The Development of Employment Rights and the Management of Workplace Conflict

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Conflict is endemic to organizational life. In extreme cases, conflict among co-workers, or between workers and bosses, can escalate into murderous rage – as it did outside the Empire State Building in September, 2012 (Brown, 2012) – or into revolutionary regime change – as it did in Poland in the 1980s. More often, workplace conflict coalesces into collective labor unrest, and flows into established labor law channels for union organizing and collective bargaining. Most workplace conflict unfolds in less dramatic fashion, however, and is either resolved internally or left to fester, and to take a toll on the organization in the form of resentment, turnover, low productivity, deterioration of workers’ health and happiness, or, especially in the U.S., litigation. This chapter focuses on the experience in the U.S., where the shift away from collective labor relations and toward litigation has been particularly dramatic.

While employment litigation has become a salient feature of workplace relations in the U.S., it is a relative newcomer to the great historical drama of labor-management conflict and conflict resolution. During the tumultuous era of liberty of contract and the labor injunction that culminated in the early 20th century, courts were seen as inhospitable to workers and their grievances. The National Labor Relations Act of 1935 (NLRA), which remains the basic framework legislation for collective labor relations in the U.S., was crafted and interpreted to minimize the judicial role in collective labor disputes in favor of arbitrators, administrative bodies, and the parties themselves. Outside the union setting, and until the mid-1960s, workers had rather few legal rights, and were relegated to the tender mercies of managers and markets. When and where markets and managers converged to create strong internal labor markets and long-term employment relations, workers often fared reasonably well. Or at least the core (mostly white and male) workers in primary industries and leading firms fared reasonably well. Racial minorities and women were largely excluded from those relatively comfortable positions.

With help from litigation under the Civil Rights Act of 1964 (CRA), women and minorities began to gain access to those internal labor markets just as their foundations began to crumble under pressure from economic and technological developments. The erosion of internal labor markets undercut the potential gains from antidiscrimination and other wrongful discharge litigation, for the jobs at stake were less likely to last. But the erosion of internal labor markets also made legal rights more important, for it stripped workers of some non-legal protections against the vicissitudes of the external labor market. In the meantime, union density has fallen to just over 11 percent of the labor force, and to less than 7 percent in the private sector (Bureau of Labor Statistics, 2013). Without labor unions or strong internal labor markets, most workers are left with little
more than their individual "market power" and a collection of legal rights against discrimination, retaliation, or other forms of mistreatment.

The growing body of statutory employee rights is sometimes said to serve as a "union substitute," and to partly explain workers' declining willingness to take the risks involved in forming a union. At least to most workers who have experienced union representation, the formal right to file a complaint or bring a lawsuit after the fact in case of actionable employer misconduct is a far cry from access to union representation and union power in a functioning collective bargaining relationship. Unions enable workers to pursue their own collectively self-determined interests, not merely their societally-determined legal rights. And the litigation process -- formalistic, lawyer-driven, strewn with procedural hurdles and technicalities -- displays little of the human drama and solidarity of a union organizing drive or a strike. And yet there are some intriguing parallels between collective bargaining and litigation, and their relationship to organizational (and societal) conflict, that are worth exploring, for they may suggest a path forward in our post-collective bargaining era.

This chapter will first explore several parallels between litigation and collective bargaining (primarily as it evolved in the U.S. private sector under federal labor law) as modes of workplace dispute resolution. The point of that exploration is to lay the foundation for arguing that employment rights, litigation, and regulation might be following, or at least could follow, a path pioneered by the labor movement in leveraging workplace disputes and the need to resolve them into pressure for more participatory structures of workplace governance. I will then turn to the forms of governance -- regulated self-regulation and internal dispute resolution -- that are beginning to take shape under the shadow of litigation and regulation. Those structures could be creatively and consciously molded into a system of "co-regulation" that would secure for workers some of what collective bargaining was meant to deliver: a form of participation through collective representation in the resolution of workplace disputes -- in the first instance "rights disputes," but potentially "interest disputes" as well.

I. Conflict and Conflict Resolution through Collective Bargaining and Litigation

At first blush, collective bargaining and litigation represent nearly opposite approaches to the problem of workplace conflict. Collective bargaining emerges out of bottom-up mobilization of workers (within a public statutory framework); litigation stems from top-down legislative enactments (which sometimes follow workers' mobilization). Collective bargaining represents a privatized system of dispute resolution (again, within a public framework); litigation is quintessentially public and judicial dispute resolution (though the rise of mandatory arbitration challenges this distinction). Collective bargaining is designed primarily to resolve interest disputes (though it also helps workers to enforce legal rights and resolve rights disputes); litigation seeks to resolve legal rights claims (under laws that aim to serve workers' interests). There are many important differences between the two approaches to workplace conflict; yet, as the many parenthesized qualifications suggest, they have more in common than first meets the eye.

First, both collective bargaining and employment litigation strike fear into the hearts of employers, and have generated a thriving industry of avoidance -- "union avoidance," "litigation avoidance" -- and a raft of human resource management (HRM) practices
designed to keep them at bay (Colvin, 2012). Interestingly, many of the very same HRM practices – especially internal review and grievance systems – are designed to help avoid both litigation and unionization (Colvin, 2003). Indeed, as some of the economic underpinnings of internal labor markets have eroded, it seems that what is left of internal labor markets, and of organizational norms of fair treatment, is underpinned by employers' twin fears of unionization and litigation. Workers' right to form a union, however frayed, and their potential right to file a lawsuit, however fraught or frustrated, entail a kind of latent power on the part of workers to which we will return.

Second, both collective bargaining and litigation have the somewhat paradoxical quality of serving both as a mechanism of conflict resolution and as a catalyst of conflict. Collective bargaining and its signature system of grievance arbitration is above all a system of dispute resolution (Colvin, 2012). Collective bargaining aspires to resolving interest disputes by generating a collective contract; during the term of the contract most labor-management disputes take the form of contractual rights disputes to be resolved between the parties or by a jointly chosen arbitrator. Yet unions and collective bargaining are obviously associated with conflict -- at least in the process of bargaining for an agreement, and at lower levels during the term of the agreement. That is partly because unions derive bargaining power from their ability, at least periodically, to galvanize workers' discontent and to sharpen its focus on the employer. Conflict in the form of strikes both depends on and builds solidarity among workers. The decline of unions is thus perhaps as much a product of the decline of strikes as it is a cause (Getman, 2010). But let us be clear: unions are also associated with conflict because they give workers the power to challenge management's unilateral governance of the workplace and the allocation of revenues. There are, after all, conflicting interests between labor and capital, workers and managers. And there is likely to be more conflict, or at least more open conflict, when both sides in this contest are organized and have some power.

Employment litigation is also simultaneously a mechanism of conflict resolution and a catalyst of conflict. Litigation is a notoriously disputatious mode of dispute resolution, and that is a big part of why it is so feared by employers. There is the adversarial process of litigation itself, of course; but there is also the organizational conflict associated with litigation, which is one of its large though less obvious costs, alongside attorney fees, expenditure of managerial time, reputational harms, and monetary or other remedies. Of course litigation only happens when there is already a dispute of some sort. But the ritualized combat of litigation sharpens the conflict and appears more fearsome to employers than the conflicts that produce the litigation. And that is partly for the same reasons that fuel employer resistance to collective bargaining: Employment litigation allows employees to contest employer power. Without litigation and the rights it asserts, employers (those who do not have to deal with a union) would be largely free to rule the workplace on a take-it-or-leave-it basis, and to eject those who create conflict, or bring it to the surface, by complaining about their treatment.

Third, the groundbreaking laws that launched both the system of collective bargaining and modern employment litigation – the NLRA of 1935 and the CRA of 1964 – were themselves conceived in the midst of intense social conflict, and were intended in part to quell that conflict by channeling it into more peaceful and constructive (though still
conflictual) channels. Again, that is especially obvious in the case of collective bargaining. The New Deal labor legislation largely solved "the labor question" – many decades of episodically violent labor-management conflict that had fractured communities and undermined the legitimacy of basic public institutions (especially police and courts) – by establishing a peaceful mechanism for resolving disputes at the bargaining table. But bargaining under the NLRA scheme was hardly conflict-free; it was backed up by lawful "economic weapons" – chiefly the strike and various employer countermeasures – to which the parties could resort to press their bargaining demands. The law both legitimized and regulated those economic weapons, especially with the Taft-Hartley amendments of 1947, and the resulting conflicts were both less violent and less political than the street battles and sit-in strikes of the 1930s. But as the latter receded from memory, the organized economic combat associated with collective bargaining appeared far more conflict-ridden than the non-union alternative, in which labor conflict may simmer under the surface, but rarely breaks into the open or poses a challenge to managerial power.

Like the NLRA, the CRA of 1964, which launched the modern era of employment litigation, was enacted in the midst of strife. The civil rights movement and the violent resistance that it met in some parts of the country posed the greatest domestic threat to political and social order since the great labor battles of the 1930s. In that context, the CRA was enacted in part to quell unrest and to end violent public and private resistance to equality rights by recognizing those rights, backing them with the force of federal law, and affording peaceable channels for their vindication (Eskridge, 2002). Much as with the NLRA, this monumental piece of legislation was enacted on the strength of convictions about the justice of the cause and support for its prospective beneficiaries, but also out of a belief that it was necessary (if hardly sufficient) to secure social peace. Adversarial combat in the courts, however troublesome to the employers that now had to reckon with it, was preferable to the existential conflict that was building up on the streets. As with the NLRA, the CRA did not immediately quell social conflict, and may have even fueled it for a while by embracing the justice of the cause that was still being resisted, often violently. Yet there seems little doubt in either case that the strife would have been more serious and longer-lasting had Congress failed to act.

Running through these two tales is a fourth parallel that speaks to the nature of organizational conflict more broadly. In the context of workplace disputes – collective and individual disputes, "interest disputes" and "rights disputes" – conflict is not simply a social evil to be avoided or suppressed; it is also a by-product of, and a means for, the pursuit of justice. When workers actively pursue their rights and interests against employers who are not giving them what they think they deserve, conflict results. If workers lacked either legal rights or collective representatives, workplaces themselves might be fairly peaceful, for employers could simply fire or refuse to hire those who contest their unilateral power -- the union activists and rights-conscious minority workers, for example. But unaddressed grievances, when they are shared among groups of workers, have a tendency to pile up and spill into the society at large, creating a more dangerous (and politicized) type of conflict. In both the 1930s and the 1960s, conflict arising from shared grievances helped spur Congress to empower employees and compel employers to deal with them more fairly, and to do so by legitimizing non-violent though still costly forms of conflict between workers and employers.
That brings us to a fifth parallel between labor-management conflict and conflict over employment rights, and a step closer to this chapter’s thesis. While conflict is associated with employees' pursuit of just claims and legitimate interests, there is no bleak and inexorable choice between rampant conflict on the one hand and injustice on the other. For the proponents of both collective bargaining rights and statutory employment rights, it was mainly the latent threat of costly conflict, not its frequent occurrence, that was supposed to induce the parties (mainly the employer) to construct a more just state of affairs.

That is rather obvious in the case of equal employment rights. The proponents of equal employment legislation could hardly have imagined that it would be desirable, or necessary, or even possible to pursue full-blown litigation against every employer that was engaged in discrimination before the law was passed. Proponents assumed that the articulation of new employee rights, backed by the threat of enforcement, would be enough to induce most employers to reform themselves. And so they did, to varying degrees and in ways to which we will return. "Litigation avoidance" was certainly one factor in the manifold organizational reforms that large and medium-sized firms pursued in the wake of Title VII and the first wave of litigation (Dobbin, 2009; Edelman, 1999). That is mostly how law works, after all: by inducing voluntary compliance. And that is how the prospect of discrimination litigation helped to transform day-to-day workplace life even though actual litigation is relatively rare and occurs outside of the workplace and usually after the plaintiff has left it.

The parallel scenario under the NLRA is more complex. Some of the law's chief proponents hoped that it would usher in an era of labor-management cooperation: Once employers were faced with the legal duty to recognize employees' chosen union representative, and with the prospect of legally protected strikes in support of employee demands, the rational response would be to sit down and work things out, and to construct a cooperative and mutually beneficial relationship (Barenberg, 1993). That idealized aspiration bears a passing resemblance to what developed over the next few decades in the widely-unionized core industries – including major manufacturing, transportation, and communications: Strikes occurred periodically, but for the most part employers accepted the union's existence and the need to coexist under a collective agreement. Most workplace disputes were routinely worked out informally between union officials and their company counterparts through a grievance process that could, but rarely did, culminate in arbitration. Labor-management peace and cooperation through collective bargaining, and through the legitimization and regulation of conflict, largely prevailed for a few decades in a sizable unionized sector.¹

But there was another path by which the NLRA encouraged employers to reform themselves: the path of union avoidance through union substitution. In the non-union sector (including most white-collar jobs within partly-unionized companies), companies developed sophisticated HRM practices that were designed in part to deliver to workers some of what they might hope to gain from unionization: internal labor market norms of fair treatment and job security, grievance procedures, managerial control over abusive or

¹ It is clear in hindsight that this fairly peaceful accommodation in the union sector was partly contingent on regulatory, geographic, and technological hurdles to competition that began to fall, or were deliberately dismantled, in subsequent decades.
arbitrary supervisors, and often higher-than-market-clearing wages (Wachter, 2012; Kochan, et al., 1994). In a rather different way than envisioned by the NLRA's proponents, the law's protection of the right to unionize and bargain collectively brought a measure of fairness and decency into many non-union organizations. Fairness and decency perhaps, but not democracy. On the contrary, "high-road" HRM practices are typically coupled with sophisticated anti-union strategies; and the resulting combination of carrots and sticks has proven highly effective in discouraging union organizing and confining the sphere of "industrial democracy" through collective bargaining to a small fraction of the private sector workforce (Bisom-Rapp, 1999; Godard, 2001). (Moreover, the NLRA prohibits employers from establishing alternative non-union forms of employee representation; we will return to this problem.)

Therein lies one major difference between litigation and collective bargaining as forms of workplace dispute resolution: Litigation is not generally regarded as a good in itself; and so voluntary compliance without actual litigation is a nearly unambiguous good. But collective bargaining and union representation are not only means to the end of higher wages or better working conditions; nor are they merely systems of conflict resolution. They are the law's chosen embodiment of workplace democracy. The success of the non-union HRM model, though due partly to the satisfaction of employee preferences, is a loss on the less tangible dimension of democracy.

The brilliance of the NLRA and the system of collective bargaining that it institutionalized was in simultaneously transforming labor-management conflict from violent to non-violent forms, and leveraging that conflict into a form of democratic self-governance within industry. Collective bargaining and grievance arbitration were on the one hand elaborate systems for the resolution of labor-management conflict; but they were also vehicles for workers' representation in workplace governance. Of course that system is now a shrunken and embattled vestige of its former self. But the question I want to pursue in the remainder of this chapter is whether something comparable could and should arise out of the elaborate web of employee rights and rights of action that has surpassed the collective bargaining system in its impact on the workplace.2

II. The Rise of Employee Rights and of Regulated Self-Regulation

Employment law creates neither a coherent nor an effective instrument of workplace governance; unlike the NLRA, it was not meant to do that. But it has become a hydrahead of duties and liabilities for employers, and those liabilities have to be managed. And the managerial practices that have evolved under the shadow of employment laws (and other laws) have effectively inaugurated a new mode of workplace governance: regulated self-regulation.

As we have noted, Title VII and the wave of discrimination litigation that followed generated the growth of internal grievance procedures and equal employment offices within firms, with the aim of preventing or redressing potential discrimination complaints and avoiding lawsuits. Similarly, the enactment of OSHA spurred the growth of internal health and safety departments. Corporate compliance structures were put in place to manage proliferating employment law liabilities (as well as liabilities under

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2 The next section draws heavily from Estlund, 2010.
environmental, securities, consumer safety, and other regulatory regimes). At their best, corporate compliance efforts aspire not only to avoid liabilities but to internalize the public values and goals behind the law. At their worst, these programs may be mere window dressing – a glossy façade behind which business goes on as usual.

Even as employers publicly embrace corporate compliance and social responsibility, they continue to push back politically and legally against the burdens of regulation and litigation. Employers’ tirades against the “litigation crisis” have yielded few legislative rollbacks, but they have produced doctrinal and procedural hurdles to plaintiffs’ success, such as mandatory arbitration, to which we will return (Clermont & Schwab, 2004). Challenges to the efficacy of regulation and litigation of workplace rights and standards have come not only from employers, however, but from scholars and employee advocates as well. Observers from a range of perspectives have argued that the postwar regulatory regime is losing its grip in the face of rapidly changing markets, technology, and firm structures (Breyer, 1982; Dorf & Sabel, 1998); that uniform legislated labor standards cannot address the range of concerns and contexts that workers face (Weiler, 1990); that “adversarial legalism” and “regulatory unreasonableness” are undermining the pursuit of public regulatory goals (Kagan & Bardach, 1982); and that civil litigation is a costly, slow, and often inaccessible mechanism for securing workplace rights and adjudicating disputes (Dunlop Commission, 1995; Estreicher, 2001; Outten, 1999; Sternlight, 2004).

Some of these critiques echo the very arguments that led New Dealers to turn to collective self-governance, and to unionization and collective bargaining as the primary vehicles for addressing workplace disputes and the inequities of the labor market. This time around, however, many critics, courts, and regulators have converged instead on the concept of “self-regulation.” Proponents of self-regulation have argued for using public law to encourage employers to regulate their own practices rather than as a direct instrument of control. They point to the growth and increasing sophistication of corporate compliance structures as evidence that self-regulation makes sense.

The concept of self-regulation has begun to shape the external law of the workplace. Most important in the present context: courts responsible for enforcing employee rights have begun to formalize the role of internal compliance procedures -- most notably in the sexual harassment context, but also more broadly -- and to defer to private dispute resolution schemes (including arbitration), granting employers a partial shield against litigation and liability based on those schemes. These developments bring the main locus of rights enforcement inside the firm or under the firm’s control. The internal compliance regimes of large firms must be seen in that light: as efforts not simply to comply with the law but to secure the legal advantages of self-regulation and a partial shield against liability. We will focus here on the internal structures, and particularly the dispute resolution structures, that have arisen to deal with the expanding array of "rights claims" under employment laws.

A. From Managing Conflict Under the Shadow of Employment Law to Regulated Self-Regulation

Employers have invested heavily in dispute resolution procedures as the linchpin of

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3 For critical accounts of employer responses to litigation and regulation, see Edelman et al., 1992; McGarity & Shapiro, 1996.
their strategies of litigation avoidance and management. But it is worth distinguishing two different kinds of strategies: Systemic strategies seek to avoid lawsuits by internalizing compliance and complaints, and contractual strategies seek to induce or require employees either to waive liability after a dispute has arisen or to waive the right to litigate future disputes in favor of arbitration.

**Systemic litigation avoidance strategies:** In recent decades, many nonunion employers have crafted internal grievance and dispute resolution mechanisms, which vary in their complexity from simple open-door policies to multi-step processes involving peer review, mediation, and arbitration. These systems are thought to enhance employee morale, longevity, and performance; to quell interest in unionization; and to allow management to rationalize discipline and monitor supervisors. That being said, it is clear that the threat of litigation helped to spur the dramatic growth of these systems in medium and large sized firms (Edelman, 1999; 1992). It has become near gospel among human relations professionals that corporate due process systems help to avoid litigation (as well as unionization) by resolving disputes within the firm and by flagging and potentially correcting actions that may be found or plausibly claimed to be discriminatory.

These corporate due process regimes typically afford “some kind of hearing,” usually before a relatively impartial company official, not only for legally actionable claims but for other complaints of unfair treatment (Edelman et al., 1990). At a minimum these procedures afford a sober second look and a check against the personal tyranny of low-level supervisors; they administer a dose of procedural regularity and soften the sharp edges of employment at will. Yet many observers cast a sceptical eye upon these internal grievance procedures for their failure to fully realize employee rights, as well as for their tendency to assimilate complaints of discrimination to the ordinary run of personnel conflicts (Edelman, 1993, 2001; Krawiec, 2003). Moreover, there is little solid evidence about how well these internal enforcement systems actually work (Krawiec, 2003; Lawton, 2004). Some scholars see promise; others see costly but largely symbolic gestures.4

So long as internal grievance procedures played no direct role in the adjudication of formal legal complaints, their shortcomings posed little threat to the enforcement of legal rights. These internal systems might avoid or remedy some discrimination; or they might avert some legal claims by mollifying grievants or persuading them that their case was weak. But if the employee did file a formal complaint, it would still follow the course charted by external law, culminating in public administrative or judicial adjudication (or settlement under the shadow of adjudication), without regard to its fate within the corporate hierarchy.

That changed with the Supreme Court’s 1998 decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. The Court reaffirmed employers’ liability for supervisors’ discrimination and harassment, regardless of whether high-level managers knew or approved of the conduct. But with respect to one type of discrimination – the

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4 Among the more skeptical accounts, see, e.g., Bagenstos, 2006; Selmi, 2005; Bisom-Rapp, 2001; Krieger & Fiske, 2006. Among the more favorable assessments, see, e.g., Green, 2003; Sturm, 2001. Some commentators see potential as well as the need for safeguards not yet in place. Carle, 2006; Hart, 2007.
creation of a discriminatory hostile environment without any tangible adverse employment action – the Court offered the employer an affirmative defense: The employer could escape liability by showing that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,” (Faragher, at 807, 1998). A year later the Court effectively extended a version of the "self-regulation defense" to tangible adverse actions: The Court held that “good faith efforts to comply with Title VII,” in the form of antidiscrimination policies and procedures, would bar punitive damages against the employer for intentional discrimination in promotions (and presumably discharges) (Kolstad, at 544, 1999).

With these decisions, the Court transformed employers’ internal compliance and grievance procedures into front line mechanisms for enforcing antidiscrimination law and avoiding liability. No longer is the law merely casting a “shadow” beneath which firms may devise whatever procedures they believe will best avoid liability. Nor is this wholesale self-regulation, in which firms are freed from external scrutiny. Rather, the law is now regulating the process of self-regulation. Courts are charged with distinguishing sham processes from effective ones – with deciding whether employer’s policies and practices are “reasonable” and demonstrate good faith. Employers in turn have to look to external legal standards to assess the adequacy of their own internal antidiscrimination policies. If courts do their job well, these doctrines should promote organizational practices that reduce the incidence of discrimination and harassment and offer better recourse to aggrieved employees. But if judicial oversight is cursory, and litigation ends up being barred by a mere pretense of internal process, then employers may be able to insulate themselves from the litigation threat that has driven much internal workplace reform. Deregulation under the guise of self-regulation is a serious risk with a doctrine that rewards employers not just for preventing discrimination but for convincing a court that they tried to prevent it, or would have tried if the plaintiff had come forward earlier.

**Contractual litigation avoidance strategies:** Employers cannot contract out of discrimination liability for claims that have not yet arisen, for that would amount to contracting out of the mandatory prohibition of discrimination (Estlund, 2007). But employers can and do contract out of liability for existing claims through severance agreements that waive those claims as a condition of severance pay (Issacharoff, 1996). Employers can also contract out of liability for future claims – and this is our focus here – by demanding that employees sign mandatory arbitration agreements as a condition of employment. In Gilmer v. Interstate/Johnson Lane Corp. and Circuit City Stores, Inc. v. Adams, the Supreme Court upheld the enforceability of employees’ agreements to submit future legal claims against the employer to an arbitrator rather than to a court. Since Gilmer, many employers have thus taken employment disputes out of the courts and into the more private and party-controlled arbitral forum (Colvin, 2003, 2012).

Both the rise of mandatory arbitration and the proliferation of internal grievance procedures represent organizations’ efforts to tame the litigation threat. Both seek to ameliorate the tension between outside legal norms and internal organizational needs,
partly by bringing the organization into closer conformity with outside norms, and partly by domesticating those outside norms and the means of their enforcement. And both represent forms of regulated self-regulation in the enforcement of employee rights. In the case of mandatory arbitration, employers write arbitration agreements, and they design the process and dictate how arbitrators are chosen; yet they do so subject to the power of courts to reject or redact unfair or legally invalid provisions (Gilmer, 1991).5

Whether this form of self-regulation is sufficiently well-regulated is another question: Judicial supervision is episodic, and it often takes a form that may encourage employers to overreach.6 Employees, for their part, face a serious collective action problem in deciding whether and how to challenge an arbitration agreement at the time it is presented to them. They also risk incurring the employer’s disfavor by signalling a willingness to sue in the future. All in all, an individual employee has little to gain and a lot to lose in questioning or attempting to alter an arbitration agreement presented by the employer as a condition of employment. The upshot is that arbitration agreements give employers considerable control over the adjudicatory process. There is some empirical evidence that arbitrators themselves may be subtly biased in favor of employers whom they see in multiple disputes (the so-called “repeat player effect”) (Colvin, 2011; Bingham, 1995; Hill, 2003). But there is little doubt that the employer, who foresees repeated resort to the arbitration process in employment disputes, has an incentive to invest in devising an arbitration system that serves its interests to the degree that is possible.

III. Improving the Regime of Regulated Self-Regulation through Worker Representation

So there are grounds for concern about the move toward self-regulation in the enforcement of employment rights. But there are also reasons to channel those concerns into improving, and better regulating, self-regulatory structures, rather than into outright reversal of the move toward self-regulation. For the rise of more and less regulated versions of self-regulation is no mere flash-in-the-pan. It follows a trajectory that has become increasingly familiar, and widely analyzed, in the law of corporate criminal law, securities law, and environmental law, among other areas, across much of the developed world.

In workplace regulation as elsewhere, there has been a shift away from direct top-down mechanisms of legal control and toward “reflexive” mechanisms for encouraging effective self-regulation, and the internalization of public values, by organizations themselves (Lobel, 2004). Many of these mechanisms, including most of those extant in the U.S. law of the workplace, take a conditional or quasi-contractual form: Self-regulation is not mandated but is encouraged and rewarded, most tangibly by the promise of relief from some aspect of the background enforcement regime. Those self-regulatory

5 Employers are also somewhat constrained by the standards that arbitrators and their professional organizations have set for the fairness of the process. The major arbitration provider organizations have agreed to the “Due Process Protocol” for the conduct of employment arbitrations (Estlund, 2010).

6 A court faced with an invalid clause—say, barring the award of attorneys’ fees to prevailing Title VII plaintiffs—might simply strike the clause while enforcing the rest of the agreement; in that case the employer risks nothing by including such a provision and may deter some litigation. Or a court might enforce the agreement to arbitrate and leave contested issue to arbitration itself (with very limited post-arbitration judicial review). In the meantime, prospective plaintiffs and their attorneys bear the burden of uncertainty and may be deterred from proceeding at all.
privileges are conditioned on what the law recognizes as adequate self-regulatory activity. This is what we are calling here “regulated self-regulation.”

Proponents of regulated self-regulation see the evolution of more efficient and effective systems for enforcing legal norms, systems that introduce flexibility and responsiveness into the regulatory regime, and reduce the costs and contentiousness associated with litigation, while promoting the internalization of public law norms (Ayres & Braithwaite, 1992; Bardach & Kagan, 1982). Detractors see the same trends as a dressed-up form of deregulation, one that allows firms to deflect public scrutiny by engaging in “cosmetic compliance” and window-dressing (Krawiec, 2003; Blackett, 2001). Much in the debate turns on whether courts and regulators can be counted on to distinguish effective from ineffective systems of self-regulation. If courts and regulators cannot (or will not) reliably distinguish real from cosmetic compliance, then regulated self-regulation may become a thinly disguised form of deregulation.

A. The Risks and Opportunities of Regulated Self-Regulation in the Workplace

The diffusion of self-regulation within the law of the workplace deserves special attention. The shift toward self-regulation is based in large part on the recognition that those who are best situated to detect, report, and avoid organizational misconduct are the insiders employed by the organization. Systems that activate the monitoring capabilities of those insiders have enormous potential to improve corporate compliance beyond what ordinary law enforcement can do. In the case of labor standards and employee rights, the firm’s employees are not only the best potential monitors of misconduct but are the primary beneficiaries of the law. That fact, unique to the law of the workplace, creates both distinct opportunities and distinct risks in the self-regulation of employee rights and labor standards.

The distinct opportunities are quite obvious: The convergence of interest and information – of motive and means – on the part of employees within self-regulating firms would seem to magnify their monitoring role. Whatever altruistic or organizational motive employees have to report unsafe consumer products or financial shenanigans, they have an additional intrinsic and self-interested motive to report dangerous working conditions or denial of overtime pay. To be sure, employees still face collective action problems, at least in the non-union workplace, for most of workplace laws secure “public goods” within the workforce or some subset of it: They affect employees as a group, and the collective benefits of compliance, as well as the costs to the employer, are much larger than the benefits to any one employee. So individual employees do not have enough incentive to speak up, even apart from their fear of reprisals. But if that problem can be overcome, activating employees within internal compliance systems has a huge potential payoff.

But distinct risks arise from those same employees’ economic dependence on the employer. Employees, especially those who are terminable at will, may fear reprisals if they report or complain about misconduct (unless they have already quit or been fired). Of course that may also deter employee “whistleblowers” under environmental or consumer safety or securities laws. But those non-labor laws benefit outsiders to the organization who may have enforcement tools of their own. Private enforcement by shareholders, citizens, or consumers faces hurdles, such as lack of inside information; but
it is not hampered by the economic dependence of an employment relationship. In the case of employment laws, however, fear of reprisals may inhibit employees in both their internal whistleblowing and their private enforcement efforts. Employees' fear of reprisals may be the Achilles' heel of the system, allowing employers to fend off liability or regulatory scrutiny on the basis of compliance systems that do not do the job.

B. From Self-Regulation to Self-Governance by Way of Co-Regulation

What will it take to create an effective system of regulated self-regulation in the workplace? Among other things, it will take effective forms of employee representation within the self-regulatory process. But it is important to note that the need for stakeholder representation in a system of regulated self-regulation is not unique to the workplace setting. Across an array of regulatory arenas, the work of John Braithwaite and others shows that effective self-regulation requires the participation of the regulated firm, the government, and the primary beneficiaries of the relevant legal norms (Braithwaite, 1982, 1985, 2009; Ayres & Braithwaite, 1992). And whether the beneficiaries of the relevant legal norms are consumers, patients, shareholders, air breathers, or workers, they must be represented in some organized form that allows them to influence and monitor self-regulatory processes. Organized participation by regulatory beneficiaries supplements public regulatory oversight and provides a check against covert cheating or paper compliance by regulated organizations, and against "regulatory capture," or unwarranted deference toward those organizations on the part of agencies (or courts) charged with enforcement (Ayres & Braithwaite, 1992).

Effective employee participation in self-regulation requires not only avenues for individual reporting by employees, but also some organized form of collective representation with an existence both inside and outside the workplace. First, such organizations can address the collective action problems associated with the "public good" of compliance with employment laws. Second, such organizations enjoy independence and insulation from reprisals, fear of which inhibits individual employee participation. Third, a collective entity may enable workers to exert some power in decisionmaking and to counter the opportunistic impulses that may lead firms to cheat on their self-regulatory commitments. Some form of collective employee representation that is independent of the employer may thus be essential to effective self-regulation of labor standards and employee rights.

Unions would seem to fit the bill. They address collective action problems, blunt the fear of reprisals, and put collective clout behind employee concerns; and they do indeed appear to improve compliance with employment laws in the fraction of workplaces in which they now represent workers (Rabin, 1991; Weil, 2002; Morantz, 2013). But unions themselves are unlikely to be the primary vehicle for employee representation going forward, given the drastic decline in unionization, and the ever dimmer prospects for a dramatic reversal of that trend. We will return below to the mechanisms by which unions improve compliance with external law, for therein may lie clues to how

7 The application of this principle in the workplace harkens to the concept of tripartism in labor relations and labor regulation, which goes back at least to John Commons (Kaufman, 2003).

8 On the role of unions in enforcing employment rights and labor standards, see generally (Craver, 1998; Rabin, 1991; Weil, 2002).
employees can be effectively represented in the process of self-regulation, and how self-regulation might thereby be improved, in the non-union context.

Whatever the specifics of how employees might be collectively and effectively represented in self-regulatory processes, it is important to recognize that the quasi-contractual structure of regulated self-regulation creates an avenue for encouraging the adoption of those measures. For the law can and does impose conditions on firms’ ability to secure the legal advantages of self-regulation. To the extent that firms construct compliance systems with an eye to securing favorable legal and regulatory treatment, they must meet conditions set by law, and those conditions should be designed to ensure the efficacy of self-regulation. For the reasons sketched above, one of those conditions should be the effective collective participation of the employees whose rights and working conditions are at stake. So when policymakers and public agencies set the conditions for admission to a less adversarial enforcement track based on self-regulatory programs, or when courts decide whether to uphold a mandatory arbitration agreement or whether a firm’s internal antidiscrimination structures should entitle it to a partial defense against liability, they should ensure that the affected employees have an effective organizational voice in the relevant self-regulatory process. The partial migration of employment law and its enforcement inside firms thus creates not only the need, but also the opportunity, to revive employees’ voice inside firms.

I use the term “co-regulation” here as shorthand for a regime of effective employer self-regulation in which employee beneficiaries have a genuine collective voice. We might think of “co-regulation” and its requisites, including employee representation, as a kind of official “high road” for employment practices. Any self-regulatory privileges that the law and legal actors deal out in the employment arena – partial defenses to liability, more congenial and cooperative enforcement tracks – should be reserved for firms that follow principles of co-regulation. Unlike much of what now passes for corporate self-regulation, a system of co-regulation provides safeguards against cosmetic compliance and against self-deregulation that critics legitimately fear.9 Now let us turn to what a co-regulatory approach might entail in the context of workplace dispute resolution systems.

IV. Some Aspects of Co-Regulation in the Resolution of Workplace Conflict

To begin with, co-regulation is about securing compliance with external law. In the context of workplace dispute resolution, it is about “rights disputes.” That is only a subset of workplace disputes, of course, but that is where the law is able to set standards of fairness as conditions for self-regulatory privileges. It is likely, and fortunate, that fair procedures for rights disputes will end up providing fairer recourse for some interest disputes, or ordinary personnel disputes, as well.

The law already sets some standards of fairness in dispute resolution procedures to which the employer seeks legal deference. That is most clear in the law of arbitration, where courts have to decide whether to enforce arbitration agreements (Colvin, 2011). The extent of judicial authority to oversee the fairness of arbitration agreements remains unsettled (Cole, 2011; Horton, 2011; Resnik, 2011). The law of arbitration could be improved from a co-regulatory perspective by adopting something like the “Due Process

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9 The concept of co-regulation proposed here resonates strongly with David Levine’s proposal in the late 1990s for “conditional deregulation.” (Levine, 1998).
Protocol,” or an updated version of it, as a condition for upholding mandatory arbitration agreements. Fairness standards should similarly govern any internal dispute resolution structures on which an employer seeks to base a partial defense to liability.

But let us hone in on the still largely missing element of employee representation. It is not the only element of co-regulation that is important to the fairness and legitimacy of dispute resolution processes, but it is an underappreciated and underexplored element. Elsewhere I have explored the nature of the employee representation that might complete a system of workplace co-regulation – why union representation may be the best, but cannot be the only, form of employee representation that passes muster, and what sort of non-union representation schemes, with what safeguards, might fulfill the requisites of co-regulation (Estlund, 2010). Those are hard and complex issues. I will pursue them briefly here in the context of workplace dispute resolution. But first let us take account of existing forms of participation within the already-emerging regime of regulated self-regulation and in non-union workplaces more generally.

A. Traces of Participation within Self-Regulation

Collective bargaining and employment litigation serve both as modes of dispute resolution and as catalysts of conflict. Both procedures do both of those things by enabling workers to put some clout – collective economic power or the power of state enforcement – behind claims that employers might otherwise be able to ignore, given the ordinary vectors of labor market pressure. And both collective bargaining and employment litigation lead to the creation of internal dispute resolution mechanisms (including arbitration) that aim to keep disputes from escalating into more costly forms of conflict. But both do more than establish structures of dispute resolution; they establish modes of workplace governance (Colvin, 2012). Collective bargaining and collective dispute resolution structures democratize workplace governance by enabling workers to transform their interests into contractual rights and to enforce those rights through jointly administered procedures. Employment statutes and litigation rights, and the grievance and compliance procedures that they engender, also bring about a shift in the nature of workplace governance toward what I have called regulated self-regulation. But is it, or can it be, a shift toward a more democratic mode of workplace governance?

It is worth observing at the outset that, even without the move to co-regulation, the extant regime of regulated self-regulation has a modestly participatory dimension. For a central element of corporate compliance programs, and of the legal framework for corporate self-regulation, is the encouragement and protection of employee reporting of misconduct, including claimed employment law violations. Firms acting under the shadow of public law (Title VII doctrines, organizational sentencing guidelines under criminal law, e.g.) have created structures through which individual workers are invited to bring their complaints or reports of non-compliance to organizational actors with some power to resolve those complaints (Moberly, 2008). Public law plays other supporting roles as well, sometimes prescribing internal reporting procedures, and more often prohibiting retaliation against internal employee reporters (Moberly, 2006). Encouraging and protecting employee whistleblowing is very far from “democracy,” but it is a modestly democratizing step toward improving legal compliance, or the “rule of law,” in workplace governance.
Employers have taken other potentially democratizing steps voluntarily, without legal encouragement or oversight. Many employers have adopted “peer review” procedures for employee discipline. Some corporations are designing systems to resolve both employee-employer grievances and disputes between employees. These systems, if properly implemented, can increase employee commitment to the workplace, reduce tension between external norms and internal organizational needs, and decrease litigation costs (Colvin, 2003; Estlund, 2005; Stone, 2001). Questions remain, however, whether these procedures constitute a form of employee voice and participation, or a mechanism for managerial cooptation of employee resistance.

Many firms have gone further, and created informal structures of collective employee voice in some firm decisionmaking. For example, employee affinity groups are nearly ubiquitous in large firms as part of their diversity management portfolios (Dobbin, 2009). Affinity groups enable subsets of employees – minority racial and ethnic groups, women, parents, disabled workers, for example – to meet and convey shared concerns to management. The actual impact of these groups on their members’ welfare and advancement in firms is not well-understood (Dobbin & Kalev, 2013, p. 268). But it seems plausible that, in hosting such groups, an organization signals a willingness to meet reasonable demands, and risks catalyzing group discontent if it fails to do so.

Most ambitious among employers' participatory initiatives are workforce-wide employee representation structures through which employees participate in workplace governance and often discuss wages and benefits (Frege & Godard, 2010; Kaufman & Taras, 2000; Freeman & Rogers, 1999). Managers have diverse motives for creating these representational structures, but they surely include a desire to resolve disputes and grievances that might otherwise ripen into those more disputatious forms of dispute resolution, litigation and unionization. And it appears that many of these non-union representation schemes are performing fairly well from employees' perspective, perhaps by better enabling workers to communicate their concerns and get satisfactory responses from management (Frege & Godard, 2010).

Rather little is known about how these representational structures work (Kaufman & Taras, 2000). That is partly because most of them probably violate federal labor law: Section 8(a)(2) of the NLRA prohibits employers from interfering with or dominating any labor organization, which is defined in turn to include any structure of employee representation through which employees “deal with” employers, or engage in give-and-take, about terms and conditions of employment. Most of these employer-established non-union representation schemes run afoul of the law.10 That is an unsettling fact.

There is of course a longstanding debate over whether Section 8(a)(2) makes sense today.11 The current posture of de jure prohibition and de facto laissez faire seems untenable. But should the reality be brought in line with the law or vice versa? In particular, how should the law treat structures of informal non-union collective

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10 The survey questions posed by both Freeman & Rogers and Frege & Godard were designed to identify structures that appeared to violate Section 8(a)(2).
representation from the perspective of promoting the fair resolution of workplace disputes, especially rights disputes?

Until recently, the law basically adopted a posture of *laissez faire* toward employers' internal dispute resolution structures: employers could decide for themselves what internal structures would help them to avoid litigation (provided they did not violate the law); but those structures made no difference in how litigation would proceed if it came to pass. But since the advent of mandatory arbitration, and the decisions in *Faragher*, *Ellerth*, and *Kolstad*, the law is clearly engaged in the enterprise of regulating employers' own dispute resolution structures. Without mandating them, courts are encouraging them, judging their adequacy, and dealing out regulatory advantages to those that pass muster. At best, the regulation of employers' self-regulation can promote the realization of employee rights and the penetration of public values into organizations. But without effective employee representation in the design and implementation of those self-regulatory structures, there is reason to doubt that those internal procedures are trustworthy enough to warrant regulatory deference. The law should not be dealing out regulatory concessions to self-regulators unless employees are effectively represented within the "self" that is being regulated (Estlund, 2010).

In other words, having gone down the path toward regulated self-regulation in the workplace, the law must take additional steps to democratize internal governance structures. Crucially, one need not embrace the intrinsic value of democracy in the workplace to recognize that worker representation in the machinery of self-regulation – and specifically in the machinery of dispute resolution and employee reporting – is an important safeguard of the legitimacy and integrity of those structures. The core idea of co-regulation is thus to better realize the public norms and values embodied in employment rights and labor standards by democratizing workplace governance. Co-regulatory reforms would extend the parallel trajectories of employment rights and litigation and of union organizing and collective bargaining from conflict toward shared governance. (Of course even parallel trajectories might be quite distant from one another; as I have conceded elsewhere, co-regulation is unlikely to deliver to workers the kind of voice and power that they had in some unionized workplaces in the heyday of collective bargaining (Estlund, 2010, pp. 241-42).

The upshot is that neither prohibition nor permissive *laissez faire* is the right approach to non-union representation schemes. Neither, however, is it necessary to mandate or mandatorily regulate such structures (though that is what other advanced industrial economies of the world do through "works councils" or other forms of employee consultation). What is required is the development of legal standards, including standards for employee representation structures, that can safeguard the integrity of internal and arbitral dispute resolution structures, and thereby justify the deference that self-regulating employers are claiming in the context of public rights disputes.

**B. How Can Non-Union Employee Representation Work in a Co-Regulatory Regime?**

So let us consider briefly what employee representation in internal dispute resolution procedures, including arbitration, might look like. We know what it looks like in the
union workplace, and it is clear that collective bargaining and its signature grievance-arbitration processes do contribute to compliance with employee rights and labor standards under external law. But what about in the non-union setting? We might do well to ask: By what mechanisms do unions improve compliance with external law, and can any of those mechanisms be reproduced or approximated in the non-union setting?

Our focus here should be chiefly on the role of worker representatives in the fair implementation of dispute resolution systems as opposed to their basic design. That is because, as noted above, a co-regulatory approach to workplace dispute resolution should include indices of fairness in the design of dispute resolution schemes. For example, for any mandatory arbitration of “rights disputes,” that would include guarantees of arbitrators’ neutrality (at least as robust as those under existing law). But how are any such guarantees to be monitored and implemented in particular workplaces and cases? The difficulty of that question is one of the reasons for requiring employee representation in dispute resolution processes. So let us focus on the nature and functions of employee representation in dispute resolution schemes.

We have already suggested three ways in which unions address the difficulties that individual employees face in pursuing rights-claims and other grievances: Unions help to solve collective action problems; they reduce or blunt employees’ fear of reprisals; and they put independent collective power behind employee interests. It is important to note that unions do these three things (especially the last) only because – or to the extent that – unions actually represent workers. That, along with independence and power, is difficult to achieve with non-union representation, and we will return to it below.

Addressing collective action problems: Unions help to solve collective action problems in at least four ways: First, they pool information about worker concerns and employer practices (for example, the fact that several workers are being required to work off-the-clock to clean up after their shift, or are finding small discrepancies in their paychecks that may suggest manipulation of time records, both practices that have been documented in large retail operations (Greenhouse, 2009). Second, unions pool workers’ interests in pursuing shared concerns that may not be worth pursuing for the individual, but that can be efficiently pursued on behalf of the group (as with off-the-clock work and time-shaving). Third, they can develop technical, legal, and practical expertise that it is not worthwhile or feasible for individual workers to acquire (such as knowledge about the proper classification of workers under the FLSA, and skilled advocacy for workers within grievance-arbitration processes. Many of these advantages of unions stem from a fourth feature: as repeat players in the use of dispute resolution machinery, unions have a greater incentive and ability to shape the decisionmaking process in employees' interest; and arbitrators, who depend on repeat business, have an incentive to reach decisions that both sides regard as fair.

None of these capabilities is categorically beyond the reach of non-union representative bodies, though some pose challenges. The pooling of information and interests within the particular group of workers is the least challenging criterion; it would seem mainly to require proximity and open lines of communication between workers and their representatives within the workplace. That may be harder in large, or highly dispersed, or fragmented workplace organizations. But these problems recall the question, posed but postponed above, of how to ensure the representativeness of a non-
union employee representation body. If “representativeness” is understood to require not only elections but elections within reasonably-sized units that map onto workplace networks and interests – e.g., departments, level (rank-and-file versus supervisory), or work locations – then those representatives should be able to pool workers’ knowledge and interests as well.

The third function of unions – their accumulation of technical and legal expertise – depends partly on scale: Unions have their own resources, drawn from thousands of workers from many workplaces in the same industry; and they enjoy economies of scale that are not available to a non-union workplace-based representative. Public regulators might partially fill that gap by serving as a resource and training center for non-union representatives, and by developing and disseminating “best practices” regarding fair internal procedures for reporting and dispute resolution. Unions’ status as “repeat players” is important in part for their incentive to invest in developing fair dispute resolution machinery; public resources and public standards for what counts as a fair dispute resolution process can help address this need. The “repeat player” effect on arbitrators also depends partly on unions’ scale and continuity over time: It may be only over multiple workplaces and several years that any one arbitrator can expect to meet the same employee representative repeatedly. That is less likely in the case of workplace-based non-union representatives. But that gap, too, may be partially filled by dedicating modest public regulatory resources to the support of employee representatives.

On the whole, it seems that non-union employee representatives can do some but not all of what unions do to overcome collective action problems in the design and implementation of dispute resolution procedures.

Guarding against reprisals: Employees’ vulnerability to reprisals is the Achilles’ heel of any system of self-regulation. Unions guard against reprisals and the disabling fear of reprisals in at least two ways: First, they can pursue some grievances as an institution, thus enabling individuals to make complaints anonymously vis-à-vis the employer. That is something that a non-union representation structure should be able to do, provided that the designated representatives themselves are protected from reprisals. That points to the second mechanism by which unions guard against reprisals: They typically secure strong job security in the form of contractual just cause protection both for ordinary employees and for union representatives. Just cause protection, backed by “industrial due process,” confers much greater security against reprisals than does the right to bring a retaliation complaint or lawsuit, where burdens of proof, procedural roadblocks, and delay fall on the complainant.

The remarkable staying power of “employment at will” might seem to put the desideratum of “just cause” protection beyond reach for non-union workers. But the law could and should provide that one criterion for the adequacy of internal self-regulatory

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12 The problem of reprisals is a familiar one in the domain of corporate compliance, but current law on the matter is highly unsatisfactory: The law strongly encourages and rewards "effective compliance systems," which must include employee reporting procedures and assurances that those who use them will suffer no reprisals. But the law does not require that non-retaliation promises be legally binding, and employers routinely get by with, and get legal credit for, unenforceable promises (Moberly, 2008).

13 Union officers and stewards also often enjoy "super-seniority" protections against layoff under the collective bargaining agreement (Elkouri & Elkouri, 2003).
structures is that employee representatives must enjoy not only protection against reprisals but also just-cause protection by contract. The law should ensure that retaliation or the threat of retaliation for legitimate activities of an employee representative or informant should trigger not only expeditious and adequate remedies for the employee but also serious sanctions for the offending employer.

**Power:** Finally, and behind all of the foregoing mechanisms, unions potentially put collective economic power behind their representation of employee concerns, and they are accountable to workers and independent of the employer. These are the features of unions that are most difficult to approximate, much less replicate, in the non-union setting. Let us begin with the question of power. Ultimately unions' power still rests largely on the ability to strike (or to use other collective "economic weapons"). We will not dwell on the difficult question of how powerful unions' economic weapons are in today's perilous legal and economic landscape. The question is what power, if any, non-union representatives could put behind their demands for compliance with legal rights and labor standards.

One answer is the law itself; that is, the ability to trigger costly, disruptive, and embarrassing litigation against the employer. If power in this context is the ability to bring undesirable consequences to bear on employers that resist workers' demands, and if the demands in question consist of well-founded rights claims, then the law itself, and the existence of private rights of action, give workers power that collective representation enables them to deploy more effectively. (For example, a representative entity might be able to organize aggregate litigation, or even pursue litigation itself on behalf of the workers.) That proposition might seem to ignore the very phenomenon of regulated self-regulation that we are seeking to improve here. That is, if employers can dodge the threat of public enforcement through mandatory arbitration, and can limit the extent of their liabilities through internal grievance procedures, employees' power is accordingly limited. Co-regulation offers a way out of this conundrum: Workers' representatives must have both a meaningful role within self-regulatory processes (including arbitration) and the ability to escape those processes when they are ineffectual or skewed. So arbitration agreements should not be enforceable unless workers have effective representation in the design and operation of the arbitration system. Workers' representatives must be empowered to exercise the outside option of judicial enforcement, and to blow the whistle on ostensibly responsible self-regulators, when they can show that internal processes are not trustworthy.

**Representation, Accountability, and Independence:** U.S. labor law seeks to ensure unions' representativeness, independence, and accountability in several ways: It confines collective bargaining (through which unions perform nearly all their functions) to unions that enjoy majority support in the relevant group of workers; and it requires election of key union officials, with rules designed to ensure some measure of democratic accountability to workers. (Crucially, US labor law also bars employer interference, assistance, and domination of labor organizations, broadly defined; that provision poses some paradoxical hurdles in the present context, as we have seen.) There are other labor law regimes that can ensure unions' accountability, often with less state involvement in trade union affairs. But the point is that unions cannot perform their functions in an
industrial relations system – including their function in promoting industrial peace and conflict resolution – unless they are reasonably accountable to workers.

Putting aside for the moment the hurdles posed by Section 8(a)(2), it seems equally clear that, for a non-union representative body to serve its functions within a system of regulated self-regulation, it must have some institutional guarantees of “representativeness.” At a minimum, its members must be chosen by workers. That probably requires elections in most instances, and elections within reasonably small units that map onto workplace networks and worker interests – e.g., departments, pay and authority level (rank-and-file versus supervisory), and work locations. This is not the place for further elaboration of the form that elections would take (though European experience with works councils and other consultation mechanisms would provide useful models, Rogers & Streeck, 1994).

It is worth repeating the point that election of employee representatives would not be mandatory; it would be one condition for entry into a co-regulatory system. It may be that, to many employers, a requirement of elected employee representatives would appear so onerous or risky that it would be a deal-breaker -- too high a price for entry onto the co-regulatory "high road." So be it. To gain the regulatory concessions and the reputational boost that ostensibly responsible employers seek, they should have the burden of proving up the requisites of effective self-regulation. Employee representation is a critical structural safeguard against the risks of cheating, backsliding, and "cosmetic compliance" that attend any system of self-regulation (Krawiec, 2003).

V. Conclusion

In some ways the trend toward self-regulation in employment law is a reenactment of the New Deal embrace of self-governance over external public regulation as the primary mode of protecting workers and improving wages and working conditions. We are once again moving toward internal lawmaking and law enforcement within a public law framework, and away from direct public regulation or judicial resolution of workplace disputes. This time around, however, workers have been largely cut out of the internal governance schemes.

It is troubling that the trend toward self-regulation, and toward public reliance on self-regulation, has gained ground at the same time that the existing system of collective representation in workplace governance has lost so much ground. The corporate “self” that is gaining the prerogative to regulate itself is less likely than ever to encompass employees other than as individuals, who face familiar and daunting impediments to effective bargaining or intervention on their own behalf. Fortunately, the emerging system of regulated self-regulation contains the ingredients of a partial solution to the problem: The law sets conditions on self-regulatory privileges and concessions, and those conditions should include some reasonable form of employee representation.
References


