory strategy has reduced minimum wage violations by approximately 17 per 100 workers and by $4.85 per worker per week.[32] This is an excellent example of use of a well designed regulatory strategy fitted to the structure of this particular industry and one that could well be adapted to fit others.

For years, a number of states and Canadian provinces have made use of labor-management committees as a way to go beyond the traditional inspection/penalty model for monitoring and enforcing safety and health standards. The Occupational Health and Safety Administration (OSHA) has a voluntary protection program first developed in the late 1970s and implemented in 1982 that encourages organizations to develop and implement a comprehensive system for managing health and safety that includes a role for employee participation in return for being exempt from OSHA initiated inspections (although not from inspections initiated in response to an

30. For an account of initial efforts in the clothing industry see REICH, *supra* note 8.

31. David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, (B.U. Sch. Mgmt. 2007), *available at* http://ssrn.com/abstract=960987.

32. David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 52 INDUS. & LAB. REL. REV. 238, 253 (2005); Carlos Mallo & David Weil, *Government Regulation of the Minimum Wage: Estimating the Effects of Intervention* (B.U. Sch. Mgt., Working Paper No. 2005-22, 2004), *available at* http://smgnet.bu.edu/smgnet/Personal/Faculty/Publication/pubUploadsNew/WP2005-22.pdf?did=540&Filename=WP2005-22.pdf.

employee complaint or accident).[33] The experience is that workplace-based monitoring institutions and processes, if well integrated with other organizational processes for managing health, safety, and production, complement and improve on basic standards and enforcement regimes. Studies of enforcement of both wage and hour law and health and safety standards in the United States have also shown that compliance tends to be higher in union than non-union establishments. Thus, unions and companies, if given the appropriate incentives and opportunities, could serve as effective complements to government enforcement efforts.[34]

These approaches illustrate the benefits of updating enforcement models in ways that leverage the power and expertise of private institutions. Other ways could be invented and tried first on an experimental basis and then, if the results warrant, expanded. For example, I've previously suggested experimenting with a two track enforcement strategy for enforcing safety and health and perhaps other employment standards.[35] One track would allow for flexibility in *how* standards are enforced if the parties have an agreed upon code of conduct that meets or exceeds the legal standards, a clear system for monitoring and documenting enforcement/compliance that involves employee representatives, and a system for resolving complaints or disputes that meets recognized due process standards.[36] In this track the relevant government agency and courts would serve as appellant bodies, available to individuals or groups who believe their statutory rights are not being met and whose disputes have not been resolved through the established procedures. The second track would follow traditional enforcement/inspection processes for organizations that have chosen not to apply for or not met the requirements for the internal responsibility track. This two-track approach would allow for more efficient targeting of scarce enforcement resources and provide an incentive for organizations to develop their own monitoring and compliance systems that are

33. For a description of the Voluntary Protection Program, see U.S. DEP'T LAB., OSHA, VOLUNTARY PROTECTION PROGRAMS, *available at* http://www.osha.gov/dcsp/vpp/index.html.

34. *See* David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters* (B.U. Sch. Mgt., Working Paper No. 2005-21, 2004), *available at* http://smgnet.bu.edu/smgnet/Personal/Faculty/Publication/pubUploadsNew/WP2005-21.pdf?did=542&Filename=WP2005-21.pdf.

35. For more detailed discussion of this approach see Thomas Kochan, *Labor Policy for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 117 (1998).

36. For a discussion of the due process standards that would need to be in place see Arnold Zack, *Bringing Fairness and Due Process to Employment Arbitration*, 12 NEGOTIATION J. 167 (1996). *See also* JOHN T. DUNLOP & ARNOLD ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 171–78 (1997).

integrated and well-matched to their businesses and technologies. Other labor policy experts have used ideas like this to develop models for using different forms of employee representation at the workplace, firm, and industry levels to extend and complement traditional legal enforcement regimes, all of which offer promising new directions for labor policy.[37]

Many of these new regulatory and diffusion strategies could be implemented with or without waiting for the Congress to enact the labor law reforms proposed earlier. What is required are labor policy leaders willing to experiment and learn from these and other efforts to leverage the skills, incentives, and capacity of private sector institutions.

C. Rebuilding Trust and Dialogue

One of the most important and currently most neglected roles for labor policy leaders is to facilitate the types of labor and management dialogue needed to build relationships of respect and trust so that these leaders that can be called on to solve problems and respond to unpredictable crises as they arise. This needs to go on at the national, industry, and community levels. Unfortunately, this is not happening today. The one government initiative for supporting labor management dialogue and relationship building, the grant program authorized under the Labor Management Cooperation Act of 1978, was deleted from the 2006 budget of the Federal Mediation and Conciliation Service. Moreover, the leading private forums that facilitated labor and management dialogue in the past, such as the Collective Bargaining Forum, the National Policy Association, and the Work in America Institute, have all disbanded. A modern labor and employment system cannot function effectively if those who share responsibility for making it work do not trust each other or even know each other on a personal and professional basis. Restoring dialogue and relationship building forums among leaders at all levels of society has to be a key part of the strategy for updating and modernizing America's labor and employment policies.

37. For a review the range of self-governance models that have been proposed and are in use in various settings, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005).

VII. COMPLEMENTARY INSTITUTIONAL REFORMS AND INNOVATIONS

Taken together, this integrated set of labor and employment policy, administrative and leadership reforms would go a long way toward supporting the transition from an industrial to a more flexible and knowledge-driven economy and set of workplace practices that support better integration of work and family life. But to make this approach work will require institutional changes on the part of business organizations, unions and professional associations, the courts, and their interrelationships.

A. Corporations

Corporations are institutions chartered by government (state governments) to serve a variety of economic and social purposes. The past two decades, however, an ideology favored by the financial community but lacking a deep economic or legal theory dominated public and academic discourse: Corporations exist primarily or even solely to maximize shareholder wealth. The result is that the gap between the private interests and behavior of corporations and the public interest has widened considerably over this time period. When this happened in the past, government policy-makers were called on to rein in the excesses of corporate power and behavior to better align their interests and behavior with those of the public. It is time to do so again.

There is both a need and a solid intellectual basis for doing so. In recent years, a more robust theory of the corporation built around a "team production" perspective has argued that there is no economic or legal basis for privileging shareholders over other constituents who put their capital at risk and contribute to the value of the firm.[38] This view holds that the appropriate purpose of the firm is to maximize the total wealth created by all constituents—financial investors and creditors, suppliers, and employees who invest their human capital. This view of the firm is also consistent with the national interest in encouraging firms to adopt business strategies that emphasize innovation and high performance employment practices that can generate both profits and sustain good jobs. Labor policy should do whatever it can to promote this team production view of the role and objectives of corporation. Doing so provides a basis for holding firms

38. *See* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

accountable for complying with the full set of employment laws and reducing the gap between the behavior and practices of private firms and the interests of their employees and the public.

B. Twenty-first Century Unions and Associations

In other settings I've argued that unions and professional associations need to adopt fundamentally new organizing/recruiting, representation, and service delivery strategies if they are to make a significant comeback in the years ahead.[39] I believe this to be the case with or without the labor law reforms advocated above. Incremental improvements in the standard organizing model in which unions depend on overcoming employer resistance to gain exclusive representation to bargain for a specific group or bargaining unit of employees continues to place too much control over who gets representation in hands of employers, uses the employer's home field (the workplace) as the turf for organizing (with a considerable home field advantage that is difficult to overcome), and requires unions to reorganize employees every time they change jobs. Replacing, or, more realistically, complementing this model with a life-time commitment to represent and provide needed education, career, and labor market services and representation in negotiations with employers would better fit today's workforce and family needs and labor market realities. Taking this approach would allow unions and professional associations to take on broader roles as both partners with firms and as service providers to members, thereby supporting efforts to reduce dependence on individual firms as providers of health care, retirement, and other benefits and services. By moving in this direction unions and professional associations, like corporations, would be serving both their members' interests and the broader public interest.

C. Courts

A two track labor policy strategy will require changes in the role of the courts as well. Courts would need to be willing to defer to and enforce the decisions of private dispute resolution systems that meet due process standards. It would be helpful, but perhaps not essential, if the courts developed a special channel for hearing and resolving labor and employment cases that come to them, similar to the labor

39. See KOCHAN, *supra* note 16.

court systems found in Europe. This would allow, as is now evolving in bankruptcy proceedings, courts to develop the expertise needed to oversee and adjudicate employment disputes by judges who have sufficient technical knowledge of workplace law and practice. That, unfortunately, is not always the case in our present judicial system where judges have to preside over a wide variety of civil lawsuits.

VIII. MAKING IT HAPPEN

Is another window of opportunity about to open that will allow these ideas to be pursued? If so, how could it be done? Prediction and scenario planning like this are at best risky and at worst can be exercises in self-delusion. But I do believe we may have a potential opening. Many commentators are beginning to recognize that the era of dominance of conservative ideology and ideas that took root in the 1980s has about run its course. Moreover, a rising chorus of concerns is coming from the growth in income inequality and stagnant wages, stresses from longer working hours, excesses of CEO pay and corporate irresponsibility and scandals, and the failure of trade agreements and interventions of international financial institutions to produce their promised benefits. These growing pressures in my view are building to a boiling point. If and when they burst, they could provide the public recognition and political pressure needed to address these issues directly.

If this happens, political leaders may be willing to put these issues on the national agenda. We are beginning to see the first signs of this as some candidates for Congress have tested the response to openly criticizing Wal-Mart for its labor and employment practices. If concerns over the direction of the country's domestic and international policies lead to a shift in political power in Congress and/or the White House, another brief window of opportunity may get opened, if only by a crack and for a brief moment. That will be the time for leaders in Congress, the Administration, and the larger public to join with Senator Kennedy and other longstanding champions of progressive labor policy in leading a highly visible and swift effort to reframe the debate about the role of labor policies in ways that speak directly to the values, interests, and concerns of America's working families. My hope is that when this time comes, the ideas outlined here will provide a framework for a new policy.