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LABOR AND EMPLOYMENT LAW AT THE MILLENNIUM: A HISTORICAL REVIEW AND CRITICAL ASSESSMENT

STEPHEN F. BEFORT*

Abstract: This Article uses a historical perspective as a basis to analyze the current state of labor and employment law in the United States. The Article first chronicles the decline in collective governance and the corresponding rise in the governmental regulation of the individual employment relation during the past 50 years, and attempts to ascertain the socio-economic forces contributing to this evolution. The Article then critiques the current state of workplace legal rules and finds a number of deficiencies in terms of both efficiency and equity. The Article pays particular attention to the impact of globalization and the resulting exacerbation in the imbalance of power between labor and capital. The Article concludes by making four recommendations for systemic law reform with an eye toward the development of new international norms in the areas of job security, collective bargaining, employee participation programs, and the legal status of the contingent workforce.

INTRODUCTION

The passage into the new millennium has unleashed a passion for reflection and assessment. It is as if this monumental turning of the calendar necessitates a meaningful appraisal of our world today as a prerequisite for a better tomorrow. This Article joins in this trend by reflecting on the status of American labor and employment law at the millennium. This particular assessment, however, is undertaken with a historical focus on tracking the changing nature of labor and employment law over the past fifty years. Grounded in the notion that "what's past is prologue,"¹ this longitudinal perspective provides a unique viewpoint from which to appraise the present and to develop recommendations for a better tomorrow.

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¹ WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. i, line 281.

Assessing the current status of American labor and employment law is the easiest part of this task. Simply put, it's a mess. In 1950, the American workplace was structured by two overarching legal regimes: the presumption of at-will employment and the alternative of labor-management co-determination. Since then, both of these regimes have crumbled. In their stead today is a patchwork of governmental regulation that lacks both doctrinal coherence and administrative efficiency.

A closer look, however, reveals a more complicated and troubling story, as the legal structures of employment have failed to keep pace with dramatic changes in working life. As examples of such changes, the demographic composition of the workforce and the output of workers both have changed markedly. Even more significant is the transformation in the how and why of work. Global trade and technology have crafted a workplace unknown in 1950.

Workplace change, of course, has influenced the evolving legal landscape. Innovations in trade and technology, however, have set askew the balance of power in the workplace. With capital mobility enhanced, the previous equilibrium between management and labor has been destroyed. As a result, the current regulatory regime simply does not play fair with workers.

Pressure emanates from global economic competition, creating a disastrous "race to the bottom." The watchword of "flexibility" demands ever-increasing workplace deregulation throughout the world. The fact that the United States already leads the industrialized world in the lack of workplace regulation does little to stem that tide within our borders.

What is needed is not massive deregulation, but a new international consensus on labor norms. This is not the first time that technological change has tipped the balance of power in favor of capital. In previous eras of sweeping innovation and workplace change, legal regulation eventually stepped in to create a new equilibrium that re-balanced considerations of efficiency and fairness. This must happen again.

This Article attempts to contribute to the building of the consensus that will be necessary to achieve a new equilibrium. In particular, it offers four recommendations for systemic reform in American labor and employment law to guide it toward such a consensus.

Part I of this article describes the law of the American workplace as it existed in 1950.² Part II tracks the changes that have occurred during the past 50 years and summarizes the current legal framework.³ This part also discusses workplace changes that have contributed to the evolution of legal rules.⁴ Assisted by this historical perspective, Part III goes on to provide a policy-oriented critique of the present scheme of American labor and employment law.⁵ Part IV then concludes by making four recommendations for reformulating American labor and employment law.⁶

I. LEGAL REGULATION OF THE WORKPLACE—1950

A. Introduction

The typical American employee in the 1950s was a white male with an education that did not exceed that of a high school degree.⁷ Women comprised only one out of three members of the civilian labor force at this time.⁸ Minorities made up only ten percent of the workforce.⁹

Most employees at the mid-point of the twentieth century worked in blue-collar jobs. Typical occupations included manufacturing, mining, construction, and unskilled labor positions.¹⁰ Employees working in the service sector accounted for only twelve percent of the total

² See *infra* notes 7–61 and accompanying text.

³ See *infra* notes 62–175 and accompanying text.

⁴ See *infra* notes 176–296 and accompanying text.

⁵ See *infra* notes 297–460 and accompanying text.

⁶ See *infra* notes 461–716 and accompanying text.

⁷ In 1955, 69.76% of the total labor force was male. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 131 (1975). In addition, in 1955, 85.4% of the civilian labor force as a percentage of the civilian non-institutional population consisted of white males. See *id.* at 133. In 1950, the mean years of school completed by white males was 9.3, and in 1960 it had risen to 10.6. See *id.* at 381.

⁸ See HANDBOOK OF U.S. LABOR STATISTICS, EMPLOYMENT, EARNINGS, PRICES, PRODUCTIVITY, AND OTHER LABOR DATA 52 tbl.1–7 (Eva E. Jacobs ed., 3rd ed. 1999) (showing 33.9% of working age females participating in the civilian labor force in 1950).

⁹ See U.S. DEP'T OF LABOR, 1999 REPORT ON THE AMERICAN WORKFORCE 141 tbl.8 (1999). The U.S. Department of Labor did not maintain data concerning minorities in the workforce until 1954. At that time, approximately six million out of a total workforce of sixty million workers were nonwhite. See *id.*

¹⁰ See *id.* at 146 tbl.12. In 1950, approximately forty-five million employees were on nonfarm payrolls. Of these employees, 15.2 million worked in manufacturing jobs, 0.9 million in mining jobs, 2.4 million in construction jobs, and 13.4 million in other unskilled labor positions. See *id.*

workforce.¹¹ Professional employees made up another eighteen percent of the workforce.¹²

The American workplace of 1950 was subject to very little government regulation. Absent union representation, employers were free to hire and fire employees at their sole discretion. Employers were free to set terms and conditions of employment subject only to the minimum standards imposed by the Fair Labor Standards Act (FLSA).¹³ The FLSA, enacted in 1938, required (and still requires) employers to pay covered employees the equivalent of the mandated minimum hourly wage plus overtime compensation at one and one-half times the regular rate of pay for time worked in excess of forty hours per week. In 1950, the minimum wage was pegged at seventy-five cents per hour.¹⁴

This lack of legal regulation is vividly illustrated by one of the most significant workforce transitions in recent history: the return of the armed forces following the conclusion of the Second World War. During the war, the Armed Forces increased from 800,000 men in December 1940 to nine million in June 1943 and 12.3 million in June 1945.¹⁵ The increased draw on the male workforce created a shortage in the civilian workforce which was to a great extent alleviated by an influx of women into the workforce.¹⁶ This change proved to be only temporary as United States' employers replaced female employees

¹¹ See *id.* (showing approximately 5.3 million American workers employed in the service sector in 1950).

¹² See *id.* (indicating that, in 1950, the finance, insurance, real estate, services, and government sectors employed 7.9 million American workers).

¹³ 29 U.S.C. §§ 201–219 (1994).

¹⁴ See U.S. Dep't of Labor, *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-1996*, at <http://www.dol.gov/dol/esa/public/minwage/chart.html> (last visited March 15, 2002).

¹⁵ See U.S. DEP'T OF LABOR, AMERICAN WORKERS' FACT BOOK 34 (1960).

¹⁶ See Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 TEX. J. WOMEN & L. 37, 45 n.45 (1995). Prior to Pearl Harbor, women comprised only 27.6% of the American workforce. See *id.* During the war the percentage of women working in factories increased to 46% and by the end of the war 37% of the workforce was made up of women. See *id.*; see also Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 590 (1997). During the years surrounding World War II, 20.6 million women entered the nation's workforce. See Bookspan, *supra*, at 45 n.45. In fact, in 1940, women filling positions previously held by men who had been drafted made up nearly 25% of the labor force. See *id.* This increased demand for labor manifested itself differently within the African-American community. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 435 (1990). Typically, African-American women were denied factory, office, and sales jobs that were held by most white women, and instead found work in domestic employment. See *id.*

with returning male G.I.s after the war.¹⁷ Some of these replacements were voluntary;¹⁸ some, however, were not.¹⁹

Employer preference for male workers in 1950 was perfectly lawful. Civil Rights statutes prohibiting the discriminatory treatment of women and minorities in employment did not yet exist.²⁰ The relative skills and abilities of the displaced workers were legally irrelevant. Simply put, the existence or nonexistence of the employment relationship was almost entirely a matter of employer discretion, not government regulation.

The principal exception to this laissez-faire approach was in the arena of labor-management relations. The National Labor Relations Act (NLRA), adopted in 1935, obligated employers to negotiate with the freely-selected union representatives of their employees.²¹

Thus, in 1950, the workforce and the relatively barren landscape of employment regulation could be divided into two main sectors. The largest was the at-will sector in which employers possessed the legal authority to determine unilaterally the existence and terms of the employment relationship. Smaller, yet still quite significant, was the unionized sector in which employers and unions bilaterally set terms and conditions of employment.

B. *The At-Will Sector*

In 1950, "employment law" did not exist as an area of legal practice or study. The controlling law of the workplace at that time was either labor law or the at-will regime, which was no law at all. More

¹⁷ See Marion O. Crain, *Feminizing Unions: Challenging the Gender Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1167 (1991).

¹⁸ See *id.* Ruth Millknan has argued that this reversion to postwar patterns is a result of two factors: (1) the traditional sexual division of labor was so ingrained in society and industry that it compelled the reversion; and (2) that while it was profitable for industries to utilize women in the workforce during the war, they could get more "bang for their buck" by employing men when they were available. See *id.*

¹⁹ The federal government played a large role in pushing women out of the workforce when it granted veterans the right to displace wartime workers and it terminated child care funding that had been established during the war. See Bridge, *supra* note 16, at 590. In addition, many industries restructured their workforce through outright layoffs. See Dowd, *supra* note 16, at 436. As a result of these reallocations of employment opportunities, by 1947 only sixteen million women, 30% of the working age females, remained in the labor force. See Bridge, *supra* note 16, at 590. Those women who did remain in the workforce returned to jobs more traditionally allocated to females that were lower paying and typically in the clerical field. See *id.*

²⁰ See *infra* notes 276-278 and accompanying text (discussing the enactment of Title VII, the first federal antidiscrimination statute, in 1964).

²¹ 29 U.S.C. §§ 151-169 (1994).

than two-thirds of American employees in 1950 fell into the latter, regulation-free category.

The at-will rule, which provides the theoretical foundation for this sector, is generally traced²² to treatise writer Horace Gray Wood, who wrote the following in 1877:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring-at-will, and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party.²³

Although the accuracy of Wood's description of the law is questionable,²⁴ "Wood's rule" quickly became the law throughout the United States.²⁵ Only a few years later, for example, the Tennessee Supreme Court articulated its classic formulation of the rule: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for a cause morally wrong, without being thereby guilty of legal wrong."²⁶

The employment-at-will doctrine is premised on a theoretical equality of rights where both employer and employee have the right to terminate the employment relationship at any time and for any reason. This theoretical equality was consistent with prevailing late nineteenth century notions of freedom of contract and unfettered entrepreneurship.²⁷ As a doctrine grounded in market rather than

²² For a good description of the development and historical antecedents of the employment-at-will rule, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

²³ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

²⁴ See *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1030 (Ariz. 1985) ("As commentators and courts later would point out, none of the four cases cited by Wood actually supported the rule."); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 (1974). Apparently, some American courts continued to follow the one-year presumption as to duration, which had been borrowed from the English common law. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 n.51 (1980) [hereinafter Note, *Protecting At Will Employees*] (citing CHARLES MANLEY SMITH, TREATISE ON THE LAW OF MASTER AND SERVANT 53-57 (1852)).

²⁵ See Feinman, *supra* note 22, at 121.

²⁶ *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915).

²⁷ See Note, *Protecting At Will Employees*, *supra* note 24, 1824-26 (1980) ("By increasing the employer's freedom in the employment relationship and restricting her liability, the at-will contract rule was meant to further economic growth and entrepreneurship."); see also Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the*

legal forces, the at-will rule has been defended on the grounds that it promotes overall economic efficiency with a minimum of administrative costs.²⁸

Thus, two significant attributes characterized the legal framework governing the at-will sector in 1950. First, employers possessed virtually unfettered discretion over both the existence and terms of the employment relationship. Second, beyond the basic at-will principle itself, this sector was essentially free of any governmental regulation.

C. The Unionized Sector

Union members accounted for 31.5% of the American nonagricultural workforce in 1950.²⁹ Although this figure is far lower than in many European countries, it is not far below the all-time U.S. high of 35% recorded in 1954.³⁰ Indeed, the union movement was so strong during this period that Congress, by adopting the Taft-Hartley Act in 1947, significantly amended the NLRA in order to curb what was perceived to be excessive union power.³¹

The vast majority of unionized employees³² are subject to two sources of legal regulation. One source, in the form of a federal statute, is the NLRA. The other is in the form of contractual rules flowing from privately-negotiated collective bargaining agreements.

Broadly speaking, the NLRA protects three types of employee conduct. First, the NLRA, at least in the private sector,³³ protects the

Employment-At-Will Doctrine, 139 U. PA. L. REV. 197, 201 ("[T]he at-will doctrine contributed to the entrepreneurship and economic growth of an era.").

²⁸ See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989).

²⁹ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS 1980b, at 412 tbl.165, in MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl.1 (1987). Approximately fifteen million American workers belonged to unions in 1950. See U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION D 927-39* (1975). Of these, approximately eight and one-half million were members of the American Federation of Labor (AFL), four million belonged to the Congress of Industrial Organizations (CIO), and the remaining two and one-half million were members of independent or unaffiliated organizations. See *id.*

³⁰ See GOLDFIELD, *supra* note 29, at 10 tbl.1.

³¹ 61 Stat. 136 (1947).

³² The exact size of the unionized sector is somewhat imprecise in that not all union members are covered by collective bargaining agreements and not all of the employees who are so covered are union members.

³³ The NLRA does not apply in the public sector. See 29 U.S.C. § 152(2) (1994). Most states, however, have enacted labor relations acts applicable to public employees. Many of

right of employees to engage in organizational activities.³⁴ The NLRA specifically prohibits an employer from interfering with an employee's right to join a union or to engage in activities that urge fellow employees to join a union.³⁵ Accordingly, an employer commits an unlawful labor practice by such acts as discharging an employee organizer³⁶ or making threats of reprisal for union support.³⁷

A second right conferred by the NLRA is the right of employees to bargain collectively through their selected union representative.³⁸ Mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment,"³⁹ but not matters that go to the core of an employer's entrepreneurial control,⁴⁰ such as plant closings⁴¹ and product advertising.⁴² The NLRA obligates both parties to negotiate in "good faith"⁴³ with a present intention to find a basis for agreement,⁴⁴ although "such obligation does not compel either party to agree to a proposal or require the making of a concession."⁴⁵

Finally, the NLRA protects the right of employees to engage in "concerted activity . . . for mutual aid or protection."⁴⁶ This includes a

these statutes provide rights and obligations similar to the NLRA, with the notable exception of the right to strike. See DONALD ET AL., *BARGAINING IN PUBLIC EMPLOYMENT* 9-11 (4th ed. 1993) (describing the typical provisions of the public sector labor relations statutes adopted in 36 states). Only thirteen of these state statutes recognize a right of public employees to engage in strikes, and even in these states, the right is "limited and conditional." See *id.* at 10.

³⁴ 29 U.S.C. § 157 (1994). The NLRA also protects an employee's right not to join a union and to refrain from engaging in organizational activities. *Id.*

³⁵ 29 U.S.C. § 158(a) (1994).

³⁶ See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

³⁷ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

³⁸ 29 U.S.C. § 157.

³⁹ 29 U.S.C. § 158(d) (1994); see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁴⁰ See *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that the NLRA does not require bargaining with regard to managerial decisions "which lie at the core of entrepreneurial control").

⁴¹ See, e.g., *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (ruling that an employer is not required to bargain with respect to a decision to close part of its business operation).

⁴² See, e.g., *NLRB v. Detroit Resilient Floor Decorators Local Union No. 2265*, 317 F.2d 269 (6th Cir. 1963) (ruling that an employer is not required to bargain with respect to deciding whether to contribute to an industry promotion fund).

⁴³ 29 U.S.C. § 158(d).

⁴⁴ See *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 683-84 (9th Cir. 1943).

⁴⁵ 29 U.S.C. § 158(d).

⁴⁶ 29 U.S.C. § 157; see also 29 U.S.C. § 163 (1994) ("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.").

ban on an employer's ability to discharge⁴⁷ or otherwise retaliate⁴⁸ against an employee who participates in a lawful strike. In reality, most collective bargaining agreements waive the union's right to strike during the contract term in favor of a grievance arbitration mechanism for dispute resolution.⁴⁹

Collective rights arising under the NLRA are enforced through administrative procedures. The NLRA prohibits various "unfair labor practices" committed either by employers⁵⁰ or labor unions.⁵¹ The NLRA established as its administrative enforcement mechanism a National Labor Relations Board (NLRB) with two distinct functions. One branch of the NLRB, under the direction of the NLRB's General Counsel, investigates and prosecutes unfair labor practice proceedings on behalf of complaining unions, employees, or employers.⁵² Independently, the NLRB, as a five-member, quasi-judicial body, reviews the unfair labor practice decisions of administrative law judges.⁵³

Collective bargaining agreements, negotiated pursuant to the NLRA, may also create enforceable rights. For example, the vast majority of such agreements provide for a "just cause" limitation on employee discipline and discharge.⁵⁴ Most contracts also establish a grievance procedure culminating in binding arbitration to resolve contract interpretation and application disputes.⁵⁵ Taken together,

⁴⁷ See 29 U.S.C. § 158(a)(3) (1994); *NLRB v. Browning-Ferris Indus.*, 700 F.2d 385 (7th Cir. 1983).

⁴⁸ See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-35 (1967) (employer committed unfair labor practice by paying accrued vacation benefits to all qualifying employees except those who participated in lawful strike).

⁴⁹ See FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 8 n.34 (5th ed. 1997) (noting two studies which found that approximately 90% of collective bargaining agreements with arbitration clauses also contain a limitation on the right to strike during the life of the contract). The Supreme Court of the United States has ruled that unless the agreement specifies otherwise, it is presumed that the availability of grievance arbitration waives the union's right to strike in response to an alleged breach of the labor contract. See *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁵⁰ 29 U.S.C. § 158(a).

⁵¹ 29 U.S.C. § 158(b).

⁵² See 29 U.S.C. § 153 (d) (1994).

⁵³ See 29 U.S.C. § 153(a), 160(c) (1994). NLRB decisions, in turn, are subject to further review by the federal appellate courts. See 29 U.S.C. § 160 (1994).

⁵⁴ See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 n.1 (1985) (94% of collective bargaining agreements entered into under the NLRA contain clauses that provide that an employer may discharge employees only with "just cause").

⁵⁵ See *Characteristics of Major Collective Bargaining Agreements, July 1, 1976*, 2013 U.S. DEP'T OF LABOR BULL. 82 (1979) (reporting that approximately 96% of agreements in

this means that employers may discharge employees covered by union contracts only upon convincing a neutral arbitrator that just cause exists to support the termination decision.⁵⁶ If an employer fails to carry this burden, an arbitrator typically issues a "make whole" remedy consisting of an order for reinstatement and back pay.⁵⁷ These arbitration decisions are subject to very limited judicial review.⁵⁸

Accordingly, the unionized sector was and remains characterized by four important attributes. First, while the unionized sector was subject to greater governmental regulation than the at-will sector, this regulation still has largely been only indirect and procedural in nature. The NLRA, itself, has never mandated any substantive terms of the employment relationship.⁵⁹ The Act, instead, regulates only the process of collective bargaining, leaving the substance to private ordering by the effected parties. This, in turn, leads to a second attribute of the unionized sector—management and labor bilaterally establish terms and conditions of employment through the collective bargaining process. Those employees who are represented by a union representative have a collective voice in the governing of their work life. Third, most employees in the unionized sector are subject to discharge only upon an employer's showing that it had "just cause" to do so.⁶⁰ Finally, unions can enforce this job security standard in a relatively expeditious and inexpensive arbitration forum.⁶¹

II. THE LEGAL REGULATION OF THE WORKPLACE—2000

Much has changed in the world of labor and employment law in the past 50 years. Both unions and the at-will rule have declined in relative importance. But while down, neither is yet out. The unionized sector continues as a unique subset of the workplace regulatory struc-

effect during July 1976 in the nation's most important industries provided for arbitration as the terminal point of the contractual grievance process).

⁵⁶ Typically, labor and management jointly select a neutral arbitrator from a list of private arbitrators maintained by a federal or state agency. See generally LAURA COOPER ET AL., *ADR IN THE WORKPLACE* 19 (2000).

⁵⁷ See ABA SECTION OF LABOR AND EMPLOYMENT LAW, *DISCIPLINE AND DISCHARGE IN ARBITRATION* 369-71 (1998).

⁵⁸ See *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").

⁵⁹ See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

⁶⁰ See *supra* note 54 and accompanying text.

⁶¹ See, e.g., ELKOURI & ELKOURI, *supra* note 49, at 10-13 (noting the advantages of arbitration over litigation); Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 236-37 (1977) (same).

ture, though clearly reduced in size. And, while the at-will rule no longer defines the entire legal relationship applicable to most employees, it still serves as the default presumption outside of the unionized sector.

Governmental regulation, meanwhile, has grown apace. The American workplace has evolved from a largely unregulated arena to one subject to regulation from a myriad of sources—federal and state, legislative and judicial. Employers, correspondingly, attempt to ease the weight of these regulations. American firms increasingly have turned to non-employee, or contingent, work arrangements as a means of avoiding employee-orientated regulation. The explosion of the contingent workforce is, indeed, a third major phenomenon of working life at the turn of the millennium.

A. *The Decline of American Unions*

The decline of the American union movement is a well-known story. Beginning in the mid-1950s, union density as a proportion of the non-agricultural labor force began a long and steady slide. Today, union density is less than half of what it was in 1950.

1. The Numbers

In 1950, union members comprised 31.5% of the nonagricultural labor force.⁶² This percentage rose to 34.7% in 1954⁶³ and then began to fall. Union density dropped to 24.7% in 1970⁶⁴ and continued downward to 16.1% in 1990.⁶⁵ The decline has slowed but not stopped as the most recently available data in 2000 shows union membership at approximately 13.5% of the nonagricultural labor force.⁶⁶

The actual drop in private sector union membership is even more severe once the simultaneous rise in public sector unionism is considered. In 1950, union membership among public employees was negligible. During the decades of the 1960s and 1970s, public sector union density increased five-fold;⁶⁷ since then thirty-six states have en-

⁶² See U.S. DEP'T OF LABOR, *supra* note 29, at 412 tbl.165.

⁶³ See *id.*

⁶⁴ See GOLDFIELD, *supra* note 29, at 11 tbl.2.

⁶⁵ See Bureau of National Affairs, 26 DAILY LAB. REP. (BNA), at B-8 (Feb. 7, 1991).

⁶⁶ See *Labor Force Statistics from the Current Population Survey: Union Members Summary* (2000), available at <http://stats.bls.gov/newsrels.htm>. The Bureau of Labor Statistics reports a total of 16.3 million union members in the United States in 2000. See *id.*

⁶⁷ In 1956, only 915,000 federal, state, and local governmental employees were union members. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 1865, HANDBOOK

acted labor relations statutes protecting public employee bargaining rights.⁶⁸ By 2000, 37.5% of all government workers were union members accounting for approximately 40% of total union membership.⁶⁹ In reality, union members comprise only 9% of the private sector labor force once the public sector boom is factored out.⁷⁰

2. Reasons for the Decline

Many reasons have been suggested for the decline in union membership. A brief look at some of the most likely factors provides a useful introduction to some of the most significant influences on today's workplace.

a. *The New Global Economy*

Unions fare best in a climate in which they enjoy monopoly power in product markets.⁷¹ Put another way, where unions are successful in organizing an entire sector of the economy, the presence of a union no longer puts any particular enterprise at a disadvantage in the marketplace. By "taking wages out of competition," unions thus reduce the amount of resistance from employers and consumers.⁷² One of the reasons underlying the higher union density of 1950 was the fact that organized labor was able to achieve wall-to-wall representation of workers in a variety of American industries.⁷³

OF LABOR STATISTICS 1975, at 382 tbl.155 (1975). By 1980, more than five million public employees belonged to unions. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR-MANAGEMENT SERVS. ADMIN., NO. 102, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980, at 1 tbl.B (1981).

⁶⁸ See DONALD, *supra* note 33, at 9-11.

⁶⁹ See *Labor Force Statistics from the Current Population Survey: Union Members Summary* (2000), available at <http://stats.bls.gov/newsrels.htm>.

⁷⁰ See *id.*

⁷¹ See THOMAS KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 26 (1986) ("Stability in collective bargaining could be achieved only as long as unions were successful in organizing a sufficient part of the market and spread a standard wage across the market so as to take wages out of competition."); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1993) ("[U]nions for many years were able to pursue traditional high-labor-cost policies across entire product markets and thus grow or at least maintain their positions.")

⁷² RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 82 (1984); Estreicher, *supra* note 71, at 12.

⁷³ See KOCHAN ET AL., *supra* note 71, at 114 (stating that "[u]nions' bargaining power was strengthened [during the 1950s and 1960s] by their substantial organization of a number of the nation's core industries"); Clyde Summers, *The Usefulness of Unions in a Major Industrial Society—A Comparative Sketch*, 58 TUL. L. REV. 1409, 1436-37 (1984) ("Where the union is able to organize an entire product market, such as the steel and auto industry,

American unions enjoy this status in few product markets today.⁷⁴ Advances in technology and transportation have created a global economy in which American firms must compete on an international basis.⁷⁵ Given the lower wage structures of most developing nations,⁷⁶ American unions now face intense resistance in virtually every sector in which international production is feasible.⁷⁷

This pressure has led to lower union density rates in two related, but somewhat different ways. First, trade and technology have made capital more mobile.⁷⁸ Modern advances in information and communication technologies, in particular, have enabled employers to produce goods wherever labor costs are the most attractive.⁷⁹ American

airlines, longshore, or sections of trucking and construction, so that all competitors in the product market pay the same wages and fringes, the union is able to increase substantially the economic welfare of those it represents.”); see also Peter Capelli, *The New Deal At Work*, 76 CHL-KENT L. REV. 1169, 1174 (2000) (noting that until recently, “[f]oreign competition was very limited, and domestic competition often operated as an oligopoly where unions effectively took labor costs out of competition with standardized union contracts”).

⁷⁴ See KOCHAN ET AL., *supra* note 71, at 113–15 (noting that American unions suffered a significant decline in numbers and bargaining power as they became less able to take wages out of competition).

⁷⁵ See CHARLES B. CRAVER, CAN UNIONS SURVIVE? 42–47 (1993) (describing the rise of the global economy); HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 1–5 (1987) (depicting the development of an integrated world economy since the 1960s); U.S. DEP’T OF LABOR, COMM. ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 2–3 (1994) (reporting that the ratio of exports and imports to gross domestic product for the United States more than doubled between 1960 and 1991).

⁷⁶ See CRAVER, *supra* note 75, 43–47; INTERNATIONAL LABOR OFFICE, MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 77 (1973).

⁷⁷ See Estreicher, *supra* note 71, at 13 n.33 (noting that “[t]he impact of international product market competition has been principally felt in the manufacturing sector—in particular, the clothing, steel, automobile, rubber, and electronics industries”). The fact that public sector governmental services are less susceptible to production on an international basis may help explain the greater degree of success that unions have achieved in that sector.

⁷⁸ See generally ROBERT REICH, THE WORK OF NATIONS 113–22, 263–64 (1991) (describing the significant mobility of capital in the new global economy); Janice Bellace, *Labor Law—New Deal Model*, in LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS 22 (Janice Bellace & Max Rood eds., 1997) (noting the greater mobility of capital as compared to labor in the global economy).

⁷⁹ See Roger Blanpain, *The Changing World of Work*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 23, 24–26 (Roger Blanpain & Chris Engels eds., 1998) (describing the impact of technology on the global movement of goods and services); Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L. J. 1, 1–2, 11 (2000) (same).

employers, accordingly, have shifted production to the Sunbelt⁸⁰ and developing nations as a means of escaping unions and lowering labor costs.⁸¹

Second, American firms, whether or not they relocate operations, face intense pressure to cut costs in order to compete in the new global economy.⁸² Since unionization tends to come with a sizeable wage premium,⁸³ union avoidance and resistance to union wage demands have become a prime business strategy.⁸⁴ The ability of unions to organize is also affected indirectly by cost-cutting measures such as reorganizations, downsizing, and contingent work arrangements to which American businesses have turned since the 1980s.⁸⁵ These measures destabilize long-term work arrangements and are inimical to union strength.⁸⁶

b. *Changing Workforce Composition*

A second factor frequently asserted as contributing to the decline in union membership is the changing composition of the American labor force. In particular, fundamental alterations in the nature and identity of American employees between 1950 and today arguably have resulted in a workforce that is less conducive to unionization.

One alteration concerns the nature of the jobs that American workers perform. The American economy has changed from a predominately blue-collar workforce in 1950 to a predominately white-collar workforce in 2000.⁸⁷ Unions traditionally have enjoyed greater

⁸⁰ See SANFORD JACOBY, *MODERN MANORS* 255–56 (1997) (describing the relocation of manufacturing operations to southern states); see also KOCHAN ET AL., *supra* note 71, at 66–68 (describing the influence of labor costs and union avoidance on plant location decisions).

⁸¹ See CRAVER, *supra* note 75, at 42–47 (describing the flight of American business to “foreign export platforms”); Bellace, *supra* note 78, at 22 (noting that the global marketplace entices American businesses to move production facilities to lower wage countries).

⁸² See Dau-Schmidt, *supra* note 79, at 2, 12 (describing how global competition has led to a new flexibility in structuring work arrangements).

⁸³ See FREEMAN & MEDOFF, *supra* note 72, at 46, 64 (describing a 20–30% union wage effect); see generally H. G. LEWIS, *UNION RELATIVE WAGE EFFECTS: A SURVEY* (1986) (describing a 14–17% union wage effect).

⁸⁴ See generally KOCHAN ET AL., *supra* note 71, at 70, 107–08 (describing the financial incentive for American business to avoid unions).

⁸⁵ See PETER CAPELLI ET AL., *CHANGE AT WORK* 66–88 (1997) (describing various changes in business practices beginning in the early 1980s).

⁸⁶ See FREEMAN & MEDOFF, *supra* note 72, at 221–45; Dau-Schmidt, *supra* note 79, at 20.

⁸⁷ In 1950, 30% of employed Americans worked at manual labor jobs, and another 39% were industrial workers. By 1998, these percentages had shrunk to 28% and 20%, respectively. See U.S. DEP’T OF LABOR, *supra* note 9, at 146 tbl.12. In contrast, white-collar

success in organizing blue-collar workers; it follows that unions would not fare as well in organizing a white-collar workforce. In 1956, for example, more than 82% of all union members were blue-collar workers employed in manufacturing, mining, construction, and transportation jobs.⁸⁸ These jobs, however, have been replaced by white-collar positions, primarily in the professional, service, and technical ranks.⁸⁹ Working in a less stratified environment, employees in these latter types of positions generally have a lower incidence of union membership.⁹⁰

A second alteration concerns the demographic identity of American workers. The 1950 workforce overwhelmingly consisted of white, male employees.⁹¹ The workforce of 2000, in contrast, is considerably more diverse owing to a large influx of women and minority employees. As an example, in 1950, 33.9% of adult women were members of the labor force.⁹² By 2000, 61.1% of all adult women, or almost double the earlier percentage, are employed outside the home.⁹³ Similarly, the proportion of nonwhite employees in the American workforce has increased by more than fifty percent since 1950.⁹⁴ Since women and minority employees traditionally have not been on the forefront of the union movement, some commentators suggest that this demographic diversification also has contributed to lower union density rates.⁹⁵

workers grew from 18% of the workforce in 1950 to 22% in 1998, and the service sector grew even faster from 12% of the workforce in 1950 to 30% in 1998. *See id.* *See also* HUDSON INSTITUTE, *supra* note 75, at 20–29 (describing the shift in jobs from producing goods to providing services).

⁸⁸ *See* WALTER GALENSON, *THE AMERICAN LABOR MOVEMENT, 1955–1995*, at 4 tbl.1.3 (1996).

⁸⁹ Professional, service, and technical workers have grown from 30% of the 1950 workforce to 52% of the 1998 workforce. *See* U.S. DEP'T OF LABOR, *supra* note 9, at tbl.12 (reporting percentages of "white-collar" and "service" workers); *see also* U.S. DEP'T OF LABOR, *supra* note 75, at 7–8 (discussing the increase in white-collar jobs requiring advanced education).

⁹⁰ *See* PAUL C. WEILER, *GOVERNING THE WORKPLACE* 107 (1990).

⁹¹ *See supra* notes 7–9 and accompanying text.

⁹² *See supra* note 8.

⁹³ *See* HUDSON INSTITUTE, *supra* note 75, at 85 tbl.3–4. As of 1993, 57.9% of working age American females were workforce participants. *See* U.S. DEP'T OF LABOR, *supra* note 75, at 10.

⁹⁴ *See* U.S. DEP'T OF LABOR, *supra* note 75, at 12. In 1950, nonwhite workers made up approximately 10% of the American labor force. By 1993, the presence of nonwhite workers jumped to 15.2%. *Id.* This percentage is expected to increase further to 15.7% by 2000. *See* HUDSON INSTITUTE, *supra* note 75, at 89 tbl.3–5.

⁹⁵ *See, e.g.,* GOLDFIELD, *supra* note 29, at 123.

Statistical data concerning union membership only partially bears out this contention. Nonwhite employees actually have a higher unionization rate than do their white counterparts. In 1980, for example, 32.1% of nonwhite workers were organized as compared to 24.9% of white workers. The opposite is true for female employees, however. Again, using 1980 data, only 18.9% of women belonged to labor organizations as compared to 31% of men.⁹⁶

Economic and social circumstances likely have more to do with union proclivities than any innate inclinations associated with gender or race.⁹⁷ Black workers, for example, probably have a higher unionization rate because of their generally lower economic status as well as a greater concentration in basic industries that are heavily unionized.⁹⁸ Women, on the other hand, tend to work at occupations that traditionally have been subject to less union organization.⁹⁹ Other commentators suggest that since women still play a greater child-rearing role in society, women workers tend to be more transitory and perhaps less committed to a long-term struggle to improve working conditions at any particular workplace.¹⁰⁰ Polling data, moreover, suggests that when placed in the same circumstances as their male counterparts, minorities and women are as likely, if not more likely, to favor union representation.¹⁰¹

c. *The Increase in Contingent Work*

A third significant change in the employment landscape is the growth of the contingent workforce. As late as the 1970s, the predominant employment model in the United States could be described as that of a "core worker system" characterized by long-term employment relationships.¹⁰² Today, however, a large and growing group of

⁹⁶ See *id.* at 126.

⁹⁷ See generally H.S. Farber & D.H. Saks, *Why Workers Want Unions: The Role of Relative Wages and Job Characteristics*, 88 J. POL. ECON. 349 (1980).

⁹⁸ See *id.* at 352; see also GOLDFIELD, *supra* note 29, at 134-35.

⁹⁹ See Irving Bernstein, *The Growth of American Unions, 1945-1960*, 2 LAB. HIST. 131, 150 (1961).

¹⁰⁰ See DEREK BOK & JOHN DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 44 (1970).

¹⁰¹ See FREEMAN & MEDOFF, *supra* note 72, at 227 (reporting studies showing nonwhite workers more likely to vote for union representation, while female workers were just as likely to do so); Lisa Schur & Douglas Kruse, *Gender Differences in Attitudes Toward Unions*, INDUS. & LAB. REL. REV. 89, 89 (1992) (finding that female workers are at least as likely to vote for union representation as similarly situated male workers).

¹⁰² RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* 12 (1989). As explained by Belous:

workers provide labor or services based on a variety of arrangements that deviate from the traditional core worker model.¹⁰³ Workers in this diverse group tend to have a weak workplace affiliation and a lessened expectation of long-term employment.¹⁰⁴

Although the definition varies, the contingent workforce generally is described as including independent contractors, contracted workers, leased employees, part-time employees, and temporary employees.¹⁰⁵ Although it is difficult to determine the exact number of contingent workers, reliable estimates range upwards to twenty to thirty percent of all American workers.¹⁰⁶ This accounts for more than thirty million members of the American workforce.¹⁰⁷

It is helpful to think of these contingent workers in terms of two broad categories. The first of these groups, which consists of independent contractors,¹⁰⁸ contracted workers,¹⁰⁹ and leased employ-

Core workers have a strong affiliation with an employer and are treated by the employer as having a significant stake in the company. Core workers can be thought of as being a part of the so-called corporate family. They show long-term attachment to a company and have a real measure of job stability.

Id. at 5.

¹⁰³ See Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 867 (1995) (stating that the contingent workforce has grown about 75% faster than the overall workforce between the years of 1980 and 1993); see also Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 564 (noting a greater than 30% increase in contingent workers between 1980 and 1996).

¹⁰⁴ See BELOUS, *supra* note 102, at 5-6.

¹⁰⁵ See, e.g., Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 53, 57 (1998).

¹⁰⁶ See BELOUS, *supra* note 102, at 15-17 (estimating that approximately 25-30% of U.S. workers fall into contingent categories); STANLEY NOLLEN & HELEN AXEL, *MANAGING CONTINGENT WORKERS* 9-10 (1996) (estimating that approximately 20-25% of U.S. workers fall into contingent categories); Middleton, *supra* note 103, at 564 (estimating that about one-quarter of the nation's working population are contingent workers). *But see* Dietrich et al., *supra* note 105, at 58 (using more stringent criteria to estimate that contingent workers comprise about 5% of the U.S. workforce).

¹⁰⁷ See BELOUS, *supra* note 102, at 16 tbl.2.1 (calculating between 29.9 and 36.6 million contingent American workers as of 1988); Middleton, *supra* note 103, at 564 (estimating the number of contingent workers in 1996 at approximately thirty-two to thirty-seven million). The two largest categories of contingent workers are part-time workers and independent contractors. See BELOUS, *supra* note 102, at 16 tbl.2.1 (estimating 19.8 million part-time workers and 10.1 million independent contractors).

¹⁰⁸ Independent contractors are self-employed workers who are engaged by a company to "provide specialized services on a contract basis." Mark Diana & Robin H. Rome, *Beyond Traditional Employment: The Contingent Workforce*, N.J. LAW., Apr. 1999, at 9.

¹⁰⁹ Contracted, or outsourced, work occurs when a company uses another firm to perform a particular service, such as janitorial services or copy services. See Jonathan P. Hiatt

ees,¹¹⁰ are not legally classified as employees of the entity for which they provide services.¹¹¹ The second group of workers, consisting of part-time¹¹² and temporary employees,¹¹³ have the legal status of employees, but with a lower degree of attachment to the workplace as compared to traditional core employees.

A number of factors have acted as catalysts for the contingency explosion. First, many firms see contingent work arrangements as a means to maximize labor market flexibility.¹¹⁴ Contingent workers add to the flexibility of the workforce by enabling companies to adjust personnel and staffing needs while avoiding "the expense of cyclical hiring and lay-off periods."¹¹⁵ Second, many workers, particularly those with a need to balance work and family responsibilities, also find flexible work arrangements to be desirable.¹¹⁶ Third, technological advances have spurred contingent work arrangements.¹¹⁷ Advances in communications and information technology permit work

& Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, 10 LAB. LAW. 143, 146 (1994).

¹¹⁰ Leased employees are workers who are employed by one entity, typically an employee leasing firm, but who provide work for a separate entity. *See id.*; BELOUS, *supra* note 102, at 46.

¹¹¹ *See infra* notes 438–449 and accompanying text (discussing the legal tests for determining "employee" status).

¹¹² Part-time employees are those who are scheduled for less than a usual forty-hour work week. *See, e.g.*, Diana & Rome, *supra* note 108, at 8, 9.

¹¹³ Temporary employees perform work at a particular company as a short-term supplement to the regular workforce. *See id.* at 9.

¹¹⁴ *See* NOLLEN & AXEL, *supra* note 106, at 22 (1996) (noting that in an increasingly global economy, companies experience the pressure of "severe fluctuations in their need for labor"); U.S. DEP'T OF LABOR, *supra* note 75, at 22 ("The increase in 'contingent work' is largely the result of the way in which employers offer jobs to increase flexibility with uncertain product demand and to reduce labor costs by retaining a smaller core of full-time workers.").

¹¹⁵ *See* Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 858 (1995).

¹¹⁶ *See* NOLLEN & AXEL, *supra* note 106, at 23 (As "more people . . . move in and out of the labor force, [there are more] who prefer part-time or temporary jobs because of competing demands on their time, [who are in] different states in the life cycle, or [who have] different family circumstances.").

¹¹⁷ *See* Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 8 (1999) (noting that "revolutionary developments in information technologies . . . have conspired to create new modes of laboring"); Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 112 (1998) (noting the acceptance of many that, among other things, technological change has contributed to the "drive toward contingent staffing").

to be removed from a physical worksite or a traditional nine-to-five work schedule.¹¹⁸

Finally, American business entities have powerful legal and financial incentives to increase their use of contingent workers. This is particularly true for those contingent workers who fall outside of the legal definition of an "employee."

Most statutes governing the workplace only apply within the context of the employment relationship. Since the factors scrutinized for determining whether a worker falls within the legal definition of a covered "employee" are prone to manipulation,¹¹⁹ many firms consciously attempt to structure work relationships in a manner that will avoid "employee" status and its accompanying legal strictures.¹²⁰

Firms also can garner cost savings through the use of contingent workers. Business entities are responsible for payroll taxes as well as contributions for unemployment insurance and workers compensation plans only for their employees.¹²¹ Moreover, many firms provide contingent workers with lower pay and benefits.¹²² Although this later phenomenon is not legally compelled, many companies view core employee status as a convenient and defensible eligibility threshold for conferring premium pay and benefits.¹²³

¹¹⁸ See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 78 (4th ed. 1998); U.S. DEP'T OF LABOR, *supra* note 75, at 6. See generally MANUEL CASTELLS, *THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE* (1996) (describing the impact of changes in information technology on social and economic trends).

¹¹⁹ See Middleton, *supra* note 103, at 568-69 ("[T]he legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability."); see also *infra* notes 438-449 and accompanying text (discussing the legal tests for determining "employee" status).

¹²⁰ See U.S. DEP'T OF LABOR, *supra* note 75, at 37-38 ("[C]urrent tax, labor, and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations."); Middleton, *supra* note 103, at 571 (noting that employers are motivated to categorize workers as non-employees in order to avoid legal regulations applicable to employees).

¹²¹ See generally U.S. DEP'T OF LABOR, *supra* note 75, at 40-41.

¹²² See, e.g., Hiatt & Rhinehart, *supra* note 109, at 148-49; Middleton, *supra* note 103, at 564-65 (1996) (noting that part-time employees earned 58% of the hourly wage of median full-time employees in 1989); see also Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 525 n.11 (noting that the average hourly wage for temporary employees in 1994 was 35% lower than it was for full-time employees). The benefit shortfall is particularly notable with respect to health care insurance. See Middleton, *supra* note 103, at 565 (noting that only 22% of part-time workers received health care benefits through their employers in 1988 as compared to 78% of full-time employees).

¹²³ See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc) (reviewing legality of pension and welfare plan benefits made available to common law employees but not to similarly situated workers designated as independent contractors).

Contingent work arrangements contribute to union decline in several ways. First, as noted above, many contingent workers are not employees or, at least, not employees of the entity for whom they provide work.¹²⁴ As such, these workers are not covered by the NLRA and have no legal protection in seeking to unionize.¹²⁵ Second, part-time and temporary workers, even though legally classified as employees, commonly are excluded from bargaining units on the grounds that they do not share a sufficient community of interests with more permanent employees.¹²⁶ Thus, they are not within the group represented even if a union is successful in obtaining exclusive representative status.¹²⁷ Third, until recently, workers who are leased from a supplier firm and who work alongside regular employees could not be included in a bargaining unit with the user firm's employees without the consent of both joint employers.¹²⁸ Since one or both of the employers invariably withhold consent,¹²⁹ these workers could unionize only in a separate unit consisting solely of employees of the lessor firm.¹³⁰

Above and beyond these legal obstacles is the fact that contingent workers, with their weak affiliation with the enterprise, are a difficult group to organize.¹³¹ Many contingent workers simply do not see the benefits of union representation in an environment of short-term

¹²⁴ See *supra* note 111 and accompanying text.

¹²⁵ See 29 U.S.C. § 152(3) (1994) (defining an "employee" for purposes of the NLRA). The NLRB uses the common law test in determining employee status. See *infra* notes 438-440 and accompanying text (describing the common law test).

¹²⁶ See THE DEVELOPING LABOR LAW 1481-84 (Charles J. Morris ed., 1983); Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 513 (1997).

¹²⁷ See generally Virginia L. duRivage, *New Policies for the Part-time and Contingent Workforce*, in NEW POLICIES FOR PART-TIME AND CONTINGENT WORKERS 89, 116 (1992) (reporting that part-time workers are only one-third as likely to be unionized as are full-time workers).

¹²⁸ See *Lee Hospital*, 300 N.L.R.B. 947 (1990). The Board overruled *Lee Hospital* in 2000. See *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173 (2000). Under the new standard announced in *Sturgis*, the Board will include leased employees in a unit alongside regular employees without requiring consent so long as the two groups share a sufficient community of interest so as to constitute a single appropriate bargaining unit. *Id.* at 19. Whether *Sturgis* will survive appellate review and/or reconsideration by a new Bush labor board remains to be seen.

¹²⁹ See Bitá Rahebi, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1124 (2000).

¹³⁰ See *id.* at 1113-15; see also *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173, at 12 (reaffirming that the dispersed employees of a supplier firm may seek to bargain with the supplier firm without needing to obtain the consent of the various user firms).

¹³¹ See KOCHAN ET AL., *supra* note 71, at 221; Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 551 (2001); Middleton, *supra* note 103, at 589-90.

employment. Employers are well aware that contingent work and unions do not typically go hand-in-hand, and some employers hire contingent workers as an affirmative tool of union avoidance.¹³²

d. *Employer Opposition to Unions and Deficiencies in the NLRA's Regulatory Structure*

The factors discussed above do not explain why the decline in union membership has been far more severe in the United States than in most other western industrialized countries. Those nations also have experienced the effects of a global economy and the entry of more women and contingent workers into the workforce, and yet, with the exception of France, they have not suffered a similar extreme drop in unionization rates.¹³³ Indeed, union density actually has increased in some northern European countries such as Sweden and Denmark during the last quarter of the twentieth century,¹³⁴ and our two North American neighbors have unionization rates that are two to three times higher than our own.¹³⁵

Some commentators point to two related factors to explain the steepness of the American decline. First, a unique attribute of the American system of labor-relations is the active opposition of American employers to union organizing efforts.¹³⁶ Second, commentators point to weaknesses in the NLRA regulatory scheme, in that it treats

¹³² See Forster, *supra* note 131, at 551; Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 197-204 (1999).

¹³³ See WILLIAM B. GOULD IV, AGENDA FOR REFORM 14-15 tbl.2.1 (depicting union membership as a percentage of the workforce from 1955 to 1990 in various industrialized countries).

¹³⁴ See *id.* (showing higher union density rates for both Sweden (95%) and Denmark (88%) in 1990 as compared to 1980); see also Tore Sigeman, *Insiders and Outsiders in the Labour Market: Experiences of a Nordic Welfare State in Labour Law Perspective*, in LABOR LAW AT THE CROSSROADS, *supra* note 78, at 202 (noting that the percentage of organized employees in Sweden is "stable, or even increasing").

¹³⁵ Union density in the early 1990s stood at 36% in Canada, GOULD, *supra* note 133, 14-15 tbl.2.1, and between 25-30% in Mexico, U.S. DEP'T OF LABOR, FOREIGN LABOR TRENDS, MEXICO 1991-92, at 2 (1992). For a comparison of the labor and employment law regimes in the United States and Mexico, see Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L. J. 269 (1995).

¹³⁶ See FREEMAN & MEDOFF, *supra* note 72, at 230-39 (describing various employer tactics in opposing union organizing efforts); GOULD, *supra* note 133, at 45 ("The fact is that American employers have never accepted trade unionism to the extent that their counterparts have in other industrialized countries throughout the world, a phenomenon sometimes encapsulated by the term 'American exceptionalism.'").

many anti-union tactics as lawful and fails adequately to deter others that are not.¹³⁷

Much employer opposition is facilitated by the NLRA's use of an electoral model for determining representational status.¹³⁸ In many industrialized countries, an employer automatically must bargain with a union concerning the rights of its members.¹³⁹ Under such a system, employers play no overt role in an employee's decision to join a union, and any opposition to union demands typically does not occur until the parties meet at the bargaining table.¹⁴⁰ Under the NLRA, in contrast, an employer is not obliged to bargain until after a union first establishes its majority status in a representation election. U.S. employers, moreover, may participate actively in this election process. The NLRA permits an employer to express its opposition to union representation so long as it does not threaten reprisal for union support or promise benefits in order to entice union opposition.¹⁴¹ Misstatements of fact and even intentional lies are not forbidden.¹⁴² Many employers hire professional consultants¹⁴³ for the purpose of orchestrating sophisticated anti-union campaigns that not infrequently consist of unlawful as well as lawful conduct.¹⁴⁴ Empirical studies show that these anti-union tactics often are successful in influencing election outcomes.¹⁴⁵

¹³⁷ Professor Paul C. Weiler is probably the most vocal and eloquent of these commentators. See WEILER, *supra* note 90, at 111-14; Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-81 (1983).

¹³⁸ See U.S. DEP'T OF LABOR, *supra* note 75, at 75 ("The United States is the only major democratic country in which the choice of whether or not workers are to be represented by a union is subject to such a confrontational process.").

¹³⁹ See, e.g., JUAN B. CLIMENT BELTRAN, *LEY FEDERAL DEL TRABAJO: COMMENTARIOS Y JURISPRUDENCIA* 268 (7th ed. 1993) (Mexico); ALEX LEUGHTEN, *I INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 4-22 (William L. Keller ed., 1997) (Germany).

¹⁴⁰ See Roy J. Adams, *The Right to Participate*, 5 EMPLOYEE RESP. & RTS. J. 91, 94 (1992) ("Few advanced democratic societies condone open opposition by employers to unionization.").

¹⁴¹ 29 U.S.C. § 158(c) (1994).

¹⁴² See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

¹⁴³ See GALENSON, *supra* note 88, at 88 (reporting on a 1983 survey conducted by the AFL-CIO finding that outside consultants or lawyers directed counter-organizing drives on behalf of employers in approximately 75% of union campaigns).

¹⁴⁴ For a discussion of both the legal and illegal tactics used by U.S. employers in opposing union organizing efforts, see Weiler, *supra* note 137, at 1776-81 and FREEMAN & MEDOFF, *supra* note 72, at 230-33.

¹⁴⁵ See FREEMAN & MEDOFF, *supra* note 72, at 233-39 (summarizing empirical studies concerning the impact of anti-union campaigns). *But cf.* JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 128-29 (1976) (finding that most em-

Three examples illustrate that the remedial shortcomings of the NLRA also have an impact on unionization rates in the United States. First, a common employer tactic in opposing union organizational campaigns is to discharge the leading employee organizers.¹⁴⁶ While the NLRA makes this conduct unlawful,¹⁴⁷ it does little to deter its occurrence. The usual remedy under the NLRA for the illegal discharge of an employee organizer is a cease and desist order coupled with reinstatement and back pay.¹⁴⁸ The NLRA does not provide for fines, punitive damages, or any other "penalty," and the discharged employee is subject to a duty to mitigate losses by finding alternative work.¹⁴⁹ This "make whole" approach provides little deterrence against employers who realize that they can chill union organization efforts by immediately firing the employee organizers.¹⁵⁰ The lack of remedial clout is compounded by the fact that lengthy procedural delays in resolving the resulting unfair labor practice charges operate to dissipate union support.¹⁵¹

The NLRA's relatively weak remedial scheme also diminishes the effectiveness of the Act's bargaining mandate. The only remedy recognized under the NLRA for a party's refusal to engage in good faith bargaining is an order requiring that party to return to the bargaining table.¹⁵² The Supreme Court of the United States has ruled that the NLRB is without power to impose substantive contract terms in the event of a violation even where the NLRB has concluded that an employer has acted in a manner designed to frustrate the bargaining

employees do not change their support for or against union representation because of an employer's anti-union tactics).

¹⁴⁶ See U.S. DEP'T OF LABOR, *supra* note 75, at 70 (reporting that unlawful employee terminations occurred in one out of every four certification elections); Robert LaLonde & Bernard Meltzer, *Hard Times for Unions: Another Look at Employer Illegalities*, 58 U. CHI. L. REV. 953, 994 (1991) (reporting that unlawful employee terminations occurred in one-third of all elections, with one out of thirty-six union supporters being unlawfully discharged).

¹⁴⁷ See 29 U.S.C. § 158(a)(3) (1994) (making it an unfair labor practice for an employer to terminate an employee for the purpose of "encourag[ing] or discourag[ing] membership in any labor organization").

¹⁴⁸ 29 U.S.C. § 160(c) (1994).

¹⁴⁹ See CRAVER, *supra* note 75, at 151.

¹⁵⁰ See *id.*; Weiler, *supra* note 137, at 1788-90.

¹⁵¹ As of 1988, the median length of time from the filing of an unfair labor practice charge until adjudication by the NLRB was 762 days. If judicial review of the Board's decision was sought, the median interval between charge and resolution jumped to more than three years. See GOULD, *supra* note 133, at 158-59.

¹⁵² See *Ex-Cello Corp.*, 185 N.L.R.B. 107 (1970), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971).

process.¹⁵³ Thus, an employer may engage in protracted "surface" bargaining with little fear of meaningful administrative intervention.¹⁵⁴ The problem of "surface" bargaining is particularly acute when used by an employer as a tactic to avoid the consummation of an initial collective bargaining agreement. Approximately one-third of all newly certified union representatives fail to conclude a first contract.¹⁵⁵ At this early stage, a union's inability to obtain a collective bargaining agreement virtually dooms it to an eventual decertification.¹⁵⁶

Finally, an additional shortcoming of the NLRA scheme flows from an employer's ability to hire permanent replacements to fill the positions of striking employees.¹⁵⁷ An employer lawfully may decline to reinstate a striker at the conclusion of a strike so long as the position continues to be occupied by a replacement employee.¹⁵⁸ This practice significantly undercuts the power of unions in two respects. First, the threat of being permanently replaced serves to deter strikes and decreases the union's ability to use the threat of a strike as leverage in collective bargaining.¹⁵⁹ Secondly, the permanent replacements have the right to vote in representation elections, while the voting rights of displaced strikers typically cease twelve months after the beginning of the strike.¹⁶⁰ These electoral rules, accordingly, permit an employer to rid itself of a union by pushing the employees into a strike and then hiring permanent replacements who vote to decertify

¹⁵³ See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

¹⁵⁴ See, e.g., GOULD, *supra* note 133, at 222; see also WEILER, *supra* note 90, at 250 (noting the incidence of "bad faith bargaining" has risen as employers "appreciate the lack of force in their obligation to recognize and deal with a certified union").

¹⁵⁵ See U.S. DEP'T OF LABOR, *supra* note 75, at 73-74.

¹⁵⁶ See GOULD, *supra* note 133, at 169 ("If the union cannot negotiate an agreement, the result is virtually the same as decertification or lack of certification during the organizational campaign.").

¹⁵⁷ The Supreme Court has ruled that an employer does not act unlawfully in hiring either temporary or permanent replacement workers to fill positions vacated by those engaged in a lawful strike. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). A temporary replacement is a worker hired only for the duration of a strike and then is bumped by a returning striker. An employer, however, may retain the services of a permanent replacement for an indefinite period. The strikers whose positions are filled by permanent replacements are placed on a waiting list and entitled to return to work only as their former positions become vacant. See *id.*; *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968).

¹⁵⁸ See *Mackay Radio & Tel. Co.*, 304 U.S. at 333; *Laidlaw Corp.*, 171 N.L.R.B. at 1366.

¹⁵⁹ See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 296-97 (1991).

¹⁶⁰ See 29 U.S.C. § 159(c)(3) (1994).

the union in an election held a little more than twelve months after being hired.¹⁶¹

e. *The Nature of American Unionism*

The seeds of decline also may be traced, in part, to the historical origins of the American labor movement. In contrast to many European countries where unions evolved as part of a broad political and social movement,¹⁶² American unionism had more pragmatic roots.

Although some early organizations such as the Knights of Labor in the 1870s¹⁶³ and the International Workers of the World¹⁶⁴ some forty years later urged a broad platform of political and social reform, the mainstream of the American labor movement chartered a very different course. The American Federation of Labor (AFL), founded in 1886, advocated a strategy of economic empowerment as opposed to political upheaval. Composed mostly of craft workers, the AFL concentrated on a policy of "business unionism" that sought not to replace capitalism but to share in its gains.¹⁶⁵ Even during the heady years of the New Deal era, organized labor focused on bettering the lot of its members through collective bargaining rather than attempting to craft a new social and economic landscape through political activism.¹⁶⁶

Business unionism fit America's lack of class-consciousness, but it came with a price. American unions today are relatively unpopular and isolated. Many Americans view unions as just another self-serving,

¹⁶¹ See WEILER, *supra* note 90, at 266-67; Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 565, 567 n.138.

¹⁶² See, e.g., Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 39 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (contrasting the United States with various West European countries in which labor is linked with social democratic or labor political parties); Summers, *supra* note 73, at 1409, 1418-19, 1425-26 (1984) (describing the close affiliation between labor unions and political parties in the United Kingdom and Sweden).

¹⁶³ For an overview of the history and aims of the Knights of Labor, see LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* (1983) and JOSEPH RAYBACK, *A HISTORY OF AMERICAN LABOR* ch. XI (1966).

¹⁶⁴ For an overview of the history and aims of the International Workers of the World, see DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA*, ch. 4 (1979) and see generally MELVIN DUBOFFSKY, *WE SHALL BE ALL: A HISTORY OF THE INTERNATIONAL WORKERS OF THE WORLD* (1988).

¹⁶⁵ See LEWIS L. LORWIN, *THE AMERICAN FEDERATION OF LABOR* 44-54 (1970); SELIG PERLMAN, *HISTORY OF TRADE UNIONISM IN THE UNITED STATES* (1922).

¹⁶⁶ See KOCHAN ET AL., *supra* note 71, at 27-28.

special interest group.¹⁶⁷ And having gone it alone when times were good, American unions lack the strong support of allied social partners that many of their European counterparts receive.¹⁶⁸

The insular attitude of American unions also has interfered with their ability to attract members from a new generation of workers. A 1972 statement by then AFL-CIO President George Meany illustrates the problem:

Why should we worry about organizing groups of people who do not want to be organized? If they prefer to have others speak for them and make the decisions which effect their lives, without effective participation on their part, that is their right. . . . I used to worry about the size of the membership. But quite a few years ago I stopped worrying about it, because to me it doesn't make any difference.¹⁶⁹

This view, of course, is no longer official AFL-CIO policy. Current President John J. Sweeney has made a serious commitment to organizing new workers.¹⁷⁰ This belated attempt, however, may be too late to change the popular perspective of American unions as bureaucratic and outdated.

f. *Rugged Individualism*

One additional factor warrants a brief mention—unionism always has been an awkward fit with the rugged individualism of the American psyche. This may explain why the United States has never fully

¹⁶⁷ See Thomas A. Kochan, *How American Workers View Unions*, MONTHLY LAB. REV., Apr. 1979, at 24 (reporting that unions suffer from a "big labor" stereotype with a majority of Americans holding unions in low esteem); see also GALENSON, *supra* note 88, at 60-61 (reporting survey results showing that a majority of nonunion workers viewed unions as pursuing an agenda that was not beneficial to their needs). A related factor that has contributed to the erosion of public support for unions is the highly publicized disclosures of illegal behavior by some labor officials. See THOMAS EDSALL, THE NEW POLITICS OF INEQUALITY 173 (1984).

¹⁶⁸ See GOULD, *supra* note 133, at 56; Freeman & Rogers, *supra* note 162, at 39.

¹⁶⁹ U.S. Needs "30,000 New Jobs Just to Break Even," U. S. NEWS & WORLD REP., Feb. 21, 1972, at 27-28.

¹⁷⁰ See Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should be Charged to Financial Core' Employees*, 47 CATH. U. L. REV. 979, 979 (1998). During his first two years in office, Sweeney has committed over thirty million dollars and has trained 250 workers to spread the "gospel of collective bargaining to the next generation of American workers." See *id.*

embraced the union movement,¹⁷¹ as illustrated by the fact that even at its zenith, union density in the United States fell far short of that in most industrialized countries.¹⁷²

Unionization, of course, is a matter of collective action. The dominant American self-image, in contrast, is squarely grounded in the cult of the individual.¹⁷³ Fueled by generations of Horatio Alger stories, working-class Americans dream of a middle-class future.¹⁷⁴ Indeed, Americans popularly view unions as reserved for the "lower class."¹⁷⁵ Since most Americans, whether by hard work or good luck, plan not to be part of that lower class some day, union membership is symbolic of opting out of the American dream.

B. *The Decline of the At-Will Rule and the Rise of Governmental Regulation*

The at-will principle is a rule of construction rather than a rule of law.¹⁷⁶ The lack of governmental regulation concerning the workplace in 1950, however, had the effect of making the at-will presumption a virtual doctrinal rule.¹⁷⁷ Thus, in the absence of a contractual agreement explicitly promising some type of job security and supported by additional consideration,¹⁷⁸ an American employer in 1950 had the absolute right to discharge an employee for any reason.

¹⁷¹ See GOULD, *supra* note 133, at 45 ("The fact is that American employers have never accepted trade unionism to the extent that their counterparts have in other industrialized countries throughout the world, a phenomenon sometimes encapsulated by the term 'American exceptionalism.'"); Steve Fraser, *The "Labor" Question*, in STEVE FRASER & GARY GERSTLE, *RISE AND FALL OF THE NEW DEAL ORDER* 77 (1989) (quoting a labor official in 1950 complaining that "there is little evidence that employers are prepared to accept trade unionism as a proper and permanent feature of our industrial relations").

¹⁷² See GOULD, *supra* note 133, at 14-15.

¹⁷³ See Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPLOYEE RTS. & EMP. POL'Y 269, 285 (1999) (noting that "our national cultural orientation is highly individualistic and, therefore, prone to regard collective action with some suspicion"); Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 333 (1994) (noting the "perceived un-American character of concerted activity").

¹⁷⁴ See STANLEY ARONOWITZ, *FALSE PROMISES* 141 (1973); CRAVER, *supra* note 75, at 51-52.

¹⁷⁵ See BARBARA EHRENREICH, *FEAR OF FALLING* 108-09 (1990).

¹⁷⁶ See *Pine River State Bank v. Metille*, 333 N.W.2d 622, 628 (Minn. 1983) ("[T]he at-will rule . . . is only a rule of contract interpretation . . . [not] a rule imposing substantive limits to the formation of a contract.").

¹⁷⁷ See generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68-70 (2000).

¹⁷⁸ Traditionally, a contract providing for a limitation on an employer's right to terminate an employee at-will was valid only if supported by some consideration in addition to

That is no longer the case. The American employer in 2000 is subject to numerous legal constraints emanating from a variety of sources. This development has not eliminated the at-will rule, but instead has transformed it into a true rule of construction. Today, the at-will rule stands as the default legal presumption of the employment relationship, but one subject to many limitations and exceptions.

1. Limitations on the At-Will Rule

The decline of the at-will rule and the rise of governmental regulation concerning the employment relationship are two sides of the same coin. That is, the recent growth in workplace regulation has resulted in the reduced importance and application of the at-will principle.

These new limitations are diverse in terms of both origin and purpose. Unlike the traditional field of labor law which continues to be regulated by a single federal statute, the new arena of employment law is composed of numerous strands that often bear little relationship to one another. This section attempts to categorize and summarize the most significant of these limitations on the at-will rule presumption.

a. *Statutory Regulation*

Until the mid-1960s, the NLRA and the Fair Labor Standards Act¹⁷⁹ were the only two federal statutes that comprehensively regulated the workplace. That situation has changed dramatically as Congress has adopted a host of more recent employment-related statutes. These newer statutory enactments fall into two basic categories: 1) statutes that prohibit discrimination on the basis of certain protected characteristics; and 2) statutes that establish minimum workplace requirements.

the employee's promise to perform services for the employer. See Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 335-36 (1992).

¹⁷⁹ The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1994), mandates that employers pay covered employees a minimum hourly wage, currently pegged at \$5.15 per hour, and compensate work performed in excess of forty hours in a week at one and one-half times the employee's regular rate of pay. The FLSA contains numerous exemptions, the most significant being for executive, administrative, and professional employees. See *id.* § 213(a)(1).

i. Antidiscrimination Statutes

The principal federal antidiscrimination law was enacted as Title VII of the 1964 Civil Rights Act.¹⁸⁰ Title VII prohibits employers and labor unions from discrimination in employment on the basis of race, color, religion, sex, or national origin.

By its terms, Title VII bans intentional discrimination with respect to hiring, discharge, compensation, and other terms and conditions of employment.¹⁸¹ The Supreme Court has interpreted Title VII as also prohibiting facially neutral employment practices that have a disproportionate, negative impact on a protected class.¹⁸² An employer may avoid liability for such disparate impact claims only by showing that the employment practice at issue is compelled by business necessity.¹⁸³

Congress extended the nondiscrimination principle in two subsequent acts.¹⁸⁴ Under the Age Discrimination in Employment Act,¹⁸⁵ adopted in 1967, employees over the age of forty are protected from discrimination in hiring, discharge, and mandatory retirement. The Americans with Disabilities Act,¹⁸⁶ enacted in 1990, prohibits employers from discriminating against an otherwise qualified disabled person who, with or without a reasonable accommodation, is capable of performing the essential functions of the job in question.¹⁸⁷ An employer need not provide an accommodation, however, if doing so would impose an undue hardship on the employer.¹⁸⁸

Two characteristics of these antidiscrimination statutes should be noted. First, these statutes provide protection to individuals not as workers, but as members of a particular group or on the basis of a

¹⁸⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (1994).

¹⁸¹ 42 U.S.C. § 2000e-2(a)(1).

¹⁸² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

¹⁸³ See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁸⁴ Antidiscrimination statutes also have been adopted by most states. Many of these state statutes go beyond federal law in terms of the classes protected. See, e.g., MINN. STAT. §§ 363.01–.20 (2001) (prohibiting discrimination on the basis of sexual orientation, marital status, and receipt of public assistance in addition to those groups protected under federal law). An additional federal statute, The Equal Pay Act of 1963, prohibits gender-based wage discrimination with respect to jobs that are substantially equal in skill, effort, responsibility, and working conditions. 29 U.S.C. § 206(d) (1994).

¹⁸⁵ The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994).

¹⁸⁶ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994).

¹⁸⁷ *Id.* §§ 12112(a), 12111(8).

¹⁸⁸ See *id.* § 12112(b)(5)(A).

specified protected trait.¹⁸⁹ Second, even as to these protected classifications, employers are prohibited only from acting in a discriminatory manner; they are not required to act on the basis of some more expansive notion of fairness or cause.

ii. Substantive Statutory Regulation

A second category of federal statutes are those that mandate minimum workplace requirements. These include the following:

*Occupational Safety and Health (OSH) Act.*¹⁹⁰ The OSH Act authorizes the Secretary of Labor to adopt workplace health and safety standards. The Secretary is empowered to enforce these standards by conducting workplace inspections and by issuing citations for non-compliance.

*Employee Retirement Income Security Act (ERISA).*¹⁹¹ ERISA regulates pension and employee welfare benefit plans. It establishes procedural requirements with respect to the reporting, disclosure and fiduciary responsibilities for such plans.¹⁹² While ERISA contains detailed provisions governing the funding and content of pension plans, it does not regulate the substantive content of welfare benefit plans, such as those providing health benefits. Instead, the principal impact of ERISA on employment law matters is the Act's broad preemption of state regulation.¹⁹³ As a result, nonpension benefit plans are largely unregulated by either the federal or state governments.

*Worker Adjustment and Retraining Notification (WARN) Act.*¹⁹⁴ The WARN Act requires employers with 100 or more employees to provide at least sixty days advance written notice to employees who will suffer an employment loss by virtue of a plant closing or a mass layoff.

*Family and Medical Leave Act (FMLA).*¹⁹⁵ The FMLA requires employers with fifty or more employees to permit employees to take up

¹⁸⁹ See Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 68-70 (1999) (discussing the somewhat different models of discrimination used by Title VII and the Americans with Disabilities Act).

¹⁹⁰ 29 U.S.C. §§ 651-678 (1994).

¹⁹¹ 29 U.S.C. §§ 1001-1461 (1994).

¹⁹² See 29 U.S.C. §§ 1021-1031 (1994).

¹⁹³ 29 U.S.C. § 1144(a) (1994) ("[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan."). See generally Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1 (2000).

¹⁹⁴ 29 U.S.C. §§ 2101-2109 (1994).

¹⁹⁵ 29 U.S.C. §§ 2601-2654 (1994).

to twelve weeks each year of unpaid leave in order to care for a new child or a family member with a serious health condition. The FMLA's leave entitlement also extends to an employee who is incapacitated because of his or her own serious health condition.¹⁹⁶

b. *Judicially Created Limitations on the At-Will Rule*

Over the past fifteen years, the courts increasingly have become less tolerant of the traditional at-will rule. The judiciary has demonstrated this growing intolerance in two different ways. First, courts are now more receptive to adapting traditional tort and contract theories as a basis for challenging employment decisions. For example, many courts now authorize a discharged employee to maintain a defamation action without third party publication for an employee's foreseeable self-publication of the employer's stated reasons for discharge.¹⁹⁷ Similarly, many jurisdictions permit a discharged employee to challenge the manner of his or her termination by means of a tortious intentional infliction of emotional distress claim without requiring a showing of the presence of an accompanying physical injury.¹⁹⁸

Various state courts, in addition, have recognized new causes of action in the employment context. The three claims most commonly recognized are as follows:

Public Policy Tort. Most jurisdictions now permit an employee to maintain a tort action claiming that a discharge decision offends public policy.¹⁹⁹ Based on this notion, courts have held that public policy considerations bar employers from terminating employees who refuse to commit an unlawful act,²⁰⁰ who exercise statutory rights,²⁰¹ or who

¹⁹⁶ *Id.* § 2612(a)(1)(D).

¹⁹⁷ *See, e.g., Lewis v. Equitable Life Assurance Co.*, 389 N.W.2d 876 (Minn. 1986).

¹⁹⁸ *See, e.g., Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976).

¹⁹⁹ *See Michael A. Chagares, Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400-05 (1989) (citing forty-three states as recognizing the public policy cause of action).

²⁰⁰ *See, e.g., Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refusal to participate in an unlawful price-fixing scheme); *Remington Freight Lines, Inc. v. Larkey*, 644 N.E.2d 931 (Ind. Ct. App. 1994) (refusal to drive an illegally overloaded truck); *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987) (refusal to violate antipollution laws by dispensing leaded gas into car designed for unleaded gas).

²⁰¹ *See, e.g., Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) (affirming award to employee discharged for filing workers' compensation claim); *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166 (N.C. 1992) (finding public policy cause of action for employee who was fired for refusing to work for less than the statutory minimum wage).

report an employer's unlawful conduct.²⁰² With respect to the last type of conduct, a number of jurisdictions have enacted statutes specifically prohibiting employee discharges for "whistleblowing" activities.²⁰³

Contract Claims. Most states also recognize a contract-based exception to the at-will employment rule.²⁰⁴ These courts imply contractual obligations, such as some form of job security or disciplinary procedure, from an employer's unilateral promise expressed orally²⁰⁵ or in an employee handbook.²⁰⁶

Covenant of Good Faith and Fair Dealing. A few jurisdictions go further and read a covenant of good faith and fair dealing into employment agreements.²⁰⁷ This covenant requires that each party in an employment relationship refrain from acting in bad faith that frustrates

²⁰² See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (finding public policy cause of action for employee who was discharged for reporting labeling misrepresentations to employer); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (employee discharged for reporting criminal conduct to authorities); *Fox v. MCI Communications*, 931 P.2d 857 (Utah 1997) (finding public policy cause of action for employee who was discharged for informing law enforcement authorities of fraudulent sales practices).

²⁰³ See, e.g., The Whistleblower Protection Act of 1989, 5 U.S.C. § 2301(b)(9) (1994) (protecting federal employees from retaliation for whistleblowing); MICH. COMP. LAWS § 15.361 (2000) (protecting both private and public sector employees from retaliation for blowing the whistle on illegal acts); see also ROTHSTEIN & LIEBMAN, *supra* note 118, at 923. (reporting that thirty-seven states have enacted some form of statutory protection for employees reporting illegal activity).

²⁰⁴ See *Chagares*, *supra* note 199, at 400-05 (citing forty-one states as recognizing an implied contract exception to the at-will rule).

²⁰⁵ See, e.g., *Eales v. Tanana Valley Med.-Surgical Group*, 663 P.2d 958 (Alaska 1983) (holding representation that employee would not be discharged without cause may be read into employment contract); *Bullock v. Auto. Club*, 444 N.W.2d 114 (Mich. 1989) (finding revocation of oral promise in policy manual not necessarily binding).

²⁰⁶ See, e.g., *Duldulao v. Saint Mary of Nazereth Hosp. Ctr.*, 505 N.E.2d 314 (Ill. 1987); *Wooley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985); see generally Befort, *supra* note 178.

²⁰⁷ See, e.g., *Mitford v. De Lasala*, 666 P.2d 1000 (Alaska 1983) (ruling against an employer who discharged an employee in effort to avoid profit sharing liability); *K-Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (holding against an employer who dismissed an employee in an effort to avoid retirement benefit payments). Most states have declined to recognize the covenant because of the difficulty in determining what constitutes bad faith. See, e.g., *Parner v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Haw. 1982) (rejecting the covenant because it would necessitate "judicial incursions into the amorphous concept of bad faith"); see also *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (declining to recognize the covenant cause of action because to do so "would completely alter the nature of the at-will employment relationship").

the other's expectations of receiving the benefits of his or her bargain.²⁰⁸

c. *Constitutional Limitations in the Public Sector*

The U.S. Constitution also provides an extra set of limitations on the at-will principle. The Supreme Court has recognized that a public employee may assert as many as three constitutional claims challenging a public employer's²⁰⁹ discharge decision.

i. *First Amendment*

A public employer cannot lawfully terminate an employee for exercising his or her right to free speech.²¹⁰ The First Amendment, however, does not protect all speech in all instances. To be protected, the speech must relate to a matter of public concern.²¹¹ In addition, the employee's right to comment on matters of public concern must be balanced against the employer's interest in effective and efficient fulfillment of its responsibilities.²¹²

ii. *Due Process*

The Fourteenth Amendment to the Constitution prohibits states from depriving any person of life, liberty, or property without due process of law.²¹³ A public employer violates this provision if it deprives an employee of a property or liberty interest without complying

²⁰⁸ See *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (holding in favor of salesman fired by employer in an attempt to avoid paying future bonus payments under a contractual arrangement).

²⁰⁹ The federal constitution operates as a limit only on governmental action. See *Shelley v. Kramer*, 334 U.S. 1, 13 (1948). For purposes of the "state action" prerequisite, the "state" comprises all subdivisions of federal and state government, including local branches. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688 n.2 (2nd ed. 1988).

²¹⁰ See, e.g., *Rankin v. McPherson*, 483 U.S. 378 (1987) (finding that a county constable violated the First Amendment in terminating a clerical employee for privately expressing her hope that an assassination attempt on the President would succeed); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (finding that a school board violated the First Amendment in terminating a teacher for sending a letter to a local newspaper criticizing a proposed school tax increase).

²¹¹ See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (explaining that speech is a matter of "public concern" if it relates to a political, social, or other community issue).

²¹² The disruptiveness of the employee's conduct is one factor to be considered in this balance, particularly where close working relationships may be impaired. The time, place, and manner of the expression is also relevant. See *id.* at 151-52.

²¹³ U.S. CONST. amend XIV, § 1.

with certain due process safeguards.²¹⁴ An employee has a protected property interest if he or she can point to state law sources, such as a contract²¹⁵ or statute,²¹⁶ that supports a claim of entitlement to continued employment. A liberty interest arises if a public employer disseminates a false and defamatory impression about an employee in connection with the employee's termination that imposes a stigma that effectively forecloses the employee's freedom to take advantage of other employment opportunities.²¹⁷

Once a liberty or property interest is found in public employment, a public employer may terminate an employee only if it provides certain basic due process procedures. Prior to termination, the employer must notify the employee of the impending disciplinary action, explain the charges against the employee, and provide the employee with an "opportunity to present reasons, either in person or in writing, why [the] proposed action should not be taken."²¹⁸ The employer also must provide the employee with an evidentiary hearing before a neutral decision-maker within a reasonable time following discharge.²¹⁹

iii. Equal Protection

The Equal Protection Clause provides a third constitutional avenue for challenging employment terminations in the public sector.²²⁰ A public employee may assert an equal protection claim if he or she can show that the employer discriminated in making the termination

²¹⁴ See generally *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

²¹⁵ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (finding that a college teacher had a property interest flowing from a written contract with an explicit tenure provision guaranteeing continued employment absent cause for termination).

²¹⁶ See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (finding that a statutory civil service system creates property interests if it provides that employees may be terminated only for cause).

²¹⁷ See *Roth*, 408 U.S. at 573-75; see also *Polson v. Davis*, 635 F. Supp. 1130, 1142 (D. Kan. 1986) (holding that to establish that a charge is stigmatizing, an individual must show that his "good name, reputation, honor, or integrity is at stake because of what the government is doing to him") (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

²¹⁸ *Loudermill*, 470 U.S. at 546.

²¹⁹ See *id.* at 546-47.

²²⁰ "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause applies to the states directly through the Fourteenth Amendment and to the federal government as incorporated through the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

decision.²²¹ Once a prima facie showing is made, the public employer then must carry the burden to justify its action or policy. Under the analytical framework created by the Supreme Court, the sufficiency of the employer's justification varies with the likelihood that the state has singled out for unfavorable treatment a group that is unable to protect itself in the political process or that has traditionally faced discrimination.²²² Applying this rationale, the Court has identified three different levels of review: (1) strict scrutiny for governmental action affecting suspect classes (race, alienage, and national origin); (2) intermediate scrutiny with respect to quasi-suspect classes (gender and illegitimacy); and (3) rational basis review for all other governmental classifications.²²³

2. Reasons for the Regulatory Boom

Because of the piecemeal adoption of these limitations on the at-will rule, it is difficult to isolate the precise origins of this transformation. Nonetheless, it again is useful to attempt to identify some of the principal forces that may have contributed to this development.

a. *The Changing Nature of the Workplace*

The workplace of today is far different than the nineteenth century workplace that gave birth to the at-will rule. Many critics point to this changed work environment as evidence that the at-will rule is at odds with the realities of the contemporary employment relationship.²²⁴

²²¹ See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a plaintiff must show that a governmental employer engaged in intentional discrimination in order to prevail on an equal protection claim).

²²² See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (explaining that the Court considers several factors to determine when this risk is high and a class of people deserve the more stringent levels of judicial protection: whether the class is identified by an immutable characteristic, whether the class has a long history of suffering from invidious discrimination, and whether the class is relatively politically powerless).

²²³ See generally TRIBE, *supra* note 209, ch. 16.

²²⁴ See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Joseph DeGiuseppe, Jr., *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 69-70 (1981); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482-84 (1976); Richard A. Winters, Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 198-99 (1985).

Smaller enterprises dominated the nineteenth century American economy. Within these businesses, employers, foremen, and employees often enjoyed a personal relationship.²²⁵ Employment relationships typically were transitory in nature,²²⁶ and because labor had greater mobility than capital at that time, the entrepreneur's natural advantage in bargaining power tended to be dampened.²²⁷

Now, the growing predominance of large corporate employers and specialized job functions has triggered criticism of the at-will rule as harsh and lopsided.²²⁸ As one commentator has concluded:

[I]n principle there is widespread agreement that the employment-at-will doctrine has no economic or moral justification in a modern industrialized nation. The idea that there is equity in a rule under which the individual employee and the employer have the same right to terminate an employment relationship is obviously fictional in a society in which most workers are dependent upon employers for their livelihood.²²⁹

Recent advances in trade and technology have severely exacerbated the imbalance between employers and employees. The emergence of the global economy has put great pressure on American business to reduce costs in order to compete internationally.²³⁰ Corporate reorganizations, downsizing, and a growing reliance on contingent workers increasingly became the norm beginning in the early 1980s.²³¹ These measures, in turn, have significantly eroded employee

²²⁵ See SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY 1900-1945*, at 13-23 (1985) (describing factory labor in the period prior to 1915).

²²⁶ See *id.* at 31-37; Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 Wis. L. Rev. 733, 751-52 (1986).

²²⁷ See generally SUMNER H. SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* 100 (1941).

²²⁸ See, e.g., *Palmateer*, 421 N.E.2d at 878 (citing *Blades*, *supra* note 224, at 1405) ("With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic."); *Blades*, *supra* note 224, at 1404-05; Pratt, *supra* note 27, at 197, 200-01.

²²⁹ Jack Steiber, *Most U.S. Workers Still May be Fired Under the Employment-at-Will Doctrine*, MONTHLY LAB. REV., May 1984, at 34, 36.

²³⁰ See CAPELLI ET AL., *supra* note 85, at 15-64; Dau-Schmidt, *supra* note 79, at 2, 12; Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 136 (1994).

²³¹ See CAPELLI ET AL., *supra* note 85, at 66-88 (describing various changes in business practices resulting from global economic pressures).

job security.²³² Similarly, modern information and communication technology has made capital considerably more mobile than labor.²³³ Employers can move, or threaten to move, production facilities to locations with lower labor costs.²³⁴ This mobile capacity thus greatly enhances the relative bargaining power of employers vis-a-vis employees.²³⁵

In this new climate, the purported equality of the at-will rule becomes even more "obviously fictional."²³⁶ This obvious fiction has provided fuel for the movement to adopt or overhaul governmental regulation to redress the power imbalance between employers and employees.

b. *Employee Expectations and the Decline of the Social Contract*

In a 1997 law review article, Professor Pauline Kim reported the results of an empirical study designed to ascertain employee perceptions concerning the legal rules governing the workplace.²³⁷ Her survey data indicated that workers greatly overestimate the extent to which the law provides limitations on an employer's discretion to dismiss employees.²³⁸ She reported, for example:

overwhelming majorities of the respondents erroneously believed that an employer cannot legally fire an employee in order to hire someone else at a lower wage (82.2 percent), for reporting internal wrongdoing by another employee (79.2 percent), based on a mistaken belief of the employee's

²³² See *id.* at 1179-83 (summarizing empirical research indicating an increase in employee turnover and a decrease in employee job security); Dau-Schmidt, *supra* note 79, at 20 (noting the impact of trade and technology on the decline in long-term employment).

²³³ See e.g., BELLACE & ROOD, *supra* note 78, at 22 (noting that labor law and unions are "bound by national borders, but capital is not"); Dau-Schmidt, *supra* note 79, at 11 (noting the increased mobility of capital in the new global economy).

²³⁴ See *supra* notes 79-81 and accompanying text.

²³⁵ See Capelli, *supra* note 73, at 1179 (concluding that the business restructuring spurred by trade and technology has systematically shifted business risk to employees); Dau-Schmidt, *supra* note 79, at 11 ("The increased mobility of capital in the international economy has meant that employees must now compete with workers in other countries merely to retain the allegiance of their employer.").

²³⁶ See *supra* note 229 and accompanying text.

²³⁷ See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

²³⁸ See *id.* at 133-46.

own wrongdoing (87.2 percent), or out of personal dislike of the employee (89 percent).²³⁹

On the other hand, these same workers correctly presumed that they lawfully could be terminated for unsatisfactory job performance or a lack of work.²⁴⁰ These survey results, which are corroborated by other studies,²⁴¹ suggest a serious disconnect between the expectations of employees and the realities of contemporary employment law.

Why do many employees incorrectly believe that the law protects them against discharge so long as work is available and they perform satisfactorily? The answer, in part, may lie in the fact that American employers for many years fostered those expectations. As noted above, employment tenure during the late 1800s and early 1900s was very transitory in nature.²⁴² One study, for example, showed that the majority of industrial workers in the period from 1905 to 1917 changed jobs at least once every three years.²⁴³ Many firms during this period experienced monthly separation rates in excess of ten percent.²⁴⁴ Beginning with the era of World War II, however, American employers invested great efforts in reducing employee turnover.²⁴⁵ These employers realized that a stable workforce helped to reduce recruitment and training costs while simultaneously boosting employee morale.²⁴⁶ To achieve this stability, employers designed personnel policies to encourage career rather than casual employment tenure.²⁴⁷ Among the cornerstones of this policy were managerial commitments to long-term job security and the creation of defined paths of progression and promotion.²⁴⁸ This "bureaucratization of work"²⁴⁹ not only reduced employee turnover rates,²⁵⁰ but also fos-

²³⁹ *Id.* at 133-34.

²⁴⁰ *See id.* at 134 tbl.1.

²⁴¹ *See, e.g.,* Frank S. Forbes & Ida M. Jones, *A Comparative-Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause*, 37 *LAB. L.J.* 157, 165-66 (1986) (reporting the results of a telephone survey showing that only 15-22% of respondents knew that employers could terminate employees without cause).

²⁴² *See supra* notes 226-227 and accompanying text.

²⁴³ *See* D. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, at 163 (1978).

²⁴⁴ *See* JACOBY, *supra* note 225, at 32.

²⁴⁵ *See generally* CAPELLI ET AL., *supra* note 85; JACOBY, *supra* note 225, at 243-70.

²⁴⁶ *See* CAPELLI ET AL., *supra* note 85, at 23; WEILER, *supra* note 90, at 141-52.

²⁴⁷ *See* JACOBY, *supra* note 225, at 262-74 (describing the rise of internal labor markets and increased employee job security); *see also* WEILER, *supra* note 90, at 146 (noting the transition of the employment relationship from casual to career in nature).

²⁴⁸ *See* JACOBY, *supra* note 225, at 262-74; FINKIN, *supra* note 226, at 741-42.

²⁴⁹ FINKIN, *supra* note 226, at 733.

tered the development of an extra-legal social contract in which both employers and employees had legitimate expectations of a long-term relationship.²⁵¹ A key ingredient of this social contract was the understanding that employees could expect continued employment so long as they performed their job duties in an adequate fashion.²⁵²

Legal rules generally reflect widely-held beliefs and practices.²⁵³ Thus, the at-will principle was consistent with the nineteenth century ethos of unfettered entrepreneurship²⁵⁴ coupled with the reality of high labor mobility.²⁵⁵ On the other hand, the at-will rule does not fit easily with the job security expectations flowing from the social contract of the mid-twentieth century.²⁵⁶

Some scholars suggest that the expectations of the social contract explains at least some part of the newer limitations on the at-will rule.²⁵⁷ A more likely source of these limitations, however, is the demise of this social contract, as many American employers began to withdraw their support for this set of implicit workplace rules. Under pressure from global competition and enabled by technological advances, these employers relocated plants and downsized operations.²⁵⁸ They hired contingent workers and reduced the number of core workers.²⁵⁹ In short, many employers abandoned their commitment to long-term employment. The employment relationship once again be-

²⁵⁰ See JACOBY, *supra* note 225, at 276.

²⁵¹ See CAPELLI ET AL., *supra* note 85, at 200-01 (describing an implicit employment contract by which "loyalty and retention by the employee are rewarded by stable employment and income"); see also JACOBY, *supra* note 225, at 269 (noting the "widespread acceptance of the principle that a worker could be dismissed only for just cause").

²⁵² See GOULD, *supra* note 133, at 80; KOCHAN ET AL., *supra* note 71, at 138; Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 539 (2001).

²⁵³ See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 33 (2001) (stating that "law and social forces have a multidirectional causal relationship").

²⁵⁴ See *supra* note 27 and accompanying text.

²⁵⁵ See *supra* notes 226-227 and accompanying text.

²⁵⁶ See Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 137 (1992) ("[I]niting dismissal to just cause . . . more accurately reflects the unstated expectations of the parties than does permitting dismissal at will.").

²⁵⁷ See Finkin, *supra* note 226, at 751 (contending that the recently recognized contract-based limitations on the at-will rule do not represent so much a change in the law as the application of "the extant law of contract to a world of vastly changed business practice").

²⁵⁸ See, e.g., CAPELLI ET AL., *supra* note 85, at 27-29, 44-63; KOCHAN ET AL., *supra* note 71, at 114-15.

²⁵⁹ See *supra* note 103 and accompanying text.

came more transitory,²⁶⁰ however, this time the cause was capital mobility rather than labor mobility.²⁶¹

Many Americans perceive this change in employment practices as an unfair breach of the earlier social contract.²⁶² Many see this abandonment of internal labor markets as driven by greed, and not simply by considerations of just efficiency.²⁶³ Viewed in this light, the government has stepped in and restricted the at-will principle, not to effectuate a social consensus, but to redress some of the more egregious employer practices.

Some commentators suggest that these events have ushered in a new social contract based upon notions of "employability" rather than employment security.²⁶⁴ Professor Katherine V. W. Stone, for example, sees a new "boundary-less" employment realm²⁶⁵ in which employees no longer desire or expect long-term employment, but, instead, seek only the capability of continuous employment with a series of employers facilitated by employer-provided training.²⁶⁶

I have my doubts about this proposition. Internal labor markets hardly are extinct. Professor Sanford Jacoby recently published an article in which he examined the purported demise of long-term employment relationships and found that claim to be "exaggerated."²⁶⁷ Professor Jacoby's research detected "only a slight drop in the overall prevalence of long-term jobs" over the past twenty years²⁶⁸ and found that internal labor markets continue to be the norm in the U.S. economy.²⁶⁹ He summarized his conclusions as follows:

To summarize, a variety of sources have been examined to assess the degree of change in career-type employment practices. Without doubt, blue-collar workers in the early 1980s and white-collar workers in the early 1990s experienced higher levels of permanent job loss. As a result, aggregate job tenure rates have declined modestly since the late 1970s.

²⁶⁰ See CAPELLI ET AL., *supra* note 85, at 177-79 (discussing various studies showing a decline in job tenure during the 1980s and 1990s).

²⁶¹ See *supra* notes 77-79 and accompanying text.

²⁶² See CAPELLI ET AL., *supra* note 85, at 200-01; Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1220-21 (2000).

²⁶³ See Jacoby, *supra* note 262, at 1221.

²⁶⁴ See CAPELLI ET AL., *supra* note 85, at 203; Stone, *supra* note 252, at 569-72.

²⁶⁵ See Stone, *supra* note 252, at 553-56.

²⁶⁶ See *id.* at 569-72.

²⁶⁷ Jacoby, *supra* note 262, at 1205.

²⁶⁸ *Id.* at 1206.

²⁶⁹ *Id.* at 1196.

On the other hand, the majority of workers continue to hold career-type jobs that offer fringe benefits, training, and prospects of continuity.²⁷⁰

In addition, I doubt that the purported new social contract is rooted in an increased commitment of employers to employee training. To the contrary, some research shows that shorter-term employment relationships are accompanied by a decrease in employer training efforts.²⁷¹ Short-term employers tend to hire skills rather than to invest in them.²⁷²

A more plausible explanation is that the former social contract has declined, but that it has not yet been replaced by a new set of mutual understandings. A number of employers may have reduced their commitment to long-term employment, but the evidence is scarce that society has embraced a new "boundary-less" order. Contemporary surveys repeatedly show that workers still expect continued employment for good work and that they want more attachment and participation in their employment relationships.²⁷³ It is true, of course, that fewer objections to more flexible workplace practices have been voiced during the boom years of the 1990s than in the lean years of the 1980s.²⁷⁴ But, a return to a less robust economy, as we now seem to be experiencing, will again tilt the workplace balance of power more decidedly against employees and unleash displeasure with the demise of the old social contract.²⁷⁵

c. *The Rise of the Nondiscrimination Principle*

The post-World War II civil rights movement also contributed significantly to the decline of the at-will rule. Indeed, the first modern statutory departure from at-will employment was enacted in the form of Title VII.²⁷⁶ The antidiscrimination principle embodied in that act,

²⁷⁰ *Id.* at 1219–20.

²⁷¹ See, e.g., CAPELLI ET AL., *supra* note 85, at 141–42; Wiji Arulampalam & Alison L. Booth, *Training and Labor Market Flexibility*, 36 BRIT. J. INDUS. REL. 521, 525–27.

²⁷² See CAPELLI ET AL., *supra* note 85, at 141–42.

²⁷³ See, e.g., RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT?* (1999) (finding that a majority of workers want greater participation in workplace decision-making); Kim, *supra* note 237, at 133–46 (finding that most employees believe that they were entitled to continued employment in the absence of poor work performance).

²⁷⁴ See Schwab, *supra* note 253, at 36 (contending that pressure to limit the at-will rule decreases in a climate where employees change jobs frequently).

²⁷⁵ See Jacoby, *supra* note 262, at 1214 (explaining that employee leverage in the employment relationship varies with the demand for labor).

²⁷⁶ 42 U.S.C. § 2000e-17 (1994).

in turn, both directly and indirectly led to other limitations on employer discretion.

The legislative history of the 1964 Act shows that its principal aim was to eradicate racial discrimination.²⁷⁷ The push to ban racial discrimination, however, had broad coattails. Title VII, as enacted, also prohibits discrimination in employment practices on the basis of religion, gender, and national origin.²⁷⁸ Congress subsequently extended the antidiscrimination principle to bar discrimination based on age²⁷⁹ and disability status.²⁸⁰ In short, Congress directly has limited the at-will rule in order to eliminate discrimination against certain groups of workers who have suffered from a history of "unfair and unnecessary discrimination."²⁸¹

The nondiscrimination principle also may have contributed to the withering of the at-will rule in a more indirect fashion. A basic premise of antidiscrimination legislation is to compel employers to make employment decisions based on individual capabilities as opposed to stereotypical assumptions.²⁸² By prohibiting a certain subset of unfair employment practices, these statutes create a climate in which expectations of fair treatment are fostered even beyond the precise contours of statutory coverage.²⁸³ As former NLRB Chairman William Gould has explained, "[t]oday, the average employee enters

²⁷⁷ See Civil Rights Act of 1964, 1964 U.S.C.C.A.N. 2355, 2513-17. The employment context of Title VII was only one of the Act's eleven titles. Other titles extended the anti-discrimination principle to such areas as voting rights, education, and public accommodations. See 42 U.S.C. § 2000 (1994).

²⁷⁸ 42 U.S.C. § 2000e-2(a)(1) (1994). Of interest is the fact that the amendment adding "sex" to the list of protected classifications was offered on the floor of the House of Representatives by an opponent of the bill one day before final adoption and with the apparent intent of making the bill unacceptable to most legislators. See WILLIAM F. PEPPER & FLORYNCE KENNEDY, *SEX DISCRIMINATION IN EMPLOYMENT* 17-18 (1981).

²⁷⁹ See The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).

²⁸⁰ See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

²⁸¹ 42 U.S.C. § 12101(a)(9) (1994) (Congressional findings relating to the Americans with Disabilities Act).

²⁸² See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (ruling that Title VII bans employment decisions resulting from sex-based stereotyping); *School Board v. Arline*, 480 U.S. 273, 284 (1987) (explaining that the Rehabilitation Act of 1973, which bans disability discrimination by federal employers, contractors, and grant recipients, was designed to redress "society's accumulated myths and fears about disability").

²⁸³ See GOULD, *supra* note 133, at 78-80 (describing how recognition of the antidiscrimination principle has contributed to a broader expectation of fair treatment); Rosabeth Moss Kanter, *Work in America*, in *DAEDALUS* 53-54 (1978) (noting the increasing tendency of American employees to assert demands for individual rights, justice, and equality in the workplace).

into the employment relationship with the expectation that if he or she does a fair day's work, that he or she will not only receive compensation but also fair treatment."²⁸⁴ The antidiscrimination statutes, accordingly, provide a useful analogy on which legislative and judicial bodies can draw in prohibiting certain employer actions that fall short of this expected standard of conduct.

d. *The Lack of a Viable Union Alternative*

The contemporaneous decline of both unionization and the at-will rule likely are related phenomena. With the shrinking union sector less capable of providing a meaningful counterweight to undeterred employer discretion, governmental regulation becomes the next best line of defense.²⁸⁵

In 1950, the union sector offset the potential harshness of the at-will rule in two ways. First, employees unhappy with unilateral employer authority had the option to organize their workplace and seek union representation.²⁸⁶ The bilateral regulation of the union sector, then, was an alternative regulatory structure available through collective employee choice. As discussed above, approximately one-third of all non-agricultural employees chose this option at the mid-century mark.²⁸⁷

Second, the impact of the union sector reached far beyond unionized workplaces. Bargains struck in the union sector effectively set the pattern for much of the nonunion sector as well. Nonunion firms, whether to attract good workers or to stave off unions, frequently adopted the compensation rates and personnel practices of their union counterparts.²⁸⁸ In this manner, the strength of the union sector deterred excessive employer practices even in the absence of formal legal restraints.

The union movement of 2000 can no longer perform either of these functions effectively. Employees of today, even those favorably

²⁸⁴ GOULD, *supra* note 133, at 80.

²⁸⁵ See *id.* at 55–58 (discussing the interrelationship between the decline of unionization and the rise of governmental regulation); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 15 (1988) (stating that with the decline in labor unions, “[s]ociety is now looking to the courts and legislatures to protect employees not covered by collective bargaining”).

²⁸⁶ The right of employees to join a union and select a union representative is discussed *supra* at notes 35–61 and accompanying text.

²⁸⁷ See *supra* note 29 and accompanying text.

²⁸⁸ See FREEMAN & MEDOFF, *supra* note 72, at 151–54; KOCHAN ET AL., *supra* note 71, at 35.

inclined toward union membership,²⁸⁹ are less likely to be successful in securing union representation. The odds of a union obtaining majority support in a representation election simply are longer in a world in which only one in eleven private sector employees is unionized and unions control few industries in which they can "take wages out of competition."²⁹⁰ This difficulty is exacerbated by the widespread use of anti-union tactics by American employers.²⁹¹ While unions routinely won more than seventy-five percent of all representation elections in the years around 1950, the success rate plummeted to less than fifty percent by the 1980s.²⁹²

Furthermore, union agreements now exert far less influence over the nonunion sector. Beginning in the 1980s, unionized firms increasingly made concessionary demands on unions to help alleviate the impact of competition from lower-paying foreign plants and nonunion firms.²⁹³ Unions responded by agreeing to accept lower compensation and more flexible work arrangements in order to avoid massive lay-offs.²⁹⁴ In short, the tables have turned in many industries with pattern-setting influences now flowing from the nonunion sector rather than from the union sector.²⁹⁵

A strong union movement fifty years ago provided a practical counterweight to unbridled employer power. As union density has declined, the scales have tipped to a degree that many find to be unacceptable. Direct governmental regulation is the most obvious way to rectify this imbalance.²⁹⁶ Increased governmental regulation, accordingly, has filled the gap vacated by a weakened labor movement and serves as a new counterweight in the American employment relationship.

²⁸⁹ See FREEMAN & ROGERS, *supra* note 273, at 68-69 (reporting survey results that show that approximately one-third of all currently unrepresented American workers would like a union form of representation); KOCHAN ET AL., *supra* note 71, at 217 (reporting polling data showing that "[O]ne-third of the nonunion workforce does see unionization as a vehicle for improving specific job conditions and would prefer to have a union represent them, if given the opportunity").

²⁹⁰ See *supra* notes 71-73 and accompanying text.

²⁹¹ See *supra* notes 136-161 and accompanying text.

²⁹² See GOLDFIELD, *supra* note 29, at 23 fig.4.

²⁹³ See KOCHAN ET AL., *supra* note 71, at 114-21, 144-45.

²⁹⁴ See *id.* at 116-18; Peter Capelli, *Concession Bargaining and the National Economy*, in PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING OF THE IND'L REL. RESEARCH ASSOC. 362-71 (1983).

²⁹⁵ See generally KOCHAN ET AL., *supra* note 71, at 144-45.

²⁹⁶ See generally Summers, *supra* note 285, at 10, 15.

C. *Summary*

This part has chronicled a major shift in the legal regulation of the workplace over the past fifty years. The collective oversight provided by labor/management relations has shrunk in importance, while the role of governmental regulation of the individual employment relationship has substantially increased.

This historical view, moreover, reveals a subtext to this story that is perhaps even more important. The emergence of a global economy and advances in technology have changed the face of work itself. These two factors have unleashed a number of forces, such as capital mobility and short-term work arrangements, that alter both where and how work is accomplished. These forces, in turn, have significantly skewed the balance of economic power in a manner that is detrimental to employee interests. Any realistic assessment of the new legal landscape must be cognizant of this new disequilibrium as well.

III. PRINCIPAL DEFICIENCIES OF THE CURRENT REGIME

This section shifts the focus from the historical to the critical. More precisely, this section attempts to identify and analyze the major shortcomings of the current system of American labor and employment law.

This concentration on deficiencies is not meant to suggest that the current regime is wholly devoid of any favorable attributes. It instead reflects a need to identify the unfavorable attributes of the current landscape in order to find solutions that will augment those that work today. Put another way, identifying today's problems may be a first step toward designing tomorrow's solutions.

Unfortunately, finding deficiencies in the current labor and employment law system is not a difficult task. The current system fails to serve the best interests of those governed by this framework in a number of respects. Workers, employers, and the American public alike needlessly suffer under the highly complicated rules of the workplace developed over the past fifty years.

A. *Lack of Doctrinal Coherency*

A properly structured body of law should exhibit at least three basic attributes. First, it should be grounded in a set of fundamental and widely-accepted principles that order social and economic conduct. Second, a legal code, whether statutory, judge-based, or a com-

bination, should build upon and implement these principles in a logical and coherent manner. Finally, this body of law, or legal sub-system, should be administered in a fair and efficient fashion under the auspices of a tribunal with sufficient expertise to guide future doctrinal development.

The labor law wing of the labor and employment law sub-system scores relatively well when measured against these objectives. Section 7 of the NLRA recognizes three fundamental guiding principles of American labor law: the rights of employees to organize, to bargain collectively, and to engage in concerted activities for mutual aid and protection.²⁹⁷ As amended by the Taft-Hartley Act, section 7 also recognizes the right of employees to refrain from engaging in each of these activities.²⁹⁸ The NLRA provides a statutory framework for implementing these basic rights; the NLRB and an informal system of labor arbitration serve as accessible arbiters of labor-management disputes. While the NLRA has some serious shortcomings in terms of adequately protecting the employee rights conferred by section 7,²⁹⁹ the American body of labor law is, at least, relatively coherent and efficient.

The employment, or non-collective, wing, in contrast, fails to exhibit any of the attributes of a properly structured body of law. First of all, the current body of employment law has never been grounded in any well-accepted foundational principle. The closest pretender to that throne, the at-will rule, is now limited by numerous exceptions. Most Americans, moreover, appear to believe that the at-will rule either is not or should not be the prevailing principle governing the employment relationship.³⁰⁰

Moreover, one cannot extrapolate a unifying principle from the spate of new regulations emerging in the past fifty years. Some of the regulations prohibit conduct that discriminates on certain narrowly specified bases, other statutes mandate minimum workplace standards, and still other at-will limitations seek to deter particularly egregious types of employer behavior. What we have is not one or two bed-rock principles, but a number of competing, overlapping, and sometimes contradictory themes.

²⁹⁷ 29 U.S.C. § 157 (1994).

²⁹⁸ *Id.*

²⁹⁹ See *infra* notes 386–392 and accompanying text.

³⁰⁰ See *supra* notes 237–241 and accompanying text (discussing surveys showing that most adult Americans believe that an employer may terminate an employee only based on a reasonable cause).

Needless to say, the resulting body of employment law is anything but logical and coherent. Unlike the unitary statute implementing federal labor policy, the legal rules governing the employment relationship consist of a crazy quilt of regulation emanating from a variety of sources—federal and state, legislative and judicial. These regulations, in turn, bear little relationship to one another beyond having applicability in the workplace setting.

Finally, the means of enforcing the rights created by these regulations is wholly inadequate. The principal, although not exclusive, means of enforcement is through private suits in courts of general jurisdiction.³⁰¹ Unlike the NLRB and arbitrators, who are experts in labor law, federal judges are hardly experts in the complicated world of employment law. Of course, they are becoming more so as employment cases increasingly crowd federal court dockets.³⁰² As discussed in greater detail below, this litigation model of enforcement is overly cumbersome and costly.³⁰³

B. *The Maze of Multiple Claims and Forums*

The legal landscape resulting from the employment law regulatory boom is a very complicated one. The current landscape, particularly in the context of employment termination, is garbled by a maze of potential claims and forums.³⁰⁴ The parties involved in an employment termination lawsuit, as well as the judiciary, must divert considerable time and attention to navigating this maze.

A fired worker may assert a host of possible claims challenging his or her former employer's termination decision. It is not uncommon for employee discharge complaints today to plead claims numbering in the double digits. The chart below lists only those claims that are

³⁰¹ During the fiscal year 1983, about 9000 employment discrimination cases were filed in court. See John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991). In comparison, only 1973 employment discrimination cases were filed with the American Arbitration Association in 1999. E-mail from Toni L. Griffin, Vice President of Corporate Communications, American Arbitration Association, to Sarah A. Link (Oct. 26, 2000) (on file with author).

³⁰² See Donohue & Siegelman, *supra* note 301, at 983–94 (stating that federal employment discrimination litigation has grown at such a rapid rate that it is now raising concerns that employment discrimination litigation is imposing a significant burden on federal judges).

³⁰³ See *infra* notes 313–337 and accompanying text.

³⁰⁴ See Summers, *supra* note 285, at 18 (stating that “the most difficult problem of the near future will be reconciling overlapping protections”).

discussed in this article, with many more possible based upon lesser known state laws and miscellaneous tort theories.

Federal Claims	State Claims
<i>Antidiscrimination Laws</i>	<i>Statutory Claims</i>
—Title VII	—antidiscrimination statutes
—ADEA	—whistleblower statutes
—ADA	
<i>Other Statutory Claims</i>	<i>Common Law Claims</i>
—NLRA—unfair labor practice	—public policy tort
—Retaliation—FMLA, ERISA, OSHA	—contract
	—covenant of good faith & fair dealing
	—defamation
	—intentional infliction of emotional distress
<i>Constitutional Claims</i>	<i>Collective Bargaining Agreement</i>
—First Amendment	—public sector grievance arbitration
—Due Process	
—Equal Protection	
<i>Collective Bargaining Agreement</i>	
—private sector grievance arbitration	

This maze is further complicated by the possibility of multiple forums. Discharge-related claims potentially may be heard by a federal court, state court, administrative agency, or an arbitrator.

Much of current employment litigation entails the sorting and accommodation of these multiple claims and forums. Some federal statutes, such as ERISA,³⁰⁵ broadly preempt state law claims, while others, such as Title VII,³⁰⁶ do so narrowly. In between are no less than three different strands of federal labor law preemption, each with its own complicated standard for ousting state law claims.³⁰⁷

At the state level, courts sometimes find that certain statutory claims are exclusive and preclude common law claims based upon the same set of facts.³⁰⁸ Other courts, however, view common law claims as

³⁰⁵ Section 1144(a) provides that ERISA supercedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1994). This standard has led to an "expansive sweep" of federal preemption under ERISA. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). See generally Befort & Kopka, *supra* note 193.

³⁰⁶ See 42 U.S.C. § 2000e-7 (1994) ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.").

³⁰⁷ See Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 430-37 (1998) (discussing NLRA and section 301 preemption).

³⁰⁸ See, e.g., *Ficalora v. Lockheed Corp.*, 193 Cal. App. 3d 489 (1987); *Giese v. Phoenix Co. of Chicago, Inc.*, 639 N.E.2d 1273 (Ill. 1994).

supplementary and permit both statutory and parallel common law claims to proceed at the same time.³⁰⁹ Still other jurisdictions chart something of a middle course by permitting multiple claims to proceed simultaneously, but limiting the amount of damages to a single claim where the harm alleged in the multiple counts is essentially identical.³¹⁰

Sometimes the end result of all this sorting and accommodating is that a discharged employee gets two bites at the apple. The most well-known example is that of a unionized employee who contends that he or she was terminated because of race or gender discrimination. The employee usually can contest the discharge in labor arbitration under the just cause standard of the governing collective bargaining agreement.³¹¹ Whether the employee wins or loses in that forum, the Supreme Court has held that the discharged employee also can proceed with a suit under Title VII with no collateral estoppel effect.³¹²

C. *Administrative Burdens of the Litigation Enforcement Model*

Despite the variety of forums available for certain types of claims, most nonunion employment termination matters are heard in courts of general jurisdiction. This is true whether the claim at issue is based upon a federal statute or a state-based common law theory. To a considerable extent, turning an old phrase, we have made a federal case out of routine employment disputes.

This litigation enforcement model has considerable drawbacks. The litigation model, coupled with the employment law regulatory boom, has resulted in an explosion of employment litigation. The number of employment suits in federal court increased by 430% between 1971 and 1991.³¹³ The four following years witnessed another

³⁰⁹ See, e.g., *Helmick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212 (Ohio 1989); *Clay v. Advanced Computer Applications, Inc.*, 536 A.2d 1375, 1381 (Pa. Super. Ct. 1988).

³¹⁰ See, e.g., *Williams v. Marriott Corp.*, 864 F. Supp. 1168, 1175 (M.D. Fla. 1994); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990).

³¹¹ See *supra* notes 54-58 and accompanying text (discussing the near universal provisions in collective bargaining agreements requiring just cause for termination and the access to an arbitration forum to enforce such a standard).

³¹² See *Alexander v. Gardner-Denver*, 415 U.S. 36, 50-51 (1974). While the Court ruled that the Title VII claim in *Alexander* should be considered de novo, it added that the prior "arbitral decision may be admitted as evidence and accorded such weight as may be appropriate." *Id.* at 60.

³¹³ U.S. DEP'T OF LABOR, *supra* note 75, at 113. Between 1991 and 1995, employment-related civil rights lawsuits in federal courts shot up 128%. See *id.*

jump of 128%.³¹⁴ In the last thirty years, the amount of employment litigation has grown at a rate almost ten times greater than the rate of increase in other types of civil litigation.³¹⁵ Due to this explosion, court dockets have become overwhelmed with litigation. In May of 1999, there were approximately 25,000 wrongful discharge and discrimination cases pending nationwide.³¹⁶

Aside from the problems associated with the sheer volume of cases, civil litigation is a relatively slow method of dispute resolution. Research shows that the "median time between the date a lawsuit is filed and the commencement of a civil trial is 2.5 years."³¹⁷ While waiting for a trial date, parties typically engage in discovery, pre-trial motions, and settlement discussions. The litigation timeline may be extended further by post-trial proceedings and appeals.³¹⁸

Litigation also is an expensive mechanism for resolving employment disputes. The cost of taking a case from complaint to trial typically reaches or exceeds \$300,000.³¹⁹ Attorney fees paid by defendant employers make up the vast bulk of this amount.³²⁰ In addition, parties to an employment suit incur indirect expenses due to the necessary diversion of time and resources from productive activity to litigation preparation activity.³²¹ Many employers also hire lawyers and consultants to assist them in avoiding litigation by auditing corporate practices, creating policies, and generating favorable evidence.³²²

³¹⁴ See Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997) ("Approximately ten percent of the docket of the federal courts is estimated to be employment issues.").

³¹⁵ See Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8, 10 (1997); see also Bompey et al.; *supra* note 314, at 22 ("[E]mployment litigation has increased by 400% in the past twenty years."). The number of employment discrimination cases has increased twenty-five fold between 1970 and 1998. See Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 DISP. RESOL. J. 78, 78 (1999).

³¹⁶ See Spelfogel, *supra* note 315, at 78.

³¹⁷ Bompey et al., *supra* note 314, at 22.

³¹⁸ See Spelfogel, *supra* note 315, at 78.

³¹⁹ See Bompey et al., *supra* note 314, at 22 (citing figures based on litigation in California).

³²⁰ See JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 35 (1992) (reporting that as of 1986, defense lawyer costs could exceed \$250,000 in the course of a lengthy wrongful-termination trial).

³²¹ See Bompey et al., *supra* note 314, at 22 ("Defending against a wrongful discharge claim brought by a former employee can cost an employer hundreds of thousands of dollars in legal fees and considerable time of corporate personnel diverted from productive activity to providing information or testimony.").

³²² See Susan Bisom-Rapp, *Discerning Form From Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 14-18 (1999); Denise V. M. Hubert, *Exactly What is Employment ADR?*, HUM. RESOURCE PROF., July-Aug. 1998, at 23 (not-

Finally, the litigation model also fails to interject the views of an expert body into the decision-making process. In contrast to the labor law arena, in which an expert NLRB oversees individual decisions and the development of controlling legal principles,³²³ employment law disputes generally are heard in courts of general jurisdiction. These courts hear employment cases with a mix of criminal cases, contract disputes, and other matters. Given the increasing complexity of American employment law, this is not the most efficient means of guiding and coordinating future doctrinal developments.³²⁴

Beyond these systemic problems, the litigation model also results in some unique problems for employees and employers. For terminated employees, the problem is one of access to the justice system. The high cost of attorney fees, out-of-pocket expenses, and the considerable amount of time it takes to litigate a claim all make it difficult for employees to access the courts.³²⁵ These obstacles disproportionately impact lower paid employees.³²⁶ It is more difficult for this group to afford the combined cost and delay of litigation than for more highly compensated workers.³²⁷ While some attorneys are willing to handle employment discharge cases on a contingency fee basis, they are less likely to do so on behalf of lower-income workers.³²⁸ In part this is because workers who earn modest wages prior to discharge are less likely to receive large monetary jury verdicts even if they are successful in a discharge suit.³²⁹ As a result, contingent fee lawyers are

ing that the cost of undertaking steps to avoid litigation sometimes exceeds the cost of litigation itself).

³²³ See *supra* notes 52-53 and accompanying text.

³²⁴ See GOULD, *supra* note 133, at 86 ("A problem with the existing system is that judges and juries have less expertise than administrative agencies or labor arbitrators who specialize in the employment relationship.")

³²⁵ See Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMP. POL'Y J., 221, 241 (1997).

³²⁶ See GOULD, *supra* note 133, at 85 (noting that "the average employee below the managerial ranks simply cannot afford [the litigation] process."); U.S. DEP'T OF LABOR, *supra* note 75, at 105 (noting that the time and expense of the litigation model make it especially difficult for low-wage workers to pursue employment claims).

³²⁷ See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J., 189, 198-99 (1997); see also FitzGibbon, *supra* note 325, at 241 (noting that most employment plaintiffs are workers who were removed from professional and/or managerial positions).

³²⁸ See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998) (reporting estimates that only about 5% of employees with potential claims are successful in retaining an attorney).

³²⁹ See MODEL EMPLOYMENT TERMINATION ACT Prefatory Note, 7A U.L.A. 421, 424 (1999) (reporting that between 60 and 80% of successful plaintiffs in employment termination cases come from the ranks of middle or upper management and professional em-

more likely to decline representation of lower paid workers due to fear that the cost of litigating such a claim would exceed the likely amount of recovery.³³⁰

Many employers experience a similar problem at the opposite end of the spectrum. Here, employers have a strong incentive to settle employment claims in order to avoid the costs associated with litigation.³³¹ Given that defense costs through trial hover at around \$250,000 in a typical employment termination case,³³² settling even a non-meritorious claim may make financial sense. This incentive is heightened by the potential for a sizeable jury verdict if a case is taken to trial.³³³ A study by the Employer's Resource Group revealed an average award of \$733,000 in employment termination cases tried to a jury.³³⁴ Moreover, while employers prevail in most employment suits,³³⁵ this same study indicated that plaintiffs won in sixty-four percent of those cases that ended by means of a jury verdict.³³⁶ Not surprisingly, the vast majority of employment law suits result in voluntary settlements.³³⁷

What we have, in effect, is a uniquely American employment law lottery. Most employees work on an at-will basis and have no viable legal claim in the event of a job termination. Many of those workers

ployees); FitzGibbon, *supra* note 325, at 260 (noting that in addition to lower back pay awards, lower paid workers tend not to be as successful in winning discharge suits as compared to high wage professionals).

³³⁰ See Bickner, *supra* note 315, at 12.

³³¹ See U.S. DEP'T OF LABOR, *supra* note 75, at 112 (noting that employment litigation "imposes legal costs on the targeted employers, many of whom turn out to be fully in compliance with the law").

³³² See DERTOUZOS & KAROLY, *supra* note 320, at 35; Bompey et al., *supra* note 314, at 22.

³³³ See Hubert, *supra* note 322, at 23 (stating that the fear of litigation also "causes managers to accept inadequate performance, avoid re-engineering positions and systems, and miss development opportunities").

³³⁴ See *id.* at 23; see also DERTOUZOS & KAROLY, *supra* note 320, at 35 (reporting on a California survey in 1986 showing average jury trial awards in wrongful termination cases at "nearly \$700,000").

³³⁵ See, e.g., 158 Lab. Rel. Rep. (BNA) 257 (1998) (reporting a study by the American Bar Association showing that employers have prevailed in 92% of all cases filed under the ADA, most frequently at the summary judgment stage).

³³⁶ See Hubert, *supra* note 322, at 23.

³³⁷ See DERTOUZOS & KAROLY, *supra* note 320, at 36 (reporting that about 95% of all wrongful termination cases settle before trial with employers paying an average of \$25,000 to the terminated employee and another \$15,000 in legal costs); Howard A. Simon & Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, EMPLOYEE REL. L.J., Summer 1995, at 29, 30 (noting that more than 85% of all employment cases settle before trial).

who may have a legitimate claim are unable to pursue it because of the high entry cost of our justice system. Employers, nonetheless, fear employment termination suits and spend considerable sums in deterring and settling lawsuits. The only real winners in this system are the handful of plaintiffs who strike it big before a jury.

The administratively cumbersome nature of the litigation model is underscored when compared to possible alternative systems. In the United States labor sector, as discussed above, employment termination disputes usually are addressed through an interactive grievance process that culminates in arbitration. This process is widely believed to be "faster, cheaper, and simpler than litigation."³³⁸ Most European and Latin American countries test the validity of job termination decisions in proceedings before a specialized labor tribunal of one form or another.³³⁹ Here again, the use of these specialized tribunals is "thought to dispense a cheaper, quicker, more accessible and expert justice."³⁴⁰

Data compiled by Federal Mediation and Conciliation Service (FMCS), the federal agency primarily charged with overseeing private sector labor arbitration matters, tend to confirm the faster, cheaper, and simpler assertion. In contrast to the typical two and one-half year timetable for litigated employment termination cases to reach trial,³⁴¹ FMCS statistics show that the average labor arbitration case in 1996 was completed from start to finish in less than one year's time.³⁴² In reality, the contrast is greater still because arbitration awards typically are final and subject to a very narrow scope of review.³⁴³ Similarly, the average labor arbitration hearing in 1996 took only 1.12 days to com-

³³⁸ See COOPER, *supra* note 56, at 500-01; see also ELKOURI & ELKOURI, *supra* note 49, at 10-13; ABRAMS, *supra* note 61, at 236-37.

³³⁹ See, e.g., BEFORT & CORNETT, *supra* note 135, at 296-97 (discussing Mexico's use of specialized conciliation and labor tribunals); SAMUEL ESTREICHER, *Unjust Dismissals in Other Countries: Some Cautionary Notes*, 10 EMP. REL. L.J. 286, 296 (1984) (surveying the employment termination laws of six countries).

³⁴⁰ See ESTREICHER, *supra* note 339, at 296.

³⁴¹ See *supra* note 317 and accompanying text.

³⁴² See FMCS, Public Information, Arbitration Services, Average Elapsed Time in Days Per Case for FMCS Closed Arbitration Award Cases Sampled in Fiscal Year 1992 Through 1996, available at <http://www.fmcs.gov/pubinfo> (last visited Apr. 4, 2002) (showing an average time of 318.58 days from the time of filing a grievance to the date of the arbitration award); see also SPELFOGEL, *supra* note 315, at 81 (explaining that arbitration moves faster than litigation because it avoids the possibility of huge jury verdicts, reduces internal costs, and minimizes the expense of discovery due to less extensive rules).

³⁴³ See *supra* note 58 and accompanying text.

plete, a far cry from the length of a formal jury trial.³⁴⁴ An additional piece of FMCS data shows that the average fee charged by an arbitrator in a grievance case was approximately \$2500.³⁴⁵ These figures certainly suggest that arbitration is both quicker and cheaper than litigation.³⁴⁶

D. *The Lack of a Unitary Standard for Employment Termination*

The United States stands virtually alone among industrialized nations in failing to provide general statutory protection against unjust dismissals. Most other industrialized countries recognize an employee's right to continued job security unless either work is unavailable or an employer has sufficient cause to terminate the employment relationship.³⁴⁷

Most industrialized nations, even those with a common law heritage,³⁴⁸ have adopted an explicit statutory limitation on an employer's right to dismiss its employees.³⁴⁹ While Mexico was the first to do so in 1917,³⁵⁰ most of the legislation dates from the 1960s following the strong encouragement of an International Labor Organization (ILO) recommendation issued in 1963.³⁵¹ Article 4 of current ILO Convention No. 158 states that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the

³⁴⁴ See FMCS, Public Information, Arbitration Services, Average Number of Days Charged by Arbitrator for Travel, Hearing and Study Time Based on Closed Arbitration Award Cases Sampled in Fiscal Year 1992 Through 1996, available at <http://www.fmcs.gov/pubinfo> (last visited Apr. 4, 2002).

³⁴⁵ See FMCS, Public Information, Arbitration Services, Arbitrator's Per Diem Rate Fees and Expenses Charged Fiscal Years 1992 Through 1996, available at <http://www.fmcs.gov/pubinfo> (last visited Apr. 4, 2002).

³⁴⁶ COOPER, *supra* note 56, at 501.

³⁴⁷ See generally B. Hepple, *Flexibility and Security of Employment*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 277-303 (R. Blanpain & C. Engels eds., 1998).

³⁴⁸ Both the United Kingdom, *infra* note 358, and Canada's federal sector, *infra* note 354, for example, have statutes that authorize employee terminations only upon a showing of sufficient cause.

³⁴⁹ See Estreicher, *supra* note 339, at 287-94 (summarizing employment security statutes in Canada, Great Britain, Germany, France, Italy, and Japan); Hepple, *supra* note 347, at 298 (summarizing employment security statutes in worldwide industrial market economies).

³⁵⁰ See Hepple, *supra* note 347, at 280.

³⁵¹ *Id.* at 298.

operational requirements of the undertaking, establishment or service."³⁵²

Most countries require some variant of a just cause standard in order to justify employee dismissals.³⁵³ Our North American neighbors, for example, bar dismissals that are "unjust,"³⁵⁴ or which are not supported by "just cause."³⁵⁵ Similarly, virtually all European countries have enacted statutory limitations on wrongful dismissal. In France, an employer must show a reason that is both genuine and serious to support a lawful termination.³⁵⁶ In Germany, the Constitution proscribes "socially unwarranted dismissals . . . not based on reasons connected with the person or [his conduct] . . . or [not based] on urgent social needs that preclude his continued employment."³⁵⁷ The standard is somewhat lower in Great Britain where a dismissal will be upheld so long as an employer has a good faith belief in the existence of a sufficient reason to warrant termination.³⁵⁸

Although several variations exist, most statutes follow a similar pattern in terms of procedures and remedies. Specialized labor tribunals rather than courts of general jurisdiction generally preside over unlawful dismissal claims.³⁵⁹ This means that claims generally are processed much more quickly than under our litigation-based model.³⁶⁰ Another common feature is that the remedies provided by these statutes are considerably more limited than under American

³⁵² Convention No. 158: Termination of Employment at the Initiative of the Employer, June 22, 1982, 65 ILO Official Bull. Series A, No. 2, 72.

³⁵³ See Hepple, *supra* note 347, at 298-99.

³⁵⁴ CANADA LABOR CODE § 240; see G. England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 12 MANI. L.J. 9 (1982).

³⁵⁵ MEX. CONST. art. 123, pt. A., chs. XIX, XXII; *Ley Federal de Trabajo* arts. 47, 53; Be-fort & Cornett, *supra* note 135, at 280-81 (Mexico).

³⁵⁶ See Stephen E. Tallent, *France*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 3-7 to 3-8 (William L. Keller ed., 1997); Estreicher, *supra* note 339, at 291.

³⁵⁷ Estreicher, *supra* note 339, at 290. This right is extended to employees who work at firms with more than five employees. See *id.*

³⁵⁸ See Dorothy Henderson, *United Kingdom*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 7-11 to 7-15 (William L. Keller ed., 1997); Hepple, *supra* note 347, at 298-99. Under this statute, the employer must point to one of five reasons warranting dismissal: (1) capability or qualifications; (2) conduct; (3) redundancy; (4) inability to work without contravening a statute; or (5) some other substantial reason. See John D. R. Craig, *Privacy in the Workplace and the Impact of European Convention Incorporation on United Kingdom Labour Law*, 19 COMP. LAB. L. & POL'Y J. 373, 385-86 (1998). The final category, of course, provides an employer with considerable leverage. See *id.*

³⁵⁹ See Estreicher, *supra* note 339, at 286; Summers, *supra* note 224, at 519.

³⁶⁰ See Estreicher, *supra* note 339, at 286; Summers, *supra* note 224, at 519. Dismissal cases in Sweden, for example, generally are determined by the labor court within a six month period. See Hepple, *supra* note 347, at 301.

law. Outside of Canada, monetary awards for wrongful dismissal tend to be modest and predictable.³⁶¹ In Belgium, for example, the statute sets a fixed amount of compensation for a wrongfully discharged white-collar worker at three months pay.³⁶² More typically, the tribunal has discretion to set the award subject to statutory minimum or maximum amounts. In France, an employee terminated without cause is entitled to a minimum of six months of wages.³⁶³ Sweden sets a maximum of sixteen to forty-eight months of pay depending upon the employee's age and length of service.³⁶⁴ Punitive damage awards generally are not authorized.³⁶⁵

A growing number of commentators have urged that the United States adopt a similar statutory approach to employment termination.³⁶⁶ Many of the reasons underlying a call for a statutory just cause standard have been discussed in other parts of this article. These include the following:

- 1) A growing imbalance in bargaining power between employers and employees with the rise of large corporations and the capital mobility of the global economy;³⁶⁷
- 2) the demise of the social contract and the resulting disconnect between societal expectations and actual legal rules;³⁶⁸
- 3) the decline of a union alternative to the at-will rule;³⁶⁹ and
- 4) the possibility that a unitary statute could overcome the current maze of multiple claims and forums.³⁷⁰

³⁶¹ See Estreicher, *supra* note 339, at 295.

³⁶² See Hepple, *supra* note 347, at 302.

³⁶³ See *id.*

³⁶⁴ See Reinhold Fahlbeck, *Labour Law, in SWEDISH LAW: A SURVEY* 262 (1995).

³⁶⁵ See Estreicher, *supra* note 339, at 295; see also Fahlbeck, *supra* note 364, at 262 (explaining that "since legal rights and obligations in [Swedish] labour law are considered private this blatant act of disobedience on the part of the employer will not result in fines to society or any contempt of court type sanction").

³⁶⁶ See, e.g., Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads to Full Flower*, 67 NEB. L. REV. 56 (1988); Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983); Summers, *supra* note 224, at 508-19.

³⁶⁷ See *supra* notes 228-236 and accompanying text.

³⁶⁸ See *supra* notes 237-263 and accompanying text.

³⁶⁹ See *supra* notes 62-70 and accompanying text.

³⁷⁰ See *supra* notes 304-312 and accompanying text.

The almost universal adoption of statutes in other countries limiting an employer's right to terminate employment provides an additional push toward a similar American statute. These statutes, along with the ILO convention, establish a global norm of fundamental fairness with respect to the legal status of the employment relationship.³⁷¹ Our "American exceptionalism,"³⁷² by comparison, falls short of this normative standard in its treatment of employee rights.³⁷³ Some commentators go so far as to see in the American at-will rule a violation of international human rights principles.³⁷⁴

Further, as the global economy reduces national boundaries, international bodies increasingly respond by attempting to harmonize governing legal principles.³⁷⁵ International directives, the General Agreement on Tariffs and Trade, and free-trade zones all point toward a greater degree of legal uniformity. With American businesses reaping the benefits of global trade, American law should reciprocate by adopting employment termination standards that approximate those recognized by the rest of the world. Quite simply, continued

³⁷¹ See Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent Discharge Policy*, OHIO ST. L.J. 1443, 1501-02 (1996) (noting that all major industrialized nations other than the United States have ratified ILO Convention No. 158).

³⁷² See Estreicher, *supra* note 339, at 286.

³⁷³ As of 1983, approximately sixty million private sector workers were subject to the at-will rule, and at least 1.4 million of these workers are fired each year. See Stieber & Murray, *supra* note 366, at 322-24. Stieber and Murray estimate that 150,000 of these annual discharges are unjust or without cause. See *id.*

³⁷⁴ See Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 678-80 (1988) (stating that legislation exists to protect employees from termination because of race, sex, age, religion, union activities, or other personal characteristics; however "[n]o such legal requirement exists under an at will regime for those employees whose personal characteristics or activities do not place them in a statutorily protected group"); Theodore J. St. Antoine, *You're Fired*, HUM. RTS., Winter 1982, at 32 (stating that the contract doctrine of employment at will subjects employees to "legally protected [] abusive discharge").

³⁷⁵ See Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 817 ("[T]he global pressures felt by domestic lawmakers stem . . . from global actors who simultaneously are located in many of these states and who wish to create legal systems that can facilitate their ability to carry out their operations as efficiently as possible. As a result, there are increasing pressures for various forms of harmonization or deep integration of national economies into the global economy."); *Global Dynamics of (Un)fair Employment: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Employment Discrimination*, 4 EMPLOYEE RTS. & EMP. POL'Y. J. 141 (2000) (discussing the emergence of European social policy norms that are not limited by national boundaries).

American economic dominance should not be built on the backs of its workers.³⁷⁶

Finally, the adoption of a unitary, statutory standard would ease some of the tensions that currently divide workers in the United States. Under the current regime, not all workers receive the same level of legal protection against unfair termination. This uneven playing field breeds resentment at the workplace and contributes to societal conflict along the race, gender, and disability divides.

The employment security statutes of most countries provide unjust dismissal protection to workers *qua* workers. That is, these statutes adopt a standard for employment termination that applies universally to all employees, or at least to all who have worked for an employer for more than a certain period of time.³⁷⁷ This universal standard does not vary depending on an employee's non-work characteristics such as race, gender, or age.

This is not the case in the United States, at least outside of the shrinking unionized sector. Here, the coexistence of the at-will presumption and antidiscrimination statutes results in both real and perceived differential standards for termination. Some antidiscrimination statutes overtly protect only a discrete group of individuals. The ADEA and the ADA fall into this category.³⁷⁸ Title VII, on the other hand, applies universally and simply bans an employer's use of certain characteristics, such as race and gender, in making employment decisions.³⁷⁹ Theoretically, Title VII protects white and black, male and female, on an equal basis. Yet, that is not society's perception and perhaps also not the reality. The legislative history leading to the adoption of Title VII shows that Congress's purpose in enacting that

³⁷⁶ See MODEL EMPLOYMENT TERMINATION ACT, Prefatory Note, 7A U.L.A. 421, 426 (1999) (stating that the "adoption of a 'good cause' standard [for employment termination] would not put this country at a disadvantage in global competition by imposing restraints not borne by firms overseas—quite the contrary. The United States is the last major industrial democracy in the world that does not have generalized legal protections for its workers against arbitrary dismissal.").

³⁷⁷ See, e.g., Estreicher, *supra* note 339, at 291 (discussing legislation in France that generally bars the dismissal of employees without cause who have served at least two years at firms with eleven or more employees).

³⁷⁸ The ADEA limits an employer's right to discharge only those employees who are aged forty years or older. See 29 U.S.C. § 631(a) (1994). The ADA, similarly, confers standing only on individuals who have an impairment that substantially limits one or more major life activities. See 42 U.S.C. § 12112(a) (1994) (generally banning discrimination against "a qualified individual with a disability"), § 12102 (defining a covered "disability").

³⁷⁹ 42 U.S.C. § 2000e-2(a)(1) (1994) (banning discrimination in employment because of an individual's race, color, religion, sex, or national origin).

law was to improve the status of previously disadvantaged groups, principally African-Americans,³⁸⁰ and Title VII more readily facilitates litigation designed to protect the interests of women and racial/ethnic minorities than it does for suits brought by white men.³⁸¹

Many white men perceive Title VII as establishing special protective rules for women and minorities.³⁸² This perception has led many white males to resent those groups that receive more legal protection.³⁸³ This resentment is most clearly manifested in the racial arena and in the context of affirmative action.³⁸⁴ Some studies have shown that the negative views of white men toward antidiscrimination laws, in turn, lead to an increasingly negative view of African-Americans as well.³⁸⁵

The adoption of a unitary standard for discharge would diminish the resentment fueled by real and perceived disparities in employment protection rights. An across-the-board prohibition on terminations absent just cause would level the playing field while still banning dismissals wrongly premised on stereotypical notions of race or gender.

³⁸⁰ See Civil Rights Act of 1996, 1996 U.S.C.A.N. 2355, 2513-17.

³⁸¹ See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 5 (2001).

³⁸² See, e.g., Jeanne Duquette Gorr, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?*, 31 DUQ. L. REV. 111, 113 (1992) (stating that some overtly wonder why "only white males under the age of forty lack some kind of job protection").

³⁸³ See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 958-59 (1996) (stating that when asked, 68% of white respondents believed that black Americans currently have the same or more economic opportunities as white Americans do to become "really successful and wealthy"); Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1788-89 (1989) (stating that because of preferential treatment for minorities, certain whites who have never actively engaged in discriminatory treatment are harmed and as a result some whites who would have otherwise succeeded did not); Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 HOW. L.J. 587, 604 (1995) (stating that those opposing affirmative action have claimed that the use of quotas has led to reverse discrimination against white males).

³⁸⁴ Many Americans express deep resentment with affirmative action. See Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 1995 ANN. SURV. AM. L. 515 (1995). According to a January 1995 Time/CNN poll of eight hundred adults, 75% thought that affirmative action sometimes or frequently discriminated against whites. See *id.* Additionally, a 1994 Times Mirror poll indicated that the majority of whites feel that we have gone too far in implementing the idea of equal rights in this country. See *id.*

³⁸⁵ See, e.g., PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993), cited by John Donohue, *Rethinking of Equality Global Conference*, 75 WASH. U. L.Q. 1586, 1592 (1997).

E. A Deficient Federal Labor Law

1. Lack of Choice

Turning to the labor law arena, two significant and related shortcomings predominate. First, employer opposition to unions and weaknesses in the NLRA regulatory scheme undercut employee free choice in obtaining union representation. Secondly, the decline in union density along with the NLRA's limitations on employee involvement plans (EIPs) severely restrict the ability of American workers to participate in workplace decision-making.

United States labor law is not kind to employees who desire union representation at the bargaining table. As discussed above, the most significant impediment to the ability of employees to exercise free choice in the selection of a union representative flows from employer participation in the election process.³⁸⁶ Given management's natural economic leverage in the workplace, the significance of employer opposition activities is not lost on the employee electorate.³⁸⁷ Management opposition tactics, moreover, frequently spill over to include illegal conduct, and the NLRA's tepid remedies fail to deter such illegal tactics as the discharge of union supporters.³⁸⁸

The weakness of the NLRA's regulatory structure also encourages employers to continue to oppose unions even if the latter successfully has run the election gauntlet. American employers not infrequently dispense with union representatives by refusing to bargain in good faith for an initial contract or by pushing unions into a strike and hiring permanent replacement workers.³⁸⁹ Both strategies often result in a decertification election or an employer's lawful withdrawal of recognition.³⁹⁰

These forces seriously erode the free choice principle on which the NLRA is grounded. Many employees who voluntarily would choose union representation lack the practical ability to convert that desire into reality. While polling data reveals that more than forty percent of American workers, including almost a third of current nonunion workers, desire to have union representation,³⁹¹ labor organiza-

³⁸⁶ See *supra* notes 138-145 and accompanying text.

³⁸⁷ See FREEMAN & MEDOFF, *supra* note 72, at 233-39 (summarizing empirical studies indicating the negative impact of anti-union campaigns on employee free choice).

³⁸⁸ See *supra* notes 146-151 and accompanying text.

³⁸⁹ See *supra* notes 152-161 and accompanying text.

³⁹⁰ See *supra* notes 156, 160-161 and accompanying text.

³⁹¹ See FREEMAN & ROGERS, *supra* note 273, at 68-70.

tions currently represent less than fourteen percent of the workforce. Few other nations, if any, tolerate this degree of interference with worker rights to representation.³⁹²

2. Lack of Voice

American employees also suffer from a lack of voice in workplace decision-making. In part, this flows directly from the decline in union membership. Federal labor law compounds this problem, however, by serving as a significant obstacle to the creation of alternative mechanisms of employee participation.

Freeman and Medoff describe the concept of employee voice in the following terms:

“Voice” refers to the use of direct communication to bring actual and desired conditions closer together. It means talking about problems. . . . In a political context, “voice” refers to participation in the democratic process, through voting, discussion, bargaining, and the like. In the job market, voice means discussing with an employer conditions that ought to be changed, rather than quitting the job.³⁹³ In short, the notion of employee voice connotes some participatory process in which employees have input on matters of workplace decision-making.

Most commentators believe that industrial systems benefit from mechanisms that foster employee participation in addressing matters of workplace concern.³⁹⁴ This participation, in turn, is more effective if undertaken as a collective process rather than as an individual, ad hoc exchange between employee and employer. In this regard, Professor Estreicher states:

Voice is important not only because of the contribution it makes to the dignity and autonomy of the individual worker. Voice mechanisms in the workplace also promote efficient contracts between workers and firms. Some contractual terms like a meaningful grievance procedure are “collective goods” that are likely to be underproduced in individual

³⁹² See Adams, *supra* note 140, at 94 (“Few advanced democratic societies condone open opposition by employers to unionization.”).

³⁹³ FREEMAN & MEDOFF, *supra* note 72, at 8.

³⁹⁴ See, e.g., *id.* at 8–11; Bellace, *supra* note 78, at 24–25; Estreicher, *supra* note 71, at 21–22; Freeman & Rogers, *supra* note 162, at 27.

bargains, and unilateral employer promulgation may not adequately capture employee preferences.³⁹⁵

Labor unions are the traditional vehicle for facilitating employee voice in the American workplace.³⁹⁶ Under the NLRA's regulatory scheme, a union that attains exclusive representative status not only has the capability of communicating employee concerns, but the statutory mandate to compel employers to listen and respond to this collective voice in the context of bilateral negotiations.³⁹⁷ Where it succeeds, unionization is a very powerful mechanism for amplifying employee voice. But, as the proportionate size of the union sector has shrunk, so too has this form of collective employee voice. The new employment law regulatory structure that has waxed while the union movement has waned, unfortunately, provides no mechanism to replace the resulting silence. These statutes and claims may limit an employer's right to terminate workers at-will, but they leave the issue of workplace participation to the diminishing domain of the NLRA.

Unions, however, are not the only possible vehicle for employee voice. One alternative is some form of employee involvement and participation program (EIPs).³⁹⁸ These programs come in many forms, such as joint labor-management committees,³⁹⁹ quality circles,⁴⁰⁰ qual-

³⁹⁵ Estreicher, *supra* note 71, at 21-22; see also John T. Addison et al., *German Works Councils and Firm Performance*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 305, 313-14 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (summarizing arguments generally advanced for finding collective voice to be superior to individual voice).

³⁹⁶ See FREEMAN & MEDOFF, *supra* note 72, at 8 ("In modern industrial economies, and particularly in large enterprises, a trade union is the vehicle for employee voice—that is, for providing workers as a group with a means of communicating with management."); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 *CATH. L. REV.* 791, 808 (1998) ("It is through collective bargaining that employees have a voice in the decisions that affect their working lives.").

³⁹⁷ See *supra* notes 38-45 and accompanying text.

³⁹⁸ See Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 *YALE L. & POL'Y REV.* 729, 729 (1999). Such programs are referred to by other names, for instance, "employee participation programs." See Michael S. Albright, *The Legality of Employee Participation Programs Following the NLRB's Electromation, Inc. Decision*, 1993 *DET. C.L. REV.* 1035, 1037-38.

³⁹⁹ See Martin T. Moe, Note, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 *N.Y.U. L. REV.* 1127, 1157-58 (1993). Joint labor-management committees usually include employees and management officials and are generally "designed to address multiple issues at the department or plant level and often serve as an umbrella under which smaller employee involvement efforts operate. They may also serve as one component of a larger program." *Id.* at 1157.

⁴⁰⁰ See *id.* at 1158. Quality circles, also known as quality control circles, usually involve programs in which employers give employees the responsibility of identifying product-

ity of work-life programs,⁴⁰¹ and self-directed work teams.⁴⁰² Despite the diversity of possible EIPs, these programs share a key characteristic: primarily, they are employer-instigated efforts to improve productivity, performance, and employee job satisfaction through a cooperative dialogue involving both management and employee representatives.⁴⁰³ Research suggests that employee involvement generally enhances the economic productivity of the firm.⁴⁰⁴ This is particularly true for participation mechanisms that remain in place over time and are integrated in a systemic way with other innovative management practices.⁴⁰⁵

Over the last two decades, American companies have begun to use EIPs in ever-increasing numbers.⁴⁰⁶ These plans, accordingly, arguably could serve as an important means to offset the loss of voice resulting from the decline of the union movement. However, one critical problem remains: The NLRA renders many, if not most, of these EIPs illegal.

Section 8(a)(2) of the NLRA makes it an unfair labor practice (ULP) for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or

quality and production-related problems. See Moe, *supra* note 399, at 1158; Note, *Participation Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1740 (1985). Employees are then charged with finding solutions to those problems. See *id.* at 1158. Employers frequently model these programs after Japanese plans. See *id.*; Note, *supra*, at 1740.

⁴⁰¹ See Moe, *supra* note 399, at 1158-59; Note, *supra* note 400, at 1739-40. Quality of work-life programs "focus primarily on making workers' jobs more meaningful and satisfying, which presumptively leads to gains in worker productivity." Moe, *supra* note 399, at 1159. These programs "involve various techniques intended to bring about fundamental changes in an employer's organizational structure and in the relations between workers and managers." *Id.*

⁴⁰² See Moe, *supra* note 399, at 1159. These EIPs are comprised of employees who are accountable for some discrete segment of production. See *id.* The company divides the employees into groups or teams and each team has its own area of responsibility. See *id.*

⁴⁰³ See, e.g., Albright, *supra* note 398, at 1036; Kaufman, *supra* note 398, at 729; Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1651-53, 1663-64 (1999); Moe, *supra* note 399, at 1127.

⁴⁰⁴ For summaries of these studies, see FREEMAN & ROGERS, *supra* note 273, at 103-05; Brian Becker & Barry Gerhart, *The Impact of Human Resource Management and Organizational Performance*, 93 ACAD. MGMT. J. 779 (1996); Casey Ichnniowski et al., *What Works at Work: Overview and Assessment*, 35 INDUS. REL. 299 (1996). After reviewing the various studies, Freeman and Rogers conclude that "[a]s a broad summary, employee participation raises productivity modestly—say, by two to five percent." FREEMAN & ROGERS, *supra* note 273, at 105.

⁴⁰⁵ See U.S. DEP'T OF LABOR, *supra* note 75, at 45.

⁴⁰⁶ See Kaufman, *supra* note 398, at 729.

other support to it. . . ."⁴⁰⁷ This provision was incorporated into the original Wagner Act primarily as a means of outlawing the sham, company-dominated unions that proliferated during the 1920s and 1930s.⁴⁰⁸ Because the NLRA's definition of a "labor organization" is worded broadly, however, section 8(a)(2) has the effect of also banning most types of EIPs. Section 2(5) of the NLRA defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁴⁰⁹

As a result of these two provisions, determining whether an EIP violates the NLRA requires a two-part analysis. In the first step, the NLRB must determine whether the EIP in question is a "labor organization" under section 2(5). If it is, the Board must then ascertain whether the employer is dominating or interfering with the EIP.⁴¹⁰

As an initial matter, three requirements must be met for an EIP to be deemed a "labor organization." First, employees must participate in the EIP.⁴¹¹ Second, the EIP must exist in whole or in part for the purpose of "dealing with" the employer.⁴¹² It is important to understand that "dealing with" is not synonymous with collective bargaining. The Supreme Court has adopted a broad understanding of "dealing with" to include an interactive exchange in which employees make recommendations to representatives of management.⁴¹³ Finally, the topics dealt with by the EIP must concern terms and conditions of employment such as "grievances, labor disputes, wage rates, hours of employment, or conditions of working."⁴¹⁴

Most EIPs meet each of these requirements. The majority of EIP arrangements involve committees in which employees discuss and make recommendations to management concerning terms and conditions of employment.⁴¹⁵ Except for EIPs that only address management functions or that act in a purely adjudicatory fashion, almost all

⁴⁰⁷ 29 U.S.C. § 158(a)(2) (1994).

⁴⁰⁸ See S. REP. NO. 74-1, at 9-11 (1945).

⁴⁰⁹ 29 U.S.C. § 152(5) (1994).

⁴¹⁰ See, e.g., Albright, *supra* note 398, at 1047.

⁴¹¹ See Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 684 (1994).

⁴¹² See *id.* at 684.

⁴¹³ See NLRB v. Cabot Carbon, 360 U.S. 203, 210-14 (1959).

⁴¹⁴ 29 U.S.C. § 152(5) (1994); see Note, *supra* note 411, at 684.

⁴¹⁵ See Kaufman, *supra* note 398, at 809.

EIPs come within this broad definition of a covered "labor organization" for NLRA purposes.⁴¹⁶

Most EIPs similarly meet the second prong of section 8(a)(2)'s test. For instance, an employer who acts to establish, administer, or support an EIP likely will be found to "dominate or interfere" with the organization.⁴¹⁷ In addition, an employer may not contribute financially to an EIP without triggering this prong.⁴¹⁸

The NLRB's landmark decision in *Electromation, Inc.*⁴¹⁹ illustrates the reach of the section 8(a)(2) prohibition. In that case, an employer established five "action committees" in which certain employees and management representatives met to discuss such issues as absenteeism, workplace smoking, and pay progression for premium positions. The NLRB found that the committees constituted "labor organizations" because the participating employees bilaterally discussed terms and conditions of employment with management representatives.⁴²⁰ The NLRB further ruled that the employer "dominated" these organizations by creating the committees and by determining their structure and functions.⁴²¹ The NLRB, accordingly, concluded that the employer violated section 8(a)(2) in spite of the lack of any evidence that the employer established the committees for the purpose of deterring union organization efforts.⁴²²

Many existing EIPs survive despite their illegality. At least part of the reason for their survival is that these devices are viewed by employees as desirable mechanisms for providing some type of voice in the workplace.⁴²³ Accordingly, few complaints are actually brought to the NLRB on these issues.⁴²⁴ Nonetheless, the fact remains that many EIPs survive only because no one has challenged their legality.

⁴¹⁶ See David W. Orlandini, Comment, *Employee Participation Programs: How to Make Them Work Today and in the Twenty-First Century*, 24 *CAP. U. L. REV.* 597, 607 (1995); Note, *supra* note 411, at 684.

⁴¹⁷ See, e.g., *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *aff'd*, 35 F.3d 1148 (7th Cir. 1994); Orlandini, *supra* note 416, at 608.

⁴¹⁸ See 29 U.S.C. § 158(a)(2) (1994); see also Orlandini, *supra* note 416, at 608.

⁴¹⁹ 309 N.L.R.B. 990.

⁴²⁰ See *id.* at 997.

⁴²¹ See *id.* at 997-98.

⁴²² See *id.* at 991-92, 997-98.

⁴²³ See FREEMAN & ROGERS, *supra* note 273, at 151 exhib.7.4 (showing that most employees want workplace participation through a joint employee-management committee).

⁴²⁴ See U.S. DEP'T OF LABOR, *supra* note 75, at 54. "Few cases have actually been brought to the NLRB on . . . issues [surrounding the use of EIPs]. A recent study found an average of about three such NLRB decisions a year over the last quarter century." *Id.* (internal citation omitted).

F. *Contingent Work—The Black Hole of Workplace Regulation*

The surge in contingent work has brought several problems. Contingent workers tend to earn less pay than their core employee counterparts.⁴²⁵ They are less likely to enjoy employer-paid health care coverage and other employee benefits.⁴²⁶ Contingent workers generally receive less training and are more often unemployed.⁴²⁷ They also feel less loyalty and commitment to their employers.⁴²⁸ Not surprisingly, contingent workers are disproportionately female and African-American.⁴²⁹

The most significant societal problem posed by the rise in non-standard employment arrangements, however, is the fact that many of these workers fall outside of the regulatory safety net constructed for the employment relationship. This regulatory "black hole" occurs primarily for three reasons.

First, some employment statutes only apply to employees who have attained a certain level of workplace attachment with a particular employer. The FMLA, for example, guarantees leave time only to employees who have worked for the same employer for at least one year and for at least 1250 hours during the previous twelve-month period.⁴³⁰ Under ERISA, employers may establish a minimum five-year employment period before an employee's pension fully vests.⁴³¹ In addition, ERISA does not compel an employer to allow participation in a pension plan until an employee works at least 1000 hours in a twelve-month period.⁴³² Similarly, most state statutes require an employee to work twenty weeks per year in order to qualify for unem-

⁴²⁵ See *supra* note 122 and accompanying text.

⁴²⁶ See *supra* note 122–123 and accompanying text.

⁴²⁷ See Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Workforce*, 52 WASH. & LEE L. REV. 879, 881–82 (1995); see also CAPELLI ET AL., *supra* note 85, at 141–42 ("As more part-time and subcontracted employees are taken on board, companies are unwilling to underwrite both remedial and technical skills training, on the presumably accurate perception that such workers will not remain with the company long enough to pay back their investments.")

⁴²⁸ See BELOUS, *supra* note 102, at 6 (noting that "contingent workers have a weak affiliation with a specific employer and do not have a significant stake in a company"); Summers, *supra* note 126, at 520 (noting that contingent workers generally have a "reduced sense of attachment and loyalty to the enterprise").

⁴²⁹ Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?* 52 WASH. & LEE L. REV. 731, 733 (1995) (noting that "the percentage of African Americans in the temporary work force is double that of the whole work force [and that] two out of every three temporary workers are women").

⁴³⁰ 29 U.S.C. § 2611(2)(A) (1994).

⁴³¹ 29 U.S.C. § 1053(a)(2) (1994).

⁴³² 29 U.S.C. §§ 1052(a)(1), 1052(a)(3)(A) (1994).

ployment insurance benefits.⁴³³ Part-time and temporary employees often fail to meet these threshold requirements for obtaining statutory benefits or protection.

Second, several statutes only apply to employers having a minimum number of employees. The FMLA, for example, does not apply to employers with fewer than fifty employees.⁴³⁴ Title VII⁴³⁵ and the ADA⁴³⁶ each require a minimum of fifteen employees for coverage to occur. Some employers can avoid the applicability of such laws by using independent contractors and temporary workers to stay under the respective numerical thresholds.

Third, and most significantly, American labor and employment regulations invariably extend only to "employees."⁴³⁷ Given the restrictive tests currently used to determine employee status, many contingent workers fall outside of the zone of statutory coverage.

American courts have used a variety of tests to determine whether a worker is an "employee" and thus entitled to the benefits of protective labor and employment legislation. The most restrictive of these tests is the common law agency test.⁴³⁸ This test primarily focuses on the employer's right to control not only the "result accomplished by the work," but also the "details and means by which that result is accomplished."⁴³⁹ If such a right to control is found to exist, the worker is deemed to be an employee.⁴⁴⁰ In the absence of such a right to control, the worker is classified as an independent contractor and falls outside of the coverage of labor and employment regulation.

⁴³³ See *duRivage*, *supra* note 127, at 106.

⁴³⁴ 29 U.S.C. § 2611(4)(A) (1994).

⁴³⁵ 42 U.S.C. § 2000e(b) (1994).

⁴³⁶ 42 U.S.C. § 12111(5)(A) (1994).

⁴³⁷ See REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 37 (1994) [hereinafter REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS] (noting that the "single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors"); *Dau-Schmidt*, *supra* note 427, at 883 ("Under our social welfare system, the receipt of statutory protection or benefits is dependent on a person meeting the definition of employee under the relevant statute.").

⁴³⁸ The multi-factor formula of the common law test is set out in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

⁴³⁹ Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 248 (1997).

⁴⁴⁰ See *id.*

A more inclusive "economic realities" test is used to determine employee status under the FLSA.⁴⁴¹ A 1968 Department of Labor opinion letter summarized that "an employee, as distinguished from a person who is engaged as a business of his own, is one who, as a matter of economic reality follows the usual path of an employee and is dependent on the business for which he serves."⁴⁴² While an employer's right to control the manner in which work is performed is still an important factor under this approach, the economic realities standard assesses these and other factors by asking "whether the putative employee is economically dependent upon the principal or instead is in business for himself."⁴⁴³

During the 1970s and 1980s, most federal courts of appeals adopted a "hybrid" test, combining elements of both the common law and economic realities test, for determining employee status under federal discrimination statutes.⁴⁴⁴ Under the hybrid approach, courts examine the economic realities of the work relationship, but with particular emphasis on "the employer's right to control the 'means and manner' of the worker's performance."⁴⁴⁵

Despite the growing popularity of the hybrid test, the Supreme Court reinvigorated the common law standard in its 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*.⁴⁴⁶ At issue in that case was the appropriate test for employee status under ERISA. The Court rejected the use of an economic realities test under that statute suggesting that this broader standard was limited in application to the unique statutory formulation of the FLSA.⁴⁴⁷ The Court instead adopted a thirteen-factor formulation of the common law test.⁴⁴⁸ The

⁴⁴¹ The economic realities test was first developed under the National Labor Relations Act in *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944). That decision was overturned by the Taft-Hartley amendments later that same year, see *supra* note 31 and accompanying text, and the NLRB now uses the common law test for ascertaining employee status, see *Roadway Package System*, 326 N.L.R.B. 842 (1998).

⁴⁴² W & H Opinion Letter No. 832, U.S. Dep't of Labor (June 25, 1968).

⁴⁴³ *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992).

⁴⁴⁴ See Deanne M. Mosely & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 Miss. L.J. 613, 636 (1998); see also Maltby & Yamada, *supra* note 439, at 250 ("the hybrid test . . . became the favored standard for claims under both Title VII and the ADEA.")

⁴⁴⁵ *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979); see also *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (applying hybrid test to ADEA claim).

⁴⁴⁶ 503 U.S. 318 (1992).

⁴⁴⁷ *Id.* at 323-26.

⁴⁴⁸ In *Darden*, the Court articulated thirteen factors that should be considered when determining whether a worker is an employee:

Darden decision has led many courts to replace the hybrid test with the common law test in ascertaining employee status under other statutes.⁴⁴⁹

The *Darden* test is problematic for several reasons. For one thing, the test can produce unpredictable results. Any formula with thirteen variables is bound to have considerable play in the joints. And, as Microsoft has learned recently, mistaken assumptions about employee status can entail potentially costly consequences.⁴⁵⁰

The *Darden* test also is prone to entrepreneurial manipulation. As the final report of President Clinton's blue-ribbon Dunlop Commission noted, the test provides employers with both "a means and incentive to circumvent the employment policies of the nation."⁴⁵¹ The incentive, of course, is to avoid the costs and loss of flexibility associated with governmental regulation.⁴⁵² The means is to structure work arrangements so that subcontractors and leased employees fall on the non-employee side of the *Darden* divide.⁴⁵³

(1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hiring party's discretion over when and how long to work; (8) the method of payment; (9) the worker's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provisions of employee benefits; and (13) the tax treatment of the hired party.

Id. at 323-24.

⁴⁴⁹ See *Maltby & Yamada*, *supra* note 439, at 253; see also *Lambertsen v. Utah Dep't of Corr.*, 79 F.3d 1024, 1028 (10th Cir. 1996) (favoring common law test for Title VII claim, but finding that because the common law and hybrid tests are so similar, the lower court did not commit reversible error by applying the latter standard); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (adopting the common law test for ADEA claim).

⁴⁵⁰ See *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1012-13 (9th Cir. 1997) (en banc) (holding that a group of workers erroneously classified by Microsoft as independent contractors may be eligible as employees to participate in the company's pension plans).

⁴⁵¹ REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 38.

⁴⁵² *Id.* at 37-38 ("[C]urrent tax, labor, and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations."); *Middleton*, *supra* note 103, at 571 (noting that employers are motivated to categorize workers as non-employees in order to avoid legal regulations applicable to employees).

⁴⁵³ *Linder*, *supra* note 132, at 227 (stating that the common law test "enables employers and judges to manipulate the appearances of control"); *Middleton*, *supra* note 103, at 578 (explaining that businesses "enter complex arrangements of subcontracting and employee leasing in order to circumvent their responsibilities toward the workers involved"); *Summers*, *supra* note 126, at 518 (stating that "[e]mployers and their lawyers use all their inge-

Finally, the common law test is inconsistent with the fundamental objectives of modern labor and employment legislation. This legislation is rooted in the premise that "individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment."⁴⁵⁴ The common law test, which was fashioned in the nineteenth century search for the purpose of determining the reach of respondeat superior tort liability,⁴⁵⁵ is blind to this goal. By focusing primarily on the right to control, the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances. As Professor Marc Linder puts it, the common law test is rooted in "a denial of socioeconomic purpose."⁴⁵⁶

The Title VII sex discrimination claim of Patricia Knight provides just one example of this lack of purpose.⁴⁵⁷ Ms. Knight worked as an insurance agent selling Farm Bureau Insurance Company policies. Toward that end, Farm Bureau trained Ms. Knight in the art of insurance sales and assigned her to a designated sales territory. It provided her with an office, a secretary, and a computer. Farm Bureau required her to be present in the office during three specified periods each week and to retrieve mail and messages on a daily basis. Farm Bureau gave Ms. Knight written performance standards which were backed up by periodic evaluations. Her contract with Farm Bureau prohibited Ms. Knight from selling the insurance products of any other company.⁴⁵⁸ The district court, after a two-day trial, found substantial evidence of sexual harassment.⁴⁵⁹ Nonetheless, the court dismissed Ms. Knight's claim because Farm Bureau did not control the intricacies of "the manner and means by which she sold insurance."⁴⁶⁰ Detering

nity to create forms of detached employment which will free users of all employee responsibility").

⁴⁵⁴ Summers, *supra* note 285, at 7; see also Taco van Peijpe, *Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL'Y J. 127, 155 (1999) (stating that the fundamental rationale of protective labor law is "to compensate for the social inequality constituted by economic dependence in labor relations").

⁴⁵⁵ See MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 133-70 (1989).

⁴⁵⁶ Linder, *supra* note 132, at 187; see also REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 38 (noting that the test for defining employee status "is based on a nineteenth-century concept whose purposes are wholly unrelated to contemporary employment policy").

⁴⁵⁷ Knight v. Farm Bureau Ins. Co., 950 F.2d 377 (7th Cir. 1991).

⁴⁵⁸ *Id.* at 378-79.

⁴⁵⁹ *Id.* at 378.

⁴⁶⁰ *Id.* at 380.

the sexual harassment of a subordinate and dependent worker such as Ms. Knight is apparently beyond the purposes of the common law test.

IV. FOUR PROPOSALS FOR SYSTEMIC REFORM

The numerous shortcomings of the current labor and employment law regime require significant legal reforms for the future. Given the jumbled maze of today, these reforms must not only be fair in substance, they also must be coherent and administratively efficient. Nothing short of systemic change will suffice to correct the mess of the present system.

This Part lays out a proposed four-prong program for meaningful systemic change. Many of the individual recommendations are not new, but instead, reflect and build upon issues that are the subject of current scholarly debate. The proposed program, nonetheless, attempts to go beyond that debate in several respects. First, this set of recommendations was formulated with an express recognition of the historical roots of the current system, the likely direction of historical trends, and an assessment of their future impact. Second, the recommendations attempt to respond directly to the present-day shortcomings of today's labor and employment law as outlined above. Finally, the proposals are not made in isolation; they seek a holistic reformulation of the American law of the workplace.

Before turning to these recommendations, an obvious potential objection to any reform efforts needs to be addressed. Some commentators view the recent rise in flexible job arrangements, such as contingent work and higher employee turnover rates, as creating a new order in which the only form of acceptable employment regulation is that which serves the cause of "flexible" business practices.⁴⁶¹ Professor Katherine V. W. Stone, for example, sees a "boundaryless workplace"⁴⁶² as the new norm in which workers expect "employability security" rather than continued employment with a single employer.⁴⁶³ With internal labor markets rapidly disappearing,⁴⁶⁴ measures that further employment security and workplace regulation are out of step with the realities of the modern workplace.

⁴⁶¹ See generally Stone, *supra* note 252, at 572-76.

⁴⁶² See *id.* at 553-56, 605 (describing the notion of "boundaryless careers" and identifying a new boundaryless workplace "with its depreciation of long term employment and its rejection of job ladders").

⁴⁶³ *Id.* at 569-72.

⁴⁶⁴ *Id.* at 539-49, 555-56; Dau-Schmidt, *supra* note 79, at 1-2, 8.

This basis for objection to reform is both overstated as a matter of fact and misguided as a matter of policy. As a factual matter, internal labor markets have not evaporated. As noted above,⁴⁶⁵ Professor Sanford Jacoby has amply demonstrated that long-term employment relationships have suffered only a slight decrease and that internal labor markets continue to be the norm in the U.S. economy.⁴⁶⁶

As a matter of policy, Professor Stone's view inevitably invites a disastrous "race to the bottom." If the sole objective of modern labor policy is to facilitate flexible employment practices, then the absence of regulation is necessarily the superior form of regulation. In the global economy, individual nations will have a clear incentive to decrease regulation so as to afford their entrepreneurs with the greatest degree of flexibility possible. In short, a single-minded concentration on achieving flexibility will set off a leapfrog game of competitive legal deregulation.

Such a "race to the bottom" would be disastrous for workers because maximizing employer profits through flexible employment arrangements is not, or, at least, should not be, the sole objective of modern labor policy. Labor market regulation appropriately serves other extremely important purposes such as ensuring equality of opportunity and fair treatment for workers.⁴⁶⁷ The unvarnished truth of U.S. labor and employment law at the millennium is this: American capital is reaping the benefits of the new global economy without affording American labor anywhere near the degree of regulatory protection deemed minimally desirable by international norms. The adoption of meaningful reform would not undercut the ability of American businesses to compete in the global marketplace. Instead, it simply would nudge the United States toward playing by a fair set of rules with respect to employer-employee relations, just like everyone else.

It is true, of course, that innovations in technology and trade have led to many changes in business practices over the past quarter century. But these same forces have badly skewed the balance of power between management and labor. The greater mobility of capital in the new global economy enhances management's leverage at

⁴⁶⁵ See *supra* notes 267-270 and accompanying text.

⁴⁶⁶ Jacoby, *supra* note 262, at 1196, 1219-20; see also HENRY S. FARBER, JOB CREATION IN THE UNITED STATES: GOOD JOBS OR BAD? 25 (Indus. Relations Section, Princeton Univ. Working Paper No. 385, 1997).

⁴⁶⁷ See REINHOLD FAHLBECK, FLEXIBILISATION OF WORKING LIFE: POTENTIALS AND CHALLENGES FOR LABOUR LAW, AN INTERNATIONAL ANALYSIS 12 (1998).

the expense of employee interests. This shift in power exacerbates the fact that American labor and employment law already is far less protective than the international norm.⁴⁶⁸

A historical perspective offers a valuable lesson at this juncture. This is not the first time that a technological revolution has tilted the economic forces of the workplace powerfully against worker interests. Technological change generally enables employers to alter production modes in ways that boost productivity and profitability.⁴⁶⁹ While innovation benefits those who have ownership rights to the new technology, it also tends to displace and diminish the many workers who now find themselves with an outdated mix of skills.⁴⁷⁰

Technological changes in the form of power machinery and mass production ushered in the industrial revolution of the early to mid-1800s.⁴⁷¹ This technological revolution, however, also brought "child labor, shocking working conditions, subsistence or lower wages, the disappearance of artisans, and the displacement of male workers."⁴⁷² Employers adamantly argued against reform,⁴⁷³ but eventually the increased inequality between capital and labor led legislators to adopt reform legislation that restricted the hours of work and abuses in child labor.⁴⁷⁴

Advances in transportation, communication, and manufacturing instigated another technological revolution beginning in the 1890s.⁴⁷⁵ By the 1920s these developments and the rapid introduction of machinery throughout the economy again weakened the position of labor to the point of creating an intolerable imbalance in workplace

⁴⁶⁸ Not surprisingly, the United States now leads the world in income inequality between the haves and the have-nots. See Goldman, *supra* note 173, at 286-93; Michael Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 104-05 (2001).

⁴⁶⁹ See generally JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR 187-94* (1959).

⁴⁷⁰ See Charley Richardson, *The Role of Technology in Undermining Union Strength*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 223, 228 (Sheldon Friedman et al. eds., 1994) ("Changes in technology also inevitably alter the strength of the workforce in relation to management in that they affect the number of workers, the location of critical skills, the ability to relocate production, and the ability of management to divide and monitor the workforce. Although there are certainly examples of technological change that have increased the power of the workforce, historical experience points primarily in the other direction.")

⁴⁷¹ See Philip F. Feldblum, *A Short History of Labor Law*, 44 LAB. L.J. 67, 71 (1993).

⁴⁷² *Id.*

⁴⁷³ *Id.* at 72.

⁴⁷⁴ *Id.* at 72-73.

⁴⁷⁵ See RAYBACK, *supra* note 469, at 187-94.

forces.⁴⁷⁶ With the impetus of the Great Depression, however, the imbalance was ultimately redressed by the many social reforms of the New Deal era, including the enactment of the NLRA and the FLSA.⁴⁷⁷

We now have entered into yet another era in which technological change has produced a decided workplace imbalance. Once again, meaningful reform is needed to create a new and fairer equilibrium. In the new global economy, we need a global consensus on labor and employment norms that will stave off an inevitably disastrous race to the bottom in workplace regulation.

A. Recommendation #1—An American Employment Security Act

Congress should enact a statute that systematically governs the issue of employment security. This statute should adopt a unitary, just cause standard for termination. In addition, the statute should establish a streamlined administrative structure for adjudicating individual cases coupled with a reasonable cap on monetary damages.

This recommendation, of course, is not new. As noted above, many commentators have called for a statutory solution to today's cumbersome employment termination system.⁴⁷⁸ Moreover, the Uniform Law Commissioners in 1991 adopted a Model Employment Termination Act (META)⁴⁷⁹ that embraces each of the objectives suggested above. META, however, fails to strike the proper balance between employee and employer interests and largely has been ignored. A reformulated solution is necessary.

1. The Model Employment Termination Act

META incorporates many of the common attributes of European employment security acts.⁴⁸⁰ META would prohibit the discharge of most private sector employees in the absence of "good cause."⁴⁸¹ The prefatory note to META explains that this is meant to be similar to the "just cause" standard incorporated in most labor agreements.⁴⁸² As such, META's official comments suggest that "principles and considerations

⁴⁷⁶ See *id.* at 304.

⁴⁷⁷ See Feldblum, *supra* note 471, at 73, 79.

⁴⁷⁸ See *supra* note 366 and accompanying text.

⁴⁷⁹ MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 421 (1999).

⁴⁸⁰ See *supra* notes 347–365 and accompanying text (discussing employment termination statutes adopted by other industrialized countries).

⁴⁸¹ MODEL EMPLOYMENT TERMINATION ACT § 3(a).

⁴⁸² *Id.* Prefatory Note.

generally accepted in [labor] arbitration" should be applicable in determining the existence of good cause in particular circumstances.⁴⁸⁵ META departs from traditional labor arbitration principles, however, in placing the burden on the discharged employee to show an employer's lack of good cause.⁴⁸⁴

META adopts arbitration as the preferred method for enforcing these rights.⁴⁸⁵ META contemplates that a state agency would adopt rules specifying the appointment of arbitrators and the procedures applicable to the arbitral proceeding.⁴⁸⁶ Arbitrators would be empowered to award successful claimants back pay and either reinstatement or front pay for a period not to exceed thirty-six months.⁴⁸⁷ An arbitrator further could award reasonable attorney's fees and costs to a prevailing party.⁴⁸⁸ On the other hand, META expressly denies arbitrators authority to award punitive damages or monetary awards for pain and suffering.⁴⁸⁹

The cause of action provided by META would preempt most currently available common law claims including implied contract actions and all tort actions.⁴⁹⁰ META, however, would not bar claims based upon either an express contract or a federal or state statute.⁴⁹¹

META would apply to all private sector employers having five or more employees.⁴⁹² Covered employees would include those who work a minimum of twenty hours per week and who have been employed by the same employer for at least one year.⁴⁹³ META would permit an employer and employee jointly to waive the good cause limitation on discharge by entering into an agreement whereby the

⁴⁸⁵ *Id.* § 1(4) cmt.

⁴⁸⁴ *Id.* § 6(e). META also provides for a greater scope of judicial review than that afforded to labor arbitration awards, by adding "prejudicial error of law" as a grounds for vacating or modifying an arbitration award issued under META. *See id.* § 8(c)(4). The commentary explains that this broader review is appropriate because "individual statutory rights are at issue [under META], and arbitration has been imposed upon, not agreed to by, the parties." *Id.* § 8(c)(4) cmt.

⁴⁸⁵ *See id.* § 6. An Appendix to the model act sets out language providing for alternative enforcement mechanisms through either an administrative agency or the civil courts. *See id.* Appendix; *see also id.* Prefatory Note ("the preferred method of enforcement is the use of professional arbitrators, appointed by an appropriate state agency.").

⁴⁸⁶ MODEL EMPLOYMENT TERMINATION ACT § 6(a)-(b).

⁴⁸⁷ *Id.* § 7(b).

⁴⁸⁸ *Id.* § 7(e)-(f).

⁴⁸⁹ *Id.* § 7(d).

⁴⁹⁰ *See id.* § 2(c).

⁴⁹¹ MODEL EMPLOYMENT TERMINATION ACT § 2(e).

⁴⁹² *Id.* § 1(2).

⁴⁹³ *Id.* § 3(b).

employer promises to "provide severance pay in an amount equal to at least one month's pay for each full year of employment."⁴⁹⁴

The basic philosophical premise underlying META is that of "compromise—an equitable tradeoff of competing interests."⁴⁹⁵ As Professor St. Antoine, the reporter for the drafting committee, has noted, META recognizes the significant and sometimes competing interests of the parties to the employment relationship and "tries to meet these manifold needs by a series of practical compromises."⁴⁹⁶ META makes the largest single concession to covered employees who would receive an expanded substantive right to continued employment in the absence of "good cause" for termination. The drafters of META attempt to balance this significant departure from the traditional at-will rule with three smaller, yet significant, concessions for employers. First, META would extinguish most common law limitations on an employer's discharge prerogative, including all tort-based actions. Second, META would cap available damages to eliminate the costly punitive and compensatory damage awards that can result from successful tort claims under the current system. Finally, META would route termination claims into an arbitral forum, presumably facilitating proceedings that are quicker and less costly for all parties concerned.⁴⁹⁷

At this point, however, META is a compromise that has not yet borne fruit. Only one state, Montana, has enacted legislation bearing any resemblance to META, and that statute predates META's 1991 birth date.⁴⁹⁸ Thus, no state has adopted META's proposed reformulation of employment termination law in the decade following its much heralded promulgation.

Critics have assailed META's compromise from many angles. Some commentators fault META for failing adequately to protect employee interests.⁴⁹⁹ At the opposite end of the spectrum, many com-

⁴⁹⁴ *Id.* § 4(c).

⁴⁹⁵ *Id.* Prefatory Note.

⁴⁹⁶ Theodore St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 370 (1994).

⁴⁹⁷ See MODEL EMPLOYMENT TERMINATION ACT Prefatory Note (explaining the "equitable tradeoff" embodied in META).

⁴⁹⁸ See MONT. CODE ANN. §§ 39-2-901 to 2-914 (1989) (prohibiting employers from discharging employees without good cause, or in violation of either public policy or express provisions of the employer's own written personnel policy).

⁴⁹⁹ See, e.g., Dawn Perry, *Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act*, 67 WASH. L. REV. 915, 925 (1992) (arguing that META's limitation on damages would fail to deter violations of public policy by employers); Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 500,

mentators criticize META for imposing too many burdens on employers.⁵⁰⁰

2. Rebalancing META's Attempted Compromise

In spite of the many criticisms, META embodies a rational, policy-based attempt to redress a number of the shortcomings of the current employment law regime. The fundamental problem with the current version of META is that it does not provide employers with an adequate trade-off for their loss of the at-will prerogative. This problem may be rectified and the META compromise rebalanced through two pro-employer alterations outlined below.

a. *Broadening META's Preemptive Scope*

First, META should more broadly replace existing bases for challenging an employment termination. As noted above, the current law of employment termination encompasses a multitude of potential claims and forums.⁵⁰¹ This is particularly burdensome to employers who may be forced to defend a single termination decision in multiple proceedings. Although a purported goal of META is to simplify the current maze by "extinguish[ing] a variety of subsidiary tort claims,"⁵⁰² META's current formula tends to do the opposite by adding yet an additional layer without removing much from the table.

META, as currently formulated, would preempt most common law claims including those asserting an implied contract and all claims grounded in tort.⁵⁰³ This approach, however, leaves most of the current maze intact. An employee still would be able to pursue statutory claims such as those based on federal antidiscrimination statutes and state whistleblowing laws. Employees also could challenge dismissals

501-502 (1992) (contending, among other things, that META fails employee interests by eliminating punitive and compensatory damages and by expanding the scope of judicial review).

⁵⁰⁰ See, e.g., Mary Jean Navaretta, *The Model Employment Termination Act—META—More Aptly the Menace to Employment Tranquility Act*, 25 STETSON L. REV. 1027, 1044 (1996) (arguing that META would unduly intrude on managerial discretion); Ellen Pierce, *Reactions to the Proposed Model Employment Termination Act*, 1 J. INDIV. EMPL. RIGHTS 19 (1992) (reporting that 63% of surveyed human resource management professionals believed that META would create expensive bureaucratic problems); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 9 (1993) (contending that META does not serve legitimate employer interests in preventing employee shirking).

⁵⁰¹ See *supra* notes 304-312 and accompanying text.

⁵⁰² See MODEL EMPLOYMENT TERMINATION ACT Prefatory Note.

⁵⁰³ See *id.* § 2(c).

under antiretaliation provisions contained in statutes such as federal OSHA and state workers' compensation laws.⁵⁰⁴ Further, claims based on express contractual arrangements, whether written or oral, and whether collective or individual, still would survive.⁵⁰⁵ When the new claim provided by META is added to the mix, a welter of legal challenges to a single employment termination decision still could be asserted in federal courts, state courts, administrative tribunals, and now in arbitration as well.

The META claim should supplant rather than add to the existing host of alternative claims. My proposal is that all existing termination claims, except for those arising under a collective bargaining agreement,⁵⁰⁶ should be funneled into the arbitration forum created by META and merged with META's good cause claim. In this manner, statutes and express contracts would not survive as independent claims, but they would inform META's good cause substantive standard.⁵⁰⁷

Take, for example, the claim of an employee who believes that she was selected by her employer for lay-off because of her age. Under my proposal, the employee could not maintain a separate action in court under the ADEA. The employee, however, could argue in a META-based arbitration proceeding that the employer's lay-off action was influenced unlawfully by considerations of age. If the employee succeeds in establishing to the arbitrator's satisfaction that the employer's action violated the substantive standards of the ADEA, then she automatically has established a violation of META's just cause pro-

⁵⁰⁴ See *id.* § 2(e).

⁵⁰⁵ *Id.*

⁵⁰⁶ I agree with the drafters of META that the substantive rights and procedures established through the collective bargaining process should not be extinguished by META, and that employees governed by collective agreements should not be barred from exercising the rights afforded under META. See *id.* §§ 2(e), 2(e) cmt. The process of collective bargaining under the NLRA establishes a system of industrial self-democracy whose objectives are not symmetrical with those of statutory regulation such as that embodied in META. See generally Katherine van Wesel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992). It does not necessarily follow, however, that a unionized employee should be able to invoke the protections of each system in challenging a single employment decision. But see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50-51 (1974) (holding that an employee's prior resort to labor arbitration did not bar an action under Title VII challenging the same employment termination decision).

⁵⁰⁷ Because the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI, cl. 2, makes federal law superior to state law, the approach I propose would require either that META be enacted as a federal statute or that Congress pass some type of enabling legislation that would permit a state META statute to trump federal law in this manner.

vision. In essence, META's good cause inquiry would subsume the standards established by other statutes and by express contracts. The resulting violation and remedy, however, would flow solely from META.

This proposal would have the benefit of eliminating the burden of multiple claims and multiple forums by transferring all employment termination challenges into a single just cause claim subject to resolution in an expeditious arbitration proceeding. This unitary claim also would serve to correct another of the shortcomings of the current regime. Under this proposal, all employees would enjoy the same just cause guarantee of job security.⁵⁰⁸ This unitary standard would help to alleviate much of the resentment directed at minority groups owing to the perceived preferential treatment of the current legal framework.⁵⁰⁹

At least two cogent objectives can be lodged against this proposal. First, critics undoubtedly will voice the concern that META's remedies will not serve adequately to deter workplace discrimination. Second, critics likely will argue that arbitration lacks many of the procedural safeguards built into our system of court-based litigation. Both criticisms have merit and warrant some adjustments in this proposal.

At present, the remedial schemes embodied in federal antidiscrimination laws go beyond that of simply making whole the victims of employment discrimination. Title VII and the ADA authorize awards of compensatory and punitive damages in addition to that of back pay and reinstatement.⁵¹⁰ The ADEA, similarly, permits an award of liquidated damages in an amount equal to the backpay award in the event of a willful violation.⁵¹¹ These remedies reflect the fact that these statutes serve a societal goal of eradicating discrimination in the workplace.⁵¹² The enhanced remedies, accordingly, are designed to deter discriminatory conduct as well as to compensate employees who have been injured by such conduct.⁵¹³

META, on the other hand, only authorizes an award of back pay and, in certain circumstances, a lump-sum severance amount in the

⁵⁰⁸ The just cause standard would still result in differential degrees of actual legal protection since existing statutes would be encompassed within the just cause concept. Nonetheless, a greater equality would result from the just cause baseline applicable to all employees.

⁵⁰⁹ See *supra* notes 382-385 and accompanying text.

⁵¹⁰ 42 U.S.C. § 1981(a) (1994).

⁵¹¹ 29 U.S.C. § 626(b) (1994).

⁵¹² See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

⁵¹³ See *id.*

form of front pay.⁵¹⁴ The model act expressly states that "the arbitrator may not award damages for . . . punitive damages; compensatory damages; or any other monetary award."⁵¹⁵ While this formula compensates employees for lost earnings, it does not fulfill the deterrent function of current antidiscrimination statutes. Since this is an important societal goal, META should be modified to provide arbitrators with the power to double or treble damage awards upon a finding that the lack of good cause for termination was attributable to unlawful discrimination.

META also should mandate fundamental fairness in arbitration procedures. Many commentators, particularly in the context of individual arbitration agreements,⁵¹⁶ have raised concerns about the lack of basic due process safeguards in the arbitration of statutory employment claims.⁵¹⁷ These concerns involve such basic hallmarks of fairness as the selection and training of arbitrators, pre-hearing discovery, and the issuance of a written decision. In the individual arbitration context, guidelines have been developed that identify basic procedural requirements that should inhere in arbitration proceedings.⁵¹⁸ These or similar guidelines should be incorporated by reference in META as a means of ensuring that the arbitration process will be fair as well as expeditious.

⁵¹⁴ See MODEL EMPLOYMENT TERMINATION ACT § 7(b). The commentary states that front pay may be awarded where reinstatement is "unfeasible because of the personal relations between the employer and the employee [or because of] changes in the employer's business." *Id.* § 7(b)(3) cmt.

⁵¹⁵ *Id.* § 7(d).

⁵¹⁶ By "individual arbitration agreements," I am referring to pre-dispute agreements in which an employer and an employee in a nonunion setting agree to resolve employment-related disputes, including those arising under antidiscrimination statutes, through resort to an arbitral rather than a judicial forum. Prior to 1991, considerable doubt existed as to the validity of such agreements. In that year, the Supreme Court generally upheld the validity of pre-dispute agreements under the Federal Arbitration Act (FAA). See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). More recently, the Supreme Court clarified that an exclusionary clause in the FAA applies only to agreements covering transportation workers and not to employment agreements generally. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

⁵¹⁷ See, e.g., Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. & EMP. L.J. 1 (1996); David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745 (1999).

⁵¹⁸ See AM. ARBITRATION ASS'N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (1997); *Due Process Protocol for Mediation and Arbitration of Statutory Disputes*, 9A Lab. Rel. Rep. (BNA) 534:401 (1995).

b. *Scaling Back META's Remedies*

The second basic flaw in the current version of META concerns its remedial scheme. Given the traditional individualistic nature of American society,⁵¹⁹ it is highly unlikely that the United States will adopt an employment security statute that is more protective than the international norm. As the global marketplace shrinks the economic world, pressure will mount to develop greater consensus on comparative legal principles.⁵²⁰ In terms of reforming American labor and employment law, the most that can be hoped for is a solution that falls somewhere in between our at-will dominated current regime and the more protective systems of other countries.

The model act in its current form proposes a remedial scheme that is more expansive than that adopted in most countries. In most European countries, for example, the statutory response to dismissal without cause is a modest transfer payment, often in the range of three to twelve months of pay.⁵²¹ Orders requiring reinstatement tend not to play a major role.⁵²² In short, the typical remedial response to wrongful discharge among most industrialized countries is to provide a modest monetary cushion to alleviate the economic hardship of a temporary period of unemployment.⁵²³

META's remedies should be adjusted in that direction as well. In particular, I propose the following modifications:

- 1) Delete reinstatement as a remedy except in cases where the societal goal of eliminating discrimination is implicated;
- 2) cap front pay awards at a maximum of one year's pay; and
- 3) reduce the buy-out cost of a waiver so that an employee may waive the good cause requirement in exchange for an employer's agreement to provide severance pay in an amount equal to at least one month's pay for each full year of employment up to a total maximum payment of twelve months' pay.

⁵¹⁹ See *supra* notes 171–175 and accompanying text.

⁵²⁰ See Bob Hepple, *European Rules on Dismissal Law*, 18 *COMP. LAB. L.J.* 204, 206 (1997) (noting that "there is a need for guaranteed minimum labor standards as a foundation for prolonged economic and social progress").

⁵²¹ See *id.* at 302; *supra* notes 362–364 and accompanying text.

⁵²² See Estreicher, *supra* note 339, at 294; Hepple, *supra* note 520, at 223.

⁵²³ See Estreicher, *supra* note 339, at 294.

These adjustments would still preserve the core objectives of the model act to establish a unitary standard for job security that would be enforceable in a streamlined, yet fair process. At the same time, this modified act would provide a better trade-off for employers. The modified remedies would impose less direct financial costs on employers and pose less of a burden on employers who seek to maintain flexible employment practices.

B. Recommendation #2—Level the Labor Law Playing Field

A second tier of reform law should focus on the NLRA. In its current form, the NLRA no longer fulfills its stated purpose of adjusting "the inequality of bargaining power" through free and fair collective bargaining.⁵²⁴ While many reforms may be warranted,⁵²⁵ the most crucial need is to address the three principal deficiencies noted above.⁵²⁶ In short, Congress should amend the NLRA in order to protect the fundamental rights of employees to organize, to bargain, and to engage in concerted activity.⁵²⁷

Once again, a set of recommendations from a blue-ribbon panel of experts provides a useful starting point for this task. President Clinton, in 1993, charged The Commission on the Future of Worker-Management Relations with the task of examining the need for labor and employment law reform. Commonly referred to by the name of the committee's chair, the Dunlop Commission issued a fact finding report in 1994,⁵²⁸ and, after receiving considerable input, issued its final report and recommendations later that same year.⁵²⁹ With the Republican sweep of the 1994 Congressional races, the report was dead upon arrival and promptly archived.⁵³⁰ As discussed below, it is time to dust off the report, make a number of critical adjustments,

⁵²⁴ See 29 U.S.C. § 151 (1994).

⁵²⁵ In addition to the reforms discussed below, many commentators have proposed other adjustments to the NLRA. See, e.g., Craver, *supra* note 159, at 397 (proposing increased union access to employees during organizational campaigns and permitting limited forms of secondary pressure); Estreicher, *supra* note 71, at 43 (proposing relaxing existing prohibitions on pre-hire agreements and repealing the NLRA's authorization of state "right to work" laws); Summers, *supra* note 396, at 801-809 (proposing, among other ideas, limitations on employer speech and broadening the scope of mandatory bargaining).

⁵²⁶ See *supra* notes 136-161 and accompanying text.

⁵²⁷ See 29 U.S.C. § 151.

⁵²⁸ U.S. DEP'T OF LABOR, *supra* note 75.

⁵²⁹ REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437.

⁵³⁰ See GALENSON, *supra* note 88, at 79; Richard B. Freeman & Joel Rogers, *Introduction: Worker Representation . . . Again!*, 3 U. PA. J. LAB. & EMP. L. 375, 377 (2001).

and use it as a basis for correcting the current tilt in American labor policy.

1. Facilitating Free Choice in the Representational Process

The Dunlop Commission's final report makes two principal recommendations that attempt to reduce the strife and intimidation typical of today's election campaigns. First, the report calls for speedy representation elections, typically occurring within two weeks of the filing of an election petition.⁵³¹ This change would be accomplished by postponing hearings involving contested bargaining unit composition issues until after the election.⁵³² Second, the report proposes that the NLRB General Counsel be authorized to seek immediate injunctive relief to remedy discriminatory employer actions such as the discharge of employee union supporters.⁵³³ The report estimates that the General Counsel could obtain temporary injunctive relief within five days of the filing of a facially meritorious unfair labor practice charge if the NLRA mechanism for enjoining secondary boycotts were made applicable to section 8(a) (3) claims.⁵³⁴

The Commission report noted several advantages in such a revamped electoral scheme. The report found that "much of the conflict that mars the [current] election process would be eliminated if the process was shortened."⁵³⁵ This, in turn, would lead to a more cooperative employer-union relationship in the event of an affirmative representation vote.⁵³⁶ The report suggested that the prompt injunctive remedy not only would undo the illegal act, but also produce a "backfire" effect of making the discriminating em-

⁵³¹ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 18.

⁵³² See *id.* at 18-19. The Board currently hears and resolves such issues prior to an election, resulting in an average of seven weeks time from the filing of an election petition until the actual election itself. *Id.* at 18.

⁵³³ See *id.* at 18.

⁵³⁴ *Id.* at 21. Section 10(l) of the NLRA mandates that the Board seek injunctive relief if it has reasonable cause to believe that an unfair labor practice charge alleging that a union is engaging in an unlawful secondary boycott is meritorious. See 29 U.S.C. § 160(l) (1994). At present, the Board may use only the slower section 10(j) injunctive procedures with respect to claims of employer unfair labor practices. A section 10(j) injunction is discretionary and may be sought only after the filing of a formal unfair labor practice complaint. See 29 U.S.C. § 160(j). The Board traditionally has been reluctant to authorize petitions for injunctive relief under section 10(j). See ARCHIBALD COX ET AL., LABOR LAW 262-63 (12th ed. 1996).

⁵³⁵ REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 19.

⁵³⁶ *Id.*

ployer look bad in the eyes of the employees.⁵³⁷ In sum, the report concluded that "the combination of prompt elections and immediate injunctive relief would eliminate much of the incentive for engaging in discriminatory behavior."⁵³⁸

While the Commission's recommendation certainly improves on the current system, it falls short of an ideal solution. The truncated election period would compress rather than eliminate strife and intimidation. Both employer anti-union efforts and employee trepidation likely would be intensified during this shorter campaign period.⁵³⁹

Rather than simply shorten the election period, the more desirable solution is to eliminate it altogether. A majoritarian election process is a representation hurdle that does not exist outside of North America⁵⁴⁰ and for good reason. Given the financial incentive for employers to avoid unionization and the economic dependence of employees, a competitive, political-style election campaign inevitably results in a tilted playing field on which pro-union sentiments slide into anti-union votes.

At least two alternative approaches should be considered. One possibility is members-only representation.⁵⁴¹ Under this approach, a union negotiates on behalf of all those employees who voluntarily desire representation, even if union membership constitutes less than a majority of the employer's workforce.⁵⁴² This is the model used in much of the industrialized world.⁵⁴³ In order to transplant this model to the United States, Congress would need to amend the NLRA to compel employers to bargain with a union that has some minimum level of membership, such as ten percent, among that employer's workforce. The advantages of members-only representation, besides avoiding the pitched battle of an election campaign, is that union representation would coincide with individual employee desires. Fur-

⁵³⁷ *Id.* at 20.

⁵³⁸ *Id.*

⁵³⁹ Of course, an employer's anti-union campaign could begin well before the filing of an election petition.

⁵⁴⁰ See *supra* notes 138-145 and accompanying text.

⁵⁴¹ A number of labor law scholars have urged the adoption of a members-only representational model. See, e.g., Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Non-majority Employee Representation*, 69 CHI.-KENT L. REV. 195, 218 (1993); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 898 (1975); Summers, *supra* note 396, at 795.

⁵⁴² See Finkin, *supra* note 541, at 199-200.

⁵⁴³ See Summers, *supra* note 396, at 795.

thermore a non-majority union, if successful, may evolve into a majority institution.⁵⁴⁴ The disadvantages, on the other hand, are that non-majority representatives may lack the clout to be effective and, where multiple unions are on the scene, may result in a cumbersome system of labor relations.⁵⁴⁵

A second and probably superior approach is to adopt a card-check certification process. This would retain the principle of majority rule, but without the drawbacks of a contested election campaign. Under this system, which is used in a number of Canadian provinces,⁵⁴⁶ an employer would be obliged to recognize and negotiate with a union that presents signed authorization cards from a majority of employees in an appropriate unit.⁵⁴⁷

Two principal objections may be lodged against a card-check system of certification. One objection is that employees would make a more informed choice concerning representation if they have the opportunity to hear the viewpoint of the employer as well as that of the union. This objection would have more validity if representation campaigns truly focused on a respectful exchange of information. But, this certainly is not the case in the one in four campaigns during which an unlawful discharge of a union supporter occurs.⁵⁴⁸ Even lawful campaigns abound in misinformation and intimidation.⁵⁴⁹ As Professor Clyde Summers has aptly summarized:

Elections no longer serve to encourage and promote the process of collective bargaining, but rather to minimize and impede constructive collective bargaining. When a union petitions for an election, it marks the beginning of a bitter campaign which may last for weeks or months. The employer

⁵⁴⁴ See *id.* at 801.

⁵⁴⁵ COX ET AL., *supra* note 534, at 1010.

⁵⁴⁶ See Roy L. Heenan, *Canada*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 21-16 to 21-17 (William L. Keller ed., 1997) (reporting that "labor legislation in most Canadian jurisdictions permits labor relations boards to certify unions without holding a vote when they present evidence of having more than a specified percentage of the bargaining unit employees as members").

⁵⁴⁷ See generally Roy J. Adams, *The North American Model of Employee Representational Participation: "A Hollow Mockery,"* 15 COMP. LAB. L.J. 4, 9-10 (1993); Sheila Murphy, *A Comparison of the Selection of Bargaining Representatives in the United States and Canada: Linden Lumber, Gissel, and the Right to Challenge Majority Status*, 10 COMP. LAB. L.J. 65, 82 (1988).

⁵⁴⁸ See U.S. DEP'T OF LABOR, *supra* note 75, at 70.

⁵⁴⁹ The Board has taken the position that it will not set aside an election on the basis of misleading statements made by one of the parties during an election campaign unless a party has used forged documents such that the voters are unable to recognize the source of the misrepresentation. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982).

and the union each lay claim to the loyalty of the employees. Misinformation as to the employer's profitability and as to the union's effectiveness is spread widely by both sides. Accusations of dishonesty, bad conduct, and illegal actions are exchanged and name-calling becomes commonplace.⁵⁵⁰

This certainly is a strange seed bed for what the NLRA envisions as a precursor to "the friendly adjustment of industrial disputes."⁵⁵¹

A second possible objection concerns the reliability of authorization cards as a measuring device for gauging employee desires. One empirical study, for example, found a 12.5% falloff in union support when cards are compared to actual votes in representation elections.⁵⁵² This discrepancy, by itself, does not tell us which is the more accurate measuring device. But even if we were to assume that authorization cards as currently used in the United States generally are less reliable because of peer pressure or a lack of clarity regarding the purposes for which the card will be used,⁵⁵³ the Canadian experience shows that proper safeguards may be crafted to reduce these concerns.

Three attributes of the Canadian practice are particularly noteworthy in this regard. First, a number of the provincial labor boards attempt to make explicit the ramifications of signing an authorization card by requiring that the employee also apply for union membership and pay a nominal application fee at the time of signing.⁵⁵⁴ Second, some provinces require signed cards from a minimum of fifty-five percent of the unit employees before certifying a union in the absence of an election.⁵⁵⁵ Third, the provincial labor boards generally retain discretion to order an election if the cards were collected under circumstances that draw their accuracy into question.⁵⁵⁶

⁵⁵⁰ Summers, *supra* note 396, at 799-800.

⁵⁵¹ 29 U.S.C. § 151; see also REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 20 (noting that card check agreements, in contrast to election campaigns, are a non-conflictual way to determine employee desires concerning representation and "build trust between union and employer").

⁵⁵² See Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 Nw. U. L. REV. 87, 120 (1984).

⁵⁵³ See, e.g., Estreicher, *supra* note 71, at 31 ("NLRB policy over the decades has recognized that employees often sign cards (even when properly worded) under the mistaken impression that they are merely authorizing an election or simply to avoid a personal encounter with the union organizer.").

⁵⁵⁴ See Murphy, *supra* note 547, at 82.

⁵⁵⁵ See GOULD, *supra* note 133, at 162; Murphy, *supra* note 547, at 85.

⁵⁵⁶ See Murphy, *supra* note 547, at 84.

The possibility of a decertification election would serve as an additional safety valve for a card-check certification system. The standards enunciated in the NLRB's recent *Levitz Furniture Co. of the Pacific* decision seem appropriate for this purpose.⁵⁵⁷ Pursuant to that decision, a union enjoys a one-year irrebuttable presumption of majority support.⁵⁵⁸ After that period, the presumption may be rebutted in several ways. An employer may withdraw recognition unilaterally if it establishes that the incumbent union actually has lost the support of the majority of bargaining unit employees.⁵⁵⁹ Alternatively, the employer may petition for a RM election by demonstrating a good-faith reasonable uncertainty as to the union's continuing majority status,⁵⁶⁰ or the unit employees may petition for a decertification election based upon a thirty percent showing.⁵⁶¹ In this context, where the union has the benefit of incumbency to counter the employer's natural position of economic superiority, an election contest is less problematic than it is in the initial organizing setting.

Accompanied by these safeguards, a card-check certification system is the most desirable format for resolving representational issues. The card-check system enables employees to exercise free choice in an environment free from the intimidation and misinformation all too typical of election campaigns. The card-check approach also still retains the majority rule framework that is so deeply rooted in our labor law policy.⁵⁶² Further, as the Dunlop Commission report noted, the card-check method of determining majority status "build[s] trust

⁵⁵⁷ See 333 N.L.R.B. No. 105 (2001).

⁵⁵⁸ *Id.* at 5.

⁵⁵⁹ *Id.* at 11. The Board in this decision overruled prior precedent which had permitted an employer to withdraw recognition based on a good-faith doubt as to the union's continued majority status. The Supreme Court in *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), had interpreted this standard as requiring only a reasonable uncertainty as to the union's majority status, as opposed to the Board's practice of requiring an objectively-based disbelief of majority status. *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. No. 105 (Mar. 29, 2001), accordingly, in requiring an employer to show an actual loss of majority status, raises the bar for unilateral withdrawals of recognition.

⁵⁶⁰ *Levitz Furniture*, 333 N.L.R.B. at 11. Thus, in contrast to the heightened standard for withdrawal of recognition, the *Levitz Furniture* decision retained the lowered *Allentown Mack* interpretation as the benchmark for an employer's RM petition.

⁵⁶¹ See 29 U.S.C. § 159(c)(1)(A)(ii) (1994).

⁵⁶² See generally *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984) (declining to impose a non-majority bargaining order to remedy serious and repeated unfair labor practices committed by an employer during an election campaign because "the majority rule principle is such an integral part of the Act's current substance and procedure").

between union and employer," and thereby provides a less contentious foundation for successful collective bargaining.⁵⁶³

As a final matter, a revamped representational process also should entail a set of remedies that will adequately deter the commission of unfair labor practices. Two recommendations are appropriate in this regard. First, the NLRA should be amended to provide for the prompt injunctive relief suggested by the Dunlop Commission. Second, the Board should be empowered to remedy discriminatory discharges in a manner similar to the ADEA by including an award of liquidated damages in an amount up to the size of the compensatory award.⁵⁶⁴

2. Facilitating First Agreements

The NLRA also should be amended to deal with the problem of bad-faith bargaining in the first contract setting. As noted above, more than one-third of newly certified union representatives never succeed in consummating an initial collective bargaining agreement.⁵⁶⁵ In many instances, this failure results from the continued opposition of employers to unionization, even in the face of a union election victory.⁵⁶⁶ The incentive for employers to engage in bad-faith bargaining tactics is great, because the lack of a first agreement almost invariably leads to the eventual disappearance of the union.⁵⁶⁷ At present, the only remedy available to the Board is an order directing the parties to return to the bargaining table.⁵⁶⁸

The Dunlop Commission's final report proposes a multi-level system of alternative dispute resolution to address this problem. The Commission report suggests, as a first step, that the parties be permitted early access to the mediation assistance provided by the Federal Mediation and Conciliation Service.⁵⁶⁹ The report also proposes the creation of a tripartite First Contract Advisory Board (FCAB). The FCAB would be empowered to review disputes and order the parties

⁵⁶³ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 20.

⁵⁶⁴ See 29 U.S.C. § 626(b).

⁵⁶⁵ See *supra* note 155 and accompanying text.

⁵⁶⁶ See GOULD, *supra* note 133, at 222.

⁵⁶⁷ *Id.* at 169.

⁵⁶⁸ See *supra* note 152 and accompanying text.

⁵⁶⁹ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 22. Currently, the NLRA only requires the parties to notify the FMCS of a bargaining dispute, but, other than with respect to disputes involving health care institutions, see 29 U.S.C. § 158(d)(C) (1994), it does not require the FMCS or the parties actually to engage in mediation efforts. See 29 U.S.C. § 158(d)(3) (1994).

to engage in various dispute resolution procedures, including fact-finding, further mediation, and arbitration.⁵⁷⁰ In what the report describes as likely necessary only in rare circumstances, the FCAB could require the parties to submit the disagreement to final and binding interest arbitration.⁵⁷¹ This step could be ordered, the report suggests, without the need for any preliminary finding of an unlawful failure to bargain in good faith.⁵⁷²

There is much to commend in the Dunlop Commission's proposal. The dispute resolution machinery would advance sound labor law reform by facilitating agreements and deterring unfair labor practices. Further, the fact that this machinery would apply only to first contract disputes removes any concern over a possible "narcotic effect" that might impede true collective bargaining.⁵⁷³

Nevertheless, critics have objected to the report's proposed use of binding interest arbitration on two principal grounds. One objection is that the use of interest arbitration runs counter to the NLRA's objective of promoting voluntary agreements.⁵⁷⁴ The Dunlop proposal, in contrast, would authorize the imposition of a government-compelled substitute for a bargained agreement. A second objection is that a first contract imposed by an outside source "offers no assurance of the ongoing viability of the [future] bargaining relationship."⁵⁷⁵

These objections are not without merit. However, these concerns could be lessened if the binding arbitration alternative was restricted to situations in which a party has failed to bargain in good faith. In this context, arbitration would serve as a suitable remedy for unlawful conduct, rather than as a universally available substitute for collective bargaining. In addition, while there is no certainty that arbitration would lead to a permanent bargaining relationship, the union would have the opportunity to demonstrate its effectiveness in administering

⁵⁷⁰ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 22.

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ See generally Rynicki & Gausden, *Current Trends in Public Sector Impasse Resolution*, in STATE GOVERNMENT 274-76 (1976) (postulating that the availability of arbitration as a dispute resolution device could have a chilling effect on the parties' incentives to bargain in good faith).

⁵⁷⁴ See Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 128 (1996); see also *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (stating that the NLRA is based on the fundamental premise that agreements will be the result of "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract").

⁵⁷⁵ Estreicher, *supra* note 574, at 129.

the first contract. Unit employees would have a more informed and less intimidating atmosphere in which to determine their support of the union's efforts at negotiating a second contract.

As noted by the Dunlop Commission, a drawback to limiting interest arbitration to the remedial context is the resulting delay in processing unfair labor practice charges.⁵⁷⁶ This problem could be reduced by requiring the NLRB to expedite hearing procedures in circumstances where the FCAB has reason to believe that a party to first contract negotiations is not bargaining in good faith. Given the administrative burden that this would impose on the Board, perhaps a better alternative would be to amend the NLRA to empower the General Counsel, acting on behalf of the FCAB, to obtain an order to compel arbitration upon demonstrating a clear lack of good faith bargaining to a federal district court.

3. Restricting the Use of Permanent Replacement Workers

A third essential objective of labor law reform is to curtail the permissible use of permanent replacement workers. As discussed above, the Supreme Court has ruled that employers may hire workers on a permanent basis to replace striking employees, with the latter possessing no bumping rights upon the conclusion of the work stoppage.⁵⁷⁷ Potential strikers face the prospect of job loss and an eventual transfer of unit voting rights to their replacements.⁵⁷⁸ The permanent replacement rule, accordingly, acts as a powerful deterrent to the exercise of lawful strike rights and enables employers to gerrymander bargaining unit composition in a manner that paves the way for union decertification.

Although the Supreme Court first recognized the right of employers to hire permanent replacement workers in its 1938 *NLRB v. Mackay Radio & Telegraph Co.* decision,⁵⁷⁹ this tactic seldom was used until the 1980s.⁵⁸⁰ Emboldened by President Reagan's discharge of the striking air traffic controllers represented by the PATCO union in

⁵⁷⁶ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 22.

⁵⁷⁷ See *supra* notes 157-158 and accompanying text.

⁵⁷⁸ See *supra* notes 160-161 and accompanying text.

⁵⁷⁹ See 304 U.S. 333, 345 (1938).

⁵⁸⁰ See Finkin, *supra* note 161, at 548 ("For much of its history, the *Mackay* rule had limited practical significance, for large nationally-based unionized companies tended not to avail themselves of it.")

1981,⁵⁸¹ thirty percent of U.S. employers indicated in a 1989 study undertaken by the General Accounting Office that they would hire permanent replacements in the event of a strike.⁵⁸² Not surprisingly, this same study revealed that this increased willingness to employ permanent replacements was accompanied by a significant decline in strike activity.⁵⁸³ Other data, meanwhile, reveals a concomitant increase in the number of decertification elections.⁵⁸⁴ As Professor Finkin has noted, "resort to the statutory 'right' to strike would be, for many employees, an exercise in permanent job loss, and, for the union, an act of potential self-immolation."⁵⁸⁵

The *Mackay* rule represents a considerable departure from international norms. Most other countries do not permit employers to respond to lawful strikes by hiring permanent replacement workers.⁵⁸⁶ In these countries, an employee engaged in a lawful job action has the right to reclaim his or her former position upon the end or abandonment of the strike.⁵⁸⁷ Legislation in some jurisdictions go even further and bar the hiring of temporary as well as permanent replacements.⁵⁸⁸

The current permanent replacement rule clearly needs to be altered; the question is in what manner. A prohibition on the hiring of any replacement workers, whether temporary or permanent, would go too far, as it is generally recognized that employers have an entrepreneurial right to continue business operations during a strike.⁵⁸⁹

⁵⁸¹ See Craver, *supra* note 159, at 421 (noting that "the *Mackay Radio* doctrine has been employed with greater frequency since President Reagan decided in 1981 to terminate 11,000 air traffic controllers who participated in an illegal strike against the federal government").

⁵⁸² See Finkin, *supra* note 161, at 548-49 n.12 (summarizing the data generated by the Government Accounting Office study). The study also revealed that about 15% of those employers involved in a strike in 1989 actually did hire permanent replacement workers. See *id.*

⁵⁸³ See *id.* (reporting that the number of strikes in the United States during the 1980s was about one-half of what it was during the 1970s); see also GOULD, *supra* note 133, at 181 (summarizing Bureau of Labor Statistics data showing that there were 1250 work stoppages per year in the 1980s as compared to 2660 per year in the 1970s).

⁵⁸⁴ See GOLDFIELD, *supra* note 29, at 52 tbl.10 (showing a steadily rising volume of decertification elections during the 1970s and early 1980s).

⁵⁸⁵ Finkin, *supra* note 161, at 567.

⁵⁸⁶ See *id.* at 569-70; A. J. M. Jacobs, *The Law of Strikes and Lock-outs, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 461, 493 (R. Blanpain & C. Engels eds., 1998).

⁵⁸⁷ See Jacobs, *supra* note 586, at 488.

⁵⁸⁸ See, e.g., Treu, *Italy, in* 7 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR AND INDUSTRIAL RELATIONS 183 (R. Blanpain ed., 1995); Heenan, *supra* note 546, at 21-26.

⁵⁸⁹ See generally Craver, *supra* note 159, at 422; Jacobs, *supra* note 586, at 492.

Similarly, a ban on all permanent replacements probably is excessive since circumstances can arise in which an employer may have a legitimate need to hire permanent replacement workers in response to union pressure tactics or in order to stay in business.⁵⁹⁰ A compromise solution suggested by some commentators is to ban permanent replacements unless an employer demonstrates that hiring such workers will serve a legitimate business purpose and would not be inherently destructive of the union's right to bargain and strike.⁵⁹¹ While this approach is conceptually consistent with the standard used for measuring the validity of other employer counter-measures to concerted activity,⁵⁹² it offers little in the way of predictability and entails a continued need for NLRB intervention.

Legislation adopted in Ontario provides a preferable model. The Ontario statute authorizes struck employers to hire temporary, but not permanent, replacement workers for the first six months of a lawful strike.⁵⁹³ If a strike continues beyond that point without resolution, employers then may deny reinstatement to those strikers who have been replaced.⁵⁹⁴

Although a two or three month automatic reinstatement period may be a more appropriate time line, the Ontario approach offers a number of advantages. First, this approach would restore the right to strike as guaranteed by the NLRA.⁵⁹⁵ Employees could resort to a lawful strike in support of bargaining demands for a period of time without the fear of practical job loss or the unwanted loss of union representation. Second, employers still would have the capability to continue business operations through the use of nonstrikers, temporary replacements, and, after a specified period of time, permanent replacements.⁵⁹⁶ Finally, the Ontario model provides a predictable

⁵⁹⁰ An employer arguably may have a need to hire permanent replacement workers due to special skill requirements or local labor conditions, *see Craver, supra* note 159, at 421, or where a strike has continued for a prolonged period of time, *see GOULD, supra* note 133, at 202.

⁵⁹¹ *See generally* WEILER, *supra* note 90, at 267; Craver, *supra* note 159, at 422-23.

⁵⁹² *See Metro. Edison Co. v. NLRB*, 460 U.S. 693 (1983) and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-34 (1967) for generally applicable standards for determining the validity of employer responses to protected concerted activity.

⁵⁹³ *See* The Labour Relations Act, R.S.O. ch. 1, sched. A, §80 (1995); *see also* Heenan, *supra* note 546, 21-26.

⁵⁹⁴ *See* The Labour Relations Act §80; *see also* WEILER, *supra* note 90, at 268.

⁵⁹⁵ *See* 29 U.S.C. §§ 157, 163 (1994).

⁵⁹⁶ *See* GOULD, *supra* note 133, at 202 (opining that the Ontario model "would provide the [struck] employer with a chance to recruit a new work force with some permanency").

bright line rule in which both employers and employees would be aware of their respective rights and responsibilities.

C. *Recommendation #3—Provide Employees a Works Council Form of Collective Voice*

The proposals set out in the preceding section would do much to correct the current tilt in the labor law playing field. These suggestions, if adopted, would put employers and unions on a more equal footing and help to reinvigorate the NLRA's stated objective of protecting employee rights to self-organization and collective bargaining.⁵⁹⁷ As a corollary matter, these reforms also likely would reverse the long decline in American union membership.

Even with these reforms, however, it is doubtful that union density in the United States ever will extend beyond twenty or twenty-five percent of the workforce.⁵⁹⁸ As discussed above, deficiencies in the NLRA are only one of the several factors that have contributed to labor's decline. Other factors, such as the global economy, the loss of manufacturing jobs, and America's traditional antipathy for collective action, will continue to militate against any greater rebound in union strength.⁵⁹⁹

This means that some mechanism other than traditional union representation must be found in order to provide a collective voice for the vast majority of the workforce. The NLRA's current prohibition on many types of EIPs is not acceptable in an environment in which the vast majority of Americans are not represented by unions.

As discussed above, a workplace voice mechanism serves fundamental societal interests.⁶⁰⁰ Voice enhances workplace democracy and individual dignity. Research also shows that employee involvement, if appropriately structured, generally improves the economic productivity of the firm.

⁵⁹⁷ See 29 U.S.C. § 151 (1994).

⁵⁹⁸ See KOCHAN ET AL., *supra* note 71, at 252 (predicting that labor law reform only would have the effect of slowing the continued decline in union membership); Bellace, *supra* note 78, at 23 (predicting that labor law reform would result in only a modest increase in union density to encompass about 15% of the private sector workforce); WEILER, *supra* note 90, at 279–81 (predicting that substantial labor law reform would make a significant difference in the prospects for union representation, but that the rise in union membership would fall far short of the then 45% union density figure for Canada).

⁵⁹⁹ See *supra* notes 71–175 and accompanying text.

⁶⁰⁰ See *supra* notes 393–395 and accompanying text.

Workers, moreover, strongly desire a collective workplace voice. In what the authors have termed as the "mother of all workplace surveys," Professors Freeman and Rogers have painstakingly demonstrated that employees want more influence at work through an independent voice mechanism.⁶⁰¹ Freeman and Rogers interviewed more than 2300 workers as part of the Worker Representation and Participation Survey that first was summarized as an appendix to the Dunlop Commission report,⁶⁰² and then expanded upon in their recent book, *What Workers Want*.⁶⁰³ Approximately ninety percent of the survey respondents expressed a preference for workplace representation through some type of independent institution.⁶⁰⁴ One-third of the respondents stated that they would like a union form of employee representation.⁶⁰⁵ A majority of the workers, however, expressed a preference for representation through an employee organization that interacts with management in a non-adversarial manner.⁶⁰⁶

The Freeman and Rogers study documents a "representation/participation gap" in which worker desire for voice far exceeds its current availability.⁶⁰⁷ They find this gap to be "harmful to the nation's economic progress and social well-being."⁶⁰⁸ Freeman and Rogers, accordingly, suggest that the United States needs "a system that admits new institutions as well as extension of current ones."⁶⁰⁹ In short, if labor law reform can fix only a small part of the problem, some other, alternative voice mechanism needs to be established.

1. A Full or Partial Repeal of Section 8(a)(2)

Since NLRA section 8(a)(2) stands as an obstacle to the formation of many types of EIPs,⁶¹⁰ it is not surprising that numerous reform proposals call for an amendment of that provision. These proposals come in many variations, but all share the common objective of reducing the statute's current barrier to the creation of employer-sponsored EIPs.

⁶⁰¹ FREEMAN & ROGERS, *supra* note 273, at 16.

⁶⁰² REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, app.A.

⁶⁰³ See generally FREEMAN & ROGERS, *supra* note 273.

⁶⁰⁴ See *id.* at 151, ex.7.2.

⁶⁰⁵ *Id.* at 68.

⁶⁰⁶ *Id.* at 56, 141-43.

⁶⁰⁷ *Id.* at 48-51, ex.3.5.

⁶⁰⁸ Freeman & Rogers, *supra* note 162, at 14.

⁶⁰⁹ FREEMAN & ROGERS, *supra* note 273, at 155.

⁶¹⁰ See *supra* notes 407-422 and accompanying text.

A few commentators suggest a total repeal of section 8(a)(2).⁶¹¹ This would have the effect of permitting employers to experiment with an unlimited range of possible involvement programs.⁶¹² But such a complete deregulation would go too far. Employers then would be free to establish company-dominated organizations whose purpose is to suppress union organizing efforts rather than to afford any true measure of independent representation.

More common are proposals for a partial repeal of section 8(a)(2). This is the route suggested by the Dunlop Commission. The Commission's final report recommended that Congress clarify section 8(a)(2) so that nonunion EIP's are not deemed unlawful "simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purpose of these programs."⁶¹³ The Commission, however, would continue the prohibition on company-dominated unions, particularly where an employer establishes a program "with the purpose of frustrating employee efforts to obtain independent representation."⁶¹⁴

A somewhat more pro-employer variant is the TEAM Act that passed Congress in 1996,⁶¹⁵ but which President Clinton vetoed.⁶¹⁶ This legislation would have amended section 8(a)(2) to make clear that an employer's creation of an EIP is not an unfair labor practice, even if it addresses terms and conditions of employment, so long as the entity does not seek "to negotiate or enter into collective bargaining agreements."⁶¹⁷ This version appears to permit the formation of company unions so long as their proceedings are not reduced to a written agreement.⁶¹⁸

⁶¹¹ See, e.g., Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491, 532, 543 (2001).

⁶¹² See Estreicher, *supra* note 230, at 160 (arguing in favor of experimentation in the design of nonunion EIPs).

⁶¹³ REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 8.

⁶¹⁴ *Id.*

⁶¹⁵ Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Congress (1996).

⁶¹⁶ See Daily Lab. Rep. (BNA) (Dec. 1997), at e-1.

⁶¹⁷ See H.R. 743.

⁶¹⁸ See Arthur J. Martin, *Company Sponsored Employee Involvement: A Union Perspective*, 40 ST. LOUIS U. L.J. 119, 136-37 (1996) (characterizing the TEAM Act and the Dunlop Commission recommendation as "nothing more or less than attempts to legitimize the company unions that flourished in the darkest days of early industrialization in order to frustrate employees' efforts to organize"); see also Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 142-43 (1997) (criticizing the TEAM Act

Others have proposed a more pro-employee version of partial repeal in which employer-sponsored EIPs would be tolerated only upon compliance with various structural safeguards. As an example, Professors Summers and Hyde both would permit EIPs only if approved by a secret-ballot election of the employees in question.⁶¹⁹ Similarly, a group of six professors crafted an Employee Involvement Bill as an alternative to the TEAM Act which would partially repeal section 8(a)(2) subject to a number of conditions.⁶²⁰

The shared shortcoming of all of these proposals is that they merely tolerate, rather than require, employee involvement. Thus, an easing of section 8(a)(2)'s ban on employer-dominated EIPs will result in more employee involvement only if employers desire that result.⁶²¹ At present, there is much to suggest that most employers would prefer to muffle rather than to amplify employee voice.⁶²² While the sheer number of EIPs has risen in recent years, many of those programs are "largely talk"⁶²³ and designed to influence worker preferences rather than to listen to worker concerns.⁶²⁴

for not containing safeguards to ensure that employers not use EIPs as a mechanism for thwarting unionization).

⁶¹⁹ See generally Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

⁶²⁰ See Charles J. Morris, *Will There Be a New Direction for American Industrial Relations?—A Hard Look at the TEAM Bill, The Sawyer Substitute Bill, and the Employee Involvement Bill*, 47 LAB. L. J. 89, 92 (1996). The six professors are Charles J. Morris, Thomas A. Kochan, Clyde W. Summers, William N. Cooke, Charles B. Craver, and Harry C. Katz. See *id.* The EIB would add two provisos to section 8(a)(2). The first would permit EIPs where no union representation exists and the EIP does not seek to represent employees with regard to grievances, wages, and other working conditions. *Id.* at 100. The second set of conditions would apply where the EIP is representational in nature. Here, five conditions must be met that, on the whole, assure affected employees a democratic process with regard to how the EIP runs and how the members are chosen. *Id.*

⁶²¹ See WEILER, *supra* note 90, at 206–11 (discussing how EIPs generally exist at the discretion of the employer and that even if workers want workplace involvement, if the employer does not, then no EIP will exist because management alone has the power to decide).

⁶²² See Harper, *supra* note 468, at 115 (concluding that "the different responses of management to average workers in union and nonunion environments . . . do not reflect an inability to hear the voices of these workers without the amplification of union representation, but rather a lack of interest in listening").

⁶²³ Freeman & Rogers, *supra* note 162, at 35.

⁶²⁴ See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 825–78 (1994); Harper, *supra* note 468, at 113–14.

2. Works Councils

A better option than EIPs is to mandate some form of works council system similar to that which exists in Germany.⁶²⁵ Works councils are "elected bodies of employees who meet regularly with management to discuss establishment level problems."⁶²⁶ Works councils in Europe typically are independent institutions through which employees consult with management in a relatively non-adversarial manner.⁶²⁷ In short, they are a close approximation of the type of employee involvement mechanism that workers who were questioned as part of the Worker Representation and Participation Survey so highly favored.⁶²⁸

Although most West European countries have adopted legislation mandating works councils,⁶²⁹ the German experience is the oldest and most well-developed.⁶³⁰ Under the German Works Constitution Act,⁶³¹ an employer who employs a minimum of five employees must establish a works council upon the request of three or more employees.⁶³² The size of the council varies with the size of the employer, and the employees elect representatives in a manner that reflects the composition of the workforce.⁶³³

The works council is empowered to consult with management on a variety of plant or enterprise-related topics. The works council has

⁶²⁵ A number of English-language publications describe German works councils. See, e.g., MANFRED WEISS, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* Ch. 5 (1995); Rudolph Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 *COMP. LAB. L.J.* 26 (1993); Alex Leuchten, *Germany*, in 1 *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 4-35 to 4-45 (William L. Keller, ed. 1997); Clyde W. Summers, *An American Perspective of the German Model of Worker Participation*, 28 *COMP. LAB. L.J.* 333 (1987).

⁶²⁶ U.S. DEP'T OF LABOR, *supra* note 75, at 43.

⁶²⁷ See generally Summers, *supra* note 625, at 343-45.

⁶²⁸ See *supra* notes 604, 606 and accompanying text.

⁶²⁹ See Freeman & Rogers, *supra* note 162, at 45-46. In 1994, the European Union approved a directive requiring large multinational corporations that operate in two or more EU states to establish a European Works Council or similar mechanism for employee consultation. Council Directive 94/45, 1994 O.J. (L 254) 64.

⁶³⁰ The first Works Council Law was enacted in Weimer Germany in 1920. The statute was revoked during the Nazi era and reintroduced following World War II. The statute subsequently was amended in both 1952 and 1972. See Janice R. Bellace, *The Role of Law in Supporting Cooperative Employee Representation Systems*, 15 *COMP. LAB. L.J.* 441, 456 (1994); Leuchten, *supra* note 625, at 4-35.

⁶³¹ Betriebsverfassungsgesetz (BetrVG) [Works Constitution Act], v. 15.1.1972 (BGBl. S. 13).

⁶³² See Leuchten, *supra* note 625, at 4-36 to 4-37.

⁶³³ See *id.* 4-37. The statute requires that salaried and hourly workers be proportionately represented in the works council. *Id.*

the right to receive information from, and exchange views with, management concerning the employer's compliance with applicable laws and on general business matters.⁶³⁴ The employer also must consult with the works council prior to the hiring, transfer, or termination of employees.⁶³⁵ Finally, with respect to a number of "social" topics, such as work scheduling, safety measures, and the restructuring of jobs, the works council has a right to "co-determination."⁶³⁶ If the parties cannot come to agreement on one of these topics, the dispute is referred to a dispute resolution panel for final and binding resolution.⁶³⁷ The works council is forbidden to strike or to use other types of economic action in support of its position.⁶³⁸

Works councils in Germany serve to supplement, rather than to supplant, traditional unions. In Germany, unions tend to bargain on economic matters on a national or regional basis within certain industries.⁶³⁹ Works councils may seek to enforce or supplement the union agreement at the local level, but the applicable union contract preempts any contradictory works council arrangement.⁶⁴⁰ Although the unions play no official role in works council operation, a majority of works council members also are union members, thereby ensuring a considerable amount of coordination in efforts.⁶⁴¹

Professor Paul Weiler has been the most vocal proponent of adopting an American works council system.⁶⁴² He has endorsed importing most aspects of the German system with two major excep-

⁶³⁴ See *id.* 4-39 to 4-40.

⁶³⁵ See *id.* 4-40 to 4-41. An employer may discharge a worker even if the works council disapproves of such action. *Id.* at 4-41. The employee, however, may challenge the termination by appealing to the labor court, and the employer can rely only on its explanation previously given to the works council in attempting to establish sufficient cause for the discharge. *Id.* at 4-15 to 4-19, 4-41.

⁶³⁶ See *id.* 4-41 to 4-42; Buschmann, *supra* note 625, at 31; Freeman & Rogers, *supra* note 162, at 49.

⁶³⁷ See Bellace, *Cooperative Employee Representation*, *supra* note 630, at 448; Leuchten, *supra* note 625, at 4-42.

⁶³⁸ See Bellace, *supra* note 630, at 447-48; Leuchten, *supra* note 625, at 4-35.

⁶³⁹ See generally Leuchten, *supra* note 625, at 4-19 to 4-30; Summers, *supra* note 73, at 1412-14.

⁶⁴⁰ See Leuchten, *supra* note 625, at 4-35.

⁶⁴¹ See Otto Jacobi et al., *Germany: Codetermining the Future?*, in *INDUSTRIAL RELATIONS IN THE NEW EUROPE* 243-44 (Anthony Ferner & Richard Hyman eds., 1992) (estimating that 75% of German works councilors are members of unions affiliated with the central labor federation); Summers, *supra* note 73, at 1416 (estimating that 80% of those employees elected to German works councils are nominated from union slates). Works councils and unions in Germany frequently work closely together. See WEISS, *supra* note 625, at 169, 174-75.

⁶⁴² WEILER, *supra* note 90, at 283-95.

tions. First, Professor Weiler recommends that disagreements involving matters subject to co-determination be resolved by affording the affected employees the right to strike rather than by access to binding arbitration.⁶⁴³ Second, he suggests that in a unionized workplace, the local union, upon majority vote, should serve as the works council body.⁶⁴⁴

I disagree with Professor Weiler on both points. Providing works councils with the right to strike would alter radically their consultative nature. Rather than being a body that is directed to seek solutions with management in a "spirit of mutual trust" as it is in Germany,⁶⁴⁵ the option of concerted action would transform works councils into a more adversarial body akin to American unions. Of course, Professor Weiler is right in arguing that generally available binding interest arbitration is inconsistent with American labor traditions.⁶⁴⁶ The only real solution, it appears, is to require the consultative process, but without imposing any formal impasse-breaking mechanism.⁶⁴⁷

On Professor Weiler's second point, enabling the local union to serve as the consultative body blurs the essential distinction between the nature of these two entities. Unions are independent institutions with the right to compel collective bargaining on terms and conditions of employment and the right to back up bargaining positions with concerted economic action.⁶⁴⁸ Works councils, on the other hand, are parliamentary-type consultative bodies that address a broader array of topics at the local level in a less confrontational manner.⁶⁴⁹ If unions serve both functions, it is likely that the consultative function will become submerged in the union's bargaining

⁶⁴³ See *id.* at 290.

⁶⁴⁴ See *id.* at 294-95. Professor Weiler suggest that a second council would be necessary for nonunion employees at the work site, with the two councils coordinating their efforts in consulting with management. See *id.*

⁶⁴⁵ See Buschmann, *supra* note 625, at 30 (citing to BetrVG § 2).

⁶⁴⁶ See WEILER, *supra* note 90 at 290 ("Under American labor policy, at least in the private sector, we have decided for good reasons not to give unions a regime of binding interest arbitration"); see also Summers, *supra* note 625, at 352 ("Recourse to arbitration to settle an interest dispute, as under the Works Constitution Act, runs directly counter to the deeply rooted American principle of free collective bargaining.").

⁶⁴⁷ This would not necessarily result in a lack of good faith consultation by management. Employers would have an incentive to consult in good faith so as not to create a disgruntled group of employees who then might find the option of union representation more palatable.

⁶⁴⁸ See *supra* notes 35-49 and accompanying text.

⁶⁴⁹ See generally U.S. DEP'T OF LABOR, *supra* note 75, at 43. Works councils, unlike German unions, function at the local level and maintain independence from the union. See generally Summers, *supra* note 625, at 343-45.

agenda.⁶⁵⁰ A better resolution is to keep the two entities separate, but, as in Germany, permit unions to endorse candidates for works council membership.⁶⁵¹

With these suggestions, the adoption of an American works council system effectively could close the "representation/participation gap" documented by Freeman and Rogers.⁶⁵² Employees at firms exceeding a certain minimum size would have the automatic right to a participatory mechanism without being dependent on the benevolence of their employer and without the necessity of enduring the strife and adversarial hangover of a union election campaign. The works council institution, itself, would provide a mechanism for expressing employee concerns in a more cooperative environment. And, when combined with the labor law reforms suggested above,⁶⁵³ employees still would have the option of amplifying their voice yet further by freely selecting more traditional union representation.

While works councils mirror the type of employee involvement plan that most workers desire, gaining the support of either management or unions for such a system will be difficult.⁶⁵⁴ Both tend to oppose a works council system, albeit, for different reasons.⁶⁵⁵

Some commentators perceive mandatory works councils as costly and cumbersome.⁶⁵⁶ They point out that such legislation would impose costs on employers with respect to both the establishment and the maintenance of such organizations.⁶⁵⁷ Additional costs would result from a lack of employer flexibility in being able to adjust employment practices quickly in response to market conditions.⁶⁵⁸

⁶⁵⁰ See Freeman & Rogers, *supra* note 162, at 62-63 (maintaining that works councils should not engage in wage bargaining because they are an institution designed to increase enterprise surplus rather than to fight over how firm profits should be divided).

⁶⁵¹ See *supra* note 641 and accompanying text.

⁶⁵² See *supra* note 607 and accompanying text.

⁶⁵³ See *supra* notes 524-596 and accompanying text.

⁶⁵⁴ See Estreicher, *supra* note 230, at 159 (noting the lack of a political constituency for the adoption of a works council system); Michael H. Gottesman, *Whither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L. J. 2767, 2807 (1991).

⁶⁵⁵ See Bellace, *supra* note 78, at 26 (noting that both management and unions tend to oppose the adoption of a works council system).

⁶⁵⁶ See generally Carol D. Rasmic, *Germany's Statutory Works Councils and Employee Codetermination: A Model for the United States?*, 14 LOY. L. A. INT'L & COMP. L. J. 275, 299-300 (1992) (criticizing works councils as impinging on management prerogatives).

⁶⁵⁷ See Kaufman, *supra* note 611, at 541-42. Under the German works council model, employers are responsible for financing the operations of work councils. See Leuchten, *supra* note 625, at 4-44 to 4-45.

⁶⁵⁸ See Addison, *supra* note 395, at 313; Kaufman, *supra* note 611, at 541-42.

The evidence concerning the likely impact of works councils on productivity, however, is far from clear. Research suggests that employee involvement generally increases productivity and the economic performance of the organization.⁶⁵⁹ Interviews with managers of European firms who consult with works councils "overwhelmingly . . . [report that work councils] have important positive effects which in general make them a net benefit to firms."⁶⁶⁰ On the other hand, empirical studies looking specifically at German works councils find that they have little correlation with productivity,⁶⁶¹ except in smaller firms where the correlation is for a reduced level of productivity.⁶⁶²

While economic productivity should not be the sole gauge for measuring the worth of a works council system, these financial concerns can be mollified, at least in part, by two adjustments to the German model. First, the potential drag on managerial speed and flexibility could be reduced by the expedient of only requiring consultation without also requiring lengthy impasse procedures such as arbitration.⁶⁶³ Further, legislation could exempt small employers, such as those with fewer than fifty employees, from the works council mandate.⁶⁶⁴

Union supporters also find much to dislike in works councils and other employee involvement plans.⁶⁶⁵ They perceive such programs as creating sham organizations that inherently impede true collective bargaining.⁶⁶⁶ As former United Auto Workers President Douglas A.

⁶⁵⁹ See *supra* notes 404–405 and accompanying text.

⁶⁶⁰ Freeman & Rogers, *supra* note 162, at 51. Freeman & Rogers also state that "managers widely report that councils facilitate communication with employees, increase employee commitment and force advanced planning in areas that require council consultation that improve management's own initiatives." *Id.*

⁶⁶¹ Addison, *supra* note 395, at 322 (reporting that the empirical research shows "little evidence of any positive impact of works councils on firm performance. Much of the evidence actually points in the opposite direction"); Kaufman, *supra* note 611, at 541 (reporting that mixed econometric evidence exists that works councils in Germany promote productivity).

⁶⁶² See Kaufman, *supra* note 611, at 541.

⁶⁶³ See *supra* notes 646–647 and accompanying text.

⁶⁶⁴ This is the threshold adopted in the Dutch Works Constitution Act, see van Peijpe, *supra* note 454, at 134, as well as in the United States' Family and Medical Leave Act, see 29 U.S.C. § 2601(4)(A)(i) (1994).

⁶⁶⁵ For a discussion of union views on works councils as a specific sub-type of EIP, see Freeman & Rogers, *supra* note 162, at 50.

⁶⁶⁶ See, e.g., Laurence Gold, *The Legal Status of "Employee Participation" Programs After the Labor Board's Electronation and du Pont Decisions*, in PROCEEDINGS OF NEW YORK UNIVERSITY'S 46TH NATIONAL CONFERENCE ON LABOR, JUNE 2, 1993 at 21–24 (Bruno Stein ed., 1994); Michael Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Work-*

Fraser's stated in his dissent to the Dunlop Commission's majority position on this issue, the kind of participation and cooperation that the American system really needs "is democratic participation and cooperation between equals."⁶⁶⁷ In other words, America needs independent unions, not employer-dominated participation schemes.

I think that union supporters are shortsighted in opposing legislation establishing works councils. Unlike other employee involvement mechanisms, employers cannot manipulate the creation of mandatory works councils to deter a union organizing drive.⁶⁶⁸ Works councils, moreover, involve collective action and likely will serve as seed beds for independent unions.⁶⁶⁹ Workers who feel either empowered or thwarted by a works council experience, may turn to independent unions to further their new-found collective aspirations.⁶⁷⁰

Even if this is incorrect, the argument that unions conceptually are a more desirable model of employee representation no longer provides a compelling basis for employee advocates to oppose works councils. Union representation in the United States now stands at a mere thirteen percent of the workforce and continues to drop.⁶⁷¹ Stated conversely, the vast majority of American workers have no representation rights at all. Under the circumstances, some voice is better than no voice at all.

place, 96 MICH. L. REV. 2322, 2375-76 (1998); Owen Herrstadt, *Section 8(a)(2) of the NLRA: The Debate*, 48 LAB. L.J. 98, 104-05 (1997); Martin, *supra* note 618, at 136-37.

⁶⁶⁷ REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 13.

⁶⁶⁸ Unlike most EIP plans which exist only at the discretion of management, only workers can trigger the formation of a works council. See U.S. DEP'T OF LABOR, *supra* note 75, at 43; WEILER, *supra* note 90, at 292; WEISS, *supra* note 625, at 169.

⁶⁶⁹ See Estreicher, *supra* note 71, at 29 (stating that works councils, if adopted in the United States, "are likely to be seed beds of traditional unionism, if they take hold at all"); George Strauss, *Is the New Deal Collapsing? With What Might It Be Replaced?*, 34 INDUS. REL. 329, 340 (1995) (stating that institutions such as works councils "might serve as way stations toward independent unions").

⁶⁷⁰ See Goldman, *supra* note 173, at 302 ("union leadership should recognize that works councils may be the best means for providing the new American work force with object lessons in the value of collective action as well as serve as a training ground to develop the core of rank and file leadership needed for successful bargaining unit organizing."); see also Kaufman, *supra* note 398, at 788-89.

⁶⁷¹ See *supra* note 66 and accompanying text.

D. *Recommendation #4—Enhancing Employment Protection for the Contingent Workforce*

The final set of recommendations attempts to address the black hole of legal deregulation⁶⁷² that has accompanied the increase in contingent work. Toward this objective, this Section recommends expanding the coverage of employment protection statutes, easing union organizing rules for leased employees, and increasing the portability of certain employee benefits.

1. Expanding the Reach of Employment Protection Statutes

As discussed above,⁶⁷³ the most serious legal problem resulting from the increase in nonstandard work arrangements is the lack of coverage for many types of contingent workers under American employment protection statutes. This problem, in turn, flows primarily from a restrictive interpretation of "employee" status which serves as the touchstone for statutory coverage. The prevailing common law definition fails to extend basic social protection to many workers who provide labor under subordinate circumstances.⁶⁷⁴

The Dunlop Commission's proposed solution is to adopt a unitary "economic realities" test for defining employee status.⁶⁷⁵ The Commission's final report opined that the determination of whether someone is an employee for purposes of employment protection statutes "should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying economic realities of the relationship."⁶⁷⁶ Presumably, the Commission's recommendation, if adopted, would extend the economic realities test currently used under the FLSA to other federal labor, em-

⁶⁷² See *supra* notes 425–460 and accompanying text.

⁶⁷³ See *supra* notes 430–458 and accompanying text.

⁶⁷⁴ See *supra* notes 451–460 and accompanying text.

⁶⁷⁵ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 36. The Report also recommended that the "single employer" doctrine should be expanded so that firms do not have incentives to use variations in the corporate form to avoid workplace responsibilities." *Id.* at 41. I have argued elsewhere in favor of the need for such reform and proposed a reformulated test for determining employer status. See Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67, 101 (1987).

⁶⁷⁶ See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 437, at 38.

ployment, and tax statutes.⁶⁷⁷ Many commentators agree with this recommendation.⁶⁷⁸

While the Commission's recommendation certainly would improve on the current common law approach, it falls short of an ideal solution. As with the common law standard, the economic realities test also consists of a multi-factor formula in which the right to control the manner of work is a significant factor.⁶⁷⁹ As demonstrated by Professor Marc Linder, the federal courts increasingly have interpreted the economic realities test in a manner that is more restrictive than its ostensible purpose would suggest.⁶⁸⁰ As a result, many workers are deemed not to be covered employees even though they are economically dependent upon a particular user entity.⁶⁸¹

A comparative view once again offers the prospect for a preferable solution. A number of countries have recognized a third category of workers that falls in between that of employees and independent contractors. These "dependent contractors"⁶⁸² technically are not employees under the traditional legal tests, but nonetheless are recognized as deserving of some employee-like legal protections by virtue of working in positions of economic dependence.⁶⁸³ Employment protection laws that are currently in place in Canada,⁶⁸⁴ Sweden,⁶⁸⁵ Ger-

⁶⁷⁷ The economic realities test as currently used under the FLSA is discussed *supra* at note 441 and accompanying text.

⁶⁷⁸ See, e.g., Dau-Schmidt, *supra* note 79, at 884; Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 749-50 (1995); Stone, *supra* note 252, at 652. But see Hylton, *supra* note 115, at 849-50 (arguing for a cautious approach to any increased legal regulation of contingent work).

⁶⁷⁹ See *supra* note 443 and accompanying text.

⁶⁸⁰ See Linder, *supra* note 132, at 207-09.

⁶⁸¹ See *id.*; Maltby & Yamada, *supra* note 439, at 260-62.

⁶⁸² The term "dependent contractor" was coined by Canadian scholar Harry W. Arthurs. See Harry W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Counter-vailing Power*, 16 TORONTO L. J. 89 (1965).

⁶⁸³ See Langille & Davidov, *supra* note 117, at 24-25.

⁶⁸⁴ Most Canadian jurisdictions have adopted provisions that treat "dependent contractors" as employees for purposes of collective bargaining. See *id.* at 25. Ontario's Labour Relations Act, for example, extends to a "dependent contractor" who is defined as:

a person, whether or not employed under a contract of employment . . . who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

Ontario Labour Relations Act, R.S.O. ch. 1, sched. A., § 80 (1995).

⁶⁸⁵ See Ronnie Eklund, *A Look at Contract Labor in the Nordic Countries*, 18 COMP. LAB. L.J. 229, 240-41 (1997) (reporting that "dependent contractors" are covered by Sweden's

many,⁶⁸⁶ and the Netherlands,⁶⁸⁷ for example, treat dependent contractors similar to employees for some purposes, but not for others.

Germany's approach is the one most worthy of emulation. There, an intermediate group of "employee-like persons"⁶⁸⁸ are technically self-employed, yet nonetheless treated as employees for some purposes because they are "economically dependent and are in similar need of social protection."⁶⁸⁹ Thus, employee-like persons are covered by statutes relating to workplace health and safety, the prevention of sexual harassment, and collective bargaining.⁶⁹⁰ On the other hand, these dependent contractors are not covered by Germany's Act on Protection against Dismissals and the Act on Working Time.⁶⁹¹ This dichotomy apparently reflects the notion that statutory coverage should be broader where basic societal interests are at stake than where the interests in question relate more narrowly to the status of an individual worker.

The United States should follow this example and extend the reach of employee protection statutes that serve core societal goals to contractors who are economically dependent on a user firm. Antidiscrimination statutes such as Title VII clearly fall within this category. The eradication of discrimination is a well-recognized societal goal,⁶⁹² and it will not unduly distort labor market competition by extending the antidiscrimination ban to this group of workers.⁶⁹³ The same is true for broadening OSHA's reach. On the other hand, individual employment security protection from the revised META proposal should not go so far as to restrict the termination of non-employee contractors. With respect to the NLRB, a preferable solution is discussed in the following section.

collective bargaining statute (the Joint Regulation Act), but not by the Swedish Employment Protection Act).

⁶⁸⁶ See Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL'Y J. 77, 94-95 (1999) (reporting that "employee-like persons" in Germany are covered by statutes relating to workplace health and safety, the prevention of sexual harassment, and collective bargaining, but not by statutes relating to employment security and working time).

⁶⁸⁷ See van Peijpe, *supra* note 454, at 141, 152 (reporting that economically dependent workers are covered by Dutch labor law, and to a lesser extent, by the Dutch statute regulating employment security).

⁶⁸⁸ "Arbeitnehmerähnliche Personem." See Daubler, *supra* note 686, at 77.

⁶⁸⁹ *Id.* at 88.

⁶⁹⁰ *Id.* at 94.

⁶⁹¹ *Id.* at 95.

⁶⁹² See *supra* note 512 and accompanying text.

⁶⁹³ See generally HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW & PRACTICE 1039 (1992); Maltby & Yamada, *supra* note 439, at 265.

2. Enhancing the Option of Collective Bargaining for Leased Employees

It is not uncommon in today's economy for a company to have workers leased from a temporary services company working side-by-side with the regular employees of the user company. Yet, while the regular employees can decide for themselves whether to develop a collective bargaining relationship with their employer, the leased workers, at least until recently,⁶⁹⁴ could join in that bargaining unit only with the consent of both joint employers—the supplier lessor company and the user lessee company.⁶⁹⁵ The reason for this result is that the NLRB has treated this situation as a variant of multi-employer bargaining where it necessarily follows that a union cannot expand a bargaining unit to encompass another employer's employees without the consent of that other employer.⁶⁹⁶ Such consent is hardly ever granted,⁶⁹⁷ with the result that the only union option for leased employees is to attempt to organize the dispersed workers of the leasing company, a daunting task, indeed.⁶⁹⁸

The problem with the multi-employer analogy is that, in many leased employee contexts, the user firm is not some outside entity, but instead, an employer of both employee groups. The user entity, along with a supplier entity, are considered to be joint employers of the leased workers if the two entities share or co-determine matters governing the workers' terms and conditions of employment.⁶⁹⁹ Because of this fact, the NLRB in *M.B. Sturgis, Inc.*⁷⁰⁰ recently declined to accept the "faulty logic" of prior decisions relying upon rules applicable to multi-employer bargaining,⁷⁰¹ and ruled that a unit composed of employees who are jointly employed by a supplier employer and a user employer, as well as employees who are solely employed by the

⁶⁹⁴ The Board overruled *Lee Hospital*, 300 N.L.R.B. 947 (1990), in 2000. See *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173 (2000).

⁶⁹⁵ See *supra* note 128 and accompanying text.

⁶⁹⁶ See *Lee Hospital*, 300 N.L.R.B. at 948 (applying the rules generally applicable to multi-employer units to the leased employee situation).

⁶⁹⁷ See Rahebi, *supra* note 129, at 1124 (referring to an interview with former Board Chairman William Gould during which he reportedly "remarked that he had not heard of a case to date in which the [leased] employees had obtained the consent of both employers").

⁶⁹⁸ See *id.* at 1113–15; see also *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173, at 12 (reaffirming that the dispersed employees of a supplier firm may seek to bargain with the supplier firm without needing to obtain the consent of the various user firms).

⁶⁹⁹ See *Riverdale Nursing Home*, 317 N.L.R.B. 881, 882 (1995).

⁷⁰⁰ 331 N.L.R.B. No. 173.

⁷⁰¹ See *id.* at 13.

user entity, is permissible so long as the two groups share a sufficient community of interests.⁷⁰²

Although combining solely employed permanent employees with jointly employed temporary employees may introduce some awkwardness in terms of tri-party negotiations,⁷⁰³ the *Sturgis* approach comes with several advantages. First, eliminating the dual consent prerequisite to a combined unit offers the only realistic prospect of meaningful choice in union representation for leased employees. Second, bargaining in a combined unit provides a vehicle for narrowing the pay and benefit gap that currently separates temporary and long-term workers.⁷⁰⁴ Further, the *Sturgis* decision will not unduly burden the user firm's flexibility since a combined unit only will be appropriate where a joint employer relationship exists,⁷⁰⁵ and the two groups of workers share a community of interests.⁷⁰⁶ Put another way, leased employees will be included in the unit only where the user firm both exercises control over the leased employee's working life and assigns them to work tasks that are similar in nature to the user firm's long-term workforce. In this particular context, the *Sturgis* decision also serves the purpose of limiting an employer's capability of using leased employees as a union avoidance tool.⁷⁰⁷

At this point, a legitimate question could be raised concerning why a NLRB decision that already has been issued should be included on a list of proposals for reform. The reason is that the *Sturgis* decision may well be short-lived. Either an appellate court or a NLRB newly constituted by President Bush could reintroduce the former dual consent requirement. In the face of a possible retreat, the long-term elimination of the dual consent rule should remain on the reform agenda just in case.

3. Increasing the Portability of Benefits

Some have called for more direct governmental intervention to reduce the pay and benefits gap. For a number of years beginning in 1987, U.S. Representative Patricia Schroeder introduced bills that

⁷⁰² See *id.* at 12, 15.

⁷⁰³ See *id.* at 38-39 (Member Brame, dissenting).

⁷⁰⁴ See *supra* note 122 and accompanying text (discussing the lesser pay and benefits generally received by contingent workers).

⁷⁰⁵ See *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173 7.

⁷⁰⁶ See *id.* at 15.

⁷⁰⁷ See *supra* notes 124-130 and accompanying text (discussing that some employers hire contingent workers in order to further a union avoidance strategy).

would compel employers to provide proportional health and pension benefits to certain part-time and temporary workers.⁷⁰⁸ More recently, in 1999, U.S. Representative Lane Evans introduced legislation calling for employers to provide contingent workers with equal pay for equal work and the same benefits as earned by regular employees after a qualifying period of work attachment.⁷⁰⁹

These proposals are quite intrusive and likely not very feasible. Equal pay for equal work is a concept that, as we know from experience under the federal Equal Pay Act, applies to a very narrow range of positions.⁷¹⁰ It probably would engender more litigation about what work is "equal" than it would engender pay equity. As for benefits, it is difficult to conceive how Congress, in fairness, could compel an employer to provide benefits to contingent workers when it does not do so for employees generally.⁷¹¹ Further, a mandate for more employer-provided benefits could act as a serious drag on employment.⁷¹²

A more fruitful route would be to increase the portability of benefits.⁷¹³ As discussed above, many contingent workers are ineligible for certain employee benefits because of the lack of a sufficient work attachment with a particular employer.⁷¹⁴ Thus, even an employee who has engaged in substantially continuous employment, but with a series of different employers, may not gain eligibility for a variety of benefits. As an example of legislation that could enhance port-

⁷⁰⁸ See, e.g., H.R. 2188, 103d Cong., 1st Sess. (1993); see also Schroeder, *supra* note 430, at 736-37 (summarizing the proposed Part-Time and Temporary Workers Protection Act).

⁷⁰⁹ See H.R. 2298, 106th Cong. (1999); see also Forster, *supra* note 132, at 570 (summarizing the proposed Equity for Temporary Worker Act of 1999).

⁷¹⁰ See Equal Pay Act, 29 U.S.C. § 206(d) (1994); see also MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 298 (2d ed. 1999) (describing the Equal Pay Act's substantive proscription as "brief and narrow").

⁷¹¹ ERISA, the principal federal statute governing employee benefits, regulates the fiduciary management of benefits plans, but does not require that employers actually provide any particular benefits to employees. See generally Philip D. Hixon, *Contingent Workers and ERISA: Should the Law Protect Workers With No Reasonable Pension Expectations?*, 25 OKLA. CITY U. L. REV. 667, 679 (2000).

⁷¹² Employer-paid benefits have increased three-fold since 1948 and now constitute 15.6% of compensation. MISHÉL ET AL., ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2000-2001 at 116-17 (2001). Since the amount of benefits generally is fixed for a full-time employee without regard to the number of hours worked, an employer has a financial incentive to meet labor needs by increasing hours rather than by increasing the number of employees. *Id.* Mandating proportionate benefits for contingent workers likely would serve to strengthen that incentive.

⁷¹³ The Health Insurance Portability and Accountability Act of 1996, which protects worker access to health insurance when changing jobs, is an example of a federal statute that enhances the portability of benefits. See 29 U.S.C. §§ 1181-82 (1994).

⁷¹⁴ See *supra* note 430-433 and accompanying text.

ability, Congress could amend ERISA to provide that employees who work for more than one employer can accumulate periods of service to meet the minimum vesting period for a defined contribution pension plan.⁷¹⁵ Similarly, state unemployment compensation laws could be altered to permit more employees who work at part-time and temporary positions to qualify for some proportion of unemployment benefits.⁷¹⁶ In both situations, the cost of providing these benefits could be prorated among the various employing entities.

Contingent work arrangements are not likely to decrease in the foreseeable future and trying to prevent their use is likely to be a futile endeavor. By increasing the portability of benefits, the law can accommodate rather than obstruct the prevalence of these nonstandard work arrangements.

CONCLUSION

Much has changed in the world of work over the past fifty years. Evolving gender roles and increased immigration have changed the demographics of who is at work. Advances in technology have changed how we work. And, the global economy has altered what we do at work and the market in which work is valued.

In the legal realm, the last fifty years have witnessed the decline of collective regulation and the rise of governmental regulation. The prevalence and impact of union-management relations has waned while government oversight of the individual employment relationship has waxed. Full-tilt civil litigation has displaced the bargaining table and the relative informality of labor arbitration.

It is tempting to dismiss this trade-off in regulatory models as a wash. One could look at this trade-off and conclude that although employees now receive less security through union representation, the new statutory and judicial limitations on the at-will rule provide an equally effective counterweight to managerial interests. But this view would not be accurate. The new governmental model of regulation, at least for employees, is haphazard, difficult to access, and lacking in voice. Further, as Professor Clyde Summers has shown in a recent article, the courts have "grudgingly applied" many of the at-will

⁷¹⁵ ERISA currently permits employers to establish a minimum five-year employment period before an employee's pension benefit fully vests. See *supra* note 431 and accompanying text.

⁷¹⁶ Most state laws require an employee to work twenty weeks per year in order to qualify for unemployment compensation benefits. See *supra* note 433 and accompanying text.

limitations during the past decade.⁷¹⁷ Most importantly, however, the changing dynamics of the global workplace have created a shift in practical economic forces that dramatically skews the true balance in the new legal order.

The new global market places a premium on capital flexibility. Economic efficiency demands a decrease in workplace regulation. Countries compete to deregulate in order to attract capital. Put simply, we are engaged in a dramatic race for the bottom in terms of employment regulation. Economic efficiency, however, is not the only goal of a social system. Considerations of fair treatment must be added to the mix as well.

This is not the first time in the World's history that technical innovation has outpaced the civilized rules of the master and servant relationship. Technological change necessarily benefits first those who have ownership rights to the new technology. In other eras, imbalances in the respective legal rights of management and labor have been adjusted in order to establish a new equilibrium. We need to do so again.

Since global trade and technology largely are responsible for the current lack of equilibrium, some type of global solution ultimately will be necessary to re-balance the scales of workplace justice. What is sorely needed is not a race to the bottom, but a new international consensus on labor norms. As Europe has learned the hard way, it is difficult to compete in a global economy with social policies that are far more generous than the international norm. But it is increasingly difficult to justify the fairness of American business having an advantage in global economic competition by virtue of social policies that fall below the international norm. A new consensus must be forged that falls somewhere in between these two sides of the Atlantic Ocean.

This Article makes a number of recommendations that would direct American labor and employment policy toward such a consensus. They are an ambitious set of proposals, and I have no illusion that they will be adopted readily in our present political climate. I only hope that they will contribute to the ongoing debate that will be necessary to correct the mess of our current labor and employment law regime.

⁷¹⁷ See Summers, *supra* note 177, at 73-77.