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Anne M. Lofaso

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Author : Anne Marie Lofaso

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Charles J. Morris, *How the National Labor Relations Act Was Stolen and How it Can Be Recovered: Taft-Hartey Revisionism and the National Labor Relations Board's Appointment Process*, 33 **Berkeley J. Emp. & Lab. L**. 1 (2012), available at SSRN.

Charles J. Morris, Professor Emeritus at Southern Methodist University Dedman School of Law, is a giant in the field of labor law. After graduating from Columbia Law School in 1948, he practiced in Dallas, Texas, for just shy of 20 years before receiving an academic appointment at SMU, where he taught for about a quarter-century, from 1967 until his retirement in 1991. During his first year in teaching, Professor Morris began service as a labor arbitrator. In 1978 President Carter appointed Morris to serve on the Federal Services Impasse Panel (FSIP), a post he held until 1983. Despite his retirement, Morris has remained an active scholar. Indeed, Cornell University Press published his magnum opus, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* in 2005, a book that earned him a place on the Right-to-Work’s Ten Most Wanted list.

In other words, Professor Morris is an active 90-year-old with a plethora of institutional knowledge about the Act. He started law school when the National Labor Relations Act (NLRA) was the Wagner Act. He graduated from law school after the passage of Taft-Hartley. He practiced law for two decades before teaching labor law for another quarter-century. He has been involved in labor-dispute resolution as an arbitrator and as a member of the FSIP. His labor law scholarship spans five decades. He has lived through almost the entire history of modern labor law. So when he writes about the subject that puzzles all labor scholars—why is union density so low—those in his field should at least consider his thoughts.

Professor Morris’s main argument is two-fold. The question—what’s wrong with the NLRA—is the wrong question. The real question is what’s wrong with the National Labor Relations Board (NLRB). Morris contends that organized management and its political allies have been able to steal the NLRA by appointing political leaders to the Board who do not share Congress’s purpose in enacting the NLRA, but instead have engaged in a misleading and perhaps disingenuous campaign to revise those purposes.

The article is beautifully written in the style of mid-twentieth-century prose that sports the liberal-arts education of halcyon days. Professor Morris’s article uses the tale of the six blind men and an elephant to make the following point. Congress passed the NLRA to encourage collective bargaining as a means for sustaining industrial peace. Shortly after Taft-Hartley was passed, union-density began its gradual decline from over 30 percent to just over 6 percent of the private-sector workforce today. This phenomenon has baffled academics and labor advocates who have identified several problems with the NLRA to explain this phenomenon. But like the blind men describing only that part of the elephant that they are touching, these thinkers describe only part of the story. If they were able to see the big picture they would understand the main problem. Presidential appointees since President Eisenhower have been increasingly politicized. Those who have been coopted by business interests have successfully messaged to the public that the NLRA serves the purpose of protecting the individual’s right to refrain from union activity, as opposed to protecting the collective right to engage in concerted activity.

Although long—it comes in at 72 law review pages—Professor Morris does an excellent job of succinctly explaining the main problems with the NLRA, as identified by labor scholars. Among them are the usual suspects: lengthy delays in representative and unfair labor practice (ULP) proceedings, ineffective remedies, lack of card check, unclear rules, absence of rules that encourage compliance, and “the absence of limitations on employers’ unqualified right to

permanently replace economic strikers." To these six reasons, Morris adds "widespread [lawful and unlawful] employer opposition to unions . . . ; decreases in rust-belt manufacturing combined with increases in the exportation of jobs to low-wage countries abroad; major changes in the patterns of employment;" and decreasing interest in unionization reveal part of the story of increasingly lower union-density rates. Unsatisfied with this story, Morris turns to what he views as the main reason for the decline in union-density rates—"the Act has not been fully enforced because Board majorities have not been consistently motivated to enforce the Act's declared policy."

Much of the meat of Professor Morris's argument debunks the revisionist message. His argument is as follows. Neither the Taft-Hartley nor the Landrum-Griffin amendments disturbed the Wagner Act's core provisions. Instead, "these [amendments] were primarily limitations on the exercise of economic power [of] unions [during] the collective-bargaining process." Morris argues that the Act's elegant and streamlined language coupled with flexible procedural mechanisms gave the Board "ample authority to enforce the core provisions of the Act and obtain positive results consistent with its policy." Board appointees with political agendas, however, seized upon the right-to-refrain language added to Section 7 to revise the Act's purposes from primarily protecting employees' rights to engage in collective action to protecting the individual's right to choose whether or not to engage in collective action.

Much of the rest of his article reads as a treasure-filled treatise for the labor scholar interested in the NLRA's jurisprudential and historical development. For example, Professor Morris uses historical context to support his argument that the Taft-Hartley and Landrum-Griffin amendments were passed to show that those amendments were primarily union-regulatory acts. In particular, "following World War II there was considerable popular criticism of union power and a widely held belief that the NLRB had become one-sided and even influenced by Communists within the agency." Morris concludes: "while exhibiting a preference for management, Taft-Hartley was not intended to equate individual bargaining with collective bargaining or to lessen the *positive* right of employees to engage in union and other collective activity or to elevate the *negative* right to refrain from such activity."

Professor Morris ends with the following summary:

> [The NLRA was] stolen through a synthesis of a long-standing policy of revisionism – which was largely unrecognized – and repetitive appointments of a critical number of Board members and General Counsels who were not committed to the Act's basic policy of encouraging union organizing and collective bargaining. Consequently, the NLRB degenerated into a broken agency that for the most part failed to accomplish its fundamental purpose of facilitating the creation of democratic workplaces where employees, through their unions, could deal with management as joint partners in a civilized interactive process that seeks to create and maintain mutually satisfactory conditions of employment.

While he devotes only 5 of 72 pages to policy suggestions, the article's main function is not to preach policy but to prove that politics has distracted from the agency's mission. In any event, his main solution – members-only bargaining – is laid out in his book, *The Blue Eagle at Work*. Whether one agrees or disagrees with Professor Morris's critique of (or solutions for) labor, this is legal scholarship at its best. Clear writing designed to establish a dialogue with practitioners and policy makers to improve the law. SMU should be proud to have such a productive member of its emeritus faculty.

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