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Chapter 10:
Citizens of the Corporation? Workplace Democracy in a Post-Union Era

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Forthcoming in Corporations and Citizenship
(University of Pennsylvania Press, 2014) (Greg Urban, ed.)

Once upon a time, in the cauldron of economic depression and widespread labor unrest that produced the New Deal, the idea of “industrial democracy” burst into mainstream discourse and helped produce the National Labor Relations Act (NLRA). The NLRA, still the foundation of U.S. labor law, created a framework for industrial democracy through union representation and collective bargaining. Of course, unionization was not mandatory; it was an option that could be exercised by a majority of workers in a particular bargaining unit, and that employers (at least since the 1947 Taft-Hartley amendments to the NLRA) could freely and quite aggressively oppose. And that they did. For unionized operations, with their higher wages and benefits, had to compete with non-union operations.1 Globalization and deregulation gradually ramped up product market pressures, which stoked employer resistance to unionization, which in turn outstripped the reach and deterrent capacity of the aging NLRA.

That, in short, is the story behind the drastic decline of union density to less than 8 percent in the private sector. It will take a monumental effort by organized labor, and a political economic sea change, to bring that figure back up to double digits. That battle is worth fighting, but it would still leave 90 percent of private sector workers without any semblance of what we once called industrial democracy.

It is telling that we can barely entertain the notion of a democratic form of workplace governance today without backpedaling: we do not really mean “democracy,” of course, but only some form of collective worker “voice” or participation. We cannot quite conceive of workers as citizens of the workplace with a right of collective self-determination, but only perhaps as “stakeholders” of firms that are governed by managers who are chosen by and accountable to the firm’s 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. We have become accustomed to thinking of work as a domain of economic relations—of market forces, supply and demand, entry and exit—rather than a domain of politics. And yet perhaps there is still a case to be made for a form of workplace democracy that can meet employee needs and aspirations without provoking vehement employer resistance—a domesticated version of workplace democracy to supplement (and not to replace) the essential right of workers to go into opposition against their employer by forming a union.
This essay explores the question of what workplace democracy could mean in the twenty-first century for the overwhelming majority of private sector workers that are destined to remain without union representation. It first takes up the questions of “what workers want,” and what they have by way of representation in today’s workplace. It then turns to whether and why workers still need a collective voice in the modern workplace, given the rise of employment mandates and improved workplace management practices. Finally, it suggests a role for responsible corporate citizens in supplying a measure of what workers want and need as workplace citizens (if only the law would allow them to do so).

What Kind of Workplace Representation Do Workers Want, and What Do They Have?

The decline of unions has opened up a large democratic deficit, or a “representation gap,” in the workplace. But the nature of that representation gap is contested and open to interpretation. In their massive, in-depth survey of worker attitudes in the 1990s, Freeman and Rogers found support for the labor movement’s view that many workers (30 to 40 percent of non-union, non-managerial employees in the private sector) wanted independent, union-like representation, and that labor law reform was needed to make that choice available even in the face of management opposition. But the survey found that 85 percent of workers wanted a less adversarial type of organization, one that is “run jointly” by employees and management. Indeed, when asked to choose between an organization with which management cooperated but that had no power, and an organization that had more power but that management opposed, employees said they preferred the former by a margin of 63 percent to 22 percent.

Employees’ preference for cooperative non-union forms of representation is partly an “adaptive preference”: employees know that employers vehemently oppose unions, and that makes unionizing difficult, risky, and less likely to yield gains. For some employees, employer opposition is simply a fact of life; others may trace it, as many employers themselves do, to increasingly intense product market competition from near and far-flung sources. Either way, that is the world these employees live in. In that world, workers’ preference for a form of participation that is cooperative by design, and that elicits management’s cooperation, seems entirely sensible. Workers want a collective voice at work, even if it is a less powerful voice than unionization and collective bargaining would bring.

Unfortunately, the NLRA prohibits the very form of representation that most workers say they want; that is, an organization “run jointly” by employees and management. The NLRA’s “company union” provision, Section 8(a)(2), prohibits employer domination of or assistance to “labor organizations”; that term is defined to include any organization “in which employees participate,” and that “deals with” the employer on terms and conditions of employment. To be sure, there are no serious
sanctions for violating 8(a)(2); at worst an employer may be ordered to disestablish an unlawful organization. The fact remains, though, that federal law prohibits employers from maintaining representative structures through which employees can meaningfully discuss workplace concerns unless they are entirely independent of the employer.

Section 8(a)(2) was the most controversial provision of the NLRA, partly because it prohibited not only representative structures that were designed to fend off majority-backed demands for union recognition, but also those that pre-dated any union organizing and that enjoyed strong support from employees. For a New Deal Congress that sought to promote collective bargaining throughout the economy, all company-backed representation schemes appeared to discourage the growth of independent unions. The “independent union or nothing” approach of the NLRA remained in place even after Congress in 1947 recast the goal of the labor laws as the protection of employee “free choice,” and even today when union density has fallen to single digits. Under U.S. labor law, it is legitimate for employees to choose not to be represented by a union, and for employers to pay good wages and treat employees fairly 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 now mandate some form of employee representation, apart from union representation and collective bargaining. No country broadly prohibits voluntary forms of non-union representation or worker-management cooperation as does the United States. Even Canada, whose labor laws are largely modeled on American ones, maintains a narrower “company union” ban; it permits, even requires, forms of worker representation that are illegal in the United States.

So what most workers say they want in the United States is not legally available. And yet consider what U.S. workers say they have. In one recent study, 34 percent of non-union respondents reported having some form of management-established representation structure at work. These are not identity-based affinity groups (which were tracked separately), nor are they mere “quality circles.” Many (42 percent) involved discussions of wages and benefits. Workers mostly seem to like these representation schemes (as one would expect given their expressed preferences). Most participants rated them highly in terms of consulting with workers (54 percent) and standing up for them (51 percent). These schemes were also correlated with employee perceptions of modestly greater security, dignity, fairness, and justice (though that appeared to reflect their coexistence with other employee-friendly human resources practices). These structures are almost certainly illegal under the NLRA.

We do not know much more about how these management-established schemes function. Many employers appear willing to violate Section 8(a)(2) by creating these
structures, but few are willing to discuss them publicly. Moreover, it seems certain that
the law discourages some employers—especially large, high-profile firms with strong
“compliance” structures and norms—from setting up such organizations. It is fair to
assume that more employees would have access to these forms of representation, and we
would know more about them, if they were not illegal.

So we find that the overwhelming majority of workers say they want a form of
collective representation that the law says they cannot have, and that a significant
minority of employers are in violation of the law by giving employees what they say they
want. These are facts worth reckoning with. But perhaps workers’ own stated preferences
are not a sufficient basis for reform. In some accounts of the modern workplace, workers
no longer need collective representation because their interests are adequately protected
by a combination of legally enforceable mandates and self-enforcing norms. I will argue
in the next section that these accounts are wrong and 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.

The Rise of Workplace Mandates (and Why They Are No Substitute for Collective
Voice)

The New Deal launched three forms of legislative intervention in private sector
employment: support for collective bargaining through unions, construction of a floor on
wages and working conditions, and elaboration of rights and liberties at work.14 The three
branches of the New Deal settlement have obviously met divergent fates. Employers have
mostly won their battle against collective bargaining. But they have had less success in
resisting the encroachment of mandates, as both minimum labor standards and
nonwaivable employee rights have proliferated modestly but steadily since the New Deal.

On some accounts, legislative mandates function as a kind of union substitute,
giving workers much of what they might have sought through unionization. But most
minimum standards are quite minimal, and are often under-enforced, leaving most terms
of employment for most workers subject to individual “bargaining” and labor market
forces. Moreover, the enforcement of mandates is largely in the hands of employees
themselves, and is beset by both collective action problems and the fear of reprisals. That
is partly because U.S. law does not mandate protection against unjustified dismissal.
Employees’ lack of legally enforceable job security, whatever its economic benefits,15
undermines employees’ ability to enforce other workplace rights.16 So the regime of
mandates on which we have come to rely for the protection of employees is itself plagued
by a “representation gap.” I have elaborated on this problem at length elsewhere,17 and
will be brief here.

Minimum Labor Standards and Their Limitations

The New Dealers believed that market mechanisms for the allocation of goods,
services and labor, though worth preserving, were intrinsically flawed.\(^{18}\) Competition needed to be “fair” rather than “free,” lest it generate a destructive “race to the bottom” in which responsible firms were undercut and the public injured by exploitative cost-cutting.\(^ {19}\) In particular, in the midst of the Great Depression, labor market competition had pressed wages too low and hours too high to satisfy the legitimate needs of workers and their families. The NLRA of 1935 and the institution of collective bargaining was part of the New Dealers’ answer. But in addition, the Fair Labor Standards Act of 1938 (FLSA) set a nationwide minimum wage and mandatory overtime premium and banned most child labor across much of the private sector labor market. Above that fairly low nationwide floor, states were free to demand higher standards, and private parties were free to bargain, either collectively or individually.

For a few decades, Congress left the field of employment to collective and individual bargaining, subject to a periodically adjusted minimum wage level. But some gaps between public demands and private bargaining gained political salience in the 1960s. Congress responded with the Occupational Safety and Health Act of 1970 (OSHA), which sought to take workplace safety out of competition by establishing publicly enforced minimum standards; the Employee Retirement Income Security Act of 1974 (ERISA), which regulated the administration and funding of employee pension and benefit plans; the Worker Adjustment and Retraining Notification Act of 1988 (WARN), which required advance notice of plant closings and mass layoffs; and the Family and Medical Leave Act of 1993 (FMLA), which required modest periods of unpaid parental and medical leave. Notwithstanding persistent complaints from employers about the burdens they impose, none of these mandates has ever been significantly cut back.

These employment laws have conferred on employees a modest measure of protection from the vicissitudes of the market. Yet those laws have proven inadequate to the task of regulating labor standards in millions of workplaces across the country. In part that is because no uniform standards can meet the needs of workers and the capabilities of employers across the breadth of the labor market;\(^ {20}\) minimum labor standards fall well below the level that many employees demand and many employers could supply. But even those minimum standards are under-enforced, especially in the lower reaches of the labor market.

The problem under the wage and hour laws is illustrative: whenever there are workers willing to work for less than the law requires—as poor and undocumented immigrants often are—employers are sorely tempted to pay them less. Traditional enforcement mechanisms fail to raise the cost of noncompliance high enough to outweigh the immediate savings from noncompliance, and employers risk little by underpaying employees in violation of the law.\(^ {21}\) Some simply ignore minimum wage and overtime requirements; others misclassify workers as exempt from the law’s requirements or exact “off-the-clock” work. These practices are found even in major firms—Wal-Mart, for
example, became notorious for its “off-the-clock” work policies—but they are especially common among marginal producers with little fixed capital or stake in their reputation.\(^\text{22}\)

Occupational health and safety laws confront a more complex economic calculus; clearly the law is not all that drives firms to invest in safety. But to the extent that the law is needed to deter dangerous practices, it is not up to the job. OSHA enforcement is plagued by rare inspections, low penalties, and long delays.\(^\text{23}\) Some firms invest seriously in compliance and worker safety, but some firms compete by squeezing labor costs, and in part by skipping safety precautions, or by driving workers at a pace that forces them to cut corners.

The problem of under-enforcement under the FLSA and OSHA reflects in part a chronic shortfall in public enforcement capacity. There is simply no way for public agencies and inspectors to monitor and enforce compliance with labor standards in millions of covered workplaces. Rather, employees themselves must take the lead role in monitoring and enforcing their own labor standards. But that points to another problem: decent labor standards are “public goods” within the workforce. The public good dimension of workplace safety is especially clear.\(^\text{24}\) But collective action problems plague many terms of employment, for employers manage their workers largely through policies and practices, not individualized agreements. So if an employer demands “off-the-clock” work from a group of employees, a single employee who challenges that practice faces a “free rider” problem: both the cost to the employer and the benefit to employees of correcting the practice far exceed the benefit to the individual complainant. A complaining employee bears all the costs and only a fraction of the benefits of confronting the employer.

The public goods nature of workplace terms and conditions suggests, and empirical studies confirm, the value of a collective voice for workers in achieving compliance with minimum labor standards.\(^\text{25}\) And that brings us back to the problem of union decline and the “representation gap”: most employees have no legally sanctioned vehicle for collective participation in labor standards enforcement; they have only the individual right to file a complaint or contact regulators.\(^\text{26}\) The NLRA poses a legal obstacle to efforts by states or regulatory agencies, as well as by employers, to institute health and safety committees in the non-union workplace.\(^\text{27}\) The decline of unions and the lack of any lawful alternative vehicle of collective voice contribute in turn to the under-enforcement of labor standards.

**Employee Rights and Their Under-Enforcement**

The idea of the workplace as a domain of civil rights and liberties animated the NLRA and its version of industrial democracy. But that idea was dramatically extended and transformed with the Civil Rights Act of 1964, Title VII of which banned discrimination in terms and conditions of employment based on race, sex, religion, color,
and national origin. The banner of equal opportunity has proven to be politically formidable and adaptable. Congress has extended it to new categories (age, pregnancy, disability, and genetic endowment), added new remedies, and overruled court decisions that restricted liability. State and local laws protect additional groups and provide additional avenues of recourse. Most of these statutory equality rights are enforceable both by public agencies and by individuals; a jury trial is generally available, and remedies include compensatory and exemplary damages, as well as attorney fees.

Employment discrimination laws gave birth to a plaintiffs’ employment bar, which in turn helped employees claim rights of privacy and dignity on and off the job, and of freedoms of belief, association, and expression at work. Those claims were up against the employers’ presumptive power under employment at will to terminate employment at any time for good reason, bad reason, or no reason at all. But the civil rights laws had already dealt a mortal blow to the legitimacy of firing employees for “bad reasons,” and opened the door to legislative and judicial recognition of other unacceptably bad reasons for discharge. Beginning in the 1960s, common-law courts began to invoke public policy to afford redress to employees fired for refusing to violate the law, for claiming a legal right, or for “blowing the whistle” on illegal conduct. Legislatures also entered the fray, particularly with the protection of “whistleblowers” from retaliation. Wrongful discharge law thus became a major source of litigation.

The expansion of employee rights should not be overstated. The scope and strength of those rights vary from state to state and are often quite restricted. Moreover, enforcement is left largely to employees themselves. Given the cost of litigation and the difficulty of proving an unlawful motive, many employees are unable to find an attorney to challenge employer actions they believe to be illegal. Some workers, especially low-wage immigrants, may be so unlikely to sue that employers can safely ignore their rights. In short, some employee rights, like labor standards laws, are under-enforced, at least at the bottom of the labor market.

Part of the problem is that even individual employee rights have a “public goods” dimension, so that enforcement faces collective action problems. That is particularly true of many discrimination claims. First, the very nature of discrimination lies in treating individuals differently based on their group identity; absent “smoking gun” evidence, discrimination may not be recognized, much less provable, unless employees can share and collect information about how other group members are treated. That information is a public good. Second, as Title VII law itself recognizes, discrimination often occurs not through one-off personnel decisions, but through policies and practices that affect many employees at once. Those policies and practices may be challenged through both “pattern-and-practice” lawsuits and “disparate impact” claims, and the law allows for aggregate litigation to mitigate the collective action problems that face such claims and to spread the considerable cost of proving them. Yet workforce-wide theories of liability
and aggregate lawsuits face many hurdles, legal and practical, especially in the wake of recent Supreme Court decisions overturning class certification in the Wal-Mart case, and upholding employers’ power to use mandatory arbitration clauses to bar group claims.33

So aggregate forms of discrimination, and the collective action problems that follow, are not matched by effective aggregate forms of redress. Nor are they matched by effective collective mechanisms for addressing discrimination internally, and for pooling employees’ information and interests regarding discriminatory policies and practices. Once again, the “representation gap”—and the lack of a meaningful collective employee voice in most workplaces—undermines effective enforcement, here, of employee rights.

For a variety of reasons across a wide range of employment mandates, both above and below official minimum standards, the individual employment contract and the market forces that operate on parties to the contract effectively govern most terms and conditions of employment most of the time for most employees. That is especially true at the top and the bottom of the labor market. So let us turn briefly to the nature of that employment contract.

**Norms in the Non-Union Workplace (and Why Workers Still Need a Collective Voice)**

The employment contract is highly incomplete. Most of its terms are relegated to employer discretion, informal norms, and reputational sanctions, and are not legally enforceable. On one account, that is as it should be. In any event, that is how it is. The question is whether employees in the non-union workplace are adequately protected against the risk of employer opportunism in this norm-based regime, or whether they need some form of collective voice to help police against opportunism.

*The Incomplete Employment Contract in Theory*

According to the economic theory of the firm, firms “make” rather than “buy”—they employ labor internally rather than contracting with other market actors for the relevant products or services—when the nature of the work requires close monitoring, firm-specific knowledge, or both.34 In such cases, both the transaction costs associated with the negotiation and enforcement of detailed contracts with outsiders and the productivity gains from workers’ accumulation of firm-specific skills are likely to be very high. In such cases, it is more efficient to hire employees to perform the work within the firm, subject to managerial control, than to contract with outside actors.

So the boundaries of the firm are defined by the choice of managerial control within the firm over formal contracting with outside parties. As a result, employment relations within the firm, though contractual in nature, are fundamentally different from ordinary contracts for goods or services. Their raison d’etre is the avoidance of explicit contracting costs, and their terms are largely open-ended or “incomplete”; they leave
much to employer direction and discretion. The resulting “internal labor markets” generate joint gains that can be divided between the firms’ owners and employees. Yet internal labor markets are also characterized by “match-specific investments” and information asymmetries, and by risks of opportunism that are generally thought to be absent in competitive external labor markets. In particular, employers may be tempted to exploit employees’ firm-specific investments and lack of external labor market options, and keep too much of the joint surplus for themselves.35

One solution lies in discerning and enforcing the terms of the individual contract. But the economic theory of the firm suggests that legal enforcement of the terms of individual employment contracts is presumptively inefficient because it imports into the employment relationship many of the costs that the relationship was formed to avoid.36 Crucially, legal enforcement is also said to be unnecessary to protect employees, for workplaces are governed by norms of fairness backed by the threat of informal sanctions.37

We should pause for a moment to observe that the quality of “human resources management” (HRM) in the non-union workplace has undoubtedly improved since the conflict-ridden 1930s. Under the pressures of legislation, litigation, and the “union threat effect,” modern corporate employers have developed fairer and more humane modes of managing workers.38 Clearly, harsh (and illegal) labor practices still prevail at the bottom of the labor market, including within major corporations and their supply chains (and observers will disagree over how to define that “bottom” and how high up it goes). But at least relative to the levels of exploitation and arbitrariness that prevailed up to the New Deal, most employers in both the union and non-union sectors have cleaned up their act. It is against that backdrop that some economists contend for the superiority of non-legally enforceable norms of fairness over formal contract.

Rock and Wachter thus argue that legal enforcement of employer promises of job security is unnecessary, costly, and ultimately counterproductive for workers.39 It is unnecessary because employers already face reputational sanctions for breaching norms of fair treatment: current employees may punish the opportunistic employer by quitting or reducing their effort, and prospective employees will avoid those employers or demand higher wages. Legal enforcement is also costly: both the sheer expense of litigation and the risk of error by outside decision makers are high given the open-endedness of many terms of employment and the difficulty of monitoring employee performance. All that being the case, legal enforcement is ultimately counterproductive for workers because its costs are greater than the incremental gain in job security, and those costs will be borne by employees in the form of lower wages. In short, workers are and rationally should be unwilling to pay for the benefit of legal enforceability; it is simply not worth the price.

So there is a theoretical case to be made for reliance on non-legally enforceable norms within internal labor markets—a case that we will revisit more critically below.
(For one thing, to the extent the union threat effect is responsible for “self-enforcement” of norms, the waning of that threat is a source of concern.) But does the law comport with the theory? In fact it has come to do so, by a somewhat roundabout path.

The Incomplete Employment Contract in Fact

Although courts are hardly guided by the “theory of the firm” when faced with employee claims of unfair treatment and broken promises, they reach much the same result through doctrines that ensure a high degree of managerial discretion over how employment relations are to be governed. Managerial discretion and the predominance of norm-based governance was supported by one set of legal doctrines for much of the twentieth century, and then, after a decade or two of transitional uncertainty, by another set of doctrines.

Until the 1960s or 1970s, individual employee claims of unfair treatment were mostly kept out of the courts by a very robust presumption of employment at will. As long as employees were free to quit at will, courts were loath to find employers bound even to express promises of job security, and as long as employers were free to fire employees at will, they were also free to impose virtually any terms they wanted as a condition of continued employment. The result was that, except in rare cases, employers were constrained only by non-legally enforceable norms and informal sanctions, not by enforceable contracts.

Starting in the 1970s, the legal fortifications around employment at will began to crumble, and courts began to see broken employer promises as breaches of contract. Few employees had secured individual written promises regarding job security, but many could attest to oral or implied promises of job security, or could point to employee handbook provisions promising fairness in discipline and discharges. There was much wrangling over whether these promises were sufficiently definite and of the proper form to be legally enforceable. But by 1990 or so, courts in most states had opened one or more avenues of legal recourse to employees claiming that employers had broken promises of job security in discharging them without justification.

Employers were alarmed to learn that past assurances and existing policy documents might open them up to employee lawsuits over discharges. But even as courts opened the door to employees’ contract claims, they instructed employers on how to close the door: all they needed to do was to include in any employee handbook a clear “disclaimer” explicitly denying any intent to make binding promises and reaffirming the employer’s right to modify its terms and to terminate employment at will, without cause. A reasonably prominent boilerplate disclaimer in employee handbooks or job applications would foreclose nearly all contract claims, whether based on an oral contract, implied contract, or handbook.

Once employers rewrote their manuals and job applications to incorporate the
requisite disclaimers, they largely defused the threat of contract litigation for newly hired employees. For incumbent employees who already had (newly) enforceable expectations of job security, employers sometimes had to jump through some legal hoops to modify those prior promises. But one way or another, employers were generally able to condition continued employment on employees’ acceptance of new (at-will and non-legally enforceable) terms for the future. It took a decade or two in most states for the new legal rules to be worked out and for employers to modify their employment practices accordingly. But in the end, employer prerogatives were largely intact. The new law of the employment contract, much like the old, allows employers to adopt a regime of norms without legal enforceability. For at the end of the day, contract law is about enforcing promises, and employers largely decide for themselves what to promise employees.

So under the modern law of the employment contract, employers can and generally do choose to govern the workplace largely on a discretionary basis, subject to market forces, external mandates, and informal norms, but without the constraints of legally enforceable contractual obligations. Unlike the old days, employers now have to make explicit their commitment to employment at will and their avoidance of contractual constraints. If employees read and understand the disclaimer language by which they are bound, they now realize that their expectations of fair treatment are backed up only by their employers’ reputation, and not by the courts. (Unfortunately, many employees appear to believe otherwise.)

In theory, again, this should work out just fine for employees—better, in fact, than a costly regime of legal enforceability. In theory, if employees observe employer opportunism, they can go elsewhere or simply put forth less effort, or they can form a union and opt for a regime of collective contract and arbitral enforcement. Those informal, non-legal sanctions may induce most employers to live up to their promises most of the time. But problems remain.

Prospective employees may have difficulty gaining reliable information about employment practices. They may not see employee manuals, non-compete covenants, or arbitration agreements until starting a new job, when their options have narrowed. Even as to current employees, employers may be able to conceal opportunistic behavior (for example, by portraying an unfair discharge as fair or turning it into a “voluntary” resignation), and they may be able to detect and deter employees’ countermeasures (reduced effort, for example) by closer monitoring and the threat of termination. Employees’ primary recourse in response to unfairness is the right to quit, but quitting may be quite costly, especially for employees who have accumulated firm-specific skills and knowledge, and especially in slack labor market conditions.

The vagaries of non-legal enforcement are exacerbated by the fact that employers’ compliance with informal norms and promises of fair treatment, as well as information about compliance, is a public good within the workforce. Compliance is usually a
wholesale and not a retail matter—a matter of policy, not individual case-by-case decision making. The cost of compliance to the employer is often much greater than the benefits to any one employee, so that, even apart from the fear of employer reprisals, each employee is tempted to free-ride on others’ efforts to enforce norms or promises made to a group of workers.

The point is not that informal sanctions do not work at all, but that they work imperfectly and to varying degrees. Informal norms and reputational sanctions will better protect the expectations of workers with scarce and higher-level skills; workers who lack those skills are easier to replace and easier to monitor, thus reducing the cost to the employer of its own opportunism. So, too, informal norms and sanctions will be more effective in disciplining the behavior of larger and more established firms with robust reputations, and less effective in disciplining smaller and more marginal firms with less history, less of a public profile, and less of a stake in cultivating a good reputation. In other words, even if informal norms and sanctions were perfectly adequate to protect the expectations of most skilled and valued workers in Fortune 500-type firms, they would come up short for less skilled workers, especially in smaller and more marginal firms. All employees, but especially those in the latter group, would benefit from the existence of collective structures for pooling information, monitoring conditions, and asserting complaints.

**Is There a Future for Workplace Democracy or Worker Voice?**

So there is good functional sense in employees’ desire for more and better forms of collective voice in their working lives. The decline of unions in the past sixty years, and the lack of any lawful alternative structures of collective voice, have opened a representation gap that has not been filled, or rendered irrelevant, by the simultaneous rise of employer mandates, better HRM practices, and stronger norms of fair treatment.

Unfortunately, that is not enough to get employees what they want. It is not even enough to remove legal obstacles to cooperative forms of employee representation. The well-grounded demand for labor law reform that facilitates union organizing has a powerful institutional advocate in organized labor, yet it has (again) failed in the face of unanimous and vehement business opposition. An effort to meet employees’ well-grounded desire for more cooperative forms of collective voice at work would provoke far less opposition, and even some support, from employers. But that effort does not have a strong institutional champion. (Indeed, unions have long opposed any narrowing of the “company union” ban on the grounds that it would expand employers’ anti-union repertoire and impede organizing.47 Nor are employee desires for greater collective voice (in union or non-union forms) spilling into the streets and disrupting the social and economic order. 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 anticapitalist ideologies—and the claim that union recognition and collective
bargaining were necessary to secure labor peace and social order.

I do not want to digress too far into the realm of politics here. But I do want to explore the question of whether “responsible corporations” could themselves become the champions of meaningful yet cooperative forms of employee representation in workplace governance. The template that I have in mind is the corporate embrace of workforce diversity.

The quest for workforce diversity originated in legal demands for equal opportunity. But it grew into an independent movement, one emanating largely from inside corporate HR departments, for institutional reforms that go far beyond what employment discrimination law demands (and perhaps even beyond what its “colorblind” version permits). Lawsuits, threats of federal contract debarment, and damaging publicity surrounding complaints of bias all played crucial parts in motivating corporations to embrace a commitment to equal opportunity, especially in the beginning of the civil rights era. But in the decades since, “compliance” motivations have receded, and corporate diversity efforts have moved up the organizational chart and into the management suite. Having a diverse and inclusive workforce, and following “best practices” to promote diversity and inclusion, has become an important part of how corporations and their managers define their corporate identity and promote their reputations as good corporate citizens.

The story of how corporate America came to champion diversity and equal opportunity is fascinating and complex. A major part of the story lies in how personnel and HR managers both embraced the antidiscrimination norm and adapted it to fit organizational imperatives and minimize internal conflict (and incidentally to elevate their own role within the firm). The antidiscrimination norm has proven “digestible” by organizations; it has been accepted and internalized into the corporate body, both transforming corporations and being transformed in the process.

We should not paint too rosy a picture, even within the Fortune 500; after all, Number One on that list is Wal-Mart, Inc., sued in 2004 in the largest sex discrimination lawsuit of all time. Still, progress is undeniable. Overt barriers to entry and advancement at work have been largely dismantled, and the more subtle barriers that remain are less exclusionary. For black and Hispanic workers who make it to adulthood with an education and a decent basket of skills, their prospects for employment and advancement in a wide variety of jobs and organizations are far better than they were fifty years ago. Title VII and the norm of equal opportunity must be judged at least a qualified success.

Is something like that possible with a norm of workplace democracy or “voice at work”? That is another complicated question, and one that I only begin to explore here. The analogy between a right of “equal opportunity” and a right of democracy or
collective voice at work is hardly seamless; there are many reasons why the former was more “digestible” than the latter can possibly be (unless it is reduced to meaningless pabulum). But one thing is quite clear: collective voice will never be embraced as an element of responsible corporate citizenship as long as it is identified exclusively with unionization. The right to form a union and bargain collectively, even as it has been rebranded as “freedom of association” and elevated to the status of customary international law, has proven “indigestible” by U.S. 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 of the private sector economy.

Let me be clear: the right to form a union should not be abandoned; it should be fortified. Employees’ right to go into opposition, and to do economic battle with their employer, is an essential protection against abuse. At a minimum, the possibility of unionization must be part of the punishment that awaits employers on the “low road.” Collective bargaining need not take such an adversarial form, but that is how most employers see it, and that adversarial possibility is an essential inducement to better workplace behavior. But unionization and collective bargaining as we know them in the United States will never be embraced as essential features of responsible corporate citizenship.

The idea here would be 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 participation that employers would be not only allowed but encouraged (or eventually even required) to internalize and institutionalize. Such a right might be championed by the sort of coalition of civil rights and employee advocates and forward-thinking corporations that supported the enactment and expansion of the antidiscrimination laws. A campaign for workers’ right to participate—collectively and cooperatively—in workplace decision making has the potential to divide the business community, and to attract “responsible” employers, in a way that no union-backed labor law reform effort has ever done (not even in 1935, when the future of capitalism seemed to be on the line).

Conclusion

These musings are likely to be rejected as naïve at best and insidious at worst, by many in the labor movement. Some see all professions of 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. Others may believe that, while there are sincere corporate proponents of social responsibility, they are fooling themselves (and the rest of us) because corporations in
today’s world, and their top managers, cannot help but pursue profits at the price of human values. Like many reluctant converts to the belief that CSR can be a progressive force, I vacillate between the fear that the anticorporate crusaders are tragically squandering an opportunity to accomplish something good for workers, and the fear that they are right.

The 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 the process of promoting and shaping a norm in favor of affording employees a voice at work. Corporations are quite certain to use that greater freedom of action in part with an eye toward avoiding union organizing. If the risks are worth taking, it is only because the path we are now on appears to be leading to a grim place, with unions on life support (or beyond) and alternative outlets of employee voice under a shadow of outlawry. 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 reforms in the interest of employees.


3 Ibid., 81–92.

4 Ibid., 84–88.

5 Ibid.

6 Ibid., 88–91.


8 Freeman and Rogers, What Workers Want.


11 Godard and Frege, “Labor Unions, Alternative Forms.”
By way of comparison, unions got high marks from 41 percent of members (for consulting with members) and 54 percent (sticking up for members). Ibid., 16.


The argument made in this and the next major section of this chapter is elaborated at greater length in prior work. Cynthia Estlund, "Why Workers Still Need a Collective Voice in the Era of Norms and Mandates," in Estlund and Wachter, eds., Research Handbook on the Economics of Labor and Employment; Cynthia Estlund, Regoverning the Workplace: From Self-Regulation to Co-Regulation (New Haven: Yale University Press, 2010).


Estlund, Regoverning the Workplace.


The obvious utility of joint health and safety committees has led many employers to ignore the proscriptions of Sec. 8(a)(2) in this area, and it has led even the NLRB’s general counsel to offer a fig leaf of an argument against federal preemption, to states that require such committees. See Estlund, *Regoverning the Workplace*, at 172-75. Still, most functioning non-union health and safety committees are probably in technical violation of 8(a)(2).


Before 1991, race discrimination plaintiffs could seek damages and a jury trial under 42 U.S.C. §1981(a). After the 1991 amendments, a jury trial and damages (subject to caps) were available under Title VII itself.


37 Rock and Wachter, “The Enforceability of Norms.”
38 Wachter, “Neoclassical Labor Economics.”
39 Rock and Wachter, “The Enforceability of Norms.”
42 Estlund, Regoverning the Workplace.
43 Except for promises regarding compensation for work that has already been done; such claims will likely be deemed “vested” and thus enforceable. Rock and Wachter appear to concede the legal enforceability of “vested benefits.” Rock and Wachter, “The Enforceability of Norms,” 1936, n. 47.
47 The TEAM Act—the Teamwork for Employees and Managers—of 1997, which would have amended Section 8(a)(2) to allow for certain forms of non-union employee representation, was passed by Congress over union opposition but vetoed by President Clinton.
50 It is clear after the Supreme Court’s ruling in Wal-Mart v. Dukes, 564 U.S. 131 (2011), that claims of sex discrimination cannot proceed in the form of a single nationwide class action. But individual or store- or region-specific lawsuits involving many thousands of plaintiffs have followed.
51 According to EEOC data, the percentage of professionals in the private sector who belong to a “minority” group (Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native, Native Hawaiian, or mixed race) rose from 3.9 percent in 1966 to 23.8 percent in 2007; among private-sector “officials and managers,” minority representation rose from 1.8 percent in 1966 to 19.5 percent (and Black and Hispanic representation rose from 1.5 percent in 1966 to 14.6 percent) in 2007. Available at http://archive.eeoc.gov/stats/jobpat/2007/indicators.html.
course, minority group (and black and Hispanic) representation in the labor force as a whole also rose during this period, but to a far lesser extent.

52 Those pressures are muffled in the more centralized bargaining systems of Europe, for example. Indeed, most of the developed world embraces the idea, and has put in place institutional structures, for taking wages largely out of competition.