I. INTRODUCTION

When I began to write this paper, I was surprised to learn that it had been five years since I had undertaken a serious intellectual analysis of American Labor Law. My last effort had been as Chief Counsel to President Clinton's Commission on the Future of Worker-Management Relations. That had begun as an enlightening and enjoyable experience, but it had a rather frustrating closing. The Commission completed its Report—one that did not follow my advice as to the proper way to embark upon labor law reform—just as Newt Gingrich was being installed as Speaker of the House.

Needless to say, there have been major developments since then in
both the White House and the Speaker's offices. As has been true for the last four decades, however, there has been no significant reform of this country's labor laws. Now that we have entered the twenty-first century, it is time for we Americans to rethink the issues and have our politicians address them properly.

Over the last quarter century, there have been a host of proposals for revisions of the National Labor Relations Act ("NLRA"). Any such proposals, however, generate totally partisan stances for or against them, and ultimately a political logjam rather than a public policy accomplishment. The previous era had apparently been an order of magnitude more productive in this field. The 1935 Wagner Act, the 1947 Taft-Hartley Act, and the 1959 Landrum-Griffin Act each made major changes in labor law. However, the political process was equally, if not more partisan at that time, with the Wagner Act biased in favor of unions and against employers, and the Taft-Hartley and Landrum-Griffin Acts biased in favor of employers and against unions. This is not the role model I would like to see us follow in the future.

The aim of true labor law—indeed, any law reform—should not be to confer selected political benefits on the constituencies that happened to support the governing party in the last election. Instead, reform should reflect systematic policy analysis of real world problems and principled adoption of appropriate solutions—no matter who happens to be the winner or loser on a particular item. This is the only way we can ensure that the government will be fair to the people who are directly affected by its actions, and not just react to the positions of those organizations with political clout.

In the case of labor law, the key interests are those of workers, rather than the unions who represent them or the companies who employ them. The interests of workers are actually quite complex. Sometimes they coincide with the position of the union, sometimes with that of the employer, and sometimes with neither. In addition, there is an interplay amongst different legal rules and reforms. Sometimes, the rules are mutually reinforcing, but often they are in tension. By analogy, in my

2. See id.
5. I should note that this is true of the parts of the Landrum-Griffin Act that revised the NLRA. The bulk of that 1959 legislation was embodied in the LMRDA, which was designed to restrain internal union affairs on behalf of members.
appraisal of tort law and reform, especially medical malpractice, I have always asserted that the principal focus of attention should be the interests not of doctors nor lawyers, but rather patients. However, as patients we all wear several hats—not just as people who need protection from injury, but also as those who ultimately pay the bill for what the law does to offer such protection. The same is true for those of us who are workers, and that is why we need and deserve a fair-minded analysis of whether the gains we are receiving from the law are worth the costs we ultimately are bearing.

The fact that labor law reform, like tort reform, has instead been so partisan and logjam-generating has created another institutional flaw. The major features of present-day labor law are actually the work of the Supreme Court rather than Congress. As a matter of democratic principle, it seems inappropriate that a tiny majority of five lifetime-tenured Justices should be writing the rules that shape the fate of ordinary American workers, rather than regularly-elected members of Congress who are supposed to be responsive to worker interests. Even worse, the Court's rulings are all rendered in particular cases, sometimes without a lot of thought about the general formulation, usually without any systematic analysis of its interplay with other parts of labor law, and rarely with real appreciation of the current practical realities of the workplace. Furthermore, because the Court believes that labor law is the responsibility of the Congress that enacted the NLRA, later Court members are almost always unwilling to rethink their earlier rulings even when subsequent real world experience and scholarly analysis has demonstrated their flaws. However, unlike other parts of our statutory legal system (e.g., corporate securities law and tax law), the Congress has been unable and/or unwilling to rework labor law for four full decades.

II. LABOR AND POLITICAL CONTRIBUTIONS

A vivid illustration of both the problem and the appropriate solution can be found in the role of labor law in campaign financing and the latter's non-reform in America. There is no doubt that we have a major problem here. As an index of the problem's dimensions, back in 1964 the total amount spent on all federal, state, and local campaigns was $200 million, while in 1996 it was $4 billion—up 20-fold in just three decades. A reform proposal that is quite popular with the general public would impose on "soft money" gifts to parties much the same kinds of restraints that now apply to direct "hard money" donations to candidates. To help fend off that effort (so far successfully), the Republican leadership has pressed instead (both in Congress and referenda in states like California) for a Paycheck

Protection Act that would require every labor union spending money in a political campaign (whether via party donations or supportive advertisements) to secure consent in writing from each and every union member before any part of his or her union dues could be devoted to the political process (as is now required for direct union contributions to candidates). Both the AFL-CIO and the Democrats (including President Clinton) concentrated their efforts on successfully defeating that proposed amendment, but paid the price of securing no campaign finance reform at all.

What I told the people in Washington (as well as in my Harvard labor law classes) was that this was a justifiable legal reform, but that one key addition was necessary: as a matter of principle, I believe that union members should have the right to opt out of their dues money being spent on the campaign of a political party with which they disagree, and that they themselves are going to vote against. During these debates, though, I was struck by how little of the discussions in Congress or the media adverted to the current (and one-sided) legal restraints now imposed on such union political expenditures—restraints created by liberal Justices on the Supreme Court.

On its face, the 1947 Taft-Hartley Act permitted unions to negotiate with willing employers a union—though not a closed—shop contract provision (i.e., a clause that would require membership, only 30 days after the person had been employed, as a condition of employment and enforceable against that employee only if membership was available to him). Sixteen years later, in NLRB v. General Motors Corp., the Supreme Court read that statutory language as not requiring actual membership in the union, but only payment of dues to the union. That same day, in Retail Clerks International Ass'n Local 1625 v. Schermerhorn, the Court used that formula to eliminate what unions had always believed was their freedom to negotiate: payment of union dues as a condition of employment in so-called "right to work" states—although again on its face the language of this section 14(b) permits states to eliminate "membership" requirements from the parties' collective agreements.

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7. In the 1990's, while almost all union expenditures were made on behalf of Democratic candidates, between 25% and 30% of all union households contained at least one family member who voted for Republican candidates.
10. These are states that grant such a right to work only as against the employees' union, not as against their employer.
11. The General Motors case is very significant in labor—not just political—disputes. This is the reason that, in a strike action supported by a majority of employees, dissidents who either have not joined the union or have chosen to resign are free to cross that line and undercut the concerted efforts of the employee group. And if that collective worker effort
related decisions (International Ass'n of Machinists v. Street\textsuperscript{12} under the Railway Labor Act ("RLA") and Communications Workers of America v. Beck\textsuperscript{13} under the NLRA), the Justices have ruled that in "non-right to work" states, members of the bargaining unit who exercise this judicially-created freedom to choose not to join the union have a right to request a rebate of the share of their dues that was spent by their union bargaining agent for political activities.\textsuperscript{14}

The campaign reform proposal favored by Republicans would give to union members the same political rebate rights now enjoyed by unit members. The understandable response of Democrats and the AFL-CIO is that employees who voluntarily choose to join the union should then be bound by the political decisions their elected organization and officials make. This position is plausible under the current Court-created law of union security clauses. It still is the case, though, that employees must join their union if they want to have a role in electing their representatives, voting to strike or ratifying contracts covering their jobs. In any event, if one views this from the perspective of employees as citizens, not as members of a labor organization that they belong to on their jobs, we should revise the law along the lines of what the Republicans have proposed.

Giving union, as well as unit members, the option to decide whether they want their dues money spent on the party supported by the union would entitle (and hopefully induce) workers to focus their attention on the position their union-supported candidates have adopted, and thence decide whether they agree with the union and the candidate on that issue. Such concentration of each union member's political attention might also lead them (and their family members) to think about whether, and for whom, to

\textsuperscript{12} 367 U.S. 740 (1961).

\textsuperscript{13} 487 U.S. 735 (1988).

\textsuperscript{14} Justice Brennan refused Justice Black's invitation to use the First Amendment to impose this restraint on what Congress could authorize unions to do with dues. He instead read all of this into the Taft-Hartley Act's wording of what Congress had authorized in union security clauses. One further consequence of this doctrinal formula was that in Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984) (decided under the RLA), a later Court held that employees are entitled not just to rebates of political expenditures, but also to amounts spent by the union in organizing drives elsewhere. These union efforts were found unrelated to collective bargaining and representation of the immediate unit, even though from any realistic economic perspective the degree of union organization of the relevant work force is crucial in determining the level of pay and benefits that can be secured for the immediate unit.
vote in the political campaign.\textsuperscript{15} That would help reduce the current "grass roots" failure by Americans to vote in elections, which is now one of the most pathological features of American life.\textsuperscript{16}

There is, however, a crucial addition that should have been part of the Republican proposal (though, unsurprisingly, it was not). The opt-out rebate right should be available not only to members of unions, but also to members of other organizations such as the National Rifle Association (NRA), the American Association of Retired People (AARP), and most importantly, to the shareholder-members of corporations. A considerable number of ordinary working Americans—not just the wealthy—now own corporate shares, especially through their pension and retirement plans, and if partial privatization of Social Security takes place, this ownership will be mandated by another federal law. It has always seemed to me that citizens should have exactly the same rebate right in their corporate dividends as in their union dues, to reflect the share of their money that is going to political campaigns they do not support.\textsuperscript{17} After all, the Taft-Hartley Congress followed that principle in 1947 when it imposed upon unions the same "voluntary" standard required of corporations in collecting "hard" money to be donated to candidates.

Thus, my reaction to the Republican proposal is that it is the functional equivalent of Major League Baseball imposing a "hard" salary cap on smaller-market franchises, like the Pittsburgh Pirates and Kansas City Athletics, in order to protect these teams and their fans from the pressure to spend too much money on players; the same cap would not, however, be imposed on the large-market New York Yankees and Los Angeles Dodgers, because they are said to have so much money that they do not "need" protection. Creating a level playing field in the political (even more than in the sports) arena requires application of the same governing standard to parties on both sides of the table—here to protect the political rights not only of citizens who may be members of the UAW or the Teamsters, but also those who are shareholders in General Motors and UPS (as well as the non-unionized Microsoft).

\textsuperscript{15} One important change that I believe should be made to this Republican proposal is that union members should have to file a written request in order to secure a political dues rebate, rather than the union having to seek written consent from every union member. Not only are there significant transactional economics in the latter arrangement, but it would serve the purpose of having American union members affirmatively make a political decision, rather than a non-decision.

\textsuperscript{16} The voting gap is greatest between younger, high-school educated, lower-paid workers and older, college-educated, higher-paid workers (or retirees).

\textsuperscript{17} Needless to say, corporations, in the aggregate, spend many times the amount in political campaigns than unions do.
III. CURRENT ECONOMIC SITUATION OF AMERICAN WORKERS

Hopefully, one by-product of the inducement to American employee-citizens to focus their attention on whom they want to support in political campaigns is that it would also induce politicians (and workers) to focus their attention on the needs and options for improving the situation of ordinary workers on the job. Of course, the initial reaction of many observers is that there is no real problem and need for reform. By contrast to Charles Dickens' opening line in *A Tale of Two Cities*, these now seem to be just "the best of times."

Certainly, inflation rates in the late 1990s were under 2% and unemployment rates were under 5%, and the combination of the two were at the lowest level since the late 1960s. An even better index of why the media regularly celebrates the trends in the American economy is what has been happening in the stock market. Whereas in the early 1970s, the Dow Jones was under 1000, it is now over 10,000—a 1000% increase in a quarter century. Certainly the 1990s were a wonderful time for someone in the professional employment situation of a Harvard Law professor. Yet when one delves beneath the surface of these stock index numbers, it should become apparent why "middle American" workers are not so happy. Certainly, these people find it easier to get jobs; but they also find it essential to work more hours (often in more than one job) because they are earning less in real dollars than they were twenty-five years ago. Consider these key statistics:

(a) Median real family incomes went up more than 100% from 1947 to 1973, but since 1973 they have risen by only 10%—and this during a period when real stock values rose nearly 300%.

(b) Worse yet is the data reflecting median earnings per hour received by non-supervisory employees. In real dollars, these earnings rose by more than 100% from 1947 to 1973 (and from as far back as 1896, they doubled every thirty years). However, these real median earnings have actually fallen since 1973, with an even bigger drop for full-time male workers.

(c) The explanation for the disparity between a modest increase in annual family income and an actual drop in individual hourly earnings is that families are having to put in more hours on the job in order to stay even with the economy. The average full-time employee between twenty-five and fifty-four years of age now works around 2,000 hours a year for the first time since the late 1950s, up nearly 10% from the early 1980s (when it was only 1,840 hours a year).

Part of the explanation for these trends is a substantial decline in the
rate of economic growth in the United States (notwithstanding the apparent
economic surge of the last five years). Per capita productivity has
increased an average of about 1% a year since 1973 (1.4% annually in the
1990s), in sharp contrast to the 3% annual growth rate in the "Golden Era"
following World War II. If there is less growth in real output per hour
worked, then there must be less real growth in absolute real earnings for the
people doing the work. However, a decline in the rate of productivity
growth will not explain the significant decline in absolute real pay for the
average worker. After all, even a 1% annual increase in per capita
productivity should permit roughly a 30% increase in real pay (after
compounding the productivity figures) during that same period. The true
explanation for the 7% drop in real pay stems from the fact that the
earnings of well-off workers have risen so sharply during that time.

To someone like myself, who for the last five years has been
concentrating his writings on the sports and entertainment worlds
(including their labor markets), especially vivid illustrations are the huge
salary records being set by not-so-big-name players as the National
Basketball Association's Kevin Garnett ($21 million a year for six years)
and Major League Baseball's Kevin Brown ($15 million a year for seven
years). Much the same visible change has also taken place in the
entertainment world. Tom Hanks, for example, has made about $50
million from *Forest Gump* and then from *Saving Private Ryan*. Not very
many ordinary Americans know, though, that the same phenomenon has
taken place with senior executives and financial talent. A good index is the
ratio of CEO earnings to those of the *average* employee. Whereas back in
1965 CEO's made twenty times the earnings of average workers, by 1997
this ratio had reached 116 to 1, a gap nearly six times larger than before.
Another study has found that, whereas back in 1974 the ratio of CEO pay
in the United States' Fortune 500 companies to average pay in the same
firm was about 40 to 1, by 1996 that disparity had reached 180 to 1.

From one perspective, CEO's and their top colleagues have clearly
earned these spiraling salaries, because they have been running the
companies whose profits and stock prices have been soaring during this
era. These corporate gains have not, however, come from generally
increasing economic productivity. As noted earlier, the aggregate rate of
growth has dropped substantially from its pace before the Dow Jones
spiraled. The key, instead, has been corporate reduction of its labor costs;
not just by containing real pay, but also by gradually reducing the coverage
of benefits such as health care and pension plans. Over the last quarter
century, corporate profits as a share of national economic earnings have

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18. By contrast, the 1947-73 era generated not only large gains in real take-home pay,
but even bigger expansion in medical, pension, and other fringe benefits.
risen by about three percentage points, while labor compensation has dropped by a corresponding amount. This is one key reason why the Dow Jones stock index soared by 1000% during that period. In addition, the heads of individual firms face not only strong pressure from these capital markets to downsize their firms' labor costs, but they have a personal incentive to do so as well, since a far larger share of executive pay now comes from favorable options to buy their own company's stock.

IV. IMPROVING LEGAL ACCESS TO UNION REPRESENTATION

Whatever the explanation for the decline in economic productivity, a clear factor in the huge rise in inequality within the American labor market has been the decline in union representation. The following is another sports law index that I discovered while writing *Leveling the Playing Field*. Back in 1947, American workers had just embarked on full-blown collective bargaining for their wages and benefits, with roughly 40% of the private sector directly covered in this fashion, and a substantial spillover effect in related non-union jobs. One key exception, though, were baseball players, who had just rejected independent unionization and instead consented to a "company" union created by the team owners. At that time, average baseball player salaries were approximately 4.5 times the pay of the average American workers. Twenty years later (in 1967), collective bargaining for employees generally had reduced the baseball-ordinary worker ratio to 3.5 to 1. That was the year that baseball players decided to install a real union official, Marvin Miller, as head of their Association and embark on true collective bargaining. By that time, though, overall union membership (and even more, the ratio of union membership to the growing American labor force) had begun to slide, and by the early 1970s, these union shares were dropping sharply. By the late 1990s, private sector union density was below 10% and still declining everywhere except for sports and entertainment union members like Kevin Brown and Tom Hanks. By 1997, the average baseball player was making fifty-two times as much money on the job as the average American worker.

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19. By inequality here, I am not referring to the usual preoccupation of liberals with racial and sexual inequality, where the gap with white male workers has dropped significantly over the last quarter century. My focus, instead, is the inequality between ordinary workers (whether white male or black female) and corporate owners and/or executives, where the gap has increased dramatically.

20. Some of those huge gains in major league salaries are attributable to rising league revenues, most recently in the form of luxurious taxpayer-built stadiums. But a key index of the difference that unionization has made in baseball is the fact that in the late 1960s the payroll share of major league revenues was under 20%, while in the late 1990s it was over 60%. But during that same period, the pay of still non-union minor league players had been
This sports example illustrates how the huge drop in union representation of private sector employees has had some major economic consequences. Relying simply on individual rather than collective negotiating leverage in dealing with their employers has left average non-union wages about 20% lower than they would otherwise be, and the combination of wages and benefits is nearly 30% lower. But while this feature of the current American workplace may be a social problem, it does not necessarily justify a legal policy solution.

To my mind, the current representation gap is a problem from a broader social perspective, for reasons articulated in the early 1990s by (interestingly) a major figure in both Chicago labor economics and the Republican party—George Schultz. Independent union representation, as Schultz put it, serves as a valuable check and balance in the workings of the labor market. Indeed, as Schultz explained, the ideal for each firm is to not have a union in its own operations, but to have representation established in its industry and in the economy as a whole. The good company that wants to do the right thing for its employees, without having to bear the costs of collective bargaining, can then feel economically comfortable about doing that because it knows that the not-very-good companies, those who might want to reap a profit premium by cutting their payrolls (via outsourcing, downsizing, contingent employment, and other present-day techniques) will face meaningful countervailing pressure from their employees acting collectively to make the "bosses" do the right thing. The flip side of Schultz's point is that the absence of such employee constraints on the harsher employers places the better firms in a real financial/moral bind.

Indeed, this tension within the current labor market that flows out of the decline in independent union representation has inflicted some legal damage on the economy. As it has become more obvious that people working for tougher employers do not have the private collective resources to protect themselves, politicians, administrators, and judges have felt compelled to step in and fill this gap with more and broader laws. The rise of this new brand of government regulation under employment law, coupled with the decline of free collective bargaining under labor law, has certainly been beneficial for we law professors and our former law students. However, for reasons I shall explain later, this trend has been a mixed blessing for we law professors and our former law students. Having spelled out these social costs, I have always believed (and said) that the representation gap is not a public policy problem if no union representation is what American workers really want. The fate of this

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21. By analogy, as a (recent) professor and writer in the area of Entertainment Law, I have been stunned to learn that the average American watches television for 1600 hours per
brand of workplace representation should be determined through marketplace choice by consumers—here the workers themselves.

However, a key fact that was driven home to the President's Commission was a national survey\(^22\) that discovered a large, unsatisfied demand among American workers for collective bargaining. There are now roughly fifteen million non-union employees—nearly one-third of the total in all but the tiny firms in the private sector—who would now like to have union representation (and more than 90% of employees who now have union representation said that they want to keep it.) Whatever the admitted flaws of many present-day unions and their leaders, this vehicle definitely offers workers a much better prospect than leaving their working lives in the hands of a CEO whose pay soars while theirs is contained.

However, by contrast with other associations and their services (including employment law firms), unionism is not perceived as a realistically available option, even to those non-union workers who want it. Whatever legal rights are promised to employees by section 7 of the NLRA, workers are correct in what they told the Freeman-Rogers survey: any effort on their part to engage in "self-organization" for purposes of "collective bargaining" is going to be strongly opposed by their employers. While 32% of currently non-union employers would vote for a union if they could (and they said their co-workers would as well), 79% said that it was very likely that employees who visibly sought such representation would lose their jobs as a result, and 41% said they could lose their own jobs with their current employers if they were seen to be involved in such a campaign. The investigations done for the Commission of what was actually happening in current campaigns demonstrate the tangible base for this employee concern. Almost always, a union certification petition sets off an intense, adversarial, and traumatic campaign, and at least one in four of these campaigns produces the firing of a union supporter.\(^23\)

Why is it that so many employers feel free to violate this first-ever

\(^{22}\) This research project was conducted by my Harvard colleague Richard Freeman, a member of the Commission, in tandem with Joel Rogers. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999).

\(^{23}\) And the latter is a conservative estimate of illegal employer reprisals against union supporters. It does not include suspensions, denials of promotions, and other tangible penalties. Even with respect to discharge, it includes only those discharges that produced an unfair labor practice charge, an affirmative verdict or settlement, and reinstatement, rather than just back pay for those pro-union employees who in fact were fired during the campaign.
federal anti-discrimination law? The reason is that the legal sanctions for such illegal actions are so weak.

When Congress enacted the Wagner Act in 1935, most observers believed that the Supreme Court would strike down the statute for infringing the employer's *constitutional*—not just *contractual*—right to terminate employees at will. While the Court in *NLRB v. Jones & Laughlin Steel Corp.*[^24] did make "the constitutional switch in time that saved nine," it accompanied this with very restricted readings regarding the scope of remedies for discriminatory discharges. The employer's financial liability was limited to just *net*, rather than *gross*, back pay lost by the fired union supporter[^25], and only after the latter had taken all reasonable steps necessary to find alternative work.[^26] The result is that by the 1990s the median NLRB damage award against employers was less than $3,000 apiece (and even that amount is a tax-deductible corporate expense).

One possible justification for the minimal financial sanctions imposed upon the anti-union employer is that the NLRB has always been authorized to reinstate the fired employee. Certainly an immediate return to the position where the employee had invested years of his or her working life is the ideal form of affirmative action through which to minimize the financial losses and personal dislocation suffered by the discharged worker. And from the point of view of prevention strategy, returning a key union supporter to the place where the illegal employer action took place, and at a time when the employee organizing campaign was going on, would inflict a major setback on the employer in his struggle with the union. This employee's reappearance on the job would visibly display to his colleagues both the need for and potential value of a mechanism to challenge the absolute authority of management through group action under labor law.

The reality, though, is that the current combination of a three-stage NLRB administrative process and the need for circuit court endorsement of the board verdict means that the employer does not face a legally-enforceable reinstatement order until 1000 days or more after the original firing. And even if the employer is prepared to settle earlier (if only to avoid its expanding legal bills), this almost invariably takes place after the pro-union employees have lost their organizing campaign. By that time, only one in three of the reinstated employees will exercise their right to return to work with the firm that fired them, and of those who do return, four out of five will feel compelled by management to leave that job within a year.

On its face, a simple and fair mode of labor law reform would be to give workers fired for supporting the cause of unionization the same right

[^24]: 301 U.S. 1 (1937).
[^25]: Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).
[^26]: Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
to sue the employer for at-large damages in court as Title VII claimants and other victims of actionable discrimination. As noted above, it was the enactment of the NLRA that produced the constitutional precedent that permitted legal bans on all forms of employer discrimination. By the 1990s, it was not unheard of for a woman who was forced out of her job due to sexual harassment to secure jury verdicts of $5 million or more. When one adds the possibility of hundreds of millions of dollars paid in class action suits for systematic discrimination, this legal prospect provides employers with a very strong incentive not to violate these rights. If a black woman has been fired for leading a union organizing effort amongst her fellow employees, she would seem morally entitled to the same kind of legal relief and employer sanction.27

However, if we have to choose only a single reform of labor law here, my own preference has always been to drastically enhance the speed, and thence the effectiveness, of the reinstatement remedy. The simple solution, endorsed by the President's Commission, would be to provide immediate injunctive relief for the victims of such firings in the midst of a representation campaign. That would simply give employees one key part of the legal protection that Congress gave employers back in 1947 when it enacted section 10(1) of the NLRA to protect firms from "secondary boycotts" by unions (then used principally in organizing campaigns).28 Any country that believes in fair treatment of both sides of the employment relationship should give employee-victims of illegal organizational firings by their employers the same immediate injunctive relief now effectively used by employers to block illegal organizational (and other) boycotts mounted by unions. And the reason for my preference for injunctive rather than monetary relief (if I have to make that choice) is, as noted earlier, that reinstating the illegally fired worker to his job while the representation campaign is still going on is the best way to restore and preserve the feelings among fellow employees that they do have a real legal right to organize themselves into a union for purposes of enhancing their own situation on the job.

Even more important than trying quickly to undo the harm after it has been done is reshaping the legal environment to reduce the opportunity and incentive to inflict the illegal harm in the first place. In the union representation context, the most crucial feature of labor law reform is

27. Indeed, the Supreme Court has ruled that already-unionized workers who have been fired for asserting their right to workers compensation can sue in court for general and unrestricted damages for wrongful dismissal in violation of public policy. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

28. I should note that not only do employees have the right to section 10(1) injunctions against unions, but they also have the right (under section 303 of the Labor Management Relations Act) to sue in court for any damages that the union may have inflicted in the interim.
replacing *protracted* with *promptly-held* elections. The way to do this is to tell unions that in order to be certified as a bargaining agent, they must sign up more than a majority (e.g., 55% or 60%) of the affected employees. When the union has provided those clearly-written and signed representation forms, the Board should conduct the election within the next week or two. That kind of election still gives the affected employees\(^{29}\) a real opportunity for second thoughts on this issue, with the benefit of secrecy in the voting booth. And if the union wins the vote, it receives the further mandate and legitimacy generated by an election rather than just a sign-up campaign. At the same time, the promptness of this election sharply reduces the opportunity for unscrupulous employers to single out one or two key union supporters for firing or other reprisals—not just to remove them from the voter's list, but to send the message to other employees about how their jobs are also at risk (something that American workers now strongly believe to be the case).

The major counter-argument made by employers—especially the majority who do not engage in this most egregious breaking of labor law tradition—is that they are denied what should be their equal right to campaign for the allegiance of employee voters. This is said to be the equivalent of a political election that allows the Democratic party, but not the Republicans, to campaign effectively for voter support in political elections.

The fallacy in that analogy and argument is that it mistakenly assumes that an affirmative vote for the union or an NLRB election means that the union is now *governing* employers (or even employees). All that a successful employee verdict does is give the union the mandate to *represent* employees in negotiations with the employer under labor law. Under employment law, we would never dream of suggesting that the employer should have an affirmative right and opportunity to campaign against the employee's decision about whether to hire a law firm (and if so, which one) when challenging employer policies regarding occupational safety or sexual harassment, for example. Nor would one suggest that under corporate law, employees should have the same full-blown rights as shareholders to campaign and/or vote about proposed corporate mergers and "down-sizing" policies designed to enhance company earnings and stock prices. It is time for American labor law to recognize that employees alone are the constituency that should be involved in the judgment about whether *they* need union representation to persuade corporate management

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29. If there are issues raised regarding the inclusion or exclusion of certain employees from the unit (e.g., individual managers or groups of clerical employees), judgments concerning these employees would be made after the vote had been held, with the contested ballots sealed and opened up only if they needed to be counted and after the Board had heard and ruled upon the legal issues regarding their unit status.
to enhance their pay and working conditions.

V. Deregulating Established Bargaining Relationships

One possible objection that employers could make to that last claim is that labor law jurisprudence, fashioned by the Supreme Court, does impose some significant constraints on employer personnel prerogatives once the employees have voted to be represented by a union. Indeed, I do agree that a fully principled approach to labor law reform, one that acknowledges the statute's supposed commitment to free and flexible negotiations at a more equal bargaining table, would also relax the obligations that certification now imposes on the employer.

When the Wagner Act was first enacted in 1935, then-Senate Labor Committee Chairman Walsh said, in effect, that when employees vote in favor of union representation, the job of the law and the NLRB is to escort the union representative to the doors of the employer, but not to get involved with what is happening behind those doors. However, beginning in the 1950s, the Supreme Court read the employer's duty to bargain in good faith as containing not just a genuine willingness to reach and sign an agreement with the employees' union, but also some requirements and limits on what the employer could do on the way there.

One such doctrine evolved from the Supreme Court's decision in *NLRB v. Truitt Manufacturing Co.*, 30 in which the Court directed an employer to provide the union with all information that was arguably relevant to its negotiation of a new contract or administration of the old one. A second such ruling was *NLRB v. Katz*, 31 which barred an employer from making any unilateral changes in existing employment conditions without securing consent from, or negotiating to an impasse with, the union. These doctrines have, in turn, led to a large number of subsequent cases tackling the following issues: what amounts to a mandatory, as opposed to a permissive, subject of bargaining; when is the information sought by the union relevant to any such mandatory term (and how much countervailing weight should be given to the employer's need for confidentiality); and, most difficult of all, has an impasse—i.e., a deadlock—actually been reached at the bargaining table? 32

32. One of the most visible illustrations of these legal consequences is what took place in Major League Baseball in 1994 and 1995. In June 1994, team owners presented to the players union their demand and plan for a hard salary cap. In August 1994, the players went on strike. In September 1994, the owners called off the World Series. In October 1994, President Clinton asked a special mediator to attempt to bring the parties to an agreement. In December 1994, with no settlement yet reached, and the winter season of individual free agency negotiations about to begin, the owners imposed their salary cap on these
In my earlier life as a Labor Board Chairman in my native Canada, I had written a number of decisions that refused to follow that American judicial line.\(^3\) In particular, in a major British Columbia forest products labor dispute, I read the law as saying that as long as an employer was genuinely prepared to negotiate with a union a contract which covered some conditions of employment, that employer should be under no legal obligation even to discuss any one particular topic, let alone have to provide detailed information about, and/or refrain from unilateral action relating to, these issues, unless and until management could persuade the Labor Board that further negotiations had proven fruitless.\(^3\) The incentives for employers (or unions) to take or refrain from any such action should be provided by the parties at the other side of the bargaining table, rather than their own labor lawyers. Needless to say, I would like to see Congressional reform of American labor law follow that Canadian model and roll back the current elaborate body of good-faith bargaining law to restore the principle that collective bargaining is supposed to be free.

There is an analogous, though more complicated issue, in which the Supreme Court itself could (and should) remove a constraint it has imposed on what the parties can jointly agree to at the bargaining table. I am referring here to the ruling in *Alexander v. Gardner-Denver Co.*\(^3\)\(^5\) There the Court held that, even though a union member had available (indeed, had used) the grievance arbitration system negotiated by his union with the employer to challenge any discharge or discipline, he could not thereby be precluded from suing the employer in court for allegedly firing him in breach of the Civil Rights Act. The Court believed that there could be "no prospective waiver" of an employees' rights under Title VII.\(^3\)\(^6\) However, negotiations. In February 1995, the NLRB's General Counsel told the owners that their action was illegal because an "impasse" had not yet been reached. The owners, feeling compelled to accept that ruling because of the potential cost if they lost, substituted league, rather than individual team, negotiations with players, and also abolished salary arbitration. Those radical changes in the labor-relationship were said to be permissive rather than mandatory, thus requiring no negotiations at all. On April 1, 1995, the judge (using section 10(j)) told the owners that they had misread labor law on this case as well. Happily, that judicial ruling helped produce a 1995 season using true major league players, rather than strike replacement players that the owners had brought to spring training. It did, however, impose a significant and unfair legal constraint on the owner-employers in their subsequent negotiations and settlement with the players' union for an extremely soft tax.

33. Indeed, as a student of American labor law, I have always been impressed by the position of Justice Harlan in his dissent in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), to the effect that "the bargaining process should be left fluid, free from intervention of the Board . . ." *Id.* at 358-359.


36. *Id.* at 51.
seventeen years later, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that individual non-union employees could waive their right to go to court instead of arbitration (under the Age Discrimination in Employment Act), even though that had been made a condition of employment by a group of employers acting collectively (through the New York Stock Exchange). There is now a debate going on within the circuit courts about the intended and current scope of both *Gardner-Denver* and *Gilmer*. However, to the extent these specific holdings are applied more generally (as they regularly have been), the Court's basic principles are wrong in both situations, and there is a better way the Court can approach each of them.

As noted earlier, the decline in employee representation under labor law over the last three decades has coincided with a huge surge in employee litigation under both new employment statutes and the common law. Indeed, since the early 1970s the number of employment suits has risen much faster than even tort suits in federal courts: employment litigation is up 800% from what it was in 1971, and now makes up around 20% of the total federal docket. Even on the personal injury side, workers compensation total annual expenditures ($60-65 billion) dwarf the amount now spent on products liability ($20-25 billion) or medical malpractice ($7-8 billion).

Immediate popular and judicial attention focuses on the few cases that actually go to court, especially those producing a verdict for the "sad victim" of maltreatment and injury at the hands of the "bad boss." However, in assessing the broader values of employment litigation and its alternatives, it is crucial to be conscious not just of the costs of the system, but also of the ratio of costs to benefits, and especially who actually bears those costs as well as receives the benefits.


38. The most recent ruling is *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), in which the Court held that even if *Gilmer* were eventually to override *Gardner-Denver*, the general arbitration clause wording was not sufficient to operate as a "clear and unmistakable" waiver by the union of the unit members' right to a "judicial forum" (under the Americans With Disabilities Act). In the non-union context, the most recent decisions are *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), in which the circuit panel found that mandatory arbitration agreements as a condition of non-union employment are now precluded by the 1991 Civil Rights Act revisions to Title VII (as opposed to the ADEA which was at issue in *Gilmer*), and *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), which rejected the *Duffield* court's reading of the 1991 Act. And in Fall 2000, the Supreme Court heard arguments in the appeal of a *per curiam* decision by a Ninth Circuit panel, *Circuit City Stores v. Adams*, 194 F.3d 1070 (9th Cir. 1999), which had ruled that the 1925 Federal Arbitration Act (FAA) does not give the employer the right to enforce in federal courts an arbitration provision that had been made a condition of employment in any industry that is part of the interstate commerce over which Congress now has constitutional authority.
Based on my research about personal injury, as well as employment litigation, these are the basic facts we should be aware of in appraising the current regime:

(a) The amount of dollars spent on litigation (by both plaintiffs and defendants) is roughly twice the net amount that ends up in the pockets of victims.

(b) The costs incurred by companies (in terms of time, effort, and expenses) to comply with more and more detailed employment regulations are several times the cost of litigation and insurance when companies are sued.

(c) A substantial share of these aggregate costs are initially paid for by the good employers—both the compliance costs to reduce the risk of suit and the litigation costs to defend what often are spurious suits.

(d) However, the burden of these employer expenditures is then largely passed on to employees. Employers in a competitive marketplace face limits as to what they can spend in terms of aggregate labor costs; thus, if some of the costs are mandated by government (e.g., workers' compensation premiums), others must be reduced—in particular, the wages and benefits that are not legally mandated. What this means is that the employees of good employers actually pick up much of the bill of government mandates designed to protect employees from the actions of not-so-good employers.

(e) The benefits are also unevenly distributed amongst employees. Indeed, almost all of the lawsuits (more than nine of ten) are filed by workers who never were, or no longer are, on the job in question—something that is quite understandable since it is difficult to keep working for a "boss" whom one is suing in court. In addition, those employees who were dismissed for arguably inappropriate reasons are likely the marginal members of that category (e.g., of age), who thus need to draw upon the help of the law to get the fair treatment that their pure talent cannot assure them.

(f) With respect to anti-discrimination law, in particular, none of those benefits go to young, able-bodied, white males, which may explain some of their current political disenchantment. However, even amongst the protected legal categories, the bulk of successful suits are filed by older, upper-level, managerial/professional employees, not those in the lower-echelon jobs in which mostly women and minorities work. The fact that the average cost to plaintiffs of litigating an employment case is approximately $60,000 is the reason why only about 10%
of the people who get a "right to sue" letter from the EEOC can actually find a lawyer willing to file suit on their behalf. Obviously, a crucial factor in the lawyer's judgment about whether it is worthwhile to take and press a case to the finish is how much in the way of damages will be paid if the case wins—and that number turns principally on how much the employee was making before he or she was fired from (or felt forced to quit) the job.

There is, then, a much more complicated distribution of the benefits and burdens of employment litigation and regulation than the standard "good worker versus bad employer" rhetoric in the general debates. That perspective does not lead me to call for repealing or rolling back the basic laws that attempt to fashion a fairer and safer workplace for those who need it.39 It has, however, persuaded me of the virtues of major changes in the administration of employment law, through private arbitration of employees' statutory claims.

As a matter of general principle, employees should be free to negotiate with the employee-elected union a term in their collective agreement that makes their jointly-created arbitration system the exclusive vehicle for administering legal as well as contractual rights on the job. That freedom must, however, be subject to the following conditions to ensure effective access to, and enforcement of, the public policies in question:

(a) The individual employee must have the right to pursue the claim to arbitration free of settlements agreed-to just by the employer and the union (and subject only to the latter's duty of fair representation).

(b) The employee must also have the right to use his or her own lawyer to present the case (with the union presenting its position as well).

(c) The employee and his or her counsel must have full access to any information about the case generated through the grievance procedure.

(d) The arbitrator is authorized to award whatever remedies are made available by the statute, even if these are not provided for pure contract claims.

(e) The employee (as well as the employer) should be able to seek judicial review of the arbitrator's reading of the general law

39. I would, however, restore the employer's freedom to terminate employees at the age of seventy by removing the recent ADEA bar, whose principal benefits accrue to well-off white males like me with a tenured professorship at Harvard Law School.
Wherever these public enforcement standards have been complied with, *Gardner-Denver* must be distinguished so as to accommodate the benefits that a jointly-created and readily-accessible labor arbitration process can bestow on American workers who are supposed to be the beneficiaries of the substantive employment laws.

At the same time, the apparent freedom offered by the Court in *Gilmer* to non-union employers to unilaterally create their own arbitration systems and insist upon these as conditions of employment must be revised to ensure that all of the above standards, and several more, have been met. Other key conditions would include allowing the affected employee (not just the employer) an equal voice in deciding who is to be the arbitrator, and providing that employee with some pre-hearing right of access to documents and discovery of witnesses (analogous to those that union members now secure through grievance procedures). President Clinton's Commission was prepared to accept my recommendation that this set of quality standards should be the benchmark for the legal enforceability of employee agreements to substitute arbitration for litigation of civil rights, wrongful dismissal, and other employment law complaints. However, accepting the views of civil rights and labor groups, the Commission members came down strongly against permitting such enforceable contracts to be made before the dispute had arisen, and certainly not as a condition of employment when being hired. Needless to say, I believe that adopting only half of my position was a mistake.

The policy problem in allowing arbitration agreements to be entered into only after a dispute has arisen is that there will be a strong disincentive to reaching such an agreement. When the employer's lawyer and the employee's lawyer are both looking at the facts of the same dispute, the reasons why one side will say this is a better case for arbitration than a trial are the very reasons why the other side will say "Show me the jury!" Faced with the prospect of such *ex post* adverse selection of the arbitrable cases by plaintiffs who, at this point, are almost all former employees, employers will have little up-front incentive to develop and administer such a post-dispute program.

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40. In other words, the courts must apply the standard of *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) to ensure that the arbitral reading of the contract language, not just the language itself, does not conflict with "explicit public policy," rather than the huge judicial deference afforded by the *Steelworkers Trilogy* to the privately-selected arbitrator's reading of privately-negotiated contract language. The *Steelworkers Trilogy* was comprised of three separate arbitrations. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
That failure will impose a bigger cost on employees than on employers. The historical experience with grievance arbitration in labor agreements has demonstrated the huge benefits that quality ADR systems can confer on ordinary workers. For those employees who run into a problem (e.g., sexual harassment) in their workplace, legal justice would become more, not less, accessible. Not only is arbitration cheaper and faster relief, but current, not just former, employees can regularly use it. As noted earlier, workers are understandably leery about both suing and staying on their jobs. But as experience with grievance arbitration shows, employees feel much more comfortable about seeking to resolve an immediate problem in the employer's private ADR system, while preserving their own personal investment in a career with that firm. And even with respect to employees who do not themselves have a legal problem, the total costs to their employers of arbitration are much lower than litigation in American courts. This means that employers will have more money in their labor cost budget to spend on take-home pay, rather than on this statutorily-imposed and judicially-enforced benefit package. Thus, replacing costly and erratic public litigation with high-quality, private arbitration can enhance the legal and economic situation of workers as much as that of employers. Certainly, the Supreme Court should recognize this fact in re-working *Gardner-Denver* to enhance freedom of contract in the collective bargaining setting.

VI. FREEING UP NON-UNION EMPLOYEE INVOLVEMENT

Employer-created alternative dispute resolution ("ADR") plans do pose some legitimate questions as to the effective enforcement of public employment law by and for non-union employees. Those questions are, however, best addressed by permitting fair ADR plans, rather than by barring all such plans from being made a condition of employment. Employer-created Employee Involvement Plans ("EIPs") are even more legally questionable under current labor law, but with much less justification for continuance of that law into this new century. Adoption of the brand of serious labor law reforms presented earlier—instant injunctions and instant elections—would make a substantial contribution to closing the current representation gap. Recall that fifteen million currently non-union workers would like to have independent union representation to try to improve their relative situation in our present-day economy of soaring stock values and stagnant real pay and benefits. However, the Commission-sponsored Freeman-Rogers survey of worker views found that the United States actually has a far larger participation gap. Approximately fifty million American employees (many of them union members) would like to have more voice in what is happening in
their day-to-day working lives.

This is not just a matter of what employees would like to experience and enjoy. There can be real economic gains from more cooperative employer-employee relationships, in which management gives employees a real say in their jobs. Employers (and the economy) can derive large benefits from employee insights and commitment to more efficient production of higher quality goods and services; and this at the same time as employees (and the society) are experiencing real involvement in, and influence upon, the quality of working lives. However, a key message I have derived from my scholarly colleagues in human resources management (e.g., M.I.T.'s Tom Kochan, who was also on the Commission) is that innovations such as work teams, worker-management committees, and the like will have a meaningful and enduring impact on production quality only if the employees involved see that the firm's program has a reciprocal focus on their concerns, as well as those of the firm's customers and shareholders.

Unfortunately, there is a major obstacle in present-day American labor law to such reciprocal treatment. In Electromation, Inc., the wording of the original NLRA ban on "company unionism" was definitively interpreted by the Bush Administration's Labor Board as barring such human resource practices. It is illegal for a company alone to fashion an "employee representation committee" that "deals with" the employer about the employee's "working conditions." That means that a non-union firm can establish and administer an employee involvement program that focuses just on the employer's productivity problems, but not on the employees' concerns about job safety, fair discipline, benefit administration, and the like.

An example that really drove this legal message home to me during the Commission proceedings involved Polaroid—a company based close to where I live and work in Cambridge. Polaroid's founder, M.I.T. Professor Dr. Land, was a pioneer in human resources, as well as technological innovation. Back in the late 1940s, Land not only invented instant photography, he also developed a system of full-blown employee democracy in his workplace. Every Polaroid employee, from the CEO down to the janitor, had a secret ballot vote to elect the board members who addressed a broad array of employee concerns. In the early 1990s, though, this system generated a legal complaint concerning who actually had been

41. 309 N.L.R.B. 990 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994).
42. As both the Board and Seventh Circuit opinions made clear, this seemed to be the necessary reading of the actual language of section 8(a)(2) and its earlier interpretations by the Supreme Court in NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939), and NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).
When this non-section 8(a)(2) case came across the desks of Polaroid's labor lawyers in Boston (who had just read *Electromation*), they had to tell their client the bad news. This version of workplace democracy was illegal under American labor laws and had to be dismantled.

I have always been somewhat skeptical about the benefits of this American ban on "company unionism." I recognize, though, that just as employers have done regarding expedited injunctions and union elections, unions and their supporters have also made a plausible argument for the preservation of section 8(a)(2)—the dangers of conflict of interest. Certainly we would all consider it to be a serious breach of professional ethics if the company were to hire and provide the lawyers who represent employees even in settling—let alone litigating or arbitrating—an employment lawsuit against the firm. An analogous conflict of interest is felt to exist where the employer creates and administers an employee representation system that deals—not just bargains—with the employer about "conditions of work."

In addition to unions, American workers feel somewhat the same concern. Indeed, the Freeman-Rogers survey which discovered the huge and unsatisfied worker demand for employee participation on the job also found that more than 90% of workers polled said they want the employees, not the managers, to select the people who will be their representatives on the committee. Although no similar survey was done on the other side, my own impression is that just as high a percentage of employers want it done in the opposite fashion. Management feels it must have the prerogative to select many, if not all, of the employee-members of a committee that the company has created. Polaroid's Dr. Land was very much the exception rather than the rule of the American business tradition.

However, the fact that many firms are inclined to create the kind of employee involvement plan that most workers find rather spurious is no reason for preserving a sixty-five-year old blanket ban on what a company like Polaroid did do. Indeed, however broad its wording and interpretation, section 8(a)(2) is in fact enforced only sporadically and erratically, usually when another legal dispute has arisen and thence displayed the apparently

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44. I must acknowledge that these personal views have been shaped to some extent by my Canadian background. At the same time that Canadian labor law has offered interested employees immediate access to union representation (often just through membership card checks rather than prompt elections), it has also permitted employers to create a broad array of EIPs. The only restraint is that the employer must not fashion a true company union that collectively bargains, rather than just deals, with the employer regarding terms of employment.

45. Including, as in *Electromation*, picking the employee-representatives.
illegal company practice.\textsuperscript{46} The right way for American workers to get their wishes satisfied is through an improved labor law marketplace in which employees can express their own majority preferences as between alternative forms of representation (i.e., between committees created and controlled by employers or unions created and controlled by workers).

While I was unsuccessful in persuading President Clinton's Commission to endorse them, I do want to reiterate my scholarly views on this score. We should roll back section 8(a)(2) of the NLRA so that it bans only company-dominated unions that collectively bargain—not just deal—with the employer.\textsuperscript{47} However, as I also tried unsuccessfully to persuade the Gingrich Congress regarding its Teamwork for Employees and Managers Act ("TEAM") effort, reforming just this one branch of labor law that employers now object to is equally inappropriate. Employers should be free to fashion employee representation plans they think would make their firm more effective and attractive in the current labor market. However, they should be given that freedom only as part of broader labor law reform that makes independent union representation readily accessible to the fifteen million American workers who now want it, but rightly feel intimidated about trying for it.\textsuperscript{48} That kind of fairer, as well as freer, labor market would serve as the best check and balance against "spurious" unionism being imposed on employees by management. And removing the blanket regulation of section 8(a)(2) would no longer block innovative efforts by Polaroid's Dr. Land that have provided valuable human resources lessons for unionized, as well as non-unionized, firms.

\textsuperscript{46} Not just in \textit{Polaroid}, but also in \textit{Electromation}, the unfair labor practice charge was filed only after the Teamsters were looking to find a basis for overturning a protracted anti-union election campaign that had been run by that employer.

\textsuperscript{47} I should note that, if the employer were to create an EIP during the midst of a union organizing campaign to try to woo the employees back to its side in this score, that action \textit{would not} be illegal under section 8(a)(2) and \textit{Electromation}, but \textit{would} be illegal under section 8(a)(1) and \textit{NLRB v. Exchange Parts Co.}, 375 U.S. 405 (1964), which bans any kind of employer-awarded benefits designed to best the union in the upcoming election.

\textsuperscript{48} One thing that the TEAM Act proponents refused to incorporate into the bill was a response to the way that EIPs would expand the scope of the statutory exclusion of "supervisors" (especially as read by the Supreme Court in \textit{NLRB v. Health Care & Retirement Corp.}, 511 U.S. 571 (1994)), as well as a response to the Court's own creation of an exclusion of non-supervisory "managers" from any labor law rights, see \textit{NLRB v. Bell Aerospace Co.}, 416 U.S. 267 (1974), even if any such "managerial" influence on the firm's operations is conducted in a collective rather than individual fashion (like the faculty Senate in \textit{NLRB v. Yeshiva University}, 444 U.S. 672 (1980)). This is just another of the Court-developed limits and restraints on union representation and collective bargaining that Congress must start to rethink and revise as we move into the 21st Century.
VII. A REAL RIGHT TO STRIKE

The bottom-line test of the legitimacy of comprehensive labor law reform is whether it tackles features of the current labor system that both unions and employers might like to preserve, but whose replacement serves the interests of workers. The last and most important such issue—though one that President Clinton left off of the agenda of his Commission—relates to the employees' right to strike to improve their situation on the job.

Just as we saw with EIPs, there is a major difference between American and Canadian labor law on this score—though this difference was created by the worst contribution that the U.S. Supreme Court has made to the current shape of labor law in this country. In the original 1935 NLRA, Congress conferred on employees the affirmative right not just to organize themselves into a union and bargain collectively with their employer, but also (if necessary) to engage in "concerted" action—i.e., to strike—to try to move the employer's position at the bargaining table. The law explicitly barred the employer from discharging or otherwise retaliating against its employees for exercising this and other statutory rights. But just three years later (at a time when the constitutionality of the Wagner Act was still somewhat in doubt), the Court made a casual and unnecessary comment in *NLRB v. Mackay Radio & Telegraph Co.* that while employers could not *discharge* their striking employees, they could *permanently* replace them. Sixty years later, this *Mackay Radio* dictum remains firmly entrenched in American labor law.

*Mackay Radio* is actually the source of the one tangible value of the elaborate jurisprudence regarding "good faith" bargaining. The sole exception the Supreme Court has been prepared to carve out of the employer's prerogative to permanently replace its striking employees is whether the work stoppage was initiated or prolonged by bad faith bargaining on the part of the employer. Only if Congress is finally ready to roll back *Mackay Radio* under sections 8(a)(1) and (3) of the NLRA should the same action be taken towards *Katz, Truitt,* and other expansions of section 8(a)(5).

From the employee's perspective, there would seem to be little tangible difference between being discharged for striking or being permanently replaced in one's job. Certainly under other federal

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49. 304 U.S. 333 (1938).
51. Indeed, it took thirty years for the Court to recognize any difference. Whereas under *Mackay Radio* an employee who was permanently replaced during the strike had no right to return to work even if a vacancy later opened up, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) finally gave the legal striker priority rights among applicants for new positions if they became available before the strikers had themselves found permanent positions elsewhere.
statutes—e.g., the Family and Medical Leave Act ("FMLA"), which gives employees the right to unpaid leaves during childbirth and other medical needs—the Court would never dream of ruling that the employee exercising that right could not be discharged, but could be permanently (rather than just temporarily) replaced. And it would seem considerably easier for an individual woman leaving her current job to give birth to a child to find another job somewhere else than it would for a sizeable group of women who all left their jobs together to go on strike and eventually have to look for new jobs when they were permanently replaced for that reason.

Within the labor relations context, this permanent replacement prerogative gives employers a major, but by no means an essential, weapon to use in their battles with their employees. Even if the employee work stoppage does effectively shut down the company's operations, it operates as a double-edged sword for the strikers. The employees are also left without work and pay, with financial consequences for their families that almost always are much more than the economic costs inflicted on the company's shareholders, let alone its still-paid executives on the other side of the table. In any event, employers can and should be free to operate during the strike, hiring temporary replacements for that purpose. As the National Football League owners demonstrated during the 1987 players strike (recently replayed in the Hollywood movie, The Replacements), such an employer measure largely insulates the employer from union pressure, and eventually forces the employees to give up and return to work on the employer's terms.

Twenty-seven years after Mackay Radio, the Supreme Court ruled that employers were entitled to initiate a lockout on employees in order to place the same economic pressure on employees to concede at the bargaining table. Up to this point, the Reagan Board and the circuit courts have (appropriately) permitted employers to use only temporary, rather than permanent, replacements during the lockout work stoppage. The demonstrated ability of many employers to recruit temporary replacements in both strikes and lockouts provides tangible evidence that offering permanent status is not crucial to employers seeking to bring in replacements in our ever-increasingly "contingent" work force. Indeed, the combination of both bad faith bargaining law (e.g., in Mastro Plastics) and

52. Certainly that is true when the employer is a large conglomerate that has only part of its operations closed down.
55. See, e.g., Int'l Bhd. of Boilermakers, Local 88 v. NLRB (National Gypsum Co.), 858 F.2d 756 (D.C. Cir. 1988).
economic bargaining with the union means that the employer cannot actually guarantee the replacements a permanent claim to these jobs. That is why the Supreme Court advised employers that in order to insulate themselves from any contract suits by the replacements, the kind of "permanent" priority that should be offered to these "at will" replacement employees is contingent on the strikers not being able to get their jobs back via an unfair labor practice charge or negotiated labor settlement.\(^5\)

Read in this fashion, the Supreme Court's jurisprudential "refinement" of \textit{Mackay Radio} is designed simply to give employers total freedom of choice about whether to permanently or temporarily replace their striking employees. Employers, in fact, use just the temporary replacement option when they hire someone to replace the higher-quality, higher-paid union members—e.g., a John Elway and Dan Marino during the 1987 NFL players strike—and they use the permanent replacement option to rid themselves of the ordinary American workers who have sought to use concerted action to protest their often underpaid situation. While this might seem to be yet another legal contribution to the economic inequality noted earlier, the Supreme Court might respond by saying that collective bargaining is supposed to be free of outside legal regulation, even when employees choose to "gamble" by striking.\(^5\)

The fact is, though, that current labor law (again, largely as constructed by the Supreme Court) places some major constraints upon what union members can do while on strike, thereby substantially reducing the "gamble" that employers take when economically battling with their employees. First, while any strike has to be a collective effort by affected employees committed to a joint cause, unions are precluded from imposing any meaningful sanctions on employees who cross over the line. As seen earlier, in \textit{General Motors} the Court reworded section 8(a)(3) to prohibit any voluntary agreements between unions and employers that require employees to become members of the union and thence make the commitment to fellow members that they will go out and stay out on a strike approved by the group. Then, in \textit{Pattern Makers' League of North America v. NLRB},\(^5\) the Court upheld the Reagan Board's reading of \textit{General Motors} as implying that even if employees voluntarily choose to join the union and make that commitment, when they want to cross over their colleagues' picket line, they can simply resign from the union and thence insulate themselves from any sanctions. (That is what players like


\(^5\) Characterizing the "right" to strike as a "gamble" is the term used by Justice O'Connor in \textit{Trans World Airlines, Inc. v. Independent Federation of Flight Attendants}, 489 U.S. 426, 438 (1989), when the Court chose to extend its \textit{Mackay Radio} dictum about the NLRA to the RLA.

Joe Montana, Tony Dorsett, and others did during the 1987 NFL strike.) And workers can take that action aware that they remain fully entitled to all of the employment benefits that their fellow unit members are able to secure from the employer. The only such contractual restraints on employee section 7 rights that the Court has held enforceable are union-employer agreements that the employees will not strike.59

Suppose, though, that the employees who remain committed to their common cause and strike action seek the support of fellow union members and sympathizers by asking them not to handle or use the product made by replacements or "crossovers." Here the Court has created another distorted brand of labor jurisprudence, whose bottom-line effect is again a reduction in worker leverage at the bargaining table.

True, if the employees picket at the stores where the product is being sold, they can ask customers not to buy this struck product (though not to refrain from buying anything else in that store). This NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)60 reading of the very vague Congressional wording of section 8(b)(4) draws the proper distinction between primary and secondary consumer boycott efforts.61

However the much more effective lever that employees can use to reduce the value of the struck product for the employer and its replacements would be to ask fellow workers in the store (as opposed to customers) not to unload the product, place it on the shelves, or sell it to customers choosing to ignore the strikers' appeal in front of the store. In

59. And not only has the Court readily (and legitimately) concluded that the latter restraints are fully compatible with section 7, but the Court has also read into the 1932 Norris-LaGuardia Act an exemption of these agreements from that Act's apparent blanket ban on federal court injunctions against any kind of strike. See Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), in which Justice Brennan authored the opinion reversing Justice Black's contrary verdict just eight years earlier in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). That judicial reform of 1930s labor legislation removed, of course, any felt need of employers to seek, rather than block, labor law reform from Congress later in the 1970s—legislative action that would have responded to the legitimate needs of workers as well as employers.

60. 377 U.S. 58 (1964).

61. Unfortunately, in two later cases the Court ignored this rational line even in the consumer setting. In NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.), 447 U.S. 607 (1980), the Court said that if struck products constitute the principal product sold in the store, then this turns the union's efforts into a boycott of the secondary store rather than the primary employer (and notwithstanding the fact that the employer was principal owner of the store). By contrast, in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988), the Court ruled that if the union used a leaflet rather than a picket, not only could it ask the customers to boycott the entire store where the struck product was just one of the items being sold, but the union could also ask its supporters not to go into any one of the many independent and totally-uninvolved stores in that same shopping mall. A rational legal approach would reverse both Safeco and DeBartolo.
Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB (Sand Door), though, the Court ruled that any such strike effort (whether through pickets, handbills, or just verbal requests) is an illegal secondary boycott even though targeted just at the struck product (which the secondary firm would not have had any access to if the primary employer had not chosen and been able to replace the strikers). And in 1959 the Congress (via section 8(e)) closed up the one possible loophole in Sand Door when it barred secondary employers and their unions from voluntarily agreeing not to handle struck products (i.e., "hot cargo").

If American labor law was truly committed to the principle of economic freedom in the bargaining process, it would have reached the opposite results in General Motors, Pattern Makers, and Sand Door (just as in Katz and Truitt, for reasons noted earlier). What I advocate, though, is the more moderate labor law reform of overturning Mackay Radio instead (something that nearly came to pass in the Workplace Fairness Act of 1993, until a minority group of Senators blocked it from coming to a final vote). Employers should be free to use just temporary replacements of striking, as well as locked-out, employees. American workers would then finally enjoy the same meaningful right to strike without being permanently replaced in their jobs as they now have with their FMLA right to leave work to care for a sick child, for example. Indeed, I would follow the FMLA model further, and state that this right to be on strike, free of permanent replacement, should have a time limit—whether the twelve months of the FMLA or perhaps only the six months in the original Ontario labor law in this area.

VIII. The Right Path Towards True Reform

I would suggest that Congress add this further legal feature to union strike action. Workers should become entitled to protection from permanent replacement when they go on a legal strike, because the union should be permitted to call such a strike only with secret ballot majority approval by the affected members. Certainly this condition would add to the political appeal of rolling back Mackay Radio. From a policy perspective, though, it would also ensure that union members, not just union leaders, have focused on whether the immediate pay checks they are giving up (even though they are no longer "gambling" their permanent jobs) really are necessary to extract a fairer settlement offer from their employer.

And that secret ballot feature to union strike decisions would reinforce a point I made earlier. Congress should feel comfortable about replacing protracted with prompt certification elections to make union representation
more accessible to the fifteen million non-union employees who now want it, because the key decisions made by the union (including contract ratification) ultimately are made by the workers themselves. Indeed, there should be a similar right of employees to vote about whether to accept the employer's last contract offer or to ratify a negotiated settlement. And if Congress were to restore the freedom of unions to negotiate with employers a true requirement of membership in the union that represents all the employees (and must do so fairly), then everybody in the unit must have the right to vote in favor of a settlement or a strike.

After providing American workers with easier access to more effective union representation, lawmakers should also feel comfortable about rolling back the current "company union" restraint on EIPs created by non-union employers. I am quite sure that a bipartisan reform package that addressed these (and other) key issues on both sides of the labor-management table would have much better political prospects for success than what Congress has been debating (and filibustering) for the last quarter century. More important, from a longer-term policy perspective such comprehensive legislation would reflect a principled analysis of the real needs of ordinary workers in the current labor market. Hopefully, in their role as citizens, these employees will not only get out and vote, but will also send the message to the candidates that they must start doing what is necessary to enhance the world of work in this new century.