

# A Framework for the Rejuvenation of the American Labor Movement<sup>†</sup>

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## I. INTRODUCTION

As the twenty-first century dawns, the long decline of American private sector unions continues with no ready plateau in clear view.<sup>1</sup> Should American policymakers be concerned? Or is the decline an inevitable consequence of trends associated with ascendant global capitalism that also will erode, albeit more slowly, union density in other advanced industrialized nations with laws more favorable to independent labor movements?<sup>2</sup> In my view, the answer to the first question is yes and the answer to the second question is a qualified no. It is also my view, however, that formulating proposals that have a realistic chance of arresting the decline requires an analysis of precisely why we should be concerned about the current condition of private sector unionism. Time is short. The depreciation of the political capital of American labor—even from the level of the late seventies when labor’s great push for labor-law reform failed<sup>3</sup>—reflects that of its membership rolls. Indeed, it is doubtful that a President Gore, a Speaker Gephardt, and a filibuster-proof Senate would satisfy labor’s 1970s “wish-list.”<sup>4</sup> Labor’s leaders and labor’s friends must be ready for any

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1. The U.S. Department of Labor’s Bureau of Labor Statistics reports that the percentage of private sector nonagricultural workers who were union members fell to single digits, 9.6%, in 1998. Bureau of Labor Statistics, U.S. Dep’t of Labor, *EMPLOYMENT & EARNINGS*, Jan. 2000, at 221 tbl.42. This reflects a slow but steady decline from a 16.8% level in 1983, the first year the Bureau kept comparable statistics segregating private-sector workers. Bureau of Labor Statistics, U.S. Dep’t of Labor, *EMPLOYMENT & EARNINGS*, Jan. 1985, at 209 tbl.53. The 1983 figure itself marks a long decline from the peak for union organization of the total nonagricultural workforce—about 35% during the 1945 to 1954 decade. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES* (1967). The picture of continuing union decline until the middle of the last decade is fully painted in tables in MICHAEL C. HARPER & SAMUEL ESTREICHER, *LABOR LAW* 107-15 (1996). Public-sector unions, of course, have fared much better organizing workers who are not as threatened by job loss from employer retaliation, from the product market competition of nonunion competitors, and from strikes and permanent replacements. *Id.* The unionization rate for government workers in 1998 was 37.5%. Bureau of Labor Statistics, *EMPLOYMENT & EARNINGS supra*, at 221 tbl.42.

2. See, e.g., Leo Troy, *Convergence in International Unionism: The Case of Canada and the U.S.A.*, 30 *BRIT. J. INDUS. REL.* 1 (1992).

3. For an account of this initiative and its failure, see BARBARA TOWNLEY, *LABOR LAW REFORM IN U.S. INDUSTRIAL RELATIONS* (1986); Gerald E. Rosen, *Labor Law Reform: Dead or Alive?*, 57 *U. DET. J. URB. L.* 1 (1979).

4. A filibuster in the Senate defeated the labor-law reform movement of the late 1970s, TOWNLEY, *supra* note 3, at 178-87, although Democrat Jimmy Carter was in the White House and there were Democratic majorities in both houses of Congress, *id.* at 12-13.

political opportunity with a proposal for a new stable labor-relations system that will reverse union decline without generating a political backlash that would soon negate union gains.

In this Article I offer for consideration a somewhat different proposal than those that dominated the debate among the academic friends of labor in the 1990s.<sup>5</sup> I do so after arguing that what seems to be the primary concern of the participants in that debate—the muting of the “voice” of American workers as union representation declines<sup>6</sup>—should not be the primary concern of policymakers when considering a revision of American labor law. I shall argue that the problem is not that most American workers have no representative to develop and to express their views on the business strategies and tactics, or the personnel policies and benefits, chosen by their employers. The problem is that American workers have lost power—power to extract a larger share of the returns of American enterprise and power to protect individual employees from arbitrary, unjust, or discriminatory treatment by their managers. The loss of this power has been somewhat mitigated by the expansion of minimum employee benefits and individual rights through federal and state legislation and common-law developments. But even the securing of these benefits and rights has been compromised by the loss of independent representation in the workplace.

While my proposal is not designed to attempt to prop up a system of decentralized collective bargaining that has always been flawed and is increasingly impotent in today’s economy, it is also not designed simply to facilitate the enterprise- or workplace-based representation of employee views on business policies that employees cannot, and in some cases, should not, affect against the judgment of their managers. It is instead primarily formulated to better and more efficiently insure the protection of individual employee rights and benefits. It is designed with the hope that the efficiency of the protection would offer enough to American society so that shifting political winds would make vulnerable neither a concomitant expansion of the American union movement nor the potential for economy-wide redistributive policies that this expansion could bring.

## II. ROLES FOR AMERICAN LABOR

### *A. Redistribution*

As most readers must be aware, the distribution of earnings in America is now more imbalanced than that of any other rich, industrialized nation.<sup>7</sup> For most of the final decades of the twentieth century, moreover, as unions lost more and more labor

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5. See *infra* Part III.B.

6. See *infra* Part II.B.

7. For a probing analysis, see LAWRENCE R. MISHEL ET AL., *THE STATE OF WORKING AMERICA 1998-99*, at 362-68 (1999). In their Executive Summary, the authors note:

High-income families (those in the ninetieth percentile of family income) in the United States earn almost six times more than their low-income counterparts (those in the tenth percentile). The average ratio for other advanced economies is under four, with only the United Kingdom (with a ratio of about five) anywhere near the U.S. level.

*Id.* at 12.

market shares, the wage imbalance in America increased<sup>8</sup> and the relative economic position of the American middle class deteriorated.<sup>9</sup> It is thus tempting to assume a cause and effect relationship between the contraction of collective bargaining and the erosion of lower- and middle-class wages,<sup>10</sup> incomes,<sup>11</sup> and wealth.<sup>12</sup> The high profit

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8. *Id.* The authors conclude that “by the mid-1990s, the United States had surpassed Canada as the OECD [Organization for Economic Cooperation and Development] country with the greatest degree of earnings inequality among full-time workers.” *Id.* at 366. Furthermore, [the] typical low-wage worker in an advanced European economy earns 44% more than in the United States. The large dispersion of earnings in the United States relative to other countries leaves U.S. low-wage workers with very low earnings, despite living in the country with one of the world’s highest income levels.

*Id.* at 368.

9. *See id.* at 48-53. “Between 1979 and 1989, the bottom 80% [of American families] lost income share and only the top 20% gained. Moreover, the 1989 income share of the upper fifth, 44.6%, was far greater than the share it received during the entire postwar period . . .” *Id.* at 49. Extending their analysis of the data through 1996, the authors conclude that the “increase in inequality continued unabated over the 1989-96 period. . . . The top fifth, and in particular the top 5%, continued to gain at the expense of everyone else, including the group in the 80-95th percentile range.” *Id.* at 49-50; *see also* FRANK LEVY, *THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE 2* (1998) (reporting that in 1969 the richest 5% percent of families earned 15.6% of all income, while in 1996 these families earned 20.3% of all income). The trend seems to have continued into 1999; a more recent study demonstrates that the top quintile of families garnered more than 50% of household income in the last year of the 1990s. David C. Johnston, *Gap Between Rich and Poor Found Substantially Wider*, N.Y. TIMES, Sept. 5, 1999, at A16 (reporting Congressional Budget Office data analyzed by Center on Budget and Policy Priorities). The top 1%, 2.7 million Americans, have as many after-tax dollars to spend as the bottom 100 million. *Id.*

10. Despite some improvement in the last two years of what is now a decade-long economic expansion in America, wages fell even faster for the median worker in the 1989 to 1997 period (-0.4% per year) than they did in the prior decade (-0.2% per year). MISHEL ET AL., *supra* note 7, at 2-3, 30. Real wages “stagnated or fell between 1989 and 1997 for the bottom 60% of all workers.” *Id.* at 5. Moreover, during this period even the wages of male white-collar workers, including managers, scientists, and engineers, were stagnant or declined. *Id.* at 119-20. The average wages of male college graduates at the end of the period were below that of the mid-1980s or early 1970s. *Id.* at 120. The wages of the average American worker reached their 1989 level in 1999, but are still about 10% below those of 1973. *See* COUNCIL OF ECONOMIC ADVISERS, *ECONOMIC REPORT OF THE PRESIDENT* (1999). American chief executive officers, however, have been faring well. MISHEL ET AL., *supra* note 7, at 120. In the 1989 to 1997 period their total compensation grew by 100% and had reached 115.7 times that of the average worker. *Id.*

11. Notwithstanding a loss of position relative to the richest American families, MISHEL ET AL., *supra* note 7, at 48, the median American’s family income did rise slightly (0.6%) from 1989 to 1997, *id.* at 2. This slight increase, however, derives from a much greater increase in number of hours worked per year during this period. *See id.* at 71. For instance, from 1989 to 1996, the typical married couple with children worked 247 more hours per year. *Id.* at 2.

12. From 1983 to 1997, the share of all wealth held by the top 1% of American households rose, and now stands at almost 40%. *Id.* at 261-64. The share of the wealth held by the middle fifth of American households, on the other hand, continues to decline, *see id.* at 258-66; indeed, “the value of this middle group’s wealth holdings actually fell between 1989 and 1997,

margins enjoyed by American corporations<sup>13</sup> as wages have stagnated may suggest that much of the well-documented, usual union-wage premium<sup>14</sup> could draw from those margins rather than from consumers through price inflation.<sup>15</sup> Indeed, some economic studies indicated that as much as a fifth of the rise in American inequality before the last decade could be correlated with the decline in union density.<sup>16</sup> Such a correlation would not have surprised the drafters of the National Labor Relations Act (“NLRA”).<sup>17</sup> Both the findings in the first section of the NLRA and its legislative history make clear that one goal of the statute was to correct the “depressi[on of] wage rates and the purchasing power of wage earners in industry” by righting the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”<sup>18</sup>

There is good reason to believe, however, that in today’s economy only limited income redistribution can be achieved through the kind of decentralized collective bargaining encouraged by the NLRA. Rather than simply being a primary cause of the widening inequalities in American incomes, the continuing decline of union density to a great extent is an effect of the same underlying economic trends—the globalization and deregulation of our economy. As competition has become more global and capital more mobile, those who allocate investment funds undoubtedly have become more sensitive to any reduction in profit margins caused by increases in labor costs. The documented increases in both legal and illegal employer resistance to unionization<sup>19</sup> seemed to have been augmented in the 1970s by particularly high

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due primarily to a rise in indebtedness,” *id.* at 9.

13. Profit levels grew from 1979 to 1997 to a before-tax level not seen since the mid-1960s, and an after-tax level not matched since 1959. *Id.* at 68-69. This growth during a period of wage stagnation reflects a substantial redistribution of returns from labor to capital during this period.

14. See generally RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43-60 (1984) (discussing the role of unions in raising wages for workers).

15. The authors of *The State of Working America* conclude that if profits had grown only at historically normal levels since 1979, “then hourly compensation could have been 7% higher in 1997 than it actually was.” MISHEL ET AL., *supra* note 7, at 3. It is also revealing that between 1989 and 1996 the productive capacity of the economy increased by 8% while median wages declined and family incomes stagnated. *Id.* at 2.

16. See, e.g., RICHARD B. FREEMAN, EMPLOYEE COUNCILS, WORKER PARTICIPATION, AND OTHER SQUISHY STUFF, PROCEEDINGS OF THE 43RD ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 328-37 (1991); see also Thomas Lemieux, *Unions and Wage Inequality in Canada and the United States*, in SMALL DIFFERENCES THAT MATTER: LABOR MARKETS AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES 69, 70 (David E. Card & Richard B. Freeman eds., 1993) (ascribing two-fifths of the greater wage inequality in the United States than in Canada to different rates of unionization).

17. 29 U.S.C. §§ 151-169 (1994).

18. *Id.* § 151; S. REP. NO. 573, at 3 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 2302 (1949); 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner). See also Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 291-92, 319-20 (1987).

19. Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the*

union-wage premiums<sup>20</sup> as well as by labor's loss of control of certain market sectors and by the elimination of some protective governmental regulation in the transportation and communication industries.<sup>21</sup> Higher profit margins in the last two decades have not reduced corporate management's resistance to union attempts to obtain a greater share of profits; if similarly high profits are available in other global investments, managers must be concerned about the withdrawal of capital as profits are eroded. Furthermore, there are limits to the redistribution of profits that unions can achieve even through control of most of a domestic market in manufacturing and in service industries whose work can be, and has been, outsourced outside our borders.<sup>22</sup> The rise in income inequality in part reflects the same loss of union wage-premium jobs that has led to a decline in union-membership rolls.

In retrospect, the system of decentralized collective bargaining encouraged by the NLRA seems to have been ill-designed to serve its redistributive goals. Shop-by-shop, office-by-office, or even firm-by-firm bargaining never was able to take wages out of competition and thereby insure any significant continuing wage premium. After passage of the NLRA, American unions, through surprise and militant action and by the encouragement of the Roosevelt administration during the prewar and war years, were able to seize control of the labor markets in certain key manufacturing industries and achieve significant wage premiums through multiemployer or pattern bargaining.<sup>23</sup> But as international competition developed and regulatory protections receded, even in some of these industries, union leverage has declined. Absent transformed labor laws that encourage industry-wide bargaining and absent the emergence of some form of international cooperation among unions, it is hard to imagine collective bargaining having a significant impact on income inequality in early twenty-first century America. Furthermore, given the potential for inflationary price increases and a wage-deflationary, labor-displacement effect in unorganized industries, even industry-wide collective bargaining provides an imperfect form of capital-to-labor income redistribution.<sup>24</sup>

This is not to say that collective bargaining cannot enhance benefits for represented

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*Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 954 (1991); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

20. See FREEMAN & MEDOFF, *supra* note 14, at 53-54.

21. See Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WISC. L. REV. 1, 108-17 (showing that earlier union decline could be explained by sectoral shifts in employment, while union density was stable within heavily organized sectors until the 1970s, and started to decline then in these sectors with a changing economy and increased employer resistance).

22. See generally BARRY T. HIRSCH & JOHN T. ADDISON, *THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE* 208-16 (1986).

23. See Janice R. Bellace, *Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA*, in *LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS* 11, 11-13 (Janice R. Bellace & Max G. Rood eds., 1997).

24. Even Freeman and Medoff acknowledge this, stressing the compensating union benefits of lower-wage inequality within firms, of wage standardization across firms, and of reduced inequality between blue- and white-collar workers. FREEMAN & MEDOFF, *supra* note 14, at 78-93.

American workers without causing a comparable decline, through inflation or labor displacement, in the income of other workers. We should not, for instance, gainsay the studies that indicate that unions generally enhance productivity, particularly by reducing turnover through the establishment of fair grievance processes and structured internal labor markets.<sup>25</sup> As I argue below, there is no reason to think that all American employers cannot be required to provide a minimally fair, dignified, and safe workplace, without causing a substantial withdrawal of capital. Furthermore, there undoubtedly continue to be market sectors where employers enjoy rents from which unions can extract a further share without causing capital withdrawal.<sup>26</sup> There are, for instance, certain private- as well as public-sector service industries, such as hospital care and hotel,<sup>27</sup> that have limited geographic mobility and at least some market power. The unorganized but burgeoning high-technology sector, though characterized by highly mobile capital, seems dominated by firms with at least temporary monopolistic positions. But even if the organizational hurdles in, say, the high-tech and health-care industries were surmounted,<sup>28</sup> a somewhat greater sharing of the monopoly rents of a few firms could not affect the income of the vast majority of middle- and lower-income Americans.

However, simply because collective bargaining in the decentralized American mode probably cannot arrest the growing inequality in our incomes does not mean that a strong union movement also would be hamstrung on all fronts. A strong labor movement could achieve much more income redistribution through federal wage, benefit, and taxation legislation than through collective bargaining.<sup>29</sup> Employers who might withdraw or transfer capital in the face of union demands for wage premiums in the form of, say, health-care insurance or additional guaranteed vacation leave, could accept the imposition of such benefits via legislation that would also affect all domestic-competitive uses of the capital.<sup>30</sup> Tax policy, at least when directed at

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25. See *id.* at 162-80.

26. For a theoretical discussion of the situations in which unions may share in a firm's rents or quasi rents, see Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law*, 91 MICH. L. REV. 419 (1992).

27. Notwithstanding the hotel industry's heavy use of relatively unskilled labor, the Hotel Employees and Restaurant Employees International Union ("HERE") has maintained organization in some major urban and entertainment sites. See Dorothy Sue Cobble & Michael Merrill, *Collective Bargaining in the Hospitality Industry in the 1980s*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 447, 454-55 (Paula B. Voos ed., 1994).

28. See, e.g., Steven Greenhouse, *Getting Organized, Unions Struggle to Attract High-Tech Workers, Look Toward Temporary Employees*, FORT LAUDERDALE SUN-SENTINEL, Aug. 8, 1999, at 3F, available at 1999 WL 20275409; Joel Kotkin, *Unions See Fertile Fields at Lower End of High Tech*, N.Y. TIMES, Sept. 26, 1999, at C4.

29. For an analysis of how unions have helped achieve the enactment of redistributive and minimum-benefit legislation, see John Delaney & Susan Schwochau, *Employee Representation Through the Political Process*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 265, 277-87 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

30. 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, *supra* note 29, at 13, 40 (contrasting the "greater universalism of nonwage benefits overseas, which takes these benefits 'out of competition'" (emphasis in original)).

individual recipients of profits, can even negate the advantages of international investments. It is certainly revealing that the level of redistribution achieved in the United States through tax and transfer payments or through Social Security, unemployment insurance, or other such programs is only a fraction of that of most other industrialized nations, many of which are competing effectively in the global economy.<sup>31</sup>

A labor movement as feeble as that in America today, however, cannot hope to achieve income redistribution through electoral politics in the manner of many European labor movements. Unions generally remain a part of the Democratic Party's core constituency, but the leadership of the party need not and does not give priority to labor's agenda. To be sure, Democratic presidential candidates during contested primary campaigns and those politicians who run for election in districts where unions retain special pockets of strength attempt to secure the support of unions who can provide both limited financial support and valuable campaign workers.<sup>32</sup> To an increasing extent, however, even such politicians promise union leaders only the protection of current law and limited special-interest legislation, shying from major redistributive initiatives that could jeopardize business contributions necessary to the financing of any significant campaign today. Labor's early endorsement of candidates in Democratic primaries<sup>33</sup> reflects the strategy of a special-interest lobby able to make deals for limited goals rather than that of a political movement to which any elected official must respond. The results are not surprising: tax cuts are framed to further favor the most fortunate Americans; income redistribution initiatives generally do not find a place on the national agenda; and even major efforts to insure social benefits, such as President Clinton's first-term health-care plan,<sup>34</sup> seem doomed to failure. If the system of American pluralism and countervailing political power was ever vital and healthy,<sup>35</sup> it is now, at least on redistributive economic issues, all but moribund.

No other political representative of the economic (rather than social, cultural, or religious) interests of average Americans as workers has or is likely to emerge.<sup>36</sup> The collective-action problem in politics is especially serious. Moreover, the problem has been exacerbated by the elimination of the spoils system and most organized political "machines," and by the increasing importance of the electronic media and the money necessary to support its use. Without an organization that can bundle and direct his

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31. See *A New Swedish Prosperity, Even Within a Welfare State*, N.Y. TIMES, Oct. 8, 1999, at A1, C4. For a comprehensive analysis, see Joel Rogers, *United States: Lessons from Abroad and Home*, in WORKS COUNCILS 375, 394-97 (Joel Rogers & Wolfgang Streeck eds., 1995) (reporting that the United States ranks second to last among OECD states in the social funding of benefits and does comparatively little redistribution through tax and transfer payments).

32. E.g., Jeanne Cummings, *Bradley and Gore Duel for Labor's Backing in Iowa*, WALL ST. J., Oct. 11, 1999, at A24; Josh Goldstein, *Philadelphia Labor Unions Urge Members To Vote Democratic*, PHILADELPHIA INQUIRER, Oct. 11, 1999, available at 1999 WL 28697872.

33. E.g., Glenn Burkins, *AFL-CIO Leaders Who Support Gore Say They Have Votes for Early Backing*, WALL ST. J., Oct. 11, 1999, at A24.

34. Health Security Act, H.R. 3600, 103d Cong. (1993); S. 1757, 103d Cong. (1993).

35. See DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 384-426 (1970).

36. See Delaney & Schwochau, *supra* note 29, at 265.

or her marginal electoral leverage, the average individual voter can only feel impotent and alienated. The decline in American electoral participation,<sup>37</sup> especially among lower-income voters,<sup>38</sup> is thus totally predictable.

Unfortunately, the prospect of exerting political power through unions is likely to attract few new members. In part this is because the American labor movement is caught in a vicious downward cycle: as its membership rolls contract, its political power declines, and it has less leverage to achieve the political successes that would attract new members. The attractiveness to potential new members of unions as a representative in electoral politics also must be limited, however. The connection between political success and union membership probably seems too attenuated to warrant the costs of union membership, especially when a free ride on the payment of others seems plausible and when the costs include, in addition to union dues, the risks of job loss from employer retaliation, strikes, or capital withdrawal.<sup>39</sup> Organizers cannot successfully sell unions by primarily emphasizing their external political or electoral role.

### B. Voice

Although organizers also typically do not sell their unions by claiming that a union can somehow bring “democracy” to the workplace or enable workers to influence management decisions on business or personnel strategy, for many academic friends of labor the loss of an amplifying representative of employee views to management seems to be the primary reason to lament union decline. For some the concern seems to be, in part, the loss of a valuable employee perspective on how American businesses can become more productive and create enlarged surpluses to be shared by labor and capital.<sup>40</sup> The argument seems to be that effective and efficient labor-management cooperation requires that workers have some type of representative to speak for them in order that they not feel intimidated and that their voice not be ignored. For other academics the claim may be, in part, that senior managers cannot determine which particular collective goods—that is, which pension plan, health insurance plan, or grievance system—can most efficiently satisfy their workers without having these workers speak through some collective representative.<sup>41</sup> Not

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37. Participation in presidential elections, for instance, has declined from 62.8% in 1960 to 49% in 1996. Robin Toner, *If a Poll Falls in the Forest and No One Hears It . . .*, N.Y. TIMES, Nov. 21, 1999, at D16.

38. David Callahan, *Ballot Blocks: What Gets the Poor to the Polls?*, AM. PROSPECT, July-Aug. 1998, at 68.

39. See Michael H. Gottesman, *In Despair Starting Over: Imagining a Labor-Law for Unorganized Workers*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 57, 60-65 (Matthew W. Finkin ed., 1993).

40. See, e.g., BARRY BLUESTONE & IRVING BLUESTONE, NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS (1992); Joel Rogers, *Reforming U.S. Labor Relations*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION, *supra* note 39, at 95, 115-18.

41. Gottesman, *supra* note 39, at 77-78; see, e.g., PAUL WEILER, GOVERNING THE WORKPLACE 181-83 (1990); see also Samuel Estreicher, *Labor Law Reform in a World of Competitive Markets*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION, *supra* note 39,

surprisingly, for those who believe that the primary problem with union decline is the muting of the “voice” of unrepresented workers on matters of business or personnel strategy, part of the legislative agenda should be at least a partial repeal of section 8(a)(2) of the NLRA<sup>42</sup> so that employers can be more free to fashion their own systems of employee representation to achieve more efficient cooperation and a clearer understanding of employee-benefit preferences.<sup>43</sup>

I am skeptical, not only of the wisdom of repealing section 8(a)(2), but also of the claims that employees have insufficient channels for communicating their views on either business strategy or desired benefits in the nonunion workplace. I find particularly problematic any claim that American businesses would be more successful and create greater surpluses if their managements were somehow impelled, beyond what they deem desirable, to be influenced by the views of subordinate employees or their representatives, regarding business strategy, tactics, or even production processes. This claim reaches beyond the premises of collective bargaining under the NLRA, which, of course, does not require employers to compromise with union bargaining agents on “permissive” topics of business strategy, tactics, or production.<sup>44</sup> Employers must only bargain, and more importantly can only be subject to strikes or other economic coercion,<sup>45</sup> on issues involving how the firm’s surplus is to be divided between capital and labor, not on issues concerning how that surplus can be best created.<sup>46</sup>

The academics’ plea for some form of representation to provide greater employee influence on the latter issues in response to union decline, to be sure, is consistent with their discomfort with the current distinction between mandatory and permissive bargaining topics.<sup>47</sup> But the arguments for this rejection, like the claim that American business would be better off if its managers were somehow forced to consider more fully the views of subordinate employees on firm strategy and tactics, have never been persuasive. The mandatory/permissive distinction does not in any way limit cooperative collective bargaining. If they deem it in their firm’s interest, managers are

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at 13, 31-32.

42. 29 U.S.C. § 158(a)(2) (1994).

43. WEILER, *supra* note 41, at 211-15; *see* Estreicher, *supra* note 41, at 45; Gottesman, *supra* note 39, at 84-85; *cf.* Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 430-31 (1992) (suggesting qualification of section 8(a)(2) to encourage labor-management cooperation); Freeman & Rogers, *supra* note 30, at 64; Rogers, *supra* note 40, at 112 n.26 (advocating qualification of section 8(a)(2) where employees seem to endorse employer influence).

44. *See, e.g.*, *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964).

45. *Cf.* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (leading case—holding that an employer may not insist that a union bargain about certain “permissive” topics within its authority).

46. For my own attempt to rationalize judicial and labor-board doctrine on this topic, *see* Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982).

47. *See, e.g.*, BLUESTONE & BLUESTONE, *supra* note 40, at 251-53; Craver, *supra* note 43, at 427; Estreicher, *supra* note 41, at 49-50; Rogers, *supra* note 21, at 135. *But cf.* WEILER, *supra* note 41, at 258 n.40 (suggesting that expansion of the content of the duty to bargain may intrude too much on employer discretion).

free to make legally enforceable commitments on any permissive issue after sharing relevant information and listening to the arguments of union negotiators; managers simply are not required to pause to listen or to be subject to coercion on permissive topics if they deem it in the firm's interests to move on.<sup>48</sup> Similarly, when managers of nonunion firms decide they can benefit from the views of particular subordinate employees on production processes or even on marketing strategies or tactics, they are free to solicit and respond to these views in ways that assure that there will not be any retaliation. Despite the distorting hysteria concerning section 8(a)(2),<sup>49</sup> senior managers are also totally free to delegate decisions on the details of production processes to groups or "teams" of generally subordinate employees or to discuss with these teams how production, marketing, or other business tactics can be improved.<sup>50</sup>

To be coherent, therefore, the claim that employees lack adequate influence over how their employer's business is operated must be that since American managers often do not understand how much they could benefit from hearing employee views, they must be forced to listen through some coercive process. It is this claim that I find unconvincing: I see no conflict of interest on the issue of employee influence on business strategy between firm managers and their principals (shareholders); and it seems absurd to argue that labor leaders or other employee representatives, however well-schooled with hard knocks or common-sense lessons, can make better judgments on what business strategies or tactics will maximize a firm's generated surpluses than can sophisticated American managers with the best business educations available in the world. I continue to believe that in our capitalist economy collective bargaining should be about the division of firm surpluses, and that managers, in response to consumer demand, should determine how those surpluses are created.

I also do not find ultimately persuasive the claim that employees require some collective representative in order for management to understand what particular collective goods will best satisfy employee needs at the lowest cost to the firm. This moderate claim for collective employee "voice" is not based on the assumption that senior managers must be forced to listen to their subordinates in order to maximize the firm's surplus. Rather, this claim is based on the assumption that senior managers need the collective amplification of employee views in order to understand how to use the portion of the surplus available to labor in ways that will best satisfy their employees' preferences.<sup>51</sup>

Although somewhat more plausible than the first assumption, the second assumption

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48. See Michael C. Harper, *The Scope of the Duty to Bargain Concerning Business Transformations*, in *LABOR LAW AND BUSINESS CHANGE* 25, 28-33 (Samuel Estreicher & Daniel G. Collins eds., 1988).

49. The "findings" contained in the Teamwork for Employees and Managers Act ("TEAM Act"), advanced in Congress to mitigate the impact of section 8(a)(2), assert that "the escalating demands of global competition have compelled an increasing number of employers . . . to make dramatic changes in workplace and employer-employee relationships" for "enhancing . . . productivity and competitiveness," which are "threatened by legal interpretations of the prohibition against employer-dominated 'company unions.'" S. 295, 105th Cong. § 2(a)(1), (4), (7) (1997); H.R. 634, 105th Cong. § 2(a)(1), (4), (7) (1997).

50. See Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 *MICH. L. REV.* 2322, 2326-37 (1998).

51. See, e.g., Estreicher, *supra* note 41, at 31-32; Gottesman, *supra* note 39, at 77-78.

also is difficult to square with the reality of the sophistication of modern American management. Today's personnel managers, well-schooled in how to attract and develop "human resources,"<sup>52</sup> must generally have a very good idea of how to get the most out of every dollar they spend on labor—whether they can attract and retain the workers they want by, for instance, enhancing their pension plan rather than adding dental benefits to their health plan, providing more vacation leave, or adding an additional percentage to next year's pay increases. The fact that all these benefits constitute collective goods that can be efficiently provided only to all employees rather than to just a few does not prevent managers from being proactive in discovering employee preferences, rather than simply reactive to collective employee pressure.

To the extent the personnel officers need more information on employee preferences, they can obtain this information, with no concern of running afoul of section 8(a)(2), through questionnaires and surveys of all or a targeted group of employees.<sup>53</sup> The solicitation of views of individual employees need not be at all intimidating if management does not want it to be—management can elicit honest views if honest views are what it truly wants. No survey can elicit preferences that can guide the detailed structuring of some benefit plan, of course. Such structuring requires expertise and concentrated attention. But it is naive to suggest that the expertise and attention applied by union or other employee representatives on such details is guided by, rather than directive of, employee preferences.

Section 8(a)(2) does constrain management's use of nonindependent employee representatives to filter or aggregate the preferences of employees. Indeed, the most insistent proponents of a repeal of section 8(a)(2) are not intellectual academics concerned about the abstraction of employee "voice," but rather business representatives who claim to want their clients to be free to form and orchestrate employee-representation committees.<sup>54</sup> The business representatives claim that American business can benefit by the formation of joint labor-management committees that discuss and formulate suggestions not only on topics like production processes, which do not define a "labor organization" protected from employer interference by section 8(a)(2), but also on topics like benefit plans and working conditions that make section 8(a)(2) relevant.<sup>55</sup>

However, as I have argued elsewhere, the business representatives' story about the impact of section 8(a)(2) is not credible.<sup>56</sup> Managers, both historically and contemporaneously, have neither formed nor orchestrated employee representation

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52. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 43, 62-64 (1986).

53. See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993), *discussed in* Harper, *supra* note 50, at 2332.

54. The Labor Policy Association, for instance, which has led the lobbying effort to dilute section 8(a)(2), represents "senior human resource executives of more than 200 major U.S. companies." Daniel V. Yager, Statement Before the Commission for the Future of Worker-Management Relations 1 (Jan. 19, 1994) (transcript on file with the *Indiana Law Journal*).

55. See, e.g., *id.* at 14-21; Richard A. Beaumont, Statement Before the Commission for the Future of Worker-Management Relations (Jan. 19, 1994) (transcript on file with the *Indiana Law Journal*).

56. See Harper, *supra* note 50, at 2326-38.

committees (under various and sundry sobriquets) to gain a better understanding of employee preferences, which usually can be measured directly. Rather, managers have formed these committees to influence worker preferences, to align them with management priorities, to create a distorted impression of employee influence, and to extract information about efficient production that it may not be in the self-interest of employees to provide—at least in the absence of the protection of independent representatives.<sup>57</sup> The last motivation is often salient today as managers attempt to understand how they can eliminate all employee “slack” through the intensification of work and the perfection, rather than rejection, of Tayloristic techniques of “lean production.”<sup>58</sup> As noted above, section 8(a)(2) does not restrain managers from directly soliciting information from employees on ways the firm can enhance surplus creation.<sup>59</sup> It should, however, proscribe the manipulative extraction of information by fellow employees posing as representatives on matters of surplus division.<sup>60</sup>

Nonetheless, there is some persuasive force in an aspect of the claim of the academics who lament the loss of employee “voice” associated with the decline of unions. In the absence of a collective representative, employers may have difficulty extracting constructive complaints from individual employees about managerial decisions already made. Employees may understand that such complaints, unlike views on which collective goods are most valuable or on how production can be made more efficient, threaten managers and may provoke retaliation. It may be that managers cannot be expected to assuage employee qualms about the airing of many complaints or grievances that are in the interest of the firm to address because, in many cases, managers’ interests as agents are distinct from those of their principals, the owners of the firm. This suggests that firms may sometimes gain from the encouragement of the expression of employee grievances offered by collective representation.

In my view, this does not argue for a qualification of the basic command of section 8(a)(2)—collective representatives must be independent of employer control. Without such independence, a representative cannot alleviate the average employee’s concern about managerial retaliation. Furthermore, without the independent representative having the authority and capacity to challenge management, it is unlikely that average employees will benefit from collective amplification of their complaints.

The concern about the muting of employee complaints and grievances, however,

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57. See *id.* at 2343-56; see also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 825-78 (1994).

58. See Harper, *supra* note 50, at 2357-69. The intensification of work may enhance productivity and lead to an increase in wages as well as profits. *Id.* It still may not be in the interests of workers, or of a general goal of social equality, however, because it also impairs working conditions and magnifies risks of injury. *Id.*; see also Mark D. Brenner et al., “Flexible” Work Practices and Occupational Safety and Health: Exploring the Relationship Between Cumulative Trauma Disorders and Workplace Transformation 2-3 (July 1999) (unpublished manuscript on file with the *Indiana Law Journal*) (finding a statistically significant relationship between cumulative trauma disorders, the use of employee-involvement committees, and just-in-time production).

59. See *supra* text accompanying note 50.

60. See Harper, *supra* note 50, at 2370-75.

does suggest a strong reason to rue the decline of unions. As some advocates of collective employee “voice” have stressed, in the absence of unions, managers listen most closely to the views not of the average worker, but rather to the views of the marginal worker who the managers are most interested in retaining and who can most easily find other work.<sup>61</sup> Union leaders, by contrast, like other politicians in a system dominated by votes rather than money (unlike our electoral system), must be attuned to the views of the average constituent. This contrast affects the benefits offered by managers. In a union environment, for instance, the interests of more senior, and thus less mobile, workers are more likely to be served by seniority preferences and pension benefits.<sup>62</sup> Unions are also likely to promote pay equity among workers.<sup>63</sup>

The different responses of management to average workers in union and nonunion environments, however, 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. The problem, if it is a problem at all, is a problem of collective employee power not of collective employee representation. If the problem is to be addressed, it must be by the assignment of real legal authority to the collective employee representative, not by the mere amplification of a voice that can be ignored by management.

### *C. Assuring Minimum Rights and Fair Treatment for Average Workers*

Should we view any lack of attention given by nonunion employers to the interests and complaints of average or relatively disfavored employees as a serious problem that is further aggravated with each decline in union density? This question, I think, is related to a second question: Should the decline of the countervailing power of independent unions at the workplace be a concern because this power is not available to protect average or disfavored workers from being treated arbitrarily or below socially-established minimum standards? In my view, the decline of union power to protect workers from arbitrary or other socially unacceptable treatment and the diminishment of union political strength are the two major reasons to lament the current state of unions in America. Moreover, the workplace function of protecting workers from arbitrary or unfair treatment, unlike the political function of representing the economic interests of average workers in the political system, provides a basis on which to rebuild the union movement.

There is good reason to believe that the decline of unions denies an increasing number of American workers a fair, nondiscriminatory, dignified, and safe workplace. In the first place, there is a fundamental conflict of interest between firm management and most average employees that does not fully reflect that between capital and labor. Managers, like all human beings, value discretion, control, and power—the exercise of which may affect disfavored workers. The presence of an independent union almost invariably limits managerial discretion and control over personnel issues. Unions that successfully negotiate collective bargaining agreements almost always insist on the

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61. See, e.g., FREEMAN & MEDOFF, *supra* note 14, at 107-08; WEILER, *supra* note 41, at 181-82.

62. See FREEMAN & MEDOFF, *supra* note 14, at 122-35.

63. See *id.* at 78-93.

establishment of a grievance system culminating in arbitration before some type of neutral tribunal.<sup>64</sup> Outside industries like construction or temporary services, where employees regularly change employers, unions also typically negotiate seniority systems that help structure stable and equitable internal-labor markets.<sup>65</sup> A similar function is performed even for temporary employees by agreements to use union hiring halls. Where necessary, unions also have negotiated limited job descriptions to protect workers from being disfavored by inequitable work assignments.<sup>66</sup>

The studies that have found unions to have a positive impact on employee productivity suggest that this impact derives from a reduction of employee turnover that in turn results from an effective and credible grievance-arbitration system and from a fair seniority system.<sup>67</sup> Some managerial agents, understanding that their standing with their principals (their firm's shareholders) might be improved by an increase in employee productivity, have therefore been willing to sacrifice some of their control by the unilateral implementation of elements of such systems even without the prodding of an independent union.<sup>68</sup> But few managers have been willing to accept the definitive check of grievance adjudication before a truly neutral arbitrator in the absence of an independent union.

It is understandable why shareholder representatives have not insisted on the implementation of grievance-arbitration systems to attempt to capture any productivity enhancement that they might generate. On the one hand, embracing an independent collective employee representative as part of such a system invites collective bargaining for wage premiums and pressure to share firm surpluses with represented employees.

On the other hand, operating a grievance-arbitration system without independent union representation of employee grievants may not offer the same benefits to employees or to their firms as does a union-based system. If employees do not view a nonunion system as fair and effective, it will not reduce turnover or enhance productivity. Employees may use grievances in nonunion systems as "exit" complaints, rather than as tools to correct problems in jobs to which they are committed.<sup>69</sup> Using a system only when not planning to return to work is rational if one fears retaliation.

Moreover, there are other good reasons for employees, as well as independent observers, to doubt that a nonunion grievance-arbitration system, even if it culminates in arbitration before a neutral, can offer the same protections offered by a union-based system. Unions offer experienced and trained representatives who have continuing knowledge of the particular workplace and its managers. Unions also offer protection

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64. See BASIC PATTERNS IN UNION CONTRACTS 37 (Bureau of National Affairs, 14th ed., 1995) (99%).

65. *Id.* at 85 (ca. 90%).

66. *Id.* at 124 (ca. 60%).

67. See FREEMAN & MEDOFF, *supra* note 14, at 162-80.

68. See RONALD BERENBEIM, NON-UNION COMPLAINT SYSTEMS: A CORPORATE APPRAISAL 3-6 (1980); ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION 13, 22 (1988).

69. There is evidence that employees do, in fact, use nonunion systems in such a manner. David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 836-37 (1990).

of witnesses from retaliation and the development of supporting evidence during the early stages of grievance processing when the evidence is fresh and most easily secured.<sup>70</sup> Furthermore, union-based systems, through seniority clauses and other contractual standards, typically provide protections against managers either disguising discharges through layoffs, developing cases against disfavored employees by unfair assignments or other formal discipline and warnings short of discharge.<sup>71</sup>

The number of workers who suffer unremedied arbitrary or inequitable treatment because of the absence of an independent union defender probably has been reduced only marginally by developments in American employment law over the last few decades. Employer retaliation against workers who have claimed statutory entitlements or who publicly have blown whistles against illegal behavior has been curtailed by legislative<sup>72</sup> or judicial recognition of new causes of action.<sup>73</sup> Additionally, in some jurisdictions more highly skilled and compensated employees have been able to take advantage of their employer's implied contractual commitments to claim damages for wrongful discharge.<sup>74</sup> However, very few of these cases have been brought by workers displaced from jobs traditionally represented by unions. Such jobs typically are favored neither with salaries sufficient to attract plaintiffs' attorneys nor the implied employer commitments on which to base wrongful discharge actions in the most "progressive" of jurisdictions. Furthermore, even proposed (as well as Montana's enacted)<sup>75</sup> state legislation designed to protect all employees from *discharge* for lack of good cause<sup>76</sup> suffer not only from many of the deficiencies of employer-designed grievance systems, but also would do nothing to protect employees from other forms of arbitrary or inequitable treatment while employed.

Federal and state laws prohibiting discrimination on the basis of various status categories—including race, sex, national origin,<sup>77</sup> and age<sup>78</sup>—promise protection against a broader range of unfair treatment, including workplace harassment.<sup>79</sup> Such laws do not, however, reach the arbitrary treatment of employees caused by the

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70. See, e.g., James Wallihan, *Too Little, Too Late: The Limits of Stand-Alone Arbitration in Discharge Cases*, LAB. STUD. J., Spring 1996, at 49-52; see also, e.g., Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 923-24 (1979).

71. See, e.g., Wallihan, *supra* note 68, at 53-54.

72. E.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a)(3) (1994); MICH. COMP. LAWS ANN. §§ 15.361-.368 (West 1994); N.J. STAT. ANN. §§ 34:19-1 to :19-8 (West 2000); N.Y. LAB. LAW § 740 (McKinney 1988).

73. E.g., *Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981).

74. E.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

75. MONT. CODE ANN. §§ 39-2-901 to -914 (1989).

76. E.g., MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 428 (1991).

77. E.g., Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e to -17 (1994 & Supp. IV 1998).

78. E.g., Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).

79. E.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (endorsing a cause of action under Title VII against discriminatory working conditions).

personal animus, indifference, or negligence of supervisors or other managers.<sup>80</sup> Moreover, in the absence of direct overt comments or policies, employment-discrimination plaintiffs have found it difficult to prove that managerial decisionmaking was influenced, possibly subconsciously, by consideration of some protected categories.<sup>81</sup> Perhaps concerned with the encouragement of burdensome and specious litigation, the courts have resisted the development of doctrine that would make such proof more feasible.<sup>82</sup> Even the availability of attorneys fees in civil rights cases<sup>83</sup> has not resulted in the litigation of nearly as many individual discrimination cases as would be considered in arbitration if all employees protected by laws like Title VII were instead protected by private systems of industrial justice founded in collective bargaining agreements.<sup>84</sup> As a number of commentators have noted, most claimants under the Age Discrimination in Employment Act of 1967 ("ADEA"),<sup>85</sup> which would seem to be the type of antidiscrimination law best suited to challenging managerial indifference to the plight of the average, less-mobile, senior worker typically protected by collective bargaining agreements,<sup>86</sup> have been white-collared, highly salaried employees.<sup>87</sup>

Indeed, rather than supplanting unions in their role as protector of employees from arbitrary treatment, antidiscrimination laws, like other minimum-benefit laws, provide further reason to lament the weakening of union power to champion the interests of disfavored employees. Unions can help implement antidiscrimination laws more effectively and efficiently, just as their workplace presence can assist in the implementation of other minimum-benefit laws. A union's continuing presence in the workplace as a monitor or watch dog, for instance, can insure that a reinstatement remedy is more lasting and meaningful.<sup>88</sup> Even more importantly, by securing the establishment of fair arbitration systems, unions should be able to provide a cheaper

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80. *E.g.*, *St. Mary's Honor Ctr. v. Hicks*, 507 U.S. 502 (1993) (confirming that discrimination on the basis of personal animus is not prohibited by Title VII).

81. *See generally* Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 *MICH. L. REV.* 2229 (1995).

82. *E.g.*, *Hicks*, 509 U.S. at 523-24 (holding that Title VII does not require fact-finders to assume a discriminatory motive when employers cannot articulate a legitimate, credible motive for a challenged employment action).

83. *E.g.*, 42 U.S.C. § 1988(b) (1994 & Supp. IV 1998); 42 U.S.C. § 2000e-5(k) (1994).

84. *See* Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *IND. L.J.* 83, 91-92 (2001).

85. 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).

86. *See* Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 *U. RICH. L. REV.* 757, 787-93 (1997).

87. *E.g.*, DANIEL P. O'MEARA, *PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 48* (1989). One study of ADEA litigation concluded that almost four out of five ADEA claimants are white-collar employees. CATHIE A. SHATTUCK, *ADEA LITIGATION SURVEY* (1983), *reprinted in Recipients of ADEA Settlements Are Mostly Long-Term Male Employees*, 7 *Daily Lab. Rep. (BNA)* A-3 (Jan. 12, 1984).

88. *See* WEILER, *supra* note 41, at 85-87 (contrasting studies demonstrating a 70-80% rate of return to work for an appreciable period in unionized workplaces, with studies showing only a 10-30% success rate for reinstatement remedies in nonunion workplaces).

and quicker adjudication system than that provided by courts.<sup>89</sup> Such a system, supported in part by risk spreading through union dues, is much more likely to be available in practice to lower salaried, average workers. A strong case also can be made that private arbitrators, chosen jointly by managers and independent unions for their neutrality and understanding of particular working environments, are more likely to accurately decide discrimination cases, just as they are more likely to understand the meaning of collective agreements.<sup>88</sup>

Rather than obviating the critical role of an independent collective representative as a champion of industrial justice for the average employee, antidiscrimination protective legislation thus renders that role potentially even more important. The same is true for other minimum benefit legislation. The Occupational Safety and Health Act of 1970 ("OSHA")<sup>89</sup> is a much cited example.<sup>90</sup> Unions at the plant, office, or store can provide continuing monitoring, while overworked federal agents only can hope to conduct sporadic reviews.<sup>91</sup> As a collective guardian of the job security of represented employees, unions also can encourage employees to invoke their OSHA-provided rights to initiate agency inspections and enforcement and to accompany and inform government inspectors.<sup>92</sup> Similarly, unions can make the disclosure required by statutes like the Employment Retirement Income Security Act of 1974 ("ERISA")<sup>93</sup> and Worker Adjustment Retraining and Notification Act of 1988 ("WARN")<sup>94</sup> much more meaningful to workers trying to understand their options in an increasingly complicated economy.<sup>95</sup>

Furthermore, for the same reasons that employers cannot effectively provide a

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89. *E.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1187 (1993); Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, Proceedings of the 35th Annual Meeting of the National Academy of Arbitration 16 (1983).

88. *Cf.* *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960) (holding that collective bargaining agreement's arbitration clause required arbitration of disputes "as to the meaning and application of the provisions of [the] agreement").

89. 29 U.S.C. §§ 651-678 (1994 & Supp. IV 1998).

90. *E.g.*, WEILER, *supra* note 41, at 157-58; Rogers, *supra* note 31, at 387-88.

91. W. Kip Viscusi, *The Impact of Occupational Safety and Health Regulation, 1973-1983*, 17 RAND J. ECON. 567, 571-75 (1986).

92. See, in particular, the statistical work by David Weil demonstrating in union workplaces significantly higher levels of employee participation in OSHA inspections, of enforcement intensity, of citation rates, and of penalties. David Weil, *Building Safety: The Role of Construction Unions in the Enforcement of OSHA*, 13 J. LAB. RES. 121-32 (1992); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 IND. REL. 20-36 (1991).

93. 29 U.S.C. §§ 1001-1461 (1994 & Supp. IV 1998).

94. 29 U.S.C. §§ 2101-2109 (1994 & Supp. IV 1998).

95. David Weil's empirical work indicates that the presence of unions increases regulatory activity not only under OSHA, but also under a wide variety of other statutes, including ERISA and WARN, and the Fair Labor Standards Act. David Weil, *Regulating the Workplace: The Vexing Problem of Implementation*, in 7 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 247, 252-55 (David Lewin et al. eds., 1996). Unions also encourage employees to invoke their rights to unemployment insurance and workers' compensation benefits. *Id.* at 263-65.

system of industrial justice without an independent employee representative as a source of countervailing power, our minimum-benefit laws cannot be effectively enforced by delegation of responsibility to employee-representation committees established, supported, and influenced by employers. Without independence, employee representatives are subject to manipulation by managers and by management-favored workers who are least in need of protection. Without independence, employee representatives are not credible or legitimate delegates of minimum individual-employee rights such as those granted by antidiscrimination legislation. In sum, if employee representatives are not independent of employer authority, the protection of the rights of the average American worker may be best left to outside government agents.<sup>96</sup>

There is, therefore, great reason to be concerned about the decline in independent employee representation caused by shrinking union density. That decline has resulted in a weakened capacity to resist, in the political arena, economic trends toward greater income inequality. It has also prevented many American workers from being assured the minimally fair, dignified, and safe workplace that can be secured through collective agreements and that to some extent is promised in federal and state minimum-benefit laws. The latter effect, unlike the former, however, may suggest how legislation might be framed to reverse union decline. It is time to turn to that framing.

### III. THE PROPOSAL

#### *A. Criteria for Evaluation*

The above analysis indicates that labor-law reform proposals should be evaluated by several criteria. Some of these criteria are suggested by the primary reasons we should be concerned by union decline. First, labor-law reform must facilitate the development of independent countervailing employee power to insure both the protection of externally imposed employee rights and minimum benefits and also the establishment of grievance-arbitration systems to more generally protect workers from arbitrary or inequitable treatment. Second, labor-law reform should encourage a shift toward more industry-wide or sectoral-redistributive bargaining and away from ultimately frustrating and ineffectual situs- or enterprise-based bargaining. Third, labor-law reform should promise some immediate enhancement of the presence on the political stage of representatives of the economic interests of middle- and lower-income Americans.

Some criteria are also suggested by more practical considerations, however. Thus, labor-law reform must take account of American traditions and current institutions. It must develop and build on these traditions and institutions, rather than attempt to overlay them with structures lifted from different cultures without the integration of

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96. In his latest study of the impact of unions on the enforcement of OSHA, David Weil discovered that the large gap between enforcement in union and nonunion workplaces actually was widened in Oregon after that state mandated safety and health committees in the private sector after 1990. David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 *INDUS. & LAB. REL. REV.* 339, 358 (1999). As Weil concluded, this indicates that such committees can supplement, but not supplant, the activities of independent unions. *Id.*

other supportive traditions and institutions from those cultures.<sup>97</sup> Furthermore, labor-law reform also must be attentive to the needs and concerns of American business.<sup>98</sup> It must offer some potential cost savings and must not cause the substantial loss of jobs, even as it provides more certain guarantees of minimum benefits, justice, and dignity at the workplace, and provides a basis for redistributive initiatives. This is true not only because of the decline in labor's political power, but also because of the economic realities that have in part caused that decline.

Applying these criteria to the most prominent proposals thus far advanced by academic friends of labor exposes the flaws of each. Consider, for instance, proposals to encourage employee representation by unions that do not command the support of a majority of workers even in some small units that would be considered appropriate for bargaining under current labor-board standards.<sup>99</sup> Current law, of course, prohibits employer discrimination against concerted action by any collection of employees,<sup>100</sup> but some academic proposals also would require employers to bargain in good faith with any employee representative, regardless of the extent of that representative's support.<sup>101</sup>

Such a requirement probably would encourage union membership and thus potentially could enhance the political strength of organized labor. But it also could encourage the further fractioning of that strength, especially in our era of divisive cultural politics.<sup>102</sup> It certainly is hard to contemplate how compelled bargaining with minority unions could lead to more effective centralized bargaining, rather than further ineffectual and even competitive posturing by union leadership. Furthermore, despite the creative attempts by some of its advocates to suggest how compelled minority bargaining could be made practical,<sup>103</sup> the business community must understand the potential costs of competing unions and proliferating negotiations. For instance, unions, as exclusive majority representatives, help develop employee consensus and control dissidents.<sup>104</sup> Shifting these functions to firm managers would make collective bargaining more expensive for American business. Therefore, rather than offering American workers any hope for economy- or industry-wide redistributive bargaining, compelling minority bargaining would only impose new

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97. Estreicher, *supra* note 41, at 32, 39.

98. See Sanford M. Jacoby, *Reflections on Labor Law Reform and the Crisis of American Labor*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION, *supra* note 39, at 215, 222-23.

99. E.g., Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION, *supra* note 39, at 191, 198; Clyde W. Summers, *Unions Without Majority—a Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

100. E.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962) (protecting activity regardless of whether it is intended to lead to collective bargaining).

101. E.g., Finkin, *supra* note 99, at 198; Summers, *supra* note 99, at 538-39.

102. Some commentators indeed advocate cultural identity-based unionism as an accommodation of such politics. See, e.g., Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION, *supra* note 39, at 156-59.

103. See Finkin, *supra* note 99, at 199-203.

104. See, e.g., Archibald Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

costs on American business and encourage additional movements of capital away from disruptive local unions or “caucuses.”

The suggestion that American labor law should import the institution of works councils from continental European industrialized democracies<sup>105</sup> also suffers under the light of the criteria generated by my analysis. To the extent that a works-council law required such bodies to be independent of employer influence, these bodies could help assure the guarantee of the minimum rights and benefits promised by other American laws. A works-council law also could attempt to empower councils to implement grievance-arbitration systems, although councils would have to be given authority either to strike or to enlist government assistance to avert employer recalcitrance against such systems.

Adopting a works-council system as a means of assuring minimally fair and equitable treatment for American workers would probably lead to a further weakening of unions and collective bargaining within the American system, however.<sup>106</sup> Union organizers would lose one of their primary, if not their most important, selling points. Union organization would further shrink, and with it any hopes of centralized, meaningful collective bargaining, or of a more authoritative voice in electoral politics for the economic interests of middle- and lower-income Americans. Works councils will not be adopted in America in the near future because union leaders, like business leaders, understand that work councils are not in their interests.<sup>107</sup> In European nations where works councils have provided an effective parallel track for employee representation, unions have been strong politically and have conducted industry-wide collective bargaining.<sup>108</sup> Unions thus have been able to use, rather than be displaced

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105. See, e.g., WEILER, *supra* note 41; Freeman & Rogers, *supra* note 30, at 61-65.

106. Even Joel Rogers, a primary advocate of the introduction of works councils into the U.S. system, acknowledges that rather than a “strengthening of the labor movement,” it is “at least equally plausible” that any such introduction

would lead to substitution away from unions—as is suggested by the Dutch case, and that of France—and a further devolution of the importance of extrafirm structures of mediation and support of the very sort desired. . . . [I]f councils need external unions to function well, and the introduction of councils would weaken unions as presently organized in the United States, how would the introduction of councils into this already decentralized system do anybody any good?

Rogers, *supra* note 31, at 399-400.

107. See Jacoby, *supra* note 98, at 222.

108. As Wolfgang Streeck explains, outside of West Germany and before the 1970s, works councils served only consultative and consensus building roles. Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, in WORKS COUNCILS, *supra* note 31, at 313, 316-17. Non-German unions thus came to view councils as threats to “worker solidarity across enterprise lines, potentially replacing it with solidarity between individual employers and their workforces across class lines.” *Id.* at 317. This was not the case in Germany not only because of its strong ideology of industrial democracy and cooperation, but also because German unions were sufficiently united and influential to “take over the councils and exercise council rights as union rights.” *Id.* at 321 (emphasis in original). Since the 1970s in nations like Sweden and Italy, where the union movement has remained strong through centralized bargaining, unions have been willing to cooperate with employers in the fashioning of workplace-based representational structures that operate to solve workplace issues and to cooperate to improve firm efficiency in the same manner as the legally mandated German

by, the councils.

Finally, consider the range of proposals advanced by academic friends of labor to facilitate union organization and the acceptance of an initial collective bargaining agreement. These proposals include more timely and punitive remedies for anti-union discharges in organizational campaigns, insuring effective union organizer access to employees both at the work-site and at the employees' homes, and compulsory recognition based on signed cards registering majority employee support or at least based on "instant" accelerated elections that do not provide employers time to stage effective illegal or legal resistance.<sup>109</sup> Understanding that current law does not provide many newly certified unions with meaningful bargaining leverage, and noting that first contracts are only secured in about one in two new units, some also have advocated first-contract interest arbitration to insure that collective bargaining has a chance to survive where employees want to try it.<sup>110</sup>

I have little doubt that enactment of a range of aggressive proposals along these lines, including sufficiently punitive remedies, card-check recognition, and first-contract arbitration, could reverse the continuing decline of union density. If combined with other labor-law reform proposals that are or should be on the union "wish list," including the contraction of the supervisory and managerial exemption,<sup>111</sup> the abrogation of employer authority to hire permanent replacements for economic strikers,<sup>112</sup> protection of some secondary union-protest activity,<sup>113</sup> and various ideas on how to deal with the increasing prevalence of temporary workers and capital-ownership transfers,<sup>114</sup> the enactment and retention of these proposals might well provide the union movement with the opportunity to expand to levels not seen in two, if not four, decades.

Yet, as long as American capital enjoys the benefits of global mobility and confronts the rigors of competitive product markets, it is hard to imagine our political institutions long accepting a labor-relations system so designed to encourage redistribution through decentralized collective bargaining. Enactment of the labor movement's "wish list" of proposals under the most favorable political conditions would not create a stable system that could survive the resistance of American business when political conditions changed. The critics of a reinvigorated decentralized system would point to unproductive labor posturing and turmoil, as well

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works councils. *See id.* at 321-33. In nations like France and Spain, weaker unions have viewed employer efforts to create workplace based councils as threats rather than opportunities to extend their representational role. *See id.*

109. The most influential essay remains: Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

110. *See, e.g.*, Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 405-12 (1984).

111. *E.g.*, Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1011-21 (1990).

112. *E.g.*, National Labor Relations Act/Railway Labor Relations Act Amendment, S. 55, 103d Cong. (1993) (unenacted bill that would have made it an unfair labor practice for an employer to replace a striking worker permanently).

113. *See Weiler, supra* note 109, at 397-404.

114. *See, e.g.*, Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 333-63 (1998).

as the loss of capital investments and jobs, as the price of any regrowth of the union movement. Defenders of the reinvigorated system, by contrast, would not be able to show a major redistribution of income to labor through a collective bargaining system that did not transcend its institutionalized decentralization. By demanding too much of the old, and thinking too little of a new system, when the political moment was right, the labor movement would end up losing all when political institutions inevitably reacted.

*B. A Two-Tier Representational System*

Though neither is practical in America's current economic and political climate, both of the last two sets of proposals—those for adoption of some kind of works-council system and those to reform American labor law to facilitate collective bargaining—nonetheless provide guideposts for a more promising direction for reform. The works-council proposal suggests a kind of workplace representation that need not be as threatening to American business, while the proposals for labor-law reform suggest how that representation can be achieved.

The central problem with works councils in America is that they would further inhibit rather than encourage the revivification of American unions and the countervailing political power that unions can provide on behalf of the economic interests of average American workers. This central problem can be addressed by having unions play the role of works councils. Unions, of course, better than any ad hoc group created by managers or by government agents, are well equipped to serve any of the proposed functions of works councils in America, including the critical one highlighted here of insuring a system of just treatment of individual workers. They have experience, expertise, resources, and a basis for independent action.

There are, however, two obvious problems with having unions serve the roles proposed for works councils: first, imposing particular unions and union dues on groups of employees without their consent; and second, separating unions as work site representatives from unions as traditional collective bargaining agents. Solving the first problem necessitates requiring a would-be works-council representative to display majority employee support in some appropriate unit. Such a requirement, in any event, accords much better with American traditions and political culture than the imposition on workers of some mandatory employee representative. There are reasons other than union dues and the threat of job losses for workers to resist having some representative speak for them. Some workers may want to use their individual-bargaining leverage to defend themselves as individuals rather than to have to pool that leverage and deal with the elected leaders of some representative, even one that takes no dues from their paychecks.

Solving the second problem—that of unions serving dual roles—necessitates legal framing of a two-tier representational system, rather than the two-channel system presented by most proposals for works councils. This means that in order to serve as a traditional collective bargaining representative with authority to use economic coercion to secure enhanced benefits, a union must clear hurdles beyond those erected for the first-tier employee-representational function.

The proposals for reform of regulation of the organizational campaign, and the resistance to that reform, suggest how the two tiers can be distinguished. A first-tier employee representative would have authority to negotiate and implement collective

bargaining agreements, including “just cause for discipline” and grievance-arbitration clauses, as well as to assist in the enforcement of any external laws delegated to employee representatives. A first-tier representative, however, would not have authority to engage in strikes or other forms of economic coercion in support of its bargaining demands. Furthermore, its negotiation and consultation authority would be limited to a unit no larger than all employees at a single situs, with the exception of units of temporary workers who regularly change work sites.

In order to serve as a first-tier employee representative, a union might be required only to present verifiable authorization cards from a majority of the employees in some appropriate unit. Alternatively, in order to be more certain of majority support, we might require unions seeking first-tier status to stand for an immediate-certification election in which employers could not participate.<sup>115</sup> The arguments for exposing employees to employer persuasion in an extended-certification election,<sup>116</sup> in any event, do not apply where the employees are not risking their jobs by selecting a representative who can call strikes and seek wage premiums. To insure that employees could freely choose a representative for grievance arbitration, union organizers also would have orderly access to employees in order to attempt to convince them to sign recognition cards,<sup>117</sup> and penalties for employers who denied such access or discriminated against employees for giving unions support would be magnified.<sup>118</sup>

Furthermore, the labor board would be invested with a new authority to impose, through interest arbitration, contracts on employers and unions who cannot reach agreement after some set period for bargaining, such as ninety days. Such contracts would include just-cause and grievance-arbitration clauses, based on due-process standards and industry practices, in addition to no-strike clauses enforceable through injunctions as well as damages.<sup>119</sup> The just-cause and grievance-arbitration clauses

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115. Any direct restriction of employer participation, however, would invite a First Amendment challenge. *See* *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941).

116. *See, e.g.*, *Estreicher*, *supra* note 41, at 53-54.

117. Thus, *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which the court failed to find an unfair labor practice when employer barred nonemployee union organizers, would be overruled, and employers would be required to treat nonemployee union organizers under nondiscriminatory rules ensuring reasonable on-site access. Those rules might require employers to allow union organizers any special access to employees granted to managers opposing union organizations, such as work-time, “captive-audience” presentations. *See* *Bonwit-Teller, Inc.*, 96 N.L.R.B. 608 (1951) (board’s erstwhile reading of such a rule into the current statute).

118. I agree with Professor Weiler that this magnification should provide for the same kind of legal damages available to victims of employment discrimination under Title VII. *See* WEILER, *supra* note 41, at 247-48. The 1991 amendments to Title VII, 42 U.S.C. § 1981a(b) (1994), allow not only compensatory damages, but also punitive damages where the employer shows “malice” or “reckless indifference to the federally protected rights of an aggrieved individual.” *Id.*; *see also* *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999) (malice or reckless indifference requires the bad faith of senior management and awareness of applicability of relevant federal prohibitions). Attorneys who prove that particular employees have been discriminated against for union activity also should be able to collect reasonable attorney’s fees available to successful attorneys in Title VII cases. *See* 42 U.S.C. § 2000e-5(k).

119. *See* *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

would require employers to apply their chosen standards and rules consistently in all decisions affecting individual employees, but these clauses would not authorize arbitrators to dictate the substance of the standards or rules. The contracts also would require employers to provide information and to respond to a representative's requests for consultation on any decision that might affect represented employees. The contracts would not impose further bargaining obligations or restrictions on unilateral action, however. Nor would the contracts include provisions on wages or fringe benefit plans, other than ones to assist in the enforcement of some external law like the Fair Labor Standards Act ("FLSA")<sup>120</sup> or ERISA.

A first-tier representative would not need the authority to engage in economic strikes to make such contracts meaningful. In the first place, these contracts could be enforced under the authority and common-law doctrine of section 301 of the Labor Management Relations Act ("LMRA").<sup>121</sup> Arbitrators therefore would provide the first line of enforcement. An employer's recalcitrant refusal to abide by an arbitration system, moreover, would be an unfair labor practice, which should be punishable by serious labor board-imposed sanctions. Such a refusal also could warrant an unfair labor practice strike called by the first-tier representative and not restricted by a no-strike clause in a contract which the employer is materially breaching.<sup>122</sup>

Only second-tier employee representatives, however, would have authority to engage in legally protected strikes or other forms of economic coercion to attempt to convince an employer to agree to a more favorable collective agreement, including one that included provisions on wage- and fringe-benefit requirements that exceed those imposed by external law. Furthermore, sections 8(a)(5) and 8(d)<sup>123</sup> would be qualified so that employers would have no enforceable duty to bargain over topics other than those which could be subject to interest arbitration with a first-tier representative. In order to have any legally protected economic power to move an employer to bargain over wages and fringe benefits, therefore, a union would have to achieve the authority of a second-tier representative.

To do so, the union would have to obtain authorization to strike in a secret-ballot election conducted in any bargaining unit for which the union wants to bargain as a second-tier representative. The scope of second-tier bargaining units would not be limited to the size of units for first-tier representatives; the board would be directed to approve even multiemployer units if requested by a union.<sup>124</sup> In order to further encourage centralized bargaining, a union could seek to be a second-tier representative of employees who have other first-tier representatives; employees' first- and second-tier representatives would not have to be identical. Employees not represented by the union seeking second-tier status should be able to have a separate vote before being included in the larger second-tier unit, however.

The strike-authorization election would not be held immediately after the union

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120. 29 U.S.C. §§ 201-219 (1994 & Supp. IV 1998).

121. 29 U.S.C. § 185 (1994).

122. Even under current doctrine, therefore, the strikers would be protected from replacement as well as discharge. *E.g.*, *Nat'l Car Rental Sys., Inc. v. NLRB*, 594 F.2d 1203, 1206-07 (8th Cir. 1979).

123. 29 U.S.C. § 158(a)(5), (d) (1994).

124. Existing bargaining representatives could be granted grandfather rights to have second-tier authority in their current bargaining units.

requested the strike authority; the employer would be given ample opportunity to attempt to convince its employees not to provide the authorization, given the risks of job loss from wage premiums or from replacements and the benefits to which the employer has agreed without incurring the threat of strike pressure. This is the point at which arguments for employer influence over an employee vote become persuasive; a more meaningful debate on the union's ability to extract a wage premium can be engaged when the union seeks the authority to strike, especially if employers are required to provide the union adequate information to verify any economic claims.<sup>125</sup>

Although the force of section 8(a)(5) would be weakened under this proposal, the force of sections 8(a)(1) and 8(a)(3) would not. Employers still would be prohibited from taking discriminatory or retaliatory action against employees for choosing union representation or for any other support of a labor organization, including participation in a protected strike called by a second-tier representative. Reducing benefits, laying off employees, or moving capital in response to union activity, rather than in response to the demonstrated economic effects of union action, thus still would be illegal.<sup>126</sup>

Employees also should be given an opportunity to withdraw union strike authority during an appropriate window before the commencement of negotiation of a new collective agreement. Petitions for decertification elections could be filed by employees under rules similar to those under current law. Consistent with rules governing certification, in order to encourage fair representation of dual-union employees, decertification elections also could be held in any segment of a second-tier unit that has a separate first-tier representative. Petitions in addition could seek removal of a union's first-tier authority without challenging second-tier representation. Employers, however, would not be able to escape a union's representational status on the basis of independently obtained information.<sup>127</sup> There would be a presumption of continuing first-tier status, as well as of second-tier strike authority, that only could be removed by a secret-ballot election.

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125. Such a requirement does not exist currently, of course. Employers only are required to provide supporting data for claims of complete inability to pay higher wages demanded by a union in collective bargaining. Compare *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956), with *Graphic Communications Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168, 1170-71 (7th Cir. 1992).

126. See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965); *NLRB v. Adkins Transfer Co.*, 226 F.2d 324, 327-28 (6th Cir. 1955). I also would favor modification of *Darlington* to clarify the prohibition of any anti-union motivated decision on the allocation of capital.

127. See Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653, 705 (stating that employers should be able to obtain elections when they have a reasonable basis to doubt continuing majority status, but they should not be able to withdraw recognition without an election).

*C. Meeting the Criteria*

This two-tier proposal is designed to meet the five criteria set forth above for evaluating proposals addressing union decline. First, no other current proposal, whether or not directed at union decline, could lead to a more significant expansion of the number of American workers effectively protected from unjust discharge or discipline. Unions should be able to rapidly double or perhaps even triple their membership numbers by securing first-tier representational responsibilities. Adoption of the recognition-card check or accelerated election system and other reform proposals for first-tier representation would ease the organizing burden. Employees, moreover, would not have to fear job loss by giving unions authority only to consult, to control grievances, and to implement external law, rather than to negotiate wage premiums. In addition, managers would not feel compelled to resist union representation that did not threaten profits by the specter of such premiums. Managers instead could accept readily a grievance-arbitration system, as well as other protections of individual employee rights, that easily could more than pay for themselves by reduced employee turnover and consequent improvements in productivity.<sup>128</sup>

Union leaders conducting an organizing campaign under current law of course could pledge that they would not call strikes to secure enhanced wages or benefits. The employees the union seeks to represent might be skeptical of such a pledge, however, and most union leaders today must feel pressure to claim that they will achieve benefit

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128. Union-commissioned polling data indicates that a majority of American workers may be receptive to unions, but that many believe that they could lose their jobs if they participated in organizing drives or strikes. Freeman & Rogers, *supra* note 30, at 1, 28-34; Peter D. Hart Assocs. Inc., *Americans' Attitudes Toward Unions* (March 1999) (unpublished research, on file with the *Indiana Law Journal*). This data can be read to suggest that changing the law to reduce the risk of job loss and to provide an alternative form of independent representation could galvanize union expansion.

Significant union success in achieving first-tier representational status is also predicted by Richard Freeman's and Joel Rogers's comprehensive telephone survey of 2500 representative workers in the mid-1990s. Richard B. Freeman & Joel Rogers, *What Do Workers Want? Voice, Representation and Power in the American Workplace*, in *PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR 3* (Samuel Estreicher ed., 1998). Freeman and Rogers found that 40% of the workers would vote for a union and believed that most workers at their workplace also would vote for a union in the current system if they could do so immediately in an election. *Id.* at 15. A majority of the workers surveyed agreed that management opposition was the reason that they did not have a union currently. *Id.* at 23. A majority of the surveyed workers preferred "joint employee and management committees," but ones in which the employee representatives were elected and enjoyed real power, including the ability to insist that final decisions on contested issues be made by an outside arbitrator. *Id.* at 15-16. Freeman and Rogers also found that most workers felt that independent "worker regulatory committees" could improve enforcement of safety and health standards. *Id.* at 30.

There is also a great deal of anecdotal evidence that workers resist unions because of the fear of the impact of strikes. Douglas Fraser, once the President of the United Auto Workers, for instance, attributes his old union's recent difficulty organizing a Mercedes-Benz plant in Alabama to such a fear. See *Don't Walk: Why Labor Unions Have Grown Reluctant To Use the 'S' Word*, *WALL ST. J.*, Dec. 16, 1999, at A1.

enhancement to prove their mettle. More importantly, under current law, managers cannot be certain that any union leaders will continue a policy of restraint after securing representational status.

If my proposal were adopted, managers could fear that first-tier representational status would serve as a bridgehead for gaining authority to strike over wage and benefit premiums. But before a union could secure such authority, the managers would have an opportunity to explain to employees why economic coercion could threaten jobs without providing a realistic chance for wage and benefit enhancement. In most cases the managers also would have a longer period in which to develop a stable relationship with the union, and to convince its rank and file, and perhaps its leadership, that coercive bargaining could be destructive. Moreover, the fact that the employees could benefit from the system of industrial justice secured by the union, without also empowering the union to strike for greater benefits, would make the union's case for strike authority more rather than less difficult.

Union leaders, on the other hand, could be expected to be hesitant to jeopardize their union's status as a first-tier representative for the uncertainties of a strike-authorization vote that could divide their membership and spoil good relations with the employer. They would have the security of knowing that to maintain their leadership position and the collection of some level of union dues, they would not have to take such a risk. It seems likely that union leaders would seek strike authority not for purposes of empty and destructive posturing, but rather only where they were convinced that their level of organization was sufficient to secure a wage and benefit premium—that is where there is some surplus rent from which the employees could extract a greater share or where the union had achieved sufficient organizational density to take wages out of competition.

This analysis suggests that this proposal also is well designed to meet the second standard for assessing labor-law reform proposals: whether it encourages more effective, centralized industry-wide bargaining, rather than the ineffective decentralized bargaining that characterizes much of the American industrial-relations system today. The proposal encourages effective centralized bargaining by extricating union leaders from the dilemma of having to choose between bargaining in a small unit with no market power and not being a representative at all. Instead, union leaders can organize gradually as first-tier representatives, delaying seeking authority to strike for wage premiums until they have sufficient breadth of organization to assure employers that they will not threaten their competitive position. Admittedly, where international competition is a significant consideration, the employers' flexibility still will be limited even after broad domestic organization, but even in such circumstances, a secure union leadership is more likely to be a responsible union leadership, concerned that any wage demands do not threaten the jobs and the union dues they support.

By eliminating the incentive to attempt to manipulate government regulation of collective negotiations through the good-faith bargaining command in section 8(a)(5), the proposal also encourages union leaders only to seek redistributive collective bargaining when they have real market power. A union could not, for instance, hope to extract a wage premium over the short term by claiming that a strike was provoked by the employer's lack of good faith or by delaying capital movement during fruitless, formal bargaining to impasse. Elimination of the good faith bargaining command for terms that cannot be imposed by first-tier interest arbitration would mean that unions

would gain nothing by attempting to achieve redistribution without an effective strike or other economic-coercion threat.

At the same time that it encourages any coercive collective bargaining that could result in work stoppages to have a real promise of at least some degree of income redistribution, moreover, this proposal also satisfies my third suggested criterion for labor-law reform by promising an almost immediate enhancement of union electoral political power. Unions will be able to collect dues or agency fees, albeit probably at a reduced level, from employees in bargaining units that are only on the first-tier. Moreover, even if the restraints imposed by the Supreme Court on the use of such dues or fees for electoral political purposes<sup>129</sup> were maintained, a union's role as a grievance representative will enable it to secure active members and to develop political organization and communication systems. Many, many more middle- and lower-income American workers would feel connected to organizations tied together in a federation that could lobby more effectively for income redistribution through the enactment of legislation that mandates that all private employers provide particular benefits regardless of their collective bargaining obligations.

Indeed, it probably would be the prospect of such enhancement of unions' political power, more than the threat of an enhancement of their collective bargaining leverage, that would generate the political opposition to this proposal. Unfortunately, the current Republican Party has found it convenient to cut almost all ties to a weakened labor movement and would feel especially threatened by any renaissance.<sup>130</sup> Moreover, business opposition could be insurmountable even within a Democratic Party that gained control of both houses of Congress as well as the White House. This proposal, like other labor-law reform proposals, thus admittedly is probably not viable in the current political climate. Unlike the labor movement's current "wish list,"<sup>131</sup> however, this proposal promises a stable labor-relations system that could be workable in today's economy and difficult to overturn once enacted during a political moment that is most favorable to labor.

First, by discouraging bargaining over wages and fringe benefits in small units without market power, it promises more stable collective bargaining and no increase in disruptive strikes. The proposal also somewhat deregulates bargaining over wages and fringe benefits by withdrawing section 8(a)(5)'s vague, but labor board enforced command for "good faith" bargaining over such subjects.<sup>132</sup> Employers thus would not have to worry about going through the motions of bargaining to impasse before making unilateral changes in benefits or other working conditions necessary to competitive operations.<sup>133</sup> Employers would have to worry only about the union's enforcement of contractual commitments and a second-tier representative's authority to strike in response to unilateral change. To further encourage nondisruptive bargaining, moreover, the proposal could include a compromise on the strike-replacement issue, such as a time limit on the right of second-tier economic strikers

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129. *E.g.*, *Communication Workers v. Beck*, 487 U.S. 735, 751-54 (1988).

130. *See, e.g.*, Steven Greenhouse, *Labor Dares Republicans To Cut Its Political Clout*, N.Y. TIMES, Feb. 18, 1997, at A15.

131. *See supra* text accompanying notes 109-14.

132. *See supra* text accompanying note 123.

133. *NLRB v. Katz*, 369 U.S. 736 (1962).

to strike without the threat of permanent replacement.<sup>134</sup>

The resiliency of the proposal also could be enhanced by providing that any grievance-arbitration system negotiated with a first-tier union representative and meeting certain minimum-process standards would provide the exclusive procedural recourse for employee challenges to employer discharge and discipline. Such a displacement of the two-track system secured by *Alexander v. Gardner-Denver*<sup>135</sup>—grievance arbitration for contract claims and judicial consideration of claims under external public law—should be dependent on the arbitration system affording neutral arbitrators all the remedies granted by the external law they would be enforcing. It also should be dependent on union control of access to the arbitration system being qualified for claims based on external law. For such claims grievants should be guaranteed use of arbitration and the option of representation by an advocate other than the union<sup>136</sup>—an option that employees would certainly want to avail where they accused the union of participating in discrimination or union-prominent coworkers of engaging in harassment.

The viability of this two-tier proposal also is greater because it satisfies my fifth criterion—it attempts to invigorate, rather than supplant, existing American institutions, unions, and collective bargaining, and thus has a natural constituency. Unlike works councils or minority representation, this two-tier proposal poses no threats to unions. Its adoption could only expand their membership and influence and provide expanded roles in the implementation of minimum-benefit legislation and other external law. All of the functions that it contemplates for union leaders should be familiar.

Of course this proposal does compromise some of the tenets underlying the NLRA and held as principles of faith by some labor leaders and academic friends of labor—especially the meaningfulness of an expansive scope of mandatory bargaining and of nonsubstantive government regulation of the collective bargaining process. But unlike proposals to compromise section 8(a)(2), it picks the correct provision of the Act to qualify. This proposal appreciates that section 8(a)(2) embodies the special genius of American labor—its understanding that there are conflicts between the interests of management and labor, as well as between those of capital and labor, and that the independence of an employee representative from management is therefore essential if that representative is to protect the interests of labor.<sup>137</sup> The proposal also recognizes that at least in today's competitive world a union's ability to bargain collectively for wage premiums must derive from real market power, and not from what has become both futile and burdensome government regulation of process.

The compatibility of the proposal with American institutions and law also is evidenced by the ease with which it could be integrated with other reform proposals to address special current problems in our labor-management relations system. Consider, for instance, the increasing difficulty posed for that system by methods of

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134. See generally Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrike Breaker Legislation*, 93 MICH. L. REV. 577 (1994).

135. 415 U.S. 36 (1974).

136. These options have not typically been granted under collective bargaining agreements as they have developed under our current system.

137. See generally Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986).

supervisory control in occupations in which unions have attempted to expand organizing activity, such as nurses and doctors<sup>138</sup> in the health sector, as well as by the greater devolution of supervisory authority to some front line workers in other sectors. The two-tier proposal offers a means to compromise the resulting controversy over who should be excluded from the coverage of the NLRA as a supervisor.<sup>139</sup> Unions might be allowed to represent employees with a degree of supervisory authority for purposes of achieving a regime to protect minimum contractual and statutory rights to an equitable and safe workplace without the unions also being authorized to impel the supervisors to strike in an attempt to extract special wage or benefit premiums.

Consider also the controversy over the adequacy of the law developed by the Supreme Court to deal with the sale of capital made productive by employees represented by a collective bargaining agent. Under the current Supreme Court crafted, ostensibly formalistic doctrine, if the capital is sold through a transfer of stock holdings, the collective bargaining relationship and any extant collective bargaining agreement continue in effect; but if the capital is transferred directly by a sale of assets, the collective bargaining agreement is defunct and the new owner even can escape the bargaining relationship by hiring more new employees than old ones retained.<sup>140</sup> A strong argument can be made that under the current NLRA, a transfer of ownership, whether effected by a sale of stock or a sale of assets, should extinguish neither the collective bargaining relationship nor any extant collective bargaining agreement. Since the employees have been organized to bargain with the providers of the capital that the employees make productive, the identity of the providers should make no difference to the employees' statutory or contractual rights.<sup>141</sup>

A case also can be made, however, that an abrupt transfer of controlling ownership of capital, such as always occurs when assets are sold directly and which may occur when large blocks of stock are sold, should signal to employees that their demands for wage premiums may be putting their jobs at risk. A sale of capital does not necessarily mean that there is a significantly increased risk that the capital will be withdrawn from the use that supports the employees' jobs; a small firm's unusually high profit margins, for instance, often prompt the interest of larger potential buyers. But a sale of capital may signal especially low returns and the vulnerability of jobs. A l l these considerations could be accounted for if the proposed two-tier bargaining system were adopted. Any transfer of capital control, whether through asset or stock sale, would not be an occasion for an abrogation of the basic first-tier collective bargaining relationship or for renegotiation of the job-security guarantees secured through that relationship. Thus, contrary to current law,<sup>142</sup> a direct purchaser of assets would have to continue to offer employment to the employees who were making those assets productive under the former owner. The new owners' employees, however, could be given an opportunity after the sale to reassess the wage premium they have extracted from the prior owner and any strike authority they have invested in the union. The new employer thus could ask for a secret ballot election in which the employees would

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138. *E.g.*, Chris Phan, *Physician Unionization*, 20 J. LEGAL MED. 115 (1999).

139. *See* NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571, 576-78 (1994); *Providence Hospital*, 320 N.L.R.B. 717 (1996).

140. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

141. *See* Harper, *supra* note 114, at 356-63.

142. *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262-64 (1974).

vote on whether they wanted to reopen any existing contract and whether they wanted to withdraw their prior strike authorization. Before the election the new employer could conduct a debate with the union concerning either vote.

#### IV. CONCLUSION

As the speculative elaborations of possible doctrine spun out in the last several paragraphs make clear, this Article represents an attempt to broaden the debate on possible labor-law reform, not a definitive cataloging of all the aspects of an ideal reform package. The approach of the Article reflects a conviction that effective reform must be attentive to the past, present, and future of American labor relations. Effective reform must build on the institutions developed over our history, especially collective bargaining through independent labor unions; and it must learn from the lessons of the past, especially on the benefits to average, rather than favored employees, of the same kind of divided power at the workplace that has benefitted average, rather than favored citizens, in the political system.<sup>143</sup> Effective reform, however, also must recognize the realities of today's global competitive economy and must be designed so that it and the labor movement it invigorates can survive in that economy. The labor movement eventually may be provided with another political opportunity; it best be ready.

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143. See generally Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 4 (1988).