Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View

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This article argues that the industrial relations legal and policy-making systems in the United States have developed zero-sum attributes that have made it extremely difficult to effectuate changes in the National Labor Relations Act to address the legitimate concerns of labor and management. Any proposals to amend the NLRA are viewed as a loss for one of the parties. At the same time, these attributes have increased political conflict between labor and management over Board nominees and operations. The paper also points out that there is no vehicle for analyzing statutory controversies that arise under the NLRA in a neutral manner that facilitates compromise.

The article then proposes fundamental changes that would make the current labor law system tripartite (labor, management, neutral) in character, in contrast to its current public nature. These proposals are based on the United States War Labor Board and Canadian experiences. Thus they have proven workable in the United States and in a country that is quite similar to the United States in many industrial relations attributes.

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INTRODUCTION

As is generally well-known to even casual observers of the labor movement in the United States, the percentage of the American workforce represented by unions has persistently declined over the last four decades. From a peak in 1955 of approximately 33%, the percentage of the nonagricultural workforce who were members of unions dropped to approximately 14.9% by 1995. For 1955 data, see LEO TROY, TRADE UNION MEMBERSHIP, 1897-1962, (National Bureau of Econ. Research Occasional Paper No. 92, 1965). For 1996 data, see Union Members in 1995, USDL News Release 96-41, tbl. 1 (Feb. 9, 1996).
level of unionization in the public sector. In 1995, approximately 37.8% of the public sector workforce were union members, while private sector union membership stood at approximately 10.4%. This latter figure is very close to the unionization level in the United States during the late 1920s and early 1930s, which was a difficult period for unions because there were no general laws protecting the rights of employees to unionize. In fact, American unionization reached its lowest levels between World War I and 1935, the year in which Congress passed the National Labor Relations Act (NLRA), also known as the Wagner Act, which formed the basis of the industrial relations legal system in the United States.

Many factors have contributed to the decline in the American unionization level since the middle 1950s. One likely factor is the overall reduction of employment in the manufacturing and transportation sectors, both of which were highly unionized. Another likely factor is the use of improved human resource management techniques, which has eliminated many of the most egregious employer practices that encouraged employees to unionize.

Another view suggests that an anti-union bias has developed in American labor law which has, in turn, substantially contributed to the decline in unionization levels. This view has produced a series of proposals to reform the NLRA. However, all of these efforts have failed. The first modern effort, in 1977-78, failed to survive a Senate filibuster. Later attempts, in the 1990s, also failed. The most recent effort to reform the NLRA was through the establishment of the Commission on the Future of Worker-Management Relations.

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2. Union Members in 1995, supra note 1, tbl. 3.
7. See discussion infra Part IA.
The perception that the development of an anti-union bias is a primary cause of declining unionization levels in the United States is buttressed by comparative research on American and Canadian labor law that began in the 1980s. It is important to note that the Canadian unionization level has remained at approximately 35% since the middle 1950s, while American unionization levels declined over the same period.

This fact is highly significant because many American companies and unions operate in both countries. Further, Canada's industrial relations system, although provincially based, has a "common core" across all jurisdictions that is quite similar to the Wagner Act model which forms the basis of the American industrial relations system.

Despite these similarities, the accumulated evidence suggests that differences between the American and Canadian labor law systems account for a substantial portion of the divergence in unionization levels between the two countries. This paper explores the insights gained from investigating the differences and similarities between the American and Canadian labor law systems. Section I reviews the three unsuccessful attempts to amend the NLRA over the last twenty years. This paper argues that these proposed amendments failed because they were merely continuations of a "zero-sum"


11. Adams, supra note 9, at 2-87.

12. Id. at 2-87 to 2-95. All of the Canadian jurisdictions have majority determination of representation in an appropriate unit, exclusive representation, an obligation on the part of employers to bargain, workplace- or firm-level negotiations, defined unfair labor practices, and administration by a special board.
labor law system.\textsuperscript{13} Using the hearings of the Commission on the Future of Worker-Management Relations as a background, Section II illustrates the wide range of industrial relations practices that have developed under the NLRA. It also provides some perspective on the labor law reform proposals that failed in the late 1970s and early 1990s and the prospects for any future proposals to amend the NLRA.

Section III explores some characteristics of the Canadian labor law systems that have fostered higher unionization levels and a more vibrant collective bargaining system than that of the United States. Canadian institutions have maintained a viable collective bargaining system while, at the same time, protecting the fundamental interests of both employers and unions. This section also demonstrates that the Canadian systems are similar in important aspects to the War Labor Board system used in the United States during World War II.

Finally, Section IV outlines proposals for changes to the American labor law system based on both the War Labor Board system and the Canadian labor law systems. These proposed changes would fundamentally alter the existing American labor law system. Essentially, the rationale for these proposals is that they have proven workable in both Canada and the United States.

I REFORM PROPOSALS SINCE 1977: ANALYSIS AND IMPLICATIONS

A. Substance of the Proposals

Since 1977, there have been three noteworthy attempts to amend the National Labor Relations Act. The first of these was the Labor Law Reform Act of 1977-78 (LLRA). This was followed by two attempts in the 1990s to ban employers from hiring permanent replacements for economic strikers.

The LLRA was designed to be a broad-based reform. Had it been enacted, the LLRA would have instituted several significant changes, including:

- reducing delays in Board proceedings by raising the number of Board members from five to seven;
- placing an absolute maximum of 75 days on the period between petition for and election of a representative;
- requiring double back pay in cases involving unlawful discharge;
- permitting federal contract debarment of willful labor law violators;
- providing unions with an opportunity to respond to employers' addresses made to employees during working hours;

\textsuperscript{13} The phrase "zero-sum" is adapted from the game theory notion of a zero-sum game. In a zero-sum game, the sum total of gains available to all participants must equal zero. Joint gains do not exist. Thus, in a two person game, a participant succeeds only at the expense of the other participant.
• requiring the National Labor Relations Board (NLRB) to promulgate rules on presumptively appropriate bargaining units;
• permitting the NLRB to hold elections and then impound challenged ballots; and
• permitting make-whole relief for employees in unlawful refusal to bargain cases in first contract situations.14

Because of its many pro-employee reforms, the LLRA was strongly and vigorously opposed by employers.15

The LLRA was followed by two unsuccessful attempts to ban the hiring of permanent strike replacements, the first in 1990-91, and the second in 1993-94.16 As was the case with the LLRA, employers lodged an extremely aggressive and ultimately successful lobbying campaign against these proposals.17

B. Analysis of the Proposals in the Context of Current Labor Law

The above proposals were all consistent with the zero-sum structure of the NLRA because each of them would have either expanded union rights or infringed on employer interests.

The structure of the NLRA can be characterized as “zero-sum” because it has evolved into a law which primarily determines the rights of employers, unions and employees in relation to and against each other.18

Typical concerns addressed by the NLRA include defining the activities

18. Despite this apparent evenhandedness, during the past decade, over 70% of the unfair labor practices involved violations of Section 8(a) of the NLRA. See NLRB ANN. REP. (1976-1990).
that employers may engage in to restrict collective bargaining activity; defining the activities that employees and unions may engage in to encourage collective bargaining activity; limiting the pressures that each party may place on the other in negotiations; and determining whether there are matters on which the employer has the right to proceed without first negotiating with the union.

These concerns, all of which are at the heart of the NLRA, involve zero-sum rights. Under the current American labor law system, each expansion of one party’s legal rights results in a corresponding contraction of the opposing party’s rights. For instance, granting employers the right to speak during election campaigns removes from employees the right to be free from the potential interference or coercion that could result when an employer expresses a view on the matter of unionization.\(^{19}\) Similarly, permitting employers to address their employees during working hours without permitting the union to respond removes both the employees’ right not to listen to their employer’s views and their right to hear both sides.\(^{20}\) Conversely, permitting the union to respond to such captive audience speeches would have resulted in a corresponding reduction in the employer’s rights.

The debate over allowing employers to hire replacement workers also involves another application of the zero-sum dynamic. Granting employers the right to hire permanent replacements for strikers increases the scope of employers’ self-help options.\(^{21}\) Similarly, giving employers the right to make organizational changes which affect employment without first requiring employers to negotiate with their respective unions removes from those unions a significant part of their bargaining leverage.\(^{22}\) On the other hand, banning permanent replacements would have reduced the scope of employers’ right to engage in self-help during an economic strike.

Also, those provisions in the LLRA that would have required Board rule-making to create presumptively appropriate units limited the rights of employers to structure units to the particular characteristics of their organizations. In this sense, the use of rule-making would have reduced the procedural rights of employers.\(^{23}\)

\(^{19}\) See, e.g., NLRB v. Virginia Electric and Power Co., 314 U.S. 469, 477 (1941)(asserting that the Board may not base a finding of a violation of the Act solely on employer speech and posting notices at plants).

\(^{20}\) See, e.g., Livingston Shirt Co., 107 N.L.R.B. 400, 408-09 (1953).


\(^{22}\) See, e.g., First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 678-79 (1981); United Food Co. v. NLRB (Dubuque Packing Co.), 81 F.3d 24 (D.C. Cir. 1993), cert. denied.

\(^{23}\) In American Hosp. Ass’n v. NLRB, 499 U.S. 606, 608-609 (1991), the Supreme Court upheld the Board’s right to declare eight units presumptively appropriate in cases involving acute-care hospitals.
Viewed in this context, the opposition of employers to these proposed reforms is not surprising. It would be expected that employers would oppose any infringements on their procedural and substantive rights.\textsuperscript{24} The remedial structure of the NLRA does not directly affect substantive rights. Because the cost of committing an unfair labor practice—net of legal expenses—is low, however, employers are more likely to violate the law when they believe it is in their interest to do so.\textsuperscript{25} The low cost of violating the law also permits employers to aggressively test the limits of their rights under the NLRA, by engaging in acts of borderline legality.\textsuperscript{26} Moreover, because the existence of employer property rights permits the employer to maintain actions pending the outcome of litigation, employees must still bear the burden of employer actions regardless of whether the actions are ultimately found to be legal.\textsuperscript{27} Looked at in this context, provisions that increase the penalties on employers reduce their rights to explore legal options under the NLRA.

Given the zero-sum nature of both the NLRA and the proposed amendments to it, there are obvious reasons why labor law reform and strike replacement legislation were advocated by unions, but resisted by employers. For similar reasons, the 1947 Taft-Hartley amendments were advocated by employers and opposed by unions. Each of these proposed reforms shared the zero-sum dynamic, in which each change would have decreased the rights of one party, and expanded the rights of the other.

C. "Zero-Sum" Labor Law and Industrial Relations in the United States

This focus on legal rights in the American labor law system has encouraged the movement of industrial relations toward the extremes in response to changing economic conditions. While some relationships have turned cooperative, others have turned harsh and conflictual.\textsuperscript{28}

The nature of conflictual relationships between employers, employees and unions depends on the manner in which each party exercises its legal rights. Nonunion employers may use every legal means at their disposal to


\textsuperscript{27} See generally Block & Wolkinson, supra note 26; Block et al., supra note 26.

resist organization by their employees. For instance, employees may be brought into their managers' offices and discouraged from voting for the union. Employers may also distribute literature which portrays the union as an outsider who is opposed to the company and its employees. In fact, given the weakness of remedies available under the NLRA, employers may decide that the cost of committing unfair labor practices is so small that they may harass or even discharge employees.29

In a similar fashion, unionized employers may pyramid their legal rights to either eliminate or obtain substantial leverage over the union. This process is simple and straightforward. At the close of the collective bargaining contract, the employer has the right to present the union with a proposal that is extremely favorable to the employer, but unacceptable to the union. This practice is not likely to be found in violation of the NLRA. So long as the employer continues to meet with the union, and demonstrates a willingness to sign an agreement, it can legally exercise these rights to gain concessions. Once negotiations reach an impasse, the employer may then submit its final proposal. At this point, the union's options are limited; it can either strike and risk striker replacement, or it can accept the employer's terms.30

If the union chooses to strike and its workers are replaced, there is a substantial likelihood that the union will eventually be decertified. Notice that although the employer has merely exercised its legal rights, the outcome completely undermines the intended purpose of the NLRA, which is designed to support unionization and maintain a collective bargaining relationship where employees so desire. Under the NLRA, the exercise of bargaining power is supposed to determine the terms of an agreement.31 Yet, in the hypothetical outlined above, a legal exercise of bargaining power can be used to eliminate the collective bargaining relationship.

On the other hand, if the union simply accepts the employer's terms, the pyramiding of employer rights still results in an anomalous outcome. Rather than yielding a bilaterally determined agreement, the result is a unilaterally imposed set of employment terms and conditions.32

The clear result of such outcomes is a declining level of unionization in the United States. It may be argued that this state of affairs should not be lamented if it is the result of employee choice against unionization. The possibility must be raised, however, that the organizing process has so

30. See EMPLOYEE CHOICE, supra note 28, at 90.
evolved against unions that the choice mechanism has been compromised. If so, then many employee choices against representation do not represent their true opinions.33

In addition, the pyramiding of employer rights can result in the elimination of collective bargaining relationships for reasons other than employee desires against representation or competitive pressures on the firm. Although the federal government is not empowered through the NLRB to determine the content of collective bargaining agreements,34 the noninterference principle was not designed to be used to eliminate a bargaining relationship or discourage concerted activity by employees.35

D. Implications of “Zero-Sum” Labor Law

Neither party, if acting rationally, would support any reduction of its legal rights. Because any extension of one party’s rights reduces the opposing party’s rights in a zero-sum system, attempts to make legislative changes in the system have generated substantial conflict. For instance, employer attempts to address perceived inequities in the Wagner Act through the Taft-Hartley Act were enacted only after Congress overrode a presidential veto. Also, as discussed above, over the last twenty years, employers have successfully resisted attempts to decrease the scope of their ability to resist union organizing and to hire permanent replacement workers. They have also successfully resisted attempts to allow harsher remedies to be imposed upon them in response to their unlawful activities.

While this stagnation appears to have benefitted employers over the last twenty years, the system is now beginning to work against their interests as well. Employer groups have advocated changes to section 8(a)(2) that they believe would increase their ability to initiate employee participation plans without violating the law.36 Employer representatives have also


34. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)(holding that the Board may not compel an employer’s agreement to a provision); NLRB v. Ins. Agents Int’l Union, *supra* note 31, at 490 (“And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract.”).

35. *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)(providing that an employer may not lawfully offer twenty years of superseniority to permanent striker replacements and to strikers returning to work); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1987)(providing that an employer may not lawfully pay vacation benefits accrued under an expired collective agreement to nonstrikers, while refusing to pay those same benefits to strikers).

36. The Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1995), passed the House by a vote of 221-202 on September 27, 1995. If enacted, HR 743 would have amended the NLRA to allow employers to establish, assist, maintain, or participate in an organization or entity in which employees participate, to at least the same extent practicable as do representatives of management, to address matters of mutual interest . . . if such organizations or entities do not have,
recently expressed concern about requests to the Board by the General Counsel for the issuance of section 10(j) injunctions. However, the current system makes any change extremely difficult to accomplish.

The failure of these proposals shows that there is no mechanism in American labor law for "normal maintenance" of the industrial relations system through marginal and incremental changes that might prevent larger problems from occurring. In view of the absence of such mechanisms, it is not surprising that the NLRA has not been substantially revised since 1947. For almost fifty years, through numerous Board and Court decisions, through changes in employment practices, and through enormous changes in the world economy, the NLRA has remained essentially unchanged.

Perhaps because of the absence of a vehicle for addressing labor law matters in a more objective manner, much of the partisan energy over the last fifteen years has been channeled into intense conflict over nominations to the National Labor Relations Board. There is evidence that the division between labor and management over Board nominations has become deeper since the late 1970s because each party has believed, at one time or another, that the Board was dominated by appointees favorable to the other party. As a result, confidence in the integrity of the Board has been lost. When the Board was dominated by Republican appointees in the middle of the 1980s, union complaints about the Board's alleged anti-union, pro-employer ideology became so intense that the House of Representatives held oversight hearings.

Claim, or seek authority to: (1) be the exclusive bargaining representative of the employees; or (2) negotiate, enter into, or amend collective bargaining agreements. The amendment would be inapplicable in any case in which a labor organization is the representative of such employees (any unionized workplace). Although an amended version of the bill was passed by the Senate by a vote of 53-46 on July 10, 1996, it was vetoed by President Clinton on July 30, 1996.


40. Oversight Hearings on the Subject "Has Labor Law Failed?": Joint Hearings before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor and the Manpower and Housing Subcommittee of the Committee on Government Operations House of Representa
newly acquired influence in a Republican-controlled House of Representa-
tives to threaten the Board's budgetary appropriation because of what was
perceived as the Board's anti-employer, pro-union ideology. 41

II
RECONSIDERING THE ZERO-SUM MODEL

As the twentieth century closes, it is clear that the rights-based, zero-
sum labor law system in the United States has caused extreme distress for
many employees, unions, and employers. To the extent that it governs a
continuing relationship between an employer and its employees, labor law
can be distinguished from other kinds of business-related law which govern
relationships between parties that have either a one-time relationship or a
strictly business relationship. 42

Given the conflictual and extreme development of the current rights-
based system, the United States should reconsider and perhaps move away
from the zero-sum model of the NLRA. Instead, the United States should
consider adopting a system that encourages parties to contemplate their
practical interests as opposed to their legal rights. Can a system that pro-
tects the interests of both parties be developed? Can a system be developed
that relies on problem-solving and is less formal than the current system?

The Commission on the Future of Worker-Management Relations
demonstrated that a system that encourages the parties to consider their in-
terests rather than their rights would be useful to the United States. The
hearings presented numerous examples of companies that have successfully
developed cooperative relationships with both unions and independent em-
ployee groups. Unionized firms, along with the unions which represent
their employees, testified before the Commission about the linkage between
cooperative labor-management relations and financial and market success.
Among the well known unionized firms testifying were Ford Motor Co.
(United Auto Workers); 43 New United Manufacturing Company (United

41. See, e.g., Aaron Bernstein, The Long Knives are out for Bill Gould's NLRB, BUSINESS WEEK,
September 25, 1995, at 61 (describing NLRB actions which have triggered opposition of business com-
munity); Robert L. Rose, Federal Labor Board Gets More Aggressive, To Employers' Dismay, WALL

42. The relationship between a corporation and its shareholders is quite different from the relation-
ship between the corporation and its employees. With the possible exception of executives whose com-
pen-sation may be primarily in stock options, most shareholders do not depend on the relationship for a
large share of their income. In addition, shareholders can extricate themselves from that relationship
simply by selling their stock; the severance is almost always voluntary and the costs of severing the
relationship are quite low. Employees, on the other hand, generally depend on the relationship for a
substantial portion of their income. Severance of the relationship may be involuntary, imposing substan-
tial costs on the employee.

43. Hearing of the Comm'n on the Future of Worker-Management Relations, 17-43 and 48-
49(D.C., July 28, 1993).
Auto Workers);\textsuperscript{44} Miller Brewing Co. (United Auto Workers);\textsuperscript{45} Bell South (Communications Workers of America);\textsuperscript{46} Philip Morris (Bakery, Confectionery and Tobacco Workers Union);\textsuperscript{47} Reynolds Metals (International Association of Machinists);\textsuperscript{48} National Steel Corporation (United Steelworkers of America);\textsuperscript{49} AT&T (Communications Workers of America);\textsuperscript{50} and Scott Paper Company (United Paperworkers International Union).\textsuperscript{51}

Lesser known unionized firms that have prospered under labor-management cooperation include Healthspan (Service Employees International Union), a 15,000-employee health care organization;\textsuperscript{52} Buckhorn, Inc. (United Steelworkers of America), a 190-employee manufacturer of reusable plastic material handling containers;\textsuperscript{53} and Louisville Gas and Electric (International Brotherhood of Electrical Workers), the utility serving the Louisville, Kentucky area.\textsuperscript{54}

Evidence from the Commission hearings also suggests that nonunion firms can be successful by cooperating with their employees rather than by relying on the assertion of their legal rights. Well known firms that are either nonunion or operate with many nonunion employees that have developed strong, nonlegalistic employee relations systems include Toyota,\textsuperscript{55} Coca-Cola,\textsuperscript{56} and Federal Express.\textsuperscript{57} Lesser known firms include Donnelly Corporation, a 2600-employee manufacturer of automobile mirrors, windows, and glass components for appliances;\textsuperscript{58} Herman Miller Corporation, a 5700-employee office furniture manufacturer;\textsuperscript{59} and VCW Corporation, 74-employee specialty insurance agency for 8,000 independent contractors nationwide.\textsuperscript{60}

While these examples do not demonstrate that firms cannot be successful through the vigorous exercise of their legal rights, they do indicate that

\begin{itemize}
  \item 44. Hearing of the Comm'n on the Future of Worker-Management Relations, 92 (San Jose, Ca., Jan. 27, 1994).
  \item 46. Hearing of the Comm'n on the Future of Worker-Management Relations, 72 (Atlanta, Ga., Jan. 11, 1993).
  \item 48. Hearing, supra note 46, at 89-100.
  \item 49. Hearing of the Comm'n on the Future of Worker-Management Relations, 6 (D.C., Sept. 15, 1993).
  \item 50. Id. at 56-95.
  \item 51. Id. at 100-39.
  \item 52. Hearing, supra note 43, at 160-212.
  \item 53. Hearing, supra note 47, at 153-62.
  \item 54. Hearing, supra note 47, at 73-87.
  \item 55. Hearing, supra note 49, at 140-78.
  \item 56. Hearing, supra note 46, at 101-17.
  \item 57. Hearing, supra note 43, at 216-51.
  \item 58. Hearing, supra note 45, at 55-75.
  \item 59. Id. at 41-54.
  \item 60. Hearing, supra note 43, at 105-60.
\end{itemize}
the exercise of such rights is not necessary to succeed. Thus, a labor law model that encourages parties to move away from the exercise of legal rights and toward an interest-based relationship has the potential to create competitive firms and still protect the legitimate interests of employers, unions, and employees.61

III
Two Interest-Based Models

The Canadian labor law systems and the War Labor Board System temporarily used in the United States are useful models for developing an interest-based labor law system to replace the current zero-sum system.

A. The Canadian Models

The Canadian industrial relations systems have three attributes that merit attention from the United States. First, the Canadian systems have a normal maintenance mechanism. Second, the Canadian systems employ a wider scope of informal activities and greater independence of the industrial relations legal system. Third, Canadian labor boards have a tripartite structure.

1. The Normal Maintenance Mechanism

Unlike the United States, the Canadian provinces are continually amending their labor law statutes. For example, between 1947 and 1994, Alberta amended its statute 13 times.62 Ontario has amended its labor relations act 22 times since 1950.63 All of the other provinces demonstrate similar patterns of revision.64

Clearly, all amendments are not of equal importance. For example, the 1979 amendments to the Ontario Labour Relations Act transferred functions between governmental offices, provided that the Minister of Labor refer differences to an arbitrator appointed by the Office of Arbitration, and also placed time constraints on statutory grievance arbitration.65 On the other hand, the 1992 amendments prohibited employers in Ontario from hiring


62. ADAMS, supra note 9, at 2-8 to 2-16.

63. Id. at 2-54 to 2-64.2.

64. See ADAMS, supra note 9, at 2-1 to 2-95, for a discussion of these legislative patterns.

65. ADAMS, supra note 9, at 2-59. The legislation in all Canadian provinces requires that the parties create a method for peacefully resolving disputes during the term of the collective agreement. The predominant method is grievance arbitration. Id. at 12-9 to 12-18.
permanent replacements for strikers and limited employers to the use of in-plant management personnel for operation during a strike.66 The 1995 amendments repealed many of the 1992 changes and eliminated card based recognition.67

This continual amending of the provincial labor law statutes demonstrates a vibrant industrial relations legal system, in which both parties are able to have their interests represented. Moreover, frequent amendments prevent these laws from tilting too far in the direction of any party for an extended period of time. In short, amendment patterns in the Canadian systems demonstrate that Canada has developed a system of “normal maintenance” of its labor law statutes.

One important factor in the Canadian systems is Canada’s parliamentary system of government. Because both political parties form alliances with the labor-backed New Democratic Party in order to form a government, changes in labor legislation are far more likely in Canada than in the United States.68 Still, the fact that the Canadian political system is more conducive to labor law changes than the American system does not detract from the fact that the Canadian labor law systems have normal maintenance mechanisms.

2. The Scope of Activities and Independence of the Canadian Industrial Relations Systems

The role of the American National Labor Relations Board and other federal and state governmental agencies, such as the Federal Mediation and Conciliation Service, is generally passive during collective bargaining. The NLRB becomes involved only when a refusal to bargain or other unfair labor practice charge is filed, and then only to determine if an unfair labor practice was committed. Similarly, the Federal Mediation and Conciliation Service, as well as the state mediation agencies, become involved only when invited.

In Canada, however, the federal and provincial governments generally play a substantial role in monitoring the bargaining process. The federal jurisdiction,69 New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Ontario, all require mediation as a precondition to a strike or

66. Id. at 2-64.
69. Certain industries that are viewed as having a direct effect on interprovincial commerce are covered by federal labor law in Canada, and regulated by the Canada Labour Relations Board. The following sectors are under the federal jurisdiction: air transportation, banking, broadcasting, communications, crown corporations (e.g., Canada Post), flour, feed mills, grain elevators, longshoring, interprovincial and international railways, interprovincial and international road transport, shipping and navigation, and anything else under the federal jurisdiction. See CAN. LAB. REL. BD., ANN. REP. (1990-91) at 4. These jurisdictional distinctions are based on an interpretation of the Constitution Act of 1867,
lockout. In every jurisdiction, a request by one party for mediation results in the appropriate governmental office initiating the process. The appropriate governmental agency may initiate the process in British Columbia, Quebec, and Saskatchewan. In some provinces, the Minister of Labor may appoint a conciliation Board prior to a legal strike being called.

All provinces, except Ontario and the federal jurisdiction, require a strike vote before a legal strike may be called. Five provinces and the federal jurisdiction allow the appropriate governmental agency to conduct a strike vote among employees on an employer’s final proposal. Eight jurisdictions—including British Columbia, Manitoba, Newfoundland, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the federal jurisdiction—provide for first agreement arbitration by the government, generally upon the application of either party.

These mechanisms are designed to minimize labor conflicts. In so doing, they bring the federal and provincial governments into the bargaining process to a much greater degree than governments in the United States. While the Canadian governments cannot prevent strikes or make outcomes a function of something other than the bargaining power of the parties, they can help assure that the bargaining power of one side is not used to undermine the collective bargaining relationship or the existence of the other party. Such governmental intervention also helps to assure that union power is not used to severely harm smaller employers.

In addition to the wider scope of activities by the Canadian governments, the Canadian labor systems are also characterized by limited judicial review of labor board decisions. Privative clauses in all Canadian labor statutes generally limit judicial review to claims that the labor board did not have jurisdiction over the case, or that the party was denied “natural justice,” which is fairly equivalent to a due process claim in the United States.

As a result, the decisions of Canadian labor boards are much more likely to be final than the decisions of their American counterpart. Further, Canadian labor board decisions have a very low rate of appeal. For instance, between 1980 and 1992, approximately 7.1% of labor board cases in Ontario closed with a court decision. The figures are similar for British
Columbia, which had a 5.2% appeal rate between 1988-91, and for the federal jurisdiction, which had a 6.4% appeal rate between 1980 and 1991. On the other hand, between 1980 and 1992, approximately 33% of all NLRB compliance orders were closed with a court decision rather than a board decision.\(^\text{78}\)

Canadian law's greater deference to its labor boards means that the Canadian systems are much less likely than the American system to be administered by judges. Instead, it is more likely in Canada that the labor law system will be administered by industrial relations experts. Essentially, the system is much more self-determinative in Canada than in the United States.\(^\text{79}\)

3. **Tripartitism**

Although both the United States and Canada use labor relations boards as the primary means for adjudicating labor law disputes, the apparent similarity between the two system fades away when one examines the composition of each nation's labor boards. The NLRB is composed of political appointees who serve five-year terms, while eight Canadian provinces have tripartite boards which consist of labor, management and neutral representatives.\(^\text{80}\) In the context of the differing legal systems, this difference in composition leads to substantially different institutional outcomes.\(^\text{81}\)

The NLRB consists of political appointees with no formal links to either labor or management.\(^\text{82}\) Political questions aside,\(^\text{83}\) the NLRB is

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\(^\text{80}\) The seven provinces with tripartite boards are British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, and Saskatchewan. Quebec has a system of labor courts. See Adams, supra note 9, at 2-74 to 2-75 and 5-11 to 5-14. In addition, the Minister of Labour of Canada has recently introduced a bill which would reconstitute the Canada Labour Relations Board on a tripartite board rather than a neutral board. See "The Honourable Alfonso Gagliano, Minister of Labour Introduces Changes to the Canada Labour Code, Part 1," Minister of Labour, Deputy Leader of the Government in the House of Commons, News Release 96-87, November 4, 1996 at http://labour_travail.hrdc_drhc.gc.ca/labour/newsrele9687_e.html.

\(^\text{81}\) For a brief discussion of this tripartitism, see Unionism in Canada, U.S., supra note 10.

\(^\text{82}\) By contrast, Executive Order 9017 establishing the National War Labor Board on January 12, 1942 created a tripartite body consisting of four members representing labor, four members representing management, and four members representing the public. See Industrial Disputes and Wage Stabilization in Wartime, in 1 U.S. DEPT. OF LAB., THE TERMINATION REPORT OF THE NAT'L WAR LAB. BD. 6-7 (1947) [hereinafter The Termination Report].

\(^\text{83}\) Although the Board was, and is, supposed to be neutral as between unions and employers, creating a Board of political appointees also means that Board decisions in NLRA cases generally fol-
meant to be a neutral and detached adjudicative body. It is designed to be an impartial arbiter of the cases that come before it.

The eight tripartite boards in Canada are not neutral and detached adjudicators. Instead, they are composed of representatives from the parties that understand industrial relations and associated problems. Tripartitism insures that each party will have its case presented and understood before a sympathetic board member who understands that party’s day-to-day concerns. Tripartitism also enhances the likelihood that the resulting decision will be accepted, because the losing party will understand that a sympathetic representative heard its case. The interaction between representatives on Canadian labor boards also encourages the possibility of compromise and the practical resolution of problems. As Adams notes,

[T]he tripartite regulatory approach in Canada permitted the manning of the dispute resolution machinery, at least in part, by labour and management representatives and in this way created a commitment in the parties of interest to the workability of the system.\(^8\)

The key word in this context is Adams’ reference to a “system.” In other words, the role of a tripartite labor board goes beyond simply protecting the rights of each party. By including representatives from each party, these boards are institutions that have an interest in maintaining the overall industrial relations system. Conversely, the system maintenance obligation of the NLRB is far less clear because it is an adjudicator of the respective rights of the opposing parties.

**B. The War Labor Board Model**

The War Labor Board (WLB) was established by Executive Order in January 1942 to settle labor disputes that could interfere with the war effort.\(^8\)\(^6\) Wage stabilization was added to the WLB’s responsibilities in September, 1942.\(^8\)\(^7\) Like the Canadian models described above, the WLB had a tripartite structure, consisting of four labor representatives, four management representatives, and four public representatives.\(^8\)\(^8\) The WLB’s jurisdiction extended to all nongovernmental establishments except those in the

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84. See, e.g., ADAMS, supra note 9, at 5-11 to 5-12; George W. Taylor, Voluntarism, Tripartitism and Wage Stabilization, in THE TERMINATION REPORT, supra note 82, at xv and xvii-xviii [hereinafter Taylor].


86. See The TERMINATION REPORT, supra note 82, at 6-7. See also Dexter Merriam Keezer, Observations on the Operations of the National War Labor Board, 36 AM. ECON. REV. 233, 235-36 (1946) [hereinafter Keezer].

87. THE TERMINATION REPORT, supra note 82, at 8.

88. Id. at 7.
railroad and agriculture industries; all employees, including supervisors; and all issues customarily within the scope of collective bargaining.  

Due to a growing caseload and the need for speedy resolution of ongoing labor disputes, the WLB reorganized itself in December, 1942, by establishing 10 regional tripartite boards, each of which consisted of four labor, four management, and four public representatives. It was believed that local boards would be more familiar with local problems and issues than the national board. In consideration of the special circumstances and expertise associated with particular industries, the WLB also used tripartite industry panels to make recommendations. In addition, the WLB used preexisting industry commissions to settle disputes.

The national board served as an appellate body, with the right, but not the obligation, to review decisions made by the regional boards and industry commissions. In order to have its case reviewed, an appellant was required to show either that a contested order exceeded the regional board’s jurisdiction; that the order contravened the established policy of the board; that the case involved a novel question of such importance as to warrant national action; or that the decision was unfair and caused undue hardship. A national board decision was not subject to court review.

The national board received 20,692 cases during its existence and closed 17,650. The remaining cases were a backlog when the WLB ceased its wartime functioning on August 18, 1945. The cases decided by the national board were the most difficult cases to arise; straightforward wage adjustments were handled by the Regional Wage and Hour Offices, and disputes that could be more easily resolved were either settled by the parties themselves or with the aid of the Conciliation Service.

Although the decision-making process was adversarial, and although the board had no authority to petition a Court of Appeals for enforcement, compliance was almost universal. In fact, instances of noncompliance viewed as sufficiently serious to warrant referral to the President occurred in only 46 cases, or .2%. Lesser noncompliance issues were usually ad-

89. Id. at 25.
90. Id. at 13.
91. Id.
92. Id. at 15.
93. Id.
94. Id. at 52-53.
95. Id. at 53.
96. Id. at 58.
97. Id. at 468 and 479-81.
98. According to The Termination Report, supra note 82, at 479, the Conciliation Service handled 75,653 cases between December 7, 1941 and August 1, 1945. Subtracting the cases certified to the Board, it can be estimated that the Conciliation Service disposed of 54,961 cases during this period, or 2.6 times as many cases as were certified to the WLB.
99. Keezer, supra note 86, at 242-43 (discussing the effects of adversarial board dynamics).
100. Id. at 426.
dressed through persuasion by the employer or union members, depending on which party was responsible for the noncompliance.\textsuperscript{101} Most of the remaining noncompliance issues were addressed informally at the staff level.\textsuperscript{102} George Taylor, a Board chair, placed the number of cases in which there was noncompliance as “100-odd.”\textsuperscript{103} Although conceding that the war encouraged people to make sacrifices, Taylor pointed out that the WLB was successful in resolving disputes because the parties wanted to make it work and because they were involved in the machinery.\textsuperscript{104} Most differences were resolved informally by the Board’s members.\textsuperscript{105} Taylor observed that

\begin{quote}
(t)he very fact that representatives of labor and industry participated on an equal basis with public members in the work of the Board served to assure disputants that their interests were fully considered in any action. . . . In addition, every action of the Board, with but few exceptions, had the full support of all members including those who had voted in the negative.\textsuperscript{106}
\end{quote}

The only leverage that the partisan members of the Board had was the right of withdrawal, which would have made it impossible for the Board to function.\textsuperscript{107} Taylor noted that the “power . . . to withdraw . . . was an important protection against undue bureaucratic control and an assurance that Board actions would conform to the necessities of sound industrial relations in the field.”\textsuperscript{108}

Edwin Witte, a public representative on the Board, concluded that both labor and industry fared well during the war.\textsuperscript{109} Unions increased their membership and workers continued to receive wage increases.\textsuperscript{110} Total industry profits were much higher during the war than in prewar years.\textsuperscript{111} Also, while dividends remained stable, reserves increased.\textsuperscript{112} Although one cannot attribute these successes to the WLB, it should be noted that the Board was not created to assure the success of the parties. Rather it was designed to equitably resolve labor disputes and to create wage stabilization during wartime. The basic point is that it appears that the Board did not disrupt the market forces that were affecting industry. With aggregate demand high, one would expect wages and profits to be high, and that is what occurred.

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 416.
\item \textsuperscript{102} \textit{Id.} at 417.
\item \textsuperscript{103} Taylor, \textit{supra} note 84, at xvi.
\item \textsuperscript{104} \textit{Id.} at xvi-xvii.
\item \textsuperscript{105} \textit{Id.} at xvii-xviii.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at xviii.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{110} \textit{Id.} at 185-86.
\item \textsuperscript{111} \textit{Id.} at 186.
\item \textsuperscript{112} \textit{Id.}
\end{itemize}
C. Conclusions

The Canadian system permits, and the War Labor Board permitted, collective bargaining to thrive while protecting the legitimate interests of employers, employees, and unions. Common to both systems is the central role of tripartitism, limited appeals of tribunal decisions, and active monitoring of the bargaining process. Although the WLB did not exist for a sufficient period of time to require “normal maintenance” through legislation, such “normal maintenance” is a characteristic of the Canadian systems.

IV
RETHINKING THE NLRA AND ZERO-SUM LABOR LAW: SOME SPECIFIC PROPOSALS

The foregoing discussion of the deficiencies of the current American labor law system, and the strengths of the Canadian and War Labor Board models, suggests some specific changes to the NLRA.\(^1\)

A. PROPOSAL: Amend the NLRA by reconstituting the NLRB as a tripartite national body with regional boards.

The NLRB should be reconstituted as a tripartite decision-making body with regional boards modelled on the War Labor Board and on the eight Canadian Boards that have tripartite membership. In addition, the NLRB’s current adjudicative structure of Administrative Law Judges should be replaced with a structure of regional boards similar to the structure of the WLB regional boards.\(^2\)

Such a change would shift the American industrial relations legal system from reliance on a model that adjudicates the respective rights of parties to a model that also has a formal dispute resolution component.\(^3\)

A tripartite board with a strong practitioner component would bring both management and union perspectives to the NLRB’s administration of

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\(^1\) The WLB continually changed its procedures to improve administration of cases. See The Termination Report, supra note 82, at 45.

\(^2\) This is an expanded and revised discussion of some of the proposals contained in Block, Reforming U.S. Labor Law, supra note 9.

\(^3\) A full discussion of the structure and purpose of the World War II War Labor Board is beyond the scope of this paper. For more detail, see generally, The Termination Report, supra note 82; Keezer, supra note 86; Witte, supra note 109.

\(^4\) Although over 90% of all unfair labor practice charges are disposed of without formal action, the vast majority of these are disposed of on the legal merits of the case. For example, during the period 1976-90, 93.4% of all (536,324) C cases were disposed of without formal action. Of these cases, 70.4% (65.7% of all C cases) were disposed of based on the legal merits of the case, either with a Regional Office dismissal or a withdrawal by the charging party. The remainder were resolved by agreement of the parties. These data suggest that while informal problem solving plays a role in the unfair labor practice resolution process, that process is still dominated by the legal rights model. See NLRB Ann. Rep., supra note 78.
the NLRA. These changes would increase the likelihood that the practical problems and concerns of both parties are addressed in addition to legal issues. It would increase the amount of voluntarism and reduce the amount of judicial compulsion in the system by making sure that the views of both sides are represented in disputes.

Under the proposed structure, investigation, resolution, and, if necessary, adjudication would be done at the regional level by a regional board or a panel of that board. Regionalization of the tripartite decision-making process would help bring voluntary resolution of the dispute, or if necessary, bring Board decisions closer to the parties.

If a regional board should rule that a violation has occurred, it would issue a recommended order which would be effective pending an appeal to the national Board. In the event the national Board overturns or modifies the decision of the regional board, the appellant may take whatever action is appropriate based on the national Board’s decision.117

117. The advantages and disadvantages of tripartitism vis-a-vis neutral adjudication have been the subject of much debate. The basic strength of tripartitism is its participatory aspects. Its major weakness is that it is inefficient compared to neutral adjudication. It should be pointed out however, that the current, neutral NLRB has been severely criticized for delays. For a discussion of tripartitism, see The Termination Report, supra note 82, at 579-85; George W. Taylor, Voluntarism, Tripartitism and Wage Stabilization, in id. at xvii-xix.

An additional criticism that could be made regarding a tripartite board is that partisanship will be encouraged, as all decisions will be 2-1 or in that proportion, with the representative of the side that has received an unfavorable decision always voting to dissent. To test the validity of this assertion, the author examined all Ontario Labour Relations Board (OLRB) decisions issued in July, 1990, October, 1990, and February, 1991. These months were randomly chosen from the 1990-91 fiscal year, a year in which the Ontario Labour Relations Board Annual Report listed the partisan affiliations of all members. The OLRB issued decisions in 39 cases in those three months. Of those 39, nine could not be classified as either favorable to the union or favorable to the employer because they involved either an allegation of a violation of the duty of fair representation (which is decided only by the neutral member) or because they involved a first contract arbitration and the decision was not clear on which party’s position prevailed. Of the 30 cases that could be classified as either favorable to one party or the other, 22, or 73.3% were decided unanimously. In the other decisions, the representative of the losing side dissented. These results, although highly preliminary, suggest that the OLRB tripartite system has been sufficiently institutionalized such that the partisan representatives can often act as neutrals. A listing of the 39 cases, the decisions, the OLRB members, and the way they voted, is available from the author upon request.

Interestingly, in 1993, a bill was introduced by Representative Major R. Owens which, if enacted, would have created a tripartite NLRB by requiring selection of two Board members from lists of individuals recommended by national labor organizations and two Board members from lists of individuals selected by organizations representing employers. See H.R. 1466, 103rd Congress, 1st Session (1993).
B. PROPOSAL: Amend the NLRA by making Regional Board orders immediately effective and automatically enforceable by a court upon issuance of the order; narrow the scope of judicial review of national Board decisions at the Court of Appeals level to the question of whether the Board has jurisdiction over the case and whether the Board granted the appellant due process.

These proposed changes would increase the status and importance of the NLRB by limiting the scope of judicial review of regional board decisions to a scope similar to that formerly used by the WLB in appeals of regional board cases and to that currently used in the Canadian system. Board decisions would be reversed or remanded only if the Board denied the complainant due process, exceeded its jurisdiction, or violated the NLRA. Limiting judicial review in such a way would help insure that industrial relations problems and issues are addressed and resolved by the entity that is most expert in industrial relations.

Making regional board orders immediately effective and enforceable by a court also eliminates the possibility of delay and the need for costly enforcement proceedings. In the case of sections 8(b)(4) (secondary activity), 8(b)(7) (recognition/organizational picketing), and 8(e) (hot cargo) cases, it would speed up case processing in a manner comparable to the current section 10(l) injunction, which will offset the elimination of that procedure for noninvolved parties.

C. PROPOSAL: Amend the NLRA by abolishing the position of the General Counsel.

A key characteristic of the Canadian and War Labor Board systems is the absence of a screening mechanism for cases. The Canadian boards must hear any case brought into the system. Similarly, the War Labor Board was obligated to dispose of all cases certified to it.

The screen created by the General Counsel system makes a preliminary determination of the legal merits of the case. However, it makes no determination about the importance of the case to the parties involved.

By contrast, removing the General Counsel as a screen is consistent with the notion that the Board should resolve labor disputes. The Board's substantial mediating role should not be hampered by a system that screens out cases as having no merit. It can be assumed that any labor dispute

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122. Section 10(l) of the NLRA requires the regional office to give these cases the highest priority, and requires the regional director to request an injunction if the case is found to have merit. 29 U.S.C. § 160(e)(1994).
brought before the Board is worthy of consideration, either because it presents a legal question or an industrial relations dispute.

D. PROPOSAL: Amend the NLRA by creating a standing tripartite National Labor Law Commission that would make periodic, regular recommendations to the Board and to Congress regarding changes in the provisions of the NLRA, changes in interpretations of existing provisions, and changes in Board procedure.

The creation of a tripartite National Labor Law Commission is designed to provide the United States with the "normal maintenance" mechanism that is provided in Canada by the nature of the Canadian parliamentary system. Under the proposals outlined in this paper, the courts would no longer provide substantial oversight for the decisions of the reconstituted NLRB. Therefore, there must be a mechanism by which parties dissatisfied with Board decisions or doctrines developed by the Board can make their views known. The National Labor Law Commission would be a public body that periodically, but regularly, receives comments from interested parties on the state of the NLRA as interpreted by the NLRB, but that could act on its own as well. If the Commission believed that changes in the law were warranted, it could recommend changes to the Board and to Congress. Failure of the Board to adopt the Commission's recommendations, to the extent the Board's legal authority permitted it to do so, could lead to congressional action to amend the NLRA.

Establishment of such a commission would create a vehicle by which the development of the NLRA could be monitored. If recommendations for changes were forthcoming, Congress could be assured that the recommendations have the support of at least one party and the public representatives, if not both parties.

In addition, the partisan members of the Commission could be high level labor and management representatives, making the Commission an excellent vehicle for informal discussions on topics of mutual interest. No such regular vehicle for bringing together the highest level officials of labor and management currently exists in the United States.

E. PROPOSAL: Amend the NLRA to give the regional boards the option to direct the Federal Mediation and Conciliation Service to mediate a dispute in which there has been a charge of unlawful refusal to bargain.

The purpose of this change is to give the reconstituted NLRB a vehicle which could assure the institutional integrity of both parties in "refusal to bargain" cases and to aid the parties in carrying out bargaining when the Board believes that such support is needed. It gives the Board a nonlegalis-
tic option that does not go so far as to dictate contract terms, but goes farther than a simple bargaining order.

The proposed change would also provide the Board with a means of informing the parties that it expects bargaining to take place in good faith. It would help to assure the bargaining process will not be used by the union to place undue burdens on the employer, or by the employer to undermine the status of the union.

V
SUMMARY AND CONCLUSIONS

The last twenty years have seen a persistent decline in unionization in the United States, an equally persistent failure to amend the NLRA in ways that might reverse that decline, and an increasingly bitter conflict over Board decisions, Board processes, and the nominees to the National Labor Relations Board. If these problems are not addressed, at some point in the near future, the United States may reach a point where it becomes the only major industrialized country without broad-based employee representation at either the national or workplace level, and without a mechanism for resolving disputes over the interpretation of the labor laws that both labor and management find consistently acceptable.

The contention of this paper is that the industrial relations system in the United States has developed zero-sum attributes that have made it impossible to effectuate changes which might encourage labor-management cooperation and reduce conflict, while at the same time protecting the legitimate interests of employers, unions, and employees. These zero-sum attributes also encourage political and legal conflict between labor and management over Board operations. Thus, rather than fostering improved labor-management relations and the resolution of disputes, the current system has instead created additional arenas in which parties who are inclined to engage in labor conflict can continue to do so.

The proposals presented above attempt to outline a system by which industrial relations professionals, employer representatives, labor representatives, and neutral representatives have primary responsibility for administering the industrial relations legal system and for proposing changes to that system. That is the rationale behind the proposal to create a tripartite NLRB with regional boards; to eliminate the General Counsel; to reduce the scope of review of Board decisions; to create a National Labor Law Commission; and to grant the NLRB the authority to direct the FMCS to intervene in a first contract dispute. These proposed changes would also create a system that treats unfair labor practice charges and representation issues as problems to be resolved within a cooperative legal framework, rather than as rights disputes to be litigated. This type of system worked well for the
United States during World War II, and currently works well for the Canadian jurisdictions.

The proposed system, although largely self-deterministic, does allow for interaction with structures representing the larger society. The courts could intervene if the Board exceeded its authority. Congress would be involved through the National Labor Law Commission. Indeed, it is likely that Congress would look quite favorably upon any changes that are recommended by the Commission, since, presumably, they would have the support of at least some neutral members of the Commission.

In conclusion, it is time to change the terms of the debate regarding changing the labor laws in the United States. The proposals outlined in this paper would move the United States toward the creation of a depoliticized, neutral, industrial relations law system that is administered by industrial relations experts and that is self-determined, with minimal outside involvement. This would truly be a new era for industrial relations in the United States.