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# MODELS OF WORKER PARTICIPATION: THE UNCERTAIN SIGNIFICANCE OF SECTION 8(a)(2)†

THOMAS C. KOHLER\*

Whether, by what means, and to what degree workers should have a voice in the management of their workplace have been matters of recurring concern in the United States for well over a century. Perhaps at no time since the early years of the New Deal, however, have these issues attracted such widespread attention and discussion, both in the academic journals and by the public at large, as they have recently. The convergence of a number of factors over the past decade, including increasingly successful foreign economic competition, coupled with reports of employee alienation from their work and management and declining levels of productivity, is responsible for the generation of much of this interest. A growing societal regard of adversarially based relationships as obstructive and wasteful, as well as a renewed interest in some circles in developing means by which to increase "democracy" in the workplace also have contributed to the revival of interest in this topic. Much of this attention has been directed at the development and implementation of integrative methods of employee relations that are intended to create an atmosphere of labor-management cooperation. This condition is meant to be achieved through the use of a variety of structures intended to enhance employee involvement in workplace decisionmaking. These integrative schemes of industrial relations are known by a number of names, including quality of work life, employee involvement, participative management or more broadly worker participation. They have come by many to be associated with Japanese and Western European schemes of industrial relations and are often considered to be an innovative departure from the traditional adversarial form of labor relations that American-style collective bargaining represents.

The duty to bargain which the National Labor Relations Act<sup>1</sup> (The Act) requires of an employer, upon the proper designation by its employees of a bargaining representative, is designed to give workers an effective means through which to participate in a broad variety of decisions about the management of their workplace. From among several forms of group dealing, the Act through its Section 8(a)(2),<sup>2</sup> sanctions one, the well-known model of free collective bargaining. Some versions of the participatory programs that have become popular over the past decade are consonant in their application with

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<sup>1</sup>29 U.S.C. §§ 151-168 (1976 & Supp. IV 1980).

<sup>2</sup>This section of the Act provides that:

It shall be an unfair labor practice for an employer . . .

(2) 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 section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . . .

*Id.*

the model established by the NLRA; others, however, rest on premises different from those that underpin the Act's structure, and are designed to obtain different goals.

Remarkably, over the last several years, when presented with challenges to the legality of the implementation and maintenance of employee relations schemes that appear in conflict with the model the Act sanctions, the National Labor Relations Board (Board) and the courts either strenuously have avoided squarely confronting the issue, or more frequently, have construed the statute in a way that seems at odds with its historical purposes. Consequently, what the Act, and in particular its Section 8(a)(2), means concerning the legality of various forms of worker participation schemes is unclear. Starkly put, and yet to be authoritatively determined, is whether the prohibitions contained in Section 8(a)(2) permit the unilateral implementation and maintenance of integrative models of industrial relations as a management sponsored alternative to collective bargaining. Much of the uncertainty that the Board and the courts have manifested in approaching this issue, and the inconsistencies that have resulted in the cases, seem rooted both in a lack of understanding of the theoretical premises on which the integrative and the collective bargaining models rest and the differences in the ends each is intended to obtain. Interestingly, the Board and the courts have not been aided by the legal literature since it similarly has failed to investigate and analyze the bases on which the various types of individual relations schemes rest. An examination of the theoretical foundations of these models, in the context of their historical development, obviates much of the confusion that abounds in this area and elucidates the ramifications that may follow from the choices the Board and the courts make.

To adequately comprehend these legal and theoretical issues, some understanding of the characteristics of worker participation schemes is necessary. Accordingly, in its first section, the article will provide a descriptive overview of these schemes. It will discuss the general characteristics and goals of American participatory schemes, describe generally the features of some commonly used participative devices, and consider and contrast their application in the context of a few concrete union and non-union settings. In its second section, the article will turn to examine the theoretical underpinnings of the adversarial and integrative models, the sources from which the two models spring and the ends each are intended to secure. It will then sketch the historical context out of which the provisions of Section 8(a)(2) arose, tracing there the development of methods of group dealing that are alternatives to collective bargaining. The article will then examine the course of the courts' treatment of the provisions of Section 8(a)(2). The article concludes that the legislative purpose behind Section 8(a)(2) has largely been either forgotten or ignored and that the trend in the court decisions construing and applying its provisions threaten to undermine one of the Act's central purposes.

## I. WORKER PARTICIPATION SCHEMES: A DESCRIPTIVE OVERVIEW

### A. *Introduction*

Discussion of worker participation schemes in the United States is difficult for several reasons. As an initial matter, there is little agreement concerning the term's definition. "Worker participation," one commentator has observed, "has become a magic word in many countries. Yet almost everyone who employs the term thinks of something differ-

ent."<sup>3</sup> Outside the United States, the term participation tends to refer to formal devices, the structure and use of which are mandated by law.<sup>4</sup> In the United States, however, participation usually is conceived of as a style or theory of management.<sup>5</sup> Consequently,

<sup>3</sup> Schregle, *Forms of Participation in Management*, 9 INDUS. REL. 117, 117 (1970). Another scholar has commented that "[c]learly, participation means all things to all people. For some it means increased motivation and productivity or, by contrast, protection of jobs and work rules. For various others, it means personal growth, a defeat for capitalism, or the preservation of social peace." Strauss, *Workers Participation in Management: An International Perspective* in 4 RESEARCH IN ORGANIZATIONAL BEHAVIOR 182 (B. Staw & L. Cummings ed. 1982).

<sup>4</sup> Strauss & Rosenstein, *Workers Participation: A Critical View*, 9 INDUS. REL. 197, 197 (1970). This is in strong contrast to several Western European countries, most notably the Federal Republic of Germany, whose laws either permit or in certain circumstances require that workers be represented on corporate boards. Summaries of the provisions made for worker participation in various foreign legal systems can be found in Merrifield, *Worker Participation in Decisions Within Undertakings*, 5 COMP. LAB. L. 1 (1982); Waschke, *Workers' Participation in Management in the Nine European Community Countries*, 2 COMP. LAB. L. 83 (1977). For more detailed accounts of such legislation in two Western European nations, see Bergquist, *Worker Participation in Decisions Within Undertakings in Sweden*, 5 COMP. LAB. L. 65 (1982); Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L. 23 (1982). For a comparison of American and German legislation on this point, see Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980). For the views of the German trade unions on co-determination (at least as of 1973), see *Co-Determination in the Federal Republic of Germany* in WORKERS' CONTROL 194 (G. Hunnius, G. Garson & J. Case ed. 1973); their views are criticized in Schauer, *Critique of Co-Determination*, in *id.* at 211. For a thoughtful and provocative discussion of the implications of co-determination, see Simitis, *Workers' Participation in the Enterprise — Transcending Company Law?*, 38 MOD. L. REV. 1 (1975) (the July, 1974 Chorley Lecture).

<sup>5</sup> Strauss & Rosenstein, *supra* note 4, at 197. Professors Strauss and Rosenstein suggest that the difference in emphasis between Continental and American participation schemes is due, at least in part, to a difference in the traditions from which their respective advocates spring. The former, they contend, have been heavily influenced by socialist ideology, which emphasizes the need to ameliorate the conditions of subordination which result from the institution of private property. Because socialists largely have been concerned with formal structural issues, such as power relationships and questions of ownership and representation, European versions of participation are characterized by representational mechanisms which permit workers to influence or control organizational decisions. In contrast, Strauss and Rosenstein assert that leading American advocates of participation are largely of the human relations tradition, whose research and practices have been advanced on behalf of management. Starting with Mayo's Hawthorne Studies, they state, the human relationists have placed great value upon cooperation and partnership between management and subordinates. Adherents of this school thus have concentrated primarily upon face-to-face relations within conventional hierarchy, and largely have ignored formal structures of power. Others have taken similar positions, e.g., Mills, *Europe's Industrial Democracy: An American Response*, HARV. BUS. REV., Nov.-Dec. 1978, at 143. Professors Locke and Schweiger have contended, however, that:

contrary to a commonly held view (e.g., Strauss and Rosenstein . . .) [worker participation] in the last analysis is not advocated from two entirely different viewpoints; i.e., human relations theory in the United States and socialist ideology abroad, but in the name of the same moral idea of equality in each case. The only difference is that the implications of egalitarianism have not been carried as far in the United States due to the strength of the conflicting ideal of individualism.

Locke & Schweiger, *Participation in Decision-Making: One More Look*, in 1 RESEARCH IN ORGANIZATIONAL BEHAVIOR 271 (B. Staw ed. 1979). Regardless of the reason for its acceptance, Professor Strauss reports that "[p]articipation is a central tenet in the managerial ideology taught in many capitalist business schools" and that it "is now at least superficially accepted by managers in most parts of the world." Strauss, *supra* note 3, at 179.

there has been little governmental involvement in the sponsorship or development of various worker participation schemes in the United States,<sup>6</sup> and there is no legislation requiring their use.

Differences of opinion also exist concerning which theories and techniques properly may be termed participative. Some scholars, for instance, exclude from this category job enrichment and work redesign schemes in which the affected employees do not participate in deciding the degree of increased responsibility to be delegated to them. Such schemes, these commentators contend, result in a hierarchically determined division of labor, not a sharing in common in the decisionmaking process.<sup>7</sup> Others more broadly include devices that permit workers some degree of autonomy in deciding how their assigned tasks are to be performed, even where the choices are to be made for a predetermined set of alternatives, and both their selection and subsequent execution requires no consultation with fellow workers or management personnel.<sup>8</sup>

Another problem is that much of the literature concerning participation programs is of an anecdotal nature and fails to detail fully either the programs' structural features or the content of the decisions made within them.<sup>9</sup> This is compounded by the fact that the subject of worker participation, like that of labor relations generally, is charged with emotion and ideologies; consequently, a good deal of the writing concerning the subject tends to be biased and promotional. In addition, terms used to denote various schemes are often used interchangeably, and there appears to be little consensus as to the meaning of some. The phrase, quality of work life, for example, is used extensively in both a

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<sup>6</sup> In the United States, of course, free collective bargaining rather than statutorily mandated shop councils and/or co-determination schemes is the model of worker participation sanctioned by the legal system. Pursuant to the Labor-Management Cooperation Act of 1978, 29 U.S.C. §§ 173(e), 175(a), 186(c) (Supp. IV 1980), however, the Federal Mediation and Conciliation Service (FMCS) has been instructed to assist in the development of joint labor-management committees at individual work sites, or on an area or industry wide basis. The Labor Management Cooperation Act is intended to comport with the model of free collective bargaining established by the National Labor Relations Act; thus, its terms restrict the grant assistance to committees established at individual work sites to unionized employers, 29 U.S.C. § 175(b)(1). In fiscal year 1982 for example, the FMCS awarded \$1 million in grants. 108 LAB. REL. REP. (BNA) 211 (1982). For an extensive comparison and critique of various worker participation schemes with the collective bargaining model, see Getman and Kohler, *Mechanismes de Participation des Travailleurs aux Etats-Unis*, 1983 JOURNÉES DE LA SOCIÉTÉ DE LEGISLATION COMPARÉE 55.

<sup>7</sup> See Locke & Schweiger, *supra* note 5, at 273-75. Professors Locke and Schweiger further contend that:

[t]he failure to separate these two concepts [i.e., delegation and worker participation in decision-making (PDM)], in our opinion, has led to serious confusion in the PDM literature. The merging of PDM with delegation has led to a merging of the human relations school with the cognitive growth school . . . . While there is nothing wrong with combining elements of these two schools of thought in practice, they are conceptually distinct. The human relations school stresses the importance of developing good supervisor-subordinate relationships (through PDM) and cohesive work groups in order to satisfy man's social needs. The cognitive growth school advocates job enrichment through delegating individual responsibility in order to satisfy man's need to grow in his knowledge, efficacy, and individuality.

*Id.* at 274-75 (citations omitted).

<sup>8</sup> *E.g.*, Sashkin, *Changing Toward Participative Management Approaches: A Model and Methods*, 1 ACAD. OF MGMT. REV. 75 (1976).

<sup>9</sup> *E.g.*, D. ZWERDLING, *WORKPLACE DEMOCRACY* (1980); Guest, *Quality of Work Life — Learning from Tarrytown*, HARV. BUS. REV., July-Aug. 1979, at 76.

descriptive and denominative sense, and has been affixed to nearly every type of scheme that might be considered participatory.

Lastly, because their generation and implementation have been on an ad hoc and frequently experimental basis, the specific characteristics of various schemes, as well as the type and degree of participation each affords employees, differ greatly and are highly idiosyncratic. Much, of course, depends upon the context, i.e., union or non-union, in which a program is instituted, the goals toward which it is directed and the distribution of power within the employing entity.

B. *General Characteristics and Goals of Participation Schemes in the United States Other than Collective Bargaining*

Despite the disagreements over the nomenclature and classifications appropriate to them, several characteristics typical of American participatory schemes can be discerned. Common to all is their emphasis on the personal relationship between managers and their subordinates:<sup>10</sup> participation in American schemes is of a direct, informal, face-to-face nature and typically occurs at the shop or work floor within normal hierarchical channels.<sup>11</sup> Hence the reason that in the United States, participation is most often conceived of as a managerial style or theory.<sup>12</sup>

The types of decisions that come within the purview of American participatory schemes can be grouped into three broad categories: routine personnel functions, including hiring, training, discipline and performance evaluation; task issues such as determining work methods, the assignment of work to individuals, and the establishment of production and quality control goals; and matters pertaining to working milieu, for example, the placement of lighting, types of equipment, working speed, and in some cases, hours of work.<sup>13</sup> Matters in the second category however, are the sort over which employee participation is most frequently permitted.<sup>14</sup> Normally, workers involved in American participatory schemes do not share equal decisionmaking power with their employers. Rather, most schemes either are of the joint consultation type, in which management retains the right to make the final decision, or are of the type in which management unilaterally delegates greater responsibility to its employees.<sup>15</sup>

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<sup>10</sup> Locke & Schweiger, *supra* note 5, at 175; and see *supra* note 4 and sources cited therein.

<sup>11</sup> Locke & Schweiger, *supra* note 5, at 175.

<sup>12</sup> See *infra* notes 75-80 and accompanying text.

<sup>13</sup> Locke & Schweiger, *supra* note 5, at 276.

<sup>14</sup> Strauss & Rosenstein, *supra* note 4, at 202. Some participatory schemes, however, particularly those instituted in the organized sector, do employ the use of a formal structure, the joint labor-management committee, as an adjunct to the informal, shop or office floor level participatory devices. Typically, the mandate of these committees is limited to overseeing and coordinating the operation of the shop floor programs. The committees do not function as representative, decision-making bodies and generally do not serve as a forum for the discussion of wages, grievances, employment conditions or other subjects of collective bargaining. Such limited-purpose joint committees are a common feature of quality of work life and Scanlon plans, both of which are discussed below. For a description of a participatory scheme in an unorganized setting which employed a joint committee, see J. WITTE, *DEMOCRACY, AUTONOMY AND ALIENATION IN WORK* (1980) (especially at 15-20; 61-108). Although theoretically the mandate of the committee in the workplace studied by him was open-ended, Professor Witte observed that management was able to retain "subtle control" of its agenda, and restricted it from considering matters of central concern of employees, such as grievances and wage and benefit issues.

<sup>15</sup> Locke & Schweiger, *supra* note 5, at 276.

Brief comparison with some general characteristics of Western European participation schemes brings the traits of American schemes into heightened relief. In contrast to its informal nature in the United States, participation in Western European schemes tends to involve the creation of formal decisionmaking or advisory bodies that operate at the plant or corporate level, such as works councils or a tier of the corporate board on which worker-directors serve.<sup>16</sup> Participation in decisionmaking under these schemes occurs through the workers' elected representatives, and thus, from the individual's standpoint, is indirect and formal in nature.<sup>17</sup> Not surprisingly, the manner of and the level at which participation occurs in Western European schemes also affects the character of the issues that comprise its subject-matter. Thus, lower level committees like the works council tend to handle issues of the general character treated in American plans, while committees operating at higher levels concentrate largely upon organizational policies.<sup>18</sup> Among the issues in the latter category over which employees may be allowed some participation include decisions about investments, dividend declaration, profit sharing and executive hiring and dismissal. Despite the principle of the equality of labor and capital that theoretically undergirds many Western European schemes, such parity of power in actual practice is largely symbolic; like American participatory devices, Continental schemes have not extended employees equal decisionmaking power with management.<sup>19</sup>

As noted, the specific goals sought through the use of American-style participatory schemes vary. By the implementation of these plans, most employers intend to improve productivity and product quality, and to reduce levels of absenteeism and workforce turnover, through increasing worker morale and job satisfaction — though the link between productivity and job satisfaction has yet to be firmly established.<sup>20</sup> Employers in the organized sector also use participatory techniques as a means to improve the union-management relationship and to involve more fully the union in their organizations' operation, thereby securing its cooperation in attaining managements' goals, and possibly co-opting it.<sup>21</sup> Non-unionized firms, on the other hand, frequently

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<sup>16</sup> *Id.* See also Strauss & Rosenstein, *supra* note 4, at 205–06.

<sup>17</sup> Locke & Schweiger, *supra* note 5; see *supra* note 4 and sources cited therein.

<sup>18</sup> See, e.g., Locke & Schweiger, *supra* note 5, at 276. An exception may be the scheme in use at International Group Plans, an insurance company described in D. ZWERDLING, *supra* note 9, at 117–34.

<sup>19</sup> Concerning this point, see S. Simitis, *supra* note 4; Glendon, *French Labor Law Reform 1982 - 1983: The Struggle for Collective Bargaining*, 32 AM. J. COMP. L. 449, 485–91 (1984). Indeed, as Professors Simitis and Glendon point out, it is the limits that such institutionalized participation place on employee voice in decisionmaking that has reawakened interest on the Continent in American-style collective bargaining. As one West German commentary states, unions in the Federal Republic are becoming more interested in issues than in institutions. Glendon, *supra*, at 490.

<sup>20</sup> See, e.g., Locke & Schweiger, *supra* note 5; Levitan & Werneke, *Worker Participation and Productivity Change*, MONTHLY LAB. REV., Sept. 1984, at 28; Goodman, *Quality of Worklife Projects in the 1980's*, 31 LAB. L. J. 487 (1980).

<sup>21</sup> The actual or perceived co-optation of worker's representatives is a problem that is inherent in all types of participative schemes (including, though usually to a lesser extent, collective bargaining) and programs of labor-management cooperation. See, e.g., KUHNE, CO-DETERMINATION IN BUSINESS 51–52, 82–83 (1980) (perceived co-optation of worker directors contributed to failure of British Steel Corps. experiment with worker-directors, and a basis for complaint in German co-determination). In writing about the special problems of union representatives who serve on joint union-employer councils, Professors Strauss and Rosenstein state that:

employ participative devices in their strategies to avoid the organization of their workforces.<sup>22</sup>

Unionists who favor their use regard participation schemes as a way to alter traditional management authority patterns and methods of organizing work, thereby affording workers greater dignity. They also view such schemes as means to extend worker and union control over the shop or office and as a step toward eventual workplace democracy.<sup>23</sup> Involvement in these programs also may result in better union access to information concerning the employers' plans and economic status. Though sometimes this rationale goes unstated, union proponents of the use of participatory schemes also frequently view them as a means to improve the competitive positions of cooperating employers, thereby promoting workers' job security.

### C. *Cursory Descriptions of Some Commonly Used Participation Schemes*

As has been mentioned, some disagreement exists about the types of schemes that properly can be termed participatory. For the purposes of this portion of the discussion, the term participation is used in its broadest sense to include a wide variety of means — other than collective bargaining — by which workers gain some role, however limited, in the decisionmaking process in their workplace. Among the participatory schemes most frequently discussed and employed in the United States are quality control circles, job enrichment and redesign techniques, employee opinion surveys, semi-autonomous work teams, and a nebulous amalgam of these and other techniques known broadly as quality

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Almost all observers comment on the difficult dual nature of the council member's role — on one hand he represents workers, on the other he assists in making management decisions. As a partner in management, he may assent to actions which, as a representative of the workers, he should oppose. In addition, the more familiar he becomes with management's problems and the more involved he becomes in deciding them, the more likely it is that he will become alienated from his constituents. As Slichter commented in regards to an early case of union-management cooperation in the United States, "Union-management cooperation turned out to be a process by which the leaders gain such a thorough appreciation of the problems of the company that proposals which seemed unreasonable to the rank and file seemed reasonable to the leaders." In some instances, the co-optation process may become so effective that the workers' representative becomes little more than another member of management.

Strauss & Rosenstein, *supra* note 4, at 208–09 (citations omitted).

<sup>22</sup> E.g., Goodman, *supra* note 20, at 488; Myers, *Overcoming Union Opposition to Job Enrichment*, HARV. BUS. REV., May–June 1971, at 37 (stating in part (at 38) that "job enrichment . . . offers the only realistic strategy for preventing the unionization of [an organized employer's] workforce"). Similarly, such schemes are often used by organized employers as a means to induce employees to abandon their union. See, e.g., Walton, *From Control to Commitment at the Workplace*, HARV. BUS. REV., Mar.–Apr. 1985, at 77, 83 ("Some companies, as they move from control to commitment, seek to decertify their unions, and at the same time, strengthen their employees' bond to the company.").

<sup>23</sup> Bluestone, *Human Dignity Is What It's All About*, VIEWPOINT (Industrial Union Department, AFL-CIO), Third Quarter, 1978, at 21. Like worker participation, the phrase workplace democracy has assumed a variety of meanings. See, e.g., Strauss & Rosenstein, *supra* note 4, at 203; Strauss, *Workers Participation: Symposium Introduction*, 18 INDUS. REL. 247, 250–51 (1979). As Professor Bluestone uses the term, workplace democracy means the right to participate in making workplace decisions, including job structure and design, job layout, material flow, tools to be used, methods and processes of production, plant layout, work environment, etc. In its broadest sense it means decisionmaking as to how the workplace will be managed and how the worker will effectively have a voice in being master of the job rather than being subservient to it. Bluestone, *supra* at 22.



of work life programs.<sup>24</sup> To these can be added the durably if cyclically popular Scanlon Plan. Though analytically distinguishable from one another, these devices, or variants of them, are not infrequently used in combination. Although they have been instituted more extensively by non-unionized employers, these schemes have also been adapted for use in organized settings, as will be more fully discussed.

The first mentioned participatory scheme, the quality control or quality circle, is patterned roughly after Japanese schemes<sup>25</sup> and turns over to workers the responsibility to identify and solve product quality and production problems.<sup>26</sup> A quality circle usually consists of a small group of workers formed from employees within existing departments or natural work groups, led by a supervisor or senior employee.<sup>27</sup> Typically, members of a quality circle meet at specific intervals to discuss and analyze approaches to improve product reliability and production efficiency. Theoretically, at least, participation in such programs on the part of employees is voluntary and, under ideal conditions, both the formation and undertakings of the circles depend upon the employees' initiative, not managements'.<sup>28</sup> Quality circles provide means by which to allow workers to have an influence upon the manner in which the product they build is designed, and the methods by which their work is performed, but beyond this permits them no opportunity to participate with management in formulating decisions.

Job enrichment and redesign techniques constitute another type of participatory scheme. These techniques concentrate on methods of ordering work so that through its execution, workers' needs for fulfillment and personal growth can be met, thereby providing them a self-generated incentive to perform well.<sup>29</sup> Broadly stated, traditional

<sup>24</sup> These categories are not necessarily discrete (for example, job redesign may involve the implementation of semi-autonomous work teams) nor are the titles employed here universally used to describe various participative schemes (Ford Motor Co., for instance, terms quality circles "employee involvement groups").

<sup>25</sup> These schemes, as well as other Japanese personnel management practices, are, in turn, based in part upon Western social science research in personnel management and organizational behavior. See R. COLE, *WORK, MOBILITY, AND PARTICIPATION* 6-7, 132-37 (1980).

<sup>26</sup> Cole observes that at least in Japan, quality control circles also are intended to develop the leadership abilities of foremen and workers, to identify workers with supervisory ability, to improve workers' skills, morale, and motivation, and to stimulate teamwork within the work groups. *Id.* at 135.

<sup>27</sup> Concerning the design and use of quality circles, see *id.* at 135-41; D. COSTLEY & R. TODD, *HUMAN RELATIONS IN ORGANIZATIONS* 450-62 (2d ed. 1983); WORK IN AMERICA INSTITUTE, *PRODUCTIVITY THROUGH WORK INNOVATIONS* 109-15 (J. Rosow & R. Zager ed. 1982); Field, *Quality Control: The Human Factor*, *TRADEPEDIA INT.*, Winter 1980, at 6; Kanter, *Dilemmas of Participation*, *NAT'L F. (THE PHI KAPPA PHI JOURNAL)*, Spring 1982, at 16, 19; *The New Industrial Relations*, *BUS. WK.*, May 11, 1981, at 85, 86.

<sup>28</sup> As Cole points out, however, "management often plays a behind-the-scenes role (critics would say manipulates), laying the groundwork [for the circle's establishment] through educational activities." R. COLE, *supra* note 25, at 138.

<sup>29</sup> The literature concerning job enrichment and work redesign is voluminous; some helpful books and articles include: A. SZILAGYI, JR. & M. WALLACE, JR., *ORGANIZATIONAL BEHAVIOR AND PERFORMANCE* 148-96 (2d ed. 1980); Davis & Trist, *Improving the Quality of Work Life: Sociotechnical Case Studies*, in *WORK AND THE QUALITY OF LIFE* 246 (O'Toole ed. 1974); Dowling, *Job Redesign on the Assembly Line: Farewell to Blue-Collar Blues?* in *PERSPECTIVES ON BEHAVIOR IN ORGANIZATIONS*, 227 (Hackman, Lawler & Porter ed. 1977); Hackman, *Designing Work for Individuals and for Groups* in *id.* at 244 [hereinafter cited as *Designing Work*]; Hackman, *Is Job Enrichment Just a Fad?*, *HARV. BUS. REV.*, Sept.-Oct. 1975, at 129; Oldham, *Work Redesign*, *NAT'L F. (THE PHI KAPPA PHI JOURNAL)* at 8; see also W. HAMNER & D. ORGAN, *ORGANIZATIONAL BEHAVIOR: AN APPLIED PSYCHOLOGICAL APPROACH* 270-98 (1978).

organizational methods have stressed the systematic reduction of an operation into a series of extremely specialized and elementary tasks which the individuals performing them constantly repeat. In its most basic form, job enrichment calls for combining tasks, thereby allowing workers to perform a more elaborate and complicated set of operations. This technique, called horizontal task loading, is designed to make work more meaningful through requiring workers to use a number of different skills and making them responsible for more than a small part of the entire job. Some programs also "vertically load" jobs by delegating to workers some limited power to manage aspects of the job such as work pace or the timing of breaks.<sup>30</sup> Where extensively applied, these techniques may afford workers the opportunity to enhance existing skills and learn new ones, and to take some increased responsibility for matters such as problem solving, quality control, determination of work methods and budgeting and cost control.<sup>31</sup> Use of these schemes often requires reorganization of the workplace to allow workers, for example, to assemble an entire product or to complete all the steps necessary to provide a service rather than merely to perform smaller, more incremental tasks. Depending upon their scope, job enrichment schemes may permit employees some degree of autonomy in performing their work, but few provide workers further opportunity to participate in the management decisionmaking process.

An advanced form of job enrichment involves the use of semi-autonomous work teams.<sup>32</sup> Typically, where this technique is employed,<sup>33</sup> workers are organized into groups of roughly five to fifteen members. Each team is responsible for the performance of a major operational function. A leading domestic producer of diesel engines, for example, has broken the assembly line at one of its plants into four or five teams, each of which completely assembles and tests the large engines manufactured there.<sup>34</sup> Normally, where this scheme is employed, work is organized so that each team has a variety of tasks to

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<sup>30</sup> For one description of the application of horizontal and vertical loading techniques, see Hackman, *Designing Work*, *supra* note 29.

<sup>31</sup> See generally sources cited *supra* note 29. Quality circles also are used frequently as a means to introduce other participation devices. See Lawler & Mohrman, *Quality Circles After the Fad*, *HARV. BUS. REV.*, Jan.-Feb. 1985, at 65.

<sup>32</sup> As Professor Hackman states, "the ultimate aim" in the employment of the team form of organization "generally is similar to that sought when individual job enrichment is carried out; that is, to improve the quality of the work experience of the people involved, and simultaneously to increase the quality and quantity of work produced." Hackman, *Designing Work*, *supra* note 29, at 251.

<sup>33</sup> There is a great amount of literature describing the use of semi-autonomous teams. See, e.g., A. SZILAGYI, JR. & M. WALLACE, JR., *supra* note 29, at 170-77 (teams in pet-food and automobile plants); D. ZWERDLING, *supra* note 9 (teams in pet food plant and coal mine); Dowling, *supra* note 29 (use of teams and other job redesign techniques in Swedish automobile plants); GENERAL MOTORS CORP., REPORT ON THE 1981 QUALITY OF WORK LIFE CONFERENCES 59-66, 111-20 (use of teams in two automobile plants); Walton, *How to Counter Alienation in the Plant*, *HARV. BUS. REV.*, Nov.-Dec. 1972, at 70 (use of teams in pet-food plant). For an extensive study of one experiment in work restructuring in a coal mine which in part involved the use of semi-autonomous teams, see P. GOODMAN, ASSESSING ORGANIZATIONAL CHANGE: THE RUSHTON QUALITY OF WORK EXPERIMENT (1979). A recently published work that contains a series of case studies of a number of corporations' experiences with a wide variety of participatory schemes (including quality circles, Scanlon Plans, semi-autonomous work teams and quality of work life projects) is THE INNOVATIVE ORGANIZATION (R. Zager & M. Rosow ed. 1982).

<sup>34</sup> Telephone interview with Theodore Martson, Vice-President, Personnel, Cummins Engine Co. (Sept. 9, 1982).

perform, many of which are complex; accordingly, teams are usually structured to permit members to learn over time the skills necessary to perform all the jobs within the units' jurisdiction.<sup>35</sup> Teams may also be delegated responsibility for: interviewing and selecting for hire job applicants usually from a pool chosen by management; developing criteria against which eligibility for pay increases is determined within the structure established by the employer or the collective agreement; reviewing and criticizing the performance of team members and imposing discipline; resolving production and quality problems, and making job assignments to individual team members. Additionally, teams are charged not infrequently with the duty to order the tools, parts and equipment they use from vendors, to set their own production and material flow schedules and to prepare budgets and monitor costs.<sup>36</sup>

Use of work teams, of course, requires an organizational structure different from that common to the conventionally ordered workplace. Because the team approach diffuses authority and decisionmaking power throughout the employee complement, the hierarchical levels of supervision normally are reduced, and distinctions between management and workers are diminished. The team approach allows employees, as a group, and within the limits established by the program, to make the variety of decisions about the work directly under their control. For the most part, work team programs and other job redesign efforts have been instituted by non-unionized employers, or in newly opened, unorganized facilities of employers whose facilities at other locations are unionized.<sup>37</sup>

Another means by which employees can be afforded a limited voice in decision-making is through the use of opinion surveys. Such surveys permit management to monitor employee attitudes toward various company policies, particularly personnel policies, and to shape them accordingly.<sup>38</sup> Surveys are often used by non-unionized employers, both to ascertain the attitudes of job applicants concerning unions,<sup>39</sup> and to keep abreast of areas of employee discontent. They are also frequently employed in conjunction with other participation devices as a "feedback mechanism."<sup>40</sup>

The term quality of work life (QWL) denotes no particular program or specific set of techniques and may be the most promiscuously used phrase of the last decade.<sup>41</sup> One commentator,<sup>42</sup> however, in loose agreement with other observers,<sup>43</sup> has stated that QWL

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<sup>35</sup> *Id.* and see sources cited *supra* note 33.

<sup>36</sup> *Id.* See generally, Goodman & Lawler, *New Forms of Work Organization in the United States in I NEW FORMS OF WORK ORGANISATION*, 165-68 (Int'l Lab. Org. 1977).

<sup>37</sup> Goodman, *supra* note 20, at 488; Strauss, *supra* note 23, at 248.

<sup>38</sup> See *Listening and Responding to Employees' Concerns*, HARV. BUS. REV., Jan.-Feb. 1980, at 101; Foulkes, *How Top NonUnion Companies Manage Employees*, HARV. BUS. REV., Sept.-Oct. 1981 at 90, 94-95. See generally Morano, *Opinion Surveys: The How-to of Design and Application*, PERSONNEL Sept.-Oct. 1974, at 16.

<sup>39</sup> See, e.g., National Organizing Coordinating Committee, AFL-CIO, *Report on Union Busters RUB Sheet*, April 1972, at 2.

<sup>40</sup> For an example of the use of such surveys, see *infra* notes 53-54 and accompanying text.

<sup>41</sup> Professor Strauss states that the term "quality of work life" was selected "only after either labor or management had shot down as too controversial other suggested names, many of which contained the term 'productivity.' Deliberately ambiguous, Quality of Work Life acquires meaning in the eyes of the beholder." Strauss, *Quality of Worklife and Participation as Bargaining Issues in THE SHRINKING PERIMETER* 121, 127 (H. Juris & M. Roomkin ed. 1980) (citation omitted).

<sup>42</sup> Goodman, *supra* note 20, at 487.

<sup>43</sup> Carlson, *A Model of Work Life as a Developmental Process* in TRENDS AND ISSUES IN OD: CURRENT

programs, properly so called, are those schemes designed to bring about a fundamental transformation in an employer's organizational structure and in its labor-management relationships. Such programs initiate these alterations by changing the "authoritarian, decisionmaking, reward, communication, technological, selection and training dimensions within an organization," rather than any single facet of the structure of an organization.<sup>44</sup> This commentator further observed that projects correctly denominated as QWL programs institute a "mechanism internal to the organization which introduces and sustains change over the time."<sup>45</sup> The devices that QWL programs use to effect these organizational changes are, for the most part, some combination of those techniques that have already been described, especially the quality circle and semi-autonomous work team, or bodies that closely resemble them. The mechanism that many QWL programs have adopted as a vehicle to introduce and sustain change is the joint worker-management committee. These committees form the nucleus of many QWL programs, particularly those established in the organized sector.<sup>46</sup> Their general purposes are to coordinate and monitor the operation of the program, and to provide a forum in which workers and management can share information and discuss and resolve problems concerning both the program and their overall relationship.<sup>47</sup>

Another participation scheme which has been used by both organized and unorganized employers is the Scanlon Plan.<sup>48</sup> Briefly stated, the Scanlon Plan provides for the payment of a financial bonus to all employees, both managerial and non-supervisory, when productivity is increased. The Plan operates through joint worker-management committees. Typically, each department in a workplace elects two representatives who assist fellow employees in formulating and framing suggestions. The two representatives meet on a monthly basis with their supervisor as a production committee. This committee usually has authority to reject meritless suggestions and to implement those which do not involve other departments and major expenditures of money. Disagreements and suggestions entailing major modifications are referred to a higher level steering committee. The membership of the steering committee typically is divided equally between worker and management representatives. It is usually comprised of one representative from each department elected by secret ballot, the plant manager and, where the employees are represented, the president of the union local. The steering committee reviews

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THEORY AND PRACTICE 83 (W. Burke & L. Goodstein ed. 1980); Whiting, *Quality of Work Life: What Is It?*, 1 WORK LIFE REV. 1 (Mich. Quality of Work Life Council 1982).

<sup>44</sup> Goodman, *supra* note 20, at 487.

<sup>45</sup> *Id.* at 487-88.

<sup>46</sup> See, e.g., PRODUCTIVITY THROUGH WORK INNOVATIONS, *supra* note 27, at 109-15; Strauss, *supra* note 41, at 134-35; see discussion *infra*, § 1(D) (QWL projects at GM and Ford Motor Co.).

<sup>47</sup> It should be remembered, however, that theoretically at least, the committee does not engage in traditional collective bargaining nor does it supplant the bargaining process. See PRODUCTIVITY THROUGH WORK INNOVATIONS, *supra* note 27, at 77-81.

<sup>48</sup> Like other participatory devices, Scanlon Plans have generated an immense literature; some helpful descriptions and discussions can be found in: S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 864-77 (1960); Driscoll, *Working Creatively with the Union: Lessons from the Scanlon Plan*, ORGANIZATIONAL DYNAMICS, Summer 1979, at 61; Murtmann, *The Scanlon Plan Joint Committee and Section 8(a)(2)*, 31 LAB. L.J. 299 (1980). Professors Strauss and Rosenstein stated in 1970 that "aside from the Scanlon Plans . . . participation schemes have enlisted less worker interest in productivity than other areas." Strauss & Rosenstein, *supra* note 4, at 206; see also Strauss, *supra* note 23, at 253 (article written in 1979 stating that "research over the last nine years does little to shake this earlier conclusion").

suggestions referred by production committees, shares and discusses economic information, and supervises the calculation of the monthly bonus. As UAW programs in the organized sector that are anchored by a joint worker-management committee, and in contrast to most of the other American participation schemes, the Scanlon Plan involves the use of a formal limited purpose structure through which workers participate only indirectly.<sup>49</sup> Like other participatory devices, Scanlon Plans encourage a less adversarial relationship between union and management, and have been used by non-unionized employers as a tactic to avoid organizational efforts on the part of employees.<sup>50</sup>

D. *Participation Programs in Context: Some Examples of Programs in Unionized and Non-Unionized Settings*

Participation programs, as previously observed, have been instituted in both organized and unorganized settings, although the purposes and the manner in which these programs are administered, however, depends wholly upon the context in which it is implemented. These dissimilarities, in turn, are attributable to the disparity in the relative distribution of power between employer and employed that exists in the two settings. Perhaps the clearest way to illustrate these differences, and to understand the manner in which participatory schemes operate generally, is briefly to describe and compare the conduct of some programs within and without the presence of a union.

The participation programs conjointly instituted by the United Auto Workers (UAW) and Ford Motor Company (Ford), and by the UAW and the General Motors Corporation (GM) are among the most extensive in the organized sector. The following principles underpin their operation: the union and management stand as equal partners in the institution and administration of the programs; the grievance procedure and the terms of the collective bargaining agreement remain sacrosanct; increases in productivity produced through the program do not result in lay-offs, nor gained through speed-ups; and worker involvement in the program is voluntary.<sup>51</sup>

The programs<sup>52</sup> consist essentially of two parts: a joint union-management commit-

<sup>49</sup> See *supra* note 14.

<sup>50</sup> See Driscoll, *supra* note 48; see also Murrmann, *supra* note 48.

<sup>51</sup> Telephone interview with Irving Bluestone, University Professor of Labor Studies, Wayne State University (Feb. 3, 1983); see also O. Bieber, *Quality of Work Life and Product Quality*, in GENERAL MOTORS CORP., REPORT ON THE 1981 QUALITY OF WORK LIFE CONFERENCE 18; DOC. no. 36, *Quality of Work Life — National Committee* (reaffirming text of 1973 letter of understanding between the UAW and GM concerning establishment of QWL project), reprinted in, 1 COLLECTIVE BARGAINING NEGOTIATIONS AND SETTLEMENTS (BNA) 21:95; Doc. 36 *Quality of Work Life — Development and Training — Joint GM-UAW Statement of Job Security and the Competitive Edge in the Marketplace*, reprinted in *id.*, at 21:96-99; UAW-Nat'l Ford Dep't/Ford Motor Co. — Labor Relations Staff, *Guidelines for the Organization and Operation of Local Mutual Growth Forums 1-9 and Mutual Growth Forum Letter* in *id.* (appendix) (letter of understanding concerning structure of participation programs at Ford). UAW-Ford National Joint Committee on Employee Involvement, *Employee Involvement: A Handbook on the UAW-Ford Process for Local Unions and Management* (1980).

<sup>52</sup> The following discussion is based on the sources cited *supra* note 51, and a telephone interview with B.D. Pickel, Employee Involvement, Labor Relations Staff, Ford Motor Co. (Feb. 3, 1983). Also, see generally GENERAL MOTOR CORP., REPORT ON THE 1981 QUALITY OF WORK LIFE CONFERENCES (reports of various labor and management participants in QWL projects in various GM plants); PRODUCTIVITY THROUGH WORK INNOVATIONS, *supra* note 27, at 97-115 (discussion concerning the planning and implementation of QWL projects).

tee, which is maintained at both the corporate and plant levels;<sup>53</sup> and employee participation groups, which exist at the shop floor level. At the corporate level, top union and management officials form the joint committee. In addition to the purposes already mentioned, this committee, if requested, provides assistance to local committees in the form of training and guidance in establishing participation schemes. The structure, procedures, size and membership of the plant committees vary, and are considered to be matters for local determination. Their constituency usually includes the local union president or unit chairman and members of the bargaining committee, the plant manager and management personnel from the quality control and industrial relations staffs. Like the committee at the corporate level, a union official and a member of management usually co-chair the local committee.

The nature of the programs to be undertaken at each plant is determined by its committees. Accordingly, the plant committees' particular functions are to identify the types of participatory programs that are most appropriate for their facility, and to formulate and implement pilot projects and to monitor and resolve problems associated with the projects' operations. In deciding upon the projects best suited to the circumstances at its facility, the committee may use a variety of devices including opinion surveys and direct interviews; it may also obtain the advice of outside consultants as well as the assistance of the corporate joint committee.

Typically, each plant also has two facilitators or "joint coordinators," one of whom is an hourly employee, the other salaried. Once projects have been decided upon, the facilitators work directly with the employee groups in launching the programs, and act as information conduits between the groups and the joint plant committees. The facilitators also assist in training groups in problem solving techniques, leadership and other matters associated with the participatory programs.

Not surprisingly, the types of participatory programs and their structure differ not only between plants, but within departments at any single facility. Generally, however, groups are formed out of natural work units and consist of eight to fifteen persons. At Ford, three general types of programs seem to dominate: problem solving groups, quality circles, and a technique known as team building.<sup>54</sup> Problem solving groups operate through meetings of small groups of employees and supervisory personnel in which quality and production problems and possible solutions are discussed and evaluated. These groups also receive training in problem identification and causal analysis. Quality circles are similar, but emphasize the use of basic statistical methods to analyze quality problems. The last technique, team building, attempts to improve group performance by initiating and ameliorating relationships between, and by increasing communication and trust amongst its members, including both hourly and supervisory employees.<sup>55</sup>

In addition to these techniques, the UAW and GM have implemented the use of semi-autonomous work teams at some facilities, one of which is GM's Buick Division

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<sup>53</sup> This description is intended as a general outline only, and does not include all the details of the structure of these organizational change efforts. For example, in addition to the corporate and plant committees, the UAW and Ford also have established regional committees.

<sup>54</sup> UAW-FORD NAT'L JOINT COMM. ON EMPLOYEE INVOLVEMENT, *EMPLOYEE INVOLVEMENT: A HANDBOOK ON THE UAW-FORD PROCESS FOR LOCAL UNIONS AND MANAGEMENT* 37; telephone interview with B.D. Pickel, Employee Involvement, Labor Relations Staff, Ford Motor Co. (Feb. 3, 1983).

<sup>55</sup> Team building techniques are further discussed in A. SZILAGYI, JR. & M. WALLACE, JR., *supra* note 29, at 570-72.

plant in Flint, Michigan. In 1975, GM decided to terminate the foundry operations that had been performed at this plant and to convert it to the manufacture of transmission parts.<sup>56</sup> A joint union-management committee was formed to resolve problems concerning the conversion process, to consider ways to increase worker participation in the facility after its reopening and to assist in redesigning the plant.

The committee decided to implement the use of semi-autonomous work teams and organized the plant's production workers into groups of eight to fourteen employees, the members of which all hold the same classification. Workers were enabled to decide among themselves the memberships of each team and what operations each team should perform within the employers' product line framework. Each team selects its own leader, and as a group assigns work to individual members. The reward system has been modified: rather than by strict seniority, wage rates are based upon one's skills and proficiency. Employees become eligible for pay increases by demonstrating an ability to perform all the functions within the team's jurisdiction; additional increases may be earned by learning skills necessary to accomplish the work of other teams. An individual's eligibility for a wage increase is determined by his fellow team members, who base their decisions on written criteria each team has jointly promulgated. Teams also identify and resolve quality control problems and have limited responsibility for scheduling and controlling costs. It is reported that the maintenance of discipline largely has been assumed by employees who individually or as a group admonish fellow workers who are not performing properly, and that the role of supervision has been transformed largely to that of acting as an advisor to the work units. Teams meet weekly to review performance and discuss problems, and opinion surveys of the work force are taken periodically to identify areas of dissatisfaction with the program.

The Jamestown, New York plant of the Cummins Engine Company provides a good example of the broad application of participatory management techniques in the context of an unorganized work force. Like the GM Buick Division plant, Cummins has organized the production<sup>57</sup> employees at its Jamestown facility into semi-autonomous teams.<sup>58</sup> Not surprisingly, the features of the GM and Cummins schemes at the shop floor levels are very similar. Work teams at Jamestown have been delegated joint responsibility for a variety of personnel matters, including: selecting team members from among candidates chosen by management; monitoring and rectifying performance and attendance problems; interpreting and applying, within the limits specified by management, plant attendance and disciplinary policies; and reviewing the eligibility of individual members for raises.<sup>59</sup> The teams at the Jamestown plant also are jointly responsible for planning and forecasting, within the goals set by management, material flow and work loads, scheduling the group's working hours, ordering the tools and supplies necessary to the teams' work and for controlling the costs and quality of the work under the teams'

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<sup>56</sup> The following discussion is based on a report entitled, *Union-Management Teamwork Builds an Innovative New Plant* in GENERAL MOTORS CORP., REPORT ON THE 1981 QUALITY OF WORK LIFE CONFERENCES 111-20.

<sup>57</sup> Although the entire staff at Cummins Jamestown facility has been organized into teams, only the production teams will be discussed here.

<sup>58</sup> Telephone interview with Theodore Marston, Vice President, Personnel, Cummins Engine Co., Jamestown, N.Y. (Feb. 2, 1983).

<sup>59</sup> *Id.*, telephone interview with Dede Courtine, Personnel Staff, Cummins Engine Co., Jamestown, N.Y. (Feb. 15, 1983).

control.<sup>60</sup> Each team has a "leader," or "advisor" whose job, theoretically at least, is to assist in teaching members new job skills and in developing the team approach on the shop-floor level.<sup>61</sup>

In the absence of a union the structure of the participation program at Jamestown varies in several fundamental respects from those instituted at Ford and GM. These points of divergence serve to illustrate many of the differences that exist between participation programs in organized and unorganized settings generally. The most obvious and far reaching difference, of course, is that participation at Jamestown does not take place within the framework of a jointly determined collective agreement. Consequently, determinations concerning the types of participatory devices to be employed, the manner of their implementation and their administration rest solely with management. The promulgation of the rules under which the program operates similarly has been reserved to management. Thus, while workers have been delegated the authority to decide jointly matters such as the eligibility of their fellows for a wage increase, the magnitude of such an increase and the standards by which an individual's entitlement is measured are determined by management, which, in the absence of a union, has sole discretion as to their disposition. Further, unlike the programs at the unionized plants of GM and Ford, employee involvement in the non-unionized Cummins plant is mandatory and there is no guarantee that workers will share in the economic benefit that the program may produce.

## II. THE ADVERSARIAL AND INTEGRATIVE MODELS: THEORY AND LAW

### A. *The Models and Their Premises*

As was suggested at the outset, the theoretical premises on which the collective bargaining model rests are distinctly different from participative schemes which are based on what has come to be referred to as an integrative model of industrial relations. It is appropriate here to examine in turn the foundational principles of these two models, and the sources from which each has developed.

In considering its basic tenets, it is important to recall that the National Labor Relations Act was innovative neither of the institution nor of the practices of collective bargaining. Rather Congress, through the Act's terms, merely adopted a scheme for the private ordering of the employment relationship that workers themselves had initiated without legal sanction or protection, and in spite of much judicial antipathy. Similarly, the distinctive features of collective bargaining are not the product of legislative invention, but were shaped jointly in an evolutionary fashion by labor and management; the major characteristics of the institution were well established thirty years before the Act's passage.<sup>62</sup> In short, collective bargaining is an institution that developed from a "grass-

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<sup>60</sup> Telephone interview with Dede Courtine, Personnel Staff, Cummins Engine Co., Jamestown, N.Y. (Feb. 15, 1983).

<sup>61</sup> In practice, however, it has been reported that at least some of the team advisors have continued to act like traditional first-level supervisors, particularly with regard to personnel matters such as discipline or discharge recommendations, which team members frequently hesitate to make. Telephone interview with Dede Courtine, Personnel Staff, Cummins Engine Co., Jamestown, N.Y. (Feb. 15, 1983).

<sup>62</sup> The Court has on several occasions recognized this fact. See, e.g., *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952); *Railway Tel. v. Railway Express Agency*, 321 U.S. 342, 346 (1944).



roots" level and which permits ordering to occur from the same plane,<sup>63</sup> by those directly affected.

In sharp contrast to nearly every Western nation, the United States historically has chosen not to regulate the employment relationship through a comprehensive and detailed legislative scheme, nor to subject it to a high degree of state intervention.<sup>64</sup> While during the past twenty years there has been an increasingly strong trend in the other direction, the employment relationship can probably still be characterized as predominantly a matter for private ordering, to be performed through the market.<sup>65</sup> Save for those topics specifically reserved to public control, notably wage and hour and workplace safety regulation, and prohibitions against certain discriminatory employment practices, the state's power to legislate has, in effect, been delegated to private actors who are free, subject only to the restrictions the market imposes, to arrange the terms according to which their relationship will be conducted.<sup>66</sup>

The appearance and development of collective bargaining is reflective of the average employee's lack of economic power vis a vis the entity that employs him, and thus of his impotence in participating in the ordering process. Absent the economic strength self-association provides individual employees, the employer typically is free, both de facto and de jure, either to promulgate and administer the terms governing the employment relationship unilaterally, or to do so only with such employee participation as it chooses to allow, and within the limits that it singly establishes. Hence, employee organization into self-controlled, autonomous groups through the exercise of their basic associational rights is central to the collective bargaining scheme: it is through this association that workers are afforded the means to voice and protect their own interests and, thereby, to achieve effective participation in the ordering, i.e., the private lawmaking process. In essence then, collective bargaining constitutes a method for group self-determination. Its practice, to borrow a felicitous phrase of J. Willard Hurst, represents an effort through employee self-association, "to mobilize group power in behalf of individual status."<sup>67</sup> The employee group, its formation and protection is essential to the collective bargaining scheme. The group serves to mediate the relationship between the individual and the entity that employs him. In a setting in which one's job is generally both one's primary form of wealth and determinant of status,<sup>68</sup> the group acts to reduce the

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<sup>63</sup> See generally Tuebner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 229 (1983) (Discussing the NLRA as an example of "reflexive" legal ordering. Reflexive law is defined as a scheme intended only to erect procedural and organizational norms within which private ordering can occur. The goal of reflexive ordering is "regulated autonomy").

<sup>64</sup> For further application of this point, see Getman & Kohler, *supra* note 6. For a comparative perspective, see, Glendon, *supra* note 19, at 449.

<sup>65</sup> It has been suggested (properly so, in light of developments during the past thirty years) that the state will become an increasingly influential actor in the ordering of the employment relationship. See J. DUNLOP, F. HARBINSON, C. KERR & C. MEYERS, *INDUSTRIALISM AND INDUSTRIAL MAN RECONSIDERED: SOME PERSPECTIVES ON A STUDY OVER TWO DECADES OF THE PROBLEMS OF LABOR AND MANAGEMENT IN ECONOMIC GROWTH*, 16-18 (1975).

<sup>66</sup> See generally Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 717-71 (1973).

<sup>67</sup> J. W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES*, 86 (1956).

<sup>68</sup> For a well known, if not the first statement of this idea, see Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964).

individual's vulnerability and to enhance his status by permitting him some control over his circumstances.

As the foregoing suggests, two principles are key to the collective bargaining model. The first is that, given the nature of the ordering process and the distribution of power in the society in which it occurs, employees should have the unimpeded freedom to form self-controlled and self-directed organizations that stand at arm's length from the entity that employs its members and through which employees can participate in framing, administering and adjusting the private law that governs the employment relationship. The second basic principle is the well-known one of free collective bargaining, *viz.*, that the outcomes of the ordering process are to be determined by the parties themselves, free from governmental intervention.<sup>69</sup> Several assumptions are imbedded in these principles. The first is that between employer and employed inherent conflicts of interest exist which are a function of the authoritarian nature of the employment relationship itself.<sup>70</sup> Further assumed is the idea that employees will be able to gain, protect and further recognition of their peculiar interests and goals only through formation of an autonomous group that can act to check management's inherent power.<sup>71</sup> Since a conflict of interests is regarded as inherent to the employment relationship, the use of economic pressure is seen as having a legitimate and appropriate role in the parties' ordering process. Thus, in the collective bargaining model, conflict is viewed as a natural rather than a morbid characteristic, and its expression through the strike, lockout and the like is regarded as integral to a system that permits the parties to seek their self-interest in establishing the order of their relationship.<sup>72</sup> These features of collective bargaining have led to its characterization as an adversarial system. The term adversarial, however, carries much baggage with it. This is especially true for lawyers, for whom the word often conjures up images of our "give no quarter" litigation system. Unlike litigants, employed and employer are engaged in an ongoing relationship and are yoked by their mutual dependence.<sup>73</sup> This interdependence — what E. Wight Bakke termed the need for

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Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.

*Id.*; see also T. ARNOLD, *THE FOLKLORE OF CAPITALISM*, 121–22 (1937). For a seminal study detailing the relationship between the increased importance of the job and the legal order, see M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 143–205 (1981).

<sup>69</sup> For a succinct and provocative essay detailing the recent drift from these basic principles, see Barbash, *The American Ideology of Industrial Relations*, 30 *L.A.B. L.J.* 453 (1979); see also J. DUNLOP, F. HARBISON, C. KERR & C. MYERS, *supra* note 65.

<sup>70</sup> For a fuller statement of this thesis, see R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 249–57 (1959).

<sup>71</sup> As Dahrendorf points out, the very formation of the group serves to reduce conflict. *Id.* at 258–59.

<sup>72</sup> The Supreme Court has frequently recognized this point. *E.g.*, *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488–90 (1960); see also T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 1–22 (1980).

<sup>73</sup> The mutual — if not mutually pressing — need of employer and employee and the divergence of their interests is a long established theme. See A. SMITH, *THE WEALTH OF NATIONS* 167–90 (Penguin ed. 1982); R. DAHRENDORF, *supra* note 70, at 248–50.

"mutual survival" — acts to describe the boundaries within which the parties' "adversariness" will be expressed, and to limit the amount of actual conflict between them. Indeed, the parties typically share a substantial commonality of interests; and their state of reciprocal need impels compromise over contested issues. Hence, bargaining often has been described as a cooperative form of conflict wherein the parties' goal is a mutually acceptable agreement, or "code."

One other assumption is an integral part of the principles on which the collective bargaining model rests: that each of the parties are the best judges of their various needs and the weight to be assigned each, and hence are best able to effect a mutually acceptable adjustment of their differences and to order rationally their relationship. Consequently, third parties — and especially the state — are not to intervene in the bargaining process without invitation.

The primary effect of bargaining is a redistribution of decisionmaking power; the chief impact of its practice thus has been identified as lying in the restriction of the otherwise unfettered exercise of management's discretion.<sup>74</sup> Collective bargaining is understood best as a continuous ordering process in which the employees' representative constantly negotiates and adjusts with management the terms of the employment relationship.

Unlike collective bargaining, the genesis of the various integrative schemes of worker participation has come not from those who are to be enabled through their use to participate, i.e., the workers, but rather from members of the academy. Although the structural details, specific goals, the degree of involvement in the managerial decision-making process and the level and manner in which it is to occur vary among them, the integrative schemes share a common intellectual heritage: all stem from the research and theories of the human relations school of Elton Mayo and its successors — the organizational behaviorists (OB) — whose work has been advanced on behalf of management.<sup>75</sup> Representing a melding of earlier management theories that focused primarily upon organizational structure with the work of the relationists, whose attention was directed chiefly at the individual worker's motivations and needs, OB represents a loose amalgam of views and propositions and not one comprehensive theory.<sup>76</sup> Despite differences in detail and theoretical emphasis however, the integrative scheme of the human relationists and their progeny, however denominated,<sup>77</sup> have a common set of norms and characteristics. A central concern of the relationists has been the discovery and application of means by which to achieve employee acceptance of and cooperation<sup>78</sup> in securing management's goals. The strategy for obtaining these ends has been to make management techniques more responsive to worker's social needs, thereby overcoming

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<sup>74</sup> See S. SLIGHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 946-51 (1960).

<sup>75</sup> Strauss & Rosenstein, *supra* note 4, at 201-02; T. KOCHAN, *supra* note 72, at 8-11, 16-21.

<sup>76</sup> For a description of the roots and development of OB Theory, see R. DAHRENDORF, *supra* note 70, at 109-14; Greiner, *A Recent History of Organizational Behavior* in *ORGANIZATIONAL BEHAVIOR* 3-14 (S. Kerr ed. 1979); *An Overview of the Field* in *ORGANIZATIONAL BEHAVIOR: RESEARCH AND ISSUES* 1-11 (Industrial Relations Research Association Series (1974)).

<sup>77</sup> For a brief description of the progeny and their works, see J. BARBASH, *THE ELEMENTS OF INDUSTRIAL RELATIONS* 27-33 (1984); *An Overview of the Field* in *ORGANIZATIONAL BEHAVIOR: RESEARCH AND ISSUES*, *supra* note 76, at 7-11; Miles, *Organizational Development* in *id.* 165-76; Strauss & Rosenstein, *supra* note 4, at 201-02.

<sup>78</sup> See T. KOCHAN, *supra* note 72, at 10-11, 16; Strauss & Rosenstein, *supra* note 4, at 201-02.

among workers the feeling of alienation and powerlessness that these theorists posit as obstructive to cooperation. These techniques emphasize changes in the way management leads, designs work and structures the organization that will permit workers' greater autonomy and discretion in performing their tasks; in short, participation. From the application of these techniques will arise a sense of accomplishment from the work itself, enhanced feelings of self-worth, and in turn, improved morale, cooperation and productivity among workforce members. It is for these reasons that integrative participatory schemes are most often conceived of as a style or theory of management, or as a managerial ethic. "Operationally," observes Professor Barbash, the "ethic comes to this: management must give employees more say in their work and work surroundings. It is in management's cost discipline<sup>79</sup> interest to enhance participation; the implication is that this can be achieved without surrendering management rights."<sup>80</sup>

Not surprisingly, the norms on which the human relationist model of employee relations are based are antipodal to those that underlie the collective bargaining model. As Professors Strauss and Rosenstein have observed, unlike the collective bargaining model, which "assumes that labor and management have conflicting interests" and which "accepts the power struggle" between the parties "as a legitimate phenomenon," the

human relationists are [not] willing to admit that there are fundamental conflicts of interest in work organizations which require institutional representation and accommodation . . . . The human relations people ignore conflict or assume that it can be resolved through good human relations as long as the participants behave in an authentic, trusting manner. They object to win-lose, adversary bargaining as an inefficient way to resolve conflicts.<sup>81</sup>

With conflict viewed as a pathological state, and the goals of management seen as paramount, the ultimate success of the integrative schemes depends upon the ability of such schemes to inculcate workers to view their personal goals and the goals of the organization that employs them as being identical.<sup>82</sup> Self-organized employee groups that stand outside of the employing organization's control thus are regarded as potential sources of conflict, and therefore are to be avoided. Indeed, not surprisingly, most human relationist theory has no room within it for unions whatever. Implementation of these integrative participative schemes is by management and is not the result of independent action on the part of employees, as is their organization for the purposes of collective bargaining.

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<sup>79</sup> Professor Barbash defines cost discipline as the "techniques of economizing on the use of costly resources in order to achieve an acceptable return on investment." J. BARBASH, *supra* note 77, at 4.

<sup>80</sup> *Id.* at 30. Barbash further states:

The key word, therefore, in the new management ethic is *participation*, as in participative management. The personal involvement which comes with participation, the logic runs, makes for both improved efficiency and more satisfying work. Participation may be individual, as in management by objective, or it may be collective, as in union representation in the boardroom (e.g., Chrysler, Pan American). Participation in these contexts is meant to be positive, affirmative, and problem-solving, and distinguishable from the protective, defensive, zero-sum collective bargaining approach to participation.

*Id.* (emphasis in original).

<sup>81</sup> Strauss & Rosenstein, *supra* note 4, at 203.

<sup>82</sup> Miles, *supra* note 77, at 165.

As methods of worker participation in managerial decisionmaking, collective bargaining and the integrative schemes represent two very different models that are intended to secure different ends. In each case, the model reflects its heritage. Both, of course, are designed to permit private ordering of the employment relationship. Under the integrative model, however, management remains "in charge but with greater responsiveness to the needs of the lower participants in the enterprise."<sup>83</sup> In short, ultimate control of the order of the employment relationship remains with management. The end sought is "organizational effectiveness,"<sup>84</sup> not employee self-determination. In collective bargaining, in contrast, management does not retain such control. All terms and conditions are subject to joint agreement; a failure of consensus over a matter eventually leads to its determination through the application of economic forces. The aim of bargaining is not efficiency or willing compliance with management's goals, but the joint establishment and adjustment of the code governing the employment relationship.

As has been described above,<sup>85</sup> when applied in organized settings, employers and unions have normally attempted to fit the use of participative techniques within the framework of their collective bargaining relationship, however uncomfortable this fit may at times be. So adapted, participation is viewed (at least by unionists) as a supplement to rather than a replacement for bargaining, the two being coordinate processes that operate alongside one another.<sup>86</sup> While practical and theoretical questions exist concerning both the manner in which the two approaches are to be accommodated, and the limits of each, there seems to be no legal prohibition against the use of such schemes where the union has agreed to their implementation.<sup>87</sup> In the organized setting, the promulgation, implementation and operation of the participatory scheme occurs through the joint ordering process, and not as the result of the unilateral act of management. As such, the participatory scheme serves — ideally at least — as a vehicle for union-management cooperation, the scheme being the product of and not a substitute for collective decision through self-organization. Yet unclear, however, is the reach of Section 8(a)(2) and whether it permits management unilaterally to implement various integrative participatory schemes.

#### B. Section 8(a)(2): *The History and Rationale Behind the Legislative Choice*

To ensure employees' freedom of choice concerning whether and by whom to be represented, Section 8(a)(2) of the National Labor Relations Act forbids employers to "dominate or interfere with the formation or administration of any labor organization, or contribute any financial or other support to it."<sup>88</sup> This provision functions as the Act's keystone; by requiring the union to be completely independent of the employer, it cements the Act's adversarial model of industrial relations. It also safeguards the union's

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<sup>83</sup> J. BARBASH, *supra* note 77, at 85.

<sup>84</sup> Miles, *supra* note 77, at 165.

<sup>85</sup> See *supra* notes 51–54 and accompanying text.

<sup>86</sup> Telephone interview with Irving Bluestone, University Professor of Labor Studies, Wayne State University (Feb. 3, 1983); PRODUCTIVITY THROUGH WORK INNOVATIONS, *supra* note 27, at 79–84; see also sources cited *supra* note 51.

<sup>87</sup> For a thoughtful article suggesting that such a prohibition may exist, see Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541 (1984).

<sup>88</sup> 29 U.S.C. § 158(a)(2) (1976).

integrity as the bargaining agent, insuring that it will be free to act solely in the interest of its principals, the unit-member employees, in the private law-making process.

The restrictions contained in Section 8(a)(2) can probably best be understood when regarded in the historical context that gave them rise. After 1900, American trade unions achieved an impressive growth in membership. In 1897, at the end of a short, but severe depression, they had 450,000 members. By 1904, their constituency exceeded two million,<sup>89</sup> and by 1920, spurred in part by the war, over five million persons (about nineteen percent of non-farm workers) held membership.<sup>90</sup> Not surprisingly, the increase in the unions' numerical strength and ability to challenge successfully management's absolute control of the workplace elicited a strong response on the part of the latter. This response was comprised essentially of two parts, a fervent "open-shop" campaign, and the creation and introduction of management sponsored and controlled alternatives to collective bargaining.<sup>91</sup>

Launched by the National Association of Manufacturers in the beginning of the century, the "open-shop" or "American-plan" campaign reached its height after World War I.<sup>92</sup> Although its rhetoric was couched in terms of individual rights and freedom of choice,<sup>93</sup> the "open-shop" movement was at base an anti-union propagandizing effort.<sup>94</sup> Reinhard Bendix has described it as appearing "to consist of little else than the employers' ever more rigorous assertion of their authority and their strength."<sup>95</sup> In contrast to the negative character of its open-shop efforts, the search for a model of industrial relations that could compete with the collective bargaining paradigm involved management in a creative endeavor. Of the various schemes propounded and employed as substitutes for collective bargaining,<sup>96</sup> so-called shop committees or employee representation plans be-

<sup>89</sup> M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 114-15 (1970); R. BENDIX, *WORK AND AUTHORITY IN INDUSTRY* 265 (1956).

<sup>90</sup> M. DERBER, *supra* note 89, at 175, 202-03. This total, however, was the movement's pre-depression zenith; by 1929, membership had declined to 3.4 million persons. In the following year, it was calculated that 10.2% of the non-farm workforce belonged to unions. I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 2 (1950).

<sup>91</sup> See M. DERBER, *supra* note 89, at 199; R. BENDIX, *supra* note 89, at 267-70.

<sup>92</sup> The development of this effort is discussed in Chace, *The Open Shop Campaign* in *UNIONS, MANAGEMENT AND THE PUBLIC* 275 (E. Bakke & C. Kerr ed. 1948) [hereinafter cited as Bakke & Kerr]. The ideology of the open shop campaign is discussed in R. BENDIX, *supra* note 89, at 267-74.

<sup>93</sup> See, e.g., Nat'l Ass'n of Mfrs., *An American Principle and the Closed Shop*, in Bakke & Kerr, *supra* note 92, at 125.

<sup>94</sup> See, e.g., Leiserson, *Closed Shop and Open Shop*, in Bakke & Kerr at 121. In public at least, proponents of the open-shop campaign disclaimed that any anti-union animus motivated their efforts. Social commentator and satirist F.P. Dunne, who wrote as "Mr. Dooley," made the following observation in a 1920 essay concerning the open-shop movement:

"But," said Mr. Hennessey, "These open-shop min ye menshun say they are f'r unins if properly conducted."

"Shure," said Mr. Dooley, "if properly conducted. An' there we are: an' hour would they have them conducted? No strikes, no rules, no contracts, no scales, harly iny wages, an' dam' few mimbers!"

Dunne, *Mr. Dooley on The Open Shop*, in Bakke & Kerr at 120-21.

<sup>95</sup> R. BENDIX, *supra* note 89, at 267.

<sup>96</sup> Broadly speaking, these schemes were of four types: welfare work (this encompasses a broad variety of activity, from company-built model towns such as Pullman, Illinois, to company-sponsored education and recreation programs), scientific management techniques (based on the work of

came the dominant management alternative by 1920. Although they assumed a wide variety of names<sup>97</sup> and forms,<sup>98</sup> such committees or plans consisted fundamentally of two distinct types.<sup>99</sup> In recognition of their genesis, orientation, and their nearly universal characteristic of confining both the jurisdiction of the employees' representative and the parties eligible to be selected as such to workers employed at an individual plant, all have become known generically as company unions.<sup>100</sup>

The development and use of the company union was indigenous and unique to the United States.<sup>101</sup> While shop committees and industrial councils of various types were in use in England and on the Continent, in some instances before the turn of the century,<sup>102</sup> all by the post-War period were tied to and their operation coordinated with the presence

Frederick Taylor, *see infra*, personnel management techniques (largely directed at centralized hiring and assignment of workers on the basis of their skills and preferences, removing (at least partially) the arbitrary system of hiring and discharge by foreman), and employee representation plans. *See, e.g.*, E. BURTON, *EMPLOYEE REPRESENTATION* 53-58 (1926); M. DERBER, *supra* note 89, at 206-19; Wilcock, *Industrial Management's Policies Toward Unionism*, in *LABOR & THE NEW DEAL* 281-87 (M. Derber & E. Young ed. 1957); *see also* R. BENDIX, *supra* note 89, at 274-81 (ideology of scientific management), 281-87 (changes in ideology after World War I). A valuable study of Frederick Taylor's work and philosophy, and its later development by his students, is provided in S. HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1890-1920* (1964). For an historical overview of employers' "welfare capitalism" efforts during the twenties, *see* I. BERNSTEIN, *THE LEAN YEARS* 144-89 (1960).

<sup>97</sup> *See, e.g.*, Note, *Employer-Dominated Unions — Illusory Self-Organization*, 40 COLUM. L. REV. 278, 279 n.1 (1940). (Among the names under which these bodies have appeared are: industrial democracy plan, work council, shop union, employee representation plan, and joint council.)

<sup>98</sup> For a detailed description of these, *see* French, *The Shop Committee in the United States*, 41 JOHNS HOPKINS U. STUD. HIST. AND POL. SCI. 107, 131-50 (1923).

<sup>99</sup> NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *COLLECTIVE BARGAINING THROUGH EMPLOYEE REPRESENTATION* 19 (1933); TWENTIETH CENTURY FUND, INC., *LABOR AND THE GOVERNMENT* 69-71 (1935). A third type of representation plan that received much notice, after its successful introduction at the Packard Piano Company in 1913, but which never gained the widespread use of the other two, was the so-called Leitch plan. Leitch, a pioneer "industrial consultant," advocated a system of employee representation superficially patterned after that of the federal government, with a house of representatives composed of members elected by the rank and file, a senate, the members of which were to be elected by foremen, and a cabinet comprised of top management officials. The congress was to pass bills, and the cabinet held a veto power. For a detailed description of the plan, and some instances of its application, *see* J. LEITCH, *MAN-TO-MAN: THE STORY OF INDUSTRIAL DEMOCRACY* (1919). A response by labor to these various schemes is presented in R. DUNN, *COMPANY UNIONS: EMPLOYERS' "INDUSTRIAL DEMOCRACY"* (1927).

<sup>100</sup> Concerning the use of this term, *see* H. MILLIS & R. MONTGOMERY, *ORGANIZED LABOR* 833 (1945); BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *BULLETIN NO. 634, CHARACTERISTICS OF COMPANY UNIONS 1935* 3 (1937).

<sup>101</sup> H. MILLIS & R. MONTGOMERY, *supra* note 100, at 830-31; French, *supra* note 98, at 8; Douglas, *Shop Committees: Substitutes for, or Supplement to, Trades-Unions?*, 29 J. POL. ECON. 89, 90-91 (1921).

<sup>102</sup> Professors Millis and Montgomery note that an industrial representation plan was presented by the Industrial Commission of the German Constitutional Assembly in 1849 and was introduced in a number of plants some decades later. MILLIS & MONTGOMERY, *supra* note 100, at 831. For a bibliography concerning German plans, *see* Douglas, *supra* note 101, at 89 n.2. Professor Douglas also points out that the use of such plans began on the Continent in the last quarter of the nineteenth century as "an attempt to check the growing power of the trades-unions, and failing, decayed (save in the mining industry) only to be reincarnated after the armistice in a far more radical guise as a method of securing control by the workers' overproduction." *Id.* at 89.

of a trade union.<sup>103</sup> Only in the United States were such bodies primarily intended as a substitute for group dealings through self-organized employee associations.

Interestingly, most American employers stoutly resisted any form of group dealings with their employees until after World War I. Though some rationalized system of dealings was inevitable as the size of industrial units increased,<sup>104</sup> management as a field of study and applied technique was virtually unknown until after 1900.<sup>105</sup> Generally speaking, during the first decade or so of this century, large plants continued to practice the same management methods that had been used in earlier decades.<sup>106</sup> In this regime, the foreman was typically the supreme authority over all personnel matters, including hiring (which often was conducted on a day-to-day basis), task assignments and discharge.<sup>107</sup> Hence it was that in the pre-War period, American employers almost universally set terms and conditions through individual dealings<sup>108</sup> with their employees unless compelled by circumstance to establish them collectively through a union.

The use of company union schemes spread comparatively slowly during the period before 1918. The first use of a "representation plan" as a means of group dealing with employees other than through collective bargaining occurred in 1903.<sup>109</sup> While several other plans were subsequently implemented during the succeeding ten years,<sup>110</sup> the first use by a corporation of substantial size did not occur until 1915 when such a scheme was established by the Colorado Fuel and Iron Company.<sup>111</sup> This plan, which was instituted at the close of a bloody but fruitless recognitional strike,<sup>112</sup> was openly a substitute

<sup>103</sup> See Douglas, *supra* note 101, at 89-91; H. MILLIS & R. MONTGOMERY, *supra* note 100, at 831.

<sup>104</sup> Concerning this point, see generally M. WEBER, *ECONOMY AND SOCIETY* 212-26 (1968) (description of what for Weber are the three "ideal types" of legitimate authority and observing that amongst them, the bureaucratic form of administration is that most capable of efficiently exercising authority and hence, the form of administration that modern forms of organizations of all types will adopt).

<sup>105</sup> D. Lescohier, *Scientific Management and Rationalization*, in 3 *HISTORY OF LABOR IN THE UNITED STATES* 303-04 (J. Commons ed. 1935). Professor Lescohier notes that the Technology Division of the New York Public Library found that before 1881, there were no American titles on management, and that from 1881 to 1900, only twenty-seven. In the following decade, however, 240 such titles were published. Professor Lescohier further observes that "though there had been several excellent engineering schools in the country since the Civil War period, schools interested in management came later. The Wharton School of Finance was established in 1881, The Babson Statistical Service in 1900, the Harvard Business School in 1908." *Id.* For a brief overview of the development of management theories, see Greiner, *supra* note 76, at 3.

<sup>106</sup> D. Lescohier, *supra* note 105, at 303.

<sup>107</sup> Among the abuses attendant to such a system were required "kick-backs" of a portion of one's salary to the foreman, bribes and the like. Not surprisingly, it was against such abuses that organizing efforts were often directed. Interestingly, the scientific management techniques of Frederick Taylor were also in part designed to rationalize hiring and discharge through the establishment of a centralized personnel department with routinized procedures and guidelines for hiring. See S. HABER, *supra* note 96.

<sup>108</sup> The setting of terms through "individual bargaining" of course occurred whether the employer's representative took the form of a foreman or a centralized personnel office.

<sup>109</sup> E.g., French, *supra* note 98, at 113.

<sup>110</sup> *Id.* at 113-14. BURTON, *supra* note 96, at 27-29.

<sup>111</sup> French, *supra* note 98, at 115; Douglas, *supra* note 101, at 92.

<sup>112</sup> This strike gave rise to the tragic and infamous Ludlow massacre. For a brief historical overview, see I. BERNSTEIN, *supra* note 96, at 157-66.



for collective bargaining,<sup>113</sup> and its adoption sparked much interest among members of the business community in the use of company union schemes.<sup>114</sup>

A great impetus to the introduction of company union schemes was government policy during World War I.<sup>115</sup> In the early autumn of 1917, a series of strikes broke out that threatened production and construction related to wartime needs.<sup>116</sup> The President appointed a Mediation Commission charged in part with determining the reasons for the labor unrest which the Commission subsequently reported had fundamentally two causes: the "insistence by employers upon individual dealings with their men" that precluded the development of "a healthy basis of relationship between management and men;" and a mutual lack of knowledge on the part of the parties about the needs and problems of the other which was "due primarily to a lack of collective negotiations as a normal process of industry."<sup>117</sup> Shortly after the Mediation Commission delivered its report, the War Labor Conference Board, which had been formed in January 1918 of an equal number of representatives of labor and capital, endorsed the principle of collective bargaining, and recommended the formation of a National War Labor Board which was to act to settle disputes in essential industries.<sup>118</sup> From the start, consistent with the findings and policies of both the Mediation Commission and the War Labor Conference Board,<sup>119</sup> the National War Labor Board employed the use of shop com-

<sup>113</sup> The Rockefeller family owned roughly 40% of the common and preferred stock of the Colorado Fuel and Iron Company. Commenting on the institution of the so-called Colorado Plan, Carroll French, while noting that it was a substitute for collective bargaining, stated that

Unbiased critics . . . gave Mr. Rockefeller credit for more than a mere desire to avoid trade union recognition. For a corporation whose traditional labor policy had so long ignored the slightest claims of labor to representation and had insisted upon individual bargaining, the change to a policy of collective dealing through joint committees of its own men was a big step forward.

French, *supra* note 98, at 116 (citation omitted). For a statement of his views on industrial relations and the Colorado Plan, see John D. Rockefeller, Jr., *Representation in Industry*, 81 THE ANNALS 167 (Jan. 1919).

<sup>114</sup> For an extensive study of the operation of the Colorado Plan, see B. SELEKMAN & M. VAN KLEECK, EMPLOYERS' REPRESENTATION IN COAL MINES: A STUDY OF THE INDUSTRIAL REPRESENTATION PLAN OF THE COLORADO FUEL AND IRON COMPANY (1924).

<sup>115</sup> E.g., H. MILLIS & R. MONTGOMERY, *supra* note 100, at 833; Wehle, *War Labor Policies and Their Outcome in Peace*, 33 Q.J. ECON. 321, 336 (1919). This is not to suggest that government war policy alone was the most important factor in the growth in the use of company union schemes.

<sup>116</sup> For a description of the strikes, and the response of union leaders and government to them, see R. Wehle, *supra* note 115; French, *supra* note 98, at 116-25; BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 10-18.

<sup>117</sup> French, *supra* note 98, at 120. Significantly, the findings of the Mediation Commission were foreshadowed by those of the U.S. Industrial Commission in 1898. See U.S. INDUSTRIAL COMMISSION, 5 REPORT OF THE INDUSTRIAL COMMISSION ON LABOR LEGISLATION 8, H.R. Doc. No. 95, 56th Cong., 1st Sess. (1900).

<sup>118</sup> French, *supra* note 98, at 120-22; Wehle, *supra* note 115, at 326-28.

<sup>119</sup> These policies consisted of the following:

1. The right of the workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.
2. The right of employers to organize in association of groups and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the workers in any manner whatsoever.
3. Employers should not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

mittees as a dispute settlement tool. In accord with the principles that the Conference Board had established to guide the War Labor Board in its work — which one commentator has characterized as amounting to a “truce” between management and labor<sup>120</sup> — the War Labor Board consistently declined to order employers to grant recognition to unions not already recognized.<sup>121</sup> However, awards of the Board and its analogue, the Shipbuilding Labor Adjustment Board,<sup>122</sup> that ordered the establishment of shop committees ran almost exclusively against employers who had refused to recognize or deal with unions.<sup>123</sup> The shop committee thus was used as a substitute means for establishing collective dealings where an employer resisted engaging in collective bargaining with a union.<sup>124</sup> The structure of the committees ordered by the Board varied.<sup>125</sup> Not infrequently, the first task of a committee established by an award was to set a new wage scale for the plant; committees also dealt with grievances, disciplinary matters and the like.<sup>126</sup>

At the close of its existence, the War Labor Board had ordered the establishment of 125 plans. As Professors Millis and Montgomery observe, while employers objected to the plans government devised and imposed on them, “they did not object to this form of organization instead of the trade union.”<sup>127</sup> Some evidence of this is provided by the voluntary implementation of such plans during the War by a number of large corporations.<sup>128</sup>

By the end of the War, the company union had become firmly established as an alternative to collective bargaining with self-organized employee associations. Proponents

4. The workers in the exercise of their right to organize shall not use coercive measures of any kind to induce persons to join their organizations, nor to induce employers to bargain or deal therewith.

1. In establishments where the union shop exists the same shall continue and the union standards as to wages, hours of labor, and other conditions of employment shall be maintained.

2. In establishments where union and nonunion men and women now work together, and the employer meets only with employees or representatives engaged in said establishments, the continuance of such condition shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right or discourage the practice of the formation of labor unions, or the joining of the same by the workers in said establishments, as guaranteed in the last paragraph, nor to prevent the War Labor Board from urging, or any umpire from granting, under the machinery herein provided, improvement of their situation in the matter of wages, hours of labor, or other conditions, as shall be found desirable from time to time.

Wehle, *supra* note 115, at 328–29 (citation omitted).

<sup>120</sup> French, *supra* note 98, at 122.

<sup>121</sup> Wehle, *supra* note 115, at 329. Significantly, in some of its awards, the Board also prohibited employers from making a company union the exclusive representative for its employees and requiring membership in it. The Board based its decision on the grounds that this would constitute an interference with the employees' right to organize, which was guaranteed by the principles of the National War Conference Board. See H. MILLIS & R. MONTGOMERY, *supra* note 100, at 833; I. BERNSTEIN, *supra* note 90, at 19–20.

<sup>122</sup> For a description of the work of this body, see French, *supra* note 98, at 17, 23.

<sup>123</sup> Douglas, *supra* note 101, at 92.

<sup>124</sup> *Id.*

<sup>125</sup> For a description of some, see French, *supra* note 98, at 122–24; H. MILLIS & R. MONTGOMERY, *supra* note 100, at 833.

<sup>126</sup> French, *supra* note 98, at 122–23.

<sup>127</sup> H. MILLIS & R. MONTGOMERY, *supra* note 100, at 834.

<sup>128</sup> Among those companies who voluntarily established plans were Proctor and Gamble, Good-year, International Harvester, Yale and Towne. *Id.*

of these management-oriented alternatives offered the company union method of "collective bargaining"<sup>129</sup> as a scheme premised on an integrative rather than an adversarial model of industrial relations. This method emphasized the mutuality of worker and employer economic interests and was directed at establishing an attitude of trust and willing cooperation with management on the part of employees and a sense of identity on their part with their employer.<sup>130</sup> In addition to their usefulness as union avoidance devices, these alternative schemes were advocated as a means by which to improve communication with the work force, thereby increasing morale and, consequently, productivity and product quality, while reducing work-force turnover.<sup>131</sup>

While the details of their structures varied,<sup>132</sup> until the early 1930's the prevailing form assumed by company union schemes involved the use of joint committees on which employee and employer representatives served.<sup>133</sup> Typically, management unilaterally both formulated the terms of the plan and inaugurated it,<sup>134</sup> frequently in response to an organizational effort<sup>135</sup> or in the face of a threatened or actual strike for recognition, and often in combination with some sort of employee welfare program.<sup>136</sup> Although the committees generally consisted of equal numbers of representatives, with equal voting power, their role was limited to consultation rather than decisionmaking. As one proponent of these schemes explained, "few executives" who had done so "would regard"

<sup>129</sup> Until some time after the passage of the Wagner Act, many proponents of company union schemes referred to them as a means of "collective bargaining." For example, at the President's First Conference on Industrial Relations held in October 1919, employers' representatives announced their support of collective bargaining and then declared that the "shop committee" system was a fully satisfactory means for its institution. Carroll French comments that:

the employers' stand was not only inconsistent but the application of the term collective bargaining to shop committees was misleading, and, to the extent that it was deliberate, was highly disingenuous. The shop committee, contrary to the popular idea, does not imply collective bargaining.

The truth is that the trade union and the shop committees are diametrically opposed in principle. They represent two distinct and conflicting systems of industrial relations. Collective bargaining implies national agreements arrived at through conferences between national trade unions and national associations of employers. Underlying it is the right of the employee to be represented by representatives of his own choosing, from whatever source derived. The shop committee, on the other hand, means collective dealing within the local plant, negotiation by means of permanent joint committees made up of an equal number of representatives of the men and the management. The right of the employee to be represented by representatives of his own choosing is restricted by the necessity of choosing his representatives from among his own number, bona fide employees of the plant or firm concerned. The term collective bargaining has always been used to embrace the trade union idea of bargaining. It is a misnomer to use it in connection with the shop committee which in its fundamental principles presents such a contrast to trade unionism.

French, *supra* note 98, at 110.

<sup>130</sup> See R. BENDIX, *supra* note 89, at 283-87; E. BURTON, *supra* note 96, at 60-76, 182-86.

<sup>131</sup> See R. BENDIX, *supra* note 89, at 283-87; E. BURTON, *supra* note 96, at 60-76, 182-86.

<sup>132</sup> For an overview of the structures, see French, *supra* note 98, at 131-37. An extensive description and evaluation criticism of several representation plans is contained in W.J. LAUCK, *POLITICAL AND INDUSTRIAL DEMOCRACY 1776-1926* (1926).

<sup>133</sup> TWENTIETH CENTURY FUND, INC., *supra* note 99, at 69-70.

<sup>134</sup> *E.g.*, *id.* at 67; Douglas, *supra* note 101, at 91.

<sup>135</sup> For a series of examples, see Douglas, *supra* note 101, at 92-93.

<sup>136</sup> For a description of the benefits provided in one well known program, see I. BERNSTEIN, *supra* note 96, at 166-67; M. DERBER, *supra* note 89, at 215-16.

the implementation of an employee representation plan "as in any sense implying that employees should 'participate' in management."<sup>137</sup> Rather,

[t]he committees established by employee representation in most cases are . . . conceived of having essentially *advisory* functions, being called upon to recommend to the management actions which the latter remains free to adopt or reject. . . . Thus, employee representation virtually becomes a working arrangement between the supervisory personnel (management) and the rank and file, whereby the latter give expression to their desires and thus influence the decision of executives.<sup>138</sup>

In his extensive evaluative study of them, Carroll French similarly but more pointedly observed that such plans, "have involved little or no sacrifice in control on the part of management."<sup>139</sup>

Not surprisingly, since one of the objectives behind their inauguration typically was the avoidance of collective bargaining,<sup>140</sup> plans often restricted issues concerning wages, hours, or work rules from the committees' competence.<sup>141</sup> Consequently, the business of many committees was largely concerned with grievance and other personnel matters, housekeeping and safety issues, and consideration of ways to improve product reliability and production methods. Interestingly, some representation schemes delegated to employees the responsibility for undertaking a variety of managerial tasks, including decisions concerning the hiring, promotion and discharge of employees, the solicitation of orders from customers, the determination of production methods and schedules, the

<sup>137</sup> E. BURTON, *supra* note 96, at 72.

<sup>138</sup> *Id.* at 73-74.

<sup>139</sup> French, *supra* note 98, at 109.

<sup>140</sup> As D.R. Kennedy, an industrial relations advisor to several large corporations remarked, "After all what difference does it make whether one plant has a 'shop committee,' a 'works council,' . . . or whatever else it may be called? These different forms are but mechanics for putting into practice . . . 'family factory relations' . . . . They can all be called 'company unions,' and they all mean the one big fundamental point — the *open shop*."

Kennedy, *Collective Bargaining in Practice*, in *INDUS. MGMT.*, Feb. 1920 at 152, *quoted in* Douglas, *supra* note 101, at 93-94 (emphasis in original).

<sup>141</sup> *E.g.*, Lescoghier, "Employee Representation" or "Company Unions," in 3 *HISTORY OF LABOR IN THE UNITED STATES* 336, 338 (J. Commons ed. 1935). For a comprehensive study of a pioneering plan of employee representation, see M. LA DAME, *THE FILENE STORE* (1930). The Filene plan is discussed and criticized in W.J. LAUCK, *supra* note 132.

Of course, because representatives of management sat on most of these committees, they were able to exert control over their actions and deliberations. See *TWENTIETH CENTURY FUND, INC.*, *supra* note 99, at 100-02 ("Scope of Plans"). Although the Twentieth Century Fund study notes some instances where employees successfully negotiated wage and benefit increases through company union machinery (*id.* at 102-03), it further observes that

it should be borne in mind . . . that under very few plans does management have to obtain the consent of the employees before making changes in working conditions, including wages and hours. The reason is that there is no contract or agreement between employees and management which binds the latter to maintain conditions for any fixed period of time. It has, for example, been customary for management to announce wage reductions to the employee representatives in advance, and for the representatives to argue against the reductions and to urge postponement — sometimes with success and sometimes not. But the consent of the representatives is not required because no agreement exists.

*Id.* at 103.

preparation of cost estimates and the like.<sup>142</sup> Further, in some instances, the use of a shop committee was integrated with the presence of a bona fide union and was employed both as a means of improving the union-management relationship and increasing production.<sup>143</sup> Then, as now, management was assisted in the application, extension and further development of these alternative means of group dealing by university-affiliated academics like the human relationists,<sup>144</sup> whose work commenced shortly after the century's turn.

By 1928, company union schemes had come into such widespread use that the Social Science Research Council reported in its survey of industrial relations, "that while unionism was practically the only form of collective dealing two decades ago, since that time there has been rapid spread of other forms of group representation."<sup>145</sup> Indeed, it is correct to say that from roughly 1915 until 1935, there were two labor movements in the United States, one consisting of self-organized employee associations, the other being the management sponsored "employee representation" movement.<sup>146</sup> As the Social Science Research Council put it, in the latter "a real challenge had been offered"<sup>147</sup> to employee self-organization for the purpose of collective bargaining. It was a challenge that had been made with increasing success during the post-World War I period. After 1920, union membership steadily declined, while the number of workers covered by company union plans just as steadily increased.<sup>148</sup> By 1928, the number of employees represented through company plans was nearly forty-five percent of the total of those holding union membership.<sup>149</sup>

Though since 1894, a number of special Presidential and Congressional committees on industrial relations had variously endorsed and urged legislative support for the collective bargaining model, and for the protection of employee self-organizational activities,<sup>150</sup> the first piece of federal legislation actually to embody these recommendations

<sup>142</sup> See Cornick, *Why Labor Should Be Represented in Industrial Management*, 90 THE ANNALS 32, 34 (1920); Merritt, *Employee Representation as a Step Toward Industrial Democracy*, 90 THE ANNALS 39, 41 (1920).

<sup>143</sup> See French, *supra* note 98, at 13; Douglas, *supra* note 101, at 103 n.1.

<sup>144</sup> As Professor Sumner Slichter observed, "Modern personnel methods [which were largely the works of the human relationists] are one of the most ambitious social experiments of the age, because they aim, among other things, to counteract the effect of modern technique upon the mind of the worker, to prevent him from becoming class conscious, and from organizing trade unions." Slichter, *The Current Labor Policies of American Industries*, 43 Q.J. ECON. 393, 432 (1929).

<sup>145</sup> H. Feldman, *A Survey of Research in the Field of Industrial Relations — A Preliminary Report to the Advisory Committee on Industrial Relations of the Social Science Research Council*, 119 (1928), quoted in M. DERBER, *supra* note 89, at 229.

<sup>146</sup> The latter's proponents both clearly conceived of employee representation as a social movement and referred to it as such. See, e.g., E. BURTON, *supra* note 96; NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 99.

<sup>147</sup> Feldman, *supra* note 145, at 119.

<sup>148</sup> In 1919, total trade-union membership consisted of 4,125,200 persons; the number of employees covered by company union plans was 403,765. By 1928, total trade-union membership had fallen to 3,479,800 persons, while the number of workers covered by a company union plan had risen to 1,547,766. See H. MILLIS & R. MONTGOMERY, *supra* note 100, at 837.

<sup>149</sup> *Id.*

<sup>150</sup> See United States Strike Commission, Report on the Chicago Strike of June-July, 1894, LIV, S. Exec. Doc. No. 7, 53d Cong., 3d Sess. (1895); U.S. Industrial Commission, 5 Report of the Industrial Commission on Labor Legislation 8, H.R. Doc. No. 95, 56th Cong., 1st Sess. (1900); U.S.

was the Railway Labor Act of 1926.<sup>151</sup> Not surprisingly, this legislation also provided the vehicle for the first challenge to the institution and use of company unions to be considered by the courts. In its landmark opinion in *Texas and New Orleans Railway v. Brotherhood of Railway Clerks*,<sup>152</sup> the Supreme Court upheld the constitutionality of the Act and affirmed the order of a district court directing the Railway to purge itself of contempt by disestablishing a company union which it had promoted and maintained. The Court concluded that these activities constituted an interference with the employees' statutorily guaranteed rights to self-organization and to designate representatives of their own choosing.<sup>153</sup>

The protections of employee self-organization extended through the terms of the Railway Labor Act prefigured the provisions contained in Section 7(a) of the National Industrial Recovery Act (NIRA), which was passed in June, 1933.<sup>154</sup> In part, Section 7(a) provided that "employees shall have the right to organize and bargain collectively through representatives of their own choosing," free of employer interference, coercion or restraint.<sup>155</sup> This language, coupled with the often cloudy and inconsistent construction and applications<sup>156</sup> given it by the labor boards established in the NIRA's wake<sup>157</sup>

Industrial Commission 844, H.R. Doc. No. 380, 57th Cong., 1st Sess. (1902), U.S. Commission on Industrial Relations (1915).

A succinct summary of the major recommendations of each of these commissions is contained in M. DERBER, *supra* note 89 at 83-91, 118-123. See also Getman & Kohler, *The Common Law, Labor Law and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1423-25 (1983).

<sup>151</sup> Pub. L. No. 257, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151-188 1982).

<sup>152</sup> 281 U.S. 548 (1930).

<sup>153</sup> *Id.* at 570-71.

<sup>154</sup> 48 Stat. 198 (1933).

<sup>155</sup> In pertinent part Section 7(a) provided:

Every code of fair competition, agreement and license approved, prescribed or issued under this title, shall contain the following conditions:

(1) That employees 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 either in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(2) That no employee and no one seeking employment shall be required, as a condition of employment, to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . . .

*Id.* For the history of this Act's passage, see I. BERNSTEIN, *supra* note 90, at 29-39; J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS AND THE LAW* 1-41 (1974).

<sup>156</sup> For a summary and discussion of these, see J. GROSS, *supra* note 155; H. MILLIS & R. MONTGOMERY, *supra* note 100, at 843-50; BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 225-39; TWENTIETH CENTURY FUND, *supra* note 99, at 83-86.

<sup>157</sup> President Roosevelt, without any express statutory authority, created the National Labor Board on August 5, 1933 to resolve the wave of strikes and disputes that followed the passage of the NIRA. (The text of the President's statement is reprinted in DECISIONS OF THE NATIONAL LABOR Bd., 1933-1934 at V (1934).) To quell uncertainties concerning the Board's authority, President Roosevelt issued Executive Order 6511 (reprinted in *id.* at VI) on December 16, 1933, in which he "approved and ratified" all the actions previously taken by the Board. The Order also outlined the Board's "powers and functions." Challenges to the Board's authority continued to be made, however, and on February 1, and 23, 1934, the President issued Executive Orders 6580 and 6612-A (both

produced two, unintended consequences. It prompted a change in the form of company unions, causing most existing representation plans to undergo a metamorphosis that resulted in their resembling trade unions in structure and operation.<sup>158</sup> It also prompted many unorganized employers, now fearful of being compelled to bargain with an independent or so-called "outside" organization — either by governmental order or as a result of a successful, self-organizing effort — to initiate a company union instead.<sup>159</sup>

To make themselves more resistant to challenge on the grounds of restraint or interference, the prototypal post-NIRA version of the company union abandoned the use of the previously popular joint-committee form for the use of an employee-committee arrangement.<sup>160</sup> The latter made provision for the separate meetings of employee representatives, reserving meetings with management — theoretically at least<sup>161</sup> — for occasions when proposals were to be presented or grievances discussed. Like the bodies after which they were patterned, the post-NIRA employee committee style company union had elected officers and representatives, a membership, by-laws, and other attributes of independent unions.<sup>162</sup> Management, however, typically instigated the committee's formation,<sup>163</sup> not infrequently in the wake of an unsuccessful recognitional strike

of which are reprinted in *id.*, at VII–VIII), which purported to give the Board authority to hold representation elections and to report, in the Board's discretion, violations by employers of the terms of Section 7(a) to the Attorney General for possible prosecution. The first National Labor Relations Board (which supplanted the NLB) was subsequently created by a joint resolution of Congress (38 Stat. 1183 (1934)). The creation of the NLB and NLRB is extensively and definitively treated in J. GROSS, *supra* note 155; see also Madden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234 (1960); BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 225–26.

<sup>158</sup> TWENTIETH CENTURY FUND, *supra* note 99, at 70–72; H. MILLIS & R. MONTGOMERY, *supra* note 100 at 855, 860–61.

<sup>159</sup> TWENTIETH CENTURY FUND, *supra* note 99, at 77–79. As Professor Wilcock has pointed out, however, company unions were found "almost exclusively in large firms. Only one in twenty of the manufacturing firms had company unions or a company union along with one or more trade unions . . . but the firms in this group had one-third of all the workers in manufacturing." Wilcock, *supra* note 96, at 290. In large part, he notes, "company unionism was not an alternative in the small firm[s]," which, outside of the garment industry, were rarely targets for organizational efforts. *Id.*

<sup>160</sup> *E.g.*, TWENTIETH CENTURY FUND, *supra* note 99, at 70; H. MILLIS & R. MONTGOMERY, *supra* note 100, at 858–60.

<sup>161</sup> Despite the provisions for employee-only meetings, which would permit much greater freedom of discussion of issues amongst the committees' members, it is reported that representatives of management were typically present at all committees to provide information, render advice and the like. TWENTIETH CENTURY FUND, *supra* note 99, at 70.

<sup>162</sup> *E.g.*, H. MILLIS & R. MONTGOMERY, *supra* note 100, at 860–61.

<sup>163</sup> BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 85–87. For example, of the eighty-five business firms from whom the Twentieth Century Fund received usable questionnaires, fifty-three responded that the representation plans in effect at their establishment had been initiated by management, thirteen replied that their plan had been initiated by the employees, and twelve stated that initiation was upon the joint suggestion of employees and management. The Twentieth Century Fund's study further observes, however, that:

It is doubtful that in 13 of the 78 cases covered by the questionnaire replies, plans were actually initiated by the employees. It is more likely that in these 13 cases management in some direct or indirect way conveyed to the workers the idea of forming a company union, and that the workers acted accordingly. This is undoubtedly true of some of the plans established since the NIRA where management did not wish to deal with an outside union and at the same time did not wish to appear to be

or as part of a "back to work" movement, and often through the assistance of supervisors or "citizen's groups."<sup>164</sup> Normally, management also framed the committee's constitution and by-laws,<sup>165</sup> and it frequently retained the right to disapprove of alterations in either.

Likewise, the committees' proposed undertakings were often subject to managements' review and approval. Although employees usually elected their representatives, candidates were restricted to current company employees, and often minimum age and length of service requirements were imposed. Similarly, representatives' terms were normally of limited duration, which had the effect of constraining the development of expertise among them.<sup>166</sup> Though membership in the typical post-NIRA style company union was optional — thereby complying at least formally with the provisions of Section 7(a) — it not infrequently was automatically accorded after an employer had completed a minimum length of service in the company's employ.<sup>167</sup> Employees, however, were rarely charged dues or initiation fees. Hence, most company unions had no treasury and thus were unable to finance a strike or undertake other activities independently of the employer. Normally, management recompensed employee representatives at their usual rate for time spent on committee business, and supplied the committee with secretarial services, offices, meeting space and the like.<sup>168</sup> Typically, the employee representatives met once a month, normally during working hours, as noted, often with members of management present.<sup>169</sup> Most plans, tellingly, made no provision for general membership meetings.<sup>170</sup>

Although theoretically they were to act as a bargaining representative, few post-NIRA company unions concluded a written agreement that set wages, hours and employment terms.<sup>171</sup> Consequently, most managements remained free to change conditions without obtaining the consent of their employees' representatives. For the majority of company unions then, collective dealings meant discussion, not bargaining an opportunity to make suggestions, not the occasion to participate in the ordering process as an

interfering with their employees' freedom of choice of a collective bargaining agency . . . .

TWENTIETH CENTURY FUND, *supra* note 99, at 98–99.

<sup>164</sup> *E.g.*, Note, *supra* note 97, at 283–84.

<sup>165</sup> *E.g.*, TWENTIETH CENTURY FUND, *supra* note 99, at 99–100. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 99–100. In his testimony before the Senate Committee on Education and Labor in its hearings on S. 2926, the first version of the Wagner Act, noted labor authority and National Mediation Board member, William Leiserson, testified that "As soon as Section 7(a) was adopted, the National Organization of Employers held conferences and worked out plans of employee representation and distributed them throughout the industry, and beginning in July, those plans were imposed on the industry." *To Create a National Labor Relations Board: Hearings on S. 2926 Before the Committee on Education and Labor, 73d Cong., 2d Sess. part I (1934)*, in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 262.

<sup>166</sup> *E.g.*, TWENTIETH CENTURY FUND, *supra* note 99, at 107–08.

<sup>167</sup> H. MILLIS & R. MONTGOMERY, *supra* note 100, at 860–61; BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 108–10.

<sup>168</sup> TWENTIETH CENTURY FUND, *supra* note 99, at 110–11; BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 114–19.

<sup>169</sup> TWENTIETH CENTURY FUND, *supra* note 99, at 108–10.

<sup>170</sup> *Id.* at 110.

<sup>171</sup> *Id.* at 103, 329–31; BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, BULLETIN No. 634, *supra* note 100, at 154–56.



autonomous entity with independent power. Like their pre-NIRA cousins, much of the work of the employee-committee style of company unionism was devoted to grievance settlement and other personnel matters.

In terms of the number of employees covered, the post-NIRA company union movement continued to present highly successful alternatives to collective bargaining: by 1935, 2.5 million workers came under a company union plan, a number equal to about sixty percent of workers belonging to self-organized unions.<sup>172</sup> Significantly, of the representation plans in existence in 1935, three-fifths had been organized since 1933;<sup>173</sup> such plans also were growing at a rate faster than the independent unions.<sup>174</sup>

Though anemic in comparison to the degree and scope of worker participation in management decisionmaking afforded through collective bargaining, for many employees company union plans did act to provide them with at least some voice in management decisionmaking where they otherwise may have had none. As one commentator has noted, however, while company unions often had "a positive effect on the improvement of labor relations" and, except where used solely as an anti-union expedient, were inaugurated "for the most part by 'relatively good employers,' the company union movement without doubt severely limited the forward advance of the labor movement by establishing a substitute" for self-organization and private ordering through collective bargaining in large portions of industry.<sup>175</sup>

The framers of the National Labor Relations Act (NLRA) clearly agreed with the foregoing assessment of the effects of company union schemes upon self-organization. In introducing, in February, 1934, the first version<sup>176</sup> of what would subsequently become the NLRA, Senator Wagner observed that Congress, through Section 7(a) of the Recovery Act, "attempted to open the avenues to collective bargaining by restating the right of employees to act through representatives of their own choosing, free from the influence of employers."<sup>177</sup> The provisions of Section 7(a), however, proved deficient because "they did not outlaw the specific practices by which some employers set up insuperable obstacles to genuine collective bargaining."<sup>178</sup>

The purpose of his bill, declared Wagner, was to "establish genuine collective bargaining," which the bill was "designed to do through clarify[ing] and fortify[ing] the provisions of" the NIRA's Section 7(a).<sup>179</sup> "The very first step toward genuine collective bargaining," Wagner insisted, "is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employ-

<sup>172</sup> TWENTIETH CENTURY FUND, *supra* note 99, at 77-81.

<sup>173</sup> *Id.*; H. MILLIS & R. MONTGOMERY, *supra* note 100, at 840-42; Wilcock, *supra* note 96, at 288.

<sup>174</sup> Wilcock, *supra* note 96, at 288.

<sup>175</sup> *Id.* at 295.

<sup>176</sup> S. 2926, 73d Cong., 1st Sess. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1. (Because it is the most conveniently accessible source, all references to the legislative history of the NLRA will be to the separately bound, two-volume compilation just cited. It will hereinafter be referred to as L.H.) As S. 2926, the 1934 version of the Wagner bill went through two printings and a full set of hearings in the Senate before being passed over on June 13, 1934. Wagner redrafted the bill and re-introduced it in the 74th Congress as S. 1958 on February 15, 1935. For a concise history of the bill's progress, see I. BERNSTEIN, *supra* note 90, at 57-128.

<sup>177</sup> 1 L.H. at 15.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

ment."<sup>180</sup> The NIRA's "promise of free and unhampered development of real employee organizations, and their complete recognition," Wagner stated, "should be guaranteed by the enactment of the new legislation which is being proposed today."<sup>181</sup>

As its legislative history reflects, throughout the hearings and debates over its terms, the Act's basic policy, as conceived of by its framers, opponents and sympathizers, was to settle the ideological contest between competing models of industrial relations that had been conducted since the century's turn. Thus, for example, the noted industrial relations scholar, Sumner Slichter, in hearings on the bill held before the Senate's Committee on Education and Labor, testified that the "basic policy" of the proposed Act, "if I understand it correctly, is to prevent the growth of employer-dominated unions."<sup>182</sup> Similarly, industrialist and National Labor Board member Henry Dennison, whose firm was celebrated for its early, broad and innovative implementation of employee representation methods,<sup>183</sup> urged the Committee to strike those portions of Wagner's bill that foreshadowed the language currently contained in Section 8(a)(2),<sup>184</sup> because they would have the effect of instituting a "single form of unionism."<sup>185</sup> "Employee representation," Dennison stated, "is an essential supplementary and a necessary competing type of

<sup>180</sup> *Id.* at 16.

<sup>181</sup> *Id.* at 17.

<sup>182</sup> *Id.* at 89. Slichter puckishly added that:

I have been trying to find some of these employer-dominated unions, and I have talked with many employees, and thus far I have been unable to discover a single employer who admits that he has an employer-dominated union. In fact, every employer with whom I have talked has been outspoken in expressing the principle — the belief in the principle that employee organizations should be entirely independent of employer control. So I should be greatly surprised were any employer to appear and oppose this bill, except in matters of detail.

*Id.*

<sup>183</sup> The Dennison Company's representation plan was initiated in 1919. Among its features was an industrial partnership plan, which permitted employees to share in profits through a special class of stock (non-voting). It also made provision for housing, insurance and unemployment funds. The plan specifically prohibited discrimination on the basis of an employee's union affiliation and provided that collective bargaining agreements in force were not to be superseded by the representation plan. The provisions of the Dennison Plan are extensively treated in W.J. LAUCK, *supra* note 132. (In his testimony before the Committee, Dennison admitted that his company's plan "is a company union . . ." 1 L.H. at 436).

<sup>184</sup> The first version of NLRA, as noted, was introduced at S. 2926 in the 73d Congress on February 28, 1934. In the first Senate print of the bill (reproduced in 1 L.H. at 1-14), the precursors of current Section 8(a)(2) were Section 5(3) and 5(4) which provided that,

It shall be an unfair labor practice for an employer, or anyone acting in his interest, directly or indirectly —

- (3) To initiate, participate in, supervise, or influence the formation, constitution, bylaws, other governing rules, operations, policies, or elections of any labor organization.
- (4) To contribute financial or other material support to any labor organization, by compensating anyone for services performed in behalf of any labor organization, or by any other means whatsoever.

1 L.H. at 3.

A "labor organization" was defined in the first print of S. 2926 in Section 3(5) of the bill as "any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages or hours of employment." *Id.* at 2.

<sup>185</sup> *Id.* at 436.

unionism,"<sup>186</sup> through which "a sound system of joint and mutual participation in management has developed or is developing."<sup>187</sup> Wagner's bill, Dennison warned, would cause these schemes "for a wholesome mutual business relationship between management and workers" to be "dug up with the tares" instead of permitting them "to be cultivated as seeding ground or laboratories from which we may learn."<sup>188</sup> Out of the "slowly freeing competition and the gradual comparison of the two forms," stated Dennison, "we shall be able to develop modifications of each" that will permit the "realization . . . of the truth that any business organization that can knit itself into a single organism will prove superior as an institution of broad social value, to one which must exist in two somewhat stiffly cooperating and sometimes actively conflicting segments."<sup>189</sup> A bill that would "cramp all systematic contact . . . as this bill cramps it," Dennison admonished, ought "to be considered most carefully" before being enacted.<sup>190</sup>

With its purpose so identified and recognized, it is hardly surprising that much of the testimony and the debate about the proposed Act's terms concerned the uses and legitimacy of the various forms of company union schemes. Predictably, in their testimony, employer representatives objected to the provisions and goals of the bill, largely along the lines stated by Henry Dennison.<sup>191</sup> Many also contended that the adversarial model on which collective bargaining rests was archaic and had been historically superseded by the integrative model that underpinned its alternatives.<sup>192</sup> It was further argued that by "discriminating" against forms of group dealing other than collective bargaining, the bill would restrict employees' freedom "to consider" and "choose" alternative forms of representation.<sup>193</sup>

Throughout the hearings and debates Wagner consistently repeated that the protection of "the genuine freedom of self organization" was a principle basic to the bill.<sup>194</sup> Thus, he several times stated in explaining the provisions presently contained in Section 8(a)(2) that "the question" of whether a union is company-dominated, "is entirely one of fact, and turns upon whether or not the employee organization is entirely the agency of the workers . . . . The organization itself should be independent of the employer-

<sup>186</sup> *Id.* at 435.

<sup>187</sup> *Id.* at 437.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 438.

<sup>190</sup> *Id.* at 437.

<sup>191</sup> For a succinct summary of the views of the bill's supporters and opponents, see I. BERNSTEIN, *supra* note 90, at 68-71 (1934 version, S. 2926), 102-11 (1935 version, S. 1958). For a representative selection of objections to the bill, especially concerning its impact on employee representation plans, see, e.g., 1 L.H. at 374-411 (J. Emery, Nat'l Ass'n Mfr.); *id.* at 950-52 (W. Elliott, Int'l Harvester); *id.* at 1056-58 (W.G. Merritt); *id.* at 601-05 (C. Cragmile, Belden Mfg. Co.); *id.* at 563-67 (R. Foster, Am. Laundry Mach. Co.); *id.* at 637-39 (J. Galvin, Sheffield Brick Title Co.); *id.* at 639-44 (W. Donham, Harv. Bus. School); *id.* at 818-19 (J. Larkin, Bethlehem Steel Co.); *id.* at 996-97 (G. Young, Chicago C. of C.); 2 L.H. at 876-78 (H. Ellard, Inst. of Am. Meat Packers); *id.* at 1895-97 (J. Donnelly, Ill. Mfr. Ass'n).

<sup>192</sup> *E.g.*, 1 L.H. at 758, 763-64 (A. Young, U.S. Steel); *id.* at 601 (C. Cragmile, Belden Mfg. Co.); 2 L.H. at 1885 (H. Ellard, Inst. of Am. Meat Packers); *id.* at 1767-69 (C. Trier, Acme Steel Co.); *id.* at 1997 (Memorandum on the Proposed Nat'l Lab. Rel. Act by the Auto. Mfrs. Ass'n).

<sup>193</sup> *E.g.*, 1 L.H. at 952-54 (W. Elliott, Int'l Harvester); *id.* at 565 (R. Foster, Am. Laundry Mach. Co.); *id.* at 1058 (W.G. Merritt); 2 L.H. at 1845 (J. Westlake, Chairman Employee Rep. Plan, Jones & Laughlin Steel Co.); *id.* at 1851 (H. Harriman, U.S. C. of C.); *id.* at 1910-11 (C. Cragmile, Belden Mfg. Co.); *id.* at 2349-51 (Sen. M. Tydings, Mo.).

<sup>194</sup> *E.g.*, 1 L.H. at 1416; 2 L.H. at 2322; 2 L.H. at 2387; see also, e.g., 1 L.H. at 21, 39, 1414.

employee relationship."<sup>195</sup> Wagner further repeatedly explained in hearings and debate that the prohibitions presently contained in Section 8(a)(2) do

not even outlaw the company union, if by that term is meant solely the free and independent organization of workers who desire to confine their cooperative actions to a single company . . . . But to argue that freedom of organization for the worker must embrace the right to select a form of organization that is not free is a contradiction in terms.<sup>196</sup>

Throughout its consideration of the Act's terms then, Congress was confronted with a clear choice between two distinctly different models of group dealing. In enacting the NLRA, Congress endorsed one, and thereby adopted a scheme for the private ordering of the employment relationship that is based on collective bargaining through self-organized and autonomous employee associations.

The significance of this choice bears emphasis. Inextricably bound-up with it was a fundamental choice about the extent to which there would be direct state control over and intervention in one of the most basic of modern social relationships, the employment relationship.<sup>197</sup> At the time of the Act's passage, circumstances forced Congress to make a difficult choice that it had long postponed. The then existing legal model for the ordering of the employment relationship was one that the common law courts had developed in the latter part of the nineteenth century, and which was founded on and justified by formalized notions of contractual freedom.<sup>198</sup> Because, as noted, this model gave employers virtually unilateral control over the ordering of the relationship, in effect transferring lawmaking authority to them alone, this regime was regarded by large segments of the population as unacceptable. The choice lay between two paths. Congress could adopt a scheme of the type Western European nations were then instituting that entailed the erection of a comprehensive statutory background against which the relationship would be ordered;<sup>199</sup> alternatively it could adopt a voluntary scheme of private ordering through collective bargaining. Accurately understood then, the choice Congress made far exceeded simply a question about appropriate models for group relations in the workplace. Also involved were more fundamental questions about the type of society the United States would be, *e.g.*, the amount of involvement government should have in establishing and adjusting the order of the employment relationship, the extent of associational rights workers enjoy, and the degree to which they — and employers — would be enabled directly to participate in framing the law that most directly affects their daily existence. The key to this legislative scheme is employee free choice: the Act does not, of course, mandate that employees organize and bargain. This would be

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<sup>195</sup> *E.g.*, 1 L.H. at 1418; 2 L.H. at 2489.

<sup>196</sup> *E.g.*, 1 L.H. at 667, 1313; 2 L.H. at 2489; *see also, e.g.*, 1 L.H. at 23, 24, 39, 380–81, 392–93, 1416; 2 L.H. at 2332–34, 2374–77.

<sup>197</sup> The relationship, of course, has been a basic one for much longer than the last century; in his COMMENTARIES, for example, Blackstone, writing in 1776, states that master and servant, parent and child, and husband and wife are "[t]he three great relations in private life." 1 W. BLACKSTONE, COMMENTARIES 410 (1979).

<sup>198</sup> See Getman & Kohler, *supra* note 150.

<sup>199</sup> Interestingly, the shift in the way the law conceived of employment from being predominantly a status-based relationship to one founded primarily on contract occurred virtually simultaneously in England, the United States and Western Europe. Similarly, each at roughly the same time was compelled to make the choice that faced the United States Congress in 1935. *See generally id.*

contrary to its basic principles. Rather, the foundational aim of the Wagner Act's provisions has been the removal of impediments to employee efforts to form autonomous associations if they so choose, through which they can engage in the ordering process. Hence, of course, the purpose for the prohibitions contained in Section 8(a)(2). Like all legislative schemes, however, the effectuation of the Wagner Act's purposes depends ultimately upon the judiciary's compliance with the framer's intent in construing and applying the statute's terms. It is appropriate here to consider this matter.

### III. PARTICIPATORY SCHEMES AND STATUTORY APPLICATION

Whether the provisions of Section 8(a)(2) prohibit management from the unilateral implementation and maintenance of various integrative participatory devices raises a series of issues. The first is whether joint worker-management bodies of various types, semi-autonomous teams, and similar devices constitute labor organizations for the Act's purposes. Further requiring necessary resolution is whether the members of structures like autonomous work teams hold supervisory or managerial status under the Act, and thereby are excluded from its protections of self-organization. Lastly, it must be determined whether such schemes are dominated or supported by the employer, and hence unlawful. All of these questions, of course, must be analyzed and resolved in light of the Act's central purposes.

The prohibitions contained in Section 8(a)(2), of course, are coterminous with the statutory definition of a "labor organization." Thus, this definition is the jewel on which much of the statutory scheme turns. In the form in which it was eventually enacted, for the purposes of Section 8(a)(2), a labor organization is defined as

any organization of any kind, or any agency, or employee representation committee or plan, 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.<sup>200</sup>

Some idea of the breadth of coverage that was intended by this formulation can be gleaned from a Senate report that compared an earlier version<sup>201</sup> of the definition with that virtually identical<sup>202</sup> to the definition Congress ultimately adopted. The memorandum explained that as previously formulated, "the term 'labor organization' was strictly limited to an organization which existed for the purpose of dealing with employers concerning wages, hours, or working conditions." In the form that eventually would be enacted, however, the term's definition had been augmented

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<sup>200</sup> 29 U.S.C. § 152(5) (1976 & Supp. IV 1980).

<sup>201</sup> In the second printing of S. 2926 in the 73d Congress, the term "labor organization" was defined as "any organization or any agency or employee representation committee, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning hours of labor, wages or working conditions." 1 L.H. at 1086. This is the version against which comparison was made in the Senate report. This report, entitled *Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) Senate Committee Print*, accompanied the first print of S. 1958 and is reprinted in 1 L.H. at 1319.

<sup>202</sup> The definition of "labor organization" as set forth in the first print of S. 1958 is the same as that now in the Act, save for the phrase "conditions of work," which was added at the suggestion of Labor Secretary, Frances Perkins.

to include an organization that deals with employers concerning grievances as well . . . . The importance of this is that an employer is now not permitted to organize a shop committee to present grievances on questions of safety and other minor matters even though he does not use such shop committee as a subterfuge for collective bargaining on the essential points of wages and hours. In other words, the present draft is intended to outlaw certain types of personal [sic] administration commonly used by employers and not hitherto felt to be obnoxious.<sup>203</sup>

Also included with this Senate report were the comments of noted industrial relations scholar and then National Mediation Board Chairman William Leiserson, who had provided technical assistance to Senator Wagner's office in the bill's drafting. In his explanation of the ways in which the term labor organization had been broadened from its previous formulation, Leiserson observed that "for obvious reasons" the word "plan" had been included in the expanded definition.

It has been argued frequently by employers as well as by protagonists of the bill . . . that an employee representation plan or committee arrangement is not a labor organization or a union but simply a method of contact between employers and employees.

. . . [I]t is clear that unless these plans, etc., are included in the definition [of labor organization], whether they merely "deal" or "adjust," or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act. The act would thus be entirely nullified.<sup>204</sup>

"For like reasons," Leiserson continued, the definition had been expanded to incorporate the terms

"grievances" and "labor disputes" in addition to the traditional wages, hours, and working conditions. In most cases employee representation plans or committees are nothing but agencies for presenting and discussing grievances or other minor matters, and do not address themselves at all to the fundamental issues of collective bargaining agreements as to hours, wages, and basic working conditions. To exclude the term "grievances" particularly would exclude from the provisions of this act the vast field of employer interference with self-organization by way of such plans or committees.<sup>205</sup>

Consistent with the framers' intent, the Supreme Court guaranteed the broad coverage of the statutory definition of the term "labor organization" in the leading case of *NLRB v. Cabot Carbon Co.*,<sup>206</sup> which was decided in 1959. In *Cabot Carbon*, the employer had established joint employee-management committees at several of its plants. These committees met regularly to discuss production matters, employee grievances, working conditions and related issues. The committees were not organized formally; they collected no dues, had no officers and were not recognized by the employer as the bargaining agent for its employees. Finding that they never had attempted to negotiate a

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<sup>203</sup> *Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) Senate Committee Print*, in 1 L.H. at 1320.

<sup>204</sup> *Id.* at 1347.

<sup>205</sup> *Id.*

<sup>206</sup> 360 U.S. 203 (1959).

collective agreement or otherwise bargain with the employer, but served only as a forum for discussion, the Fifth Circuit<sup>207</sup> in disagreement with the Board,<sup>208</sup> concluded that the committees were not "dealing with" the employer as the Act used the term, and therefore did not constitute labor organizations under the terms of the statute. Accordingly, the court of appeals held that the employer had not violated Section 8(a)(2) by establishing the committees. On its review of the case, the Supreme Court reversed this holding. It was not necessary, the Court ruled, that an employee committee bargain with an employer to be "dealing with" it under the terms of the Act; merely making recommendations concerning any of the subjects enumerated in the statutory definition was sufficient.<sup>209</sup> "Certainly nothing," observed the Court, in either the statutory definition of labor organization or in its legislative history, "indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'"<sup>210</sup> The Court also rejected the Company's argument that the committees were not "dealing with" the employer for the Act's purposes because the committees' "proposals and requests amounted only to recommendations" to management.<sup>211</sup> The Court observed that "this is true of all such 'dealing,' whether with an independent or a company-dominated 'labor organization.' The principal distinction lies in the unfettered power of the former to insist upon its requests."<sup>212</sup> Consequently, the Court held that the committees did constitute labor organizations as defined in the Act. Other courts have concluded that employee committees were "dealing with" the employer, and thus constituted labor organizations, where the parties simply discussed<sup>213</sup> or exchanged information<sup>214</sup> concerning the topics the definition lists.

Under the terms of this definition, the framers' demonstrated intent, and the broad reading it has been given by the Court, joint worker-management committees and like participatory devices plainly appear to constitute labor organizations for the purpose of the Act. Employees, of course, participate on these bodies, which exist for the express purpose of involving workers with management in making determinations concerning, inter alia, working conditions and employee grievances. Indeed, as seen, it was against precisely this sort of structure that the prohibitions of Section 8(a)(2) had been directed.

Several recent Board and circuit court decisions, however, have attempted to restrict the scope that the statutory definition of a labor organization encompasses and hence, in terms of predicting a legal result, make this conclusion less certain. Perhaps the most extreme of such cases is the Sixth Circuit's recent opinion in *NLRB v. Scott & Fetzer Co.*,<sup>215</sup> which in essence attempts to overrule *Cabot Carbon* by limiting that decision to its facts. In *Scott & Fetzer*, the employer, in the wake of two unsuccessful union organizing

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<sup>207</sup> The court of appeals' opinion is reported at 256 F.2d 281 (5th Cir. 1958).

<sup>208</sup> 117 NLRB 1633 (1957).

<sup>209</sup> 360 U.S. at 213.

<sup>210</sup> *Id.* at 211.

<sup>211</sup> *Id.* at 214.

<sup>212</sup> *Id.*

<sup>213</sup> *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971).

<sup>214</sup> *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

<sup>215</sup> 691 F.2d 288 (6th Cir. 1982). The reach of *Scott & Fetzer* is unclear. In *Lawson Co. v. NLRB*, 753 F.2d 471 (6th Cir. 1985), a three-judge panel, comprised of different members than those which had decided *Scott & Fetzer*, distinguished the latter case and upheld the Board's finding that a management-sponsored grievance committee comprised of sales clerks constituted an unlawfully dominated labor organization.

efforts formulated and established an "In Plant Representation Committee" plan. The committee instituted by the plan consisted of eight employee representatives and various high ranking management officials, such as the company's personnel manager and its vice-president of operations. Employee representatives, whose term the plan limited to three months, were chosen by secret ballots in elections supervised by management and held on company property during working hours. The committee met monthly to discuss and make suggestions about employee complaints and grievances, working conditions and like issues. Upon its review, the court concluded, in disagreement with the Board,<sup>216</sup> that the committee was not a labor organization under the terms of the Act. Judge Engel, writing for the majority, acknowledged that the *Cabot Carbon* opinion specifically had concluded that the term "dealing" encompassed the making of recommendations by an employee committee concerning the topics enumerated in the statutory definition of a labor organization.<sup>217</sup> Left unresolved by the Supreme Court's opinion, he stated, was "how much interaction" between an employee committee and management "is necessary before dealing is found . . ."<sup>218</sup> Noting that "*Cabot Carbon* cautions against a restrictive reading of the term dealing," Judge Engel opined that the facts of that case "involved a more active, ongoing association between management and employees, which the term dealing connotes, than is present here."<sup>219</sup> In its attempt to further differentiate the two, the court relied upon the following factors in determining that the Scott & Fetzer employee committee did not constitute a labor organization: the short terms allowed representatives which resulted in the committee members speaking "to management on an individual rather than representative basis"; the fact that no employer anti-union animus has been found; and that "neither the employees, nor the Committee, nor, so far as we can ascertain, the union" which had attempted to organize the company's employees considered the representation committee to have "even remotely resembled a labor organization in the ordinary sense of the term."<sup>220</sup> The committee involved in the case before it, Judge Engel wrote for the court, had been instituted as part of the employer's plan to determine "employee attitudes regarding working conditions and other problems in an accurate and effective way, for the company's self-enlightenment, rather than a method by which to pursue a course of dealings."<sup>221</sup> Although the court admitted that the "difference between communication of ideas and a course of dealings at times is seemingly indistinct," it concluded that the distinction was a "vital" one in the instant case.<sup>222</sup>

Interestingly, the intellectual underpinning for the *Scott & Fetzer* opinion seems to have been supplied by Judge Wisdom's dissenting opinion in *NLRB v. Walton Manufacturing Co.*,<sup>223</sup> which the court quotes at length. In part, this excerpt reads:

To my mind an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one,

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<sup>216</sup> The Board's decision is reported at 249 NLRB 346 (1980).

<sup>217</sup> 691 F.2d at 291-92.

<sup>218</sup> *Id.* at 292.

<sup>219</sup> *Id.* at 294.

<sup>220</sup> *Id.* at 294-95.

<sup>221</sup> *Id.* at 294.

<sup>222</sup> *Id.*

<sup>223</sup> 289 F.2d 177 (5th Cir. 1961).



preventing the development of a decent, honest constructive relationship between management and labor.<sup>224</sup>

Evidently, it is the sentiment expressed here, rather than an application of the language of the statute and precedent that forms the rationale for the *Scott & Fetzer* opinion. As Judge Engel revealingly states in discussing some of the Sixth Circuit's prior decisions involving Section 8(a)(2), "our court" has joined "a minority of circuits indicating that the adversarial model of labor relations is an anachronism."<sup>225</sup>

Like the joint worker-employer committee, semi-autonomous work teams and similar bodies also clearly appear to constitute labor organizations for the Act's purposes under the *Cabot Carbon* doctrine. Again, however, recent statutory applications suggest that objections to this conclusion might be raised successfully. The first uncertainty concerns whether, under the terms of the Act, teams are engaged in "dealing with" their employers. As explained above, the organization of a workplace into structures like semi-autonomous teams involves the use of an advanced form of job enrichment in which management delegates certain decisionmaking responsibility to the team. Often, this delegation includes the authority to make determinations concerning the matters enumerated in the statutory definition of a labor organization. In those instances in which a team or similar institution has such authority and exercises it without consultation with management, it might be contended that there is no dealing between the team and management, and consequently, that the team is not a labor organization for the Act's purposes. Even a cursory examination of this argument reveals its fundamental flaws. The team is itself, of course, a scheme of labor relations. When implemented unilaterally

<sup>224</sup> *Id.* at 182, quoted in 691 F.2d at 292.

<sup>225</sup> The court's statement in *Scott & Fetzer* can profitably be compared with the following passage from *United States v. Wierton Steel Co.*, 10 F. Supp. 55, 86 (D.C. Del. 1935):

Production in quantity and quality with consequent wages, salaries and dividends, depends upon a sympathetic cooperation of management and workmen. A relation acceptable and satisfactory to both workmen and management is an essential feature of the enterprise. It is said this relation involves the problem of the economic balance of the power of Labor against the power of Capital. The theory of a balance of power or of balancing opposing powers is based upon the assumption of an inevitable and necessary diversity of interest. This is the traditional Old World theory. It is not the Twentieth Century American theory of that relation as dependent upon mutual interest, understanding and good will.

The *Wierton* case involved a petition brought by the government to enjoin defendant from violating the Code of Fair Competition for the Iron Industry that had been promulgated pursuant to the NIRA and incorporated within it (as it was required to under the terms of that statute) the provisions of Section 7(a) of the NIRA. In its petition, the government averred that the company union implemented by *Wierton* was dominated by the employer and that it had been adopted "as a means of circumventing the rights of its employees to bargain collectively . . . and to choose their own representatives for that purpose . . ." 10 F. Supp. at 57. The court, in an opinion that well exemplifies the antipathy held by much of the judiciary towards organized labor, both denied the petition for an injunction and held that the terms of Section 7(a) of the NIRA were unconstitutional as applied to *Wierton* because the company, by its manufacturing operations, was not engaged in interstate commerce.

Significantly, the above-excerpted passage from the *Wierton* case was quoted approvingly by the National Lawyers Committee of the American Liberty League in its REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935). The Committee, composed of fifty-eight distinguished lawyers, concluded that the NLRA would illegally interfere with individual employees' freedom of contract and was "unconstitutional and that it constitutes a complete departure from our constitutional and traditional theories of government." *Id.* at xi.

by management, it constitutes a means of group dealing that is both an alternative to, and which rests on premises that contradict, the collective bargaining model endorsed by Congress through the Act's terms. The team is an organization in which employees participate and through which, on a group basis, the terms of the employment relationship are ordered, grievances settled, working conditions determined, and the directions of management transmitted. Further indicative of the team's status is the fact that the set of choices about which it can make decisions both are established by, and once made, are reviewable by management. As one commentator has observed, "[i]f a team's decision is final in practice, its finality is not attributable to the team's authority, but to management's ultimate authority to let the decision stand."<sup>226</sup> A team's decisions then constitute no more than a series of recommendations to management; moreover, like the committees at issue in *Cabot Carbon*, a team has no power "to insist on its requests." In short, the team is a management sponsored and organized body that provides a forum for the employer to communicate systematically and on a group basis with its employees about various aspects of their relationship, including wages, conditions, and other topics enumerated in the statute. As such, it is precisely the type of body that the statute, its legislative history and its construction by the Court in *Cabot Carbon* all indicate falls within the definition of a labor organization. In this connection, it is also worth recalling, as has been noted, that before 1920 some representation plans performed functions absolutely identical to those of the semi-autonomous team.<sup>227</sup>

In its only consideration of the issue to date, however, the Board concluded that semi-autonomous teams which, inter alia, made job assignments and prepared work schedules for individual team members, and which met with management officials to discuss grievances and to make recommendations concerning employees' work responsibilities were not labor organizations.<sup>228</sup> Incredibly, the Board found that the teams were merely work crews that had been established "for reasons quite apart from labor relations,"<sup>229</sup> even though it also found that "team meetings served as occasions for management to communicate directly with its employees, and vice versa."<sup>230</sup> The Board appears to have rested its conclusion on two grounds: that the teams had not been established during a union organizational drive or in response to "unrest in the bargaining unit," and that the team's organization did not resemble that of the typical union. Despite the team meetings, the Board also concluded that because the work tasks had been "flatly delegated" to the employees, there existed no dealing between the teams and management. It seems unlikely, however, that this decision represents the Board's last thinking about the status of semi-autonomous work teams as labor organizations. The Board's decision is no more than a pro forma adoption of the opinion of its administrative law judge, which, in turn, fails to cite even one case in its analysis of the issue or to analyze the premises on which the scheme rested.

A further uncertainty about the conclusion that semi-autonomous work teams constitute labor organizations concerns the Act's restriction of the right to organize and bargain collectively solely to non-supervisory employees. Like the requirement that the

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<sup>226</sup> Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?* 49 IND. L.J. 516, 527 (1974).

<sup>227</sup> See text *supra* at note 142.

<sup>228</sup> *General Foods Corp.*, 231 NLRB 1232 (1977).

<sup>229</sup> *Id.* at 1234.

<sup>230</sup> *Id.* at 1235.

union be an organization independent of management, the Act's limitation of bargaining rights is designed to guarantee the faithfulness of agents to their principal: Congress feared that were supervisors permitted to join labor organizations that represented the rank and file employee, there was a danger that they would become accountable to those they were to oversee and direct in the employer's interest. In the words of the Supreme Court, this restriction prevents supervisors from being placed "in the position of serving two masters with opposed interests."<sup>231</sup> This limitation further mirrors the Act's premises regarding the inherent conflict between the interests of workers and those who employ them.

As defined by Section 2(11) of the Act,<sup>232</sup> a supervisor is

any individual having authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Because the members of semi-autonomous work teams and like bodies are often delegated responsibility to direct production, decide who shall be hired and discharged, impose discipline, and determine the rates or compensation for fellow team members, it may be possible that all will be found to hold supervisory status. This issue, too, has yet to be authoritatively determined, but several considerations militate against such a conclusion. Firstly, the supervisory authority delegated team members cannot be exercised individually, but only jointly, and on the basis of consensus; none exercises discretion in these matters autonomously. Hence, the group decisionmaking engaged in by the team does not appear to constitute the use of independent judgment contemplated in Section 2(11). Similarly, because of the constraints plans typically place on the range of choices available to their discretion, the decisions made by a team may for the most part be regarded as "merely routine" in nature. Additionally, a team has no supervisees. Theoretically, at least, all its members stand in positions of equal authority and power; no one singly responsibly directs the others in their work or otherwise holds a station ordinate to his fellows. None exercises "independent judgment in overseeing other employees in the interest of the employer."<sup>233</sup> Thus, by organizing, individual team members would no more be placed in the position of serving "two masters" than any other rank and file employee whom the law requires to serve his employer loyally.<sup>234</sup> Moreover, management's arrangement of workers into teams does not alter the fundamental conflicts of interest that inhere in the employment relationship and thus does not result in employee interests being basically realigned with management's. Adoption of the position that team members are supervisors would lead to other anomalies as well. It would permit an employer to choose to remove its entire workforce from the Act's coverage by the simple expedient of delegating to them a modicum of authority which only can be jointly exercised. Thus, those workers who perform essentially the same

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<sup>231</sup> *Beasley v. Food Fair*, 416 U.S. 653, 662 (1974). *See also* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

<sup>232</sup> 29 U.S.C. § 152(11) (1976).

<sup>233</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980).

<sup>234</sup> *See, e.g., NLRB v. Local 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953).

tasks as employees in a conventionally structured workplace would be excluded from rights they otherwise would enjoy. In short, employers would in effect be granted the power to determine whether their employees would enjoy the associational rights and protections extended by the Act; the entire purpose of the statute would thereby be undermined.

A closely related and similarly unsettled issue is whether a team's members might be found to be managerial employees, which are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."<sup>235</sup> The implied managerial exclusion,<sup>236</sup> not surprisingly, is founded on the same rationale as that supporting the exclusion of supervisory personnel: "that an employer is entitled to the undivided loyalty of its representatives."<sup>237</sup> In its opinion in *NLRB v. Yeshiva University*,<sup>238</sup> the Court held that the University's full-time faculty members, because of the degree of control that they exercised as a group over academic and hiring matters, were managerial employees and hence without the Act's protections. It might be argued that in their decisionmaking, team members are analogous to a faculty, and hence should similarly be considered to be managerial employees.<sup>239</sup> Such a conclusion would be fundamentally unsound. As an initial matter, a "managerial employee" is conceived of as an employee "'much higher in the managerial structure' than those [like supervisors] explicitly mentioned by Congress, which regarded . . . [managerial employees] as so clearly outside the Act that no specific exclusion was thought necessary."<sup>240</sup> Though organization of a workplace into teams often does away with some levels of supervision it, as seen, hardly results in team members becoming the equivalent of high-level management. As one commentator has observed, "most employees in the new economic structures do not fill such fundamental managerial roles. These employees — professional, white-collar, and blue-collar — do not usually act as managements' representatives and do not formulate policy for subordinates to implement."<sup>241</sup> Similarly, the degree of authority team members hold is not of the amount that would align them with management so that by their unionization, they would be forced to divide their loyalties.<sup>242</sup> Unlike the true managerial employee, the discretion that members of a team may

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<sup>235</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The *Bell Aerospace* Court also indicated that "the question of whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." *Id.* at 290 n.19.

<sup>236</sup> The managerial employee exception is a gloss on the Act's terms. For a history of its development, see Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. Rev. 694, 696-702 (1981).

<sup>237</sup> *Yeshiva Univ.*, 444 U.S. at 682.

<sup>238</sup> 444 U.S. 672 (1980).

<sup>239</sup> The *Yeshiva* Court held that the faculty members of the employer constituted managerial employees because they participated in determining jointly the school's curriculum, grading system, admission standards, academic and course schedule, and because the "overwhelming majority" of their recommendations concerning hiring, tenure, promotion and termination issues are implemented, and that they are not employees under the Act. In its discussion, however, the Court noted that "the authority structure of a university does not neatly fit within the statutory scheme" of the Act, which was designed to "accommodate the type of management-employee relations that prevail in . . . private industry." *Id.* at 680.

<sup>240</sup> *Id.* at 682 (quoting *Bell Aerospace Co.*, 416 U.S. at 288).

<sup>241</sup> Note, *supra* note 236, at 720.

<sup>242</sup> See discussion in text *supra* at notes 232-34.

exercise, "must conform to an employer's established policy."<sup>243</sup> Nor have team members, like managers or supervisors "abandoned the 'collective security' of the rank and file voluntarily"<sup>244</sup> in return for the greater opportunities afforded to members of management. The conflicts of interest remain, which self-organization and collective bargaining are designed to adjust. To foreclose such employees from the Act's protections would defeat the very purpose for which the statute was enacted. In summary then, to conclude through an application of the Act's terms that workers organized by management into teams or related bodies are either supervisors or managerial employees would be to erect form over substance. Such a conclusion would permit the institution of forms of group dealing that are fundamentally inconsistent with the model the Act endorses, ironically enough through the application of the statute's own provisions.

Assuming that joint-worker management committees, semi-autonomous teams, and related participatory devices constitute labor organizations, the next question in applying the terms of the statute is whether such bodies are unlawfully dominated or supported by employers under the provisions of Section 8(a)(2). Where instituted unilaterally by management, there seems little doubt about the answer to this query: such institutions are integral to rather than "independent of the employer-employee relationship." They are not the "free and independent" organizations of the employees, but instead are the creatures of the employer, who alone determines their activities, powers and continued existence. As such, they appear to be precisely the type of bodies that history demonstrates and that Congress concluded had been used to obstruct employee self-associational efforts, and which the Act was designed to abolish.

Such a conclusion is consistent with the Court's seminal 1939 opinion in *NLRB v. Newport News Shipbuilding & Drydock Co.*<sup>245</sup> There, in keeping with the framers' intent, the Court ruled that the structural independence of the employee association from management was the touchstone by which to determine whether Section 8(a)(2) had been violated. At issue in *Newport News* was the Board's finding that the employer had unlawfully dominated an employees' committee, where according to its plan of governance, amendments to the plan, as well as the committees' proposed undertakings, were subject to the employer's approval, even though the organization enjoyed overwhelming employee support. Upon its review of the matter, the Court unanimously affirmed the Board's finding, and its order that the organization be disestablished. "Such control of the form and structure of an employee organization," the Court stated, "deprives the employees of the complete freedom of action guaranteed them by the Act . . ."<sup>246</sup> The Act's aim to permit employees to be "entirely free to act upon their own initiative" in organizing, the Court observed, "may be obstructed by the existence and recognition by the management" of an organization the "structure and operation of which is not in accordance with the provisions of the law."<sup>247</sup> Significantly, in making its ruling, the Court rejected the conclusion of an appellate court that because the plan enjoyed demonstrated employee support and approval, and because there had been no serious

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<sup>243</sup> *Bell Aerospace Co.*, 416 U.S. at 288 n.16 (quoting *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, C. J.)).

<sup>244</sup> *Bell Aerospace Co.*, 416 U.S. at 281 n. 11 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947) (Taft-Hartley Act report)).

<sup>245</sup> 308 U.S. 241 (1939).

<sup>246</sup> *Id.* at 249.

<sup>247</sup> *Id.* at 250.

labor disputes during its existence, the plan was a "proper medium" for employee representation. The difficulty with that position, declared the Court, "is that the provisions of the statute preclude such a disposition of the case."<sup>248</sup> "In applying the statutory test of independence," the Court continued, "it is immaterial whether the plan" had obviated disputes or that company involvement "had been incidental rather than fundamental and with good motives."<sup>249</sup> "It was for Congress," the Court reminded, "to determine whether, as a matter of policy, such a plan should be permitted" to be maintained. Because "the statute plainly evinces a contrary purpose,"<sup>250</sup> the appellate court's holding was reversed.

Consonant with the *Newport News* Court's test of structural independence, and with apparent sensitivity to the various guises in which a company union might appear, the Board and the lower courts for the next decade or so applied the provisions of Section 8(a)(2) with rigor. A more recent line of lower court cases, however, has departed substantially from the guidance of the *Newport News* case, and has announced new standards by which to determine whether unlawful domination has occurred. In so doing, these cases have also made ambiguous the meaning and purpose of Section 8(a)(2), and thereby have threatened to undermine the Act's basic purpose.

The first court to enunciate a new test for applying the terms of Section 8(a)(2) was the Seventh Circuit in its 1955 opinion in *Chicago Rawhide Manufacturing Co. v. NLRB*.<sup>251</sup> There, the company's employees independently had desired to organize a shop committee to review grievances and other employment matters, and management assisted them, inter alia, by permitting elections and committee meetings to be held on company property and during working hours, without deduction from the compensation of committee members, and by making financial contributions to the shop recreation committee. After consultation with some employee representatives, management also promulgated the grievance procedure and reviewed all notices of the committee before they were posted. Although the Labor Board found that the employer's actions constituted unlawful support under the provisions of Section 8(a)(2),<sup>252</sup> the Seventh Circuit disagreed. "A line must be drawn," the court declared, "between support and cooperation."<sup>253</sup> Failure to make such a distinction, the court asserted, "may defeat the principal purpose of the Act, which it inventively re-cast as being," cooperation between management and labor.<sup>254</sup> The court opined that to make out a violation, "actual," not "potential" domination must be shown, the test of which "is not an objective one, but rather subjective, from the standpoint of employees."<sup>255</sup> As can be seen, *Chicago Rawhide* shifts substantially the grounds upon which a violation of Section 8(a)(2) is analyzed, and thereby distorts the purpose behind that provision's enactment. With the link between structural independence and free choice ruptured, willing cooperation, not the freedom of self-association becomes the court's focus. Indeed, the Seventh Circuit's opinion in effect adopts an amendment to the language of Section 8(a)(2) that was suggested during the hearings

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<sup>248</sup> *Id.* at 251.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> 221 F.2d 165 (7th Cir. 1955).

<sup>252</sup> The Board's decision is reported at 105 NLRB 727 (1953).

<sup>253</sup> *Chicago Rawhide Mfg. Co.*, 221 F.2d at 167.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 168 (quoting *NLRB v. Sharples Chem. Inc.*, 209 F.2d 645, 652 (6th Cir. 1954)).

over the Act by Walter Gordon Merritt, a management consultant and a leading proponent of the employee representation movement, which would have removed the Section's requirement of the structural independence of the employee association from management. In part, Merritt's proposed language would have modified the formulation of Section 8(a)(2) by making it an unfair labor practice for an employer "to contribute financial or other support to [a labor organization] except in such manner and such extent as may be requested by the employees . . . ."<sup>256</sup> Significantly, but inexplicably, the Seventh Circuit's opinion is bereft of any mention of *Newport News*, or of reference to the Act's legislative history.

Both the courts<sup>257</sup> and the Board<sup>258</sup> have subsequently adopted and expanded upon the *Chicago Rawhide* approach. Its greatest extension, however, can probably be found in the Ninth Circuit's 1974 opinion in *Hertzka & Knowles v. NLRB*.<sup>259</sup> In this case, the professional employees of an architectural firm decertified their bargaining representative after it had engaged in several months of unsuccessful negotiations with their employer. Immediately after the decertification, management held a meeting with these employees and enthusiastically accepted the suggestion of one of them that five joint worker-management committees be established for the purpose of discussing and formulating proposals for changes in working conditions and employment terms.<sup>260</sup> Although the Board<sup>261</sup> concluded that the committees unlawfully were dominated and supported by the employer, the Ninth Circuit disagreed. The purpose of the Act, the court declared, is to foster employee free choice, which a too literal interpretation and application of Section 8(a)(2) provisions might obstruct.<sup>262</sup> The question in cases arising under Section 8(a)(2), the court stated, "is whether the organization exists as the result of a choice freely made by the employees, in their own interests and without regard to the desires of their employer."<sup>263</sup> Accordingly, it continued, to make out a violation, it must be shown "[t]hat the employee's free choice, either in the type of organization, or in the assertion of demands, is stifled by the degree of employer involvement at issue."<sup>264</sup> In the court's mind, in the case before it, the "question essentially comes down to the significance of having management partners" on the joint committees.<sup>265</sup> Acknowledging that management's presence might result in "weaker" bargaining for employees than would otherwise have been the case, the court nevertheless stated that this feature was "one chosen by the employees."<sup>266</sup> The court concluded its opinion by observing that:

<sup>256</sup> 1 L.H. at 1335 (Merritt's proposed language continued: "or except in such amount, or in such manner, as will dominate or interfere with the formation or organization thereof.")

<sup>257</sup> E.g., *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967).

<sup>258</sup> For a discussion of several of these decisions, see *Janesville Product Div., Amstel, Inc.*, 240 NLRB 854, 857-60 (1979).

<sup>259</sup> 503 F.2d 625 (9th Cir. 1974).

<sup>260</sup> Ironically, the court notes that "the source of this idea . . . was a proposal put forth by the . . . [union] during their unsuccessful negotiations with Hertzka & Knowles prior to decertification." *Id.* at 629 (citation omitted).

<sup>261</sup> 206 NLRB 191 (1973).

<sup>262</sup> 503 F.2d at 630.

<sup>263</sup> *Id.* at 630 (quoting *NLRB v. Weymess*, 212 F.2d 465 (9th Cir. 1954)).

<sup>264</sup> 503 F.2d at 630.

<sup>265</sup> *Id.* at 631.

<sup>266</sup> *Id.*

For us to condemn this organization would mark approval of a purely adversarial model of labor relations. 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.<sup>267</sup>

As can be seen, *Hertzka & Knowles* works a radical transformation in the meaning of Section 8(a)(2), one that cannot be accommodated with the Act's basic purpose. In the framers' usage, free-choice referred to removing all obstructions to the exercise of employee initiative to exercise their associational rights to organize — if they so chose — self-directed and self-controlled autonomous groups through which employees would participate in promulgating the code that governs their relationship with their employer. To the *Hertzka & Knowles* court, free-choice becomes the freedom not to self-associate, but to ratify an "organization that is not free" and thus incapable of functioning in the collective bargaining process. In effect then, the *Hertzka & Knowles* decision is tantamount to the judicial repeal of Section 8(a)(2). It returns the law to its pre-*Texas & New Orleans Railway* state, and permits employers to implement substitutes for self-association and collective bargaining so long as some sort of employee assent is manifested. Ironically, this holding adopts the interpretation of the NIRA's Section 7(a) which management had forwarded, and which led Senator Wagner to frame the Act in the first place.

Thus has the meaning of Section 8(a)(2) become unclear, and the standards for determining whether a labor organization is unlawfully dominated or supported uncertain. Under the structural independence standard of *Newport News*, joint worker-management committees, work teams and similar participative devices plainly contravene the Act's provisions. Under *Chicago Rawhide* and *Hertzka & Knowles*, however, this determination is far less certain even though such participative devices, when unilaterally implemented by management, rest on premises inconsistent with those that underpin the Act, and the system of private ordering that it endorses. In short, it appears that as time has passed, the meaning and basic purposes of the Act have been forgotten by the bodies charged with enforcing and applying its terms.

#### IV. EMPLOYER CONTROL OR SELF-ORGANIZATION: THE CHOICE RENEWED, THE IMPLICATIONS RE-STATED

Among those testifying before the Senate Committee on Education and Labor in support of the Act was Otto Beyer, who, as the industrial relations manager of the Baltimore and Ohio Railway, was the co-author of its innovative union-management co-operation plan, which was inaugurated in 1923.<sup>268</sup> In the course of his comments about the proposed Act's provisions, Beyer told the committee that "I would just like to give you this warning — no matter how many unfair labor practices you spell out in this act, you are not going to be very successful in catching the employer in bringing about

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<sup>267</sup> *Id.*

<sup>268</sup> For a description and evaluation of the plan's operation by Beyer, as well as representatives of labor and management, see *Union-Management Cooperation in the Railway Industry*, 11 BULLETIN OF THE TAYLOR SOCIETY (Feb. 1926). This plan is also discussed in S. SLICHTER, J. HEALY & W. LIVERNASH, *supra* note 74, at 851-62. A very useful analysis of the history of such cooperative efforts, and of the prospects for the long-term success of current efforts is found in Jacoby, *Union-Management Cooperation in the United States: Lessons from the 1920's*, 37 INDUS. & LAB. REL. REV. 18 (1983).



company unions. There are various devices and ways of doing it."<sup>269</sup> To Senator Wagner's skeptical reply that employers had not been "very astute about it so far,"<sup>270</sup> Beyer retorted, "They will get more astute."<sup>271</sup>

Recent history suggests that Beyer was correct. As proponents of an ideological movement, contemporary advocates of participative theories, like their predecessors, have traded upon, and have been greatly benefitted by, terms such as "worker participation," "industrial" or "workplace democracy," that have come to be associated with the integrative model of industrial relations that they champion. Such terms are immensely emotive and suggest that the application of participative organizational methods will in and of themselves result in a reordering of the workplace from a hierarchical structure where a core elite exercise autocratic control over a complement of subordinates to an egalitarian structure in which all persons share roughly equal power in the decision-making process. That these labels promise more than the devices to which they are attached can or are intended to deliver is clear.

All business enterprises, in Ralf Dahrendorf's words, are "imperatively co-ordinated associations:" Each has an authority structure in which incumbents in certain positions hold the power not only to direct those in other positions in the performance of their tasks, but also to determine the conditions of the subordinates' relationships with the enterprise.<sup>272</sup> As Dahrendorf points out, "The labor contract implies acceptance of a role which is, *inter alia*, defined by the obligation to comply with the commands of given persons."<sup>273</sup> When applied in the unorganized setting integrative devices do not alter this state in a fundamental way. Rather, they represent a point on the continuum of types of group dealing that is closer to the conceptual ideal of absolute and unilateral management control of decisionmaking authority than it is to its antipode and equally idealized notion of complete worker control. In such a participative regime, management voluntarily diffuses some decisionmaking power — typically that held primarily by first-level supervision — amongst the employee complement at-large. This permits employees some opportunity to self-expression and enlarges the sphere of employee choice. Management itself, however, determines the matters open to employee discussion or choice, and all determinations made by them remain subject to management's ultimate review and decisional authority. Unlike the situation that obtains in collective bargaining, the order that governs the relationship, including the scope, operation, and continued existence of the participatory program itself, is not contingent upon negotiations with an autonomous employee association. Management remains in control, as is reflected in the fact that even to its proponents, integrative theory is conceived primarily as a style of management, one which concentrates on the cultivation of good face-to-face relations between ordinates and subordinates. Thus, the application of integrative organizational devices has not resulted in an essential restructuring of patterns of authority in organizational hierarchies much beyond first-level supervision. The division between those who make decisions and those who are obliged to execute them remains, and with it, the innate conflicts of interests that exist between the two groups. Given the premises, aims,

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<sup>269</sup> 1 L.H. at 258.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> R. DAHRENDORF, *supra* note 70, at 249.

<sup>273</sup> *Id.*

source and history of their development, this is hardly a surprising outcome. As has been noted, participative theories have been formulated on management's behalf and are intended to secure worker cooperation and identity with the goals and directives of their employers. The use of integrative devices may help to promote the belief in and acceptance of managerial authority amongst employees by making them feel as if they have a share in its exercise. Such schemes thus serve to palliate the austereness of managerial power without fundamentally shifting the locus of ultimate decisional authority. At base, then, they can be viewed as devices that are more manipulative than democratic in intent. This is not to suggest that participatory theories and programs are wholly without value. The inculcation of participation as a managerial "ethic" or ideology has undoubtedly served both to make work less oppressive and the atmosphere of the workplace more humane. Participatory devices may also make the performance of one's tasks more personally satisfying and may aid in increasing productivity, at least in certain circumstances. None of these are insignificant contributions, but their nature and limits must be kept in perspective. Despite the aura that some of the literature has generated about them, participatory schemes are not some strife-free form of collective bargaining, a system of democracy with passion and irrationality scientifically distilled away. Control over the relationship in these schemes ultimately remains with management. Under the right conditions, it seems clear that in the presence of a union, worker participation programs can produce important benefits for all the parties to the employment relationship.<sup>274</sup> Such conditions include management's acceptance of the legitimacy of the union's presence, a joint commitment to supporting the program over an extended period of time,<sup>275</sup> and the existence of sufficient resources to support the plan's operation. In the absence of a self-organized, autonomous employee association, however, the degree of worker participation in management decisionmaking will remain, at best, superficial.<sup>276</sup>

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<sup>274</sup> For a description and analysis of these benefits see T. KOCHAN, H. KATZ & N. MOWER, *WORKER PARTICIPATION AND AMERICAN UNIONS: THREAT OR OPPORTUNITY* (1984).

<sup>275</sup> Quality of Work Life and related participation schemes, at least to this point, appear to be fragile and rather short lived: a recent study by Paul Goodman of such projects showed that at least seventy-five percent of them were no longer functioning five years after their implementation. Goodman, *supra* note 20, at 490. Cf. Jacoby, *supra* note 268 (cooperation programs historically have been similarly fragile).

<sup>276</sup> This is well exemplified by Professor Witte's in-depth study of an unorganized employer's extensive participatory scheme. J. WITTE, *supra* note 14. Central to the scheme Professor Witte studied was a joint worker-management committee. While, as noted above, the mandate of this committee was theoretically open-ended, Professor Witte found that management was able to exercise "subtle control" of its deliberations and restrained it from considering grievances, wage and benefit issues, and other matters of deep concern to employees. Professor Witte states that:

In the vast majority of cases, participation in these issues on an ad hoc basis will eventually be subverted, forgotten, or shunted off to a group in which management domination is ensured. Without the job security and advancement guarantees afforded by a union, even the most active, hostile workers will eventually give up; while more timid workers, protecting their futures with the company, will subside much earlier. One council member who was interviewed in depth described the phenomenon as more extensive: "You see, there's a little bit of fear out there; you know when a good issue is brought up and there's going to be good talk, nobody ever says anything. Any time an issue comes up that's important, it always gets buried." I asked him why he thought people were afraid to speak out, and he replied, "I don't know — job minded. They aren't thinking about why they're in the room there, but maybe they're thinking

Participatory schemes simply are not intended to serve the same ends as collective bargaining. They are incomparables, and it is a mistake to think of them otherwise.

Proponents of participative theories have also benefitted from the widely held notion, which they have furthered earnestly, that integrative schemes represent a new model for the conduct of group relations in the workplace, an innovative solution to such problems as productivity, worker disinterest, and how the ideals of political democracy can be transplanted to the workplace. This perception is responsible in part for the uncertainty with which these schemes have been treated by the Board and the courts under Section 8(a)(2). What the term worker participation (and industrial democracy) meant to the framers of the Act, however, is clear: collective bargaining. Contrary to popular perceptions, participatory schemes, as has been seen, are hardly novel or untried institutions. From joint-committee structures to schemes involving worker "self" (or "autonomous") management, essentially similar participatory devices and schemes have existed and been employed since the early part of this century. While variations on basic themes have been developed, what is new is not so much the schemes themselves, and certainly not their essential nature, premises and goals. Much of the novelty instead consists in the nomenclature associated with the schemes, and in refinements to the theoretical justifications that academics have forwarded for their use — refinements that Professor Barbash has characterized recently as having "taken a strong homiletic turn."<sup>277</sup> The Wagner-Act Congress was quite familiar with the essential differences between the adversarial and integrative models, and the features of various participative schemes based upon the latter. The choice Congress made between them, and the implications of the provisions of Section 8(a)(2) for integrative schemes were carefully considered, and fully intended. Though time has passed, and incidentals have been varied, the underlying model and its aims remain the same. Thus, it is no coincidence that, like their predecessors, many contemporary proponents openly advocate integrative schemes as the alternative to employee self-organization and collective bargaining: as one present-day writer has stated, for example, participation programs offer an employer "the only realistic strategy for preventing the unionization of its workforce."<sup>278</sup> Similarly, the President of the National Association of Manufacturers has recently stated that his organization, and its "Council on a Union-Free Environment" will use worker participation programs as a key device in their efforts to exclude unions from American businesses.<sup>279</sup> Beneath the rhetoric and the inevitable allure of that which seems new, the basic tension between employer control and self-organization stays constant.

It has now, however, been fully fifty years since the passage of the Act. Both American society and its economy have undergone great changes during this course of

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about their own job; maybe they are a little leery about it. If they say anything, maybe they are a little leery about it. If they say anything, they won't be able to advance."

*Id.* at 90-91.

Professor Witte concludes that while he believes "that a joint worker-management policy level committee can co-exist with a strong union, the union is absolutely essential. Without it, democracy at work will always be tilted against the worker, especially in those areas of greatest concern to the majority of employees." *Id.* at 91 (citations omitted).

<sup>277</sup> J. BARBASH, *supra* note 77, at 4.

<sup>278</sup> Myers, *supra* note 22. See also Walton, *supra* note 22.

<sup>279</sup> BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, *INDUSTRIAL DEMOCRACY IN TWELVE NATIONS* 2 (1979) (The "Council on a Union-Free Environment" is the successor to the N.A.M.'s open-shop movement).

time. What Congress originally intended by the provisions of Section 8(a)(2) largely either has been forgotten or become ambiguous through the holdings of influential appellate courts. Further, American industry is facing increasing challenge on an international basis from foreign competition, and a steadily declining number of American workers are organized. In the face of these circumstances, it is reasonable to question whether the prohibitions of Section 8(a)(2) against "certain types of personnel administration" can be justified, or whether we as a society can afford to insist that self-organization and collective bargaining continue to be the one legally sanctioned form of group dealing. To put the matter somewhat differently, it is appropriate to consider — at least briefly — what significance, if any, the earlier Congressional choice for collective bargaining holds for a contemporary society.

A fully satisfactory answer to this question — or at least one that speaks to every pertinent point — would require a thoroughgoing consideration of the impact and roles both of collective bargaining as a social institution and of unions as mediating groups within a democracy.<sup>280</sup> Such an analysis far exceeds the more narrow bounds intended for the present inquiry. Some start toward a broad outline of an answer, however, will here be attempted.

At one level, the concerns that underlie the provisions of Section 8(a)(2) appear to be of the most mundane type. Little seems to be at stake but an argument over preferred methods of group dealing in the workplace. Indeed, one way of handling the matter, it can be argued, is for the law to ignore it altogether, and leave it to the parties to settle. Management, it can be contended, should be free to institute alternatives to collective bargaining. If these methods prove unsatisfactory to employees, they can repudiate them, attempt to undertake self-organizational activities and, if successful, insist that their employer bargain with them collectively. In these circumstances, the use of the participatory devices might even be retained — now under joint control — as a means for union-management cooperation. Further, it can be argued that it makes no sense, given the large numbers of unorganized employees, to prohibit the use of managerial techniques that would permit the non-unionized at least some voice in management decisionmaking. A closely allied point is that Section 8(a)(2), if vigorously applied, prevents employees who might wish to do so from selecting a form of group dealing and representation in management other than collective bargaining.

The first thing to notice about these arguments is that identical contentions were made to Congress by opponents of the Act during the hearings and debates over its terms, and were rejected through the enactment of the provisions of Section 8(a)(2).<sup>281</sup> Their reconsideration under the guise of statutory interpretation or application is not then a proper function for the Board or the courts, but rather is for Congress alone, particularly since these arguments go to the heart of the statutory scheme itself.

Turning to the substance of the arguments, each at first blush appears plausible and some even attractive; but all are flawed by taking too narrow a view of the issues involved. The significance of the Act, and its Section 8(a)(2), as earlier noted, does not lie simply in the choice between competing models of industrial relations. It rather rests in the choices Congress made to protect the associational freedom of employees, and for the private ordering of the law governing the employment relationship. The rami-

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<sup>280</sup> This will be the subject of forthcoming work by the author.

<sup>281</sup> See *supra* notes 191–93 and accompanying text.

fications of these choices transcend notions that might be labeled as "pro-labor" or "pro-management," and the various ideologies that have been associated with each. They instead go to the root of the maintenance of a healthy democracy itself.

As the experience of every industrialized nation reveals, managements' control of the order of the employment relationship has not been a regime acceptable to most workers. Collective bargaining has thus provided the only alternative to increased state control over and regulation of the employment relationship. Employer-sponsored alternatives to collective bargaining have not sufficed because under them, management retains ultimate control of the order of the relationship. Where self-association is made difficult or obstructed, employee reliance on the state is encouraged. What Section 8(a)(2) does in effect then is to act as a prophylactic against activities that will, in the long run, promote greater state involvement in the governing of a basic social relationship. Indeed, it is interesting to note that as the practice of employee self-association and collective bargaining has declined in recent times, the state, both through statutory enactments and in developments in common-law doctrines, increasingly has come to determine the order of the employment relationship. This is hardly to suggest that the recent interpretations and applications of Section 8(a)(2) which are at odds with the framers' intent are alone responsible for the trends just mentioned. They are, however, part of a piece which, taken together, have helped to further the trend toward the growth of government intervention in the employment relationship.

The practice of collective bargaining has another important effect for a democracy as well: It encourages employees actively to form themselves into free associations which in turn function as mediating groups in society on at least two levels. They act, in ways earlier described, to mediate between the individual employee and the entity that employs them. Such groups also afford employees an organized voice in political decisionmaking where they otherwise would have, at best, a diffuse and unclear one. In this and similar ways then, in a society dominated by large organizations, unions function to mediate the relation between the individual employee and the state. In both contexts, the group serves to enhance individual status by affording the means for self-determination through the combined power association provides. Like other voluntary associations, unions also serve to reduce the sort of atomistic individualism which, as commentators such as Tocqueville and Henry Adams so early noted, poses an insidious and powerful threat to a democracy by weakening and destroying amongst citizens bonds of common interest, concern and action necessary to the existence of a democratic form of government.<sup>282</sup>

Despite some currently fashionable notions, the fifty-year-old Congressional choice for a scheme that promotes self-association and private ordering is of more importance now than at any time in our past. The greatest danger to the maintenance of democracy and personal freedoms in the twentieth century is exactly that about which Tocqueville warned over one hundred and fifty years ago: the slowly growing dominance of society by a benign yet all-powerful state that will gradually assume from its citizens the responsibility for ordering and arranging all aspects of their lives.<sup>283</sup> Indeed, as Czeslaw Milosz

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<sup>282</sup> For a further sketch of the foregoing and allied points, see Kohler, *The Regulation of Union Economic Power: An Interpretive Summary and Commentary* (especially at pt. III), in *AMERICAN LABOR POLICY: A CRITICAL APPRAISAL OF THE NATIONAL LABOR RELATIONS ACT* (C. Morris ed. forthcoming).

<sup>283</sup> A. de Tocqueville, *DEMOCRACY IN AMERICA* 690-702 (Anchot ed. 1969).

has recently observed, "contrary to the predictions of Marx, this is the central problem of the twentieth century. Instead of the withering away of the state, the state, like a cancer, has eaten up the substance of society."<sup>284</sup> It is private associations like unions — as well as other voluntary intermediary associations — that act to curtail the long-term trend to the shift of such power to the state, and it is in this that much of their importance rests. The practice of self-organization and collective bargaining functions as a school for democracy, inculcating habits of self-governance, stability, and direct responsibility on which the health of a democracy depends. By clearing the field and unencumbering employee initiative to undertake self-organizational activities, the provisions of Section 8(a)(2) promote practices that in the long run protect not only the freedom of employees, but the institutions of political self-rule as well.

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<sup>284</sup> Gardels, *An Interview with Czeslaw Milosz*, N.Y. REV. OF BOOKS, Feb. 27, 1986, at 34. Milosz further observed that "[a]s a workers' movement, Solidarity resisted this" expansion of state power. "The importance of the movement . . . of Solidarity," he stated, "is that it is not just a Polish phenomenon." *Id.*