

WORKPLACE DEMOCRACY FOR THE TWENTY-FIRST CENTURY? RETHINKING A NORM OF WORKER VOICE IN THE WAKE OF THE CORPORATE DIVERSITY JUGGERNAUT

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Once upon a time, in the cauldron of economic depression, turbulent labor unrest, and the greatest crisis capitalism has ever faced, the idea of “industrial democracy” burst into mainstream discourse and helped produce the National Labor Relations Act (NLRA). The NLRA created a framework for industrial democracy through union representation and collective bargaining.

Of course, unionization was not made mandatory; it was an option that was to be exercised by a majority of workers in a particular bargaining unit, and that employers, at least since the Taft-Hartley Act of 1947, could freely and quite aggressively oppose.¹ And that they did, in part because those unionized operations had to compete with non-union operations with lower wages and benefits, comparable productivity, and greater profits.² Globalization and deregulation gradually ramped up product market pressures on employers, which in turn stoked employer resistance to unionization, which in turn outstripped the reach and the deterrent capacity of an aging NLRA and a hamstrung National Labor Relations Board (NLRB).

That is a very short version of the very sad story behind the decline of private sector union density to below 7 percent.³ On the existing model of union representation, it will take a monumental effort by organized labor, and a political economic sea change, to bring that figure back up to double digits. The battle for labor law reform—for reforms that enable unions to organize workers and enable workers to form unions—is worth fighting. But even if that battle is won, it would still leave upwards of 90 percent of private sector workers without any semblance of what we once called industrial democracy.

There is a strong case to be made—and Joel Rogers made it powerfully at the conference whose papers are assembled here—for why this existing model of unionization has to change in favor of a more political and more geographi-

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¹ On the nature and extent of lawful (and unlawful) employer opposition, see Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 680–91 (2010).

² Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427, 443 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

³ See *id.* at 427.

cally, occupationally based labor movement.⁴ I want to endorse his argument for the reorientation of our political economy toward what he calls “productive democracy.”⁵ But here I want to descend down to the workplace level, and talk about that subsidiary matter of voice and representation in the workplace. That is not something that unions in their current form are going to provide for the vast majority of workers in our lifetime; nor is it something that new locality-based, politicized unions are going to provide. And yet, voice within the workplace is important to the daily working lives of millions of people. So let us focus for now on that dimension of “workplace democracy.”

Nowadays we can barely entertain the idea of workplace democracy without backpedaling: we do not really mean “democracy,” of course, but only some form of collective worker “voice” or participation in workplace governance. We can no longer quite conceive of workers as citizens of the workplace with a right of collective self-determination, but perhaps as “stakeholders” of firms that are governed by managers who are chosen by and chiefly accountable to shareholders. Nor is there much currency these days to the notion that citizens in a democratic society must enjoy a measure of democracy in their economic lives in order to be fully engaged citizens of the polity.

And yet perhaps there is a case to be made for a form of workplace democracy that can meet some employee needs and aspirations without necessarily provoking vehement and unanimous employer resistance—a domesticated version of workplace democracy to supplement the essential right of workers to join together and even go into opposition against their employer by forming a union.

I want to explore here the question of what workplace democracy could mean in the twenty-first century, including for the great majority of private sector workers who are destined to remain without union representation, and who perhaps do not want to take up the cudgels and go into opposition against their employer. I also want to explore whether responsible *corporations* might be brought on board to supply part of what workers want and need as citizens of the workplace. Inevitably that will require that we reprise aspects of the old and tired debate over reform of Section 8(a)(2) of the NLRA. But I mean to recast that debate in light of several decades of experience with the evolving norm of equal employment opportunity and corporate diversity efforts.

I. ON THE “REPRESENTATION GAP”: WHAT DO WORKERS WANT, WHAT DO THEY HAVE, AND WHAT DO THEY NEED?

Let us briefly survey the existing landscape of worker representation: What do workers want by way of representation, what do they have, and what

⁴ Joel Rogers, Professor of Law, Political Sci., Pub. Affairs, and Sociology, Univ. of Wis., Madison, *Are Democratic Workplaces Possible, or Only Necessary to Our Survival?*, Opening Plenary at the Saltman Center for Conflict Resolution Symposium on Contemporary Issues in Labor and Employment Law at the Univ. of Nev., Las Vegas: Democracy and the Workplace (Feb. 24, 2012), available at <http://scholars.law.unlv.edu/lls/2012/Schedule/12/>.

⁵ For an overview of Rogers’ conception of “productive democracy,” see Joel Rogers, *Productive Democracy*, in *RENEWING DEMOCRATIC DELIBERATION IN EUROPE: THE CHALLENGE OF SOCIAL AND CIVIL DIALOGUE* 71, 71–92 (Jean De Munck et al. eds., 2012).

do they need in the modern workplace—or in the many different kinds of workplaces that have emerged in contemporary labor markets?

A. What Do Workers Want and What Do They Have?: The Surprising Emergence of Non-Union Employee Representation

First, what kind of workplace representation do workers want? In their large, in-depth survey of worker attitudes, Richard Freeman and Joel Rogers found support for unions' view that many workers (30 to 40 percent of non-union, non-managerial private sector employees) want independent union-like representation, and that labor law reform is necessary to make that choice available in the face of management opposition.⁶ But they also found, to their surprise, that many more workers (85 percent) wanted a less adversarial type of organization, one that is "run jointly" by employees and management.⁷ Indeed, when asked to choose between an organization with which management cooperated but had no power, and an organization that had more power but which management opposed, employees chose the former by nearly a three to one margin (63 percent versus 22 percent).⁸

To be sure, employees' preference for cooperative non-union forms of representation is partly an "adaptive preference": employees know that employers vehemently oppose unions, and that such opposition makes unionization difficult, risky, and less likely to yield gains. For some, employee/employer opposition is just a fact of life; others may themselves trace it to increasingly intense product market competition from near and far-flung sources. Either way, that is the world that these employees live in; and in that world, workers' preference for a form of participation that is cooperative by design may be entirely sensible.

So workers want some kind of collective voice at work, even if it is a less powerful and less independent voice than unionization and collective bargaining would bring. Unfortunately for them, as we all know, the NLRA prohibits the very form of representation that most workers say they want; that is, an organization "run jointly" by employees and management.

Section 8(a)(2) was the most controversial provision of the NLRA when it was debated in 1934 and 1935, partly because it prohibited even representation structures that enjoyed strong support from employees. The "union or nothing" approach was entirely logical for a New Deal Congress that sought to actively promote collective bargaining throughout much of the economy. Its logic was undercut by the Taft-Hartley Act, which in some ways (though not completely) essentially recast the goal of the NLRA as protecting employee's "free choice" whether to unionize or not.⁹ Its logic has been further undercut as union density has fallen to single digits, and as the prospects that most employees would seek and secure union representation have faded away.

⁶ RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 17–18 (updated ed. 1999).

⁷ *Id.* at 170.

⁸ *Id.* at 85.

⁹ Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 *BERKELEY J. EMP. & LAB. L.* 1, 20 (2012).

Under the NLRA as it stands, it is legitimate for employees to choose not to be represented by a union at all, and for employers to pay good wages and treat employees fairly and decently in hopes of avoiding unionization. But it is not lawful for employees to choose, or for employers to supply, a less adversarial, less independent, and less powerful form of employee representation than a union.

In the meantime, the rest of the world has moved in a very different direction. Most developed countries in the world now *mandate* some form of employee representation.¹⁰ More to the point, no country broadly prohibits voluntary forms of non-union representation or organized employee-management cooperation as does the United States. Even Canada, whose labor laws are largely modeled on the NLRA, maintains a narrower “company union” ban, and permits forms of worker representation that are illegal here.¹¹

But now let us consider what US workers say they have by way of representation. We know that less than 7 percent of private sector workers have union representation. Far more of them, it turns out, have non-union representation. In one recent study, 34 percent of non-union respondents reported having some form of management-established representation structure at work.¹² These were not identity-based affinity groups (which are quite common as well, and were tracked separately); nor were these mere “quality circles.” Indeed, 42 percent of these non-union representation schemes involved discussions of wages and benefits.¹³ It is fair to say that nearly all of these structures are illegal under NLRA.

So what do we know about these representation schemes? Most workers say they like them (as one might expect given the widely expressed preference for this form of representation). Most participants rated them highly in terms of consulting with workers (54 percent) and in terms of standing up for workers (51 percent).¹⁴ Those ratings are in fact not very different from, and some ways a little higher than, how union members rated their unions in the same study.¹⁵ These management-established representation schemes were also modestly correlated with employee perceptions of security, dignity, fairness, and justice at work—though that seems to reflect the tendency of these representation schemes to go along with other employee-friendly HR practices.¹⁶ In short, it appears that these are pretty decent employers. Indeed, one suspects that employers that are not treating their employees reasonably well might hesitate to create a forum in which employees can share their concerns with each other, even if it is a management-sponsored and management-dominated forum.)

¹⁰ See Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, in *NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY* 196, 196 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

¹¹ Daphne Gottlieb Taras, *Why Nonunion Representation is Legal in Canada*, 52 *INDUS. REL.* 763, 769–71 (1997).

¹² John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces*, 66 *INDUS. & LAB. REL. REV.* 142, 151 (2013).

¹³ *Id.* at 154.

¹⁴ *Id.* at 153.

¹⁵ *Id.* at 153–54.

¹⁶ *Id.* at 155–63.

We do not know much more about how these management-established schemes function. Many employers appear willing to violate Section 8(a)(2), but few are willing to discuss it publicly. The legal risk posed by the NLRA's proscription is modest; the most serious penalty for employers who violate this federal prohibition is "disestablishment" of the scheme. Moreover, someone has to complain about the structures to trigger enforcement; that rarely happens except in the presence of a union organizing effort. (Even then, many unions might not deem such a complaint to be a wise organizing tactic.) The lack of enforcement of this provision of the NLRA has allowed the flourishing of a certain kind of "under-the-radar" experimentation with non-union employee representation schemes. At the same time, the law presumably discourages some employers—especially large firms that have strong compliance structures and a high public profile—from setting up such blatantly illegal entities. Surely more employees would have access to these representation structures if they were not illegal. Even more surely, we would know more about the structures that do exist if they were not illegal.

In sum, the overwhelming majority of US workers say that they want a form of collective representation that the law says they cannot have, and a significant minority of US employers are in violation of federal law by giving employees what they say they want. These are facts worth reckoning with. But how we reckon with them may depend partly on our understanding of what workers *need* by way of representation.

*B. What Do Workers Need in an Era of Managerialism, Markets, and Mandates?*¹⁷

On some accounts of the modern workplace, workers no longer need collective representation; their interests are adequately protected by a combination of legal mandates and self-enforcing norms. I think that these accounts are wrong and that workers are right: most workers not only want but need some form of collective representation in order to enforce the mix of legal mandates and informal norms by which they are currently governed at work.

First, as to workplace mandates: On some accounts, the proliferation of legislative mandates, including employee rights against discrimination, functions as a union substitute, giving workers much of what they might have sought through unionization. But that overstates the case, given the limited reach and efficacy of these mandates. As compared to other developed countries, employment mandates in the US are relatively few and relatively minimal. Moreover, the enforcement of legislated rights and mandates is largely in the hands of employees themselves, and is beset by both collective action problems and often fear of reprisals. Even so-called "individual rights" are either realized or violated within a workplace largely through policies and organizational practices and are thus localized "public goods." Without collective

¹⁷ This section briefly reprises an argument developed in Cynthia L. Estlund, *Why Workers Still Need a Collective Voice in the Era of Norms and Mandates*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 2, at 463, 463–94, and more fully in CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010).

representation, workers' own efforts to enforce mandatory rights and labor standards are likely to be undersupplied.¹⁸

So the regime of mandates on which our society has come to rely for protection of employees is itself plagued by a "representation gap." Given the problem of enforcement and the minimality of minimum standards, most terms and conditions of employment for most non-union workers are the product of labor market forces and of individual "contract." So let us examine the nature of the employment contract in the non-union private sector workplace.

The employment contract in the typical at-will employment setting is a peculiar one.¹⁹ The worker agrees to supply labor for an undefined period—terminable at will by either side at any time—subject to managerial direction. Some terms and conditions are expressly agreed upon and binding for work that has been done, but virtually all terms and conditions—even wage levels—are subject to modification going forward, again at managers' discretion. The peculiar nature of at-will employment has misled some observers to say there is no employment contract at all in the at-will setting. But that is wrong. The contract is one that subjects workers to very broad managerial discretion, both in the nature of the work and the conditions under which it is done. Managers' discretion, in turn, is shaped by market forces as well as by mandates and non-legally enforceable norms (to which we will turn shortly). But managers are the central actors in determining how workers are treated and how work relations are governed.

The quality of non-union workplace governance, or "human resources management" (HRM), has undoubtedly improved since the conflict-ridden 1930s. Modern employers have developed fairer modes of managing workers; that is part of why workers are not up in arms and out on the streets demanding union representation. Clearly harsh conditions still prevail at the bottom of the labor market, including within major corporations and especially their supply chains. Indeed, given the underenforcement of employment mandates, illegal labor practices are common at the bottom of the labor market. An important and contestible question is how big that bottom is. Nonetheless, there is no denying that, since the New Deal, many employers have cleaned up their act in many respects.

The pressure on managers to treat workers decently—such as it is—comes from a variety of sources. It comes from labor markets, of course, especially for those lucky workers with scarce and sought-after skills. It comes from legislation and litigation, the incidence of which varies by company and by class of worker. It also comes from the "union threat effect": the need, at least since the

¹⁸ ESTLUND, *supra* note 17, at 60–68; Stewart J. Schwab, *The Union as Broker of Employment Rights*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 2, at 248, 254–55.

¹⁹ For a brief overview of at-will employment, see Cynthia L. Estlund & Michael L. Wachter, *Introduction: The Economics of Labor and Employment Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 2, at 3, 12–13, and for a more in-depth discussion of the at-will employment debate and a proposal for reforming the current legal regime, see Rachel Arnow-Richman, *From Just Cause to Just Notice in Reforming Employment Termination Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 2, at 296, 296–329.

New Deal, to use positive inducements (perhaps combined with threats) to discourage employees from forming a union.²⁰

In addition, some labor economists argue that internal and external labor market dynamics tend to generate *norms* of fairness that are largely self-enforcing.²¹ Workers value fair treatment and are more likely to stay and to work more productively, and less likely to require intensive and costly monitoring, if they expect to be treated fairly. Given these largely self-enforcing norms of fair treatment, they argue that legal enforcement of employer promises of fairness is unnecessary, costly, and ultimately counterproductive for workers. It is unnecessary because employers already face reputational sanctions for breaching norms of fair treatment. Legal enforcement is costly because of the open-endedness of many terms of employment, the difficulty of monitoring employee performance, and the cost of third-party enforcement (error costs and process costs). Legal enforcement is accordingly counterproductive for workers because its costs greatly exceed the incremental gain in enforcement of norms, and those costs will one way or another be borne by employees, most simply in the form of lower wages. In short, they argue that workers are *and rationally should be* unwilling to pay for the benefit of legal enforceability; it is not worth the price.

Whatever we think of the theory, the fact is that employers in the non-union setting can and do choose to govern the workplace through non-legally enforceable norms versus binding contracts.²² Employers were alarmed to learn in the 1970s and 1980s, with a wave of new doctrines on the enforceability of employer promises of job security, that past informal assurances and existing employee handbooks might open them up to employee lawsuits over allegedly unjustified discharges.

But even as the courts opened the door to employees' contract claims, they instructed employers on how to close the door by clearly and expressly disclaiming their intent to make binding promises and by reaffirming the employers' right to modify terms of employment and to terminate employees at will, with or without cause. Once employers rewrote their manuals and such to incorporate the requisite disclaimers, they largely defused the threat of contract litigation for newly hired employees. For incumbent employees, it took a bit longer. Depending on the particular state, employers had to jump through some legal hoops to modify their prior promises (and they had to await the slow course of litigation and common law adjudication to find out what those hoops were). When the dust had cleared, employers found that they were generally able to condition continued employment on employees' acceptance of new non-legally enforceable terms for the future. The new law of the employment contract, much like the old, allows employers to adopt a regime of norms without legal enforceability. The difference is that employers now have to make explicit

²⁰ Benjamin I. Sachs, *Union Organizing and the Architecture of Employee Choice*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 2, at 146, 156–62.

²¹ Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1914–19 (1996).

²² See Sachs, *supra* note 20.

their commitment to employment at will and to avoiding contractual constraints on managerial discretion.²³

In theory, again, this could work out just fine for employees. If they observe employer opportunism, or cheating on the assurances of fairness, they can quit or shirk (as long as they can get away with it). Or they can form a union and opt for a regime of collective express contract with arbitral enforcement.

But many readers will recognize the problems with this sunny account. Employees, and especially prospective employees, may not have reliable information about employer practices, and they may not have practical means of responding if they do learn of employer cheating. Quitting is often costly, especially for employees who have accumulated firm-specific skills and knowledge, and especially in slack labor market conditions. Unionization is not a realistic option for the vast majority of employees (for reasons grounded both in the labor laws and in the underenforcement of their central guarantee of the right to form a union).

As for informal enforcement within the workplace, the problem is familiar: employers' compliance with informal norms and promises of fair treatment (and information about compliance), much like employers' compliance with external mandates, is a public good within the workforce. Compliance with informal norms, like legal compliance, is usually a matter of policy, not individual case-by-case decisionmaking. Especially if the employer's non-compliance can be hidden, or if it affects workers who can be easily monitored or replaced, the cost of compliance to the employer is often much greater than the benefits to any one employee. Any one employee who experiences or perceives employer opportunism has too little incentive to enforce these collective norms or promises, even apart from the potential fear of reprisals.

The point is not that informal sanctions do not work at all, but that they work imperfectly and to varying degrees. They work much better for workers with scarce and higher-level skills than for workers who lack those skills. And they work better for workers in larger and more established firms with robust reputations than for workers in smaller firms with less history and less of a stake in their reputation. Most workers are on the wrong end of those dichotomies (or spectrums).

Workers today are mostly governed by managerial discretion, which is driven mainly by market forces (including internal labor market forces). Even when we throw both mandates and norms into the mix, we can see that there is good functional sense in employees' desire for more and better forms of collective voice in their working lives. Indeed, we might conclude that workers actually need unions more than they think. But in any case, the decline of unions has opened up a large representation gap that has not been filled or rendered irrelevant by the parallel rise of employer mandates and better management practices.

²³ Arnow-Richman, *supra* note 19, at 301–04.

II. CAN WORKERS GET MORE OF WHAT THEY WANT AND NEED?: THE CASE FOR A “DIGESTIBLE” NORM OF WORKER REPRESENTATION

Many readers will agree that workers still need collective representation in an age of markets, managerialism, and mandates. Unfortunately, a good argument is not enough to get employees what they want (or need) by way of representation. That brings us back to politics. The well-grounded case for labor law reform that facilitates union organizing has a powerful institutional advocate in organized labor, yet it has repeatedly failed in face of unanimous and vehement business opposition. An effort to meet employees' desire for additional, less powerful and less adversarial, forms of collective voice at work would provoke far less opposition, and maybe even some support, from employers. But that effort does not have a strong institutional champion. Indeed, unions have long opposed narrowing the NLRA's "company union" ban on the ground that it would expand employers' anti-union repertoire and impede organizing. Nor are employee desires for a greater collective voice (in union or non-union forms) spilling into the streets and disrupting the social and economic order. And that is what it has taken in the past to secure labor law reform.²⁴

I do not want to digress too much into politics here, so let us imagine away the political obstacles to reforming Section 8(a)(2) for the moment. Of course, we might prefer to imagine away a lot of other political obstacles, like those that block traditional labor law reform or make either corporatist-style "social dialogue" or mandatory works-councils a political pipe dream. But I think it is more realistic to imagine a political opening for relaxing the ban on employer-established representation schemes. That is, some leading elements in organized labor might support (or relax their opposition to) such a reform, and some segment of the business community might support it.

Let us put aside for now what might change the minds of union leaders, and focus on what might generate support among some business leaders for a norm of affording cooperative yet meaningful forms of employee representation in workplace governance, and for the permissive legal space in which to realize that norm. The template I have in mind is the corporate embrace of workforce diversity.

²⁴ See Alan Hyde, *A Theory of Labor Legislation*, 38 *BUFF. L. REV.* 383, 422–24, 436–37 (1990) (discussing the role of labor unrest in gaining favorable legislative action). The case for the NLRA was clinched in 1935 not by idealistic appeals to the value of industrial democracy, but by widespread labor unrest—some of it infused with revolutionary sentiment. Forcing employers to recognize and bargain with independent unions came to appear necessary to secure labor peace and social order. The votes of workers and their sympathizers, and the positive appeal of industrial democracy and redistribution through collective bargaining, may have sufficed in 1935 in Congress (though even then the upsurge of disruptive strike activity is commonly said to have contributed to enactment); but "industrial peace" was the argument that won the day in 1937 in the Supreme Court. In the United States as throughout the Western world during the middle decades of the twentieth century, workers gained their basic rights to organize and bargain collectively by creating a problem of industrial unrest to which unions and collective bargaining became a solution.

A. *The Corporate Embrace and “Digestion” of Equal Employment Opportunity and Diversity*

The movement for workforce diversity originated in legal demands for equal employment opportunity.²⁵ Executive orders, federal contractor compliance requirements, and eventually lawsuits all played crucial parts in motivating major corporations to embrace a commitment to equal employment opportunity, especially in the 1960s and 1970s. But that commitment took on a life of its own within corporate HR departments and generated institutional reforms—initially called “affirmative action”—that went far beyond what employment discrimination law prescribed.²⁶

Since the 1970s, corporate diversity efforts have moved up the organizational chart and into the upper management suites—for example, many “corporate diversity officers” now report directly to the CEO. The shift in terminology and organizational structure was partly due to the changing policy environment: “Affirmative action” came under legal and political pressure from the Reagan administration. But HR professionals responded not by trimming back their efforts but by rebranding affirmative action as promotion of diversity, and by promoting it as a business imperative rather than as a legal or moral imperative. “Compliance”—or at least litigation avoidance—remained important but largely in the background. The “business case for diversity,” a version of which was famously propounded in corporate amicus briefs in *Grutter v. Bollinger* and duly cited by the majority, came to the fore.²⁷

Having a diverse and inclusive workforce, and following “best practices” in this regard, is now part of how corporations define themselves—how they promote their reputation as good corporate citizens and how they position and brand themselves in a global marketplace. And that has pushed corporate practices far ahead of the law. Consider, for example, corporate policies regarding sexual orientation and LGBT rights, which are far ahead of federal and state law.²⁸ Indeed, the corporate commitment to diversity does not only go beyond what the law prescribes; it almost surely goes beyond what the “colorblind” version of the law permits, particularly in hiring and promotions.

There is more to the fascinating and complex story of how corporate America came to champion EEO and diversity (which is told especially well by sociologists Frank Dobbin and Lauren Edelman and their collaborators).²⁹ And there are more lessons for those who might try to craft a parallel movement for “worker voice.” For a major part of the corporate diversity story lies in how personnel and HR managers both embraced the antidiscrimination norm and

²⁵ FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 4 (2009).

²⁶ Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 604–05 (2006).

²⁷ *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

²⁸ DOBBIN, *supra* note 25, at 201. “LGBT” is the familiar acronym for “lesbian, gay, bisexual, and transgender.”

²⁹ *See id.* at 129–34. *See generally* Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997); Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 LAW & POL’Y 73 (1991).

adapted it to fit organizational objectives (and to elevate their own role within firms). In short, the antidiscrimination (or diversity) norm has proven “digestible” by corporate employers: it has been accepted and internalized into the corporate body, both transforming corporations *and being transformed* in the process. I will return to the latter below. But first let us acknowledge the good that has come of corporations’ internalization of the equal opportunity and diversity norm.

I do not mean to paint too rosy a picture of the reality behind the diversity rhetoric, even within the Fortune 500. After all, atop that list is Wal-Mart, Inc., which jumped on the rhetorical bandwagon of diversity only after being sued on behalf of a class of 1.2 million female employees claiming discrimination in pay and promotions.³⁰

Still, progress is undeniable. During the 1960s and 1970s, most overt barriers to entry and advancement at work for women and minorities were largely dismantled, and the more subtle barriers that remained, and that still remain, are less exclusionary. According to EEOC data, for example, the percentage of private sector “officials and managers” who belong to a “minority” group rose from 1.8 percent in 1966 to 19.9 percent in 2008.³¹ Black and Hispanic representation among those “officials and managers” rose from 1.5 percent to 14.4 percent in that period.³² Female “officials and managers” increased dramatically from 9.3 percent in 1966 to 36.4 percent in 2002 (though there has been little change since, with 37.5 percent in 2008).³³ These are very big changes, even if the uppermost echelons of corporate and professional organizations remain mostly white and mostly male.

B. Toward a “Digestible” Norm of Worker Representation?

Title VII and the norm of equal employment opportunity should thus be judged at least as a qualified success; and that is largely due to its internalization or “digestion” by corporate America. Is something like that possible with a norm of workplace democracy or “voice at work”?

Of course, that will depend partly on how we define that norm. There is much more work to be done on this. But for now, let us simply follow Freeman and Rogers’ findings on what most workers say they want: *every responsible employer should maintain some mechanism through which employees are represented, and to which they can turn with concerns about their rights and interests at work.* That may be in the form of independent and potentially adversarial union representation, or it may be “run jointly by employers and employees,” and it may be cooperative by design.³⁴

If we imagine away Section 8(a)(2)’s legal obstacles to such a norm, is it possible to envision such a norm being embraced, internalized, and digested by

³⁰ The Supreme Court eventually held that the class was too unwieldy to be certified in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

³¹ *Job Patterns For Minorities And Women In Private Industry, 2008 Indicators Over Time*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/docs/indicators.html> (last visited Feb. 15, 2014).

³² *Id.*

³³ *Id.*

³⁴ *See supra* Part I.A.

corporations in something like the mostly positive way in which the equal employment norm has been embraced, internalized, and digested?

The analogy between the right to equal employment opportunity and the right to collective representation at work is far from simple. There are many reasons why the former is more “digestible” than the latter can possibly be (unless it is reduced to meaningless pablum). But our very formulation of the norm of employee representation recognizes that collective voice will never be embraced as an element of responsible corporate citizenship as long as collective voice is identified exclusively with unionization.

The right to form a union and bargain collectively, even rebranded as “freedom of association” and elevated to the status of binding international law, has proven “indigestible” by US employers. They uniformly and aggressively resist the exercise of that right even if they concede it in principle. They do so largely, though not entirely, in response to market incentives and pressures that are endemic to a decentralized system of collective bargaining like ours, and that have become intensified in most parts of the private sector economy.

Let me be clear: the right to form a union should not be abandoned, but fortified. Employees’ right to go into opposition, and to do economic battle with their employer, is a fundamental labor right and an essential protection against abuse. Among other things, and at a minimum, the possibility of unionization must be part of the punishment that awaits “low road” employers. Collective bargaining need not take such an adversarial form, but that adversarial possibility is an essential inducement to better workplace behavior by employers. And unfortunately, given employers’ resistance to union organizing, unions have to be structured and organized in part around the need to do battle. But in part because of their essential adversarial dimension, unionization and collective bargaining as we know them in the United States will never be embraced as essential and central features of responsible corporate citizenship.

So the idea here is not to replace the right to form an independent union and bargain collectively, but to reframe that right as one embodiment of a more encompassing right of collective participation—a right of workers to active and organized participation in the economic organization that defines their working lives and on which they depend for their livelihoods.

The idea is to define a right of representation that employers would be not only allowed but encouraged to internalize and institutionalize. That encouragement need not be limited to soft social and reputational pressures; law can be used to encourage compliance with norms that are not mandatory. Government procurement criteria is one such mechanism that was crucial in the equal employment context.³⁵ I have argued at length elsewhere that the law can and should be deployed to set stronger conditions for the privileges the law accords to responsible, “compliant” self-regulating organizations.³⁶ Those mechanisms of “regulated self-regulation”—for example, those embodied in the federal Sentencing Guidelines for Organizations—could be used to encourage corporations to adopt structures of worker representation as part of their required apparatus of compliance.

³⁵ DOBBIN, *supra* note 25, at 162–63.

³⁶ See ESTLUND, *supra* note 17, at 105–28.

The politics of promoting a norm of employee representation are uncertain, but surely better than the politics of traditional pro-union labor law reform. Such a right might be championed by something like the coalition of civil rights and employee advocates and forward-thinking corporations that backed the enactment and expansion of antidiscrimination laws. It might draw on the experiences of US and other multinational corporations in many developed countries in which non-union forms of employee voice are mandated. And it can draw as well on the extensive, albeit under-the-radar, experiences of many US employers that have found it wise and helpful (even though currently illegal) to create mechanisms that enable their workers to express concerns and have input into decisions that affect their working lives. A campaign for workers' right to participate in workplace decisionmaking has the potential to divide the business community, and to enlist responsible employers, in a way that no pro-union labor law reform effort has ever done.

III. CONCLUSION

These musings are likely to be rejected as naïve at best, and insidious at worst, by many in the labor movement. Some see “corporate social responsibility” (CSR) as a snare and a delusion—a cynical and self-serving public relations juggernaut that deflects workers and activists from the need to build a movement that is based on solidarity and that can exercise countervailing collective power on behalf of workers. On that view, the proponents of CSR, if they are sincere, are simply fooling themselves (and the rest of us) because corporations and their top managers cannot help but pursue profits at the price of human values and workers' rights.

Like many reluctant converts to the belief that CSR can be a progressive force, I vacillate between the fear that the skeptics are tragically squandering an opportunity to accomplish something good for workers, and the fear that they are right. Those skeptics are surely right in part, at least where it comes to enabling workers to exercise collective voice and influence at work. There are enormous risks in a strategy that would expand corporations' freedom of action and engage them in promoting and shaping a norm favoring employee voice at work. Corporations are sure to use that greater freedom of action in part to make it harder for workers to organize unions.

If the risks are worth taking here, it is only because the situation has become so desperate, with unions on life support and no other robust or sustainable vehicles of employee voice on the horizon. At some point, the existing labor movement will be too weak to stand in the way of reforms that allow a broader range of vehicles of employee representation. Unfortunately, at that point the labor movement will also be too weak to play a constructive role in shaping those reforms in the interest of employees.