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Articles

"THE MORE THINGS CHANGE, . . .": REFLECTIONS ON THE STASIS OF LABOR LAW IN THE UNITED STATES

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I. DÉJÀ VU ALL OVER AGAIN

YOU know the story of political change and static labor law in the United States: the party in power changes from time to time, but the labor law remains the same. Consider the following illustrative story.

The story begins as a Democratic President is elected. He is elected to succeed a Republican—President George Bush. During the presidential campaign, the Democratic nominee pledged to organized labor his support for the proposed legislation that was labor's top priority item, and organized labor vigorously supported his election. The bill would have amended the National Labor Relations Act (NLRA)[1] in a way that held some promise of reinvigorating unions and strengthening organized labor. Passage of the bill was organized labor's chief legislative objective, just as defeat of the bill was the principal goal of the business community. However, the new President's legislative priority was health care reform, which he undertook with the support of organized labor. While focusing on health care reform, the President signed an employment bill, the first bill he signed into law, but it was not the one that organized labor most fervently desired: it was an employment law, not a labor law.[2] More than a year into the new Administration, prospects for passage of the labor bill dimmed. It appeared questionable whether sixty votes could be mustered in the Senate to invoke cloture and avoid a Republican-led filibuster.

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1. The current NLRA is the Wagner Act, as amended by chapter 120 of the Taft-Hartley Amendments of 1947, 61 Stat. 136, and the Landrum-Griffin Amendments of 1959, Pub. L. No. 86-257, 73 Stat. 519. The NLRA is codified at 29 U.S.C. §§ 151-69 (2006).

2. In the United States, we distinguish between labor law and employment law. Labor law refers to law governing union representation and collective bargaining—primarily the NLRA and the Railway Labor Act. Employment law is the label for individual employment rights laws, such as the employment discrimination laws and the wage and hour laws. *See infra*, Part III.A. *See generally*, Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688-89 (2008) (discussing distinction between labor law and employment law but noting division is not always clear).

Then, an election to replace a long-serving Democratic senator produced a surprising Republican victory, further diminishing the prospects for bringing the labor bill to a vote on the Senate floor. By summer, everyone agreed that the labor bill was dead. Once again, organized labor had put its money and support behind a Democrat who won the Presidency with control of both congressional chambers, and yet the bill it desperately wanted enacted had died a quiet death.

Yes, you know the story of the Cesar Chavez Workplace Fairness Act (WFA),[3] which died in the Senate in 1994. Oh, that was not the proposed legislation that you were thinking about? Perhaps you had in mind the Employee Free Choice Act (EFCA),[4] which did not make it to the Senate floor in 2010 and now seems dead. For organized labor, the demise of the EFCA, the latest holy grail of labor law reform, is "déjà vu all over again."[5]

A. *The Workplace Fairness Act*

The WFA would have amended the NLRA to prohibit the hiring of permanent replacements during economic strikes, overturning a 1938 Supreme Court decision.[6] The bill was crucial to organized labor because the right to hire permanent replacements during strikes and, more importantly, the ability legally to threaten to hire such replacements, essentially has rendered the strike, which once was labor's nuclear option,[7] a feckless

3. H.R. 5, 103d Cong. (1993); S. 55, 103d Cong. (1993). The bill was passed by the United States House of Representatives on June 15, 1993. *See* Clifford Krauss, *House Passes Bill to Ban Replacement of Strikers*, N.Y. TIMES, June 16, 1993, at A9. The Senate took a vote on whether to invoke cloture and cut off debate, but the vote fell short of the required sixty votes. *See* Jack Germond & Jules Witcover, *Labor Dealt Blow Again in Defeat of Striker Bill*, BALT. SUN, July 15, 1994, http://articles.baltimoresun.com/1994-07-15/news/1994196170_1_organized-labor-striker-replacement-unfair-labor-practices.

4. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

5. This is one of the many famous quotes attributed to baseball manager Yogi Berra. *See Yogi-isms*, YOGI BERRA: THE OFFICIAL WEBSITE, http://www.yogiberra.com/yogi-isms.html (last visited Mar. 27, 2011) (listing quotes attributed to Berra); *Yogi Berra*, WIKIPEDIA, http://en.wikipedia.org/wiki/Yogi_Berra (last modified June 15, 2011) (same).

6. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (stating that NLRA did not require employer to reinstate replaced workers who had participated in economic strike). As has been often pointed out, the declaration in the opinion that employers can hire permanent replacements for economic strikers was dictum. *See, e.g.*, Robert B. Moberly, *Labor-Management Relations During the Clinton Administration*, 24 HOFSTRA LAB. & EMP. L.J. 31, 50 (2006).

7. Although it has been the law since at least 1938 that employers could permanently replace economic strikers, it was very rare for employers to threaten to hire permanent replacements until recent times. *See, e.g.*, Kenneth G. Dau-Schmidt & Benjamin C. Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 IND. INT'L & COMP. L. REV. 1, 14 (2010) (stating that "[a]lthough permanent replacements were rarely implemented in the years immediately after the adoption of the MacKay doctrine, American employers have shown an increased willingness to resort to permanent replacements since the late 1970s"); *see also* Jack J. Canzoneri, Comment, *Management's Attitudes and the Need for the Workplace Fairness*

weapon. A vivid demonstration of this point came during the election year in 1992 when a strike at Caterpillar factories in Illinois by United Auto Workers (UAW)-represented employees collapsed when Caterpillar threatened to hire permanent replacements.[8] Bill Clinton, the presidential candidate, pledged his support for the WFA.[9] When Clinton was elected, he made health care reform his focus, and along the way, less than a month after he took office, the first bill he signed into law was the Family and Medical Leave Act.[10] When President Clinton took office, there were fifty-six Democrats in the Senate. The seat of Texas Senator Lloyd Bentsen became vacant when he was named Secretary of the Treasury in the Clinton White House.[11] The victory of Republican Kay Bailey Hutchison over Democrat Bob Krueger, whom the Texas governor had appointed to fill the seat until the special election, virtually assured that the striker replacement bill would never come to the Senate floor.[12] Some commentators opined that President Clinton did not put forth herculean effort to force a Senate vote.[13]

Act, 41 BUFF. L. REV. 205, 229 (1993) ("[D]uring the 1980s and early 1990s, management has increasingly used, threatened to use, and had the propensity to use permanent replacements, a drastic change from the period prior to 1980 when use of permanent replacements was rare.").

8. *See* Peter T. Kilborn, *Caterpillar's Trump Card; Threat of Permanently Replacing Strikers Gave Company Advantage Against Union*, N.Y. TIMES, Apr. 16, 1992, at A1.

9. *See Dogged Democrat Nears Victory: Gov. Clinton Wins Union Label*, THE MACHINIST, May 1992, at 1 (quoting Governor Clinton as saying, "'I don't think it's fair to tell workers they have the right to strike, and then tell them that means the right to lose their jobs'"); *see also* Karen Tumulty, *Striker Bill Clears House as Battle Looms in Senate*, L.A. TIMES, June 16, 1993, at A1 (referring to White House endorsement of WFA as "fulfill[ing] a campaign promise to a key constituency"). Governor Clinton also visited the striking Caterpillar workers to show his support. *See* Cynthia Todd, *Clinton Backs Strikers' Rights: He Endorses Bill to Ban Replacements*, ST. LOUIS POST-DISPATCH, Apr. 9, 1992, at A1 (discussing Governor Clinton's comments to union members).

10. *See* Pub. L. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-2654 (2006)); Moberly, *supra* note 6, at 32 (noting that Family and Medical Leave Act was first bill signed by President Clinton).

11. *See* Gebe Martinez & J. Michael Kennedy, *Texas Gov. Richards to Appoint Krueger to Replace Sen. Bentsen*, L.A. TIMES, Jan. 5, 1993, at A12.

12. *See* Tumulty, *supra* note 9 (noting that recent Senate election adversely affected prospects of striker replacement bill); *see also Bill to Ban Striker Replacements Still Faces Tough Climb in Senate*, Daily Lab. Rep. (BNA) No. 71, at AA-1 (Apr. 15, 1993) (forecasting simple passage of bill in House of Representatives but potential filibuster in Senate); *Senate Ratio Changes with Hutchison Victory*, Daily Lab. Rep. (BNA) No. 108, at D-16 (June 8, 1993) (reporting that Senate election result is "setback for labor leaders").

13. *See, e.g.*, Don McIntosh, *The Broken Promise of U.S. Labor Law, Part Two*, NORTHWEST LABOR PRESS, July 2, 1999, *available at* http://www.nwlaborpress.org/1999/7-02-99NLRB2.html (arguing that President Clinton put less effort into passage of this bill than into passage of North American Free Trade Agreement); *cf. NLRB Member Devaney Tells Management to Prepare for Bumpy Ride with New Board*, Daily Lab. Rep. (BNA) No. 94, at D-10 (May 18, 1994) (discussing rumor in Washington, D.C. that President Clinton was not willing to "twist arms," including those of two Arkansas senators, to win passage of Act). President Clinton subsequently

B. *The Employee Free Choice Act*

In 2009, the EFCA was labor's make-or-break bill.[14] Since a 1974 Supreme Court decision,[15] employers, when confronted with demands for recognition by unions based on signed authorization cards, could refuse to recognize the union, regardless of the level of support indicated by the cards, and instead wait for the union to file a petition for election with the National Labor Relations Board (NLRB). Organized labor long has argued that the limited means of recognition has been a significant cause of unions not enjoying more success in being certified as employees' collective bargaining representatives.[16] The EFCA would have amended the NLRA to provide for certification of unions based on cards signed by a majority of an appropriate bargaining unit.[17]

While campaigning for President, Barack Obama pledged his support for the proposed EFCA, and organized labor supported his candidacy.[18] When President Obama took office, health care reform was the focus of his legislative agenda. Less than a month after his inauguration, President

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issued an Executive Order that prohibited the federal government from contracting with employers that hired permanent replacements for strikers, but the D.C. Circuit invalidated the order. *See* Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 285-87 (2001) (arguing that President Clinton tried to use executive order to accomplish failed legislative goal).

14. H.R. 1409 and S. 560 were just the latest iterations of the EFCA. The House passed an earlier version, H.R. 800, on March 1, 2007, but the companion bill S. 1041 was withdrawn after a motion to invoke cloture failed. *See* Steven Greenhouse, *Senate Republicans Block Labor Bill*, N.Y. TIMES, June 26, 2007, http://www.nytimes.com/2007/06/26/washington/26cnd-labor.html?_r=1&sq="employeefreechoiceact=&st=cse"=&scp=10&pagewanted=print (considering defeat of Democrats' attempt to pass union-favored bill).

15. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974). *Linden Lumber* was not new law; in it the Court adopted the position of the National Labor Relations Board (NLRB). *See id.* at 304-05 (citing earlier case law and Board decisions).

16. Although unions win a significant percentage of elections held, Professor Gould points out that this is not the salient statistic, as many unions have eschewed the election route by filing petitions for elections only when they have a very good chance of winning. *See* William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 302 n.43 (2008) [hereinafter Gould, *The Employee Free Choice Act*] (discussing trend towards fewer union elections).

17. The Act also would have amended the NLRA to provide for mediation and arbitration if first collective bargaining agreements are not achieved in specified periods along with enhanced remedies for unfair labor practices during periods of union organizing. William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 3-4 (2009) [hereinafter Gould, *New Labor Law Reform*] (reviewing history of labor relations reform and discussing effects of EFCA proposal).

18. *See, e.g.*, Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 9, 2008, at A33 (noting that unions supported Obama and then hoped for President's support for union initiatives).

Obama signed his first law, the Lilly Ledbetter Fair Pay Act, which amended employment discrimination statutes to overturn a Supreme Court decision which had restrictively interpreted the limitations period for filing charges for pay discrimination.[19] By the time health care reform had passed, a special election to fill the late Senator Edward Kennedy's seat in the Senate resulted in a stunning Republican victory that cost the Democrats a filibuster-proof sixty votes in the Senate.[20] Although the Obama Administration reiterated its support for the EFCA[21] after the Massachusetts election, labor's top legislative initiative appeared to be dead by summer 2010,[22] and there were no signs of vitality at the end of 2010.[23]

C. *The Dunlop Commission*

In addition to the mirror image debacles of the WFA and the EFCA, another unsuccessful effort at labor law reform by a Democratic Administration is noteworthy. In early 1993, the Clinton Administration appointed the Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission for chair John T. Dunlop, a former Secretary of Labor.[24] The Commission's charge was to evaluate what changes should be made in the laws governing collective bargaining "to enhance productivity, employee participation, labor-management cooperation, and resolution of workplace problems by the parties themselves."[25] When the Commission delivered its recommendations in December 1994, the proposals were dead on arrival, coming one month after the Republicans swept into power under the "Contract with America."[26]

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19. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.). For a discussion of the Act, see Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 563 (2010).

20. *See, e.g.*, Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1 (describing Senator Brown as "a little-known Republican state senator [who] rode an old pickup truck and a growing sense of unease among independent voters to an extraordinary upset . . . in the overwhelmingly Democratic state of Massachusetts").

21. *See* Michelle Amber, *Biden Tells Labor Chiefs that Administration Is Not Abandoning Their Priorities Like EFCA*, Daily Lab. Rep. (BNA) No. 39, at A-12 (Mar. 2, 2010) (chronicling Vice President Biden's reassurances to labor that Administration would support EFCA).

22. *See* Derrick Cain, *Harkin Says He Does Not Have Enough Votes to Approve EFCA*, Daily Lab. Rep. (BNA) No. 92, at A-8 (May 5, 2010) (quoting Senator Harkin as saying, "We were within one vote, but something happened in Massachusetts").

23. *See* Derrick Cain, *New House Labor Chairman Kline Plans Focus on Job Creation, Leaner Government*, Daily Lab. Rep. (BNA) No. 237, at A-7 (Dec. 10, 2010) (discussing new labor priorities of new Republican majority).

24. *See, e.g.*, Barbara Presley Noble, *At Work; Labor-Management Rorschach Test*, N.Y. TIMES, June 5, 1994, http://query.nytimes.com/gst/fullpage.html?res=9501EED61E3BF936A35755C0A962958260&sec=&spon=&pagewanted=all.

25. Samuel Estreicher, *The Dunlop Report and the Future of Law Reform*, 12 LAB. LAW. 117, 120 (1996).

26. *See id.* at 121; Moberly, *supra* note 6, at 49.

Part of the 1993-1994 story during the Clinton Administration was not reprised in 2009-2010 because President Obama did not appoint a commission analogous to the Dunlop Commission. However, there was an ample backlog of employment bills pending in Congress when President Obama took office. Although he signed into law the Ledbetter Fair Pay Act, the fate of the Paycheck Fairness Act,[27] the Arbitration Fairness Act of 2009,[28] the Employment Non-Discrimination Act of 2009,[29] and others may have been sealed by the midterm elections of November 2010, when the Republicans gained control of the House and eroded the Democrats' majority in the Senate.[30] Indeed, shortly after the midterm elections, the Paycheck Fairness Act met its demise.[31]

II. SEISMIC SHIFTS IN POLITICS AND LABOR LAW REFORM IN OTHER NATIONS

The striking similarity of the stories in 1993-1994 and 2009-2010 illustrates a point about labor law in the United States: in recent decades, shifts in political power have not resulted in significant changes in labor law.[32]

27. H.R. 12, 111th Cong. (2009); S. 182, 111th Cong. (2009).

28. H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

29. H.R. 2981, 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

30. *See, e.g.*, *The Republicans Strike Back*, THE ECONOMIST DEMOCRACY IN AM. BLOG (Nov. 3, 2010, 7:11 AM), http://www.economist.com/blogs/democracyinamerica/2010/11/mid-term_elections_0.

31. *See Senate Vote 249—To Advance the Paycheck Fairness Act*, N.Y. TIMES, http://politics.nytimes.com/congress/votes/111/senate/2/249 (last visited Dec. 30, 2010) (detailing Senate vote taken on November 17, 2010, that fell two votes short of invoking cloture).

32. The failure to amend the NLRA is not limited to Presidents Clinton and Obama. During President Carter's Administration, there was an attempt through the Labor Reform Act of 1977 to strengthen the remedies under the NLRA. That effort failed. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 134-35 (2009) (noting failure of Labor Reform Act of 1977); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 1-2 (2009) (noting attempts at labor reform during Carter, Clinton, and Obama Administrations). Although one might guess that Republican Administrations and Republican-led Congresses have weakened the worker protections under United States law, the NLRA has not been significantly amended since 1959. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). Professor William B. Gould points out that the retreat of Democratic presidential candidates on reform of the NLRA goes back to Governor Adlai Stevenson's vacillating repudiation of the prior pledge of the Democratic Party to repeal the Taft-Harley Act amendments of the NLRA. *See* William B. Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421, 1422 (1972) [hereinafter Gould, *Taft-Hartley Comes to Great Britain*]. A persuasive argument, however, can be made that the NLRB has diluted employees' rights and protections through its interpretations of the NLRA at various times. For example, the AFL-CIO filed a complaint with the International Labour Organization's (ILO) Committee on Freedom of Association, alleging that a series of NLRB decisions during President George W. Bush's two terms constituted violations of two fundamental conventions of the

Juxtapose that phenomenon with that of political changes and associated labor law changes in other nations. Consider the United Kingdom as an example. Political power changes in the last four decades have wrought dramatic changes in labor law in the United Kingdom. When the Conservatives came to power under Prime Minister Edward Heath in 1971, the government began to pass statutes to reign in powerful unions, which had flourished in an absence of regulation.[33] The Industrial Relations Act of 1971 ushered in the new regulation.[34] The Labour Party government subsequently repealed the law.[35] The pendulum swung again, however, and the curtailing of union power hit full stride with the election of the next Conservative Prime Minister, Margaret Thatcher, in 1979. Under Prime Minister Thatcher and her successor John Major, the laws were changed to substantially weaken unions.[36] Union density and power significantly declined. As commentators explained:

ILO. *See* Complaint to the ILO Committee on Freedom of Association by the American Federation of Labor and Congress of Industrial Organizations Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act at 10-41, ILO Case No. 2608 (Oct. 25, 2007), *available at* http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf. For reflections on the Bush NLRB from a Board member, see Wilma B. Liebman, *Values and Assumptions of the Bush NLRB: Trumping Workers' Rights*, 57 BUFF. L. REV. 643, 643 (2009) (stating "the Bush NLRB reflects no shortage of decisions that are odd, irrational, or inconsistent with the received wisdom"). The NLRB under President Reagan has been characterized as being radically anti-union. *See* Gould, *The Employee Free Choice Act*, *supra* note 16, at 330 (noting, as former NLRB Chairman, "rather severe anti-unionism promoted by the Reagan Board in the 1980s").

33. *See* Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model*, 8 TUL. J. INT'L & COMP. L. 117, 137 (2000) (discussing how "until recently [the United Kingdom] has been remarkably devoid of any regulation of the conduct of industrial relations"). *See generally* Gould, *Taft-Hartley Comes to Great Britain*, *supra* note 32 (discussing Industrial Relations Act of 1971).

34. *See* Dau-Schmidt, *supra* note 33, at 137-38 (distinguishing labor regulation in United Kingdom from significantly more expansive regulation in United States); William B. Gould IV, *Recognition Laws: The U.S. Experience and Its Relevance to the U.K.*, 20 COMP. LAB. L. & POL'Y J. 11, 11 (1998) [hereinafter Gould, *Recognition Laws*] (noting fulfillment of promise by Conservative party to enact comprehensive labor law reform); Gould, *Taft-Hartley Comes to Great Britain*, *supra* note 32, at 1423 (explaining that Industrial Relations Act of 1971 was "the first comprehensive legislation relating to labor management relations in the United Kingdom [and that] [t]he legislation attempted to both restrict union abuses in the collective bargaining arena and provide statutory protection for unions and employees").

35. *See* Dau-Schmidt, *supra* note 33, at 138 (arguing that labor reform proved unpopular and was quickly repealed).

36. *See, e.g.*, *id.*; Gould, *Recognition Laws*, *supra* note 34, at 11; John Pencavel, *The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia, and New Zealand*, 20 COMP. LAB. L. & POL'Y J. 447, 464-67 (1999); *see also* Raymond J. Friel, *Blair's Third Way—Thatcher's Enduring Legacy*, 48 U. KAN. L. REV. 861, 875 (2000) (describing Thatcher's successful effort to "denude" unions of power).

> The sharp union decline in Britain that dates from 1979 is by now well known. Aggregate union density showed a remarkable stability in the postwar period (at around 40-45% membership), followed by a sharp rise in the 1970s, but then an even sharper fall from the late 1970s onward. Since 1979 aggregate union density has trended downward so that, by the end of the 1990s, less than 30% of workers were members of trade unions.[37]

The election of Prime Minister Tony Blair and the "New Labour" Party in 1997 was a significant change in political power that was accompanied by significant changes in the labor law of the United Kingdom. While the New Labour Party broke from the decidedly pro-union leanings and affiliation of the "Old Labor" Party,[38] it did usher in significant labor law changes after many years of Conservative leadership.[39] For example, in an attempt to reverse the weakening of unions, a statutory recognition procedure was enacted in the Employment Relations Act 1999, giving unions another avenue to gain recognition as collective bargaining representatives.[40] On the other hand, New Labour did not repeal many of the

37. *See* Stephen Machin & Stephen Wood, *Human Resource Management as a Substitute for Trade Unions in British Workplaces*, 58 INDUS. & LAB. REL. REV. 201, 203 (2005). The decline in union density in the United Kingdom from 1997 to 2003 was 15.5%. *See* Jelle Visser, *Union Membership Statistics in 24 Countries*, 129 MONTHLY LAB. REV. 38, 45 tbl.3 (2006) (charting union membership decline). While union density in the private sector decreased, density in the public sector has remained relatively stable. *See The Ties That (Still) Bind*, THE ECONOMIST, June 10, 2006, at 22, *available at* http://www.economist.com/node/7041097/print. *See generally (Government) Workers of the World Unite!*, THE ECONOMIST, Jan. 8, 2011, at 35, *available at* http://www.economist.com/node/17849199 (referencing lack of decline in union density within public sector).

38. *See* Clint Bolick, *Thatcher's Revolution: Deregulation and Political Transformation*, 12 YALE J. ON REG. 527, 545 (1995) (explaining that New Labour "recanted [the Labour Party's] blind obedience to labor unions").

39. *See, e.g.*, Dau-Schmidt, *supra* note 33, at 138; Sandra Fredman, *The Ideology of New Labour Law*, *in* THE FUTURE OF LABOUR LAW 9 (Catherine Barnard et al. eds., 2004); Claire Kilkpatrick, *Has New Labour Reconfigured Employment Legislation?*, 32 INDUS. L.J. 135, 148-49 (2003) (discussing effect of European Union regulations on New Labour).

40. *See generally* Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States?*, 25 COMP. LAB. L. & POL'Y J. 227 (2004) (comparing labor reform in United States and United Kingdom). The statute included incentives for the employer to opt for voluntary recognition rather than going the route of statutory recognition. *See id.* at 241-42 (discussing incentives added to labor relations process). For an informed review of the new statutory recognition procedure concluding that it encourages voluntary recognition, but not collective bargaining, see Ruth Dukes, *The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?*, 37 INDUS. L.J. 236, 237 (2008). While observing that there has been an increase in recognitions since the statutory procedures were enacted, Dukes argues that the statute "ignores the fundamental difference between voluntary and statutory recognition: namely, that in the case of statutory recognition, the role of legislation should be to persuade an otherwise unwilling employer to negotiate." *See id.* at 266. Dukes also discusses the criticisms of the statutory recognition procedures by the ILO's Committee of Experts on the

unfavorable laws enacted by the Conservative Government,[41] generally favoring laws facilitating employee-employer "partnerships" rather than union-management relations.[42] Nonetheless, the decimation of unions through legislation ended and New Labour enacted some laws favorable to unions and even more protecting individual workers. Many of the labor and employment reforms followed from Prime Minister Blair's signing onto the European Union Social Charter from which the United Kingdom had opted out until Blair's election.[43] In the first year after the election of a new coalition government of Conservatives and Liberal Democrats in 2010,[44] the early indications are that another major shift in the labor law policy has begun in the United Kingdom. Consider, for example, the new government's proposals for substantially reforming the United Kingdom's employment tribunals.[45] If the government proceeds with the proposed

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Application of Conventions and Recommendations. *See id.* at 238-39, 260-64 (discussing Committee's reasons for concluding that statutory recognition procedure does not satisfy ILO Convention 98 on Right to Organise and Collective Bargaining).

41. *See* Friel, *supra*, note 36, at 890 ("Anti-union legislation was not repealed upon Labour's election."); *see also* James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 131 n.140 (2004) ("The Employment Relations Act of 1999, enacted by the Labour Party, means no change in the restrictive provisions of the prior Thatcher legislation dealing with secondary pressure.").

42. *See* Charles B. Craver, Book Review, 55 INDUS. & LAB. REL. REV. 548, 548-49 (2002) (reviewing TONIA NOVITZ & PAUL SKIDMORE, FAIRNESS AT WORK: A CRITICAL ANALYSIS OF THE EMPLOYMENT RELATIONS ACT 1999 AND ITS TREATMENT OF COLLECTIVE RIGHTS (2001)) (discussing authors' disappointment with Blair government's failure to enact laws more supportive of unions); *see also* Friel, *supra* note 36, at 890-91 (discussing Blair's vision as not including an enhanced collective role for unions).

43. *See* Dau-Schmidt, *supra* note 33, at 38; D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law: A Model For the United States?*, 29 SYRACUSE J. INT'L L. & COM. 207, 211 (2002) (suggesting Social Charter is "[p]erhaps the most significant non-legislative event").

44. *See, e.g.*, *A Compromising Position*, THE ECONOMIST, Jan. 6, 2011, at 20, *available at* http://www.economist.com/node/17849447?story_id=17849447 (discussing election of coalition consisting of Conservatives and Liberal Democrats and vote reactions to coalition rule).

45. The most significant change likely to occur is a major reform of the employment tribunals. The new coalition government initiated a review of the employment tribunals, which were created in 1964. In January 2011, the government released the product of that review. *See* DEP'T FOR BUS., INNOVATION & SKILLS, RESOLVING WORKPLACE DISPUTES: A CONSULTATION (2011), *available at* http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation. The review stems from the premise that there have been too many cases (particularly involving unfair dismissals) and an overabundance of frivolous claims in the tribunals, costing businesses too much money. *See id.* at 15, 27-28. The consultation closed on April 20, 2011. If the government moves forward with the recommended reforms, there will be a number of changes favorable to employers, including several disincentives for employees to assert claims such as required deposits and enhanced cost shifting.

changes, the employment tribunals will become less hospitable forums for workers to assert their claims.

Another nation exemplifying political power shifts and concomitant major labor law changes is France. With the ascendancy in 2007 of President Nicolas Sarkozy and his party, the Union for a Popular Movement, the center-right President said that he would "break with the past" and change France's rigid labor market and bring unemployment rates down from 8.85% to 5% by the end of his five-year term in 2012.[46] Notwithstanding the failure of his predecessor, President Jacques Chirac, to effect significant labor law reform,[47] the Sarkozy government embarked upon significant reforms.[48] These reforms included the evisceration of the thirty-five-hour workweek,[49] cutbacks on special retirement entitlements,[50] and the Law on Modernization of the Labor Market 2008, which included a consent termination that eases the requirements of France's for-cause termination law.[51]

The United Kingdom and France are only two of the nations in which shifts in political power usher in significant labor law reform. The United States is exceptional. The demise of the EFCA and the WFA notwithstanding seemingly favorable shifts in political power raises the question of why labor law is so static in the United States. Professor Cynthia Estlund provided an insightful analysis of the reasons for "ossification" of labor law in the United States.[52] The focus of this essay is to ponder why political power shifts in other nations sometimes usher in major labor law reform, while in the United States changes in political power result in little or no change in *labor law*.[53] The purpose of this essay is neither to blame nor credit any politician or party for the static labor law of the United States

46. *See* Lawrence J. Speer, *Labor Reform Tops Agenda of French President-Elect Sarkozy*, Daily Lab. Rep. (BNA) No. 91, at A-7 (May 11, 2007).

47. *See* Jennifer A. Dyer, Note, *The Failure of France's First Employment Contract: Failing to Protect Jobs and Workers*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 503, 505 (2008) (discussing public outcry causing repeal of laws).

48. *See* George J. Terwilliger III, *Impediments to Commercial Risk-Taking*, 12 TEX. REV. L. & POL. 425, 429 (2008) (describing labor law changes under Sarkozy as "sea change"); Dyer, *supra* note 47, at 516 (recounting Sarkozy's plans for reform).

49. *See* Katrin Bennhold, *Sarkozy Wins Battle to Loosen 35-Hour Workweek*, N.Y. TIMES, July 24, 2008, http://www.nytimes.com/2008/07/24/world/europe/24iht-france.4.14765628.html.

50. *See* William Pfaff, *Sarkozy and the Unions*, N.Y. TIMES, Nov. 16, 2007, http://www.nytimes.com/2007/11/16/opinion/16iht-edpfaff.1.8365141.html?_r=1&scp=9&sq=sarkozy%20and%20unions&st=cse; *see also (Government) Workers of the World Unite!*, *supra* note 37 (stating that "[m]illions of French workers marched against Nicolas Sarkozy's modest plans to raise the retirement age by two years").

51. *See* Marjorie R. Culver et al., *Employment Law*, 43 INT'L LAW. 707, 710-11 (2009); Phillippe Desprès, *Common-Consent Termination Agreements Introduced*, INT'L L. OFF. (Oct. 1, 2008), http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=0cd9d194-dee8-43dc-8af6-22499e7148b1.

52. *See* Estlund, *supra* note 32.

53. Again, I distinguish between labor law and employment law. As will be discussed *infra*, both major political parties in the United States have supported

nor to evaluate the merits of any particular reform. Rather, this essay presents ruminations on the reasons for the static labor law in the United States in comparison with the changing labor law in many other nations.

III. RUMINATIONS ON STATIC LABOR LAW AMIDST POLITICAL CHANGE IN THE UNITED STATES

A. *The Labor Law-Employment Law Dichotomy*

One key to understanding the stasis of labor law is appreciating the distinction made in the United States between *labor law* and *employment law*. Labor law refers to one type of regulation of the workplace, and employment law refers to another. Labor law is the name given to the law governing labor-management regulation principally in unionized workplaces.[54] Employment law, on the other hand, is the body of individual employment rights law regulating non-unionized workplaces.[55] Labor law deals primarily with the NLRA and the Railway Labor Act, which protect the rights of employees to engage in collective bargaining and other forms of collective action.[56] Employment law encompasses the federal and state statutes and state case law regarding individual employment rights.[57] This dichotomy is recognized neither in Europe nor in much of the rest of the world, where the term labor law is used to describe the whole body of law regulating the workplace.[58]

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significant changes in employment law while they have paid minimal regard to labor law reform.

54. *See* Sachs, *supra* note 2, at 2688; Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 489 (2001); *cf.* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 215 (2007) (concluding that labor law and employment law should not be considered independently). It is worth noting that although the NLRA principally governs representation and collective bargaining, workers who are not represented by unions also have some rights under the Act. *See, e.g.*, William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002).

55. *See* Scalia, *supra* note 54, at 489. In 1988, Professor Steven Willborn, discussing the labor law that is taught in law schools, observed that "[f]or the vast majority of today's workers and employers, labor law is relevant only to the extent it considers individual employment rights, rights outside of the context of collective bargaining." Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection*, 67 NEB. L. REV. 101, 102 (1988); *cf.* Sachs, *supra* note 2, at 2721 (noting that workers in United States are turning to employment laws to provide protection for their collective activity).

56. *See, e.g.*, Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 688 (1997); Scalia, *supra* note 54, at 490; Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System,* 59 U. CHI. L. REV. 575, 575 (1992).

57. *See, e.g.*, Bales, *supra* note 56, at 688-89; Scalia, *supra* note 54, at 490; Stone, *supra* note 56, at 576.

58. *See generally* Patrick Hardin, *United States*, *in* 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 23a-1 to 23a-3 (Am. Bar Ass'n ed., 1st ed. 1997).

Given this distinction, one explanation for the stasis of labor law is that, even if the Democratic Party generally supports employee rights and protections, politicians of both parties long ago gave up on labor law and opted for a regime of individual employment rights laws.[59] Politicians in the United States have not forsaken workplace regulation, but they have turned their backs on laws that facilitate representation and collective bargaining. In the past two decades during which the WFA and the EFCA failed,[60] several employment laws of the individual employment rights variety have been enacted in the United States, including: the Americans with Disabilities Act of 1990;[61] the Civil Rights Act of 1991;[62] the Family and Medical Leave Act of 1993;[63] the ADA Amendments Act of 2008;[64] the Genetic Information Nondiscrimination Act of 2008;[65] and the Lilly Ledbetter Fair Pay Act of 2009.[66] The prospects were promising in 2010 for

59. *See, e.g.*, James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1571 (1996); Estlund, *supra* note 32, at 1539 (discussing lack of positive role for unions in many individual minimum rights laws); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 73 (1999); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 794 (1998) [hereinafter Summers, *Questioning*] (explaining that "[t]he Wagner Act has failed in its purpose only because collective bargaining has not become the dominant pattern for managing employment relations").

60. Beyond the last two decades, this cavalcade of employment laws can be traced back to 1963: Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2006)); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2006)); Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (2006)); Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-78 (2006)); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-461 (2006)); Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e(k) (2006)); Employee Polygraph Protection Act of 1988 (EPPA), Pub. L. No. 100-347, 102 Stat. 646 (codified as amended at 29 U.S.C. §§ 2001-09 (2006)); and Worker Adjustment and Retraining Notification Act (WARN Act), Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101-09 (2006)).

61. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-17 (2006)).

62. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

63. Pub. L. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-54 (2006)).

64. Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 & 42 U.S.C.).

65. Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29 & 42 U.S.C.).

66. Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 & 42 U.S.C.).

the Employment Non-Discrimination Act,[67] which would amend Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation, but the likelihood of passage has diminished. Notwithstanding the expansion of employment law, the NLRA has not been significantly amended since 1959.[68]

Organized labor supported passage of the individual rights laws, although it was not obvious that the passage of such laws was in the best interest of unions.[69] It is arguable that the more such individual employment rights Congress bestows on employees, the less employees need unions to bargain for rights through collective bargaining agreements. Yet, how could organized labor credibly take a different political position, given that the individual employment rights laws help workers? After almost fifty years of enactment of employment laws, it is not clear that such laws have been a factor in the decline of unions. On the other hand, it also seems true that organized labor has not devised many effective ways to use the employment laws to the mutual advantage of workers and unions.[70]

Moreover, both political parties sometimes support the regulation of the workplace through individual employment rights, further indicating that politicians have given up on labor law and chosen to focus their efforts on employment law instead.[71] Why the disparity? As we are ruminating here, I offer several possible explanations.

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67. H.R. 3017, 111th Cong. (2010); S. 1584, 111th Cong. (2010); *see* Kevin P. McGowan, *Congress May Turn to ENDA, Equal Pay Bill After Long Health Care Battle, Speakers Say*, Lab. Rel. Week (BNA) No. 24, at 502 (Apr. 1, 2010).

68. *See* Estlund, *supra* note 32, at 1535; Gould, *New Labor Law Reform*, *supra* note 17, at 2.

69. *See, e.g.*, Brudney, *supra* note 59, at 168-69 (discussing important role of organized labor in securing passage of federal employment discrimination laws); *see also* Boyd Rogers, Note, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1308-09 (1997) (discussing gradual building of support for FMLA among unions).

70. *See* William B. Gould IV, *The Third Way: Labor Policy Beyond the New Deal*, 48 U. KAN. L. REV. 751, 755-56 (2000) ("My National Labor Relations Board took account of the need of unions to involve themselves in the wide array of new regulatory legislation that has become such a prominent part of the landscape during this past quarter century."). For example, this array of federally granted and protected rights in employment laws may mean little in practice if the employees cannot obtain representation, and many aggrieved workers cannot find attorneys to take their cases and file lawsuits on their behalf. *See* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-07 n.3 (2003) (citing Paul Tobias's testimony before Dunlop Commission that plaintiffs' employment bar turns away 95% of potential plaintiffs); Ken May, *Law Professor Urges Unions to Arbitrate Workers' Race Claims in Wake of* Pyett, Daily Lab. Rep. (BNA) No. 32, at A-6 (Feb. 16, 2011) (quoting Professor Michael Green as saying that 95% of claimants cannot get lawyer to take their case); *see also infra* note 78 (discussing under-representation of workers with employment discrimination and employment law claims). Unions could educate employees about their rights and provide a means of representation for employees with claims under employment statutes.

71. *See, e.g.*, Estlund, *supra* note 32, at 1530 (positing that Congress and federal judiciary "have grown unsympathetic to—even unfamiliar with—the collectiv-

First, union density has declined in this nation since the 1950s and even more precipitously since the 1970s, to the point that only about seven percent of the private sector is unionized.[72] Perhaps politicians do not believe that collective bargaining law covers enough of the workforce to be worth the effort and political capital it takes to pass such laws.[73] In exchange for the number of votes that organized labor can deliver, the political price of labor law reform is relatively high. It takes much effort and political capital to enact representation and collective bargaining laws because business interests concentrate their resources and lobbying efforts on killing such laws.[74] Consider, for example, the fierce opposition of business organizations during the failure of the WFA[75] and the EFCA.[76] In contrast, employment laws do not attract the same level or intensity of opposition. Several employment discrimination laws were enacted at approximately the time the WFA and the EFCA were failing: the Americans with Disabilities Act of 1990; the Civil Rights Act of 1991; the ADA Amendments Act of 2008; and the Genetic Information Nondiscrimination Act of 2008. Moreover, two different Republican presidents named George Bush signed all four of those bills into law.[77]

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ist premises of the New Deal labor law regime as it falls increasingly out of sync with the surrounding legal landscape"); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10 (1988) [hereinafter Summers, *Labor Law as the Century Turns*] ("The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party.").

72. *See, e.g.*, Estreicher, *supra* note 25, at 1; Gould, *New Labor Law Reform*, *supra* note 17, at 3.

73. *See infra* notes 71-72 and *infra* Part III.B; *see, e.g.*, *(Government) Workers of the World Unite!*, *supra* note 37 (discussing former California Governor Schwarzenegger's battles with state's public unions). It is worth noting that union density does not necessarily correlate with coverage under collective bargaining agreements. In the United States, the correlation is a product of the decentralized collective bargaining in which representation and collective bargaining predominantly take place at the plant level. In France, although union density is approximately the same as in the United States, about ninety percent of French employees are covered by collective bargaining agreements. *See* G.J. Bamber & P. Sheldon, *Collective Bargaining: An International Analysis, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 585, 612 tbl.1 (Roger Blanpain ed., 2007). This divergence between union density and collective bargaining agreement coverage in France is the result of a centralized collective bargaining regime in which collective bargaining is predominantly at high levels, such as industry-wide. *See id.* at 613.

74. This powerful opposition mirrors the energy and money that individual employers devote to efforts to defeat unions that launch organizing campaigns at their workplaces. *See, e.g.*, Summers, *Questioning*, *supra* note 59, at 794.

75. *See* Clifford Krauss, *House Passes Bill to Ban Replacement of Strikers*, N.Y. TIMES, June 16, 1993, at A23.

76. *See* Steven Greenhouse, *Bill Easing Unionizing Is Under Heavy Attack*, N.Y. TIMES, Jan. 9, 2009, at A12; Steven Greenhouse, *Fierce Lobbying Greets Bill to Help Workers Unionize*, N.Y. TIMES, Mar. 11, 2009, at B3.

77. President George H.W. Bush signed the ADA, Robert Pear, *Congress Passes Civil Rights Bill, Adding Protections for Disabled*, N.Y. TIMES, Sept. 18, 2008, at A21, and the Civil Rights Act of 1991 (after vetoing its predecessor, the Civil Rights Act

It is a seeming paradox that business interests fight legislation that would strengthen labor laws—such as the WFA and the EFCA—with more energy, time, and resources than they fight individual employment rights laws. Two possible explanations for this dissimilar treatment occur to me. First, individual employment rights laws do not yoke employers to a collective bargaining representative and the concomitant duty to engage in good faith bargaining with that representative for an extended period of time. The results of the collective bargaining process—i.e., what rights and protections a collective bargaining agreement will confer on the covered employees—are uncertain, while the legal obligation to bargain and work with and through the collective bargaining representative for a period of time is certain. It seems that businesses like neither the first uncertainty nor the second certainty. Another possible explanation is that businesses understand that rights achieved through collective bargaining are much more likely to be asserted through grievance and arbitration procedures established in the corresponding agreements than are the rights created in individual employment rights statutes.[78]

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of 1990), Robert Pear, *With Rights Fight Comes Fight to Clarify Congress' Intent*, N.Y. TIMES, Nov. 18, 1991, at A1. His son, George W., signed the ADA Amendments Act, Kevin P. McGowan, *President Bush Signs into Law Bill to Broaden ADA's Protections*, Daily Lab. Rep. (BNA) No. 187, at AA-1 (Sept. 26, 2008), and the Genetic Information Nondiscrimination Act, Derrick Cain, *Bush Signs Legislation to Prohibit Genetic Discrimination in the Workplace*, Daily Lab. Rep. (BNA) No. 99, at A-1 (May 22, 2008).

78. The concern with the ability to assert individual employment rights claims is two-fold. First is the concern with overcrowded court dockets. *See, e.g.*, Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 154 (1993) ("It would be hard, however, to find anyone who believes that the nation has enough judges and courthouses to make common law litigation the modal institution of employee grievance processing."). A second and more significant concern with employees asserting claims is whether there are enough lawyers willing to take the cases. *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467-68 (1992) ("Because of litigation costs, all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal. . . . Lower income employees without substantial tort claims will have difficulty finding a lawyer."); *see also* Leslie King, *Mandatory Arbitration Better for Workers With EEOC, Courts Stretched, Professor Says*, Daily Lab. Rep. (BNA) No. 151, at C-2 (Aug. 6, 1997) (quoting Professor Theodore St. Antoine stating that experienced attorneys accept only about one out of every hundred potential discrimination cases because they are not worth their time). The channeling of many employment claims to alternative dispute resolution has no doubt ameliorated the problems in having claims heard in court. Indeed, employers often have employees sign mandatory arbitration agreements. There are, however, concerns with whether arbitration of individual rights claims, without the involvement of a union, provides an even-handed and effective adjudication of the employees' claims. *See* Martin H. Malin, *Privatizing Justice—But By How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 601-22 (2001) (discussing matters that courts should consider in deciding whether to enforce mandatory arbitration agreements' neutrality of arbitral forum, arbitral control over discovery, restrictions on limitations periods and remedies, allocation of arbitration costs, and mutuality regarding mandatory nature of arbitration); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alter-*

A second reason that politicians have forsaken labor laws in favor of employment laws may be that politicians can assess particular issues and test the political winds on specific issues, such as family and medical leave, genetic discrimination, and employer electronic monitoring of employees, and then decide the political upside and downside without *necessarily* being placed in either the business or labor camp. As mentioned, President George W. Bush signed both the ADA Amendments Act and the Genetic Information Nondiscrimination Act in 2008 and his father had signed the ADA in 1990 and the Civil Rights Act of 1991.[79] I doubt many would go so far as to characterize either President Bush as having been in the camp of organized labor. In contrast, a politician who votes for labor law reform favoring organized labor and collective bargaining is more likely to be beatified by labor and demonized by businesses and concomitantly to receive the respective favors and punishments.[80] Regardless of the position a politician takes on a labor law, it is likely to provoke attention and opposition.[81]

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native Judicial Systems?: Repeat Players in ADR, 15 OHIO ST. J. ON DISP. RESOL. 19, 43-44 (1999) (discussing study results showing that repeat players and higher level employees with resources for representation fare better in mandatory arbitration); Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1911-18 (2000) (discussing inadequacies of current mandatory arbitration systems, including lack of public accountability, limited discovery, no jury, selection of arbitrators, advantage of repeat players, and limitation of remedies). The EEOC has opposed mandatory arbitration of employment discrimination claims. *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997). For a critique of the EEOC's position, see Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999). In 1999, however, the EEOC launched a voluntary mediation program that has, by the Commission's account, been very successful. *See EEOC's Mediation Program Going Strong Despite Budget Shortfall, Coordinators Say*, Daily Lab. Rep. (BNA) No. 59, at B-1 (Mar. 27, 2000); Nancy Montwieler, *Commission's Voluntary Mediation Program Is Off to Strong Start, Chairwoman Asserts*, Daily Lab. Rep. (BNA) No. 232, at A-3 (Dec. 3, 1999).

79. *See supra* note 74.

80. *See, e.g.*, Jason Kosena, *Both Sides on EFCA Set Sights on Bennet*, THE COLORADO STATESMAN, Mar. 26, 2009, http://www.coloradostatesman.com/content/99911-both-sides-efca-set-sights-bennet. Although he was speaking of employment laws, a statement by Deron Zeppelin, Director of Government Affairs for the Society for Human Resource Management, illustrates the concern politicians have regarding being labeled based on one's position on labor or employment bills: "Most members of Congress, believe it or not, do not like to vote on [employment] issues, period. It is not fun to be labeled either anti-worker or pro-business. Most of them will run for the hills before they have to vote on them." *See* Michael Bologna, *Hill Watchers Foresee Little Activity on the Labor and Employment Law Front*, Daily Lab. Rep. (BNA) No. 153 (Aug. 9, 2001).

81. Consider the curious case of former Senator Arlen Specter. Senator Specter became entangled with the EFCA: first, announcing that he would not vote to invoke cloture to bring the bill to the Senate floor; then switching parties; then proposing an amended version of the EFCA; and finally losing the Democratic

A third reason for politicians' preference for employment laws over labor laws may be that the individual employment rights laws are imbued with an approach to law and an ideology embraced by much of U.S. society, whereas labor laws are based on an approach and ideology no longer embraced by most of society. Laws that are inconsistent with a society's values are not likely to survive.[82] Thus, labor law may be a casualty of the decline of collectivism and the rise of individualism in U.S. culture, society, economy, and labor law.[83] Although individualism has been part of the American fabric throughout its history,[84] it has in recent decades ascended while collectivism has declined.[85] There was a period after the Great Depression during which the Wagner Act was passed, in which a collectivist approach held sway.[86] That orientation changed after World War II.[87] According to Professor Estlund, "Congress and . . . the federal judiciary, both . . . have grown unsympathetic to—even unfamiliar with—the collectivist premises of the New Deal labor law regime as it falls increasingly out of sync with the surrounding legal landscape."[88] Collectivist

primary despite having the support of the AFL-CIO. *See* Jeff Zeleny & Carl Hulse, *Specter, Running as Democrat, Ousted in Pennsylvania Primary*, N.Y. TIMES, May 19, 2010, at A1 (discussing Senator Specter's loss); Alec MacGillis, *Specter Unveils Revised EFCA Bill*, WASH. POST CAPITOL BRIEFING BLOG (Sept. 15, 2009, 2:33 PM), http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html?hpid=news-col-blog (discussing Senator Specter's involvement with EFCA and position and party changes).

82. *See, e.g.*, Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 310 (1994) ("The industrial relations system of any country is a subsystem within that country, along with other subsystems such as the political system, the economic system, the human relations system, and systems concerning human values (culture). A subsystem that is not in harmony with other subsystems will either change those other systems so that harmony is established, or disappear.").

83. Although the individualism so valued in the United States often is discussed along with the libertarian or laissez faire approach to government regulation, I am not addressing the American affinity for limited government regulation and intervention. Libertarian values or not, the workplace will be regulated in some way. *See* Summers, *Labor Law as the Century Turns*, *supra* note 71, at 10. Thus, the point on which I focus is whether that regulation will be a collective or individual approach.

84. *See, e.g.*, Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 605 (2006); Clyde W. Summers, *Individualism, Collectivism, and Autonomy in American Labor Law*, 5 EMP. RTS. & EMP. POL'Y J. 453 (2001) [hereinafter Summers, *Individualism*].

85. *See* Fahlbeck, *supra* note 82, at 320-21; *see also* Schiller, *supra* note 59, at 73 ("Since the 1960s, the labor movement has suffered from American liberalism's rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly."); *cf.* Summers, *Individualism*, *supra* note 84, at 456 (positing that law of employment contracts as developed by judges is permeated with "economic individualism of the late 19th century").

86. *See* Fahlbeck, *supra* note 82, at 320-21.

87. *See id.* at 320.

88. *See* Estlund, *supra* note 32, at 1530.

approaches to problems still invoke protestations against Marxism, communism, or socialism. Dr. Rheinhold Fahlbeck observed that "[t]he United States is not known as a land that propagates collectivist ways and means; rather, rugged individualism is the hallmark."[89] Bringing the perspective of an outsider to an evaluation of the demise of labor law in the United States, Dr. Fahlbeck concluded that the labor law of the nation is discordant with fundamental values in American society, and therefore it is doomed.[90]

B. *Organized Labor's Lack of Political Alternatives*

Organized labor repeatedly puts its money and support behind candidates who profess support for its priorities. Nonetheless, even when those candidates win, the laws fail. The failures seem more the result of political processes and shifts in political winds than a lack of resolve on the part of the victorious politicians. In this setting, what can labor do to achieve its objectives?

If organized labor does not receive much return from Democrats, then perhaps organized labor will make Democratic candidates whom it supports pay a price. By doing what? Channeling support to Republicans? Generally, that does not seem a viable threat, although it may be so in specific elections. Withdrawing from an active role in politics? Perhaps, but that seems to be a high-risk strategy. Forming a new political party? One sometimes hears calls for the formation of a labor party in the United States. Such calls were loud when President Clinton and the Democrats were unable or unwilling to enact the WPA,[91] and they may be renewed with the demise of the EFCA under President Obama and the Democratic Congress. However, formation of a labor party in the United States seems farfetched at this time,[92] owing, at least in part, to the low union density, public indifference toward unions, and a general lack of fervor for organized labor and collective action.[93] At this time, the only emergent party or

89. *See* Fahlbeck, *supra* note 82, at 333.

90. *See* Fahlbeck, *supra* note 79, at 310 ("In the U.S., the system of labor and industrial relations law is not in harmony with other subsystems. Indeed, it seems to me that the American labor and industrial relations legal system is in disaccord with fundamental features of American society to such an extent that it is—and has been ever since its enactment in 1935—by and large doomed.")

91. *See, e.g.*, *The Labor Party Is Founded—But for What Purpose?*, SPARK, Sept.-Oct. 1996, http://www.the-spark.net/csart132.html; *Labor Party Advocates*, NADER.ORG (Aug. 5, 1994), http://www.nader.org/index.php?/archives/2014-Labor-Party-Advocates.html.

92. *See generally* ROBIN ARCHER, WHY IS THERE NO LABOR PARTY IN THE UNITED STATES? (2007). For an interesting discussion of the association of labor with the New Democratic Party in Canada and the failure of American labor to gain a foothold in a labor party, see John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82 (2009).

93. *Cf.* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 415 (2010) (stating that "[u]nlike Europe, the United States has no enduring labor party tradition").

subparty in U.S. politics is the tea party, and it is not likely to be the champion of labor.

C. *U.S. Exceptionalism and Lack of International Influences on U.S. Law*

"American exceptionalism" is an in vogue phrase that is seldom explained but commonly accepted as expressing some truth.[94] One aspect of exceptionalism is that it often is used tautologically. One can explain a phenomenon as resulting from or being affected by exceptionalism or offer the phenomenon as an example of exceptionalism itself. In labor and employment law, the United States is different from most of the rest of the world in many important respects. One difference is the labor law-employment law dichotomy discussed above.[95] Another exceptional aspect of U.S. employment law is the employment-at-will doctrine,[96] which is the law in forty-nine states in the United States and is the basis for the United States' reputation internationally as a hire-and-fire society.[97]

U.S. exceptionalism, although an amorphous concept, may help us understand the stasis of U.S. labor law, and tautologically the stasis of U.S. labor law is itself an example of American exceptionalism. In short, when a nation's politicians and judges are relatively unconcerned about—and sometimes proud of—their legal system's divergences from the laws of other nations and international standards and is resistant to consideration of foreign or international standards, it is unsurprising that political changes do not cause reexamination of the law in light of such distinctive foreign and international standards.

Scholars have "unpacked" American exceptionalism by revealing several faces. First there is America's human-rights narcissism, meaning the United States' embrace of the First Amendment and its "nonembrace of certain rights . . . that are widely accepted throughout the rest of the world."[98] Second is American judicial exceptionalism, by which U.S. judges eschew laws and practices of other nations and international standards.[99] Third is the United States' employment of various methods to

94. *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) ("Since September 11, 'American Exceptionalism' has emerged as a dominant leitmotif in today's headlines.").

95. *See supra* notes 54-90 and accompanying text.

96. *See* Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y J. 257, 305-06 (2004); Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 13 (2001) ("American businesses are steeped in their unique and peculiar employment-at-will doctrine, which even other Anglo-system countries like England, Canada, and Australia rejected years ago.").

97. *See* Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 103-04 (1999).

98. Koh, *supra* note 95, at 1482.

99. *Id.*

exempt itself from international rules and agreements, such as nonratification, noncompliance, ratification with reservations, etc.[100] Professor Koh has come up with a modification of the third face, what he labels the "flying buttress mentality," whereby the United States sometimes supports and complies with international standards but refuses to ratify them, thus giving it a sense of sovereignty while complying. Therefore, the United States "has it both ways."[101] The fourth is double standards, describing situations in which the United States advocates a different standard for the rest of the world than that to which the United States adheres.[102]

With American exceptionalism unpacked in that way, it is possible to see how at least the first three faces apply to the U.S. approach to labor and employment law. First, the United States was a world leader in developing an organized and articulated body of employment anti-discrimination law. Although other nations and the European Union have surpassed the United States in some respects, such as breadth of coverage, other nations developed their employment discrimination law according to the U.S. model.[103] Since the passage of the Civil Rights Act of 1964, the United States has embraced employment nondiscrimination. However, the United States lags far behind many other nations and multinational organizations regarding other employment rights, such as employment security and workplace privacy rights.[104] The United States is the epitome of a developed free market economy that is not very protective of employees. It is known for its laissez faire approach to termination embodied in the doctrine of employment-at-will.[105]

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100. *Id.*

101. *Id.* at 1484-85.

102. *Id.* at 1485-86.

103. *See* NEIL REES, KATHERINE LINDSAY & SIMON RICE, AUSTRALIAN ANTI-DISCRIMINATION LAW: TEXT, CASES AND MATERIALS 20 (2008) ("Australian anti-discrimination legislation has its roots in a statute enacted by the US Congress . . . ."); Steven L. Willborn, *Theories of Employment Discrimination in the United Kingdom and the United States*, 9 B.C. INT'L & COMP. L. REV. 243, 243 (1976) ("While the roots of U.S. law are found in English legal history, the roots of British discrimination law are found in recent U.S. legal history."); Shari Engels, Comment, *Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMP. LAB. L.J. 340, 341 (1994) (stating Civil Rights Act of 1964 was model for United Kingdom's Race Relations Act).

104. *See, e.g.*, Kohler, *supra* note 97, at 103-04 ("As is generally known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a 'hire and fire' society . . . ."). Regarding the state of U.S. workplace privacy law compared with that of European nations, see *infra* note 116.

105. *See, e.g.*, Dowling, *supra* note 96, at 13 ("American businesses are steeped in their unique and peculiar employment-at-will doctrine, which even other Anglo-system countries like England, Canada, and Australia rejected years ago."); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) ("The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice."). Unsurprisingly,

Second, the United States is very insular and parochial in some areas of law, and labor is among those. There is a debate in this nation about U.S. courts referring to foreign and international law.[106] Courts rarely refer to international or foreign sources in opinions involving labor or employment issues. Perhaps more important is the reluctance of the United States to assume obligations under international labor standards.

The third facet of exceptionalism—whereby the United States exempts itself from international rules and agreements or, as Professor Koh suggests, supports and complies with them but refuses to ratify them—is well illustrated in the approach of the United States to the International Labour Organization (ILO). The ILO is the agency of the United Nations responsible for promulgating and overseeing international labor standards.[107] The ILO has existed since 1919 and has 183 member nations.[108] The labor standards that the ILO passes are conventions, and member nations have an obligation to submit them to the proper national bodies for consideration of ratification.

Although the United States is a member of the ILO,[109] it has ratified only fourteen of the ILO's 188 conventions,[110] and only two of the eight fundamental conventions that undergird the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[111] This is not to say that U.S. labor and employment law is inconsistent with many unratified ILO conventions. The United States has not ratified the fundamental conventions

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the United States has not ratified the 1982 ILO Termination of Employment Convention, which provides that "employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." Int'l Labour Org., *Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment*, at iii, 1 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/meetingdocument/wcms_100768.pdf (noting convention has been ratified by thirty-two countries).

106. *See generally* Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59 (2009).

107. *About the ILO*, INT'L LABOUR ORG., http://www.ilo.org/global/about-the-ilo/lang—en/index.htm (last visited Feb. 1, 2011).

108. *See id.*; *see also Alphabetical List of ILO Member Countries*, INT'L LABOUR ORG., http://www.ilo.org/public/english/standards/relm/country.htm (last updated May 19, 2011).

109. The United States withdrew from the ILO in 1977, but rejoined in 1980. *See* Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 68-71 (1989).

110. The last ILO convention ratified by the United States was in 1999, when the Senate unanimously approved and President Clinton signed Convention No. 182, The Worst Forms of Child Labour Convention. *See* Int'l Labour Org., *U.S. Ratifies ILO Convention Against the Worst Forms of Child Labour*, ILO Press Release ILO/99/43 (Dec. 2, 1999), *available at* http://www.ilo.org/global/about-the-ilo/press-and-media-centre/press-releases/WCMS_071320/lang—en/index.htm.

111. *See ILOLEX: Database of International Labour Standards*, INT'L LABOUR ORG. (2006), http://www.ilo.org/ilolex/english/newratframeE.htm (follow "United States" hyperlink under "Click to display the ratifications for a country").

on freedom of association and nondiscrimination, although the United States has national laws recognizing these rights.[112] Thus, the United States does not reject some international labor standards, but it also does not fully embrace obligations under those standards.[113] Another example involving ILO standards illustrates the desire of the United States to withhold ratification while adhering to the standard and requiring other nations to do so. As mentioned, the United States has ratified only two of the eight fundamental conventions upon which the four Fundamental Principles and Rights at Work are based. Yet, when the United States considers entering into an international trade agreement, U.S. law requires the fundamental rights to be incorporated.[114]

When a nation feels little need to examine its standards in light of foreign or international law, it seems less likely that political changes within the nation will provoke significant law reform. In contrast, when Prime Minister Blair signed on to the European Union's Social Charter in 1997, the United Kingdom committed itself to bringing its labor law into conformity with the EU directives.[115] The absence of significant international influence means the United States is less likely to follow international trends in labor law.[116] It is worth noting, however, that the U.S. government took some affirmative steps towards increased engagement with the ILO in 2010, when Secretary of Labor Hilda Solis chaired the first meeting of the President's Committee on the International Labor Organization held in ten years.[117] One of the stated goals of the Committee was to work for Senate ratification of ILO Convention 111 on employment

112. *See* Estlund, *supra* note 32, at 1587-88 (explaining that United States does not reject existence of international human rights in labor); *Ratification of the Fundamental Human Rights Conventions by Country in the Americas*, listing under *ILOLEX: Database of International Labour Standards*, INT'L LABOUR ORG., http://www.ilo.org/ilolex/english/docs/declAM.htm (last updated Apr. 7, 2011).

113. *See* Estlund, *supra* note, 32, at 1587-88.

114. *See* Okezie Chukwumerije, *Obama's Trade Policy: Trends, Prospects, and Portends*, 16 U.C. DAVIS J. INT'L L. & POL'Y 39, 73-74 (2009) (citing OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2009), *available at* http://www.ustr.gov/webfm_send/2558); Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13 (2003).

115. *See* Shine, *supra* note 43, at 211. For a discussion of the U.K. New Labour government's rhetoric about efforts to promote ILO core labor standards, see Tonia Novitz, *International Promises and Domestic Pragmatism: To What Extent Will the Employment Relations Act 1999 Implement International Labour Standards Relating to Freedom of Association*, 63 MOD. L. REV. 379 (2000).

116. Consider, for example, that there are significant developments in the EU regarding workplace privacy law, and U.S. law in this area remains relatively underdeveloped. *See* Matthew W. Finkin, *Some Further Thoughts on the Usefulness of Comparativism in the Law of Employee Privacy*, 14 EMP. RTS. & EMP. POL'Y J. 11 (2010); Ariana R. Levinson, *Carpe Diem: Privacy Protection in Employment Act*, 43 AKRON L. REV. 331, 339 (2010).

117. U.S. DEP'T OF LABOR, ILAB Release No. 10-0496-NAT, *Secretary of Labor Hilda L. Solis Chairs 1st Meeting of the President's Committee on the International Labor*

discrimination, one of the ILO's fundamental conventions, which was submitted to the Senate in 1998.[118]

IV. THE ROAD AHEAD

So where do these ruminations lead us? How likely is it that significant political changes in the United States ever will lead to significant changes in labor law?

In an article published in 1998, Professor Samuel Estreicher hypothesized about labor law reform in the United States in the year 2007 after the collapse of the stock market.[119] Escalating strikes resulted in a general work stoppage that virtually stymied all production and distribution in the nation. At the behest of Congress and the President, business organizations petitioned the AFL-CIO to "develop new rules for constituting the social order."[120]

Well, 2007 came and with it came economic malaise in the United States and the world, but no major change occurred in labor law in the United States. It was in this economic environment that the EFCA failed. A commission was not even appointed to study labor law reform.

Experience over many years seems to demonstrate that the political stars are unlikely to align for significant labor law reform. We are likely to continue on our course of enacting and amending employment laws. As for labor law, however, "the more things change, the more they remain the same."[121] The adage accurately depicts the recent history and likely future of politics and labor law in the United States.

Organization in 10 Years (May 5, 2010), *available at* http://www.dol.gov/opa/media/press/ilab/ILAB20100496.htm.

118. *See id.*

119. *See* Samuel Estreicher, *"Come the Revolution": Employee Involvement in the Workers' State*, 1 U. PA. J. LAB. & EMP. L. 87 (1998). Professor Estreicher's hypothetical proved quite prescient, as the latest recession, depression, or debacle began in 2007.

120. *Id.*

121. The famous adage is translated from French as, "The more things change, the more they remain the same." JEAN-BAPTISTE ALPHONSE KARR, LES GUÊPES (1849), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 443 (Justin Kaplan ed., 16th ed. 1992).