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REFLECTIONS ON EMPLOYEE VOICE AND REPRESENTATION FOR THE FUTURE

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The New Deal legislation, the Wagner Act and its amendments,¹ institutionalized a form of employee voice and representation (EVR) that featured employers and unions as adversaries. This legislation endured despite its growing inability to deal with changing organizational realities. These new realities have resulted in a great deal of local experimentation with forms of EVR outside of the legal regime of the New Deal legislation. During this time, organized labor and national lawmakers have in effect sat back and allowed this experimentation to go on, only occasionally speaking out against these new forms of EVR or urging their wider diffusion.

There now appears to be something of a consensus that the New Deal legislation no longer works at promoting EVR,² particularly because it seems irrelevant if not a thorn in the side of the large nonunion sector. Coupled with the growing awareness in industry and in government that human resource management (HRM) matters for competitive advantage and that EVR is a key HRM policy and practice, discussion of EVR has moved closer to center stage. The time is propitious for considering the role of labor law in promoting EVR.

Each of the authors in this Symposium makes use of law to propose a model of what EVR should look like in the future. These authors, however, express a wide variety of views on how the law should be modified. Their diversity of views mirrors the diversity in forms of EVR that now exists, suggesting that the role of law should not be to favor any one model of EVR over another, but to promote EVR more generally through enabling variety to emerge and flourish.

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1. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-169 (1988).

2. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986).

I. THE NEW ORGANIZATIONAL REALITIES

Since the time of the New Deal legislation, organizations and their labor primarily have had principal-agent or employment relationships in which the employer acted as a monitor and controller.³ The employer qua principal monitored and controlled what and how his/her employees qua agents accomplished work activities. These organizations were hierarchical because of their concern with monitoring employees.

The New Deal model, with the union acting as an adversary to management, had a certain logic in these organizations. The union moderated management prerogatives over monitoring and controlling the workforce, and it redistributed profits in favor of employees and away from stockholders.

Increased product market competition both at home and abroad has led many firms to depart from these traditional employment relationships.⁴ One alternative response has been for organizations to adopt more relational employment models, dedicating employees to their firms through lifetime employment, empowerment, and the like. The aim of organizations with these models is to have employees with dedicated assets who will provide their firms with dedicated capabilities. Flexibility and innovation in these organizations arise through employee commitment and loyalty. These organizations are invariably leaner and flatter than their traditional hierarchical counterparts.

The EVR implications with such relational models are clear. Firms must give their employees a larger voice in strategy formulation and implementation. For such firms, EVR becomes embedded in the

3. For more on this, see David Lewin & Peter D. Sherer, *Does Strategic Choice Explain Senior Executives' Preferences on Employee Voice and Representation?*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 235 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993); Peter D. Sherer & Kyungmook Lee, *Variation from the Standard Employment Relationship: The Character and Determinants of RRTs, ATAs, and CIRs* (1993) (unpublished manuscript, on file with The Wharton School, University of Pennsylvania) [hereinafter *Variation from the Standard Employment Relationship*]. For the classic statement in support of the hierarchical firm, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972).

4. This argument draws from Peter D. Sherer, *Variety and Selection in Organization-Labor Relationships: A Macro Organizational and Strategic Framework to Human Resource Management* (1993) (unpublished manuscript, on file with The Wharton School, University of Pennsylvania). For more on the topic, see RICHARD BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (National Planning Association Report No. 239, 1989); PETER B. DOERINGER ET AL., *TURBULENCE IN THE AMERICAN WORKPLACE* (1991); PAUL OSTERMAN, *EMPLOYMENT FUTURES* (1988); Jeffrey Pfeffer & James Baron, *Taking the Workers Back Out: Recent Trends in the Structuring of Employment*, in *10 RESEARCH IN ORGANIZATIONAL BEHAVIOR* 257 (Barry M. Staw & Larry L. Cummings eds., 1988).

way the organization manages its human resources. Indeed, the common separation between working and "voicing" becomes less visible, if at all visible, in such organizations.

Another alternative response has been for organizations to have more transactional relationships with labor, deploying labor with as much fluidity as possible. Organizations have done this largely through contracting in relationships with independent contractors, free lancers, and the like.⁵ The aim of organizations with these transactional models is to have fluid human assets that will allow for fluid capabilities. Flexibility and innovation arise through the flow of human capital in and out of organizations. These organizations are also lean and flat, if not hollow, as compared to their traditional hierarchical counterparts.

The EVR implications with these transactional relationships may not be immediately obvious but they are potentially very important. Just as craft unions in the 1800s once trained and aided the mobility of labor from one locale to another through traveling cards, so too can labor organizations provide training and take the friction out of mobility for contracted in workers.⁶ As Joel Rogers persuasively argues in this Symposium, labor organizations, in taking such a role, not only legitimize themselves with workers, but they also make themselves attractive to the many firms who need well trained workers.⁷

Competition has also had an effect on employee attitudes about EVR. As Michael Gottesman clearly points out, many employees have become much more concerned with their firms' competitive position.⁸ These employees do not want to lose good jobs because they are hard to come by. Indeed, despite the fact that many workers are working harder and have not seen significant increases in their real wages, employee dissatisfaction hardly seems to be a pressing issue today. Many employees do not want forms of EVR, particularly unions, that create sharp differences between them and their employers.

5. The legal relationships between the organization and the labor often falls between the cracks of independent contractor relationships with and without agency. They are not fully in the capacity of employees nor are they fully outsiders in these organizations. I use the term "contracting in relationships" to refer to the many situations in which there is such a partial, or quasi-agency, relationship.

6. See Peter D. Sherer & Huseyin Leblebici, *The Formation and Transformation of National Unions: A Generative Approach to the Evolution of Labor Organizations*, in 12 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 75 (1993). See generally LLOYD ULMAN, *THE RISE OF THE NATIONAL TRADE UNION* (2d ed. 1966).

7. See Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993).

8. Michael Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 65 (1993).

Those who work in services, especially the well educated, are apt to be turned off by labor organizations that challenge employers through bluff, bluster, and strikes. Such employees appear to be persuaded by organizations that have knowledge and expertise.

Competition may be having a different effect on the attitudes of other workers, particularly those who are contracted in, are operating as "free agents employees," or in some other way no longer are permanently attached to one employer. These more nomadic or mobile workers no longer have the commitment and loyalty that they once felt for their employer and they operate more on the notion of having employability as opposed to employment security.⁹ For these workers, exit may be viewed as a better option than voice.

The changing composition of the labor force also has important implications for EVR. The widely cited *Workforce 2000* makes it dramatically clear that white males will no longer dominate the labor market, especially at entry points, as they once did.¹⁰ Women, African Americans, Hispanic Americans, and a multitude of immigrants will diversify the labor market and organizations, and they have the potential to have a very real impact on EVR. Alan Hyde's discussion of black caucus groups shows how minority concerns in a firm can become actualized into a group voice that may in fact be illegal under the New Deal legislation.¹¹

II. THE UNION RESPONSE

Despite the highly visible self-analysis by the American labor movement in the AFL-CIO report by the Committee on the Evolution of Work of 1985, national unions have changed little.¹² They remain the dominant form of labor organization, dwarfing subsidiary local unions, independent local unions, and intermediary bodies such as city centrals and regional federations of different unions.¹³

The dominance of national unions stifles experimentation with alternative forms of EVR. As Sam Estreicher points out in this Symposium, national unions as multi-employer organizations make it very

9. See Rosabeth Moss Kanter, *The New Managerial Work*, HARV. BUS. REV., Nov.-Dec. 1989, at 85, 92; see also Steve Lohr, *Fewer Ties Are Bonding Workers to Corporations*, N.Y. TIMES, August 14, 1992, at A1.

10. See WILLIAM B. JOHNSTON & ARNOLD E. PACKER, *WORKFORCE 2000* (1987).

11. See Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 172-77 (1993).

12. See COMMITTEE ON THE EVOLUTION OF WORK, AFL-CIO, *THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS* (1985)[hereinafter *THE CHANGING SITUATION*].

13. For a fuller discussion of these issues, see generally Sherer & Leblebici, *supra* note 6.

difficult for firms to share proprietary information with the union, or to get labor costs attuned to a single firm.¹⁴ As a result, experimentation with enterprise-like unionism is stunted. Yet, as Michael Gottesman suggests, enterprise unionism would seem to be what many unionized employees would prefer, since they want their firm to win in the competition among employers.¹⁵

Another key component to traditional unionism is the selection rule that membership is a product of being a member of a union and being a party to a labor contract.¹⁶ The basic premise was that a union member needed a union contract in order for the union to be able to take wages out of the competition. As Matt Finkin points out in this Symposium, this selection rule was written into the New Deal legislation as majority rule and exclusive representation.¹⁷ Membership-by-contract provided the needed instrument of power for the national unions both with respect to their members and employers. Yet, membership-by-contract meant no union members if less than fifty percent of a bargaining unit voted for the union. Membership-by-contract became a problem when unions lost many more elections than they won and they were not able to secure first contracts.

The labor movement's highly visible alternative to membership-by-contract was associate unionism.¹⁸ Associate unions are based on the idea that union membership does not require coverage by a collective bargaining contract. As Michael Gottesman suggests in this Symposium, associate-like unions could act as service providers to nonunion workers by providing expertise, training and counsel, and benefits for workers that would be too costly for them to purchase as individuals.¹⁹ To date, however, associate unionism has not had a major impact on reviving the American labor movement.

14. Samuel Estreicher, *Labor Law Reform in A World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 11 (1993).

15. Gottesman, *supra* note 8, at 67-68.

16. See Sherer & Leblebici, *supra* note 6.

17. See Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993).

18. See THE CHANGING SITUATION, *supra* note 12, at 18-29. See also CHARLES C. HECKSCHER, THE NEW UNIONISM 177-91 (1988); Peter D. Sherer & Huseyin Leblebici, *Union Membership Rules: What Do They Tell Us About Alternative Union Form in the Past, Present, and Future?*, in PROCEEDINGS OF THE FORTY-SECOND ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 74 (John F. Burton, Jr., ed. 1990); Paul Jarley & Jack Fiorito, *Associate Membership: Unionism or Consumerism*, 43 INDUS. & LAB. REL. REV. 209 (1990).

19. Gottesman, *supra* note 8, at 80-83.

III. THE ROLE OF LAW: LAGGING OR ENABLING?

The proposals for promoting EVR in this Symposium range from fairly specific and narrow changes to major changes that require us to rethink a larger set of social institutions. Where there is a great deal of unity is in proposals for relaxing or narrowing section 8(a)(2) of the Wagner Act.²⁰ These proposals, with Clyde Summers' being the most reasoned and detailed statement on this matter, are aimed at encouraging nonunion employers to have employee involvement or participation plans when they do not actively subvert unions.²¹ The main encouragement in these proposals is to strip away legal prohibitions against employee involvement and participation plans. Such a change in law might be expected to tip the balance toward participation plans for those employers at the margin.

What is clear, though, is that many organizations in the nonunion sector already have such plans.²² Involvement teams, participation plans, and the like are now "best practices" in many managements' eyes. Business schools all around the country teach the virtues of using these practices. Many employers in fact believe that participation plans are useful. The issue here seems to be how much the law wants to lag organizational realities.

For those who contend that such plans are simply shams, Alan Hyde's example of Tekko illustrates that employee voice without unions can make a difference.²³ His example of the black caucus groups at Xerox illustrates too that initially local and somewhat informal groups arise to pursue their common concerns outside of unions and that these group voices do make a difference.²⁴ Both these examples further suggest that employees may not want a union even if they have real grievances because they believe unions lead to more problems than solutions.

Several authors in this Symposium call for unions to improve firm competitiveness through their voice effects, or what Joel Rogers calls

20. National Labor Relations (Wagner) Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988).

21. See Clyde Summers, *Employee Voice and Employer Choice: A Structural Exception to Section 8 (a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

22. For works that look at the diversity of firm practices, see generally Peter D. Sherer & Kyungmook Lee, *Cores, Peripheries, and More and Less: An Examination of Mixes of Labor Relationships in Firms*, in PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 317 (John F. Burton, Jr., ed., 1993); Paul Osterman, *How Common Is Workplace Transformation and How Can We Explain Who Adopts It?* (1993) (working paper, on file with the Sloan School of Management, MIT); Sherer & Lee, *Variation from the Standard Employment Relationship*, *supra* note 3.

23. See Hyde, *supra* note 11, at 155-58.

24. *Id.* at 172-77.

“democratic productivism.”²⁵ The general point is that unions can play a positive role in firm competitive advantage rather than simply exact rents from firms’ competitive advantage or monopoly powers. Joel Rogers’ specific strategy for unions is to press both firms and the state to move to greater uniformity in practices through imposing standards at the work place. The question here is whether such uniformity contributes to firm competitiveness at the firm or micro level. If firm heterogeneity or idiosyncracies do not contribute to competitive advantage, then Rogers’ proposal makes good sense. However, if firms have idiosyncratic practices that contribute to their unique capabilities and hence competitive advantage over other firms—what the resource-based approach in the business strategy literature increasingly tells us is a key basis for firm competitive advantage²⁶—then firms will surely resist the pressure for uniformity and standards. Even given the latter scenario, though, there still could be a role for unions. Craft-like or professional-like unions could train workers in transportable or general skills which firms might need.

Matt Finkin takes a different approach to promoting EVR by suggesting the possibility of nonmajority union representation.²⁷ As noted earlier, associate unionism has been the labor movement’s answer to nonmajority representation: an associate union would be the exclusive agent of a nonmajority who wanted representation. Matt Finkin’s proposal goes further by allowing for plural unions in one work place.²⁸ Plural unionism would provide the freedom of association for workers that Joel Rogers persuasively argues for in this Symposium, and it might provide the incentives for unions to compete amongst themselves in ways that get them to innovate. The intriguing question is how would nonmajority unionism work in a plant with employee involvement and participation plans or a majority union? Matt Finkin’s proposal is also important in that it makes us recognize that experimentation with EVR can occur within firms and their establishments as well as across firms and their establishments. Law has a role in allowing both types of experimentation to occur.

Other proposals suggest a multiple stakeholder model of the firm as the means to promote EVR. Such a relational model involves a

25. Rogers, *supra* note 7, at 112.

26. See Peter Cappelli & Harbir Singh, *Integrating Strategic Human Resources and Strategic Management*, in RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 165, 182 (David Lewin et al. eds., 1992).

27. See Finkin, *supra* note 17.

28. *Id.* at 213-18.

consensus that there are many stakeholders in the firm, not just stockholders, and that employees as key stakeholders have a long-term relationship and voice in firm matters that affect them.²⁹ As Michael Gottesman argues, the legal “deck” in the United States is stacked toward a stockholder model and against the stakeholder model.³⁰ The view that dominates in the U.S. is that corporate officers and boards of directors have a fiduciary responsibility to the corporation, which is operationalized as maximizing shareholders’ value. Given these points, it is not surprising that David Lewin and I found that a sample of American senior executives ranked employees as the fourth most important stakeholder, with stockholders first, customers second, and suppliers ranked third.³¹

In contrast, as Ronald Dore has so vividly described, Japanese firms view employees as key stakeholders.³² Japanese corporate, bankruptcy, and antitrust laws support and reflect this relational model. Japanese corporate law includes employees in its definition and conception of the firm. Japanese bankruptcy law requires that employees receive debt payments ahead of other creditors. Friendly banks provide a significant portion of the equity capital that Japanese firms require; stock and stockholders play less of a role in a firm gaining access to capital as compared to the U.S. firms.

How do authors in this Symposium suggest moving away from the stockholder model to a stakeholder model? Sam Estreicher argues that law should encourage longer-term horizons.³³ Unions and management should be encouraged to have long-term contracts and to engage in information sharing rather than information hoarding. Management, he argues, should be encouraged by tax and corporate law to be less driven by the stock market and short-term share price. Gottesman’s answer is deceptively simple: give employees stock ownership so that they are stockholders cum stakeholdings in firms.³⁴

Whether a stakeholder model is appropriate in all cases is certainly subject to question. There may be times when firms need to respond much more quickly and dramatically than such relational

29. Ronald Dore, *Japan’s Version of Managerial Capitalism*, in *TRANSFORMING ORGANIZATIONS* 17, 18 (Thomas A. Kochan & Michael Useem eds., 1992).

30. Gottesman, *supra* note 8, at 91.

31. See Lewin & Sherer, *supra* note 3.

32. Dore, *supra* note 29, at 24.

33. Estreicher, *supra* note 14, at 40-42.

34. See Gottesman, *supra* note 8, at 93-96.

models ordinarily allow. When that is the case, a more transactional or stockholder model makes more sense.³⁵

Given the diversity of the suggestions for promoting EVR, it is clear that no single model of EVR has come to supplant the New Deal legislation, nor might that need to be true at a future date. Different approaches to EVR are parts of more relational, traditional, as well as more transactional relationships that organizations have with their labor. The role of law should be to enable this variety to flourish.

35. See Franklin Allen & Peter D. Sherer, *The Design and Redesign of Organizational Form*, in REDESIGNING THE FIRM (Bruce Kogut & Edward Bowman eds., forthcoming 1994).

