10 Opportunities in the NLRA Permitting Employers to Limit Workers' Economic Actions

Labor Law Reforms Needed[1]

Prohibit employers from permanently replacing employees who strike.

Clarify the scope of the right to strike.

Prohibit offensive lockouts.

Remove limitations on secondary picketing and strikes and repeal NLRA § 303 (private right of action for an employer to sue unions that conduct secondary strikes and other activities).

End prohibitions on collective and class action litigation.

Repeal § 14(b), which permits states to pass laws that prevent unions from requiring union membership as a condition for employment.

* * *

Prohibiting the Permanent Replacement of Employees Who Strike

The right of employers to permanently replace economic strikers is a judicially created policy. Nothing in the National Labor Relations Act (NLRA) privileges the employer to unleash this economic weapon. Of the many judicially created labor policies that have aided employers to defeat workers' desire for meaningful protection through the collective bargaining process, none has harmed workers more than the striker replacement rule created by the Supreme Court in its 1938 *Mackay Radio* decision.[2]

It is hard to disagree with Ahmed White (2018), who argues that "the rule established in *Mackay Radio* came out of the blue. It was set forth in a case which required no such question to be resolved, in a manner that drew no support from the text of the Wagner Act, and on the basis of legislative history

that was ambiguous at best."[3] In addition, the *Mackay* rule is in direct conflict with NLRA policies that bar employers from retaliating against employees who exercise the right to strike.[4] The *Mackay* rule is particularly problematic because the text of the act, in § 13, states that "[n]othing in the Act, except as *specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish *in any way* the right to strike."[5] Forcing strikers to gamble with job loss due to permanent replacement interferes with, impedes, and diminishes the right to strike. It is hardly surprising, therefore, that the eminent labor law scholar Paul Weiler (2001) has concluded that the *Mackay Radio* rule is "the worst contribution that the Supreme Court has made to the current shape of labor law in this country."[6] Other authorities in the field of private-sector labor relations law "have made the restoration of the right to strike a cornerstone of [their] scholarship. [They] strongly criticize the arguments that judges, legislators, and others have used to justify their degradation of the right to strike."[7]

"Permanent replacement" may be the technical term for the economic weapon that the Court handed to employers in its *Mackay* decision, but as Weiler (2001) says, "[f]rom the employee's perspective, there would seem to be little tangible difference between being discharged for striking or being permanently replaced in one's job."[8] To be clear, according to Gould (1996), "[p]ermanent strike replacement means the loss of jobs for the strikers for the foreseeable future [and] [i]t is difficult to imagine a prospect more likely to dissuade employees from exercising their statutory protected rights than the loss of jobs and the benefits bound up with them."[9]

Because of this risk of permanent replacement, the strike has become a rarity in many industries regulated by the NLRA. As White (2018) has explained, "For most people, strikes are hardly more than historical relics or quaint curiosities" due to "the near extinction of this form of protest."[10] This observation is certainly accurate with respect to major work stoppages in NLRA-regulated industries. For example, in 2021, the US Labor Department reported that there were only eight major work stoppages that began in 2020. This was the third-lowest number of major work stoppages since the Labor Department first began keeping track of such strikes in 1947.[11] For most employees, the strike is seldom a realistic option as a means to secure favorable contract terms because the employers' use of permanent replacements creates such a devastating effect on the workers who strike, as well as on their unions.[12]

Initially, employers seldom used the right of permanent replacement as an economic weapon, although it has been in the employers' arsenal since 1938 when the Court decided *Mackay Radio*. By the mid-1970s, according to White (2018), "the labor movement found itself . . . locked in bitter conflicts [with employers] increasingly over . . . fundamental issues, including the movement's very right to exist in a meaningful way."[13] This emerging, no-holds-barred assault on unions, combined with the Ronald Reagan administration's public willingness in 1981 to fire more than 11,000 striking air traffic controllers, made resistance to unions more fashionable and permanent replacement of strikers less stigmatizing.[14] There is no question that the permanent replacement of strikers occurred in proportionately more strikes beginning in the 1980s.[15]

One should not conclude that the labor relations quiescence brought on by the relative absence of strikes is cause for celebration. Productive, good faith collective bargaining can, and often does, proceed without the strike, but that depends on the credible threat of the strike. As the Supreme Court has recognized, the right to strike is integral to the collective bargaining process.[16] The country is now reaping the economic whirlwind from employers' increased use of permanent striker replacement to crush any realistic option by workers to choose whether to strike in support of bargaining objectives. The resulting relative demise of collective bargaining in the US has resulted in wage stagnation, economic inequality, the collapse of the middle class, and social unrest.[17]

One irony regarding this occurrence is that there is almost never a business justification for permanently replacing economic strikers, and the law does not require that employers demonstrate such a justification. Indeed, hiring temporary striker replacements has proved adequate in other circumstances, such as during an offensive lockout and during an unfair labor practice strike, when only temporary replacements may be hired. But even when permanent replacement is lawful, temporary replacement normally is sufficient to pressure workers to settle a bargaining dispute: the employer maintains operations with temporary replacements and the strikers suffer increasingly from lost wages as the strike continues.[18] This is particularly true, as White (2018) states, "in a context where workers far outnumber decent jobs, where mechanization and automation have steadily eaten away at the centrality of skill, [and] where employers wield overwhelming advantages in wealth and power over workers."[19]

In two cases decided after *Mackay Radio*, the Supreme Court interpreted the NLRA to make the need for permanent replacement even more unnecessary. First, the holding in *Pattern Makers League of North America v. NLRB*[20] permits striking union members to resign from the union at any time during a strike, become "crossovers" who quit the strike and return to work, and remain insulated from union discipline resulting from their decision to abandon the strike. By barring unions from enforcing members' agreements not to break ranks during a strike, the Court in *Pattern Makers* encouraged striking union members to quit the strike and return to work.

In the second case, the Court's ruling actually creates incentives for strikers to break ranks and return to work during a strike. In *TWA, Inc. v Flight Attendants*,[21] the Court held that strikers who made an unconditional offer to return to work at the end of a strike not only may not displace permanent replacements, but also may not insist on exercising their seniority to displace less-senior strikers who crossed the picket line to return to work during the strike. Quitting the strike and returning to work had the effect of providing less-senior workers the ability to retain their jobs following termination of the strike and thereby surmount the seniority rights of more senior workers who did not cross over. The *TWA* decision creates strong incentives for strikers to break ranks during a strike as a way to overcome the seniority system to protect their own jobs.

In sum, the permanent replacement of strikers has set up a one-sided contest in which many employers almost look forward to work stoppages as a weapon that they can use to crush unions. A strike provides employers with the option of permanently replacing strikers, and hiring anti-union permanent striker replacements conveys an object lesson to all the firm's workers that it is senseless to challenge the superior power of the employer. Maintaining solidarity is challenging when, by striking, workers place their jobs and financial fortunes in jeopardy, with only a vague anticipation of getting much in return.

Banning the permanent replacement of strikers reinstates the possibility of resurrecting a right to strike that "entails the ability to put real pressure on employers without the workers unduly sacrificing their jobs or needlessly compromising their material well-being." Workers deserve a right to strike that is "practical, functional, and legally legitimate, and not merely an artifact of rhetoric."[22]

Clarifying the Right to Strike

NLRA § 13 makes clear that nothing in the NLRA, "except as *specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish *in any way* the right to strike.[23] Yet the right to strike needs to be clarified to redress erosions of the protected right to strike that have crept into the NLRA. The approach taken by the Protecting the Right to Organize Act (PRO Act) to address this need for reform is to make clear that the "duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited."[24]

Notwithstanding the broad language of § 13, the right to strike protected by the NLRA is not an absolute right. For example, the courts and the National Labor Relations Board (NLRB) have interpreted Congress's intent in protecting the right to strike in the NLRA as not protecting strikers' defiance of law, either state or federal. Examples are the unprotected status of strikes that violate the NLRA itself, such as unlawful jurisdictional strikes, secondary boycotts, and unlawful recognition picketing.[25] Other examples of unprotected strikes are mass picketing, which blocks ingress and egress; and disregard for state trespass laws when, for example, workers engage in so-called sit-down strikes, in which strikers take possession of an employer's property and refuse to remove themselves during a strike.[26] Proposals for labor law reform rarely propose disturbing these well-established limits on the right to strike.

However, over the years, the NLRB and the courts have only given lip service to the § 13 ban on interpreting the NLRA in ways that will "interfere with or impede or diminish . . . the right to strike." The NLRB and the courts have cast aside § 13 in many cases that have found peaceful and lawful work stoppages unprotected even when they fall short of a total strike; that is, if the strike "blurs the clear-cut boundary between working and [completely] stopping work."[27] Discussed next are examples of such peaceful and lawful concerted activities that have been found to be unprotected.

Disapproval of the Scope of the Strike: Refusals to Perform Specific Assigned Tasks and the Unprotected Status of the Partial Strike

One effective way to secure a favorable outcome during a labor dispute is to bring economic pressure on the employer by refusing to perform specific

tasks[28] or refusing to work at specific times or on specific days (e.g., refusals to work overtime or on weekends).[29] These are described as "partial strikes," and the NLRB and the courts consider these strikes unprotected.[30] Under the current construction of the NLRA, therefore, the protected versus unprotected status of a work stoppage turns on its form. But the courts and the NLRB have "failed to articulate a comprehensive theory that justifies stripping . . . strikes of protection [because they constitute partial strikes]."[31] Accordingly. no coherent line separates protected from unprotected partial strikes.

For example, in *Harnischfeger Corporation*,[32] to determine whether a concerted refusal to work overtime was unprotected, the NLRB applied its "so-indefensible" standard to permit the employer to discharge of the strikers. In that case, the Board held that the refusal to work overtime there was *not* "so indefensible" that the strike was unprotected. The ruling offered no guidance for future cases to determine when such a strike is or is not "indefensible," other than stating that "calling a [total] strike would have occasioned much more serious difficulty" for the employer than the employees simply refusing to work overtime. However, following its decision in *Harnischfeger Corporation*, in its foundational decision in *Elk Lumber Company*,[33] the Board cited with approval *C. G. Conn, Ltd. v. NLRB*,[34] a Seventh Circuit case that categorically held that a refusal to work overtime constitutes unprotected concerted activity. Moreover, in *Elk Lumber*, the Board held that a slowdown constituted an unprotected partial strike, on the theory that the slowdown required the employer to pay workers for work not performed, a rationale that does not apply to concluding that refusals to work overtime are unprotected. The slowdown in *Elk Lumber* also was found to be unprotected because the workers intended to continue working at their own pace rather than at the pace set by the employer, contrary to the NLRA's underlying principle that employees must work at terms prescribed solely by their employer. But such an underlying principle is *ipse dixit* based on undiscussed and unexamined assumptions of employer hegemony over the production process, assumptions that "are not ratified in the NLRA, which, in fact, grants workers a role in setting these and other terms of employment."[35] Moreover, as Atleson (1983) has pointed out, "principles built upon such tenuous bases cannot help causing continued litigation and a series of [additional] unprincipled decisions."[36]

Disapproval of the Duration, Frequency, or Intermittence of the Strike: The Unprotected Status of the Intermittent Strike

An additional example of how the protected versus unprotected status of a work stoppage turns on its form is the current construction of the NLRA holding that the intermittent strike constitutes unprotected concerted activity, thus subjecting such strikers to discharge and other employer discipline. The NLRB uses the term "intermittent strike" to mean repeated short strikes. These strikes are not unlawful; indeed, the Supreme Court has stated that the intermittent strike is an accepted and integral aspect of the collective bargaining process, not an unfair labor practice when deployed as an economic weapon by a union.[37] Further, the intermittent strike is not subject to regulation under state law.[38] Neither can these strikes be criticized because they involve selectively choosing which assigned tasks to complete, nor can they entail objections to workers receiving pay for work not completed according to the terms and pace set by the employer. Yet, in *International Union, U.A.W.A., A.F.L., Local 232 v Wisconsin Employment Relations Board (Briggs-Stratton)*,[39] the Supreme Court stated, in dicta, that a series of short, unannounced strikes constituted "intermittent strikes" that were not protected by the NLRA. Thus, an employer could lawfully discipline employees for engaging in an intermittent strike. This dictum has become a bedrock NLRA principle. However, as with the partial strike, nothing in the NLRA's language supports a finding that the intermittent strike is unprotected. Moreover, the courts and NLRB have provided no principled rationale explaining why a work stoppage that is intermittent rather than continuous is unprotected, other than the Supreme Court, in its *Briggs-Stratton* decision, referencing the NLRB's *Harnischfeger Corporation* case and stating the *ipse dixit* that engaging in short, repeated strikes was "so indefensible" as to permit the employer to discharge the strikers.[40]

This is no way to fashion a labor relations regime. Both employers and employees deserve a greater amount of structure and predictability. Moreover, the absence of principled and workable lines of demarcation between protected and unprotected concerted activity subjects the parties to the unarticulated policy preferences of Board members whose political leanings shift with the political winds. The remedy is to reject the view that it is appropriate to determine the protected status of strikes by applying the *ipse dixit* of whether the form of the strike is deemed "so indefensible" as

to permit the employer to discharge the strikers. This reform objective can be achieved by clarifying § 13 by adding to the NLRA that the "duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited."[41]

Prohibiting Offensive Lockouts

It might initially seem anomalous to add a ban on offensive lockouts by an employer in a chapter devoted to reform proposals that are designed to address current opportunities in the NLRA for employers to limit workers' economic actions. But the offensive lockout is one way that employers are able to take control of employees' choice of whether and when to strike. Under current law, even in the absence of a strike, employers may offensively lock out employees by prohibiting them from returning to the work site, usually following an impasse in bargaining,[42] until their union agrees to a collective bargaining agreement that incorporates the employer's final bargaining offer.[43] This usurps workers' control over the timing and duration of any work stoppage, undercutting workers' bargaining power.

Current law also permits employers to continue operations during an offensive lockout by using supervisors and hiring temporary replacements, and there is no limitation on the duration of an offensive lockout.[44] In its decision in *Inland Trucking Co.*, the Seventh Circuit Court of Appeals explained the injustice of combining the offensive lockout with the employer's ability to hire replacements during the lockout. The court said that the offensive lockout, unlike the defensive lockout, "would not merely pit the employer's ability to withstand a shutdown of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked-out employees were endeavoring to bargain."[45] To these observations should be added the fact that the NLRB has held that an employer may initiate a partial lockout, pitting one group of employees against the other. For example, when a union strikes and the employer hires temporary replacements, and some strikers then quit the strike and become crossovers, the NLRB has ruled that if the union calls off the strike, the employer is permitted

to decline the union's offer to return to work and initiate a partial offensive lockout of those still on strike, while not locking out those who quit the strike and crossed over prior to the lockout.[46] It is easy to understand how this creates a schism among the bargaining unit employees.

To counter the employer's deployment of the offensive lockout as an anti-union tactic, the NLRA should prohibit any lockouts from occurring prior to a strike, while maintaining the employers' right to respond to strikes with defensive lockouts.[47]

Removing Limitations on Secondary Picketing and Strikes

It is time to reverse one of the 1947 Taft-Hartley Act's most dramatic inroads on unions' ability to exercise the basic First Amendment right to publicize a labor dispute in an effort to secure public support and the support of other workers for union objectives during a labor dispute. The NLRA currently prohibits unions from engaging in secondary picketing, strikes, or boycotts, where workers of one company picket, strike, or support a boycott in solidarity with another company's workers to improve wages or conditions of employment. Private-sector labor relations law should permit this form of worker solidarity.[48]

It is worth repeating an observation made more than a quarter-century ago—namely, that "[t]he outcome of [the] economic contest [between workers and employers] is not simply a product of private resources [of each to resist the economic pressure exerted by the other]. It is also deeply influenced by the legal framework that determines what resources the parties start out with."[49] As construed, the NLRA starts the employer out with the right to continue to operate during a strike and to do so with permanent replacements. As discussed here, enlightened labor law reform should reverse that remarkable advantage currently provided to employers by proscribing the employer's use of permanent replacements to continue operations. But eliminating permanent replacements will not in itself level the playing field. Employers may continue operations during a strike with a combination of nonstrikers, crossovers, managerial personnel, and temporary replacements. But the current ban on secondary boycotts precludes strikers and their unions from attempting to interdict those continuing operations by the self-help tactic of appealing to workers at other firms to cease performing services required for the struck employer to continue normal, uninterrupted operations.[50]

Appealing to the public to boycott a struck employer's products and attempting to induce workers at other firms to cease performing services required for the struck employers to continue operations are effective and deeply rooted self-help options that unions deployed well before the advent of the modern, post–World War II, labor relations system. American labor law has not always banned secondary activity.[51] Nineteenth- and early-twentieth-century common law courts, in their zeal to promote market efficiency and "devotion to competition and freedom of contract," manifested hostility toward the activities of unions, in part by perfecting "government by injunction," which they deployed against labor[52] and by condemning secondary boycotts.[53] But secondary activity was never banned in all states. In New York, for example, state law permitted unions to exert pressure up to the point that "the union's . . . direct interests cease."[54] Further, in *United States v. Hutcheson*,[55] the Supreme Court finally held that union secondary activity does not violate federal antitrust laws, so long as labor acts in its own self-interest and does not combine with nonlabor groups. Even after the enactment of the 1947 Taft-Hartley Amendments, federal law did not bar all secondary boycotts and does not do so today.[56] As the Supreme Court has explained, the NLRA does not contain a "sweeping prohibition" of secondary activity; instead, it "describes and condemns specific union conduct directed to specific objectives."[57]

Indeed, it was not until the 1959 Landrum-Griffin amendments to the NLRA that it was unlawful under the NLRA to induce individual workers at other firms to cease performing services required for the struck employer to continue its normal, uninterrupted operations.[58] Even today, unions regulated by the Railway Labor Act (RLA)—unions representing employees of railroads and airlines—are free to advance lawful union objectives by means of secondary boycotts.[59] In practice, the RLA, enacted in 1926, has worked well without the need for a secondary boycott ban. As one observer has noted, "[i]n view of the interests of both parties in avoiding a strike . . . the availability of such self-help measures as secondary picketing may increase the effectiveness of [the RLA] in settling major disputes by creating an incentive for the parties to settle . . . The real oddity in federal labor law . . . is not the lawful status of secondary boycotts in the airline and railroad industries, but the illegality of secondary boycotts in nearly all other industries."[60]

In recent years, labor and constitutional scholars increasingly have made the case that "the secondary boycott prohibition contradicts the

Constitution's otherwise broad right of free speech."[61] For example, Catherine Fisk (2018) has made a convincing case that labor picketing should be accorded full First Amendment free speech recognition:[62]

> The Court and the NLRB have already recognized that most forms of labor advocacy other than picketing to encourage a full consumer and worker boycott are not coercive. Unions may picket to encourage consumers to boycott a product (though not a store that sells the product, and not even the product if a business is heavily dependent on the product). Unions have the right to distribute leaflets and display banners to publicize labor abuses, and to communicate via social media. Civil rights activists, immigrant rights activists, and all groups other than labor unions have the rights to picket and to urge secondary boycotts. While a labor picket line may convey a more forceful message than a labor banner or a civil rights picket line, now that labor unions lack the power to prevent those who cross from getting or keeping a job, [or from being disciplined by a union] a picket line has lost the power to coerce.

The risk of free speech violations in § 8(b)(4) adjudications has surfaced as a central consideration. In December 2021, in a statement of position to the Board on remand from the Ninth Circuit in the case of *Preferred Building Services, Inc.*, the NLRB general counsel advised the Board of the need for it to engage in a more fact-intensive, case-by-case approach to secondary picketing, cautioning it that any wide ban on secondary picketing may violate the First Amendment and arguing that union assembly should be presumed lawful "unless rebutted by clear and convincing evidence to the contrary."[63]

Reforming the NLRA to delete § 8(b)(4) removes from federal law limitations on secondary picketing, strikes, and boycotts, but this leaves unaddressed the effect on state regulation of secondary activity. The issue is whether by defederalizing the regulation of secondary boycotts, Congress would be understood as having intended to leave it to the states to regulate such activity. Or, if Congress defederalized the law of secondary boycotts, would courts find that Congress intended to legalize the secondary boycott nationwide? One possibility is that the federal courts would find that states are preempted from regulating labor secondary activity pursuant to the so-called *Machinists* branch of federal labor preemption doctrine.[64] *Machinists* preemption advances the congressional policy that when Congress chooses not to regulate some conduct, the intent is that such conduct should be left unregulated by *any* governmental body. *Machinist* preemption prohibits state and local regulation that the courts conclude "upset[s] the balance of power between labor and management expressed in our national labor policy"[65] by

"introduc[ing] some standard of properly 'balanced' bargaining power . . . [or defining] what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."[66] It has been argued that given many courts' decades-old propensity to view secondary activity as inherently coercive, *Machinists* preemption theory may be insufficient to block state regulation of secondary activity. Accordingly, congressional silence with respect to the preemptive effect on state law of defederalizing the regulation of secondary boycotts is ill advised. To protect all secondary activity from state regulation, an "effective repeal of the [NLRA's] secondary boycott prohibition [requires a provision] explicitly preempting any states' attempts to [regulate labor secondary activity]."[67] That precaution seems well advised in order to assure that labor secondary activity remains legal nationwide.[68]

Ending Prohibitions on Collective and Class Action Litigation

In 2018, in *Epic Systems Corp. v. Lewis*,[69] the Supreme Court held that, despite the NLRA's commitment to protect employee concerted activity for mutual aid and protection, it is lawful for employers to force workers into signing agreements that waive the right to pursue work-related litigation jointly, collectively, or in a class action. Labor law reform should overturn that decision by explicitly stating that, regardless of the unionized status of the employees involved, employers may not require employees to waive their right to collective and class action litigation.[70]

The NLRA protects employee concerted activity, rather than the activities of individual employees, because only through concerted group actions are employees able to make systemic changes at the workplace—changes that require restructuring employer practices. Collective bargaining is the NLRA's prime vehicle for effecting this restructuring, but only roughly 10 percent of the private-sector workforce in the US currently has access to that tactic. The other American workers depend on private rights of action contained in state and federal protective legislation to effect systemic changes at their places of work. The two best options under federal law for effecting systemic changes at the workplace are collective actions provided by the Fair Labor Standards Act (FLSA)[71] and pattern-or-practice class action suits brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII).[72] Class actions under state civil rights law and protective labor legislation may also provide opportunities for achieving systemic changes at the workplace.

For example, an FLSA collective action might challenge widespread employer misclassification of employees as independent contractors or an employer's failure to pay minimum wage or overtime pay.[73] Prospective injunctive relief is not available to private litigants under the FLSA, but groups of litigants can combine individual claims for monetary relief by bringing a collective action to redress past FLSA violations.[74]

Or employees who have been adversely affected by discriminatory business practices that harm all of an employer's minority employees might form a protest group that organizes mass actions to protest a pattern-or-practice of discrimination at the workplace, and then bring a pattern-or-practice Title VII class action seeking injunctive and monetary relief.[75]

Or women may organize to redress a pattern-or-practice of sexual harassment at the workplace and bring a Title VII sexual harassment class action seeking injunctive and monetary relief.[76] In these collective and class action suits, the employees bringing the actions might be unionized, but most often they are not. They look to the courts to provide the systemic changes that collective bargaining might have provided had unionization been available to them.

A decade of Supreme Court litigation has now provided employers a straightforward way to foil these litigation options to redress the denial of employees' state and federal rights. The simple solution now is for employers to require employees to sign mandatory arbitration agreements that include "class waivers." These arbitration agreements contain two powerful provisions. First, they waive an employee's right to initiate litigation that seeks judicial redress of employer unlawful conduct and require that all redress be sought exclusively through arbitration. Second, the arbitration agreement's "class waiver" provision precludes employees from joining claims in arbitration. This strategy to protect employers from judicial adjudication of systemic workplace violations of employee rights has correctly been summarized as follows: "[W]hen arbitration agreements include class waivers, employees cannot bring group actions via litigation or arbitration. And because Title VII pattern-or-practice claims must be brought as group actions rather than as individual claims, arbitration agreements prevent employees from bringing pattern-or-practice claims altogether."[77]

AT&T Mobility LLC v. Concepcion[78] was a pivotal decision in this area. In that case, the Supreme Court upheld the enforceability of class waivers in arbitration agreements, including contexts where state law rendered the waivers unenforceable. *Concepcion* incentivized employers to add arbitration

agreements in employees' contracts of adhesion as a simple way to eliminate class action litigation. Mandatory arbitration agreements in employee contracts steadily accelerated following the Court's decision. One study concluded that "mandatory arbitration agreements rose from just over 2% [of all workers] in 1992 to around 25% in the early 2000s to over 55% in 2017. . . . Mandatory arbitration is more common in low-wage work and in industries with higher proportions of women and Black workers."[79]

There is evidence, contested by some, that arbitration is a less satisfactory option for employees than judicial relief: with mandatory arbitration, employees bring fewer claims, win less often, and receive lower awards.[80] What is uncontested is that "arbitration makes it impossible for plaintiffs to pursue structural reform via class litigation [depriving law of its ability to] be used to 'structure and reform institutionalized practices.'"[81]

In *Murphy Oil, USA, Inc.*,[82] the NLRB attempted to quell the rising forced waiver of employees' statutory right to seek judicial redress of violations of workplace rights. There, it held that an employer commits an unfair labor practice when requiring employees to sign an arbitration agreement waiving their right to pursue class and collective actions and requiring that they bring all employment-related claims through individual arbitration. The Board reasoned that these mandatory arbitration agreements constitute unlawful interference with employees' § 7 rights because they restrict employees' substantive right, established by § 7 of the act, to join together to improve their working conditions through administrative and judicial forums.

It was this holding that the Supreme Court reversed in *Epic Systems Corp. v. Lewis*.[83] In *Epic Systems*, the Court held that the term "concerted activities" in the NLRA does not include actions by employees to join together in FLSA collective litigation. The majority reasoned that "the term 'other concerted activities' [in § 7] should, like the terms that precede it, serve to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound activities' of class and joint litigation."[84]

The reform needed is to clarify in the NLRA that the scope of § 7's right to engage in concerted activities includes joining together in collective and class action litigation, and it is unlawful for employers to require employees to waive their right to seek redress through collective and class action litigation, without regard to the unionized status of the employees involved.[85] Among other things, this will preserve the option for employees to bring

Title VII class action pattern-or-practice actions to achieve systemic changes in their conditions of employment that root out workplace discrimination.

Insulating Fair Share Agreements from State Regulation

Under the NLRA, the union, as the exclusive bargaining representative of all the employees the union represents, is legally obligated to represent all bargaining unit members equally, without regard to their membership in the union.[86] The NLRA allows unions and employers to agree that employees who are not members of the union, but benefit from a collective bargaining agreement, may be assessed a fair-share fee to support the costs of bargaining and implementing the agreement.[87] As the *NLRB v. General Motors Corp.* ruling states, "The burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. [In other words,] '[m]embership' as a condition of employment is whittled down to its financial core."[88] In addition, in *Communications Workers of America v. Beck*,[89] the Court held that this "financial core" only includes the obligation to support union activities that are germane to collective bargaining, contract administration, and grievance adjustment.[90]

Even with these extensive limitations on NLRA unions' ability to negotiate lawful union security agreements in collective bargaining agreements, § 14(b) of the NLRA permits states to enact laws that prevent unions from requiring this "financial core" membership as a condition for employment. To date, twenty-eight states have done so.[91] State right-to-work laws create a "free rider" problem: they allow workers to join a union if they wish, but they also permit employees to not join the union and yet receive the benefits of a union contract without having to pay their share of the dues and fees needed to finance the union's ability to negotiate and administer collective bargaining agreements. In other words, right-to-work laws shift the costs of providing enhanced workplace benefits from free riders onto the shoulders of coworkers who elect to join the union and pay dues. Advocates of labor law reform have argued that regardless of state laws, unions and employers should be permitted, if they so choose, to voluntarily agree to require payment of fair-share fees to cover the costs of collective bargaining and contract administration.[92]

Fulfilling the Pledge

Securing Industrial Democracy for American Workers in a Digital Economy

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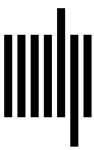

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