

# CAN PRIVATE SECTOR UNIONIZATION BE SAVED?: AN ANALYSIS OF THE PRO ACT AS A MODEL FOR EFFECTIVE NLRA REFORM

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*In February 2020, the U.S. House of Representatives passed the Protecting the Right to Organize Act (“PRO Act”), one of the most prolabor pieces of legislation since the creation of the current labor relations framework in 1935. For almost seventy-five years, the substantive text of the National Labor Relations Act (NLRA) has remained largely unchanged, despite the pervasive increase of anti-labor hostility from companies seeking to avoid the unionization of their workers. Across all stages of unionization, organizers and bargaining agents face coercive management tactics, diminished negotiating positions, the loss of collective action tools, and a National Labor Relations Board without the ability to effectively deter illicit activity. This Note examines the current framework’s issues and the PRO Act’s attempt to remedy these problems by amending the text of the NLRA. Although the legislation is the most comprehensive piece of private sector labor reform since the inception of the NLRA, this Note addresses the PRO Act’s deficiencies and advocates for a stronger, more effective model for future federal labor law change.*

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## INTRODUCTION

On February 6, 2020, the Democrat-controlled House passed the Protecting the Right to Organize Act (“PRO Act”),<sup>1</sup> one of the most pro-labor bills passed since the National Labor Relations Act (NLRA)<sup>2</sup> in 1935.<sup>3</sup> The PRO Act’s various provisions would significantly amend the NLRA, attempting to reclaim the policy of encouraging collective bargaining by protecting the “full freedom of association.”<sup>4</sup> The legislation seeks to realize this protection at three principal stages of the labor relations process: (1) union organizing drives and elections, (2) collective bargaining contract negotiations, and (3) workers’ ability to exercise collective economic pressure.<sup>5</sup> Protection of the freedoms of association and collective bargaining has been significantly diminished as a result of the NLRA’s failure to adequately prevent illegal tactics employed by companies seeking to avoid unionization.<sup>6</sup>

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1. H.R. 2474, 116th Cong. (2020).

2. 29 U.S.C. §§ 151–169; *see* Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [https://perma.cc/4JU9-8Z5K].

3. 29 U.S.C. §§ 151–169.

4. *Id.* § 151 (“It is . . . the policy of the United States to . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . .”).

5. H.R. 2474.

6. *See* H.R. REP. NO. 116-347, at 8–9 (2019); *see also* Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770, 1773–74 (1983) (arguing that private sector unionization has felt a “chilling effect” in large part due to the NLRA framework, “the core legal structure” of American labor law that

All of the major NLRA reform attempts for over half a century have failed due to the Senate supermajority requirement to overcome a filibuster.<sup>7</sup> Therefore, even with a Democrat-controlled Senate, the PRO Act will most likely fail to survive a Republican-led filibuster.<sup>8</sup> Following the 2020 election, the composition of the Senate has stifled the likelihood of the PRO Act's passage.<sup>9</sup> Still, an assessment of the PRO Act's potential for substantial change is relevant for any future model that will be employed by hopeful reformers. This Note analyzes the effectiveness of the PRO Act and whether it could be used as a model for any future NLRA reform attempts.

If passed, the PRO Act would amend the cornerstone of federal labor law that has remained essentially unchanged for almost seventy-five years.<sup>10</sup> As private sector union density has dropped to a mere 6 percent of the workforce,<sup>11</sup> the PRO Act seeks to restore the NLRA as an "effective mechanism of workplace representation" that would revitalize efforts to increase private sector unionization and, in turn, the ability to collectively bargain.<sup>12</sup> The freedoms to engage in organizing and collective bargaining are considered fundamental human rights internationally.<sup>13</sup> Yet, the

has been "providing employers with the opportunity and the incentives" to coerce employees from forming unions).

7. See *infra* Part I.B.

8. See *infra* Part I.B.

9. See *infra* notes 198–201 and accompanying text.

10. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 14, 16 (2016) (stating that the NLRA, "[a] sweepingly broad statute," ushered in the "modern era of American labor law" and established "an affirmative national policy in favor of collective bargaining"); James J. Brudney, *Gathering Moss: The NRLA's Resistance to Legislative Change*, 26 A.B.A. J. LAB. & EMP. L. 161, 161 (2011) [hereinafter Brudney, *Gathering Moss*] ("In stark contrast to . . . other regulatory schemes, Congress has made virtually no changes in the NLRA [for sixty years]."); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1595 (1996) [hereinafter Brudney, *Reflections on Group Action*] ("Neither amendment of NLRA provisions nor routine review of NLRB activities and events has served as a source for legislative renewal.").

11. See U.S. BUREAU OF LAB. STAT., *Economic News Release: Union Members Summary* (Jan. 22, 2010, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/P2VG-9S4K>].

12. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528, 1530 (2002) (arguing that the private sector labor laws in the United States, which have "ossified" for more than fifty years, have been ineffective in enforcing basic employee rights); see also Thomas Kochan et al., *Who Wants to Join a Union?: A Growing Number of Americans*, MIT SLOAN: GOOD COMPANIES GOOD JOBS (Sept. 2, 2018), <https://gcfgj.mit.edu/whats-new/blog/who-wants-join-union-growing-number-americans> [<https://perma.cc/UK35-7KUE>] ("The results obtained from nearly 4,000 respondents show that 48 percent—nearly half of nonunionized workers—would join a union if given the opportunity to do so.").

13. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to form and to join trade unions for the protection of [one's] interests."); INT'L LAB. ORG., DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 2 (2d ed. 2010) ("[A]ll Members, even if they have not ratified the Conventions in question, have an obligation . . . to promote and to realize, in good faith . . . the principles concerning the fundamental rights of . . . freedom of association and the effective recognition of the right to collective bargaining."). The United States has not ratified ILO Convention No. 87 (Concerning Freedom of Association and Protection of the

NLRA's weak protections and remedies for union organizing drives, contract negotiations, and collective economic self-help have contributed to the steep decline in private sector union density, diminishing these rights.<sup>14</sup>

Employers have learned to use the NLRA to their advantage, namely by outsourcing production, conducting anti-union campaigns before elections, and exploiting the National Labor Relations Board's (NLRB or "the Board") long delays and small penalties that fail to disincentivize unfair labor practices and bad-faith bargaining.<sup>15</sup> Since the 1970s, employers have steadily increased their use of retaliatory tactics.<sup>16</sup> NLRB elections have become fraught with intimidation and coercive tactics.<sup>17</sup> Even if employees are able to successfully unionize, years often pass before a union obtains a first collective bargaining agreement ("first contract"), if it is able to do so at all.<sup>18</sup> During the period of negotiations for a first contract and beyond, unions may face bad-faith negotiations,<sup>19</sup> ineffective remedies,<sup>20</sup> and a "gutted" ability to strike.<sup>21</sup>

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Right to Organize) or Convention No. 98 (Right to Organize and Collective Bargaining Convention), despite being a permanent member of the International Labor Organization that has recognized the 1998 Declaration. See David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1842, 1845–46 n.28 (2014).

14. See Andrias, *supra* note 10, at 6, 25 (arguing that the NLRA has facilitated employers' use of anti-union tactics, resulting in the "fail[ure] to protect workers' statutory right to organize").

15. See *id.* at 23, 25–26; see also James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMPAR. LAB. L. & POL'Y J. 221, 221 (2005) ("[T]he Board has . . . weaken[ed] the rights of workers to engage in organizing and collective bargaining under the [NLRA]."); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 522, 526 (2004) (explaining that the ineffectiveness of labor law and the current state of the NLRB have stripped workers of the right to strike and left workers without an effective means to hold employers accountable for unfair labor practices).

16. See Weiler, *supra* note 6, at 1779–80; see also Andrias, *supra* note 10, at 22 (citation omitted) ("Employers permanently replaced striking workers. They also closed union plants and opened up low-wage nonunion plants in other locations.").

17. See, e.g., KATE BRONFENBRENNER, ECON. POL'Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 2 (2009), <https://files.epi.org/page/-/pdf/bp235.pdf> [<https://perma.cc/XA4R-JNH8>] ("[E]mployers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections.").

18. See *id.* at 22 ("Within one year . . . only 48% of organized units have . . . agreements. By two years it increases to 63% and by three years to 70%. Only after more than three years will 75% have obtained a first agreement.").

19. See Andrias, *supra* note 10, at 26 (stating that the NLRB's inability to impose contract terms as a remedy for employers breaking good faith has resulted in employers forcing delays over years); see *infra* Part I.A.2.

20. See H.R. REP. NO. 116-347, at 9 (2019) (arguing that the "statutory remedies for violations of the [NLRA] are wholly inadequate"); see *infra* Part I.A.4.

21. See Craig Becker, "Better than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 353–54 (1994) (explaining how the NLRB and courts have interpreted the NLRA to diminish the right to strike).

Reformers have attempted to amend the NLRA in a variety of ways.<sup>22</sup> Yet over several decades, no significant reforms have passed both chambers of Congress,<sup>23</sup> leaving the NLRA largely unchanged since the passage of the Taft-Hartley Act<sup>24</sup> in 1947.<sup>25</sup>

The House passed the PRO Act to address the substantive and procedural inadequacies of the NLRA and the NLRB to combat the “low rate of union membership” that has contributed to pervasive income inequality.<sup>26</sup> The PRO Act should be viewed through the lens of private sector unions’ current issues, which stem from the NLRA’s language. This Note analyzes the PRO Act’s mechanisms as a model for effective changes to the NLRA that may combat the decline in private sector union density and the diminishment of the freedoms to associate and collectively bargain.

Part I of this Note explains the most pressing legal issues resulting from the NLRA’s inadequacies and three major failed labor law reforms. Part II discusses the various provisions of the PRO Act. This topical analysis first explains how the legislation seeks to amend the NLRA to effectively combat a corresponding inadequacy and then determines whether that mechanism would be effective. Part III advances improvements to the PRO Act that should be included in any future reform model. By addressing potential revisions to the legislation, this Note seeks to devise a more thorough, effective model to adequately amend the entirety of the NLRA.

## I. NLRA’S DEFICIENCIES AND RECENT REFORM ATTEMPTS

The NLRA’s original language has remained largely untouched for almost seventy years.<sup>27</sup> As employer resistance to unionization has become “increasingly brazen,” the NLRA’s text and the NLRB have failed to safeguard the NLRA’s basic ideals.<sup>28</sup> The combination of anti-union tactics and inefficient NLRB machinery have eroded labor relations in the United States.<sup>29</sup> Part I.A of this Note summarizes the NLRA’s inadequacies at the three stages of labor relations, as well as the NLRB’s ineffective remedies and procedures. Part I.B discusses three of the most important reform attempts of the past fifty years.

### A. The Most Pressing Issues Facing Private Sector Unions Today

Beginning in the 1970s, the decline in private sector union density contributed to the rise in income inequality, which is now at the “highest level since the Census Bureau started tracking it more than five decades

22. See *infra* Part I.B.

23. See *infra* Part I.B.

24. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197).

25. See *supra* notes 10, 12.

26. See H.R. REP. NO. 116-347, at 9–10 (2019).

27. See Estlund, *supra* note 12, at 1532–33.

28. *Id.* at 1529.

29. *Id.*

ago.”<sup>30</sup> In the United States, “a worker covered by a union contract earns 13.2 percent more in wages than a peer with similar education, occupation, and experience in a nonunionized workplace in the same sector.”<sup>31</sup> An important part of this decline is employer opposition to unionization, which the NLRA framework currently permits.<sup>32</sup>

Workers and unions face issues stemming from the NLRA’s current state throughout a unionization drive and beyond. Part I.A.1 discusses the NLRA’s election inadequacies and an employer’s ability to exploit the NLRB’s weak enforcement against unfair labor practices (ULPs). Part I.A.2 addresses the issues surrounding first contracts and the way the NLRA facilitates the ability to bargain in bad faith. Part I.A.3 discusses the diminishment of the right to strike and the ban on secondary boycotts. Part I.A.4 addresses the weaknesses of NLRB enforcement generally. Part I.A.5 briefly discusses issues surrounding employee classification in the NLRA.

### 1. Organizing Drives and Elections

To certify a union as the exclusive bargaining representative, the NLRA requires that employees first file a petition signed by 30 percent or more of the workers in the bargaining unit.<sup>33</sup> The NLRB then conducts a “secret ballot” election, in which a majority vote of the unit is required to certify the union.<sup>34</sup> Employers may also voluntarily recognize a union without an election if a majority of employees sign authorization cards.<sup>35</sup> However, an

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30. See Taylor Telford, *Income Inequality in America Is the Highest It's Been Since Census Bureau Started Tracking It, Data Shows*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/> [https://perma.cc/B8CJ-5DDK]; see also JOSH BIVENS ET AL., ECON. POL’Y INST., HOW TODAY’S UNIONS HELP WORKING PEOPLE: GIVING WORKERS THE POWER TO IMPROVE THEIR JOBS AND UNRIG THE ECONOMY 7 (2017), <https://files.epi.org/pdf/133275.pdf> [https://perma.cc/94M5-U3ZW] (“[U]nion decline can explain one-third of the rise in wage inequality among men and one-fifth . . . among women.”).

31. BIVENS ET AL., *supra* note 30, at 9. High union density can facilitate wage increases and better working conditions for nonunion workers sector wide. *Id.* at 9–10; see also U.S. BUREAU OF LAB. STAT., *supra* note 11 (breaking down unionization rates by sector, occupation, industry, and state).

32. See BIVENS ET AL., *supra* note 30, at 9. The decline in private sector unionization is attributable not solely to employer interference and NLRA inadequacies but also to the evolution of the global economy. See Andrias, *supra* note 10, at 6. As manufacturing and industrial production moved overseas, companies “fissured” their labor forces by creating subcontracting hierarchies, and automation replaced full-time workforces as private sector union density declined. See *id.* at 21–22. Still, these nonlegal factors are also present in Europe, where union density and collective bargaining coverage is far greater, which lends credence to the idea that the American legal framework is failing to protect the freedom to associate. See Dylan Matthews, *Europe Could Have the Secret to Saving America’s Unions*, VOX (Apr. 17, 2017, 9:30 AM), <https://www.vox.com/policy-and-politics/2017/4/17/15290674/union-labor-movement-europe-bargaining-fight-15-ghent> [https://perma.cc/QUJ6-ZRXL].

33. See 29 U.S.C. § 159(e)(1).

34. See *id.* § 159(a).

35. See NLRB v. Gissel Packing Co., 395 U.S. 575, 579 (1969).

employer may reject these cards and demand that an NLRB election take place.<sup>36</sup>

Since employers tend to avoid unionization, unions typically must turn to the other statutory option for certification: an election.<sup>37</sup> In the majority of unionization attempts, known as unionization drives, organizers ensure that the union has majority support before submitting the original petition.<sup>38</sup>

Employers in the overwhelming majority of elections conduct campaigns to convince workers to vote against unionization.<sup>39</sup> However, the NLRA states that “[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of” their rights, including “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.”<sup>40</sup> Despite this statutory promise, employees are often subject to coercive and retaliatory tactics before voting.<sup>41</sup> These tactics include captive audience meetings,<sup>42</sup> interrogatory one-on-one supervisor meetings,<sup>43</sup> threats and actual changes in working conditions and plant closures,<sup>44</sup> harassment, and surveillance.<sup>45</sup> Although many of these activities are considered illegal ULPs,<sup>46</sup> the NLRA penalties and enforcement mechanisms are too meager and inefficient to disincentivize employers from engaging in these abusive practices and effectively protect

36. See 29 U.S.C. § 159(e)(1).

37. See *id.* § 159(a).

38. See Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process* 5 (Inst. for Soc. and Econ. Rsch. and Pol'y Working Paper, 2011) [https://ecommons.cornell.edu/bitstream/handle/1813/74589/Bronfenbrenner102\\_The\\_empirical\\_case.pdf?sequence=1&isAllowed=y](https://ecommons.cornell.edu/bitstream/handle/1813/74589/Bronfenbrenner102_The_empirical_case.pdf?sequence=1&isAllowed=y) [https://perma.cc/GE22-MX78] (“[T]oday 60 percent of all unions filing for NLRB elections file with at least 60 percent of the unit on cards.”).

39. See BIVENS ET AL., *supra* note 30, at 19–20.

40. 29 U.S.C. §§ 157–158(a)(1).

41. See BRONFENBRENNER, *supra* note 17, at 2; Weiler, *supra* note 6, at 1777–78 (explaining that employer discharges and other election ULPs spiked in the 1970s during the period between the initial filing and the NLRB election).

42. A “captive audience meeting” is a mandatory, employer-held meeting during work hours in which management explains its views on an organizing drive. *See infra* notes 52–55 and accompanying text.

43. See BRONFENBRENNER, *supra* note 17, at 2.

44. See *Textiles Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 273–75 (1965) (holding that a full plant closure, “even if . . . motivated by vindictiveness” is not a ULP, while “discriminatory partial clos[u]res” may be ULPs); BRONFENBRENNER, *supra* note 17, at 2 (“[E]mployers threatened to close the plant in 57% of elections . . . and threatened to cut wages and benefits in 47% of elections.”).

45. See BRONFENBRENNER, *supra* note 17, at 2.

46. See 29 U.S.C. § 158(a)(1)–(5). Most of the enumerated ULPs are listed under § 158(a)(1), which states that an employer cannot “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157,” and § 158(a)(3), which states that an employer cannot “by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . encourage or discourage membership in any labor organization.” *Id.* § 158(a)(1), (3). In addition, employers may not change the benefits and work conditions of an employee without bargaining with the certified bargaining unit. *Id.* § 158(a)(5).

workers during drives.<sup>47</sup> For example, if an employer illegally terminates an employee for participating in a unionization drive, that employer is liable only for that employee's reinstatement and backpay, less any wages earned during the interim period.<sup>48</sup> If that employee files a charge with the NLRB, the employer can use the process to its advantage by delaying any redress to the employee and further hampering union organizing drives.<sup>49</sup> These small economic penalties are minor when compared to the potential cost of having to pay higher wages and improvements to working conditions sought through collective bargaining with a union representative.<sup>50</sup> Therefore, an employer would commit the ULP and pay backpay—benefiting from employees' fear of retaliation—rather than deal with the costs of a unionized workplace.<sup>51</sup>

Captive audience meetings have proven to be one of the most effective tactics employers use during unionization drives.<sup>52</sup> These mandatory meetings are held during work hours on employers' premises, where the employers are in the strongest position to "to exert its economic authority over employees and to play on fears of job loss."<sup>53</sup> The NLRA allows the practice as part of an anti-union campaign permitted under the First Amendment and in the name of employee free choice.<sup>54</sup> The anti-union effects of these meetings are compounded by the banning of union representatives from accessing employers' workplaces and restrictions to employee information.<sup>55</sup> Thus, while employers may ban "discussions of

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47. See Andrias, *supra* note 10, at 26 (arguing that the NLRA's small economic penalties have contributed to exploitation by anti-union employers); BIVENS ET AL., *supra* note 30, at 20; *infra* Part I.A.4.

48. 29 U.S.C. § 160(c); see H.R. REP. No. 116-347, at 20 (2019) ("Because the NLRB is only empowered to award backpay, employers can commit serious violations . . . and avoid paying any monetary amount because the violation did not directly cause an individual monetary harm.").

49. See James J. Budney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 833–34 (2005).

50. See David Lee & Alexandre Mas, *Long-Run Impacts of Unions on Firms: New Evidence from Financial Markets, 1961–1999*, at 36 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14709, 2009), <https://www.nber.org/papers/w14709> [https://perma.cc/L75F-YR5] (comparing the costs of both union and nonunion employees, concluding that the average cost of a union in market value is about \$40,500 per worker).

51. See Weiler, *supra* note 6, at 1787–89.

52. See William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. RELS. REV. 560, 570–71 (1983); Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FIU L. REV. 385, 385 (2010) (describing "captive audience meetings" as meetings during the workday that occur "in the midst" of an active union organizing campaign where employees are "compelled" to listen to a "one-way conversation . . . about the evils of unionism").

53. See Secunda, *supra* note 52, at 385; see also Cynthia Estlund, *Response, Truth, Lies, and Power at Work*, 101 MINN. L. REV. HEADNOTES 349, 351 (2016) ("Employees do not know enough about their legal rights at work . . . and they get much of their knowledge from employers, who sometimes misrepresent the nature of those rights.").

54. See *In re Clark Bros. Co.*, 70 N.L.R.B. 60, 802, 805–06 (1946); Secunda, *supra* note 52, at 393–95.

55. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 114 (1956) ("[The NLRA] does not require that the employer permit the use of its facilities for organization."); see also

unionization during work time and in working areas,” employers are free to discuss their opposition to unions with employees and compel their attendance.<sup>56</sup>

In addition, the U.S. Supreme Court in *Lechmere, Inc. v. NLRB*<sup>57</sup> held that nonemployee union organizers do not have a right under the NLRA to access employers’ premises and, therefore, contact employees in person at work, unless “unique obstacles” exist as to render a union’s access to those employees unreasonable.<sup>58</sup> While organizers have a right to employee names and addresses,<sup>59</sup> employers enjoy unequal access to all other voting information.<sup>60</sup> Although NLRB elections utilize secrecy in an attempt to fulfill the democratic ideals of an election process,<sup>61</sup> “there are an equally critical series of standards that must be met . . . for a vote to be deemed democratic.”<sup>62</sup> These standards include “the right to free speech . . . [and] equal access to voters for all competing parties,” which, due to the current framework, are granted only to employers during NLRB elections.<sup>63</sup> Even if a union succeeds in secretly filing a petition, the NLRB requires unions to give employers notice before an election occurs.<sup>64</sup> Once notified, anti-union employers are able to use the NLRB’s slow election process to deploy their campaigns.<sup>65</sup>

Today, a union will, at some point during its organizing drive, give workers the prospect of approving the bargaining agent through a “card check procedure” in which workers may sign “authorization cards.”<sup>66</sup> If a majority of workers express their intent to unionize by signing these cards, the union will request that the employer approve and “enter into a collective bargaining relationship.”<sup>67</sup> An employer does not need to accept this request, even if a majority of its employees have expressed their support for the bargaining agent and may instead request that an NLRB election be held.<sup>68</sup>

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Gordon Lafer, *What’s More Democratic Than a Secret Ballot?: The Case for Majority Sign-Up*, 11 WORKING USA: J. OF LAB. & SOC’Y 71, 73–74 (2008) (comparing NLRB elections to democratic political elections to demonstrate the one-sided privileges granted to employers).

56. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664 n.25 (2010).

57. 502 U.S. 527 (1992).

58. *Id.* at 541.

59. See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1245–46 (1966).

60. See Lafer, *supra* note 55, at 73.

61. *Id.* at 72.

62. *Id.*

63. *Id.* at 72–73.

64. See Sachs, *supra* note 56, at 665.

65. See Andrias, *supra* note 10, at 25–26 (“NLRB’s election machinery is extraordinarily slow; employers are able to defeat organizing drives through delay and attrition.”); Sachs, *supra* note 56, at 666 (“On average, an NLRB election is scheduled forty-one days after the employees’ petition is filed.”).

66. See *Brudney, supra* note 49, at 821, 824.

67. *Id.* at 824.

68. See 29 U.S.C. § 159(c).

To deal with this impediment, unions hoping to become certified attempt to utilize neutrality agreements, which are contracts between the union and employer in which employers agree to stay neutral in organizing drives.<sup>69</sup> Equipped with this neutrality protection, unions are able to utilize majority card check support to become authorized bargaining agents, bypassing NLRB elections.<sup>70</sup>

Although “most new union members in recent years” have resulted from these voluntary recognition agreements,<sup>71</sup> the NLRA’s only other statutory method for certifying a union is through an NLRB secret election.<sup>72</sup> Certified unions enjoy certain rights that are not afforded to unions recognized voluntarily or under a bargaining order.<sup>73</sup> For example, when a union is certified, the possibility for decertification does not arise for a year; however, if an employer voluntarily certifies through card check, this period of time is a “reasonable” one.<sup>74</sup> Certified unions are also afforded the “protection against the filing of new election petitions by rival unions” for a year.<sup>75</sup>

## 2. Contract Negotiations

Even if employees are able to successfully certify a union, the bargaining agent must then successfully negotiate a first contract with the employer.<sup>76</sup> Over half of all unions that win elections will be without a first contract one year after the election, while close to 40 percent of those unions will not have a contract two years after.<sup>77</sup>

The NLRA states that “[i]t shall be an unfair labor practice for an employer to . . . refuse to bargain collectively,” which is the “performance of the mutual obligation of the employer and the representative . . . to meet at reasonable times and confer in *good faith*.<sup>78</sup> Although the policy of the

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69. See Budney, *supra* note 49, at 825–26.

70. *Id.* at 827.

71. See Cynthia Estlund, *Freeing Employee Choice: The Case for Secrecy in Union Organizing and Voting*, 123 HARV. L. REV. F. 10, 11 (2010).

72. See 29 U.S.C. § 159(a); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 514 (1993).

73. See NLRB v. Gissel Packing Co., 395 U.S. 575, 598–99 (1969).

74. See *id.* at 599 n.14.

75. *Id.* Certified unions are also protected “for a reasonable period . . . against . . . claims that the union no longer represents a majority [and] . . . recognitional picketing by rival unions.” *Id.* (citation omitted). In addition, these unions have the statutory freedom from restrictions “in work assignment disputes . . . and on recognitional and organizational picketing.” *Id.* (citation omitted).

76. See Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 86 (Sheldon Friedman et al. eds., 1994) (explaining that since 23 percent of employers refused to recognize the elected unions, employers were able to drag out the time without a first contract, decreasing the percentage of successful contracts by 13 percent).

77. See BRONFENBRENNER, *supra* note 17, at 3.

78. 29 U.S.C. § 158(a)(5), (d) (emphasis added).

NLRA is to encourage collective bargaining,<sup>79</sup> the Supreme Court has held that the NLRA does not empower the Board to compel agreement following bad-faith bargaining by an employer,<sup>80</sup> based on the Court's analysis of section 8(d)'s text, reinforced by references to freedom of contract.<sup>81</sup> When an employer breaks its obligation to bargain in good faith, the only remedy available under the NLRA is an NLRB order to resume good-faith bargaining.<sup>82</sup> This allows employers to continue to commit ULPs, such as surface bargaining,<sup>83</sup> without the threat or levying of monetary fines.<sup>84</sup>

The NLRA's inability to force contract terms has contributed to significant NLRA violations,<sup>85</sup> including dragging out negotiations over periods of years and outright refusals to negotiate.<sup>86</sup> Unions may be forced to sign "face-saving" contracts that fail to achieve substantial gains for employees.<sup>87</sup> In addition, the NLRA does not permit the use of mandatory arbitration, giving employers even more opportunities to avoid bargaining outright with their employees' certified agents.<sup>88</sup> The NLRA does allow for mediation in limited instances: when either party to a contract wants to terminate or modify that contract.<sup>89</sup> Because of ineffective penalties, the NLRB's inability to deter bad-faith bargaining, and the lack of effective alternative dispute resolution, the NLRA currently fails to uphold its policy goals of ensuring that employers bargain in good faith.<sup>90</sup>

### 3. Collective Action Issues

Many scholars argue that the right to strike is the most important means of collective action and central to labor's bargaining position.<sup>91</sup> Despite

79. See *id.* § 151.

80. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970) (holding that the NLRA does not provide for "governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands").

81. *Id.* at 107.

82. See 29 U.S.C. § 160.

83. See Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261, 261 (2007) (stating that surface bargaining occurs when a party "seemingly engag[es] in arms [sic] length negotiations while concealing a purposeful strategy to make bargaining futile and to avoid reaching an agreement").

84. See H.R. REP. NO. 116-347, at 20 (2019).

85. See Andrias, *supra* note 10, at 25.

86. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 360–61 (1984) ("[S]uch an order does not expose the violator to the more tangible sanction of contempt proceedings for continued intransigence until a federal court of appeals chooses to enforce it. But by that time—approximately three years later—the damage has long been done . . .").

87. *Id.* at 361.

88. See H.R. REP. NO. 116-347, at 27 (2019).

89. 29 U.S.C. § 158(d)(3); see *infra* note 191.

90. See Estlund, *supra* note 71, at 16. See generally Weiler, *supra* note 86, at 352.

91. See, e.g., JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS 52 (2016) ("[C]oercion for settlement of bargaining disputes was to come from the strike and its potential to harm both sides."); Becker, *supra* note 21, at 351 ("The strike is the essence of collective labor activity."); James J. Bradney, *To Strike or*

this view, the use of strikes has “declined dramatically”<sup>92</sup> due to a number of related issues,<sup>93</sup> including the employer’s right to permanently replace strikers, a ban on secondary boycotts, and the narrow types of strikes protected by the NLRA.

An employer’s right to permanently replace strikers has “nullif[ied] the statutory regime of collective bargaining for those employees” who either face the threat of the replacements or have experienced the replacements themselves.<sup>94</sup> In 1938, the Supreme Court, in *NLRB v. Mackay Radio & Telegraph Co.*,<sup>95</sup> interpreted the NLRA to hold that once a strike has begun, an employer has the ability to “issue an ultimatum to return to work or face permanent replacement.”<sup>96</sup> As the use of a strike may lead to permanent job replacements, the threat of these replacements has the ability to completely wipe out the current work unit and, therefore, the union itself from the workplace.<sup>97</sup> Disputes involving working conditions are transformed into threats or actual discharges when permanent replacements are permitted.<sup>98</sup>

In that sense, the NLRA, as currently interpreted, allows employers to utilize strikes for their own benefit.<sup>99</sup> The threat alone of losing one’s job to a permanent striker is a “powerful disincentive to engage in protected activity.”<sup>100</sup> Although the NLRA purportedly encourages collective bargaining, the permanent replacement doctrine is wholly “inconsistent with the policy of free choice.”<sup>101</sup>

In addition to the impact of permanent replacements, different forms of strikes have been restricted in scope and content by both courts and the

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*Not to Strike*, 1999 WIS. L. REV. 65, 77 (reviewing JULIUS G. GETMAN, THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, AND PERMANENT REPLACEMENTS (1998)) (“Historically, the economic strike has been the foundation for trade unionism in this country.”); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 547 (“The strike . . . is an essential component of the collective bargaining system.”).

92. See Finkin, *supra* note 91, at 548.

93. The decline of the strike is also attributable to nonlegal issues, such as increasing globalization. See Becker, *supra* note 21, at 353. The shift in cultural attitudes against striking workers is exemplified by the “increased willingness to employ permanent replacements” over forty years after the doctrine was recognized; President Ronald Reagan’s firing and replacing of the striking PATCO air traffic controllers in 1981 emboldened employers. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 440–41 (2002). Still, “the law has played an equally decisive role,” as federal courts and the NLRB have limited the scope of the NLRA. See Becker, *supra* note 21, at 353–54.

94. See Finkin, *supra* note 91, at 549.

95. 304 U.S. 333 (1938).

96. See Finkin, *supra* note 91, at 567; see also *Mackay Radio*, 304 U.S. at 346.

97. See Befort, *supra* note 93, at 440.

98. See Brudney, *supra* note 91, at 72.

99. See Pope, *supra* note 15, at 528–29 (“[W]orkers who exercise their statutory right to strike are punished with the loss of their jobs.”).

100. *Id.* at 529.

101. See GETMAN, *supra* note 91, at 68 (stating that “[s]everal leading union organizers” believe the permanent replacement doctrine to be employers’ “most powerful” tool).

NLRB,<sup>102</sup> further diminishing the value of the tool.<sup>103</sup> Partial strikes have been categorized as a single unprotected group of “strikes that stop short of a total work stoppage lasting for an indefinite length of time.”<sup>104</sup> The phrase “partial strikes” is misleading, encompassing not only partial strikes<sup>105</sup> but also slow-downs<sup>106</sup> and intermittent strikes.<sup>107</sup> If the form of strike deployed is not a traditional strike in which employees notify the employer, completely abandon work, and leave the workplace until the strike ends, the NLRA does not protect its use.<sup>108</sup>

Though it dates back to the 1940s, the ban on secondary boycotts by unions is still felt today and further diminishes unions’ ability to leverage economic power to improve working conditions.<sup>109</sup> Congress’s passage of the Taft-Hartley Act in 1947 included a statutory ban on certain kinds of secondary boycotts.<sup>110</sup> Today, employees cannot use picketing to put pressure on “secondary” organizations,<sup>111</sup> including suppliers within its own chain, whether this is to get the primary employer to recognize their union, to influence contract negotiations, or to pursue any other priority of labor power.<sup>112</sup>

102. See Becker, *supra* note 21, at 364–71 (discussing the narrowing of the scope of forms of strikes under NLRA protection); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 256 (1939) (holding that sit-down strikes are not protected under the NLRA).

103. See Becker, *supra* note 21, at 362 (“Rules narrowing the forms of strikes protected by the NLRA have dovetailed with those allowing permanent striker replacement, leaving individual workers with vastly diminished legal protections and unions with little substantive leverage in the bargaining process.”).

104. *Id.* at 356. Courts have not held that partial strikes are prohibited but that they are “unprotected against retaliatory employer self-help.” *Id.* at 383. The NLRB has “repeatedly confirmed the existence of an unprotected class of strikes” under the NLRA, specifically activity that is “partial” or “intermittent.” *Id.*; see also Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 662 (2016) (analyzing whether successive actions are considered intermittent strikes and arguing that the ban on these strikes is “irreconcilable with the NLRA’s plain text”).

105. See Becker, *supra* note 21, at 356 n.24 (defining “partial strike” as “the refusal to perform specific tasks or to work at specific times or on specific days”).

106. See *id.* (defining “slow-down” as “the refusal to perform work at the ordinary or expected pace”).

107. See *id.* (defining “intermittent strike” as “repeated short strikes not involving the refusal to perform specific tasks or to work at specific times or on specific days”).

108. See *id.* at 354–55.

109. See Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 907 (2005) (stating that the NLRA does not define “secondary boycott” but that it can be referred to as “a combination to harm one person by coercing others to harm him”). An example of this activity is when a union in a dispute with company A in which that union “pressures A indirectly, by making A’s clients, suppliers or other persons with whom A conducts business the target.” *Id.* at 908 (typeface altered).

110. 29 U.S.C. § 158(b)(4).

111. See *id.* But see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574, 578 (1988) (holding that consumer handbilling is lawful secondary pressure under the First Amendment).

112. See H.R. REP. NO. 116-347, at 34 (2019); see also Andrias, *supra* note 10, at 18, 32 (listing as secondary boycott examples workers picketing at “corporate headquarters designed to coerce franchisees to negotiate a contract” or forcing employers to contract only with unionized buyers and suppliers).

In today's global economy, work is increasingly outsourced up and down the supply chain and out to third parties.<sup>113</sup> Businesses are adopting "fissured workplaces," where employers are breaking up and outsourcing different types of work domestically and across borders to subcontractors.<sup>114</sup> Traditional "vertically integrated corporation[s]" have declined, while the United States has seen the rise of scattered work "across multiple employers."<sup>115</sup> Secondary boycotts are particularly useful to encourage unionization and collective action in fissured industries, not only within a single bargaining unit but also along supply chains and across sectors.<sup>116</sup> Secondary boycotting allows for disruption along "supply chain[s] to . . . other . . . employers" to improve the conditions not only of the boycotters' unit—by pressuring suppliers and other employers—but also of all of the employees in those other workplaces.<sup>117</sup>

#### 4. NLRB Order Enforcement

The NLRA has undercut the channels to remedy unlawful practices employers carry out. The NLRA states that the NLRB's general counsel has "final authority . . . in respect of the prosecution of" ULP complaints.<sup>118</sup> If the NLRB general counsel decides not to pursue the violation, the worker is left without means for redress.<sup>119</sup> Petitioning the Board for the decision is the only way that the NLRA provides for private sector employees to seek redress, as the Board has jurisdiction over all ULP hearings.<sup>120</sup> Meanwhile, an employee suing under "[v]irtually every major employee rights statute enacted by Congress,"<sup>121</sup> such as Title VII of the Civil Rights Act of 1964,<sup>122</sup> has the right to bring a private suit.<sup>123</sup> As the decision not to issue a complaint is not subject to judicial review,<sup>124</sup> an employee is left without recourse.<sup>125</sup>

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113. See David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, 20 PERSPS. ON WORK 26, 27 (2016).

114. *Id.*

115. See MARK BARENBERG, WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING 3 (2015), <https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf> [https://perma.cc/EEM9-LLAA].

116. *Id.* at 21.

117. *Id.*

118. 29 U.S.C. § 153(d).

119. See H.R. REP. NO. 116-347, at 21–22 (2019) ("[T]he NLRB 'sparingly' uses its authority to seek court injunctions for temporary reinstatement.").

120. 29 U.S.C. § 160(a) ("[T]he Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . .").

121. See Budney, *supra* note 15, at 231.

122. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

123. See Budney, *supra* note 15, at 231.

124. See NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112, 122–23 (1987).

125. See Budney, *supra* note 15, at 231.

The absence of a private right to sue has contributed to the ineffectiveness of the NLRA in three important ways. First, employees are at the mercy of the NLRB to seek redress for any alleged ULPs.<sup>126</sup> Even in instances of discharges or other serious economic harm, the NLRB general counsel has the right to pursue violations in cases where employees' economic livelihoods may be at stake.<sup>127</sup> Second, directing redress to the Board's administrative decision-making rather than judicial adjudication limits reform through private litigation.<sup>128</sup> Lawsuits have not only generated bodies of precedent for federal workplace statutes but also "have helped fuel Congress's continued interest in revisiting and revising the basic regulatory scheme."<sup>129</sup> Instead, the Board retains full power to adjudicate all ULP claims without "press[ing] for private rights of action."<sup>130</sup> Third, deferring to the NLRB's expertise on all labor relations issues congests the Board's docket and furthers delays.

Although "empowered" to stop ULPs,<sup>131</sup> the NLRB does not have the statutory right to enforce its own orders, unlike other "self-enforcing" administrative agencies.<sup>132</sup> Instead, the NLRA gives the Board the "power to petition any court of appeals of the United States."<sup>133</sup> Similar to its slow election mechanisms,<sup>134</sup> the Board's inability to enforce its own orders against ULPs causes inefficient delays,<sup>135</sup> which inevitably aid in employers' exploitation during organizing and negotiations.<sup>136</sup> One study has shown that the median time between the filing of a charge and when the Board issues an order is 483 days.<sup>137</sup> Administrative law judges (ALJs) hear cases when a ULP is issued.<sup>138</sup> These judgments are often appealed and lead to additional extensive delays of upwards of five years.<sup>139</sup>

The impact of the Board's rigid enforcement system is heightened by the ineffective penalties, which fail to disincentivize employers from carrying out serious ULPs.<sup>140</sup> The NLRB "cannot authorize civil monetary

126. See 29 U.S.C. § 160(a).

127. See *id.*

128. See Brudney, *supra* note 15, at 232–33.

129. *Id.* at 232.

130. *Id.* at 233.

131. See 29 U.S.C. § 160(a).

132. See H.R. REP. NO. 116-347, at 9, 21 (2019).

133. 29 U.S.C. § 160(e).

134. See *supra* note 65 and accompanying text.

135. See H.R. REP. NO. 116-347, at 21 (2019).

136. See *supra* notes 47–51, 85–87 and accompanying text; see also Bronfenbrenner, *supra* note 76, at 86 (explaining that when employers refused to recognize certified unions, the objections filed with the NLRB delayed negotiations for first contracts, resulting in a "negative impact" on those contracts' terms for the employees).

137. 74 NLRB ANN. REP. 152 (2009).

138. 29 U.S.C. § 160.

139. See BRONFENBRENNER, *supra* note 17, at 3.

140. See H.R. REP. NO. 116-347, at 9 (2019) ("[T]he statutory remedies for violations of the [NLRA] are wholly inadequate."); BIVENS ET AL., *supra* note 30, at 19–20 ("While the [NLRA] . . . makes it illegal for employers to intimidate, coerce, or fire workers involved in union-organizing campaigns, the penalties are insufficient to provide a serious economic disincentive for such behavior.").

penalties,”<sup>141</sup> including punitive damages, nor may it bring criminal charges against an employer.<sup>142</sup> Instead, the Board may only post notices, reinstate fired workers, award back pay, or rerun elections.<sup>143</sup> The most serious penalty the Board may issue is a bargaining order, which is often ignored or dragged out.<sup>144</sup>

### 5. Employer-Employee Classification

The NLRA’s framework was created to work within traditional, long-term employer-employee relationships based on the “industrial model for production.”<sup>145</sup> Today, these relationships are being replaced in part by the willingness of employers to classify certain workers as independent contractors, a group that falls outside the purview of the NLRA’s definition of a covered “employee.”<sup>146</sup> The rise of this “gig economy,” in which employers classify workers as “independent contractors,” has resulted in the ability to avoid the NLRA’s strictures and unionization through misclassification.<sup>147</sup> In addition, employers’ use of subcontractors and franchising has contributed to this “skirt[ing] [of] almost all labor law protections for employees.”<sup>148</sup>

The difficulty with the misclassification of workers is the fact-intensive nature of the determination.<sup>149</sup> As “gig workers” have characteristics that are associated with both employees and independent contractors, the text of the NLRA is ill-suited for the determination.<sup>150</sup> Therefore, a new test should be built into the definition of “employee” to categorize this new class of workers into protected workers or unprotected independent contractors.

#### B. Prominent Reform Failures and the NLRA

The NLRA has undergone “virtually no changes” since the 1940s.<sup>151</sup> Despite its nearly seventy-year “ossification,”<sup>152</sup> reformers have tried to amend the NLRA several times, hoping to align the statutory text with its underlying intent.<sup>153</sup> These attempts focused on specific areas of the NLRA’s weaknesses. Today, however, reform must reflect the interplay of

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141. H.R. REP. NO. 116-347, at 9.

142. See BIVENS ET AL., *supra* note 30, at 20 n.75.

143. *See id.*

144. *Id.*

145. See William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement*, 69 LAB. L.J. 181, 181 (2018).

146. 29 U.S.C. § 152(3); see Tronsor, *supra* note 145, at 183. An in-depth discussion of this classification issue is outside the purview of this Note but worth noting when discussing the effectiveness of the PRO Act.

147. See Tronsor, *supra* note 145, at 183.

148. *Id.*

149. *See id.* at 184.

150. *See id.*

151. See Budney, *Gathering Moss*, *supra* note 10, at 161.

152. See Estlund, *supra* note 12, at 1530.

153. *See infra* Part II.B.

the NLRA as a regulatory scheme that chronologically mirrors real-world unionization. Still, these reforms are valuable comparisons that are helpful in determining how to effectively solve the NLRA's deficiencies.

This section will address the three reforms that had passed at least one chamber of Congress but later failed before successfully amending the NLRA. The Labor Reform Act of 1977,<sup>154</sup> the Workplace Fairness Act of 1991,<sup>155</sup> and the Employee Free Choice Act of 2008<sup>156</sup> all demonstrate how Congress has previously approached the issues surrounding diminished private sector unionization.

### 1. The Labor Reform Act of 1977

The Labor Reform Act of 1977 (LRA) passed the House in October 1977.<sup>157</sup> By 1977, exploitation of the NLRA's remedial deficiencies had become widespread, and the NLRA could not effectively deter employers from committing ULPs during organizing drives.<sup>158</sup> The LRA sought to amend the NLRA by addressing procedural issues with the law,<sup>159</sup> bolstering remedies "to fully compensate employees victimized by violations of the Act" and cutting delays stemming from NLRB procedures.<sup>160</sup> Specifically, the LRA took a four-part approach: (1) improve representation election procedures, (2) expedite decisions in ULP cases, (3) compensate and safeguard workers fired for protected activity, and (4) increase remedies for employer bargaining delays.<sup>161</sup>

To improve representation elections, the legislation would have amended the NLRA to streamline when the NLRB must hold an election after receiving a petition.<sup>162</sup> The LRA would also have streamlined appeals of ALJ decisions.<sup>163</sup> In addition, the Board would have needed to promulgate a rule that would give union representatives the ability to communicate with the employees in an "equivalent manner" as employers could.<sup>164</sup>

Additionally, two remedial features were introduced by the LRA to bolster protections for workers who are fired for engaging in protected activities. First, the LRA would have amended the NLRA by doubling the

154. H.R. 8410, 95th Cong. (1977).

155. H.R. 5, 102d Cong. (1991).

156. H.R. 800, 110th Cong. (2007).

157. H.R. 8410.

158. See Estlund, *supra* note 12, at 1540 ("[T]he [LRA] sought to address . . . the overwhelming advantages that employers enjoy in union campaigns by virtue of . . . the original Act's inadequate deterrence of employer misconduct.").

159. H.R. REP. NO. 95-637, at 8 (1977) (stating that procedural reform was necessary, as NLRA procedures were being exploited by employers); Brudney, *Gathering Moss*, *supra* note 10, at 170.

160. H.R. REP. NO. 95-637, at 4.

161. *Id.* at 5–8.

162. *See id.* at 5.

163. *See id.*

164. *See id.* at 6 (noting that employers enjoyed the one-sided ability to speak to employees in the workplace during working hours about the elections).

backpay awarded without deducting interim earnings.<sup>165</sup> Second, the legislation would require the NLRB to seek an injunction whenever an alleged ULP involved an illegal discharge.<sup>166</sup> To combat the increasing number of employers refusing to bargain in good faith to settle upon a first contract, the LRA would have “award[ed] the employees compensation for the delay in bargaining” at factories where bargaining lawfully resulted in a first contract.<sup>167</sup>

The Senate’s version of the bill failed due to a filibuster in June 1978.<sup>168</sup> Still, the LRA serves as an example of Congress’s attempt to revitalize private sector union organization campaigns by fixing procedural delays that could end union drives at any point. This attempt did have two significant deficiencies that have been addressed by the PRO Act.<sup>169</sup> First, the legislation did not create a private right of action. Giving employees another channel for redress would have facilitated the LRA’s goal of reducing NLRB procedural delays and protecting the right to organize.<sup>170</sup> Second, the legislation would have implemented improved, yet still weak, monetary penalties. Doubling backpay without deductions for interim earnings is menial compared to the economic costs of unionization.<sup>171</sup> The LRA failed to include other forms of monetary awards, such as liquidated damages that would be available for private lawsuits.

## 2. The Workplace Fairness Act of 1991

The Workplace Fairness Act of 1991<sup>172</sup> (WFA) also concentrated its efforts on a specific stage of NLRA weakness: the practice of hiring permanent replacements for strikers in labor disputes.<sup>173</sup> The WFA passed the House in July 1991,<sup>174</sup> but, like the LRA, could not survive a Senate filibuster, even with majority support.<sup>175</sup> The WFA’s purpose was to outlaw the employer practice of permanently replacing workers by statutorily designating the action as a ULP.<sup>176</sup> As discussed in Part I.A.3, the threat of permanent replacements alone has the ability to completely

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165. *See id.* at 7.

166. *See id.*; H.R. 8410, 95th Cong. § 8(3) (2d Sess. 1978).

167. *See id.* at 8.

168. *See* Brudney, *Gathering Moss*, *supra* note 10, at 170.

169. *See infra* Part II.A.

170. *See supra* notes 126–30, 135–36 and accompanying text.

171. *See supra* note 50 and accompanying text.

172. H.R. 5, 102d Cong. (1991).

173. *Id.*

174. *Id.* An almost identical legislative attempt was carried out in 1993 to designate permanent replacements as ULPs, but that attempt failed due to the Senate filibuster after a majority 53–47 vote. *See* Helen Dewar, *Senate Fails to Break Filibuster on Striker Replacement Bill*, WASH. POST (July 13, 1994), <https://www.washingtonpost.com/archive/politics/1994/07/13/senate-fails-to-break-filibuster-on-striker-replacement-bill/32b7dc5f-e77f-462b-acce-da15529a2a03/> [https://perma.cc/SQL5-6XQJ].

175. *See* Brudney, *Gathering Moss*, *supra* note 10, at 173. The bill was withdrawn due to a filibuster after a cloture vote of 57–42. *Id.* at 173 n.79.

176. H.R. 5.

“destabilize[] labor-management relations” by nullifying workers’ right to strike,<sup>177</sup> the core of a union’s economic leverage against an employer.<sup>178</sup>

A majority in the House of Representatives understood that permanent replacements undermine the entire process, nullifying the right to strike and, therefore, outright diminishing a union’s bargaining position.”<sup>179</sup> The WFA would thus amend the NLRA by adding a provision that designates “offering” or “granting” a permanent replacement of an employee who “has exercised the right . . . to engage in . . . concerted activities for the purpose of collective bargaining” against a ULP.<sup>180</sup>

The WFA focused specifically on the loss of the right to strike by adding explicit language that would nullify any interpretation that could result in the survival of the permanent replacement doctrine. The amendment would have sufficiently prohibited striking, an important strengthening of the NLRA for organized labor. The legislation exemplifies how to implement a successful solution to a specific NLRA inadequacy.

### 3. The Employee Free Choice Act of 2008

The Employee Free Choice Act of 2008<sup>181</sup> (EFCA) passed the House in March 2007.<sup>182</sup> By the late 2000s, employers had succeeded in utilizing NLRB election rules and delays to quash union organizing drives.<sup>183</sup> The penalties for ULPs began to be treated as the “mere cost of doing business to prevent” unionization.<sup>184</sup> The House had started to take seriously the effect of bad faith bargaining on the part of employers after the certification of a union.<sup>185</sup> With these issues in mind, the purpose of the EFCA was to amend the NLRA to “restor[e] workers’ freedom to organize and collectively bargain” by “protect[ing] the . . . full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.”<sup>186</sup>

Congress took a three-pronged approach: (1) give employees the option of certifying a bargaining unit by a majority sign-up in lieu of an NLRB election, (2) strengthen penalties for NLRA violations, and (3) allow for

177. H.R. REP. No. 102-57, pt. 3, at 2 (1991).

178. *Id.* at 13 (“The ultimate form of . . . peaceful concerted activity is the economic strike . . . the primary method for resolving disputes.”); *see also supra* Part I.A.3.

179. *Id.* at 3, 12 (claiming that the ability to permanently replace “reduces collective bargaining to collective begging”).

180. H.R. 5, 102d Cong. § 1(2) (1991).

181. H.R. 800, 110th Cong. (2007).

182. *Id.*

183. *See* H.R. REP. No. 110-23, at 8, 20 (2007) (explaining how delays in certifying results and management’s exclusive access to employee information and the work premises contributes to the stripping away of the freedom to organize); *supra* Part I.A.1.

184. *See* H.R. REP. No. 110-23, at 15–16; *supra* Part I.A.1.

185. *See* H.R. REP. No. 110-23, at 23 (discussing the difficulties of enforcing the obligation to bargain in good faith and explaining how employers’ ability to delay the process could “ultimately bust [a] union”); *supra* Part I.A.2.

186. *See* H.R. REP. No. 110-23, at 3.

referrals by either party to mediate and arbitrate contract disputes if the parties could not reach a first contract.<sup>187</sup> First, the EFCA would have provided for statutory protection of majority sign-ups for certification.<sup>188</sup> If the NLRB receives authorization cards signed by a majority of the employees in the unit, the union would be certified and the employer would not be able to refuse to bargain and demand an election.<sup>189</sup> Second, the EFCA sought to increase penalties, including three times backpay for an unlawful discharge or discrimination, civil penalties levied by the NLRB of up to \$20,000 per ULP, and a requirement that the Board “seek a federal court injunction . . . whenever there is reasonable cause” of the threat of, or carrying out of, an illegal firing or discrimination.<sup>190</sup> Third, since the NLRA does not “provide for the use of binding arbitration,”<sup>191</sup> the EFCA would have amended the NLRA to provide the option to request mediation after ninety days of bargaining and binding arbitration if an agreement had not been reached within thirty days of mediation.<sup>192</sup>

As with its reform attempt predecessors before it, the EFCA was blocked by a filibuster in the Senate in June 2007.<sup>193</sup> The EFCA had managed to garner strong opinions amongst the public, resulting in a scholarly debate on whether it would have had a positive, substantive effect on private sector unionization.<sup>194</sup> Regardless of its merits, compared to the LRA and the WFA, the EFCA took a more comprehensive approach to NLRA reform. Congress sought to ensure the freedom to associate by addressing the interplay between election interference, bad faith post-certification bargaining, and inadequate deterrence penalties. The PRO Act builds upon

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187. *See id.* at 6.

188. *See id.* at 23.

189. *See id.* This authorization card process has been labeled as the “card check procedure” among labor law scholars. *See* Sachs, *supra* note 56, at 657.

190. H.R. REP. NO. 110-23, at 6–7.

191. *Id.* at 24. The NLRA did allow for “the Federal Mediation and Conciliation Service (FMCS) [to] provide mediation . . . services upon its own motion or upon request of one or more of the parties to the dispute, whenever it believes that the dispute threatens a substantial interruption to commerce.” *Id.*

192. *Id.* at 25.

193. *See* ROSS EISENBREY & DAVID KUSNET, ECON. POL’Y INST., THE EMPLOYEE FREE CHOICE ACT: QUESTIONS AND ANSWERS 1 (2009), <https://files.epi.org/page-/efcaquestions.pdf> [<https://perma.cc/K77G-H4D8>].

194. *See, e.g.*, Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 U.C. IRVINE L. REV. 609, 614 (2014) (arguing that NLRA reform should focus on “fair ground rules” for elections with secret ballots, rather than mandatory card checks); Michael M. Oswalt, *Automatic Elections*, 4 U.C. IRVINE L. REV. 801, 833–34 (2014) (proposing that “regularly scheduled, automatic elections” for each worker in the unit should be held annually). *See generally* Sachs, *supra* note 56 (recommending that employees be able to cast support by card check secretly in their own homes or over the internet or phone due to the possibility of coercion by both sides). *But see* Bradney, *supra* note 49, at 841, 849 (explaining that, despite the argument that employees need the freedom of their own choice to associate or not, the NLRB election paradigm has deteriorated, completely failing to protect employee free choice and proposing future reliance on neutrality agreements and card checks).

this measure's penalty provisions, but largely ignores the EFCA's effort to work outside the NLRB election process.<sup>195</sup>

## II. THE MOST RECENT LABOR REFORM MODEL: THE PRO ACT

The three major reform attempts discussed in Part I.B failed to garner enough support in the Senate to successfully amend the NLRA.<sup>196</sup> As the 2020 election came to a close, Democrats won the presidency and an outright majority in the House of Representatives.<sup>197</sup> Despite their control of the Senate, Democrats do not have a supermajority large enough to defeat a filibuster.<sup>198</sup> Although calls to end the filibuster have gained traction,<sup>199</sup> abolition is unlikely, even with a majority.<sup>200</sup> Therefore, as past reforms have shown, this version of the PRO Act will most likely fail in the Senate.<sup>201</sup>

A discussion of the PRO Act is useful for building a future NLRA reform model. This bill is more comprehensive and detailed than any of the previous reforms that have passed the House.<sup>202</sup>

The legislation seeks to both procedurally and substantively amend the NLRA across all stages of unionization, a more aggressive approach than those of the LRA, WPA, and EFCA. The PRO Act's purpose is "to safeguard workers' full freedom of association and to remedy longstanding weaknesses that fail to protect workers' rights."<sup>203</sup> The legislation is an overhaul of the current framework that addresses the NLRA in terms of election interference, contract negotiations, the right to strike in different forms, delays in NLRB procedure, and remedies.<sup>204</sup> This part presents a topical discussion of the PRO Act's various provisions across the stages of unionization and an evaluation of whether the reform would successfully solve the framework's most pressing problems.

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195. See *infra* Part I.A.1.

196. See *supra* notes 168, 175, 193 and accompanying text.

197. See Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/07/us/politics/biden-election.html> [<https://perma.cc/2SEE-YADL>]; Ella Nilsen, *House Democrats Will Keep Their Majority for Two More Years*, VOX (Nov. 8, 2020, 8:33 PM), <https://www.vox.com/2020/11/8/21539959/election-2020-house-democrats-control-majority> [<https://perma.cc/3ZHK-YT8Z>].

198. See Norman Ornstein, *Democrats Can't Kill the Filibuster. But They Can Gut It*, WASH. POST (Mar. 2, 2021), <https://www.washingtonpost.com/outlook/2021/03/02/manchin-filibuster-never-sinema/> [<https://perma.cc/DP9Y-2TSK>]; Nilsen, *supra* note 197.

199. See Molly E. Reynolds, *What is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/> [<https://perma.cc/64TM-UMM6>].

200. See *id.*

201. See *supra* notes 168, 175, 193 and accompanying text.

202. See *supra* Part I.B.

203. H.R. REP. NO. 116-347, at 8–9 (2019).

204. Protecting the Right to Organize Act, H.R. 2474, 116th Cong. (2020).

### A. Strengthening the Position of Unions During NLRB Elections

Due to the NLRA's inability to deter election interference, unions try to maintain secrecy for as long as possible during an organizing drive.<sup>205</sup> Despite involving only the workers' choice of whether to certify, a union must notify the employer of the campaign prior to an election.<sup>206</sup> Once management is informed, an employer campaign can be deployed to deter employees from certifying the union.<sup>207</sup> NLRB elections have become wrought with interference, failing to maintain democratic principles upheld in political elections.<sup>208</sup> The penalties provided for in the NLRA have proven too limited in pecuniary terms and too dependent on agency discretion to actually deter ULPs.<sup>209</sup>

The PRO Act works within the NLRB election framework, attempting to hold employers accountable for violations, rather than overhauling the entire voting process.<sup>210</sup> For example, captive audience meetings are added to the list of ULPs, as are any mandatory anti-union activity that is not related to a worker's job.<sup>211</sup> Voluntary meetings are still permitted because of the freedom of speech protected by the First Amendment.<sup>212</sup> Regarding the actual vote itself, the legislation permits the union to request the manner in which the election is to take place—whether it be by mail, electronically, at work, or at a neutral site.<sup>213</sup> Employers must give employee information to the union within two days of the declaration of an NLRB election or face penalties for committing a ULP.<sup>214</sup> This includes not only names and addresses but also “work locations, shifts, job classifications . . . personal landline and mobile telephone numbers, and work and personal email addresses.”<sup>215</sup>

In terms of specific remedies to election interference, the PRO Act requires the NLRB to presume that an employer's violative conduct affected the outcome of an election where the employer has been found to have committed a ULP and if at one point there had been majority support for certification.<sup>216</sup> Thus, the NLRB will make a rebuttable presumption that the election would have resulted in the certification of the union and

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205. See Sachs, *supra* note 56, at 665 (discussing how “the intensity of employer opposition to unionization” forces organizing drives underground).

206. *See id.*

207. *See id.*

208. See Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?* 26 ABA J. LAB. & EMP. L. 327, 331 (2011) (discussing how, despite the NLRA's attempt to follow democratic election fundamentals, the result has been a “failure of NLRA elections to resemble the ideal laboratory conditions”).

209. *See supra* notes 47, 50–51 and accompanying text.

210. *See H.R. 2474, 116th Cong. § 2(e)(1) (2020).*

211. *Id.* § 2(d)(3) (“[I]t shall be an unfair labor practice . . . for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties . . . ”).

212. *See H.R. REP. NO. 116-347, at 23 (2019).*

213. *H.R. 2474, § 2(e)(1)(A).*

214. *Id.* § 2(d)(4).

215. *Id.*

216. *Id.* § 2(e)(1)(A).

compel that certification.<sup>217</sup> If a ULP is committed before the election takes place, the employer may be subjected to both damages and the rebuttable presumption.<sup>218</sup>

The PRO Act seems to have thoroughly addressed the largest problems of NLRB elections: weak penalties, additional ULPs for mandatory anti-union activities, manner and place of voting alternatives, streamlined or improved NLRB machinery procedures, bilateral information transparency, and the possibility of a certification by the NLRB if the employer illegally interferes under the NLRA. Unions, equipped with equal information, should be better able to facilitate educational conversations with potential members. Employers, fearing an order to certify, may be deterred from illegally interfering with an employee's free choice.

Still, the legislation is ill-equipped to solve the issues of certification. Due to the position of employers over the working conditions of laborers, the idea of an adversarial election will always be undemocratic compared to its model—democratic political elections.<sup>219</sup> Even with all of these changes, the PRO Act fails to overhaul the election process, or at least create another alternative process for certification,<sup>220</sup> as the EFCA had attempted to do in the late 2000s.<sup>221</sup> The legislation instead tries to work from within the current certification framework to maintain the status quo of electing a union through a secret ballot.<sup>222</sup>

Even within the election framework, the legislation fails to address several key points. While the PRO Act improves upon the inequality of positions, employers would still have the constitutional right to wage anti-union campaigns under the First Amendment.<sup>223</sup> Therefore, employers would still host meetings to sway employees, so long as an employee agrees to attend the meeting.<sup>224</sup> The PRO Act also fails to overturn the Supreme Court's decision in *Lechmere* that bans union representatives from accessing workplace premises.<sup>225</sup>

The idea of holding an election to cast support is superfluous, especially as unions today already wait until they have majority support in a bargaining unit before filing a petition.<sup>226</sup> In addition, the PRO Act does not change the requirement that an employer be given notice before an

217. *Id.*

218. *Id.* § 2(e)(1)(A), (i)(1)(A).

219. See Lafer, *supra* note 55, at 72–73 (arguing that NLRB elections fail to live up to any of the baseline standards of a “free and fair election” and that the notion that “secret ballots” create a true democratic election is false).

220. See H.R. 2474, § 2(e)(1)(A).

221. See *supra* Part I.B.3.

222. See H.R. 2474, § 2(e)(1)(A).

223. See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 U.C. BERKELEY J. EMP. & LAB. L. 356, 381–82 (1995).

224. See H.R. REP. NO. 116-347, at 23 (2019) (“The PRO Act does not prohibit meetings that are truly voluntary.”).

225. See *Lechmere Inc. v. NLRB*, 502 U.S. 527, 541 (1992).

226. See *supra* note 38 and accompanying text.

election is commenced.<sup>227</sup> The legislation fails to overhaul the election process for a majority sign-up method akin to that of the EFCA. As the certification of the bargaining representative is the critical starting point for a union, this issue must be addressed in any future legislative reform attempt.<sup>228</sup>

### B. Facilitating Good-Faith Bargaining and First Contracts

The NLRA's inadequacies in terms of contract negotiations are two-fold: (1) the difficulty in ensuring that employers bargain in good faith; and (2) the inability to compel agreements due to freedom of contract.<sup>229</sup> The freedom to collectively bargain rests on the presumption that the union will negotiate with an employer that, in fear of economic harm resulting from collective action, will reciprocate and act in good faith.<sup>230</sup> The entirety of the NLRA's labor-management relations framework rests on the idea of collective bargaining.<sup>231</sup> The NLRA explicitly states that the refusal by "an employer . . . to bargain collectively" is a ULP.<sup>232</sup> This duty to bargain includes the statutory requirement that the negotiations be in good faith.<sup>233</sup>

The PRO Act creates a three-step framework, similar to that of the EFCA, to deal with the inadequacies at the negotiations stage of unionization.<sup>234</sup> First, the legislation requires the parties to begin collective bargaining within ten days of notice by one party to the other with the intent to start the negotiation process.<sup>235</sup> The parties "shall make every reasonable effort" to reach a first contract.<sup>236</sup> Second, if the parties cannot reach an agreement within ninety days from the first date of negotiations, either the union or the employer may request mediation services.<sup>237</sup> Third, if the parties still cannot reach an agreement within a thirty-day period of mediation, the mediation servicer must mandate arbitration by a three-member arbitration panel to settle on a binding contract for two years.<sup>238</sup> The panel is selected by the parties. The union chooses one arbitrator, the employer chooses the second, and a third neutral arbitrator is

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227. See *supra* notes 205–07 and accompanying text.

228. See *supra* Part I.A.1.

229. See *supra* Part I.A.2.

230. See Finkin, *supra* note 91, at 547–48.

231. See Andrias, *supra* note 10, at 14.

232. 29 U.S.C. § 158(a)(5), (d).

233. *Id.*

234. H.R. 2474, 116th Cong. § 2(d)(4)(K) (2020); see *supra* Part I.A.2.

235. H.R. 2474, § 2(d)(4)(K).

236. *Id.*

237. *Id.* ("If after the expiration of the 90-day period . . . or such additional period as the parties may agree upon . . . either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation.").

238. *Id.* ("If after the expiration of the 30-day period beginning on the date on which the request for mediation is made . . . or such additional period as the parties may agree upon, the [Federal Mediation and Conciliation] Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to a tripartite arbitration panel . . .").

mutually agreed upon.<sup>239</sup> Each party has fourteen days to choose its arbitrator so as to avoid delaying the negotiations further.<sup>240</sup>

Working in tandem with the stronger monetary penalties for all ULPs,<sup>241</sup> the PRO Act would effectively solve the issue of first contract disputes and employer failure to bargain in good faith. Despite freedom of contract blocking the NLRB from imposing agreement terms,<sup>242</sup> the legislation sufficiently amends the NLRA to give unions multiple opportunities to confront bad faith throughout the negotiations with the option to use mediation and arbitration.<sup>243</sup> Whereas the NLRA currently only permits mediation in circumstances of “substantial interruption of commerce,”<sup>244</sup> the PRO Act would give either party the ability to request mediation and then mandatory binding arbitration.<sup>245</sup>

However, it is worthwhile to note an important procedural deficiency that the PRO Act would embed in the NLRA. The legislation explicitly allows the parties to specify longer periods of time to start bargaining, to bargain before mediation, and to request arbitration.<sup>246</sup> The text lays out default timeframes with the phrase “or such additional period as the parties may agree upon.”<sup>247</sup> If the employer is in a significantly better bargaining position than the union, that employer may be able to strong-arm longer timetables, prolonging negotiations.

### C. Restoring the Right to Strike

Despite the NLRA’s language disclaiming that nothing in it should be “construed so as either to interfere with or impede or diminish in any way the right to strike,”<sup>248</sup> interpretations of the NLRA have in essence nullified striking.<sup>249</sup> In particular, the interpretations allowing permanent replacements of strikers, the bans on all forms of strike other than the traditional strike, and the ban on the secondary boycotts have all gutted striking.<sup>250</sup> All of these practices are at odds with the text of the NLRA and its purpose to facilitate collective bargaining,<sup>251</sup> as the economic leverage of a strike gives workers the collective power to negotiate for better working conditions.<sup>252</sup>

In a similar fashion to its good-faith negotiations provisions, the PRO Act succinctly and explicitly addresses the diminishment of the right to

239. *Id.*

240. *Id.*

241. See *infra* Part II.D.

242. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970).

243. H.R. 2474, § 2(d)(4)(K).

244. See *supra* note 191 and accompanying text.

245. H.R. 2474, § 2(d)(4)(K).

246. *Id.*

247. *Id.*

248. 29 U.S.C. § 163.

249. See *supra* Part I.A.3.

250. See *supra* Part I.A.3.

251. See 29 U.S.C. § 151.

252. See Becker, *supra* note 21, at 351.

strike in several key provisions.<sup>253</sup> First, the legislation overturns the *Mackay Radio* doctrine by explicitly listing threats to replace a striker and the actual permanent replacement of a striker as ULPs.<sup>254</sup> “[T]o promise, threaten, or take any action . . . to permanently replace” a worker under the newly expanded definition of “strike” would result in hefty penalties for the employer.<sup>255</sup>

Second, the legislation explicitly expands the forms of collective action that can be utilized.<sup>256</sup> The PRO Act would amend the NLRA to state “[t]hat the duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited.”<sup>257</sup>

Third, the PRO Act would repeal the ban on secondary boycotts.<sup>258</sup> Allowing employees to carry out secondary boycotts has numerous benefits, including improving a work unit’s own terms and conditions of employment, improving the terms and conditions across a supply chain, and pressuring suppliers and other employers to accept unionization.<sup>259</sup> Restoring this right would have important implications in today’s global economy, as unions would be able to utilize the form to reach subcontractors to improve their own bargaining positions, while improving the conditions and unionization of workers across borders and sectors.<sup>260</sup>

These provisions affecting the right to strike are the strongest and most effective PRO Act attempts in terms of holistically improving the use of the tool. The legislation overhauls the text of the NLRA to end permanent replacements, the ban on different forms of the strike, and the prohibition on secondary boycotts. By ending the practice of permanent replacements, unions once again would be able to reclaim the ability to strike to improve their employees’ working conditions without fear of job loss.<sup>261</sup> In addition, the expansion of different forms of striking gives employees flexibility in applying economic pressure; these forms include “sit-down strikes, slowdowns, refusals to perform specific tasks, and intermittent strikes.”<sup>262</sup> This expanded flexibility would “more accurately represent employee dissatisfaction,” as workers could strike in ways that are more spontaneous based on current grievances, rather than having to plan a traditional strike “aim[ed] to redress past injury and to secure favorable terms of future employment.”<sup>263</sup>

In sum, the PRO Act would effectively restore the right to strike. If passed, the provisions would not only protect the ability to strike without

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253. See H.R. 2474, 116th Cong. § 2(d)(1)(B) (2020).

254. *Id.*

255. *Id.* § 2(d)(1)(B), (i)(1)(A).

256. *Id.* § 2(j).

257. *Id.*

258. *Id.* § 2(d)(2).

259. See *supra* notes 112–13, 116–17 and accompanying text.

260. See *supra* notes 113–17 and accompanying text.

261. See *supra* notes 94–98 and accompanying text.

262. See Becker, *supra* note 21, at 354 (footnote omitted).

263. *Id.* at 406.

fear of reprisal and job loss to permanent replacements but also strengthen the options employees have to change their working conditions and affect the workplace conditions in employers' supply chains. The legislation would significantly improve most of the major deficiencies that have pervasively diminished the right to strike. Therefore, any future model that follows the PRO Act's approach to strike reform would effectively amend the NLRA's deficiencies that have significantly reduced the negotiating position of unions.

#### *D. Improving NLRB Procedures and Penalties*

At every stage of unionization, the NLRB's slow procedures and meager penalties fail to effectively deter violations of the NLRA.<sup>264</sup> The NLRA inadequately facilitates collective bargaining not only by allowing employers to absorb small monetary penalties and avoid NLRB orders<sup>265</sup> but also by prolonging union attempts to organize and negotiate for contracts.<sup>266</sup> The only channel employees have to seek redress is through the NLRB general counsel's decision to prosecute a ULP, as workers do not have a private right to sue an employer.<sup>267</sup> The NLRB cannot issue self-enforcing orders and can only petition courts, extending the delays to certification or contract agreement.<sup>268</sup>

The PRO Act aims to expand the remedial options for employees who have suffered from employers' ULPs and give teeth to the penalties available to the NLRB. In terms of channels of redress, the legislation grants a private right of action "in the appropriate district court" to employees who allege a ULP, yielding not only backpay but also consequential damages, liquidated damages, and possibly even punitive damages.<sup>269</sup> Employees would have ninety days to exercise this right sixty days after either "filing of a charge with the Board" or "the date the Board notifies the person that no complaint shall issue."<sup>270</sup> An employee must wait sixty days or until notified that the NLRB general counsel has declined to prosecute the ULP after the employee files a petition with the Board.<sup>271</sup> Thus, an employee cannot bring a suit until filing a petition with the Board and after the sixty-day period has elapsed.<sup>272</sup>

Regarding the decision to prosecute, the PRO Act would amend the NLRA to direct the NLRB general counsel "to seek injunctive relief whenever an employee suffers a . . . discharge [or] other serious economic harm."<sup>273</sup> In addition, "the preliminary investigation of" any filed ULP that

264. See *supra* Part I.A.4.

265. See 29 U.S.C. § 160(c).

266. See *supra* note 47 and accompanying text.

267. See 29 U.S.C. § 153(d).

268. 29 U.S.C. § 160(e); see *supra* notes 132–39 and accompanying text.

269. H.R. 2474, 116th Cong. § 2(i)(B) (2020).

270. *Id.*

271. *Id.*

272. *Id.*

273. See H.R. REP. NO. 116-347, at 22.

involves these charges would be “given priority over all other cases except” other discharge or serious economic harm cases.<sup>274</sup>

The legislation would also grant the Board the ability to institute self-enforcing orders.<sup>275</sup> The PRO Act would give the NLRB the power to levy a civil penalty of upwards of \$10,000 for “fail[ure] or neglect[] to obey” an order.<sup>276</sup> The provision states that “[e]ach separate violation of such an order shall be a separate offense” but that every day that an offender continues to “fail or neglect” constitutes a separate violation of the order.<sup>277</sup> If the NLRB decides to sue the violator of the order, a court, under the amended NLRA text, would have the explicit power to issue injunctive relief.<sup>278</sup>

Seeking to improve a framework that currently does not give the Board any right to dole out monetary penalties aside from backpay less interim earnings,<sup>279</sup> the PRO Act would amend the NLRA to grant the NLRB the ability to levy civil penalties.<sup>280</sup> The legislation states that “in addition to any remedy ordered by the Board,”<sup>281</sup> employers may face a fine of more than \$50,000 for ULP violations under the NLRA.<sup>282</sup> In addition, the legislation would allow for Board determinations of “director or officer’s personal liability [when] warranted,” resulting in a monetary civil award against that director or officer.<sup>283</sup>

Following the specific intention of protecting employees from violations involving discharge or serious economic harm, an employer that commits this type of ULP multiple times within a five-year period would face a mandatory double penalty of more than \$100,000 per ULP.<sup>284</sup> If the Board finds that an employer has violated the NLRA by carrying out these ULPs, the NLRB would be required to award the employee a similar reward that could be achieved through a private suit: “back pay without any reduction, front pay (when appropriate), consequential damages, and an additional amount as liquidated damages equal to two times the amount of damages awarded.”<sup>285</sup>

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274. *Id.* at 104.

275. H.R. 2474, § 2(g)(1)(C).

276. *Id.*

277. *Id.*

278. *See id.*

279. Andrias, *supra* note 10, at 25.

280. *See* H.R. 2474, § 2(i)(1)(B).

281. *Id.*

282. *Id.*

283. *Id.* (“[A] civil penalty . . . may also be assessed against any director or officer . . . who directed or committed the violation, had established a policy that led to such a violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation.”).

284. *Id.* The legislation directs the Board to determine these penalties by considering “the gravity of the [ULP] . . . the impact . . . on the charging party, on other persons seeking to exercise rights guaranteed by this Act, and on the public interest . . . and the gross income of the employer.” *Id.*

285. *Id.* § 2(f); *see supra* note 146 and accompanying text.

The PRO Act significantly changes the current NLRA procedures and penalties. The legislation would open more channels for employees to seek redress and give the NLRB the ability to enforce its own orders and levy civil monetary fines. Compared to the current framework, these changes would improve on the remedial aspects of private sector labor relations. However, the amended NLRA framework faces two challenges in light of these changes. First, the private right of action only arises sixty days after filing or notification that the Board will not prosecute.<sup>286</sup> Second, it may also be the case that, despite self-enforcement, the fines are still too meager to truly deter employers from committing ULPs.<sup>287</sup>

#### *E. Creating a New Test for Employee Classification*

The “gig economy” has created an entirely new class of workers who fall in between the definitions of “employee” and “independent contractor.”<sup>288</sup> As this gives employers the ability to avoid unionization and protects collective bargaining under the NLRA, the current labor-management framework needs a new test to make the determination.<sup>289</sup>

The PRO Act would change the definition of “employee,” based on an “ABC Test.”<sup>290</sup> This test provides that the default status of a worker is “employee” unless that worker satisfies three criteria.<sup>291</sup> The specific language of the three criteria is:

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer; and
- (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.<sup>292</sup>

This test focuses not only on the degree of control that a worker has but also on the service performed itself.<sup>293</sup> Providing a test that requires satisfaction of all three criteria ensures that more workers would be able to enjoy the protections of the NLRA and that workers would not be subject to misclassification as independent contractors.

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286. *Id.* § 2(i)(B).

287. See *supra* notes 47, 51–52 and accompanying text.

288. See Tronsor, *supra* note 145, at 184.

289. See *supra* Part I.A.5.

290. H.R. 2474, § 2(a)(2).

291. *Id.*

292. *Id.*

293. See *id.*

### III. THE PRO ACT AS A MODEL FOR EFFECTIVE CHANGE

Compared to previous reform attempts, the PRO Act is a sweeping piece of legislation that, if passed, would significantly improve the position of organized labor in the private sector of the United States.<sup>294</sup> Despite its breadth, the PRO Act still fails to overhaul the current NLRA framework as thoroughly as possible.<sup>295</sup> This part discusses possible solutions to lingering issues in order of the principal stages of unionization that should be incorporated into any future legislation attempting a comprehensive overhaul of the NLRA's current framework.

As discussed in Part II.C, the PRO Act would sufficiently amend the NLRA's strike provisions.<sup>296</sup> As stated in Part II.E, the legislation's ABC Test would also sufficiently amend the NLRA to ensure that employers cannot misclassify their workers as independent contractors.<sup>297</sup> As these provisions are sufficient to successfully amend the NLRA and should be adopted by any future model,<sup>298</sup> this Note does not discuss additional reforms to these stages of unionization.

Part III.A proposes that any reform model should amend the NLRA to incorporate a card check procedure as the default method of certification. Part III.B recommends an emphasis on alternative dispute resolution and changes to the default timeframes for mediation and arbitration that the PRO Act would add to the NLRA. Part III.C recommends stronger NLRB enforcement mechanisms, including an immediate private right of action, more rigid monetary penalties than those utilized in the PRO Act, and the potential for director and officer criminal liability for egregious conduct.

#### *A. Card Check Authorization to Certify*

In terms of elections, the PRO Act continues to work within the NLRB-election framework,<sup>299</sup> which would still be subject to anti-union campaigns under the First Amendment.<sup>300</sup> The decision to collectively bargain is an employee's choice;<sup>301</sup> an NLRB election, unless held immediately upon the initial filing, will always give employers the chance to exert influence over their workers' decisions.<sup>302</sup> NLRB procedures were

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294. See *supra* Parts II.A–E.

295. See *supra* Parts II.A–E.

296. See *supra* Part II.C.

297. See *supra* Part II.E.

298. See *supra* Parts II.C, II.E.

299. See H.R. 2474, 116th Cong. § 2(e) (2020).

300. See, e.g., Brudney, *supra* note 49, at 854 (explaining that First Amendment law has allowed for corporate entities to avoid regulation of speech).

301. See Sachs, *supra* note 56, at 661–62 (“[W]hile the outcome of the employees' decisionmaking process [whether to unionize] will impact employers, this fact does not entitle employers to an affirmative right to intervene in that process.”).

302. See *supra* Part I.A.1.

never meant to be adversarial in nature;<sup>303</sup> rather, they are a means to ensure the freedom of association.<sup>304</sup>

As one of the NLRA's purposes is to safeguard this freedom,<sup>305</sup> any future model should include alternative methods of certification. For example, an argument against the EFCA in the late 2000s was that the NLRA should be amended to replace the current NLRB election machinery with a rapid election regime.<sup>306</sup> This alternative would work within the NLRB-election framework with all of the NLRA organizing rules in place.<sup>307</sup> An NLRB election would immediately take place after a union files its initial petition, avoiding any employer interference.<sup>308</sup> As discussed in Part I.A.1, unions are abandoning the election certification process and turning instead to more effective methods outside the system.<sup>309</sup>

Instead, in an attempt similar to the EFCA,<sup>310</sup> future labor relations legislation should implement a mandatory card check procedure. Card check processes bypass the opportunity for employer interference by securing certification immediately upon majority support.<sup>311</sup> Unlike the PRO Act's attempt to amend the election procedure,<sup>312</sup> card check would work outside the current framework, focusing organizing drives more on employee choice rather than on holding onto support against an anti-union campaign.<sup>313</sup> Most union drives have already turned to card check and neutrality agreements for certification.<sup>314</sup> Alongside stronger penalties and the ability to self-enforce,<sup>315</sup> the Board's certification of a bargaining agent through card check would both lend legitimacy to immediate majority employee support and ensure recognition without employer interference.<sup>316</sup>

Card check recognition can be implemented in a few different ways.<sup>317</sup> Two important characteristics, in particular, that would affect unionization drives are: (1) whether card check is an option or the mandatory process

303. See H.R. REP. NO. 116-347, at 24 (2019) ("In the legislative history of the NLRA, Congress did not contemplate giving employers standing as parties in representation procedures, because these procedures are investigative, not adversarial, in nature.").

304. See Finkin, *supra* note 91, at 547–48.

305. 29 U.S.C. § 151.

306. See Sachs, *supra* note 56, at 658.

307. See *id.* at 667 (explaining that a rapid elections regime would still require a petition to the NLRB for an election, the Board to give notice to the employer that the drive is occurring, and an employee vote in "a secret ballot election conducted on the employer's property").

308. *Id.* at 667–68.

309. See *supra* notes 66–70 and accompanying text.

310. See *supra* Part II.C.

311. See Sachs, *supra* note 56, at 658.

312. See H.R. 2474, 116th Cong. § 2(e) (2020).

313. See *supra* note 189 and accompanying text.

314. See *supra* notes 66–72 and accompanying text.

315. See *supra* Part II.D.

316. See *supra* Parts I.A.1, I.B.3.

317. See Sachs, *supra* note 56, at 718.

and (2) the manner in which employees signal their support for the bargaining agent.<sup>318</sup>

As discussed in Part I.A.3, card check recognition is an optional method for unionization without the official support of NLRB certification.<sup>319</sup> Since authorization cards are a more effective method for recognition,<sup>320</sup> the NLRA should be amended to allow for official certification by the Board, not just an alternative option outside the purview of the statute.<sup>321</sup> Since the option would be more effective than NLRB elections and would better preserve employee free choice,<sup>322</sup> future reform models should implement card check as the centerpiece for certification.

As for the card check procedure, while the process, as is, allows for unionization without management influence,<sup>323</sup> the way in which authorization is expressed may also facilitate pro-union coercion from organizers or fellow employees.<sup>324</sup> To ensure that employee choice is safeguarded, workers should have the opportunity to cast their support not only at work but also in the privacy of their own homes, away from any coercive influence.<sup>325</sup> Future legislation should amend the NLRA to permit the Board to accept not only authorization cards signed by hand and given to union organizers but also authorization cards signed at home and submitted by mail, phone, or the internet.<sup>326</sup> Employees need a channel of certification that prevents any external coercive interference.<sup>327</sup>

With stronger penalties and improved NLRB enforcement machinery,<sup>328</sup> an amended NLRA could also significantly safeguard election procedures as a reserve option for certification.<sup>329</sup> The NLRB needs to have the ability to limit employer interference and reduce delays so that certification is more akin to an instant ballot.<sup>330</sup>

Using the LRA as a model, the NLRA should statutorily expedite election procedures by holding an election immediately upon the filing of a petition.<sup>331</sup> Card check is preferable because the process allows certification immediately upon filing, whereas the equivalent timing using the election framework would only be the filing of an election petition.<sup>332</sup>

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318. *See id.*

319. *See supra* notes 71–75 and accompanying text.

320. *See supra* Parts I.A.1, I.B.3.

321. *See supra* notes 71–75 and accompanying text.

322. *See supra* Parts I.A.1, I.B.3.

323. *See* Sachs, *supra* note 56, at 658.

324. *Id.* at 657.

325. *See supra* notes 52–65 and accompanying text.

326. *See* Sachs, *supra* note 56, at 721–23 (explaining how electronic voting gives employees flexibility and privacy to make their decisions without experiencing coercion from either the union or management).

327. *See supra* Part II.A.

328. *See supra* Part II.A.

329. *See supra* Parts I.A.1, I.A.4, II.B.3.

330. *See supra* notes 135–42 and accompanying text.

331. *See supra* Part I.B.1.

332. *See supra* Parts I.A.1, I.B.3.

Still, any reform that works within the election framework must aim to reduce delays to a minimum.<sup>333</sup>

If future legislative attempts follow the PRO Act's direction and try to amend the certification process within the election framework,<sup>334</sup> a provision that explicitly overturns the *Lechmere* decision should be included.<sup>335</sup> Absent from the PRO Act,<sup>336</sup> but included in the LRA,<sup>337</sup> such a provision allowing unions to access an employer's premises further equalizes the power imbalance between management and labor during unionization drives.<sup>338</sup> Alongside the proposed information symmetry provision,<sup>339</sup> unions would have a better chance to counter campaigns that occur during working hours, balancing the information employees receive before making their decisions.<sup>340</sup>

#### *B. Private Negotiations and Default Timeframes*

As to contract negotiations, the PRO Act's provisions regarding mediation and arbitration would effectively facilitate securing first contracts.<sup>341</sup> Based on the same timeframes as the EFCA,<sup>342</sup> all legislative reforms aimed at amending NLRA contract negotiations should include provisions to foster cooperation between the parties with alternative dispute resolution options,<sup>343</sup> including mediation and arbitration when agreement is not feasible.<sup>344</sup> Still, future reform models could improve on the EFCA and PRO Act by excluding the language that allows the parties to agree to longer timeframes for negotiations.

In each provision regarding the timeframes for mediation and arbitration, the PRO Act adds the phrase "or such additional period as the parties may agree upon."<sup>345</sup> As a result, the PRO Act would amend the NLRA to explicitly allow the parties to disregard the timing before either can request mediation or arbitration.<sup>346</sup> The issue at this stage of unionization is not that unions do not have enough freedom to contract, but that employers are bargaining in bad faith and prolonging negotiations to avoid first contracts and break the bargaining unit.<sup>347</sup> By giving the parties this freedom to

333. See *supra* notes 65, 135–42 and accompanying text.

334. See *supra* Part II.A.

335. See generally *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

336. See *supra* Part II.A.

337. See *supra* note 161 and accompanying text. The LRA sought to amend the NLRA to give the parties equivalent manners of communication with the bargaining unit. See H.R. REP. NO. 95-637, at 6 (1977).

338. See *supra* Part I.A.1.

339. See H.R. 2474, 116th Cong. § 2(d)(4) (2020).

340. See *supra* Parts I.A.1, I.B.1.

341. See *supra* Part II.B.

342. See *supra* note 192 and accompanying text.

343. See *supra* notes 241–45 and accompanying text.

344. See *supra* notes 241–45 and accompanying text.

345. H.R. 2474, § 2(d)(4)(K).

346. *Id.*

347. See *supra* notes 85–90 and accompanying text.

ignore the timeframes set for alternative dispute resolution, the PRO Act creates another channel to prolong negotiations.<sup>348</sup>

Instead, future models should maintain the timeframes set by the EFCA and the PRO Act and amend the NLRA to further prevent any breach of the duty to bargain in good faith.<sup>349</sup> Deterring these ULPs requires stronger penalties and NLRB enforcement.<sup>350</sup> As such, NLRA reform should include not only self-enforcing orders and monetary fines for negotiating in bad faith, as the PRO Act includes,<sup>351</sup> but also additional penalties for the breach.<sup>352</sup> For example, the reformers should consider the LRA penalty that awards compensation at the new level rather than the status quo level before unionization directly to workers where bargaining eventually ended in a first contract.<sup>353</sup> Penalizing employers in this manner deters not only bad faith efforts to prevent a contract<sup>354</sup> but also delays that occur to keep the status quo working conditions for as long as possible.<sup>355</sup>

The PRO Act also focuses too strongly on trying to facilitate private negotiations between the parties,<sup>356</sup> as the legislation would amend the NLRA to allow mediation requests only after the timeframe expires and for arbitration thirty days after mediation has begun.<sup>357</sup> Instead, future reforms should build on the EFCA and PRO Act,<sup>358</sup> leaving open an option for a mediation request at any point during negotiations, subject to NLRB review for a party that tries to use this option as a path to delay arbitration or agreement.<sup>359</sup> This option would strengthen the positions of bargaining agents that are considerably weaker compared to larger employers.<sup>360</sup> Together with a provision that would compel arbitration after mediation fails to secure a contract, these requests would facilitate a greater number of first contracts.<sup>361</sup>

### C. Private Right of Action, Stronger Penalties, and Criminal Liability

A few improvements to the NLRB's enforcement and penalties are worth discussing. A legislative reform model to amend the NLRA should include: (1) a private right of action whenever employees decide to sue their employer, (2) stronger penalties above \$50,000 for larger corporations, and (3) criminal liability for directors and officers who purposefully direct a company to commit serious ULPs against employees.

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348. See *supra* notes 246–47 and accompanying text.

349. See *supra* Parts I.A.2, I.B.3.

350. See *supra* Part I.A.2.

351. See *supra* notes 275–78, 280–83 and accompanying text.

352. See *supra* Parts I.A.2, I.A.4.

353. See *supra* note 167 and accompanying text.

354. See *supra* note 167 and accompanying text.

355. See *supra* notes 135–36 and accompanying text.

356. See *supra* Part II.B.

357. See *supra* notes 234–40 and accompanying text.

358. See *supra* Part I.B.3.

359. See *supra* Parts I.A.2, I.A.4.

360. See *supra* Parts I.A.2, I.A.4.

361. See *supra* Parts I.A.2, I.A.4.

Under the PRO Act, a private right of action would arise for employees alleging a ULP only sixty days after filing a petition or after the NLRB general counsel decides not to pursue the violation and notifies the complainant.<sup>362</sup> Almost every other important federal employment statute gives employees a private right of action in federal court “without serious restriction.”<sup>363</sup> Title VII of the Civil Rights Act, the Americans with Disabilities Act of 1990,<sup>364</sup> and the Employee Retirement Income Security Act<sup>365</sup> all vest a right to civil action.<sup>366</sup> The PRO Act tries to remedy this deficiency by granting a conditional private right of action under the NLRA;<sup>367</sup> instead, this right should exist whenever an employee wants to bring a suit against an employer without needing to wait the required sixty days, a period during which employers can impose poor working conditions and implement ULPs in the workplace.<sup>368</sup> In addition, as federal court actions are adjudicative, unlike administrative NLRB decisions,<sup>369</sup> every case that is decided will have precedential effect,<sup>370</sup> easing courts’ deference to the NLRB’s labor relations expertise and reducing the Board’s busy docket.<sup>371</sup> Similarly, NLRA reform should adopt the LRA’s provisions that expedite NLRB decisions and delays, including those that would statutorily reduce delays in ALJ appeals processes.<sup>372</sup> Furthermore, as the PRO Act would amend the NLRA to require the Board to give priority to alleged violations that have involved “discharge or other serious economic harm,”<sup>373</sup> a private right of action for any alleged ULP permits wronged employees to pursue actions more efficiently and with more certainty of resolution.

A complete analysis of the effect of various economic penalty values on corporations based on size, industry, and other profit determinations is outside the scope of this Note, but the size of the maximum penalty must be addressed.<sup>374</sup> Congress has determined that a maximum penalty for a single violation should be \$50,000, with possible additional awards depending on the severity of the violation.<sup>375</sup> Compared to the LRA’s double backpay and the EFCA’s triple backpay including possible civil

362. H.R. 2474, 116th Cong. § 2(i)(1)(A) (2020).

363. See *Brudney, supra* note 15, at 231 (“Employees generally are given the right to sue without serious restriction . . . . By contrast, the NLRA places enforcement authority entirely in the hands of the Board . . . .”).

364. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

365. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S.C.).

366. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. §§ 626(c), 1132(a).

367. See H.R. 2474, § 2(i)(1)(A).

368. See *supra* notes 134–39 and accompanying text.

369. See *Brudney, supra* note 15, at 231.

370. See *supra* notes 128–32 and accompanying text.

371. See *supra* notes 128–32 and accompanying text.

372. See *supra* notes 138–39 and accompanying text.

373. See H.R. 2474, § 2(h)(1)(B).

374. See *supra* Part II.D.

375. See *supra* notes 281–85 and accompanying text.

penalties of \$30,000, the PRO Act's penalties are significant.<sup>376</sup> Yet, if one uses the estimate that the cost of unionization per worker is \$40,500,<sup>377</sup> an employer's net penalty for committing a single ULP would only be around \$10,000.<sup>378</sup> Especially as a single ULP may deter other employees from supporting unionization,<sup>379</sup> this penalty seems meager for large, multinational corporations.<sup>380</sup> Future legislation must ensure that the NLRA is amended to include fines that are hefty enough to deter even the largest corporations from impeding on the right to collectively bargain.<sup>381</sup> Just as the PRO Act directs arbitration panels to do so when determining the size of awards,<sup>382</sup> future reforms should amend the NLRA to direct the Board, arbitration panels, and courts to take into account various benchmarks on a sliding scale when deciding the size of a penalty.

Finally, in terms of director and officer liability, future legislation should implement the potential for criminal liability for the most egregious and explicit acts committed against employees. Criminal liability is currently unavailable for ULP violations.<sup>383</sup> Unlike its predecessors,<sup>384</sup> the PRO Act would amend the NLRA to give the Board the power to levy civil liability upon directors and officers.<sup>385</sup> With the addition of a private right of action,<sup>386</sup> criminal liability should be considered for egregious conduct.<sup>387</sup> As the PRO Act increases the severity of monetary penalties for multiple offenses,<sup>388</sup> criminal liability should be considered only if a director or officer has, on multiple occasions, explicitly directed a company to carry out a ULP that involves a discharge or other serious economic harm. The NLRA should vest the power to levy criminal penalties not within the Board but through private rights of action.<sup>389</sup>

#### CONCLUSION

Although the text of the NLRA has remained almost completely unchanged for close to seventy years, the need for effective reform has been lingering for decades. Despite the difficulty of passage that the legislation will face in the Senate, the PRO Act is the most comprehensive attempt at private sector labor relations reform in the history of the NLRA. Although the filibuster remains, reformers continue to fight for effective labor law, giving unions a hopeful glimpse into the future of labor management

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376. See *supra* notes 165–90 and accompanying text.

377. See Lee & Mas, *supra* note 50, at 3.

378. See *id.*

379. See *supra* note 51 and accompanying text.

380. See *supra* note 47 and accompanying text.

381. See *supra* Part I.A.4.

382. See H.R. 2474, § 2(d)(4)(K).

383. See *supra* note 142 and accompanying text.

384. See *supra* Part I.B.

385. See *supra* note 283 and accompanying text.

386. See *supra* notes 269–72 and accompanying text.

387. See *supra* Parts I.A.1, I.A.4.

388. See *supra* Part II.D.

389. See *supra* Part II.D.

relations. Even if the PRO Act itself does not find its way into the U.S. Code, this Note proposes a more effective, comprehensive model for reform based on the 2020 legislation. By addressing every stage of unionization and the NLRB's ability to deter coercive activity, the NLRA is ripe for an amendment to restore its goal of protecting all private sector workers' rights to associate and collectively bargain.