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Shared Governance and Academic Collective Bargaining in American Higher Education: A Potential Model for U.S. Participation in the Global Experience of Works Councils and Codetermination

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Shared Governance and Academic Bargaining

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Introduction

Works councils and codetermination processes are gaining an increased foothold on a global basis. Much of the groundbreaking developments can be traced to Germany in the 1920's. Many other European countries have adapted to the use of these systems in recent decades. Indeed, the European Union has mandated similar processes since the 1990s. These worker involvement systems have spread around the globe with significant activity in Asia and South America as key examples.

A glaring omission from this movement has been the United States. Much of this lack of development can be traced to the structure of US labor law. The National Labor Relations Act (NLRA) prohibits employers from dominating or interfering with the formation or administration of any labor organization (e.g., a union). This prohibition, deemed an unfair labor practice under the act, reflects a public policy concern at the time the NLRA was passed. This concern was based on the belief that employers should not be able to create a "company union" and therefore undermine the creation of independent worker controlled organizations (e.g., unions). The National Labor Relations Board (NLRB) has maintained a relatively strict interpretation of this prohibition and courts have upheld the NLRB positions. Employer development of works councils in the European style have remained a prohibited practice under US labor law. Statutory attempts to modify this restriction have been unsuccessful.

A major exception to this prohibition in the United States can be found in academic collective bargaining in institutions of higher education. There are over 4500 colleges and universities in the United States with over 1,000,000 faculty and a significant number of other professional level employees. Academic collective bargaining is a well-established phenomenon in colleges and universities. In fact, approximately 40% of all 2-year and 4-year public institutions of higher education have some form of collective bargaining

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(Cassell, 2012). Some of these bargaining arrangements are carried out under the NLRA (i.e., private colleges and universities) while other bargaining arrangements are carried out under state labor laws (i.e., public colleges and universities). The NLRA prohibition against worker council systems is repeated in most state labor laws that are closely modeled after the NLRA.

Nevertheless, despite these prohibitions a significant number of higher education collective bargaining contracts acknowledge and even legitimize a “shared environment” for the faculty union and the higher education equivalent of a works council, a faculty senate (Bucklew, Houghton, & Ellison, 2011). The higher education “industry” has accommodated a faculty collective bargaining system that coexists in many cases with a faculty or academic senate that provides faculty with a structured involvement in the shared governance of the institution. There are different approaches or models to this shared environment for unions and senates (Bucklew et al., 2011). The important conclusion is that in many academic collective bargaining arrangements the unions and the employers have established and recognized roles for both the traditional labor union and the faculty senate, effectively a form of works council.

It seems that this experiment in higher education collective bargaining might provide models for the further development of works council type organizations in other “industries,” thereby expanding the practice of extended worker involvement that is spreading in use around the globe. In short, the higher education bargaining experience suggests that it might be timely to revisit this area of labor law on both the federal and state level. The purpose of this paper is to examine the shared governance traditions in U.S. higher education in the context of the global models of employee representation, including works councils and codetermination. We begin with an overview of employee representation legislation and practices worldwide, before contrasting these with U.S. labor law and practices. We then examine the unique governance structure of U.S. higher education as an exception to U.S. traditional law and practices. We conclude by examining the implications of this example for public policy and employment practices in the U.S.

Works Councils and Codetermination in Practice

Over the past two decades the phenomenon of works councils and codetermination has been an important global development in worker participation in business organizations. This movement was grounded in Germany and the German Works Council Act of 1920. *Works councils* are legally mandated, corporate governing bodies that consist of equal representation of owners and employees. The concept spread

to other European countries and each developed its own version of this arrangement. Examples include: Germany—a two level system with worker involvement related to business decisions; France—an employee advisory mechanism with a management representative chairing the council; and Denmark and Belgium—a council made up of management and employee representatives.

In Germany, employees are given control rights through seats on the corporate board (Gorton & Schmid, 2004). German labor law, specifically the *Montan* Codetermination Act of 1951, requires that the supervisory board have an equal number of employee and shareholder representatives (Gorton & Schmid, 2004). Additional laws include the Works Council Act of 1952, the Works Council Act of 1972, and the Codetermination Act of 1976, which governs corporations with more than 2,000 employees (Gorton & Schmid, 2004).

The advent of the European Union (EU) resulted in EU Directive 94/34/EC in 1994, which mandated a European Works Council structure for any company with more than 1000 employees with at least 150 in each of 2 countries (Addison & Belfield, 2002) . In 2002, another EU directive established requirements that each EU member country develop legislation covering employers with more than 50 employees and requiring an “inform and consult” or “inform and consent” system for employee codetermination. *Codetermination* is a legal requirement that the suppliers of equity capital and the suppliers of labor run the firm together (Gorton & Schmid, 2004). Codetermination rests on the issue of control. Will the organization be controlled only by the shareholders, or will the employees also have a say in the control of the corporation? Under codetermination, the corporation is controlled by both the shareholders and the employees (Gorton & Schmid, 2004). Under another EU arrangement, a company doing business in several EU countries could form a “European Company” and have one European-wide works council.

The expansion of works council arrangements has spread beyond Europe. In some cases, the exportation of the works council concept pre-dates the EU developments. Japan is one of the earliest examples. In more recent years, a number of nations including Argentina, Bangladesh, Thailand and South Africa have adopted some form of works councils. Many global firms with operations in Europe have been introduced to this type of employee involvement and input, leading to the possible adoption of works councils in their non-European operations. Across Europe and in many other countries with labor union traditions, there is a functional co-existence of collective bargaining and systems of worker participation. These countries have arranged for this co-existence by having mutually compatible labor laws and worker representation laws.

In the United States, the primary goal of for-profit organizations tends to be the maximizing of shareholder value. In Europe, however, works councils and codetermination tend to allow for the maximization of employee interests as well (Dammann, 2003). In Germany, for example, corporate law protects the interests of both shareholders and employees (Dammann, 2003). Works councils and codetermination give employees power and offer some protection in the design and implementation of work systems (Duggan & Duggan, 2004). Indeed, these types of arrangements require organizations to be more socially responsible and proactive in planning for the well-being of their employees (FitzRoy & Kraft, 1993).

Costs and Benefits

Much of the employee representation literature focuses on performance. Specifically, have works councils and codetermination made things better or worse for organizations and their employees? Our review of the literature finds no clear consensus. For instance, early studies show that codetermination in Germany may have reduced profitability, but may also have increased job security and reduced the social and adjustment costs of unemployment (FitzRoy & Kraft, 1993). Gorton & Smith (2004) provide evidence that equal representation may have a substantial effect on firm value, concluding that “equal representation appears to be a binding constraint on the shareholders” (p. 895). In addition, researchers have found a positive association between a works council’s presence and plant closings (Addison, Bellmann, & Kölling, 2004). Another study suggests that although works councils may not increase productivity, there is nevertheless some evidence to indicate that they increase employee voice and information sharing (Fairris & Askenazy, 2010). Furthermore, research suggests that works councils provide more security and a lower separation rate into unemployment or non-employment (Hirsch, Schank, & Schnabel, 2010).

On the other hand, there is some evidence to suggest that works councils may actually increase income, although not necessarily security (Beckmann, Föhr, & Kräkel, 2010). Indeed, one study found that productivity and profitability increase when codetermination is introduced (Renaud, 2007), while others have argued that the low-level participation required by codetermination leads to increases in productivity (Hodgson & Jones, 1989). Works councils involve a complex network with several different actors (Köhler & Begega, 2010) and may also have an effect on trust and identity (Timming, 2006), while providing motivation for employees (Jirjahn & Smith, 2006). Nevertheless, some employees may choose not to elect works councils, possibly because of a lack of transparency in the organization or the perception of little value added by works councils (Whittall, Lücking, & Trinczek, 2009). Some have even

suggested that works councils may have no influence on productivity one way or the other (Addison & Belfield, 2002). For instance, one study found no evidence of works councils affecting firm capital whatsoever (Addison, Schank, Schnabel, & Wagner, 2007).

Clearly, the impact of worker representation on firm performance is not well understood (Addison, 2005). As Addison, Schnabel, and Wagner (2004) suggest, “it would appear to be the case that, on net, either the early literature encouraged an overly negative view of the impact of works councils, or else the functioning of works councils has improved since then” (p. 277). Firm performance may depend on the relationships of the representatives on the board, and also on the attitudes and values of those representatives (Berg, Grift, & Witteloostuijn, 2011), who may actually be citizens of different nations (Bicknell & Knudsen, 2006).

Works Councils, Unions, and Multi-National Corporations

Works councils function independently from employee unions and may lead to increased employee voice (Bailey, 2009). Unions, however, may influence representative candidate nominations (Addison, 2005) and several potential issues involving solidarity and identity building should be considered (Banyuls, Haipeter, & Neumann, 2008). In turn, works councils may be beneficial to unions and their members may also influence union membership (Behrens, 2009). In some situations, works councils could potentially serve as a substitute for non-union employee representation, although union workers may have higher expectations for works councils (Dong-One & Hyun-Ki, 2004). Works councils may have a positive effect on wages in collective bargaining in some circumstances (Hübler & Jirjahn, 2003). Nonetheless, unions are more often associated with gaining higher wages, while works councils tend to be more often associated with higher levels of job satisfaction (Kleiner & Young-Myon, 1997). The relationship between unions and works councils can be complicated and it is influenced by many factors, including economic conditions and the strength of the union (French, 2001).

To some extent, works councils have evolved in response to increases in multinational corporations (MNC) (Contrepolis & Jefferys, 2010). Works councils are limited by the power and the decision making processes of the organizations (Gilson & Weiler, 2008) and the character of a particular works council may be largely determined by the interplay of ‘country of origin’ factors and ‘country of location’ factors (Hall, Hoffmann, Marginson, & Müller, 2003). There are times when a works council has great influence and times when it provides more of a rubber stamp (Hann, 1975). One potential problem in the context of employee representation is the notion of “real seat,” an

established principle under European labor law which dictates that corporations will be governed by the laws of the country in which they are headquartered (Dammann, 2003). However, in a recent case (Centros Ltd.) the court's ruling implied that freedom of establishment should be paramount (Dammann, 2003). This opens up the possibility that new corporations may be less likely to establish their headquarters in countries with strong codetermination laws.

The United States Legal Tradition for Employee Involvement In The Determination of Working Conditions

The National Labor Relations Act (NLRA) establishes the exclusive bargaining agent concept. There are several ways a union can gain this status but by far the most dominant manner is through a secret ballot election. If a union wins such an election, it is certified as the exclusive bargaining agent for that unit of employees. The union is the sole agent to represent the employees in regard to many central issue of employment within that firm. Section 9(a) of the NLRA creates the "exclusivity doctrine," and it prohibits employers from bargaining with any other organization (Alexander, 1988). The act creates a set of prohibited practices both for the employer and the union. One critical prohibited practice (deemed an unfair labor practice or ULP under the act) for an employer is that they cannot dominate or interfere with the formation of any organization of employees concerned with issues of employment. This legal restriction prohibits the employer from creating councils or other organizations of employees. The employer is required to work *only* with the elected exclusive bargaining agent or union (Hogler, 2007). There has been some limited areas where worker "advise and consent" has been adopted by the company. If these arrangements have been instituted in a plant with an exclusive bargaining agent the pattern is that the arrangement requires union concurrence. This is particularly true if the issue involves working conditions and standards.

The National Labor Relations Board (NLRB) has ruled on a number of cases (that subsequently have been upheld by the courts) that the prohibition against employer domination or support of any labor organization applies to arrangements such as works councils. The seminal case, *Electromation, Inc.*, 309 NLRB 990[1992], enfd.35F.3d 1148 [7th Cir. 1994], establishes a narrow set of legal parameters governing situations that could be described as a company attempting to introduce an adapted version of a works council. In this case, the company was ordered to disband a series of worker-management committees that were dealing with issues such as absenteeism, communications, pay progression, and attendance bonuses. In 2001, the NLRB in the case of *Crown Cork and Seal*, NLRB No.92 [July 2001] provided some additional guidance on the matter of employee committees created by the employer. The essence of this decision was that if

the committee is truly advisory and does not enter into any type of codetermination arrangement, there might be some leeway for employers to establish such committees without violating the law. There have been attempts to modify the NLRA in this area by passage of a new statute. Indeed, Congress actually passed such a law, the TEAM act of 1996, but it was vetoed by President Clinton. United States labor law and its interpretation continue to provide a major stumbling block to the introduction of works council types of arrangements into American business practices.

U.S. Higher Education Academic Governance: The Exception to the Rule

Faculty governance in American higher education is a form of codetermination quite unique among worker involvement patterns in private industry and public employment. For over a century many U.S. colleges and universities have used a governance model that provides an extensive (and on some matters, an exclusive) decision making role for faculty. In most four year colleges and universities, both public and private, this “shared governance” model of management is firmly established. Many institutions have formalized this model in their constitution and policy statements. In others it is reflected in decades of practice.

Under this model faculty are viewed as key advisors on a broad array of institutional policies and practices. For example, faculty input (and even approval) is assumed for executive level appointments. This is particularly true for department chairs, deans, and academic executive administrators. The central “product” of an institution of higher education is its academic programs and degrees. In this area, faculty dominance is assured by a shared governance model. Few four year institutions would offer a degree program without review and approval by the appropriate faculty governance mechanism. Through this system of shared governance, most institutions of higher education in the United States have adopted a variant of the works council system. The title most often used is Faculty Senate. Other names and similar models of faculty involvement in governance are used [Academic Senate, University Senate] but for purposes of this analysis we use the term Faculty Senate. This body is normally a representative, elected council through which the faculty role in shared governance is performed. The senior management of the institution consults regularly with the Senate. Their advice and counsel is sought and valued. On some matters, the position of the Faculty Senate is considered determining or at least highly influential.

Since the early 1970s, faculty unionization has become an alternate or competing model of faculty involvement in the life of a college or university. Public colleges and universities located in states with an enabling collective bargaining statute are now

offered the option of using a labor-management negotiating system. Private colleges, if covered, are covered by the National Labor Relations Act rather than by state level legislation. During the 1970s and 1980s, there was an extensive unionization effort within higher education institutions under the NLRA. In 1980, the U.S. Supreme Court ruled in the case *NLRB vs. Yeshiva University*, stating in their decision that the national labor law did not apply to almost all full-time faculty in private colleges because they participated as managers of the institution through the shared governance system. This decision has essentially remained in place and has resulted in a clear decline of private college unionization.

The Impact of Faculty Unionization on Shared Governance and Faculty Senates

The exclusive bargaining agent concept underlying collective bargaining in the United States has led to pressure and potential conflict with the shared governance (e.g., Faculty Senate) tradition. The codetermination and works council systems that are so strong in Europe and growing globally have not flourished in the United States. A key factor is the enabling labor laws at the federal and state levels. These laws create an exclusive bargaining agent arrangement for the union. As outlined above, in most cases these laws actually prohibit management endorsed or aided employee organizations. Nevertheless, shared governance models on most campuses predate the faculty union movement and in many instances have been allowed to co-exist with faculty unions.

After four decades of academic collective bargaining in American higher education, a number of arrangements have evolved relative to how or whether faculty unions will co-exist with shared governance traditions. In a recent review and conceptual paper, Bucklew and his colleagues (2011) identified four models of faculty unionization and shared governance. These models not only provide a framework for understanding the co-existence of faculty unions and shared governance, they also show how these boundaries are defined in collective bargaining agreements. In the *comprehensive model*, both traditional labor-management contract issues and shared governance issues are addressed in the contract. Here, the union fulfills the primary faculty representation role in place of traditional faculty governance, such as the faculty senate. In this model, matters that were traditionally decided by the faculty senate are now explicitly spelled out in the collective bargaining agreement. These matters would include: wages, promotion and tenure, teaching load, academic rank (job classification), peer evaluation committees and processes, academic governance advisory process, retirement policies, pension programs, health insurance, life and disability, insurances, sick leave, vacation and holidays, and academic freedom rights and responsibilities (Bucklew et al., 2011).

The second model is the *codetermination model*. In this model, parties negotiate over traditional collective bargaining topics, *but also* create enabling language in the contract concerning the continuation of shared governance activities (Bucklew et al., 2011). Here, language exists in the contract that authorizes faculty senates to continue to oversee traditional governance items, such as promotion and tenure processes, teaching load, and curriculum committee structures. This model allows traditional faculty senates to exist and function in a similar manner to works councils.

The third or *permissive model* also addresses traditional labor issues (Bucklew et al., 2011). However, references in the collective bargaining agreement to faculty governance issues are less explicit. Here, the faculty senate may be mentioned in the contract, and its traditional role as a governing body is acknowledged. However, the parameters and boundaries of traditional faculty governance are not established.

The fourth and final model is the *restricted or limited model* (Bucklew et al., 2011). In this model, the collective bargaining agreement is silent on matters that are traditionally handled by the faculty senate. There is no language in the contract to address how these issues will be decided; instead, the contract only addresses traditional labor topics, such as wages, benefits, etc. This model may be adopted voluntarily, or, in some cases, it may be mandated by law.

It is important to note that under most of these models, the employer and exclusive bargaining agent (i.e., union) have agreed to include a role for the faculty senate (i.e., another employee organization). They have done so using different approaches, but under the prevailing NLRB interpretation of a prohibited practice these arrangements could not have been implemented only by the employer and required the agreement or at the least quiet acceptance of the union. There is no record of unfair labor practice allegations on this matter. It is not clear whether or not employers in other “industries” that do not have the long tradition of shared governance found in higher education could insist on such worker participation arrangements. It is also doubtful that they would normally be successful in gaining union agreement with contract language providing for such processes.

In short, the higher education experience serves as a clear example that unions and a works council type arrangement (i.e., faculty senate) can function successfully in the United States. It shows that unions and worker participation arrangements similar to those developing on a global basis can work in the United States. What is not clear is whether this experience can be transferred to other industries under the current legal framework.

Potential Implications and Conclusions

Shared governance in U.S. higher education is a long established form of employee representation. This long and valued tradition of codetermination in central policy and practice along with the use of a type of works council arrangement (i.e., the faculty senate) may serve as a model for other U.S. industries and organizations. For example, it would appear to be a reasonable fit for hospitals, legal firms, higher level law enforcement, firms in the knowledge industry, and other organizations using primarily highly technical and professional employees. As the case of higher education demonstrates, faculty unions and shared governance structures may not only co-exist, they can, in many respects, have a symbiotic or mutually beneficial relationship (Bucklew et al., 2011).

How might the U.S. higher education experience with shared governance provide an avenue for expansion of global initiatives in employee representation? Some states are considering the modification (or even elimination) of their historical labor law structure. The result in some instances may be to provide no structured alternative for employee involvement in the development and functioning of the company. One such alternative could be built based on the relatively successful and symbiotic models of co-existence between unions and works councils in higher education. It is important to note, however, that this approach would require some modification of the exclusive bargaining agent arrangement. Another alternative could be to fully authorize organizations to develop and support employee representation arrangements for their employees through the creation of work councils by the employer. This option might be of particular interest for states with no traditional labor law that wanted to establish a process leading to more employee representation in the workplace.

In conclusion, the case of shared governance traditions in U.S. higher education provides an instructive example of the potential for employee representation in the form of works councils and codetermination in the United States even when the faculty have a union in place. The experience in higher education governance may provide an effective framework that has the potential to serve as a foundation for the development of works council types of arrangements in other industries, effectively expanding the worker involvement and representation practices that are becoming increasingly popular worldwide. Although it could require changes to existing labor law at both the federal and state level, we suggest that policy makers carefully consider the potential advantages of these types of shared governance arrangements and pursue the necessary legal structural changes required to help facilitate worker participation in the United States on a wider scale.

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