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REFORMING U.S. LABOR RELATIONS

JOEL ROGERS*

I. INTRODUCTION: A FAILED SYSTEM

Labor, management, and neutrals all recognize that the New Deal system of labor relations, codified in the Wagner (1935) and Taft-Hartley (1947) Acts, no longer works for the good of the U.S. economy. While it may have been well-suited to the industrial society of the 1930s-1950s, when it helped deliver enormous growth in real income and productivity, the New Deal system has not adjusted to the “new economic realities” of the 1990s. It currently serves neither unions nor workers nor management effectively.

The New Deal system was designed to allow worker selection of exclusive union bargaining representatives¹ through secret ballot elec-

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In thinking about the subject matter of this essay, I benefit from ongoing collaborations with Joshua Cohen, Daniel Luria, Wade Rathke, Charles Sabel, Wolfgang Streeck, and especially Richard Freeman. See JOSHUA COHEN & JOEL ROGERS, *BEYOND FACTION: ASSOCIATIONS AND DEMOCRATIC GOVERNANCE* (forthcoming 1994) [hereinafter COHEN & ROGERS, *BEYOND FACTION*]; Joshua Cohen & Joel Rogers, *Associations and Democracy*, 10 SOC. PHIL. & POL’Y 282 (1993) [hereinafter Cohen & Rogers, *Associations and Democracy*]; Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC’Y 393 (1992) [hereinafter Cohen & Rogers, *Secondary Associations*]; Daniel Luria & Joel Rogers, *Get Up and Dance! Strategies for High-Wage Metropolitan Economic Development* (1993) (unpublished manuscript, on file with author); Wade Rathke & Joel Rogers, *Labor Strategies* (1993) (unpublished manuscript, on file with author); Joel Rogers & Charles Sabel, *Imagining Unions*, BOSTON REV. Oct.-Nov. 1993, at 10; Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, in *WORKING UNDER DIFFERENT RULES* (Richard B. Freeman ed., forthcoming 1994); Joel Rogers & Wolfgang Streeck, *Producing Solidarity*, in *REINVENTING THE LEFT* (David Miliband ed., forthcoming 1994); Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) [hereinafter Freeman & Rogers, *Who Speaks for Us?*]; Richard B. Freeman & Joel Rogers, *Labor Relations: Let’s Move Into the 21st Century* (1993) (unpublished manuscript, on file with author); Richard B. Freeman & Joel Rogers, *What Workplace Representation and Participations Do American Workers Want?* (1993) (unpublished manuscript, on file with author) [hereinafter Freeman & Rogers, *Workplace Representation*]. The following draws freely from this joint work, while holding all co-authors blameless for errors that have survived their care.

1. The entire structure of the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1947) (Wagner Act and Taft-Hartley Act, as amended), is directed to specifying the rights, obligations, and conditions of emergence and stability of such exclusive representatives. The importance of exclusivity in turn derived from assumptions about the appropriate ambit of negotiated wage and benefit settlements. The LMRA contemplates collective bargaining on a firm rather than industry basis. It also generally does not contemplate use of “extension laws,” common in Europe, extending the terms of collective agreements to firms not party to negotiation. Without

tions free of management interference, and to buttress collective bargaining between such representatives and management as a way of dividing the economic pie between labor and capital.² At the core of the Wagner Act was the conviction that union representation within firms was not only a moral imperative but an economic and political good. The basic economic idea was that workers, acting collectively, would be able to drive up wages. In a closed economy with unemployed resources, the resulting increase in demand would stimulate private investment and job growth. The basic political idea was that, inside the firm and out, worker organization would help American democracy by providing a "countervailing power" to otherwise overwhelming business domination.

The core ideas of this system—that workers should enjoy associational rights within and without the firm and that collective worker organizations can contribute to the vitality of the American economy—remain perfectly sound today. The problem is that the particular ways in which these ideas were institutionalized in the New Deal system are increasingly inapposite to present circumstance.

The New Deal system effectively premised: a sharp distinction between production workers, who were assumed to be solely concerned with wages and working conditions, and management, who were assumed to have full competence in running the enterprise;³ an essentially closed economy with little international wage competition; the organization of production along "Fordist" and "Taylorist" lines, in which the dominant model of efficient production was a large firm featuring assembly-line mass production of standardized goods by un-

extension, worker gains from collective bargaining depend on worker strength within particular firms. Exclusivity is the gravamen of such power, and thus the key to stability in collective bargaining. See the discussion below.

2. Such division, of course, is not the only function of collective bargaining, much of which is concerned with nonmaterial benefits (for example, rules on notice and fair treatment); with transfers among workers (for example, "solidarity" bargaining); and with the appropriate form material gains should take (for example, wages versus benefits). Still, determining the worker share of the production surplus is the key function of collective bargaining, and the one which conditions performance of most others.

3. Reflected in the "adversarialism" that has always defined U.S. industrial relations, acceptance of this distinction was a cardinal principle on both sides of the labor-management relation. Consider the heavily circumscribed vision of George Meany, as expressed shortly after he assumed the presidency of the new AFL-CIO:

Those matters that do not touch a worker directly, a union cannot and will not challenge. These may include investment policy, a decision to make a new product, a desire to erect a new plant so as to be closer to expanding markets, etc. . . . But where management decisions affect a worker directly, a union will intervene.

CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 59 (1988).

skilled and semi-skilled labor; and the feasibility of providing a family wage and benefit package through lifetime jobs held by single male breadwinners. Put simply, the world described by these premises no longer exists—workers have other interests, management needs more worker involvement, the economy is more open, production is more flexible and quality-driven, jobs are less stable, the workforce is more diverse—and the system based on them works poorly in the world that does exist.

The costs of this institutional mismatch are visited on everyone.⁴ Unions—the only form of independent collective worker organization contemplated in the system—are effectively denied their right to organize, and escalating employer opposition⁵ is rapidly “disappearing” them as a presence in national public life.⁶ Individual managements, while generally welcoming the decline of unions, are denied the ability to support advanced forms of worker participation in the nonunion sector.⁷ Workers are denied voice, choice among representative

4. Of course, they are not visited equally. As indicated in a moment in the text, unions are, for example, threatened with extinction, while employers are only constrained in their strategies of nonunion worker “empowerment.”

5. Increased employer resistance is reflected in the sharp increase in employer unfair labor practice charges issued by the NLRB since the early 1970s. The reasons for increased resistance are many, but two bear special note. First, internationalization and the union decline itself put wages and benefits once “taken out of competition” forcefully back in. This provides clear economic incentives for firms to resist unionization. Second, increased product market instability has put a premium on flexibility in workplaces and corporate structure. While the experience of other countries (and selective cooperative programs in the United States) indicates that such flexibility can be achieved under unionization, most managers strongly prefer unilaterally imposed to negotiated flexibility.

6. The United States now approximates the “union free” environment favored by professional anti-unionists. Private sector union density now stands just above 11 percent, and on a continuation of current trends should fall to about 5 percent by the end of the decade. Of course, history has not always been kind to predictions of continued union decline. In 1932, the president of the American Economic Association spoke confidently of the “lessening importance of trade unionism in American economic organization” as one of the “fundamental alterations” of American society. George E. Barnett, *American Trade Unionism and Social Insurance*, 23 AM. ECON. REV. 1 (1933). Without some radical changes in the conditions and strategies of union organizing, however, it seems most unlikely that the coming years will see anything like the burst in union power that made these remarks ridiculous.

7. Section 8(a)(2) of the Labor Management Relations Act makes it unlawful for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(2) (1947). Deliberately, “labor organization” is elsewhere defined broadly to include not only labor unions but “any organization of any kind or any agency or employee representation committee or plan” that features (a) employee participation, (b) the representation of some employees by others, in (c) dealings with the employer regarding (d) one or more of six traditional subjects of collective bargaining: grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5) (1947). For at least some nonunion employers, this imposes a restraint on desired innovations in worker participation and “empowerment” in workplace governance. For example, an employer that set out the purposes and powers of a committee making decisions about the terms and conditions of employment (for example, on health and safety, or the use of

forms, and protection from economic insecurity. The nation as a whole suffers the "denials" of lost productivity growth, rising inequality, a failure to block the "low road" response to rising international competition, ineffective enforcement of labor standards, and, less tangible but no less real, the erosion of democratic norms.⁸

For all the good reasons so many people have to be unhappy with the present system, however, the path of reform is less than clear. At present, there is no consensus on the elements of reform, nor even a sense of how consensus might be organized. Organized business and organized labor remain bitterly divided over their vision of the role of worker organization in the new economy.⁹ However unfairly, both

a new technology) and subsidized that committee, or appointed some its managers to it—even if it permitted workers free choice in selecting their representatives to it—would likely be in violation of 8(a)(2).

8. While few would blame our obsolete labor relations framework and the denial of collective voice to workers for all the country's economic ills, there is growing consensus that they contribute to a host of problems and at this point pose a real barrier to economic renewal. Union decline accounts for about a fifth of the recent rise in American earnings inequality, RICHARD FREEMAN, ON THE DIVERGENCE IN UNIONISM AMONG DEVELOPED COUNTRIES (National Bureau Economic Research Working Paper No. 2817, 1989); DAVID CARD, THE EFFECT OF UNIONS ON THE DISTRIBUTION OF WAGES: REDISTRIBUTION OR RELABELLING? (National Bureau of Economic Research Working Paper No. 4195, 1992), an extreme outlier in comparative terms. Richard B. Freeman & Lawrence S. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in WORKING UNDER DIFFERENT RULES (Richard B. Freeman ed., forthcoming 1994). Union decline contributes to declining company provision of private social welfare benefits, such as pensions and health care, Joel Rogers, *Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws'*, 1990 WIS. L. REV. 1; David Bloom & Richard Freeman, *The Fall in Private Pension Coverage in the United States*, 82 AM. ECON. REV. 539 (1992), and it encourages federal regulations or court rulings to resolve labor problems and protect workers that are not as flexible or effective as labor-management negotiation at specific workplaces. ROBERT J. FLANAGAN, LABOR RELATIONS AND THE LITIGATION EXPLOSION (1987); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990). The more general lack of voice representation mechanisms in the present system depresses the productivity gains that would come of substantive worker involvement in enterprise management and job design, PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE (Alan S. Blinder ed., 1990); UNIONS AND ECONOMIC COMPETITIVENESS (Lawrence Mishel & Paula B. Voos eds., 1992), and contributes to a "hire and fire" culture that discourages investments in human capital. MASAHIKO AOKI, INFORMATION, INCENTIVES, AND BARGAINING IN THE JAPANESE ECONOMY (1988); ROBERT E. COLE, STRATEGIES FOR LEARNING: SMALL GROUP ACTIVITIES IN AMERICAN, JAPANESE, AND SWEDISH INDUSTRY (1989); THOMAS A. KOCHAN & PAUL OSTERMAN, HUMAN RESOURCE DEVELOPMENT AND UTILIZATION: IS THERE TOO LITTLE IN THE U.S.? (Sloan School of Management, MIT Working Paper, Feb. 1991); OFF. TECH. ASSESSMENT, U.S. CONGRESS, OTA ITE-457, WORKER TRAINING: COMPETING IN THE INTERNATIONAL ECONOMY (Washington, D.C., Gov't Printing Off., 1990). On the relation between democratic performance and the level of independent collective worker organization, see Cohen & Rogers, *Secondary Associations*, *supra* note *; Cohen & Rogers, *Associations and Democracy* *supra*, note *; Freeman & Rogers, *Who Speaks for Us?*, *supra* note *; Rogers & Sable, *supra* note *; ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITION IN MODERN ITALY (1993).

9. Just how bitterly divided is not, I think, sufficiently appreciated. To take one recent instance: the National Association of Manufacturers and Chamber of Commerce announced opposition to the confirmation of William Gould as chair of the National Labor Relations Board, apparently for no more reason than Gould's view that unions are, on balance, a good thing to

are also generally regarded as self-serving in their proposals for reform. At the same time, each retains the power to block the other's favored agenda, and neither favors wholesale transformation of the present system of the sort that now seems needed.¹⁰ Not surprising, given this background, the present administration is deeply ambivalent on the topic. And among the general public, whose views on the subject are barely known,¹¹ labor law reform is simply not an issue of great salience. In brief, labor law reform lacks a public constituency and an articulate and credible agent.

Still, the ascent of a Democratic administration, and its appointment of a Commission on the Future of Worker/Management Relations (the "Dunlop Commission")¹² has at least formally put labor law reform on the national agenda. And diffuse but accumulating dissatisfaction with the consequences of the present system create a potential general constituency for such an effort. The questions arise: "Given changed circumstances, what appear to be the general requirements of reform?" and, critically, "How might their satisfaction be organized—or, amounting to the same thing, how might reform come to be seen as in the *general* interest of American society?"

Neither question can be answered without a closer appreciation of the structure and effective collapse of the New Deal system itself. This is so not only because the institutional legacy of the New Deal system provides the natural starting point for current reform efforts. More importantly, it is because the New Deal system was not only a random experiment in democracy, but a particular social answer, offered under specific conditions, to the more general question of how improvements in democracy could be reconciled to the requirements of a productive capitalism. If "labor law reform" is to become something more than an endgame between a declining labor movement and a business community united only in its opposition to unions—if it

have around. Gould is an utterly mainstream, accomplished, "establishment" labor law professor, and an African American. Twenty years ago this appointment would have been greeted with a happy yawn—as a completely reasonable decision also evidencing progress in civil rights. Discussion today is far more exacting, and nasty, than then.

10. Albeit their reasons differ. Labor resists because its position is already so tenuous that it fears substantial change. Business resists because it can already get much of what it wants outside existing legal constraints.

11. Determining such is the major goal of the effort outlined in Freeman & Rogers, *Workplace Representation*, *supra* note *.

12. The Commission was so named because of its chair, former Secretary of Labor John Dunlop. The Commission is charged with investigating the current state of labor-management relations and law in the United States and recommending any changes it sees fit to improve productivity through increased worker-management cooperation and employee participation in the workplace.

is to be something of truly general interest—it is *that* reconciliation that must again be found. Seeing how it was found in the past and why the terms of its achievement were undone provides clues to the present requirements of reform.

In what follows, then, I first offer an analysis of the New Deal system and its decline. Based on that analysis, and certain “first principles” of what is sought from a labor relations system, I then address the question of present reform requirements. Finally, and more speculatively, I offer some remarks on how a constituency for reform might be organized. For concreteness, these remarks focus on what is needed from one of reform’s natural beneficiaries and most likely leaders—organized labor itself.

II. THE NEW DEAL SYSTEM AND ITS DECLINE

A problem arises immediately. Taking the universe of rich capitalist democracies as our field of comparison,¹³ current problems in U.S. labor relations are distinctive—in many ways, indeed, increasingly so. But they are not unique.

On the one hand, the United States now has the lowest effective rate of unionization in the developed world. And now, as ever, it lacks those other institutions—worker-based political parties, mandated “works councils” or other forms of worker representation inside the firm, or general wage regulation—that elsewhere supplement or substitute for union power. By almost any measure, we are more “union free” and “worker unfriendly” than any other rich nation. And by almost any measure, it shows—in the lowest level of general social protections and highest level of wage inequality, after-tax poverty, and working class electoral abstention in the developed world.¹⁴

In comparative terms, U.S. labor relations have long offered an extreme instance of “low-density, decentralized unionism” (LDDU) and the union and employer strategies characteristically associated with it. For unions, this means strategies of gain not centered on society-wide political regulation of the labor market or the establishment of a high “social wage,”¹⁵ but instead on decentralized bargaining over

13. As a practical matter, this is equivalent to taking member nations of the Organization for Economic Cooperation and Development.

14. The term “working class” is not fashionable these days, for good reasons and bad. By “working class,” I mean simply, and only, the 80% of the workforce characterized as “production and nonsupervisory” workers. These are people who have to work for a living and do so under the direction of somebody else.

15. A “social wage” is a baseline packet of benefits and income guarantees provided irrespective of current job position or, in the most adventurous form, employment status.

individual firm surpluses and “job control” adversarialism in the internal labor market. Among employers, it means strategies to roll back or contain unionism at all cost. The basic reason for employer hostility is not union strength, but weakness. Given their failure to impose society-wide constraints on wages, benefits, or other terms and conditions of employment, unions in LDDU systems appear to individual employers as irritatingly distinctive burdens on their profit-taking and flexibility in organizing production inside the firm.

Traditionally, and in some measure still today, the dynamics of such LDDU systems could be contrasted with systems of “high-density, centralized unionism” (HDCU). The latter traditionally featured more “peak level” sectoral or national collective bargains and more extensive generic political regulation of the labor market. Within HDCU systems, given success in imposing society-wide terms on employers, organized labor appeared to individual employers less as a distinctive burden than a standard cost of doing business. And, secure in their social position, unions were more willing to make sure that business was done. With more power they could afford to be less adversarial. With greater protection on the external labor market, for example, they could afford to be less concerned with internal labor market rigidity. In such systems, labor and management appeared, in stark contrast to the United States, as genuine “social partners”—intent on improving economic performance within certain social bounds on the terms of economic governance and appropriate division of the social pie.

On the other hand, this contrast is less robust today. The reason is obviously not that organized labor in the United States has gotten stronger or more coordinated, but that labor elsewhere has gotten less. Virtually all rich nations show a decline in union density since 1980. Within more traditionally centralized systems, fissures have appeared within unions and union federations as employers (joined by many workers) insist on more decentralized decisions about firm organization and compensation. In consequence, once robust structures of peak bargaining have widely collapsed. And while “social wage” and other generic labor regulation remain infinitely more exacting than in the United States, many of these labor-friendly “external rigidities” are also being qualified. Labor’s stature within social democratic parties has also been curtailed, and the fortunes of those parties have themselves declined.

In taking measure of the decline of the New Deal system in the United States, our distinctive experience needs to be located within

this comparative frame. Things have clearly come unstuck here, but to some degree they have come unstuck elsewhere as well. To be confident in what they are about, labor law reformers in the United States need to be attentive to these deeper and more pervasive sources of derangement. And so, with due notice to be given to the peculiarities of the U.S. case, we ask: "Why is the New Deal order not working as well as it once did, *everywhere*?"

With equivalent clarity and results, the answer can be provided from different perspectives. Here, given the focus of later remarks on labor's possible role in organizing a constituency for reform, I answer from the perspective of unions.

A. *Core Elements of the Old System*¹⁶

In the old deal of the New Deal and the postwar era, unions functioned as the redistributive agent of the working class. They operated in essentially closed national economies where the state relied on fiscal and monetary policy to regulate the macro-economy. They demanded and got wage and benefit increases for their members—partially extracted from firms directly, partly extracted through the state. And, through the alchemy of Keynesian economics, they brought benefits to the broader society. By delivering solid and rising wage floors to their members, they boosted aggregate demand. This gave firms markets for sales, and reasons to renew investment. And that, in turn, increased productivity and lowered the costs of mass consumption goods, which was good for everyone.

Notice what happened here. Labor did something for its members or potential members of obvious usefulness—increased compensation. It solved a problem for capital that capital could not solve for itself. It created effective mass demand, which assured the existence of mass markets for goods, which increased firm productivity via the increased investment and production scale that followed. And by doing both things—by solving a problem for workers that also enhanced the productivity of capital in ways beyond those that capital itself could achieve—labor appeared as an agent of the general interest. It gained the organizational resources and social cachet that gave it political clout on other matters. The achievement was not ready-made, however. It was a fight, success in which required that unions organize both labor and capital.

16. This section draws from Rogers & Sabel, *supra* note *.

But the organization of labor was facilitated by the fact that “the working class” was a more or less determinate social group whose shared interests were spotlighted by the institutions of mass production. In a vast assembly-line factory churning out cars or refrigerators, with each worker doing a numbingly simple task, and with superordinate layers of oppressive management, it wasn’t too hard to figure out which side you were on.

And the organization of capital was facilitated by the same production system. This was the age of “monopoly capitalism” in a more or less literal sense. In many of the most important industries, a few producers with vast identifiable production complexes were the key to market power. Organize them—you could organize them—and you had most of the industry. Deals struck with lead firms could be extended through most of the industry, and the deals could be good. Large firms could “afford” wage increases in a way that low-cost rivals could not. And as industry leaders, they had every incentive to cooperate with unions in removing such rivals by making sure that all firms paid the same costs.

Inside the firm, finally, unions struck a deal with management. In return for labor peace they would get pay increases proportionate to productivity advance and shared control over the movement of workers within the internal labor market of firm employees. In return for this, management kept the “right to manage”—to make essential decisions about firm structure, product strategy, production design, and the level of employment.

B. Peculiarities of the U.S. Case

Of course, as already noted in the contrast of LDDU and HDCU systems, there was enormous variation across union movements in the precise structure of this deal. In most countries, particularly continental European ones, generalization of the wage and benefit deal struck between labor and management was facilitated by the legalized “extension” of collective agreement to nonunionized firms and a generous social wage. In the United States, by contrast, generalization was achieved, if at all, only by brute economic strength—unionization or its threat. Accordingly, much importance was assigned the precise terms under which collective bargaining rights would attach within individual firms and what the conditions of maintaining the fruits of organizing success within firms required. The arcana of American law regarding the formal certification of bargaining representatives and

the requirement that those representatives be exclusive were solutions to the problem of contested, decentralized unionization and wage bargaining. Without a general presumption of unionization, or its equivalent in wage and benefit guarantees, employer assumption of these costs was justified only upon a showing of majority support. Without generalizing support from the state, the welfare of individual workers depended unusually on their bargaining power vis-à-vis specific individual employers. In relation to those employers, exclusivity in representation—a guarantee of a single collective voice—was the gravamen of worker power.

In addition to thus establishing effective minima on material benefits in their nonunion sectors, most countries also established minima on employee “voice” and consultation in firm decision making through mandated works councils.¹⁷ Generalization of this “second channel” of industrial relations was facilitated by the “first channel” of encompassing collective bargaining, itself led on the side of workers by supra-firm union organizations. In effect, the latter created a deficit of effective intra-firm worker organization and the political wherewithal to insist on some general measure of “economic democracy.” In the U.S. case, by contrast, the “first channel” was never developed. Lacking a social mandate, moreover, worker representation in the nonunion sector depended by definition on the will of employers. Given the disastrous experience with employer-dominated “company unions” in the 1920s, however, the expression of this will in the form of material support or assistance to representative nonunion labor organizations was itself barred.¹⁸

As a consequence of both these distinctive features, collective worker representation in the U.S. private sector came to center more and more narrowly on an “all or nothing” choice between exclusive majority unions and, indeed, nothing. The employer’s duty to bargain

17. The variety of forms of these works councils and their evolution across different European systems is explored in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, COOPERATION* (Joel Rogers & Wolfgang Streeck eds., forthcoming 1994).

18. For the rationale for such a bar—employer interference with autonomous employee choices about representation—we do no better than to consider the first case decided by the National Labor Relations Board, *Pennsylvania Greyhound Lines*, 1 N.L.R.B. 1 (1935), *enforced in part and denied in part*, 91 F.2d 178 (3d Cir. 1937), *rev’d*, 303 U.S. 261 (1938), *cited in* *Electromotion, Inc.*, 309 N.L.R.B. 990, 994 (1992). As the Greyhound manager in charge of the company union challenged there summarized management’s goals:

[I]t is to our interest to pick our employees to serve on the committee who will work for the interest of the company and will not be radical. This plan of representation should work out very well providing the proper men are selected, and considerable thought should be given to the men placed on this responsible Committee.

Electromotion, Inc., 309 N.L.R.B. at 994.

with collective organizations of workers came gradually to be understood as an obligation attaching only to majority unions; union organizing came even more quickly to accept majority status per se as its goal, rather than simply increasing the membership and effectiveness of worker organizations inside firms; failure to achieve such usually resulted in abandonment of the field. Employers rested content with resisting unions and, in the context of that resistance, invoked the "company union" ban as a bar to effective nonunion forms of collective representation.

Within the unionized firm, moreover, the scope and function of collective worker power in the United States was even more sharply circumscribed than elsewhere. The scope of "mandatory" topics of collective bargaining was drawn narrowly to exclude worker involvement in firm management. Information and consultation rights, nonexistent in the expanding nonunion sector, were limited to the terms of negotiated contracts within this circumscribed frame. Lacking statutory supplements on intra-firm power, lacking guarantees even of information about what the firm was doing, and barred from using economic force to invade the "core of entrepreneurial control," unions in the United States, more than elsewhere, concentrated on the division of the firm surplus much more than its production.

C. *Core Elements of Decline*¹⁹

These peculiarities of the U.S. case aside, most rich capitalist countries featured the three essential elements of the New Deal system—a Keynesian, "demand-based" national policy framework, "ready made" blocks of workers able to cut and enforce deals, and large, dominant, stable firms through which the deals could be cut. What explains the general decline of unions, however, is that over the past twenty years each part of this system has fallen apart.

Keynesianism is qualified. A combination of market saturation and the entrance of new competitors into the saturated markets undercut the autonomy of national economies, uprooting the foundations of Keynesian policy. By the early 1970s most people in the advanced economies who could afford cars, radios, or washing machines had them, so the growth rates of national manufacturers in those industries slowed. At the same time firms in newly industrializing countries like South Korea or Mexico got better at producing the less sophisticated goods demanded in the advanced countries, while

19. This section also draws from Rogers & Sabel, *supra* note *.

Japan got better at producing the more sophisticated ones. With new producers crowding into already overcrowded markets in the United States and Western Europe, domestic firms were driven to look for new export outlets. But once firms began looking for export markets, it became difficult to regulate the growth of any economy by stimulating consumer demand. If the French government, for example, tried to accelerate growth in France by putting more money in consumers' pockets, nothing prevented German or Italian firms from beating the French firms to the market. Even the fear of such cross-border raids was enough to dampen the stimulative effect of Keynesian stimulation. Firms were unlikely to expand capacity to meet the new demand if they had to worry that a foreign competitor could capture the market before their new facilities were ready.

Firms reacted to these pressures in two sharply contrasting ways, both of which had the long-term effect of undermining their self-sufficiency and thereby killing the stable firms that comprised another core element of the old system. One response—especially common in the United States—was to meet the competition by cutting costs, primarily wage costs. To achieve these cuts, large firms were broken up into separate profit and cost centers, thus achieving the “transparency” needed for strategic planning. Labor-intensive, low-skill operations were then transferred abroad to low-wage countries in the developing world, while the remaining domestic workers were told that their jobs would be next if they (and their unions, where they had them) did not make concessions on wages and benefits. This “sweating strategy” obviously drains work from rich countries to poor, depresses living standards at home, and wrecks lots of communities along the way. U.S. firms were naturally drawn to such a strategy in the 1980s because union weakness kept it available, and because the semi-skilled workforce relied on for generations of “assembly line” mass production provided a weak basis for more advanced and versatile production strategies.

Another response—more common in Western Europe—was to compete on quality and product differentiation rather than price. The basic idea was to allow skilled workers operating sophisticated, flexible machines to customize products to customers' needs. Although goods made this way cost more than mass-produced items, buyers will pay a premium to get what they want that more than covers the difference. This “high-wage, high-skill” strategy is obviously better for domestic workers and community stability. Western European firms were naturally drawn to it in the 1980s because stronger unions

blocked "sweating," and ample reserves of skilled workers made upgrading possible.

Today, however, the lineup between countries and strategies is much less clear. Both U.S. and European firms discovered hidden costs to their strategies. Now they borrow from the other's model.

The news from the United States is that many firms have figured out that sweating is a losing strategy. There is always a lower-wage competitor ready to pounce on the low-wage subsidiary just established, and the divisions in firm operations occasioned by the search for cheap labor—between planning and production, between conception and execution—make it harder to avoid and learn from manufacturing mistakes. At least some firms (still a distinct minority) are seeking radical quality improvement and product customization and differentiation, and are placing a corresponding emphasis on the skill and shopfloor responsibility needed to get better integration of product design and execution. While others (still a distinct majority) continue with their sweating strategy, what they once did with conviction they now do with hesitation.

The news from Europe is that skill is not enough to stay abreast of the market. Firms get stuck in specialty niches. The craft hierarchies established inside firms—in which those with more skill are supposed to solve the problems that the less skilled cannot—thwart the needed flow of authority to the shopfloor. And long-term relations between the component-making and assembly divisions of the same firm degenerate into cronyism as the company's traditions of technical flare become a pretext for not worrying about costs. Inspired in part by U.S.-style administrative decentralization, the response all across Europe has been to break large concerns into autonomous profit or cost centers with the power to restructure their own operations and then sink or swim. Typical is Volkswagen's hire of the Spanish head of General Motor's purchasing operations, with the aims of reorganizing its relations to its external suppliers and building effective shopfloor teams in its own plants.

In both the United States and Western Europe, the upshot of all this firm-level reorganization is to undercut the integrity of workers as a group with distinct and compact interests—killing off the third element of the old system. There are fewer places for unskilled or semi-skilled workers in manufacturing, and even where such places exist there are fewer career ladders connecting them to skilled work in the same plants. Thus, just as unions' core constituency is squeezed out of

the well-paying manufacturing jobs, it becomes more difficult to advance the interests of their (less skilled) remaining members. Moreover, managers are increasingly vulnerable to job loss. Middle managers in large corporations disappear when the profit centers they once supervised are given the authority to make their own way; senior managers get the ax if their profit centers do not make it. Often it seems as though these groups have more in common with the skilled workers than the latter do with their less-skilled colleagues.

With their role in national macro-economic management limited by the decline of Keynesianism, with their role as the administrator of labor markets in large firms and well-defined industries limited by the massive decentralization of corporations, and with their core constituencies divided and disoriented, it is hardly surprising that even the strongest unions are on the defensive, and the weakest ones, as in the United States, are facing a rout.

III. THE REQUIREMENTS OF REFORM

Given this general experience, and the place of the United States within it, what lessons are to be drawn about labor law reform?

One lesson commonly drawn is that, especially as the more worker-friendly labor relations systems of other countries come under pressure, the United States itself should not engage in substantial amendment of its own. On this reading of the evidence, forces are abroad in the world that effectively moot the original purposes of New Deal system—in particular, again, its commitment to reconciling associative rights for workers and resulting limits on inequality with productive capitalism. This mooting may be welcomed—by those who believe that a core value of “liberty” requires that all collective organization be minimized, or that inequality is a necessary spur to the effort on which all social wealth depends. Or it might be regretted—as a tragically “realistic” response to a world in which effective social control over the economy and its organization is no longer possible. Those who argue that the internationalization of capital and product markets is effectively complete, or who slide from that proposition to the claim that the combination of essentially mobile factors of production are all that wealth-generation is about, may fall into either camp.

Again, however, I take the problem to be one of institutional mismatch, not weakness in the core ideas. Other things equal, the free exercise of associative rights is a good thing, for workers as well as

others.²⁰ Gross inequalities are a bad thing, and not helpful to economic performance.²¹ Moreover, current economic integration does not preclude some political management of the terms of economic cooperation.²² So consideration of more suitable institutional means of achieving the good and avoiding the bad, in ways again consistent with a productive capitalism, is not idle. Institutional arrangements that no longer facilitate the achievement of core purposes simply need to be changed in ways that do—in light of the changes in the organization of production just described.

What this means, in very broad terms, is that the forms of worker organization need to be amended in ways responsive to the greater diversity of employee interest and potentially more autonomous role of workers in governing the productive enterprises. The mechanisms of wage and benefit regulation need to be changed in ways responsive to decentralization and casualization in labor markets to permit restructuring without diminution in the quality of life and to get some lower bound on income and welfare. And, throughout, labor relations needs to be seen through a productivist supply-side optic as much as a demand-side one. For democracy again to appear in the general interest, under capitalism, the alchemy of particular-to-general interest will this time likely arise more from labor's contribution to "effective supply"—of skilled labor, technology diffusion, comparability across establishments in ways that promote flexibility, linkages of firms in ways

20. The basic criterion of the moral judgment expressed here is respect for the moral equality of persons. For elaboration, see COHEN & ROGERS, *supra* note *.

21. Among others, see TORSTEN PERSSON & GUIDO TABELLIN, IS INEQUALITY HARMFUL TO GROWTH? (National Bureau of Economic Research Working Paper No. 3599, 1991), and the review and findings in Lane Kenworthy, *Equality and Efficiency: The Illusory Tradeoff* (1993) (unpublished manuscript, on file with author).

22. This issue deserves more attention than can be given it here. Briefly, however, those who argue that capital and product markets are now completely integrated mistake stylized facts for reality. National savings and investment rates still correlate closely—belying the first claim; for the vast majority of U.S. firms, including manufacturers, buying and selling is still overwhelmingly domestic—belying, at least in the U.S. case, the second. The fact that economic activity is more and more taken up with untraded services qualifies it further. Even if they were completely integrated, however, the picture of production as consisting only in the rearrangement of the classic factors of land, labor, capital, and technology is incomplete. In the real world, transactions costs and externalities, bearing on the costs of factors and the efficiency of their combination, are heavily mediated by the institutional infrastructure of the economy. Even if factors themselves slop across borders, these institutional arrangements do not. This describes the possibility that politics may in fact shape the direction of the economy. In the U.S. case—given the enormous size of our domestic economy (at nearly \$6 trillion, nearly twice the size of the annual \$3.5 trillion volume of world trade); relatively low rates of import penetration and export reliance (their additive share has been stable, at about 23%, for years), and the dimensions of publicly controlled investment (aggregate government spending, at all levels, is approximately \$2 trillion)—it is very hard to believe the public has no capacity to set the terms under which economic production and exchange will occur or to influence directly that which does.

that promote general economic upgrading, private multipliers, and supplements to state regulatory efforts—as much if not more than its contribution to effective demand.

Many, perhaps most, of the ways this might be done have already been suggested in present reform debates. In this section, I consolidate some of these suggestions along the lines of the core values and concerns that are presently at stake—free association, equality, democratic productivism—while noting that the specific form reform takes should be influenced by a party not yet heard from with any clarity—the general population. The discussion is deliberately general. I argue from basic principles with some notice of the context in which they now need to be enacted. In the next section, with greater explicitness, I use the example of the labor movement to suggest how the suggestions might be knit together, and advanced, through a labor-led strategy of reform.

A. *Free Association*

Assuming, again, that *ceteris paribus* free association is a good thing for diverse workers as well as others, and recognizing various imperfections in the “market” of associational choice bearing on representation of worker interests, efforts here should be directed to perfecting that market. This means widening the range of employees permitted collective representation, reducing the direct cost of their choosing such, and widening the range of choice itself.

Widening the range of protected employees would mean abolishing most, if not all, restrictions on the free choice of farm workers, individual contractors, and supervisors, as well as those public employees in that half of the United States that have still not recognized even minimal rights to self-organization.

Reducing the direct costs to employees in choosing representation would mean institutionalizing respect for individual freedom in choice and collective worker deliberation about how it might best be made. At present, as regards the only available form of collective representation—unions—this condition is clearly not satisfied. Whatever one’s opinion of unions, current levels and kinds of employer resistance to them clearly impose direct costs on employees and corrupt the process of deliberation.²³ Getting closer to free deliberation would

23. Apart from repeated documentation of employer violations of the spirit and letter of the LMRA and the close correlation between such resistance and union failure in representation elections, perhaps the best evidence for the importance of management resistance on current

thus appear to require more effective sanctions on such employer behavior, quickly applied.²⁴ Moreover, while informed consideration of the merits of alternatives is desirable and takes time, some significant expediting and simplification of the current election process in ways respectful of free employee choice—in the form of a return to “card check” certification or very rapid elections—seems desirable. In labor relations, as in democracy generally, the law is simplified and strengthened by a presumption that those in whose name power is exercised have the capacity to exercise that power themselves. Choosing collective representation is a choice for workers, not managers, to make. Finally, choices for collective representation in bargaining are meaningless if immediately frustrated by effective refusals to bargain. At present in the United States, only about one half of the units won by unions in representation elections before the NLRB ever make it to first contract. If employees want a union to negotiate for them, they should be assured the fruits of genuine negotiation. If the union and employer reach impasse, a neutral third party arbitrator should be empowered to force agreement.

Application of the same principle of free employee choice, however, would mandate expansion of the range of representative forms—a move that seems recommended in any case by the diversity of the employee population. There is no good reason to reify majority unionism as the only possible form of independent worker association. If a group of individual workers short of a majority in a relevant unit wish to concert, to join a union, to present grievances to employers, or otherwise to act to advance their interests in the employment relation, there is no compelling reason why they should not be permitted to do so—absent the prior and continuing existence of a majority union.²⁵ Neither—assuming conditions of employee free choice are institution-

employee choices is provided by the public sector. Controlling for age, income, race, sex, occupation, and all other conceivable individual and group variables, unionization in the public sector—essentially free of management resistance—runs better than three times as high as in the private sector.

24. Sanctions might include such things as outright fines and treble compensatory damages for actual violations of the law, or disqualification from government contract eligibility for repeat offenders. Speed might be achieved by a requirement of hearings and determination of the merit of employer unfair labor practices within 30 days of filing.

25. On their face, §§ 9(a) and 8(a)(5) provide no suggestion that employers are *not* obligated to bargain with such “minority unions.” Contrary NLRB and court interpretations have stood so long, however, that statutory amendment would now probably be required to establish this obligation. Apart from administrative difficulties in handling the claims of multiple such unions (themselves navigable through threshold representation requirements and rules on their interaction), there seems no reason why it should not be—again, in the absence of an elected majority representative. See Clyde Summers, *Unions Without Majority: A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

ally respected—is there compelling reason why representative committees or “employee caucuses” enjoying the support of management should not also be permitted.²⁶

B. Equality

American labor markets, where the wages of most workers have been falling for years, are now marked by punishingly high degrees of inequality in wages and benefit compensation. For those at the bottom of our increasingly dispersed wage structure, the results are clearly horrible, and in comparative terms, increasingly anomalous. (In real purchasing power parity terms, for example, the wages of the bottom decile of American workers are now only one half those of their counterparts in Europe.)²⁷ Within the union sector and without, moreover, inequality is exacerbated by the fact that compensation is heavily determined by firm or industry specific rents. Even as they share in the division of such rents, however, conflicts between particular labor organizations and particular managements over benefits—even basic benefits of generally recognized social importance, such as health care—often preclude their constructive cooperation. Finally, in an age of increasingly casualized employment, the firm-based character of the American benefit system—with health care, vacation time, pensions, and more determined on a firm-specific basis, and receipt of

26. What such “institutional” respect for free choice might look like is suggested by Alan Hyde’s proposal for an “employee free choice” defense to a § 8(a)(2) complaint. Leaving the section intact, and assuming a return to the early breadth of that denoted by “labor organization”:

An employer who would otherwise violate that section by establishing or supporting a system of employee representation or communication may defend against unfair labor practice charges by showing: (a) that the system was authorized by a majority of employees in a secret ballot; (b) that before the ballot, employees were specifically advised of their right to oppose the creation of such a plan without reprisal; (c) that such authorization expires in some uniform period of time, perhaps three years, unless reauthorized.

Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 188 (1993). To these provisions we might add:

(d) that the system may be abolished by a majority of employees in a secret ballot at any time; and (e) that the system cannot at any time be unilaterally abolished by the employer.

Were such conditions satisfied, employer “domination” in the current sense of the law—that which § 8(a)(2) *quite rightly* seeks to prevent, would be effectively extinguished. It would thus be possible to define current controversy over nonunion forms of worker representation not in terms of a choice between “unions or nothing” but between “independent (not employer-dominated) forms or nothing.” How many employers would, under such clarification, actually seek nonunion independent worker representation is, of course, an open question. How many workers, assuming enactment of the other reforms suggested here, would choose this over rival representative forms is as well. The real values at stake, however, would be clarified in a way that they are not in the present debate.

27. This fact comes from Richard Freeman.

those benefits conditioned on continuance in that firm—further threatens equality in provision.

These familiar facts suggest that the basic structure of employment compensation in the United States—long defined by highly decentralized wage and benefit determination and a very low “social wage” of generic minima—is in need of reform. Equality concerns and, increasingly, efficiency concerns recommend a move toward more encompassing wage setting and higher guaranteed social minima.²⁸

Raising social minima is in principle simple enough. Whether administered through firms or not, certain basic benefits would be guaranteed on a society-wide basis, much as is currently being promised for health care. The efficiency benefits of doing this are many. As against other means, minima are an efficient way to redistribute income, especially when receipt is conditioned on employment.²⁹ By raising the base price of labor, minima can also be an important spur to more productive labor use, setting dynamic efficiencies in motion. And, by generalizing certain standards of behavior and performance, minima facilitate flexibility in the deployment of productive resources. As emphasized in recent discussions of health care benefits, socializing benefits promotes greater allocative efficiency in the labor market. A Firm A employee economically (given skills, taste, whatever) best suited to Firm B is more likely to find her way to Firm B if B does not suffer from a crippling shortfall in benefits provided by A. The most obvious benefit, however, is to the level of equality itself. By removing a chunk of individual welfare from wage competition, minima make it more likely that those less fortunate in that competition will still live a decent life.

For all the same reasons, greater uniformity and generalization of wage bargaining is also desirable. While the United States seems unlikely ever to contemplate truly peak bargaining between unified union federations and a unified business community, nor even anytime soon to contemplate the full use of extension laws in the unor-

28. Is this an appropriate topic of labor law reform? It is if that reform is seen as it should be—as an effort aimed not only at addressing issues of worker representation or management prerogative inside the firm, but of the appropriate design of a society-wide system of production and reward.

29. For a recent argument to this effect and a more general review of the evidence on minima, see Richard B. Freeman, *Minimum Wages—Again!*, Paper Delivered at the Conference on Economic Analysis of Base Salaries and Effects of Minimum Wages, Arles, France (Sept. 30-Oct. 1, 1993).

ganized sector,³⁰ more modest efforts to facilitate wage generalization on a regional or sectoral basis might be considered. The law on multi-employer bargaining might be amended, shifting the presumption away from the voluntariness (and, inevitably, instability) of such arrangements and toward their requirement.³¹ And more ambitious schemes of "sectoral bargaining," of the sort now being discussed in Canada, might be usefully considered.³² In a given area or industry grouping or both, sectors of employees, defined by common occupational positions across different employers, could be defined (e.g., "restaurant workers in New York City"). Unions demonstrating support among members of the sector at different sites would be permitted to bargain jointly with all the employers corresponding to those sites. In subsequent organizing during the term of the resulting contract, union certification at additional sites would automatically accrete their employers to the population covered by the contract, with that employer joining in the multi-employer bargaining in the next round.³³ To make the scheme more palatable to employers and the general public, its application might be limited to traditionally low-wage, under-represented sectors, characterized by highly uniform conditions of work.

Such efforts would facilitate greater wage coordination among stable employees of large firms. Their larger and more important effect, however, would be to extend the benefits of wage generalization to employees in smaller locations—too small, under present circumstances, to support the costs of the negotiation and enforcement of separate contracts—or operating in more casualized or "independent" employment relations. There is no good reason why shifts in the structure of employment—in recent years, toward smaller firms, independent contracting, and less stable employment—should be associated *per se* with diminution in the quality of employment. By effectively reducing the costs of establishing a "commonality of inter-

30. The only extension laws in the United States are "prevailing wage" statutes. The reach of these is limited and, at present, shrinking.

31. We are speaking of presumptions here. It would be important in any scheme to permit employers a chance to show why the conditions of their enterprise were sufficiently distinct from those with whom they were asked to join to defeat the presumption.

32. See John Baigent et al., *Recommendations for Labour Law Reform, A Report to the Honourable Moe Sihota, Minister of Labour, British Columbia, Canada* (Sept. 1992); Judy Fudge, *Labour Needs Sectoral Bargaining Now*, CANADIAN DIMENSION, Mar.-Apr. 1993, at 33.

33. Again, it would be important to leave room for some variation due to local circumstance. Authority to make such allowances might be assigned regional offices of the Department of Labor, or the NLRB, or a more formal and new system of regional labor market boards.

est" with others, this sort of reform would permit adjustment to changed structures without a sacrifice in quality.³⁴

C. *Democratic Productivism*

If the "equality" reforms of the sort just described were implemented, many of the most enduring sources of labor-management conflict would be shifted, at least slightly, to a resolution basis above or beyond that of the individual firm. If the "free association" reforms were implemented, the forms of collective worker organization inside the firm would become more finely attuned to the variety of employee interests and identities, unions would be more self-confident, and management would be freer in the nonunion sector to experiment with its own ideas of how best to organize employee voice. In combination, this should enlarge the role of the employee in productivity enhancement, both within and without the firm.

Within the firm, as determinations about shares of the "pie" came to be determined more externally, the concentration of all parties could turn more squarely to increasing the size of the pie itself.³⁵ As the market for representation cleared and its results were granted legitimacy, another source of haggling would be removed, and talk could again turn more easily to cooperation. Outside the firm, the increased reach of worker organizations—and their increased definition as organizations supporting social minima and comparability across sites of employment—will yield a potentially powerful multiplier on government and firm efforts to diffuse productivity-enhancing changes in the organization of production and to secure effective monitoring and enforcement of such efforts. Effective systems of training and technology diffusion, for example, are easier to achieve when there are linkages across firms. Regional labor market programs are easier to administer when worker organizations are more spatially defined. Such improvements would be made more likely by the reforms already discussed.

But the enhancement of firm and state efficiency through use of workers and worker organizations might also be aimed at explicitly.

34. I leave unattended the need for specific reforms in the law governing successorship. If something like the scheme suggested in the text were adopted, most of those would disappear.

35. Standard principles of rational behavior imply that when the share of the pie is exogenous, self-interested parties will cooperate to make a bigger pie, as this is the only way they can benefit themselves. When the share of the pie is "up for grabs," by contrast, there is danger of noncooperative, low-output solutions to prisoners' dilemma problems, including strikes, withholding information that might raise output, and the like.

The American economy currently suffers from the fact that the "low road" sweating response to new competition is not sufficiently foreclosed by public policy, while the "high road" of advanced, high-involvement, high-wage, quality competition is not sufficiently supported. While the reforms already suggested would go some distance toward the first goal, the second also needs attention. This is where explicit aiming may be recommended, in several areas.

We know that vast efficiency gains can be achieved within firms and in labor markets if information flows more freely to workers. General reporting requirements of firms to workers—on current performance, future plans, upcoming choices about products, technology, workforce restructuring, and the like—of the sort most advanced firms do already, ought to be considered.³⁶

We know that genuine involvement of workers in solving firm problems requires not only that they see some reward from that involvement, but that they have genuine power to affect choices made. In light of this, where workers are organized, the ancient mandatory/permissive distinction in bargaining seems overdue for overhaul.

We know that in most areas of workplace regulation, the sheer number, heterogeneity, and dispersion of workplaces forbids their effective monitoring by any plausibly sized state inspectorate, and that "private attorneys general" pursuing civil claims also cannot be relied on to achieve desired results. In such areas, increased explicit reliance on worker, or worker-manager, committees for monitoring and enforcement might usefully be explored. Occupational health and safety is one familiar area of such experimentation, but "worker based" models of regulation might also be extended to other areas of pressing national concern—training and technology among them.³⁷

36. As one instance of a more general effect, most of the empirical literature on advance notice of plant closing supports the notion that workers gain from early notice, *see, e.g.*, RONALD G. EHRENBERG & GEORGE H. JAKUBSON, ADVANCE NOTICE PROVISIONS IN PLANT CLOSING LEGISLATION (National Bureau of Economic Research Working Paper No. 2611, 1988), with the most negative studies claiming only that notices are neutral. John T. Addison & Pedro Portugal, *Advance Notice and Unemployment: New Evidence from the 1988 Displaced Worker Survey*, 45 INDUS. & LAB. REL. REV. 645 (1992); John T. Addison & Pedro Portugal, *The Effect of Advance Notification of Plant Closings on Unemployment*, 41 INDUS. & LAB. REL. REV. 3 (1987).

37. LINDA J. MORRA, U.S. GEN. ACCT. OFF., OCCUPATIONAL SAFETY AND HEALTH: WORKSITE SAFETY AND HEALTH PROGRAMS SHOW PROMISE, GAO/T-HRD-92-15 (1992), reviews some of the U.S. experience with occupational safety and health committees. See as well the review of Canadian experience in Elaine Bernard, *Canada: Joint Committees on Occupational Health and Safety*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, COOPERATION (Joel Rogers & Wolfgang Streeck eds., forthcoming 1994). Among others, Kochan & Osterman, *supra* note 8, suggest that worker committees be used in the administration of national training policy. And with training integrated with technology diffusion on a multi-firm regional basis (see below), the thought might naturally be extended. More general "productivity

We know that in regional labor markets and (commonly metropolitan) industry agglomerations the provision of skill and diffusion of technology is seldom “to standard,” in part because no credible institutions exist to define standards and diffuse practice based on them. Explicit efforts to promote regional skills and technology consortia, consisting of labor organizations, area employers, and relevant public authorities, and to devolve to such consortia responsibility for executing regional policies in these areas, according to national standards on performance, might also be usefully encouraged.³⁸

In brief, we know that modernization and industrial upgrading efforts, as well as workplace regulation, require institutional supports within and across firms—to facilitate communication, organize key players, reward cooperation, punish free-riders, monitor performance, diffuse best practice, use “local knowledge” to devise efficient compliance strategies with social mandates, and more. The sorts of institutional supports extend well beyond those supplied within the markets versus states (“live free or die”) governance dichotomy on which conventional policy discussion remains transfixed. Specifically, they extend to the encouragement of a variety of *associative* forms of governance, across as well as within firms. Labor law reform should in part be about building this institutional infrastructure of high-wage productivism. Among other things, this means explicitly encouraging our existing “social partners” to assume a socially needed task of economic governance—“incentivizing” the voluntary establishment of appropriate association forms—with special benefits and protections they receive from public authority conditioned on their willingness to assume this burden.³⁹

committees” with responsibility for intrafirm administration of broader training and technology diffusion agreements to which that firm was party might be natural spokes on the wheel of regional upgrading efforts.

38. The desirability of such in the United States is emphasized in the recent recommendations of the Modernization Forum Skills Commission. MODERNIZATION FORUM SKILLS COMM’N, *SKILLS FOR INDUSTRIAL MODERNIZATION* (1993). For treatment of the general point of which this is one instance, see Cohen & Rogers, *Secondary Associations*, *supra* note *; Cohen & Rogers, *Associations and Democracy*, *supra* note *; COHEN & ROGERS, *BEYOND FACTION*, *supra* note *. For a concrete example of what this might look like in the U.S. context with unions and management both involved, see ERIC PARKER & JOEL ROGERS, *THE WISCONSIN REGIONAL TRAINING PARTNERSHIP: A MODEL FOR REGIONAL SKILLS CONSORTIA?* (forthcoming 1993).

39. The thought here is simple, if perhaps remote from conventional policy discussion in this most liberal of liberal politics. Assuming it makes sense, for all the reasons given, for the state to provide explicit support to associative partners in governance, it is appropriate to condition such support on those partners’ antecedent agreement to, and ongoing satisfaction of, what the public regards as appropriate behaviors. For general discussion and advice on design, again see Cohen & Rogers, *Secondary Associations*, *supra* note*; Cohen & Rogers, *Associations and Democracy*, *supra* note *; COHEN & ROGERS, *BEYOND FACTION*, *supra* note *.

D. *What We Don't Know*⁴⁰

While these broad directions for appropriate reform can be signalled with some confidence, one large gap in our knowledge about what is desirable commands caution, and some work. The gap is public opinion on all these matters. The work is finding out what the structure of worker demand for representation and participation actually is. Without some better sense of public concerns in this area than we have now, many of the details of reform, and perhaps much more than detail, cannot be resolved.

The limits of our knowledge are these. Over the last decade, scattered national polls have explored the attitudes of workers toward workplace representation.⁴¹ Most of these focus on whether people are favorable or unfavorable toward unions. They show that about two-thirds of the public have "favorable" attitudes, but in a vague way,⁴² and that about one-third of nonunion workers would vote union in an NLRB representation election if given the opportunity.⁴³ The polls also indicate considerable public awareness of management opposition to unions, recognition that trying to organize a union is risky and confrontational, and concern over noncooperative labor relations.

Few polls explore anything beyond attitudes toward unionism. A 1988 Gallup poll asked about worker attitudes toward collective representation other than that provided by unions. A 1988 Harris poll asked office workers about their desire to have a say in workplace

40. This section draws on Freeman & Rogers, *Workplace Representation*, *supra* note *.

41. See the review in Freeman & Rogers, *Who Speaks for Us?*, *supra* note *. Cited polls include those reported in Gallup Org., *Public Knowledge and Opinion Concerning the Labor Movement* (1988); Fingerhut/Powers, *National Labor Poll* (1991); Robert P. Quinn & Graham L. Staines, *The 1977 Quality of Employment Survey: Descriptive Statistics with Comparison Data from the 1969-70 and 1972-73 Surveys* (1979); Louis Harris & Associates, *A Study on the Outlook for Trade Union Organizing* (1984); James A. Davis & Tom W. Smith, *General Social Surveys, 1972-1991*, available in electronic database, NATIONAL OPINION RESEARCH CENTER (1991); Henry Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues in Employee Representation: Alternatives and Future Directions in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 105 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

42. As evidence of the vagueness of perceptions of unions: the public vastly overestimates the extent of unionization; few people (even in unions) recognize Lane Kirkland as head of the AFL-CIO; few know the names of any other union leader; and there is considerable confusion on the current state of the law regarding union organizing or administration.

43. A recent Penn & Schoen poll, Penn & Schoen, # 2200—National—5/93 (1993), commissioned by the Employment Policy Foundation and circulated to all Dunlop Commission members in advance of their first meeting in support of the proposition that pro-union reform is *not* needed or desired at this time, found that 39% of workers would vote to form a union "if there were an election by secret ballot among you and your co-workers." This is better than twice the actual level of unionization in the United States.

decisions. But no general survey has explored attitudes toward possible new forms of labor-management arrangements or systematically linked the issue of workplace representation directly to productivity, cooperation, and competitiveness.

The 1988 Gallup Survey found that ninety percent of all workers wanted a workplace association of some (vague and unspecified in the survey) form. Most important, it showed that eighty percent of persons unfavorable to unions desired such an association at their workplace. But it did not determine the type of association people wanted, what they wanted it to do for them, how it might affect their work behavior, or how willing they would be to pay dues or other charges for its services.

In addition to national polls, companies often survey their workers to determine employee attitudes toward existing human resource or pay and benefit practices, firm organization, supervision, and other aspects of the workplace. Similarly, unions routinely survey their members or prospective members to determine the same things, as well as the demand for unionization, attitudes toward current organizing drives or initiatives, and the like. These surveys, however, are usually undertaken only by large "best-practice" firms and unions; and as proprietary surveys, their results are not widely disseminated. The extent to which their findings could be generalized to the nation is questionable, and the picture they give of worker desires is not well-known or well-probed.

In sum, no extant poll or survey tells us much about possible worker desires and responses to potential labor reforms. They do not probe attitudes toward existing representative structures in any depth, ask about the desired predicates of alternatives, or ask what workers would be willing to pay for those alternatives. They do not probe the reasons for the structure of preferences—the degree, for example, to which attitudes toward unions are shaped by aversion to the labor-management conflict with which unions are commonly associated, or the degree to which willingness to join a union is shaped by fear of employer reprisal. Nor do they ask for specifics of what workers see as useful ways to increase participation in workplace activities, how hard they might work to make a system of representation or participation succeed for them and their companies, or their views on how alternative modes of workplace organization might affect work performance and company competitiveness.

Thus, entering the labor law reform discussion, the nation has little good information on what workers want, and why they want it, in the area of workplace representation and participation. If employee representation or participation in firm decisionmaking is thought of as a product, we do not know what the "customer" employees want that product to look like, why they want that, or what they are willing to pay for it. This gap in knowledge, rather obviously, needs to be substantially filled.⁴⁴

IV. WHO MIGHT DO IT, AND HOW

However desirable reform might be, and however well-refined reform suggestions are by further research on public wants, reform will inevitably face opposition. It needs a committed agent to succeed.

This is not likely to be the American business community, which is sharply divided on the desirable future path of economic development in the United States, although it could very easily include some segments of the business community. Nor is it likely to be the present administration—which is deeply ambivalent about "traditional" labor organization, accepting of budget constraints so harsh that they will limit the side payments likely needed, and in general loathe to enter conflicts with the business community of the sort that will inevitably be required.⁴⁵ Nor will it come from the disorganized public, as yet far from up-in-arms about the topic.

This leaves labor. For reasons already reviewed, reform is also unlikely to come, even given intense labor mobilization, if it is seen as piecemeal, let alone narrowly self-serving. To put across something like the package talked about here, even to get needed discussion of that package going, reform must come to be seen as something in the

44. This is the aim of the project outlined in Freeman & Rogers, *Who Speaks for Us?*, *supra* note *.

45. What role for the Dunlop Commission does this assessment imply? I think the best thing this Commission could do is document the pathologies of the present system and thus help establish the arena as one demanding public attention. It could as well, of course, inventory the range of reform suggestions, and suggest ways in which they might be knitted together into a more coherent and satisfying system, but I take its political power to be very limited, and the possibilities of "cutting a deal" amongst labor, business, and government to be nearly hopelessly constrained in the absence of organized public concern of the sort that does not yet exist. Creating a constituency for reform is the first, most important, and perhaps only role for the Commission. As bears on the narrower question of worker representation, two specific tasks seem most urgent. The first, already mentioned, is to provide a credible documentation of the real structure of employee demand for representation and participation. The second is to consider just why that demand is not now being met. For the only form of independent representation and participation that now exists—unions—the latter effort would usefully include documentation of the range and effects of employer resistance.

general interest of the society. Its agent must be seen as a paladin of the general will.

How might labor cast itself as such a paladin? Some speculations follow.

A. *General Strategy*⁴⁶

In very broad terms, “unions”—in our revised system, here meant only to mean “independent collective worker organizations”—need more self-consciously to create and occupy a place analogous to their old one. What that means, again, is that they need to find a way to serve their members’ interests in a way that also serves the interests of capital and (precisely because it serves both) enables labor to claim to advance a general will that stands above the special pleading of any particular group.

Take first the problem of serving members’ interests. In the old system the unions provided job security though a combination of Keynesian demand management and internal labor market administration. As we have seen, difficulties in controlling macro-economic demand and the internal structures of the firm make that much more difficult today. Accepting this, the alternative is to aim more for career security rather than job security, and to develop mechanisms of insurance rooted more in “effective supply” than effective demand. Instead of trying to define a worker’s place in a fixed structure, a new unionism would seek to ensure workers power in fluid ones. The way to do that is to provide all workers with the advanced technical (and, increasingly, “business”) training and counseling needed to assert power in the design of the work teams in which they are increasingly employed, and to move freely in external labor markets as their current employer goes under.

Notice that while workers desperately want such training and counseling services, there is little likelihood that firms themselves will provide them. After all, the firms are busy forming cost and profit centers precisely because they have no idea what is working well enough to justify additional investment. Notice too that such services cannot be easily provided through (though they might be funded by) the state, which is certainly no more able than firms to ascertain the sorts of services needed. They will need to be provided by institutions that are actually rooted in the economy, extend across the population

46. Again, this section draws from Rogers & Sabel, *supra* note *.

of firms, and have workers' interests chiefly in mind. They will need to be supplied by unions.

Unions cannot equip members for careers independent of particular firms, however, if compensation and work rules in the corporate way stations of a likely career are so diverse that no one with an acceptable job will dare to move. As discussed, this problem, familiar from the way people today cling to jobs to preserve firm-based pension or health benefits, can only be solved by generalizing compensation and organizational practices. Barriers to mobility arising from the cross-firm differences—in performance review or dispute-resolution procedures, stock option plans or opportunities for skill acquisition, and compensation itself—that have in part arisen from decentralization now stand as a barrier to worker mobility. Just as unions can serve their members' interests by making their skills more versatile, they should serve them by pressing both firms and the state to establish greater uniformity in the conditions of compensation (itself increasingly tied to skill) and employment.

Here again, notice that unions have unique capacities to perform this role. If they are in touch with their members, they will have a much better idea than government or managers of just what underlying standards of equity need to be respected in establishing "comparable" work settings. As institutions spread across firms, they will have wider-ranging experience of the different kinds of jobs that cluster into careers than even the most decentralized, joint-venturing corporation. Firms and groups of employees trying to reconcile differences sufficiently to establish a workable workplace could thus well look to the unions when conflicts arise over the definition and application of rules. Moreover, as institutions of workers in the economy itself, unions are indispensable vehicles for enforcing standards—with the local knowledge and capacity for disruption needed to play that role.

Next consider how the interests of firms are advanced by this two-fold strategy of new-model unions. On the first,—training and counseling—while members want a combination of technical and managerial skills to protect themselves against the risks of the labor market, firms would like to wave a magic wand over their current work force and have employees with precisely these skills costlessly appear. If the unions can help firms figure out how to make effective use of the vast public funds available for training, they can be the magic wand.

On the second,—achieving comparability across firms in conditions of work and compensation—employers, too, have an interest in this goal. As firms decentralize and cooperate more and more closely with outsiders, there is less connection between who employs a person and where and with whom that person works. If an automobile firm and an airbag manufacturer codevelop a new product, a project group from one might easily spend six months on the other's site. Or if a manufacturing firm subcontracts its information-system work to a data-processing firm, technicians employed by the data processor might work fulltime at the manufacturing site. In such cases, cooperating firms are in trouble if they tell their respective employees to treat their new co-workers as partners, and then themselves treat the partners very differently. Without some generalization in work conditions, rules, and compensation, advanced forms of cooperation are far more difficult to enter into, manage, and fold when the task is done.

Just as in the old system, then, unions can play an economic role that both advances their members' interests and solves economy-wide problems beyond the capacity of any firm. Organizationally, their doing so will inevitably require them to be attentive to a wider variety of worker interests than they are identified with at present and—to get deals cut across diverse firms—to be more defined by geographic region and less by economic sector. (Here, recent signs of revival among U.S. metropolitan central labor councils are suggestive.) At the same time, since people still work in particular settings (and the places are still largely described by firm ownership) it is vital that unions extend the reach of worker power in such settings throughout the economy—including sites where unions themselves have relatively few members. This will require getting state supports for generic baselines of worker representation. All three changes will give unions more of a “political” flavor than they have at present. Moreover, the reemergence of unions as innovative, moral, and rational social agents of general benefit will award them a fair degree of political capital with the general public. People will see the “point” of unions more clearly than they do now.

In combination, these changes suggest a basis for a new political role for unions, at both the local and national levels, as advocates for the legislated social protections and supports needed to ensure equity as well as innovation. As already discussed, the welfare state needs to be moved from a jobs-based system to one of more generic social entitlement. Public programs—as in unemployment insurance and training—need to take full measure of increases in job mobility and risk.

And, especially in the United States, the state needs to help spur industrial upgrading of the desired sort not only by rationalizing its services to firms, but by using its residual powers of direction (purchasing power, direct regulation of wage and production standards) to encourage movement in the right direction. New-model unions, as agents of the general interest, could play an important role in making sure that all this happens.

B. Internal Reform

The labor movement that did these things would have very broad appeal. It would also, however, be a labor movement that looked rather different from the one that now exists. While many unions in particular locales already engage in just such practices, a commitment to this sort of egalitarian productivism is not, in general, the way unions would characterize their role. Taking that commitment seriously would imply, among other things: (1) sustained efforts within the labor movement to develop the technical capacities for guiding human capital systems, technology diffusion programs, and firm management itself; (2) a massive increase in organizing, coupled with a willingness, even eagerness, to accept "nontraditional" collectivities of workers as allies; (3) a much more active, and independent, political role, at all levels of government; (4) an overhaul of internal rules on jurisdiction to get new institutional boundaries carved along genuinely functional lines and to permit the direction of inter-union cooperation on issues of cross-cutting concern; (5) generalization of an "organizing" model of unionism with much heavier reliance put on membership involvement and democratic direction; (6) consolidation of directive powers, under democratic guidance, at the core of the labor movement—a two-step process perhaps best accomplished by greater direct membership election of national officers; (7) and more. In brief, the labor movement would need, in ways manifest to the general public, to "reinvent" itself as a lively, democratic, intellectually self-assured, popular force for egalitarian productivism. This will involve breaking some eggs inside the labor movement.

C. Putting It Together

Suppose however, through means best known to it, the labor movement made such moves and signalled their making to the general public. Suppose it announced, in public fashion, what it now saw as its vision, given a changed economy, along the lines suggested. Suppose

it offered something like the general reform package suggested, noticing with the reader that all of its elements are perfectly consistent with, even supportive of, such a transformed social role. And suppose then that it said to business, government, and the general public:

What we intend to do is manifestly good for the country. To do it, however, we need labor law reform. The reform we seek is not self-interested. In part, indeed, it will pose a challenge to our past practices, even as it permits us the space for internal transformation on which we are now bent. It respects free association, equality, and the requirements of a productive capitalism. It expands choice for all, while limiting inequality and providing the basic security needed for flexible adaptation to today's economy. All evidence suggests that it will promise a vast improvement in human happiness and welfare, not to mention competitiveness. Have you got something that does all those things better?

Suppose, that is, that labor sought to make "labor law reform" congruent with "labor's transformation" and offered "labor's transformation" as something manifestly guided by declared interest in meeting very general concerns—about economic well-being, insecurity, competitiveness, some residuum of democratic feeling—alive and well in the general population. Would there be takers? Would a number of people see their stake in labor law reform, so described and understood? Would they be more prepared to join the fight that will inevitably be needed to make it happen? I think so. And I see no realistic alternative equally as hopeful.

