

BRIDGING THE “REPRESENTATION GAP”

Matthew W. Finkin†

I don't think we need more lawsuits in America. And I don't think we need more . . . labor unions in America.¹

It's a hell of a lot easier to get \$100,000 [for a plaintiff employee] than to get five cents an hour for blue-collar workers.²

*What Workers Want*³ tells us a great deal, but just *what* it tells us will be much discussed: social survey research is notoriously “soft”; criticism of the research design or its execution is inevitable; and the data may be variously interpreted despite the obvious care Freeman and Rogers have taken even to explore the effect of changed wording and question sequence on the responses. In what may be their most controversial finding, for example, Freeman and Rogers conclude that a majority of workers favor a “cooperative” form of representation, one in which employees lack “power” but have “influence.” This finding perplexes because, from what appears, the survey did not explain the distinction between “power” and “influence” to its respondents, nor is the distinction obvious. The respondents did indicate that having “influence” meant that they were listened to and taken seriously, that their views actually affected management decision-making in certain areas of importance. But this only confounds the distinction: What is “power” if not the capacity to influence another's decisions better to comport with one's wishes?⁴

† Albert J. Harno Professor of Law, University of Illinois College of Law. B.A., 1963, Ohio Wesleyan University; LL.B., 1967, New York University; LL.M., 1973, Yale University. These remarks have benefited from critical comments by Clyde Summers who, it must be said, is skeptical (to say the least) of the “soft law” suggestion broached at the close of these remarks.

1. Robert Pear, *Elated by Antitrust Triumph, Doctors Take Case to Senate*, N.Y. TIMES, July 1, 2000, at A1 (quoting Trent Lott, U.S. Senate Majority Leader).

2. WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 237 (1997) (quoting Judith Vladeck, Esq.).

3. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

4. Cf. Patricia Greenfield & Robert Pleasure, *Representatives of Their Own Choosing: Finding Workers' Voice in the Legitimacy and Power of Their Unions*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 169, 178-180 (Bruce Kaufman & Morris Kleiner eds., 1993) (“Power is often described as ‘the ability to bring about

Nevertheless, at an irreducible minimum, the study tells us that a great many American employees feel a need for representation vis-à-vis their employers, that their need is not being filled, and that the reason for the gap between demand and supply can be attributed to American management's unwillingness to relinquish authority or to share power.⁵ This conclusion is beyond cavil; and, it speaks volumes as to whether the representation gap can be filled and how the law might fill it.

I. THE LAW AS OBSTACLE

Some see the paramount obstacle to giving workers the kind of representation they want to lie in the Labor Act's allegedly anachronistic and inflexible prohibition of company domination of "labor organizations", which are broadly defined to include *any* representation plan in which employees participate and which exists to deal with management over conditions of work.⁶ Note, for example, Michael LeRoy's characterization of the Act's "severity" in this regard:

An employer wants to try to accommodate working parents by allowing more flexible scheduling. However, the employer does not know which employees want a more flexible schedule or how to make a series of flexible schedules fit the organization's daily work requirements. A committee of employees and managers *is formed* and charged to discuss the matter with coworkers and develop a new scheduling plan. The committee eventually produces a plan that the employer considers and implements with some modifications.⁷

This course of conduct, LeRoy concludes, violates the law⁸ and so deters employers from meeting the very need that Freeman and Rogers document.

outcomes you desire' There is a debate as to whether to distinguish power, persuasion, authority, influence and control.") (citations omitted).

5. FREEMAN & ROGERS, *supra* note 3, at 144. This accords with Freeman and Lazear's earlier theoretical exposition leading to their conclusion that "management, on its own, will either fail to institute socially productive councils [systems of employee participation] or give them less power than is socially desirable." Richard Freeman & Edward Lazear, *An Economic Analysis of Works Councils*, in WORKS COUNCILS 25, 31 (Joel Rogers & Wolfgang Streeck eds., 1995).

6. 29 U.S.C. § 152(5) (1995).

7. Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1657 (1999) (emphasis added).

8. *Id.* ("The flex-scheduling committee is a section 2(5) labor organization because employees participated in it and they dealt with their employer over a condition of work. Since the employer formed the committee and determined its composition, it was dominated for purposes of section 8(a)(2).") (citations omitted).

There are three reasons to be skeptical about this claim grounded in law, in experience, and in the fit between what would be offered and what is sought. First, note the use of the passive voice in LeRoy's hypothetical: a committee "is formed." Only in the next paragraph does the reader learn that the employer formed the committee. The committee then "produced" a plan, but the reader is not told how. If management selected the employee participants (perhaps from a group of volunteers), scheduled the meetings, chaired (or "facilitated") the discussions, decided what was in and out of bounds for committee consideration, and modified the employees' proposals for its own adoption, then it would indeed have committed an unfair labor practice.⁹ The question is why management would have insisted on structuring the process that way. To be sure, management was faced with a problem: how best to accommodate working parents and those without children (who might resent having a less desirable schedule thrust upon them), while still getting its work done. If management needed to understand employee sentiment, it was free to survey employees without violating the law.¹⁰ If management really did not care what the schedule was as long as the work was done and most of the employees were satisfied, it could have asked the work group to solve the problem independently.¹¹ And if the employer felt the need to engage with employees in devising a schedule, it could simply have summoned them—personally or by e-mail—and said: "I need to work out a schedule. Send me your representatives and I will deal with them." Absent more, no unfair labor practice will have been committed, for nothing in the law prohibits an employer from *initiating* a labor organization.¹² And, as long

9. See *Polaroid Corp.*, 329 N.L.R.B. No. 47 (1999).

10. Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2326 (1998).

11. *General Foods Corp.*, 231 N.L.R.B. 1232 (1977). Bruce Kaufman explored this option in his interviews with several managements involved in employee participation programs. Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729 (1999). He observes:

From a management perspective, this approach both satisfies the law and increases the credibility and legitimacy of the decisions made by the employee representational committee [or work group], but it also opens up the possibility that a committee's [or group's] decisions may substantially change company employment policy (an "unholy precedent") or contravene employment law.

Id. at 775. The latter reason is unpersuasive. There would be few consequences to the company were it to decline to enforce or to rescind an action the group had taken that was unlawful; and there would be scant impact on the morale of the work group once the legal grounds were adequately explained. The former and more persuasive reason begs the question: whom does the policy vex, for whom is the precedent "unholy"? Not the work group that produced it. This is the crux of management's concern: by delegating decisional authority to the work group, management would lose control.

12. Note, *Participation With Representation: Ensuring Workers' Rights in Cooperative*

as the employer exercises no control over the employees' committee—as long as the employees are free to select their representatives and to establish their own structure and procedures—the employer will not have impermissibly dominated it.¹³ Management does not routinely secure employee representation this way, but not because the law prohibits it.¹⁴

The second reason to be skeptical is experiential. Michael LeRoy's empirical research suggests that the law has actually had scant effect on management's ability to create "employee involvement" systems.¹⁵ It seems that employers are largely indifferent to section 8(a)(2). Bruce Kaufman disagrees. On the basis of interviews with managers at nine companies, four management labor lawyers and two management consultants, several of whom were indifferent to the law because of the extreme unlikelihood of being charged with a violation and the "modest" penalty involved,¹⁶ Kaufman concludes that companies would do more in the nature of employee involvement but for the law.¹⁷ This proposition cannot be disproved;¹⁸ but, it is counter-experiential.¹⁹

Management, 1994 ILL. L. REV. 729, 737-738.

13. Whether or not management will have impermissibly "supported" the labor organization financially or otherwise under section 8(a)(2) is a separate matter. The Board has long distinguished permissible cooperation with a labor organization from impermissible support; and were the employee group to be truly independent, there should be no reason why that distinction would not apply. See ROBERT GORMAN, *LABOR LAW* ch. IX § 6 (1976).

14. Around 1919, Charles Schwab of Bethlehem Steel said of that company's employee representation plan, "We discuss matters, but we never vote . . . I will not permit myself to be in a position of having labor dictate to management." DAVID BRODY, *LABOR IN CRISIS: THE STEEL STRIKE OF 1919* 86 (1987); cf. Ann G. Leibowitz, *The "Non-Union" Union?*, in *PROCEEDINGS OF THE N.Y.U. 50TH ANNUAL CONFERENCE ON LABOR* 235 (Samuel Estreicher ed., 1999) [hereinafter CONFERENCE] (providing an account, as labor counsel to Polaroid, of the events leading up to the Board's finding of a section 8(a)(2) violation in Polaroid Corp., 329 N.L.R.B. No. 47 (1999)). One cannot but be struck, in both Leibowitz's account and the Board's decision, by the extraordinary length to which Polaroid went to try to avoid a formal vote on proposals by the employee group.

15. Michael H. LeRoy, *Employee Involvement Programs and Section 8(a)(2): A Survey of Employer Practices*, in CONFERENCE, *supra* note 14, at 141; cf. Mark Barenberg, *Commentary on LeRoy, Employment Involvement Programs*, in CONFERENCE, *supra* note 14, at 177 (challenging the use of empirical data and concluding that this case law has not had the extreme effect predicted by employers and unions); James Rundle, *The Debate Over the Ban on Employer-Dominated Labor Organizations: What is the Evidence?*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 161 (Sheldon Friedman et al. eds., 1994).

16. Kaufman, *supra* note 11, at 777.

17. *Id.* at 778-79.

18. See Laura W. Stein, *What Can "Non-Unions" Do?: A Response to Ms. Leibowitz and Professor Hyde*, in CONFERENCE, *supra* note 14, at 267.

19. Kaufman argues that "[m]ost companies understandably want to avoid both the large financial costs and public embarrassment associated with litigation." Kaufman, *supra* note 11, at 777. Kaufman's argument is supportable if company domination of a labor

Third, the Act's deterrent effect, such as there may be one, raises the question of whether it deters employers from instituting not the kind of employee representation employers want, but the kind of representation employees want. It may be that management should be free to structure and direct work groups that consider working conditions as well as productivity even when, as Michael Harper has observed, managers have formed such bodies "to align them with management priorities, to create a distorted impression of employee influence, and to extract information about efficient production that it may not be in the self-interest of employees to provide—at least in the absence of the protection of independent representatives."²⁰ *I.e.*, one may think the law ought not attempt to blunt such efforts, but that has little to do with filling the representation gap as perceived by employees. According to Freeman and Rogers, employees want their representatives to be independent of management (and so they would prefer to elect them); they want their representatives to have the ability to raise any matter of interest; and they want their representatives to agree jointly with management in certain critical matters, failing which they want their representatives to be able to address these differences through an outside neutral agency rather than to leave it to unilateral managerial action. None of these elements run afoul of section 8(a)(2); indeed, they are bolstered by it. But as Freeman and Rogers show, this tends not to be what management has in mind.²¹

II. REFASHIONING FEDERAL LAW

Virtually every commentator has conceded that the search for alternative forms of representation is stimulated, even if only in part, by the weaknesses of the National Labor Relations Act.²² It is equally recognized

organization always has that effect; but, it does not. The only "risk" an employer runs by falling afoul of section 8(a)(2) is of quietly settling the case with the NLRB regional office's agent (merely by disestablishing the organization) upon complaint (most likely only when a union comes on the scene to organize) without any compensation, because no one is involved, or without a murmur in the press, because the public does not care.

20. Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 *IND. L.J.* 103, 114 (2001) (citing Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *COLUM. L. REV.* 753, 825-78 (1994)).

21. Indeed, a major argument for abrogating section 8(a)(2) is the possibility that, as in the 1940s, these new "company unions" might evolve into truly independent (and effective) employee representatives. *See, e.g.*, Sanford Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 *J. LAB. RES.* 387, 389-91 (1995) (recommending an experimental relaxation of current law proscribing employer assistance to labor organizations to improve the quality of the representation).

22. *See, e.g.*, Michael Gottesman, *Collective Employee Representation in the 21st Century*, paper presented at *Symposium on The Changing Workplace in the New*

that there is no political prospect of strengthening that law, for example, by adding significant penalties for the discharge of union supporters or providing for the arbitration of initial collective bargaining agreements.²³ Consequently, a question inherent in *What Workers Want* is whether a rather different law could be fashioned: one that would accommodate what workers perceive as an alternative to collective bargaining—that is, a “cooperative” system of representation that eschews “power” for “influence.” Because much recent writing has looked to foreign experience to inform our thinking (Paul Weiler and Charles Craver have argued that European works councils are worthy of emulation here,²⁴ Michael LeRoy and Bruce Kaufman have pointed to the absence of section 8(a)(2) analogues in Canadian law in support of its modification,²⁵ and Ellen Dannin has challenged the alternative of “value-added unionism”²⁶ by reference to New Zealand’s experience with it²⁷), I have turned to a long-neglected foreign model. The model is from an industrial country, and would seem to fit the values and assumptions of American management better than some of the more commonly touted schemes, while providing special insight into our current situation.

We are called upon to reconcile the tension between two potentially conflicting demands. First, management must be assured that its fundamental prerogatives will not be compromised, and that the function of any employee representative body will be only advisory. Second, employees must be assured that, even though they lack power to compel accession to their views, their advice will be solicited and taken seriously—that they can have an *effective* voice, at least as best as legal

Millennium, sponsored by the Columbia Business Law Review, Columbia Law School, March 18, 2000. Leo Troy argues that it is “[c]ompetitive forces, including structural change,” not weakness in the law that has resulted in union decline. Leo Troy, *Commentary on Freeman & Rogers, What Do Workers Want?*, in CONFERENCE, *supra* note 14, at 33, 38. Most other commentators agree that these factors explain a good deal of union decline, but they are not as dismissive of the law’s inadequacy. See Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575 (1997).

23. Indeed, Kaufman’s argument for loosening section 8(a)(2) is conditioned on a strengthening of the Labor Act so that the two forms of representation—company-sponsored and external—would compete on a level playing field. Kaufman, *supra* note 11, at 775.

24. PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); Charles Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 146 (1997).

25. LeRoy, *supra* note 7, at 1670-88; Kaufman, *supra* note 11, at 803-08.

26. See Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996) (proposing an emerging model of “value-added unionism” as a conception that suggests that unions also present a “voice face” to workers and the firm).

27. Ellen J. Dannin, *Cooperation, Conflict, or Coercion: Using Empirical Evidence to Assess Labor-Management Cooperation*, 19 MICH. J. INT’L L. 873, 883 (1998).

machinery can assure it. The bridge between the two would have to rest upon the creation of a shared sense of community, of mutual trust and obligation.

Let us first address management's concern. Our model law provides at the very outset: "The employer is the leader of the enterprise [and] the employees are supporters ['followers' would be a better translation, but it sounds a bit demeaning and antiquated] who work together with the leadership to further the aims of the enterprise and for the common benefit." The statute then vests in management the express power to make policy and determine working conditions subject, however, to a duty of care for the well being of the workforce which, in turn, owes a statutory duty of loyalty to the leadership.

Two aspects of this provision would only restate existing American law. Management has the pre-existing right to make rules and determine working conditions and employees labor under a common law "duty of loyalty" to the enterprise.²⁸ What this provision injects is the idea of management performing a leadership role²⁹ in which it owes a statutory duty of care to the workforce. There is much in the recent corporate governance literature on whether or not employees ought be treated legally as "stakeholders" of the enterprise.³⁰ This provision adopts that view. It recognizes that workers have a legitimate claim on management. Although they are not equal partners (another aspect of existing law³¹), they are participants in the enterprise and management must have due regard for employee interests.

Having assured management of its proper role by law, the statute attends to replacing "the mistrust that characterizes many traditional factory settings with the mutual trust and confidence" that observers have found to characterize the modern "high performance" workplace.³² Indeed,

28. See generally, Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 322 (1999) (discussing an employee's duty of loyalty to the enterprise).

29. There is much in the literature of the "high performance" workplace on the role of modern management as "leadership." See, e.g., NATIONAL RESEARCH COUNCIL, *THE CHANGING NATURE OF WORK* 136-37 (1999).

30. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287 (1999) (considering the theory that employees should be treated as stakeholders); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 954 (1993) (proposing to reform the legal model of the corporation to recognize employees' stake in the firm).

31. See, e.g., *First Nat'l. Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981) (explaining that Congress, in establishing the process of collective bargaining under the National Labor Relations Act, "had no expectation that the elected union representative would become an equal partner in the running of the business").

32. EILEEN APPELBAUM ET AL., *MANUFACTURING ADVANTAGE: WHY HIGH-*

proponents of the abandonment of section 8(a)(2) argue that they seek “to build a stronger and stronger bond between employers and employees, a bond of mutual trust.”³³ Accordingly, our model law next provides for the establishment of an elected employee representative body to act in an “advisory capacity.” Given the statutory purpose, it is called a “Council of Trust.” The Council is charged with the statutory duty of increasing “mutual confidence” in the plant community. It is authorized:

to discuss all measures concerning the improvement of output, the form and enforcement of the general conditions of labor especially the plant regulations, the enforcement and improvement of safety measures, the strengthening of the ties between the members of the plant themselves and their ties with the plant, as well as the welfare of all members of the community. Furthermore, it is their task to resolve all disputes within the plant community. Their views must also be heard before any decision on punishment for the violation of the plant rules.

The law also creates a public office, the Trustee of Labor, for the administration of the Act to oversee the electoral process and the proper functioning of the system. The plant leader chairs the Council, but a majority of Councillors could call it into session. Management is statutorily obligated to provide the Council with all information necessary for it to perform its statutory functions. And when a Council of Trust believes a managerial decision is “incompatible with the economic or social conditions in the plant,” for example, in the content of a plant rule adopted by management over the Council’s very strong objection, it has the right, by majority vote, to appeal such a decision to the Trustee of Labor who is charged with resolving such disputes.

In terms of housekeeping, the law specifies the number of Councillors depending on the size of the plant, their terms of office, and electoral procedure. Because the whole purpose of the system is to develop *mutual* confidence, the electoral list of Council nominees has to be vetted with the plant leadership to assure management that the Councillors elected by the workforce are persons with whom management can cooperate. In other words, there would have to be a degree of give-and-take in the nominating process to assure that both employees *and* management shared confidence in the Council. In the current American context, this works a fair compromise between employees, a majority of whom prefer election, and managers, a narrow majority of whom oppose election.³⁴ Even in a

PERFORMANCE WORK SYSTEMS PAY OFF 8 (2000).

33. Testimony of Vicki J. McCormick, Human Resources Manager, EFCO Corp., before the House Economic and Educational Opportunities Committee (May 11, 1995).

34. FREEMAN & ROGERS, *supra* note 3, at 142.

unionized setting, management may refuse to deal with a union representative where the particular individual would create ill will and make good faith bargaining impossible,³⁵ and the element of mutual confidence is, if anything, more important in the "cooperative" system the statute is intended to create.

Although the foregoing is fairly faithful in structure and even in literal text to the model from which it was fashioned, there are some omissions and losses in translation. For example, the "plant leader" of the original was not understood in the contemporary jargon of the high performance workplace, but carried a strong military connotation. Similarly, the discussion has omitted the role of overseer (*Obmann*) of the plant organization of the National Socialist party in vetting the list of electoral nominees and the requirement that members of the Council of Trust (*Vertrauensrat*) be members of the party, the model for our hypothetical statute being the Law for the Organization of National Work (*Gesetz zur Ordnung der nationalen Arbeit*) ("AOG") of 1934.³⁶

I have turned to the AOG because the National Socialist regime also sought the means to provide employees with representation and it, too, was presented with inconsistent and potentially conflicting concerns.³⁷ Before the Nazi seizure of political power, the employer's power over the workplace had been legally constrained by four sources: positive law; the collective bargaining agreement negotiated with the union; the plant agreement negotiated with the independent works council established by law during the Weimar Republic; and individual contract. By 1934, the regime had eliminated the trade unions and was faced with developing an alternative industrial relations policy. The AOG sought to supplant contractualism, with its subtext of individual rights, with an intense (and politically correct) communitarianism:³⁸ the workplace was to be a

35. See, e.g., *Fitzsimmons Mfg. Co.*, 251 N.L.R.B. 375 (1980) *aff'd*, 670 F.2d 663 (6th Cir. 1982); *KDEN Broad. Co.*, 225 N.L.R.B. 25 (1976).

36. The original text can be found in the *Reichsgesetzblatt*, January 23, 1934, at 45-56. A translation of some provisions and a synopsis is supplied in Document 227, in *NAZISM 1919-1945: STATE, ECONOMY AND SOCIETY 1933-1939* 339-43 (J. Noakes & G. Pridham eds., 1984), and I have relied heavily, but not exclusively on the translation in the above. The law designated the employer as the "leader of the plant" (*Führer des Betriebs*), and white and blue collar workers as "retinue" of the leader (*Gefolgschaft*), in a harkening back to the medieval military band.

37. The best sources in English on the AOG are TIM MASON, *SOCIAL POLICY IN THE THIRD REICH* (Joan Broadwin trans., Jane Caplan ed., 1993) [hereinafter MASON, *SOCIAL POLICY*] and Tim Mason, *The Origins of the Law on Organization of National Labor of 20 January 1934. An Investigation into the Relationship Between 'Archaic' and 'Modern' Elements in Recent German History* [hereinafter Mason, *Origins of the AOG*], in TIM MASON, *NAZISM, FASCISM AND THE WORKING CLASS 77* (Jane Caplan ed., 1995).

38. The principal draftsman of the AOG and its animating spirit was Dr. Werner Mansfeld. Mansfeld was born in 1893. He fought in World War I as a front line officer.

community (*Betriebsgemeinschaft*), headed by a leader (*Führer*) to whom loyalty was owed but who, in return, had a publicly accountable duty to care for the welfare of the workforce.³⁹ The *Vertrauensrat* was conceived of, not as a representative of the “special interests” of workers like the works council of Weimar law, but as an “organ of the company.”⁴⁰ It was an effort, stimulated by the most advanced thought in industrial psychology,⁴¹ to “grasp the worker as a whole person and reincorporate him as such in the organism of the plant.”⁴² In so doing, it would also restore the employer to his traditional role of “master in his own house” (*Herr im Hause*).⁴³ German workers failed to be beguiled. About sixty

After the war ended, he joined the *Freikorps* taking part in the Kapp Putsch. He had studied law at the University of Münster in 1930, and later served there as a lecturer; in other words, he was a man of some academic accomplishment. As a lawyer, he represented the Association of Mining Interests in Essen. From this he developed a specialty in labor relations. He joined the Nazi party only when called to the Ministry of Labor as a Ministerial Director and Leader of Department III for Labor Law. As Wolfgang Spohn puts it, Mansfeld was not an absolute (*unbedingt*) Nazi, but rather “a reactionary to the bone [*reaktionär bis auf die Knochen*] and thoroughly unscrupulous.” WOLFGANG SPOHN, *BETRIEBSGEMEINSCHAFT UND VOLKSGEMEINSCHAFT: DIE RECHTLICHE UND INSTITUTIONELLE REGELUNG DER ARBEITSBEZIEHUNGEN IM NS-STAAAT* 13 (1987) (reviewing Mansfeld’s biography and role). Mansfeld is further discussed in ANDREAS KRANIG, *LOCKUNG UND ZWANG: ZUR ARBEITSVERFASSUNG IM DRITTEN REICH* 37-38 (1983). In 1941, Mansfeld wrote a commentary on the AOG in which he said, in pertinent part:

Individual labour contracts had hitherto been understood in materialist terms and established only a contractual relation between ‘employer’ and ‘workforce’. This has been replaced by the ‘loyalty relationship’ [*Treueverhältnis*] between leader and followers which is the foundation of their common activity, and has (along with the employer’s welfare responsibilities) to a large extent become the juridical foundation of the rights and duties that derive from labour relations. Of course, the contract remains indispensable as the basis for labour relations, and certain material details must be regulated by it. But the contractual relationship with mutual and interdependent rights and duties has been eliminated from the relationship between the entrepreneur and his followers.

Mason, *Origins of the AOG*, *supra* note 35, at 98-99; *see also*, Bernd Rütters, *Die Ideologie des Nationalsozialismus in der Entwicklung des deutschen Rechts von 1933 bis 1945*, in *RECHT UND RECHTSLEHRE IM NATIONALSOZIALISMUS* 17 (Franz Jürgen Sächer ed., 1992).

39. I have omitted discussion of the AOG’s creation of “courts of social honor” to regulate abuse of workplace authority by managers and supervisors. *See* KRANIG, *supra* note 38, at 232-40. It was an exercise in cynicism. *Id.* However, the employer’s duty of care for the welfare of the workforce (*Fürsorgepflicht*) has continued as a significant element of German labor law today.

40. SPOHN, *supra* note 38, at 68.

41. MASON, *SOCIAL POLICY*, *supra* note 37, at 106.

42. Mason, *Origins of the AOG*, *supra* note 37, at 91 (citation omitted). *See, e.g.*, Hans Nipperdey, *Die Pflicht des Gefolgsmannes zur Arbeitsleistung*, *DEUTSCHES ARBEITSRECHT* 186 (1938).

43. BERNARD BELLON, *MERCEDES IN PEACE AND WAR* 223 (1990) (discussing the effort to implement the AOG at Mercedes). Although the AOG provided that, “[i]n order for the Councillors of Trust to perform their function, the leader of the plant is obligated to supply

percent of those workers eligible to vote for Councillors of Trust stayed away from the polls in 1934. The 1935 election was so rigged by the regime as to totally discredit the result. The next election was canceled. Elections never were held again. Council members were simply appointed jointly by the employer, the overseer of the party cell organization and the Trustee of Labor.⁴⁴

This rebarbative historical digression is intended to illuminate the context in which we take up industrial relations—or human resource management⁴⁵—as a matter of public policy today. The United States also faces a gap in representation; we, too, are told that means should be found to fill it by creating a “cooperative” form of workplace governance, and that this earlier German model would seem ready-made to supply what American workers want. The comparison takes us to the legal and social landscape on which the model would be rooted: in Germany, of a then recent history of independent worker representation bolstered by the law; in America, of decades of decline in union density and a labor law that fails to deter employers from engaging even in anti-union terrorism.⁴⁶

From this perspective, it is more than a little unnerving to realize that a law drafted by a fascist regime to dissolve worker independence, to persuade employees by modern techniques of industrial psychology to think of themselves as integral members of a cooperative workplace community, and to restore employer dominance, might actually be taken in America today as an *advance* in securing employees some workplace influence. In any event, it is inconceivable that this model would be supported by American managers who are already masters in their own house and perceive no need for the intervention of the state.

The raw political fact is that there is no prospect for change in the federal law of employee representation. Section 8(a)(2) will not be abrogated or modified, whether or not that is a good⁴⁷ or a

necessary information.” Under section 13(2), in practice, it was for the employer to decide what information was “necessary.” SPOHN, *supra* note 38, at 62. And though a majority of the Council could appeal a plant leader’s directive to the Trustee of Labor in the Reich Ministry of Labor (the office created by the AOG to oversee the law), the leader’s directive remained in force pending a ruling and could be actionable against the Councillors if the Trustee found the complaint to be unjustified. RICHARD GRUNBERGER, *THE 12-YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933-1945* 193 (1995).

44. MASON, *SOCIAL POLICY*, *supra* note 37, at 166, 177-78.

45. PHILIP SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 96 (1969) (stating that “[i]n one sense, to think of a man as a ‘human resource’ is to affront his personality”).

46. This characterization is Professor Gottesman’s in Gottesman, *supra* note 22, at 2 (speaking of “the threshold of terror that employees must hurdle”—of threats and summary discharge—to secure collective representation). Gottesman’s characterization is not unwarranted.

47. See Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV.

bad⁴⁸ idea, because organized labor (with whatever political influence it can muster) sees nothing in it; and, more adventurous schemes for indigenous representation, for example, by genuinely independent works councils (or the *outré* idea of non-majority representation⁴⁹) have no future, for employers see nothing in it for them. Consequently, attention must be paid to the area of action left within the existing confines of federal law.

III. THE RESORT TO LAW

Almost fifty years ago, V.L. Allen contended that “[t]he end of trade-union activity is to protect and improve the general living standards of its members and not to provide workers with an exercise in self-government.”⁵⁰ By these lights, unions are service-providers pure and simple. Others see unions as critical social institutions from which we learn and practice collective self-rule that is essential to the maintenance of political democracy, as “seedbeds”⁵¹ of a civic engagement that seem to be in a general societal retreat.⁵² The two conceptions, however, are not

125, 126 (1994) (making the case for the partial repeal of Section 8(a)(2)).

48. See Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 331 (1994) (arguing that proposals to amend or repeal section 8(a)(2) would lead to schemes that would threaten employee rights, evade unionization, and seriously damage the credibility of legitimate worker participation programs).

49. Non-majority representation was supported by American business when the Labor Act was proposed in lieu of exclusive representation by majority rule. Matthew Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 191 (Matthew Finkin ed., 1994) [hereinafter EMPLOYEE REPRESENTATION]. The idea has been scouted in Michael Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, in EMPLOYEE REPRESENTATION, *supra*, at 57, and in Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247, 260 (2000), but it was given a more sympathetic consideration in Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 COMP. LAB. L. & POL’Y J. 47 (1998), who fathered the inquiry. See generally Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

50. V.L. ALLEN, POWER IN TRADE UNIONS: A STUDY OF THEIR ORGANIZATION IN GREAT BRITAIN 15 (1954) (I am indebted to Sheldon Leader for bringing this reference to my attention.). Allen’s was a riposte to the claim that unless unions are run democratically, they will be a threat, instead of a contributor, to political democracy. Samuel Estreicher has criticized the very idea that a service provider, union or otherwise, should be democratically governed. Estreicher, *supra* note 49, at 247-48.

51. E.g., Thomas Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279 (1995).

52. ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 80-92 (2000) (noting a recent steep decline in union membership and a shift in the workplace causing unions to serve as mere bargaining agents rather than leaders of social movements).

antagonistic.⁵³

As many despair the loss of unions as institutions of self-rule, Michael Gottesman has recently turned to their role as service-providers.⁵⁴ He points out that the decline of unions has been accompanied by the rise of workplace law. Ironically, the laws often resulted from union lobbying.⁵⁵ However, many of these laws are still inadequately implemented due to the lack of legal counsel who are able and willing to undertake the necessary litigation. He envisions the role of unions shifting from workplace bargainers to legal service providers.⁵⁶ As Gottesman recognizes, there is no inconsistency in unions including a more aggressive program with legal services for dues-paying members to complement their role in workplace representation; a social movement can do both.⁵⁷

There are reasons to be sanguine about this prospect. First, there is *something* to be said for the better realization in the workplace of what society holds conditions ought to be, as a matter of law.

Second, it requires no change in law: group actions are frequently brought over workplace disputes that implicate the legality of an employer's policy or practice that affects a number of employees.⁵⁸ Class actions brought under federal employment discrimination and pension protection laws, as well as other federal claims, commonly command a good deal of press coverage. However, group actions are brought as well under state employment law (both statutory and common law). State claims may include: invasion of privacy,⁵⁹

53. As Putnam points out, unions can be both service providers *and* arenas of civic engagement, which makes these two functions "mutually reinforcing." *Id.* at 80.

54. Gottesman, *supra* note 49, at 57. He suggests in the latter that in this new environment, characterized by individual legal entitlements, it is even possible for other commercial organizations to market themselves more aggressively by packaging group legal services.

55. Gottesman, *supra* note 22, at 12.

56. *Id.* at 9, 12-13. An earlier version of this argument was advanced by Robert Rabin, Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 172 (1991).

57. Gottesman, *supra* note 22, at 12-13. *See also* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 538-39 (1992).

58. Gottesman pointed out in his remarks, *supra* note 22, that unions lack standing to bring suits on behalf of their members under the Fair Labor Standards Act ("FLSA"). *United Food & Commercial Workers, Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193 (10th Cir. 2000). This, he argued, calls for remedial legislation. The need for this reform seems unassailable. Class actions are not allowed under the FLSA, only group actions brought by multiple plaintiffs. A suit brought by a union in its own name would enable the union to represent more efficiently the plaintiff group.

59. *E.g.*, *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122 (9th Cir. 2000); *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174 (1st Cir. 1997); *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914 (C.D. Ill. 1999); *Raines v. Shoney's, Inc.*, 909 F. Supp. 1070 (E.D. Tenn. 1995); *Johnson v. K-Mart Corp.*, 723 N.E.2d 1192 (Ill. App. Ct. 2000).

defamation,⁶⁰ express or implied contract,⁶¹ breach of the covenant of good faith and fair dealing,⁶² violation of state wage payment or minimum wage law,⁶³ state wage and hour law,⁶⁴ and discharge for a reason that violates public policy,⁶⁵ to cite a few recent examples.

Third, a likely consequence would be actually to facilitate unions functioning as minority (or “members only”) representatives. Even in the absence of mandated pre-trial mediation (required in some states and in some federal districts⁶⁶), it is inconceivable that most of these cases would come to trial without a prior course of dealing between the parties looking toward a resolution. Notice from the union as a litigant to the employer in anticipation of legal action would most likely result in such a course of dealing. In effect, the union would be bargaining with the employer on behalf of the self-selected group in conjunction with its assertion of a legal right.

Finally, according to Freeman and Rogers, although those workers who have experienced the legal system tend to be dissatisfied with it, workers want more law, or, at least, more legal protection.⁶⁷ A more aggressive union role in this regard would supply part of this demand.

We can only speculate, however, about the further consequences that might flow from a more routine resort to law. The Dunlop Commission was less than sanguine about the growth of litigation:

For every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims. Moreover, aside from

60. *E.g.*, Freeman v. Bechtel Constr. Co., 87 F.3d 1029 (8th Cir. 1996); Davis v. Copelan, 452 S.E.2d 194 (Ga. Ct. App. 1994); Aranyosi v. Delchamps, Inc., 739 So. 2d 911 (La. Ct. App. 1999); Eskew v. Plantation Foods, Inc., 905 S.W.2d 461 (Tex. Ct. App. 1995).

61. *E.g.*, Demasse v. IIT Corp., 984 P.2d 1138 (Ariz. 1999); Baldwin v. Pirelli Armstrong Tire Corp., 3 S.W.3d 1 (Tenn. Ct. App. 1999).

62. *E.g.*, Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329 (Cal. Ct. App. 1995).

63. *E.g.*, Cork v. Applebee's of Mich., Inc., 608 N.W.2d 62 (Mich. Ct. App. 2000); Boustany v. Monsanto Co., 6 S.W.3d 596 (Tex. Ct. App. 1999); Schneider v. Snyder's Foods, Inc., 976 P.2d 134 (Wash. Ct. App. 1999).

64. *E.g.*, Morillion v. Royal Packing Co., 995 P.2d 139 (Cal. 2000).

65. *E.g.*, Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 59 F.3d 80 (8th Cir. 1995); Inter-Modal Rail Employees Ass'n v. Burlington N. and Santa Fe Ry. Co., 87 Cal. Rptr. 2d 60 (Cal. Ct. App. 1999); Babick v. Or. Arena Corp., 980 P.2d 1147 (Or. Ct. App. 1999); Bravo v. Dolsen Cos., 888 P.2d 147 (Wash. 1995).

66. NANCY ROGERS & CRAIG MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 7.01 (2d ed. 1994) (“Although parties to a dispute may ultimately refuse to settle in mediation, they are not always free to decline participation. Increasingly, mediation of designated contested issues is made mandatory by statute, court rule, or individual court ruling.”) (footnote omitted). I am indebted to my colleague, Ellen Deason, for bringing this and additional references on this point to my attention.

67. FREEMAN & ROGERS, *supra* note 3, at 127-32.

the direct costs of litigation, employers often dedicate significant sums to designing defensive personnel practices (with the help of lawyers) to minimize their litigation exposure. These costs tend to affect compensation: as the firm's employment law expenses grow, less resources are available to provide wage and benefits to workers.⁶⁸

Because of these financial consequences, the Commission viewed the rise in employment litigation as a "crisis"⁶⁹ which would only be exacerbated by more litigation. Others, however, are skeptical of the general claim of a litigation crisis rife in America.⁷⁰

Conceding that at some level (and on some issues) the legal system may create nothing more than a transfer of resources to lawyers, at another level (and on other issues) it is a price we necessarily pay for civilization, even if employees might pay for it with reduced wages. The latter, for example, may well be the effect of workers' compensation systems, but no one has argued seriously for the abandonment of those systems on that ground.⁷¹

Might there also be non-economic consequences of a heightened resort to litigation? The extension of the influence of law into areas where it was not all that active or visible heretofore not only "enlarge[s] and deepen[s] the application of law,"⁷² it also means that the people subject to it "more and more format their lives in accordance" with it.⁷³ In the nineteenth and early twentieth century, labor was subject to a process of proletarianization, which unions sought to redress in the workplace. The more aggressive resort to law in the twenty-first century holds the prospect of a process of "juridification,"⁷⁴ in which workplace decisions will be subject to judicial scrutiny as long as a category of legal wrong can be claimed and a client to assert it can be found.

Though the term has a slightly pejorative connotation, it is far from

68. Commission on the Future of Worker-Management Relations, *Report and Recommendations*, December 1994, at 25. The predicate for the conclusion would seem to be off by a multiple, at least in wrongful discharge litigation, where for every dollar paid to the employee, four dollars are paid to lawyers. Summers, *supra* note 57, at 469.

69. *Id.*

70. The leading skeptic is Marc S. Galanter. See Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998). Some of the empirical literature on point is collected in Kaufman, *supra* note 11, at 721-22.

71. John Addison & Barry Hirsch, *The Economic Effects of Employment Regulations: What Are the Limits?*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125, 138-41 (Bruce Kaufman ed., 1997).

72. JAN M. BROEKMAN, A PHILOSOPHY OF EUROPEAN UNION LAW 431 (1999).

73. *Id.* at 397-99.

74. See generally Spiros Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L.J. 93 (1985). The term in German is *verrechtlichung*. In French, *juridicisme*. *Id.* at 95.

obvious that a juridified workplace would necessarily be an evil. Employer policies governing covenants not to compete, trade secrets, and use of confidential business information currently require very close attention to the law. No one has argued that this intensive legal involvement has had a socially harmful effect. Indeed, it is far from obvious that we do or will face an “intolerable” level of litigation.

The Dunlop Commission decried the “litigation leap”—an increase in federal employment lawsuits of 430% from 1971 to 1991.⁷⁵ Freeman and Rogers estimate that workers account for approximately 600,000 legal complaints to state and federal courts and to regulatory agencies per year.⁷⁶ Note that these figures are for a civilian workforce of well over 100,000,000.⁷⁷ In the Federal Republic of Germany, which has a civilian workforce that is one-third of this size, more than 700,000 claims are brought to the labor courts alone every year.⁷⁸ It is not at all clear that if the United States were to resemble Germany more in this regard that it would be worse off because of it.

The German comparison is complicated, however, by the presence there, and absence here, of an indigenous system of works councils. These statistics do not reflect all of the issues brought to and resolved by works councils,⁷⁹ but they do include cases brought to enforce co-determinational or consultative rights before policies are adopted or managerial decisions are made. There, juridification works in part to reinforce the role of the workers’ representatives in the workplace. Here, juridification would work a transfer of power from human resource managers to lawyers; but, again, it is not obvious that the shift of power on the company’s side of the ledger would be deleterious, or much noticed.

On the other side of the ledger, employees would get a form of “members only” representation, which is unavailable to them under the Labor Act. The problem is that the interests represented on the plaintiffs’ side may not invariably coincide with those of the larger workgroup not represented in the litigation. Disputes, in particular, over private collective goods—*i.e.* contractual claims concerning employer policies that cannot be

75. Commission on the Future of Worker-Management Relations, *Fact Finding Report*, May 1994, at 112-13.

76. FREEMAN & ROGERS, *supra* note 3, at 122.

77. *Id.*

78. Günter Grotmann-Höfling, *Die Arbeitsgerichtsbarkeit im Lichte der Statistik*, in 45 ARBEIT UND RECHT 268, 272 (1997) (recording 714,865 claims); Günter Grotmann-Höfling, *Die Arbeitsgerichtsbarkeit 1998 im Lichte der Statistik*, in 47 RECHT DER ARBEIT 355, 339 (1999) (recording 741,003 claims).

79. In the matter of employee discharge, for example, the works councils endorse sixty-six percent of termination decisions, are silent in twenty percent of them and register opposition in only eight percent. Michael Kittner & Thomas Kohler, *Kündigungsschutz in Deutschland und den USA*, in 13 BETRIEBS BERATER 1, 24 (Supp. 4, 2000). Only about ten percent of all termination decisions are ever contested in the labor courts. *Id.* at 26.

individually tailored, but must treat the workforce or components of it as a group—may well implicate conflicts between represented and unrepresented employees⁸⁰ that litigation only awkwardly resolves.

In sum, juridification would work to hold employers more routinely accountable to the law (at a possible cost of a reduction in wage levels), work a shift of power away from managers to lawyers, and give some employees a stronger voice vis-à-vis their employers. On balance, this is not an obviously evil set of trade-offs.

However, the "legal service" model of representation, which is geared toward the vindication of established rights, is unsuited to the generation of new private collective goods; that is, what unions do through collective bargaining. Yet, as Freeman and Rogers show, workers want not only more legal protection, but also more internal workplace participation.⁸¹ If federal law is incapable of filling this want, and if unions as aggressive legal service providers can supply only part of what workers want, is there something, anything, that states can do?

IV. THE POTENTIAL OF STATE LAW

The potential for state law to bridge, even partially, the representation gap must come to grips with the weltered world of federal labor law preemption.⁸² Earlier, it was commonly assumed that without collective bargaining employees had rather little in the way of legally enforceable protections or guarantees. As the foregoing has illuminated, however, today collective bargaining is but one actor, not even in a major supporting role, on a stage set with a host of protective federal and state labor laws—laws dealing with occupational safety and health, job discrimination, plant closing, wage payment, whistle-blowing, personnel files, pensions and benefits, wages and hours, drug testing, and much more. The question

80. See, e.g., *Cork v. Applebee's of Mich., Inc.*, 608 N.W.2d 62 (Mich. Ct. App. 2000) (concerning three restaurant servers complaints of "tip sharing" with bartenders and other employees, who were not parties to the suit). This is the kind of dispute unions routinely negotiate, in the resolution of which the complete satisfaction of each member of the group cannot be assured. See, e.g., *Hussein v. Sheraton N.Y. Hotel*, 100 F. Supp. 2d 203, 206-209 (S.D.N.Y. 2000) (concerning a worker's claim of differential treatment and inadequate union representation). It also cannot be assumed that in litigation, management's legal position in defense of its policy or action—often to seek the most expansive judicial recognition of an unfettered managerial prerogative—would coincide with the interests of employees not represented in the litigation.

81. FREEMAN AND ROGERS, *supra* note 3, at 132.

82. Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469 (1993); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 *YALE J. ON REG.* 355 (1990); Eileen Silverstein, *Against Preemption in Labor Law*, 24 *CONN. L. REV.* 1 (1991).

posed is whether the state has the ability to become one more actor on the scene by, for example, mandating a works council or requiring an employer to deal with “members only” organizations for those workforces that are not represented by exclusive bargaining agents under federal law.

Such laws would confront two potential legal challenges. The first, and more easily dealt with, is the part of preemption law that forbids the states to require what federal law forbids. To the extent a state works council law would require employers to violate section 8(a)(2), it would be preempted.⁸³ However, the law could avoid this pitfall by seeing to it that the worker representatives are completely independent of employer domination in the design and operation of the works council. In addition, section 8(a)(2) would not pose any problem for requiring a “members only” system.

The second and more difficult question is whether the Labor Act has so “occupied the field” of employee representation as to preclude the states from acting in these ways. As Justice Frankfurter observed in *Bethlehem Steel Co. v. New York State Labor Relations Board*,⁸⁴ care needs be taken, for the “[m]etaphor—‘occupied the field’—has at times done service for close analysis.”⁸⁵ In that case, New York applied its “Little Wagner Act” to extend collective bargaining rights to the company’s foremen, a result that was concordant with the federal act, but which, at the time, the NLRB would not have chosen to do. The majority charted out the field:

In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state.⁸⁶

Nevertheless, the Court held the action to be preempted.⁸⁷

Two terms later, in *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*,⁸⁸ the Court glossed over the *Bethlehem Steel* decision where a state labor board had applied state statutory criteria,

83. Cf. Op. of NLRB Gen. Counsel, *Goody’s Family Clothing, Inc.*, No. 10-CA-26718, 1993 WL 726790 (Sept. 21, 1993).

84. 330 U.S. 767 (1947).

85. *Id.* at 782.

86. *Id.* at 773.

87. *Id.* at 776.

88. 336 U.S. 18 (1949).

determining appropriate bargaining units, that differed from those contained in the NLRA. The jurisdiction of the NLRB had not been invoked. Nevertheless,

Both the state and the federal statutes had laid hold of the same relationship [in *Bethlehem Steel*] and had provided different standards for its regulation. Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us.⁸⁹

... A certification by a state board *under a different or conflicting theory of representation* may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer. The problem of employee representation is a sensitive and delicate one in industrial relations. The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy.⁹⁰

These are the Court's last definitive words; and, arguably, the Court leaves the question presented here—whether, in the absence of an exclusive bargaining relationship, the states may require an employer to deal with an independent employee organization, either mandated by state law or created voluntarily by employee designation—rather at sixes and sevens. On the one hand, it can be argued that *La Crosse Telephone* forbids the states from applying a “different or conflicting theory of representation” than that set out in the NLRA.⁹¹ The Labor Act adopts a particular theory of representation: by majority designation of an exclusive representative for the wages, hours, and working conditions of members of an appropriate bargaining unit. Congress considered and declined to adopt a members only system; nor did Congress favor a works council approach, of proportional representation, that it knew was likely to be one outcome of that option.⁹² Were Congress to adopt either of these today, it would be considered a fundamental change in federal labor policy; and so, the argument would run, the states cannot apply a “theory of representation”

89. *Id.* at 25.

90. *Id.* at 26 (citation omitted) (emphasis added).

91. *Id.*

92. Finkin, *supra* note 49, at 195-96.

that Congress refused to enact.⁹³

Without denying the argument's obvious power, there remains something to be said on the other hand: that the potential for the conflict of laws contemplated by *La Crosse Telephone* is difficult to discern; that inasmuch as employers may voluntarily deal with independent non-majority representatives, the federal law should, in *Bethlehem Steel's* terms, be "equally indifferent to what . . . [the employer] may do under compulsion of the state" in that regard.⁹⁴ Furthermore, there seems scant reason to require employees who wish to be heard and to deal with their employer over a particular issue of moment to them—and to which federal law is substantively indifferent—to designate an exclusive bargaining agent under federal law for all wages, hours, and working conditions in order to do so.⁹⁵

Freeman and Rogers tell us that workers have a fairly sophisticated idea of which issues call for group action or assistance, and which issues they would prefer to take up with their employers individually: "[t]hey differentiate between those areas in which they prefer to deal with problems by themselves and those in which the collective or public-goods nature of the decision—health and safety, benefits, a system for resolving problems—would seem to require a group input to be effective."⁹⁶ In other words, a fair reading of the data suggests not that employees necessarily want a single alternative organization to represent them; instead, employees may well want discrete bodies capable of dealing with particular issues of moment to them, while being assured that these bodies are independent of the employer.

Accordingly, if the state cannot enact a "different theory of representation,"⁹⁷ governing employee participation in framing terms and conditions of employment in general, could it do something less sweeping to accommodate these more specific desires? The Court in *Bethlehem Steel* recognized that the Labor Act deals with the employment relationship, "but

93. Section 10(a) of the Taft-Hartley Act, added in 1947, authorizes the NLRB, by agreement with state agencies, to cede jurisdiction for the regulation of labor relations in certain businesses so long as the statute administered by the state is consistent with the provisions of the Labor Act. The Supreme Court has interpreted this provision to require that state law parallel federal law. *Algoma Plywood Co. v. Wis. Employment Relations Bd.*, 336 U.S. 301, 313 (1949). Section 10(a) of the act recognizes a role for the states to regulate labor relations in enterprises over which the Board could assert jurisdiction, and so weakens the claim of federal law to occupy the field. But the states would not be free under this provision to apply a theory of representation other than one paralleling exclusive representation by majority rule.

94. *Bethlehem Steel*, 330 U.S. at 773.

95. Finkin, *supra* note 49, at 212-13.

96. FREEMAN & ROGERS, *supra* note 3, at 56.

97. *La Crosse Tel. Corp. v. Wis. Employment Relations Bd.*, 336 U.S. 18, 26 (1949).

partially,"⁹⁸ and the Court later admonished that "[t]he National Labor Relations Act... leaves much to the states."⁹⁹ An "appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction"¹⁰⁰ over a variety of matters of concern in the employment relationship. A state may mandate specific insurance benefits for employees¹⁰¹ or severance pay in the event of a plant closing,¹⁰² even though these are mandatory bargaining subjects to be negotiated with a union, if one is in place. The states are free to impose "minimum terms of employment" and extend these to unionized, as well as non-unionized, employees; and by "minimum," the Supreme Court made plain that it meant non-waivable by individual employees and so non-waivable by the union that represents them.¹⁰³ In other words, the states are free to reach those substantive aspects of the employment relationship that are not reached, or reached only partially by the NLRA. Does this mean that the states are totally precluded from attaching procedural requirements for the better realization of these specific substantive rights by providing for employee representation vis-a-vis employers instead of establishing minimum terms of employment, because the "entire area" of employee representation is "occupied" by federal law? Judicial interpretation of the Labor Act may well contemplate a general bifurcation of state and federal authority in labor relations,¹⁰⁴ but an absolutely rigid wall of separation between ends and means would be difficult to maintain. As we have seen, class or group actions brought to vindicate a labor protective law or an employer-generated collective good necessarily engenders a form of members-only collective representation, albeit one geared to the vindication of those specific legal claims. It could not seriously be entertained that a state-mandated judicial mediation adjunct to such litigation must be disallowed on preemption grounds because it necessarily contemplates a different method of worker representation than that

98. *Bethlehem Steel*, 330 U.S. at 773.

99. *Garner v. Teamsters Local 776*, 346 U.S. 485, 488 (1953) (citation omitted).

100. *Brown v. Hotel & Rest. Int'l Union Local 54*, 468 U.S. 491, 503 (1984).

101. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985).

102. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-23 (1987).

103. *Metro. Life*, 471 U.S. at 754-55. Indeed a refusal to extend these benefits to unionized employees would be preempted. *Lividas v. Bradshaw*, 512 U.S. 107, 133 (1994).

104. No provision of the Labor Act deals with preemption per se; it is a malleable, judge-made doctrine. The *Metropolitan Life* Court observed that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metro. Life*, 471 U.S. at 753 (citing Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 297 (1980) (observing that "[t]he NLRA is primarily concerned with a *method* of establishing terms and conditions of employment")).

provided in the Labor Act. And if this is so, would it not be permissible for the states either to require (a hard approach) or to encourage (a soft approach) consultative processes with independent employee representatives in non-unionized workplaces on questions concerning specific public or private collective goods, even before litigation is contemplated? We shall look at each of these in turn.

A. *Hard Law*

We need not speculate about the state's willingness to require more narrowly focused forms of employee participation: at least eighteen states mandate¹⁰⁵ or authorize¹⁰⁶ the creation of workplace safety committees in

105. See ALA. CODE § 25-5-15 (1992) (requiring the employer to appoint a safety committee including at least one non-supervisory employee to "advise" on workplace safety); CONN. GEN. STAT. § 31-40v (1997) (establishing health and safety committees pursuant to regulations issued by the Workers' Compensation Commission); FLA. STAT. ch. 442.012 (1999) (mandating an equal number of employee representatives under rules to be adopted by the division of occupational safety and health); HAW. REV. STAT. § 386-k (2000) (requiring an equal number of employee and employer representatives); MINN. STAT. § 182.676 (Supp. 2000) (stating that "[e]mployee safety committee members must be selected by employees"); MONT. CODE ANN. § 39-71-1505(2)(a) (1999) (requiring committee to be composed of employee and employer representatives) (MONT. ADMIN. R. 24.30.2542(3)) (1997) states that "[f]ederal law prohibits domination of a safety committee by management." Subsection (4)(a)(i) provides that employer representatives may not exceed the number of employee representatives); NEB. REV. STAT. § 48-443 (1998) (providing for an equal number of employer and employee representatives; employees may not be selected by the employer); NEV. REV. STAT. ANN. 618.383 (Michie 2000) (requiring workplace safety committees); N.H. REV. STAT. ANN. § 281-A:64 III (1999) (demanding an equal number of employer and employee representatives and providing that employee representatives be selected by employees) (N.H. CODE ADMIN. R. ANN. LAB. 603 (1999) (implementing regulations); N.C. GEN. STAT. § 95-252 (1999) (establishing that employer representatives are not to exceed the number of employee representatives with employee and employer representative co-chairpersons) (implementing regulations are set out at N.C. ADMIN. CODE tit. 13, r.7A.0604 (June 2000)); OR. REV. STAT. § 654.182 (1997) (requiring an equal number of employee and employer representatives); R.I. GEN. LAWS § 27-7.1-21 (1998) (authorizing the director to establish loss control standards that require a safety committee); TENN. CODE ANN. § 50-6-502 (1999) (mandating an equal number of employee and employer representatives under rules to be prescribed; these are set out in considerable detail in chapter 0800-2-3 of the Rules of the Tennessee Division of Workers' Compensation); WASH. REV. CODE § 49.17.050 (Supp. 2000) (providing for rules establishing safety and health plans) (WASH. ADMIN. CODE § 296-24-045 (1999) provides accordingly for safety committees with employer representatives not to exceed employee representatives, the committee to elect its chair); W. VA. CODE ANN. § 23-2B-2 (Michie 1998) (authorizing the Commissioner of the Bureau of Employment to require a safety committee; the rules require at least fifty percent employee representation, W. VA. CODE ST. R. § 85-23-3 (2000)).

106. California permits employee safety committees to be provided for in employer-generated injury prevention programs. CAL. LAB. CODE § 6401.7(f) (West 2000). Pennsylvania provides for a discount on workers' compensation insurance premiums if

conjunction with their workers' compensation or occupational safety and health laws. Insofar as these apply to unionized workplaces, there is little doubt that they are preempted as an impermissible intrusion into the bargaining process: the state may not require that an employer circumvent an exclusive bargaining agent by setting up a safety committee independent of it,¹⁰⁷ nor may the state require a union to negotiate a specific provision.¹⁰⁸ In the non-union workplace, these laws would be preempted to the extent they would require an employer to violate section 8(a)(2).¹⁰⁹ But they need not run afoul of section 8(a)(2): if they are established to assure the free election by employees of their representatives, and if these representatives have full freedom of action to propose, to consider, and to approve (or reject) safety plans and rules in dealing with management, all of this assured by state supervision, there would be no violation of section 8(a)(2).

There is no reason why such a narrowly crafted state law should be preempted in the non-union workplace because the Labor Act has "occupied the field" of employee representation. The *Bethlehem Steel* Court made plain that even as the Labor Act dealt with the employment relationship, it did so "but partially" and left "closely related matters" to the states.¹¹⁰

The mandate of workplace safety committees fits within the compass of state action thus allowed: these committees are procedural adjuncts to a substantive end of assuring greater workplace safety,¹¹¹ a valid concern of

safety committees are operative. PA. STAT. ANN. tit. 77, § 1038.2 (West Supp. 2000). New York authorizes the establishment of a Safety Trade Association Group which, in turn, may appoint safety committees. N.Y. COMP. CODES R. & REGS. tit. 12, App. D-1 (2000). Utah recommends that injury prevention programs be established. UTAH ADMIN. CODE R614-1-5 (Supp. 2000).

107. Op. of NLRB Gen. Counsel, *Goody's Family Clothing, Inc.*, No. 10-CA-26718, 1993 WL 726790 (Sept. 21, 1993).

108. *Cannon v. Edgar*, 33 F.3d 880, 885-86 (7th Cir. 1994). However, the states may permit unions to "opt out" of minimum standards by collective agreements. *Lividas v. Bradshaw*, 512 U.S. 107, 131-32 (1999).

109. Op. of NLRB Gen. Counsel, *Goody's Family Clothing, Inc.*, No. 10-CA-26718, 1993 WL 726790 (Sept. 21, 1993). The Connecticut law and implementing regulations provide that non-management employees will "select" their members, that the number be at least equal to the number of "employer members," and that the chair rotate between employee and employer members as elected by the committee. The committee is given statutory responsibility for "establishing procedures for sharing ideas with the employer" concerning safety inspections, investigations, training, and prevention. The Attorney General of Connecticut opined that these committees were not preempted because the rules provided that they "shall not be construed to constitute a labor organization" under the Labor Act. Op. Conn. Att'y Gen., No. 94-030, 1994 WL 873077 (Nov. 22, 1994). Obviously, whether or not these committees are statutory labor organizations is not determined by how the state has chosen to characterize them.

110. *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 773 (1947).

111. See generally, Clyde Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFF. L. REV. 9, 27-29 (1982) (asserting the value of statutory

the state that long antedates federal involvement. Nor is it obvious that state-mandated safety committees so upset the system of collective representation erected by the Act that they cannot be tolerated: the committees do not bargain with the employer, rather they are bodies for information-sharing and consultation whose work product, if successful, will find its way not into collective agreements, but in employer policies and procedures. It would be anomalous to say that the states may mandate working conditions that unions acting under federal law cannot bargain away, but may not extend to non-represented workers a means of better realizing them.¹¹² It would be equally anomalous to say that a group of workers can sue for a safety violation and in that process require their employer to deal with them over safety standards, and that workers can deal at arms-length with their employer beforehand in setting up those standards *if* he agrees to go along, but that the state is precluded from requiring such a course of dealing as a way of improving standards and avoiding litigation. And if this is so of safety, there is no reason why it would not be equally so in other specific areas where workers may want to have an independent voice.¹¹³

The serious hurdles to an expanded use of state-mandated employee representation lie in implementation. As David Weil observed, "the notion of requiring employers to institute employee participation in the formation, approval, and/or administration of internal regulatory systems does not ensure that activity in practice."¹¹⁴ The imponderables are not only in the states' willingness to devote the resources and personnel necessary to police such systems, but also in managements' willingness to cooperate with them.¹¹⁵ Were managers avid to establish independent employee

safety committees as a means of providing employees with a form of representation on key matters of workplace safety).

112. There is general recognition that worker involvement in health and safety programs can be a significant factor in assuring workplace safety. Commission on the Future of Worker-Management Relations, *Report and Recommendations*, December 1994, at 55-58.

113. As Freeman and Rogers show, even as American workers may want more law, they want workplace committees to enforce workplace standards even more. Eighty-five percent thought this a "very good idea" or a "good idea." FREEMAN & ROGERS, *supra* note 3, at 138. The overwhelming majority wanted employees to elect their committee members and wanted the committee to be able to get advice from outside experts. Employees were, however, roughly evenly divided over whether the committee's function should be advisory or something more. *Id.* at 139.

114. David Weil, *Implementing Employment Regulation: Insights on the Determinants of Regulatory Performance*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 429, 464 (Bruce E. Kaufman ed., 1997).

115. From what appears, the likelihood of safety committees actually being established is much greater at unionized workplaces than non-unionized workplaces. David Weil, *Mandating Safety and Health Committees: Lessons from the States*, in PROCEEDINGS OF THE 47TH ANNUAL MEETING OF THE IRRA 273 (Paula Voos ed., 1995). This finding parallels the pattern of implementation of the German works council law, which tends to be implemented

bodies and give them real authority, they could do so without the insistence of the state. As Eileen Appelbaum and her colleagues observe, "most managers will only introduce changes in work organization that fundamentally alter the balance of shop-floor power and allow workers to share responsibility for making decisions as a matter of economic necessity."¹¹⁶ (Moreover, management might well fear that unions would aggressively seek to implement these mandatory employee committee laws, for which bodies they could provide technical services and which could become beach-heads for organization.) An additional question worth exploring is whether it also can be in managements' economic interest to give workers some of the participation they want.

B. *Soft Law*

The stark fact is that, absent effective legal compulsion, American workers will not be heard in the workplace unless American managers want to listen. The question is whether the state can devise means, possibly coupled with mandated employee committees, to make it in managements' interest to share information and seriously engage with independent employee bodies in the absence of an exclusive bargaining agent. In the area of occupational health and safety, for example, it has been proposed that employee committees be linked to deregulation.¹¹⁷ Pennsylvania, as noted earlier, gives a discount on workers' compensation premiums for employers with employee safety committees.¹¹⁸

Proceeding on the assumption that litigation will continue to grow, at least some of the legal claims to be brought will require a determination of the reasonableness *vel non* of an employer policy or an action taken pursuant to it. This is clearest in the area of workplace privacy where allegations of a violation may turn on whether or not an intrusion or a disclosure infringed upon a "legitimate" expectation, or was offensive to a "reasonable" person. In the cognate area of defamation, whether a communication of information about an employee—the results of an

in larger workplaces where the effectiveness often depends on union support. Walther Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in *WORKS COUNCILS*, *supra* note 5, at 53, 56.

116. APPELBAUM ET AL., *supra* note 32, at 8. A student note sees the issue from the employee perspective as a "classic collective action" problem, of free riding. Louise S. Brock, Note, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 810 (1997). But Freeman and Rogers conclude that there is an adequate critical mass of workers willing to make such systems work. FREEMAN & ROGERS, *supra* note 3, at 6-7.

117. PAUL OSTERMAN, *SECURING PROSPERITY* 175-76 (1999) (citing David Levine, *Reinventing Workplace Regulation*, 39 CAL. MGMT. REV. 98-117 (1997)); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 108-09 (1986).

118. PA. STAT. ANN. tit. 77, § 1038.2 (West Supp. 2000).

investigation of sexual harassment or other misconduct—is or is not privileged may turn on the reasonableness of the scope of disclosure. So, too, cases brought in contract—for breach of company policy contained in an employee handbook or the like—may implicate the reasonableness of the competing constructions offered by the parties. And in employment discrimination law, the ability of an employer reasonably to accommodate a disability or religious observance may implicate the interests of other members of the work group.

It may pay to consider whether an express and uncoerced approval of the policy or practice in question by the collectivity governed by it should accord a level of judicial deference—a presumption of reasonableness. Oddly, there is no texture to this proposition in the area of its most obvious application: state lawsuits brought against employers on state claims that implicate the terms of a collective bargaining agreement. This is because of the application of yet another and even more bewildering element of federal preemption doctrine: section 301 preemption.¹¹⁹ In essence, if a state claim derives from or requires an interpretation of a collective bargaining agreement, the prevailing view is that the claim is completely preempted; the plaintiff's sole recourse is through the grievance-arbitration procedure of the collective bargaining agreement. Consequently, where the collective agreement's provisions might speak to the reasonableness of the challenged action, the courts have applied preemption, in effect, to "extinguish" the state claim.¹²⁰ This doctrine may not make much sense in terms of labor law,¹²¹ but one can discern in the interstices of that body of law an approach that speaks to the issue of interest here. The Seventh Circuit considered a case where an employee sought to enforce his statutory right under state workers' compensation law to reinstatement to

119. As Richard Bales put it, "the section 301 preemption doctrine is an awful mess." Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 702 (1997).

120. *Id.* at 719. See, e.g., *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122, 1133 (9th Cir. 2000) (2-1 decision) (holding that a claim of invasion of privacy that arose from an employer's videotaping of employee restrooms was preempted because the collective agreement's treatment of the employer's power to videotape might have spoken to that installation); *Gore v. Trans World Airlines*, 210 F.3d 944, 951 (8th Cir. 2000) (2-1 decision) (holding that actions for invasion of privacy, negligence, false arrest, and defamation arising from an employer's summary removal and causing the arrest of an employee were preempted because the collective agreement might speak to the employer's standard of care and responsibilities).

121. As Judge Posner opined, the more satisfying (if protracted) approach would require the plaintiff first to exhaust the arbitration procedure provided by the collective agreement rather than to extinguish the state claim. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180 (7th Cir. 1993). To similar effect, see *Drummonds*, *supra* note 82, at 594-95; see also Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMP. & LAB. L. 1, 44-5 (1996).

"suitable employment," which was also a matter partially addressed in the operative collective bargaining agreement.¹²² The court held that the action was not preempted. The state's workers' compensation law guarantees suitable work to all employees:

What constitutes "suitable work" *under the statute* has its own distinctive meaning, no matter how a collective bargaining agreement is drafted. For a state law to have any force whatsoever, its own legislature and courts must be the final arbiters as to that law's interpretation. (Were this not true parties could contractually redefine statutory language with idiosyncratic meanings designed to subvert state law.) While a collective bargaining agreement (along with the statute's plain meaning, a state's policy, the industry's practice, environmental factors, or some other indication) may lend assistance into a statutory inquiry, such an inquiry would be limited in scope to interpreting the statutory language without necessarily defining any term in the collective bargaining agreement.¹²³

If the terms approved by the collectivity could "lend assistance into a statutory inquiry,"¹²⁴ akin to the very text of the law, it would seem to be of equal assistance in deciding the reasonableness or legitimacy of the policy challenged as a matter of common law as well. Such a presumption would be accorded upon a showing of complete independence of action by the employee committee in its selection and manner of operation (including not only its ability to secure independent counsel or expert advice, but whether it had done so) and that it was fairly representative of the group affected by the policy.¹²⁵ (The presumption would be rebuttable, for it is possible that an employee committee could transgress the bounds of the permissible, just as unions are held to a duty of fair representation in the contract terms they negotiate. A further critical caution is added because these representatives, unlike their union counterparts, are not protected against discharge without good cause.)¹²⁶ Conceivably, then, group agreement that tips would be shared,¹²⁷ that the piece-rate of pay would apply not per item packaged, but

122. *Kohl's Food Stores, Inc. v. Hyland*, 32 F.3d 1075, 1078 (7th Cir. 1994).

123. *Id.* at 1079.

124. *Id.*

125. This requirement was made express in the rules adopted under some of the mandatory safety committee laws. *E.g.*, CONN. AGENCIES REGS. § 31-40v-4(d) (1999) (providing that "[r]easonable efforts shall be made to ensure that committee members are representative of the major work activities at the work site"); Tenn. Div. of Workers' Compensation R. 0800-2-3.06(4) (1999) (providing that "[r]easonable efforts shall be made to ensure that committee members are representative of the daily work activities of the employer").

126. *Cf.* Clyde Summers, *Employee Voice and Employer Choice: A Structural Exception to Section 8(a)(2)*, in *EMPLOYEE REPRESENTATION*, *supra* note 47, at 126, 140

127. *Cork v. Applebee's of Mich., Inc.*, 608 N.W.2d 62, 63 (Mich. Ct. App. 2000).

per package packed,¹²⁸ or even that participation in “pre-employment” orientation would be uncompensated,¹²⁹ could be considered in arguable cases to evidence whether or not the employer breached its compensation policies, or even whether or not it had breached the law;¹³⁰ and, *per contra*, non-concurrence would leave the matter judicially more open.¹³¹

This proposal is subject to at least two rather strong criticisms. First, employers will set up “patsy” agreements which the courts will find difficult to penetrate. Second, in view of the scant prospect that a court would read an employer’s policies to impose a stricter standard than the employer claims, the employer is under no pressure to agree to a more restrictive standard with a non-union employee committee than it would otherwise unilaterally adopt. In sum, the effort to induce the creation of independent employee bodies will either be manipulated or ignored.

The former criticism turns upon the aggressiveness of plaintiffs’ counsel on the issue of the collectivity’s independence; here, the NLRB could play an important role, for any person would be free to file a charge of violation of section 8(a)(2) with the Board. The General Counsel’s declination to issue a complaint should be admissible as an indication of want of either employer dominance or impermissible support. A Board decision finding a section 8(a)(2) violation would also be dispositive because the presumption would never come into play. The issuance of a complaint by the General Counsel could be taken by a court as evidence indicating the body’s lack of independence. Here, section 8(a)(2) would

128. *Evans v. Taylor Made Sandwich Co.*, 522 S.E.2d 350, 351 (S.C. Ct. App. 1999).

129. *Seattle Prof’l Eng’g Employees Ass’n v. Boeing*, 991 P.2d 1126, 1128 (Wash. 2000).

130. Lest this idea seem fanciful, a sidelong glance at corporate law might prove instructive. Where shareholders believe that corporate directors are guilty of wrongdoing to the corporation, they may bring an action against them on the corporation’s behalf. In a number of jurisdictions, however, the corporate defendant can free itself of the litigation if it has been exonerated by a committee of the board (commonly called a “special litigation committee”) upon a judicial showing that the committee was independent of the alleged wrongdoing (and wrongdoers) and had acted in good faith after a reasonable investigation. *See generally*, Gregory V. Varallo et al., *From Kahn to Carlton: Recent Developments in Special Committee Practice*, 53 BUS. LAW. 397 (1998). This has become a highly nuanced area of law. *See, e.g.*, *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 637-38 (Colo. 1999) (reviewing the law in several jurisdictions); *In re PSE & G S’holder Litig.*, 718 A.2d 254, 256-60 (N.J. Super. Ct. Ch. Div. 1998) (reviewing the law in several jurisdictions). But for purposes here it is enough to note that a corporate defendant is permitted to free itself of a lawsuit merely by appointing a committee to review the allegations. *See Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985) (holding that the special litigation committee consisting of a distinguished public figure may have lacked adequate independence such that defendant’s motion to dismiss cannot be granted). The independent directors presumably adequately represent the corporate interests at stake.

131. *See, e.g.*, *Boustany v. Monsanto Co.*, 6 S.W.3d 596, 598 (Tex. Ct. App. 1999) (noting that the employee group did not agree with management’s interpretation of its stock option policy).

work to assure at least a statutory minimum of independence.

The latter criticism is the more powerful, possibly compelling, of the two. After all, state lawsuits may be totally precluded when an element of the cause of action requires an interpretation of a collective agreement. Yet even this near total legal insulation has not induced employers to be less resistant to unionization. The question is whether, in the face of a *much* more aggressive union litigation strategy, management will see it in its interest to seek the legally safer harbor of employee concurrence as a deterrent. Perhaps most employers will not find the benefit worth the erosion of total control and, because unions could function as service providers to these independent committees, not worth the additional risk that employee participation may only wet their employees' appetite for unionization; but, other employers might see these as risks worth taking. In sum, there may well be little "upside" in this particular suggestion, but there seems scant "downside" either.

V. CONCLUSION

Freeman and Rogers document what has come to be called "the representation gap": the failure of the federal system to meet employees' demand for an effective, independent voice in determining the policies that will govern their workplace lives. What is to be done? Congress is politically unable to bridge the gap, the states are legally constrained by that very federal system in their ability fully to bridge it, and American management, which has the ability to bridge it, won't.

According to Senator Lott (and others), America needs neither more unionization nor more lawsuits, but it is unlikely to be had both ways: the decline of one incites the rise of the other.¹³² Today, it may well be easier to get a hundred thousand dollars for one worker (half the judgment going to the plaintiff's lawyer and an additional sum from the employer to pay to its own legal defense) than to get a nickel an hour raise for a hundred workers; but if unionization will not fill this gap, litigation will, albeit awkwardly and at a cost.

In this environment, there remains room still for state action within the constraints of federal law partially to bridge the gap. The states can identify specific areas where independent, employee-elected committees might function in aid of state law, mandate their establishment and oversee their operation. These might deal not only with occupational safety and health, but with a variety of other issues: with work schedules, to use Michael LeRoy's example, as speaking to the duty to accommodate family

132. Robert Pear, *Elated by Antitrust Triumph, Doctors Take Case to Senate*, N.Y. TIMES, July 1, 2000, at A1 (quoting Trent Lott, U.S. Senate Majority Leader).

leave, religious observance or physical or mental disability; with workplace privacy, in aid of specific legislation and the common law; with standards and procedures for dismissal, in aid of the law of employment discrimination, whistleblowing and wrongful or retaliatory discharge; even with wages and benefits, as implicated by state wage and hour and wage payment law. The states might consider as well according a legal safe harbor for the policies concurred in by such bodies, insofar as they clarify vague or ambiguous statutory or common law protections, as an incentive for managerial cooperation. In other words, the more juridified world of work in the twenty-first century holds open the possibility, however remote, of redirecting some responsibility away from the courts and into the workplace, of giving American workers some of what they want.