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ARTICLES

WORKPLACE DEMOCRACY & MARKET RECONSTRUCTION: AN AGENDA FOR LEGAL REFORM*

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Whether through an excess of caution or wishful thinking, it was still possible as recently as a few years ago to question whether American industrial relations and labor law had entered a period of profound transformation. Lingering skepticism has now receded in the face of dramatic changes in employer/employee relations, the siege of the unionized sector, and the crisis of labor law.

This is a time of great risks to our fragile institutions of workplace democracy. The economic, political, and legal climates seem distinctly inhospitable to the values and assumptions that have been embodied in labor law since the New Deal and that have informed the prevailing legal conception of industrial democracy. Yet it would be a mistake for friends of employee rights and of collective bargaining to dig in behind defensive barricades. The current period of transformation harbors dangers but also great potential for expanding and enriching workplace democracy. Employee rights advocates should defend and protect the enduring contributions of collective bargaining and of the labor movement's best traditions of egalitarianism and solidarity. Yet simultaneously we must be ready to rethink old assumptions and to confront our very real problems with new ideas and approaches. Above all, we need to enlarge our conceptions of workplace democracy. We must be ready to experiment and to take conceptual and practical risks to seize the opportunities and potential of the times. In considering this challenge, I have drawn inspiration from many colleagues in the labor law community and in the labor movement itself who are searching so imaginatively for new concepts and approaches. My hope here is to make some small contribution to advancing the discussion.

In a symposium subtitled "Projections Into the Next Century," one assumes contributors may take certain liberties in formulating their proposals; specifically, that they may look beyond the constraints of practical politics and sketch out a vision of desirable, if not necessarily presently enactable, paths of development. As will be obvious, I have fully availed myself of this prerogative. I have not attempted to predict what labor law *will* look like two or three decades hence. Rather, my question is, what *should* labor law look like twenty or thirty years from now? What should be its goals and mission over that time span?

What I am proposing is an agenda for a generation, not for next year's legislative session. I assumed it would be most useful here to attempt to generate reflection and debate, and consequently I have drawn my projection in broad strokes. Whether the exercise is valuable depends on how well it serves to clarify issues of principle and direction in legal and industrial relations theory, and whether such a general projection assists us in identifying

good questions about institutional strategies worth pursuing in greater detail.

Part I of this Article proposes that expansion of democracy in work should be the guiding principle of our labor laws and social policy. I defend that view by reference both to the philosophical ideal of self-determination and to the pragmatic business considerations stemming from changes occurring in our economic and technological environment. Part II discusses the relationship between markets and planning in the employment context and provides the foundations for a "market reconstruction" approach to labor law reform. This section also anticipates and rebuts several likely objections to the approach, notably that expansive market reconstruction violates contractual liberty and is inefficient. Part III surveys several areas of labor law in urgent need of reform. It outlines a series of examples of reforms suggested by the market reconstruction approach, in light of the proposed democracy-enhancing imperative.

I. A Mission For Labor Law: Enhancing Workplace Democracy

A. Basic Premises

Several goals are customarily ascribed to labor law, chief among which is the maintenance of industrial peace. Equalizing bargaining power is also mentioned, and occasionally even the concept of industrial democracy is cited, usually in vague and general terms. My central thesis is this: as our vision projects into the twenty-first century, *the preeminent role and guiding principle of labor law should be to expand and enhance democracy at every level of the experience and organization of work.* This democratization should extend both to the upper tiers of the firm's governance and strategic decisionmaking processes, and to the mundane levels of the organization and structure of day-to-day operations and decisionmaking. Democratization is also needed with respect to the institutional and social mechanisms that control entry into and exit from paid employment. This "entry/exit" aspect of workplace democratization must be concerned with equalizing access to employment opportunities in the most desirable jobs, and with developing policies on long-term leave and day-to-day scheduling that will permit relatively equal labor force participation by employees who desire off-the-job training or who have parenting or other caretaking responsibilities.

In this Article, I sketch some future institutional and legal changes suggested by the democracy-enhancing perspective. One point seems fundamental. Collective bargaining plays a central role in my projected vision of a desirable labor law framework for the next generation. Regrettably, this is

not equally obvious to all other observers, so I will briefly cite some of the primary reasons why an adherent of a democracy-enhancing perspective on labor law reform would consider collective bargaining to be an essential component.[1]

At least so long as massive inequalities of power in the workplace exist, employees will have a need for autonomous organization to aggregate their interests and voices, and to identify and articulate their collective needs independent of employer domination. Autonomous organization is needed to maximize employees' collective strength, and to allow pursuit of independent, concerted action to protect their interests. In addition, collective bargaining promotes employee autonomy and participation, and, hence, self-determination, because of its unique capacity, when functioning well, for flexible adaptation to local conditions and therefore for decentralized, participatory problem solving. Finally, unions, as institutions of working people, can contribute to civic and political democracy. This is particularly so in a political system like ours, which lacks an established social democratic tradition and major labor or social democratic parties. For these and other reasons, it is unfortunate that there is at present no consensus in the United States on the enduring value and potential of collective bargaining to democratic life.

Having said this, however, I believe that any program for labor law reform projecting into the next century must come to terms with the fact that the historic project of attaining industrial democracy has been at most only partially fulfilled. Without doubting the profound contributions of New Deal labor law, it is fair to say that the process of democratizing work remains uncompleted. That unionization covers a small and shrinking portion of the workforce is only one reason why the agenda remains unfinished. An equally fundamental problem is that all along our collective bargaining and labor standards law remained only partially and ambivalently committed to the democratization of work and of labor markets. The New Deal system that has framed industrial relations for much of the postwar era takes for granted management control over the strategic level of business decision-

1. A "critical" school of labor law scholarship has emerged in the past decade that has criticized numerous aspects of the prevailing system of collective bargaining law in the United States and called for greater democratization of labor law. To my knowledge, however, virtually every one of the authors associated with the critical school remains committed to the basic principles of collective bargaining and credits collective bargaining's contributions to workplace democracy. Many practice labor law on the union side or with the National Labor Relations Board (NLRB) or did so before entering law teaching. Many of the academic critics continue to assist organizing campaigns or other labor movement projects and to perform pro bono legal work for unions or in the area of union democracy.

making.[2] It accepts that work must be organized on a hierarchical and authoritarian basis.[3] It made a significant but inherently limited effort to reconstruct labor markets.[4]

In the next cycle of labor law reform, the agenda inaugurated by the Wagner Act[5] must be brought to completion. Henceforth, public policy should no longer remain indifferent to the hierarchical governance structures found in most firms. Nor should law be indifferent to, much less embrace, the hierarchical command structure of work operations, or occupational segregation along gender, race, and class lines. Nor should law retain its abstentionist posture toward the substantive results of collective bargaining. Labor law should be framed and administered with a commitment to democratizing decisionmaking in the workplace and to redistributing power in labor markets in favor of employees, both in the collective bargaining setting and in the unorganized sector. Law should steadily raise the social minimum wage and benefits package so as to mitigate the discriminatory effects of labor market segmentation.

My projection calls for large changes in the role and function of labor unions. I foresee a more politicized, more European style[6] labor policy and labor movement emerging in the "next cycle" of American industrial relations. Unions would likely experiment with new structures of industrial democracy and new forms of shopfloor organization. They would likely seek to accomplish relatively more of their goals in the political as distinct from the collective bargaining arena.[7] Unions would seek, more than ever before,

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2. *See* T. KOCHAN, H. KATZ, & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 27-28 (1986).

3. *See, e.g.*, Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973)[hereinafter Feller, *General Theory*]; *see id.* at 722 ("[t]he industrial enterprise is, and must be, bureaucratically organized")(note deleted); *see also id.* at 737 ("[i]mplicit in these [basic] rules [under collective bargaining agreements] is the essential characteristic of the industrial agreement: an acceptance of the authoritarian nature of the employment relationship").

4. *See infra* text accompanying notes 89-94.

5. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982 & Supp. II 1984))[hereinafter NLRA].

6. In recently announcing that he would permit the Worker Adjustment & Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109), to become law without his signature, President Ronald Reagan attacked the bill as an unfortunate step "down the road of European labor policy." 24 WEEKLY COMP. PRES. DOCS. 990 (Aug. 2, 1988). Would that it were true.

7. This, and numerous other themes explored herein, *see e.g.*, *infra* text accompanying note 95, were discussed some years ago in a series of prescient articles by Alan Hyde, to whom I am very much indebted. *See* Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1; Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas For Liberal Legalism*, 60 TEX. L. REV. 1 (1981).

to champion the interests of nonunion employees and unpaid workers[8] by leading a society-wide political effort to raise the socially acceptable wage and benefit floor.

No doubt these new union roles and institutional structures would require alterations of or departures from established collective bargaining norms and practices. My proposals may appear to conflict with the old and venerable tenet of private ordering or the "autonomy" of collective bargaining. One of my goals here is to explore the theoretical foundations of the traditional commitment to the autonomy of collective bargaining and, I hope, to show that expansive legal intervention aimed at democratically reconstructing labor markets poses no threat to collective bargaining. Indeed, the proposed law reform agenda will ultimately enhance the virtues of collective bargaining.

In any case, organized labor has no choice but to achieve some such fundamental reorientation. Gallons of ink have been spilled demonstrating that the unique institutional structures of American labor relations and labor law follow from and synchronize with the equally unique features of American social history and political culture, particularly, the special traditions and aspirations of the American labor movement.[9] There is some force in these arguments, but times are changing. We now have an economy steadily more exposed to a highly integrated and competitive world market. Perhaps the powerful economic and political pressures that have eroded organized labor's strength in recent years will induce a new openness to ideas and methods that have not commanded support in the past. For collective bargaining to be revitalized, and for unions to recapture the initiative, the labor movement must reconceive its goals and purposes. To my mind, its best hope is to link the interests of organized, unorganized, and unpaid workers in a new vision of and program for democratizing and enhancing the quality of workplace life and the connections between employment and other central aspects of human experience. While I stake my case on the independent desirability of the changes proposed, I also believe that some form of major transformation in our conception of industrial democracy is essential to the future prospects of the labor movement. Whether it takes the form suggested here or

8. The working time of millions of Americans, predominantly women, is occupied with unwaged labor such as homemaking and caregiving.

9. In sharp contrast to the apologetic character of much of the American exceptionalism literature, Joel Rogers' account argues that the distinctive institutional structures of American industrial relations have "codified and furthered the weakness of American labor" by "institutionalizing a socially perverse set of incentives and rewards," a consequence of which is that "unions rationally adopt highly particularistic bargaining strategies." Rogers, *Divide and Conquer: Further Reflections On the Distinctive Character of American Labor Laws* (to be published in 1988 WIS. L. REV.).

another, without such a metamorphosis, collective bargaining may not survive into the next century as a significant institution in the American workplace and in political life.

Before elaborating and defending my thesis that all labor law should be democracy-enhancing, I should state the premises which underlie it. My elevation of workplace democracy over competing values is grounded in certain basic normative commitments. I view democracy-enhancing labor law as right because democracy is right. As I have argued elsewhere, however, advocates of employee rights can ill-afford to ignore questions of productivity and efficiency.[10] Efficiency is simply too important a matter to be left to management. My commitment to a democracy-enhancing perspective on labor law is therefore grounded secondarily in a certain understanding of America's economic woes and future. Democracy is not only desirable for its own sake. It also makes good business sense.

B. Values Informing the Workplace Democracy Approach

Fundamentally, my approach to labor law is grounded in a set of philosophical commitments. The motivating ideal is *self-determination* or *self-realization*, by which I mean the full and free development by each person of his or her own powers and abilities.[11] Of course, no one can develop all of their potential capacities in one lifetime. The thought is that we should each be free over the course of our lives to make meaningful self-developmental *choices*.

Self-realization stresses individual autonomy, but it is not an individualistic ideal. For reasons amply recounted both in classical and contemporary social theory, individual autonomy assumes, and can only meaningfully occur in, a context of community, that is, in the context of democratic relations with others. This is both an ontological and practically grounded premise. The individual is partially constituted by his or her relationships with others, and moreover, human fulfillment requires a developmentally oriented social context. Free development of the individual assumes that we are not only permitted to make choices but are so situated in terms of the basic necessities of life that our choices are meaningful. This requires a democratic and egalitarian social organization.

Implicit in the self-realization ideal is that the human species has the capacity and the vocation for self-determination. The aspiration of a demo-

10. *See* Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 47-50, 78-81 (1988).

11. *See* Elster, *Self-Realization in Work & Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POLICY 97 (1986).

cratic culture should be to awaken and nurture in all people their capacities for self-realization and self-governance. The aspiration of such a culture should be to democratize the entire existential space of the world. It follows that all spheres of social life, and specifically for purposes of this Article, the paid workplace, ought to be organized so as to enhance human self-realization. To the extent possible, work itself, the processes for governing work, and avenues of access to paid employment opportunities should all be structured to provide opportunities for learning, self-discovery, growth, and expression. This should be in addition to the role of employment in providing means to achieve material benefits, security, respect, and immediate psychic gratifications. The workplace should provide opportunities to live adulthood as a continuous, developmental experience.[12]

From this perspective, work operations and workplace governance should be designed so that, at a minimum, all employees can participate directly and/or through representatives in selecting and implementing the strategic goals of the firm and in assessing and periodically revising its organizational structure. Participation in making the decisions that affect one's working life is a good in itself. Participatory decisionmaking is a fundamental component of democracy, even in the so-called "private" or nonpolitical sphere. However, democratic involvement in employment also contributes to civic democracy by enhancing peoples' inherent capacities to participate in politics. I refer here to politics in the best sense of the word: the making of principled, socially significant choices respectful of human need and individual rights, under circumstances of constraint due to resource, technological, and other limitations. Democratizing work and labor markets contributes to political democracy by breaking down the rigid divisions of labor that stunt and inhibit civic participation.[13]

If these ideals were simply personal views, I might hesitate to offer them as a foundation for future labor policy. In fact, however, they have a bit more momentum. Elsewhere I would be prepared to argue that the notion of democratizing the private sphere represents the logical completion of the best ideals in our intellectual and cultural heritage. For present purposes the more telling point is that in fact American workers increasingly desire and expect self-realization in and through paid employment. To be sure, the demand is not typically expressed in the words and phrases used here, but the essential concerns are the same. Employee concerns often focus more on

12. The concept of social organization facilitating a "developmental adulthood" derives from the work of Fred Block. *See, e.g.*, Block, *The New Left Grows Up*, WORKING PAPERS FOR A NEW SOC'Y, Sept.-Oct. 1978, at 41, 46.

13. *See generally* C. PATEMAN, PARTICIPATION & DEMOCRATIC THEORY 45-84 (1970); Green, *Considerations on the Democratic Division of Labor*, 12 POL. & SOC'Y 445 (1983).

day-to-day operations than on enterprise strategic decisionmaking, but the plea for democratic participation surfaces at that level as well, particularly in recent years in plant closing situations.

A profound change is undoubtedly occurring in the sensibilities, aspirations, and expectations of American workers. The civil rights and other social and political movements of the 1960s have contributed to this, but perhaps the central influence has been the values and social movements associated with modern feminism. Increasingly, work is understood not simply as a paycheck or a fate, but as one of the most important opportunities in life to grow and to experience personal autonomy, self-governance, and interpersonal connection. On the job, employees increasingly demand not only "job satisfaction," understood to mean more pleasant and interesting work under safer, less onerous and regimented working conditions, but self-realization in a deeper sense. This refers to work that has a meaning, work that presents opportunities for learning and expression, work that constantly challenges one to enhance operational and professional skills and interpersonal capacities.

Hitherto excluded groups, notably women and minorities, are demanding the right not just to break into paid employment, but to have good, well-paying, personally satisfying jobs. Parents are demanding job timetables structured to mesh with their family responsibilities, so that home life and work life can be mutually reinforcing rather than antagonistically conflicting developmental arenas. The massive entry of women into the paid labor force in recent decades, which is perhaps the single most significant change in the world of work during this time period, potentially represents a profoundly democratizing force in employment. This potential can only be realized, of course, if labor market segmentation, work scheduling practices, and other barriers to equal employment opportunity are successfully tackled.

As we project into the next century, there is every reason to assume that expectations about the content of work will continue to rise. Yet, because of problems of market failure and imperfection,[14] economic inequality, and shortcomings of collective bargaining law, rising employees' aspirations for greater participation, autonomy, and democratic input in work have thus far been regularly frustrated.

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14. *See infra* text accompanying notes 77-88. *See generally* McPherson, *Efficiency and Liberty in the Productive Enterprise: Recent Work in the Economics of Work Organization*, 12 PHIL. & PUB. AFFAIRS 354, 362-63 (1983); Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 152-61 (1988).

C. The Business Environment

I would support workplace democracy even if it had serious drawbacks from a business standpoint. Moreover, I do not deny that democratization may entail transaction costs, certainly in the short run. Nevertheless, I am confident in the belief that over the long run, democratization is the best, indeed the only, sensible strategy for confronting the considerable woes that beset the American economy. One bit of evidence of this is that nations abroad that have developed elaborate welfare-state infrastructures and that have experimented with various forms of employee participation are clobbering the United States in trade competition. In a phrase, workplace democracy is good for business.

A full and proper defense of this claim is beyond the scope of this paper. In any event, others are more competent than I to make the case.[15] Here I will briefly outline the contours of the argument.

Thoughtful observers claim that America's trade crisis is but a symptom of deeper transformations occurring in the economy. At one level, there is a growing realization that "Fordist" business strategies are outmoded. Fordism connotes the era of business strategy built around the mass manufacture of standardized goods with heavy fixed capital investment in "dedicated" (inflexible) machinery.[16] Labor relations in the Fordist era have been dominated by the model of "Taylorism," except insofar as that pattern was altered by the onset of collective bargaining. Taylorism refers to an industrial relations strategy that combines extremely fine subdivision of jobs into routinized and inflexible tasks; the separation of conception and execution; coordination of all work operations by management direction and command; and intensive monitoring, control, and discipline of employees.[17]

These observers claim that we are entering a new, "post-Fordist" era of "diversified quality production," in which further growth and competitive success for the advanced economies requires more flexible business and employee relations strategies. These strategies will include much more variable production of specialty or customized goods in smaller runs; less fixed in-

15. For background, *see generally* F. BLOCK, THE ECONOMIC SOCIOLOGY OF POSTINDUSTRIALISM (forthcoming: University of California Press 1989); L. HIRSCHHORN, BEYOND MECHANIZATION: WORK & TECHNOLOGY IN A POSTINDUSTRIAL AGE (1984); M. PIORE & C. SABEL, THE SECOND INDUSTRIAL DIVIDE (1984); R. REICH, THE NEXT AMERICAN FRONTIER (1983); C. SABEL, WORK & POLITICS: THE DIVISION OF LABOR AND INDUSTRY (1982).

16. As used here, the concept of "Fordism" derives from C. SABEL, *supra* note 15.

17. On "Taylorism," see generally H. BRAVERMAN, LABOR & MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 85-152 (1974); R. EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY 111-29 (1979); Stone, *supra* note 14, at 140-44.

vestment in dedicated machinery and, conversely, an emphasis on development and deployment of "flexible," usually computer-driven, cybernetic technologies; and abandoning persisting Taylorist approaches in favor of more participatory, less hierarchical forms of work organization.

At a somewhat higher level of generality, the claim is not simply that a new business approach must supersede obsolete and failing competitive strategies, but that the technological and economic changes now occurring are absolutely fundamental, that we are entering a new era of history: the period of "postindustrial transition." Postindustrial transition connotes a complex of emergent and mutually reinforcing trends: the decline of labor inputs in manufacturing, despite continuing output growth; the shift to a service-based economy, so that even manufacturing increasingly resembles a service in its growing focus on design and development of custom products;[18] the emergence of electronic, feedback-based technologies that fundamentally alter the experience and organization of work; and workers' changing aspirations referred to above, particularly the rapidly changing roles of women in paid employment. The various social and technological changes linked in the concept of postindustrial transition create both pressures and opportunities for significant reorganization of the structure of work.

The pressure to find new business strategies in the context of these epochal changes is linked to the question of workplace democracy in numerous ways. The new technological and trade environments—emphasizing flexibility in and feedback from both markets and machines—create a demand for new skills and a new type of worker, and therefore for new, less hierarchical work structures.[19] In an historical reversal of the routinization and degradation of work characteristic of Taylorism, advanced firms now increasingly expect employees to be learners, investigators, and problem solvers. Employees are expected to be multiskilled and able to respond and adjust quickly. They are expected to be interpersonally as well as technically competent, so that they can perform as members of integrated production teams. In a phrase, the demand for labor, at least in the primary sector of the economy, is increasingly a demand for developmentally oriented workers. Satisfying this demand will require changes in both public and business policy, implicating in turn fundamental debates about the future of labor law.

Additionally, some analysts and managers are beginning to understand that the key to business success in the new environment is skillful organiza-

18. *See generally* Jaikumar, *Postindustrial Manufacturing*, HARV. BUS. REV., Nov.-Dec. 1986, at 69.

19. *See generally* L. HIRSCHHORN, *supra* note 15.

tion of the interplay between fixed capital and labor inputs, and particularly the skillful management of intellectual resources and workers' problem-solving capacities. It is increasingly apparent that horizontal coordination of work by highly trained, integrated, and relatively autonomous teams is much more productive than vertical (hierarchical) coordination of workers locked into finely subdivided tasks. Studies have shown, for example, that identical, state-of-the-art technology is many times more productive in Japanese industry, with its emphasis on integrated teamwork, than in the American setting still wedded to Taylorist conceptions of work organization.[20] Theoretical economists have frequently hailed the efficiency advantages of hierarchy,[21] but successful business people know better. They have begun to discover some of the transaction cost superiorities of horizontal (less hierarchical and more democratic) work organization. To be sure, even the most advanced management initiatives to flatten hierarchy or to organize work around integrated teams fall well short of my vision of workplace democracy. This is particularly so when, as is the norm, management retains unilateral control over strategic decisionmaking. Nonetheless, even these nascent and limited developments in employee involvement represent a significant acknowledgment of the productivity advantages of democratic work organization and of a developmental perspective on work.

For these and related reasons, progressive employers are coming to realize that the most productive asset in the economy, the asset most important to future economic growth and success, is employee skill, adaptability, creativity, and pride in work. Quite apart from the intrinsic appeal of democratization, in practical terms our future well-being depends upon adopting what some call a "human capital strategy" of economic growth by investing heavily in this asset through work reorganization and social welfare policy. Such an approach would aim to reduce hierarchy and encourage employee participation in workplace decisionmaking, so as to fully mobilize employees' learning and problem-solving capacities. Simultaneously, it would gear social policy to continuous enhancement of the skills and productive potential of American workers. Together, workplace and social policy should be designed so that industry can draw upon the talents of all who seek paid employment opportunities. A human capital strategy for economic growth must feature enormously expanded retraining and adult education opportunities, vastly expanded child care services, and a general rise in the social minimum wage and benefits package. It must have a "security dimension,"

20. *See generally* Jaikumar, *supra* note 18.

21. *See, e.g.*, Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Williamson, *The Organization of Work: A Comparative Institutional Assessment*, 1 J. ECON. BEHAVIOR & ORG. 5 (1980).

significantly improving protections against job loss, so that employees will more readily accept and accommodate economic restructuring rather than adamantly and, from their point of view, quite rationally, resisting it.

II. MARKET RECONSTRUCTION

A. Introduction

We could approach from several angles the formulation of an agenda for labor law reform in the service of workplace democracy. This Article focuses particularly on the relationship between markets and planning in determining the content and governance structures of the employment relationship. I will advocate systematic and vigorous law reform designed to enhance democracy in the employment relationship and in labor markets, an approach that might be called "expansive" or "democracy-enhancing market reconstruction." It is to be distinguished from the mainstream approach to collective bargaining, which I call "self-limiting market reconstruction."[22]

Expansive market reconstruction is, of course, opposed by supporters of the so-called free market approach to labor relations. And even though labor's supporters may endorse this or that particular proposal, the idea of radical, systematic market reconstruction is often thought to be in tension with the traditional collective bargaining philosophy that extols its "autonomy" from governmental or legal intervention. I will attempt to show that the standard, dichotomous contrast of free market and regulation is misleading. The distinction is grounded upon an outwardly plausible but ultimately incoherent notion that markets *can* be autonomous.

Over the years, and especially in the current atmosphere, the overdrawn market/regulation opposition has tended to set up an unjustifiable presumption in favor of the market and against law reform. It has even promoted unnecessarily restrained and limiting approaches among those who favor market reconstruction. Clarification of these issues opens the door to a more expansive law reform agenda. Of course, I realize that by undermining this one conceptual barrier to the expansive market reconstruction approach, I have not thereby established its overall desirability on the merits. In the end, the approach must justify itself in the normative and economic terms mentioned above. But as a step toward reaching and opening that terrain of debate, it will be useful first to clear away this constraining conceptual underbrush.

22. *See infra* text accompanying notes 89-94.

B. A Spectrum of Views

A useful place to begin is with how the content of the employment relationship is determined. Under content I include not only obvious matters, such as wages, hours, and working conditions, but also questions of access or entry to paid employment and issues of how the workplace is to be governed. In this latter aspect, the employment relationship also includes institutional arrangements for determining its future content.

The content of the employment relationship is partly determined by deeply embedded social patterns and structures, most notably the gender-based role differentiation underlying the sexual division of labor. These social forces particularly affect access opportunities. Regrettably, industrial relations and labor law theory have only recently begun to focus systematically on the sexual division of labor, racism, and other social-structural constraints.[23]

Beyond this, the employment relationship derives most of its structure and content from three processes: exchange or bargaining in light of "market forces"; planning internal to the firm; and planning external to the firm through the medium of public law. Thus, beyond social-structural constraints, the employment relationship is partly bargained and partly administered (the latter by both public and private actors).

Contemporary debate about the reform of industrial relations and labor law, echoing earlier views, may be organized as a spectrum of different conceptions of the proper relationship between bargaining and planning. It is conventional in American political and legal rhetoric to treat bargaining, described as "freedom of contract" or "private ordering," and administration through law, known as "governmental intervention" or "regulation," as dichotomous, polar opposites. In the customary view, where regulation begins, freedom of contract ends. The problem for public policy, then, lies in making the proper choices or in finding the proper balance between free contract and regulation, with a strong presumption in favor of the former.

For reasons to become clear, I prefer the notion of a spectrum of views rather than a dichotomous choice. Partly, I wish to emphasize that market exchange, internal planning, and public planning are interrelated modes of determining the content of the employment relationship. How these methods should be combined in any given setting depends both on the broader philosophical considerations guiding social and economic policy and specific contextual factors. An emphasis on one or another of these three linked

23. *See, e.g.*, Conaghan, *The Invisibility of Women In Labour Law: Gender-Neutrality in Model Building*, 14 INT'L. J. SOC. L. 377 (1986).

regulatory modes cannot be settled by presumption and must always be defended in social and ethical terms.

At one end of the spectrum of today's diverse views on these matters, advocates of the "free market" approach stress the general superiority of market exchange to planning.[24] In questioning nonmarket approaches, the free marketeers are usually challenging government planning through legal regulation. Their models tend to ignore planning internal to the firm and, thus, are quite out of touch with modern principles of personnel management. One of the central teachings of modern labor economics is that many of the most significant aspects of the employment relation are determined neither by market forces, nor by law, but by planning internal to the firm.[25] Free market advocates are commonly thought to urge that law play a minimal role in structuring the employment relationship ("deregulation"), but this is not quite their view. While Richard Epstein and others have advocated repeal of the National Labor Relations Act (NLRA),[26] the free market perspective does not, in fact, hold that wage bargaining should occur in an environment free from law. Rather the proposal is to substitute for the NLRA the aggressively pro-employer common law of the late nineteenth century,[27] which is seen as embodying the proper framework of public planning of the employment relationship.

Another perspective sees a broader role for law but rejects federal law's special solicitude for collective bargaining. There are many variants of this perspective. Former Solicitor General Charles Fried has offered a conservative version,[28] but the structure of his approach, if not the specifics, is occa-

24. For one of the leading statements of the position, see Epstein, *A Common Law For Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L. J. 1357 (1983)[hereinafter Epstein, *Common Law*]. For related arguments, see Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984)[hereinafter Epstein, *Contract at Will*].

25. *See infra* text accompanying notes 78-85. *See generally* P. WEILER, THE LAW AT WORK [hereinafter P. WEILER, LAW AT WORK](unpublished manuscript).

26. *See* Epstein, *Common Law*, *supra* note 24.

27. *See* Cook, *Privileges of Labor Unions in the Struggle For Life*, 27 YALE L. J. 779 (1918); Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 INDUS. REL. L. J. 307 (1986); Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1 (1983); *see also* C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 32-95 (1985); Nockleby, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980). [Editors' Note: In deference to the author, who believes that student writers should receive credit for their work, and in the spirit of the democracy-enhancing ideals reflected in this Article, student notes cited herein identify authors by name although this is a departure from conventional citation form.]

28. Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984); *see also* Sunstein,

sionally echoed by liberal advocates of employee rights who have grown disillusioned with collective bargaining. In this second view, public law is seen as playing an active and potentially quite expansive role in guaranteeing such minimal protections and entitlements as are necessary to assure the basic dignity, well-being, and associational liberties of employees. It is understood within this perspective that, due to excessive inequality or market failure, bargaining may not provide such basic guarantees and, therefore, legal "intervention" (meaning here, the revision or overriding of market outcomes) may be appropriate.

Thus, the free market perspective argues that law should leave the market in its "natural state." That is, this view holds that the law should once again structure markets as it did in the late nineteenth and early twentieth centuries, and workers should protect their rights through bargaining and contract. The second view holds that law should correct for market failure or extreme inequality on an ad hoc basis, but otherwise leave the content of the employment relationship to bargaining.

Advocates of collective bargaining, both in the past and today, assign a different role to law, which has been called "market reconstruction." The theory is that the results of private bargaining are socially unacceptable. Traditionally, advocates have stressed inequality of bargaining power in labor markets. This is still a frequently voiced concern, but contemporary theory adds another. Because many of the most significant aspects of the employment relationship are planned and administered within the firm, collective bargaining is favored not only for its contribution to bargaining equality but also for its contribution to democratizing firm governance by affording employees a voice in planning processes.[29]

All proponents of collective bargaining agree that public law should "reconstruct" the "free market" so as to remove obstacles to and encourage collective bargaining. Among the many other important ways in which the New Deal represents a watershed in American law, its validation of the concept of market reconstruction is one of its most significant contributions. The Wagner Act is generally understood to have sought to accomplish its basic goals by altering the background legal regime of bargaining processes

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Rights, Minimal Terms, and Solidarity: A Comment, 51 U. CHI. L. REV. 1041 (1984) (Epstein's and Fried's views thoughtfully discussed and criticized).

29. For a classic version of this position, see Feller, *supra* note 3 ("governmental function" theory of collective bargaining). In the current literature, two of the most important statements of the position are R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984) and P. WEILER, LAW AT WORK, *supra* note 25. Freeman and Medoff derived the concept of "voice" as a determinant of social conditions from A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

in labor markets, rather than by mandating particular substantive results. The NLRA vindicated the legal and political thinkers who had for a generation argued that law is always involved in structuring markets and that a collective bargaining regime therefore represents not a choice for regulation over the free market, but rather a choice to regulate labor markets according to one, rather than another, set of assumptions.

As will be seen, however, the New Deal approach embodied distinct, built-in limitations on the extent of market reconstruction thought to be desirable. Therefore, completing the spectrum, this Article raises the possibility of an *expansive* market reconstruction approach.[30] In several European countries there is widespread agreement on the use of state power to alter labor markets and even to impose substantive employment terms.[31] The expansive market reconstruction approach has until now garnered little support in the United States. As argued above, however, it may be that present exigencies and future possibilities will increasingly incline reformers to reconsider the traditional commitment to self-limiting market reconstruction and to review more favorably the expansive approach advocated here.

C. Myths of the Free Market

In utilizing the spectrum metaphor to present the current array of views, I intend to reinforce the point that there is no question as to *whether* public power should be deployed to structure bargaining processes, since that is inevitable. There are only questions of *how* this should be done, consistent with prevailing ideals and goals of public policy (such as a commitment to employee autonomy and self-determination). To put it another way, all markets are based on and constituted by a structure of legal rules. Because such rules establish bargaining groundrules, they are intimately involved in shaping substantive outcomes, and therefore the distributive results of all bargaining processes. Thus, background legal rules always constitute a regulatory regime.

Regulation is not something separate from markets. There is no possibility of an "unregulated" or "free" market. The creation of the background

30. Theoretically, the far end of the spectrum would be occupied by an approach calling for "total" planning of the employment relationship and the complete disappearance of bargaining, contract, and markets in labor. This hardly seems an attractive possibility, if it is coherent at all. To my knowledge, no one in current labor law debates seriously advocates this position, so I will not pursue it further.

31. A dramatic example of the latter is the practice of "extension laws," by which terms agreed in collective bargaining are automatically extended to the nonunion sector. *See generally* Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1436-39 (1971); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 377-78 (1980).

legal regime partly establishes the parties' starting bargaining positions. When bargaining, private planning, and government planning are combined in an institutional system, regulation is not added to or superimposed upon markets. Regulatory choices are made at every step along the way in which markets come into being. Accordingly, the question for public policy is not whether we ought to regulate contracts and markets, but always to determine which regulatory regime will best serve our spiritual and material needs. In particular, because law partially constitutes both the structure of labor markets and the governance structures of firms, a sound and democratic public policy must explicitly define a posture toward these structures.

To many readers, all this will seem about as startling as last week's news. Nevertheless, a somewhat different way of talking about these issues apparently has great resiliency and appeal in American legal and political rhetoric. It is conventionally asserted that public policy faces not choices among regulatory regimes but a choice between regulation and bargaining, between governmental intervention and free contract or the free market. This overdichotomized way of framing the issues cannot withstand serious analytical scrutiny. Market and regulation are so inextricably linked that it is incoherent to talk of a choice *between them* as modes of social organization, as distinct from debate about what regulatory choices should be made in structuring various markets.

By the 1920s and 1930s, the Legal Realists had developed most of the essential points of the critique of the idea of the free market, thereby establishing the theoretical foundations of the market reconstruction perspective.[32] As is well known, their work provided important intellectual support for New Deal reformism in labor law and many other fields. Yet New Deal

32. Classics of the genre include: F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); M. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927)[hereinafter Cohen, *Property*]; M. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943)[hereinafter Hale, *Bargaining*]; Hale, *Coercion and Distribution in A Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)[hereinafter Hale, *Coercion*]; Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

Of course, in a broader sense the intellectual foundations of the attack on the idea of the free market were laid in the classical texts of continental social theory, particularly in the works of Karl Marx and Max Weber.

Note that the form of the critique of the free market discussed here does not rest on the familiar ground that the free market "never really existed" because, as a matter of historical fact, government has regularly intervened in markets. The claim is of a different nature, namely that the very ideal of autonomous or self-regulating markets is incoherent. For the classic presentation of the historical form of the critique, see K. POLANYI, THE GREAT TRANSFORMATION (1957) (originally published 1944).

labor policy only ambivalently embraced the implications of the market reconstruction approach.[33] For reasons of political and intellectual history too complex to survey here, the notion of a choice between markets and regulation has had a curious and stubborn persistence in our legal culture. Contemporary free marketeers have launched what is in essence a pre-Realist attack on New Deal market reconstruction. It thus becomes necessary to relearn, update, and extend the Realists' half-century-old arguments.

Some members of the critical legal studies movement have taken up this project of extending and modernizing the insights of Legal Realism. The major contribution has been made by Duncan Kennedy, notably in his critique of the standard treatment of law in neoclassical microeconomic theory.[34] In a sense, the proposals offered here are but an application of the theoretical arguments developed within this intellectual tradition to contemporary labor law. In particular, I want to mobilize the tradition to advance one of my central claims: namely, that it is mistaken to think that the ideal of free collective bargaining requires law to be indifferent to hierarchy and domination in the internal governance structures of firms.[35]

Before proceeding to the implications of market reconstruction, I will enlarge on its theoretical bases and examine two common objections to expansive, democracy-seeking reforms of the type proposed. These objections are based, respectively, on the claim that such reforms are paternalistic and that they are inefficient.

1. Naturalism, Convention, and Indeterminacy

A market is a set of practices and institutional arrangements for regularized and voluntary exchange. It is a precondition of having a market that there exist—whether explicitly or implicitly, formally or informally—some rules, understandings, and/or practices that determine property entitlements (i.e., specify who owns what); that indicate how ownership can be transferred; and that define "voluntariness" (i.e., set groundrules for the bargaining process). In modern societies these understandings are usually embodied in legal rules. This is not essential. Such understandings can be embedded in customary or religious norms, as in some premodern or contemporary societies that lacked or lack an autonomous legal order. The distinction may

33. *See generally* Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985)[hereinafter Klare, *Traditional Scholarship*]; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

34. Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985).

35. *Cf. supra* note 3 and accompanying text.

be highly significant for some theoretical contexts, but it does not seem essential here. For ease of presentation, I will assume the typical modern case in which the background rules and understandings are embodied in what we call law (although law can and frequently does refer to custom). With that qualification, we can restate the central point as follows. At a minimum, the notion of a market assumes a law of property, contracts, and torts. Economists have always understood this, although economic theory pays scant attention to the knotty problems of how property and bargaining rules are actually defined.[36] Generally these issues are referred to the lawyers.

When economists and political philosophers assign questions of entitlement and groundrule definition to lawyers, it may appear to these theoreticians that only "technical" problems are involved. If the notions of ownership and voluntariness were self-defining, the nonchalance of economic theory toward law might be unproblematical. However, one of the Realists' most important contributions was to show that legal concepts are not and cannot be self-defining, nor can they be derived from any natural or transhistorical structure of the human personality or condition.[37] Legal rules are always *conventional*, that is, they are fashioned as the product of human choices within particular historical and normative contexts. Moreover, general concepts like property and free exchange are not self-defining, they are *indeterminate*. To be applied to legal problems they must be given ever more precise institutional content. To be sure, norms, traditions, and mental habits internal to legal discourse ordinarily guide the process of giving particularized content to general legal concepts, but the process always to some extent involves choices based on general ethical and political values. Legal formalists aspire to provide a deductive method of legal reasoning largely purged of extralegal value judgments, but no one has ever come close to achieving this.

The choices made in defining legal rules, even the very basic or background rules of property, contract, and tort, have important distributive implications. The incidents of property ownership (i.e., what you can do with it and what you can prevent others from doing with it) significantly affect the property's value. Likewise, all detailed, conventional definitions of "voluntary exchange" must specify permissible and impermissible (e.g., coercive or fraudulent) bargaining tactics. Such rules significantly affect the parties' bargaining strength in the market. This is actually quite an old lesson. Af-

36. For a casual but revealingly typical example of how the matter is presented to beginning students, see J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 10-13 (3d ed. 1984).

37. For a contemporary statement of the critique of naturalism and objectivism in legal and social thought, see Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

ter all, Oliver Wendell Holmes taught us a century ago that one can speak of "free bargaining" in both labor markets that treat peaceful picketing as a coercive invasion of the employer's rights and therefore as an enjoinable tort, as well as in those that do not. But there are likely to be very different bargaining outcomes depending on which rule is chosen to structure labor markets.[38]

One might try to escape the dilemma through a minimalist definition of impermissible tactics, for example, by defining coercion solely in terms of the use or threat of physical force. This approach, however, does not make indeterminacy problems go away. For example, a long and continuing debate has raged in American law as to whether peaceful picketing constitutes physical coercion or a threat thereof. For present purposes, the point is that even a minimalist definition of coercion is conventional, rather than "natural," because among other things, virtually every modern legal system has used a broader definition. Defining coercion solely in terms of force, and therefore permitting other forms of pressure (e.g., accelerated foreclosure on debts, "cut-throat" pricing, or undue influence over psychologically dependent individuals), will significantly affect who gets what in many transactions. Like all definitions of coercion, the minimalist one has distributive implications and therefore must be justified, if at all, in ethical and political terms. A minimalist approach to this and similar problems is as much a choice for a particular form of regulatory regime as would be advocacy of tripling the list of forbidden practices contained in the NLRA.

To sum up so far, there is no natural or "a-legal" form of bargaining or markets. All markets are structured by law. Legal concepts are malleable and not self-defining. The design and application of legal rules is always a product of historically contingent, value-laden human choices. Each set of the infinite variety of possible property and bargaining groundrules has distinct distributive consequences. Every market therefore rests on conventional legal foundations—a regulatory regime—which must in turn be understood as embracing a public policy commitment to particular distributive consequences.

Since the idea of a free market, a market autonomous from regulation, is incoherent, the case for free labor markets generally amounts to an argument for a minimalist regulatory regime, based on the common law as it is imagined to have stood in the years around the turn of the century.[39] Mini-

38. *See* Vegelahn v. Guntner, 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896) (Holmes, J., dissenting); *see also* Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

39. In fact, the common law rules relating to employment matters underwent rapid and systematic transformation during this period. Just how "unnatural" the emergent rules

malist arguments typically naturalize the common law and treat as determinate legal concepts that are extremely open-ended. They largely ignore rather than seek to vindicate the distributive consequences of the then-prevailing common law rules. But even those who grant a broader role for law in setting minimum conditions or establishing a collective bargaining process argue that, once these minima or processes are established, the role of law should be to await and enforce the parties' bargains. This view mistakenly assumes that law is uninvolved in and neutral regarding the bargains themselves, except to the extent that it invites a bargaining process in either a "free" or "reconstructed" market. Simple reference to the bargain of the parties to validate the morality of contract enforcement is circular reasoning. Directly or indirectly, law shapes the parties' bargains. Justifying enforcement of market outcomes requires law to accept some responsibility for the content of the bargains. That is, a theory of contractual justice in labor law must be explicit about its distributive premises.

Obviously, I am not asserting that because minimalism or "laissez faire," on the one hand, and elaborate statutory encouragement of collective bargaining, on the other, are both forms of regulation that no important differences between them exist. Nor am I asserting that no difference exists between regimes that leave wide scope for employee bargaining and regimes that rely heavily on central planning. To the extent that bargaining permits employees to participate directly and on a decentralized basis in determining the rules and conditions that affect their working lives, bargaining processes themselves are of social value and contribute to employee self-determination. This is a basic reason to support the institution of collective bargaining.[40]

Rather, the effort here is simply to get beyond the tired and unilluminating rhetoric of "free market versus regulation." My claim is that the superiority of a market orientation cannot be established on the ground that it is nonregulatory. The superiority of particular market institutions can only be established by describing in detail the precise content and effects of the market's background rules, and then justifying the complex of rules in terms of their contribution to advancing overarching social and philosophical goals.

This is as much an issue for supporters of collective bargaining as for the free marketeers. Supporters of collective bargaining often hesitate to advocate or resist proposals for extending industrial democracy on the ground

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were—that is, how much they were a product of contingent human choices and judgments in response to particular historical and political problems—is painstakingly documented in Hurvitz, *supra* note 27.

40. Professor Weiler has spiritedly defended freedom of contract in these terms. *See* Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 419 (1984)[hereinafter Weiler, *Striking A New Balance*].

that such proposals will violate the "basic principles" of freedom of contract and the autonomy of collective bargaining from government regulation. These concepts are often invoked in vague and unreflective terms. As I have insisted, employee involvement in bargaining over working conditions can be a value of great significance to democratic theory, but by themselves the general notions of free contract and autonomous bargaining cannot tell us precisely how to structure labor markets. With respect to every problem and context, we need to ask: What degree of individual and group choice is provided by the existing or proposed market structure? Does or will the background legal regime enhance or stifle human self-realization in work and other basic democratic values? These questions cannot be answered in general terms, as legal reasoning often purports to do.[41] Such questions demand socially and historically contextualized inquiry and analysis.

Given this, there is simply no *a priori* reason why a vigorous and systematic program of egalitarian market reconstruction aimed at enhancing direct workplace participation and workers' self-realization opportunities is not fully compatible with the general ideals of liberty and autonomy, and specifically with the ideal of employee participation in setting the terms and conditions of employment through free collective bargaining. Because all labor markets are structured by law, there is no reason why they should not be restructured, so long as a particular proposed change reflects wise social policy. With respect to every workplace rule or practice, it is fair inquiry to ask

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41. A classic instance is Justice Black's opinion in the leading case of H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), holding that the NLRB lacks the power to order employers to grant a particular union-sought contract provision as a remedy for bad faith bargaining. The core argument is contained in these well-known words:

> One of [the] fundamental policies [of the National Labor Relations Act] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108.

As the dissent was quick to point out, Justice Black's conclusion does not inexorably follow from his premise, largely because the premise is stated in such general terms. *Id.* at 110 (Douglas, J., dissenting). One could easily argue, for example, that in the particular but recurring circumstance of egregious employer evasion of bargaining, allowing the proposed remedy would actually vindicate, not derogate, Congress's policy to encourage a collective bargaining process that sets employment terms largely by contract. To choose between the Court's position and the dissent's position requires a more focused inquiry into the structure of labor markets, and how, in the relevant contexts, the proposed remedy would serve or disserve the stated goal of governmental promotion of an employment bargaining system.

This type of error in reasoning is quite common in labor law discourse. A similar lapse appears, for example, in Finkin, *Revisionism In Labor Law*, 43 MD. L. REV. 23, 38-41 (1984), as I demonstrate in Klare, *Traditional Scholarship*, *supra* note 33, at 798-804.

whether it enhances or impedes employee self-determination, economic productivity, and other basic social values. There is no reason to favor market autonomy in the abstract. To put it another way, it is illogical to treat market autonomy, as such, as a "basic value" or fundamental premise, without showing that in particular circumstances regulatory restraint conduces to industrial democracy or some other value *besides* market autonomy.

2. *Antipaternalism and Efficiency*

The goal of my argument is to open space for debate about the impact of labor law rules on employee self-determination, with an eye toward advocating extensive democratizing reform. As a first step, I have attempted to show that this program cannot be attacked on the oft-invoked, general ground that it is "over-regulatory" and, for *that* reason, inconsistent with employee choice and autonomy. A critic might respond by conceding the point that all markets are structured by legal rules comprising a regulatory regime and yet still rebel at open-ended market reconstruction, with its inevitable appeal for vastly elevated minimum employment standards and bargaining groundrules designed to favor workers. That is, the critic might argue for the presumptive validity of free, minimally-regulated contract, on grounds other than a general preference for markets over regulation. Accordingly, before turning to a discussion of the reform agenda, it pays to review some typical claims of this kind.

So-called free contract could be defended in distributive terms. For example, one could argue that a high level of economic inequality, such as that which existed when labor markets were only minimally structured by late nineteenth century common law rules, provides the proper incentive structure and information flow needed to maximize productivity and social well-being. This type of argument is rarely heard, at least in contemporary labor law circles. More common are arguments framed in antipaternalist terms and arguments based on efficiency.

The antipaternalist theme is that minimal regulation of bargaining and agreements is faithful to the general precept that each individual is the best judge of his or her desires and interests. Therefore, law should ordinarily allow individuals to make whatever bargains with whomsoever they please.[42] Here again there is a problem of abstraction or indeterminacy. If the antipaternalist conception of liberty or autonomy simply means that people should be allowed to make what bargains they please, then the argument for

42. Professor Epstein's defense of a common law for labor relations, see Epstein, *Common Law*, *supra* note 24, is based in large part on a libertarian formulation of the antipaternalist perspective. *See id.* at 1359, 1364-78; *see also infra* note 45 and accompanying text.

a minimalist free contract regime is tautological.[43] If, on the other hand, this conception of contractual liberty is given a richer philosophical content, if it is linked to more elaborate conceptions of human fulfillment and self-determination, then there arise very complex and problematic empirical difficulties in showing that particular common law rules actually serve such ideals. This is a fundamental insight upon which the sociology of law is based. As Max Weber wrote long ago: "A legal order which contains ever so few mandatory and prohibitory norms and ever so many 'freedoms' and empowerments can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion."[44] We are back to the need for contextualized inquiry and political argument.

Another line of attack on expansive reform is to defend free contract in terms of the value of efficiency. This approach has enjoyed great currency in recent years, particularly among academic lawyers and in the policy analysis community.[45] A typical claim is that common law rules provide the optimal framework for structuring labor markets because these rules will lead to efficient outcomes.[46] At the very least, pre-NLRA common law rules are pre-

43. Professor Epstein simply equates "freedom of contract" as an institutional system with autonomy and freedom of choice. *See* Epstein, *Contract at Will*, *supra* note 24, at 953. This move permits him to avoid many of the hard questions raised by his argument.

44. Weber, *Freedom and Coercion*, in ON LAW IN ECONOMY & SOCIETY 191 (M. Rheinstein ed. 1954).

45. The approach is exemplified by Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984)[hereinafter Posner, *Some Economics*]. *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW 299-312 (3d. ed. 1986); Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061 (1984). Professor Epstein's defense of free labor markets is based primarily on a libertarian, "autonomy-based" theory. *See* Epstein, *Common Law*, *supra* note 24, at 1364-79; *see also supra* notes 42-43 and accompanying text. However, he argues that there is a "substantial convergence of libertarian and utilitarian principles as they apply to labor relations." *Id.* at 1358. Epstein cites particularly the "wealth maximization variant of utilitarianism" championed by Posner. *Id.* at 1379 n.70. Elsewhere he argues that freedom of contract "tends both to advance individual autonomy and to promote the efficient operation of labor markets." Epstein, *Contract at Will*, *supra* note 24 at 951.

As might be expected, the efficiency perspective on labor law is not monolithic and contains many variations. Recently economic perspectives on labor law have emerged that are considerably more refined than the widely known but less sophisticated Epstein and Posner analyses that supply the basis of my portrayal of the efficiency arguments. *See, e.g.*, Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986); Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984); Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987); Wachter & Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988).

46. According to Epstein, the NLRA and other New Deal labor legislation is "in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible

sumptively efficient,[47] whereas expansive, or even limited, market reconstruction is presumptively inefficient and therefore socially retrograde.[48] Advocates of this view sometimes argue that there is a natural common law regime, and that it is efficient. Once the conventionality of legal rules becomes clear, however, the naturalistic underpinnings of free market efficiency claims cannot survive. The position is then transformed to the view that a particular ideal set of common law rules or the set of rules said to exist at a given time (e.g., 1890-1910) are relatively more efficient than alternative market structures, and that by comparison modern statutory reform necessarily entails efficiency costs.[49]

This argument cannot be sustained, at least not at the level of dismissive generality at which it is frequently offered. Neither the efficiency consequences of legal rules, nor the shape of a perfectly or presumptively efficient rule system can be determined *a priori*. How particular rules impact on efficiency concerns is something that can be known, at best, only on the basis and in the light of specific, ad hoc judgments about social and institutional contexts, peoples' actual and potential wants, and their adaptive potentialities. Highly general claims about the presumptive efficiency of free contract, private property, and minimalist regulation are wholly undemonstrable. This does not mean that efficiency concerns are unimportant or that inquiry regarding efficiency effects is useless. Rather, it means that efficiency inquiry must be conducted in a focused, contextualized manner and must incorporate a multitude of social and political judgments. Accordingly, the criterion of efficiency by itself cannot serve as the foundation of a general policy favoring minimally regulated labor markets. Nor can it supply the basis of a wholesale, *ex ante* condemnation of the program of democracy-enhancing reconstruction of the countless institutional contexts that make up the world of work.

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common law regime relying heavily upon tort and contract law." Epstein, *Common Law*, *supra* note 24, at 1357; *see also* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY & THE POWER OF EMINENT DOMAIN 279-82, 328 (1985) (questioning constitutionality of modern labor legislation). I should note, however, that Posner does not advocate repeal of the NLRA, although he argues that its primary function is to cartelize labor markets. *See* Posner, *Some Economics*, *supra* note 45, at 990, 999.

47. *See*, Posner, *Some Economics*, *supra* note 45, at 991-92 & n. 11.

48. Epstein's analysis is prescriptive. *See supra* note 46. On the other hand, Posner states that his "analysis is positive, not normative." Posner, *Some Economics*, *supra* note 45, at 990. This description of the status of his discussion is belied by his overt hostility to historical claims and academic evidence running contrary to his cartel theory of unionization. *See, e.g.*, *id.* at 991, 999-1009.

49. Epstein argues for an ideal set of common law rules, *see* Epstein, *Common Law*, *supra* note 24, at 1359, but his case is largely built on a discussion of the common law as Epstein believes it to have stood in the late nineteenth century.

"Efficiency" means the satisfaction of peoples' preferences under circumstances of constraint. The constraining conditions include the technological state of the art and the distribution of wealth, personal entitlements, and endowments. It is well-established that given *any* legal regime (so long as it contains neither direct prohibitions on making bargains nor compulsory or nonwaivable terms in permitted bargains), and given the absence of transaction or information costs that block or distort bargaining, there will be an efficient outcome. The outcome will be efficient in the sense that all desired exchanges will be effected, thereby yielding their accompanying gains. The proposition is true regardless of the initial allocation of entitlements. Similarly, if transaction or information costs exceed zero, *no* legal regime will generate a perfectly efficient outcome.[50]

It is possible by legal reform to move to a relatively more efficient outcome; that is, to increase consumer satisfaction, other things being equal. This will occur if the legal change (a) reduces or eliminates the adverse effects of transaction or information costs, without causing outweighing reductions in consumer satisfaction; and/or (b) permits the making of previously forbidden exchanges or eliminates compulsory terms, where the gains from these changes outweigh any collateral diminution in consumer satisfaction.

It should be obvious that whether a reversion to late nineteenth century common law rules would produce efficiency gains in labor markets cannot be answered without performing an empirical inquiry of staggering complexity.[51] I do not believe anyone has ever proposed a research design that would permit even a preliminary test of the efficiency superiority of the old common law rules, let alone has anyone actually undertaken to make the empirical case. The best existing quantitative studies suggest that legally mandated collective bargaining generates gains in efficiency.[52]

Conceding, or even invoking, the problem of empirical evidence, proponents of minimalist regulation on efficiency grounds typically repair to yet another line of argument. The claim becomes that while we may never know for sure the efficiency consequences of many legal rules, *some* important rules can be identified as inefficient *a priori* and therefore worthy of condemnation. The rules so designated are what might be termed "substantive" or "direct" restrictions on freedom of contract.

In considering this sort of claim, it will be helpful first to set out a rough

50. *See generally* Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

51. *See generally* Kennedy, *supra* note 34, at 963 & n.43 and sources cited therein.

52. *See* R. FREEMAN & J. MEDOFF, *supra* note 29, at 3-25.

typology of the kinds of rules that make up a labor law regime. There are two main categories. The first, "Type I rules," covers a wide territory of rules that structure bargaining behavior. The second, "Type II rules," refers to substantive restrictions on freedom of contract, which operate directly on bargaining content.

With respect to Type I rules, a first subcategory, Type I(a), consists of rules that in effect determine what a person can do to others against their will, what powers he or she can exercise over them. Many such rules are general background rules that are not particularly designed for application to labor contexts. Such rules may seem so obvious and general that their implications for labor law are often invisible. It was one part of the Realists' contribution to expose the significance to labor law of these familiar rules.[53] I would include in subcategory I(a) such things as the law of trespass. It is fundamental that the employer can obtain state assistance in preventing employees from occupying and using the means of production for their own ends.[54] Trespass and property rules give the employer great power, namely the power to withhold access to productive resources and earning opportunities except on terms suitable to the employer. I would also include in subcategory I(a) rules forbidding battery, assault, and false imprisonment.

A second subcategory, Type I(b), includes background rules specifically devised or developed for the labor context. They may, however, apply in other settings as well. Examples of such rules include the common law rules regulating picketing, secondary boycotts, and interference with protected economic expectancies. These rules were crucial in the era of industrialization and still influence modern decisions, particularly regarding picketing. Since the New Deal, however, most Type I(b) rules have been statutory in origin. Examples include: the NLRA prohibitions against secondary boycotts[55] and industrial espionage;[56] the rules governing organizer access to the workplace;[57] and the rule requiring employers to provide relevant information to incumbent unions.[58]

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53. *See generally* Hale, *Bargaining*, *supra* note 32; Hale, *Coercion*, *supra* note 32; and Cohen, *Property*, *supra* note 32.

54. Ordinarily the law of trespass is state law. In a landmark case, the Supreme Court held additionally that employee sitdown strikes and similar trespassory activity are unprotected under the NLRA. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252-57 (1939).

55. NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1982).

56. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982) (forbidden conduct includes employer surveillance of union activity); *see* 1 THE DEVELOPING LABOR LAW 127 (C. Morris, 2d ed. 1983).

57. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112-14 (1956).

58. *See, e.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956) (discussing connection between information provision and good faith bargaining).

A third subcategory, Type I(c), consists of rules governing the construction of employment agreements and collective bargaining contracts. Again, some of these rules are so "obvious" as to appear "natural," and hardly to be rules of law at all. This is an illusion, of course, given the conventionality of all legal rules. An example is the basic doctrine that, in the absence of express contrary contractual language, it is an assumed aspect of the employment relationship that the employer owns and can dispose of the product. Another example of a Type I(c) rule is the now eroding common law principle, often mistakenly thought to be ancient but actually of quite recent origin, that employment is presumed to be at-will. A sophisticated example of a Type I(c) rule is the presumption of coterminous application of the no-strike and arbitration clauses.[59]

No doubt there are other subcategories as well. All of these Type I rules can affect the parties' bargaining positions, and therefore such rules can affect the substantive content of the employment relationship. But the essential characteristic of Type I rules is that they operate on substantive content indirectly, by structuring or facilitating bargaining processes.

By contrast, Type II rules, which place substantive restrictions on freedom of contract, operate directly on bargaining content. They require or prohibit certain parties from contracting, specify the identity of mandatory bargaining partners, or mandate or prohibit certain content in agreements. Rules of this type existed in the late nineteenth century, but were not as common as they are today. An historical example of a Type II rule is labor standards protection for women and children. Modern labor law contains quite a number and variety of Type II rules. Examples include:

— labor standards legislation regarding wages, hours, and safety requirements,[60] and equal employment opportunity laws that forbid invidious discrimination;[61]

— the duty to bargain, as under section 8(a)(5) of the NLRA[62] and parallel statutes, obliging employers to bargain collectively with the union and to refrain from negotiating individual contracts, even with willing employees, once an exclusive bargaining representative has been designated;[63]

59. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974).

60. *See, e.g.*, Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986); Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. IV 1986).

61. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. IV 1986) (forbidding employment discrimination on the basis of race, color, gender, religion, or national origin).

62. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982) (employer has duty to bargain with union designated by majority of employees).

63. *See* J. I. Case Co. v. NLRB, 321 U.S. 332, 337-339 (1944) (majority rule).

— the prohibition against company unions;[64]

— the Quebec statute forbidding the use of strike replacements;[65]

— the doctrine of "illegal" topics of bargaining, barring insertion of certain types of clauses in collective agreements;[66]

— section 8(e) of the NLRA, which prohibits "hot cargo" agreements (an example of a pro-management restriction on free contract);[67]

— antitrust[68] and Shipping Act[69] rules that proscribe certain anticompetitive labor agreements;

— the complex of rules regarding union security agreements, which flatly bar some forms of union security (e.g., the closed shop),[70] and yet

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64. *See* NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982) (forbidding employer domination of or interference with the formation of any labor organization).

65. Quebec Labour Code, §§ 109.1-.3, QUE. REV. STAT., ch. c-27, §§ 109.1-.3 (1979).

66. An "illegal clause" may not be included in a collective bargaining agreement and is unenforceable. Insistence on such a clause or use of strike or lockout to obtain an "illegal clause" violates the duty to bargain. The inclusion of certain illegal clauses is itself an unfair labor practice. Examples of illegal clauses include: provisions for a hiring hall that gives preference to union members; racially discriminatory clauses; clauses that involve the union in a breach of the duty of fair representation; clauses that impermissibly alter the bargaining unit; and clauses forbidding employees to solicit for rival unions on nonworking time. *See generally* 1 THE DEVELOPING LABOR LAW 863-69 (C. Morris 2d ed. 1983); R. GORMAN, BASIC TEXT ON LABOR LAW 529-31 (1976). Further examples are "hot cargo" clauses, see *infra* note 67 and accompanying text. For examples of anticompetitive agreements unprotected by a labor exemption, see *infra* notes 68-69 and accompanying text. For a discussion of invalid union security agreements, see *infra* note 70 and accompanying text.

67. *See* NLRA § 8(e), 29 U.S.C. § 158(e) (1982), which makes it an unfair labor practice to enter a "hot cargo" agreement and renders such agreements void and unenforceable. Hot cargo agreements bind the employer to cease and/or refrain from doing business with another employer with which the union has a dispute or which it seeks to organize. NLRA § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) (1982), makes it unlawful for a union to threaten or coerce an employer into agreeing to a hot cargo clause. The Labor Management Relations Act (LMRA), § 303, 29 U.S.C. § 187 (1982), creates a civil action in favor of any employer injured by a violation of § 8(b)(4). These sections reveal an irony in the free market approach. Hot cargo clauses generally advantage the union and are opposed by employers, who in most other contexts invoke free market rhetoric. Yet employers are not typically heard to call for the repeal of § 8(e). In this instance, employers seek statutory protection from the results of free bargaining. Of course, the anomaly is thought to be explained by the argument that, without legally encouraged collective bargaining, labor would never be in a position to press for hot cargo clauses in the first place. The argument is doubtful, since contracts of this type, or efforts to obtain them, predate the NLRA.

68. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965) (union agreement with one set of employers to impose a certain wage scale on other bargaining units is subject to attack under the Sherman Antitrust Act).

69. *See, e.g.*, 46 U.S.C. § 814 (1982); Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40 (1978) (collective bargaining agreement subject to Federal Maritime Commission scrutiny for anticompetitive restraints).

70. *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982)(barring agreements that make union membership a condition of employment on entry).

which authorize other forms (e.g., valid union shop agreements), thereby compelling unwilling third parties (nonunion or conscientiously objecting bargaining unit members) to contribute to defraying union costs;[71]

— the unenforceability of "yellow dog contracts" under section 3 of the Norris-LaGuardia Act;[72] and,

— nonwaivable protections against unjust dismissal of at-will employees.[73]

Type II provisions directly forbid the making of, or refuse enforcement to, certain kinds of contracts because of their substantive content, or they forbid willing parties to deal, or compel dealings between unwilling parties. As such, free marketeers argue that Type II rules not only violate the liberal presumption that respect for individual autonomy requires enforcement of willingly entered contracts, but also that rules of this type are inefficient by definition. Let us assume for the moment that efficiency is the preeminent social value; that is, let us temporarily set equity considerations aside.[74] It does not follow that Type II rules are automatically condemned. The problem with *a priori* condemnation of substantive restrictions is that it fails to deal with the wide variety of problems of market failure and third party effects. There are many recurrent reasons other than bad luck or miscalculation why a willingly entered contract may fail to benefit one (or both) of the parties or why parties may fail to enter utility-enhancing contracts.[75] Proscribing or refusing enforcement to such utility-impairing contracts or exerting legal pressure to bargain in certain situations may yield an outcome that

71. Under valid union security agreements, all bargaining unit employees may be compelled as a condition of employment (on or after the thirtieth day of employment) to contribute to the union amounts equal to the portion of union dues devoted to routine collective bargaining expenses. *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982); *see also* Communications Workers v. Beck, 108 S. Ct. 2641 (1988) (most recent Supreme Court interpretation of NLRA § 8(a)(3)).

72. Section three of the Norris-LaGuardia Act, 29 U.S.C. § 103 (1982), holds unenforceable in federal court promises by employees to refrain from joining a union while employed by the employer. Agreements of this kind are traditionally called "yellow dog contracts."

73. Many jurisdictions now provide relief for at-will employees discharged in violation of public policy. *See* Employment at Will: State Rulings Chart, 9A [IERM] Lab. Rel. Rep. (BNA) 505:51-52 (1988). A sound rule would be that rights created by the tort of retaliatory discharge are nonwaivable.

74. This is done solely for purposes of discussion and as a way of engaging the efficiency critique of law reform. In fact, equity and efficiency considerations are inextricably linked. *See infra* note 76.

75. *See* Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kennedy & Michelman, *supra* note 50; Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245 (1986); *see also* Hedlund, *An Economic Case for Mandatory Bargaining Over Partial Termination and Plant Relocation Decisions*, 95 YALE L. J. 949 (1986); Savarese, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

is more efficient than the one that would occur under "free contract." In other words, there may be perfectly valid justifications *strictly from an efficiency standpoint* for substantive restrictions on freedom of contract. Once it is understood that efficiency concerns must be considered and worked through on a case-by-case basis, it is clear that efficiency in the abstract does not necessarily either favor or disfavor any particular form or modification of either Type I or Type II rules. Whether to conclude that a particular substantive restriction on freedom of contract undermines or actually serves efficiency will depend on ad hoc, historically and socially contextualized judgments about peoples' circumstances and wants. It is elementary that judgments of this kind are inevitably influenced by political values and assumptions, including one's vision of the meaning, possible forms, and significance of employee self-determination. In any case, the claim that Type II rules are *a priori* inefficient is false.[76]

As it happens, there is a wealth of scholarship suggesting that problems of market failure and third party effects are pervasive in labor markets, giving rise to cogent efficiency arguments for substantive restrictions such as mandated, majority-rule collective bargaining. Some of the most important recent work in labor economics focuses on these issues, and, in turn, this work has begun to have an exciting impact on labor law scholarship.[77] To give a sense of the literature, I will briefly recount some of the major arguments.[78]

Labor economists in recent decades have devoted considerable attention to how labor markets depart in practice from the idealized neoclassical

76. The way I have structured the discussion implicitly concedes that if transaction and information costs are zero and there are no externalities, third party effects, free rider problems, or similar market failure issues, then a substantive restriction on freedom of contract is definitionally inefficient. While I cannot develop the point in detail here, I want to insist that in conceding this much I do *not* concede that the fact that a legal reform is inefficient is by itself an ethical argument to forego enacting the reform. Whether or not we should proceed in the face of efficiency losses depends on whether they are outweighed by equity gains, a question which economic theory refers to social philosophy. It is incoherent to say that efficiency costs, by themselves, provide an ethical objection to a proposed change. If the reform effects desirable distributive consequences (accounting for the efficiency losses), then the inefficiency is ethically objectionable only if there is an alternative way to accomplish the redistribution that has lower efficiency costs. Similarly, just because a reform would yield an efficiency gain is not, by itself, a reason to enact the reform. We must examine the distributive consequences of the change and satisfy ourselves that there is a sufficient ethical basis to bring about those consequences (in light of the efficiency gains). On these points, see generally, Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUDIES 191 (1980).

77. Professor Weiler's important manuscript, *see* P. WEILER, LAW AT WORK, *supra* note 25, draws on and contributes to this scholarship. *See also* Stone, *supra* note 14, at 152-61 (labor law theory and transaction cost economics).

78. The following discussion draws upon R. FREEMAN & J. MEDOFF, *supra* note 29; and P. WEILER, LAW AT WORK, *supra* note 25. For a brief, but illuminating summary, see L. THUROW, THE ZERO-SUM SOCIETY 54-61 (1980).

model. According to neoclassical theory, casual and fluid employee entry into and exit from the jobs offered by a multitude of competing employers conduces to frequent and flexible adjustments of wage/benefit packages to changing employee preferences, as well as to changes in demand and technology. The price of labor is adjusted in labor markets so as to correspond to the marginal productivity of the worker, and consequently, social resources are efficiently allocated. Contemporary scholarship shows this image of labor markets to be misleading in many if not most cases. Flexible adjustments, particularly downward adjustments, of wage/benefit packages may have serious adverse morale and productivity consequences. Therefore, compensation is "downwardly rigid," that is, compensation packages tend not to be reduced routinely. Moreover, because in many sectors skill acquisition takes place largely within the firm (i.e., there is no independent labor supply curve), employers attempt to use internal labor markets to induce employee continuity and cooperation in training fellow employees, so as to capture the rewards of their investment in human capital. "Internal labor markets" are institutional devices (job ladders, seniority systems, step increases, internal job bidding) designed to encourage promotion from within or career employment with the firm. The linkage of benefits to seniority and the importance of firm-specific skills exercise a powerful "lock-in" effect on employees (and sometimes firms). The consequence of these practices is to make long-term employment common, if not the norm in many leading sectors of the economy. This means that much of the content of the employment relationship is internally planned, and that in much of the economy the forces of supply and demand exercise only an indirect, often weak influence on employment terms. For employees, the lock-in effect of career employment with the firm makes exit or the threat of exit (employees' primary device for impacting labor markets) extremely costly and risky. This gives rise to a series of classic problems of market failure, including instances of "transaction-specific asset" problems.[79]

Legal regulation, including Type II rules, can correct for the adverse efficiency consequences stemming from the long-term lock-in effect and similar barriers to exit. I emphasize again that we are not talking here of equity arguments (e.g., long-term workers are at an unfair disadvantage in bargain-

79. Oliver Williamson has developed the notion of a "transaction-specific asset" — an asset that is significantly more valuable in its present use than in its next best use. Williamson, *Corporate Governance*, 93 YALE L. J. 1197, 1202-03 (1984); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 239-42 (1979). A long-term employee's investment in a job commonly has the attributes of a transaction-specific asset. *See also* Hedlund, *supra* note 75, at 955-57 (exploration of transaction-specific asset problems in labor markets); Stone, *supra* note 14, at 152-61.

ing with employers), but of claims of market failure, that is, arguments formulated entirely under the rubric of efficiency.[80] For example, Freeman and Medoff have made the case that, quite apart from any equity considerations, legally mandated, majority-rule collective bargaining overcomes a host of market failure problems.[81] These problems include: the unresponsiveness of labor markets to the preferences of inframarginal employees (with consequent dampening effects on productivity);[82] information cost and myopia problems; problems of "unrevealed preferences" (i.e., the inhibition of preference revelation by long-term employees caused by their perception of the risks and high costs of dismissal);[83] all sorts of free rider problems, particularly acute in the workplace setting where many important benefits resemble "public goods" (e.g., safety measures and pension plans);[84] and certain third party effects (e.g., young workers may fail to appreciate the need for fringe benefit protection for future dependents and for retirement).[85]

Other problems of market failure abound and may call out for mandated bargaining, nonwaivable terms, or other substantive restrictions on freedom of contract on efficiency grounds. There are a wide variety of third-party effects or externality problems. A particularly pressing example is the plant closing situation, where failure of the employment contract to protect against the social consequences of capital flight may have profoundly destructive effects on third parties including family members, small community businesses, and clients of municipal services. To overcome this problem it has been proposed that all employment contracts contain nonwaivable protections against plant closure.[86]

In a somewhat different vein, Professor Sunstein has highlighted the question of "adaptive preferences," which are preferences conditioned by the absence of alternatives.[87] This is analogous to a form of market failure, since efficiency analysis assumes the exogeneity of preferences. Where the absence of alternatives is due to the structure of law, the efficiency argument for the status quo necessarily involves an element of circularity. For example, it is sometimes claimed (quite incorrectly, I believe) that employees "do not

80. Of course, the boundary between efficiency arguments and equity arguments is often blurred. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 574-75 (1982).

81. *See* R. FREEMAN & J. MEDOFF, *supra* note 29, at 3-25.

82. *Id.* at 9-10.

83. *Id.*

84. *Id.* at 8-10.

85. *Id.* at 9-10, 61-77.

86. *See* Kennedy, *supra* note 80, at 629-31.

87. *See* Sunstein, *supra* note 75, at 248-49.

want" enhanced participation in workplace decisionmaking, and therefore legally mandating such participation is inefficient as well as illiberal. But if the legal system has historically been heavily biased in favor of hierarchy and against participation, the alleged employee preference for hierarchy may be "adaptive." If so, the efficiency attack on legal reform aimed to increase participation is circular reasoning. Legal reforms of the sort proposed here might enhance efficiency by removing the endogenous conditioning of employee preferences.[88]

My goal in this discussion is not to establish an efficiency case for any particular proposal. Rather, the point is that the value of efficiency does not *a priori* rule out, and may actually be served by, substantive restrictions on freedom of contract. Whether that is true in a particular case turns on a complex of ad hoc, empirical judgments, that is to say, on a type of inquiry that pushes beyond general categories to the terrain of social and historical context. Such an inquiry is inevitably embedded within and influenced by the moral and political world view of the investigator. In any event, while claims of efficiency may raise specific and important concerns for labor law reform, they present no general theoretical obstacle to a program of radical market reconstruction. The market reconstruction approach is not open to the criticism that it disregards efficiency concerns.

D. Self-Limiting Market Reconstruction

A workplace democracy approach to labor law must be sensitive to the claims of individual autonomy and efficiency, as these concerns make themselves felt in specific social settings. Neither value represents a general, *ex ante* obstacle to democratic revision of the institutional structures of employment. Accordingly, there is no reason why democracy-enhancing market reconstruction should not proceed indefinitely, through all of the contexts constituting or linked to the world of work.

The New Deal's ratification of the market reconstruction approach was a watershed event in American legal as well as political history. Since that time, however, proponents of labor law reform have not sought to extend market reconstruction indefinitely. Indeed, the dominant liberal conceptions of collective bargaining often seem committed, Pandora-like, to restraining the potentially limitless scope of the approach.

The industrial philosophy of New Deal and postwar labor law may be characterized as a commitment to *partial* or *self-limiting market reconstruction*. Federal labor policy embodies the basic market reconstruction idea. Congressional policy is to "encourag[e] the practice and procedure of collec-

88. *See* McPherson, *supra* note 14, at 364-68.

tive bargaining . . . ."[89] Yet federal labor policy has also always adhered to distinct, principled, and antidemocratic limitations on the scope and goals of the market reconstruction it endorses. For example, the New Deal/postwar model contains significant restrictions on protected, concerted activity; fundamentally accepts that work must be organized on an authoritarian basis; and holds that there is a "core of entrepreneurial control"[90] from which employee participation is excluded. The model takes for granted a background legal regime that treats managerial prerogative as "inherent in" the employer; this unduly limits the scope of employee participation in enterprise governance.

This is a negative way of describing New Deal labor law's philosophy of self-limiting market reconstruction. A more positive version holds that labor law is committed to the *autonomy* of collective bargaining. Labor law's greatest postwar theorists generally shared a commitment to this autonomy perspective.[91] The familiar theory is that law should set up the process and

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89. NLRA § 1, 29 U.S.C. § 151 (1982).

90. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

91. *See generally* Cox, *The Duty to Bargain In Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox & Dunlop, *Regulation of Collective Bargaining By the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. NAT'L. ACAD. ARB. 97 (1976)[hereinafter Feller, *Golden Age*]; Feller, *General Theory*, *supra* note 3; Shulman, *Reason, Contract, and Law In Labor Relations*, 68 HARV. L. REV. 999 (1955).

Professor Summers has provided the following excellent summary of the autonomist view embodied in federal labor policy:

> The most obvious function of collective bargaining was of course its market function, to provide a better balance of bargaining power. The workers' economic weakness in individual bargaining, when confronted with the collective economic power of the employer, produced socially unacceptable results. The inequality of the individual labor market was to be remedied by creating a collective labor market . . . . A market, so constructed, would not guarantee socially desired outcomes but would leave market forces free to produce socially acceptable results.
>
> Collective bargaining, however, was conceived as much more than a market mechanism; it was prized as a process for extending constitutional values by bringing 'an element of democracy into the government of industry.' . . .
>
> . . . .
>
> Beyond these specific constitutional values, collective bargaining, as conceived by the Wagner Act, contributed to the underlying principle of limited government. . . . By replacing the individual labor market with the collective labor market, regulation of terms and conditions of employment could be left to market forces, and legal intervention could be limited to constructing the collective market. Workers would obtain sufficient bargaining power, the constitutional values of participation and due process would be enriched, and reliance on market forces retained.

Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 UNIV. ILL. L. REV. 689, 697-98 (footnote omitted). In current debate, Professor Weiler has offered the most probing and illuminating reconsideration of the

provide the groundrules, but otherwise recede into the background and play a minimalist role.[92] Beyond setting up the bargaining process, labor law is not and should not be designed to steer the substantive content or results of collective bargaining. To do so would be inconsistent with the basic ideal of party autonomy.[93] In particular, labor law is said to embody no preference for democratic, as opposed to authoritarian, forms of organization within the firm. To the contrary, by accepting the status quo, labor law often works *against* the democratization of firm governance procedures.[94]

The New Deal/postwar model of collective bargaining and labor law represents a highly effective effort to humanize work and extend democracy to working people by establishing and nurturing an "autonomous" rule of law in the workplace. Labor law at its best reflects a genuine societal commitment to the principle that employees have the right to participate in workplace governance. But the model of workplace democracy embodied in our labor law is a "defensive" or "reactive" conception. Employees can use concerted activity and collective bargaining procedures to bargain for general terms and to react to or protest management action, but they are not invited to participate directly and continuously in the firm's decisionmaking processes. In this sense, collective bargaining is not and never has been autonomous. It is an enclave of reactive due process in a sea of economic inequality and managerial power. Moreover, the autonomy of collective bargaining, implying as it does a minimalist role for law in market reconstruction, has permitted market segmentation to flourish, with profoundly damaging consequences to the interests of unrepresented and unpaid workers.

Of course, the Wagner Act was not the only important New Deal statute. The law has been committed to reconstruction of labor markets in other

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market reconstruction approach. He has utilized its insights to advocate significant democratizing reforms, e.g., in the areas of strike replacements and secondary boycotts. *See generally* Weiler, *Striking A New Balance*, *supra* note 40, at 412-19; *see also* P. WEILER, LAW AT WORK, *supra* note 25. While Professor Weiler's position goes well beyond the customary restraint of the traditional approach, he too stops short of endorsing systematic market reconstruction.

92. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.").

93. *See, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960) ("Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.").

94. This phenomenon is exemplified by NLRB v. Yeshiva University, 444 U.S. 672 (1980), in which the Supreme Court held that, because professors allegedly had significant input into policymaking at Yeshiva University, they were therefore excluded from the rights accorded employees under the NLRA. *Id.* at 686-90.

ways. Obvious examples of this commitment include wage and hour regulation, social security, and unemployment insurance, programs which provide a minimum social wages and benefits package. Conceding that perhaps it is all a matter of degree, I would nonetheless argue that even these crucial programs reflect an ambivalent, partial, and self-limiting conception of market reconstruction. Minimalism is the whole point of United States social welfare policy. Labor standards enactments have always set the floor sufficiently low as to leave ample room for thriving secondary labor markets. The problems of standards minimalism and market segmentation have been tragically, if unwittingly, exacerbated by labor's postwar success in creating a private welfare system through collective bargaining. As a result, unions saw less need to press government for a universal welfare system. Nor has minimum standards legislation been designed to generate wage pressure on backward employers, thereby inducing them to modernize by adopting high productivity techniques. As a general matter, our social policy has been designed to provide a safety net for those permanently or temporarily unable to function in prevailing labor markets. By contrast, particularly since World War II, many of our trade rivals have viewed social welfare policy as, at least to some extent, an investment in protecting and upgrading human capital. Insofar as these nations view generous and egalitarian social welfare programs as an investment in the quality of the workforce, their public policies dramatically and continuously alter both the supply and demand sides of the labor market equation.

In recent years, American employment law has begun to move beyond minimalism.[95] The self-limitations of New Deal market reconstruction have been breached, not so much by enhancing collective bargaining as such,[96]

95. *See supra* note 7 and accompanying text.

96. Recent legislative efforts to effect major changes in collective bargaining law have failed, notably in the case of the Labor Reform Act of 1977. *See infra* notes 111, 125 and accompanying text. However, there has been a significant extension of the coverage of collective bargaining law to new categories of employees. This includes non-profit health care employees, see Health Care Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974) (amending NLRA); and agricultural employees, *see, e.g.*, California Agricultural Labor Relations Act, 1975 Cal. Stat. 4013 (codified at CAL. LAB. CODE §§ 1140-1166 (Deering 1976)). Another area of expanded coverage is the public sector, although typically public employees are not granted the right to strike. Public employee unionism in the United States dates as early as the 1830s, however, the major expansion has occurred since the 1960s. The process was encouraged by legal reforms. At the federal level, the watershed event was President Kennedy's Exec. Order No. 10,988, 3 C.F.R. § 521 (1959-1963), which led, through a process of evolution, to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192 (1978) (codified at 5 U.S.C. §§ 7101-7135 (1982 & Supp. IV 1986)). *See also* Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, 728 (1970) (codified at 39 U.S.C. §§ 1001-1209 (1982 & Supp. IV 1986)) (collective bargaining rights of postal employees). Many states have also enacted collective bargaining statutes covering state civil servants. *See, e.g.*, ILL. ANN. STAT.,

although this did occur,[97] as by raising the baseline of labor standards. Significant early departures include: the Equal Pay Act (1963);[98] Title VII of the Civil Rights Act of 1964;[99] section 304 of the Consumer Credit Protection Act (1968);[100] the Occupational Safety & Health Act (1970);[101] and the Employee Retirement Income Security Act (1974).[102] Recent years have witnessed one of the most remarkable changes in modern common law history, the sudden, widespread emergence of contract and tort remedies for wrongful discharge.[103]

The strategy of democratizing labor markets by raising the social minimum wage and benefits package seems hardly to have run its course, although Reaganism has slowed its pace. Since I delivered the original version of this paper, Congress has enacted legislation on plant closing notification[104] and on polygraph testing.[105] Congress is currently considering or has recently considered legislation on parental leave,[106] mandatory health benefits,[107] and whistleblowers' protection.[108] State legislatures have also been active in raising the social floor of the employment relationship. Though knotty and difficult preemption issues remain, surely the United States Supreme Court's recent permissive holdings will encourage this trend at the

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ch. 48, §§ 1601-1622 (Smith-Hurel 1986); MASS. GEN. L., ch. 150E, §§ 1-15 (1976); MINN. STAT. ANN. § 179A.01-.025 (West 1988).

97. *See generally* Modjeska, *Labor and the Warren Court*, 8 INDUS. REL. L. J. 479 (1986) (progressive interpretations of NLRA during Warren Court era).

98. 29 U.S.C. § 206(d) (1982).

99. 42 U.S.C. §§ 2000e - 2000e-17 (1982 & Supp. IV 1986).

100. 15 U.S.C. § 1674 (1982) (restricting discharge from employment due to wage garnishment).

101. 29 U.S.C. §§ 651-678 (1982 & Supp. IV 1986).

102. 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986).

103. *See supra* note 73.

104. Worker Adjustment & Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109).

105. Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (to be codified at 29 U.S.C. §§ 2001-2009); Daily Lab. Rep. (BNA), June 28, 1988, at G1.

106. S. 2488, 100th Cong., 2d Sess. (1988) (required employers to grant unpaid leave to parents of new-born, newly adopted, or seriously ill children); H.R. 925, 100th Cong., 2d Sess. (1988) (similar to Senate bill but included more generous leave period). Parental leave legislation died in the Senate on October 7, 1988, although sponsors promised to revive the proposal in the next session. *See* 2 LAB. REL. WEEK (BNA) 970 (1988).

107. S. 1265, 100th Cong., 2d Sess. (1988) (minimum health benefits for all workers); H.R. 360, 100th Cong., 2d Sess. (1988) (similar to Senate bill).

108. S. 508, 100th Cong., 2d Sess. (1988) (designed to provide more protection to federal employees who report waste and fraud); H.R. 25, 100th Cong., 2d Sess. (1988) (similar to Senate bill). Final congressional passage of S. 508 occurred on October 7, 1988. *See* 142 CONG. REC. 15,328-29 (daily ed. Oct. 7, 1988). President Reagan pocket-vetoed the measure on October 26, 1988. 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988).

state level.[109]

These steps beyond minimalism sit in an uneasy relationship with collective bargaining. The Supreme Court's preemption docket is but one symptom of the tension. Another is the continuing debate over the arbitrator's role, if any, in enforcing law external to the contract. Advocates of collective bargaining generally applaud minimum standards legislation, and they are often instrumental in getting it enacted. But there is a lingering disquiet that, beyond a certain point, the expanding role of statutes is a threat to the autonomy of collective bargaining. Some unionists fear that legislative and judicial developments may suggest to unorganized employees that eventually the political process will protect their rights without need of resort to the arduous and risky challenges of concerted activity and collective bargaining. For example, in some labor circles there has been hesitancy about expanding protections for non-organized at-will employees, although the AFL-CIO has officially endorsed such protections.[110] Perhaps for these or similar reasons, some of the most eloquent and creative contemporary advocates of workplace democracy hesitate to endorse open-ended, systematic market reconstruction.

While I ardently support "labor law reform" in the specific sense of improving collective bargaining law, I find this ambivalence about market reconstruction, or hesitancy to go further with it, puzzling. In retrospect, the emphasis on the autonomy of collective bargaining in the works of its leading labor law theorists appears to be not a necessary assumption, but, indirectly, a reflection of the decline of social unionism and the political isolation of the labor movement in the postwar era, leading to its failure or inability to mount a successful political challenge to the background legal regime of managerial prerogative. While the self-imposed limitations on market reconstruction contained in the New Deal conception of industrial democracy are understandable in historical and political terms, they cannot be defended from the standpoint of democratic principles. I therefore offer an alternative perspective favoring expansive market reconstruction.

III. Democracy-Enhancing Market Reconstruction

Proponents of industrial democracy have frequently and unnecessarily

109. *See* Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988) (no preemption of state law remedy for retaliatory discharge); Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) (no preemption of state mandatory severance pay program); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) (no preemption of state mandatory mental health coverage).

110. AFL-CIO, Statements Adopted by the AFL-CIO Executive Council 44 (1987), *reprinted in* 34 Daily Lab. Rep. (BNA), Feb. 23, 1987, at E1.

blunted their case by confining it to arguments about the need to correct for bargaining or market failure, that is, arguments located on the terrain of efficiency analysis. In effect, collective bargaining is defended as a public good. This approach is quite helpful as far as it goes, but for too long it has suppressed the distributive dimension of labor law debate. Even equity arguments aimed at rectifying bargaining inequality are often somewhat euphemistically couched in the idiom of efficiency (e.g., "true liberty of contract," "establishing equality of bargaining power"). We need to reopen the discourse to frankly redistributive arguments. Power sharing is and should be on the agenda in the era of postindustrial transition.

My proposal, in essence, is to take the market reconstruction logic of New Deal labor law reform beyond its self-imposed limitations. *In the next cycle of labor law reform, the market reconstruction approach should be systematically mobilized to enhance democracy in every aspect of the employment relationship and the world of work.* The method of market reconstruction should be deployed to enhance collective bargaining, to democratize the governance structures of firms, and to democratize labor markets in both the organized and unrepresented sectors. Within collective bargaining law, market reconstruction should reduce the risks and increase the benefits of collective bargaining to employees. Law should strengthen employee bargaining power and remove certain built-in limitations of collective bargaining from the standpoint of democratic theory. With respect to firm governance, law should make an unambiguous commitment to democratic as opposed to hierarchical structures. Both for reasons of political theory and for practical business reasons, public law can no longer afford to be indifferent to the debilitating effects of hierarchy in working life. In labor markets, particularly the unorganized sector, law should redistribute power in favor of employees, raise the social minimum wage and benefits package, and mitigate labor market segmentation.

Democratic progress in work will require both legislative change and institutional reforms accomplished through enterprise-centered concerted activity. Political mobilization by employees and their allies and collective action within enterprises and industries are not antagonistic or alternative methods of achieving workplace democratization; they are fundamentally linked. In some cases, legislation can directly establish foundational democratic standards and conditions in work, as, for example, in the prohibition of race and gender discrimination. In general, law shapes the terrain upon which employee concerted activity takes place. Thus, the political process is, and must be, a vital arena of employee participation. Legislation can be an important register of gains from concerted activity. But my proposal is also oriented to the enterprise level, which, particularly in the United States,

often offers a more accessible forum for employee participation. This is significant in light of the participatory conception of democracy that informs my proposal. Democracy—in work as in civic life—is something that needs to be won, created, and periodically reenvisioned. It is inherent in the concept of workplace democracy that it must, in a large part, be fashioned by employees themselves on an ongoing basis. Therefore, enterprise-centered employee concerted activity and collective bargaining must continue to play a central role in democratizing work. My call is not for government determination or imposition of all of the terms of the employment relationship, but rather for systematic revision of the background legal context in which employees participate through self-organization and otherwise in making the decisions that affect their working lives.

The remainder of this Article surveys potential areas of labor law reform and describes changes consistent with an expansive market reconstruction approach. The program of democratization through market reconstruction has possible implications for all aspects of the legal process, including further elaboration of common law remedies; the interpretation and administration of collective bargaining agreements and existing statutes by arbitrators, courts, and agencies; new legislation; and revised constitutional doctrine. The approach poses complex federalism and jurisdictional questions. Likewise, there is a wide array of subject matter areas to which democracy-enhancing market reconstruction could be applied. Here I present only some examples for purposes of launching the discussion, no attempt being made to cover the entire ground. Systematic elaboration of the program must necessarily be a long-term, collaborative project. Many of the specific reform proposals discussed here are well known. My hope is that the market reconstruction focus will link disparate areas of concern into a unified approach to law reform that will, in turn, suggest new areas of potential legal and institutional innovation.

A. Enhancing Collective Bargaining

Collective bargaining law creates a background legal regime that does more than affect the likely success of employees in organizing and collectivizing wage bargaining. As I have argued earlier, this background legal regime also affects the distribution of power within collective bargaining relationships, and, usually indirectly, the substantive outcomes of the process.

The emphasis in discussion of and proposals for labor law reform has been almost entirely on the organizing process and on boosting union chances for success in representation elections and in obtaining first contracts. There is

no doubt that employer violations of the letter and spirit of the NLRA during organizing campaigns have been a potent barrier to the exercise by employees of their collective bargaining rights. I therefore strongly support reforms of the type contained in the ill-fated Labor Reform Act of 1977.[111]

Nonetheless, the time has come to acknowledge that labor law reform is also needed in aspects of collective bargaining that are often thought by its friends to be working rather well. The evidence suggests that even if the labor movement had won 100% of the elections it entered in recent years, union density would *still* be in decline.[112] Not only in the representation process, but throughout collective bargaining law and the law of internal union democracy, reform is needed to increase the value and decrease the risks of collective bargaining to employees.

Let me begin with a simple example, designed to bring the market reconstruction perspective into focus. The topic is how the law of waiver[113] interacts with legal regulation of the weapons of self-help. An issue that arises in strike situations is whether the employer may grant artificial or "superseniority" to strikebreakers. Such superseniority provides dramatically enhanced protection against future layoffs and is therefore a powerful incentive to cross picket lines. A common law regime creates no major barriers to the grant of superseniority, thus allowing the employer a potent economic weapon. By contrast, the Warren Court's brave decision in *NLRB v. Erie Resistor Corp.*[114] held that the grant of superseniority to strikebreakers is "inherently destructive" of employee rights under the NLRA, and therefore unlawful absent a showing of overriding business justification.[115] *Erie Resistor* was a high-water mark of liberal market reconstruction.

A subsequent NLRB decision, *Gem City Ready Mix Co.*,[116] shows how the device of waiver can undercut such a holding. Suppose that, in violation of *Erie Resistor*, the employer uses the superseniority tactic with a ven-

111. The Labor Reform Act of 1977 amended the NLRA, but never became law. S. 2467, 95th Cong., 2d Sess. (1977); H.R. 8410, 95th Cong., 1st Sess. (1977) (passed the House of Representatives on October 6, 1977); *see* 123 CONG. REC. 32,613 (1977).

112. *See* T. KOCHAN, H. KATZ, & R. MCKERSIE, *supra* note 2, at 47-80; Dickens & Leonard, *Accounting For the Decline in Union Membership, 1950-1980,* 38 IND. & LAB. REL. REV. 323 (1985).

113. On the doctrine of waiver, see Phillips, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.L. SCH. L. REV. 793 (1986).

114. 373 U.S. 221 (1963).

115. *Id.* at 231-32. In an unusually frank departure from the dominant autonomy rhetoric, *see, e.g., supra* notes 91-93 and accompanying text, the Court noted that often labor cases will turn on the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner . . . ." *Id.* at 229.

116. 270 N.L.R.B. 1260, 116 L.R.R.M. (BNA) 1266 (1984).

geance, thereby bringing the union to its knees. Suppose also that in the strike settlement the defeated strikers agree to waive any right to challenge the employer's conduct. *Gem City* suggests, although it does not precisely hold, that the waiver would be honored, even if the defeated strikers did not understand or appreciate their relevant legal rights.[117] Validating the waiver reconstructs the market nearly full circle back to the common law, to the distinct advantage of employers.

Whatever one's substantive view of *Erie Resistor*, which I see as a victory for employee self-determination, it is fairly obvious that whenever a court or the Board proscribes the use of a particular bargaining weapon, the resulting legal rules will adjust power relations. But waiver is a complex and thorny area of labor law, and its implications for the structure of bargaining relationships are often more obscure. The waiver of rights seems something unremarkable, indeed, a "natural" feature of a system of "autonomous" collective bargaining. Most collective contracts routinely waive the right to strike. Despite possible Fourth of July overtones, a rhetoric of "inalienable rights" faces an uphill battle in the labor law context, as against the instinctive appeal of "free contract," "employee free choice," and limited government intervention in bargaining. That is, a prohibition of waiver seems "regulatory," whereas the authorization of waiver suggests the absence of government involvement.

Both prohibition and authorization reflect regulatory choices. In the typical labor market context of gross economic inequality, loose and unquestioning authorization of the waiver of employee statutory rights may crush rather than affirm worker autonomy and self-determination. Accordingly, my first proposal for democracy-enhancing reform is that labor law adopt a much more suspicious and grudging attitude toward the waiver of employee rights than hitherto. *Gem City* was wrong on the element of knowledge alone, but in any event it should be strictly confined to the narrowest reading of its facts, if not overruled on the substantive point of its inconsistency with the principles of *Erie Resistor*. Likewise, a general no-strike clause should not be deemed a waiver of the right of sympathetic observance of picket lines.[118] Assuming that the right to strike should under some circumstances

117. *Id.* at 1260-61, 116 L.R.R.M. at 1267-68. The Board's brief opinion in *Gem City* treats the superseniority question there as having arisen only as a part of a strike settlement, not as a cause of the union's defeat in the strike as in the hypothetical offered in the text.

118. Accordingly, the NLRB's doctrine in Indianapolis Power & Light Co., 273 N.L.R.B. 1715, 118 L.R.R.M. (BNA) 1201 (1985), *rev'd and remanded sub nom.* Local 1395, IBEW v. NLRB, 797 F.2d 1027 (D.C. Cir. 1986), should be overruled. (The Board's decision in this particular case was reversed and remanded for reconsideration of certain evidentiary issues).

be expressly waivable, it should never be subject to implied waiver.[119] An arbitration clause should surely never be deemed to waive the right to strike over nonarbitrable grievances, much less over grievances as to which the union has reserved freedom of action.[120] I question whether the right to strike over serious unfair labor practices should ever be waivable,[121] and I would be extremely reluctant to conclude that employees have waived the right to refuse unsafe work.[122] Unions should not be permitted to waive employees' statutory rights without, at a minimum, their consent having been manifested through ratification after full and adequate discussion. The law presently permits unratified union waivers of rights statutorily vested in employees, most notably and routinely the right to strike.[123]

Another area long overdue for reform is the question of access to and use of the workplace for employee self-organization and concerted activity.[124] In particular, nonemployee union organizers should be guaranteed some access to the workplace so that employees may have at least minimal opportunities to learn about collective bargaining.[125] Existing cases recognize that

119. Therefore, Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), in which a no-strike obligation was implied, was wrong and should be overruled.

120. The "*Gateway Coal* presumption" should be abandoned. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974), holds that an arbitration clause gives rise to an implied no-strike obligation that must be expressly negated in order for the union to preserve the right to strike. *Id.* at 382. This doctrine was applied in Goya Foods, Inc., 238 N.L.R.B. 1465 (1978), which held that a typical arbitration clause waives the right to strike after contract expiration over grievances arising during the contract term. *Id.* at 1467. *Goya* is another case that should be overruled.

121. The Board announced it would uphold this type of waiver in Reichhold Chemicals, Inc., 277 N.L.R.B. 639, 640, 120 L.R.R.M. (BNA) 1339, 1341 (1985), *vacated on other grounds*, 288 N.L.R.B. No. 8, 127 L.R.R.M. 1265 (1988) (supplemental opinion). In its supplemental opinion, the NLRB reaffirmed its view that the right to strike over unfair labor practices is waivable, 127 L.R.R.M. at 1268, but held that an employer may not insist to impasse on a prospective waiver of the right to seek redress from the NLRB or other tribunals regarding discipline imposed on replaced strikers under a contractual no-strike clause. *Id.* However, the Board did not determine whether a waiver of access to the Board is a permissive or an illegal subject of bargaining. *Id.* at n.18.

122. Another questionable decision is American Freight System v. NLRB, 722 F.2d 828 (D.C. Cir. 1983), ruling that contract language permitting employees to refuse unsafe work if "justified" waives any right under the NLRA to refuse work because of good faith safety fears. *Id.* at 832.

123. *See also* Prudential Insurance Co., 275 N.L.R.B. 208, 119 L.R.R.M. (BNA) 1073 (1985), holding that unions may waive employees' statutory right to assistance at disciplinary investigation interviews. *Prudential* should also be overruled.

124. *See generally* Gresham, *Still As Strangers: Nonemployee Union Organizers On Private Commercial Property*, 62 TEXAS L. REV. 111 (1983); Korn, *Property Rights and Job Security: Workplace Solicitation By Nonemployee Union Organizers*, 94 YALE L. J. 374 (1984); Summers, *supra* note 91, at 704-08.

125. The Labor Reform Act of 1977 proposed that the NLRB issue regulations providing minimal organizer access rights, so as to guarantee some opportunity to respond to employer

the workplace is the natural locus of work-related communication,[126] and that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."[127] Decisionmakers should give life to these basic democratic principles in interpreting existing rules and entitlements.

At a minimum, rules that violate these principles, thereby impeding employee self-determination, should be overruled, beginning with the doctrine of *NLRB v. Babcock & Wilcox Co.*[128] and its progeny. Prior to that case, the Court had decided *Republic Aviation Corp. v. NLRB*,[129] a classic example of market reconstruction. *Republic* holds that under the NLRA the employer must suffer certain employee concerted activity (e.g., solicitation on behalf of the union) to occur on its property, unless the employer can establish that such activity interferes with a specific managerial interest.[130] According to *Republic* and subsequent cases, these interests include efficiency, productivity, safety, public image, and like concerns. The Court's decision is phrased as though the employer's common law ownership rights "give way" in the face of the competing statutory rights of employees. But a more accurate formulation is that the meaning of property ownership has been redefined so that the employer's ownership rights are more limited to start with than they were under the pre-existing common law.

Babcock & Wilcox dealt with access by *nonemployee* union organizers, which the Court treated as posing a different case from on-site *employee* concerted activity. While it has never been satisfactorily explained why this presents a different case, the Court did not follow *Republic* with respect to nonemployee access. Instead, it held: "[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will

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"captive audience" speeches. *See* H.R. 8410, 95th Cong., 1st Sess., § 3 (1977). The measure passed the House on October 6, 1977. *See* 123 CONG. REC. 32,613 (1977). The bill died in the Senate the following year.

126. *See* Gale Prod. Div. of Outboard Marine Corp., 142 N.L.R.B. 1246, 1249 (1963) (acknowledging unique status of workplace as locus of communication among employees), *enf. denied*, 337 F.2d 390 (7th Cir. 1964). The relevant portion of *Gale Products* was cited with approval by the Supreme Court in Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1977), and NLRB v. Magnavox Co., 415 U.S. 322, 323-24 (1973).

127. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

128. *Id.* at 112-14 (employer may exclude nonemployee union organizers).

129. 324 U.S. 793 (1945).

130. *Id.* at 803-04 & n.10 (citing Peyton Packing Co., 49 N.L.R.B. 828 (1943)). While *Republic Aviation* is an admirable decision, it is by no means beyond criticism. The Court's approval of the Board's famous dictum, "[w]orking time is for work," was an unnecessary and regrettable endorsement of a limiting, productivist conception of work. *Id.*

enable it to reach the employees with its message . . . ."[131] In practice, the alternative channels rule "has hardened into a near conclusive presumption that nonemployee union organizers can lawfully be excluded from the workplace."[132] For present purposes, the key point about *Babcock & Wilcox* is that the employer is *not* required to establish that the proposed on-site communication activity will interfere with any management interest. Rather, the *Babcock & Wilcox* conclusion is said to derive from a process of balancing or accommodating the employees' statutory rights and the employer's nonmanagerial "property rights."[133]

The law of organizer access rests upon a basic conceptual error of the sort exposed by the Legal Realists many years ago. In order to "balance" organizational and ownership rights, there must first *be* ownership rights; that is, these rights must have some source in law. There are no natural or preconventional rights of property ownership. "Property" is an emblem for the conclusion that, for reasons of social policy, the law enforces certain relationships and powers. Whether law ought to do so in a particular case or category of cases depends on whether there exist reasons of ethics or social policy indicating that law should play that role. However, the moment *Babcock & Wilcox* distinguished *Republic*, every legitimate concern for which "property" is a surrogate (e.g., efficiency, safety) was eliminated from the analysis. *Babcock & Wilcox* therefore rests on the erroneous premise that some ownership rights exist in the abstract, apart from any plausible instrumental consideration that might induce society to enforce property rights.[134]

But suppose there is some content to the employer's property interests apart from the managerial considerations. Even so, *Babcock & Wilcox* involves an element of circularity. The balancing test assumes that before balancing we know or can determine the respective weights of the employer's ownership and the employees' statutory rights. In effect, the balancing test assumes that we can calibrate the gravity of the employer's property rights apart from considerations of labor policy, and that policy enters only at the point of comparison between the two sets of rights. But because property entitlements are conventional rather than natural, we cannot possibly know the extent of the employer's rights until we consider, among other things, the implications of a national labor policy committed to encouraging collective

131. *Babcock & Wilcox*, 351 U.S. at 112. Additionally, the employer must not discriminate against the union by allowing other distribution. *Id.*

132. Gresham, *supra* note 124, at 114-15.

133. *Babcock & Wilcox*, 351 U.S. at 112. The distinction between managerial and other property interests is carefully maintained in a thoughtful recent case. *See* Dt. Lodge 91, International Ass'n of Machinists v. NLRB, 814 F.2d 876 (2d Cir. 1987).

134. There is also the dubious assumption that Congress intended to protect such abstract rights.

bargaining. The circularity of *Babcock & Wilcox* is that a balancing process is supposed to resolve the cases, but the balancing called for cannot be performed until the employer's rights take shape in light of labor policy; that is, until after the case is over.[135]

The proper approach to cases of this kind is to determine the maximum level of organizational and communication activity that can occur on-site consistent with reasonable "time, place, and manner" restrictions. Such restrictions may reflect considerations of productivity, safety, customer service, privacy, and the like, but should accord no weight to the employer's abstract property interests or desire to oppose unionization. The often ignored point of *Republic* is that the physical space of the workplace does not "belong" to the employer in the sense that the employer is privileged to exclude as a trespass protected activity that does not unduly interfere with operations.

This analysis has a constitutional law parallel. In *Perry Education Association v. Perry Local Educators' Association*,[136] Justice White upheld on mere reasonableness scrutiny a public employer's exclusion of dissenting union communications from school mailboxes.[137] His theory was that since the school mailboxes are not a "public forum," i.e., they are not dedicated to expressional activity by members of the public, only the most minimal scrutiny applies to the government employer's exclusion of the dissenting speech.[138] One would think that some showing of a plausible managerial concern should be required to justify the exclusion of nondisruptive, site-related speech on public property because of the identity or message of the speaker. Predictably, however, the Court's review of the employer's reasons for the exclusion was so superficial as to be meaningless. There is also an element of circularity in *Perry Education Association*. Justice White assumed that the mailboxes were not a public forum because the dissenting union (and other members of the "public") had no right of access to the mailboxes. However, the precise purpose of the case was to determine whether the first amendment and/or the equal protection clause afforded the dissenters a right to such access.

From a democracy-enhancement perspective, the proper first amendment test should track the approach to section 7 of the NLRA.[139] Namely, the

135. For a similar argument, *see* Gresham, *supra* note 124, at 161-73. The illogic of *Babcock & Wilcox* is exacerbated by the Board's recent refinement of access doctrine in Fairmont Hotel Co., 282 N.L.R.B. No. 27, 123 L.R.R.M. (BNA) 1257 (1986).

136. 460 U.S. 37 (1983).

137. *Id.* at 46-54.

138. *Id.* at 46-49.

139. 29 U.S.C. § 157 (1982); *see also supra* text following note 135.

first amendment should be interpreted to permit public employees to engage in the maximum amount of on-site expressional activity consistent with proper performance of the agency's functions. Seen in this light, *Perry Education Association* was wrongly decided. The Court's decision to favor the employer was arbitrary and insensitive to democratic values. It is inconceivable, on the record described by the Court, that the speech at issue could interfere either with school business or the proper performance of collective bargaining duties by the incumbent union. Conceivably the speech would enrich workplace democracy in that setting. The Constitution should protect it.

Another priority area for reform is the aspects of collective bargaining and arbitral law that deal with managerial prerogative, capital mobility, and successorship. In these matters, labor law has been deeply influenced by a certain common law conception of property entitlement. This notion is that the owner of a business has inherent, plenary authority to organize operations and make strategic decisions, unless the owner surrenders those rights in collective bargaining. Upon this foundation are erected a series of crucial doctrines that unduly limit the scope of industrial democracy: the mandatory/permissive distinction, the "reserved rights" doctrine of arbitral law, and the right of an employer to go completely out of business in retaliation against unionization.[140]

Collective bargaining is the primary institutional mechanism through which American private sector employees obtain a voice in matters of enterprise governance. But their input is artificially limited by the notion that topics falling within the "core of entrepreneurial control" are inherently decisions for management and therefore are not mandatorily bargainable.[141] Rarely is an attempt made to explain why certain business decisions are inherently unsuitable for discussion with employees. When such efforts are made, they are wholly unconvincing. They often reveal inappropriate and elitist attitudes regarding workers' alleged ignorance, immaturity, or shortsightedness.[142] But the true basis of the entrepreneurial core limitation on industrial democracy is a deep, often unarticulated belief, pervasive in the discourse of labor law, that it is simply inherent in the nature of private property that management is endowed with ultimate decisionmaking authority. Although Congress in 1935 enacted the NLRA, a statute designed to

140. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269-74 (1965).

141. The "core of entrepreneurial control" dictum appeared in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). Current Supreme Court doctrine is set forth in First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

142. These attitudes are exposed and criticized in J. ATLESON, VALUES & ASSUMPTIONS IN AMERICAN LABOR LAW 111-35, 143-59 (1983).

foster industrial democracy,[143] democratic claims still apparently have to justify themselves in light of the cultural premise and presumption of employer sovereignty.

But managerial prerogative is not inherent in the concept of private property, much less in the nature of things. Managerial prerogative is a social convention. It can and should be altered and redefined. The mandatory/permissive distinction should be abandoned. In a democratic conception of labor law, any topic relevant to the strategic future of the enterprise or to employee job security should be presumptively bargainable. It follows that any information—including confidential financial data—relevant to this broad conception of the scope of bargaining should be mandatorily disclosable, subject to an appropriate system of such protective orders as are necessary to preserve trade secrets and the like.

It is often said that if strong unions are permitted to bargain about investment decisions, then weak unions must be forced to accept bargaining concerning internal union affairs. This logic escapes me. The proposal is to expand indefinitely bargaining over issues of concern to *enterprise* governance. *Union* governance forms no part of that agenda. Union democracy needs legal protection, but not through employer "bargaining." Union autonomy from managerial influence and domination is an essential component of any system of workplace democracy. But there need be no concern that abolishing the mandatory/permissive distinction must logically lead to exposing weak unions to the sort of illicit pressures involved in the *NLRB v. Wooster Division of Borg-Warner Corp.* [144] case. The rule should be that any topic related to governance of the enterprise is bargainable. A significant democratization of firms would be achieved by subjecting capital investment and disinvestment decisions to mandatory bargaining and information disclosure.[145]

Another important step to which the market reconstruction approach points is abolition of the arbitral doctrine of "reserved rights." This is a

143. *See* NLRA § 1, 29 U.S.C. § 151 (1982); *see also supra* text accompanying note 89.

144. 356 U.S. 342 (1958) (employer unlawfully insisted that collective bargaining agreement include "ballot clause" regarding internal union decisionmaking processes).

145. Skeptics argue that this change would be of little significance, because a union strong enough to exploit decision bargaining could achieve all or most of its realistic goals through bargaining over the effects of entrepreneurial decisions. Effects bargaining is mandatory. *See generally* Feller, *The Structure of Post-War Labor Relations: Response*, 11 N.Y.U. REV. L. & SOC. CHANGE 136, 138-39 (1982-83); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of* First National Maintenance, 5 INDUS. REL. L. J. 402 (1983). While there is some force in these arguments, for reasons beyond the scope of this paper, I disagree. There are many situations in which predecision notice and opportunity to bargain can be of strategic and political significance to unions.

variant of the theme of "inherent managerial prerogative." According to this view, before the onset of collective bargaining, an employer possesses the prerogative to make strategic decisions for the firm and to direct operations. Therefore, even after collective bargaining commences, the employer retains such rights except and only to the extent that it surrenders them in the collective agreement. Employer prerogative is also subject to the union's right to protest management action by strike if, but only if, the union has retained a right to strike over such action in any contract in effect. As Professor Feller succinctly summarizes the theory:

> The agreement governs by its silence as well as its words. To the extent that a dispute as to management's right to take action affecting the employment relationship is not subject to arbitration, the agreement, if it does not permit a strike in protest against that action, establishes that management's action is final just as much as if that proposition were spelled out in words.[146]

Management's prerogative is said to be "inherent" or "reserved" unless surrendered, as though that way of ordering authority and power were a fact of nature. This is not correct. Management has this power not because this is the nature of things but because relatively recent political and social judgments were embodied in the common law to structure property entitlements this way. This is one of many reasons why talk of the "autonomy" of collective bargaining and arbitration, though descriptively plausible, is analytically unsound. Collective bargaining was never autonomous from the general legal regime, not even during Professor Feller's "golden age of arbitration." Collective bargaining has always been deeply embedded in and drawn some of its central norms from the common law of property entitlements.

There is no reason why collective bargaining and arbitration must assume an inherent managerial prerogative. Law easily could, and in my view should, substitute a different baseline assumption.[147] The norm should be that *employees* enjoy an inherent or vested right to participation in workplace decisionmaking. A situation vesting management with exclusive decisionmaking authority should be the exception requiring special justification as a departure from the basic commitment to democracy in firm governance. The presumption should be against waivers of participation rights. If the agreement is silent on, say, subcontracting or plant relocation, a democratic labor law would assume that management has failed in bargaining to achieve unilateral authority over that matter and that unilateral action is therefore

146. Feller, *Golden Age*, *supra* note 91, at 103.

147. *See generally* Langille, *"Equal Partnership" in Canadian Labour Law*, 21 OSGOODE HALL L. J. 496 (1983).

either prohibited or, at a minimum, that any proposed course of action is now subject to bargaining.

A conception of collective bargaining based on a presumption that employees are entitled to some form of democratic participation in the decisions that affect their working lives would also call for revision of many doctrines having to do with capital mobility. Again based essentially on a common law notion of the "inherent" rights of the owner, the Supreme Court ruled in *Textile Workers Union v. Darlington Mfg. Co.*[148] that an employer may visit job loss, the ultimate punishment of industrial life, on employees simply because they have exercised their statutory right to organize.[149] There is no reason why private property ownership must be understood to include this privilege, and many reasons of social policy and democratic theory why it should not. Ownership rights should be redefined to exclude this power to use one's property so purposefully and unjustifiably to harm the vital interests of others. More generally, the legal definition of property should be revised so that the obligation of a successor to bargain with an incumbent union is guaranteed. Some Canadian provinces have statutes that point in this direction.[150] Successors' bargaining rights should not be left to rest on the shifting sands of current doctrine.[151] Moreover, the right of employees to make a fair price "buy out" of the enterprise upon employer disinvestment should also be guaranteed as an incident of the law of property.

Some readers may ask whether legislatures and/or courts can alter and redefine the basic social understanding of property in this way. In fact, it is not at all uncommon in American legal history for legislatures and courts to make such changes. The definition of property is regularly revised by legal reform, both in small and quite dramatic ways. While the *politics* of each situation varies, from the standpoint of legal process, there is no great difference between, on the one hand, promulgating a strong successor's duty to bargain or a mandatory buy-out option and, on the other, a legislative decision to abolish prospectively the common law tenancy by the entirety;[152] a court's declaration of public access entitlements vis-a-vis beachfront proper-

148. 380 U.S. 263 (1965).

149. *Id.* at 273-74.

150. *See, e.g.*, Ontario Labour Relations Act, ONT. REV. STAT., ch. 228, § 63 (1980) (as amended) (successor rights).

151. *See generally* Silverstein, *The Fate of Workers In Successor Firms: Does Law Tame the Market?*, 8 INDUS. REL. L. J. 153 (1986).

152. *See* West v. First Agricultural Bank, 382 Mass. 534, 549-52, 419 N.E.2d 262, 271-72 (1981) (discussing the 1979 amendments to MASS. GEN. LAWS ANN., ch. 209, § 1 (1958 & Supp. 1980)); Robinson v. Trousdale County, 516 S.W.2d 626, 629-32 (Tenn. 1974) (discussing the effect of the 1919 amendments to the Tennessee Code) (amendments currently codified at TENN. CODE ANN. §§ 36-3-504 to 505 (1984)).

ties;[153] a court's conclusion that owners of real property do not have the right to exclude government workers or legal services attorneys on official business seeking to visit migrant farmers temporarily staying on the owner's land;[154] or a court's ruling that an actionable nuisance is not enjoinable, so that the neighbor must suffer an inverse condemnation of a portion of his or her property for the polluter's private use.[155] In the labor context, two well-known property-revision cases are *Republic Aviation*,[156] and California's decision to open private shopping malls to political and labor activity.[157]

These are all classic instances of market reconstruction. Such decisions hardly guarantee substantive conditions: city dwellers are not guaranteed a vacation on the beach, migrant farmers are not guaranteed counsel, wives are not guaranteed an estate. But such legal changes are intended to and do shake up power relations, e.g., between husbands and wives or between growers and migrant workers. I by no means minimize the political and social questions raised by my proposals: my purpose is to invite such debate. But purely from the standpoint of legal form, the proposals are unremarkable.

B. Democratizing Firms

Labor law should be committed to democratizing the organizational structure of firms. Steps in this direction can be achieved simply by changes in the existing framework of collective bargaining law. One of the most promising sources of movement toward democratizing work is employee concerted activity, as found both in collective bargaining innovation and in the establishment of worker-owned businesses.

An important reform needed to encourage these processes is to remove the threat contained within existing doctrine that if employees achieve democratic forms of work organization or firm governance structures, they will bargain themselves right out of the protections of collective bargaining law.

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153. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (public trust doctrine), *cert. denied*, 469 U.S. 821 (1984); State *ex. rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969)(custom). These cases are discussed in Singer, *The Reliance Interest In Property*, 40 STAN. L. REV. 611, 673-75 (1988).

154. *See* State v. Shack, 58 N.J. 297, 307, 277 A.2d 369, 374 (1971).

155. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 223-28, 257 N.E.2d 870, 872-75, 309 N.Y.S.2d 312, 315-19 (1970).

156. 324 U.S. 793 (1945); *see supra* notes 129-35 and accompanying text.

157. In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Supreme Court upheld a California constitutional provision which, as interpreted, allows expressional activity on private shopping mall property. *Id.* at 80-88. Justice Rehnquist, whose relentless positivism sometimes leads him to unpredictable conclusions, wrote for the Court, rejecting first amendment and property rights challenges.

For example, *NLRB v. Yeshiva University*[158] suggests that the possession of governance powers and participation rights is inconsistent with "employee" status under the Labor Act. *College of Osteopathic Medicine*,[159] a post-*Yeshiva* NLRB decision, takes this antidemocratic absurdity to its logical conclusion by holding that, if statutory employees successfully utilize collective bargaining to obtain a direct, participatory voice in firm governance, they therefore cease to be covered employees and the employer becomes free to disavow its collective bargaining commitments.[160]

As I have argued elsewhere, in this period of historic transformation, workplace democracy requires both "adversary" and "participatory" institutional structures.[161] Given the pervasive inequality in labor markets and the ineradicable conflicts between employer and employee interests, the adversary or conflict-based system of collective bargaining is essential to guarantee employees the right to combine their voices and strength in autonomous, self-directed organizations. At the same time, if employees are to play a direct and continuous role in firm governance, participatory structures are needed so that the employees can become informed and have their input registered. *Yeshiva* and its progeny reflect a deep-seated distrust of democratic workplace organization. Such doctrine has no place in the democratic labor law of the future. Collective bargaining should not be restricted to the employees of authoritarian firms. Labor law should not only permit, but encourage, employees to use the collective bargaining process to obtain direct participation in firm governance.

Consistent with this view, the law should permit employees to achieve representation on corporate boards of directors through collective bargaining. Although this has been done, for example, at Chrysler Motors Corporation,[162] it is not yet entirely clear whether the NLRA contains obstacles to employees achieving significant or controlling positions on corporate boards. Collective bargaining also has an essential role to play in worker-owned businesses of any significant size. Yet substantial questions exist as to whether the owner-employees in such businesses have rights under the NLRA. Doubts should be promptly resolved in favor of coverage.[163]

The logic of the market reconstruction position is to favor statutorily mandated employee participation on corporate boards of directors, such as exists in some European systems. Difficult and challenging institutional is-

158. 444 U.S. 672 (1980).
159. 265 N.L.R.B. 295, 111 L.R.R.M. (BNA) 1523 (1982).
160. *Id.* at 297-98.
161. *See generally* Klare, *supra* note 10.
162. Wash. Post, Mar. 3, 1981, at F1, col. 1.
163. On these points, see Stone, *supra* note 14, at 120-31.

sues would arise in working out the precise role of employee representatives and the precise relationship between them and the union in organized plants. For present purposes, I simply insist on the desirability of inserting a right to participation in firm governance into the minimum social wage and benefits package. This right should be guaranteed whether or not employees choose to be represented by a labor union. Of course, fundamental changes in corporate as well as labor law would be required to accomplish such a result.

C. Democratizing Markets

As a general matter, the democracy-enhancing perspective endorses a redistribution of power in labor markets in favor of employees by raising the social minimum wage and benefits package. The specific goals of democracy-enhancing labor law over the next twenty or thirty years ought to be the protection of employee security in this period of economic restructuring; promotion of a human capital strategy for economic growth; reduction and eventual elimination of the discriminatory effects of labor market segmentation; and the creation of genuine, not just formal equal employment opportunity for women and minorities.[164] In order to expand women's opportunities for economic advancement and self-determination through paid work, it is essential to promote flexible entry and exit to paid employment by reducing the work week, establishing full-time equivalent benefits for part-time workers, including mandated flexitime in the social minimum wage and benefits package, and vastly increasing the provision of childcare services.

Democratic theory and a hopeful economic future demand linking American minimum employment standards policy with a strategy for upgrading

164. The area of discrimination in employment represents a crucial field for democratic reconstruction of labor markets. Although there is doctrine to the contrary, some current cases expressly or implicitly hold that existing market "realities" may excuse discrimination, even where such market forces are patently tainted by past or continuing racism, sexism, or other forms of invidious discrimination. For example, in AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (Kennedy, J.), the employer based its compensation levels on prevailing market rates, even though the employer's own studies showed these rates to embed and carry forward past discrimination. *Id.* at 1403. The court held that the employer's wage practices were not subject to legal attack. *Id.* at 1405-08. Cases like this are inconsistent with what should be a fundamental purpose of our civil rights laws to reconstruct labor markets so that they are purged of the effects of past and current invidious discrimination. Such cases should be disapproved.

Fuller treatment of these issues would require a separate article. For discussions of the market reconstruction implications of feminist equality theory, see Finley, *Transcending Equality Theory: A Way Out of the Maternity & the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Frug, *Securing Job Equality For Women: Labor Market Hostility to Working Mothers*, 59 B. U. L. REV. 55 (1979); Frug, *Sexual Equality & Sexual Difference In American Law* (unpublished manuscript).

and enhancing human capital. The normative dimension is the promotion of self-realization. From an economic standpoint, this linkage is a vital step in building a post-Fordist business system capable of organizational flexibility, rapid market response, and high quality outputs. As noted earlier, my assumption is that the know-how, creativity, and morale of American workers is the most important, growth-oriented asset in the economy.

I use "minimum standards" in a very broad sense. I include not only minimum wage and benefits legislation as such, but all programs that affect the "social wage." To promote a highly skilled, conceptually and interpersonally flexible, and confident workforce for the era of postindustrial transition, we will need massive investment in subsidized adult education and retraining, not only for technologically displaced employees but for all individuals who wish to alter their life paths. Educational sabbaticals must become as much a fixture in industry as they are in academia.

Education and training, both on the job and in schools, represent one side of the issue. There is another important facet to the economy's ability to enhance and draw upon employee problem solving capacities, namely, creating a climate of confidence among employees and respect for their job and income security. Without basic security, why should American workers be expected to participate willingly, let alone creatively, in the process of economic restructuring? Social policy and labor law must promote a climate of openness to change grounded on a baseline sense of job and income security.

Certain steps seem obvious. A democratic labor law must at a minimum provide for advance notice of mass layoffs and adequate transitional support in the event of plant closings or technological displacement. At the least this should include retraining allowances and mandatory severance pay. The new Worker Adjustment and Retraining Notification Act[165] represents an important initial step, but much remains to be done. In addition, public policy should encourage worker buyouts and worker-owned businesses through funding programs, loans, and favorable tax treatment.

It is important to note that welfare legislation and other spending programs are not the only ways to protect income security in periods of economic transition. It is also possible to restructure the background legal regime so as to compel businesses to internalize the economic and social dislocation costs of capital mobility. This could be accomplished by creating common law actions through which employees can protect their investment in human capital in plant closing situations.[166] As I assure my first-year

165. Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109).

166. The case for a legally protected reliance interest in property in plant closing situations is elegantly made in Singer, *supra* note 153.

students every year, this idea is fully consistent with the long-standing policy of tort law to design liability rules so as to correct for market failure due to the existence of externalities or third party effects. The goal of many tort rules is to force enterprises to internalize the costs of the physical injuries and environmental harms they cause. Transferring this well-established tort policy to the labor arena, it is obvious that cases like *United Steel Workers, Local 1330 v. United States Steel Corp.*,[167] which deny all common law remedies for capital flight, are wrongly decided. It should be a tort for an employer unilaterally to close a viable business vital to a community solely to make higher profits elsewhere without accounting for the social dislocation costs of capital mobility, a classic form of externality. The employer should be compelled by the threat of tort liability to discount alternative investments to the extent of potential liability for reparations to the abandoned community. The proposed tort rule for plant closings would require this calculus.

Reform is also urgently needed with respect to the problem of individual discharge. Almost all the advanced industrial nations now provide some form of public law protections against wrongful discharge. The United States is uniquely backward in this area. Until recently, and apart from special groups such as academics, there were two primary mechanisms for American employees to obtain such protections: civil service laws and collective bargaining. Perhaps American collective bargaining's greatest contribution, certainly one of its most significant, is to have introduced "just cause" protections into the private sector. But the time has come for the fundamental law of our society to guarantee protection against unjust dismissal for all employees. This protection should be a basic right, an aspect of the social minimum wage and benefits package.[168] Wrongful discharge pro-

167. 492 F. Supp. 1 (N.D. Ohio), *aff'd in part and vacated and remanded in part*, 631 F.2d 1264 (6th Cir. 1980).

168. At present, there is no federal constitutional right to job security, as there should be in a democratic society. For one thing, constitutional rights are not ordinarily applicable in the so-called "private sector," although it seems an easy case to argue that a large corporate employer's discharge of an employee is "state action." Even in the public sector, however, constitutional doctrine does not guarantee full just cause protections. Under current constitutional law, a discharged public employee has at most a claim of entitlement to procedural due process if and only if he or she can establish a "property interest" in the job (or the impairment of a "liberty interest"). *See* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). *But see id.* at 588 (Marshall, J., dissenting)("[i]n my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment"). Under current doctrine, state and local employers can circumvent constitutional due process simply by placing public employment on an at-will basis. At a minimum, constitutional doctrine should be revised so that all public employees are afforded due process

tections should be built into the floor of collective, as well as individual, bargaining, so that unions do not have to expend resources to obtain "just cause."

To achieve this goal, the underlying legal regime upon which individual and collective bargaining are erected should be revised.[169] Currently, the starting assumption is that employment is at-will unless modified. Instead, the assumption should be that absent an express modification, the employer cannot discharge without just cause. This protection should be waivable only under the most exceptional circumstances; it should never be waivable respecting discharges that violate public policy. The proposed change in the background legal regime could be achieved through judicial decision, legislation, or even constitutional amendment, or a combination of such actions.

Making "just cause" protections universally applicable would pose no threat to either the labor movement or to collective bargaining institutions. Although protections against arbitrary discharge and discipline are among the central benefits of organization, unions offer many other things of value to employees. The breadth of their contribution can be expected to expand in the next decades, particularly in the area of firm governance. Even in the area of discharge and discipline, much would remain to be done through collective bargaining even if basic just cause protections were guaranteed by law as is the minimum wage. Unions play and will continue to play a vital role in giving meaning and content to general legal rights in the particular setting of each workplace. Even with the proposed reform, unions would bargain for a jurisprudence, procedures, and remedies superior to those guaranteed to unrepresented employees. The presence of a union is often the best assurance that employee rights guaranteed on paper will actually be translated into meaningful enforcement at the workplace level. Moreover, were just cause protections mandated on a society-wide basis, unions might be relieved of the terrible dilemma they sometimes now face of choosing either to expend precious resources on weak grievances or to risk fair representation suits. Therefore, unions and the collective bargaining system have little to lose and much to gain from a basic societal commitment to prohibiting unjust discharge.

Much is made of the allegedly intractable conflict between the collective bargaining and arbitration system, on the one hand, and emergent state law

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in discharge cases, regardless of whether the employee has a legal claim to the job under local law.

169. For an argument that principles long recognized in the common law already provide foundations for general wrongful discharge protection, see Minda, *The Common Law of Employment At-Will In New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985).

remedies for wrongful discharge, on the other. An extreme version of the argument is that generous state law remedies will render arbitration less attractive and thereby undermine the congressionally preferred system of workplace dispute resolution. Hence, the supremacy of federal labor policy constitutionally bars the states from offering these remedies, at least with respect to employment in or affecting commerce. A softer and somewhat more plausible version claims that the states are barred only with respect to unionized employees.

Usually such arguments are put forth by employer counsel defending wrongful discharge suits. However, even friends of labor sometimes express concern that the common law/arbitration conflict with respect to unionized employees poses genuine dilemmas for workplace democracy. If state tribunals are permitted to pronounce whether an employee was discharged with or without just cause, it is feared that this will inevitably and directly interfere with the orderly and binding arbitral interpretation of just cause provisions in collective bargaining agreements. Likewise, there is concern that if unionized employees can circumvent and obtain remedies outside the arbitral process, the union's role as coauthor of the law of the shop will be undermined.[170]

While these are not simple issues, I am persuaded they can be resolved in favor of permitting the states to enact general wrongful discharge remedies as a basic component of the social minimum wage and benefits package. (There can be, of course, no preemption objection to Congress enacting such remedies pursuant to the commerce power.) The following is just an overview of preferred lines of development. Many tricky legal issues will need to be worked out in the years ahead. If the discussion illustrates anything it is that preemption doctrine may well become a crucial market reconstruction battlefield in the near future.[171]

Taking the problem a step at a time, let us first consider what seems a relatively easy issue, particularly after the Supreme Court's unanimous decision in *Lingle v. Norge Division of Magic Chef, Inc.*[172] The question arises as to whether a state is preempted from promulgating, by statute or decision, a tort remedy on behalf of employees who are discharged in violation of an important state policy. This issue could be raised, for example, in defense to a suit by an employee who is fired for filing a workers compensation claim or

170. *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967).

171. For general overviews of the preemption doctrine, see F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 37-57 (2d. ed. 1986); J. GETMAN & B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW & PRACTICE 333-61 (1988).

172. 108 S. Ct. 1877, 1881-83 (1988) (state tort remedy held not preempted by § 301 of the LMRA).

for refusing to accede to the employer's request to do something illegal. This type of case is commonly known as a "retaliatory discharge" case.

Retaliatory discharge remedies should not be preempted, nor should they be waivable. There is no reason of collective bargaining policy why the states should be barred. Nor is there any evidence that Congress intended in section 301 of the Labor Management Relations Act[173] to preclude the states from protecting significant public policies by forbidding retaliatory discharges, any more than Congress intended to prevent states from forbidding race or gender discrimination in employment. A state tort rule creating a cause of action in favor of an employee fired in retaliation for exercising a legal right, performing a civic duty, or refusing to break the law, is simply one aspect of the basic civil rights law of the jurisdiction, which Congress in 1947 gave no hint of intending to disturb. The collective bargaining process can supplement, enlarge, and enforce these policies as it does other basic civil rights protections, but it should not be permitted to compromise or dilute them. Accordingly, the *Lingle* decision against preemption was correct.[174]

More difficult problems arise if the state promulgates "general" wrongful discharge remedies or "general" just cause protections.[175] "General" wrongful discharge or just cause protections go beyond remedies for retaliatory discharge. The employer is not only required to refrain from discharge in violation of public policy (i.e., discharge for a "bad" or forbidden reason). General just cause protections require the employer to refrain from *any* discharge unless the employer possesses and relies upon a "good" or "just" reason for its action. Such "general" remedies may sound either in tort, for illicit invasion of a valued interest or expectancy, or in contract, for breach of an implied-in-law just cause term in all employment contracts.

Opponents of general just cause protections challenge the power of the states to enact such remedies at all, with respect to employment in or affecting commerce. At any rate, they question the power of the states to afford

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173. LMRA § 301(a), 29 U.S.C. § 185(a) (1982).

174. *Lingle* was awaiting decision when I delivered the original version of this paper. Not surprisingly, I took a position in favor of the result subsequently announced by the Court.

175. *See, e.g.*, MONT. CODE ANN., § 39-2-901 to 914 (1987). Montana's wrongful discharge statute breaks exciting new ground. However, Montana avoided the precise set of preemption issues discussed in the text. *See id.* at § 39-2-912(2) (exempting employees covered by written collective bargaining agreements from wrongful discharge remedies). While the exemption for unionized employees most likely eliminates a preemption challenge arising from the federal policy of uniformity with regard to collective bargaining agreements, *see infra* text accompanying notes 186-87, the fact that unionized employees are treated adversely on the face of the statute may constitute a discrimination that, somewhat ironically, raises a preemption issue under the *Machinists* doctrine. *See infra* notes 180-82 and accompanying text.

such remedies to employees covered by a collective bargaining agreement. The gist of the attack is that Congress has preempted the field of employer/employee relations which operate in or affect commerce, and that intrusive state remedies must therefore give way under the supremacy clause.[176] Congress has determined that voluntary arbitration is the preferred method of workplace dispute resolution.[177] Because the state just cause remedies will undermine arbitration, they are barred. A curious tension appears at this point in the discussion of exactly why the state scheme undermines the objectives of federal labor policy. One theory—a somewhat ironic one for employers to advance—is that the availability of state just cause remedies will render collective bargaining itself less attractive, in violation of the congressional policy of promoting collective bargaining to achieve industrial peace. The alternative theory is that automatic state remedies would give unions a head start at the bargaining table. The effect would be to make collective bargaining *more* attractive to employees, in violation of the congressional command that state law not alter the balance of power between management and labor.

These arguments for preemption are wholly unpersuasive. They reflect the basic pre-Realist error, discussed throughout this paper, of "naturalizing" the common law. The basic assumption is that the background legal regime *must* be authoritarian, it *must* permit discharge without just cause, as though the employer's power wrongfully to discharge were a datum of natural law. Moreover, the arguments are ultimately circular. Precisely what needs to be proved in these cases, precisely what is open to question, is *whether* the common law is required by federal labor policy to authorize discharge without cause. One cannot very well assume that in advance, as is implicitly done by the preemption challenges to just cause protections.

Underlying the preemption challenges is the erroneous assumption that in 1935 or 1947 Congress declared that only two workplace regimes can exist: the authoritarian regime of largely unbridled employer power or the collective bargaining regime. To be sure, Congress is on record as preferring the latter.[178] But there is no indication that Congress was of the view that these are the only two possibilities. Implicit also in the preemption challenges is the equally mistaken belief that collective bargaining can only be built on a foundation of authoritarian employer power. In the United States that is the typical case historically. Employees ordinarily seek to unionize in response to the felt disadvantages of unrestrained employer power. But there is noth-

176. U.S. CONST. art. VI.

177. *See* LMRA §§ 203(d), 29 U.S.C. §§ 173(d) (1982).

178. NLRA § 1, 29 U.S.C. § 151 (1982).

ing in the nature of collective bargaining that says this must be so or that collective bargaining is inconsistent with a more democratic background legal regime. Collective bargaining thrives elsewhere in the world where just cause and other rights are granted by positive law. While I have argued that the conception of collective bargaining enshrined in federal labor policy contains certain antidemocratic elements, there is no evidence that Congress ever determined that the unorganized workplace *must be* authoritarian or that employees have a choice only between traditional collective bargaining or no protection.

Let us now consider the challenges to general just cause protections in doctrinal terms.[179] Does a state violate the supremacy clause by promulgating and enforcing a basic right of all employees to be immune from wrongful discharge? Did Congress preempt the states from declaring just cause to be a fundamental human right?

One line of attack is based on "*Machinists*-preemption."[180] The concern of this doctrine is to prevent the states from upsetting the scheme of federal labor policy by regulating in an area that Congress intended to be left "unregulated." Outcomes in this zone are to be left to private ordering based on the "free play of economic forces."[181] For example, the *Machinists* case held that Wisconsin is federally preempted from regulating concerted refusals to accept overtime, which are neither protected nor prohibited under the NLRA.[182] Employers argue that state wrongful discharge remedies are preempted under *Machinists* for either one of two reasons. First, management may contend that such remedies interfere with the employer's self-help options, for example, its right to terminate employees who concertedly refuse overtime. The second, broader argument is that, by granting employees a

179. For a detailed discussion of the doctrinal issues that reaches similar conclusions, see Herman, *Wrongful Discharge Actions After* Lueck *and* Metropolitan Life Insurance: *The Erosion of Individual Rights and Collective Strength?*, 9 INDUS. REL. L. J. 596 (1987). For an opposing view stressing the primacy of arbitration in federal labor policy, see Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L. J. 1 (1986).

180. *See generally* Lodge 76, International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). I have set aside another issue that I regard as relatively easy, the question of "*Garmon* preemption." The essence of the *Garmon* problem is to secure the exclusive, primary jurisdiction of the NLRB. As a protective rule, cases even arguably subject to Board jurisdiction may not be heard in the first instance by any other tribunal, state or federal. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959). Cases alleging matters proper for Board adjudication in the first instance can be channeled there as in the past. This does not seem to me to present a significant barrier to permitting the states to proceed in other cases.

181. *Machinists*, 427 U.S. at 140 (*quoting* NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

182. *Id.* at 148-51, 155.

crucial right they ordinarily seek in bargaining, state law has given them an unfair head start, thereby interfering with the "free play of economic forces" that is supposed to underpin collective bargaining.

Both forms of argument are based on the fallacy of assuming a preconventional legal order. Both assume a natural, neutral background regime in which employers have a power to discharge without cause. This image of the background regime is necessary in order to perceive wrongful discharge remedies as a departure from baseline, as an intervention in the free play of economic forces. But, like all legal powers, the right to discharge is conventional and therefore subject to revision. The absence of wrongful discharge remedies is no less "regulatory" than their presence. Indeed, the common law conception of at-will employment is of quite recent vintage. As for the neutrality of the at-will rule, I am reminded of an apt phrase used by my labor law professor (in another context): the at-will rule is "neutral on the side of the employer." If an employer's *Machinists* argument were valid, so too must be the employee's opposite argument that the employer's common law *right* to discharge without cause is preempted under *Machinists* as a radical and harmful intrusion upon what should be the "unregulated" zone.

Moreover, the employer's "self-help option" argument is circular. The employer's argument *assumes* that in a free market employers can discharge without cause, but this is precisely what the employer seeks to prove. "Preemption" is a label for the conclusion, sought to be drawn, that the states cannot divest employers of the power to discharge without cause. One cannot logically use as a reason for that conclusion the premise that employers must have that power in the first place.

The broader *Machinists* argument also fails. A unanimous Court (Justice Powell not participating) recently stated in *Metropolitan Life Insurance Co. v. Massachusetts*[183] that:

> No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with [the] general goals of the NLRA.[184]

We may assume this statement applies to state common law rules as well as to legislation. Just cause remedies no more interfere with labor-management relations than any other form of minimum standards legislation. The only way to avoid this conclusion, and, therefore, the conclusion under *Metropoli-*

183. 471 U.S. 724 (1985).

184. *Id.* at 754-55. The great significance of the *Metropolitan Life* case is developed in Herman, *supra* note 179, at 625-39.

tan Life that just cause guarantees are not preempted, is to assume that, unlike the wage rate, rules about discharge cannot be altered. Minimum standards legislation simply sets the floor of assumptions upon which the collective bargaining process builds. To distinguish discharge rules from, say, wage rates, we would have to assume that collective bargaining *cannot* be erected upon a just cause foundation. But that is to assume, wholly without warrant, that collective bargaining can only thrive where the background legal regime is hostile to industrial justice.[185]

For the reasons stated, neither the NLRA nor the LMRA preempts general just cause protections. This brings us to the final challenge, the more focused argument that general just cause protections are at least preempted with respect to *unionized* employees, because of the unavoidable institutional conflicts between common law and arbitral remedies. The doctrinal claim arises under "section 301 preemption."[186] The goal of this doctrine is to provide uniformity in the law governing the interpretation and enforcement of collective bargaining agreements. Accordingly, as the Court stated in *Lucas Flour*: "in enacting § 301 [of the LMRA] Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."[187] Arguably, application of state remedies for wrongful discharge to unionized employees threatens to disrupt uniform administration of collective bargaining contracts, specifically of the just cause clause found in the typical agreement.[188] In a sense, this focused version of the section 301 preemption problem—how to combine the virtues of collective bargaining with other needed legal foundations of employee self-determination—is symbolic of all the problems facing the market reconstruction perspective discussed in this paper.

As noted above, the focused section 301 preemption issue is not simply an employer argument to evade wrongful discharge liability. Conflicts between legal and arbitral remedies may raise genuine issues for workplace democ-

185. It should go without saying that just cause meets the *Metropolitan Life* test of being not incompatible with the general goals of the NLRA. *See supra* text accompanying note 184.

186. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

187. *Id.* at 104.

188. While most collective bargaining agreements contain a clause prohibiting discharge except for "just cause," no provision of labor law requires the insertion of such a term. Presumably the § 301 preemption claim is arguable, if at all, only where the applicable contract contains a just cause clause. Indeed, it may be that § 301 preemption claims are further restricted to cases in which the parties intend to administer the just cause provision through a so-called "exclusive grievance procedure." *See* Vaca v. Sipes, 386 U.S. 171, 184 & nn. 9, 10 (1967) (indicating that the rules created there pursuant § 301 to apply only where an exclusive grievance procedure is intended); Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965) (similarly restricting application of the rule of that case).

racy. A common error in the way the question is discussed, however, is to confuse potential future issues with present-day concerns.

If just cause were recognized as a basic civil right, like protection against race and gender discrimination, collective bargaining about job security and discipline would start with just cause as the floor and build upwards. Employees would not have to expend bargaining chips to get elementary just cause protections. They might still seek to negotiate arbitral protections against unjust discharge, however, because arbitral jurisprudence, procedures, and remedies might be superior to those available under local law. Even today, unions often bargain hard to incorporate protections against race and gender discrimination in collective bargaining agreements to obtain swifter, less costly enforcement and better remedies than those available at law.

If in the future unions were to negotiate superior discharge protections on top of a just cause legal foundation, and if these protections were democratically chosen by employees, it might then be appropriate to implement preemptive doctrines of attempted exhaustion of and deferral to arbitration similar to those now existing under the law of section 301.[189] That is, arguably general just cause protections, as distinct from retaliatory discharge protections that implicate basic public policies, should be waivable if a democratically ratified collective bargaining agreement provides superior or at least equal remedies.[190] Even then, however, I would place an outer limit on waivability. I would not permit a waiver of all access to industrial due process in a discharge case. If the union cannot or in good faith will not invoke the collective bargaining remedies on behalf of a discharged employee, he or she must be free to invoke the minimal state remedies.[191]

All of that is for the future. It does not describe our situation now. At

189. *See Vaca*, 386 U.S. at 171 (exhaustion of grievance procedure); *Republic Steel Corp.*, 379 U.S. at 650 (requirement of attempt to exhaust grievance procedure); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)(judicial deference to arbitral awards).

190. The Montana Wrongful Discharge From Employment Act exempts all employees covered by a written collective bargaining agreement from state wrongful discharge remedies. *See* MONT. CODE ANN., § 39-2-912(2) (1987). However, the statute does not in turn require that the exemption-triggering collective bargaining agreement satisfy minimum protective standards, such as the inclusion of a just cause clause subject to arbitral enforcement. *See id.* In theory, an employee could be barred from state remedies by the exemption, yet not have just cause protections under the contract. This gap should be closed by amendment or interpretation. A collective bargaining contract that fails to meet minimum protective standards should never trigger an exemption from state remedies.

191. To this extent, the contrary rule of *Vaca* should not be carried forward. Under *Vaca*, if without a fair representation breach the union declines to process a grievance to arbitration, the employee is precluded from any contractual remedy for wrongful discharge. *See Vaca*, 386 U.S. at 185-92.

present, just cause is not anything close to a universally recognized civil right in the United States. It is not the floor of bargaining (at least outside the public sector). It is something fought for and won by employees through concerted activity, often at a high price in terms of risk, effort, and alternative rights traded or benefits foregone at the bargaining table. To say that section 301 preemption now bars states from extending just cause to unionized employees is to make the wholly unjustified and inappropriate assumption that, by adopting section 301 in 1947, Congress intended to penalize employees who choose to bargain collectively by making them pay for elementary industrial justice at the bargaining table, even though a state grants it free of charge and as a matter of right to nonunionized employees. This reasoning assumes that Congress intended to make collective bargaining unattractive, to make unionized employees second-class citizens who have to pay for basic human rights available to first-class citizens at no cost. Section 301 should not be given this absurd interpretation.

For the reasons canvassed in the previous pages, I do not believe federalism concerns pose any insuperable barriers to the market reconstruction program, at least with respect to individual employee job security. In now concluding this survey of areas for democracy-enhancing labor law reform, I turn from constitutional constraints to constitutional guarantees implicated by the program of reconstructing labor markets.

As one example, the workplace democracy perspective should be a source of equal protection doctrine. This may be illustrated by examining the recent case of *Lyng v. International Union, United Automobile Workers.*[192] The Supreme Court there upheld, against substantial first amendment and equal protection challenges, a congressional policy denying food stamp benefits to strikers. *Lyng* turns on several arguments, but I wish to focus particularly on the Court's conclusion that striker ineligibility serves the legitimate governmental objective of avoiding favoritism in private labor disputes.[193] This position is reminiscent of the fallacious assumption that managerial prerogative is "inherent" or that property owners have an "inherent" right to exclude expressional activity irrespective of privacy or productivity concerns.[194] It cannot withstand serious scrutiny. Only the highest formalism could treat government withdrawal of benefits as "neutrality" in labor disputes, but deem the grant of such benefits an act of support for one side. Surely Justice Marshall's dissent in *Lyng* has it right:

> [T]he 'neutrality' argument reflects a profoundly inaccurate view

192. 108 S. Ct. 1184 (1988).

193. *Id.* at 1192-93.

194. *See supra* notes 131-35 and accompanying text (discussing property rights); and notes 140-51 and accompanying text (discussing "inherent" managerial prerogative).

> of the relationship of the modern federal government to the various parties to a labor dispute. Both individuals and businesses are connected to the government by a complex web of supports and incentives. . . . When viewed against the network of governmental support of both labor and management, the withdrawal of the single support of food stamps . . . cannot be seen as a 'neutral' act.[195]

The fallacy of the *Lyng* majority is the same, basic pre-Realist error of assuming that government is neutral with respect to the background legal regime.[196] A theme of this Article throughout has been that governmental action establishing the background regime of rights and entitlements implicates government and law in the distribution of wealth and the enjoyments of life. A Constitution committed to equality therefore demands that legislation be framed and interpreted so as to counteract inequality in the "private" sphere that inhibits the exercise of democratic rights. Strikers should receive food stamps not only because withdrawal of the benefit is a governmental act inhibiting the exercise of statutory and first amendment rights. *Lyng* should also be overruled because, under the equal protection clauses, employees should be at least minimally subsidized in self-organization and concerted activity.

This is not an argument that the Constitution requires Congress to see to it that employees always win strikes. The claim is the narrower one that our notions of constitutional freedom should minimally guarantee that basic democratic rights can be exercised without fear that one's family will suffer nutritional deprivation. Perhaps I am wrong in believing that the Constitution requires government minimally to subsidize the exercise of certain constitutional rights. At the least, however, in cases such as *Lyng* and *Harris*, which test funding program exclusions, equal protection should bar government from enacting exclusions that inhibit or prevent the exercise of basic freedoms and civil rights.

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195. *Lyng*, 108 S. Ct. at 1198 (Marshall, J., dissenting).

196. A similar error underlies Justice Stewart's opinion in Harris v. McRae, 448 U.S. 297 (1980). In upholding the constitutionality of government's decision to subsidize childbirth, but not abortion, Justice Stewart wrongly argues that:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

Id. at 316.

IV. CONCLUSION

The preceding discussion suggests the range and concerns of an expansive market reconstruction approach to labor law reform. The reform agenda is founded on the central premise that labor law should promote and enhance democracy at every level of working life: within firms, in collective bargaining, in unorganized labor markets, and in the institutional relationships between paid employment and the other aspects of social life. Programs of this kind are criticized in general terms as interfering with autonomy and as being inefficient. These same complaints are also frequently lodged against more moderate programs of legal encouragement of collective bargaining, such as that contained in federal labor policy. As I have attempted to show, these criticisms are unpersuasive. However, even friends of employee rights may question whether an expansive program of democracy-enhancing market reconstruction would threaten the autonomy of collective bargaining. To the contrary, the proposed law reform agenda is fully consistent with the enduring values of collective bargaining. The proposals have the potential to enhance collective bargaining's contribution to the continuing project of creating a democratic workplace. The next cycle of labor law reform must reenvision and advance that project.