

System of Employee Representation at the Enterprise The US Report

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A. Introduction

Although employee-representation systems have been coexisting in a collective-bargaining framework in continental Europe for many years, U.S. labor advocates have looked upon those representations systems with suspicion. The reasons for this suspicion are historical: U.S. employee-representation systems have their roots in company-dominated unions that the National Labor Relations Act (“NLRA”) was designed to prohibit. The National Labor Relations Board (“NLRB” or “the Board”), the independent agency created by the New Deal Congress to administer the NLRA, has interpreted that legislation’s prohibition to essentially make unlawful most, if not all, employer-initiated employee-representation systems and many other types of employee-representations systems.

While Congress’s and the Board’s efforts to prohibit employer-dominated employee-representation systems have been noble and are grounded in values designed to preserve employees’ rights to workplace participation to the greatest extent, these efforts have, in fact, muffled employee voice. The problem arises in part from differences in two competing values: employee voice and employee self-organization. At first blush, those values appear to be co-extensive. But in reality, employee voice, which focuses on employee participation and industrial democracy, is a broader concept than self-organization, which focuses on employee autonomy. That section of the NLRA that prohibits company-dominated unions values *self-organization*, or worker autonomy, over employee voice, or participation. Other sections of the NLRA, such as its exclusivity principle, whereby the union that the majority selects or designates is the exclusive employee representative, further serve to stifle employee voice.

A review of employee-representation systems that have managed to take hold in the United States within this hostile framework uncovers several questions, for which this report seeks to provide preliminary responses. Against a backdrop of understanding the instrumental and principled rationale for employee-representation systems, this report asks which types of systems function well within the U.S. legal framework, which systems don’t work well within

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this framework, and to what extent that framework needs to change to accommodate greater participation.

Section B. of this report begins with a brief history of the development of employee-representation systems in the United States, the rise of hostility for those systems, an analysis of the failed legislative attempts to overcome that hostility, and a review of the extent to which workplace safety committees have been a notable exception to the ban on employee-representation committees. Section C. describes the U.S. legal framework of collective-bargaining and provides insight into the legal impediments to bringing employee-representation systems to fruition. Section D. commences with a description of the instrumental and intrinsic values underlying employee-representation systems; it then proceeds to examine those grassroots attempts at employee-representation that have been more successful. That section concludes with a look to the future.

B. Description of the U.S. Employee Representation System

1. Historical Underpinning of the “Company Union”

In the United States there is no formal legal framework for non-union employee representation systems. In fact, the New Deal legacy, which established the framework of modern U.S. labor law, has put into question not only the necessity of such a system but even its mere legality. Historically, the NLRA’s prohibition of “company unions” was a reaction to their rapid spread in the 1930s, prominently featured in John Rockefeller’s declaration that capitalists, workers, and shareholders are to be partners in economic ventures. Rockefeller had devised a worker-participation plan in reaction to pressures from President Woodrow Wilson and public calls to resolve labor conflicts.¹ The New Dealers sought to protect independent labor unionization by limiting other types of employee participation and representation systems and creating a promise of autonomy for industrial unions. According to Senator Robert Wagner, who was the force behind the legislative action, “the company union is generally initiated by the employer; it exists by his sufferance; its decisions are subject to his unimpeachable veto.”²

Non-union systems of employee representation in the United States, despite their tenuous standing under current law, do have historical roots in the United States and have not always been so heavily regulated and warily looked upon as they are today. Rather, the idea of the “company union” and the negative connotations that attach to it connected for the labor movement during the Great Depression. Prior to the Great Depression, employers using forms of non-union systems of employee participation sought to instill cooperation, loyalty, and input on quality. However, the Great Depression changed the course of non-union forms of employee representation. In the wake of the economic turmoil of the Great Depression, the Franklin D. Roosevelt administration envisioned the NLRA as part of the overall plan for economic recovery. In late 1931, even the most employee-oriented companies were forced to

¹ Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1546 (2006).

² 78 CONG. REC. 4229, 4230 (1934) (statement of Sen. Wagner), *quoted in* Leroy, Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromotion Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812, 1817 (1993).

institute wage cuts, layoffs, and production speedups, resulting in an employee loss of faith in the integrity of their employers and a sense of panic that created the mindset that extraordinary reform must be taken to remedy the situation.³ The NLRA sought to promote the formation of unions and the use of collective bargaining. Employers responded in fear to this new mandate for unionization by attempting to fight back by creating “company unions.” Unlike earlier 1920 representation plans, the New Deal era non-union representation efforts were largely motivated by employers with anti-union sentiments. In the wake of the negative response against company unions, non-union representation virtually disappeared for a period in U.S. history.

Columbia Law Professor Mark Barenberg, who has explored in two comprehensive articles the prohibition of “company unions” and its relevance to today’s economy, explains that,

In Wagner’s institutional ideal, company-union-like collaborative structures such as works councils and joint labor-management committees would emerge and operate effectively and non-manipulatively *only within the protective shell of independent unionism*.⁴

The idea of securing a separate autonomous space, or “shell” in Barenberg’s term, for workers, free of coercive powers, is also embodied in the NLRA’s “managerial exclusion” rule. Section 2(3) of the Act excludes “managerial employees” or “supervisors” from the definition of employees that can form a bargaining unit.⁵ Section 2(11) defines the term “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁶

One rationale for this exclusion is similarly the protection of a separate sphere of rank-and-file workers and to prevent the inclusion within a bargaining unit of employees that will have a “conflict of interest,” which will “hinde[r] the functioning of the adversarial model of labor-management relations.”⁷

³ Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL’Y REV. 729, 738 (1999).

⁴ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1391 (1993) (emphasis added). Mark Barenberg argues that banning the company-union for the reasons of preventing despotism is inconsistent with the permission of remaining a non-unionized workplace. *Id.* See also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 761 (1994).

⁵ Section 2(3) of the NLRA states: “The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor.” NLRA § 2(3), 29 U.S.C. § 152(3) (1982).

⁶ NLRA § 2(11), 29 U.S.C. § 152(11).

⁷ See Patrick S. Bryant, *Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 602 (1988). For similar reasons, Congress prohibits guards and nonguards from forming a bargaining unit. See 29 U.S.C. § 159(b)(3). Cf. Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FIU L. REV. 495, 534-42 (2010) (arguing that wholesale exclusion of supervisors from the NLRA, unlike bargaining-unit separations, “punches a gaping hole” in the NLRA’s protective cover for workers).

2. The Rise of Non-Union Employee Representation in Practice

Despite the continued hostility toward non-union representation, the decline of traditional labor law requires alternative models of employee voice and workplace democracy. The NLRA, which prohibits employers from interfering with any form of labor organization, inhibits the development of new forms of employee representation while the realm of traditional collective bargaining continues to shrink. During the 1960s and 1970s, legal academia as well as industry employers rediscovered non-union employee participation.⁸ Since the mid-1980s, employee participation models have accelerated in practice. As labor unions rapidly decline, leaving over ninety percent of the private sector workforce in the United States not unionized, representation and participation models outside of the traditional NLRA framework have become more prominent. One study of large firms in the 1980s found that forty-three percent of non-union manufacturing workers were involved in some form of employee participation or representation model.⁹ A more recent study has found that this number has increased even further, finding that seventy-five percent of all employers used some sort of employee involvement programs and that ninety-six percent of employers with 5,000 or more employees had such programs.¹⁰ Another study looking at companies with fifty or more employees finds that thirty-two percent have self-directed work teams, eighteen percent have peer review of employee performance, and forty-six percent utilize total quality management techniques.¹¹

3. The Dunlop Commission and the TEAM Act

As these practices became a reality, the historical prohibition on non-union employee representation systems have increasingly become the focus of many debates concerning workplace reform. In the mid-1990s, a major attempt for legislative reform of the NLRA was undertaken during the Clinton administration, with the goal of facilitating the growth of employee involvement.¹² The Clinton administration commissioned a report on the future of work relations, the Dunlop Commission's "Goals for the 21st Century American Workplace." The primary goal established in the report was to expand employee participation and labor-management partnerships to more workers and workplaces and facilitating the growth of employee involvement. The Commission recognized the substantial growth in new forms of employee participation, such as self-managed teams, safety and health committees, gain sharing plans, total quality management (TQM), quality circles, and employee ownership plans.¹³

The Commission viewed this rise in various schemes as triggered by market competition,

⁸ See Kaufman, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Maury Gittleman et al., "Flexible Workplace" Practices: Evidence from a Nationally Representative Survey, 52 *INDUS. & LAB. REL. REV.* 99, 105 (1998).

¹² COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS (1994); Teamwork for Employees and Managers Act of 1995, S. 295, 104th Cong; see also Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 *U. PA. J. LAB. & EMP. L.* 121 (2001); Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 *J. LAB. RES.* 387 (1995).

¹³ U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS - FINAL REPORT 24, 98, 100 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2 [hereinafter Dunlop Report].

technological change, changes in organizational structures, and the nature of industrial production. It further emphasized empirical findings showing that millions of workers are interested in participating in decisions and governance at work but lack the opportunity to do so. The Dunlop Commission described the prohibition on “company unions,” as “critically impeded growth of some employee involvement programs and giv[ing] rise to challenges against joint worker-management committees.”¹⁴ The Commission emphasized, however, that employee-sponsored programs should not substitute for independent unions. It “should [still] be an unfair labor practice . . . for an employer to establish a new participation program or to use an existing one with the purpose of frustrating employee efforts to obtain independent representation” or to subvert the collective bargaining experience.¹⁵

Subsequently, the Teamwork for Employees and Managers Act (TEAM Act),¹⁶ which would have repealed the historical prohibition on company unions, was passed by both houses but vetoed by President Clinton. The TEAM Act proposed to amend the NLRA “to provide that an employer’s establishing, assisting, maintaining, or participating in any organization in which employees participate on matters regarding quality, productivity, and efficiency will not be an unfair labor practice.”¹⁷ This would provide a broader framework for instituting different types of employee representation schemes. Proponents of the TEAM Act state that approval of the TEAM amendments would mark “an important step toward improving the ability of American companies to compete in the global market place.”¹⁸ However, there were significant concerns among some that such an amendment would invite the return of the “company union” and give employees a false sense of protection, without adequately ensuring that workers would still be able to institute independent union representation.

4. In the Shadow of Law

Notwithstanding these failed attempts to legally reform the labor law system, new models of employee voice are increasingly introduced in the U.S. labor market. Despite the possible illegality of such experiments, private firms have been broadly introducing new forms of employee representation including self-management teams, quality circles, and employee-action committees, ranging from shop-floor operational consulting to strategic policymaking. As we further discuss below, basic distinctions can be drawn between representation in *decision-making* and participative schemes in *ownership*; between representation in *shop floor practices* and representation in *managerial strategic choices*; between representation about *production and processes* and representation about *work conditions*.¹⁹ Another important

¹⁴ *Id.*

¹⁵ *Id.* at 26.

¹⁶ Teamwork for Employees and Managers Act of 1995, passed both houses of Congress in 1996 but was vetoed by President Clinton. 142 CONG. REC. H8816 (daily ed. July 30, 1996). Identical legislation later was proposed with H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997).

¹⁷ H.R. 634; S. 295; see also Michele L. Maryott, *Participate at Your Peril: The Need For Resolution of the Conflict Surrounding Employee Participation Programs by the TEAM Act of 1997*, 24 PEPP. L. REV. 1291 (1997).

¹⁸ Maryott, *supra* note 17 (citing 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (statement of Rep. Harris W. Fawell)).

¹⁹ On ownership schemes, see Henry Hansmann, *When Does Worker Ownership Work? ESOPs Law Firms, Codetermination and Economic Democracy*, 99 YALE L.J. 1749 (1990); Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”*, 67 FORDHAM L. REV. 957 (1998); Herbert Gintis, *Financial Markets and the Political Structure of the Enterprise*, 11 J. ECON. BEHAVIOR AND ORGANIZATION 311 (1989).

distinction is between representation at the single workplace and cross-firm and cross-sectoral systems of non-union employee representation. Employee representation on corporate boards is extremely rare.²⁰ For example, “of the Fortune 1000 companies in the United States, only three have their own senior HR manager on their corporate board, which is an astoundingly small proportion.”²¹ Although representation on boards is rare, employees as stock holders are common. In general, institutional ownership in U.S. corporate equities increased dramatically in recent decades, in large part due to pension funds growth.²² Such employee ownership schemes, which have grown rapidly since the 1990s, have been shown empirically to improve cooperative employment relations and collaborative work environments.²³

At the same time that there is a burgeoning range of non-union employee representation schemes in the shadow of law, scholars continue to argue that experimenting with non-union systems of employee representation would require “turning the Wagner Act upside down” to allow more established and structured representation systems.²⁴ Numerous commentators have described the NLRA prohibition on non-union employee representation systems as critically impeding the growth of contemporary management strategies. Moreover, the lack of a legal framework for employee representation continues to shed a problematic light on work law in the United States. For example, the National Labor Relations Board (NLRB) has recently held that nonunionized employees do not have a right to have other employees accompany them during disciplinary procedures.²⁵

In the context of occupational safety regulation, the Occupational Safety and Health Administration (OSHA) has been reluctant to promote worker involvement in safety-regulation compliance, despite strong evidence of worker safety committees’ success in reducing risk.²⁶ OSHA has been deeply criticized for its lack of structured involvement of workers.²⁷ Under the Occupational Safety and Health Act (the OSH Act), even in non-unionized work settings, any worker is entitled to request an inspection, accompany inspectors during an inspection, and receive relevant information about compliance. And yet, the courts have interpreted the Act as not requiring an employer to pay wages for time employees spend accompanying OSHA inspectors.²⁸ A recent OSHA initiative “deputizes” workers as Special

²⁰ DAVID CHARNY, WORKERS AND CORPORATE GOVERNANCE: THE ROLE OF POLITICAL CULTURE 91–120 (Margaret M. Blair & Mark J. Roe eds., 1999); Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, in WORKING UNDER DIFFERENT RULES 97, 99 (Richard B. Freeman ed., 1994); Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58 (1995).

²¹ Sanford M. Jacoby, *Employee Representation and Corporate Governance: A Missing Link*, 3 U. PA. J. OF LAB. & EMPLOYMENT L. 449, 483 (2001).

²² MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 45–46 (1995).

²³ Margaret M. Blair et al., *Employee Ownership: An Unstable Form or a Stabilizing Force*, in THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION 241 (Margaret M. Blair & Thomas A. Kochan eds., 2000); Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743 (1999); Michael A. Conte & Jan Svejnar, *The Performance Effects of Employee Ownership Plans*, in PAYING FOR PRODUCTIVITY 143 (Alan S. Blinder ed., 1990).

²⁴ CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 254–56 (1988).

²⁵ *In re IBM Corp.*, 341 N.L.R.B. No. 148 (2004) (overruling *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676 (2000)).

²⁶ Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005); see also Anne Marie Lofaso, *What We Owe Our Miners*, 5 HARV. L. & POL’Y REV. 87, 107 (2011) (documenting a similar success story regarding worker safety committee in the coal mining industry).

²⁷ See Lobel, *supra* note 26, at 1114–15.

²⁸ *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1164 (D.C. Cir. 1975).

Government Employees (SGEs). The SGE program trains workers at participating Voluntary Protection Program (VPP) sites to serve alongside OSHA officials “as full-fledged members of evaluation teams.”²⁹ This initiative is quite new, is limited to employers that voluntarily opt to participate in the program, and is further limited to certification processes of firms showing they are particularly safe rather than extending to the ongoing operational management of safety. Despite strong empirical evidence that employee representation and joint employee-employer safety committees reduce risk, “OSHA has largely failed to triangulate the governance of work safety with the aim of systematically including workers. In recent years, there have been recurrent proposals to reform the OSH Act to mandate the creation of safety and health workplace committees, yet ‘even the whiff of ‘labor law reform’ was sufficient to doom [the] proposals.’”³⁰

In sum, while reform efforts of U.S. labor law have thus far been largely unsuccessful, and while the NLRA continues to formally exclude systems of non-union employee representation, a tenuous frame and practice of such systems does exist in the background of the union framework. Because the current post-depression labor law framework set forth in the NLRA and subsequent case law have placed such practices on shaky footing, employee representation systems vary widely in practice.

C. Relationship between Employee Representation Systems and Collective Bargaining

1. Overview of Unionization and Collective Bargaining

a. Legal Framework Regulating Unionized Workplaces and Collective Bargaining

In the United States, several laws govern the relationship between unions and employers. In the private sector, union-employer relations are regulated by the National Labor Relations Act (NLRA),³¹ or in some cases the Railway Labor Act (RLA).³²

Section 7 of the NLRA grants employees the following rights:

- to self-organize;
- to join, form, or assist unions;
- to bargain collectively through representatives of their own choosing;
- to engage in other concerted activities for the purpose of collective bargaining;
- to engage in other concerted activities for the purpose of other mutual aid or protection; and

²⁹ OSHA Directive CSP 03-01-001, Policies and Procedures Manual for Special Government Employee (SGE) Actively Conducted Under the Auspices of the OSHA’s VPP (Jan. 4, 2002).

³⁰ Lobel, *supra* note 26, at 1132 (citing Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1541 (2002)).

³¹ 29 U.S.C. § 151 et seq. (2006).

³² 45 U.S.C. § 151 et seq. (2006). The RLA regulates the employer-union relationship in the railroad and airline industries, established the National Mediation Board (NMB) to govern labor disputes in those industries. The NMB, which has a very different administrative structure and which provides for a very different dispute resolution process from the NLRB, is not discussed in this paper.

- to refrain from any of these activities, except as this right is affected by an agreement requiring union membership as a condition of employment.³³

Congress created the National Labor Relations Board (NLRB or Board), an independent federal administrative agency, to protect these rights.³⁴

The NLRA covers most employees in the private sector. The NLRA expressly excludes the following individuals:

- agricultural workers;
- domestic servants;
- those employed by their parents or spouses;
- independent contractors;
- supervisors;³⁵
- those employed by employers subject to the RLA; those employed by the federal, state, or local government; or any other person employed by an employer that is not covered by the NLRA.³⁶

The statutory definition of employee is the gateway to legal protection of U.S. workers.³⁷ Employees not covered by the NLRA do not possess Section 7 rights and are not protected in the event that an employer takes some adverse employment action against them because that worker engaged in an activity otherwise protected by the NLRA.³⁸

b. Unionization Rates in the Private Sector Continue to Decline

As a result of congressional, administrative, and judicial modification to the NLRA through legislative and adjudicative amendment, increasingly fewer workers are protected by the NLRA.³⁹ Moreover, the nature of production and industry has been evolving and economic pressures have contributed to these transformations. For both the reasons that are internal to the legal system and the reasons that are related to industrial change, private-sector union density has decreased dramatically in the past few decades. Whereas the union membership rate in the United States was 11.8 percent in 2011, the union membership rate was 20.1 percent in 1983, the first year for which comparable union data were collected.⁴⁰

³³ 29 U.S.C. § 157.

³⁴ *Id.* § 153.

³⁵ *Id.* §§ 152(3), 152(11).

³⁶ The Federal Labor Relations Act governs the relationship between unions representing federal workers and the federal government. 5 U.S.C. § 7101. State law governs the relationship between public employees and their employer (the state or local government). This paper concerns employee representation at the enterprise and therefore will not examine the significant differences between private-sector and public-sector collective bargaining.

³⁷ See generally Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 203 (2010).

³⁸ See *id.*; see also Ellen Dannin, *Not a Limited, Confined, or Private Matter—Who is an “Employee” Under the National Labor Relations Act*, 59 LAB. L. J. 5, 5 (2008).

³⁹ Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 F.I.U. L. REV. 497 (2010).

⁴⁰ BUREAU OF LABOR STATISTICS, Economic News Release, Jan. 27, 2012, <http://www.bls.gov/news.release/union2.nr0.htm>.

The number of workers belonging to a union has also decreased from 17.7 million union workers in 1983 to 14.8 million workers in 2011.⁴¹

By contrast, public-sector union density rates are much stronger than private-sector union density rates. Nearly half of all union workers—7.2 million—are public employees. The union membership rate in the public sector is 37.0 percent making it five times higher than the union membership rate in the private sector, which is 6.9 percent.⁴² Union density rates in the private and public sectors are also higher in the northern states of the United States than in its southern states.⁴³

c. Federal Law Imposes a Mutual Duty to Bargain Collectively on Private-Sector Employers and Unions

Private-sector employers and unions have a mutual duty to bargain collectively under Section 8(a)(5) and 8(b)(3) of the NLRA.⁴⁴ In particular, the NLRA imposes on unions and employers a “mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”⁴⁵ In *N.L.R.B. v. Insurance Agents’ International Union*, the United States Supreme Court observed that the NLRA “impose[s] a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace.”⁴⁶ United States labor scholars have explained that this good-faith requirement means that employers and unions have a duty to bargain collectively with a view *toward* reaching agreement.⁴⁷ The duty to bargain in good faith does not, however, imply an “obligation [to] compel either party to agree to a proposal or require the making of a concession.”⁴⁸

To the extent that the US-style duty to bargain can be viewed as “a free market solution to a free market problem,”⁴⁹ the Board’s role in resolving collective-bargaining disputes is intentionally limited to ensuring procedural regularity and does not extend to examining the substantive terms of the agreed-upon contract. Along those lines, the Supreme Court in *H.K. Porter v. N.L.R.B.* observed that “[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”⁵⁰ In support of that view, the NLRA’s duty to bargain requires the free flow of information, most obviously by incorporating an employer

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, Economic News Release, Jan. 27, 2012, Table 5. *Union affiliation of employed wage and salary workers by state*, available at <http://www.bls.gov/news.release/union2.t05.htm>.

⁴⁴ 29 U.S.C. §§ 158(a)(5), 152(b)(3) (2006).

⁴⁵ *Id.* § 158(d).

⁴⁶ 361 U.S. 477, 488 (1960).

⁴⁷ Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing and Encouraging Individual Rights to Job Security in a Collective System* (A Tribute to Clyde Summers), 14 EMP. RTS. & EMP. POL’Y J. 55 (2010).

⁴⁸ 29 U.S.C. § 158(d); see also *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395, 404 (1952).

⁴⁹ Lofaso, *supra* note 47, at 62 (attributing this comment to Professor Clyde Summers).

⁵⁰ 397 U.S. 99, 107–08 (1970).

duty to furnish unions with information relevant to collective bargaining into the duty to bargain itself.⁵¹

The duty to bargain in the private sector extends to what are known as mandatory subjects of bargaining,⁵² or “wages, hours, and other terms and conditions of employment.”⁵³ In addition to this definitional limitation on the duty to bargain, there are other judicially imposed limitations. For example, employers are never required to bargain over a decision to go out of business. Nonetheless, employers are required to bargain over the effects of that decision.⁵⁴

2. Union Influence over the Selection or Working of Employee Representatives

a. Union Influence over the Selection of Union Employee Representatives

In the United States, individual bargaining over the terms and conditions of employment is the default legal rule. U.S. labor law gives “employees the right to depart from this default by forming labor unions and bargaining collectively with their employers over terms and conditions of employment.”⁵⁵

With regard to the question whether or not a union should represent employees for the purposes of collective bargaining, employees—not unions—select employee representatives through one of two processes, card check or secret-ballot election.⁵⁶ In either event, employee choice must be free, that is, uncoerced by either the employer or the union.⁵⁷ Almost all union campaigns begin with a card check that is highly regulated by the NLRB to ensure employee free choice. Employees may solicit their coworkers’ signatures on union authorization cards, which typically state that the undersigned wishes to be represented by the specified union. Although solicitation may occur at the workplace during breaks and in nonworking areas,⁵⁸ most solicitations are done by house calls.⁵⁹ An employer is prohibited from discriminating against an employee for soliciting coworkers.⁶⁰ By contrast, employers are not required to yield access to their property to nonemployees union organizers for the purpose of soliciting,⁶¹ which may explain why so much organizing is done away from the worksite.

To obtain an election, the union must petition the Board for an election and present a thirty percent showing of employee interest⁶² in “a unit appropriate” for purposes of collective

⁵¹ See generally *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

⁵² For a general discussion of the distinction among mandatory, permissive and illegal subjects of bargaining, see *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁵³ 29 U.S.C. § 158(d).

⁵⁴ See *First Nat. Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 681 (1981).

⁵⁵ Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 656, 664 (2010).

⁵⁶ See generally *id.*

⁵⁷ NLRA section 8(a)(1) makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). NLRA section 8(b)(1)(A) makes it unlawful for a union “to restrain or coerce employees in the exercise of the rights guaranteed in section 7.” *Id.* § 158(b)(1)(A).

⁵⁸ See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 800–04 & nn.6–10 (1945).

⁵⁹ Sachs, *supra* note 55, at 664 (“[a]lthough some discussions between employees take place at work, the effort consists primarily of visits with employees when they are not at work through so-called ‘house calls.’”).

⁶⁰ 29 U.S.C. § 158(a)(1), (3).

⁶¹ See *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).

⁶² NLRB RULES AND REGULATIONS, 29 C.F.R. § 101.18. This rule is based on NLRA Section 9(c)(1)(A), which provides:

bargaining.⁶³ The unit appropriate is more colloquially known as the bargaining unit. If the solicited union has garnered over 50% employee support, the employer may lawfully recognize it as the majority representative of the employer’s employees and bargain with it upon request over the terms and conditions employment. Although the employer may, upon request, voluntarily recognize the union (card check), the employer may also lawfully refuse to bargain and demand that the union prove its support through a NLRB-conducted, secret-ballot election.⁶⁴

An employer’s duty to recognize and bargain with a union attaches only once a majority of employees in the bargaining unit has decided to unionize by secret-ballot vote or when the employer agrees voluntarily to recognize a union that enjoys majority support as evidenced by a card check. The union, as the representative of the majority of employees selected or designated, is the sole and exclusive representative of those employees.⁶⁵ Indeed, it is unlawful for an employer to recognize or bargain with a union as the exclusive bargaining representative before that union enjoys majority support.⁶⁶ Employees may then choose their local representatives, which typically include a shop steward who serves as a point person between management and the employees as well as between management and the union.

b. Union Influence over the Selection of Other Workplace Employee Representatives

Once a union is in place as the exclusive bargaining representative of a majority of the workers, unions will exert a certain amount of influence over the selection of other workplace employee representatives. A union has the most direct influence over the shop steward, a bargaining-unit worker, selected by his or her coworkers to serve as the union’s bargaining-unit representative. Although the shop steward’s duties vary by each union’s constitution, by-laws, and local practices, these duties typically include monitoring the workplace for statutory, contractual, and other legal violations, enforcing and maintaining the provisions of the collective-bargaining agreement, representing bargaining-unit employees in grievance

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provided for an appropriate hearing upon due notice. If the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1)(A).

⁶³ Section 9(a) instructs that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. § 159(a) (emphasis added).

⁶⁴ See *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974).

⁶⁵ See *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944).

⁶⁶ See *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 738 (1961) (holding that an employer violates Section 8(a)(2) and (1) and a union violates Section 8(b)(1)(A) when the employer recognizes the union as the exclusive bargaining representative before the union enjoys majority support).

proceedings, and serving as a liaison between bargaining-unit employees and management as well as between bargaining-unit employees and local and international union officials.⁶⁷

c. Section 8(a)(2)'s Limits to the Authority of Employee Representatives in a Unionized Workplace

Unions can also place limits on other types of employee representatives that are not union officials. In particular, the NLRA places limits on the employer's ability to select employee representatives or to create employee participation groups. As noted earlier, NLRA Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."⁶⁸ NLRA Section 2(5) defines labor organization to mean "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁶⁹

Interpreting these statutory sections, the Board, in *Electromation, Inc.*, has determined that an employee group or committee constitutes a statutory labor organization if that committee involves: "(1) employee participation, (2) a purpose to *deal with* employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an 'employee representation committee or plan' is involved, evidence that the committee is in some way representing the employees."⁷⁰ Applying that test, the Board has concluded that "dealing with" is a broader term than bargaining that encompasses any "bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals."⁷¹ In other words, a labor organization is something broader than what we normally think of as a union. Applying its own analysis, the Board held in *Electromation* that an employer violated section 8(a)(2) when it established "employee-action committees."⁷² These committees were comprised of six employees and one or two members of management to discuss issues such as bonuses, no-smoking policies, and raises. The court affirmed that these committees were unfairly dominated by the employer, because the employer had structured the committees, was involved in structuring its proposals, and paid the employees for their time on the committee. Thus, the committees were held to violate the NLRA.

The Board's seminal decision in *Electromation* thus instructs that, if a union is already representing employees in a particular workplace, whether or not a collective-bargaining agreement has been executed, then management-initiated working groups, which meet the Board's construction of the statutory definition of labor organization, violate Section 8(a)(2) of the Act.⁷³ In the unionized setting, the NLRB has similarly found other types of non-union

⁶⁷ Examples of shop steward clauses found in collective bargaining agreements are available at Collective Bargaining Agreements—U.S. Department of Labor, on line at <http://digitalcommons.ilr.cornell.edu/blscontracts/>.

⁶⁸ 29 U.S.C. § 158(a)(2).

⁶⁹ *Id.* § 152(5).

⁷⁰ *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992) (emphasis added), *enforced*, 35 F.3d 1148 (7th Cir.1994).

⁷¹ *Id.* at 997–98.

⁷² *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1161–71 (7th Cir. 1994).

⁷³ See generally LeRoy, *supra* note 2.

committees to be in violation of the NLRA. For example, in *Du Pont*, the Board found six safety committees and one fitness committee to be employer-dominated labor organizations prohibited by the NLRA. The Board found that the respondent employer had bypassed the union in dealing with the committees. The Board explained that while employers were not prohibited from encouraging its employees to express their ideas, to report hazards, and to become more aware of safety problems, employers were prohibited from involving employees in developing safety policies and in decision-making processes. The Board emphasized that because the committees were charged with making proposals, including employee compensation proposals to management, they were unlawful.⁷⁴

The consequence of these and other decisions puts in jeopardy most management-initiated groups that might have had the possibility of enhancing worker participation into decisions affecting employees' work lives, where the Board makes the additional finding of employer domination. The Board has determined that employer domination occurs "when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement."⁷⁵ The Board's construction of Sections 2(5) and 8(a)(2) do not, however, jeopardize a "unilateral mechanism, such as a 'suggestion box,' or 'brainstorming' groups or meetings, or analogous information exchanges."⁷⁶ Nor is an enterprise's delegation of authority to lower managerial bodies viewed as prohibited "dealing with," but rather as lawful change-of-command management. For example, in *General Foods Corporation*, the Board found no "dealing" where an enterprise "flatly delegated [managerial functions] to employees" involved in a "job enrichment program" designed "to enlarge the powers and responsibilities of all its rank-and-file employees and to give them certain powers or controls over their job situations which are normally not assigned to manual laborers."⁷⁷

d. An Employee Representative System Cannot Supersede the Functions of Collective Bargaining

The Board's construction of Section 8(a)(2) informs us that an employee representation system cannot supersede the function of collective bargaining. Indeed, the above analysis shows that employer dealings with employer-dominated committees often violate Section 8(a)(5)'s prohibition on bargaining with anyone except the exclusive representative of the employees. At best, employee representation systems can complement collective-bargaining functions, so long as they are unilateral or, if bilateral, are not dominated by employers. While this may make unlawful some labor-management work teams, it does so to ensure that employees remain uncoerced in their decision-making. This view of labor-management relations values worker autonomy over subordinated worker participation.⁷⁸ Nevertheless, as

⁷⁴ E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 893, 893, 918–19 (1993) (holding that employee participation committees in a *unionized-setting* are unlawful if they discuss anything other than concerns of quality and production; in particular, discussing issues such as work benefits violates sections 8(a)(2) and 8(a)(5) by "bypass[ing] the Union" and fostering an unlawful competing organization).

⁷⁵ *Electromation, Inc.*, 309 N.L.R.B. 990, 996 (1992), *enforced*, 35 F.3d 1148 (7th Cir.1994).

⁷⁶ *Id.* at 995, n.21.

⁷⁷ 231 N.L.R.B. 1232, 1232–33, 1235 (1977).

⁷⁸ See generally Anne Marie Lofaso, *Toward a Foundation Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007).

we discussed, the lack of workplace voice for employees has garnered much attention—both before and after the Board decided *Electromation*.⁷⁹ Many of these labor academics view Section 8(a)(2) as a “barrier” to employee workplace voice.⁸⁰

D. Function and Dysfunction of Employee Representation System

1. The Multiple Roles of Representation and Voice

a. *Instrumental Rationales for Non-Union Employee Representation*

There are both instrumental and principled reasons for employee representation systems.⁸¹ The American system is paradigmatic of one in which, for most people, work is the main source of access to material income, including regular wages and other economic and social benefits, such as health care coverage, pension programs, disability compensation, childcare provision, severance pay, and supplemental unemployment benefits. Welfare has been structured around the workplace, creating an “employee welfare state” rather than a universal public provision regime.⁸² In such systems, employee representation at work is even more crucial than in other regulatory regimes. Moreover, another possible role for employee representation systems is facilitating the portability of employee benefits. In light of the changes in typical career cycles in the direction of much shorter tenure frames and more frequent turnover, employee associations can play a particularly important role as labor-market intermediaries that provide continuity in welfare benefits. As mentioned above, the U.S. social welfare regime has been intimately tied to the workplace. While the New Deal established the Social Security Act, creating certain universality in retirement benefits, and an unemployment insurance system, the New Deal continued the close link between income security and the industrial work cycle. In the industrial era, workers could expect to receive benefits through a stable employment relationship. As is evident from the recent heated debates concerning health care reform, social security, and pensions, the U.S. system heavily relies on privately provided benefits.

From the perspective of employee rights, representation can serve to address the pervasive problem of under-enforcement of individual protective regulations in non-unionized workplaces. This is particularly true in industries and workplaces where non-compliance with labor standards is a widespread phenomenon.⁸³

⁷⁹ See generally Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837 (2011); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B. C. L. REV. 499 (1986).

⁸⁰ See Cooper, *supra* note 79, *supra* at 837.

⁸¹ PHILIP SELZNIK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 152 (1969).

⁸² See generally GOSTA ESPING-ANDERSEN, *WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES* (1996); GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); David Chamy, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601 (1996).

⁸³ On under enforcement, see, for example, Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994); Saskia Sassen, *The Informal Economy*, in *DUAL CITY RESTRUCTURING NEW YORK* 79 (John Hull Mollenkopf & Manuel Castells eds., 1991); Saskia Sassen-Koob, *Growth and Informalization at the Core: A Preliminary Report on New York City*, in *THE CAPITALIST CITY: GLOBAL RESTRUCTURING AND COMMUNITY POLITICS* 138

b. Symbolic Rationales for Non-Union Employee Representation

At the same time, work is a central locus of social interaction, identity formation, and community. As such, employee representation systems serve to consolidate and create a common space of interaction and engagement. Professor Cynthia Estlund recently emphasized the role of such spaces thinking of the workplace as a training ground for political activism.⁸⁴ From the management perspective, while asserting the need to preserve managerial prerogatives and authority, employee representation is understood as potentially increasing competitiveness and productivity by offering an efficient way of extracting information from employees.⁸⁵ Under this view, employee representation can efficiently eliminate the need for mid-managerial positions by increasing self-monitoring, discipline, and responsibilities of employees, creating a variety of new pressures on employees designed to deter shirking and reduce workplace frictions by increasing loyalty.⁸⁶ Taking it a step further, some thinkers believe that employee representation serves the function of internalizing the goals of worker incorporation. Louis Kelso believed that creating forms of employee participation and representation would produce “mini-capitalist” employees who would understand the value of capitalism for a society.⁸⁷ Indeed, while representation on corporate boards is rare even as employees increasingly become shareholders through employee stock programs, American corporate scholars have offered reasons why managers might favor elected employee representatives on their boards:

They may see employee representation as a way of taking power back from shareholders and moving away from policies that require them to bear more risk than they would otherwise prefer. After all, workers, like managers, are less diversified and more risk-averse than shareholders. When managers pursue risk-minimizing policies such as growth, diversification, and earnings retention, workers benefit by receiving more firm specific training, career opportunities, stable employment, and higher wages. Thus workers and managers have common interests, which do not always align neatly with shareholder objectives.⁸⁸

(Michael P. Smith & Joe R. Feagan eds., 1987); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2180 (1994).

⁸⁴ CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (Yale University Press, 2010) [hereinafter *REGOVERNING THE WORKPLACE*]; CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (Oxford University Press, 2003) [hereinafter *WORKING TOGETHER*].

⁸⁵ See Stephen M. Bainbridge, *Privately Ordered Participatory Management: an Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979 (1998).

⁸⁶ See Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265 (1998); Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 27–50 (Joel Rogers & Wolfgang Streeck, eds., Chicago: University of Chicago Press 1995).

⁸⁷ See LOUIS KELSO & MORTIMER ADLER, *THE CAPITALIST MANIFESTO* (1958); LOUIS KELSO & PATRICIA HETTER KELSO, *HOW TO TURN EIGHTY MILLION WORKERS INTO CAPITALISTS ON BORROWED MONEY* (1967); Elana Ruth Hollo, Note, *The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy*, 23 RUTGERS L.J. 561, 563–64 (1992).

⁸⁸ Jacoby, *supra* note 21, at 452; see also Sanford M. Jacoby, *American Exceptionalism Revisited: The Case of Management*, in *MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS* 173 (Sanford M. Jacoby ed., 1991).

Whether from the perspective of employees or employers, it is commonly agreed that employee representation thus serves a voice function. As Charles Handy has described, “our economic well-being and the continued success of capitalism depend on efficient and effective organizations of all types. One way, perhaps the only way, to match our needs for democracy in our critical institutions with our need for efficiency is to think of our organizations as membership businesses.”⁸⁹

2. Categories of Employee Representation

Generally, non-union employee representation systems in the United States are constituted as workplace advisory groups that focus on issues such as quality of work life and improved production. These programs involve periodic elections of representatives, who meet with management to discuss grievances, shop-floor operational problems, and, less frequently, wages and benefits, although most often, final authority over all decisions, including grievances, remains with management. The types of programs that have emerged in the shadow of the NLRA prohibition are numerous. Many of these various models can be viewed as “institutions of ‘employee voice’ that are set up to serve management needs, but may also take on a life of their own, becoming a forum to express dissatisfaction [and] often perceived by their members as an alternative to unionization.”⁹⁰

a. *Self-managed Teams and Quality Circles*

Typically, a self-managed or self-directed team consists of a group of several employees at the shop-floor level, organized around certain areas of production and authorized to make collective decisions about day-to-day work problems.⁹¹ Such teams oversee their assigned project and may elect team leaders who serve representative functions vis-à-vis the rest of the organization.⁹² Quality circles refer to small groups of employees that are formed to discuss productivity, procedures, and product and service quality.⁹³ These programs have an almost sole focus on productivity and quality, without involving any focus on working conditions. Both types of employee groups are focused on shop floor production issues rather than employment conditions and work relations.

b. *Quality of Work Life, Advisory Councils and Safety Committees*

Quality of Work Life programs (QWL) or “employee-action committees” are small groups of employees, who usually, on a voluntary basis, represent employees in formulating recommendations for management concerning work-related conditions.⁹⁴ Committees with

⁸⁹ CHARLES HANDY, *THE AGE OF PARADOX* 24 (1995).

⁹⁰ Lobel, *supra* note 12, at 174.

⁹¹ JOHN L. COTTON, *EMPLOYEE INVOLVEMENT* 174 (1993).

⁹² Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 761 (1994).

⁹³ JEROME T. BARRETT, *LABOR-MANAGEMENT COOPERATION IN THE PUBLIC SERVICE: AN IDEA WHOSE TIME HAS COME* 3–6 (1985).

⁹⁴ DONALD M. WELLS, *EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT* (1987); MIKE PARKER, *INSIDE THE CIRCLE: A UNION GUIDE TO QWL* (1985); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379, 1393 (1995); Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 685 (1996).

such general characteristics are also called “focus groups,” “human resource programs,” or “employer-employee committees.” Many non-unionized workplaces also have extensive grievance systems.⁹⁵

Employee safety committees are widespread; over half of the large non-unionized manufacturing firms in the United States have some form of safety committees.⁹⁶ In 2004, a study of the U.S. Government Accountability Office (GAO) found that firms attributed much of the success of OSHA initiatives to employee involvement, including participation on safety committees, weekly meetings, assistance with training other employees, and employee participation in tours of other facilities in search for new ideas. Workers involved in internal safety programs reported major changes in attitude and communication and felt that participation in safety decisions spilled over to other aspects of voice at the workplace.

Safety committees may become even more common in the near future. The Department of Labor announced in 2010 that it would be launching its Plan/Prevent/Protect program as part of its good jobs agenda. This initiative would require employers to “create a plan for identifying and remediating risks of legal violations and other risks to workers—for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plans.”⁹⁷ According to the Department of Labor’s website, Plan/Prevent/Protect, which includes an injury and illness prevention program, requires management commitment to employee safety, employee engagement, and a hazard recognition program that would include hazard evaluation and hazard control.⁹⁸

c. Profit-Sharing Programs

Many firms, particularly in the high-tech industry, have constructed some form of profit-sharing programs, which may include collective or individual ownership of stocks or firm assets (Employee Stock Ownership Plans (ESOP)),⁹⁹ or simply structural bonuses that are linked to profits of the firm (Gain Sharing Programs, such as *Scanlon plans* and *Improshare plans*),¹⁰⁰ usually without providing for power in decision-making.

d. Employee Caucuses and Identity Groups

Employee caucuses have become widespread, initiated mainly by professional employees in the high-tech industry, with the goal of voicing concerns about work conditions and benefits

⁹⁵ See DAVID EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 299–308 (1989).

⁹⁶ Dennis Devaney, *Electromation and DuPont: The Next Generation*, 4 CORNELL J.L. & PUB. POL’Y 3, 16 (1994).

⁹⁷ U.S. DEP’T OF LABOR, *Department-Wide Regulatory and Enforcement Strategies—“Plan/Prevent/Protect” and Openness and Transparency* (Spring 2010), available at www.dol.gov/regulations/2010RegNarrative.htm (last visited February 2, 2012).

⁹⁸ U.S. DEP’T OF LABOR, Video, *Jim Thornton of Northrup-Grumman Discusses OSHA’s Injury and Illness Prevention Program*, available at <http://www.dol.gov/regulations/> (last visited February 2, 2012).

⁹⁹ See generally KELSO & ADLER, *supra* note 87; KELSO & HETTER, *supra* note 87. Considered the “father” of Employee Stock Ownership Plans (ESOP), Kelso supported distribution of stock to workers in order to broaden their financial bases, but not other forms of worker participation, which Kelso believed would reduce management control over the firm.

¹⁰⁰ *Scanlon plans* link profit sharing to other forms of participation, such as making suggestions to improve the workplace, while *Improshare plans* are provided without constructing any further participatory schemes, but rather are linked to increases in profits for the company or productivity bonuses. See Bainbridge, *supra* note 85 at 988–89; JOHN L. COTTON, EMPLOYEE INVOLVEMENT 89–95 (1993).

without the burdens of formal unionization.¹⁰¹ “Identity caucuses” are similarly non-union employee groups that have formed in recent years around issues of identity, ethnicity, gender, and discrimination: The first identity caucus, BABE (Bay Area Black Employees) was founded by African-American sales representatives at the Xerox corporation in 1969, in reaction to receiving inferior sales territories.¹⁰² Similarly, employers frequently set “employee diversity committees” as a response to complaints by minority employees and with the goal of informing management about steps to bring more equality to the workplace.¹⁰³

e. Labor-Management Cooperation Committees

As discussed above, Labor-Management Cooperation plans are the typical term for participatory plans *within* unionized settings. These are committees consisting of management and union officers, set for discussion of general issues, primarily regarding the collective bargaining relationship, and specific issues such as work conditions, safety, and workplace environment.¹⁰⁴ They differ from simple collective bargaining in their more frequent, informal discussions with management. For example, the first cooperative safety program adopted in the United States in the early 1980s was in fact a joint labor-management initiative in the construction industry, developed collaboratively by managers and the construction union, despite OSHA’s initial opposition.¹⁰⁵

f. Cross-Workplace Employee Associations

Worker membership organizations that are not workplace-centered are associations that have the goal of facilitating training, networking, and human capital nurturing.¹⁰⁶ The dramatic decline in unionism in the United States has created great pressures on the U.S. labor movement to re-envision the role of employee representation in the new economy. The AFL-CIO’s associate membership program now offers nonunion worker services and consultation.¹⁰⁷

3. Directions for the Future

The NLRA collective-bargaining model was based on the idea that workers should present a unified voice to advance their common goals: “The [NLRA] requires a well-defined form of representation, which involves strict separation between leadership and grassroots activities, demands loyalty to the group from its members, and requires that representation be

¹⁰¹ Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993).

¹⁰² *Id.* at 172–73; Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 72 (1995); Rachel Geman, *Safeguarding Employee Rights in Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 379–80 (1997).

¹⁰³ Note, *Labor-Management Cooperation after Electromation: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 683–84 (1994).

¹⁰⁴ DON DEWAR, *THE QUALITY CIRCLE GUIDE TO PARTICIPATION MANAGEMENT* (1980); JEROME T. BARRETT, *LABOR-MANAGEMENT COOPERATION IN THE PUBLIC SERVICE: AN IDEA WHOSE TIME HAS COME* 3–4 (1985) (defining labor-management cooperation as committees, usually comprising equal numbers of union and management officers, who meet regularly to discuss work related issues).

¹⁰⁵ Lobel, *supra* note 26, at 1131.

¹⁰⁶ Lobel, *supra* note 1, at 1547; Janice Fine, *Building Community Unions*, NATION, Jan. 1, 2001, at 18.

¹⁰⁷ David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, 31 INDUS. REL. 56 (1992) (advocating a “new brand of unionism”).

exclusive.”¹⁰⁸ The American union has therefore been perceived as “*an entity external to the employees*: as a large, bureaucratic organization whose full-term officials periodically negotiate a long-term contract behind closed doors with the employer, and then represent a fairly small number of employees who are aggrieved by the way management administers the contract during its lifetime.”¹⁰⁹ Scholars have criticized the NLRA because it treats union participation as a “foreign entity,” rather than an “organic ‘activity’” that is essential to employees.¹¹⁰ At a time when unionization in the United States is at an all time low, non-union employee representation is gaining more attention.

The perverse effect of the prohibition on non-union employee representation systems under the NLRA is that “in nonunionized firms, today comprising approximately ninety percent of the private workforce [employee groups] are allowed under the NLRA to discuss issues important to the employer, such as, the quality of the product and production, but not those issues related to the quality of work and life of workers.”¹¹¹ For example, in one case, the NLRB struck down two committees that addressed “the needs or conveniences of employees” but allowed a third, which focused on “quality of product.”¹¹² Quality circles are not viewed as conflicting with the NLRA requirements because they are considered a “management tool . . . designed to permit rank-and-file employees to assist management in making its operations more efficient” and as “solely involved in operational matters.”¹¹³ Conversely, as described above, employee committees that potential negotiate, propose, and contribute to the improvement of employee work benefits, conditions, and welfare are deemed suspect and may be found unlawful.

U.S. federal law has posited that union-based collective bargaining and non-union representation are mutually exclusive.¹¹⁴ And yet despite the differences and the gaps between union and non-union representation systems, the goals and logic of each are surprisingly similar. Compare the preamble of the NLRA:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and

¹⁰⁸ Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace*, in *DIVERSITY IN THE WORKFORCE* 131, 137–38 (Nancy DiTomaso & Corinne Post eds., 2004).

¹⁰⁹ PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 11–12 (1990) (emphasis added).

¹¹⁰ James B. Raskin, *Reviving The Democratic Vision of Labor Law*, 42 *HASTINGS L.J.* 1067, 1071 (1991).

¹¹¹ Lobel, *supra* note 26, at 1135.

¹¹² *Simmons Indus.*, 321 N.L.R.B. 228, 254 (1996).

¹¹³ *Vons Grocery Co.*, 320 N.L.R.B. 53, 68–69 (1995).

¹¹⁴ Lobel, *supra* note 1.

wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.¹¹⁵

With the following more recent statement:

Managers are beginning to realize that in today's competitive economy workers and management better swim together, or they will sink together.¹¹⁶

Both statements tie the success of industry with voice and cooperation between management and labor. With the constraints of and uncertainty caused by the *Electromation* decision and subsequent case law, there is clearly a need for change in the current legal framework to allow employer instituted employee participation models to function efficiently. Despite the bad connotations attached to these programs and the idea of the "company union," there is a growing discontent with the current system and a recognition of the need for change. The following statement by William Buddinger, Chairman and CEO of Rodel, Inc., to the Senate Committee on Labor and Human Resources in testimony on the impact of the NLRA's section 8(a)(2) on employers reflects this discontent:

A modification of the NLRA to allow teamwork and collaborative management is clearly needed. . . . The modern experiments in teamwork have generally produced the best of two worlds--more competitive enterprises and happier workers. . . . American enterprise must be free to change. . . . We cannot do that if we are shackled by laws that lock us into the past.¹¹⁷

Beyond labor law reform, suggestions to increase employee representation in the U.S. market include increasing disclosure laws, securing the availability of information that would permit employees to monitor management, financial performance, operating results, strategic plans, and business risk factors.¹¹⁸ These suggestions include calling for the Organisation for Economic Cooperation and Development (OECD) recent recommendation to grant employees information relevant to the employment relationship, including training opportunities, compensation practices, and health and safety records.¹¹⁹ Other suggestions from corporate law reformers include mandating employee-owner representation on corporate boards.

E. Conclusion

This report suggests that two values underlying employee participation in workplace decision-making tug in different directions. While some U.S. labor policies encourage employee voice, others encourage self-organization. The conflict is most dramatic in situations where NLRA Section 8(a)(2), in the name of protecting worker autonomy, paralyzes

¹¹⁵ The Preamble of National Labor Relations Act (NLRA) §1, 29 U.S.C. §151.

¹¹⁶ JOHN R. PHILLIPS, *THE FUTURE OF LABOR-MANAGEMENT COOPERATIVE PROGRAMS* 14 (1994).

¹¹⁷ *Teamwork for Employees and Managers Act of 1997: Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources*, 105th Congress (1997).

¹¹⁸ Jacoby, *supra* note 21, at 485 (2001).

¹¹⁹ *Id.* (citing Directorate for Financial, Fiscal and Enterprise Affairs, *OECD Principles of Corporate Governance*, OECD, 19-22 (1999), available at <http://www.oecd.org/daf/governance/principles.htm>).

potentially important channels for employee voice. The United States, which has a workplace-benefit structure rather than a citizenship or universal-benefit system, should be particularly concerned about legal obstacles that prevent workers from having some say in how such benefits will be distributed. The United States, as a federal democratic republic, should also be concerned about any legal obstacle that stifles employee participation in workplace decision-making. Instead, U.S. policy makers should seek out ways to encourage democratic participation in as many social units as possible. While the workplace is one of the more difficult social units to democratize, it is also one of the most important as it tends to be the locus for social interaction, identity formation, and community.¹²⁰

¹²⁰ See, e.g., Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 20 HOFSTRA L. REV. 301, 310–17 (2011); ESTLUND, *REGOVERNING THE WORKPLACE*, *supra* note 85; ESTLUND, *WORKING TOGETHER*, *supra* note 84.