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# STRATEGY FOR LABOR REVISITED

SAMUEL ESTREICHER<sup>†</sup>

[EDITOR'S NOTE: What follows is an unofficial transcript of an off-the-record conversation among three of the labor movement's leading strategists. The meeting was convened by C, or "cooperationist," who had been for over ten years the president of a local union, part of a major industrial union, representing 3,000 employees who had been hired to staff a new manufacturing plant in a Southern town ("Newplant"). Newplant had been widely touted as a breakthrough in U.S. labor-management relations because it was consciously designed to promote greater participation of production and maintenance workers in business decisions. In bitterly contested local elections last year, C was voted out of office and now serves in a staff capacity at the AFL-CIO. A, or "adversarialist," a longstanding friend of C, is the research director of another industrial union. A was very active in the Students for A Democratic Society in the 1960s, and after graduating from Antioch College, began his career as a labor organizer, working for a succession of unions that had been active in the McGovern-Kucinich wing of the Democratic Party. S, or "stay the course," is the highly respected chief of staff for a national union representing government workers. Section headings and citations are supplied by the editor and do not appear in the original transcript.]

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## I. SETTING THE STAGE

C: We are discussing tonight what if anything could or be should be done about the decline of unions in private companies. We now represent less than eight percent of private workers;<sup>1</sup> and we have not yet hit bottom. This has to change if we are going to speak for all working people, to be a social movement in the true sense and not just another interest group.

I know we all agree there is a problem, although I suspect we are not going to agree on solutions. It might be useful, at the outset, if we stated our initial positions on how we view the problem and where we think the solution(s) might be.

Let me start.

We've just spent a king's ransom on reelecting Obama and stymieing the Republican-Tea Party assault, not to mention tens of thousands of hours of manpower simply getting out the vote. For the first two years of the first Obama administration, we had a Democratic Congress and President; only the Senate and the White House for the last two years, where we now stand for another four. Last time around, we pushed hard to pass into law the Employee Free Choice Act<sup>2</sup>—to get bargaining authority on the basis of card-checks and a first-time contract through arbitration—and these Democrats even though they had sixty votes could not break a threatened filibuster or even force a real debate on the floor. This has happened before. We broke the bank electing Clinton and a Democratic Congress in 1992 and what did we end up with—a study commission and the FMLA! At the end of the day, what is a Democratic administration likely to do? We will never get the changes—card-check certification, repeal of the secondary-boycott and hot-cargo prohibitions, and outlawing of permanent replacements of economic strikers—that might really make a difference.

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<sup>1</sup> See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary* (Jan. 27, 2012), [www.bls.gov/news.release/union2.nr0.htm](http://www.bls.gov/news.release/union2.nr0.htm).

<sup>2</sup> See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 2-4 (2009) (discussing proposed Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007)).

Even if magic occurred, and we could get a Canadian-style package over the hump of a likely filibuster, even this kind of labor law reform cannot reverse our decline in private companies. The Canadian unions have secured into law the AFL-CIO wish list, and their unionization rate in private companies keeps dropping.<sup>3</sup> Sure, we can slow it down with better laws, but we cannot reverse the trend without a change in what we do, in what we are about.

We need to go back to basics. Over the course of our history, labor has been viewed by employers and much of the larger society as a net cost-adding institution. We produce value for our members—giving them a voice, providing integrity to an inside-the-firm grievance procedure, establishing portable benefits, and so on. Sometimes we prod managers to improve productivity as a means of paying for wage and hour improvements. But on balance the value we provide to employees and the firm is outweighed by the costs we add through our traditional insistence on industry wages and job controls. Sam Gompers understood this well, and in what we might call “Gompers 101” insisted that it is labor’s job to impose the standards set in the union sector on nonorganized firms in the same industry, “to take wages out of competition” by organizing all product market competitors.

We were able to achieve this objective for several decades, at a time when Americans enjoyed a huge domestic market, global competition was rare, and our companies in many industries enjoyed a nearly oligopolistic position. The Auto Workers, once they organized the three major U.S. producers, in effect organized the entire product market. The Big Three would fight us on better wages and benefits, but they all knew that, in the

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<sup>3</sup> In 2004, the unionization rate in the Canadian “commercial sector” (which excludes public services but includes quasi-governmental Crown corporations and the publicly financed healthcare industry) hovered around 20%, where it had been 29.8% in 1981. See René Morissette et al., *Diverging Trends in Unionization*, PERSP. ON LAB. & INCOME, Apr. 2005, at 5, 6, available at [www.statcan.gc.ca/pub/75-001-x/75-001-x2005104-eng.pdf](http://www.statcan.gc.ca/pub/75-001-x/75-001-x2005104-eng.pdf). In the first half of 2009, the private-sector unionization rate in Canada dropped to 16.1%. See *Unionization*, PERSP. ON LAB. & INCOME, Aug. 2009, at 27, 27, available at <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2009108-eng.pdf>.

end, they would face no competitive disadvantage in agreeing to our terms, because we could credibly promise that the very same terms would be imposed on all competitors.<sup>4</sup>

Those days are gone. Product and labor markets are now global. Achieving Gompers 101—enormously difficult even in the earlier period—is now virtually impossible.<sup>5</sup> And I do not believe that labor-linked trade rules can significantly change this, for we will never be able to impose U.S. labor standards on most producers in the developing world. The “cat is out of the barn”; we allowed U.S. industry to farm out production to China and its neighbors, and that ain’t coming back. Perhaps we can impose occupational safety rules and get these countries to enforce their own laws against child labor, but we will never be able to impose our wage and other economic standards.

In the public sector, we have enjoyed considerable gains, and now represent well over a third of all government workers.<sup>6</sup> But government managers are also, for all practical purposes, oligopolists. Sure, there are limits on how far they can go in acceding to union demands, but there is little danger of negotiating ourselves out of existence. Most government services are either natural monopolies, like police, fire, and highways, or are sheltered from any effective product market competition because they will continue to be financed from taxes even in the face of widespread dissatisfaction, as in the case of public schools in some cities.

Some Republican opportunists will try to turn public opinion against government labor, but in Wisconsin we forced them to relearn the political power of organized labor.

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<sup>4</sup> See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 12 (1993).

<sup>5</sup> See Samuel Estreicher, “*Think Global, Act Local*”: *Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81 (2009).

<sup>6</sup> U.S. public-sector workers have a union membership rate (37.4%) that is over five times that of private-sector employees (7.2%) and account for half of total union membership, even though government work is only one-fifth the size of the private workforce. See News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, *Union Members—2009* (Jan. 22, 2010), [http://www.bls.gov/news.release/archives/union2\\_01222010.pdf](http://www.bls.gov/news.release/archives/union2_01222010.pdf). In 2010, total U.S. union membership declined by 612,000 and the union membership rate fell to 11.9 % from 12.3% the year before. See Economic News Release, *supra* note 1.

We also need to relearn—to remember the lessons of Gompers 101. How can we continue to pursue wage and other economic policies that benefit our membership while at the same time figuring out ways of reducing the costs of union representation for employers? That, in my view, is the challenge, and I hope our discussion today will point out some practical approaches.

A: We're old friends, and I respect you despite your consistent wrongheadedness. Labor is never going to get anywhere trying to make itself user-friendly to employers. I am no longer a Marxist, but the essential Marxian insight still obtains: The interests of workers are fundamentally adverse to those of employers, because labor's gains are purchased at the shareholders' expense. Gompers 101 was about imposing costs on the nonunion sector, not reducing costs for unionized firms. The essential adversity of interest may have been muted in the old days, in certain industries, for some of the reasons you give. But no longer. Today, employers are not committed to their workers, and are even less committed to their communities. They are singlemindedly committed to their executives and shareholders.

Labor is a variable cost; from a human rights perspective it should be considered a fixed cost. The employer's focus is on reducing its dependence on that cost item, by outsourcing, where feasible, and if that can't be done, by reducing the level of that cost. From the employees' standpoint, however, their jobs represent an immobile investment, as people are rooted in their homes, their communities. It is because of that essential disparity in leverage—firms can desert workers, but workers (in most situations) cannot easily desert their employers—that workers cannot fend on their own, unless they have highly mobile skills that increase in value with time. Most of our members, and those whom we can plausibly recruit to become members, are folks without mobile skills, and whatever skills they bring to the job get eroded over time.

If labor is going to improve its situation, it has to craft strategies that flow from this fundamental premise. We are representatives of the dispossessed, and we need to make ourselves relevant to the dispossessed.

I agree with you, C, that the usual labor politics is not going to get us anywhere. The Wagner Act never would have occurred were it not for the social revolution in the mills and offices, the imminent explosion in the streets that FDR headed off with the NLRA and other New Deal legislation.<sup>7</sup> We will never get the right labor law until we become a mass movement again, until we make clear to the powers that be that our voice cannot be silenced.<sup>8</sup>

To become a movement again, we have to organize outside of the NLRA framework. Take the SEIU's "Justice for Janitors" program. The union's pressure is directed at the users of janitorial labor, the high-rise office buildings, not the ostensible employers—the cleaning contractors, the thinly capitalized operations that do the owners' bidding. The owners call the shots, and they should feel the pressure. We can do a good deal lawfully, through corporate campaigns, community pressure, and the like—until owners find it in their interests to use only union contractors. If this can be done for janitors, who have little skills and can be easily replaced, this can be done for a good many American workers who have somewhat more mobile skills and are not so easily replaced.

Sure, we cannot legislate foreign competition out of existence. But we can make it more difficult for firms presently under union contract to outsource work. Where we have leverage, we can insist on "neutrality" agreements up and down the supply and vending chain. Labor-linked trade rules are about slowing down outsourcing abroad, making it more expensive. We have a natural alliance here with environmentalists and students. To borrow from Che: One, two, many Seattles!

S: It's great to have this far-ranging discussion. But I think both of you make too much of our declining unionization rate in private firms. That statistic way overstates the potential unionization that is possible under current law. It includes people like supervisors and managers who do not have the right

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<sup>7</sup> See generally IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–1941* (1969); IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1975).

<sup>8</sup> See JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 1, 325 (2010).

to organize, and highly compensated, highly mobile professionals who never will seek collective representation. If you look at folks we are capable of organizing (what I would call “achievable union density”), we are doing a pretty good job. We can do and are doing better. We have now been able for the first time in living memory to increase the absolute number of private workers under union contract.

It is a mistake to measure our success solely in terms of the unionization rate. It may not be “Gompers 101,” but it is at least “Gompers 102,” that organized labor shouldn’t try to be a mass movement. We are the leading force among working people, raising standards for competition among all workers as we seek to improve the private interests of our members. We are also the leading force for a civil society. We have been and can continue to be the most effective organization in the country for advancing and protecting workers’, indeed all Americans’, rights, even if we represent only a small fraction of overall workforce through collective bargaining. No piece of progressive social legislation has passed in the last seventy years at least without our political leadership; no agency regulation worth the effort is promulgated without our expert assistance and insistence. Sure we want more density, but not if it means fundamentally altering either our objectives or mode of operation.

## II. TRADE AND EMPLOYEE INVOLVEMENT

C: I think we’ve done a good job in setting out our basic differences. Let’s see if we can narrow them somewhat if we proceed issue-by-issue.

Let’s take trade. Even our standard-bearers from Clinton to Obama carry the torch for free trade; and they are not reluctant conscripts. The Democrats do not want to appear anti-consumer and they are also funded by corporations; our political allies are never going to pursue the kind of aggressive program that we need. If we get anything, it will be some kind of papering over of the dispute, some sort of mechanism for raising issues, as in the labor side-letter to NAFTA or the labor clause in CAFTA. In the end, the trade barriers will come down further; U.S.-based manufacturing will still have to compete with non-U.S. firms—and increasingly, with nominally U.S. and European companies



using contractors in China—who will be able, with increasing ease, to produce competitive goods at markedly lower labor costs and import them here free of tariffs.

What we can do is help U.S. manufacturers compete for that segment of the market where our employers still have a comparative advantage because of the combination of U.S.-educated workers, U.S. infrastructure, and high-end products.

How can we help them compete? We need to be smart about what we are about. We have to drop the old concerns: We're not about job classifications, penalizing work out of classification, grieving over supervisors, and techs doing bargaining-unit work. We are (or should be) about being agents of employee voice—improving communication between managers and employees, making sure workplace norms are fairly developed and fairly applied, providing the organizational memory and representational skills that give integrity to the grievance procedure, instilling trust in the negotiated incentive compensation plan, and reducing the costs of employment disputes.

U.S. (or foreign) firms are not going to commit new capital to U.S. plants unless they can be assured of a competitive return on their investments. They have to reach a certain comfort level that U.S. plants will in fact be more productive, that a U.S. workforce brings something special to the table that cannot be found in Mexico, India, or China, because U.S. workers are highly educated and committed to organizational goals.

We all know of many unionized industrial plants in the Midwest that are dead from the waist up, plants that hardly have any remaining salvage value. No new capital has come into these plants in decades, or ever will. That should be no surprise if you spend a day on the shopfloor with those demoralized workers. The unions have been complicit here because over the years they have made it hard to fire the troublemakers, the slackers. Their focus, like management's, has been on the endgame: How much can we squeeze out of the sunk, non-portable assets in these plants?

A: I disagree vehemently. It is not our job to manage or co-manage. That is management's job. Our job is to represent those folks who have no chance ever to reach management's ranks. They are the other, the hourlies, the nonexempt, the implementers, the "touch" workers, the front-line workers, the

rank and file. We have to protect their jobs and salaries, if we are to be a trade union in any meaningful sense, in any sense that can galvanize people to take the risks involved in collective representation and struggle.

Of course, there are places, especially where new facilities are being constructed with entirely new work forces, where some flexibility is possible. However, we have to draw the line at any programs that compromise seniority, allow standard-less merit pay, or enlist the union as a partner in the management function. This is about core commitments, not ideological squeamishness. If we blur the lines and start taking responsibility for production and discipline, our members will not understand where we are coming from; they will see us as “being in bed with the boss,” and rightly so. Over the long run, we will have trouble balancing these conflicting roles, and in the process will compromise ourselves.

This brings us to trade. We can't stop progress, but we can stop exploitation. We have a minimum wage, overtime laws, and occupational safety and health and civil rights laws. These laws reflect the judgment of our elected representatives that work cannot be performed in this country except in conformity with these rules. We have to insist that these standards reflect the minimum conditions of industrial decency under which U.S. workers should have to compete with workers anywhere else in the world. We don't allow South Carolina to undermine the federal minimum wage simply because that state believes it would be better off if it could attract new plants by paying wages below the federal standard. Why allow China, Indonesia, or the Philippines a competitive advantage that we disallow our own states on grounds of industrial decency?

I am not some besotted idealist. I know that we cannot be too rigid here because we want to promote U.S. exports, but these rules of industrial decency should be our starting point for trade negotiations. Today, they are simply swept aside in the interest of promoting “free trade.” But trade is no more free than labor is “free” if competition occurs without rules of the game, without rules of decent competition. We need rules of fair trade, not free trade.

International trade is about transaction costs. We have more trade today because certain costs—transportation, communication—have been reduced as a result of technological

improvement. To slow down the erosive effect of trade on U.S. labor standards, we have to increase other costs. Through political pressure, "local content" legislation, collective bargaining over outsourcing, and pressure of the sort represented by Seattle, we have to make it more expensive for U.S. employers to site work outside of the U.S.

S: To a large extent, I agree with both of you. We don't have to choose. We can make clear to U.S. employers that we are open to new approaches. The Board has opened the door to pre-recognition discussion of terms; and we should take advantage of this opening.<sup>9</sup> We are not against employee involvement, team-based systems, and the like if they are freely negotiated with independent labor organizations.

Without inconsistency, we can continue to fight measures that lower trade barriers that do not take account of labor standards. We didn't want NAFTA, and we would be better off without it, but the labor side-letter has had a beneficial effect. It has helped make the Mexican system more transparent, and we are seeing the beginnings of an independent trade union movement there. We might also consider establishing U.S. affiliates in Mexico to further spur these developments. I note also that recent free trade agreements contain labor-linked standards of the sort we wanted in NAFTA.

### III. CONTINGENT WORK

C: Maybe it's overstated, maybe it isn't, but there is certainly a basis for fearing a fundamental change in the U.S. labor market. In many places, workers do not have career employment. Increasingly, they are hired on a "project only" basis. Even if the "project" lasts for a long time, they are not employees of the user employer but employees of a referral agency or are deemed independent contractors. Traditional union organizing and traditional union objectives assume a steady employer and a permanent work force interested in things like seniority protection and defined benefit pension plans.

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<sup>9</sup> See *Dana Corp.*, 356 N.L.R.B. 49, 8 (2010).

Contingent workers cannot be readily organized on an industrial basis. Sure, rulings like *Sturgis*<sup>10</sup> help, and we need to get it restored into law, but in most cases the temporary workers will not agree to be in a unit with the user employer's work force because they do not share sufficient commonality of interest with them. In some cases, *Sturgis* may, paradoxically, make it harder to organize the user employer's work force.

If contingent workers are to be organized in decent numbers, we have to renovate the craft-union model. (I never thought those words would come from the lips of an old industrial unionist like me.) We need to provide industry-based or career-based organizations. We've done this in the construction and entertainment industries, and we need to do it in the temporary help industry.

What labor's experience in the construction and entertainment industries suggests is that we have to figure out ways we can provide valuable services for temporary workers, and ways we can provide benefits to unionized firms that at least offset the costs that union wages, benefits, and grievance procedures often entail.

Consider some possibilities. The construction-trades model points to union-provided training services so that people can rapidly move beyond the entry level; and a referral system that does a better job than manpower companies in maintaining a roster of qualified, motivated workers. The entertainment-union model points to career-building services and an information clearinghouse informing temporary workers of better opportunities elsewhere. Both models also suggest union provision of portable pension and health insurance.

Can this be done without the law's help? A relaxation of the pre-hire contract ban would help, as would a change in the "hot cargo" clause prohibition allowing us to reach agreements with user employers that deal only with those temporary-help agencies that recognize career-based unions. We are not likely to

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<sup>10</sup> See *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *overruled by H.S. Care L.L.C.*, 343 N.L.R.B. 659, 659 (2004).

get such legislation in the near future, and have to do what we can on our own. Maybe this is Gompers 103: voluntarism, doing this on our own, without counting on the state to bail us out.<sup>11</sup>

A: I agree with almost everything you said, but I have a difference in emphasis. Where we should focus our efforts is in raising the costs of using temporary help, and this can only be done by making life as difficult as possible for employers who use the services of temporary-help agencies. One path is to use our leverage over the user employers with whom we have contracts in order to establish terms under which outsourcing can occur, and at the very least to require neutrality agreements from companies doing the outsourcing. Another complementary path is to use *Sturgis* to organize temporary workers in units that also include the user employer's people. There is a community of interest: The latter want the higher wages and benefit improvements that a union contract can bring; the former want steady employment with union-scale benefits.

S: A very helpful discussion. It seems we need legislation to establish an §8(f)-type provision<sup>12</sup> for other industries that, like construction, hire people for short-term, project-only assignments. It is doubtful that any time soon, we can get repeal of Taft-Hartley's secondary-boycott prohibition,<sup>13</sup> but it would seem that we might be able to get some improvement in the hot-cargo prohibition, to the effect that unions should be able to enter into agreements with user employers governing the terms under which they will use the services of temporary-help or labor-supply companies.<sup>14</sup>

#### IV. CARD-CHECK CERTIFICATION

A: I want to change the terms of our discussion. Even though EFCA was stalled the last time around, the top priority item for the labor movement remains getting card-check certification into law. The issue of whether to have a collective bargaining agent and who that agent should be is a matter

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<sup>11</sup> See Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 417 (2010).

<sup>12</sup> 29 U.S.C. § 158(f) (2006).

<sup>13</sup> *Id.* § 158(b)(4).

<sup>14</sup> See Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829 (1996).

strictly between the worker and that organization. The employer has no proper role to play in this process. We don't allow third parties to decide who your lawyer will be if you want to bring a divorce proceeding or buy a house. The employer is no different. He is a third party who has no proper role to play in the workers' decision whether to bring in a union.

Giving the employer a role in representation elections, as the law currently allows, is to give the employer an opportunity to scare workers away from collective representation, through veiled and actual threats and well-timed discharges of union supporters. In essence, the workers have to surmount not only the obstacle of agreeing among themselves to have a collective agent, they then have to withstand the employer's lawful and unlawful campaign. It is no surprise we win only fifty percent of NLRB elections (even though we normally wait for card signatures from seventy percent or more of the work force before filing a petition). What is surprising is that American workers have the courage to select a union half of the time.

The law should adopt the model of the Canadian system: certification of a labor organization upon presentation of petitions signed by, say, sixty percent or more of the work force. No election is necessary. If the workers ultimately find the organization unresponsive, they can decertify or, more likely, withhold their support from a strike. A union that cannot galvanize its members will have no effective authority; it will disappear from the scene.

We should make clear to our allies in Congress that this is still the "red line" for us. We need to pressure them to agree that no legislation of any kind sought by Republicans that is not absolutely essential to the workings of the government, passes without a law giving effect to the unkept promise of the Wagner Act: the right of self-organization—self-organization, that is, not employer-approved organization, not organization requiring herculean effort and courage.

C: There is a lot in what you say. It is exceedingly difficult to organize in the ways you suggest, but also difficult to remove a representative. The system is really one of "hard in, hard out"—

hard to get in a union representative, and hard to remove him. You urge in its place a regime of “easy in, hard out,” as in Canada.<sup>15</sup>

I favor the “easy in” idea but have some reservations about the “hard out” feature. I agree that employers have no right in terms of any property or First Amendment right to participate in elections, but they have a role to play because they provide information workers should have. They point out the down-side of unionization and the down-side of the particular organization seeking bargaining authority. Admittedly, the informational role that employers play is problematic because they are likely to overstate—or misstate—the negative, even where they do not engage in outright threats. But in the absence of some other source of information, it should trouble us that we are asking workers to make a decision that effectively could lock them in for some time, until they can mount the kind of collective action effort necessary to file a decertification petition. It is not always true that an unresponsive union is voted out or walks away; often such a union finds a way to make peace with the employer to the detriment of the represented employees.

In place of the “easy in, hard out” approach, I propose “easy in, easy out.”<sup>16</sup> We can worry less about how informed employees are when voting on union representation if we improve the exit option. In lieu of the current rules that only a labor lawyer could love (periods of election/certification bar, periods of virtually irrebuttable and rebuttable presumptions, narrow thirty-day window period before new contract kicks in with another three-year contract bar, and thirty percent showing of interest)<sup>17</sup> the law should provide for automatic reauthorization elections without any showing of interest, say, once every two or three years. In these elections, the employees now armed with some information about the actual contract the labor organization has

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<sup>15</sup> See generally Micah Berul, *Revitalizing American Labor through Canadian-Style Certification Reform: Is It in the Cards?*, in GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21st CENTURY 939 (Samuel Estreicher ed., 2000).

<sup>16</sup> See generally Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247 (2000).

<sup>17</sup> See Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal To Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 652–53, 692–93, 696 n.270 (2006).

negotiated and the quality of contract administration it provides, will be able in secret ballot to decide whether they wish to reauthorize the bargaining agent.

We can also facilitate rival bids on the theory that the best way to ensure effective representational services is to create a competitive marketplace. Rival organizations might appear on the reauthorization ballot on, say, a ten percent showing of interest. Election dates could be required to be posted on the Internet so that interested organizations can keep abreast of raiding opportunities.

An “easy in, easy out” regime also facilitates a change in the law with respect to pre-hire agreements. We can worry less about whether a labor organization represents a majority preference at the time of recognition, if the employees will have a low-cost opportunity to vote in secret on the organization’s continued bargaining authority.

A: You may be on to something, but a major problem I see is that employers hell-bent on frustrating the wishes of their employees will dally in bargaining, unwilling to agree even to a bare-bones contract, simply letting the two- or three-year clock run—at which point inevitable employee frustration will express itself in a vote to de-authorize. I don’t see how “easy in, easy out” can work without providing for first-contract interest arbitration at least where employers do not bargain in good faith. That is the Canadian model; it is not automatic interest arbitration, as EFCA would have provided.<sup>18</sup>

C: You raise a significant concern, and we certainly know that under current law employers continue their opposition campaign even after certification by not agreeing to a first contract. Remember, however, that we are providing for “easy in.” An employer who plays games of the type you mention not only risks alienating his own work force, and in the process impelling a work stoppage, but also risks re-organization by other labor organizations. Such an employer will have to think long and hard whether the benefits of obstructionism really outweigh these risks.

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<sup>18</sup> See Roy L. Heenan, *Issues for the Dunlop Commission: The Canadian Experience*, *Contemporary Issues in Labor and Employment Law: Proceedings of New York University’s 47th Annual National Conference on Labor* 351-84 (Bruno Stein ed., 1995).



S: I am essentially in a “listen mode”: This is an interesting idea, but I do not see how, especially in light of the EFCA experience, even if the Democrats one day again control both houses of Congress and the White House, we can get this past a filibuster in the Senate.

## V. EMPLOYMENT DISPUTES

C: I am glad you raised the issue of political agency. This brings me back to Gompers 101. We cannot hope to get any of the labor law changes we are seeking unless we can essentially form an alliance with some significant segment of employers. Employers, on the whole, see no need for labor law reform; they're pretty much happy with a status quo that spells further decline in unionism. So any alliance based on compromising some labor law issue—say, reform of 8(a)(2)—is not likely to provide enough “quo” for the “quid” we are seeking.

What employers do want is some change in the litigation system for resolving employment discrimination and other employment claims. It seems to me that there is some basis for a grand alliance here. If we are prepared to support a change from a system based on using the courts to one based on using inside-the-firm grievance and arbitration systems for resolving such disputes, we have something to offer that employers might find is worth the price of a more union-friendly labor law, say, of the “easy in, easy out” form.

Many employers now are doing this on their own. What we can offer is legal legitimacy through legislation approving of pre-dispute grievance arbitration programs for all employment disputes, while still permitting administrative agencies to go to court to challenge systemic wrongdoing.

What we also can provide is practical legitimacy for such programs, because union representation provides the benefits of expert advocates, institutional memory, and repeat player advantages—benefits that private lawyers often cannot provide, and certainly cannot provide at comparable cost.<sup>19</sup> The Court's decision in *Pyett*<sup>20</sup> also opens a door here.

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<sup>19</sup> See Samuel Estreicher, *Beyond Cadillacs and Rickshaws: Towards a Culture of Citizen Service*, 1 N.Y.U. J. L. & BUS. 323, 325–26 (2005).

<sup>20</sup> 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

A: Intriguing stuff. I have often thought that you missed your calling, and perhaps should have gone into academics. First, you want us to cozy up to employers. Now, we are to sell civil rights down the river.

We are a movement of the forgotten. We are a social movement of the dispossessed. In the happily now-distant past, we had a lousy record in some areas on civil rights. One of the proudest moments for the labor movement was its decisive support of the Civil Rights Act of 1964, even though that law created real problems for our construction unions and in many of our southern plants.<sup>21</sup> I do not see how we can make this sort of deal with the devil without losing our institutional soul and our credibility with members and those whom we wish to recruit in the future.

C: Yes, some people lose under the proposal I have outlined: those who have high-value claims and can command the attention of high-priced trial lawyers. Those folks will still have a claim, but they lose the opportunity to win big in the jury lottery. The folks who gain are the average claimants, the folks who do not make enough to attract the plaintiff bar and who cannot afford an hourly fee that most competent lawyers nowadays require to initiate their services. Today, we have a litigation system for employment disputes that offers a Cadillac for the few, but a rickshaw for the many. In its place, we can offer a Ford for all, and, in the process, secure a rejuvenated labor movement for workers in private companies.<sup>22</sup>

S: I like the insistence on U.S.-made automobiles. And I also find C's ideas worthy of consideration. I don't see how we can even raise this stuff openly, and how we can survive the barrage of criticism we are likely to encounter from our colleagues in the civil rights community and plaintiff's bar.

Let's continue the conversation over some stiff drinks.

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<sup>21</sup> See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972* (1990).

<sup>22</sup> See generally Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW* (Michael L. Wachter & Cynthia L. Estlund eds., forthcoming 2013).