THE RISE AND FALL OF PRIVATE SECTOR UNIONISM: WHAT NEXT FOR THE NLRA?

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In this Article, we ask whether the National Labor Relations Act, enacted over 70 years ago, can remain relevant in a competitive economy where nonunion employer discretion is the dominant form of workplace governance. The best opportunity for the NLRA's continued relevance is the modification of its language and interpretation to enhance worker voice and participation in the nonunion private sector, without imposing undue costs on employers. Examples of such reforms include narrowing the NLRA's company union prohibition; implementing a conditional deregulation system that relies on consent by an independent employee association; changing the labor law default to some form of a nonunion work group; expanding state and local authority over labor relations; and encouraging NLRA protection for employee use of employer-owned Internet services. These legal innovations have the potential to be welfare enhancing, as compared to outcomes likely to evolve under the current legal framework. Although the political likelihood of such changes is currently low, steps in this direction could result in an increased relevance for the NLRA in the modern economy.

The National Labor Relations Act ("NLRA" or "Act") of 1935[1] provided the legal framework that ushered in union organizing, collective bargaining, and a sharp rise in private sector unionism in the United States during the early and mid-twentieth century. Since that time, the role and relevance of the NLRA has narrowed as private sector union density has eroded.[2] In today's competitive environment, the dominant form of workplace governance lacks the presence of a union; it is a governance structure under which management has unilateral, albeit constrained, discretion with respect to most aspects of the workplace. This dominance is so

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[1] 29 U.S.C. §§ 151-169.

[2] *See infra* Section I.A; Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527-28 (2002).

complete that reforms in the NLRA cannot restore traditional unionism to its previous level. Designed for a different era and type of workplace, the NLRA's 1930s vision of bargaining relationships has limited relevance today. One result of this transformation is an unmet desire of many nonunion workers for opportunities to express individual and collective voice in cooperation with their employers, albeit in a form different from what exists in most traditional union establishments.

This Article explores changes in labor law and public policy that might satisfy this unmet desire by promoting welfare-enhancing worker voice, participation, and cooperation in the United States labor market, in particular for nonunion private sector workers.[3] Underlying this assessment of possible regulatory change is the reality that in today's competitive environment, the dominant form of employee governance is one in which management has unilateral discretion with respect to most aspects of the workplace environment, albeit constrained by societal norms and the need for employers to attract and retain capable employees. This reality is reflected in the declining fortunes of traditional private sector unionism—a decline that does not look to be reversed in today's increasingly competitive economic environment.

Most labor reforms, including some discussed here, were originally proposed with the intent of either encouraging or discouraging traditional unionism. Our concern, however, is not with the promotion of an arguably out-dated model of collective representation. Rather, our analysis recognizes that traditional unionism will remain a small part of the economy's private sector and focuses on reforms that, given this fact, are welfare enhancing for society as a whole. The focus of this Article's proposals, therefore, is to facilitate welfare-enhancing employee voice and participation in an economy where few private sector employees will be represented by

[3] Major themes in this Article were previously outlined in a brief proceedings paper. *See* Barry T. Hirsch & Jeffrey M. Hirsch, "*The NLRA After Seventy Years: What Next?*, 58 PROCS. LAB. & EMP. REL. ASS'N ANN. MEETING (forthcoming 2006), *available at* http://www.aeaweb.org/annual_mtg_papers/2006/0107_1015_1702.pdf.

traditional unions.

We use the term "welfare enhancing" to indicate that the societal benefits from a change exceed its costs, with benefits and costs interpreted broadly to include nonmonetary as well as monetary effects. Of course, reliable estimation of the benefits and costs associated with labor regulations is exceedingly difficult.[4] Therefore, while we cannot state with certainty that our proposals would be successful, they represent promising opportunities to enhance overall welfare by expanding worker voice and cooperation without imposing undue costs on—and perhaps providing benefits to—employers.

The need for welfare-enhancing labor reform is well-illustrated by the contrast between the NLRA's policies and antiquated view of the workplace, and the workplace as it currently exists. The original version of the NLRA was enacted in 1935 as the Wagner Act. A key goal of the Act was to promote national commerce, which had faced major disruptions due to labor unrest,[5] by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."[6] The Wagner Act's endorsement of collective action[7] was tempered by the Taft-Hartley Act's amendments to the NLRA in 1947. Although not mutually exclusive with the purposes of the Wagner Act, the Taft-Hartley amendments emphasized, among other things, the goal of protecting employee free choice—specifically the choice *not* to

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[4] *See* John T. Addison & Barry T. Hirsch, *The Economic Effects of Employment Regulation: What Are the Limits?*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125, 134-38 (Bruce E. Kaufman ed., 1997).
[5] *See* Michael Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, __ PENN. L. REV. __ (forthcoming 2007) (manuscript at 15, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920458) [hereinafter Wachter, *A Corporatist Institution*].
[6] 29 U.S.C. § 151.
[7] *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1449 (1993) [hereinafter Barenberg, *Political Economy*] (stating that the "primary objective of the Wagner Act was to achieve workers' 'substantive freedom'" through "the facilitation of collective action in the labor market in order to enhance workers' bargaining power").

seek collective representation.[8] The resulting NLRA, therefore, has a strong aim to promote and protect employees' ability to freely choose whether or not to engage in collective action or representation. This policy goal is not limited to choices about traditional unionism, however. Collective action may take many forms, and employees' freedom to choose unconventional means to exercise their collective rights is firmly within the protection of the Act.[9]

The NLRA's statutory language is vague enough to protect, at least theoretically, ever-changing forms of collective action—even forms found in a modern workplace that are vastly different from what existed in 1935. Many manufacturing jobs have been replaced by positions that stress service or intellectual skills.[10] The strict hierarchy that once existed in most workplaces has eroded as many businesses seek flexibility, information sharing, and more decentralized management.[11] Although the broad scope of the NLRA's language is generally capable of taking these changes into account, the National Labor Relations Board ("NLRB" or "Board"), the agency that enforces the NLRA, has been surprisingly reluctant to support these changes. Some of the NLRA's provisions are beyond the Board's control, however, and several have become obsolete or even detrimental in the contemporary economy.[12] Thus, both flexible

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[8] *See* Estlund, *supra* note 2, at 1534; Paul C. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 229 (1990) [hereinafter Weiler, *Governing the Workplace*]. The unmistakable concern of proponents of the amendments was to assist the ability of employees to choose *not* to have collective representation, in large part to combat what proponents viewed as abuses by unions. *See* 29 U.S.C. § 151 (stating in preamble that "[e]xperience has further demonstrated that certain practices by some labor organizations . . . have the intent or the necessary effect of burdening or obstructing commerce . . . through strikes and other forms of industrial unrest or through concerted activities").

[9] *See infra* note 193.

[10] *See* Katherine V. W. Stone, FROM WIGITS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 5, 125 (2004); Estlund, *supra* note 2, at 1536 (citing Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 143, 164).

[11] *See* 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, 1652-53, 1663-66 (1999); David I. Levine, REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN 2-8 (1995) (providing brief history and usage data on employee-involvement plans).

[12] One example, as discussed in detail below, is the NLRA's ban on company unions. The broad definition of "labor organization," working in tandem with that ban, reveals a need for modification of the statute. *See infra* Section III.A.

enforcement and statutory changes in the NLRA are warranted.

Part I of this Article examines the rise and fall of private sector unionism in the U.S. and addresses the reasons that managerial discretion, rather than union-negotiated agreements, has emerged as the dominant form of workplace governance. Part II explores private sector workers' desire for more voice and cooperation in the workplace and describes ways in which that desire may be satisfied. Finally, Part III evaluates several labor regulations changes that may be welfare enhancing, providing greater opportunities for employee voice and participation while being economically sustainable in a competitive economic environment.

I. IS THE NLRA RELEVANT IN TODAY'S WORKPLACE?

A. *Private Sector Unionism in Decline*

It is undisputed that unionism in the private sector has long been in decline. Private sector union density[13] was about one-in-three workers in the early 1950s, falling to nearly one-in-five workers by the end of the 1970s.[14] Although the number of private sector workers climbed from 66.1 million to 105.5 million workers between 1977 and 2005, union membership declined from 14.34 million to 8.26 million.[15] This translates into a union membership density decrease from 21.7% (or 23.3% covered by a collective-bargaining agreement) in 1977 to only 7.8% (8.5% covered) in 2005.[16] Particularly sharp declines occurred in sectors highly organized in the past. Between 1977 and 2005, membership density fell from 35.5% (37.6% covered) to

[13] "Union density" is defined here as the percentage of wage and salary workers who are members of a union or, where indicated, covered by a union-negotiated collective-bargaining agreement.
[14] Union density among private sector workers, based on a compilation of figures reported by labor unions to the federal government, is estimated to have peaked at 35.7% in 1953 and fallen to 22.0% in 1979. *See* Leo Troy & Neil Sheflin, UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY A-1, A-2 (1985).
[15] *See* http://www.unionstats.com (compiling data since 1973 from the Current Population Survey ("CPS"), the monthly household survey conducted jointly by the Bureau of the Census and Bureau of Labor Statistics ("BLS"), as described in Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349-54 (2003)). The CPS adopted the currently used union status questions in 1977, hence the choice of years in the text.
[16] *See id.*

13.0% (13.7% covered) in manufacturing and from 35.9% (37.6% covered) to 13.1% (13.8% covered) in construction.[17] It is difficult to identify any large industry in which private sector union density has not diminished.

Nor has private sector unionization ended its decline. Union density is affected by flows in and out of "stocks" of union and nonunion employment. In any given year, large numbers of union and nonunion jobs are lost and large numbers of mostly nonunion jobs are created. For density to remain constant in a growing economy, union organizing of existing and new nonunion jobs, plus employment increases in already-unionized companies, must exceed the number of union jobs lost. Organizing since the early 1980s has fallen well short of the conditions to hold density constant; thus, the steady-state private sector density is likely to be below its current level of 7.8%.[18]

The reasons for declining unionism are many and well known. Important, but hardly sufficient, are structural changes that have reallocated jobs toward industries, occupations, and locations that are typically less unionized. A significant factor leading to these changes has been technological advances that reduce the need for labor in production jobs and in occupations where job tasks are routinized and programmable (e.g., elevator operators in an earlier era; travel agents today).[19] This rapid productivity growth has been particularly evident in manufacturing,

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[17] *See id.* In contrast to the private sector, public sector union density rose sharply during the 1960s and 1970s and has held relatively steady since the early 1980s. Public sector membership density rose from 32.8% (40.1% covered) to 36.5% (40.5% covered) between 1977 and 2005. *Id.* Whereas 25.8% of all union members were public sector workers in 1977 (and 28.4% public among all covered workers), 47.4% of union members were government workers in 2005 (48.0% among covered). *Id.* Among 7.43 million union members employed in the public sector in 2005, 62.4% worked in local government, 24.7% in state government, and 12.8% in federal government. *Id.* The federal government figure of 12.8% consists of union densities of 7% for postal employees and 5.8% for nonpostal employees. *Id.*

[18] Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973-1998*, *in* THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES 28, 52-54 (James Bennett & Bruce Kaufman eds., 2002).

[19] *See* David H. Autor, Frank Levy & Richard J. Murname, *The Skill Content of Recent Technological Change: An Empirical Exploration* 118 Q. J. ECON. 1279 (2003).

where increasing output has been accompanied by lower employment.[20] Moreover, the NLRA organizing process has proven costly and difficult for unions, due in no small part to often fierce management opposition.[21] Such resistance reflects, in part, an increasingly competitive domestic and international economy,[22] coupled with union wage premiums that have shown surprisingly modest declines.[23]

Unenthusiastic worker, public, and employer sentiment for unions in this highly-competitive world is the ultimate constraint, limiting not only the ability to organize, but also adoption of union-friendly public policy and workplace norms.[24] Sentiment for unions may also

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[20] Manufacturing employment declined from approximately 20 million workers in 1977 to 15.5 million workers in 2005; because of the growth in overall employment during that time period, manufacturing employment declined from 30.3% of the private sector workforce in 1977 to 14.7% in 2005. *See* http://www.unionstats.com; *see also* Stone, *supra* note 10, at 197 (arguing that decline in manufacturing unionism has allowed employers to restructure work practices in ways that make organizing more difficult, such as increased use of technology).

[21] Richard B. Freeman & Joel Rogers, WHAT WORKERS WANT 62 (1999) (describing survey results showing that a majority of managers would oppose union organizing). Similarly, Cynthia Estlund has argued that the NLRA's isolation from any significant revisions or other forms of innovation—which she describes as its "ossification"—has contributed to the NLRA's ineffectuality and the decline of unionism. *See* Estlund, *supra* note 2, at 1530-31; *see also* Stone, *supra* note 10, at 125 (stating that the NLRB's organizing rules, such as bargaining unit determinations, are often incompatible with the modern workplace).

[22] Indeed, Michael Wachter sees a single over-arching reason for union decline, arguing that the NLRA did not incorporate the corporatist outlook of the 1933 National Industrial Recovery Act ("NIRA"), which was overturned by the Supreme Court in its 1935 decision in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and that over time, the competitive U.S. economy made unionism a niche workplace institution in the private sector. *See* Wachter, *A Corporatist Institution*, *supra* 5, at 3.

[23] Wage premiums refer to the increase in wages that accompany unionization; wage premiums in the U.S. are larger than in most other developed countries. *See* David Blanchflower & Alex Bryson, *Changes Over Time in Union Relative Wage Effects in the UK and the US Revisited*, *in* INTERNATIONAL HANDBOOK OF LABOR UNIONS 197, 207-18 (John T. Addison & Claus Schnabel eds., 2003) (summarizing international evidence and concluding that there has been only a weak downward trend in the U.S. union wage premium); *see* also, Barry T. Hirsch & David A. Macpherson, UNION MEMBERSHIP AND EARNINGS DATA BOOK: COMPILATIONS FROM THE CURRENT POPULATION SURVEY 19-26, Tables 2a-2c (2006) (providing time-consistent regression estimates of union wage premiums for the years 1973-2005).

[24] *See, e.g.*, Darryl Fears, *Union Tries To Unite Blacks, Latinos: Workers at Meatpacking Plant Must First Overcome Distrust*, WASH. POST, Jul. 24, 2006, at A4 (noting resistance of some workers to unionization, including one employee's comment that "[a] union speaks on your behalf . . . I can speak for myself"). Distrust of traditional unions is common among professional and technical workers, who often identify with management. *See* Richard W. Hurd & John Bunge, *Unionization of Professional and Technical Workers: The Labor Market and Institutional Transformation*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 179, 186-90 (Richard B. Freeman, Joni Hersch, & Lawrence Mishel eds., 2005) (describing their survey of professional and technical workers, which revealed desire for greater voice and participation in decision making, but aversion to type of adversarial relationship often seen in unionized workplaces). Worker sentiment toward organizing is also less favorable in geographic areas where unionization has been low in the past. *See* Thomas J. Holmes, *Geographic Spillover of Unionism* (National Bureau Econ. Research, Working Paper No. 12025, 2006) (showing that unionism

have been dampened by government mandates and regulations that affect all workplaces; such legislation may act more as a substitute than a complement for collective bargaining.[25] Changes in the interpretation and enforcement of the NLRA since the 1980s—when Republican administrations led to a more anti-union NLRB—have not enhanced organizing, but can explain little of the decline. Private-sector union density decreased throughout the Clinton years and its more labor-friendly NLRB.[26]

Absent a sharp and unlikely shift by workers and voters from individualistic to collectivist attitudes,[27] or a more broad shift in U.S. economic policy from a competitive to a corporatist orientation,[28] a resurgence in traditional private sector unionism is unlikely. Thus, employees' demand for greater workplace voice and cooperation[29] will not be satisfied by NLRA-style collective bargaining. This leads to questions about the NLRA's continued relevance and whether other forms of employee representation and participation will develop.

B. *Managerial Discretion or Contractual Governance: Which Works Best?*

How relevant is the NLRA for workers in the current U.S. labor market? Apart from its role in governing the union organizational and electoral process, the NLRA's role in nonunion

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is "contagious," spilling out of long-ago unionized coal mines and steel mills into newly established supermarkets and hospitals), *available at* http://www.nber.org/papers/w12025.

[25] *See* George R. Neumann & Ellen Rissman, *Where Have All the Union Members Gone?* 2 J. LAB. ECON. 175 (1984) (estimating frequently espoused, but rarely tested, thesis that governmental protections for workers have led to lower union density, and finding time-series and cross-section evidence consistent with thesis).

[26] *See* http://www.unionstats.com (Section I).

[27] Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 265, 278-87 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998) (arguing that increases in union density have occurred in spurts following shifts in worker and public attitudes toward collective action).

[28] "Corporatist" governance emphasizes cooperation among groups and cooperation between the state and certain powerful groups, such as national unions. *See* Wachter, *A Corporatist Institution*, *supra* note 5, at 6. In the labor context, corporatism "views free competition as a destructive force that has to be both controlled and channeled through institutions that practice fair—but not free—competition under the watchful, mediating power of the government." *Id.* at 1. Corporatist policymaking, therefore, seeks "fair union wages" and "responds to institutional actors such as unions and corporations rather than to individuals." *Id.*

[29] *See infra* notes 56-61 and accompanying text.

workplaces, which cover over 90% of private sector employment, is modest.[30] Even for firms that could face union organizing campaigns, the NLRA's relevance has waned, as today's workplaces no longer match the work environment envisioned by the Act's architects.

Implicit in the NLRA is a hierarchal view of management, in which workplaces have top-down control moving from managers to workers who have minimal discretion or decision-making authority. This characterization may have been defensible during the NLRA's formative years, but not today. Traditional union governance regularizes and codifies worker tasks within a top-down command structure. In contrast, modern workplaces typically require interaction and two-way communications between workers and supervisors, accompanied by the use of bottom-up worker and managerial discretion that takes advantage of site-specific information.[31] In contemporary workplaces, job hierarchies are often not clear-cut and worker decision-making is essential at most levels.[32]

In addition, the current dominant governance structure in the private sector is not traditional unionization, but employer-fiat personnel systems in which outcomes are determined by some combination of employer norms, governmental regulation, and the incentives and constraints produced by market forces. The principal market constraints derive from competition in capital and labor markets. For the firm to survive over the long run, it must earn a competitive return on capital, preventing an employer from paying its workers a wage in excess—or, at least, well in excess—of the value they generate for the firm. In order to attract and retain capable

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[30] The NLRA does apply to nonunion workforces in numerous circumstances, although employees' knowledge of the statute's relevance is uncertain. Most obviously, the NLRA governs the organizational and electoral process before a union becomes the bargaining representative. *See* 29 U.S.C. § 159. The NLRA also protects a wide variety of concerted activity, even where there is no union on the scene (e.g., safety complaints and pushes for higher wages). *See id.* § 158(a)(1); *infra* notes 196-201 and accompanying text. Moreover, as discussed in detail below, Section 8(a)(2) regulates nonunion employers' ability to create or support groups that involve discussions with employees over terms and conditions of employment. *See* 29 U.S.C. § 158(a)(2); *infra* Section III.A.

[31] "Site-specific information" refers to information targeted to a particular work location, product, process, or time.

[32] *See supra* notes 10-11; 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. 125, 135-39 (1994).

employees, however, workers must expect to receive compensation similar to, or in excess of, what they could receive in alternative employment opportunities. Subject to these economic constraints—as well as governmental limits on actions involving discrimination, minimum pay, hours of work, safety, and the like[33]—nonunion employers are free to dictate wages and workplace governance methods. If a wage and governance regime is costly relative to the value of output, the employer will suffer losses. If wages are too low or the work environment too harsh, the firm cannot attract and retain sufficient numbers of workers to operate and survive. For enterprises operating between these upper and lower bounds, nonunion employer fiat has proven to be a more dominant governance structure than collective bargaining contracts.

Michael Wachter identifies several factors in labor-contracting relationships that are critical for all firms, union and nonunion, and that help to explain the current dominance of nonunion governance structures.[34] Wachter argues that the predominance of nonunion firms is primarily the result of low transaction costs, coupled with nonunion firms' ability to deal effectively with match-specific investments, asymmetric information, and risk bearing. Although unionized firms can handle these latter three factors through formal contracting, nonunion companies manage these factors without the use of explicit contracts, sometimes more and sometimes less effectively than if they were unionized. More significant is the disadvantage that union companies face due to high transaction costs.

Match-specific investments refer to the time and money necessary to create and maintain

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[33] *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

[34] *See* Michael L. Wachter, *Theories of the Employment Relationship: Choosing Between Norms and Contracts*, *in* THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP 163, 176 (Bruce E. Kaufman ed., 2004). Alan Hyde has identified similar market failures—such as inelasticity of supply, collective action problems, low trust and opportunism, and information asymmetry—that he argues provide justification for labor regulation. *See* Alan Hyde, *What is Labor Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAWS: GOALS AND MEANS IN THE REGULATION OF WORK (Guy Davidov & Brian Langille eds., forthcoming 2006), *available at* http://ssrn.com/abstract=896381.

a work relationship. These investments result in workers becoming more valuable to their current employer (relative to other employers) as the worker gains job-specific skills and the parties become adept at dealing with each other.[35] A problem associated with match-specific investments is the possibility of hold-up; once a party makes such investments, the other party can behave opportunistically and capture *ex post* quasi-rents.[36] One solution is for workers and firms to jointly invest in firm-specific skills that create self-enforcing agreements that give both parties an interest in continuing the relationship rather than losing their investment.[37] Opportunistic behavior by nonunion employers is also constrained by concern for their reputation among potential workers.[38]

Asymmetric information involves differences in the ability of the parties to monitor certain aspects of the job or firm, creating a risk that the advantaged party will behave opportunistically.[39] For example, firms possess information on product demand superior to that of workers, thereby providing firms the opportunity to misstate market conditions to gain an advantage in workplace negotiations.[40] A result of the product-demand asymmetry has been the widespread norm under which firms rarely adjust wages downward, but are relatively free to

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[35] *Id.* at 167.
[36] *Id.* at 168. In other words, as workers gain more job-specific—that is, "match-investment"—skills and connections, their value to the firm becomes higher than their value in the external labor market. *Id.* This difference between a worker's value to the firm and value to the outside labor market is a "quasi-rent" that a party may be able to capture by, for example, threatening to end the work relationship unless they receive a larger share of profits. *Id.* As Wachter notes, match-specific investments generally benefit both employers and employees; thus, the parties, and society, would be better off if parties could make match-specific investments without the risk of the other party attempting to capture any rents that result after the initial investments are made. *Id.*
[37] *Id*. at 168.
[38] *See* Wachter, *supra* note 34, at 176, 181-82. Not so easily solved is the hold-up problem faced by union firms with respect to firm-specific capital investments. Once fixed capital is in place, unions can capture—or "tax"—some share of the normal returns to investment. Knowing this, unionized firms will invest less, requiring a higher "before-tax" return. *See* Paul A. Grout, *Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach*, 52 ECONOMETRICA 449 (1984) (providing theory); *see also* Barry T. Hirsch, *What Do Unions Do For Economic Performance?*, 25 J. LAB. RES. 415, 434-36 (2004) [hereinafter Hirsch, *Economic Performance*] (evaluating empirical literature for U.S., which generally finds lower investment in physical capital, and research and development, among union firms).
[39] *See* Wachter, *supra* note 34, at 168.
[40] *Id.*

adjust employment levels.[41] This self-enforcing mechanism helps to diminish opportunistic use of the information asymmetry by eliminating the incentive to understate the true level of demand in order to justify a decrease in wages.[42] Employers lack incentive to misstate demand with regard to employment levels because they do not want to cut employment if demand is strong.[43] In unionized workplaces, a similar but more formal arrangement exists, where most collective-bargaining agreements allow employment level, but not wage, adjustments absent negotiation. Unions may grant employer requests for wage concessions, but generally only if financial records are disclosed to union representatives.[44]

Risk bearing is another major problem in the employment relationship. Because most workers have incomes tied to their jobs, they are in a poor position to bear company-specific earnings risk that could result in fewer hours, lower wages and benefits, or job loss.[45] Investors, in contrast, can readily diversify investments and bear such risk. This difference in the ability to tolerate risk may cause problems, as workers' compensation and wealth are tied to factors out of their control. More efficient risk bearing would insulate workers' compensation from variances in firm revenue and profit.[46] Consequently, both union and nonunion workplaces tend to have relatively fixed wage rates.[47] In union companies, such rates are usually required under a collective bargaining agreement, and in nonunion companies there is a largely self-enforcing

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[41] *Id.* at 168-69; *see also* Truman F. Bewley, WHY WAGES DON'T FALL DURING A RECESSION (1999) (providing comprehensive theoretical and empirical treatment of why wages are rigid downward).
[42] *Id.* at 169.
[43] *See* Wachter, *supra* note 34, at 169.
[44] *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956) (holding that an employer that claims an inability to provide wage increases must disclose financial information to support claim). Later decisions have limited employers' disclosure obligation to instances where it explicitly states that it cannot afford a union demand. *See* Graphic Commc'ns Int'l Union, Local 508 v. NLRB, 977 F.2d 1168, 1170-71 (7th Cir. 1992).
[45] *See* Wachter, *supra* note 34, at 169; Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"*, 63 FORDHAM L. REV. 957, 977-78 (1998) [hereinafter Hirsch, *Labor Law Obstacles*].
[46] *Id.* at 169.
[47] The term "fixed wage rates" refers here to time-based pay (e.g., an hourly wage or annual salary) that does not vary with respect to temporary fluctuation in firm revenues and costs.

implicit contract or norm of fixed wages, with employer reputation playing a key enforcement role.

The principal advantage of nonunion pay and governance determination over union agreements is not from the above factors, but rather from transaction costs.[48] Because new information is constantly coming to a firm and its workers, it is prohibitively costly to have explicit contract terms for every possible contingency. Although many collective bargaining agreements have broad management rights clauses,[49] a unionized company's formalized contractual governance structure limits management's and workers' flexibility and discretion. Revising contractual terms via the collective bargaining process is difficult and costly.[50] By the same token, the *inability* to revise the employer-employee relationship in response to external market changes is also costly, all the more so in today's rapidly changing and highly competitive economic environment.

Ultimately, the workplace choice between informal nonunion governance—that is, employer fiat—and formal union governance should depend on the answers to two questions. First, does management discretion or union governance better handle the contractual problems found in all workplaces—match specific-specific investments, asymmetric information, risk, and transaction costs? For example, if management can behave opportunistically and appropriate quasi-rents from immobile workers with little loss in firm reputation or worker productivity, then a formalized union contractual relationship becomes attractive. To the extent that unions can and

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[48] As Wachter notes, transaction costs are exacerbated in the face of more match-specific investments and information asymmetries, as the need to regulate a higher potential for opportunistic behavior is more costly. *See* Wachter, *supra* note 34, at 170.

[49] *See, e.g.*, St. George's Warehouse, Inc., 341 N.L.R.B. 904, 907, 927 (2004) (finding employer's proposal for broad management rights clause—which would allow it complete discretion over hiring; promotions; discipline for cause; demotions; transfers; layoffs; recalls; setting productivity standards; contracting with third-parties to supply personnel; closing, expanding, or relocating its facility; ceasing any job; and changing methods of operation—to be lawful).

[50] *See* Wachter, *supra* note 34, at 170.

do behave opportunistically by appropriating quasi-rents from shareholders to acquire wage premiums, then the union form becomes less attractive. The second question is how competitive and dynamic are product and resource markets? Where changes in technology, product markets, and financial markets are rapid, the costs of inflexibility in a formalized environment are more severe. In such an environment, the greater discretion and flexibility associated with nonunion governance are distinct advantages.

We contend that sectoral and technological changes, coupled with rising competition in the U.S. and world economies,[51] increasingly tilt labor-contracting preferences toward nonunion governance. Outside of today's formalized union sector, most workers are employed in firms where workplace governance is subject to substantial management discretion. That discretion is influenced by societal norms and constrained by governmental regulations. At least as important, competition for employees requires that companies provide sufficient compensation and acquire a reputation that will enable them to attract, motivate, and maintain a productive work force.[52]

In today's economy, union governance has proven to be an expensive minority model. The disadvantage of traditional unionism is most apparent in the effect of unions on profitability, investment, growth, and other aspects of firm performance, where improvements in productivity fail to offset the costs of union wage premiums.[53] Any profitability gap between union and nonunion firms is sure to fuel and maintain strong management opposition to union organizing.[54] As long as there is a gap in firm performance, managerial discretion will remain the dominant

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[51] *See supra* notes 10-11, 20-23.
[52] *See supra* note 34.
[53] *See* Hirsch, *Economic Performance*, *supra* note 38, at 431-34.
[54] There is some circularity here. No doubt much of management opposition to unions is the result of higher per unit costs and less management discretion. But a hostile attitude by management toward unions also makes it less likely one will see an enhancement in performance owing to cooperation and collective voice within union companies.

form of workplace governance.

The dominance of managerial discretion over contractual governance suggests that the future labor relations environment will look much like it does today, with no resurgence of unionization on the horizon—at least traditional unions in the style envisaged by the NLRA. In the following section, we identify alternative paths that might lead to workplace gains in a world in which traditional collective governance continues to lose relevance. The NLRA, however, still retains some significance, for both better and worse. Under the alternatives proposed here, the Act could enjoy increased relevance by fostering a new model of collective action that makes society better off.

II. UNFULFILLED DESIRES OF PRIVATE SECTOR EMPLOYEES

A. *What Workers Want*

The purpose of this Article is to outline alternative paths that, although not politically likely, could lead to workplace gains in a world where private sector unionism remains limited. To assess what gains may be possible, we begin by asking what workers want. Labor reforms should address the concerns of workers, while taking into account their impact on employers and the economy, such as investment and job creation. Worker concerns, at least to the extent they touch on collective action, are expressly protected by the NLRA.[55]

In the early 1990s, the Commission on the Future of Worker-Management Relations (commonly known as the "Dunlop Commission") administered the Worker Representation and Participation Survey. The results of this survey, along with similar surveys in other countries, are comprehensively analyzed by Richard Freeman and Joel Rogers in *What Workers Want*.[56]

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[55] *See supra* notes 6-9 and accompanying text.
[56] Freeman & Rogers, *supra* note 21; *see also* Bruce E. Kaufman, *The Employee Participation and Representation Gap: An Assessment and Proposed Solution*, 3 PA. J. LAB. & EMP. L. 491 (2001) (challenging conclusions drawn by Freeman and Rogers from the worker survey).

The survey results paint a picture of significant unmet employee desires. First, many workers want greater voice and participation in workplace decision-making, although they seek individual voice as much as the collective right to be heard associated with traditional unions.[57] Second, workers want a more cooperative and less adversarial worker-management relationship, coupled with managerial support for entities that foster worker participation.[58] Third, workers want not just to express themselves, but also to have their views affect workplace outcomes in meaningful ways.[59] And fourth, workers see management resistance as the primary obstacle to worker participation and cooperation.[60] Despite some differences, the expressed desires and concerns of workers are similar in union and nonunion workplaces.[61]

We draw several inferences from these results. One conclusion is that the current system often leads to an underproduction of worker voice and participation, as well as worker-management cooperation, in both union and nonunion workplaces.[62] Moreover, the adversarial relationship envisioned and reinforced by the NLRA does not appeal to workers. Finally, greater voice and cooperation are unlikely to evolve from the current status quo. These inferences open the door for potential societal gains through welfare-enhancing regulatory reforms.[63]

We identify four criteria by which labor regulation reforms should be evaluated, while

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[57] Freeman & Rogers, *supra* note 21, at 4-5, 147. Approximately 50 million employees (union and nonunion) wanted more voice at work, while nearly one-third (15 million) of nonunion employees of all but the smallest private sector firms wanted union representation and over 90% of unionized employees wanted to keep their union representation. *See* Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 187, 197 (2001) [hereinafter, Weiler, *A Principled Reshaping*] (citing the Worker Representation and Participation Survey).
[58] Freeman & Rogers, *supra* note 21, at 5, 59, 141-42.
[59] *Id.* at 4-5, 40-42. Freeman and Rogers note that the biggest gap in the amount of influence that employees want, versus what they actually have, involves issues of benefits and pay, followed by training and, to a much smaller degree, determining how and when to perform work. *Id.* at 51.
[60] *Id.* at 5, 87. *See* Weiler, *A Principled Reshaping*, *supra* note 57, at 178 (2001) (noting that 79% of nonunion employees said that employees visibly seeking unionization would very likely lose their jobs and 41% said that they would personally lose their job if there were identified as being involved in a union campaign).
[61] Freeman & Rogers, *supra* note 21, at 52.
[62] *See* Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989) (comparing efficiency of labor regulations versus unregulated market outcomes).
[63] *See infra* Section III.

recognizing that tradeoffs among the criteria may exist.[64] First, proposals should be welfare-enhancing for the parties and the economy.[65] Second, reforms should facilitate enhanced voice (including some freedom to choose whether and how to exercise that voice), encourage cooperation and discourage costly conflict, and increase the flow of information within nonunion workplaces. Third, any arrangement should constrain rent-seeking and opportunistic behavior by workers and employers. Fourth, reforms should allow for variation across heterogeneous workplaces and be flexible over time.

There are several paths that might encourage welfare-enhancing workplace governance. We focus on nonunion workplaces, although what happens in the nonunion sector will affect outcomes in the union sector. By "nonunion," however, we include ventures sponsored by unions that do not follow the traditional union form. Indeed, we anticipate that unions will be an important catalyst for new workplace governance structures, with such innovations taking on an increasingly significant role as long as union density remains low. Accordingly, we propose alternatives that reduce legal impediments to nontraditional forms of workplace governance, with the hope that these labor law and employment regulation reforms can provide at least modest social welfare gains. Before discussing these alternatives, however, we identify some recent workplace governance innovations that may establish the foundation for the future of private sector collective action.

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[64] For example, under certain circumstances, increasing worker voice while limiting rent-seeking behavior among workers may be mutually exclusive.

[65] Welfare-enhancing reform is defined at *supra* notes 4 and accompanying text. The value to the parties of an "enterprise" can be defined as the sum of shareholder profits plus worker rents (the excess of compensation over opportunity costs). *See* John M. Abowd, *The Effect of Wage Bargains on the Stock Market Value of the Firm*, 79 AM. ECON. REV. 774, 777 (1989) (developing and applying this definition of an enterprise).

B. *What Workers Get*

The vast majority of private sector workers will never have an opportunity to engage in collective voice and participation via traditional unionism.[66] Yet, despite legal hurdles to nontraditional workplace governance schemes,[67] the use of innovative work groups[68] is developing rapidly. No doubt due to their recent lack of success at gaining members,[69] traditional unions have been at the forefront of developing new and different ways to reach and serve the interests of workers. Whether these innovations are intended solely to boost traditional union membership, or are merely a reflection of unions' concern for workers, they represent potentially vital tools for providing real voice and participation to nonunion private sector employees. Although the use of welfare-enhancing work groups is growing, they face legal obstacles and reach only a small percentage of private-sector employees; thus, labor reforms should seek to further encourage their development.

Unions increasingly seek to organize workers outside the typical NLRA election process.[70] One popular technique is to organize workers around issues other than those directly implicating workplace concerns. The Service Employees International Union ("SEIU"), for example, successfully organized janitors in Santa Clara County, California despite significant

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[66] *See supra* Section I.A.
[67] *See infra* Sections III.A, III.E.
[68] We refer to "work groups" broadly as any entity in which employees participate and that serves some interest of employees. This use is similar to the "employee involvement" programs that Freeman and Rogers define as including such disparate entities as quality circles, discussion groups, total quality management groups, self-directed work teams, safety committees, production committees, holiday part committees, and other small groups that work on certain issues. *See* Freeman & Rogers, *supra* note 21, at 101.
[69] *See supra* notes 14-17 and accompanying text.
[70] For example, unions have increasingly sought to avoid the Board's election process by convincing employers, and pressing for legislation that would require employers, to bargain with unions that have been selected by a majority of employees who signed cards in support of the union. *See* Employee Free Choice Act, S. 842; H.R. 1696. The bill would require employers to recognize a union that obtains majority support from employees via a "card-check" (cards signed by employees stating that they want the union to represent them). Surprisingly, a majority of House members—in a Republican-majority House—have already signed on to the bill as co-sponsors. *See Majority of House Likely To Co-Sponsor 'Card Check' Bill, AFL-CIO Official Says*, 89 DAILY LABOR REPORT (BNA), May 9, 2006, at A-6.

hurdles that included the mostly Mexican immigrant workers' low English language and job skills.[71] The SEIU's success was based in large part on a campaign centered on Mexican culture that involved religious and political leaders, and used publicity techniques that included demonstrations and boycotts against the high-tech companies such as Apple Computer that hired the cleaning contractors employing the janitors.[72] As union density levels remain low, unions are likely to increase their use of such innovative strategies. Indeed, the 2005 split in the AFL-CIO was prompted by the belief of the SEIU and other major unions joining the Change To Win Coalition that the AFL-CIO's organizing efforts were too conservative.[73] Attempts at innovative organizing have also led to the formation of work groups that do not act as traditional unions, but provide an opportunity for voice that many workers want.

These nontraditional work groups include a growing trend by unions forming affiliate organizations that do not deal with employers on behalf of their members. For example, the AFL-CIO's "Working America" affiliate consists of members who are associated with labor generally, but are not formally represented by a union.[74] Its main purpose has been to encourage

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[71] *See* Stone, *supra* note 10, at 225 (describing Justice for Janitors campaign and other nontraditional union organizations); Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 497 (2002) [hereinafter Hyde, *Employee Organization*].

[72] *See* Christopher L. Erickson, Catherine Fisk, Ruth Milkman, Daniel J.B. Mitchell & Kent Wong, *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-first Century?*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 22 (Phanindra V. Wunnava ed., 2004) (examining reasons for success of justice for janitors campaign and asking whether a similar approach would succeed more generally); Hyde, *Employee Organization*, *supra* note 71, at 497; *see also* Estlund, *supra* note 2, at 1604-06 (describing "corporate campaigns," by which unions publicize dispute to employer's customers); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 951-54 (1994) [hereinafter Barenberg, *Democracy and Domination*] (discussing historical examples of joint union-management councils).

[73] *See* Michelle Amber, *SEIU, IBT Disaffiliate From AFL-CIO, Announce Plan to Set Up New Federation*, 142 DAILY LABOR REPORT (BNA), July 26, 2006, at AA-1.

[74] *See* Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 17 (National Bureau Econ. Research, Working Paper No. 11298, 2005), *available at* http://www.nber.org/papers/w11298; Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues*, 50 N.Y.L.S. L. REV. 501, 505 (2005-2006) [hereinafter Hyde, *New Institutions*]. The AFL-CIO also initiated an associate member program that allowed nonunion or unemployed workers to pay reduced dues and enjoy certain privileges of union membership. *See* Stone, *supra* note 10, at 218 (noting that primary goal was to support possible future organizing efforts).

action on local and national political issues; yet, its potential to activate members for other projects is significant.[75] For example, Working America recently created a web site that contains a database with information on over 60,000 companies, including executive compensation, overseas outsourcing, and labor and employment violations.[76] This type of information may be valuable to workers, arguably reducing information asymmetries and, in some cases, the employer opportunistic behavior such asymmetries allow.[77]

Another interesting example of the increasingly blurry line between traditional unionism and less formal work groups is the alliance between the AFL-CIO and the National Day Laborer Organizing Network ("NDLON"). In announcing their alliance, the groups expressed their intent to form a National Worker Center Partnership, which would further support community-based entities called "worker centers" that act as advocates for nonunion workers and provide a large range of services to enhance both collective and individual voice.[78] Worker centers already have a significant presence in the U.S., with over 140 centers in 31 states.[79]

These new work groups aptly show how employee voice can be satisfied through alternative institutions and that such institutions can be transformed and evolve over time. The Communication Workers of America's ("CWA") "WashTech" affiliate, for instance, transformed from a nonbargaining entity to one that sought formal bargaining status and ultimately led to the creation of several entirely different work groups. The CWA initially formed WashTech only to assist, and lobby on behalf of, Microsoft independent contractors and

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[75] *See* Freeman, *Web*, *supra* note 74, at 19; Hyde, *New Institutions*, *supra* note 74, at 505.
[76] *See* Amy Joyce, *Labor Web Site Keeps Tabs on Business: Workers Can Check Executive Salaries, Company Violations*, WASH. POST, Nov. 18, 2005, at D3 (noting also similar actions by two groups that monitor Wal-Mart's conduct). The Working America database is available at: http://www.workingamerica.org/jobtracker.
[77] *See supra* notes 39-44 and accompanying text.
[78] *See* Michelle Amber, *AFL, Day Laborers Group, Sign Pact To Advance Workers, Immigration Rights*, 154 DAILY LABOR REPORT (BNA), August 10, 2006, at A-4 (noting that some worker centers may also provide legal services).
[79] *See id.* NDLON already operates the largest association of worker centers, with more than 40 centers focused on issues affecting day laborers. *Id.* Twenty-five other day labor centers operated by 28 other groups exist as well. *Id.*

temporary help agency workers, but it has begun to seek recognition on behalf of some technology workers—and even obtained card check recognition from one employer.[80] Washtech's success prompted the CWA to form a national website for all technology workers, and other unions have followed suit.[81]

The examples above illustrate the possibility of providing services to workers through innovative organizations not directly tied to the workplace—that is, outside the traditional collective bargaining process. Although these groups have potential, they will not necessarily flourish or become widespread. Such efforts are costly both in the initial and ongoing stages, and the union and philanthropic foundation funds needed to support these groups are limited. Monies will flow to these organizations only if they provide benefits greater than alternative uses of scarce funds.

More fundamentally, as pointed out by Joni Hersch, there is a basic tension in such organizations that may limit their development.[82] Hersch asks whether a large interest group not attached to the workplace can successfully provide services to workers and lobby for their well-being. Hersch examines in some detail the experience of Working Today, which began as a group broadly focused on services and lobbying for independent workers, but evolved into a group claiming an overriding social agenda, while focusing more narrowly on making benefits portable across jobs.[83] Generalizing from this analysis, Hersch models a group that provides services, lobbies, and represents members. Tension arises because the organization provides a good that is partly public—that is, its benefits spill over to nonmembers. It must attract members

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[80] *See* Stone, *supra* note 10, at 235; Hyde, *New Institutions*, *supra* note 74, at 506; *see also id.* at 507-09 (discussing other examples of membership-based "alternative worker organizations").
[81] *See* Freeman, *Web*, *supra* note 74, at 18-20 (describing International Association of Machinist's "Cyberlodge," Steelworkers union's open membership plan, and SEIU's "Purple Ocean").
[82] *See* Joni Hersch, *A Workers' Lobby to Provide Portable Benefits, in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 207 (Richard B. Freeman, Joni Hersch, & Lawrence Mishel eds., 2005).
[83] *Id.* at 213-15.

based on the private goods it provides, while raising money from foundations or large entities interested in the public outcome.[84] The implication drawn by Hersch is that there is no common blueprint for such an organization—different types of groups can and will arise. But their success and growth is not guaranteed.

As described in more detail below,[85] work groups can provide a diverse set of services for workers and satisfy to some degree the desire for workplace voice and participation. The NLRA, however, has not been hospitable to these nontraditional work groups, effectively reducing the choice set for most workers to either traditional unions or management discretion (albeit constrained), with little in between.[86] What follows, therefore, are proposals to make the NLRA more open to welfare-enhancing innovations that facilitate worker voice, participation, and cooperation in the workplace, in particular for private sector nonunion workers.

III. ENCOURAGING WORKER VOICE AND PARTICIPATION IN NONUNION WORKPLACES

A. *Reforming the NLRA's "Company Union" Prohibition*

Any discussion of expanding the development of nontraditional work groups must focus on the NLRA's broad "company union" prohibition. This prohibition, as currently interpreted by the NLRB, severely limits employers' ability to lawfully establish work groups that may provide welfare-enhancing employee voice and participation. Accordingly, we propose a legislative modification that would significantly reduce the number and types of groups that fall under the

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[84] *Id.* at 216-18.

[85] *See infra* notes 106-111 and accompanying text.

[86] Alex Bryson and Richard Freeman find that underlying preferences among workers are roughly similar in the U.S. and UK, but that workplace outcomes differ because the UK provides a greater range of institutional options than does the U.S. The authors conclude:

> The different choices on offer in the two countries appear to affect the different responses of UK and US workers to fairly similar workplace needs/problems. The dichotomous choice between collective bargaining and no representation in the US produces a smaller rate of unionization in the US that manifests itself in greater unfilled demand for unions among non-union workers than in the UK; whereas the wider choice of voice institutions in the UK attracts many to take the free rider option.

Alex Bryson & Richard B. Freeman, *Worker Needs and Voice in the US and the UK* 22 (National Bureau Econ. Research, Working Paper No. 12310, 2006), *available at* http://www.nber.org/papers/w12310.

company union ban.

In its attempt to prevent employer-controlled unions via Section 8(a)(2) and, by inclusion, Section 2(5),[87] the NLRA also limits less formal employer-sponsored work groups—even those that do not bargain on behalf of employees. Section 8(a)(2) prohibits employer domination or support for any labor organization.[88] Section 2(5) defines a "labor organization" as any entity in which employees participate and which has a purpose to deal with employers over grievances, disputes, wages, pay rates, hours of employment, or work conditions.[89]

The legitimate goals underlying Section 8(a)(2)'s inclusion in the 1935 Wagner Act include an attempt to prevent employer-dominated work groups that would interfere with employees' freedom to choose an independent, traditional union and to bar representation that, because of ties to employers, was viewed as inherently flawed.[90] The fear that employers may create entities that interfere with employees' choice whether or not to seek collective representation led to Section 2(5)'s broad definition of "labor organization," which the Board subsequently expanded further.[91]

The Board has concluded that it will classify an entity as a labor organization under

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[87] 29 U.S.C. §§ 152(5), 158(a)(2).

[88] *Id.* § 158(a)(2) (making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization").

[89] *Id.* § 152(5) (defining "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

[90] *See* Electromation, Inc., 309 N.L.R.B. 990, 992-94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); LeRoy, *supra* note 11, at 1661 (noting that many early twentieth century employee participation groups were progressive, but other employers created such groups in anticipation of federal labor legislation and in hopes of barring independent unions from the workplace); Estreicher, *supra* note 32, at 130-32 (describing "employer coercion" and "false consciousness" rationales); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 174-76 (1993) (discussing possible rationales of Section 8(a)(2)). An excellent volume edited by Bruce Kaufman and Daphne Gottlieb Taras includes several papers examining company supported worker groups in the U.S. and in Canada. *See* NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

[91] *See* Barenberg, *Political Economy*, *supra* note 7, at 1459 (citing, as examples, NLRB v. Pa. Greyhound Lines, 303 U.S. 261, 268-69 (1938); Int'l Harvester Co., 2 N.L.R.B. 310, 354 (1936); Wheeling Steel Corp., 1 N.L.R.B. 699, 710 (1936)).

Section 2(5) if "1) employees participate, 2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and 3) these dealings concern 'conditions of work' or concern other statutory subjects [listed in Section 2(5)], such as grievances, labor disputes, wages, rates of pay, or hours of employment."[92] The current expansive reach of Section 2(5), and by extension Section 8(a)(2), results in large part from the Board's interpretation of "dealing with." According to the Board, an entity is "dealing with" an employer wherever there is a "bilateral mechanism involving proposals from [an] employee committee concerning the subjects listed in Sec[tion] 2(5), coupled with real or apparent consideration of those proposals by management."[93] In particular, "dealing" is present if there is a "pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."[94] The Board has broadly interpreted this definition to cover entities with no formal structure, even if they have no elected officers, by-laws, regular meetings, or dues and do not engage in anything close to collective bargaining.[95] Any employer support or control over such an organization—for instance, creating the group or running its meetings—violates Section 8(a)(2).[96]

The expansiveness of these provisions restricts development of nonunion vehicles for

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[92] *Electromation*, 309 N.L.R.B. at 994.

[93] *Id.* at 995 n.21 (stating also that "[a] unilateral mechanism, such as a 'suggestion box,' or 'brainstorming' groups or meetings, or analogous information exchanges, does not constitute 'dealing with'"). Since the Supreme Court's 1959 decision in *Cabot Carbon*, "dealing with" has been interpreted broader than "collective bargaining." NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959). *Electromation* also suggested, but ultimately did not decide, that a labor organization must serve in some sort of representational capacity. *See* 309 N.L.R.B. at 944 n.20. The Board's interpretation of Section 2(5)'s scope came in part as a reaction to some courts' more narrow interpretation of "labor organization." *See id.* at 996 (rejecting NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982) (requiring employees to believe that an entity is a union to constitute a "labor organization" under Section 2(5)).

[94] E. I. Du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

[95] *See Electromation*, 309 N.L.R.B. at 993-94 (concluding that legislative history of Section 8(a)(2) required a broad interpretation of "labor organization" in order to ban "employee representation committees," which had little formal structure); Estreicher, *supra* note 32, at 126 (1994) (citing *Cabot Carbon*).

[96] *E. I. Du Pont*, 311 N.L.R.B. at 896; *Electromation*, 309 N.L.R.B. at 995.

employer-employee cooperation and productivity-enhancing worker voice.[97] This is because the NLRA allows no middle ground—employees often must choose between traditional union representation or no representation at all.[98]

One of many illustrations of the vast reach of the company union prohibition is the Board's decision in *Grouse Mountain Lodge.*[99] The employer in that case operated a Montana resort that was facing an organizing campaign.[100] Among several unfair labor practices occurring during the campaign, the Board found that the employer violated Section 8(a)(2) because of its support for the "Quality Assurance (QA) Committee."[101] The QA Committee consisted of a suggestion box and various meetings; all employees were invited to the meetings, where they could offer ideas to management and discuss issues such as work conditions, guest matters, and safety concerns.[102] Although the QA Committee had no structural documents, by-laws, or procedures,[103] the Board found that it was a labor organization. According to the Board, the QA Committee satisfied the "dealing with" requirement, in part, because the employer sought input from the committee about what should be served for employees' free lunches and which holiday they should designate as the new day providing overtime pay.[104] It is difficult to imagine how this type of employer-employee interaction interferes with employees' labor rights. Rather, this type of virtually structureless feedback is often indispensable to companies in the modern economy. Yet, the Board's current company union jurisprudence unjustifiably treats

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[97] *See* Estlund, *supra* note 2, at 1545-46 (discussing different approaches that Congress may have taken in 1935).
[98] *See id.* at 1546.
[99] 333 N.L.R.B. 1322 (2001), *enforced*, 56 F. App'x 811 (9th Cir. 2003).
[100] *Id.* at 1328.
[101] *Id.* at 1335-37.
[102] *Id.* at 1335.
[103] *Id.*
[104] *Id.* at 1336 (concluding that suggestions and ideas initially raised by individual employees are "debated amongst the employees[ ] who have attended the meeting, sometimes altered, and then sent to the [employer] in the name of the QA program rather than as an individual employee's suggestion. Thereafter, the [employer] either accepts or rejects the ideas or returns them to the next QA program meeting for further development.").

such beneficial interactions as unlawful.

The potential benefits of employer-supported work groups are widespread, although not universal.[105] In some cases, managers will enthusiastically adopt measures to enhance opportunities for employee voice to take advantage of the production improvements and increased job satisfaction gained from employee input; in other cases, managers will adopt such measures by necessity to remain competitive in the marketplace.[106] In sharp contrast to the strictly hierarchical manufacturing model of the 1930s, such input is considerably more important in the modern economy, where the need for workers to think and make suggestions is much higher than when the NLRA was enacted.[107] Employee work groups may also provide an alternative to resolve workplace disputes that both employers and employees find more beneficial than other methods.[108] Employers that are open to more employee voice may also discover that employees develop more loyalty and attachment to the firm.[109]

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[105] Studies examining employee participation programs typically conclude that they have positive (if not always large) effects on productivity and employee earnings, but do not in general decrease per unit labor costs and increase profitability. *See* Hirsch, *Labor Law Obstacles*, *supra* note 45, at 969-76, 982 (discussing benefits of employee participation in workplace decision-making and citing studies). The literature suggests that such programs are not without costs and that competition eventually leads to any net savings from such programs to be passed through to consumers in lower prices. Lowering the cost of adopting such programs should increase their use and increase economy-wide productivity. *See* Peter Cappelli & David Neumark, *Do "High Performance" Work Practices Improve Establishment-Level Outcomes?*, 54 INDUS. & LAB. REL. REV. 737 (2001) (discussing methodological difficulties in measuring causal effects of workplace organization, surveying prior studies, and providing longitudinal evidence).

[106] *See* Freeman & Rogers, *supra* note 21, at 7, 103-07 (describing survey results showing that a significant number of managers favor more employee voice in joint work committees and discussing productivity gains possible through employee involvement programs); Weiler, *A Principled Reshaping*, *supra* note 57, at 198; *cf.* Hirsch, *Labor Law Obstacles*, *supra* note 45, at 982 (citing data on employee ownership effects on firm performance). *But see* Levine, *supra* note 11, at 63 (stating that "[m]any middle- and lower-level managers resist and sometimes sabotage employee involvement . . . [because greater employee autonomy] may be threatening to supervisors and managers").

[107] *See* Barenberg, *Democracy and Domination*, *supra* note 72, at 885-90, 926 n. 826 (discussing numerous examples of successful flexible work teams and citing studies showing improvement in productivity, quality, and innovation from increased employee involvement); Estreicher, *supra* note 32, at 135-39 (describing importance of "smart" workers who can fully understand the business, make use of new technologies, and make suggestions to the employer).

[108] *See* Freeman & Rogers, *supra* note 21, at 136-38 (discussing workplace committees that monitor labor standards); Hyde, *supra* note 90, at 153-54 (describing advantages of work "caucuses" over other responses to work grievances, such as quitting, internalizing complaints, or litigating).

[109] *See* Clyde Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 135 (1993) (discussing the benefits of the "shared enterprise" model of employment in Germany

Labor law reform that relaxed the Board's current company union prohibition would effectively expand choices for many employees. Employees who have little prospect for seeing formal collective bargaining in their workplace would have the option to take part in a group that provides some outlet for voice, while enjoying NLRA protection for their participation.

The possible gains from employer-supported work groups' flexibility and ingenuity are well-illustrated by the variety in the structure of the groups themselves. Avenues for employee voice may arise from groups formed for nonproduction purposes, such as a diversity committee. Moreover, other entities—such as work teams that concentrate on certain projects or production issues, or groups that are focused on procedures, policies, or rules—can foster employee input and feedback.[110] It is not surprising, therefore, that studies have shown the use of some form of employee work groups is reasonably widespread and growing.[111]

Although unions are concerned that employer-supported work groups might replace them,[112] it is also possible that the process of electing worker representatives or exercising voice

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and Japan). The potential benefits of employer-run work groups have been recognized in other areas as well. For example, a failed amendment to the Occupational Health and Safety Act would have required health and safety committees in most workplaces. *See* H.R. 1280, 103rd Cong. (1993); H.R. 3160, 102nd Cong. (1991); *see also* Estlund, *supra* note 2, at 1541 n.69 (stating that such groups can improve safety) (citing Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J.L. & PUB. POL'Y 65, 82-89 (1994)); Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. PA. J. LAB. & EMP. L. 75, 91-96 (2002) (discussing state legislation mandating workplace safety committees); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 431 (2000)).

[110] *See* Estreicher, *supra* note 32, at 127 (describing production-focused groups as "on-line," as distinguished from nonproduction "off-line" groups).

[111] *See* Bruce E. Kaufman, *Does The NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 747-53 (1999) (describing results of various studies and noting that most of these groups are probably not affected by Section 8(a)(2)); Freeman & Rogers, *supra* note 21, at 92 (describing reports that one-third of employees said their employer met with committees of employees to resolve problems and over half said their employer had some form of an employee involvement system); Levine, *supra* note 11, at 7 (citing study showing that in 1990, 88% of companies had at least one worker involved with an employee-involvement program).

[112] *See* Jonathon P. Hiatt & Laurence E. Gold, *Employer-Employee Committees: A Union Perspective*, *in* Kaufman & Taras, *supra* note 90, at 507-08.

in nonunion companies would complement the organization of traditional unions.[113] Other countries have much higher union density rates, even though they do not foreclose employer-initiated or -supported work groups that might engage in discussions over compensation and working conditions. For example, employer-supported nonunion work groups are permitted and not uncommon in Canada,[114] where traditional unions and collective bargaining operate at levels higher than in the U.S.[115]

Some countries, Germany being the prime example, mandate that some form of elected employee work group be available to workers, a right that has now been adopted by the European Union.[116] German employers are often supportive of these "works councils," finding that a good working relationship with them is productive.[117] More to the point, German works councils are often closely tied to trade unions and have historically fed unions with new

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[113] *See* Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?* 45 B.C. L. REV. 125, 145 (2003) (noting that the steel unions and National Education Association evolved in part from company unions); Estlund, *supra* note 2 at 1545, 1551, 1601 (arguing that allowing some sort of employer work groups might spur innovation among unions); Estreicher, *supra* note 32, at 153-54; Barenberg, *Democracy and Domination*, *supra* note 72, at 831-35 (discussing pre-NLRA company unions morphing into traditional, independent unions). *But see* Freeman & Rogers, *supra* note 21, at 113-15 (describing survey results showing that workers at firms with employee involvement programs have less interest in traditional unions, although noting that such programs do not lessen support for union at unionized firm).

[114] For a good history of Canada's law in this area, *see* LeRoy, *supra* note 11, at 1669-73; *see also* Weiler, *A Principled Reshaping*, *supra* note 57, at 199 n.44.

[115] *See* Kaufman, *Constrain*, *supra* note 111, at 805-06 (arguing that Canadian union density of 34% is due, in part, to independent unions co-opting employer-initiated work groups and a legal regime that better protects employee free choice).

[116] The European Union Charter contains a provision establishing a fundamental right of workers or their representatives to information and consultation in the workplace. *See* Charter of Fundamental Rights of the European Union art. 27, 2000 O.J. (C 364) 1, *available at* http://ec.europa.eu/justice_home/unit/charte/en/charter-solidarity.html. Paul Weiler has suggested that the U.S. adopt basically the same requirements as Germany. *See* Weiler, *Governing the Workplace*, *supra* note 8, at 282-95. Others have made similar suggestions. *See, e.g.*, Summers, *supra* note 109, at 130-32; Hyde, *supra* note 90, at 152 & n.9; Richard B. Freeman & Joel Rogers, *Who Speaks For Us? Employee Representation in a Nonunion Labor Market*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 14 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (suggesting encouragement of such groups through government incentives).

[117] *See* Summers, *supra* note 109, at 132 (noting that Japanese employers typically accept that country's similar "enterprise unions" as well); *see also* Levine, *supra* note 11, at 3-4, 115-21 (discussing widespread employee-involvement in Europe and Japan); Charles C. Heckscher, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 177-231 (1988) (arguing for "associational unions" that exist to develop and enforce agreements at a specific employer).

members.[118] It is true, however, that although activation of a works council is a simple process, workers do not find it necessary to do so in a sizable share of German workplaces, and the recent decline in works council members reinforces a slide in union membership.[119] Further, China's government-sponsored union, which does not typically engage in collective bargaining, has done what previously seemed impossible—convince Wal-Mart to voluntarily allow the union to represent all of its employees in that country.[120] It is not clear what influence the Chinese union will have on Wal-Mart's operations in that country. However, it is hard to imagine that having Wal-Mart or other nonunion companies in the U.S. engage in discussions with worker representatives will result in lower private sector union density than would otherwise exist.

This diversity of employer-supported worker participation schemes illustrates the ability of work groups to adapt to the unique circumstances of a wide variety of companies, workers, and societies. Such flexibility and innovation provide more promise for employee participation and voice in the private sector than do traditional unions, although management and workers in many establishments will not opt to implement vehicles for employee voice. We should see adoption of employer-supported work groups where such activity has the greatest potential benefit. These potential benefits from nonunion work groups are currently limited, to some unknown degree, by the NLRA's expansive company union prohibition. To the extent that employer-supported work groups created as a result of NLRA reforms prove effective, competitive pressures will induce their adoption by other companies. If ineffective, such reforms will have little impact.

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[118] *See* John T. Addison, Claus Schnabel & Joachim Wagner, *The (Parlous) State of German Unions* 9 (IZA Discussion Paper No. 2000, 2006), JOURNAL OF LABOR RESEARCH (forthcoming), *available at* www.iza.org/en/webcontent/publications/papers.

[119] *Id.* (showing that in 2004, just one in ten German establishments had works councils in the private sector, which included 47% of all employees in Western Germany and 38% in Eastern Germany; the significantly higher employee- versus establishment-density resulting because works councils exist primarily at larger establishments). In addition to declining union density, there also has been greater decentralization of bargaining. *Id.*

[120] *See* David Barboza, *Wal-Mart Agrees to Unionization in China*, N.Y. TIMES, Aug. 9, 2006.

By making many of these groups unlawful—particularly the most effective ones, which often involve substantial interactions between employees and management—the NLRA's company union ban has impeded the development of groups that could provide significant improvement for workers, employers, society, and possibly even traditional unions. Consequently, we support modification of the NLRA's prohibition against employer-sponsored work groups. A change that best reflects our four reform criteria[121] would maintain restrictions against company domination of traditional unions, while permitting the development in nonunion companies of less formal work groups. These work groups would not participate in formal collective bargaining, but could communicate with management and participate in workplace discussions, including those regarding pay, grievances, and working conditions.

Our recommendation is to change Section 2(5)'s definition of labor organization to include only those entities that have been certified by the Board, or recognized by an employer, as the exclusive collective-bargaining representative of a unit of employees under Section 9 of the NLRA.[122] The modification would permit employers to create or maintain work groups that discuss terms and conditions of employment, so long as those groups are not labor organizations as defined by the revised Section 2(5).[123] This offers employers virtually unfettered opportunity to promote the sharing of information without the specter of a Section 8(a)(2) violation, while

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[121] *See supra* note 65 and accompanying text.

[122] 29 U.S.C. § 159(a), (c), (e) (stating Board's certification process and authority to evaluate questions whether an exclusive bargaining representative enjoys support from a majority of employees).

[123] This proposal has similarities with a proposal made by Samuel Estreicher, *see* Estreicher, *supra* note 32, at 150 (proposing limiting Section 2(5)'s definition of labor organization to groups that "bargain with" employers over terms and conditions of employment), and a House-passed Taft-Hartley bill in 1947, *see* H.R. Rep. No. 80-245, at 54 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 345 (1948) (stating that it would not be an unfair labor practice for an employer to form or maintain "a committee of employees and discussing with it matters of mutual interest, including [terms and conditions of work], if the Board has not certified or the employer has not recognized a representative . . . under section 9"). This bill took care to allow "discussions" without imposing a formal duty to "bargain" on the organization or the employer. *See id.*; LeRoy, *supra* note 11, at 1704-05 (providing bill's history). Indeed, the bill stated that Section 8(a)(2) would still bar an employer from creating a formal organization with common characteristics of a labor union. *See* H.R. Rep. No. 8-245, at 54.

maintaining the major policy aims of that provision. Section 8(a)(2)'s goal of preventing employers from coercing or misleading employees into thinking that they have independent representation would be maintained, as employees would be well aware whether or not they are represented by an independent union. Moreover, as is the case currently, an employer would still be unable to discuss conditions of employment with its work group if there was already a union on the scene.[124]

Unlike other proposals, such as the failed TEAM Act,[125] which call for changes to the definition of labor organization, the proposed modification ensures that non-Section 9 work groups cannot take advantage of the protections that independent labor organizations enjoy under the NLRA.[126] For example, the certification, recognition, and contract bars—which preclude

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[124] Any attempt to deal with represented employees about terms and conditions of employment without going through the union violates the employer's duty to bargain under the NLRA and is considered unlawful "direct dealing." *See* 29 U.S.C. § 158(a)(5) (making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees"); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944); Toledo Typographical Union No. 63 v. NLRB (Toledo Blade), 907 F.2d 1220, 1222 (D.C. Cir. 1990); Estreicher, *supra* note 32, at 151-52

[125] The "Teamwork for Employees and Managers Act of 1995," H.R. 743, 104th Cong. (1995) ("TEAM Act"), would have lowered restrictions on employer-sponsored workplace participation groups. The TEAM Act would have created a proviso to Section 8(a)(2) stating that it is not unlawful:

> for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representatives of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except . . . a case in which a labor organization is the representative of such employees as provided in section 9(a).

Id. The House and Senate passed the TEAM Act, which Present Clinton then vetoed. *See* 142 Cong. Rec. H8816 (1996).

[126] One could also exclude groups created by employers to thwart organizing campaigns, *see* Estreicher, *supra* note 32, at 155; Summers, *supra* note 116, at 142 (arguing that a plan should not be allowed if an organizing campaign or representation proceeding was pending), or where an employer had recently committed an unfair labor practice, *see* Summers, *supra* note 116, at 142 (arguing for ban where unfair labor practice charge was pending or was found to have been committed within the last three years); Hyde, *supra* note 90, at 190 (same). There have been many other alternatives proposed as well. *See, e.g.*, Summers, *supra* note 116, at 142-45 (proposing exceptions to Section 8(a)(2) for plans that, among other things, allow employees to modify plan's structure, separate supervisors and non-supervisors, allow employee-elected representatives, and require an employer to bargain); LeRoy, *supra* note 11, at 1708-09 (proposing that Section 8(a)(2) allow employers to create a group that discusses work conditions, but does not claim or seek to be an exclusive bargaining representative); Weiler, *A Principled Reshaping*, *supra* note 57, at 200 (arguing that Section 8(a)(2) should ban only company-sponsored unions that collectively bargain, rather than merely deal with the employer); Hyde, *supra* note 90, at 187-90 (arguing that "labor organization" should be defined

rival unions from seeking to represent workers for a period of time after an incumbent union becomes the employees' representative[127] or during much of the existence of a collective-bargaining agreement[128]—will not apply to these work groups. Thus, employers and employees would be able to engage in information-sharing without fear of violating the NLRA.

Information-sharing would also be promoted by the clarity of the test—it is unmistakable, *ex ante*, whether or not a group is a Section 2(5) labor organization.[129] Employers that want to establish a work group may do so without risk of a future Section 8(a)(2) violation. Importantly, the modification favors neither traditional unionism nor employer-supported work groups; employees who want representation by an independent union may still pursue that goal without interference by the employer.[130] This heightens employee choice and encourages competition between unions and employers to fulfill employee demands.

Employer-supported work groups may also benefit from not being considered labor organizations. Avoiding that designation frees a group from the risk of liability for unfair labor practices under Section 8(b) of the NLRA[131] and the reporting and disclosure requirements under

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as any group that employees participate in and that "deals with"—to be broadly defined and including communicating or exercising delegated management authority—employers concerning any condition of work, and that an employer should be allowed to support a labor organization if approved by employees via secret ballot for a specified time period); Charles B. Craver, *The National Labor Relations Act Must Be Revised To Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 420, 430-31 (1992) (proposing no Section 8(a)(2) violation unless employer unilaterally establishes group with purpose of chilling or precluding organizing).

[127] Under the certification bar, an incumbent union enjoys an irrebuttable presumption of majority status for typically a year following certification; during that year, the Board will not order an election and the employer may not withdraw recognition, even if another union claims to have majority support. *See* Brooks v. NLRB, 348 U.S. 96, 98-104 (1958). Under the recognition bar, an incumbent union enjoys a irrebuttable presumption of majority status for a "reasonable period" after being recognized by the employer as the employees' representative. *See* Keller Plastics E., Inc., 157 N.L.R.B. 583, 586-87 (1966).

[128] Under the contract bar, an active collective bargaining agreement will inoculate the incumbent union from challenges to its majority status for a maximum of three years. *See* Gen Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

[129] *See* Summers, *supra* note 116, at 141 (stressing the need for "reasonably clear" line between lawful and unlawful employee participation groups).

[130] *See* Weiler, *A Principled Reshaping*, *supra* note 57, at 178 (stating that key interests in labor law "are those of workers, rather than the unions who represent them or the companies who employ them").

[131] *See* 29 U.S.C. § 158(b) (establishing "labor organization" unfair labor practices, such as restraints on picketing).

the Labor-Management Reporting and Disclosure Act ("LMRDA").[132] Freedom from these laws could help spur the growth of work groups by allowing them to develop outside of federal labor restrictions[133] Similarly, in order to keep regulatory and employer costs low, there would be few, if any, legal requirements attached to the structure of employer-supported work groups. For example, although many employers would designate that employee representatives be freely elected, there would be no such requirement.[134] Despite the lack of legal requirements, self-enforcing mechanisms would often advance employees' interests, as work groups without strong support from the workforce would have little credibility or effectiveness.

Current law hinders the flexibility and originality that could serve to fill a much-needed niche for workers. By reducing the costs of creating nontraditional work groups, the proposal would allow more workers to fulfill their desire for some form of representation or voice at work. Moreover, because participation in these groups would generally be considered concerted and protected activity under the NLRA, employers could not retaliate against or interfere with such activity without violating the Act.[135]

At the same time that Congress amends Section 2(5) to encourage employer-supported

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[132] *See id.* §§ 430 (establishing LMRDA reporting and disclosure obligations), 439 (imposing fines or incarceration for failing to file required reports under LMRDA); Hyde, *New Institutions*, *supra* note 74, at 522-23 (noting that avoiding the need to service collective-bargaining agreements can save money). Note that the LMRDA's definition of labor organization is broader than the NLRA's definition. 29 U.S.C. § 402(i) (defining "labor organization" as "any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment" and also including "any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body"). Such groups would also avoid—perhaps less defensibly—the requirement to observe democratic processes and a duty of fair representation to its members. *See* 29 U.S.C. §§ 411-415, 481-504 (LMRDA democratic requirements); Air Line Pilots Ass'n v. O'Neil, 499 U.S. 65, 74-78 (1991) (discussing duty of fair representation).

[133] *See* Hyde, *New Institutions*, *supra* note 74, at 508 (discussing group, "ROC-NY," that obtained contract on behalf of some New York City restaurant workers that was expressly not collective bargaining agreement). However, Hyde rightly questions whether ROC-NY would be able to avoid a finding that it was a labor organization if its status was ever challenged. *Id.* at 509 n.31.

[134] Subsequent discussions of conditional deregulation and a change in the labor law default each include the requirement that work group representatives be freely elected. *See supra* Sections III.B, III.C.

[135] *See infra* note 193.

nonunion work groups, however, it should also adopt other changes to the NLRA that strengthen the Board's ability to remedy employer unfair labor practices or other inappropriate obstacles to organizing. Employers are currently able to interfere with employees' decision whether or not to pursue collective representation with little cost. The lack of a significant penalty for interfering with employees' rights calls into question whether those rights have much value. Strengthening the Board's enforcement powers while also relaxing the company union ban would give employers more freedom to establish work groups and, at the same time, provide better protection of employees' right to freely choose whether to participate in the employer-sponsored group rather than a more independent form of collective activity.

One reform particular to the company union prohibition is to change current holdings that refuse to consider a Section 8(a)(2) unfair labor practice as a "continuing violation."[136] The result is that an employer can create and dominate a labor organization, sign a contract "negotiated" with the organization, and—if not challenged within the NLRA's 6-month statute of limitations[137]—avoid any Section 8(a)(2) problems during the life of the contract.[138] The harm created by a contract negotiated with an employer-dominated labor organization should not be permitted to continue simply because, as is often the case, no one was prepared to file a Section 8(a)(2) charge at the time the contract was signed.[139] Although this is not a widespread problem, such a change is consistent with the philosophy of the Act and the reforms proposed in this Article.

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[136] Sav-On Drugs, Inc., 253 N.L.R.B. 816, 824 n.19 (1980), *enforced*, 728 F.2d 1254 (9th Cir. 1984) (citing Local Lodge No. 1424, Int'l Ass'n of Machinists (Bryan Mfg. Co.) v. NLRB., 362 U.S. 411, 419-23 (1960) (holding that Section 10(b)'s sixth-month statute of limitations bars challenge to lawfulness of execution of collective-bargaining agreement and "continuing violation" theory is inapplicable if enforcement of agreement is not, by itself, unlawful).
[137] 29 U.S.C. § 160(b).
[138] *See* Armored Transp., Inc., 334 N.L.R.B. 143, 145, 148 (2001), *enforcement denied on other grounds sub nom.* AT Sys. W., Inc. v. NLRB, 294 F.3d 136 (D.C. Cir. 2002).
[139] Generally, Section 8(a)(2) charges are filed by independent unions that seek to represent a unit of employees only to find an employer-sponsored labor organization already in place. *See id.* at 148.

It is also important that employees' right to choose independent union representation be adequately protected. In this vein, Samuel Estreicher has identified the need to proscribe work groups created in response to an organizing campaign, to strengthen protections against retaliatory discharges, to increase union access to employees, and to decrease the incentive to delay the representational process through litigation.[140] Other changes could include permitting private rights of action,[141] increasing the use of injunctive relief,[142] and accelerating elections.[143] More generally, Congress needs to strengthen the Board's limited remedial power.[144] For instance, although employer-dominated "sham" unions are not widespread, the Board's sole remedial power against even the most egregious Section 8(a)(2) violations is to post notices and to disestablish such entities, neither of which is likely to dissuade employers committed to creating them.[145] Giving the Board enhanced authority to punish employer unfair labor practices—particularly through monetary fines—would impose real costs that an employer must

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[140] Estreicher, *supra* note 32, at 155.

[141] Employers currently have the right, under Section 303 of the LMRA, to sue in federal court for damages caused by union secondary boycotts. *See* 29 U.S.C. § 187(b) (providing suit for damages caused by violation of Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4)). Providing a private right of action would also enhance nonunion employees' exercise of their right to pursue collective action. Few employees are aware that the NLRA applies in the nonunion setting, and the NLRB could do more to advertise that fact. Private actions, particularly if attorney fees and other damages were available, would drastically increase nonunion employees' exercise of their NLRA rights, thereby maintain the Act's relevance in an economy that is overwhelmingly nonunion. *See* Estlund, *supra* note 2, at 1555 (arguing that private right of action would provide more effective enforcement than currently exists under the NLRA).

[142] *Cf.* Weiler, *A Principled Reshaping*, *supra* note 57, at 189-90, 205 (arguing for quicker enforcement of reinstatement orders through injunctive relief, expedited elections, and a ban on permanent replacement of strikers). The Board General Counsel *may* seek injunctive relief against employer unfair labor practices pursuant to Section 10(j), but *must* seek such relief against union secondary boycotts under Section 10(*l*). *See* 29 U.S.C. § 160(j), (*l*).

[143] *See* Kaufman, *Constrain*, *supra* note 111, at 800 (proposing maximum of four weeks between representation petition and election); Craver, *supra* note 126, at 420 (proposing two week maximum). Other options, which are not endorsed here, include mandated employer neutrality and card-check recognition, as the proposed Employee Free Choice Act would require. *See supra* note 70.

[144] Criticism of the Board's limited remedial power has been widespread. *See, e.g.*, Estlund, *supra* note 2, at 1538-39 (citing other criticisms).

[145] *See* Kaufman, *Constrain*, *supra* note 111, at 776-77 & n. 147 (describing management statements and NLRB enforcement statistics indicating some employers run work groups that they know may be unlawful because of weak penalties and low risk of a Section 8(a)(2) violation).

take into account before attempting to interfere with employees' rights under the Act.[146]

The current company union prohibition harms both employers who want more input from their workers and employees who would like to provide such input, but do not want traditional union representation.[147] By removing the threat of a Section 8(a)(2) violation for employers that value employee input, whether as a benefit to the firm or as a means to attract workers,[148] the proposed modification expands opportunities for worker voice and participation. It is difficult to see how this expansion would be detrimental.[149] Employees preferring an independent union can still pursue that path. Employees who want enhanced voice but do not want a union, or are employed at a firm where unionization is not a realistic possibility, would be better off if the NLRA's company union restriction were modified to allow more development of employer-supported work groups.[150]

As noted, it is unlikely that weakening the company union prohibition would greatly

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[146] *Cf.* Weiler*, A Principled Reshaping*, *supra* note 57, at 188 (noting that Board damage awards in even discriminatory discharge cases are significantly limited and delayed).

[147] As Clyde Summers has suggested, the current legal framework—particularly the extent to which it allows employers to fight unionization—is likely a significant factor in many employees' stated preference for more voice, but not through a traditional union. *See* Summers, *supra* note 116, at 138. Absent substantial employer hostility, employees may prefer traditional unions to a much larger degree. *Id.* The proposal here addresses part of this problem by pairing the modification of the company union prohibition with remedial changes that would increase enforcement and penalties for employer unfair labor practices. *See supra* notes 136-143 and accompanying text.

[148] *See* Freeman & Rogers, *supra* note 21, at 6 (describing survey result that employees typically welcome employer-initiated employee-involvement programs, although would prefer them to give employees more authority).

[149] The lack of a significant cost to this change is in relation to the current state of unionism in the U.S. *See* Estlund, *supra* note 2, at 1547, 1550-51. It is true, of course, that the modification proposed here would allow plans that do not necessarily represent a majority of workers and that could give employers more leeway to set up a sham organization that only pretends to take employee input into account. *See* Summers, *supra* note 116, at 147. These possibilities, however, will often be discernable to employees—at least eventually—which undermines their threat to employees. Moreover, employers seeking to infringe employees' freedom to unionize currently have many other options, most of which are far more effective; thus, the possibility that an occasional employer will have another weapon in its arsenal is not a significant cost. Indeed, if penalties against employers increase, it is likely that this potential cost is vastly outweighed by the benefits of greater protection against employer interference. *See supra* notes 136-143 and accompanying text.

[150] Indeed, prior to the enactment of the NLRA, some company unions were recognized as providing benefits to employees through assistance with grievances, information gathering, communication with employers, and improving wages, benefits, and other conditions of work. *See* Barenberg, *Democracy and Domination*, *supra* note 72, at 849-51. Barenberg also notes that the benefits of company unions were often ultimately overshadowed by unmet employee desires and, in the 1920s, most employers eventually discontinued their company unions; however, he recognizes that the earlier company unions were far less collaborative than modern work groups. *See id.* at 860-61, 875-79.

damage traditional unionism.[151] To be sure, the proposal may make organizing more difficult in some circumstances, but much of that difficulty would arise from workers being satisfied with the level of input they enjoy via their employer-sponsored work group. It is up to the union to convince employees that traditional unionism would be better. Thus, in addition to providing more employee voice, encouraging work groups would spur competition and innovation by traditional unions and give employees a taste of collective representation—possibly resulting in a higher level of union density.[152] Indeed, the company union prohibition under the Railway Labor Act[153] ("RLA") is narrower than the NLRB's, yet union density is significantly higher in industries covered by the RLA.[154] The goal, however, should not be purely to bolster traditional unionism. What is more important is that competition and complementarity between union and nonunion vehicles of worker voice are likely to pull traditional unions in a direction aimed more

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[151] *See supra* notes 113-117 and accompanying text.

[152] *See* Kye Pawlenko, *Reevaluating Inter-Union Competition: A Proposal To Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 682-88 (2006) (arguing that increased competition among unions will result in increased union membership); Rafael Gomez & Morley Gunderson, *The Experience Good Model of Trade Union Membership*, *in* THE CHANGING ROLE OF UNIONS, *supra* note 72, at 92, 102-08 (arguing that union membership is an "experience good"—a good or service whose attributes and quality are hard to discern prior to purchase or exposure); Estlund, *supra* note 2, at 1545 (arguing that allowing some sort of employer work groups might spur innovation among unions); LeRoy, *supra* note 11, at 1702, 1711-12 (noting Canadian example of a work group transforming into a traditional union, and a similar transformation in the U.S. at AT&T) (citing Daphne Gottlieb Taras & Jason Cropping, *The Transition from Formal Nonunion Representation to Unionization: A Contemporary Case*, 52 INDUS. & LAB. REL. REV. 22 (1998)); Hyde, *supra* note 90, at 160 (arguing that work groups might lead to unionization and may allow some form of union representation in workplaces where there is not majority support for the union).

[153] 45 U.S.C. §§ 151-188.

[154] The RLA states that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives," *id.* § 152 (Third), and that it "shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining," *id.* § 152 (Fourth). The RLA defines "representative as "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." *Id.* § 151 (Sixth). This suggests that the RLA's company union prohibition, unlike Section 8(a)(2), extends only to organizations that act in a representational role in collective bargaining activities. *See* Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, *in* Kaufman & Taras, *supra* note 90, at 215. Although not attributable—at least not to any significant degree—to differences in the NLRA's and RLA's company union prohibitions, the union density in industries covered by the RLA is much higher than the current overall private sector rate of just under 8%. For example, in 2005 the union density in the air transportation industry was 49.4% and in the rail transportation industry union density was 72.9%. *See* www.unionstats.com.

at value creation and less at rent appropriation.

Most workforces will remain nonunion in the current economic environment. The choice, then, is between the status quo or more nonunion workplaces with enhanced employee input. As evidenced by the Dunlop Commission report and subsequent literature, many employees say they want such input.[155] The highly competitive environment in which U.S. firms operate will provide both an incentive to develop welfare-enhancing innovations in workplace governance and a constraint on developments that transfer rents but do not add value. If welfare-enhancing innovations develop, adoption could be widespread; if not, there will be little change. Whatever the eventual effects, employer response is likely to be slow. Despite management protestations, the extent to which current law provides an overwhelming barrier to nonunion work groups is unclear[156] and their use may be limited to a significant degree by management reluctance to increase worker participation.[157] Relaxation of the current restrictions would be a change in the right direction, however, encouraging and publicly sanctioning participation and cooperation in nonunion companies.[158]

B. *Changing the Labor Law Default*

A particularly broad reform that could prompt far greater development of nontraditional work groups than modifications to the company union ban would be to change the labor law default from its current nonunion setting. One alternative default would be a governance

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[155] *See supra* notes 57-61.

[156] *See supra* note 145 and accompanying text. *But see* Kaufman, *Constrain*, *supra* note 111, at 753, 777-78 (describing interviews with managers who sought to avoid the cost and embarrassment of Section 8(a)(2) litigation or to avoid giving a union grounds to file an unfair labor practice charge).

[157] It would take further change in employers' view of the role of employees to significantly increase the use of such groups. Employers in the U.S. are seeking more employee input then they did decades ago, but have yet to completely buy into the idea of employees as true partners in the enterprise. *See* Summers, *supra* note 116, at 131, 136 (noting that American employers have emulated Japan's quality circles, but have resisted allowing employee voice in more substantial decisions). That said, the use of such groups is growing and fewer restrictions would likely further that trend. *See* Freeman & Rogers, *supra* note 21, at 7, 62 (reporting survey results showing that many managers favor some employee involvement); Kaufman, *Constrain*, *supra* note 111, at 753, 804-05 (noting growth in the U.S. and far greater use of such groups in Canada).

[158] *See* Estlund, *supra* note 2, at 1548-49 (discussing effects of Section 8(a)(2) on work groups).

structure with some level of independent worker voice that does not rise to the level of formal collective bargaining—perhaps similar to Germany's works councils.[159] This default could be waived or replaced with the express approval of employees and management.[160] As is the case for German works councils, one may want to require that the voice mechanism be activated only in those establishments where it is requested by employees, while also exempting very small establishments.[161]

At first blush, one might think that changing the default would have little effect. Labor law's current nonunion default allows a majority of workers to either choose union representation or subsequently decertify a union.[162] If union representation were the default, a majority of workers could similarly decertify the union as their agent or subsequently elect a union. This raises the question whether, in a frictionless system, employee preferences would be unaffected by the initial default and thus lead to the same low level of private sector union coverage seen today. The answer is no. The labor law default has a significant effect on the resulting governance structure, even when a low cost procedure to move away from the default exists. Shifting to a union default, for example, would lead to widespread union decertification, but not to a steady-state private sector density as low as the current 8%.[163]

The default's importance results from several factors. One reason is that the NLRA

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[159] Other commentators have discussed changing the default. *See* Estlund, *supra* note 2, at 1594-95; Cass Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 256-57 (2001); Barenberg, *Democracy and Domination*, *supra* note 72, at 959-60; *cf.* Weiler, *Governing the Workplace*, *supra* note 8, at 228-32 (discussing the hurdles to unionization caused by the current default).

[160] Workable standards for determining whether an agreement to move from the default has been reached could include an election among workers or the type of unmistakable evidence required to find that a union has waived its right to bargain over a certain issue. *See* Metro. Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (holding that a valid waiver must be "explicitly stated" and "clear and unmistakable").

[161] If the new labor law default is deemed by employers to be costly, one would see a spike in the number of small establishments holding employment to just below the coverage level.

[162] *See* 29 U.S.C. § 159.

[163] *See supra* note 16.

certification and decertification process is far from frictionless.[164] More important is that economic agents exhibit behavioral inertia, often sticking with an existing rule or environment as long as it does not differ too much from the preferred choice.[165] The default also acts as a signal that the state or employer has deemed the default norm as appropriate.[166] Further, as businesses engage in normal turnover, there is a tendency to move toward the default; currently, older businesses, including some that are unionized, are replaced by new businesses, which almost always begin as nonunion.[167] Many workplaces, therefore, will not change from the default governance structure. Yet, despite these factors, changing the default rule will not act as a mandate. Rather, the default is a starting point—or bargaining "threat point"—from which the parties would remain free to move given mutual agreement.

We see virtue in a default that establishes some form of independent work group, although not one with full collective bargaining rights. Workers would retain their current right to form independent unions without management approval. The default mechanism would specify standard procedures through which these independent work groups and management might discuss, negotiate, and approve mutually beneficial changes. It is difficult to predict precisely how any given system might evolve and operate, and the default will not function well in all workplaces. We suspect that in many, if not most, workplaces, employees would not invoke their right to engage in collective voice. In other workplaces, the employer and workers would have incentive to move away from the default and develop proposals for participatory welfare-enhancing governance structures, whether in the form of unions or less formal work groups. Over time, experience with such a system will lead to administrative and legislated

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[164] *See Barenberg*, *Democracy and Domination*, *supra* note 72, at 933 (discussing costs of organizing and other types of collective action); Weiler, *Governing the Workplace*, *supra* note 8, at 114-15.
[165] *See* Sunstein, *supra* note 159, at 220-24.
[166] *See id.* at 225-26.
[167] *See Barenberg*, *Democracy and Domination*, *supra* note 72, at 932-33.

changes in the default.

The inability to identify in advance all outcomes of a given reform is not a fatal flaw. The same can be said of any change, including the NLRA's enactment in 1935. Moreover, laws and regulations evolve in response to changing benefits and costs. Adoption of a new workplace default would set off significant activity among management, workers, and workers' agents to communicate, negotiate, and arrive at alternatives that make the parties better off.

Such a major change in labor law obviously requires thorough analysis and careful design. The actual working of such a system, however, would be determined in no small part by the way it evolves in the workplace, courts, and regulatory agencies. Given the current stagnation in the NLRA's governance of the changing workplace, a fundamental change such as shifting the default could provide a useful catalyst for important modifications and refinements of labor regulation.[168]

C. *Conditional Deregulation*

Another means to encourage the development of certain types of work groups is a modification along the lines of David Levine's proposed "conditional deregulation." Under this proposal, a subset of governmental regulations would be waived if there is consent by both the company and an approved worker organization within the company.[169] Levine recognizes that there are a large number of governmental mandates and regulatory measures regarding workplace safety, hours and overtime requirements, pensions, discrimination, family leave, and

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[168] One concern in shifting the default toward collective voice is that such a change might transfer too much power to incumbent workers, leading to labor cost levels inconsistent with full employment. It may prove difficult to limit the ability of work groups to appropriate rents within a framework that promotes voice and the evolution of welfare-enhancing arrangements. *See* Richard B. Freeman & Edward P. Lazear, *An Economic Analysis of Works Councils*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 27-50 (Joel Rogers & Wolfgang Streeck eds., 1995).

[169] David I. Levine, *They Should Solve Their Own Problems: Reinventing Workplace Regulation*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 475, 477 (Bruce E. Kaufman ed., 1997).

other subjects, but argues that one-size-fits-all rules are often inefficient.[170] Instead, he contends that employee involvement in enforcing these rules could significantly lower the cost of workplace regulation.[171] Although Levine's focus is more efficient enforcement of workplace regulations, his proposal could also expand welfare-enhancing worker voice and participation.

Under the Levine proposal, the default for nearly all firms would be the status quo—coverage by the full extent of regulations. These regulations would be divided into waivable and non-waivable rules, with the latter including a minimum set of standards, such as those dealing with discrimination or safety, required of all employers.[172] Conditional deregulation would exempt employers from the waivable set of regulations and subject them only to the minimum standards if they voluntarily adopt alternative regulatory systems with employee oversight and approval.[173] The expectation is that this form of conditional deregulation would be welfare-enhancing for both workers and employers.

In order to deregulate workplace standards, firms must have in place independent worker committees to perform the approval and oversight functions. The union and employer would provide such authority within unionized companies.[174] For nonunion employers, worker committees, created via a certified free election process, would have authority to approve the waiver on behalf of employees.[175] Conditional deregulation would thus spur the establishment of worker associations throughout the private sector, providing a vehicle for nonunion worker participation and cooperation. Such groups might also be used as an instrument to transfer quasi-

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[170] *Id.* at 478-79.
[171] *Id.* at 480.
[172] *Id.* at 478, 484.
[173] *Id.* at 493.
[174] *Id.* at 478.
[175] As Levine notes, this is similar to the experience in many European countries, where work councils often oversee workplace safety. *Id.* at 478-79; *see also supra* notes 114-117.

rents from shareholders to workers.[176] But rent-seeking should be limited given that employers can determine whether or not to stick with the default regulatory standard. Therefore, although the details of any such plan are important, conditional deregulation offers an opportunity to foster nonunion voice and provide mutual gains to workers and employers in at least some workplaces.

D. *State and Local Labor Regulation*

Changes in the national labor law default or conditional deregulation require strong public and legislative support, neither of which look to occur imminently. Richard Freeman and others have suggested that a more promising source for labor regulation reform—possibly including reforms that would encourage welfare-enhancing employee voice—is state legislation.[177] The theory is that states' successes and failures in implementing workplace regulations would be imitated and avoided, respectively, by other states. Thus, to the extent that states have latitude to enact labor regulations, it is possible that state capitals may become the focal point for political action.[178] Indeed, counties and municipalities already are often at the forefront of laws affecting the workplace, including sexual orientation anti-discrimination measures and living wage ordinances.[179]

Significant limits to the state and local model exist, however. The broad scope of NLRA preemption means that many major innovations in labor regulation would be permissible only at

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[176] *See supra* note 36.
[177] *See, e.g.*, Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, PROCS. LAB. & EMP. REL. ASS'N ANN. MEETING (forthcoming 2006) (on file with authors) [hereinafter Freeman, *State Labor Relations*].
[178] *See Minimum Wage Was "Hot Button" Issue In State Labor Laws Enacted in 2005*, 22 DAILY LABOR REPORT (BNA), Feb. 2, 2006, A-1 (reporting that states enacted more labor and employment legislation in 2005 than usual) (citing BLS report).
[179] *See Indianapolis Adds Protections for Gays, Lesbians*, 4 DAILY LABOR REPORT (BNA), Jan. 6, 2006, at A-11 (reporting that Marion County, Indiana and Indianapolis enacted legislation prohibiting workplace sexual orientation discrimination); Susan J. McGolrick, *Professor Examines Living Wage Law Growth In Comments to New York Labor Law Forum*, 101 DAILY LABOR REPORT (BNA), May 26, 2004, at C-1 (stating that over 110 state and local living wage laws existed as of early 2004 and over 70 campaigns for such laws in other localities were taking place).

the federal level.[180] Accordingly, federal labor preemption must drastically change for any significant state or local innovations in workplace governance to occur. Because labor preemption is primarily a creation of the Supreme Court—based on its interpretation of congressional intent—such a modification is theoretically possible without legislation.[181] Yet, the Court's preemption jurisprudence began in earnest almost 50 years ago, and is unlikely to suddenly shift absent legislative action.

The cost of federal preemption is that it forecloses what might otherwise be beneficial state labor and employment law innovations. Were federal preemption relaxed, governance innovations adopted in large states would frequently lead national firms to implement them company-wide. Moreover, if innovations in states of any size were viewed as welfare-enhancing, other states would be more likely to copy them; governance innovations that are costly to firms or appear to provide few benefits to workers are least likely to be adopted.[182] Some variation in state employment regulation should also be welfare enhancing by allowing legal heterogeneity that reflects differences in the preferences of voters, in states' economic environment, and in the legitimate influence of interest groups.

Federal labor preemption, however, provides the obvious benefit of enabling employers

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[180] The federal preemption barrier is recognized by Freeman. *See* Freeman, *State Labor Relations*, *supra* note 177, at 1-2; *see also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that NLRA generally preempts state action involving conduct that NLRA clearly protects or prohibits, or conduct that NLRA arguably protects or prohibits where there is danger to national labor policy in allowing state, rather than NLRB, to examine issue); Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Commc'n, 427 U.S. 132 (1976) (upholding "dormant preemption" that precludes state regulation where NLRA intends parties to freely engage in economic conflict); Estlund, *supra* note 2, 1570-77 (describing preemption and arguing for allowing more state and local labor regulation). Interestingly, unions often face a much greater risk of entanglement with state law, as the preemption doctrine has increasingly allowed state liability for union conduct that is alleged to have violated state tort law. *See* Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. __ (forthcoming 2006), (manuscript at 51-56, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887957) [hereinafter Hirsch, *Property Rights*]; Getman, *supra* note 113, at 132 (citing libel, defamation, intentional infliction of emotional distress, and strike violence).

[181] *See Machinists*, 427 U.S. 132; *Garmon*, 359 U.S. 236.

[182] For example, several states require employer-sponsored safety committees, which in at least one state appears to have significantly lowered the cost of workplace injuries. *See* Levine, *supra* note 169, at 481 (citing Oregon experience).

with establishments in more than one state to operate under the same legal regime.[183] Variations in state regulations may produce other negative effects as well. For example, politicians in some states may be overly sensitive to business interests and the location of new plants, thereby adopting labor and employment laws that may not be welfare enhancing.[184] Politicians in other states may produce a set of labor and employment laws that are overly beneficial to incumbent workers, which may discourage new plants and job growth.

In the end, the attractiveness of greater state and local flexibility depends on numerous factors that are difficult to assess. Heterogeneity in states' and localities' underlying preferences and economic environments makes heterogeneity in the law more attractive. Lack of uniformity in the law has a cost, however, particularly in a dynamic economy with considerable interstate (and international) commerce. Legal experimentation and innovation can provide many of the same benefits as does competition in the private economy. But the link is not nearly so clear-cut. Many reasonable persons will prefer to put all their eggs in a single basket of federal labor regulation than in the many baskets of various state labor laws. A more nuanced analysis, one beyond the scope of this paper, would identify the specific forms of labor and employment regulation that might best operate at the federal level, and those for which state and local heterogeneity would be most beneficial.

Regardless of one's view of the attractiveness of state and local innovation in workplace governance, a move in that direction faces considerable political, legal, and economic barriers.[185] Accordingly, we believe that greater state and local labor regulation may expand welfare-

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[183] *See, e.g.*, Erik Schelzig, *FedEx's Smith Warns of Regulating*, MEMPHIS COMM. APPEAL (Aug. 16, 2006), at C2 (quoting FedEx chairman warning conference of state legislatures that additional state regulation can drive business away because "commerce today is not local in virtually any respect").
[184] This is a variant of the argument that states will "race to the bottom."
[185] To varying degrees, much the same can be said for other reforms analyzed in this Article.

enhancing worker voice and participation in certain geographic areas, but is not a particularly promising avenue for the country as a whole.[186]

E. *The Internet*

The promotion of employee voice and participation also requires labor regulations that ensure employees' freedom to use electronic communications to converse with each other about workplace concerns. Email, weblogs, and websites, which we refer to simply as the "Internet," have sharply lowered communication costs and are changing the way in which people interact. This change is highly significant for the workplace, as the Internet has become a vital tool for a wide variety of entities such as unions, companies, employees, work groups, and policy advocates. Employees' use of the Internet at work—from communications made while at the worksite to work done exclusively as a telecommuter—has continued to grow drastically. In the October 2003 supplement to the Current Population Survey, the Bureau of Labor Statistics ("BLS") estimated that 55% of all employees used a computer at work and that 42% used the Internet, although computer use varies substantially with respect to occupation, industry, and education.[187] The Board, even as early as 1993, recognized that at some worksites, email had "become an important, if not essential, means of communication."[188] That description is far more apt today.

The low cost of electronic communications has made it particularly valuable to unions and other groups attempting to organize employees because they provide an affordable means to

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[186] The appeal of state labor reform to Freeman and other scholars may stem less from their optimism about the promise of state reforms than from a strong pessimism regarding the possibility or direction of federal reforms.

[187] *See* U.S. DEP'T OF LAB., BUREAU OF LAB. STATISTICS, COMPUTER AND INTERNET USE AT WORK IN 2003 2, Table A (2005), *available at* http://www.bls.gov/news.release/pdf/ciuaw.pdf; *see also* Joan T. A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 U. ILL. J. L. TECH. & POL'Y 233, 235 (2001) (discussing rise in teleworkers). Email is not the only popular form of electronic communication for employees; one survey found that 35% of employees used instant messaging at work. *See Survey Finds More Employer Policies Focus on Employees' Email than IM, Blogs*, 137 DAILY LABOR REPORT (BNA), July 18, 2006, at A-8.

[188] E. I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 919 (1993).

reach many employees, especially at small and widely dispersed job sites.[189] However, given the low rate of private sector unionism, most employees' use of the Internet for collective action takes place in firms that are nonunion. The Internet provides nonunion firms interested in promoting employee voice and cooperation an additional, low-cost means of communicating with their employees. Use of the Internet is not without legal risk, however. Although to a far lesser extent than Internet usage by outside organizers or work groups,[190] employees' freedom to use electronic communications to discuss work issues among themselves or with their employer faces possible hurdles under the NLRA.

A threshold issue involving employee Internet use is the extent to which electronic communications are treated as concerted activity that is protected by the NLRA.[191] The question is important given that, in many workplaces, a significant amount of employee interactions occur electronically.[192] Even where these interactions involve discussions and cooperation with an employer, employees must have the freedom to talk among themselves without fear of employer interference. Indeed, whatever value may inure to the employer or employees from enhanced

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[189] *See* U-Haul Co. of Cal., 347 N.L.R.B. No. 34, 17 (June 8, 2006) (describing employee organizing drive started by downloading information from union website and distributing it to other employees); Frontier Tel. of Rochester, Inc., 344 N.L.R.B. No. 153, 8, 10-11 (2006) (finding that employer unlawfully terminated employee who, among other union activity, created a Yahoo! webpage to encourage discussions among employees during organizing campaign), *enforced*, 2006 WL 1359938 (2d Cir. May 16, 2006) (Table); Freeman, *Web*, *supra* note 74, at 2, 10-11 (noting that all international unions, and thousands of local unions have websites and describing AFL-CIO's "Working Families Network," which has over two million email addresses of union "eActivists").

[190] Nonemployee organizers' ability to use an employers' Internet system raises several important issues that are beyond the scope of this Article, which focuses on maximizing employee voice and workplace cooperation in an economy where the dominant form of workplace governance is based on nonunion, managerial discretion. These issues include whether organizers' unauthorized use of an employer's electronic communications system is treated the same as organizers' unauthorized activity on an employer's real property. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992) (holding that employer can exclude organizers from its property in a nondiscriminatory manner if reasonable alternatives to contacting employees exist); Hirsch, *Property Rights*, *supra* note 180 (discussing *Lechmere* and proposing new Board analysis for nonemployee right to access cases).

[191] Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 2 (2000) (citing Timekeeping Sys., Inc., 323 N.L.R.B. 244, 248-50 (1997) (concluding that employee's email criticism of vacation benefits was protected under the Act); E. I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 897 (1993) (finding that employer unlawfully barred union literature from company email system)).

[192] *See supra* note 187; Elena N. Broder, Note, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 Yale L.J. 1639, 1657 (1996).

employee voice is dependent on a free flow of information. If employees fear that their comments, suggestions, or requests will result in adverse employment actions, they are unlikely to participate in meaningful workplace communications. Having an independent third party—the NLRB—guarantee and protect employees' right to communicate without undue employer interference could be an important safeguard that helps to foster workplace participation.

The potential for employers to react negatively to employee comments is not far-fetched. Lower-level supervisors and managers, in particular, may be more concerned with their personal interests than that of the firm as a whole.[193] Yet, the performance of these supervisors and managers is likely to be an important piece of information that employees possess and employers want.[194] It is exactly this type of knowledge that can provide significant benefits for workplace cooperation programs—but only if employees believe that they can provide the information without suffering adverse actions. The NLRA is well-suited to safeguard employees in such situations.[195]

Section 7 of the NLRA protects most employee activity that is concerted—that is, activity that seeks to promote or protect employees' collective workplace interests.[196] Thus, an employer generally may not engage in any activity that reasonably tends to make employees feel that their

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[193] *See* Hirsch, *Labor Law Obstacles*, *supra* note 45, at 984-85 & n.186 (noting managerial interests, such as salary and job security, that may create a disparity between managers' interests and the firm's interests).

[194] *See id.* at 971-72 (discussing possibility that employees' increased participation in employee stock ownership plans may lead to better monitoring of work).

[195] One private source for this safeguarding role is the Anonymous Employee website, which provides a means for employees who fear retaliation to inform, and possibly engage in a dialogue with, their employer about workplace problems while maintaining their anonymity. *See* http://www.anonymousemployee.com.

[196] Section 7 of the NLRA protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Those rights are enforced through Section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. *Id.* § 158(a)(1). An employer violates Section 8(a)(1) when its conduct tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; evidence of animus or actual coercion is unnecessary. *See* Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995). Moreover, Section 7 protects collective activity even where no formal organization is involved. *See, e.g.*, NLRB v. Wash. Alum. Co., 370 U.S. 9, 12 (1962); Hyde, *New Institutions*, *supra* note 74, at 520-21.

right to engage in concerted activity is chilled. Typically, Internet usage is considered the same as any other traditional, concerted and protected communication.[197] This approach makes sense, for the means of communications has little or no effect on whether an activity is considered concerted and protected under Section 7. The Internet merely serves as a resource to engage in this type of activity and the Board appropriately treats it as such.[198]

Because a Section 8(a)(1) violation requires only a "reasonable tendency" to interfere with employees' freedom to engage in protected activity, no matter the motive,[199] employers must ensure that they not retaliate, even unintentionally, against employees' electronic communications. An employer that encourages employee participation should make clear to employees that they are generally free to communicate with each other and with the employer without facing negative consequences. Punishing an employee for even a highly critical email would not only chill employees' willingness to fully participate in workplace discussions, but likely violate Section 8(a)(1) as well.[200]

Employees must also be wary. Complications exist when, as is common, employees use

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[197] *See, e.g.*, Timekeeping Sys., Inc., 323 N.L.R.B. 244, 247-48 (1997) (finding that employee's email to other employees was concerted and protected activity that was "for the purpose of mutual aid or protection" because the email criticized the employer's proposed vacation policy and implicitly attempted to elicit support from others employees to oppose the proposal). A further problem that may result from increased use of electronic communications involves employees who do not work at the primary worksite, such as telecommuters. Under the Board's long-standing test for determining whether a worker is an employee or an independent contractor, the Board considers factors including the hiring party's right to control the work, the location of the work, and the hiring party's discretion over when and how to work. St. Joseph News-Press, 345 N.L.R.B. No.31, 7 (2005) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 750-52 (1989)). Unless the Board adapts its test to reflect technological changes that make telecommuting more common and employers better able to maintain control over telecommuters, those workers are more likely to be considered independent contractors and excluded from the protection of the NLRA. *See* 29 U.S.C. § 152(3) (exempting independent contractors from NLRA definition of employee). Without the protection of the NLRA, telecommuters will be less likely to participate in a workplace cooperative program if they fear the possibility that their employer will retaliate against their contributions to the program.

[198] A problem, however, is that many nonunion employees may not realize that their concerted activity is protected by the NLRA. Hyde, *Employee Organization*, *supra* note 71, at 499, 507 (noting that nonunion employee activity often fails to garner the respect and protection of unionized conduct, perhaps in part because nonunion action does not fit the stereotype of NLRA-protected conduct).

[199] *See Retlaw Broad*, 53 F.3d at 1006.

[200] *See* Timekeeping Sys., Inc., 323 N.L.R.B. 244, 247-48 (1997).

employer-provided Internet services. An employer's interests in the operation of its Internet system may alter the typical Section 7 balancing test between employee rights and employer interests, and that shift may be dispositive in determining whether employee activity on an employer's system is protected.[201] Under this balance, an employee's concerted and otherwise protected action will lose Section 7 protection if it unreasonably interferes with the employer's business interests. For example, in *Washington Adventist Hospital, Inc.*,[202] the Board found that a nonunion employee's email critical of its employer was not protected by the Act because it automatically appeared on all computers and required a user to delete the message to remove it from the screen.[203] According to the Board, this email interrupted employees' work during a busy time and took over the system as medical information was being entered.[204] Although a similar message that lacked such an effect would generally be protected,[205] the Board will likely continue to find that emails causing disruptions to the extent of what occurred in *Washington Adventist* are excessive. The result is that employees must be careful in how they use their employer's Internet system.

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[201] *See, e.g.*, Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (holding that "it is only when the interference with [Section] 7 rights outweighs the business justification for the employer's action that [Section] 8(a)(1) is violated"). Given this Article's focus on employer-initiated workplace cooperation schemes, we do not address problems involving employer attempts to broadly restrict employees' use of the Internet or email, which implicates the *Republic Aviation* line of cases. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801 (1945) (holding that, with some exceptions, employers cannot prohibit discussions among employees about concerted and protected topics during non-work time and in non-work areas); Adrantz, ABB Daimler-Benz Transp., 331 N.L.R.B. 852, 293 (2000) (finding that employer's broad ban against all non-work emails, which was not regularly enforced against personal emails, was valid), *enforcement denied on other grounds*, 253 F.3d 19 (D.C. Cir. 2001). Instead, where an employer authorizes some employee use of its electronic communication system, the greater threat is retaliation against specific messages and the chilling effect of surveillance and monitoring of those communications.

[202] 291 N.L.R.B. 95 (1988) (finding that employer did not unlawfully fire employee).

[203] *Id.* at 102.

[204] *Id.*

[205] *See, e.g.*, Timekeeping Sys., Inc., 323 N.L.R.B. 244, 247-49 (1997) (expressly distinguishing *Washington Adventist* and finding that use of employer's email system to send messages criticizing employer's vacation policy proposal was protected activity); Malin & Perritt, *supra* note 191, at 57 (arguing that employer should have to prove an actual, significant disruption before barring employee email solicitations).

Another issue centers on whether employer's surveillance of employees' electronic communications—or the creation of an impression of such surveillance—may unlawfully chill employees' ability to engage in meaningful discussions with one another about workplace issues. In particular, the monitoring of employees' Internet use, which many employers now do as a routine matter,[206] may constitute unlawful surveillance if some of those communications involve subjects related to protected activity.[207] Employees participating in an employer-sponsored work group are susceptible to this risk, as they are likely to be in contact with other employees to discuss their views on workplace matters. If the employer monitors emails, a reasonable employee is likely to feel hesitant about criticizing her employer or supervisor. That chilling effect could undermine the value of workplace participation programs and violate the Act.

The Board's well-established surveillance law seeks to minimize the chilling effect on protected conduct by reducing the risk that employees believe that their employer is taking special efforts to monitor their collective activity.[208] Thus, absent sufficient justification, an employer violates the NLRA by observing employees engaged in protected activity or making an impression that they are engaging in such observations.[209] Sufficient justification for

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[206] One 2005 survey found that 76% of employers monitored the Internet use of at least some of its employees. *See Study Finds 76 Percent of Respondents Monitor Internet Usage by Employees*, 100 DAILY LABOR REPORT (BNA), May 25, 2005, at A-8 (finding also that 62% of employer monitor Internet use of all of their employees).

[207] Moreover, attempts to use an employer-controlled system without authorization risks violating the federal Electronic Communications Privacy Act ("ECPA"). In the ECPA, Congress enacted the Stored Communications Act, which makes it a crime to "intentionally access[ ] without authorization a facility through which an electronic communication service is provided . . . and thereby obtain[ ] . . . access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. § 2701(a)(1); *see id.* § 2701(c)(2) (exempting conduct authorized by user of service); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879-80 (9th Cir. 2002) (holding that employer's access to employee's restricted-access site may violate Stored Communications Act). The ECPA, however, contains an exception in certain instances for employer monitoring of workplace communications. *See, e.g.*, 2701(c)(1) (monitoring employer's own service); Malin & Perritt, *supra* note 191, at 38-40 (citing exceptions).

[208] *See* Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (holding that photographing or videotaping protected activity has tendency to intimidate employees); Belcher Towing Co. v. NLRB, 726 F.2d 705, 708 (11th Cir. 1984) (holding that, although surveillance is not per se unlawful, it has "natural, if not presumptive, tendency to discourage [union] activity").

[209] *See* Snyder's of Hanover v. NLRB, 39 F. App'x 730, 736-37 (3d Cir. 2002) (watching employees take handbills); United States Steel Corp. v. NLRB, 682 F.2d 98, 101-02 (3d Cir. 1982); Ingram Book Co., 315 NLRB 515, 518 (1994). An impression of surveillance violation occurs where, "under all the relevant circumstances, reasonable

surveillance exists where an employer can show the existence of a reasonable threat of violence or other misconduct that would affect the employer's business.[210]

The key issue regarding an employer's monitoring of electronic communications is whether a sufficient business justification exists. This inquiry should depend on whether the employer's monitoring resembles a program that merely screens electronic communications for certain words or other indications of improper usage (e.g., pornography), or the monitoring regularly reports the content of communications or the identities of employees using the Internet. Both circumstances could reasonably lead employees to believe that the employer is monitoring their protected discussions. The latter example, however, has a far weaker business justification, thereby failing to defend the employer's surveillance and increasing the interference with employees' ability to communicate with each other without fear of retaliation. In short, an employer should have few problems if it does not attempt to monitor specific communications related to protected activity and does not generally monitor the substance of Internet activity. Employers, however, must be careful not to make their observations too broad or specific.

Regardless of the NLRB's approach to the issues of protection and surveillance of electronic communications, the Internet will continue to play a large role in the workplace. The NLRA, however, will have an impact on the Internet's ability to foster collective action. That impact will be most significant with regard to outside groups' ability to contact workers in the

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employees would assume from [the employer's action or statement] that their union or other protected activities had been placed under surveillance." Frontier Tel. of Rochester, Inc., 344 N.L.R.B. No. 153, 8, 9 (2006) (citing Flexsteel Indus., 311 N.L.R.B. 257 (1993); Schrementi Bros., 179 N.L.R.B. 853 (1969)), *enforced*, 2006 WL 1359938 (2d Cir. May 16, 2006) (Table). An impression of surveillance finding does not require that employees attempted to keep their activity secret or that the employer used unlawful means to obtain knowledge of the employees' activity. *Id.* at 9 (citing United Charter Serv., 306 N.L.R.B. 150, 151 (1992)).

[210] *See Nat'l Steel*, 156 F.3d at 1271 (holding that "reasonable, objective justification," such as legitimate security interests, gathering evidence for legal proceeding, or reasonable anticipation of misconduct, will mitigate tendency to coerce). Explaining to employees why the surveillance is necessary will be an important part of this justification. *Cf.* Teletech Holdings, Inc., 333 N.L.R.B. No. 56, 2001 WL 209470, at *3 (2001) (concluding that employer must clarify for employees a facially overbroad no-distribution rule to rebut presumption of unlawfulness).

face of employer resistance,[211] but the Act does have some relevance to employer-sponsored worker participation programs. To be sure, employers that are willing to encourage worker voice are less likely to interfere with employees' freedom to exercise that voice. Nevertheless, the NLRA can protect employees' freedom to use electronic communications while participating in employer-sponsored cooperation programs. This protection will encourage employee voice and cooperation that is more honest and representative of other employees' interest, which will in turn make workplace participation programs more useful.

CONCLUSION

Over the past 70 years, the NLRA has played an important role in the development of private sector unionization. The NLRA's current role has become marginalized, however, largely failing to serve well either the small private union sector or the large nonunion sector. This failure is most pronounced with regard to the demand for, and potential gains from, greater workplace voice and cooperation in many nonunion workplaces. To the extent that mutual employer and worker gains are to be realized, they will occur largely through non-mandated employer workplace norms in nonunion establishments. Accordingly the NLRA should foster the development of employee voice in the nonunion sector; however, the statute more frequently acts as a hurdle than a spur to welfare-enhancing workplace communications and cooperation.

We have suggested labor and employment law reforms that might facilitate the development of greater voice and cooperation in the nonunion private sector, while providing the impetus for unions to create joint value and flourish in an increasingly competitive world. Specifically, we suggest weakening the NLRA's company union prohibition in a manner that would permit more employer-supported work groups, as they will often serve as the best option for employee voice in the largely nonunion private sector. Other possible reforms include

[211] *See supra* note 190.

changing the nonunion labor law default, allowing for conditional deregulation that encourages the development of independent workers councils as a substitute for governmental mandates, and greater experimentation and competition in state and local labor regulations. Finally, labor law should recognize the lower costs of communication and coordination associated with the Internet, encouraging its use to enhance workplace voice and participation.

Unfortunately, the most likely prospect for the near future is the absence of significant policy innovations. With or without major changes, however, evolutionary transformation in the workplace will continue as economic agents react to changing opportunities and constraints. Rather than relying on a labor law regime designed for a different era, or increasing the use of federal "one-size fits all" labor regulations, there exists a better way. Employment and labor law reforms that encourage and facilitate the evolution and development of nonunion workplace voice and cooperation can best satisfy the diverse needs of workers, employers, and society in the modern economy.