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# Strike Ballot Law and Practice in the United States: Order without Law in Labour Relations?

## **Abstract**

The labour relations system in the US is often characterized by its exceptionalism from other national systems. The US is the paradigmatic liberal market economy, with weakly regulated labour markets, poorly institutionalized unions, and an attenuated voice for labour in the political realm. Even as other English speaking countries have moved towards models emphasizing decentralized private economic ordering with a more limited role for collective bargaining and an emphasis on employment law as providing minimum standards, the US has retained its distinctiveness compared to other countries following this Anglo-American model due to its strongly pro-employer and weak labour approach. Strike law provides one of the signature elements of the American employer-favourable model of labour law. The Wagner Act model of labour law in the US establishes the strike as the primary mechanism for resolving bargaining impasses and explicitly recognizes the right to strike. Some of the limitations on the right to strike in US labour law, such as the ban on secondary boycotts, parallel provisions found in the labour laws of other countries. Where American strike law diverges from other countries is in its much more pro-employer treatment of strike breakers or replacement workers.

## **Keywords**

National Labor Relations Act, strike ballot laws, American unions

## **Disciplines**

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## **Comments**

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# Strike ballot law and practice in the United States: Order without law in labour relations?

Alexander J S Colvin\*

*This article reviews strike ballot law and practice in the United States. The US has had only limited experience with strike ballot laws. The most extensive use of strike ballots was under emergency wartime legislation during World War II. Strike ballots were later required under the national emergency dispute provisions of the Taft-Hartley Act of 1947. Although used in some major disputes from the late 1940s to early 1970s, these provisions subsequently fell into disuse. In recent decades there has been little interest in revival of strike ballot laws in the US. The article argues that the reasons for this neglect include a perception that these laws were unsuccessful in reducing strikes in the US and that American employers had other legal tactics available to limit union strike power. The article concludes by describing how despite the absence of strike ballot mandates in labour law, many American unions require strike authorisation votes in their union constitutions and strike authorisation ballots are widely used in practice. This development of rules and norms of practice in the absence of legal mandates provides an example of the emergence of 'order without law' in the labour relations realm.*

## Introduction

The labour relations system in the US is often characterised by its exceptionalism from other national systems. The US is the paradigmatic liberal market economy, with weakly regulated labour markets, poorly institutionalised unions, and an attenuated voice for labour in the political realm.<sup>1</sup> Even as other English speaking countries have moved towards models emphasising decentralised private economic ordering with a more limited role for collective bargaining and an emphasis on employment law as providing minimum standards, the US has retained its distinctiveness compared to other countries following this Anglo-American model due to its strongly pro-employer and weak labour approach.<sup>2</sup> Strike law provides one of the signature elements of the American employer-favourable model of labour law. The Wagner Act model of labour law in the US establishes the strike as the primary mechanism for resolving bargaining impasses and explicitly recognises the right to strike. Some of the limitations on the right to strike in US labour law, such as the ban on secondary boycotts, parallel provisions found in the labour laws of other countries. Where American strike law

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\* Professor of Labor Relations and Conflict Resolution, Cornell University. I would like to thank Bradley Weinberg for his very able research assistance on this project.

1 P A Hall and D Soskice (Eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, Oxford, 2001.

2 A J S Colvin and O Darbishire, 'Convergence in Industrial Relations Institutions: The Emerging Anglo-American Model?' (2013) 66 *Indus & Lab Rel Rev* 1047.

diverges from other countries is in its much more pro-employer treatment of strike breakers or replacement workers.

In the area of strike ballot laws, we find further evidence of American exceptionalism. However, perhaps surprisingly, America is an exception in this area in the limited extent or general absence of strike ballot requirements. While there are strike ballot requirements in the narrow category of national emergency disputes and under some state public sector labour laws, for the vast majority of collective bargaining settings in the private sector and in most states in the public sector there is no legal requirement that a strike ballot be held. This article will explore the history of strike ballot laws in the US and consider the policy debates concerning their adoption. The story here will be one of 'the dog that didn't bark'. The lack of adoption of strike ballot laws in the US may tell us much about the reasons these provisions are adopted in other countries. The article will also explore the widespread use of strike ballots by American unions in the absence of legal mandates. In this area, we can see the emergence of a form of 'Order without Law' in the labour relations realm.<sup>3</sup>

## US Strike Law Background

The regulation of strikes has long been a central issue in American labour law. In the early nineteenth century, the American common law considered unions to be criminal conspiracies in restraint of trade. The criminal conspiracy rule was replaced in the mid-nineteenth century by the means-ends doctrine,<sup>4</sup> which accorded unions permission to exist but regulated their activities based on whether the courts judged the means they used to be lawful. Central to the means inquiry were issues of strike activity. In the late nineteenth and early twentieth centuries, the US courts liberally granted employer requests for labour injunctions limiting union strike actions. Unions' legal jeopardy for strike action was further increased with the passage of the Sherman Act in 1890, which, while designed to provide antitrust regulation of businesses, raised the specter of union collective action being similarly classified as unlawful anti-competitive behavior. This danger was dramatically realised in the famous Danbury Hatters case of 1908, where striking members of the Hatmakers union were found to have engaged in unlawful antitrust activities and held individually personally liable for the employer's substantial losses, with the damages tripled under the punitive provisions of the Sherman Act.

The Clayton Act of 1914 was the first legislative effort to limit the restrictive impact of labour injunctions on strikes. It declared that 'Labor is not a commodity', intended to avoid application of antitrust law to union activities. However a remarkably narrow reading of the Clayton Act's provisions by the US Supreme Court rendered this statute ineffective in

3 The idea of 'Order without Law' was explored by Robert Ellickson in his book of that name that investigated the development of property rules among cattle ranchers in Northern California that occurred in the absence of legal enforcement: R C Ellickson, *Order without Law: How Neighbors Settle Disputes*, Harvard University Press, Cambridge MA, 1991.

4 *Commonwealth v Hunt* 45 Mass 111 (1842).

limiting labour injunctions.<sup>5</sup> More substantial limitations on the US courts' common law based hostility to strike actions would have to await the passage of the Norris-LaGuardia Act of 1932, which expressly barred the courts from issuing injunctions in labour disputes. Norris-LaGuardia represents a high-water mark for voluntarism in American labour law, with the prospect of the US following the British path of deregulation of industrial action. However with the intensifying economic crisis of the Great Depression, labour policy in the US soon shift toward efforts to establish a more extensive, and initially pro-collective bargaining, approach to regulating labour relations.

The National Labor Relations Act (NLRA), initially passed as the Wagner Act of 1935, established a comprehensive set of laws governing private sector labour relations in the US. The NLRA sets out rules governing union organising, recognition and legal certification of union representation, the conduct of bargaining, and the use of industrial action, including strikes. In many areas, the NLRA approach represented a relatively detailed regulatory structure for the conduct of labour relations. For example, union recognition was to be based on collective representation of legally defined bargaining units with majority status determined by the National Labor Relations Board (NLRB), increasingly through formal, secret ballot elections following extended campaigns. By contrast, the NLRA continued the Norris-LaGuardia approach of relatively light regulation of strike activity. Section 7 of the NLRA recognised the right of employees to engage in 'concerted activity' for 'mutual aid and protection', providing legal protection for both formal strikes and informal industrial action. Section 13 of the NLRA further declared that the Act did not in any way limit the right to strike, thereby preserving the Norris-LaGuardia prohibitions of labour injunctions.<sup>6</sup>

Subsequent amendments to the NLRA, most notably the Taft-Hartley Act of 1947, did introduce some limitations to strike action. In particular, these amendments limited recognition picketing and the use of secondary boycott strikes.<sup>7</sup> The more substantial limitations on strike activity in US labour law have emerged not from new legislative initiatives, but rather from interpretations of the NLRA provisions by the courts. Most famously in its 1938 *Mackay Radio*<sup>8</sup> decision, the US Supreme Court held that American employers did not commit an unfair labour practice by promising permanent employment to replacement workers hired during a strike and that so long as those permanent replacement workers occupied their jobs, the strikers had no right to reinstatement even if they abandoned their strike. Although subject to an important exception where the strike in question was the result of an unfair labour practice, such as a failure to bargain in good faith, the *Mackay Radio* doctrine provides American employers with a powerful weapon to defeat strikes and in many cases eliminate union representation as non-union permanent replacements take away the jobs of the strikers. For a number of

5 *Duplex Printing Press Co v Deering* 254 US 443 (1921). This case interprets the Clayton Act's labour provision as being 'but declaratory of the law as it stood before'.

6 NLRA s 13: Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

7 NLRA s 8(b)(4).

8 *National Labor Relations Board v Mackay Radio and Telegraph Co* 304 US 333 (1938).

decades, the *Mackay Radio* doctrine lay fallow as permanent replacement of strikers was considered beyond the pale of the norms of American labour relations practices. However following President Reagan's dramatic firing in 1981 of air traffic controllers who had engaged in an illegal strike, employers began to use permanent replacements as an increasingly normal weapon to defeat strikes.<sup>9</sup> From the 1980s onward, strikes became steadily less frequent and the strike threat a much less potent weapon for unions in collective bargaining. The result is that while American labour law became increasingly ossified over time,<sup>10</sup> with the last major amendments to the NLRA being the 1947 Taft-Hartley Act and the 1959 Landrum-Griffin Act, interpretation and shifts in practice have increased the arguably already pro-employer tilt of US labour law.

### The Law of Strike Ballots in the US

As initially enacted in 1935, the NLRA did not contain any requirement for strike ballots. Strike ballots first appear in US labour law during World War II under the wartime War Labor Disputes Act (the Smith-Connally Act).<sup>11</sup> This wartime legislation sought to limit the danger of industrial disputes interfering with wartime production. It established the War Labor Board to supervise industrial relations during the war and provided a series of limitations on strikes, including the ability of the government to seize workplaces necessary to the war effort where strikes had occurred. For any private sector establishment during the war period, the Smith-Connally Act required 30-day notice of an intention to strike and required that the National Labor Relations Board (NLRB) conduct a secret-ballot vote among the members of the bargaining unit on the major issues in bargaining prior to the strike.<sup>12</sup> Over 2000 strike votes were conducted by the end of the war, with the large majority showing majority support for the strikes.<sup>13</sup> Despite this extensive wartime experience with a strike ballot law, the provisions of the Smith-Connally Act lapsed with the end of the war and the return to peace-time labour law.

Strike ballots next emerged as an issue in American labour law with the passage of the major Taft-Hartley Act amendments to the NLRA in 1947. Inspired by a political reaction to the post-war strike wave of 1945–46, the Taft-Hartley Act reshaped the NLRA to limit what were perceived by its crafters as excesses of industrial conflict and union power.<sup>14</sup> Notably the Taft-Hartley Act added union unfair labour practices to the NLRA and introduced a series of limitations on strikes, including a ban on secondary

9 The best account of how this process played out is provided in: J D Rosenblum, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America*, ILR Press, Ithaca NY, 1998.

10 C L Estlund, 'The Ossification of American Labor Law' (2002) 102 *Colum L Rev* 1527.

11 See F R Anton, 'Are Strike Ballots Necessary?' (1970) 13(2) *California Management Review* 5.

12 *Ibid*, at 6.

13 Anton, above n 11, reports that 82% of individual voters were in favor of the strikes and the strikes had majority support in 85% of the votes.

14 D E Cullen, 'The Taft-Hartley Act in National Emergency Disputes' (1953) 7 *Indus & Lab Rel Rev* 15 at 19.

boycotts and restrictions on recognition picketing. The Taft-Hartley Act also included provisions allowing the President to intervene in a national emergency dispute, defined as 'a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof . . . [which] will, if permitted to occur or to continue, imperil the national health or safety . . .'.<sup>15</sup> These provisions allow the Attorney-General to seek a temporary injunction from the federal courts that would provide an 80-day cooling off period before the strike or lockout could occur. During the first 60 days of the cooling-off period, federal mediators seek to resolve the dispute. If this mediation is unsuccessful, the NLRB then has 15 days to conduct a vote among the employees on management's final offer and a further 5 days to tally the votes before a strike can occur.<sup>16</sup>

During the initial quarter century after its passage, the national emergency dispute provisions of the Taft-Hartley Act were invoked in a number of disputes. Charles Rehmus reports eight disputes from 1947-49 in which the national emergency provisions were invoked, nine national emergency disputes from 1950-59, 12 from 1960-69, and a further five occurring in 1971 alone.<sup>17</sup> Following the initial stage of the temporary injunction cooling off period, 17 of these disputes reached the stage of a pre-strike ballot on the employer's final offer. In 15 of these disputes, the outcome of the ballot was that a large majority of the employees rejected the final offer. In one of the other disputes the outcome was never announced and in the last dispute no ballots at all were cast after the union members decided to boycott the vote. In no dispute over this quarter century period did the ballot on the employer's final offer result in the settlement of the dispute. Rehmus describes the conclusion from this experience as being that final offer ballots were a failure: 'The prediction of the disutility of final offer ballots contained in President Truman's veto message in 1947 was fulfilled . . . [G]overnment administrators have concluded such polls are useless in settling disputes'.<sup>18</sup>

The national emergency dispute procedures fell into disuse from the 1970s onward. The only other attempt to invoke them in the 1970s was an attempt by President Carter to obtain an injunction against the coal strike of 1977-78 that was rejected by the courts. After this failed attempt, the procedures were not used again until 2002, when President Bush obtained a national emergency dispute temporary injunction to halt a lockout of dockworkers in the West Coast ports.<sup>19</sup> This dispute was settled through mediation during the cooling off period before any final offer ballot was held.<sup>20</sup> Although there have been calls as recently as a 2015 dockworkers strike to again invoke the procedures, no subsequent use of the national emergency dispute procedures has been made. Although the provisions remain in the statute, at present the final offer ballot procedures under the NLRA are an inactive relic of an earlier, higher

15 Labor Management Relations Act of 1947 29 USC § 401-531 s 206.

16 Labor Management Relations Act of 1947 29 USC § 401-531 s 209(a).

17 C M Rehmus 'Emergency Strikes Revisited' (1990) 43 *Ind & Lab Rel Rev* 175.

18 *Ibid*, at 177.

19 D E Sanger and S Greenhouse, 'President Invokes Taft-Hartley Act to Open 29 Ports', *New York Times*, 9 October 2002.

20 S Greenhouse, 'Both Sides See Gains in Deal to End Port Labor Dispute', *New York Times*, 25 November 2002.

conflict era in American labour relations.

Another potential source of strike ballot regulation in the US is state labour relations statutes. During the 1930s and 1940s, some states enacted comprehensive labour relations statutes seeking to regulate private sector labour relations activity and disputes. While paralleling the provisions of the NLRA in many respects, some of these statutes also included additional requirements for a secret ballot majority vote to authorise a legal strike. State labour relations statutes with strike ballot requirements remain on the books in the States of Colorado,<sup>21</sup> Michigan,<sup>22</sup> Minnesota,<sup>23</sup> and Wisconsin.<sup>24</sup> However in regards to private sector labour relations, the provisions of these statutes are largely pre-empted under the US Supreme Court's *Garmon* pre-emption doctrine.<sup>25</sup> Jurisdiction over labour relations in the US rests primarily at the federal level and federal legislation pre-empts any state level statutes relating to labour in the same area. Under the *Garmon* pre-emption doctrine, it is not necessary that the NLRA contain a similar provision or remedy to that provided for in the state law to trigger pre-emption, only that the state law attempt to regulate conduct that is arguably regulated by the NLRA.<sup>26</sup> Although this doctrine has not been applied in any case where there was an attempt to enforce a state labour relations statute strike ballot provision, it appears clear that the *Garmon* doctrine would require pre-emption in such a case. Under the NLRA, employees have a right to engage in a strike unfettered by any strike ballot requirement, so to require such a ballot under state law would interfere with the regulatory scheme of the federal statute. This conclusion is reinforced by the choice of Congress to add a strike ballot requirement for national emergency disputes under the Taft-Hartley Act amendments, but not to add such a requirement for other labour disputes. As a result, these state statutes only apply to labour relations in small employers not covered by the NLRA. Given the very low level of unionisation among these small employers, the state statutes have little to no practical impact.

While the NLRA establishes federal pre-emption of state regulation of private sector labour relations, the states retain authority to regulate public sector labour relations within the state. Beginning with Wisconsin in 1959, most American states passed statutes allowing collective bargaining by public sector employees, albeit a few states continue to make public sector bargaining illegal.<sup>27</sup> Although most states now allow collective bargaining, most prohibit strikes by public sector employees and instead provide for interest arbitration to resolve bargaining impasses. However a few states do allow at least some public sector employees the right to strike, generally with qualifications concerning the types of workers involved or prior use of dispute

21 Colorado Labor Peace Act, passed in 1943.

22 Michigan Labor Relations and Mediation Act, passed in 1939.

23 Minnesota Labor Relations Act, passed in 1939.

24 Wisconsin Employment Relations Act, passed in 1937.

25 *San Diego Unions v Garmon* 359 US 236 (1959).

26 *Wright Elec Inc v Ouellette* 686 NW 2d 313 (2004).

27 See 'Collective Bargaining in the Public Sector', in H C Katz, T A Kochan and A J S Colvin, *An Introduction to Collective Bargaining & Industrial Relations*, McGraw Hill/Irwin, Boston MA, 2007, chap 13.

resolution mechanisms, which in two states also include strike ballot requirements. In the State of Alaska, school employees are allowed to engage in a strike if the dispute is initially subject to advisory interest arbitration, they give the employer 72 hours notice, and a majority of the employees vote in favour of the strike in a secret ballot. Similarly in the Illinois education system employees are allowed to engage in strikes, however the Illinois Educational Labor Relations Act requires that three-quarters of the bargaining unit approve the strike through a secret ballot vote. Despite this supra-majority requirement, Illinois teachers unions have been able to successfully obtain strike authorisation from their members. In the most prominent recent example, in September 2012 the Chicago Teachers Union launched its first strike in 25 years, having received the support of nearly 90% of bargaining unit members in a strike ballot. This example, though, illustrates a major limitation of using strike ballot laws to limit industrial conflict. The strike ballot vote had been held in June 2012, while bargaining was still underway, with the union leadership explicitly stating the purpose of the vote was to obtain bargaining leverage at the negotiating table.<sup>28</sup> In practice, strike ballots can often serve in this way as a method of increasing pressure on the employer in bargaining, rather than as a mechanism to dissuade the union from striking. This may explain the lack of strike ballot law requirements in other US states that allow public sector strikes.<sup>29</sup>

### American Debates on Strike Ballots

American policy debates about the desirability of strike ballot laws have responded to the historical experience with these laws. Ballots received greater attention during the immediate postwar period after the experience of the wartime ballot laws and the then-new Taft-Hartley national emergency dispute provisions. However many argued that this experience had shown the lack of utility of final offer ballots as a tool for resolving disputes and avoiding strikes. Donald Cullen, a leading industrial relations academic during the postwar period, described this view in a 1953 article:

The discredited assumption that union leaders do not represent the wishes of the workers is not the only weakness of this provision, however, for the Federal Mediation and Conciliation Services has pointed out that the ballot can seriously impede bargaining. Since the employer knows that a vote against his last proposal is likely and will serve as a mandate for the union officers to get more, he keeps something in reserve when he makes his nominal last offer; but the union negotiators know he is doing this and they react accordingly . . . Fortunately, the futility of the last-offer ballot is now widely recognized, even on Capital Hill.<sup>30</sup>

Arguments continued to be advanced in favor of legislation that would require a strike ballot before a union would be in a legal strike position. In addition

28 N Ahmed-Ullah and J Hood, 'CTU: Nearly 90 percent of Teachers Vote to Authorize Strike', *Chicago Tribune*, 11 June 2012.

29 Another state that may require public sector strike ballots is Colorado. Although initially intended to apply to private sector employees, the strike ballot provisions in Colorado's Labor Peace Act arguably apply to public sector strikes, which are now permitted in that state.

30 Cullen, above n 11, at 27.

to the instrumental argument that strike ballots would reduce the incidence of strikes, these arguments emphasised the importance of secret ballots to allow employees to express their true feelings about an impending strike.<sup>31</sup> By the 1970s and 1980s, the idea of mandating strike ballots had moved off the American labour law reform agenda and there was an absence of discussion of the issue in academic writings of the time.

In the 1990s and 2000s, the idea of requiring strike ballots re-emerged as part of labor law reform proposals from two different leading labour law academics. Samuel Estreicher proposed a series of reforms to strike law as part of a response to concerns about the *Mackay Radio* doctrine allowing the hiring of permanent replacement workers.<sup>32</sup> Estreicher proposed a limitation on the use of permanent replacements to situations where the employer had made a prior showing of business necessity for their use and a right of reinstatement during the first 6 months of a strike even where permanent replacements had been used. As part of this package of reforms, Estreicher proposed that a strike vote on the employer's final offer be made mandatory so as to ensure the individual union members had full and accurate information before entering into the strike.<sup>33</sup> Paul Weiler similarly offered a package of reform proposals to reinvigorate US labour law.<sup>34</sup> Weiler's proposals were broader in including accelerated election procedures, rapid reinstatement of workers fired for union organising, limitations on the good faith bargaining requirement, and relaxation of the rules limiting non-union employee representation. In regard to strike law, Weiler proposed a full repeal of the *Mackay doctrine* allowing permanent replacements. He argued that requiring a strike ballot on the employer's final offer would complement these reforms by showing Congress that even though union representation would be easier to obtain, employees would have full opportunity to participate in the key decision to engage in industrial conflict.

Although eloquently argued, neither of these proposals has yet emerged into the broader public policy realm, or the legislative arena. It is noteworthy that both authors suggesting adoption of mandatory strike ballots offered it as part of a package of reforms that would overall shift American labour law in a more union favourable direction. By contrast, labour law policy proposals from the employer-side have generally not focused on the issue of strike ballots. Rather the focuses of employer community proposals have been on loosening the restrictions on non-union employee representation plans under s 8(a)(2) of the NLRA and on limiting union use of dues money and agency fees, ideally through federal legislation that would extend so-called right to work laws at a national level. Over recent decades, strike ballot laws have not been on the policy agenda of American employers and there is no indication that they will emerge as a priority.

31 Anton, above n 13, at 8–9.

32 S Estreicher, 'Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation' (1994) 93 *Mich LR* 577.

33 *Ibid*, at 607.

34 P C Weiler, 'A Principled Reshaping of Labor Law for the Twenty-First Century' (2001) 3 *University Pennsylvania Journal of Labor & Employment Law* 177.

## The Fading Threat of Strikes in the US

At this point, we have arrived at the Holmesian ‘dog that did not bark’.<sup>35</sup> Why have strike ballot laws not been a major issue in the US in recent years? Passage of strike ballot laws was a component of the Thatcher era labour law reforms introduced in the United Kingdom in the 1980s designed to weaken the power of British unions. The US experienced a similar conservative shift in its political economy during the Reagan era of the 1980s, with reducing union power also being one of its signature achievements.<sup>36</sup> Part of the story may simply be the use of other means to achieve the same end. Efforts to limit union strike power in the US focused on the elaboration of the use of permanent replacement workers to weaken union strike power and ultimately lead to the elimination of union representation in many workplaces. The combination of the availability of the *Mackay Radio* doctrine and the powerful political symbolism of the defeat of the Professional Air Traffic Controllers Organization strike in 1981 through the use of permanent replacements helped lead American political conservatives and employers to emphasise this weapon in undermining union strike power.<sup>37</sup>

In subsequent years, the lack of attention to strike ballot laws in the US likely also reflects the steady weakening of the bargaining power of American unions and the increasing rarity of resort to the strike weapon to exert that power. The long, steady decline of union representation in the US is well known. From a high of around 30–35% of the workforce in the late 1940s and early 1950s,<sup>38</sup> the union membership rate had shrunk to 20.1% by 1983 and further contracted only 11.1% in 2014.<sup>39</sup> The parallel decline in strike rates over this same period has been even more dramatic. Between 1950 and 1979, there was an average of 308 major strikes (involving 1000 or more workers) each year in the US, idling on average some 1.439 million workers. By contrast, in 1983 there were only 81 major strikes involving 909,000 workers and by 2013 there were only 15 major strikes idling only 55,000 workers.<sup>40</sup> Strikes do still occur in the US, but they are much less frequent and pose much less threat to employers. Given the dramatic weakening of the strike threat, it is unsurprising that employers are less focused on the need for additional legal measures to ward off this threat.

If the purpose of strike ballot laws is to protect the democratic interests of union members, then the weakening of the economic power of the strike weapon might not matter for this policy goal. But if the real purpose of strike ballot laws is as a tool to reduce industrial conflict and to diminish the threat of the strike weapon in collective bargaining, then a weakened strike threat

35 In ‘The Adventure of Silver Blaze’ by Arthur Conan Doyle, the failure of the watchdog to bark at a night-time intruder is a key clue allowing Holmes to solve the case:

Inspector Gregory: ‘Is there any other point to which you would draw my attention?’

Sherlock Holmes: ‘To the curious incident of the dog in the night-time.’

Gregory: ‘The dog did nothing in the night-time.’

Holmes: ‘That was the curious incident.’

36 See generally Colvin and Darbishire, above n 2.

37 See Rosenblum, above n 9.

38 Katz et, above n 27, at 126.

39 Bureau of Labor Statistics, *Union Members — 2014*, BLS, Washington DC, 2015.

40 Bureau of Labor Statistics, *Work Stoppages Summary*, BLS, Washington DC, 2014.

diminishes the urgency of this policy goal. The absence of employer side efforts in the US to enact strike ballot laws as the urgency of the strike threat has diminished provides at least some suggestive evidence from a comparative perspective that these laws are primarily about this latter policy goal.

## Union Constitutional Provisions and Practices

The absence of legal mandates requiring strike ballots does not complete the story of strike votes in the US. While labour law statutes have only required strike ballots in the limited circumstances already described, in practice many union constitutions require pre-strike votes and they are widely used to provide authorisation for strikes.

Provisions in union constitutions requiring strike votes were already widely adopted by the 1950s. A 1954 Bureau of Labor Statistics (BLS) study reviewing 133 union constitutions found that 78 of them (59%) required a local union strike vote before the local could call a strike.<sup>41</sup> Most of these constitutional provisions required a supra-majority to approve the strike. Among the provisions reviewed in the study, 19 required a simple majority, 33 required a two-thirds majority, and 11 required a three-quarters majority, while 13 did not specify a required majority level.<sup>42</sup>

To provide an updated picture of union constitutional provisions requiring strike votes, I replicated the 1954 BLS study using current US union constitutions. The number of unions has shrunk during the interim years, due in part to an ongoing process of union merger consolidation. Of the 44 current union constitutions examined, 28 of them (64%) included provisions requiring a vote before a strike was authorised. Many of these provisions also continue to require a supra-majority to authorise a strike, with 14 specifying such a level, mostly a two-thirds majority. These numbers are likely to somewhat underestimate the total extent of union strike ballot requirements as they only include such provisions in the national constitutions of the unions. Some of the unions that lack strike ballot provisions in their constitutions have local unions that include strike ballot rules in their own local constitutions. Overall, what these results indicate is that most American unions do require strike ballots under the internal rules governing the operation of the union. Rather than strike ballots being imposed on unions by external labour law, in the US they have developed as an internal expression of democratic governance of the unions.

The strike ballot provisions found in union constitutions are detailed rules governing the circumstances under which a strike will be authorised. One representative example is the provision in the constitution of the United Autoworkers:

Section 1. (a) When a dispute exists between an employer and a Local Union concerning the negotiation of a collective bargaining agreement or any other strikeable issue the Local Union or the International Executive Board may issue a call for a strike vote. All members must be given due notice of the vote to be taken

41 Bureau of Labor Statistics, 'Strike-Control Provisions in Union Constitutions' (1954) 77 *Monthly Lab Rev* 497.

42 Ibid. Among the provisions reviewed, 19 required a simple majority, 33 required a two-thirds majority, 11 required a three-quarters majority.

and it shall require a two-thirds (2/3) majority vote by secret ballot of those voting to request strike authorization from the International Executive Board. Only members in good standing shall be entitled to vote.<sup>43</sup>

Many union constitution strike ballot provisions include relatively detailed rules governing how these votes will be conducted. Interestingly, one example is the provisions in the constitution of the International Brotherhood of Teamsters, historically the American union most famously associated in the public mind with union corruption and ties to organised crime. Many of those problems at the Teamsters were cleaned up when the union entered into an agreement in 1989 accepting federal government oversight of its operations, though this oversight only came to an end in early 2015. The current Teamsters constitution now provides detailed rules for strike ballots:

(b) Agreements shall either be accepted by a majority vote of those members involved in negotiations and voting, or a majority of such members shall direct further negotiations before a final vote on the employer's offer is taken, as directed by the Local Union Executive Board. During negotiations, the Local Union Executive Board may order a secret ballot strike vote to be taken and when, in the judgment of the Local Union Executive Board, an employer has made a final offer of settlement, such offer must be submitted to the involved membership for a secret ballot vote as hereinafter provided:

- (1) If at least one half of the members eligible to vote cast valid ballots, then a cumulative majority of those voting in favor of the final offer shall result in acceptance of such offer; and a cumulative majority of those voting against acceptance of the final offer shall authorize a strike without any additional vote being necessary for such strike authorization. In the event of a tie vote on either a motion to accept a final offer or to strike, the Local Union Executive Board shall conduct a second vote. If the result of the second vote is a tie, the Local Union Executive Board shall have the discretion to either accept the final offer or reject the final offer and authorize a strike at such time as it determines.
- (2) If less than half of the eligible members cast valid ballots, then a two-thirds (2/3) vote of those voting shall be required to reject such final offer and to authorize a strike. The failure of such membership to reject the final offer and to authorize a strike as herein provided shall require the Local Union Executive Board to accept such final offer or such additional provisions as can be negotiated by it. When the final offer has been rejected in accordance with this Section, it shall constitute authorization for a strike at such time and under such terms and conditions as the Local Union Executive Board may determine. Any question arising from the application or interpretation of this Section shall be decided by the General President whose decision shall be final.<sup>44</sup>

A key feature of these provisions is that they condition support of the national union, including the payment of strike pay from the union's strike fund, on the holding and outcome of a strike vote. As a result, the use of the union's

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43 Constitution of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, as amended at the 36<sup>th</sup> UAW Constitutional Convention, (June 2014) art 50.

44 Constitution of the International Brotherhood of Teamsters art XII.

primary economic weapon of the strike is conditioned on the execution of the democratic process of union self-government through the strike vote.

The role of strike ballots as an expression of union democratic governance can also be seen in the practice of strikes in the US. When American unions contemplate authorising a strike, it is common practice to hold a strike ballot to ensure membership support. A search of strikes in 2014 reported in the Daily Labor Report, the leading US specialty news source for labour issues, indicated that in all cases that could be identified the union had conducted a strike vote prior to engaging in the strike.

Why did American unions adopt strike ballots so widely in the absence of legal mandates to do so? One plausible explanation is the value in bargaining of being able to demonstrate union membership support for using the strike weapon. Given that US labour law casts the use of the strike weapon as the key source of union bargaining power in negotiating a new contract, demonstrating the viability of a strike through a ballot provides a natural mechanism for American unions to strengthen their position at the bargaining table. It is also the case that the US labour relations system has had an historic focus on issues of union democracy and American labour law has opened internal union affairs up to a high degree of scrutiny.<sup>45</sup> One prominent example of this is the legal requirement for secret ballot elections in union organising campaigns to determine majority support for union representation. Notably the 1959 Landrum-Griffin Act amended the National Labor Relations Act to provide additional oversight of internal union operations in response to public concerns about union corruption.<sup>46</sup> The Landrum-Griffin Act amendments included a union members 'bill of rights' providing for rights to attendance at union meetings, to vote in elections for union leadership, and not to be treated unfairly by the union. Although these amendments did not include strike ballot requirements, they encouraged the general adoption of democratic procedures in internal union decision-making. Given the widespread use of voting procedures in other internal union decisions, it is not at all surprising that American unions would also use membership ballots as a mechanism for the crucial decision of whether not to engage in a strike.

## Conclusion

Reviewing the issue of strike ballots in US labour law produces a tale of two different realms of law. In the realm of formal labour law enacted in statutes, we see a history of experimentation with strike ballot requirements in special wartime legislation during World War II and for national emergency disputes under the 1947 Taft-Hartley Act. These experiments were deemed largely unsuccessful due to their limited effectiveness in achieving the policy goal of reducing industrial conflict. The underlying theory behind this policy, that union leaders were pushing reluctant union members into strikes against their own desires, was considered to be discredited in practice with union members

45 S M Lipset, M A Trow, and J S Coleman, *Union Democracy: The Internal Politics of the International Typographical Union*, Free Press, New York, 1956; G Strauss, 'Union Democracy' in G Strauss, D G Gallagher and J Fiorito (Eds), *The State of the Unions*, University of Wisconsin Press, Madison, 1991, chap 6.

46 Katz, Kochan and Colvin, above n 27, at 60–1.

widely supporting strikes in the ballots that were held. No new strike ballot laws were proposed on the legislative reform agenda and the existing Taft-Hartley provisions fell into disuse from the 1970s on.

In the realm of labour law statutes, the US story of strike ballots is one of the 'dog that did not bark'. With the waning of American union strike power and the availability of permanent replacements as an alternative legal weapon against strikes, there has been a lack of need to turn to strike ballots as a mechanism for limiting industrial conflict.

However, when we turn to the realm of internal union governance and practice, we see a very different picture. Strike ballots are widely required in union constitutions. Votes of their membership are commonly taken by American unions before a strike is authorised. If the concern behind strike ballots is to ensure democratic participation in the governance of unions, particularly in such a major decision as to engage in a strike, then the picture of US labour relations is a positive one. In this area we see a manifestation of what Ellickson described as 'Order without Law'. In the behavior of the actors we see the emergence of sets of practices that reflect a commonly accepted set of norms. This process of institutionalisation of practices may not have the universality or enforceability of formal law, but nevertheless provides a widely accepted set of rules governing behavior. As such, it draws our attention in understanding labour law beyond the formal realm of statutes to a broader set of rules, norms, and structures that govern the practice of labour relations.