# "COME THE REVOLUTION": EMPLOYEE INVOLVEMENT IN THE WORKERS' STATE

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[*Editor's Preface*: The year is 2007 A.D. A collapse of stock market values has provoked a general demoralization of American society, particularly among employees who had heavily invested their pension assets in equity instruments. A series of work stoppages—beginning first among employees in the remaining unionized sectors of construction and automobile production, and spreading gradually to government offices and finally to the all-important nonunion computer and financial services industries—has led to a general strike halting virtually all production and distribution in the country. Managerial confidence has reached an all-time low. At the invitation of their agents in Congress and the White House, the leaders of American finance and commerce assembled in Philadelphia on January 15th to develop a plan for rescuing the country. In desperation, unable to reach consensus after weeks of raucous debate, this assemblage of American Capital—including, among others, representatives of the Business Roundtable, U.S. Chambers of Commerce, National Association of Manufacturers, National Federation of Independent Business, Labor Policy Association, Securities Industry Association, and Society for Human Resource Management—petitioned the AFL-CIO (whose ranks had been swelled by millions of general striker-recruits) to develop new rules for reconstituting the social order.

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1. For "Gompers" or "G-d," depending on whether you believe in secular salvation or require some form of divine intervention or inspiration.

interest" and employee-advocate organizations. The AFL-CIO, mindful that there are as many non-members as members in the work force, has asked G to participate in formulating guiding principles for labor market reform for the upcoming deliberations over a laborist social charter. (A different group has been convened to propose recommendations for capital market reform.)

The following colloquy represents some of the initial musings between G and "P"[2]. P is a leading tactician for the AFL-CIO, assigned by the Federation to consult with G on this enterprise critical to the success of the workers' state. The Federation wants G's independent views but they also want G to take into account P's (hence, organized labor's) perspective.]

## I. REDISTRIBUTION OF WEALTH?

G: First, we must tackle the question of redistribution of wealth. Should the new state provide some mechanism for periodic redistribution, or should we rely on the outcomes of private bargaining, perhaps as supplemented by social rights legislation establishing minimum terms for all?

P: Redistribution is a difficult, divisive task. We have a rare opportunity to develop a new society and I fear that openly espousing redistribution of wealth will galvanize dissidents among the forces of American Capital, along with their allies in Congress, to oppose by any available means the enactment of a new social contract. More fundamentally, we have to take the long view. We know from the differences in public support for social security and social welfare programs, that direct grant programs are not politically sustainable. Working people will soon forget how we got into this mess in the first place, and they will come to resent the fact that they are being taxed to help others. The only improvements in social allocations that will last are those that were "earned" through collective bargaining and unceasing political struggle.

G: I hear you. But if we do not provide a mechanism for periodic redistribution of wealth, history will soon repeat itself. We will have a society where initial endowments, whether due to forces of nature or those of nurture, will inevitably produce inequality.

Any form of bargaining, whether individual or collective, builds upon existing endowments. Collective bargaining has a role to play in

2. For "Proletarian" or "Parishioner," depending on your view of the causes of the revolution.

establishing standards for fair worker treatment, but it does not offer a very promising technique for creating a new egalitarian society. To avoid replicating a society of "haves" and "have nots," we have to go beyond private bargaining outcomes.

My preliminary view is to propose a Social Redistribution Fund, whereby twenty-five percent of the GNP is reserved for biannual lump-sum redistributions. This fund will be drawn from general tax revenues. (We will have to consider later whether to retain a national income tax or move to a consumption tax with built-in progressivity features.) We should not levy employment taxes to fund our social programs. We want a full-employment economy to the extent feasible. We do not want to freight the decision to hire or retain people with adverse tax consequences; nor do we want to distort other economic decisions. I agree with you that public attitudes will revert to the old ways of thinking, and for this reason, whatever principles of redistribution are agreed upon need to be preserved in the Constitution.

P: I still disagree that we should be using our limited political capital in this way. In any event, who gets what under your scheme?

G: We will be guided by John Rawls' ingenious heuristic.[3] If we were making decisions from behind a "veil of ignorance," not knowing how we ourselves would end up in the society, I believe we would make ample provision for the least fortunate, the least able, the least desired of our society. I envision distributions to families below the poverty line, to the blind and infirm, to the less intelligent, to the physically and aesthetically challenged. I know this principle of redistribution reflects what some consider an irrational level of risk-aversion. We are not buying insurance in the conventional sense, where we are only concerned with insuring against average risks. We are providing a floor for a civilized society below which our people will not be allowed to fall. Distributions will be made every two years, and will take account of intervening changes in circumstances. To the greatest extent feasible, the transfers will be in the form of cash rather than in-kind. People are the best judge of what they need. Government will play a role to make sure that institutions providing education, job-training and other services to recipients are bona fide and competent. Families incapable of providing for children will continue to need social welfare services and, possibly, family court intervention.

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3. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). On the utilitarian predecessor, see John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953); John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOC. RES. 623 (1977).

P: Does everyone have to work in your "utopia"? Does government become the "employer of last resort"?

G: The job of government is to enable citizens to be gainfully employed to the best of their abilities. Every able-bodied adult citizen will have to work in order to participate in the Social Redistribution Fund. Government will provide necessary child care assistance to enable people to attend to their jobs. Individuals unable to find jobs will be put to work cleaning our cities and will be paid at the minimum wage. Over time, those on "workfare" will be expected to find regular jobs, and government will promote their placement by providing necessary training. Remember, these are not intended, and will not be allowed, to become career positions.

## II. PUBLIC OWNERSHIP OF THE MEANS OF PRODUCTION AND DISTRIBUTION?

P: The capitalists have lost their footing. Do we now seize the initiative and socialize the means of production and distribution? The capitalist class has made a shambles of the economy. They have lost the moral right to hold on to their property.

G: But socialization of property will require just compensation, not because of anything in the old Constitution but because we do not want to encourage a flight of capital. If we appropriated the factories and offices without compensation, we would pay dearly over time for that decision. And remember we need a rich and growing society in order to provide jobs and fund social equality.

Putting aside the question of compensation, I doubt we would be able to do a particularly good job of running the economy on our own. We can learn from history. Ownership of the means of production and distribution is an old socialist shibboleth. It was a dream that turned sour wherever it was tried. There is no reason to believe that we will be better at it.[4]

P: But how do we ensure that corporations are run in a manner consistent with social objectives? Shouldn't the state demand minority representation on corporate boards and the opportunity to influence major corporate decisions?

G: To a considerable extent, I am afraid, we will have to rely on decentralized decisions in a competitive marketplace. Corporations will have to obey the laws we write, and we will take steps to ensure that

4. *See generally* JOSEPH E. STIGLITZ, WHITHER SOCIALISM? (1994).

corporations do not engage in monopolistic practices. But your question does prompt me to consider proposing social appointment of at least one "public interest director" in every corporation whose shares trade on the national markets. Companies will still be run by their owners; obviously, a single vote can be easily overcome by majority holders. The director's role will be limited to ensuring that corporate decisions are at least informed by a broader public perspective.

P: What do we do about the short-term horizons of investors[5] that brought us to this point of social paralysis?

G: It's hard to say what caused the fall in market values, or whether stock markets fail to value properly long-term investments. We certainly need to rethink pension policy—particularly the wisdom of the shift from defined-benefit to defined-contribution plans (where participants have too much of a say over investment decisions) and the appropriate fiduciary rule for investing pension assets.[6] Perhaps it would also be desirable to create additional incentives to lengthen holding periods, as long as we are careful to avoid significantly reducing market liquidity. We should be open to further interventions, but only after careful study of their impact on the cost of capital for American enterprise.

P: Even if we retain private ownership, don't we have to build in a social accountability mechanism? Can we really allow corporations to continue a single-minded pursuit of shareholder value without regard to the social consequences of their actions?

G: What would this mechanism look like? Are we going to require state approval of every corporate decision resulting in layoffs? Can we really determine whether the benefits to the corporation of a restructuring or merger are outweighed by the costs incurred by employees and the community? If we make it hard for corporations to operate as efficiently as possible, are we shooting ourselves in the foot? We may be able to help particular workers to keep their jobs, or particular communities to keep plants open, but capital can "go on strike" by escaping to other areas of the country or abroad where returns are higher.[7]

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5. *See* Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513 (1993).

6. *But see* Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519 (1997); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987).

7. *See generally* Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social Welfare*, *in* THE JURISPRUDENCE OF CORPORATE AND

## III. CODETERMINATION?

P: I hadn't thought of it until now, but why don't we adopt the German model of codetermination? By law, one-half of the boards of directors of all firms over a certain size would be comprised of representatives directly chosen by the employees of the company; we would, however, allow the shareholders' representatives to cast the deciding vote in the event of a tie. Capital would not be tied down in this world, but it would have to listen to, and hopefully take account of, the employees' perspective.

G: The idea is a promising one, but we will need to learn more about the German experience. I have some questions: First, are the employee representatives too powerful in Germany in the sense that they are able to block actions that German corporations should take to remain competitive and continue making capital investments in the home country? I am troubled by the persistent double-digit unemployment in Germany that preceded unification of the former East German states and reports of new capital fleeing Germany for the U.K., Ireland and South Carolina. I do not want to confuse correlation with causation, but we do not want double-digit unemployment here and we need capital investment to fuel social reform. Second—and this question proceeds from a converse premise—is employee representation on corporate boards of little consequence to the cost of capital in Germany because the German stock market is relatively undeveloped, and hence German firms rely principally on bank debt rather than equity financing? Are banks in Germany the critical counterweight to employee/union directors?[8] Third, can employee/union directors be held accountable to employee interests in a country like ours where most companies do not have strong inside-the-firm employee organizations?

This has been a very useful discussion on corporate board issues, a text of which will be forwarded to the group considering capital market reform.

## IV. MANDATORY UNIONISM?

P: Then, let's turn to what's within our bailiwick. I was beginning to worry that our "velvet revolution" wouldn't be producing much in the way of fundamental change. Shouldn't we, at the very least, mandate unions for all enterprises having fifteen or more employees? The employer class is on its knees. Now is the moment to strike for genuine representation for all American workers.

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COMMERCIAL LAW (Kneus & Wolt eds., forthcoming).

8. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 213-15 (1994).

G: The moment is indeed ripe for change. But whatever we do has to be carefully considered. Can we be certain that all American workers want to be represented by independent, exclusive bargaining agents?[9] That they all wish to submit to the rule of political majorities, to the risk of union discipline, to the diversion of a portion of their salaries for union dues, to the use of dues for union political activity?

I have the same problem with mandating works councils—a common feature in continental European systems. Such works councils would be another form of mandate. And, particularly since our unions are enterprise-based, the mandated councils would tend to become unions in sheep's clothing or effectively displace unions (an eventuality not likely to find favor with our friends in organized labor).

P: This is just a question of deciding who bears the costs of collective action. The status quo is that employees and unions (as prospective service providers) have to overcome collective action problems to organize successfully. Let's just reverse the premise: establish a status quo where everyone is organized, and it's the people who want to retain individual bargaining who organize for decertification.[10]

G: A good point. I do think, however, that whatever we do must be reciprocal. If we mandate unionism as a new status quo, we have to be sensitive to the collective action problems that may prevent the principals (the employees) from monitoring or changing their agent (the union or works council). Let's turn to what our collective labor law should look like.

## V. EMPLOYEE-FRIENDLY LABOR LAW REFORM?

P: We can create an employee-friendly labor law and entrench it in the Constitution: Any two or more workers should have a right to insist on collective representation and to have the employer bargain with their designated representative *until* a majority coalesces behind a representative who will then become the exclusive bargaining agent.[11]

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9. *See* WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (Dec. 1994) (prepared for Richard B. Freeman & Joel Rogers; conducted by Princeton Survey Research Associates).

10. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

11. *See* Matthew Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993).

G: We do need labor law reform, but is nonexclusive, minority unionism the way to go? Most other countries that have plural union structures also envision bargaining occurring on the multi-enterprise level. Only in Japan do we find both enterprise bargaining and nonexclusive bargaining agents. With nonexclusive unions, employers find it easy to "divide and conquer." We know that Japanese employers use the threat to recognize a "second union" as a lever to discipline the primary union. And even where unions bargain with multi-employer associations, plural unionism does not work well. In France, only one agreement applies to any one enterprise. French employers are able to pick and choose by entering into an agreement with one of the "representative" union federations and making that the operative agreement for all.[12]

P: But we are not talking about plural unionism as the end-state, only as an intermediate stage until a majority representative emerges.

G: Even if plural structures are viewed as an intermediate stage, I do not see a workable approach. What do we do about terms that require uniform application across a work force? Do we allow two or more employees effectively to set wages and hours for all? (Is this really a better state of affairs than allowing the employer who must take account of firm-wide effects to set the rule, in the absence of a majority representative?) Also, what about shifting employee coalitions? Do we allow employees essentially to abrogate agreements that they don't like by joining other minority organizations that will negotiate a different deal? I see here a recipe for balkanization and instability, not the productive environment we need to expand social wealth and provide the resources for redistribution.

P: Perhaps. Let's not lose sight, however, of the need for a system that allows employees at minimum cost to choose independent representatives. We should at least codify card-check certification and recourse to "interest arbitration" where the parties cannot reach agreement on their own.[13] If, say, sixty percent of the employees sign authorization cards, there is no need for an election. This is enough of an initial showing of support to require bargaining to begin; ultimately, the union's bargaining power will depend on its ability to encourage employees to "vote with their feet" by authorizing a strike. For first-time bargaining situations, the law also should help nascent organizations by resolving impasses through the use of panels of neutral decision makers who would have the authority to impose

12. See Michel Despax & Jacques Rojot, *France*, *in* 5 INTERNATIONAL ENCYCLOPAEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS 251 (R. Blanpain ed., 1987).

13. *See* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

an initial contract.

G: Cards are problematic. Do we know why employees sign them? Do employees get all the information they need—especially on the costs and risks of unionization—from an essentially one-sided communication with the union organizer? If we are going to travel down the card-check certification route, don't we need also to permit card-check decertification? Is this desirable? Or are we better off with the solemnity of an election process and the legitimacy that such a process confers on the bargaining representative?

We should directly address the costs of union organization. Let's lower the barriers: allow union organizers on company property where such access does not interfere with the business. Any "captive audience" speech held by employers should trigger a correlative right of the organizing union to address the employee electorate. Any employee discharged for union activities must be promptly reinstated, with fines imposed on the employer for engaging in a retaliatory discharge.

P: In this new social order, are we still allowing employers to express opposition to independent organization?

G: I think it is unavoidable. We can't assume that unionism is the right course for all employees and all firms in all circumstances. Employers are there to express the opposing view. They can't engage in coercive tactics, of course; and managements that are found to be repeat violators will be barred from business by the state. But noncoercive employer opposition has a role to play in the process, unless we embark on an approach that makes it easy for employees to opt in (card-check certification) and out of (card-check decertification) collective representation. If employees have a low-cost means of disavowing union representation, we can be less concerned about whether their initial choice was informed and freely made. But where we are going to establish fairly significant barriers to decertification—in the interest of bargaining stability—we cannot in good conscience prevent the employer from expressing the opposing perspective. (I am assuming, of course, that our Constitution will not incorporate any right of "employer free speech" in this context.)

## VI. MANDATORY MULTI-ENTERPRISE/SECTORAL BARGAINING?

P: Don't we need a mechanism for requiring multi-enterprise/sectoral bargaining? Shouldn't our new state "take wages out of competition"? Companies within an industry should not be able to take market share from unionized enterprises because of lower labor costs. Let them compete on

the basis of the quality of their products and services—not their willingness to pay people poorly or treat them harshly. Let's finally give effect to section 6 of the Clayton Act: "The labor of a human being is not a commodity or article of commerce." Where, say, twenty-five percent of an industry is unionized, the parties to the collective agreements should be able to impose the average economic terms of the agreements on the nonunion sector. This will, in turn, create incentives for nonunion firms to get involved in multi-employer bargaining at the outset.

G: Remember, we are establishing a state and economy that will operate for the benefit of the larger society. Is it clearly desirable that unionized firms be insulated from labor-cost competition? If the unions and firms in the organized sector have adopted costly, inefficient staffing rules, what claim do they have on the workers' state to impose collectively bargained labor-cost regimes on all who wish to enter the particular industry? Are we going to set up a state agency to determine which terms of collective agreements merit imposition on nonunion companies and which do not? If the representatives in Congress, in their collective wisdom, determine that some terms (such a minimum wage and safe workplace) must be treated as minimum conditions for a civilized society, so be it. What is the justification for bypassing the democratic process and imposing the product of private bargains on unwilling firms?

We also have to take into account the fact that our companies have to compete effectively in global markets. Whatever we may think of the social desirability of labor-market competition, our companies will not be insulated from competition on this basis. We do not operate as an island unto ourselves. The days when American producers could confine themselves to harvesting a huge domestic market are gone. We have to help U.S. companies improve productivity and global market share, while at the same time making sure that gains are equitably shared with workers.

## VII. WRONGFUL TERMINATION LEGISLATION?

P: Can we at least end the American anomaly and enact a comprehensive wrongful termination law: In all firms with fifteen or more employees, a discharge without good cause should be unlawful. Such a measure would promote job security and embolden employees, now fearful of retaliatory discharge, to seek independent representation when it is in their best interest to do so.

G: You have a point, but if we are going to adopt the European model, don't we need to incorporate all of the features of that model? I have in mind a centralization of all employment litigation in specialized courts

where the remedy for a wrongful termination is not essentially unlimited damages determined by civil juries, but rather some multiple of pay assessed by an administrative tribunal.[14] There are risks here in discouraging job growth because of increased dismissal costs, but we should shoulder those risks for the sake of providing a general remedy against improper supervisor decisions. I wonder, however, whether this proposal would be supported by the plaintiffs' bar, our allies in the Movement for Progressive Social Change.

## VIII. EMPLOYEE INVOLVEMENT IN THE NONUNION SECTOR?

G: What about firms that remain nonunion in our economy? Should employers be able to form committees of managers and employees to discuss matters of mutual concern, including pay and working conditions?[15] How about the rule that prevails in Canada—that dominated employee organizations cannot act as exclusive representatives or bar election petitions but are otherwise not unlawful?[16]

P: We need to continue to prohibit *employer* involvement in employee representation systems. Employers can discuss terms with individual employees or groups of employees. They should not, however, be permitted to discuss terms with representatives of the employees unless the representatives are able to function as autonomous agents of employee interests—free to insist on their substantive positions, to form alliances with other labor organizations, and to call for work stoppages without fear of employer discipline. This is what a right of self-association calls for. This should be an unequivocal, impregnable standard for a workers' state.

G: Let's think about "employee involvement" as representing two different systems. The first is what might be called an "on line" system—where employees are assembled in work teams to take collaborative responsibility for the work tasks of the team and essentially supervise themselves. Should these systems be lawful?

P: Yes, provided the work teams involve no representational function

14. *See* Samuel Estreicher, *Unjust Dismissal Laws in Other Countries: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985).

15. *See* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994).

16. *See* Daphne G. Taras, *Company Unionism in Canada: Legal Status and Legislative History*, *in* PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 152-58 (Paula B. Voos ed., Jan. 4-6, 1997).

and wages and working conditions are dictated to the teams rather than negotiated with them.

G: If representatives from the work teams—say, the safety representative—sit on a company-wide body to discuss company-wide issues, should such a structure be unlawful in the absence of authority to act as independent employee representatives?

P: Yes. Representation requires independence. The company cannot bargain on both sides of the table.

G: Now, let's turn to "off line systems"—where employees volunteer or are selected to sit on committees to discuss company-wide problems. Should this be unlawful in the absence of authority to act as independent employee representatives?

P: If the committees discuss pay and working conditions, same answer.

G: But why are we adopting these restrictions? Employees know that these structures are not independent unions, and as we have discussed they will be able at little cost to opt for independent representation. Does it make sense in our state to adopt a rule for nonunion firms that holds employees to the stark choice of unilateral management or independent representation—and nothing in between?

P: I get the feeling as Yogi Berra would put it: this is "dejà vu all over again." Let's knock off for the day.

[*Editor's Note*: After a long day, G and P retired for the evening to listen to old Woody Guthrie and Pete Seeger songs.]