AGENCY AND COERCION IN LABOR AND
EMPLOYMENT RELATIONS: FOUR DIMENSIONS
OF POWER IN SHIFTING PATTERNS OF WORK

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Aviv University; LL.M. 2000, Harvard. I thank Duncan Kennedy for his endless support.
For their comments and suggestions, I am also thankful to On Amir, Yishai Blank, David
Charny, Cait Clarke, Janet Halley, Martha Minow, Celestine Nyamu, and Lucie White.
Errors are mine alone.
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I. INTRODUCTION

Because of the way that we divide up the world, it seems as though ownership and control are inextricably linked. Thus, we find it hard even to think about ways in which more humane, democratic, and participatory workplaces could be organized. The boss is the boss.¹

Traditionally, the idea of control has been aligned with hierarchy or “ownership,” while participation has been linked with democracy and “humanization.” Recently, though, these structural understandings have been challenged by the changing patterns of work and workplace organization. This paper argues that the course of power in the workplace setting is more complex and multidimensional than a flat hierarchy/coercion, horizontality/agency alignment and explores different patterns of work and production, and the possibilities for worker organization and employee voice in various settings. Its primary goal is not simply to defend certain forms of work-related organizations, but rather to show the problems in our concepts of power relations and to expose the logic of control in the context of the laws of work.

In the first part of the paper (Section II), I map the arguments and reasoning regarding collective bargaining and employee participation from two perspectives—“efficiency,” including productivity, profitability, macro-efficiency and growth, and “legitimacy,” including intrinsic values of membership, self-fulfillment, equitable power distribution, and the work arena as a learning process for the broader structures of society. As I unpack the genres of scholarship dealing with these questions, I emphasize two findings. First, I show how both economists and critical social theorists are divided in their accounts regarding the desirability of either of the two institutions—collective bargaining and employee participation. Thus, contrary to common assumptions about clear “pro-labor”/”pro-capital” divisions concerning unionization and participation, I find that there are no sharp alignments among scholars. Second, I describe how, despite the fact that there are very similar patterns of argumentation regarding each of the two modes of worker organization, collective bargaining and employee participation are depicted as sharply distinct and often mutually exclusive institutions. The two modes are often relegated to different industries, times, economies, and perhaps most strikingly, “types” of workers: I argue that both the internal disagreements among labor scholars with regard to the desirability of each of these institutions and the belief that the two institutions are sharply distinct can be understood as a

result of the different realities and perceptions of coercion, agency and power in the context of work.

In section III, I describe the linear story of the movement from the “old” model of work, characterized by the realities of assembly-line production (Fordism) and by the theory of scientific management (Taylorism), to the “new” model of work, which is based on flexible, lean production, “relational coordination,” “flat hierarchies,” and the theory of managerialism. Within this context, I describe the shift from collective bargaining, as has been constructed by the National Labor Relations Act (“NLRA,” “the Act,” “the Wagner Act”), to new models of employee participation, such as “self-managed teams,” “quality circles” and “employee-action committees.”

In sections IV and V, I introduce four dimensions of coercion that can be present in a workplace setting: “vertical,” “horizontal,” “internal” and “co-optive.” Within each category, I demonstrate a symmetry between mechanisms of control applied by management and modes of resistance that emerge among workers; the latter once again raising problems of coercion and agency. I further demonstrate how legislators and courts have traditionally constructed the prohibition of coercive mechanisms through a narrow vertical understanding of work-related power relations. I also argue that a more comprehensive conception of such relations, vertical, horizontal and internal, requires us to rethink the language and interpretation of central labor and employment laws.

The first dimension, hierarchical or vertical coercion, represents our paradigmatic understanding of coercion in the traditional setting of hierarchical relationships between management and labor (for example, Taylorist-Fordist Regimes). Collective bargaining, as we perceive it through the “old” NLRA model, has been a direct response to this type of relationship. It is built on the notion of hierarchical organization: countering adversarial power with power. As a result of the united-front and loyalty requirements of hierarchical representation, unions have historically excluded, discriminated against or inadequately represented the interests of women, minorities and immigrants.

The second dimension, which I describe as horizontal coercion, is increasingly central to new patterns of flexible “flat hierarchies” of employment. I show that despite the fact that participatory schemes, such as “self-managed teams,” are depicted as empowering forms of employee voice, they are often used as mechanisms for peer pressure, monitoring and control of information. More broadly, participatory settings pose new requirements that can become equally coercive, emphasizing open-ended “soft-skills,” interpersonal skills, “emotional labor” and “forced intimacy.” Moreover, in participatory settings, work organization and worker organization are often conflated, and it becomes difficult to distinguish
between modes of employee resistance and managerial control mechanisms. At the same time, quasi-independent employee organizations ("caucuses") are developed, which move away from formal unions and mirror the structures of participatory programs. Here again, certain groups of workers may be disparately impacted, and new "counter-powers," such as "employee diversity committees" and "identity caucuses," emerge to overcome these disparities.

The third category, internal coercion, refers to various mechanisms that are relatively invisible, and therefore harder to resist, in the workplace. A paradigmatic example is the corporate culture movement. This movement indoctrinates, in subtle and in less subtle ways, a narrow set of values, such as increased commitment, "money ethics," self-interest and shifting personal/impersonal boundaries, by using a spectrum of incentives and mechanisms to maintain compliance. I show how, while these may be thought of as more benign forms of worker control, they can be understood as no less coercive and, in certain circumstances, may have similar effects of alienation and exclusion. Resistance to coercive devices in such settings becomes more passive and atomized, and legislative efforts to regulate the use of such devices are often limited by the difficulties to define coercion and render it visible in this context.

Finally, I present a fourth over-arching "meta" type of coercion: conceptual co-optation. Similar to the way in which critical labor scholars, such as Karl Klare, have shown a judicial deradicalization of collective bargaining, I demonstrate the practical deradicalization of the implementation of the participatory ideal. I describe how studies from recent years have shown that, in fact, participatory schemes serve to separate between "low" shop-floor operational decisions and "high" strategic decision-making, the latter remaining in the hands of employers even in a "participatory" workplace.

Within this framework, I demonstrate how elements from all four coercive dimensions have been employed by organizations in both the "old" and "new" economies. Thus, I assert that the story that has been told in a historical linear sequence is, in fact, much more dispersed, intertwined and complex. Different typologies of worker coercion and agency occur in different segments of the economy, and various control mechanisms are used within a singular workplace in many, often complementary, ways. A more complex understanding of coercion and agency in the workday experience has broad implications for labor and employment law. Labor regulation, including the prohibition of "company unions,"\(^2\) exclusive representation,\(^3\) the "managerial exclusion" rule\(^4\) and the doctrine of "fair

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representation” by labor unions (Steele v. Louisville) are traditionally informed by our conventional conception of hierarchical, adversarial relationships. Similarly, employment protections against coercion in the workplace, including privacy, discrimination, and sexual harassment laws are constructed with the vision of a powerful individual boss engaged in top-down decision-making processes. I argue that rethinking our conceptions of coercive work-related environments can challenge current assumptions about legal protections and expose our biases in shaping the lines of desirable and “legitimate” human interaction.

I conclude with the argument that the question of whether labor-management relations are either adversarial or collaborative—the question at the core of the complexities of coercion and agency in the workplace and the linear descriptions of old/new work relations—is inherently irresolvable. Labor-management relations in most workplace settings should be understood as simultaneously competitive and cooperative. I argue that it is within this duality that resistance emerges, and it is the existence of a multiplicity of channels that can be a source for empowerment to those at the bottom of (multiple) hierarchies. Therefore, I suggest that the law support what I term a “constructive tension,” requiring both adversarial collective bargaining schemes and cooperative participatory schemes, in order to generate spaces for agency and positive shifts among systemic uses of power in the workplace.

II. THE RATIONALES OF COLLECTIVE BARGAINING AND EMPLOYEE PARTICIPATION

This section describes the arguments that are used to support and to oppose collective bargaining and/or employee participation. I divide the modes of argumentation into two categories: “efficiency” and “legitimacy.” Initially, I assumed that the two categories could be aligned with “pro-capital” and “pro-labor” arguments. However, as we shall see, there is no clear alignment between the categories and there is ambivalence in scholarship from all sides of the political spectrum regarding the desirability and the actual effects of both unionization and participation.

We shall also see that the two categories of efficiency and legitimacy cannot be rigidly separated. Both are ambiguous and open-ended terms, used in different ways in various contexts. The relatively “mainstream” current approach to efficiency is that of micro-profitability of the firm. In other words, enlarging the corporate “pie,” or more simply, asking what is good for business. In this framework, labor is considered as one of the

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5. 323 U.S. 192 (1944).
6. For critiques of these mainstream frameworks, including the notion of an unregulated “free” market, see, Duncan Kennedy, Law-and-Economics from the
many variables in the production line, and the goal is to keep the best
cost/production ratio possible. When the human factor, workers, is taken
into account as unique (for example, increasing worker satisfaction), it is
done so in the terms of how we perceive the human "function" as a means
to an end. In addition to this narrow approach to efficiency, I also consider
a more "macro" concept of efficiency, including growth, material
distribution and equity.7

"Legitimacy," too, can be deconstructed even before we have begun to
explore its substance. Whose legitimacy? Who are "we," and who speaks
for "us" workers? Is legitimacy an intrinsic goal or is it a mechanism for
rationalizing (illegitimate) processes? All these questions are at the core of
my inquiry. In this section, I consider two types of legitimacy arguments:
one, that of the intrinsic value of participation and membership in the
workplace, including the right to influence an arena which significantly
affects our lives; and two, that of workplace organization as a learning
process for the broader processes of a democratic society.

A. The Economics of Worker Organization

1. Micro-Productivity and Profitability

   (a) The Functions of Collective Bargaining

   The denial by some employers of the right of employees to
organize and the refusal by some employers to accept the
procedure of collective bargaining lead to strikes and other forms
of industrial strife or unrest, which have the intent or the
necessary effect of burdening or obstructing commerce by (a)

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Perspectives of Critical Legal Studies, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS
AND THE LAW 465 (Peter Newman, ed., 1998); see also David Kershaw, Manufacturing
Survival: A Critique of Henry Hansmann's and Oliver Williamson's Economic Point of
View, 3-5 (2000) (unpublished manuscript, on file with author) (speaking of the prevalence
of "efficiency" as "king" in the last few decades).

7. Michael Piore, for example, argues that while mainstream theoretical scholarship on
efficiency is based on competitive economic theory, premised on the notion of liberal
individualism, in practice, economics is interested in the concept of growth. Today, newer
theories of economics, including networking theories of organization, derived from Japan,
Germany, and Italy, appear to be in conflict with these understandings of efficiency.
MICHAEL J. PIORE, BEYOND INDIVIDUALISM 95-100 (1995) ("The kind of technological
change for which networks are valued involves intense, direct interaction among individuals
and organizations. Networks are thus the antithesis of the isolated individuals acting
independently, constrained only by income and prices, which constitute the nodes in the
competitive marketplace.").
impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.8

Much research has been dedicated to the influence of unionization on productivity and profitability.9 However, there are no clear answers, both because of the complicating variables involved in any such investigation and because of the diversity among the conceptions, arenas and constructions of collective bargaining.10 Many law and economics scholars

10. See MICHAEL C. HARP & SAMUEL ESREICHER, LABOR LAW 13-14 (1996) (commenting on the multiplicity of complicating variables); Kennedy, supra note 6 (same). American labor economists and legal scholars are working under the assumptions of collective bargaining as it has taken form in the United States. There are many other ways to define labor laws and collective bargaining. I will be discussing some of these other possibilities throughout the paper. Two important examples are the American prohibition of "company unions," and the need of direct membership in order to be part of a collective agreement. See generally ORLY LOBEL, LABOR LAW 1-2, 7-12 (1998) [Hebrew] (exploring different comparative influences on Israeli labor law including American and European labor law models); Joel Rogers, Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws, 1990 WIS. L. REV. I (speaking of the distinctiveness of
have argued that unions produce a cartel, which inevitably leads to higher wages than would be set in a non-unionized (or in an "unregulated" or "free") market.\(^{11}\) "Unregulated" individual contracting is thought to enhance efficiency and accuracy in the market whereas labor law functions to distort the value of labor supply at the expense of productivity, competition, consumer welfare, and the remainder of the labor market.\(^{12}\) According to this "market" argument, the competition among firms for labor will ensure that workers are not under-compensated.\(^{13}\) Therefore, protections against layoffs, regulated rigid promotions, and job descriptions are inefficient because they limit the possibilities of flexible production and efficient changes through technological advancement, subcontracting, or outsourcing.\(^{14}\) In addition, scholars claim that giving power to labor through collective bargaining is inefficient because labor is unqualified to take into account strategic considerations that are necessary to allow companies to maintain competitiveness.\(^{15}\) Another argument forwarded against unionization is that the diverse interests among workers themselves inevitably lead to inefficiency in decision-making and to the exclusion of some workers by others, creating the structure of a dual (primary and secondary) labor market.\(^{16}\) Finally, some scholars have simply argued that unions must be inefficient because otherwise employers would voluntarily

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organize their employees.\textsuperscript{17}

Responses to these arguments are several. First, regarding the final argument, scholars point out that employers in many cases are in fact supportive of organizing the workplace.\textsuperscript{18} Thus, as will be discussed later, historically many employers have sought to form unions within their firms and have actively aided worker organization. One of the interesting, or even (at this stage) mysterious, phenomena regarding the enactment of the NLRA was that some of the most important representatives of capital supported its enactment.\textsuperscript{19} Moreover, several analyses suggest that managers may have an interest in resisting collective bargaining even when it is efficient to embrace it.\textsuperscript{20} This is because unionization may reduce some of their managerial prerogatives, whereas close control and intimidation enable managers to keep away from workers as well as public scrutiny.\textsuperscript{21} Workers themselves have an incentive to monitor management efficiency, and in some cases, can play a role superior to that of absent ownership. Yet, workers will only assume the role of active monitors of their bosses if they are unionized, and are thus freed from the fear of discharge.\textsuperscript{22} The theory of “union shock effect” similarly implies a process of increased efforts by management in a unionized setting, suggesting that an increase of wages brought on by worker organization “shocks” management into increasing efficiency and productivity.\textsuperscript{23} Finally, managers may fear that, although in the long-run the overall result of unionization is increased productivity, the power of unions in distinct times of struggle may have sharp operational effects on the ability of the workplace to function during certain periods. These effects will allow large shifts and instability in productivity, which will be too difficult for managers to justify and might make the company “look bad” in the eyes of the public.

Several studies regarding the effects of labor unions have shown that productivity increases in a unionized workplace.\textsuperscript{24} Before exploring the

\begin{flushleft}
\textsuperscript{17} Campbell, supra note 12, at 996-97; Kenneth Dau-Schmidt, A Bargaining Analysis of American Labor Law, 91 Mich. L. Rev. 419, 470-471 (1992); Posner, supra note 11, at 1000-01.
\textsuperscript{18} Klare, supra note 9, at 266.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Dau-Schmidt, supra note 17, at 431-32; Peter Kuhn, Union Productivity Effects and Economic Efficiency, 6 J. Lab. Res. 229 (1985).
\textsuperscript{23} Barry T. Hirsch & John T. Addison, The Economic Analysis of Unions 188 (1986); Dau-Schmidt, supra note 17, at 431-32.
\textsuperscript{24} For example, see the recent study of Lisa Lynch, What’s Driving the New Economy: The Benefits of Workplace Innovation (2000) (unpublished manuscript, on file with author)(finding that employee voice has a larger positive effect on productivity when it is done in the context of unionized establishments); see also Freeman & Medoff, supra
\end{flushleft}
reasons for this effect, it should be noticed that some writers express skepticism about unions' positive effects on productivity in the long-run.\textsuperscript{25} Moreover, in certain cases, as a whole, even when productivity increases, workers' increased power leads to an increase in wages which exceeds the rise in productivity, and thus reduces overall "profitability" for owners.\textsuperscript{26}

Economists have offered different explanations for the increased productivity in unionized settings. The most common explanation is that unions facilitate the enforcement of long-term contracts by preventing employers from acting opportunistically through the enactment of just-cause provisions, seniority rules and other such clauses.\textsuperscript{27} The powers of collective action (including strikes, protest, and grievance procedures) ensure the rigidity of contracts, and therefore allow workers to trust these agreements. Long-term employment is often more efficient for both sides, particularly when jobs involve firm-specific training, yet individual negotiations and enforcement of such contracts may have high costs.\textsuperscript{28} Collective bargaining reduces the transaction costs of attaining job security by preventing opportunistic behavior by management.\textsuperscript{29} The detailed contracts, which are enabled by collective bargaining and are structured to include promotion ladders and benefits, also magnify the costs of resignation.\textsuperscript{30} In turn, firms can obtain lower wages when they credibly secure such promises.\textsuperscript{31}

A closely related explanation for increased productivity in the workplace is that unions are able to voice workers' interests and

\textsuperscript{25} See generally John T. Addison & Barry T. Hirsch, Union Effects on Productivity, Profits and Growth: Has the Long Run Arrived?, 7 J. LAB. Econ. 72 (1989) (arguing that many studies only take into account the effect of unions on surviving firms and are influenced by firm pricing decisions).


\textsuperscript{27} Dau-Schmidt, supra note 17, at 432.

\textsuperscript{28} Id. (stating that long-term contracts usually involve deferred compensation); Douglas L. Leslie, Labor Bargaining Units, 70 VA. L. REV. 353, 364-71 (1984).

\textsuperscript{29} See Stephen M. Bainbridge, Employee Involvement in the Workplace Governance Post-Collective Bargaining: A Retrospective on Selznick's Law, Society, and Industrial Justice, 7 (working paper, available at http://www.ssm.com) (arguing that "at least among lawyer-economists in the transaction costs branch of law and economics, the once widely-held view that unions exist to capture monopoly rents for workers in the form of higher wages and superior benefits has given way to an understanding that unions play an important role in reducing transaction costs by constraining strategic behavior by management").

\textsuperscript{30} FREEMAN & MEDOFF, supra note 20, at 103-107.

\textsuperscript{31} BAINBRIDGE, supra note 29, at 7.
dissatisfaction, and to attempt to improve their working conditions. By instituting comprehensive negotiation and arbitration systems, unionization enables efficient changes in employment patterns rather than changes in workers. Similarly, collective bargaining may serve to overcome the problems of collective action and "free-riders" in negotiating certain working conditions, which are "public goods." Without collective bargaining, each individual worker might fail to negotiate important issues such as safety and production conditions, and as a result, there may be two negative effects on productivity. First, such inefficient individual negotiations may cause high turnover rates of unsatisfied workers. Second, in the absence of collective bargaining, governments will attempt to regulate general standards, which are likely to be inefficient, because of their generality and inaccuracy.

Moreover, collective bargaining can strike efficient "off the supply and demand curve" balances in wages, which take into consideration not only wage levels but also employment levels, and thus avoid inefficient displacement effects. Finally—an argument that will reoccur in the next section regarding legitimacy—an important reason for increased productivity in unionized settings is that higher involvement in the workplace results in more worker dedication, commitment, and effort. Thus, unionization promotes a peaceful and cooperative working environment and reduces opportunistic behaviors of both sides, violent conflicts, and "industrial strife."

33. As will be discussed in later sections, this might be achieved differently by unions than by other employee participation schemes because of the "independent" quality of unions. The role of unions as an independent voice for the collective preferences of workers, who would otherwise fear expressing their preferences, and its positive effect on productivity is emphasized by Freeman & Medoff, supra note 20, at 94-109 (offering empirical evidence that unions reduce worker turnover independent of the incentive of continued employment that results from higher wages); Weiler, supra note 14, at 181-184.
35. Hylton & Hylton, supra note 34, at 152-55.
37. Section 141 of the NLRA expresses the goal of "industrial peace" (or the prevention of "industrial strife") which is good for labor, capital and the market-at-large, in a rather general way:

...
(b) The Functions of Employee Participation

Managers are beginning to realize that in today’s competitive economy workers and management better swim together, or they will sink together.\(^\text{38}\) In recent years, employee participation has increasingly become the focus of many debates concerning workplace organization.\(^\text{39}\) Scholars that are against employee participation argue that managers are most “fit” to make decisions regarding the firm, since they are the most informed and skilled. These decisions are too complex to be delegated and decentralized. Moreover, employees are too diverse in their interests to participate in decision-making processes of the company.\(^\text{40}\) Further, they argue that employees may not be interested in sharing the responsibilities of decision-making in their firms and that the costs of increasing employee participation, including the risks of coordination and experimentation will eventually come out of the wages of employees.\(^\text{41}\) In any case, those who

public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peace procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.


39. As will be discussed in the later sections, “participation” is an open-ended term which may include a vast array of structures, including shop-floor decision making, strategic decision making, profit sharing schemes and some form of employee ownership. See infra Section III.C. In this paper, I am mostly limiting the scope of my inquiry to forms of participation in decision-making, rather than participative schemes in ownership. However, similar patterns of arguments are made regarding employee ownership. See generally Herbert Gintis, Financial Markets and the Political Structure of the Enterprise, 11 J. ECON. BEHAV. & ORG. 311 (1989); Henry Hansmann, When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy, 99 YALE L.J. 1749 (1990); Jeffrey M. Hirsch, Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”, 67 FORDHAM L. REV. 957; Kershaw, supra note 6.

40. Hansmann, supra note 39, at 1780-81 (arguing that heterogeneity of interests in worker-controlled corporations could lead to inefficiency); Hirsch, supra note 39, at 977-83(commenting on the divergent interests of workers with respect to risk).

oppose participation claim that in order to maintain competitiveness, managers must preserve their managerial prerogatives and authority.

Interestingly, despite these arguments, in recent years participation schemes have been perhaps more justified in the terms of "efficiency" than in other categories of justification, including legitimacy. Thus, law and economics scholars, even those describing themselves as offering "a neoclassical law and economics-based alternative to the prevailing New Left-ish paradigm," have begun to understand that a central function of current forms of employee participation is increased competitiveness of a firm. Participation increases productivity by offering an efficient way of extracting information from employees. It thus allows management to respond to problems in production and organization, receiving feedback from the employees themselves, a means of collecting information and implementing change. Further, a form of communication is created through participatory schemes, which can address the need for coordination and facilitates integration of processes within a workplace. Information flow also allows employees to respond flexibly by working extra hard in difficult times. In this sense, employee participation serves the "voice function," similar to that described with regard to collective bargaining. Indeed, many non-unionized workplaces have extensive grievance systems, which are linked to some form of participation. Participation can thus help enhance job security, which in turn encourages employees to take a longer-run view of the firm's prospects and needs. Another advantage of participation is that it can also efficiently eliminate the need for mid-managerial positions, by increasing self-monitoring, discipline and

42. Bainbridge, supra note 29, at 1.
45. DAVID EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 299-308 (1989). Yet, as we shall see, current models of employee participation do little to protect employees from opportunistic behavior by management; Bainbridge, supra note 29, at 8.
46. Freeman & Lazear, supra note 44, at 27 (describing co-determination programs in Germany). See generally Chris Doucouliagos, Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis, 49 INDUS. & LAB. REL. REV. 58 (1995) (surveying different studies on the effects of participation on productivity, and arguing that while codetermination and productivity are negatively correlated, profit sharing, worker ownership, and participation in decision making are positively associated with productivity. Moreover, finding that these correlations are stronger among labor-managed firms—firms owned and controlled by workers—than among participatory capitalist firms—firms adopting one or more participation schemes involving employees, such as ESOPs or quality circles).
responsibilities of employees. Thus, economists describe participatory schemes as a new framework for creating a variety of new pressures on employees designed to deter "shirking."

In addition, allowing employees to participate may reduce the costs of workplace frictions by increasing loyalty to the firm, and thus can bring less absenteeism, careless production and turnover. In other words, similar to collective bargaining, employee participation is usually explained as a means to increase employee satisfaction and morale and thus to enhance productivity. Finally, in this context, participation can serve as a way to combat collective bargaining. Many describe the need for competitiveness vis-à-vis foreign markets as the reason to reduce "adversarial relations" between workers and management, and thus advocate the implementation of employee participation schemes, which are likely to prevent the formation of unions.

2. Macro-Efficiency and Material Redistribution

(a) Collective Bargaining and Employee Participation

For most people, work is the main source of access to material income, including regular wages and other economic and social benefits, such as health care coverage, pension programs, disability compensation, childcare provision, severance pay, and supplemental unemployment benefits. This is particularly true in liberal welfare regimes, in which welfare has been structured around the workplace, creating an "employee welfare state."

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48. Id. at 1002 ("Participatory management works well for a sub-set of firms, but is often adopted by fad-following managers of firms for which it is poorly suited."); Bainbridge, supra note 29, at 7; Eric W. Orts, Shirking and Sharking: A Legal Theory of the Firm, 16 Yale L. & Pol'y Rev. 265, 296-97, 315-16 (1998) (describing the prevention of shirking as a function in structures of employment relations).
49. Freeman & Lazear, supra note 44, at 28-30.
One of the clear purposes of the NLRA was to balance the unequal bargaining power between workers and employers in order to increase the power of workers to attain higher wages and material benefits. This was viewed as desirable not only to workers and to their families, but also to the broader economy, due to the expansion of purchasing levels that would be brought by higher wages (for example, workers as consumers). Similar arguments are advanced to support employee participation, which can increase the voice of employees and allow them to attain better working conditions. Material distribution also relates to arguments that will be discussed in the next section regarding legitimacy. If workers do not earn enough money to sustain themselves, they are unable to fully participate in democracy. In order for workers to have meaningful participation in the broad democratic process, they should have suitable access to wealth and security.

With regard to collective bargaining, studies have found that union members are likely to receive between ten and twenty percent higher wages than non-unionized workers. Studies also show that unionization increases wages for unorganized workers, since employers provide wages and benefits that are competitive with those of unionized firms. Thus, labor unions establish wages through collective bargaining which set a pattern for compensation that is extended to unorganized workers, and national labor movements focus on extending the pattern through labor legislation, securing minimum conditions for all workers.

Other writers claim, however, that collective protections can lead to harmful results by reducing the wages of non-unionized workers. According to these arguments, unionization creates more unemployment, because higher wages lead to bankruptcy of some firms and to investment in technology, rather than in labor, by others. Also, unionization may raise the prices of products, which eventually hurts the working class. Finally, collective organizations exclude some groups of workers, creating a dual workplace than in other countries, while, on the other hand, in comparison to other countries, providing very little voice and power for the employee.

52. HARPER & ESTREICHER, supra note 10, at 13-14.
53. FREEMAN & MEDOFF, supra note 20, at 151-154.
54. Freeman and Medoff have concluded that, on balance, unions bring greater wage equality within an establishment, across establishments and between blue-collar and white-collar workers. "Union wage policies lower inequality of wages within establishments; union wage policies favor equal pay for equal work across establishments; and union wage gains for blue-collar labor reduce inequality between white-collar and blue-collar workers." Id. at 78.
55. WEILER, supra note 14, at 123.
56. Id.
labor market, in which more vulnerable workers are marginalized and left unprotected when hired in informal settings.\textsuperscript{57} In reaction to these sets of arguments, scholars have responded that even if these were the real effects of unionization, the source of the problem is the construction of collective bargaining in the United States, which does not allow for implementation of collective agreements across industries, applying also to unorganized sectors. This is also the reason that the increased ("inefficient") wage premium in unionized workplaces is overstated, since the broader market economy limits the leverage that workers can gain from unionization.\textsuperscript{58}

Another advantage of both collective bargaining and participation from a macro-efficiency perspective is that they serve the important function of "perfecting" the market by enhancing the flow of information.\textsuperscript{59} This argument is linked to attacks against the mere concept of "free market." In reality, there is no unregulated perfect market in the first place and most workers cannot effectively negotiate their wages. Without some form of collective organization, they are more likely to face a "take it or leave it" situation when confronting the "visible hand," rather than invisible, of corporate management.\textsuperscript{60}

(b) Worker Organizations and Individual Protections

Some scholars have argued that if one must interfere with the market, it is better to provide substantive and procedural individual protections to all workers rather than the more intrusive and distorting instruments of collective bargaining or employee participation.\textsuperscript{61} According to these arguments, individual protections are more narrowly tailored to cover a certain range of minimum conditions and apply to all workers. Yet, one response to this is the problem of under-enforcement of individual protections.

\textsuperscript{57} For discussion on dual labor markets, see Section III.A.2.
\textsuperscript{58} \textit{Weiiler}, supra note 14, at 130-133.
\textsuperscript{59} Id. at 125-26.
\textsuperscript{60} Id.; Oliver E. Williamson, \textit{Emergence of the Visible Hand: Implications for Industrial Organization}, in \textit{Managerial Hierarchies} 182, 186-93 (Alfred D. Chandler, Jr. & Herman Daems eds., 1980). Another advantage that is suggested is that employers tend to be more sensitive to workers hired at the margin, employees that are likely to have more power, those who, because of age or skill, have more alternative employment opportunities, whereas unions and employee groups have greater incentives to be responsive to the "average" worker. \textit{Freeman & Medoff}, supra note 20, at 9-10.
\textsuperscript{61} Epstein, 92 \textit{Yale L.J.} 1357, supra note 12, at 1357; Epstein, 51 U. Chi. L. \textit{Rev.} 947, supra note 12, at 982; Fried, 51 U. Chi. L. \textit{Rev.} 1012, supra note 12, at 1012 (proposing direct imposition of minimal standards and removal of collective labor guarantees). What is interesting, however, is that very similar arguments are made against having individual protections, which many view as distorting efficiency, slowing investment, decreasing employment and curtailing growth. See, \textit{e.g.}, Eddy Lee, \textit{Globalization and Labor Standards: A Review of Issues}, 1997 \textit{Int'l Lab. Rev.} 172.
protective regulations. Non-compliance with labor standards is a widespread phenomenon and is particularly prevalent with regard to vulnerable workers in informal "underground" economies—precisely the workers who are more likely to be non-unionized, and for whom individual labor protections were primarily designed.

Moreover, as we move on to the next set of arguments, it should be stressed that unlike individual regulation, worker organization has the intrinsic advantage of membership and participation. While some material redistribution could perhaps be achieved outside of the market, the combination with empowerment cannot. According to this argument, there is a real difference between redistribution as "hand downs" through taxation and redistribution by allowing some control over one's own worklife.

B. The Legitimacy of Worker Organization

1. The Intrinsic Value of Union/Firm "Membership"

Membership is a way of thinking about the psychological contract between the individual and the organization. If the individual is seen as an instrument, even an "empowered" instrument, he or she is there to be used by others for their purposes. Such an instrumental contract, no matter how well intentioned or how benevolently interpreted, is a denial of democracy. Our economic well-being and the continued success of capitalism depend on efficient and effective organizations of all types. One way, perhaps the only way, to match our needs for democracy in our critical institutions with our need for efficiency is to think of our organizations as membership businesses.

In addition to the instrumental, utilitarian explanations for both unionization and participation, scholars as well as activists have long suggested an intrinsic value in both forms of worker organization. These


arguments are based on the fact that the workplace is where a tremendous proportion of human activity and energy is generated. Thus, work is closely linked to our constructions of agency, identity, personality, or, more broadly, of the "self." Many of the arguments that were used to predict efficient results within work relations here stand on their own grounds, including increased motivation, satisfaction, interest, fulfillment, dignity and human development. These are not merely "symbolic" effects.

Studies often show that worker mobilization is not based solely on economic self-interest, but also on an appeal to general notions of fairness and legitimacy. For many social theorists and activists, collective bargaining and employee participation are legitimate forms of community within the economic enterprise. Participation in the workplace, either through unions or directly, increases the legitimacy of processes and structures in society, and decisions become more justifiable when forums for self-expression are provided. The comparison between work and the political process helps illuminate this rationale. The argument is that the same justifications for democracy in the government of the state exist in the context of governing economic enterprises. Workers are affected by their workplace in equivalent ways to citizens by the state, and people should participate in decisions affecting their interests. In these terms, the goals of collective bargaining often collapse into the goals of "direct" employee participation, and both are thought to create a more humane and just working environment, by increasing workers' voice, self-worth and esteem.

In response to these arguments, several objections are made. First, the idea of legitimation can also be understood as a negative effect. If the basic premises of separation between work and ownership remains, then limited forms of worker organization serve to legitimate what is most fundamentally an illegitimate form of social organization. On the other

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65. See, e.g., JOHN F. WITTE, DEMOCRACY, AUTHORITY AND ALIENATION IN WORK: WORKER'S PARTICIPATION IN AN AMERICAN CORPORATION (1980).


68. ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY 111 (1985).

69. See, e.g., RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE 103 (1992); Cass R. Sunstein, Rights, Minimal Terms, and Solidarity: A Comment, 51 U. CHI. L. REV. 1041, 1058-59 (1984) (arguing that the significance of the Wagner Act is that it creates a right to a process of workplace decisionmaking with the goal of generating employee participation).

70. Legitimation effects will be discussed in particular in Section V regarding the co-optive effects of both collective bargaining and employee participation as they have been constructed in liberal capitalist regimes. See, discussion infra Section V.D.
side of the political spectrum, a different argument claims that since there are costs of creating forms of organization and participation in a workplace, advocating such structures, rather than providing the best mechanisms for generating the highest profits and thus better material benefits for workers, is a "paternalistic" approach that does not recognize the real interests of workers. Moreover, scholars evoke the diversity among workers, which poses the difficult problem of who will represent workers' preferences and how will diversity be reflected. A complication to this set of arguments is introduced when we understand preferences and interests as dynamic rather than pre-existing and static. In this case, arguments regarding "false consciousness," "paternalism," and "diversity" are all challenged and social reform can refocus on creating mechanisms to prevent coercion and exclusion rather than giving up structures of employee voice altogether.

2. The Work Arena as a Learning/Cohesion Process of Democracy

Work has always been central to social reform, not only because of the intrinsic importance of the workplace arena, but because of the broader effects of workplace organization on the society at large. Collective participation not only provides more material benefits and power, and thus serves as a means for more power in the polity, but it can also be viewed as a learning process for other arenas. Indeed, participation in any forum of social life is a learning process, and all aspects of life reflect on each other. Increased involvement around the important arena of work has the effect of increasing awareness to the political democratic process at large.

Work also serves as a "social melting pot" arena. Participation in labor unions, employee committees or other forms of collectivity is a process of cultural learning. For example, Micheal Piore believes that unions serve as "universal public institutions" where the borders between groups are open, providing an opportunity to reverse the move of American society toward particularism. In fact, under such a rationale, the goals of "industrial peace" are extended to social cohesion among workers themselves, and thus, among the majority of members of society. Piore also believes that unions serve the role of introducing a vocabulary of economic awareness to various groups that are usually isolated from each

71. Such arguments are also made against democracy in general, particularly in regard to developing countries, and their immediate needs for social and economic rights, rather than political participatory rights. See Yash Ghai, Human Rights and Governance: The Asia Debate, 15 AUSTRAL. Y. BK. INT'L. L. 1, 5-6 (1994).


74. PIORE, supra note 7, at 178.
other. Similarly, Louis Kelso believes that creating forms of employee participation, particularly by stock ownership plans, will produce "mini-capitalist" employees that will understand the value of capitalism for a society.

C. Are Collective Bargaining and Employee Participation Compatible?

As we have seen in the preceding sections, a very similar genealogy emerges when paralleling the modes of reasoning of collective bargaining and employee participation. The two are promoted and resisted for similar reasons, serve similar functions, and achieve similar results. Yet, at the same time, the two structures are often considered very different, and even mutually exclusive, in several different senses. First, their perception in theory is based on a different "quality" of relations, and many scholars write within a framework of choosing to support one or the other. Second, American law has regulated collective bargaining and participation schemes as mutually exclusive, and the prohibition of company unions, which will be discussed later, has led courts to distinguish between union settings and non-union settings when deciding the legality of employee participation. Therefore, scholars that support employee participation, whether as "idealists" or as "realists" who have given up on the possibilities of unionization, suggest the need to "turn [ ] the Wagner Act upside down" in order to allow participatory schemes.

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75. Id. at 164.

76. See generally LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO (1958); LOUIS O. KELSO & PATRICIA HETTER, HOW TO TURN EIGHTY MILLION WORKERS INTO CAPITALISTS ON BORROWED MONEY (1967); Elana Ruth Hollo, Note, The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy, 23 RUTGERS L.J. 561, 563-64 (1992). Under this rationale, it should be realized that it is unnecessary to distribute stocks of the workers' own firm. Rather, for decreasing risk, it may be preferable to distribute stocks of a mutual fund.


78. CHARLES C. HECKSCHER, THE NEW UNIONISM 254-56 (1988) (arguing for "associational unionism," a new, more flexible form of unionism which is appropriate in the new economy).
Third, pedagogically, in many countries, the two are even studied, if at all, in different law classrooms—employment and labor laws. In fact, we could view “the law of work” as encompassing also contract law and corporate law, along with doctrines of many other fields such as constitutional law, torts, property, intellectual property, and welfare law. The following table relates the legal fields of practice, pedagogy and scholarship, along with the modes of activity of each, which are central to any reform of the workplace.

<table>
<thead>
<tr>
<th>PERSPECTIVE ORGANIZATION</th>
<th>CAPITAL</th>
<th>LABOR</th>
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</thead>
<tbody>
<tr>
<td>Individual Action</td>
<td>Contract law</td>
<td>Employment law</td>
</tr>
<tr>
<td>Collective Action</td>
<td>Corporate law</td>
<td>Labor law</td>
</tr>
</tbody>
</table>

Interrogating this framework, it becomes clear that “blind spots” are likely to occur within such divisions of thought. For example, it seems that the discussion regarding a model of participation would most easily be situated in the law of corporations, yet as a result of the fact that corporate theorists can refer to the existence of employment and labor laws, such proposals tend to be marginalized in legal thought. Moreover, since labor law is seen in the United States as less and less relevant, there is a notion that labor scholars are “transforming themselves” into employment scholars. And indeed, as I am using throughout the paper, there are different terms to describe people who work in unionized settings (“workers”), and people who work in non-unionized settings (“employees”).

Finally, in practice, collective bargaining and employee participation typically appear in different industries, more or less aligned with “old” and “new” economies. Labor law is depicted as creating and conserving rigid adversarial relations between labor and management, while participation

79. It is important to realize that these internal divisions are neither “natural” nor necessary. For example, in Israel, employment and labor laws are one discipline and are taught in the same class. See LOBEL, supra note 10. Pedagogically, I believe that workplace regulation should be taught in one encompassing course called “the law of work” which would help surpass rigid divisions that narrow our perspectives and prevent us from imagining broader ways to achieve social reform.

80. Indeed, in most “Employment Law” text books I have surveyed there was no mention of any form of employee participation. Employment law courses are usually focused solely on individual protection and anti-discrimination laws.

81. In the next section, I describe the conventional story of this shift from workers to employees, in a shift from an “old” to a “new” economy. See infra, Section III.
FOUR DIMENSIONS OF POWER

schemes are depicted as creating a more flexible, informal collaborative framework. Moreover, the two are considered in conflict because they are used as strategies to exclude each other. Thus, some pro-labor scholars argue that allowing employee participation schemes is a method to resist unionization. Indeed, according to studies conducted by the labor movement, employee participation programs are among the most effective anti-union strategies implemented by employers. Strikingly, the supporters of each structure tend to characterize it as empowering for workers, while describing the other as coercive. All of these issues, and in particular, understanding the "real" effects of collective bargaining and employee participation on workers' agency, are at the core of the inquiries of the following sections.


84. Heckscher, supra note 78, at 97-98 (explaining that most companies that have implemented participatory schemes have been anti-union); Hogler & Grenier, supra note 69, at 116. Karl E. Klare claims that "all sophisticated union leaders now understand that they must develop a program on employee participation issues. Many are considering ways to respond to the [quality of working life] movement not just as a management trap but as an opportunity, under the proper circumstances, genuinely to improve employees' lives on the job." Karl E. Klare, Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin, 44 Md. L. Rev. 731, 810 (1985) (citation omitted).
Table I: Between Collective Bargaining and Employee Participation

<table>
<thead>
<tr>
<th>Collective Bargaining</th>
<th>Employee Participation</th>
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<tbody>
<tr>
<td>Adversarial (competitive)</td>
<td>Cooperative (collaborative)</td>
</tr>
<tr>
<td>Rigid</td>
<td>Flexible</td>
</tr>
<tr>
<td>Formal</td>
<td>Informal</td>
</tr>
<tr>
<td>Collective</td>
<td>Individual or collective</td>
</tr>
<tr>
<td>Indirect participation</td>
<td>Direct participation</td>
</tr>
<tr>
<td>Old</td>
<td>New</td>
</tr>
</tbody>
</table>

III. FROM UNIONIZATION TO PARTICIPATION—THE LINEAR ACCOUNT

A. The “Old Economy”: Scientific Management and Assembly Line Production

1. The Taylorist-Fordist Ideology

The era of mass production is marked by narrow, menial jobs, and strict managerial supervision. At the beginning of the twentieth century, Fredrick W. Taylor developed his influential theory of “scientific management,” also known as Taylorism. In essence, Taylorism was a management theory concerned with the implementation of strict control over workers. According to Taylor, managerial planning of the production process is best centralized with hierarchical monitoring of the performance of workers. Tasks should be specified to decrease as much as possible the

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85. Before the industrial era, in the 19th century, skilled craftsmen workers had an information advantage over owners, controlling the knowledge of production and, thereby, controlling the processes and pace of production. With the move to the industrial assembly line production, Taylorism enabled management to reverse the information asymmetry. See Sanford Jacoby, Employing Bureaucracy: Manager, Unions and the Transformation of Work in American Industry, 1900-1945 44-49 (1985); Katherine Stone, The Origins of Job Structures in the Steel Industry, in Labor Market Segmentation 27, 30-32 (Richard C. Edwards et al. eds., 1975); Bainbridge, supra note 43, at 983.

86. Daniel Nelson, Frederick W. Taylor and the Rise of Scientific Management

need for thought among workers. Thus, job descriptions should be extensively detailed, and the production process should be broken down to small steps, each step assigned to closely monitored individual workers. Managers should use time and motion studies to develop the rules of performance of these steps, and the worker should be "deskilled," transferring skill to management or to machines.

Thus, Taylorism also involved a strict line between management and workers and promoted the use of symbolic structures to increase their differences, including different modes of payment (workers paid by the hour, along with incentive payments to increase productivity performance; management by salary), separate cafeterias, separate entrances, and separate parking spaces.

Taylorist management theory was developed hand in hand with the development of assembly line production, paradigmatically that of the automobile industry. Henry Ford, the father of the "Fordist era," implemented great control over the workers of the Ford Motor Company. He created a body called the "Sociology Department," which consisted of social workers and researchers in charge of eliminating the "immoral" behavior of the company's workers. The issues of morality ranged from cleanliness to smoking cigarettes and gambling. The consequences for immoral behavior were disciplinary sanctions, such as pay-roll deductions.

No one discerned anything improper in investigators [of the Sociology Department] knocking on the door of workers' homes to check that the beds were made up, in demanding to see savings account passbooks, or in requiring an itemization of household debts. Fellow workers, neighbors, wives, children, and even the doctors of workers were interviewed.

Ford's image of the worker was highly paternalistic, attributing to

38-43 (1980).
87. Id. at 90, 137-154.
90. See HECKSCHER, supra note 78, at 98.
91. ROBERT CONOT, AMERICAN ODYSSEY 175-76 (1974).
92. Id.; see also STUART BRANDIES, AMERICAN WELFARE CAPITALISM, 1880-1940 88-89 (1970) (describing some negative attributes Henry Ford sought to eliminate from his workforce).
93. CONOT, supra note 91, at 175.
94. Id. at 176.
workers such images as "a mind that’s weak and a back that’s strong."\textsuperscript{95} Taken together, the separation between blue-collar workers and managerial workers in the Fordist-Taylorist era was both theoretical and practical in the industrial mass production economy.

2. Internal Labor Markets and Dual-Labor Markets

The Fordist era is also linked to the idea of internal labor markets, with limited ports of entry and rigid promotion ladders, assuring job security and progressive compensation structures, and creating mutual dependency between employers and employees.\textsuperscript{96} Labor law, as described in the former section, functioned to facilitate the internal labor market structure.\textsuperscript{97} Internal labor markets also implied an “outside,” creating a “dual labor market” structure. The workforce was thus divided into “insiders,” who work for large stable firms within the internal employment patterns, and “outsiders,” contingent, part-time, temporary, seasonal, or simply “atypical” workers, all of whom disproportionately included minorities, women and immigrants. This latter group of workers, forming a “secondary labor market,” was typically employed in low-waged, low-skilled, unstable jobs.\textsuperscript{98} These workers were usually non-unionized and less protected by labor standards.

\textsuperscript{95} JOHN R. PHILLIPS, THE FUTURE OF LABOR-MANAGEMENT COOPERATIVE PROGRAMS 13 (1994).

\textsuperscript{96} PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 1-2 (1971).


\textsuperscript{98} See Marion Crain & Ken Matheny, "Labor's Divided Ranks": Privilege and the United Front Ideology, 84 CORNELL L. REV. 1542, 1571 (1999). Some social theorists even believe that working class fragmentation is a product of deliberate practice of employers, who benefit from opposition and division within groups of workers, typically along racial and gender lines. Under this “dual labor market” theory, the upper classes support discrimination in order to create a segregated dual market in which a reserve army of marginalized workers is produced, and thus, ultimately, all labor is disadvantaged. \textit{Id.} at 1574.

In many regimes, including the United States and Israel, this dual structure becomes even more problematic as a result of centering the welfare structure of the regime around the stable workplace, creating “a first-class employee welfare state.” \textit{See}, e.g., Charny, 74 TEX. L. REV. 1601, supra note 50, at 1606-11.
B. Managerialism and Flexible Production

1. Flattening Hierarchies and Relational Coordination

For over two decades there have been writings on the "New Economy." 99 Often referred to as the "post-industrial" economy, the shift is described as parallel to the great transformation of the labor market in the late nineteenth century. 100 The term "post-industrial" implies the move to an economy that is primarily based on services, rather than manufacturing or production. However, Michael J. Piore and Charles F. Sabel, in their book The Second Industrial Divide, emphasize the continuing reliance on manufacturing, although less the traditional "mass-manufacturing," even in the "New Economy." 101 According to Piore and Sabel, mass manufacturing has shifted to less costly production overseas, but the production of "flexible specialization" remains in the United States and requires skilled workers that can accommodate constant innovation. 102 The new production patterns further require what is termed "relational coordination." 103 Piore has described this as a shift from viewing work as the application of human force on commodities to viewing work as an interaction between human beings. 104 Others have emphasized that the new organizational models have blurred the boundaries among constituents of the firm, owners, clients, customers, suppliers, managers and employees. 105 Thus, such organizations are claimed to require "a new declaration of interdependence between those who work in the firm and those who provide the capital; a new social contract based on mutual obligations and mutual

99. The term "New Economy" is somewhat problematic because many economists believe that currently we are in something of a transition, in which we witness a mixture between "old" and "new" features and that the "New Economy," which is yet unknown, is yet to arrive. Interviews with MIT economists (Jan. 2000).


102. Id. at 17.

103. Jody Hoffer Gittell, Organizing Work to Support Relational Coordination (January 2000)(unpublished manuscript, on file with author).


responsibilities."

Within this context, new management and organizational theories have emerged. The new characteristics of the workplace are said to require flat hierarchies, complex matrix organization, capacity to tolerate ambiguity, permeability of organizational boundaries, capacity for renewal, and mechanisms for self-integrating coordination. Most often referred to as "managerialism" or "participative management," new managerial theories advocate a "bottom-up" approach, where innovations in technique and product are triggered by shop-floor level input. Originating in the late 1960s, with early experiments of "job enlargement," or what Alfred Sloan has called "coordinated independence" (borrowing the term of the Swedish Employer’s Federation), these theories advocate a decentralized decision-making process and an "increase in individual autonomy." Thus, the managerialist model is said to include more expression of employees' concerns, implementing both participatory structures and suggestion systems, such as "open doors," surveys and meetings. Unions are claimed to burden such reforms, because they require rigid rules of "who does what."

2. Employability over Job Security

When compared to the traditional internal labor markets, the emergence of a new economy, marked by a dramatic decline in unionization, and a shift to "leaner," "outsourcing," "flexible" patterns, has brought less stability in employment patterns. The number of people working in contingent patterns is rapidly growing. In this sense, the

107. See Oliver E. Williamson, Emergence of the Visible Hand: Implications for Industrial Organization, in MANAGERIAL HIERARCHIES 182, 186-87 (Alfred D. Chandler, Jr. & Herman Daems eds., 1980); Richard L. Daft & Arie Y. Lewin, Where are the Theories for the "New" Organizational Forms?: An Editorial Essay, ORG. SCI., Nov. 1993, at i. "M-form" enterprise is the term for a multidivisional organization of managerial bureaucracies; see also HECKSCHER, supra note 78, at 87.
109. HECKSCHER, supra note 78, at 92-94 ("Rather than tightening structures of control, they seek to increase individual autonomy.") (citing ALFRED P. SLOAN, MY YEARS WITH GENERAL MOTORS 54 (1964)).
110. HECKSCHER, supra note 78, at 98-99.
111. Gittell, supra note 103.
112. In the end of the 1980s, the estimate placed the total number of contingent workers in the United States at a minimum of 29 million people. These numbers have rapidly grown over the last decade. The shift reflects both globalization and explicit employer strategies to subcontract work and redesign jobs. Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 CORNELL L. REV. 523, 571 (1997); see also Stanley D. Nollen, Negative Aspects of Temporary Employment, 17 J. LAB. RES. 567, 569-70 (1996);
“atypical” outsider worker is becoming more “typical.” On the other hand, there are still clear divisions between “insiders” and “outsiders” in the new economy. Widespread migration flows of workers from poor countries have relegated labor-intensive low-wage services and production sectors, particularly in global metropolitan areas, to an informal, often invisible, migrant workforce. Thus, perhaps the new divisions of a new dual-labor market are better described as divisions between skilled (rather than stable), upwardly mobile jobs and “dead-end,” low-skill jobs.

For the “insiders,” new implicit benefits have replaced the job security and promotions that had been implicit in the “old” employment relationship. These new terms include “general skills training, upskilling of jobs, networking opportunities, contact with firm constituents for employees at all levels of the firm, micro-level job control, market-based pay, and firm-specific dispute resolution institutions for ensuring procedural fairness.”

C. The Decline of Unions and Rise of the Participatory Umbrella

Since their peak in the 1950s, labor unions have been constantly declining and there are predictions of their further decline in the near future. Unions represented 34.7 percent of the workforce in 1954, 16.4 percent in 1990, and approximately 14 percent in 1997. In 1999, the


114. Stone, supra note 89, at 549-55?? 568-72.

115. Id. at 524.

116. Although 1998 and 1999 have been marked with renewed labor militancy and strikes, analysts believe that union density will continue to decline in the next century. See Crain & Matheny, supra note 98, at 1542 n.3; Charles B. Craver, Why Labor Unions Must [and Can] Survive, 1 U. PA. J. LAB. & EMP. L. 15 (1998); Rachel Geman, Safeguarding Employee Rights in Post-Union World: A New Conception of Employee Communities, 30 COLUM. J.L. & SOC. PROBS. 369, 370 n.6 (1997); Paul C. Weiler, Hard Times for Unions: Challenging Times for Scholars, 58 U. CHI. L. REV. 1015, 1017 (1991); Steven Greenhouse, Waning Militance: Labor Unrest Masks Peaceful Trend, N.Y. TIMES, July 14, 1998, § 4 (Week in Review) at 4. It is important to recognize the decline of labor organization not only in the United States, but as a global phenomena. For example, Israel is also experiencing the decline of the labor movement. Compared to the United States, the Israeli labor movement has been more influential in the country’s politics and economy for several reasons. First, the State of Israel was founded on collectivist notions of Jewish
percent of unionized workers in the private sector was 9.4 percent. The decline of unionism is depicted both as a reason and as a result of the changing nature of work and the rise of new forms of employee voice.

In the post-unionization era, some form of employee participation has been adopted by thousands of American corporations, both in production and service sectors. "Employee participation" (and many other terms, including "self-management," "co-management," "workplace democracy," "co-determination," "employee representation" and "employee involvement plans" (EIP)) should be understood as a wide continuum, ranging from shop-floor operational consulting to strategic policy-making. The definitions of the different programs are not sharp and often terms are used interchangeably. In the following pages, I suggest a brief taxonomy for these programs. I return to these differences throughout the next sections, particularly with regard to what I will describe as the "practical deradicalization of the participatory ideal," in Section V.

ethno-republicanism and its shaping was influenced by social theorists and politicians. Second, the idea of "Hebrew labor" was at the root of Zionism, the return to "the promised land" and the transformation of the "Diaspora Jew" to the "Tsabar," the autonomous, Israeli-born, hard-working Jew. Thus, the Israeli labor movement, and especially the Federation of Jewish Labor in Israel (the Histadrut), had an historical role in the formation of the state and had accumulated much power in the political arena. The Histadrut was founded in 1920, twenty-eight years prior to the foundation of the State of Israel, and one of its goals was to encourage divisions among Jewish and Arab workers, while fostering solidarity between Jewish workers and Jewish employers. A central explanation to the diminishing power of labor unions in Israel is the Israeli "Americanization"- the on-going processes of privatization, individualization and constitutionalization- has brought more hostile decisions to the courts towards unions and more focus on individual rights and competitive economic growth. See LOBEL, supra note 10, at 1-12, 161-68; Ran Hirschl, Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order, 46 AM. J. COMP. L. 427, 439. See generally MICHAL SHALEV, LABOUR AND THE POLITICAL ECONOMY IN ISRAEL (1992) (discussing the diminishing power of labor unions in Israel).


118. The new forms of participation have been implemented both in new companies and in traditional production and sales companies, such as General Electric, General Motors, Xerox, Wal-Mart, McDonald's, and the traditional source of Fordism, the Ford Corporation. PHILLIPS, supra note 95, at 14-19; see also Bainbridge, supra note 43, at 981; Klare, supra note 84, at 810-811 (noting that about 32 percent of workers in businesses employing 100 or more employees are involved in some form of employee participation program). According to Charles Heckscher, the programs of employee involvement in the last few decades were only of partial success. A pattern emerged in which a program would be experimented with, stories of success would be told, and then, without clear reasoning, the particular effort would wither away, yet without slowing the general enthusiasm for other employee involvement plans. HECKSCHER, supra note 78, at 86-87.
1. Self-Managed Teams

Typically, a "self-managed (or "self-directed") team" consists of approximately a dozen employees at the shop-floor level, organized around certain areas of production and authorized to make collective decisions about day-to-day work problems. Teams are often characterized by job rotations and on-going training, and each team member is usually trained to perform most of the team’s tasks. Some teams are created (and its employees are hired) especially for a specific short-term project, thus serving also as an employment strategy to create more flexible jobs and to reduce long-term permanent employment. Often teams elect team leaders who serve representative functions vis-a-vis the rest of the organization.

2. Quality of Work Life

Quality of Work Life programs (QWL), or “employee-action committees,” are small groups of employees, who, usually on a voluntary basis, represent the employees in forming recommendations for management concerning work-related conditions. Committees with such general characteristics are also called “focus groups,” “human resource programs” or “employer-employee committees.”

3. Quality Circles

Quality circles are small groups of employees that form to discuss productivity, procedures, and product and service quality. These programs differ from the QWL programs in their almost sole focus on productivity and quality, without involving any focus on working conditions. They originate from management theories, including the well-
known Japanese model of Total Quality Management (TQM).\textsuperscript{125} In recent years, permanent quality circles have been widely replaced by temporary problem-solving teams.\textsuperscript{126}

4. Representation on Boards and Work Councils

Work councils and “employee representation plans,” establishing worker representatives who communicate with management are very rare in the United States, but continue to play a significant role in Europe.\textsuperscript{127} These programs involve periodical elections of representatives, who meet with management to discuss grievances, shop-floor operational problems and less frequently, wages and benefits. Most often, however, final authority over all decisions, including grievances, remains with management.\textsuperscript{128} Some forms of representation, more likely to be found in European models of “co-determination,” allow a vote to the representatives at the company’s boards or in other decision-making processes.

5. Labor-Management Cooperation Committees

Labor-Management Cooperation plans are participatory plans within unionized settings. Under these plans, committees usually consist of management and union officers, who discuss general issues, primarily regarding the collective bargaining relationship and specific issues such as work conditions, safety and workplace environment.\textsuperscript{129} They differ from simple collective bargaining in their more frequent informal discussions with management.

6. Profit-Sharing Programs

Many firms, particularly those in the high-tech industries, have


\textsuperscript{126} Bainbridge, supra note 43, at 987-88.

\textsuperscript{127} Freeman & Lazear, supra note 44, at 27. These forms of participation were one common form of “company unions” in the past, but have vanished from the U.S. since the 1920s. See Barenberg, supra note 9, at note 16.

\textsuperscript{128} See Barenberg, supra note 9, at note 16.

\textsuperscript{129} See generally Barrett, supra note 124, at 3-4 (defining Labor-management cooperation as the use of committees usually comprising equal numbers of union and management officers who meet regularly, to discuss work related issues); Don Dewar, The Quality Circle Guide to Participation Management (1980) (same).
constructed some form of profit-sharing programs, which may include collective or individual ownership of stocks or firm assets (Employee Stock Ownership Plans (ESOP)),\(^{130}\) or simply structural bonuses that are linked to profits of the firm (Gain Sharing Programs, including Scanlon plans and Improshare plans),\(^{131}\) usually without providing for power in decision-making. This paper focuses mainly on decision-making forms of participation, rather than on profit participation programs.

Table II: “Old” and “New” Workplaces

<table>
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<tr>
<th>CHARACTERISTIC</th>
<th>“OLD” MODEL</th>
<th>“NEW” MODEL</th>
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</thead>
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<tr>
<td>Structure</td>
<td>Hierarchical supervision</td>
<td>Horizontal coordination</td>
</tr>
<tr>
<td>Management Theory</td>
<td>Scientific Management</td>
<td>Managerialism</td>
</tr>
<tr>
<td>Production</td>
<td>Assembly-line mass production</td>
<td>Flexible production; Services</td>
</tr>
<tr>
<td>Firms</td>
<td>Large, self-sufficient</td>
<td>Lean, outsourcing</td>
</tr>
<tr>
<td>Strength of Firm</td>
<td>Material resources</td>
<td>Human capital</td>
</tr>
<tr>
<td>Labor and Capital Markets</td>
<td>Local</td>
<td>Global</td>
</tr>
<tr>
<td>Workforce</td>
<td>Relatively homogenous</td>
<td>Diverse</td>
</tr>
<tr>
<td>Working Format</td>
<td>Individuals</td>
<td>Teams</td>
</tr>
<tr>
<td>Job</td>
<td>Rigid classification, narrowly defined, routinized</td>
<td>Flexible, more cross-functional tasks, multi tasked</td>
</tr>
<tr>
<td>Work</td>
<td>Menial “deskilled”</td>
<td>Intellectual and emotional, “thinking” skills</td>
</tr>
<tr>
<td>Worker</td>
<td>Blue-Collar Worker</td>
<td>White-Collar Worker</td>
</tr>
<tr>
<td>Workers’ Expectations</td>
<td>Stability, security</td>
<td>Employability, mobility</td>
</tr>
<tr>
<td></td>
<td>[Internal labor markets]</td>
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</tr>
<tr>
<td>Labor-Management Relations</td>
<td>Adversarial</td>
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</tr>
<tr>
<td>Worker Organizations</td>
<td>Traditional collective bargaining</td>
<td>Employee participation programs</td>
</tr>
<tr>
<td></td>
<td>labor unions</td>
<td></td>
</tr>
<tr>
<td>Participation</td>
<td>Representatives</td>
<td>Direct / Representatives</td>
</tr>
</tbody>
</table>

130. See generally KELSO & ADLER, supra note 76 (supporting the distribution of stock to workers in order to broaden their financial bases. However, Kelso, who is considered the “father” of Employee Stock Ownership Plans (ESOP), did not support other forms of worker participation that would reduce management control over the firm.; KELSO & HETTER, supra note 76 (same). See also, Hollo, supra note 76, at 562-64 (explaining the workings of an ESOP as a stock bonus plan or a money purchase plan).

131. Scanlon plans link profit sharing to other forms of participation, such as making suggestions to improve the workplace, while Improshare plans are linked to increases in profits for the company or productivity bonuses. JOHN L. COTTON, EMPLOYEE INVOLVEMENT 89-95 (1993); Bainbridge, supra note 43, at 988-89.
IV. KEEPING THE MOTION

A. The Terms Coercion and Agency

In 1964, Robert Blauner in his classic study, *Alienation and Freedom: The Factory Worker and His Industry*, compared different industries and how they contributed to workers' sense of freedom or alienation.132 He suggested that "the nature of a man's work affects his social character and personality... and his over-all sense of worth and dignity."133 Blauner found that different industries used different methods of authority over workers and evoked different modes of resistance by workers.134

In this paper, I accept these effects when comparing collective bargaining and employee participation in different work settings. In my exploration, I use the term *coercion*, rather than, alienation or domination, and the term *agency*, rather than freedom or autonomy. One reason for my choice of terminology is my background in feminist jurisprudence.135 But more than a mere "habit," I believe that using these concepts can avoid some of the problems of other terms. Coercion has been explored in legal theory in a variety of contexts. Realists have shown how the term should not be construed formalistically, and how coercion and "freedom" should be understood as a continuum.136 While both the terms "coercion" and "domination" appear in labor laws,137 coercion is broad and more open-

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133. Id. at 122.
134. Blauner similarly compared the utilization of technology in different industries and its effect on the meaning and purpose of work. He suggested, for example, that in the face of dehumanizing work, auto workers retain their dignity by collectively resisting authority and engaging in protests. Id.
135. In particular, Kathy Abrams has written extensively using this pair of terms, see generally the following three articles: Kathryn Abrams, From Autonomy to Agency: Feminist Perspectives on Self-Direction, 40 WM. & MARY L. REV. 805 (1999); Kathryn Abrams, Redefining Women's Agency: A Response to Professor Williams, 72 IND. L.J. 459 (1997); Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 COLUM. L. REV. 304 (1995).
136. Duncan Kennedy, The Stakes of Law, or Hale and Foucault!, in DUNCAN KENNEDY, SEXY DRESSING ETC. 83 (1993); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923); see also PETER BACHARACH & ARYEH BOTWINIK, POWER AND EMPOWERMENT (1992).
137. Section 8(a)(1) prohibits employer practices that "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights to self-organization, collective bargaining, and other concerted activities. Section 8(a)(2) prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it." National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (2001).
ended. Rather than being hermetic and total, it implies spaces for resistance and agency. Agency seems more open-ended than “freedom” or autonomy. It implies dynamic relations to others, rather than “a static human characteristic to be posited as a presupposition.”

B. The Symmetry Between Institutions and Their Counter Institutions

In the following sections, which explore the four dimensions of coercion, I suggest that there are relations between certain patterns of work/production organization and corresponding forms of workers’ organization/resistance. I argue that both as a descriptive historical matter, and as a rhetorical move of legal scholarship, collective bargaining is linked to hierarchical work relations and employee participation is linked to a horizontal organization of work. I further suggest that in a more internalized disciplinary setting, resistance will tend to be more passive and individuated. Finally, I suggest that both concepts of collective bargaining and employee participation have been “deradicalized” when they shifted from theory to practice. Hence, I describe the following structure of coercive dimensions and correlations in the workplace:

Vertical ↔ Rigid Hierarchies ↔ Collective Bargaining

Horizontal ↔ Employee Participation ↔ Employee Caucuses

Internalized ↔ Corporate Culture ↔ Atomized Resistance

Conceptual Co-optation ↔ Overarching ↔ Judicial/Practical Deradicalization

In this sense, I partly adopt the linear account of the shift from an “old” to a “new” workplace as paradigmatic to the different typologies I explore. However, I also emphasize that this picture is much more complex than a simple chronological shift. First, as described in the previous section, there are always many weak workers who do not fit into either paradigm, and who have formed a “secondary market,” “informal

workforces,” or “underground economies.” Second, currently, we are facing a “mixed regime,” in which both “old” and “new” forms of employment coexist. Most importantly, no single corporation is a clear-cut example of one of these types, and we will see how in many workplaces all coercive dimensions are present. Finally, often one coercive dimension can be embedded in other coercive dimensions. This is also one of the reasons that the four dimensions cannot be sharply separated, since, as we shall see, often even when coercion is horizontal or internal, it can still be traced to an orchestrating hierarchical hand.

V. THE COURSE OF POWER: FOUR DIMENSIONS OF COERCION

A. The First Dimension: Vertical Coercion

The predominance of hierarchy in both public and private life leads to a profound loss of the sense of social connection because it breaks down any possibility of real community, and forces people into a life-long series of isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way.140

1. Economic Weapons, Company Unions, and Managerial Exclusion

The first type of coercion within the workplace, hierarchical or vertical, is the most intuitive. We understand the workplace as consisting of asymmetrical power relations between management and workers. Although today this dimension seems the most “natural” and clear to explain, here too there was a move from a very narrow concept of hierarchical coercion to a broader understanding. Although legislators and courts regularly regulate and explore this dimension, often, particularly in the past, these regulations had been interpreted narrowly. An illustrative example is the Coppage case from 1915, in which the Supreme Court interpreted the breadth of a Kansas statute, which declared it unlawful for an employer to “coerce, require, demand, or influence” any person to enter into a “yellow dog contract,” a promise not to join a union.141 The majority held that an employer who tells his workers they will be fired if they refuse to sign could not be prosecuted under this law, since:

139. Discussion supra Section IV.A.
Aside from th[e] matter of pecuniary interest, there is nothing to show that [the worker] was subject to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. 142

The enactment of the NLRA marked a sharp move from this narrow approach to hierarchical coercion in the workplace. The 1930s background to the enactment of the Act was distrust and violence between labor and management. The regulation of labor relations was thus based on the premise of adversarial relations and the need for protections and economic weapons in order to counter management’s asymmetrical power over workers.

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. 143

Paul Weiler describes some of the measures that employers continue to use to suppress unionization. Many of these practices are illegal under the NLRA, nonetheless they have been widespread in the last several decades. 144

[A] vigorous campaign against the union in which management regularly raises the spectre of strikes and job losses, and adds credibility to the threats through selective discriminatory action against key union supporters. If the union wins the election nonetheless, the employer will simply carry on its resistance at the next stage by stonewalling at the bargaining table, forcing the union members out in strike, and hiring permanent replacements to fill their jobs, thus confirming the accuracy of the employer’s initial campaign prognostications, but too late for these

142. Id. at 8-9.
144. WEILER, supra note 14, at 112.
Because of this reality, Weiler has argued for the expansion of the economic weapons granted by the NLRA to workers, in order to revive American unionization.\(^{146}\)

However, despite its weaknesses, the NLRA does provide a set of economic weapons for workers, and prohibits coercive practices of employers. Section 8(a)(1) prohibits employer practices that "interfere with, restrain, or coerce" workers in the exercise of their Section 7 rights to self-organization, collective bargaining, and other concerted activities.\(^{147}\) Section 8(a)(2) prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it."\(^{148}\)

The latter prohibition is, in effect, the prohibition of "company unions," for example, unions "dominated" by employers, which represents the clear need for workers to assume certain independence within a hierarchical relationship. It is important to note that courts have inquired into the legality of employee participation schemes using solely this standard of independence versus hierarchical coercion, for example, "domination by employer." In Electromation, the National Labor Relations Board (NRLB) held that an employer violated section 8(a)(2) when it established "employee-action committees."\(^{149}\) These committees were

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\(^{145}\) Id. at 111; see also FREEMAN & MEDOFF, supra note 20, at 221-45.

\(^{146}\) See Paul Weiler, Promises To Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1805 (1983) (asserting that union certification should be on basis of signed authorization cards rather than a long organizing campaign and an election which employers can suppress); Paul Weiler, Striking A New Balance: Freedom of Contract and the Prospects for Union Representation, 98 HARV. L. REV. 351, 404-19 (1984) (suggesting reversal of rule allowing permanent replacement of strikers and loosening of secondary boycott restrictions); see also WEILER, supra note 14, at 185 (proposing expanded protection for union’s economic weapons).


\(^{148}\) Id. Section 2(5) of the NLRA defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” National labor Relations Act § 2(5), 29 U.S.C. § 152(5) (2001). In June 1996, Congress passed the Teamwork for Employees and Managers Act (TEAM). However, the act was vetoed by President Clinton. Without sufficient votes in Congress to override the presidential veto, TEAM was not enacted. TEAM offered to amend section 8(a)(2) of the NLRA to allow non-unionized employers to establish and participate in worker-management groups. See Teamwork for Employees and Management Act, S. 669, 103d Cong., 1st Sess. (1993); see also Alvin L. Goldman, Potential Refinements of Employment Relations Law in the 21st Century, 3 EMPLOYEE RTS. & EMP. POL’Y J. 269, 290-99 (1999).

comprised of six employees and one or two members of management to discuss issues such as bonuses, no-smoking policies, and raises. The court affirmed that these committees were unfairly dominated by the employer, because the employer had structured the committees, was involved in structuring its proposals, and paid the employees for their time on the committee. Thus, the committees were held to be a violation of the NLRA.

Mark Barenberg, who has explored in two comprehensive articles the prohibition of "company unions" and its relevance to today's economy, explains that, "[i]n Wagner's institutional ideal, company-union-like collaborative structures such as works councils and joint labor-management committees would emerge and operate effectively and non-manipulatively only within the protective shell of independent unionism."

The idea of securing a separate "clean" space (or "shell") for workers, free of coercive powers, is also embodied in the NLRA's "managerial exclusion" rule. Section 2(3) of the Act excludes "managerial employees" or "supervisors" from the definition of employees that can form a bargaining unit. Section 2(11) defines the term "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

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150. Id.
151. See also E.I. Du Pont de Nemours & Co., 311 N.L.R.B. No. 88 (1993) (holding that employee participation committees in a unionized-setting are illegal if they discuss anything other than concerns of quality and production; discussing issues such as work benefits violated section 8(a)(2) and "bypassed the union and fostered an illegal competing organization").
152. Barenberg, supra note 9, at 1391, 1442-59 (arguing that banning the company-union for the reasons of preventing despotism is inconsistent with the permission of remaining a non-unionized workplace). According to Senator Wagner: "[t]he company union is generally initiated by the employer; it exists by his sufferance; its decisions are subject to his unimpeachable veto." Therefore, company unions raised "[m]ajor questions of self-expression and democracy. . . . At a time when politics [was] becoming impersonalized and when the average worker [was] remote from the processes of government, it [was] more imperative than ever before that industry should afford him real opportunities to participate in the determination of economic issues." Senator Wagner also believed that "industrial strife is most violent when company unionism enters into the situation . . . [because] the company union line of organization is least likely to bring forth the restraint of irresponsible employees by others of their own group." Michael H. LeRoy, Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis, 61 GEO. WASH. L. REV. 1812 (1993) (citing Sen. Wagner at 78 CONG. REC. 4229, 4230 (1934)).
exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.\textsuperscript{154}

The rationale of this exclusion is again to protect the separate sphere of rank-and-file workers and to prevent the inclusion within a bargaining unit of employees who will have a "conflict of interest" that will "hinde[r] the functioning of the adversarial model of labor-management relations."\textsuperscript{155}

The notion of the importance of a separate collectivity that serves to mediate between groups of people is a powerful one that recurs in many social contexts.\textsuperscript{156} However, it is important to notice that within a hierarchical framework, separate entities that counter the vertical power tend to become a "black box," in which intra-group struggle is often overlooked.

2. The Representation Model and Labor's United-Front

From one perspective, unionization has been and can be viewed as an activity of the employees themselves, whereby they participate as a group in the improvement of their own working conditions. In its current image, though, the union is usually perceived as an entity external to the employees: as a large, bureaucratic organization whose full-term officials periodically negotiate a long-term contract behind closed doors with the employer, and then represent a fairly small number of employees who are aggrieved by the way management administers the contract during its lifetime.\textsuperscript{157}

The NLRA collective bargaining model is based on the idea that workers should present a unified voice to advance their common goals. The NLRA requires a well-defined form of representation, which involves


\textsuperscript{155} Patrick S. Bryant et al., Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act, 41 VAND. L. REV. 601, 602 (1988).

\textsuperscript{156} For example, similar ideas are found in debates regarding development and entity, and the notions of "separation" in international law (as in the Israeli-Palestinian peace process). Another example is that of religion and churches, which have been described as providing "a separate sphere from the sphere of state control . . . [allows] their members to work out understandings of reality that are often quite different from those of the powerful groups of individuals known as the state," which can lead to progressive resistance. Stephen Carter, Comment: The Resurrection of Religious Freedom?, 107 HARV. L. REV. 118, 136 (1993).

strict separation between leadership and grassroots activities, demands loyalty to the group from its members, and requires that representation be exclusive. Sections 8 and 9 grant exclusivity to the majority union, that is, the union that wins the most votes in an election and its representatives are the only ones who can bargain on behalf of all the workers in the bargaining unit, including non-members. Union leaders are given disciplinary powers over members and may suspend members for being "unloyal," for example, for forming a separate caucus. Paul Weiler, consistent with his aforementioned suggestions to increase economic weapons in order to revive the labor movement, has also suggested the regulation of more union powers that would enable unions to discipline their members.

Hence, some have described American labor law as a mini-model of representative democracy, promising "the same rewards and confront[ing] the same problems as its parent and archetype, liberal democracy." The metaphor of a mini-democracy is illuminating: the NLRA functions as the constitution of the regime, providing structure, organization and ensuring the rights of workers. The NLRB serves as the administrative body, supervising the election of unions by workers to represent them in the "legislative process" of collective bargaining. The labor agreement becomes the industrial code applicable to the particular workplace. Therefore, although collective bargaining could be imagined as a strong form of workplace participation, "the structure of conventional collective bargaining has not been particularly encouraging toward day-to-day employee participation."

What is striking is that the hierarchical structure of NLRA unions was

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158. On the dangers of the "loyalty duty" in the context of social movements, see Janet E. Halley, Gay Rights and Identity Imitation: Issues in the Ethics of Representation, in THE POLITICS OF LAW 115, 126 (David Kairys ed., 1988) ("Here is a dangerous point in intragroup politics. When group members promote a duty of loyalty they implicitly ask internal dissenters to fall silent.").


163. Id. at 728-731.

164. Id.

165. Id.

166. Klare, supra note 84, at 808-809.
conceptualized at a time of overt exclusion of workers by unions. At the peak of the labor movement struggle, the labor movement was a relatively homogenous exclusionary movement. Such homogeneity made it relatively easy to universalize "the worker" as a white, male, English-speaking, able, American worker. Up until the New Deal, and in some cases even after, unions widely practiced overt exclusion of minorities, women and immigrants. During the Lochner era, almost all labor unions engaged in race discrimination, ranging from complete exclusion to internal segregation. Due to this exclusion, employers consistently used black strikebreakers during strikes.

Women were excluded from unions for the double fear that women would take men's jobs (and perhaps decrease wages) and that their work would weaken the nuclear family. Even when women were allowed to join unions, it has been argued that this was because the American Federation of Labor (AFL) understood that it would be easier to control women from within the unions. When unions finally admitted women to their ranks, many unions "engaged in exclusionary tactics ranging from holding late-night meetings in saloons, where women were unwelcome without escorts, to ridiculing women who spoke at the meetings." As the workforce grew more diverse and overt exclusion from union ranks was no longer possible, the majoritarian rule of the NLRA served as a basis for covert exclusion. During the 1940s and '50s, discriminatory collective bargaining agreements were signed by unions. These included clauses that blocked the hiring of African-Americans and married women as well as clauses that forced women who married to resign. The first

171. Kessler-Harris, supra note 170, at 97-98.
172. Id. at 99.
173. See, e.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); see also Herbert Hill, Black Labor and the American Legal System 26 (1977) ("[N]ational labor law was, until 1964, concerned almost exclusively with the regulation of relations between management and organized labor, leaving such 'third parties' as blacks and women unprotected from discriminatory employment practices."); Marion Crain, Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story, 4 TEX. J. WOMEN & L. 9, 62 n. 242 (1995) (citing Nancy Gabin, Women and the United Automobile Workers' Union in the 1950s, in WOMEN, WORK AND PROTEST 259, 264 (Ruth Milkman ed.,
move away from overt discrimination was to increase scrutiny over the internal structures and processes within unions by the development of the fair representation doctrine. Although the NLRA did not include such an obligation, over time courts required unions to represent every worker in a bargaining unit fairly. The duty was first articulated in Steele v. Louisville & Nashville R.R. in regard to the Railway Labor Act. The Court held that a union could not bargain for an agreement that discriminated against the African-American members of the bargaining unit. The Court explained that the duty to represent fairly was an implied obligation stemming from exclusive representation. Later cases further developed the fair representation doctrine to encompass a wider prohibition against discriminatory practices. By failing to fairly represent its members, the union itself may be liable under Title VII for breach of duty.

Although the doctrine of fair representation was an important step in decreasing internal discrimination within a hierarchical structure of worker organization, many writers have commented on the weakness of the doctrine and have pressed the need for its reform. Most problematic is that it is often the case that goal definition cannot be read as discrimination, since the focus on wages and material benefits is widely understood to be the lowest common denominator of all workers. Discrimination is usually not perceived as such if it merely involves an omission to bargain on various issues that are more central to the lives of certain workers. Because

1985)); Herbert Hill, Race, Ethnicity and Organized Labor: The Opposition to Affirmative Action, NEW POL., Winter 1987, at 31, 33 (arguing that labor unions "functioned primarily to advance the interests of white workers, to guarantee them privileges in the labor market").


175. Steele, 323 U.S. at 204, 207.

176. Id. at 204.

177. See, e.g., Vaca v. Sipes, 386 U.S. 171, 190-91 (1967) (stating that a labor union may not use its discretion partially, arbitrarily, or in bad faith).

178. Id. at 190.

179. For examples of articles that are dedicated to reforming the fair representation doctrine see the following: Ross E. Chett, Competing Models of Fair Representation: The Perfunctory Processing Cases, 24 B.C. L. REV. 1 (1982); Martin H. Malin, The Supreme Court and the Duty of Fair Representation, 27 HARV. C.R.-C.L. L. REV. 127 (1992); Lea S. VanderVelde, A Fair Process Model for the Union's Fair Representation Duty, 67 MINN. L. REV. 1079 (1983). See also Michael J. Goldberg, The Duty of Fair Representation: What the Courts Do in Fact, 34 BUFF. L. REV. 89, 96 (1985). Empirically, in a study that reviewed cases regarding the duty of fair representation, it was found that plaintiffs rarely won such actions against their union. In the opinions published from 1977 to 1983 plaintiffs won in less than five percent of the cases. Id. Although this could be interpreted as showing that most cases are simply baseless, in light of the historical and on-going reality of discrimination within labor unions, I believe these figures may indicate the ineffectiveness of the doctrine of fair representation to provide a framework of ensuring equality and participation within unions.
all issues placed on the bargaining table are in fact competing with one another in a situation of finite time, energy, and resources, it is almost impossible to detect how a bargaining process and its outcome has disparately affected different workers. Since historically, and still today, union leadership is dominated by white men, even at times when men do not necessarily outnumber the women in the group,¹⁸⁰ these problems are still very real.¹⁸¹

In addition to exclusion of issues from the bargaining table, in many cases union representatives have been hesitant to represent workers in discrimination claims and grievances. Thus, workers have turned to “outside” sources for legal and moral support.¹⁸² In certain cases, union leaders have even played an active role in discrimination and have reportedly been active participants in creating hostile working environments by engaging in harassment.¹⁸³

Today, many union organizers are calling to rebuild unions using a

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¹⁸⁰. Even in unions in which men are outnumbered by women, men tend to control leadership positions, particularly at the national level. Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 GEO. L.J. 1903, 1944 (1996).

¹⁸¹. For example, even though women are now a dominant part of the workforce, very few collective agreements include clauses regulating flexible hours or childcare facilities. In effect, statistics have shown that only approximately 2 percent of the nation’s establishments with ten or more employees sponsor day care centers for their workers. Carol Ann Diktaban, Employer Supported Child Care as a Mandatory Subject of Collective Bargaining, 8 HOFSTRA Lab. L.J. 385, 413 (1991). This is particularly telling when compared to issues of workers’ “individual care,” such as sickness, injury and pensions, that are typically included in collective bargaining agreements. Similarly, collective bargaining on equal pay for comparable worth, sexual harassment prohibitions, and issues concerning gay and lesbian workers has been scarce. Crain, supra note 170, at 1945; Marion Crain, Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story, 4 TEX. J. WOMEN & L. 9, 34 (1995). Even when such benefits are conferred, they are often a result of external interventions by different social movements. For example, where domestic partner benefits have been conferred on employees through collective bargaining, it has usually been under the threat of litigation, initiated by gay and lesbian identity groups such as Lambda. Steven Briggs, Domestic Partners and Family Benefits: An Emerging Trend, 45 Lab. L.J. 749, 750-53 (1994). Regarding disabilities, although labor unions have been strong vocal supporters of the ADA, there have already been cases in which unions opposed accommodation of disabled workers that interfered with collectively bargained seniority rights. Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996) (holding that the ADA did not require reassignment of disabled workers in violation of a bona fide seniority system). For a general discussion on the realtionship between collective bargaining and the ADA, see Robert A. Dubault, The ADA and the NLRA: Balancing Individual and Collective Rights, 70 Indy. L.J. 1271 (1995); Mary K. O’Melveny, The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?, 82 KY. L.J. 219 (1993-94).


¹⁸³. Id.
“bottom-up approach” and increasing democracy within unions.\(^{184}\) A hierarchical model of worker organization provides the strength of a “united-front” vis-a-vis a united, hierarchical employer, as we shall see in the next section. At the same time, the rise of employee organizations that distinguish themselves from “unions” is in part a reaction to the hierarchical model of the NLRA, and its evident problems — the silencing and exclusion of the voices and interests of weaker sub-groups, coupled with pacifying workers’ struggles by a rigid separation between representatives and rank-and-file.

B. The Second Dimension: Horizontal Coercion

Esprit de corps: the common spirit existing in the members of a group and inspiring enthusiasm, devotion, and strong regard for the honor of the group.\(^{185}\)

1. Relational Work, Soft Skills and Emotional Labor

The move from individuated to more coordinated work, paradigmatically linked with the move from production to services, or from mass production to flexible production, has brought an increased emphasis on what is termed “soft skills” and “emotional labor.” Soft skills can be divided into two sub-categories of skills, namely, interpersonal and motivational.\(^{186}\) Although the two sub-categories are many times tightly connected, and this is part of the conflation in many writings between the horizontal and internal dimensions, I view the first category, interpersonal skills, as part of the horizontal dimension, and the second category, motivational skills, as part of the internal dimension, which will be discussed in the next section. Interpersonal skills include friendliness, teamwork, and ability to fit in.\(^{187}\) They may also involve appropriate affect, grooming, and attire.\(^{188}\) These skills are emphasized and evaluated both during the hiring process and during the course of employment. For example, before hiring, the use of personality tests, such as the Hogan Psychological Test, which examines ability to adjust, ambition, sociability,

\(^{184}\) Martha Gruelle, Democracy is Power: Rebuilding Unions from the Bottom Up, Lecture at Harvard Trade Union Program (Mar. 6, 2000) (advocating more control for rank and file over their campaign and more local involvement in organizing).


\(^{187}\) Id. at 256.

\(^{188}\) Id.
likeability, creativity and prudence, is now widespread.\textsuperscript{189}

Emotional Labor relates to interpersonal activities at work. Arlie Hochschild defines emotional labor as work that “requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others.”\textsuperscript{190}

When an organization seeks to create demand for a service and then deliver it, it uses the smile and the soft questioning voice. Behind this delivery display, the organization’s worker is asked to feel sympathy, trust, and good will. On the other hand, when the organization seeks to collect money for what it has sold, its worker may be asked to use a grimace and the raised voice of command. Behind this collection display the worker is asked to feel distrust and sometimes positive bad will. In each kind of display, the problem for the worker becomes how to create and sustain the appropriate feeling.\textsuperscript{191}

Although Hochschild includes in her definition the production of a particular emotional state in a customer, client, or co-worker, she focuses her study on emotional work vis-a-vis clients and customers, and emphasizes the interaction with the “public” as a criterion in defining emotional work.\textsuperscript{192} Yet, in many workplaces, the requirements of interpersonal interaction are most often present vis-a-vis co-workers, supervisors and subordinates.

Traditionally, neither emotional labor nor interpersonal skills have been perceived as coercive work requirements. On the contrary, given conventional biases of privileging emotional over menial work, these requirements often seem empowering. Yet, in many cases, this is ironic, since the codes of emotional task fulfillment may be as rigid as other sorts of tasks, and as artificially performed, requiring a sharp separation between “real”/”work” or “screened”/”internal” emotions, between the “personal” and the “impersonal.”\textsuperscript{193} Moreover, with the growing importance of the concepts of soft skills and emotional labor, new patterns of discrimination and exclusion are emerging. In fact, it is easier to stereotype with regard to soft skills than with regard to “hard” skills, that are more formalized or

\textsuperscript{189} Jody Hoffer Gittell & James Powers, Organizing Work to Support Relational Coordination, Lecture at Sloan School of Business, MIT (Mar. 14, 2000).

\textsuperscript{190} Arlie Russell Hochschild, The Managed Heart: Commercialization of Human Feeling 7 (1983).

\textsuperscript{191} Id. at 137-38.

\textsuperscript{192} Describing clerical and service occupations, including cashiers, salespeople, lawyers and social workers. Hochschild’s two examples for the production of the emotions of gratitude and fear are flight attendants, who must enhance customers’ status, and bill collectors, who must deflate customers’ status. Id.

\textsuperscript{193} In the next section, I discuss the dichotomy between personal/impersonal at the workplace, see infra Section V.C.
technical, and can be more easily measured, quantified, or certified by a
degree. Soft skills are also more contingent and dependent upon cultural
norms. Because they are so open-ended, they can be used as a pretext for
other things, such as racial discrimination or discrimination against
applicants who are suspected to be people that will want to unionize.194
Studies have shown that employers consistently discriminate against
African-Americans when screening on the basis of soft skills.195 Similarly,
studies have found that certain types of emotional work are
disproportionately delegated and expected of women in the workplace,
while other emotions are thought to be better expressed by men.196
Discriminatory decisions in such situations are either made by supervisors,
in a traditional hierarchical form, or by peers, as will be discussed in the
following sub-section. These forms of discrimination and disparities are
only beginning to be recognized by courts. As with many issues in liberal
regimes, although the law is often a step behind in addressing problems, the
forefront for bringing legal adjustments to new realities is likely to be
identity-based discrimination claims, which are more receptively heard,
particularly in the United States, than class-based claims for universal
redistribution or justice.197

One example in which the Court has recognized gender discrimination
in the context of soft skills is the Price Waterhouse case, where the
plaintiff, Ann Hopkins, was denied partnership in her accounting firm.198
While she was often praised as an “outstanding professional,” and Judge
Gessel stressed that she was described as

[an employee with a] strong character, independence, and
integrity ... extremely competent, intelligent, strong, and
forthright, very productive, and creative. Virtually all of the
partners’ negative remarks about Hopkins—even those of partners
supporting her—had to do with her “interpersonal skills,” ... [both]
supporters and opponents of her candidacy, indicated
that she was sometimes overly aggressive, unduly harsh, difficult
to work with and impatient with staff. There were clear signs,
though, that some of the partners reacted negatively to Hopkins’
personality because she was a woman. One partner described her

194. See Moss & Tilly, supra note 186, at 271 (recommending the development and
support of programs that will teach “code switching to assist inner-city Blacks in bridging
the cultural divide with employers”).

195. Id.

196. Hochschild, supra note 190, at 163.

197. See generally Nancy Fraser, Justice Interruptus: Critical Reflection on the
dichotomy between “distribution,” which is class-based and “recognition,” which is
identity-based).

as “macho”; another suggested she “overcompensated for being a woman”; a third advised her to take “a course at charm school.”

Under these circumstances, the majority opinion of the Supreme Court held that Hopkins was discriminated against on the basis of gender stereotyping. While this is an important decision, it is important to remember that it leaves untouched the legitimacy of interpersonal requirements in and of themselves, and focuses solely on the discriminatory effects of such requirements.

2. Manufacturing Interpersonal Skills: The Rise of the “Team Player”

As technology advances, the workplace is becoming more and more dispersed, meaning that co-workers can often work at home or in different offices. However, with the growing importance of relational coordination, new emphasis is put on coordination and meetings, and this is seen in new designs of work environments that emphasize conference rooms and common spaces. The “water cooler” has become iconic to informal meetings where people “get things done.”

In addition to altering the physical environment, many employers actively shape interpersonal skills by hiring group dynamics consultants, mandating collective “think sessions,” setting up extra-curricular activities, and by sending their employees to participate in “leadership workshops,” “executive retreats,” or simply “employee trips.” Employee “adventure training” retreats, for example, are designed to “bind participants to each other and instill greater unity once they return to the workplace.” Employees are often required to participate in games such as “trust falls,” in which “one participant stands on a tree stump with his or her back to other group members who line up and hold out their arms. The participant is then told to fall back, and is caught by the others before he or she hits the ground.”

The Wagenseller case, in which the plaintiff, a nurse, went on an eight-day camping and rafting retreat down the Colorado River with a group consisting largely of hospital co-workers and her immediate supervisor, illuminates the nature of some retreats. During the trip, the

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199. Id. at 1782.
200. Bill Mitchell (Dean of School of Architecture, MIT and author of City of Bits and E-Topia), Lecture at MIT, (April 4, 2000).
201. Id.
203. Id. at 660.
205. Id. at 1029. For additional analysis, see Vogel, supra note 202, at 660.
group engaged in collective urination, bathing, and heavy drinking. They also prepared a group parody "Moon River," in which all the participants exposed themselves. The plaintiff refused to engage in these activities, although she experienced great pressures from the group to do so. Although her evaluations before the trip were very good, upon return from the retreat, her supervisor constantly criticized her work, and eventually she was fired. The supervisor, who believed that participation in the group activities was a bonding experience among employees, claimed that the plaintiff’s behavior indicated she was not a “team player.” The case, in which the plaintiff claimed wrongful discharge, was analyzed in terms of violation of the state’s indecency statutes. The Arizona Supreme Court held that the discharge would be contrary to public policy if the employee was fired for refusing to participate in activities that would violate Arizona’s indecent exposure statute. Although the court did not limit the scope of public policy to acts violating a specific statute, it based much of its findings in this case on the fact that a criminal statute, “indecent public exposure,” was involved.

3. “Peer” Pressure in a Participative Environment

In the context of interpersonal relations, participative schemes should be understood. Employee involvement is advocated by many management scholars regarding “hierarchical, authoritarian management as being responsible for the most serious problems facing corporate organizations.” Yet, within participatory workplaces, it is important to notice the continuing existence of the several dimensions of coercive forces. First, there exist hierarchical forces, which are encoded and implemented in the participative settings. Using participative schemes, managers have developed new ways to exercise control over employees through social or “horizontal” relations, and are still directly involved in various “intimidation rituals” that coerce employees into submitting to their will. Second, a “purer” form of horizontal coercion appears when it is harder (although often times possible) to trace co-worker behavior and “peer” pressure back to the managerial direction. Finally, participation also relates to the dimensions of internal coercion and conceptual co-optation, which will be discussed in the following sections.

206. Wagenseller, 710 P.2d at 1029.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id.
213. HOGLER & GRENIER, supra note 69, at 109.
In their study on employee participation, Raymond Hogler and Guillermo Grenier quote a quality circle developer explaining the comprehensive use of different anti-union strategies: the “traditional approach,” “pro-active approach” and “individual approach”:

We are using the “traditional” management approach [against unionization] where management gives the workers information not necessarily solicited by them but nevertheless important in informing them about the anti-union stance of the company.

Another approach is the “pro-active” approach [used by some teams]. The facilitator sort of orchestrates and initiates the discussion of the union at QC meetings and in that way gets across certain ideas about the union to employees. The third approach is the “individual conflict” approach where individuals already known to be pro-union are isolated at the QC level and individual level. We try to keep them isolated from other QC members and at the same time confront them individually concerning the union issue.\(^\text{214}\)

As we can see, the “traditional approach” is clearly a hierarchical measure. The “proactive approach” described in the passage is more complicated. It uses horizontal peer pressure, organized and directed by managers. The “individual approach” is also a “mixed” measure. It uses the separation from the group as a method of control. Indeed, the use of coercive measures together shows the conflicting possible effects of co-workers, both as control “measures” orchestrated by management, and as threats, which need to be separated from one another in instances of resistance.

Supervisors, often called “facilitators,” are present during participation program meetings. The hierarchy is “flattened”, but present. Facilitators stage discussions by “insiders,” which bring up, in a seemingly spontaneous way, topics that are on management’s agenda, such as an anti-union discussion.\(^\text{215}\) It is interesting to notice that similar to today’s social psychologists who are used as facilitators or organizers of workplace participation, we have seen how in the Fordist era, industrial engineers and social workers served to supervise, to instill values, and to pose co-workers

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214. The individual approach is further described: “For the psychological campaign to be effective at the individual level, the “button” or weakness of each pro-union worker had to be identified, and the “personal touch” in authority soon became the customary method of controlling the work force.” \textit{Id.} at 112-13.

215. \textit{Id.} at 113-14. In this context, it is also important to rethink the prohibitions of employers’ coercive speech against unionization. Clearly, the use of co-workers should also be considered in some way. On employer speech prohibitions, see generally Alan Story, \textit{Employer Speech, Union Representation Elections, and the First Amendment}, 16 \textit{BERKELEY J. EMP. \\& LAB. L.} 356, 406-14 (1995) (suggesting that the NLRB underestimates the coercive power of certain non-threatening employer speech regarding unionization).
against one another by requiring them to report on each other's behaviors.\textsuperscript{216} Understood in this light, it is not surprising that some scholars and union leaders refer to participatory schemes in the workplace today as "Team Taylorism."\textsuperscript{217}

[W]hen a union is not involved [in participation programs] workers usually end up being manipulated. This might have its attractions, since usually it means that the company will change its routine for a while and it will seem as if something will come out of this change. But in most cases it's all smoke and mirrors... Especially in these days, when companies are looking for flexibility, which really means absolute control, you find that employers will put in some sort of quality circle model to avoid other models which might require that they really listen and respond to the people, like a union... Employers create these things to create an illusion of participation when in reality the purpose is the opposite: to control and manipulate the workers.\textsuperscript{218}

And again, many scholars worry that dividing employees into small participatory groups fragments their collective voice.\textsuperscript{219} Parker and Slaughter argue that such "choosing sides" pressures also exist when participatory schemes are introduced within a unionized setting.\textsuperscript{220}

Employees, first of all, have a sense of belonging to and identifying with a specific work group. For that reason, they have little sense of community with all other workers in the plant. The segmentation into small groups engenders an "us-them" view of work relations and obscures common interests of workers as opposed to the interests of managers. The small group allows management to more closely monitor employee behavior and

\textsuperscript{216} See infra Section III. For an example of today's facilitators see Hogler & Grenier, supra note 69, at 109 (describing the manager in charge of developing a quality circle program as "a social psychologist from one of the major behavioral science departments in the country. In one of his candid moments, he confided that he was hired for three reasons: he was a Chicano, he hated unions, and he was trained in manipulating people"). It is similarly interesting to observe that Senator Wagner, explaining the need for the NLRA, talked also about "human engineering" and "the new economics of social control." Barenberg, supra note 9, at 1415, (citing Robert F. Wagner, Address to the Conference on Unemployment 5 (Dec. 30, 1930)).


\textsuperscript{218} Hogler & Grenier, supra note 69, at 117 (quoting Richard Bensinger, Director of the AFL-CIO Organizing Institute) (emphasis added).

\textsuperscript{219} Mike Parker & Jane Slaughter, Choosing Sides: Unions and the Team Concept 3-6, 48-49 (1988).

\textsuperscript{220} Hogler & Grenier, supra note 69, at 109-110 (citing Parker & Slaughter supra note 219).
attain conformity to the organizational norms. Similarly, participatory structures encourage workers to confront managers on an individual basis, thus impeding collective activity on the part of workers. Conflict is to be resolved by personal interaction and not through institutional methods such as a negotiated labor agreement, the supervisor appears to be "one of the workers," and the goals of workers and supervisors are perceived as common and mutually attainable, rather than class-based and adversarial.\textsuperscript{221}

In addition to the presence of hierarchy within horizontality, "purer" forms of horizontal coercion also exist within participation frameworks. The concept of "self-managed team" typically gives workers direct responsibility for managing their own time-schedules, task distribution and discipline. Many forms of employee participation often encourage written evaluations or open discussion regarding negative emotions toward other employees.\textsuperscript{222} At times, co-workers can exercise more pressure on each other than management because of their close relationships and the access to information about each other's "soft spots" and vulnerabilities. Everything becomes more "personal" and boundaries between friend and foe are blurred.

The coercive effects of the group may begin during the hiring process and may continue until the termination of employment. Hogler and Grenier describe the roles of quality circles in the hiring processes in a Johnson & Johnson plant during the 1980's.

\textit{[T]}he effects of QC [quality circle] on the work force began even before an applicant was officially hired. Each potential employee was first interviewed by a member of the personnel department and, if she survived the initial interview, was referred to the plant manager or a department supervisor for another interview. The final stage in this process was an interview by two QC members or future "peers" from the Circle to which the applicant would be assigned. Those two workers had the authority to hire or to veto the hiring of the applicant. Consequently, the new employee realized during the hiring process that she was dependent upon her fellow QC members for her job; and after an employee was hired, the QC program continued to function as the primary structure socializing the employee into the normative patterns of the plant work culture.\textsuperscript{223}

In addition to their universal effects, here again, a close look at

\textsuperscript{221} Hogler & Grenier, supra note 69, at 109 (emphasis added).
\textsuperscript{222} Id.; see also Guillermo J. Grenier, Inhuman Relations: Quality Circles and Anti-Unionism in American Industry 46-48 (1988).
\textsuperscript{223} Hogler & Grenier, supra note 69, at 112.
participative dynamics reveals that they may entail patterns of discrimination and exclusion. These patterns are more subtle, interactive, and structural, and not easily configured into preexisting constructions of anti-discrimination laws. According to some studies, women have greater difficulties assimilating in the participation process. Recently, a group of African-American employees filed a suit against their employer in reaction to the creation and actions of self-managed teams at the company. However, discrimination laws reflect the traditional images of hierarchical coercion, in which there is an individual who has the power to decide to discriminate against a subordinate. In self-managed teams that decide their own directions, it is much more difficult to point out who decided and how a discriminatory decision was made. Therefore, understanding the dynamics of decision-making within a group of peers is crucial to rethinking the laws to accommodate these challenges.

One of the areas in which such inquiries have begun to take place is that of peer sexual harassment. While sexual harassment cases are continuously informed by hierarchical motivations (such as the sexual desires of a supervisor) rather than peer competition, they have also recognized to some extent the presence of horizontal harassment relations. Building on this recognition, Vicki Shultz argues that it is important to adopt explicitly an "in-out" approach and reject the "top-down" approach to sexual harassment. This is because one must understand sexual harassment as a mechanism for exclusion by co-workers, with the purpose, not of gaining sexual favors, but of excluding women's participation and inhibiting their advancement. Cases like Price Waterhouse, Wagenseller and Johnson Wax also illuminate the need for more sensitivity toward interpersonal work requirements, intra-group "horizontal" dynamics, and

225. PAUL BATE & IAIN MANGHAM, EXPLORING PARTICIPATION 205 (1981) (observing in their case study that "[t]his could be because it is male-dominated, but we also feel that the women have shown greater timidity in bringing issues forward, and have had greater difficulty freeing themselves from the 'moaning and groaning script'"). Rather than exploring the complex coercive dynamics of a genderized society, this kind of statement invokes an essentialist stereotype that women are less inclined to receive power, to participate in decisionmaking and that they prefer in some way to be in a hierarchical situation.
226. Polland, supra note 125.
227. Sturm, supra note 224, at 643.
228. Id. (citing Susan Jackson, Team Composition in Organizations, in GROUP PROCESS AND PRODUCTIVITY (S. Worchel et al. eds., 1992)).
the different functions of pressure at work. While discrimination and harassment claims are helpful in assessing such requirements, they should not be the end of every inquiry. There is always (and always has been) a need to assess the legitimacy of work relations and the requirements that are imposed upon individuals and groups in the workplace by others and by themselves. There are many areas in which the laws have developed in detail, including discrimination, harassment, and, to a lesser extent, privacy. Yet, there are still many blind spots in work relations, and this inquiry is aimed at illuminating where and how these could be found.

4. Employee Caucuses and Identity Groups

Participatory schemes can be described as a collapse of both hierarchical work patterns and hierarchical worker organizations. Employee participation programs are institutions of "employee voice" that are set up to serve management needs, but may also take on a life of their own, becoming a forum to express dissatisfaction. Therefore, they are often perceived by their members as an alternative to unionization. This is the on-going tension that can be read in the literature dealing with participation models. When participation programs are set up by management, it is difficult to view them as a "mode of resistance," which "mirrors" (rather than is) a pattern of work organization. It is interesting, however, to notice that within workplace settings that can be characterized as the "new workplace models," there have also emerged relatively autonomous constructions of employee organizations.

"Employee caucuses" have become widespread, especially in the high-tech industry, formed by active employees in a certain workplace with the goal of influencing their working conditions without forming a formal union. For example, in TekCo, an encouragement by management to use an electronic bulletin board to express employee dissatisfaction led to the formation of employee groups and collective resistance to the company's policies. Employee caucuses are portrayed as having an emphasis different from unions. These caucuses tend to be:

- decentralized and participative, minimizing the role of bureaucratic structure. Rather than placing demands on the employer, [an informal employee association] emphasizes services to the membership ranging from insurance plans to intellectual networking to "consciousness-raising." And when

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230. Alan Hyde, Employee Caucus: A Key Institution in the Emerging System of Employment Law, 69 CHI.-KENT L. REV. 149, 157-58, 166 (1993) (arguing that although currently such groups are not unions and their legal status is unclear, labor law should protect such employee caucuses as a fundamental institution of employee voice).

231. Id.
pressing collective interests, it usually makes use of publicity rather than such direct action as a strike.  

"Identity caucuses," again, are non-union employee groups that have formed in recent years at many workplaces around issues of identity and discrimination.

The first identity caucus, BABE (Bay Area Black Employees) was founded by African-American sales representatives at the Xerox Corporation in 1969 in reaction to receiving inferior sales territories. Since then, many other identity groups have formed in various workplaces, representing workers with shared "identities" (but not "class"), including women's groups, ethnic and national groups, and gay and lesbian groups. They may be said to mirror "employee diversity committees," which have been set up by management in many non-unionized companies as a response to complaints by minority employees.

Employee and identity caucuses reflect the movement away from hierarchy and the strict separation between labor and management that were the elements of the NLRA model. They can also be understood as a reaction to the traditional authoritarian and exclusionary practices of the labor movement. Finally, they may also reflect a strategic move. When a company is explicitly hostile to labor unions, employees have found other ways to advance their rights. In the case of identity caucuses, the strategic advantage is even broader. In an anti-union, anti-redistribution regime, along with the relative receptiveness of anti-discrimination and "recognition" claims on behalf of identity social movements, worker organizations that frame their claims around identity issues may well be more successful than those who frame universal demands.

232. HECKSCHER, supra note 78, at 66.
233. Hyde, supra note 230, at 172-73. BABE convinced management to increase the number of black employees at Xerox by assigning one black interviewer to each black candidate and by personal recruitment by BABE members. BABE's goals widened when the group filed a suit against Xerox, claiming that black sales representatives were assigned inferior sales territories. The suit was settled, local management was replaced, new territories were assigned, and Xerox even provided some compensation to equalize past earnings.
234. For example, 9to5, the Working Women's Association, addresses the needs of women office workers to enhance their ability to assert and enforce their rights. Although it is allied with the labor movement, it remains an independent organization. Crain, supra note 173, at 72; Rachel Geman, Safeguarding Employee Rights in Post-Union World: A New Conception of Employee Communities, 30 COLUM. J. L. & SOC. PROBS. 369, 379-80 (1997) (citing Ann Scales, Black AT&T Workers to Urge Diversity Plan, Dallas Morning News, Sept. 23, 1993, at 2D).
236. E.g., FRASER, supra note 197; Kelman, supra note 64, at 993.
C. The Third Dimension: Internal Coercion

1. Faceless Authority and Corporate Cultures

In its March 2000 issue entitled "The Liberated, Exploited, Pampered, Frazzled, Uneasy New American Worker," the New York Times Magazine notes:

Authority has not exactly vanished from corporate America, but it isn’t what it once was. The boom has turned employers into buyers in a seller’s market and it is tough to sell discipline and order to a newly empowered population imbued with the free-agent spirit. Anyone who doubts just how vulnerable the boss now is need only visit the Web site[s] [where employees exchange information about supervisors]. . . . It’s hard to think of a form of authority that has gone unchallenged in this boom, other than the faceless authority of huge piles of money.  

There are many ways in which authority can be embedded in social and organizational structures other than direct “external” commands. Indeed, the most insidious use of coercive power is shaping values and perceptions so that workers accept their role in the existing order, preventing questions, resistance, and conflicts from arising in the first place. One of the greatest mysteries with which social theorists have struggled is how and why people “obey” something that is not “there;” how organizational discourse and structures function to exclude certain meanings and to legitimate others, creating a range of shared meanings, which are biased in favor of employers.

Many writings have been dedicated to the formation of corporate cultures (or “ethos”), often linking these questions to inquiries concerning the shifts between perceptions of economic enterprises as fiction and as “real,” as networks of contracts or as organic entities. In fact, many
FOUR DIMENSIONS OF POWER

Corporate cultures are described as double-sided. There is the “external culture,” which reflects how the corporation portrays itself to the “world,” the consumers, the public, the market and an “internal culture,” the life inside the firm.¹⁴¹

In the “inside world,” certain attitudes and values can be understood to be the “right” ones to hold, and certain beliefs are likely to be shared. One attempt to articulate the faceless values of enterprises is that of Gerald Frug in his article, The Ideology of Bureaucracy in American Law, in which Frug explains how bureaucratic power is legitimated by creating an image of a structure that restrains human domination through constraints on those who wield power within it.²⁴² Frug argues that the characteristics of bureaucratic ideology serve as “mechanisms of deception,” leading us deceptively to believe that bureaucracy allows for human freedom and autonomy, or in our terms, human agency, when in fact it serves as a coercive system with narrow possibilities.²⁴³ This is made possible by maintaining two coexisting ideologies within the bureaucracy. First, bureaucratic organizations are defended on the basis that their power is constrained by “objectivity” and “neutrality.”²⁴⁴ Second, within this “objective structure,” there is also a notion of its antithesis, subjectivity, in which the bureaucracy allows for the presence of personal self-expression and individuality.²⁴⁵

At this stage of our inquiry, using the context of Frug’s objective/subjective dialectic, it is important to emphasize that the questions of internal coercion should be complicated in several ways. First, when we understand preferences not as fixed, but as dynamic, how can we differentiate between benign development of preferences and coercive influence? In this sense, the interplay between subjective/objective,


²⁴² Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1286-87 (1984); see generally Meir Dan-Cohen, Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society (1986) (discussing the question of bureaucracy and how it was created); Alvin W. Gouldner, Patterns of Industrial Bureaucracy (1935) (same).

²⁴³ Frug, supra note 242, at 1286-87.

²⁴⁴ Id.

²⁴⁵ Id.
personal/impersonal challenges the possibility of "subjectivity," and perhaps even of "agency." Thus, "[s]ubjectivity" becomes just as much of a construct as 'objectivity,' so that we could use the same tools to show that it is impossible for law and science to be 'subjective' as we had just used to show that they could not be 'objective.' Moreover, without a more substantive idea of "good" worklife, it is difficult to draw the lines between coercion and preference reconstruction, and between legitimate and illegitimate influence.

Second, what are the values, requirements, and expectations to which internal coercion mechanisms are geared? There is a wide spectrum of "commands" or "expectations" present in a workplace. The most obvious are concrete norms that are explicitly stated, either as a general matter, through detailed codes of conduct of a firm, or in ad hoc situations, for example, demanding obedience to a supervisor’s or a team’s resolution. The more difficult situations to explain are when a company expects something more than mere obedience. The compliance with such expectation may seem vague, and it is difficult to trace where the expectation was generated. Indeed, often such expectation may even be in contradiction with a firm’s formal work conditions. A vivid example, and one close to home, is that of law firm culture. While many law firms formally offer reduced hour arrangements and flexible parental leave policies, these have little effect on the lives of the lawyers employed by the firm, since the cultural underpinning of law firms, the "culture of success," prevents lawyers from utilizing these formal arrangements. Thus, if in the previous section, we saw the demands for "forced intimacy," here we must recognize the existence of demands for "forced spontaneity/creativity."

Hence, as promised, this section completes the second side of "soft skills," motivational skills, including enthusiasm, creativity, positive work attitude, morale, commitment, dependability, and willingness to learn. Again, these requirements have become increasingly important in new patterns of work. Michael Piore describes how new forms of organizing work and job descriptions contribute to more creativity and independent thought of employees in comparison to the "old" narrowly tailored tasks: "[t]he notion of creativity is alien to a conception of thought in which the range of possible ideas is anticipated in advance and encoded in memorized routines or in abstract principles that are evoked by cues from the external conditions."
Katherine Stone has also recently described the new requirements of workplaces, pointing to a paradox in these new employment relationships. On the one hand, job security and promotions are no longer implicitly promised in the relationship, yet, on the other hand, employers aim to build a “high-commitment workforce,” in which employees are expected to be highly motivated and dedicated to their jobs.

A third commentator, Charles Heckscher, contrasts the expectations from workers in the old Taylorist hierarchical workplaces (which he refers to as bureaucracies in the following passage) with new participatory workplaces, based on the managerial theory:

[B]ureaucracy is driven by the need for stability, managerialism, by the need for flexibility. From employees, bureaucracy requires obedience, and, if possible, loyalty; managerialism requires creativity and commitment. Finally, the organization principle of bureaucracy is command; of managerialism, coordination of diverse and autonomous units. If innovation can come from any part of the system, the problem is to get all the pieces working in the same general direction.

When describing the movement from “old” requirements to new expectations, writers often fall into a dialectic of a shift from the old Taylorist discipline and obedience (bad) to the drive and motivation of new employees (good). The following table posits some of the rhetoric in this dialectic.

<table>
<thead>
<tr>
<th>BAD</th>
<th>GOOD</th>
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<td>Loyalty</td>
<td>Commitment</td>
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<tr>
<td>False Trust</td>
<td>Real Trust</td>
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<tr>
<td>“Above”-discipline</td>
<td>Self-discipline</td>
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<tr>
<td>Manipulation</td>
<td>Shaping values</td>
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<tr>
<td>Obedience</td>
<td>Work ethics</td>
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<tr>
<td>Pressure</td>
<td>Stress</td>
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<tr>
<td>Fear</td>
<td>Motivation</td>
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<tr>
<td>Strive-for</td>
<td>Drive-for</td>
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<tr>
<td>“survival”</td>
<td>“success”</td>
</tr>
<tr>
<td>Command</td>
<td>Coordination</td>
</tr>
<tr>
<td>Stick</td>
<td>Carrot</td>
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249. PIORÉ, supra note 7, at 119.
250. Stone, supra note 85; Richard E. Walton, From Control to Commitment in the Workplace, 76 HARV. BUS. REV. 76, 79-80 (1985).
251. HECKSCHER, supra note 78, at 101 (emphasis added).
Yet, as we have seen in the horizontal dimension, and as will further be described in this section, “newer” requirements are often not very different from the “old” ones, and both are often manufactured and tightly controlled by the employer.

2. Internal Control Mechanisms and Their Relation to the Former Dimensions

Workplaces generate values and internal coercion mechanisms in many different ways. We have already mentioned the role of structuring the workplace as personal and impersonal at the same time. Many employers make demands on employees that are considered very “personal.” Fordist environments included supervision regarding church attendance, personal savings, and even whether workers make their beds every morning. Workplaces also make demands regarding dress codes, extracurricular activities and social interactions. Even when such requirements are not made explicitly, employers and more veteran co-workers can signal their approval of certain attire and behavior by setting their own standards, rewarding certain employees and disapproving of others. At the same time, workplaces, often with the help of legal regulation, exclude the “personal” and set sharp boundaries between the objective/subjective, impersonal/personal, work/play, market/family, by prohibiting, for example, romantic relations between co-workers, personal arrangements during work hours, and the use of knowledge and skills gained from work outside of the workplace. Setting the boundaries of time and space are important elements of internal controls. In recent years, many firms have implemented open spaces, see-through cubicles, e-mail monitoring systems, drug-testing, strict time-table requirements, and reports of tasks in very short intervals.

Other pro-active mechanisms include the use of educational and training programs. In addition to promoting group unity as we saw in the former section in Wagenseller, outdoor adventure retreats are designed to develop employee identification with the corporation’s goals. Activities and classes are supposed to help employees “face their fears,” increase their creativity, and learn to deal with anxiety and stress through accomplishing physical goals, such as overcoming fear of heights or white water rafting. “[L]ike military basic training, these programs are designed to ‘remake’ executives in the image of the organization and to

252. Conot, supra note 91, at 176.
255. Id.
erase individual differences.”

Clearly, there is often also a close relationship between horizontal settings and internal coercion. The implementation of “cultural coercion” is facilitated by the coercive mechanism of the “social.” The new lean, “no-slacking,” “total quality” organizations that have looked at the Japanese workplace as a model have not only implemented the idea of “management by participation,” but also the idea of “management by stress.” Moreover, many firms that have looked at the corporate culture concept coming from Japan have found that employee participation programs that have been implemented in their own firms have been developing the same principles of the corporate culture movement. In subtle ways, managers use the teams to influence employees to understand the work environment from management’s perspective. The culture of participation creates an atmosphere in which rules and regulations are “informal” and are not directly associated with management, but seen as “a natural outcome of the social relations of production.” In light of such practices, managerial theorists believe that participation serves the function of “breed[ing] identification with the values and goals of the firm.”

Finally, the renaming phenomenon in the context of work is similarly an important piece of our puzzle. In recent years, many firms have changed job titles, from “secretaries” to “assistants,” from any title to “associates,” and sometimes even to “partners.” The renaming effect is closely related to the “disappearance” of the “blue-collar worker” and of the “working class.” Today, all are “white-collar” and “middle-class.” Exploring the current fracture between social-democratic parties and mass-production working-class, Roberto Unger notes:

They find this traditional constituency to be a shrinking part of the population, stuck in a declining sector of the economy, and perceived by others and ultimately by itself as just one more faction, with factional interests, rather than as the bearer of universal popular interests. When the labor and progressive parties sever their favored links with these working-class organizations, they often believe themselves to have no alternative but to turn to the generic “quality-of-life” concerns of the professional-business class. Although this class may

256. Id.
258. HECKSCHER, supra note 78, at 88.
259. HOGLER & GRENIER, supra note 69, at 109.
260. Id. at 108.
represent but a small portion of the population, it is a portion enjoying cultural ascendancy, especially over the vast masses of propertyless and powerless white collar workers, in services, shops, and offices, who imagine themselves member of a "middle class" to which all but the richest and poorest belong.

3. Passive Resistance

By pushing to its ultimate consequences the disciplinary power of the panoptic built by modern science, Foucault demonstrates that in this "regime of truth," there is no emancipatory way out, since resistance itself becomes a disciplinary power, hence a consented, because internalized, oppression.

The existential dilemma of "no exit" is most strongly understood within the context of internal coercion. How can workers resist faceless authority or values that they have learned to passively accept as part of their culture? How is dissatisfaction expressed against a system rather than a person? Legislative efforts to regulate the coercive use of this dimension are often limited by the difficulties of defining coercion and rendering it visible in this context. As Foucault has characterized, disciplinary power in various social institutions has no center; it is pervasive throughout the institutions; it is generated from the bottom up, making its own targets the agents of its diffusion.

Resistance to such forms of power is consequently difficult to mobilize or even to detect. Indeed, today, dissatisfaction of workers is expressed more passively than in the past. From sabotage to mere shirking, resistance to internal coercive devices becomes more subtle and atomized. The Dilbert comic-strip series represents the alienation of "white-collar" workers facing the absurdities of large bureaucracies and taking a micro-resistance, petty-corruption "survivalist" route, unable, as Unger implies, to imagine themselves as a collective class that could organize to improve their lives. Thus, the problem of a "commitment gap" is most widespread today and is apparent in many "high-discretion" job-holders. Rather than

263. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 143-144 (1996).
264. Boaaventura de Sousa Santos, Oppositional Postmodernism and Globalizations, 23 LAW & SOC. INQUIRY 121, 126 (1998) (emphasis added); see also DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION 271 ("Foucault is right that power, including power exercised through law, has meaning only to the extent that there is resistance and gets its practical content from resistance as well as from 'above.'").
266. HECKSCHER, supra note 78, at 5 (citing DANIEL YANKELOVICH & JOHN IMMERWAHR, PUTTING THE WORK ETHIC TO WORK: A PUBLIC AGENDA REPORT ON RESORTING AMERICA'S
active protest, employees tend to express their dissatisfaction by diminishing their commitment and effort at work.267

D. The Fourth Dimension: Conceptual Co-optation

The fourth dimension is the over-arching "meta" category of co-optation. While the third dimension, internal coercion, described "micro"-work patterns of pacifying workers, this dimension discusses the "macro"-phenomenon of deradicalizing an idea. Moreover, while the third dimension took a more static view of the single workplace, this dimension takes a comparative view, contrasting between the theoretical, often academic, ideal of reform, and how it plays out in practice. The two dimensions are, however, clearly connected. Thus, many phenomena that were discussed in the former section, such as the importance of "naming," reappear here. In fact, this dimension relates to much of what has been explored throughout this paper and, in a sense, can be seen as a partial summary and integration of former ideas. It will, therefore, be described relatively briefly.

A helpful distinction, which relates to the distinction between the dimensions put forth above, is that of the two senses in which concepts and forms of worker organization can be co-optive. First, many writers have explored how unionization and participation may co-opt (or "bust") one another, and I have discussed these concerns in former sections. Marc Barenberg describes the different ways in which this type of co-optation has been described in relation to participation:

The proposition, in the argot of economists and cognitive psychologists, is that capital suppliers' managerial agents, acting either in the distributive interests of their principals or in their independent interest in managerial control, use their bargaining power to generate "endogenous" changes in the "preferences" or "perceptual frame" of weaker contracting parties. Stated in the terminology of critical theory, employers exercise domination over workers through "hegemonic" transformations in worker consciousness or ideology, either as an alternative or a supplement to coercive forms of control. In lay terms, cooperative schemes "co-opt" workers. That is, such schemes do deflect workers' group choice over workplace governance modes, and in a systematic direction—away from the full collective bargaining that the New Deal policy equates with

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267. HECKSCHER, supra note 78, at 5.
268. Discussion supra Section II.
Again, this form of co-optation has been discussed in the earlier sections, particularly with regard to the use of social "peer" pressure and corporate values that lead workers to believe that unionization belongs to different times and types of workers, not to them—that they are already organized or part of the "system." Yet, in this section, I am interested in describing a second co-optation effect, that of the stripping down of the institutions of collective bargaining and employee participation from their own ideal. That is, the tension between the theory and the action, when facing a partial realization of an imagined reform.

1. The Judicial Deradicalization of Collective Bargaining

At the outset of his path-breaking paper, Karl Klare mentions a puzzle regarding the enactment of the NLRA: "[I]t appears that a small number of the most sophisticated representatives of business favored passage of the Act on the theory that some such measure was essential to preserve the social order and to forestall developments toward even more radical change."270

The puzzle is solved when Klare proceeds to explore the judicial deradicalization of collective bargaining. Klare argues that the New Deal reform has eventually fostered the co-optation of the labor movement and the diminution of labor's combativeness.271 In its most critical version, Klare explains, the claim is that "collective bargaining has become an institutional structure not for expressing workers' needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market."272 Klare demonstrates how certain interpretations of the Act, seemingly neutral or even favorable, actually reflected certain unarticulated images rather than necessary outcomes: contractualism surmounted participation, representation surpassed grass-roots activities, and "neutral" public/private dichotomies overrode the New Deal social-communal moment.

Thus, the courts understood the NRLA as implying individualism and self-interest by replicating the classical model of contractualism, and by perceiving the merits of collective action as merely a way to equalize bargaining power.273 Therefore, rather than interpreting the NRLA as a framework for the advancement of worker participation in ownership and

269. Barenberg, supra note 122, at 762.
270. Klare, supra note 9, at 266.
271. Id. at 267.
272. Id. (citing STANLEY ARONOWITZ, FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS 306 (1973)).
273. Id. at 265.
management, collective bargaining was limited to be simply a means of remedying unequal bargaining power by numerical aggregation of its members and strict representation by leadership. Moreover, the courts often continued to base their decisions on the notion that labor and management are more or less equivalent in their power, but extremely divergent in their interests and goals. Thus, the NLRA, as it has been interpreted by the courts, limited the scope of the bargaining unit (for example, rigidly excluding "managerial employees"), limited the possibilities of participation, limited the forms of labor activity, excluding "secondary boycott," and limited the scope of labor speech, excluding from it "political speech."

2. The Practical Deradicalization of Employee Participation

[Participative management] doesn't mean you delegate all your responsibilities to those below you, and it doesn't mean you start taking a vote on everything. Nor does it change the structure or hierarchy of your organization. Participative management is simply a style of operating in which you give your peers and subordinates an opportunity to say what they think, and you include their ideas in the overall decision-making process.

While in its ideal, workplace participation has been advocated by pro-labor scholars and activists. In practice, employers have demonstrated that they can implement participatory schemes while keeping the larger framework of the traditional labor-management power relationship essentially unchanged. For several decades, in the face of union decline,
labor scholars have been engaged in imagining new forms of labor organization, and have looked at the new participation schemes adopted by businesses, fantasizing that these were the new forms of workplace empowerment. Yet, as they looked closer, they began to realize that often, “[m]anagement can limit worker participation to the unimportant aspects of plant operations, in which no genuine power is surrendered.” In practice, many participatory schemes only allow for a consultative role for employees, without granting any actual power to decide. In the vast majority of cases, participatory programs concern operational involvement in day-to-day problems regarding issues that mainly benefit employers, such as quality of production and work processes, rather than strategic policymaking, regarding the direction of the company and the future of workers.

Facing this reality, labor scholars have begun to feel that they have been “tricked,” describing the practical implementation of the participatory ideal as “one of the last tricks of capitalism.” Thus, in reaction to the story that has unveiled itself, scholars who have advocated workplace participation are beginning to rethink, or at least rephrase, their conceptions. Early on, Paul Bernstein warned that the term “participation tends toward vagueness and is subject to a host of interpretations,” and therefore suggested using instead the term “workplace democratization.” Frank Lindenfeld and Joyce Rothschild-Whitt have stressed the distinction between “limited participation,” strictly controlled and limited by management, and “economic democracy,” which is a “genuine” form of participation. Katherine Stone has distinguished between “participation,” which allows “true” empowerment of labor, and “cooperation,” which is a management-oriented project and diserves labor. Stone thus asserted that the two terms, “cooperation” and “participation,” “must be kept distinct.” Finally, many scholars now argue that the concepts of (“low”) operational participation, at the shop-floor level and (“high”) strategic participation, at the upper-management levels, are distinct concepts properly considered separately.

278. HOGLER & GRENIER, supra note 69, at 109.
281. FRANK LINDENFELD & JOYCE ROTHCHILD-WHITT, WORKPLACE DEMOCRACY AND SOCIAL CHANGE 4-6 (1982).
283. Id. at 162.
284. See, e.g., Bainbridge, supra note 29; Barenberg, supra note 122.
3. Rethinking the Problem of Co-optation

Describing the co-optation dimension sometimes takes an uneasy path. It looks at something that has been perceived as improving workers’ situations, and declares, “the king has no clothes,” or more gently, “this is not good enough.” In the alternative, it finds ulterior motives in real improvements of working conditions, such as the motives of preventing organization and surrendering power. Thus, deradicalization arguments are difficult to make, and even more difficult for others to receive, without distorting the argument itself. Many times, or perhaps most of the time, the argument does not attempt to deny the benefits of what has been achieved but to illuminate what has not (yet) been imagined, linking the reasons for the latter with the existence of the former. It does not mean that having nothing is better than having a limited form of collective bargaining or a limited form of participation. It does mean, however, that having a limited form of collective bargaining or participation is incomplete, and there are yet paths for improvement and goals to achieve.

Equally important, exploring the fourth dimension exposes the problems of thinking about rhetoric and concepts as belonging to one side of a political debate. Then, when “the other side” embraces the language, there is a sense of loss of control over an ideal. This illuminates the need, in any effort for social reform, to always contextualize the discourse and to avoid evasive, open-ended slogans.

VI. ADVERSARIAL VERSUS COOPERATIVE - MAINTAINING AGENCY THROUGH A CONSTRUCTIVE TENSION

The more bureaucratic and confrontational the employer, the more the organizations of employees will fall into adversarial and centralized patterns. When they are treated as an inferior mass, white collar workers are quite capable of showing militancy, striking and picketing in traditional fashion. It is nevertheless true that, given the chance, they will gravitate toward more associational types of action.285

Are labor-management relations adversarial or cooperative? Linear descriptions of old/new work relations suggest that within hierarchical settings they are adversarial and within horizontal settings they are collaborative. They further suggest that adversary and hierarchy are aligned with coercion; while cooperation and horizontality are aligned with agency. Yet, a multi-dimensional understanding of coercion challenges these conventional alignments and illuminates the complexities of power in

285. HECKSCHER, supra note 78, at 67.
Adhering to traditional images of adversary and hierarchical coercion conceals many "old" and "new" forms of coercion that are still pervasive in current patterns of employment relationships. We have seen how in both "old" and "new" workplaces several dimensions of coercion may exist. Indeed, we have seen that in the paradigm of "paternalism," the Fordist model, all coercive dimensions were present in a high degree. Moreover, we have explored how hierarchical power can be embedded in horizontal forces, and vice versa, and how a single institution, such as a "self-managed team," can simultaneously be an empowering and a suffocating experience. In this sense, both collective bargaining and employee participation have similarly functioned to serve, in many ways, both labor and capital needs.

Unless there is a complete identity between ownership, management, and workers, there are always conflicts of interests between the constituents of an economic enterprise. These tensions may be enhanced or mitigated, overt or covert, but in any case continue to exist. As are most human relationships, labor-management-ownership relations are both adversarial and cooperative. In sociology, the tension has been termed "antagonistic cooperation":

Antagonistic cooperation. A relationship between or among persons in which they join their efforts to produce something of value to the participants, while at the same time being in conflict over other things, most particularly the division among themselves of the product of their joint efforts. The term has some currency in sociology. It has, oddly enough, almost none in economics, even though the normal alliance of factors of production in modern economic aggregates, e.g., between labor and capital in a corporation, marvelously exemplifies the term and concept. Indeed, in a somewhat less obvious sense, normal economic trading also exhibits antagonistic cooperation, in that parties to a trade can both increase their utilities by exchange, but still contend over the ratio between the traded goods, i.e., over the price.\(^\text{286}\)

This is an irresolvable tension, but it is also a clearly patterned and unequal tension: throughout prosperity and crisis, old and new economies, it is the worker who is more vulnerable to the tension and who has less power in shaping its shifting points of balance. Because of this, it is essential to visibly maintain both aspects of the tension, and to understand the tension itself as a potential space for action, agency, resistance, and change.

Within this tension, it is also important to realize that both "labor" and "capital" are not singular entities. Rather than a monolithic image of labor-management relations, throughout the paper, I have accepted a pluralist framework of labor relations, understanding organizations as "[f]ractured...with incompletely overlapping memberships, widely differing power bases and a multitude of techniques for exercising influence on decisions salient to them."\footnote{287}

Co-workers, whether in participatory settings or organizing in a representative hierarchical structure, have both empowered one another and have excluded weak groups of workers among them. In turn, marginalized workers have at times been able to overcome discrimination by co-workers by turning directly ("bypassing" the union) to employers. Employers, too, are in competition among themselves. At times, for example, when facing strong competition with foreign enterprises, employers seek to strengthen their cooperation with workers. Moreover, there is no simple trade-off between cooperation between workers and management and cooperation of workers among themselves. Worker organization, both the collective bargaining typology and employee participation, in fact contributes to more cooperation with employers.\footnote{288} Again, work-related alliances, pressures, and power are dispersed, yet patterned, multi-dimensional and highly unequal. The following chart illustrates this dynamic web of relations.

Critical feminists and critical race theorists have explored the epistemic advantage that people at the bottom of hierarchies, often people of color and women, have in escaping dominant views and imagining alternatives to the majority culture.\footnote{289} A complex understanding of the

\footnotesize{287. Nelson W. Polsby, Community Power and Political Theory 118 (1963).}

\footnotesize{288. We have seen how loyalty to the organization, whether to the union or to a team/committee, often increases loyalty and motivation in regard to the workplace in general. Empirical studies support these arguments as well. See, e.g., Heckscher, supra note 78, at 6 (Motivation is proved to be higher in workplaces where there is a strong union); Bainbridge, supra note 43, at 1026 (citing James Wallace Bishop & K. Dow Scott, How Commitment Affects Team Performance, HR Magazine, Feb. 1997, at 110) (evidence shows that commitment and loyalty to the work team, rather than to the firm, is the factor that brings about increased productivity); Freeman & Lazear, supra note 44, at 28 (only "real" participation of employees through work councils with real power is likely to result in greater loyalty of employees to their firms); Lynch, supra note 24 (stating that a recent national survey indicates that only when participation implemented in unionized settings productivity increases).}

logic of control and the functions of power in the workplace further illuminates the importance of the number of hierarchies in shaping the relative power of the powerless.
TABLE II: Why Constructive Tension?

Adversarial ↔ Cooperative

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Foreign Competition
Employer

Pool of Foreign Workers

Employer
Owner
Management

Worker

Workers (Labor Unions)

Community, Consumers, Human Rights NGOs

National cooperation; industry bargaining (not regulated US)

"Reserve" pool of workers, as strike breakers (usually minorities); secondary market

ILO, International alliances between labor organizations

Employee / "Identity" Caucuses [But 'fragmentation']
Thus, I believe that rather than choosing between labor law and new forms of employee participation, a legal regime should support a "constructive tension" and require both "adversarial" collective bargaining schemes and "cooperative" participatory schemes, in order to create spaces for resistance and positive shifts among systemic uses of power in the workplace. Institutions and culture are not monolithic. They serve both as a means of control and a site for reform and resistance. A multiplicity of worker organizations can provide alternative routes and bypasses to "check and balance" work power relations. The model that I propose can sustain the need for "solidarity" and "fragmentation," the "power of numbers" and "the power of separatism," strong "united" representation and direct "unmediated" grassroots activism. Most importantly, a constructive tension will enable workers to broaden their understandings of the nature and possibilities of such organizations, to recognize the links between different economies, industries and "types" of workers, and to imagine new institutions that will challenge these so often false dichotomies.

VII. CONCLUSION - BETWEEN HAMMOCKS AND WEBS

Describing efforts of building work-related social institutions in Mexico, that would be "decentralized" and "heterogeneous," Gustavo Esteva writes:

We discovered that webs – as fisherman and spiders know very well – are designed to trap . . . So we started to use the image of a hammock to represent, metaphorically, our vocation. Like a web, a hammock holds the idea of horizontality and lack of a center (except for its center of gravity). But it opens other possibilities. The hammock is there, where it is placed: one is not inside it, nor part of it, nor a member of it. It can be used or not used when necessary, and for whatever purpose. One can change its location and carry it along when travelling. The hammock, above all, has the quality of adopting the shape of its user. "We" are not a web nor a hammock. "We" have a hammock: a flexible construction that "we" use when "we" need or want.290

Every human network, even when not originally designed to do so, has the potential to "trap"—to become coercive. This is the nature of the collective, that in addition to its promises, there are always perils. Changing the metaphor (from web to hammock, from worker to employee, from union to caucus) has "real" power in the shaping of consciousness.

Yet, increasing our awareness to the many ways in which power continues to “trap” in newly named frameworks is essential.

In this paper, I have suggested that a multi-dimensional understanding of power can help us contemplate the pervasive dilemma of how to reallocate power, without, once again, creating structures of coercion and exclusion. I have argued that in work-related institutions, both legal and cultural understandings of power traditionally emphasize paradigmatic hierarchical forces and overlook other dimensions. I further argued that rather than eliminating coercive mechanisms, shifting work patterns have changed the visibility and nature of coercion. Indeed, rather than attempting the impossible goal of “eliminating” the risks of power, we should aim to keep power in motion, to create spaces for resistance, to open visions for reform and to trigger multiple responses and possibilities for agency and empowerment, from within rather than from “without” a framework of power.