

Labor Law for the 21st century: Stalled reform in the United States

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However one assesses the details of the new Labour Relations Act, surely South Africa's progress in labor law reform shines by comparison to the stalemate and drift on this front in the United States. Our basic law on collective bargaining – the National Labor Relations Act (NLRA)² – received its most recent substantial revision in 1959. In basic conception and structure, the NLRA still reflects the thinking of an earlier, manufactures-based economy relatively sheltered from global economic forces. A sustained effort to overhaul the NLRA during the Carter Administration in the late 1970s died in Congress, and labor law reform was off the political agenda during the Reagan-Bush years. Meanwhile, there is rapid change in the legal status of individual employees, but this is occurring in an unsystematized and largely ineffective manner.

President Bill Clinton's election in 1992 raised new hopes for reform. As a so-called "new" (ie, neo-liberal) Democrat, Clinton brought no deep commitment to collective bargaining or trade unionism to the White House, but made several early and promising moves. The Democrats promptly pushed through Congress the Family & Medical Leave Act, which guarantees employees 12 weeks of unpaid leave-of-absence to fulfill parenting and other caretaking responsibilities. For all its weaknesses and loopholes, the FMLA was an enormous achievement. Moreover, Clinton chose a thoughtful and energetic Secretary of Labor, Robert B. Reich, and made other excellent appointments in the labor field.

In addition, the Administration, encouraged by organized labor, established a high-profile commission to study and propose changes in labor and employment legislation. Officially known as the Commission on the Future of Worker-Management Relations, the body is commonly referred to as the "Dunlop Commission" after its chair, Harvard University Professor John T Dunlop. Dunlop is a world-renowned labor relations scholar who was himself once the Secretary of Labor. The panelists included two

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2 S 7 and 8 of the NLRA are included as App 1 to this article.

other former Labor Secretaries, leading business and labor figures, and a core of highly respected academics of generally progressive outlook. The Dunlop Commission held well-publicized hearings, both in Washington and out in the field, and it drew upon the energies and resources of a large number of interested labor relations professionals and academics. I had the privilege to be called as an academic witness and to participate in a law-professors study-group convened by the Commission's counsel, Harvard Professor Paul C Weiler.

The stage seemed set for the Commission to propel labor relations issues back into the forefront of American politics and to produce a major proposal for legal reform. As events unfolded, the Commission's achievements were more modest. The crucial development was the capture by conservative Republicans of both legislative Houses in the November 1994 elections. As everyone knew immediately, this closed the door to even the most mild reform legislation for the foreseeable future. Reopening that door will require a dramatic transformation of the electorate.

Many progressives had hoped that organized labor would be able to use the Dunlop process as a platform to reach out beyond its traditional constituency and to project the issue of labor law reform into popular consciousness so that all American working people, including the overwhelming majority who are not unionized, would understand labor law reform as an issue that concerns their most vital interests, needs, and aspirations. Perhaps that task was impossible of achievement; but in any event, labor law reform did not surface in the mainstream of U.S. political debate. In addition to the Republican election victory, labor's own supporters became somewhat bogged down in technical details of the debate. Moreover, some currents of opinion at the rank-and-file level were hostile to or suspicious of the Commission because it appeared to take seriously certain agenda items pushed by management.

The Commission issued a lengthy fact-finding volume in May 1994. While poorly edited, the report is and will remain an important compendium of insight and data regarding employment and labor relations in the United States. The fact-finding report reflects the experience and energy of its talented and accomplished academic members and counsel.

Given the excitement and hopes that accompanied the Commission's appointment, its final report and recommendations, issued 9 January 1995, must be judged disappointing. The report contains many interesting observations and proposals, and it should be celebrated for its emphasis on wage stagnation and increasing income inequality in the United States, and on the problems of so-called "contingent" or "atypical" workers. However, overall, the final report lacks the ambition and vision one would hope for in a program for labor law reform for the 21st century. No doubt the drafters' optimism was punctured by the knowledge, as of the previous November, that labor law reform would be impossible in the Newt Gingrich era. Frustratingly, the final report has generated very little serious discussion and debate, and it has had no short-run practical consequence.

In a word, labor law reform in the United States is stalled. In this, as in so many other things, we have much to learn from the South African experience.

The only major, post-Dunlop legislative development entirely ignored the Commission's plea for a comprehensive rethinking. Responding to intense pressure from some (but by no means all) sectors of the business community, the House of Representatives on 27 September 1995, passed a bill (HR 743) known as the "Teamwork for Employees and Managers (TEAM) Act." The bill would have amended NLRA section 8(a)(2), the "company union" prohibition, which makes it illegal for employers to set up, dominate, or interfere with the administration of labor unions.

The Dunlop final report, over the dissent of commissioner Douglas A. Fraser, formerly president of the United Auto Workers, suggested a need for clarification or reinterpretation of NLRA section 8(a)(2) to remove a legal cloud hovering over *bona fide* employee participation schemes, such as those relating to product quality and employee health and safety, while continuing the ban on company unions. However, the TEAM bill would have cut a major hole in section 8(a)(2), effectively permitting employers to manipulate "participation" schemes so as to undermine collective bargaining. Despite some fancy industrial relations rhetoric, the TEAM bill was class legislation in its crudest form. The Senate passed a nearly identical bill (s 295) on 10 July 1996, and a reconciled text was approved and sent to the White House on July 18. President Clinton vetoed the bill on 30 July 1996. Thus ended the Dunlop process, at least for now.

I was invited to appear before the Commission on 19 January 1994, at a time when hope for labor law reform still ran high. The Commission particularly solicited my testimony with respect to the section 8(a)(2) question on employee participation schemes. With the Commission's indulgence, I submitted a prepared statement offering a broader vision of labor law reform for the 21st century before addressing the technical statutory questions. The editors of *Law, Democracy & Development* graciously suggested that the general portions of my statement might interest their readers. There follows a lightly edited text, from which I have deleted much of the concluding, technical discussion.

PREPARED STATEMENT OF KARL E KLARE SUBMITTED TO THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

1 A DEMOCRACY-ENHANCING APPROACH TO LABOR LAW REFORM

In my scholarly activities and writings over fifteen years, I have advocated what I call a "democracy-enhancing approach" to labor law reform.³ The basic premise of my approach is that, as our vision projects into the 21st century, the guiding principle and role of labor law should be to expand and enhance democracy at every level of the experience and organization of work. Public policy and law should be framed and administered so as to democratize work organisation, both at the upper tiers of the firm's strategic

³ See, eg. Klare (1988/1) and Klare (1988/2).

decision-making processes, and at the mundane level of day-to-day operations and decisions. Labor law should embrace a commitment to power-sharing between employers and employees.

At the same time, the democracy-enhancing approach to labor law reform looks beyond the organization and governance of work itself. In service to both democratic values and productive efficiency, policy should establish economic, social, and legal conditions that will enable all employees to experience and enjoy opportunities for learning, self-development, and expression through paid employment as well as other pursuits, such as caretaking relationships and education. Reform should encourage public and enterprise investment in human capital, insure effective and egalitarian linkages between paid employment and other spheres of life, and seek to break down all forms of occupational segregation and labor market segmentation based on gender, race, class, or other invidiously discriminatory category.

The democracy-enhancing approach to labor law reform is grounded in an enlarged conception of democracy that would extend democracy beyond politics as such and into "private" spheres of social and economic life such as paid employment. A democratic culture should aspire to awaken and nurture in all people their capacities for self-realization and self-governance. At minimum, a democratic society should provide all people with meaningful opportunities to participate in making the decisions that affect their lives. Democracy in work is both a normative end in itself, because of its contribution to human self-realization, and additionally, it contributes to civic democracy by enhancing peoples' capacities to participate in politics and by breaking down rigid divisions of labor that inhibit civic participation.

Achieving these ideals requires not only that people are afforded opportunities to make choices and to participate in decision-making and dialogue, but also that these choices and opportunities are not merely formal but genuine. For this, all people must be so situated in terms of the basic necessities of life, training, and legal entitlements that they can meaningfully avail themselves of opportunities for choice and participation.

These premises, which are elaborated in greater detail in my scholarly writings, lead me to a series of conclusions about the desirable direction of labor law and employment reform that I would like to share with the Commission.

From a democracy-enhancing perspective, the system of labor law and collective bargaining we inherited from the 1930s and 1940s (referred to herein as 'the New Deal system of collective bargaining') was an enormous advance. It has empowered millions of employees, allowed them to improve their living circumstances and working conditions, and afforded them significant opportunities to participate in and influence the decisions affecting their working and economic lives. As I shall argue below, the National Labor Relations Act (NLRA) and New Deal system embody enduring democratic values that we should respect and preserve. And that system did not spring up out of nowhere. It became entrenched not only through the efforts of progressive legislators like Senator Wagner, but

primarily through the collective efforts of millions of ordinary working Americans, who impressed their hopes and aspirations onto the law. Brave men and women sacrificed to establish collective bargaining and employee rights; some gave their lives. We should honor their contribution.

Nonetheless, in its classic form, the New Deal collective bargaining system contains certain shortcomings that, in the light of contemporary trends, limit the system's contribution to employment democracy and economic growth and renewal. As a model of industrial democracy, the New Deal system was flawed and incomplete to begin with and has only partially, although significantly, succeeded in democratizing the organization and governance of work. Because of legal and other limitations, many, perhaps the majority, of American workers have been legally or practically excluded from the benefits of collective bargaining and have been remitted to an entirely inadequate system of generic social guarantees that, in practical effect, encourages labor market segmentation and victimization of women and people of color.

In any event, the New Deal system is now gravely threatened and in decline; and, although the point is routinely exaggerated, the system is in some respects maladapted to contemporary competitive challenges and the aspirations of our increasingly diverse workforce.

Thus, effective labor law reform must do more than revamp NLRB procedures or tinker with [the statute]. We need to move toward an entirely new model of workplace relations, one that preserves the best accomplishments and virtues of collective bargaining, but modernizes and updates it and also provides a new array of employee rights and participation opportunities. A convincing and effective program for labor law reform must encompass, and must be seen and understood by the American people to encompass, a comprehensive program for workplace justice in both unionized and nonunion workplaces. Moreover, this program must be built upon a convincing account of the changing realities and pressures of an increasingly integrated and competitive world economy. Only a broad-based approach of this kind has a chance to generate sufficient popular enthusiasm and support to push labor law reform to the forefront of the nation's political attention. Unless we aim high, there is little chance that our efforts, even if legislatively successful, will foster fundamental and positive change.

With these thoughts in mind, I advocate a labor and employment law reform program with four major dimensions:

1.1 Revise collective bargaining law

Collective bargaining through independent labor unions remains a central component of industrial democracy. Labor law reform must begin with a thorough revamping of the law, procedures, and remedies under the NLRA designed to afford employees a fair opportunity to engage in meaningful collective bargaining should they so choose. In practice, NLRA law, procedures, and remedies systematically deny American workers a fair opportunity to engage in collective bargaining, and they elevate the costs and reduce the value of collective bargaining where it is achieved.

1.2 Raise the social minimum wages and benefits package

The most productive asset in the economy is the intelligence, perseverance, skill, and problem solving abilities of American employees. Any hope for economic renewal turns on investing in employees (investing in "human capital"). In practice, this means that public policy should discourage low-wage employment and seek to lift the minimum living, working, and training conditions of all employees. Labor law reform should devote particular and intense attention to low-wage and so-called "contingent" employees (those without a stable career relationship with a particular employer), who predominantly are outside the collective bargaining framework at present. The "social minimum wage and benefits package" should be seen to include not only monetary entitlements and services, but also the array of background legal rules that determine power relations in the workplace. An obvious and urgent example is that labor law reform should establish as a basic legal right, part of the package of entitlements employees bring to work, that no employee may be discharged without just cause.

1.3 Reform should be geared to our increasingly diverse, multicultural workforce

The labor law reform process should place emphasis on addressing the needs, interests, and concerns of women workers and employees of color, groups which have suffered a long history of labor market discrimination. To put a fine point on it, in my view, no labor law reform program can succeed that does not have a pronounced feminist and race-conscious dimension. Women comprise close to half of the paid work force and upwards of 35 percent of the labor movement, and approximately two thirds of projected job growth in the next decade will be in positions traditionally occupied by women. Thus, for example, labor law reform should not be solely concerned with full-time employees in the high-wage sector, who tend to be white males, but should also focus searchingly on the problems confronting part-time and contract employees, among whom women and people of color are over represented. Issues pertaining to the stresses of combining paid employment with family and caretaking responsibilities should be high on the list of employment law reform priorities.

1.4 Reform should encourage employee participation

Labor law reform should encourage democratic restructuring of the organization and governance of work, both at the enterprise level and at the level of routine operations. This would involve mandating or encouraging new forms and institutions of employee participation, consistent with a continuing and meaningful option of employees to bargain collectively. Additionally, labor law reform would be incomplete if it did not also focus on changes needed to bring a greater degree of democracy and participation to the internal life of labor unions.

The remainder of this paper elaborates on these points, focusing on the relationship of the weaknesses of the National Labor Relations Act to the

problem of union decline; the need for labor law reform to address labor standards improvement and participation opportunities for all employees, including those who are outside the unionized sector; and, the need to explore new forms of workplace representation and participation in addition to (although not as a substitute for) collective bargaining.

2 THE PROBLEM OF UNION DECLINE IN AMERICA

Barring some extraordinary change in current trends, the vast majority of private sector employees in the United States will not enjoy the benefits of collective bargaining for at least the next 10 to 20 years, perhaps longer. This means that, over the next generation, most American workers will realize improved benefits and working conditions, if at all, not through collective bargaining but either because of the intervention of public law or because employers voluntarily improve conditions in order to enhance morale and productivity or as a union avoidance technique.

To understand why this is so and what the implications are for labor law reform, it is useful to begin with an analysis of the causes of union decline in the United States in recent decades. The basic data reflecting union decline are well known. According to BLS statistics, union density has plummeted from a high of about 35,5 percent in 1945 to 15,8 percent in 1992. ("Union density" refers to union membership as a percentage of the paid workforce.) However, in the private sector (which accounts for more than 80 percent of paid employment), union density is only 11,5 percent. (The most recent data, covering 1995, showed overall density at 14,9 percent, with private sector density at a bare 10,4 percent.) It is sad but true that private sector union density is now at roughly the same level as prevailed before the Wagner Act and the great organizing drives of the 1930s. If current trends continue, private sector unionization will be about 5 percent by the end of the decade.

What has caused this dramatic decline? Public discussion of this question tends toward an unilluminating polarization. Labor's partisans insist that employer opposition to unions, particularly high-pressure and illegal tactics, is the primary cause of de-unionization ('employer opposition thesis'). Critics claim, to the contrary, that unionization has declined because American workers have chosen to reject it ('employee choice theory'). There are several versions of the employee choice theory, but it is common to attribute the change in preferences to structural changes in the economy, such as the shift from manufacturing to white collar, services and retail.

The empirical evidence is too unruly to sustain simplistic analyses of the causes of union decline. For example, the structural changes explanation does not do justice to dramatic organizing successes in recent years among certain categories of white collar and service workers (notably, school teachers and nurses). Moreover, as Professor Weiler points out, the structural changes explanation begs the hard question of exactly *why* certain occupational categories are or might be unsympathetic to unionization.

But the core fallacy of the opposition versus choice rhetoric is the notion that either employer behavior or employee preferences can be

understood in isolation from one another and from social context. Industrial unionism triumphed in the 1930s and 1940s against bitter, sometimes deadly, employer opposition. Why has labor been so much less successful against the new, sophisticated but on the whole tamer forms of union avoidance?

Moreover, employee preferences are *not* wholly exogenous to management practices and the background legal structure. Employer hardball tactics and the Government's seemingly helpless response to the surge in unfair labor practices (ULPs) impact on the formation of employee preferences. Indeed, survey data reveals that upwards of 40 percent of non-union workers believe that their *own* employer would illegally victimize union supporters in a representation campaign. A proper appreciation of the causal role of changing employee preferences in union decline must take account of the fact that employees rationally calculate that the weaknesses of NLRA substantive, procedural, and remedial law elevate the risks and costs of collective bargaining and diminish its value.

In my view, the academic literature conclusively establishes that employer unfair labor practices and other strong-arm tactics constitute an important factor in explaining the long-term decline of union density in the United States. In practical effect, the weaknesses of the NLRA permit forms of employer resistance to and subversion of collective bargaining that are not tolerated in any of the other advanced industrial democracies. These features of NLRA law represent an important factor in explaining labor's decline over the past 30 years. The NLRA has proved inadequate to protect the elementary rights of free association and concerted activity ostensibly entrenched in law nearly 60 years ago. This must be remedied if the nation wishes to be minimally faithful to its democratic promises. Accordingly, labor law reform must surely address the problem of improving NLRA doctrine, processes, and enforcement.

It is instructive to compare the recent experience in the public sector with private sector developments. In the public sector, which admittedly comprises much the smaller share of total paid employment, 1992 union density was at 36,7 percent. (The 1995 public-sector figure was up slightly, at 37,8 percent.) This high figure was reached despite the fact that many states do not permit public sector collective bargaining. Union density among eligible public employees in the "bargaining states" (states that permit their public employees to engage in collective bargaining) is estimated as high as 70 percent. In the federal sector, union density reaches as high as 50 percent among white collar and 85 percent among blue collar workers. An important new study shows that in recent years the union-win rate⁴ in the public sector has been a staggering 85 percent.⁵

Why has unionization fared so much better, and why does it continue to grow in the public sector? The primary reason is that, once a jurisdiction commits itself to public sector collective bargaining, governmental employers

4 1e in ballots over union representation at bargaining unit level [Editor].

5 See Bronfenbrenner & Juravich (1993). See also "Public Sector Unions Win", 144 Labor Rel Rptr (BNA) 253 (October 25, 1993).

typically do not engage in the illegal and strong-arm tactics of union avoidance frequently deployed by private employers. Thus, representation elections in the public sector more fairly reflect the preferences of the voters, free from illicit coercive pressures.⁶

Thus, the public sector/private sector comparison confirms that the unfavorable legal climate in the private sector is significantly responsible for the decline of private sector unionization. Accordingly, all who believe in workplace justice should work hard to achieve significant reform of the NLRA and collective bargaining law. The most important reform proposals are familiar, and I simply list them here without extended discussion:

- (a) card-check recognition⁷ and/or expedited election procedures;
- (b) organizer access to employer premises and captive audience reply rights;
- (c) a ban on permanent striker replacement;
- (d) first contract arbitration as a remedy for surface bargaining;
- (e) an enhanced duty to bargain, including successorship and double-breasting protections, greater information access, and an expanded "scope" of bargaining to include a duty to bargain over major entrepreneurial decisions such as plant closure;
- (f) removal of the highly constraining restrictions on concerted activity, including elimination of Reagan [National Labour Relations] Board limitations on unorganized employee protests, loosening restrictions on secondary appeals in aid of primary strikes and organizing campaigns, overruling the use of injunctions against *bona fide* grievance and safety strikes, and expansion of the right to strike to non-emergency public sector workers;
- (g) expanded protections for part-time, temporary, and contract workers, including expanded coverage under labor protective statutes and imposing Labor Act obligations on the purchasers of temporary and contract services (thus treating them as primary employers or as "joint employers" along with the agency referring the temporary or contract labor);
- (h) streamlining NLRB procedures and dramatically enhancing Board interim and final remedies;

6 Some commentators suggest another, somewhat counterintuitive, reason for union success in the public sector. Public sector bargaining laws generally deny unions their most cherished weapon, the strike. Other mechanisms, such as interest arbitration, are used to break deadlocks in economic bargaining. While these procedures sometimes produce smaller gains for employees than the traditional methods of economic conflict, the strike has been declining in effectiveness and power as a conflict resolution tactic for years, as employers have become more skillful and determined in strike resistance and have been increasingly willing to utilize strike replacements. Thus, the fact that the strike remains labor's ultimate weapon in the private sector may actually have become an uninviting prospect to some potential recruits to labor's cause.

7 "Card-check recognition" means that the employer's duty to recognize and bargain with the union automatically takes effect when a majority (or, say, 60%) of employees in a bargaining unit sign an authorization designating the union as their bargaining representative. This method has been successfully instituted in some Canadian jurisdictions.

- (i) granting victims of discriminatory discharge the right to bring a civil action for damages and equitable relief including interim and permanent reinstatement;
- (j) contractor debarment of repeat labor law violators and firms that utilize anti-union consultants;
- (k) extension of public sector collective bargaining to all state and local jurisdictions;
- (l) expansion of NLRA coverage to include presently excluded employees, such as agricultural and domestic workers, managerial employees who are not true executives, and contract and other contingent employees.

Enacting these reforms would begin to set the nation back on the path promised in 1935, that all employees will have a right to bargain collectively through representatives of their own choosing. But the fact is that the problem of union decline probably would not be entirely solved even in the unlikely, if devoutly to be desired, event that every proposal just listed were promptly enacted. This is because illegal employer resistance is not the sole cause of union decline. Without detailing the voluminous scholarly literature, let me focus on two important points in support of this conclusion.

Despite the NLRB's seeming unwillingness or inability to stem the tide of illegal employer campaign tactics, the union win-rate in representation elections has not declined precipitously in recent years. The union-win rate averaged over 70 percent in the early 1950s and then began to decline. By the early 1970s, the win-rate was a bit over 50 percent. However, in the years since 1975, a period of catastrophic decline in union density, the win-rate has held fairly steady, hovering in the range of 45-50 percent.⁸

Second, reliable studies demonstrate that union density would still have declined in the United States, although not as swiftly, even if unions had had better electoral success rates. For example, Dickens and Leonard have shown that union density in the United States would still have declined somewhat even if unions had continued to win representation rights for the same percentage of voters as they did in the 1950-1954 period. Indeed, unionization would still have declined somewhat, although much less steeply, even had unions won every single election they entered since 1950 (Dickens & Leonard 1985: 323-332 fn 27).

Thus, there are other causes of union decline besides employer resistance and unfair labor practices.⁹ Precise quantification of the relative

8 LaLonde and Meltzer (1991: 960) point out that "the overall decline in union success rates in NLRB elections (since the 1950s) can be attributed principally to union election failures in the traditionally organized sectors of the economy". Recently there has been a slight improvement in the win-rate. In 1992, unions won 49.9% of elections; in 1991 and 1990, the win-rates were 46.8% and 47.6%, respectively. No doubt, the improved election fortunes reflect greater selectivity in petition filings. Cf Chaison & Dhavale (1990: 368).

9 Labor's supporters often compare the beleaguered state of unionization in the US with its more robust status and much higher density in Canada, and then attribute the difference

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influence of the various causal factors has eluded scholars, but there can be no doubt that the following items each play a significant role (in addition to the powerful influence of employer resistance tactics):

- (a) the changing occupational composition of the workforce, induced by technological and product market changes;
- (b) the poor state of the American economy in recent years, accompanied by significant job loss in traditional labor strongholds;
- (c) changes in the nature of the employment relationship (ie, the trend away from single-firm, single-site, career employment to more casual, contingent, and mobile relationships);
- (d) union "substitution" and other lawful, "soft" tactics of union avoidance, such as greenfield siting and the implementation of "advanced" human resource management (so-called "advanced" employers have proved exceedingly difficult to organize);
- (e) erosion of the sheltered status the organized sector enjoyed a generation ago due to the intensification of world trade competition, the deregulation movement, and similar pressures which have heightened employer opposition even in organized establishments and made it very difficult to produce substantial gains through the collective bargaining process; and,
- (f) declining union investment in organizing.

In addition, one must acknowledge that, with some notable exceptions, organized labor has experienced difficulty in adjusting to these developments and modifying its organizing and bargaining strategies so as to neutralize employer resistance, and labor continues to struggle to project a more modern image capable of capturing the imagination of new generations of American workers.

For these and other reasons, the vast majority of American workers are not likely to enjoy the benefits of collective bargaining for the foreseeable future, even with major NLRA reform. Accordingly, any serious program for labor law reform must address not only the problems of union representation and collective bargaining, but also the question of how law can

to Canada's more union-friendly labor law regime. There is much that is enviable in Canadian labor law, and it is appropriate for friends of collective bargaining to make the comparison and to point out the superiority of Canadian law. Nevertheless, the comparison can be easily be exaggerated, risking the danger that we will not fully understand the causes of union decline in the US or, for that matter, certain problematical trends in Canada (such as recent signs of decline in union growth) and weaknesses of the Canadian legal regime. The US/Canada comparison must place the labor law differences in a broader context. Canada has far more public sector employment than the US and a considerably more progressive political culture. Quite apart from the differences in law, for reasons of political culture and tradition, Canadian employers are generally more receptive to collective bargaining than their American counterparts, and generally they do not viciously oppose unions in the manner of many American employers. One must also take account of the presence in Canada of an established social democratic party with strong trade union links that from time to time has held power at the provincial level (where much Canadian labor law and policy are formulated) and, despite recent reverses, has sometimes held an important swing position at the federal level.

best serve the needs and protect the interests of employees who are not presently or foreseeably represented by labor unions.

I wish this were not true. The decline of unionism is a tremendous loss for American democracy and political culture. Unions gave working people a voice in political life and have transmitted appealing notions of solidarity and social commitment down through the generations. Collective bargaining celebrates the idea of employees making gains through their own efforts and solidarity, rather than bureaucratic largesse.

In my view, an independent and democratic labor union movement is an essential feature of a democratic society. At least so long as massive inequalities of power exist in the workplace, employees will have a need for autonomous organization to aggregate their interests and voices, and to identify and articulate their collective needs independent of employer domination. Autonomous organization is needed to maximize employees' collective strength, and to facilitate pursuit of independent, concerted action to protect their interests. In addition, collective bargaining promotes employee autonomy and participation, and, hence, self-determination, because of its unique capacity, when functioning well, for flexible adaptation to local conditions and therefore for decentralized, participatory problem-solving. Collective bargaining creates powerful and welcome pressure toward social and economic equality, and is an effective tool for advancing the economic fortunes of women and minorities and for combating poverty. As institutions of working people, unions can contribute to civic and political democracy, particularly in a political system like ours that lacks an established social democratic tradition and major labor or social democratic parties.

Having said all this, I do not mean to imply that the New Deal model of collective bargaining and labor law is a completed system of industrial democracy or that it presents no difficulties. In the heated context of labor-management debate, there is an understandable tendency for supporters of collective bargaining to defend and extol the New Deal system and CIO¹⁰ social unionism in complacent, exaggerated, or even romanticized terms. It is more helpful and productive to face up to the limitations and difficulties of the New Deal model candidly and forthrightly and to be open to the possibility that collective bargaining may need to adapt and change.

It is crucial for reformers to appreciate that collective bargaining is an adaptable and changing institutional form and that the New Deal system is only one, historically specific instance of the collective bargaining ideal. That is, one can be an ardent supporter of collective bargaining and still harbor reservations about the particular *form* collective bargaining took in the New Deal system. Similarly, doubts about or criticisms of the New Deal system do not automatically entail the conclusion that collective

10 Congress of Industrial Organizations, formed in 1935 to organize workers in mass production industries, in contrast to the American Federation of Labor (AFL) consisting mainly of craft unions. The CIO merged with the AFL in 1955. [Editor.]

bargaining is obsolete and should be entirely superseded by some other system of workplace governance.

The limitations and difficulties are substantial. Despite its profound contribution, the New Deal system of collective bargaining and labor law is only ambivalently committed to democratizing work and labor markets. The New Deal system takes for granted unilateral management control over strategic decision-making for the firm, and it is largely based on the premise that work must be organized on a hierarchical and authoritarian basis. The New Deal system made a significant but inherently limited effort to achieve an egalitarian reconstruction of labor markets. Moreover, the background economic, social, and institutional circumstances that gave rise to the New Deal system are rapidly unraveling, so that the system is mismatched with contemporary economic and social challenges and opportunities.

New Deal collective bargaining and labor law are largely products of the era of "Fordism", a phase in American economic history when business was oriented toward mass manufacturing of standardized goods in high volume runs made with "dedicated" or inflexible technology. This was a period of relatively limited international wage competition. In this system, the employee is a *command-follower*. The labor relations framework corresponding to mass manufacturing was "Taylorism", which involved a sharp separation between managerial and production workers, and between conception and execution; systematic reduction of skill levels in all jobs by divesting employees of craft and production knowledge and transferring it to management; subdivision of jobs into minute, routinized tasks paced by machines; and rigid hierarchy, monitoring, and discipline. Social policy in the Fordist era was based on a sharp separation between work life and home life and a durable sexual division of labor sustained by the concept of the family wage.

New Deal industrial unionism was a defensive rebellion against and resistance to the oppressiveness of Fordism, yet New Deal unionism embodies or mirrors many of its features. Just as Taylorist management subdivided jobs and monitored closely, labor protected its interests through complex rules of job description, work assignment, and compensation fixed to jobs, and these rules were closely monitored and legalistically enforced through adversary grievance procedures. Benefits and "welfare" are tied to the possession of a job, but labor was given little input into or control over the strategic business decisions that determine whether there *are* jobs.

Business spokespersons and some academic commentators claim that New Deal job control unionism entrenches socially counter-productive rigidities that inhibit technological innovation and adaptation to contemporary competitive challenges. The evidence for this proposition is less conclusive than frequently assumed by the media, and there is considerable evidence to the contrary. But let me grant merit to the point for purposes of discussion. After all, the very purpose of job control unionism is to establish rules that inhibit managerial freedom of action. Nonetheless, in its historical context, job control unionism was an entirely rational response to Fordist managerial practice. It allowed employees to protect

their interests within a system of decentralized wage determination, limited worker political power, and ferocious and violent management resistance to unions.

Management got the style of collective bargaining for which it asked. It seems perverse now to blame unions for the adversary frame of American industrial relations. "Adversary bashing" amounts to a covert attack on one of the few remaining forms of worker power in our society. Labor cannot realistically be expected to relax its commitment to New Deal job control unionism absent a genuine readiness on the other side to abandon Taylorism, to accept unions, and to entrench an alternative system that guarantees workplace equity, employment security, and meaningful forms of power-sharing, including collective bargaining.

The labor law framework we inherited from the New Deal and postwar periods reflects these features of industrial unionism as a defensive reaction to Fordism. On the positive side, the law guarantees narrowly constrained rights of organization and collective bargaining, basically rights to engage in conventional wage and fringe bargaining. Unions used these rights with immense success to raise living standards. But the system contains severe restrictions on even mildly unconventional or disapproved forms of collective action, such as grievance protests, secondary boycotts, and political strikes.

The central institution of postwar industrial unionism is the grievance and arbitration procedure, which creates an enclave of due process within the private sphere, thereby curbing management power. Perhaps the most important example of this is the nearly universal dissemination to unionized workers of protections against unjust dismissal through the "just cause" clause of the collective bargaining agreement. Nearly alone among the advanced democracies, the United States (apart from the State of Montana) has no statutory protection against unfair dismissal in the private sector. However, unionized workers obtained such protection through contract. This represents an historic achievement of the American working class.

But the New Deal labor law framework also contains substantial limitations and undemocratic features, which are routinely overlooked by labor movement critics of alternative representation models. The system is premised upon solicitous protection for managerial prerogatives regarding both strategic business decisions and day-to-day operations and work assignments. Employee participation is excluded from managerial decisions which lie at the core of entrepreneurial control.¹¹ As to almost all significant decisions about capital investment, disinvestment, and the like, workers have limited or no rights of notice, information, consultation, or bargaining.

¹¹ *Fibreboard Paper Products Corp v NLRB* 379 US 203 223 (1964) (Stewart J concurring). See also *First National Maintenance Corp v NLRB* 452 US 666 676 (1981): "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."

Regarding day-to-day operations, the basic rule is that management manages and the worker obeys. If a management command violates the contract, the employee may protest through the grievance procedure, but, with few exceptions, is obliged to obey during the interim no matter how inappropriate the employer's order. That is, industrial unionism and collective bargaining are premised upon hierarchical and authoritarian organization of work. Within the New Deal system, the employee remains a command follower.¹²

In certain important but limited areas, unions can bargain for work rule changes or protest violations of contractually established rules. But this is largely an after-the-fact, "defensive", or "reactive" form of industrial democracy within an enclave, not an open-ended, prospective, continuous, fully informed, and participatory democracy. It is a tragic irony that, in its currently beleaguered and isolated situation, the labor movement defends and celebrates a system of industrial relations committed to authoritarianism in work organization and to only a limited form of democracy in enterprise governance.

Additional problems arise from linkages between the New Deal collective bargaining system and overall social policy in the United States. The basic New Deal social policy idea is minimalist social provision through an exceedingly ungenerous safety net. Issues of social and economic security were to be tackled primarily through labor markets and collective bargaining, not through social provision or entitlements. Indeed, in many of the most important social benefits programs, such as old age benefits, accident compensation, and unemployment insurance, eligibility and benefit levels are closely tied to labor market attachment. Unlike most of the advanced industrial nations, which provide more or less generous public benefits to all citizens (or residents), the United States has largely privatized the provision of social welfare.

Postwar collective bargaining made extraordinary gains for millions of workers and their families, particularly as fringe bargaining became common in the 1950s. But, the privatized welfare system had its costs. For one thing, it drove a wedge between the organized and secondary, largely unorganized sectors of the labor market. Because women and people of color are so heavily over-represented in the secondary, unorganized sector, labor market segmentation induced by the privatization of welfare has compromised the ability of collective bargaining fully to address the interests of our increasingly diverse, multicultural workforce, much of which remains unorganized.

12 One striking proof of this is the Supreme Court's decision in *NLRB v Yeshiva University* 444 US 672 (1980), which holds that most university professors are "managerial employees" excluded from Labor Act rights and protections. The Court did not really conclude that professors are managerial because they perform executive functions. Rather, because professors traditionally have considerable autonomy within and control over their work, the Supreme Court reasoned that they could not be "employees". In the end, professors were placed in the category of managerials because that was the sole remaining legal category available to rationalize the exclusion of professors from the ranks of employees.

Moreover, the New Deal system carried forward the family wage idea. The premise of collectively bargained social security is that a breadwinner (ordinarily a husband) will hold a full time job for life and bring home a wage and benefits package that can support the family. To the extent the family wage premise was actually realized in collective bargaining practice, this only reinforced the gender division of labor and entrenched a hierarchy between continuous, full-time jobs and more casual employment, with profoundly destructive consequences for the economic fortunes and social opportunities of women and minority groups.

For these reasons, even ardent admirers of the New Deal collective bargaining system must look beyond its hallowed assumptions, acknowledge its weaknesses, and join in the process of rethinking work organization, business structure, modes of workplace representation, and social provision policy.

3 LABOR LAW REFORM FOR THE UNREPRESENTED: LOW-WAGE WORKERS, CONTINGENT EMPLOYMENT, AND THE DIVERSIFIED WORKFORCE

Thus far, the debate on labor law reform and the testimony before this Commission have primarily concerned the collective bargaining sector and nonunion but high-paying, primary sector employment.¹³ To touch the needs and concerns of the majority of American workers, and to arouse sufficient political attention and enthusiasm to rise onto the nation's legislative agenda, labor law reform must look beyond problems of union organization and collective bargaining and develop programs for improving workplace conditions through political and other processes. President Clinton, Secretary Reich, and other members of the Administration have opened the door to a comprehensive approach by emphasizing the nation's need to invest in human capital. "Human capital investment" is a formal way of talking about better treatment, training, and deployment of employees so that, in turn, employees are more committed, motivated, and productive. Thus, the Administration's human capital strategy for economic growth and competitiveness meshes closely with the question of enhancing workers' capabilities, rights, and dignity on the job.

In that light, a core objective of labor law reform should be to raise the social minimum wage and benefits package.¹⁴ The Commission should

13 The most notable exception to this generalization was the important conference sponsored by the Department of Labor's Women's Bureau on October 14, 1993, focusing on the employment law reform concerns of women workers, including those in the low-wage, nonunion sector. In addition, the December 15, 1993, testimony of John J. Sweeney, President, Service Employees' International Union, AFL-CIO, and the November 8, 1993, statement of Lane Kirkland, President, AFL-CIO [to the Dunlop Commission], both emphasized the concerns of low-wage employees and the contingent workforce.

14 The "social minimum wage and benefits package" refers to a society's legally mandated economic floor. Five main aspects of law combine to determine this level:

(1) *social provision or the social wage*, meaning government benefits and entitlements guaranteed by law;

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recommend and advocate a program of reforms designed to discourage low-wage and low-skill labor and to encourage high-wage, high-skill employment.

Reforms should be designed to utilize public law, as well as the collective bargaining process, to take “wages and benefits out of competition”, at least to the extent of guaranteeing a minimally decent standard of living for all people residing in the United States. Law should be systematically deployed to reduce labor market segmentation (to close the gap between the primary and secondary sectors of the labor market). That is, law reform should aim to take the low-wage option away from employers.

Despite that low-wage production processes provide profit-taking opportunities for particular employers in particular markets, over the long run such strategies degrade human capital and undermine the competitive position and growth potential of the economy as a whole. The United States cannot build sustainable growth or compete successfully against the more industrialized developing nations on a low-wage, low-quality basis. Only a high-quality strategy is consistent with postindustrial growth, and this implies the need for a highly trained and motivated workforce compensated at levels commensurate with the high values it adds.

Social provision and minimum standards policies in the United States should be designed to enhance human capital, and labor protective programs should prevent the degradation of human capital. The government’s own purchasing power should extend an exemplary, socially acceptable (not just minimum) wage and benefits package to the vast public-contracting sector. Labor reform policy should promote serious, lifetime training programs and adjustment assistance. While some part of the costs of such programs should be funded by government, enterprises, too, should be made to bear and internalize at least some of the costs of capital mobility and economic adjustment. Labor reform should crack down on the growing child labor problem in the United States; raise the minimum wage; and improve retirement protections (by lowering the vesting threshold, improving portability, tightening pension funding obligations, eliminating rules that allow employers to profit from plan terminations, and by mandating advance funding of health insurance benefits, as is required for pensions). The vagaries of American politics have made “health care reform” a separate issue from “labor law reform”, but obviously entrenchment of a decent health care program comports

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- (2) *employer mandated wages and benefits*, minimum wages, benefits, and conditions that employers are legally obligated to observe (“labor standards law”);
 - (3) the indirect impact on labor markets of *government purchasing and contracting activity*, including particularly the effects of social criteria embedded in government procurement policy (such as affirmative action set-asides and prevailing wage requirements);
 - (4) *immigration and international trade law*, particularly the degree to which labor and human rights guarantees embedded in trade policy affect prevailing labor conditions in immigration-source and trade-partner nations; and,
 - (5) the *background regime of legal entitlements and prohibitions* that structure power relations between employers and employees (such as rules about the power of the employer to discharge employees and rules about union organizing and strikes).

fully with the objective of raising the social wage to enhance human capital.

Systematic attention must be paid to issues of special concern to women employees, particularly by addressing contemporary problems and stresses of combining paid labor with parenting and other caretaking commitments. If we were to speak candidly about the felt needs of American employees and would-be employees, obtaining a decent and effective childcare program would almost certainly be at or near the top of the list.¹⁵ If the nation were seriously committed to a strategy of promoting economic growth by mobilizing the energies and skills of all Americans, establishing a decent, affordable, and accessible childcare system would be a priority. Similarly, firm links should be drawn in the public mind between labor law reform and civil rights issues such as pay equity, guarantees of diversity, and protections against sexual harassment.

Another concern should be to extend the minimum social benefits package to part-time and contract workers, a burgeoning group excluded from many protective laws and disadvantaged within or actually excluded from collective bargaining. At a minimum, labor law reform should seek to close the loopholes in statutory coverage under the NLRA, ERISA, workers compensation, unemployment compensation, and other statutory programs. Beyond this, labor law reform should mandate pro-rata, full-time or equivalent benefits and health care coverage for part-time employees; employer contributions to fully portable retirement trusts for mobile and contingent workers; and, appropriate opportunities for flexible scheduling and voluntary part-time work as a component of fair labor standards law.

The labor law reform process should also carefully review the interface between employment policy and social welfare programs. A consensus apparently exists among politicians and media pundits that welfare programs create a form of dependency that discourages able-bodied recipients from entering paid employment (even when jobs are available). It is fashionable to blame the victims for their fate, often in language coded with racism. In fact, serious empirical study of the so-called welfare dependency thesis shows that most recipients are eager to enter paid employment and would gladly do so if decent jobs for which they are or could be trained were available and if effective solutions could be found to the problems of childcare and health coverage. But our society is not creating such jobs in meaningful numbers, childcare and training opportunities are limited and ineffective, and most low-wage jobs do not provide health coverage. Thus, American social policy *does* discourage recipients from entering the labor market, but *not* (as we are told) because government generosity induces dependency and laziness, but rather because social policy fails to provide the minimal supports necessary for

15 Only 11.1 percent of American employers provide any child-care benefits or services, and that includes employers who provide only information and referrals. Only 5.2 percent of employers (in the private sector, only 4.7 percent) provide day-care or assistance with childcare expenses (Commission on Ways and Means 1992: 947).

recipients to enter paid employment, and because welfare law actually penalizes recipients when they do become employed (eg, by removing Medicaid eligibility). By design or, at any rate, in practical effect, American welfare policy maintains a core underclass in desperate poverty. This produces dampening pressure on labor market floors and worker militancy. The shameful persistence of unspeakably oppressive poverty in one of the wealthiest nations on earth encourages those who *are* regularly attached to the labor market to regard bad wages and conditions as a bargain compared to the misery and social opprobrium of welfare. The labor law reform debate, particularly in light of the “human capital” spin provided by the Administration, offers an important opportunity to break this disastrous political cycle.

4 CLOSING THE REPRESENTATION GAP

I now return to Question 1 of the Commission’s mandate, namely, whether new methods and institutions of employee participation should be encouraged and/or required. My answer is “yes”, for the reasons that follow.

Labor law reform must close the representation gap in the American workplace, so that all employees have at least some form of participation in enterprise governance through which they can monitor the implementation of legal guarantees, secure an equitable share of gains from productivity increases, and acquire a voice in strategic business decisions that affect their lives. Survey data indicates that most American workers desire some form of representation and voice in enterprise governance, even if only a minority of the unorganized currently regard unionization as their preferred representational vehicle. In order to respond to the participatory aspirations of American workers, labor law reform should mandate or encourage new and revitalized forms of workplace representation.

Labor law for the 21st century should offer a diverse and accessible array of representation mechanisms. I am cognizant that the Commission has invited me specifically to address the issue of management-instituted employee participation programs, particularly in reference to legal issues under NLRA section 8(a)(2). I will, of course, discuss that matter in some detail. However, before doing so, I would like to emphasize that employer-instituted participation schemes represent only one among several forms of participatory innovation that should be considered, and by no means the most important. I will therefore list a range of other alternatives that I favor, although I will not pause in this context to provide a detailed explanation and rationale for each.

The first and foremost priority should be to eliminate the legal barriers to collective bargaining and to expand its meaning, scope, and potential as a system of workplace participation. Perhaps the most fundamental value expressed in the NLRA is the idea that, for industrial democracy to be genuine, employees must have an independent power base and focus for collective self-organisation. An independent employee power base is not only an advantage to employees themselves, but is also socially functional because it is a precondition of effective workplace co-operation.

Only through power-sharing can employees elicit from and hold management to credible commitments of equitable treatment which are the foundation of workplace co-operation. Thus, a priority for labor law reform must be, once and for all, to guarantee employees a fair chance to bargain collectively in a meaningful and effective way through representatives of their own choosing.

But we should do more than just revamp the representation and organizing process and provide more effective remedies for surface bargaining and successorship problems. The *scope* and *potentiality* of collective bargaining should be expanded. Three examples of reforms that would revitalize collective bargaining are:

- (a) expanding the topics of mandatory bargaining to include entrepreneurial decisions that affect employees' job security and working conditions;
- (b) introducing legal changes to facilitate "sectoral bargaining" on an area-wide (eg, municipal) basis, where the employment relationship is contingent, fluid, and multisited¹⁶; and,
- (c) facilitating "for-members-only" bargaining by unions or other organizations that represent less than a majority of employees in a bargaining unit (when no exclusive representative has been designated).¹⁷

Expanded employee participation should apply to the decisions and processes of the labor movement as well as the enterprise. Labor law reform should address ways to democratize internal union affairs and promote affirmative action within unions. This would include such things as direct election of international union and federation officers; a legal requirement that all collective bargaining agreements be submitted for a vote of ratification; amendment of union election law to ease campaign burdens on challengers; and encouragement of and legal protection for affirmative action plans, so that labor's leadership becomes more reflective of membership diversity.

Public policy should require or encourage (eg, through procurement policy) that enterprises be structured and governed in a democratic manner. Hierarchical work organization and exclusion of employees from participation in enterprise governance are counterproductive and inefficient in today's economic world. As Professor Weiler (1990: 199) has written: "[w]e can no longer afford the traditional vertical relationship between manager and subordinate".

16 This would involve, among other things, changes in the legal doctrines concerning bargaining units, joint employer status, and secondary pressure. The basic principle should be that labor rights and entitlements are attached to and travel with the *employee*, and that corresponding obligations accrue to any entity that stands in the functional relationship of employer.

17 For-members-only or minority bargaining is generally legal in the US, but it is not obligatory on the employer and meshes poorly with certain prevailing doctrines. A number of legal reforms would facilitate this representational mechanism. See generally Hyde, Sheed & Uva (1993: 637).

To the end of democratizing the structure of the firm, I advocate that the United States entrench a system of works councils and co-determination similar to institutions widely established in Europe. However, although I support the works council idea in principle, I acknowledge that it is not likely to appear on the practical political agenda in the United States in the near future. Still, more modest but quite meaningful initiatives have been proposed and even legislated.

The common thread of these proposals is that the law would mandate that all enterprises above a certain size establish a committee composed of or including elected (or union-designated) employee representatives that would have certain specified statutory functions (eg, safety inspection). A leading example is the program of mandated safety committees recently instituted in Oregon, which is credited with considerable success in reducing workplace injuries.¹⁸ At the federal level, the Comprehensive Occupational Safety & Health Reform Bill of 1993 (s 575) includes a provision requiring firms to have joint safety and health committees. This is a promising development, and hopefully enactment will lead, in turn, to introduction of an array of similar plant and firm-level councils or joint committees focused on monitoring and enforcement of labor standards.¹⁹ Perhaps institutional innovation of this kind will someday precipitate serious debate in this country regarding the establishment of participatory works councils in all enterprises.

The primary reason to promote direct participation institutions is that they will enhance workplace democracy. Public policy should favor democratic work organization. But there is an additional, if more instrumental, reason for labor to promote new forms of workplace participation. Worker participation has a vital function to play in our economic future. Democratic reorganization of work, improved communication between and within all levels of enterprises, and a flattening of hierarchy are essential features of any viable strategy for economic renewal.

In the post-industrial era, the engine of economic renewal is high quality, customized production of specialized goods and services. The emerging competitive environment requires the capability for rapid shifts and adjustments and therefore for flexible employees, flexible technology, and more effective and creative linkages between employees and technology. In this environment, the worker can no longer be treated as a simple command-follower or an adjunct to the machine. Maximum utilization of employee potential, and therefore maximum productivity, can be achieved only if the employee is treated as an investigator, a learner, a problem solver, and a communicator. Postindustrial renewal requires new forms of work organization that build upon and enhance these capacities of workers. That is, economic renewal requires a more democratic and participatory workplace. Accordingly, employees have an *economic stake*

18 See, eg, "Oregon Official Describes Benefits of Mandated Safety Committees", 7 Labor Relations Week (BNA) 757 (August 4, 1993) (reporting testimony before the Commission).

19 See in general Summers (1992: 457-538-46).

in enlarging employee voice in enterprise governance, as well as a *moral or justice stake*.

We now come to the question of nonmandated, employer-initiated participation schemes, the so-called quality circles, quality of work life programs, labor-management joint committees, total quality management programs, and employee involvement schemes. I will refer to these programs generically as employee participation plans or EPPs.²⁰

Some management spokespersons argue that participatory work organization is superior to the hierarchical forms characteristic of the Fordist era and that EPPs are essential to improving the competitiveness of American industry. They complain that the prohibition on company unions contained in NLRA section 8(a)(2), particularly as interpreted in recent cases such as *Electromation Inc*, 309 NLRB No 163, 142 LRRM 1001 (1992), raises a substantial legal barrier to the introduction of EPPs. The argument is that section 8(a)(2) was designed to restrain hostile, anti-union employers back in the old days and should not be read to bar benign and constructive work-innovation in today's radically altered circumstances. These days, management spokespersons, including witnesses before this Commission, frequently advance the astonishing, if highly implausible, position that virtually every aspect of the nation's labor law system is just fine except for this one detail of section 8(a)(2).

Recently it has been suggested, with some fanfare, that, as part of a labor law reform package, organized labor seek to "trade" a repeal of NLRA section 8(a)(2), or an overruling of the *Electromation* decision, in return for card-check recognition, streamlined NLRB election procedures, or other reform measures.

In my view, management publicists have blown the section 8(a)(2) issue entirely out of proportion, and, I respectfully submit, this has diverted the debate from far more important and fundamental issues upon which the Commission should concentrate. It is very doubtful that management is interested in a trade of this kind. There is little evidence that section 8(a)(2) presents much of a barrier to workplace innovation.²¹ Sophisticated management counsel seem to feel that their clients have considerable leeway with regard to *bona fide* participation schemes despite the *Electromation* ruling.²² Moreover, employers face no real penalty in the

20 In this paper, "EPP" connotes a participation program that is *not* required by law. Typically it will be introduced at management's initiative. However, as used here, EPP also includes collectively bargained participation schemes.

21 An important recent study of the NLRB's caseload over the past two decades persuasively concludes that section 8(a)(2) poses no substantial deterrent to *bona fide* participation programs introduced by employers in good faith. See Rundle (1993: 24-26). Of course, the Rundle data do not rule out the possibility that some or even many employers harbor sincere concerns about the risk of section 8(a)(2) liability, given the uncertain state of the law, and that these fears exercise a chilling effect on innovation.

22 In a statement recently submitted to the Commission, former NLRB Chair Edward B Miller, now a prominent management attorney in Chicago, urged caution in changing the law, arguing that the *Electromation* decision had not seriously inhibited companies from operating employee involvement schemes. Calling the "so-called *Electromation* problem" a

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unlikely event they are found to have violated section 8(a)(2). The standard remedy in interference and domination cases is disestablishment. In effect, the employer is simply told to discontinue the participation scheme.²³

Moreover, the quality of the debate has been diluted by widespread repetition of a series of misunderstandings and myths. One is that policy-makers face a stark choice between adversary and co-operative labor relations models. In fact, all viable and dynamic industrial relations systems have and must have both co-operative and adversary aspects. This stems from the nature of the employment relationship itself, which is at root a co-operative enterprise aimed at producing joint gains, but which also always contains an element of interest-conflict regarding the division of those gains. In the absence of some form of meaningful countervailing power through which employees can monitor the relationship and protect their interests, management has a permanent incentive to seek distributive advantage at the expense of efficiency and human capital.

To put it another way, the trust necessary to get on with mutual gains solutions and productivity advancement *requires* the recognition of adversary conflict through some form of power-sharing. So-called co-operation or participation schemes that do not involve authentic power-sharing are likely to be evanescent and to contribute nothing to economic renewal. The inflated rhetoric about *Electromation* to the contrary notwithstanding, most of the Board's section 8(a)(2) cases in recent years involve superficial participation programs of this kind. By contrast, considerable empirical evidence, much of it developed in research by Commission member Professor Thomas Kochan and his colleagues, demonstrates that participation programs work best and set down the most lasting roots in the presence of a strong union committed to innovation but poised to protect employee interests. Employer spokespersons who claim to favor employee involvement and participation, but who adamantly oppose any form of power-sharing, should not be credited by this Commission.

Just as workplace co-operation needs an adversary component to succeed, traditional collective bargaining has always had a significant conflict-avoidance or joint-gains aspect. The goal of collective bargaining is and always has been to reach an accommodation between labor and management in a setting in which the employer almost always has superior power and control over the fortunes of the enterprise. The portrait of traditional bargaining as wholly adversary is particularly poignant in light of the billions of dollars in givebacks that labor conceded during the

"myth". Miller (1993: 1044) argued that "(i)t is indeed possible to have effective (employee involvement) programs of this kind in both union and non-union companies without the necessity of any change in the current law."

23 I owe the observation to union attorney Ira Sills, who recently made a superb suggestion regarding reform of section 8(a)(2) *remedies*. Sills noted that in many contemporary situations, a much more appropriate and potent remedy than disestablishment would be to order that the participation scheme be continued for at least a certain period of time, but that henceforth it be operated and structured on a basis autonomous from the employer and purged of the elements of employer domination.

1980s. Such adversarialism as exists in American collective bargaining reflects a historically specific and understandable reaction to managerial Taylorism, not an inherent characteristic of American unions or feature of collective bargaining.

The most important misunderstanding in the current section 8(a)(2) debate is the notion that prohibiting management dominated EPPs denies employees "free choice". The notion is that if employees do not like an EPP, they can always opt for collective bargaining (as though that were a costless and instantly effective possibility). There is some irony in management seeking the legal power *unilaterally* to determine workplace organization in the name of "employee free choice". But the basic fallacy in the argument is that the failure of employees either to quit or to opt for collective bargaining does *not* necessarily indicate their satisfaction with or preference for the status *quo*. Well known forms of labor market failure may prevent employees from effective use of the threat of exit to bargain for the working conditions they favor. Moreover, the empirical evidence indicates that participation programs can and frequently are used to coerce employees, to isolate and pressure potential union activists, and generally to discourage employees from pursuing the path of unionization. The record of participation programs and QWL innovations in the 1970s and 1980s is punctuated with unfair labor practices. EPPs are frequently instituted in response to or in order to pre-empt union organizing drives. The Rundle study previously cited examined all cases between 1972 and 1993 in which the NLRB ordered disestablishment of an employee committee or participation plan. In all but two cases (out of 58), the employer committed collateral Labor Act violations and/or commenced the EPP in response to an organizing drive.²⁴

In its early cases on the company union problem, the Supreme Court developed a profound insight about the nature of "employee free choice".²⁵ The teaching of these cases is that an apparent expression of choice, even in a secret ballot election, cannot automatically be taken to reflect employee preference. A history or context of employer coercion may vitiate the expression as an appropriate indicator of employee preference.

The real question is whether and under what circumstances, EPPs actually contribute to democratizing work. Public policy should encourage employee participation, but it must also carefully guard against the abuse of employer power to undermine employees' rights to bargain collectively through independent labor unions. In this matter, extreme caution is warranted.

Some take the view that the risk posed by EPPs to collective bargaining rights is so grave that there should be a monolithic prohibition of all participatory work redesign (unless it arises through collective bargaining).

24 See Rundle (1993).

25 See generally *NLRB v Link-Belt Co* 311 US 584 (1941); *NLRB v Bradford Dyeing Ass'n* 310 US 318 (1940); *NLRB v Falk Corp* 308 US 453 (1940); and *NLRB v Newport News Shipbuilding & Dry Dock Co* 308 US 241 (1939).

The problem with this view is that, as we have seen, the vast majority of American workers most likely will not enjoy the benefits of collective bargaining in the foreseeable future, so that the "hard line" interpretation of section 8(a)(2) would leave most employees with no form of workplace representation at all. This seems unwise. Non-unionized employees should have at least some opportunity for and experience of representation, even one that is a pale shadow of authentic workplace democracy.

In my view, there is room for revision that would be responsive to the participatory aspirations of non-unionized employees but that would not undermine and might actually advance union interests. Many EPPs are likely to be superficial and contribute only marginally, if at all, either to workplace democracy or to productivity improvement. I reiterate my view that true employee participation and workplace democratization requires power-sharing, and it remains to be seen whether American management is interested. Nonetheless, the option to engage in participatory innovation should be available under appropriate constraining circumstances that will discourage or bar employer coercion.

Thus, the problem becomes one of finding a formula that will allow some flexibility in redesigning work organization yet preserve the enduring principle premise of section 8(a)(2), namely, the central importance and value of independent employee organization. The rules must be designed to restrain the power of employers, subtly or overtly, to bias employee choice in favor of the EPP and against the rigors and sacrifices of union organization.

The remainder of the text sketches a possible revision of section 8(a)(2) designed to meet these criteria. Where unions are in place, I argued that all matters of employee participation must be collectively bargained with the union. In non-union settings, I set out nine minimum conditions for the legality of employer-implemented participation schemes, including secret ballot election of employee representatives.

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