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## A New Voice for the Workplace: A Proposal for an American Works Councils Act

*Stephen F. Befort\**

### INTRODUCTION

After decades of ossification,<sup>1</sup> the prospects for meaningful labor law reform appeared possibly to be within grasp in the early 1990s. With the Democratic Party in control of both houses of Congress as well as of the White House, President Clinton, in 1993, charged the Commission on the Future of Worker-Management Relations with the task of examining the need for labor and employment law reform. Commonly referred to by the name of the committee's chair,<sup>2</sup> the Dunlop Commission issued a fact finding report in 1994,<sup>3</sup> and, after receiving considerable input, issued its final report and rec-

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1. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (stating "[t]he core of American labor law has been essentially sealed off—to a remarkably complete extent and for a remarkably long time—both from democratic revision and renewal and from local experimentation and innovation. The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years.").

2. Former Secretary of Labor John T. Dunlop served as the Commission's Chair.

3. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT (1994) [hereinafter FACT FINDING REPORT].

ommendations later that same year.<sup>4</sup> But, with the Republican Party's sweep of the 1994 Congressional races, the report was dead upon arrival.<sup>5</sup>

One significant piece of data generated by the Dunlop Commission, however, continues to stir debate. Professors Richard Freeman and Joel Rogers undertook a massive survey of American employees with respect to their attitudes toward workplace relationships. In this "mother of all workplace surveys,"<sup>6</sup> Freeman and Rogers interviewed and re-interviewed more than 2400 workers.<sup>7</sup> The results of the Worker Representation and Participation Survey first were summarized as an appendix to the Dunlop Commission report,<sup>8</sup> and then expanded upon in the recent book, *What Workers Want*.<sup>9</sup> Freeman and Rogers document a large "representation/participation gap" between the influence that employees want at work and the influence they currently possess.<sup>10</sup> The authors summarized their principal findings as follows:

American workers want more involvement and greater say in their jobs; they would like this involvement to take the form of joint committees with management and would prefer to elect members of those committees rather than have managers select them. They prefer cooperative committees to potentially conflictual organized relationships. A sizable minority are in workplaces where they and their fellow workers want to be represented by unions or union-like organizations.<sup>11</sup>

When asked to select a single most preferable type of workplace organization, a majority of the surveyed employees chose a joint employee-management committee that discusses and resolves workplace issues.<sup>12</sup> As the authors point out, this is "an institutional form that does not effectively exist in the United States."<sup>13</sup>

4. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (1994) [hereinafter REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS].

5. See WALTER GALENSON, THE AMERICAN LABOR MOVEMENT, 1955-1995, at 79 (1996); Richard B. Freeman & Joel Rogers, *Introduction: Worker Representation ... Again!*, 3 U. PA. J. LAB. & EMP. L. 375, 377 (2001).

6. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 16 (1999).

7. *Id.* at 31-38.

8. REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 4, at app. A.

9. FREEMAN & ROGERS, *supra* note 6.

10. *Id.* at 4.

11. REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 4, at app. A.

12. See FREEMAN & ROGERS, *supra* note 6, at 151-52.

13. *Id.* at 152.

What American workers want, in short, is more “voice” in the workplace. The concept of “voice” in the employment context refers to the ability of workers to communicate viewpoints, complaints, and desires to their employers in a meaningful way.<sup>14</sup> This voice is beneficial in terms of enhancing individual dignity, employee satisfaction, workplace productivity, and civic responsibility.

For the past century, unions have served as the principle voice mechanism for workers in the United States. With the decline of unions, employee voice also has diminished. Federal labor law compounds this problem by serving as a significant obstacle to the creation of many alternative mechanisms for employee participation. Section 8(a)(2) of the National Labor Relations Act bars such mechanisms to the extent that they involve employer-supported programs by which employees “deal[] with” employers concerning terms and conditions of employment.<sup>15</sup>

The fact that employees want additional voice at work, by itself, does not mean that the law necessarily should compel or facilitate such a result. To paraphrase Mick Jagger, American workers can’t always get what they want.<sup>16</sup> The strong preference of America’s muted workforce, however, does warrant a close examination of how national labor policy should address the matter of employee voice. This article attempts such an examination.

Both the East and the West offer possible alternative voice mechanisms. So far, most attention has focused on Japanese employer-initiated employee participation practices. Over the past two decades, American employers increasingly have adopted quality circles, work teams, total quality management, and other employee involvement programs.<sup>17</sup> But the growth in these programs has fallen short of expectations due, in part, to the reluctance of some employers to cede managerial discretion and, in part, to the continuing limits imposed by Section 8(a)(2). Thus far, attempts either to amend or repeal that section have failed.

Europe provides a different alternative model in the form of works councils. “Works councils are elected bodies of employees who meet regularly with management to discuss establishment level problems.”<sup>18</sup> Most countries in Western Europe legislatively mandate the formation of works councils for enterprises or plants in excess of a certain minimum size. In addition, works councils are undergoing a continent-wide boom as the expanding European Union has adopted a series of directives that require a near universal establishment of works councils over the next few years. For a

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14. See *infra* notes 25-27 and accompanying text.

15. See National Labor Relations Act § 8(a), 29 U.S.C. §§ 158(a)(2) and 152(5) (2000).

16. THE ROLLING STONES, *You Can’t Always Get What You Want*, on LET IT BLEED (ABKCO Records 1969).

17. See *infra* notes 113-26 and accompanying text.

18. FACT FINDING REPORT, *supra* note 3, at 43.

number of reasons discussed below, a works councils model provides the best option for reinvigorating employee voice in the United States.

Part I of this Article introduces the notion of voice and summarizes the benefits of employee voice in the workplace. Part II provides an overview of how unions amplify employee voice and chronicles the decline of the American labor movement. In Part III, the Article explores various alternative voice mechanisms with particular reference to management-initiated employee participation programs borrowed from Japan. Part IV analyzes Section 8(a)(2) and discusses how that provision serves as a limitation on certain types of employee participation practices. Part V reviews various proposals that have been suggested as a means to reform the NLRA in order to increase employee voice. Part VI of the Article then tacks in a different direction and describes the functions and growth of works councils in Europe. Finally, Part VII proposes the framework for a new American Works Councils Act and discusses the potential advantages and disadvantages of such a system.

## I. THE BENEFITS OF VOICE IN THE WORKPLACE

In a seminal book fusing economic and political analysis, Albert O. Hirschman articulated the role of “voice” in a relational context.<sup>19</sup> According to Hirschman, individuals who are unhappy in some aspect of a relationship with a firm or an organization may express their displeasure through either of two optional responses.<sup>20</sup> One possible response is for the individual to *exit* the relationship by simply ceasing to deal with that particular firm or organization.<sup>21</sup> The individual, alternatively, may give *voice* to his or her displeasure by communicating with the firm or organization.<sup>22</sup> Hirschman defined “voice” in this context as:

any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.<sup>23</sup>

Hirschman further postulated that an individual’s choice between these two options is influenced by the individual’s degree of loyalty to the firm or

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19. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

20. *See id.* at 4.

21. *See id.*

22. *See id.*

23. *Id.* at 30.

organization. He noted that, in general, loyalty serves to activate the voice option and makes exit less likely.<sup>24</sup>

Professors Freeman and Medoff have transposed Hirschman's model to the employment arena.<sup>25</sup> They note that an employee who is displeased with an employer's labor policies may either quit the job or attempt to change the policies in question.<sup>26</sup> In this context, "voice means discussing with an employer conditions that ought to be changed, rather than quitting the job."<sup>27</sup> In short, the notion of employee voice connotes some participatory process in which employees have input on matters of workplace decision-making.

A considerable body of scholarly literature touts the benefits of enabling employee participation by means of addressing matters of workplace concern. These proponents of employee participation tend to fall into two broad camps. The first group contends that employee voice mechanisms boost the economic performance of the firm. This enhanced performance purportedly occurs for several reasons. First, employee participation fosters an increased flow of information in the workplace.<sup>28</sup> This information aids in better problem solving and in the creative design of workplace systems.<sup>29</sup> This improved information flow also may facilitate better coordination among production functions.<sup>30</sup>

Many commentators additionally believe that employee participation boosts employee motivation to perform well at work. By having a say in workplace decisions, employees are more likely to buy into the firm's processes and objectives.<sup>31</sup> In short, a worker who perceives herself as valued is more likely to be a productive worker.<sup>32</sup>

Finally, echoing Hirschman,<sup>33</sup> a number of scholars see a positive correlation between employee participation, job satisfaction, loyalty, and job ten-

24. *See id.* at 77-78.

25. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

26. *See id.* at 8.

27. *Id.*

28. *See* EDWARD E. LAWLER III, *HIGH-INVOLVEMENT MANAGEMENT: PARTICIPATIVE STRATEGIES FOR IMPROVING ORGANIZATIONAL PERFORMANCE* 35-37 (1986); DAVID I. LEVINE, *REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN* 38 (1995); Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 17-20 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

29. *See* FREEMAN & MEDOFF, *supra* note 25, at 15; LAWLER, *supra* note 28, at 33-37.

30. *See* LAWLER, *supra* note 28, at 33-37.

31. *See id.* at 28-32; LEVINE, *supra* note 28, at 38.

32. *See* LAWLER, *supra* note 28, at 29-32.

33. *See* HIRSCHMAN, *supra* note 19, at 77-78.

ure.<sup>34</sup> The latter factor, in turn, reduces the costs associated with the hiring and training of new employees and provides an incentive for investment in enterprise-specific skills.<sup>35</sup>

Numerous studies have attempted to gauge the impact of employee participation programs on productivity. Although the empirical findings of these studies are mixed, most find that employee involvement generally enhances the economic productivity of the firm.<sup>36</sup> Levin and Tyson, for example, reported that their analysis of forty-three empirical studies revealed "usually a positive, often small, effect of participation on productivity . . . and almost never a negative effect."<sup>37</sup> Similarly, Freeman and Rogers stated that their review of the relevant empirical data supports the conclusion that employee participation raises productivity in the range of two to five percent.<sup>38</sup> Productivity gains tend to be most pronounced with respect to participation mechanisms that remain in place over time and that are integrated systematically with other innovative management practices.<sup>39</sup>

The second group of proponents tends to urge greater employee involvement in workplace decisions on participatory democracy grounds. This non-economic justification for employee participation proceeds on two levels. On the enterprise level, employee participation purportedly enhances an employee's sense of efficacy over his or her work environment.<sup>40</sup> This democratic empowerment serves basic notions of human dignity and autonomy.<sup>41</sup>

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34. See FREEMAN & MEDOFF, *supra* note 25, at 14; LAWLER, *supra* note 28, at 32-33; Freeman & Rogers, *supra* note 28, at 19.

35. See FREEMAN & MEDOFF, *supra* note 25, at 14.

36. See, e.g., FREEMAN & ROGERS, *supra* note 6, at 103-05; LEVINE, *supra* note 28, at 80-81; Brian Becker & Barry Gerhart, *The Impact of Human Resource Management on Organizational Performance: Progress and Prospects*, 39 ACAD. MGMT. J. 779 (1996); Casey Ichniowski et al., *What Works at Work: Overview and Assessment*, 35 INDUS. REL. 299 (1996).

37. David I. Levine and Laura D'Andrea Tyson, *Participation, Productivity, and the Firm's Environment*, in PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 203-04 (Alan S. Blinder ed., 1990).

38. See FREEMAN & ROGERS, *supra* note 6, at 105.

39. See FACT FINDING REPORT, *supra* note 3, at 46. See also Takao Kato & Motohiro Morishima, *The Productivity Effects of Participatory Employment Practices: Evidence from New Japanese Panel Data*, 41 INDUS. REL. 487, 516-17 (2002) (reporting econometric findings that an employer's use of complementary employee participation practices can lead to eight to nine percent increases in productivity if continued over a long gestation period of approximately seven years).

40. See JOHN L. COTTON, *EMPLOYEE INVOLVEMENT: METHODS FOR IMPROVING PERFORMANCE AND WORK ATTITUDES* 17 (1993); S. LANCE DENNING, *THE PRACTICE OF WORKPLACE PARTICIPATION: MANAGEMENT-EMPLOYEE RELATIONS AT THREE PARTICIPATORY FIRMS* 2-3 (1998); Marshall Sashkin, *Participative Management is an Ethical Imperative*, 12 ORGANIZATIONAL DYNAMICS 5 (1984).

41. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 21 (1993); Patricia A. Greenfield & Robert J.

On a broader scale, participatory theorists posit that individuals who become actively engaged in the workplace will carry over this participatory behavior into larger social and political arenas in the community.<sup>42</sup> While the church or the town meeting may have played this role in the past, advocates of participatory democracy now see the modern workplace as offering the most effective training ground for the skills and attitudes necessary for civic engagement.<sup>43</sup> Robert Dahl has aptly summarized the participatory democracy line of reasoning as follows:

Workplace democracy, it is sometimes claimed, will foster human development, enhance the sense of political efficacy, reduce alienation, create a solidary community based on work, strengthen attachments to the general good of the community, weaken the pull of self-interest, produce a body of active and concerned public-spirited citizens within the enterprises, and stimulate greater participation and better citizenship in the government of the state itself.<sup>44</sup>

## II. THE MUFFLED STATE OF VOICE IN AMERICA'S WORKPLACES

Labor unions constituted the principal voice mechanism for American workers during the twentieth century.<sup>45</sup> The decline in union density during the second half of that century<sup>46</sup> has carried with it an overall diminution of employee voice. Thus far, increases in governmental regulation and employer-sponsored participation programs have not made up for this loss.

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Pleasure, *Representatives of Their Own Choosing: Finding Workers' Voice in the Legitimacy and Power of Their Unions*, in *EMPLOYEE REPRESENTATION*, *supra* note 28, at 169, 173.

42. See PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 103-04 (1967); C. B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 104 (1977); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 42-43 (1970).

43. BACHRACH, *supra* note 42, at 103.

44. ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 95 (1985).

45. See FREEMAN & MEDOFF, *supra* note 25, at 8 ("In modern industrial economies, and particularly in large enterprises, a trade union is the vehicle for collective voice—that is, for providing workers as a group with a means of communicating with management."); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 808 (1998) ("It is through collective bargaining that employees have a voice in the decisions that affect their working lives . . .").

46. See *infra* notes 65-72 and accompanying text.



## A. Union Voice

Using the mid-century mark as a reference point, the legal framework applicable to the American workforce in 1950 divided into two distinct sectors. The larger at-will sector covered approximately two-thirds of the workforce.<sup>47</sup> In this union-free zone, employers were free to hire and fire employees for any reason.<sup>48</sup> Governmental regulation was virtually non-existent except for the minimum wage and overtime pay requirements of the Fair Labor Standards Act.<sup>49</sup> Employers in this climate were free to set terms and conditions of employment unilaterally with no compulsion to consult with any collective employee voice. And, with firms organized in the hierarchical style urged by Frederick Winslow Taylor,<sup>50</sup> American employers typically neither sought nor gave weight to the suggestions of individual employees.<sup>51</sup>

The unionized sector accounted for the remaining portion of the workforce. In 1950, union members accounted for 31.5 percent of the American

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47. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 355-57 (2002).

48. The Tennessee Supreme Court articulated a classic description of the at-will rule in a 1884 decision. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled by* *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915) (stating “[a]ll [employers] may dismiss their employes [sic] at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong”). For a good description of the development and historical antecedents of the employment-at-will rule, see generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

49. 29 U.S.C. §§ 201-19 (2000). Enacted in 1938, the Fair Labor Standards Act requires employers to pay covered employees the equivalent of a mandated minimum hourly wage plus overtime compensation at one and one-half times the regular rate of pay for time worked in excess of 40 hours per week. In 1950, the minimum wage was pegged at seventy-five cents per hour. See *The Federal Hourly Minimum Wage Since its Inception*, available at [http://www.cnn.com/US/9608/20/minimum.wage.sign/graph\\_mimimum.wage.gif](http://www.cnn.com/US/9608/20/minimum.wage.sign/graph_mimimum.wage.gif) (last visited May 30, 2004).

50. FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911). Under the Taylorist model, which came to dominate American business organizations in the early twentieth century, rank and file employees were assigned specialized and standardized tasks which eventually led to the assembly line mode of production. See generally DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* (1980).

51. See LAWLER, *supra* note 28, at 5-6 (“Authority and decision making were supposed to rest at the top while the lower-level participants were asked to focus on doing, not thinking. Thinking, coordinating, and controlling were left to management.”); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 196 (1990) (“Under . . . scientific management, there was a sharp divide between the small elite management team that decided what and how the work was to be done, and the large mass of labor that simply did what it was told.”).

nonagricultural workforce.<sup>52</sup> In sharp contrast to the at-will sector, employers and unions in the unionized sector are required to engage in a bilateral process in an attempt to establish terms and conditions of employment.

As part of this bilateral process, unions empower employee voice in three related, but different ways. First, the NLRA guarantees the right of employees to bargain collectively through their selected union representative.<sup>53</sup> Mandatory subjects of bargaining include “wages, hours, and other terms and conditions of employment,”<sup>54</sup> but not matters that go to the core of an employer’s entrepreneurial control<sup>55</sup> such as plant closings<sup>56</sup> and product advertising.<sup>57</sup> The NLRA obligates both parties to negotiate in “good faith”<sup>58</sup> with a present intention to find a basis for agreement,<sup>59</sup> although “such obligation does not compel either party to agree to a proposal or require the making of a concession.”<sup>60</sup>

Second, the NLRA protects the right of employees to engage in “concerted activit[y] for . . . mutual aid or protection.”<sup>61</sup> This includes a ban on an

52. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS 1980b, at 412 tbl.165, *reprinted in* MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10, tbl.1 (1987). Approximately fifteen million American workers belonged to unions in 1950. *See* U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, D 927-939 (Bicentennial ed. 1975). Of these, approximately eight and one-half million were members of the American Federation of Labor (AFL), four million belonged to the Congress of Industrial Organizations (CIO), and the remaining two and one-half million were members of independent or unaffiliated organizations. *See id.*

53. 29 U.S.C. § 157 (2000). A union generally attains representational status only after first establishing its majority status among the employees in a representational election. *See* 29 U.S.C. § 159(a). Upon attaining such status, the union serves as the exclusive representative of all employees in that bargaining unit. *Id.*

54. 29 U.S.C. § 158(d). *See* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

55. *See* *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that the NLRA does not require bargaining with regard to managerial decisions “which lie at the core of entrepreneurial control”).

56. *See, e.g., First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (ruling that an employer is not required to bargain with respect to a decision to close part of its business operation).

57. *See, e.g., NLRB v. Detroit Resilient Floor Decorators Local Union No. 2265*, 317 F.2d 269 (6th Cir. 1963) (ruling that an employer is not required to bargain with respect to deciding whether to contribute to an industry promotion fund).

58. 29 U.S.C. § 158(d).

59. *See* *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 683-84 (9th Cir. 1943).

60. 29 U.S.C. § 158(d).

61. 29 U.S.C. § 157. *See also* 29 U.S.C. § 163 (“Nothing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .”).

employer's ability to discharge<sup>62</sup> or otherwise retaliate<sup>63</sup> against an employee who participates in a lawful strike, boycott, or picket.

Finally, collective bargaining agreements negotiated pursuant to the NLRA may themselves provide an additional voice mechanism. The vast majority of such agreements establish a grievance procedure culminating in binding arbitration to resolve contract interpretation and application disputes that may arise during the life of a collective agreement.<sup>64</sup>

In short, unionization, at least where it succeeds, is a powerful mechanism for activating and amplifying employee voice. As the next section details, however, unions have succeeded less and less since 1950.

## B. The Decline of Union Voice

### 1. The Numbers

Union membership in the United States peaked in 1954 at 34.7 percent of the nonagricultural labor force<sup>65</sup> and then began a long and steady decline. Union density dropped to 24.7 percent in 1970<sup>66</sup> and continued downward to 16.1 percent in 1990.<sup>67</sup> The decline has slowed but not stopped as the most recently available data in 2003 shows union membership at 12.9 percent of the nonagricultural labor force.<sup>68</sup>

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62. See 29 U.S.C. § 158(a)(3); *NLRB v. Browning-Ferris Indus.*, 700 F.2d 385 (7th Cir. 1983).

63. See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (employer committed unfair labor practice by paying accrued vacation benefits to all qualifying employees except those who participated in lawful strike).

64. See U.S. DEP'T OF LABOR, BULL. NO. 2013, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JULY 1, 1976, at 82 (1979) (reporting that approximately 96 percent of agreements in effect during July 1976 in the nation's most important industries provided for arbitration as the terminal point of the contractual grievance process). Most contracts also provide for a "just cause" limitation on employee discipline and discharge. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 n.1 (ninety-four percent of collective bargaining agreements entered into under the NLRA contain clauses that provide that an employer may discharge employees only with "just cause") (citing 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) § 40:1 (1983)). Taken together, this means that employers may discharge employees covered by most union contracts only upon convincing a neutral arbitrator that just cause exists to support the termination decision.

65. See GOLDFIELD, *supra* note 52, at 10 tbl.1.

66. See *id.* at 11 tbl.2.

67. See 26 Daily Lab. Rep. (BNA) B-8 (Feb. 7, 1991).

68. See Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Union Members in 2003 (Jan. 21, 2004), available at <http://www.bls.gov/news.release/pdf/union2.pdf>. The Bureau of Labor Statistics reports a total of 15.8 million union members in the United States in 2003. See *id.*

The actual drop in private sector union membership is even more severe once the simultaneous rise in public sector unionism is considered. In 1950, union membership among public employees was negligible. During the decades of the 1960s and 1970s, public sector union density grew five-fold<sup>69</sup> and thirty-six states enacted labor relations statutes protecting public employee bargaining rights.<sup>70</sup> By 2000, 37.5 percent of all government workers were union members, accounting for approximately 40 percent of total union membership.<sup>71</sup> Once this public sector boom is factored out, union members comprise only nine percent of the current private sector labor force.<sup>72</sup>

## 2. The Reasons

In a recent article, I discussed six factors that have contributed to the decline of the American labor movement. They are: (1) the new global economy; (2) employer opposition to unions and deficiencies in the NLRB's regulatory structure; (3) changing workforce composition; (4) the increase in contingent work; (5) the nature of American unionism; and (6) American rugged individualism.<sup>73</sup> While each factor has played a role, the first two are particularly significant.

### a. The Global Economy

Advances in technology and transportation have created a global economy in which American firms must compete on an international basis.<sup>74</sup>

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69. In 1956, only 915,000 federal, state, and local governmental employees were union members. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 1865, HANDBOOK OF LABOR STATISTICS 1975, at 382 tbl.155 (1975). By 1980, more than five million public employees belonged to unions. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR-MANAGEMENT SERVS. ADMIN., U.S. DEP'T OF LABOR, NO. 102, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980, 1 tbl B (1981).

70. See DONALD H. WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 9-11 (4th ed. 1993).

71. See Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Union Members in 2000 (Jan. 18, 2001), available at <ftp://ftp.bls.gov/pub/news.release/History/union2.01182001.news>.

72. See *id.*

73. See Befort, *supra* note 47, at 362-77.

74. See CHARLES B. CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 42-47 (1993) (describing the rise of the global economy); WILLIAM B. JOHNSTON & ARNOLD E. PACKER, HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 1-5 (1987) [hereinafter WORKFORCE 2000] (depicting the development of an integrated world economy since the 1960's); FACT FINDING REPORT, *supra* note 3, at 2-3 (reporting that the ratio of exports and imports to gross domestic product for the United States more than doubled between 1960 and 1991).

Given the lower wage structures of most developing nations,<sup>75</sup> American unions now face intense resistance in virtually every sector in which international production is feasible.<sup>76</sup>

This pressure has led to lower union density rates in two related ways. First, trade and technology have made capital more mobile.<sup>77</sup> Modern advances in information and communication technologies, in particular, have enabled employers to produce goods wherever labor costs are the most attractive.<sup>78</sup> American employers, accordingly, have shifted production to the Sunbelt<sup>79</sup> and to developing nations as a means of lowering labor costs and escaping unions.<sup>80</sup>

Second, American firms, whether or not they relocate operations, face intense pressure to cut costs in order to compete in the new global economy.<sup>81</sup>

75. See CRAVER, *supra* note 74, 43-47; INT'L LABOUR OFFICE, MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 77 (1973).

76. See Estreicher, *supra* note 41, at 13 n. 33 (noting that "[t]he impact of international product market competition has been principally felt in the manufacturing sector—in particular, the clothing, steel, automobile, rubber, and electronics industries"). The fact that public sector governmental services are less susceptible to production on an international basis may help explain the greater degree of success that unions have achieved in that sector.

77. See generally ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21st CENTURY CAPITALISM 113-22, 263-64 (1991) (describing the significant mobility of capital in the new global economy); BEVERLY J. SILVER, FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870, at 3-4 (2003) (summarizing various studies discussing the "hypermobility" of capital); Janice R. Bellace, *Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA*, in LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS 22 (J.R. Bellace & M.G. Rood eds., 1997) (noting the greater mobility of capital as compared to labor in the global economy).

78. See R. Blanpain, *The Changing World of Work*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 23, 24-26 (R. Blanpain & C. Engels eds., 6th ed. 1998) (describing the impact of technology on the global movement of goods and services); Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 1-2, 11 (2000) (same).

79. See SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 255-56 (1997) (describing the relocation of manufacturing operations to southern states); see also THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 66-68 (1986) (describing the influence of labor costs and union avoidance on plant location decisions).

80. See CRAVER, *supra* note 74, at 42-47 (describing the flight of American business to a "foreign production platform"); Bellace, *supra* note 77, at 22 (noting that the global marketplace entices American businesses to move production facilities to lower wage countries).

81. See Dau-Schmidt, *supra* note 78, at 2, 12 (describing how global competition has led to a "new flexibility" in structuring work arrangements).

Since unionization tends to come with a sizeable wage premium,<sup>82</sup> union avoidance and resistance to union wage demands have become a prime business strategy.<sup>83</sup> Less directly, American businesses, particularly beginning in the 1980s, have turned to reorganization, down-sizing, and contingent work arrangements as cost-cutting measures.<sup>84</sup> These measures destabilize long-term work arrangements and are inimical to union strength.<sup>85</sup>

#### b. Employer Opposition and NLRA Regulatory Structure

A unique attribute of the American system of labor-relations is the active opposition of many American employers to union organizing efforts.<sup>86</sup> Much of this opposition is made possible by the NLRA's adoption of an electoral model for determining representational status.<sup>87</sup> In many other industrialized countries, an employer automatically must bargain with a union concerning the rights of its members.<sup>88</sup> Under such a system, employers play no overt role in an employee's decision to join a union, and any opposition to union demands typically does not occur until the parties meet at the bargaining table.<sup>89</sup> Under the NLRA, in contrast, an employer is not obligated to bargain until after a union first establishes its majority status in a representation election.<sup>90</sup> U.S. employers, moreover, may participate actively in this

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82. See FREEMAN & MEDOFF, *supra* note 25, at 46, 64 (describing a 20 to 30 percent union wage effect).

83. See KOCHAN ET AL., *supra* note 79, at 107-08 (describing the financial incentive for American business to avoid unions).

84. See PETER CAPPELLI ET AL., *CHANGE AT WORK* 66-88 (1997) (describing various changes in business practices beginning in the early 1980s).

85. See FREEMAN & MEDOFF, *supra* note 25, at 221-45; Dau-Schmidt, *supra* note 78, at 20.

86. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 45 (1993) ("The fact is that American employers have never accepted trade unionism to the extent that their counterparts have in other industrialized countries throughout the world, a phenomenon sometimes encapsulated by the term 'American exceptionalism.'").

87. See FACT FINDING REPORT, *supra* note 3, at 75 ("The United States is the only major democratic country in which the choice of whether or not workers are to be represented by a union is subject to such a confrontational process . . .").

88. See, e.g., Richard E. Lutringer & Mark S. Dichter, *Germany*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 4-1, 4-40 to 4-41 (William L. Keller & Timothy J. Darby eds., 2nd ed. 2003) (Germany); Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L. J. 269, 289 (1996) (Mexico).

89. See Roy J. Adams, *The Right to Participate*, 5 EMPLOYEE RESPS. & RTS. J. 91, 94 (1992) ("Few advanced democratic societies condone open opposition by employers to unionization.").

90. See 29 U.S.C. § 159(a) (2000).

election process. The NLRA permits an employer to express its opposition to union representation so long as it does not engage in threats of reprisal for union support or make promises of benefits to entice union opposition.<sup>91</sup> Many employers hire professional consultants for the purpose of orchestrating sophisticated anti-union campaigns.<sup>92</sup> These campaigns not infrequently spill over to include illegal tactics such as the discharge of union supporters,<sup>93</sup> which go undeterred by the tepid remedies of the NLRA.<sup>94</sup> A number of empirical studies show that these anti-union tactics often are successful in influencing election outcomes.<sup>95</sup>

The weakness of the NLRA's regulatory structure also encourages employers to continue to oppose unions even if the latter successfully has run the election gauntlet. American employers often dispense with union representatives by refusing to bargain in good faith for an initial contract<sup>96</sup> or by push-

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91. 29 U.S.C. § 158(c). Misstatements of fact and even intentional lies are not forbidden. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

92. See GALENSON, *supra* note 5, at 88 (reporting on a 1983 survey conducted by the AFL-CIO finding "that outside consultants or lawyers directed counter-organizing drives" on behalf of employers in approximately 75 percent of union campaigns).

93. For a discussion of both the legal and illegal tactics used by U.S. employers in opposing union organizing efforts, see Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-81 (1983) and FREEMAN & MEDOFF, *supra* note 25, at 230-33.

94. The usual remedy under the NLRA for the illegal discharge of an employee organizer is a cease and desist order coupled with reinstatement and back pay. 29 U.S.C. § 160(c). The NLRA does not provide for fines, punitive damages or any other "penalty," and the discharged employee is subject to a duty to mitigate losses by finding alternative work. See CRAVER, *supra* note 74, at 151. This "make whole" approach provides little in the way of deterrence for employers who realize that they can chill union organization efforts by immediately firing the employee organizers. See *id.*; Weiler, *supra* note 93, at 1788-90.

95. See FREEMAN & MEDOFF, *supra* note 25, at 233-39 (summarizing empirical studies concerning the impact of anti-union campaigns); *but cf.* JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) (finding that most employees do not change their support for or against union representation because of an employer's anti-union tactics).

96. The only remedy recognized under the NLRA for a party's refusal to engage in good faith bargaining is an order requiring that party to return to the bargaining table. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), *rev'd*, *UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971). Thus, an employer may engage in protracted "surface" bargaining with little fear of meaningful administrative intervention. See WEILER, *supra* note 51, at 250 (noting "the incidence of bad faith bargaining has risen" as employers "appreciate the lack of force in their obligation to recognize and deal with a certified union"). This problem is particularly acute when used as a tactic to avoid the consummation of an initial collective bargaining agreement. See FACT FINDING REPORT, *supra* note 3, at 73-74 (reporting that approximately one-third of all newly certified union representatives fail to conclude a first contract).

ing unions into a strike and hiring permanent replacement workers.<sup>97</sup> Both strategies often result in a decertification election or an employer's lawful withdrawal of recognition.<sup>98</sup>

### C. *The Rise of Governmental Regulation*

During this same period of union decline, the United States experienced a significant increase in the amount of governmental regulation affecting the employment relationship. Until the mid-1960s, the NLRA and the FLSA were the only two federal statutes that comprehensively regulated the workplace. That situation has changed dramatically. Congress since has enacted a host of statutes that can be grouped into two basic categories. Some of these statutes, such as Title VII<sup>99</sup> and the Americans with Disabilities Act,<sup>100</sup> prohibit workplace discrimination on the basis of certain protected characteristics. A second category of statutes, such as the Occupational Safety and Health Act<sup>101</sup> and the Family and Medical Leave Act,<sup>102</sup> substantively establish minimum workplace requirements. In addition, state legislatures and courts have adopted several limitations to the at-will presumption such as

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97. The Supreme Court has ruled that an employer does not act unlawfully in hiring permanent replacement workers to fill positions vacated by those engaged in a lawful strike. *See* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). In addition, an employer lawfully may decline to reinstate a striker at the conclusion of a strike so long as the position continues to be occupied by a permanent replacement. *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968). The threat of permanent replacement deters strikes and decreases the union's ability to use the threat of a strike as leverage in collective bargaining. *See* Charles B. Craver, *The National Labor Relations Act Must be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992); Daniel Pollitt, *Mackay Radio: Turn it Off, Tune it Out*, 25 U.S.F. L. REV. 295, 296-97 (1991).

98. *See* GOULD IV, *supra* note 86, at 169 ("If the union cannot negotiate an agreement, the result is virtually the same as decertification or lack of certification during the organizational campaign."); Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 565, 567 n.138 (noting that permanent replacements frequently vote to decertify the union in an election held a little more than twelve months after being hired).

99. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (2000).

100. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

101. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2000).

102. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601-2654 (2000).



statutes protecting employee whistle-blowing<sup>103</sup> and court decisions authorizing tort claims for dismissals that offend public policy.<sup>104</sup>

The simultaneous decline in unionization and rise of governmental regulation likely are related developments. With the shrinking union sector less capable of providing a meaningful counterweight to undeterred employer discretion, many view governmental regulation as the next best line of defense.<sup>105</sup>

This governmental regulation, however, does little to compensate for the mounting silence resulting from the decline of American unions. These statutes may impose new workplace rules, but they provide no mechanism for the ongoing communication of employee desires and complaints. Rather than encouraging on-the-ground monitoring of workplace issues, these statutes channel enforcement into the costly realm of judicial litigation.<sup>106</sup>

### III. ALTERNATE VOICE MECHANISMS

#### A. Individual Voice

Unions are not the only possible vehicles for employee voice. Another alternative, for example, is for employees to express their viewpoints on an individual basis.

I believe, however, that individual voice is inferior to collective voice in addressing matters of workplace concern for several reasons. First, because of the power imbalance between employers and employees in many workplaces, individual employees may be reluctant to express their candid view-

103. See, e.g., MICH. COMP. LAWS ANN. § 15.361-.369 (West 2000) (protecting both private and public sector employees from retaliation for blowing the whistle on alleged illegal acts). See also MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 923 (4th ed. 1998) (reporting that 37 states have enacted some form of statutory protection for employees reporting illegal activity).

104. See, e.g., *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (finding public policy cause of action for employee discharged for refusing to participate in an unlawful price-fixing scheme). See also Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400-05 (1989) (citing 43 states as recognizing the public policy cause of action).

105. See GOULD IV, *supra* note 86, at 55-58 (discussing the interrelationship between the decline of unionization and the rise of governmental regulation); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 15 (1988) (stating that with the decline in labor unions, "[s]ociety is now looking to the courts and legislatures to protect employees not covered by collective bargaining").

106. Estreicher, *supra* note 41, at 22 (noting that legislation "may poorly reflect employee preferences, deter needed job growth, and divert resources to the litigation system").

points out of a concern for how their employer might react.<sup>107</sup> A 1988 Gallup poll revealed that 45 percent of questioned workers reported, "there are concerns I'd like to raise with my employer but I've held back;" and that 54 percent stated that "I'd feel more comfortable raising workplace problems through an employee association, rather than as an individual."<sup>108</sup> Second, many of the potential topics of an employee-employer dialogue involve "public goods" such as workplace safety, production quotas, and layoff criteria. While these issues affect the well-being of all workers, the absence of a collective voice may make the incentive for an individual to attempt to effect change single-handedly too small to spur action.<sup>109</sup> Third, many workplaces remain structured in a hierarchical Taylorist model.<sup>110</sup> In these settings, management may simply dismiss individual communications as unimportant. Finally, individual expression may not be representative of broader group preferences and generally does not promote deliberations among employees that may cultivate shared preferences.<sup>111</sup> Accordingly, an employee who does choose to respond to individual concerns may be acting on inaccurate or incomplete information.<sup>112</sup>

### *B. Collective Voice—Looking to the East for a Model*

Beginning in the 1980s, American firms increasingly became interested in collective employee participation devices.<sup>113</sup> This interest was spurred on by the relative success of the more participatory Japanese economy.<sup>114</sup> Japanese firms have long used various employee participation programs (EPPs) as a means of flattening organizational structures and motivating employee per-

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107. See FREEMAN & MEDOFF, *supra* note 25, at 9 (stating that "workers who are tied to a firm are unlikely to reveal their true preferences to an employer, for fear the employer may fire them"); Freeman & Rogers, *supra* note 28, at 27 (stating that "[t]he inequities in power that define an employment relation make individual voice an uncertain channel of communication, inducing many employees to keep silent").

108. See Freeman & Rogers, *supra* note 28, at 27 (reporting the results of the Gallup poll).

109. See FREEMAN & MEDOFF, *supra* note 25, at 8-9; John T. Addison et al., *German Works Councils and Firm Performance*, in EMPLOYEE REPRESENTATION, *supra* note 28, at 305, 313.

110. See *supra* notes 50-51 and accompanying text (describing the Taylor model of firm organization).

111. See Freeman & Rogers, *supra* note 28, at 27.

112. *Id.*

113. See CAPPELLI ET AL., *supra* note 84, at 41; LAWLER, *supra* note 28, at 10-14.

114. See CAPPELLI ET AL., *supra* note 84, at 41; JAMES P. WOMACK ET AL., *THE MACHINE THAT CHANGED THE WORLD* 3-4, 98-100 (1990); Freeman & Rogers, *supra* note 28, at 34.

formance.<sup>115</sup> By the 1980s, Japan's growth in productivity far outpaced that of the United States.<sup>116</sup> American firms began to see employee participation as a possible solution to their own stagnating productivity.<sup>117</sup>

EPPs take many forms. Variations include joint labor-management committees,<sup>118</sup> quality circles,<sup>119</sup> quality of work-life programs,<sup>120</sup> self-directed work teams,<sup>121</sup> and, on a more holistic basis, total quality management.<sup>122</sup> Despite the diversity of EPPs, these programs share some key characteristics. Primarily, these programs represent employer-instigated efforts to improve productivity, performance, and employee job satisfaction through a

115. See LAWLER, *supra* note 28, at 45-50 (describing the use of quality circles in Japan); LEVINE, *supra* note 28, at 115-21 (describing employee involvement in Japan).

116. See LAWLER, *supra* note 28, at 14 (reporting that "Japanese productivity . . . more than doubled, while that of the United States . . . increased by less than 50 percent" from 1970 to the early 1980s).

117. *Id.* at 19-20; Freeman & Rogers, *supra* note 28, at 34.

118. See Martin T. Moe, Note, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127, 1157-58 (1993). Joint labor-management committees usually include employees and management officials and are generally "designed to address multiple issues at the department or plant level and often serve as an umbrella under which smaller employee involvement efforts operate. They may also serve as one component of a larger program." *Id.* at 1157 (footnotes omitted).

119. Quality circles, also known as quality control circles, usually involve programs in which employers give employees the responsibility of identifying product-quality and production-related problems. See *id.* at 1158; LAWLER, *supra* note 28, at 44-64; John R. McLain, Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1740 (1985). Employees are then charged with finding solutions to those problems. See Moe, *supra* note 118, at 1158.

120. Quality of work-life programs "focus primarily on making workers' jobs more meaningful and satisfying, which presumptively leads to gains in worker productivity." Moe, *supra* note 118, at 1159. These "programs involve various techniques intended to bring about fundamental changes in an employer's organizational structure and in the relations between workers and managers." *Id.*

121. Self-directed work teams are comprised of employees who are accountable for some discrete segment of production. The company divides the employees into groups or teams and each team has its own area of responsibility. See LAWLER, *supra* note 28, at 101-18; Moe, *supra* note 118, at 1159.

122. See CAPPELLI ET AL., *supra* note 84, at 120 (defining total quality management as a "[q]uality control approach that emphasizes the importance of communications, feedback, and team-work"); LEVINE, *supra* note 28, at 5-6 (describing total quality management as involving "a set of tools that are intended to achieve continuous improvement in quality and efficiency").

cooperative dialogue involving both management and employee representatives.<sup>123</sup>

American companies have begun to use EPPs in increasing numbers over the past two decades.<sup>124</sup> The use of EPPs is most pronounced in very large firms where various surveys undertaken in the early 1990s reported that approximately 80 percent of such firms utilize at least some type of employee involvement practice for some groups of workers.<sup>125</sup> The growth in EPPs among large firms continued through the latter half of the decade in spite of a climate of downsizing and economic insecurity.<sup>126</sup> These numbers, however, tell only part of the story. Only about 25 to 30 percent of the workers employed by large firms actually are involved in these programs,<sup>127</sup> and participation at smaller firms is decidedly less extensive.<sup>128</sup> A number of studies also have found that many EPPs are short-lived with a substantial number not surviving more than five years.<sup>129</sup> Finally, when the focus narrows to the most desirable type of EPPs, which involve both high levels of worker participation and high levels of integration with other organizational practices, only about 5 to 10 percent of American workplaces pass muster.<sup>130</sup>

Given the asserted benefits of employee participation discussed above,<sup>131</sup> one would expect that EPPs or some other collective participation mechanism would be even more prevalent than they are today. One would

123. See, e.g., Michael S. Albright, *The Legality of Employee Participation Programs Following the NLRB's Electromation, Inc. Decision*, 1993 DETROIT C.L. REV. 1035, 1036; Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 729 (1999); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1651-53, 1663-64 (1999); Moe, *supra* note 118, at 1127.

124. See generally LEVINE, *supra* note 28, at 6-8; FACT FINDING REPORT, *supra* note 3, at 29.

125. See LEVINE, *supra* note 28, at 6-7; FACT FINDING REPORT, *supra* note 3, at 34-36; Freeman & Rogers, *supra* note 28, at 35.

126. See PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* 81 (2001).

127. See LEVINE, *supra* note 28, at 7 (reporting that 31 percent of employees in responding Fortune 1000 firms participated in an EPP in 1990); FACT FINDING REPORT, *supra* note 3, at 35 (reporting that approximately 25 percent of employees working for 51 surveyed large firms participated in an EPP in 1993).

128. See Freeman & Rogers, *supra* note 28, at 60 (reporting that 10 to 15 percent of all American firms had EPPs by the late 1980s).

129. See FACT FINDING REPORT, *supra* note 3, at 36-37; Robert Drago, *Quality Circle Survival: An Exploratory Analysis*, 27 INDUS. REL. 336 (1988).

130. See FACT FINDING REPORT, *supra* note 3, at 36 (estimating that less than five percent of all American workplaces use such "high performance" employment systems); Freeman & Rogers, *supra* note 28, at 36 (reporting that only ten percent of American firms employed such "advanced worker participation" programs).

131. See *supra* notes 28-44 and accompanying text.

assume that employers would adopt EPPs in order to boost firm productivity, and that employees would support the adoption of EPPs in order to facilitate greater participatory democracy and individual dignity at work.

The Worker Representation and Participation Survey (WRPS) undertaken by Freeman and Rogers provides strong empirical evidence in support of the latter of these assumptions.<sup>132</sup>

Professors Freeman and Rogers have painstakingly demonstrated that employees want more influence at work through an independent voice mechanism. After interviewing and re-interviewing more than 2400 workers, the authors reported the following findings with regard to employee preferences:

- Sixty-three percent of employees want more influence at work.<sup>133</sup> Fifty-three percent of those surveyed indicated that they currently have less say in workplace decisions than they desire.<sup>134</sup>
- Thirty-two percent of nonunion workers and 90 percent of currently unionized workers would vote for a union in a NLRB election at their workplace.<sup>135</sup> In all, "44 percent of private sector American workers would like to be represented by a union."<sup>136</sup>
- In choosing the attributes of an ideal workplace organization, the vast majority of employees prefer one that acts cooperatively with management.<sup>137</sup> Eighty-five percent of employees prefer an organization run jointly by employees and management.<sup>138</sup>
- In terms of the desired relationship between such an organization and management, 44 percent of employees favor an organization that is "strongly independent"<sup>139</sup> of management, 43 percent of employees favor an organization that is "somewhat

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132. FREEMAN & ROGERS, *supra* note 6, at 40.

133. *Id.* at 41 exhibit 3.1.

134. *Id.* at 51.

135. *Id.* at 68-69 exhibit 4.1.

136. *Id.* at 89 (noting that this figure is more than three times the 14 percent share of the survey sample who reported union membership).

137. *Id.* at 56.

138. *Id.* at 56, 141-42 exhibit 7.1.

139. *Id.* at 146-47 exhibit 7.2. The authors define a "strongly independent" organization as one that both elects worker members and uses an outside arbitrator to resolve disputes. *Id.* at 147 exhibit 7.2.

independent” of management,<sup>140</sup> and the remaining employees desire either no organization or one that is not independent of management.<sup>141</sup>

- When asked to select a single most preferable type of workplace organization, 23 percent chose a union representative,<sup>142</sup> while 58 percent chose a joint employee-management committee that discusses and resolves workplace issues.<sup>143</sup>

Freeman and Rogers contend that this survey documents a “representation/participation gap” in which worker desire for voice far exceeds its current availability.<sup>144</sup> They find this gap to be “harmful to the nation’s economic progress and social well-being.”<sup>145</sup> Noting that the most-preferred type of workplace organization is “an institutional form that does not effectively exist in the United States,”<sup>146</sup> Freeman and Rogers suggest that the United States needs “a system that admits new institutions as well as extension of current ones.”<sup>147</sup>

Managerial attitudes toward employee participation appear to be more mixed. On the one hand, the increasing prevalence of EPPs illustrates that many employers are receptive to at least some forms of employee participa-

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140. *Id.* at 146–48, 147 exhibit 7.2. The authors define a “somewhat independent” organization as one that either elects members without arbitration, functions with volunteer representatives, or in which a management-appointed organization has authority to submit disputes to an outside arbitrator. *Id.*

141. *Id.* at 146, 147 exhibit 7.2. The authors report that 7 percent of employees want management to both select members of the organization and to possess unilateral authority to resolve any areas of disagreement, while a different 7 percent indicated that they did not want any workplace organization. *Id.*

142. *Id.* at 150. The authors note that this support rises to 31 percent when employees have the option to choose an organization that functions like a union, but that is not denominated as such. *See id.* at 150–51.

143. *Id.* at 152. The authors report that 36 percent of those who favored a joint committee prefer that it act as a strongly independent institution, while 56 percent prefer that it function in a somewhat independent manner. *Id.* A more recent 1999 survey commissioned by the AFL-CIO reached similar conclusions. Forty-three percent of employees responding to that survey reported that they probably would vote in favor of forming a union, while 79 percent stated that they probably would vote to form an employee association. *See* OSTERMAN ET AL., *supra* note 126, at 103 (reporting the results of a survey undertaken by Peter D. Hart Research Associates, Inc, March 29–31, 1999).

144. FREEMAN & ROGERS, *supra* note 6, at 50–51, 48–49 exhibit 3.5.

145. Freeman & Rogers, *supra* note 28, at 14.

146. FREEMAN & ROGERS, *supra* note 6, at 152.

147. *Id.* at 155.

tion. On the other hand, Taylorist attitudes<sup>148</sup> persist. The fact that participation programs extend only to a small sector of the workforce suggests that many managers may view participation programs as a threat to managerial discretion and flexibility.<sup>149</sup> Some commentators also see a lack of commitment in the fact that many existing programs fall short of integrated practices that effectuate meaningful participation.<sup>150</sup> Some commentators, for example, perceive many current programs as "largely talk [involving] trivial routinization of management access to employee opinion rather than substantive changes."<sup>151</sup> This purported use of EPPs as symbolic gestures rather than opportunities for participation may explain why American participation programs tend to be less successful and more short-lived than those in Japan.<sup>152</sup>

Managerial reluctance, however, is not the only obstacle to the development of new devices for employee voice in the United States. An additional and substantial obstacle exists by way of current American labor law. As detailed in the following section, the NLRA renders many, if not most, employee participation programs illegal.

#### IV. NLRA SECTION 8(A)(2)

Section 8(a)(2) of the National Labor Relations Act 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."<sup>153</sup> This provision was incorporated into the original Wagner Act primarily as a means of outlawing the company-dominated unions that proliferated during the 1920s and 1930s.<sup>154</sup> As the Senate Committee considering the bill reported, "It seems clear that an organization or a representative or agent paid by the employer for representing employees cannot command,

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148. See *supra* notes 50-51 and accompanying text (discussing the Taylor model of firm organization).

149. See LEVINE, *supra* note 28, at 83-85; Freeman & Rogers, *supra* note 28, at 36-37. See also DENNING, *supra* note 40, at 146-47 (attributing managerial reluctance to accept full participation to "the power and tradition of the dominant market system").

150. See Freeman & Rogers, *supra* note 28, at 35-36; see also FACT FINDING REPORT, *supra* note 3, at 36 (estimating that less than 5 percent of American firms use integrated, "high performance" participation programs).

151. Freeman & Rogers, *supra* note 28, at 35.

152. See LAWLER, *supra* note 28, at 59-60, 63-64; SILVER, *supra* note 77, at 67-68. Compare FREEMAN & ROGERS, *supra* note 6, at 105 (summarizing empirical studies that EPPs in the United States raised productivity in the range of 2 to 5 percent) with Kato & Morishima, *supra* note 39, at 516-17 (reporting an empirical study showing that the use of complementary participation practices over time in Japan raise productivity in the 8 to 9 percent range).

153. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (2000).

154. See S. REP. NO. 74-573, at 9-11 (1935).

even if deserving it, the full confidence of such employees. And friendly labor relations depend upon absolute confidence on the part of each side in those who represent it."<sup>155</sup>

At first blush, Section 8(a)(2) would appear to be irrelevant since most modern participatory mechanisms such as quality circles and work teams do not operate like the sham company-dominated unions of yesteryear. The NLRA's broad definition of what constitutes a "labor organization," however, means that Section 8(a)(2) has the practical effect of banning most types of EPPs. Section 2(5) of the NLRA defines a labor organization as "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."<sup>156</sup>

Based on these provisions, a two-part analysis is used in determining whether a participatory program runs afoul of Section 8(a)(2). In the first step, the NLRB must determine whether the program in question is a "labor organization" under Section 2(5).<sup>157</sup> If so, the Board must then ascertain whether the employer is dominating or interfering with the program.<sup>158</sup>

As an initial matter, three requirements must be met for an EPP to be deemed a "labor organization." First, employees must participate in the EPP.<sup>159</sup> "[S]econd, the [EPP] must exist in whole or in part for the purpose of 'dealing with' the employer."<sup>160</sup> It is important to understand that "dealing with" is not synonymous with collective bargaining. The Supreme Court has adopted a broad understanding of "dealing with" to include an interactive exchange in which employees make recommendations to representatives of management.<sup>161</sup> Finally, the topics dealt with by the EPP must concern terms and conditions of employment such as "grievances, labor disputes, wage rates, employment hours, or working conditions."<sup>162</sup>

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155. *Id.* at 10.

156. National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (2000).

157. *See, e.g.,* Albright, *supra* note 123, at 1047.

158. *Id.*

159. Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 684 (1994).

160. *Id.*

161. *See* NLRB v. Cabot Carbon Co., 360 U.S. 203, 210-14 (1959). *See also* E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993) (stating that *dealing* involves a "bilateral mechanism" evidenced by "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").

162. 29 U.S.C. § 152(5) (2000); *see* Note, *supra* note 159, at 684.



Most EPPs meet each of these requirements.<sup>163</sup> The majority of EPP arrangements involve teams or committees in which employees discuss and make recommendations to management concerning terms and conditions of employment.<sup>164</sup> Such a program meets the statutory definition of a "labor organization" even if it lacks a formal structure, has no elected officers, and does not require the payment of initiation fees or dues.<sup>165</sup>

Most EPPs similarly meet the second prong of the Section 8(a)(2) test. For instance, an employer who acts to establish, administrate, or support an EPP likely will be found to "dominate or interfere" with the organization.<sup>166</sup> In addition, an employer may not contribute financially to an EPP without triggering this prong.<sup>167</sup> Significantly, the second prong of the Section 8(a)(2) test does not require a finding that the employer established the program with either anti-union animus or an intent to interfere with employee organizational rights.<sup>168</sup>

The NLRB's landmark decision in *Electromation, Inc.*<sup>169</sup> illustrates the reach of the Section 8(a)(2) prohibition. In that case, an employer established five "action committees" in which certain employees and management representatives met to discuss such issues as absenteeism, workplace smoking, and pay progression for premium positions.<sup>170</sup> The NLRB found that the committees constituted "labor organizations" because the participating employees bilaterally discussed terms and conditions of employment with management representatives.<sup>171</sup> The NLRB further ruled that the employer "dominated" these organizations by creating the committees and by determining their structure and functions.<sup>172</sup> The NLRB, accordingly, concluded that the employer violated Section 8(a)(2) in spite of the lack of any evidence that the employer established the committees for the purpose of deterring union organization efforts.<sup>173</sup>

163. See Note, *supra* note 159, at 684-85; David W. Orlandini, Comment, *Employee Participation Programs: How to Make Them Work Today and in the Twenty-First Century*, 24 CAP. U. L. REV. 597, 607-08 (1995).

164. See Kaufman, *supra* note 123, at 809.

165. *Fire Alert Co.*, 182 N.L.R.B. 910, 912 n.12 (1970).

166. See, e.g., *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); Orlandini, *supra* note 163, at 608.

167. See 29 U.S.C. § 158(a)(2) (2000); see also Orlandini, *supra* note 163, at 608.

168. See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939).

169. 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

170. See *id.* at 991.

171. See *id.* at 997.

172. See *id.* at 997-98.

173. See *id.* at 991-92, 997-98. Member Raudabaugh, in a concurring opinion, suggested a less limiting test that would permit employers to establish EPPs under circumstances in which the employer's motive is not to stifle unionization but "solely to enhance lawful entrepreneurial goals." See *id.* at 1014 (Radabaugh concurring).

Of course, not every EPP runs afoul of Section 8(a)(2). Employee committees that operate as a suggestion box or that simply share information with management, for example, are not “labor organizations” in that they are not engaged in “dealing with” an employer.<sup>174</sup> In a 2001 decision, the Board underscored that an employee committee that exercises delegated authority with respect to management issues, as opposed to terms and conditions of employment, also does not violate Section 8(a)(2).<sup>175</sup> In addition, it is clear that many existing EPPs survive despite their illegality.<sup>176</sup> Nonetheless, Section 8(a)(2) serves as a significant deterrent to the growth and development of employee participation in the United States.

## V. PROPOSALS FOR REFORM

Since NLRA § 8(a)(2) stands as an obstacle to the formation of many types of EPPs, it is not surprising that numerous reform proposals have called for an amendment of that provision. These proposals come in many variations, but all share the common objective of enabling greater employee voice in the workplace.

### A. Full Repeal of Section 8(a)(2)

Some commentators suggest a total repeal of Section 8(a)(2).<sup>177</sup> This would have the effect of permitting employers to experiment with an unlim-

174. See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

175. Crown Cork & Seal Co., 334 N.L.R.B. 699 (2001). Some commentators read this decision as providing “a potential turning point” toward a less restrictive interpretation of Section 8(a)(2). See, e.g., Gerald L. Pauling II & M. Andrew McGuire, *The Implications of Crown Cork & Seal Co. for Employee Involvement Committees as Labor Organizations under the NLRA: What Constitutes “Dealing with” Pursuant to Section 2(5) of the Act Since Electromation, Inc.?* 18 Lab. Law. 215, 233 (2002). On the other hand, the NLRB’s ruling that an employee committee with delegated managerial authority does not “deal” with management is not new, see General Foods Corp., 231 N.L.R.B. 1232 (1977), and, in fact, was even acknowledged by the NLRB in its *Electromation* decision. See *Electromation, Inc.*, 309 N.L.R.B. at 995.

176. At least part of the reason for their survival is that these devices are viewed by many employees as desirable mechanisms for providing some type of voice in the workplace. See FREEMAN AND ROGERS, *supra* note 6, at 151 exhibit 7.4 (showing that most employees want workplace participation through a joint employee-management committee). Few complaints are actually brought to the NLRB alleging Section 8(a)(2) violations. FACT FINDING REPORT, *supra* note 3, at 54. “A recent study found an average of about three such NLRB decisions a year over the last quarter century.” *Id.*

177. See, e.g., Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491, 532, 543 (2001).

ited range of possible involvement programs.<sup>178</sup> But such a complete de-regulation would go too far. Employers would be free to establish company-dominated organizations whose purpose was to suppress union organizing efforts rather than to afford any true measure of independent representation. This approach, accordingly, carries the potential for substituting employer-dominated voice for union-sponsored voice.

### B. Reform Labor Law

From the opposite end of the political spectrum, many commentators have called for labor law reform as a means to increase employee voice through a reinvigorated labor movement. Although proposals for revamping the NLRA come in many stripes,<sup>179</sup> most proposals focus on ensuring free choice in the union election process, facilitating first contracts, restricting the use of permanent replacement workers, and enhancing remedies for unfair labor practices.<sup>180</sup>

These proposals would do much to correct the current tilt in the labor law playing field. These suggestions, if adopted, would put employers and unions on a more equal footing and help to accomplish the NLRA's stated objective of protecting employee rights of self-organization and collective bargaining.<sup>181</sup>

Even with these reforms, however, it is doubtful that union density in the United States ever will extend beyond 20 or 25 percent of the workforce in the foreseeable future.<sup>182</sup> As discussed above, deficiencies in the NLRA

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178. See Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125, 160 (1994) (arguing in favor of experimentation in the design of nonunion EPPs).

179. See, e.g., Craver, *supra* note 97 (proposing, among other ideas, increased union access to employees during organizational campaigns and permitting limited forms of secondary pressure); Estreicher, *supra* note 41, at 43-44 (proposing, among other ideas, relaxing existing prohibitions on pre-hire agreements and repealing the NLRA's authorization of state "right to work" laws); Summers, *supra* note 45, at 801-09 (proposing, among other ideas, limitations on employer speech and broadening the scope of mandatory bargaining).

180. See generally CRAVER, *supra* note 74, at 126-55; GOULD IV, *supra* note 86, at 151-203; REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 4, at 15-24; Befort, *supra* note 47, at 432-43.

181. See 29 U.S.C. § 151 (2000).

182. See KOCHAN ET AL., *supra* note 79, at 252 (predicting that labor law reform only would have the effect of slowing the continued decline in union membership); WEILER, *supra* note 51, at 79-81 (predicting that substantial labor law reform would make a significant difference in the prospects for union representation, but that the rise in union membership would fall far short of the then 45 percent union density figure for Canada); Bellace, *supra* note 77, at 23 (predicting that labor law reform

are only one of several factors that have contributed to labor's decline. Other factors, such as the global economy, the loss of manufacturing jobs, and America's traditional antipathy for collective action, will continue to militate against any greater rebound in union strength.<sup>183</sup>

This means that some mechanism other than traditional union representation must be found in order to provide a collective voice for the vast majority of the workforce. The NLRB's current prohibition on many types of EPPs is not acceptable in an environment in which the vast majority of Americans are not represented by unions.

### C. Partial Repeal of Section 8(a)(2)

Most attention for reform has focused on a partial repeal of Section 8(a)(2). These proposals generally have attempted to expand the range of lawful participation devices while guarding against the use of such devices for anti-union purposes.

This is the route suggested by the Dunlop Commission. The Commission's final report recommended that Congress clarify Section 8(a)(2) so that nonunion EPPs are not deemed "unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs."<sup>184</sup> The Commission, however, would continue the prohibition on company-dominated unions, particularly where an employer establishes a program "with the purpose of frustrating employee efforts to obtain independent representation."<sup>185</sup>

A somewhat more pro-employer variant is the TEAM Act that Congress passed in 1996,<sup>186</sup> but which President Clinton vetoed.<sup>187</sup> This legislation would have amended Section 8(a)(2) so as to make clear that an employer's creation of an EPP is not an unfair labor practice, even if it addresses terms and conditions of employment, so long as the entity does not seek "to negotiate or enter into collective bargaining agreements."<sup>188</sup> This version appears to permit the formation of company unions so long as their proceedings are not reduced to a written agreement.<sup>189</sup>

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would result in only a modest increase in union density to encompass about 15 percent of the private sector workforce).

183. See *supra* notes 73-98 and accompanying text.

184. REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 4, at 8.

185. *Id.*

186. Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Congress (1996).

187. 142 CONG. REC. H8816 (daily ed. July 30, 1996).

188. H.R. 743.

189. See Arthur J. Martin, *Company Sponsored Employee Involvement: A Union Perspective*, 40 ST. LOUIS U. L.J. 119, 136-37 (1996) (characterizing the TEAM Act and the Dunlop Commission recommendation as "nothing more or less than attempts

Others have proposed a more pro-employee version of partial repeal in which employer-sponsored EPPs would be tolerated only upon compliance with various structural safeguards. As an example, Professors Summers and Hyde both would permit EPPs only if approved by a secret-ballot election of the employees in question.<sup>190</sup> Similarly, a group of six professors crafted an Employee Involvement Bill as an alternative to the TEAM Act which would partially repeal Section 8(a)(2) subject to a number of conditions designed to ensure that EPPs would operate in a democratic fashion.<sup>191</sup>

The shared shortcoming of all of these proposals is that they merely tolerate, rather than require, employee involvement. Thus, an easing of the Section 8(a)(2) ban on employer-dominated EPPs would result in more employee involvement only if individual *employers* desired that result.<sup>192</sup> Further, the design, operation, and duration of such programs is entirely within management's discretion. At present, there is much to suggest that many employers would prefer to muffle rather than to amplify employee voice.<sup>193</sup> And, while

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to legitimize the company unions that flourished in the darkest days of early industrialization in order to frustrate employees' efforts to organize"); see also Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 142-43 (1997) (criticizing the TEAM Act for not containing safeguards to ensure that employers not use EPPs as a mechanism for thwarting unionization).

190. See generally Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

191. See Charles J. Morris, *Will There Be a New Direction for American Industrial Relations?—A Hard Look at the TEAM Bill, The Sawyer Substitute Bill, and the Employee Involvement Bill*, 47 LAB. L. J. 89, 98-102 (1996). The six professors are Charles J. Morris, Thomas A. Kochan, Clyde W. Summers, William N. Cooke, Charles B. Craver, and Harry C. Katz. *Id.* at 89-90. The Employee Involvement Bill would add two provisos to Section 8(a)(2). The first proviso would permit EPPs where no union representation exists and the EPP does not seek to represent employees with regard to grievances, wages, and other working conditions. *Id.* at 99-100. The second set of conditions would apply where the EPP is representational in nature. *Id.* at 100. Here, five conditions must be met that, on the whole, assure affected employees a democratic process with regard to how the EPP runs and how the members are chosen. *Id.*

192. See WEILER, *supra* note 51, at 206-11 (discussing how EPPs generally exist at the discretion of the employer and that even if workers want workplace involvement, if the employer does not, then no EPP will exist because management alone has the power to decide).

193. See *supra* notes 148-52 and accompanying text. See also Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 115 (2001) (concluding that "[t]he different responses of management to average workers in union and nonunion environments . . . do not reflect an inability to hear the voices of these workers without the amplification of union representation, but rather a lack of interest in listening"); H. Victoria Hedian, *The Implications of Crown Cork &*

the sheer number of EPPs has risen in recent years, many of those programs are designed to influence worker preferences rather than to listen to worker concerns.<sup>194</sup>

## VI. THE WORKS COUNCILS ALTERNATIVE

Perhaps we have been looking in the wrong direction for ways to overcome Section 8(a)(2) and to enhance employee voice. Rather than looking to the Far East in seeking to replicate employer-initiated quality circles and work teams, we would do better to perform an about face and look toward Western Europe and its experience with works councils.

Rogers and Streeck "define works councils as institutionalized bodies for representative communication between a single employer . . . and the employees . . . of a single plant or enterprise."<sup>195</sup> As they are most often constituted, "works councils are elected bodies of employees who meet regularly with management to discuss establishment level" issues.<sup>196</sup> Works councils differ from the EPPs discussed above in that they are institutional bodies independent of management and serve to aggregate the views of workers into a common voice.<sup>197</sup> Works councils, for the most part,<sup>198</sup> do not usurp managerial discretion—they have no right to strike or to engage in negotiations over wages—but nonetheless amplify employee voice through rights to information and consultation over a broad range of labor and personnel matters.<sup>199</sup> As such, the relationship between management and works councils tends to

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Seal Co. for Employee Involvement Committees as "Labor Organizations" under the Wagner Act: What Constitutes "Dealing with" Pursuant to Section 2(5) of the Act Since Electromation, Inc.,? 18 Lab. Law. 235, 258 (2002) (stating that "[e]mployers want to hear what employees have to say as long as it is what they want to hear. If employees present a contradicting viewpoint, employers often react negatively.").

194. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 825-78 (1994); Harper, *supra* note 193, at 113-14.

195. Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 3, 6 (Joel Rogers & Wolfgang Streeck eds., 1995).

196. FACT FINDING REPORT, *supra* note 3, at 43; Rogers and Streeck, *supra* note 195, at 6.

197. Rogers & Streeck, *supra* note 195, at 8.

198. The German works council system serves as an exception in giving councils co-determination rights with regard to some decisions. See *infra* notes 235-37 and accompanying text.

199. See INVOLVEMENT OF EMPLOYEES IN THE EUROPEAN UNION XVI (Roger Blanpain ed., 2002) [hereinafter Blanpain]; Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, in WORKS COUNCILS, *supra* note 195, at 27, 29.

be relatively cooperative and non-adversarial.<sup>200</sup> In short, works councils are a close approximation of the type of employee involvement mechanism that workers favored so highly in the Worker Representation and Participation Survey.<sup>201</sup> Works councils may either be voluntary in nature, as they are in Japan,<sup>202</sup> or mandated as they are in most of Western Europe.<sup>203</sup> Most Western European countries, with the notable exception of England and Ireland, have adopted legislation mandating some form of works councils system in enterprises above some minimum size.<sup>204</sup> Many of these statutes were adopted in the 1970s<sup>205</sup> and, as chronicled by Wolfgang Streeck, the ensuing years witnessed a “remarkable convergence of European industrial relations systems on a pattern of representative consultation—or participation—at the workplace, promoted by public policy, infused with union influence, and more or less willingly accepted by employers.”<sup>206</sup>

### A. Works Councils in the European Union

The European Union has given works councils an extra-national boost with the recent adoption of three significant directives colloquially known as “the three sisters.”<sup>207</sup> The directives provide mechanisms by which employee representatives may exercise influence on enterprise decisions,<sup>208</sup> and each directive obligates the covered parties to work together in a “spirit of cooperation.”<sup>209</sup>

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200. See Joel Rogers, *United States: Lessons from Abroad and Home*, in WORKS COUNCILS, *supra* note 195, at 375, 385 (describing how European employers direct their efforts at building constructive relationships with works councils rather than opposing their existence); Clyde W. Summers, *An American Perspective of the German Model of Worker Participation*, 8 COMP. LAB. L. J. 333, 344 (1987) (stating that works council members in Germany “view themselves not so much as adversaries of management, but as co-managers”).

201. See *supra* notes 137-43 and accompanying text.

202. Although the Japanese version of works councils, denominated as “joint consultation committees,” are not mandated by law, they are widespread among large Japanese firms. See Freeman & Rogers, *supra* note 28, at 55-56; Kato & Morishima, *supra* note 39, at 493.

203. See Freeman & Rogers, *supra* note 28, at 45-46.

204. See *id.*; Freeman & Lazear, *supra* note 199, at 29.

205. See Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, in WORKS COUNCILS, *supra* note 195, at 313, 321-27.

206. *Id.* at 347.

207. Blanpain, *supra* note 199, at XVI-XVII.

208. *Id.* at XV-XVI.

209. *Id.* at XVIII-XIX (citing to language contained in each of the three European Union directives).

## 1. European Works Councils Directive

In 1994, the European Union approved a directive requiring large multinational corporations that operate in two or more European Union states to establish an enterprise-wide works council or similar mechanism for the purpose of providing information and facilitating employee consultation.<sup>210</sup> Altogether, more than 1,800 of these transnational bodies will be established under this directive.<sup>211</sup>

## 2. European Company Statute

In 2001, the European Union adopted a directive providing for consultative mechanisms for every European Company set up as a merger of two or more enterprises located in different member states, or by transformation of an existing enterprise.<sup>212</sup> This directive calls for the creation of a special representative employee negotiating committee whose role is to determine an information-sharing and consultation arrangement equal to or exceeding the directive's minimum standards.<sup>213</sup> This arrangement may involve either the appointment of employee representatives to the company board or the creation of a separate employee consultative body.<sup>214</sup> The member states of the European Union have a three-year period to transpose the directive's requirements into national legislation.<sup>215</sup>

## 3. General Framework Directive

Most recently, in 2002, the European Union adopted a new, far-reaching directive that establishes a general framework for information and consulta-

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210. Council Directive 94/45, 1994 O.J. (L 254) 64. The directive applies to all enterprises that employ more than 1,000 workers within the member states, including at least 150 employees in each of two member states. *Id.* See generally Blanpain, *supra* note 199, at 3-104.

211. See Stavroula Demetriades, *European Works Councils Directive: A Success Story?*, in *QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE* 49, 49 (Marco Biagi ed., 2002). Thus far, the implementation of this directive has been rather slow, with 665 councils established as of the writing of this chapter. See *id.*

212. Council Directive 2001/86, art. 3, 2001 O.J. (L 294) 22.

213. See Blanpain, *supra* note 199, at 107-215; Manfred Weiss, *Workers' Involvement in the European Company*, in *QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE*, *supra* note 211, at 63, 72-76.

214. See Blanpain, *supra* note 199, at 108-10. The directive takes this optional approach so that the member states can choose a model that corresponds best with their respective national traditions. *Id.* at 108.

215. See Marco Biagi, *Quality of Work, Industrial Relations and Employee Involvement in Europe: Thinking the Unthinkable?*, in *QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE*, *supra* note 211, at 3, 17.



tion rights throughout all of the member states.<sup>216</sup> This directive is not aimed at transnational undertakings, but instead mandates a general requirement of information sharing and consultation for all European enterprises with more than fifty employees and all plants with more than twenty employees.<sup>217</sup> Although most member states already have legislation mandating employee consultation, this directive goes further to require countries to adopt minimum Europe-wide standards for information and consultation<sup>218</sup> as well as enhanced enforcement of those mandates.<sup>219</sup> The directive provides for a normal three-year implementation period, but with additional extensions for countries like England and Ireland that have no current system for information and consultation.<sup>220</sup>

Roger Blanpain summarized in a recent book the impetus for this wave of employee involvement directives as follows:

Economic globalisation and the speedy advance of the market economy world-wide has in many countries resulted in a retreat by governments from the running of the economy and greater freedom for management . . . .

At the same time and as a consequence, traditional, especially national collective bargaining structures, are slowly eroding in many countries, while overall, trade unions are losing members and their grip on the labour markets. . . .

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216. Council Directive 2002/14, 2002 O.J. (L 80) 29.

217. *Id.* at art. 3.; *see also* Blanpain, *supra* note 199, at 221-22; Alan C. Neal, *Information and Consultation for Employees—Still Seeking the Philosopher's Stone?*, in *QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE*, *supra* note 211, at 83, 92-94.

218. *See* Neal, *supra* note 217, at 95-96. The directive provides that information and consultation shall cover, at a minimum,

- (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- (b) information and consultation on the situation, structure and probable development of employment within the undertaking . . . ; [and]
- (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual . . . .

Council Directive 2002/14, art. 4, para. 2, 2002 O.J. (L 80) 29; *see also* Blanpain, *supra* note 199, at 222.

219. *See* Biagi, *supra* note 215, at 13. The Directive provides that an employment decision may be cancelled in the event of a serious breach of information or consultation rights that result in direct and immediate consequences in terms of substantial changes or termination of employment contracts or relationships. Council Directive 2002/14, 2002 O.J. (L 80) 29.

220. *See* Council Directive 2002/14, art. 10-11, 2002 O.J. (L 80) 29; Blanpain, *supra* note 199, at 225-26.

Increased and often world-wide competition leads to ongoing restructuring, mergers, outsourcing and downsizing, and to the atomisation of individual employment relationships. . . .

So, and the question arises naturally, where are the employees in all this? . . . what about the employees' voice?<sup>221</sup>

These forces and concerns obviously exist on this side of the Atlantic as well.

Taken together, the "three sisters" effectively establish a continent-wide norm of employee participation through works councils institutions.<sup>222</sup> In the words of Alan Neal, these directives have the potential to serve "as a monument to regulatory optimism"<sup>223</sup> that will "nourish effective information, consultation and participation for workers throughout the European Community."<sup>224</sup> They also may lay the ground work for a new *international* norm of industrial relations.<sup>225</sup>

### B. Works Councils in Germany

Although works councils vary widely across countries in structure and function,<sup>226</sup> the German works council system, as the oldest and most well-developed,<sup>227</sup> is worth a closer look.<sup>228</sup> Under the German Works Constitu-

221. Blanpain, *supra* note 199, at XV.

222. Works councils are growing in Eastern Europe as well. See, e.g., Michael Federowicz & Anthony Levitas, *Poland: Councils Under Communism and Neoliberalism*, in WORKS COUNCILS, *supra* note 195, at 283. This development undoubtedly will accelerate as the European Union expands to encompass more eastern European members. See Michal Seweryński, *Employee Involvement and EU Enlargement—Polish Perspective*, in QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE, *supra* note 211, at 263.

223. Neal, *supra* note 217, at 99.

224. *Id.* at 98.

225. See, e.g., Martin Foley, *Democratising the Workplace—Unions and Work Councils?*, in WORKS COUNCILS IN AUSTRALIA: FUTURE PROSPECTS AND POSSIBILITIES 37, 43-45 (Paul J. Gollan et al. eds., 2002) (discussing the desirability of Australia adopting a works councils form of employee participation similar to that used in western Europe).

226. In Sweden and Italy, for example, consultation occurs primarily through union representatives rather than through stand-alone bodies. See Streeck, *supra* note 205, at 330.

227. The first Works Council Law was enacted in Weimer Germany in 1920. The statute was revoked during the Nazi era and reintroduced following World War II. The statute subsequently was amended in both 1952 and 1972. See Janice R. Bellace, *The Role of Law in Supporting Cooperative Employee Representation Systems*, 15 COMP. LAB. L.J. 441, 456 (1994); Lutringer & Dichter, *supra* note 88, at 4-54 to 4-55.

228. A number of English-language publications describe German works councils. See, e.g., MANFRED WEISS, *LABOUR LAW AND INDUSTRIAL RELATIONS IN*

tion Act,<sup>229</sup> an employer who employs a minimum of five employees must establish a works council upon the request of three or more employees.<sup>230</sup> The size of the council varies with the size of the employer, and the employees elect representatives in a manner that reflects the composition of the workforce.<sup>231</sup>

The works council is empowered to consult with management on a variety of plant or enterprise-related topics.<sup>232</sup> The works council has the right to receive information from, and exchange views with, management concerning the employer's compliance with applicable laws and on general business matters.<sup>233</sup> The employer also must consult with the works council prior to the hiring, transfer, or termination of employees.<sup>234</sup> Finally, unlike in most countries where works councils have rights only to information and consultation,<sup>235</sup> German works councils have a right of "co-determination" with respect to a number of "social" topics, such as work scheduling, safety measures, and the restructuring of jobs.<sup>236</sup> If the parties cannot come to agreement on one of these topics, the dispute is referred to arbitration for final and binding resolution.<sup>237</sup> The works council is forbidden to engage in wage bargain-

GERMANY Chap. 5 (1995); Rudolf Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993); Lutringer & Dichter, *supra* note 88, at 4-54 to 4-68; Walther Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in WORKS COUNCILS, *supra* note 195, at 53; Summers, *supra* note 200, at 333.

229. Betriebsverfassungsgesetz [Works Constitution Act, BetrVG], BGBl. I, Tiel I 13 (Jan. 15, 1972).

230. See Lutringer & Dichter, *supra* note 88, at 4-55 to 4-57.

231. See *id.* at 4-57 to 4-58. The statute requires that salaried and hourly workers be proportionately represented in the works council. See Müller-Jentsch, *supra* note 228, at 73.

232. German works councils and management are required to meet on at least a monthly basis. See Müller-Jentsch, *supra* note 228, at 65.

233. See Lutringer & Dichter, *supra* note 88, at 4-60 to 4-61.

234. See *id.* at 4-61 to 4-62. An employer may discharge a worker even if the works council disapproves of such action. *Id.* at 4-62. The employee, however, may challenge the termination by appealing to the labor court, and the employer can rely only on its explanation previously given to the works council in attempting to establish sufficient cause for the discharge. *Id.* at 4-20 to 4-25, 4-62.

235. See Blanpain, *supra* note 199, at XV; Freeman & Lazear, *supra* note 199, at 29.

236. See Buschmann, *supra* note 228, at 31; Freeman & Rogers, *supra* note 28, at 49; Lutringer & Dichter, *supra* note 88, at 4-62 to 4-63. The results of negotiations between employers and works councils are set out in written "works agreements." Müller-Jentsch, *supra* note 228, at 60. Most of the issues covered in these agreements concern topics subject to co-determination rights. *Id.* at 60-61.

237. See Bellace, *supra* note 227, at 448; Lutringer & Dichter, *supra* note 88, at 4-63 to 4-64.

ing,<sup>238</sup> to strike, or to use other types of economic action in support of its position.<sup>239</sup>

The works councils in Germany serve to supplement, rather than to supplant, traditional unions. In Germany, unions tend to bargain on economic matters on a national or regional basis within certain industries.<sup>240</sup> Works councils may seek to enforce or supplement the union agreement at the local level, but the applicable union contract preempts any contradictory works council arrangement.<sup>241</sup> Although the unions play no official role in the works council operation, a majority of works council members also are union members, thereby ensuring a considerable amount of coordination in efforts.<sup>242</sup>

## VII. A PROPOSAL FOR AN AMERICAN WORKS COUNCILS ACT

The German works councils system offers an interesting possible model for enhancing the voice of American workers. The adoption of such a system necessarily would require enacting federal legislation. Some of the suggested features of an American Works Councils Act are set out below, followed by a discussion of the respective advantages and arguable disadvantages of such a system.

### A. *The Structure and Functions of American Works Councils*

The European Union General Framework Directive<sup>243</sup> and the German Works Constitution Act<sup>244</sup> provide a workable model for an American Works Councils Act. Some of the salient features of the proposed act would include the following:

238. See Lutringer & Dichter, *supra* note 88, at 4-54; Rogers & Streeck, *supra* note 195, at 7.

239. See Bellace, *supra* note 227, at 447-48; Lutringer & Dichter, *supra* note 88, at 4-54.

240. See generally Lutringer & Dichter, *supra* note 88, at 4-37 to 4-49; Clyde W. Summers, *The Usefulness of Unions in a Major Industrial Society—A Comparative Sketch*, 58 TUL. L. REV. 1409, 1412-14 (1984).

241. See Lutringer & Dichter, *supra* note 88, at 4-54.

242. See Otto Jacobi et al., *Germany: Codetermining the Future?*, in INDUSTRIAL RELATIONS IN THE NEW EUROPE 218, 243-44 (Anthony Ferner & Richard Hyman eds., 1992) (estimating that 75 percent of German works council members belong to unions affiliated with the central labor federation); Summers, *supra* note 240, at 1416 (estimating that 80 percent of those employees elected to German works councils are nominated from union slates). Works councils and unions in Germany frequently work closely together. See WEISS, *supra* note 228, at 169, 174-75.

243. See *supra* notes 216-20 and accompanying text.

244. See *supra* notes 226-42 and accompanying text.

1) Employees would have the automatic right to call for the creation of a works council in an enterprise or facility above a certain minimum size.

2) Employees would be empowered to elect representatives periodically with hourly and salaried employees represented on a proportional basis.

3) The works council would be entitled to receive information periodically from the employer with respect to personnel policies, financial conditions, and plans for future undertakings that may impact the performance and organization of work.

4) The works council would be entitled to consult periodically with the employer on a broad range of subjects. These topics should go beyond terms and conditions of employment subject to negotiation under the NLRA<sup>245</sup> to also include:

a) the manner of work performance and organization;

b) the hiring, transfer, and termination of employees;

c) compliance with pertinent laws and regulations; and

d) entrepreneurial decisions that may impact the performance and organization of work.

5) The works council should not have the right to bargain with respect to employee compensation in the absence of an employer's consent.<sup>246</sup>

To this point, my proposal looks similar to that suggested by Professor Paul Weiler, perhaps the most vocal proponent of an American works councils system. Professor Weiler similarly has endorsed importing most aspects of the German system with two major exceptions.<sup>247</sup> First, Professor Weiler recommends that disagreements involving matters subject to co-determination be resolved by affording the affected employees the right to strike rather than through binding arbitration.<sup>248</sup> Second, he suggests that in a unionized workplace, the local union, upon majority vote, should serve as the works council body.<sup>249</sup>

I disagree with Professor Weiler on both points. Providing works councils with the right to strike would alter radically the consultative nature of that institution. Rather than being a body that is directed to seek solutions with management in a "spirit of cooperation,"<sup>250</sup> the availability of concerted action would transform works councils into a more adversarial body akin to that of American unions. Of course, Professor Weiler is right in arguing that mandatory binding interest arbitration is inconsistent with American labor

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245. See *supra* notes 54-57 and accompanying text.

246. See *infra* notes 290-93 and accompanying text (discussing why wage bargaining should not be mandatory topic of consultation).

247. WEILER, *supra* note 51, at 283-95.

248. See *id.* at 290.

249. See *id.* at 294. Professor Weiler suggests that a second council would be necessary for nonunion employees at the work site, with the two councils coordinating their efforts in consulting with management. See *id.* at 294-95.

250. See Blanpain, *supra* note 199, at XVIII-XIX (citing to language contained in each of the three European Union directives).

traditions.<sup>251</sup> The only real solution, it appears, is to require the consultative process, but without imposing any formal impasse-breaking mechanism.<sup>252</sup> This, in fact, is the approach used in most European systems and in the three European Union directives.<sup>253</sup>

On Professor Weiler's second point, enabling the local union to serve as the consultative body blurs the essential distinction between the nature of these two entities. Unions are independent institutions with the right to compel collective bargaining on terms and conditions of employment and the right to back up bargaining positions with concerted economic action.<sup>254</sup> Works councils, on the other hand, are parliamentary-type consultative bodies that address a broader array of topics at the local level in a less confrontational manner.<sup>255</sup> If unions serve both functions, it is likely that the consultative function will become submerged in the union's bargaining agenda.<sup>256</sup> A better resolution is to keep the two entities separate, but, as in Germany, permit unions to endorse candidates for works council membership.<sup>257</sup>

### *B. The Advantages of an American Works Councils System*

The adoption of an American works councils system as outlined above would serve several positive policy interests. The following five advantages of such a system are particularly noteworthy.

First, the adoption of an American works councils system would do much to close the "representation/participation gap" documented by Freeman and Rogers.<sup>258</sup> As the Worker Representation and Participation Survey

251. See *id.* at 290 ("Under American labor policy, at least in the private sector, we have decided for good reasons not to give unions a regime of binding interest arbitration."); see also Summers, *supra* note 200, at 352 ("Recourse to arbitration to settle an interest dispute, as under the Works Constitution Act, runs directly counter to the deeply rooted American principle of free collective bargaining.").

252. This would not necessarily result in a lack of good faith consultation by management. Employers would have an incentive to consult in good faith so as not to create a disgruntled group of employees who then might find the option of union representation more palatable.

253. See Blanpain, *supra* note 199, at XV (discussing the European Union directives); Freeman & Lazear, *supra* note 199, at 29 (discussing national systems).

254. See *supra* notes 53-64 and accompanying text.

255. See generally FACT FINDING REPORT, *supra* note 3, at 43. Works councils, unlike German unions, function at the local level and maintain independence from the union. See generally Summers, *supra* note 200, at 343-45.

256. See Freeman & Rogers, *supra* note 28, at 62-63 (maintaining that works councils should not engage in wage bargaining because they are an institution designed to increase enterprise surplus rather than to fight over how firm profits should be divided).

257. See *supra* note 242 and accompanying text.

258. See *supra* note 144 and accompanying text.

found, 63 percent of American workers want more influence at work,<sup>259</sup> and the proportion of workers who want representation through an organization with at least some independence of management is more than six times greater than the current rate of unionization.<sup>260</sup> Since covered employees of the proposed American Works Councils Act would have the automatic right to a participatory works council, the adoption of such a measure would mean that a clear majority of American employees would shortly obtain the greater voice that they desire.

Second, works councils resemble the type of institution that the WRPS identified as what American workers want. Freeman and Rogers reported that a significant majority of American employees desire representation through an independent organization<sup>261</sup> that works cooperatively with management in addressing workplace issues.<sup>262</sup> As opposed to many of the employer-initiated EPPs discussed above, works councils operate in exactly this manner.

Third, this proposal would foster less adversarial and more productive employee-employer relations. The existence and composition of works councils would be determined by employees in a democratic fashion rather than in a pitched battle like so many union representation elections under the NLRA.<sup>263</sup> The absence of wage bargaining and strikes should mean that works councils are unlikely to engender the same degree of opposition that American employers have displayed toward unions. As in Europe, it is likely that employers eventually will move away from opposing works councils and toward building more constructive relationships.<sup>264</sup> This, in turn, should enhance the productivity and democratic participation benefits of voice as discussed above.<sup>265</sup>

259. See FREEMAN & ROGERS, *supra* note 6, at 41 exhibit 3.1.

260. Compare *id.* at 146-48 (reporting that 87 percent of WRPS respondents indicated a desire for representation by an organization that is either "strongly" or "somewhat" independent of management) with Press Release, Bureau of Labor Statistics, U.S. Department of Labor, Union Members in 2003 (Jan. 21, 2004), available at <http://www.bls.gov/news.release/pdf/union2.pdf> (reporting that 12.9 percent of the current nonagricultural workforce are union members).

261. See FREEMAN & ROGERS, *supra* note 6, at 146-48.

262. See *id.* at 56. Fifty-eight percent of responding employees chose a joint employee-management committee as their single most preferable type of workplace organization. *Id.* at 151-52.

263. See *supra* notes 86-95 and accompanying text (discussing management opposition to unions in the context of union organizing campaigns).

264. See Rogers, *supra* note 200, at 385 (describing how European employers direct their efforts at building constructive relationships with works councils rather than opposing their existence).

265. See *supra* notes 28-44 and accompanying text.

Fourth, many increasingly view works councils as a transplantable model of employee-employer relations.<sup>266</sup> As recently as the early 1970s, only a few European countries had functioning works councils systems.<sup>267</sup> Works councils now have spread to the vast majority of Western European countries, and the European Union's recent directives mean that Great Britain and Ireland will soon join the fold.<sup>268</sup> Other countries, as well, are paying serious attention to this system as a counter-weight to the world-wide phenomenon of declining unionization rates.<sup>269</sup>

Which leads to the fifth and perhaps the most important advantage: works councils may be and should be on the way to becoming a new international labor norm. If anything is needed to correct the current disarray of labor and employment law, it is the development of a new consensus on international labor norms.

The forces of global trade and technology dramatically have altered the relative influence of labor and capital in the economic marketplace. The new global economy places a premium on capital flexibility<sup>270</sup> which, in turn, has set off a race to the bottom in employment regulation.<sup>271</sup> The good news and the bad news is that the United States continues to win this race. While the American economic engine continues to dominate the world economy,

266. This belief certainly underlies the adoption of the three European Union directives calling for the creation of works councils institutions throughout an expanding European Union, *see generally* Blanpain, *supra* note 199, at XV-XX; Neal, *supra* note 217, at 98-99, and in the increasing analysis being given in other countries to the possible adoption of a works councils form of employee involvement, *see, e.g.*, Foley, *supra* note 225, at 43-45 (Australia).

267. *See* Streeck, *supra* note 205, at 317, 327-28.

268. *See supra* notes 216-20 and accompanying text (discussing the European Union's general framework Directive).

269. *See, e.g.*, Foley, *supra* note 225, at 43-45 (discussing the desirability of Australia adopting a works councils form of employee participation similar to that used in western Europe). *See also* Blanpain, *supra* note 199, at XV (discussing the growth of works councils systems as a response to declining union power).

270. *See generally* REICH, *supra* note 77, at 113-22, 263-64 (describing the significant mobility of capital in the new global economy); SILVER, *supra* note 77, at 3-4 (summarizing studies discussing the "hypermobility" of capital in the global marketplace); Bellace, *supra* note 77, at 22 (noting the greater mobility of capital as compared to labor in the global economy).

271. *See* SILVER, *supra* note 77, at 3-4 (summarizing various studies discussing a race to the bottom in terms of labor power and governmental regulation in the global economy); Dau-Schmidt, *supra* note 78, at 25 ("The problem of course is that the increased mobility of capital in a global economy undermines the ability of individual nation-states to regulate employers. If a country regulates the employment relationship in such a way as to impose costs on capital, this gives the employer incentive to move his operations to a country that does not impose such costs. As a result countries have incentive to minimize their regulations of employers, a result known as 'the race to the bottom.'").



American labor and employment law is far less protective than in other industrialized countries.<sup>272</sup> Interestingly, while the United States cooperates in establishing international norms for trade, it has steadfastly declined to do the same with respect to labor and employment norms,<sup>273</sup> openly rejecting and failing to comply with a number of international standards formulated by the International Labor Organization.<sup>274</sup> But, it is increasingly difficult to justify the fairness of American business having an advantage in global economic competition by virtue of social policies that fall below international standards. The advent of a global marketplace calls for global labor standards. What is needed is not a further race to the bottom, but a new international consensus on labor policies that corrects the current lack of equilibrium in the relationship between labor and capital.<sup>275</sup> An American Works Councils Act would be a significant step in that direction.

### C. Countervailing Considerations

While works councils mirror the type of employee involvement plan that most workers desire, gaining the support of either management or unions for such a system will be difficult.<sup>276</sup> Both tend to oppose a works councils system, albeit for different reasons.<sup>277</sup>

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272. The United States, for example, virtually stands alone among industrialized nations in failing to provide general statutory protection against unjust dismissals. See generally Samuel Estreicher, *Unjust Dismissal Laws in Other Countries: Some Cautionary Notes*, 10 EMPLOYEE REL. L.J. 286, 287-94 (1984) (summarizing employment security statutes in Canada, Great Britain, Germany, France, Italy, and Japan); B. Hepple, *Flexibility and Security of Employment*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES, *supra* note 78, at 277 (summarizing employment security statutes in worldwide industrial market economies). In addition, few other advanced democratic societies condone the degree of lawful employer opposition to union representation that pervades labor relations in the United States. See Adams, *supra* note 89, at 94.

273. See OSTERMAN ET AL., *supra* note 126, at 156-57 (noting that while "the United States has been the major force articulating a direction and coordinating policy among the major international [trade] agencies . . . the US government has conspicuously abrogated its responsibilities for strategic leadership in the area of workers' rights and labor standards").

274. See Christopher R. Coxson, Comment, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 DICK. J. INT'L L. 469, 471 (1999) (noting that the United States has not ratified any of the four core labor standards promulgated in the ILO Declaration of Fundamental Principles and Rights of Work and also fails fully to comply with them).

275. See Befort, *supra* note 47, at 422-24 (discussing the current lack of equilibrium between capital and labor in today's global economy).

276. See Estreicher, *supra* note 178, at 159 (noting the lack of a political constituency for the adoption of a works council system); Michael H. Gottesman, *Whither*

## 1. Management Opposition

Some employers and commentators perceive mandatory works councils as costly and cumbersome.<sup>278</sup> They point out that such legislation would impose costs on employers with respect to both the establishment and the maintenance of such organizations.<sup>279</sup> Additional costs would result from a lack of employer flexibility in being able to adjust employment practices quickly in response to market conditions.<sup>280</sup>

The evidence concerning the likely impact of works councils on productivity, however, is far from clear. Research, as discussed above, suggests that employee involvement generally increases productivity and the economic performance of the organization.<sup>281</sup> Interviews with managers of European firms who consult with works councils "overwhelmingly . . . [report that] they have important positive effects which in general make them a net benefit to firms."<sup>282</sup> Freeman and Lazear, similarly, have demonstrated the likely beneficial effect of European works councils through economic modeling.<sup>283</sup> On the other hand, empirical studies looking specifically at German works councils find that they have little correlation with productivity,<sup>284</sup> except in smaller firms where the correlation is for a reduced level of productivity.<sup>285</sup>

*Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2807 (1991).

277. See Bellace, *supra* note 77, at 26 (noting that both management and unions tend to oppose the adoption of a works council system).

278. See generally Carol D. Rasnic, *Germany's Statutory Works Councils and Employee Codetermination: A Model for the United States?* 14 LOY. L. A. INT'L & COMP. L.J. 275, 299-300 (1992) (criticizing works councils as impinging on management prerogatives).

279. See Kaufman, *supra* note 177, at 541-42. Under the German works council model, employers are responsible for financing the operations of works councils. See Lutringer & Dichter, *supra* note 88, at 4-66 to 4-67.

280. See Addison, *supra* note 109, at 313; Kaufman, *supra* note 177, at 541-42.

281. See *supra* notes 28-39 and accompanying text.

282. Freeman & Rogers, *supra* note 28, at 51. Freeman and Rogers also state that "managers widely report that councils facilitate communication with employees, increase employee commitment and force advanced planning in areas that require council consultation that improve managements own initiatives." *Id*

283. See Freeman & Lazear, *supra* note 199, at 27-28, 49.

284. Kaufman, *supra* note 177, at 541 (reporting that "mixed econometric evidence exists that works councils in Germany promote productivity"); Addison, *supra* note 109, at 322 (reporting that the empirical research shows "little evidence of any positive impact of works councils on firm performance. Much of the evidence actually points in an opposite direction."). Streeck contends that the economic impact of European works councils is hard to establish quantitatively because no comparison sector exists in which works councils do not operate. See Streeck, *supra* note 205, at 343.

285. See Kaufman, *supra* note 177, at 541.

While economic productivity should not be the sole gauge for measuring the worth of a works councils system,<sup>286</sup> these financial concerns can be mollified, at least in part, by two adjustments to the German model. First, the potential drag on managerial speed and flexibility could be reduced by the expedient of only requiring consultation without also requiring lengthy impasse procedures such as arbitration.<sup>287</sup> Further, legislation could exempt small employers, such as those with fewer than 50 employees, from the works councils mandate.<sup>288</sup>

Some critics also maintain that works councils are unlikely to succeed in an American climate in which wage bargaining does not take place on a national level.<sup>289</sup> In countries where compensation is established on a nationwide or industry-wide basis, as in Germany,<sup>290</sup> wages are taken out of competition and that source of potential friction is removed from the works council agenda.<sup>291</sup> But, when pay is established at the enterprise level, employers and employees become natural competitors for a larger slice of the enterprise pie.<sup>292</sup> In order to maintain a relatively cooperative playing field for works councils in this latter environment, wages should not be a mandatory topic for consultation in an American works councils system.<sup>293</sup> Instead, the topic of wages should be reserved for management determination or, in a unionized setting, for union/management negotiations.

Finally, some commentators object to a system of works councils, arguing that one size does not fit all with respect to employee participation devices.<sup>294</sup> That is, while a works councils system may be an appropriate par-

286. See REINHOLD FAHLBECK, *FLEXIBILISATION OF WORKING LIFE: POTENTIALS AND CHALLENGES FOR LABOUR LAW, AN INTERNATIONAL ANALYSIS* 12 (1998) (stating that, in addition to efficiency concerns, modern labor policy also should serve other purposes such as ensuring equality of opportunity and fair treatment of workers); OSTERMAN ET AL., *supra* note 126, at 11-12 (stating that a properly functioning employment system must balance the goal of economic efficiency with other goals such as individual dignity, equality of opportunity, and collective participation).

287. See *supra* notes 250-53 and accompanying text.

288. This is the threshold adopted in the European Union's General Framework Directive, *supra* note 217 and accompanying text, the Dutch Works Constitution Act, see Taco van Peijpe, *Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL'Y J. 127, 134 (1999), as well as in the United States' Family and Medical Leave Act, see 29 U.S.C. § 2611(4)(A)(i) (2000).

289. See Freeman & Rogers, *supra* note 28, at 61.

290. See *supra* note 240 and accompanying text.

291. See Freeman & Rogers, *supra* note 28, at 61; Kaufman, *supra* note 177, at 544.

292. See Freeman & Rogers, *supra* note 28, at 62-63.

293. See *id.* at 62-63 (stating that "[w]e regard decentralized wage bargaining by councils as undesirable because . . . councils should be a device to enable labor and management to increase enterprise surplus, not to fight over their respective shares, and this requires a separation of these two activities").

294. See, e.g., Estreicher, *supra* note 178, at 160.

ticipation mechanism in some settings, other participatory devices may be superior in other settings. These commentators conclude, accordingly, that employers should retain the discretion to select the most appropriate type of program for the particular circumstances.<sup>295</sup>

Beyond the fact that this solution more often than not results in little or no participation, this criticism erroneously perceives the nature of works councils. A works councils system operates as a portal to the realm of participation as opposed to an exclusive participatory device. Discussions between management and works councils in Europe frequently spawn additional participatory arrangements.<sup>296</sup> As Wolfgang Streeck has noted, European works councils "may sustain a 'cooperative culture' within which experimentation with decentralized organizational structures can flourish."<sup>297</sup>

## 2. Labor Opposition

Union supporters also find much to dislike in works councils and other employee involvement plans.<sup>298</sup> They perceive such programs as creating sham organizations that inherently impede true collective bargaining.<sup>299</sup> As former UAW President Douglas A. Fraser stated in his dissent to the Dunlop Commission's majority position on this issue, the kind of participation and cooperation that the American system really needs "is democratic participation and cooperation between equals."<sup>300</sup> In other words, America needs independent unions, not employer-dominated participation schemes.

I believe that union supporters are shortsighted in opposing legislation establishing works councils. Unlike other employee involvement mechanisms, employers cannot manipulate the creation of mandatory works councils to deter a union organizing drive.<sup>301</sup> Works councils, moreover, involve

295. *Id.*

296. See Müller-Jentsch, *supra* note 228, at 69-70; Streeck, *supra* note 205, at 345.

297. Streeck, *supra* note 205, at 345.

298. For a discussion of union views on works councils as a specific sub-type of EPP, see Freeman & Rogers, *supra* note 28, at 50.

299. See, e.g., Laurence Gold, *The Legal Status of "Employee Participation" Programs After the NLRB's Electromation and du Pont Decisions*, in CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW: PROCEEDINGS OF NEW YORK UNIVERSITY 46TH ANNUAL NATIONAL CONFERENCE ON LABOR, JUNE 2, 1993, at 329, 346-51 (Bruno Stein ed., 1994); Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2375-76 (1998); Owen E. Herrnsstadt, *Section 8(a)(2) of the NLRA: The Debate*, 48 LAB. L.J. 98 (1997); Martin, *supra* note 189, at 136-37.

300. REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 4, at 13.

301. Unlike most EPP plans which exist only at the discretion of management, only workers can trigger the formation of a works council. See FACT FINDING

collective action and likely will serve as seed beds for independent unions.<sup>302</sup> Workers who feel either empowered or thwarted by a works council experience may turn to independent unions to further their new-found collective aspirations.<sup>303</sup>

But even if I am wrong on this score, the argument that unions conceptually are a more desirable model of employee representation no longer provides a compelling basis for employee advocates to oppose works councils. Union representation in the United States now stands at a mere thirteen percent of the workforce and continues to drop.<sup>304</sup> Stated conversely, the vast majority of American workers have no representation rights at all. Under the circumstances, some voice is better than no voice at all.

A related concern expressed by some commentators is that works councils work best in countries having a strong labor movement and may not be transplantable to the United States where union density is so low.<sup>305</sup> This is a legitimate, but not fatal concern. There is some logic to the notion that employers will take works councils more seriously when their views are buttressed by a strong union ally.<sup>306</sup> This factor suggests that the adoption of an American Works Councils Act should proceed in tandem with meaningful labor law reform.<sup>307</sup> It does not mean, however, that the best available option for enhancing employee voice should be abandoned simply because that voice is not amplified as loudly as some may desire.

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REPORT, *supra* note 3, at 43; WEILER, *supra* note 51, at 292; WEISS, *supra* note 228, at 169.

302. See George Strauss, *Is the New Deal System Collapsing? With What May it be Replaced?*, 34 INDUS. REL. 329, 340 (1995) (stating that institutions such as works councils "might serve as way stations toward independent unions"); Estreicher, *supra* note 41, at 29 (stating that works councils, if adopted in the United States, "are likely to be seedbeds of traditional unionism, if they take hold at all").

303. See Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 269, 302 (1999) (stating that "union leadership should recognize that works councils may be the best means for providing the new American work force with object lessons in the value of collective action as well as serve as a training ground to develop the core of rank and file leadership needed for successful bargaining unit organizing"); see also Kaufman, *supra* note 123, at 788-89.

304. See *supra* note 68 and accompanying text.

305. See Bellace, *supra* note 227, at 460; Estreicher, *supra* note 41, at 29.

306. See Rogers, *supra* note 200, at 398-99 (stating that "councils inside the firm work best when they enjoy some relation, however distanced, to a powerful union movement outside it. The latter is a source of residual political support—including, vitally, that needed to extract resources necessary to council functioning from employers or the state—and expertise in issues of council concern, from ergonomics to new technologies, work organizations, or whatever.").

307. See *supra* notes 179-81 and accompanying text (discussing proposals for labor law reform).

## CONCLUSION

American workers want and deserve a greater voice at work. Many agree that the NLRA, in its current form, is not supportive of this goal. Most of the reform proposals advanced by management and labor, however, are inadequate to accomplish a broad-based and meaningful increase in employee voice.

Most management proposals look to the East for a possible model. They seek to replicate the employer-initiated EPPs that are prevalent in Japan through a full or partial repeal of Section 8(a)(2). While EPPs produce positive results where properly structured, this route falls short of providing a systemic solution to the problem of insufficient employee voice. Even if the Section 8(a)(2) bar is removed, more employee voice will result only if individual employers choose that result. Under such an approach, individual employers would have full discretion to decide whether to create an EPP, what form and functions it would take, and for how long it would continue to exist. Given our current experience, there is reason to believe that American employers will not exercise this discretion in a manner that broadly effectuates employee voice.

Union proposals inevitably call for broad reform of the NLRA as a means of revitalizing the shrinking American labor movement. While such reform is badly needed, it too would fail as a systemic remedy. A leveling of the labor law playing field would promote fundamental fairness and boost union density, but it would not provide voice to most workers.

This article suggests that we turn to another direction and to another model. The works councils system that is burgeoning in Europe enhances employee voice through a readily accessible, representative institution that consults with employers in a "spirit of cooperation." This institution closely resembles the type of organization that, according to Freeman and Rogers, most American workers want. The adoption of an American Works Councils Act would not only close the representation/participation gap, but also would link the United States and Europe in effectively establishing what hopefully would be the first of many new global labor norms.

A significant number of Americans would like to see a return to an era in which a strong union movement provided a forceful voice for American workers. But, this is not in the cards. The global economy will continue to squeeze unions for the foreseeable future with or without labor law reform. In this climate, some voice is better than no voice at all. Or, to paraphrase Mick Jagger one more time, even if you can't always get what you want; if you try sometimes, you just might find, you get what you need.<sup>308</sup>

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308. THE ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (ABKCO Records 1969).

