

Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law

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INTRODUCTION

Trade and technology have always dictated the nature of the employment relationship, and accordingly the issues that are important in labor and employment law. After World War II, advances in our understanding of the uses and hazards of chemical compounds led to their greater use in the workplace, and their regulation under the Occupational Safety and Health Act of 1970 ("OSHA").¹ Prior to that, the development of assembly-line technology at the beginning of this century gave rise to large plant industrial corporations and the industrial union organizing strategy. Mechanization during the end of the nineteenth century resulted in a dramatic increase in the frequency and severity of industrial accidents and accordingly resulted in the workers' compensation movement. Improvements in communications and transportation during the nineteenth century produced a national economy that necessitated a national labor policy. Indeed, it was the methods of mass production and accompanying expansion of trade that developed during the industrial revolution that gave birth to a class of employees with interests distinct from those of their employers and so gave rise to the modern employment relationship.²

At this time, on the eve of the twenty-first century, the employment relationship is once again undergoing a profound change as a result of changes in trade and technology. The rise of the global economy and recent developments in information and computer technology have resulted in changes in firm structure and managerial techniques that have undermined long-term employment relationships and brought the market into the firm in ways that have not previously been experienced.³ Continental

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1. 29 U.S.C. §§ 651-678 (1994 & Supp. IV 1998).

2. See ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 9-10 (11th ed. 1991); HAROLD W. DAVEY ET AL., *CONTEMPORARY COLLECTIVE BARGAINING* 16 (4th ed. 1982).

3. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 1 (1999).

and intercontinental free-trade agreements⁴ combine with improvements in transportation and communications to place American workers in competition with workers across the world, both to attract new capital investments and employers and to sell the fruits of their labors.⁵ These same changes have both made possible and required a new flexibility in firm production methods that allows the out-sourcing of many jobs and the compartmentalization of production.⁶ This vertical disintegration of firms, combined with new managerial techniques such as benchmarking, profit centers, and core competencies expose every aspect of a firm and every employee to market pressure.⁷ As a result, the American workplace is undergoing a transformation from a place that was dominated by internal labor markets with corporate administrative rules and expectations of long-term employment to one which is governed by an international spot market for labor with no rules or expectations except payment for product and the prospect of constant change.

This change from being a country that was dominated by internal labor markets with corporate administrative rules and expectations of long-term employment to one which is governed by an international spot market for labor raises a host of issues for our national labor policies and labor and employment law. How do we construct a legal infrastructure that can govern the employment relationship, an inherently complex and contestable relationship, after the recession of corporate administrative rules and long-term employment? In particular, how do we enforce contracts for employment that adequately allow employers to protect corporate secrets and recoup training costs without unduly infringing on employee initiative and freedom of mobility? In an economy that involves more frequent turnover and rearrangement of employees and payment for product, how do we allow employers to report and assess potential employees' skills and monitor their productivity, while still adequately protecting employees from defamation and needless infringements on their privacy? How do we ensure that employees obtain adequate training to maintain their productivity and standard of living in an economy in which employment relationships are more serial and short-term and in which employer efforts at on-the-job training likely just benefit another employer? Moreover, in a labor market in which employees may have numerous employers over the course of their work life, how do we provide employees with the semblance of a career, complete with promotions and benefits comparable to those that were provided in the more long-term employment relationships of the internal labor market? The increased competitiveness and turnover of the labor market have only increased obstacles to employee collective action and negotiation with their employers. How do we insure adequate opportunities for employee expression of a collective voice in this new environment? Finally, the globalization of the economy undermines nations' ability to undertake even efficient regulation that might put their employers at a competitive disadvantage.

4. *E.g.*, North American Free Trade Agreement, Dec. 17, 1992, pmbi., 32 I.L.M. 289, 297 (1993) [hereinafter NAFTA].

5. Frances Lee Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 405 (1998).

6. *See* STEPHEN A. HERZENBERGET AL., *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* 108-10 (1998).

7. CAPPELLI, *supra* note 3, at 5.

How do we maintain democratic values and the rule of law in a country whose economy dances to the tune of a global economy?

By understanding the shift in the paradigmatic employment relationship that has occurred in this new age of trade and technology, we can understand why these issues have come to the forefront of labor and employment law and perhaps also develop new and appropriate ways to address these issues under the new paradigm.

I. ECONOMIC ANALYSIS OF THE EMPLOYMENT RELATIONSHIP

Before presenting my full argument, it will be useful to present a brief summary of some of the economic analyses of the employment relationship. How might the parties structure the purchase and sale of labor? What might be the advantages and disadvantages of structuring the employment relationship in various ways? In examining these questions I will discuss the paradigm of a "spot market" for labor and the paradigm of an "internal labor market" that I will use in my later analysis.

A. A Spot Market for Labor

One way to structure the employment relationship is to treat labor like any other commodity.⁸ Just as the employer might enter the market on a given day to purchase the quality and quantity of steel he needs for a given job, so too he might purchase the hours of labor he needs for a job from people with the appropriate skills. In such a case the employment relationship would be a fairly cursory relationship, perhaps lasting only a few hours. Workers would be paid only for their product on a given day, and might work for the same employer the next day, or perhaps for a different employer. All transactions would be on a monetary basis, leaving the employee on his own to purchase any health or retirement benefits. The hourly wage for a given type of labor might vary on a daily basis depending on how many workers of a given skill showed up at the market that day and how many hours of that skill employers wanted to employ on that day. Such a market, in which the employer purchases only the needed hours of labor on a short-term or daily basis is called a "spot market" for labor.⁹

There are several advantages, at least for employers, in such a system. For the employer, a spot market presents a very efficient, low cost, and flexible way to construct the employment relationship—if it can be managed. The employer purchases only the types and quantities of labor he needs and, beyond the initial assessment of employee skills and monitoring their work, needs no costly administrative staff to handle employee benefits or relations. Moreover, should the type or quantity of labor the employer needs change tomorrow, the employer can merely employ different employees with different skills or purchase a different amount of labor the next day. All of the risk that an employee's skills will lose their

8. The model presented here is a stylized model. Even the purchase of many commodities cannot be conducted in such a simple fashion. Some commodities are specialized and have to be ordered ahead of time. Others display discontinuities in their consumption, for example, a foundry of some minimal scale.

9. GEORGE J. BORJAS, *LABOR ECONOMICS* 401 (1996).

marketability due to demand deficiency or obsolescence lies squarely on the employee. Employees too might find benefits in this system, if their skills are in great demand or they have strong individual preferences about the health or retirement benefits they purchase. However, given the relative risk adversity of most employees and the relative inconsequence of getting to choose an individualized set of health and pension benefits, it seems unlikely most employees would highly value their potential benefits under such a system.

In real life, the problem of purchasing labor is usually much more complicated than the purchase of an ordinary commodity and several problems would predictably develop under such a transitory employment relationship. First, there is the employer's problem of adequately assessing employees' skills and monitoring their productivity. In such a transient labor market, employees would have incentives to exaggerate their skills and in many situations, such as a shift manager or assembly-line worker, individual productivity would be hard to assess.¹⁰ Absent adequate monitoring, payment for product, especially in such short-term relationships, gives employees incentive to slack and cheat their employer.

Second, there is the problem of ensuring that employees have the skills that the employers demand. Although under a very simple economic analysis one might suppose that wage differentials would give employees adequate incentives to borrow and invest in appropriate training, in real life, banks will not lend money against future labor, which cannot be compelled without charging a substantial premium,¹¹ and the resulting shortfall in worker investment in training will have to be made up through public education and on-the-job training. The employer has no incentive to finance or pay for training that will likely just benefit the employee and other employers when the employee takes another job in the spot market for labor.

Third, there is the employees' problem of negotiating efficient terms with respect to public goods in the workplace.¹² In almost every workplace there are public goods which affect numerous employees—for example, how fast the assembly-line goes, the level of air quality in the plant, and common safety features in the plant. If employees negotiate individually with employers regarding these terms, they have incentive to “free ride” on improvements negotiated by other employees with the result being that too little of these goods will be negotiated.¹³ Such inadequacies in individual employment contracts can be addressed through the “collective voice” of the employees in collective bargaining or through legislation.¹⁴

10. *Id.* at 316; see also, John H. Pencavel, *Work Effort, On-the-Job Screening, and Alternative Methods of Remuneration*, in 1 RESEARCH IN LABOR ECONOMICS 225, 231-34 (Ronald G. Ehrenberg ed., 1977) (discussing different wage payment methods based on employee productivity).

11. In labor-economics literature this constraint on workers to borrowing only against liquid assets is known as the “liquidity constraint.” Kenneth G. Dau-Schmidt, *The Effect of Consumption Commitments and the Liquidity Constraint on Labor Supply*, 18 J. ECON. 49, 49 (1992).

12. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 7-11, 14-16 (1984).

13. *Id.* at 8-9.

14. Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 431-34 (1992). Recent theoretical work demonstrates that competitive labor markets need not produce an

Finally, unlike commodities, employees and their families have to be maintained even after their productive years are over. Although individual workers might be able to solve this problem through savings or the purchase of accident insurance and pension benefits with a portion of their wages, historically workers have seemed to underprepare for such events and either have not saved adequately or have not purchased insurance or retirement benefits.¹⁵ Once again government programs and employer-provided benefits have historically made up for the shortfall.

As a result of these problems, employers have historically sought alternative employment relationships to that represented by a spot market for labor. Almost all of these forms of employment relationships involve a longer-term relationship than that engendered by the spot market. The opposite of the spot market in this regard would be an employment relationship with an expectation of lifetime employment. It is to this paradigm of the employment relationship that I now turn.

B. Internal Labor Markets with Lifetime Employment

As an alternative to the spot market for labor, the employer might want to build a long-term relationship with his employees. Why look for new employees every time you have a new job when the employees you had on the last job performed admirably? Indeed, the employer could institutionalize the entire arrangement, hiring employees into less demanding entry-level positions and promoting them into more demanding positions based on their performance.¹⁶ If a promising employee needed

efficient level of worker collective voice. *E.g.*, Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION AND COOPERATION* 27 (Joel Rogers & Wolfgang Streeck eds., 1995); David I. Levine & Laura D'Andrea Tyson, *Participation, Productivity, and the Firm's Environment*, in *PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE* 183 (Alan S. Blinder ed., 1990). For example, Freeman and Lazear argue that although worker organization increases both the quantity and quality of information, and thus increases the net surplus of the enterprise, worker organization also increases worker bargaining power and share of the surplus. Freeman & Lazear, *supra*, at 34-38. Thus, employers may resist employee organization efforts even though they increase the net surplus of the enterprise. *See* Dau-Schmidt, *supra* at 470.

15. Historically, prior to the modern statutory schemes, employees relied on a combination of savings, support from their children, and very modest private and public largesse to support them during periods of infirmity or retirement. Very few workers had adequate savings or private insurance policies to cover such periods of unemployment, and as a result voluntary retirement was a relatively rare phenomenon. WILLIAM C. GREENOUGH & FRANCIS P. KING, *PENSION PLANS AND PUBLIC POLICY* 27-29 (1976). Besides, with their control of working conditions and greater risk-spreading capabilities, it would seem that employers should enjoy a marked advantage over individual employees in bearing or purchasing insurance to cover the risk that employees will become injured or infirm. Accordingly, the question of real interest, at least with respect to workplace injuries, is why *employers* did not develop adequate private employer-provided insurance to cover the risk of on-the-job injury in advance of the workers' compensation system. My own suspicion is that employers did not adequately develop private insurance as part of the employment package because workers systematically underestimate the risks of workplace injury and accordingly do not place sufficient demand on such employer-provided benefits, at least in individual bargaining.

16. PETER B. DOERINGER & MICHAEL J. PIORE, *INTERNAL LABOR MARKETS AND*

new skills to do another job, the employer could provide on-the-job training to ensure the employee had the requisite skills.¹⁷ The employer might retain an employee as long as he or she performed acceptably—perhaps for the employee's entire career.¹⁸ Once the employer and employee are in a long-term relationship, there is no necessity that an employee's pay equal his or her productivity during a given period.¹⁹ As long as the present value of the employee's expected total pay does not exceed the present value of his or her expected worth to the firm, the employer might defer some of the employee's compensation as a reward for productive behavior or to maintain the employee during times when his or her productivity does not equal the agreed wage.²⁰ The institutionalization of such an employment relationship is known as an "internal labor market" because the relationship of the parties is governed by the employer's internal administrative rules as to hiring, compensation, and promotion rather than by an external labor market.²¹

The major advantage of an internal labor market with lifetime employment is that it solves most of the shortcomings of a spot market for labor previously discussed. Long-term employment lessens the costs of evaluating and monitoring employees since the employer does not have to continually evaluate new employees and has a reliable work history upon which to base his or her evaluation.

Moreover, the employer can lower employee-monitoring costs by deferring a portion of the employee's pay over his or her "life-cycle," paying the employee less than his marginal product early in his career and paying the employee more than his marginal product late in his career.²² Under such a deferred compensation scheme the employee has incentive to be productive early in his career so that the employer will continue to employ him late in his career, and so needs less monitoring.²³ The employee will agree to such a deferred compensation scheme as long as he gets a share of the savings in monitoring costs and the present value of his expected total wage is higher than what the employer would offer in the absence of such a scheme.

The problem of ensuring that employees gain the skills they need to meet the employer's needs is also mitigated. With adequate assurances that the employee will stay with the employer long enough for the employer to recoup his costs, the employer would be willing to pay for training in skills particular to his firm, and may even be willing to finance or pay for more general job skills.²⁴ The employer can help

MANPOWER ANALYSIS 27 (1985).

17. *Id.* at 106-15.

18. *Id.* at 29-30.

19. *Id.* at 65.

20. *Id.* at 66-73.

21. *Id.* at 1-2; see RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 318 (1982).

22. EHRENBERG & SMITH, *supra* note 21, at 193-201; see GILBERT R. GHEZ & GARY S. BECKER, THE ALLOCATION OF TIME AND GOODS OVER THE LIFE CYCLE ch. 3 (1975).

23. EHRENBERG & SMITH, *supra* note 21, at 320-21; Edward P. Lazear, *Why is There Mandatory Retirement?*, 87 J. POL. ECON. 1261, 1264-65 (1979).

24. The employer's problem with paying for general skills is that those skills are valuable in employment with other employers, and so other employers may bid away the employee once trained, resulting in the loss of the original employer's investment in general skills. BORJAS, *supra* note 9, at 252-56; see GARY S. BECKER, HUMAN CAPITAL 33-51 (3d ed. 1993)

to ensure that he retains the employee long enough to recoup any investment in training by establishing an employment system that rewards seniority or by sharing a portion of the employee's increased value to the employer from firm-specific training.²⁵ Shared investment in job training between employers and employees is another commonly given explanation for the deferral of wages under the "life-cycle" theory of wages.²⁶ Even the problem of negotiating public goods in the workplace is eased since the employees have a greater investment in a given place of employment and are thus more likely to organize and express collective concerns about conditions in the workplace.²⁷

Finally, since the internal labor market severs the connection between pay and productivity in a given period, it is easier for the employer to provide benefits that maintain the employee during times of decreased productivity. For example, part of the deferred compensation scheme adopted by the employer to lower monitoring costs might be a pension to maintain the employee during his retirement.²⁸ Similarly the employer might devise formal or informal deferred compensation schemes that maintain the employee during times of modest economic downturn, or when the employee is sick or injured.

The primary disadvantages of a lifetime employment relationship under an internal labor market for the employer are administrative expense and loss of flexibility. In order to operate an internal labor market, the employer has to hire managers who evaluate employees and plan how best to use the firm's "human resources."²⁹ These administrators devise and enforce the rules on hiring, compensation, and promotion that constitute the firm's internal labor market.

Moreover, in order to make the reasonable assurances of continued employment that allow this system to work, the employer gives up some flexibility in the operation of his business. For example, under a long-term employment relationship the employer cannot just jettison employees whose skills have become obsolete or are no longer needed by the company. The deferred compensation scheme, which is an important benefit of internal labor markets and lifetime employment, depends on employees believing that the employer will live up to his representations of lifetime employment. If the employer treats employees in ways that are considered unfair or harsh, this will undermine the employer's ability to make deferred compensation promises on which the employees believe they can rely.³⁰ Instead of just jettisoning

(discussing general and specific training).

25. When a firm trains an employee, the employee may also feel that he "owes" the firm a debt of loyalty which will bind the employee to the employer long enough for the employer to recoup his investment. CAPPELLI, *supra* note 3, at 20.

26. Under this explanation, employees accept wages lower than their marginal product when they are young in order to invest in their career and in the acquisition of skills, and they are rewarded for this investment later in their careers with wages above their marginal product. See EHRENBERG & SMITH, *supra* note 21, at 231-32.

27. See Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 694 (1993).

28. EHRENBERG & SMITH, *supra* note 21, at 323.

29. CAPPELLI, *supra* note 3, at 65-68; PETER CAPPELLI ET AL., *CHANGES AT WORK* 22-23 (1992).

30. If the employees do not believe they will continue to be employed by the employer and

superfluous employees, the employer will have to find ways to usefully integrate the employees back into the firm by retraining the employees or changing production methods. Thus, in a long-term employment relationship under an internal labor market, the employer accepts a certain amount of the risk that the employee's skills will become obsolete or no longer needed by the firm.

II. THE IMPACT OF CHANGES IN TRADE AND TECHNOLOGY
ON THE EMPLOYMENT RELATIONSHIP:
A BRIEF HISTORY OF THE TWENTIETH CENTURY

As the above discussion demonstrates, there are various advantages and disadvantages to either constructing the employment relationship as a short-term relationship through a spot labor market, or as a lifetime relationship through an internal labor market. At any given time in our economy there are employers who choose short-term relationships and employers who choose lifetime relationships—and everything in between. Those who choose short-term relationships conducted through a spot market for labor are usually in industries where the technology of production makes it easy to evaluate individual productivity and requires low investments in employee skills—for example, landscape gardening or apparel manufacturing.³¹ Those who choose long-term relationships conducted through an internal labor market are usually in industries where the technology of production makes it hard to evaluate individual productivity and requires high investments in employee skills—for example, airplane assembly workers and college professors.³²

Although the American economy currently includes a mix of both short-term and long-term employment relationships, in this section I will argue that the rise of the new age of trade and technology has brought the external labor market into American firms in ways that we have not previously experienced and shifted the balance in our economy away from the paradigm of lifetime employment in an internal labor market and decidedly in favor of the paradigm of short-term or contingent employment in a spot market. Indeed given the new importance of international trade in our economy, one can argue that the spot market that defines our employment relationships is an international spot market that includes competing workers from all over the world.

A. The Golden Age of Lifetime Employment in America

Lifetime employment, governed by an internal labor market, has been the dominant paradigm of employment relationships in America throughout the twentieth century. Although its roots go back to the employment practices of William Durant and Henry

receive their deferred compensation, the employer will have to pay them their full compensation now to be competitive with other employers, and there will be no savings in monitoring or in joint employer/employee human-capital investment.

31. EHRENBERG & SMITH, *supra* note 21, at 316; LOUIS LEVINE, *THE WOMEN'S GARMENT WORKERS* 25-31 (1924).

32. *See* EHRENBERG & SMITH, *supra* note 21, at 316.

Ford in the 1910s and 1920s,³³ the paradigm of lifetime employment reached the zenith of its reign in America during the decades just after World War II. During this period, international competition was of small concern to most American businesses. The United States emerged from the war as one of the few nations with its productive capacity intact. Indeed, American manufacturing had been greatly strengthened during the war due to government investments in technology and productive capacity.³⁴ As a result, American manufacturing dominated world trade.³⁵ Although some American industries were highly competitive, many, such as the auto, steel, and petroleum industries, settled into “comfortable” relations with their domestic competitors.³⁶ Corporate strategies for increasing profits were based on vertical integration and growth.³⁷ Following the lead of General Motor’s William Durant, most firms saw vertical integration of production as necessary to ensure adequate quality and quantity of the requisite components of the finished product.³⁸

This environment proved fertile for the growth of lifetime employment and internal labor markets.³⁹ The relative security of American firms in international and domestic competition made it easy for firms to accept the risk that fixed investments, such as investments in employees’ skills would become obsolete and made flexibility in production methods a low priority.⁴⁰ Moreover, the large vertically integrated corporate enterprises that evolved during this time lent themselves to governance by internal labor markets. The administrative staff necessary to run the internal labor market posed a relatively small addition to the managerial staff necessary to run these large vertically integrated operations, while the steps of the vertical operation proved amenable to the “career ladders” of promotion found in the internal labor market.⁴¹ Furthermore, tight labor markets in the postwar boom years encouraged employers to try to keep and to further develop skilled employees.⁴² Accordingly, during this period, lifetime employment governed by internal labor markets was viewed by many managers and academics as the “best” management practice, at least for large companies.⁴³

What did the lifetime employment relationship look like during this period? As an idealized example, we might examine the employment practices of IBM from 1950

33. CAPPELLI, *supra* note 3, at 54-55, 60-62. Modern “progressive” management under the administrative rules of an internal labor market replaced the “drive” method of managing workers in which foremen yelled at, threatened, and sometimes hit workers to raise productivity. *Id.* at 57.

34. HERZENBERG ET AL., *supra* note 6, at 7.

35. American dominance of world manufacturing is demonstrated by the fact that during 1953, American industry accounted for forty-five percent of world manufacturing output. *Id.*

36. *Id.*

37. CAPPELLI, *supra* note 3, at 59-60.

38. *Id.*

39. *Id.* at 75.

40. *Id.* at 97-98.

41. *Id.* at 61; HERZENBERG ET AL., *supra* note 6, at 11-12.

42. CAPPELLI, *supra* note 3, at 62.

43. *Id.* at 67; *see, e.g.*, JAMES C. ABEGGLEN & GEORGE STALK, JR., KAISHA, THE JAPANESE CORPORATION 199-203 (1985) (discussing the Japanese system of career-long employment); WILLIAM G. OUCHI, THEORY Z (1984).

to 1985. The concept of lifetime employment was first undertaken by IBM in the 1950s with the adoption of distinctive criteria for hiring employees.⁴⁴ Under the IBM plan, specific job skills were much less important than general aptitude, teamwork skills, and "character," because the company itself planned to develop the employees' particular job skills.⁴⁵ Indeed, once hired, an employee was subjected to an extensive training regimen that never ended during the course of his or her career.⁴⁶ This training included skills training at the firm's Armonk training center, on-the-job training in a variety of firm positions chosen for the employee's development, and generous programs to facilitate or pay for employee training at institutions of higher education.⁴⁷ Every manager's performance appraisal included employee development as a goal.⁴⁸ Because IBM was large, and had few competitors, it was relatively easy for the corporation to develop and follow long-term business plans.⁴⁹ This long-term planning allowed IBM to develop the skills and talent it needed internally by promoting skills development among its employees and promoting successful employees up the corporate ladder. IBM managed demand swings internally by shifting employees from one production process to another and was "proud of the fact that it had never had a layoff in its forty-year history as a modern computer company"—a fact that it advertised to all potential new hires.⁵⁰ IBM was rewarded for these efforts with a highly skilled workforce, thoroughly versed in the operations of the firm, motivated by internal promotions and rewards, and loyal to the company that had undertaken to invest in and guarantee their futures.⁵¹

*B. The New Age of Trade and Technology and the
Rise of Short-Term and Contingent Employment*

During the last three decades of the twentieth century, the conditions that fostered lifetime employment and internal labor markets began to change. First, international competition became a much more important factor for most American firms. The complete victory of the proponents of free trade, as represented in a variety of international treaties,⁵² has combined with a retooled Europe and Japan and with industrial development in previously third-world countries, to ensure that American companies across the entire breadth of our economy now feel the pressures of international competition.⁵³ Indeed, the breadth of this change, in concert with a

44. CAPPELLI, *supra* note 3, at 70.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 71.

51. *Id.* at 72.

52. *E.g.*, TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]; NAFTA, *supra* note 4.

53. Ansley, *supra* note 5, at 386-87. The first tremors along this fault line were felt with the invasion of foreign cars in the wake of the OPEC oil embargo and price hikes of the early 1970s. Later incursions by foreign steel, apparel, and consumer electronic goods made it clear that the foreign car imports were not a limited phenomenon.

growth in American consumer demand for services, has caused the transformation of the American economy from one dominated by manufacturing to one dominated by its service sector.⁵⁴ Together with the deregulation movement over the same period, the increase in international trade in the last quarter of the twentieth century has ensured that most American firms operate in a much more competitive environment than they previously did.

Second, new information technology has both facilitated the movement of capital from country to country and allowed new methods of managing firms and organizing production that bring the market inside the firm. Increased communication and information processing capabilities allow companies to keep track of and manage plants and investments in other countries. The increased mobility of capital in the international economy has meant that employees must now compete with workers in other countries merely to retain the allegiance of their employer.⁵⁵ The improvements in information gathering and processing capabilities have also allowed employers to trim midlevel management positions and devolve some management responsibilities to lower-level employees. As a result, the managerial ranks are much leaner than in times past and some of the past distinctions between managers and the managed have disappeared. Furthermore, the new information technology has allowed employers to collect and manage data on rivals and potential suppliers and use this information as a "benchmark" for the performance of their own divisions and operations.⁵⁶ As a result, individual departments and divisions within firms have been placed in direct competition with their rivals in a way not previously experienced in the modern corporation. Finally, the new information technology allows employers to collect and manage information on the current capabilities and capacities of component suppliers to an extent not previously possible outside a single firm. Thus, it is no longer necessary for firms to be vertically integrated to ensure the adequate quality and quantity of their component parts, and methods of production increasingly rely on the subcontracting of important production work.⁵⁷

The economic environment in the new age of trade and technology is much less hospitable to internal labor markets and lifetime employment. The increased level of competition to which firms are subject has increased the risk of fixed investments such as employee training, and caused firms to put new emphasis on flexibility in methods of production.⁵⁸ As the level of competition has increased, firms have tended to focus on ever smaller areas of "core competency" in which they enjoy some competitive advantage. With the narrowing of corporate interests, fixed investments, such as specialized employee skills, run a greater risk of becoming useless to the firm.⁵⁹

Moreover, with greater competition, American firms are more subject to the dictates of the market place and want to remain flexible in order to respond to changes in demand. As a result, firms are less amenable to accepting the risk that

54. See BORJAS, *supra* note 9, at 367.

55. Ansley, *supra* note 5, at 370-77.

56. CAPPELLI, *supra* note 3, at 106.

57. *Id.* at 104.

58. *Id.* at 76.

59. *Id.* at 99-100.

employee skills will become obsolete and to locking themselves into long-term employment commitments.

In addition, the new information technology has allowed the reorganization of firms in leaner ways that are internally more subject to the machinations of the market and less integrated in their levels of production. The paring of midlevel managers from the operations of the firms and the availability of market-oriented management strategies such as benchmarking has made the administration necessary for internal labor markets relatively more expensive. Why maintain a large and costly human resources apparatus when the rest of your management tasks are being streamlined and reoriented to the market?

Finally, the disintegration of the firm allows for the subcontracting of work to various suppliers. Such subcontracting changes the firm's concerns back to payment for product and dismantles the larger corporate enterprises that served as vehicles for long-term careers. It is perhaps not surprising then that currently the "best" management practices identified by managers and academics are those that focus on flexibility and an immediate orientation to the market.⁶⁰

No single example demonstrates all of the many ways in which the employment relationship is changing in the new age of trade and technology, but perhaps the most talked about is the Volkswagen truck assembly plant in Resende, Brazil. Although most employers usually retain at least a core of "permanent" employees, supplementing them with temporary employees or subcontractors to handle particular components or seasonal variations in demand,⁶¹ the Volkswagen truck plant in Resende employs almost no permanent employees.⁶² Instead, truck production is undertaken in four "modules" which are produced by four different subcontractors within the Volkswagen plant.⁶³ Once employees from one subcontractor assemble the chassis, it makes its way down the main assembly line as employees from other subcontractors assemble and attach their components. Yellow lines on the floor of the plant delineate the area in which each subcontractor is supposed to operate.⁶⁴ Volkswagen's relationship with the subcontractors runs on a quarterly basis and the subcontractors accordingly make no commitment of long-term employment to their employees.⁶⁵ Employees of the subcontractors earn about a third of the wage of unionized Volkswagen workers in São Paulo, Brazil.⁶⁶ Although this "virtual Volkswagen" plant is still somewhat unique, there are plans to emulate its system of subcontracted modular production in the industry. General Motors is currently engaged in negotiations to undertake subcontracted modular production at four of its American plants, including the new Saturn plant, under its "project Yellowstone."⁶⁷

60. *See id.*

61. *Id.* at 136-37.

62. *See* Jane Slaughter, *Modular Assembly: The Ultimate in 'Contracting Out' Comes to North America*, LAB. NOTES, May 1999, at 8. Actual employees of Volkswagen merely manage the facility and undertake quality inspections. CAPPELLI, *supra* note 3, at 104.

63. Slaughter, *supra* note 62, at 8.

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.*

III. IMPLICATIONS OF THE NEW AGE OF TRADE AND TECHNOLOGY FOR LABOR AND EMPLOYMENT LAW

Not every worker will experience the changes in the employment relationship I have outlined above. Even employers who replace permanent employees with temporary employees and subcontractors or adopt new market-oriented methods of management, commonly retain a core of "permanent" employees, especially among their high-skilled or managerial workers. Moreover, many workers, especially unskilled low-wage workers, have never enjoyed the benefits of internal labor markets and lifetime employment.⁶⁸ Indeed, because of the inadequacy of our data on temporary workers and subcontractors there has been a fair amount of controversy among academics about the number of employees who have been directly affected by these changes.⁶⁹

Nevertheless, as in economics, where it is the marginal worker who determines the wage and conditions of employment,⁷⁰ so too in law is it the marginal worker, the one whose legal status might change or is changing, who determines the current legal issues to be addressed by the legislatures and the courts. There is no doubt that lifetime employment relationships have ceded ground to short-term employment relationships in the American economy and that the market has been interjected into the employment relationship in a way not experienced in the recent past. What do these changes mean for us in our efforts to address the current needs of employers and employees through labor and employment law?

The short answer is that, as the paradigm of lifetime employment under an internal labor market recedes, all of the problems of the employment relationship that this paradigm addressed will once again come to the forefront of the employment relationship and labor and employment law. As turnover rates increase with the rise of contingent employment, firms will place new emphasis on finding ways to evaluate the potential productivity of new hires. These efforts will undoubtedly raise issues in the conflict between employers' need for information and employees' right to privacy, including questions about defamation and the proper use of employee references.⁷¹ Similarly, as the employment relationship shortens and wages become

68. A variety of economists have done theoretical and empirical work on the basis of a "dual" or "segmented" labor market that treats low-wage and high-wage workers differently. *E.g.*, Glen G. Cain, *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 J. ECON. LITERATURE 1215 (1976); Paul Taubman & Michael L. Wachter, *Segmented Labor Markets*, in 2 HANDBOOK OF LABOR ECONOMICS 1183 (Orley Ashenfelter & Richard Layard eds., 1986).

69. *See* RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* 15-17 (1989); Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 771 (1995).

70. BORJAS, *supra* note 9, at 106-09.

71. Consistent with this analysis, employer efforts to test prospective employees for various characteristics including psychological strengths or defects, honesty, drug use, and medical conditions, are also booming. *E.g.*, *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (drug use); *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (honesty, psychological defects); *see also*, Matthew W. Finkin, *Employee Privacy*,

more closely tied with the employee's current product, employers will strive to find new ways to monitor employees on the job. These efforts will also bring employers in conflict with employees' right to privacy. Moreover, as employees move from one employer to another over the course of their careers, employers will be less willing to finance employee training. Society will have to find new ways to ensure that employees can obtain the requisite skills. As workers' pay becomes more directly tied to current productivity, employers will be less likely to offer benefits that maintain employees during times of decreased productivity. Society will have to readdress existing public programs or find new ways to ensure that employees can maintain themselves and their families during times of slack demand, infirmity, and retirement. Finally, as employees become more transient they will become harder to organize and less likely to address public goods in the workplace. Society will have to find new ways to encourage workplace democracy and give expression to employees' collective voice. What does the above analysis tell us about how we should address these issues?

One central conclusion that can be drawn from the analysis is that remedies that attempt to adapt the parties and the employment relationship to the new information technology and global economy will be more successful than those that attempt to resist these changes. The underlying causes of the changes in the employment relationship that I have identified are not passing fads, but instead constitute fundamental changes in our economy. Employers are not going to forget how to use the new information technology and it seems extremely unlikely that efforts to restrict how that technology can be used would be popular or successful. Similarly, although in the future there may be the occasional small retreat from international free trade as the nation-state grapples with international business to maintain the rule of law,⁷² the march toward a global economy in manufactured goods and even many services seems relentless. Accordingly, it would be best to find solutions to the above problems that were consistent with or made use of the new information technology or global trade. What might some of those solutions be?

*A. Adapting Labor and Employment Law
to the New Information Technology*

The central insight of my analysis is that labor and employment law should attempt to encourage the use of the new information technology to address the problems I have identified. In other words, we should use the new information technology to build relationships among workers and employers that aid the flow of accurate information and references among employees and employers, that promote employee training over employees' careers, that allow for employee benefits across multiple employers, and that facilitate the expression of employees' collective voice to their employers. Some might wonder why we should not just leave these tasks to the marketplace. After all, if employers can use the new information technology to ensure the availability of the right quality and quantity of car parts, why can't they use it to

American Values, and the Law, 72 CHL.-KENT L. REV. 221 (1996) (medical conditions, drug use, psychological strengths/defects).

72. See generally *infra* Part.III.B.

ensure the availability of the right quality and quantity of labor? As we will see, there are various market failures, primarily public-good problems among employers, in the development of skilled employees that prevent this simple market solution and require the intervention of labor and employment law. I turn now to the question of how can we apply the new information technology to address some of the identified problems.

1. Employee Job References

The decline of lifetime employment has fostered an intense interest among employers in finding cheap and accurate information about the likely productivity of potential employees. In the modern equivalent of the "shape-up,"⁷³ employers poke and prod potential employees, administering psychological profile tests, honesty tests, drug tests, and, with literal poking and prodding, medical exams. A potentially very useful source of information in this process would be accurate references on the employees' work for past employers. Both employers and employees have an interest in the production of accurate references to facilitate the "matching" of employees to appropriate work.⁷⁴ The possibility of effective references also gives employees an additional incentive to be productive, even in short-term employment.⁷⁵ Unfortunately, although virtually all employers ask for past job references, a recent survey by the Society for Human Resource Management found that over sixty percent refuse to give such information to other employers.⁷⁶

The problem, of course, is that employers fear liability from defamation suits by past employees over less than glowing references.⁷⁷ Although employers enjoy a privilege from defamation in their communication of job references to other employers,⁷⁸ this privilege is qualified and can be lost if it is "abused" by "over-

73. A "shape-up" is a method of selecting employees for a day's work by collecting them in a line in front of the hiring boss so that he can pass down the line and assess their physical attributes. The boss then selects those who appear the fittest for the job. The shape-up is identified with the past of the long-shoring industry, but undoubtedly occurs in other industries and continues to occur up to this day. WEBSTER'S NEW COLLEGIATE DICTIONARY 1057 (9th ed. 1983).

74. J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 138-40 (1998) (discussing mismatching resulting from employer difficulties in learning relevant information about employees).

75. Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 126 (1992).

76. Frances A. McMorris, *Some Firms Less Guarded in Sharing Job References*, ARIZ. REPUBLIC/PHOENIX GAZETTE, July 15, 1996, at E4.

77. There also is potential liability in "wrongful referral" suits for overly generous references. *E.g.*, *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 593 (Cal. 1997); *Contra Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990); *Cohen v. Wales*, 518 N.Y.S.2d 633, 634 (N.Y. App. Div. 1987).

78. Employers are privileged in their communications concerning the quality of work of an employee among people who have a "special need to know" because they are engaged in a "common enterprise." See RESTATEMENT (SECOND) OF TORTS § 596 (1977) [hereinafter RESTATEMENT]. This privilege includes other employees in the firm as well as other employers who are looking for choice employees. *E.g.*, *Zinda v. La. Pac. Corp.*, 440 N.W.2d 552, 552-53 (Wis. 1989); *Hett v. Ploetz*, 121 N.W.2d 270, 273 (Wis. 1963).

publication”⁷⁹ or “knowingly or recklessly” making false and defamatory statements about the employee.⁸⁰ In recent years there seems to have been an increase in the number of law suits finding that employers had abused the privilege, and as a result, more employers have declined to give references.⁸¹ In response to this decline in employer references, many states have passed new laws designed to strengthen and reinvigorate the employers’ privilege.⁸²

However, it is not clear that employer fear of defamation liability is such a bad thing. After all, it is accurate employee references that are valuable in the market, and, at least on its face, the old standard for abuse of the privilege, “recklessness,” does not seem unduly burdensome on employers. Indeed, given the fact that most employees never know what their references are from past employers, it would be surprising if the real problem in the decline of employer references was an excess of defamation liability. State statutes that strengthen the employers’ privilege only serve to further suppress an already inadequate level of defamation liability from sufficiently policing the veracity of employer references. The real problem is that, given *any* level of potential defamation liability, employer references dry up because there are potential costs to the reference-granting employer of making a reference, but no benefits. The shared information the employers could enjoy from a universal system of references poses a classic public-good problem.⁸³ Why should an employer give a reference and take any risk of defamation liability when he cannot compel other employers to give him references, and thus gets nothing in return?

The solution is for states to encourage employers to use the new information technology to create reference pools which all participating employers can access with the permission of job applicants. Once established, employers would see benefits from participating and giving job references because they would be sure of receiving useful employee references in return. Although difficulties in pricing such reference information generally prevent private intermediaries from setting up such pools,⁸⁴ if local government undertook the initiative to set up or encourage such pools

79. “Over-publication” occurs when the employer communicates the information to people outside of the common interest, or for reasons that do not further the common interest. RESTATEMENT, *supra* note 78, §§ 603-605A, 605 cmt. a; *see also* Zinda, 440 N.W.2d at 553-54.

80. Zinda, 440 N.W.2d at 553; RESTATEMENT, *supra* note 78, §§ 600, 602, 605 cmt. a.

81. David C. Martin & Kathryn M. Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L.J. 43, 44 (1987); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of “Overdeterrence” and a Proposal for Reform*, 13 YALE L. & POL’Y REV. 45, 45-46 (1995).

82. At last count twenty-six states had passed such laws. Alex B. Long, Note, *Addressing the Cloud over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 177 (1997).

83. A public good is a good, such as a park or commons, from which people who do not contribute to the good cannot be excluded from consuming the good. As a result, people do not contribute to consume the good and too little of the good is produced. ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR, 606-07 (1991).

84. Verkerke, *supra* note 74, at 171-72. If the private intermediary pays a flat amount for references, he gives incentive for employers to only give references when they are good or innocuous, and he poses no threat of defamation liability. If the intermediary pays more for valuable “bad” references, he gives incentives for employers to give inaccurate or “bad”

and state governments passed some simple rules for their governance, this would greatly facilitate employers' ability to set up and run such organizations.⁸⁵ The state laws that would be necessary would be laws that allow such pools to punish members who do not cooperate or who supply inadequate information, laws to prevent the abuse of such power, and laws to make it clear that exchanges of information within the reference pool should be treated the same as exchanges within a single firm for the purposes of defamation liability.⁸⁶ Under such an arrangement, area employers would become like one or several big employers for the purposes of sharing information on employees' job performance. State law could also add a right on the part of the employee to view his employment file on record with the reference pool and to correct any erroneous information: a right similar to the right of creditors to view and correct their credit rating under the Fair Credit Reporting Act.⁸⁷ In the interests of providing full and accurate information, the review and correction procedure could allow for arbitration of the disputed facts so that prospective employers are not just left with two conflicting accounts of an employee's departure from a firm when deciding whether to hire the prospective employee.⁸⁸ If a state wanted to further empower employees, it could also maintain Internet accessible pools of employee experiences with employers, governed by the law of defamation, or it could foster the development of such employer reference pools by unions, with the grant of a qualified privilege against defamation to unions. After all, employees have an interest in accurate information on prospective employers just as employers have an interest in accurate information on prospective employees.

references. Accordingly, such intermediaries are rare except for situations in which references are extremely important to the hiring decision. *Id.* at 171-73. A reciprocal reference exchange program avoids pricing references and so avoids this problem.

85. State governments may even want to compel employer membership and the disclosure of information in some cases: for example, truck drivers who were discharged for drunk driving. *Id.* at 163.

86. Existing legal doctrine in most states extending the employer's qualified privilege to other employers who receive employee references would already suffice to achieve this last function. *See, e.g., Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 552 (Wis. 1989).

87. 15 U.S.C. §§ 1681g, 1681i (1994). Such an arrangement may cause employers to rein in references on bad employees, but even terse references such as "the employee was fired" would communicate needed information to prospective employers without being defamatory. Moreover, employee access to the files would improve accuracy in some cases and not leave individual workers at the mercy of more powerful employers acting, with the state's encouragement, in concert.

88. I added the possibility of arbitrating reference disputes to my proposal at the suggestion of Professor Matthew W. Finkin, who gave me this suggestion and other useful comments after reading this article. For further elaboration on the desirability and feasibility of reference arbitration and other thoughts by Finkin on the problems of workforce screening, see Matthew W. Finkin, *From Anonymity to Transparency: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. (forthcoming).

2. Employee Training

The decline of lifetime employment and the vertical disintegration of firms have also undermined employer-sponsored training. Although the demands for skills in employment have only increased, in recent years real employer expenditures on training per worker have actually decreased.⁸⁹ Moreover, this decrease has been greatest for entry-level employees and low-skill employees.⁹⁰ This is bad news given the importance of employer-provided training to the training of American workers and the importance of training in general to the maintenance of American earning potential in a global economy.⁹¹ Some employers have adopted a conscious strategy of raiding other employers for skilled employees, rather than training their own.⁹² As this practice suggests, lower levels of employer-provided training are not just bad for American workers, but also bad for American employers. The new higher rates of job mobility among the American workforce have meant that it has been hard for employers to retain high-skilled workers even if they train them.⁹³

The problem is that once the bonds of long-term employment are broken, employer sponsored training in general skills becomes a public good, or even worse, a potential liability if the employee leaves with trade secrets and employer sponsored training in employer-specific skills becomes a potential waste. Why should an employer provide valuable training to temporary employees who will only end up working for someone else? The loose connection of employees to their employer in the new age of trade and technology encourages employers to raid other employers for skilled workers, free riding off of any training efforts of the original employer. Moreover, the vertical disintegration of firms has destroyed the old career paths that were the underlying structure for employer-sponsored training.⁹⁴ Even if an employer wanted to undertake on-the-job training, many of the jobs that made up the natural progression from entry-level employee to skilled employee or manager are now assigned to some subcontractor and are outside the employer's immediate control.

Some employers have attempted to address this problem, at least for high-skilled workers who might leave of their own accord, through resort to traditional actions in contract and tort. Covenants not to compete are becoming increasingly popular for employees who have valuable skills or access to important customers or trade secrets.⁹⁵ Such covenants are generally enforceable only if they are reasonable in scope and serve some legitimate interest of the employer.⁹⁶ Suits against former

89. LAURIE J. BASSI ET AL., *THE ASTD TRAINING DATA BOOK 3* (1996); CAPPELLI, *supra* note 3, at 152.

90. *See* CAPPELLI, *supra* note 3, at 153; JILL M. CONSTANTINE & DAVID NEUMARK, *TRAINING AND THE GROWTH OF WAGE INEQUALITY* (Nat'l Bureau of Econ. Research, Working Paper No. 4729, 1994).

91. *See generally infra* notes 147-65 and accompanying text.

92. HERZENBERG ET AL., *supra* note 6, at 124.

93. *See* CAPPELLI, *supra* note 3, at 44-45.

94. HERZENBERG ET AL., *supra* note 6, at 123.

95. *COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY* (P. Jerome Richey et al. eds., 1991).

96. ALVIN L. GOLDMAN, *LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 97-98* (1996). In my own experience I have found that employers generally write covenants not to

employees for the appropriation of trade secrets also seem in vogue.⁹⁷ Although former employees are allowed to use general information and skills acquired during employment in later jobs, they are not allowed to appropriate the value of employer trade secrets which are not readily available to other members of the industry.⁹⁸ Employers have also developed what I believe to be a relatively new contractual provision requiring employees who receive training either to stay with the employer for a set term, or to reimburse the employer for all or part of their training upon departure. At this time, the enforceability of such provisions is questionable.⁹⁹

Employer efforts to address the problem through resort to traditional actions in contract and tort are inadequate for the problem. Individual suits in contract and tort would seem a costly and awkward way to protect a program of employer-sponsored training. Moreover, given the justifiably strong presumption in favor of the mobility of labor in our law and the inadequacy of most employees' resources to repay training costs, it seems doubtful that the problem can be successfully solved by legally binding select employees to the employer. Besides, what about the lesser-skilled and entry-level employees? Even if employers are successful in using contract and tort actions to bind high-skilled people that they have trained for the job, this program does nothing to promote employer training of low-skilled and entry-level employees.

A better solution would be for federal or state government to undertake to develop new multiemployer training programs that utilize the new information technology to coordinate employees' careers among multiple employers.¹⁰⁰ The government could solve the problem of employers free riding on other employers' training efforts by levying a modest payroll tax to finance the programs.¹⁰¹ Several other countries already require employers to spend a percentage of payroll on training, perhaps to solve this same problem.¹⁰² Employers could be clustered in the training program

compete that are much broader than the legitimate interest they have to protect. The problem of course is that employees may think they are bound by these overbroad covenants even if they are unenforceable in the courts. Accordingly, I subscribe to the theory propounded by some courts that covenants not to compete should be completely void if they are written in such a way that they are clearly overbroad, so as to deter employers from writing overbroad covenants and taking advantage of employees' uncertainty as to their enforceability.

97. *See, e.g., Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989). Indeed the problem has captured the attention of Congress and prompted the passage of the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839 (Supp. IV 1998).

98. GOLDMAN, *supra* note 96, at 95; *see, e.g., K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 474 (9th Cir. 1974); *cf. Michael A. Epstein & Stuart D. Levi, Protecting Trade Secret Information: A Plan for Proactive Strategy*, 43 BUS. LAW. 887 (1988).

99. In the only reported case to date, the court refused to enforce such a provision because the employee owed more for the training than its apparent worth. *Brunner v. Hand Indus., Inc.*, 603 N.E.2d 157, 160-61 (Ind. Ct. App. 1992). The court also made a more sweeping condemnation of such provisions emphasizing that a worker who quit soon after training could end up owing more than he would have earned while employed. *Id.* at 161. For this reason, such provisions may also run afoul of the Fair Labor Standards Act minimum-pay provisions. Alvin L. Goldman, *Potential Refinements of Employment Relations in the 21st Century*, 3 EMPLOYEE RTS. & EMP. REL. PUB. POL'Y J. 269, 272 (1999).

100. *See HERZENBERG ET AL., supra* note 6, at 150, 158.

101. *Id.* at 161.

102. *Id.* (citing OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, WORKER TRAINING:

according to the types of skills they need and can produce, to set up a logical progression of training and to promote employees across the cluster. These clusters could also serve as a basic building block for grouping employers for the reference pools discussed in the previous section.¹⁰³ Coordinating portable benefit plans across employers would also be an important part of career progression in the training program.¹⁰⁴ Such multiemployer training programs would provide much needed employee training and allow employees to undertake multiemployer career paths with benefits and logical promotions in skills and jobs in much the same way as they did under the old paradigm of lifetime employment.¹⁰⁵

3. Employee Collective Voice

The new age of trade and technology has not been conducive to the expression of employees' collective voice. Indeed, although there are other factors at play,¹⁰⁶ it seems fair to say that the globalization of the economy and the decline of lifetime employment and internal labor markets have been driving forces behind the decline of unions in the United States.¹⁰⁷ Foreign competition has taken many of our manufacturing jobs—the bedrock of the American labor movement—overseas, converting our economy to one dominated by the service sector.¹⁰⁸ Many of the jobs that remain operate in a much more competitive environment that is not conducive to unionization.¹⁰⁹ Unions that functioned well in enforcing long-term promises in the administrative bureaucracy of the internal labor market struggle to find a role for themselves in the new market environment. Transient employees who operate in a spot labor market are much harder to organize than lifetime employees. Not only are they easier for employers to replace, but because they have little expectation of working long for the same employer, they have little incentive to invest time or energy in public goods such as union organization or collective voice.¹¹⁰ Moreover, the devolution of managerial responsibility that has occurred with the new

IN THE NEW INTERNATIONAL ECONOMY 94 (1990)).

103. See *supra* notes 84-88 and accompanying text.

104. See HERZENBERG ET AL., *supra* note 6, at 161.

105. Several models for such multiemployer training programs already exist. Employer-union coalitions have already taken the initial steps at developing community career ladders in Madison, Wisconsin, and Hyannis, Massachusetts, in a variety of industries including health care, insurance, and manufacturing. *Id.* at 126-28.

106. A variety of reasons have been given for the decline of unions in the United States, including: the decline of the manufacturing sector in the United States, the increase in women as a percent of the labor force, and the increase in employer recalcitrance towards unions, FREEMAN & MEDOFF, *supra* note 12, at 221-45, as well as increased competitiveness in many markets due to international trade and deregulation, the decline of long-term employment, and a decline in government support for unions that began with President Reagan's busting of the Professional Air Traffic Controllers Organization ("PATCO") strike. Barry T. Hirsch, *The Dunlop Commission's Premise: A Tilted Playing Field?*, 17 J. LAB. RES. 15, 21-26 (1996).

107. Hirsch, *supra* note 106, at 21-26; cf. FREEMAN & MEDOFF, *supra* note 12, at 221-45.

108. See Hirsch, *supra* note 106, at 19-21.

109. Unions tend to organize employees in industries that enjoy some measure of monopoly power in the product market. Dau-Schmidt, *supra* note 14, at 469.

110. Dau-Schmidt, *supra* note 27, at 694.

information technology has left more and more employees within the broad definitions of supervisory and managerial employees under the National Labor Relations Act ("NLRA" or "Act"),¹¹¹ and so outside of the protections of the Act.¹¹² As a result, the percent of workers organized in the private sector in the United States has dropped from roughly seventeen percent to about ten percent since the early 1980s.¹¹³

Nevertheless, there remains a need for employees' collective voice in the workplace. As previously discussed, many of the conditions of the workplace are public goods including the quality of the air, light, speed of the assembly line, and perhaps even the hours of work.¹¹⁴ In order to negotiate efficient terms with the employer with respect to such public goods, it is necessary that the employees address the employer with a collective voice.¹¹⁵ Employees also have useful insights into the operation of the plant. Several recent management techniques, for example "Quality Circles," are predicated on the idea that employees have useful information to contribute in determining how best to undertake production.¹¹⁶ Although employers can gain information on how to improve production from individual employees, a collective voice for employees may also facilitate such discussions. Employee collective voice has also proved useful in the enforcement of government regulatory schemes, for example OSHA.¹¹⁷ Furthermore, the idea of industrial democracy still holds a philosophical appeal.¹¹⁸ If capital is organized in its representation in the workplace, why shouldn't labor be organized? Recent efforts by employers to weaken the restrictions of section 8(a)(2) of the NLRA through litigation and legislation stand as a testament to the continuing need for an employee collective voice in the workplace.¹¹⁹ How can we best meet this need in the new economic environment?

There has been a long standing chorus of calls from academics for reform of the NLRA.¹²⁰ It has been persuasively argued that the provisions of the NLRA, at least as currently interpreted by the courts, do not present a legal environment that is conducive to organization.¹²¹ The court decisions that have been identified as limiting

111. 29 U.S.C. §§ 151-169 (1994).

112. *See, e.g., NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571 (1994).

113. Hirsch, *supra* note 106, at 20.

114. *See supra* note 83.

115. FREEMAN & MEDOFF, *supra* note 12, at 8-9.

116. *See* Dau-Schmidt, *supra* note 14, at 470.

117. David Weil, *Are Mandated Health and Safety Committee Substitutes for or Supplements to Labor Unions?*, 52 INDUS. & LAB. REL. REV. 339, 340 (1999).

118. *See* Goldman, *supra* note 99, at 303.

119. *See* Dau-Schmidt, *supra* note 14, at 470-71.

120. *E.g.*, Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 61-68 (1993); William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937 (1986); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

121. Goldman, *supra* note 99, at 284.

union representation include those allowing employers to tell workers that the business will close if the workers exercise their right to choose a collective representative;¹²² allowing employers to permanently replace striking employees regardless of any necessity to do so;¹²³ permitting workers to remove themselves from the jurisdictional authority of the elected representative;¹²⁴ delineating broad definitions of managerial and supervisory employees so as to exclude from the coverage of the Act any employee with even modest managerial responsibilities;¹²⁵ and permitting new owners to avoid current labor contract obligations and collective bargaining obligations.¹²⁶ It has also been persuasively argued that the Act's remedial penalties are too low to adequately deter employers from committing unfair labor practices;¹²⁷ that the Act's election procedures should be eliminated or streamlined so as to deny employers opportunity to commit unfair labor practices;¹²⁸ and that first-time contract negotiations should be subject to interest arbitration to improve the chances of the parties achieving a first contract.¹²⁹ Although reform of the NLRA would undoubtedly facilitate union representation in the private sector, even with such reform it seems unlikely that traditional NLRA-style unions will ever represent the vast majority of American private-sector employees under the current economic environment.¹³⁰

Commentators have identified more creative alternatives for promoting employee collective voice. Several have supported amending section 8(a)(2) to allow employer sponsored committees;¹³¹ although some would require employee election of such committees¹³² or limit their operation to cases in which there was not a current organizing effort by an independent union.¹³³ Professor Matthew Finkin has proposed that we explore the use of minority representation as a means of broadening the reach of collective bargaining in our country.¹³⁴ Under this proposal, unions could achieve

122. *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965)).

123. *Id.* (citing *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989), and *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983)).

124. *Id.* (citing *Communication Workers v. Beck*, 487 U.S. 735 (1988), and *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985)).

125. *Id.* (citing *NLRB v. Healthcare & Retirement Corp.*, 511 U.S. 571 (1994), and *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980)).

126. *Id.* (citing *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974)).

127. *Dau-Schmidt*, *supra* note 14, at 508.

128. *Weiler*, *supra* note 120, at 1776-1805.

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

130. *Gottesman*, *supra* note 120, at 61.

131. Craver, *supra* note 120, at 429-31; *Gottesman*, *supra* note 120, at 86; Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 141 (1993); see also Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 20-22, 25-26 (1993).

132. Charles J. Morris, *Will There Be a New Direction for American Industrial Relations?—A Hard Look at the Team Bill, the Sawyer Substitute Bill, and the Employee Involvement Bill*, 47 LAB. L.J. 89 app. B at 105-107 (1996).

133. *Gottesman*, *supra* note 120, at 86-87.

134. Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee*

bargaining rights in a workplace merely by gaining the allegiance of a significant minority of the employees.¹³⁵ At this symposium, Michael Harper makes a very interesting proposal for a two-tiered system of employee representation in which unions can achieve a limited representational status through an abbreviated employee-selection procedure without employer input or resistance, and full representational rights through a more traditional election procedure.¹³⁶ Others have suggested importing the German idea of co-determination into American industrial relations.¹³⁷ Under these proposals, in workplaces with some minimum number of employees, the government would mandate the election of employees to "Employee Participation Committees," which would collect information from the employer and consult with him or her on certain designated issues.¹³⁸ More ambitious proposals also call for employee representation on the board of directors.¹³⁹ Finally, Michael Gottesman has suggested that, in the absence of collective bargaining, we imbue individual employees with many of the rights traditionally associated with the collective bargaining system including protection from employer reprisal, access to employer information concerning bargaining issues, and the ability to compel the employer to bargain in good faith.¹⁴⁰ Gottesman would rely on employee representation on the board of directors, employee stock ownership, and mandatory interest arbitration to give employees "leverage" in negotiations.¹⁴¹

Among these proposals, the ones that seem the most compatible with the new age of trade and technology are Harper's proposal for two-tiered representation, Finkin's proposal for minority representation, and Weiler's proposals for employee representation on participation committees and corporate boards of directors.¹⁴² The two-tiered representation and minority representation proposals would ease unions' obstacles in organizing across occupations to provide continuity for employees in multiemployer careers. Although limited and minority representation may not pose a powerful bargaining force in the workplace, it can still act as a collective voice for employees in workplace concerns and provide services to members such as references and benefit plans. Among western industrialized countries, the United States is unique in its insistence on the selection of an exclusive majority representative in

Representation, 69 CHI.-KENT L. REV. 195 (1993).

135. *Id.*

136. Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 124-28 (2001).

137. PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 284 (1990); Goldman, *supra* note 99, at 296-97.

138. WEILER, *supra* note 137, at 284-95.

139. Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 936-65 (1993).

140. Gottesman, *supra* note 120, at 71-85.

141. *Id.* at 93-96.

142. Proposals to enhance individual bargaining, although perhaps laudable in themselves, do not solve the public-good problem that makes the collective voice necessary. Proposals for employee stock ownership may also be laudable as encouraging saving and promoting unity of interest between employers and employees, but they seem doubtful as a means of giving current employees a voice in the workplace since employee mobility from job to job may mean employees own more stock in past employers than their current employer.

collective bargaining through a full-fledged election proceeding.¹⁴³

Employee-participation committees and employee representation on corporate boards of directors also provide a forum for collective voice that is consistent with the fast-paced changes of the modern labor market. Although the new pace of change in the workplace may be too fast to be conducive to traditional organizing, there seems no practical reason why large corporations could not be required to conduct periodic elections among their employees for employee representatives on participation committees and the corporation's board of directors. Although such employee participation committees would not conduct full collective bargaining, they could serve as a useful source of information for employees and employers. Moreover, they could facilitate collective bargaining in units in which independent unions existed and facilitate the enforcement of a variety of regulatory schemes. Indeed, to date over twenty states have experimented in some way with mandated employee health and safety committees in the enforcement of OSHA regulations.¹⁴⁴

Unions can aid their cause in the new age of trade and technology by adapting their organizing strategies and functions to account for the changed economic landscape. Since in the new age, employees are more connected to their careers than individual employers, unions should undertake organizing more on an occupational basis than an employer basis. Moreover, unions can appeal to employees by acting as a source of continuity for employees throughout their multiemployer careers. This can be done by participating in the employer and employee reference pools and multiemployer training programs discussed in previous sections.¹⁴⁵ Unions can provide further continuity by engaging in multiemployer bargaining to act as the prime administrator of multiemployer benefit plans. This multiemployer approach to employee services has been used for decades by unions in industries where multiemployer careers have long been common, such as the building trades.¹⁴⁶ The labor movement needs to adapt the lessons learned in these industries to other industries where multiemployer careers are now more common.

B. Adapting Labor and Employment Law to the New Global Economy

Although the new information technology poses some challenging issues for labor and employment law, the real challenge in the new age of trade and technology will be to adapt labor and employment law to the global economy. The globalization of the economy has not only wrought fundamental changes in the employment relationship, it has substantially diminished the regulatory power of individual nation-states and so challenged conventional notions of state sovereignty.¹⁴⁷ Unfortunately

143. See generally INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS: A STUDY OF INDUSTRIALISED MARKET ECONOMIES (Greg J. Bamber & Russell D. Lansbury eds., 3rd ed. 1998) (discussing employment relations in ten industrialized countries).

144. Weil, *supra* note 117, at 345. In Washington, state regulations requiring employee health and safety committees go back to 1945, predating OSHA. Other notable programs can be found in Oregon and Alaska. *Id.*

145. See *supra* Part III.A.2.

146. 1 THE DEVELOPING LABOR LAW 508-09 (Patrick Hardin ed., 3d. ed. 1992).

147. This diminished regulatory power of individual nation-states undermines state

my analysis suggests no answers to this challenge, instead it just presents the problem.

The problem of course is that the increased mobility of capital in a global economy undermines the ability of individual nation-states to regulate employers. If a country regulates the employment relationship in such a way as to impose costs on capital, this gives the employer incentive to move his operations to a country that does not impose such costs. As a result countries have incentive to minimize their regulation of employers, a result known as the "race to the bottom."¹⁴⁸ A fact that is sometimes overlooked in the analysis of this problem is that these incentives to avoid regulation exist regardless of the economic efficiency of the regulation and the motives of the employer.¹⁴⁹ For example, suppose that both American and Mexican workers do not understand how dangerous it is for them to work with a chemical compound and consequently, neither requires adequate compensating wages for this risk. Moreover, the cancer the compound causes can occur over a long period of time after exposure and is not solely identified with chemical exposure so that making it difficult to trace cases back to the job under the workers' compensation system. If OSHA were to make an efficient decision to ban the use of the compound in favor of a safer but more expensive compound,¹⁵⁰ and Mexican authorities did not impose a similar ban on their manufacturers, employers who use the compound would have incentive to move their operations to Mexico. Moreover, even if an American employer were relieved by the ban on the substance because he had no desire to needlessly expose his workers to carcinogens, if the employer remained in the United States, the regulation would put him at a competitive disadvantage relative to manufacturers in Mexico.¹⁵¹ The question then is how can a nation assert itself, rightly or wrongly, and govern the employment relationship in a global economy?

There currently seem to be four basic strategies at play among nations as means to govern the employment relationship in the global economy.¹⁵² Each strategy has its own advantages and disadvantages. The first, and perhaps most straightforward method, is to agree with one's primary trading partners on a treaty that establishes rules governing the conduct of industrial relations that preempt national law. An example of such transnational preemptive regulation would be the European Social Charter.¹⁵³ The Charter contains a list of fundamental social rights of workers, including occupational health and safety protections, guarantees of the right to

sovereignty in the traditional sense both because the individual state is less able to regulate activities within its borders, and also because effective international regulation of a problem will necessitate accommodation of other states' interests. See Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 988-89 (1995).

148. *Id.* at 992-93.

149. See Dau-Schmidt, *supra* note 27, at 697.

150. This decision would be "efficient" if the benefits of banning the compound in the form of saved health costs outweighed the increased costs to manufacturing of using the substitute compound.

151. See Dau-Schmidt, *supra* note 27, at 697.

152. Van Wezel Stone, *supra* note 147, at 989-90.

153. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965).

organize and bargain collectively, rights to adequate social welfare benefits, rights to workplace consultation, and protection of children, older workers, and the disabled.¹⁵⁴ Such provisions then become enforceable in each of the signatory countries as a matter of law. Such direct preemptive transnational regulation has the advantage that it can give employees specific legal rights across a broad collection of countries. As one can imagine though, it is often hard for countries to achieve consensus on the standards that should be applicable in all countries, and such standards can become weak and overgeneralized in negotiations. However, the success of the European Union shows that broad transnational preemptive regulation is possible under some circumstances.¹⁵⁵

The second method, closely related to the first, is that a country may try to agree with its trading partners on a treaty that establishes certain minimum standards for all signatories for the regulation of industrial relations, and then each country agrees to "harmonize" their laws to meet these standards within a specified time.¹⁵⁶ The protected rights then become enforceable in the manner prescribed in each country's harmonizing laws. An example of such an arrangement would be European Union directives under the Maastricht Treaty,¹⁵⁷ including the 1994 directive requiring works councils or other consultive procedures in all European multinational corporations.¹⁵⁸ The advantages and disadvantages of this method of harmonization are much the same as preemptive transnational regulation, except that the process of harmonization allows more individual variation among countries as to how the agreed-upon legislative objectives are realized.¹⁵⁹

A third strategy is for a country to search out trading partners who have "acceptable" standards for the regulation of the employment relation, and restrict free trade agreements to just those countries. A country, like the United States, with sufficiently attractive consumer markets, can use this strategy to encourage other potential trading partners to bring their labor standards up to par with those of the consumer country. A variety of U.S. trade laws allow the President to withhold trade privileges from other countries that do not give their workers certain basic protections, including the right to organize.¹⁶⁰ Ostensibly this was the theory behind

154. *Id.* at 92-95.

155. Although initially a hold out on the Social Charter, Great Britain has recently agreed to its terms. Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany and Japan Under the Bargaining Model*, 8 TUL. J. OF INT'L & COMP. L. 117, 138 (2000); J. R. Schackleton, *Industrial Relations Reform in Britain Since 1979*, 19 J. LAB. RES. 581, 600-01 (1998).

156. Van Wezel Stone, *supra* note 147, at 1001.

157. EC TREATY, *supra* note 52.

158. Van Wezel Stone, *supra* note 147, at 1002-03.

159. *Id.* at 1023.

160. *Id.* at 1018-19. These laws include the 1983 Caribbean Basin Initiative, Pub. L. No. 95-67, 97 Stat. 384 (codified as amended at 19 U.S.C. §§ 2701-2706 (1994)); Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3018, 3018-24 (amending scattered sections of 19 U.S.C.); the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 19 U.S.C. §§ 2901, 2903 (1994 & Supp. IV 1998)); and the Overseas Private Investment Corporation Act of 1985, Pub. L. No. 99-204, 99 Stat. 1669 (codified as amended at 22 U.S.C. § 2151 (1994 & Supp. IV 1998)).

the undertaking of NAFTA. However, little effort was made to equalize or establish a minimum floor of labor standards and labor rights among the three countries that are party to NAFTA.¹⁶¹ Of course the country that seeks to impose higher labor standards on a trading partner may worry that the converting country will not adequately enforce the new laws, and may ask to monitor enforcement of these laws and to have some recourse for complaints concerning enforcement.¹⁶² This approach can be appealing for powerful consumer countries that want to maintain their labor standards while trading with lesser-developed countries. However, monitoring enforcement of labor standards in other countries that may not be committed to the same ideals may be problematic.

The final strategy that countries, or their citizens, have adopted to enforce labor standards across nations is the extraterritorial application of a country's labor and employment laws. Although traditionally American courts have presumed that U.S. laws do not apply extraterritorially unless they expressly state otherwise,¹⁶³ more recently there have been departures from this presumption, at least with respect to commercial law.¹⁶⁴ Although the courts remain hesitant to apply American labor and employment laws extraterritorially, recent cases show some softening on the issue since the stated rationale for denying application has changed from a presumption of statutory construction to an application of international comity.¹⁶⁵ On the legislative front, Congress has recently expressly provided for the extraterritorial application of the Age Discrimination in Employment Act and the Civil Rights Act to U.S. corporations employing U.S. workers overseas, and even considered extraterritorial application of the NLRA.¹⁶⁶

Undoubtedly the nations of the world will utilize all of these strategies, and more, in constructing an international regulatory response to the global economy. A country like the United States, which has a very large and attractive consumer market, could have a lot of influence in the formulation of international industrial-relations policy if it were to assert its will. Perhaps in the future, as the importance of international trade grows, the United States will find the political will to take more of a leadership role in this regard.

161. The NAFTA labor side agreement merely addresses the enforcement of each country's existing labor laws with respect to safety and health, child labor, and minimum wages. No effort was made to force new legislation in any country. Van Wezel Stone, *supra* note 147, at 1008.

162. The NAFTA labor side agreement allows each country to undertake cross-border enforcement procedures before a Commission for Labor Cooperation, an Evaluation Committee of Experts, and ultimately an arbitrator. Van Wezel Stone, *supra* note 147, at 1008-09.

163. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909), *overruling recognized by* *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

164. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

165. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

166. Van Wezel Stone, *supra* note 147, at 1018.

CONCLUSION

The new age of trade and technology has wrought fundamental changes in employment relationships in the United States. Free trade agreements combine with improvements in information technology to place American workers in competition with other workers across the world. Moreover, the improvements in information technology have led to the disintegration of the firm and new management techniques that bring the market inside the firm in ways not experienced in recent history. As a result, the American workplace has changed from one dominated by internal labor markets with expectations of long-term employment to one dominated by global spot markets for labor with no expectations except constant change.

The change in the American workplace from the paradigm of internal labor market and lifetime employment to the paradigm of international spot markets and short-term employment raises a number of important issues in labor and employment law: How will employers gain adequate information on prospective employees and monitor the work of those employees while not infringing the employees' freedom from defamation and right to privacy? How can we encourage employers to take an interest in adequately training short-term employees? How can we promote the expression of employees' collective voice in this market-driven atomistic environment? How do we ensure employees opportunities for benefits and promotions in multiemployer careers? Finally, how can the nations preserve their national sovereignty and their ability to effectively regulate the employment relationship in a global economy? These are the questions that will dominate labor and employment law for the foreseeable future. Our resolution of these questions will determine our children's and grandchildren's success, enjoyment, and fulfillment in their employment relationships.