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Johanna Oreskovic

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# Capturing Volition Itself: Employee Involvement and the TEAM Act\*

Johanna Oreskovic†

*This article analyzes the Teamwork for Employees and Managers Act of 1997, a proposed amendment to Section 8(a)(2) of the National Labor Relations Act. Section 8(a)(2), which makes it an unfair labor practice for an employer to dominate labor organizations, was intended to outlaw the company-unions of the 1930s. According to supporters of the TEAM Act, however, many modern employee involvement programs may also violate Section 8(a)(2). The TEAM Act clarifies the problematic legal status of such programs by permitting employers in non-union workplaces to establish groups devoted to discussion of areas of "mutual interest," provided these groups do not interfere with employees' exercise of their collective bargaining rights.*

*This article begins from the premise that an important goal of the NLRA was to further greater democratization of industry and asks whether employee involvement groups initiated, structured, and controlled by employers can perform a similar function, and concludes that they cannot. The author contends that modern employee involvement groups are the contemporary manifestation of an alternative, management-initiated cooperative model of labor relations, which reached its most coherent form as welfare capitalism. This model, however, is inconsistent with the principle of employee self-organization upon which the NLRA is based because ultimate decision-making authority remains, at all time, firmly in the hands of management. While employee involvement groups generally may help to fill the void created by the decline of traditional unions, the TEAM Act is not the answer. It fails to reconcile the tensions between the cooperative and collective bargaining models. Indeed, the TEAM Act creates an exception to Section 8(a)(2) which, in effect, swallows the rule. Passage of the TEAM Act would, therefore, cut away one of the pillars of the NLRA's conception of industrial democracy.*

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\* The title of this paper is based on the following: "There is no subjugation so perfect as that which keeps the appearance of freedom, for in that way one captures volition itself." JEAN-JACQUES ROUSSEAU, EMILE (quoted in William Tench, 'Worker Involvement' Means Union Busting, NAT'L L.J., Aug. 14, 1995, at A18).

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## INTRODUCTION

Two recent developments in labor relations practice have challenged the viability of the National Labor Relations Act (NLRA)<sup>1</sup> and raised questions about the traditionally-understood labor-management relationship. First, since the early 1980s, the number of labor-management cooperative programs in the workplace has increased significantly.<sup>2</sup> Grouped under the general rubric of employee involvement (EI),<sup>3</sup> these programs assume a variety of forms, but they share assumptions about the nature of labor-management relations and have common structural characteristics. EI repudiates adversarial conceptions of labor relations. Instead, EI conceptualizes the workplace as an organic whole, characterized by collaborative relationships and common interests.<sup>4</sup> In most cases, EI programs are the result of management initiatives to increase productivity and/or quality<sup>5</sup> in the face of increasingly stiff international competition.<sup>6</sup> Many EI programs initially focus on production or quality concerns, but it is not uncommon for EI programs to consider conditions of work or other aspects of the employment relationship.<sup>7</sup> Indeed, students of the EI movement note that em-

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1. 29 U.S.C. §§ 151-169 (1994).

2. See, e.g., Audrey Anne Smith, Comment, *The Future of Labor Management Cooperation Following Electromotion and E. I. du Pont*, 35 SANTA CLARA L. REV. 225, 226 (1995) (noting that in 1982, approximately 14% of all corporations and 33% of corporations with 500 or more employees had instituted labor-management cooperative efforts); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT. OF LAB., U.S. DEPT. OF COMM., FACT-FINDING REPORT 33 (1994) [hereinafter DUNLOP COMM'N. FACT-FINDING REP.] (noting that in 1987, 70 percent of Fortune 1000 firms in the manufacturing and service sectors reported that they used some form of employee involvement program. In 1990, the number had increased to 86 percent. In a 1993 survey of 51 large firms, between 80 and 91 percent of these firms reported using some form of employee involvement). See also Christopher J. Martin, *Electromotion and Its Aftermath*, 19 EMP. REL. L.J. 134 (1993) (noting that in 1993, an estimated 30,000 employee involvement programs were in operation, involving 80 percent of the Fortune 1,000 companies). Employee involvement (EI) programs exist in both union and non-union workplaces. This paper, however, focuses primarily on EI programs in non-union workplaces. For discussion of EI programs in unionized workplaces, see *infra* notes 321-28 and accompanying text. For discussion of union leaders' responses to EI, see *infra* note 127 and accompanying text.

3. See generally A.B. Cochran III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458, 462-63 (1995) (noting that lack of standardized labels and the wide variety of programs in operation make precise classification of EI programs difficult).

4. See Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 57, 58 (1988).

5. See Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 504 (1986).

6. See, e.g., *Removing Impediments to Employee Participation/Electromotion: Hearing Before the House Subcomm. on Employer-Employee Relations of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 30 (1995) [hereinafter *Hearing: Removing Impediments to Employee Participation*] (statement of Howard V. Knicely, Executive Vice President, TRW, Inc.); *Teamwork for Employment and Management Act of 1995: Hearing of the Committee on Labor and Human Resources, United States Senate*, 104th Cong. 78-79 (1995) [hereinafter *Hearing: TEAM Act of 1995*] (statement of Howard V. Knicely, Executive Vice President, TRW, Inc.). See also Cochran, *supra* note 3, at 463-64.

7. See Jonathan B. Goldin, Comment, *Labor-Management Cooperation: Bath Iron Works' Bold New Approach*, 47 ME. L. REV. 415, 434, 435 (1995).

ployee involvement in workplace decision-making often necessitates discussion of wages, hours, or conditions of work.<sup>8</sup>

These types of discussions, however, may render EI programs in non-union workplaces illegal. Specifically, management design, initiation, and/or participation in EI groups, when coupled with discussion of mandatory bargaining topics, may violate Section 8(a)(2) of the NLRA.<sup>9</sup>

The second development is that union density has dropped steadily and significantly since the mid-1950s,<sup>10</sup> never more than 50%, by 1995, only about 12% of private sector workers belonged to a union.<sup>11</sup> Thus, the NLRA, with its enshrinement of collective bargaining and requirement that workers be represented only by labor organizations that are structurally in-

8. See *id.* at 435.

9. Section 8(a)(2) makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158 (a)(2) (1994). The NLRB's decision in *Electromation* underscored the problematic legal status of EI programs under current law. *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, *Electromation, Inc. v. N.L.R.B.*, 35 F.3d 1148 (7th Cir. 1994). There, the NLRB found that the company violated Section 8(a)(2) by establishing several joint labor/management committees which dealt, at least to some extent, with conditions of work. The *Electromation* decision has served as a rallying point for EI supporters who argue that the nation's labor laws must be reformed to respond to the realities of contemporary labor/management relations. See, e.g., 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (Rep. Fawell) ("Perhaps the best known example of the legal impediments confronting companies that wish to utilize employee participation programs is the NLRB's December 1992 decision involving *Electromation, Inc.*"); *Hearing: TEAM Act of 1995, supra* note 6, at 2 (statement of Senator Nancy Kassebaum, Chair of the Committee on Labor and Human Resources, United States Senate) (noting that the decision has called into question the legality of all employee involvement programs and that the TEAM Act is designed to remove legal barriers to the introduction of EI programs and to create the "flexibility for a variety of different employee team efforts to move forward"); *Hearing on H.R. 743, The Teamwork for Employees and Managers Act: Hearing Before the Committee on Economic and Educational Opportunities House of Representatives*, 104th Cong. 7 (1995) [hereinafter *Hearing: H.R. 743*] (statement of Michael P. Morley, Senior Vice-President and Director of Human Resources, Eastman Kodak Company) ("that decision sounded an alarm to the 30,000 workplaces in the United States that have adopted employee involvement. It told them that worker systems incorporating employee involvement in non-union settings were potentially in violation of the National Labor Relations Act."). *But see id.* at 38 (statement of David M. Silberman, Director, AFL-CIO Task Force on Labor Law) ("Despite all the hype surrounding *Electromation* . . . the case had nothing to do with work teams, quality circles, or any of the other form [sic] of legitimate employee involvement that are supposedly under legal attack and that H.R. 743 is supposedly needed to 'save' from that attack.").

10. See Cochran, *supra* note 3, at 466. See also *id.* at 460 ("[T]he pressures to cooperate more closely with management and to weaken the protections of the Wagner Act come at a time when unions are at a historic nadir in their strength.").

11. See, e.g., Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 n. 1 (1993) ("Union density as a percentage of private nonagricultural wage and salary workers has declined from a high of 38 percent in 1954 to 11.5 percent in 1992."); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993) (unions represent under 13 percent of private sector workers); Klare, *supra* note 4, at 40 (union density at 18 percent in 1987); Cochran, *supra* note 3, at 466 (union density at 16.1 percent in 1990); Thomas C. Kohler, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 727, 734-35 (in 1960, approximately 34 percent of the private sector workforce was organized; in 1993, 12 percent of the private sector workforce was unionized. That figure is expected to fall to 7 percent by the year 2000.).

dependent of management,<sup>12</sup> has little direct relevance to the workplace experience of the majority of American workers. Indeed, if employees experience opportunities for collective decision-making at work, those opportunities are significantly more likely to come via participation in an EI program than through a union.<sup>13</sup>

These two developments—the growth of EI programs and the decline in union density—suggest that a major change in American labor relations practice may be underway, a change the NLRA may be ill-equipped to accommodate.<sup>14</sup> This perception of a mismatch between the NLRA and the realities of the contemporary workplace has resulted in a number of proposals from supporters and critics of EI to reform the nation's labor law.<sup>15</sup> This article examines one such proposal: the Teamwork for Employees and Managers Act (TEAM Act).<sup>16</sup>

The TEAM Act is a direct response to the *Electromotion* decision, which supporters of the Act claim contributed to confusion over the legality of EI programs.<sup>17</sup> The Act would amend and clarify Section 8(a)(2) by removing from the ambit of unfair labor practices management-initiated EI programs in non-union workplaces whose activities may include discussion

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12. See 29 U.S.C. § 158(a)(2) (1994).

13. The decline in union density, coupled with the increase in employee participation in EI programs in non-union workplaces, suggests that increasing numbers of employees will enter EI groups rather than unions. Compare statistics on growth of EI, *supra* note 2, with statistics on declining union density, *supra* note 11.

14. See, e.g., Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 98-100 (1993) (noting that the New Deal system of labor relations codified in the NLRA and the Taft-Hartley Act no longer fits the needs of the economy or the desires of the workforce).

15. See, e.g., *Labor Law: Attorneys Debate Whether NLRA Is Relevant to Today's Workplace*, Daily Lab. Rep. (BNA) No. 112, at d-17 (June 12, 1995) (Prof. Charles Carver, George Washington University) ("[T]he TEAM Act should require employer-employee cooperation panels."); *Employee Involvement: Proposal by Labor Law Professor Finds Few Supporters in Washington*, Daily Lab. Rep. (BNA) No. 109, at d-28 (June 27, 1995) (Prof. Charles J. Morris) (advocating change in Section 8(a)(2) to permit any kind of EI program, but requiring that all employee representatives be elected by secret ballot); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 188 (1993) (proposing an employee "free choice" defense to Section 8(a)(2) complaints); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 141-48 (creating an exception to Section 8(a)(2) permitting employers to establish employee representation plans if: (1) employees are free to modify the plan's structure; (2) supervisory and non-supervisory employees are represented separately; (3) employees elect representatives; (4) employees are provided the resources needed to perform their representative functions; (5) employees are granted due process rights in disputes with employer; and (6) employers are required to confer with workers on all aspects of work life).

16. See H.R. 743, 104th Cong. (1995); S. 295, 104th Cong. (1996); H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997) [hereinafter TEAM Act].

17. *Electromotion, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, *Electromotion, Inc. v. N.L.R.B.*, 35 F.3d 1148 (7th Cir. 1994). See WILLIAM F. GOODLING, *TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1995*, H.R. REP. 104-248, 104th Cong., 2nd Sess. 11 (1995) [hereinafter H.R. REP. 104-248]. Several members of Congress who subsequently introduced the TEAM Act submitted amicus briefs on behalf of the company during the Board's hearings on the *Electromotion* case. See generally Michael H. LeRoy, *Can TEAM Work? Implications of an Electromotion and du Pont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215, 234 (1996).

of hours and conditions of work.<sup>18</sup> The Act affirms employees' rights to organize and to bargain collectively.<sup>19</sup> Thus, its supporters argue, the TEAM Act is not intended to weaken unions; instead, passage of the TEAM Act would enable innovative programs that empower workers and enjoy their support to flourish.<sup>20</sup> For opponents, however, passage of the TEAM Act would result in the reintroduction of employer-dominated company unions similar to those of the 1930s,<sup>21</sup> organizations that the framers of the NLRA specifically intended to ban.

The debate surrounding the TEAM Act—characterized on one side by utilitarian arguments cast in the language of popular psychology and on the other by dire predictions of a return to a dimly remembered but nonetheless disreputable period in American labor relations—fails to come to grips with two larger concerns that ought to inform discussions about proposals to alter the nation's labor law. First, to what extent should the social relations of the workplace harmonize with those of the polity? Phrased another way, how can the egalitarian, participatory ideals of the larger society be reconciled with the prerogatives of management direction and control inherent in capitalist enterprises? Second, what function should labor law play in reconciling a democratic polity with a hierarchical workplace?

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18. See H.R. 743, 104th Cong. § 2(b)(3) (1995) (to allow legitimate EI programs to evolve and proliferate, in which workers may discuss issues involving terms and conditions of employment). See also 141 CONG. REC. H9531 (daily ed. Sept. 27, 1995) (statement of Rep. Goodling) (the TEAM Act "specifically provides that it does not . . . apply in unionized workplaces"); H.R. REP. 104-248, *supra* note 17, at 18; JAMES M. JEFFORDS, *TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1997*, S. REP. 105-12, 105th Cong., 1st Sess. 2, 22 (1997) [hereinafter S. REP. 105-12].

19. See H.R. 743, 104th Cong. § 2(a)(6) (1995) ("[E]mployers who have instituted legitimate [EI] programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham 'company unions' to avoid unionization . . ."); *id.* at § 3 (employee involvement programs legalized by the TEAM Act would not "have, claim, or seek authority to be the exclusive bargaining representatives of the employees or to negotiate or to enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization . . ."); *id.* at § 4 ("Nothing in this Act shall affect employee rights and responsibilities contained in this provision other than Section 8(a)(2) of the National Labor Relations Act, as amended."); H.R. REP. 104-228, *supra* note 17, at 18, 19, 21; S. REP. 105-12, *supra* note 18, at 22-24.

20. See, e.g., *The TEAM Act: Legal Problems with Employee Involvement Programs: Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 1, 2 (1996) [hereinafter *Hearing: Legal Problems with Employee Involvement Programs*] (opening statement of Sen. Nancy Kassebaum) (arguing that the TEAM Act is "in no way an attempt to undermine unions. It is in no way an attempt to undermine the protections that are laid out very carefully in labor law . . ."); *Hearing: TEAM Act of 1995*, *supra* note 6, at 58 (statement of Harold P. Coxson, labor law attorney) (quoting President William D. Marohn, President and COO of Whirlpool Corp., discussing EI at Whirlpool and claiming that "[w]e empower our employees . . . [T]hey are empowered to manage themselves."); *id.* (discussing Princeton Survey Research Associates survey which found that employees preferred EI over union representation by an overwhelming margin).

21. See, e.g., 141 CONG. REC. H9524 (daily ed. Sept. 27, 1995) (statement of Rep. William L. Clay) (passage of the TEAM Act "would destroy one of the most essential protections provided under the NLRA: protection against company-dominated sham unions").

The framers of the NLRA confronted these questions. The Act is premised on a conception of industrial democracy rooted in contract law. This conception sees worker collective action through independent unions as the best means of equalizing a bargaining equation heavily weighted in favor of management.<sup>22</sup> The TEAM Act is merely a proviso to and a clarification of Section 8(a)(2). Thus, even though the TEAM Act exempts, for policy reasons, specific types of EI programs from the strictures of Section 8(a)(2), the outcomes envisioned by the TEAM Act cannot be inconsistent with the underlying premises of either Section 8(a)(2) or the NLRA as a whole.

This article argues that the critics of the TEAM Act are correct in their contention that legalization of management-initiated EI programs in non-union workplaces is inconsistent with the collective bargaining model enshrined in the NLRA. The critics are also correct in their contention that modern EI programs break little new ground in industrial relations practice and that passage of the TEAM Act would legalize employer-dominated labor organizations. But the critics' arguments fail to elucidate clearly why EI programs are incompatible not only with the collective bargaining model but also with the goal of achieving greater democratization of industry.

Collective bargaining and management-initiated EI programs are incompatible not because one is adversarial and the other cooperative, but because the principle of worker self-organization upon which the NLRA is premised is antithetical to management creation and structuring of labor organizations. The analogy that critics of the TEAM Act draw between the company unions of the 1930s and modern EI programs, however, is inaccurate in some respects, and too limiting to capture fully the contradictions inherent in the management-initiated cooperative model which render that model an inadequate vehicle for the achievement of industrial democracy.<sup>23</sup> Instead, it is more useful to conceptualize modern EI programs as the contemporary manifestation of an alternative tradition in American labor relations practice that has waxed and waned throughout the century, but which reached its most intellectually coherent and systematic elaboration during the 1920s in the form of "welfare capitalism."<sup>24</sup>

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22. See Kohler, *supra* note 5, at 514; Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993).

23. See LeRoy, *supra* note 17, at 218. For a more complete discussion of company unions, see *infra* notes 52-72. For a more complete discussion of modern EI programs, see *infra* notes 117-42 and accompanying text.

24. The cooperative approach, of which welfare capitalism and EI are a part, emphasizes mutual employer-employee interests rather than the inevitability of labor-management conflict. The behaviorist approach, which followed welfare capitalism, shared the assumptions of the cooperative approach. See, e.g., Andrew A. Lipsky, Comment, *Participatory Management Schemes, the Law, and Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667, 672-73 (1990). For a discussion of the Human Relations School of personnel management, see RONALD M. MASON, PARTICIPATORY AND WORKPLACE DEMOCRACY: A THEORETICAL DEVELOPMENT IN CRITIQUE OF LIBERALISM 126 (1982).



Like modern EI, welfare capitalism was, in part, the product of employer dissatisfaction with the adversarial character of labor relations.<sup>25</sup> Like modern EI, a number of motives, ranging from concern about declining productivity to anti-unionism to idealism converged to shape welfare capitalism. And, just as it is impossible to dismiss modern EI programs as self-serving attempts by management to manipulate employee perceptions of their own interests, so too is it impossible to dismiss welfare capitalism as merely a cynical and insincere attempt to diffuse employee unrest with false promises of economic security and participation in company decision-making.

Both EI and welfare capitalism, nevertheless, suffer from a defect that renders both incapable of achieving greater democratization of the workplace. Both are premised upon management voluntarily ceding to employees some of its rights of control over the enterprise. But in both EI and welfare capitalism, the increased participation this voluntary restriction of rights affords employees is contingent, dependent solely upon management's continued belief that curtailment of its prerogatives is in the best interest of the business.<sup>26</sup> Thus, from the standpoint of industrial democracy, the principle limitation of the cooperative model is that at best it functions only as an enlightened form of corporate paternalism, not as a truly democratic, participatory method of workplace governance. This is not to say that contemporary EI programs offer employees no chance to participate in workplace decision-making; however, absent the ability to make binding decisions, participation is not always the equivalent of democracy. In addition, as the examples of EI and welfare capitalism show, despite the rhetoric of cooperation and teamwork, management-initiated cooperative programs also have the potential to function in authoritarian ways.

The principle defect of the TEAM Act is that it does not create sufficiently clear or precise mechanisms to nurture the democratic potential of EI programs or to control against the authoritarian tendencies of EI programs. As it is currently structured, the TEAM Act would effectively repeal Section 8(a)(2), eviscerating those provisions of the NLRA designed to protect the formation of the independent employee organizations which are necessary prerequisites for truly participatory workplaces.

Part I examines the conception of industrial democracy embodied in the NLRA and the manner in which the courts have interpreted the Act's prohibition against the creation of company-sponsored labor organizations. Part II surveys the types of EI programs currently operating in the United States and analyzes the ways in which many EI programs can run afoul of

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25. See *infra* notes 257-59 and accompanying text.

26. See Devki K. Virk, Note, *Participation with Representation: Ensuring Workers' Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 755 (1994) (arguing that since cooperative management "creates no enforceable rights, no redress exists if the creator of the system withdraws or limits this power. An employee group under such a system suffers from 'structural impotence.'").

the NLRA. Part III reviews welfare capitalist programs of the 1920s and compares them with modern EI programs in an effort to identify the strengths and the limitations of management-initiated cooperative programs in creating more democratic, participatory workplaces. Finally, Part IV analyzes the TEAM Act with particular emphasis on the ways in which it protects management's interest in fostering greater productivity and efficiency without protecting employees' collective bargaining rights or creating mechanisms to control the anti-democratic tendencies of management-initiated cooperative programs.

## I.

### INDUSTRIAL DEMOCRACY AND THE NLRA

#### A. *The NLRA's Conception of Industrial Democracy*

Industrial democracy is a frequently used but imprecisely defined concept in labor relations thought and practice.<sup>27</sup> In the minds of some, industrial democracy means that those who do the work of the organization set its goals and policies.<sup>28</sup> This definition denies the validity of status distinctions in determining access to rights and decision-making authority within an enterprise and is most consistent with notions of communal ownership. Development of a definition of industrial democracy in the context of a capitalist system is more problematic. In the United States, common law notions of property rights that view the employer as the sole decision-maker and absolute sovereign of the workplace persist.<sup>29</sup> As a result, those who own or manage an enterprise enjoy considerable discretion over the manner in which capital, including human capital, will be deployed. Although an employee may be the legal equal of the employer outside of the workplace, an employer has no duty to grant an employee the same freedom of action or expression in the workplace that the employee enjoys in the broader society.<sup>30</sup> Tensions thus exist between the egalitarianism of democracy and the

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27. See Hideaki Okamoto, *Introduction* to B.C. ROBERTS, *COLLECTIVE BARGAINING AND INDUSTRIAL DEMOCRACY IN WESTERN EUROPE, NORTH AMERICA AND JAPAN* 5 (Hironobu Kunimoto trans., International Center for Hosei Univ. ed.) (1981) [hereinafter *COLLECTIVE BARGAINING AND INDUSTRIAL DEMOCRACY*] (noting that the term "industrial democracy" has been used "multivocally to indicate different patterns of social relations" including "collective bargaining" alone or "worker participation in the intra-enterprise decision-making process"). See also MASON, *supra* note 24, at 188.

28. See Joyce Rothschild-Whitt & Frank Lindenfeld, *Reshaping Work: Prospects and Problems of Workplace Democracy*, in *WORKPLACE DEMOCRACY AND SOCIAL CHANGE* 1 (Frank Lindenfeld & Joyce Rothschild-Whitt, eds. 1982).

29. See Madelyn Carol Squire, *Reality Or Myth: Participatory Programs And Workplace Democracy—A Proposal For A Different Role For Unions*, 23 *STETSON L. REV.* 139, 164-65 (1993) (noting that passage of protective legislation and modification of the employment-at-will doctrine have modified common law notions of the employer as absolute sovereign of the workplace).

30. See SHERRI DEWITT, *WORKER PARTICIPATION AND THE CRISIS OF LIBERAL DEMOCRACY* 160 (1980) (noting that "there is a schizophrenic division between man-worker and man-citizen" and discussing attempts by political philosophers to reduce antagonism between work values and other social values).

prerogatives of direction and control inherent in the ownership and management of an enterprise. In fact, it is logically impossible to reconcile the contradictory bases of democracy and the employment relationship, at least in a capitalist economic system: management's rights to control and direct the enterprise can be protected only by limiting the participation of labor in workplace decision-making, and full democratization of the workplace can be achieved only by radically curtailing management's rights. Historically, the latter option has been viewed as politically unacceptable in the United States.<sup>31</sup> It is for this reason that the conceptions of industrial democracy developed in liberal democracies generally attempt to balance the conflicting aims of social democracy against property rights in such a way that neither system is completely sacrificed to the other.<sup>32</sup>

### 1. *Industrial Democracy Through Collective Bargaining*

The NLRA, as an integral part of the New Deal system of labor relations, represents one attempt to reconcile political democracy with the demands of productive capitalism.<sup>33</sup> In the mind of the Act's chief architect, Senator Robert Wagner, the survival of political democracy, in the face of the violent labor unrest and high unemployment of the Depression, depended upon the democratization of industry.<sup>34</sup> For Wagner, industrial democracy meant fair participation by workers in setting the terms and conditions of their employment.<sup>35</sup> Participation, in turn, would pave the way for genuine consent, a prerequisite for the creation of a cooperative, democratic industrial order.<sup>36</sup> Conceptualized in this way, an important and indispensable function of labor law is to foster the development of methods of workplace governance that reconcile the values of the polity with those of the workplace and to restrain the development of methods of workplace governance which do not.

The reconciliation which the Act achieved was based not on a well-developed theory of industrial democracy but on the legitimization of collective bargaining, a system whose characteristics and practices employers and employees had jointly shaped over time.<sup>37</sup> Under the collective bar-

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31. *See id.* at 67-68.

32. *See id.* at 8-9; MASON, *supra* note 24, at 147.

33. *See* Rogers, *supra* note 14, at 97, 101. *See also* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 41-42 (1983) (noting that the NLRA's definition of industrial democracy is vague).

34. *See* 78 CONG. REC. 4229 (daily ed. Mar. 12, 1934) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 22, 24 (1985) [hereinafter LEG. HIST. NLRA].

35. *See* Clyde W. Summers, *Introduction and Overview: Models of Employment Representational Participation*, 15 COMP. LAB. L.J. 1 (1993).

36. *See* Barenberg, *supra* note 22, at 1425, 1491 (noting that Wagner believed the workforce could "democratically consent to hierarchical discipline").

37. *See* Kohler, *supra* note 5, at 513-14. *See also* DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 145 (1980) (noting that "the notion that

gaining model, workers participate in workplace governance when they regulate the terms and conditions of the employment relationship through the collective bargaining agreement. Collective bargaining could, thus, serve as a voluntary means of privately ordering the employment relationship.<sup>38</sup>

In the minds of the Act's framers, a bargaining equation heavily weighted in management's favor rendered the classical contract model of negotiation between two individuals inapplicable to labor contracts, because the bargaining power of employers greatly exceeded that of the individual worker.<sup>39</sup> Inequality of bargaining power tainted the employment contract with duress and coercion, and rendered meaningless the concept of mutual assent.<sup>40</sup> Collective bargaining, however, could strike a balance between equality and inequality of bargaining power and help to legitimate the employer-employee authority relationship.<sup>41</sup> Specifically, the threat of collective action would act as an inducement for management to negotiate in good faith; therefore, collective empowerment in the labor market was necessary to enable the parties to forge agreements based on genuine consent.<sup>42</sup> In this way, collective bargaining would facilitate the "development of a partnership between labor and management in the solution of national problems."<sup>43</sup> The increased bargaining power of organized labor would also result in more equitable division of the fruits of production, thereby enabling workers to participate meaningfully in the economic life of the society as well.<sup>44</sup> Thus, the adoption of collective bargaining as the national policy of the United States would serve as an indispensable complement to political democracy.

Although collective bargaining was to serve as the principle vehicle for the achievement of workplace democracy, the Act also imported many of the concepts and procedural mechanisms of political democracy into the private realm of employment negotiations. The right of workers to self-

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labor should have the right to organize and engage in collective bargaining" was recognized in the Norris-LaGuardia Act and the Railway Labor Act); Milton Derber, *Developments in Collective Bargaining and Industrial Democracy in the United States and Canada*, in COLLECTIVE BARGAINING AND INDUSTRIAL DEMOCRACY, International Center for Hosei Univ., *supra* note 27, at 51.

38. See Kohler, *supra* note 5, at 533.

39. See MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 320-21 (1970).

40. See Virk, *supra* note 26, at 752. See also 78 CONG. REC. 3678 (1934), reprinted in LEG. HIST. NLRA, *supra* note 34, at 20 (statement of Sen. Wagner) ("We are forced to recognize the futility of pretending that there is equality of freedom [to contract] when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus, the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract.")

41. See Barenberg, *supra* note 22, at 1423.

42. But see Gottesman, *supra* note 11, at 90 (noting that collective bargaining departs from traditional contract law by legalizing labor's use of duress as an economic tool).

43. See 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 15.

44. See Barenberg, *supra* note 22, at 1427.

organization and freedom of association extended First Amendment protections to the employment relationship.<sup>45</sup> Exclusive representation ensured that the principles of majority rule would govern the selection of labor's representatives, just as they did the selection of representatives in the political realm.<sup>46</sup> The Act's procedures and protections also ensured that the rule of law and due process would govern the private ordering of the employment relationship.<sup>47</sup>

The NLRA, therefore, provided a means to democratize the workplace without altering in significant ways the private, contractual basis of American labor law. Moreover, because American unions historically had not attempted to use collective bargaining to reorganize the economy or to displace management in the operation of industry,<sup>48</sup> the adoption of collective bargaining was unlikely to precipitate any fundamental changes in the nation's social structure.<sup>49</sup> In both of these respects, collective bargaining harmonized with the values and practices of American society and provided the framers of the NLRA with a means to reconcile the social relations of the workplace with those of the polity.<sup>50</sup>

## 2. Section 8(a)(2): The Ban on Company-Dominated Unions

The ability of a collective bargaining regime to achieve greater democratization of industry depended primarily on the creation of a balance of power between labor and management. That balance could be struck only if labor's representatives were not subservient to management.<sup>51</sup> For the Act's framers, the principle obstacle to the creation of such an independent labor movement was the existence of company-dominated unions.<sup>52</sup>

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45. See Clyde W. Summers, *The Privatization of Personal Freedoms and the Enrichment of Democracy: Some Lessons from Labor Law*, 689 U. ILL. L. REV. 698-99 (1986) (arguing that the NLRA is too often viewed solely as a means for striking a balance between unions and employers instead of as a law protecting the personal freedoms of individual employees and extending democratic procedures to industrial life). See also MASON, *supra* note 24, at 189.

46. See MASON, *supra* note 24, at 189.

47. See Summers, *supra* note 45, at 698.

48. See Julius G. Getman and Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1421-22 (1983) (noting that the collective bargaining model triumphed over its rivals because of the congruence between it and the patterns and practices of American society).

49. See *id.* at 1422.

50. See *id.* See also THOMAS A. KOCHAN, ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 24 (1986) (arguing that collective bargaining "fit[s] neatly with the American social and political ethos favoring limited government intervention in substantive decision-making, the protection of property rights, and the freedom to contract").

51. See Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812, 1818-19 (1993) (quoting Senator Wagner, "[o]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees").

52. See Squire, *supra* note 29, at 41 (noting the Framers' conviction that only in the absence of a subservient relationship could an employee representative "act freely in the interest of employees").

Although company unions and other employer-sponsored worker participation plans had existed since the turn of the century, in the 1920s many employers introduced new and elaborate employee representation plans.<sup>53</sup> With the exception of those in the largest companies, the Depression ended many of these plans.<sup>54</sup> But following the passage of the National Industrial Recovery Act (NIRA) in 1933,<sup>55</sup> the number of company unions once again began to increase.<sup>56</sup>

The NIRA conferred on workers rights of self-organization and mutual assistance virtually identical to those later enshrined in the NLRA,<sup>57</sup> but the NIRA did not provide adequate means for enforcing those rights.<sup>58</sup> Moreover, early interpretations of Section 7(a) suggested that company unions were legal.<sup>59</sup> Employers, therefore, found it easy to avoid recognizing independent unions by creating company unions that bore a superficial resemblance to independent labor organizations.<sup>60</sup>

The post-NIRA company unions consciously emulated the structure of independent trade unions with constitutions, by-laws, and employee representatives elected by their peers.<sup>61</sup> But the company unions differed from trade unions in that management customarily attended employee meetings, few of these company unions actually bargained or signed wage contracts with management, and absent dues provisions, they were unable to finance

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53. By 1928, 869 employee representation plans were in operation which covered 1.5 million employees. DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 46. For a discussion of employee representation plans during the 1920's, see *infra* notes 252-74 and accompanying text.

54. See DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 46.

55. Pub. L. No. 73-67, 48 Stat. 195 (1933). The Supreme Court struck down the NIRA in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

56. See *Hearings on S. 1958: Before the Committee on Education and Labor, U.S. Senate*, 74th Cong. 40 (1935) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 1416 (noting that over 69% of the company-dominated unions in existence as of 1935 began after the passage of the NIRA).

57. Compare Section 7(a)(1) of the NIRA, 48 Stat. 195, 198 (1933) ("[E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."), with NLRA Section 7 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for . . . mutual aid and protection."). National Labor Relations Act (Wagner Act), ch. 372, § 7, 49 Stat. 452 (1935). Section 7 was amended by the Labor Management Relations (Taft-Hartley) Act to grant employees the "right to refrain from any or all of such activities." ch. 120, title I, § 101, 61 Stat. 140 (1947) (codified as amended at 29 U.S.C. § 157 (1994)).

58. See 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 16-17 (arguing that a major defect of the NIRA was that it gave employees the right to organize but not the right to be recognized). Wagner noted that "[o]ver 70 percent of the disputes coming before the Labor Board have been caused by the refusal of employers to deal with representatives chosen by workers." *Id.* See also Squire, *supra* note 29, at 144 n.21 (citing Edwin E. Witte, THE BACKGROUND OF THE LABOR PROVISIONS OF THE NIRA, 1 U. CHI. L. REV. 572 (1934)).

59. See ATLESON, *supra* note 33, at 37.

60. See Squire, *supra* note 29, at 142.

61. See *id.* at 144.

strikes.<sup>62</sup> Power in the company unions also remained firmly in the hands of management, which wrote the union's constitutions and by-laws,<sup>63</sup> and generally retained the right to veto amendments to company union constitutions.<sup>64</sup> The involvement of management in the internal affairs of company unions, in Senator Wagner's view, meant, in effect, that to disagree with one's employer was to risk one's livelihood.<sup>65</sup>

Employers controlled the company unions in other ways as well. Management established age, citizenship, and length of service requirements workers had to meet before they were eligible to run for positions in the company unions.<sup>66</sup> Company union officials were reluctant to appeal matters to upper management.<sup>67</sup> Short terms of office made it difficult for representatives to develop the expertise needed to represent employees effectively.<sup>68</sup>

Company unions also suffered from structural weaknesses which made it virtually impossible for them to engage in collective bargaining.<sup>69</sup> Employers generally established and funded company unions.<sup>70</sup> Workers typically paid no union dues; without this source of income, company unions had no treasuries and no strike funds.<sup>71</sup> Because company unions were organized in individual plants not on an industry-wide basis, it was difficult for workers to compile comparative data on wages and conditions in other plants; consequently, workers had little knowledge of economic conditions in the industry as a whole.<sup>72</sup> In all of these respects, company unions were structurally incapable of providing workers with the independent voice and power necessary to forge agreements with management based on mutual consent.

Much of the testimony during the NLRA hearings focused on the treatment company unions would receive under the Act. In fact, the legislative history suggests that the debate over the NLRA was essentially a debate

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62. See Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127, 1134-36 (1993).

63. See Kohler, *supra* note 5, at 529.

64. See Squire, *supra* note 29, at 141-42. See also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 634, CHARACTERISTICS OF COMPANY UNIONS 1935, at 200 (1937) [hereinafter CHARACTERISTICS OF COMPANY UNIONS].

65. See generally 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 16.

66. See CHARACTERISTICS OF COMPANY UNIONS, *supra* note 64, at 121, 123.

67. See *id.* at 202.

68. Cf. *id.* at 121-22 (noting that representatives served for one year in the majority of company unions).

69. See Kohler, *supra* note 5, at 528-30.

70. See CHARACTERISTICS OF COMPANY UNIONS, *supra* note 64, at 199-200.

71. See *id.* at 61 (noting that of the 592 company unions surveyed in 1935, 411 reported having no dues provisions); *id.* at 202 (noting that "a negligible number [of company unions] had funds to carry a strike for any length of time").

72. See generally 78 CONG. REC. 4229 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA., *supra* note 34, at 24. See also CHARACTERISTICS OF COMPANY UNIONS, *supra* note 64, at 202.

over whether employees should have a choice between company unions and independent unions.<sup>73</sup> Proponents argued that company unions could supplement independent trade unionism, and that competition between the two would result in a better single model of employee representation.<sup>74</sup> But Senator Wagner was adamant in his belief that company unionism was incompatible with collective bargaining.<sup>75</sup> The dispositive question for Wagner was whether “the employee organization is entirely the agency of the workers.”<sup>76</sup> Wagner labeled company-dominated unions “the greatest barrier to freedom,”<sup>77</sup> because they were “initiated by the employer; exist[ed] by his sufferance,” and their decisions were “subject to his unimpeachable veto.”<sup>78</sup> As a result, collective bargaining in a company-dominated union would always be a sham because “the employer [would] sit[ ] on both sides of the table or pull[ ] the strings behind the spokesmen of those with whom he [was] dealing.”<sup>79</sup> In short, because the company-dominated union was the creation of management it could represent only management’s interests. Thus, in answer to proponents of company unions who argued that the freedom of workers would be compromised if they could not elect to be represented in a company union, Wagner argued that the freedom to be represented by an organization “that is not free is a contradiction in terms.”<sup>80</sup>

Section 8(a)(2) of the NLRA represents the triumph of Wagner’s view. Under its terms, an employer violates employees’ right to self-organization and freedom of association when the employer “dominates or interferes with the formation of a labor organization or contributes financial or other support to it.”<sup>81</sup> Section 2(5)’s broad definition of the term “labor organization” complements Section 8(a)(2) by bringing virtually any employer-sponsored organization in which employees participate within the ambit of

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73. See generally Kohler, *supra* note 5, at 531-32.

74. See, e.g., *Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73rd Cong. 401, 404 (1934) (statement of Henry S. Dennison of Dennison Mfg., Framingham, Mass.), reprinted in LEG. HIST. NLRA, *supra* note 34, at 435, 438.

75. See 78 CONG. REC. 4229 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 23.

76. See *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong. 15 (1935) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 2489.

77. See *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73rd Cong. 9 (1935) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 39.

78. See 78 CONG. REC. 4229 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 24. Wagner also noted that strikes were most likely when a company union entered the picture. Industrial strife was caused by employers’ failure to honor the spirit of collective bargaining. *Id.* at 24-25.

79. See *Labor Dispute Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong. 15 (1935) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 2489.

80. *Id.*

81. 29 U.S.C. § 158(a)(2) (1994).



Section 8(a)(2).<sup>82</sup> Taken together, Sections 8(a)(2) and 2(5) effectively ban company-dominated unions by making it an unfair labor practice for employers to create labor organizations, write their by-laws, or contribute financial support to them.<sup>83</sup>

*B. The Structural Approach of the Supreme Court and the NLRB*

Supreme Court and NLRB interpretations of Sections 2(5) and 8(a)(2) have been faithful to the Act's restrictive policy toward company-sponsored employee organizations.<sup>84</sup> Under the Supreme Court and NLRB approach, before the question of employer domination or interference can be reached, an employee committee or organization must first be found to be a labor organization within the meaning of Section 2(5). If the group is a labor organization, the court will then determine whether it is employer-dominated with the meaning of Section 8(a)(2).

The Supreme Court established the parameters of the Section 2(5) analysis in *NLRB v. Cabot Carbon Co.*,<sup>85</sup> where the Court held that employee committees created by the company at each of its plants to discuss "ideas and problems of mutual interest" were labor organizations.<sup>86</sup> The committees made suggestions and discussed with management proposals and requests concerning seniority, overtime, scheduling, wage corrections, sick leave, and improvements in working conditions and facilities.<sup>87</sup> Management was free to accept or reject the proposals.<sup>88</sup>

The Supreme Court overturned the Fifth Circuit's decision that the committees were not labor organizations. The circuit court had held that the term "dealing with" meant "bargain[ing] with" the employer.<sup>89</sup> In the court's view, the committees were not labor organizations within the meaning of Section 2(5) because they did not bargain with the employer.<sup>90</sup> Absent bargaining, these employee committees were not statutory labor organizations.<sup>91</sup>

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82. Section 2(5) defines a labor organization as "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1994).

83. The Act did not prohibit employers from setting up organizations that dealt insurance, employee benefits or recreation, but it did make clear that collective bargaining would be preserved for labor organizations created by and answerable only to workers. See 78 CONG. REC. 4229 (1934) (statement of Sen. Wagner), reprinted in LEG. HIST. NLRA, *supra* note 34, at 25.

84. Some circuits have adopted an alternative approach to Section 8(a)(2) and Section 2(5) determinations. For a more complete discussion of this approach, see *infra* notes 177-97 and accompanying text.

85. 360 U.S. 203 (1959).

86. See *id.* at 205.

87. See *id.* at 207.

88. See *id.* at 208.

89. See *id.* at 210.

90. See *id.*

91. See *id.*

The Supreme Court, however, declined to limit the definition of “dealing with” an employer solely to activities that might amount to bargaining with the employer.<sup>92</sup> Instead, the Court held that if an organization existed—even if only in part—to discuss grievances or bargaining subjects with an employer, then it was “dealing with” that employer and constituted a labor organization.<sup>93</sup>

The *Cabot Carbon* Court declined to formulate an exhaustive list or a bright line test of activities that would amount to dealing with an employer.<sup>94</sup> The Court did indicate that an employer-created organization would be “dealing with” the employer whenever discussions between the two touched on the conditions of work. Subsequent NLRB and Court of Appeals decisions, following *Cabot Carbon*, have held that employee committees created by employers during organizing drives are labor organizations,<sup>95</sup> and that the lack of a constitution, by-laws, and dues will not insulate an employee organization from a finding that it is a labor organization.<sup>96</sup> Thus, under *Cabot Carbon* and its progeny, “dealing with” an employer appears to include any interaction between employers and employee organizations created by management regarding any issue that touches on work conditions.

In *NLRB v. Newport News Shipping and Dry Dock Co.*,<sup>97</sup> the Supreme Court formulated objective, structural criteria to determine whether an employee organization was employer-dominated within the meaning of Section 8(a)(2).<sup>98</sup> The company had established employee representation committees prior to the passage of NLRA in order to allow employees a voice in the structuring of work conditions and to provide a means for resolving labor-management differences.<sup>99</sup> Employees overwhelmingly approved the committees in a referendum conducted by secret ballot.<sup>100</sup> The Court found that neither the employer’s intent nor the employees’ wishes were sufficient to prevent a finding of employer domination.<sup>101</sup> Instead, the Court held that the company violated Section 8(a)(2) because it determined the form and structure of the committees and in so doing,<sup>102</sup> “deprive[d] the

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92. *See id.* at 211.

93. *See id.* at 213-14.

94. *See id.* at 211-13.

95. *See Ona Corp.*, 285 N.L.R.B. 400, 405, 407 (1987); *Clappers Mfg., Inc.*, 186 N.L.R.B. 324, 334 (1970), *enforced*, 458 F.2d 414 (3d Cir. 1972).

96. *See Indiana Metal Prod. Corp. v. NLRB*, 202 F.2d 613, 620-21 (7th Cir. 1953) (holding that a lack of by-laws or a constitution may not shield an employer from a finding that an employee organization is a statutory labor organization).

97. 308 U.S. 241 (1939).

98. *See id.* at 247-48.

99. *See id.* at 244.

100. *See id.* at 248.

101. *See id.* at 251.

102. *See id.* at 249.

employees of the complete freedom of action guaranteed to them by them Act . . . to choose such forms of organization as they wish."<sup>103</sup>

While the structural approach established in *Newport News* protects employees' Section 7 rights<sup>104</sup> by preventing employers from creating or unilaterally imposing employer-selected forms of representation on employees, it arguably limits employee choice by foreclosing the possibility that employees may choose to express their views through the medium of an employee organization that does not enjoy complete structural autonomy from management. In essence, therefore, the *Newport News* Court's interpretation of Section 8(a)(2) leaves employees with a choice between independent union representation or no representation at all. In addition, although the Court's refusal to consider the employer intent or employee perceptions may be consistent with Senator Wagner's view that there is an inherent contradiction in seeking to protect the freedom of employee choice by enabling them to chose organizations that are not free, there is a latent paternalism in this approach as well. Specifically, the Court's refusal to base a finding of employer-domination on the subjective perceptions of employees suggests that the Court did not trust the employees' understandings of their own needs and interests and that the Court believed that employees were apt to make choices that do not serve their own interests. In this respect, the structural approach, arguably, is inconsistent not only with Section 7's affirmation of worker agency, but with its extension of the First Amendment right of freedom of association to the employment relationship.<sup>105</sup>

Use of the structural approach to analyze modern EI programs is particularly problematic. Specifically, Section 8(a)(2) could plausibly be interpreted narrowly as simply an attempt to prohibit those types of employer-dominated labor organizations that existed at the time the Act was passed.<sup>106</sup> Modern EI programs, however, are created for different reasons

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103. *Id.* at 249-50. Irrespective of the employer's intentions, employee rejection of a management-initiated program risks offending the employer who, by virtue of the nature of the employment relationship, is in a position of power over employees. In this way, the presence of an EI-type program can limit an employee's ability to choose freely which organizations will represent them. *See Virk, supra* note 26, at 759-60.

104. *See* 29 U.S.C. § 157 (1947), amended by 29 U.S.C. § 157 (1994) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any and all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.").

105. *See Summers, supra* note 45, at 697 (arguing that Section 7 of the NLRA and national labor policy generally are "rooted in the first amendment right of freedom of association").

106. *See* *Electromation, Inc.*, 309 N.L.R.B. 990, 1007 (1992). Member Raudabaugh argued that, although *Cabot Carbon* could not be reinterpreted, the Taft-Hartley Act and, in particular, its emphasis on employee choice, made it possible to reinterpret *Newport News* to permit a wider range of EI programs to pass muster under Section 8(a)(2). For Raudabaugh, the answer to whether an EI program was

and are based on a different set of assumptions.<sup>107</sup> Application of principles of legal analysis developed to respond to the concerns of the 1930s, therefore, may distort the contours of contemporary labor law issues and result in the law acting as an impediment to beneficial social change.<sup>108</sup>

## II.

### CONTEMPORARY EI PROGRAMS AND THEIR UNCERTAIN LEGAL STATUS

#### A. *Contemporary EI Programs*

During the mid-1970s, several factors coalesced to cause many within corporations to favor the adoption of EI programs. The first was a belief that American firms were losing their competitive edge in an increasingly global market.<sup>109</sup> Employers and industrial relations experts attributed the success of foreign competitors to the utilization of management strategies designed to involve workers in the production process.<sup>110</sup> In contrast, the majority of firms in the United States still relied on industrial relations practices developed at the turn of the century by F.W. Taylor.<sup>111</sup> The "Taylorized" workplace, characterized by rigid job classifications and the concentration of authority in the hands of management, left employees with little voice and no real stake in the success of the companies for which they

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employer-dominated would hinge on the following factors, none of which he believed was dispositive: the extent of employer involvement in the structure of the committee; whether employees from an objective standpoint do not perceive EI programs as a substitute for collective bargaining; whether employees had been assured of their Section 7 right to select a union; and the employer's motivation. *See id.* at 1013.

107. For a more complete discussion of the reasons behind the creation of modern day EI programs, see *infra* notes 109-16 and accompanying text.

108. For a discussion of an alternative approach utilized by some courts of appeals to analyze Section 2(5) and Section 8(a)(2) questions, see *infra* notes 177-97 and accompanying text.

109. See, e.g., Cochran, *supra* note 3, at 463; Klare, *supra* note 4, at 40, 59.

110. See generally 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (statement of Rep. Fawell).

111. Taylor believed that talent and experience should reside with management and that management should make all decisions about the deployment and utilization of resources. Taylor's system of "scientific management" scheduled and routinized jobs to de-skill and cheapen the cost of labor. Management set rates at which work would be completed. Management also appropriated workers' knowledge of the production process and separated conception from execution. Taylorized workplaces motivated workers by means of bonus systems and piece rates, which were subject to change if workers met or exceeded them too easily. The system of piece rates and bonuses sometimes pitted workers against one another, thereby making it more difficult for workers to organize. Lipsky, *supra* note 24, at 670-71. For a general discussion of Taylorism, see HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 124-39 (1974). Taylor is sometimes contrasted with E.W. Demming, whose work in post-war Japan became the foundation of the total quality approaches used in Japan and, more recently, in the United States. Until the advent of EI, Demming's work was largely ignored in this country. See *Teamwork for Employees and Managers Act of 1997: Hearing of the Committee on Labor and Human Resources United States Senate on S. 295*, 105th Cong. 75 (1997) [hereinafter *Hearing: TEAM Act of 1997*] (statement of Samuel Estreicher, Law Professor); *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 28 (statement of Mr. Knicely); *Hearing: TEAM Act of 1995*, *supra* note 6, at 78 (statement of Mr. Knicely).

worked.<sup>112</sup> The result was worker alienation, which in turn led to absenteeism, high turnover, widespread labor unrest, and poor product quality, all of which had a significant negative impact on productivity.<sup>113</sup> To complicate matters further, employers argued, collective bargaining, which had become the staple of American industrial relations practice, locked employers and employees alike into legalistic and adversarial modes of interaction, denying employers the flexibility they needed to respond to changing market conditions.<sup>114</sup> Finally, as the older manufacturing industries declined during the seventies and eighties, power shifted from managers who were accustomed to hierarchical workplaces and the collective bargaining model to managers who were more receptive to the new and innovative systems of human resources management<sup>115</sup> that were being developed at business schools.<sup>116</sup>

EI embraces many different personnel management practices: some focus solely on production or quality issues, others are more concerned with altering job structures to create conditions conducive to high productivity. As a result, EI is sometimes characterized not as a set program or way of doing things but as a change in the corporate culture itself.<sup>117</sup> The “culture” of EI is the product of a common core of assumptions—derived from motivational and behavioral theories of organizational psychology—about employees and the nature of work.<sup>118</sup> Motivational theories assume that individuals have strong growth needs that can be satisfied through the work process.<sup>119</sup> These needs also predispose individuals to be hardworking and committed to the goals of the firm.<sup>120</sup> Behavioral science theories, conversely, focus on the questions of what kinds of job characteristics and workplaces are most conducive to the creation of a highly motivated, productive work force.<sup>121</sup> For behavioral science theorists, a good job is one that combines a high degree of feedback, task variety, challenge, and opportunities to learn new skills.<sup>122</sup> The marriage of behavioral theory and motivational theory is embodied in the workplace with considerable employee

112. See e.g., *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 28 (statement of Mr. Knicely); *Hearing: TEAM Act of 1995*, *supra* note 6, at 78 (statement of Mr. Knicely).

113. See DERBER, *supra* note 39, at 54.

114. See KOCHAN, ET AL., *supra* note 50, at 93; Klare, *supra* note 4, at 59.

115. See KOCHAN, ET AL., *supra* note 50, at 79.

116. See Jack Metzgar, *Employee Involvement Programs and the Philosophy of Labor*, 39 DISSENT 67, 69-70 (1992) (noting that EI is the product of critiques of top-down management in the 1970s by members of the Harvard Business School and MIT).

117. See *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 29-30 (statement of Mr. Knicely); *Hearing: TEAM Act of 1995*, *supra* note 6, at 78-79 (statement of Mr. Knicely).

118. See KOCHAN ET AL., *supra* note 50, at 94.

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

involvement and employee participation in management decision-making.<sup>123</sup>

In keeping with this more collaborative and hence more cooperative conception of the workplace, many EI programs diffuse authority and decision-making throughout the organization or reduce status distinctions between labor and management.<sup>124</sup> Because work within the EI mode is a cooperative process, conflict in the employment relationship is not inevitable. Instead, conflict is pathological, a symptom of interpersonal misunderstandings, which can be overcome through discussion and reassertion of the mutual interests of labor and management.<sup>125</sup>

Although EI programs are generally initiated and structured by management, EI programs have functioned successfully in unionized workplaces.<sup>126</sup> Union leaders see EI as a potential means of enhancing the firm's competitiveness, but tensions often exist between management and union leaders' competing conceptions of the impact of EI on the social relations of the workplace. Management tends to see EI as a means of providing workers with more job satisfaction, a benefit that will bear fruit in the form of increased productivity. Labor leaders, on the other hand, tend to conceptualize EI as a means of fostering industrial democracy by providing workers with a voice at all levels of decision-making.<sup>127</sup>

EI programs often evolve and change focus over time to encompass aspects of workplace life not included in their original mandates.<sup>128</sup> In addition, employers tend to experiment with EI approaches, continually adopting and adapting practices to meet the needs of the moment.<sup>129</sup> The protean nature of EI programs, coupled with the variety of EI approaches, make it difficult to draw fine analytical distinctions between different types of EI programs.<sup>130</sup> Nonetheless, EI programs tend to fall into three broad categories.

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123. See DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 34, 37.

124. See Kohler, *supra* note 5, at 508.

125. See *id.* at 517.

126. See *id.* at 510.

127. The AFL-CIO's version of partnership between labor and management in EI programs includes giving decision-making power to employees, redesigning jobs so that workers perform a variety of skills, transforming the role of managers so that workers become self managers, and having decision-making at all levels of the enterprise. See, e.g., *Most Companies are Prepared to Engage in Partnership with Unions*, Daily Lab. Rep. (BNA) No. 35, at AA-1 (1995). But see Kohler, *supra* note 5, at 505 (noting that non-union employers sometimes use EI to avoid union organizing).

128. See *Hearing: TEAM Act of 1997*, *supra* note 111, at 112 (statement of the National Association of Manufacturers) (noting that "[t]eams continue to evolve, where they currently exist, to fit the specific needs of each work force" and cautioning that "rigid prescriptive guidelines for the composition and operation of teams will greatly diminish the effectiveness of teams as they seek workplace improvements").

129. See Kohler, *supra* note 5, at 503.

130. In addition, questions involving the production process cannot easily be separated from questions involving the terms and conditions of employment; thus, some commentators believe that "[i]t is impossible to separate conditions of work from employee involvement." *Hearing: Legal Problems with Employee Involvement Programs*, *supra* note 20, at 90 (statement of Richard S. Wellins).

ries: production- and quality-centered initiatives, job enrichment and redesign programs, and workplace committees and partnerships.

Quality circles epitomize the production- and quality-centered approach. In the quality circle model, supervisors regularly review employee suggestions for improving quality and efficiency.<sup>131</sup> Quality circles generally have between six and twelve members, all of whom receive at least some training in problem-solving techniques and group dynamics.<sup>132</sup>

Total quality management (TQM) is another type of production-centered initiative in which team members also discuss and formulate solutions to problems which sometimes implicate human resources practices and policies.<sup>133</sup> In contrast to the quality circle model which does not alter traditional status distinctions between labor and management, TQM deliberately blurs distinctions between employees and managers by downplaying status differences between the two groups and by assigning employees some managerial tasks.<sup>134</sup> TQM programs have also tended to evolve into forums for discussion of a wide range of issues not limited to production or quality.<sup>135</sup>

Job enrichment and redesign programs experiment with methods of work organization presumed to be more appealing to employees and better capable of meeting their needs for fulfillment and personal growth.<sup>136</sup> Job enrichment programs combine tasks, allowing workers to perform more complex operations and to use a variety of different skills.<sup>137</sup> Job redesign programs, on the other hand, elicit worker input on ways to set the work pace. These programs may also redesign traditional assembly line techniques to make workers responsible for assembling an entire product.<sup>138</sup>

Semi-autonomous and self-managed work teams represent more sophisticated forms of job redesign. Semi-autonomous work teams may be responsible not only for structuring jobs but for a number of personnel functions traditionally performed by management.<sup>139</sup> Teams often make hiring decisions, generally from a list of approved candidates provided by management. They may also develop criteria for pay increases.<sup>140</sup> In the self-managed work team, on the other hand, team members may be made

131. See Nealia S. Bruning and Patrick R. Liverpool, *Membership in Quality Circles and Participation in Decision Making*, 29 J. OF APPLIED BEHAVIORAL SCIENCE 76, 77 (1993).

132. See *id.* at 77.

133. See DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 37.

134. See Goldin, *supra* note 7, at 434-36.

135. See *id.* at 434.

136. See Kohler, *supra* note 5, at 506-07; Cochran, *supra* note 3, at 463.

137. See Kohler, *supra* note 5, at 507.

138. See *id.*

139. As early as 1977, TRW experimented with semi-autonomous work teams. The company decentralized decision-making to the shop floor and workers participated in scheduling production, assigning work, monitoring production and scrap levels, determining overtime requirements, providing feedback to teams, and making hiring and promotion decisions. KOCHAN, ET AL., *supra* note 50, at 96-97.

140. See Kohler, *supra* note 5, at 508.

responsible for all aspects of the production process as well as for hiring, firing, and setting basic personnel policies for the group. Leadership may also rotate from one team member to another.<sup>141</sup>

Workplace committees and partnerships are cooperative ventures in which employees and managers meet to discuss mutual goals and shared concerns. Like job redesign groups, these committees, sometimes referred to as quality of work-life groups, deal with a variety of topics that frequently move beyond production or health and safety concerns into issues of worker satisfaction.<sup>142</sup>

### B. Legal Status of EI Programs

The principal legal difficulty with management-initiated EI programs, particularly those in non-union workplaces, is that it is often difficult to draw distinctions between the groups' permissible discussion of production issues and their impermissible discussion of employment practices, involving questions of wages, hours, and conditions of work.<sup>143</sup> This difficulty, when combined with management design and/or initiation of EI programs, suggests that many EI programs would meet Section 8(a)(2)'s definition of an employer-dominated labor organization.

Recognizing that modern EI programs in non-union workplaces may violate the NLRA, employers argue that the solution lies in reform of the NLRA, not in the redesign of EI programs.<sup>144</sup> For employers, the NLRA is based upon an adversarial conception of labor relations that has no relevance to the realities of the new cooperative corporate culture.<sup>145</sup> The Act is thus archaic, an impediment not only to the proliferation of innovative programs that empower workers, but to the viability and competitiveness of American business.<sup>146</sup>

#### I. Electromotion

The *Electromotion* case has served as a flashpoint for employer antagonism to the NLRA.<sup>147</sup> In *Electromotion*, the NLRB and the Seventh Circuit, following the *Cabot Carbon/Newport News* approach, held that four-

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141. See DUNLOP COMM'N. FACT-FINDING REP., *supra* note 2, at 38.

142. See Kohler, *supra* note 5, at 508-09.

143. See PATRICK HARDEN, THE DEVELOPING LABOR LAW 1-11 (3rd ed.) (1992); DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 38.

144. For an articulation of this argument, see *infra* notes 365-66 and accompanying text.

145. See, e.g., *supra* note 20 and accompanying text.

146. See 141 CONG. REC. H9525 (daily ed. Sept. 27, 1995) (statement of Rep. Fawell) (arguing that the NLRA definition of labor organization is "fossilized" and that it "collid[es] head-on with dynamic new concepts of doing business in today's fast evolving, information-centered economy and society"). See also Moe, *supra* note 62, at 1145 (arguing that although the Board's interpretation of Section 8(a)(2) may have helped to eradicate company unions, it is not well adapted to modern forms of participatory management, which are dissimilar to and less threatening than the company unions of the 1930's).

147. See *Electromotion, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).



employee "action committees" established by the company in response to employee dissatisfaction with changes in the company's bonus system were labor organizations within the meaning of Section 2(5) and that they were employer-dominated within the meaning of Section 8(a)(2).<sup>148</sup> The Board recognized that it was possible for employee committees to function as communications devices without becoming labor organizations; the difficulty lay in distinguishing between the two functions.<sup>149</sup> According to the Board, an employee committee is a labor organization if it meets the following criteria: employees participate in the organization; the organization exists at least in part to deal with management; and those dealings concern grievances, labor disputes, wages, rates of pay, and/or hours of employment.<sup>150</sup> The Board held that all of the action committees, with the exception of the no smoking policy committee, which had never met, satisfied all three prongs of its test. The committees involved employees in attempts to solve company-wide problems, the involvement occurred through a process of bilateral communication between labor and management, and the discussions dealt at least to some extent with conditions of work.<sup>151</sup> This pattern of bilateral communication amounted to "dealing with" the employer within the meaning of both Section 8(a)(2) and Section 2(5) as interpreted in *Cabot Carbon*.<sup>152</sup> The Board also held that the committees were employer-dominated because the employer unilaterally established the committees, defined their functions, set their agenda, selected some of the employee representatives to the committees, paid employees for their committee work, and could terminate the committees at will.<sup>153</sup> In the Board's view, this kind of structural dependence amounted to precisely the type of company unionism that Section 8(a)(2) was meant to eliminate.<sup>154</sup> Also in keeping with *Newport News*, the Board held that even though the company disbanded the committees when an organizing drive began, a factor indicating the absence of anti-union animus, neither the employer's nor the employees' intent was relevant in the Board's Section 8(a)(2) determinations.<sup>155</sup>

Although the Board limited its decision to the facts of the case and made no attempt to rule on the issue of EI programs generally,<sup>156</sup> its holding that the committees were labor organizations and that the employer vio-

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148. See *id.* at 998. The five actions committees were Absenteeism and Infractions, No Smoking Policy, Communications Network, Pay Progression for Premium Positions, Attendance, and Bonus Program. See *id.* at 991.

149. See *id.* at 990.

150. See *id.* at 994.

151. See *id.* at 997.

152. See *id.* at 998.

153. See *id.*

154. See *id.*

155. See *id.*

156. See *id.* at 990.

lated Section 8(a)(2) could arguably be applied to other similarly structured EI programs.<sup>157</sup>

The *Electromation* decision thus creates a number of legal difficulties for EI programs. The majority of EI programs are created by or for employers who then introduce the programs into the workplace.<sup>158</sup> In many EI programs, particularly those that deal with quality of work-life issues, employees act as representatives for the group. The concept of the cooperative work team also necessitates considerable employer-employee interaction and perhaps even discussion of statutory bargaining topics. Under the *Electromation* rationale, then, virtually all EI programs could be deemed employer-dominated labor organizations, with the possible exceptions of quality circles that confine discussion solely to product quality and self-managed work teams which enjoy complete structural autonomy from management.

*Electromation* and subsequent decisions indicate that the Board has remained faithful to the structural approach.<sup>159</sup> For example, in *E.I. du Pont de Nemours & Co.*,<sup>160</sup> the Board applied the *Electromation* rationale to a unionized workplace, holding that the company violated Section 8(a)(2) by unilaterally initiating and administering seven-employee committees.<sup>161</sup> The committees engaged in discussions with and made proposals to management on matters involving conditions of work.<sup>162</sup> The Board held that although isolated instances of employee-management communication would not necessarily render an employee committee a labor organization, a committee constitutes a labor organization if it functions as a means for regular, bilateral communication between employees and management.<sup>163</sup> As was the case in *Electromation*, the committees were employer-dominated because management created the committees, determined their structure and agenda, and participated in the decision-making process.<sup>164</sup>

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157. *See id.*

158. *See* DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 50.

159. *See, e.g.*, V & S Proglav, Inc., 323 N.L.R.B. 144 (1997); Aero Detroit, Inc., 321 N.L.R.B. 1101, 1105 (1996); Dillon Stores, 319 N.L.R.B. 1245, 1250-52 (1995); Keeler Brass Automotive Group, 317 N.L.R.B. 1110, 1118 (1995); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154, 1156 (1995); Webcor Packing Inc., 319 N.L.R.B. 1203, 1210 (1995); Garney Morris, Inc., 313 N.L.R.B. 101, 102 (1993); Salt Lake Div., A Div. Of Waste Mgt. Of Utah, Inc., 310 N.L.R.B. 883 (1993).

160. 311 N.L.R.B. 893 (1993).

161. *See id.* at 893.

162. *See id.* at 895.

163. *See id.* at 894.

164. *See id.* at 910-18. The Board followed a similar line of reasoning in several additional cases, all of which also involved the unilateral creation by management of employee committees. In Keeler Brass Automotive Group, 317 N.L.R.B. 1110, 1115-16 (1995), the Board held that employer-structured grievance committees violated Sections 2(5) and 8(a)(2). The committees were employer-dominated because management determined the grievance committees' procedures and composition. *See id.* at 1115-16. *See also* Dillon Stores, 319 N.L.R.B. 1245, 1251 (1995) (holding that where an EI program in which employee committees present proposals about working conditions in the form of "may we" or

Similarly, in *Peninsula General Hospital and Medical Center*,<sup>165</sup> the Board found that the employer violated Section 8(a)(2) when it elicited grievances from groups designed to discuss the nursing practice. The Fourth Circuit, however, reversed, holding that the groups were not labor organizations within the meaning of Section 2(5) because discussions involved irregular contact with management, rather than a pattern or practice of dealing with the employer.<sup>166</sup> Because the groups were not labor organizations, they did not violate Section 8(a)(2).<sup>167</sup>

## 2. Possible Exceptions to the Cabot Carbon/Newport News Approach

### a. Section 2(5) Issues: The NLRB Approach

The structural approach does provide some safe harbors for EI programs. Board decisions prior to *Electromation* had held that where all employees deal with the employer as a "committee of the whole," no statutory labor organization existed.<sup>168</sup> In addition, the Board has held that management-appointed committees which are delegated the authority to make final decisions on grievances are not labor organizations, if those organizations exercised authority independent of management and did not interact with management either during their deliberations or when they rendered their final decisions.<sup>169</sup> These pre-*Electromation* cases do not widen the parameters of permissible activity for EI programs, nor do they undermine *Cabot*

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"will the employer permit," which the employer may veto, those committees will be considered labor organizations).

165. 312 N.L.R.B. 582 (1993), *reversed*, 36 F.3d 1262, 1263 (4th Cir. 1994).

166. *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262, 1274 (4th Cir. 1994).

167. *See id.* at 1274.

168. *See, e.g., General Foods Corp.*, 231 N.L.R.B. 1232, 1234 (1977). The employee structures at issue in the case were employer-created job enrichment teams. These teams comprised the entire bargaining unit. Their function was to meet and discuss operational matters. *See id.* at 1233. Despite the fact that the teams did discuss conditions of employment, the Board held that the teams were not labor organizations because they did not have an agency relationship with the employees; instead, the bargaining unit functioned as a "committee of the whole." *Id.* at 1234. As a result, all that occurred was a "staff meeting or the factory equivalent thereof." *Id.*

169. *See Sparks Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977), *enforced in part sub. nom.* *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980) (holding that an "Employees' Council" created by management to render final decisions on grievances was not a labor organization because it did not deal with management except to render final decisions on grievances); *Mercy Memorial Hospital Corp.*, 231 N.L.R.B. 1108, 1121 (1977) (holding that employer-created employee committees established to hear grievances and empowered to render final decisions on them were not labor organizations because the committees simply gave "employees a voice in resolving the grievances of their fellow employees"; this activity did not amount to "dealing with" the employer). For post-*Electromation* clarification of employer/employee interactions which do not amount to "dealing with" the employer, *see E.I. du Pont de Nemours & Company*, 311 N.L.R.B. 893, 894 (1993) (noting that no "dealing with" an employer occurs where a "committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information"). Thus, according to the Board, a brainstorming session would not be "dealing with" an employer, provided the purpose of the session was to gather information. *See id.* Similarly, a suggestion box used by employees to make proposals to management is not "dealing with" because the "proposals are made individually and not as a group." *See id.*

*Carbon*.<sup>170</sup> They merely provide authority to support the proposition that self-managed work teams and other forms of EI that are structurally independent of management and are permissible under current law.

Several cases decided after *Electromation*, however, suggest greater willingness on the Board's part to adopt a more lenient approach to Section 2(5) questions, similar to that used by the Fourth Circuit in *Peninsula General*.<sup>171</sup> In *Stoody Company Div. of Thermadyne*,<sup>172</sup> the Board held that an employer-created handbook committee designed to gather information about handbook policies inconsistent with current practices was not a statutory labor organization because the committee did not engage in a pattern or practice of making proposals to the employer.<sup>173</sup> In *Vons Grocery*,<sup>174</sup> a quality circle created by the company to discuss operational concerns later expanded its focus to discussions of the company's dress code and accident system and made proposals to both the company and the union. The Board declined to find that the quality circle had become a labor organization, holding instead that communication between the quality circle and the employer was "incidental" to the group's purpose and not indicative of a pattern or practice of dealings with the employer over Section 2(5) issues.<sup>175</sup> The exceptions to the *Electromation* rule carved out in recent decisions do not represent a retreat from the Board's position that employee committees dealing with conditions of work must be structurally independent of management to avoid violating Section 8(a)(2). But the Board's decisions may reflect a recognition that even though some discussion of conditions of work in production-centered groups will probably occur, such discussions do not necessarily turn a quality circle into a labor organization.<sup>176</sup>

#### b. *Alternatives to the Structural Approach*

The view that the adversarial model of labor relations has become an anachronism is central to an alternative judicial approach to Section 2(5) and Section 8(a)(2) issues. This alternative approach, often referred to as the Permissive or Free Choice approach, adopts a more lenient posture toward employer-created employee organizations and reaches results that

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170. See *supra* notes 84-103 and accompanying text.

171. See, e.g., *supra* notes 166-67 and accompanying text.

172. 320 N.L.R.B. 18, 19 (1995). The committee met only once and was disbanded when the employer learned that a union attempting to organize the company had filed a § 8(a)(2) complaint about the committee. See *id.*

173. See *id.* at 20-21.

174. 320 N.L.R.B. 53, 54 (1995).

175. See *id.* at 54.

176. In both *Vons Grocery*, 320 N.L.R.B. at 53-54, and *Stoody Company*, 320 N.L.R.B. at 20-21, the Board relied on *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993) to find that the committees had not engaged in a pattern or practice of dealing with the employer and that the groups did not exist for the purpose of following such a pattern or practice.

contradict in important ways the Supreme Court's teachings in *Cabot Carbon* and *Newport News*.<sup>177</sup>

The Sixth Circuit has taken the lead in formulating a more permissive approach to Section 2(5) questions. Under this approach, employee perceptions that an employer-sponsored committee is not a labor organization, coupled with absence of anti-union animus, will generally shield the committee from a finding that it is a labor organization.<sup>178</sup>

Within the context of Free Choice jurisprudence's analysis of Section 8(a)(2) questions, the primary purpose of the NLRA was to foster labor-management cooperation.<sup>179</sup> While this is a plausible reading of the Act's legislative history,<sup>180</sup> the permissive approach is premised on an assumption that finds virtually no support in the Act's legislative history—that employer-created labor organizations have only the *potential* to dominate employees.<sup>181</sup> If such organizations present only the *potential* for domination, it follows that the Act cannot absolutely preclude employee choice of, or participation in, labor organizations created or supported by an employer.<sup>182</sup>

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177. The seminal case for this more permissive approach is *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955). The term "free choice" was first used to describe this approach in *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

178. See, e.g., *NLRB v. Streamway Div. of the Scott & Fetzer Co.*, 691 F.2d 288, 289 (6th Cir. 1982), holding that several employer-initiated committees designed to enable employees to communicate with management about company plans and programs and to identify problems and propose solutions were not labor organizations. The company had not introduced the committees during an organizational drive, and thus, in the court's view, it had not displayed anti-union animus. See *Virk*, *supra* note 26, at 758. The court went on to hold that continuous rotation of committee representatives rendered discussions between employee representatives and management more akin to a forum for individual communication with management. Also relevant to the court's analysis was the fact that there was a general recognition among employees that the committees were not labor organizations. See *Streamway*, 691 F.2d at 294-95.

179. See *Chicago Rawhide*, 221 F.2d at 167 (noting that the purpose of the NLRA is to facilitate cooperation between labor and management); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967) (holding that a labor-management cooperative program furthered the primary purpose of the NLRA to create industrial peace).

180. See 78 CONG. REC. 4229 (1934) (statement of Sen. Wagner), *reprinted in* LEG. HIST. NLRA, *supra* note 34, at 22 ("The constant readjustments necessary to strike a fair balance between industry and labor cannot be accomplished simply by code revisions or by general exhortations.").

181. The thrust of Senator Wagner's analysis of company unions was that such equality and freedom could never exist within the context of a company-dominated labor organization. See *generally supra* notes 39-44 and accompanying text. For a discussion of actual versus potential domination, see *Chicago Rawhide*, 221 F.2d at 167-168; *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968).

182. See, e.g., *NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1214 (1st Cir. 1979) (recognizing "some room for management-employee cooperation short of domination"); *Hertzka & Knowles*, 503 F.2d at 630 (noting that under a strict interpretation of Section 8(a)(2), "almost any form of employer cooperation, however innocuous, could be deemed 'support' or 'interference.' Yet such a myopic reading of Section 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole.").

The critical question becomes whether an employee organization is actually dominated by the employer.<sup>183</sup>

For the Free Choice Circuits, domination is a subjective phenomenon, determined by examining whether employees themselves believe that they have been deprived of their freedom to choose who will represent them.<sup>184</sup> Employee perceptions of the nature and function of employer-created labor organizations, therefore, are central to the Free Choice Circuits' analyses of Section 8(a)(2).<sup>185</sup> Accordingly, if under the totality of the circumstances, viewed from the perspective of employees, an employer has interfered with employees' freedom to choose their representatives, the employer will have violated Section 8(a)(2).<sup>186</sup> The fact that an employee organization is relatively weak when compared with formal unions,<sup>187</sup> or that an employer provides the organization with financial support of various kinds,<sup>188</sup> does not necessarily mean that an employee organization is employer-dominated. Nor will employer participation in or structuring of an employee organization lead inexorably to a finding of domination.<sup>189</sup> As long as the labor organization "exists only as the result of a choice freely made by employees, in their own interests, and without regard to the desires of their employer," it will not violate Section 8(a)(2).<sup>190</sup>

Although it is possible that EI programs would fare better under the Free Choice approach than they have under the structural approach, in all of

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183. See *NLRB v. Northeastern Univ.*, 601 F.2d at 1213 (adopting the requirement of actual domination); *Chicago Rawhide*, 221 F.2d at 167; *Modern Plastics*, 379 F.2d at 204; *NLRB v. Homemaker Shops Inc.*, 724 F.2d 535, 544 (6th Cir. 1984).

184. See, e.g., *Homemaker Shops*, 724 F.2d at 545; *Coppus Engineering v. NLRB*, 240 F.2d 564, 571-73 (5th Cir. 1957); *Chicago Rawhide*, 221 F.2d at 168; *NLRB v. Sharples Chemicals*, 209 F.2d 645, 652 (6th Cir. 1954); *Federal-Mogul Corp.*, 394 F.2d at 918.

185. See, e.g., *Hertzka & Knowles*, 503 F.2d at 631 (holding that management participation on committees which represented employees was not an indication of employer domination because employees were not dissatisfied with managerial participation); *Modern Plastics*, 379 F.2d at 204 (holding that an employer-created employee committee was not employer-dominated because, *inter alia*, employees had shown no dissatisfaction with the way in which the committees represented them); *Chicago Rawhide*, 221 F.2d at 165 (noting that continued employee committee functioning in the face of withdrawn company support indicated that during negotiations with the company, the committees had become independent labor organizations).

186. See *Federal-Mogul Corp.*, 394 F.2d at 917; *Northeastern Univ.*, 601 F.2d at 1213-14; *NLRB v. Wemyss*, 212 F.2d 465, 471 (9th Cir. 1954); *Chicago Rawhide*, 221 F.2d at 168; *Sharples Chemicals*, 209 F.2d at 652; *Modern Plastics*, 379 F.2d at 204.

187. See *Federal-Mogul Corp.*, 394 F.2d at 918; *Modern Plastics*, 379 F.2d at 204.

188. See, e.g., *Northeastern Univ.*, 601 F.2d at 1213.

189. See *id.* at 1214 (declining to infer "subtle domination" from management attendance at employer committee meetings); *Homemaker Shops*, 724 F.2d at 545-46 (employer's involvement in committee elections evidence of cooperation and not *per se* unlawful where committees enjoyed support of employees); *Chicago Rawhide*, 221 F.2d at 169 (company's permitting employee committees to hold elections for shop committeemen on company time, company's supervising elections present only the potential for domination where employee organization enjoyed support of employees and functioned in the court's opinion as a labor union); *Hertzka & Knowles*, 503 F.2d at 631 (management participation in employee committee meetings not domination where idea originated with employees).

190. See *Hertzka & Knowles*, 503 F.2d at 630 (citing *Wemyss*, 212 F.2d at 471).

the Free Choice cases discussed above, the employee committees in question enjoyed considerable employee support. In several cases, the unfair labor practices charges were brought not by disgruntled employees but by outside unions which had lost certification elections.<sup>191</sup> In addition, a number of those employee organizations engaged in collective bargaining and were formally recognized by the company and the Board as the employees' exclusive representatives.<sup>192</sup> It is by no means certain, therefore, that a Free Choice court would find an EI program introduced and structured by management *per se* permissible.

Nonetheless, by shifting the focus of analysis to employee perceptions, the Free Choice approach alters and expands the parameters of legal analysis of EI programs. First, the Free Choice approach broadens the realm of employee choice to include employer-created EI programs, provided those programs do not stifle employee choice or freedom of expression.<sup>193</sup> In so doing, the Free Choice approach eliminates much of the paternalism of the structural approach.<sup>194</sup> Second, by making the wishes of employees rather than the structure of a committee dispositive, the Free Choice approach permits courts to give voice to the Act's emphasis on promoting worker agency and to recognize that it is possible for the underlying character of labor relations to change over time.<sup>195</sup> But, despite its strengths, the Free Choice approach ignores *Cabot Carbon* and *Newport News* entirely.<sup>196</sup> It is difficult to understand why the Supreme Court has permitted two such fundamentally contradictory approaches to co-exist within the corpus of Section 2(5) and Section 8(a)(2) jurisprudence.<sup>197</sup> However, given the apparent conflict between the Supreme Court's approach and the Free Choice ap-

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191. See, e.g., *Federal-Mogul*, 394 F.2d at 917; *Modern Plastics*, 379 F.2d at 202; *Chicago Rawhide*, 221 F.2d at 167-68; *Homemaker Shops*, 724 F.2d at 538. See also *Northeastern Univ.*, 601 F.2d at 1212 (members of employee committee had previously voted out an AFL-CIO union).

192. See *Homemaker Shops*, 724 F.2d at 539 (despite absence of "hard bargaining" on part of employee committee negotiators, committee and employer had negotiated two collective bargaining agreements); *Chicago Rawhide*, 221 F.2d at 168-69 (employee committee represented majority of employees and had worked to resolve many employee grievances); *Northeastern Univ.*, 601 F.2d at 1212 (although the employee committee had not negotiated a formal collective bargaining agreement, it had proposed and obtained university consent for paid personal leave and improved medical benefits). See also *Modern Plastics*, 379 F.2d at 204 (court deemed relevant the fact that some committees held private sessions to prepare for grievance adjudications and salary negotiations).

193. See *Hertzka & Knowles*, 503 F.2d at 631 ("Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.").

194. For further discussion, see *supra* note 104 and accompanying text.

195. See, e.g., *Northeastern Univ.*, 601 F.2d at 1214 ("[C]hanging conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model.").

196. See Lipsky, *supra* note 24, at 720.

197. The Supreme Court has never heard a Free Choice case. See, e.g. *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975). Kohler has argued that the subjective test for domination is tantamount to judicial repeal of Section 8(a)(2). See Kohler, *supra* note 5, at 545.

proach, both the utility and the feasibility of reliance on the Free Choice model is at best questionable.

### C. Official Responses to EI Programs and Their Uncertain Legal Status

A general consensus appears to exist in political circles that EI programs are good for American business. Even though the Clinton Administration has opposed the TEAM Act,<sup>198</sup> both the President and former Secretary of Labor Robert Reich have been vocal in their support for EI and their wish to see EI programs expanded.<sup>199</sup> The Department of Labor has urged employers to introduce EI programs.<sup>200</sup> In 1995, Congress passed the Workers Technology Skill Development Act, which provides grants to help identify and spread information about superior EI programs.<sup>201</sup>

Perhaps the most influential endorsement of EI, albeit a qualified one, has come from the Dunlop Commission, a blue ribbon panel appointed in 1993 by President Clinton to study the state of labor-management relations.<sup>202</sup> The Commission was chaired by former Secretary of Labor John T. Dunlop and was charged with recommending changes in work practices to increase labor-management cooperation and employee participation in the workplace.<sup>203</sup> The Commission held eleven meetings in Washington, D.C. and six regional meetings, hearing from members of the labor, business, and academic communities with regard to steps that might be taken to improve the current state of employee-management relations.<sup>204</sup> The Commission concluded that it was in the national interest to promote the expansion of EI programs.<sup>205</sup>

The Commission recognized that some EI programs currently in operation may violate Section 8(a)(2).<sup>206</sup> But the Commission's endorsement of the need for legal change was qualified and reflected an awareness that EI

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198. See, e.g., *Employee Participation: Clinton Vetoes TEAM Act Despite Pleas from Business for Passage*, Daily Lab. Rep. (BNA) No. 147, at d-4 (July 31, 1996). In his veto message, the President noted that the TEAM Act would result in the reintroduction of company unions and that "current law provides for 'a wide variety of cooperative workplace efforts.'" *Id.*

199. See, e.g., Robert B. Reich, *The Pronoun Test for Success*, WASH. POST, (July 28, 1993) (noting that the high performance workplace is organized from the bottom up).

200. See *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 32 (statement of Mr. Knicely); *Hearing: TEAM Act of 1995*, *supra* note 6, at 80 (statement of Mr. Knicely).

201. Pub. L. No. 103-382.

202. See *Dunlop Panel Urged to Examine Full Range of Employment Law: Republican Members of the House Education and Labor Committee Have Urged the Commission on the Future of Worker-Management Relations Not to Limit Itself to Perceived Problems With the National Labor Relations Act But to "Address the Entire Spectrum of Employment Law."* Daily Lab. Rep. (BNA) No. 87, at d-11 (May 9, 1994).

203. See *id.*

204. See *id.*

205. U.S. DEPT. OF LAB., U.S. DEPT. OF COM. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: REPORT AND RECOMMENDATIONS, 7 (1994) [hereinafter DUNLOP COMM'N: FINAL REP.].

206. See *id.*



programs could infringe on employees' collective bargaining rights.<sup>207</sup> The Commission recommended that Congress clarify Section 8(a)(2) and that the NLRB interpret it in a manner which insures that EI programs in which discussion of conditions of work are *incidental* to the group's larger purpose do not run afoul of the NLRA.<sup>208</sup> But the Commission also made it clear that EI programs should not be confused with independent union representation. Thus, the commission recommended that Congress clarify Section 8(a)(2) to accommodate EI programs that dealt with topics such as safety, quality, or dispute resolution as long as such clarification did not lead to the reintroduction of company unions.<sup>209</sup> In addition, the Commission recommended that it be an unfair labor practice for employers to establish EI programs or to manipulate existing EI programs for the purpose of frustrating employees' exercise of their collective bargaining rights.<sup>210</sup> It also recommended that issues normally dealt with in collective bargaining should not be discussed in EI groups without the union's consent.<sup>211</sup> Finally, the Commission concluded that employees in EI programs should be accorded the same legal protections against employer retaliation for expressing opinions on workplace issues that workers protected by the NLRA enjoy.<sup>212</sup> The Commission, thus, at most offered a qualified endorsement of EI programs.

### III.

#### WELFARE CAPITALISM AND CONTEMPORARY EI

The Dunlop Commission's qualified endorsement of EI programs and its reiteration of the need to guard against the danger of EI programs infringing on workers' collective bargaining rights reflect its recognition that EI programs have the potential to function in a manner inconsistent with values the nation's labor law aims to protect. When a program's potential to have adverse effects is an issue, debate often proceeds from the assumption that insight can best be gained by drawing analogies between the instant issue and similar historical developments.

In debates over EI, analogies are most frequently drawn between EI programs and the company unions of the 1930s. But important differences exist between EI and company unions.<sup>213</sup> While the company unions of the 1930s bargained with employers over wages and conditions of work, mod-

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207. *See id.* at 8.

208. *See id.* This approach is similar to that used by the Board in *Vons Grocery*, 320 N.L.R.B. 53 (1995) and *Stoody Co.*, 320 N.L.R.B. 18 (1995). For discussion of these cases, *see supra* notes 172-76 and accompanying text.

209. DUNLOP COMM'N.: FINAL REP., *supra* note 205, at 7.

210. *See id.* at 9.

211. *See id.*

212. *See id.* at 8.

213. *See supra* notes 53-72 and accompanying text for a description of company unions; *supra* notes 117-42 and accompanying text for a description of EI programs.

ern EI programs focus on issues of quality or productivity. The company unions grew up in hierarchically-structured, Taylorized workplaces, whereas a goal of many EI programs is to "flatten" organizational structures. Prospects for employee participation in the decentralized, non-hierarchical EI workplaces may therefore be much greater than was the case in the company union workplaces of the 1920s and 1930s.<sup>214</sup> Finally, and most significantly, the company unions of the 1930s were ad hoc responses designed to undermine traditional unions and to circumvent legal protections accorded to collective bargaining. EI, conversely, is the outgrowth of a philosophy of industrial relations that seeks to alter the basic foundations of labor management relations.<sup>215</sup> The broader, systemic focus of EI suggests that the relevant question is whether EI, as a philosophy of industrial relations, is capable of creating more democratic workplaces.

In resolving this question, the appropriate comparison is not between EI and company unions but between EI and welfare capitalism, the only other well developed expression of a management-initiated cooperative approach to labor-management relations in modern American history.

#### A. *Welfare Capitalism*

Although nearly seventy years of history separate welfare capitalism and EI,<sup>216</sup> the similarities between the two are striking. Like modern EI, welfare capitalism assumed a variety of forms,<sup>217</sup> ranging from the provision of company housing to the establishment of YMCAs to the creation of adult education programs devoted to "Americanizing" immigrant workers.<sup>218</sup> More advanced forms of welfare capitalism included the creation of employee profit-sharing or stock purchase plans.

The motivations of employers who introduced welfare programs were as diverse as the programs themselves. First, as is the case in contemporary EI programs, concerns about declining productivity played a major role in the decision to adopt welfare programs. For example, turnover rates during the 1920s often exceeded one hundred percent, necessitating continuous hiring and training of new personnel and reducing efficiency.<sup>219</sup> Companies also instituted welfare programs as public relations moves. During the

214. See generally *supra* notes 53-72 and accompanying text.

215. See generally *supra* notes 117-42 and accompanying text.

216. In the 1920's, significant numbers of employers began welfare programs. See BRODY, *supra* note 37, at 49-54. For discussions of welfare practices in individual firms between the late 1880's and 1930, see ROBERT OZANNE, *A CENTURY OF LABOR-MANAGEMENT RELATIONS AT INTERNATIONAL HARVESTER* (1967); GERALD ZAHAVI, *WORKERS, MANAGERS, AND WELFARE CAPITALISM: THE SHOEWORKERS AND TANNERS OF ENDICOTT JOHNSON 1890-1950* (1988).

217. See H.M. Gittleman, *Welfare Capitalism Reconsidered*, 33 *LABOR HISTORY* 5, 9 (1982).

218. See STUART D. BRANDES, *AMERICAN WELFARE CAPITALISM, 1880-1940*, at 11-12 (company housing); *id.* at 14-15 (YMCA's); *id.* at 59-60 (use of welfare programs to Americanize immigrants).

219. See, e.g., LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919-1939*, at 171 (1990).

first decade of the twentieth century, the trusts sought to escape regulation by publicizing the beneficial functions they performed in society.<sup>220</sup> Welfare activities, thus, served as a powerful tool in the public relations arsenals of large companies. Idealism also played a role in the introduction of welfare programs.<sup>221</sup> Some employers, troubled by the dichotomy between political democracy and workplace authoritarianism, sought to establish harmonious, equitable social relations in the workplace.<sup>222</sup> Finally, anti-unionism was also a significant factor in the decision to adopt welfare programs. While some companies' welfare programs were direct responses to labor unrest and previous union activity, other companies tried to "inoculate" their workforces against the threat of unionism, using welfare programs to create conditions just as good if not better than those of union shops.<sup>223</sup> Welfare activities thus served as a means for employers to address firm- or industry-specific concerns as well as larger economic, social, and even political concerns. Although it would be tempting to ascribe a single set of motivations to each firm, as is the case in modern EI programs, the motives for introducing welfare work probably interacted to shape the policies of a given company or corporate officer.

### 1. *Welfare Capitalism as a Philosophy of Industrial Relations*

Historians generally have viewed welfare capitalism negatively, arguing that the primary purpose of welfare programs was to enable employers to preserve their dominance and independence in the face of threats from organized labor.<sup>224</sup> Indeed, there is ample evidence to support this view. The Stetson Company, for example, used a Christmas bonus to stave off a union drive in 1901.<sup>225</sup> Nonetheless, although welfare activities were useful to employers in reducing labor unrest or in improving the image of the company, like modern EI, welfare capitalism was too complex a movement to be explained solely in terms of anti-unionism.<sup>226</sup>

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220. See NEIL J. MITCHELL, *THE GENEROUS CORPORATION: A POLITICAL ANALYSIS OF ECONOMIC POWER* 94-99 (1989).

221. BRODY, *supra* note 37, at 55, 58-59 (discussing employer idealism and employee representation and one welfare capitalist's view that employees needed to be treated like thinking men).

222. See MITCHELL, *supra* note 220, at 118-19; IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 165 (1960); A. LINCOLN FILENE, *A MERCHANT'S HORIZON* 89 (1924).

223. See BRODY, *supra* note 37, at 57; OZANNE, *supra* note 216, at 70. See also BRANDES, *supra* note 218, at 32, 127.

224. See BRANDES, *supra* note 218, at 32. Bernstein also argues that the "central purpose of welfare capitalism [was] the avoidance of trade unions." BERNSTEIN, *supra* note 222, at 187. For discussions of the prominence of anti-unionism in welfare capitalist thought, see OZANNE, *supra* note 216, at 116-24 (detailing the relationship between labor unrest and welfare programs at International Harvester).

225. See OZANNE, *supra* note 216, at 33. U.S. Steel similarly "carefully blended coercion with inducement" in the form of welfare benefits to clear the company of unions. See ROBERT H. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* 165 (1962).

226. See, e.g., COHEN, *supra* note 219, at 160-61 (arguing that welfare capitalists wanted a "benign industrial society").

The end of cutthroat competition that accompanied the concentration of power in the hands of large corporations contributed to the development of welfare capitalism, enabling employers to devote more time and effort to developing the "human factor in industry."<sup>227</sup> But an equally important factor in the decision to adopt welfare programs may have been the considerable pressure businessmen faced to legitimize the activities of large corporations both to the broader society and to themselves.<sup>228</sup> The sharp business practices of the trusts, growing class divisions, and violent labor unrest resulted in increasing public criticism and scrutiny of the large corporations raised the specter of government regulation, and placed additional pressure on businessmen to justify their actions and prove that large corporations could play a constructive role in society.<sup>229</sup>

Welfare capitalists shared an underlying core of beliefs about the nature of business activity and the employment relationship. They did not question the inviolability of property rights or the right of owners and their stewards, management, to exercise sole control over the affairs of the business.<sup>230</sup> But for the welfare capitalists, legitimizing the corporation meant that property rights needed to be exercised with reference to the obligations that the corporation as a member of society owed to the broader society. These obligations included at least partial responsibility for the well-being of workers.<sup>231</sup>

Paul W. Litchfield of Goodyear Tire and Rubber articulated perhaps the most intellectually coherent statement of welfare capitalism's resolution of the tensions between property rights and the values of the polity.<sup>232</sup> Litchfield distinguished between human rights—possessed by each member of the company, which the company had no right to abridge—and property rights, enjoyed only by owners.<sup>233</sup> For Litchfield, the function of employee representation was to protect workers' rights to fair wages and fair, safe working conditions.<sup>234</sup> Decision-making authority, however, derived from property rights and was properly exercised only by owners or by management as the owners' representatives. In Litchfield's view, until labor risked its financial capital in the business enterprise, it had no legitimate claim to the exercise of property rights.<sup>235</sup>

227. See *supra* note 222 and accompanying text.

228. See MITCHELL, *supra* note 220, at 110-11.

229. See *id.*

230. See P.W. LITCHFIELD, *THE INDUSTRIAL REPUBLIC: REFLECTIONS OF AN INDUSTRIAL LIEUTENANT* 24-26 (1946).

231. See BRODY, *supra* note 37, at 52 (noting that Elbert Gary, no friend of the labor movement, saw welfare work as a duty capital owed to labor). See also MITCHELL, *supra* note 220, at 119 (discussing growing concern for workers' well-being on the part of businessmen during the twenties).

232. See LITCHFIELD, *supra* note 230, at 41-73.

233. See *id.* at 24-29.

234. See generally *id.* at 29 (arguing that workers should be involved in decision-making if they make financial contributions to the company).

235. See *id.* at 24-25.

Even if labor and management had different rights and played different roles, these differences did not, according to the welfare capitalist view, necessarily mean that the two groups were inevitably locked into conflict. For welfare capitalists like A. Lincoln Filene, John D. Rockefeller, and Litchfield, labor-management conflict was the result of misunderstandings that arose in large part from the increased size of companies.<sup>236</sup> It was these misunderstandings, not any inherent conflict of interest, that led to industrial unrest.<sup>237</sup> Properly conceived, welfare programs, and in particular employee representation programs, could eliminate these misunderstandings and create a harmonious corporation in which labor and management both worked in a principled manner for the common good.

For the welfare capitalists, one of the main difficulties with unionism was that outside unions had little direct knowledge of conditions within individual companies and thus were not appropriately sympathetic to the constraints and risks that employers faced in running their businesses.<sup>238</sup> Moreover, the adversarial approach of outside unions rendered peaceful discussion and cooperation impossible.<sup>239</sup> Finally, within the welfare capitalist's view, the average worker was not an adversary, but a potential junior partner who desired not to control the business but simply to be treated justly and fairly.<sup>240</sup> Unions, therefore, were undesirable because they sought to limit management's exercise of its prerogatives and, in so doing, upset the natural balance between workers and management within the enlightened welfare capitalist firm.<sup>241</sup>

## 2. *The Welfare Capitalist Conception of Industrial Democracy*

Employee stock ownership and employee representation were the pillars of the welfare capitalist conception of industrial democracy. Stock ownership offered employees access to property rights.<sup>242</sup> Employee repre-

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236. See, e.g., *id.* at 46 (noting that "[t]he heads of the company knew all of the employees personally in the early days," but that by 1919, when Goodyear's supervisory forces alone consisted of 863 men, this personal connection no longer existed).

237. See, e.g., BERNSTEIN, *supra* note 222, at 164-65 (discussing Rockefeller's views on the causes of industrial unrest).

238. See BRANDES, *supra* note 218, at 121.

239. See DANIEL BLOOMFIELD, PROBLEMS IN PERSONNEL MANAGEMENT 482, 488-89 (1923).

240. See, e.g., FILENE, *supra* note 222, at 67 (arguing the "[t]he average employee cares nothing for owning an industry. Its perplexities and losses are not for him."); *id.* at 150-52 (discussing an employee survey finding that an overwhelming number of employees did not want a voice in management). See also JOHN CALDER, CAPITAL'S DUTY TO THE WAGE-EARNER 228 (1923).

241. Anti-unionism did not necessarily preclude support for greater democratization of the workplace, nor did anti-unionism preclude concern on the part of welfare capitalists for improving employees' standard of living. See generally BERNSTEIN, *supra* note 222, at 159-62. Instead, anti-unionism was a component of a philosophy of industrial relations premised on the voluntary subordination of property rights to larger societal goals. Any attempt to coerce such restraint was tantamount to "confiscation and injustice." See LITCHFIELD, *supra* note 230, at 26.

242. A Proposal by the Stockholders of the Larkin Co. to Its Employees (1919), in DARWIN D. MARTIN PAPERS 1 (Buffalo and Erie County Historical Society MS-B76-1, Box 1 Folder 7).

sentation, on the other hand, offered workers immediate input into the day to day functioning of the company, thereby giving employees access to human rights.

*a. Employee Stock Ownership Plans*

The number of companies offering stock ownership plans increased dramatically during the early and mid 1920s.<sup>243</sup> But despite the idealistic rhetoric of the welfare capitalists,<sup>244</sup> stock ownership plans were designed in ways that rendered illusory any prospect of significant worker control. In some companies, employees could not sell their shares except to the company.<sup>245</sup> Companies established rigid eligibility requirements, often requiring employees to serve for a number of years before they became eligible to buy stock.<sup>246</sup> Given high annual turnover rates, these requirements made it virtually certain that relatively few employees would ever become shareholders. The cost of shares was often too high for workers in the lower wage brackets;<sup>247</sup> the majority of stock purchases were made by high salary employees, not ordinary workers.<sup>248</sup> In practice, these restrictions meant that employees as a whole exercised no real control of the company.<sup>249</sup> Accordingly, it is not surprising that employees did not respond as enthusiastically to the stock plans of the 1920s as employers had hoped.<sup>250</sup>

*b. Employee Representation*

In 1898, the Filene department store became the first important American company to institute an employee representation plan.<sup>251</sup> Not until 1915 did larger companies, like Colorado Fuel and Iron, begin to introduce

243. See BRANDES, *supra* note 218, at 83-84 (discussing the growth of employee stock ownership plans).

244. See, e.g., A Plan for Industrial Partnership (undated), DARWIN D. MARTIN PAPERS, *supra* note 242, at 2 (2-MS- B76-1, Box 1, Folder 8) (contending that “[d]irect co-partnership management,” of which employee stock ownership was a variety, “is a form of socialism of the highest, best and most ideal sort, a socialism that makes real partners of employer and employee and yet preserves a right of private property and individual initiative, giving the worker new inspiration for effort, and humanizing all”).

245. A Plan for Co-Operative Ownership (1919), DARWIN D. MARTIN PAPERS, *supra* note 242, at 5 (Buffalo & Erie County Historical Society MS-B76-1, Box 1, Folder 8).

246. See, e.g., *id.* (in order to be a charter employee stockholder, employees must have been employed for three full years as of January 1, 1919, and in addition, have been at least twenty-one years of age and a citizen of the United States).

247. See BRANDES, *supra* note 218, at 90.

248. See BERNSTEIN, *supra* note 222, at 183.

249. See, e.g., RAY STANNARD BAKER, THE NEW INDUSTRIAL UNREST: REASONS AND REMEDIES 139-40 (1920) (Although 61,000 of U.S. Steel’s 268,000 employees owned stock in 1919, their stock amounted to only one fifty-fourth of the company’s total shares.).

250. An employee of U.S. Steel argued that “every share has a string attached”—“[s]tock ownership” could also become “a long chain shackling the employee to the company.” *Id.* at 141. But employees also used stock purchase plans to their own advantage and recognized that the stock market could be volatile. See COHEN, *supra* note 219, at 195.

251. See BRANDES, *supra* note 218, at 121-22.

their employee representation plans.<sup>252</sup> During World War I, the federal government supported the creation of company unions as a means of settling labor disputes which could threaten wartime production.<sup>253</sup> The popularity of employee representation increased throughout the twenties: in 1922, 690,000 workers were represented by employee representation plans; by 1928, the number had risen to over 1,500,000.<sup>254</sup> As with modern EI programs, the popularity of employee representation increased at a time when union density was decreasing.<sup>255</sup> Along with other aspects of welfare capitalism, companies employing more than 5,000 workers sponsored the majority of employee representation plans.<sup>256</sup>

Although fear of labor unrest played a role in the introduction of many of employee representation plans,<sup>257</sup> anti-unionism alone does not explain fully the reasons for the post-war growth of employee representation plans. Employee representation was introduced during the war because it was useful in promoting worker-management cooperation.<sup>258</sup> But the force of wartime rhetoric also convinced some businessmen to import democratic institutions and rhetoric into the workplace, as employers also realized that employee representation could act as a means to harmonize political and workplace cultures.<sup>259</sup>

Many employee representation plans equated industrial democracy with the creation of employee representation committees which superficially resembled American political and legal institutions. A number of employee representation plans were modeled on the structure of the national government and operated under the terms of management-written constitutions.<sup>260</sup> In some cases these constitutions granted workers limited due process protections.<sup>261</sup> While nearly all of the plans adopted demo-

252. See BERNSTEIN, *supra* note 222, at 160.

253. See SQUIRE, *supra* note 29, at 142.

254. See CHARACTERISTICS OF COMPANY UNIONS, *supra* note 64, at 24-25.

255. Union membership dropped from 19.4 percent of the nonagricultural workforce in 1920 to 10.2 percent in 1930. See BERNSTEIN, *supra* note 222, at 84. The two developments are not necessarily causally related. As with contemporary EI, employee representation plans might have filled a vacuum created by the decline of union strength.

256. In 1928, over 63 percent of employee representation plans existed in companies employing more than 15,000 workers. See *id.* at 171.

257. During WWI, the United States government mandated the introduction of employee representation plans where unions did not exist in order to ward off labor unrest. See DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 46. Although many of these plans went out of existence at the end of the war, the labor unrest of 1919 was a catalyst for some employers' introduction of employee representation plans. See, e.g., OZANNE, *supra* note 216, at 116-17.

258. See CHARACTERISTICS OF COMPANY UNIONS, *supra* note 64, at 19.

259. Litchfield, at least, felt compelled by the force of wartime rhetoric to attempt to realize democratic ideals in the workplace. See, e.g., LITCHFIELD, *supra* note 230, at 43-45. Brody argues that industrial democracy became "a national by-word during World War I." BRODY, *supra* note 37, at 56. The idea, he contends, had powerful idealistic appeal through the 1920's. See *id.*

260. See BRANDES, *supra* note 218, at 122-23 (discussing characteristics of the Leitch Plans).

261. See, e.g., FILENE, *supra* note 222, at 59-60, 93-110 (reproducing the constitution of the Filene Cooperative Association); LITCHFIELD, *supra* note 230, at 50-60 (reproducing the constitution of the

cratic procedural devices, the decision-making authority of employee representatives was limited.<sup>262</sup> Employers generally listened to individual but not group grievances.<sup>263</sup> Employee representation plans permitted employees to challenge the ways in which policies were administered, but not the policies themselves.<sup>264</sup> Employee representatives had little power to compel management to grant wage increases.<sup>265</sup> Employee representation committees had no power to strike, no strike funds, and no access to information about conditions in other plants.<sup>266</sup> The decisions of many employee representation groups could also be overruled by management.<sup>267</sup> In sum, employee representation organizations had no ability to engage in meaningful discussion of wages or conditions of work.<sup>268</sup>

It appears that workers recognized that the employee representation plans offered them no real power to affect the conditions of their employment. The high levels of employee apathy which so perplexed management indicate that employees "saw through" the representation programs and expected almost nothing from them.<sup>269</sup> Nonetheless, the evidence suggests that employee representation groups were not entirely powerless; they managed to exercise some influence over company policy, primarily by creating seniority systems, coordinating relief work during economic downturns, and administering company welfare programs.<sup>270</sup>

On the whole, it appears that employee representation achieved, at best, a very limited democratization of the workplace. As long as management retained control over the ability to create, modify, and terminate programs *not required by law*,<sup>271</sup> the only constraints on welfare capitalists

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Goodyear Industrial Assembly); CALDER, *supra* note 240, at 293-318 (reproducing the constitution of the Swift Company's employee representation plan).

262. For example, Goodyear employees could formulate and pass legislation dealing with any area of plant life. See LITCHFIELD, *supra* note 230, at 29. Next, legislation went to the Cabinet which had absolute veto power over any measure that dealt with economic rights. A cabinet veto on matters of human rights could be overridden by a two-thirds vote of both legislative houses. For veto and override procedures, see *id.* at 29, 53-54.

263. See COHEN, *supra* note 219, at 173.

264. See *id.*

265. See BERNSTEIN, *supra* note 222, at 173.

266. See *id.* See also Ozanne, *supra* note 216, at 123 (arguing that the employee representation plan of International Harvester "effectively isolated Harvester employees by plant").

267. See OZANNE, *supra* note 216, at 122 (management held veto power over Harvester Works Councils' actions); BRANDES, *supra* note 218, at 122. *But see* FILENE, *supra* note 222, at 58 (employee representative decisions could not be vetoed by management).

268. See BERNSTEIN, *supra* note 222, at 173 (noting that company unions were ineffective with respect to wages, hours, and the handling of grievances).

269. Workers at Bethlehem Steel, Colorado Fuel and Iron and Proctor & Gamble were not enthusiastic about employee representation. See BRANDES, *supra* note 218, at 129. An observer at a Proctor & Gamble Works Council meeting remarked that nothing of importance was discussed. See BRODY, *supra* note 37, at 60.

270. Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination*, 56 Bus. Hist. Rev. 335, 350, 355 (1982).

271. See *supra* note 221 and accompanying text.



were those imposed by their own rhetoric<sup>272</sup> or the market. As a result, even though welfare capitalism may have provided workers with rudimentary access to rights of representation, participation, due process, dissent, and personal dignity,<sup>273</sup> without the independent power to negotiate and bargain with employers, those rights existed at the whim of management. And because welfare capitalists could not conceive of an industrial relations system not based upon the *voluntary* restraint of inviolable rights to control property, neither could they grasp the fundamental contradiction at the heart of the system; a contradiction embodied in Filene's statement: "[s]uch is the constitution adopted under the bill of rights we gave our people, by our own desire and not at their demand."<sup>274</sup>

### B. Contemporary EI Programs

For some commentators there is little danger that modern EI programs will function like the employee representation plans of the 1920s and 1930s. The workforce, they argue, is more educated and hence less likely to be coerced by management into foregoing independent representation.<sup>275</sup>

Empirical studies and anecdotal information suggest that EI programs do provide greater opportunities for employees to participate in discussion of work-related matters and that these discussions enhance job satisfaction, at least in the short run. Many employees also believe they have benefitted personally from their involvement in EI programs.<sup>276</sup> These benefits include a heightened sense of personal efficacy resulting from participation in the decision-making process, improved working conditions, and better employee-supervisor relations.<sup>277</sup> Finally, employees report feeling more positive about their work when they know that they have a direct influence over the work environment and can communicate with others at the workplace without relying on intermediaries.<sup>278</sup> Thus, Graham and Verma conclude that there is "general agreement that EI programs enhance the

272. See Virk, *supra* note 26, at 729, 754.

273. See DERBER, *supra* note 39, at 100.

274. FILENE, *supra* note 222, at 110.

275. See, e.g., *Hearing: TEAM Act of 1997*, *supra* note 111, at 82 (statement of Prof. Estreicher).

276. See *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 31 (statement of Mr. Knicely) (referring to Princeton Research Associates' study in which 79% of nonmanagerial non-union participants in EI programs reported having "personally benefitted from [their] involvement in the program by getting more influence [in] how [their] job is done").

277. See e.g., *Hearing: Legal Problems with Employee Involvement Programs*, *supra* note 20, at 8-10 (testimony of Molly Dalman, employee, Donnelly Corp.) (discussing the positive effects of her involvement in workplace teams); *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 61 (testimony of Elaine Jensen, employee, FMC Corp.) ("We trust that management and that our contracts manager will bring in business for us.").

278. See *Hearing: H.R. 743*, *supra* note 9, at 19 (testimony of Julie Smith, Team Advisor, TRW Vehicle Safety Systems, Inc.).

affective response to work."<sup>279</sup> In this respect, the positive employee responses to modern EI programs would appear to contrast sharply with the apathetic responses of employees in the 1920s to welfare capitalism. But, Graham and Verma note that such self-reported results of EI programs may be misleading.<sup>280</sup> Specifically, employees who are the most favorably disposed to EI programs may participate in these programs more frequently than employees who are less enthusiastic about EI.<sup>281</sup> In fact, one commentator believes that given selection bias, the lack of clear evidence linking EI to improved affective responses to work is both "striking and damning."<sup>282</sup> In addition, some studies have found disparities between worker and management responses to EI, with workers responding much more negatively than management.<sup>283</sup> Thus, further research is clearly needed to determine whether positive affective responses are the result of self-selection or other employee personality variables, and not of the nature of EI programs themselves.<sup>284</sup>

Commentators have also argued that there is little evidence that cooperative programs represent a move away from authoritarian workplaces, and toward industrial democracy.<sup>285</sup> One commentator has argued that management carefully controls EI programs "to prevent workers from expanding the scope of their participation" and that, as a result, the promise of increased worker influence and power is largely illusory.<sup>286</sup> Studies have found that EI programs undermine employee solidarity and turn workers against one another in part because these programs convey a message that workers need to measure their productivity against that of their peers.<sup>287</sup> In addition, individuals with unpopular viewpoints may be subjected to subtle psychological pressure to conform to the views of an EI group and may be labeled "poor team players" or "losers" by fellow workers or management

279. Jill W. Graham & Anil Verma, *Predictors and Moderators of Employee Responses to Employee Participation Programs*, 44 *HUM. REL.* 551, 552 (1991).

280. *See id.*

281. *See id.*

282. *See* Stephen M. Bainbridge, *Participatory Management and the Theory of the Firm*, 21 *J. CORP. L.* 651, 678 (1995). *But see* Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist*, 8 *DEPAUL BUS. L.J.* 159, 173 (1996) (arguing that studies have demonstrated a positive relationship between employee involvement and firm performance).

283. *See, e.g.*, Tom Juravich et al., *Mutual Gains? Labor and Management Evaluate Their Employee Involvement Programs*, 14 *J. OF LAB. RES.* 165, 181 (1993) (noting that what is striking in their survey of labor and management perceptions of EI in a unionized facility is that "management and labor have completely different views on the impact of their EI program on workers' morale, supervisory relations, productivity and quality with no correlation between labor and management responses").

284. *See* Graham & Verma, *supra* note 279, at 552.

285. Steven H. London, *The New Industrial Relations Ideology and the Decline of Labor*, 18 *POLICY STUD. J.* 481, 489 (1989-90).

286. *See, e.g.*, Rick Fantasia et al., *A Critical View of Worker Participation in American Industry*, 15 *WORK & OCCUPATIONS* 468, 471 (1988).

287. *See id.* at 476.

if they do not.<sup>288</sup> In these respects, peer pressure functions not only as a form of social control but as a form of indirect management control as well.<sup>289</sup> The personal nature of worker-management contact in EI programs can also function as a form of social control of employees. Specifically, by personalizing bureaucracy and humanizing power without changing the underlying authoritarian structure of the workplace,<sup>290</sup> employees who deviate from managerial expectations may feel that they have violated a personal rather than the more impersonal and often adversarial employment relationship.

In his study of management use of quality circles during a union organizing drive at the Ethicon Company plant in Albuquerque, New Mexico, Grenier demonstrated some of the ways in which EI programs can function as an extremely effective means for management to circumvent captive audience rules and other NLRB rules designed to protect employees from management coercion.<sup>291</sup> The quality circles existed before the union drive and were not established to thwart union organizing. But during the organizing drive, management used the quality circles as a conduit to pass anti-union information to employees.<sup>292</sup> The company also used the quality circles to identify potential union organizers and threatened pro-union quality circle members with dismissal if they joined the union.<sup>293</sup> Grenier argues that through these practices, the company used the rhetoric of popular psychology and personalism to increase its control over employees.<sup>294</sup> Although the union filed a number of unfair labor practice charges, company management was willing to risk litigation and trust that their methods of "psychological persuasion" within the quality circles would result in employees repudiating the union.<sup>295</sup>

Grenier's criticisms of the quality circles are reminiscent of those leveled against employee representation plans of the 1920s and 1930s. But while it is true that EI programs may cloak the reality of continued employer control in the empowerment language of popular psychology, surely

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288. See GUILLERMO GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES & ANTI-UNIONISM IN AMERICAN INDUSTRY* 16, 192 (1992).

289. See *id.* at 16.

290. See *id.* at 17, 18.

291. See *id.* at 106-15.

292. See *id.* at 109. Employees were told that they would lose their autonomy and that the union would make decisions for them. See *id.* at 82. Grenier also notes that quality circle facilitators were trained by the company to identify and influence pro-union employees. See *id.* at 68.

293. See *id.* at 113. Pro-union employees were pulled from their machines and interrogated about their union activities in plain view of their co-workers. The company's social psychologist attempted to "counsel" employees out of their pro-union sympathies by treating pro-union employees as though they had temporarily "succumbed to an attitudinal sickness." Pro-union employees, therefore, needed treatment. See *id.* at 124. The company lumped personal problems, lack of productivity, and pro-union sympathies under the rubric of counter-productive behavior. See *id.* at 75.

294. See *id.* at 18, 131.

295. See *id.* at 83, 87, 118.

the employees of the 1990s are capable of appreciating that EI programs do not necessarily create a true partnership between labor and management. Indeed, Grenier's study indicates that employees understood fully both how the company used the quality circles and the amount of power management actually exercised them.<sup>296</sup>

Ironically, the evidence suggests that cooperative programs in non-union workplaces do not necessarily lead to greater productivity. Despite the contentions of some commentators for whom the adversarial and cooperative models of labor relations are incompatible, several recent studies suggest that EI programs in unionized firms tend to be at least as successful, if not more successful than EIs in non-union firms. In a recent study of two large manufacturing firms, only one of which was unionized, EI programs administered jointly by unions and management achieved productivity gains equivalent to those achieved in non-union settings.<sup>297</sup> Another study of one thousand unionized and non-unionized plants found that EI programs were one-third more effective when a union was present.<sup>298</sup> Several other studies have found that in unionized settings the survival of EI programs is significantly increased if union and management are partners in EI group efforts.<sup>299</sup> Plants with unions but no EI programs were found to be nearly twice as productive as plants with EI's and no unions.<sup>300</sup> According to the Dunlop Commission, joint union-management partnership significantly improved a given EI program's survival.<sup>301</sup> For Graham and Verma, the outcomes of EI programs are also better when unions are involved.<sup>302</sup> Union representation may, therefore, provide employees with the security and the voice to engage in the "contentious give and take"<sup>303</sup> discussions sometimes necessary to realize EI's goals of utilizing fully the intellectual resources of employees.<sup>304</sup>

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296. *See id.* at 91.

297. William Cooke, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union/Management Administration*, 46 *INDUS. & LAB. REL. REV.* 119, 132 (1992).

298. *See Metzgar, supra* note 116, at 71.

299. *See DUNLOP COMM'N FACT-FINDING REP., supra* note 2, at 35.

300. *See Metzgar, supra* note 116, at 71.

301. *See DUNLOP COMM'N FACT-FINDING REP., supra* note 2, at 35.

302. *See Graham & Verma, supra* note 279, at 552.

303. *See Metzgar, supra* note 116, at 71. *See also* Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovation in Work Organization and Employee Participation*, in *UNIONS & ECONOMIC COMPETITIVENESS* 194-96 (Laurence Nischel & Paula B. Voos, eds. 1992) (arguing that unions offer workers who speak their minds freedom from reprisals for speaking out). Because unions can say no, they can also say yes to such efforts. *See id.* at 198.

304. *See, e.g., Hearing: Removing Impediments to Employee Participation, supra* note 6, at 30 (statement of Mr. Knicely) (arguing that pre-EI methods of human resource management "underutilized a tremendously valuable asset - the intellectual resources of our work force").

### C. *Welfare Capitalism and Modern EI Programs*

Clearly, there are important differences between welfare capitalism and modern EI programs. However, these differences should not obscure the very real similarities between the two systems. Welfare capitalism and EI were both begun at times when the corporate form was being questioned, either because of its failure to create a peaceful industrial order, in the case of welfare capitalism, or because of its failure to compete effectively in a global market, in the case of EI. Both systems gained popularity as worker alienation, whether expressed in the form of labor militancy, high turnover, or pervasive worker apathy, threatened productivity. Each system developed techniques to respond to pragmatic business considerations. But in both, pragmatic responses were outgrowths of a broader philosophy of industrial relations designed to restructure all workplace interactions to conform with management's objectives and its assumptions about the mutuality of employer and employee interests.

Central to that philosophy is the notion of voluntary management restraint. Restraint is often synonymous with magnanimity, reasonableness, and consideration. Nonetheless, behavior displaying these qualities implicitly underscores management's superior power in the employment relationship and suggests alternative ways in which that power can be exercised. Furthermore, as with welfare capitalism, EI's promise of increased worker participation is supported by nothing stronger than mutual trust.

Differences between welfare capitalism and EI are more reflective of changing fashions in rhetoric than they are of substantive differences between the two systems. Both welfare capitalism and EI view unions as destructive influences in the workplace. But whereas welfare capitalists were unabashedly anti-union and introduced welfare programs for the express purpose of making unions less attractive to workers, modern practitioners of EI are less likely to articulate anti-union sentiments openly. Nonetheless, terms like "adversarial," "bureaucratic," and "rigid," when used in reference to labor relations practices in older—and implicitly unionized—manufacturing industries, have definitively pejorative connotations, particularly when juxtaposed against the EI ideals of an open, flexible, informal, cooperative workplace.<sup>305</sup> Second, both welfare capitalism and EI programs use highly positive, emotionally-charged language to present programs to workers. The evidence suggests that employees in the twenties were keenly aware that welfare capitalist programs were not in fact capable of or concerned with developing the "human factor" or the "right relations in industry." Interestingly, however, the emphasis on reconciling the social relations of the workplace and the polity central to welfare capitalism is entirely absent from the rhetoric of modern EI. Instead, EI replaces the

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305. See *Hearing: H.R. 743*, *supra* note 9, at 7, 8, 14 (statement of Mr. Morley).

language of industrial democracy with the language of empowerment, fulfillment and self-realization imported from popular psychology, motivation seminars, and talk shows.

By holding out to employees the opportunity to fulfill through work personal goals much sought after in other realms of life, EI programs may have a significant initial emotional appeal, but in reality do little to change the hierarchical, authoritarian nature of the traditional workplace.

For instance, one commentator views EI as simply an adaptive response to inefficiencies created by the excessive bureaucracy and hierarchy that are characteristic of large corporations. Within this view, EI functions as a means of bypassing hierarchy without overthrowing it.<sup>306</sup> Specifically, large firms create bureaucracies to make the flow of information more efficient, but excess layers are also created when managers engage in empire building.<sup>307</sup> These unnecessary layers distort the flow of information and lengthen the path it must travel to reach decision-makers.<sup>308</sup> In addition, there also exist "information asymmetries," which, in spite of Taylorism, result in workers having more actual knowledge about production processes than those higher up in the workplace hierarchy.<sup>309</sup> EI solves these problems in two ways. First, EI enables management to bypass hierarchy and "tap workers' knowledge directly."<sup>310</sup> Second, EI also plays a monitoring function by using peer pressure as a means of preventing employees from shirking.<sup>311</sup> In EI, therefore, groups become a self-monitoring device, and EI builds on values that "American workers deem important like self-respect via doing a good job and earning the respect of one's peers."<sup>312</sup> Thus, EI fulfills managerial objectives, but not necessarily the goals of promoting either industrial democracy or employee empowerment.

In sum, in management-initiated cooperative models whether in the form of welfare capitalism or EI, management strictly demarcates permissible levels of worker participation. Employees are given a measure of control over some job tasks or aspects of the work environment, while management remains in full control of the overall enterprise. Patterns of ownership do not change, management can stop experiments with job-re-design or self-managed work teams at any time, and the reward structures and evaluation procedures within the firm remain entirely in management's hands.<sup>313</sup>

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306. See Bainbridge, *supra* note 282, at 696.

307. See *id.* at 680.

308. See *id.* at 681.

309. See *id.* at 682.

310. See *id.*

311. See *id.* at 690.

312. See *id.* at 692.

313. See Rothschild-Whitt & Lindenfeld, *supra* note 28, at 5.

The cooperative model thus stands in sharp contrast to the collective bargaining model. Although the collective bargaining model also accepts management control over key decisions regarding the deployment of resources, unlike the cooperative model, collective bargaining creates binding, enforceable limits on the exercise of managerial power.<sup>314</sup> Consequently, collective bargaining can provide workers with the power to affect the terms and conditions of their employment; EI programs cannot. In these respects, the collective bargaining appears to be more effective than the cooperative model in achieving democratization of the workplace.

Nonetheless, EI programs do give employees opportunities to participate in some types of workplace decision-making. EI's repudiation of Taylorism promises to give employees increased input into problem-solving. EI also has the potential to break down rigid and artificial distinctions between jobs. Empirical evidence suggests that in these respects, EI responds more effectively than traditional unions to the desires of the contemporary workforce.<sup>315</sup> The work force is more educated and, studies suggest, more interested in having direct input into enterprise planning and culture.<sup>316</sup> Historically, unions have focused on issues like wages, seniority, and pensions, but not on issues involving the deployment or the mobility of capital or the organization of work routines. As a result, traditional unions may not offer the kinds of representation employees appear to want. It should be noted, however, that the focus of contemporary unions on "bread and butter" issues derives in large measure from limitations the courts have placed on the topics over which unions and management may bargain.<sup>317</sup>

Current labor law, therefore, leaves unions and employers alike in a paradoxical situation. Absent management agreement, unions may not bargain over the issues which appear to interest workers most. Conversely, EI programs offer employees at least the appearance of input into the decision-making process, but many EI programs are illegal under current law. Thus,

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314. See Virk, *supra* note 26, at 755-56.

315. See, e.g., *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 14 (statement of Rep. Steve Gunderson) (noting that a Princeton Research Associates' survey found that by a 2 to 1 margin, employees preferred joint worker-management committees over unions or union-like organizations).

316. See Hyde, *supra* note 15, at 151 (noting that professional, white collar, and managerial employees want more than bread and butter unionism; instead, professionals want help with career planning and input into enterprise planning and culture). Squire notes that the number of white collar workers now exceeds the number of blue collar workers and that workers are better educated. As levels of education increase, so too, Squire argues, do workers' expectations and desires "to exercise responsibility, self-direction, and skill in work life." Squire, *supra* note 29, at 171. Squire concludes that contemporary employees are more individualistic than workers in the 1940's or 1950's and that they place greater importance on realizing self-esteem and self-actualization through work. These needs, Squire argues, are not adequately addressed by traditional union organizing and collective bargaining agreements. In addition, Squire contends, organized labor has displayed "no sense of urgency in developing a strategic plan aimed specifically at organizing white collar workers." Squire, *supra* note 29, at 171-75.

317. See *infra* Part IV.2.a. for a discussion of mandatory/permissive jurisprudence and the effect of the distinction on limiting subjects over which employees and managers can bargain.

under current labor law and in the absence of the TEAM Act, employees may not be able to engage in discussion of those areas of workplace life which concern them most.<sup>318</sup> Accordingly, despite the potential of EI programs to function in authoritarian ways, perhaps Sections 2(5) and/or 8(a)(2) of the NLRA *should* be changed to enable a wider range of EI programs to flourish. In fact, the need for legal change appears to be particularly great where, as is the case today, less than fifteen percent of the workforce is represented at all.<sup>319</sup> However, from the standpoint of industrial democracy, any attempt to modify Sections 2(5) and 8(a)(2) to accommodate management-initiated EI programs in non-union workplaces must do two things. First, they must create a legal framework capable of nurturing the potential of EI programs to involve employees in workplace governance. Second, such attempts must also erect safeguards against the potential of EI programs to reduce employee freedom of expression.<sup>320</sup> As the next section will demonstrate, the TEAM Act does neither.

#### IV. THE TEAM ACT

The Findings and Purposes section of the TEAM Act recapitulates the arguments of EI supporters. Global competition has required employers to make dramatic changes in workplace relationships.<sup>321</sup> These changes, referred to collectively as employee involvement, provide employees with an enhanced role in workplace decision-making.<sup>322</sup> Not only has EI enhanced productivity and efficiency, it has had a "positive impact on the lives of such employees, better enabling them to reach their potential in the workforce."<sup>323</sup> But legitimate employee involvement programs are threatened by the NLRA's prohibition against company unions,<sup>324</sup> even though legitimate EI programs do not attempt to interfere with collective bargaining rights and bear little resemblance to the sham company unions of the 1930's.<sup>325</sup> The TEAM Act, therefore, is designed to protect legitimate EI programs in non-union settings, including those in which workers may discuss the terms and conditions of employment, and to encourage their continued evolution and proliferation.<sup>326</sup>

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318. See, e.g., Rominger, *supra* note 282, at 186

319. For a discussion of declining union density, see *supra* notes 10-11 and accompanying text.

320. See Virk, *supra* note 26, at 754. This is particularly important in employment at will contexts in which employers need not justify their reasons for acting.

321. See TEAM Act, *supra* note 16, § 2(a)(1).

322. See *id.* §§ 2(a)(1), (2).

323. See *id.* § 2(a)(4).

324. See *id.* § 2(a)(7).

325. See *id.* § 2(a)(6).

326. See *id.* § 2(b)(1)-(3). See also *Employee Involvement: House Panel Approves TEAM Act*, Daily Lab. Rep. (BNA) No. 121, at d-3 (June 23, 1995) (restricting EI activities in union settings).



The Act inserts, at the end of the current Section 8(a)(2), language permitting an employer to “establish, assist, maintain, or participate in any organization or entity of any kind . . . to address matters of mutual interest, including but not limited to, issues of quality, productivity, efficiency, safety and health . . . .”<sup>327</sup> The Act’s definition of matters of mutual interest is open-ended and places no limitations on the subjects that may be addressed by employers and employees in EI programs. When read in conjunction with Section 2(b)(3) of the Act’s statement of Findings and Purpose, collective bargaining topics could be matters of mutual interest and, consequently, permissible topics of discussion in EI programs.<sup>328</sup> The Act does not impair the right of employees to organize or to join labor organizations, nor does it eliminate employers’ obligation to bargain with labor organizations representing employees.<sup>329</sup> It also mandates that employees and managers participate in EI programs on an equal basis, insofar as equal participation is “practicable.”<sup>330</sup>

### A. Arguments of Supporters and Opponents

Debate over the TEAM Act has broken down along party lines. Republicans supported by the National Chamber of Commerce, a group of employers calling itself the TEAM Coalition, and the heads of a number of the nation’s largest companies, including IBM, Kodak, and Motorola, favor passage of the Act. Democrats, supported by the AFL-CIO and a number of labor law scholars, generally oppose it.<sup>331</sup>

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327. TEAM Act, *supra* note 16, § 3. The TEAM Act would amend § 8(a)(2) of the NLRA by striking the semicolon at the end of the section and adding § 3 of the TEAM Act. Thus, § 8(a)(2) of the NLRA as amended by the TEAM Act would read as follows:

It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to § 6 [Section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. *Provided further, that it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain or participate in any organization or entity of any kind, in which employees who participate at least to the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in Section 9(a), this proviso shall not apply.*

(TEAM amendment in italics).

328. The TEAM Act, *supra* note 16, § 2(b)(3), reads as follows: “The purpose of this Act is ”(3) to allow legitimate Employee Involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.”

329. *See id.* § 3.

330. *See id.*

331. *See Employee Participation: Business Leaders Urge Clinton to Sign Teamwork Legislation*, Daily Lab. Rep. (BNA) No. 122, at d-6 (June 25, 1996).

Supporters argue that labor-management relations have changed fundamentally in the years since the passage of the NLRA.<sup>332</sup> No longer are employees and employers adversaries.<sup>333</sup> Instead, both recognize their common interest in ensuring the continued viability and competitiveness of American industry in the global market.<sup>334</sup> In addition, supporters contend that EI programs differ fundamentally from the company unions of the 1930s and present none of their dangers.<sup>335</sup> Moreover, the small size of EI programs encourages employees to be more assertive than they might be in large organizations.<sup>336</sup> These characteristics of EI programs, when coupled with a finding that employees volunteered to participate in EI groups at least as frequently as management selected representatives, suggest that “more employers are pushing power down to the ‘shop floor.’”<sup>337</sup> Because the dangers Section 8(a)(2) addressed no longer exist, it is unnecessary to maintain the wall of silence Section 8(a)(2) erects between labor and management in unorganized workplaces.

Even if EI programs share some of the characteristics of company unions, supporters argue, the critical difference between the two is that unlike company unions, legitimate EI programs do not attempt to represent employees.<sup>338</sup> Furthermore, under current law, employers may dictate to non-unionized employees on any issue involving the conditions of work.<sup>339</sup> In the cooperative model, management’s exercise of authority is limited by the

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332. See, e.g., *Hearing: Legal Problems with Employee Involvement Programs*, *supra* note 20, at 72 (statement of David E. Khorey, Attorney, Labor Law specialist).

333. See 141 CONG. REC. E228 (daily ed. January 31, 1995) (statement of Rep. Fawell) (“American business is no longer faced with the type of labor-management strife that permeated virtually every aspect of industrial America during the 1930’s. Instead, we are witness to [sic] growing trend in which American workers and managers are abandoning the confrontational tactics of their past and, together, are seeking better ways of doing business.”); 142 CONG. REC. S7478 (daily ed. July 9, 1996) (statement of Sen. Gorton) (“This is 1996 . . . . We have a far more cooperative attitude today . . . . We do not need to repeat the arguments of 1935. They are no longer relevant.”).

334. See 141 CONG. REC. H9525 (daily ed. Sept 27, 1995) (statement of Rep. Fawell) (“They are teams of employees who, under an infinite number of methods, are freely experimenting, usually quite informally and successfully with new and exciting ways of pursuing quality and greater productivity, and satisfaction at the place of employment. They were unimagined in the thirties.”); 142 CONG. REC. S7480 (daily ed. July 9, 1996) (statement of Sen. Jeffords) (“On this one, I am strongly in favor of doing what must be done to improve this Nation’s productivity, and that is what we are talking about here — this Nation’s productivity — for if there is no productivity, there is no profit. If there is no profit, there is nothing for the workers and the management to split up for the owners and the stockholders.”).

335. See LeRoy, *supra* note 17, at 218.

336. See *id.* at 253-54.

337. *Id.*

338. See, e.g., H.R. REP. 104-248, *supra* note 17, at 18; S. REP. 105-12, *supra* note 18, at 23; 142 CONG. REC. S7470 (daily ed. July 9, 1996) (statement of Sen. Kassebaum) (The TEAM Act is not “an effort to have a sham type of union.” Instead, “[o]nce workers seek the union the employer must recognize the union as the employee representative.”).

339. See *Hearing: TEAM Act of 1997*, *supra* note 111, at 8 (statement of William D. Bundinger, Chairman & C.E.O., Rodel, Inc.).

concept of cooperation itself.<sup>340</sup> Thus, employees benefit from EI in that they achieve real decision-making authority, not guaranteed to them by law.

The TEAM Act not only preserves employees' right to choose to be represented by independent labor organizations, but supporters argue, EI offers employees more opportunities for participation than exist with representation by a traditional union. This is because EI topics like product design or quality fall outside the scope of topics over which unions can bargain.<sup>341</sup> Finally, supporters note the irony inherent in a labor law purportedly designed to enhance the exercise of employee choice but which forecloses the possibility that employees might voluntarily choose to have their interests represented by an EI team.<sup>342</sup>

Opponents of the TEAM Act argue that it is not a panacea for increased productivity or labor-management peace, but rather an attempt to weaken organized labor and the NLRA's collective bargaining protections.<sup>343</sup> Legitimate employee involvement programs, they argue, are already protected under existing law.<sup>344</sup> The management-initiated programs the TEAM Act would legalize are illegitimate because they offer employees only the illusion of empowerment. Under the Act, employers would have complete authority to determine the structure and function of EI programs, to hand-pick team members, to set the team agenda, and to dissolve these

340. *Cf. id.* at 9 ("If my company adopted an abusive management style, our employees would begin to focus their attention on protecting themselves instead of producing top quality products.").

341. Some supporters argue that unions themselves are becoming anachronisms because of civil rights laws which limit employers' ability to discriminate in hiring, firing, and benefit practices. *See Rominger, supra* note 282, at 180. Because these civil rights laws allow employees to directly enforce their rights, supporters explain, they do not have as great a need for unions to contract for or to enforce their rights in the workplace. *See id.*

342. *See LeRoy, supra* note 17, at 251-52.

343. *See, e.g., Arthur J. Martin, Company Sponsored EI: A Union Perspective*, 40 ST. LOUIS U. L.J. 119, 128 (1996) (arguing that the TEAM Act "is a disingenuous effort by the management lobby and certain members of Congress to dilute employees' § 7 rights to organize a union by legitimizing heretofore illegal obstacles to organization. The proposed amendment would also undermine the unions' role as the exclusive representative of employees by permitting management dominated employee organizations to preempt or compete with the union as the representative of employees."). *See also* 141 CONG. REC. H9524 (daily ed. Sept. 27, 1995) (statement of Rep. William L. Clay) (arguing the TEAM Act is "the latest installment in the campaign by the new Republican majority to eradicate protections afforded to our workforce . . . H.R. 743 [the TEAM Act] would effectively repeal Section 8(a)(2). It would permit management to negotiate with itself while claiming it was carrying on discussions with representatives chosen not by those they purport to represent, but by management itself.").

344. *See, e.g., Hearing: H.R. 743, supra* note 9, at 35-36 (statement of David M. Silberman, Director AFL-CIO Task Force on Labor Law) (arguing that "there is nothing in Section 8(a)(2) which in any way prohibits employers from 'transferring decision-making power to the workers'" or that prevents management from "involving employees intellectually in the business"). *See also* 141 CONG. REC. H9530 (daily ed. Sept. 27, 1995) (statement of Rep. Beccera) ("We do not need H.R. 743 [the TEAM Act] because . . . 80 percent of all large employers . . . and over 30,000 workplaces already use [EI programs]"); 141 CONG. REC. H9530 (daily ed. Sept. 27, 1995) (statement of Rep. William L. Clay) (quoting a letter from NLRB Chairman Edward Miller which asserted that "the so-called *Electromation* problem . . . is [a] myth. It is indeed possible to have effective [EI] programs . . . in both union and non-union companies without the necessity of any changes in current law.").

organizations at will.<sup>345</sup> As a result, if the TEAM Act were to become law, opponents argue, employers would quickly reintroduce organizations bearing striking functional if not structural similarities to the company unions of the 1930s.<sup>346</sup> Legalization of management-initiated EI programs would also undermine existing unions.<sup>347</sup> Employers could make temporary concessions as a means of winning employees over to committees, thereby undermining the union. Thus, for opponents, tampering with Section 8(a)(2) would critically damage the American labor movement.<sup>348</sup>

Finally, opponents argue, the TEAM Act does not democratize the workplace because it makes no provisions for employees to elect representatives. Instead, employers could effectively dominate EI groups by imposing "representative" arrangements on employees, a practice "contrary to the democratic assumptions of American society."<sup>349</sup>

Despite these criticisms, both the House and the Senate passed the TEAM Act during the 104th Congress.<sup>350</sup> President Clinton vetoed the Act, claiming that although he supported "workplace practices that promote cooperative labor-management relations," the TEAM Act would reintroduce

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345. See, e.g., 141 CONG. REC. H9525 (daily ed. Sept. 27, 1995) (statement of Rep. Bonoir); 142 CONG. REC. S7475 (daily ed. July 9, 1996) (statement of Sen. Kennedy) ("[T]he TEAM Act would make it legal for management to foist a labor organization on employees that employees did not ask for or . . . vote for. It would be legal for management to impose a company-dominated union made up of employees hand-picked solely by the employer. They would meet when the employer sees fit, consider only issues the employer wants to consider and then speak for all employees when they do so."); *Hearing: Legal Problems with Employee Involvement Programs*, supra note 20, at 65 (daily ed. Feb. 8, 1996) (statement of Alan Reuther, Legislative Director, International Union UAW) ("[D]espite all of the rhetoric by the proponents of the TEAM Act about the need for labor-management cooperation, it is apparent that this bill is not designed to foster genuine cooperative efforts between equal, independent partners. Instead, it would allow employers to establish the equivalent of 'puppet' governments, which could be used by management to rubber stamp their decisions and to suppress employee dissent . . . . [E]mployers often try to use these types of sham, company-dominated unions to undermine devices to resist union organizing drives by real independent unions.").

346. See, e.g., *id.* at 28-29 (statement of Alan Reuther) ("[I]f S. 295 [TEAM Act] were enacted into law, employers would be perfectly free to pick who would serve as representatives for workers on committees. The employer could dictate the structure and powers of the committees, stacking them with a preponderance of management representatives. Employers would even dictate what issues could be discussed by the committees. And, if the employer did not agree with certain proposals by the committee, management would be perfectly free to ignore the proposals, or indeed to disband the entire committee. In our experience, employers often try to use these types of sham company-dominated unions to undermine organizational drives by real independent unions.").

347. See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993). See also DUNLOP COMM'N. FINAL REP., supra note 205, at 9 (cautioning that employers not be permitted to bypass unions when they implement EI programs).

348. See Daily Lab. Rep. (BNA) No. 87, at d-11 (May 9, 1994) (quoting letter from Prof. Charles J. Morris of Southern Methodist University).

349. *Employee Participation: Business Leaders Urge Clinton to Sign Teamwork Legislation*, Daily Lab. Rep. (BNA) No. 122, at d-6 (quoting NLRB Chairman William B. Gould).

350. See 141 CONG. REC. H9556 (daily ed. Sept. 28, 1995); 142 CONG. REC. S7619 (daily ed. July 9, 1996). See also *Employee Participation: Clinton Vetoes TEAM Act Despite Pleas from Business for its Passage*, Daily Lab. Rep. (BNA) No. 147, at d-4 (July 31, 1996) (noting that the TEAM Act passed the House by a vote of 221-202 and that a nearly identical bill passed the Senate by a vote of 53-43).

company-dominated labor organizations and thus “undermine the system of collective bargaining that has served this country so well for many decades.”<sup>351</sup>

The President’s veto notwithstanding, the TEAM Act has proved to be a remarkably hardy piece of legislation, and it is not likely to fade easily or quickly from view. A version of the TEAM Act identical to the one the President vetoed has been reintroduced in the Senate,<sup>352</sup> where the Senate Committee on Labor passed the Act despite threats of a filibuster.<sup>353</sup> The TEAM Act has also been reintroduced in the House.<sup>354</sup> Administration officials have said that President Clinton will veto the bill again should it pass during the current term.<sup>355</sup>

The current version of the TEAM Act has roots stretching back to the debates over the Taft-Hartley Act. The TEAM Act resembles a bill passed by the House<sup>356</sup> but ultimately rejected in the Conference Committee in favor of the current Section 9(a),<sup>357</sup> which permits individual employees or groups of employees in unionized workplaces to present grievances to the employer without the intervention of the union.<sup>358</sup> A version of the current TEAM Act was also introduced during the 103rd Congress.<sup>359</sup>

351. H.R. Doc. No. 104-251 (1996).

352. See *Labor Law: Senate Labor Panel Delays TEAM Act Vote for Lack of Quorum; Amendments Put Off*, Daily Lab. Rep. (BNA) No. 39, at AA-1 (March 1, 1997).

353. See *Labor-Management Cooperation: Senate Panel Approves TEAM Act; Democrats Warn Floor Fight, Filibuster*, Daily Lab. Rep. (BNA) No. 44, at AA-1 (March 6, 1997).

354. See *Legislation: Contentious Labor Bills Cleared for Debate in House and Senate*, Daily Lab. Rep. (BNA) No. 45, at a-9 (March 7, 1997).

355. See *id.*

356. H.R. 3020, 80<sup>th</sup> Cong. 26 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 56 (1948).

357. See H.R. CONF. REP. No. 510, at 45 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 549 (1948) (indicating that the committee omitted the bill because the “[A]ct by its terms permits individual employees and groups of employees to meet with the employer and Section 9(a) of the conference agreement permits employers to answer their grievances”). Interestingly, the TEAM Act debate entertained similar arguments to those asserted in the Section 8(d)(3) debate. See, e.g., H. R. REP. No. 245, at 34 (1947) (“This clause does not permit ‘company unions.’ The employer and the committee may discuss and reach decisions, but neither side may require the other to make an agreement, or to follow the procedures of collective bargaining set out in Section 2(11).”); H. R. REP. No. 245, at 77, 85 (1947) (asserting that “[u]nder Section 8(a)(2) [as modified by Section 8(d)(3)], the precise and clear language of the NLRA prohibiting the employer from creating and maintaining company unions, and the abundant Board and court precedents giving vitality to this guarantee, gives way to a confusing definition that would permit numerous forms of employer domination of such labor organizations . . . . It is the beginning of the imposition on employees of many employers’ desire for a subservient labor organization . . . . It is aimed directly at current organizing drives and will resurrect and legitimize those employee representation plans so familiar prior to the passage of the National Labor Relations Act.”).

358. See 29 U.S.C. § 159(a) (1988).

359. See 139 CONG. REC. S4013 (daily ed. Mar. 30, 1993) (statement of Sen. Kassebaum introducing the TEAM Act); *Gunderson Bill Would Allow for Participatory Programs*, Daily Lab. Rep. No. 60, at a-14 (Mar. 31, 1993).

Regardless of the TEAM Act's fate in the 105th Congress,<sup>360</sup> given the widespread support the Act enjoys among members of the business community as well as the uncertain legal status of EI programs, it is likely that, barring clarification by the Supreme Court, legislative attempts to modify Sections 2(5) and 8(a)(2) will continue.

### B. *Analysis of the TEAM Act*

EI programs can shape the quality of employees' work experiences in positive and negative ways. They offer employees the prospect of greater participation in discussions about conditions of work, a significant benefit at a time when organizations like labor unions, designed to mediate between individuals and large institutions and to promote self-rule, are in decline.<sup>361</sup> Participation, however, is not always the equivalent of democracy. Democracy presupposes that "voice" is accompanied by the ability to make choices binding on the group as a whole. As long as management retains the ability to create, structure, and terminate cooperative programs, such programs are by definition employer-dominated labor organizations. Whether expressed as welfare capitalism or as EI, employers have the ability to make their wishes binding; employees do not. EI programs, therefore, offer employees more opportunities to participate in discussions in the workplace without significantly democratizing the workplace. As Grenier's study demonstrates, employees' jobs may depend on the extent to which their participation in EI groups conforms to company-created attitudinal norms. In this respect, participation may function not as a means of employee self-expression, but as a vehicle for the imposition of management's values. As a result, employees may actually be less free in EI programs than they were in traditional hierarchical workplaces where employee-management communication may have been less frequent.

These difficulties have important implications for any attempt to alter Section 8(a)(2) to accommodate employer-sponsored EI programs. If labor legislation is to perform its rightful but frequently overlooked role of reconciling the social relations of the workplace with those of the broader society, the inherent power of employers must be counterbalanced by labor organizations responsible only to employees and capable of making choices binding on the whole. Labor legislation must also prevent the creation of labor organizations which, in reality, serve only management's

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360. Given the relatively narrow margins by which the TEAM Act passed the House and Senate, it is unlikely that given the current composition of either body, enough votes could be mustered to override the President's veto.

361. See Thomas C. Kohler, *The Overlooked Middle*, 69 CHI-KENT L. REV. 229 (1993). Kohler claims that the decline of unions coincides with the decline of other mediating groups like the family, religious congregations, and grassroots political clubs, which Tocqueville called "schools for democracy." *Id.* at 230, 236, 238.

needs or desires. The NLRA achieves both goals; the TEAM Act achieves neither.

The TEAM Act is a proviso to Section 8(a)(2). The Act removes EI programs that might otherwise be considered employer-dominated labor organizations from the reach of Section 8(a)(2). While Section 8(a)(2) enumerates three specific forms of employer conduct that could amount to unfair labor practices,<sup>362</sup> the TEAM Act defines impermissible employer conduct negatively, listing types of employer behavior that are not unfair labor practices.<sup>363</sup> This language, however, is broad enough to legalize EI programs which constitute per se violations of Section 8(a)(2).<sup>364</sup> The question thus becomes whether the TEAM Act creates an exception that swallows the rule, or whether the tensions between the TEAM Act and Section 8(a)(2) are more apparent than real.

The response of the TEAM Act's supporters is somewhat schizophrenic. When they refute criticisms that the TEAM Act would lead to the reintroduction of company unions, supporters generally deny the existence of any fundamental inconsistency between the NLRA and the TEAM Act.<sup>365</sup> Yet when they argue in favor of the social utility of legalizing EI programs, supporters often contend that the NLRA and Section 8(a)(2) are archaic impediments to socially beneficial change in labor-management relations.<sup>366</sup> The principal line of argument, however, appears to be that the TEAM Act merely creates a safe harbor within the NLRA for "legitimate" EI programs. But implicit in the concept of legitimacy is a recognition that

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362. The three forms of conduct are: [1] employer domination of a labor organization; [2] employer interference with the formation or administration of a labor organization; and [3] employer contribution to or provision of financial or other support to a labor organization. See 29 U.S.C. § 158(a)(2) (1988).

363. Under the TEAM Act, it shall *not* be an unfair labor practice for an employer "to establish, assist, maintain or participate in *any organization or entity of any kind*, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, *including but not limited to* issues of quality, productivity, efficiency, safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees . . ." TEAM Act, *supra* note 16, at § 3 (emphasis added).

364. Not only would the TEAM Act legalize EI programs that deal with quality, safety, efficiency, or productivity, it would also legalize programs whose activities could include discussion of wages, hours, or other conditions of work. See H.R. REP. 104-248, *supra* note 17, at 18; S. REP. 105-12, *supra* note 18, at 22. The decisions of such groups could be made by managers and by employees acting in a representative capacity. The TEAM Act would, therefore, legalize labor organizations created and dominated by employers which would be empowered to engage in collective bargaining in all but name, which was an outcome Section 8(a)(2) was intended to eliminate.

365. See, e.g., 142 CONG. REC. S4789 (daily ed. May 7, 1996) (statement of Sen. Lott) (stating that "the TEAM Act just amends the Federal Labor laws to make clear that employers and employees can meet together, in committee, or other employee involvement programs to address issues of mutual concern").

366. See, e.g., 142 CONG. REC. S7479 (daily ed. July 9, 1996) (statement of Sen. Brown) (arguing that "(t)he archaic provisions of Section 8(a)(2) of the 1935 NLRA are entirely out of step with modern management techniques that are mutually beneficial to employers and employees. It is shocking to this Senator that employers and employees are not allowed, under the law, to sit down and discuss issues of importance to them.").

the TEAM Act could open the door for the introduction of "illegitimate" EI programs capable of functioning much like the company unions of the 1930s.

Questions about the TEAM Act's consistency with the NLRA and its potential to nurture the democratic potential of EI programs may perhaps best be approached by an analysis of the framers' conception of what constitutes a legitimate EI program. The legislative history of the TEAM Act suggests that the legitimacy of an EI program hinges not on its structure or on the subject matter of EI program discussions, but on whether an EI program interferes with employees' collective bargaining rights, should the employees choose to exercise them.<sup>367</sup> An EI program would be "illegitimate" and hence presumably subject to an unfair labor practice charge if, for example, it were set up during an organizing campaign to make unionization a less attractive alternative to workers. An EI program would also be illegitimate if it interfered with employees' Section 7 rights by committing other unfair labor practices enumerated in Section 8, or if it bypassed a union representing the bargaining unit.<sup>368</sup> In addition, an EI program would be illegitimate if it attempted to represent employees in collective bargaining or if it attempted to alter the terms of a collective bargaining agreement.<sup>369</sup> Thus, if an EI program does not masquerade as a union or attempt to usurp the functions of a traditional union, that EI program is legitimate, irrespective of whether it engages in discussions of hours, wages, or conditions of work.<sup>370</sup>

The critical questions are: first, does this definition of legitimacy erect adequate safeguards against the possibility that EI groups will bargain with employers over conditions of work<sup>371</sup> or otherwise infringe on employees' Section 7 rights? And second, are the TEAM Act's criteria for legitimate EI programs capable of providing guidelines for nurturing the democratic potential of EI programs?

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367. See, e.g., H.R. REP. 104-248, *supra* note 17, at 18; S. REP. 105-12, *supra* note 18, at 23; *Hearing: Removing Impediments to Employee Participation*, *supra* note 6, at 11 (statement of Rep. Steve Gunderson).

368. See H.R. REP. 104-248, *supra* note 17, at 18; S. REP. 105-12, *supra* note 18, at 24; *House Approves TEAM Act, Restricts Employee Involvement Committee Activities in Union Settings*, Daily Lab. Rep. (BNA) No. 121, at d-3 (June 23, 1995) (summarizing an amendment to the TEAM Act offered by Rep. Tom Petri and passed by the House).

369. See, e.g., H.R. REP. 104-248, *supra* note 17, at 19; S. REP. 105-12, *supra* note 18, at 24; *Teamwork for Employees and Managers Act of 1997: Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources*, 105th Cong. 33 (1997) (statement of Sen. Michael Enzi). *But see* 141 CONG. REC. H9528 (daily ed. Sept. 27, 1995) (statement of Rep. Charlie Rose) (opposing H.R. 743 because it expanded the capability of company dominated committees to discuss terms and conditions of employment, rather than limiting discussion to issues of production and quality).

370. This concept of legitimacy overlooks the NLRA framers' belief that employer-created labor organizations that dealt with conditions of work were per se violative of the policies which informed the Act. See *supra* notes 73-80 and accompanying text.

371. Such a practice would undermine the rationale for the creation of independent labor organizations. See generally LeRoy, *supra* note 17, at 257.



1. *Discussion of Statutory Bargaining Subjects in EI Groups under the TEAM Act*

Scholars sympathetic to the TEAM Act have dismissed as hyperbole predictions that passage of the Act would lead to the reintroduction of company unions.<sup>372</sup> One commentator contends that the TEAM Act seeks only to codify the Board's conception, expressed in the *Electromotion* and *du Pont* decisions, of permissible employer activities in an EI program context.<sup>373</sup> If, however, the TEAM Act simply codifies the Board's rulings on permissible EI activity, why is legislation like the TEAM Act necessary in the first place?

Another commentator has argued that the TEAM Act clarifies confusion surrounding the legal status of EI programs by removing discussion of matters of "mutual interest" from challenge under Section 8(a)(2).<sup>374</sup> The NLRB has distinguished between subjects like wages, hours, and grievances, which are of interest primarily to employees,<sup>375</sup> and subjects like productivity, efficiency, and productivity, which are employer interests.<sup>376</sup> Between the two lies an area of mutual interests, including safety, conservation of supplies and materials, and the encouragement of industry and initiative.<sup>377</sup> Both employer and mutual interests are permissive bargaining subjects.<sup>378</sup> By opening these areas, which fall outside the ambit of collective bargaining, to employer-employee discussion, the TEAM Act provides employees with greater participation in workplace decision-making, and in doing so paves the way for more democratic modes of workplace organization.<sup>379</sup>

There are two difficulties with this argument. First, the term "mutual interests" has been given a number of meanings, some of which differ significantly from the Board's definition in *Electromotion*. For instance, some

372. See *id.* at 240-41.

373. See *id.* at 257. According to LeRoy, the TEAM Act codifies language in *Electromotion* which states that even though an employer may control an EI group, no Section 8(a)(2) violation occurs when the group's discussions are limited to quality, productivity and efficiency. See *id.* at 240.

374. See Rominger, *supra* note 282, at 194. According to this argument, companies need legal certainty in order to pursue their EI goals. See *id.* at 192.

375. See *id.* at 190.

376. See *id.* Under current law, employers may create EI programs that deal with employer interests, as long as these groups do not stray into discussion of wages, hours, or conditions. See *id.* at 190-91.

377. See *Electromotion, Inc.*, 309 N.L.R.B. 990, 1001 (1992) (Devaney, member, concurring).

378. For a discussion of mandatory and permissive bargaining subjects and cases which developed the distinction between mandatory and permissive bargaining subjects, see *infra* note 384. Under these cases, subjects like quality, productivity, and efficiency are employer interests. See Rominger, *supra* note 282, at 190. The subjects identified by Member Devaney as mutual interests would be permissive bargaining subjects. See *id.* at 190.

379. See *id.* at 195.

commentators argue that mutual interests encompass conditions of work.<sup>380</sup> Under the proposed Section 8(d)(3) of the Taft-Hartley Act, mutual interests are synonymous with statutory bargaining subjects.<sup>381</sup> The TEAM Act defines mutual interests as productivity, quality, and efficiency, despite the fact that the Board in *Electromation* defined these subjects as management interests. Finally, Rominger contends that the TEAM Act would leave further definition of areas of mutual interest to case-by-case analysis.<sup>382</sup> In the absence of a uniform definition of mutual interests, it is difficult to see how the term can serve as a useful analytical criterion for distinguishing between legitimate and illegitimate EI program discussions.

The claim that discussion of topics of mutual interest will somehow democratize the workplace is also suspect. Under current Board precedent, employers and employees are already permitted to discuss quality, safety, and productivity.<sup>383</sup> But because these concerns are not mandatory bargaining topics, even when a union is present, the choice of whether to initiate discussion remains the employer's.<sup>384</sup> True expansion of the realm of employee participation would necessitate either expansion of the scope of mandatory bargaining to include both mutual and employer interests, or, in non-union contexts, the creation of mechanisms guaranteeing employees

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380. See, e.g., *Hearing: Legal Problems with Employee Involvement Programs*, *supra* note 20, at 84 (statement of David E. Khorey, labor and employment law attorney) (claiming that "[m]atters of mutual interest' is at least as broad as 'conditions of work'").

381. See H.R. 3020, 80th Cong., § 8(d)(3) (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 56 (1948) (defining mutual interests as "grievances, wages, hours of employment and other working conditions").

382. See Rominger, *supra* note 282, at 194. If in fact such definition would have to occur case-by-case, it is difficult to see how the TEAM Act would represent an improvement over the NLRB's interest-based approach, which proponents of the TEAM Act argue contributes to the lack of clarity over the legal status of EI under current law. See *id.* at 192.

383. See *supra* notes 168-76 and accompanying text.

384. The concept of mandatory and permissive bargaining topics derives from judicial interpretation of Section 8(d) of the NLRA, added to the Act by the Taft-Hartley amendments. See generally 29 U.S.C. §158(d) (1994) (defining topics over which an employer is obligated to bargain in good faith as "wages, hours, and other terms and conditions of employment"); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Under the original version of the NLRA, the scope of bargaining was not limited. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 356 (1958) (Harlan J. concurring). Theoretically, even with the addition of Section 8(d), "conditions of work" would be broad enough to include discussion of virtually any workplace issue. The Supreme Court, however, has held that Section 8(d) requires that distinctions be drawn between mandatory and permissive bargaining subjects. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 219 (1964) (Stewart, J. concurring). The Court has not formulated a bright line test for distinguishing mandatory from permissive bargaining subjects. The thrust of mandatory/permissive jurisprudence has been to narrow and circumscribe the areas of mandatory bargaining. The following would appear to be permissive bargaining subjects: the introduction of machinery, the liquidation of assets, the decision to go out of business, financing, and advertising, product type, and design issues. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-77 (1981). Thus, discussion of topics like quality, efficiency, and concerns about productivity—in short, many of the topics with which EI groups deal—would appear to be permissive bargaining subjects. Hence, even if a union were present, these subjects could be discussed only if the employer proposes discussion to an EI group or if the employer consents to discussion of these issues.

the right to insist on discussion of topics of mutual or employer interest. The absence of language granting employees these rights suggests that these outcomes were not envisioned by the TEAM Act.<sup>385</sup> Thus, although the TEAM Act's mutual interest approach may lead to greater employee participation, it is important not to conflate participation with democracy.

Assessments of the TEAM Act's ability to maintain distinctions between collective bargaining and EI group activities were based on early versions of the Act, which denominated quality, productivity, and efficiency matters of mutual interest but which did not—explicitly at least—expand the definition of mutual interests to include conditions of work.<sup>386</sup> Later versions of the TEAM Act, however, suggest that the Act does much more than codify *Electromation*.<sup>387</sup> The range of EI activities legalized in these versions is broad, indeed, extending far beyond legalization of EI programs focused on a narrow band of mutual interests. Under the TEAM Act, permissible activities in an EI program context would include, *but would not be limited to*, discussion of quality, safety, efficiency, etc.<sup>388</sup> Discussion of wages, hours, and conditions of work would therefore be permissible in an EI group context as long as the EI groups did not engage in collective bargaining.

In his study of EI groups, LeRoy found little empirical evidence suggesting that EI group activities actually extended beyond discussions of quality, productivity, and efficiency or that discussion within EI groups was the functional equivalent of collective bargaining.<sup>389</sup> Nonetheless, in order to determine how post-TEAM Act EI groups might function, it is necessary to examine what kinds of practices the language and the legislative history of the Act would permit.

In this context, what is absent from the TEAM Act is at least as significant as the Act's specific provisions. For example, there is no express language in the TEAM Act prohibiting EI groups from formulating agreements that would impact wages, hours, or working conditions. In this respect, it is

385. There is no language in the TEAM Act to suggest that employees can shape or set the agenda of EI group discussions.

386. See, e.g., H.R. 743, 104th Cong., §3 (Version 1 and Version 2) (“[I]t shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including issues of quality, productivity, and efficiency . . .”).

387. See, e.g., H.R. 743, 104th Cong., §3 (1995) (Version 6); H.R. 634, 105th Cong., §3 (1997) (“[I]t shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, *including, but not limited to*, issues of quality, productivity, efficiency, and safety and health . . .”) (emphasis added).

388. See *id.*

389. See LeRoy, *supra* note 17, at 218. LeRoy did, however, acknowledge that his small sample and other methodological issues might limit the extent to which his findings could be generalized. See *id.* at 242-44.

difficult to see how the TEAM Act enables distinctions to be drawn between discussion and collective bargaining. The most obvious distinction is that collective bargaining agreements are enforceable. Thus, agreements forged by EI groups, which include provisions that touch on statutory bargaining subjects, would pass muster under the TEAM Act only if employees lacked the power to enforce them. It is, therefore, difficult to escape the conclusion that the TEAM Act's prohibition against EI groups entering into collective bargaining serves employer interests by preventing the creation of "the very types of agreements employers do not want in the first place."<sup>390</sup>

In addition, the Act's legislative history also indicates that EI programs focusing solely on discussions of statutory bargaining subjects would not be impermissible. For example, supporters' conceptions of legitimate EI group activity include employer formation of groups to discuss issues like scheduling, a statutory bargaining subject.<sup>391</sup> Supporters do not overlook the fact that these groups could be considered employer-dominated labor organizations, but they prefer to focus on how such groups represent common sense ways of solving workplace problems.<sup>392</sup> Irrespective of the framer's intent, however, even *de minimis* discussion of statutory bargaining subjects in EI groups could undermine the rationale for independent unionism as well as the integrity of the collective bargaining system envisioned by the NLRA.<sup>393</sup>

Perhaps the most efficient way to have prevented confusion over the role and the purposes of EI groups would have been to restrict EI group discussions to issues of quality, efficiency, or productivity and to limit strictly any discussion of statutory bargaining subjects. Two such proposals, one offered by Representative Sawyer during House discussion of the

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390. Martin, *supra* note 343, at 128-29.

391. See, e.g., 141 CONG. REC. H9528 (daily ed. Sept. 7, 1995) (statement of Rep. Meyers) (noting that "last week, I sent around a 'Dear Colleague' letter which described a situation that would occur in any small business—an employee made a suggestion about summer hours to her supervisor and the supervisor thought [sic] it was a good idea. The supervisor liked the idea and asked the employee to get a group together to discuss the matter, and found a room for the group to meet. Unfortunately under current law, this kind of system could lead to problems for the employer . . ."; *Id.* at H9540 (statement of Rep. James M. Talent) ("A supervisor goes to the plant manager and says people are upset because they are working a lot of overtime. The schedules, they say, are not right. They want some changes so they can get to day care centers, a couple of guys have hunting vacations planned. What shall we do? The manager says 'well, I would like to sit down and work with them and then come to me with a proposal.' Why do we not want them to be able to do that?").

392. See *id.* (statement of Rep. Talent) ("Mr. Chairman, the gentlemen will agree that scheduling is a term and condition of employment is it not? . . . [U]nder current law there is no question if that supervisor goes out and says, okay, Bill and Bob, let us talk about it and sit down Jane. And, by the way, we better get Mel and Fred, because I know they are upset about this too. That is dominating because the supervisor is involved in choosing which employees are involved in the discussion . . .").

393. Cf. Cochran, *supra* note 3, at 511 (arguing that "participation schemes possibly threaten to undermine unions by giving employers an alternative vehicle to empower, or at least appear to empower, employees within the corporate structure").

TEAM Act and the other offered by Senator Dorgan, would have limited EI group discussions.<sup>394</sup> The Sawyer and Dorgan amendments were defeated.<sup>395</sup> Both amendments recognized that EI groups might, at times, discuss wages, hours, or conditions of work, but, like the Dunlop Commission's recommendations, both amendments permitted the discussion of mandatory bargaining subjects only if these discussions were ancillary to the groups' main purposes.<sup>396</sup> Arguably, rejection of both amendments indicates that the TEAM Act's supporters have little interest in limiting the scope of the Act to a narrow band of production or quality-centered EI programs.

If the TEAM Act provides no meaningful protections against EI groups usurping traditional union functions, the next question is whether the TEAM Act's conception of legitimacy is capable of providing adequate protection against the possibility<sup>397</sup> that EI programs will function in ways antithetical to the values that both the NLRA and the polity attempt to foster.<sup>398</sup>

## 2. *Protection of Employees' Section 7 Rights under the TEAM Act*

Although supporters of the TEAM Act point to the Act's prohibition against EI groups engaging in collective bargaining or attempting to represent employees in collective bargaining as evidence that the TEAM Act will not undermine the system of industrial relations envisioned by the NLRA, the integrity of that system depends upon employees' ability to exercise a core of rights enumerated in Section 7 of the NLRA.<sup>399</sup> Thus, protection of rights guaranteed employees under the NLRA entails more than prohibitions against EI groups engaging in collective bargaining. According to

394. For the text of the Sawyer Amendment, *see* 141 CONG. REC. H9536-37 (daily ed. Sept. 27, 1995). For the text of the Dorgan Amendment, *see* 142 CONG. REC. S7484-85 (daily ed. July 9, 1996).

395. *See* 141 CONG. REC. H9546 (daily ed. Sept. 27, 1995) (reporting that the Sawyer Amendment was defeated by a vote of 204 Ayes, 221 Noes, with 9 not voting); 142 CONG. REC. S7618 (daily ed. July 9, 1996) (The Dorgan amendment was defeated by a vote of 36 Yeas, 63 Noes and 1 not voting).

396. *Compare* 142 CONG. REC. S7484-85 (daily ed. July 9, 1996) (the Dorgan amendment, § 3) *with* 141 CONG. REC. H9536-37 (daily ed. Sept. 27, 1995) (the Sawyer Amendment, § 3). Both amendments were criticized on the grounds that many EI group activities—such as the creation of flexible schedules—would remain illegal. *See* 141 CONG. REC. H9541-42 (daily ed. Sept. 27, 1995) (statement of Rep. Goodling). Opponents also argued that the amendments would create a “host of new legal terms that would be the subject of years of litigation.” *Id.* (statement of Rep. Goodling). Determining whether discussions of statutory bargaining subjects are ancillary to an EI group's main activities would spawn some litigation. But the same can be said of most new legislation. Besides, there is no indication that an unamended TEAM Act would spawn less litigation than either the Sawyer or Dorgan Amendments. For a discussion of the Dunlop Commission's views on discussions of conditions of work, *see supra* note 208 and accompanying text.

397. *See supra* notes 291-96 and accompanying text.

398. *See id.*

399. Section 7 of the NLRA grants employees the right to: form, join, or assist in labor organizations; bargain collectively through representatives of their own choosing; engage in other concerted activities for the purpose of mutual aid and protection; and refrain from engaging in any and all such activities. *See* 29 U.S.C. § 157 (1994).

Section 4 of the TEAM Act, nothing contained in the Act would affect employees' rights and responsibilities under any section of the NLRA other than Section 8(a)(2). Although the TEAM Act appears to protect employees' freedom to exercise their Section 7 rights, the legislative history of the Act suggests otherwise.

At the most basic level, employee empowerment would appear to require that employees who act in a representative capacity be elected by their peers. The TEAM Act itself is silent on the question of how employee representatives in EI programs might be selected; however, an amendment offered by Representative Moran, which would have required the election of team members, was defeated.<sup>400</sup> Opposition to the amendment stemmed in part from the view that election procedures were cumbersome and bureaucratic and would make it impossible for EI programs to achieve the flexibility needed to respond quickly to workplace concerns.<sup>401</sup> Defeat of the Moran Amendment suggests that the TEAM Act would permit the creation of EI programs in which managers hand picked employee participants. It is difficult to understand how employees can be empowered when they are denied the Section 7 right to choose their own representatives.<sup>402</sup>

The TEAM Act also has the potential to undermine the principle of employee choice implicit in Section 7 in other ways as well. First, Section 7 grants employees the right to form, join, and assist labor organizations, and the right to refrain from such activities.<sup>403</sup> The logic and legislative history of the NLRA clearly do not confer the right to participate in em-

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400. See 141 CONG. REC. D1154 (daily ed. Sept. 27, 1995) (reporting that the Moran Amendment, which would have required persons representing employees in EI groups to be elected by a majority of the employees by secret ballot, was defeated by a vote of 195 ayes to 228 noes).

401. See 141 CONG. REC. H9551 (daily ed. Sept. 27, 1995) (statement of Rep. James M. Talent) (arguing that "if people . . . [want elections,] there is a method to get th[em]. Under current law, it is called a union.").

402. See 29 U.S.C. §157 (1994). But see Charles J. Morris, *Will There Be a New Direction For American Industrial Relations? A Hard Look at the TEAM Bill, The Sawyer Substitute Bill, and the Employee Involvement Bill*, 49 LAB. L.J. 89 (1996) (arguing that because the TEAM Act does not alter the definitions of a labor organization in Section 2(5) of the NLRA and Section 302 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), those provisions would continue to apply to post-TEAM Act EI programs). In addition, even if the TEAM Act effectively repealed Section 8(a)(2), employer provision of financial assistance to a labor organization, would still be impermissible under Section 302 of the LMRDA. See *id.* Though the TEAM Act makes no provision for employees to elect representatives to EI programs, Title I of the LMRDA and its report filing provisions would require periodic election of EI program representatives. See *id.* The ability to elect representatives, however, will not, in and of itself, cure the fundamental inability of management-initiated cooperative programs to democratize the workplace.

403. See 29 U.S.C. §157 (1947), amended by 29 U.S.C. § 157 (1994) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. and shall also have the right to refrain from any and all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.").

ployer-created labor organizations. It follows that refusal to participate in such organizations would not be protected under Section 7. Moreover, the TEAM Act includes no language protecting employees who refuse to participate in EI groups, even those which engage in discussions of work.<sup>404</sup> Second, it is possible that employees would attempt to create an EI program but that employers would either refuse to participate or to allow the creation of such groups. If joint employer-employee groups that deal with statutory bargaining subjects are to be legalized by the TEAM Act, while the remainder of Section 8(a)(2) is left unchanged, employer refusal to participate in an employee-created EI groups could amount to employer interference with the formation of a labor organization. But the TEAM Act creates only an employer exception to Section 8(a)(2). Therefore, although it would no longer be an unfair labor practice under the TEAM Act for an employer to create an EI program which could discuss statutory bargaining subjects, the Act grants employees no reciprocal right to demand employer participation in such a program. In this way, the TEAM Act increases only the realm of employer choice.

In addition, because EI programs do not fundamentally alter power relationships within a business, EI groups may by their very nature impose considerable pressure on employees to affirm management's decisions or points of view. It is true that under the TEAM Act employees who believe they have been discharged or otherwise discriminated against for engaging in the activities protected by Section 7 could file an unfair labor practice charge.<sup>405</sup> However, it is important to note that the TEAM Act does not address, much less provide mechanisms to control against, other, more subtle, forms of employer behavior that can also place pressure on employees to act in management's interest rather than their own. The need for such protections may be particularly great because contact between management and employees is relatively more frequent in EI groups than in traditional workplaces and because the TEAM Act would apply only to unorganized workplaces.<sup>406</sup> Consequently, those covered by the TEAM Act are also likely to be at-will employees, particularly sensitive and vulnerable to sub-

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404. The Dorgan and Sawyer amendments did, however, contain such language. *See* 142 CONG. REC. S7485 (daily ed. July 9, 1996) (the Dorgan amendment, § 3(2)(C)); 141 CONG. REC. H9537 (daily ed. Sept. 27, 1995) (the Sawyer Amendment, § 3(iii)(C)). *See also* H.R. REP. 104-248, *supra* note 17, at 39 (minority report noting defeat of amendment which sought to ensure expedited hearings for employees illegally discharged for attempting to organize unions in lieu of EI programs).

405. *See* 142 CONG. REC. S7618 (daily ed. July 10, 1996) (statement of Sen. Kassebaum) ("[T]he TEAM Act . . . applies only to nonunion settings.").

406. Although the Supreme Court has recognized that some forms of management action are so inherently destructive to unionization that no showing of employer anti-union animus is required, in § 8(a)(3) cases such a showing is generally required. The affected employee bears the burden of making a *prima facie* case. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). This burden can be particularly heavy when an employer asserts a legitimate business reason for discharging or otherwise disciplining an employee or when an employer has a legitimate business reason for his actions as well as an illegitimate reason. *See* Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980).

tle forms of management pressure. Absent either consideration of, or explicit safeguards against, such pressures, it is difficult to see how the TEAM Act would not undermine—at least indirectly—employees' exercise of their Section 7 rights.

Finally, under the so-called "supervisory exclusion" added to the NLRA by the Taft-Hartley Act,<sup>407</sup> employees who assume management functions in EI programs may be viewed as supervisors and thus lose their collective bargaining rights.<sup>408</sup> The Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of Am.* suggests that the Court may be widening the definition of supervisory activities.<sup>409</sup> In this case, the Court held that all acts directing co-workers and within the scope of employment are in the interest of the employer. Thus, any employee who responsibly directs co-workers may be a supervisor and therefore denied the protections of the NLRA.<sup>410</sup> The Sawyer and Dorgan Amendments attempted to preserve the collective bargaining protections of employees assigned managerial functions in EI programs.<sup>411</sup> The defeat of these amendments,

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407. See 29 U.S.C. § 164(a) (1994).

408. See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 286 (1974) (quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 (1947)) (defining managers as those who "formulate and effectuate management policies by expressing and making operative the decisions of the employer"). The Court has held that professional employees can also be considered supervisors. See *NLRB v. Yeshiva University*, 444 U.S. 672, 686 (1980) (holding that university professors who vote on matters such as class size and curriculum exercise managerial authority when they exercise judgment in their work, and have interests that are inseparable from those of the institution). Thus, an employee's duties, not the specific job title, will define whether the employee is a supervisor. See Lipsky, *supra* note 24, at 682-83.

409. 511 U.S. 571 (1994). At issue in the case was whether the Board's test for determining whether nurses who directed the activities of less-skilled employees were supervisors was consistent with Section 2(11) of the NLRA. See *id.* at 572, 574-75. Section 2(11) of the NLRA defines supervisors as those who exercise independent judgment in the interest of the employer to, *inter alia*, responsibly direct other employees. See *id.* at 573. The Board held that the nurses were not supervisors because their supervisory activity was incidental to the treatment of patients, and were not exercised in the interest of the employer. See *id.* at 576. The Supreme Court, however, reversed, holding that the case was conceptually analogous to *Yeshiva* and that the Board's distinction between patient care and activities in the interest of the employer created a "false dichotomy." See *id.* at 577. Thus, the Court held that there was "no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer." *Id.* at 577-78.

410. The Court noted that because the Board's interpretation of "in the interest of the employer" was limited, for the most part, to nursing cases, the Court's holding in the case would likely have little effect on employees in other contexts. See *id.* at 583-84. Nonetheless, it is possible that the logic of the case could be used to define as supervisors other professional employees who exercise independent judgment in directing others. See DUNLOP COMM'N FINAL REP., *supra* note 205, at 10 (discussing the possible effect of the case on expanding the scope of the supervisory exclusion). As a result, it is possible that employees in EI groups who gain decision-making authority will lose their collective bargaining protections.

411. See 142 CONG. REC. S7471 (daily ed. July 9, 1996) (the Dorgan amendment, §3(3)) ("An employee who participates in a group, unit, or committee described in subparagraph (A), (B), or (C) of paragraph (1) shall not be considered to be a supervisor or manager because of the participation of the employee in the group, unit, or committee."); 141 CONG. REC. H9537 (daily ed. Sept. 27, 1995) (the Sawyer Amendment, § 3(iii)(D)) ("[I]ndividuals who participate in an entity established pursuant to subparagraph (i), (ii), or (iii) shall not be deemed to be supervisors or managers."). See also DUNLOP



particularly in the context of the *Health Care & Retirement Corp.* decision, suggests that in this area as well, the TEAM Act's protection of employees' collective bargaining rights may prove entirely meaningless. Employers could thwart union organizing drives by assigning supervisory tasks to all EI program members. In addition, even though assignment of supervisory functions to EI group members might be an indication of anti-union animus, such a charge might be difficult if not impossible to prove given the blurring of lines of demarcation between employees and managers contained in many EI programs.<sup>412</sup>

The TEAM Act's failure to create an exception to the supervisory exclusion for employees in EI groups would make it possible for employers to use EI as a means of denying collective bargaining rights to significant portions of the work force. Given the fact that many employees do not volunteer to participate in EI programs but are simply included in them by virtue of a management decision to organize an entire facility or department into EI groups, it is possible that employees assigned supervisory functions in EI programs would have no voice at all in determining whether they wish to surrender their collective bargaining protections. In this respect, the TEAM Act empowers employers, not employees, and provides employees with virtually no protection of their collective bargaining rights.

The TEAM Act's inability to provide meaningful protection of employees' collective bargaining rights also renders meaningless its supporters' contention that if employees in an EI program are dissatisfied they can always join a union<sup>413</sup>—a contention which, in any event, serves only to strengthen the opposing argument that it is only through union representation that employees' rights can be protected.

### 3. *The TEAM Act's Conception of the Scope of Employer/Employee Participation in EI Groups*

In addition to criteria suggested by the Act's legislative history, the legitimacy of an EI program under the TEAM Act hinges on another analytical criterion: whether employees and managers participate in an EI pro-

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COMM'N. FINAL REP., *supra* note 205, at 9 (recommending that Congress restrict the scope of the managerial and supervisory exclusions so that professionals and other workers who participate in decision-making at work not be stripped of their collective bargaining rights).

412. See DUNLOP COMM'N FACT-FINDING REP., *supra* note 2, at 38 (noting that "[o]ver time it becomes increasingly difficult if not impossible to draw a line . . . among 'employees,' 'supervisors,' and 'managers' in . . . productivity and quality improvement efforts").

413. See, e.g., 141 CONG. REC. H9538 (daily ed. Sept. 27, 1995) (statement of Rep. Fawell) (arguing that if cooperation does not work "a union will be organized"). See also 141 CONG. REC. H9551 (daily ed. Sept. 27, 1995) (statement of Rep. Talent) ("[I]f people have a representative who will go in and collectively bargain and want a secret ballot and they want the months and months of campaigning, there is a method to get that. Under current law, it is called a union.").

gram "to the same extent practicable."<sup>414</sup> The Act makes no attempt to give substantive content to the phrase "the same extent practicable."<sup>415</sup> The question becomes what kinds of interpretive standards might be used to make "to the same extent practicable" determinations?

Implicit in the term "practicable" is an assumption that employers and employees would not enjoy absolute equality in EI groups. The degree of participation practicable for each group may be a function of other factors not enumerated in the Act or its legislative history. Some of those factors might include status differences between employers and employees generally or characteristics of a particular employment context which might make it impossible for employees and employers to participate equally in EI group discussions.

At bottom, determining whether employers and employees participate equally, to the extent practicable, is another way of asking whether an EI group is employer dominated. Courts could look to existing Section 8(a)(2) precedent for guidance in making "to the same extent practicable" determinations. The TEAM Act would overrule *Newport News*.<sup>416</sup> But, a totality of the circumstances analysis adapted from the Free Choice tests for employer domination of EI groups would, at least initially, appear to offer useful analytical criteria for making "to the same extent practicable" determinations.<sup>417</sup> Specifically, if the degree of employee and management participation is conceptualized as a function of circumstances unique to a particular employment relationship, a totality of the circumstances test might help to elucidate how much employee participation is practicable in a given EI program. The principle difficulty with the Free Choice approach is that it requires courts to examine the circumstances from the perspective of employees.<sup>418</sup> Thus, employee perceptions of the degree of employee participation practicable in a given context would be dispositive. As the previous sections suggest, however, the TEAM Act is concerned with expanding the realm of employer, not employee, choice under the NLRA. Therefore, the policy objectives of the TEAM Act and Free Choice case law are in conflict.<sup>419</sup>

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414. The phrase "who participate to at least the same extent practicable as representatives of management" was added to the Act by an amendment sponsored by Rep. Traficant. See 141 CONG. REC. H9553 (daily ed. Sept. 27, 1995).

415. Rep. Traficant initially stated that the intent of the amendment was to enable employers and employees to participate equally. But when pressed by Rep. Fawell to define the amendment more precisely, Rep. Traficant replied "I leave it open and broad enough" as to what "the same extent practicable" is in fact. See 141 CONG. REC. H9552 (daily ed. Sept. 27, 1995) (statement of Rep. Traficant).

416. Under the structural approach, any labor organization structurally dependent on management is employer dominated. Many of the EI programs the TEAM Act would legalize would be employer-dominated labor organization under the *Newport News* test.

417. See *supra* notes 177-97 and accompanying text.

418. See *id.*

419. Analyzing the extent of practicable equal participation in an EI group from the standpoint of employees, as the Free Choice Approach mandates, presents other analytical problems. In addition to the

One commentator has suggested that in the context of EI programs, the principle of mutuality—articulated at least to some extent in *Electromotion*—may be the best guide for distinguishing between cooperation and domination.<sup>420</sup> Courts could focus on whether employees played a significant role in creating or administering the organization and on whether the organization had an existence independent of management.<sup>421</sup> The ability of the employer to abolish the organization unilaterally could be an additional indication of employer domination as could employer appointment of employee representatives.<sup>422</sup> Here again, however, such an approach would appear to be in conflict with the TEAM Act's language and legislative history, which, in effect, grant employers virtually unlimited freedom to create, structure, and dissolve EI programs.

Finally, practicable employer/employee participation in EI groups could be a function of status differences between employees and managers. The Board and the courts have defined supervisory and managerial functions in some detail. But the utility of this case law in making "to the same extent practicable" determinations is limited. If managers exercise discretion but employees do not, the logic this body of case law dictates that supervisory-level employees would have considerably more input into decision-making than would ordinary employees. Employees and managers would be able to participate equally in EI groups only if employees who exercised supervisory functions were deemed managers. While there is a measure of equity in a grant of equal participation in EI groups serving as the quid pro quo for the loss of collective bargaining protections, there is no indication in its legislative history that the TEAM Act contemplates employees—even those who might legally be supervisors—and managers exercising equal authority within EI programs.

Utilization of existing case law in making "to the same extent practicable" determinations would, therefore, lead to outcomes that are inconsistent with the TEAM Act's conception of the appropriate relationship between employers and employees. When coupled with the fact that neither the Act itself nor its legislative history gives any indication of what kinds of interpretive criteria ought to be used to gauge how much employer and em-

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difficulties inherent in measuring subjective impressions, employee perceptions can change over time. For instance, employees may be much more optimistic about, and hence set higher standards for, "practicable" equal participation with management early in an EI group's development and revise their expectations downward as time passes (or vice versa). As a result, it may be difficult to determine when employee perceptions can most reliably be measured. On the other hand, deciding "to the same extent practicable" questions from the employer's point of view could be equally, if not more, unreliable. EI programs are usually designed by employers. Thus, a focus on employer perceptions could result in a court simply "rubber stamping" employer decisions. A third alternative of deciding the question from the point of view of a "reasonable person" would substitute Board or judicial perceptions for those of the parties. This would, in effect, replace employer paternalism with judicial paternalism.

420. Moe, *supra* note 62, at 1184.

421. *Id.*

422. *Id.*

ployee participation is "practicable," the phrase becomes, for all intents and purposes, meaningless. If the phrase is meaningless, and if the Act provides no meaningful protection against EI programs engaging in the functional equivalent of bargaining over mandatory subjects, the net effect of the TEAM Act is that under Section 8(a)(2) it is an unfair labor practice for an employer to dominate or interfere with the formation of a labor organization, unless that labor organization is an employer-created and employer-dominated labor organization. In effect, the exception swallows the rule.

#### CONCLUSION

As the foregoing suggests, the contention that the TEAM Act would legalize EI programs which empower workers and which democratize the workplace is incorrect at best and disingenuous at worst. By legitimizing virtually any management-created program as long as it calls itself an EI program, the TEAM Act serves only management interests. The principle difficulty with the TEAM Act is not so much that its passage would lead to the reintroduction of discredited labor organizations like the company unions of the 1930's, but that it would legitimize an approach to industrial relations, the structure and underlying assumptions of which need to be questioned, particularly in an era of declining union density. The management-initiated cooperative model masks but does not alter the hierarchical authoritarian structure of the employment relationship. Managerial self-restraint—not independent worker organization or the creation of enforceable legal limits on employer action—is the only barrier against employer control of organizations that purport to speak, at least to some extent, to employee interests and concerns. While management-initiated cooperative programs may be consistent with improved efficiency, productivity, or competitiveness, corporate paternalism—whether expressed as EI or welfare capitalism—is inconsistent with the promotion of democratic values in the workplace. Passage of the TEAM Act would, therefore, legalize an approach to industrial relations practice which, like welfare capitalism, creates the appearance of employee empowerment but does not develop true industrial democracy. Accordingly, to suggest, as do the framers of the TEAM Act, that the proliferation of the EI model in non-union workplaces is consistent with the values and policies of the NLRA is to misrepresent the nature of both EI and the NLRA.