

1994

Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production

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DEMOCRACY AND DOMINATION IN THE LAW OF WORKPLACE COOPERATION: FROM BUREAUCRATIC TO FLEXIBLE PRODUCTION

*Mark Barenberg**

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* Associate Professor of Law, Columbia Law School. For their valuable comments on the entire manuscript, I thank Vince Blasi, Terry Fisher, Alan Hyde, Deborah Malamud, Henry Monaghan, Subha Narasimhan, Clyde Summers, and Paul Weiler. Special thanks to Chuck Sabel for reading several drafts and generously sharing time, ideas, and knowledge. Kerry Candaele, Steve Kang, and Howard Fischer provided outstanding research assistance. I am very grateful to Columbia Law School alumnae/i for financial support.

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I. INTRODUCTION

In May of 1993, President Clinton's Commission for the Future of Worker-Management Relations began its investigation of whether a major overhaul of United States labor law is necessary to encourage high-performance workplaces and labor-management cooperation.¹ Even if its recommendations, due in November 1994, do not yield immediate congressional fruit, the Commission's work is likely to influence the study and politics of labor law reform for some time to come. The Commission is chaired by John Dunlop, the eminent labor-relations specialist and former Secretary of Labor. Its membership includes some of the nation's foremost academic and political proponents of far-reaching labor law reform.² The Commission's Chief Counsel is Harvard Law School's Paul Weiler, who, over the last decade, has built the most formidable edifice of comprehensive reform proposals within the legal academic community.³

The appointment of the Dunlop Commission registers several seismic changes in the topography of labor relations in recent decades.⁴ First, the percentage of private-sector employees in unionized workplaces has declined from nearly 37 percent in 1953 to less than 12 percent today.⁵ The resulting "representation gap" in workplace governance is a salient policy concern for philosophic proponents of industrial democracy⁶ and for economic supporters of those welfare-enhancing workplace arrangements that require collective action by employees.⁷

1. See Commission on the Future of Worker-Management Relations Mission Statement, reprinted in *Daily Lab. Rep.* (BNA), at F-1 (Mar. 25, 1993).

2. In addition to Dunlop, the Commission members are former Secretaries of Labor Ray Marshall and W.J. Usery, former Secretary of Commerce Juanita Kreps, former United Auto Workers President Douglas Fraser, Xerox Corp. President Paul Allaire, Standard Technology CEO Kathryn Turner, and industrial relations scholars Thomas Kochan of MIT, Richard Freeman of Harvard, and Paula Voos of the University of Wisconsin. See Kathryn Turner Named to Dunlop Commission, *Daily Lab. Rep.* (BNA) (Nov. 5, 1993); Reich, Brown Announce New Panel to Examine Workplace Cooperation, Employee Participation, *Daily Lab. Rep.* (BNA), at AA-1 (Mar. 25, 1993).

3. See Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 *Harv. L. Rev.* 351 (1984) [hereinafter Weiler, *Striking a New Balance*]; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *Harv. L. Rev.* 1769 (1983) [hereinafter Weiler, *Promises to Keep*]. Professor Weiler's proposals are updated and elaborated in Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (1990) [hereinafter Weiler, *Governing the Workplace*]; Paul C. Weiler, *Governing the Workplace: Employee Representation in the Eyes of the Law*, in *Employee Representation: Alternatives and Future Directions* 81 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) [hereinafter *Employee Representation*]; Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 *Yale L.J.* 1907 (1993). Of course, many other legal academics have contributed to the reform debate. See *infra* Part VI.

4. These changes are discussed in detail *infra* Part V.

5. See David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, 31 *Indus. Rel.* 56 (1992).

6. See *infra* text accompanying notes 656-694, 861-882.

7. See Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 8-10 (1984).

Concurrent with the fall of organized labor, the annual growth in labor productivity slowed from a median of three percent in the post-World War II boom years to little more than one percent since the late 1960s.⁸ This climacteric coincided with an intensification of global economic competition and volatility in product and capital markets. These years also saw the emergence, led by Japan, of "lean" production systems that seem to break with the hierarchical mass-production model at the core of United States industry.⁹ Many variants of the emergent organizations are based on principles of flexible collaboration and consultation between employees and managers within the firm and among fluid networks of firms.

Their adaptability and delegation of discretion to frontline work teams give such "high-performance" firms and networks the potential for enhanced productivity, innovation, and employee learning. The United States' regime of adversarial, bureaucratic labor relations seems to fly in the face of the high-performance principles of cooperation and trust. That regime not only imperils labor productivity and participation. Its discouragement of high-skill, high-discretion work processes, together with the fall of organized labor, has helped produce the most unequal distribution of incomes and job opportunities of any advanced industrial country.¹⁰

The reform balloons floated by Weiler, Dunlop Commission members, and other legal commentators over the years include various proposals to fill the workplace representation gap.¹¹ To revive the labor movement, the proposals promise to reduce the cost of union organizing and to enhance the benefits of unionization. To make organizing easier, the revised legal regime would require an employer to bargain with a union that obtained the signatures on authorization cards, or the votes in an "instant election," of a majority of bargaining-unit employees. Alternatively or concurrently, the law would require employers to bargain with "minority" unions representing only those workers who voluntarily join, at least in workplaces without a majority representative. Under both

8. See U.S. Dep't of Labor, *Monthly Lab. Rev.*, June 1992, at 112.

9. Some important elements of the most advanced participatory workplaces include dramatically flattened managerial hierarchies; delegation of discretion over work methods and organizational decision-making to "self-managing teams" of frontline workers; conversion of fragmented, rule-bound job classifications into flexible, high-skill work processes; greater horizontal coordination of activity among teams rather than vertical bureaucratic control; joint committees of labor and shareholder representatives to make strategic decisions about enterprise operations, technology, and capital allocation; and consultative or consensus modes of problem-solving, rather than adversarial arbitration and economic warfare. For details, see *infra* Part V.

10. See Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries* (1993) (unpublished manuscript, on file with the Columbia Law Review).

11. The relation between employee representation and enterprise performance is analyzed and empirically assessed at length *infra* text accompanying notes 796-825.

schemes, union supporters could avoid altogether the aggressive, well-financed anti-union campaigns that managerial consultants have made a precision missile against unionization. That is, legal reform would erase the present period of several weeks or months of campaigning that currently pass between the time the union requests recognition and the National Labor Relations Board ballot.

Other proposals would afford unions, once organized, greater bargaining power in first and subsequent contract negotiations by protecting striking workers—perhaps even secondary strikers¹²—against permanent replacement. In addition, unions could lawfully use their enhanced strike power to influence strategic technological and capital allocation decisions now beyond the bounds of legally mandated bargaining. Many have also proposed—in the event that American workers of the 1990s do not rise to the occasion—that the law simply mandate elected employee councils in every workplace to consult with management and to enforce individual employment rights already on the books.

Leading scholars from across the political spectrum—addressing the question posed to the Dunlop Commission of how best to encourage labor-management cooperation—have proposed the outright repeal of the federal prohibition on management-established participatory teams and representative committees.¹³ It may surprise strangers to labor law to learn that such popularly touted schemes as employee-led work teams, joint labor-management committees, quality circles, and other flora of the new cooperative workplace are sprouting illegally. But in the last eighteen months, two long-awaited NLRB decisions reaffirmed that the language and history of the 1935 legislative ban on company unions reach cooperative representative committees and perhaps the vast portion of self-managing teams that have some form of “representative” team leader. The ban applies to all nonunion workplaces and, when management unilaterally establishes or excessively supports the collaborative schemes, to unionized workplaces.¹⁴ Employer spokespersons immedi-

12. Secondary strikers withdraw their labor from employer B (the secondary employer) in order indirectly to inflict hold-out costs on employer A (the primary employer with whom the union is negotiating). The secondary employer may be a supplier or customer of the primary employer. Such strikes are presently outlawed by Section 8(b)(4) of the National Labor Relations (Wagner) Act of 1935, as amended by the Labor Management Relations (Taft-Hartley) Act of 1947. See 29 U.S.C. § 158(b)(4) (1988). Employers may lawfully discharge secondary strikers and may obtain injunctions and damages against a union that conducts a secondary strike.

13. See *infra* Part VI.

14. See *E.I. Du Pont de Nemours & Co.*, 311 N.L.R.B. No. 88 (1993); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992). These cases interpret Section 8(a)(2) of the NLRA, which prohibits employers from “dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(2) (1988). Section 2(5) defines “labor organization” broadly enough to include any ongoing employee entity, even if informal and bearing no resemblance to an independent labor union. See *id.* § 152(5). Dictum in *Electromation*, however, reaffirmed the Board’s ruling in *General Foods Corp.*, 231 N.L.R.B. 1232 (1977), which permitted an

ately announced their renewed support for already-drafted legislation that would expressly authorize employers unilaterally to establish and support such entities.¹⁵ Meanwhile, AFL-CIO President Lane Kirkland, in the same phrases deployed by opponents of company unions in the 1930s, denounced managerial cooperative schemes as "sham organizations designed to prevent real worker empowerment."¹⁶

This Article proposes that the Dunlop Commission recommend a revised labor law regime designed to achieve three goals: first, to support employees' capacity to engage in well-informed, egalitarian deliberation and affirmative choice over modes of workplace governance, including the options of in-house participatory and representative schemes, as well as more empowered, trans-enterprise outside unions; second, to encourage the diffusion of flexible, "continuous-learning" organizations and networks with the innovative and productive capacity to succeed in global competition; and third, to enhance opportunities for cumulative employee responsibility and self-transformation in the work process and in organizational decision-making. The first and last goals require that the legal regime protect workers against organizational forms pregnant with routinized, task-fragmented work processes and with coercive or paternalistic manipulation of employees' subjective perceptions and interests about workplace governance issues. I argue that, in order to achieve these goals, labor law needs more robust reconstruction than even the worthwhile, far-reaching programs advanced by Commission members in their past public statements and writings. A new legal regime should embody the collaborative, self-revising organizational principles that are as appropriate to the transformation of public institutions as to that of private bureaucracies.

Competing legal commentators frequently posit, without much empirical defense, that management-supported teams and representative committees have predictable effects on employees' subjective experi-

employer to establish participatory work teams that lack representative team leaders. The *General Foods* distinction between participatory and representative structures is hard to square with the language of § 2(5), which explicitly includes "participat[ory]" employee entities within the definition of "labor organization," and with the legislative purpose of protecting workers against employers' illegitimate deflection of workers' organization of outside unions. See *infra* notes 42-44 and accompanying text. In any event, the most advanced, "best practice" self-managing teams have elected or rotating team leaders who serve representative or liaison functions vis-à-vis the rest of the organization. See *infra* note 995 and accompanying text. Such teams may therefore fall outside the *General Foods* exception to the ban on inside entities.

15. The companion versions of the Teamwork for Employees and Management Act of 1993 are S. 669, 103d Cong., 1st Sess. (1993) (pending in committee), and H.R. 1529, 103d Cong., 1st Sess. (1993) (same).

16. AFL-CIO's Kirkland Tells UFCW Delegates that Organizing Is Key to Better Life, *Daily Lab. Rep. (BNA)*, at A-19 (July 27, 1993). The AFL-CIO's Committee on the Evolution of Work also recently declined to support government-mandated employee-management committees or works councils, which have greater independence than management-sponsored entities.

ence.¹⁷ Supporters of repeal of the company union ban propose that the current cooperative schemes enhance workers' subjective trust in management, unleash their intrinsic motivation to work creatively and collaboratively, or spur them to seek greater workplace participation. At worst, they are relatively ineffective innovations that leave workers subjectively indifferent or only slightly satisfied. In any event they have no more malignant effect on worker consciousness than other management-established benefits or work arrangements. Hence, managers' unilateral imposition of collaborative schemes does not disserve the core regulatory purpose of labor law—to protect workers' right to choose whether to form full-fledged unions.

Opponents—echoing the original legislative enactors, as interpreted by the Board and the Supreme Court—maintain that cooperative schemes either overtly coerce or subtly manipulate workers' behavior and subjectivity. Under management's asymmetric power, cooperative practices paternalistically alter workers' descriptive perception of workplace reality or their normative sense of their own preferences and interests in ways that serve managerial interests. The proposition, in the argot of economists and cognitive psychologists, is that capital suppliers' managerial agents, acting either in the distributive interests of their principals or in their independent interest in managerial control, use their bargaining power to generate "endogenous" changes in the "preferences" or "perceptual frame" of weaker contracting parties. Stated in the terminology of critical theory, employers exercise domination over workers through "hegemonic" transformations in worker consciousness or ideology, either as an alternative or a supplement to coercive forms of control. In lay terms, cooperative schemes "coopt" workers. That is, such schemes *do* deflect workers' group choice over workplace governance modes, and in a systematic direction—away from the full collective bargaining that the New Deal policy equates with objective "industrial democracy."

In order to generate and defend my specific legal proposals, this Article undertakes theoretical, empirical, and normative elaborations of the asserted modes of instrumental coercion and psychological transformation on which the legal debate about collaborative workplace governance turns. At a theoretical level, the Article seeks to illuminate and sharpen the shadowy concepts of "endogenous preference transformation," "hegemonic consciousness," and "cooptation" under conditions of "asymmetric bargaining power" or "domination" within workplace relations. At an empirical level, it attempts to assess whether specific institutional and cultural practices in fact achieve various theoretically refined modes of coercion and consciousness-transformation. For purposes of my legal-policy inquiry, the Article's empirical reservoir includes both the historical experience of workers under classic company unions—the original target of the statutory ban on collaborative work relations—and contemporary em-

17. See *infra* text accompanying notes 832–833 and *infra* notes 832, 990.

ployees' experience of new forms of cooperative work relations. Many legal commentators have posited that old-style company unions ubiquitously implemented coercion and psychological cooptation, even if those commentators diverge in their assumptions about whether those processes occur among today's workers and workplaces. Finally, at a normative level, the Article assesses various bases for distinguishing between legitimate and illegitimate systems of (1) instrumental incentives (coercive sanctions or rewards) applied by management within the employer-employee authority relation; and (2) ideological and discursive schemes deployed by employers to influence employees' cognition, affect, or volition. Labor law pervasively draws normative lines between the legitimate and the illegitimate exercise of employers' material and communicative resources. More often than not, the justificatory grounds for the normative judgment are not well specified.

This inquiry primarily aims to prescribe a new labor law policy. As a by-product, it affords an opportunity to explore two issues of burgeoning interest to legal theorists—theoretical issues that may be illuminated when examined in a detailed doctrinal context. The first is the question of how the legal system depicts or constructs human "subjectivity."¹⁸ The legal "construction" of subjectivity has two different meanings in the context of the debate over labor law reform.¹⁹ First, it denotes the NLRB's, the courts', and legal commentators' conceptions of the subjective state that serves as the standard of a responsible, freely choosing employee. The pervasive normative line-drawing mentioned above generally turns on some such conception, because labor law is so fraught with questions of coerced versus autonomous or responsible choice. The conceptions of subjectivity that inform this line-drawing are diverse and fragmented in part because the New Deal labor policy itself incorporated in the law new modes of valuation—new understandings of the good or right—in the sphere of work. That is, once the legal mind envisioned the workplace as a quasi-political rather than (as at common law) a purely contractual zone, labor law's picture of the "choosing subject" took on characteristics of the deliberative, reason-giving citizen, in addition to those of the calculating, instrumental bargainer. And, in response to claims that collaborative schemes reduce labor-management adversarialism, the courts have more recently been drawn to a conception of the potentially trusting, relational self—a descriptive and evaluative crossover from the sphere of

18. See J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *Yale L.J.* 105 (1993); James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 *U. Colo. L. Rev.* 489 (1991); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 *Harv. L. Rev.* 959 (1992); Pierre Schlag, *The Problem of the Subject*, 69 *Tex. L. Rev.* 1627 (1991). For earlier, valuable treatments of the question, see Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563 (1984); Mark Kelman, *Choice and Utility*, 1979 *Wis. L. Rev.* 769.

19. The distinction between these two meanings is sometimes blurred in analyses of the legal construction of subjectivity.

intimacy to the world of work. My analysis thus suggests a strong affinity between the law's demarcation or blurring of plural social arenas and modes of valuation,²⁰ on the one hand, and its various, not-always-coherent instantiations of the responsible self, on the other.

The legal construction of subjectivity also denotes the way in which the instrumental incentives and symbolic messages of legal rules and discourse actually affect non-legal actors' subjective experience. As already mentioned, a central issue in the debate over legal policy toward cooperative work arrangements is how different legal regimes, by influencing workplace institutions and culture, will shape workers' motivation, commitment, interpersonal skills, and development of the capacity for learning and self-revision within fast-changing organizational contexts. The abstract questions of subjectivity in legal theory thus link with the important practical problem of enhancing employees' capacities for organizational learning and innovation in a time when enterprise performance depends increasingly on such capacities.²¹

The legal construction of subjectivity is closely related to the second question of legal theory on which I hope to shed light that reaches beyond the debate on labor law reform. Such concepts as "domination," "ideological hegemony," and "power" serve widely as touchstones in critical, postmodernist, pragmatist, feminist, and race theory. Their general or contextual meanings—and their distinction from liberal concepts of substantive equality or autonomy—are not always well elaborated.²² The project of conceptual clarification and enrichment is unavoidable in the workplace governance debate, if only because a key provision in the NLRA explicitly prohibits "dominat[ion]."²³ Such clarification may prove useful in other areas of legal analysis that may be characterized as terrains of asymmetric power, such as racial, gender, and statist hierarchies.

As to both issues—the legal construction of subjectivity and the meaning of domination in normative jurisprudence—my analysis and proposals rest on a radical-pragmatist or reflexive conception of intersub-

20. On the plurality of incommensurable modes of valuation and self-understanding across and within different spheres of social life and law, see Joseph Raz, *The Morality of Freedom* 321–66 (1986); Cass R. Sunstein, *Incommensurability in Law*, 92 Mich. L. Rev. 779, 784–85 (1994); Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 Mich. L. Rev. 1520, 1530–59 (1992) (reviewing Martha C. Nussbaum, *Love's Knowledge* (1990)).

21. My project is thus in the spirit of Dominick LaCapra's endorsement of concrete institutional invention even in the face of now widely accepted notions of interpretive indeterminacy and of the subordinating potential of any regulative ideal. See Dominick LaCapra, *Soundings in Critical Theory* 23–25 (1989).

22. For some postmodernists, of course, the lack of elaboration is a virtue, on the grounds that even finely textured, contextual conceptual schemes (1) constrain or distort authentic experience, (2) falsely suggest that experience pre-exists—and can be transparent or mirrored in—thought or utterances, or (3) falsely presume the possibility of simultaneous identity and difference between concept and experience or between signifier and signified.

23. See *supra* note 14.

jectivity and the relational self.²⁴ In that conception, through communication and interaction individuals may simultaneously transform their identities²⁵ and their social contexts.²⁶ Such interchanges may be instrumental, in the sense that they aim to alter or deploy relative bargaining power or incentives for joint practical activity; or they may be noninstrumental—that is, experiences of reasoned persuasion, emotional or perceptual transfiguration, or evaluative redefinition. One of the aims of this Article is to explore, within specific historical settings, the various descriptive relations among law, noninstrumental transformations in individual and group identity, and the parties' instrumental capacities to exert distributive power and achieve practical cooperation.²⁷ My normative jurisprudence, as well, relies on a radical intersubjectivist vision that seeks to promote individuals' capacity for egalitarian communication, mutual affirmation of autonomy, and self-transformation within relationships of mutual vulnerability.²⁸

Part II of this Article begins by examining the claims made by legislators, early NLRB and court decisions, and other observers about the ways in which old-style company unions illegitimately coerced or ideologically manipulated employees. I parse and elaborate those claims in light of more recent theoretical and empirical studies of the economics, culture, and psychology of relations of authority or asymmetric power. I begin with legal actors' explicit or implicit understandings of worker subjectivity and behavior under company unionism; then, based on more sophisticated current theories, I "work up" those understandings into more conceptually specific and potentially plausible explanations of workers' experiences. In this way, I draw on the legal materials as a reservoir of contextualized, detailed conceptions of subjectivity that enable us to give

24. For incisive formulations of this conception, see, e.g., Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1988); John Dewey, *Human Nature and Conduct* 1922: *The Middle Works of John Dewey* (Jo Ann Boydston ed., 1988); Roberto M. Unger, *Passion: An Essay on Personality* (1984).

25. By identity, I mean an individual's more or less coherent or fragmented clusters of perception, affect, cognition, volition, and other intrapsychic phenomena.

26. By social context, I mean people's more or less shared or contested understanding of their past and present relations, and their resulting expectations about the meaning and behavior that may be reenacted, altered, or created in their future social roles and institutions.

27. For example, noninstrumental transformation of the parties' shared norms, individual desires, or moral commitments may alter their relative bargaining power. See *infra* notes 305–312, 407–417, 777–787 and accompanying text. Noninstrumental transformations in the parties' dispositions to trust or distrust may alter their capacity for practical reciprocity and cooperation. See *infra* notes 279–282, 376–386, 638–655 and accompanying text. Conversely, for example, instrumental alterations in relative bargaining power may encourage or discourage sentiments of shared interests, trust, or resentment. See *infra* notes 796–825 and accompanying text. And, legal symbols and sanctions, in turn, may affect both relative bargaining power and the parties' norms of fairness and dispositions of trust and distrust. See *infra* text accompanying notes 838–882, 908–910, 1014–1017.

28. See sources cited *supra* note 24.

more precise content to the murky concepts of hegemonic consciousness and psychological cooptation. Part II ends by hypothesizing that the legal system's understanding of the coercive and hegemonic effects of company unions was in part fictive and one-dimensional. The NLRB and the courts articulated this one-sided understanding in order to justify the statute's absolute ban on an institution that likely had complex and contingent effects on workers' subjectivity and behavior.

Part III then argues that latent in the NLRB's and courts' own descriptions—though not explicitly acknowledged in their legal analyses—of company unions was a wide range of workers' subjective experience. Board and court narratives depicted such nonhegemonic and noncoercive labor-management interactions as "pure reformism" (defined simply as the satisfaction of employees' pre-existing preferences) and presumptively legitimate consultative and informational exchanges that promoted norms of trust and commitment. Workers' experience also included such "counterhegemonic" ideological responses as indifference, skepticism, indignation, and resentment, and such counterhegemonic instrumental boomerangs as the managerial provision of resources and communicational channels that aided workers' collective action. Again, Part III "works up" these latent depictions of workers' subjective experience into more theoretically specific and refined concepts.

Part IV turns to historical evidence of the actual experience of workers under company unionism in order to assess the conceptual formulations and claims about that experience elaborated in Parts II and III. Part IV concludes that workers' experience of company unionism was in fact highly variable, contingent, and dependent on the complex "local" path of institutional and cultural forces in different workplaces. I nonetheless find in the historical evidence some generalizations or regularities relevant to the legal debate over current forms of cooperative work relations. The many case studies and large-scale surveys suggest that coercive, hegemonic, nonhegemonic, and counterhegemonic subjective experiences obtained concurrently among company-unionized workforces. At the same time, there were inherent tensions between different experiences. Most broadly, company unions that relied more heavily on modes of structural coercion were likelier to yield either distrustful resignation or backlashes of indignation and resentment among workers. Those company unions that implemented greater genuine benefits and certain forms of cultural hegemony were likelier to generate a complex dynamic of "contested trust." Workers often did partially internalize professed managerial norms of community, loyalty, and democracy. But they also deployed those norms in "wars of position" by developing expanded notions of reciprocal obligation and demanding that employers live up to employees' reinterpretation of managers' own stated norms. This is a salient example of the way in which a shift in *cultural norms* could decisively influence relative *bargaining power* in the workplace.

The historical evidence also shows that those employers who, willingly or under government or union pressure, set up more robust company unions were likelier to see their employees convert the in-house structures into partially or fully independent unions. Perhaps of greatest relevance for the current policy debate, the evidence shows convincingly that company unions, as representative structures, generally had weaker effects on rank and file employees than on the cadre of representatives who bore the brunt of employer intimidation and seduction. The company unions simply failed to penetrate the daily work experience of most frontline employees sufficiently to have deeper instrumental and ideological effects on them. Although the historical evidence shows that company unionism was widely coercive and manipulative, it nonetheless confirms the hypothesis that the early Board and court decisions embodied substantial fictionalization.

Part V, drawing on the conceptual scheme and empirical findings of instrumental and ideological processes developed in the analysis of interwar workplaces, examines the dynamics of current high-involvement organizations. It starts with a quick synopsis of the development and diffusion of flexible work organizations in the current international and domestic economic environment. Tracking my analysis of old-style company unionism, I again present and elaborate the theoretical claims made about the promise and peril of the new cooperative workplaces. Part V then examines the potential instrumental and psychological enhancement of productive efficiency in high-involvement organizations, and presents a succession of other appealing normative arguments—from autonomy, self-realization, and radical pragmatism and democracy—for heightened worker participation.

Although the promise of team-based organizations is fulfilled in many current experiments in North America and Europe, there is also undeniable evidence that collaborative organizations can degenerate if in-house teams and representatives become “integrated” into coercive or psychologically manipulative managerial structures. Collaborative organization may then become an infrastructure both for deflecting workers’ ongoing capacity freely to choose workplace governance modes and for implementing the deskilled, intensified labor-sweating permitted by “flexible” work allocation. Such coercion and hegemony may be more egregious than under old-style company unionism precisely because paternalistic norms, surveillance, and opportunities for intimidation are built-in to day-to-day organizational routines. Team “facilitators” or committee “coordinators” are ambiguous authority figures who are imbricated with team members and representatives in intimate, daily, face-to-face processes of work and decision-making. Although the facilitators are ostensible peers of frontline workers, they in fact may be fully trained and coached by management. And they may exercise potent discretion in distributing instrumental rewards or sanctions and psychological affirmation or anxiety in a flexible, non-rule-bound workplace.

At the same time, team workplaces pose their own idiosyncratic potential—greater than that of interwar company unions—for employees to heighten their bargaining power and to redefine and expand managerially proclaimed norms of participation and reciprocal obligation. Part V concludes by summarizing the emerging consensus among political economists that collaborative enterprises tend to be more productive, and are less likely to embody instrumental and ideological domination, when they implement comprehensive participation at both shopfloor and strategic levels. That is, delegation of egalitarian deliberation to self-managing teams, and the capacity of employee representatives meaningfully to influence strategic decisions of upper management, are mutually dependent and reinforcing. The mobilization of frontline workers from below encourages the responsiveness of their employee representatives. The strategic role of representatives can, in turn, safeguard the delegation of responsibility and the distribution of a fair share of the fruits of productive efficiencies to autonomous teams.

Part VI situates the legal doctrines bearing on labor-management cooperation within the overall regulatory scheme of federal labor law, which in part determines the capacity of employee representatives to play an empowered, strategic role. This Part summarizes various widely endorsed proposals for overall labor law reform. It concludes that those proposals are worthwhile, but, without additional robust legal-institutional innovation, unlikely to contribute dramatically to the rejuvenation of employee representation or the diffusion of high-performance workplaces.

Finally, Part VII develops law reform proposals designed to encourage the diffusion of the most democratic, empowering, and productive forms of high-involvement organization. In light of the pathological potential of collaborative workplaces, my reforms would retain a ban on in-house participatory and representative structures that fail to meet specified indicia of independence and empowerment sufficient to protect against managerial coercion or manipulation. These standards could be implemented through reinterpretation of the ban on "dominat[ion]" of worker entities already contained in NLRA Section 8(a)(2) or through more particularized statutory amendment. Hence, I oppose the widespread call for the outright repeal of that section. On the other hand, unlike present law, my proposal would allow in-house options that fulfill the new standards of non-domination. Unlike proposals for allowing management (or government²⁹) unilaterally to impose these in-house options, however, my regime would require that they be affirmatively chosen by employees.³⁰

29. As in the proposal for government-mandated works councils.

30. This requirement resurrects the law prevailing in 1933–35, when labor-board election ballots included nonunion, outside union, and in-house union options. See *infra* notes 508–509 and accompanying text.

The NLRA's principle of employee choice of governance modes would thus be retained, but with an expanded choice-set: nonunionization, autonomous teams, strategic representative councils, and full-fledged unionization. Workers would be free to choose any combination of the first three or the last three options. There is no good reason, and there are several bad ones, for allowing employers to impose potentially paternalistic or coercive collaborative structures, while pro-union workers are required to run the difficult gauntlet of mobilizing collective action for fuller forms of workplace participation.

This expanded choice-set, however, requires vastly deepened government protection and facilitation of the ideal of employees' egalitarian deliberation over governance modes.³¹ I propose a system of regional Centers for Advanced Workplace Participation that would combine the functions of the NLRB regional offices and of the nationwide network of Manufacturing Outreach Centers that the Department of Commerce is currently establishing.³² On statutorily designated occasions, these Centers would hold intensive Conferences for Employee Choice. The Conferences would afford workers a forum for well-informed, egalitarian deliberations radically removed from the property and control of the employer, although managerial representatives would be vital stakeholder participants in the deliberations. Experiments in stakeholder, organizational-design conferences in North America, Scandinavia, and elsewhere are the institutional forerunners of such Conferences.

The Centers would provide employees with access to information about best-practice, high-performance workplaces and about the promise and danger of different governance options. Employees would be entitled to such information from Center staff, but also from unions, other employee associations, private consultants, or educational institutions. The Centers would affirmatively encourage employees to opt for more participatory, collectively empowering governance options both through direct information dissemination and through *conditional funding* for worker training, career development, and "proactive capacities" to participate in strategic technological and organizational-design decisions. Workers and managers are likely to find such incentives increasingly attractive in the new environment of heightened economic insecurity, rapid corporate reconfigurations, and training-intensive, high-perform-

31. My proposed regulative ideal of "egalitarian deliberation" would replace the Board's longstanding ideal of ensuring "laboratory conditions" for free worker choice. The former, unlike the latter, emphasizes that the process of worker choice is dialogic, preference- and perception-shaping, and vulnerable to distortions by inequalitarian distributions of speech opportunities and information. See *infra* notes 113-133 and accompanying text. The ideal of egalitarian deliberation is, in fact, more faithful to the pragmatic cooperationism that animated Robert Wagner and his circle of labor progressives. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1412-30 (1993).

32. The new federal centers are inspired by widely successful state and local programs of the 1980s and early 1990s. See *infra* notes 927-931 and accompanying text.

ance organizations. Through the deliberative Conferences, the encouragement of cooperative workplace teams and councils, and the use of nonadversarial modes of dispute resolution, the Centers would contribute to the growth of high-trust, consultative labor-management relations. This "facilitative" approach to legal regulation would also incorporate principles of decentralized governmental experimentation and revision, as the regional Centers engage in mutual learning and redesign in consultation with enterprise and community stakeholders.

This legal regime would encourage unionization not only through the conditional-funding incentives just mentioned, but also through the new role for labor organizations in *supplying* the training, career-development, and other resources to which workers would be statutorily entitled both for their governance deliberation and for their roles in autonomous teams and strategic representative councils. The regime would also tend to revitalize the labor movement by requiring unions to compete with alternative modes of participatory governance. Concurrently, unions or wholly new employee associations, as support-providers to participatory teams and strategic representatives, would face incentives to shift from distant bureaucratic service organizations to "mobilizing" models of unionism. My proposed regime would also allow more encompassing bargaining agents—with heightened bargaining power—that span networks of horizontally and vertically related enterprises. Such collaborative networks are a growing, dynamic feature of the new economic landscape of flexible organization. Trans-enterprise union-management governance mechanisms could supply the public goods of general and network-specific training, and career readjustment programs, which are beyond the capacity of individual enterprises in the new flexible labor markets.

By encouraging more encompassing and more participatory forms of self-chosen workplace governance, the legal regime would help steer United States enterprises toward a high-learning, high-wage path of economic growth rather than the low-skill, low-wage path of least resistance. Most important, the law would actively encourage deliberative self-governance and high-challenge, self-transforming experiences in employees' daily lives.

II. CONCEPTIONS OF DOMINATION AND HEGEMONY IN THE APPLICATION OF SECTION 8(a) (2) TO CLASSIC COMPANY UNIONISM

All major schools of academic thought on the employment relation (other than some currents within neoclassical economics)³³ recognize

33. See Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 777 (1972) (denying that authority is a relevant concept in the analysis of employment relations). By contrast, leading institutionalist and transaction-cost economists put the concepts of "authority" and "hierarchy" at the center of their models and frequently acknowledge the importance of

that it, like any authority relation, combines instrumental and ideological mechanisms for securing compliance with exercises of management's asymmetric decision-making power.³⁴ Managerial strategists and functionaries have, historically, almost always self-consciously cast their labor-relations techniques in the dual language of instrumental discipline and noninstrumental consent or commitment.³⁵ This was especially true in the 1930s. Under the intense pressure of mass labor unrest and political challenges to unbridled managerial authority, managers, while fervently retaining the 1920s mentality that their authority was "natural and right," understood clearly that "[t]hey were engaged in a complex struggle for moral authority."³⁶

employee attitudes, motivation, culture, and trust. See, e.g., Oliver E. Williamson, *The Economic Institutions of Capitalism* 206–39, 268–71 (1985); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *Stan. L. Rev.* 313, 334–39 (1985); Victor P. Goldberg, *Bridges Over Contested Terrain: Exploring the Radical Account of the Employment Relationship*, 1 *J. Econ. Behav. & Organization* 249, 264 n.33, 271–72 (1980).

34. "[A]ctivity devoted to changing the image of the world and especially the values or preference orderings in the minds of somebody else" constitutes "a major part of industrial relations." Kenneth E. Boulding, *The Pathologies of Persuasion*, in *Unconventional Wisdom: Essays on Economics in Honor of John Kenneth Galbraith* 3, 12 (Samuel Bowles et al. eds., 1989). Indeed, grand theorists as diverse as Freud, Weber, Gramsci, and Foucault see civilization itself as a complex of coercive and cultural-psychological means to discipline labor for purposes of society's material reproduction. See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, at 104–08 (Colin Gordon ed. & Colin Gordon et al. trans., 1980); Sigmund Freud, *Civilization and Its Discontents* 55–63 (James Strachey ed. & trans., 1961); Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* 206–320 (Quintin Hoare & Geoffrey N. Smith eds. & trans., 1971); Max Weber, *From Max Weber: Essays in Sociology* 271 (Hans H. Gerth & C. Wright Mills eds. & trans., 1946).

35. The locus classicus on managerial ideology is Reinhard Bendix, *Work and Authority in Industry* (1956). For samples of the vast sociological and economic research demonstrating that managerial thinking is correct in this respect—that is, that worker behavior is (perhaps inevitably) strongly affected by symbolic and psychological processes in addition to instrumental incentives—see, e.g., Jon Elster, *The Cement of Society: A Study of Social Order* 121–22 (1989) (summarizing evidence that workplace is a "hotbed" of cultural norms affecting behavior in ways not captured in instrumentalist rational choice theory); Charles F. Sabel, *Work and Politics* 1–30, 78–193 (1982) (exploring cultural and psychological influences on various worker cohorts); Haig R. Nalbantian, *Incentive Compensation in Perspective*, in *Incentives, Cooperation, and Risk Sharing* 3, 27–33 (Haig R. Nalbantian ed., 1987) (summarizing discrepancy between economic models of instrumental "extrinsic" incentives and empirical findings that worker behavior is affected by "intrinsic" psychological motivators and social environment); Arthur L. Stinchcombe, *Work Institutions and the Sociology of Everyday Life*, in *The Nature of Work: Sociological Perspectives* 99 (Kai Erikson & Steven P. Vallas eds., 1990) (summarizing cultural dimension of work life).

36. Howell J. Harris, *The Right to Manage: Industrial Relations Policies of American Business in the 1940s*, at 6, 10 (1982).

Indeed, the deepened paternalistic strategy of welfare work³⁷ in the 1900s and 1910s and of welfare capitalism³⁸ in the 1920s—of which company unionism was a keystone—had already marked a deliberate shift in the balance from the coercive sanctions of the “drive system” of work discipline toward more psychologically transformative techniques for eliciting worker compliance.³⁹ The head of the famed Sociological Department of the Ford Motor Co.—a pioneer of the paternalist strategy—said, “[A]s we adapt the machinery in the shop to turning out the kind of automobile we have in mind, so we have constructed ou[r] [company] educational system with a view to producing the human product in mind.”⁴⁰ Historian David Montgomery concludes that “to those in business [in the 1920s] who were enthusiasts for employee representation, works councils and managers trained in industrial psychology were inseparable.”⁴¹

It was within this social context of ubiquitous instrumental and ideological mechanisms for deploying managerial power that the NLRB was charged with the imposing task, in Justice Douglas’s words, of “free[ing] the collective bargaining process from all taint of an employer’s compulsion, domination, or influence.”⁴² In seminal opinions interpreting Section 8(a)(2) of the NLRA, the Board and the courts offered their most comprehensive accounts of the ways in which structures of managerial

37. Employers in the “welfare work” movement aimed to prevent labor unrest and raise productivity through “programs ranging from thrift clubs, compulsory religious observances, and citizenship instruction, to company housing, outings, and contests. The idea was that the firm could be used to recast the worker in a middle-class mold: uplifting him, bettering him, and making his family life more wholesome.” Sanford M. Jacoby, *Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry, 1900–1945*, at 49 (1985).

38. “Welfare capitalism” refers to progressive employers’ package of various nonwage benefits, profit-sharing, and company unionism. Less frequently, this paternalistic strategy included rationalized job ladders, higher wages, and restraints on foreman discretion. See Stuart D. Brandes, *American Welfare Capitalism, 1880–1940* (1970); David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* 48–59 (1980).

39. See Steven Fraser, *Labor Will Rule* 129–30 (1991); Jacoby, *supra* note 37, at 49–64 (showing that paternalism of welfare work and instrumentalism of foremen’s drive system coexisted in 1900–1920); Gerald Zahavi, *Workers, Managers, and Welfare Capitalism: The Shoenworkers and Tanners of Endicott Johnson, 1890–1950*, at 1–30, 99–125 (1988). By the late 1910s, one of the foundational ideas of even the scientific management approach to labor discipline—best known for its rigorous scheme of instrumental incentives for the performance of minutely specified behaviors—was that “managers must transform the consciousness of their workers,” an idea that “remains central to virtually all managerially inspired efforts to recast the workplace environment.” Nelson Lichtenstein, *The Union’s Early Days: Shop Stewards and Seniority Rights, in Choosing Sides: Unions and the Team Concept* 65, 66 (Mike Parker & Jane Slaughter eds., 1988) [hereinafter *Choosing Sides*]; accord Jacoby, *supra* note 37, at 102–05; Daniel Nelson, *Frederick W. Taylor and the Rise of Scientific Management* 168–202 (1980).

40. Stephen Meyer III, *The Five Dollar Day: Labor Management and Social Control in the Ford Motor Company, 1908–1921*, at 156–57 (1981) (quoting S.S. Marquis).

41. David Montgomery, *The Fall of the House of Labor* 413–14 (1987).

42. *International Ass’n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940).

authority ostensibly "dominated" workers, instrumentally and ideologically. The immediate aim of that crucial provision was to settle the primary legal-institutional contest in the 1930s workplace—that is, to extinguish the company-union structures that managers had interposed as a last-ditch alternative to outside unionization.⁴³ But the drafters of Section 8(a)(2) deliberately used open-textured terms that forbade management to "dominate," "interfere with," or "support" any entity through which employees as a group "deal[]" with employers over conditions of work.⁴⁴ In light of this protean language, it is not surprising that the Board's and the courts' contextual accounts of company unionism were infused with understandings of the general forms of illegitimate domination that potentially infect collaborative relationships under conditions of asymmetric power in the workplace and elsewhere.

For present purposes, this Part distinguishes three social "technologies" for exercising and securing managerial power, each of which corresponds to a set of more specific justifications for the ban on company unions.⁴⁵ Some liberal and legal-economic thinkers doubt that the con-

43. See Barenberg, *supra* note 31, at 1886 & n.18, 1401–03, 1452–53, 1461, 1495 n.495. The typical interwar company unions (also known as "works councils" and "employee representation plans") centered around periodic consultative meetings between employee and managerial representatives of a single enterprise or plant. The subjects of consultation included individual grievances, production problems, and, less frequently, wages and benefits. The company union was generally initiated and funded by management. Management retained final unilateral authority over all questions of company union structure, policy, and grievance resolution. Employees were not permitted to elect representatives from outside the company workforce, and, of course, the employer provided no strike funds. See Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 634, *Characteristics of Company Unions* 32–77 (1937). The evolution and variation in company union plans are discussed in greater detail in Part IV of this Article.

44. The core language is set out *supra* note 14.

45. I adopt Foucault's term—"technologies of power"—because the object of analysis is the operation of local institutions (labor-management behaviors and discourses) for deploying disciplinary power. See Foucault, *supra* note 34, at 104–06. The substantive analysis of the technologies, however, diverges from Foucault's. Although he does see social practices and discourses as (interwoven) elements of power relations, the analysis below gives greater emphasis to the interior psychological life and relatively autonomous social communities of workers as important components of the process through which power is exerted and resisted. Also, while Foucault highlights the way in which power is "locally" instituted, this Article's analysis reemphasizes the legal realists' and positivists' familiar insight that the legal regime's coercive and ideological authority ultimately stands behind the employer's disciplinary regime. See, e.g., H.L.A. Hart, *The Concept of Law* (1961); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 8–14 (1927). Management constructs and enforces workplace rules—engages in private law-making—by exercising the power delegated by property, contract, corporate, and labor law. The state's police powers enforce employers' sanction of discharge against employees who violate those private rules. Of course, because state authority ultimately turns on legal and nonlegal actors' internalization of norms of legal legitimacy or inevitability, there is a mutually reinforcing relation between the "local" cultural and psychological reproduction of the legitimacy or naturalness of private power and the "central" power of the state. See, e.g., Gabel, *supra* note 18, at 1577–86; Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 93–95 (1984).

cept of "power" has much payoff in positive or normative legal analysis. This Article's focus on the legislative regulation of private actors' modes of deploying power, however, does not impose a conceptual scheme foreign to the language and purposes of American labor law.⁴⁶ To the contrary, in its first decision upholding the constitutionality of statutory protections of workers' collective action, the Supreme Court capsulized those protections as limits on "the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.'"⁴⁷

The first social technology of power has instrumental or coercive effects on employees: management exercises its power by altering the choice set—the penalties and rewards, costs and benefits of the decisional options—faced by workers.⁴⁸ Management, for example, tells workers that they will be discharged or the plant will close if they unionize. The second technology is also instrumental or coercive, but the employer, rather than alter workers' set of governance choices, transforms the "procedural" conditions within which workers engage in group deliberation and choice. Management bans meetings among workers, for example, or requires that managerial representatives be present at all meetings among workers or worker representatives.

The final technology of power—call it ideological, rather than instrumental—is simply a residual category that includes all other means by which the structure or exercise of managerial authority alters workers' consciousness. Such alterations include transformations in workers' normative preferences, interests, and values; in their affective orientations, desires, and impulses; in their preconscious behavioral dispositions, compulsions, and habits; and in their descriptive beliefs about workplace real-

46. Notwithstanding their centrality in the Wagner Act scheme, the concepts of "power," "unequal bargaining power," and "relative bargaining power" remain largely unexplored in labor-law adjudication and commentary. See, e.g., Barenberg, *supra* note 31, at 1491 n.472; Douglas Leslie, *Retelling the International Paper Story*, 102 *Yale L.J.* 1897, 1902 (1993); cf. Robert E. Scott & Douglas L. Leslie, *Contract Law and Theory* 67 (1988) (examining confusions in the use of the concept of unequal bargaining power in contract law). Although this Article does not offer an explicit theory of relative bargaining power, my analysis of domination aims to provide some conceptual building blocks for future articulation of a comprehensive theory relevant to labor jurisprudence.

47. *Texas & N.O. R.R. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 568 (1930) (interpreting the Railway Labor Act of 1926). This case was the primary legal precedent on which Senator Wagner and other proponents of the Act relied in their defense of its constitutionality. See, e.g., S. Rep. No. 573, 74th Cong., 1st Sess. 17 (1935), reprinted in 2 *Legislative History of the National Labor Relations Act, 1935*, at 2317 (1949) [hereinafter *Legis. Hist.*].

48. See Lewis A. Kornhauser, *The Great Image of Authority*, 36 *Stan. L. Rev.* 349, 352–57 (1984) (labelling analogous instrumental effects of law "coercive"). At this stage, as in Kornhauser's and earlier legal realists' usage, the term "coercion" is not intended to have normative connotations. See *id.*; see also Cohen, *supra* note 45, at 8–14; Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 *Am. Lab. Legis. Rev.* 155, 155–60 (1925). The next section addresses the problem of distinguishing legitimate from illegitimate coercion.

ity.⁴⁹ For example, management implements trust-building training programs, or ongoing transmission of "familial" corporate symbols and principles, or consultative workplace arrangements, each designed to alter workers' affective or cognitive sense of unity of purpose with the enterprise.

The first two technologies of power may also have such intrapsychic effects in addition to their external effects on the actual sanctions and rewards facing workers who make alternative governance choices or engage in communicational activities. Of course, even the "purely" instrumental impact of those two technologies depends on workers' cognitive, affective, and motivational response to managements' threats or offers. All human practices—whether employers' activity or employees' responses—interweave outward behaviors (physical movements, gestures, and speech acts) and associated internal meanings, beliefs, and affects.⁵⁰ Thus, both "instrumental" and "ideological" practices are complexes of action and subjective states. At the same time, management's intended meanings need not match workers' attribution of meanings to specific managerial acts and utterances. The problem of intersubjective interpretation of others' meanings, beliefs, and motives is ubiquitous.⁵¹ In the analysis of economic activity, it is easy to forget that such "hard" constraints as "institutions," "organizational structures," and even "markets" are constituted, reproduced, and changed by participants' enactments and creative transformations of psychologically internalized role structures. The degree of institutional constraint is therefore always problematic, because role structures are clusters of inherently ambiguous, more or less convergent or contested, intersubjective expectations and norms about others' meaningful behavior.⁵²

A vast range of managerial deployments of the three social technologies of power was routine and legal under the common law and remained so even after the enactment of the NLRA.⁵³ Each of the three technologies does, however, contain a category of managerial practices—call the respective categories structural coercion, distorted communication, and hegemony—that the Board and courts invoked to give content to Section

49. Some distinctions and relations among these elements of subjective experience are discussed *infra* notes 164–328 and accompanying text.

50. See the essays collected in 1 Charles Taylor, *Philosophical Papers: Human Agency and Language* (1985).

51. See Donald Davidson, *Inquiries into Truth and Interpretation* 17–36, 124–39 (1984).

52. See generally Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality* (1966).

53. For example: "pure coercion" by management's threats of discharge for shirking job duties, or promises of bonuses for good performance; "procedural coercion" by management prohibitions, also backed up by the discharge threat, on union solicitation during work hours; and "consciousness-shaping" by management-sponsored training or athletic and social events aimed at eliciting employee loyalty to the enterprise.

8(a)(2)'s central concept of illegitimate "dominat[ion]."⁵⁴ In this Part, I parse and taxonomize these managerial practices and recast them in various recent conceptual frameworks of economic sociology, psychology, and cultural anthropology. That is, I attempt to provide plausible theoretical underpinnings to the Board's and courts' various arguments about how company unions systemically coerced and coopted workers. The final section of this Part sketches theoretical grounds for doubting that those arguments accurately captured the whole instrumental and ideological story of company unionism or, more generally, of any relationship of authority or power. Parts III and IV then elaborate and historically assess these grounds for doubt about the Board's and courts' claims about domination.

Before exploring these legal conceptions of illegitimate workplace domination, it is important to understand the interpretive puzzle that Section 8(a)(2) presented to the Board and the courts.⁵⁵ The framers of the Wagner Act believed that workers' objective interests and entitlements lay in outside unionization. The Act therefore sought to protect workers' right to unionize—their right of free economic association—by prohibiting employer interference with union organizing campaigns. But the Act allowed workforces the option—in government-supervised, majority-rule, secret-ballot elections—to remain nonunionized. Indeed, the drafters insisted that the Act rested on an absolute right to free group choice between unionization and nonunionization, notwithstanding that the nonunion workplace was, in their view, a state of objective despotism or "economic slavery." Hence, the puzzle of the company union ban: if, owing to liberal principles of free choice, the Act permits nonunion despotism, why does it ban company-union despotism?⁵⁶ The Board and the courts attempted to solve the puzzle by proposing that structural coercion, distorted communication, and ideological hegemony systemically and irremediably infected company unions, but not nonunion workplaces. The ban on company unions therefore protected, rather than paternalistically overrode, workers' free group choice. Sections A through C proffer plausible descriptive and normative arguments for this solution to the interpretive puzzle. Section D then presents some grounds that challenge the simplicity of the Board's and courts' solution.

54. See *supra* note 14.

55. For a more extended treatment of this puzzle, see Barenberg, *supra* note 31, at 1442–59.

56. The weaknesses of various potential justifications for the company union ban—including "simple coercion," "contracting into slavery," "principal-agent conflict," "collective disempowerment," and "agenda effects"—are canvassed in *id.* at 1442–50. The primary weakness of each of these justifications rests on the simple fact that each would equally justify a statutory ban on nonunion workplaces. See *id.*

A. *Domination Proper: The Company Union as an Infrastructure of Illegitimate Coercion*

In order to achieve workers' free group choice, the proponents of the NLRA sought to eliminate "simple coercion," understood as an employer's direct threat or offer that conditioned workers' job security or compensation on their vote against outside unionization. At the same time, the Act's framers believed that employers engaged widely in simple coercion to ensure workers' "choice" of company unions over outside unions. The objective of eliminating simple coercion is nonetheless not a strong justification of the company union ban.⁵⁷ The proponents of the Act were committed to the view that workers' choice over modes of governance could be cleansed of that form of instrumental impairment. Their commitment is demonstrated in part by the statutory permission of the nonunion option even though they believed that the choice between unionizing and not unionizing had been equally widely subject to simple coercion.

1. *The Idea of Structural Coercion.* — The NLRB and the Supreme Court, in their early interpretations of Section 8(a)(2), suggested an alternative instrumental basis for the ban, which might appropriately be called structural coercion or domination proper. In early decisions, the Board's and the Court's initial premise was that the company union ban was designed primarily to protect (not paternalistically to override) workers' free choice.⁵⁸ They also strongly intimated agreement with Senator Wagner's belief that workers' objective interests and subjective preferences lay in collective bargaining through outside unions.⁵⁹ The Board

57. Senator Wagner was insistent in his belief that the Act's general safeguards against employer interference with secret-ballot elections would erase such simple coercion. See *id.* at 1444 & n.291.

58. See, e.g., *NLRB v. Falk Corp.*, 308 U.S. 453, 461–62 (1940), enforcing 6 N.L.R.B. 654 (1938); *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250 (1939), enforcing 8 N.L.R.B. 866 (1938); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938), enforcing 1 N.L.R.B. 1 (1936); *International Harvester Co.*, 2 N.L.R.B. 310, 345–55 (1936); *Wheeling Steel*, 1 N.L.R.B. 699, 709 (1936). That is, the Board and the Court did not rely on any of the choice-overriding justifications canvassed in *Barenberg*, *supra* note 31, at 1445–51.

Between 1936 and 1947, the Board disestablished some 1400 company unions. See *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 1, 98–99 (1947) [hereinafter *Hearings on S. 55*] (testimony of Professor Leo Wolman). The discussion in this Part draws most heavily on those Board and Supreme Court decisions that discussed the dynamics of company unions at length and generated fresh diagnoses of their ostensible illegitimate practices of domination. Generally, such cases involved highly visible, prototypical company unions. The vast majority of Board decisions reinvoled the key descriptive and justificatory phrases of these generative cases. Tabulations of the grounds for disestablishing company unions in several hundred randomly sampled cases are on file with the author.

59. See, e.g., *NLRB v. Pacific Greyhound Lines, Inc.*, 303 U.S. 272, 275 (1938) (quoting approvingly the NLRB's finding that the operation of the company union repressed the "employee's impulse" to unionize), enforcing 2 N.L.R.B. 431 (1936).

and the Court did rule that widespread "simple coercion" of workers constituted violations of Section 8(a)(2) for "interference" with the "formation" of inside unions, as well as violations of Section 8(a)(1) for "coerc[ion]" of workers in the exercise of their right of self-organization.⁶⁰ But they also frequently found employer "domina[tion]" under Section 8(a)(2) on the ground that the *ongoing operation* of the inside union "would in itself be a *continuing obstacle* to the exercise of the employees' right of self-organization."⁶¹ A company-dominated union provided an employer "with a device by which its power may . . . be made effective unobtrusively."⁶²

Something about the ongoing structure and functioning of company unions, then, was thought to impair the workers' capacity for free collective choice over modes of workplace governance. The underlying normative principle is that, even if workers should be free knowingly to choose a weak or conflicted collective agent, they should not be free knowingly to choose a regime that undermines their (and subsequently hired employees') ongoing capacity to make autonomous choices over modes of workplace governance.⁶³ Administrative and judicial sanctions could eliminate the ad hoc instrumental incentives constituting simple coercion in the nonunion workplace, but incentives that *inhered in the structure* of company unionism could not be eliminated without banning that governance mode altogether. "Domination" is an apt label for such *structural* incentives—at least if there is a plausible normative case that those incentives constitute illegitimate *coercion*.

2. *The Idea of Structural Coercion.* — As noted above, management pervasively uses instrumental incentives (threats and inducements, penalties and rewards) in workplace governance. While some legal scholars label all such incentives "coercion,"⁶⁴ it is more appropriate for our purposes to reserve that term for the instrumental practices made illegal by the Act—to use the term, that is, in a normative rather than descriptive sense.⁶⁵ "Structural coercion" shall therefore refer to the illegitimate in-

60. See *supra* note 14 and *infra* note 65.

61. *Pennsylvania Greyhound*, 303 U.S. at 270 (emphasis added); see also *Newport News Shipbuilding*, 308 U.S. at 250 (employee free choice "may be obstructed by the existence and recognition by the management" of a dominated organization).

62. *Pacific Greyhound*, 303 U.S. at 275 (quoting Board approvingly) (internal quotations omitted).

63. Cf. Michael McPherson, Efficiency and Liberty in the Productive Enterprise: Recent Work in the Economics of Work Organization, 12 Phil. & Pub. Aff. 354, 367 (1983) ("[T]he argument that workers can protect themselves from manipulation through freely contracting out of such influence is not persuasive, since there are obvious problems about enforcing contracts not to be deceived or manipulated.").

64. See *supra* note 48.

65. Liberal and critical theorists agree that the concept of "coercion" is both "nonlexically normative"—it can be used both descriptively and normatively—and "protean"—it is open-textured or less than fully specified. See Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 Duke L.J. 541, 546–48; see also Mark Kelman, A Guide to Critical Legal Studies 102–10, 126–37 (1987) (expressing same idea).

strumental incentives that the ongoing operation of a company union brings to bear on employees' exercise of their right to choose modes of workplace governance. Those illegitimate incentives include coercive threats in the relatively restricted, if contested, sense that libertarian philosophers have explored.⁶⁶ But the Board and the courts also found a broader range of instrumental incentives to be normative impairments of worker choice, such as bribes and "coercive offers," "manipulative" or "exploitative" inducements, and certain incentives that altered employees' communicative opportunities or that otherwise ostensibly transformed their preferences and perceptions.⁶⁷ As Part I noted, these normative stances generally reflect explicit or, more often, implicit conceptions of subjectivity. Such conceptions frequently embody plural, sometimes inconsistent, understandings of what constitutes an autonomous, choosing subject or self. The next subsection identifies and conceptually elaborates the features of company unions that the framers and early interpreters of Section 8(a)(2) saw as illegal domination in the form of structural coercion.

3. *Company Union Practices Constituting Structural Coercion.*

a. *Trasformismo: Incentives to Realign the Leadership Cadre.* — Proponents of the company union ban often asserted that a conflict of interest inhered in management-supported employee representation schemes because management sat on both sides of the table. That is, management

Because the concept of "coerc[ion]" appears in the unfair labor practice provisions in Section 8 of the NLRA, see 29 U.S.C. § 158(a) (1988), it makes sense to reserve the term for its normative role for purposes of discussing Section 8(a)(2). Section 8(a)(1) prohibits employer practices that "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights to self-organization, collective bargaining, and other concerted activities. Because Section 8(a)(1) is an umbrella provision that includes the more specific unfair labor practices of Sections 8(a)(2)–(5), the illegal practice of dominating a labor organization under Section 8(a)(2) is also interference, restraint, or coercion under Section 8(a)(1).

66. See, e.g., Robert Nozick, *Coercion*, in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* 440, 440–53 (Sidney Morgenbesser et al. eds., 1969) (distinguishing between coercive "threats" and noncoercive "offers" based on whether people view a change in available alternatives as a gain or a loss relative to a baseline of "what the normal and expected course of events is").

67. Some of the high points in the voluminous legal and philosophic literature on coercive threats and offers, in addition to the sources cited *supra* notes 63–66, include 1 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* *passim* (1984); Kent Greenawalt, *Speech, Crime, & the Uses of Language* 79–109, 239–59 (1989); Alan Wertheimer, *Coercion* *passim* (1989). On the less explored concepts of choice-disabling manipulation and exploitation, see, e.g., 4 Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* 176–276 (1988) [hereinafter Feinberg, *Harmless Wrongdoing*]; Alan Ware, *The Concept of Manipulation: Its Relation to Democracy and Power*, 2 *Brit. J. Pol. Sci.* 163, 163–81 (1981); Daniel Wikler, *Persuasion and Coercion for Health*, in *Paternalism* 35, 35–56 (Rolf Sartorius ed., 1983). On the normative evaluation of preference- and perception-transformations, within the liberal tradition, see Gerald Dworkin, *The Theory and Practice of Autonomy* 3–84 (1988); Lawrence Haworth, *Autonomy: An Essay in Philosophical Psychology and Ethics* 6–52, 176–229 (1986); and within critical theory, see *infra* text accompanying notes 156–260.

deployed incentives that disaligned the interests of worker representatives from the interests of the rank and file. This was often depicted as a defect in *representation* or *agency*.⁶⁸

Early interpreters characterized worker representatives not just as (conflicted) agents of the rank and file, but also as a subgroup of rank and file employees themselves. The inside union targeted that subgroup with threats of loss or offers of gain of bonus pay, perquisites, promotions, welfare benefit "patronage," opportunities to distribute such patronage to the rank and file, status, and, most important, the job itself—all conditioned on the representatives' active support.⁶⁹ The company union was thus an apparatus that tended to produce a cadre of workers opposed to outside unionism because especially beholden to, or intimidated by, management's preferred mode of governance.⁷⁰

In this way, the phenomenon that legislators had identified primarily as a problem of principal-agent conflict was reinflected by the Board and the courts as a problem of impairment, by the inherent operation of the company union, of worker representatives' autonomous choice of governance modes. For example, the Board's principal theme in its 1938 *Republic Steel* decision—which gave one of the Board's most exhaustive factual descriptions of a dominated company union—was the myriad ways in which the ongoing functioning of the company union generated, through threats, coercive offers, and manipulation directed at worker representatives, a core of "loyal" workers actively supporting the company union option and opposing the CIO during organizing drives and elections.⁷¹ Indeed, proponents of "welfare capitalism" in the 1920s and 1930s themselves widely believed that company unionism had such an effect.⁷²

Because workers tended to elect "natural" shop-floor leaders as their company union representatives, the infrastructure of company union in-

68. See Barenberg, *supra* note 31, at 1446–49.

69. One could understand these discriminatory incentives as the kind of "selective incentives" that are one means of solving a collective action problem—in this instance, the problem of inducing collective action in support of the company union. See, e.g., Pamela E. Oliver, Rewards and Punishments as Selective Incentives for Collective Action, 85 Am. J. Soc. 1356 (1980). Such a "solution," however, rests on a prior achievement of collective action—in this instance, the employer's establishment of the very company-union apparatus that imposes the selective incentives. See, e.g., Michael Taylor, The Possibility of Cooperation 22 (1987).

70. The *tendency* of this incentive effect, of course, might have been resisted by worker representatives. For example, supporters of autonomous unions, who might have served as company union representatives in order to "bore from within," might have received the favors and threats targeted at representatives without abandoning allegiance to an outside union. Many contemporary observers reported, however, that even pro-union workers sometimes succumbed to the incentives faced by company union representatives. See *infra* note 507 and accompanying text.

71. See *Republic Steel Corp.*, 9 N.L.R.B. 219, 230, 236–49, 256–61, 338–42 (1938), enforced, 107 F.2d 472 (3d Cir. 1939).

72. See *infra* notes 543–552 and accompanying text.

centives had the potential to deflect a crucial worker subgroup. Various theorists have modeled the potential importance of "organizational entrepreneurs" and of a "critical mass" of activists for overcoming the free-rider obstacles to collective action.⁷³ Such formal models are concordant with the empirical importance of the leaders of informal shop-floor groups in the union organizing process. Prominent pioneers in the Steel Workers Organizing Committee of the CIO, for example, wrote:

In going about the task of organizing a group of workers in a given plant into a labor union, we have consciously sought out the leaders of these informal groups throughout the plant, interested them in taking a lead in forming the union, and found that their joining the union invariably caused the members of the informal organization to follow suit. In labor-union parlance these leaders are called "the men with a following."⁷⁴

If the Board was accurate in finding that company unions diverted such entrepreneurs or activists from the cause of independent unionization, the inside union provided an instrument for managerial preemption of one of the core social processes of collective organization and action. Gramsci identified this process of instrumental realignment of the potential leadership subgroup of a subordinate group as a key, nonideological means by which systems of asymmetric power or domination are maintained, and gave it the name *trasformismo*.⁷⁵

Although *trasformismo* captures one aspect of the general phenomenon of "cooptation" that contemporaries (and others since) attributed to company unions, does this specification of "structural coercion" justify the Act's differential treatment of the company union option and the nonunion or nondominated company union options? While employers may have used the company union apparatus as a means for directing threats and bribes at company union representatives, could the Act have solved the problem by simply banning threats and bribes directed against any subgroup of workers, whether in a nonunionized, company-unionized, or outside-unionized setting, rather than banning the company union altogether? The Act could have prohibited the company-unionized employer from conditioning bonus pay, promotion, or continued

73. See, e.g., Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* 85 (1982); Pamela E. Oliver & Gerald Marwell, *A Theory of the Critical Mass I: Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 *Am. J. Soc.* 522 (1985); Pamela Oliver & Gerald Marwell, *The Paradox of Group Size in Collective Action: A Theory of the Critical Mass II*, 53 *Am. Soc. Rev.* 1 (1988).

74. Clinton S. Golden & Harold J. Rutenber, *The Dynamics of Industrial Democracy* 182 (1942). For an exemplary ethnographic case-study of this process, see Peter Friedlander, *The Emergence of a UAW Local, 1936-1939: A Study in Class and Culture* (1975). See also Sidney M. Peck, *The Rank-and-File Leader* (1963) (surveying roles and attitudes of shopfloor leaders).

75. See Antonio Gramsci, *Il Risorgimento* 157-58 (1949). An English-language summary of Gramsci's analysis can be found in Joseph V. Femia, *Gramsci's Political Thought* 47-48 (1987).

employment on an employee representative's (and, of course, a rank and file employee's) vote in an NLRB election, just as the Act prohibits the employer from extending such bribes or making such threats to individuals or groups of workers in the nonunionized or unionized workplace. Indeed, an early, discarded draft of the company union provision prepared by Wagner's Senate office focused principally on banning such specific practices.⁷⁶

A plausible premise of the drafters of the final Wagner Act, however, was that the company union deflected employee representatives' actions and decisions because of *ineradicable* intimidation, or *ineradicable* "rents" afforded by virtue of the heightened status or expanded opportunities for winning employer favor or for skimming patronage that inherently attached to the office.⁷⁷ These ostensibly ineradicable mechanisms, of course, were precisely the basis for the irremediable-conflict-of-interest justification for banning the company union.⁷⁸ Even so, the question remains whether these instrumental incentives would illegitimately influence the representative's choice over modes of workplace governance in an NLRB secret ballot election. A company union representative could curry favor with, or knuckle under to, management in pressing grievances or negotiating wages, but still vote autonomously for or against the company union when casting a secret ballot. Management's instrumental penalties and bribes could be conditioned on compliant policies and decisions by company union representatives, but they could not be conditioned on representatives' vote in NLRB elections.

The only instrumental influence of the company union's operation on the representative's governance choice itself, then, would be the *indirect* effect of ineradicable rents and intimidation on the representative's calculation of the relative costs and benefits to him of, respectively, a company-unionized, an outside-unionized, and a nonunionized workplace—not the *direct* effect of (even structurally inherent) threats or bribes conditioned on his secret ballot vote.⁷⁹ A company union representative would have to weigh not only the changes in wages, benefits,

76. The provision would have made it illegal for an employer "to extend or to withhold special privileges, such as group insurance, donations to relief funds, and the like, depending upon whether an employee or employees belong or do not belong to any such [labor] organization." It also would have forbidden "discriminatory practices as to wage and hour differentials, advancement, demotion, job tenure, or any other condition of employment, to encourage employees to join, or to attempt to dissuade them from joining any such organization." Undated Memorandum, 694 LA 715, Folder 7, in *The Robert Wagner Papers*, Georgetown University.

77. Observers often characterized company unionism as a form of systematic graft. See, e.g., Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933-1941*, at 465 (1970).

78. See Barenberg, *supra* note 31, at 1447 & nn.298-99.

79. This analysis considers only the instrumental incentive effects of the carrots and sticks faced by company union representatives. The indirect psychological effects of bribes and threats are examined *infra* text accompanying notes 177, 193-198, 214-218.

union dues, and dignity that would come with outside unionization, but the loss of the ineradicable benefits and costs that accrue to him or her by virtue of holding the company union office.

In what sense is this indirect incentive effect, viewed within the basic structure of the Act, illegitimate? Think, for example, of individual workers in nonunionized workplaces who receive bonus pay based on skill, seniority, shift, or the like, or who receive greater across-the-board wages (so-called "union threat" wages) as a means of preempting a potential but nonimmediate union threat. Such pay gives these workers greater incentive to vote for maintaining the nonunionized workplace, yet the Act neither prohibits such practices nor eliminates the nonunion option on the ground that those workers' votes would otherwise be coerced. Similarly, employees acting as representatives in a nondominated company union face the same kind (though not the same degree)⁸⁰ of ineradicable incentives as those faced by representatives in a dominated company union.

The relevant normative principle in play is that the illegitimacy of an act of coercion—including the making of a "coercive offer"—rests not simply on the coercing party's alteration of the choice conditions facing the coerced party, but on whether the altered rewards and penalties in some contextually compelling sense *wrongfully* condition the choice.⁸¹ Although adjudicators and commentators occasionally reach conclusions of statutory "coercion" or "noncoercion" predicated solely on management's descriptive manipulation of the workers' choice set, there is nothing automatic in the concept of "coercion" that dictates either normative conclusion.⁸² The fact that management offers workers a third choice with a particular distribution of costs and benefits—the company union, in addition to nonunionization and outside unionization—may but *need* not be seen as a wrongful influence on group choice. Adding that element to workers' choice set could be seen, indeed, as an enhancement of workers' substantive autonomy. Their range of real options has increased; and if workers choose that option they have exercised autonomy and maximized the satisfaction of their preferences, whatever management's interest in the matter.

80. See Barenberg, *supra* note 31, at 1448 n.303.

81. Liberal and critical theorists argue compellingly that a contextual moral evaluation of party A's motivation for altering the choice set faced by party B is unavoidable if normative judgment is to be passed on the "autonomy" of party B's choice. See 3 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* 189–268 (1986); Kelman, *supra* note 65, at 131; Westen, *supra* note 65, at 584–86. Thus, the normative proposition—which requires justification—is that it is illegitimate for the employer to condition the representatives' receipt of ineradicable benefits on the group's choice of the company union.

82. See, e.g., Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. Pa. L. Rev. 1, 6, 42 (1982) (blurring distinction among alternative baselines for measuring "coercion" by tautological appeal to "literal compulsion").

But of course the same could be said of bribes offered to voters in a political election. Casting *trasformismo* as a form of vote-buying rests on contextual conceptions of (1) the proper mode of valuation within the new legal regime of "industrial democracy," and (2) the standard of free citizen-worker subjectivity and choice within that democracy. Wagner and his allies intended the statutory regime to implement and safeguard workers' freedom of association. The starting premise of the National Labor Board of 1933-34, chaired by Wagner, was that the choice of workplace governance mechanisms was solely for the workers to make. The Board established the regime of government-supervised elections precisely in response to management's efforts to intervene in what the Board initially thought could be a collective choice privately orchestrated by the workforce.⁸³ In this vision, the "demos" of industrial democracy is the workforce, and the process of group deliberation and voting is the province of that demos alone. For management to condition the provision of managerial resources on the outcome of that choice is a distortion of democratic process and of principled, deliberative citizenship. Even if it were thought legitimate or noncoercive for management to engage in reasoned argumentation to persuade workers not to unionize, managerial attempts to alter the choice by instrumental manipulation go beyond such noncoercive persuasion. The sphere of reasoned "political" decision should not be tainted by pecuniary deals.⁸⁴

On this understanding of Section 8(a) (2), there are at least two reasons why management's instrumental manipulation of wages in the non-unionized (by contrast with a company-unionized) workplace does not constitute such a distortion of democratic choice. First, a rank hierarchy or an across-the-board, union-threat wage increase in a nonunion workplace is not intrinsically conditioned on the outcome of the NLRB election. A vote to unionize does not automatically terminate the regime of benefits and costs associated with the rank hierarchy or the payment of a

83. The NLB's initial position was that the *process* of workers' collective choice of representatives was for the workers themselves, not the government, to formulate and conduct. Answering an early inquiry about what procedure workers should use to choose their representatives, William Leiserson, secretary to the NLB, responded that "that is a matter for the employees to decide for themselves. They may call a meeting and elect the representatives in any way they desire." Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*, at 113 (1985). But in the face of employer conduct that raised the transaction costs of employees' collective efforts to organize and choose representatives (by threatened and actual discharges, use of informants, refusal to acknowledge the collectively chosen representative as such, imposition of biased management-imposed procedures for collective choice, and the like), "the Board was slowly forced by employer interference" to impose its own procedure for collective choice: the government-supervised, majority rule, secret-ballot election. See *id.* It was this experience of the NLB that cast the die for the election process that became a centerpiece of the NLRA. See Barenberg, *supra* note 31, at 1401-03, 1450-61.

84. See Michael Walzer, *Spheres of Justice* 281-311 (1983); Sunstein, *supra* note 20, at 780-85.

union-threat wage. Section 8(a) (3) of the Act, in fact, prohibits an employer from engaging in such retaliatory discrimination against a newly unionized workforce. A vote against the company union, to the contrary, automatically terminates the built-in rents and costs flowing to company union office-holders because the structure of offices is necessarily dismantled.

Second, the rank hierarchy or across-the-board increase may have more substantial legitimate contextual purposes or effects, other than simply altering workers' governance choice, than does the company union. The standard for measuring whether there is such a substantial purpose or effect is supplied by other basic goals of the Act beside safeguarding workers' freedom of association—namely, achieving worker consent and productivity-enhancing cooperation via increased bargaining power. In Wagner's view, the altered incentives that the company union imposed on employee representatives' governance choice brought neither a gain in employee bargaining power comparable to the empowerment of an outside union or of a nondominated company union, nor a gain in efficiency comparable to that stemming from the cooperation induced by such empowerment.⁸⁵ Likewise, such *trasformismo* does not reward meritorious work performance like the nonunion compensation hierarchy, nor does it redistribute income or implement trust-enhancing norms of fair exchange to the extent that the payment of union-threat wages does.⁸⁶ The built-in, selective incentives to company union representatives thus smack more of simple vote-buying: the predominant purpose and effect of company unionism are simply to condition net benefits to a particularly important subgroup of employee-leaders on the outcome of the group's governance choice.⁸⁷

85. See Barenberg, *supra* note 31, at 1449, 1465–89.

86. On such trust-based “gift exchange,” see *id.* at 1485–87. Wagner and other legislators did not articulate these particular distinctions between nonunionized and company-unionized workplaces. It was, however, implicit in the Wagner Act scheme that reducing the transaction costs of unionization would raise the bargaining power of even nonunionized workers by making their threat to unionize more credible. Nonunion workers could thus expect to receive a union-threat premium that, unlike the ineradicable perquisites of company union representatives, was not inherently tainted by built-in discrimination among workers.

87. The Supreme Court's much-debated holding in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)—barring employers from raising workers' wages and benefits during an NLRB election campaign, but only if the employer's purpose and the foreseeable effect are to alter the election outcome—can be rationalized within this analysis. If the employer's purpose is to implement a routine and presumptively independently justifiable merit increase, there is no unfair labor practice regardless of the concurrent incentive effect on workers' votes. A nonroutine wage increase during an organizing drive may be thought to constitute an illegitimate distortion of democratic choice for any of three reasons. First, the Supreme Court thought that the middrive wage increase constituted an implicit threat to workers to withdraw those or other benefits should workers vote to unionize. See *id.* at 409. For the Court, then, the middrive wage increase or other potential benefits, unlike the predrive increase, *are* implicitly conditioned on the outcome of the election and therefore akin to a bribe or threat. Second, it is unlikely that the middrive increase would

b. *Infrastructure of Surveillance and Illegitimate Incentives by Peers.* — Early interpreters of Section 8(a) (2) portrayed the company union apparatus not only as a selective-incentive apparatus that structurally bribed, coerced, and manipulated worker representatives *qua* employee-voters. They also depicted that apparatus as an institutionalized vehicle for, in turn, structurally bribing, coercing, and manipulating other rank and file employee-voters. That is, many Board and court opinions highlighted how worker representatives acted as the shock troops in management's campaign of anti-union threats and promises directed at the rest of the workforce. In its *Douglas Aircraft* decision of 1938, for example, the Board rested its finding of "domination" in part on the fact that worker representatives dispensed welfare fund benefits only to those workers willing to support the company union, and led a campaign of coercive threats against workers supporting the CIO union.⁸⁸

Did the company union apparatus make such coercion and bribery any less remediable than the coercion and bribery that management could bring to bear on nonunion workers in the absence of the company union infrastructure of worker representatives? Or could management just as effectively add coercion and bribery of rank and file workers to the job responsibilities of managerial and supervisory employees in the non-union workplace as it could to the job responsibilities of worker representatives in the company union workplace?

There are three possible grounds for thinking that the cadre of company union representatives provided a more effective political machine for management than did supervisors. First, to the extent that the *transformismo* phenomenon was real, company union representatives were self-motivated to promote the company union among rank and file workers.⁸⁹

have the trust-enhancing effect of the predrive increase, because the former is more patently a response to instrumental threat rather than a credible commitment to the norms of fair gift-exchange. Third, while it is true that the ongoing threat of unionization may inhibit the employer from withdrawing a middrive increase if the workers vote down the union, the managerial manipulation may, by preempting the union drive, have caused the workers to dissipate or waste limited resources available to organize for collective action. That is, should workers attempt to unionize in response to management's withdrawal of a middrive wage increase, the total transaction costs of unionization will be higher, defeating the statutory purpose of minimizing workers' costs of free association. Permitting such managerial strategic behavior raises the costs of unionization and thereby diminishes the empowering effect of the union threat.

Notwithstanding these rationalizations of the *Exchange Parts* holding, there are stronger arguments cutting the other way. That is, wage increases intended to prevent unionization may impair workers' governance choice more greatly if granted before than after a union organizing drive begins. The potency of human resources granted to workers prior to union organizing campaigns is discussed *infra* text accompanying notes 886-895.

88. See *Douglas Aircraft Co.*, 10 N.L.R.B. 242, 248-50 (1938); see also *Republic Steel Corp.*, 9 N.L.R.B. 219, 234-42 (1938); *Remington Rand*, 2 N.L.R.B. 626 (1936).

89. That is, even if management did not explicitly condition representatives' benefits or job security on their deployment of instrumental incentives against the rank and file, representatives would be motivated in the same direction by their own interests—generated by *transformismo*—in the continued existence of the company union. Supervisors,

Although the analysis above may cast some doubt on how powerful that phenomenon was, worker representatives' motivation to impose instrumental incentives on other workers need not itself have been created by instrumental means. To the extent that any of the hegemonic processes discussed below were effective in transforming representatives' preferences, representatives might be noninstrumentally motivated to bribe and coerce rank and file workers.⁹⁰

Second, company union representatives, as coworkers of the rank and file, had additional instrumental penalties and rewards to impose on noncompliant workers, the potency of which should not be underestimated: the ostracism or approbation of peers, particularly peer leaders, within a small workplace community.⁹¹ Precisely because company union representatives were caught in conflicted status, however, rank and file workers could subject worker representatives who bribed and threatened on behalf of managerial rather than worker interests to the same kind of peer penalties, which rank and file workers could not inflict as effectively on supervisors in the nonunion workplace. The balance of forces in this respect would depend on, among other things, how effectively the rank and file could mobilize social norms of worker autonomy and empowerment and how effectively company union representatives could mobilize norms of organizational solidarity—issues that could be expected to turn heavily on the wider politico-economic climate and on the culture and practices of labor relations in the particular workplace.⁹² The effectiveness of the rank and file's "counter-ostracism" would be further diminished by second-order free-rider problems. Applying peer pressure to company union representatives is itself a public good whose provision is costly to individual frontline workers.⁹³ Such second-order costs would

whose formal terms of employment would remain the same under nonunionization or unionization in the absence of affirmative employer action, would have no such built-in incentive to impede unionization among the rank and file. Of course, this rationalization of Section 8(a)(2) rests on a simplified model based on such built-in, formal incentives. Supervisors may in fact experience various contingent, self-regarding motives to oppose either unionization or company-unionization. Supervisors might well anticipate, for example, that both of the latter governance modes would cause them disutility by curbing their power or discretion.

90. "[T]hose who provide selective incentives for people who would join [in some collective activity, such as company unionism] only for selfishly rational motives need not themselves be guided solely by this motivation." Elster, *supra* note 35, at 42.

91. There is historical evidence of this sort of penalty, as well as of the "counter-ostracism" by the rank and file. See *infra* Part IV. Michael Taylor and Mancur Olson emphasize the way in which the members of a small group—particularly a "community" exhibiting shared beliefs, direct relations, and generalized reciprocity—can solve collective action problems by "wield[ing] with great effectiveness a range of positive and negative sanctions, including the sanctions of approval and disapproval." Olson, *supra* note 73, at 23–24; see also Taylor, *supra* note 69, at 23.

92. See discussion *infra* Part IV.

93. On the second-order free rider problems that diminish individual workers' willingness to bear the cost of "mutual monitoring" of coworkers' behavior on behalf of group interests, see Elster, *supra* note 35, at 40–41; Taylor, *supra* note 69, at 30.

be less of an impediment to representatives' peer pressure of the rank and file, because the company union structure, initiated by management, itself "solved" the representatives' collective action problem in this respect.⁹⁴

A third ground, mentioned in the legislative proceedings, again rests on the fact that worker representatives, unlike supervisory personnel, were coworkers of the rank and file. An officer of an AFL local union told the Senate committee:

The only reason why the company unions oppose the bill is that it would prevent them from spying on their fellow workers openly in the guise of representing them in the presentation of their grievances and get [sic] paid for it by their employer, instead of having to operate under cover.⁹⁵

Public opponents of company unions widely argued that employee representatives served as an institutionalized substitute for the army of undercover "labor spies" supplied by scores of management agencies to many, if not most, leading American corporations in the 1920s and 1930s, before the practice was made illegal by the Wagner Act.⁹⁶

The "panoptic"⁹⁷ surveillance of rank and file workers by company union representatives constantly in their midst—and whose very function was to elicit and transmit to management information about employees who felt aggrieved by workplace conditions—would, by raising the probability of detection and reprisal, have a greater chilling effect on pro-union activity within informal shopfloor groups than would surveillance by supervisors in the nonunion shop.⁹⁸ In the terminology of institu-

94. On the way in which a system of sanctions to induce collective action itself depends on prior solution of a collective action problem—as management's initiation of the company union helped company union representatives to overcome free-rider problems in deploying sanctions against rank and file workers—see Taylor, *supra* note 69, at 30.

95. National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong., 1st Sess. 564 (1935) [hereinafter Hearings on S. 1958], reprinted in 2 Legis. Hist., *supra* note 47, at 1950 (testimony of John D. House).

96. See, e.g., Robert W. Dunn, *Company Unions* 52 (1927) (company union at Forstmann and Huffman said to be "a nest of stool pigeons and spies"); *id.* at 28 (quoting Goodyear worker's view that the company union "embodies a secret espionage system"); *id.* at 203 (company unions serve "as intelligence systems"). A study by the National Labor Relations Board in 1936 estimated that there were some 230 agencies. Estimates of the number of undercover informants ranged from 40,000 nationwide to 135,000 supplied by the three leading agencies alone—the William J. Burns, Pinkerton, and Thiel firms. See Leo Huberman, *The Labor Spy Racket* 5–6 (1937) (citing study presented to LaFollette Committee on Civil Liberties). The in-house personnel departments of some companies performed such espionage functions. The Ford Sociology Department is the most notable example. See Meyer, *supra* note 40, at 172–73, 175.

97. This concept, revived by Foucault, derives from Jeremy Bentham's design of a prison in which inmates knew they were vulnerable to secret visual surveillance at all moments. See *infra* text accompanying notes 727–730 and note 729.

98. This phenomenon is similar to the potentially greater monitoring of worker shirking that coworkers can undertake, compared to monitoring by supervisors whose

tional economics, the cost of extracting information impacted in the social groupings of workers on the shopfloor would be lessened, and the potential for instrumental deflection of rank and file choice thereby heightened, by the infrastructure of company union representatives that, unlike supervisory employees, penetrated into those very groupings.⁹⁹ Even if this were not the case, any surveillance of workers' union activities constitutes coercion under the Act because of the consequent fear of employer retaliation.¹⁰⁰ While such supervisory surveillance of a nonunion workforce can be proscribed short of foreclosing the nonunion option, surveillance of coworkers by company union representatives was embedded more deeply in the company union structure, at least in workplaces where union activity could be expected to germinate in interdependent groups of workers.

The normative taint of this mode of structural coercion can be characterized in two ways. First, as with the manipulation of incentives facing workplace representatives discussed above, the built-in dispensing of costs and benefits to the rank and file through the company union apparatus smacks of vote-buying. Second, management's use of company union representatives as a cadre of organizers could be understood as a distortion of the process of workers' democratic deliberation and choice, even if company union representatives engaged only in reasoned persuasion and not instrumental manipulation. The latter is best characterized as a form of "distorted communication," the social technology of power discussed in Part II.B below.

c. *Discriminatory Organizational Funding, Recognition, and Bargaining Concessions.* — Legislators and early Board and court decisions justified the company union ban on the ground that workers' right of self-organization was damaged by management's discriminatory conferral of at least three kinds of advantages to company unions.¹⁰¹ While management would readily provide (1) organizational funding, (2) formal recognition, and (3) substantive bargaining concessions to company unions, it would deny (or resist giving) those advantages to outside unions or

observation of individual and work team behavior is necessarily sporadic and, because of worker counter-strategies, non-random. See, e.g., Louis Putterman, *On Some Recent Explanations of Why Capital Hires Labor*, 22 *Econ. Inquiry* 171, 174 n.5 (1984). For a vivid ethnographic study of the importance in union organizing of workers' degree of suspicion of surveillance by coworkers, see Friedlander, *supra* note 74. For an historical assessment of the claim that inside union representatives monitored the union activity of their rank and file coworkers, see discussion *infra* text accompanying notes 544-552.

99. Company union representatives' information gathering is in this respect akin to a cost-free "joint product" of the representatives' regular duties both in production and in company union grievance administration.

100. See, e.g., *Hendrix Mfg. Co.*, 139 N.L.R.B. 397, 408-09 (1962), enforced, 321 F.2d 100, 104 n.7 (5th Cir. 1963).

101. See, e.g., *Automotive Maintenance Machinery Co.*, 13 N.L.R.B. 338, 349 (1939); *Link Belt Co.*, 12 N.L.R.B. 854, 866-67 (1939); *J. Greenebaum Tanning Co.*, 11 N.L.R.B. 300, 311-13 (1939); *Douglas Aircraft Co.*, 10 N.L.R.B. 242, 252-53 (1938); *Industrial Rayon Corp.*, 7 N.L.R.B. 878, 896-97 (1938).

nondominated inside unions—or so, at least, workers facing a choice between company unions and outside or nondominated inside unions would anticipate. This managerial manipulation of incentives could amount to “structural coercion” in the normative sense discussed above: the incentives are conditioned on the outcome of the group vote and their predominant purpose or effect is to alter workers’ governance decision.

Do these discriminatory advantages inhere in the operation of company unions, or could they be eliminated without banning the company union itself? Section 8(a)(2) itself prohibits employer contributions of “financial and other support” to a labor organization, and that proscription is enforced by orders to cease the contributions, not by orders to disestablish the organization (the remedy for unlawful “domination”). At the same time, Section 8(a)(5) requires that the employer recognize the union chosen by a majority of the bargaining unit members,¹⁰² and thereby formally forecloses discriminatory recognition of a company union and nonrecognition of a nondominated, majority union. Similarly, Section 8(a)(3)’s ban on discriminatory conduct discouraging or encouraging union activity¹⁰³ and Section 8(a)(2)’s ban on support of and interference with a labor organization would proscribe discriminatory concessions to, or recognition of, company unions, assuming the organizations themselves were not banned.

These two discriminatory advantages—financial support and transaction-cost-free recognition by the employer—might seem to be necessary, and perhaps sufficient, defining features of dominated company unions as they were pictured by the Wagner Act’s framers and by contemporaneous managerial proponents of company unions.¹⁰⁴ If so, the prohibition of these features would make the company union ban unnecessary. Even assuming these two features were formally proscribed and the still-conflicted¹⁰⁵ inside union placed on the ballot, however, workers could still reasonably believe that they faced an inducement to vote for the company union, in that management could be expected costlessly to recognize the company union, while there would remain some positive possibility that the outside union would have to incur the transaction

102. Under Section 8(a)(5), it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5) (1988).

103. Under Section 8(a)(3), it is an unfair labor practice for an employer “by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (1988).

104. Legislators mentioned other important features, one or more of which may also have been thought necessary or sufficient to the definition of company-dominated unions. These include management’s ultimate unilateral authority over grievance and substantive policy resolutions, management veto power over changes in the structure of the company union, and lack of strike funds or other substantial independent funds. See Barenberg, *supra* note 31, at 1442–60.

105. See *supra* note 104.

costs of administrative or direct-action efforts to compel a resistant employer to recognize it even after winning an NLRB election.

Could the same be said for the third discriminatory advantage mentioned above: workers' anticipation that management would be more resistant to granting substantive bargaining concessions to an outside union than to a dominated company union? This anticipated resistance could take the form of (1) lower absolute wages and benefits conceded to the outside union than to the company union; (2) lower relative wages and benefits to the outside union, in the sense that management would deploy whatever bargaining power it had more aggressively against the outside union than against the company-dominated union, even if management's bargaining power against the outside union were (in some sense)¹⁰⁶ less than that against the inside union; or (3) relative backloading of any wage and benefit concessions to the outside union compared to any concessions to the company union, due perhaps to the delay caused by harder bargaining with the outside union. Again, workers could reasonably believe that there was some possibility that the resistant employer would be *able* to impose each of these forms of discriminatory advantage to some degree even if they were proscribed, because of the positive transaction costs in enforcing the proscriptions. But is it plausible that workers would anticipate that management would act in each of these ways, whether proscribed or not? That is, are employers' implicit or explicit threats to discriminate in favor of company unions *credible*?

Even though it was raised several times in the legislative hearings and frequently invoked in early Board interpretations of Section 8(a)(2), version (1) of the discriminatory concession claim may at first seem difficult to credit, at least if we accept the premises of the proponents of the Act. The plausible premise of the framers of the Wagner Act was that nondominated unions could exert greater bargaining power than dominated company unions because the former amassed strike funds and, in the case of nondominated outside unions, organized workers across firms in the relevant labor market. If, as Senator Wagner and others also believed, unionized enterprises had greater productive efficiency than nonunionized or company-unionized enterprises,¹⁰⁷ then unionized workforces might be expected to use their greater bargaining power to

106. For theories of bargaining that rest on various explicit or implicit baselines for at least ordinal comparisons of parties' relative bargaining power, see Elster, *supra* note 35, at 50-96.

107. Due to enhanced labor productivity stemming from unionized workers' greater job security and protection of fair distributive shares, and consequent enhanced trust, morale, and collective self-discipline. See Barenberg, *supra* note 31, at 1427-30, 1465-88. The weight of the available empirical evidence confirms the counter-conventional view that unions raise productivity, even if they lower profits by increasing labor's distributive share. See, e.g., Blanchflower & Freeman, *supra* note 5, at 68. But cf. Barry T. Hirsch, *Labor Unions and the Economic Performance of Firms* 35-66, 91-111, 115-25 (1991) (arguing that evidence of unions' effect on productivity is inconclusive).

extract larger absolute wage shares from the larger corporate residual available to workers and shareholders.

Nonetheless, there are conditions under which the employer might offer workers a higher absolute wage if they voted for the company union over the outside union, even on Wagner's premise that the unionized workplace was both more productive and more labor-empowering than the company-unionized workplace.¹⁰⁸ If the combination of transaction costs to workers of unionizing (including initial organizing costs and ongoing union dues) and management's disutility from the constraints of collective bargaining were large enough to outweigh the hypothesized gains in labor's distributive share from unionization, management might opt to pay a union-threat package of company union wages and benefits sufficient to forestall workers' choice of unionization. This result is more probable to the extent that management's commitment to a union-free environment rises to an ideological or moral principle—a realistic premise in the age of mass production systems built on the logic of centralized coordination of decomposed work processes.¹⁰⁹ The repeat-play opportunities for workers' governance choice and for labor-management bargaining may also give credibility to management's threat to absorb losses—by favoring company unions and disfavoring outside unions—that are otherwise irrational in the short-term.¹¹⁰

Versions (2) and (3) of the discriminatory concessions claim seem to do no independent work in shaping worker incentives to vote for the company union or the outside union. Management has no credible threat of relaxing the tenacity of its bargaining positions beyond the point of offering an absolute union-threat wage sufficient to bribe the workers not to choose independent unionization. If management indeed has the discretionary capacity to backload wages or deploy whatever bargaining power it has more aggressively to resist concessions, management cannot credibly promise not to use that capacity to reduce labor costs to the union-threat level if the workers choose company unionism.

While management's threat to provide higher absolute wages and benefits to the company union than to the independent union may be credible in some circumstances, this nonetheless does not seem to provide grounds for banning the company union while permitting the non-union option. Once the nonunion option is available, the employer has

108. Professor Getman argues that workers are unlikely to believe that of two rival outside unions the one favored by management will yield greater wages and benefits. The inference workers would draw from management's preference is, to the contrary, that the preferred union will yield lesser gains. See Julius Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. Chi. L. Rev. 292, 306-07 (1964). The analysis below suggests that such an implication would not always be accurate in the analogous instance in which management's preferred union is a company union.

109. See Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide* 64 (1984).

110. See Barenberg, *supra* note 31, at 1474.

an incentive to threaten to exert maximum bargaining power against the outside union, whether to diminish the net benefits of unionizing for the particular body of voting workers or to develop a reputation that deters unionization in other existing or future bargaining units. The presence of a company union option does not alter management's incentive to act relatively more or less advantageously toward the outside union, other than by offering the union-threat level of wages and benefits to a workforce that chooses either the company union or nonunionization. If management's payment of union-threat wages is considered a normatively justifiable alteration of the instrumental incentives facing workers in their choice between unionizing and nonunionizing,¹¹¹ the same would apply in their choice between outside and company unions. If the payment of such "discriminatory" wages is permitted in the nonunion workplace only because of the administrative difficulty of policing against the practice, again the same would seem to apply to the company union workplace.

This theoretical analysis notwithstanding, the framers and early interpreters of Section 8(a)(2) believed that management pervasively conditioned greater wages and benefits on workers' choice of a company union over an outside union, but did not appear to believe that management so conditioned the choice between nonunionization and unionization. That is, management would, if financially able, pay the union-threat wage to nonunion workers to satisfy workers' preferences sufficiently to preempt their desire to unionize, but without any threat or warning to lower that wage if workers chose to unionize. Accepting this (inconsistent) empirical premise, the company union option resembled systematic bribery or threats—a form of "structural coercion"—in a way that the nonunion option did not.¹¹²

B. Domination as Distorted Communication

1. *The Ideal of Egalitarian Deliberation.* — The idea of domination as structural coercion looks to the legitimacy or illegitimacy of managerial alteration of the costs and benefits of the governance options facing workers voting in an NLRB representation election. Management can also influence worker choice by altering the conditions within which workers interact and communicate prior to marking their ballots. In the post-War period, administrative regulation of these conditions has been

111. See *supra* text accompanying notes 84–87.

112. Nonetheless, this mode of structural coercion may be less normatively tainted than the two modes discussed above—*trasformismo* and infrastructural coercion. If the former is predicated on the overall pareto-superiority of company unionism when the governance costs of independent unionism are taken into account, management's manipulation of the choice set has a substantial, legitimate effect. If instead management's payment of a lower absolute wage to workers who choose unionism is a strategic effort to develop a reputation for reprisal, then there may be no such justification for the threat, and this mode of structural coercion would be just as illegitimate as the other two.

guided by the standard of maintaining "laboratory conditions" for "free and reasoned choice" by workers.¹¹³ While the laboratory-conditions standard encompasses safeguards against the instrumental interference captured in the analysis of structural coercion above,¹¹⁴ it also serves as the regulative ideal for ensuring the proper conditions for communication among workers, union organizers, and employers.¹¹⁵ The Board and court decisions defining that regulative ideal reflect a familiar conception of free choice succinctly summarized in a leading text:

Such a choice implies that employees should have access to relevant information, that they should use this data to estimate the probable consequences if the union is selected or rejected, and that they should appraise these consequences in the light of their own preferences and desires to determine whether a vote for the union promises to promote or impair their self-interest. This definition provides a key to the meaning of a free and unrestrained choice under the statute. Ideally, at least, the employees should be free from restrictions which unduly obstruct the flow of relevant information¹¹⁶

As a normative conception of human choice, this standard may seem unexceptionable on first glance. From the standpoint both of the Act's framers and of attractive independent conceptions of collective deliberation and choice that elaborate the framers' view, however, the laboratory-conditions standard is limited and incomplete. That standard elides three aspects of group choice that were underscored by the drafters and

113. "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The laboratory conditions standard enunciated in *General Shoe* has been reaffirmed repeatedly. See, e.g., *Midland National Life Ins. Co.*, 263 N.L.R.B. 127 (1982) (reaffirming laboratory conditions standard in both majority and dissenting opinions); *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 n.7 (1966).

114. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969) (defining outlawed employer threats); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (defining outlawed employer provision of benefits); *Operating Eng'rs Local 49 v. NLRB*, 353 F.2d 852, 855-56 (D.C. Cir. 1965), on remand, 165 N.L.R.B. 1062 (1967) (defining outlawed employer interrogation and polling).

115. See, e.g., *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 849 (1992) (employer may deny union organizers access to employer parking lot to communicate with employees, unless off-property communication is infeasible); *NLRB v. United Steelworkers* (Nutone and Avondale), 357 U.S. 357, 364 (1958) (union not entitled to reply speech after employer gives mandatory "captive audience" anti-union speech to workforce, unless union has unequal communicational alternatives); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945) (employer may not penalize workers for communicating among themselves during work breaks); *Excelsior Underwear*, 156 N.L.R.B. 1236 (after election petition filed, union is entitled to list of employees in order to allow adequate communication).

116. Archibald Cox et al., *Cases and Materials on Labor Law* 119 (11th ed. 1991); see also Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46-47 (1964) (presenting similar summary).

early interpreters of the Wagner Act:¹¹⁷ first, workers' preferences, interests, and emotional bonds are not exogenously fixed but rather created, transformed, and chosen; second, this process of interest-formation, as well as formation of perceptions about the descriptive reality of the workplace, is a group or intersubjective process; and third, substantive equality, autonomy, or other democracy-underpinning values provide normative criteria for evaluating the conditions for group deliberation and choice. These three aspects are central to an ideal of "egalitarian deliberation" that informs an array of current views about collective choice in social and political theory, ranging from civic republicanism,¹¹⁸ to radical or socialist democracy,¹¹⁹ to leading liberal (e.g., John Rawls's) accounts of democratic process in a just society,¹²⁰ to a "discourse ethics" of ideal communication.¹²¹

117. See Barenberg, *supra* note 31, at 1418–22, 1427–30, 1434–38, 1454–56, 1475–88.

118. For a sample of the voluminous legal academic literature, see, e.g., Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 *Harv. L. Rev.* 1695 (1989); Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29 (1985). These legal writings followed a revival of republicanist thought in political and historical writing. See, e.g., J.G.A. Pocock, *The Machiavellian Moment* (1975); Michael J. Sandel, *Liberalism and the Limits of Justice* (1982); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969); Joyce Appleby, *Republicanism in Old and New Contexts*, 43 *Wm. & Mary Q.* 20 (1986).

119. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Policy: Normative Analysis of the State* 17 (Alan Hamlin & Philip Petit eds., 1989) [hereinafter Cohen, *Democratic Legitimacy*]; Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 *Soc. Phil. & Pol'y*, Spring 1989, at 25, 30–39 [hereinafter Cohen, *Economic Basis*]; David Miller, *In What Sense Must Socialism Be Communitarian?* 6 *Soc. Phil. & Pol'y*, Spring 1989, at 51.

120. John Rawls, *A Theory of Justice* (1971). Rawls argues that a well-ordered democracy incorporates all three aspects of egalitarian deliberation enumerated above: it shapes the interests and identities of citizens, see *id.* at 234; it embodies intersubjective deliberation aiming at the public good, see *id.* at 226, 360–61, 472; and it secures the "fair value" of opportunities for communicative participation by means of egalitarian distribution of resources. See *id.* at 225–26, 277–78. See also John Rawls, *The Basic Liberties and Their Priority*, in *III Tanner Lectures on Human Values* 42–43 (1982). For a good discussion of these aspects of Rawls's theory, see Cohen, *Democratic Legitimacy*, *supra* note 119, at 18–20.

121. See, e.g., 1 Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Thomas McCarthy trans., 1984) [hereinafter Habermas, *Communicative Action*]; Seyla Benhabib, *In the Shadow of Aristotle and Hegel: Communicative Ethics and Current Controversies in Practical Philosophy*, in *Hermeneutics and Critical Theory in Ethics and Politics* 1 (Michael Kelly ed., 1990); Jean Cohen, *Discourse Ethics and Civil Society*, in *Universalism vs. Communitarianism: Contemporary Debates in Ethics* 83, 83–101 (David Rasmussen ed., 1990); Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophic Justification*, in *The Communicative Ethics Controversy* 60 (Seyla Benhabib & F. Dallmayr eds., 1990) [hereinafter Habermas, *Discourse Ethics*]; cf. C. Edwin Baker, *Human Liberty and Freedom of Speech* 48–51 (1989) (arguing for similar communicative rights alternatively

By emphasizing the accessibility of relevant information about the empirical effects of unionization,¹²² the laboratory-conditions standard resembles the "marketplace of ideas" justification for constitutional free speech rights. The key desideratum is to encourage the discovery of truth by ensuring a sufficiently robust market in information.¹²³ The ideal of egalitarian deliberation instead shifts the focus to the participatory rights of group members to shape their collective destiny, including the transformation of their preferences, interests, values, and individual and group identities. This ideal is concordant with the Deweyan pragmatist-progressive intellectual vision held by the political elite that fashioned the Wagner Act.¹²⁴ Joshua Cohen provides a clear contemporary statement of an ideal deliberative procedure.¹²⁵

In ideal deliberation parties are both formally and substantively *equal*. They are formally equal in that the rules regulating the procedure do not single out individuals. Everyone with the deliberative capacities has equal standing at each stage of the deliberative process. Each can put issues on the agenda, propose solutions, and offer reasons in support of or in criticism of proposals. And each has an equal voice in the decision. The participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation, nor does that distribution play an authoritative role in their deliberation.¹²⁶

from Habermasian ideal of communicative action, from liberty-based justification of legal obligation, and from actual commitments of liberal democratic societies).

122. See *supra* note 116 and accompanying text.

123. See, e.g., Baker, *supra* note 121, at 6-46.

124. See *supra* text accompanying notes 83-84.

125. Proponents of deliberative democracy or egalitarian communication, of course, do not expect that actual institutions can fully realize such a formal, abstract definition of ideal deliberative conditions. Pildes and Anderson, for example, accept the three descriptive features of deliberative group choice presented in the text, but emphasize that [p]olitical legitimacy . . . should not be treated as an abstract concept, to be gauged by reference to unattainable ideals. The question of legitimacy must be a pragmatic and comparative one—a question of institutional arrangements more or less legitimate than other alternatives that could be constructed.

Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2196 (1990). Nonetheless, Pildes and Anderson evaluate practical institutions in light of a regulative ideal not unlike Cohen's:

[T]he distribution of effective ability to contribute to meaning making in democratic politics becomes central for evaluating democratic institutions, norms, and democratic political culture in general.

...

Any practice or institution, public or private, that systematically deprives groups of the power to participate meaningfully in deliberative politics is challenged by [this] conception of democratic legitimacy

Id. at 2203-04.

126. Cohen, *Democratic Legitimacy*, *supra* note 119, at 22-23. This is only part of Cohen's specification of the ideal procedure.

The ideal deliberative procedure is designed to neutralize the effect of relations of power and subordination on deliberative procedure and outcomes. Interest- and preference-formation are thus freed from the dangers, *inter alia*, of non-autonomous "adaptive preferences"—preferences that adapt to circumstances without the exercise of the agent's deliberative capacities.¹²⁷ They are also freed of "accommodationist preferences"—preferences that accommodate, even after individual or group self-reflection, to unjust relations of subordination, such as the Stoic slave's preference to remain enslaved.¹²⁸ Deliberation under conditions that fall short of the ideal can be characterized as "distorted" or "dominated" communication.

Three unappealing features are sometimes incorrectly taken to be inevitable correlates of the ideal of egalitarian communication. First, that ideal is said to exclude or devalue pluralist difference and disagreement among participants and to require homogenizing consensus and closure of ongoing deliberation.¹²⁹ Quite the contrary¹³⁰—as current "best practices" in egalitarian work-team decision-making, discussed below in Part V, demonstrate. Second, the principle of egalitarian communication is sometimes thought to entail acceptance of the dubious concept of objective "false consciousness."¹³¹ One can, however, embrace an entitlement to deliberative democracy without maintaining that the substantive decisions or identity-transformations that issue from that procedure are true or good. Third, some proponents depict egalitarian deliberation as a process of narrowly rational argumentation and persuasion.¹³² However, the intersubjective dialogue over group interests, values, and identity need not (and probably cannot) exclude appeals to deeply felt emotions and intuitions that may not be fully articulable or accessible to others.¹³³

127. Cf. Dan-Cohen, *supra* note 18, at 977 (arguing that ascription of responsibility for choice may rest on an agent's deep reflection and decision to identify with internal traits or will, even if the latter are historically determined and unchosen).

128. See Cohen, *Democratic Legitimacy*, *supra* note 119, at 25; see also Jon Elster, *Sour Grapes* 109–40 (1983); Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* 78–88 (1981); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1146–50 (1986).

129. See Amy Gutmann, *Communitarian Critics of Liberalism*, 14 Phil. & Pub. Aff. 308, 319 (1985); Don Herzog, *Some Questions for Republicans*, 14 Pol. Theory 473, 488 (1986).

130. See, e.g., Robert D. Putman, *Making Democracy Work: Civic Traditions in Modern Italy* 117 (1993); Michael Walzer, *Interpretation and Social Criticism* 29–30 (1987) (presenting argument for pluralist deliberation); Michelman, *Law's Republic*, *supra* note 118, at 1528–32 (same).

131. The concept of "false consciousness" is also distinguishable from the nonessentialist understandings of "hegemonic consciousness" (subjective states that reinforce unjust power relations) discussed in the next section.

132. See, e.g., Habermas, *Communicative Action*, *supra* note 121.

133. See Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 3–107 (1989); Kent Greenawalt, *Private Consciences and Public Reasons* (forthcoming, from Oxford University Press) (manuscript at ch. 14) (on file with the Columbia Law Review). The emotive aspect of group debate does require difficult, but unavoidable,

2. *Company Union Practices That Constitute Distorted Communication.* —

The framers and early interpreters of the Section 8(a)(2) ban emphasized that company unionism undermined workers' autonomous choice by distorting the conditions for workers' egalitarian deliberation. Summarizing the key features of the company-dominated union in introducing the Labor Relations Act before the Senate Education and Labor Committee in March 1935, Senator Wagner pointed to the employer's "participat[ion] in [the inside union's] deliberations as an organic entity."¹³⁴ Even the leading corporate spokesperson against the Act, while defending employers' right to establish company unions, conceded that employers should be barred from using company unionism to "dominate the free opinion of the employee, except by argument or reasoning."¹³⁵ The decisions of the NRA labor boards of 1933–35, which were codified in the NLRA unfair labor practice provisions, had repeatedly underscored the company unions' illegitimate interference with the procedures for workers' "collective discussion" and for the formation of their collective "desires," "wishes," "will," and "opinions."¹³⁶ This concern was carried forward in the early interpretation of Section 8(a)(2). These various pronouncements identified several specific mechanisms by which company unionism dominated workers' communication.

a. *Bans on Employee Meetings.* — The company union apparatus typically made no provision for meetings among rank and file workers either before their votes to endorse the company union and to elect representatives or during the operation of the organization. Meetings between rank and file workers and their elected representatives, or even among the representatives alone, were also rare. In one of its earliest decisions, the Wagner-chaired National Labor Board of 1933–34 condemned the establishment of the company union by the Corcoran Shoe Company because the employer "precluded any deliberation on the part of the employees, and prevented a true expression of their will."¹³⁷ Its successor, the old NLRB of 1934–35, frequently cited the lack of a "reasonable opportunity [for workers] to talk" about whether to endorse the company union,¹³⁸ and the preemption of any "means for the formulation of the collective wishes of employees" because the company unions banned general meet-

contextual judgments about the legitimacy of intersubjective appeals to "opaque" or substantively illicit affective inclinations or compulsions (e.g., racism, xenophobia) as bases for group choice. See *infra* text accompanying notes 220–231.

134. Hearings on S. 1958, *supra* note 95, at 41, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 1417.

135. To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor, 73d Cong., 2d Sess. 355 (1934) [hereinafter *Hearings on S. 2926*], reprinted in 1 *Legis. Hist.*, *supra* note 47, at 389 (statement of James A. Emery, General Counsel, Nat'l Ass'n Mfrs.).

136. See cases cited *infra* notes 137–139.

137. Joseph F. Corcoran Shoe Co., 1 N.L.B. 78, 80 (1934).

138. See, e.g., Kaynee Co., 2 N.L.R.B. [old] 33, 34 (1934).

ings.¹³⁹ In an article read to the Senate committee in its second day of hearings on Wagner's 1934 Labor Disputes bill, an automotive industry trade paper advised: "It is thought to be bad policy to permit employee representatives to meet privately since there is no control over the issues that they bring up and, also, because the group forms a majority opinion on any given issue, which is hard to change"¹⁴⁰ The Twentieth Century Fund's influential report supporting Wagner's 1935 Labor Relations bill concluded: "Failure to provide for rank-and-file meetings is an important shortcoming of company-union plans. Such meetings are necessary to give "public opinion" in the plant an opportunity to crystallize and become a real force, and to develop a sense of solidarity among the employees."¹⁴¹ Post-Wagner Act NLRB and court decisions continued to highlight company unions' outright denial of workers' opportunities for "collective discussion" and group opinion-formation.¹⁴²

b. *Managerial Participation in Employee Deliberations.* — Company union representatives typically assembled only in the presence of managerial representatives. The framers and early interpreters stressed the distorting effects of this practice on the deliberations among employee representatives. As already noted, Senator Wagner saw employers' participation in the organic deliberations of a labor organization as a central feature of company unionism, and employers' associations were aware of the importance of management's control of the agenda when representatives assembled.¹⁴³ The Wagner-drafted Senate Report to his 1934 bill cited employers' "dictating to the organization officials the procedure or agenda for meetings" as a prime manifestation of employer "domination" under Section 8(a)(2).¹⁴⁴ Legislators and early interpreters also maintained that, apart from agenda-control, management's mere presence at meetings of representatives or of the rank and file distorted employee communication and interest-formation, owing to the inherent threat of managerial reprisal against disfavored employee expression.¹⁴⁵ In one of

139. See, e.g., *International Nickel Co.*, 2 N.L.R.B. [old] 271, 272 (1935) B.F. Goodrich Co., 1 N.L.R.B. [old] 181, 183 (1934); *Firestone Tire and Rubber Co.*, 1 N.L.R.B. [old] 173, 176 (1934).

140. Hearings on S. 2926, *supra* note 135, at 93, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 123 (testimony of William Green, President, A.F. of L.) (quoting trade paper).

141. Twentieth Century Fund, *Labor and the Government* 109 (Alfred L. Bernheim & Dorothy Van Doren eds., 1935).

142. See, e.g., *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 270 (1938); *Carpenter Steel Co.*, 76 N.L.R.B. 670, 687 (1948); *American Enka Corp.*, 27 N.L.R.B. 1057, 1070 (1940), enforced, 119 F.2d 60, 62 (4th Cir. 1941); *Republic Steel Corp.*, 9 N.L.R.B. 219, 230 (1938), enforced in part, 107 F.2d 472 (3d Cir. 1939); *International Harvester Co.*, 2 N.L.R.B. 310, 329, 348 (1936).

143. See *supra* notes 134, 140 and accompanying text.

144. S. Rep. No. 1184, 73d Cong., 2d Sess. 5 (1934), reprinted in 1 *Legis. Hist.*, *supra* note 47, at 1104.

145. In Senate hearings on proposed amendments to the Railway Labor Act in 1934—which included company union provisions that prefigured NLRA Section 8(a)(2)—the Federal Coordinator of Transportation explicitly contrasted communication between

its earliest company union cases, the NLRB found that "the presence of [Pacific Greyhound's] officers at the meetings of the Drivers' Association, taking notes of the proceedings and joining in the discussion . . . exerts a powerful pressure upon the members and representatives."¹⁴⁶ The Second Circuit, in a later case, found that management's participation in workers' meetings denied them "the opportunity in the absence of the employer to canvass their grievances [and] formulate their demands in common."¹⁴⁷

c. *Trasformismo, Again.* — The way in which company unionism instrumentally bribed and threatened employee representatives to, in turn, bribe and threaten rank and file employees was discussed above as an instance of structural coercion or domination proper. Such intimidation could, of course, also distort communication by chilling pro-union speech. In addition, the Act's framers maintained that management's use of employee representatives as a cadre of pro-company union organizers was a form of domination even when the employee representatives solicited noncoercively on behalf of the company union. That is, the use of managerial resources—including management's inherent, centralized capacity to overcome free-rider problems among individual workers—in support of one mode of collective governance amounted to a distortion of egalitarian deliberation among the workforce. In an opinion entered into the record and discussed in the Senate Committee during hearings on the Labor Relations bill, the old NLRB noted that B.F. Goodrich's payments to a subgroup of employees to organize a company union "w[ere] a form of discrimination which handicapped the efforts of one group of employees in promoting their ideas on self-organization. . . . [This] involves in substance the subsidizing of an active group of propagandists among the employees for the type of employee representation the company would prefer to deal with."¹⁴⁸ The view that employer-subsidized persuasion and solicitation impaired workers' free collective choice underpinned many post-Wagner Act decisions of the Board and

management and workers with communication among workers on the ground that the former was inherently distorted by asymmetric power, while the latter could be distorted only by misrepresentations that, unlike intimidation, could be remedied by rebuttal. See *To Amend the Railway Labor Act: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 149 (1934) [hereinafter *Hearings on S. 3266*].

146. *Pacific Greyhound Lines, Inc.*, 2 N.L.R.B. 431, 455 (1936) (internal quotations omitted), enforced in part, 91 F.2d 458 (9th Cir. 1937), rev'd as to partial denial of enforcement, 303 U.S. 272 (1938).

147. *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 904 (2d Cir. 1954), cert. denied, 348 U.S. 964 (1955).

148. *B.F. Goodrich Co.*, 1 N.L.R.B. [old] 181, 184 (1934); see also *Hearings on S. 1958*, supra note 95, at 570, 572–73, reprinted in 2 *Legis. Hist.*, supra note 47, at 1956, 1958–59 (incorporating *Goodrich* decision in records of Senate hearings); id. at 562–63, reprinted in 2 *Legis. Hist.*, supra note 47, at 1948–49 (testimony of John D. House) (discussing *Goodrich* decision in pertinent part).

courts.¹⁴⁹ This view rests on a conception of choice embodying the ideal of egalitarian deliberation within the relevant demos, that is, the workforce.¹⁵⁰ In contrast, under the narrower laboratory-conditions view of free choice—as in the marketplace-of-ideas rationale for the First Amendment—additional noncoercive persuasion and solicitation does not impair free communication and choice, regardless of the source of the additional solicitation. While the ideal of egalitarian deliberation among workers casts doubt on the now-widespread and lawful managerial practice of deploying supervisors and other managerial personnel to campaign against unionization, the subsidization of employee representatives for the same purpose can be seen as an even more severe distortion of egalitarian deliberation. Managerial deflection of the speech of employee representatives, precisely because they are members, if not opinion-leaders, within the relevant demos,¹⁵¹ may have a deeper effect on deliberative outcomes.

C. *Hegemonic Consciousness*¹⁵²

1. *Hegemony as a Consequentialist Theory of Ideology.* — The ideal of egalitarian deliberation discussed in the previous section can be understood as a standard for evaluating processes of subjective interest-formation that looks solely to the “genetic” or “epistemic” properties of preferences or interests.¹⁵³ The deliberative procedure that *generates* interests may be flawed from the standpoint of political or ethical rights of equal participation in group discourse or collective choice. Alternatively, the deliberative ideal may rest on an *epistemic* standard presumed to be

149. See, e.g., *Automotive Maintenance Mach. Co.*, 13 N.L.R.B. 338 (1939); *Link Belt Co.*, 12 N.L.R.B. 854, 866–67 (1939); *J. Greenebaum Tanning Co.*, 11 N.L.R.B. 300, 312 (1939); *Douglas Aircraft Co.*, 10 N.L.R.B. 242, 248, 250 (1938).

150. Note that this view stands in tension with the legalization of noncoercive employer anti-union campaigns. The former view implicitly underpins some commentators’ argument that employers have no more right to participate in workers’ deliberations prior to NLRB representation elections than do employees in shareholder campaigns for the election of corporate directors, or foreign citizens in American political election campaigns. See, e.g., Weiler, *Governing the Workplace*, *supra* note 3, at 259.

151. See *supra* text accompanying notes 73–75.

152. A purely scholastic point: Antonio Gramsci, the seminal thinker on the theory of hegemony, wrote ambiguously about whether “hegemony” referred only to ideological means or to both ideological and coercive means for maintaining systems of authority or domination. At one point, Gramsci wrote: “The ‘normal’ exercise of hegemony on the now classical terrain of the parliamentary regime is characterized by the combination of force and consent which balance each other in various ways . . .” Antonio Gramsci, *Note Sul Machiavelli, Sulla Politica, e Sullo Stato Moderno* 103 (1949), quoted and translated in Femia, *supra* note 75, at 25. Nonetheless, Gramsci’s dominant understanding of “hegemony” was “the myriad ways in which the institutions of civil society operate to shape, directly or indirectly, the cognitive and affective structures whereby men perceive and evaluate problematic social reality.” *Id.* at 24. I use the term in the latter sense and distinguish it from the instrumental processes of “structural coercion” and “distorted communication” discussed above.

153. These categories and the following analysis rely heavily on Geuss, *supra* note 128.

held by the participants. The presumption is that the agents themselves are committed to an epistemological principle of rejecting interests or preferences that could be formed only under conditions of domination departing from the egalitarian deliberative ideal.¹⁵⁴

An alternative standard for evaluating interests and preferences—"hegemony" proper—rests on a consequentialist conception of ideology. Under this standard, practices that have the effect of encouraging subordinate groups to hold preferences, interests, affects, habits, or descriptive maps that help sustain illegitimate relations of asymmetric power are themselves presumptively illegitimate. In any given instance of interest-formation, the three standards—genetic, epistemic, and consequentialist—may be intertwined. Subjective interests that offend the genetic and epistemic standards because formed under conditions that violate the egalitarian deliberative ideal may also reinforce those very conditions. Consequentially tainted ideology or hegemony, however, need not also be genetically and epistemically illegitimate. A subordinate group's submissive desires or false descriptive beliefs that reinforce its illegitimate subordination may originate in practices other than those that violate the ideal procedural conditions of egalitarian deliberation.

Although ideologies that help sustain illegitimate power relations may be presumptively illegitimate, they are not necessarily so. Many normative positions agree, of course, that it is illegitimate for an actor to encourage others to hold false *descriptive* beliefs that support unjust practices. The question becomes more contested when the legal regime evaluates practices that induce injustice-sustaining submissive or deferential desires and interests, or that trigger neurotic compulsions or predictable cognitive "irrationalities." Once again, the legal outcome in such cases generally reflects variable, contextual modes of valuation and associated understandings of the responsible choosing self.¹⁵⁵

2. *Hegemonic Company Union Practices.* — The idea of hegemony underpins one of the justifications for Section 8(a)(2) most frequently voiced by adjudicators and commentators. Company-union practices transformed workers' consciousness—their normative interests and preferences, emotional desires and dispositions, behavioral habits and compulsions, and descriptive perceptions—in ways that helped sustain management's illegitimate asymmetric power.¹⁵⁶ Many contemporary ob-

154. The presumption may be historical—appealing to the actual norms of members of a particular community—or quasi-transcendental—based on ostensible assumptions that inhere in the nature of human communication. Compare Theodor W. Adorno, *Negative Dialectics* (E.B. Ashton trans., 1973) (historicist position), with Habermas, *Communicative Action*, *supra* note 121 (quasi-transcendentalist position).

155. See *supra* notes 18–28 and accompanying text; *infra* notes 220–231 and accompanying text.

156. The framers of the Act clearly believed that the asymmetric power between management and workers in the nonunionized workplace was illegitimate. Wagner and his allies frequently denounced the nonunion workplace as a state of "despotism" and "economic slavery." See Barenberg, *supra* note 31, at 1445–46 & n.297, 1456. The fact

servers condemned or praised company unionism on just this ground. Sumner Slichter, the Harvard economist and Wagner adviser, wrote in 1929 that modern personnel methods, including company unions, were "one of the most ambitious experiments of the age, because they aim, among other things, to counteract the effect of modern technique upon the mind of the worker, to prevent him from becoming class conscious and forming trade unions."¹⁵⁷ An economist for an employer association, Leslie Vickers, testified approvingly in Senate hearings that "management has, through these employee-representation plans, fostered the thought that ultimately . . . the interests of management and labor are identical."¹⁵⁸ The catch-phrase of labor reformers was that company unionism served as a "delusion and a snare."¹⁵⁹

For Wagner himself this phenomenon was at most a secondary justification for banning company unions. His dominant view was that company unions were so structurally coercive that workers "know full well whose union it is and in whose interests it will work."¹⁶⁰ But in several early cases, the NLRB and the courts faced specific instances in which the workers clearly favored in-house unions. In those and other cases, the Board and the courts sought to reconcile the company union ban and the Act's principle of worker free choice by appealing to the idea of hegemonic consciousness, often cast in language identical to that of the labor reformers.¹⁶¹ In fact, by the time of the 1947 hearings on the proposed Taft-Hartley Amendments to the Wagner Act, the Board's chief argument for continuing the ban was that workers' genuine free choice needed protection against subordinating desires, impulses, and perceptions im-

that the framers gave workers the right to choose to remain in such a state did not alter that normative judgment, although it does generate some difficult puzzles and tensions in interpreting the statute. See *id.* at 1442-55.

157. Sumner H. Slichter, *The Current Labor Policies of American Industries*, 43 Q.J. Econ., May 1929, at 393, 432.

158. Hearings on S. 2926, *supra* note 135, at 680, reprinted in 1 Legis. Hist., *supra* note 47, at 718. "Every advocate of employee representation lays great stress on the 'moderating' and 'educating' effects of the plans, and the facilities they offer for reaching and directing the minds of the workers into conservative ruts." Dunn, *supra* note 96, at 179.

159. American Fed'n of Labor, Report of Proceedings, 39th Annual Convention 303 (1919); see also Carroll E. French, *The Shop Committee in the United States* 81 (1923) (company unions "delude" workers, according to William Foster, union organizer); *id.* at 85 n.23, 86 (company unions are "subterfuge" that "manipulate[s] . . . the wishes" of workers).

160. He so stated in the widely circulated "Wagner Brief" attacking New York state courts' grant of injunctions enforcing yellow-dog employment contracts. See *Interborough Rapid Transit Company Against William Green, et al., Brief for Defendants* 397 (1928) [hereinafter *Wagner Brief*].

161. The Second and Fourth Circuits for example, called the company union a "delusion and a snare." *NLRB v. Stow Mfg Co.*, 217 F.2d 900, 904 (2d Cir. 1954); *American Enka Corp. v. NLRB*, 119 F.2d 60, 63 (4th Cir. 1941); cf. *supra* notes 157-159 and accompanying text.

planted by company unionism.¹⁶² The administrative and judicial understanding of company unions' effect on workers' consciousness—an understanding developed over hundreds of cases—thus represents an extraordinary practical effort by the legal regime to address (if only implicitly) the empirical and theoretical nature of hegemonic ideology and its relationship to the instrumental modes of domination discussed above.

The following subsections reconstruct several alternative versions of the judicial understanding of "hegemony" in light of more theoretically self-conscious insights drawn from the recent burgeoning studies of ideology and interest-formation and from cognitive and depth psychology.¹⁶³ The processes that sustain illegitimate power relations (in the workplace or other settings) are better captured in categories more finely textured than the conventional dichotomy of "coercion," on the one hand, and "consent" or "legitimation," on the other.

a. *Structural and Performative Dissemblance.* — In its first decision interpreting Section 8(a)(2), the Supreme Court upheld a Board order requiring an employer to cease recognition of a company union because such recognition "enabl[ed] the employer to induce adherence of employees to the [company union] in the mistaken belief that it was truly representative and afforded an agency for collective bargaining."¹⁶⁴ This language can be read as a condemnation of company unionism's encouragement either of false *descriptive* beliefs about the features of company unions and independent unions, or of false *normative* understandings of what constitutes true representation or collective agency. The former reading seems the more natural. Although the Board and the courts saw the creation of false descriptive beliefs as a normative impairment of free

162. Board chairman Paul Herzog conveyed several versions of the hegemony justification for the company union ban in his Taft-Hartley testimony. See Hearings on S. 55, *supra* note 58, at 1901, 1911–13. For his specific statements, see *infra* text accompanying notes 205–207.

163. Jon Elster declares that "[t]he central task of the theory of ideologies must be to explain how ideas arise or take root in the minds of the persons holding them." Jon Elster, *Making Sense of Marx* 476 (1985). A narrower definition of the theory of ideology, similar to the use of "hegemony" in this Article, is offered by John Thompson—that is, the analysis of symbolic, meaningful, and other preference- or perception-shaping phenomena that help establish or maintain relations of asymmetric power or domination. See John B. Thompson, *Ideology and Modern Culture* 56–57 (1990). My definition of "hegemony" adds an evaluative element to Thompson's definition. That is, to show an instance of hegemony, one must offer contextual or abstract considerations why the power asymmetry or manipulation of consciousness is illegitimate.

164. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938). The NLRB's first General Counsel hoped that this case would provide the first Supreme Court test for the Act's constitutionality because the employer was clearly involved in interstate commerce, but a slow Third Circuit panel issued its decision in the case three months after the Supreme Court upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For the full story, see Peter H. Irons, *The New Deal Lawyers* 254–56 (1982). In the Taft-Hartley hearings of 1947, Board Chairman Herzog restated and defended the *Pennsylvania Greyhound* justification for the company union ban. See Hearings on S. 55, *supra* note 58, at 1912 & n.26.

choice akin to simple misrepresentation, they identified characteristics of company unionism that induced such beliefs by means other than false factual statements or deceptive non-disclosure by management.¹⁶⁵ I will conceptualize some of those means as "structural" or "performative dissemblance."

After an exhaustive description of the workings of the International Harvester Company's inside union, the Board asked rhetorically, "[I]s it anything more than an elaborate structure designed to create in the minds of the employees the belief that they possess something of substance and value that enables them to deal with their employer on an equal footing, so that they will be sufficiently content to resist the appeal of an outside labor union?"¹⁶⁶ As one specific mechanism of such *structural* dissemblance, the Board maintained that the operation of inside unions systematically distorted workers' perceptions of the relative costs and benefits of outside versus inside unionism. By channelling all wage and benefit gains and welfare activities through the company union, "[t]he employees are thus led to feel that Works Councils directly bring about reforms of such a nature and favor for the Plan is thus stimulated."¹⁶⁷ Concurrently, workers were led to believe that, unlike unionized workers, they were "getting [these benefits] for nothing" because they made no direct payment of dues, even though the not inconsiderable costs of running the company union in fact came out of labor and management's joint surplus.¹⁶⁸

The Board's decisions also found various forms of performative dissemblance inherent in the company unions' operation. While the establishment and operation of company unions gave a show of independent worker action, the employer subtly orchestrated outcomes, often through "adroit manipulation" of a small group of loyal or intimidated employee representatives.¹⁶⁹ An employer "could afford to indicate outward indifference and unconcern . . . Its passive aloofness could at least serve to camouflage its subtle guidance of the moves, [and its] legerdemain. . . . What it could not do openly and directly it could . . . accomplish

165. Raymond Geuss notes that "most of the interesting cases" of ideological delusion are something other than simply "an empirical error. . . . It is, of course, an extremely important task for empirical social research to point out how the interests of powerful social groups cause false information to be produced and disseminated throughout the society." Geuss, *supra* note 128, at 12, 41-42.

166. International Harvester Co., 2 N.L.R.B. 310, 348 (1936).

167. *Id.* at 331.

168. See *id.* at 351. In Senate testimony, a Weirton Steel company union representative maintained that company unions had the great advantage of appearing cost-free to the workers, but acknowledged that company union expenses, like AFL dues, ultimately came out of workers' wages. Hearings on S. 1958, *supra* note 95, at 412, reprinted in 2 Legis. Hist., *supra* note 47, at 1798.

169. See Lion Shoe Co., 2 N.L.R.B. 819, 830 (1937) ("The formation of the Lynn Shoe Workers' Union is a clear example of how an employer, by suggestion and indirection, may encourage others to bring into being an organization subservient to its wishes.").

clandestinely and indirectly."¹⁷⁰ The Supreme Court agreed that company unionism provided an employer "a device by which its power may . . . be made effective unobtrusively."¹⁷¹ Consultants detailed the surreptitious steps by which management could attempt to get loyal foremen and rank and file leaders to establish organizations that other rank and file workers would falsely believe to be their independent creation.¹⁷² The practices uncovered by the pre- and post-Wagner Act labor boards ranged from the hidden subsidization of solicitation on behalf of the company union¹⁷³ to the staging of company union "strikes" in order "to simulate the existence of a genuine conflict and to make it appear that the company was forced to enter into an agreement."¹⁷⁴

Although the Board heard much evidence of explicit managerial statements to employees that company unionism matched outside unionism in the effectiveness of its representation and bargaining, managerial strategists and the Board maintained that structural or performative dissemblance was inherently more effective than simple misrepresentation. Management consultants advised employers to set up company unions when outside unions were not on the horizon, because direct comparisons between the actual features of inside and outside unions would too likely undermine the appearance that company unionism equalled collective bargaining.¹⁷⁵

b. *False Juridico-Political Legitimation.* — In liberal democracies, the primary public mode of legitimation of authority relations is through norms of democratic consent and the rule of law.¹⁷⁶ The framers and early interpreters of Section 8(a)(2) identified at least three ostensible ways in which company unions, by wrongful means, legitimated managerial authority through appeal to such juridico-political norms. First, company unions gained a substantial number of adherents based on a false appearance of widespread support or majoritarian legitimation. That

170. Alaska Juneau Gold Mining Co., 2 N.L.R.B. 125, 136 (1936); see also, e.g., J. Greenebaum Tanning Co., 11 N.L.R.B. 300, 311 (1939) (company union practices "clothe[d] the Association with an appearance of independence").

171. NLRB v. Pacific Greyhound Lines, Inc., 303 U.S. 272, 275 (quoting NLRB findings) (internal quotations omitted).

172. See, e.g., Julian J. Aresty & Gordon S. Miller, *The Technique of Arousing and Maintaining the Interest of Foremen and Workers in Plans of Employee Representation*, 6 Personnel 115 (1930).

173. See *supra* text accompanying notes 88–100.

174. Standard Tailoring Co., 2 N.L.R.B. [old] 422, 424 (1935); see also, e.g., Shell Oil Co., 2 N.L.R.B. 835, 852 (1937) (simulation of collective negotiation and agreement); Atlas Bag & Burlap Co., 1 N.L.R.B. 292, 300 (1936) (same). Some of the other specific mechanisms of hegemony discussed in subsequent subsections could be understood as further instances of structural or performative dissemblance.

175. See Dunn, *supra* note 96, at x.

176. See Kent Greenawalt, *Conflicts of Law and Morality* 62–93 (1987); Don Herzog, *Happy Slaves: A Critique of Consent Theory* (1989); Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* 81–102 (1979); Perry Anderson, *The Antinomies of Antonio Gramsci*, 100 New Left Rev. 15–78 (1976–77).

false appearance rested on two phenomena: the structural coercion that led some workers falsely to express support for the company union,¹⁷⁷ and the "unwarranted prestige" and "deceptive cloak of authority" that came with the company's automatic recognition of company unions as majority representatives—by contrast with employers' resistance to outside unions.¹⁷⁸ The Board and the Supreme Court believed that such inflated expressions of adherence and prestige "could only have the desired effect of prodding those employees who had not yet expressed their preference."¹⁷⁹ Such false majoritarian legitimation would reciprocally reinforce instrumental intimidation against outside unionization, to the extent that many workers would only take the risk of supporting an outside union when it had demonstrated sufficient shopfloor strength to protect its adherents.¹⁸⁰

Second, in the Board's view, the trappings of representative elections and deliberative councils provided "the semblance, rather than the substance,"¹⁸¹ of democratic accountability. The employer retained unilateral control over final decisions, manipulated elections to ensure compliant employee representatives, and blocked intra-union communication by which the rank and file could form its opinions and monitor and instruct its representatives.¹⁸²

177. See *supra* text accompanying notes 68–100.

178. See *ILGWU v. NLRB* (Bernhard-Altmann Tex. Corp.), 366 U.S. 731, 736 (1961) (employer recognition afforded the union a "deceptive cloak of authority with which to persuasively elicit additional employee support"); *Midwest Piping and Supply Co.*, 63 N.L.R.B. 1060, 1071 (1945) ("unwarranted prestige"). While these cases involved an employer's premature recognition of a minority union or one of two rival outside unions rather than a company union, they both rested on the proposition advanced by the Supreme Court in its first company union case: "[O]nce an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees." *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938).

179. *Federal Bearings Co.*, 4 N.L.R.B. 467, 482 (1937).

180. For vivid case studies of the process in which more timid workers are drawn to support the union only after a critical mass of union adherents has demonstrated its capacity to withstand or deter managerial reprisal, see Rick Fantasia, *Cultures of Solidarity: Consciousness, Action, and Contemporary American Workers* 82–87 (1988); Friedlander, *supra* note 74, at 12–36.

181. *H.E. Fletcher Co.*, 5 N.L.R.B. 729, 736 (1938).

182. See, e.g., *Republic Steel Corp.*, 9 N.L.R.B. 219, 230 (1938) (stating that "behind its outward semblance of democratic procedure and its announced purposes of insuring justice and promoting the common welfare, the Plan was shrewdly designed to foreclose genuine collective bargaining and to fix firmly in the hands of the [employer] an indisputable control over its employees."); *International Harvester Co.*, 2 N.L.R.B. 310, 348 (1936) ("[The] conception of the Works Council as a deliberative body possessing power is false."). In its first decision, the Board quoted an internal company letter of Pennsylvania Greyhound Lines:

It is to our interest to pick out employes [sic] to serve on the committee who will work for the interest of the company and will not be radical. This plan of representation should work out very well providing the proper men are selected,

Third, the primary benefit offered by company unionism was generally a process for addressing employee grievances. Management often introduced the company union as part of a broader policy of centralizing personnel administration and providing more uniform policies and rules to displace the pre-existing "foremen's empires" that were a constant source of worker charges of arbitrary treatment.¹⁸³ The Board thought this effort at legitimation through the "rule of law" was a ruse because the often complex apparatus for grievance-resolution ended with unilateral managerial decision, not neutral arbitration. Thus, in the International Harvester scheme, "[t]he elaborate machinery of appeal to the President, convocation of a General Council, resort to arbitration [only] upon the acquiescence of the management serves only further to create the illusion of equality."¹⁸⁴

c. *Universalization.*

Mr. Clement: [I] officially represent all class I railroads in the United States and am delegated by them to give you their views [on the proposed Railway Labor Act Amendments of 1934.] I am vice president of the Pennsylvania Railroad Co. . . . At heart, I am also speaking for a million railroad employees of the United States.

The Chairman:¹⁸⁵ That is an interesting statement—"at heart." Your heart or their heart?

Mr. Clement: Both, sir.¹⁸⁶

The most familiar ideological mechanism is "universalization," in which practices that serve the particular interests of some group are represented as serving the interests of all. It is well capsulized by British historian E.H. Carr:

The doctrine of the harmony of interests . . . is the natural assumption of a prosperous and privileged class, whose members have a dominant voice in the community and are therefore naturally prone to identify its interest with their own. In virtue of this identification, any assailant of the interests of the dominant group is made to incur the odium of assailing the alleged common interest of the whole community, and is told that in making this assault he is attacking his own higher interests. The doctrine of the harmony of interests thus serves as an ingenious

and considerable thought should be given to the men placed on this responsible Committee.

Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 8 (1935). On the company union's distortion of internal communication and monitoring of representatives, see *supra* text accompanying notes 134-150.

183. See Jacoby, *supra* note 37, at 161-63.

184. *International Harvester*, 2 N.L.R.B. at 348.

185. Of the Committee on Interstate Commerce, Senator Clarence C. Dill.

186. Hearings on S. 3266, *supra* note 145, at 55.

moral device invoked, in perfect sincerity, by privileged groups in order to justify and maintain their dominant position.¹⁸⁷

"The fundamental idea" of company unionism, according to the followers of John D. Rockefeller, Jr., who spearheaded the movement for such enlightened management, was "that the only solidarity natural in industry is the solidarity which unites all those in the same business establishment."¹⁸⁸ Opponents of the Wagner Act testified in Congressional hearings that company unionism "fostered the thought that ultimately . . . the interests of management and labor are identical,"¹⁸⁹ while independent unionism generated artificial grievances and antagonistic interests.¹⁹⁰ Independent unionism created "two armed camps," but company unionism produced a "single organism" based on endogenously formed sentiments of mutual understanding and perceived common interests in the prosperity of the enterprise.¹⁹¹

The Board agreed that company unionism "conditioned" workers to feel loyalty to managerial interests and "canalized [workers'] desire" into "the channel of an inside union" serving those interests, but found that such ideological deflection of workers' choice away from empowerment through independent unionization violated Congress's understanding of

187. Edward H. Carr, *The Twenty Years' Crisis, 1919-1939*, at 80 (Harper Torchbooks 1964) (1939).

188. Irving Bernstein, *The Lean Years: A History of the American Worker, 1920-1933*, at 170 (1960) (quoting Rockefeller aide referring to solidarity not just among enterprise workforce, but between management and labor as well).

189. Hearings on S. 2926, *supra* note 135, at 680, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 718 (testimony of Leslie Vickers, employer association economist).

190. The president of the meat packers' trade association declared that the bill "would substitute the principle that the interests of employers and employees are opposed for the principle now behind employee representation plans in this industry, that the interests of employers and employees are mutual." *Id.* at 1004, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 1042 (brief of William Woods). A mining industry executive protested that labor organizers threatened the harmony of company unionism by "tell[ing] our men the troubles which they have, which they themselves have never thought about." Hearings on S. 1958, *supra* note 95, at 625, reprinted in 2 *Legis. Hist.*, *supra* note 47, at 2011 (statement of R.C. Allen).

191. See Hearings on S. 2926, *supra* note 135, at 403, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 437 (testimony of Henry Dennison, progressive manager and former NLRB member). This view was endorsed by a federal district court that refused to disestablish Weirton Steel's company union in a significant Justice Department suit to enforce Section 7(a) of the National Industrial Recovery Act:

It is said that [the employment] relation involves the problem of the economic balance of the power of labor against the power of capital. The theory of a balance of power or of balancing opposing powers is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional old world theory. It is not the Twentieth Century American theory of that relation as dependent upon mutual interest, understanding, and good will. This modern theory is embodied in the Weirton plan of employee organization.

United States v. Weirton Steel Co., 10 F. Supp. 55, 86 (D. Del. 1935). See Irons, *supra* note 164, at 220 (characterizing *Weirton* case as labor's "most crushing defeat" under the NIRA).

Section 8(a)(2).¹⁹² The Board, however, articulated no single well-developed theory of the process by which company unions achieved such interest-transformation and of why that mechanism was illegitimate. Board and court decisions and General Counsel arguments pointed to various possible mechanisms.

First, the Board recurrently recounted how workers whose efforts at outside unionization were frustrated by managerial coercion ultimately acquiesced in, and developed loyalties and habits supporting, the company union option. The Board and the Supreme Court believed that these new preferences persisted and normatively tainted the workers' subsequent choice of inside unionism even after the coercive practices themselves ended. In a substantial line of cases, the Board and the Court disestablished enterprise unions that clearly had majority support, and excluded them from future NLRB ballots, although the employer had wholly ceased its earlier domination of the labor organization.¹⁹³ The Board's and Court's finding that employees' lingering preferences were illegitimate could be explained by the idea of "adaptive preferences." Because systematic coercion by company unionism made outside unionism seem practically unavailable to workers, their preferences and perceptions may have adapted through the alternative psychological mechanisms of "sour grapes," "wishful thinking," or "rationalization."¹⁹⁴ In order to reduce the psychic frustration of not having the independent unionism that they initially preferred, workers' desire for, or valuation of, the attributes of outside unions may have diminished, or their valuation of company unionism and sense of common interest with management may have inflated.¹⁹⁵

192. See, e.g., *American Petroleum Co.*, 12 N.L.R.B. 688, 703-04 (1939); *Crawford Mfg. Co.*, 8 N.L.R.B. 1237, 1242 (1938); see also Brief for Petitioner at 24, 32, *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941) (NLRB General Counsel argues that company union "conditioned" employees into attitudes of "loyalty" and "submission"); Brief for Petitioner at 50, *NLRB v. Falk Corp.*, 308 U.S. 453 (1940) (same); Brief for Petitioner at 11, *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939) (NLRB General Counsel argues that the company union "canalized the desires of the men").

193. The leading case in this line is *Newport News Shipbuilding*, 308 U.S. at 250, enforcing 8 N.L.R.B. 866 (1938); see also *Falk*, 308 U.S. at 459-61, enforcing 6 N.L.R.B. 654 (1937) (excluding enterprise union from ballot although "purged of company influence").

194. See Elster, *supra* note 128, at 109-40; Elster, *supra* note 163, at 466-68; Leon Festinger, *A Theory of Cognitive Dissonance* 73-74 (1957). For interesting legal applications, see Sunstein, *supra* note 128, at 1146-50.

195. Following Elster's analysis, workers might have been best off, given the coercive constraints they faced, if they engaged in Stoic or Spinozist character-planning to upgrade their desire or interest in the positive attributes of company unionism than if they unconsciously devalued the independent unionism that was beyond their reach. Workers' autonomy is enhanced if they are able consciously to plan their preferences; and their welfare increases if they inflate their desire for what they have, rather than alter their descriptive perception of what they do not have. See Elster, *supra* note 128, at 119, 125. Barrington Moore presents the phenomenon of dissonance reduction in terms not of altered preferences or perceptions, but of legitimation: "People are evidently inclined to

An alternative or supplement to this sour-grapes mode of overcoming cognitive dissonance is wishful thinking by workers—perceptual distortions of the descriptive attributes of company unions and outside unions. Andrew Furuseth, President of the Seaman's Union, espoused the latter theory:

The tired and worried working man, who has nothing but his labor with which to support himself and his family, believes the promises [of the benefits of company unions] because he wishes to believe them. He is tired. He does not like the struggle [for independent unionism] . . . and so he joins the "company" union.¹⁹⁶

Such wishful thinking would also constitute a process other than structural dissemblance to underpin the Supreme Court's view that company unionism induced false descriptive beliefs that blurred the distinction between inside and outside unions.¹⁹⁷ This type of rationalization might be a particularly powerful psychological force among employee representatives struggling to neutralize guilt or self-loathing over their obsequious or ingratiating behavior toward management.¹⁹⁸

Second, the Board occasionally suggested cruder explanations for workers'—especially employee representatives'—interest-alignment: a mixture of indoctrination and seduction captured in the Board's accusation of "conditioning" by the company union. Management subjected employee representatives to barrages of company-biased information and arguments about workers' interests in enterprise performance, while assuring representatives of their special, favored status in forging organizational solidarity. The Board found it "not unreasonable to believe that many of these representatives, through constant association with management officials, always on a most cordial basis, come to regard themselves as part of the management and its machinery."¹⁹⁹ What proponents of company unions saw as legitimate "cordial" communication, the Board viewed as manipulative exploitation of workers' vulnerability in a context of asymmetric power and information. Recent experimental studies suggest that, in situations of asymmetric information, even people who are fully aware of their "role disadvantage" relative to another person's display of esoteric information will tend to overestimate the superiority of the other's overall knowledge.²⁰⁰ The illegitimacy of this "conditioning"

grant legitimacy to anything that is or seems inevitable no matter how painful it may be. Otherwise the pain might be intolerable." Barrington Moore, Jr., *Injustice: The Social Bases of Obedience and Revolt* 458–59 (1978).

196. Andrew Furuseth, *Company Unions*, *Am. Federationist*, May 1928, at 541, 542.

197. See *supra* text accompanying notes 164–175.

198. See Unger, *supra* note 24, at 132 (describing phenomenology of self-abasement among subordinate individuals).

199. *International Harvester Co.*, 2 N.L.R.B. 310, 327–28 (1936).

200. People tend to be relatively "insensitiv[e] to the limited inferential value of biased data samples." Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* *Judgment Under*

of employee representatives may have been reinforced by the "addictive" nature of their heightened status. Rank in a status hierarchy "ceases to give satisfaction after a while because it is taken for granted, but its loss can give much pain."²⁰¹ That is, the status elevation of employee representatives may have induced a preference-transformation further aligning their interests with management's. The loss of the rank becomes more painful than its initial lack.²⁰²

A final possible process of universalization follows from the mechanisms of structural dissemblance or false democratic legitimation discussed above. Wagner believed that collective bargaining through independent unions would in fact achieve a genuine alignment or harmony of workers' and management's interest.²⁰³ His normative conception was that the empowerment of unionization created the egalitarian conditions in which genuinely reciprocal dialogue could generate legitimate shared interests; or, stated alternatively, the democratic participation embodied in collective bargaining would ensure that managerial authority operated in the interests of the citizenry of workers.²⁰⁴ Accepting this statutory premise, workers who falsely believed that the company union provided full-fledged collective bargaining or industrial democracy would, by implication, falsely believe that the company-unionized organization mutually served their and management's interests.

Whatever the assumed underlying mechanism, the universalization rationale for banning company unions was the dominant theme of Board Chairman Paul Herzog's arguments in the Taft-Hartley hearings for keeping company unions—even formerly but no longer company-dominated enterprise unions—off the NLRB representation ballot. "The theory of the statute is that employee desire under the circumstances stems from employer domination, and therefore is not free."²⁰⁵ The installation and operation of the company union replaced "the employee's impulse to seek the organization which would most effectively represent him" with acquiescence in the inside union serving managerial interests.²⁰⁶ Recognizing that the diachronic process of preference-formation was central to evaluating worker autonomy, Herzog declared that "[h]istory is important" in applying the Act's "sole criterion" of free worker choice.²⁰⁷

Uncertainty: Heuristics and Biases 129, 138 (Daniel Kahneman et al. eds., 1982); see also Richard E. Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* ch. 4 (1980).

201. Tibor Scitovsky, *The Joyless Economy: The Psychology of Human Satisfaction* 130 (rev. ed. 1992).

202. See *id.*

203. See Barenberg, *supra* note 31, at 1427–30, 1478–88.

204. See *id.*

205. Hearings on S. 55, *supra* note 58, at 1912.

206. *Id.* at 1912 n.26 (quoting *NLRB v. Pacific Greyhound Lines, Inc.*, 303 U.S. 272, 275 (1938)).

207. *Id.* at 1912.

d. *Naturalization*. — False legitimation and universalization are ostensible ideological processes that rest on agents' affirmative consent to or normative approval of an illegitimate asymmetric relation of power. This classic notion of ideology—as the symbolic construction of consent, contrasted with instrumental coercion—often reflects a presumption that a subject's compliance with authoritative directives is motivated by a system of relatively abstract norms or principles internalized from a culture that is disproportionately influenced by dominant groups.

The classic view requires amendment along three related lines. First, compliance by a subordinate group need reflect neither coercion nor normative consent. There is a range of alternative orientations that may explain compliance to authority, including apathy, resignation, unconscious habit or custom, emotional patterns of coping or compulsion, or behavioral or psychic diversions and displacements.²⁰⁸ Second, ideology need not take the form of a system of descriptive and prescriptive propositions embodied in a reigning, abstract "comprehensive view" such as liberalism or socialism. It can instead inhere in more practical, action-oriented systems of thought, feeling, and speech, in what Raymond Williams calls "structures of feeling" and Pierre Bourdieu dubs "habitus"—the prereflective dispositions and discursive performances, the inarticulate, spontaneous practices and emotions that suffuse everyday experience.²⁰⁹ Third, these enriched understandings of ideology direct attention away from global cultural systems to the local social contexts or micro-structures that both frame daily experience and mediate the relation between such larger symbolic systems and individual mentalities.²¹⁰

One process encompassed by this broadened understanding of ideology is "naturalization"—when a subordinate group is motivated to comply with a system of power by habituation to seemingly natural or inevitable practices woven into the texture of daily life.²¹¹ It might seem unlikely that a practice as novel as the company unionism of the 1930s could take on an aura of inevitability, especially in light of the widespread challenge from the vivid counter-model of outside unionism. Nonetheless, the

208. See, e.g., Nicholas Abercrombie et al., *The Dominant Ideology Thesis* 1–58, 156–86 (1980) (emphasizing resignation, apathy, rational calculation); Terry Eagleton, *Ideology: An Introduction* 18–24, 156–58, 221 (1991); Thompson, *supra* note 163, at 59–67; T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 *Am. Hist. Rev.* 567, 569–71 (1985).

209. See Pierre Bourdieu, *Outline of a Theory of Practice* 78–87 (1977); Raymond Williams, *Marxism and Literature* 110, 132 (1977); see also Louis Althusser, *For Marx* 233–34 (1969); Michel Pecheux, *Language, Semantics and Ideology* (1975) (arguing that ideology is embedded in discursive performance); Louis Althusser, *Ideology and the Ideological State Apparatuses*, in *Lenin and Philosophy* (Louis Althusser ed., 1971).

210. See, e.g., Thompson, *supra* note 163, at 146–54, 313–19; Stuart Hall, *Brave New World*, *Socialist Rev.*, Jan./Mar. 1991, at 57, 63.

211. Thompson calls this phenomenon "naturalization" or "reification." Thompson, *supra* note 163, at 65–66. Geuss labels it an "objectification mistake." Geuss, *supra* note 128, at 14.

Board and leading management practitioners believed that company unionism could be so routinized as to seem an unchangeable part of workplace life. In its condemnation of International Harvester's works councils plan, the Board detailed how the company union was made a part of production, compensation, welfare, and social activities to such a degree that it was regarded by employees as an integral part of the plant life.

[Management] has carefully supplied prop after prop for its support so that today the average employee at the plant accepts the Plan as an institution without any realization of the careful structure that has thus been built to keep the Plan alive and functioning [T]he effect [of the company union orientation program] upon the normal [new] employee not too curious about the bargaining agencies that may exist in the plant is that the Plan is a thing to be accepted without question²¹²

A leading guide-book on managerial implementation of company unionism advised against efforts at overt propagandizing of workers, warning:

"The [managerial] leaders think they can substitute new ideas for old before they have changed the action tendencies, habit systems, of the people The question all leaders, all organizers, should ask is not, how can we bring about the acceptance of this idea, but how can we get that into the experience of the people which will mean the construction of new habits?"²¹³

e. *The Psychodynamics of Authority and Deference.* — Certain arguments of the Board and the Supreme Court—some of which have already been quoted—have the flavor of a crude Freudian interpretation of workers' psychological response to domination. The Court, adopting language of the Board, asserted that managerial "domination" had the effect of suppressing workers' "impulse" for collective action and substituting the "compulsions" of "timorous habits" and "habitual subservience" from which the worker would only be "released" if management not only ceased to dominate or interfere with the inside union, but publicly disclosed and renounced its repressive practices and dismantled the company union.²¹⁴ The Board wrote that "the praises of such business

212. *International Harvester Co.*, 2 N.L.R.B. 310, 329, 335 (1936).

213. Ernest R. Burton, *Employee Representation* 187 (1926) (quoting M.P. Follett, *Creative Experience* 200 (1924)) (internal quotations omitted). The primacy of the concept of habitual behavior in interwar psychological theory, see, e.g., Dewey, *supra* note 24. Follett, *supra*, is reflected in this analysis by the Board and management progressives in the 1920s and 1930s.

214. See *NLRB v. Pacific Greyhound Lines, Inc.*, 303 U.S. 272, 273, 274-75 (1938); see also *NLRB v. Falk Corp.*, 308 U.S. 453, 461 (1940). The full quotation, not unambiguous, reads:

In ordering withdrawal of recognition of the [inside union] by [the employer], the Board pointed out that a mere order to cease the unfair labor practices "would not set free the employee's impulse to seek the organization which would most effectively represent him"; that continued recognition of the [inside union] would provide [the employer] "with a device by which its power may now be made

leaders [as International Harvester executives] at the very least are certain to commend the [company union] Plan to many an employee and his family—'Approbation from Sir Herbert Stanley is praise indeed'.²¹⁵

In Freud's theory of ideology, the power of a dominant group may be reinforced by outward projection of the subordinate individual's sub-conscious masochistic love of the tyrannical superego.²¹⁶ "[T]he suppressed classes can be emotionally attached to their masters; in spite of their hostility to them they may see in them their ideals," he wrote.²¹⁷ The psychological phenomenon of masochistic or self-abasing idealiza-

effective unobtrusively, almost without further action on its part. Even though he would not have freely chosen [the inside union] as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firmly to his choice. The employee must be released from these compulsions."

Pacific Greyhound, 303 U.S. at 274-75 (quoting Board decision in same case, 2 N.L.R.B. 431, 455-56 (1936)); see also *Carlisle Lumber Co.*, 2 N.L.R.B. 248, 277 (1936); *Ansins Shoe Mfg. Co.*, 1 N.L.R.B. 929, 937 (1936); *Wheeling Steel Corp.*, 1 N.L.R.B. 699, 710 (1936); Hearings on S. 55, supra note 58, at 1912 n.26 (testimony of Board Chairman Herzog). The "compulsions" facing the employee could be understood to refer to either the "force of timorous habit" or the effective, unobtrusive "power" of the employer. The former reading—that the "compulsions" from which the worker is to be "released" are his own psychic drives or habits—is suggested (1) by the earlier parallel language of "impulse[s]" to be "set free," and (2) by the assumption of the Court that the actual ongoing domination, coercion and interference by management was terminated. See *Pacific Greyhound*, 303 U.S. at 273. Further, in a decision two terms later, the Court affirmed a Board order denying an inside union a place on the NLRB representation ballot even though, in addition to ceasing its domination and support, the employer had also dismantled and ceased to recognize the inside union prior to the election. See *Falk*, 308 U.S. at 453. Hence, even though the employer's "power" could not be made effective by continued recognition of the inside union as in *Pacific Greyhound*, the employees were denied the option of a newly created, nondominated enterprise union, again on the ground that "habitual subservience" to the employer impaired "complete freedom of choice." *Id.* at 461.

215. *International Harvester Co.*, 2 N.L.R.B. at 354; cf. *ILGWU v. NLRB* (Bernhard-Altmann Tex. Corp.), 366 U.S. 731, 736 (1961) (arguing that employers' recognition of a non-majority union affords "a deceptive cloak of authority" to the recognized union) (emphasis added); see also *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 267 (1938) (arguing that employer recognition of company union gives it "a marked advantage over any other in securing the adherence of employees"); *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1071 (1945) (arguing that recognition of one of two rival unions gives it "unwarranted prestige") (citing *Pennsylvania Greyhound*) (emphasis added); M.H. Hedges, *Organizing the Hidden Men*, Labor Age, Dec. 1926, at 2 (arguing that "sub-conscious" emotion of loyalty to management drives workers to support company union against their self-interest).

216. The Board's language, quoted supra note 214, resonates not only with psychoanalytic theory, but also with the Deweyan pragmatist psychology of the "suppress[ion]" of "impulse" by culturally constructed "habit." Dewey, supra note 24, at 108. Deweyan psychology was popular among interwar progressives, including Robert Wagner and his circle. See Barenberg, supra note 31, at 1413-15, 1418-22, 1434-38.

217. Sigmund Freud, *The Future of an Illusion* 17 (James Strachey ed. & trans., 1961). A powerful recent psychoanalytic account of domination and masochism in the context of gender roles is presented in Benjamin, supra note 24. Applications of the account to various other social institutions are sketched in Lynn S. Chancer, *Sadomasochism in Everyday Life* (1992).

tion of authority figures need not, of course, be cast in the concepts of Freudian drive theory. Object-relations, intersubjectivist, and post-structuralist psychological theories capture the same process.²¹⁸ These psychological theories of ideology have the virtue of offering an interpretation of the familiar experience of the irrational and tenacious hold of ideology on individual minds:

If "disinvesting" ourselves of an ideological viewpoint is as difficult as it usually is, it is because it involves a painful "decathecting" or disinvestment of fantasy-objects, and thus a reorganization of the psychical economy of the self. Ideology clings to its various objects with all the purblind tenacity of the unconscious; and one important hold that it has over us is its capacity to yield enjoyment.²¹⁹

The issue of whether the legal regime should or can draw a normative line between decisions that are and those that are not driven by neurotic compulsion or unreflective habitual subservience vividly demonstrates that the company-union question cannot avoid confronting the legal construction of subjectivity. Libertarians, of course, see a dangerous potential of paternalism in any legal effort to distinguish between character traits that are integral to the "true self" and neurotic compulsions that are understood as "false" external constraints on choices made by the true self.²²⁰ Some legal theorists propose to draw that line based on whether the inner drive serves the objective "best interests,"²²¹ subjective

218. See, e.g., Benjamin, *supra* note 24, at 3-27 (presenting an intersubjectivist or relational theory of authority); W.R. Bion, *Experiences in Groups* 59-75 (1961) (presenting an object-relations theory of authority); Slavoj Žižek, *The Sublime Object of Ideology* 11-53 (1989) (presenting a poststructuralist theory of authority).

219. Eagleton, *supra* note 208, at 184 (discussing psychoanalytic theory of ideology of Slavoj Žižek, *supra* note 218).

220. Feinberg, *supra* note 81, at 162-71; Richard Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *Harv. L. Rev.* 1431, 1446-48 (1986).

221. The psychoanalyst Karen Horney articulates this naive essentialist position:

When we call a drive compulsive we mean the opposite of spontaneous wishes or strivings. The latter are an expression of the real self; the former are determined by the inner necessities of the neurotic structure. The individual must abide by them regardless of his real wishes, feelings or interests lest he incur anxiety, feel torn by conflicts, be overwhelmed by guilt feelings, feel rejected by others, etc. . . . Since [the neurotic person] himself is unaware of the difference between wanting and being driven, we must establish criteria for a distinction between the two. The most decisive one is the fact that he is driven on the road to glory with an utter *disregard for himself, for his best interests*.

Karen Horney, *Neurosis and Human Growth* 29 (1950). Horney, of course, is making no claims about the implications of neurosis for legal intervention to block the neurotic choice. Robin West argues that judicial paternalism that overrides "revealed preferences" is justified when based on the judge's "sympathetic understanding of the parties' true interest," but West would have judges measure such "true interests" by the parties' anticipated or actual subjective suffering or happiness. See Robin L. West, *Taking Preferences Seriously*, 64 *Tul. L. Rev.* 659, 680 (1990).

well-being,²²² autonomy,²²³ or self-realization²²⁴ of the agent.²²⁵ Modern skeptics, postmodern theorists of the decentered or fragmented subject, and neo-Buddhist theorists of the "no-self" reject any notion of identifying the "real self" amidst the conflicting impulses, perceptions, and causal relations that constitute the phenomenology of personhood.²²⁶

In any event, as liberal, critical, and postmodern legal theorists emphasize, the liberal legal regime already incorporates *some* (contestable) criteria for distinguishing the autonomous and nonautonomous self in different contexts, exemplified by such familiar doctrines as duress and incapacity.²²⁷ The Board's treatment of workers' habitual or compulsive subservience to the company union as one element diminishing the genuineness of their choice can thus be understood as an instance of unusually expansive legal inquiry into the conditions of autonomous selfhood.²²⁸ That view embodies a widely held but contestable ascription of irrational, non-autonomous choice to a self that is "under the sway of opaque psychological forces."²²⁹ To the extent that individuals internalize or evade that ascription, the legal regime contributes to the social construction of subjectivity.²³⁰ The Board's law, in its internal discourse

222. See, e.g., West, *supra* note 221; Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384, 399–400 (1985).

223. See, e.g., Cass R. Sunstein, *supra* note 128, at 1133, 1136.

224. See, e.g., Jon Elster, *Self-Realisation in Work and Politics: The Marxist Conception of the Good Life*, in *Alternatives to Capitalism* 127 (Jon Elster & Karl O. Moene eds., 1989).

225. Each of these criteria, of course, becomes problematic once the existence of multiple selves is recognized. The interests, happiness, or autonomy of *which* fragmentary self is to trump? Useful essays from an analytic perspective on this point are collected in *The Multiple Self* (Jon Elster ed., 1986). For poststructuralist articulations of this view, see sources cited *infra* note 226.

226. On the skeptical and post-modernist view, see generally Steven Best & Douglas Kellner, *Postmodern Theory: Critical Interrogations* (1991), and the essays collected in *Who Comes After The Subject?* (Eduardo Cadava et al. eds., 1991). On the neo-buddhist view, see, e.g., Steven Collins, *Selfless Persons* (1982); Serge-Christophe Kolm, *The Buddhist Theory of 'No-Self'*, in *The Multiple Self*, *supra* note 225, at 233.

227. See, e.g., Kelman, *supra* note 65, at 127–41; Dan-Cohen, *supra* note 18, at 992, 999, 1003. Boyle "venture[s] to suggest" that "the definition of the subject will be one of the most important parts of the legal consciousness of the time—although it will probably also be seen as something that 'goes without saying.'" Boyle, *supra* note 18, at 511.

228. "The result of the realist revolution has been to produce not one, but a host of legal subjects." Boyle, *supra* note 18, at 516.

229. Jon Elster, Introduction, in *Rational Choice* 1, 15 (Jon Elster ed., 1986). This view

amounts to making *autonomy* part of the notion of rationality, and is thus inconsistent with any purely welfarist conception of rational choice. Acting rationally means more than acting in ways that are conducive to welfare: it also implies that the beliefs and desires behind the action have a causal history with which we can identify ourselves.

See *id.* (footnote omitted).

230. See, e.g., Dan-Cohen, *supra* note 18, at 992, 999, 1003.

and its intended though not necessarily achieved social impact, purges the worker's identity of the deferential impulse; the latter is treated "as an external and intrusive agency rather than a part of [the worker herself]."²³¹

Of course, the Board's proposition that workers deferred to their superiors' "approbation" of company unions does not require psychoanalytic underpinnings. A straightforward "cultural" explanation of workers' deference to authority—whether based on general socialization; on what Goffman calls "rituals of subordination";²³² or, historically, on the still "profoundly deferential"²³³ cultures of newer immigrant workers in the interwar years—would do.²³⁴ The normative taint of workers' deference to managerial approbation of the company union may then be captured in Joel Feinberg's rigorously formulated concept of "exploitation" in the form of "manipulated benevolence." That is, the employer unfairly plays on the workers' "benevolent virtues" of loyalty and trust for its own self-interested advantage.²³⁵

f. Expurgation of the Other: Emotional Splitting and Dichotomous Mapping. — In its *General Shoe* decision in 1938, the Board described at length the employer's persistent rhetorical appeals for "loyalty" to the company "family" in its struggle against the "outsiders" and "strangers" who sought unionization.²³⁶ The Board concluded:

These highly inflammatory words of advice and fervent pleas for loyalty, directed to employees who were the recipients of many substantial benefits donated by a paternalistic employer, ignited a flame of resentment against the Union, which unquestionably explains the [employees'] formation of the [company union], and the acts of violence that followed. Had the [employer] actually participated in the organization of the [company union],

231. *Id.* at 991.

232. Erving Goffman, *Interaction Ritual* *passim* (1982).

233. Fraser, *supra* note 39, at 139; see also Friedlander, *supra* note 74, at 97.

234. Paul Veyne offers an explanation of workers' idealization of their bosses that lies somewhere between Freud's theory of masochistic desire and the pure cultural socialization argument. He analyzes at length the human tendency to "overshoot" in making psychological adjustments to subordination: that is, the sour grapes phenomenon is likely to generate excessive humility. Masochistic desire is the consequence, not the cause, of submission. See Paul Veyne, *Bread and Circuses* 295–304 (Brian Pearce trans., 1990); see also Elster, *supra* note 128, at 115–18.

235. Feinberg gives the following example of "manipulated benevolence":

[A] loving and devoted spouse may find no higher satisfaction than unquestioning service to his partner. Helping the other unquestioningly is what he *likes* doing. If that trait is cynically exploited by the partner, who makes ever more unreasonable demands on him, the devoted husband may not feel ill-used in the slightest. He has not been wronged or harmed, but his wife exploited his disposition to the fullest for her own selfish advantage . . . [T]he injustice consists in a wrongful gain [even] in the absence of any wrongful loss.

Feinberg, *Harmless Wrongdoing*, *supra* note 67, at 207.

236. *General Shoe Corp.*, 5 N.L.R.B. 1005, 1008–10, 1015 (1938).

such direct action could have had no stronger effect upon the employees than had [the general manager's] moving address.²³⁷

A recurrent theme in the Board's company union decisions was employers' deployment of the tropes of "community," "insider," "team," "American," and, most frequently, "family" in connection with company unions, in contrast to the independent unions' identification with "traitor," "stranger," "outsider," "alien," "anti-American," "disloyalty" and "communist."²³⁸ The Board believed this strategy was particularly effective at tainting workers' free, reasoned choice by triggering the eruption of hateful emotions attached to the latter signifiers. The insider/outsider symbols were thought "to provoke the antagonism which is easily aroused in many people against strangers to the community."²³⁹ The Board's implicit normative conception of the autonomous self here may simply rest on a categorical privileging of reason over passion.²⁴⁰ Alternatively, that conception may rest either on substantive moral distinctions among various "irrational" desires (good coworker sympathy and solidarity versus bad xenophobia or chauvinism),²⁴¹ or on some narrower sense of "opaque," unconscious impulses that would be resisted under conditions of calm reflection.²⁴²

This ideological strategy has been called "expurgation of the other"—the identification of an external enemy against which the group's collective identity is mobilized.²⁴³ The Board's emphasis on the primordial, hostile emotions aroused by such a symbolic strategy resonates strongly with widely accepted psychological theories traceable to Freud but elaborated more fully by the "object-relations" school pioneered by Melanie Klein.²⁴⁴ In that theory, the infantile self develops through a process of "splitting" the ego between "introjective identifications" with the attributes of good "others" and good experiences of the

237. *Id.* at 1015.

238. See, e.g., *Triplex Screw Co.*, 25 N.L.R.B. 1126, 1131 (1940); *W.F. & John Barnes Co.*, 12 N.L.R.B. 1028, 1033, 1037 (1939); *Link-Belt Co.*, 12 N.L.R.B. 854, 859, 865 (1939); *Servel, Inc.*, 11 N.L.R.B. 1295, 1310 (1939); *Lane Cotton Mills*, 9 N.L.R.B. 952, 961 (1938); *Revolution Cotton Mills*, 9 N.L.R.B. 468, 472 (1938); *American Mfg. Concern*, 7 N.L.R.B. 753, 762 (1938); *General Shoe*, 5 N.L.R.B. at 1015.

239. *American Mfg. Concern*, 7 N.L.R.B. at 762.

240. See *supra* text accompanying note 116; *infra* text accompanying notes 260–261.

241. Cf. Bruce Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 741 (1985) (arguing that judicial removal of racial "prejudice" from the scope of legitimate political preferences embodies a substantive moral commitment).

242. For a recent summary of the normative view, within the liberal tradition, that unreflective, perhaps transitory emotional impulses defeat autonomous rational choice, see, e.g., Feinberg, *supra* note 81, at 40–42.

243. Thompson, *supra* note 163, at 65. Thompson identifies this ideological strategy, but does not link it to psychoanalytic processes discussed in this subsection.

244. See generally the essays collected in *Essential Papers on Object Relations* (Peter Buckley ed., 1986); Hannah Segal, Melanie Klein (1979); *The Selected Melanie Klein* (Juliet Mitchell ed., 1986). The Kleinian tradition of psychoanalytic thought has spawned much compelling analysis of workplace relations. See, e.g., Larry Hirschhorn, *The Workplace Within: Psychodynamics of Organizational Life* (1988).

external world and "projective identifications" with the bad. Through projective identification, the self attempts to rid itself of unwanted, painful internal feelings by projecting them onto others "and then relating to them, so to speak, through hatred or fear, externally and in a relatively objectified form."²⁴⁵ Dichotomous descriptive categories may then come to "function mainly not as cognitive mapping devices intended to identify facts, but as ways of channelling and condensing basic feelings of positive and negative identification. They are modes of mental splitting, idealization, and denigration."²⁴⁶

Even leading clinical or relational psychologists who reject the Kleinian psychoanalytic notion that emotional "splitting" originates in the preverbal infant self conclude that it is empirically "a pervasive human phenomen[on]" in the post-infancy mind and is "ready-made for pathological elaboration" based on "symbolic transformations and condensations on an hedonic theme."²⁴⁷ The archetypes of this psychological dynamic, of course, are such potent irrational forces as racist emotion and national chauvinism.²⁴⁸ In this light, it is not surprising that the Board's analysis and language in its company union decisions prefigure its later adoption of a rule against employers' inflammatory appeals to racial symbols in NLRB election campaigns—a rule proscribing not "temperate, . . . truthful and germane" racial messages, but appeals designed to "inflare" the "powerful emotional force" of racial prejudice and to "create an emotional atmosphere of hostility" to the union.²⁴⁹

Even accepting, as I do, the usefulness of the psychological model as an interpretation of the familiar experience of the irrational force of antipathies for the outsider or "other," it alone does not account for *which* dichotomous "us-them" categories, if any, will become the conductors of expurgated hateful feeling. Cultural socialization and political contesta-

245. Michael Rustin, *The Good Society and the Inner World: Psychoanalysis, Politics and Culture* 64 (1991); see also Jacob A. Arlow, *Object Concept and Object Choice*, 49 *Psychoanalytic Q.* 109 (1980).

246. Rustin, *supra* note 245, at 66 (referring specifically to dichotomous symbols of racial difference).

247. Daniel Stern, *The Interpersonal World of the Infant: A View from Psychoanalysis and Developmental Psychology* 252 (1985); see also Benjamin, *supra* note 24, at 63–67 (applying "splitting" concept within intersubjectivist or relational approach to psychoanalytic theory); Joel Kovel, *White Racism: A Psychohistory* 49–50 (1984) (applying similar analysis to psychology of racism).

248. See Benedict Anderson, *Communities Imagined* (rev. ed. 1991) (depicting emotional force of nationalist splitting); Rustin, *supra* note 245, at 66 (linking psychological splitting and racism). The splitting dynamic is also paradigmatically at work in the conventions of gender opposition. See, e.g., Benjamin, *supra* note 24, at 222.

249. Sewell Mfg. Co., 138 N.L.R.B. 66, 71–72 (1962). The Board reasoned that inflammatory emotional appeals, as opposed to rational messages, about race violated employees' right to "cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *Id.* at 71.

tion are significant determinants of the connection between particular symbolic dichotomies and the provocation of primordial, "split" emotions. The ideological campaign (fought within both the company and the broader polity) between proponents of company unions and supporters of independent unions can be seen as a contest over the perceptual maps or templates that would serve most saliently to align us-them feelings. While the company union attempted to mobilize workers' perceptions that the company or plant was the relevant "insider" community or family, the independent union appealed to class or occupational grouping. The importance of perceptual "reframing" or "paradigm-shifts" in organizational culture—and in political choices analogous to NLRB governance elections—is widely documented by recent organizational and political studies.²⁵⁰

g. *Neutralization and Reference-Group Reframing.* — The Board maintained that the primary substantive benefit that company unions provided workers was machinery for resolving individual grievances. Proponents of company unionism viewed grievance resolution as a legitimate benefit that satisfied genuine worker preferences. The Board, to the contrary, depicted company unions' resolution of relatively minor grievances as a "sop" and a diversion from workers' participation in determining more important workplace terms and conditions.²⁵¹ In this, the Board echoed the Twentieth Century Fund's report supporting the Wagner Act, which concluded that the "real purpose" of many company unions was to serve "as lightning rods by which the aspirations of the employees for a share in the determination of their conditions of employment are directed from 'dangerous' to 'harmless' objects."²⁵² Progressive managerial publicists had commended company unions for serving a somewhat similar "safety valve" function.²⁵³

If no means are available for bringing the [worker's complaint] out into the open for investigation and settlement, it rankles in the minds of those who consider themselves ill-treated, becomes magnified as they brood over it, warps their attitude toward other questions, and in the end may lead to an explosion out of all proportion to the original trouble.²⁵⁴

250. On perceptual "reframing" in economic enterprises, see *infra* text accompanying notes 762–766 and note 764; and in political elections, see Robert Westbrook, *Politics as Consumption: Managing the Modern American Election*, in *The Culture of Consumption: Critical Essays In American History, 1880–1980*, at 143, 170 (Richard W. Fox & T.J. Jackson Lears eds., 1983).

251. See *American Potash & Chemical Corp.*, 3 N.L.R.B. 140, 148 (1937).

252. Twentieth Century Fund, *supra* note 141, at 323–24.

253. National Industrial Conference Board, *Collective Bargaining Through Employee Representation* 39 (1933) [hereinafter *NICB* (1933)].

254. *Id.*; see also French, *supra* note 159, at 61–62 (concluding that company unions resolved grievances that "would have led to serious trouble or at least would have formed the basis for secret grudges [and] ill will").

Trade association representatives testified in Congressional hearings that "every employer of labor knows [that] it is frequently the little things which create friction in the ranks of the employees."²⁵⁵

The Board's understanding that the grievance-"neutralizing" effects of company unions illegitimately distorted workers' autonomous choice can be recast in the more recent theoretical terms of "relative deprivation" and, again, "perceptual framing." Psychologists and sociologists widely find that people's (and, more to the point, workers') sense of satisfaction, deprivation, and injustice frequently depend on their treatment relative to the baseline of a reference group or a reference state.²⁵⁶ The reference baseline itself depends on the perceptual frame through which a person describes and evaluates outcomes. The perceptual frame is alterable and contingent on a "diversity of factors . . . in everyday life."²⁵⁷ One important regularity uncovered by experimental psychologists is that people assign greater weight to deprivations or losses relative to the (contingent) baseline than they assign to gains from that baseline.²⁵⁸ For example, workers may view a wage increase of ten dollars per week as a loss relative to the baseline of another workforce's twelve dollar increase, but as a gain relative to their previously expected eight dollar increase. Workers who internalize the former baseline experience less subjective benefit from the same "objective" ten dollar gain than is experienced by those who internalize the latter baseline. Shifts in the perceptual frame may therefore alter people's choices by changing their valuation of an otherwise identical range of real-world outcomes.

As discussed above, the Board depicted the ideological contest between company unions and independent unions as in part a battle over perceptual framing: Would workers take a class-wide perspective that looked to the treatment of workers at a range of other companies (some of which would afford their workers better average conditions), or would they confine their reference state to their own workplace? To the extent

255. Hearings on S. 2926, *supra* note 135, at 1003, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 1041 (statement of W. Woods, President, Institute of American Meat Packers).

256. Some key works on the general phenomenon include W.G. Runciman, *Relative Deprivation and Social Justice* (1966); Raymond Boudon, *The Logic of Relative Frustration*, in *Rational Choice*, *supra* note 229, at 171; Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, in *Rational Choice: The Contrast Between Economics and Psychology* 101 (Robin M. Hogarth & Melvin W. Reder eds., 1987); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, in *Rational Choice*, *supra* note 229, at 123. As applied to workers' subjective experience, see the overviews presented in Elster, *supra* note 35, at 123-25, 221-26; Robert M. Solow, *The Labor Market as a Social Institution* 5-24 (1990); Lester C. Thurow, *Dangerous Currents: The State of Economics* 173-215 (1983).

257. Tversky & Kahneman, *supra* note 256, at 134. The perceived reference outcome is "labil[e]" and "is usually a state to which one has adapted; it is sometimes set by social norms and expectations; it sometimes corresponds to a level of aspiration, which may or may not be realistic." *Id.*

258. See Robyn M. Dawes, *Rational Choice in an Uncertain World* 34-47 (1988); Tversky & Kahneman, *supra* note 256, at 134.

that an individual worker looked primarily to the relative treatment of co-workers, individual grievances that departed from the baseline of typical treatment in the plant would become more salient.²⁵⁹ Deprivations or injustices common to all workers in the plant would be relatively neutralized by such a perceptual frame. Because workers would perceive individual grievances as deprivations or losses relative to that baseline, they would value their resolution more highly than the kind of amelioration of common conditions (which would be perceived as gains relative to the baseline) that an independent union would have more power to effect. The company union thus extinguished the sparks of salient individual grievances and preserved the tinderbox of deeper, common subordination. At the same time, it encouraged a perceptual frame that inflated workers' valuation of the benefits of company unionism relative to those of outside unionism.

This reinterpretation of the "lightning rod" or "safety valve" claim about company unions is consistent with theoretical and empirical studies concluding that, when workers enter a given work environment, their perceptions and aspirations are relatively fluid and subject to adaptation to the opportunities and routines experienced there.²⁶⁰ To the extent that the salient and sanctioned channel for worker protest was the company union grievance procedure, workers' inchoate "aspirations" may have been "directed from 'dangerous' to 'harmless' objects" that were remediable by that readily available procedure, as the Twentieth Century Fund report concluded. In the company union workplace, that is, the adaptation of worker preferences may have reinforced the more direct symbolic messages that identified the prevailing conditions of the company "family" as the baseline for perceptions of relative deprivation or gain.

The Board did not articulate why such neutralization constituted illegitimate rather than legitimate preference-satisfaction. But several of the already-mentioned normative conceptions of the freely choosing self—each associated with an alternative mode of valuation in the workplace—could be invoked. Neutralization deprived the reason-giving citizens of industrial democracy an opportunity for conscious deliberation over

259. In attributing causal relations in the world, individuals tend to attribute greater weight to aspects of their environment that are made disproportionately "available" or "salient" to the actor. See Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, *in* Judgment Under Uncertainty, *supra* note 200, at 163. To the extent that workers' perceptual baseline rendered individual grievances more salient, they may have attributed more of their sense of discontent to idiosyncratic grievances than to conditions shared with coworkers.

260. See, e.g., J. Richard Hackman & Grey R. Oldham, Work Redesign 16 (1980) (citing empirical workplace studies); James G. March, Bounded Rationality, Ambiguity, and the Engineering of Choice, *in* Rational Choice, *supra* note 229, at 142, 154–55 (concluding that people have a tendency to formulate desires and objectives in vague terms, especially in situations subject to manipulation by others); *supra* note 257 and accompanying text; *infra* note 765 and accompanying text.

group preferences formed "behind their backs." It could also be characterized as exploitative manipulation among relational, trusting selves. Or, as intimated by current cognitive psychologists, neutralization could be seen simply as a failure of rational calculation—a kind of market failure within a purely commercial transaction.

D. Domination Under Section 8(a)(2): A Case of Legal Fiction About Subject-Formation?

As the discussion above reveals, the proponents and early interpreters of Section 8(a)(2) detail a wide range of ostensible instrumental and symbolic mechanisms by which company unions illegitimately affected workers' choice over modes of workplace governance. Indeed, the analysis in those decisions, viewed overall, has a somewhat indiscriminate appearance. Many imaginable modes of instrumental and symbolic domination are canvassed and their effectiveness credited by the Board and courts, even where, for reasons discussed presently, those mechanisms seem contradictory or their plausibility seems undercut by the Board's own factual narrative. In other words, the body of decisions has the appearance of legal advocacy pursuing all conceivable grounds for rationalizing the ban on company unions as a safeguard of workers' free choice.

This is not surprising. The early NLRB officials were labor progressives and aggressive missionaries against company unionism.²⁶¹ More precisely, they found themselves in the position of justifying a bright-line rule against company unions even in cases where workers' revealed preferences seemed to favor such inside unions. Outright paternalistic rationales seemed foreclosed by the insistent free-choice rhetoric of Wagner Act proponents and of dominant liberal legal discourse more generally. The Board slipped this interpretive knot by turning to justifications based on structural coercion and illegitimate preference-transformation.²⁶² Precisely for that reason, the Board's decisions afford a useful descriptive reservoir for the taxonomy of modes of domination and hegemony presented above. But for the same reason, the Board's analysis reflects a one-sided, decontextualized stylization of the instrumental and ideological dynamics of company unionism and of asymmetric power relations or "domination" more generally. At least, as the next two Parts of this Article argue, there are good theoretical and empirical grounds for believing that this body of decisional law embodies substantial fictionalization—although I by no means deny that company unionism was widely marked by coercion and psychological manipulation.

261. See, e.g., James A. Gross, *The Making of the National Labor Relations Board* 109–88 (1974); Irons, *supra* note 164, at 203–89; Barenberg, *supra* note 31, at 1401–09.

262. See Barenberg, *supra* note 31, at 1442–60.

III. NONHEGEMONIC AND COUNTERHEGEMONIC ASPECTS OF COMPANY UNIONISM: SOME PLAUSIBLE CANDIDATES FROM THE THEORY OF IDEOLOGY

The Board's and Supreme Court's view of domination elides several significant phenomena captured in richer, more realistic conceptions of ideology and psychology under conditions of asymmetric power. First, the Board portrays company union ideologies as univocally hegemonic in their content and effect. To be effective, however, a "dominant" ideology must appeal in some way to the extant preferences and lived experience of the subordinate group.

[R]uling ideologies can actively shape the wants and desires of those subjected to them; but they must also engage significantly with the wants and desires that people already have, catching up genuine hopes and needs, reflecting them in their own peculiar idiom, and feeding them back to their subjects in ways which render these ideologies plausible and attractive In short, successful ideologies must be more than imposed illusions²⁶³ [B]ut this is also [a dominant ideology's] Achilles heel, forcing it to recognize an "other" to itself and inscribing this otherness as a potentially disruptive force within its own forms.²⁶⁴

That is, a dominant ideology will generally be responsive in some way—whether "authentic" or "distorted"—to oppositional beliefs and desires. The ideology is thus likely to contain the seeds of "Utopian longings" that have subversive implications;²⁶⁵ it provides the resources for immanent critique or counterhegemonic consciousness.²⁶⁶

Second, the Board and courts tend to depict a false determinism between the particular institutional practices of company unionism and modes of worker consciousness. Even apart from the counterhegemonic impulses or beliefs incorporated within a dominant ideology, there are many other sources of fragmentation, contingency, and potential incoherence in the consciousness of a group such as a particular company workforce. These sources include innumerable aspects of the wider culture and polity and the "local" history of labor relations in the enterprise

263. Eagleton, *supra* note 208, at 14–15.

264. *Id.* at 45; see also Veyne, *supra* note 234, at 379 (arguing that "[f]or an ideology to 'take,' the facts must not contradict it too flagrantly, there must be no insuperable credibility gap"). The anthropologist James Scott documents wide-ranging instances in which subordinate groups make strategic use of dominant ideologies in public discourse, but concurrently imagine and voice oppositional discourse in private communication. Hence, observers are likely to overestimate the degree of effective ideological hegemony and underestimate the extent of oppositional norms in the culture. See James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* *passim* (1990).

265. Fredric Jameson, *The Political Unconscious* 288–91 (1981); see also T.J. Jackson Lears, *Power, Culture, and Memory*, 75 *J. Am. Hist.* 137 (1988).

266. For compelling discussions of the ubiquitous vulnerability of dominant ideologies to internal critique, see Walzer, *supra* note 130, at 33–66; Michelman, *Law's Republic*, *supra* note 118, at 1528–32.

or community.²⁶⁷ In theoretical terms, workers' particular consciousness may contain "residual" ideologies generated by now-defunct practices and institutions, "spillover" ideologies from other domains of social life, and "emergent" ideologies flowing creatively from their lived experience, including intersubjective communication among themselves.²⁶⁸ These alternative ideologies may reinforce, undermine, or be wholly irrelevant to assumed hegemonic managerial ideologies. Anthropological studies of workplaces (and other arenas of asymmetric power) universally uncover a "double discourse." The official or formal discourse of public organizational life is shadowed by an "informal discourse" or "hidden transcript" that embodies various practical, sometimes counterhegemonic, ideologies of workers or other subordinate groups.²⁶⁹ Indeed, mid-level managerial groups often develop informal networks of communication and culture that contradict or complement senior management's "official" policies and norms.²⁷⁰

Finally, the Board and court decisions frequently tell a story of concurrent widespread instrumental coercion and ideological seduction by company unions. There is, however, an inherent tension between coercive and ideological modes of sustaining authority or power relations. A regime that applies active coercive measures is less likely to induce in its subjects perceptions of the legitimacy or naturalness of the regime. Industrial sociologist Richard Hyman states the problem succinctly: "Shift-

267. This generalization is strongly supported in Fantasia, *supra* note 180, at 13-17 (detailing local contingency and path-dependency of worker sentiment and solidarity); Sabel, *supra* note 35 (recounting historical, cultural, and political influences on worker consciousness); and in innumerable works of labor history and ethnography. See, e.g., Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (1990); Fraser, *supra* note 39; Zahavi, *supra* note 39.

268. The concepts of "residual" and "emergent" ideologies are developed in Raymond Williams, *Marxism and Literature* 121-27 (1977); see also Berger & Luckmann, *supra* note 52, at 166 (arguing that "[i]ncipient counter-definitions of reality and identity are present as soon as [subordinated or marginalized] individuals congregate in socially durable groups"); James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* 331 (1985) (concluding that "the imaginative capacity of subordinate groups to reverse and/or negate dominant ideologies is . . . widespread—if not universal"). On the clash of heterogeneous ideologies in a differentiated, plural society, see *id.* at 167-73.

269. For this phenomenon in the workplace, see David Halles, *America's Working Man: Work, Home and Politics Among Blue-Collar Property Owners* *passim* (1984); Stinchcombe, *supra* note 35, at 99. Similar phenomena in other social settings are canvassed in Scott, *supra* note 264; Scott, *supra* note 268.

270. Proof that [organizations' cultural] paradigms come in pairs—professed and operational—is found when consultants use the company credo or philosophy to gain support for [organizational] change and get only snickers and turnoffs by managers at the plant level. Attitudes toward the professed organizational paradigm will range from blissful ignorance to Machiavellian cynicism.

Lyman D. Ketchum & Eric Trist, *All Teams Are Not Created Equal: How Employee Empowerment Really Works* 62 (1992); see also David Krackhardt & Jeffrey R. Hanson, *Informal Networks: The Company Behind the Chart*, *Harv. Bus. Rev.*, July-Aug. 1993, at 104, 104-11.

ing fashions in labour management stem from this inherent contradiction: solutions to the problem of [instrumental] discipline aggravate the problem of consent, and vice versa."²⁷¹ Theories of ideology tend to divide between those that give greater weight to the effectiveness of hegemonic ideologies and those that maintain that instrumental coercion produces behavioral compliance combined with a greater measure of covert ideological insubordination.²⁷² But almost all recognize the potential tension between the two modes of sustaining authority relations.

The Board and court opinions failed to explore effects of company unionism other than those feared by the Act's framers (that is, coercion or illegitimate transformation of workers' perceptions and desires about independent unionization), and therefore ignored the three ideological phenomena just discussed. Contemporary observers of company unionism pointed to concrete instances of these ideological phenomena—instances that might either constitute legitimate workplace reform or induce worker consciousness and action *opposing* company unions. This Part, applying the methodology of the previous Part, presents more elaborate, theoretically plausible accounts of such reform and opposition. Part IV will then assess the empirical accuracy of the claims that company unionism implemented specific forms of domination, reform, and opposition. The purpose of this theoretical and empirical exploration is two-fold. At a general level, it seeks to develop a richer conceptual vocabulary and empirical framework for legal analysis of contextual instances of domination and resistance. At a particular level, it aims ultimately to construct a jurisprudence of lawful and unlawful managerial practices that is better tailored than the Board's one-dimensional approach to the phenomenological nuances and variety of collaborative workplaces.

A. *Pure Reformism*

As many studies of ideology emphasize, the Achilles heel of dominant ideologies—their inevitable recognition of the needs of less powerful groups—may take the form of pure reformism.²⁷³ In the context of

271. Richard Hyman, *Flexible Specialization: Miracle or Myth?*, in Richard Hyman & Wolfgang Streeck eds., (1988). Herbert Hoover cautioned employers that there was "no surer road to radicalism than by repression" in industrial relations. Stephen J. Scheinberg, *Employers and Reformers: The Development of Corporation Labor Policy, 1900–1940*, at 194 (1986) (quoting Hoover).

272. For the former, see, e.g., Adorno, *supra* note 154, at 243; Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* 250 (1964); Lears, *supra* note 208, at 569. For the latter see, e.g., Abercrombie et al., *supra* note 208, at 158–59; Anthony Giddens, *Central Problems In Social Theory: Action, Structure and Contradiction in Social Analysis* 148 (1979); Scott, *supra* note 264, at *passim*; Paul Willis, *Learning to Labour* 175 (1977); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379, *passim*.

273. See, e.g., Abercrombie et al., *supra* note 208, at 153; Eagleton, *supra* note 208, at 45–46; Gramsci, *supra* note 34, at 312.

company unionism, "pure reformism" means simply that managerial elites may achieve approbation or at least quiescence through the normatively less-assailable satisfaction of workers' pre-existing preferences.²⁷⁴ This, unsurprisingly, was the proposition urged by managerial and company union representatives testifying against the ban on company unions. An employee representative of Goodyear's company union, for example, urged that NLRB representation ballots include company unions on this ground: "Who knows better than we, the employees, what the employees desire? Is the labor board to tell us that what we desire is not good for us?"²⁷⁵ Wagner himself conceded that company unions afforded workers some genuine benefits—although, in his view, the benefits were relatively minor and, in any event, did not cleanse the taint of company unions' structural coercion of workers' choice of governance modes.²⁷⁶ In the Taft-Hartley hearings, congressional committees heard and rejected re-statements of the argument that company unions belonged on NLRB ballots because they could prevail over outside unions only by the legitimate means of satisfying workers' preferences.²⁷⁷

In neoclassical labor market theory, pure reformism is the only strategy that management need deploy to achieve workers' approbation. Workers move to those employers (or choose workplace governance modes) that offer preference-maximizing packages of compensation and working conditions. The *descriptive* question of legitimation or hegemony does not arise because the employment transaction is viewed as a horizontal contractual exchange, not as an administered hierarchical relation. At the same time, workplace authority relations are necessarily legitimated as a *normative* matter because workers fully consent by taking or keeping the job.

The more sophisticated school of institutionalism economics, to the contrary, acknowledges that employment is a vertical authority relation with costly exit.²⁷⁸ This view, implicitly opening the door to theorization of the full panoply of hegemonic and counterhegemonic processes, creates a frontier for fruitful engagement between economic and critical theory.

274. This proposition, of course, pretermits normative attacks on preferences whose source lies outside of workplace relations. My focus here is on the relative legitimacy of alternative modes of workplace governance. Cf. Pildes & Anderson, *supra* note 125, at 2196 ("[T]he question of legitimacy must be a pragmatic and comparative one—a question of institutional arrangements more or less legitimate than other alternatives that could be constructed.").

275. Hearings on S. 1958, *supra* note 95, at 547, reprinted in 2 *Legis. Hist.*, *supra* note 47, at 1373, 1933 (statement of A.B. Trembley, Goodyear Tire & Rubber Co.).

276. "The company union has improved personal relations, group welfare activities, discipline and the other matters which may be handled on a local basis." Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, *N.Y. Times*, Mar. 11, 1934, § 9, at 1.

277. See Hearings on S. 55, *supra* note 58, at 98, 105 (testimony of Professor Leo Wolman).

278. See Williamson, *supra* note 33, at 242–43; Goldberg, *supra* note 33, at 271–72.

B. *Egalitarian Communication and Trust Across Power Asymmetries*

Proponents of company unionism maintained that rational persuasion, information exchange, and friendly interaction during the company union's labor-management consultations guided workers legitimately to a felt identity of interests with management.²⁷⁹ Whereas pure reformism rests on management's provision of new net benefits to workers, these processes purported to alter worker perceptions or preferences. The National Industrial Conference Board concluded that

[w]orks councils provided the means of presenting the facts of the situation before the working force and of helping employees to understand the reason and necessity for policies that might affect them in a serious way. To secure understanding and acceptance of such policies, there must have been built up over a period of years a belief in fair dealing based on experience.²⁸⁰

Labor-management consultation in company unions would not only enhance information flows for purposes of *reasoned* understanding, but would also develop mutual *sentiments* of empathy, trust, and shared commitment to enterprise success.²⁸¹ Even recent theorists antagonistic to unnecessary hierarchy recognize the possibility that egalitarian communication and trust may emerge, however ambiguously, in contexts of nonreciprocal power.²⁸²

C. *The Oz Effect: Indifference and Skepticism*

There is a contradiction in many of the pronouncements of opponents of company unionism, as well as in Board and court decisions rationalizing the company union ban. Recurrently, in the same breath in which they denounced company unions as "delusions," labor reformers condemned them as "counterfeit[s] of the flimsiest, most transparent character."²⁸³ A transparent counterfeit, of course, is not likely an effective delusion. Those who know they are being manipulated—like Dorothy after drawing aside the curtain concealing the lever-pulling Mighty Oz—are hard to dupe. Indeed, what I shall call the "Oz Effect" can discredit even institutions that would otherwise satisfy workers' pre-existing preferences and interests.

In the hands of the apologist, good reasons are transformed into tools of persuasion. The recipient is in a bind, for should he listen to the reasons or to the tone of voice in which they are

279. See Barenberg, *supra* note 31, at 1457–58, 1460 & n.350, 1461 & n.353.

280. NICB (1933), *supra* note 253, at 15–16.

281. See, e.g., Montgomery, *supra* note 41, at 349–50 (quoting proponents' view that company unions induced "cordial cooperation"); see also *supra* note 57 and accompanying text.

282. See, e.g., Unger, *supra* note 24, at 128–29.

283. Brandes, *supra* note 38, at 120 (quoting Samuel Gompers).

advanced? It takes more than ordinary good faith to be susceptible to good reasons advanced in bad faith.²⁸⁴

Legislators, management advisers, and, implicitly, even the Board recognized that the Oz Effect could neutralize choice-distorting delusions otherwise attributable to company unionism. Wagner himself had written, "The men understand thoroughly the nature of the company union which has been wished upon them as a condition of employment. They know full well whose union it is and in whose interests it will work."²⁸⁵ Management consultants universally warned that the average worker was "quick to sense hypocrisy,"²⁸⁶ and that workers "lose all respect and confidence" in company unions "administered insincerely."²⁸⁷ The Board often described how employers "feared that [the] disclosure [of their manipulation of the company union] would have a disastrous effect on their organizational activities."²⁸⁸ Even though the Board recognized—indeed, emphasized—that employees almost always knew of the employer's influence on the company union,²⁸⁹ the Board did not acknowledge the significance of the resulting Oz Effect in potentially countering the purported hegemonic effect of the company union on workers' desire and perception.

Even if the Oz Effect in fact undermined other ideological processes by which company unions ostensibly seduced workers, those processes might still have helped sustain asymmetric power relations by providing the managerial corps with a rationalization for its authority. Cultural theorists who doubt the general effectiveness of dominant ideologies in shaping the consciousness of subordinate groups nonetheless recognize that these ideologies may shore up the cohesion and confidence of

284. Elster, *supra* note 128, at 155. "[T]here would seem to be two conditions for being a good propagandist. First, you should believe in the message you are preaching; and secondly, your belief in the message should not too obviously correspond to your narrow self-interest." *Id.* at 157 n. 42.

285. Wagner Brief, *supra* note 160, at 397; see also 79 Cong. Rec. 9719 (1935), reprinted in 2 Legis. Hist., *supra* note 47, at 3199 (statement of Rep. O'Malley) (stating that "[t]he intelligent American worker knows well enough that any union organized by employers is not for the benefit of the employees"); Hearings on S. 1958, *supra* note 95, at 656, reprinted in 2 Legis. Hist., *supra* note 47, at 2042 (statement of Sen. Walsh) (arguing that workers know that employers influence company union representatives and will therefore reject them). Wagner believed that the public as well was not duped but was "overwhelmingly conscious of the fact that the company-dominated union was a sham." Robert Wagner, National Radio Forum, June 13, 1935, 600 SF 103, Folder 35, in *The Robert Wagner Papers*, Georgetown University.

286. French, *supra* note 159, at 92.

287. NICB (1933), *supra* note 253, at 41-42.

288. *Falk Corp.*, 6 N.L.R.B. 654, 660 (1938).

289. Recall that several of the mechanisms of domination and hegemony recognized by the Board rested on the premise that employees were aware of the employers' control of the company union. See *supra* notes 29-77, 95-101, 143-150, 177-179, 215 and accompanying text.

elites.²⁹⁰ There is no doubt that a significant bloc of enlightened interwar managers believed sincerely, even fervently, that "employee representation plans" provided democratic legitimization of managerial authority.²⁹¹ The ideological "self-deception" or "wishful thinking"²⁹² that may underpin such belief was conveyed in Senate hearings by an NRA Labor Board member, who spoke of the "strange naivete and little boy faith in miracles that prevents these employers from having any realistic conception of how they injure irreparably their own interests" by installing company-dominated unions.²⁹³

D. *The Tocqueville Effects: Spurring Collective Action*

The last quotation intimates that the company-dominated union may not only have contained a built-in counter-mechanism against the diversion of workers by such processes as legitimization, dissemblance, universalization, and naturalization. It may have actually spurred workers in the direction of independent unionization. Within the interwar managerial community, many anti-union belligerents thought company unionism was a dangerous concession to collective dealing with labor that would only encourage workers' efforts to unionize.²⁹⁴ In fact, for the same reason, the AFL approved of the National War Labor Board's policy of establishing company-union-like shop committees in nonunion workplaces during World War I—at the dawn of the company union movement. Even after official AFL policy turned against company unionism at the Federation's 1919 convention, AFL officers and activists and, later, CIO organizers frequently returned to the idea that company unions could serve as stepping stones to independent unionism.²⁹⁵ This idea can be understood in four distinct ways, all of which fit under the rubric of "Tocqueville Effects," a label drawn from de Tocqueville's thesis that the French Revolution was hastened by the aristocracy's reformist concessions to unrest from below.²⁹⁶

290. See, e.g., Abercrombie et al., *supra* note 208, at 35; Eagleton, *supra* note 208, at 26–28; Elster, *supra* note 163, at 484.

291. See, e.g., Scheinberg, *supra* note 271, at 161–89, 195–97, 214–29.

292. On the descriptive significance of self-deception and wishful thinking in sustaining ideology, see, e.g., Elster, *supra* note 163, at 482–84; Elster, *supra* note 128, at 123–25, 148–49. On their normative significance, see Mike W. Martin, *Self-Deception and Morality* 6–18, 103–08 (1986).

293. Hearings on S. 2926, *supra* note 135, at 184, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 214 (statement of Elinore M. Herrick, Acting Chairman, NRA Regional Labor Board).

294. See, e.g., NICB (1933), *supra* note 253, at 9; Walter G. Merritt, *Employee Representation as a Step Toward Industrial Democracy*, 90 *The Annals* 39, 44 (1920). This point was made in Senate committee hearings by key Wagner adviser, William Leiserson. See Hearings on S. 2926, *supra* note 135, at 232, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 262.

295. See *infra* Part IV.

296. Alexis de Tocqueville, *The Old Régime and the French Revolution* 180–87 (Stuart Gilbert trans., 1955). For this use of the term "Tocqueville Effect," see Elster, *supra*

1. *Whetting the Appetite*. — Classic sociological studies of “relative frustration” reveal the apparent paradox that members of a group may become more frustrated as their opportunities and achievement of social betterment increase.²⁹⁷ This has been understood alternatively as the product of: excessive hopes induced by the promise of betterment;²⁹⁸ a one-shot surge in desire after release from preferences adapted to formerly constricted opportunities—that is, sour grapes in reverse;²⁹⁹ or the ever-escalating desire of individuals seeking more of the pleasures of their latest experience of desire-satisfaction.³⁰⁰ The metaphor frequently deployed by contemporaneous observers to capture this phenomenon was that workers’ “taste of power” in company unionism “whet their appetites for more.”³⁰¹ A similar phenomenon has been widely observed in studies of the recent revival of schemes of labor-management collaboration—workers’ appetite for greater participation tends to grow with the eating.³⁰²

2. *Group Articulation*. — Contemporaries proffered an alternative explanation of company unionism’s enhancement of workers’ desire for independent unionism. The installation of inside unions purportedly improved, rather than worsened, the conditions for undistorted communication and interest-formation among workers. For all its restrictions on workers’ meetings and interaction, the company union at least provided some forum within which workers could articulate, affirm, and stoke their shared grievances. Law Professor Harold Shapiro testified in Senate hearings that company unions were “excellent breeding grounds for outside union[s]” because they furnished workers with such a “common forum.”³⁰³ Again, a similar phenomenon—the politicization of the firm’s workforce” owing to the enhancement of the *means* for collectively formulating and voicing grievances—is captured in recent empirical studies showing that articulated and felt grievances increase among unionized workers relative to nonunionized workers, even as their objective condi-

note 128, at 159–60 & n.50. For classic sociological treatments of the phenomenon, see Samuel A. Stouffer et al., *The American Soldier* 257 (1949); sources cited *infra* note 297.

297. See, e.g., Robert K. Merton, *Social Theory and Social Structure* 237 (1957); Stouffer, *supra* note 296, at *passim*. For a more recent discussion, see Boudon, *supra* note 256.

298. See Merton, *supra* note 297, at 237.

299. See Elster, *supra* note 128, at 124.

300. In this view, the phenomenon of the “appetite growing with the eating” is basic to the psychology of human motivation and satisfaction. The pleasure that attends an initial quantum of want-satisfaction generates a drive for satisfaction of greater wants in order to experience greater pleasure. See, e.g., Scitovsky, *supra* note 201, at 63–70.

301. See, e.g., Brandes, *supra* note 38, at 142; Warren B. Catlin, *The Labor Problem: In the United States and Great Britain* 325 (1926).

302. See *infra* notes 784–793 and accompanying text.

303. Hearings on S. 1958, *supra* note 95, at 699, reprinted in 2 *Legis. Hist.*, *supra* note 47, at 2085.

tions improve and their commitment to the enterprise and the union grows.³⁰⁴

3. *Runaway Legitimation*. — Contemporaries also proposed a Tocqueville Effect that operated through inflation not of workers' desires and felt grievances, but of their sense of normative entitlement. Robert Wagner believed that workers' commitment to democratic norms in the workplace stemmed from the general norms of the wider political culture, from the symbolism of legislative enshrinement of entitlements to "industrial democracy," and from workers' and organized labor's lived experience and culture.³⁰⁵ In contrast, managerial publicists feared that implementation of company unionism under the banner of "employee representation," "industrial democracy," and "mutual obligations" was a symbolic concession potentially reinforcing the legitimacy of worker entitlements, the precise scope of which was subject to dispute and uncontrollable expansion.³⁰⁶ The bulk of interwar managers feared precisely that any such liberalization of their "benevolent despotism" would, in the words of one Wagner adviser, "give the workmen exaggerated notions of their rights."³⁰⁷

This potential for "runaway legitimation" is a classic instance of the Achilles heel of dominant ideologies—their incorporation of oppositional or universalizable norms.³⁰⁸ Once a dominant group invokes emancipatory norms, it faces the possibility of escalated demands cast in the same norms and, for that very reason, more difficult to resist. "The would-be manipulator of norms is also constrained by the need to be consistent. Even if the norm has no grip on his mind, he must act as if it had. Having invoked the norm . . . on one occasion, I cannot just dismiss it when [a bargaining partner] appeals to it another time."³⁰⁹ This "Pandora's Box Principle"—familiar to seasoned negotiators—is effectively a second-order social norm dictating that if a bargainer "invokes a certain [first-order] social norm, it stays on the table forever."³¹⁰ As discussed above, the Board believed that the "prestige" of managerial "approbation" gave company unions a normative boost in the eyes of some work-

304. See, e.g., Freeman & Medoff, *supra* note 7, at 137–45; George J. Borjas, *Job Satisfaction, Wages, and Unions*, 14 J. Hum. Resources 21, 25 (1979).

305. See Barenberg, *supra* note 31, at 1424 n.208, 1434–37, 1439 n.273.

306. The pronouncements of managerial supporters of company unionism sounded "revolutionary" to their open-shop brethren who retained a belief in the natural right to "the absolute authority of each employer in his plant." NICB (1933), *supra* note 253, at 9; Bendix, *supra* note 35, at 269. Cyrus McCormick III, promoting the Harvester Company's inside union, said in 1919, "There is a close parallel existing between the movement in favor of employee representation and the growth of democratic government. . . . [U]ntil recent years our industrial system was . . . a benevolent despotism." Robert Ozanne, *A Century of Labor-Management Relations at McCormick and International Harvester* 119 (1967) (quoting McCormick).

307. Sumner H. Slichter, *The Turnover of Factory Labor* 204 (1921).

308. See *supra* notes 264–266 and accompanying text.

309. Elster, *supra* note 35, at 128.

310. *Id.* at 240.

ers. The Board did not explore the possibility that a similar boost might be given to the more general, expansive democratic norms to which management appealed in conveying that approbation.³¹¹

Such an ideological process may again feed upon the psychology of wishful thinking, here "consist[ing] in the belief that the specific interest of the [dominant] class can be generalized into claims that go far enough to attract other classes and yet not so far as to render them dangerous when the claims are fulfilled."³¹² Progressive managers may have self-deceptively believed that they could both endorse democratic workplace norms and maintain control of workers' definition of the institutional fulfillment of those norms.

4. *Aiding Collective Action.* — A fourth possible Tocqueville Effect was captured in management's apprehension and organized labor's hope that company unions provided the organizational embryo that would grow into independent unionism.³¹³ In the early phases of the company union movement, the AFL and other observers believed that shop committees were "educating unorganized labor" in both the benefits of and skills necessary for collective organization.³¹⁴ Many managers as well expressed concern that company unions might simply help workers overcome the logistical and coordination problems of collective action. They "feared that active union men might be elected [as company union representatives] . . . and use [the company union] as a lever to force union recognition," or that outside union organizers would perceive company unions as inviting targets for appeals for affiliation.³¹⁵ Union officers and

311. The potential for runaway legitimation is confirmed by managers' unwillingness to recognize independent unions even when they believe that unions can provide a useful disciplinary and trust-building vehicle:

If the right of a certain degree of encroachment upon managerial prerogative by employee collectives were to be formally enshrined in the theory of the enterprise, was there not a danger of theory being used to legitimize—indeed even incite—a progressive encroachment far beyond the point which management found convenient?

Alan Fox, *Beyond Contract: Work, Power and Trust Relations* 256–57 (1974).

312. Elster, *supra* note 163, at 486.

313. This is an instance of a more general phenomenon noted by Mancur Olson, among others:

In firms that have the same employment pattern for some time, the networks for employee interaction that the employer created to encourage effective cooperation at work may evolve into informal collusions, or occasionally even unions, of workers, and tacitly or openly force the employer to deal with employees as a cartelized group . . . [T]he employer may gain more from the extra production that this cooperation brings about than he loses from the informal or formal cartelization that he helps to create.

Olson, *supra* note 73, at 22 n*.

314. See *Twentieth Century Fund*, *supra* note 141, at 77; see also Bernstein, *supra* note 188, at 172–73; French, *supra* note 159, at 104.

315. Paul H. Douglas, *Shop Committees: Substitute For, or Supplement to, Trade-Unions?*, 29 J. Pol. Econ. 89, 94–95 (1921).

activists were not oblivious to these possibilities.³¹⁶ In fact, some AFL craft officials feared—and industrial union proponents hoped—that shop-wide company unions would divert the solidarities of union activists from craft to industrial union organization.

E. *Backlash Effects: Indignation and Ressentiment*

The Oz Effect is a potential cognitive or “cold” psychic response by workers to their awareness of employer manipulation and control of company unions. Emotive or “hot” responses to paternalistic or manipulative exercises of authority, however, are more likely to provide a motor to collective action than cooler-headed recognition of injustice.³¹⁷ Legislators and other commentators apprehended such a hot response by workers in the form of a backlash of resentment or spite toward the company union and the employer. One employee representative claimed a linkage of cold and hot responses:

[P]aternalistic schemes have been adopted by the management in an endeavor to hide their real purpose, but I have never seen an instance of this nature where the workers were not cognizant of the true motive and realized fully that they were doing as some one else directed. The workers are not laboring under the delusion that they are acting on their own initiative. They appreciate very keenly that they are being managed and quite naturally resent it.³¹⁸

Contemporaries most frequently characterized workers’ emotional reaction against company union manipulation in either of two ways. The first saw workers’ indignation as the straightforward product of self-respect—the dignitary value workers placed in autonomous action, in being treated non-paternalistically and honestly.³¹⁹ A Rockefeller aide concluded that the “psychological appeal” of independent unionism over company unionism rested on “a sense not only of power but of dignity and self-respect . . . [Workers] want something which they themselves have created and not something which is handed down to them.”³²⁰

316. In 1925, AFL President William Green stated: “Wage earners will do themselves and industries a great service when they capture company unions and convert them into real trade unions. The machinery of the company union offers a strategic advantage for such tactics. Use that machinery as a basis for real organization.” Dunn, *supra* note 96, at 194 (quoting Green).

317. “No matter how careful the criticism of justifications for the non-reciprocal exercise of power may be, it cannot become a collective force unless it is associated in the minds of large numbers of people with resentment at being treated unfairly.” Unger, *supra* note 24, at 131.

318. R.L. Cornick, *Why Labor Should Be Represented in Industrial Management*, 90 *The Annals* 32, 34 (1920).

319. See French, *supra* note 159, at 64 (employees perceive management “welfare” programs as an “odious” form of paternalism).

320. Raymond B. Fosdick, John D. Rockefeller, Jr.: A Portrait 177–78 (1956).

The second—call it *ressentiment*³²¹—pointed toward a deeper probe into the psychic ambiguities of the subservient mentality recognized by the Board and the Supreme Court.³²² Nietzsche's classic account depicts the emotional dialectic of those who "understand[] how to keep silent, . . . how to be provisionally self-deprecating and humble," while nursing and waiting to unleash "the submerged hatred, the vengefulness of the impotent."³²³ A prominent managerial guide conveyed a somewhat less caustic but similar warning of the dangers of employer "dominance" and "manipulation" of company unions: even where workers "go through the motions of ostensibly cooperative conferences" and "appear but indifferent," the employer "courts disaster" by creating "sharply drawn" lines of antagonism that cause workers to "chafe" and grow "restive."³²⁴ AFL craft union officers, perhaps reflecting their own apprehension of loss of leadership over unskilled mass-production workers, played rhetorically on managerial fears that shop-wide company unionism contained the "germ of uncontrolled rampage."³²⁵

Robert Wagner's less self-serving advocacy of collective bargaining also warned that the explosive resentments bred by company unionism fed revolutionary unrest, which he thought could be averted only through the institutionalized consent and disciplinary strength of independent unions.³²⁶ He noted the "bitterness of feeling" and likelihood of "revolt" and "wide-spread violence" among workers subjected to company union domination.³²⁷ Paul Douglas, his adviser, believed that "the minds of the workers" became "inflamed" by submission to a company union interposed as a union substitute.³²⁸ The Board's company union decisions, again without acknowledging the hegemony-undermining im-

321. After Nietzsche's analysis of the slave mentality. See Friedrich Nietzsche, *On the Genealogy of Morals*, First Essay § 10, at 36-39 (Walter Kaufmann ed. & trans., Vintage Books 1967) (1887).

322. See *supra* notes 214-231 and accompanying text.

323. Nietzsche, *supra* note 321, at 37. For two recent analyses—from, respectively, psychoanalytic and cognitive perspectives—of the dialectic of submission and hostility in the psyche of the subservient, see, e.g., Benjamin, *supra* note 24, at *passim* (presenting intersubjectivist psychoanalytic model of domination and submission); Elster, *supra* note 128, at 119 (giving account of how cognitive dissonance created by opportunity constraints can breed "envy, spite, [and] malice" instead of adaptive preferences).

324. See Burton, *supra* note 213, at 183-84.

325. Dunn, *supra* note 96, at 187 (quoting Matthew Woll, AFL Vice-President, 1925).

326. Wagner believed that genuine collective bargaining implemented free, egalitarian cooperation between labor and management—a relationship purged of the dynamics of domination, subservience, and smoldering resentment. See Barenberg, *supra* note 31, at 1422-30.

327. 79 Cong. Rec. 7570 (1935), reprinted in 2 *Legis. Hist.*, *supra* note 47, at 2334; 78 Cong. Rec. 4229, reprinted in 1 *Legis. Hist.*, *supra* note 47, at 25.

328. Douglas, *supra* note 315, at 102-03.

plications, occasionally recounted workers' sudden behavioral swing from outward obsequiousness to enraged rejection of the company union.³²⁹

IV. THE HISTORICAL COMPLEXITY OF REFORM, DOMINATION, AND WORKER SUBJECTIVITY UNDER COMPANY UNIONISM

This Part ventures an assessment of the empirical strength or weakness of the different theoretically plausible processes, canvassed in Parts II and III, by which company unionism assertedly affected worker consciousness and choice. As longstanding debates over the nature of subjectivity and the interpretation of historical mentalities highlight, such an assessment is extremely treacherous. It requires a survey of distant psychic terrain using contested hermeneutic and epistemological tools.³³⁰ Section A of this Part briefly summarizes these interpretive problems.

Turning to the substantive historical assessment, Section B emphasizes the contingent, local paths of worker responses to company unionism. Sections C through F show that the interwar evidence nonetheless forms some more generalizable patterns that help illuminate today's debate over collaborative workplaces. Two such patterns are particularly important for legal policy. First, company unions fall into two rough categories, which I label "core" and "vulnerable." Company unions in each group typically exhibited the full range of specific processes of domination, reform, and opposition conceptualized in Parts II and III. For historical reasons that I shall detail, the core company unions tended disproportionately to implement pure reform, egalitarian communication, and some successful forms of hegemonic consciousness. These processes, however, characteristically set in motion a dynamic of "contested trust," in which workers frequently advanced their interests through various Tocqueville Effects, especially runaway legitimation. The vulnerable company unions, by contrast, relied disproportionately on coercive and manipulative hegemonic processes that often triggered greater worker resentment and explosive oppositional collective action.³³¹

Second, the dialectics of reform/acquiescence and domination/resentment within both core and vulnerable company unions had much

329. As discussed *infra* Part IV.F, there is no necessary contradiction between the recognition of workers' resentment toward management and the Board's recognition that workers deferred to and internalized management's approbation of company unionism. The contradiction may have rested within workers' own consciousness.

330. See, e.g., Dominick LaCapra, *Rethinking Intellectual History: Texts, Contexts, Language* 13-71 (1983); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. Chi. L. Rev. 1203, 1216 (1990) (describing consensus among contemporary historians and philosophers of history that historical writing is an inherent process of imposing "narrative structures" and "cultural conventions of interpretation on the resistant surface of accessible factual details").

331. As we shall see, however, the core company unions easily slipped into this same pattern when firms faced economic crises or outside union threats.

greater impact on company union representatives than on rank and file workers. As a *representative* institution, the company union machinery generally penetrated the daily experience of employee representatives, but not that of frontline workers. Interwar workers widely experienced a sense of betrayal and a desire to form outside unions when the Depression caused employers to breach the promises of welfare capitalism. For the rank and file, however, employers' retraction of job security, material benefits, and the expensive personnel programs that constrained the arbitrariness of the "foreman's empire" was more significant than the collapse or capture of employee representation plans that typically touched their lives only tangentially.

Part V demonstrates how both of these generalizations hold important lessons for the collaborative workplaces of the 1990s. The heralded "workplace of the future" potentially intensifies the various specific dynamics of subtle domination, contested trust, and collective empowerment precisely because *participatory* structures, unlike company unions, integrate rank and file workers into the "organized intimacy" of frontline teams. My law reform proposals, developed in Parts VI and VII, seek to safeguard workers against the new structures of collaboration most susceptible to domination and affirmatively to encourage those structures that are most likely to yield egalitarian communication, continuing labor-management trust, and cumulative increases in worker decisional authority and bargaining power.

A. *Some Interpretive Thickets*

The "direct" evidence of interwar employees' mentality, in the form of workers' statements expressing their own desires and perceptions about company unionism, is scattered and hardly constitutes a reliable, random sample of worker opinion. Most of the relevant, surviving words of workers are selective quotations deployed in politically charged advocacy by proponents and opponents of company unionism—whether in managerial or labor publications, the writings of academic or government analysts, or in legislative and administrative testimony.

In addition, *interpreting* workers' words for what they reveal about workers' actual cognitive, affective, and perceptual inner worlds is tricky business, to say the least. Experimental studies of people's attitudes and judgments conclude, unsurprisingly, that individuals' articulated reasons for reaching decisions are unreliable guides to the actual emotional stimuli and cognitive processes that affect their decision-making.³³² When describing the motives and perceptions behind their judgments, people tend to invoke conventional cultural formulas—the very kind of formulas

332. See, e.g., Nisbett & Ross, *supra* note 200; Richard E. Nisbett & Timothy D. Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes, 84 *Psychol. Rev.* 231, 246–49 (1977).

about the effects of company unionism that we want to assess empirically.³³³

The interpretive problem is compounded by the psychological subtlety of the various choice-deflecting mechanisms attributed to company unionism, notwithstanding how crude those mechanisms might initially seem in the schematic formulations presented above. An empirical assessment of those distinct mechanisms requires identifying workers' perceptions of the descriptive attributes of company unions and outside unions, and workers' evaluations of those attributes. It requires as well distinguishing whether that evaluation is based on workers' first-order preferences, emotional impulses, or desires; their habitual dispositions, norms, or compulsions; their second-order prudential preferences or interests; or their moral or political values—while recognizing that various evaluative stances or volitional impulses may operate concurrently and contradictorily. And it requires assessments of the causal links between specific company union practices and alterations in these various subjective elements—while recognizing that some of the causal, intrapsychic processes are, by hypothesis, subconscious.

Workers' actual behavior (as opposed to their words) in the face of company unions is, of course, another important and much more widely and reliably documented clue from which we can draw inferences about at least some aspects of their mentality—although such inference-drawing is far from unproblematic. Does workers' quiescence under a company union imply the success of instrumental coercion? Of genuine preference-satisfaction or trust-enhancement? Of hegemonic processes? Does workers' overt rejection of a company union imply the failure of all three, or instead the strength of counterhegemonic processes or other ideological or self-interested sources of workers' collective assertion? There is a lively historiographic and social theoretic debate on the general question of what inferences about worker consciousness can be drawn from workers' outward behavior. Some social historians, such as John Patrick Diggins, conclude that Lockean acquisitive "interests" have historically driven American workers' actions, whatever their expressed communitarian sentiments. Hence, workers' quiescence must stem from the success of employers' instrumental incentives, while workers' assertion of self-interest explains worker insubordination or rebellion.³³⁴ T.J. Jackson Lears, although writing from an antipodal Gramscian perspec-

333. See Frederic C. Bartlett, *Remembering: A Study in Experimental and Social Psychology* (1967); Nisbett & Wilson, *supra* note 332, at 246–49. This problematic dimension of oral testimony is, of course, well known to labor and other historians. See, e.g., Friedlander, *supra* note 74, at xx–xxiii; David W. Sabean, *Power in the Blood: Popular Culture and Village Discourse in Early Modern Germany* (1984); Barbara Allen, *In the Thick of Things: Texture in Orally Communicated History*, *Int'l J. Oral Hist.*, June 1985, at 92, 93–96; Nathan Wachtel, *Memory and History*, Introduction, 2 *Hist. & Anthropology*, Oct. 1986, at 207, 207–09.

334. See John P. Diggins, *Comrades and Citizens: New Mythologies in American Historiography*, 90 *Am. Hist. Rev.* 614, 624–29 (1985).

tive, similarly ascribes workers' failure to act militantly to the effective domination of a possessive individualist culture.³³⁵

For many "new labor historians" and cultural theorists, on the other hand, workers' relatively autonomous, communitarian culture, rather than their internalization of the dominant culture's acquisitive individualism, explains their behavioral attempts at collective resistance. The failure of those attempts is due predominantly to instrumental suppression that may yield even greater hidden ideological insubordination.³³⁶ While for Diggins, workers' true preferences or deepest interests are expressed in their (presumptively self-interested) behavior, for the new historians and theorists, workers' true sentiments more likely lie in a resistant, sometimes collectivist oppositional ideology that belies outwardly compliant behavior. That is, workers (as other subordinate groups) have a greater degree of freedom in thinking oppositionally than in acting so.³³⁷

The problem of "reading" workers' inner impulses and thoughts from the "text" of their external utterances and actions is an instance of a broader post-Quinean and post-structuralist epistemological and hermeneutic puzzle. As the work of Donald Davidson and others has shown,³³⁸ there is a double mystery in the effort to understand human speech and gesture. First, what does a statement or act mean? The "linguistic turn" in human sciences in the twentieth century has made commonplace the notion that the meaning of any signifier depends on its place within a web-like system, or unending spiral, of signifiers. That is, the meaning of any word or statement is given by other words or statements, which must then be defined in endless recursion or circularity. Reaching agreement within an interpretive community about the meaning of a statement therefore involves an inevitable degree of uncertainty because such an

335. Lears, *supra* note 208.

336. See, e.g., Scott, *supra* note 264; Leon Fink, *The New Labor History and the Powers of Historical Pessimism: Consensus, Hegemony, and the Case of the Knights of Labor*, 75 J. Am. Hist. 113 (1988). For a representative sample of the new labor history, see, e.g., *Working-Class America: Essays on Labor Community, and American Society* (Michael H. Frisch & Daniel J. Walkowitz eds., 1983) [hereinafter *Working-Class America*]. Such writing was often inspired by the works of E.P. Thompson and Herbert G. Gutman, among others. See, e.g., Herbert G. Gutman, *Work, Culture, and Society in Industrializing America* (Vintage Books ed., 1977) (1966); E.P. Thompson, *The Making of the English Working Class* (1963).

337. My view, borne out by the experience of interwar company unions and current collaborative workplaces presented in Part IV.F below, is that Diggins's thesis risks lapsing into an ahistorical or essentialist approach to worker (or any human) "interests." Interests cannot be objectively defined, and people's subjective perceptions of their interests may be multiple, inconsistent, and change over time. Hence, concordant with the new historians, I believe that workers' culture must be closely examined for its oppositional and non-pecuniary possibilities. By the same token, however, one cannot presume that workers' culture in any particular historical period will be collectivist and oppositional. Such a presumption would replicate the fallacy of essentialist interests. See Barenberg, *supra* note 31, at 1431-34, 1439-42, 1459-61.

338. See Davidson, *supra* note 51.

agreement can only be reached through exchanges of statements and gestures that must themselves be recursively defined.

Second, what is the relation of a statement or act to the beliefs and desires of the speaker/actor? That is, the problem of sincerity or authenticity further clouds the attempt to reach a confident conclusion about the meaning of particular statements: how can we know the speaker's motives and beliefs in deploying a statement? Our knowledge of those motives and beliefs necessarily depends on the very meaning of the utterances and acts we are trying to determine, and on other beliefs already ascribed to the speaker. Thus, not only is the relation among the meanings of signifiers or statements recursive. There is a similar circular relation between meaning and internal belief or desire. Hence, Davidson's theory of "radical interpretation": any understanding of outward meanings and internal beliefs depends on a holistic mode of interpretation.³³⁹ The interpreter makes another person's system of meanings and beliefs "hang together" by the (in Davidson's view, unavoidable or empirically true) "charitable" assumption that most of what the other says is sincere and by mutual adjustments of the interpreter's initial belief-meaning system and the beliefs and meanings recursively attributed to the other.

We cannot, of course, escape these interpretive problems by simply falling back on contemporary observers', the Board's, or labor historians' interpretations of company unions' effect on worker consciousness, even if those interpretations provide some helpful guidance. Those interpretations may reflect the same enlistment of ambiguous cultural formulas and uncertain sincerity as do workers' and managers' own words,³⁴⁰ and may be skewed by the interpreter's general views in the above-mentioned substantive debate over the relation between worker behavior and self-interest. Equally important, even the most sophisticated and impartial observers and historians have not examined workers' subjective experience under company unionism with an eye to the precise empirical questions that we want to assess. As disentangled and theoretically recast in Parts II and III, the possible mechanisms by which company unions affected worker choice are stated more precisely than in the Board's analysis. Yet the Board's analysis, guided as it is by surgical legal criteria, is in

339. See *id.* at 125-39; J.E. Malpas, *Donald Davidson and the Mirror of Meaning* 24-190 (1992).

340. The Board's scorched-earth descriptive and normative attack on company unions may have been skewed not only by Board lawyers' natural tendency as legal advocates to justify in every way plausible the statute's overriding of workers' choice of inside unions. See *supra* Part III.D. In addition, much of the early Board's staff held allegiances aligned with the same progressive and radical political movements that had generated the array of rhetorical slogans and arguments against company unionism. See, e.g., Gross, *supra* note 261; Irons, *supra* note 164. This is not to say that the "result-oriented" genesis of those arguments *per se* invalidates them. It does, however, call for careful assessment of the arguments, especially since there are apparent tensions, if not contradictions, among them. See *supra* notes 271-72 and accompanying text.

turn more precise in its empirical focus than are contemporaries' and historians' descriptions.

Even while recognizing these acute interpretive difficulties, we can nonetheless venture interpretations of the words and actions of employees under company unionism—just as we must inevitably do in every interchange with others, as both analytic philosophers such as Davidson, and critical theorists such as Dominick LaCapra, propose.³⁴¹ Adapting Davidson's notion of "radical interpretation" among contemporaneous discussants, we can attempt to converge on an interpretation of the consciousness of interwar workers through recursive confrontations and readjustments between our initial belief-meaning system and the beliefs and meanings we charitably but skeptically attribute to historical subjects.³⁴² In this task, we are aided by the many contemporaneous and recent narratives that offer the most subtle, finely textured accounts of workers' experience.

B. *Workplace Micropolitics and Local Contingencies*

Many economic, sociological, and anthropological studies—concordant with much contemporary social theorizing and historiography—conclude that modes of consciousness within organizations are influenced by a contextual mix of "local" and "global" institutional and cultural patterns;³⁴³ that there is no inevitable, one-to-one correspondence between particular organizational structures and organizational cultures or consciousness;³⁴⁴ and that variations in such consciousness are highly path-dependent.³⁴⁵ The best case studies—ethnographic and historical—of the contest between company and independent unions in the 1920s and 1930s confirm these conclusions. That contest played out amidst many large and small scale economic and cultural forces that contingently deflected the impact of company unionism on worker consciousness and choice in particular workplaces.

341. See Davidson, *supra* note 51; LaCapra, *supra* note 21, at 6–8. On the methodology of such "pragmatic hermeneutics," see generally Hans Joas, *Pragmatism and Social Theory* (1993).

342. See James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 *Harv. L. Rev.* 1332, 1335–36 (1993) (reviewing Morton Horwitz, *The Transformation of American Law, 1870–1960* (1992)); cf. William N. Eskridge, Jr., *Gadamer's Statutory Interpretation*, 90 *Colum. L. Rev.* 609 (1990) (presenting analogous model for interpreting the meaning of statutes).

343. See Sabel, *supra* note 35, at 78–126; Clifford Geertz, *Local Knowledge* (1983); Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* 10–35 (1991).

344. See Hirschhorn, *supra* note 244; Roberto M. Unger, *False Necessity* (1987).

345. See Fantasia, *supra* note 180; Richard A. Guzzo & Raymond A. Katzell, *Effects of Economic Incentives on Productivity: A Psychological View*, in *Incentives, Cooperation, and Risk Sharing* 107 (Haig R. Nalbantian ed., 1987) (presenting survey of empirical studies stressing great contextual variability of psychological effects of specific organizational incentive schemes); Edward H. Lorenz, *Trust and the Flexible Firm: International Comparisons*, 31 *Indus. Rel.* 455 (1992).

At the local level, the particular matrix of ethnic cultures and political divisions in a given workplace and its surrounding community often affected the capacity of workers to form coalitions of sufficient solidarity to undergird an independent union offensive against a company union. For example, in organizing the predominantly Irish workforce of the New York City transit system, the Transport Workers Union faced a company union actively supported by the Catholic Church and by prominent Irish community organizations whose leadership was predominantly middle class or managerial.³⁴⁶ The TWU triumphed through a quirky alliance of Communist Party activists and Irish Republican Army emigrants culturally hostile "to paternalistic systems of social control."³⁴⁷ These allies won despite disagreement between themselves about the proper strategy for combating the well-entrenched company union. While the CP advocated an effort to bore from within the company union, the Irish republicans adhered to "the deep-rooted Irish tradition of boycotting institutions viewed as illegitimate."³⁴⁸

Another interesting case is A. Phillip Randolph's guidance of the Brotherhood of Sleeping Car Porters through difficult racial and ideological shoals en route to defeating Pullman's company union.³⁴⁹ In the 1920s, significant African-American community and religious organizations encouraged black workers to support their paternalistic employer rather than heed Randolph's call to join the traditionally racist organized labor movement. When the Brotherhood became a real threat to the company union in the 1930s, Randolph won the backing of such important groups as the NAACP and the Urban League—and of white progressives—although Pullman's patronage sustained both substantial worker loyalty to the company union and anti-union activity in the outside African-American community. To cut a deal to win the inclusion of the porters in the crucial ban on company unions imposed by the 1934 Railway Labor Act amendments,³⁵⁰ Randolph betrayed his anti-racist principles and supported Senate committee chair Clarence Dill's campaign to ban Filipinos from railroad work. Meanwhile, depending on their shifting political interests, white labor leaders oscillated between supporting and opposing the Brotherhood. A key moment of interracial political coalition, however, arose precisely from the unions' common interest in winning the legislative ban on company unions in 1934. Similar adventitious divisions, alliances, and strategies—among ethnic, political, racial, gen-

346. See, e.g., Joshua B. Freeman, *Catholics, Communists, and Republicans: Irish Workers and the Organization of the Transport Workers Union*, in *Working-Class America*, supra note 336, at 256, 265, 274.

347. *Id.* at 264.

348. *Id.* at 270.

349. The story is best told in William H. Harris, *Keeping the Faith: A. Philip Randolph, Milton P. Webster, and the Brotherhood of Sleeping Car Porters, 1925–37*, at 20–21, 184–86, 204–18 (1977).

350. See *Railway Labor Act Amendments of 1934*, ch. 691, 48 Stat. 1185, 1187 (codified as amended at 45 U.S.C. §§ 151, 152 (1988)).

der, and occupational groups—played out in kaleidoscopic permutations, often contributing to success or failure, in the battles between independent and company unions in particular companies and localities.³⁵¹

As is familiar to students and practitioners of union organizing, the particular technological, spatial, and social organization of a workplace often affects the formation, cohesion, and allegiances of work groups. Among such relevant workplace micro-structures in the 1920s and 1930s were the idiosyncratic features and practices of company unions themselves. A company union that permitted employee representatives to cast secret votes in joint labor-management councils, for example, allowed delegitimizing displays of worker dissent in ways that open voting would not.³⁵² Employers that guarded less rigorously against meetings among workers in the absence of management representatives opened the door to more independent collective action.³⁵³ Company unions that assembled representatives from across plants encouraged more encompassing networks of oppositional employee action.³⁵⁴

In addition to such microstructural features, the personal experiences and personalities of key workplace actors—ranging from upper management to strategically positioned supervisors and rank and file leaders—often shaped workplace governance outcomes.³⁵⁵ Those actors' unpredictable strategic and tactical choices, particularly in moments of crisis or heightened confrontation, could make the difference between a fatally demoralizing setback to union activists' efforts to project a critical mass of pro-union strength, on the one hand, or a snowballing delegiti-

351. See, e.g., John Bodnar, *Workers' World: Kinship, Community, and Protest in an Industrial Society, 1900–1940* (1982) (recounting complex alliances forged by ethnic activists in coal and steel industries); Friedlander, *supra* note 74 (recounting second-generation Polish workers' alliance with older ethnic immigrant groups); Gary Gerstle, *Working-Class Americanism* (1989) (recounting alliance of French-Canadian skilled workers and radical Franco-Belgians that overcame traditional anti-union Catholicism).

352. See, e.g., Dunn, *supra* note 96, at 79–80.

353. See Ozanne, *supra* note 306, at 139; John N. Schacht, *Toward Industrial Unionism: Bell Telephone Workers and Company Unions, 1919–1937*, 16 *Lab. Hist.* 5, 19–22 (1975) (discussing intermingling and grievance-articulation by committees of employee representatives).

354. See *id.*; *infra* notes 491–507 and accompanying text.

355. Clarence Hicks, the leading personnel manager and pioneer of company unionism of the interwar years, wrote:

In no area of management is the character and personality of the controlling executive or group more clearly reflected than in policies dealing with labor relations. Two companies may use similar techniques or policies in production, sales and finance, but still be at opposite poles in the way in which they deal with the human beings they employ.

Clarence Hicks, *My Life In Industrial Relations: Fifty Years in the Growth of a Profession* 111 (1941). Hicks was the personnel manager of three company union pioneers—International Harvester, Colorado Fuel and Iron Company, and Standard Oil of New Jersey—and the first president of Rockefeller's Special Conference Committee of leading progressive firms. See Barenberg, *supra* note 31, at 1433–34.

mation of managerial authority (a lapse of worker "confidence" in the company union's "prestige," in the personnel-administration jargon of the day) on the other. In light of such local, path-dependent, cultural and psychological environments, identical symbols and concepts—"Americanism," "loyalty," and the like—became favorably associated in one community, workforce, or informal work group with a company union and in another with an outside union.³⁵⁶ Compounding such local variation and unpredictability is the fact that most company unions concurrently implemented instrumental, potentially coercive incentives and a variety of ideological, symbolic strategies—which, as discussed above, could promote contradictory worker responses.

Although the evidence reveals that one historical "regularity" of company unionism is precisely its local variability, there are some more generalizable regularities that have significant implications for the current debate over the effects of today's collaborative workplaces on worker subjectivity. As seen below, the variegated historiographic interpretation of company unions' effects is explained to some extent by broader economic, cultural, and political trends, by structural differences among categories of company unions, and by the differential impact of company unions on specifiable groups of workers.

C. *Some Broader Historical Viewpoints and Trends*

The historical writing on company unions tends to divide between broad "traditional" and "revisionist" views. The traditional view—espoused by postwar historians generally supportive of organized labor—concludes that company unions were doomed to fail in the face of workers' presumed overwhelming interest in fuller forms of collective bargaining. The traditionalists, however, do not always clearly specify whether that inevitable failure was due to the insufficiency of company unions' genuine benefits, coerciveness, or hegemony; to company unions' excessive coerciveness and consequent counterhegemonic backlash; to the unanticipated aiding of workers' intragroup communication and collective action; or to other factors.³⁵⁷ The revisionists, by contrast, conclude that interwar welfare capitalism, including company unions, constituted a stable and effective collaborative mode of workplace governance.³⁵⁸ The

356. This is well recounted in Cohen, *supra* note 267, and Gerstle, *supra* note 351.

357. See, e.g., Bernstein, *supra* note 188, at 187 (concluding that "the company union . . . had an inherent propensity to disintegrate"); 6 Philip S. Foner, *History of the Labor Movement in the United States: On the Eve of America's Entrance into World War I, 1915–1916*, at 84–102 (1982); Harry A. Millis & Royal E. Montgomery, *Organized Labor passim* (1945).

358. See, e.g., Brody, *supra* note 38, at 48–81; Piore & Sabel, *supra* note 109, at 124–32; Daniel Nelson, *The Company Union Movement, 1900–1937: A Reexamination*, 56 *Bus. Hist. Rev.* 335, 335–57 (1982); cf. Sanford M. Jacoby & Anil Verma, *Enterprise Unions in the United States*, 31 *Indus. Rel.* 137, 139–43 (1992) (extending revisionist claim to post-Wagner Act enterprise unionism).

fortuitous shock of the Great Depression, however, undercut employers' capacity paternalistically to sustain workers' trust and ultimately led to the statutory ban on company-dominated unions. The revisionists, however, do not always explicitly distinguish the particular effect of company unions from the overall impact of interwar employer welfarism. Further, when they do examine company unionism proper, the revisionists do not always address precisely the extent to which company unions' effectiveness was due to instrumental incentives or psychic transformations, nor whether those incentives or transformations were of the kind that would be deemed legitimate or illegitimate under the NLRA's (or some alternative) normative standards. Nonetheless, the historiographic interpretations and contemporaneous evidence allow some generalizations—useful to current legal-policy concerns—about these more finely tuned questions. Before setting forth those generalizations, I sketch the broader context of four interrelated historical trends that affected managerial strategy, company union structure, and worker responses and initiatives.

First, the interwar period was punctured by two severe economic slumps—the sharp recession of 1920-21 and the Great Depression. The timing of company union formation relative to fluctuations in macroeconomic (or sectoral and enterprise) performance could dramatically affect workers' response to company unions. Economic slumps threatened workers' loyalty to recently formed company unions, either because the company union was discredited when it "consented" to dramatic wage or employment cuts or because workers felt that management had betrayed newly trumpeted norms of paternalistic protection. Company unions that had germinated during longer periods of relative prosperity were more apt to survive such downward shocks.³⁵⁹ For similar reasons, company unionism took deeper root in prosperous sectors than in the chronically "sick industries" of the 1920s.³⁶⁰

359. The number of companies with company unions fell from 432 in 1926 to 313 in 1932. See NICB (1933), *supra* note 253, at 16. In describing the response of company unions to the Great Depression, the National Industrial Conference Board, a leading managerial proponent of company unions, put the point delicately:

Problems of the most difficult character have been laid before works councils during the depression. First, when it was necessary to lay off substantial numbers of employees, again, when reductions in wage rates became unavoidable, and still again, when a widespread adoption of the policy of work-sharing raised questions as to the basis on which work should be distributed, the works council shared with management the task of carrying out necessary policies in the most equitable manner possible Works councils provided the means of presenting the facts of the situation before the working force and of helping employees to understand the reason and necessity for policies that might affect them in a serious way. To secure understanding and acceptance of such policies, *there must have been built up over a period of years a belief in fair dealing based on experience*. . . . Naturally, the stronger and better managed [works councils] . . . survived, and the weaker and less resourceful . . . succumbed.

Id. at 15-17 (emphasis added).

360. See Nelson, *supra* note 358, at 339-45.

Second, as I have detailed elsewhere, shifts in national political culture and legislative symbols could galvanize workers' sense of entitlement to outside unions and could to some degree delegitimize company unions.³⁶¹ The political elite endorsed and legitimated "industrial democracy" and collective bargaining to an unprecedented degree under the National War Labor Board and the Industrial Conferences of the World War I years. Public political and legal affirmation of workers' right to independent collective bargaining was even more salient between 1933 and 1937, as a result of the "Blue Eagle" campaign promoting Section 7(a) of the National Industrial Recovery Act of 1933, the high visibility of the National Labor Relations Act of 1935, and such well-publicized political spectacles as the 1935-37 LaFollette Committee hearings on employer anti-union practices.

Third, such shifts in political culture and legal symbolism generally coincided with (and mutually reinforced) widespread labor unrest and union organizing campaigns that, like downward economic shocks, constituted more treacherous psychological terrain for cultivating company union loyalties. The failed, but explosive, effort to organize industrial unions in 1919³⁶² and the ultimately more successful eruptions after 1933 registered in part the secular emergence of more homogeneous industrial workforces during the consolidation of a mass production economy.³⁶³ Company unions were less likely to take root in those industries with traditions of independent union activism and in older firms that had developed autonomous workforce cultures of solidarity. At the same time, as detailed below, managers established company unions in greater numbers and with greater powers in the face of threats from organized labor and political elites.

Finally, the ethno-demographic composition and wider cultural loyalties of the workforce affected workers' response to company unions. Compared to their parents who had been reared in traditional agrarian communities, the growing pool of second-generation immigrant workers in the interwar years generally displayed diminishing deference to paternalistic authority.³⁶⁴ The grip of patriarchal ethnic cultures was weakened by a combination of forces, including the Americanization campaigns of the post-World War I years;³⁶⁵ the accelerating encroachment of mass, trans-ethnic, urban culture and consumption in the 1920s

361. See Barenberg, *supra* note 31, at 1434-39.

362. 1919 saw the greatest American strike wave to that date, involving four million workers, or one-fifth of the labor force. Massive strikes occurred in the steel, coal, railroad, and meat-packing industries. See Robert H. Zieger, *American Workers, American Unions, 1920-1985*, at 5-6 (1986).

363. See Cohen, *supra* note 267, at 324-55; David M. Gordon et al., *Segmented Work, Divided Workers: The Historical Transformation of Labor in the United States* 100-64 (1982).

364. See Fraser, *supra* note 39, at 337, 340; see also Cohen, *supra* note 267, at 54-158.

365. See Gerstle, *supra* note 351, at 5-15; John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925*, at 242-324 (1981).

and 1930s;³⁶⁶ the expansion of secondary public education among the children of blue-collar workers;³⁶⁷ the unanticipated shopwide bonds that gradually developed across ethnic groups whom employers of the 1920s had deliberately intermixed in the hope of weakening workforce solidarity;³⁶⁸ and, particularly, the dramatically new sense of mass political entitlement and national citizenship begun in the Democratic Party's "Al Smith Revolution" and consolidated by the New Deal.³⁶⁹

D. *The "Core" Company Unions*

In light of these broader trends, the revisionist historians' thesis that company unions represented progressive, viable modes of personnel management applies disproportionately (although by no means exclusively) to the group of employee representation schemes cultivated by certain large, profitable firms generally in newer industries—electrical and other machinery, chemicals and oil refining, scientific instruments, public utilities, mass food processing, some sectors of the metal trades, and others—during the long prosperity of the 1920s.³⁷⁰ These were firms that chose to make strong organizational commitments to welfarism and rationalized personnel administration and that typically had no substantial history of outside unionism. Initiated for many reasons—to end strikes, preempt future unionization, comply with War Labor Board decrees, reduce labor turnover, and boost employee morale and productivity—these "core" company unions reached maturity by 1924.³⁷¹ Firms with company unions lasting the decade numbered less than 320 and were never more than a small percentage of all firms before 1933.³⁷² Ap-

366. See Cohen, *supra* note 267, at 99–158; Gary Cross, *Time and Money: The Making of Consumer Culture* 46–98, 128–53 (1993).

367. As the Lynds found in their pioneering study of Muncie, Indiana, the children of blue-collar workers widely expected to ascend into white-collar careers through their access to the newly expanded system of secondary education. See Robert S. Lynd & Helen M. Lynd, *Middletown* 51, 68, 80–81 (1929).

368. See, e.g., Cohen, *supra* note 267, at 163–67. Employers' deliberate effort to break down ethnic cohesion by creating heterogeneous workforces (in which worker communication was impeded by linguistic differences) is a reminder that not all workplace dynamics are explained by the axiom of surplus-maximization invoked by some legal economists. In his recent attack on antidiscrimination laws, Richard Epstein, for example presumes that employers hire homogeneous workforces to promote productivity-enhancing cohesion. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). The interwar story—in which employers sought heterogeneous workforces (presumptively) less able to work well interdependently—shows that distributional struggle can complicate matters.

369. See the discussion and references in Barenberg, *supra* note 31, at 1399–1401, 1437 n.264, 1439 n.273.

370. See Harris, *supra* note 36, at 17; Nelson, *supra* note 358, at 341–57.

371. See Nelson, *supra* note 358, at 346.

372. Of the 421 firms with company unions in 1924, between 246 and 313 retained company unions in 1932. These numbers are based on calculations from surveys by the National Industrial Conference Board (NICB) in 1933 and 1925. See NICB (1933), *supra*

proximately forty large firms employed eighty percent of the 1.5 million workers in company unions that survived the 1920s.³⁷³

In the vanguard of core company unionism were the firms affiliated with the secretive Special Conference Committee (SCC) assembled by associates of John D. Rockefeller, Jr., in 1919.³⁷⁴ The ten firms of the SCC—including such showcases of company unionism as Standard Oil of New Jersey, Goodyear, International Harvester, General Electric, Westinghouse, and Bethlehem Steel—met monthly to discuss industrial relations strategy. Along with Industrial Relations Counselors (the public arm of Rockefeller's labor relations campaign), the National Industrial Conference Board (NICB), the American Management Association, and (especially after the enactment of the NIRA) the National Association of Manufacturers, the SCC was the vehicle for disseminating the model of company unionism pioneered by Mackenzie King, Clarence Hicks, and Arthur Young at the Rockefeller-owned Colorado Mining and Fuel Company and Jersey Standard Oil.³⁷⁵ The core company unions displayed certain characteristic patterns in workers' subjective experience.

1. *Pure Reformism*. — There is ample evidence that at least the vanguard of the core company unions provided genuine benefits, in the sense of satisfying worker preferences that pre-existed company-union or other company-welfare programs (the "pure reform" mechanism discussed in section III.A). These inside unions resolved many (albeit generally minor) worker grievances, opened channels of communication and information previously unavailable to labor and management, and, less frequently, implemented collaborative problem-solving in work organization and technique. The benefits were exaggerated by managerial proponents of company unionism, such as the NICB,³⁷⁶ but were grudgingly acknowledged even by its staunchest opponents,³⁷⁷ and have been confirmed by several careful historical case studies.

note 253, at 16; National Industrial Conference Board, *The Growth of Works Councils in the United States 10* (1925) [hereinafter NICB (1925)].

373. See Brody, *supra* note 38, at 60.

374. See Jacoby, *supra* note 37, at 180–81; Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 *Int'l Org.* 41, 50–64 (1984).

375. See Howard M. Gitelman, *Legacy of the Ludlow Massacre: A Chapter in American Industrial Relations 332–38* (1988); Scheinberg, *supra* note 271, at 214–34 (recounting role of SCC, IRC, and AMA); Ben M. Selekman & Mary Van Kleeck, *Employees' Representation in Coal Mines 9–37* (1924) (describing Colorado Coal's prototype company union). By the end of the decade, eight of the ten SCC firms had company unions. See Jacoby, *supra* note 37, at 181. The Rockefeller plan was also the model for the more than 100 shop committees established in 1918 and 1919 by the war labor boards. See Scheinberg, *supra* note 271, at 165, 178.

376. See NICB (1933), *supra* note 253, at 18, 40.

377. The best-documented, albeit highly anecdotal, attack on the company unions of the 1920s conceded "the success of the companies in winning workers to the company unions," particularly the unskilled workers abandoned by AFL craft unionism. See Dunn, *supra* note 96, at 191. Similarly, even the most pro-labor, traditionalist historians of

Daniel Nelson's study of the Goodyear Industrial Assembly and the Leeds & Northrup Cooperative Association documents how they "fulfilled the promise of the company union movement" by, among other things, "enlisting lower echelon employees in the operation of the firm . . . [.] resolv[ing] disputes, encourag[ing] suggestions for technical improvements, promot[ing] safety, and provid[ing] other concrete services."³⁷⁸ Indeed, workers who later became active in the CIO acknowledged that thousands of Goodyear workers had found the Industrial Assembly a beneficial organization.³⁷⁹ A case study based in part on oral histories of Jersey Standard workers concludes that the company union there "undoubtedly influenced" management's understanding of worker preferences and deserved credit for increased wages and benefits, improvements in working conditions, and grievance resolutions.³⁸⁰ The inside unions at Armour and Swift gained the support of "some" substantial fraction of the meatpacking workforce, which won more than half of the grievances processed by the new entities in the early 1920s.³⁸¹ After interviewing workers at General Electric's Lynn plant in 1926, labor progressive Robert Bruere concluded that many appreciated the Works Council's exchange of information and adjustment of grievances.³⁸² Oral histories indicated that Bell Telephone's company unions "held genuine attractions for workers," affording them a "means of collective expression, usually on minor matters but sometimes on major ones."³⁸³ The employee representation plan at the Bethlehem Steel Pueblo Works gained the eight-hour day several years before a large-scale public campaign and unrelenting White House pressure forced the rest of the open-shop industry to give up the twelve-hour day.³⁸⁴ Howell Harris concludes that the progressive core of "the employee representation movement es-

company unions acknowledged their genuine benefits. See *infra* note 386 and accompanying text.

378. Nelson, *supra* note 358, at 352; see also Daniel Nelson, *American Rubber Workers & Organized Labor, 1900-1941*, at 104-10 (1988) [hereinafter Nelson, *American Rubber Workers*].

379. See Nelson, *American Rubber Workers*, *supra* note 378, at 107-08; Nelson, *supra* note 358, at 354 n.38.

380. Edmund R. Gray & C. Ray Gullett, *Employee Representation at Standard Oil of New Jersey: A Case Study 29* (Louisiana State Univ., College of Business Admin., Div. of Research, Occasional Paper No. 11, 1973).

381. See James R. Barrett, *Work and Community in the Jungle: Chicago's Packinghouse Workers, 1894-1922*, at 252-53 (1987).

382. See Robert W. Bruere, "West Lynn," Survey, Apr. 1, 1926, at 21, 21-27, 49. For a portrait of the dark side of G.E.'s Lynn company union, see Louis Francis Budenz, *Wife in Name Only: The "Generous Electric" Drama of "East Lynn, West Lynn,"* Lab. Age, Jan. 1927, at 2, 2-3; Louis Francis Budenz, *Genesis at West Lynn*, Lab. Age, Feb. 1927, at 15, 15-17. A nuanced overall assessment of the General Electric and Westinghouse company unions is offered in Ronald W. Schatz, *The Electrical Workers: A History of Labor at General Electric and Westinghouse 1923-60*, at 41-42, 67-91 (1983).

383. John N. Schacht, *The Making of Telephone Unionism 1920-1947*, at 43 (1985).

384. See David Brody, *Steelworkers in America: The Nonunion Era* 234, 271-75 (1960).

tablished a justifiable reputation for offering their workers good conditions, especially in terms of fringe (nonwage) benefits and the physical work environment in response to workers' expressed desires."³⁸⁵ Even the leading traditionalist historian, Irving Bernstein, acknowledges that benefits in grievance-handling and safety made "the company union with all its inadequacies preferable to nothing" for many of those unskilled, black, or new immigrant workers "beyond the pale of the labor movement."³⁸⁶

2. *Contested Trust.* — There is compelling evidence that the effects of these progressive managerial practices went beyond "pure reformism"—that is, beyond satisfaction of workers' pre-existing preferences. Such practices also often transformed workers' emotional and normative orientation to the firm in ways that blended the various processes of hegemony and counterhegemony conceptualized above.³⁸⁷ The Goodyear CIO activists recalled, for example, that the Industrial Assembly generated a culture of "institutional loyalty" among thousands of company employees.³⁸⁸ "[T]he loyalty of workers to the company unions" was a "major factor" in the steel industry's tenacious resistance to the CIO, especially among the "Little Steel" enterprises, even after the enactment of the NLRA.³⁸⁹ In concluding that collaborative welfare capitalism took "deep root in the American industrial order" in the 1920s, David Brody, the foremost revisionist historian, writes that those practices successfully "persuaded workmen that they were best off as wards of the employer."³⁹⁰

The effectiveness of such company-union symbols as "family factory relations," "factory solidarity," "the Big Family,"³⁹¹ and the "company

385. Harris, *supra* note 36, at 18. Sanford Jacoby's important history of personnel policy warns against the revisionists' exaggeration of company union and welfare benefits, see Jacoby, *supra* note 36, at 188–89, 198, but his subsequent case study concludes that TRW's company union was "quite popular" at the company's main plant, despite workers' annoyance at managerial manipulation. See Sanford M. Jacoby, *Reckoning with Company Unions: The Case of Thompson Products, 1934–1964*, 43 *Indus. Lab. Rel. Rev.* 19, 28 (1989) [hereinafter Jacoby, *Thompson Products*].

386. Bernstein, *supra* note 188, at 172–173. Other noted academic friends of organized labor voiced similar views. A leading institutionalist labor economist, Harry Millis, conceded that "most company unions" were not "merely obstructive organizations" but had "positive or constructive functions of one kind or another." Millis & Montgomery, *supra* note 357, at 873.

387. See *supra* Parts II–III.

388. Nelson, *American Rubber Workers*, *supra* note 378, at 109–10.

389. Ronald L. Filippelli, *The Historical Context of Postwar Industrial Relations*, in *U.S. Labor Relations, 1945–1989: Accommodation and Conflict* 137, 154 (Bruce Nissen ed., 1990); see John Bodnar, *Immigration and Industrialization: Ethnicity in an American Mill Town, 1870–1940*, at 140–41 (1977); Millis & Montgomery, *supra* note 357, at 886 n.4 (citing the "influence and prestige achieved by employee-representation plans" as an obstacle to CIO organizing in the steel industry).

390. Brody, *supra* note 38, at 78.

391. Dunn, *supra* note 96, at 15, 21.

community"³⁹² is explained in part by the emerging solidarities of industrial workforces that AFL craft unions failed to exploit. Workers' actual experience in the industrial workplace had begun to generate bonds of sentiment that extended factory-wide. The insider/outsider symbolism of company unionism appealed to those bonds, while AFL unions sought to carve workforce sentiments into separate craft or occupational solidarities. Contemporary labor progressives and other supporters of industrial unionism expressed anguish over the emotive opening that the anachronistic AFL strategy gave to the company union movement's call for "shop solidarity" over "union solidarity."³⁹³ But the company union philosophy did not just play off of existing plant-wide sentiments. The progressive managerial strategy often aimed to win worker loyalty (and dependence) away not only from trade unionism, but from ethnic, mass-culture, and governmental institutions that challenged corporate paternalism and control in the Progressive Era.³⁹⁴ A careful city-wide study documents that interwar Chicago employers deliberately encouraged factory-wide sentiments as a substitute for the ethnic loyalties that had underpinned earlier union militance. Chicago employers concurrently attempted to subordinate the newly unified workforce to the employers' authority through the uniquely appropriate, paternalistic ideal of the "happy family."³⁹⁵

Nonetheless, it would be wrong to say that the material benefits, representative voice, and collaborative symbols of company unionism simply aligned workers' interests with management—in the forms, discussed in Parts II and III, of either legitimate "trust-building"³⁹⁶ or hegemonic "universalization," "false legitimation," or "perceptual reframing"³⁹⁷—

392. A study of efforts by communists and civil libertarians to organize Appalachian miners in the 1930s demonstrated the effectiveness of the deployment by coal operators of insider/outsider symbols that blended appeals to "local blood," anti-communism, and religious community. See John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* 110 (1980).

The Communists assumed that the militant response of the miners to economic conditions implied an equally vehement rejection of their fundamentalist Protestant culture. But for miners, religion was not an opiate; it was the only form of collective organization they had been allowed for decades. Communists were fixated on economic issues, liberals on civil liberties. Both groups held the miners' culture in contempt. Local elites realized that the miners' interests involved more than free speech and economic redistribution; in combatting the outsiders, they could address local pride, fears of communism, longings for a righteous community. The hegemony of Appalachian elites involved an appeal to resonant cultural symbols.

Lears, *supra* note 208, at 585 (summarizing Gaventa).

393. See, e.g., Dunn, *supra* note 96, at 188; Fraser, *supra* note 39, at 275.

394. See Cohen, *supra* note 267, at 162–83. Paternalistic managers consciously designed their loyalty-promoting welfare works and social activities to undercut ethnic community organizations and preempt government programs. See *id.* at 176–81.

395. *Id.* at 176–79.

396. See *supra* Part IV.B.

397. See *supra* Part II.C.2.c.

even in the vanguard firms. Brody concedes—as did company union proponents themselves, at least out of workers' earshot³⁹⁸—that company unionism in no way diminished management's formal rights of ultimate workplace control.³⁹⁹ Closer examination shows the complex nature of worker trust and ostensible interest-realignment under such paternalist hierarchy. That complexity belies both the Board's stylized thesis of false legitimation and the revisionist historians' claim that workers were contented wards of company unions. It also reflects, more generally, the contradictory and protean quality of ostensibly hegemonic ideologies.

In turning to a strategy of company unionism, a minority of progressive interwar managers appealed to norms of democracy, legality, and community precisely because those norms were entrenched in the wider political culture and, more important, had penetrated deeply into workers' and labor reformers' oppositional culture through the pervasive wartime rhetoric of "industrial democracy."⁴⁰⁰ Management's perceived need to deploy communitarian and democratic norms reflects the erosion of the discursive and emotional force of the managerial community's preferred mode of legitimating its own authority: appeals to market consent or natural right.⁴⁰¹ The belief that labor market transactions were pervasively tainted by duress and injustice—and that workers were willing to act militantly on such emotionally charged beliefs, particularly during the tight wartime labor market—had spread widely enough among the public and political elites to induce this shift in strategy.⁴⁰²

In 1922, John D. Rockefeller, Jr. publicly condemned the Consolidated Coal Company's managers for denying

their employees all voice and share in determining their working conditions and any adequate machinery for the uncovering and adjustment of grievances. The day has passed when such a position can justly be maintained . . . in a country like ours . . . Employees in every industrial unit [have] a fundamental right, namely, the right to representation in the determination of those matters which affect their own interests.⁴⁰³

398. See, e.g., Burton, *supra* note 213, at 73.

399. See Brody, *supra* note 38, at 58.

400. See generally Milton Derber, *The American Idea of Industrial Democracy, 1865–1965*, at 111–95 (1970); Daniel T. Rodgers, *The Work Ethic in Industrial America 1850–1920*, at 57–61 (1978). In 1919, Cyrus McCormick, vice-president of the Harvester Company, wrote that

the most significant feature in labor conditions of the day is the expressed desire of labor to share in the management of business. There is a close parallel existing between the movement in favor of employee representation and the growth of democratic government . . . [U]ntil recent years our industrial system was . . . a benevolent despotism.

See Ozanne, *supra* note 306, at 119 (quoting McCormick).

401. See Bendix, *supra* note 35, at 267–74, 287–308.

402. See *supra* notes 361–362 and accompanying text.

403. Brody, *supra* note 38, at 55–56 (quoting Rockefeller).

Interwar managers saw collective dealing even in the limited form of company unionism as a radical departure from a regime of absolute managerial authority. They fully understood they were "engaged in a complex struggle for moral authority, not just a contest for power."⁴⁰⁴ For just that reason, most managers angrily rejected Rockefeller's enlightened lectures. They feared that even limited liberalization of the drive system would, in the words of one Wagner adviser, "give the workmen exaggerated notions . . . of their rights."⁴⁰⁵ The incorporation of workers' and reformers' oppositional norms within company union ideology is a prime illustration of the cultural resources for immanent critique latent in ostensibly hegemonic ideologies.

Vividly reflecting the Pandora's Box Effect discussed above,⁴⁰⁶ companies that invoked norms of democracy and community often found it difficult to resist workers' escalating demands armored in those very norms. Judge Elbert Gary of U.S. Steel blamed his own workers' 1919 strike for independent unionism on the unsettling effect of Rockefeller's widely publicized policies.⁴⁰⁷ Workers could brandish managerially endorsed democratic or communitarian norms in both "wars of maneuver" aimed at achieving independent unionization and (sometimes concurrently) in "wars of position" aimed at incremental expansions of benefits within the company union structure.⁴⁰⁸ In the latter instance, workers deployed managerial norms primarily in bargaining directed against management itself. In the former, workers drew on those norms to reinforce oppositional solidarity among themselves as more robust "citizens" of the enterprise polity.

One workforce's cultural "war of position" is recounted in Gerald Zahavi's finely textured study of the welfare capitalist program of the Endicott Johnson shoe company.⁴⁰⁹ Zahavi shows convincingly that Endicott workers internalized management's assiduously-promoted, perceptual maps of the company as a "family" and participatory "community," in which management and labor had reciprocal obligations of fair dealing. But the company's proclaimed commitment to reciprocity and participation enabled workers to press for expanded rights and benefits under the banner of those newly legitimated (but vaguely defined) perceptions and norms. The company feared charges of betrayal—and worker demoralization, unrest, and independent unionization—if it vio-

404. Harris, *supra* note 36, at 10.

405. Sumner H. Slichter, *The Turnover of Factory Labor* 204 (1921).

406. See *supra* Part III.D.3.

407. See Scheinberg, *supra* note 271, at 189.

408. These categories of political combat are, of course, Gramsci's. See Gramsci, *supra* note 34, at 238–39.

409. See Zahavi, *supra* note 39, at 99–125. Although Endicott Johnson did not have a full-fledged employee representation plan, its panoply of welfare works included the kind of grievance system that was the core of most company unions.

lated its own norms; and workers knew it. Hence, the shift in normative terrain itself altered relative bargaining power.

This well-documented example of "runaway legitimization"⁴¹⁰ is corroborated by many other instances of company unionism. At International Harvester, employee representatives warned company officials that if their demands were not granted, the Works Council would lose "prestige" because the rank and file would feel the Council was not "worth half what it was cracked up to be" by management.⁴¹¹ Harvester management relented.⁴¹² The Goodyear Industrial Assembly surprised management by generating an escalating number of grievances and protests.⁴¹³ Employee representatives, knowing that Goodyear management felt the need to "keep the good will of the assembly"⁴¹⁴ and to maintain workers' "confidence in the organization," successfully forced management to make concessions.⁴¹⁵ The president of another company was taken aback when his own appointee's recurrent "Wilsonian speeches" to the company union set off "a number of requests for raises in wages and rather upsetting socialistic debates."⁴¹⁶ Such instances, of course, may also reflect the closely related phenomena of "whetting the appetite," "grievance articulation," or "aiding collective action."⁴¹⁷ The historical evidence is too coarse to distinguish confidently the relative significance of "runaway legitimization" and these other Tocqueville Effects.⁴¹⁸

The fluid fight between company and independent unions for the mantle of legitimacy reflects a widespread cultural contest in the interwar workplace—and in ideological contests more generally, as Eagleton has articulated well: "Ideology is a realm of contestation and negotiation, in which there is a constant busy traffic: meanings and values are stolen, transformed, appropriated across the frontiers of different classes and groups, surrendered, repossessed, reinflected."⁴¹⁹ The compelling insight implicit in the work of the revisionist historians is that the outcome of neither the ideological nor instrumental interwar labor battles was predetermined. The symbols of an organic corporate family or democratic

410. See *supra* Part III.D.3.

411. Ozanne, *supra* note 306, at 148 (quoting employee representative).

412. See *id.*

413. "... Goodyear executives learned more about 'what's on the worker's mind' than they wanted to know." Nelson, *American Rubber Workers*, *supra* note 378, at 106.

414. *Id.* at 107.

415. Nelson, *supra* note 358, at 353–54.

416. NICB (1933), *supra* note 253, at 26–27 (quoting unidentified company president).

417. One careful survey, not otherwise sympathetic to company unionism, described the multifaceted "Tocqueville Effects" of inside unions: "[T]he [grievance] machinery established, the right specifically accorded to use it, and the assistance given by the workers' representative have multiplied the number of grievances brought into the open—frequently to the surprise of alert and well-disposed management." Millis & Montgomery, *supra* note 357, at 877.

418. See *supra* Part III.D.

419. Eagleton, *supra* note 208, at 101.

community were potentially powerful managerial weapons. The New York Times, for example, was able publicly to denounce transport workers who struck the Interborough Rapid Transit Company of New York City as "outlaws" violating the "self-government" implemented by the company union.⁴²⁰ Claims of democratic or communitarian legitimacy pervaded the arguments of proponents of both company unionism and independent unionism in the public media, in congressional hearings, and in direct appeals for the loyalty of rank and file workers.⁴²¹ Important segments of the political elite—including Franklin Roosevelt, and officials of the National Recovery Administration and the Labor Department—assimilated the rhetoric of company union advocates.⁴²²

Of course, the eventual legal and discursive equation of outside unionism and "industrial democracy," and the triumph of the pejorative term "company-dominated union" over management's preferred "employee representation plan" register the ultimate outcome in 1935 of the ideological and political contest among political elites, workers, unions, and employers.⁴²³ That managerial norms of fair treatment and mutual loyalty meant something real to workers, however, is shown by their disappointment at the limits of 1920s welfare benefits,⁴²⁴ and even more by their bitter sense of betrayal by Depression-era wage and employment cuts.⁴²⁵ Indeed, the interwar cycle of trust-building and betrayal among core firms is a paradigmatic instance of the possibility and fragility of labor-management "gift-exchange," a concept I have examined elsewhere.⁴²⁶ As Brody writes, "Welfare capitalism rested ultimately on confidence in the strength of the big employers. They guaranteed the wellbeing of their workmen, and in turn received loyalty and goodwill. But the guarantee had not been honored."⁴²⁷ After the experience of the 1930s, the empowerment of outside unionism was often necessary to restore workers' trust that management would honor norms of fair exchange.⁴²⁸ Ironically, the interwar norms of gift-exchange also account in part for workers' predominant unwillingness to reject the capitalist

420. Dunn, *supra* note 96, at vii (quoting the New York Times).

421. See Barenberg, *supra* note 31, at 1402-03, 1412-15, 1450-61.

422. See *id.* at 1452-53.

423. See *id.*

424. See *infra* notes 443-446 and accompanying text.

425. Note the interrelation among "internal" affect and cognition, and "external" (i.e. intersubjective) cultural and political contests. Workers' emotional resentment depended on particular cognitive conceptions of just and unjust work relations, conceptions that flowed from social discourse and practice. On the socio-cultural element in such emotions as outrage, resentment, and indignation (if not all emotions) see Justin Oakley, *Morality and the Emotions* 22-37 (1992) and the various essays collected in *The Social Construction of Emotions* (Rom Harré ed., 1986).

426. See Barenberg, *supra* note 31, at 1485-87.

427. Brody, *supra* note 38, at 77.

428. See William Lazonick, *Competitive Advantage On The Shop Floor* 270-77 (1990); Barenberg, *supra* note 31, at 1491. The exceptions confirm the rule. The large companies that remained securely nonunion after the 1935 enactment of the NLRA and

model even during capitalism's worst crisis. Workers had seen, and still believed, albeit ambivalently, that capitalism could have a human face.⁴²⁹

3. *Hegemonic Processes to Bolster Insufficient Reform.* — The core company unions therefore widely exhibited both the material incentives of "pure reformism" and the contested trust reflected in various "Tocqueville Effects." They also sporadically displayed other specific mechanisms of hegemony, structural coercion, and resistance—often because material reform proved insufficient or the trajectory of contested trust spun out of control.

By far the primary material benefit that company unions provided workers was machinery for grievance adjustment.⁴³⁰ Even though management, rather than third-party arbitrators, retained final "appellate" authority, workers in core firms typically pressed and won a substantial volume of individual complaints before joint labor-management bodies.⁴³¹ Indeed, the aggressiveness with which employee representatives in some firms pursued individual grievances in part reflected management's unwillingness to yield its prerogatives over larger matters of wages and conditions.⁴³²

While management generally conceded only on minor grievances, there is much evidence that workers often believed they had gained something of value.⁴³³ The company union was in effect a mechanism by which upper management could rein in the despotism of the "foreman's

the rise of industrial unionism were those, such as Eastman Kodak and Sears Roebuck, which

took special pains to maintain their [elaborately paternalistic] personnel programs during the early 1930s, that is, when unionism was in decline and other firms at the time were cutting back in this area and weakening the authority of their personnel departments, action that came to be resented by employees who felt that their employers had reneged on the implicit contract inherent in the nonunion model of the 1920s.

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* 19, 34–35 (Katharine G. Abraham & Robert B. McKersie eds., 1990). Brody believes that welfare capitalism rather than industrial unionism would have prevailed if the Depression had ended by the winter of 1932–33 because many large paternalistic firms successfully struggled to maintain their welfare programs until then. See Brody, *supra* note 38, at 71.

429. See Cohen, *supra* note 267, at 206–09.

430. See Bureau of Labor Statistics, *supra* note 43, at 70; Millis & Montgomery, *supra* note 357, at 876, 881 (stating that "the settlement of grievances has been the most generally performed function of those company unions that have really done anything").

431. In its first five years, the Bethlehem Steel company union processed almost 2,400 cases, 70% of which were decided in favor of worker grievants. See Raymond L. Hogler, *Worker Participation, Employer Anti-Unionism, and Labor Law: The Case of the Steel Industry, 1918–1937*, 7 *Hofstra Lab. L.J.* 1, 22 (1989) (citing John Calder, *Five Years of Employee Representation Under "The Bethlehem Plan," The Iron Age*, June 14, 1923, at 1690, 1694). Similar data is provided for several other works councils in NICB (1933), *supra* note 253, at 80–85; Barrett, *supra* note 381, at 252–53.

432. See Ozanne, *supra* note 306, at 132.

433. See *supra* notes 377–86 and accompanying text.

empire."⁴³⁴ If management's motive in part was to check the "suboptimizing" autonomy of the firm's lower echelons, workers were nonetheless beneficiaries of even incremental limits on the notoriously despised arbitrariness and favoritism of the old "drive" system. Did this entail false "rule of law" legitimization of managerial authority, in the sense of Thurman Arnold's famous broadside?

Though the notion of a "rule of law" may be the moral background of revolt, it ordinarily operates to induce acceptance of things as they are From a practical point of view it is the greatest instrument of social stability because it recognizes every one of the yearnings of the underprivileged, and gives them a forum in which those yearnings can achieve approval without involving any particular action which might joggle the existing pyramid of power.⁴³⁵

The Board believed that core company-union grievance procedures, such as those of International Harvester, fit Arnold's analysis snugly: "The elaborate machinery of appeal to the President, convocation of a General Council, and resort to arbitration [only] upon the acquiescence of the management serves only further to create the illusion of equality [between workers and management]."⁴³⁶ Much empirical evidence—recent and historical—suggests that relatively minor grievances do often act as the trigger of union organizing drives. Interwar management's frequent claim⁴³⁷ that company unions' grievance machinery served a "safety valve" function may well be accurate to some (indeterminate) extent—particularly in light of the partial success of management's reframing of workers' perceptual map of the company as a family or community, an element of the hegemonic process of "neutralization."⁴³⁸

But neutralization is different from the kind of false juridico-political legitimization⁴³⁹ described by Arnold and the Board. That is, even if company unionism extinguished the immediate flashpoints of unionization, there is little evidence that workers at International Harvester or elsewhere mistook minor grievance resolution for either democratic legitimacy or substantive equality.⁴⁴⁰ The same workers who were grateful for

434. See Jacoby, *supra* note 37, at 158–61, 188–89, 244–51.

435. Thurman W. Arnold, *The Symbols of Government* 34–35 (1935). The view espoused by the Board and by Arnold, of course, conveys one relatively simplistic position in a multi-faceted debate on the cross-cutting effects of the ideology of the rule of law. For other views, see *infra* note 440.

436. International Harvester, 2 N.L.R.B. 310, 348 (1936) (citation omitted).

437. See French, *supra* note 159, at 61–62; Jacoby, *supra* note 37, at 225; NICB (1933), *supra* note 253, at 39; Ozanne, *supra* note 306, at 148.

438. See *supra* Part II.C.2.g.

439. See *supra* Part II.C.2.b.

440. The impact of the "private law" of company unionism is thus more consistent with Mark Kelman's analysis of "rule of law" legitimization than with Arnold's and the Board's. Kelman argues that legal formality *per se* is unlikely to induce a false normative belief in the fairness or justice of substantive rules and policies, although it may induce a false belief that rules and policies can be applied impersonally and objectively and may

the incremental limits on foremen's discretion understood that the supposed "democracy" of the Industrial Assembly, whose agenda and larger policy decisions were fully controlled by management, was largely hollow.⁴⁴¹ They also expressed chronic dissatisfaction at their substantive wages, conditions, and weak bargaining power.⁴⁴²

Indeed, the latter iron reality—the continued grinding work conditions, poor wages, and job insecurity of the interwar years—posed the greatest challenge to management's implantation of company unions.⁴⁴³ The modest material benefits provided by company unionism paled in an era of heavy seasonal unemployment in many industries,⁴⁴⁴ of slow wage growth that lagged far behind productivity increases and behind the wage hikes of pre-War industrial surges,⁴⁴⁵ and of foremen's persistent resistance to the wavering constraints of rationalized personnel management.⁴⁴⁶

It is not surprising, therefore, that even those core firms sincerely committed to progressive management engaged widely in "performative dissemblance"⁴⁴⁷ designed to inflate workers' perceptions of the net benefits of company unionism. As virtually every historical case study and contemporaneous management guidebook shows, employers channelled wage increases, welfare benefits, and social activities through the company union deliberately to generate the appearance that employee representation had achieved these gains, which management would have granted in any event.⁴⁴⁸ Such dissemblance was aided by "distorted com-

convey cognitive maps that limit people's capacity to criticize legal policy. See Kelman, *supra* note 65, at 262–63, 273–74, 294–95. Others, of course, in both liberal and critical traditions, have emphasized the liberating potential of the norms embodied in the rule of law. See, e.g., E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* 263–66 (1975). But cf. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *Yale L.J.* 561, 566 (1977) (reviewing E.P. Thompson, *Whigs and Hunters* (1975)) (denying that the rule of law is "an unqualified human good").

441. See Richard Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* 107–09 (1979); Ozanne, *supra* note 306, at 135–39, 142–45.

442. See Ozanne, *supra* note 306, at 135–39, 142–45.

443. This is not to deny that the modest material gains of the 1920s helped contain or preempt workers' mobilization for independent unionism, even if the gains left workers quietly dissatisfied. In part, workers' quiescence may be due to qualitative, rather than quantitative, gains in consumption. During the 1920s, important segments of blue-collar workers entered the mass-consumption era of indoor plumbing and electricity, home appliances, radios and phonographs, and even automobiles. See Brody, *supra* note 38, at 63–64; Cohen, *supra* note 267, at 99–158.

444. See Cohen, *supra* note 267, at 185–86, 197.

445. See Brody, *supra* note 38, at 62–63.

446. See Jacoby, *supra* note 37, at 173–74, 193–95.

447. See *supra* Part II.C.2.a.

448. See Millis & Montgomery, *supra* note 357, at 881; C. Ray Gullett & Edmund R. Gray, *The Impact of Employee Representation Upon the Development of Management-Worker Relationships in the United States*, 20 *Marq. Bus. Rev.* 95, 97 (1976) (surveying nine leading company unions). As discussed *supra* Part II.C.2.a, this dissemblance was sometimes accompanied by elaborate shows of feigned bargaining and even strikes. Often,

munication"⁴⁴⁹—particularly the informational asymmetry between management and employment representatives in company union meetings, and the incentive and interaction cleavages between employee representatives and the rank and file.⁴⁵⁰ By creating the appearance, especially among new workers, that the company union was woven into the fabric of company welfare and social activities,⁴⁵¹ this mode of performative dissemblance also concurred with managements' widespread goal of "naturalizing" the company union, in the sense discussed above.⁴⁵²

While the absolute benefits of company unionism were thus exaggerated, their (often quite high)⁴⁵³ costs could be hidden in invisible downward adjustments of the wage term. Managers, workers, and even union advocates pervasively stated that company unions had a built-in advantage over independent unions because workers bore no dues or other expenses to gain the benefits of the inside, as opposed to outside, unions.⁴⁵⁴ Only rarely did contemporaries point out the obfuscation stemming from the likelihood that company unions passed costs through to workers.⁴⁵⁵

4. *From Contested Trust to Structural Coercion.* — Even if the perceived net benefits achieved by company unions proper (as distinguished from the net benefits of firms' overall welfare programs) were inflated, the total package of benefits and working conditions under welfare capitalism generally did not satisfy the desires encouraged, in part, by the newly trumpeted managerial norms and practices. The insufficiency of pure reformism and the tendencies toward "runaway legitimation" and "whetting the appetite" had a corrosive effect on workers' loyalty even toward the core company unions. That corrosion was compounded, as progres-

the company unions' publications and spokespersons simply claimed credit for the material gains.

449. See *supra* Part II.B.

450. See, e.g., Robert R.R. Brooks, *As Steel Goes*, . . . , at 93 (1940) (recounting U.S. Steel management's control of company union communications with rank and file, and the increases in worker leverage that followed the opening of informational channels between employee representatives and rank and file).

451. See *International Harvester*, 2 N.L.R.B. 310, 348 (1936).

452. See *supra* Part II.C.2.d.

453. See, e.g., Nelson, *supra* note 358, at 352–55 (discussing high costs of maintaining company unionism).

454. See *Hearings on S. 55*, *supra* note 58, at 27–10; Bureau of Labor Statistics, *supra* note 43, at 195; Dunn, *supra* note 96, at 200 (concluding "it is an easy matter for the employer to entice [the worker] with a plan whereby he is offered certain superficial advantages without any charges or dues payments"); Schatz, *supra* note 382, at 40; Twentieth Century Fund, *supra* note 141, at 327 ("There is a strong inducement for employees to favor company plans because they involve little or no cost."); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662, 1679 (1983).

455. *Hearings on S. 1958*, *supra* note 95, at 412, reprinted in 2 Legis. Hist., *supra* note 47, at 1798 (testimony of Jack Larkin, employee representative in Weirton Steel company union); *Hearings on S. 2926*, *supra* note 135, at 676, reprinted in 1 Legis. Hist., *supra* note 47, at 715 (testimony of G.L. Fullmer, employee representative in AT&T company union).

sive managers knew,⁴⁵⁶ by the reputational spillover effects of brute coercion and manipulation among the much larger group of ephemeral company unions discussed below. A leading managerial authority and proponent of company unionism warned, "Coercion and dominance have no place in the inauguration or development of employee representation; and the employer who resorts to manipulation, be it ever so subtle, not only courts disaster but helps discredit the whole movement."⁴⁵⁷

Notwithstanding such pronouncements, even "enlightened" firms resorted to more blatant ideological manipulation and open intimidation or "bribes" of representatives and the rank and file when crises erupted from the failure of pure reformism or from setbacks in the contest for worker trust. Indeed, the core firms expended great effort in the mid-1920s merely overcoming the ill-will and distrust left by the employment and wage cuts of the 1920-21 recession.⁴⁵⁸ In 1922, the NICB declared the strategy of enlightened management vindicated, on the ground that the rank and file were soothed by their representatives' "endorsement" of the cuts in all but two of three hundred company unions surveyed.⁴⁵⁹ Although inside unions' disclosure of companies' dire financial information did mitigate workers' discontent over cuts,⁴⁶⁰ managers nonetheless learned to rue the delegitimizing effects of such forced consent by employee representatives.⁴⁶¹ Experts thereafter advised management to funnel some wage or benefit increase quickly through any newly established company union in order to win workers' "confidence" in the organization.⁴⁶² Indeed, many firms simply abolished their inside unions after the 1929 crash "rather than again go through the expensive and unpleasant sham of getting employees to approve wage cuts."⁴⁶³

More damaging perhaps than the use of company unions to "sell" unpleasant wage and employment policies during economic downturns was their use against strikes or threats of independent unionism. During such confrontations, management readily reinflected the company union's symbols of family or community to demonize the outside union and its supporters. Those trust-building symbols—like symbols of com-

456. See Jacoby, *supra* note 37, at 227.

457. Burton, *supra* note 213, at 184.

458. See Barrett, *supra* note 381, at 256-57 (meatpacking); National Industrial Conference Board, *Experience with Works Councils in the United States* 86 (1922) [hereinafter NICB (1922)]; Ozanne, *supra* note 306, at 132-36 (farm equipment).

459. See NICB (1922), *supra* note 458, at 86, 99.

460. See *id.* at 86-101.

461. See Burton, *supra* note 213, at 189; Brandes, *supra* note 38, at 132-33. At Harvester, employee representatives were "humiliated" by their endorsement of wage cuts in the 1921 recession. Many were voted out in the subsequent company union election—a "grave slap at the entire council system." Ozanne, *supra* note 306, at 132-36.

462. See Julian J. Aresty & Gordon S. Miller, *The Technique of Arousing and Maintaining the Interest of Foremen and Workers in Plans of Employee Representation*, 6 *Personnel* 115, 120-21, 125 (1930); Burton, *supra* note 213, at 189.

463. Ozanne, *supra* note 306, at 145.

munitarian loyalty in general⁴⁶⁴—were intrinsically well-suited to management's new purpose of playing on the psychological "expurgation of the other."⁴⁶⁵ Benign loyalty to "us" readily turned to malignant hostility toward "them." The price of routinely branding independent union supporters as anti-American, traitors, or communists, however, was not only the risk of intensified polarization and turbulence in the workplace. Again, in the fluid contest over symbols, and with the help of the New Deal's endorsement of collective bargaining as national legislative policy, workers were often able to realign "community" and "Americanism" with independent-union solidarity.⁴⁶⁶

More important than management's manipulation of communitarian symbols, however, was its instrumental use of the company-union infrastructure as the intimidating spearhead of back-to-work or anti-union campaigns. At Harvester, for example, management required company union representatives to go door-to-door to urge workers to break their 1919 strike, while vesting in those representatives authority to decide which workers would get their jobs back when production resumed.⁴⁶⁷ Management's use of the company union as a coercive apparatus generally dissipated, at least for a time, whatever fragile sentiments of trust or approbation were previously evoked in the workers who now faced intimidation. The national industrial climate of open-shop campaigns, the Red Scare, and the "American plan" was marked by widespread employer coercion—including blacklists, large corporate "security" forces and munitions caches, routine use of "labor spies" planted in workforces to identify and chill pro-union sentiment, and police enforcement of increasing numbers of court injunctions against collective activity in the 1920s.⁴⁶⁸ In this broader context, even management's infrequent use of a company union as an instrument of intimidation could more than suffice to confirm workers' widespread initial skepticism about an "enlightened" employer's professions of mutual trust.⁴⁶⁹

E. The "Vulnerable" Company Unions

If workers' trust in the core company unions was fragile and often broken, their loyalty to company unions that were formed in less propitious economic and political climates was even more vulnerable. Ironi-

464. See generally Anderson, *supra* note 248, at 9–36, 141–54.

465. See *supra* Part II.C.2.f.

466. See Gerstle, *supra* note 351, at *passim*.

467. See Ozanne, *supra* note 306, at 124–30.

468. See Bernstein, *supra* note 188, at *passim*; William E. Forbath, *Law and the Shaping of the American Labor Movement* 37–39, 59–66, 105–18 (1991); Howard Gitelman, *Perspectives on American Industrial Violence*, *Bus. Hist. Rev.*, Spring 1973, at 1, 1–23.

469. Managers almost universally reported the necessity of a gradual process of "selling" the idea of company unionism to workers initially distrustful of managerial motives. See NICB (1922), *supra* note 458, at 150–55; Aresty & Miller, *supra* note 462, at 118–23, 126–31.

cally, circumstances that exacerbated workers' doubts about employers' commitment to genuine reform often simultaneously induced management to establish company unions that were structurally more suited to capture by, or evolution into, independent unions. The bulk of such "vulnerable" company unions were those established either during World War I or after the 1933 enactment of Section 7(a) of the National Industrial Recovery Act.⁴⁷⁰ The various wartime labor boards, generally prompted by labor unrest that threatened military production, ordered over 150 employers to initiate shop committees.⁴⁷¹ Employers erased almost all of them after the government dismantled wartime labor regulation, and after organized labor suffered decisive setbacks in the 1919 strike wave and the 1920-21 recession.⁴⁷²

Of the company unions subsequently formed voluntarily by management in the 1920s, many were disbanded during the first few years of the Great Depression.⁴⁷³ But the passage of Section 7(a) and the renewal of worker militancy triggered a massive resurgence between 1933 and 1935. The terms of Section 7(a) broadly prohibited employer coercion and interference with workers' newly declared right to collective organization. The National Recovery Administration and the White House sided with employers who claimed that company unionism satisfied that mandate. In contrast, the labor boards with primary authority to interpret Section 7(a) declared a ban on company unions that failed to show majority support in government-approved elections. The boards, however, lacked the power to enforce that interpretation.⁴⁷⁴ The number of workers in company unions doubled to reach roughly three million, compared with about four-and-a-half million in autonomous unions.⁴⁷⁵ The Bureau of Labor Statistics reported that company unions and outside unions together covered about half of the workforce in a survey of 15,000 firms.⁴⁷⁶ Some two-thirds of the company unions extant in 1935 were established after the NIRA's passage.⁴⁷⁷

In establishing both the wartime shop committees and the NRA company unions, therefore, employers acted under the combined pressure of government decrees and threats of independent unionism. Such historical pressures differentiated these inside entities (which traditionalist historians took as their paradigm of company unionism) from the

470. 15 U.S.C. § 707(a) (1933). Section 7(a) forbade employers from interfering with workers' rights to organize unions and engage in collective bargaining, although Congress established no effective enforcement mechanism.

471. See NICB (1922), *supra* note 458, at 7, 10; John A. Fitch, *Survey*, May 3, 1919, at 192, 192-95.

472. See French, *supra* note 159, at 27; NICB (1922), *supra* note 458, at 5-24.

473. See *supra* note 463 and accompanying text.

474. See Barenberg, *supra* note 31, at 1402.

475. See Bureau of Labor Statistics, *supra* note 43, at 37-50; Jacoby, *supra* note 37, at 224, 227.

476. See Bureau of Labor Statistics, *supra* note 43, at 37.

477. See *id.* at 50.

revisionists' core company unions in several ways.⁴⁷⁸ First, workers were more inclined to doubt the sincerity of management's commitment to inside unions that were established patently to avert independent unions or government orders.⁴⁷⁹ Because the success of the company union ideology depended so heavily on evoking a sense of mutual obligation and trust, workers' reading of management's initial motive was crucial. Immediate external pressures not only implied the untrustworthiness of management's motives, but also prevented management from gradually "preparing" or "educating" workers to accept the company union—a process that even progressive proponents dubbed a necessary "sell" job.⁴⁸⁰ Workers generally distrusted a company union when not given the opportunity to feel that they had participated in fashioning or at least endorsing it.⁴⁸¹

Second, in an environment where the perceived catastrophe of independent unionism loomed large, where workers were widely militant, and where genuine material reforms were foreclosed by economic constraints, management was much more prone to install and operate company unions through outright intimidation and bribes.⁴⁸² Employers gradually standardized such structural coercion in what Remington Rand's president called the "Mohawk Valley Formula."⁴⁸³ That formula set out nine steps for defeating strikes and outside unionization. A key step was the mobilization of loyal company union members, together with local "Citizens' Committees," to act as the vanguard of back-to-work and anti-union movements, as even the core company unions had done in sporadic crises of the 1920s. Even if coercion further subverted many workers' trust in the inside union, management hoped simultaneously to chill open support for independent unionism and to drive an organizational wedge through its workforce.

Equally important, management hoped to gain legitimacy in arenas outside the workplace, particularly among political elites—both to justify the aid of state and national troops and to fend off legislative support for

478. The revisionist historians do not ignore the vulnerable company unions, but rather emphasize the potential long-term viability of the core company unions. See, e.g., Nelson, *supra* note 358.

479. See *infra* notes 456–461 and accompanying text.

480. See NICB (1925), *supra* note 372, at 24, 170–79.

481. See generally Ordway Tead & Henry C. Metcalf, *Labor Relations Under the Recovery Act 108* (1933).

482. See, e.g., Bureau of Labor Statistics, *supra* note 43, at 78–84; Bernstein, *supra* note 77, at 39–40, 101–05, 175–78, 455–68, 612–14, 740. A sample of industry studies includes Brooks, *supra* note 450, at 75 (steel); Robert H. Zieger, *Rebuilding the Pulp and Paper Workers' Union, 1933–1941*, at 79–80 (1984); Steve Jefferys, "Matters of Mutual Interest": The Unionization Process at Dodge Main, 1933–1939, in *On the Line: Essays in the History of Auto Work 100, 100–128* (Nelson Lichtenstein & Stephen Meyer eds., 1989).

483. See Bernstein, *supra* note 77, at 478–81; Brooks, *supra* note 450, at 138; Remington Rand, Inc., 2 N.L.R.B. 626 (1937).

independent unionism.⁴⁸⁴ The strategy nearly achieved the latter goal. As already noted, even progressive elites as pivotal as top NRA and Labor Department administrators and FDR himself were inclined to accept the company union as part of an adequate solution to the labor question. If not for the fervent commitment to independent unionism on the part of Senator Wagner and the NRA labor boards, there likely would have been no legislative ban on company unions.⁴⁸⁵ While management's strategy of coercively deploying company unions barely misfired at the heights of political ideology and contest, it often caused a backlash of resentment in shopfloor culture.⁴⁸⁶ Workers felt legally and morally entitled to independent unionism after enactment of section 7(a) and the NLRA. Managerial obstruction in the face of public ratification of their sense of injustice fed their outrage and militance.⁴⁸⁷

Third, external government and union pressures forced management to implement company unions that looked and were more like independent unions. The War Labor Board authorized shop committees to engage in full-fledged collective bargaining during World War I.⁴⁸⁸ As mentioned above, the AFL initially approved of this brand of company unionism as a way-station to independent unionism.⁴⁸⁹ Similar expectations explain employers' rush to jettison the committees as soon as post-war political and economic conditions permitted.⁴⁹⁰ During the struggle for control of NRA-era company unions, the broader climate was not as favorable to management. Mass-production workers achieved a greater capacity for sustained militance in the 1930s and government more aggressively supported the right of independent unionism. Hence, as some managers had feared, employers' installation of more "advanced" inside organizations often handed a logistical gift to supporters of outside unions. To forestall independent unionization and palliate NRA administrators, management increasingly gave the post-1933 company unions permission to collect dues to achieve some financial independence from

484. This motive also in part animated the core welfare-capitalist firms of the 1920s. See Neil J. Mitchell, *The Generous Corporation: A Political Analysis of Economic Power* 7 (1989) (arguing that welfare capitalists' motive in part was to gain legitimacy in government circles).

485. See Barenberg, *supra* note 31, at 1401-03, 1410-12.

486. For example, after company unions grew "like mushrooms" in the paper industry, a Central Labor Union organizer reported in July 1933 that employers' coercive tactics "ha[d] set [the workers] on fire" and created good "morale" for outside organizing. Zieger, *supra* note 482, at 79-80 & n.25.

487. On the relation between socially shaped, cognitive notions of justice and the emotional feeling and intensity of outrage, see *supra* note 425.

488. See French, *supra* note 159, at 21, 25.

489. See *supra* Part III.D. The AFL's approval was also due to the government's wartime resistance to new organizing by independent unions. Shop committees that might later be captured by union supporters seemed a second best. Also, the AFL had not yet experienced employers' use of shop committees as anti-union devices. See French, *supra* note 159, at 27, 78-79.

490. See French, *supra* note 159, at 27.

management, to hold formal membership meetings apart from joint labor-management meetings, and to enroll members voluntarily rather than as a mandatory condition of employment.⁴⁹¹

Union supporters often effectively exploited these management-created structures, whether by progressively building them from the ground up into more autonomous unions, by capturing them for top-down affiliation with already established CIO or AFL unions, or by some combination of the two. The potential for such conversions of NRA-era inside unions had been twice foreshadowed. First, before employers dismantled the wartime shop committees, workers widely elected representatives sympathetic to outside unionism.⁴⁹² Second, among shop crafts, telegraphers, and clerks of the 1920s, the railroads found themselves in sporadic struggles to contain rebellious company unions—tellingly, in an industry with longstanding beachheads of independent unionism, unlike other industries of that relatively quiet decade.⁴⁹³ The AFL's 1919 Convention, in a change of policy, had adopted a resolution denouncing shop committees, at the urging of organizers who had been foiled by steel companies' effective use of inside unions.⁴⁹⁴ AFL officials nonetheless continued throughout the 1920s to encourage activists to capture company unions where possible.⁴⁹⁵ Widespread attempts to convert or capture company unions—fueled in part by Tocqueville Effects or *ressentiment*—began in 1933 and continued well after enactment of the NLRA in 1935, for many employers still sought to maintain loyal enterprise unions, albeit with a greater semblance of autonomy.⁴⁹⁶

Developments in bellwether industries and enterprises show that particular company-union characteristics and contingent strategies of management and workers significantly shaped the kind of independent unionism and labor relations climate that emerged from the conversion process. The different industrial-relations paths of major firms in the auto industry, which had no company unions before 1933, are illustrative. Under the spur of Section 7(a), a secret referendum among Chrysler's employees overwhelmingly endorsed a Joint Council of fifty-three employee representatives and fifty-three managerial representatives in the

491. See Bureau of Labor Statistics, *supra* note 43, at 108–19, 203–04.

492. See NICB (1922), *supra* note 458, at 15–24.

493. See Dunn, *supra* note 96, at 121–49; Twentieth Century Fund, *supra* note 141, at 331.

494. See Resolution No. 201, Report of Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor (Atlantic City, 1919).

495. AFL President William Green wrote in October 1925: "Wage earners will do themselves and industries a great service when they capture company unions and convert them into real trade unions. The machinery of the company union offers a strategic advantage for such tactics. Use that machinery as a basis of a real organization." William Green, Editorial, *Am. Federationist*, Oct. 1925.

496. See David J. Saposs, Organizational and Procedural Changes in Employee Representation Plans, 44 *J. Pol. Econ.* 803 (1936).

Dodge Main plant, which employed half of the company's 60,000 workforce.

The Joint Council helped to identify and then bring together a sizable element of the Dodge Main plant's more articulate workers. Meetings of the fifty-three elected workers' representatives gave the different areas of the highly concentrated plant a unity they might otherwise have had considerable difficulty establishing. And in what was to serve as a model for the rights of shop stewards, the scheme also gave the representatives time off their work . . . [and] allowed them to meet independently . . . At such a meeting the first major step to a full union organization of the plant was taken.

. . . .

. . . Instead of being a forum for management-labor togetherness, the Chrysler works councils fostered antimanagement resentment among those most actively involved . . . The works councils legitimized the articulation of collective *demands*, but Chrysler management continued to deny the right to collective *bargaining*.⁴⁹⁷

With the active encouragement of Father Charles E. Coughlin, the employee representatives of the Joint Council converted their organization into an independent union, the Automobile Industrial Workers' Association, which soon merged with the UAW.

By contrast, GM installed a weaker company union structure, with six or seven employee representatives and no employee referendum. GM's resistance to worker unrest remained hardnosed, whereas Chrysler management in 1936 legitimized the dense network of shop stewards by yielding to their strike demands. A much larger fraction of workers participated in the factory takeovers of 1936-37 at Chrysler than at GM; and, even against UAW urgings, the Chrysler sit-downers successfully held out for a better deal than GM workers won. Until the late 1950s, Chrysler workers retained much greater power than their GM counterparts in setting production standards, through the strong shopfloor organization born from the Dodge Main company union.⁴⁹⁸

497. Jefferys, *supra* note 482, at 108-09. The path of company and independent unionism is described at *id.* and in Steve Jefferys, *Management and Managed: Fifty Years of Crisis at Chrysler* (1986); Sidney Fine, *The Automobile Under the Blue Eagle* (1963); Sidney Fine, *Sit-Down: The General Motors Strike of 1936-1937* (1969); David Gartman, *Auto Slavery: The Labor Process in the American Automobile Industry, 1897-1950* (1986); William Serrin, *The Company and the Union: The "Civilized Relationship" of the General Motors Corporation and the United Automobile Workers* (1973).

498. Ford did not implement company unions until 1937, after independent unions had gained recognition at GM and Chrysler. By 1941, the now-active NLRB ruled that Ford's imposition of company unions and other pervasive coercive activities were unfair labor practices, and the UAW finally won representation rights in an NLRB election. See Bernstein, *supra* note 77, at 740-46.

In the steel industry prior to 1933, only Bethlehem Steel had a company union with any substantial legitimacy among its workforce.⁴⁹⁹ In the year after the enactment of Section 7(a), under the guidance of Arthur Young the number of steel company unions grew from seven, covering twenty percent of the industry's workforce, to ninety-three, covering ninety percent.⁵⁰⁰ In 1936, the CIO's newly formed Steel Workers Organizing Committee (SWOC) focused its campaign on the United States Steel Corporation, in part because the latter employed half the industry's workforce. Equally important, U.S. Steel's company union representatives had already formed rebellious central councils in Pittsburgh, Youngstown, Chicago, and elsewhere. In December, 1936, those councils amalgamated into a "CIO Representatives Council" pledged to work within the company unions to bring steelworkers into the SWOC. Phillip Murray, chairman of the SWOC, agreed fully with a CIO field report that concluded: "Electing real union men to the job of [company union] representative, agitating and activising the workers to use the company union rather than ignoring it will bring much better results. In many cases, as shown, such tactics will result in genuine union activity."⁵⁰¹ In early 1937, to the astonishment of "Little Steel" executives, U.S. Steel chairman Myron Taylor proffered his historic grant of recognition to the CIO leadership—in part to avoid having to deal with the destabilizing force of local bodies that had emerged from the company union revolt.⁵⁰² One lasting organizational consequence of this top-down deal was the relatively centralized, bureaucratic structure of the United Steel Workers union.⁵⁰³ By contrast, the longstanding company union at Bethlehem Steel retained enough support to lead a successful back-to-work-movement that helped break the SWOC campaign among "Little Steel" in the summer of 1937—a historic setback in the CIO's fortunes.⁵⁰⁴

Although the transformation to independent unionism occurred disproportionately in those company unions established after the NIRA,⁵⁰⁵

499. See Bernstein, *supra* note 77, at 455, 479. For the contest between company unions and the CIO in the steel industry, see generally *id.* at 432–98; Brooks, *supra* note 450, at 75–109, 130–52; Hogler, *supra* note 431, at 22–36.

500. See Brooks, *supra* note 450, at 79.

501. Bernstein, *supra* note 77, at 457 (quoting report of Hyman Schneid to Sidney Hillman).

502. See *id.* at 468; David Brody, *The Origins of Modern Steel Unionism: The SWOC Era, in Forging a Union of Steel: Philip Murray, SWOC, and the United Steelworkers* 13, 21–22 (Paul F. Clark et al. eds., 1987).

503. See Brody, *supra* note 502, at 21–29.

504. Bethlehem Steel was the leader of the antiunion holdouts. See Bernstein, *supra* note 77, at 493–94; Brooks, *supra* note 450, at 134, 138, 147.

505. See Twentieth Century Fund, *supra* note 141, at 82. The rubber industry provides another good illustration. Substantial, if not majority blocs of Goodyear's and U.S. Rubber's workforces remained loyal to longstanding "core" company unions even after enactment of the NLRA. By contrast, Firestone's company union, jerry-built in 1933, collapsed after one year and was soon replaced by a local of the United Rubber Workers. See Daniel Nelson, *Managers and Nonunion Workers in the Rubber Industry: Union*

some of the core company unions of the 1920s also evolved into independent unions that bore the stamp of their distinctive origins. In the early twenties, the Bell System consolidated a relatively dense pyramid of committees and employee representatives—one for every twenty-five to fifty members—who were elected upwards from departments, plants, and regions.⁵⁰⁶ AT&T embedded this company union structure in a corporate culture saturated with symbols of company-wide worker “interdependence” and elite “public service” status. After the Supreme Court’s validation of the Wagner Act in 1937, the Bell System successfully kept out CIO and AFL unions while granting marginally greater autonomy to its inside committees. But Bell’s company union and culture had educated workers in the need (and skills) for still greater autonomy and company-wide unity across an otherwise geographically dispersed workforce. And Bell workers’ sense of themselves as an exclusive elite fit well with their ultimately successful strategy of building the company unions into an aggressive, nationwide, but unaffiliated, independent union.⁵⁰⁷

Not all of the interwar enterprise unions ended in failure, conversion, or capture after the validation of the NLRA regime. Even the NRA-era inside unions won the support of a significant minority of workers.⁵⁰⁸ In NRA labor board elections of 1933-35, some twenty-five to thirty-five percent of workers voted for company union representation—perhaps an underestimate because outside unions were more likely to seek elections where company unions were weaker.⁵⁰⁹ While Depression-era employers were constrained in granting monetary benefits, the same “advanced” company union structures that made tempting targets for union activists also afforded workers greater reformist gains in grievance settlement and

Avoidance Strategies in the 1930s, 43 *Indus. & Lab. Rel. Rev.* 41, 44-48 (1989). Ironically, but consistent with the gift-exchange theory discussed *supra* note 428, management’s acceptance of union workplaces at Firestone and (in 1937) U.S. Rubber generated greater labor peace and cooperation than the divisive wedge of company unionism at Goodyear. See *id.* at 45, 47-48, 49.

506. For the story of Bell System labor relations, see generally Schacht, *supra* note 383, at *passim*; Schacht, *supra* note 353, at 5-19.

507. The Communication Workers of America, successor to the National Federation of Telephone Workers that grew from the unification of local company unions, did not affiliate with the CIO until 1949.

508. See Ronald L. Filippelli, *The History is Missing, Almost: Phillip Murray, the Steelworkers, and the Historians*, in *Forging a Union of Steel*, *supra* note 502, at 1, 8 (noting “loyalty of a large number of steelworkers to their company unions”).

509. See Emily C. Brown, *Selection of Employees’ Representatives*, 40 *Monthly Lab. Rev.* 1, 5 (1935); George S. Wheeler, *Employee Elections Conducted by the NLRB*, 40 *Monthly Lab. Rev.* 1149 (1935). Of course, the data on employees’ votes for company unions does not bear any straightforward relation to the debate over the relative force of legitimate and illegitimate effects of company unionism. In theory, workers could have voted for company unions by reason of either pure reform and trust-building, or illegitimate hegemony.

working conditions.⁵¹⁰ Indeed some enterprise unions, although of dubious independence from management, survived against challenges by the NLRB and by outside unions into the post-World War II period.⁵¹¹ These apparently anomalous organizations—at such firms as TRW, DuPont, and Weirton Steel—evolved quietly into one of the “union-free,” collaborative models that came to dominate the sophisticated human-resources strategies of United States corporations after the 1960s.⁵¹²

F. *Some Historical and Theoretical Regularities Relevant to the New Cooperative Workplaces*

The historical accounts of company unionism reveal at least three regularities relevant to the legal debate over current forms of workplace collaboration.

1. *The Fluidity of Workers' Subjective Experience.* — The more acute historians and contemporaneous analysts recognize that interwar workers' desires, interests, and perceptions were highly plastic and multivalent. Even apart from the kaleidoscopic “socializing” forces outside the world of work proper—such as ethnicity, generational influences, family status, economic well-being, religious and civic institutions, popular culture, mass media and advertising, and political ideology—the instrumental incentives, communicational structures, and symbols shaped by the “private law” of workplace rules and by the “public” regime of labor law were key sites of contest over workers' mentality and behavior. On this general point, the revisionist and traditionalist labor historians, as well as the pre- and post-NLRA labor boards, agree. Workers' group “opinion,” “desire,” and “will” often appeared inchoate, tentative, and subject to sudden shifts and cross-currents. Many close observers maintained that a given workforce simply had nothing that could be called collective perceptions and motivations when workplace institutions failed to afford social interaction and communication among workers.⁵¹³ Individual workers often exhibited multiple, seemingly inconsistent allegiances—to company union, outside union, and employer—or suspended any commitment in a chaotic, uncertain environment.

510. See, e.g., Brooks, *supra* note 450, at 82 (noting that in 1934 steelworkers won 70% of grievances—41% of which addressed working conditions—processed by new company unions).

511. See, e.g., Sanford M. Jacoby & Anil Verma, *Enterprise Unions in the United States*, 31 *Indus. Rel.* 137, 139–43 (1992); Sanford M. Jacoby, *Norms and Cycles: The Dynamics of Nonunion Industrial Relations in the United States, 1897–1987* [hereinafter Jacoby, *Norms and Cycles*], in *New Developments in the Labor Market* 19, 39 (Katharine G. Abraham & Robert B. McKersie eds., 1990); Sanford M. Jacoby, *Reckoning with Company Unions: The Case of Thompson Products, 1934–1964*, 43 *Indus. & Lab. Rel. Rev.* 19, 19–34 (1989).

512. See Jacoby, *Norms and Cycles*, *supra* note 511, at 39, 43–44.

513. See Millis & Montgomery, *supra* note 357, at 884 (concluding that workers who meet irregularly “have developed no general view of what they really wanted”); Dunn, *supra* note 96, at 180 (same); sources cited *supra* notes 140–41.

Such mentalities might appear as states of irrationality, arationality, or indifference from the point of view of a narrow rational-decision theory that assumes complete and consistent preference-ordering. Workers' subjectivity might, however, be understood in other ways. At a general level, empirical study and everyday experience suggest that

human beings recognize in their behavior that there are limits to personal and institutional integration in tastes. They know that no matter how much they may be pressured both by their own prejudices for integration and by the demands of others, they will be left with contradictory and intermittent desires partially ordered but imperfectly reconciled Human beings are both proponents for preferences and observers of the process by which their preferences are developed and acted upon. As observers of the process by which their beliefs have been formed and consulted, they recognize the good sense in perceptual and moral modesty [T]hey appear to be comfortable with an extraordinary array of unreconciled sources of legitimate wants. They maintain a lack of coherence both within and among personal desires, social demands, and moral codes. Though they seek some consistency, they appear to see inconsistency as a normal, and necessary, aspect of the development and clarification of tastes.⁵¹⁴

This abstract characteristic of human subjectivity is reflected in the many recent ethnographies showing that individuals' expectations may be quite unformed upon entering a new work environment and quite volatile afterwards.⁵¹⁵

Indeed, there is good reason to believe that people's capacity for ambiguity and inconsistency may be especially marked in a setting of asymmetric power and information, such as a workplace. Members of less powerful groups may deliberately (or unconsciously) maintain ambiguous preferences and perceptions as a psychological defense against those with the apparent incentive and communicational resources to manipulate subordinates' preferences and perceptions.⁵¹⁶ The phenomenon of "double discourses" within hierarchies may reinforce such ambiguous mentalities:

[A] manservant might swing with such bewildering rapidity between admiring his master and betraying withering contempt for him that we might conclude that he held, in effect, two mutually contradictory beliefs at one and the same time. The admi-

514. James G. March, Bounded Rationality, Ambiguity, and the Engineering of Choice, *in* *Rational Choice* 142, 156-57 (Jon Elster ed., 1986) (citations omitted).

515. See, e.g., Fantasia, *supra* note 180, at 11-24, 232-33; Vicki Schultz, Telling Stories About Women and Work, 103 *Harv. L. Rev.* 1749, 1816-38 (1990) (amassing empirical references on this point).

516. Cf. March, *supra* note 514, at 157-58 (making analogous point with respect to asymmetries of cleverness).

ration no doubt belongs to his "official" ideology, whereas the contempt arises from his "practical consciousness."⁵¹⁷

These are plausible grounds for Amartya Sen's proposition that the problem of inconsistent and incomplete value orderings is "particularly important" in matters of union organizing, wage bargaining, and worker productivity.⁵¹⁸

One can imagine instrumental-rationalist grounds for workers' apparent inchoate or inconsistent preferences. Self-interested prudence and information-gathering may have dictated, for example, that individual workers suspend judgment or expectations—or play both sides—until either a company union or an outside union proved its capacity both to achieve workplace gains and to protect the workers from reprisal for their organizational allegiance.⁵¹⁹ But, ultimately, a parsimonious (and manifestly fictive) rationalist psychology seems unable to do justice to the vast weight of reliable "thick" accounts of company union participants' subjective experience. One charismatic U.S. Steel worker, "Colonel" Fred Bohne, was a "cantankerous old Socialist" who, according to a keen interviewer, passionately believed that his support for an industry-wide company union and compulsory arbitration was equivalent to supporting the SWOC brand of industrial unionism—even while he led the prominent "Defense Committee" of company union loyalists against the SWOC.⁵²⁰ Many other accounts depict workers whose obsequious acquiescence in company union activities appears just as "sincere" as their concurrent volatile resentment and participation in independent unionization.⁵²¹ Even the well-documented culture of seemingly unshakable prudence and conservatism among immigrant steelworker communities⁵²² did not preclude emotive "outbursts of rebellion" in the wake of Section 7(a)'s symbolism and of heady partial strike victories—leading occasionally to such "irrational" undertakings as the doomed Little Steel strike.⁵²³

This historical regularity is important, at a very general theoretical level, in legal analysis. The great potential for inconsistency, volatility, and malleability of actors' consciousness suggests that analysts must give careful attention to context and history in advancing propositions about

517. Eagleton, *supra* note 208, at 54.

518. See Amartya Sen, *On Ethics and Economics* 70 (1987).

519. In 1937, an SWOC organizer reported that the workers "give us plenty of encouragement, but hedge on joining . . . They hesitate to stick out their necks. 'Wait till you win the [CIO-led] auto strike. Then we'll join.'" Brooks, *supra* note 450, at 120.

520. See Bernstein, *supra* note 77, at 460–65; Brooks, *supra* note 450, at 91–92; Hogler, *supra* note 431, at 32–33.

521. See Brooks, *supra* note 450, at 107; Ozanne, *supra* note 306, at 154; Dunn, *supra* note 96, at *passim*.

522. See generally John Bodnar, *Immigration and Industrialization: Ethnicity in an American Mill Town, 1870–1940* (1977); Clinton Golden & Harold Ruttenberg, *The Dynamics of Industrial Democracy* (1942); Charles Walker, *Steeltown: An Industrial Case History of the Conflict Between Progress and Security* (1950).

523. See Brody, *supra* note 502, at 18.

the impact of legal rules and institutions on subjective experience and behavior. The economists' assumption that actors' response to legal rules is governed by instrumental rationality, by stable, consistent, and pecuniary preference rankings, and by freedom from power-based manipulation of perception and desire is likely to be problematic in many settings.

As to the particular issue of the appropriate legal policy toward labor-management cooperation, the interwar experience suggests that analysts must examine the fine-grained context and structure of the new collaborative workplaces rather than rest on monolithic assumptions about their wholly benign⁵²⁴ or malignant⁵²⁵ effect on worker subjectivity. Parts V and VII undertake such a close analysis and show that legal rules must be finely tuned to match the nuances of alternative collaborative structures in the 1990s.

2. *Company Unions and Worker Subjectivity: Some General Patterns.* —

Against this backdrop of fluid preferences and perceptions, however, the historical survey in sections IV.D and IV.E reveals some more concrete regularities in the mentality of workers living through the contest between company and outside unions. Many of the processes of reform, trust, domination, hegemony, and counterhegemony were in play among both core and vulnerable company unions. At the very least, then, the historical evidence contradicts the early NLRB's view that company unions were monolithically hegemonic and coercive. The evidence also reveals characteristic alignments among broad managerial strategies and workers' cognitive or affective responses, represented in the pairings presented in Figure 1 on the following page. The arrows in that Figure indicate potential lines of causation or explanation among (A) broader social forces, (B) company union practices, and (C) worker activity.

Under Interaction 1, company unions that afforded pure reforms, egalitarian communication, and some successful forms of hegemony were more likely to yield workers' trust, even if that trust were susceptible to contestation, runaway legitimation, and inflamed desires that escaped managerial control.⁵²⁶ Interaction 2 represents the range of worker responses to company unions that operated repressively or through forms of hegemony likelier to provoke destabilizing perceptions and emotions.⁵²⁷ The third Interaction captures the pattern by which company

524. See, e.g., Samuel Estreicher, *Employee Voice in Competitive Markets*, Am. Prospect, Summer 1993, at 48, 55; Charles C. Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 Syracuse L. Rev. 809, 845 (1977).

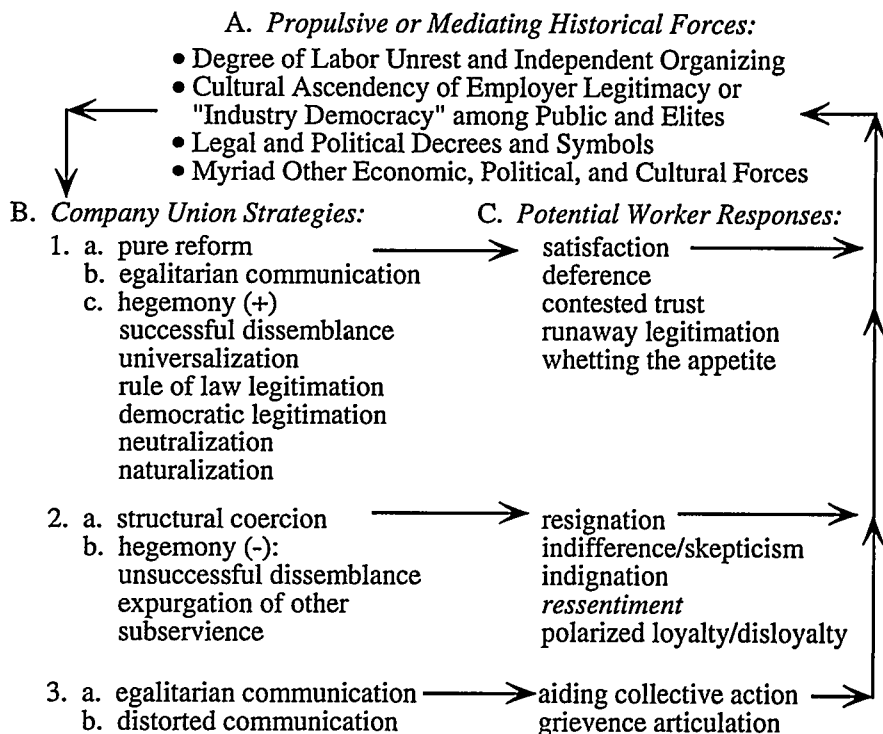
525. See, e.g., Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. Rev. 499, 515-16 (1986); Note, *An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662, 1679 (1980) (arguing that workers will always falsely believe that inside entities provide something for nothing by contrast with outside unions that require dues payments).

526. See *supra* notes 396-429 and accompanying text.

527. See *supra* notes 456-91 and accompanying text.

unions' communicational and grievance apparatus—whether more or less subject to managerial manipulation—could promote workers' collective action and felt grievances. The historical accounts permit at least the broad generalization that core company unions disproportionately exhibited Interaction 1, whereas vulnerable company unions disproportionately displayed Interactions 2 and 3. The debate among revisionist and traditionalist historians is fuelled to a large degree by this categorical difference, as well as by the high general degree of heterogeneity of worker subjectivity that overlay this difference.

FIGURE 1



Like the contextual contingency of worker consciousness, these broad dialectics suggest avenues for careful exploration of current collaborative workplaces. Part V shows that the new team-based workplaces replicate these general patterns of authoritarianism and backlash, seduction and acquiescence—albeit with new inflections stemming from different contextual labor-management structures, strategies, and cultures.

3. *Manipulated Representation and the Failure of Naturalization.* — A third historical regularity—providing perhaps the most important lesson for present policy debates—lies in the difference between the rank and

file's and employee representatives' experience under company unionism. Within both core and vulnerable company unions, the intensity of all three interactional patterns depicted in Figure 1 was greater among employee representatives than among the rank and file. This reflects the fact that the paradigmatic company union of the interwar period was, of course, a representational structure—unlike the widespread participatory nature of current schemes of workplace collaboration.

Perhaps the most common finding in historical and contemporaneous accounts of company unions is that rank and file workers widely exhibited indifference, resignation, quiet indignation, or simmering resentment that rarely reached boiling point in the face of patently weak and management-controlled representational schemes.⁵²⁸ Generally, interwar representation plans simply had minor effects on the everyday life of most workers—at least in the absence of exogenous crises reflected in significant worker mobilization for independent unionism. The interwar managerial community quickly learned that constant attention and resources were often required merely to keep a representation plan alive.⁵²⁹ The NICB estimated that while some 570 firms launched new company unions between 1922 and 1932, about 390 discontinued theirs.⁵³⁰ A 1923 survey concluded that because of "lack of sufficient interest on the part of the employees," the "ease of [the shop committee's] installation is equalled only by the ease of its rejection."⁵³¹ A Sage Foundation field study found that most of the mineworkers interviewed expressed apathy toward employee representatives they knew to be intimidated and powerless.⁵³² One Goodyear worker wrote that most workers believed "the plan is of benefit only to the company, that its purpose is to prevent organization, that it is partly a company advertising stunt, and that it is intended to keep the workers satisfied as to trivialities so they will work for less wages."⁵³³

The NLRB's assessment of the International Harvester company union is telling. The Board, after finding that Harvester implemented every mechanism of domination and hegemony canvassed in Part II, concluded that Harvester's representation plan "create[d] in the minds of the employees" the false belief that they were empowered "to deal with their employer on an equal footing" and were "sufficiently content to resist the

528. See Brandes, *supra* note 38, at 129; Brody, *supra* note 38, at 60.

529. See French, *supra* note 159, at 55; Jacoby, *supra* note 37, at 187 (concluding that personnel departments had to carefully ensure that company unions "did not fade out for lack of interest"); NICB (1922), *supra* note 458, at 26–28; Aresty & Miller, *supra* note 172, at 115–32.

530. See NICB (1933), *supra* note 253, at 13. The failure rate was particularly high between 1922 and 1924, when both the threat of organized labor and the "industrial democracy" fad of the post-war years receded. See Nelson, *supra* note 358, at 337–38.

531. French, *supra* note 159, at 55.

532. See Selekmán & Van Kleeck, *supra* note 375, at 188–94.

533. Dunn, *supra* note 96, at 28 (quoting letter by anonymous worker).

appeal of an outside labor union."⁵³⁴ Yet, the Board's lengthy fact-finding, confirmed by later historical research,⁵³⁵ notes that "the sum total of the [rank and file] employees' participation in the plan" was casting a vote for an employee representative.⁵³⁶ The election was seen either as a "joke" or as a "social" event because representatives presented no policy positions and, in any event, would be allowed no contact with their constituents after the vote.⁵³⁷ "The role of the employees as a group in the workings of the Plan [was] thus negligible," and workers took "very little interest in the Plan."⁵³⁸ Even the leading revisionist historian concludes that "[t]he vaunted employee representation plans . . . were too transparently management's creation to gain much standing in the shop Employee representation rarely, if ever, developed much real meaning."⁵³⁹

I want to emphasize, nonetheless, that the various hegemonic and counterhegemonic processes of company unionism did play out to varying degrees under varying identifiable circumstances—as presented in the historical survey above. The overarching interwar cycle of rank and file workers' contested trust and quiescence in the 1920s, and their felt betrayal and explosion in the 1930s, however, owes relatively more to the general paternalistic promises and norms of welfare capitalism, the swing from relative prosperity to depression, and seismic political and demographic shifts, than to the effects of the representation plans per se.

If rank and file workers' attitude toward company unions proper often tended toward chronic indifference or contained resentment, employee representatives, to the contrary, were more actively integrated into the structure of managerial incentives and culture. They bore the brunt and the benefits of managerial patronage, intimidation, seduction, and informational barrages. During periods of wider militancy such as World War I and the post-1933 years, as already noted, independent union activists frequently captured employee representative posts. But absent such takeovers, company union representatives were drawn disproportionately from the older, more conservative, native-born segment of the workforce.⁵⁴⁰ The typical plan required that representatives be either American citizens or literate in English, and that they be veteran workers.⁵⁴¹ In addition, management often used "more or less covert pressure" to defeat radicals and encourage the election of loyal workers.⁵⁴²

534. *International Harvester*, 2 N.L.R.B. 310, 348 (1936).

535. See Ozanne, *supra* note 306, at 156 (concluding that Harvester workers developed a "calloused apathy, generally tinged with the bitterness of frustration, toward the representation plans").

536. *International Harvester*, 2 N.L.R.B. at 328.

537. See *id.*

538. *Id.* at 327, 334, 348.

539. Brody, *supra* note 38, at 60.

540. See Brandes, *supra* note 38, at 133.

541. See French, *supra* note 159, at 40-41; Jacoby, *supra* note 37, at 188.

542. See Douglas, *supra* note 96, at 94.

Managers and workers also widely reported that even militant workers tended to become quiescent or acquiescent while serving as representatives.⁵⁴³ The company union served in part as "a sort of selection agency through which those representatives who serve the company with unswerving loyalty are promoted to higher positions."⁵⁴⁴ Much evidence confirms that representatives knew they stood to gain foremen or supervisory positions as a reward for being good "company men."⁵⁴⁵ Particularly in the quiet 1920s, the route of individual upward mobility seemed more promising to many ambitious shopfloor leaders than the risks of collective action.⁵⁴⁶ The seductions of promotional opportunities, status, perquisites, and constant "education" in management's viewpoint generally succeeded in aggregating a loyalist cadre with which any independent union campaign would have to contend.⁵⁴⁷

Managers understood the advantages—and workers apprehended the consequences—of creating a workfloor leadership structure that bypassed both the foreman's empire and the independent union activists on the shopfloor. Direct access to workers' grievances, without the intermediation of powerful foremen, helped management rationalize personnel administration and dampen workers' resentments against arbitrary treatment.⁵⁴⁸ One steel industry executive, after implanting an employee representation plan, said:

[J]ust because the employee representation plans were put in to protect us from outside unions, don't make the mistake of thinking that that's their only value to us. We've gotten a real education We . . . knew nothing of the men's feeling and grievances. The foremen would often be hardboiled with them and pay no attention to their complaints, because the foremen were afraid of being criticized by the superintendents and higher executives.⁵⁴⁹

At the same time, employee representation afforded a surveillance mechanism that substituted for the less effective corps of "spies" provided by outside agencies.⁵⁵⁰ "Professional" labor spies lacked the social imbrication of longstanding shopfloor leaders and, for self-justifying motives,

543. Dunn, *supra* note 96, at 190; French, *supra* note 159, at 68; Montgomery, *supra* note 41, at 456.

544. Dunn, *supra* note 96, at 148.

545. Accounts of company unions at Armour, Swift, International Harvester, General Electric, Goodyear, Amoskeag Manufacturing, Lackawana Railroad, Thompson Products, and elsewhere confirm this point. See Barrett, *supra* note 381, at 250–52 (meatpackers); Ozanne, *supra* note 306, at 131, 151–52 (Int'l Harvester); Schatz, *supra* note 382, at 22 (GE and Westinghouse); Jacoby, Thompson Products, *supra* note 385, at 21 (Thompson); Dunn, *supra* note 96, at 26, 57, 148 (Goodyear, Amoskeag, Lackawana).

546. See Brody, *supra* note 38, at 57.

547. See Schatz, *supra* note 382, at 41–42.

548. See Cohen, *supra* note 267, at 172.

549. 2 Carroll R. Daugherty et al., *The Economics of the Iron and Steel Industry* 989–90 (1937) (quoting steel executive).

550. See Jacoby, Thompson Products, *supra* note 385, at 21.

sometimes created real or fictive workforce demons.⁵⁵¹ Another steel executive reported: "There's a good chance that these employee representation plans, if they continue to work out so well, will do away with most or all of the necessity for [espionage], at least inside the plants."⁵⁵² Hence, the *trasformismo* and infrastructural-coercion modes of domination—transmitted by the company unions through employee representatives—were quite real. In addition, employee representatives experienced, relatively more than did the rank and file, the processes of pure reform, trust-enhancing consultation, communicational distortions, and various modes of hegemony, including universalization, subservience, and perceptual reframing.⁵⁵³

Again, however, the instrumental and symbolic inducements that were targeted at employee representatives succeeded in varying degrees, and could misfire in all the ways already discussed—accounting for the frequent reports of the best "company men" suddenly appearing as independent union activists and officers, or for outwardly loyal representatives casting secret ballots against management positions.⁵⁵⁴ The most potent form of managerial influence over representatives, after all, remained the coercive threat of discharge.⁵⁵⁵ Representatives, perhaps more than the rank and file, directly experienced the limits of company union power, and learned the advantages of shopwide (industrial) over craft organization.⁵⁵⁶ For this reason, one of the first tasks of union activists seeking to convert a company union was to become an employee representative and publicize to the wider workforce the details of management's manipulation and vetoes in joint committee meetings.⁵⁵⁷

To the extent, however, that employee representatives did "come to regard themselves as a part of the management and its machinery,"⁵⁵⁸ rank and file employees looked on them with a mixture of respect, yearning, fear, and resentment similar to workers' feelings about management in general.⁵⁵⁹ As discussed above, however, that mixture contained a disproportionate dose of skepticism and indifference, in light of employee representatives' relative lack of power and presence in workers' daily experience. The NLRB believed that International Harvester had successfully "supplied prop after prop for [its company union's] support so that today the average employee at the plant accepts the Plan as an institution

551. One steel industry vice-president said that spies provided by "outside agencies" were "too dumb and in order to hold their jobs usually cook up a lot of stuff But you've just got to have some way to learn what's going on among the men." Brooks, *supra* note 450, at 77-78 (quoting steel executive).

552. *Id.* at 79 (quoting steel executive).

553. See *supra* Parts II-III.

554. See Ozanne, *supra* note 306, at 135.

555. See Twentieth Century Fund, *supra* note 141, at 326.

556. See Schatz, *supra* note 382, at 85; Schacht, *supra* note 353.

557. See Brooks, *supra* note 450, at 93.

558. International Harvester, 2 N.L.R.B. 310, 327-28 (1936).

559. See Barrett, *supra* note 381, at 250-52.

without any realization of the careful structure that has thus been built [T]he Plan is a thing to be accepted without question."⁵⁶⁰ Even if the Board accurately concluded that the company union was "regarded by the employees as an integral part of plant life,"⁵⁶¹ however, this would not necessarily indicate the success of the "naturalization" mode of ideological hegemony. If workers did not question the company union, neither did they embrace it. Effective naturalization rests on weaving routines of feeling, thought, and behavior into the texture of everyday life. The more sophisticated proponents of company unionism realized that occasional speeches, threats, or voting rituals would not significantly affect workers' mentality. The question, rather, was how to build collaborative norms "into the experience of the people which will mean the construction of new habits" ⁵⁶² The company union, with its weak representative structure, did not deeply infiltrate the collective social life of workers on the shopfloor or in their communities outside the workplace. It was that dense collective experience "that sustained the American workers through the 1920's and the Depression and became a basis for the powerful new union movement of the 1930's."⁵⁶³

The collaborative schemes of the 1980s and 1990s go beyond the representative joint committees of interwar company unionism. The most advanced of the new cooperative workplaces organize frontline workers into participatory teams that penetrate, indeed constitute, both the work process and workplace social interaction—in an era when workers' community life off the job is no longer congruent with their workplace groupings.⁵⁶⁴ Participatory team structures concurrently intensify and qualitatively reinfect the various potential experiences of rank-and-file domination and empowerment identified in the interwar debate over collaborative work relations. The next Part examines this contextual transfiguration of the specific modes of deploying and resisting workplace power that I conceptualized in Parts II and III.

V. FLEXIBLE WORK ORGANIZATIONS IN THE 1990S: NEW POSSIBILITIES FOR PRODUCTIVITY, DEMOCRACY, AND DOMINATION

By the 1950s, the NLRB's vigorous enforcement of Section 8(a)(2) erased company unionism as a salient model of workplace control—and as a central issue in labor law. Some collaborative enterprise unions in

560. *International Harvester*, 2 N.L.R.B. at 329, 335.

561. *Id.* at 329.

562. Burton, *supra* note 213, at 187.

563. James R. Green, *The World of the Worker* 102 (1980); see also David Montgomery, *Workers' Control In America* 163–64 (1979) (stressing the "inextinguishable small-group resistance of workers" in the mass unionization of 1936–37).

564. See, e.g., Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* 6–7, 193–215 (1981); Sar A. Levitan & Clifford M. Johnson, *The Changing Work Place*, 473 *Annals Am. Acad. Pol. & Soc. Sci.* 116, 127 (1984).

fact quietly survived⁵⁶⁵ as virtually unnoticed deviants from the dominant post-War model of adversarial collective bargaining and rule-bound, hierarchical "internal labor markets."⁵⁶⁶ By the late 1960s, however, dramatic changes in the global economy began to undermine the competitiveness of the bureaucratic systems of mass production that conformed with the dominant model of labor relations. The concurrent revitalization of the pre-existing, nonunion collaborative models and the emergence of new forms of flexible, team-based cooperative work systems gradually moved Section 8(a)(2) back to the center of labor law attention—so much so that the Presidential Commission on labor law reform, appointed in 1993, is focusing much of its inquiry on that provision.

As discussed above,⁵⁶⁷ the NLRB recently reconfirmed that the broad language of the ban on company unions covers the joint labor-management committees and, quite possibly, many of the team structures that are integral to the most advanced forms of the new cooperative workplace models. In a (not necessarily self-conscious) display of "dynamic" statutory interpretation, several circuit courts have radically reinterpreted the language and legislative history of Section 8(a)(2) to allow such committees and teams on the ground that they represent laudable, if not inexorable, gains in workplace cooperation and productivity.⁵⁶⁸ Commentators widely call for the repeal of Section 8(a)(2), either outright or in conjunction with wider reforms aimed to restore workers' representation in enterprise decision-making after years of declining union density.⁵⁶⁹

In Parts VI and VII, I propose more thoroughgoing reform of the law of workplace cooperation than the predominant recent proposals. My proposals aim both to protect workers against the all-too-readily dismissed potential for domination latent in the new cooperative workplaces, and affirmatively to encourage the diffusion of high-productivity collaborative models that are most likely to heighten workers' egalitarian communication and capacity for individual and group self-revision. As I argued in Part IV, this exercise in legal revision requires a close, contextual analysis of the interplay between particular collaborative workplace institutions and worker subjectivity and behavior. This Part undertakes such an analysis of the emergent collaborative organizations of the 1990s.

565. See *supra* notes 508–12 and accompanying text.

566. The "internal labor market" is economists' oxymoronic term denoting the non-market, management- or union-administered job classifications and promotion ladders that spread widely in United States workplaces as a result of union and government pressure after the 1930s. See, e.g., Jacoby, *supra* note 37, at 207–85; Barenberg, *supra* note 31, at 1461–65.

567. See *supra* notes 13–14 and accompanying text.

568. See, e.g., *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982); *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974); *NLRB v. Newman-Green, Inc.*, 401 F.2d 1 (7th Cir. 1968).

569. See *infra* notes 832–35 and accompanying text.

Section A surveys the recent transformations in economic enterprises and work processes—changes that register the crisis of bureaucratic mass production and the uneven emergence of various forms of organizational flexibility and collaboration. The remaining sections of this Part examine how the emergent organizational forms give new inflections to the various specific processes of reform, domination, and opposition conceptualized above in the context of the interwar youth of mass production. Section B presents the theoretical and empirical case that self-managing teams of frontline workers promise potential gains in egalitarian communication and radical democracy—as well as productive efficiency and innovative capacity—within enterprises. Section C examines flexible team organizations' contrary potential to exacerbate the pathologies (conceptualized at length in Parts II-IV) of structural coercion, distorted communication, and psychological manipulation within collaborative yet unequalitarian work relations. Section D shows that, similar to the complexities of interwar collaborative schemes analyzed above,⁵⁷⁰ the new cooperative workplaces concurrently generate idiosyncratic possibilities for heightened employee bargaining power and cultural assertion. Section E then adduces recent compelling evidence that employees' nonpathological team participation and their meaningful representation in higher-level strategic decision-making are mutually reinforcing. Hence, this Part's examination of the economic sociology and social psychology of the new forms of workplace participation points to the broader legal policy goal of enhancing worker representation and sets the stage for my analysis of comprehensive labor law reform in Parts VI and VII. Throughout this Part, I indicate the political, cultural, and collective-action roadblocks that impede diffusion of desirable workplace innovations in the absence of robust legal revision of current market structures.

A. *The Economics and Sociology of New Collaborative Work Relations*

1. *The Economic Context of the Emerging Flexible Organization.* — The emergence of collaborative work arrangements is one of a set of broad changes in the international and domestic economies since the 1960s. First, the United States has faced stiffer competition and greater volatility in international product markets spurred by the successful export strategies of Japan; the “newly industrializing countries” (NICs) of South Korea, Taiwan, Hong Kong, Singapore, Brazil, and Mexico; certain sectors in northern Italy, West Germany, and Scandinavia; and, increasingly, multinationalized enterprises throughout the industrial economies.⁵⁷¹ The challenge of new economic competitors and faster-changing markets is intensified by decreases in the mobility-costs of goods and capital stem-

570. See *supra* Parts III-IV.

571. See Peter Dicken, *Global Shift: The Internationalization of Economic Activity* 19-43, 51-58, 162-88 (2d ed. 1992); Lowell Turner, *Democracy at Work: Changing World Markets and the Future of Labor Unions* 9 (1991); David B. Yoffie, Preface, in *Beyond Free Trade: Firms, Governments, and Global Competition* xi-xii (David B. Yoffie ed., 1993).

ming from advances in informational and transportation technologies and reductions in international trade-barriers.⁵⁷² It is true that the lion's share of increased trade and capital flows occurs among already industrialized economies. Nonetheless, although labor remains relatively immobile across national boundaries, the not insubstantial increment of imports produced by workers in lower-wage countries amounts to displacement or "movement" of higher-paid United States jobs within an effectively transnational labor market.⁵⁷³

Second, new microelectronic technologies enhance the economic feasibility of smaller-batch production runs, quicker development of new products, and shortened product life-cycles.⁵⁷⁴ Compared with sunk capital equipment dedicated to the large-batch output of single products in classic mass production, programmable machinery and "snap-on" capital goods allow more rapid changes in product design and production.⁵⁷⁵ Such "non-dedicated" technology has mutually reinforced the increasing fragmentation of product and intermediate markets since the 1970s—that is, markets for final goods or inputs aimed at specialty or niche purchasers.⁵⁷⁶

Third, the new technologies have developed concurrently, although not always in conjunction, with innovations in organizational design. The trumpeted Toyota system of "lean production," for example, incorporates flattened managerial hierarchies, just-in-time inventory systems, multi-skilled work teams, "continuous-improvement" and zero-slack production norms, statistical process control to ensure quality, and collaborative networks of input suppliers and dealers.⁵⁷⁷ That system has diffused overseas from its Japanese origins in the 1950s, albeit unevenly in the face of the managerial conformism characteristic of mass production bureaucracies, the inertia of political institutions sustained by constituents of the old economic order, and various other cultural and collective-action impediments discussed below.⁵⁷⁸ As a result of the spread of lean produc-

572. See David E. Bloom & Adi Brender, *Labor and the Emerging World Economy* 1–2 (National Bureau of Economic Research Working Paper No. 4266, 1993).

573. See *id.* at 3–4.

574. "[S]hortening product-development cycles" was the top priority given in a poll of approximately 400 CEOs in 1990. See N.R. Kleinfeld, *How 'Strykeforce' Beat the Clock*, N.Y. Times, Mar. 25, 1990, at D1, D6.

575. See Jill Rubery et al., *Flexibility, Marketing and the Organisation of Production*, 12 *Lab. & Soc'y* 131, 141 (1987); Charles Sabel, *Moebius-Strip Organizations and Open Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy*, in *Social Theory for a Changing Society* 23, 35–36 (Pierre Bourdieu & James S. Coleman eds., 1991).

576. See Piore & Sabel, *supra* note 109, at 184–90.

577. See Michael A. Cusumano, *The Japanese Automobile Industry: Technology and Management at Nissan and Toyota* 262–384 (1985); Yasuhiro Monden, *Toyota Production System* (1983); James P. Womack et al., *The Machine That Changed the World* (1990).

578. On managerial conformism in hierarchical enterprises, see Larry Hirschhorn, *Managing in the New Team Environment* 7–13 (1991); Howard Schwartz, *On the Psychodynamics of Organizational Totalitarianism*, 42 *J. Mgmt.* 24, 24–28 (1987). For a

tion, well-specified job classifications and seniority-based career ladders—so-called internal labor markets⁵⁷⁹—are crumbling at an accelerating rate.⁵⁸⁰

Increasingly blurred boundaries within and between firms reinforce the gutting of internal labor markets. A recent MIT study concludes that fluid networks of simultaneously competitive and collaborative enterprises are “spreading rapidly.”⁵⁸¹ Such networks are better able than rigidly bounded individual firms to nurture and redeploy the versatile know-how necessary to respond quickly to volatile markets.⁵⁸² Enterprises that may appear externally to be consolidated organizational behemoths are increasingly composed internally of networks of decentralized business units and teams. While advanced information technology allows enterprise networks to take geographically far-flung “virtual” forms, there are many instances of regional industrial districts in which local public and private institutions provide various tangible and intangible public goods that nurture agglomerated networks of firms.⁵⁸³ As discussed below,⁵⁸⁴ although the empirical magnitude of these changes to date is difficult to assess, they have penetrated a wide range of blue and white collar occupations; manufacturing, service, and transportation enterprises; assembly, continuous-process, and small-batch technologies; and private and public sector workplaces.

survey of the influence of differing political institutions on the spread of new organizational forms, see the essays in *Bargaining For Change: Union Politics in North America and Europe* (Miriam Golden & Jonas Pontusson eds., 1992).

579. The dissolution of such hierarchically administered bureaucratic career ladders highlights the oxymoronic quality of the economists’ phrase “internal labor market,” discussed *supra* note 566.

580. See Peter B. Doeringer et al., *Turbulence in the American Workplace* 15–102 (1991); Texas Interfaith Educ. Fund, *Every Step Seems Down: The Chaos of Labor Market Entry and Promotion* 20–60 (1993) (unpublished manuscript, on file with the Columbia Law Review).

581. See Michael L. Gerlach & James R. Lincoln, *The Organization of Business Networks in the United States and Japan*, in *Networks and Organizations: Structure, Form, and Action* 491, 495–96 (Nitin Nohria & Robert G. Eccles eds., 1992); Martin Kenney & Richard Florida, *Beyond Mass Production: Production and the Labor Process in Japan*, 16 *Pol. & Soc’y* 121, 135–38 (1988); Michael S. S. Morton, *Introduction*, in *The Corporation of the 1990s: Information Technology and Organizational Transformation* 3, 14 (Michael S. S. Morton ed., 1991).

582. See Giovanna Ricoveri et al., *Labour and Social Conditions in Italian Industrial Districts*, 16 *Lab. & Soc’y* 57, 57–86 (1991); Julio J. Rotemberg & Garth Saloner, *Interfirm Competition and Collaboration*, in *The Corporation of the 1990s: Information Technology and Organizational Transformation*, *supra* note 581, at 95, 95–120; Charles F. Sabel, *Flexible Specialisation and the Re-emergence of Regional Economies*, in *Reversing Industrial Decline? Industrial Structure and Policy in Britain and Her Competitors* 17, *passim* (Paul Hirst & Jonathan Zeitlin eds., 1989).

583. See Michael Best, *The New Competition: Institutions of Industrial Restructuring* 17–19, 236–50 (1990); Michael E. Porter, *The Competitive Advantage of Nations* 154–57 (1990); Kenney & Florida, *supra* note 581, at 145; Sabel, *supra* note 582.

584. See *infra* Parts V.E, VII.C.5.b.

For purposes of labor law reform, it is useful to distinguish four facets of the generic "flexibility" attributed to the emergent organizational paradigm: (1) flexible boundaries of firms and networks of firms; (2) flexible technology, product design, and production set-up; (3) flexible "external" labor markets reflecting weakened centralized union bargaining, dissolution of internal job ladders, and increased mobility of employees across firms as a result of downsizing, the removal of layers of organizational hierarchy, and the fluidity of enterprise boundaries; and (4) flexible "internal" work arrangements on the factory or office floor (or, increasingly, "on" the intra- or inter-firm electronic network)—that is, the displacement of job classifications and work rules by an "ad-hocracy" of teamwork assignments for day-to-day production, design, purchasing, marketing, and special projects.

Labor law commentators have tended to focus on the jurisprudence directly bearing on the fourth form of flexibility—collaboration in work relations and organizational decision-making. This is understandable in light of the glaring statutory blockage to unilateral managerial implementation of such relations—NLRA Section 8(a)(2)—and the tempting ease of its surgical excision. Although I shall argue in Parts VI and VII that all four forms of flexibility are directly relevant to the design of a desirable new labor law regime, my inquiry in this Part begins with the immediate problem raised by Section 8(a)(2). In turning to the economics and sociology of collaborative work relations, my primary focus is on their most advanced form—workplaces based on self-managing work teams, which are often combined with joint labor-management representative committees. These workplaces hold the greatest promise and peril to which legal reformers should attend.

2. *From Mass-Production Work Groups to Flexible Teams.*

If there is one undisputed finding of industrial sociology, it is this: In every known society in which the division of labor is not fixed by custom, workers doing related tasks attempt to gain control over their workplace. This struggle for autonomy concerns every aspect of productive activity The written and unwritten rules of the contest for power between, on the one hand, the work group and, on the other, its superiors, subordinates, and confederates at other work sites constitute a system of shop-floor control.⁵⁸⁵

The empirical literature on interwar workplaces canvassed in Part IV supports the general proposition that subordinate groups—in workplaces and other authority relations—typically develop "unofficial," often oppositional, cultures that deviate from the "official" norms pronounced by managers or other elite groups. A primary source of such unofficial culture in the workplace is the interaction within and among informal work

585. Piore & Sabel, *supra* note 109, at 111.

groups.⁵⁸⁶ Such groups, we have seen, were key intersubjective building blocks for the mass unionization of the 1930s and 1940s.⁵⁸⁷ Whether or not they erupted in such formal collective organizing, informal work groups historically played a critical regulative role at the base of mass-production (or, for that matter, small-batch-production) pyramids. Workplace ethnographies almost universally uncover the web of work groups' informal norms and sanctions developed to influence the pace and manner of work.⁵⁸⁸ The father of "scientific management" at the turn of the century, Frederick Winslow Taylor, and many production engineers after him, believed that management, by diminishing workers' skills and decomposing job tasks, could weaken work groups' cohesion and powers of resistance.⁵⁸⁹ Interwar managers found, however, that the homogenization of semiskilled mass-production workers created new commonalities of interest around which irrepressible work-group social life coalesced.⁵⁹⁰

After the 1930s, the "human relations" school led by Elton Mayo and his colleagues sought strategies not to extinguish work-group life but to align group sentiment with managerial goals.⁵⁹¹ As labor relations hardened into shopfloor adversarialism after World War II, industrial sociologists attempted to "predict and control" workforce volatility through study of the technological, organizational, and intra-group factors that accounted for the behavioral patterns of different work groups.⁵⁹² Whereas some radical students of labor process in the 1970s sought to document a continued managerial-control strategy of "deskilling" factory

586. For studies confirming this proposition across a wide range of social science methodologies, see sources cited in Barenberg, *supra* note 31, at 1467 n.375. Other legal scholars have noted the importance of informal work groups in other jurisprudential contexts. See, e.g., James B. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 Ohio St. L.J. 751, 776-92 (1973) (examining implications of work groups for law of unauthorized strikes); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 Yale L.J. 1509, 1567-68 (1981) (arguing that law of grievance arbitration aimed to weaken workplace groups).

587. See *supra* note 563 and accompanying text.

588. A seminal study is Stanley B. Mathewson, *Restriction of Output Among Unorganized Workers* (1931).

589. See Curt Tausky, *Work Organizations* 184 (1978).

590. See Cohen, *supra* note 267, at 291-368; Gordon et al., *supra* note 363, at 112-62.

591. See Elton Mayo, *The Human Problems of an Industrial Civilization* *passim* (1933); Fritz Jules Roethlisberger & William J. Dickson, *Management and the Worker* *passim* (1939); T. North Whitehead, *Leadership in a Free Society* 80 (1936).

592. Leonard Sayles' classic study, whose sub-title suggests its managerial viewpoint, attempted to identify social and technological variables accounting for the behavior of four different types of work groups: "apathetic," "erratic," "strategic," and "conservative." Leonard R. Sayles, *Behavior of Industrial Work Groups: Prediction and Control* 7-118 (1958). In tune with post-structuralist theory, more recent ethnographies stress the local contingency and path-dependence of work-group culture and action—but still weave more generalizable aspects of work process and structure into the idiosyncratic narratives of group history. See, e.g., Fantasia, *supra* note 180, at 3-24, 180-225.

and office labor,⁵⁹³ other radical sociologists believed that the "rank and file rebellion" of the 1960s and early 1970s rested in part on the reconstitution of informal work communities after their disruption by World War II and the Korean War.⁵⁹⁴ Indeed, the most careful ethnographies of that time showed that the culture of workplace social groups frequently retained sufficient resilience to override even deep-rooted ethnic, racial, and neighborhood affiliations formed outside the workplace.⁵⁹⁵ Some left scholars celebrated the "spontaneism" of work-group militance outside the bounds of "bureaucratic" arbitral procedure, although recent historical studies show convincingly that the protective umbrella of contractual arbitration actually expanded the space for workers' shopfloor activism⁵⁹⁶—an important lesson influencing my labor law reform proposals in Part VII. In any event, the tenacity of relatively autonomous work-floor communities is a testament—in the terminology, if not the substantive conclusions, of the Frankfurt School—to the persistence of centers of "lifeworlds" of egalitarian communication even within the quintessential "instrumental-rationality" of bureaucratic mass production.⁵⁹⁷

At the same time, beginning in the 1950s, organizational experiments in deliberately designed, formal work teams emerged out of the human relations tradition. Mayo had earlier sought to achieve work-group commitment to organizational goals without substantial redistribution of authority in the enterprise, through such means as personal coun-

593. The most celebrated such study is Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (1974). See also the papers collected in *Case Studies on the Labor Process* (Andrew Zimbalist ed., 1979) (developing Braverman's thesis in empirical case studies of several jobs and industries).

594. See Stan Weir, *The Informal Work Group*, in *Rank and File: Personal Histories by Working-Class Organizers* 177, 177–200 (Alice Lynd & Staughton Lynd eds., 1973). Although there was much academic debate over whether Braverman's deskilling thesis adequately captured ongoing workplace trends in the 1970s, his thesis did not necessarily contradict the claim about work group revival, as the interwar experience of deskilled but militant work groups shows. Of course, as in the 1930s, political, cultural, and demographic forces outside the workplace in the early 1970s galvanized work groups on the shop floor. See Barenberg, *supra* note 31, at 1434–39 & n.273; *infra* notes 638–644 and accompanying text.

595. See, e.g., William Kornblum, *Blue Collar Community* 43–47, 57–59 (1974) (exploring relation between workplace and nonworkplace cultures in case study of Chicago steel plant).

596. See Steven Tolliday & Jonathan Zeitlin, *Shop-Floor Bargaining, Contract Unionism and Job Control: An Anglo-American Comparison*, in *Between Fordism and Flexibility: The Automobile Industry and Its Workers* 99, 99–113 (Steven Tolliday & Jonathan Zeitlin eds., 1992); cf. Jefferys, *supra* note 482, at 120–21 (reaching same conclusion in study of Chrysler in 1940s and 1950s). In this respect, the new historical research confirms sociological studies of post-war shopfloor politics. See Neil W. Chamberlain, *The Union Challenge to Management Control* 89–128 (1948); James W. Kuhn, *Bargaining in Grievance Settlement: The Power of Industrial Work Groups* 174–76 (1961).

597. See Habermas, *Communicative Action*, *supra* note 121, at 13, 72, 339–65.

selling and increased personal contact between superiors and subordinates.⁵⁹⁸ The progenitors of the most notable early experiments in self-managing teams—at several British collieries between 1949 and 1958,⁵⁹⁹ at a General Foods plant in Topeka beginning in 1968,⁶⁰⁰ and at Volvo's Kalmar facility in 1974⁶⁰¹—had more democratic and empowering aspirations. Two pioneering schools of group psychology converged in this new "sociotechnical" model—the Gestalt "group dynamics" of Kurt Lewin,⁶⁰² and the object-relations approach to psychoanalysis based at London's Tavistock Institute of Human Relations.⁶⁰³

These isolated experiments in team-based workplaces were eclipsed in the United States by less dramatic forms of "employee involvement" within the "Quality of Work Life" (QWL) movement of the 1970s and early 1980s. Management and government launched that movement in response to the employee unrest of the early 1970s and to the by-then undeniable challenge of high-performance international competitors, particularly Japan. The most widespread innovations weakly emulated the Japanese through "parallel" personnel practices that required no fundamental organizational redesign: "quality circles" which typically brought together work groups for weekly one-hour discussion sessions; ad hoc "cross-functional" groups to address specific problems; and worker survey or suggestion campaigns.⁶⁰⁴ After the severe recession of 1979-82, however, United States management and unions in core industries increasingly turned to deeper organizational reforms, including the various Japanese "lean" production methods noted above; "Total Quality Management" programs (reimported from the Japanese, who had themselves adapted the quality systems of United States production practices

598. See Bendix, *supra* note 35, at 317-25.

599. See E.L. Trist et al., *Organizational Choice* (1963).

600. See Richard E. Walton, *Work Innovations at Topeka: After Six Years*, 13 *J. Applied Behav. Sci.* 422, 422-33 (1977).

601. See Christian Berggren, *Alternatives To Lean Production: Work Organization in the Swedish Auto Industry* 118-29 (1992).

602. See Kurt Lewin, *Frontiers in Group Dynamics: Concept, Method and Reality in Social Science; Social Equilibria and Social Change*, 1 *Hum. Relations* 5 (1947); Kurt Lewin, *Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research*, 1 *Hum. Relations* 143 (1947). Lewin's original democratic vision was deflected toward the less worker-empowering "theory Y" model of positive managerial motivation developed by his influential student Douglas McGregor. See generally Douglas McGregor, *The Human Side of Enterprise* (1960).

603. See generally W.R. Bion, *Experiences in Groups* (1961); Fred E. Emery, *The Emergence of a New Paradigm of Work* (1978); Eric Trist, *The Evolution of Socio-Technical Systems: A Conceptual Framework and an Action Research Program* (1981).

604. See Robert E. Cole, *Strategies For Learning: Small-Group Activities in American, Japanese, and Swedish Industry* 85-86, 100-79 (1989); Edward E. Lawler III et al., *Employee Involvement in America: A Study of Contemporary Practice* (1989).

in World War II); and self-managing teams embedded in organizations designed and run by joint labor-management committees.⁶⁰⁵

General Motors had implemented operating teams in nonunion plants during its "southern strategy" in the 1960s and 1970s.⁶⁰⁶ By 1982, the UAW won representation rights at those plants; and, a year later, ten GM plants were unionized, team-based organizations.⁶⁰⁷ The perceived breakthrough, however, was the economic success of the joint GM-Toyota NUMMI plant—New United Motor Manufacturing, Inc.—which opened in 1984 in Fremont, California.⁶⁰⁸ In 1982, GM had closed the Fremont assembly facility, an exemplar of adversarial, mass production labor relations. The plant was a model of authoritarian supervision, hundreds of narrow job classifications, a militant workforce performing at perfunctory levels, and high rates of absenteeism, drug and alcohol abuse, and grievance-filing.⁶⁰⁹ By 1986—after two years of operation with a multi-skilled team structure, one job classification for production workers and two for skilled workers, just-in-time inventory, and intensive training in *kaizen* (the Japanese term for continuous improvement in production methods)—the still-unionized plant virtually matched Japanese efficiency and quality standards.⁶¹⁰ Elected team leaders and union coordinators used a problem-solving system that encouraged shopfloor consultation and consensus-building. As a result, grievance and absentee rates plummeted. Significantly, this high-visibility success in flexible team reorganization occurred at a relatively low-tech facility employing workers reared in the old "job control" unionism.⁶¹¹ Meanwhile, the productivity of GM's new highly automated, capital-intensive showcase plants, which failed cleanly to break with the old organizational paradigm, was very poor by comparison—a result consistent with econometric analysis of a large, international sample of auto plants.⁶¹²

605. See Eileen Appelbaum & Rosemary Batt, *High-Performance Work Systems: American Models of Workplace Transformation* 12–17 (1993); Stephen Hill, *Why Quality Circles Failed but Total Quality Management Might Succeed*, 29 *Brit. J. Indus. Rel.* 541 (1991).

606. See Harry C. Katz, *Shifting Gears: Changing Labor Relations in the U.S. Automobile Industry* 88–89 (1985).

607. See *id.* at 88–90.

608. See Toshihiro Nishiguchi, *Good Management Is Good Management—The Japanization of the U.S. Auto Industry*, *JAMA F.*, Apr. 1989, at 3, 3–7.

609. See Turner, *supra* note 571, at 54.

610. See Womack et al., *supra* note 577, at 83.

611. With the same plant, technology, workforce, and union, the reorganized NUMMI reduced labor hours per vehicle produced by 40%. See Clair Brown & Michael Reich, *When Does Union-Management Cooperation Work? A Look at NUMMI and GM-Van Nuys*, *Cal. Mgmt. Rev.*, Summer 1989, at 26, 26–37.

612. See Turner, *supra* note 571, at 70–71; Paul Osterman, *Impact of IT on Jobs and Skills*, in *The Corporation of the 1990s*, *supra* note 581, at 220, 224–26. Other recent empirical studies confirm that the success of firms today generally turns more on purely organizational routines and innovations than on technology and capital investment. See, e.g., Kim B. Clark & Takahiro Fujimoto, *Product Development Performance: Strategy,*

The culmination of the team model in the auto industry is the GM-UAW Saturn plant that began production in Tennessee in 1991. A large "diagonal slice" team—about a hundred labor and management representatives selected from across organizational levels at existing plants—designed Saturn's social and technological system. The plant is operated by self-managing shopfloor teams and joint union-management committees at all levels, including the highest level of strategic financial and technological planning.⁶¹³

Concurrently, other organizations that similarly combine participatory production teams and representative labor-management strategic committees have flourished in both manufacturing and service enterprises and across a range of technologies—from assembly line, continuous-process, and small-batch production, to customer- and human-services provision—in both the private and public sectors.⁶¹⁴ Prominent examples include Xerox's complex in Webster, New York;⁶¹⁵ Corning's catalytic converter plant in West Virginia and its specialty ceramics plant and white-collar Administrative Center in New York;⁶¹⁶ Ford's new engine plant in Romeo, Michigan;⁶¹⁷ LTV's electro-galvanizing facility in Cleveland;⁶¹⁸ and the Bureau of Motor Equipment in New York City's Sanitation Department.⁶¹⁹ As discussed below, it is no accident that the most effective team plants are typically unionized operations.⁶²⁰

Organization and Management in the World Auto Industry (1991); David A. Garvin, *Managing Quality: The Strategic and Competitive Edge* (1988) (comparing air-conditioner manufacturers).

613. See Richard G. Lefauve & Arnaldo C. Hax, *Managerial and Technological Innovations at Saturn Corporation* 8, 8-19 (Sloan Sch. of Mgmt. Working Paper No. 3418-92B5, 1992); Saul Rubinstein et al., *The Saturn Partnership: Co-Management and the Reinvention of the Local Union*, in *Employee Representation: Alternatives and Future Directions* 339 *passim* (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

614. Case studies of self-managing teams in human services, customer services, and manufacturing are collected in *Groups That Work (and Those That Don't)* 289-478 (J. Richard Hackman ed., 1990); see also Jon R. Katzenbach & Douglas K. Smith, *The Wisdom of Teams: Creating the High-Performance Organization* (1993) (examining self-managing teams in 53 different organizational settings).

615. See *A Fighting Chance: New Strategies to Save Jobs and Reduce Costs* 13-32 (Sally Klingel & Ann Martin eds., 1988); Peter Lazes et al., *Xerox and the ACTWU: Using Labor-Management Teams to Remain Competitive*, 10 *Nat'l Productivity Rev.* 339 (1991).

616. See Barry Bluestone & Irving Bluestone, *Negotiating the Future: A Labor Perspective on American Business* 175 (1992); Barbara P. Noble, *Getting a Grip on Paper Pushing*, N.Y. Times, July 25, 1993, § 3, at 25.

617. See Bluestone & Bluestone, *supra* note 616, at 176-77.

618. See Frank O. Altimore et al., *L-S Electro-Galvanizing Company*, Cleveland, Ohio, in *The Future of Labor-Management Innovation in the United States* 68 (James A. Auerbach & Jerome T. Barrett eds., 1993).

619. See David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* 250-67 (1992); Ronald Contino, *N.Y. Sanitation Shops Rival Private-Firm Performance*, 12 *Work in Am.* 1, *passim* (1987); Ronald Contino, *Employee Participation: The Blue Collar Edge*, *Pub. Works*, June 1987, at 81, 81-109.

620. See *infra* Part V.E.

There are no hard figures on the number of enterprises using decentralized team/joint committee systems. A 1990 survey of Fortune 1000 firms found that forty-seven percent used self-managing teams—a sixty-eight percent increase in only three years—but only ten percent applied them to more than twenty percent of their workforce.⁶²¹ Later surveys reach varying results. One concludes that forty-one percent of firms make “extensive” use of teams;⁶²² another that only thirteen percent of U.S. employers use “high-performance work systems that deemphasize hierarchy and emphasize collaboration and teamwork.”⁶²³ Although there is uncertainty about the number of formalized team organizations, firm evidence confirms the widespread, continuing breakdown of the internal, bureaucratic job ladders which much recent legal commentary has assumed to be the stable paradigm of workplace relations.⁶²⁴

Management’s articulated economic purpose for the new work teams is remarkably similar to the aspirations of the human-relations and, indeed, the company-union movements of the interwar years: to align work-group sentiment with managerial goals. At the same time, the altered structure and norms of the teams within a decentralized and consultative organization promise a greater measure of worker participation in setting those goals. These concurrent aspirations for team-based organizations account for the controversy over whether they manipulate or empower workers. That controversy, I shall argue, is realistically rooted in the varying practical implementations of the team ideal and should be taken seriously in designing a revamped legal regime.

B. *The Promise of Self-Managing Teams*

1. *The Instrumental Economic Advantages of Team Organization.* — The theoretical and empirical case for the instrumental efficiency of team-based, flexible organizations in the current economic environment is strong. The volatility of markets and attendant premium on rapid product development encourage an integration of design and production engineering. Multi-skilled work teams are efficiency-enhancing for the same reasons. First, the blurring of product design and production entails the integration of significant “residual industrial engineering tasks” into the work process itself.⁶²⁵ The classic Taylorist division of labor—in

621. See Edward E. Lawler III et al., *Employee Involvement and Total Quality Management: Practices and Results in Fortune 1000 Companies* 28–29 (1992).

622. See Paul Osterman, *How Common is Workplace Transformation?* (1993) (unpublished manuscript, on file with the Columbia Law Review).

623. See Anthony P. Carnevale, *What Training Means in an Election Year*, *Training & Dev.*, Oct. 1992, at 45, 48.

624. On the dissolution of internal labor markets, see *supra* notes 579–584 and accompanying text. For a summary of the legal commentary that sees such internal markets as the Darwinian victor in the struggle for survival among workplace governance modes, see Barenberg, *supra* note 31, at 1462–65.

625. Sabel, *supra* note 575, at 29; see also Janice A. Klein, *The Human Costs of Manufacturing Reform*, *Harv. Bus. Rev.*, Mar.–Apr. 1989, at 60, 65 (describing how

which management conceives the production process and workers mechanically execute it—hinders shortened product life-cycles and quick product development. Flexible work teams, as repositories of both a multiplicity of production skills and a wider knowledge of the entire techno-organizational system,⁶²⁶ are the human capital equivalent of non-dedicated physical capital.

Second, the flexible team enables the firm to shed specialized *lateral* support staff (so-called “indirect” labor) because work-flow design, set-up, task assignment, training, inventory control, maintenance, and, especially, quality control are built into team responsibilities.⁶²⁷ In its fullest forms, the self-managing team takes on personnel selection, discipline, and compensation, as well as budgeting, purchasing, and customer-relations tasks. Because these functions are at least to some degree interrelated with (or “joint outputs” of) basic production activities, folding them into team responsibilities represents a net savings, not simply a rearrangement, of labor inputs. And because task assignment among workers is not constrained by narrow job classification, work allocation can more flexibly adapt to changing production needs.⁶²⁸

Indeed, the de-Taylorization of teamwork has similar consequences for *vertical* staff requirements. In a sense, the Taylorist decomposition of the work process into small tasks *in part creates* the need for a distinct supervisory agent to coordinate, monitor, and sanction task performance.⁶²⁹ Thus, just as quality control becomes a joint output of the flexible teams’ simultaneous work-design, production, and self-feedback functions, so too does supervision and monitoring.⁶³⁰ So-called “mutual monitoring” among team members, all of whom are jointly responsible

shopfloor workers “essentially become industrial engineers” in team planning of work processes at joint GM-Toyota venture); Benjamin Whipple, *Organizing for Team-Based Manufacturing: Information, Technology, and Organizational Learning* (1993) (unpublished Ph.D. dissertation, MIT Sloan School of Management).

626. See, e.g., Kenney & Florida, *supra* note 581, at 121, 133.

627. See Knuth Dohse et al., *From “Fordism” to “Toyotism”? The Social Organization of the Labor Process in the Japanese Automobile Industry*, 14 *Pol. & Soc’y* 115, 120, 130 (1985).

628. See Turner, *supra* note 571, at 44, 58.

629. This is the case at least when workers can effectively (and more cheaply) mutually monitor one another in interdependent, high-discretion work processes, or when workers can individually internalize work discipline.

630. For a theoretical statement of the idea of mutual monitoring as a joint output of work activity, see Louis Putterman, *On Some Recent Explanations of Why Capital Hires Labor*, 22 *Econ. Inquiry* 171, 173–74 (1984). The joint-output phenomenon helps to combat the problem, identified by collective-action theory, of recursion in overcoming free-riding by individuals. That is, the individual members of a group can “solve” the free-rider problem of individual shirking by monitoring and sanctioning each other. But this creates a “second-order” free-rider problem: why should individual members absorb the potentially high social and psychic costs of sanctioning their peers? That mutual monitoring is a low-cost or costless by-product of work activity is a possible answer. See Jon Elster & Karl O. Moene, *Introduction*, in *Alternatives to Capitalism*, *supra* note 224, at 1, 29.

for output and quality, is reinforced by the combination of group-based and individual merit pay incentives implemented widely in team plants.⁶³¹ Indeed, such monitoring not only replaces, but may be more effective than, supervisory monitoring. Subtle information about potential work effort is unknown to supervisors who do not themselves do the work and whose sporadic observations of work performance are distorted by workers' awareness of surveillance.⁶³²

Finally, by formalizing work-team communication and rewarding individuals' and teams' "continuous improvement" and cooperation in production methods, the team organization induces front-line workers to reveal the idiosyncratic know-how traditionally hidden from supervisors. In authoritarian workplaces, information-hoarding by informal work groups is a crucial element both of resistance to managerial attempts to intensify work pace and erode piece-work rates and of workers' general capacity to withhold cooperation in skirmishes with supervisors over shopfloor grievances.⁶³³ The team organization (with appropriate compensation incentives and employment security assurances)⁶³⁴ tends to diminish the incentive for value-adding information to remain "impacted" in groups.⁶³⁵ The team organization's combination of broadened worker knowledge and diminished information-impacting may be particularly significant in continuous-process technologies that are "robust" in terms of throughput but "fragile" in terms of the catastrophic safety or eco-

631. See David I. Levine and Laura D'Andrea Tyson, Participation, Productivity, and the Firm's Environment, in *Paying for Productivity: A Look at the Evidence* 183, 187, 209-11 (Alan S. Blinder ed., 1990); Dohse et al., *supra* note 627, at 136-37; Louis Putterman, Some Behavioral Perspectives on the Dominance of Hierarchical Over Democratic Forms of Enterprise, 3 *J. Econ. Behav. & Org.* 139, 146 (1982). Compensation systems in team workplaces also often have a pay-for-knowledge component to encourage the multiplication of team member skills and broader organizational know-how. See Edward E. Lawler III, *The Ultimate Advantage: Creating the High-Involvement Organization* 161-71 (1992).

632. See William G. Ouchi, Markets, Bureaucracies, and Clans, 25 *Admin. Sci. Q.* 129, 136-37 (1980) (noting that subtle understandings among interdependent workteam performance are difficult to translate into verifiable performance measures); Putterman, *supra* note 98, at 174 & n.5 (noting that supervisors' observations of work performance are non-random samples).

633. See, e.g., Victor G. Devinatz, Rationalizing the Irrationality of the Shopfloor, *Lab. Stud. J.*, Spring 1993, at 3.

634. See Masahiko Aoki, Information, Incentives, and Bargaining in the Japanese Economy 49-85 (1988). Note that the individual firm need not be the guarantor of the employment security that encourages individual initiative and information-disclosure. Indeed, precisely because of the erosion of internal career ladders in the new flexible labor market, transenterprise institutions may be better suited and more vital to serve that function. See *infra* Part VII.C.7.

635. Compare Putterman, *supra* note 631, at 146 (recognizing that hierarchical monitoring may have perverse effect of exacerbating information-impacting) with Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 32-34, 43, 54-55 (1975) (recognizing problem of "information impactedness" among frontline workers and peer groups' resentment at hierarchical monitoring, but asserting that supervisors' "auditing serves to overcome information impactedness").

conomic consequences of system breakdown—as in nuclear power or chemical-processing plants, for example.⁶³⁶ The cumulative development and mutual sharing of workers' explicit and tacit knowledge of work and organizational process sits comfortably with managerial theories of competitive advantage that identify firm-specific capacities for organizational learning as the key "dynamic capability" of enterprises.⁶³⁷

2. *The Noninstrumental Economic Advantages of Team Organization.* — The economic advantages discussed in the preceding section are all instrumental, in the sense that they increase productivity through realigned material incentives, reduced net labor inputs, or reduced transaction, logistical, or monitoring costs. Proponents of "high-involvement" organization often assert its potential for noninstrumental enhancement of labor productivity and innovation—reflecting in part the psychological disciplines from which work-group theory emerged decades ago. In light of cultural changes since then, the noninstrumental argument can now begin with a strong negative claim: United States workers of the 1990s are much more likely to resent authoritarian or overtly inegalitarian management styles than their forerunners of the interwar years. Several forces—in part endogenous to the political economy of mass consumption—account for a deep cultural shift toward "a general expectation of justice . . . in contrast to the attitudes prevalent in the past: resigned fatalism, diffuse rage, sullen apathy, or passive contentment."⁶³⁸

Those forces include the revolution in political attitudes induced by the New Deal itself. Working class ethnic communities in that period developed, for the first time, a sense of political citizenship and democratic entitlement.⁶³⁹ More specifically, the New Deal labor policy itself dramatically legitimated norms of fair workplace treatment;⁶⁴⁰ and subsequent mass-unionization raised workers' standards of just working conditions, to which even nonunion employers responded under the threat of unionization.⁶⁴¹ The post-war economic boom consolidated the cultural sea-change in many ways: by giving employers the economic leeway to

636. See Osterman, *supra* note 612, at 234; see also Larry Hirschhorn, *Beyond Mechanization: Work and Technology in a Postindustrial Age* 61–109 (1984).

637. See, e.g., David J. Teece et al., *Dynamic Capabilities and Strategic Management*, (forthcoming in *Strategic Mgmt. J.*) (manuscript on file with the Columbia Law Review). Alfred Chandler offers historical support for the conclusion that actual firm economies and competitiveness principally "depend on [organizational] knowledge, skill, experience, and teamwork." Alfred D. Chandler, Jr., *Scale and Scope: The Dynamics of Industrial Capitalism* 24 (1990).

638. See Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* 60 (1990).

639. See Cohen, *supra* note 267, at 285, 289; Fraser, *supra* note 39, at 329; Gerstle, *supra* note 351, at 179.

640. See Barenberg, *supra* note 31, at 1434–39.

641. See Thomas A. Kochan et al., *The Transformation of American Industrial Relations* 47–80 (1986).

provide improved employment practices;⁶⁴² by accelerating a media-driven culture of hedonic, market-dependent leisure activities that further eroded traditional patriarchal cultures;⁶⁴³ and by helping fuel the anti-authoritarian, participatory norms of the new workplace and counterculture movements of the 1960s and 1970s.⁶⁴⁴ But whatever the source of workers' greater sense of egalitarian entitlement, present-day managers who adhere to traditional authoritarian structures and to symbols of status hierarchy face a greater probability of perfunctory performance born of employee resentment.

Proponents identify more affirmative psychological consequences of participatory workplaces as well. A central claim—which has much empirical and common-sense backing—remains the core Gestalt principle developed by Kurt Lewin and his followers as early as the 1920s and 1930s: work groups are likelier to feel committed and driven successfully to complete a project if they have participated in its conception.⁶⁴⁵ A corollary of that principle is the proposition that work-motivation is enhanced if workers understand how their (self-designed) projects help complete the whole mission of the organization.⁶⁴⁶

A second set of psychological claims rests not on the idea of commitment born of self-governance but on the related concept of trust. A number of institutional features counteract the "low-trust syndrome" between labor and management that I have summarized elsewhere.⁶⁴⁷ The delegation of high-discretion responsibilities to work teams is a powerful symbol of managerial trust to which workers typically respond in kind.⁶⁴⁸ That management "gets the worker attitudes it deserves" is an axiom endlessly rediscovered by managers and administrators from the 1930s to the

642. See Charles Craypo, *The Decline in Union Bargaining Power*, in *U.S. Labor Relations, 1945–1989: Accommodation and Conflict* 3, 13–16 (Bruce Nissen ed., 1990).

643. See, e.g., Cross, *supra* note 366, at 99–212; Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* 107–38 (1991).

644. See Stanley Aronowitz, *False Promises: The Shaping of American Working Class Consciousness* 51–134 (1973) (discussing relation among affluence, counterculture movements, and workplace dissatisfaction); Barbara R. Bergmann, *The Economic Emergence of Women* 3–39 (1986) (discussing relation between women's labor market participation and women's movement); James Miller, *Democracy Is in the Streets: From Port Huron to the Siege of Chicago* (1987) (recounting anti-war movement's cultural impact); William L. Van Deburg, *New Day in Babylon: The Black Power Movement and American Culture, 1965–1975*, at 92–97 (1992) (recounting African-American militancy in workplaces).

645. See Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 *Res. Org. Behav.* 295, 319 (1990).

646. See, e.g., Hirschhorn, *supra* note 636, at 113–51; Shoshana Zuboff, *In the Age of the Smart Machine: The Future of Work and Power* 391–92 (1988); Elster, *supra* note 224, at 152.

647. See Barenberg, *supra* note 31, at 1478–88.

648. See Alan Fox, *Beyond Contract: Work, Power and Trust Relations* 102–14 (1974).

1990s.⁶⁴⁹ The experience at NUMMI is a textbook instance. A workforce known for its adversarial militance under drill-sergeant supervisors entered the revamped collaborative organization with (again typical)⁶⁵⁰ skepticism, but unmistakably developed cooperative "quality consciousness" and "newfound plant loyalty" when management's commitment to participatory practices proved real.⁶⁵¹ The structural transition from low-trust authoritarianism to high-trust delegation is generally reinforced by a panoply of status-equalizing symbols popularized by Japanese managers (egalitarian styles of dress, common dining and parking facilities, managers' presence on the shopfloor, and the like). More important perhaps—both in the theory and practice of "trust-building"—are the continuous occasions for consultative discussion between workers and management in successful high-involvement workplaces. Clinical and field studies show that face-to-face dialogue—especially when governed by problem-solving methods of the kind inculcated in joint training sessions conducted widely in participatory workplaces—is a potent enabling condition for trust-enhancement.⁶⁵²

Self-managed teams also promise efficiency gains from trust-building among team members. The parallel often drawn between the camaraderie among military squad members and among work-team peers is not entirely hyperbolic. Workers often experience greater motivation when their lapses may be understood as "letting down" their coworkers—or their achievements as cause for praise and recognition from peers—in tasks for which the team is jointly responsible.⁶⁵³ This is especially true among teams that have emerged successfully from the often emotionally turbulent but psychologically "binding" experience of working out their own project methods, social processes, and conflict-resolutions. Such binding sentiments do not necessarily entail conscious intimacy or friendship; a sense of mutual commitment or reciprocal obligation may be the

649. In 1938, the progressive industrial relations director of U.S. Rubber, Cyrus Ching, wrote that labor's mentality would respond in kind to managers animated by "fair" and "friendly" attitudes, on the one hand, or "militant" and "underhanded" tactics, on the other. See Cyrus Ching, *Problems in Collective Bargaining*, 11 J. Bus. 33, 40 (1938). Fifty years later, a Chrysler vice-president echoed less delicately: "[W]hen you see a militant workforce, usually it's because you've had knucklehead types on the management side." Lowell Turner & Jana Gold, *Perceptions of Work Reorganization: Interviews with Business and Labor Leaders in Four Industries* 23 (Berkeley Roundtable on the Int'l Economy Working Paper 34, 1988) (quoting executive).

650. See, e.g., Donald M. Wells, *Empty Promises: Quality of Working Life Programs and the Labor Movement* 26 (1987) (describing workers' skepticism about managerial claims of organizational change).

651. See Turner, *supra* note 571, at 57–58.

652. See Barenberg, *supra* note 31, at 1481–82 (summarizing and citing empirical studies showing that face-to-face consultation breeds sentiments of trust).

653. See Hirschhorn, *supra* note 578, at 43.

more accurate characterization of the felt experience.⁶⁵⁴ In addition to building the affirmative group sentiments that heighten "intrinsic" work motivation, team responsibility and discretion counter the corrosion of constructive cooperation among coworkers that occurs in standard work systems premised on competitive "tournaments" among individuals—at least those tournaments that do not incorporate criteria of cooperation among the measures of individual performance. The latter systems embody disincentives for workers to reveal information and otherwise help improve the performance of peers.⁶⁵⁵ In this light, the instrumental advantage of mutual monitoring in work teams is matched by the noninstrumental gain from mutual commitment.

3. *Beyond Productivity: From Autonomy and Self-Realization to Intersubjective Modernism and Radical Democracy.* — The phenomena that account for the productivity-improving possibilities of participatory work also have the potential to enhance the moral texture and political vigor of workers' lives. One of the most acute legal analysts of workplace governance writes that "the nature or source of th[e] value [of workplace democracy and participation] is seldom spelled out explicitly"⁶⁵⁶ by its legal-policy proponents. There are at least four rich normative traditions that support the proposition that Robert Wagner and other Progressive Era and New Deal advocates of industrial democracy took as axiomatic: that workers' right to participate in workplace governance is as compelling as their right to participate in political governance. Because these (sometimes overlapping) traditions have been elaborated at such length by some of modernity's most eminent thinkers—and because they have already been endorsed in our labor law policy and in international legal norms—I shall merely capsulize them.

At a minimum, these traditions provide *prima facie* justifications for legal regimes that secure workers' capacity to play a more substantial role in choosing their workplace governance modes than is afforded by individual market exit and entry. They also support the stronger *prima facie* claim that workers and legislators should make the substantive choice of

654. See Hirschhorn, *supra* note 578, at 7–13; Jonathon Gillette, *Intimacy in Work Groups: Looking from the Inside Out*, in *Groups in Context: A New Perspective on Group Dynamics* 86, 100 (Jonathon Gillette & Marion McCollom eds., 1990).

655. See, e.g., Aoki, *supra* note 634, at 32–43, 81–82, 90; Dean Tjosvold, *Effects of Cooperative and Competitive Interdependence and Task Complexity on Subordinates' Productivity, Perception of Leader, and Group Development*, 14 *Can. J. Behav. Sci.* 24, 24–32 (1982).

656. Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 *Yale L.J.* 1749, 1769 (1990). Hansmann briefly canvasses four exclusively utilitarian grounds for workplace participation. Three are purely hedonic—workers gain pleasure from communal activity, from less adversarial relations, and from greater sense of control. The fourth is also consequentialist but seems ultimately to turn on whether "society" subjectively "values" the training for political democracy that industrial democracy ostensibly yields. See *id.* at 1769–70. By my lights, the most powerful arguments for workplace democracy rest on the values of self-governance, self-realization, and radical modernism, not preference-satisfaction.

high-participation workplaces. The four arguments can be understood as successively heightened (although not simply cumulative) understandings of self-governance. The first—arguments from autonomy—stress the individual's right to register her interests in collective decision-making. The second—the neo-Aristotelian argument from self-realization—recognizes that the development and affirmation of individual capacities require "mutual recognition" among individuals. The third and fourth—arguments from radical pragmatism and democracy—combine a relational conception of subjectivity with a reflexive, dynamic understanding of the self and social contexts. That is, intersubjective communication and interaction concurrently transform individual and community desires, interests, knowledge, and self-definition. Although I find the latter, heightened understanding most appealing and not reducible to a syncretic blend of the first two,⁶⁵⁷ it is significant, nonetheless, that four important traditions converge on similar conclusions.

a. *Two Arguments from Autonomy.* — Workplace democracy is, of course, at the center of democratic-socialist and social-democratic ambitions.⁶⁵⁸ But many avatars of Anglo-American liberal individualism as well—from John Stuart Mill, to Abraham Lincoln, Bertrand Russell, Louis Brandeis, Woodrow Wilson, and some compelling interpreters of John Rawls's theory of justice—advance the proposition that meaningful autonomy irresistibly encompasses workers' participation in enterprise decision-making.⁶⁵⁹ The nub of this familiar argument can be put in either pragmatist (culturally immanent) or universalistic (transcendental or naturalist) terms.

The pragmatist argument begins with our shared cultural commitment to self-governance.⁶⁶⁰ That commitment entails the principle that each member of a collective enterprise has an equal right to the greatest feasible participation in binding decisions that affect her vital interests. Because one's vital interests are affected as much by the daily decisions implemented in one's workplace institutions as by those implemented

657. Conversations with Chuck Sabel helped clarify my thinking on this question.

658. See, e.g., Samuel Bowles & Herbert Gintis, *Democracy and Capitalism* 64–91 (1986); Andrew Levine, *Arguing for Socialism: Theoretical Considerations* 32–98 (Verso 1988).

659. See Louis D. Brandeis, *How Far Have We Come on the Road to Industrial Democracy?—An Interview*, in *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* 43, 43–47 (Osmond K. Fraenkel ed., 1934); Abraham Lincoln, *Fragment on Free Labor*, in *3 The Collected Works of Abraham Lincoln* 462 (Roy P. Basler ed., 1953–55); 1 id. at 412; 1 John Stuart Mill, *Principles of Political Economy* 763–92 (7th ed. 1965); Bertrand Russell, *Proposed Roads to Freedom* at xi–xii, 211–12 (1919); 2 Woodrow Wilson, *Message to the Sixty-Sixth Congress Assembled in Special Session*, in *The Messages and Papers of Woodrow Wilson* 671, 673–74 (Albert Shaw ed., 1924); Cohen, *Democratic Legitimacy*, *supra* note 119, at 18–20 (interpreting Rawls).

660. Recent arguments taking roughly this tack include Robert A. Dahl, *A Preface To Economic Democracy* 111–35 (1985); Walzer, *supra* note 84, at 98–103; Cohen, *Economic Basis*, *supra* note 119, at 25–50.

through one's political collectivities, democratic participation is as warranted in the former as in the latter.

There are two unstated—though to my mind, well-grounded—premises in this argument: first, that exit from hierarchical workplaces is not costless (otherwise, by definition, one's interests would suffer no impairment by authoritarian intra-enterprise decisions);⁶⁶¹ second, that one's substantive autonomy is insufficiently secured by participation in the centralized political institutions that choose to permit authoritarian decision-making in decentralized economic enterprises. The first premise is borne out by much empirical evidence of the financial, somatic, and psychological costs of job loss and transitions among jobs.⁶⁶² The second premise raises a more difficult problem of democratic theory often ignored by those who simply posit a goal of "maximum workplace democracy"—namely, the "federalist" question of which demos or stakeholder constituency (local or central, functional or territorial) is most affected by, and therefore entitled either in the first or final instance to make, particular categories of social decisions.⁶⁶³ Nonetheless, a strong *prima facie* ground for the second premise is implicit in the basic principle of self-governance.⁶⁶⁴ Participation rights in decentralized institutions provide a greater (and hence more just) degree of self-determination for the members whose daily interests are directly affected by those institutions' decisions.⁶⁶⁵

661. Cf. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. Rev. 233, 242 (1989) (principles of "political" justice apply to institutions characterized by costly exit and by binding coercive decisions).

662. See, e.g., Barry Bluestone & Bennett Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* 49–81 (1982); *Grand Designs: The Impact of Corporate Strategies on Workers, Unions, and Communities* (Charles Craypo & Bruce Nissen eds., 1993).

663. For discussions of this intractable issue, see John Burnheim, *Is Democracy Possible?* 4–9 (1985); Robert A. Dahl, *After the Revolution? Authority in a Good Society* 64–67, 88–98 (1970); Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in *XXV NOMOS: Liberal Democracy* 13, 13–42 (J. Roland Pennock & John W. Chapman eds., 1983).

664. This is not to deny that there may be tradeoffs between this greater degree of justice in the workplace and other valued ends, such as welfare-enhancing efficiency. The relevant evidence, although by no means conclusive, nonetheless suffices to have shifted the burden of proof to defenders of traditional hierarchical workplaces even as to the question of efficiency. See *supra* Part V.B and *infra* notes 826–30 and accompanying text.

665. Of course, this claim itself slides over major questions for those who reject essentialist or objectivist accounts of what constitutes a human "interest" and of how to compare the weight of such interests. See Barenberg, *supra* note 31, at 1431–32. Nonetheless, our shared contemporary understanding that peoples' vital interests are affected by the decisions made in their workplaces may suffice at this stage of immanent-pragmatist argument. The problem of whether the externalities (that is, the spillover effects on non-members' interests) created by those decisions should, for reasons of democratic justice or welfare, be internalized in more encompassing democratic institutions nevertheless remains. See *infra* notes 692–694 and accompanying text, and *infra* Part VII.C.5.c.

The second premise of the immanent argument is also redolent of the universalistic argument-from-autonomy for workplace democracy—that one relinquishes one's essential humanity and dignity by subordinating one's daily practical activity to the fiat of another.⁶⁶⁶ In other words, workplace participation rights are akin to inalienable aspects of personhood, like the right to vote or to be free of slavery.⁶⁶⁷ This proposition may seem like a stretch to some United States readers.⁶⁶⁸ However, "[o]utside of North America the general attitude toward freedom of association [through unionization] is similar to the attitude of North Americans toward the right to vote. Any tampering with it is unacceptable and subject to moral condemnation."⁶⁶⁹ Article 23 of the Universal Declaration of Human Rights codifies the "right to form and to join trade unions for the protection of [each person's] interests."⁶⁷⁰

b. *An Argument from Self-Realization.* — An attractive neo-Aristotelian argument for workplace participation combines a reformulated concept of "self-realization"⁶⁷¹ with the vast psychological literature on the conditions for human gratification and "optimal experience."⁶⁷² The empirical evidence overwhelmingly confirms the unstartling hypothesis that people engaged in highly skilled execution of high-challenge activities experience greater motivation, activation, concentration, creativity, and gratification than people engaged in routinized or passive practices.⁶⁷³ The psychological catch is that myopia, weakness of will (*akrasia*), or a culture of immediate preference-satisfaction may preempt people from undertaking the often high start-up costs of developing skills or talents that yield such experiences in the long term.⁶⁷⁴ The economic catch, of

666. See Robert P. Wolff, *In Defense of Anarchism passim* (1970).

667. See Putterman, *supra* note 98, at 184 n.22.

668. However, in a 1988 Gallup Poll, 90% of a sample of the United States public agreed that employees should have "an organization of co-workers" to press grievances with their employer; and in a 1991 Fingerhut/Powers poll, 79% of nonunion employees favored stronger legal protections of the right to unionize. See Gallup Poll, *Study of Public Knowledge and Opinion Concerning the Labor Movement* (1988); Fingerhut/Powers, *National Labor Poll* (1991).

669. Roy J. Adams, *Universal Joint Regulation: A Moral Imperative*, in *Proceedings of the 43d Meeting of the Indus. Rel. Res. Ass'n*, Dec. 28–30, 1990, at 319, 322 (John F. Burton, Jr. ed., 1991) [hereinafter *Proceedings of the 43d Meeting*].

670. Universal Declaration of Human Rights, art. 23(4), G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71, 74 (1948).

671. See Elster, *supra* note 224, at 127–58; Jon Elster, *Is There (Or Should There Be) a Right To Work?*, in *Democracy and the Welfare State* 53, 64–67 (Amy Gutmann ed., 1988).

672. For theory and evidence on "optimal experience," see the papers collected in *Optimal Experience: Psychological Studies of Flow in Consciousness* (Mihaly Csikszentmihalyi & Isabella Selega Csikszentmihalyi eds., 1988) and the studies surveyed in Scitovsky, *supra* note 201, at 15–148.

673. See, e.g., Judith Lefevre, *Flow and the Quality of Experience During Work and Leisure*, in *Optimal Experience*, *supra* note 672, at 307, 316–18.

674. For the economically inclined, this can be understood as a problem of "collective action" among the "multiple selves" of one individual across time.

course, is that economic and social institutions may not afford sufficient opportunities and resources for those experiences.

Consistent with these empirical studies, the normative commitment to "self-realization" places high value on opportunities for both "self-actualization"—freedom to develop and exercise any of one's powers and abilities—and "self-externalization"—freedom to develop self-esteem (the precondition of *any* sense of well-being) through others' evaluation and affirmation of one's personal abilities.⁶⁷⁵ The requirement of "self-externalization" diminishes the possibility that self-realization can be fulfilled by the pleasures of consumption detached from interaction with others.⁶⁷⁶ Productive activity, on the other hand, provides great opportunities for *joint* self-realization, in which, like members of an orchestra or of a genuinely deliberative legislature, "the free development of each is the condition for the free development of all."⁶⁷⁷

Jon Elster identifies two distinct modes of self-realization in the workplace. First, workers may develop, deploy, and evaluate one another's performance in the activity of collaborative work itself. Second, they may do the same in the process of decision-making *about* the organization of work and other enterprise functions. Elster insists that, in either case, the joint activity or deliberation is a meaningful vehicle for self-realization if it is driven by purposes subject to external evaluation. That is, the value of engaging in joint activity or deliberation *per se* can be garnered not if sought as an end in itself, but only as a by-product of seeking other valued, practical goals. In any event, for purposes of labor law reform, it is significant that the two workplace modes of joint self-realization that Elster distinguishes have become mutually dependent, synergistic, and blurred in the successful high-involvement organization.⁶⁷⁸

The concept of self-realization emphasizes the development and affirmation of an individual's capacities. It therefore gives greater weight than does the argument from autonomy to the individual's opportunities

675. See Elster, *supra* note 224, at 134–35; Anne J. Wells, Self-Esteem and Optimal Experience, in *Optimal Experience*, *supra* note 672, at 327, 340 (reporting experimental evidence indicating that feeling appreciated in high-challenge work yields higher self-esteem as well as greater motivation, interest, concentration, and gratification).

676. Jon Elster's justification for this requirement is basically that the net attraction of consumption declines with repeated consumption; indeed, rather than achieve positive pleasure one experiences an increased need for repeated consumption simply to avoid unpleasant "withdrawal" symptoms. By contrast, the net gratification from developing one's socially recognized powers rises in quantity and profundity over time. See Elster, note 224, at 134–35; see also Scitovsky, *supra* note 201, at 15–145 (surveying empirical studies of diminishing satisfactions from consumption); Lefevre, *supra* note 673, at 307, 316–18 (reporting empirical study showing greater motivation, activation, concentration, creativity, and satisfaction during highly skilled execution of high challenge work activities).

677. Elster, *supra* note 224, at 152 (quoting Karl Marx & Friedrich Engels, *Manifesto of the Communist Party* (1948)).

678. See *infra* Part V.E.

for self-transformation and intersubjective recognition by others. Radical pragmatism carries these themes further still.

c. *An Argument from Radical Pragmatism or Intersubjective Modernism.* — The radical pragmatist argument subsumes the first two arguments, and embeds them in appealing understandings of the texture and transformative power of intersubjective experience.⁶⁷⁹ Both descriptively and normatively, radical pragmatism affirms the inevitably relational and changeable social contexts on which individual self-realization and autonomy depend.⁶⁸⁰ One's sense of autonomous selfhood—and therefore one's capacity for experiences of genuine self-revision—necessarily depends on recognition and affirmation offered freely by others. But only an "other" who is herself autonomous can effectively give such affirmation. "Affirmation" that is the product of the other's domination or submission cannot validate one's sense of authentic self. Hence, the capacity for individual self-revision requires mutual affirmation of autonomy among individuals.

But such mutual affirmation cannot occur outside of ongoing relationships, which presuppose mutual dependency and vulnerability. Interdependency, mutual vulnerability, and ongoing communication among individuals inhere not only in intimate relationships but also in collective practical activity, such as workplace relations. The radical pragmatist argument thus has a communitarian or cooperationist inflection because an irreducible minimum of solidarity or trust is necessary to collective enterprises—if only to permit sufficient linguistic commonality among individuals for even non-reciprocal, meaningful activities to proceed.⁶⁸¹ Even institutionalist economists implicitly adopt this view. They now generally acknowledge that most economic activity entails mutual vulnerability among parties who make investments specific to their relationship—and that parties will make themselves vulnerable in this way only if they share (or can create and continuously sustain) at least weak solidaristic norms.⁶⁸²

The concurrent modernist inflection of radical pragmatism rests on its heightened notion of autonomy as the simultaneous revisability of in-

679. This argument has been powerfully made in various ways by Dewey, Unger, and Giddens. See John Dewey, *The Public and Its Problems* 143–84 (1927); Unger, *supra* note 24, at *passim*; Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* *passim* (1991).

680. For accounts of personality within developmental and psychoanalytic traditions that lend powerful support to this view, see Benjamin, *supra* note 24; Stern, *supra* note 247; and the essays collected in *Relational Perspectives in Psychoanalysis* (Neil J. Skolnick & Susan C. Warsaw eds., 1992).

681. See, e.g., Davidson, *supra* note 51, at 15–39, 124–40 (1984); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development* in *Handbook of Economic Sociology* (Neil Smelser & Richard Swedberg eds.) (forthcoming 1994) (manuscript at 44–52) (on file with the Columbia Law Review).

682. See Barenberg, *supra* note 31, at 1461–89.

dividual identity and social context.⁶⁸³ That is, ongoing experiences of interdependency and self-assertion may continually transform both the social contexts and individual personalities of parties to collective action.⁶⁸⁴ Significantly, such transformation can take the form of deliberately nurtured and warily monitored enhancement of trust and commitment.⁶⁸⁵ Highly productive, innovative economic enterprises and networks today generally embody such dual capacities for sustained trust and institutional self-revisability.⁶⁸⁶

This view feeds strongly into appeals for both enhanced responsibility and flexibility in work roles. Its normative dimension calls for minimizing vertical rigidities (that is, substantive inequalities, power asymmetries, or domination) and horizontal hypostatization of roles (that is, inflexible, ascribed task structures). The value it places in both deliberative interaction and potentially conflictual self-assertion (rather than self-effacing submission) is served by work team structures that encourage consultation, commitment, and trust but avoid either managerial paternalism or intragroup conformism. As discussed below, these are precisely the qualities of the self-managing teams that have been found most effective and resilient.

The various modes of domination and hegemony conceptualized in Parts II and III of this Article can be understood as practices that undermine the preconditions for autonomous revisions of self and context. Such practices transform individual and group identities through power-propelled imposition and manipulation rather than through conscious self-reflection, egalitarian group deliberation, and affective mutual affirmations of individuals' unique identities.

d. *Arguments from Political Democracy.* — The Tocquevillian argument that workplace participation, like participation in other intermediate associations, affords both a school for political democracy and an organizational counterweight to state and corporate power, is too familiar to

683. The concepts of identity and social context are defined *supra* notes 25–26.

684. This is an especially central theme for Unger. See Unger, *supra* note 24; Roberto M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987). Social contexts are, in part, shared or divergent intersubjective understandings and expectations about the roles that individuals may reenact or transform. Thus, social interaction that changes individuals' identities—that is, that alters their self-identification with a repertoire of potential role enactments and transformations—concurrently changes the social context constituted by such intersubjective understandings.

685. See Charles F. Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*, in *Explorations in Economic Sociology* 104, 138–39 (Richard Swedberg ed., 1993) [hereinafter Sabel, *Studied Trust*]; Sabel, *supra* note 681, at 20–37.

686. See Sabel, *supra* note 681, at 20–37. For some speculation about the range of institutional forms that can embody these two capacities in various economic and technological environments, see Paul Robertson & Richard Langlois, *Innovation, Networks, and Vertical Integration* 8–34 (Mar. 1993) (unpublished manuscript, on file with the Columbia Law Review).

belabor.⁶⁸⁷ Robert Wagner and other labor progressives advanced this defense of industrial democracy repeatedly.⁶⁸⁸ Skeptics about workplace participation point to a small number of longitudinal case studies in which workers did not demonstrate greater political interest or activism after experiencing some period of formal workplace participation (although there are case studies finding the reverse).⁶⁸⁹ Industrial psychologists, however, have amassed overwhelming statistical evidence of causation between peoples' experience of increased discretion and responsibility in their individual jobs and their increased valuation of (and participation in) intellectually challenging activity outside the job.⁶⁹⁰ This intuitively plausible conclusion suggests that a high-involvement economy affording substantially more training and jobs in high-discretion, collegial work might encourage the positive externality of more informed, assertive citizenship. But whether such a conjectured tendency would do much to overcome the deep popular attachment to superficial, visual media of political information-dissemination is doubly conjectural—and dependent on unpredictable developments in education, socialization, and culture.⁶⁹¹

A positive political spillover for which we have firmer historical and comparative evidence would occur *if* high-participation workplaces encouraged a rejuvenated movement of internally democratic and "encompassing" unions or some new form of nationwide employee associations.⁶⁹² That is, the democratizing political mobilization of such larger organizations—whether in the full-blown corporatism of post-War Western and Northern European political economies⁶⁹³ or the liberal

687. The best short summary of the convergence of Mill, Rousseau, and Tocqueville on this argument remains Carole Pateman, *Participation and Democratic Theory* (1970).

688. See Barenberg, *supra* note 31, at 1425–27.

689. See Hansmann, *supra* note 656, at 1770 n.72. Hansmann cites the mixed evidence on the relation between workplace and political participation presented in Dahl, *supra* note 660, at 96–98, which, in turn, relies heavily on a study of workers who had experienced fourteen months of workplace involvement activities. See John F. Witte, *Democracy, Authority, and Alienation in Work: Workers' Participation in an American Corporation* (1980).

690. For a comprehensive survey, see Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, in *The Nature of Work: Sociological Perspectives* 36, 36–62 (Kai Erikson & Steven P. Vallas eds., 1990); see also *supra* notes 673, 676 (citing studies).

691. See Teun A. van Dijk, *News as Discourse* (1988) (finding that people who depend on print sources are better informed than people who rely on television news). Alex S. Jones, *Study Finds Americans Want News but Aren't Well Informed*, *N.Y. Times*, July 15, 1990, § 1, at 13.

692. For discussions of how "encompassing" economic negotiations, such as industry- or nation-wide collective bargaining, promote effective macroeconomic outcomes, see Olson, *supra* note 73, at 90; Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 *Wis. L. Rev.* 1.

693. See the essays collected in *Patterns of Corporatist Policy-Making* (Gerhard Lehmbruch & Philippe C. Schmitter eds., 1982) and *Structuring Politics: Historical Institutionalism In Comparative Analysis* (Sven Steinmo et al. eds., 1992).

"informal" corporatism of United State unionism at its height⁶⁹⁴—is well-documented and predictable. Legal reforms designed to encourage such democratizing gains are discussed below in Part VII.

C. The Perils of the Team Workplace: New Processes of Domination

The very features of team-based organization that promise to enhance efficiency and self-governance also generate new potential for management illegitimately to coerce workers, distort their communication, and manipulate their subjective experience. Before examining this potential, it is useful to identify the social and psychological dynamics of self-managing teams that distinguish them from work groups under mass production.

1. *Social and Psychological Dynamics of Self-Managing Teams.* — Members of a self-managing team would face hierarchical constraints even in the most democratic imaginable enterprise. The firm's organizational chart may accurately depict a "web" or "network" of teams aligned in horizontal equality, but overall organizational goals still constrain team autonomy in an effectively "hierarchical" way. This remains true even if assemblies-of-the-whole or strategic committees elected by work teams democratically determine those goals. Those who promote the "team as hero" and oppose multi-level "command and control" management acknowledge, of course, the continued need for organizational "[c]oordination and communication."⁶⁹⁵ The team is dependent on the wider organization for many kinds of tangible and intangible resources and answerable to the organization for its performance. The role of elected, rotating, or organizationally appointed team leader or "facilitator" is the institutional manifestation of the team's dependence and accountability. A key challenge—and focus of conflict—for participants in the team organization is the definition and implementation of the optimal role of the team leader/facilitator.⁶⁹⁶

As the next section explores, many of the conflicts between informal work groups and mass production employers are reenacted in team-based workplaces—including contests over work process, pace, job security, and reward. Nonetheless, organizational hierarchy has a different effect on self-managing teams than on work groups and company unions in the traditional bureaucratic workplace. The difference stems from four fea-

694. Contrary to current widespread views of organized labor as a narrow "interest-group," the role of the AFL-CIO in its post-war heyday as an interest-aggregating movement for broader public-regarding legislation is convincingly documented in J. David Greenstone, *Labor in American Politics* (1977).

695. Robert B. Reich, *Entrepreneurship Reconsidered: The Team as Hero*, *Harv. Bus. Rev.*, May-June 1987, at 77, 81, 82.

696. Hence, the outpouring of academic and popular writing on the matter. See, e.g., Kimball Fisher, *Leading Self-Directed Work Teams* (1993); Robert Johansen et al., *Leading Business Teams* 101-58 (1991); John H. Zenger et al., *Leading Teams: Mastering the New Role* (1994).

tures of self-managing teams: their high discretion and responsibility in designing and performing work; the emotional intensity of their intra-group interpersonal process; the greater formalization of team structure and process; and teams' enhanced role in horizontally coordinating organizational activity with each other.

Work teams' greater discretion and responsibility systematically produce a higher level (or, perhaps more accurately, a different kind)⁶⁹⁷ of anxiety than that experienced by workers doing routinized tasks.⁶⁹⁸ Indeed, as the economist and psychoanalyst Menzies Lyth's classic studies of high-stress hospital nursing demonstrated, rigid bureaucratic rules and procedures may *arise* in organizations precisely as a means to diminish the anxiety of personal decision-making when the stakes are high.⁶⁹⁹ The greater fragility of just-in-time production-flow that is typical of team workplaces only compounds the anxiety created by role-uncertainty and accountability in the de-bureaucratized enterprise. Workers thus bear heavier burdens of creative problem-solving precisely in settings in which mistakes or bottlenecks may cause cascading damage across the entire organization.⁷⁰⁰

Team responsibilities not only enhance stress, but also place great interpersonal emotional demands on team members. Self-managing teams generally fulfill their productive and self-governance potential only if they are more than an interdependent work group anointed with a "team" label. Unlocking that potential generally requires the formal development of deliberative and problem-solving skills, including the capacity for ongoing reflexive learning and improvement of team processes.⁷⁰¹ One of the team facilitator's key tasks is to help the team become increasingly self-evaluating and self-revising—a difficult task made only incrementally easier when workplace information-technology provides automatic feedback on team performance. Management wraps much team-building activity in the rhetoric of "trust" and "consensus." But team meetings and problem-solving can easily become ineffective, demoralizing exercises if members are not also trained to voice disagreement

697. The high levels of stress and related health impairments experienced by workers responsible for nondiscretionary routinized work is well-documented.

698. The following discussion is an extremely schematic summary of the very rich literature on group psychodynamics developed primarily, although not exclusively, within the Gestalt and object-relations traditions. That literature, unlike much deductive organizational and institutional theory, is based on inductive "action research" in thousands of actual organizations and work groups. In addition to the other works cited below, an excellent synthesis and elaboration is found in Hirschhorn, *supra* note 244.

699. The research is collected in Isabel Menzies Lyth, *Containing Anxiety In Institutions* (1988). For a more recent survey of the literature confirming Menzies Lyth's findings, see, e.g., Michael A. Diamond, *Stresses of Group Membership: Balancing the Needs for Independence and Belonging*, in *Organizations on the Couch: Clinical Perspectives on Organizational Behavior and Change* 191, 191–212 (Manfred F.R. Kets de Vries et al. eds., 1991).

700. See Hirschhorn, *supra* note 636, at 61–109; Osterman, *supra* note 612, at 234.

701. See Hirschhorn, *supra* note 578, at 44, 74, 82–85.

and frustration over perceived obstacles to fulfilling (or effectively defining) team goals and strategies.⁷⁰² That is, work teams' effectiveness often turns on their members' development of interpersonal skills in self-assertion—in overcoming the (further) anxiety that many experience in confrontations within small face-to-face groups. If the well-functioning self-managing team is a cell of deliberative democracy, that deliberation does not take the form of a communitarian convergence of opinion and feeling.⁷⁰³ Such convergence is too frequently a recipe for suppression of disagreement, confusion, or anger that impedes both self-development and effective collaborative work. Participants in team workplaces widely observe that interpersonal skill-development in self-managing teams heightens their intersubjective attunement and effectiveness in their non-work lives as well.⁷⁰⁴

At the same time, the vocalization of anger and conflict can also take destructive forms that disserve teams' work goals and undermine vulnerable individuals' attempts at self-revision—especially against the backdrop of heightened group anxiety. The most acute students of group dynamics—many working within the object-relations school of psychoanalysis—identify several recurrent regressive patterns in the subtle balance between self-assertion and group collaboration. Perhaps the most familiar is what Irving Janis dubbed "groupthink."⁷⁰⁵ Work-team deliberation may reach premature closure and commitment to decisions which even members themselves in retrospect (and third parties at the time) recognize as highly impractical if not illusory.⁷⁰⁶ The psychological dynamic at work is an irrational flight from the anxiety of responsibility to the comfort of conformist commitment.

In light of the persistent phenomenon of emotional "splitting" discussed above,⁷⁰⁷ such group "flight" often combines with the scapegoating of some external group or individual—other work teams or departments, suppliers, managers, and the like.⁷⁰⁸ Team members

702. See Hirschhorn, *supra* note 244, at 40–56; Kathleen D. Ryan & Daniel K. Oestreich, *Driving Fear Out of the Workplace* 55–70, 117–130, 185–198 (1991).

703. The point, consistent with Elster's notion that realizing the value of joint self-realization depends on effective achievement of practical goals, see *supra* note 224, is to enhance "people's ability to form serious work groups committed to the performance of clearly defined tasks," even if this requires periods of conflict and absence of the "warm glow of togetherness." Margaret J. Riach, *Group Relations: Rationale and Technique*, in *I Group Relations Reader* 3, 9 (Arthur D. Colman & W. Harold Bexton eds., 1975) (discussing general goal of object-relations study and participation in group dynamics).

704. See sources cited *supra* notes 244, 578, 672–76, 690.

705. See Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascos* (1982).

706. The case studies demonstrating this point in Janis, *supra* note 705; Hirschhorn, *supra* note 636; and Hirschhorn, *supra* note 244, are quite compelling.

707. See *supra* Part II.C.2.f.

708. See, e.g., Joseph J. Fucini & Suzy Fucini, *Working for the Japanese: Inside Mazda's American Auto Plant* 197 (1990); Wells, *supra* note 650, at 84, 118. The widespread mutual hostilities between production and sales departments in traditional

psychically regress by condensing their fears and uncertainties and displacing or attaching them to personal or organizational "objects." Sometimes, more insidiously, the "enemy" is found within the team—in the guise of an individual or (often, as it happens, and for plausible psychological reasons)⁷⁰⁹ a pair of allies who dare alert the team to its denial of serious problems in the team's consensus strategy. Alternatively, the team may close ranks and evade the anxiety of problem-solving by blaming the team leader or facilitator, who is caught between the group and the wider organization in her role of ensuring that team resources are commensurate with team responsibilities.⁷¹⁰

Another recurrent pattern is the reverse: team members flee responsibility by becoming dependent on a charismatic or domineering team member or leader.⁷¹¹ Such regressive cathexis blocks open exchange by investing disagreement with the emotional valence of disloyalty or treason. The pleasures of idealization and recognition may blind the unreflective team facilitator to this occlusion in team deliberation. In psychoanalytic terms, of course, "[t]his is what transference is all about."⁷¹²

enterprises is a similar phenomenon that prefigures the perhaps more intense scapegoating among small face-to-face groups.

709. See Otto Kernberg, *Internal World and External Reality* 308 (1980); Gillette, *supra* note 654, at 86, 95–98.

710. See Hirschhorn, *supra* note 578, at 18–19, 63.

711. See W.R. Bion, *Experiences in Groups and Other Papers* 78–86, 99–100, 119–22 (1961); Manfred F.R. Kets de Vries, *On Becoming a CEO: Transference and the Addictiveness of Power, in Organizations on the Couch: Clinical Perspectives on Organizational Behavior and Change*, *supra* note 699, at 120, 125.

712. Kets de Vries, *supra* note 711, at 124. For those unfamiliar with this central concept of psychoanalysis, de Vries gives a capsule definition of "transference" as: the process by which one person displaces onto another thoughts, feelings, ideas, or fantasies that originate with figures of authority encountered very early in an individual's life.

....

... Through interactions with parents, other family members, teachers, doctors, and other authority figures we encounter, we develop repetitive, well-rehearsed behavior patterns that become the basis of specific cognitive and affective "maps." These "maps" are decisive in creating a certain amount of consistency in our dealings with others; the various "scripts" that can be drawn from them are activated by particular cues and become operative, usually without our being aware of it, when we meet other people.

....

... The basis for th[e] particular process [of the "idealizing transference reaction"] is the illusory wish (as a way of coping with childlike feelings of helplessness) to "merge" with someone who is perceived as an omnipotent and perfect other person (originally the parent) and thus acquire some of his or her power.

....

... In this manner, followers extend their own sense of grandiosity through identification with their leader. And some leaders like that kind of admiration, especially if it feeds an unfulfilled hunger for recognition. The end result is a

The community of organizational-development teachers and consultants—whether they rely on such psychoanalytic formulations or on managerial “folk wisdom”⁷¹³—has widely incorporated the symptoms and antidotes of such “stuck” team patterns into its training programs for team members and facilitators.⁷¹⁴ Part of a team’s “maturation” is its members’ capacity to recognize and overcome psychologically regressive diversions from the gratifying process of working self-assertively and collaboratively—without self-deception, dependency, or authoritarianism—toward a challenging task that meets human needs.⁷¹⁵ The subtleties of team process, however, are all too often turned toward less benign ends.

2. *Structural Coercion: The Instrumental Abuse of Team Relations.* — The team system has the potential concurrently to intensify structural coercion of workers and to make that coercion more subtle and covert compared to old-style company unionism.⁷¹⁶ Enough reliable case studies in North America, Japan, and elsewhere have documented such heightened coercion—undermining both workers’ free choice of governance modes and their self-transformative work activity—to warrant legal attention.

a. *The Team Leader Turned Intimidator.* — As the above discussion of team psychodynamics shows, the team facilitator/leader plays a potentially powerful role in the work lives of team members—more powerful than the role of employee representative in the lives of a company-unionized workforce. Three features of work teams—their heightened formalization, discretion, and interpersonal exposure—account for the team leader’s greater *instrumental* power.⁷¹⁷ These features give the team leader access to more information about team members’ work performance and union sympathies. That greater access has several sources: the probing discussions that the team leader orchestrates in team meetings; the leader’s presence in (or rotation through) the work process itself;⁷¹⁸

mutually reinforced pattern of interaction whereby idealizing and mirror transference reactions become complementary.

Id. at 124–26.

713. Lee G. Bolman & Terrence E. Deal, *Reframing Organizations: Artistry, Choice, and Leadership* 134 (1991).

714. See, e.g., sources cited *supra* note 696.

715. Cf. Rioch, *supra* note 703, at 9 (discussing such gratification in work groups).

716. On the concept of structural coercion, see *supra* Part II.A.

717. The team facilitator’s greater opportunities for psychological manipulation, which may mutually reinforce his instrumental powers, are discussed in the next section.

718. As Victor Reuther points out, this aspect of the team workplace resembles the role of the “straw boss” who worked within the informal work groups of mass production and was therefore able to divulge to foremen information otherwise impacted in the group. See Victor Reuther, A Foreword from Victor Reuther, in *Choosing Sides*, *supra* note 39, at v, v. Dismantling the straw boss system was thus one of the first demands of the CIO’s job control unionism after the 1930s. See Nelson Lichtenstein, “The Man in the Middle”: A Social History of Automobile Industry Foremen, in *On the Line: Essays in the History of Auto Work*, *supra* note 482, at 153, 157–58, 164–65; Nelson Lichtenstein, *The Union’s Early Days: Shop Stewards and Seniority Rights*, in *Choosing Sides*, *supra* note 39, at 65, 68.

and the enhanced opportunity, discussed presently, for "cronyism" that allows team leaders to use some team members as informants.⁷¹⁹

In addition to greater information-extraction, the team leader may have a larger arsenal of instrumental incentives with which to threaten or bribe individual team members. If the authority "flexibly" to allocate tasks and rewards is vested in the team leader, the team system recreates the potential for the kind of abuse of discretion that was rampant in the "foremen's empire" of the era before industrial unionism.⁷²⁰ Upper management's failure to retrain or replace command-and-control supervisors for the new role of consultative team facilitators is widespread in team organizations.⁷²¹ The rule-bound systems of job classification and assignment that hinder work redesign and technological change in traditional mass production concurrently afford workers protection against cronyism and intimidation on the shop or office floor.⁷²² If those rules are contained in a collective agreement, they may also enhance workers' short-term bargaining power by legally protecting them from discharge for engaging in work-to-rule slowdowns in some circumstances.⁷²³

b. *From Mutual Learning to Mutual Coercion in the Panoptic Workplace.* — Whereas the informal sanctions within shopfloor groups may restrict work pace under mass production, and the collaborative camaraderie of self-managing teams may yield as a byproduct (or render unnecessary)

719. See Fucini & Fucini, *supra* note 708, at 141.

720. See Steve Babson, *Lean or Mean: The MIT Model and Lean Production at Mazda*, Lab. Stud. J., Summer 1993, at 3, 15. Berggren, *supra* note 601, at 32; Fucini & Fucini, *supra* note 708, at 140–41, 194; Choosing Sides, *supra* note 39, at 74–87; David Robertson et al., *Team Concept and Kaizen: Japanese Production Management in a Unionized Canadian Auto Plant*, 39 Stud. Pol. Econ., Autumn 1992, at 77, 77–104.

721. See Janice A. Klein, *Why Supervisors Resist Employee Involvement*, Harv. Bus. Rev., Sept.–Oct. 1984, at 87, 90; Lorenz, *supra* note 345, at 457; Turner, *supra* note 571, at 31–90; cf. William N. Cooke, *Labor-Management Cooperation* 104–05, 139–40 (1990) (management generally reluctant to share authority with workforce in absence of external constraints).

722. Critics of team workplaces are therefore right to see "job-control unionism" as a means for protecting workers against certain forms of arbitrary treatment. They are mistaken, however, in identifying such work rules as an instrumental source of long-term worker empowerment. Those rules are contained in short-term collective contracts. Workers' bargaining power at the time of contract renegotiation may determine whether protective work rules persist for the next contract term, but the rules do not instrumentally enhance such power. The work rules may afford workers a short-term bargaining weapon during the contract term, in the form of work-to-rule slowdowns. The fact that the rules are encased in a contract may protect the workers from discharge, to which they are otherwise subject under the NLRA for engaging in slowdowns, see *Elk Lumber Co.*, 91 N.L.R.B. 333, 336, 338–39 (1950), or in mid-term concerted activity in violation of the no-strike clause contained in most collective agreements. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). But even this source of short-term bargaining power can be exaggerated. Technically, employers can lawfully fire workers for using such otherwise lawful concerted activity if, as is likely, the workers' purpose is to gain a mid-term contract modification or circumvent contractual grievance-resolution procedures. See NLRA § 8(d), 29 U.S.C. § 158 (1988).

723. See *supra* note 722.

mutual monitoring in textbook flexible organizations, the peer pressure within pathological teams may reach the unmistakable pitch of coercion.⁷²⁴ A team facilitator/leader determined to use the team apparatus as an anti-union tool can deploy discretionary incentives not only directly to penalize pro-union workers, but to turn his loyal favorites against their pro-union peers. The instrumental pressures available to team members include, at a minimum, the withholding of daily cooperation and social recognition. When the organization authorizes team members (under the guidance of team leaders) to evaluate, reward, and discipline peers, instrumental anti-unionism among team members can be devastating.⁷²⁵

Three broader features of "lean" organizations—in which teams are generally embedded—encourage such mutual coercion in the work process itself and further detract from the goals of self-governance in team decision-making. First, the norm of no-slack production removes certain buffers that otherwise enable workers to vary their pace of work to satisfy their individual needs or preferences.⁷²⁶ Such buffers include informal stockpiles of finished work; backup workers to fill the temporary gaps left by sick, injured, or exhausted workers; easier jobs into which older workers can transfer or younger workers can rotate for breathing spells; and the informational buffer of shopfloor know-how that the team structure disimpacts. The logic of lean production is to allocate tasks in order to strive for sixty minutes of high-effort work per hour by all workers with zero buffers of back-up workers, intermediate or final output, or inventory.

Second, lean organization relies heavily on the "principle of visualization."⁷²⁷ Workers' performance data is publicly displayed and formally discussed. Spatial layout leaves work stations open to the view of coworkers and managers.⁷²⁸ A more novel feature of the new "panoptic" workplace⁷²⁹ is the so-called *andon* board. It displays the rate of production—

724. See Robert R. Rehder, *Japanese Transplants: After the Honeymoon*, *Bus. Horizons*, Jan.-Feb. 1990.

725. See Guillermo J. Grenier, *Inhuman Relations: Quality Circles and Anti-Unionism in American Industry* 61-138 (1988); John Junkerman, *Nissan: Teams Without Unions*, in *Choosing Sides*, *supra* note 39, at 219, 223.

726. See Richard J. Schonberger, *Japanese Manufacturing Techniques: Nine Hidden Lessons in Simplicity* 31-33 (1982); Klein, *supra* note 625, at 60-66 (recounting case study of U.S. team-based engine plant).

727. Dohse et al., *supra* note 627, at 130; see also Berggren, *supra* note 601, at 46-47 (explaining that "visualization" is an effective instrument of control); *Choosing Sides*, *supra* note 39, at 16-18.

728. See Grenier, *supra* note 725, at 44-45.

729. Shoshana Zuboff adapted this term from Bentham via Foucault. See Zuboff, *supra* note 646, at 319-24. Bentham conceived the "Panopticon"—a prison designed so that guards could always see inmates, who were unable to know when they were being watched. See Ross Harrison, *Bentham* 127-31 (1983). Foucault views the Panopticon as an exemplar of modern "disciplinary society" whose public and private institutions pervasively surveil and shape individual minds and bodies. See Michel Foucault, *Discipline and Punish: The Birth of the Prison* 201-02 (Alan Sheridan trans., 1979); Michel

often using red, yellow, and green lights—at each stage in the work flow among teams. Management seeks organizational design that achieves neither red, indicating that an emergency stop or slowdown in production is required, nor green, indicating smooth flow, but yellow lights. Yellow lights warn of production stress and therefore, unlike green lights, ensure the absence of buffers or slack time.⁷³⁰

Third, team organizations generally base pay and nonpecuniary recognition in large part on group performance. These three features together create strong incentives—internalized by individual workers or conveyed through peer pressure—for team members to work even when sick or injured in order not to overload peers or diminish group performance.⁷³¹ There is substantial evidence that systemic speed-up—“exploring the limits of human capacity”⁷³²—itself enhances the likelihood of physical injury, stress, or debilitating work pace.⁷³³ There is also a tendency for team workplaces gradually to reduce the time devoted to deliberative problem-solving as the stress of lean production cumulates.⁷³⁴ As discussed in the next section, team workplaces may even mutate into a kind of super-Taylorism, utterly undermining opportunities for joint self-realization and self-revision in the work process and in organizational decision-making.

c. *Team Taylorism*. — Much of the advantage of self-managing teams—for productivity, high-challenge self-realization, and meaningful deliberative self-governance—presumes the integration of conception and execution in high discretion, multiskilled, self-redesigning work. Its proponents and practitioners frequently describe the team workplace as a non-Taylorized organization.⁷³⁵ The reality is frequently otherwise when teams are embedded in excessively lean organizations. Central features of the “Toyota System,” in fact, are the use of classic Taylorist time-and-motion study to standardize job tasks and the requirement that employ-

Foucault, *supra* note 34, at 104–05. Zuboff applies the “panoptic” concept not so much to the social structure of team workplaces but to the feedback-generating nature of information technology. See Zuboff, *supra* note 646, at 315–86.

730. See *Choosing Sides*, *supra* note 39, at 16–18; Schonberger, *supra* note 726, at 91.

731. See *Choosing Sides*, *supra* note 39, at 16–29. The personnel director of a Nissan transplant put the norm bluntly: “commitment—not sickness—determines attendance.” Peter Wickens, *The Road to Nissan: Flexibility, Quality, Teamwork* 96–110 (1987).

732. Berggren, *supra* note 601, at 51 (quoting observer of Mazda’s U.S. transplant).

733. See *id.* at 52–53; Fucini & Fucini, *supra* note 708, at 172–91; Satoshi Kamata, *Japan in the Passing Lane: An Insider’s Account of Life in a Japanese Auto Factory* 95–113 (Tatsuru Akimoto ed. & trans., 1982); Babson, *supra* note 720, at 12–14; Klein, *supra* note 625, at 64.

734. See Babson, *supra* note 720, at 6–9; Klein, *supra* note 625, at 61.

735. See Mike Parker & Jane Slaughter, *Behind the Scenes at NUMMI Motors*, N.Y. Times, Dec. 4, 1988, at F2 (quoting former labor secretary Ray Marshall to the effect that team organization had “done away with Taylorism”).

ees adhere strictly to formally specified motions.⁷³⁶ This rigid standardization meshes with the no-slack principle of lean production. That is, assignments must be rigorously specified to achieve the sixty-seconds-per-minute load for all workers.⁷³⁷ Team facilitators and members are often trained in time-and-motion engineering; and team members may participate in the routinizing and speeding of their own jobs under the inducements for "continuous improvement" and high team performance.⁷³⁸ Job rotation and multiskilling within teams may therefore amount to little more than switching among easily learned, short-cycle tasks.⁷³⁹

In this light, it is not surprising that some scholars and workers refer to team organizations as "team Taylorism"⁷⁴⁰ or "management by stress."⁷⁴¹ A leading academic study of the Toyota system concludes that "the Japanese out-Taylor us all."⁷⁴² When lean production takes this routinized form, "team" is hardly more than a label for an administrative unit.⁷⁴³ Recognizing this potential, the German labor movement, drawing on the Swedish Metalworkers' program,⁷⁴⁴ carefully conceived its model of *Gruppenarbeit* (group work) as a prophylactic against managerial *Teamarbeit*.⁷⁴⁵ In some North American plants as well, workers and local unions counterpose a model of "group structure"—detailed below in Part VII—to the "team concept" which they perceive as little more than a "Japanese-style productivity drive" fully subordinated to managerial needs.⁷⁴⁶ This issue was central to the rise of the oppositional "New Directions" movement within the UAW and is the subject of much strategic debate across the labor movement.⁷⁴⁷

736. See Berggren, *supra* note 601, at 29–32; Schonberger, *supra* note 726, at 193; Shigeo Shingo, *Study of 'Toyota' Production System from Industrial Engineering Viewpoint* (1981); Klein, *supra* note 625, at 61, 64.

737. See Fucini & Fucini, *supra* note 708, at 150–51.

738. See Babson, *supra* note 720, at 7–9; Robertson et al., *supra* note 720, at 103.

739. See Berggren, *supra* note 601, at 30; Parker & Slaughter, *supra* note 39, at 80–82; Babson, *supra* note 720, at 9–12; Klein, *supra* note 625, at 61, 64.

740. Stephen Wood, *The Cooperative Labour Strategy in the US Auto Industry*, 7 *Econ. & Indus. Democracy* 415 (1986).

741. Choosing Sides, *supra* note 39, at 16–29.

742. Schonberger, *supra* note 726, at 193.

743. The leading guide-book to lean production, Yasuhiro Monden's *Toyota Production System: Practical Approach To Production Management* (1983), does not mention "teams" at all. See Parker & Slaughter, *supra* note 39, at 27.

744. See Kathleen A. Thelen, *Union of Parts: Labor Politics in Postwar Germany* 205 n.5 (1991).

745. See Turner, *supra* note 571, at 111 & n.27. Specific elements of *Gruppenarbeit* are discussed *infra* Part VII.C.5.a.

746. Turner, *supra* note 571, at 80 & n.44.

747. For useful exchanges among labor officials, activists, and academics, see the papers collected in Dep't of Econ. Res. AFL-CIO, *Worker Participation, Workplace Topics*, Dec. 1991; *Participating in Management: Union Organizing on a New Terrain*, Lab. Res. Rev., Fall 1989 (Midwest Center for Labor Research)[hereinafter *Participating in Management*].

It is not inconceivable that workers afforded self-government in organizational redesign would freely choose to implement Taylorized work processes⁷⁴⁸—to opt, in Elster's distinction, for joint self-realization in decision-making over self-realization in work activity. The degree to which product and labor market pressures and technological constraints facing individual enterprises would encourage such collective self-discipline remains an open empirical question. At the very least, however, labor law reform proposals should learn from the lean-production model's frequent failure to achieve either the predicate of self-governance at the organizational level or other safeguards against the new forms of structural coercion at the team level.

3. *Distorted Deliberation: The Manipulation of Team Communication.* — The potential for instrumental distortion of communication in the team system can be summarized briefly.⁷⁴⁹ If management is committed to avoiding unionization or undermining an existing union, team facilitators/leaders play the central role traditionally assigned to supervisors in anti-union campaigns. Upper management, human-resource staff, and experienced anti-union consultants coach leaders on day-to-day strategies for small-group or one-on-one solicitation against unionization.⁷⁵⁰ The leaders may control the agenda and procedure of team meetings in a way that subtly or overtly diverts the substance and outcomes of group discussion. Managers instruct leaders to raise topics and guide discussions to flush out and isolate pro-union workers, and to signal to undecided workers that the leader considers complainers and malcontents to be misfits or "losers" who are disloyal to both team and organization. Leaders may enlist team-member loyalists in turn to convey the same message.⁷⁵¹ While these practices amount to the direct structural coercion discussed above, they also have distinctly deliberation-distorting effects. They chill pro-union speech and concurrently amplify anti-union viewpoints expressed through formal organizational channels and resources of communication.

Although the potential for such distortion of ideal deliberation is already latent in the supervisory structure of traditional enterprises, it is greater in team workplaces. As already explained, the team structure gives heightened intensity to interpersonal exchanges, especially when teams have elicited the kind of emotional exposure and vulnerability that the typical battery of training programs in trust-building and problem-solving encourages.⁷⁵² The importance of social recognition and accept-

748. Paul Adler, *The "Learning Bureaucracy": New United Motor Manufacturing, Inc.* 63–64 (1991) (unpublished paper, School of Business Administration, University of Southern California).

749. On the concept of distorted communication, see *supra* Part II.B.

750. See, e.g., Grenier, *supra* note 725, at 61–115.

751. See, e.g., Wells, *supra* note 650, at 122.

752. See Wickens, *supra* note 731, at 75–95; *supra* notes 669–686 and accompanying text.

ance by the facilitator or the group may increase both the chilling effect on pro-union speech and the cohesion of team loyalists who now have an obvious common focus for their anger or anxiety: "divisive" union activists. Indeed, the industrial psychologist at one nonunion plant coached facilitators to intensify latent intra-group conflicts and anxiety in order to bolster management's campaign theme that the union's intrusion damaged the plant's collaborative culture.⁷⁵³

At the same time, the formalization of channels of plant communication—"organized intimacy" to use an apt phrase of German researchers⁷⁵⁴—may displace informal networks for discussion among workers.⁷⁵⁵ Whether workers have sufficient alternative opportunities to talk—while working together, during breaks, or before or after the workday—depends, of course, on many variables. But the presence of team leaders and loyalists in collaborative work processes, and the panoptic spatial layout and information technology of many team organizations may constrict the opportunity for worksite discussion free of chilling surveillance.⁷⁵⁶ The facilitator and higher management may also simply rearrange team boundaries or membership, or dismantle teams altogether, in order to impede pro-union solicitation.⁷⁵⁷

The flexible organization has arisen concurrently with a secular social trend in the United States toward the separation of residential from workplace communities.⁷⁵⁸ That separation increases the "transaction costs" of face-to-face persuasion outside the workplace.⁷⁵⁹ In addition, as the workday grows longer and more taxing, the worker's marginal disutility of giving up leisure to engage in stressful talk about unionization increases—particularly among those young parents, mainly women, with child-care responsibilities who are an increasing proportion of the workforce. Pressure to work long unpaid hours to meet high-performance goals often characterizes lean organizations that award merit pay based on organizational commitment and that have no rule-bound con-

753. See Grenier, *supra* note 725, at 16, 48, 108–13.

754. See Berggren, *supra* note 601, at 54 (citing Christoph Deutschmann & Claudia Weber, *Das Japanische "Arbeitsbienen"-Syndrom*, 66 *Prokla* 31, 31–53 (1987)).

755. See Gerard J. Grzyb, *Decollectivization and Recollectivization in the Workplace: The Impact of Technology on Informal Work Groups and Work Culture*, 2 *Econ. & Indus. Democracy* 455, 472–73 (1981) (discussing formalization and displacement of informal work groups).

756. See Grenier, *supra* note 725, at 44–45; Zuboff, *supra* note 646, at 315–86; cf. Dohse et al., *supra* note 627, at 139–40.

757. See, e.g., Grenier, *supra* note 725, at 86.

758. The long-term trend line is punctuated by spikes registering the erasure of entire working class communities during the waves of manufacturing plant-shutdowns in the 1970s and 1980s. See Bluestone & Harrison, *supra* note 662, at 49–85; Katznelson, *supra* note 564, at 6–7, 193–215; Levitan & Johnson, *supra* note 564, at 127.

759. See, e.g., James A. Craft, *The Community as a Source of Union Power*, 11 *J. Lab. Res.* 145, 153–57 (1990) (discussing importance in union organizing of opportunities for extra-workplace communication).

straints on worktime.⁷⁶⁰ Hence, diminished opportunities for low-cost communication outside work may compound restrictions on open deliberation at the worksite.

4. *Hegemony: The Psychological Abuse of Team Process.* — At a general level, the modes of potential ideological transformation in the team organization are similar to those under company unionism.⁷⁶¹ The broad premise—that worker-management consultation in collaborative bodies generates mutual understanding and convergence of perceived interests—is the same. Critics of the legitimacy of such ostensible subjective transformation often explicitly equate the team workplace and old-style company unionism. The specific processes of hegemony, however, have somewhat different psychological inflections in the two organizations because of changes in institutional forms and their distinct historical economic and cultural environments. I shall discuss the potential hegemonic team processes of greatest concern from the standpoint of legal reform.

a. *Naturalization and Universalization.* — My historical survey of company unions in Part IV concluded that they generally did not weave themselves tightly into the daily experience of the worker on the shop or office floor. The team workplace, on the other hand, has greater potential to integrate workers' daily activity—in work processes, social interaction, and organizational decision-making—into the formal structure of organizational control. Such "organized intimacy" is swathed in a thick blanket of organizational culture emphasizing labor's and management's commonality of interests in enterprise performance. That culture is reenacted daily in (1) the *visibility* of physical symbols conveying equality of status and respect, such as common dress, eating and parking facilities, common forms of address, management's shop-floor presence, and open-door spatial layouts; (2) the pervasive *verbalization* of such intangible concepts as trust, commitment, consultation, jointness, coordination, facilitation, and teamwork (as opposed to supervision, orders, and obedience); (3) the continual *performance* of a repertoire of stylized joint-deliberative activities—brainstorming, nominalizing, total quality management, consultative problem-solving (as opposed to adversarial grievance-arbitration), and the like; and (4) the *enactment* of the group's interdependent work process itself, often with the direct participation of the team facilitator, who embodies the team's ostensible "horizontal" collaboration with (rather than vertical subordination to) the organization as a whole.

This daily ensemble of "cooperative" actions and meanings is internalized in three key ways. First, pecuniary and social rewards based on team performance and on evaluations of individuals' commitment to collaboration encourage workers' habituation into that ensemble.⁷⁶² Sec-

760. See Berggren, *supra* note 601, at 34–35; Fucini & Fucini, *supra* note 708, at 154.

761. See *supra* Part IV.F.3.

762. See *supra* note 631 and accompanying text.

ond, direct training or "indoctrination" into these cooperative routines occurs intermittently throughout the employment relation.⁷⁶³ As early as the application stage, which may extend over several days in high-involve-ment workplaces, job candidates enter a series of group role-playing exercises, psychological tests, and problem-solving scenarios—all of which signal the traits and behaviors expected by management in the team culture. Upon hiring, the new employee typically undergoes explicit intensive training in collaborative rather than conflictual interpersonal and problem-solving skills, *kaizen* methodologies, and statistical process control for quality management. During their tenure, employees periodically engage in further refresher rounds of such "process" training.

Third, and perhaps most important, workers internalize collaborative routines and orientations by adaptation to the given, "natural" environment seemingly built on "we" rather than "us versus them" principles.⁷⁶⁴ Individual workers typically have inchoate and mixed expectations when they first enter the confusing and somewhat mythicized environment of the "workplace of the future."⁷⁶⁵ The elaborate framework of routines, symbols, technology, and broad organizational design is not theirs to create—even if they are encouraged to offer constant incremental improvements and to exercise wide discretion within the scope of their team's responsibilities and resources. Recall the remarkable transformation in behavior and attitudes among the NUMMI workforce transferred from a bureaucratic, adversarial institution and culture into a cooperationist organization. The potential potency of naturalization and

763. See, e.g., Fucini & Fucini, *supra* note 708, at 49–121; Mike Parker, *Inside the Circle: A Union Guide to QWL* 9–14, 15–21 (1985); Joop Swieringa & André Wierdsma, *Becoming a Learning Organization: Beyond the Learning Curve* 71–86, 89–124 (1992).

764. The endogenous adaptation of worker commitment to and behavior within institutional structures and culture is captured in the following summary by leading academics who have studied and advised hundreds of team organizations:

In the successful new plants the designers took great care to create the conditions—the anatomy of self-regulation—that must be established if "good" work and the resulting commitment are to be attained. New hires were not special people; for the most part they came from old-paradigm plants in which their jobs were narrow in scope, repetitive, they got too little information, they had no latitude for decision making, all psychological requirements to be met if one is to have an enriching work experience. In the radically different conditions in the new plant an enriching work experience was available at once and, discovering this, the new hires bought-in, took initiatives, and behaved in ways expected of those in a state-of-the-art organization. Commitment was immediately forthcoming. The supervisor, now called something else, could and did behave in a new way because people on the team were committed. The newly hired employees experienced a *discontinuity* in their work life in that they had gone from the "old" in their former employment to the intensely different "new" instantaneously.

Lyman D. Ketchum & Eric Trist, *All Teams Are Not Created Equal: How Employee Empowerment Really Works* 86–87 (1992).

765. See *supra* notes 513–15 and accompanying text.

universalization⁷⁶⁶ in paternalistic team arrangements animates my legal proposals, discussed in Part VII, to facilitate workers' proactive deliberation and participation in broader organizational and technological design and redesign.

b. *The Psychodynamics of Authority and Expurgation of the Other.* — The new forms that the ideological processes of subservience and expurgation⁷⁶⁷ may take in the team workplace are implicit in much of the discussion above. Although important for legal-institutional design, these processes can therefore be described briefly. Many workers in the mass production era supported the company union out of deference to the paternalistic authority of management. Although the wider egalitarian culture today poses greater obstacles to the success of authoritarian or overtly paternalistic management styles,⁷⁶⁸ two aspects of team workplaces have well-documented psychological consequences that enhance the possibility of successful paternalism: their constant occasions for direct face-to-face encounters between workers and an ostensibly or actually benign authority figure (the team facilitator); and their formal, intense small-group interactions.⁷⁶⁹ Team members' orientation to authority is not the same as the individual mass production workers' subservience to, or resentment of, distant corporate figureheads. Within the intimate group, the team member is vulnerable to the more subtle but emotionally charged regressions toward sibling/peer and parental/authority-figure reenactments described above.⁷⁷⁰ Such regressions include both the flight to dependency on the team leader and the bitter "nonrecognition" or expurgation of disloyal, nonconforming members. This is demonstrated vividly by the psychology of "dependency" among some Japanese workers, whose employers have effectively "mobiliz[ed] and penetrat[ed]" the "primary group relationships among workers."⁷⁷¹ In this light, the need for legal safeguards against paternalistic manipulation by team leaders acting at management's behest is great.

c. *Performative and Structural Dissemblance, False Legitimation, and Neutralization.* — The team context also gives an idiosyncratic inflection to the ideological processes of performative and structural dissemblance,

766. See *supra* notes 185–213 and accompanying text.

767. See *supra* notes 236–50 and accompanying text.

768. See *supra* notes 638–40 and accompanying text.

769. See, e.g., Kenwyn K. Smith & David N. Berg, *Paradoxes of Group Life: Understanding Conflict, Paralysis, and Movement in Group Dynamics* 109–51 (1987) (discussing importance of group size and intimacy in group psychodynamics).

770. See *id.*; Sigmund Freud, *Group Psychology and the Analysis of the Ego* 62, 69–70 (James Strachey trans. & ed., 1959); Gillette, *supra* note 654, at 56–60, 117–18. Ouchi's conceptualization of collaborative groups within organizations as "clans" implicitly conveys this psychological reality. See Ouchi, *supra* note 632, at 132. Of course, managers of team workplaces widely deploy the metaphor of "family."

771. Robert E. Cole, *Work, Mobility, & Participation: A Comparative Study of American and Japanese Industry* 250 (1979).

false legitimization, and neutralization.⁷⁷² The discussion above touched on the potential for potent modes of performative and structural dissemblance. Team members may well be unaware of the degree to which team leaders are subtly enacting strategies dictated by upper management rather than facilitating team members to reach self-governing decisions. Team members may therefore exaggerate the legitimacy of "participatory" team decisions and grievance resolutions.⁷⁷³ Similarly, team members may interpret their horizontal coordination of activities with other teams and their redesign of intra-team work tasks as participatory experiences even though their decisions are effectively dictated by the just-in-time work flow or zero-slack norms built into the organizational structure. One analyst sensitive to these subtleties recommends that workers use the more "participatory" *kanban* method of personalized, rather than computerized, requests for inventory or parts among lateral work teams—a pale humanization of structural constraints.⁷⁷⁴

Grievance resolutions may also more readily "neutralize" worker discontent to the extent that naturalization and universalization encourage members to internalize subjective interests that tilt more toward common goals of productivity growth and less toward distributive contests between labor and management. That is, the team organization's reframing of workers' baseline expectations affects the weight they give to the costs and benefits of substantive decisions⁷⁷⁵—in a way that serves management's distributive interests. Workers motivated to cut labor costs, for example, may do so at the expense of employment or by working longer or more intensively: a possible win-lose rather than win-win outcome, depending on how the fruits of such cost-cutting are distributed. The art of managerial "reframing"—a concept used anachronistically above to describe interwar company-union dynamics—has become quite explicit among today's managers.⁷⁷⁶

D. *New Forms of Cultural Contest and Resistance in the Team Organization*

In light of the concurrent potential for greater self-governance and domination in the team organization, it is not surprising that the dialectic of *contested* commitment and trust,⁷⁷⁷ in both its instrumental and cultural forms, is also intensified.

⁷⁷² See *supra* notes 164–84, 251–60 and accompanying text.

⁷⁷³ See Wells, *supra* note 650, at 89–91.

⁷⁷⁴ See Klein, *supra* note 625, at 65.

⁷⁷⁵ For an explanation of how perceptual reframing of baseline expectations can affect workers' valuations of grievance resolutions, see *supra* Part II.C.2.g.

⁷⁷⁶ See, e.g., Lee G. Bolman & Terrence E. Deal, *Reframing Organizations: Artistry, Choice, and Leadership* 3–19, 243–71, 385–402 (1991); Ketchum & Trist, *supra* note 764, at 38–49 (discussing organizational paradigm shifts); Susan A. Mohrman & Thomas G. Cummings, *Self-Designing Organizations: Learning How To Create High Performance* 157–80 (1989).

⁷⁷⁷ See *supra* notes 396–429 and accompanying text.

1. *The Intensified Cultural Contest Over Delegated Trust.* — The high-involvement workplace is much more vulnerable than the company-union workplace to the backlash of worker indifference and resentment, or to runaway legitimation and whetted appetite.⁷⁷⁸ Workers feel betrayed and demoralized if the barrage of participatory training and rhetoric meets the reality of authoritarian team facilitators or other retractions of team autonomy when management faces production crises.⁷⁷⁹ In organizations that have presented the team leader as a working “peer,” team members may feel special resentment when in fact superior authority and status attach to “one of us.” Again, such a backlash is bolstered by the post-War cultural shift to more generalized egalitarian expectations.

High-involvement management not only promises greater participation, but frequently articulates a principle of cumulative delegation of responsibility—promising that the “facilitated” team will mature into a fully acephalous self-managing team.⁷⁸⁰ In other words, the organization not only legitimates participatory norms; it explicitly legitimates runaway legitimation itself and encourages whetted appetites for participation. Managers are highly aware, whether apprehensively or hopefully, of this cultural spiral. As one skeptical auto executive wrote, “[A]fter participation has become a conscious, officially sponsored activity, . . . management’s present monopoly [on decision-making authority] . . . can in itself easily become a source of contention.”⁷⁸¹ A senior executive at Petro-Tex Chemical, more enthusiastic about the payoff from workers’ intrinsic motivation, said:

I don’t know how we’ve been able to keep [workers] from doing [production problem-solving] for so long. It seems like there is an insatiable desire for information I think it’s universal. . . . [Workers] want to know how things are going, first off with the unit, and secondly with the company as a whole.⁷⁸²

Workers’ demoralization—stemming from resentment, runaway legitimation, or whetted desire in the face of continued drill-sergeant “facilitators” and middle management—is one of the most frequent sources of failure in team organizations.⁷⁸³ Consultants now widely warn

778. See *supra* notes 283–329 and accompanying text.

779. See, e.g., Fucini & Fucini, *supra* note 708, at 138–39, 149; Grenier, *supra* note 725, at 91, 97, 195–98; William F. Whyte, Value of Joint Programs Underestimated, *in* *Participating in Management*, *supra* note 747, at 87, 91.

780. See Ketchum & Trist, *supra* note 764, at 87.

781. Thomas H. Fitzgerald, Why Motivation Theory Doesn’t Work, *Harv. Bus. Rev.*, July–Aug. 1971, at 42.

782. John Simmons & William Mares, *Working Together: Employee Participation in Action* 110 (1982) (quoting executive).

783. See Turner, *supra* note 571, at 31–90; William N. Cooke, Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration, 46 *Indus. & Lab. Rel. Rev.* 119, 124–25, 132 (1992); Lorenz, *supra* note 345, at 457.

managers and unions against raising workers' expectations excessively.⁷⁸⁴ But management can also dispel workers' discontent over continued authoritarianism by affording fuller self-governance. In response to such discontent, for example, the Shelby Die Casting Company in Mississippi simply eliminated team facilitators (former supervisors) and let work teams run themselves—followed by large savings in supervisory salaries, a 50 percent increase in productivity, and a doubling of profits.⁷⁸⁵ By the same token, as in the company-union era, workers' bargaining power is enhanced by the very fact that management has put the norm of autonomy and information-sharing on the table—the Pandora's Box Effect.⁷⁸⁶ For example, the management of the Philadelphia Transit System (SEPTA), "[t]rapped by their own rhetoric of cooperation and common interest, . . . could not refuse to discuss [with labor] nonmandatory subjects of bargaining like frequency and routing of service."⁷⁸⁷

2. *New Instrumental and Noninstrumental Capacities for Worker Resistance.* — Apart from workers' capacity to appeal to management's own norm of worker empowerment, the team organization generates several new potential sources of enhanced worker bargaining power. Although many managers may attempt instrumentally and psychologically to manipulate team processes, the heightened communication and collaboration among team workers may instead build peer solidarity that increases the team's muscle in workplace politics.⁷⁸⁸ Again, successful intra-team deliberation that voices and resolves, rather than suppresses, disagreement may enhance such emotional bonds and camaraderie.

Several instrumental features of high-performance workplaces may reinforce these communicative and affective ties. First, for reasons already discussed, a single team may have the power to disrupt extended production flows in just-in-time organizations that lack buffers of intermediate products between teams.⁷⁸⁹ Second, as team design approaches more closely the ideal of high-learning, discretionary work, workers' bargaining power grows, for the familiar reason that idiosyncratically skilled workers are harder to replace than unskilled.⁷⁹⁰ Third, workers have found that their training in problem-solving and interactive techniques for purposes of *team* process is also applicable to building *independent* collective organizations and strategies.⁷⁹¹ Finally, in some high-involvement

784. See, e.g., Klein, *supra* note 625, at 66.

785. See Aimee L. Stern, *Managing by Team Is Not Always as Easy as It Looks*, N.Y. Times, July 18, 1993, at F5.

786. See *supra* Part III.D.3.

787. See Roger Tauss, *Participating in Managing the Philadelphia Transit System*, Lab. Res. Rev., Fall 1989, at 80, 84.

788. See Grenier, *supra* note 725, at 87; *Choosing Sides*, *supra* note 39, at 28.

789. See Kenney & Florida, *supra* note 581, at 136–37; *Choosing Sides*, *supra* note 39, at 28, 45–46; *supra* note 606 and accompanying text.

790. See Charles Craypo, *The Economics of Collective Bargaining* 21 (1986).

791. See Fucini & Fucini, *supra* note 708, at 194.

workplaces, teams have plant-wide breadth;⁷⁹² in others, individuals' rotation among teams parlays team sentiments into plant-wide solidarity.⁷⁹³ Many have pointed out the danger of a race-to-the-bottom among enterprise unions, as the spread of flexible organization encourages the decentralization of collective bargaining. Nonetheless, plant- or enterprise-wide solidarity can in some economic circumstances⁷⁹⁴ afford workers great bargaining power because enterprise-level strikes or slowdowns inflict large costs on individual firms whose competitors continue operation. Indeed, for this reason, in post-War Japan militant unionists unable to achieve industry-wide bargaining made highly effective use of independent enterprise unions, although they were counterposed and finally defeated by managerially controlled enterprise unions.⁷⁹⁵

These are yet further examples of how workers' bargaining power and ultimate distributive share are endogenous to organizational design and ideology. An apparently neutral matter of organizational design may in fact cloak a contest over ultimate bargaining power, distribution, and control. This is the key reason why management may resist productivity-enhancing reorganization—giving strong grounds for policy concern over the legal institutions that shape control over larger organizational design.

E. The Emerging Consensus: Effective Team Participation and Strategic Labor Representation Are Mutually Reinforcing

Which features of enterprise institutions determine whether the democratic and empowering promise of self-managing teams (discussed in Sections B and D) or the pathologies of domination (discussed in Section C) are likelier to prevail? Part VII presents some specific structural indicia that the legal system can deploy in order to distinguish democratic from dominated teams and joint committees. This Section describes a broader institutional feature—which labor law reform can also encourage—of organizations that tend to sustain teams that are relatively free of structural coercion, distorted communication, and psychological manipulation.

Over the last decade, the evidence has mounted that neither frontline workers' participation in teams nor employee representation (via unionization, sufficiently empowered joint committees, or employee ownership) in strategic organizational decision-making alone is likely to

792. See, e.g., Thomas D. Rankin, *New Forms of Work Organization: The Challenge for North American Unions* 69–72 (1990) (describing plant-wide teams that run Shell Sarnia chemical processing plant).

793. See Aoki, *supra* note 634, at 40, 45–46.

794. This occurs, for example, when an enterprise operating in relatively competitive markets cannot credibly threaten to move the work because of sunk capital or lack of allied facilities.

795. See Andrew Gordon, *The Evolution of Labor Relations in Japan: Heavy Industry, 1853–1955*, at 341–45 (1985); Kenney & Florida, *supra* note 581, at 128.

achieve the full productivity-enhancing and democratic promise of the high-involvement workplace. The two processes, rather, are mutually dependent and synergistic. Worker representatives, if afforded meaningful power, can ensure the organization's delegation of wide authority to self-managing teams. High-discretion teams, in turn, may provide rank and file workers with the countervailing power and information necessary to ensure that their representatives are accountable and able to convey to management at least the latent threat of employee mobilization, such as strike action. This thesis, advanced by a prominent Sloan School empirical study in the mid-1980s,⁷⁹⁶ is supported by a wave of sophisticated large-sample and case studies still swelling in the last year.⁷⁹⁷ There are several interrelated explanations for this finding.

1. *Credible Managerial Commitment to the Fair Distribution of Costs, Rewards, and Risks.* — As we have seen, flexible teams systematically expose employees to predictable vulnerabilities in the distribution of instrumental costs and benefits. Work teams that dispense with traditional job-classification and assignment rules expose workers to two increased input costs: intensified work effort (through either speed-up or task-loading) and the disutility of super-Taylorized, routinized work.⁷⁹⁸ Work teams that implement a "salaried" model of noncontractual work-schedules expose workers to the additional input cost of longer hours.⁷⁹⁹ Organizations that reward workers according to competitive team and individual performance—rather than predetermined formulas for gain-sharing or the traditional tying of wages to job classification or seniority—reinforce these vulnerabilities to increased labor extraction.

As for the distribution of enterprise risks and revenue, the flexible organization potentially exposes workers to greater employment insecurity. Relaxed seniority protections and more flexible enterprise and job boundaries may enhance the risk of job loss for the median worker (while potentially lowering the risk for young workers or for core workers who are still yielding their productive return on the firm's investment in human capital).⁸⁰⁰ Workers' vulnerability to management's discretionary

796. See Kochan et al., *supra* note 641, at 146–205.

797. See, e.g., Eileen Appelbaum & Rosemary Batt, *The New American Workplace: Transforming Work Systems in the U.S.* (1994); Edward E. Lawler III, *The Ultimate Advantage: Creating The High-Involvement Organization* 307–22 (1992); Michael A. Conte & Jan Svejnar, *The Performance Effects of Employee Ownership Plans*, in *Paying for Productivity*, *supra* note 631, at 143; Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in *Unions and Economic Competitiveness* 247, 276–77 (Lawrence R. Mishel & Paula B. Voos eds., 1992) (conclusions of study of 1000 union and nonunion plants); Levine & Tyson, *supra* note 631.

798. See *supra* notes 726–747 and accompanying text.

799. See *supra* note 731 and accompanying text.

800. See Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. Pa. L. Rev. 1349, 1355–64 (1988) (explaining why employers have incentive opportunistically to fire older, less productive

allocation of work is enhanced by the lapse both of the direct constraints of seniority rules, and of the large indirect disruption costs imposed by the cascading of workers who exercise their "bumping" rights when management reallocates work under seniority systems.⁸⁰¹ Further, to the extent that the flexible organization succeeds in enhancing output per worker—either through more intense or longer labor per worker or through heightened intrinsic motivation or *kaizen* improvements—the fruits may be lost to workers who are casualties of consequent downsizing. At the same time, the power of the remaining workforce to bargain for a share of such increased value-added may diminish due to management's enhanced instrumental and noninstrumental opportunities for dominating teams and for weakening the union threat.

Workers will more willingly expose themselves to these hazards if they are entitled to information and meaningful representation at the enterprise levels that decide how the costs and benefits of increased flexibility are distributed.⁸⁰² Such information and representation rights—if sufficiently secured by union bargaining power, law, entrenched norms, or trust—enable management credibly to commit to safeguarding workers against super-Taylorism, speed-up, forced overtime, and unfair employment insecurity and distributive shares. Management's credible commitment, in turn, frees workers to contribute continuous improvements and creative initiative with the assurance that the costs and benefits will be fairly distributed among stakeholders.

2. *Credible Managerial Commitment to the Cumulative Delegation of Authority.* — We have also seen that management can undermine the promise of flexible teams by retaining or readily restoring authoritarian shopfloor practices that belie the rhetoric of worker participation. "At plant after plant, workers have proven willing to give up job classifications in return for promises of new participation—only to return from training programs to the shop floor, where their raised expectations are dashed by old-fashioned . . . authoritarian shopfloor approaches and a broader pattern of adversarial management."⁸⁰³

There are several explanations for management's unwillingness to relinquish its command-and-control authority. The first is simple cultural lag among managers socialized in bureaucratic folkways. The cognitive leap to uncertain paradigms of fluid organizational structure and new understandings of individual motivation—especially when those para-

workers from whom firm has already recouped its match-specific human capital investment).

801. See Michael J. Piore, *A Critique of Reagan's Labor Policy*, Challenge, Mar.-Apr. 1986, at 48, 48-49.

802. See Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, in *Unions and Economic Competitiveness*, supra note 797, at 173, 176, 199-201; Levine & Tyson, supra note 631, at 209.

803. Turner, supra note 571, at 22 n.15; see also Fucini & Fucini, supra note 708; Babson, supra note 720, at 8.

digms entail dramatically new roles for managers themselves—is difficult.⁸⁰⁴ Those managers who have been rewarded for successfully enacting the social routines and professional techniques for climbing the traditional bureaucratic hierarchy may also feel a self-justifying commitment to their reenactment. One perhaps surprisingly widespread aspect of contemporary bureaucratic managerial culture—which bears the traces of the harsh belief of interwar management that mass-production workers were a dim and untrustworthy subspecies⁸⁰⁵—is a self-fulfilling devaluation of the knowledge and initiative of the average employee.⁸⁰⁶

Second, what economists widely recognize as management's "taste" for power is well-confirmed in the clinical and theoretical study of the psychology of authority. To speak of the "addictiveness" of power is barely hyperbolic—especially for those managers whose weak self-esteem or domineering ego feeds on subordinates' idealizing adulation or abasement.⁸⁰⁷ It is not surprising, then, to hear old-style managers concede that their unilateral delegation of responsibility to the lower echelons of enterprises is as improbable as an oligarchy's voluntary relinquishment of political power.⁸⁰⁸

Third, management's cultural and psychological inertia is built atop a solid foundation of apprehension about the distributional consequences of dramatically delegating authority. For reasons discussed above, management may plausibly fear that reorganization will legitimate and whet workers' appetite for cumulative empowerment, and will enhance workers' instrumental bargaining power by creating skilled teams capable of crippling zero-slack production processes.⁸⁰⁹ Managers, even if convinced that a decentralized organization will raise productivity, may anticipate that the redistributional consequences will dominate the surplus-enhancing effects.⁸¹⁰ For similar motives, management may retain excessive hierarchical control of teams in order to implement the various coercive or paternalistic means of deflecting workers' choice of governance modes.⁸¹¹ That is, management may want to maintain, if only in reserve, the capacity to use the team infrastructure as an anti-union political machine—to preempt redistribution of bargaining power in labor's favor.

Finally, building a "learning organization" may have high up-front costs and backloaded benefits. Those benefits may be the "public

804. See Ketchum & Trist, *supra* note 764, at 38–52; Lawler, *supra* note 797, at 323–24, 328–32; see also William G. Dyer, *Team Building: Issues and Alternatives* 9–20, 52–53, 155–58 (2d ed. 1987).

805. See Bendix, *supra* note 35.

806. See Fox, *supra* note 648, at 102–14; Simmons & Mares, *supra* note 782, at 110.

807. See Kets de Vries, *supra* note 711, at 123–27.

808. See *infra* note 926.

809. See *supra* Part V.D.

810. See *supra* Part V.D.

811. See *supra* Part V.C.2–3.

goods"⁸¹² of returns on non-firm-specific human capital that fluid enterprises cannot capture and therefore undersupply. At the same time, individual employees may be reluctant to invest in high-discretion work and organizational skills until firms are widely designed to reward them.⁸¹³ The typical start-up costs include not only intensive training programs in problem-solving techniques, statistical process control, social interaction, and substantive skills, but also the impasses and trial-and-error that characterize the infancy of self-designing teams.⁸¹⁴ Indeed, management's premature intervention into substantive team decision-making and abandonment of (or incompetence in)⁸¹⁵ its difficult new role as process-facilitator recurrently spell the early demise of high-performance experiments.⁸¹⁶ When managerial performance is evaluated by indices that emphasize short term results, the tripwire for premature intervention is even more sensitive.

As with assuring management's credible commitment to fair distribution of costs and benefits, so with its commitment to decentralization of authority: employees must be entitled to a meaningful role in organizational decisions over delegation and retraction of responsibility to frontline teams. Employees' strategic representatives, if sufficiently empowered, can ensure that unexpected or unfair retraction does not occur—as the exercise of the union's bargaining power at Saturn has exemplified.⁸¹⁷ Continued delegation of responsibility also often depends on elements of technological and organizational design that constrain the scope of discretion and skill in the team's work process.⁸¹⁸ This is yet another reason that worker representatives must have the proactive capacity influentially to participate in the most basic decisions over technological and organizational design and redesign.

3. *Promoting Employees' Capacity to Monitor and Empower Their Representatives.* — If employees' meaningful representation in strategic decision-making encourages their robust participation in high-discretion frontline teams, the reverse also holds. Employee representatives are more likely to be held accountable by rank and file employees who have broad knowledge of the sociotechnical system and who feel challenged to participate

812. I use "public goods" in the economist's sense of goods that are inefficiently undersupplied by competitive markets.

813. Cf. Putterman, *supra* note 631 (noting similar collective-action problems in transition to worker-managed enterprises).

814. See Appelbaum & Batt, *supra* note 605, at 48 (showing high training costs); Mohrman & Cummings, *supra* note 776, at 105–54 (detailing complex learning curve in high-performance organizations).

815. Paradoxically, such incompetence may take the form of management's failure to intervene sufficiently to support team processes with necessary resources and goal-clarification. See Hirschhorn, *supra* note 578, at 9–75.

816. See sources cited *supra* notes 776, 780–785, 803–806.

817. See Rubinstein et al., *supra* note 613, at 356–57.

818. See Berggren, *supra* note 601, at 232–56.

actively in workplace problem-solving.⁸¹⁹ At the same time, skilled, cohesive teams are likelier to have the bargaining muscle to back up representatives' influence in joint committees at higher organizational levels.⁸²⁰ These propositions, of course, are similar to the premises of the "mobilizing" model of democratic unionism that has long been practiced and urged by union activists.⁸²¹ That model sees the constant nurturing of participatory, face-to-face groups of union members and elected shop-floor stewards as the foundation both of unions' bargaining power against management and of unions' democratic responsiveness to the membership.⁸²² Recently, labor movement activists and officers have attempted to weave together the mobilizing model of unionism and the participatory approach to empowering employee representatives on joint strategic committees.⁸²³ The shopfloor mobilization program of the Communication Workers of America is one of the most successful and highly visible exemplars of such creative efforts.⁸²⁴

Hence, strategic democratic representation and active shopfloor participation are mutually dependent. If work team practices and culture are coercively or paternalistically integrated into managerial structures, employee representatives are likelier to be weak and ineffective protectors of frontline workers' responsibility and autonomy, risks and rewards. Witness Japanese lean production and consultative committees, or North American instances of lean production coupled with anti-unionism.⁸²⁵

F. *Summary*

There is more than a whiff of self-promotion and faddishness in the current avalanche of managerial writing (both academic and practical) extolling team and joint-committee work-systems. Nonetheless, the instrumental and noninstrumental grounds for efficiency gains canvassed in Sections B and C are now supported by a stock of quantitative analyses, case studies, and qualitative management surveys showing improved pro-

819. See, e.g., Turner, *supra* note 571, at 80-81 (describing link between shopfloor group structures and active representation in strategic decision at auto plant).

820. See *supra* notes 777-95 and accompanying text. A good example is team members' shopfloor action—in the form of slowdowns and various symbolic protests—against perceived product quality deterioration at the Saturn plant in 1991. See Rubinstein et al., *supra* note 613, at 354-55.

821. The "mobilizing" or "continuous organizing" model contrasts with the "service" or "business" model under which unions are relatively nonparticipatory entities that provide services to individual employees.

822. See the papers collected in *An Organizing Model of Unionism*, Lab. Res. Rev., Spring 1991 (Midwest Center for Labor Research).

823. See Andy Banks & Jack Metzgar, *Participating in Management: Union Organizing on a New Terrain*, Lab. Res. Rev., Fall 1989, at 1, 24-58 (recounting several case studies and proposing general model); Tauss, *supra* note 787, at 80-86 (describing such efforts by a Transport Workers local).

824. See Morton Bahr, *Mobilizing for the '90s*, Lab. Res. Rev., Fall 1989, at 59, 59-65.

825. See *supra* Part V.C.2-4.

ductivity, quality, and innovation from enhanced employee involvement.⁸²⁶ At the very least, the empirical evidence allows the conclusion that properly designed team-based organizations equal, and likely exceed, traditional organizations' capacity to develop and exploit new technologies and products across a broad range of fast-changing sectors.⁸²⁷ The most comprehensive cross-national industrial study ever undertaken (MIT's worldwide auto study) predicts confidently that the Japanese model of team production is applicable to every industry in all countries and is destined to "become the standard global production system of the twenty-first century."⁸²⁸ Although this universalist claim is dubious,⁸²⁹ the burden of proof as to the inherent inefficiency of dramatically debureaucratized production now rests with defenders of traditional hierarchical management.⁸³⁰

Section E showed, nonetheless, that team production is much likelier to achieve lasting and significant efficiency gains when embedded in comprehensively reorganized, high-involvement firms and networks—and that there is substantial institutional and cultural resistance to diffusion of such firms via market forces.⁸³¹ More important, however, for those, like myself, who put greater weight on the democratic governance and radical pragmatist goals of labor law, flexible team production has misfired badly in certain recurrent institutional, cultural, and strategic contexts, as discussed in Sections C and D.

The remainder of this Article prescribes a reconstructive legal program designed simultaneously to diminish the potential pathologies and to overcome the obstructions to the diffusion of high-learning, democratic enterprises. First, the law should develop indicia that distinguish dominated from democratic self-managing teams and joint committees. Such indicia should include the responsibilities and selection-process of team and committee facilitators, the availability of specific human-capital resources for team and committee members, and the appropriate incentive structures and informational flows that influence the relative decision-making authority of the team or committee vis-à-vis the larger organization. Second, legal policy should encourage the structural synergies between employees' strategic representation and their nondominated team participation. Third, legal reform should facilitate

826. See Appelbaum & Batt, *supra* note 605, at 27–41 (reviewing case studies); see Bluestone & Bluestone, *supra* note 616, at 174–79 (reviewing case studies); Lawler et al., *supra* note 604, at 57–59 (surveying management views); Levine & Tyson, *supra* note 631, at 183–204.

827. Robert B. McKersie & Richard E. Walton, *Organizational Change*, in *The Corporation of the 1990s*, *supra* note 581, at 244, 244–76; see also *supra* Part V.B.

828. Womack et al., *supra* note 577, at 8, 256, 278.

829. See *supra* notes 744–745 and accompanying text.

830. See Osterman, *supra* note 612, at 232.

831. The vast empirical literature demonstrating that tenacious sociological and psychological forces generally cause labor markets to deviate from the neoclassical ideal of competitive markets is cited and summarized in Barenberg, *supra* note 31, at 1475–89.

proactive employee participation in the most basic aspects of organizational and technological design to ensure that structural coercion, distorted communication, and psychological manipulation are not "naturalized" in the enterprise structure.

Fourth, the traditional function of labor law—protecting workers' choice of collective empowerment—should be fortified, in part by linking that function with the provision of the public goods of worker and managerial resources and skills to enable nondominated participation in newly flexible labor markets and high-learning, rapidly reconfiguring organizations and networks. Fifth, both the new rules of workplace governance and the administrative regime that implements them should affirmatively encourage—through instrumental and cultural means—high-trust, consultative modes of workplace problem-solving and grievance resolution. Such consultative processes reinforce the cumulative erosion of the boundary between managerial conception and employee execution of organizational tasks. Finally, the new administrative regime should be sufficiently flexible and decentralized to accommodate wide variance, experimentation, and temporal change among the nondominated participatory institutions that are most appropriate to different economic sectors and enterprises.

Before presenting my reform proposals in Part VII, Part VI explains why the leading recent proposals for even far-reaching reform are unlikely substantially to achieve these programmatic goals.

VI. THE PROMISE AND LIMITATIONS OF LEADING PROPOSALS FOR LABOR LAW REFORM

The analysis thus far suggests that, in order to spur the diffusion of nondominated, participatory innovations in flexible work relations, legal policy should be attentive both to filling the employee "representation gap" in workplaces and to preventing pathologies in shopfloor control. The emerging, rough consensus among many of the foremost United States labor law scholars concords with half of this diagnosis. The academic response to the crisis of labor law has focused on ways to restore union representation to wider sectors of the national workforce, to extend the scope of bargainable topics to include strategic corporate matters, to ease unions' or other employee agents' legal capacity to play representative roles in strategic corporate echelons, or to mandate representative committees or works councils in all workplaces. At the same time, many of the scholars most concerned about worker empowerment and democracy have registered their support for deregulation of management-implemented participation and representation schemes—that is, for repealing Section 8(a)(2).

The arguments offered by those who favor repeal of Section 8(a)(2) fall into two categories. Some commentators and judges assert that the collaborative workplaces of the 1990s simply have positive economic and psychological consequences for workers and firms, or at least no substan-

tial illegitimate consequences.⁸³² The circuit courts that have freed management unilaterally to implement collaborative schemes effectively adopt a strong presumption that employees favor such schemes and often state explicitly that labor-management cooperation makes economic sense.⁸³³ The analysis in Part V above of the potential for domination in team workplaces challenges these assertions and assumptions.

Others favor repeal of Section 8(a)(2) as part of a package of legal reforms aimed at easing workers' choice of unionization or at mandating other forms of employee representation along the lines of European works councils.⁸³⁴ These reforms, the argument goes, would legitimate a legal presumption that workers who decline to adopt unions or participate in independent works councils are content with any extant management-established collaborative scheme.⁸³⁵ Repeal of Section 8(a)(2) would also provide a political bargaining chip to induce employer lobbyists to acquiesce in these concurrent pro-labor reforms.⁸³⁶ Assessment of this argument for repeal of Section 8(a)(2) turns on at least three issues. The first is the likely effectiveness of the proposed revisions in the regime that regulates the conditions within which workers choose among workplace governance modes, and in the choice-set of modes of employee representation legally available to workers. This Part measures the likely effectiveness of these policies by their proponents' own goals: namely, safeguarding workers' free association and encouraging the adoption of representative institutions with greater bargaining power and with the ca-

832. See Estreicher, *supra* note 524, at 55; Samuel Estreicher, Some Reflections on the Future Development of Collective Representation and Individual Rights in the Workplace, in *Proceedings of N.Y.U. 45th Ann. Nat'l Conf. on Lab.* 163, 172-73 (Bruno Stein ed., 1993); Jackson, *supra* note 524, at 845; Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 *Yale L.J.* 2767, 2805 n.169 (1991) (reviewing Weiler, *Governing the Workplace*, *supra* note 3); Theodore J. St. Antoine, *The Legal and Economic Implications of Union-Management Cooperation: The Case of GM and the UAW*, in *Proc. of N.Y.U. 41st Ann. Nat'l Conf. on Lab.* § 8-1 (Bruno Stein ed., 1988).

833. See cases cited *supra* note 568. The strength of the presumption is clear in these courts' case-by-case inquiries into whether workers have shown dissatisfaction with management-implanted cooperative schemes. The courts simply credit workers' compliance in the face of management requirements of participation, or workers' approbation proffered publicly in the presence of managerial representatives eager to install the schemes. These are precisely the contexts that Wagner and the early interpreters of Section 8(a)(2) found objectively unsuited to free expression of worker preferences. Indeed, in one leading circuit decision, the court failed to mention evidence credited by the Board that, shortly before employees "approved" a cooperative scheme in managers' presence, a senior manager threatened and even physically assaulted an employee who supported outside unionism. Compare *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974) with *Hertzka & Knowles*, 206 N.L.R.B. 191, 193 (1973).

834. See Weiler, *Governing the Workplace*, *supra* note 3, at 225-306; Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 *Harv. C.R.-C.L. L. Rev.* 39, 51 n.33 (1988).

835. See Weiler, *Governing the Workplace*, *supra* note 3, at 218.

836. See *id.* at 215.

capacity to influence strategic corporate decisions. A second issue is whether the proposed reforms embody the expanded normative standard of "egalitarian deliberation," which, as I argued above, is more appealing as the legal measure of free group choice—and more concordant with Wagner's own progressive pragmatism—than is the Board's longstanding concept of "laboratory conditions."⁸³⁷ The third question is the extent to which proposed wider reforms may facilitate not only freer worker choice and more empowered representation, but also the sorts of qualitative transformations in work relations summarized at the end of Part V—that is, legal revisions that would encourage the spread of high-learning, collaborative workplaces but minimize their potential for structural coercion, distorted communication, and psychological manipulation.

Hence, in order to evaluate the particular question of the most desirable regulation or deregulation of workplace *cooperation* schemes, I must intervene in the wider debate over *comprehensive* reforms for fortifying the central functions of the New Deal labor law policy—the functions of enhancing worker representation and protecting workers' group choice of workplace governance modes. We shall see that the conceptual nuances of domination and opposition, and the detailed analysis of current collaborative organizations, discussed above in Parts II-V, have important implications for this more comprehensive debate.

Section A offers a quick theoretical overview of how the legal regime currently influences workers' communication and choice over workplace governance modes. Section B then enumerates the widespread proposals, which I generally support as minimal or second-best reforms, for filling the representation gap. Section C explains why I believe that these proposals are insufficient to accomplish their end fully—why, that is, even more robust legal reform is necessary merely to provide workers adequate freedom to choose *representational* structures. I further explain why my diagnosis of the problem of domination through management-created *collaborative* structures likewise requires comprehensive labor law reforms that differ from those proposed by other labor law commentators. In Part VII, I outline my more robust reform proposals for securing workers' egalitarian deliberation and empowered representation. I also offer an alternative to simple repeal of Section 8(a)(2) that is designed to discourage dominated cooperative schemes and encourage nondominated participation.

A. *The Legally Constructed Context of Workers' Collective Communication and Action*

There is a lively, long-running debate over whether employer unfair labor practices—particularly violations of Section 8(a)(3) by discharges of union supporters—bear much responsibility for the decline in the percentage of private-sector workers who are unionized (so-called "union

837. See *supra* Part II.B.1.

density") from about thirty-seven percent to less than twelve percent between 1953 and 1993, and for the attendant dramatic drop in the rate at which unions win NLRB elections.⁸³⁸ In my view, the available econometric and qualitative evidence supports Professor Weiler's recent reaffirmation that "the rise of employer reprisals—particularly discriminatory discharges—against union supporters is one of the important reasons why private sector union representation has declined so sharply over the last three decades."⁸³⁹ Indeed, about eighty percent of the public

838. A recent volley includes: Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953 (1991); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 59 U. Chi. L. Rev. 1015 (1991); Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. Chi. L. Rev. 681 (1992).

839. Weiler, *supra* note 838, at 1030. Several econometric studies show that, contrary to widespread belief, structural and demographic changes account for only a small fraction of the decline in unionization rates. See Henry S. Farber, *The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?*, 8 J. Lab. Econ. S75 (1990); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 Indus. & Lab. Rel. Rev. 351, 351 (1990). At the same time, highly conservative data show that today one employer out of three fires pro-union workers in the union election campaigns that precede NLRB elections, and that one out of every thirty-six pro-union voters can expect to be fired. In the late 1960s, already a decade after the sharp increase in employer illegalities began, the rates were one employer out of twelve and one voter out of two hundred. See Weiler, *supra* note 838, at 1027. It is thus not surprising that 70% of nonunion workers believe that some, and 40% believe that their own, employers would fire or otherwise penalize pro-union workers. See *id.* Meanwhile, pro-union ballots in NLRB elections dropped from 75% of eligible voters in the late 1950s to less than 40% today. See *id.* at 1018. Unions generally begin election campaigns with a "showing of interest" (i.e., employee-signed cards authorizing union representation) of well over 50% of workers. But, for every additional week that (now routinely retained) legal consultants are able to stretch out an employer's anti-union campaign, employers succeed in lowering union win rates by predictable margins. See Weiler, *Promises to Keep*, *supra* note 3, at 1777 n.24. Almost 60% of the difference between Canadian and United States union densities is explained by such "supply-side" factors as employer resistance and other collective organizing costs, rather than by lack of employee interest in unionization. See Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues* 31 (National Bureau of Economic Research Working Paper No. 4216, 1992).

While private sector unionization has plunged, public sector workers, who do not face aggressive anti-union campaigns, have unionized at "European" rates—increasing to approximately 37% in 1991. See *id.* at 1. This difference is unlikely explained by the hypothesis that workers believe that unions can gain less from private employers because their product and capital market constraints are tighter than public employers' budget constraints. In fact, the public-sector union wage premium is less than that in the private sector. See H. Gregg Lewis, *Union/Nonunion Wage Gaps in the Public Sector*, in *When Public Sector Workers Unionize* 169, 169–94 (Richard B. Freeman & Casey Ichniowski eds., 1988). In any event, although popular belief may not match the latest counter-intuitive econometric findings, the latter show that the degree of employer resistance to collective bargaining is not inversely correlated with industry levels of economic rents available to share with workers. See John M. Abowd & Henry S. Farber, *Product Market Competition, Union Organizing Activity, and Employer Resistance* (National Bureau of Economic Research Working Paper No. 3353, 1990). That is, public sector workers could

believes employers are likely to fire workers for engaging in union activity, even though between seventy-five percent and eighty-two percent believe that unions remain "the best instrument" for improving wages, job security, and grievance-resolution.⁸⁴⁰ Neither the leading reform proposals nor my more expansive program, however, turns on this contested issue. At the very least, such outright employer coercion is but one manifestation of the legal regime's woeful failure to protect workers' freedom of association. Far from creating "laboratory conditions" for free worker deliberation and choice, the legal system constructs an almost tragicomic antithesis of the ideal of egalitarian communication. The long doctrinal story is so familiar to students of labor law that I will present here only its skeletal theoretical structure.⁸⁴¹

The law's default position in the employment contract is nonunion governance—from the employees' point of view, that is, authoritarian governance. This has two fundamental consequences. First, union density tends toward "natural" decline, as old enterprises close and new ones open. Some of the former are unionized; all of the latter are not.⁸⁴² This

not accurately anticipate less employer resistance to union gains by reason solely of softer budget or market constraints.

Although a (fairly crude) survey has shown a decline in the percentage of nonunion workers who say they would vote for unionization, see Farber & Krueger, *supra*, at 8, this is consistent with the pervasive climate of fear—over "hardball" bargaining, turmoil, and individual or mass job loss—that employers cumulatively convey in their anti-union campaigns and that the mass media tend to reinforce. See William J. Puette, *Through Jaundiced Eyes: How the Media View Organized Labor* 32–45 (1992); Douglas L. Leslie, Comment, *Retelling the International Paper Story*, 102 *Yale L.J.* 1897, 1906 (1993). It is also consistent with endogenous preference transformations—or genuine preference-satisfaction—by the sophisticated nonunion human-resource models discussed *supra* note 512 and accompanying text and *infra* notes 888–892 and accompanying text. In any event, as of the late 1980s, a Gallup survey showed that 75% of workers still thought unions were the best instrument with which to increase wages and job security, 82% thought the same about complaint- and grievance-resolution, 69% agreed that "labor unions are good for the nation as a whole," and 81% supported workers' right to unionize. Gallup Poll, *Public Opinion and Knowledge Concerning the Labor Movement* (1988); accord Fingerhut/Powers, *National Labor Poll* (1991). Workers themselves, therefore, do not seem to share the widespread view among even liberal opinion-making elites that unions *per se* are an obsolete or retrograde social force, even if they are aware of unions' decreasing actual effectiveness in the current economic climate. See *infra* notes 840, 905–906 and accompanying text. Indeed, workers mistakenly believe that 45% of the workforce remains unionized. See Gallup Poll, *supra*.

840. See Fingerhut/Powers, *supra* note 839.

841. For the longer story, see, e.g., William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (1993); Weiler, *Promises to Keep*, *supra* note 3; Robert E. Williams, *NLRB Regulation of Election Conduct* (rev. ed. 1985). A colorful recent exposé is offered in Martin Jay Levitt, *Confessions of a Union Buster* (1993); see also Alfred T. DeMaria, *How Management Wins Union Organizing Campaigns* (1980).

842. See Michael Goldfield, *The Decline of Organized Labor in the United States* 79–81 (1987). This simple model, of course, ignores many variables that might counter the tendency toward union attrition. That tendency might be reversed, for example, if nonunion firms close at a greater rate than they open as a result of competition by existing

natural decline is reinforced by various legal doctrines. The law of successorship embodies easily satisfied standards that allow purchasers of unionized enterprises to operate nonunion.⁸⁴³ Unfair labor practice rules allow employers to shift capital out of unionized plants to reap lower labor costs at nonunion operations so long as the employer is not motivated by hostility to unionism *per se*.⁸⁴⁴

Second, employees have to overcome the free-rider problems and bear the other transaction costs of collective action if they wish to unionize, whether by contractual consent of the employer or by NLRB election procedures. The principle of free association does not mandate this structure. As Weiler has noted, workers' "freedom of choice" would be just as well secured if the default position—what he calls the "natural" state—were unionization.⁸⁴⁵ Workers would then have to bear the transaction costs of collective action if they wanted to choose the authoritarian nonunion state; and the tendency toward attrition in union density as enterprises closed and opened in a growing economy would diminish.⁸⁴⁶

The background legal regime not only determines that employees bear the costs of the unceasing collective organizing necessary merely to maintain a constant level of union density, but also pervasively influences the magnitude of those costs. First, the law constructs an intertemporal market failure. Employees who, as union pioneers and activists, risk their careers and bear other material and psychic costs cannot generally capture the stream of benefits flowing to workers who subsequently enter the already unionized workplace.⁸⁴⁷ Second, the employer initially creates

unionized firms. The empirical evidence suggests, however, that unionization raises labor costs more than it raises productivity. See Freeman & Medoff, *supra* note 7, at 162–90; cf. Barry T. Hirsch, *Labor Unions and the Economic Performance of Firms* 35–66, 91–111, 115–25 (1991) (arguing that unions cause lower profits and have inconclusive effects on productivity). Hence, nonunion firms will tend to out-compete unionized firms in product markets, and capital suppliers have incentives to escape the unionized sector to avoid a diminished absolute distributive share even if the joint surplus available to labor and capital is maximized under unionization.

843. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (clarifying that successor can escape union by not retaining a majority of predecessor's workforce or by implementing other substantial discontinuity in operations).

844. See, e.g., *Textile Workers Union v. Darlington Mfg.*, 380 U.S. 263 (1965) (holding that the closing of a plant is an unfair labor practice only if intended to chill unionism); *NLRB v. Adkins Transfer Co.*, 226 F.2d 324, 327–28 (6th Cir. 1955) (holding that the closing of a unionized department is not an unfair labor practice if the motive is purely economic).

845. See Weiler, *Governing the Workplace*, *supra* note 3, at 114–15. Indeed, as discussed *infra* notes 954–957 and accompanying text, a unionized setting is likely to afford greater protection of worker choice over governance modes than a nonunionized setting.

846. Again, this would hold true under very simplified assumptions. See *supra* note 842.

847. See Farber, *supra* note 839, at S80. Union dues and fees generally cannot capitalize the benefit stream from union employment. See John Raisian, *Union Dues and Wage Premiums*, 4 J. Lab. Res. 1, 1–18 (1983).

the collective environment into which individual employees (generally, to repeat, having fluid expectations) enter, adapt, and are socialized. Indeed, by reason of background property rights and endowments enforced by the legal regime, employers typically have sufficient bargaining power vis-à-vis individual workers to impose application, screening, and training/socializing requirements. Thus, the workplace "sovereign" often has some latitude to choose the kinds of "subjects" it wants, and the profession of industrial psychology aids the employer in attempting to assemble a compliant complement of subordinates.⁸⁴⁸

Third, the legal regime vests employers with sufficient bargaining power to control the physical and communicational life of the workplace. The employer has access to workers throughout their working hours for mandatory one-on-one, small-group, or mass-assembly transmission of anti-union messages.⁸⁴⁹ The hierarchy of supervisors—who can be peremptorily fired if they fail to implement the anti-union campaign to upper management's satisfaction⁸⁵⁰—affords a ready-made political machine for this purpose. The employer may ban all other speech about workplace governance except during work breaks,⁸⁵¹ and may spatially arrange the work process to limit employee interaction. Because background legal entitlements and endowments also enable employers to control enterprise information and strategic decision-making authority,⁸⁵² employees are unable to evaluate fully an employers' prediction or intimation of the dire consequences of unionization.⁸⁵³ Against this backdrop of asymmetric information, the law frees employers even to make egregious, deliberate factual misrepresentations at the eleventh hour of the union campaign.⁸⁵⁴

Employees may confidentially communicate among themselves and with union organizers outside the workplace and on their own time, but they nonetheless run the risk that management will ascertain who the union activists are. Aside from possible retribution, the transaction costs of identifying,⁸⁵⁵ contacting, assembling, and intruding on the leisure (or

848. See, e.g., Gordon F. Shea, *The New Employee: Developing a Productive Human Resource* (1981); John P. Wanous, *Organizational Entry: Recruitment, Selection, and Socialization of Newcomers* (1980).

849. See *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992) (requiring that Board allow employers to ban union organizers' access even to employer-owned parking lots otherwise open to the public); *NLRB v. United Steelworkers*, 357 U.S. 357 (1958) (affirming Board's denial of union access to company property to reply to employers' captive-audience speech).

850. See *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982).

851. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

852. See Putterman, *supra* note 98, at 172–86.

853. The Board permits such predictions, so long as the employer dresses them not as willful retribution but as the employer's "belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

854. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982).

855. The law affords unions lists of employee names and addresses only after the NLRB has directed an election. See *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966).

domestic work) time of employees may be large if not prohibitive—especially, as noted above, in a historical period when work and residential communities are not congruent and when the workforce includes many parents with child-care responsibilities. Employees attempting to mobilize collective action have no equivalent to management's power to mandate employees' attendance at repeated captive-audience speeches.⁸⁵⁶

The legal regime's construction of employers' and employees' communicational opportunities may also convey important symbolic messages. Employees may perceive the union organizer—relegated by law to meet furtively with employees at local watering holes, to intrude on workers' non-work lives, to stand on the shoulders of public highways attempting to hand leaflets to cars as they exit employee parking lots—as a subversive, unauthoritative character compared with the well-oiled, legally sanctioned campaign machinery of the employer. Even the Board has recognized that its legal regime is grossly skewed against pro-union employee communication.⁸⁵⁷

Finally, the employer controls many aspects of the individual employee's short- or long-term fate. A union activist may discount an employer's capacity for future retribution by the possibility of recourse to (exceptionally weak)⁸⁵⁸ NLRB remedies or to (stronger, but at the time of organizing, only probable) union protection. But employees reasonably fear the subtle damage to their careers caused by "disloyalty" to management even if the union wins.⁸⁵⁹ Employees' apprehension may be even deeper if they anticipate a flexible model of collaborative unionism which affords management-controlled facilitators much discretion in task assignment and reward. Indeed, unionized workers historically de-

Union supporters therefore lack such a list during the period when they must engage in face-to-face contact and communication to obtain the "showing of interest" required to petition for an election. (As already noted, unions generally seek an election only if they obtain card authorizations from well over a majority, even though the law requires cards from only 30%.) This puts union supporters in the position of furtively recording license plate numbers in employee parking lots or using other catch-as-catch-can means of assembling a voter list.

856. The seminal study by Julius Getman and associates concluded that unions' capacity to address workers was one of the most important campaign variables in NLRB election outcomes. See Julius G. Getman et al., *Union Representation Elections: Law and Reality* 156–57 (1976).

857. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than [the difficult methods of communication outside the workplace], suffers from the limited periods of nonworking time available for solicitation . . . and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1241 n.10 (1966).

858. See Weiler, *Promises to Keep*, *supra* note 3, at 1776–81.

859. Apart from the public's overwhelming belief that workers risk job loss for organizing or striking, 59% of workers believe that they would also "lose favor" in such matters as promotion if they were union supporters. See Fingerhut/Powers, *supra* note 839.

mandated that task allocation and pay be tied to seniority in part as a safeguard against employers' rampant anti-union discrimination.⁸⁶⁰

B. *Leading Legal Reform Strategies*

1. *Proposals for Reducing the Costs of Workers' Free Association.* — The reform proposals that many have endorsed to ease workers' exercise of the rights of free association and choice fit into three categories. The first—call it the “samizdat” approach—attempts to preempt the employer's use of its machinery of communication and incentives by allowing workers to organize unions secretly through whatever underground or external communication network they currently can muster. The law would require an employer to recognize a union as an exclusive bargaining agent if a majority of workers signed cards authorizing the union to represent them. The NLRB would conduct no election or, at most, an instant election—unlike the current regime under which NLRB elections are preceded by weeks of campaigning.⁸⁶¹ The employer would therefore have no opportunity to interfere with the workers' collective organizing—unless it got wind of the underground card solicitations. Another variant of the samizdat approach would require that, in the absence of a majority representative, the employer bargain with a union over the terms and conditions of any minority group of workers, and only of those workers, who had authorized such representation—by contrast with the prevailing model in which the majority agent represents all workers in the bargaining unit.⁸⁶² There is, indeed, a strong case that the law already permits such voluntary minority unionization, notwithstanding organized labor's failure all these years to pursue this strategy.⁸⁶³

The second category—call it the “fumigation” approach—favors maintaining NLRB elections of majority representatives but would provide disinfected “laboratory conditions” for free choice.⁸⁶⁴ This approach, embodied in the defeated Labor Law Reform Bill of 1978,⁸⁶⁵ includes a battery of doctrinal reforms designed to deter employer reprisals and afford greater equality of communicative opportunities for pro-

860. See Jacoby, *Employing Bureaucracy*, *supra* note 37, at 244.

861. See Bluestone & Bluestone, *supra* note 616, at 260; Gould, *supra* note 841, at 163; Weiler, *Governing the Workplace*, *supra* note 3, at 253–61.

862. See Gould, *supra* note 841, at 165.

863. See Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 Rutgers L. Rev. 637 (1993); Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 Chi.-Kent L. Rev. 531 (1990).

864. See *supra* Part II. B.1.

865. For background information on the bill, see Barbara Townley, *Labor Law Reform in U.S. Industrial Relations* 31-44, 91–97, 129–36 (1986) (recounting the substance, and political and legislative history, of the Reform bill's provisions on NLRB election campaigns).

union speech.⁸⁶⁶ These include: stronger and quicker monetary and injunctive remedies for anti-union firings; affording union organizers access to areas of company property already open to the public, such as parking lots, lobbies, and cafeterias; granting union supporters a right to captive-audience replies to any captive-audience speeches by management; giving union organizers early access to names and addresses of employees; and prohibiting employer misrepresentation.

The third approach—call it “micro-corporatism”⁸⁶⁷—would simply mandate that each workforce elect representatives for consultation with management or to serve other functions. The various proposals for such European-style “works councils” differ along several dimensions: the subjects of consultation; the amount and source of resources available to employee representatives; the scope of representatives’ informational rights; and, most important, the extent of decision-making power vested in the representatives—ranging from mere consultation, to the power to bring enforcement suits on behalf of individual employees, authority to enter into contracts with management, rights to demand third-party arbitration of unresolved matters, and veto power or unilateral control over designated issues.⁸⁶⁸

2. *Proposals for Strengthening the Strategic Role of Employee Representatives.*—Whereas the free-association reforms discussed in the previous subsection aim to ease, if not mandate, the establishment of collective agents, the proposals discussed in this subsection aspire concurrently to fortify unions once formed and to ease employee representatives’ access to strategic levels of managerial decision-making. (Such fortification, by enhancing the benefits of unionization, would also indirectly reinforce the incentives for union formation.) Achieving these ends requires legal reform in three doctrinal steps.

866. See, e.g., Charles B. Craver, *Can Unions Survive? The Rejuvenation of the American Labor Movement* 141–43 (1993); Gould, *supra* note 841, at 157–67; Weiler, *Governing the Workplace*, *supra* note 3, at 253 (noting that these reforms do not contradict, but rather complement, the first category of reforms); Estreicher, *supra* note 524, at 54–55.

867. The neologism is an extension of political theorists’ recent examination of decentralized, “meso-corporatist” institutions of “concertation” among labor, management, and government at subnational (generally regional) levels in various European settings. See, e.g., the essays collected in *Organized Interests and the State: Studies in Meso-Corporatism* (Alan Cawson ed., 1985).

868. See, e.g., Weiler, *Governing the Workplace*, *supra* note 3, at 282–95 (arguing for joint employee-employer-funded council with information and consultation rights and power to implement and enforce certain individual employment statutes); Roy J. Adams, *Universal Joint Regulation: A Moral Imperative*, in *Proceedings of the 43d Meeting*, *supra* note 669, at 319, 324 (supporting councils’ right to force arbitration over technological and training issues); Gottesman, *supra* note 832, at 2808 (arguing for rights solely to enforce statutory and contractual claims, and funding from general federal treasury); Clyde W. Summers, *An American Perspective of the German Model of Worker Participation*, 8 *Comp. Lab. L.J.* 333, 338 (supporting mandatory councils, but expressing doubt about arbitral enforcement).

The first step focuses on new legal doctrines to facilitate representatives' access to enterprises' strategic echelons. The proposals would revise rules of labor and corporate law that directly or indirectly impede employee representatives from (1) bargaining with managers over corporate strategic decisions either at arms' length or within joint strategic committees,⁸⁶⁹ and (2) serving as consultative or voting members of corporate boards supervising management.⁸⁷⁰ There is widespread agreement that the law should assure workers that their enhanced representation or participation at strategic levels—at least short of majority board control by employees—will not convert them into "managerial employees" excluded from the collective-bargaining rights of the NLRA.⁸⁷¹ There remains a contested question whether refined rules of corporate or labor law are desirable to avoid conflicts of interest or cooptation among union officers who simultaneously represent their bargaining unit members and serve on supervisory boards that represent a broader set of employee or nonemployee stakeholders.⁸⁷² A similar legal question—which has not drawn as close academic analysis⁸⁷³—applies to union officials' participation in the variety of ad hoc and strategic joint labor-management committees that have proliferated across all enterprise levels with the spread of flexible organization. Part VII takes up this question.

The second reform for expanding representatives' strategic influence would widen the scope of subjects of mandatory bargaining between union and management to include strategic corporate decisions. Having won institutional access to strategic echelons, labor representatives must be entitled to exert their bargaining power over corporate investment decisions that determine both long-term employment security and the

869. See Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 *Cath. U. L. Rev.* 1, 54 (1988); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 *U. Chi. L. Rev.* 73, 126–31, 149 (1988).

870. See Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 *U. Pa. L. Rev.* 1, 76–95 (1988); Stone, *supra* note 869, at 120–73.

871. The assurance is made necessary by uncertainty over the scope of the Board's ruling in *College of Osteopathic Medicine*, 265 *N.L.R.B.* 295 (1982). There the Board found that employees took themselves out of NLRA coverage by successfully bargaining collectively for participatory rights in workplace "managerial" decision-making. The Board's holding was explicitly "dependent on the particular facts of the current situation." *Id.* at 298.

872. Compare Stone, *supra* note 869, at 130–31, 139, 147–48 (expressing skepticism that union officials experience subjective conflict or cooptation when sharing power on Board) with Harper, *supra* note 870, at 18–28 (proposing bright-line legal rules, in light of potential conflict and cooptation, to ensure that union officers retain functions and constituents that are distinct from Board representatives of other employees or stakeholders).

873. Michael Harper recognizes, and briefly discusses, this "perplexing" matter in his comprehensive treatment of union officers' role vis-à-vis Board representation. See Harper, *supra* note 870, at 64.

organizational and technological design in which the work process is embedded. The crucial consequence of designating strategic decisions as "mandatory" rather than "permissive" subjects is that the union could then lawfully threaten or resort to strikes and other economic weaponry during negotiations over those decisions.⁸⁷⁴ That is, the NLRB would not prohibit unions from launching such strikes and would prohibit employers from firing employees who engage in them. Whether this practical result is achieved doctrinally by expanding the scope of mandatory subjects⁸⁷⁵ or by abolishing any bargaining "requirement" beyond what unions can gain by putting strike power behind any lawful demand⁸⁷⁶ may be of minimal consequence.

Finally, employee representatives' capacity actually to influence such strategic matters depends on the relative bargaining power of labor and management.⁸⁷⁷ For this reason—and to assure generally that unions can achieve meaningful first (and subsequent) contracts against resistant employers⁸⁷⁸—reformers offer a menu of changes in the law governing concerted activity. Leading proposals include the total or partial repeal

874. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

875. Those who have proposed this doctrinal route include Craver, *supra* note 866, at 148; Estreicher, *supra* note 524, at 56; and Stone, *supra* note 869, at 86–96.

876. See Gould, *supra* note 841, at 173, 178; Weiler, *Striking a New Balance*, *supra* note 3, at 379 n.92. In other words, if the scope of mandatory subjects is expanded to encompass all lawful subjects, the practical consequence is the same as eliminating the permissive-mandatory distinction altogether: unions may lawfully strike over any lawful demand.

877. Except, perhaps, where employee representatives hold a voting majority on the Board of Directors. This Article does not address the relation between worker ownership or majority control of corporate boards and proposals to fortify workers' choice of other workplace governance options. For those questions see, e.g., Harper, *supra* note 870, at 38–75, 82–95 (discussing role of union officers in employee-controlled firm); Alan Hyde, *In Defense of Employee Ownership*, 67 *Chi.-Kent L. Rev.* 159 (1991) (defending employee ownership). Nonetheless, the general discussion *supra* Part V.E of the mutual reinforcement of strategic representation and shopfloor participation is fully applicable even to workplaces with employee-majority-controlled Boards. That is, substantial empirical evidence confirms that employee ownership yields high performance and representative accountability only when rank and file workers are mobilized through empowering shopfloor participation. See, e.g., Corey Rosen, *Employee Ownership: Performance, Prospects, and Promise*, in *Understanding Employee Ownership* 1, 31 (Corey Rosen & Karen M. Young eds., 1991). I am thus inclined to think that the high-participation labor law scheme outlined *infra* Part VII.C, with appropriate refinement, is applicable to employee-owned enterprises.

878. Of the 40% of unions that retain majority support after employers' anti-union campaigns, 25–30% have insufficient bargaining power to achieve first contracts and actually establish lasting collective bargaining relationships. See generally William N. Cooke, *Union Organizing and Public Policy: Failure to Secure First Contracts* (1985). To the extent that unions have greater power to achieve bargaining gains, of course, workers are likelier to support them and unions are likelier to invest resources in organizing campaigns. Hence, labor law reformers' longstanding concern about union's success rate in achieving meaningful first contracts. See, e.g., Weiler, *Striking a New Balance*, *supra* note 3, at 354–57.

of the ban on secondary boycotts and strikes;⁸⁷⁹ the reversal of the *Mackay Radio* doctrine that technically prohibits employers from discharging striking workers but allows them to hire permanent replacements;⁸⁸⁰ the mandating or permitting of contract arbitration in lieu of strikes against resistant employers, especially at early stages of a collective bargaining relationship;⁸⁸¹ and the tightening of successorship standards and curbing of "double-breasted" nonunion subsidiaries in order to weaken management's threat to escape the union's reach.⁸⁸²

C. *Why Leading Reform Proposals Are Unlikely to Achieve Their Goals Fully*

Unhappily, this worthwhile reform package—as far-reaching as it may be⁸⁸³—is unlikely dramatically to encourage (1) the rejuvenation of the labor movement, (2) the diffusion of high-wage, high-performance work organization, or (3) the growth of deliberative democracy and self-transformation in the daily lives of workers. The most important reason is the metastasis of anti-union sentiment and strategy in the United States management community. One "social constant" in American life is "an employing class that has always been hostile to organized labor, regardless of specific economic conditions."⁸⁸⁴ In the market for managers, an executive's reputation suffers deeply if his or her workforce unionizes.⁸⁸⁵ And the means for maintaining a "union-free" environment are ready-at-hand and well-honed—even if legal reform eliminates the formal election

879. See, e.g., Craver, *supra* note 866, at 145–47 (advocating unions' right to induce employees at non-struck firms to refuse to handle products destined for or coming from struck firm); Weiler, *Governing the Workplace*, *supra* note 3, at 269–73 (advocating unions' right to boycott struck product).

880. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). Permanently replaced workers, unlike discharges, are legally entitled to re-employment after a strike if jobs come open and they have not taken work elsewhere. See *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1366, 1368 (1968).

881. See Gould, *supra* note 841, at 169–70; see also Estreicher, *supra* note 524, at 55 (proposing that mandatory bargaining include the subject of interest arbitration); Weiler, *Striking a New Balance*, *supra* note 3, at 407–08 (proposing interest arbitration as remedy for employer's bad faith bargaining over first contracts). But see Weiler, *Governing the Workplace*, *supra* note 3, at 249–51 (expressing deeper reservations about such arbitration).

882. See, e.g., Gould, *supra* note 841, at 174; Estreicher, *supra* note 524, at 56; Stone, *supra* note 869, at 102–11.

883. But see Matthew W. Finkin, *Back to the Future of Labor Law*, 32 *Wm. & Mary L. Rev.* 1005, 1006 (1991) (characterizing such reform proposals as disappointingly tepid) (reviewing Weiler, *Governing the Workplace*, *supra* note 3).

884. Jacoby, *supra* note 428, at 26. Jacoby writes that United States managers' anti-unionism, "as expressed in unitarian managerial philosophies, derives from a set of beliefs. . . rather than from a careful weighing of the actual costs and benefits of unionism." *Id.* The exceptional ferocity of United States managers' anti-unionism is widely acknowledged and documented. See sources cited in Barenberg, *supra* note 31, at 1495 nn.490–95.

885. See Kochan et al., *supra* note 641, at 14–15, 52–53, 67, 70, 80; Hoyt N. Wheeler, *Industrial Conflict: An Integrative Theory* 78 (1985).

campaign preceding NLRB balloting. If denied the opportunity aggressively to oppose unions once they have surfaced, employers have the very same financial and cultural incentive to weave a lawful "anti-union campaign" into the organizational warp and woof of the enterprise—to prevent a critical mass of underground card-signers from ever coalescing.⁸⁸⁶ Indeed, that incentive is heightened by the shift toward enterprise-level unionism encouraged by flexible organization. A newly unionized enterprise in an otherwise nonunion industry faces greater competitive disadvantage than under the industry-wide- or pattern-bargaining of the post-War mass-production era.⁸⁸⁷

Showcase employers—such as IBM, Kodak, DuPont, Eli Lilly, Northrop, TRW, Texas Instruments, and Proctor and Gamble—have already spent decades developing such sophisticated models of unshakably nonunion organizational structures and cultures.⁸⁸⁸ One such nonunion model—call it the "Baldrige Award" organization⁸⁸⁹—is lean, human-resource-intensive, and often has teams or weak representative committees (company unions, effectively) tightly integrated into the managerial structure.⁸⁹⁰ Another longstanding nonunion variant is the "elite bureaucratic" model, again human-resource-intensive, which treats individual workers as salaried careerists whose future depends on their commitment

886. Others have made the different argument that, if the law permitted unionization via card-signing or instant elections, employers would simply begin their anti-union campaigns when they first learned of the organizing drive rather than wait until the union filed an election petition. Proponents of the reform respond that in many workplaces, employers do not learn of the underground card-signing drive until it achieves its majority goal, and thus NLRB resources would be freed to focus on deterrence of illegalities by those larger employers that are more likely to learn of the underground drive. See Weiler, *Governing the Workplace*, *supra* note 3, at 256. My argument is that managers will counter-respond—as they have always done, and have the continued financial and personal incentive to do—by adopting one of the proven human-resources strategies for building nonunionism into the organizational design.

887. See Craypo, *supra* note 642, at 12–20.

888. See Kochan et al., *supra* note 641, at 47–81; Jacoby, *Norms and Cycles*, *supra* note 428, at 34–44.

889. The federal government's Malcolm Baldrige Award, begun in 1988, sets high-performance benchmarks that thousands of firms now use. See, e.g., Christopher W.L. Hart & Christopher E. Bogan, *The Baldrige* 23–39 (1992); David A. Garvin, *How the Baldrige Award Really Works*, *Harv. Bus. Rev.*, Nov.–Dec. 1991, at 80, 80–95; Jeremy Main, *Is the Baldrige Overblown?* *Fortune*, July 1, 1991, at 63, 63–65. Indeed, one employer called the process of application and consultation with the Baldrige staff "the best consulting bargain around." Guillermo Gomez del Campo, *TQM Implementation in the U.S. and Japan: Lessons from Baldrige and Deming Prize Winners* (1993) (unpublished M.S. Thesis, MIT, Sloan School of Management) (quoting employer). Although I use the term as a shorthand for a certain nonunion model, not all actual Baldrige Award winners or mimics are nonunion.

890. For example, Dupont, TRW, and Marlow Industries. See Appelbaum & Batt, *supra* note 605, at 132–33 (describing Marlow); Jacoby, *Norms and Cycles*, *supra* note 428, at 39 (describing Dupont and TRW).

to pervasive, management-defined principles and routines.⁸⁹¹ Among such "union avoidance" firms, the rates of union organizing drives and union victories are a small fraction of even the declining rates in other firms.⁸⁹²

Proponents of the repeal of Section 8(a)(2) generally agree that the law should still police employers who implement team or joint-committee arrangements for anti-union motives after organizing drives have begun—just as Section 8(a)(1) already prohibits any other similarly motivated grant of benefits during organizing campaigns.⁸⁹³ I believe this proposal has it backwards. It is precisely during union drives that workers most readily perceive such employer gambits for what they are—by reason of the "Oz Effect" discussed above.⁸⁹⁴ On the other hand, workers are less likely to perceive fully the anti-union motivation or effect of paternalistic structures "naturalized" in the everyday life of the organization long before union talk is in the air. This is especially true of elite-bureaucratic and *participatory* schemes that, unlike old-style company unions and new-style joint strategic committees, are not patent competitors of union agents that act as *representatives* of worker interests.

The French industrial relations experience of the 1980s is instructive.⁸⁹⁵ The Auroux Laws of 1982 mandated the establishment of participatory "expression groups" and gave only "consultative" rights to worker-elected enterprise committees. The Conseil National du Patronat Français (CNPF) urged its member employers to train supervisors to control discussion in expression groups and to either ignore hostile committees or capture employee representatives with management's overwhelming resources and information. The result was the rapid spread of a new model of management-dominated, collaborative work system, concurrent with a full halving of French union membership.

891. For example, IBM, Eastman Kodak, and Sears Roebuck. See Richard Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* 130–62 (1979) (analyzing the bureaucratic, nonunion model); Jacoby, *Norms and Cycles*, *supra* note 428, at 34–44. Although the internal labor markets at the core of the elite bureaucratic models are widely crumbling, see *supra* notes 579–80, 624 and accompanying text, I believe that these organizations are sufficiently capable of adapting their union-avoidance strategies to ongoing volatile environments even if they do not reconstitute their old salaried ladders in the same form after the current period of turbulence.

892. See Kochan et al., *supra* note 641, at 78.

893. See Gould, *supra* note 841, at 140–41; Weiler, *Governing the Workplace*, *supra* note 3, at 214; Estreicher, *supra* note 524, at 55; Klare, *supra* note 834, at 51 n.33. Other prominent proponents of repeal of Section 8(a)(2) include Theodore St. Antoine, *supra* note 832, §§ 8-1 to 8-23, and Michael Gottesman, *supra* note 832, at 2805 n.169.

894. See *supra* Part III.C.

895. The following discussion relies primarily on Bernard E. Brown, *Worker Democracy in Socialist France*, in *Economic Restructuring and Emerging Patterns of Industrial Relations* 67, 67–77 (Stephen R. Sleight ed., 1993); Bernard E. Brown, *The Rise and Fall of Autogestion in France*, in *Managing Modern Capitalism* 195, 203–08 (M. Donald Hancock et al. eds., 1991); W. Rand Smith, *Towards Autogestion in Socialist France? The Impact of Industrial Relations Reform*, 10 *W. Eur. Pol.* 46, 46–62 (1987).

A second ground for pessimism about the ultimate success of the proposed reform package is the undeniable loss of vitality in popular cultural perceptions of organized labor. Henry Farber and Alan Krueger's recent econometric analysis, based on new (albeit crude) survey evidence, concludes that the entire drop in unionization in the last fifteen years is explained by nonunion workers' diminished desire to unionize.⁸⁹⁶ That preference change may well be explained in large part by the cumulative "endogenous" effects of aggressive anti-union campaigning and of the sophisticated nonunion models just mentioned.⁸⁹⁷ This explanation is concordant with the fact that private-sector nonunion workers expressed increasing satisfaction with their employment conditions even as their real wages deteriorated in the late 1970s and 1980s,⁸⁹⁸ while workers who actually experienced unionized employment expressed greater preference for unions.⁸⁹⁹ The concurrent greater preference for unionization among nonunion workers in the public (compared with the private) sector⁹⁰⁰ is consistent with the relative dearth of both anti-union campaigns and sophisticated anti-union human-resource models in the public sector. Labor reform must be attentive to the widespread perception, by no means fictive, among private-sector nonunion employees that many unions have become ineffective, ossified bureaucracies unresponsive to their members.⁹⁰¹

It is unlikely that private-sector employees' preference for unionization would be significantly increased by the foreknowledge that they could resort to secondary boycotts or strikes (during which they can be temporarily but not permanently replaced) to back up union demands over strategic corporate decisions. First, the recent cultural legitimization of employers' hiring of strike replacements entails managements' capacity to continue operations even with temporary replacements⁹⁰²—especially in light of the long-term upward creep in unemployment rates. Second, the current technical classification of strategic subjects as "permissive" rather than "mandatory" need not decisively affect actual bargaining outcomes. Unions, by striking lawfully over some mandatory subject, may already effectively induce management to relent to union

896. See Farber & Krueger, *supra* note 839, at 32.

897. Another explanation is the systematic negative tilt in mass-media portrayals of organized labor. See *supra* note 839.

898. See Farber & Krueger, *supra* note 839, at 19–20.

899. Freeman & Medoff, *supra* note 7, at 145 (comparing perceptions of union power among union members and nonmembers). Three-quarters of unionists express satisfaction with their unions. See *id.* at 143.

900. See Farber & Krueger, *supra* note 839, at 5.

901. The point is well made in Alan Hyde, *Endangered Species*, 91 *Colum. L. Rev.* 456, 469–72 (1991) (reviewing Weiler, *Governing the Workplace*, *supra* note 3).

902. See, e.g., Kim Moody, *An Injury to All: The Decline of American Unionism* 140–41, 346 (1988).

desires over permissive strategic subjects.⁹⁰³ In any event, it seems unlikely that workers' knowledge of incremental gains in union bargaining power from legalizing secondary boycotts, or even from protecting workers against permanent replacement, would do much to outweigh the now-entrenched cultural perception that unions are powerless in the face of employers' threatened or actual plant closings, mass layoffs, or simple inability to pay higher wages in a globalized economy.⁹⁰⁴ Hence, notwithstanding the public's general belief in the economic and social potential of a democratic labor movement,⁹⁰⁵ most nonunion employees hold the more specific belief that unions currently lack the power to protect their members.⁹⁰⁶

This is not the 1930s and 1940s, the only era in United States history to witness a sustained leap in private-sector mass unionization. That era was marked by grinding labor conditions and poverty; workers' experience or recent memory of economic desperation and felt betrayal by employers in the aftermath of the Great Depression; the homogenization of mass production workforces; a general cultural milieu still in transition from "producerist" and work-ethic values to "consumerist" and hedonic norms; volcanic labor unrest and populist political movements; lower levels of product-market competition and capital mobility than today; a rising, progressive political-intellectual elite that was zealously committed to building a labor-corporatist society and that controlled decisive levers of state power; and the crucial clinching effect of a superheated labor market caused by state mobilization for all-out war. It took the convergence of these conditions to overcome the abiding anti-unionism of United States employers.⁹⁰⁷

If the prominent reform proposals would likely not substantially resuscitate the labor movement, they would also probably not fulfill either the ideals of egalitarian deliberation in workers' choice of workplace governance modes or of participation and self-transformation in work processes.⁹⁰⁸ Under the samizdat variant of the free-association propos-

903. See Weiler, *Striking a New Balance*, *supra* note 3, at 379 n.92; The Supreme Court, 1980 Term—Leading Cases, 95 Harv. L. Rev. 93, 333 (1981) (scope of mandatory bargaining under the NLRA).

904. See Craypo & Nissen, *supra* note 662, at 3–17; Puette, *supra* note 839, at 154.

905. See *supra* notes 839–840 and accompanying text.

906. See Fingerhut-Powers, *supra* note 839; Gallup Poll, *supra* note 839.

907. See Fraser, *supra* note 39, at 259–494; Barenberg, *supra* note 31, at 1392–1412; Jacoby, *supra* note 428, at 21–22.

908. Professor Gottesman rightly emphasizes that among the fastest growing occupations recently are fast-food workers, dishwashers, janitors, and other unskilled, non-careerist jobs. See Gottesman, *supra* note 832, at 2788. He may also be right to predict that "vast numbers" of these workers would unionize "overnight" under the minimal reform proposals, see *id.* at 2804, although many of them work in isolated or tiny aggregations for staunchly anti-union employers. Surely the labor law regime should seek concurrently to counter the deterioration of the United States job structure that this data manifests. See, e.g., Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries* (May 7, 1993) (unpublished manuscript, on

als, worker communication is (in theory) freed of intimidating employer campaigns, but workers still face the high-transaction costs and fragmentary opportunities for persuasion afforded by underground communication. Under the fumigation proposals, employers' highly asymmetric control of communicational channels and resources in election campaigns is only slightly diminished.⁹⁰⁹ In any event, for the reasons just offered, employers have every incentive to circumvent these attempts to strengthen worker deliberation by building distorted communication into the organizational structure and culture itself. As detailed in Part V, such structure and culture tend not only to deflect governance choices, but also to undermine self-realizing, discretionary work processes and autonomous, egalitarian decision-making within frontline work groups.

The samizdat and fumigation strategies also leave in place a mode of labor-market collectivization that does nothing to discourage low-trust adversarial collective bargaining even if unionization occurs. To the contrary, management's extant distrust of unions is likely to be reinforced under the samizdat proposals by the sudden surfacing of an underground network of manifestly distrustful employees, or, under the fumigation proposals, by an NLRB election campaign premised at best on adversarial debate, and likely in practice to generate feelings of intimidation and apprehension even with the most rigorous sanctions against coercion and interference.⁹¹⁰

file with the Columbia Law Review). I do not underestimate the dignitary and due process protections unionization would afford workers in "secondary market" jobs. But what sort of bargaining power and autonomy can they achieve within the very labor-market regime that disproportionately spawns such jobs—a regime of secularly rising unemployment, chronically slow productivity growth, and an increasing race-to-the-bottom with other contingent and low-skill workers?

909. Under these proposals, union organizers' access to workers—during work breaks in public areas, and in rare, brief captive-audience reply speeches—remains negligible compared to supervisors' constant, captive-audience access. And "disloyal" workers' apprehension of an employer's power over their future careers cannot be expunged by incrementally strengthened sanctions against employer coercion during the election campaign.

910. Such deepened distrust can be reversed, but exceptional efforts and individuals are usually necessary. After a hard-fought election campaign between Harvard University and union supporters, a trusting, collaborative relationship was restored through the extraordinary efforts of Kristine Rondeau and other leaders of the Harvard Union of Clerical and Technical Workers, and John Dunlop representing the University. See John Hoerr, *Solidaritas* at Harvard, *Am. Prospect*, Summer 1993, at 67, 67–82.

Although I have noted that the NLRB's adversarial election process may reinforce the adversarial culture of United States labor relations, it bears mentioning that political economists and legal policy-makers often overestimate the importance of the labor law regime in *affirmatively encouraging* an adversarial mode of collective bargaining. In fact, the labor law regime freely permits willing managers and unions to establish flexible, collaborative relations, including full codetermination of strategic technological and organizational design issues. Witness recent labor-relations developments in the auto, steel, and communication industries. See *supra* notes 608–620 and accompanying text and *infra* notes 932–935 and accompanying text. The problem, rather, is that managers (and all too often unions) have been unwilling to enter into such perfectly lawful

The final Part outlines an alternative labor law regime designed affirmatively to encourage open, robust egalitarian deliberation over modes of workplace governance; to allow workers free choice of a wide range of governance options without government imposition; to support trust-building consultative relations between labor, management, and other community stakeholders; to promote the diffusion of the types of high-performance, participatory workplaces with the least potential for paternalistic domination in the specific forms discussed at length in Part V; and to provide incentives that proactively counter management's culture of adversarial anti-unionism and encourage the revitalization of broadly encompassing democratic unions or wholly new forms of employee association. The proposals embody an approach to legal regulation based on decentralized, facilitative public entities that are capable of continuous self-revision through experimentation and consultation with enterprise and community stakeholders.

VII. A LABOR LAW REGIME FOR DELIBERATIVE DEMOCRACY AND HIGH PERFORMANCE ENTERPRISES AND NETWORKS

A. *The Basic Principles and Purposes of Deeper Reform*

The regime I propose takes the two key principles embodied in the original Wagner Act scheme, drastically expands their implementation,

relationships, and unions have not had the bargaining power to secure the strategic safeguards that would permit more flexible shopfloor collaboration. That is, management generally refuses to negotiate over (and reach agreement on) the permissive subject of substituting such joint determination for its unilateral prerogatives on strategic and other matters. Likewise, there is no legal restriction against unions and managers agreeing to resolve disputes and solve substantive production problems through non-adversarial consultative means rather than through arbitral or judicial elaboration and enforcement of densely specified workplace rules (including a contractual rule under which management retains unilateral power over many aspects of workplace life). The problem again is that management has proved unwilling, first, to give up its prerogatives on substantive decision-making, and, second, to guarantee the kind of job security, distributional share, and information disclosure that would make it sensible for workers to enter into such flexible workplace relations. It is true that the Taft-Hartley Amendments symbolized, and to some degree thereby reciprocally reinforced, the actual adversarialism in early post-war labor relations. But the key provisions of Taft-Hartley that codified this symbolism—the strict exclusion of supervisors from collective bargaining protections and from participation in nonsupervisory unions—did not instrumentally prohibit unions and management from establishing joint teams and committees or collaborative workplace problem-solving. Indeed, more than half of unionized firms recently surveyed included some form of labor-management cooperative committee or other joint program. See William N. Cooke, *Labor-Management Cooperation: New Partnerships or Going in Circles?* 62 (1990).

But if the law already permits mutually willing managers and unions to establish collaborative workplace institutions, it remains true that the legal regime does not sufficiently counteract the social and economic reality of managers' persistent anti-unionism and reluctance to give up their command-and-control prerogatives. The proposals in the next section are designed to *encourage affirmatively* collaborative labor relations, even if the current labor law regime does not affirmatively encourage (although it allows) adversarial relations.

and adapts them in order to accelerate the spread of those variants of flexible enterprises and networks that hold the least danger of domination and the greatest promise of democratic deliberation.⁹¹¹ The first principle is that the government's primary role should be to *facilitate* the decentralized, private ordering of the workplace—particularly, to safeguard workers' free communication and choice over modes of workplace governance. The second is that the legal regime should concurrently *encourage*, through instrumental incentives and normative symbols, the emergence of *democratic, labor-empowering* forms of workplace governance—both to serve the ideals of undominated self-governance and to enhance consultative trust and collaboration in productive efficiency.⁹¹² In addition to expanding these two principles, my proposals add a third. The law should build capacities for local variation and self-revision into public institutions—capacities that mesh with the needs of the flexible firms and networks with which the public entities collaborate. This additional principle itself adapts to present circumstances Robert Wagner's general commitments to pragmatic experimentalism and to blurring the line between the public and private spheres.⁹¹³

The slow demise of the Wagner Act scheme demonstrates that present legal institutions that embody the two New Deal principles must be radically fortified. The weak facilitative rules designed to ensure "laboratory conditions" for "free choice" should be replaced by more robust, governmentally protected fora for well-informed, egalitarian deliberation and choice. At the same time, in the era of flexible organization, workers' choice-set should include not only unions for full-fledged collective bargaining, but also self-managing shopfloor teams and joint strategic committees at departmental, plant, divisional, enterprise, or multi-enterprise network levels. That is, unlike the current regime (specifically, Section 8(a)(2)), my proposals *allow* those options; but unlike the minimum reform proposals, my proposals *enable* workers affirmatively to choose among them, and do *not allow* management or government to impose participatory or representative schemes unilaterally.

The point of allowing and requiring workers to choose among these widened options is threefold: first, to serve the ideal of collective self-governance; second, to enhance the likelihood that workers will be com-

911. These proposals do not assume that the various elements of flexible organization are singly or jointly appropriate or emergent in every firm or sector. Because the proposals are built on the principles of facilitative regulation and private ordering, they do not impede more traditional workplace relations even though they encourage flexible organization.

912. The tension, but non-contradiction, between these two principles is explained in Barenberg, *supra* note 31, at 1451 n.310.

913. See Senator Robert Wagner, Speech at the National Conference of Catholic Charities 3-4 (Oct. 3, 1933) (transcript available in Robert Wagner Papers, Georgetown University); Barenberg, *supra* note 31, at 1412-22.

mitted to the design that they have chosen;⁹¹⁴ and third, by requiring unions' ongoing competition for workers' allegiance with alternative modes of worker representation and participation, to encourage unions' responsiveness to, and continuing mobilization of, their members. At the same time, my proposals affirmatively support the capacity of unions, or alternative emergent forms of independent employee associations, so to compete by affording them a preferential role in the transmission of training, technological, and organizational-design resources to workers.

As for the "encouragement" function of labor law, the times require a more drastic legal shock-effect than the New Deal's normative legitimization of workers' right to collective organization. In the midst of the Depression and the growing pains of mass-production, such symbolic legitimization sufficed to electrify workers' subjective sense of entitlement and their behavior.⁹¹⁵ Given the labor movement's cultural stagnation and employers' heightened incentives and means to maintain union-free workplaces today, state intervention must be much more catalytic. My proposals include government provision of direct economic incentives for worker participation and representation, and face-to-face education about the advantages of high-involvement work systems—an amplification and decentralization of the New Deal's long-distance transmission of the symbols and slogans of industrial democracy. As specialists in organizational design widely report, comprehensive "paradigm-shifts" or "reframing" in enterprises generally require some highly committed "change agent."⁹¹⁶ In light of the public-good dilemmas of such change, the government should assume the role of affirmatively nurturing the emergence of change agents from among enterprise stakeholders—while leaving the particular organizational design to private ordering. At the

914. The latter goal is disserved by proposals to allow management to impose team or representative structures on workers (i.e. proposals simply to repeal Section 8(a)(2)), or to mandate government imposition of works councils or other forms of codetermination.

915. Numerous historical case studies and surveys documenting this vivid instance of the symbolic effect of law on non-legal actors are cited in Barenberg, *supra* note 31, at 1436 n.261. A Pittsburgh journalist described the effect of the government's declaration, in Section 7(a) of the NIRA of 1933, of workers' right to organize, even though no instrumental sanctions backed up that declaration:

Along came the New Deal, and then came the NRA, and the effect was electric all up and down those valleys. . . . [T]he steelworkers read in the newspapers about this NRA Section 7A that guaranteed you the right to organize. All over the steel country union locals sprang up spontaneously. Not by virtue of the Amalgamated Association [of Iron, Steel, and Tin Workers, AFL]; they couldn't have cared less You name the mill town and there was a local there, carrying a name like the "Blue Eagle" or the "New Deal" local. These people had never had any experience in unionism. All they knew was that, by golly, the time had come when they could organize and the Government guaranteed them the right to organize!

Staughton Lynd, *The Possibility of Radicalism in the Early 1930s: The Case of Steel, in Workers' Struggles, Past and Present* 190, 191 (James Green ed., 1983) (quoting Harvey O'Connor).

916. See *supra* Part V.C.

same time, my proposals include minimum conditions that participatory and representative options must meet to protect employees against organizational domination—that is, against institutional arrangements that preempt their ongoing individual and collective capacity freely to redesign workplace governance.⁹¹⁷ Those statutory minima—incorporated in a revised Section 8(a)(2) jurisprudence of “domination”—would also likely have even stronger symbolic benchmarking value than the potent Baldridge Award criteria,⁹¹⁸ but would incorporate the ideals of high-challenge, self-transformative work processes.

Section B reviews some historical and contemporary institutional experiences that might give my proposals more plausibility and appeal. Section C, finally, outlines those proposals.

B. *Institutional Precursors, Imaginary and Real*

First, I engage in a thought experiment about the institutions that might have emerged in late 1933 if not for employers’ scorched-earth anti-unionism. Then, I survey some actual institutions, overseas and in our states’ “laboratories of democracy,” that embody elements of my proposed regime.

1. *A Path Not Taken in the Autumn of 1933.* — In August of 1933, Franklin Roosevelt cabled Robert Wagner to cut short his European vacation and return to chair the newly established National Labor Board.⁹¹⁹ The President hoped that the Senator’s prestige might enhance the Board’s only “sanction” to enforce Section 7(a) of the Recovery Act—its appeal to public opinion.⁹²⁰ The Board’s original expectation was that workers, by whatever means they themselves saw fit, would deliberate and choose whether to form collective representatives for purposes of bargaining with employers.⁹²¹ Employers quickly squelched such expectations by launching coercive campaigns against supporters of independent unions, by imposing management-manipulated employee representation plans (company unions), and by refusing to acknowledge workers’ outside unions as genuine representatives. In response, the NLB and its 1934-35 successor, the “old” NLRB, sought settlements or issued (unenforceable) orders requiring elections in order to “demonstrate” to employers that workers genuinely sought independent representation.

917. That the dangers of various specific forms of domination in the new flexible workplaces are potentially more insidious than under old-style company unionism was discussed at length in Part V.

918. See *supra* note 889.

919. See J. Joseph Huthmacher, Senator Robert F. Wagner and the Rise of Urban Liberalism 153 (1968).

920. See Arthur M. Schlesinger, Jr., *The Coming of the New Deal* 147 (American Heritage Library ed., 1988).

921. For the more detailed story, see Barenberg, *supra* note 31, at 1392-1412, 1431-60.

Employers' continuing resistance drew the Boards more deeply into framing and supervising the election process.

Whether employee representation should be proportional or majoritarian, and whether employer-controlled organizations should appear on the ballot, were utterly contingent political questions that sharply divided key federal policymakers. From 1933 to 1935, in fact, workers were permitted the choice of company unions, and in some sectors (most notably, the auto industry) proportional representation prevailed over majority rule. In 1935, Senator Wagner's legislation—which codified exclusive representation by the majority-supported union and prohibited employer-dominated organizations—triumphed over Roosevelt's opposite but weaker preferences on both issues. Wagner's program of government-supervised elections of exclusive representatives, in turn, required that the NLRB define the "bargaining unit" of employees whose majority would count. The bargaining-unit issue was insignificant before 1935 because the old Boards generally intervened in crises where workers' strikes had already defined *de facto* election units.

Now imagine that the NLB's naive expectations of August 1933 had been fulfilled—that is, that employers in no way interfered with workers' self-structured process of communication and choice over workplace governance modes. Workers would aggregate in "units" and deliberate among themselves as they desired. Perhaps they would consult local notables, specialists, union officials, and even their (by hypothesis, wholly benign) employers about optimal workplace arrangements.⁹²² Indeed, in a world in which employers did not interpose management-supported participatory or representative structures to "divide and conquer," some workers might well choose such workplace arrangements in addition to or apart from independent unionization. (Even during the general labor-management combat of 1933–35, the Boards ruled that some company unions were freely elected.⁹²³) The legal regime could leave to unionized workers themselves the decision whether to present a united front and iron out their subgroup differences within a single union, or instead to play coalition politics among separate agents in a system of proportional representation. Alternatively, in light of the free-rider problems of workers' collective action, the law might grant exclusive bargaining rights—displacing proportional, minority, or individual bargaining—to a representative that achieved majority support in some reasonably bounded (but still initially worker-defined) bargaining unit. Workers might well choose units larger than a single enterprise.

My reform proposal attempts in some ways to simulate this imaginary path, but in a world of entrenched anti-union managerial norms and

922. Indeed, legislators expected that workers would engage in such consultations among themselves, with community leaders, and with employers, once protected against coercion under the NLRA.

923. See Barenberg, *supra* note 31, at 1451–52.

emerging flexible enterprises and networks. The next subsection surveys some real-life institutions that point the way.

2. *Institutional Forerunners.* — My proposals draw on elements of domestic institutional innovations by state and local governments and by joint union-management entities, and on foreign legal institutions, some of which, in turn, were forerunners of the domestic innovations.

a. *Homegrown Decentralized Concertation.* — A variety of promising programs have emerged under the aegis of state and local governments' economic-development efforts, of joint union-management councils, or of some blend of the two. These wide-ranging programs channel such resources as advanced technological know-how, organizational-design services, worker training, marketing support, and capital through decentralized councils, conferences, or consortia. The collective participants in these decentralized entities include representatives of employers (often including several horizontally or vertically connected small and medium-sized enterprises), unions, nonunion workforces, state or local technical agencies, private consultants, or public and private educational and research institutions. For our purposes, an important element of some of these meso- and micro-corporatist initiatives is that they condition grants of their various resources on (1) partnerships between unions and management in deploying the resources, (2) management's creation of new worker participation or representation structures, or (3) investment in workers' and unions' long-term "proactive capacity" to engage in major organizational and technological redesign. It is an incremental, albeit long, step to imagine the basic functions of the labor law regime systematically embedded in such programs. By the mandate of federal labor law, decentralized, government-supported "workplace participation centers" could provide both protected fora for free worker deliberation, and resources and information for encouraging high-participation, undominated governance choices.

One of the pioneers of such local concertation was the Jamestown Area Labor-Management Committee (JALMC) in New York State,⁹²⁴ an economic-renewal initiative sparked in the late 1960s by a representative of the Federal Mediation and Conciliation Service and a dynamic mayor.⁹²⁵ JALMC was steered jointly by the FMCS official, the mayor and city ombudsmen, and union and management leaders. With the help of federal and state funding, preeminent consultants in workplace participation, Eric Trist and William Foote Whyte, and the vocational resources of Jamestown Community College, JALMC established joint labor-management committees in many local manufacturing plants. The collaborative committees implemented training, gainsharing, and problem-solving programs, and even major organizational redesign. For example, three hundred employees, with the support of JALMC, contributed their intimate

924. The story of JALMC is told in Simmons & Mares, *supra* note 782, at 80–95.

925. The mayor, Stanley Lundine, is now Lieutenant Governor of New York.

shopfloor know-how to a joint committee's plan to redesign the Carborundum glass manufacturing plant, at a final cost that was forty percent less than the design of an outside engineering firm. Many participating managers and unionists attested to the gains in trust and worker initiative that JALMC yielded—as well as to the widespread managerial resistance due to entrenched norms of hierarchical control.⁹²⁶

By the late 1980s, several state governments launched systematic programs that developed similar labor-management-government councils in hundreds of communities.⁹²⁷ Among the foremost programs, Michigan Modernization Service's (MMS) comprehensive system of "industrial extension" services helped "small manufacturers upgrade their production technologies, retrain their workers, revamp their labor-management systems, find new markets, even launch new companies."⁹²⁸ From the point of view of facilitating flexible networks of high-performance companies that face intense global competition, one of MMS's most notable initiatives was the Council of Independent Parts Suppliers in southwestern Detroit. The Council brought together labor and management representatives of twenty auto-parts suppliers to upgrade technology, organizational design, and training, all linked with enhanced labor-management consultation and worker participation.⁹²⁹ Similar stories of collaboration and participation in enterprises and networks of enterprises emerged from Pennsylvania's Industrial Resource Councils (IRCs) and Manufacturing Innovation Network Initiative (MAIN);⁹³⁰ Massachusetts's various

926. A teacher at Jamestown Community College observed: "It takes years of relentless pushing [of control-minded company managers] to get some changes. Management knows they should ask for more participation from workers in decision-making. But it goes against their values." Simmons & Mares, *supra* note 782, at 94 (quoting Larry Carter). A keen participant-observer in similar programs in Pennsylvania likewise stated that in the absence of fundamental changes in corporate culture, "[m]iddle managers often sabotage the cooperative activities, fearing a loss of authority and responsibility." David Osborne, *Laboratories of Democracy* 74 (1988) (quoting Robert Coy, director of several successive statewide economic-development programs).

927. See Gary Florkowski, *Area Labor-Management Committees in the 1990s: Retrenchment or Revival?*, in *Proc. of the 45th Ann. Meeting of the Indus. Rel. Res. Ass'n*, 271, 271–81 (Indus. Rel. Res. Ass'n Series, John F. Burton ed., 1993) (reporting improved labor-management cooperation and productivity in large-sample survey of area labor-management committees); Arnold M. Howitt et al., *A National Overview of State Labor-Management Cooperation Programs*, in *Proc. of the 42d Ann. Meeting of the Indus. Rel. Res. Ass'n*, 58, 58–69 (John F. Burton, Jr. ed., 1990) [hereinafter *Proceedings* (1990)] (surveying twelve state programs).

928. Osborne, *supra* note 926, at 167. A new governor eliminated the program in the winter of 1990, but some of the area councils continued with employer, union, and other funding. See Michael Schippiani, *Labor and Industrial Relations Strategies in the State of Michigan*, in *Economic Restructuring*, *supra* note 895, at 109, 119.

929. See Schippiani, *supra* note 928, at 116–18; see also Charles F. Sabel, *Can the End of the Social Democratic Trade Unions Be the Beginning of a New Kind of Social Democratic Politics?*, in *Economic Restructuring*, *supra* note 895, at 37, 158–59.

930. The Pennsylvania program facilitated collaborative networks within local industries, including Pittsburgh-area foundries, Erie plastics manufacturers, and Lehigh

regional development programs and its Center for Applied Technology (CAT); and Ohio's county-level Area Labor-Management Committees (ALMCs).⁹³¹

The creative efforts of unions and employers have propelled many of the domestic experiments in regional and local concertation. I have already mentioned several instances in which unions acted as strategic partners in designing and implementing high-performance, team-based enterprises: the UAW and Saturn; the Textile Workers and Xerox; the Communication Workers and U.S. West; and the Steelworkers and LTV.⁹³² While that are paradigmatic cases of so-called "jointness" between labor and management, they of course entailed complex series of consultations not only between shifting configurations or "slices" among both sides, but also consultations with other stakeholders, supplier networks, organizational consultants, community leaders, and educational-training institutions.⁹³³ There are also many instances of full-blown regional multi-stakeholder councils, akin to the Jamestown model, that were initiated by labor and employer associations rather than by government catalysts—such as the Philadelphia Area Labor-Management Committee (PALM) and the statewide MILRITE Council in Pennsylvania.⁹³⁴

Joint programs that offer workers job training, as well as larger career-development and "lifelong learning" opportunities, require similar innovations in consultative governance and delivery institutions. These programs, while self-consciously aimed at deepening consultative trust between labor and management, enable unions simultaneously to provide richly appreciated benefits to frontline workers and to mobilize members for active participation in union and workplace governance. Exemplars include the Alliance for Employee Growth and Development among the Communication Workers, the International Brotherhood of Electrical Workers, and AT&T; and the Education, Development and Training Pro-

Valley textile and apparel makers. See Robert Coy et al., Collaborative Restructuring Efforts: Textile and Apparel Labor-Management Innovation Network, Lehigh Valley, Pennsylvania, in *Economic Restructuring*, supra note 895, at 91, 91–108; Sabel, *Studied Trust*, supra note 685, at 126–37. See generally Osborne, supra note 926, at 43–81 (providing background information on Pennsylvania and other state programs).

931. See Frank Emspak, Applying Skills-Based Automation Through Participatory Management: The Center for Applied Technology, in *Economic Restructuring*, supra note 895, at 121; Paul F. Gerhart et al., Ohio Economic Development: The Effects of State Intervention to Improve the Labor-Management Relations Climate, in *Proceedings* (1990), supra note 927, at 46, 51–53; Sabel, *Studied Trust*, supra note 685, at 124.

932. See supra text accompanying notes 613–618.

933. The United States labor movement has produced important historical precursors of the recent experiments. Most notably, since the interwar period union engineering departments have set enterprise efficiency and design standards for employers in the garment industry, see, e.g., Fraser, supra note 39, at 170–77, although without the emphasis on high-learning, self-revising work processes of today's experiments.

934. See, e.g., Osborne, supra note 926, at 71; Arthur B. Shostak, *Robust Unionism: Innovations in the Labor Movement* 21–23 (1991).

gram of Ford and the UAW.⁹³⁵ Committed organizations like the CWA and UAW have found that, for such programs to succeed, unions must devise grass-roots, participatory committees to determine members' local educational preferences and needs, and must actively mobilize local actors to spark their interest and commitment. These largely unnoticed initiatives point toward renewed roles for broader employee organizations even in—especially in—a world of global competition and flexible, continuous-learning enterprises. Amidst fluid corporate boundaries and more flexible external labor markets, trans-enterprise employee organizations—with the encouragement of a reformed labor law regime—may increasingly function as suppliers of the public goods of training, education, and career readjustment resources, in addition to serving as repositories of technological- and work-design capacities based on an employee rather than a managerial perspective.

b. *Overseas Institutions.* — There are innumerable foreign models to which one might turn for practical schemes of decentralized government facilitation of labor-management consultation and fortification of employee participation.⁹³⁶ I will at this point simply mention some institutions that serve as reference points in my discussion below. First, German systems of labor relations offer workers a more robust and independent role in shopfloor governance than, for example, Japanese enterprise unions, consultative committees, and paternalistic work groups. While this is due in significant part to the support provided by more centralized (or regional) union bargaining power, the legal regime also plays a vital role through direct statutory mandates of the minimal authority of works councils. In any event, German unionists and works councils have developed more worker-empowering models both of participatory work-group process and of enterprise-level representative structures than have emerged under the Toyota model of lean production. Professor Summers rightly noted in the mid-1980s that even German works councils tended to subordinate employees' interests to management's more than did United States union locals.⁹³⁷ The late 1980s, however, saw a belated surge in German unions' interest in collaborating with works councils to develop models of group work process independent of managerial approaches to *Teamarbeit*.⁹³⁸

935. These and other joint training and "lifelong learning" programs are described in the papers collected in *Joint Training Programs: A Union-Management Approach to Preparing Workers for the Future* (Louis A. Ferman et al. eds., 1991), and in Rosemary Batt & Paul Osterman, *Case Studies for a National Policy for Workplace Training: Lessons from State and Local Experiments* (1993).

936. Some foreign models of government-facilitated, decentralized tripartism date back to the early nineteenth century. In Denmark and the Kingdom of Württemberg, for example, the state provided training and technological resources contingent on joint governance by local masters and journeymen. See Sabel, *supra* note 582, at 48.

937. See Clyde Summers, *An American Perspective of the German Model of Worker Participation*, 8 Comp. Lab. L.J. 333, 338 (1987).

938. See *supra* notes 744–745 and accompanying text.

Second, the Scandinavians have likewise developed models of group-based technology and organization explicitly based on norms of worker "self-realization" and deliberately designed to counter the "Team Taylorist" tendencies of zero-slack production.⁹³⁹ They have also legally codified, although implemented only partially in practice, employees' and their representatives' entitlement to develop the capacity to engage fully in technological and job design.⁹⁴⁰ In both Germany and Scandinavia, however, labor's actual development of such proactive capacities has come largely through innovative, collectively bargained rights to hold periodic joint councils with management to map future technological and workforce skill requirements.⁹⁴¹ But, significantly, the legislative pronouncements had sufficient symbolic effect to "spark[] broad discussion within and among local unions of alternative concepts for worker training and work organization."⁹⁴² More striking perhaps are recent large-scale Swedish experiments in organizational "design conferences." Such intensive conferences use various configurations of large- and small-group consultations over several-day periods to involve all employees and other stakeholders in major organizational overhauls. The progenitors of

939. See Berggren, *supra* note 601, at 6-20, 90-183; Jonas Pontusson, Unions, New Technology, and Job Redesign at Volvo and British Leyland, *in* *Bargaining for Change*, *supra* note 578, at 277, 291-96.

940. See, e.g., Frank Blackler & Colin Broan, *The Law and Job Design: Comments on Recent Norwegian Legislation*, 13 *Indus. Rel. J.* 73, 73-82 (1982).

941. For developments in Germany, see, e.g., Thelen, *supra* note 744, at 197, 209, 219; Turner, *supra* note 571, at 185-86; Horst Kern & Charles F. Sabel, *Trade Unions and Decentralized Production: A Sketch of Strategic Problems in the West German Labor Movement* 27 (Jan. 1991) (unpublished manuscript, on file with the Columbia Law Review). On Swedish and Norwegian innovations, see, e.g., Berggren, *supra* note 601, at 78-90; Bjorn Gustavsen, *Technology and Collective Agreements: Some Recent Scandinavian Developments*, 16 *Indus. Rel. J.* 34, 35-41 (1985). Consider, for example, Turner's description of the system of local, regional, and national "personnel councils" in the Deutsche Bundespost (a state enterprise combining postal, telecommunication, and banking services):

[T]he councils have codetermination rights regarding job design and the use of new technology. . . . [T]he [union representing Bundespost workers] and the councils have used these rights to support the introduction of new technology and to ensure that technological change includes an improved quality of working life for the affected employees.

. . . .

When new technology is in the planning stages, the personnel councils send their own specially trained representatives to study the equipment and analyze its impact on jobs and working conditions. On the basis of their independent analysis, personnel councils then negotiate with management concerning appropriate technology and job design. . . . The personnel council negotiates for relocation for the displaced [and for] improved working conditions and ergonomics [for remaining workers]

Turner, *supra* note 571, at 186.

942. Thelen, *supra* note 744, at 208 (describing impact on Swedish Metalworkers' Union of legislation establishing grants for jointly administered training, research and development, and work innovation).

these conferences self-consciously base them on Habermasian ideals of egalitarian communication.⁹⁴³ Similar experiments in intensive large-group conferences designed to involve stakeholders in, and commit them to, the redesign of economic enterprises and community institutions are legion, in North America and abroad.⁹⁴⁴

C. *An Outline of Deeper Labor Law Reform*

1. *Pieces of the Puzzle, Already on the Table.* — A variety of legislative proposals and administrative changes incorporating some of these innovations—particularly the state and regional industrial extension and training programs—have surfaced at the federal level under the Clinton administration. The possible connection between these disparate federal initiatives and labor-law-reform proper has not yet been drawn.

The proposed Manufacturing Technology and Extension Act of 1993 would authorize substantial increases in the budget of the Commerce Department's National Institute of Standards and Technology for purposes of creating a network of thirty National Manufacturing Technology Centers and one hundred satellite Manufacturing Outreach Centers. A stated goal of the Senate bill is "to help United States manufacturers, especially small and medium-sized manufacturing enterprises, to adopt best current manufacturing technologies and practices and, as appropriate, new advanced manufacturing equipment and techniques."⁹⁴⁵

Meanwhile, the proposed Workers Technology Skill Development Act of 1993 would authorize the Department of Labor to make matching grants to democratically elected "worker organizations," educational institutions, and other nonprofit organizations.⁹⁴⁶ The purpose of the grants is to provide training and other resources to enable workers and their organizations to gain "the expertise necessary for effective participation with employers" in developing and implementing "advanced workplace technologies and advanced workplace practices and forms of work organ-

943. The best English-language overviews are in P.H. Englestad, *Action Research and Network Development* (1992); Björn Gustavsen, *Dialogue and Development: Theory of Communication, Action Research and the Restructuring of Working Life* 39-120 (1992); Björn Gustavsen, *Workplace Reform and Democratic Dialogue*, 6 *Econ. & Indus. Democracy Rev.* 461, 461-72 (1985).

944. They range from Kodak's "stakeholder conferences" for designing new technological systems, see McKersie & Walton, *supra* note 827, at 270, to Tavistock-inspired "large Group" conferences at a British construction equipment manufacturer, see Eric J. Miller, *Organizational Development and Industrial Democracy: A Current Case-Study*, in 2 *Group Relations Reader* 243, 256-65 (Arthur D. Colman & Marvin H. Geller eds., 1985), to various community-wide consultative conferences focusing on particular projects or issues. For a popularized account of many of these, see the dozens of case studies sketched in Marvin R. Wiesbrod et al., *Discovering Common Ground* (1992).

945. S. 4, 103d Cong., 1st Sess. § 212 (1993) (pending in committee); cf. H.R. 820, 103d Cong. 1st Sess. § 202 (1993) (pending in committee) (stating similar goal).

946. See S. 1020, 103d Cong., 1st Sess. §§ 1-5 (1993) (pending in committee). The term "worker organizations" appears to be broader than "labor organization" as defined in NLRA § 2(5).

ization.”⁹⁴⁷ The grantees may use the funds themselves or may assist state extension services or federal Outreach Centers to develop cooperative labor-management programs for implementing new technologies, autonomous work teams, job redesign for “expanded responsibility and autonomy for frontline workers,” multi-skilling, and continuous-learning programs.⁹⁴⁸ The bill also directs the Departments of Labor and Commerce jointly to gather and disseminate, through the Outreach Centers or otherwise, information about “best practice cases” and about the best training and organizational services for helping worker organizations develop such proactive capacities.

At the same time, the Department of Labor has created a new division—the Office of the New American Workplace—to promote high-performance, cooperative workplaces.⁹⁴⁹ Finally, there is a rash of proposals for enhanced provision of training, skill upgrading, and job readjustment resources for frontline workers—by contrast with past labor market programs more narrowly targeted at especially disadvantaged and unemployed workers.

My proposals for more robust labor-law reform can be understood as an integration of these various institutional and funding proposals into a greatly revamped and decentralized version of a venerable, sprawling administrative network: the NLRB and its Regional Offices. The remaining subsections, finally, set out the basic components of such reform. I leave for future work the drafting of statutory language specifying the more precise architecture of these new building blocks.

2. *The Institutional Component: Regional “Centers for Advanced Workplace Participation.”* — As intimated above, the institutional core of my proposals is a system of regional offices—call them Centers for Advanced Workplace Participation—that combine the current functions of the NLRB regional offices and the germinating Manufacturing Outreach Centers. The Participation Centers would have several functions. First, they would, as in the legislative proposals mentioned above, serve as informational clearing-houses for benchmark practices in technology, participatory and high-challenge work processes, and democratic organizational design. Second, they would provide a high-visibility, one-stop link between regional employers and employees, on the one hand, and federal and state resources for workplace training, career adjustment, technological development, organizational design, and perhaps other purposes (e.g., marketing strategies or start-up capital for smaller businesses) on the other. The actual service-providers—that is, the grantees of such resources—would include employer associations, unions and other employee organizations, private research and development firms, organizational consultants, and educational institutions. Third, the Cen-

947. S. 1020 § 3(2).

948. Id. §§ 4(5), 4(6), 5(c).

949. See Daily Lab. Rep. (BNA), July 19, 1993, at A-3.

ters would supervise and protect the process of employee deliberation and choice over workplace governance modes, and serve the other enforcement and mediation functions currently vested in the NLRB Regional Offices and the Federal Mediation and Conciliation Service.

3. *The Self-Governance Component: Ensuring Workers' Active Choice Among Governance Modes.* — As already mentioned, workers should be allowed and required to choose among the variety of governance modes described in more detail below. (Under one version of my experimental scheme, discussed below, workers would be required to deliberate over their governance choice anew at designated intervals.) This proposal envisages a restoration of the policy prevailing in 1933-35, when workers chose among not only nonunion and unionized workplaces, but also employer-supported representation plans (company unions). As discussed above, some commentators have suggested that if legal reform fortifies protection of employees' right to unionize, then workers who failed to unionize could be deemed to have "chosen" any extant management-imposed employee-involvement schemes permitted by the concurrent repeal of Section 8(a)(2).⁹⁵⁰ But if workers must bear even the hypothetically diminished transaction costs of organizing and choosing independent unions, then it is hard to justify giving management the freedom unilaterally to impose representative or participatory structures that hold all the risks of manipulation and entrenched antiunion "naturalization" discussed at length in Part V above.

By the same token, there *are* affirmative justifications for a requirement that employees actively endorse such in-house entities. First, the requirement provides workers an occasion for conscious reflection and discussion about the dangers of manipulation and paternalism (as well as the potential benefits) inherent in such schemes. Indeed, one of the facilitative functions of the regional Centers' staff would be to inform workers about the widely different forms and outcomes—both pathological and empowering—that team systems can yield. Recall that the legislation already pending in the Senate would authorize Outreach Centers to disseminate information about best-practice autonomous teams and representative committees. My proposal integrates this function into the labor law regime proper. Second, such conscious, informed deliberation would help prepare workers to monitor the good faith of both their employee representatives' and employers' performance if employees ultimately opted for the schemes. This would diminish the possibility that, after workers have chosen participatory or representative structures, employers could quietly build manipulative practices into teams or coopt committee representatives "behind workers' backs." In these respects, legal institutions would in part play the role ascribed to critical theorists themselves—the role of dialogically apprising subordinate actors of the

950. See *supra* text accompanying note 835.

opaque power relations that may shape their preferences and perceptions.⁹⁵¹

Third, because such schemes are typically more successful when workers are highly committed,⁹⁵² their formal endorsement may enhance the effectiveness of nonunion participatory workplaces. At the same time, if workers are informed about both the perils and promise of in-house schemes, they may be less likely to experience the shattered expectations that undermine participation if management oversells the scheme to overcome workers' skepticism about management-initiated programs. The imprimatur of government-supervised selection—and of the legislated, benchmark minima for in-house schemes discussed below—would also likely enhance workers' capacity to wield the empowering *norm* of democratic participation in consultations with management.⁹⁵³ Finally, trans-enterprise unions would face healthy, revitalizing competition if workers could periodically choose among in-house options and a range of existing and emergent employee organizations—so long as workers' ongoing freedom to deliberate and choose governance modes is in fact protected. This brings us to the central problem of ensuring employees' egalitarian deliberation against the backdrop of employers' entrenched anti-unionism and control of workplace communication channels.

4. *The Process Component: Formal, Nonadversarial "Conferences for Employee Choice."*

a. *The Familiar, Intractable Problem of Egalitarian Deliberation Under Asymmetric Power.* — Basic features of the workplace make the problem of legally ensuring open, well-informed employee discussion about enterprise governance appear intractable, as students of labor law well know. The most important feature, as already summarized, is employers' authoritarian control of workplace interaction and communication. This permits subtle or covert intimidation not only against potential union supporters during workers' deliberations but also against incumbent employees who testify at subsequent NLRB unfair labor practice trials.

One apparent solution is to make unionization or even some fuller form of workers' control the default position in the employment relation.⁹⁵⁴ Employees would then deliberate from an initial position of greater collective self-protection against employer intimidation.⁹⁵⁵ Employees' recent revealed preferences, combined with the theory of adap-

951. See Geuss, *supra* note 128, at *passim*.

952. See *supra* notes 645–655 and accompanying text.

953. See *supra* notes 778–787 and accompanying text.

954. In Senate hearings on the Wagner Act, the legal realist Robert Hale argued compellingly that an individual worker faces less coercion and greater autonomy under mandatory unionism than under a state of nonunionism. See Hearings on S. 2926, *supra* note 135, at 51, reprinted in 1 *Legis. Hist.* *supra* note 47, at 81.

955. Although Wagner was confident that administrative sanctions would protect nonunion workers against employer coercion, see Barenberg, *supra* note 31, at 1444 n.291, other contemporaneous labor progressives argued that only the workplace presence of a union could meaningfully safeguard workers from managerial anti-unionism.

tive preferences, may add to the appeal of this solution. That is, workers who have experienced union representation express high absolute levels of satisfaction with their unions and substantially stronger preferences for unions than those who never have.⁹⁵⁶ In the face of the high transaction costs, free-rider problems, and fear borne by union supporters, the preferences of nonunion workers may tend to accommodate the nonunion status quo.⁹⁵⁷

The appeal of mandating unionization as the workplace default position is somewhat (although, to my mind, not decisively) diminished so long as workers are allowed to choose authoritarian workplace governance. If an incumbent workforce chooses managerial fiat over joint determination, the governance choice by the next "generation" of employees (after workforce turnover) will again require legal protection against employer intimidation. At the same time, if workers are either not free to opt out of democratic workplace governance or not required affirmatively to choose unionization, their commitment to participate and to monitor representatives, and their representatives' reciprocal incentive to mobilize and be responsive to workers, may tend to diminish under the familiar iron law of oligarchy.⁹⁵⁸ And, on the plane of principle, if not free to opt out of unionism, employees would lose the right to choose for themselves the tradeoff, if any, between welfarist⁹⁵⁹ and other values, on the one hand, and the value of decentralized democratic participation, on the other.⁹⁶⁰

I believe that, on balance, the default state of unionization would more accurately reflect the undominated long-term subjective preferences of employees in the current economic environment and would provide a more protected setting for ongoing egalitarian deliberation about

956. See *supra* note 899.

957. See *supra* note 842-860, 896-900 and accompanying text; Weiler, *Governing the Workplace*, *supra* note 3, at 278 n.69; Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. Chi. L. Rev. 1041 (1984).

958. See Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* 15, 70 (Eden Paul & Cedar Paul trans., 1962) ("organization implies the tendency to oligarchy"); cf. Estreicher, *supra* note 524, at 53 (arguing that "[w]orks councils cannot simply be imposed on an overwhelmingly nonunion workplace that has yet to develop even a system of collaborative representation"). There is historical evidence that unions tend to ossify when not faced with the need for continuous "organizing" of even current members. The automatic dues-deduction from paychecks afforded unions during World War II appears to have reinforced the labor movement's adherence to a "service" rather than "mobilizing" model of unionism. See *supra* note 935 and accompanying text. That is, in order to fund collective action, union stewards no longer had continually to organize the membership. See Nelson Lichtenstein, *Labor's War at Home: The CIO in World War II* 79-81 (1982).

959. In pecuniary terms, labor's possibly enlarged distributive share from more efficient production.

960. Recall that seeing decentralized democracy as a weighty ideal does not necessarily entail that more centralized democratic participation and other values are less weighty. See *supra* notes 663-665 and accompanying text.

governance modes.⁹⁶¹ But because a mandate of "default" unionization would likely launch my proposals into the political ozone,⁹⁶² it is worth exploring intermediate critical-pragmatic proposals that do not incorporate such a mandate.⁹⁶³ (In the spirit of my proposals below for decentralized experimentation, however, a regime of default unionization could still be tried on a regional basis.)

Before turning to such intermediate proposals, it is important to insist on legal reformation at least to the extent of *permitting* management and unions to initiate unionized workplaces prior to employee choice. I have in mind the kind of pre-hire agreement between unions and employers that launched the Saturn plant. Although the NLRB General Counsel declined to file an unfair labor practice complaint against the UAW and GM, Saturn's birth was beclouded by the NLRA's ban on employer recognition of a union prior to its achievement of majority support among an established employee complement.⁹⁶⁴ In light of the fact that workers' governance choice is, if anything, more freely made in a union rather than a nonunion setting, there is no principled reason to block the desirable joint union-management planning of work processes and organizational design from scratch.

In addition to the *presence* of employer control of worker livelihood and workplace communicational channels, the legal regime confronts a debilitating *absence* from worker deliberation—the lack of a third-party watchdog. During political elections, the mass media put at least weak constraints on campaigners' misrepresentations and stronger constraints on outright intimidation or bribery of voters. There is generally no such

961. I use the term "undominated" in a relative, not absolute, sense. See *supra* note 125. That is, I do not deny that unionized workers experience various processes of domination or manipulation deployed by unions, fusions of union-management elites, and many other institutions outside the workplace. But the evidence that employees who have experienced both union and nonunion workplaces strongly favor the former is telling. See *supra* note 899 and accompanying text. And there is no doubt that unionized workers are vulnerable to much diminished levels of overt coercion and manipulation compared to nonunion workforces. Finally, my proposals for protected deliberative Conferences safeguard employees against both employer and union intimidation and manipulation during employees' deliberative process and indirectly deter such coercion even outside Conferences. See *infra* notes 970–975, 982–983 and accompanying text.

962. Cf. Gottesman, *supra* note 832, at 2807 (summarizing view that employers opposed to mandated German-style works councils "would find political pay dirt in the deep-seated American commitment to freedom of contract").

963. My intermediate proposals do retain a residue of the political dream of mandating default unionism, in the form of offering enterprises (cumulative) valuable organizational resources conditioned on workers' or managers' choice of (cumulatively) democratic governance modes, including empowered teams, strategic joint committees, and full-fledged unionization. See *infra* notes 971–72, 980, 995, 1003, 1041–42 and accompanying text.

964. It is no coincidence that an era of fluid enterprise boundaries and fast-changing products should raise the pre-hire problem on a broad scale. That problem has always inhered in such short-product-cycle sectors as construction and apparel manufacturing. See Piore & Sabel, *supra* note 109, at 115–20.

independent monitor of the day-to-day communications and interactions during workplace campaigns, let alone from the time workers enter the sophisticated nonunion enterprise. Workers must discount the reliability of campaign propaganda; their decision-making is thus further removed from the ideal of fully informed deliberation.⁹⁶⁵ The absence of an on-the-spot monitor and arbiter not only weakens deterrence of misrepresentation and intimidation. It also entails that legal remedies, including rerun elections, may come long after employees' intangible psychic resources for collective mobilization are beyond restoration.

b. *The Solution: Government-Facilitated Deliberative Conferences.* — The legal regime should afford employees a protected forum, radically removed from the day-to-day context of employer authority, in which they can openly discuss their workplace governance options. It should also ensure that workers are well and accurately informed about the content and possible consequences of those options. The staff of the Centers for Advanced Workplace Participation could serve as facilitators of intensive Conferences—akin to the North American and Swedish organizational design conferences—in which workers would meet in a series of large and small group settings to discuss and ultimately to make their governance choice. The cost of such Conferences—in terms of administration and foregone production—would be substantially offset by other proposals, discussed below, that would diminish the resources, time, and turmoil otherwise devoted to anti-union campaigns.

Adapting the pending Senate legislation, the Participation Center staff could provide organizational, technological, market, and work-design information relevant to the employees' deliberations. But the Centers should also provide employees with access to nongovernmental sources of information and expertise. Prior to the Conferences, employees could choose, through some minimal threshold showing of interest, to invite representatives of unions or other employee organizations, private consultants, training institutions, and the like to participate in the Center-facilitated discussions. Again adapting an idea from the proposed Workers Technology Skill Development Act, the Centers could provide advance information about the various "best practice" representatives who are likely to interest participating employees of enterprises in particular sectors or regions.

In the early stages of the series of group meetings, employees should be guaranteed intensive periods of deliberation outside the property and presence of management and employer-aligned consultants. Such initially excluded managerial employees should, however, be confined to a much smaller group of upper management than the current expansive

965. Absurdly, the Reagan Board saw this impairment of workers' deliberation as a ground for allowing employer misrepresentations. The Board argued that in their deliberations, workers, when unprotected from misrepresentations, will not credit campaign information. Hence, there is no need to protect the conditions for meaningful deliberation. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

corps of "managerial employees" who are excluded from NLRA coverage.⁹⁶⁶ As flexible organizations increasingly blur the hierarchical line between high-discretion and low-discretion jobs, the judicially invented managerial exclusion becomes that much more incongruous. In the present period of organizational flux, the regional Centers should again exercise context-specific discretion to decide the extent to which particular layers of "managerial" employees are subjectively integrated with upper management and therefore likely to distort the employee phase of Conference deliberations. At Saturn, in fact, white collar employees who might well be deemed "managerial" in a traditional workplace have expressed heightened desire for inclusion in the channels of collective voice already enjoyed by the broad complement of team employees.⁹⁶⁷

Nonetheless, after early stages in the series of group meetings, upper management representatives and their consultants should not only be free, but required, to participate. Joint employer-management deliberation would begin a process of collaborative rather than adversarial relations in workplace governance. The Conference procedure would be paradigmatic of consultative relations, just as the current NLRB election campaigns set the tone for the adversarial relations that follow. Of course, management's participation would also provide invaluable expertise and information, and encourage managerial employees' commitment to the governance mode ultimately chosen by nonmanagerial employees. The Conferences would thus constitute facilitative stakeholder arenas for fluid organizational self-design and transformation.

At all stages, the Center's staff would chair the discussions, balancing the value of wide distribution of employees' speech opportunities with the goal of constructive discussion. The staff would also ensure that outside and managerial representatives have sufficient, but not filibustering, time allotted for their presentations and discussions with employees. Conferences of employees from large enterprises or multi-employer networks would necessarily make greater use of discussion among employee subgroups, and among *representative* panels of employees with opportunities for observation, questions, and discussion by assemblies-of-the-whole. It is worth noting—for those who doubt the legal practicability of such conferences—that a little-known provision of German labor law allows unions unilaterally to initiate an analogous assembly of an entire enterprise workforce to deliberate over whether to establish ongoing represen-

966. The current managerial employee definition and exclusion is the product of decisional law—not statutory directive, which excludes only narrowly defined supervisors. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (formulating broad managerial employee exclusion). The Supreme Court vaguely defines "managerial employees" as those who are "aligned" with upper management and exercise discretion to formulate and implement managerial policy. See *id.* at 272–73. For a dissection and critique of this doctrine, see Karl E. Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 13 *Socialist Rev.* 99 (1983).

967. See Rubinstein et al., *supra* note 613, at 368.

tative works councils.⁹⁶⁸ In addition, longstanding proposals by the European Commission would mandate employee election of representatives who would meet in large-scale conferences with management in order to determine the structure of (proposed) participatory councils. As in my proposals, European workers would be entitled to resources necessary for effective participation.⁹⁶⁹

The Conference concept has several aims. The first is to create as pure a setting for egalitarian, informed deliberation as is possible in a highly impure world. *If* we are socially committed to affording employees the free collective choice of workplace governance modes—and, in principle, we already are⁹⁷⁰—then that choice is surely better made in my proposed setting than in furtive fragmented meetings or under the unilateral surveillance of a party (the employer) capable of inflicting great cost on the choosers.

Second, by encouraging employees to invite third-party representatives not financed by employers, the Conference system would create a robust “market” for unions, employee associations, and other labor-oriented consultants who have proactive capacities in organizational and technological design and other training and career resources, all geared to the needs and preferences of employees.⁹⁷¹ In other words, an appealing role for well-equipped, mobilizing unions or wholly new forms of employee organization would be built-in to the new institutional scheme.⁹⁷² As part of their various joint labor-management programs, unions such as the UAW and CWA have already developed sophisticated methods for determining the job-design and career-development needs and preferences of different work groups (and fancy multi-media presentations to encourage members actively to make use of the educational and other resources provided by such programs).

At the same time, the legal regime can safeguard against Center/Grantee interest-entrenchment and rent-seeking by affording employees

968. See Manfred Weiss, *German Labour Law and Industrial Relations* 157 (1986).

969. See Roger Blanpain, *Labour Law and Industrial Relations of the European Community* 193, 196 (1991).

970. That principle, of course, was embodied in the Wagner Act and survived the Taft-Hartley Amendments unscathed if not strengthened. As discussed in Barenberg, *supra* note 31, at 1450 n.309, the prevailing principle of workers’ free choice does not include the option of full workers’ control in a previously capitalist enterprise, unless through unionization workers achieve sufficient bargaining power to negotiate for it.

971. Again, S. 1020 takes a step toward encouraging such proactive capacities, but with no connection to the labor law regime, and no affirmative means for encouraging employees to make use of those services—*both* crucial features of my proposal.

972. Important exemplars are the extremely dense structures for member participation that the local unions at the Saturn auto plant and the Sarnia Shell chemical plant have developed in tandem with the unions’ “co-management” commitments. See Rubinstein et al., *supra* note 613, at 358–59 (describing Saturn); Anil Verma & Joel Cutcher-Gershenfeld, *Joint Governance in the Workplace: Beyond Union-Management Cooperation and Worker Participation*, in *Employee Representation*, *supra* note 3, at 197, 227.

and managers a choice among Centers when they participate in Conferences or seek other Center resources. That is, although Centers would provide decentralized services or linkage with other resource-providers, no Center would have a regional monopoly on its various statutory functions.

Third, the Participation Center's staff would constitute the third-party "watchdog" currently absent from employee deliberations. To some degree, the Conference method would shift labor regulation in the direction of the mediating, consultative role that New Dealers initially envisaged for federal labor boards.⁹⁷³ The Center facilitators could intervene on the spot to ventilate charges of misrepresentation. Their presence, obviously, would chill overt intimidation by employers during those group discussions in which management is included. More important, the legal regime should return to the pre-Taft-Hartley ban on all employer discussion of major workplace governance decisions which occur outside the protected context of Center-facilitated Conferences. The employers' First Amendment interests would be sufficiently preserved by this (concededly drastic) time, place, and manner restriction. The restriction is justified in light of the inherently coercive⁹⁷⁴ nature of anti-union managerial and supervisory speeches in the captive-audience setting of the workplace—as Learned Hand and William O. Douglas, among many others, well understood.⁹⁷⁵ Further protection would be afforded employer speech rights by the right, discussed presently, of either labor or management to call for deliberative Conferences.

This raises the questions of how and when the Centers should conduct Conferences. There are good pragmatic and theoretic grounds for encouraging decentralized experimentation and flexibility as to both these questions. The regional Centers should experiment to find the optimal Conference formats for enterprises and networks of varying sizes and sectors.⁹⁷⁶ The Swedish and North American organizational confer-

973. See Gross, *supra* note 261, at 18–21; Tomlins, *supra* note 83, at 109–10.

974. The First Amendment does not prohibit government limitations on coercive threats or offers by employers or others. See *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); Kent Greenawalt, *Speech, Crime, and the Uses of Language* 79–109, 239–59 (1989) (analyzing relation between First Amendment and government restrictions on threats and inducements).

975. See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 600 (1941) (Douglas, J.) (stating that mere "[i]ntimations of an employer's preference, though subtle, may be as potent as outright threats of discharge"); *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) (stating that "[w]hat to an outsider will be no more than the [employer's] vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart").

976. Such flexibility and capacity for experimental learning is, of course, one of the recognized virtues of decentralized, consultative models of legal regulation. See, e.g., Stephen Breyer, *Regulation and Its Reform* 177–80 (1982); Steven Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* 221–37 (1981); Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (1992).

ences mentioned above use many different, evolving configurations of small and large group meetings, including aggregations of representatives from a variety of slices through departments or work groups. Indeed, as a matter of action-research and reflexive-dialogic principle, the participants are encouraged to suggest designs for the conference sessions that would be most helpful to their shifting purposes.⁹⁷⁷ Just as the pre-Wagner Act labor boards developed a "common law" of adversarial unfair labor practices and election procedures over a period of years, so the regional Centers could develop a flexible common law of consultative Conferences. Unlike post-Wagner Act legal doctrine, however, the new legal regime should not freeze into law a single model for securing stakeholder deliberation and employee choice. The law should permit the format of deliberative stakeholder Conferences to change continually over time and place as a result of institutional learning, variable economic conditions, and reflexive transformations in the identities, configurations, and consequent governance needs of the collaborating parties. Remember, however, that *any* forum for protected deliberation and information-provision would be an improvement over the current regime's failure meaningfully to protect employee free association.

The Participation Centers should also experiment with alternative rules for calling deliberative Conferences. Among the imaginable models worth trying are a "mandatory" and a "stakeholder-petition" regime. In the mandatory regime, the Centers would require workers from designated enterprises or networks to convene, deliberate, and cast workplace governance ballots. The mandatory nature of the Conferences is no more coercive than employers' current captive-audience speeches to large and small employee groups, nor than the minimal proposed reform of subjecting workers to mandatory union reply speeches. The content of the Conferences, moreover, would be explicitly based on principles of deliberative democracy, unlike such authoritarian captive-audience presentations.

In the mandatory model, the law might require workers to reconvene at designated intervals. The designated intervals between Conferences for a given workforce should be long enough to ensure that the employees' governance choice has a chance to prove itself, and to provide employees a sense that the organization is necessarily committed to making the employees' participation option work. Five years seems about right.⁹⁷⁸ Before expiration of the designated term, either employees or

977. See Gustavsen, *supra* note 941, at 31-38. On the capacity of dialogic participants reflexively to discuss and transform the conditions within which they deliberate, see Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 32 (1992).

978. This interval is not arbitrarily chosen. Many high-participation workplaces lose their euphoria after two or three years and must readjust to find new sources of dynamism. Many succeed, although many also yield perhaps too quickly to discouragement, especially when management is not fully committed. The public standard of a five-year interval

management could petition the Participation Centers to hold "special Conferences" to reconsider the basic governance decision if special economic hardship or crisis in the enterprise or network can be shown, or if employees establish a threshold "showing of interest" in more participatory governance modes than were chosen at the previous Conference. The Centers could also call special Conferences, hold mediations, or use other nonadversarial dispute-resolution mechanisms if employees make a sufficient showing that the employer is manipulating governance mechanisms for purposes of influencing workers' future governance choice. Adversarial arbitrations or trials of unfair labor practices—with highly potent sanctions—could be held in reserve in the event that such consultative processes proved fruitless.

Under the stakeholder-petition model, the Centers would convene Conferences only upon a threshold showing of interest either by employees or by management. In order to minimize the incentives for employers to preempt such petitions by building nonunion organizational fortresses,⁹⁷⁹ the required showing-of-interest should be much less stringent than under the current rules for triggering an NLRB representation election. Some percentage of the workforce well below thirty percent should suffice; and the law should require only that employee-petitioners show an interest in holding a Conference, not that they indicate a prior commitment to union representation.

Managers may wish independently to petition the Center to convene a Conference in order to obtain the valued training, organizational and technological know-how, and marketing or financial resources that would be conditioned on workers' governance deliberations. The experience of the state, local, and foreign programs discussed above shows that both employee representatives and managers may have incentives to seek out the resources of the various regional councils and manufacturing extension centers—even when the string of enhanced labor participation is attached.⁹⁸⁰ The stakeholder-petition model may have the advantage of ensuring that the likely constrained time and resources of the Centers go to those enterprises in which some substantial stakeholders are primed to act as organizational change agents. Still, I believe it is worth testing

might inhibit premature abandonment of the organizational innovation. It might also generally encourage lengthened managerial time horizons. There are many instances of successful, jointly governed, team workplaces in which union officers and members have actively pressed for longer organizational time horizons than exhibited by managers who rotate through plants for short stints. See, e.g., Rubinstein et al., *supra* note 613, at 357.

979. See *supra* notes 886–895 and accompanying text.

980. Presently unfolding developments in Italian regional institutions are particularly interesting. Employers voluntarily seek employee training and readjustment resources through local union-management consortia under rules that condition such funding on acceptance of collectively bargained terms and conditions of employment. See Personal Communication with Charles Sabel (Oct. 18, 1993) (on file with author).

whether initiatives by the Centers themselves, as in the mandatory model, could catalyze private stakeholders.⁹⁸¹

There is good reason to believe that this regime would substantially reduce the level of adversarial unfair labor practice charges. The bright-line rule—again, with potent sanctions in reserve—against all employer anti-union campaigning outside of protected Conferences would erase much activity that spawns unfair labor practices. So too would employers' awareness, especially in the mandatory Conference model, that employees are personally familiar with regional Center staff, who stand ready to monitor managerial abuses and quickly call mediations or full-blown Conferences to ventilate charges that could damage managerial credibility in the presence of the entire workforce. Under the mandatory model, employees and managers would also know that their commitment and practice under existing governance modes would be publicly ventilated at regularly designated intervals. Much experience with labor-management cooperation shows that in an environment in which "participation" and "cooperation" are trumpeted norms, either party (union or employer) suffers great loss of legitimacy and loyalty if employees perceive a clear breach of those norms.⁹⁸² Management is widely aware of the damage to employees' morale and productivity if it is the perceived culprit. As for post-Conference unfair labor practices in unionized settings, the precipitous drop in rates of adversarial grievance arbitration in existing labor-management cooperation schemes is a positive harbinger.

This points to one of the most important aspects of the idea of nonadversarial Conferences administered by regional Participation Centers. It promises dramatic legitimation of the norms of participation, cooperation, consultation, and trust. The Center's facilitators would design the Conference, and especially those deliberations that include managerial representatives, as an intensive exercise in trust-building consultation. Such trust-building consultative processes and techniques are already surprisingly well-refined in the wake of substantial experience in joint labor-management programs.⁹⁸³ The Conferences themselves would afford vast opportunities for further refinement and learning.

Perhaps more important than the demonstration effect of the nonadversarial Conference process would be the direct legitimation of participatory and empowering governance norms through the highly visible commitment of the federal government to "Advanced Workplace Participation." That commitment would be personalized through the Center staff's face-to-face encouragement of employees to select feasible participatory organizational forms that offer the skill upgrading, career de-

981. The success of the national CWA in "selling" career-development resources and local participatory committees to frontline workers illustrates the potential for an "outside" entity to spark employee interest and action. See *supra* notes 935, 972 and accompanying text.

982. See *supra* notes 819–824, 935 and accompanying text.

983. See sources cited *supra* notes 647–652, 713, 927–935.

velopment, and organizational capacities for which United States workers, apprehensively facing the new flexible labor market, thirst.⁹⁸⁴ (The success of the AT&T/CWA Alliance in mobilizing similar worker participation and career development through decentralized committees is one of many encouraging precedents.) The funding incentives discussed below would also give unions, other employee organizations, and labor-oriented consultants, engineers, and educators an interest in promoting a renewal of the symbols and slogans of workplace democracy. Finally, if workforces widely emerged from their deliberations with grassroots endorsements of high-participation workplace governance, substantial "reframing" of employees' and ultimately employers' images of organizational life might ensue. A similar combination of robust legal enforcement and evolving public norms helped diminish the behavioral manifestations, and to some degree the underlying psychological force, of entrenched employer and employee attitudes about racial and gender segregation and harassment on the job.⁹⁸⁵

5. *The Governance Options.* — In addition to the fully nonunion option, workers should be afforded the nonexclusive choice-set of autonomous work teams, middle-level and strategic representation on joint committees, and independent unions for collective bargaining. Under the new Participation Center system and the economic environment of flexible organization, the legal regime should transform and protect these options in the ways sketched broadly below. I offer a new Section 8(a) (2) jurisprudence applicable specifically to self-managing teams and joint strategic committees. Although the several opinions of Board members in the recent *Electromation* case⁹⁸⁶ leave open some interesting doctrinal questions about the legality of such "employee involvement schemes" as quality or efficiency "circles,"⁹⁸⁷ my concern here is only with the more comprehensive organizational innovations that characterize thoroughgoing team-based enterprises. For the reasons offered in Part V, such paradigm-shifting organizations present the most significant opportunities and dangers from the point of view of both productivity and radical democracy. My proposals here also pretermitt the question of legal reforms designed to encourage employee ownership.⁹⁸⁸ Although I believe such

984. On newly flexible external labor markets, see *supra* notes 579, 624 and accompanying text.

985. See Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 *Am. J. Soc.* 1401 (1990).

986. See *supra* note 14.

987. "Quality circles" are small groups of workers who meet occasionally to discuss minor production problems or employee grievances. See, e.g., Edward E. Lawler III & Susan A. Mohrman, *Quality Circles After the Fad*, *Harv. Bus. Rev.*, Jan.-Feb. 1985, at 65, 65-71. They are a relatively superficial form of so-called parallel workplace innovations—that is, arrangements that are grafted onto traditional bureaucratic organizations without fundamental structural changes in enterprise decision-making and work processes.

988. Alan Hyde has offered the strongest arguments for such legal reform. See Hyde, *supra* note 877.

reforms deserve careful and sympathetic attention, the existing evidence suggests strongly that, in the absence of comprehensive changes in organizational decision-making of the sort signified by self-managing teams and joint strategic committees, formal worker ownership does not substantially serve the goals of workplace democracy or competitiveness.⁹⁸⁹

a. *Autonomous Teams.* — The empirical synopsis in Part V demonstrated that there are good grounds for skepticism about the proposition that management-created work teams and representational structures are as benign as any other presently unregulated employer-established work arrangement or benefit.⁹⁹⁰ Workers should be protected under a revised Section 8(a)(2) jurisprudence against those team structures that are pregnant with abusive manipulation of employees' workplace governance choice and with tendencies toward degeneration into fragmented, super-intensification of work processes ("Team Taylorism"). This proposal concords with the view of many political economists who reject the claim that the "Toyota System" of lean production is the universal workplace model for our time.⁹⁹¹ Indeed, in its newer plants, Toyota itself has had to "humanize" the work process in response to the increasing dissatisfaction and resistance of a "maturing," over-stressed workforce.⁹⁹² For those who are troubled by the prospect of governmental micro-management of work arrangements, recall that my proposal signifies an *expansion* of governance options relative to current legal strictures, and leaves the choice of those options to the most affected private stakeholders (employees). The language and legislative intent of Section 8(a)(2), if read as honestly as the Board has recently done, now unequivocally bans any employer-established-and-supported employee entities, whether participatory or representative.⁹⁹³

The precise features of formal work groups that mark the line between empowered, autonomous teams and dominated, paternalistic teams should again be refined through common-law evolution by the Par-

989. See *supra* note 877.

990. Professor Gottesman suggests that managerial "employee involvement schemes" are likely to spur employees to fuller forms of collective dealing. See Gottesman, *supra* note 832, at 2805 n.169. His optimism about the Tocqueville Effects (to use my terminology) of fully management-controlled structures sits uneasily with his view that the government-imposed consultative structures—virtually identical in structure to management-imposed schemes, but with the *added* independence of guaranteed funding and continued existence—proposed by Professor Weiler would be fruitless exercises in employee demoralization or management domination. See *id.* at 2807.

991. See, e.g., Appelbaum & Batt, *supra* note 605, at 23–37; Berggren, *supra* note 601, at 3–55, 232–56; Richard Edwards & Paolo Garonna, *The Forgotten Link: Labor's Stake in International Economic Cooperation* 59–94 (1991).

992. See Masami Nomura, *Farewell to 'Toyotism'? Recent Trends of a Japanese Automobile Company* 1–22 (1992) (unpublished manuscript, on file with the Columbia Law Review); Kazuo Sugeno, *Japan: The State's Guiding Role in Socioeconomic Development*, 14 *Comp. Lab. L.J.* 302, 315, 318 n.30 (1993).

993. See *supra* note 14; Barenberg, *supra* note 31, at 1442–61 (discussing Wagner's justifications for banning company unions).

ticipation Centers' facilitators and arbitrators. For administrative practicability, that doctrine would best consist of bright-line, objective *structural* team features. Rough benchmarks are already available from the experience of North American, German, and Swedish unionists who have fought on this contested terrain.⁹⁹⁴ Among the candidates for leading indicators of autonomous teams are the following:⁹⁹⁵

- Team leaders-facilitators should be chosen by team members or by rotation from among team members, not appointed by upper management, and should be subject to recall. Management should be prohibited from playing any role in the election of team leaders.

- Team members should have the right to meet for specified periods at specified intervals, with pay, without the presence of managerial or supervisory representatives.

- Teams should have the right to meet, again at specified intervals and durations, with other teams, again without the presence of managerial or supervisory representatives.

- Individual team members should be entitled (on a rotating or lottery basis) to attend, or receive full minutes of, any meetings held between team leaders-facilitators as a group and managerial representatives.

- Teams should be entitled to specified periods of training—from trainers selected from the Participation Centers' labor-oriented consultants and educators—in technological and organizational design, group-process and problem-solving skills, ergonomics, and health and safety standards.

- Teams should have ongoing access to Participation Center staff, resources, and third-party consultants, including independent unions and other employee associations.

- Teams should be entitled to design their own group discussion processes.

- Team leaders should be entitled, with sufficient advance notice, to participate in representative joint consultations with management on matters of team performance requirements, compensation systems, work design, and technology that potentially affect work design, and should be entitled to have union representatives or other consultants attend and advise during such consultations. An empowered version of this requirement would give teams the right to seek Participation Center mediation or arbitration if management rejects team proposals for

994. See, e.g., Local Agreement Between UAW Local 2166 and GM Shreveport, excerpted and reprinted in Parker & Slaughter, *supra* note 39, at 135–39; Parker & Slaughter, *supra* note 39, at 46–51 (advising unions on contractual team rights); Thelen, *supra* note 744, at 205 n.5 (noting that IG Metall's principles of group work looked to Swedish Metalworkers' program); Turner, *supra* note 571, at 161 (enumerating West Germany's IG Metall unions' principles of group work).

995. This list is an amalgam of my own reaction to the empirical literature on "team Taylorism" and the various union programs for group work cited *supra* in note 994.

work design that demonstrably meet management's specified cost/performance goals.

Teams that do not meet these or similar indicia of employee autonomy should be banned, either by reinterpretation of Section 8(a)(2)'s current proscription of employer "dominat[ion]" of employee entities, or by new legislative proscription.

b. *"Strategic Action Councils": Autonomous In-House Representatives at Intermediate and Upper Levels.* — The German model of statutorily mandated "works councils" has drawn much interest and support among North American academics.⁹⁹⁶ Indigenous, nonmandated models of representative committees are also widespread—in the form of nonunion strategic task forces and project teams;⁹⁹⁷ joint union-management steering committees established by collective bargaining;⁹⁹⁸ and the employee-management committees established at the enterprise and multi-enterprise levels by the state and local development programs mentioned above.⁹⁹⁹ Consonant with spreading domestic terminology, I refer to such representative committees as Strategic Action Councils¹⁰⁰⁰ rather than the somewhat anachronistic "works council" label that originated in nineteenth-century Europe.¹⁰⁰¹

The last indicia of team autonomy enumerated in the previous subsection—the right to representative consultation with management on matters that concern the teams—points, especially in its empowered version, toward minimal features of strategic action councils—at departmental, plant, divisional, and enterprise levels—that should be among employees' governance options. Indeed, the structural features that indicate team autonomy can be readily adapted to serve as benchmarks for a revised Section 8(a)(2) jurisprudence ensuring the autonomy of strategic representatives in high-involvement organizations. Management must not unilaterally choose employee representatives; rather, the rank and file should be entitled to decide whether they directly elect, or union and management officers jointly choose, such representatives—as was recently debated and decided among the Saturn rank and file.¹⁰⁰² The employee representatives must be entitled to meet among themselves without the presence of managerial representatives. They must have a right to Participation Center resources, training, and consultants relevant to their consultations with management on all strategic issues. In order

996. See sources cited *supra* note 868.

997. See, e.g., Kochan et al., *supra* note 641, at 93–100.

998. See *supra* notes 932–33 and accompanying text. For a generalized model of such joint committees, see Neal Herrick, *Joint Management and Employee Participation: Labor and Management at the Crossroads* (1990).

999. See *supra* notes 924–934 and accompanying text.

1000. The Saturn Plant, for example, uses this term.

1001. For the early origins of works councils, see, e.g., Stephen J. Havlovic, *German Works' Councils: A Highly Evolved Institution of Industrial Democracy*, *Lab. Stud. J.*, Summer 1990, at 62, 64–65.

1002. See Rubinstein et al., *supra* note 613, at 361.

to monitor their representatives, individual frontline workers must be entitled on a rotating basis to observe those consultations.¹⁰⁰³

Leading proponents of joint representative committees in the United States propose that the powers of such committees be more circumscribed than in the German prototype. More specifically, some American commentators propose vesting employee representatives only with the power and resources to bring suits to enforce existing employment statutes or contractual rights.¹⁰⁰⁴ Professor Weiler, offering a "re-constructive" alternative to his more limited *samizdat* and fumigation proposals discussed in Part VI, supports "Employee Participation Committees" vested with the right to information and consultation on substantive matters of work organization, but without the authority to seek binding arbitration of unsettled issues.¹⁰⁰⁵ Commentators proffer three justifications for these circumscriptions. First, affording employees the potent statutory threat of binding interest-arbitration¹⁰⁰⁶ appears to violate sacrosanct principles of "freedom of contract" and thus faces certain political death.¹⁰⁰⁷ A second argument simply yields to the weight of existing institutions: interest-arbitration introduces a principle utterly distinct from the central tradition of United States labor relations—adversarial collective bargaining.¹⁰⁰⁸ Weiler advances a third argument based on more rigorous policy analysis. He maintains that third-party interest-arbitration is a poor, and addictive, substitute for the parties' more knowledgeable, welfare-enhancing, and participatory *negotiated* tradeoffs among subtle workplace variables.¹⁰⁰⁹

These arguments may be well-taken as applied to proposals for statutorily mandated representative councils within the present regime of adversarial bargaining and trial-type arbitral or NLRB dispute-resolution

1003. I will not burden the reader by fully enumerating the straightforward analogies between the structural indicia of team autonomy, listed above, and of representatives' autonomy. The following text addresses the more difficult salient issue of the degree of strategic representatives' power sufficient to pass muster under my revised Section 8(a) (2) jurisprudence.

1004. See Gottesman, *supra* note 832, at 2807–08.

1005. See Weiler, *Governing the Workplace*, *supra* note 3, at 290; see also Janice R. Bellace, *Mandating Employee Information and Consultation Rights*, in *Proc. of the 43d Meeting*, *supra* note 669, at 137, 142; Summers, *supra* note 937, at 338.

1006. "Interest-arbitration" denotes the arbitration of the substantive terms and conditions of workplace relations, as distinguished from "grievance-arbitration" which interprets and enforces terms and conditions already established by contract or otherwise.

1007. See Gottesman, *supra* note 832, at 2807 (summarizing the argument that employers who oppose the legislative mandate of works councils vested with arbitral rights "would find political pay dirt in the deep-seated American commitment to freedom of contract").

1008. See, e.g., Bellace, *supra* note 1005, at 137–38 (arguing from explicit premise that consultative rights will supplement, but not alter, basic structure of unionization law); Summers, *supra* note 937, at 338.

1009. The point is well argued in Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* 229–35 (1980), and in Weiler, *Striking a New Balance*, *supra* note 3, at 371–79.

mechanisms. My proposal, however, would not impose joint committees by government fiat. It is therefore not subject to the critique that it displaces private ordering. Again, to the contrary, it would add a presently proscribed option to the already socially endorsed right of workers to choose governance modes. Indeed, it adds an in-house representative option, for which employer lobbyists have been clamoring.¹⁰¹⁰ I have no illusions that, by characterizing workers' choice of *highly empowered* versions of such in-house representatives as "private ordering," employers' political resistance will weaken. But short of abandoning my project of imagining a labor-law regime that would ensure meaningful worker deliberation and choice over high-participation work systems, I must take employers' all-out political resistance as given.¹⁰¹¹ My point is that the capacity of employers misleadingly¹⁰¹² to clothe their opposition in the rhetorical garb of "market-ordering" adds no further grounds for me—or others who support deliberative workplace democracy—to abandon the critical-pragmatic exercise of envisaging an intermediate "radical reform" program.¹⁰¹³

The third argument, albeit powerful in the context of adversarial bargaining, is less decisive in a regime predicated on dramatic enhancement of collaborative workplace problem solving and norms of consultative, nonadversarial impasse resolution. A key purpose of deeper labor law reform should be to facilitate the organizational paradigm-shift away from the *prevailing norm and expectation* that the central means of determining substantive workplace conditions are adversarial threats to deploy ballistic economic power during periodic negotiations of contract terms that are thereafter policed (and effectively fleshed out) by adversarial enforcement mechanisms. There is no contradiction in the proposition that achieving such a shift requires a diminution of power asymmetries between the parties—that is, an enhancement of employees' latent bargaining power. To the contrary, German works councils can achieve higher levels of trusting consultation with management than can United

1010. See *supra* note 15 and accompanying text.

1011. True, in part for reasons of political pragmatism, I bracketed the appealing idea of mandating unionization or even fuller worker democracy as a default, if not permanent, workplace arrangement. But that idea, I believe, would be unpalatable to much wider national constituencies than corporate managers and investors. In any event, political caution was not the sole ground for my provisional retreat. I see both intellectual and political value in imagining intermediate "radical reform" programs that preserve and realize the principle of employee governance choice and that may appeal to deeply held values and interests of substantial portions of the citizenry in a time of organizational flux. Although the distinction is a fine one, this is "pragmatism" not in the sense of political expedience, but in the philosophic sense of "immanent social critique." See Walzer, *supra* note 130.

1012. Misleading, because the issue is what *type* of market to construct. See Unger, *supra* note 344, at 513–24; Klare, *supra* note 869, at 13–39, 55–67.

1013. See *supra* note 1011.

States local unions precisely because of the reserve power afforded them both by statute and by a cohesive labor movement.¹⁰¹⁴

Hence, affording worker representatives the power ultimately to demand binding arbitration need not cause the parties to abandon the responsibilities of problem-solving in favor of "addiction" to easy third-party arbitral resolution. Such power can instead reciprocally reinforce the changed context of consultative norms and relations within the enterprise and expectations of primarily *consultative* dispute resolution by the regional Participation Centers. A cycle of high-trust consultation may replace a cycle of low-trust adversarialism. The most advanced, jointly governed workplaces in the United States, in fact, provide for arbitration when decision by labor-management consultation and consensus fails. The conjunction of consultative, substantive problem-solving and reserve arbitral power leads to dramatically reduced rates of interest- and grievance-arbitration.¹⁰¹⁵ Indeed, the foremost scholar in this empirical area concludes that, in various countries, flexible networks of high-trust, collaborative enterprises flourish only where there are such regional "arbitration boards or councils" to regulate substantive disputes.¹⁰¹⁶ In any event, the alternative reform route—the establishment of relatively powerless councils, whether funded at management's discretion after the proposed repeal of Section 8(a)(2), or by legal mandate—would too likely lead to the French model of employer-dominated enterprise committees or to the Japanese tendency toward excessively paternalistic consultative committees and work groups.¹⁰¹⁷

c. Independent Unions, Under New Rules. — Ensuring that employee representatives have an independent source of latent power—through the regional Centers' reserve arbitral powers and its other resources—would also lessen the need for complex regulation of union officials' participation as employee representatives.

One of the murkiest and least examined doctrines under Section 8(a)(2) is the judicially created distinction between management's lawful "cooperation" with an independently established union, and management's unlawful "support" of the union. The courts have addressed the question either in the routine instances of collective bargaining agreements that provide paid time to enable employee-stewards of a bona fide local union to engage in grievance-administration,¹⁰¹⁸ or in such idiosyncratic instances as when an airline agrees in a takeover deal to reimburse

1014. See Turner, *supra* note 571, at 91–171; Summers, *supra* note 937, at 336.

1015. See Anil Verma & Joel Cutcher-Gershenfeld, Joint Governance in the Workplace: Beyond Union-Management Cooperation and Worker Participation, *in* Employee Representation, *supra* note 3, at 197, 206–23; Rubinstein et al., *supra* note 613, at 353.

1016. See Sabel, *Studied Trust*, *supra* note 685, at 118.

1017. See *supra* notes 724–747, 761–776, 895 and accompanying text.

1018. See, e.g., *NLRB v. Basf Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986); Duquesne Univ., 198 N.L.R.B. 891, 892–93 (1972).

a national union's investment-banking fees.¹⁰¹⁹ But the question becomes more salient and interesting in the case of a seemingly vibrant independent union—such as a local of the UAW or the CWA—that forms a web of committees, task forces, and programs run and funded jointly with the employer. When has the cooperative union been unlawfully captured by the employer's support?

Several circuit courts have answered this question by applying an extremely diffuse subjective test.¹⁰²⁰ That test effectively converts the Supreme Court's early justification for banning all company unions into a case-by-case standard.¹⁰²¹ In other words, the circuits inquire whether the collaboration between the employer and the employee entity actually either systemically coerced the workers' governance choice or gave them the false impression that they had independent representation when in fact management had "overborne the will" of the labor organization. The intractability of such a dual subjective inquiry—into the minds of individual workers and the collective "will" of their organization—is reflected in bald judicial conclusions that generally rest on no actual psychological evidence or theory whatsoever.¹⁰²²

For purposes of predictability and to serve the policy of safeguarding workers against the pathological in-house structures discussed above, the law should return to an objective test. The legal regime should simply apply the same structural standards of autonomy enumerated above to joint committees and teams in unionized workplaces as to those in nonunionized workplaces. Joint committee representatives in unionized workplaces would thus add the union's reserve strike threat to the reserve right to arbitrate substantive matters that are not successfully resolved by in-house cooperative consultation or by the Participation Center's mediation. The rules designed to empower in-house strategic representatives would concurrently protect against the appearance or reality that either a union official acting as such a representative, or the official's organization, is a creature of management.¹⁰²³ Again, the German case is on

1019. See, e.g., *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1016 (9th Cir. 1990) (finding lawful cooperation because there was no employer intent to influence employees' governance choice and no evidence that the transaction made union beholden to employer).

1020. See, e.g., *id.*; *Basf Wyandotte*, 798 F.2d at 856; *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 546 (6th Cir. 1984); *NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1213-14 (1st Cir. 1979); *NLRB v. Newman-Green, Inc.*, 401 F.2d 1, 4 (7th Cir. 1968).

1021. Some of the circuit decisions explicitly quote the Supreme Court's "hegemonic consciousness" rationale for the ban, stated in its 1938 *Pennsylvania Greyhound* decision, see *supra* notes 164, 214 and accompanying text, but apply that justification as a case-by-case standard rather than as the underpinning of a per se objective test, see, e.g., *Lawson Co. v. NLRB*, 753 F.2d 471, 477 (6th Cir. 1985); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968).

1022. See cases cited *supra* notes 1020-1021.

1023. That is, my expanded reform proposals would lessen the need for rules analogous to those carefully crafted by Michael Harper to avoid the appearance of *cooptation* of union officers serving as employee representatives on corporate boards under

point. Unionists compose the bulk of elected works councils representatives even in nonunion workplaces. The statutory mandate of works councils' independence and power helps ensure the appearance and reality of vigorously independent union organizations, notwithstanding the undeniably collaborative relations between labor and management promoted by works council consultations.¹⁰²⁴

Adversarial distrust between union and management could still generate a rule-bound, grievance-intensive contractual relation under my proposed reforms. But the legal regime's normative, instrumental, and educational encouragement of workers to opt for team participation and consultative representation along with unionization would mitigate that possibility. Again, unionization in this context would begin to resemble more closely the still-evolving German model. Facing the growth of flexible production and global competition, Germany's centralized unions increasingly provide decentralized empowerment and expertise to enhance the effectiveness of employees who are mobilized through cooperative structures within the enterprise.¹⁰²⁵

The proposed regime would thus encourage the spread of collective bargaining agreements like the "Enterprise Compact"¹⁰²⁶ between GM and the UAW governing the Saturn workplace. By contrast with the hundreds of pages of rules and fine-print in traditional collective agreements, the Saturn contract, with no fixed termination date, codifies in a few pages a set of nonadversarial grievance and problem-solving principles and processes; team and consultative-committee structures with full codetermination authority; flexible job classifications (one for general employees, three for skilled trades); and basic compensation and scheduling principles.

The legal regime should also encourage more encompassing and more empowering unions both to promote democratic political mobilization and to achieve the synergies between empowered representation and

the current labor law regime. See Harper, *supra* note 870, at 1-90. The potential *conflict of interest*, also identified by Harper, between union officers' simultaneous representation of different employee groups—that is, bargaining unit members and team or council constituents—would remain. My proposals, however, encourage larger bargaining units. Any subgroup represented by union officers would likely have its subjective interests amplified, not suppressed, within the larger united front of the bargaining unit—perhaps representing an enhancement of democracy in the unions' inevitable internal coalition politics. See Banks & Metzgar, *supra* note 823, at 24-58 (describing democratic mobilization of subgroups by union representatives within larger unit). This contrasts with the paradigmatic case considered by Harper within the existing regime, namely, the potential sacrifice of the interests of smaller bargaining units if union officers serve on wider joint committees or boards.

1024. See Thelen, *supra* note 744; Turner, *supra* note 571, at 91-198.

1025. See Thelen, *supra* note 744, at 25-60, 155-200, 227-336; Kathleen Thelen, *The Politics of Flexibility in the German Metalworking Industries*, in *Bargaining for Change*, *supra* note 578, at 215, at *passim*.

1026. The Bluestones coined this apt term. See Bluestone & Bluestone, *supra* note 616, at 219.

frontline team participation, goals defended above in Part V. Hence, I support the several reform proposals, canvassed in Part VI, to enlarge the scope of union power: the authorization of minority or proportional bargaining where there is no majority representative; the ban on permanent replacement of strikers; and the protection of secondary concerted action. Because regular "outside" strikes are less effective in the new era of global capital mobility, the law should also restore workers' rights to engage in such "inside actions" as work slowdowns—weapons which may be particularly effective in "just-in-time" enterprises.¹⁰²⁷

To serve the same ends, the legal regime should also revise the rules of bargaining-unit determination. Rather than limiting workers to enterprise and sub-enterprise bargaining units, as under current legislation, the law should permit workers relatively freely to define multi-employer units.¹⁰²⁸ This would serve several desirable purposes apart from simply enhancing the bargaining power and scope of employee representatives. First, workers could institutionalize or "internalize" their secondary-strike power.¹⁰²⁹ That is, enterprises that would otherwise be secondary employers outside the scope of the bargaining unit would become primary employers within the unit. The internalization of the "externalized" costs often borne by secondary employees during primary strikes would enhance both democracy and efficiency. All effected employees would participate in the decision whether to trade the costs for the benefits of wider concerted action.

To the extent that multi-employer bargaining takes sector- or region-wide wage floors out of competition, it is all to the social good. Employees of smaller and medium sized firms would have greater capacity to close the inequitable wage gap between workers performing identical tasks in small and large firms, and across firms more generally, within the same regional sector.¹⁰³⁰ More important perhaps, employers in more encompassing, higher-wage sectors would have incentives to prosper by using high-performance, high-productivity technologies and organizational forms, rather than following the low-wage, labor-sweating line of least resistance to which American managers have been prone.¹⁰³¹

1027. See Labor Resource Center, *Holding the Line in '89: Lessons of the NYNEX Strike* 10 (n.d.).

1028. Current law allows multi-employer bargaining not by workers' choice of multi-employer units, but by all parties' (unions' and employers') consent to aggregate enterprise or sub-enterprise units after the latter are unionized. See Charles D. Bonanno *Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412–17 (1982).

1029. See Douglas L. Leslie, *Labor Bargaining Units*, 70 Va. L. Rev. 353, 416 (1984).

1030. See William T. Dickens & Kevin Lang, *Labor Market Segmentation Theory: Reconsidering the Evidence* 24 (National Bureau of Economic Research Working Paper 4087, 1992) (summarizing and citing empirical studies).

1031. See Porter, *supra* note 583, at 84; Lester Thurow, *Toward a High-Wage, High-Productivity Service Sector* 3–11 (Economic Policy Inst. 1989); Arndt Sorge & Wolfgang Streeck, *Industrial Relations and Technical Change: The Case for an Extended*

Further, multi-employer units would facilitate the development of collaborative networks among smaller and medium sized firms in the new environment of fluid enterprise boundaries. That is, the changing economic climate enhances the potential "relational-contract" benefits of multi-employer consultation with workers' organizations.¹⁰³² An instructive historical referent is the role of encompassing unions in disseminating best-practice technology and organization to small manufacturers in the fast-changing apparel industries.¹⁰³³ (The next subsection discusses some additional potential benefits of trans-enterprise unionism, in the area of training and career readjustment.) A good contemporary example is, again, the Saturn operation, where employees of subcontracting parts-suppliers have been folded into the UAW local representing Saturn workers.¹⁰³⁴ At the same time, participatory teams and strategic action councils would allow employers and employees to devise desirable specific arrangements at the enterprise, plant, or work-group level—as is already done through local units in current multi-employer bargaining relations.¹⁰³⁵

As under current law, the Participation Centers would review workers' choices of bargaining units for appropriateness, although with even greater deference than the Board currently gives to workers' unit definition. The Board's longstanding measure of appropriateness—that units encompass workers with a "community of interest"—is already quite malleable.¹⁰³⁶ Nonetheless, the Board tends to give great weight to *historical* commonalities of terms and conditions of employment and to *existing* alignments of "interests" and personnel administration.¹⁰³⁷ The law should be more sensitive to the possibility that workers (and employers) will over time come to new understandings of their subjective interests as a result of deliberative Conferences, the new governance institutions that emerge from the Conferences, and fast-changing organizational arrangements. Hence, the Participation Centers should give employees in regional enterprises that are vertically and horizontally related sufficient advance notice and information to allow their "showing of interest" in common participation in Conferences to deliberate over the possibility of creating multi-employer units.

Perspective, in *New Technology and Industrial Relations* (Richard Hyman & Wolfgang Streeck eds., 1988); Freeman & Katz, *supra* note 10, at 2-26.

1032. Cf. Leslie, *supra* note 1029, at 417-18 (canvassing possible relational benefits of multi-employer bargaining and ultimately expressing doubts about their importance, but within discussion premised implicitly on traditional hierarchical enterprises and adversarial collective bargaining).

1033. See *supra* note 933.

1034. See Rubinstein et al., *supra* note 613, at 360.

1035. See Leslie, *supra* note 1029, at 417.

1036. See 3 NLRB Ann. Rep. 174 (1938).

1037. See John E. Abodeely, *The NLRB and the Appropriate Bargaining Unit* 7-84 (1971).

6. *The Vote on Governance Options.* — The Participation Conference process would end with a series of secret ballot votes by employees, through which they could choose any combination of the first or last three of the following four basic governance options: nonunionism, autonomous teams, strategic councils, and unionism. A majority of voting employees in any department could authorize autonomous teams. A majority of employees in any department, plant, division, or enterprise could authorize representative Strategic Action Councils.¹⁰³⁸ On the question of unionization, employees could choose to organize into "minority" unions that bargained only on behalf of their voluntary members. But if a majority selects exclusive union representation in an appropriate unit (whether sub- or supra-enterprise) that includes the substantial bulk of such a minority, the larger exclusive union representative would displace the minority representative. This would encourage more encompassing union structures, and would spread the monopoly gains from a more powerful minority that would prefer to keep those gains to itself.¹⁰³⁹ At the same time, in internal union politics, the majority would have to be responsive to the interests of such a minority in order to ensure the potential mobilization of its latent bargaining power on behalf of the entire group. Indeed, such intra-union consultations illustrate one way in which employees' chosen governance structures would likely induce transformations in employees' perceived commonality of interests.¹⁰⁴⁰ Further, the structures of shopfloor teams and intermediate and upper level councils would afford meaningful fora for minorities with special needs and preferences.¹⁰⁴¹

Employees would have incentives to select union governance mechanisms to garner greater bargaining power and training, technological, and organizational-design resources. Similar incentives would encourage employees to select undominated teams and strategic councils through which they could assert their subgroup interests. Recall that a statutory requirement of such structures under a reinterpreted or redrafted Section 8(a)(2) is a right to designated amounts and kinds of valuable career-development resources.

1038. Allowing workers to choose teams or representative councils at more balkanized levels would likely be ill-advised, although experimentation on the question may be warranted. Traditional organizations often demoralize employees by suffocating isolated outposts of participatory work governance.

1039. See Leslie, *supra* note 1029, at 393–96.

1040. The social interaction of employees already generates a similar phenomenon. Wage structures tend to be more egalitarian than the range of bargaining power among work groups in an enterprise would predict. Employee groups with greater bargaining power often support such structures on grounds of fairness. See Elster, *supra* note 35, at 236–38.

1041. Some women and racial minority groups support the dissemination of team and representative structures for precisely this reason. See Mary Hollens, *Speaking for Ourselves: How 'Teams' Affect People of Color*, Lab. Notes, Apr. 1993, at 8 (discussing opposing views on this question).

7. *The Importance of Linking Programs for Training, Organizational Redesign, and Employee Choice of Workplace Governance Options.* — The incentive system should be designed to provide increasing levels of program resources to employees and managers in increasingly democratized organizations—that is, organizations that combine more of the participatory options of teams, strategic councils, and unions. Indeed, the possible potency of such incentives rests precisely on the enormous, front-loaded investments in human capital required for success in the new, high-performance organizational forms, as well as on the heightened value to workers of career readjustment resources in flexible labor markets.¹⁰⁴²

The creation of a single system that links the traditional functions of labor law (workplace governance administration) with employee training and organizational modernization programs has several virtues apart from supplying incentives for workplace democratization. Such linkage would likely improve the performance of the training and modernization programs themselves. First, participatory structures of workplace governance would provide a vehicle for employees to monitor employers to ensure that government funding is not used to subsidize pre-existing employer-provided training or other resources—a persistent problem in government-funded training programs.¹⁰⁴³

Linking worker training with ongoing capacities for organizational redesign and governance choice would also mitigate a set of problems endemic to such “displaced worker” programs as Title III of the Job Training Partnership Act of 1982 and its successor, the Economic Dislocation and Worker Adjustment Assistance Act of 1988. The latter programs reach workers too late—after they’ve been “displaced.”¹⁰⁴⁴ Such programs face the challenge simultaneously to provide income maintenance and to retrain workers outside the context of on-site job requirements. My proposals, to the contrary, would provide workers concurrently with improved capacity to assess future skill or career-adjustment contingencies and to obtain appropriate resources while on their current jobs. The much-debated problem of “skill-matching” would be mitigated. Workers could retrain in anticipation of specific, albeit never fully certain, job and organizational reconfigurations, rather than receive generalized training for categories of wholly hypothetical jobs that may not materialize when

1042. Human capital may account for fully 20% of the start-up investment in high-participation enterprises. See Rosemary Batt & Paul Osterman, *A National Policy for Workplace Training* 15 (1993); Porter, *supra* note 583, at 630; Rubinstein et al., *supra* note 613, at 350.

1043. See Batt & Osterman, *supra* note 935, at 43; cf. John H. Bishop & Mark Montgomery, *Does the Targeted Jobs Tax Credit Create Jobs at Subsidized Firms?*, 32 *Indus. Rel.* 289, 301–02 (1993) (noting analogous problem in government-subsidized hiring programs). But cf. Harry J. Holzer et al., *Are Training Subsidies for Firms Effective? The Michigan Experience*, 46 *Indus. Lab. Rel. Rev.* 625, 635 (1993) (finding one-time rise in training after introduction of state subsidies).

1044. See Adam Seitchik & Jeffrey Zornitsky, *From One Job to the Next: Worker Adjustment in a Changing Labor Market* 121 (1989).

the training programs end.¹⁰⁴⁵ In high-participation enterprises functioning in the new environment of flexible labor markets, the parties with the greatest incentive to seek out appropriate career-development resources, the employees themselves, are also intimately involved in job redesign and network reconfigurations. This is yet another by-product of the background blurring of conception and execution in the high-learning enterprise. Employees increasingly redesign the work processes they need to skill to perform.

Finally, the linkage of training, modernization, and workplace governance choice through regional Centers has the potential to spawn local institutions that accelerate the generation and dissemination of innovations in work and organizational processes—key capacities for economic success. The fluidity of enterprise boundaries, the volatility of markets, and the withering of internal career ladders produce a familiar collective-action dilemma. Individual employers cannot count on capturing the returns to non-firm-specific employee training, including the problem-solving and organizational design skills characteristic of the high-performance workplace.¹⁰⁴⁶ And neither employers nor employees can count on reaping optimal returns on firm- or network-specific human capital investments. Funding for general or specific training through regional Centers can help fill these public-goods gaps. Funding for career-readjustment can also serve as insurance against failure to reap expected returns on firm-specific human-capital investments.

Beyond the provision of resources themselves, however, is the Center's creation of conditions that may nurture the emergence of consortia of firms and employee organizations with incentives mutually to monitor and disseminate the best-practice use of those resources.¹⁰⁴⁷ In their clearinghouse function, the Centers can set and impose performance benchmarks in training and organizational and technological design. The continuing receipt of such resources by employees, employers, and their organizations should be conditioned on the Centers' evaluation of the recipients' effectiveness in using the resources from the standpoint of enterprise productivity and democracy. Organizations that exceed current best-practice performance among similarly situated network enterprises should be entitled to greater levels of future resources. Such "rank-

1045. See Peter T. Kilborn, U.S. Study Says Job Retraining Is Not Effective, N.Y. Times, Oct. 15, 1993, at A1 (summarizing internal Labor Department audit and other critics of worker retraining under the Trade Adjustment Assistance Act, on the ground that workers are "retrained" for nonexistent jobs).

1046. This may explain why Japanese workers increasingly depend on employment security within networks of related enterprises (*keiretsu*) rather than within single enterprises. See Personal Communication with Professor Tadashi Hanami (Mar. 22, 1994) (on file with author).

1047. This paragraph is indebted to the important analysis in Sabel, *supra* note 681, and to information communicated to me by Sabel about currently emergent local organizations that provide training and readjustment resources to employees and employers in Italy.

hierarchy" incentives could be reinforced if the total resources available to identifiable networks or associations of enterprises were conditioned on the performance of the entire network. If funding incentives are appropriately designed, individual firms and workforces would thus have incentives both to raise the average performance of firms within the collaborative network and to improve their own performance in the rank hierarchy among firms.¹⁰⁴⁸

CONCLUSION

Thus, the institutional, symbolic, and resource-incentive features of the new regime of labor law would cumulatively encourage the transition from low-trust, low-productivity to high-trust, high-performance organizations. More important, the new legal policy would concurrently disseminate high-challenge, continuous-learning work processes and promote employees' capacities for individual self-revision, organizational redesign, and collective self-governance. The law, that is, would safeguard workers against organizational forms with a high potential for structural coercion, distorted communication, and psychological manipulation, and would facilitate, although not guarantee, trust-enhancement through employees' collective empowerment. The new legal regime would adapt Senator Robert Wagner's radical pragmatist vision to the economic and cultural possibilities in the crisis of bureaucratic production.¹⁰⁴⁹

1048. As Sabel points out, such an incentive structure among firms and workforces within collaborative networks is homologous to the incentive structure among work teams within Japanese firms. See *id.*; see also Aoki, *supra* note 634 (discussing such rank-hierarchy incentives among work teams in core Japanese firms).

1049. There is much solid evidence that the quality of employees' skill and performance is a leading determinant of national productivity. For a leading quantitative study, see William J. Baumol et al., *Productivity and American Leadership: The Long View* 258-60 (1989). Compelling studies based on vast comparative knowledge of nations, industries, and firms include Piore & Sabel, *supra* note 109; Porter, *supra* note 583, at 109, 626-30 ("Labor-management relationships are particularly significant in many industries because they are so central to the ability of firms to improve and innovate."). I nevertheless do not underestimate the importance of many legal rules, institutions, and symbols outside labor law that influence not only workers' bargaining power and productivity but also other important aspects of the structure and performance of enterprises, such as rates of capital formation and innovation. See Baumol, *supra*. Other important legal regimes may include the law of corporate finance, ownership, and control; broader labor market and macroeconomic policies; tax, antitrust, intellectual property, and transnational trade law; and educational mandates and policies. This Article has focused on one important piece of the legal policy puzzle.