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EMPLOYEE CAUCUS: A KEY INSTITUTION IN THE EMERGING SYSTEM OF EMPLOYMENT LAW

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If union density does shrink to five percent of the American workforce, how will employees express and act on their grievances with their employers? The not-very-radical initial thesis of this Article is that, in thinking about this admittedly speculative question, one should look to how American employees in nonunion settings actually pursue their interests. The conclusions that will be developed are that (1) the voluntary, informal caucus of employees will emerge as a crucial institution of employee representation, particularly in the vast majority of workplaces that have no unions; (2) such caucuses will often emerge along ethnic, racial, gender, or sexual identity lines; (3) such caucuses, though surely not envisaged as part of the Wagner Act system,¹ are already significantly protected by federal labor law; and (4) if one concentrates on the emerging caucus, one can see certain aspects of labor law that frustrate or impede their development that will come under scrutiny over the next decade and might profitably be altered.

Employee representation through caucuses is most developed among higher-educated employees in high technology workplaces who communicate through computer networks. As such, it is of interest even if it never spreads much beyond those workplaces. However, I believe, and will argue—most speculatively—that the high technology workplace will play roughly the role in the American imagination that the automobile factory did in the first half of the century, and that the institutions of employee voice that develop in that industry will be

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1. The Wagner or National Labor Relations Act is codified at 29 U.S.C. §§ 151-169 (1982). The "Wagner Act system" includes the practices that were encouraged by and reinforced that legislation, of which the archetype was always collective bargaining in the automobile industry: exclusive representation by a majority, industrial union; formal, written collective agreements; industrial action limited to interest disputes at the termination of the agreement; grievance processing, conceived as distinct from interest disputes, through formal channels ending in arbitration. The best analysis of the relationship among American law, the economy, and institutions of industrial relations is CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 15-33 (1988).

a major symbolic reference point far beyond their site of origin.² Employee caucuses thus have the potential to become, if they are not already, the dominant institution of employee voice in the United States.³

I. COMPETING INSTITUTIONS OF EMPLOYEE VOICE

Most of what is written about American labor law these days responds to the dramatic decline in union representation; it is not necessary to repeat the facts here. This Article shares the common assumption that, for most employees, work will continue to be less than perfect; complaints, grievances, and disputes will arise; and institutions will continue to be necessary for their resolution.

Scholars of industrial relations and labor law have not exactly covered themselves with glory as forecasters. Few predicted the dramatic decline in union density (just as few at the turn of the 1930's predicted the increases of that decade). I do not claim any great skill as a forecaster and admit that informal caucuses may never play any great role in employee relations. This might be the case if employees

2. I am in the very early stages of preparing a book on the emerging system of employment law and relations in high-technology professional employment as a basis for reshaping American employment law generally. The key elements of the new system of employment law, as I see them, are: pluralistic representation, in which employees are represented at different times by a variety of formal and informal caucuses, none of which purports to speak as an "exclusive" representative; flexible compensation arrangements, including heavy use of profit sharing and employee ownership; representation designed to monitor and enforce these flexible compensation arrangements and including direct participation in corporate management, such as through employee directors, employee share ownership, and joint action committees or teams; all the arrangements of flexible compensation, and other products of pluralistic representation, understood as implicit contracts; appreciation of employees as intellectual laborers, including articulate norms on the ownership of employee ideas and knowledge; and a more developed sense of employee autonomy and privacy.

The larger work will develop these themes with many examples from American workplaces that are prototypes of these approaches. The present Article, however, was designed to be brief and punchy; I will use only two major examples and spare the reader extensive documentation of many broad assertions I hope to establish in the larger work.

3. "Caucus" is not a term of art and was selected because it presently has no technical meaning whatever in labor or employment law. I mean to emphasize the loose and informal organization of such groups. For purposes of this Article, the most significant forms of "caucuses" will be (1) unorganized networking and griping; (2) internal pressure groups that form in protest of *ad hoc* decisions; and (3) "identity" groups like women's, Black, Latino, Asian, or gay and lesbian caucuses.

"Employee voice," which has become almost a cliché, is a concept developed and made popular in RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984), applying to employee relations the conceptual scheme of ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). It does not have a precise operational meaning and is meant to refer loosely to union activities that affect management through mechanisms other than the creation of a cartel or monopoly over the price of labor stressed by neoclassical economists. In practice it amounts to the revival of what used to be known as "institutional" labor economics.

come instead to be routinely represented either by labor unions as we have known them, or by some alternative institutions, such as statutorily-required works councils or employee participation committees. I favor statutory changes to facilitate union organizing⁴ and to require experimentation with different forms of required employee councils. However, I do not expect either to emerge as a typical or modal way of representing employees.

It is possible that unions will find the way to reach the growing ranks of white collar, professional, managerial, and technical workers that has eluded them so far, and the same may be true for poorer-paid service workers.⁵ Success in organizing either group would plainly require some changed union attitudes, and perhaps legal change as well. Unions historically negotiate wage and employment stability chiefly in the context of large enterprises, preferably oligopolistic sellers that can adapt to lengthy and inflexible contracts, formal job descriptions, and seniority ladders. There are simply fewer and fewer such enterprises in the American economy, and will be fewer yet if mass production industry is encouraged to relocate to Mexico under the North American Free Trade Agreement. Unions in the Wagner Act framework have not been able effectively to address issues of individual career development and enterprise planning and culture that obsess professional workers.⁶

4. The best thought-out proposal is PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 225-81 (1990).

5. For a detailed analysis of how American union structure, organization and practices represent adaptations to an economy of mass production industry, see HECKSCHER, *supra* note 1, at 15-33.

6. From the unscientific sample of people I happen to talk to, including my own students, no complaint about unions of teachers, professors, or other professional workers is more common than the charge that the union seems interested only in wages, benefits, and parking fees and uninterested in issues of the scope, direction, and quality of the enterprise (e.g., education or children). These attitudes are deeply ingrained in American union practice and would be unlikely to be affected by the modification of National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988), to accommodate collegial organization, as advocated by David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 *YALE L.J.* 689, 754-56 (1990). The issues that my students and I would like to see unions of professional employees address—I speak here as one represented by the American Association of University Professors—are not the issues that a defender of collective bargaining for professional employees shows their unions addressing. That list includes such issues as work load and job descriptions that are much closer to a traditional industrial union agenda, though Rabban also shows some bargaining over professional standards, organizational policy, and commitment of organizational resources. David M. Rabban, *Is Unionization Compatible with Professionalism?*, 45 *INDUS. & LAB. REL. REV.* 97, 99-110 (1991). It is possible that fairly major changes in § 8(a)(5), increasing union access to company information and bargaining over areas now defined as managerial prerogatives, might help spark union bargaining in these areas, though in my opinion the deficiencies have more to do with union tradition and culture than the legal framework.

Recently, scholars have begun investigating mandatory elected statutory works councils such as are required by law in Germany, the Netherlands, France, and Italy.⁷ I agree with scholars who have observed that such councils perform many valuable public functions, such as lowering information costs for employers and employees, and enforcing statutory labor standards with less governmental bureaucracy.⁸ Some governmental subsidy or regulatory programs have begun to require organized employee representation as part of the program, which in nonunion workplaces means some kind of elected council. One can predict further experiments, which I favor, in mandated employee representation.⁹ Perhaps after some years of experimentation with elected councils in nonunion workplaces, consensus will form on an appropriate format that might be required in all work-

On the vast areas of enterprise planning and culture that are effectively unreachable by employees under American collective bargaining, see Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 40-56 (1988) (needs of working people unmet through collective bargaining unless supplemented by democratic, participatory institutions); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 86-147 (1988) (legal exclusion of workers from enterprise participation). Employers are, of course, absolutely privileged to refuse to recognize representatives of the large, undefined set of "managerial employees." *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (ordinary university professors are "managerial employees" excluded from NLRA). See David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals under the NLRA*, 89 COLUM. L. REV. 1775 (1989) [hereinafter Rabban, *Distinguishing Excluded Managers*] (supporting exclusion); Karl E. Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 13 SOCIALIST REV. Sept.-Oct. 1983, at 99 (criticizing exclusion).

7. Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13-79 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) [hereinafter *EMPLOYEE REPRESENTATION*]; *WORKS COUNCILS* (Joel Rogers & Wolfgang Streeck eds.) (forthcoming); WEILER, *supra* note 4, at 282-95; Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980).

8. Clyde W. Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 540-45 (1992) (advocating statutory safety committees as a supplement to the comparative failure of bureaucratic and common law remedies).

9. The proposed new program for national health insurance may have provisions for formal representation of employees in the health industry.

For another example, I would favor mandatory statutory elected councils of employees who work at home. The difficulties in enforcing labor standards for workers working at home, on which see *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945) (upholding Department of Labor ban on homework in seven industries because of difficulty in enforcing labor standards); Fair Labor Standards Act § 11(d), 29 U.S.C. § 211(d) (1988) (authorizing Department to ban homework); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) (Secretary must consider alternatives to deregulation before lifting ban on homework in knitted outerwear); *International Ladies' Garment Workers' Union v. Dole*, 729 F. Supp. 877 (D.D.C. 1989) (permitting Secretary to replace ban on homework with certification system in five small handiwork industries, relying in part on infrequency of departmental investigations of homework); HOUSE COMM. ON GOV'T OPERATIONS, *HOME-BASED CLERICAL WORKERS: ARE THEY VICTIMS OF EXPLOITATION?*, H.R. DOC. NO. 99-677, 99th Cong., 2d Sess. (1986); could be reduced by requiring employers employing home workers to divulge records of hours worked and compensation to an elected home workers' council.

places above a certain size, as in the European statutes. I do not believe, however, that there is any such understanding now that would permit imposition of a uniform format on all American workplaces. I also do not believe that representational structures having no organic relationship to existing worklife have much chance of being successfully imposed by statute.¹⁰

In any case, the typical American employee in 1993—as in any other year in American history¹¹—is represented neither by a labor union nor an elected works council. If this fact does not change, and if this employee has a complaint, grievance, or dispute on the job, what is she or he likely to do?

The worker might quit her job. In the blessed world of law and economics, this happens costlessly and painlessly; if the worker quits, a new worker is hired at the same rate, and the worker who quits immediately finds a new job that pays her the value of her marginal product. Alas, there are no professional labor economists who believe that this is the way things work. On this descriptive issue, neo-classicists like Edward Lazear of the University of Chicago have done outstanding, pioneering work on the implicit labor contracts that tie workers to firms over the long term, of which the most significant feature is the wage that increases over time, irrespective of changes in productivity.¹² Of course, many of these implicit employment contracts lie in ruins after the last decade.¹³ For present purposes, however, it is enough to note that we are nowhere near the happy land of

10. A sobering recent failure are the Auroux laws of President Mitterand's administration in France, which were supposed to institutionalize direct, unrepresented expression by workers at the workplace and turned into a vehicle for employers to introduce quality circles or management-dominated organization. W. RAND SMITH, *CRISIS IN THE FRENCH LABOUR MOVEMENT: A GRASSROOTS' PERSPECTIVE* 215-19 (1987); Francois Eyraud & Robert Tchobanian, *The Auroux Reforms and Company Level Industrial Relations in France*, 23 *BRIT. J. INDUS. REL.* 241 (1985).

11. See generally Sanford M. Jacoby, *Norms and Cycles: The Dynamics of Nonunion Industrial Relations in the United States, 1897-1987*, in *NEW DEVELOPMENTS IN THE LABOR MARKET: TOWARD A NEW INSTITUTIONAL PARADIGM* 22-25 (Katherine C. Abraham & Robert B. McKersie eds., 1990).

12. Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 *J. POL. ECON.* 1261 (1979). For further economic analysis of implicit employment contracts, the best starting points are the anthology *EFFICIENCY WAGE MODELS OF THE LABOR MARKET* (George A. Akerlof & Janet L. Yellen eds., 1986), and the survey, Sherwin Rosen, *Implicit Contracts: A Survey*, 23 *J. ECON. LIT.* 1144 (1985). For legal implications, see WEILER, *supra* note 4, at 63-71, 134-52 (wrongful termination law as enforcement of expectations justified under implicit employment contracts); Alan Hyde, *In Defense of Employee Ownership*, 67 *CHI.-KENT L. REV.* 159, 176-79, 199-203 (1991) (employee ownership as solution to social externalities and inefficient incentive structure associated with implicit employment contracts); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 *N.C. L. REV.* 1189, 1203-18 (1991) (summarizing economic literature on implicit employment contracts).

13. See, e.g., Louis Uchitelle, *Strong Companies are Joining Trend to Eliminate Jobs*, *N.Y. TIMES*, July 26, 1993, at A1.

law and economics in which there are no workplace disputes because unhappy employees just go elsewhere. Rather, employer abrogation of implicit employment contracts is a fertile source of reported employment litigation.¹⁴

So, for practical purposes, the contemporary American worker with a gripe has no union, no works council, and may not feel like quitting. Of course, she or he may “lump it”—the world’s most common and time-honored method of dispute resolution¹⁵—and internalize the dispute. While some such “lumping it” is socially useful—people cannot be encouraged to fight every grievance—one may well question whether the levels of internalization common in American employment are socially optimum.¹⁶ She may retaliate quietly against the employer; it is impossible to form any judgment of the frequency of this or the social costs imposed.¹⁷

She may find a lawyer and litigate. Increasingly, this is what employees do, at least, comfortable upper-level employees who can afford lawyers,¹⁸ and the field of individual employee litigation is now a law school course all by itself. It would be hard, however, to find anyone who believes that the nation has enough judges and courthouses to make common law litigation the modal institution of employee grievance processing.

So, while legal and practical alternatives for employees do exist and may even flourish over the next decade, the fate of spontaneous and informal employee responses to their grievances is worth some examination as a fundamental institution of employee representation in the nonunion workplace.

14. Employment contracts “implied in fact” from consistent employer practice: *Gilbert v. Durand Glass Mfg. Co.*, 609 A.2d 517 (N.J. Super. Ct. App. Div. 1992); *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991) (Alaska law); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (contract created by course of employer conduct); *Wilkerson v. Wells Fargo Bank*, 261 Cal. Rptr. 185 (Cal. Ct. App. 1989). Obligations of “good faith” implied in the employment contract: *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984) (Scalia, J.); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

15. William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC. REV. 63, 81 (1974); William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 L. & SOC. REV. 695 (1975).

16. MARC LENDLER, *JUST THE WORKING LIFE: OPPOSITION AND ACCOMMODATION IN DAILY INDUSTRIAL LIFE* (1990).

17. SABOTAGE IN THE AMERICAN WORKPLACE: ANECDOTES OF DISSATISFACTION, MISCHIEF AND REVENGE (Martin Sprouse ed., 1992); BEN HAMPER, *RIVETHEAD: TALES FROM THE ASSEMBLY LINE 206-09* (1991).

18. See Summers, *supra* note 8, at 467 (“Because of litigation costs, all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal.”).

II. CASE STUDY OF AN EMPLOYEE CAUCUS I: NETWORKING AT TEKCO

The literature on informal employee groups in nonunion settings is surprisingly sparse.¹⁹ Professors Elizabeth L. Bishop and David I. Levine have graciously shared the following account from their unpublished research on the large, high technology company they call TekCo.²⁰

TekCo is a major high technology company with over eight thousand employees, most highly trained. Almost every employee has a work station at his or her desk, capable of accessing electronic mail, including an internal electronic bulletin board. TekCo encourages employee use of the internal bulletin board; its training materials note that "the TekCo Recycles program, . . . got started when someone suggested it in a [network] discussion. TekCo's policies on hiring minorities, allowing smoking in TekCo buildings, naming conventions for shared computers, and many other issues have been hashed out thoroughly in these discussions."²¹ Fifty top executives receive periodic two-page summaries of the main issues discussed on the network, under the title "What employees want."²²

In January 1990, TekCo management announced revisions in the profit sharing plan that would have eliminated any payments to employees in quarters with slow sales growth. "Literally hundreds of postings were entered on [the electronic bulletin board] in the busiest days. All told, on the order of one thousand messages were received. This issue elicited a greater volume of response than had any event in the history of the company. The system was literally swamped."²³ Most responses attacked the reductions, often bitterly, while a minority defended them. A common early theme was that "employees wanted a complete explanation for why the change in profit-sharing

19. One of my favorite books about work disputes resonates with many of the themes of this study and is surely overdue for a revival. DEENA WEINSTEIN, *BUREAUCRATIC OPPOSITION: CHALLENGING ABUSES AT THE WORKPLACE* 57-106 (1979), studied how workers in bureaucratic organizations—disproportionately female, white-collar, nonunion—changed their work. It includes rare academic discussions of basic techniques of "labor struggle" known to all such workers but ignored by scholars fixated on male industrial workers. These include leaking; informing higher-ups, including going to the Board; making your supervisor look incompetent; working to rule, and the like.

20. Elizabeth L. Bishop & David I. Levine, *Computer-Mediated Communication as Employee Voice: A Case Study* (Jan. 16, 1993) (unpublished paper presented at IFIP WG 9.1, Working Conference on NetWORKing, on file with author).

21. *Id.* at 12 (quoting TekCo's training materials entitled *TEKCO, AN INTRODUCTION TO THE NETWORK*).

22. *Id.* at 14.

23. *Id.* at 17.

was necessary, and how it would encourage growth as management claimed."²⁴ TekCo's CEO did write such explanations to the bulletin board, but many employees remained unconvinced:

The electronic uproar had a dramatic effect. As reported in a Harvard Business School case on TekCo: "Ultimately, the collective resistance that came through [the electronic bulletin board] caused management to change the formula." The causal role of the electronic resistance was supported by all of our respondents, both employees and human resource managers.²⁵

Meanwhile, one employee looked through bulletin board transcripts and recorded all of the contributors to the profit sharing debate who had used their actual names. He wrote to them, suggesting a meeting. A small group formed and met quietly several times that winter. Independently, a second employee sent a bulletin board message calling for the formation of a concerned employees' league. The groups later merged under the name Employees for One TekCo. Fifty employees attended the first meeting of the merged group, announced on the bulletin board, in May 1990.

The group sought the restoration of the "corporate culture they recalled (perhaps in a somewhat idealized form) from a few years previous."²⁶ They sought greater communication with top management, fewer management "perks" and other divisions among staff, and an institutionalized voice for employees:

Members of One TekCo repeatedly pointed out that they loved TekCo. Conversely, most members and leaders we interviewed went out of their way to note that they were opposed to a union at TekCo . . . they did not want outsiders involved and they did not want a union bureaucracy to intervene between employees and managers.²⁷

Management, however, has resisted formal employee representation and to date the only real effect of this agitation has been the formation of an Employee-Executive Forum in which fifteen employees, randomly selected from among volunteers, discuss their concerns with top managers. The Forum has no rights to information or consultation and no decision making authority; it was supposed to meet quarterly but in fact meets even less often.²⁸

24. *Id.*

25. *Id.* at 18 (quoting Michael Gibbs, Strategic Human Resource Management at TekCo: Managing Morale and Corporate Culture, Harvard Business School Case N-1-491-041 (1991)).

26. *Id.* at 20.

27. *Id.*

28. *Id.* at 24.

Both the spontaneous complaints to the network, and the later formation and activity of Employees for One TekCo, are examples of the broad category of employee action that I have been calling "caucuses": (1) They arise in nonunion workforces; (2) They are not experienced by the participants as "unions," not even nonmajority unions.²⁹ In fact, they may appeal to particular employees precisely because they are not "unions."³⁰ (3) They raise both demands that unions might raise in unionized workplaces, and demands that unions rarely raise. The demand for restoration of the old profit-sharing formula, the accompanying demand for information backing management's position, and the demand for specific institutions of employee voice are demands that unions might and do raise in collective negotiations.³¹ The demand for a more egalitarian and participatory corporate culture could theoretically be the subject of negotiations, but does not look much like what unions typically negotiate about or are institutionally equipped to implement. The demand for reductions in management compensation is strictly a permissive subject of bargaining to which management need not even respond, even if raised by a union, and as to which unions are forbidden recourse to economic ac-

29. On nonmajority unions, see Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 849-865 (1992); Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637 (1993); Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 205-63 (1991); Clyde W. Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

30. In determining caucuses' legal powers, rights, and obligations, it is unnecessary to determine whether they are "unions," a term which lacks legal significance. The relevant issues, discussed *infra* pp. 163-90, are whether the networking and formation of Employees for One TekCo are "concerted activities for . . . mutual aid or protection" under National Labor Relations Act § 7, 29 U.S.C. § 157 (1988) (to which the answer is, yes), and whether either is a statutory "labor organization" under National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1988), which is a much more difficult question.

31. The demand for information would have to be a demand raised in bargaining, since the National Labor Relations Act's duty to bargain in "good faith" does not entail any duty on the employer to share financial information with unions, absent specific claims of poverty not made by TekCo (and rarely made by employers advised by counsel). Nielsen Lithographing Co., 305 N.L.R.B. 697 (1991), *review denied sub nom.* Graphic Communications Int'l Union, Local 508 O-K-I v. NLRB, 977 F.2d 1168 (7th Cir. 1992). See Leslie K. Shedlin, *Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations*, 41 OHIO ST. L. J. 441 (1980).

While the creation of institutions of employee voice is generally a mandatory subject of negotiations with a union, certain kinds of committees are "employer assisted labor organizations" within the meaning of §§ 2(5) (defining "labor organization") and 8(a)(2) (prohibiting employer assistance to labor organizations). *E.g.*, E.I. DuPont de Nemours & Co., 311 N.L.R.B. No. 88, 143 L.R.R.M. (BNA) 1121 (May 28, 1993) (joint safety committees); Electromation, Inc., 309 N.L.R.B. 990 (1992) (joint "action committees"). The relevance of this body of law to employee caucuses will be considered *infra* notes 70-123.

tion.³² (4) They limit themselves to employees of a particular employer. This has obvious strengths and weaknesses, the strengths being greater spontaneity, loyalty to the group, and ease of mobilization without professional union staff or bureaucracy, and the weaknesses being difficulty in linking up with potential support outside, a scale too small to permit retention of professionals, and a difficulty in long term planning, as illustrated by the reactive mode of the TekCo groups. (5) Just like unions, they have successes and failures. However, in this particular case, the success and failure are not necessarily what one might predict. When I discuss informal employee caucuses with people experienced in labor relations, a common, indeed near-universal reaction is that, while such groups might succeed in establishing employee "voice," they could never engage in successful economic bargaining. One anecdote may or may not tell us much, except perhaps not to cling too tightly to our prejudices. However, at TekCo, the agitation over profit sharing was by all accounts stunningly successful, while the efforts to establish organized employee voice have accomplished little.³³

32. For examples of management compensation as a permissive subject of bargaining compare *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (changes in benefits paid to already-retired workers are a permissive subject of bargaining) with *Keystone Consolidated Industries, Inc.*, 309 N.L.R.B. 294 (1992) (changes in management pension plan are mandatory subjects of bargaining where some employees participate both in management and unit plan and changes in former have impact on latter). The TekCo employees alleged that changes in management compensation had an "impact" on their work culture and relations at work every bit as concrete as the "impact" on employees of the changes in management compensation in *Keystone*. One doubts, however, that the Board would find management compensation a mandatory subject of bargaining, were there a union at TekCo that sought bargaining on management "perks."

A union's recourse to economic action over a permissive subject of bargaining violates § 8(b)(3). Summers, *supra* note 7, at 382; See Theodore J. St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301 (1984).

33. This may of course reflect differences, not in the underlying demands, but in the tactics and organization deployed by employees. Employees were successful when, lacking any organization, they complained on the electronic network. After forming an organization and trying to establish channels of communication, they accomplished little. This may not be a coincidence but a generalizable theory of political action. See generally FRANCES F. PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (case studies of successful popular protest or insurgency transformed by organizers into ineffectual mass permanent organization). It is ironic that the Employees For One TekCo should be putting energy into as silly a mechanism of employee voice as meetings with management, when their electronic network already gives them a mechanism of employee voice as efficient and powerful as any in the world.

By contrast, TekCo employees do lack mechanisms of exerting power on management. Meetings with management will, however, not give them this. Of course, unions may not either.

III. HOW TYPICAL IS TEKCO?

At this point, it would be helpful for my argument to point to studies showing the typicality of the TekCo story: how many American employees participated in spontaneous protest last year, or work at a workplace with a women's or Black or Latino or Asian or gay and lesbian caucus (as opposed to a recognized union). I am unaware of any such data, so at this point the reader and I are left with our intuitions. I do spend a lot of time talking to people about their work, and am just beginning a longer-term study of employment relations in nonunion high technology (to speak pleonastically) workplaces. I can report anecdotally on the frequency of the three basic types of employee caucus we have now identified. (1) Networking and griping, without formal organization that abides over time, are of course practically universal. (2) Internal pressure groups like Employees for One TekCo seem fairly rare. (3) "Identity" groups like women's, Black, Latino, Asian, or gay and lesbian caucuses appear to be quite common in nonunion professional employment.

So, for our present purposes, let us leave the issue there, and each reader will decide for her or himself whether we are talking about thirty, sixty, or ninety percent of American workplaces. Under any of these assumptions, we have more American workplaces with informal caucuses than are unionized or likely to become so. It is worth our while to assess, insofar as we can, the strengths and weaknesses of informal employee caucuses and the existing legal framework of their rights and organization.

IV. POTENTIAL AND EXTANT LIMITATIONS OF INFORMAL EMPLOYEE ORGANIZATION

Recent discussions of institutions of employee representation have contrasted collective bargaining through more or less traditional labor unions; newer "associational" unions limited to single employers; and mandatory statutory employee councils. Whatever the merits of each of these plans, each would function better in a world with employee caucuses than in a world without caucuses.

A. Unions

The main problem with collective bargaining as the dominant institution of employee representation is that there is not very much of it, partly because employers resist it strenuously, partly because labor law makes it difficult to organize workplaces, and partly because many

employees, like employees of TekCo, want no part of it.³⁴ Caucuses, as we have seen, bring an institution of employee voice to workplaces that lack any. Caucuses also permit a targeted organizational appeal that might not be open to unions. A women's caucus need not choose between organizing around "women's issues" or "class issues."³⁵ Caucuses might function as way stations on the road to unionism.³⁶ Or, failing that, unions might find ways of representing subgroups of employees even in workplaces in which the union does not represent a majority.³⁷

Caucuses would be at war with collective bargaining under only two scenarios. First, it is possible that a workplace with a functioning caucus system might for that reason be more difficult for unions to organize. I know of no evidence suggesting this, and, for reasons discussed in the preceding paragraph, the contrary hypothesis strikes me as more plausible. Personally, I have no difficulty with employees choosing to be represented by caucuses instead of unions, so long as the choice is truly theirs. However, if a defender of collective bargaining demanded a guarantee from me that public policies to encourage informal employee caucuses would not impede union organization, I regret that I cannot give such assurance.

Second, if caucuses would not impede collective organization, could they coexist with it? Again we have little real knowledge here; not, I repeat, because caucuses have not been coexisting with unions, but because scholars have not really studied the relationship.³⁸

34. Those three facts are obviously related to each other. For present purposes it is unnecessary to settle on any particular explanation for the decline of collective bargaining. Compare Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, in *EMPLOYEE REPRESENTATION*, *supra* note 7, at 105-34 (declining employee demand for unions) with Joel Rogers, *In the Shadow of the Law: Institutional Aspects of Postwar U.S. Union Decline*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* 283 (Christopher L. Tomlins & Andrew J. King eds., 1992) (emphasizing shifts in underlying employment and legal environment).

35. Cf. ROBERTA GOLDBERG, *ORGANIZING WOMEN OFFICE WORKERS* (1983) (making contrast); KAREN BRODKIN SACKS, *CARING BY THE HOUR: WOMEN, WORK AND ORGANIZING AT DUKE MEDICAL CENTER* (1988).

36. This was the strategy of some groups of women office workers such as 9 to 5, which organized around women's issues and later became a division of the Service Employees' International Union. There is a book waiting to be written about this experience.

37. This is the theme of the articles cited *supra* note 29.

38. This Article focuses on the legal status of employee caucuses in the nonunion workplace. Consequently, the issue of the coexistence of employee caucuses and exclusive majority representatives is left for another day. The main issue here is the continuing force of *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (employees represented by a union are not protected by § 7 when they seek separate bargaining to address alleged race discrimination). This case, which has not often been followed, looks increasingly anachronistic, the last gasp of a pure system, of exclusive representation by the majority union, that fell apart in the following decade.

I see the continued existence of caucuses within labor unions as a potential antidote to some of the problems of unions: their bureaucracy, weak internal democracy, and low rates of participation. An

Today, employees represented by a majority union may nevertheless be covered by additional, explicit and implicit individual or group contracts governing workplace rights, that they may enforce in suits under the common law of contracts. The Supreme Court has held that employees may enforce such "individual" agreements if they were entered into at a time the employees were not represented by a union. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-512 (1983) (replacement workers may enforce contracts of permanent employment in state court despite contrary provisions of strike settlement agreement); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396 (1987) (laid off employees may enforce promises of job security made to them at times they held supervisory positions; a "plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement"); see also *Berda v. CBS, Inc.*, 881 F.2d 20, 24-28 (3d Cir. 1989) (employee may enforce promise of job security made orally to him in employment interview despite contrary provisions in collective agreement applicable to him once he took the job), *cert. denied*, 493 U.S. 1062 (1990).

Employees may also, however, enforce promises made to them even at the time they were represented by a union, so long as the promises were not part of a collective agreement, according to four courts of appeals. *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1407-10 (9th Cir. 1991) (unionized employees may sue in state court alleging employer's fraudulent promises of job security since such promises were not made in a collective agreement but in speeches made directly to employees), *cert. denied*, 113 S. Ct. 2927 (1993); *White v. National Steel Corp.*, 938 F.2d 474, 484 (4th Cir.) (oral promises to induce acceptance of supervisory positions, promising right to bump back into unit, enforceable in damages despite collective agreement prohibiting such bumping), *cert. denied*, 112 S. Ct. 454 (1991); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) (employees may sue in state court to enforce employer's oral promise made during ratification of severance pay plan that employees who accepted severance could reapply as vacancies opened up), *cert. denied*, 495 U.S. 923 (1990); *Anderson v. Ford Motor Co.*, 803 F.2d 953, 958 (8th Cir. 1986) (probationary employees allegedly promised permanent positions but bumped by laid-off employees on national preferential hiring list created by collective agreement), *cert. denied*, 483 U.S. 1011 (1987).

Finally, employees may enforce promises made to them even when the promises themselves may be unfair labor practices. For example, in *Kinoshita v. Canadian Pacific Airlines, Ltd.*, 724 P.2d 110, 113 (Haw. 1986), the employer greeted the union drive with a proposed new set of employee rules, including inter alia the right to appeal from discipline. Certainly an employer covered by the NLRA would violate § 8(a)(1) in making such a promise. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (§ 8(a)(1) prohibits "conduct immediately favorable to employees which is undertaken with the express purpose of impinging on their freedom of choice for or against union organization and is reasonably calculated to have that effect"). The employees voted down the union. *Kinoshita* was later summarily disciplined and denied a right to appeal. *Kinoshita*, 724 P.2d at 114, 15. The state court held that *Kinoshita* was entitled to enforce in contract the employer's promise. The fact that the employees voted down the union was said to be evidence of their reliance on the promise. *Id.* at 117-18.

If the above cases are correct, the employees in *Emporium Capwell* could have negotiated binding individual or group promises on job discrimination, had the employer been willing, and could have enforced those promises in suit in state court. It is thus difficult to explain why they could be fired for asking for such negotiations, unless we have one rule for scabs negotiating replacement jobs and another for African-American employees negotiating to end discrimination. Nor were the employees in *Emporium Capwell* unprotected because of the manner in which they sought separate negotiations (that is, picketing the store); the Board had not found that conduct "disloyal"; the Court of Appeals had remanded for just such findings; but the Supreme Court held that § 7 did not protect minority bargaining no matter how that demand was advanced. For a critique of *Emporium Capwell* from a different perspective, see Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*. *Notl*, 28 HARV. C.R.-C.L. L. REV. 395, 415-31 (1993).

active caucus system could encourage participation, provide loyal opposition to union leadership, and create a richer internal union political life without weakening the union in its relations with employers. At least, that was the conclusion of the classic study of the classic deviant case.³⁹ However, it is possible that some workforces would be put into the position of choosing between caucuses and unions. Still, where unions have been rejected, I see no possible objection to choosing caucuses over nothing.

B. Associational Unions

Charles Heckscher has written an interesting and important book advocating the evolution of union structure toward what he calls "associational unionism"—unions that are linked to specific employers and develop, monitor, and enforce flexible arrangements of job assignment and compensation.⁴⁰ Space does not permit a fuller summary of his views, which are definitely required reading for anyone concerned about employee representation. Employee networking and caucusing at TekCo might be seen as a rough start to Heckscher's associational unions. Certainly they combine receptiveness to cooperation with the employer with organizational forms designed to accommodate flexible compensation arrangements such as profit sharing. That is, they do not negotiate job descriptions or uniform pay scales. They do monitor employee compensation, demand that management back up changes with information, and force management to share information with them.

The biggest weakness, however, that I see in Heckscher's call for associational unionism is the isolation of these loyalist associations—their inability to link up with workers at other employers.⁴¹ While employee networks and groups like Employees for One TekCo share this problem, "identity" caucuses do not. Civil rights and community

39. SEYMOUR M. LIPSET ET AL., *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* (1956) (study of a union with a functional system of internal political parties).

40. HECKSCHER, *supra* note 1, at 177-231.

41. Antitrust law reinforces this conundrum. For example, if associational unions became common it should not be difficult to create a practice in which the employees' association would nominate or even in practice select a member of the corporate Board of Directors. However, the Department of Justice has taken the position that it is a violation of § 8 of the Clayton Antitrust Act for a labor union representing employees at competing employers (there, Chrysler and American Motors) to have "representatives" (even if not formal "agents") on the board of each. Letter from Sanford M. Litvack, Assistant Attorney General, Antitrust Division, to United Automobile Workers, 7 Trade Reg. Rep. (CCH) Current Comment, ¶ 50,425 (1981). So if board representation is important, employees may be forced to select associational (rather than national) unions.

organizations can link (say) Latino caucuses to each other, as well as help them undertake activities that apparently are constitutionally protected when undertaken by civil rights organizations but said to be forbidden to labor organizations.⁴²

C. Statutory Works Councils

Finally, as mentioned above, while mandatory works councils offer intriguing possibilities for efficient administration of labor statutes and employee voice,⁴³ as imposed organizations they would create potential problems of unresponsiveness, bureaucracy, low participation, and the need to impose legal duties of fair representation. While such problems could be solved in many ways, a functioning system of employee issue and identity caucuses would help counter trends toward bureaucratic representation.

V. THE EXISTING LEGAL FRAMEWORK FOR EMPLOYEE CAUCUSES IN NONUNION WORKPLACES

Five recent articles discuss different aspects of the role of the labor union that represents some, but less than a majority, of a workforce.⁴⁴ Since "labor union" is not a legal term of art, most of what is said there applies as well to a caucus of employees that does not describe itself as a union, and so need only be summarized here. Perhaps the most important point is that this recent flurry of interest in nonmajority unions may in practice be realized not by "unions" at all, but by identity caucuses or other informal employee groups.

The most important point of labor law necessary to grasp, in order to understand the rights and powers of caucuses, is that three crucial concepts of labor law are legally independent of each other: (1) the right of "employees" to engage in "concerted activities for . . . mutual aid or protection"⁴⁵; (2) a "labor organization";⁴⁶ and (3) the status of "exclusive representative for purposes of collective bargain-

42. Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycott of white merchants protected by First Amendment from application of state tort law) with *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (group refusal of lawyers to accept court appointments until fees raised violates Federal Trade Commission Act). See Gary Minda, *Rediscovering Progressive Labor Politics: The Labor Law Implications of Federal Trade Commission v. Superior Court Trial Lawyers Association*, 16 Vt. L. Rev. 71 (1991); James G. Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 Tex. L. Rev. 889 (1991).

43. See *supra* notes 7-10 and accompanying text.

44. See *supra* note 29.

45. National Labor Relations Act § 7, 29 U.S.C. § 157 (1988).

46. National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1988).

ing" given to "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes."⁴⁷

As we shall see, a half century of labor law has been built on the distinctness of these three concepts. This point is rarely stressed in labor law classes, because under the "law in action" "Wagner Act system," the three concepts ideally approach identity.⁴⁸ The preferred mode of employee activity, as of labor organization, was the labor union. Normal union practice was not to attempt to organize a unit, unless the union would represent a majority and thus be the "exclusive representative."⁴⁹ Thus, under these ordinary assumptions, the three concepts were intimately linked, as they described temporally an idealized evolution. "Concerted activities" were normally simply an inchoate organizational form leading up to action by a "labor organization," which would in time either become the "exclusive representative" or simply fail to operate at a given workplace altogether.⁵⁰

It is long past time for scholars of labor law to appreciate the legal disaggregation of these three concepts, as they have broken apart in practice in American workplaces, of which TekCo is but one example. Here is a primer of the definitions and uses of the two concepts crucial to caucuses, "protected concerted activities" and "labor organization." It may be old hat to labor law scholars, but this material is so rarely applied, and on occasion so misunderstood by courts, that a primer-like exposition may have value. It will emerge that

47. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1988).

48. One of the greatest strengths of American labor law scholarship of the Wagner Act period was precisely to treat the contents of negotiated collective agreements and the decisions of private labor arbitrators as part of "labor law," as may be seen in any introductory casebook. This approach helped inspire some of the most powerful European scholarship, e.g. GINO GIUGNI, *DIRITTO SINDACALE* 11 (8th ed. 1988) (the opening sentence of which defines union law as including norms propounded by the state and by worker organizations), often operating against positivistic traditions under which only the product of state actors could possibly be seen as "law." I am trying to continue, not criticize, this tradition. This accounts for the concededly cumbersome formulations in text. There is a sense in which the formal "labor law" of the United States has always kept the three concepts distinct, but there is also a very real sense in which lived "labor law" for half a century tended to elide the distinctions.

49. Herbert Schreiber, *The Origin of the Majority Rule and the Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 *RUTGERS L. REV.* 237 (1971); Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 *COLUM. L. REV.* 556, 563-64 (1945).

50. For an example of this assumption in an otherwise most valuable article, see Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 *U. PA. L. REV.* 1673, 1677 & n.17 (1989) ("This Article . . . cover[s] only employee *pre-organizational* activity . . . Pre-organization activity includes any mutual activity covered by NLRA § 7 when no union is present. It does not necessarily contemplate a union organizational drive.") (emphasis added).

nearly everything that employee caucuses do is “protected concerted activity”—protected against employer retaliation. Whether caucuses are “labor organizations” is relevant mainly where employers contribute support to them. Answering that question is unnecessarily difficult and illustrates the need for reforms to that body of law.

A. *Protected Concerted Activities*

“Concerted activities for . . . mutual aid or protection” (hereinafter abbreviated, as labor lawyers do, “protected concerted activities”) set the boundaries for *employer retaliation*. It is an unfair labor practice “for an employer to interfere with, restrain, or coerce employees in the exercise of the right[]” to engage in such concerted activities.⁵¹ “Protected concerted activities” are also part of drawing the line between areas of federal and state regulation.⁵²

Since the language of section 7 itself protects *both* the right to “form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining” *and* such activities “for the purpose of . . . other mutual aid or protection” it has been easy to hold, as a consistent feature of labor law, that employers may not retaliate against employees who engage in concerted activities even when there is no union and no prospect of one.⁵³ When TekCo employees complained on the electronic bulletin board about profit-sharing reductions, or contacted other employees to form a group, or held a meeting, or formed Employees for One TekCo, they were in each case engaging in “concerted activities for . . . mutual aid or protection” and, as such, were pro-

51. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988). While an employer may not discharge or discipline employees for engaging in protected concerted activities, the employer may, under a well-known historical anomaly, replace them. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (dictum). The complexities of permissible and impermissible retaliation against protected activities are beyond the scope of this Article.

52. States are forbidden to regulate activity “arguably protected” by § 7 or “arguably prohibited” by § 8. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). There are numerous exceptions, of unclear scope. *Baker v. General Motors Corp.*, 478 U.S. 621 (1986) (state may deny unemployment compensation to workers who “finance” a protected strike with special dues); *Sears, Roebuck & Co. v. San Diego County Dist. Council Carpenters*, 436 U.S. 180 (1978) (state may enforce trespass laws against picketing “arguably protected” by § 7 where employer had no way of obtaining NLRB ruling on whether picketing was protected).

53. The leading case is *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-16 (1962), in which seven unorganized machinists were discharged when they went home rather than work in an unheated and bitterly cold shop; the discharges violated § 8(a)(1). *See also* *Mike Yurosek & Son, Inc.*, 306 N.L.R.B. 1037 (1992) (refusing to work overtime as protected activity where a protest either against inconsistent management demands or against pay reduction); *Quality C.A.T.V., Inc.*, 278 N.L.R.B. 1282 (1986) (two linemen refusing to climb wet poles, protected against discharge).

tected against discipline or discharge. TekCo employees may not think they have much use for unions, but it is the NLRA, and the NLRA alone, that protects them from getting fired for the above activities.⁵⁴

This Article argues that labor law should commit itself to protecting employee caucuses as a fundamental institution of employee voice, not merely as a “pre-organizational” state. Should the nation follow that advice, the fact that the law under section 7 protects non-union employee organization would provide a good start. Nevertheless, there are flaws in section 7 as protection for employee caucuses, mostly quite well-known, that show up clearly in the glaring light of the nonunion workforce, particularly one unfamiliar with unions and collective bargaining.

First, by longstanding administrative interpretation, “managerial” employees, a category wholly unknown to and undefined by statute, are not “employees” protected by section 7. Moreover, the Board and Supreme Court have differed on the definition of “managerial employees”; there is no agreed-on definition; and the Supreme Court’s most recent attempt, to the extent it is comprehensible at all, is wildly overinclusive.⁵⁵ Labor law committed to voice for professional employees should consider abandoning the nonstatutory exemption for

54. It is possible that their discharge might in some jurisdictions be a tortious violation of public policy. In California, however, that tort is apparently limited to public policy with “a basis in either the constitution or statutory provisions,” *Gantt v. Sentry Ins.*, 824 P.2d 680, 687-88 (Cal. 1992) (dictum).

55. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (university professors are “managerial employees,” reversing contrary determination of NLRB). Managerial employees “represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.* at 683. This nondefinition is on a collision course with much commented trends in work organization that encourage all employees to supervise each other. For example, in *Jhirmack Enters.*, 283 N.L.R.B. 609 (1987), an employee was engaged in “protected concerted activity” when she warned a co-worker that employees had been complaining about his slow performance. “The employee complaints were prompted by their concern that Ramsey’s performance adversely affected their chances of winning the weekly production award and increased the possibility of overtime work. Allison’s purposes in relaying the complaints to Ramsey was to encourage him to take corrective action to protect his job.” *Id.* at 609 n.2. The Board held that Allison was engaged in protected concerted activity. *Id.* at 609. It seems to me that she could as easily have been held to be a “managerial” employee under *Yeshiva*, particularly if the company’s team organization gave employees formal responsibility to monitor each other. The line between “employee” and “manager” is blurrier yet in professional employment, blurrier still where employees work at electronic work stations with access to the same data base, monitoring each other. See generally SHOSHANNA ZUBOFF, *IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER* 255-63 (1988).

Rabban, *Distinguishing Excluded Managers*, *supra* note 6, at 1824-32, documents the post-*Yeshiva* morass and struggles to develop a better distinction, deriving from the sociological literature on the professions a distinction between “managerial” and “practicing” professionals, that regrettably just restates the problem. *Id.* at 1832-56. Rabban does not deal with team organization, mutual employee monitoring, and the like.

“managerial” employees, as the Board once attempted to do (only to be told that Congressional action would be required).⁵⁶

Second, as a very able line of recent scholarship shows, while section 7 protects group action in the nonunion workplace, the hypertechnical nature of its boundaries provides shaky protection for employees who take spontaneous action in pressured situations without assistance from any formal organization.⁵⁷ This comes about because of the lingering assumption that all of this is just “pre-organizational” activity. When we recognize that, for most American employees, the only voice is the inchoate voice of the network, the bulletin board, or at most the caucus, much of labor law that assertedly protects employees becomes either of limited value or a trap for the unwary.

For an example different from those discussed in the recent scholarship, consider the Supreme Court’s ruling in *Eastex, Inc. v. NLRB*.⁵⁸ The president of a union local sought permission to pass out to employees his own four paragraph newsletter urging members to register to vote and to write state legislators to oppose adding a prohibition on union security to the state constitution. The Supreme Court, affirming the Board, held that the newsletter was “protected concerted activity” under section 7. In context, this meant that the newsletter could be handed out by employees in nonworking areas of the plant during nonworking time. By implication, discharge or discipline of employees for handing out the newsletter would similarly have been an unfair labor practice.

In finding the newsletter protected, however, the Supreme Court applied no simple, bright line test—for example, that employees be protected in any nonviolent communication, irrespective of content.⁵⁹ Nor did the Court simply defer to the Board’s finding that the newsletter was protected. Rather, the Court read the entire text of the

56. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Eliminating the exemption for “managerial employees” might leave intact the 1947 statutory exemption for “supervisors” with personnel authority. National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1988), although this too does not sit well with the more interesting developments in autonomous work teams, on which see HECKSCHER, *supra* note 1, at 138-52.

57. Matthew Finkin, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck & Co., and Bird Engineering*, 71 IOWA L. REV. 155 (1985); Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989); Robert Gorman & Matthew Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981); Morris, *supra* note 50.

58. 437 U.S. 556 (1978).

59. A test I suggested some years ago. Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981).

newsletter itself, noted the newsletter's "relationship to employees' interests as employees," and "assume[d] that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."⁶⁰ The Board and lower courts have since identified "political advocacy" that, despite being addressed by employees to other employees on matters of employee concern, is not protected by section 7.⁶¹

In this state of the law, and particularly given the Fifth Circuit's recent refusal to defer to the Board,⁶² distribution of political litera-

60. 437 U.S. at 567-68.

61. *NLRB v. Motorola, Inc.*, 991 F.2d 278, 283-85 (5th Cir. 1993) (reversing Board; literature prepared by community group but distributed by employees, urging passage of city ordinance banning mandatory workplace drug testing, not protected; "distinguishing" *Eastex*: "[W]hat is political is not necessarily the content of the literature, but the purpose for which it was to be distributed—to advance CAPP's political agenda."); *Local 174, UAW v. NLRB*, 645 F.2d 1151 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (affirming Board; urging votes for specific candidates, on the basis of their record on labor issues, not protected).

62. *Motorola*, 991 F.2d at 278. This is an unbelievably stupid opinion. As the excerpt in note 61 shows, the court reverses the Board on just the sort of line-drawing judgment normally committed to the Board. Far worse, however, the court ignores the approach of the Supreme Court precedent, *Eastex*, 437 U.S. at 567-68 (§ 7 protection depends on content of literature) and substitutes a "test" never before employed by any Board or court—§ 7 protection for literature depends on the "purpose" for which literature is distributed; a "political" purpose is bad. The court fails to define the terms "purpose" of distribution, or "political" purpose. Nor does the court attempt to reconcile the result with existing law under § 7, which involves a great many cases classifying literature, or explaining how the conclusion that "political" purposes are impermissible can be squared with the *Eastex* decision itself.

I have been critical of the law that makes § 7 protection turn on the content of the literature, for reasons familiar from First Amendment law, and have urged, unsuccessfully, that § 7 protection turn only on "time, place, and manner" restrictions, not on the content of peaceful employee communication. Hyde, *supra* note 59. But whatever its faults, the "content" approach, consistently applied for a generation or more, must be preferable to a new approach pulled from the sky, with no regard whatever for its constitutional or labor law problems. It is *exactly* as if protection of speech or literature for First Amendment purposes depended not on the content of the speech, or any harm caused by it, but rather on the speaker's "purpose"—and "political" purposes, entirely lawful and previously held protected, could now serve to deny the speech protection.

The *Motorola* court gives the game away with the opening line of its opinion: "In this case, we are faced with determining 'how much is too much' on-the-job activism by employees." 991 F.2d at 279. With all respect, the court is faced with no such issue. The court is faced with review of an NLRB rule that found literature, distributed by employees to other employees, urging political action on workplace drug testing, to be protected by § 7. Courts of appeals have no general or specific warrant to decide when job activism by employees is "too much," and neither does the NLRB, as the Supreme Court has pointed out. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (§ 8(a)(3) and (1): "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489-98 (1960). Under § 8(a)(5):

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized Our labor policy . . . [does not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union [The Board] has sought to introduce some standard of properly "balanced" bargaining power, or some new distinction of justifiable and

ture carries considerable risk, for the line between what may and may not be distributed is exactly the same as the line between what may and may not get you fired. In the context of late 1970's America, when the *Eastex* case was decided, responsible advice to unions and employee caucuses was to make sure that a lawyer reviewed all political, or otherwise questionable, literature going out to employees. In that context, *Eastex* was a blow for bureaucratic control and against spontaneous employee communication.

In 1990's America, focusing on this problem through the lens of the informal caucus of unorganized employees, doctrines that expose employees to discharge for a good faith attempt to invoke protected group action that fails to anticipate subtle and shifting legal doctrine are truly traps for the unwary. The problem is not unique to the definition of "political" literature; it applies equally to the intricacies of "concerted" activity,⁶³ "impermissible" partial strikes,⁶⁴ "disparage-

unjustifiable, proper and "abusive" economic weapons . . . this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.

If the Board cannot determine what economic weapons are "too much," neither it nor a reviewing court can determine generally how much "activism" is "too much."

This case would be a good candidate for oblivion.

63. See *supra* note 57 and accompanying text.

64. "Normal" Wagner Act assumptions are reinforced by cases that deny protection to various forms of labor protest that can be successfully deployed by nonmajority caucuses or informal groups, and thus restrict protection only to orthodox total cessation of work. See, e.g., *International Union, UAW-AFL, Local 232 v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 245 (1949) (calling union meetings at irregular times during working hours); *Ford Motor Co.*, 246 N.L.R.B. 671 (1979) (demonstration in plant aisles); *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (refusal to work at previous capacity, as a protest against reduced wages). See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44 (1983); Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. (forthcoming Spring 1994).

These cases are full of fine distinctions that often trip up the unrepresented employees who act spontaneously. For a heartbreaking example, see *Charge Card Ass'n v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981). Unorganized keypunch operators, dissatisfied after a day of meetings with the company vice-president, called in sick on the following day. The court, denying enforcement to the Board's order, held that they were properly discharged. The court noted that a walkout would have been protected under the *Washington Aluminum* case, discussed *supra* note 53. However, the court held:

[T]here is not substantial evidence to support the conclusion that the reason for disciplining the employees was to punish them for engaging in a protected walk-out This Court cannot excuse lying even if in the context of protected activity Just as employees cannot express dissatisfaction with work conditions by physically abusing their supervisors, employees cannot express their dissatisfaction with work conditions by lying.

Id. at 275.

The court did not discuss any reasons why the keypunch operators might have called in sick rather than struck. Is it possible they were emulating the well-publicized actions of public employees, who, forbidden striking, sometimes call in sick with what in the case of policemen is sometimes called "blue flu"? Didn't they probably think they were somehow *more* protected by

ment” of the employer’s product,⁶⁵ and “offensive” belittling of supervisors.⁶⁶ All these subtle and treacherous limitations on section 7

calling in sick? Is it conceivable that they understood that a strike or walkout would have been protected while calling in sick was not?

If, as this Article urges, labor law treats employee action through informal and spontaneous groups as a fundamental element of labor policy, these cases will have to be rethought. Section 7 should protect any employee protest that does not violate criminal law. The Board cannot continue the callous indifference to unrepresented employees represented by the following:

[A]lthough employees who are unrepresented and are working without an established grievance procedure have a right to engage in spontaneous concerted protests concerning their working conditions, the precise contours within which such activity is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed.

Waco, Inc., 273 N.L.R.B. 746, 746 (1984) (holding unprotected nine employees discharged for gathering in the lunchroom and demanding that the manager meet with them as a group). The Board went on to state that “In our view, by the time these employees were discharged, late in the morning, they had overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected.” *Id.* When the Board refuses “hard-and-fast rules” and reserves to itself the power to “weigh many relevant factors,” it subjects employees who attempt to advance their interests, particularly unrepresented employees, to serious risk of job loss.

65. The Supreme Court held in *NLRB v. Local 1229, I.B.E.W.*, 346 U.S. 464 (1953), that certain disparagement of the employer’s product is “disloyal” and unprotected. This has launched a dispiriting forty years of cases that have not succeeded in defining this doctrine and cannot be reconciled with each other. See *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989), reviewing (but not reconciling) the line of cases.

66. Employees, like all subordinate groups, frequently challenge authority and demonstrate group solidarity through Rabelaisian, carnivalesque satire or lampooning of supervisors. See generally MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* (Helene Iswolsky trans., 1968). Employees without union representation are particularly likely to resort to struggle through satire. WEINSTEIN, *supra* note 19, at 90. The Board generally protects this material, but the courts of appeals often have a hard time with it. Two courts of appeals recently split on whether to protect sarcastic letters in which employees lampooned the style and orders of supervisors. Compare *New River Indus. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991) (unprotected) with *Reef Indus., Inc. v. NLRB*, 952 F.2d 830 (5th Cir. 1991) (protected).

On rehearing, the Fifth Circuit in the latter case was challenged to reconcile the two holdings, and held that the distinction was the presence of a labor union:

In *New River Industries*, “the record shows that there had been no union activity at the plant for about eight years” As Judge Niemeyer noted in writing for the Fourth Circuit, “the decision to discipline [the employees] for the letter was not even in the context of union activity.” Furthermore, the sole purpose for the employees’ action in *New River Industries* was to belittle the company’s gesture—not to call attention to offending conduct by management or other conditions of employment. In stark contrast, the tee shirt incident in the instant case was intimately connected, both substantively and temporally, with union activity

Reef, 952 F.2d at 840.

This is surely wrong. In fact, it is the precise mistake referred to *supra* notes 45-54 and accompanying text: confusing the protection given by § 7 with status as a “labor organization” or perhaps even “exclusive representative.” Section 7 protects employee group action that is not and never will be union action. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (unorganized employees who go home rather than work in an unheated shop). See also *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) (§ 7 right to distribute literature belongs to employees, not to their union; union may not waive employees’ right to distribute literature). The right of employees to distribute literature and t-shirts satirizing their bosses cannot depend on the presence or absence of a union.

Obviously if labor policy comes to protect employee caucuses as a basic unit of employee voice, *New River* is wrongly decided and *Reef* is correct. Without unions, employee voice is

have historically performed the function of reinforcing bureaucratic unionism, by eliminating the kinds of quick, spontaneous action that groups at low levels of organization (such as industrial unions in 1930's America) may undertake.

If labor law does undertake seriously to protect the informal network or caucus as a basic institution of labor law, many of these interpretations of section 7 will have to be loosened up to give breathing space to unorganized employees. In all cases, the search should be for tests for protection that correspond to actual patterns of employee culture without the necessity of careful lawyers' advice. Any legal standard in which the Board purports to pursue a "case-by-case" approach provides no practical protection for employees.⁶⁷

B. Labor Organization

Some caucuses receive financial or material support from employers, or permit supervisors or managers to participate.⁶⁸ This raises potential issues under section 8(a)(2) if the caucus in question is a statutory "labor organization."⁶⁹

simply going to be more spontaneous, more raw, and probably more witty as well in coming decades. The statute protects employee self-organization, however, and prohibits employers from interfering with it.

In truth, it is not necessary to adopt any special fondness for employee caucuses to see that *New River* is incorrect. In its insensitive hostility to employee self-organization, it gets my vote for the worst judicial failure in recent years to understand the most basic principles of the National Labor Relations Act.

Personally, I continue to adhere to my belief that, by analogy to the First Amendment, § 7 protects all employee attempts to communicate with each other that are not violent, obscene, or incitements to illegal action. Hyde, *supra* note 59.

67. *Cf. Waco, Inc.*, 273 N.L.R.B. at 746. The theory is familiar by analogy to First Amendment overbreadth doctrine: the idea that expressive, communicative, and organizational activities are easily chilled by vague legal standards that sweep broadly into protected areas and can only be applied retrospectively. See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L. J. 853, 867-75 (1991).

68. See, e.g., Caitlin Deinard & Raymond A. Friedman, *Black Caucus Groups at Xerox Corporation*, Harvard Business School Cases 9-491-047 (Mar. 22, 1991) and 9-491-048 (Feb. 10, 1991) (describing Xerox's 1974 decision to pay expenses for up to twenty national leaders to attend all regional black caucuses in order to help coordinate regional caucuses).

69. National Labor Relations Act § 8(a)(2): "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any *labor organization* or contribute financial or other support to it . . ." (emphasis added).

The only other relevance to status as a "labor organization" is that under § 8(b), only a "labor organization or its agents" may commit an unfair labor practice. The literature so far on informal employee caucuses does not show these groups doing anything that might constitute an unfair labor practice.

For one thing, several of the most significant unfair labor practices in § 8(b) can, either de jure or de facto, be committed only by organizations that function as exclusive majority representatives or seek to do so. Section 8(b)(3) imposes a duty to bargain, limited to majority representatives. Section 8(b)(2) prohibits labor organizations from causing employer discrimination that encourages union membership. In theory, a nonmajority caucus could induce such discrimi-

This is not the place for yet another comprehensive review of section 8(a)(2). My aim is rather to shed a cross-light on the interpretation of that section through the lens of employee caucuses. Employer assistance to employee caucuses might well be legal, as these groups might fit into one of a number of "exceptions" to the statutory definition of "labor organization" that have been opened recently by the courts of appeals and the Board. I do not favor most of these exceptions. Instead, I will offer a possible reform of section 8(a)(2) that will preserve the traditional reading of that statute, but permit employer-assisted representation when it is knowingly and freely chosen by affected employees.

1. Case Study of Employee Caucuses II: Black Caucuses at Xerox⁷⁰

The first black caucus group at Xerox was started by black sales representatives in the San Francisco Bay area in 1969 and was called BABE (Bay Area Black Employees). Those employees in turn helped organize a similar group in Los Angeles. Their main goal at first was to increase the number and quality of black employees at Xerox. BABE met with regional management and convinced them to assign one black interviewer to each black candidate; together with personal recruiting by BABE members, this helped increase black employment.

Soon the group became concerned about the assignment of inferior sales territories to black sales representatives and filed suit against Xerox. This suit was settled when top Xerox management flew to San Francisco, reversed local management, announced new territory assignments and some management promotions on the spot, and an-

nation, but in the vast majority of cases under § 8(b)(2) the discrimination comes about under union shop contracts that nonmajority groups may not lawfully negotiate. § 8(a)(3)(i). Section 8(b)(7) prohibits certain picketing for the purpose of obtaining recognition. Under the predecessor of this statute, it was held that picketing to achieve recognition as the representative solely of one's members is not picketing for recognition proscribed by § 8(b)(4)(C), the language of which was later copied into § 8(b)(7). *Douds v. Local 1250, Retail Wholesale Dep't Store Union*, 173 F.2d 764, 770 (2d Cir. 1949) (L. Hand, J.).

Caucuses might conceivably violate § 8(b) by inducing individuals at another employer to refuse to work (§ 8(b)(4)(i)(B)); picketing a "neutral" entity to get it to boycott another (§ 8(b)(4)(ii)(B)); *NLRB v. Retail Store Employees, Local 1001*, 447 U.S. 607 (1980) (picketing insurance agencies urging consumer cancellation of policies of targeted insurance company); or generally coercing employees under the catchall § 8(b)(1)(A). Should any of these occur, it would be relevant whether a given caucus was a statutory "labor organization."

70. This account is drawn from Caitlin Deinard & Raymond Friedman, *supra* note 68. "Black" is not capitalized in their account and I have followed that usage, which is apparently current at Xerox, here.

nounced that checks to equalize past earnings would be written and paid that afternoon.

In 1973, a similar group in Washington, D.C. called a weekend conference for black Xerox employees that was attended by 75 or 100 employees. Most of the conference consisted of information sessions and self-help workshops. Employees paid their own expenses. Organizers told Xerox that they would be holding the conference; some hostility from management was expressed.

By 1974, caucuses were functioning in six regions. Their leaders stayed in touch and attended each others' conferences, and there was some interest in forming a national caucus. Xerox managers demanded to meet with the leaders to clarify their groups' status. As the senior corporate Human Resource manager recalled:

There was a lot of concern that they would go from making suggestions to demands. If we recognized the blacks, then women and Hispanics and native Americans, every other group would [demand similar recognition] . . . and the managers would spend full time meeting with caucus groups. Things would get out of hand. People said if blacks and other protected classes had problems, they should talk to the affirmative action managers; that's what they're there for. We don't need another vehicle to address this.⁷¹

Leaders of regional caucuses did meet with some top managers at Xerox. The result of the meeting was that "there would be no national caucus meeting and no attempt to form a national group. Instead, Xerox would pay travel and hotel expenses for up to 20 people so that the leadership could all regularly attend each regional caucus conference." This leadership group took on formal responsibilities in conveying complaints that emerged at the caucuses about particular managers or other problems. In the 1980's, caucuses for Hispanics, Asians, and women did form at Xerox; and the Xerox groups have been models for groups at other large companies.

2. The Statutory Definition

The statutory definition of "labor organization" is unchanged since the original Wagner Act.⁷² It was designed to be broad, and was

71. See *supra* note 68.

72. National Labor Relations Act § 2(5):

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

The intellectual background and legislative history of this definition and the companion proscription of employer assistance in § 8(a)(2), are discussed in Mark Barenberg, *The Political*

further broadened in the drafting process⁷³ in order to outlaw employer-sponsored representation plans that had become popular in the 1920's. It was frequently applied in the early years of the Act,⁷⁴ and its only significant ambiguity was definitively resolved by the Supreme Court in 1959 in holding that even organizations that did not bargain collectively might still be "labor organizations" if they handled grievances or made "proposals and requests" of management.⁷⁵

Under the law as it was in 1959 and for a generation thereafter, it would appear clear that the black caucuses at Xerox are statutory "labor organizations." They are organizations in which employees participate; they raise grievances with management; and they make "proposals and requests." They are not illegal, but they are "labor organizations," and management's financial support to them, in the form of the subsidies to the national leadership, and the participation of some managerial employees, would violate section 8(a)(2).

Some supporters of collective bargaining feel that perforce they must be opponents of any alternative form of employee representation. They make just the sort of formalist argument made in the last paragraph—a sort of section 8(a)(2) fundamentalism: Congress meant to outlaw it, so outlaw it we must. This is certainly a valid legal argument, but the modern legal mind generally craves something more: a sense of *why* Congress outlawed the employer-sponsored representation plan. This question turns out to be surprisingly difficult to answer. By far the best treatment of the 1930's sources, in fact a major contribution to the intellectual historiography of the New Deal, is the recent article by Professor Mark Barenberg.⁷⁶ Barenberg concludes

Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 HARV. L. REV. 1381, 1442-61 (1993); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518-535 (1986).

73. The phrase "or any agency or employee representation committee or plan" replaced Wagner's original "labor union, association, corporation or society" in order to capture employer groups that consisted only of plans for electing representatives, without any more formal organization. See *Electromation, Inc.*, 309 N.L.R.B. 990, 999 (1992) (reviewing legislative history).

74. See, e.g., *Servel, Inc.*, 11 N.L.R.B. 1295, 1299-1319 (1939) (good review of early principles).

75. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210-14 (1959) (statutory term "dealing with employers" is broader than collective bargaining and includes at least presentation of grievances and making requests and proposals).

76. Barenberg, *supra* note 72. Professor Barenberg shows how crude and ahistorical are the categories often deployed in this debate. For example, Senator Wagner did not favor an "adversarial" system over a "cooperative" system, a distinction frequently drawn by those seeking to weaken the force of § 8(a)(2). See, e.g., *Electromation*, 309 N.L.R.B. at 1011 (Raudabaugh, Member, concurring) ("The Wagner Act signified a choice of the adversarial over the cooperative model."); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (distinction between "purely adversarial" and "cooperative" arrangements). Rather,

that the precise vice of the employer-sponsored representation plan (as compared with the nonunion workplace not outlawed by the Act), is the power of institutions of "representation" to shape, not merely "represent," the preferences of those supposedly being represented. He argues that proponents of section 8(a)(2) "viewed the cadre of company union representatives under managerial control as a political machine that penetrated the social infrastructure of the workforce. That penetration illegitimately distorted group deliberation and coerced worker choice more systematically than did the nonunion workplace."⁷⁷

This sounds right as an historic explanation of section 8(a)(2). However, it seems to me to make that section make sense only if one has some kind of baseline of "normal," dare I say "objective," worker interests, next to which the output of company unions might be described as "distorted."⁷⁸ While the framers of the Wagner Act had such a baseline,⁷⁹ I agree with Professor Barenberg that we can no longer identify unions with objective worker interests.⁸⁰ A further problem with Professor Barenberg's work is that it does not leave us with a very workable test for defining "labor organization" or "domination, interference, or support" (although it is not clear that this is Professor Barenberg's goal, at least in this article). In our current state of empirical uncertainty about the institutional determinants of worker preferences, it does not seem plausible to define statutory "labor organizations" as, say, organizations that *ex ante* or *ex post* "distort" worker preferences.

Senator Wagner strongly supported labor-management cooperation, Barenberg, *supra* note 72, at 1412-30, but "anticipate[d] that effective, collaborative relations would grow only within the protective shell of collective bargaining." *Id.* at 1461.

77. *Id.* at 1459.

78. If worker preferences were and are *wholly* endogenous to institutions of workplace representation and labor law, then company unions would indeed produce one or more sets, as would nonunion workplaces, craft unions, industrial unions, and so forth. But on what possible ground could public policy prefer one set over another? If worker preferences were wholly endogenous to institutions, what possible meaning could it have to say, as Barenberg does, that company unions were tainted because of their "systematic coercive and distorting effect on workers' choice over modes of workplace governance . . ." ? *Id.* at 1458; *see also infra* note 80. By what standard of "normality" do the company unions "distort"?

79. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Mass Production to Flexible Organization*, 94 COLUM. L. REV. (forthcoming Apr. 1994).

80. He describes a belief in determinate objective worker interests as "untenable" and "essentialist." Barenberg, *supra* note 72, at 1460. So we believe, we who have passed through Marxist objective class interests by way of the New Left and into postmodern social theory. So I believe, which is why, among other reasons, I believe that exclusive representation by majority unions is dying and will be replaced by the genuine pluralism of caucus organization.

A possible defense of section 8(a)(2) different from Professor Barenberg's is that company unions and representation plans are forbidden for the same reason that discriminatory discharge of union adherents, surveillance of union meetings, and threats to retaliate are forbidden: they are particularly effective disincentives to employee votes for unions. This is an empirical claim that has not been well researched. Quality circles or quality of work life groups may well make union organizing more difficult, although these groups are never found to violate section 8(a)(2).⁸¹ By contrast, the groups that are scrutinized under that section—company unions in the 1930's, joint employer-employee committees—rarely seem to impede union organizing in the short run. The CIO achieved much of its success in the 1930's by taking over company unions.⁸² More recent examples show the same technique.⁸³

If section 8(a)(2) exists in part to limit a particularly effective anti-organizing technique, its reach is far broader than necessary for this purpose. Returning again to the black caucuses at Xerox, it is hard to see how they impede union organizing in the short run: if any union sought to organize sales representatives, the black caucuses would not seem to offer much of a problem. Of course, there is a more long-term sense in which employees in a workplace where employers have encouraged numerous identity caucuses may be less interested in unions.

81. For an account of an employer's use of its quality circle program as the vehicle for an effective and manipulative anti-union campaign, see GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY* (1988).

Professor Joel Rogers has graciously shared with me unpublished internal AFL-CIO memoranda surveying organizing campaigns in the early 1980's and reporting that, "[t]hose few companies that had quality of worklife plans were virtually impossible to organize"—success rates of 8% in manufacturing and 33% in health care, as opposed to overall success rates of 36% and 54% respectively. This was a fairly informal survey and one may question whether there was adequate control for endogenous variables. Organizations with employer-sponsored representation plans are probably disproportionately employers that unions do not organize well anyway.

In any case, this study dealt only with "quality of work life plans," which, despite a great deal of agitation, have never been found by the Board to violate § 8(a)(2). The recent application of that section, as discussed *infra* notes 84-122, has been mainly against committees with employer and employee representation. Such committees are rarely as potent psychologically as quality circles or quality of work life groups. I am unaware of any literature discussing their impact, if any, on subsequent union organization campaigns.

82. Barenberg, *supra* note 79, carefully reviews the "company unions" of the 1930's for their effects on employee consciousness and later union organizing, finding them generally less powerful than the early reformers had feared.

83. One recent account of a union organizing campaign at a hospital sees the triggering event as management's abolition of a joint management-employee policy committee. RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* 126-27 (1988).

3. Recent Judicial and Administrative "Exceptions" to the Definition of "Labor Organization"

The Board, and to a greater extent some courts of appeals, have shared this disquiet with the underlying purpose behind the application of section 8(a)(2) to joint committees and elected representation plans. Rather than state clearly an underlying philosophy for the section, they have either carved out or intimated a laundry list of possible exceptions to the statutory definition of "labor organization."⁸⁴ Some of these exceptions might well be applied to declare that the black caucuses at Xerox are not "labor organizations." This is partly because the exceptions are mostly vague, lack theoretical appeal, and seem designed mostly to give the Board and courts a free hand to approve employer plans that they like. The structure of broad definitions modified by vague exceptions creates uncertainty in the law. Moreover, many of the exceptions can survive only as *ad hoc* exceptions; if carried out consistently, they would cause serious harm to more important values in labor law.

a. Communication Device

Some decisions have suggested that a body representing employees that is merely a "communicative device" is not "dealing with" employers and is therefore not a "labor organization."⁸⁵ The Board has not adopted this theory, though it expressly reserved judgment on it in *Electromation, Inc.*,⁸⁶ and one member, writing individually, has suggested a variant of it.⁸⁷

The Supreme Court has already considered and rejected just this argument. In *NLRB v. Cabot Carbon Co.*,⁸⁸ elected employee committees met monthly with management. The purpose of the commit-

84. The first of these cases was *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982). Before that case, courts of appeals that denied enforcement to Board § 8(a)(2) findings held that the employer's actions did not amount to "domination," "interference," or "support." See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975); *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955); S. Mark Tuller, Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973). None of these cases doubted that the assisted organizations were statutory "labor organizations."

85. *Streamway*, 691 F.2d at 295 ("The Board offers no evidence that anyone viewed the committee as anything more than a communicative device.").

86. 309 N.L.R.B. 990, 997 n.28 (1992).

87. *Id.* at 1002 (Devaney, Member, concurring) stated that a "communications committee" that is a "management tool" is not a statutory "labor organization." (citing *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985), discussed *infra* note 103). This combines two exceptions that I am analyzing separately.

88. 360 U.S. 203 (1959).

tees was described in their bylaws, as paraphrased by the Court, to provide "a procedure for considering employees' ideas and problems of mutual interest to employees and management."⁸⁹ The court of appeals held that since such groups did not bargain collectively, they were not "dealing with" the employer. The Supreme Court reversed, holding that "dealing with" was broader than collective bargaining, and was satisfied here when the committees made "proposals and requests."⁹⁰ The Sixth Circuit, in *NLRB v. Streamway Div.*,⁹¹ sought to distinguish *Cabot Carbon* as "a more active, ongoing association between management and employees, which the term dealing connotes, than is present here."⁹² The distinction is specious. Both sets of committees met monthly, and in any case the frequency of meetings was not important to the Supreme Court.

It is not clear what the difference is between a "communicative" group and a group that "deals," particularly since "dealing" consists only of the making of "requests and proposals"; what is left for a "communicative" group to "communicate" that is not a "request or proposal"?⁹³ Nor is it clear why such a distinction should be drawn, except to seize anything that comes to mind to weaken section 8(a)(2). If this exception endures, it is big enough to save the black caucuses at Xerox from being "labor organizations," as it is easy enough to describe the black caucuses as merely "communicative." However, I do not understand this exception or expect it to endure.

89. *Id.* at 205. The Court continued: "Examples of the problems of mutual interest to employees and management to be considered at the Committee-Management meetings were stated in the bylaws to be, but were not limited to, safety; increased efficiency and production; conservation of supplies, materials, and equipment; encouragement of ingenuity and initiative; and grievances at nonunion plants or departments." *Id.* at 205 n.2.

90. *Id.* at 214.

91. 691 F.2d 288 (1982).

92. *Id.* at 294.

93. The *Streamway* court did not attempt to distinguish its "communicative" committees on the basis of their subjects of interest, which did not appear to be restricted and had covered at least such subjects as vacation policy. 691 F.2d at 295 n.11.

A later case in the Sixth Circuit relied on *Streamway* to hold that a President's Advisory Council, through which elected employee representatives complained about attendance and leave policy and job bidding, was merely a "means of communication." *Airstream, Inc. v. NLRB*, 877 F.2d 1291, 1296 (6th Cir. 1989). *Cabot Carbon* was distinguished as a case in which elected representatives "made specific proposals about all manner of work conditions The *Cabot Carbon* scenario is a far cry from the circumstances of this case." *Id.* at 1296. Obviously, all the facts of *Cabot Carbon* mentioned by the *Airstream* court are present in its own case, that is, elected employee representatives making specific proposals about all manner of work conditions, except that the committees in *Airstream* did not adjust grievances, an independent ground of decision in *Cabot*, 360 U.S. at 213.

b. Group "Proposals" v. Collected Individual Suggestions

The *Streamway* court, in listing the "several factors" that convinced it that the In-Plant Representation Committee was no labor organization, noted that its elected representatives were limited to three-month terms and could not serve more than three months in a calendar year.⁹⁴ The court described this as "continuous rotation of Committee members" that made "the Committee resemble more closely the employee groups speaking directly to management on an individual, rather than a representative, basis"⁹⁵

The Board has now apparently applied this distinction. In a recent case "to provide guidance for those seeking to implement lawful cooperative programs between employees and management," the Board, in a lengthy section unadorned by case citation and irrelevant to the facts before it, stated that it would not apply the label "labor organization" to "a 'brainstorming' group" the purpose of which was "simply to develop a whole host of ideas," or a committee for "sharing information with the employer."⁹⁶ The Board went on to hold that quarterly all-day safety conferences in which participants made safety suggestions were not employers "dealing" with employees.⁹⁷

This loose language is at the very least overinclusive, stretching substantially into the activities of unions engaged in collective bargaining, never before doubted to be "labor organizations." Collective bargaining may well involve both "brainstorming" and "sharing information." What the Board must have meant is that a group that does *no more than* generate and transmit "individual" proposals is not a "labor organization." Although the Board does not say this, a more coherent account of these remarks might be that every "labor organi-

94. 691 F.2d at 290.

95. *Id.* at 294-95. Of course, the committee was elected, and called the In-Plant *Representation* Committee, but these facts were omitted by the court from its discussion here.

96. E.I. DuPont de Nemours & Co., 311 N.L.R.B. No. 88, 143 L.R.R.M. (BNA) 1121, (May 28, 1993).

97. *Id.* at 1125-26. The relevance of this observation is unclear, as the conferences were not alleged to violate § 8(a)(2). They were alleged to violate § 8(a)(5), the bad faith involved in bypassing a union and dealing directly with employees. The Board found that the safety conferences did not violate § 8(a)(5). Such a violation would not normally turn on whether the vehicle through which the employer communicated with employees was or was not a statutory "labor organization." In the best-known cases of employers violating § 8(a)(5) by bypassing the union, the employers simply communicated with individual employees. *E.g.*, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). There was no attempt to set up any kind of structure; there were just individual negotiations with employees. If the Board is now suggesting that an employer may violate § 8(a)(5) by bypassing the exclusive representative only if the bypassing fits the Board's new restrictive definition of "dealing" with employees in a "bilateral" mechanism, it has carelessly overturned a half century of law on exclusive representation.

zation” must at some point make a “proposal” in the name of the group.

If this “exception” to the statutory definition “exists” and makes sense, it was surely misapplied in *Streamway*, the only court case even arguably applying such an exception.⁹⁸ The court provided little detail about the operation of the “In-Plant Representation Committee,” but no support whatever for the idea that its members spoke only as individuals. What would be the point of having a “representative” from each department, of electing the “representatives,” of calling the group a “Representation Committee”?⁹⁹

However, even if no case law supports this exception, is there a case for letting employers set up and dominate groups of employees that collect “individual” suggestions but never make a group “proposal”? This exception gets no support in the statutory language, which does not contain the word “proposal.” Indeed, the word “proposal” is not a term of art in labor law and has no meaning at all that I can see. I suspect that the emphasis on “proposals” is just a way of distinguishing *Cabot Carbon*, which, as explained above, did note that the committees there made “proposals and requests.” It takes more than a word, however, to distinguish *Cabot Carbon*. The thrust of that case was that, both in 1935 and 1947, Congress had adopted a deliberately broad, nontechnical term (“dealing”) to describe the kinds of employee activities (not simply “representation”) that could not be undertaken through employer-dominated entities. The recent attempt to give “dealing” a restricted and technical meaning flies directly in the face of *Cabot Carbon*.¹⁰⁰

98. The *Streamway* court cited *General Foods*, 231 N.L.R.B. 1232 (1977). As discussed *infra* note 108, the autonomous employee teams there were a unit of organizing work assignments and in no way may honestly be described as groups that collected “individual” thoughts for management action.

99. 691 F.2d at 289-90 & n.2.

100. [T]he concept of “dealing” does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That “bilateral mechanism” ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.

E.I. DuPont de Nemours & Co., 311 N.L.R.B. No. 88, 143 L.R.R.M. (BNA) 1121, 1123 (May 28, 1993). The Board’s prototype of “dealing” reflects the continued primacy of the collective bargaining paradigm. The Board completely fails to explain how its attempt to give “dealing” some technical, extrastatutory meaning can be squared with the Supreme Court’s refusal to do so in *Cabot Carbon*, all the more so since that case held expressly, as the Board acknowledges in word if not deed, that “dealing” was broader than “bargaining.” The Board’s recent nondefinition (“ordinarily entails,” i.e., except if we hold otherwise) of “dealing” seems to equate it with “bargaining,” despite the Supreme Court’s admonition in *Cabot Carbon*.

Finally, a rule that permits employers to dominate groups that make “individual” suggestions but never “representative” “proposals” is almost impossible to police and tantamount to licensing employer evasion of section 8(a)(2) so long as “communication” uses the right labels. The black caucuses at Xerox show the difficulty of applying this exception. The apparent quid pro quo for Xerox’s limited financial support of the leadership group is the leadership group’s transmittal of the concerns and complaints of the regional caucuses. When this occurs, are the leaders making a “group proposal” or “communicating” an “individual” idea? For what policy purpose should this distinction be drawn?

c. No Anti-Union Animus

Another of the “several factors” relied on by the *Streamway* court to find that the committee there was not a labor organization was the absence of employer anti-union animus.¹⁰¹ The Board has expressly rejected this idea.¹⁰² It does not appear to promote clarity in the definition of “labor organization” to make employer motive a factor. It would be idiotic, however welcome to a beleaguered union movement, to have the question of whether a group is liable at all under section 8(b) (unfair labor practices committed by “labor organizations”) turn on employer motivation respecting that group, so that only the creatures and darlings of hostile employers could be guilty of unfair labor practices.

d. Management Tool

An administrative law judge, affirmed without opinion (on this point) by the Board, held that a “communications committee” with rotating membership, one representative from each department, was not a “labor organization” but rather a “management tool that was intended to increase company efficiency.”¹⁰³ Company officials testified that the committee was “a vehicle to discuss such matters as uniforms, tools and equipment,” “designed to help employees understand each other’s jobs so that there would be more understanding when a problem arose.” In practice, the committee discussed such employee complaints as technicians’ inability to get parts, equipment left so as to create safety hazards, and employee needs for training.

101. 691 F.2d at 294-95.

102. *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.24 (1992).

103. *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, (1985). Member Devaney cited this case with approval in his separate concurrence in *Electromation*, 309 N.L.R.B. at 1002.

The Administrative Law Judge admitted that the committee thus discussed "work performance and working conditions" but was nevertheless not a "labor organization." "The Communications Committee was not an employee representative or advocate. The Committee did not deal with the Company on behalf of the employees."¹⁰⁴

As formulated, this exception to the statutory definition seems spectacularly underdefined. Presumably any management group that sets up a representation plan, even one specifically and expressly expected by the 1935 Congress to be outlawed by section 8(a)(2), does so as a "management tool" "created by the Company for company purposes." If this becomes a functioning part of Board law, some narrower explanation will be necessary.¹⁰⁵

e. *Delegated Management Function*

Three Board cases, all from 1977, were cited with approval in *Electromation* and generalized as cases where groups, in which employees participated, were nevertheless not statutory "labor organizations" because their "purpose [was] limited to performing essentially a managerial or adjudicative function . . ." ¹⁰⁶ This is the most coherent and workable "exception" to the statutory definition yet put forward. It is also, in my opinion, the most pernicious. In trying to divide employer-assisted groups from collective bargaining by restricting each's agenda, the Board risks paralyzing *both* institutions.

The three Board cases dealt with teams or committees on which management personnel and employees sat together. Two involved joint committees with the effective power to resolve grievances. Each involved a pool of employees, elected by their fellows, who heard grievances in panels on which one management representative sat.¹⁰⁷

104. 274 N.L.R.B. at 66.

105. *Sears* does not appear to have been cited by the full Board for its § 8(a)(2) holding.

It is possible that *Sears* and *Streamway* will come to stand for the narrow proposition that a group, the members of which rotate, is not a "labor organization." This is coherent and workable, but I cannot see what policy goal it advances. When one employee is there from each department, it is clear that the employee is expected to act as a representative in passing along complaints and grievances; the employees in both those cases so understood their roles.

106. *Electromation*, 309 N.L.R.B. at 995.

107. There were a few minor distinctions between the two grievance committees that did not appear to affect the analysis. In *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977) (2-1 decision), the Sparks Nugget Employees' Council was unilaterally implemented by management—a violation of § 8(a)(5), as the employees were represented by a union. Panels consisted of the elected employee from the grievant's department, the director of employee relations, and an employee selected by the first two. Decisions of the panel were binding on all parties. The panels were strictly adjudicatory and made no proposals to management.

In *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108 (1977) (3-2 decision), the Grievance Committee evolved from open discussions but was then unilaterally imposed by management.

The third case involved the most far-reaching work innovation to come before the Board—self-governing teams of employees who made their own job assignments and schedules.¹⁰⁸

The Board held that none of the three groups violated section 8(a)(2), for none was a “labor organization.” The Board thus did not construe “domination, interference, or support.”¹⁰⁹ None was a labor organization, for all had power, either the power to decide grievances or to assign work. The Board seemed to say that, under the NLRA, “labor organizations” may not have power, and therefore anything that *has* power is no labor organization.

The fact that the grievance committees actually had power is thus what, in the wonderful world of Board logic, permits employers to dominate them. If either grievance committee had only the power to remonstrate, either would plainly have been a “labor organization” under the very words of the statute.¹¹⁰ Employer representatives may not sit on “grievance committees” that plead or remonstrate. Give the committee real power, however, and the Board washes its hands of the matter.¹¹¹

(These employees too were represented by a union, but General Counsel did not issue a § 8(a)(5) complaint.) Panels consisted of four employees selected by the grievant from the 10 elected employees, and a department head, from a department other than the grievant’s or a committee member’s, selected by the grievant. Decisions of the panel were effectively binding, although the rules provided for appeal to the personnel committee of the Board of Directors. The Grievance Committee had authority under its rules to recommend changes in rules to management, but had exercised this authority only once in a minor manner. The Board dissenters seized on this last fact in an attempt to distinguish *Sparks Nugget*.

108. General Foods Corp., 231 N.L.R.B. 1232 (1977). Similar teams at another plant of this employer were the subject of considerable academic and journalistic interest at the time. See Richard E. Walton, *Work Innovations at Topeka: After Six Years*, 13 J. APPL. BEHAV. SCI. 422 (1977); Robert Schrank, *On Ending Worker Alienation: The Gaines Pet Food Plant*, in *HUMANIZING THE WORKPLACE* 119 (Roy Fairfield ed., 1974); *Stonewalling Plant Democracy*, BUS. WK., Mar. 28, 1977, at 78-82. For continued academic interest in autonomous or self-governing teams, see HECKSCHER, *supra* note 1, at 138-52.

109. The Board might have held in each case that the presence of one management representative capable of being outvoted did not equal employer “domination, interference, or support.” However, the Board continues to adhere to the view that the mere presence of a supervisor or manager constitutes potential “domination” or “interference,” and implicitly maintained that view in these three cases. The Board’s rigidity in the standards under § 8(a)(2) contrasts with its flexibility under § 2(5), and has been criticized judicially. *E.g.*, NLRB v. Northeastern Univ., 601 F.2d 1208, 1213-14 (1st Cir. 1979) (calling for standard of “actual” not “potential” “domination”).

110. National Labor Relations Act § 2(5): “any organization of any kind, or any agency or employee representation committee of plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning *grievances* . . .” (emphasis added).

111. The “Grievance Committee” at the hospital did not “exist for the purpose . . . of dealing with” the Hospital “concerning grievances,” as Alice might have been told by one of Wonderland’s stranger denizens, since it did not “present” or “discuss” or “negotiate” with management. It decided grievances for itself. Mercy-Memorial Hosp. Corp., 231 N.L.R.B. 1108 (1977).

The mildest criticism that might be made of these decisions is that this is at least a restriction on the statutory definition not found in its text. “[O]rganization of any kind” that “exists for the purpose, in whole or in part, of dealing with employers” does not easily admit of a reading that says: “unless that organization is performing a managerial function.” “Managerial function” is not a statutory term of art, and thus this malleable exception may easily swallow the rule. Absolutely everything that genuine, labor union-type “labor organizations” do was once a “managerial function” and still is in nonunion workplaces: articulating employee preferences, forming collective action, administering benefits.

So as a statutory term, “managerial function” has no meaning and does not distinguish among the activities of employee organizations. What gives the “managerial function” exception its apparent content however is the analogous use of similar language in the law of mandatory subjects of bargaining under section 8(a)(5). That section merely creates a duty to bargain collectively. As late as 1958, counsel representing an employer in the Supreme Court came close to arguing that the duty applied to any lawful demand made by one party on another.¹¹² However, in that year the Supreme Court accepted the view of the Eisenhower Board that some bargaining topics were “permissive” in the Pickwickian sense that the party served with the demand need not discuss it, and the party making the demand would violate its “duty to bargain” in “insisting” on such a “permissive” subject.¹¹³

The “permissive” demands in that case were petty issues over which the Board did not want to see negotiations snarled: the union’s internal ratification procedures and the substitution of the local for the international union as bargaining representative. Quickly, however, “permissive” subjects became not subjects too trivial, but subjects too important—to management. In an influential concurring opinion, Justice Stewart denied that management had to bargain about “*managerial* decisions which lie at the core of entrepreneurial

The grievance committee at Sparks Nugget did not “deal with” management. “Rather, it appear[ed] to perform a function for management.” Sparks Nugget, Inc., 230 N.L.R.B. 275 (1977). One does not have to be a Hegelian to see the flaw here. What is a delegation except a partial invitation to negotiate the terms of that delegation, in deed and word?

112. Theodore J. St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301, 1305 n.25 (1984).

113. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). For a critique, see Note, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971, 1977 n.30 (1989).

control.”¹¹⁴ This category has expanded, not contracted, in recent years as cases stake out increasing “managerial prerogatives” as to which management need not bargain, and unions may not insist on their positions or employ economic force.¹¹⁵

It is presumably this body of law that the Board purports to import into section 2(5). Together with section 8(a)(5), they would create a sort of workplace kashrut. All “company” decisions are either “managerial” or “bargainable.” “Managerial” decisions need not be taken up with the union and may instead be submitted to any body of management’s choice, even one it chairs or dominates. “Bargainable” decisions require a different path to management unilateralism. If management creates a body with power over “bargainable” decisions (such as grievances), that body is therefore “managerial” and may be dominated by management. Under this scheme, “labor organizations” definitionally exercise no power and at most receive information and make requests as to a constricted list of issues. This bifurcation, lacking any statutory basis, has long debilitated collective bargaining.¹¹⁶ Over the next generation, it has the potential to debilitate alternatives to collective bargaining as well.

114. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (emphasis added). His examples included decisions to invest in labor-saving machinery or to liquidate assets and cease operations.

115. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (decision to drop a customer, eliminating jobs); *Newspaper Guild Local 10 v. NLRB*, 636 F.2d. 550, 560-61 (D.C. Cir. 1980) (codes of ethics):

[P]rotection of the editorial integrity of a newspaper lies at the core of publishing control [A] news publication must be free to establish without *interference*, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity.

Id. at 560-61 (citations omitted) (emphasis added); *Wells v. General Motors Corp.*, 881 F.2d 166, 170 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990) (dictum) (eligibility standards for rehiring employees is nonbargainable managerial decision). For a sustained critique of the category of “managerial prerogatives,” see ATLESON, *supra* note 64, at 111-135; Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 *CATH. U. L. REV.* 1, 49-52 (1988); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 *U. CHI. L. REV.* 73, 86-96 (1988).

116. Connoisseurs of hypocrisy particularly enjoyed the crocodile tears of Justice Blackmun’s footnote in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 n.6 (1987) (“The Union was confronted with the layoff Moreover, despite the Union’s desire to participate in the transition between employers, it was left entirely in the dark about petitioner’s acquisition.”). Justice Blackmun unaccountably failed to note that for two decades or so before 1981, the Board normally imposed a duty to bargain over decisions that resulted in job loss for employees. However, in that year, the Supreme Court held that “the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision” *First Nat’l Maintenance*, 452 U.S. at 686 (Blackmun, J.).

Enthusiasts for joint teams and committees normally emphasize their flexibility, adaptability, and ability to reach into problem areas that might elude collective bargaining or unilateral managerialism.¹¹⁷ While this upside potential is far from clearly established in the literature, there is no doubt that a problem-solving group or team will be ineffectual and disintegrate quickly if it is excluded as an initial matter from areas important to the participants.¹¹⁸ While I am agnostic about the long term potential of autonomous work teams and joint groups, I am confident that they will achieve little if their agendas are limited from the beginning to lists of controlled topics.

Unfortunately, if the Board continues to adhere to this approach in defining "labor organizations," it will also draw the line between caucuses that employers may support and caucuses they may not. To return to black caucuses at Xerox, their functions have changed over time, as befits a group that is employee-created and substantially employee-controlled. Yet for the Board, the question of whether Xerox may pay travel and other expenses for group leaders is just the question of the group's "purpose" at any moment in time, and the boundary lines are vague and shifting. If black caucuses "present" grievances, they are labor organizations and may not receive any employer support. If they merely "communicate" grievances on a "non-representative" basis, then under some court of appeals decisions

It is true that a footnote immediately following this sentence "intimate[d] no view as to other types of management decisions, such as . . . sales." *Id.* at 686 n.22. However, a chief impact of the decision in *First National Maintenance* has been to remove any obligation to share information with the union over decisions leading to job loss, so that the union is unable to evaluate whether the decision is bargainable or not. One might say that the union is "left entirely in the dark." See, e.g., *Knappton Maritime Corp.*, 292 N.L.R.B. 236 (1988) (partial sale of business; sales agreement not "presumptively relevant"; union must establish relevancy; established here when union showed "reasonable basis" for assuming sale not bona fide and purchaser merely alter ego of seller).

117. See, e.g., HECKSCHER, *supra* note 1, at 138-52. Enthusiasts do not have much else to emphasize. Despite all the hoopla about employee participation and productivity, there is no evidence that joint committees enhance productivity and some evidence that they do not. A rare, and fascinating, set of data on joint committees is provided by Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 247 (Lawrence Mishel & Paula B. Voos eds., 1992). Manufacturing plants accounting for nearly all machining activity in American industry were studied for productivity and willingness to adopt new technology. Plants with joint labor-management problem-solving committees, found in more than 47% of plants, were on the whole less efficient, less invested in new technology, and more likely to outsource, than the 13% of plants with unions.

118. Most observers believe this impeded development of Quality of Work Life or Employee Involvement groups in the automobile industry in the early 1980's. "You run out of diddly-squat things to do . . . you get tired of trying to figure out what you can do and what you can't." Robert J. Thomas, *Participation and Control: New Trends in Labor Relations in the Auto Industry* 4 (U. Mich. Ctr. for Res. on Soc. Org., Working Paper #315, n.d.) (quoting worker who had recently quit his "problem-solving group"); see also HARRY KATZ, *SHIFTING GEARS: CHANGING LABOR RELATIONS IN THE U.S. AUTOMOBILE INDUSTRY* 83 (1985).

Xerox may pay the travel expenses. At the other end, should they actually be given power to decide something, they might be “delegated management authority,” in which case management might fund them however it likes, perhaps even if its avowed intent is to discourage unionization.

We have then one of those depressing corners of Board law that will only grow worse over the next decades unless its first principles are radically rethought. Unfortunately, all the reform proposals of section 8(a)(2) that I have seen create more or other vague “exceptions” relating to the *purpose* or *agenda* of the plan. These respond to no principled generalization but merely multiply the possibilities for unions that lose representation elections to litigate.

4. A Proposed Solution: An Employee Free Choice Defense to a Section 8(a)(2) Complaint

I propose doing away with all attempts to define “labor organization” (or to limit that definition) that turn on groups’ agendas. Such definitions make planning innovative employee representation impossible, and destroy the very flexibility that is the only argument in favor of joint committees and teams. I oppose generally this dominant conception of section 8(a)(2). However, it is particularly inappropriate when we focus specifically on the problems of employee caucuses, as the growing, lively, vital mode of employee representation. It would probably be livable and might even be desirable to forbid such a group from receiving any support from employers. To me, however, the story of the black caucuses at Xerox suggests a more flexible approach. At crucial moments in the growth of spontaneous employee organizations, employer support may assist the group in better employee representation without posing any danger to national policy or to employees themselves—if employees know of the support and freely choose that form of representation.

To implement this strategy, the Board should return to the broad statutory definition of “labor organization,” as drafted by Congress in section 2(5) and construed by the Supreme Court in *Cabot Carbon*: if employees participate in it and it “deals with” employers concerning any conditions of work, it is a labor organization. The “exceptions” for “managerial tools,” “communicative groups,” or “delegated” arms of management should be eliminated. “Deals with” should not have a technical meaning but should include, as argued above, “communication” and “delegated managerial authority.”

If management wishes to support, assist, organize, chair, or participate in any employee group under this definition, it should be able to do so only if employees have consented. To accomplish this, the Board—after reestablishing the breadth of statutory “labor organizations” and eliminating the poorly-thought-out exceptions—should establish, through case law or rule-making, an “employee free choice” defense to section 8(a)(2) complaints. 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 (1) that the system was authorized by a majority of employees in a secret ballot; (2) that before the ballot, employees were specifically advised of their right to oppose the creation of such a plan without reprisal; and (3) that such authorization expires in some uniform period of time, perhaps one year initially and three years thereafter, unless reauthorized in a new election.

I would encourage recourse to these three steps by making them a genuine safe haven for employers who follow them: if employees genuinely authorize it, they may lawfully be represented by *anything* they choose. The Board does not often establish genuine safe havens, preferring to reserve total freedom to itself through vague standards that, as we have seen, turn on “all the circumstances.”¹¹⁹ As I have said, if there is any value at all in joint or employer-assisted representation as an alternative to collective bargaining, or a successor to it, or just something that some firms and employees find helpful that does not harm the economy, employers who set these things up must know what they may do.¹²⁰

I would let the employer conduct the authorization ballot and simply retain the documentation of the assurances given to employ-

119. For example, in *E.I. DuPont de Nemours & Co.*, 311 N.L.R.B. No. 88, 143 L.R.R.M. (BNA) 1268, 1270 (May 28, 1993), the Board comically described as “safe havens” its “exceptions” to the statutory definition of “labor organization” for (1) “isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed”; (2) groups that “brainstorm” but “make no proposals”; and (3) groups that “share information with the employer” but “make no proposals.” These are not “safe havens” in the sense that an employer may consciously create such a group and be confident that the Board will not find it in violation of § 8(a)(2). The idea of an employer creating an “isolated instance” group is pretty amusing. Rather, they are vague and manipulable labels that reserve to the Board the freedom to apply that section essentially however it likes. Management counsel routinely assist clients in the creation of such groups, but one doubts that counsel consider them “safe havens.” I assume that professionally responsible advice is that any such group potentially buys Board litigation.

120. If there is no value to employer-assisted joint committees, we should return to § 8(a)(2) fundamentalism. I think in a world in which most employees have no union and never will that we owe them some experimentation in alternative representation.

ees. The Board has no authorization to conduct such ballots now, unless the joint team or committee sought certification as an exclusive bargaining representative, which seems unnecessary and undesirable to me (for one thing, it would bar unions' organizational efforts).

This proposal attempts to respond to some courts of appeals that have been groping for the employee free choice idea.¹²¹ While I applaud this interest in employee free choice, if sincere, the problem is the absence of mechanisms for reliably determining employee desires in a nonunion workplace.¹²² The Board would perform a valuable service if it provided incentives for employers establishing joint committees or support for caucuses to discover what employees really want. The current regulatory regime cares about employee concerns only as an afterthought; its thrust is to encourage employers to design whatever plan they want and hope the Board or court of appeals will see things their way.

The precise details of the employee free choice defense could be altered, of course. I think it is important that it not be too onerous for

121. For example, the *Streamway* court noted that:

Two certification elections have occurred in the span of time covered by this litigation. No unfair labor charges were filed. [Other than the charges that were the subject of the enforcement proceeding before the court!] Those elections provided the employees with an uncoerced opportunity to make an intelligent choice between the status quo and the alternative benefits of . . . collective bargaining . . . This was their choice. We see no reason under the Act to disturb that choice or to tip the scales against it and in favor of that which the employees themselves have twice rejected.

NLRB v. *Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 295 (6th Cir. 1982).

In holding a system of joint committees not employer dominated, another court laid almost exclusive emphasis on what it saw as employee free choice:

The sum of this is that a § 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue [Here] the idea was still that of an employee, and it was approved by the employees The question essentially comes down to the significance of having management partners on the committees Yet this feature too was chosen by the employees, and it is one with which, for all the record shows, they are not dissatisfied.

Hertzka & Knowles v. NLRB, 503 F.2d 625, 630-63 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

122. In *Streamway*, the committees were set up and implemented by management. 691 F.2d at 289-90. The sole support for the court's assertion that the employees favored the system was the employees' contemporaneous rejection of union organization.

In *Hertzka & Knowles*, management called a meeting after a union had been defeated in a decertification election (later set aside by the Board which found that the employer had threatened reprisals if the firm stayed union). Management "asked for suggestions . . . on how to accomplish a management-employee dialogue," to which request, amazingly enough, an employee suggested a system of joint committees. 503 F.2d at 629. Those assembled at the meeting adopted the proposal. The court, reversing the Board, characterized this as "employee free choice," although it was required to resort to a litotes in order to establish this characterization. *Id.* at 630-31 (quoted *supra* note 121). I am less willing to equate the results of an open employee show of hands, under the eyes of a management that has just threatened employees with reprisals unless they decertify their union, with "employee free choice."

employers to establish. Requiring elections conducted by neutrals, for example, would offer little real benefit to employees but encourage employers not to avail themselves of the "free choice" defense. On the other hand, it might be desirable to restrict availability of the "employee free choice" defense to employers with no unfair labor practices in the preceding three years. To my mind, the important points of this defense are a firm statement that employees may select their own form of employee voice and that they are free to reject or alter the employer's plan.

I am well aware that describing such a defense as "free choice" is at best a metaphor. It is impossible to ignore the ways in which the daily exercise of employer power in any form shapes worker consciousness and sense of alternatives. I do not mean to suggest that voting for a joint committee plan that the employer clearly wants is "free choice" under any strong political theory of self-realization. I am making only the weaker, but still significant, claim that under present law there is neither the requirement that nonunion representation plans be acceptable to employees nor any real incentive to obtain such acceptance. The right to say no to the employer may not exactly be "employee free choice," but it is more than employees have now.

Employers would have incentives to design plans with which their employees would be supportive (and not merely "not dissatisfied"). Employers who wanted "communication" groups, brainstorming sessions, joint committees, autonomous teams, or joint grievance committees could have them—so long as employees voted them up in a simple yes-or-no ballot. How could any employer genuinely interested in "communication" and "dialogue" resist this proposal in good faith?

CONCLUSION: LABOR LAW FOR YUPPIES?

The depressing quality about most labor law scholarship these days, that adopts a perspective in favor of employee voice, is that nobody seems to believe publicly or privately that labor unions will ever represent more than twenty percent of the workforce; few think that legal reforms could bring even that about; yet nobody wants to begin to talk publicly about forms of employee representation that will succeed unions, except for mandatory works councils. While there is much in this Article that is speculative and much that will be disagreed with, I hope I have started a discussion about forms of repre-

senting employees that are actually found in American workplaces and could become the basis for new labor law policies.

I have also tried to show that this choice is not trivial. Of course it would be possible to protect employee caucuses as we have for fifty years—by sporadic invocation of section 7 of the NLRA. Nevertheless, I have argued, a real commitment to spontaneous employee self-organization requires attention to the actual forms of contemporary self-organization, of which the most significant include networks, informal caucuses, and “identity” caucuses. It also requires a willingness to reexamine doctrine, under disparate areas of labor law, that presupposes a world of collective bargaining and must be rethought if we become committed to spontaneous employee organization. This Article has identified two such areas: the protection of concerted activities and the law of employer assistance to labor organizations. This Article, however, merely begins that rethinking process.

I have tried to draw here briefly on some observable accounts of how employees in high tech industry pursue their interests. I am therefore confident that I will be accused of pushing a sort of “labor law for yuppies” that is irrelevant to the needs of the sweaty working class.¹²³ Since nothing could be farther from my intention, I want to close with a few brief speculative thoughts on the importance of the high technology workplace as a paradigm.

Scholars of labor law and industrial relations are comfortable with something they think they understand, called the system of “collective bargaining.” It is rarely appreciated that this is in large part an intellectual construct. Out of the thousands of American workplaces, intellectuals generalize the images we carry of “workplace,” “worker,” “employer,” “grievance,” “contract,” and “strike.” Nobody can carry around thousands of images of these things. These are thoughts that the mind organizes around prototypes.¹²⁴ Like all generalizations, they are to some extent normative.

123. Cf. Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2776 (1991) (reviewing PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990)) (“yuppie justice”); Matthew Finkin, *Back to the Future of Labor Law*, 32 WM. & MARY L. REV. 1005, 1022-23 (1991) (reviewing PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990)).

124. See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES TELL US ABOUT THE MIND* (1987) (discussion of the research in cognitive science backing up the importance of prototypes). Lakoff's work has become popular among some legal scholars in recent years to prove a number of points with which I am not comfortable, including a somewhat positivistic identification of some cognitive categories as derived from universal body experiences and thereafter limiting what is thinkable (except by the researcher criticizing

For most of us, when we talk about “collective bargaining” or “labor relations,” the prototypes come from the automobile industry. For half a century, the “worker” has been a male automobile worker, “work” an automobile factory, “contracts” automobile contracts. This is a complex psychological phenomenon that reflects generic American fascination with the automobile,¹²⁵ the high levels of achievement of the automobile workers in militant action and in their collective agreements, and the high quality of many individuals associated with labor relations in the automobile industry.¹²⁶ I do not, in other words, think there is any conspiracy here. I do think it is time to reexamine whether adherence to this prototype may disable us from understanding today’s workplaces.¹²⁷

The system of collective bargaining as an intellectual construct lies in disarray, a victim of the decline in American manufacturing, including automobiles, and the decline of unions. It is unlikely that “nothing” will take its place. Out there now, a new generation of intellectuals, scholars, and publicists are constructing a new “system” of work relations that will function for the next generation as the primacy of automobile labor relations functioned for fifty years. Even a regime of common law employment contracts may be described as a “system.”

others’ limited thoughts and who has miraculously escaped the constraining force of these metaphors). I cite Lakoff only as an introduction to the literature on the cognitive significance of prototypes.

125. See, e.g., CHRISTOPHER FINCH, *HIGHWAYS TO HEAVEN: THE AUTO BIOGRAPHY OF AMERICA* (1992); JAMES J. FLINK, *THE AUTOMOBILE AGE* (1988).

126. Among the most important for lawyers is Dean Harry Shulman, permanent umpire under the Ford-UAW contract, whose influence on his friend and former Yale colleague William Douglas is apparent in such cases establishing labor disputes as a separate sphere, largely impervious to legal regulation, as *United Steelworkers v. Warrior & Gulf Mfg. Co.*, 363 U.S. 574 (1960). See Katherine Van Wezel Stone, *Re-envisioning Labor Law: A Response to Professor Finkin*, 45 MD. L. REV. 978, 1004-12 (1986).

127. A recent line of scholarship has attacked the primacy of the concept of the male industrial worker: working full-time, functioning well in jobs defined tightly by contractual job descriptions, projecting power in customary male fashion, through tough-talking narratives of violence. Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992); Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender-neutrality in Model-building*, 14 INT’L J. SOC. L. 377 (1986); Gillian Lester, *Toward the Feminization of Collective Bargaining Law*, 36 MCGILL L.J. 1181 (1991). These articles are often alarmingly vague when they turn to the “female” alternative—vague calls for cooperative organization that those comfortable with collective bargaining will dismiss as simple accommodation or timidity. Crain, *supra*, at 1874-75 (quoting papal encyclicals); Lester, *supra*, at 1213 (vague call for cooperative structures). That kind of dismissal was my first response to these articles too—until I realized that my kind of “tough talk” is itself part of the narrative of threatened male violence which is an essential element both of the general power of men over women and the specific styles of unions as we have known them.

While we do not know the content or all the elements of the emerging system of employment law, I am confident that there is or will be such a system, for the simple fact that nobody could even think about “workplace dispute” without some kind of an intellectual picture of workplaces and disputes. Moreover, that system will function through prototypes. It will provide us with a stereotyped set of prototype “workers,” “employers,” and “disputes” that will fit some cases quite well, and into which others will be stretched and pulled, in order to fit—for that is how prototypes work.¹²⁸

Computers, cybernetics, and high technology are somewhat ill-defined terms that seem to exert a great deal of fascination on people, particularly young people, today. Is it not possible that the images of work relations in those industries—networks; caucuses, along with team-based work; flexible compensation including stock options and ownership shares; and employees conceptualized as intellectual laborers with valuable ideas in their heads—may come to be the prototypes for employment law in the way that the United Automobile Workers, their grievances and strikes, were for an earlier generation?

128. Legislation, particularly legislation accompanied by devices to enhance its public salience, often symbolizes such a cognitive reorientation to new imagery of “worker” or “workplace” or “dispute,” for example the symbolized importance of shop-level representation in Italian labor relations of the late 1960’s, crystallized in the Statuto dei Lavoratori of 1970. See generally Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 456-63 (1990).

