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CORPORATE SELF-REGULATION AND THE FUTURE OF WORKPLACE GOVERNANCE

CYNTHIA ESTLUND*

We recently witnessed the most exciting presidential campaign in most of our lifetimes. The democratic process was on display in all its glory on the pages of every day's newspapers, and streets and town halls across America, and all over the Internet. Sometimes the democratic process looks glorious indeed (and sometimes it looks a bit like the sausage-making of the old saw). Either way, elections are undoubtedly the main event of the democratic process. Yet one lesson we have learned painfully over the last several years in different parts of the world is that elections alone do not a healthy democracy make.¹ As Alexis de Tocqueville observed more than 170 years ago, successful self-governance depends on a vibrant civil society with multiple sites of public discourse, popular participation, and cooperative social activity.²

Much of my own work over the years has focused on the workplace as one of those sites, with a critical role to play within a self-governing society. At work, people learn the civic skills of persuasion, discussion, compromise, and collective decision making. And they create social capital—the human connections and connectedness that enable individuals, groups, and societies accomplish things together. Moreover, people are more likely at work than anywhere else to form that especially rare and valuable kind of social capital that bridges divisions of race and ethnicity; for the workplace is, for most working adults, the most integrated social setting in which they actually interact regularly with others.³ They do more of all those things in workplaces where there is some mechanism for employee

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1. See generally Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

2. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 595–99 (Arthur Goldhammer trans., 2004).

3. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

participation in decision making.

Of course, the workplace is not simply or even primarily an arena for democratic deliberation and self-governance. It is also where people financially support themselves and their families, and it is where our gross national product is produced. In the aggregate, how well people work and how rewards of work are distributed are primary determinants of both economic productivity and levels of economic equality or inequality. And in a market economy, the main drivers in the organization and management of labor lie not in law, but in markets: labor markets, product markets, and capital markets. Managers manage, organize work, and make contracts with labor in order to compete in markets and make profits. In an economy based on voluntary contracts, and especially in an economy where capital and many services can cross boundaries at a keystroke, regulations and mandates that are costly to employers are likely to end up costing employees in the form of either lower wages or fewer jobs.⁴

Given how much of our well-being—collective and individual, social and economic—rides on how private sector employment and labor relations are managed and regulated, and given the market setting within which firms operate, the question becomes this: How can we, the people, use the law to steer the organization of work in a socially productive direction in which firms can prosper and workers can get the working conditions, rights, and rewards to which the public deems them entitled?

In the New Deal, the answer was found mainly in the idea of industrial democracy through unionization and collective bargaining.⁵ As compared to individual bargaining, collective bargaining was intended to even the playing field and give employees the bargaining power to improve wages and working conditions through contract. As compared to direct regulation, collective bargaining was seen as a more flexible, market-friendly, and democratic way of improving wages and working conditions.⁶ But we know now that the New Deal system faltered badly. With union membership running at less than eight percent of the private sector workforce, the existing system of collective bargaining is not a viable answer for the overwhelming majority of workers who want a greater voice at work.⁷

4. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 352–55 (2007).

5. See MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865–1965* (1970); see also Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1412–30 (1993).

6. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528–29 (2002).

7. 7.6% of the private sector workforce is represented by a union. Press Release, U.S. Bureau of Labor Statistics, *Union Members in 2008*, USDL 09-0095 (Jan. 28, 2009), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

Regrettably, I do not think the solution lies in labor law reform. This is not because reform is not needed—it is. And after decades of congressional deadlock, the 2008 election brought with it the best chance for federal labor law reform in many decades.⁸ But even if real labor law reform—something like the Employee Free Choice Act—is enacted for the first time in over fifty years, unionization and collective bargaining as we know them are still unlikely to reach more than fifteen percent of the private sector workforce in the foreseeable future.⁹ That will not come close to meeting the needs and desires that so many U.S. workers express for some kind of collective representation and participation in workplace governance. I want to be very clear about this: I am in no way suggesting that we give up on unionization and collective bargaining. That model is extremely important for those who have it and for those who want it; and labor law reform is essential if collective bargaining is to be a real option for many workers who seek collective representation. Still, it is clear that labor law reform is only the beginning, not the end, of efforts to secure for workers a voice at work and steer firms and managers toward the high road of decent work and respect for employee rights, even when there isn't a union present. We need to think outside the traditional labor law box.

A natural place to look is inside the larger and more jumbled box of what we have come to call “employment law.” For alongside the fall of unions and collective bargaining, we have seen a proliferation of employer mandates, especially laws establishing minimum labor standards and individual employee rights. We have laws regulating wages and hours,¹⁰ health and safety,¹¹ pensions and benefits,¹² family and medical leave,¹³ among other terms and conditions of employment, most of which are enforced administratively.¹⁴ We have laws protecting employees against discrimination and protecting scattered rights of expression and privacy,¹⁵ enforced

8. For my own take on this issue, see Estlund, *supra* note 6.

9. According to Steven Greenhouse, “[s]ome labor leaders predict that if the bill is passed, unions, which have 16 million members nationwide, would add at least five million workers to their rolls over the next few years.” Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 8, 2008, at A33, available at <http://www.nytimes.com/2008/11/09/us/politics/09labor.html>. Assuming that the additional 5 million workers were all in the private sector, that would push union membership to approximately 12% of the private sector workforce.

10. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–209 (2006).

11. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

12. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2006).

13. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

14. On the rise of regulatory statutes and individual rights in the workplace, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 327–333 (2005).

15. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

mostly through private litigation. Since the 1960s, we have seen a pattern of ever-increasing regulation of employment, sometimes successfully, in order to advance the public values and interests that the market underserves. We might simply say that the law abhors a vacuum, such as that left by the retreat of collective bargaining. However, it is probably more precise to say that society abhors the consequences of unregulated labor markets based on individual freedom of contract, which is what most workers are left with absent collective bargaining. In any case, despite much academic controversy over the wisdom and utility of employer mandates,¹⁶ they seem likely to persist and even proliferate. Under existing employment law, employees now have many formal rights at work, but most have no representation, no organized voice, beyond their individual power of negotiation. Labor law has failed to deliver a viable mechanism for employee representation in workplace governance, and employment law does not even attempt to do so. As a result, the workplace now suffers from a democratic deficit.

To speak of a democratic deficit, of course, assumes that democracy properly belongs in the workplace in some form. Some might argue that the old New Deal ideas of workplace democracy and employee participation are antiquated, outdated notions, and we should just rely on employee mandates to set a decent floor, and then let individuals bargain for better terms, or quit and seek them elsewhere. This “mandates plus markets” approach to workplace governance is roughly what we have now, given the paucity of collective bargaining. But there are many reasons to be skeptical of the adequacy of this approach: First, many more employees say they want some kind of collective representation, and a role in workplace governance, than now have it.¹⁷ In a democracy, that may be reason enough to regard this as a problem that needs addressing. Second, as suggested earlier, a strong democracy rests on civic skills, habits, and social capital developed in civil society, including at work.¹⁸ Third, because of some distinct characteristics of labor markets and of human labor, there is reason to believe that no combination of employer mandates and individual con-

16. Compare Posner, *supra* note 4, at 352–53 (discussing the traditional law and economics approach to minimum wage), with RICHARD REVESZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008) (questioning competitive labor market assumptions and arguing on efficiency grounds for regulations).

17. PETER D. HART RESEARCH ASSOCIATES FOR THE AFL-CIO, *LABOR DAY 2005: THE STATE OF WORKING AMERICA* 6 (2005); American Rights at Work, *Workers’ Rights Statistics*, <http://americanrightsatwork.org/publications/statistics> (last visited Nov. 12, 2008) (stating 12% “of U.S. workers have a union in their workplace, while 53% of U.S. workers would like one”).

18. See Estlund, *supra* note 3.

tracts can produce an *efficient* package of terms and conditions of employment—that is, one that reflects employee preferences within the extremely varied and changing organizational settings and market conditions they face.¹⁹ Finally—and this is the one argument for greater worker participation in workplace governance that I will discuss in depth here—without collective representation of employees, the rights and labor standards mandated by law are under enforced in many workplaces. In other words, employment law cannot *replace* collective voice at work, because the efficacy of employment law *depends* partly on collective voice at work.

I will discuss reasons for that shortly, but first I want to preview my overall thesis: Although employment law does not *aim* to give employees a role in workplace governance, it could and should be steered in that direction. Employment law has in fact fostered the growth of new mechanisms of governance within firms in the form of internal compliance programs that capitalize on and develop firms' own regulatory capabilities. The law has encouraged this growth in part by making effective self-regulatory structures a condition of certain regulatory concessions or advantages. I will argue that, for those internal compliance systems to be effective in the realm of employment law, they must give employees an organized institutional voice; and that the law can and should demand this voice as a condition of any self-regulatory concessions. My argument here is one part description and one part prescription. It is about what is currently happening on the ground, and about how it could and why it should be steered toward creating new mechanisms for collective employee participation in workplace governance.

Let us start with what is going on in workplaces and in governance today. There is a broad and deep trend toward self-regulation and toward conceiving of law as an instrument for fostering self-regulation. Many thoughtful observers conclude that traditional command-and-control regulation is losing its grip in a technologically supercharged global economy, and that it cannot keep up with the increasingly complex, fluid, and foot-loose organizations and networks through which goods and services are produced and distributed.²⁰ Yet those organizations and networks themselves have prodigious internal regulatory resources far greater, in the ag-

19. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

20. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 131–55 (1982); CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 100–108 (2002); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 278–79 (1998).

gregate, than what governments have. In light of this mismatch in resources and agility, and the powerful dynamics operating inside organizations in pursuit of their chosen ends, the only way law can effectively regulate complex organizations in modern society is by shaping those organizations' own processes of self-regulation and inducing organizations to internalize public values—that is, by regulating self-regulation.

Much of the analysis and empirical research in this vein flies under the wide banner of “New Governance” scholarship. This scholarship is based on trends around the world and in all arenas of regulation, not just regulation of workplaces. The best known manifestation of this trend toward regulated self-regulation in the United States is probably the Federal Sentencing Guidelines for Organizations. The Sentencing Guidelines set out elements of an effective program of corporate compliance—elements that, if met, result in a reduced penalty or leniency at the charging phase, if corporate criminal conduct nonetheless occurs.²¹ Criminal liability is relatively rare within the law of the workplace in the United States. But the trend toward regulated self-regulation is equally evident within federal anti-discrimination law. Under a series of Supreme Court decisions, if the employer has policies and complaint procedures that are reasonably calculated to prevent and remedy harassment and discrimination, the employer can avoid punitive damages for discrimination that nonetheless occurs, and can avoid liability for some harassment claims altogether.²² Even under the Occupational Safety and Health Act (OSHA),²³ a quintessential command-and-control statute, firms can qualify for a less adversarial enforcement track by maintaining internal health and safety programs that meet legally prescribed standards.²⁴ Proposed Clinton-era OSHA reform legislation would have pushed this development much further; and California and other states already do push much further toward regulated self-regulation of health and safety.

In general, the law promotes self-regulation not so much by mandating it as by rewarding it—by proposing a kind of *quid pro quo* to firms. If your firm puts in place effective self-regulatory systems, we will give you advantages of a less adversarial or less punitive regime. It is a quasi-

21. The Federal Sentencing Guidelines permit mitigation of sanctions “[i]f the offense occurred despite an effective program to prevent and detect violations of the law,” provided that the firm promptly reports violations. U.S. SENTENCING GUIDELINES MANUAL § 8c2.5(f) (2003).

22. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 546 (1999); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 746 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 779 (1998).

23. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

24. These reforms and their history are recounted in Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005).

contractual form of regulation, and it has encouraged the widespread adoption of internal compliance structures that track whatever formal elements law demands.²⁵ The growth of corporate compliance structures and corporate social responsibility commitments illustrates how law can effectively regulate organizations in modern society. The extent of corporate resources and organizational energies that go into these programs at Fortune 500-type companies is impressive.²⁶ Corporate compliance structures are most elaborate, and have come to be seen as obligatory in large firms with a significant investment in brand and reputation.²⁷ Less elaborate programs are quite common even in medium-sized firms. Unfortunately, they are non-existent in the small, marginal, less visible firms where employee rights and labor standards are often most degraded. That is a serious problem to which I will return.

The other serious problem with relying on self-regulation as means of public law enforcement, and rewarding self-regulation programs with lower penalties and less scrutiny, is that the system is highly vulnerable to cheating, or to what one scholar calls “cosmetic compliance.”²⁸ It risks putting the foxes in charge of the chicken coops—or maybe in charge of the chicken processing lines. Think of Tyson Foods, Inc. touting its Team Member Bill of Rights which includes the right to a safe workplace,²⁹ but whose employees suffer high rates of injury on its poultry processing lines.³⁰ Or think of Wal-Mart Stores, Inc., which presents itself as “a corporate leader in employment practices,”³¹ but which is the most sued employer in the United States;³² or British Petroleum, which also proclaims its commitment

25. The basic model of mitigating corporate civil liability on the basis of “effective compliance programs” received a boost from *In re Caremark Int’l Derivative Litig.*, 698 A.2d 959, 970–72 (Del. Ch. 1996), which put pressure on corporate directors to institute corporate compliance structures as part of their fiduciary duty to shareholders.

26. See DAVID VOGEL, *THE MARKET FOR VIRTUE* 80 (2005). For example, after years of negative media exposure, Nike adopted an internal code of conduct that governs labor and environmental practices for its 700 factories employing more than 600,000 workers in nearly 50 countries. *Id.* at 80.

27. See *id.* at 16–45 (discussing the business case for social responsibility).

28. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487 (2003).

29. TYSON FOODS, INC., *TEAM MEMBERS’ BILL OF RIGHTS* (2005), available at <http://www.tyson.com/Corporate/AboutTyson/CompanyInformation/TeamMemberBillOfRights0305.pdf>.

30. E.g., LANCE COMPA, *BLOOD, SWEAT, AND FEAR: WORKER RIGHTS IN U.S. MEAT AND POULTRY PLANTS*, (2005), <http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear>.

31. Press Release, Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices (June 4, 2004), <http://walmartstores.com/FactsNews/NewsRoom/4645.aspx>.

32. On wage and hour litigation against Wal-Mart, see Steven Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws*, N.Y. TIMES, Jan. 13, 2004, at A16; on discrimination litigation, see Steven Greenhouse, *Court Approves Class Action Suit Against Wal-Mart*, N.Y. TIMES, Feb. 7, 2007, at C1; see generally HUMAN RIGHTS WATCH, *DISCOUNTING RIGHTS: WAL-MART’S VIOLATION OF US WORKERS’ RIGHT TO FREEDOM OF ASSOCIATION 4* (2007), available at <http://www.hrw.org/sites/default/files/reports/us0507webwcover.pdf>; Wal-Mart Litigation Project, <http://www.wal->

to employee safety,³³ but is listed by the National Council for Occupational Safety and Health as one of the “dirty dozen” most dangerous companies to work for.³⁴ If public agencies rely on corporate self-regulation as a major element of regulatory enforcement, how do they avoid being hoodwinked? If the existence of internal compliance structures is to trigger regulatory concessions, what kind of structures should be required to provide assurances against “cosmetic compliance”?

The answer lies mainly in empowering workers to speak for themselves. There is strong support in “New Governance” scholarship, both theoretical and empirical, for the proposition that effective self-regulation depends partly on effective stakeholder participation within self-regulatory systems.³⁵ In the context of labor and employment law, that means employee participation. What that means, in turn, in the overwhelmingly non-union workplaces of the U.S. is another question to which I will return below.³⁶ Worker participation is not the only requirement for effective self-regulation; there is also a growing consensus that effective self-regulation depends on maintaining a serious background threat of public enforcement.³⁷ But workers’ participation within self-regulatory schemes is the chief safeguard. With those elements, among others, a system of well-regulated self-regulation can better advance regulatory objectives and better promote internalization of public values than traditional command-and-control regulation.

But let me pause here to address those readers who may be skeptical of talk of corporate culture and internalization of public values, and to translate the argument so far from the somewhat aspirational language of New Governance into the more parsimonious and perhaps familiar terms of the economists’ deterrence model. After all, there is nothing very new about using law to foster self-regulation. Liability rules, civil or criminal, aim to deter misconduct and avoid injuries by inducing potential defendants to take precautions.³⁸ The point of holding firms liable for bad out-

martlitigation.com (last visited May 21, 2008).

33. BRITISH PETROLEUM, BP’S SIX POINT PLAN FOR SAFETY, (2006).

34. NAT’L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, WORKPLACE HEALTH AND SAFETY DIRTY DOZEN REPORT 2 (2006), available at <http://www.coshnetwork.org/Dirty%20Dozen%20final%20revised.pdf> (last visited Nov. 8, 2008).

35. AYRES & BRAITHWAITE, *supra* note 20, at 57–60 (discussing the “tripartite” model of regulation); PARKER, *supra* note 20, at 100–108.

36. This argument was first introduced in Estlund, *supra* note 6.

37. See AYRES & BRAITHWAITE, *supra* note 20, at 47–49; Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT’L L. 413, 458 (2007); Neil A. Gunningham, *Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 COMP. LAB. L. & POL’Y J. 547, 564–72 (1998).

38. See POSNER, *supra* note 4, at 167–71, 236–38.

comes is to induce those in charge to take precautions—to self-regulate—in the interest of avoiding accidents or misdeeds, for example, to police and regulate their own environmental emissions or safety of their products.³⁹ So it is that even very conventional forms of legal regulation, such as ordinary criminal and civil liability regimes, encourage firms to self-regulate, and have fostered the growth of corporate compliance systems for decades.

Unfortunately, as my colleague Jennifer Arlen and others have pointed out, if we simply hold firms liable for outcomes, they may try to reduce liabilities in socially counterproductive ways. They may conclude that encouraging internal reporting of wrongdoing, while it is crucial to achieving compliance, might increase the likelihood that wrongdoing will come to light, thereby increasing expected liabilities. So instead of investing in those processes, firms may suppress internal reporting or hide evidence of wrongdoing.⁴⁰ This is a general problem with the simplest form of corporate (or entity) liability; it is not limited to law of the workplace.

A general solution to that problem is to make firms' liability turn partly on what internal precautions they actually take. If a firm maintains what the law deems an adequate system of self-policing and reporting, it may reduce liability for wrongdoing that nonetheless occurs. The idea is that law can more effectively deter organizational misconduct by explicitly rewarding self-regulation. That is the idea behind the Federal Sentencing Guidelines for Organizations, which offers a definition of reasonable precautions that is tailored to the organizational nature of corporate wrongdoing.⁴¹ But that approach has its own vulnerability. If courts and regulators cannot reliably distinguish between effective and ineffective compliance procedures, then firms may get credit for "cosmetic compliance"—sham policies that reduce regulatory scrutiny or reduce liability without reducing wrongdoing.⁴² That is also a general problem not limited to the law of the workplace.

So whether we are looking at compliance with employment laws or environmental laws or securities laws, and whether we use the lens of deterrence or the lens of "New Governance," we find that efforts to get firms to comply with external law face a general challenge: How do we encour-

39. *Id.* at 170 (discussing *Hendricks v. Peabody Coal Co.*, 125 N.E. 93 (N.Y. 1919)).

40. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 707–09 (1997).

41. For a comprehensive overview of this aspect of the Federal Sentencing Guidelines, see *id.*, at 745–52.

42. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 420 (2001); Krawiec, *supra* note 28.

age effective self-regulation by firms without being snookered by the mere pretense of self-regulation? How do we build in checks against “cosmetic compliance”?

Before addressing that question, however, we need to formulate the question more precisely for the present context. How does the problem—that is, the problem of insuring that self-regulation is real rather than cosmetic—play out differently with regard to the law of the workplace? The most important way in which it plays out differently is in the especially complex and crucial role that the firm’s own employees play in compliance. Of course, employees can play crucial roles in all internal compliance regimes. Some employees, especially managers, are the potential wrongdoers and the targets of regulation—it is their compliance that is the law’s ultimate aim. Employees are also generally the best monitors of compliance, whether it is compliance with environmental or consumer safety or minimum wage laws. They are in a position to observe wrongdoing and are the potential whistleblowers, both within and outside the firm.⁴³ Unfortunately, employees are highly vulnerable to employer pressure and retaliation. As a result, two major challenges of the law are, first, how to induce firms to encourage and respond to employee reports instead of suppressing them, and, second, how to protect employees who do report wrongdoing from reprisals.⁴⁴ Again, those challenges are endemic to the problem of corporate compliance.

But in the case of employment laws, employees play an additional role, for they are the law’s beneficiaries and the victims of non-compliance. They are the ones who face workplace hazards, or who are denied overtime pay, or who suffer discrimination. On one hand, that can make employees *more* effective monitors of compliance than they are for other laws. They not only possess the information but have a self-interested stake in compliance as well. Of course, employees still face collective action problems. Most of what the law of the workplace regulates are “public goods” within the workforce or some subset of it: Employees as a group share in benefits of compliance, and the benefits of compliance to employees as a group, as well as the costs of compliance to employers, are much larger than the benefit to any one employee. So individual employees do not have enough

43. For a thoughtful exploration of the importance and legal treatment of employee informants or “whistleblowers” within a New Governance paradigm, see Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, CAL. L. REV. (forthcoming 2009).

44. Elletta S. Callahan & Terry M. Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000); Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMPLOYEE RTS. & EMP. POL’Y 1 (2007).

incentive to speak up, even apart from fear of reprisals. If that collective action problem can be overcome, however, activating employees within internal compliance systems would have an even greater potential payoff for employment laws than other laws.

On the other hand, employees' vulnerability to employer reprisals poses an even greater threat to a system of self-regulation of employment laws than in the case of other law, because more rides on employees speaking up. Our legal system relies heavily on a law's beneficiaries, for example, injured consumers or aggrieved shareholders, holding firms accountable for wrongdoing, either by calling upon public regulators or by filing their own lawsuits. The ability of victims, individually or collectively, to seek recourse against firms for misconduct is especially important in a system that relies heavily on self-regulation because it provides an outside check against internal compliance processes that do not work (and against public enforcement systems that are often inadequate). In the case of employment law, there are no outside beneficiaries, no private attorneys general, outside the firm. The law's beneficiaries are employees *inside* the firm, subject to the employer's economic leverage. It is true that employees often have a private right of action under employment laws, one that is not formally subject to the employer's control; but given the pressures of the employment relationship, it is not surprising that employees rarely sue current employers. Of course, *ex*-employees sometimes do sue, and do play an important enforcement role; but they are often pressured to waive any claims on the way out, as a condition of severance pay. By and large, the victims of employer misconduct are a firm's own current employees, over whom the employer exercises significant economic leverage. The vulnerability of employee complainants to employer reprisals is thus an even greater threat to effective self-regulation in the case of employment laws than with other laws.

Whether we aim for democratic responsiveness and internalization of public values, as the "New Governance" folks do, or for mere compliance with external law, as conventional deterrence models do, it seems clear that the key to effective, reliable self-regulation of labor standards and employee rights is insuring that employees participate in internal compliance structures in a way that overcomes both the collective action problem and the problem of employer reprisals. That brings us to the following proposition: To the extent public regulators are giving concessions or rewards under the employment laws to effectively self-regulating firms—as they increasingly are doing—one thing they should require of any self-regulatory structure is employee participation that meets these requirements

of independence. In other words, no employer self-regulation without employee representation.

Institutionally speaking, what employees need, and what regulators should require of self-regulators, is a vehicle of representation with a foot both inside and outside the workplace—inside the workplace to pool information and to know what employees know, and outside the workplace to avoid employer pressure and reprisals and to expose the workplace to external scrutiny, providing a check against defective internal procedures. Unions are, in principle, ideally suited to play this role—or at least, ideal unions are ideally suited to play this role.⁴⁵ Unions aggregate the eyes and ears of employees, and have independence, expertise, and a power base outside workplace to shield employees from reprisals and facilitate outside scrutiny.⁴⁶ Studies suggest that, even aside from the additional rights employees gain through collective bargaining, employees' rights and labor standards under public law are significantly better enforced in union workplaces.⁴⁷

But what about the huge majority of employees without union representation? If independent collective representation is an essential element of a system of effective self-regulation, can that element be met in the non-union workplace? An obvious second best possibility is internal workplace committees. Let us put aside for now the potential illegality of such committees under the labor law's "company union" ban. And indeed, many employers do seem to put aside that legal consideration when it comes to health and safety. Employee health and safety committees, or joint employee-management committees, are quite common even though many of those committees violate Section 8(a)(2) of the NLRA.⁴⁸ And that may be fortunate, for there is some evidence that internal health and safety committees do improve compliance, even without a union; they may do so by improving communication, or perhaps by mitigating the collective action problem that individual employees face in monitoring workplace hazards.⁴⁹

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

46. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 n.1 (1985).

47. See, e.g., David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 28 (1991).

48. Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215, 244–51 (1996).

49. Lobel, *supra* note 24, at 1128; Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 390, 411 (2000); Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J.L. & PUB. POL'Y 65, 82–89 (1994); David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 INDUS. & LAB. REL. REV. 339, 340 (1999).

What these committees do not seem to do is stand up for safety concerns that are costly for the employer to address, especially if the hazard is integral to production, like a dangerously fast poultry processing line.

The problem is that internal employee committees have no more power or protection than the employees that comprise them. For the same reasons, we might expect internal employee committees to be of little use—even if they were legal—in addressing illegal wage and hour practices like demands for off-the-clock work or misclassification of employees as independent contractors. Without some independent existence and resources outside the workplace, employee committees are too weak and too vulnerable to employer domination to stand up to employers when compliance is costly. That is especially true where employees are terminable at will, as nearly all non-union employees are, and an employer's basic business model is based on squeezing labor costs to a minimum, as it is in many low-wage workplaces (even within some large and profitable companies). Indeed, purely internal corporate compliance systems may not do much good in such cases, where the problem is not hidden misconduct by subordinates, but deliberate pursuit of business strategies from the top.

So internal employee committees may provide a useful presence *inside* the workplace, but employees also need support from *outside* the workplace. They might get that from public regulators, but unfortunately it is partly the scarcity of public enforcement resources that is driving the move to regulated self-regulation. Instead, employees might get that outside support from independent monitors.⁵⁰ The institution of outside monitoring is familiar both from the global anti-sweatshop movement and factory monitoring programs, and the corporate securities context, with its reliance on public accountants as auditors of accounting practices. In both contexts, there is growing recognition of the importance of monitors' independence from the firms they are monitoring. For example, major accounting scandals of the last ten years were partly traced to conflicts of interest on the part of auditors that had lucrative business consulting relationships with employers they were charged with auditing. Interestingly, some of the very same public accounting firms (like Price Waterhouse) served overseas as factory monitors on behalf of the same firms with whom they had lucrative consulting relationships. Those not-quite-independent monitors were found to have fallen into some very bad habits, like announcing inspections

50. Environmental audits sanctioned by the EPA are one example of corporate regulated self-regulation that frequently includes the use of consultants or auditors from outside the corporation. For a detailed discussion on environmental audits as self-regulation, see Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 *ECOLOGY L.Q.* 663 (1996).

to factory owners ahead of time and meeting with workers in their supervisors' presence.

To play their crucial role in a system of regulated self-regulation, monitors should be chosen by and held accountable to organizations that represent employees' interests, like unions acting outside the collective bargaining model or worker centers. They should not be chosen by or tied to the employer whose practices are being monitored.⁵¹ This seems elementary, but sometimes it is necessary to relearn what is elementary. Genuinely independent monitors may supply some independence that internal employee committees, or workers as individuals, lack in a non-union setting. Independent monitoring might therefore be one required element of an effective internal system of compliance with employment laws where employees do not have independent collective representation such as unions.

One big question that remains is how much good will any of this do in the worst workplaces?⁵² This scheme of regulated self-regulation builds on and seeks to fortify internal corporate compliance programs that are most developed among larger, more visible, reputation-conscious firms. And those big firms—Fortune 500 firms like Wal-Mart, Target, Home Depot, Tyson Foods, and Aramark—do indeed employ a lot of low wage workers whose terms and conditions of employment could be improved by the injection of safeguards against “cosmetic” or non-compliance such as independent monitoring. At the same time, we have to recognize that labor standards and respect for employee rights are generally at their worst in smaller, marginal firms at the bottom of the labor market, many of which operate as virtual outlaws, beyond the sight and reach of regulators, and which rely heavily on undocumented workers whose fear of deportation may lead them to take what they can get without complaining. Is this whole idea of regulated self-regulation destined to leave behind most of the low-wage labor market?

At the very least, a system of effective self-regulation in larger firms would free up public regulatory resources for closer oversight of the smaller and less capable firms. Much more is possible to the extent that firms are held accountable—socially if not legally accountable—for labor practices of the contractors that supply them with products or services. That is because much of the low-wage labor market, and even a surprising chunk of the unregulated labor market, is made up of employees at the bottom of

51. PARKER, *supra* note 20, at 223–25.

52. What follows is drawn heavily from Cynthia L. Estlund, *Who Mops the Floors in the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671 (2008).

supply chains that lead up to large, visible, and organizationally sophisticated firms—firms that hold themselves out as responsible corporate citizens and that often have elaborate corporate compliance systems. I will call them “super-employers,” though, under existing employment law, they may not be legally liable as employers to the employees of their suppliers.⁵³

There is a powerful ethical and economic argument for holding super-employers accountable for illegal labor practices within their supply chains. Big firms have increasingly turned to competing independent contractors, to supply their labor needs for separable, labor-intensive functions. That trend puts downward pressure on labor costs, and on compliance with labor and employment laws. The use of such contractors tends to reduce super-employers’ costs, in part by removing workers from the mildly egalitarian pressures of internal labor markets that still operate to some degree within firms; in part by spurring competition among potential contractors for the lowest bid with the lowest labor costs; and in part by insulating the super-employer from liability for illegal but cost-saving practices.⁵⁴ Indeed, the last may be not merely a side benefit but a motive for the decision to utilize contractors. Facility maintenance is a good example of a service sector that is almost entirely a product of the last several decades’ movement toward contracting out separable, labor-intensive functions, and in which many contractors are largely unregulated. Many fail to pay employment taxes, or minimum wages, or the overtime premium for very long hours, and they rely heavily on undocumented immigrants. The result is labor costs that are as much as forty percent less than those of contractors that abide by the law.⁵⁵ To the extent that super-employers are both instigators and beneficiaries of the race to the bottom among the small contractors that populate much of low-wage market, it seems fair and sensible to hold them accountable.

53. The term “super-employer” is mine. But the underlying idea of using supply chains—and the contractual links between poor, exploited workers and big, rich, often multinational corporations—as the linchpin of a regulatory strategy is familiar. See, e.g., Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 VAL. U. L. REV. 913 (2007); Charles Sabel, Dara O’Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (World Bank, Social Protection Discussion Paper No. SP 0011, 2000), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/12/11/000094946_01110204011329/Rendered/PDF/multi0page.pdf.

54. A recent report by the Brennan Center (now part of the National Employment Law Project) described these dynamics in the context of New York City’s large low-wage, unregulated labor market. See ANNETTE BERNHARDT, SIOBHÁN MCGRATH, & JAMES DEFILIPPIS, BRENNAN CENTER FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN THE GLOBAL CITY 59–60 (2007), http://brennan.3cdn.net/d6a52a30063ab2d639_9tm6bgaq4.pdf.

55. See Steven Greenhouse, *Illegally in the U.S., and Never a Day Off at Wal-Mart*, N.Y. TIMES, Nov. 5, 2003, at A1.

It also seems feasible to do so, for the super-employers at the top of these supply chains have prodigious internal regulatory resources. They already need to oversee suppliers to monitor the quality of the goods or services they provide. If super-employers were accountable for illegal labor practices within supply chains—at least where they knew or should have known of those violations—they would have to find ways to extend their oversight over contractors to include labor practices. In other words, they would be induced to expand their corporate compliance programs to include suppliers—to monitor not only quality of goods and services but conditions under which they are produced. Some brand-conscious firms have already learned in recent years that they may be scarred by scandalously poor labor conditions in overseas factories where their goods are produced—even when there is no chance of legal liability.⁵⁶ Many have taken steps to try to avoid such scandals through implementing supplier codes of conduct and monitoring programs. From the opening pages of the websites of Fortune 500 firms—especially those that sell to individual consumers—two or three mouse clicks will often take you to their corporate social responsibility programs and detailed descriptions of supply chain monitoring programs.⁵⁷

The law could nudge these developments along by expanding super-employers' legal liability for abusive labor practices of contractors for which they are economically responsible and from which they economically benefit.⁵⁸ In fact, properly understood, the most important law in the low wage landscape, the Fair Labor Standards Act, does just that.⁵⁹ The FLSA defines the term "employ" to include "to suffer or permit to work."⁶⁰

56. See, e.g., Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 172 (2007) ("[A]fter years of sustained anti-sweatshop criticism [Nike] improved its code of conduct, issued its first Corporate Responsibility Report, opened up to independent monitoring, disclosed its outsourced factory locations, increased minimum wage requirements, and improved health and safety conditions.").

57. See, e.g., EXXON-MOBILE, INC., CORPORATE CITIZEN REPORT (2007), available at http://www.exxonmobil.com/Corporate/files/Corporate/community_ccr_2007.pdf (detailing contributions to education, the environment, world health, employee safety, community development, and worldwide giving); Wal-Mart Stores, <http://walmartstores.com/> (last visited Nov. 8, 2008) (portraying as its top concerns community development, economic opportunity and "health and wellness" of customers and employees, and environmental sustainability).

58. For a thoughtful account of how such developments can be nudged along in the context of global supply chains in garment manufacturing, see ARCHON FUNG, DARA O'ROURKE, & CHARLES SABEL, *CAN WE PUT AN END TO SWEATSHOPS?: A NEW DEMOCRACY FORUM ON RAISING GLOBAL LABOR STANDARDS* (2001).

59. The aim of the FLSA and its definition of "employ" and expansion of joint employer liability is exhaustively explored in Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1106 n.556 (1999).

60. *Id.* at 1089–1100.

That term was intended to reach through contracting arrangements, and impose “joint employer” liability on user firms, far more often than the common law and the existing “economic reality”⁶¹ test do. A future administration committed to improving labor standards enforcement would do well to seek to restore that original meaning.

Would that really improve compliance at the bottom of the labor market? The idea would be to charge the large, organizationally sophisticated firms that benefit from (and already have some monitoring capacity) these contracting relationships with the responsibility of monitoring compliance with basic labor standards. But without a real enforcement threat of sanctions that bite, it seems unlikely that either traditional regulation or self-regulation will do the job. There will never be enough public inspectors to secure compliance by traditional regulatory means; yet a system of self-regulation (in which the big firms gain some sort of defense against liability if they have a system of compliance that extends to contractors) may reward “cosmetic compliance.” In other words, everything we have learned about internal corporate compliance—and especially the need for an effective employee voice and independent monitoring—applies here as well. Supply chain monitoring programs that already exist have usually fallen short of these standards. But there has been pressure to improve the independence and efficacy of monitoring and the participation of workers, and it has had some impact.⁶²

The jury is still out on whether these structures add up to, or point toward, a realistic model of regulation. However, I have aimed still higher in my introductory comments about democracy and employee voice in workplace governance. What does any of this have to do with workplace democracy?

The aim here is two-sided: It is to allow employees to have a voice in, and to help enforce, those rights and regulatory regimes that exist for their benefit, while at the same time using those regulatory regimes to create new channels for employee voice. It is true that employment law covers only a fraction of what employees care about at work, and only a fraction of what collective bargaining might secure for them. However, employment law covers some of what employees care about in every workplace, and it covers more of what employees care about in low-wage workplaces,

61. *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992) (directing the inquiry away from issues of direct physical control and the formalities of the employment contract—both of which are themselves largely under the control of the contracting parties—and toward the “economic realit[ies] of the employees’ situation”).

62. For a description of these systems within garment manufacturing, see David Weil, *Regulating Noncompliance to Labor Standards: New Tools for an Old Problem*, 45 CHALLENGE 47, 34–36 (2002).

where workers are most in need of the law's aid.

To be sure, mere compliance with legal mandates, though it would be a big improvement for many workers, is hardly a worthy successor or alternative to collective bargaining. But in fact, corporate compliance and social responsibility programs almost invariably aspire by their own terms to more than mere compliance, and often to something like the values underlying legal mandates. If these self-regulatory regimes do induce firms to internalize the public values underlying legal mandates, or to live up to their own stated objectives, they may grow into more robust forms of self-governance in which employees participate. Even if that does not happen—if firms behave as the deterrence model posits and aim no higher than law effectively demands—employees may be able push beyond that. For if employees can secure an effective voice in compliance—if they can overcome the collective action problems and fear of reprisals that undermine their role in enforcement of legal standards—then that voice may not be so easy to cabin. If employees become powerful enough to claim their rights under the law, they may also become powerful enough to demand more of what else they want at work, and to claim a broader role in firm governance.