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Industrial Citizenship, Social Citizneship, Corporate Citizenship: I Just want my wages

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Abstract

The article critically examines the adaptation of citizenship rights to industrial relations and labor law. Starting with T.H. Marshall's discussion of industrial citizenship, the article examines the coupling of industrial citizenship with trade unions. While Marshall's concept of industrial citizenship may seem to be in decline, other labor market institutions are trying to bridge the divide between citizenship and labor rights: workplace democracy, which assumes the constituency of workers in the corporation; and corporate citizenship, which is used to entrust corporations with obligations that are traditionally expected of human citizens. Citizenship's contribution to the analysis of labor market institutions lies in the emphasis on the public nature of workers' rights, in the association of rights with obligations, and in the emphasis on active participation. However, citizenship also has "blind spots" that other theories address more coherently. Human rights are a preferred concept for distinguishing fundamental rights (including rights of citizenship) from "ordinary" rights. Labor rights are more effective in identifying power structures that citizenship rights may overlook. Consequently, the concept of citizenship may compromise workers' capacity to negotiate fair remuneration, protection from dismissal and the dignity of labor.

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INTRODUCTION

The fields of citizenship and labor occasionally come together in the interests of complementarity. Labor scholars and practitioners will sometimes use citizenship in the hope of remedying the exclusionary frameworks of labor. For example, the focus on labor in the sense of waged work excludes domestic household work and other productive activities. Citizenship is therefore suggested as a better framework of inclusion.¹ Similarly, for scholars and practitioners of migration and citizenship, admission for work can sometimes be a means of bypassing the traditional and exclusionary paths of citizenship. Hence, work is expected to provide the legitimacy of inclusion. Each analytical framework is self-aware of its limitations and its own exclusionary tendencies. Each seeks within the other a non-congruent analysis that can provide the coverage of inclusion to those it had to abandon on its own premises.

The focus of this article is on only one side of this two-sided relationship — the incorporation of labor rights into the citizenship framework. The purpose of the examination is to critically assess whether the adaptation of citizenship to the labor context extends inclusion and protection to those who have been marginalized within the labor framework, or whether it serves as a means of compromising the labor project. The benchmark of this study is therefore a labor benchmark. It asks what the concept of citizenship contributes to the attempt to address the rooted imbalance between labor and capital in the labor market; to what extent it aids in the project of decommodifying human labor; and how it aids in exposing the dignity of work.

The exposition of the labor-citizenship coupling starts at a relatively late stage in both frameworks' development — T.H. Marshall's discussion of citizenship.² In Marshall's analysis, labor issues are assigned a separate niche which is designated *industrial citizenship*. This niche is distinct from the three main categories presented by Marshall — civil, political and social. I shall characterize industrial citizenship in Part I, distinguishing it in particular from social citizenship. In Part II I shall explain the significance of framing the study of trade unionism in terms of citizenship, rather than

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- 1 GUY STANDING, *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE* (1999); ALAIN SUPIOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* (2001).
 - 2 THOMAS HUMPHREY MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT* (Greenwood Press 1973) (1965).

in terms of labor studies or human rights. In this I seek to identify the contribution of citizenship to the analysis of labor market institutions. In Part III I shall observe the significance of industrial citizenship at a time when the particular labor market institutions discussed by Marshall, namely trade unions, are in decline. In this context the article seeks to analyze the growing reference to citizenship in emerging modes of intra— and inter-national regulation. One evolutionary path is that of workplace democracy, which assumes the citizenship (or constituency or stakeholding) of workers in the corporation. Along this path, the corporation is the community, and the workers are imagined to be its members or its citizenry. Along a second path, *corporate citizenship* is used to entrust corporations with obligations that are traditionally expected of human citizens. In this variation, the community is the municipality, the state or the global village, and the corporations are imagined to be part of the citizenry.

The comparison of the various forms suggests that while at first the reference to citizenship was used to extend inclusion and support labor's project, the two methods of corporate citizenship can either reinforce or undermine and compromise labor's vocation. Citizenship is a double-edged sword.

At a greater level of generality, it seems that the contribution of citizenship to the analysis of labor market institutions lies in underscoring their public nature, rather than their role in the organization of private markets. It allows the incorporation of the concepts associated with citizenship and democracy into the understanding of micro-institutions and provides a unitary, coherent framework for grasping public and private institutions alike. Moreover, citizenship provides a theoretical framework for tying rights with obligations, adding to the discourse of human rights. Citizenship also augments the labor discourse with an emphasis on active participation and integrates measures of private ordering with general governance. It will be argued, however, that citizenship in itself should not be stretched as an all-encompassing meta-theory of social policy and justice. It has "blind spots" that other theories address more coherently. Human rights are a preferred concept for distinguishing fundamental rights (including rights of citizenship) from "ordinary" rights. Labor studies are more capable of identifying power structures that citizenship studies may overlook.

I. MARSHALL'S CITIZENSHIP AND ITS APPLICATION TO THE LABOR FRAMEWORK

Citizenship is traditionally conceived as full membership in a community,

and in the nation-state in particular. This leads to two separate questions: who is entitled to be a citizen, and what are the rights associated with citizenship? Although separate, the two questions are interrelated. Full membership is not only measured in comparison to other members, but also objectively — the quality of citizenship in a given community.

The expansion of citizenship in modernity was assumed to be a step on the road of progress. Yet it was noted when observing the rights associated with citizenship that it may not be emancipating to some, because it does not resolve and may even augment class conflict. Citizenship prescribes that all citizens must be treated equally, but in its traditional assurance of political equality it legitimizes economic inequality. T.H. Marshall's seminal article on *Citizenship and Social Class* sought to remedy the problem by setting limits to the extent of inequality that citizenship may justly legitimize. His emphasis on the different rights associated with citizenship highlighted the fact that mere political equality does not imply any other type of equality. Rights of citizenship must move beyond civil and political rights.

Which rights should be accorded to citizens is no simple truism but a matter of social evolution and the development of equal rights for all. Following civil rights, political rights emerged and social rights only subsequently. While civil rights upheld the capitalist ethos in the modern nation-state, social rights sought to enhance the citizens' equal access to all rights. Incorporating social rights into the realm of rights associated with citizenship has a dual affect. On one hand it is intended to mediate the conflict between the equality in status of citizenship and the inequality that citizenship conceals. On the other hand it brings to the surface the tension among the various rights of citizenship. Acknowledging the social rights of citizenship is not assumed to resolve class conflict, but to extend the possibilities for social change. Conflict among diverse social institutions, groups and individuals allows the transformation of the potentially entrenching effect of citizenship and exposure of its false pretense of social equality.³

In this threefold scheme drawn up by Marshall, work occupies a complex place. Clearly, the right to work as a liberty is guaranteed by civil rights. This may be so clear, however, that it is not explicitly mentioned in Marshall's essay. In that respect, work is just like any other activity in which people may (or may not) engage as part of their civil liberties. Just as important is the disassociation of work from political rights. The employed and the unemployed are equally entitled to cast a vote and participate in public life, just as the franchise has been extended beyond the domain

3 JACK BARBALET, *CITIZENSHIP: RIGHTS, STRUGGLE AND CLASS INEQUALITY* 9 (1988).

of property-owners. Interestingly, work is almost latent in the discussion of social rights as well. While Marshall acknowledges the importance of minimum labor standards as part of them, his discussion of social rights emphasizes for the most part the domain of social security, education and health. The relatively minor role that work plays in the sphere of social rights can be attributed to the view of social rights held by Marshall and others as encompassing mostly "passive rights" — that is, rights in which the citizenry is passive and merely receives something from the state.⁴ In sum, labor is almost missing, surprisingly, from all three branches of rights tied to citizenship by Marshall.

The absence of labor from the three main groups of rights is remedied by the particular category of *industrial citizenship*, which includes various rights of individuals and trade unions. It is curious to note that this is the only cluster of rights that does not fall neatly into the other three categories.⁵ Moreover, industrial citizenship, somewhat counter-intuitively, stems from civil rights rather than the social rights. It is an extension of the freedom of association and not of the right to an adequate income or other social rights. Marshall clearly distinguishes the right to collective bargaining from the right to a standard of civilization.⁶ Due to these two features industrial citizenship constitutes a "secondary system of rights," although Marshall does not precisely define the significance of designating these rights as "secondary."⁷

These particular features of industrial citizenship may be a result of Marshall's emphasis on the historical development of rights, whereby industrial rights preceded social rights. But the making of a distinct group of industrial rights can also be explained by their nature as process-oriented rights. Unlike social rights, they do not secure the end-norms (e.g., a right to minimum wage or a welfare allowance) but rather, like political rights, prescribe a process that ensures more just and legitimate outcomes. Industrial rights of citizenship are therefore classified as "active rights."⁸ They require

4 THOMAS JANOSKI, *CITIZENSHIP AND CIVIL SOCIETY: A FRAMEWORK OF RIGHTS AND OBLIGATIONS IN LIBERAL, TRADITIONAL AND SOCIAL DEMOCRATIC REGIMES* (1998).

5 Carl Gersuny, *Industrial Rights: A Neglected Facet of Citizenship Theory*, 15 *ECON. & INDUS. DEMOCRACY* 211 (1994).

6 THOMAS HUMPHREY MARSHALL, *Citizenship and Social Class*, in *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT*, *supra* note 2, at 103.

7 For an account of the secondary nature of these rights, see Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work*, 60 *INDUS. REL.* 1 (2005).

8 See JANOSKI, *supra* note 4. Not all authors who have expanded on the idea of industrial citizenship have sustained this distinction. Cf. Colin Crouch, *The Globalized Economy: An End to the Age of Industrial Citizenship*, in *ADVANCING*

the active participation of the citizenry in order to affect their community. As such, they more closely resemble political rights that provide political power to the citizenry to affect the composition of government. That is, if industrial citizenship rights are observed, the regulation of labor markets is more likely to be fair, or at least perceived as fair, in comparison to individual bargaining (and even in comparison to regulation by the state).

Consequently, Marshall's theory is a theory of social change. Later authors have emphasized this point extensively.⁹ For Marshall, the growth of citizenship is stimulated by both the struggle to win rights and their enjoyment when won.¹⁰ What industrial rights grant is the right to take part in the determination of labor standards, but also a certain level of control and power over production processes and the workplace environment. The mere process of self-governance, so basic to the practice of trade unionism (often designated as "autonomous labor law"), is itself an important ingredient of citizenship. The perception of citizenship that emerges here is very different from its formal construct. It resonates better with republican ideals, or other forms that seek to tie citizenship with virtue.

In sum, Marshall's discussion of industrial citizenship suggests several themes that stand at the center of tying labor with the issue of citizenship: the importance of labor market institutions (most notably — trade unions), their distinct position in comparison to end-norms (labor standards), and the importance of active participation. However, there are various problems with this conception of industrial citizenship. Of particular importance in the present context is Marshall's definition of industrial citizenship on the basis of the prevailing industrial practices in Great Britain at the time. In such places where trade unions have lost their strength, or never had much to begin with, industrial citizenship may be disregarded, although the problem of sorting political status and economic inequality remains.

In an attempt to remedy this shortcoming, Janoski suggests that rights should be regime-sensitive, and hence industrial rights may vary in liberal, conservative and social-democratic regimes.¹¹ This solution points to a tension in the citizenship framework. On one hand, it may remove all normative content from industrial rights and the rights of citizenship more generally. If rights of citizenship are merely the rights accorded by any given

THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT 151, 152 (T. Wilthagen ed., 1998).

⁹ *Id.*; CITIZENSHIP AND SOCIAL THEORY (Bryan Turner ed., 1993).

¹⁰ *See* MARSHALL, *supra* note 6, at 92.

¹¹ *See* JANOSKI, *supra* note 4.

community, then they are no different than any other rights. Liberal regimes provide little support to industrial rights, while social-democratic regimes offer much. Such an analysis is no different from the literature on regimes of production or models of the welfare state.¹² They have no intrinsic moral worth. On the other hand, if industrial rights can only be fulfilled by means of establishing one particular institutional structure, then arguably they are not a universal assignment of citizenship rights but an idiosyncratic institutional structure that cannot be adapted to changing circumstances. This problem may be particularly difficult because trade unions and other labor market institutions are strongly embedded in historical and social developments and differ considerably among otherwise similar political regimes.¹³

The middle ground between these two approaches is to first expose the values underlying the relationship between the rights associated with collective bargaining and the *rights of citizenship*. Only then will it be possible to assess the extent to which alternative institutional arrangements are capable of promoting industrial citizenship, even if they do not accord with the view of trade unionism that prevailed in Great Britain more than fifty years ago.

II. COMPARATIVE ADVANTAGES OF CITIZENSHIP AND ALTERNATIVE FRAMEWORKS FOR LABOR

Marshall situates the right to organize in a trade union, together with ancillary rights such as the right to information and consultation, in the category of industrial citizenship. Distinct but related, minimum labor standards belong to the category of social citizenship. Thus, labor rights are viewed as part and parcel of citizenship. Admittedly, this is not the common perspective for analyzing labor matters. Even within the literature of citizenship, the discussion of trade unions and labor standards is relatively dormant. For labor scholars, however, the perspective of citizenship is rather absent.¹⁴ In

12 GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); PETER HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (2001).

13 Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974); KATHLEEN THELEN, *HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY* (2004).

14 There are, however, several bodies of literature on the topic that are strongly embedded in state-based industrial relations and legal systems. For example, there is the resurgent interest on the topic in Canada, originally stirred by Harry Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45

what sense is the framing of citizenship important to the understanding of labor market institutions? What are its advantages, shortcomings and alternatives?

The term industrial citizenship suggests that collective action in the labor market is conducive and necessary to the status and practice of citizenship more generally. Industrial rights are first and foremost a means of allowing people to act together toward shared aims and goals. Second, they are expected to fulfill objectives that are similar to those of social rights — diminishing class differences that can undermine the achievements of citizenship. However, there are other ways of justifying industrial and labor rights. The two more common types of justification can be found in the discourse of human rights and in labor studies.¹⁵

A. Citizenship Rights or Human Rights?

The human rights discourse suggests that the freedom of association and its derivatives (the right to negotiate, the right to strike) are part and parcel of a comprehensive list of human rights. These are ingrained in the status of *humanity*, not in the status of *citizenship*.

The idiosyncratic position of industrial rights, as it appears in Marshall's essay, can also be observed in the human rights literature. The right of association appears in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶ The former correlates with Marshall's argument that industrial rights stem from civil rights, and notably from the general freedom of association, while the latter accounts for the relationship between industrial rights and social rights. They complement each other, together securing individual and collective access to social resources. However, what appears in Marshall's description as a unified framework of rights indicates

CAN. BAR REV. 786 (1967); and for a current assessment, see Michel Coutu & Gregory Murray, *Towards Citizenship at Work?*, 60 INDUS. REL. 617 (2005); Fudge, *supra* note 7.

15 I refer interchangeably to discourse or framework. The assumption is that human rights, labor studies and citizenship studies are not looking at different practices. They look at the same institutions but consider them along different lines of thought. The manner in which the problematics are defined has an effect on both the descriptive and normative outcomes of analysis. See ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW* (1993).

16 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

a tension in the human rights literature between civil and social rights.¹⁷ The ICCPR version of the freedom of association is a civil liberty, aimed at securing the association of people for diverse purposes. By contrast, the ICESCR views the freedom of association as a social right, and hence secures a special right for organization in trade unions. Unlike the ICCPR liberty, the ICESCR right is a claim right that requires the state to uphold and support association. Unlike the civil liberty, which is action-based (a right to participate), the social right is outcome-oriented (a right to concerted action that is aimed at concluding collective agreements and achieving equality). The civil liberty is situated in the context of freedom of speech and political participation. The social right is presented in the context of the right to social security, education and health. It is strongly related to the decommodification of human experience and the removal of individuals from the market sphere to a guaranteed social sphere. By contrast, the liberal liberty resonates well with an expansive market sphere and does not seek to limit its scope.

The distinction between citizenship rights and human rights is not clear. Like industrial rights, it seems, all rights that are somehow associated with citizenship appear in the list of human rights. This may be a consequence of congruence between the two lists (the community is obligated to its members to uphold and fulfill their human rights), or of the ambiguity in each. On one side, the list of human rights is contested, and at present the list of third-generation rights has grown exceedingly with rights such as the right to development or environmental protection.¹⁸ On the other side, "citizenship rights" is an equally vague term, indicating merely that citizenship is not only the actual status of membership but also the corresponding set of rights and obligations. The conflict between the different civil and social rights to associate and organize reflects the tension between the categories of citizenship rights that Marshall presents. Neither citizenship nor human rights

17 SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* (1992); Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 61 (Philip Alston ed., 2005).

18 Cees Flinterman, *Three Generations of Human Rights*, in *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES* 75 (Jan Berting et al. eds., 1990) emphasizes third-generation rights as collective rights; others discuss emerging rights that were not sufficiently recognized in the "second generation" such as environmental rights and — more directly relevant to the topic of this paper — the right to development. Cf. JACK DONNERLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 185-203 (2003).

provides an accurate rights-based solution to all social problems. Both can be viewed as frameworks for social action.

The fundamental difference is that citizenship rights are aimed at establishing the relationship between individuals and groups and the community, most notably the nation-state. Human rights are rooted in a perception of humanity that extends beyond the nation-state. They do not describe obligations and rights of members in the community, but identify the rights and obligations of all humankind. This distinction has practical implications. Consider, for example, the attempt to extend social rights to migrant workers, who are commonly deemed to be outsiders to the community and undeserving of rights associated with citizenship, even if it falls short of political citizenship. Extending rights to migrant workers therefore requires one of two practices — either extending rights of citizenship beyond the formal constituency of citizens, or arguing that migrant workers are entitled to human rights despite their lack of membership in society.¹⁹

Despite the vague distinction, there are some differences that should be considered. Human rights are justified and accounted for by various theories, but their universal thrust suggests more liberal accounts, while citizenship rights attract more communitarian justifications. The citizenship framework provides a better account of individual obligations side-by-side with rights, in comparison to theories of human rights which usually resist the incorporation of duty. Citizenship rights can be more adaptable to the nature of the community, while human rights often ignore the social context. Consequently, citizenship rights seek sources that stem from within the community, while human rights more often seek comparative and universal sources. None of these differences indicates a strong separation, but the focus of inquiry is different. The main difference would seem to be the emphasis on rights' contribution to the community (in citizenship) versus the emphasis on a more universal view of rights (in human rights).

B. Citizenship Rights or Labor Rights?

The discussion of industrial rights as part of the roster of citizenship rights also needs to be distinguished from the labor discourse. Again, the

¹⁹ Cf. Adriana Kemp, *Managing Migration, Reprioritizing National Citizenship: Undocumented Labor Migrants' Children and Policy Reforms in Israel*, 8 THEORETICAL INQUIRIES L. XXX (2007); RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* (1997).

distinction is hardly clear, but the emphases are distinct. In the discourse of labor studies, industrial rights are rights that seek to address the asymmetry between labor and capital in a market regime. While some definitions of labor law are technical (e.g., it covers all legal aspects of law that address the labor market), most definitions are value-laden.²⁰ For example, Hugh Collins discusses the vocation of labor law.²¹ This vocation is not merely descriptive, but a prescriptive view that emphasizes the enduring conflict (but also the shared interests) between labor and capital and seeks to mediate between the two. In this sense, freedom of association is hardly a neutral gathering of workers, as may be suggested by the derivation of industrial rights from civil rights in Marshall's framework or in the ICPPR. It is a right that is designated to mediate the conflict between labor and capital, and therefore one form of regulation that can be compared to minimum labor standards. Both seek to empower workers, though trade unions might do so by means of collective representation, while labor standards are based on political representation.

In searching for the most appropriate institutions to advance labor's interests, a fundamental principle is that of power. The multiple dimensions and meanings of power are all relevant in this context. It is the power to negotiate in a market that is intrinsically asymmetrical.²² Yet it is also the power of workers to act in concert with others and define joint objectives.²³ It is also the power of workers and employers to overcome conflict and design institutions that foster mutual trust.²⁴ Like citizenship and human rights, the centrality of power is not a clear prescription. It is a conceptual framework and discourse that constitutes the industrial relations system and from which the players derive their ideas and plans of action.

Labor law does not assume universal application, as does the human rights framework. On the contrary, the labor literature strongly emphasizes differences across states, sectors, and occupations. In labor studies it is often asserted that cross-national comparisons are particularly difficult. In this sense, labor studies have more in common with citizenship studies. At the same time, labor studies encourage the study of labor markets without insisting on the national community as the appropriate unit of analysis.

20 REDEFINING LABOUR LAW: NEW PERSPECTIVES ON THE FUTURE OF TEACHING AND RESEARCH (Richard Mitchell ed., 1995).

21 Hugh Collins, *Labour Law as a Vocation*, 105 L.Q. REV. 468 (1989).

22 Claus Offe, *Political Economy of Labour Markets*, in DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATION OF WORK AND POLITICS 10 (Claus Offe ed., 1985).

23 HANNA ARENDT, ON VIOLENCE 44 (1970).

24 ALAN FOX, BEYOND CONTRACT: POWER, WORK AND TRUST RELATIONS (1974).

There are regulations for sectors and occupations, as well as for regional and international labor markets.²⁵ The conflict between labor and capital is not confined to state boundaries. In the disassociation of regulation and rights from the issue of membership, labor studies are more universal, and the propositions regarding the vocation of the field resemble those of human rights and to a lesser extent those of citizenship.

Finally, labor rights are distinct from human rights and rights of citizenship in two other respects. First of all, labor rights are strongly rooted in the private sphere, although they can be extended to the public sphere as well. Hence, labor rights include the right to minimum wage from the employer, but do not cover the right to income from the state in times of unemployment. By contrast, rights of citizenship are rights of the individual in a given community and are prescribed in a manner that imposes obligations on the community itself. Human rights, while originally conceived as rights that govern the relationship between the state and the individual, have been extended also to the private sphere, albeit unevenly. A second derivative of this difference is that labor rights are considered, first and foremost, to be rights of employees. As such they do not extend protection to workers who do not fit within the legal prescription of the employment relationship. This limitation can be addressed by rethinking the scope of the employment relationship itself.²⁶ However, there is still a gap between the coverage of labor rights and the much broader coverage of citizenship and human rights.²⁷

C. Citizenship, Human and Labor Rights — Identifying the "Blind Spots"

Table 1 summarizes the main points of similarity and difference between rights of citizenship, human rights and labor rights.

25 JOHN DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (Harvard Bus. Sch. Press reprint 1993) (1957).

26 Cf. BOUNDARIES AND FRONTIERS OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2006).

27 Judy Fudge, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, 29 COMP. LABOR L. & POL'Y J. (forthcoming 2007).

Table 1

	Citizenship	Human rights	Labor rights
The premise of rights	Rights of membership in a community	Rights of humanity	Rights derived from the need to address asymmetry in the labor market
Universal or communal	Community-based	Universal	Universal objectives; adapted to community
Relativism	Allows variation in the prescription of rights across communities (as long as all members of the community receive equal rights)	Less tolerant about relative construction of rights	Acknowledges broad differentiation of rights across nation-states, but also in different occupations and sectors
Active participation	Emphasizes active participation	Right of participation in economic sphere is under-developed	Active participation is one of many values, all of which are judged by their impact on the labor-capital axis
Public and private	Public rights	Public rights, but in some countries extended to the private sphere as well	Private sphere rights with implications for the public sphere as well
Inclusion/exclusion	Equal membership rights for the constituents of the community; exclusion of non-constituents	Equal rights for all; allows multiple claims by individuals and groups; the rights of some may trump the rights of others	Rights of labor that promote equality on the basis of class; excludes non-waged workers and peripheral workers in the labor market
Major contribution	Membership, participation	Universality	Power, class

Clearly the distinctions here are overstated, and there are theories of human rights that resonate with communitarian thought, just as there are liberal theories of citizenship. Both human rights and the rights of citizenship can be viewed as rights that are political, an outcome of social transformation and strategic interplay. Labor rights are also not distinct from human rights, and there is a growing interest in designating some labor rights as human rights. However, the various perspectives do matter because they can compensate for the methodological weaknesses of other fields and, more importantly, provide for inclusion where some fields are exclusionary. An example may be useful to demonstrate these emphases.

Broad trade union representation, as is common in corporatist regimes, has been found to be effective in securing a greater share of profits to labor and enhancing social equality. In terms of labor rights, corporatist practices rank high in fulfilling the *telos* of labor regulation. A human rights perspective is of help in questioning the balance that such regimes offer between labor rights and individual rights. Rights of solidarity often require the trumping of individual interests. This may include the denial of small breakaway unions that can undermine the solidarity pact, or the denial of individuals' claims that they have been unfairly treated (as acknowledged, for example, by the American doctrine on the duty of fair representation). The emphasis of citizenship rights on the link between the right and membership in the community may elicit two additional, albeit potentially contradictory, reflections. First, to the extent that corporatism encourages social pacts in policy-making, the importance of trade unions and employers associations is on a par with political participation and membership. Second, the scope of corporatist trade unionism sometimes removes collective negotiations from shop-floor levels to the sector and national levels. Consequently, collective bargaining does not secure the active participation of individuals in policy-making and is far removed from individuals' experiences, just like national politics.

The citizenship perspective not only directs our attention to the question of active participation, but also makes it necessary to assess the price paid by the outsiders to the corporatist arrangement. The comprehensive coverage of national collective agreements may also leave a residue of individuals and groups who pay the price for national agreements. The clearest example is migrant workers, but older workers (forced to retire in early-retirement agreements or, conversely, required to postpone their pension), younger workers (for whom compromising entry-level contracts and two-tiered agreements are negotiated) and women (to whom working-time agreements are not sufficiently adapted) often pay a price. Some workers are pushed into peripheral work arrangements. Not only are those

who are marginalized in such corporatist arrangements excluded from the main venues of economic representation, but the gap between the majority who are adequately represented and those who are not creates a situation of severe relative deprivation. Similar observations can be obtained from the human rights perspective, with its general emphasis on equality. It would seem that the major difference between them is that the human rights perspective emphasizes firstly the absolute deprivation of access to work and low labor standards, while the citizenship emphasis on equality underscores the unequal set of opportunities in the labor market. Together the two perspectives aid in highlighting the insiders-outsiders tradeoff that is intrinsic to labor market regulation.

III. BEYOND TRADE UNIONISM

Marshall's discussion of industrial rights coupled this subset of citizenship rights with a particular institutional configuration, namely trade unions. Moreover, his conception of trade unions is time— and place-specific, being based on the state of trade unions in the United Kingdom in the heyday of the emerging welfare state and unionism following World War II.²⁸ However, identifying trade unions with citizenship rights is both over— and under-inclusive. It is over-inclusive because not all trade unions advance citizenship rights in the same manner and to the same extent. This was most visible in non-democratic regimes where trade unions joined the state in advancing national over class interests. Moreover, trade unions have sometimes engaged in practices that were in tension with civil rights.²⁹ Of greater interest in the present context is that the focus on unionism is also under-inclusive. Marshall did not consider the possibility that certain practices that seemed so well-accepted and integrated into the practice of citizenship would soon be retracted. Marshall's theory discusses the expansion of rights, but not receding rights. This, however, need not be detrimental to the citizenship framework. Marshall's theory should not be read as merely a description of the road that has been taken, but also as an indication of an ongoing institutional change in response to citizenship as an ideal.³⁰

Union density is in decline in most countries. One interpretation of this

28 *Id.*

29 Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOUR RIGHTS AND INTERNATIONAL TRADE 22 (Lance Compa & Steven Diamond eds., 1996).

30 Cf. COLIN CROUCH ET AL., *CITIZENSHIP, MARKETS AND STATE* (2001).

may be that industrial citizenship is receding. Such arguments are usually coupled with observations of growing neo-liberal ideologies and right wing political tendencies, or with processes of individualization and privatization that are induced by rapid globalization. However, the course that will be pursued here argues that the decline of a particular labor market institution (trade unions, employers associations, collective bargaining) need not imply the decline of industrial citizenship.³¹ Trade unions are not an end in itself but the means to an end. Consequently, we must seek the values underlying industrial citizenship in other labor market institutions.

Extending the concept of industrial citizenship has already been done in the past, for example with regard to non-union collective modes of representation. Most notably, the term was applied to works councils by various European states and at the European level.³² Works councils share the fundamental characteristics of industrial citizenship as described above — a universal right to a process (rather than outcome) which involves the active participation of workers, and in which it is assumed that the outcomes are more likely to be equitable and fair and provide individuals with an adequate and dignified working environment. Streeck argues that works councils are an even better correlate with citizenship in comparison to trade unions, because whereas trade unionism is external to the firm, works councils reach deep into the structure and design of the corporation.³³

What other paths exist for extending the repertoire of institutions that correspond to the concepts underlying industrial citizenship? Two paths have drawn to some extent on the discourse of citizenship: workplace democracy and corporate social responsibility, or corporate citizenship.³⁴

Historically, the concept of workplace democracy preceded that of

31 For a similar dilemma, see Fudge, *supra* note 7.

32 Wolfgang Streeck, *Industrial Citizenship Under Regime Competition: The Case of European Works Councils*, 4 J. EUR. PUB. POL. 643 (1997) [hereinafter Streeck, *Regime Competition*]; Wolfgang Streeck, *The Transformation of Corporate Organization in Europe: An Overview* (MPIfg Working Paper 01/8, 2001).

33 Streeck, *Regime Competition*, *supra* note 32, at 4-5.

34 For a different view, see Paul Bagguley, *Industrial Citizenship in Britain: Its Neglect and Decline* (2001) (unpublished manuscript), available at <http://www.leeds.ac.uk/sociology/people/pbdocs/Industrial%20Citizenship.doc>. Bagguley states what seems to be a common assumption — that workplace democracy and industrial citizenship are distinct. He holds that "citizenship in general refers to the equal membership of a national societal community Industrial citizenship, then, is not to be equated with ideas of industrial democracy, although some national systems of industrial citizenship might approximate some models of industrial democracy."

corporate social responsibility. Rooted in the Fabian social-democratic tradition, it evolved even before modern-day trade unions. In its more modern version, it suggests rethinking the corporation as an entity that serves a broad constituency. Instead of the economic view, which holds that the corporation is merely a nexus of contracts, managed for the purpose of maximizing the shareholders' value, the corporation should be viewed as serving multiple stakeholders — shareholders, workers, debtors, suppliers, and the like. In the broader context of *economic* democracy, the discussion of *workplace* democracy focuses on the workers' constituency. It seeks to grant workers a status that might be designated as citizenship in the workplace community. Consequently, such workers must have the rights that correspond to citizenship — civil, political, industrial and social alike.

A plethora of institutions are associated with the idea of workplace democracy. In its relatively pure form, we must consider workers' co-ops, or a macroeconomic model of participatory democracy such as the one that existed in the former Yugoslavia (until the 1970s). Less orthodox constructions of this ideal include: workers' representation on the board of directors, workers' representation on the shop-floor (works councils), some forms of profit-sharing, employee stock ownership plans (ESOPs), employee participation schemes (ranging from co-management with mutual veto power to quality circles and suggestion boxes). A different form is constituency statutes (U.S.) or stakeholder arrangements (UK). These prescribe that the corporate managers may (or, less commonly, must) take into consideration the workers' interests in the firm.³⁵

Corporate citizenship is a more recent term, which is strongly linked to the concept of corporate social responsibility.³⁶ Corporate citizenship is commonly conceived as the fulfillment of obligations, and hence it is somewhat at odds with industrial citizenship, which is primarily concerned with rights. While industrial citizenship rights have corresponding obligations (on both the state and employers), corporate citizenship is a term that was coined not to leverage further rights for corporations but to offset prevailing market rights with obligations. This is of particular importance as global corporations are no longer nested in a national regime, whether a

35 IRENE LYNCH FANNON, *WORKING WITHIN TWO KINDS OF CAPITALISM: CORPORATE GOVERNANCE AND EMPLOYEES' STAKEHOLDING — THE US AND EC PERSPECTIVES* (2003).

36 Archie B. Carroll, *The Four Faces of Corporate Citizenship*, 100 *BUS. & SOC. REV.* 1 (1998); Archie B. Carroll, *Corporate Social Responsibility — Evolution of a Definitional Construct*, 38 *BUS. & SOC.* 268 (1999); *PERSPECTIVES ON CORPORATE CITIZENSHIP* (Jörg Andriof & Malcolm McIntosh eds., 2001).

legal regime or a social regime of mutual obligations. Current debates on corporate citizenship and its derivative — corporate social responsibility — emphasize the need to identify new means of imposing obligations in a global regime where capital moves freely, disassociates from national regulation, and internalizes the sole factor of profit maximization by means of forum-shopping and the creation of complex organizational structures that cannot be captured by traditional regulatory means.³⁷ For example, the multinational corporation DHL holds that

Corporate citizenship is about the contribution a company makes to society through its core business activities, its social investment and philanthropy programs, and its engagement in public policy. The manner in which a company manages its economic, social and environmental relationships, and the way it engages with its stakeholders (such as shareholders, employees, customers, business partners, governments and communities), has an impact on the company's long-term success.³⁸

The institutions corresponding to corporate citizenship include codes of ethics, codes of practice and codes of conduct. Such codes may be internal to the corporation, while others may span an entire sector (e.g., in the carpet industry).³⁹ Some codes are generated by the corporations themselves, while others (e.g., SA 8000) are devised by a third party and corporations may decide to sign or apply for the seal indicating compliance with the standard.⁴⁰ Like collective agreements, such codes include substantive standards, but similar to industrial citizenship, the rights and obligations in this context often refer to a process. This may be the process by which such codes are devised, or it may be a process of engagement with stakeholders and other agents.

Taken together, concepts associated respectively with workplace democracy and with corporate citizenship suggest several institutions that can respond to the decline in traditional trade unionism. These, it might be

37 Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 L. & SOC. REV. 635 (2004); Ronen Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, in LAW AND GLOBALIZATION FROM BELOW 92 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

38 DHL, Corporate Citizenship at DHL (2006), <http://www.dhl.com/publish/se/en/about/citizenship.high.html>.

39 Rugmark Foundation, <http://www.rugmark.org/> (last visited Sept. 1, 2006).

40 SAI — Social Accountability International, <http://www.sa-intl.org/> (last visited Sept. 1, 2006).

claimed, are the modern extension of industrial citizenship, with its emphasis on the acceptance of a market regime, reliance on collective institutions in civil society for active self-regulation in the economic sphere, and need to foster the participation of private agents and cooperation among them. They do not need to substitute for trade unions, but their mere presence allows for the prolongation of industrial citizenship.

IV. ASSESSING POST-UNION INSTITUTIONS FROM THE CITIZENSHIP PERSPECTIVE AND FROM RIVAL PERSPECTIVES

Why citizenship? Why should diverse practices such as works councils, codes of corporate practice, ESOPs and international standards for NGOs be studied in terms of citizenship? In what sense are they rights of citizenship rather than "merely" labor market institutions?

A. First Advantage of Citizenship: Membership in the Community

By means of the collective bargaining right, industrial citizenship sought to secure rights for individuals and associations to autonomously regulate labor relations and the economic sphere more generally. Industrial citizenship extended civil and political rights for the purpose of securing the economic order in the nation-state. It fitted within the common meaning of citizenship, that is — the membership of individuals (and perhaps collective entities) in the state.

By contrast, workplace democracy and corporate citizenship suggest a more complex set of possibilities regarding the identity of both the membership and the community. Schematically, workplace democracy assimilates the economic organization to a polity and extends the membership in that community to workers. In the case of co-ops, the workers may be the sole members, whereas in other forms of workplace democracy the workers may be members together with shareholders and other stakeholders. By contrast, corporate citizenship extends the status of citizenship to corporations. The community of members usually remains the nation-state, but there are forms of corporate citizenship that seek to foster a sense of community above and below the nation-state, for example at the economic sector level, in regions, or with regard to multinationals that seek to emphasize their relationship with local communities rather than nation-states. According to this schema, a potential borderline between these two post-union modes of citizenship can be distinguished by observing the

role of the corporation: in workplace democracy it is the community, in corporate citizenship the constituent.

There is no razor-sharp distinction between workplace democracy and corporate citizenship. For example, the prescription of workers as stakeholders to whom the corporation is responsible may be common to both versions. However, regardless of how we sort different institutional patterns into the categories of workplace democracy or corporate citizenship, both configurations are not trivial to the "person *qua* member — state" framework that is commonly used in the context of citizenship.

One method of approaching the changing nature of the community or its membership is to reestablish the link between all post-union rights to membership of people in the state. In both workplace democracy and corporate citizenship it is possible to claim that employees' involvement in the management of the enterprise or the corporation's responsibility to the community and workers has a positive spillover effect on the situation of these employees *qua* citizens of the state. For example, we could claim, as has been demonstrated for organized workers, that a certain institution has the effect of increasing labor's share in the profits, consequently improving equality among the citizenship of the nation-state.⁴¹ A similar argument holds that participation in the workplace, as in other spheres of daily life (neighborhood councils, schools), enhances the citizens' political participation.⁴² Consequently, the justification of such institutions and preference for one over another should be measured by the benchmark of economic equality (measuring equality among the members of the state) and access to public participation (for state-level political institutions). This view suggests that post-union rights "compete" with social rights, because they at least partially overlap. The question should be: what would better enhance economic equality in the state, the guarantee of a basic income for each citizen or participation in the management of the workplace? A minimum wage, or a guarantee of collective bargaining that may (or may not) secure a minimum wage?

There are, however, other justifications for the expansion of industrial citizenship beyond the "person — state" relationship. With regard to the community, it is possible to look at Robert Dahl's argument regarding economic democracy, which holds that people who are affected by decisions accepted by a community must have voice and power in affecting these

41 MARTIN WEITZMAN, *THE SHARE ECONOMY: CONQUERING STAGFLATION* (1986).

42 GABRIEL ALMOND & SIDNEY VERBA., *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS AND ANALYTIC STUDY* (1965).

decisions.⁴³ Because the workplace is a place in which significant decisions that matter to individuals and collectivities are made, it is undemocratic to make them without the equal input of workers to the decision-making process. Although this formulation is framed in the concept of democracy, it is an argument that is also strongly indicative of citizenship. Dahl accepts the workplace as a meaningful community and in essence seeks to make the workers its members or citizens.

There is a way to tie together the two roles of the corporation — as an instrumental venue for improving rights at the state level, and as a community in itself. For example, Matten and Crane argue that the state is undergoing a process of privatization in the provision of social services, whereby the participants in the private sphere are assuming the roles and responsibilities of the welfare state.⁴⁴ The obligations to provide and fulfill individual needs that are currently imposed on a corporation are therefore part and parcel of the privatization process. The private agents are merely filling the state's shoes. On one hand, this argument retains the instrumental relationship between intra-organizational arrangements and the quality of the relationship between citizens and the state. But on the other hand it designates the enterprise as an emerging community that assumes the roles and responsibilities of the nation-state. It is not only instrumental to the nation-state, but partially substitutes for it.

Yet another possibility, and in fact one more commonly mentioned in the corporate citizenship literature, is to consider the enterprise a constituent, a "citizen" of the state. Although the expansion of citizenship often serves the purpose of increasing the scope of rights, here the corporation is argued to be a citizen for the purpose of instilling a sense of duty. The duty is a countervailing force to the economic privilege of the corporation in both the private market and the public sphere. However, what may seem to be an egalitarian and progressive objective must also be reconsidered in light of Marshall's emphasis on the fact that rights of citizenship legitimize some inequality and do not eliminate it. His theory of citizenship rights is intended to distinguish between legitimate and illegitimate inequalities. In this light, the extension of citizenship duties to the corporation is not only about maintaining the equilibrium of power, but also about legitimizing a power imbalance. When duties of citizenship are monitored and enforced

43 ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985).

44 ANDREW CRANE & DIRK MATTEN, CORPORATE CITIZENSHIP: TOWARDS AN EXTENDED THEORETICAL CONCEPTUALIZATION (2003).

the former may apply, but when they are deemed to be a philanthropic act of goodwill, the latter is a more appropriate view of duties.

In sum, a theory of citizenship requires an account of who the constituent-citizen and what the relevant community are. This is one of the advantages of conceptualizing labor market institutions in terms of citizenship. The citizenship perspective emphasizes the problem of sorting out the relevant community in a way that human rights and the rights of labor do not. But a theory of citizenship need not prescribe a single solution to the status of the corporation. Moreover, the various solutions are not necessarily exclusive. The emphasis on the community has both an explanatory and a normative component.

Some solutions to the expansion of industrial citizenship beyond the practice of collective bargaining by trade unions challenge the conventional theory of citizenship more than others. For example, there is no consensus over the acceptance of the economic undertaking as a community in itself, in which democratic practices must be established and an analogy to a community is assumed. Yet this controversy need not undermine the fact that such a theory can, at the descriptive level, indicate the difficulty of fostering a sense of community in the workplace. It can account for the failure of suggestion boxes, quality work circles and employee participation schemes in which no real power is given to the employees.⁴⁵ In all of these cases, the corporation does not seriously take into account the requirement of equal status. Taking the analogy to public arrangements one step further, such arrangements are more akin to the poor laws rather than a system of universal entitlements or political participation. Similarly, at the descriptive level, the concurrent inclusionary and exclusionary tendencies of citizenship can account for the insiders-outsiders phenomena of the labor market.⁴⁶ They stem from similar features of human interaction.

More controversial is the use of citizenship theory at the prescriptive level. However, if one values citizenship and political participation as an end in itself, then a normative theory of citizenship must also carry implications for the internal management of the corporation and the corporation's function in society. At a minimum, citizenship theory implies a justification for a more extensive prescription of the corporation's constituency than the exclusive position of shareholders in the traditional theory of the firm. A theory of citizenship may have implications for determining the voting rules in the

45 PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE (Alan Blinder ed., 1990).

46 Assar Lindbeck & Dennis Snower, *Insiders Versus Outsiders*, 15 J. ECON. PERSP. 165 (2001).

elections to works councils, for enforcing codes of corporate practice in which corporations market their social responsibility and capitalize on it, and for preventing the extension of benefits to one group of workers at the expense of others who are not adequately represented (e.g., future workers, part-time workers, or workers employed through temporary work agencies). Many of these policy dilemmas can be better analyzed from within the citizenship framework in comparison to human rights or the rights of labor.

B. Second Advantage of Citizenship: Industrial Rights as Rights of Active Participation

Another advantage that emerges from Marshall's positioning of industrial rights as an extension of civil rights (and distinct from social rights) emphasizes the importance of active participation. As in the literature on participatory democracy, the theory of labor-related rights as industrial rights of citizenship emphasizes that participation in a democratic regime cannot be limited merely to periodic elections. Participation has both a teleological and an intrinsic merit. It is intended to compensate for the faults of representative democracy and to guarantee equal access to decision-making venues. It provides opportunities for both learning-by-doing and learning through interaction with others. It is considered to be conducive to the political process, but is also thought of as an act that intrinsically promotes self-fulfillment and has its own psychological rewards.

This view of citizenship, which places emphasis on workers' active participation in the industrial context for the purpose of influencing the quantitative (wages) and qualitative (dignity) working conditions, has an advantage over human rights and labor studies. At both the descriptive and normative levels, for example, it is useful in analyzing corporate codes of practice. Supporters of such codes emphasize its potential for steering the new practices of a globalizing economy toward social ends.⁴⁷ Instead of drawing on state-regulated enforceable standards, the aim is to allow the industry or corporation to be self-regulating. However, unilateral codes — that is, codes that are authored by the corporation itself — do not conform to the image of industrial rights as active rights of participation. The multinational is as big and remote as the nation-state. There are means of integrating such methods of self-regulation with active participation. The framework of citizenship can account for some of the more favored options: for example,

⁴⁷ Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (KSG Working Paper No. 00-010, 2000).

the active involvement of workers in writing, monitoring and implementing the code. Similarly, there are means of integrating local communities in the implementation and monitoring. More common is the involvement of domestic and international NGOs.

Such forms of involvement serve multiple goals. First of all, consumers, communities and identity groups see employment matters as a field in which their involvement is desirable and even required. This is particularly important at a time of decline in collective bargaining and representation by trade unions.⁴⁸ Secondly, the multiple types of communities that are involved can aid in forging new alliances among diverse constituencies and in overcoming the exclusionary practices of citizenship.⁴⁹ For example, workers at headquarters may have interests significantly divergent from those of workers who are employed by overseas contractors. Placing the local overseas community in which numerous small contractors are operating on a par with the works councils at the company headquarters in Europe can help compensate for the divergence of interests among different groups. Thirdly, a legal requirement for a corporation to devise its own code, in line with the principle of reflexive law, makes it necessary to conduct deliberations among the various groups within the expanding constituency of the firm, similar to the methods of radical democracy.⁵⁰ Outcomes achieved by such processes of deliberation also facilitate a better process of implementation and enforceability.

Participation must therefore extend beyond the corporate elites and be diffused at all levels of the workplace hierarchy, as well as in distinct and sometimes competing communities. This formulation of self-governance resonates well with the study of citizenship at the state level. It serves as a descriptive model that can account for the best practices among the many multinationals that have adopted some type of corporate citizenship. It can also serve as a normative recommendation for developing post-union institutions. In doing so, however, policymakers must also be aware of the citizenship framework's "blind spots." These are developed in the following Sections.

C. Blind Spot of Citizenship: Relativism and the Need for a Human Rights Perspective

48 STEPHANIE LUCE, *FIGHTING FOR A LIVING WAGE* (2004).

49 KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004).

50 CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1993).

There is a great overlap between the substantive discussion of citizenship rights and human rights. Citizenship rights are distinct from general rights and obligations because they are deemed to be of particular importance to fostering the relationship of membership in the community. Not every right to obtain a building permit is a right of citizenship. When studying the roster of human rights and the list of rights associated with citizenship, it is difficult to point to a right from either of the two categories that clearly falls outside the domain of the other. Arguably, there is nothing human rights have to add to citizenship rights, or vice versa.

There is little in the literature on human rights with regard to industrial democracy, nor is there much reference to non-union forms of collective participation and representation. Works councils do not appear as derivatives of the right of association. While they are clearly not in violation of human rights, they are not considered to be a matter of human rights per se. In the European Union, for example, works councils are not mentioned explicitly in the European Charter of Fundamental Human Rights, although they are implicit in section 27, which holds that "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices."⁵¹ They appear more formally in the European Directive establishing the European Works Councils and are (controversially) regarded by some as the epitome of European integration in the areas of labor and corporate law, and the seed of European social and economic citizenship.⁵² This may demonstrate that citizenship rights are more accommodating towards an expansion of industrial rights beyond collective bargaining and trade unions per se. The nesting of human rights in universal values limits their capacity to encompass and actively promote diverse institutional arrangements, and economic democracy appears to go beyond the core of human rights. Where post-union rights add to the core of collective bargaining and seek to supplement it, the citizenship framework

51 Charter of Fundamental Rights of the European Union, § 27, Dec. 7, 2000, 2000 O.J. (C 364) 1.

52 Streeck, *Regime Competition*, *supra* note 32; Council Directive 94/45/EC of 22 September 1994 on the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Group Undertakings for the Purposes of Informing and Consulting Employees, 1994 O.J. (L 254) 64, *amended by* Council Directive 97/74, 1998 O.J. (L 10) 22; Directive 2002/14/EC of the European Parliament and the of the Council of 11 March 2002 Establishing a General Framework for Informing and Consulting Employees in the European Community, 2002 O.J. (L 80) 29.

may be more appropriate than human rights for distinguishing such rights and weighing their importance.

At the same time, the international body of law and practice in the field of human rights has much to contribute to the identification and clarification of industrial citizenship rights. At a minimum, the well-developed discourse of human rights can be of help in constructing the freedom of association. Industrial rights include the right to consultation and negotiation and the right to strike. They can be an individual or a collective right. The ILO's Committee of Experts on the Freedom of Association distinguishes between legitimate differences across states (e.g., with regard to the role attributed to the freedom *from* association, or the freedom of association in the armed forces) and those that are not acceptable (e.g., government intervention in the content of autonomous collective agreements).

However, human rights are more than just a source of inspiration for citizenship rights. The universal, mandatory and non-negotiable nature of human rights suggests that post-union attempts to further the industrial rights of citizenship can be precarious. This is particularly evident with regard to various forms of corporate citizenship. It has been argued that corporate codes of conduct and codes of practice provide the means for imposing obligations, moral or legal, on corporate players in a globalizing environment. Compared to citizenship, the universal nature of human rights is more adaptable to these industrial practices, which are detached from the nation-state. However, there are two problems identified with such codes: the substantive rights they guarantee, and their enforcement (the latter will be discussed in Section D).

Observing the content of some of these post-union codes, the extent of protection they extend to workers is relatively slim.⁵³ Workers' wages are merely guaranteed at prevailing market rates, hours of work and rest are often unregulated, occupational safety and health often ignored. How can the human rights framework aid in assessing these codes? Attempts to identify the core of human rights within the larger array of labor standards have resulted in a number of rights being designated as the "core labor rights" by the ILO. Although this list is contested for being too slim, among the core rights is the freedom of association, which has been rejected by most codes of practice and conduct.⁵⁴ Thus, even the most basic rights that have been identified as the

53 Int'l Labour Organisation [ILO], *Report of the Director-General: Organizing for Social Justice*, at 76-80, International Labour Conference, 92nd Sess. (2004), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=2502.

54 Guy Mundlak, *The Transformative Weakness of Core Labor Rights*, in THE WELFARE

core of human rights in the industrial context are not universally applied. The human rights framework exposes corporate citizenship as potentially a hollow promise. Despite the attempt to expand citizenship to corporations as well, the set of obligations falls short of what is universally considered to be the core or the minimum. Codes of conduct that do not conform at least with the universal developments on human rights should be viewed as an attempt to circumvent otherwise acceptable restrictions. Citizenship generally, as membership in the community, cannot replace universal values with local ones.⁵⁵

In the context of workplace democracy human rights also secure individual rights in the corporate community. It has been argued that the emphasis of workplace democracy on constituting new communities has the advantage of acknowledging the workplace community as a central venue for fostering identity, allowing action and participation, and securing economic independence. At the same time, acknowledging the workplace as a community also carries the risk of admitting "sovereigns" and collective interests that can trump rights that are only secured vis-?-vis the state. Consequently, the discourse of human rights, which protects individuals from the state and imposes active duties on the state to foster support for individuals, must also be applied in the workplace community. The protection of privacy and speech, as well as the right to health in a profit-seeking economic enterprise, are individual rights that stem from placing the individual at the center of the human rights project.

The attempt to foster post-union rights of citizenship must therefore keep a constant eye on human rights. It is their universality and inalienability towards which citizenship has a blind spot.

D. Blind Spot of Citizenship: The Neglect of Class and the Need for a Labor Framework

While there is a great degree of overlap between human rights and the rights

STATE, GLOBALIZATION, AND INTERNATIONAL LAW 231 (Eyal Benvenisti & Georg Nolte eds., 2003); Philip Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); Brian Langille, *Core Labour Rights — The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409 (2005).

55 There can be various controversial issues in which this statement may need to be qualified and questioned, particularly with regard to the adaptation of human rights to cultural diversity. In the labor context such questions can be raised with regard, for example, to minimum wage. Regardless of the debate on such rights, the attempt to pass a code that prescribes alternative norms rejecting the core canon of human rights is difficult to justify.

of citizenship, a comparison of the citizenship and labor frameworks reveals a larger gap. Historically, trade unions, the core institution for fulfilling industrial citizenship, were established for the purpose of exerting power. Although it can be argued that trade unions and collective bargaining deliver a host of other social goods, ranging from efficiency to fostering a sense of community, they are first and foremost a method of empowering labor and the workers class in the labor market. Different methods of labor representation provide different methods of balancing power relations, between workers and capital and between workers and themselves.⁵⁶ In contrast, industrial citizenship was framed in terms of rights that are necessary to constitute a community. It sought to bring about cohesion, contain and legitimize a certain level of economic inequality, and tie the problems of class and citizenship together. The emphasis on participation could be viewed as a method of granting labor a voice, access to information, and bargaining leverage — hence power. Yet the focus on citizenship sought to promote a somewhat equal level of membership in the community, not to resolve industrial conflict.

In the attempt to extend industrial citizenship beyond trade unions, the power question is often neglected. Industrial citizenship sought to prescribe a process, the outcomes of which would be deemed sufficiently fair to promote a certain level of equality that diminishes class differences and legitimizes those which remain. Unlike social rights, industrial rights seek a fair process but do not guarantee the outcomes. As has been demonstrated, the emphasis on process and participation was appropriate for extending the repertoire of institutions to include corporate citizenship as well. Yet the disregard of power relations carries the risk that an outcome consisting of imbalanced power relations will serve to legitimize class inequalities.

There are some differences between the approach that seeks to endorse a form of workplace democracy and that which seeks to advance corporate citizenship. The reference to workplace *democracy* rather than workplace *membership* suggests that workers should be made not only constituents of the workplace, but also (roughly) equal citizens of the corporation.⁵⁷ Clearly, some forms of employee participation schemes that are sometimes associated with workplace democracy fall far short of granting workers anything remotely similar to equal power. However, democratic theory is

56 Karl Klare, *Countervailing Workers' Power as a Regulatory Strategy*, in LEGAL REGULATION OF THE EMPLOYMENT RELATION 63 (Hugh Collins et al. eds., 2000).

57 DAHL, *supra* note 43.

appropriate for exposing cooptative forms of participation. Such analysis resonates with the fundamental assumptions of labor studies and labor law.⁵⁸

Once citizenship theory relinquishes the assumptions associated with democracy and remains concerned solely with membership, the power dimension of class conflict may easily be disregarded. This accounts for the concern that many of the corporate citizenship schemes are inappropriate to substitute for traditional forms of labor representation. Various brands of corporate citizenship offer workers little more than token recognition of their interest in the corporation, or of the corporation's charitable duty towards its employees. Much of the current debate on stakeholders asks in general terms whether workers should be regarded as the corporation's stakeholders. One of the practical implications of such recognition often is its being accepted that the corporation *may* act in favor of its workers, although rarely does law claim that it *must* do so. There is also little in this scheme to help workers overcome problems of collective action. The recognition that workers may have a substantive claim against the corporation does not resolve the question regarding who will press the claim on behalf of the workers as a collective of stakeholders. This problem is attenuated in the presence of trade unions, which are both the authors of detailed norms privileging (as well as obligating) individual workers, and the collective agents of labor who oversee the enforcement of labor norms. Once trade unions disappear from the system, it becomes difficult to claim and enforce rights.

From the labor perspective, codes of practice and conduct, which are recognized as being a form of virtuous citizenship, present similar challenges. As long as they are based on methods of shaming and self-policing, they do not grant workers any independent and effective basis of power. When NGOs, domestic or global, are involved in the enforcement mechanism, this problem is partially remedied. From the citizenship point of view, such involvement has the advantage of strengthening the role of civil society in the regulation of labor markets. From the labor point of view, NGOs and trade unions can partially act as functional substitutes. Yet NGOs may be self-appointed and not elected by members; they enjoy no representative status as trade unions do; and they have no power to strike or impose other forms of organized economic pressure directly on the employer.

The labor perspective with its emphasis on power might also indicate

⁵⁸ Cf. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753 (1994).

that some of these differences are overstated.⁵⁹ Not all trade unions are based on voluntary membership, not all legal systems require the status of a representative union, and the power granted to unions to strike is often difficult to translate into action. At the same time, NGOs may be more involved in the community, and they may use alternative methods of imposing power, such as consumers' boycotts. The extent to which NGOs can act as functional substitutes for trade unions need not be determined here. Yet it is clearly the labor framework that is more sensitive to the relevant differences.

In sum, as long as workers fail to obtain a power stronghold, one that can serve as a countervailing power to capital, post-union industrial citizenship should be looked upon with a suspicious eye.

V. FROM INDUSTRIAL CITIZENSHIP TO CORPORATE CITIZENSHIP — LOSSES AND GAINS

The literature on industrial citizenship is scant. Over the years industrial citizenship's standing as a "secondary form of citizenship," as Marshall framed it, has been translated into partial disregard. Where the analysis of industrial citizenship has served as the basis for scholarship and practice, it is difficult to see what contribution citizenship has made to labor relations. In practice, where the reference to citizenship has been used to advance new types of institutions, these have ranged from formalized and juridified forms of workers representation, such as the European works councils, to informal and non-binding forms of the corporation-as-good-Samaritan. The emerging practice of citizenship suggests a careful reconsideration of the sparing use of citizenship as a means of justification and legitimization.

The attraction of citizenship lies in its emphasis on membership in the community, on participation without guarantee of rock-solid end norms, and in its attempt to reduce class inequality while legitimizing the inequality that remains. These are also precisely the reasons for concern regarding the expansion of the citizenship discourse. Membership conceals class, participation does not guarantee more equal outcomes, and the absence of power guarantees may undermine the otherwise advantageous outcomes of process-based regulation of the labor market.

As noted at the outset, labor scholars sometimes point at citizenship as an organizing concept that can remedy the exclusionary tendencies of

⁵⁹ EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY (Richard Freeman et al. eds., 2005).

labor law (e.g., the emphasis on waged labor and marginalization of other forms of work). The ambivalent contribution of citizenship which has been demonstrated here indicates that while a search for partially overlapping coverage is warranted, the blanket remains too short. The expansion of citizenship to cover for the decline and incomplete coverage of collective bargaining remains a very partial promise. Only if the labor framework, with its emphasis on power in the resolution of industrial conflict, and human rights, with their quest for allowing social action to advance the strong protection of universal values, are sustained, can citizenship be carefully used to deliver on its expected promise.



