

# **Decentralizing Industrial Relations: The American Situation and its Significance in Comparative Perspective**

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## **A. Introduction**

One seeking after a model of decentralization need look no farther than the United States. Famously the home of decentralized industrial relations, the American taste for locally rooted institutional arrangements reflects itself in many spheres of our lives, from our industrial relations system, to our constitutional and political structures, and extending to many of our social arrangements as well. We may not have invented federalism (the Founders properly thanked Montesquieu for that), but we have applied the principle more extensively than has any other land. As a people, we tend to distrust—or at least we say we do—large, centralized institutions, particularly those that have anything to do with government. When we deal with large organizations, we prefer to do so straight-on, in a direct, one-on-one fashion, with no other body mediating the relationship. These attitudes mirror the starkly individualistic attitudes that characterize Americans and that stamp so many of our habits and ways of doing things.

Consequently, the topic of decentralization, so important to the discussions of trends in other work ordering systems, has gone largely unmentioned in the United States. It is embedded in our labor relations system and typifies both our institutional arrangements and our ways of doing things. We simply assume it as a natural state. Nevertheless, what I might term as the symptoms of an advanced form of decentralization have begun to appear among us and may eventually surface in the systems of other nations and regions as well. As I will note, in the American case, decentralization in the employment context has more to do with the devolution of risk of all types to the individual employee. Among employees who have enjoyed employment related benefits, for example, these risks run from assuming the risk for the investment of one's retirement funds to a slowly growing trend to shift to individuals the responsibility to save funds for underwriting their medical costs. This version of decentralization is a natural outgrowth of at least two, interrelated factors: the steady erosion of unions and our distinctive form of individualism, an attitude that represents one of our most successful and popular exports. Given trends across developed countries, one can expect decentralization to have effects that go well beyond the structures of collective representation. As will be discussed in the conclusion, the decentralization of industrial relations is symptomatic of far-deeper and more fundamental changes attitudes and habits that touch nearly every sphere of our lives.

## **B. Employee Representation in the United States: Some Key Characteristics**

### **1. Levels of Organizing and Bargaining**

As in Japan and increasingly in the United Kingdom, and in strong contrast to countries like Germany (although that situation may be changing), collective bargaining in the United States typically takes place at the establishment or at the company level, with a single

employer. For the most part, union organizing historically has occurred at these levels as well. Branch, sectoral, industry- or economy-wide agreements do not exist in the United States. Consequently, employer associations, so familiar in Europe, generally have no real equivalent in the American scheme. Multi-employer bargaining, once an important feature of collective bargaining practice in steel, coal and in trucking, largely has disappeared, a casualty in part of structural changes in these industries and especially in trucking, of deregulation.

In the American case, pattern bargaining probably represents the closest approximation to the sort of branch or industrial agreements that exist in countries like Germany. For example, the United Automobile Workers (UAW) long has employed the technique in its bargaining with the currently beleaguered American automobile manufacturers. Used as a means to take wages out of competition, in pattern bargaining, the union concludes an agreement with one of the auto firms, and then uses its key terms as a pattern for the contracts that it will negotiate with the other manufacturers. Consistent with the grass-roots focus of American style collective bargaining, and as part of the bargaining process, local union affiliates of the UAW standardly negotiate supplemental, plant level agreements to regulate local conditions not covered by the master agreement.

At least in some quarters, signs of change have begun to appear in these well-settled patterns. Some unions, such as the Service Employees International Union (SEIU), have taken radically different approaches in the ways they organize and bargain for their members. For example, instead of following the traditional model of organizing individual workplaces or companies, the SEIU's "Justice for Janitors" campaign has undertaken unionizing efforts on a city or regional basis, with some notable success.

The "Justice for Janitors" campaign represents a national undertaking that began in 1985. In it, the SEIU has focused its efforts on low-wage workers and immigrants who perform work, as the Union describes it, "on the first rung of the economic ladder." Easily replaceable because of fungible skills and employed in an intensely competitive industry that permits little room for wage and cost differentials, these workers typically have gone without representation. In its organizing campaigns, the SEIU seeks public support and makes broad alliances with religious groups, pension funds, community organizations, elected officials and other local leaders. It typically avoids the use of representation election procedures that the National Labor Relations Act establishes. Instead, the Union makes voluntary recognition pacts by which employers agree to recognize the Union once it can show majority employee support, verified by an independent third party.

Once recognized, the union bargains a market-wide master agreement with the employers that takes wages out of competition. The master contract has "trigger" provisions, designed to protect the employers who execute it. Because the employers in the cleaning industry typically are sub-contractors whose contracts with building owners can be cancelled on thirty days notice, the wage and benefit terms of SEIU collective agreements only become effective when a sufficient proportion of the companies operating in the market become signatories to the master agreement.

Whether the SEIU's approaches to organizing and bargaining represent the cutting edge of a fundamental change in organizing and bargaining patterns in the United States is not yet clear. At the end of November, however, the union announced that it had obtained majority support among 5,300 janitors in Houston, Texas, a result certified by the American Arbitration Association.<sup>1</sup> These janitors work in more than sixty per cent of the office space in Houston, and significantly, nearly all of them are Latino immigrants. The parties recently commenced bargaining for a master agreement. The Houston campaign represents the largest unionizing effort undertaken in the American South in years, a region that traditionally has resisted organizing. The union presently has 27 master contracts in urban and suburban markets throughout the country, including New York City, Chicago, Los Angeles, and

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<sup>1</sup> See, Stephen Greenhouse, *Janitor's Drive in Texas Gives Hope to Unions*, N.Y. Times, Nov. 28, 2005, at A1

Washington, D.C. With 1.8 million members, the SEIU now constitutes the largest and the fastest growing union in the United States.

UNITE HERE (the recently merged Union of Needle Trades, Industrial and Textile Employees with the Hotel Employee and Restaurant Employees Union) just has announced that it will undertake a “Hotel Workers Rising” campaign, the tactics of which closely resemble those used by the SEIU in its Justice for Janitors campaign. While the union does not seek a nation-wide agreement or standardized wages, it does propose to bargain with corporate representatives of the major hotel chains rather than with their representatives in separate cities. The union also has spoken of the possibility of a nation-wide strike and has called on the hotel chains to follow the policies the major casinos have adopted in settling agreements with the union. John Wilhelm, the president of UNITE HERE, has stated that “The present bargaining system is 60 years old and doesn’t work any more.”<sup>2</sup> UNITE HERE and the SEIU are among the unions that recently departed the AFL-CIO to form a new union federation, called Change to Win.

## **2. The National Labor Relations Act and American Employment Law: General Characteristics**

The National Labor Relations Act<sup>3</sup> is the basic labor relations statute for the United States. Passed seventy years ago, Congress has made only two major modifications to its terms. The 1947 Taft-Hartley Act reorganized the structure of the National Labor Relations Board, the Agency charged with the administration of the Act. The amendments split the Board’s adjudicative and prosecutorial functions and placed them in separate divisions. The Taft-Hartley amendments also added union unfair labor practices to the statute, as well as provisions that largely outlawed secondary strikes and related activities by unions. The Landrum-Griffin amendments, passed in 1959, refined and tightened restrictions on union secondary appeals.

In 1974, Congress enacted some minor amendments to the Act to extend its jurisdiction to private, non-profit health care institutions. These represent the last amendments of any significance to the statute. Notably, the health-care amendments enjoyed bi-partisan sponsorship and sparked little, if any, controversy. Just four years later, a bill to reform and streamline the Agency’s processes, and to strengthen its impressively weak remedies, died in Congress, perhaps signaling a growing shift in attitudes about the desirability and significance of the institution of collective bargaining. Since that time, no bill to amend the Act’s terms, regardless of sponsorship, has met with success in Congress, demonstrating both a lack of political consensus about the Act and, I suspect, a spreading view that collective bargaining retains only fading importance as a social and economic institution.

Never warmly embraced by many in management, growing numbers of unionists also appear to have lost confidence in the Act, if not in the institution of collective bargaining itself, and some even have gone so far as to call for the statute’s repeal.<sup>4</sup> Many unionists complain that the National Labor Relations Board’s decisions reflect a partisan bias toward management, and increasingly, unions seem eager to avoid recourse to the Board’s processes altogether. The SEIU’s reliance on voluntary recognition agreements as an alternative to the use of the rather cumbersome union election procedures established by the Act serves as an example of this trend.

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<sup>2</sup> Howard Stutz, *Union Boss Says Hotels Can Avoid Strike*, Las Vegas Review Journal, Jan. 27, 2006.

<sup>3</sup> 49 Stat. 449 (1935), amended by 29 U.S.C. §§ 151-69 (2000).

<sup>4</sup> See, e.g., *AFL-CIO Chief Calls Labor Laws a Dead Letter*, Wall St. J., Aug. 16, 1984 at 8; *Kirkland’s Call to Void Labor Laws Ignites a Growing National Debate*, Wall St. J., Nov. 6, 1984, at 29.

Described in 1935 by its framers as an experiment, the terms of the National Labor Relations Act cover only employees in the private sector of the economy. Nevertheless, the NLRA has served as the model for public sector labor relations statutes as well. Although most public employees do not enjoy the right to strike—a key right protected by the terms of the NLRA—most of the core features of the NLRA and the practices and institutions developed in private sector collective bargaining find their parallel in the statutes and practices that govern public sector labor relations at both the state and the federal level.

In considering the NLRA and the model of industrial relations that it sanctions, one should keep some key characteristics of American employment law in mind. In contrast to nearly all other legal regimes, employment at-will constitutes the default rule against which all other American employment rules operate. Under the at-will rule, unless otherwise agreed-upon, either party may terminate the employment relationship at any time and for any reason not specifically prohibited by law. Premised on the notion of a constant exchange of offer and acceptance of contractual terms, the rule also permits employers unilaterally to change the terms and conditions of employment. In large part, employment discrimination legislation, such as Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act, simply state exceptions to the employment at-will regime. Employers remain free to exercise their discretion so long as they do not premise their employment related decisions on one of the statutorily forbidden grounds.

Unlike most other nations, the United States has relatively little law that gives substantive structure to the terms of the employment relationship. Something like the Japanese Labor Standards Act, for example, finds no counterpart in the American system. In addition, employment law in the United States (as opposed to the law of collective bargaining) largely exists as a matter of state, rather than of federal law. Where labor law in Germany constitutes an articulated, nationally uniform whole encompassing individual and collective labor law and social security law, employment regulation in the United States represents a patchwork of statutory provisions and common law doctrine that exist at both the state and federal levels. Attitudes of contractual freedom and positivism strongly stamp our understandings of the employment relationship. Such attitudes, as Max Weber long ago taught us, mean that American courts typically will not inquire into the substantive terms of employment arrangements, but simply will enforce their terms. Traditionally, legislatures at both the federal and state levels have demonstrated a similar disinclination comprehensively to examine or to regulate the relationship of employment.

The overwhelming majority of Americans in the private sector labor force constitute at-will employees. For them, explicit protections against unfair discharge would only exist through the “just cause” provisions contained in nearly all collective bargaining agreements. Particularly for relatively well-compensated middle- and upper-level members of management near the end of their careers, employment discrimination laws have become an alternative means to challenge terminations or other significant employment decisions. In 1935, Congress enacted the NLRA against what might be called a green field. Little other statutory employment regulation existed. In stark contrast to the approach then taken by many other industrialized nations, Congress avoided the creation of a body of substantive regulation. Instead, through the NLRA, it sanctioned a framework for the private ordering of the law governing the employment relationship.

### **3. Employee Representation and the Act: Sections 2(5) and 8(a)(2) of the NLRA**

The NLRA rests on the key principles of majority rule and exclusive representation. Under the Act’s structure, a union selected by a majority of the employees in the affected workplace becomes the exclusive representative of them all. The majority rule principle follows the model of governance in a political democracy, where majority choice displaces

individual preference. The exclusivity principle prohibits an employer from attempting to bypass the majority designated representative by unilaterally changing the terms and conditions of employment or by dealing with individuals or groups of employees independently of the union. The privileged status that exclusivity confers on the majority representative carries with it the legally-enforceable obligation to represent all employees, regardless of their support for or actual membership status in the union, fairly and even-handedly.

The exclusivity principle starkly differentiates the American version of collective bargaining from the schemes adopted by many other countries. The principle prevents fragmentation and dissolution of the strength that employees achieve through collective action. It thereby serves to safeguard the notions of majoritarianism that underpin the Act's structure. The exclusivity principle reflects the organizational and bargaining patterns in the United States, and the emphasis in the American system on local, "bottom-up" workplace law-making. This emphasis traditionally has obviated the need for German-style works councils that in part fill the representation gap between the individual workplace and an umbrella agreement whose generalized terms extend to numerous employers and differing local conditions. The centrality of exclusivity to the Act's scheme reveals its preoccupation with the removal of impediments to employee self-organization.

Section 8 (a)(2) of the National Labor Relations Act constitutes the statute's key structural provision. In pertinent part, that Section provides that

It shall be 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....

Section 2 (5) of the Act provides that

The term "labor organization" means 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.

During the Congressional hearings that eventually resulted in the passage of the NLRA, of all the language under consideration, these two provisions sparked by far the most controversy. Over the course of the past two decades or so, debate over these provisions has stirred anew. What has made such innocuous seeming language the focus of repeated and passionate debate?

Answering this question requires a bit of historical perspective.<sup>5</sup> The response of American employers to the development and rise of an independent labor movement during the late Nineteenth and early Twentieth Centuries did not differ appreciably from that of employers in other industrializing nations. One reaction was wholly negative and involved employer resistance through such devices as yellow dog contracts, blacklists, the use of informants and secret police, resort to the courts for injunctions, threats and where other measures failed, various levels of violence.

The other, and far less ham-fisted approach, entailed creative efforts to develop effective alternatives to unions and to collective bargaining. These alternatives took a wide variety of forms, including welfare work (encompassing everything from company-built model towns to employer-sponsored educational and recreational programs); scientific-management techniques (based on the work of Frederick Taylor); and the development of what we now call human resource management (drawing from the efforts of Elton Mayo and the early "human

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<sup>5</sup> For a more thorough discussion, see Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 Boston College L. Rev. 499 (1986).

relationists”). The most popular and successful alternatives, however, were employer-sponsored participative management schemes.

Not all of these participative schemes represented simple union-avoidance devices. At least some constituted good-faith and innovative efforts to find effective means by which to permit employees to gain some voice in managerial decision making. Some grew out of religious, ethical or socially-conscious motivations, while concerns over improving employee morale, increasing productivity and cutting worker turnover rates, at least in part, impelled the creation of others.

Whatever the intentions behind their institution, these participative schemes assumed numerous shapes. Even before 1920, some of them took the form of what we now call semi-autonomous work teams that had the authority to make hiring, promotion and discharge decisions, to solicit customer orders, to determine production methods and schedules, to prepare cost estimates and the like. Others made provisions for placing non-voting employee representatives on company boards—the earliest such instance I have found in the United States dates back to 1893. Most, however, involved the implementation by employers of employee representation committees, a development that appeared roughly contemporaneously across the industrialized portions of Europe as well as in the United States.

The details of these representation structures varied. Until the early 1930s, the prevailing form involved the use of joint committees on which employee and employer representatives served. Management typically formulated and implemented these plans unilaterally, often in response to a union organizing effort or the threat of a recognitional strike. Generally, the committees consisted of equal numbers of employee and managerial representatives who enjoyed equal voting power. As one of their contemporary proponents explained it, “few executives” who instituted such plans would regard them “as in any sense implying that employees should ‘participate’ in management.” Instead, the committees had “essentially *advisory* functions” and management remained “free to adopt or reject” their proposals. Normally, these plans restricted the jurisdiction of the joint committees to questions involving grievances and other personnel matters, housekeeping and safety issues, and ways to improve products and production methods. Wages, hours, work rules and related matters typically had no place in the agenda of the committees.

With the passage of the ill-fated National Industrial Recovery Act (NIRA), the structure of many employer-sponsored representation plans changed. Enacted in 1933, at the depths of the depression, the NIRA represented the Roosevelt administration’s quick response to the economic emergency. Section 7 (a) of the NIRA, added at the insistence of the union movement, provided that “employees shall have the right to organize and bargain collectively through representatives of their own choosing,” free of employer interference, restraint, or coercion. This language, intended to protect employee self-organization, sprang from the 1926 Railway Labor Act, and subsequently became the language of Section 7 of the National Labor Relations Act.

The adoption of this language had two unintended consequences. It prompted many employers to change the structure of their representation plans to make them resemble the structure of independent unions. It also spurred many other employers, fearful of being forced to bargain with independent unions, either as a result of governmental order or because of a successful organizing effort, to initiate company-sponsored “unions” instead. The frequently used term, company union, stems from this development, but in recognition of their sponsorship and the source of their control, the term has come to describe both the pre- and post-1933 versions of management implemented representation plans.

By 1928, company sponsored representation schemes had come into such widespread use, reported the Social Science Research Council, “that while unionism was practically the only form of collective dealing two decades ago, since that time there has been rapid spread of

other forms of group representation.” In the management sponsored “employee representation movement,” the Social Science Research Council observed, “a real challenge had been offered” to collective bargaining through employee self-organization.

The National Labor Relations Act settled that challenge. After two sessions of Congress, and two years of extensive hearings and ringing debates, much of which centered about the language of Sections 2(5) and 8(a)(2), Congress endorsed collective bargaining through self-organized and autonomous employee associations as the accepted model of group dealing by employers. The definition of a “labor organization” as set forth in Section 2(5) represents a core structural component of the NLRA’s scheme.

The key to determining whether something that constitutes a “labor organization” unlawfully is dominated turns upon whether it is structurally independent of the employment relationship. As Senator Wagner explained it, that question “is entirely one of fact, and turns upon whether or not the employee organization is entirely the agency of the workers....The organization itself should be independent of the employer-employee relationship.”

#### **4. Sections 2(5) and 8(a)(2), the Courts and the Board**

##### ***a. Supreme Court Construction and Lower Court Reception***

Given the state of commerce clause and federalism doctrine at the time of its passage, substantial questions loomed over the constitutionality of the provisions of the proposed NLRA as the law wended its way through the hearings and debates over its terms. In fact, some in Congress who otherwise would have opposed the bill voted in its favor, permitting them to gain credit with constituents who supported the bill while being quietly convinced that the NLRA would not survive challenge before the United States Supreme Court. After the Act’s passage, the NLRB’s first general counsel, Charles Fahy, carefully selected a set of cases that would act as vehicles both to test the constitutionality of the NLRA and to establish the reach of its provisions.

The matter of *NLRB v. Newport News Shipbuilding & Drydock Co*<sup>6</sup>, in which the Court first construed the terms of Sections 2(5) and 8(a)(2), was among those early cases. *Newport News* reached the Court in 1939, just two years after the Court’s momentous decision in *NLRB v. Jones & Laughlin Steel Co*<sup>7</sup>, in which the Court upheld—to the surprise of many observers—the constitutionality of the NLRA. In *Newport News*, the employer had established a series of committees with joint-employer and employee representation, which among other things adjusted employee grievances and dealt with matters concerning working conditions. The Court unanimously upheld the NLRB’s conclusion that the employer unlawfully had dominated the committees, even though they enjoyed overwhelming employee support. “Such control of the form and structure of an employee organization,” the Court instructed, “deprives employees of the complete freedom of action guaranteed by the Act....” The determining factor in deciding such cases, the Court made clear, is “the statutory test of independence.” In applying that test, the Court reminded, the employer intent for establishing the program is immaterial.

The Supreme Court next construed the language of Sections 2(5) and 8(a)(2) in its 1959 opinion in *NLRB v. Cabot Carbon Co*.<sup>8</sup> There, at the behest of the War Labor Board during World War II, the employer had established joint employee-management committees at several of its plants. Satisfied with their operation, the employer retained them after the war ended. Concluding that the committees did not bargain collectively with the employer, but served only as a forum for discussion, the United States Court of Appeals for the Fifth Circuit ruled

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<sup>6</sup> 308 U.S. 241 (1939).

<sup>7</sup> 301 U.S. 1 (1937).

<sup>8</sup> 360 U.S. 203 (1959).

that the committees were not “dealing with” the employer as Section 2(5) of the Act used the term. Upon its review, the Supreme Court reversed this holding. It was not necessary, the Court stated, for an employee committee to bargain with the employer to be “dealing with” it for the purposes of the Act. Merely making recommendations concerning any of the subjects enumerated in the statutory definition of a labor organization is sufficient. Nothing in the Act or its legislative history, the Court continued, “indicates that the broad term ‘dealing with’ is to be read as synonymous with the more limited term ‘bargaining with’.” Consequently, the Court concluded that the committees constituted labor organizations as defined in the statute.

Despite their construction by the Supreme Court, the terms of Sections 2(5) and 8(a)(2) have not always gained either easy comprehension or enthusiastic reception by the lower courts. For example, in his dissent in *NLRB v. Walton Manufacturing Co.*,<sup>9</sup> a case decided two years after the Supreme Court’s *Cabot Carbon* decision, Judge Wisdom stated that

To my mind, an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor.

Somewhat less modestly, and over a strong dissent, a panel of the Sixth Circuit Court of Appeals in its 1982 opinion in *NLRB v. Scott & Fetzer Co*<sup>10</sup>, simply declared that “our court [has joined] a minority of circuits indicating that the adversarial model of labor relations is an anachronism.” In that case, and after two unsuccessful union organizing efforts, the employer established an “in plant representation committee.” The employee members of the committee were chosen by secret ballot for three-month terms and met monthly with the management members to discuss working conditions, review employee complaints, and similar matters.

The Sixth Circuit’s opinion acknowledged that *Cabot Carbon* specifically had held that the making of recommendations by an employee committee concerning topics enumerated in the definition of a labor organization constituted “dealing with” the employer. Nevertheless, it continued, left open by *Cabot Carbon* was “how much interaction is necessary before dealing is found.” Here, the court concluded, the committee had been established to determine “employee attitudes regarding working conditions...for the company’s self-enlightenment” and not to “pursue a course of dealings.” Admitting that the “difference between communication of ideas and a course of dealings at times is seemingly indistinct,” the court stated that the difference nevertheless was “vital” to determining this case. Concluding that the committee did not fall within the definition of a labor organization, the court found no violation of the statute. Notably absent from the court’s analysis is any investigation of the structural independence of the committee in question.

### ***b. Sections 2(5) and 8(a)(2) and the NLRB: Post-1970 Developments***

For nearly two decades after the Supreme Court’s issuance of its *Cabot Carbon* opinion, relatively few cases arose involving the interpretation and application of the terms of Sections 2(5) and 8(a)(2). That situation began to change in the late 1970s, when a new series of cases raising issues under that portion of the Act suddenly started to appear. Two things seem to have driven this trend. The first factor was a decline in union membership. As we will discuss later, union density reached its peak in the United States in the late 1950s, and then very slowly began to recede. By the late 1970s and the early 1980s, what had started as a trickle had begun to turn into a stream. The basic social institution for employee representation, and on whose existence the entire scheme of the NLRA depends, had started to disappear.

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<sup>9</sup> 289 F.2d 177 (5<sup>th</sup> Cir. 1951).

<sup>10</sup> 691 F.2d 288 (6<sup>th</sup> Cir. 1982).



Secondly, because of the comparative success during that time of the German and Japanese economies, American management had begun to take great interest in quality circles, works councils, and other participative management techniques that it saw being used successfully in Europe and Asia. To many, such devices took on the character of being the “silver bullet” that could resolve America’s competitive woes. By the mid-1980s, the noted industrial relations scholar, Jack Barbash, observed that participation had become a “new managerial ethic.” Certainly, worker participation represented one of the central research topics in management schools and over the next decade, a torrent of mostly complementary literature would be devoted to it.

The first of the new wave of cases involving Section 8(a)(2) arose before the National Labor Relations Board in the late 1970s. One of the earliest was the *Sparks Nugget, Inc.*<sup>11</sup> case. There, after withdrawing recognition from the union representing its employees, the employer established a joint employee-management committee which made binding resolutions of employee grievances. The committee, the Board concluded, did not constitute a labor organization for the purposes of the Act. Consequently, it dismissed the 8(a)(2) allegations. In so doing, the Board distinguished *Cabot Carbon*. The committees in question in *Cabot Carbon*, the Board stated, were “dealing with” the employer “in some sense as the employees’ advocates.” In contrast, the grievance committee at issue in *Sparks Nugget* “performs a purely adjudicatory function.” Because it performed a function for management, it cannot be said to be “dealing with” management.

The Board’s decision in *Mercy-Memorial Hospital*<sup>12</sup> quickly followed. Once again, the case involved the establishment by management of a joint employer-employee grievance committee, and once again, the Board had no trouble in distinguishing the facts of this matter from the *Cabot Carbon* holding. “The critical factor,” the Board stated, in the statutory definition of a labor organization for the purposes of resolving this case, “is whether the Grievance Committee ‘exists for the purpose ... of dealing with’” the hospital concerning grievances. Because “the committee was created simply to give employees a voice in resolving the grievances of their fellow employees” and not to present them to or negotiate over them with management, the Board concluded that the grievance committee was not “dealing with” management.

The last and perhaps most significant case in this line of cases is the Board’s *General Foods Corp.*<sup>13</sup> decision. There, the employer had organized the workforce at its dog food manufacturing facility into four “job-enrichment teams.” Each team as a group had the authority to assign work, schedule overtime, and on occasion, to interview job applicants. The teams also discussed complaints about their work with management after which adjustment in practices sometimes occurred. In addition, during their meetings with management, the teams conferred about the job expectations to be incorporated into a “contract” that individual employees were required to reach with their supervisors, and they reviewed the job descriptions other employees had prepared.

In a decision that cited no authority, the Administrative Law Judge (ALJ) who heard the case dismissed the complaint. “The essence of a labor organization, as this term has been construed by the Board and the courts,” the ALJ wrote, “is a group or a person which stands in an agency relationship to a larger body on whose behalf it is called to act.” The teams, the ALJ found, were merely work crews that had been established by the employer for reasons that “had nothing to do with labor relations, as that term is generally understood,” even though he also found that “team meetings served as occasions for management to communicate

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<sup>11</sup> 298 NLRB 524 (1990).

<sup>12</sup> 231 NLRB 1108 (1977).

<sup>13</sup> 231 NLRB 1232 (1977).

directly with its employees and vice versa.” Concluding that the teams did not stand in an agency relationship to anyone, and despite the meetings, that managerial functions simply had been “flatly delegated” to the teams, the ALJ found that the teams did not “deal with” the employer. The National Labor Relations Board adopted the ALJ’s decision as its own without comment.

It is a bit difficult to know what to make of these decisions. None of them cite the Supreme Court’s *Newport News* opinion, and as mentioned, the *General Foods* decision cites no legal authority whatsoever. The critical factor of the independence of the bodies in question from the employment relationship remained unmentioned and unexamined. While, as the *Newport News* Court pointed out, the employer’s motive is of no legal consequence in the finding of a violation of Section 8(a)(2), the *General Foods* decision does beg the question of what reasons, apart from labor relations, would have motivated the employer to organize the work teams? The only thing that seems to explain the *General Foods* decision is that the Board had no idea how to think about a participative device that did not appear just like a union. Through the passage of time, it appears that the purpose and significance of the key structural provisions of the Act had become opaque to the very Agency charged with its enforcement.

That would not long remain true. By the early 1990s, scholarly research, commentary, and extensive debate among those generally affected brought the NLRB to a new and more informed consideration of the issues raised by Section 8(a)(2). In its much anticipated 1993 *Electromation*<sup>14</sup> decision, the Board revisited the area and established an approach that since has governed its consideration of the legality of worker participative devices.

In *Electromation*, the employer established five “action committees” on which six employees and one or two members of management would serve. Employees were limited to serving on one committee and the employer determined the number of employees permitted to serve. Employee members were not elected, but volunteered. The five committees were to address respectively the company’s absenteeism policy; smoking regulations; communication network; pay policies; and its attendance bonus program. The company also encouraged employee committee members to act as a channel of communication between the workforce and the committees. Shortly after the committees began their work, the employer became aware of a union-organizing effort and it announced that members of management would have to cease their participation on the committees, but that employees would be free to continue to meet should they choose.

After reviewing some of the statutory history behind Sections 2(5) and 8(a)(2), as well as some of the cases construing their terms, the NLRB concluded that the action committees were unlawfully dominated labor organizations. On the facts presented, the Board’s ruling in this matter appears unremarkable. In the course of its decision, it reminded both that employer intent is not a requisite to finding a violation and that it was not necessary for a body to engage in formal bargaining to violate the Act’s terms. In an important footnote, however, the Board made a significant qualification to the Supreme Court’s *Cabot Carbon* holding. “Referring again to the abuses Congress meant to proscribe in enacting the Wagner Act,” the Board explained, “we view ‘dealing with’ as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management.”

The Board then discussed its *General Foods*, *Mercy-Memorial Hospital*, and *Spark’s Nugget* decisions, indicating that they remained good law. In reliance on those cases, and notwithstanding the broad definition the term “dealing with” had received in *Cabot Carbon*, the NLRB declared, “it is also true that an organization whose purpose is limited to

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<sup>14</sup> 309 NLRB 990 (1993).

performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5).” In another footnote, the Board majority also observed that it had found “no basis in this record to conclude that the purpose of the Action Committees was limited to achieving ‘quality’ or ‘efficiency’ or that they were designed to be a ‘communication device’ to promote generally the interests of quality or efficiency.” The case generated three separate concurrences, each of which emphasized the authors’ views that the NLRA could be read in a fashion to permit some forms of employer-sponsored participative devices.

Those views received further explication in the NLRB’s *E.I. Du Pont*<sup>15</sup> decision, written by the three Board members who had concurred separately in the *Electromation* case, and issued shortly after *Electromation*’s appearance. There, the Board concluded that six safety committees and one physical fitness committee constituted unlawfully dominated labor organizations. Citing *Cabot Carbon*, the Board once more observed that the term “dealing with” is broader than the term “bargaining with.” The latter term, the Board stated, connotes a process by which the parties “must seek to compromise their differences and arrive at an agreement.” In contrast, explained the Board, the term “dealing” does not require that parties “seek to compromise their differences.” It only involves the existence of a “bilateral mechanism” between them. A bilateral mechanism, the Board explained

ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.

Because employee and management representatives participated on the committees in *Du Pont* and discussed working conditions in a manner that left their adoption within the discretion of management, the Board found that they constituted labor organizations that were “dealing with” the company.

Further developing its distinction between bargaining and dealing, the Board then indicated that the Act permitted a distinction to be drawn between dealing and not dealing. A “brainstorming” group which makes no proposals but simply offers “a whole host of ideas,” the Board declared, is not engaged in dealing as that term is used in the Act. Likewise, a committee that gathers and shares information with the employer, but makes no proposals concerning it, is not dealing with the employer, and does not constitute a labor organization. A “suggestion box” procedure where individuals offer specific proposals similarly does not constitute dealing, the Board stated, because the recommendations are made individually and not on a group basis.

In its 1999 decision in *Polaroid Corp.*<sup>16</sup>, the Board restated its commitment to the interpretation of the statutory term “dealing with” that it had developed in *Electromation* and *Du Pont*. Citing *Cabot Carbon* and its decision in *Electromation*, the Board instructed that the “principal distinction between an independent labor organization” and an unlawfully dominated one “lies in the unfettered power of the independent organization to determine its own actions.” After reiterating the definition of “dealing with” that it developed in *Du Pont*, the Board stated that it had “articulated certain ‘safe havens’ in order to provide guidance” to parties seeking “to implement lawful employee involvement programs.” It had “underscored these safe havens,” the Board explained, “to demonstrate that there is room” under the Act for such devices. “The Board supports an interpretation of the Act,” it proclaimed, “which would not discourage employee participation programs in their various forms.”

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<sup>15</sup> 311 NLRB 893 (1993).

<sup>16</sup> 329 NLRB 444 (1999).

The facts of the *Du Pont* case, the Board continued, “provide a good example of how an employer can involve employees in important workplace matters, such as plant safety, without running afoul of the Act.” The day-long safety conferences that Du Pont held in which employees were encouraged to make suggestions about workplace safety and “to talk about their experiences with safety issues,” the Board declared, represent permissible “brainstorming” activities. Such meetings, stated the Board, did not constitute dealing because the employer “did not structure the conference as a bilateral mechanism designed to make and respond to specific proposals.”

In contrast, the “employee owner influence councils” that Polaroid established did constitute bilateral mechanisms because their employee members made proposals to management concerning matters like health insurance, policies governing the disposition of funds from the employee stock ownership plan, and family leave. Management also polled the committee members to determine majority sentiment. After hearing discussion and proposals, management would respond to them, indicating its decision or making counter-proposals for further consideration. Because the committees at issue in Polaroid did not fall within what the Board now terms a “safe haven,” they were found to be unlawfully dominated.

In its 2001 *Crown Cork & Seal Co.*<sup>17</sup> decision, the Board once again relied on *Electromation* as well as its 1977 *General Foods* decision. There, the employer organized the workforce at its aluminum can manufacturing facility into four semi-autonomous work teams. Each of the teams consisted of a team leader (a member of management) and 32 production employees. Each team as a group made determinations about production, quality, training, attendance, safety, maintenance and discipline issues. The teams also considered individual employee’s requests for time off and determined whether an individual’s absence from work should be excused. Additionally, teams investigated accidents and had the authority to remedy safety problems. Teams also had the authority to decide what disciplinary action to impose on their members. Discipline may range from “counseling,” which might require the failing member to enter into a “social contract,” to recommending a suspension or discharge.

Above the four teams were three further teams, whose members included several members of management and two members from each of the four production teams. One of these teams, the “organizational review board,” evaluated disciplinary recommendations from the production teams. It also made recommendations about working hours, layoff procedures, vacation policies, and other matters concerning terms and conditions of work. The recommendations from this team were forwarded to the plant management team or the plant’s manager for final approval. The “safety committee” similarly reviewed the production teams’ accident reports and safety recommendations. Their reports also were subject to final review by the highest levels of plant management. The last of the three teams reviewed whether production employees satisfied the company’s requirements for wage increases pursuant to its pay for skills program. Its recommendations also were reviewed by the plant manager.

In concluding that the various teams at issue did not constitute labor organizations for the purposes of the Act, the Board once again relied on its *Electromation* decision’s definition of “dealing with” as contemplating a “bilateral mechanism” involving proposals from employees “coupled with real or apparent consideration of those proposals by management.” It then reviewed the facts of its *General Foods* decision and its conclusion that since managerial functions in that case had been “flatly delegated” to the teams, they did not “deal with” the employer.

The *General Foods* case, the Board found, controlled the facts involved in the instant matter. Because the seven committees at the Crown Cork facility performed managerial functions, stated the Board, they do not constitute labor organizations and they do not “deal

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<sup>17</sup> 334 NLRB 699 (2001).

with” the employer. Instead, the teams jointly exercise managerial authority that is delegated to them, which the Board likened to the sort of authority possessed by a first-line supervisor. The review by higher levels of management of the recommendations of the seven committees at the Crown Cork facility, also involve no problems of dealing. Rather, the Board stated, what occurred at Crown Cork involves nothing more than higher levels of management reviewing the conclusions reached at lower levels of responsibility. “Higher-management review of a recommendation made by lower management,” instructed the Board, cannot be equated with the sort of “dealing” between an employer and employee representative that the Act contemplates. The Board’s most recent decisions in this area follow the pattern established by the cases discussed here.

The use of employee participative schemes by unionized employers has a very long history in the United States, and where the union has consented to their use, they raise no legal issues. In a few recent cases, however, some unusual problems involving the overlap between the union and participative efforts have arisen. In *Permanente Medical Group*,<sup>18</sup> for example, the employer sought to develop a new “member focused care” approach in response to declining patient satisfaction with its services. Among other things, this project proposed to reorganize the way Permanente’s unionized nursing staff provided patient care. As part of this process, and over the objection of the nurses’ union, Permanente established a number of “design groups.” In evaluating and recommending how work would be performed, design group members were urged to relate the views and suggestions of fellow employees along with their own. At the close of the process, management urged design group members to inform their coworkers about the advantages of the new approach. After passing through several levels of review, during which “several of the design team recommendations were accepted by management,” Permanente presented the program to the unions for bargaining.

Over a strong dissent, the Board dismissed the Union’s charges that Permanente’s actions violated the statutory duty to bargain by avoiding the Union and communicating directly with employees. In response to the dissent, the Board’s majority also concluded that the use of the design groups to develop proposals to be presented to the union for bargaining did not constitute “dealing with” an employee committee for the purposes of Section 8(a)(2).

### **C. Assessment: Non-Union Employee Representation Systems and the NLRA**

Does U.S. law allow non-union systems of employee representation? As the reader can appreciate, the answer to that question is a bit complicated. In one sense, it depends upon what one means by the term representation and whether one equates participation with representation. From the standpoint of Board law, outcomes appear to turn on structure. In *Electromation*, the NLRB specifically left open the question of whether the finding that an employee group acted in a representative capacity is requisite to concluding that it is a labor organization for the purposes of the Act. As the cases have indicated, however, where an employee group does act in a representative capacity and where the discussions between the group and members of management assume a propositional character, the conclusion that the group constitutes a labor organization follows. Such a body would seem to constitute a “bilateral mechanism.” Consequently, a works council patterned after the German model, for instance, undoubtedly would constitute a labor organization and would violate the terms of Section 8(a)(2) if instituted by an American employer.

In contrast, if as in *General Foods*, *Mercy Memorial* or *Crown Cork & Seal*, the employer establishes bodies in which employees and management jointly address and resolve work assignments, grievances, training and disciplinary matters and like issues concerning terms

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<sup>18</sup> 332 NLRB 1143 (2000).

and working conditions, but in which the employees do not purport to speak for others, then it appears under current Board law that these bodies do not constitute “labor organizations” because they do not constitute “bilateral mechanisms.” Similarly, bodies on which employees express views or offer ideas or suggestions concerning the performance of work or services, production methods, safety issues, and the like, and where the employer “simply gathers the information and does what it wishes” with it, without the employees making proposals to which management responds “by acceptance or rejection by work or deed,” then the bodies are not labor organizations because they do not “deal with” the employer for the purposes of Section 2(5).

One can fairly ask whether these cases erect form over substance and whether the Sixth Circuit came closest to the truth in its *Scott & Fetzer* opinion when it observed that the “difference between communication of ideas” which is legally permissible, and “a course of dealings” which is not, is a line that “at times is seemingly indistinct.” In all events, the recent line of cases seems flatly inconsistent with the Act’s terms and to distort the model of representation that it endorsed. Reading *Cabot Carbon* as the Board did in its *Electromation* decision to equate “dealing” with the existence of a “bilateral mechanism” hardly appears consistent with the Supreme Court’s holding in that case. In effect, *Electromation* confines the holding of *Cabot Carbon* to its facts. Likewise, the “statutory test of independence” of employee groups from the employment relationship, emphasized by Senator Wagner during the hearings over the Act and confirmed in the Supreme Court’s *Newport News* opinion seems to have gone forgotten in the mists of time.

A variety of speculative possibilities offer themselves as explanations for the course that the NLRB has followed in this area since *Electromation*. Some of the Board members, I suspect, have feared that a strict interpretation of the language of Sections 2(5) and 8(a)(2) might lead Congress to repeal them or to do away with the NLRA altogether. Others of a similar “accommodationist” attitude regarded these terms as dated and inconsistent with the demands of a globalized economy and sought to reconcile them, as much as possible, with contemporary practices. Still others may be unconvinced that Congress possibly could have intended in 1935 to endorse but one system of group dealing.

In 1994, the Commission on the Future of Worker-Management Relations, a body appointed during the Clinton administration by the then Secretaries of Labor and Commerce, made a wide-ranging report and series of recommendations for the reform of American employment law and policies.<sup>19</sup> Among its recommendations, the Commission suggested that “Congress clarify Section 8(a)(2)” to provide that “non-union employee participation programs should not be unlawful simply because they involve discussion of terms or conditions of work where such discussion is incidental to the broad purposes of these programs.” In the Commission’s view, employee involvement programs “do not violate the basic purposes of Section 8(a)(2)” and the law should facilitate their expansion. The Commission also recommended that the ban against company unions continue, using the example of the committees like the ones used by Polaroid Corp. “Such joint groups,” the Commission stated, “are representative in character and count among their primary function handling employee grievances and advising senior management about pay, work rules and benefits.” As such, “[t]hey go well beyond incidental involvement in issues traditionally reserved to independent labor organizations.”

Douglas A. Fraser, a Commission member and a former president of the United Automobile Workers, strongly dissented to this recommendation. “Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny

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<sup>19</sup> See, *Report and Recommendations, Commission on the Future of Worker-Management Relations* (U.S. Dept’ of Labor, U.S. Dep’t of Commerce, Dec. 1994).

workers the right to a voice through independent representatives of their own choosing,” he wrote. Stressing that the Commission had “not proposed any wholesale revision or exemption to Section 8(a)(2),” Fraser nevertheless stated that because of his commitment “to the principle of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs” in the absence of the “workers having an independent voice.”

While wide-ranging, Congress acted on none of the Commission’s recommendations and the Report subsequently has vanished from public discussion. In 1996, President Clinton vetoed the Teamwork for Employees and Managers Act (TEAM Act), that would have amended Section 8(a)(2) to permit employers to implement certain forms of employee representation plans. Although the TEAM act has been reintroduced in Congress, to date, neither it nor any other bills to amend Sections 2(5) or 8(a)(2) have emerged.

Once a matter of hot debate and considerable discussion, employee participation has faded from the attention of both the public and of Congress. Given the current world situation, Congress seems unlikely to return to the issue or to the matter of employment law reform generally anytime in the near future. In the last fiscal year, incidentally, 152 complaints alleging violations of Section 8(a)(2) were filed with the NLRB, which constituted 0.8 per cent of the Board’s caseload for that period.<sup>20</sup> It is impossible to say how widespread the use of participatory or representative schemes is in the United States, but at least at the time the Commission on the Future of Worker-Management Relations issued its Report, it found that 52 per cent of the employees it surveyed “reported that some form of employee participation program operates in their workplace and thirty-one per cent indicate that they participate” in such a program. Given the low level of union density in the United States and what appears to be the wide use of participative programs, perhaps the significance of Section 8(a)(2) has been resolved on a *de facto*, if not a *de jure* basis.

#### **D. Union Density in the United States**

As noted earlier, union density rates in the United States have declined from a high of about 35 per cent in the mid- to late 1950s to a rate of 7.9 per cent in the private sector today.<sup>21</sup> Including the public sector, 12.5 per cent of wage and salary earners in the United States are union members, a rate unchanged since 2004. At 36.5 per cent, the rate of unionization for public sector employees is considerably higher than the rate for employees in the private sector.

Within the public sector, local government workers held the highest union membership rates, at 41.9 per cent. This cohort includes teachers, police and fire fighters, which remain heavily unionized occupations. In the private sector, the most heavily unionized occupations, at 24 percent, were in transportation and utilities. Following them were workers in information industries, construction and manufacturing, with rates at about 13 per cent. Within the information industry, employees in telecommunications held the highest density rates, at 21.4 per cent. At 2.3 per cent, financial services had the lowest rates of unionization.

In terms of demographics, men (at 13.5 per cent) remained more likely to be union members than women (11.3 per cent). The differences between the sexes have narrowed considerably since 1983, when the rate for men stood 10 points higher than for women.

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<sup>20</sup> Sixty-Ninth Annual Report of the National Labor Relations Board at 204 (Sept. 30, 2004).

<sup>21</sup> All figures come from the Bureau of Labor Statistics, 2005 Union Members Summary, USDL 06-99 (Jan. 20, 2006) (available from the BLS website, <[www.bls.gov/cps/](http://www.bls.gov/cps/)>).

<sup>21</sup> All figures come from the Bureau of Labor Statistics, 2005 Union Members Summary, USDL 06-99 (Jan. 20, 2006) (available from the BLS website, <[www.bls.gov/cps/](http://www.bls.gov/cps/)>).

According to the U.S. Bureau of Labor Statistics, the more rapid decline of union membership rates among men accounts for the diminishing difference that current rates demonstrate. Presently, African-Americans (at 15.1 per cent) are more likely to be union members than are whites (12.1 per cent), Asians (11.2 per cent) or Latinos (10.4 per cent). Employees between 45 and 64 years old were the most likely to be union members (16.5 per cent) and those between 16 to 24 the least (4.6 per cent).

Union membership rates also vary widely geographically. The states with the highest union density rates in 2005 are New York (26.1 per cent), Hawaii (25.8 per cent), Alaska (22.8 per cent), Michigan and New Jersey (each with 20.5 per cent). Washington State had the fifth-highest density figures, at 19.1 per cent. States with the lowest rates include South Carolina (2.3 per cent), North Carolina (2.9 per cent), Arkansas and Virginia (both at 4.8 per cent), and Utah (4.9 per cent). A bit more than half of the Nation's union members live in just six states: California, New York, Illinois, Michigan, Ohio, and New Jersey.

As mentioned above, in the past year, several major unions disaffiliated themselves from the AFL-CIO, the umbrella union organization. These unions, the International Brotherhood of Teamsters (1.4 million members), the Laborers International Union of North America (800,000 members), UNITE HERE (400,000 members), the SEIU (1.8 million members), the United Food and Commercial Workers (1.4 million members), and the United Brotherhood of Carpenters and Joiners (520,000 members), along with the United Farm Workers have organized a new union federation that among other things plans to undertake aggressive and innovative organizing efforts and that plans to build a global labor movement. The new organization will hold its first organizing convention in March. Tellingly, all of these unions represent workers in sectors of the economy that are insulated from having their work transferred overseas.

### **E. Conclusion: Some Comparative Reflections on Decentralization and its Significance**

As I indicated at the outset, decentralization is a long-standing condition of the American labor relations scheme. It is embedded in our labor relations system and it characterizes many of our institutional arrangements generally. To the extent that decentralization implies the displacement or the substitution of collective bargaining with alternative systems of representation or participation, the term describes a development that may be fairly widespread among American employers.

Decentralization in the employment context has some further characteristics as well. As the practice of collective bargaining has waned in the United States, risks increasingly have been shifted to individual employees. Traditional defined benefit pensions for retirees, for example, once a typical feature of employment with any mid-size or large employer, quickly are vanishing. Their replacement are defined contribution plans, known in the United States as 401(k) plans, a reference to an Internal Revenue Code section governing their use. Under a defined contribution plan, the employer makes a certain contribution to match that made by its employees, who in turn bear the risk of investing and managing their portfolios. Money in 401(k) plans now outstrips the total in traditional pension plans, a change that will require younger workers to plan for their retirements with care.<sup>22</sup> Some also see a threat to traditional employer-based health insurance schemes in so-called medical savings account plans that give individuals a tax incentive to save their own funds to underwrite medical expenses.

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<sup>22</sup> See, Money in 401(k) Plans Outstrips Pension Totals, N.Y. Times (Feb. 2, 2006) (Available on the Times web site, <[www.NYTimes.com](http://www.NYTimes.com)>).



In the American case,<sup>23</sup> decentralization really means a thoroughgoing return to a regime of individual bargaining, at least for employees in the private sector. Of course, most American employees have never known anything different, even when union density rates stood at their zenith. Unions do not exist in a vacuum, however. As organized voices in the political sphere, unions speak for and represent interests that go well beyond those of their members alone. Just as the presence of unions affects patterns of income distribution within a society and influences the terms and conditions available to those without union representation, so their weakening and disappearance has considerable significance for those who never held union membership.<sup>24</sup>

About a decade ago, the Swedish comparativist, Reinhold Fahlbeck, published a provocative essay in which he reflected on “the un-American character of American labor law.”<sup>25</sup> The NLRA, Fahlbeck argued, with its emphasis on collective action and on the formation of associations stands in such stark contrast to the attitudes of the “archetypal American” as to make the law appear, as Fahlbeck put it, “somehow un-American.”<sup>26</sup> From the perspective of the average American, Fahlbeck observed, “Those people who want and need concerted action and unions are not quite reliable. They are not like Americans-at-large.”<sup>27</sup>

Fahlbeck has a point. As its framers suggested, the NLRA did represent an experiment, one that for a complicated series of reasons, never did fit well into the character of American society, and one that given the deep-seated trends of modernity, was a long-shot from the start.<sup>28</sup>

Union decline, however, hardly constitutes a phenomenon unique to the United States. It is going forward everywhere at an increasingly rapid pace, even in societies like Germany and Japan which traditionally have put a far greater emphasis on “communal” practices and habits than have we, and that have legal regimes that have been friendlier to collective bargaining than is ours. Is there a common thread? What can we learn from all this?

This is a big topic, one that cannot be exhaustively discussed here. I only want to point out that union decline is more than a function of changes in economic arrangements or the result of inhospitable legal regimes, although these factors certainly play a role. As Alexis de Tocqueville long ago reminded us, our mores—our “habits of the heart”—are far more important than the law and our political and economic arrangements. Over the past few decades, our mores undeniably have changed. Union decline is part of a far greater decline that has affected every aspect of associational life. Not only unions, but sodalities of all descriptions, including everything from grass roots political clubs, to religious groups, to civic and social organizations have hemorrhaged members, and not only in the United States. Marriage and birth rates in developed nations presently stand at the lowest levels ever recorded, even in times of famine and war. At the same time, the numbers of people living alone around the world stand at levels never before seen. For example, in 1950, single-person households made up just over 9 per cent of U.S. total. In 2000, in contrast, persons living alone constituted over a quarter of American households. Today, the number of people living alone in the United States exceeds the number of households comprised of a married couple

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<sup>23</sup> I strongly suspect that this will be the case for other systems as well.

<sup>24</sup> This includes managerial employees as well.

<sup>25</sup> Reinhold Fahlbeck, *The Demise of Collective Bargaining in the U.S.A.: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307 (1994).

<sup>26</sup> *Id.* at 323-24.

<sup>27</sup> *Id.* at 326.

<sup>28</sup> For a discussion of this point, see, Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 Buffalo L. Rev. 883 (2005).

living with their biological children.<sup>29</sup> When marriage and the family, which since the time of the Greeks have been regarded as the fundamental social institutions, appear to be dissolving one cannot be surprised that institutions like unions have foundered as well.

Tocqueville thought that democracy and the “progress of equality” represented forces that could not be stopped. Whether he was right about all this has yet to be seen. At the heart of these forces, however is a certain sort of individualism, a certain form of political and philosophical nominalism that increasingly has made the concept of membership in anything opaque to us.<sup>30</sup>

The collapse of unions accounts for much of the trend toward decentralization and for the accelerating instability of employment ordering systems around the industrialized world. That collapse, however, has implications that go far beyond these themes and that raise basic questions about our human character and the arrangements by which we seek to make life more fully and authentically human.

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<sup>29</sup> David B. Caruso, *Census says Manhattan First in Single-Person Households—Numbers on Rise across Nation*, *The Boston Globe*, Sept. 3, 2005 (summarizing U.S. Bureau of Census figures).

<sup>30</sup> On this theme, see the discussion in Kohler, *supra* note 29.