We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act

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We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act

A. B. Cochran, III†

This Article provides a thorough examination of the fluid state of the law governing employee involvement committees. These employer-initiated committees offer a forum for management and labor to exchange ideas and proposals on a wide variety of topics, including issues of principle concern to the employees—working conditions and rates of pay—as well as matter of principle concern to employers—operational efficiency and product development. Traditional interpretations of the prohibition on company unions found in section 8(a)(2) of the Wagner Act fail to delineate clearly between permissible employer-employee brainstorming and impermissible company-dominated labor organizations. In two recent high-profile cases, the National Labor Relations Board found two employee involvement committees to be in violation of section 8(a)(2); however, Board members disagreed over the extent of the prohibition in that section. After examining these cases and the approach of several courts of appeal, Professor Cochran concludes that it is an oversimplification to conclude that merely because employee involvement committees do not infringe on employees’ freedom to unionize, they do not violate 8(a)(2). Cochran contends that the structural approach to labor-management relations, as outlined in the Wagner Act, should not, and need not, be sacrificed to permit the establishment of employee involvement committees. Major reform of the law is not required to accommodate the goals sought by proponents of the employee involvement committees, because genuine employee participation is best achieved through dealing with independent employee organizations. By maintaining the current prohibition on company-dominated labor organizations, labor law will protect employees’ right to speak with an autonomous voice, thus ensuring that employee participation will be authentic and beneficial.

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I. **Introduction** ............................................. 459

II. **The Political Economy of Employee Participation** .......... 461
   A. The Rise of Participation at Work ...................... 462
   B. The Decline of Unions .................................. 465
   C. Long Waves and Structural Transformation .............. 467

III. **The Legal Context for Employee Participation** ............. 472
    A. The Wagner Act (NLRA) ................................ 472
    B. Supreme Court Decisions ............................... 475
    C. Section 2(5) in the Lower Courts and Before the NLRB .. 477
    D. Domination, Interference, or Support under Section 8(a)(2) ................................................ 481

IV. **Recent Board Cases: Electromation and DuPont** ............ 487
    A. Electromation ........................................... 487
    1. The Facts of the Case .................................. 488
    2. The Board's Opinion .................................... 489
    3. Devaney's Concurrence .................................. 491
    4. Oviatt's Concurrence ................................... 492
    5. Raudabaugh's Concurrence ............................... 492
    B. DuPont .................................................. 495
    1. The Facts of the Case .................................. 495
    2. The Board's Opinion .................................... 496
    3. Devaney's Concurrence .................................. 497

V. **Relaxing the Strictures on Employee Involvement Committees: Alternative Modifications of NLRA** .......... 499
    A. Revising the Definition of Labor Organizations ........... 500
    B. Revising the Standards for Domination and Support ........ 503
    C. Alternative Models of Employee Involvement ................ 506

VI. **Alternative Routes to Labor Law Revision** ................. 510
    A. Labor's Dilemma ......................................... 511
    B. Reinterpretation by the NLRB ............................ 512
    C. Reinterpretation by the Courts .......................... 513
    D. Legislative Amendment ................................... 514
    E. Employment Law as a Substitute for Labor Law ............. 515

VII. **Conclusion** ............................................... 516

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I

**Introduction**

Two recent decisions by the National Labor Relations Board (NLRB or Board), *Electromation*¹ and *DuPont*², highlight the controversy and confusion in current American labor law regarding the treatment of employee involvement committees (EICs). Employee involvement in decision-mak-

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¹. Electromation, Inc., 309 N.L.R.B. 990 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994).
ing in American corporations has grown dramatically in the 1970s and 1980s and cannot now be dismissed as merely another management fad. Touted as the key to work satisfaction, good labor-management relations, efficiency, and productivity, employee involvement is advocated by many management theorists as America's salvation from foreign competition, and growing numbers of firms are heeding this advice and experimenting with participative innovations. Provisions of the 1935 National Labor Relations Act (NLRA) designed to outlaw company unions restrict the ability of companies to institute EICs. Read literally and in line with Supreme Court and NLRB precedents, EICs seem to run afoul of the prohibition against employers dominating, interfering with, or supporting labor organizations. Several courts of appeal, however, have read more leeway into the law in their search to accommodate innovative labor relations. In its latest decisions, the Board, too, manifests a desire to find a path that will validate legitimate experimentation with employee participation without eroding the legal protections against employer domination.

The mainstream approach to industrial relations is beginning to judge the Wagner Act outdated because it is viewed as based on an adversarial model of union-management relations. Many commentators now advocate embracing cooperative relations for the sake of competitiveness in the new world economy. They would replace a strict reading of the Wagner Act's prohibition against domination, interference, or support with a looser test: is the employee deprived of freedom of choice in deciding whether to be represented by a collective bargaining agent?

Current developments in management strategies and law create a dilemma for organized labor and employees. On the one hand, employee participation may offer significant subjective and objective benefits to workers, particularly if participation offers an effective tool in the battle to make U.S. corporations more competitive. On the other hand, the pressures to cooperate more closely with management and to weaken the protections of the Wagner Act come at a time when unions are at a historic nadir in their strength. Fewer employees are represented by unions now than when the Wagner Act was passed. Without union organization and with the current movement toward relaxing the legal protections against company domination of labor organizations, employees may find themselves invited to participate in corporate decisions, but without assurance that they can speak with authenticity.

The thesis of this paper is that drastic revisions in the legal protections against company domination of labor organizations are unnecessary and that genuine participation is most likely when employees are represented by autonomous, self-directed organizations. Part II will examine the political and economic contexts of the debate on labor law revision: the increasing

popularity of employee participation schemes, the declining fortunes of unions, and the implications of structural economic transformation for systems of managing workers. These trends in political economy reveal that we are in a fluid era in which the authority relations between employers and employees are open to renegotiation. Thus, although much of the contemporary debate sounds strikingly similar to the rhetoric of the battles leading up to the passage of the NLRA, the employee involvement controversy is not simply a rehash of a perennial, and somewhat stale, debate. Instead, both management and labor have important interests at stake, and each has much to gain or lose depending on the shape of the employment relationship that emerges from the current contest.

Part III will describe the legal context of the debate, examining both the traditional interpretations of the key provisions of the NLRA and trends toward a less restrictive reading of what is meant by company domination of labor organizations. By analyzing the recent Electromation and DuPont cases, Part IV will present the Board's current position on the company domination issue. Part V will assess various revisions urged by some commentators and courts and suggested by some of the concurrences in these latest Board decisions. Contrasting models of employee involvement jurisprudence emerge from this survey: the Free Choice versus Structural Autonomy approaches. This paper argues that the Free Choice model relies on a superficial conceptualization of power and suggests that only minor modifications in the traditional Structural Autonomy model should be contemplated.

Given the political pressures for revision, however, some changes in the law governing employee involvement seem imminent. Part VI assesses several processes by which these reforms may be implemented, pointing out the potential pitfalls of each. Finally, Part VII concludes that although no substantial reform of the law is necessary to allow for genuine employee involvement, such authentic participation is unlikely to be realized outside of autonomous and independent labor organizations. To the contrary, without the collective strength of such organizations, individual employees are not likely to be afforded real freedom of choice. Moreover, if legal protections against company domination are eroded, the promised gains in economic productivity are not likely to be achieved. More seriously, the undermining of employee self-organization could have dire consequences for American democracy.

II
THE POLITICAL ECONOMY OF EMPLOYEE PARTICIPATION

Despite the bewildering proliferation of types and labels, most observers agree that various forms of employee involvement have increased dramatically in the 1980s. There is less consensus on the reasons for this
growth. Although most advocates of employee involvement cite the need to meet foreign competition with greater productivity, skeptics contend that EICs are merely management techniques for driving the last nail in the coffin of a dying union movement. Both of these explanations contain more than a grain of truth, but neither fully captures employee participation's role in the larger economic transformation underway. EICs represent management experimentation with a new system to control workers appropriate to the emerging global post-industrial economy.

A. The Rise of Participation at Work

Employee involvement, under different names and in various guises, appears to be sweeping the ranks of American businesses. A 1989 report found over 80% of the Fortune 1,000 companies had instituted an employee involvement program.\(^4\) After surveying data amassed by several researchers, Gershenfeld concluded that employee involvement was in a "growth phase" by the 1980s and that formal plans were operative in 15 percent of American organizations covering as many as 25 percent of U.S. workers.\(^5\) A 1987 study indicated that, despite possible reasons to predict a retrenchment in such programs, "U.S. businesses intend to expand their [employee participation] initiatives considerably over the next several years."\(^6\)

Part of the problem in counting these workplace innovations is the lack of standardized labels and the significant variations in particular programs,\(^7\)

\(^5\) Walter J. Gershenfeld, Employee Participation in Firm Decisions, in HUMAN RESOURCES AND THE PERFORMANCE OF THE FIRM 123, 131 (Morris M. Kleiner et al. eds., 1987). Gershenfeld suggests that most of the growth in employee involvement programs occurred in the 1980s, noting that a classic 1978 study found that no more than 200 to 500 organizations were involved with such programs. Id. at 129.
\(^6\) David Lewin, The Future of Employee Involvement/Participation in the United States, 40 LAB. L.J. 470, 472. Lewin's survey found that larger businesses were more likely to innovate using some type of employee participation and that such programs were more frequently found in lower occupational statuses and in unionized settings. Id. at 471, 474, and data in Table 2, at 475.

A survey of studies by the Commission on the Future of Worker-Management Relations (the Dunlop Commission) seems to sustain Lewin's prediction. The Commission concludes that a substantial majority of larger American employers report using some forms of employee participation in their organizations. Many small firms have more informal processes for employee participation. The best available estimates suggest that between one-fifth and one-third of the workforce is covered by some form of employee participation.

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 36 (May 1994).

\(^7\) Gershenfeld, supra note 5, at 124, defines employee involvement/quality of work life as "a structured, systematic approach to the involvement of employees in group decisions affecting work and the work environment with goals that include reducing product cost, improving product quality, facilitating communication, raising morale, and reducing conflict." THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 16 (1986), differentiate three levels of possible participation: the strategic level, involving decisions about investment, human resources, and business strategies; the middle level of collective bargaining, involving issues of terms and conditions of employment; and the workplace level, involving decisions about job design and the organization of work.
but most experiments can be grouped under four common labels. Quality circles (QCs) involve small groups of employees and supervisors from a work area meeting, often weekly for one or two hours, to discuss work problems and improvements in the work process to enhance quality or efficiency. Quality of work life (QWL) projects have a broader focus, addressing issues of worker satisfaction, interpersonal relations, and humanization of working conditions, rather than directly concentrating on productivity. Labor-management committees are frequently but not exclusively found in unionized companies and consist of joint committees which meet periodically to discuss matters of mutual concern to labor and management. Finally, semi-autonomous teams represent a reorganization of the workforce into small production teams which are delegated responsibility for organizing and managing the work tasks involved in their work area. The lack of standard terminology and definition for the forms of employee involvement, as well as the great variation in the features of actual plans, makes it difficult to generalize about the outcomes of various types of programs and the effects of worker participation.

Several rationales for the participatory schemes are offered by enthusiasts, most prominently, the rise of foreign competition. Employee partici-

Thomas C. Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C.L. Rev. 499, 501 (1986), contrasts American participation programs, which are considered a style or theory of management, with such programs outside the U.S., which are more formal and generally mandated by law.


9. Id.

10. Id.

11. Id. at 1738. Semi-autonomous teams often involve reduction in job categories, cross-training, pay for knowledge compensation systems, and delegation of managerial decisions such as supplies, quality, maintenance, and some personnel decisions. Adrienne E. Eaton & Paula B. Voos, Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation, in Unions and Economic Competitiveness 173 (Lawrence Nishel & Paula B. Voos eds., 1992).

12. Eaton and Voos provide a useful chart describing the types of employee involvement programs and research findings about their differing effectiveness. Eaton & Voos, supra note 11, at 176-78.

This paper will use the term employee involvement committee (EIC) to include any of these various types of employee involvement schemes.

13. The increase in foreign competition is generally asserted uncritically as a self-evident truth. Wilson McLeod, Labor-Management Cooperation: Competing Visions and Labor's Challenge, 12 Indus. Rel. L.J. 233, 245 (1990), however, questions if such competition from abroad should be seen as "a fundamentally new phenomenon fueled by extraordinary new forces, but as a continuation and repetition of earlier developments, albeit intensified in this present incarnation." Specifically, McLeod points out that so-called foreign competition arises from the "'internationalization'" of capital whereby corporations search for economic advantage increasingly by transferring capital and operations among various countries. McLeod quips that "we have met the competition and it is us." Id. at 249. See Robert Reich, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21st-CENTURY CAPITALISM (1991) (arguing that large corporations are no longer national companies but rather transnational economic actors).
pation supposedly contributes to meeting the challenge of international competition in several ways. First, employee involvement can increase the efficiency and productivity of the firm.\(^\text{14}\) Although the evidence for this result is mixed and the explanations for expected gains in productivity are rarely spelled out, the belief that workers can help improve the production process seems to be the chief impetus behind growing attempts to involve employees in management decisions.\(^\text{15}\) A second and related reason is the claim of heightened worker satisfaction if employees are given a voice in their jobs. Thus, employees who are involved in decision-making at work are likely to be more loyal, enthusiastic, and creative, and less likely to exhibit the symptoms of alienation so common in modern industry, such as high rates of absenteeism and turnover, sabotage, and drug and alcohol abuse.\(^\text{16}\) The popularity of the "Japanese model" in management circles reflects the belief that employee involvement in decisions about their jobs can produce a more satisfied and efficient workforce.\(^\text{17}\) Finally, there is the general claim that cooperative relations between labor and management would be enhanced by substituting employee involvement, for "outmoded" adversarial relations.\(^\text{18}\)

Some commentators point to the changing workforce, one that is more educated, demographically diverse, and affected by new attitudes toward authority after the 1960s, as a reason to develop a more participatory management style.\(^\text{19}\) This point can be stretched into a broader political rationale: participation at work could reduce the contradiction between American democratic ideology in the public sphere and authoritarianism in the workplace.\(^\text{20}\) In their more grandiose rhetoric, advocates of participation programs sometimes claim to be creating a "self-directed workforce" and "economic democracy."\(^\text{21}\)


\(^\text{15}\) Employee involvement can be seen as a reaction against scientific management. Braverman characterized scientific management as increasing specialization of work tasks and, most significantly, as the separation of conception from execution. Braverman argued that management appropriated for itself the workers' traditional knowledge and the mental tasks of work in order to reduce the cost of labor and to maximize management control over the workforce. HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL (1974).

\(^\text{16}\) Alexander, supra note 14, at 696. REPORT OF A SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, WORK IN AMERICA xvi, xvii (1973); HAROLD L. SHEPPARD & NEAL Q. HERRICK, WHERE HAVE ALL THE ROBOTS GONE? 3-4 (1972).


\(^\text{19}\) WORK IN AMERICA, supra note 16, at ch. 2.

\(^\text{20}\) Alexander, supra note 14, at 696.

\(^\text{21}\) Statements made before the Commission on the Future of Worker-Management Relations, Atlanta, Georgia (January 11, 1994).
Empirical research into the effects of employee involvement lends some support to its advocates, but some research results tend to qualify their claims and to cast doubts on their motives. Gershenfeld finds more solid evidence for participation yielding enhanced employee satisfaction than increased productivity, although some productivity effects are also frequently found.\textsuperscript{22} The effect of participation on productivity, however, seems to result from increasing workers' influence and self-direction, rather than by participation itself directly motivating productivity improvement.\textsuperscript{23} Eaton and Voos dispel the myth that unions block experimentation with employee involvement, finding that innovations are slightly more likely in the union than in the nonunion sector.\textsuperscript{24} Moreover, unionized firms are more likely to experiment with more extensive forms of participation, and it is precisely these more far-reaching types of programs that are most likely to yield the greatest gains in productivity.\textsuperscript{25} Finally, Eaton and Voos argue that the flexibility so prized by managers "is not a productivity panacea because it sets in motion protective human behavior," namely, informal work norms that protect workers from stress, poor evaluations, unattainable pacing, and peer rejection.\textsuperscript{26}

B. The Decline of Unions

Despite the evidence of union involvement with work innovations, many advocates\textsuperscript{27} of employee involvement think that meeting the challenge of foreign competition demands a less strict interpretation of those provisions of American labor law that they feel perpetuate adversarial relations between labor and management. In particular, section 8(a)(2),\textsuperscript{28} which was designed to bar company unions, is often seen as an obstacle to cooperative ventures that could enhance the effectiveness of American corporations in a global economy. On the other hand, some commentators\textsuperscript{29} are more skeptical of these reasons for management's interest in employee

\begin{itemize}
  \item \textsuperscript{22} Gershenfeld, supra note 5, at 145-154.
  \item \textsuperscript{23} Id. at 150-51.
  \item \textsuperscript{24} Eaton & Voos, supra note 11, at 174.
  \item \textsuperscript{25} Id. at 179. Unionized companies are significantly more likely to use teams, QWL, QCs, and gainsharing, while profit sharing is more frequent in non-union companies. The programs used by unionized companies are more likely to result in more substantial productivity gains. Id. at 184.
  \item \textsuperscript{26} Id. at 191-192. These authors believe that one reason the unionized sector is able to engage in the more productive types of participatory programs is that unions provide a mechanism for productivity bargaining, i.e., exchanging more productive work for higher wages. Id. at 174.
  \item \textsuperscript{27} See, e.g., Melvin Hutson, Electromation: Employee Involvement or Employer Domination, 8 LAB. LAWYER 389 (1992); Gardner, supra note 18; Shaun G. Clarke, Note, Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2), 96 YALE L.J. 2021 (1985). These authors differ on whether 8(a)(2) needs to be repealed or merely interpreted less rigidly.
  \item \textsuperscript{28} See infra notes 74 through 76 and accompanying text for a discussion of § 8(a)(2) in conjunction with § 2(5).
  \item \textsuperscript{29} See, e.g., Kohler, supra note 7, at 499; Raymond L. Hogler & Guillermo J. Grenier, Employee Participation and Labor Law in the American Workplace 116 (1992).
\end{itemize}
involvement. They are more likely to detect an anti-union motive in the current experimentation with worker participation. They view employee involvement committees not as creative inventions to meet fundamentally new challenges but rather as tactics reminiscent of the company unions and representation committees of the pre-Wagner Act era. Thus, legal barriers to such schemes are as necessary and valid today as they were in 1935. This view forcefully points out that the growth in calls for employee voice is occurring against the backdrop of a declining labor movement.

Union density (membership as a proportion of the non-agricultural workforce) rose rapidly after the passage of the Wagner Act, from 13.2% in 1935 to 35.5% in 1945. From a post-WWII high of 34.7% in 1954, however, union density has declined steadily to 16.1% in 1990. Perhaps the most common explanation for this trend is structural transformation from an industrial to service economy. This explanation is often combined with the changing composition of the workforce to include changes in race, sex, education, and age to suggest that the new, diverse service workers are less prone to unionization than were the older white male workers in blue-collar industries. After elaborate statistical investigation, Goldfield rejects these factors as the dominant explanation of union decline, suggesting that many are of little significance while others are even potentially favorable to union organizing.

He attributes more importance to what he calls the relation of class forces—a less favorable legal environment, less aggressive and committed organizing by unions themselves, and a major capitalist offensive against unions. Although traditional anti-union weapons such as blacklists, blackmail, spies, and thugs have not been entirely abandoned, according to Goldfield, newer weapons have provided a major impetus to unions’ declining fortunes: “the use of antilabor consulting firms, the large-scale growth of antiunion employer organizations, the rise in numerous illegal


32. GOLDFIELD, supra note 30, at 94-95. Freedman and Medoff estimate that these structural and compositional factors explain between 55 and 60% of the decline in union membership. Freedman and Medoff, in GOLDFIELD, supra note 30, at 132.

33. Id. at 221-23.

34. Id. at 225-26. See also Sanford M. Jacoby, American Exceptionalism Revisited: The Importance of Management, in MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS 173 (1991) (emphasizing the importance of management's hostility to unions as the key factor in shaping American exceptionalism and the travails of the American labor movement); Joel Rogers, In the Shadow of the Law: Institutional Aspects of Postwar U.S. Union Decline, in LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 285 (Christopher L. Tomlins and Andrew J. King eds., 1992) (arguing that low-density, decentralized labor movements provide incentives for employer resistance to unionization).
tactics, the engagement in lengthy election delays, and the lessening of the ready acceptance of union rights and prerogatives, even in traditionally unionized sectors. To this list some commentators would add the revival of employee representation committees. They would oppose these participatory experiments not because they oppose economic democracy or because they deny the beneficial economic effects of worker participation; rather, they view these plans as a resurrection of the old company union, constituting the latest addition to management's arsenal assembled to vanquish unions.

C. Long Waves and Structural Transformation

Radical political economy provides a more historical and structural explanation of the new enthusiasm for employee involvement and the drive to modify the Wagner Act, implying that changes apparent since the economic downturn of the 1970s represent the latest in a series of fundamental structural changes in capitalism. Gordon, Edwards, and Reich argue that the history of capitalist development has been characterized by long swings of approximately fifty years, split roughly between 25 years of economic growth followed by 25 years of stagnation. A major determinant of these long swings are what these authors call the social structure of accumulation, "the specific institutional environment within which the capitalist accumulation process is organized." Two institutions singled out for close analysis are the labor process, i.e., the organization of work, and the structure of labor markets. They chart the development of institutions affecting capital accumulation through positing a "life-cycle hypothesis," viewing the institutional infrastructure of capitalism as passing through phases of 1) exploration, in which businesses experiment with new labor management, 2) consolidation, when the new foundations of accumulation are constructed and the most promising experiments are adopted, and 3) decay, when stagnation, crisis, and workers' struggles diminish the effectiveness of the social structures of accumulation of that era. They see the present era as one of crisis beginning in the early 1970s, characterized by stagnation caused by

35. Goldfield, supra note 30, at 226. See also Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA, 96 Harv. L. Rev. 1769, 1781 (1983) (emphasizing employer tactics during organizing campaigns as a major obstacle to union organization).


38. Id. at 9. Examples of this institutional infrastructure include the monetary and credit systems, the state role in the economy, and labor markets.

39. Id. at 10-11. Although they give greatest weight to the success or failure of social structures of accumulation in determining long swings, they also survey other possible causes. Id. at 27. See also Terry Boswell & Ralph Peters, State Socialism and the Industrial Divide in the World-Economy: A Comparative Essay on the Rebellions in Poland and China, 17 Critical Sociology 3, 8 (1990) (surveying causes of "accumulation innovations").
the decay of the social structures of accumulation that they label the “post-war accord.” The industrial expansion, acceptance of unions, and growth of real wages of the postwar era have deteriorated, and a period of decay and experimentation has replaced the stability of the postwar accord premised on a liberal welfare state and collective bargaining in industrial relations.

Richard Edwards has focused more acutely on one particular element of the social structure of accumulation, systems for the control of workers. Beginning with the Marxian insight that capitalists buy workers’ labor power, or potential to work, rather than their actual labor per se, Edwards argues that the workplace remains hierarchical despite vast changes in the last one hundred years. This hierarchy is not an inevitable requirement for efficient coordination of production, however, but is a means of control over the labor process to ensure profits for capitalists. He analyzes the forms that systems of control of the labor process have taken as employers have sought profits by ensuring that workers’ potential to labor was translated into actual labor in the face of worker resistance to these forms of control. Simple control systems, with workers directly supervised by owners or managers, and technical control, with impersonal control residing in

Gordon, Edwards, and Reich maintain that there have been three overlapping stages of development of American capitalism: 1) initial proletarianization (mid-1840s to late 1890s), which depended on the continuous influx of immigrants and the erosion of independent farmers and artisans; 2) homogenization (late 1890s to World War II), which depended on new production techniques that broke skilled workers’ control over the labor process; and 3) segmentation (World War II to the present), which depended on “the successful integration of the strong national industrial unions of the 1930s into a cooperative collective bargaining system, limiting the further impact of the union movement and initiating a period of labor peace between employers and workers.” Gordon et al., supra note 37, at 13-17, 11-12. The stages are further described id. at 32.

40. Gordon et al., supra note 37, at 240.

41. Id. at 240-42. While WWII devastated most of the industrialized economies of the world, the U.S. gross national product more than doubled between 1940 and 1945. Godfrey Hodgson, America in Our Time 20 (1976). By the 1970s, this anomalous position of economic dominance had been eroded by the costly Vietnam War and increased foreign competition. See generally Ira C. Magaziner & Robert B. Reich, Minding America’s Business: The Decline and Rise of the American Economy (1982) (discussing erosion of American economic position due to competition). Capital mobility and changes in technology further undermined the hegemony of the American economy. Barry Bluestone & Bennett Harrison, The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry 6-8 (1982) (emphasizing the increasing mobility of capital), and elicited a range of policy responses. Kenneth M. Dolbear, Democracy at Risk: The Politics of Economic Renewal 83-156 (1986) (assessing four ideological programs for restructuring the American political economy); Reich, supra note 13 (emphasizing that corporations are no longer national economic actors and that accordingly policy must stress aiding the American workforce rather than nominally American transnational corporations).


43. The earliest system, simple control, was one in which the boss exercised power personally and intervened directly in the labor process. Id. at 19. This system, which characterized the individual, small-scale capitalism of the nineteenth century, was based on entrepreneurial control, further enhanced by the geographic concentration of industry, the simple nature of technology, personal ties between workers and owners, and the charismatic leadership of capitalists themselves. Id. at 25-27.
the technology of the production process, each elicited worker resistance which contradicted the potential gains of these control systems. In the post-WWII period, many core corporations sought to replace or supplement technological control with bureaucratic control. This control system is

... embedded in the social and organizational structure of the firm and is built into job categories, work rules, promotion procedures, discipline, wage scales, definitions of responsibilities, and the like. Bureaucratic control establishes the impersonal force of "company rules" or "company policy" as the basis for control.

Bureaucratic control has several advantages from the perspective of managerial control. First, it stratifies the workforce, fragmenting the working class and individualizing conflict. Bureaucratic control also narrows the range of conflict to the application of particular rules and procedures, while the "'objectivity'" of the authority exercised lends the appearance of legitimacy. Finally, this form of control offers positive incentives to workers: "relief from capricious supervision, the right to appeal grievances and bid for better jobs, [and] the additional job security of seniority," all of which tempt workers to narrow their focus to individual self-interest rather than struggling collectively to improve their position.

Like the other work control systems, however, bureaucratic control carries within itself contradictions at the level of workplace, firm, and society. The security and seniority offered to workers encourages demands for

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44. Id. at 20.
45. Simple control broke down under the strain of contradictions introduced by the expansion of corporate capitalism in the late nineteenth century. The growth of corporations' size and complexity undermined direct personal supervision and generated working class organization in industry and politics. Id. at 34, 48.
Core corporations developed more structural control systems that are less personal and direct as well as more formal and consciously contrived. Id. at 20. By using technical pacing of the production process, resources for worker resistance were reduced, while employers' dominance was externally reinforced, as less skilled labor exerted less influence over production and was more vulnerable to replacement. Id. at 112-15, 20. The homogenization of workers and linking of production in plant-wide systems of control, however, provided an entree for industrial unionism. Id.
46. Id. at 131. Edwards observes that bureaucratic control is being applied now to production work after appearing first in the office, while technocratic control emerged from the shop to be applied to lower-level office work.
47. Id. at 135. Edwards links his theory of systems of control to an analysis of segmented labor markets. The secondary market is characterized by casual employment and dead end jobs in peripheral firms, with high turnover and low pay, few benefits and rights, lack of unionization, and simple control. Id. at 167-70. The subordinate primary market consists of jobs in core and often unionized firms, jobs that offer more security, higher wages and benefits, but alienating work requiring few skills. Id. at 170-73. The independent primary market consists of jobs in core firms that span blue and white collar occupations but all of which offer higher pay and benefits, job security and longer tenure, and individual mobility up job ladders. Id. at 174-177. Labor market segmentation not only creates fragmentation within the working class but also, when linked systematically with racial and sexual discrimination, further weakens and divides workers into what Edwards calls class fragments. Id. at ch. 10.
48. Id. at 139, 141.
49. Id. at 145.
more control in making the rules of the enterprise, while lack of such control leads to worker dissatisfaction and declining productivity.50 At the level of the firm, bureaucratization leads to inefficiency and rigidity.51 Second, the behavior rewarded by bureaucratic systems is "rules orientation" rather than productivity per se.52 Finally, bureaucratic control produces long-term problems by "converting the wage bill from a variable to a fixed cost," perhaps contributing at the societal level to simultaneous high unemployment and inflation rates.53 According to Edwards, the bureaucratic system also transforms the corporation in the workers' experience from the private property of its capitalist owners into an increasingly social institution, eroding the boundaries between private and public and highlighting the society-wide consequences of corporate decisions.54 Edwards asserts that because of this changing view employees increasingly demand a voice in the workplace:

Capitalists try to obtain this higher output cheaply, by granting limited amounts of each of the needed components: some security within the overall capitalist context of insecurity, partial identification with work within the framework of private ownership, and limited self-government within an authoritarian enterprise.

The trouble is that a little is never enough. Just as some job security leads to demands for guaranteed lifetime wages, so some control over workplace decisions raises the demand for industrial democracy.55

Recognizing that the current period is an era of transition between long waves in the historic development of capitalism helps to put into perspective the claims and counterclaims of employee involvement's supporters and detractors. No doubt the decline of American postwar economic hegemony and changes in production technology have placed a premium on flexible work organization and active contributions of workers to productiv-

50. Id. at 153-155.
51. Id. at 135 (documenting the growth of supervisory personnel). See also SAMUEL BOWLES ET AL., BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE ch. 7 (1983) (analyzing and measuring the waste in the American economy).

In MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE 6, 259-60 (1987), the authors suggest that the nature of the production process is undergoing a fundamental transformation from mass to batch production. With orders for shorter runs of less standardized products, batch production requires flexible technology and organization incompatible with bureaucratic control systems.
52. See EDWARDS, supra note 42, at 149.
53. Id. at 157, 159.
54. Id. at 160-61. Edwards has written more recently about the political regulation of employment. RICHARD EDWARDS, RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA (1993).
55. Id. at 155. Edwards supports this contention with anecdotal evidence of successful experiments where worker participation "got out of hand," that is, where worker participation was so successful that it threatened management prerogatives and was accordingly cancelled. Id. at 156.

EDWARDS, supra note 42, at 215, claims that participation in these circumstances is increasingly a class demand. This insight may help explain management's ambivalence toward new systems of worker participation. See Gershenfeld, supra note 5, at 134.
EMPLOYEE INVOLVEMENT COMMITTEES

ity. On the other hand, skeptics are unquestionably correct that many participation enthusiasts seek to attain greater competitiveness by either replacing adversarial labor-management relations with more cooperative unions or by eliminating unions altogether. The analysis of long swings of capitalist development and systems of control of workers illuminates that this debate concerns more than enhancing productivity or the distribution of productivity gains. Rather, the struggle centers on efforts to fundamentally restructure the economic system and to shape the respective roles of capital and labor in the control of work in that emergent economy. Employees have great stakes in the survival of their firms as successfully competitive enterprises and in their shares in the rewards of successful competition. These are interests that both coincide and conflict with employers' interests in complex ways. Employees, however, also have a direct stake in the control of their own working lives, because the collective voice of workers will influence not only their terms and conditions of work, but also the satisfaction individuals derive from work and, indirectly and socially, the viability of our democratic system. Despite the common interest rhetoric that dominates most discussions of worker participation, Edwards' analysis demonstrates that the interests of employers and employees in the control of work are largely antagonistic. The economic structures and systems for controlling workers that emerge from the current economic transformation will be shaped not only by impersonal economic and technological forces but also by political and legal struggles between employers and employees to shape the employment relation. Labor law provisions aimed at company domination of labor organizations will provide critical terrain in that conflict.

56. McLeod, supra note 13, at 237-38, distinguishes what he calls centrist from rightist supporters of cooperation by whether they believe that unions have a valid role to play in the new cooperative labor-management relations. Lawrence E. Rothstein, Lessons for Labor-Management Cooperation Drawn from Cases of Noncooperation in the French and American Steel Industries or What We have Heah is a Failya' to Cooperate, 40 LAB. L.J. 512, 512 (1989), notes that many advocates of cooperation do so in the same spirit that school disciplinarians or prison wardens urge cooperation when they insist that their charges be more "cooperative," i.e., conform more readily to the dictates of authority.

57. Kohler, supra note 7, at 550. For the classic statement of the spillover hypothesis, that authority relations at work spill over to influence political relationships, see Carole Pateman, Participation and Democratic Theory (1970).

58. Skocpol's review of theories of the state is useful for understanding the implicit political models held by the participants in the debate on trends in employee involvement. Theda Skocpol, Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal, 10 POLITICS AND SOCIETY 155 (1980). Pluralists use an interest group model, characterizing reform as a consequence of competing organized interests. Id. at 157. Instrumentalists view reforms as a means used by enlightened capitalist leaders to coopt workers. Id. at 162. Structuralists stress the role of the state as a "factor of cohesion" in capitalist economies that functions to ensure the maintenance of capitalism by subordinating the demands of particular capitalists for the viability of the system while individualizing worker demands. Id. at 170-71. The class struggle model sees the possibility for meaningful reform arising from worker organization and pressure, especially in periods of crisis. Id. at 182-84.
THE LEGAL CONTEXT FOR EMPLOYEE PARTICIPATION

Although experimentation with employee involvement committees is an indirect indication of the economic transformation underway, many commentators believe that such innovations in the structure of authority at work conflict with the literal language of NLRA provisions designed to prohibit company domination of labor organizations. These provisions, enacted during the last transition between economic long swings, were part of a system that institutionalized collective bargaining between employers and employees to determine the employment relationship with minimal intervention by the state. During the long postwar period when this model enjoyed stability and prosperity, the major controversies were over the enforcement of the various unfair labor practices that constituted the rules of the game for companies and unions. Provisions against company domination of labor organizations long took a back seat to company coercion or discrimination against concerted or union activity, union recognitional picketing and secondary boycotts, failure to bargain charges, and other forms of unfair labor practices. With economic restructuring on the agenda once again, however, these prohibitions have reappeared among labor-management controversies because of their central role in defining how this relationship can be legally organized.

A. The Wagner Act (NLRA)

In 1935, Congress enacted the National Labor Relations Act to regulate industrial relations in the U.S. Several purposes were enumerated in section 1: to reduce industrial strife by “encouraging practices fundamental to the friendly adjustment of industrial disputes,” to relieve the maldistribution of wealth that aggravates business slumps by depressing wage rates and the purchasing power of wage earners, and to restore equality of bargaining power between employers and employees. The means to achieve these purposes was to be the promotion of collective bargaining by guaranteeing that employees have “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The Taft-

59. Kohler, supra note 7, at 514. He terms this system “private ordering through collective bargaining.” Id. at 530.

60. 8(a)(2) cases dropped from 19.5% of all unfair labor practice complaints in 1938 to 4.5% by 1970. Note, New Standards for Domination and Support Under Section 8(a)(2), 82 Yale L.J. 510, 515 n.46 (1973) [Hereinafter New Standards].


Hartley Amendments of 1947 modified these section 7 rights to include the right "to refrain from any or all of such activities." Proponents of facilitating employee involvement through representational committees tend to emphasize the Act's underlying purpose of promoting industrial peace, arguing that cooperative relations between employers and employees is within the intent of the Act. Some commentators further interpret section 7 rights as ensuring individual freedom of choice on matters of labor organization and representation, an interpretation strengthened by the Taft-Hartley addition of the right to refrain from collective activities of any kind.

Opponents of 8(a)(2) revision, on the other hand, emphasize that the Act envisions collective bargaining as the key to industrial peace, prosperity, and equalization of bargaining power, as well as meaningful employee choice. Kohler, for example, identifies the Act's emphasis on collective bargaining, i.e. the mobilization of group power on behalf of the individual employee. Self-organization rights are critical so that the private parties can determine their relationship through collective bargaining in a "cooperative form of conflict." Kohler regards 8(a)(2) as the "keystone" of the NLRA because it guards the independence of labor organizations without which meaningful bargains cannot be struck. Commentators of this persuasion tend to regard company sponsored EICs as subverting this fundamental purpose of the NLRA.

The spread of company unions, in fact, served as a backdrop to the passage of the NLRA. Although company unions, including representation committees, had made their appearance on a large scale in the 1920s, many

65. See e.g., New Standards, supra note 60, at 511.
66. See e.g., Electromation, Inc., 309 N.L.R.B. 990, 1013-14, enforced, 35 F.2d 1148 (7th Cir. 1994) (Raudabaugh, concurring) (relying on the interpretation of section 7 as upholding employee freedom of choice).
67. See Kohler, supra note 7, at 518-19.
68. Id. at 516.
69. Id. at 518. See also Note, Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act, 96 Harv. L. Rev. 1662 (1983) [Hereinafter Collective Bargaining]. The author contends that the Free Choice model is premised on the assumption that "cooperation, in whatever form, and undifferentiated free choice by employees are the primary goals of the Act." Id. at 1668. In fact, the article argues, collective bargaining was seen as the proper means to contain industrial strife. This model requires arm's-length negotiation. 8(a)(2)'s purpose is to ensure autonomous labor organizations capable of arm's-length negotiating, not employee free choice per se. This requirement is a procedural precondition of bargaining, similar to the parallel assumption of contract law, and obviates the need for state intervention to regulate the substantive fairness or to guarantee the satisfaction of the parties. The author opposes piecemeal revision of the law, precisely because he believes that the logic of arm's-length bargaining, which underlies section 8(a)(2), is inextricably woven into the Act as a whole. The courts that have attempted to reinterpret section 8(a)(2) have failed to recognize that pulling this single thread may ultimately threaten the entire fabric of the Act.

Id. at 1682.
companies adopted such plans in response to the National Industrial Recovery Act (NIRA) of 1933, which contained a forerunner of section 7 rights of employees to organize. Senator Wagner, the sponsor of the NLRA, stated that these company unions were "the greatest obstacles to collective bargaining." Several characteristics of company unions made them potent threats to independent unions. Many plans limited employee authority to issues of policy implementation, while the prerogative of policy formation was carefully reserved to management. Many plans featured grievance plans, which created a channel to pursue individual complaints but not collective interests. Some plans contained no provision for representatives to meet with the employees they putatively represented, while plans sometimes limited participation to more privileged workers, for example, American citizens only. The authority of representation committees was limited and not truly independent, with final decisions requiring management approval. Topics which company unions were permitted to consider were often restricted to grievance and personnel matters, housekeeping and safety issues, and improvements in productivity, with matters of wages and working conditions beyond the scope of their competence. Interestingly, however, some representation committees were delegated managerial tasks, including some personnel issues and certain production and business decisions. Despite their lack of legally enforceable protections, part of the allure of company-sponsored representation plans is that they appear to offer the benefits of representation without the costs and risks associated with collective bargaining.

70. Kohler, supra note 7, at 528. Kohler identifies two labor movements in the U.S. from 1915 to 1935: self-organized unions and management-sponsored representation plans. In 1928, company representation plans constituted 45 percent of organized workers. Id. at 526. By 1935, company plans represented 60 percent of the organized workers, and three-fifths of these plans had been initiated since 1933. Id. at 530. By 1935, 2.5 to 3 million employees were estimated to be covered by company unions, a 70 percent increase since passage of the NIRA. Daniel Nelson, The Company Union Movement, 1900-1937: A Reexamination, 56 BUSINESS HISTORY REVIEW 335, 338 (1982). In 1932, 313 companies had company unions involving 1,263,194 employees. In 1934, an estimated 1,491 companies had organized between 2.5 and 3 million workers into company unions. Id.

71. 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 15 (1935). Kohler, supra note 7, at 530, agrees that company unions limited the advance of independent union organizing, noting that at the time of the NLRA's passage, company unions were growing at a faster rate than independent unions.

72. Edwards, supra note 41, at 106-07. The extensive experimentation with company unions and employee representation plans in the 1920s and early 1930s could be expected to provide a model for current employee involvement and to furnish lessons, positive and negative, for contemporary advocates and detractors of employee involvement. According to Edwards, these lessons, from management's perspective, include that control must appear legitimate, that it must be concerned with the work process, that jobs must be precisely defined based on management control over expertise, that there must be positive rewards for good workers, and that management itself, especially foremen, must be subject to control as well. The greatest innovation, however, was that "power was made invisible in the structure of work." Id. at 110.

73. Kohler, supra note 7, at 525-26.
To eliminate the obstacle to self-organization and authentic collective bargaining presented by company unions, the NLRA contained in section 8(a)(2) a prohibition that made it an unfair labor practice\(^{74}\) (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.\(^{75}\) The Act also contains an extremely broad definition of labor organization in section 2(5):

(5) The term “labor organization” means 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.\(^{76}\)

\section*{B. Supreme Court Decisions}

Both of these provisions of the NLRA have been interpreted by the Supreme Court. In \textit{NLRB v. Cabot Carbon},\(^{77}\) the Court analyzed the threshold issue of the meaning of the term “labor organization.” Cabot Carbon had established Employee Committees in its plants, both union and non-union, for the purpose of discussing “ideas and problems of mutual interest to employees and management,” including grievances.\(^{78}\) The Fifth Circuit had found that although the Employee Committees were dominated by the company, they were not labor organizations within the meaning of the Act because they did not bargain with the company, and the court held that “dealing with” in section 2(5) meant “bargaining with.”\(^{79}\) The Supreme Court rejected this narrow interpretation, noting that the legislative history of the Act supported a broad meaning of labor organization in order to guarantee the “independence of action” of employee organizations.\(^{80}\) Looking as well at the plain meaning of section 2(5), the Court held that “[c]ertainly nothing in that section indicates that the broad term ‘dealing with’ is to be read as synonymous with the more limited term ‘bargaining with,’ ”\(^{81}\) The Court also refused to accept the company’s contention that the proposals and recommendations of the committees did not amount to “dealing with” because the company retained final decisional authority; the Court noted that the company would likewise have the final

\footnotesize{\begin{itemize}
\item[74.] \textit{Collective Bargaining}, supra note 69, at 1678.
\item[75.] 29 U.S.C.A. § 158(2) (West 1973 & Supp. 1994). This section, however, also contains a proviso that “an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.” \textit{Id.}
\item[77.] 360 U.S. 203 (1959).
\item[78.] \textit{Id.} at 205. Other topics discussed included seniority, job classifications, job bidding, makeup and overtime, time cards, a merit system, wage corrections, schedules, holidays, vacations, sick leave, and work facilities and conditions. \textit{Id.} at 207.
\item[79.] \textit{Id.} at 210.
\item[80.] \textit{Id.} at 211, n. 7.
\item[81.] \textit{Id.} at 211.
\end{itemize}}
word on proposals from an independent labor organization, with the difference that such an autonomous organization would have the power to insist upon its requests.  \[82\] The Court ruled that as long as the committees existed "at least in part" to deal with the employer on any one of the topics denoted in section 2(5), then they were labor organizations.  \[83\] The Court also rejected the company's contention that the Taft-Hartley amendments in section 9(a) legitimizied such committees, noting that Congress had rejected an amendment aimed directly at legalizing employee committees of the type at Cabot Carbon and that section 9(a) simply allowed employees to personally present their own grievances.  \[84\]

The Supreme Court has also construed section 8(a)(2) in several early cases, most notably in NLRB v. Newport News Shipbuilding and Dry Dock Co.  \[85\] The company had established and operated for over ten years an elaborate representation plan whose stated purpose was to give employees a voice in working conditions and to provide a mechanism for the adjustment of labor-management differences.  \[86\] The Court held that the committees were controlled in form and structure by the company, thus depriving the employees of "the complete freedom of action guaranteed to them by the Act . . . to choose such form of organization as they wish."  \[87\] The fact that the plan had in fact served the objective of labor peace by providing a forum for settling disputes was not determinative:

In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force.  \[88\]

Thus, lack of anti-union animus, and even presence of pure intentions, failed to save a plan if it was employer dominated. Finally, the company

\[82\] Id. at 214.

\[83\] Id. at 213. Gardner, supra note 18, at 9, notes that the requirement is satisfied even if the committee deals with only one of the topics designated in section 2(5).

\[84\] Cabot Carbon, 308 U.S. at 215-18.

To the proviso in section 9(a) ("Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer"), Taft-Hartley added:

and to have such grievances adjusted, without the . . . intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


The Court also rejected a free speech challenge, noting that the NLRA did not prevent the expression of employee views, but only the domination, interference with, or support of an employee organization. Cabot Carbon, 308 U.S. at 218.

\[85\] 308 U.S. 241 (1939).

\[86\] Id. at 244.

\[87\] Id. at 249-50.

\[88\] Id. at 251.
presented evidence that the employees were satisfied with the plan, having endorsed it by a large majority in a referendum by secret ballot. Employee satisfaction was insufficient to save the plan, however; the Court rejected this factor as irrelevant because it was not in the statutory provision which plainly prohibited interference or domination by the employer. The Court affirmed the Board's decision disestablishing the representation committees as the appropriate remedy for employer domination. Thus, the historic Supreme Court rulings on these provisions of the Wagner Act give a broad reading to the definition of labor organization and a very strict interpretation of the prohibition against domination.

**C. Section 2(5) in the Lower Courts and Before the NLRB**

The threshold issue in employer domination cases is whether the entity involved is a labor organization as defined in section 2(5). Given the extremely broad language of this section and the similarly expansive interpretation given it by the Supreme Court, lower courts and the Board have had less maneuvering room on this issue than on the domination question. Nevertheless, some elaboration, or erosion, has taken place, as cases have identified several characteristics that might take employee involvement plans outside of the statutory definition of a labor organization. The usual analysis follows the language of section 2(5) in a three-pronged test involving structural, functional, and subject matter requirements.

The structural requirement is that "employees participate." One possible avenue for narrowing the definition of labor organization is to find that the participants are not employees as defined in section 2(3). The more common method of relaxing this prong is by reading in an implicit

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89. *Id.*
90. *Id.* at 250.
91. Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. Rev. 571, 589 (1992). See also Lipsky, supra note 4, at 8; John Schmidman and Kimberlee Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 Lab. L.J. 772, 773 (1984). Beaver offers an alternative, less literal test that provides greater latitude for worker participation by narrowing the definition of a section 2(5) labor organization. If the organization discusses topics enumerated in section 2(5), the inquiry is whether the participation is individual or representational in nature, to be determined by: a) the function of the group as indicated by its activities; b) the form of the group as indicated by its composition, selection, and organizational formality; c) the employer's intent in creating the plan; and d) the employees' perception of the group's nature. If the committee represents employees on section 2(5) topics, the last issue is the committee's authority. If it has none, serving merely as a communication device, or if it has been delegated managerial authority, it is not a labor organization. Only if it presents employee recommendations to management would it qualify as a section 2(5) labor organization. Michael Stuart Beaver, *Are Worker Participation Plans "Labor Organizations" Within the Meaning of Section 2(5)?: A Proposed Framework of Analysis*, 36 Lab. L.J. 226 (1985).
requirement that the structure of employee participation be representational in nature.\textsuperscript{94} Thus, the Board has held that semi-autonomous work teams in which all employees participated do not constitute a labor organization.\textsuperscript{95} The Sixth Circuit has even ruled that committees on which employees serve by rotation are not labor organizations.\textsuperscript{96} Thus, plans lacking a representational structure, in which employees speak only for themselves, may sometimes be held to lack the character of a labor organization.

More often litigated is the functional requirement: does the entity “exist for the purpose, in whole or in part, of dealing with” the employer?\textsuperscript{97} Not surprisingly given the strong holding in \textit{Cabot Carbon},\textsuperscript{98} the Board and most courts of appeal have held that organizations that present recommendations, proposals, or suggestions are “dealing with” employers and qualify as labor organizations under section 2(5).\textsuperscript{99} The Board has even held that presenting employee views unaccompanied by specific recommendations was sufficient, as were “discussions” between an employee advisory committee and an employer.\textsuperscript{100} Several circuit court opinions have also hewed a tough line on the “dealing with” requirement. For example, the Seventh Circuit rejected an employer contention that an employee committee designed to serve as a channel of communication and characterized as “a suggestion box, made less impersonal,” fell outside the definition of a labor organization.\textsuperscript{101} The Second Circuit even held that a “question and answer session” with management constituted “dealing with.”\textsuperscript{102}

Other courts, however, especially the Sixth Circuit, have been willing to construe “dealing with” more narrowly. In \textit{NLRB v. Streamway Div. of Scott and Fetzer Co.}, the Sixth Circuit distinguished what it admitted was “seemingly indistinct,” the “communication of ideas” from a “course of

\textsuperscript{94} See generally \textit{NLRB v. Yeshiva University}, 444 U.S. 672 (1980).
\textsuperscript{97} 29 U.S.C.A. § 152(5) (West 1973 & Supp. 1994). The Board has interpreted “purpose” according to an objective standard, i.e., established by the activities of the committee or organization, rather than according to a subjective standard referring to the intent of the employer or participants. \textit{Electromation, Inc.}, 309 N.L.R.B. 990, 996 (1992), \textit{enforced}, 35 F.2d 1148 (7th Cir. 1994).
\textsuperscript{99} Jerry M. Hunter, General Counsel, \textit{NLRB}, Memorandum GC 93-4 (April 15, 1993), at 4 (on file with author).
\textsuperscript{100} \textit{Id.} at 5.
\textsuperscript{101} \textit{NLRB v. Ampex}, 442 F.2d 82, 84 (7th Cir. 1971).
A course of dealings implies "a more active, ongoing association between management and employees," while the communication here was merely "to determine employee attitudes . . . for the Company's self-enlightenment." While appearing to contradict Cabot Carbon's holding that "dealing with" is broader than "bargaining with," Ryan argues that the court in Scott and Fetzer saw itself as defining the lower bounds of "dealing with" (that is, what kinds of activity fail to rise to the level of "dealing with") while it viewed Cabot Carbon as "setting the upper limit at less than 'bargaining with.'" Representation may enter as a functional as well as a structural element. The Board in General Foods found that there was no "agency relationship" between the semi-autonomous teams and the employees as a whole; without such a relationship, there is no "dealing with" but rather something more akin to "a staff meeting or the factory equivalent thereof." If the entity does not in some way represent the employees, then it cannot be dealing on their behalf with the employer, the argument goes. A variation on this theme is the exclusion of groups who have been delegated managerial authority from the definition of labor organization, on the theory that they have been granted the authority to decide rather than to represent employees and to deal with management on issues relating to the exercise of that authority. Thus, another aspect of the General Foods decision was that the teams had been delegated authority to manage simple job duties. Similarly, the Board has found no violation in situations where employee groups have been delegated managerial authority to adjudicate grievances or to make final decisions in grievances. Beaver points out that these cases suggest a "continuum of authority" with the outcome of the labor organization question depending on the amount of authority wielded by the challenged employee entity.

At one end of the continuum, the worker participation group has no power to affect change in any way and simply serves to give management feedback regarding employee problems and perceptions. Such groups have been held not to be labor organizations within the meaning of Section 2(5).

At the other end of the continuum, worker participation groups have essentially managerial power. That is the power to decide the resolution of grievances, impose disciplinary penalties on other employees, and affect job

104. Scott & Fetzer, 691 F.2d at 294.
105. Ryan, supra note 91, at 590-96.
106. See Schmidman & Keller, supra note 91, at 773-74.
content or schedule changes. Such groups have also been found not to be Section 2(5) labor organizations.

However, worker participation groups falling in the mid-ranges of the continuum, with power to at least recommend change but not necessarily to implement it, are generally held to be labor organizations.\(^{110}\)

Thus, "dealing with" is implicitly held to require some minimal level of power-sharing, rather than the all or nothing situations of pure communication or complete delegation.

The subject matter element stems from the list of topics in section 2(5): "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."\(^{111}\) If the topics discussed are more related to the work process itself, "operational problems"\(^{112}\) as opposed to terms and conditions of work, the Board has found the group not to be a labor organization. Thus, in General Foods the Board found the purpose of the semi-autonomous groups was to perform certain managerial functions, although recognizing that these functions were not generally delegated to rank-and-file personnel. Although there was some evidence of the teams making recommendations about holiday schedules, the Board affirmed the administrative law judge's opinion that this discussion of working conditions was "de minimis and isolated."\(^{113}\) Similarly, in Sears, Roebuck the Board affirmed the administrative law judge's finding that the "communication committees" did not constitute labor organizations because they focused on "matters related to work performance."\(^{114}\) Although the judge acknowledged that these matters could have a "direct impact" on working conditions, he characterized the committees as a "management tool that was intended to increase company efficiency."\(^{115}\) The broad list of topics relating to terms and conditions of employment would seem to leave a narrow range of topics for employee committees to discuss legally, unless the Board and courts are willing to weaken the subject matter test by applying a de minimis test, by weakening other elements, or by adding new elements to the labor organization analysis.

This last tack appears to be the one taken by the Sixth Circuit. In Scott and Fetzer, the court considered the lack of anti-union animus in determining that the employee committee was not a section 2(5) labor organization.\(^{116}\) In Airstream, Inc., v. NLRB, the Sixth Circuit found a Presidential

12. See Beaver, supra note 91, at 228.
15. Id.
Advisory Committee that had held "'rap sessions'" with management for four years prior to a union organizing campaign functioned as "a means of communication between management and employees."\textsuperscript{117} The court distinguished Airstream's conduct from the behavior of management in \textit{Lawson v. NLRB}, where the court had affirmed a finding of animus when the employer set up an EIC during the midst of a union campaign and displayed anti-union animus.\textsuperscript{118} In \textit{Airstream}, by contrast, the court found "no substantial evidence that the formation of PAC inhibited adversely the organizational campaign."\textsuperscript{119} Thus, the court seemed to extend the subjective test of animus into a more objective requirement for a demonstration of adverse impact. Additionally, the Sixth Circuit in \textit{Scott and Fetzer} considered the employees' subjective views of the EIC in finding it not to be a labor organization: "Finally, neither the employees, nor the Committee, nor so far as we can ascertain, the union involved in two certification elections, seems to have considered that the Committee even remotely resembled a labor organization in the ordinary sense of the term."\textsuperscript{120} Hogler concludes that \textit{Scott and Fetzer} boils down to the proposition that "[i]f an employee participation program does not interfere with or coerce employees in their decision to accept or reject traditional collective bargaining representation, then the dominated entity does not exist for the purpose either in whole or in part of 'dealing with' an employer."\textsuperscript{121}

\section*{D. Domination, Interference, or Support under Section 8(a)(2)}

Although section 8(a)(2) makes it an unfair labor practice "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it,"\textsuperscript{122} the Board, to some extent, and several courts of appeal, to a much greater extent, have departed from a strict reading of the statute and eroded earlier rulings interpreting these prohibitions.\textsuperscript{123} These courts have relaxed this prohibition by applying a loose "totality of the circumstances" test to a large set of factors relevant to

\begin{table}
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\textbf{Law} & \textbf{Case} & \textbf{Date} \\
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Airstream, Inc. v. NLRB & 877 F.2d 1291, 1296 (6th Cir. 1989), appeal after remand, 914 F.2d 255 (6th Cir. 1990). & \textsuperscript{117} \\
The Lawson Co. v. NLRB & 753 F.2d 471, 477-78 (6th Cir. 1985). & \textsuperscript{119} \\
Airstream, 877 F.2d at 1298. & \textsuperscript{120} \\
\textit{Scott & Fetzer}, 691 F.2d at 295. & \textsuperscript{121} \\
\textit{Airstream}, Inc. v. NLRB & 877 F.2d 1291, 1296 (6th Cir. 1989), appeal after remand, 914 F.2d 255 (6th Cir. 1990). & \textsuperscript{117} \\
\textit{The Lawson Co. v. NLRB} & 753 F.2d 471, 477-78 (6th Cir. 1985). & \textsuperscript{119} \\
\textit{Airstream}, 877 F.2d at 1298. & \textsuperscript{120} \\
\textit{Scott & Fetzer}, 691 F.2d at 295. & \textsuperscript{121} \\
\textit{Airstream}, Inc. v. NLRB & 877 F.2d 1291, 1296 (6th Cir. 1989), appeal after remand, 914 F.2d 255 (6th Cir. 1990). & \textsuperscript{117} \\
\textit{The Lawson Co. v. NLRB} & 753 F.2d 471, 477-78 (6th Cir. 1985). & \textsuperscript{119} \\
\textit{Airstream}, 877 F.2d at 1298. & \textsuperscript{120} \\
\textit{Scott & Fetzer}, 691 F.2d at 295. & \textsuperscript{121} \\
\end{tabular}
\caption{courts of appeal decisions relevant to section 8(a)(2) because they considered the employees' subjective views of the EIC in finding it not to be a labor organization.}
\end{table}

\begin{itemize}
\item \textsuperscript{117} Raymond L. Hogler, \textit{Employee Involvement Programs and NLRB v. SCOTT & FETZER CO.: The Developing Interpretation of Section 8(a)(2)}, 35 LAB. L.J. 21, 27 (1984), in Beaver, supra note 89, at 236.
\item \textsuperscript{123} Clarke, supra note 27, at 2028-29, suggests that the First, Sixth, Seventh, and Ninth Circuits have departed most dramatically in decisions relying on what he labels "free choice analysis."
\end{itemize}
domination, by adding distinctions not in the literal language of the statute, and by requiring additional elements to find domination. These modifications amount to giving the provision a Free Choice interpretation based on a cooperative rather than adversarial model of labor relations. The Board has refused to go as far, retaining more of a structural approach to the issue of domination.

The terms domination, interference, and support are not defined or differentiated in the Act. The Board has treated the difference between domination on the one hand and interference or support on the other as "a matter of degree," and the dividing line is "narrow and often obscure." Hardin characterizes the difference as follows: "Domination of a union constitutes an irreversible subjugation of the union to the employer's will; interference or assistance is misconduct sufficiently less severe that the union is deemed capable of functioning as a union once the interference or assistance is removed."25

Moreover, domination or assistance is determined not by a per se rule but based on weighing a long list of factors "taken together."26 A partial listing of the factors considered in deciding on domination or assistance includes:

lack of any written governing instrument and lack of any independent means of financial support on the part of the labor organization, the fact that its meetings were held only on company property, the attendance at these meetings of high management representatives, the taking and distribution of minutes by a management official, the fact that meetings could be called by a management official, the fact that employees were paid for the time spent at meetings, management participation in elections, management preparation and distribution of ballots, management determination of employee

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124. Hardin, supra note 93, at 303.
125. Id. at 303-304. This distinction explains the logic of different remedies for domination (disestablishment) as opposed to assistance (a cease and desist order to terminate assistance and to withdraw and withhold support until the labor organizations is certified by the Board as exclusive representative of the employees.) Hunter, supra note 99, at 15. Since both domination and assistance are illegal, this difference in remedy seems to be the main practical significance of the distinction.
126. "The question is not whether each individual fact is a violation, but whether the facts taken together justified the Board's conclusion." Utrad Corp. v. NLRB, 454 F.2d 520, 522 (7th Cir. 1972) (citing NLRB v. Thompson Ramo Wooldridge, Inc., 305 F.2d 807, 810 (7th Cir. 1962)). See also Coamo Knitting Mills, Inc., 150 N.L.R.B. 579, 582 (1964) ("We have held that the use of company time and property does not, per se, establish unlawful support and assistance. Rather, each case must be decided on the totality of its facts.") (applying a de minimis rule when only a small percentage of members were on company time during a meeting of the employee committee). Wider latitude is permitted for lawful cooperation when the labor organization is the lawful majority representative of the employees. Hunter, supra note 99, at 14.

The author of the 1973 article New Standards, however, claimed that in practice the Board's traditional standard was a per se rule. "Any employer support of a labor organization is illegal beyond a certain critical level, regardless of the character of the challenged organization, the intent of the employer, or the will of the employees." New Standards, supra note 60, at 511-12. The author contends that "[t]he per se rule, a meat cleaver once appropriate for hacking through the mass of company unions, needs to be replaced with a scalpel for excising occasional malignancies." Id. at 516.
electoral units, management determination of time of election, managerial prerogatives which may affect the status of an employee for election purposes (such as promotion, transfer and discharge), absence of independent legal advice on part of labor organizations and general reliance on the advice of management for its functioning and activities.\textsuperscript{127}

The most critical modification to the concept of domination was initiated by the Seventh Circuit in \textit{Chicago Rawhide Mfg. Co. v. NLRB}\.\textsuperscript{128} The court differentiated actual from potential domination: "Words and actions which might dominate the employees in their choice of a bargaining agent do not constitute domination proscribed by the Act unless the employees are actually dominated."\textsuperscript{129} The court noted that "the employer-employee relationship itself offers many possibilities for domination" but held that "'actual domination' must be shown before a violation is established."\textsuperscript{130} As the Sixth Circuit stated in \textit{Modern Plastics Corp. v. NLRB}, vulnerability to domination is not sufficient to establish actual domination. "Evidence of a weak labor organization alone does not support an inference of Company domination."\textsuperscript{131} According to the court, "[a]ctive domination must be shown before a violation is established. Assistance or cooperation does not always mean domination. The Board must prove that the employer's assistance is actually creating Company control over the Union before it has established a violation of Section 8(a)(2)."\textsuperscript{132}

The significance of the actual control test is heightened even further by a second innovation: measuring domination from the subjective point of view of the employees. "The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees."\textsuperscript{133} The interplay of actual control with the subjective perspective of employees is well illustrated in \textit{Federal Mogul, Coldwater Distribution Center Division v. NLRB}\.\textsuperscript{134} There, the court noted that management "'attempted'" to control the employee committee, but that the committee member who was the target of warnings not to report on committee discussions "was adamant in his belief that he was free to report back anything he felt important, including management's attempts to limit

\begin{itemize}
  \item \textsuperscript{128} 221 F.2d 165 (7th Cir. 1955).
  \item \textsuperscript{129} \textit{Id.} at 167.
  \item \textsuperscript{130} \textit{Id.} at 167-68.
  \item \textsuperscript{131} \textit{Modern Plastics Corp. v. NLRB}, 379 F.2d 201, 204 (6th Cir. 1967). \textit{See also} \textit{Federal-Mogul, Coldwater Distrib. Ctr. Div. v. NLRB}, 399 F.2d 915, 918-19. ("In the instant case we are obviously dealing with a weak labor organization having no constitution, by-laws or possessed of any means of independent financial support. These factors may create an unstable organization susceptible to managerial control, but no inference of actual domination can be drawn from these facts alone.").
  \item \textsuperscript{132} \textit{Modern Plastics}, 379 F.2d at 204.
  \item \textsuperscript{133} \textit{Chicago Rawhide Mfg. Co. v. NLRB}, 221 F.2d 165, 168 (7th Cir. 1955), (quoting NLRB v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954)).
  \item \textsuperscript{134} 394 F.2d 915.
\end{itemize}
his discussions." On the other hand, the subjective satisfaction of the employees, *Newport News Shipbuilding* notwithstanding, might be taken as evidence that the EIC is not dominated by management. The court in *Modern Plastics* relied on the finding of the administrative law judge that none of the employees had been shown to have been dissatisfied with the committee or the type of representation it afforded them. It went on to note that "[i]f employer interference has been slight, and not coercive or oppressive, suppression of a majority organization whose members are not complaining of interference would be an extreme step."

The key justification for this subjective perspective is employee choice: "Inasmuch as it is the employees' freedom of choice that is protected by the Act the test of whether a labor organization is unlawfully dominated or supported is subjective from the standpoint of the employees." Thus, whether the problem is deception ("enabling the employer to induce adherence of employees to the [labor organization] in the mistaken belief that it was truly representative and afforded an agency for collective bargaining") or coercion ("whether the employees formed and supported the organization, rather than some other, because they knew their employer desired it and feared the consequences if they did not," the test is "whether the organization exists as the result of a choice freely made by the employees, in their own interest, and without regard to the desires of their employer."

Another distinction emerging from appellate court decisions is one between illegal assistance and legal cooperation. As the Seventh Circuit defined these terms in *Chicago Rawhide*:

Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor.

135. *Id.* at 920.
136. See *Modern Plastics*, 379 F.2d at 203.
137. *Id.* at 203. In contrast, although it noted that employee satisfaction was only one factor in determining domination, the court did find employee dissatisfaction in *The Lawson Co. v. NLRB*, 753 F.2d 471, 477 (6th Cir. 1985), where it found an EIC to be illegally dominated.
138. *Modern Plastics*, 379 F.2d at 203-04 (quoting *Humble Oil & Refining Co. v. NLRB*, 113 F.2d 85, 88 (5th Cir. 1940)).
139. *Federal-Mogul*, 394 F.2d at 918.
140. *Id.* (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938)).
142. *Id.* (quoting *NLRB v. Wemyss*, 212 F.2d 465, 471 (9th Cir. 1954)).
Once more, the distinction is based on a multiplicity of factors and is a matter of degree, but the test is again "whether there is subversion of the employees' freedom of choice." Thus, courts may see cooperation as positively encouraged under the NLRA as long as it does not have the effect of "inhibiting self-organization and free collective bargaining."

Finally, antiunion animus, another subjective element, this time from the employer perspective, has crept into the section 8(a)(2) as well as section 2(5) issue, at least in the Sixth Circuit. For example, an EIC was found legal in Modern Plastics where the record contained no showing of antiunion bias. In The Lawson Co. v. NLRB, however, the company had formed the employee committee "in direct response to the organizational campaign," and the Sixth Circuit relied heavily on animus to distinguish its finding of a labor organization and domination from what the court termed the "narrow holding" in Scott and Fetzer and from Homemaker Shops.

Freedom of choice thus becomes the touchstone for those courts using the more permissive standards to judge domination and assistance. Lipsky dubs this approach "Free Choice theory" and quotes Alexander for a description of this model:

Employees should be free, if they choose, to select non-union forms of employee organization even if established by the employer. And the law should not stand in the way of labor-management cooperation, which was an original goal of the NLRA and which holds so much potential for the good of the economy and society.

Conversely, for the Board and courts to force the disestablishment of EICs freely chosen by employees is perceived to be a violation of the employees' freedom of choice.

Free Choice theorists also believe that labor-management cooperation and industrial peace are the primary purposes of the NLRA. Judge Wisdom's influential dissent in NLRB v. Walton Mfg Co. argued that "to my mind, an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and em-

144. NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 546 (6th Cir. 1984). In this case, the company's reimbursement of store representatives for lost pay and travel expenses incurred by the representatives while meeting annually with management was characterized as "only another example of its desire to maintain a friendly and cooperative relationship with the Committee." Id.

145. Federal-Mogul, 394 F.2d at 918.

146. Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967).

147. The Lawson Co. v. NLRB, 753 F.2d 471, 477 (6th Cir. 1985).

148. Alexander, supra note 14, at 699. Alexander identifies the First, Sixth, Seventh, and Ninth Circuits as the most permissive. Id. at 700.

149. NLRB v. Walton Mfg Co., 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting in part). "The Act encourages collective bargaining, as it should, in accordance with national policy. The Act does not encourage compulsory membership in a labor organization. The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in the particular plant, if there is so much as an intention by the employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their 'general welfare.'" Id.

150. Alexander, supra note 14, at 700.
ployees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. . . . There is nothing in Cabot Carbon, or in the Labor-Management Act, or in any other law that makes it wrong for an employer 'to work together' with employees for the welfare of all.151

The Ninth Circuit suggested in Herzka & Knowles that the adversarial model should not enjoy a privileged position under the NLRA:

For us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.152

In Homemaker Shops, the Sixth Circuit implied that the adversarial model some see embedded in the Wagner Act and implicit in early Supreme Court decisions may be outmoded:

Whatever value a per se prohibition on employer support of unions may have had in early cases arising under the Labor Act, e.g., Newport News Shipbuilding and Dry Dock Co., such a rigid rule, requiring a “purely adversarial model of labor relations,” Herzka & Knowles, runs contrary to more recent trends—the decline of the notorious “company unions,” the change in public policy from nurturing the nascent labor movement to regulating and limiting management and labor excesses alike, and the change in employee attitudes toward employer-employee relations.153

Unlike the Free Choice circuits, the Board has retained a more structural model of domination, finding potential domination sufficient to find domination.154 In Jonesville Products Division, Amtel, Inc., for example, the Board found illegal assistance and interference where a weak and dependent EIC was “exceedingly vulnerable to suggestion and influence” and characterized by “an unhealthy paternalistic relationship throughout.”155 In Kaiser Foundation Hospitals, Inc., the Board found that management’s acts of assistance exceeded the bounds of permissible cooperation because “the natural tendency of such support would be to inhibit employees in their choice of a bargaining representative and to restrict the Committee in arm’s

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151. Walton Mfg., 289 F.2d at 182 (Wisdom J., dissenting in part). This influential passage is quoted, for instance, in NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 292-93 (6th Cir. 1982). In a recent interview, William Gould, appointed by President Clinton in 1993 as chair of the NLRB, mentioned that the basic problem was to break down the “iron curtain” between labor and management. David Moberg, Board Games, 18 IN THESE TIMES 25, 27 (January 10, 1994).


154. Hutson, supra note 27, at 392. Interestingly, Hutson, a supporter of EICs, thinks that there is little significance to the distinction between potential and actual control because he believes that “most employee participation plans could not exist without active employer support and involvement.” Id.

length dealing with Respondent."\textsuperscript{156} In so ruling, the Board rejected the administrative law judge's finding that the proper test was whether the employer's activities "actually undermine[d] the freedom of choice and independence of the employees in dealing with their employer" and that the evidence "fail[ed] to arouse such a subjective inference" of "impairment of choice."\textsuperscript{157} As opposed to the Free Choice circuits, the Board's concern seems more focused on the independence of the employee committees rather than on the individual choices of employees. The evil of support is that it interferes with that independence, and the evil of domination is that the employer's will, rather than the independent choice of the employees, becomes the \textit{sine qua non} of the EIC's existence.\textsuperscript{158} 

IV  
RECENT BOARD CASES: ELECTROMATION AND DuPONT

The Board has come under increasing pressure to modify its traditional approach to section 8(a)(2) cases, but in two recent decisions its opinions remained closer to the structural analysis of its precedents rather than departing on the path of Free Choice jurisprudence charted by several circuits. The narrow fact-based holdings, however, as well as the multiplicity of concurring opinions generated by these cases, indicate that the Board is anxious to preserve space for experimentation with EICs, even if these instances did not present appropriate circumstances to find these employee committees legal. Thus, if the Board has not removed all legal obstacles to contemporary employee involvement schemes, these rulings nonetheless cracked the door sufficiently to invite further exploration of the bounds of legally permissible EICs.

A. Electromation

The \textit{Electromation}\textsuperscript{159} case attracted great attention in the legal and business communities, and the Board's decision on December 18, 1992, generated intense controversy.\textsuperscript{160} The Board was under strong pressure to

\textsuperscript{157} Id. at 326.
\textsuperscript{158} This finding approaches a conclusion that the employer is the "but for" cause of the EIC if it lacks independence. Hunter, supra note 99, at 12 n.31. The Board, of course, is not alone in finding domination when the EIC lacks independence. For example, in Reed Rolled Thread Die Co. v. NLRB, 432 F.2d 70, 71 (1st Cir. 1970), the First Circuit found that the record revealed a "bland unilateralism" and "a picture of subtle domination rather than arm's length, vigorous give-and-take bargaining between two self-reliant groups." Yet somewhat contradictorily, the court in The Lawson Co. v. NLRB, 753 F.2d 471, 477 (6th Cir. 1985), found instances of management acceding to the proposals of the EIC to constitute evidence that the EIC was a section 2(5) labor organization.
\textsuperscript{159} Electromation, Inc., 309 N.L.R.B. 990 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994).
give the green light for EICs.161 In its decision, the Board, despite signaling in dicta and concurrences its receptivity to legitimate EICs, stayed within the broad outlines of its traditional approach to worker participation plans and ruled, on the facts of this particular case, that these EICs were illegal.

1. The Facts of the Case

In late 1988, Electromation, a non-unionized manufacturer of electrical components and related products in Elkhart, Indiana, instituted changes in attendance bonus policy and the payment of raises in response to financial loses. When employees expressed their displeasure by petition, the company's president met with selected employees and on January 19, 1989, despite an initially unenthusiastic response from these employees, inaugurated five "action committees" to attempt to resolve the employees' complaints.162 The president announced that each committee would consist of six employees, who could volunteer through sign-up sheets, and one or two managers, as well as the Employees Benefits Manager. No employees were involved in determining the goals of the action committees, but employee members of the action committees were to interact with other employees to get their ideas. The committees met weekly on company property during working time, and the company supplied necessary materials. When the company learned in late February, 1989, of a union demand for recognition, it suspended management participation in the action committees; some committees suspended their work, but others continued to function.163

The administrative law judge found that the action committees were section 2(5) labor organizations and that the employer dominated and assisted the committees. He did not credit charges of section 8(a)(1) unfair labor practices. The company appealed, arguing that the committees followed a tradition of employee-employer meetings, were created without knowledge of union activity, and made no proposals that were implemented. In short, the company claimed that the action committees did not interfere with employee free choice as to collective bargaining. The Board, however, affirmed the administrative law judge's rulings, findings, and conclusions, as modified, and held that the action committees were labor organizations dominated and assisted by the employer.164

161. Amici curiae were filed by unions, the Chamber of Commerce, the Council on Labor Law Equality, and the Labor Policy Association, among others.
162. The committees were designated to consider absenteeism/infractions, the no smoking policy, the communication network, pay progression for premium positions, and the attendance bonus program. Electromation, Inc., 309 N.L.R.B. at 991.
163. Id. at 991-92.
164. Id. at 990, 992.
The Board applied the three-pronged test for determining statutory labor organization status and found that the action committees were covered by section 2(5). Examining legislative history, the Board noted that the Act was intended to cover representation committees that were not independent of the employer-employee relationship. It further concluded that a committee could be a representation committee even though it lacked any formal framework for eliciting employee opinion. The Board found that employees participated in the action committees and that these employees acted in a representative capacity. The Board also found the action committees fell within the functional part of the test because they dealt with management. It noted that Cabot Carbon established that “dealing with” is broader than “bargaining with,” but recognized that not all communication constitutes “dealing with.” It distinguished bilateral “dealing with,” involving committee proposals and their consideration by management, from unilateral communication, such as suggestion boxes, brainstorming meetings, or other forms of information exchange. The Board also noted exceptions to the “dealing with” requirement when the organization performs essentially managerial or adjudicative functions. Here, the action committees dealt with the employer. The action committees also came under the subject matter prong because they discussed various conditions of employment—absenteeism, bonuses, and other incentives.

Turning to the domination issue, the Board noted that “8(a)(2) does not define specific acts that may constitute domination,” but stated that an organization that is “the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2).” The Board appeared to make a concession toward the Free Choice circuits by distin-

165. Id. at 992-94. The testimony of Senator Wagner, the bill’s author, clarified that the original prohibition making it an unfair labor practice for an employer to “initiate, participate in, supervise, or influence the formation, rules, and other policies of a labor organization” had been amended to the current version, “to dominate or interfere with the formation or administration,” because the employer should not be penalized for merely suggesting, i.e., “initiating,” the formation of a labor organization. The employer, however, should not be engaged in actively sponsoring or shaping the organization because “it is at the stage of ‘formation’ that employer activity is most effective and harmful.” Id. at 993. The Board again quoted Wagner as saying that the crucial question is “whether or not the employee organization is entirely the agency of the workers . . . . The organization itself should be independent of the employer-employee relationship.” Id. at 994.

166. Id. at 994.
167. Id. at 997.
168. Id. at 995.
169. Id.
170. Id. at 997.
171. Id.
172. Id. at 995.
guishing actual from potential domination, but it defined actual domination in terms closer to the Board's traditional structural analysis than Free Choice analyses. Actual domination is established by "the employer's specific acts of creating the organization itself and determining its structure and function," but potential employer influence over the "structure or effectiveness of the organization" when the "formulation and structure of the organization is determined by employees" is not sufficient to constitute domination. Thus,

... when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment. Applying these standards to the facts, the Board found both domination and support in that the Action Committees were the creation of the Respondent and that the impetus for their continued existence rested with the Respondent and not with the employees. Accordingly, the Respondent dominated the Action Committees in their formation and administration and unlawfully supported them.

The Board took issue with both subjective requirements imposed by the Sixth Circuit, anti-union animus and employee dissatisfaction. Resting its conclusion on statutory language, legislative history, and cases other than Scott and Fetzer, the Board found that the "purpose" in section 2(5) is not equivalent to motive. "Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does." Employer animus and employee satisfaction or confusion that the organization is a union were simply irrelevant.

The Board was not insensitive to the implications of its opinion for quality circles, quality of work life projects, semi-autonomous teams, and similar employee involvement experiments. The Board began its analysis with a caveat that its opinion was based on these facts in the record and was not intended to suggest that other employee committees "formed under other circumstances for other purposes" would necessarily be deemed labor organizations or that employee actions similar to those in this case would necessarily be held to constitute unlawful domination, interference, or support. The Board concluded its opinion by stressing that the Action Committees were not aimed at improving quality or efficiency, but rather at creating the impression that employee-employer problems were being re-

173. Id. at 995-96.
174. Id. at 996.
175. Id. at 998.
176. Id. at 996.
177. Id. at 996-97.
178. Id. at 990.
EMPLOYEE INVOLVEMENT COMMITTEES

solved bilaterally.  Thus, the Electromation decision, while it appears to uphold the Board’s traditional strict approach to employee committees, may not imply that popular forms of “participatory management” are necessarily invalid if the facts are sufficiently different so that the legal tests for labor organization and domination and support would not be met.

3. Devaney’s Concurrence

Member Devaney wrote a separate concurrence to emphasize that a “genuine ‘employee participation program’” was not at stake in Electromation and to elaborate on his views on the test for a statutory labor organization. He delved into the legislative history of the Act, finding that the supporters of the Act intended to outlaw company unions because they usurped the rights of employees to choose their own collective bargaining agents by creating illusory representation and by frustrating impulses to self-organize. He also argued that the Act’s authors had a particular type of organization in mind when they banned representation committees, one of the two types of company union (the other being the employee association), and that they did not intend to outlaw all communication between employees and employers. Surveying Cabot Carbon and selected Board decisions, he expressed agreement with the exceptions to labor organization status established by past precedent: the self-regulation of job duties, the resolution of grievances, and communication as a management tool.

Although concurring in the Board’s decision in this case, he noted several disagreements with the majority that might influence future cases. First, Devaney would require that an employee participation plan involve a group acting in a representative capacity before he would find labor organization status. Unless the employer, employees, or both have “empowered this group to speak for other employees,” there is no usurpation of the employees’ rights to choose their own bargaining representative, thus resulting in no frustration of their “fundamental freedom of choice.” Second, Devaney would tolerate more bilateral communication than the majority’s limitation of communication to the unilateral flow of information. He asked, “if ‘dealing with’ is less than bargaining, what is it more than?” He answered by stating that the mere solicitation or acceptance of employee suggestions or ideas does not meet the “dealing with” test. Further, he seemed to propose a de minimis approach to the subject matter prong, sug-

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179. Id. at 998.
180. Id. at 999.
181. Id. at 998-1003.
182. Id.
183. Id. at 1001-02.
184. Id. at 1002.
185. Id.
186. Id.
gesting that even if mandatory subjects of bargaining are occasionally broached, if the purpose was merely the communication of ideas and suggestions, the group would not necessarily constitute a labor organization.\textsuperscript{187}

4. \textit{Oviatt’s Concurrence}

Member Oviatt also agreed that the violations in \textit{Electromation} were “clear cut,” but he wrote separately “to stress the wide range of lawful activities which I view as untouched by this decision.”\textsuperscript{188} While Devaney concentrated on the representational and functional “dealing with” issues, Oviatt thought the subject matter prong was the key to differentiating legitimate worker participation schemes from section 2(5) labor organizations. He surveyed currently popular forms of employee involvement: quality circles focus on operational problems such as efficiency and waste; quality of work life programs may deal with these problems, but also with the issues of worker self-fulfillment and self-enhancement; and joint labor-management committees try to improve operating functions, but also may seek better communications as well. He maintained that nothing in the \textit{Electromation} decision would condemn these types of programs because “[t]he statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace.”\textsuperscript{189}

5. \textit{Raudabaugh’s Concurrence}

Although Member Raudabaugh concurred in finding a section 8(a)(2) violation in \textit{Electromation}, he departed most significantly from the majority’s analysis and from the concurrences of Oviatt and Devaney. He did not believe that most EICs can escape the broad definition of a labor organization under section 2(5); thus, he concentrated his attention on the section 8(a)(2) test.

He argued that the Board did not have authority to reinterpret section 2(5) because the Supreme Court has given a clear and authoritative construction to that provision.\textsuperscript{190} He noted that the Court’s interpretation of “dealing with” was very broad, and that the Board’s exceptions were correspondingly very narrow.\textsuperscript{191} He likewise pointed out that the list of section

\begin{itemize}
\item \textsuperscript{187} \textit{Id. at} 1003.
\item \textsuperscript{188} \textit{Id. at} 1004-05.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id. at} 1007. He noted that the Supreme Court’s opinion in \textit{Lechmere, Inc. v. NLRB}, 112 S. Ct. 841 (1992), gave the Board very little maneuvering room to reinterpret section 2(5). There the Court wrote: “Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.” \textit{Electromation}, 309 N.L.R.B. at 1007, (citing \textit{Lechmere}, 139 LRRM 225, 229, quoting \textit{Maislin Industries, U.S. v. Primary Steel}, 110 S. Ct. 2759 (1990) (slip op. 13)).
\item \textsuperscript{191} The exceptions are where the EIC can itself resolve grievances or where work teams have been delegated the authority to resolve employment-related problems, and consequently there is no
2(5) subjects is lengthy and contains broad terms such as "conditions of work" and "labor disputes." He doubted that employee committees could steer clear of such topics entirely.\textsuperscript{192} He concluded that most EICs will possess characteristics bringing them within the three elements of the test for labor organization. He also believed that this result is the more sound position from a policy perspective, because meeting the definition of labor organization brings EICs under Board jurisdiction and better protects the interests of all parties involved.\textsuperscript{193}

This reasoning led Raudabaugh to the possibility of reinterpreting section 8(a)(2) as an alternative to finding EICs unlawful under a strict interpretation of the NLRA. Here, unlike with section 2(5), he believed the Board did have latitude to change its approach to domination and assistance. Although the Supreme Court also has construed this section so strictly that most contemporary EICs would be ruled unlawful, the \textit{Newport News} opinion is not the last word on the NLRA, according to Raudabaugh. Because \textit{Newport News} was decided in 1939, prior to passage of the Taft-Hartley amendments in 1947, it reflects the adversarial model embodied in the original Wagner Act. Thus, section 7 of the Wagner Act gave employees rights to form, join, or assist labor organizations, and section 8(a)(2) ensured that the organizations were completely independent of employer control. Rather than employee empowerment through unionization, however, Taft-Hartley ensured government neutrality and guaranteed employees freedom of choice to form, join, or assist, or to refrain from forming, joining, or assisting unions.\textsuperscript{194} Although Congress failed to amend section 8(a)(2) in 1947, Raudabaugh maintains that this particular aspect of legislative history is not sufficiently weighty to block reinterpretations of that provision.\textsuperscript{195} Moreover, more recent legislation also indicates that Congressional policy now favors employee involvement.\textsuperscript{196}

\textsuperscript{192} Id. This position, of course, put him at odds with Oviatt and with Devaney again, to the extent that the latter would apply a \textit{de minimis} rule to allow some discussion of section 2(5) subjects.

\textsuperscript{193} Id. at 1009. Again, his analysis and policy preferences seemed to be opposed to those of Oviatt and Devaney. He concluded that section 2(5) would have to be changed by legislative amendment, although he did not advocate that. \textit{Id.}

\textsuperscript{194} Id. at 1010-12. He argued that Taft-Hartley enshrined neither a purely adversarial nor cooperative model of labor-management relations and quoted Judge Wisdom's dissent on the points that the Act does not rule out cooperation or compel unionization. \textit{Id.} at 1012 n.34.

\textsuperscript{195} \textit{Id.} But see Clarke, supra note 27, at 2036-37. Clarke shows that Congress rejected an amendment aimed specifically at weakening section 8(a)(2), a different and more pertinent proposal than the one discussed by Raudabaugh.

\textsuperscript{196} Raudabaugh cited the 1975 National Productivity and Quality of Working Life Act and the 1978 Labor-Management Cooperation Act. \textit{Electromation}, 309 N.L.R.B. at 1012-13. Hutson, supra note 27, at 390, claims that the Malcolm Baldridge National Quality Award also demonstrates the federal government's endorsement of employee involvement. None of these policies, however, directly speak to the Congressional intent behind section 8(a)(2).
In light of the indications of changed Congressional intent, Raudabaugh felt free to suggest a reinterpretation of section 8(a)(2) that relies on a four-pronged test:

\[ \ldots (1) \] the extent of the employer's involvement in the structure and operation of the committees; (2) whether the employees, from an objective standpoint, reasonably perceive the [employee participation program] as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining, and (4) the employer's motives in establishing the [employee participation program].

No single factor would be dispositive; rather, all factors would weigh into the analysis of each case.

Under the first prong, employers would be free to initiate an EIC, but employees must be free to decide to participate or not. Employers could also set out the broad purpose of EICs as long as the committee was free to consider all items relevant to that purpose. Employer support of committee operations would be lawful, and managers would be free to participate and even to suggest the rules and policies of the EIC.

The second prong is an objective one, to be determined by the Board based on the facts of the case: whether the organization can be reasonably perceived by the employees as a substitute for traditional union representation. Thus, if the committee was created to deal with employee complaints or if the employees thought of the committee as their representative on employment matters, it could reasonably be perceived as a substitute for unionization. On the other hand, a committee established by a company to address entrepreneurial interests, such as product quality or efficiency, would reasonably be viewed as a vehicle for management, not employee, concerns.

The third prong is straightforward: Raudabaugh considered it significant if the employer assures the employees of their section 7 rights to union representation and full collective bargaining. Furthermore, the fourth prong takes into account employer motives in establishing the EIC: if it was to thwart unionization, it would be detrimental to the employees' section 7 rights, but if the motive was to further business objectives, there would be no impact on section 7 rights.

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197. Electromation, 309 N.L.R.B. at 1013.
198. Id.
199. Id. at 1013-14.
200. Id. at 1014.
201. Id.
202. Id.
Although he was unsuccessful in persuading his fellow members to endorse this four-pronged test, he argued that these factors correctly balance interests in cooperative labor relations and employee section 7 rights. According to Raudabaugh, this test embodies the Taft-Hartley policies of "(1) insuring employee free choice and (2) promoting harmony and cooperation in the sphere of labor-management relations. Finally, they reflect the national interest in taking steps to insure that American firms successfully compete in a global economy."

B. DuPont

Six months after Electromation, the Board was faced with similar issues in a unionized setting in the case of E. I. DuPont de Nemours & Company. Once again, the Board remained fundamentally traditional in its analysis and found the committees in violation of section 8(a)(2).

1. The Facts of the Case

For years DuPont's chemical plant at Deepwater, New Jersey, operated its safety program with management committees, but in 1987 it began to reorganize six safety committees and one fitness committee to include employees. These committees operated under a consensus decision-making scheme known as Personal Effectiveness Process (PEP) in the company's terminology. When the union proposed the creation of a joint labor-management committee to deal with health and safety, a mandatory subject of bargaining, the company rejected its proposal and instead proceeded with implementing its employee involvement program over union objections. The administrative law judge found persuasive evidence of actual company domination of the formation of one committee and of the administration of all of the committees. Finding also that the committees met the criteria for labor organizations, he ordered them disestablished.

203. Oviatt specifically rejected the Raudabaugh test as eroding Congressional intent as interpreted by the Supreme Court. He rejected the employee perception prong as a "factor not contemplated by Congress or the statute," id. at 1005 n.5, even if it required a reasonable perception. He argued that employer assurance of section 7 rights is likely to be hollow, or to generate a flood of litigation about its sincerity and effectiveness. Finally, he maintained that NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939), is still good law and explicitly rejects employer motivation as a factor. He noted that the employer's subjective intent in no way mitigates the impact on employees of a dominated labor organization. Electromation, 309 N.L.R.B. at 1005 n.5.

204. Electromation, 309 N.L.R.B. at 1005 n.5.
206. Id. at 906-07.
207. Id. at 910. The judge noted the following attributes common to all the committees: all were initiated by the company; the company decided which employees to invite to serve; management served on all committees; the company permitted electronic mail to be used by the committees; there was no regular rotation of membership; members were paid for service; and the company provided meeting places, equipment, and supplies, and paid committee expenses. Id. He also found anti-union animus evidenced in the company's own records. Id. at 908.
208. Id. at 911-18.
2. The Board’s Opinion

The Board agreed with the administrative law judge’s rulings, adding rationale in a separate opinion to give further guidance to employers seeking to use EICs. The Board took pains to point out that some of DuPont's cooperative activities were legal in order to emphasize that "there is some room for lawful cooperation under the Act."209

In applying its traditional three-part test for labor organizations, the Board concentrated on the "dealing with" issue, attempting to spell out in greater detail than it had in Electromation what constitutes a bilateral mechanism. In the first place, a bilateral mechanism involves a pattern or practice of communication, not merely isolated instances of group ad hoc proposals. Secondly, the substance of bilateral communication is proposals, not merely the sharing of information with the employer. Finally, bilateral communication entails proposals made by a group rather than individually in a "suggestion box" type procedure.210

The Board found that the DuPont committees did not "fall within any of these safe havens" because they involved "group action and not individual communication."211 All the committees regularly discussed proposals with management, which had representatives on the committees. That management representatives were actually inside the committees as members did not change the fact that there was dealing between management and employees on these proposals, although the presence of management members on the committees did not inevitably ensure a finding of labor organization status.

For example, there would be no "dealing with" management if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management. Similarly, there would be no "dealing" if management representatives participated on the committee as observers or facilitators without the right to vote on committee proposals.212

In other words, a committee that did not depend on management’s acceptance of their proposals, whether that acceptance was exercised inside or in response to the committee, would not be considered to be "dealing with" management.

The Board also concluded that the company had dominated the formation of one committee and that the "structural operations" of the committees supported a finding that the company dominated the administration of all seven committees. The Board’s analysis placed particular weight on the implicit management veto exercised by the requirement of consensus under

209. Id. at 893.
210. Id. at 894.
211. Id.
212. Id. at 895.
DuPont's PEP program. The Board also emphasized the company's control of committee agendas. Further, management controlled the structure and selection of committee membership.\(^{213}\) The Board concluded that "[u]nit employees had no independent voice in determining any aspect of the composition, structure, or operation of the committees. In fact, as the record demonstrates, the Respondent can change or abolish any of the committees at will.\(^{214}\)

Because there was an incumbent union at DuPont, the Board found that the company actions in dealing with the committees also constituted section 8(a)(5) (refusal to bargain) violations by bypassing the union. The Board was careful to distinguish the unlawful activities of the committees from activities undertaken by the company at safety conferences. Even though safety concerns that were mandatory subjects of bargaining were discussed at these conferences, the Board held that the conferences did not constitute a bilateral mechanism for dealings between management and the employees. Employees were encouraged to talk about their experiences with safety issues, to express their ideas, and to become more aware of safety problems; however, management informed them of the union's role and duties as their exclusive collective bargaining representative and made good faith efforts to keep bargainable issues off the agenda. The Board concluded that the conferences amounted to "brainstorming sessions" and did not violate section 8(a)(5).\(^{215}\)

3. Devaney's Concurrence

Member Devaney concurred separately to highlight that DuPont's conduct would be unlawful under his "narrower and more historically focused perspective" because it "comes close to a textbook example of an employer's manipulation of employee committees to weaken and undermine the employees' freely chosen exclusive bargaining agent."\(^{216}\)

Devaney agreed that the company dominated the operation of the seven committees, but he also noted that it is difficult to imagine how committees which exist at the will of the employer could not be dominated. He hastened to add, however, that domination per se is not the problem under his analysis. Management agenda-setting, creation of committees, and committees composed of managers and employees are not banned by section 8(a)(2), but rather the manipulation of such committees to appear to be agents of the employees is the evil prohibited by the Act.\(^{217}\) If employee committees are clearly kept in proper perspective as management tools and

\(^{213}\) Id. at 896.
\(^{214}\) Id.
\(^{215}\) Since the safety conferences did not amount to "dealing," the Board concluded that there could be no bypassing of the unions by directly dealing with the employees. Id.
\(^{216}\) Id. at 898.
\(^{217}\) Id. at 899.
do not operate under a pretense that they serve employee, as opposed to employer, interests, then they should not be found to have "usurped the exclusive right of the employees to choose their own representative to deal with the employer with respect to conditions of work," which is the crucial issue in domination cases.\textsuperscript{218}

Devaney also found the committees to be labor organizations under section 2(5) of the NLRA. He did not think it necessary to determine if the committees here dealt with the employer because he found that they in fact bargained with management.\textsuperscript{219} Nevertheless, he took exception to the majority's discussion of "the limits of 'dealing with'"\textsuperscript{220} because he did not believe that the abstract distinction between unilateral and bilateral communication captures the historical intent of Congress. In his view, although bargaining is bilateral, "dealing with" is not necessarily so. He agreed that employee suggestions, whether made by individuals through a suggestion box or by groups through brainstorming sessions, are not "dealing with," but he denied that proposals that are immediately accepted do not constitute bargaining. Instead of the unilateral/bilateral distinction, he would focus on the expectation of the employees that they are acting on management's behalf in making suggestions rather than the false bargaining Congress intended to outlaw in banning dominated representative committees.\textsuperscript{221}

Devaney would require that an employee committee operate in a representative capacity before he would find it to be a statutory labor organization.\textsuperscript{222} Arguing that Congress used "employee representation committee or plan" as a term of art to denote sham committees that usurped employees' exclusive power to choose a bargaining representative by purporting to represent them when they were actually creatures of the employer, he found that DuPont's committees were indeed such unlawful representation committees. In the first place, they were "vested by management with the authority to act as agents for the employees."\textsuperscript{223} Second, the company used them as forums for negotiating compensation and benefits "with the purpose and effect of excluding and weakening the Union."\textsuperscript{224} Third, the management members, who held the power to veto any proposals, usurped employees' rights to a "loyal bargaining agent," in effect putting DuPont

\textsuperscript{218} Id. at 899, 902. Devaney found the contrast between the committees and the safety conferences "instructive" in this regard. The conferences were dominated by management in ways similar to the committees, but the contrast in their status as management tools, as opposed to instruments to represent employees, remained sharp. The company properly made no effort to disguise the fact that the conferences operated for management objectives rather than on behalf of the employees. The Board thus correctly found them not to be labor organizations, according to Devaney. Id. at 902.

\textsuperscript{219} Id. at 902.

\textsuperscript{220} Id. at 898 n.1.

\textsuperscript{221} Id. at 902-03 n.10.

\textsuperscript{222} Id. at 903 n.11.

\textsuperscript{223} Id. at 903.

\textsuperscript{224} Id.
"on both sides of the bargaining table."225 Although not essential for finding a section 8(a)(2) violation, here the "clear showing of union animus and the deliberate bypassing and undercutting of the Union" clinched DuPont's violation for him.226

Although he never explicitly stated it, Devaney seemed to be edging closer to the type of analysis suggested by Scott and Fetzer in its insistence on a representation element, in its higher toleration of communication without finding "dealing with," and especially in its emphasis on employees' perception of the employee committee. For Devaney, the main evil to be avoided is manipulation of employees' freedom of choice through the use of sham representation committees:

The lesson to be gleaned from the violations found and the allegations dismissed here is simply that, under current law and precedent, employers cannot establish and use employee committees with the flexibility, discretion, and authority inherent in the creation and use of a management tool and lead employees to believe, either directly or indirectly, that the "management tool" is the employees' tool.227

While avoiding this unlawful use of EICs, however, employers are still left with plenty of room to employ contemporary forms of employee involvement in legitimate fashion, according to Devaney's view of the Act:

I read Section 8(a)(2)'s legislative and precedential history as leaving employers significant freedom, through interaction with groups of more than one and fewer than all employees, to involve rank-and-file workers in matters formerly seen as management concerns, to call on employees' full ability and know-how, and to increase their enthusiasm for and commitment to quality and productivity through implementing recent developments in worker effectiveness training and empowerment, whether these developments occur through hierarchical employer-structured entities or through "democratization" of the workplace, whereby employees become, in a sense, their own supervisors and managers.228

V
RELAXING THE STRICTURES ON EMPLOYEE INVOLVEMENT COMMITTEES: ALTERNATIVE MODIFICATIONS OF NLRA

Various options are available to relax the traditional strictures against company dominated labor organizations to allow greater use of EICs. One approach would be to narrow the definition of labor organizations so that more forms of employee involvement would escape the coverage of the

225. Id.
226. Id.
227. Id. at 900.
228. Id. at 899.
prohibition. Another strategy would reconceptualize the test for domination or assistance.

A. Revising the Definition of Labor Organizations

Assuming that some relaxation of the law’s proscription of EICs is desirable, one obvious approach is to narrow the sweep of section 2(5)’s definition of labor organization. Several alternatives have been proposed to exclude all or certain types of employee involvement mechanisms.

One approach, advocated by NLRB Member Devaney, would read into the structure prong of the traditional test a requirement that participation take the form of representation to constitute a statutorily defined labor organization. This modification would probably have the effect of exempting quality circles, semi-autonomous teams, and perhaps some forms of quality of work life experiments, where all employees participate and speak for themselves (although many of these programs include the use of some form of steering committees that are representational in character). From a pure policy point of view, this approach has the advantage of excluding from the definition the types of worker participation programs that are most focused on aspects of the work process and are least likely to stray onto traditional collective bargaining subjects. They are most clearly tools of management designed to enhance efficiency and productivity. As such, they would seem to be most likely to give the U.S. economy a boost in international competition and least likely to threaten labor unions by coopting their functions.229 From a legal point of view, there is, of course, precedent for reading a representation requirement into the structural prong,230 and Devaney seems to find some textual support in section 2(5) as well.231

229. The evidence on these issues, however, is far from clear. Quality circles appear to generate fewer productivity gains than more extensive QWL programs or gainsharing, or potentially, participation at the strategic level. Eaton & Voos, supra note 11, at 176-77. Moreover, the threat posed by EICs to unions is difficult to assess. The author of Collective Bargaining presents the logic of unions’ fears of EICs:

Even though they entail no legally enforceable protections for employees, management-sponsored employee representation plans appear to many to offer the benefits of representation without the costs and risks associated with collective bargaining. Consequently, they hold an allure against which it is difficult, if not impossible, for conventional unions to compete. Collective Bargaining, supra note 69, at 1679. The issue of the actual effect of EICs on unionization, however, is not well researched. Although pre-NLRA company unions represented a significant challenge to independent unions, see id., there are indications that without union participation, modern EICs tend to be shortlived. See e.g., Gershenfeld, supra note 5, at 143. Two case studies of the dynamics of EICs are John Witte, Democracy, Authority, and Alienation in Work (1980); J. Maxwell Elden, Democracy at Work for a More Participatory Politics: Worker Self-Management Increases Political Efficacy and Participation (1976).

230. See, e.g., General Foods Corp., 231 N.L.R.B. 1232 (1977); NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982), although in both of these cases other elements were influential in deciding that the organizations were not section 2(5) labor organizations.

231. Devaney did not explain his position in E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 903 n.11 (1993), where he wrote that he would impose a representation requirement, but he did quote a segment of section 2(5) earlier in his opinion that seemed to imply that he sees textual support for the
however, argues persuasively that the legislative history as well as the plain meaning of section 2(5) make it clear that “employee representation committee[s] or plans” were included “as merely one type of labor organization within a broader definition.”

A second approach would raise the lower limit of the definition of “dealing with” to exclude “mere communication” that does not rise to the level of “dealing with.” Given the strict interpretation of most precedent, however, the DuPont tack of trying to distinguish unilateral from bilateral communication may be the best that can be done in defining the difference between dealing and communicating. Even the majority’s effort in that case seemed artificial and strained, as noted by Devaney in his concurrence, and there is not likely to be a bright line distinguishing the two in practice. The Scott and Fetzer approach of adding the extraneous subjective factors of anti-union animus and employee perception and satisfaction lacks textual or precedential support.

Given difficulties with the other approaches, the third approach to narrowing the definition of labor organizations by limiting the subject matter covered may prove the most fruitful. The appeal for several Board members and other commentators is that to the extent that EICs limit their focus to work process issues, they clearly remain tools of management designed to address management concerns and do not infringe on employees’ rights to address the terms and conditions of work through collective bargaining or otherwise. Indeed, many forms of worker participation can coexist easily with union representation. One advantage of this approach is that no

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233. Clarke, supra note 27, at 2034.
234. See supra notes 96 to 100 and accompanying text. Also, Raudabaugh’s point that the Supreme Court has given a definitive interpretation is correct.
235. McLain, supra note 8, at 1752-54, interprets these factors as suggesting a lack of dealings, but they appear to be indirectly linked to this requirement, at best. In any event, the Supreme Court did not consider these factors in NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959), and explicitly rejected them in the section 8(a)(2) context in NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 249-50 (1939). If Newport News applies to section 2(5) as well, even the Supreme Court would be bound to its past statutory interpretation because of the Court’s strict application of stare decisis when interpreting statutes. See Lechemere Inc. v. NLRB, 112 S.Ct. 841 (1992). Here, the precedential impact of Newport News is diminished not only by the question of whether it applies to the section 2(5) issue, but also by Raudabaugh’s argument that it carries less weight because it was decided before the Taft-Hartley amendments. Electromation Inc., 309 N.L.R.B. 990, 1011-1013, enforced, 35 F.2d 1148 (7th Cir. 1994).
236. Eaton & Voos, supra note 11, at 193-94. Indeed, this research supports the conclusion that the unionized sector is more innovative and more inclined to experiment with those types of employee involvement programs that are most likely to produce gains in productivity.
drastic amendment of the current law would be necessary, but rather a looser interpretation might suffice, for example, a *de minimis* exclusion for occasional or isolated discussions of terms and conditions.\textsuperscript{237} This approach, however, suffers from disadvantages as well. In the first place, many quality of work life projects would still be covered labor organizations because their focus on employee job satisfaction and self-realization as an indirect vehicle to boost productivity, tends to direct their attention toward the work environment and conditions of work.\textsuperscript{238} More problematic, however, is the likelihood that almost all forms of worker participation programs will inevitably mix discussions of working conditions with discussions of the work process.\textsuperscript{239}

\textsuperscript{237} The patterns or practice standard for "dealing with" articulated by the Board in *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993), would provide such a rule.

This solution is recommended by the Dunlop Commission: "The Commission recommends that non-union employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs." [Commission on the Future of Worker-Management Relations, Report and Recommendations] (December, 1994). The Commission appeared to be anxious to strike a balance between management and union pressures, because it also "reaffirm[ed] the basic principle that employer-sponsored programs should not substitute for independent unions" and that these programs "should not be legally permitted to deal with the full scope of issues normally covered by collective bargaining." *Id.* Even this apparently mild relaxation of current doctrine drew a dissent from Douglas Fraser, former president of the United Auto Workers. [Dissenting Opinion of Douglas A. Fraser] (January 3, 1995).

David F. Girard-di Carlo, et al., *Legal Traps in Employee Committees*, 43 LAB. L.J. 671, 674-75 (1992), provide an analysis of permissible topics which may be discussed without leading to a finding of labor organization as well as a list of non-permissible topics.

\textsuperscript{238} William E. Fulmer & John J. Coleman, Jr., *Do Quality-of-Work-Life Programs Violate Section 8(a)(2)?*, 35 LAB. L.J. 675, 682 (1984), however, argue that QWLs can be distinguished from labor organizations. Labor organizations serve to funnel employee concerns about employment conditions to management’s attention, whereas QWLs usually do not address employee-initiated issues, but rather “usually respond to management’s request to obtain the opinions of the employees regarding certain practices and procedures.” *Id.* This point may be more relevant to the “dealing with” standard, although it may also speak to the domination issue.

\textsuperscript{239} This point is Raudabaugh’s objection to much of the other members’ discussion in Electromation Inc., 309 N.L.R.B. 990 (1992). The Board has held that “the concept of ‘terms and conditions of employment’ is itself a broad one.” Allied Signal, Inc., 307 N.L.R.B. 752, 760 (1992) (quoting Peerless Publication, 283 N.L.R.B. 334, 335 (1987)). The Supreme Court has described terms and conditions as matters which are "plainly germane to the ‘working environment.’" *Id.* (quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979)). The General Counsel’s memorandum even asserted that “matters that will have a substantial impact upon mandatory working conditions” may be sufficient to satisfy the subject matter test. Hunter, *supra* note 99, at 9. Even McLain, *supra* note 8, at 1747, n.65, a supporter of EICs and a relaxed interpretation of section 2(5), admits that “any group of employees assembled for the purpose of communicating with management is likely to mention ‘grievances,’ usually as a way of indicating to management how ‘conditions of work,’ and therefore productivity, can be improved.” Another supporter of EICs, Gardner, *supra* note 18, at 9, emphasizes that NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959), held that the subject matter requirement was met if an EIC concerned itself with only one of the topics listed in section 2(5). QWL programs would be almost certain to fail the subject matter test: “Quality of Worklife programs provide employees with the opportunity to participate in decisions concerning their work environment or ‘conditions of work’; this is one of the subjects enumerated under 2(5).” Gardner, *supra* note 18, at 9.
In sum, the main strengths of this approach to revising the section 2(5) definition of labor organizations are that some modern EICs are arguably different from the historical company unions and representation plans that the Wagner Act intended to prohibit, and that such EICs do not interfere with the freedom of employees to choose to bargain collectively through other representatives. In fact, EICs may be quite compatible with unions and may even work better with union endorsement and participation. On the negative side, however, there seems to be no simple way to draw a boundary between labor organizations that infringe on collective bargaining rights of employees and those EICs that are merely tools of management. Given the inevitably fuzzy distinction, Raudabaugh’s argument for a policy advantage in maintaining a broad definition of labor organizations to maximize Board jurisdiction is persuasive. Also, employee involvement programs are channels of interaction between employers and employees which are in some sense inherently alternatives to unions, so the real issue is not whether they are labor organizations, but rather whether the relationship is dominated by management.

B. Revising the Standards for Domination and Support

The primary candidate for a new approach to section 8(a)(2) is Raudabaugh’s test proposed in his Electromation concurrence. However, several of the suggested standards are inherently vague, for example, “the extent of [the] employer’s involvement in the structure and operations of the committees” and “whether the employees, from an objective standpoint, reasonably perceive the [employee participation plan] as a substitute for full collective bargaining through a traditional union.” Also, several standards are not easily susceptible to proof: employer assurance of section 7 rights, employee perceptions, and especially, employer motives. The unspecified weighting of the four factors and resulting balancing of factors yields decisions that are prone to being ad hoc and influenced by subjective opinions of changing Board membership. Finally, anti-union animus is arguably irrelevant, both on the basis of precedent and also on the basis of

240. See Martin T. Moe, Decisionmaking and the NLRA: Section 8(a)(2), ELECTROMATION, and the Specter of the Company Union, 68 NYU L. REV. 1127, 1178-82 (1993) (arguing that the NLRB should reinterpret section 8(a)(2) in light of original Congressional intent, distinguishing the types of company unions the section was meant to prohibit from contemporary EICs).

241. Eaton & Voos, supra note 11, at 123.


243. Id. at 1013.

244. Id. Oviatt suggested that the latter prong creates a separate element to be contested by requiring that employees’ perception be reasonable. Id. at 1005 n.5.

245. Id. at 1003. Alexander, supra note 14, at 701, calls motive “a weak hook on which to hang interpretation of the law,” noting that “motive can be concealed or can change over time.” Oviatt argued that the difficulty of proving employer assurance of rights, “exactly what the employer said, how he said it, and to whom and when it was said,” also invites dispute and encourages litigation rather than management-labor cooperation. Electromation, 309 N.L.R.B. at 1005 n.5.
legislative intent. Oviatt argued, for example, that *Newport News* is still good law, but even further, that “[t]he employer’s subjective intent in no way dissipates the impact on the employees of the presence of an employer-dominated, in-house committee that substitutes for a legitimate labor organization’s collective bargaining function. Sec. 8(a)(2) addressed that impact, not the employer’s intentions.” Alexander also points to the impact on employees’ section 7 rights as the key standard in section 8(a)(2): “[w]hatever the motivation of the employer, the basic consideration is that his establishment of a participatory organization can affect the propensity of his employees to form or join a labor union free of employer influence. This is the specific possibility against which Section 8(a)(2) is aimed.”

The innovations of the Free Choice circuits, primarily distinguishing actual control from potential domination, measured from the subjective viewpoint of the employees, are inadequate because of their limited conception of power. Steven Lukes’ multifaceted analysis of power, as discussed by John Gaventa, helps illuminate the shallowness of the Free Choice approach. Free Choice analysts adopt the behavioral definition of power: “A has power over B to the extent that he can get B to do something that B would not otherwise do.” Thus, the approach is “one dimensional,” focusing on overt, observable behavior. It tends to assume an open institutional environment in which people are free to participate in decisions and express their views and grievances. Thus, as long as employers refrained from actually exerting power in tangible ways over employees’ rights to choose to bargain collectively or not, this approach would not find unlawful domination.

Actual domination, however, misses the second dimension of power. Beyond the overt power to change B’s choices, A exerts power over B to the extent that A can exclude certain people or issues from the decision-making process altogether. This facet of power is more subtle, even covert, and is often embedded in the very structure of institutions. Thus, choices may be stifled or strangled by the “mobilization of bias.” Ideally from the perspective of the powerful, the proposal might never be raised in a serious way at all; by excluding the item from the systemic or institutional

246. Electromation, 309 N.L.R.B. at 1005 n.5.
248. See *supra* notes 126-140, 146 and accompanying text.
250. *Id.* at 5 (quoting Robert Dahl).
251. *Id.* at 6.
252. *Id.* at 9.
entirely, the issue is in effect settled by making a "non-decision." This exclusionary aspect of power is the dimension the Board was aiming at in its DuPont opinion by focusing on the domination entailed by company control of committee agendas and by company veto power implicit in the consensus decision-making mode. Using these structural arrangements, management, while appearing to create a forum for open discussion, retained the ability to determine the parameters of acceptable proposals and discussable topics. To the extent the powerful can exercise control over agenda setting and the range of acceptable proposals, they never have to exercise more overt, observable power, and free choice by the less powerful does not appear to be infringed.

Basing judgments of domination on the subjective viewpoint of employees leaves open the possibility of missing yet another, subtler still, face of power. Lukes argues that "A exercises power over B when A affects B in a manner contrary to B's interests." In other words, A may exercise power over B by getting him to do something against his will, as the behavioral definition of power recognizes, but A may also exercise power by "influencing, shaping or determining his very wants." This dimension of power focuses on conflicts of interests between the weak and powerful, even in the absence of overt conflict, and is sensitive to ways serious consideration of potential issues is prevented. Not only may issues be kept off the agenda, challenges may not even be raised by the less powerful. By

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255. BACHRACH & BARATZ, supra note 253, at 44.
256. GAVENTA, supra note 249, at 11.
257. Id. at 12. Thus, Gaventa prefers a definition of power as "the capacity of A to prevail over B both in resolution of manifest conflict and through affecting B's actions and conceptions about conflict or potential conflict." Id. at 20.
258. Several theories are useful for analyzing how the "engineering of consent" occurs. Ralph Milliband, quoted in GAVENTA, supra note 249, at 13. Gaventa emphasizes how the dynamics of powerlessness help to keep latent potential challenges to the interests of the powerful. Not only do the powerful use their control of institutions to influence the social construction of reality, but also certain psychological adaptations characterize the less powerful. Id. at 16-17. For instance, lacking a sense of efficacy, the less powerful are much less likely to participate and voice their views and grievances, a completely rational stance in light of the distribution of power. Second, anticipating the reactions of the powerful, the less powerful may lower their demands to what is "realistically possible" without challenging the fundamental interests of the powerful. Cohen and Rogers label this phenomenon "demand constraint" and argue that it is as important as "resource constraint" in preventing radical challenges to the status quo. Joshua Cohen & Joel Rogers, Capitalism and Democracy, in DEMOCRACY: THEORY AND PRACTICE 345 (1992). Last, the less powerful often come to identify with the more powerful in order to avoid recognition of their own powerlessness. Thus, power is interrelational, accumulative, and dynamic, and often creates a "culture of silence." GAVENTA, supra note 249, at 18 (quoting Paolo Freire). Antonio Gramsci's concept of hegemony is perhaps the font of most theories of this third face of power. See, e.g., CARL BOGGS, THE TWO REVOLUTIONS: GRAMSCI AND THE DILEMMAS OF WESTERN MARXISM (1984); ANNE SHOWSTACK SASSOON, GRAMSCI'S POLITICS (1980). GAYE TUCHMAN, THE TV ESTABLISHMENT 165 (1974), quoting G. A. Williams, suggests that the essence of hegemony is the diffusion throughout society, in its culture and institutions, of "one concept of reality" that is perpetuated by, and serves the interests of, the dominant power bloc.
focusing the law only on the overt and behavioral constraints of individual free choice, the Free Choice theorists are blind to the more subtle structural dimensions of power and offer workers inadequate protection from employer domination.  

A very good case can be made that maintaining or even strengthening current legal protections of employee section 7 rights is necessary to guard employee autonomy against the multifaceted power of employers. Alexander argues that the protections of section 8(a)(2) were intended to go beyond merely ensuring individual freedom of choice. Since free choice is provided for by other sections of the NLRA, section 8(a)(2) would be redundant if that were its only purpose. As a strengthened standard, McLeod proposes outlawing all EICs not collectively bargained for, but even he recognizes that this proposal is not politically feasible. Karl Klare suggests a more plausible solution: "[n]on-bargained participation schemes initiated close in time to or during union representation campaigns or decertification elections, and non-bargained schemes linked to unfair labor practices or other evidence of employer resistance to collective bargaining should be presumptively illegal."  

C. Alternative Models of Employee Involvement

Other sections of the NLRA may be implicated by employee participation schemes, but the main controversy involves sections 8(a)(2) and
2(5). Although there are many options, the policy choices may be elucidated by summarizing two polar models. The underlying ideological differences amount to a conflict between what some commentators call a Free Choice model\(^{265}\) and what might be termed a Structural Autonomy model.\(^{266}\) These models differ on several dimensions. Free Choice theorists see contemporary forms of employee participation as a new mode of cooperative communication,\(^{267}\) whereas Structuralists see them as revived forms of worker co-optation.\(^{268}\) Fundamentally, the Free Choice model assumes a mutuality of interest shared between employees and employers; the Structuralist model stresses the adversarial nature of the relationship.\(^{269}\) As

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18. The Board found that the company violated section 8(a)(5) as well as section 8(a)(2) in E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 897 (1993).

McLeod also contends that unions abdicating to cooperative schemes could be liable to challenges under section 9(a) for failing to be the employees' "exclusive representative." McLeod, supra note 13, at 280 n.234.

The Yeshiva decision, 444 U.S. 672 (1980), could lead to the exclusion from coverage by the NLRA of employees who are delegated significant amounts of managerial authority in participatory management schemes. If this authority is devolved to employees, increasing numbers of workers might be excluded from the definition of "employees" under the managerial exception established by NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), overruled in part by NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981). Yeshiva was based on rather unusual facts, however, and indications are that the decision will not be extended to blue-collar workers. Steven M. Fetter & Joy K. Reynolds, Labor-Management Cooperation and the Law: Perspectives from Year Two of the Laws Project, 23 HARV. C.R.-C.L. L. REV. 3, 7-8 (1988). Given the insignificant amount of authority delegated in most participatory schemes, extending Yeshiva, even in more white-collar and professional settings, is likely to confuse pseudo-participation with genuine managerial authority. Cf. SIDNEY VERBA, SMALL GROUPS AND POLITICAL BEHAVIOR: A STUDY IN LEADERSHIP 220 (1961) (noting that participatory democracy is often used not as a technique of decision-making but as a technique of persuasion).

265. Brody, The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act, 41 VAND. L. REV. 545, 567 (1988). See also Lipsky, supra note 4, at 673. Lipsky specifically refers to this model as the "participatory management style." See also Alexander, supra note 14, at 700.

266. Although they do not use this label, the foremost proponents of this model are Collective Bargaining, supra note 69; Kohler, supra note 7. The traditional model for structural domination is summarized by Brody, supra note 265, at 562-70.

267. For example, the author of New Standards, supra note 60, at 516, writes that "the early threat, actual or perceived, of management's co-optation of the labor movement is no longer a problem."

268. See e.g., Sanford M. Jacoby, Union-Management Cooperation in the United States: Lessons from the 1920s, 37 INDUS. AND LAB. REL. REV. 18 (1983); Bennet D. Zurofsky, Everything Old Is New Again: Company Unions in the Era of Employee Involvement Programs, 8 LAB. LAW. 381 (1992); Hogler & Grenier, supra note 29; Kohler, supra note 7.

269. Alexander, supra note 14, at 702, terms these two aspects of the employer-employee relationship as the integrative and the distributive. "There is mutual interest in the size of the pie; there is partisan interest in the size of the respective slices, whatever the pie's size." Id. at 702-03. Some advocates of employee participation, especially those with a pro-union stance, argue that interests are both mutual and conflicting, providing a basis for both cooperative and adversarial relations. There should be no problem, they claim, as long as the two modes of interacting are kept distinct. Thus, employees should be able to cooperate on issues relating to the work process, but likewise must be able to bargain adversely over wages, benefits, and working conditions. Although there are both mutual and conflicting interests, it is a mistake to think that the division parallels the distinction between the work process and the terms and conditions of work. As Edwards and others have demonstrated, the labor process itself represents a "contested terrain" fraught with conflicting interests. Edwards, supra
discussed, the two models see power differently: Free Choicers focus on its behavioral manifestations, while Structuralists are more likely to recognize the second and third faces of exclusionary and ideological forms of power. Consequently, these models seek the empowerment of employees through distinct routes: individual free choice or autonomous self-organization for the group. Thus, while much of the language used by advocates of these models sounds similar, particularly the rhetoric of choice and freedom, the underlying ideological differences point them in rather different directions when deciding specific cases and evaluating concrete proposals.

The argument for retaining the main outlines of the current law as it defines labor organizations and prohibits domination is powerful, standing firm on persuasive legal analysis and perceptive social science. The traditional Structural Autonomy approach both allows significant room for employee involvement, whether through joint union-management plans or experiments that are clearly management instruments, and provides important protections for freely chosen and autonomous employee organizations. Although there are compelling policy arguments that more employee participation at work would lead to more productive and competitive economic enterprises and a more satisfied workforce, these arguments do not justify a wholesale revision or scrapping of the prohibitions against company-dominated labor organizations. The type of minor modifications indicated by Electromation and DuPont should suffice to ensure flexibility in the law's treatment of modern EICs. For example, slight relaxations in the interpretation of "dealing with" along the lines of DuPont (bilateral, patterned, group

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270. See supra notes 248-259 and accompanying text.

271. Implicit theories of the state also separate the models. See supra note 57. Cooperation advocates on the right and center tend to believe that American politics are pluralist, open to the satisfaction of employee as well as employer interests, if they will simply participate in the game. Leftist commentators willing to consider EICs take a more jaded view of the political process, but nonetheless perceive opportunities to advance workers' interests. McLeod, supra note 13, at 262, suggests that “[i]f centrists view cooperation as an extension of collective bargaining, leftists hope for cooperation as an extension of class struggle.” Adamant opponents of cooperation often hold instrumentalist or functionalist views of the state as responsive only to the interests of capital.

272. There are, of course, powerful arguments against reaffirming the Board's traditional approach to EICs. Raudabaugh and others have suggested that policy has changed and that Congress now favors employee participation programs. Electromation Inc., 309 N.L.R.B. 990, 1012-13 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994). See also Hutson, supra note 27, at 390. While that position is doubtless correct, it dodges the issue of whether Congress would now condone programs that amount to dominated labor organizations. The other impetus to eliminate or significantly modify the traditional approach comes from claims that the national interest requires a new form of industrial relations. In a new economic context, labor law restrictions on employee participation serve no one, and indeed may threaten the interests of employees as well as companies seeking to survive in the new world economy, according to this position. Zurofsky, supra note 268, at 384, notes that both of these arguments are more policy than legal arguments (arguing that the employer position in Electromation boiled down to an argument that "times have changed"), but they are none the less powerful for that reason.
communication) should allow some latitude for employers to involve employees in some types of decision-making. Likewise, a looser stricture against discussing statutory topics to allow de minimis discussion of terms and conditions, or at least aspects of the work process that substantially affect the working environment, would probably be enough to ensure the legality of many legitimate experiments. These minimal adjustments could exclude from coverage those experiments in "participatory management" that are truly, and clearly, instruments of management. This approach should permit those forms of employee involvement that are most directly aimed at accomplishing management goals, such as increased productivity, while retaining jurisdiction over employee organizations.

Also, the traditional structural approach to domination should not preclude legitimate experimentation by companies interested in furthering their economic goals while protecting the genuinely free choice and self-organization rights of employees. Although the Free Choice model might protect workers against the more overt exercises of power over them, this one-dimensional behavioral model offers inadequate guarantees for employee self-organization rights. The Board was correct in Electromation and even more explicitly in DuPont to recognize that an "inside veto" for the company and management control of the agenda precludes autonomy for employee organizations. The Board should also retain its traditional vigilance to guard the "indicia of independence" of employee committees as the best means to prevent the "engineering of consent." The Board's Electromation test is on the right track in defining a dominated labor organization as one that is "the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management." More theoretical coherence could clarify what elements the Board believes necessary to

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274. Raudabaugh's point that section 2(5)'s definition of labor organizations should be construed broadly for both legal and policy reasons is valid. Still, even a modestly relaxed interpretation of section 2(5) should exempt some QCs and semi-autonomous teams that are narrowly focused on improving the work process.
275. I term situations like that in DuPont, 311 N.L.R.B. 893, an inside veto to highlight the precise problem with such a structure. The rub is not that the company retains the power to reject employee proposals. Even in a unionized setting, the company can reject union demands, and many demands about matters that go beyond terms and conditions of employment are precluded from being mandatory subjects of bargaining. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964) and First National Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981). The difference is that in a company-dominated committee such as DuPont's safety committees, the company has a veto inside the committee which can, if exercised, prevent the committee from even making the proposal to the company.
277. Ralph Milliband, quoted in Gaventa, supra note 249, at 13.
278. Electromation Inc., 309 N.L.R.B. 990, 995 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994). Likewise, since the Board has essentially defined support as interfering with the labor organization, the same factors could be involved, merely to a lesser degree.
guarantee independence, and the recognition of tangible indicators of autonomy could give more concrete substance to this test. Important structural elements would at a minimum include voluntary membership, committee control over its purpose, structure, and agenda, minimal levels of control over resources, and independent space for the framing of committee proposals. Devaney's intuition is correct: the evil to be avoided is employer manipulation of appearances to foist off a sham management-dominated committee as an employee organization. Thus, a clear structural approach to domination should allow both employee committees that are obviously creatures of management, used for management goals such as productivity (because they would not be viewed as labor organizations), and employee committees that are objectively capable of voicing the employees' perspectives on terms and conditions of employment. The only way to protect this potential is not only to ensure the freedom of employees to chose to bargain collectively or not, but also to guarantee the structural autonomy of employee organizations. Section 8(a)(2), after all, prohibits dominating or interfering with "any labor organization," not merely with employees' individual choices.

VI
ALTERNATIVE ROUTES TO LABOR LAW REVISION

There are several available channels within which possible modifications of the NLRA might be considered. Although this paper endorses only minimal modification of the law, an analysis of the various avenues to revision reveals possible pitfalls to be avoided.

279. For other efforts to specify conditions necessary for successful worker participation, see Kohler, supra note 7, at 547; Rothstein, supra note 56. For efforts to theorize more fundamentally about the contours of worker participation, see Charles Derber & William Schwartz, Toward a Theory of Worker Participation, 53 SOCIOLOGICAL INQUIRY 83 (1983) (analyzing the political and psychological dynamics of participation); Paul Bernstein, Workplace Democratization: Its Internal Dynamics (1976) (inductively specifying the necessary conditions for democratic firms); Bjorn Gustavsen, Workplace Reform and Democratic Dialogue, 6 Economic and Industrial Democracy 461 (1985) (building on Habermas' theory of communicative action and inquiring philosophically into the prerequisites of democratic dialogue, arguing that the chief characteristic of democratic dialogue is that it must be free of domination).

280. While Devaney was correct to identify the evil as the manipulation of employee committees, E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 899 (1993), this factor goes more to the issue of domination (specifically to the third face of power, see supra notes 248-259 and accompanying text) than to the definition of labor organizations.

281. Of course, individual employee freedom to choose under section 7 also needs protecting, even if it is distinct from the section 8(a)(2) issue and subsidiary in determining domination. Many reforms are currently being advanced to shore up employees' rights to organize. See, e.g., Weiler, supra note 35, at 1805-1822.

282. Gardner, supra note 18, at 17, points out that the court in Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955), shifted the analysis from domination of the labor organization to domination of the employees.
A. Labor's Dilemma

The pressures for employee involvement pose a dilemma for organized labor. At one level, unions and employers share an interest in new forms of working that offer the potential for greater productivity. If greater flexibility and participation hold out the prospects that American companies will fare better in a competitive global economy, then naturally American unions should welcome the innovations. Also, employees have higher expectations from work and are less willing to accept alienating jobs for higher material benefits; they demand opportunities for self-realization at work and find participation in decision-making an attractive option. Yet on the other hand, most actual experiments with employee involvement offer only limited opportunities for employee influence over decisions, usually focused narrowly on decisions about the job or the immediate working environment and carefully circumscribed by the requirement of profitability. Even worse, these participatory schemes possibly threaten to undermine unions by giving employers an alternative vehicle to empower, or at least appear to empower, employees within the corporate structure. This challenge, of course, arises at a time when employers are engaged in a massive anti-union offensive and organized labor has been reduced to its weakest position since before the passage of the Wagner Act. Facing this dilemma, some within the labor movement counsel standing firm in opposition to worker involvement programs which they see as cooptive and aimed at undermining independent, adversarial unions. Other union advocates, however, suggest some accommodation is possible and even desirable for the health of the union movement, while yet others urge organized labor to take the offensive and embrace worker participation as a strategy to revive

283. Gould, supra note 30, at 111, quoting Hoerr, points out that EICs present a dilemma to management as well as to labor. Employee involvement promises increased productivity, but also could undermine managerial control and traditional ways of working.

284. Klare, supra note 259, at 44. Klare argues that "[a] profound transformation is occurring at the deepest cultural level," influenced by the civil rights, New Left, and, especially, women's movements, that is changing "the meaning of and expectations about work." Id. Workers no longer settle for "job satisfaction" in the sense of external utilities such as more pleasant and less regimented working conditions. Rather, the goal is to seek "active self-realization in work, an experience of work that is developmental, that enables one freely to actualize one's abilities to the fullest extent possible." Id.


286. McLain, supra note 8, at 1749-65 (arguing that EICs should not be prohibited merely because the increased power employees gain from EICs might lessen the appeal of unions as the traditional vehicle for worker power).

287. Perhaps the most prolific and persuasive spokesperson for this position is Michael Parker. See generally Michael Parker, Inside the Circle: A Union Guide to QWL (1985); Michael Parker & Jane Slaughter, Choosing Sides: Unions and the Team Concept (1988). For an interesting application of Parker's critical analysis to a professional setting, see his argument that these innovative employee participation programs are undermining traditional faculty influence in the university. Michael Parker, Participation or Control, 77 ACADEME 44 (August, 1991).
the vigor of the union movement in this country. Thus, unions are vulnerable to criticism no matter what stance they assume toward employee involvement. A survey of alternative routes available for labor law reform reveals different advantages to a labor movement under attack, although none are without their perils.

B. Reinterpretation by the NLRB

The most cautious path of change would be to rely on the NLRB to reinterpret the provisions of the NLRA to accommodate more forms of worker participation. Although the Board remained close to traditional approaches in Electromation and DuPont, the dicta and concurrences in those cases clearly signal that the Board is not unaware of, or unsympathetic to, pressures to modify its stance. Using Board interpretation to relax the constraints on EICs has several advantages. First, the Board has unique experience and expertise in the interpretation of labor law. Also, relying on case-by-case adjudication allows the Board to draw fine distinctions, to remain close to the concrete specifics of actual experiments, and to fine tune the law by incrementally adjusting its decisions. Finally, from labor's perspective, the Board is more sensitive to labor's interests than other government bodies, especially with the appointment of new Board members by a Democratic President.

On the other hand, Board reinterpretation suffers liabilities as well. The case method is reactive and essentially negative, building law by declaring what is not legal rather than comprehensively outlining what is lawful. The result can produce rather ad hoc changes, and this method of proceeding can be frustrating to companies looking for guidance about the permissible parameters of experimentation. Obviously, too, the focus of this method of adjudication is on what is legal, not on what is good policy.

288. See McLeod, supra note 13, for a survey and critique of such "leftist" theorists. McLeod believes that theorizing about "experimentation with management oriented cooperation programs" can only contribute to labor's "slow suicide" since such efforts "will not bear fruit under present conditions." Id. at 283-84. As an alternative, he recommends that "labor must adopt a broad strategy that combines aggressive opposition to cooperation with intensified struggle for international labor solidarity." Id. at 283.

289. Kenneth O. Alexander, The Worker, the Union, and the Democratic Workplace, 46 AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 385 (1987). Alexander points out that EICs can catch unions in a "damned if we do, damned if we don't" trap:

A union which is eager to cooperate in establishing new work arrangements may be viewed as 'cozying up to management,' as abrogating its historic function. Vital worker approval of the union can be weakened if union support for new work arrangements is not matched by membership support. Similarly, that approval can be weakened if the union stands apart from participatory change that is desired by a workforce.

Id. at 391-92. Of course, union endorsement of programs that fail could also taint the union with partial responsibility. Finally, a genuinely successful democratizing program might not merely coopt the workers but reduce the need for the union to play its traditional roles. Although Alexander believes that unions would have new roles to perform, he concedes that experimentation is a risky venture for unions. Id. at 392.
Lastly, to the extent that new policy is desirable, the Board is not the legitimate body for legislating policy revisions; it is unelected and partially insulated from the democratic organs of government. Thus, the Board is not the most appropriate agency to balance the interests and make the value choices at stake in this issue.  

C. Reinterpretation by the Courts

Relying on the courts to reinterpret the NLRA lacks some of the advantages of using the NLRB, such as the latter’s expertise, while suffering many of the same problems. Some courts, however, have already demonstrated impatience with the Board’s reluctance to change its approach, and have contended that in the contemporary context a less literal reading of the prohibitions on employee committees is necessary to be faithful to the Act’s purpose.  

From labor’s perspective, judicial reinterpretation holds mainly disadvantages. Federal judges are not elected, neutralizing labor’s numerical electoral resources, and are appointed mostly from elite backgrounds. Moreover, they lack the Board’s close contacts with labor that might make them more sympathetic with labor’s plight. Several scholars have catalogued the pro-employer bias in court decisions, alleging that courts continued to rule on cases with an anti-union slant despite the change in policy introduced by the Wagner Act. James Atleson contends that labor law decisions reflect hidden judicial assumptions, retained from the common law despite the passage of the NLRA, that incorporate the traditional blending of master/servant status law with contract law in the employment setting. Some of these assumptions amount to a mental picture of the company as a communitarian enterprise, but with sharply stratified roles for

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290. Alexander, supra note 14, at 702 (emphasizing the “fundamental values and judgments about our society” involved in these policy issues and arguing that the choices should be made legislatively, not by judicial interpretation).

291. Cf. NLRB v. Northeastern University, 601 F.2d 1208, 1214 n.5 (1st Cir. 1979), where the court characterized early Supreme Court decisions as “quite abrupt” and argued that these older cases should be distinguished from contemporary cases on their facts.

292. NLRB v. Steamway Div. of Scott & Fetzer Co., 691 F.2d 288, 295 (6th Cir. 1982). This court, along with other Free Choice circuits, does not show much deference to NLRB precedent. Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), however, when Congressional intent is not clear, courts are supposed to show great deference to the agencies charged with applying the relevant law. Whether this jurisprudential principle will inhibit courts from radically departing from Board decisions remains to be seen.

293. KAREN O’CONNOR & LARRY SABATO, AMERICAN GOVERNMENT: ROOTS AND REFORM 315 (1994) (showing that one third of President Bush’s appointees to federal district courts had net worths of over one million dollars).

294. These observations seem particularly compelling at a time when a majority of federal judges are Reagan-Bush appointees and only two Justices of the Supreme Court are Democratic appointees.

management and labor. Courts tend to assume that the common enterprise must be under management control and that employees cannot be full partners without interfering with the inherent and exclusive managerial prerogatives of employers. Conversely, employees are assumed to be junior partners in the enterprise, who will act irresponsibly unless controlled by employers. Obviously, if such values and assumptions continue to undergird labor law jurisprudence, as Atleson argues they do, the prospects for judicial reinterpretation of the NLRA in a way that would foster meaningful employee participation, let alone "economic democracy," are dim indeed.

D. Legislative Amendment

Several legislative reforms have been discussed, generally proposing that the labor movement trade relaxed strictures against EICs for some modifications desired by unions. Given the fear that EICs might hamper the organization of employees into unions, one compromise that readily suggests itself is abolition of section 8(a)(2) along with labor law reforms to make organizing easier and more effective. Two prominently suggested reforms are limiting the length of union election campaigns and recognizing union representation on the basis of showing a majority of authorization cards. An alternative tradeoff would extract as a concession from business a restriction on the right of companies to hire permanent replacements for strikers. Finally, if companies want more permissive rules about employee involvement, unions could seek an expansion of the scope of mandatory subjects of bargaining so that the arena of employee participation would not be so narrowly circumscribed.

There are several advantages to legislative amendment. First and foremost, it offers a more comprehensive approach to the issues. It is not confined to a case-by-case procedure, nor is it limited to just a few provisions of the NLRA. It also presents an honest confrontation of value choices and policy options facing society in this era of economic transformation. 

296. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW, 7-9 (1983). Karen Orren offers a contrasting theory, arguing that master-servant law dominated judicial interpretation until 1935, but that the Wagner Act vanquished the doctrine she conceives to be essentially a medieval holdover. KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

297. This position can be more than a simple political compromise. It can be argued that "real cooperation is not possible without a strong and autonomous organization of the workers." Rothstein, supra note 56, at 516.

298. See Weiler, supra note 35.


negative side, however, labor is in a weakened position, unprecedented since World War II, both at the bargaining table and in the political arena. The likelihood of unions forcing significant concessions from business as the price of deleting or diluting constraints on employee involvement seems remote.  

E. Employment Law as a Substitute for Labor Law

If unions are too politically impotent to protect employees’ positions vis-à-vis their employers, employees acting as citizens might be better positioned to advance their interests through strengthened employment law. For example, acting in the courts, employees have had some success in recent years in eroding the harshness of the at-will employment rule. Enhanced employment security effectively reinforces employee voice in the workplace. Likewise, if popular pressure ever succeeds in inducing Congress to pass universal health care coverage, the sting of unemployment would be greatly reduced. Other employee protections, such as full employment policies, more generous minimum wage laws, or tougher health and safety legislation, could be enacted or strengthened to buttress the worker side of the employee-employer equation.

Some proposals would go much further in legislatively assuring all employees a voice at work. Paul Weiler and Gary Mundlak have proposed the legislative creation of Employee Participation Committees in all American companies above a threshold size. The law would mandate that the committees be consulted before significant changes are introduced into the workplace; be entitled to relevant information; be guaranteed sufficient resources to access outside expertise; and be protected against employer reprisals for defending employee interests. Theoretically, at least,

302. Given the complexion of the 104th Congress elected in November, 1994, any legislative revision of section 8(a)(2) is likely to be over labor’s strenuous objections. In the face of conservative Republican hostility to unions, unions risk Congressional repeal of section 8(a)(2) without unions possessing the muscle to extract corresponding concessions from business. This prospect may explain Douglas Fraser’s dissent from the Dunlop Commission’s recommendation that “Congress clarify 8(a)(2)” and that the Board reinterpret the law to allow incidental discussions of working terms and conditions by employee participation programs. Commission on the Future of Worker-Management Relations, supra note 237, at 8.

303. Edwards, supra note 54, at 163-81; Gould, supra note 30, at 70.

304. Cass R. Sunstein, Rights, Minimal Terms, and Solidarity: A Comment, 51 U. Chi. L. Rev. 1041, 1057-59 (1984), argues that the purpose of the Wagner Act was to ensure worker “voice,” not merely to increase the odds of employees successfully wresting material benefits from employers. Thus, legislation aimed at guaranteeing “minimum terms” of employment accomplishes the purpose of the NLRA only indirectly, to the extent that making employee “exit” less painful or that building a policy-mandated floor of material benefits boosts worker influence by increasing their bargaining power. Cf. Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

305. Weiler & Mundlak, supra note 300, at 1922; Paul Weiler, Governing the Workplace, 282-295 (1990). Swedish workers won similar rights in the 1976 Codetermination Law. Swedish workers are almost universally organized, however, and these rights are exercised through their unions. See
Congress could enact protections for all employees that would constitute the minimum prerequisites for a "democratic dialogue" between workers and their employers.  

The principle advantage of the employment law approach is the universality of its coverage. As Weiler and Mundlak point out, even in the unlikely event that Congress shored up the rights of organized workers to participate in company decisions, so few workers are currently or will in the foreseeable future be unionized that most employees would be left without such legal protections. Perhaps the chief disadvantage would be the direct dependence on government for the enforcement of employee rights. Given the responsiveness of government to dominant employer interests, it is unlikely that resources would be dedicated to vigorous enforcement or that employees would fare well before agencies that tend to be captured by the interests they supposedly regulate. Employees might fare better before more politically independent courts, but legal actions expend both individual and social resources, and the historic role of courts in employment and labor law does not bode well for employee rights. Without strong employee organizations and with employees lacking the power to enforce their rights, any law guaranteeing employees voice in the workplace is likely to ring hollow.

VII
Conclusion

At this juncture of economic transformation, the erosion of past institutions and the need to construct new ones offer possibilities of increased democracy in the workplace. Employer needs for flexibility and employee contributions predispose them to grant new options for participation. Simultaneously, employees are increasingly interested in more control over their working lives. Even unions, currently in dire straits, might consider modifying their roles by seizing the opportunities presented by the new interest in worker participation to regain some of their lost momentum.

A darker side of the picture, however, cannot be ignored. The troughs of decay and experimentation between long economic waves undermine the stability of social institutions and present occasions of struggle over the shape of new arrangements. Despite the lofty rhetoric of common interests in participation, EICs and the looming battles over section 8(a)(2) revision

306. Gustavsen, supra note 279.
308. Employment law reforms might prove to be prime examples of what Murray Edelman calls the "symbolic uses of politics." He argues that much legislation serves to dispense purely symbolic satisfaction, reassuring citizens that problems are being solved and thereby securing their quiescence. See generally Murray Edelman, The Symbolic Uses of Politics (1964).
reveal the conflicting interests of management and labor over the control of workers and their labor. With labor weakened and business on the offensive, the outcome could very well be a rollback rather than extension of democracy.309

A range of outcomes seems possible. This paper has argued that an extension of economic democracy to include more direct participation by employees at work can be achieved without a drastic revision of section 8(a)(2) or section 2(5) of the NLRA. In fact, far from being a bar to worker participation, strong, independent employee organizations actually enhance the chance of success for EICs. Several researchers maintain that without the support of autonomous labor organizations, the survival span of EICs is very short.310 This finding suggests that EICs without union involvement will offer neither the deliverance from international competition hoped for by business nor the ultimate management weapon feared by unions.

Instead, a number of studies support the claim that only genuine participation boosts productivity and that autonomous labor organizations are necessary for realizing the full potential of participation. Rothstein's conclusion in a comparative study of the U.S. and French steel industries states the position most forcefully:

Real cooperation means power-sharing. Real cooperation is not possible without strong and autonomous organization of the workers. Just as citizens in a political community need political parties or interest groups to effectively represent them, so do workers in the "enterprise community."311

Eaton and Voos point out that not only has participatory innovation been more widespread in the union sector, but also that participatory programs have greater potential when implemented in a unionized setting.312 They suggest several reasons for this finding. First, unions offer protection to workers against fear of reprisals for speaking out and against economic in-

309. The Commission on the Future of Worker-Management Relations signals both the potential for progressive transformation of labor-management relations and the unfortunately very real prospects that labor law "reform" will turn out to be another blow against organized labor. See generally Laura McClure, Clinton Administration's Labor Policy: Cooperate!, 7 Z MAGAZINE 48 (1993).

Jurgen Habermas has argued that the modern state is becoming less democratic in that there are fewer individual resources to influence decisions, state decision-making agents are more insulated from popular influence, and there exist fewer public arenas open for democratic dialogue. Gustavsen, supra note 279, at 472, notes that the expected convergence between decision-making in politics and economics may well occur by the state coming to resemble the more authoritarian corporate structure, rather than by democratic principles permeating economic enterprises.

For more optimistic accounts of the transformative possibilities of gradual, piecemeal, and moderate reforms, see MARTIN CARNoy & DEREK SHeARER, ECOnOMIC DEMOCRACY: THE CHALLENGE OF THE 1980s (1980); WALTER KORPi, THE WoRuNG CLASS IN WELFARe CAPITALISM (1978); WALTER KORPi, THE DEMOCRATIC CLASS STRUGGLE (1983).

310. Recent research suggests that the average lifespan for QCs is three years. Eaton & Voos, supra note 11, at 179. Gershenfeld, supra note 5, at 143, suggests that QWL programs have high mortality rates, and even the survivors have a tendency to "plateau."

311. Rothstein, supra note 56, at 516.

312. Eaton & Voos, supra note 11, at 193.
security if enhanced productivity results in reduced labor demands.\textsuperscript{313} Second, unions offer a collective voice to workers. "It is precisely because unionized workers can say 'no' as a group that they can also collectively say 'yes' to such efforts."\textsuperscript{314} Unions' organized voices also lend institutional stability to participatory experiments and counteract management's tendency to exert "short term performance pressure" on such innovations.\textsuperscript{315} Further, union influence can infuse balance into the design of participation programs, ensuring that the quality of worklife and employee satisfaction as well as productivity and efficiency are the goals of such programs.\textsuperscript{316} Finally, union involvement increases the chances that participation will reach beyond the level of the shopfloor to corporate levels. Such involvement in strategic issues benefits participatory programs because decisions made at higher levels often impinge directly on shopfloor matters, because strategic participation can open access to information and knowledge otherwise unavailable to workers, and because higher level linkage is necessary to coordinate and integrate lower level innovations.\textsuperscript{317}

Thus, structurally autonomous labor organizations, far from constituting a hindrance to employee involvement, are potentially a key to meaningful and enduring participation at work. The traditional strictures against company-dominated forms of employee participation do not need drastic revision or repeal. The latest long swing of economic transformation opens the door to forms of labor organization that could realize more democratic and less alienating work, and with it, possibilities of a more vital political democracy.\textsuperscript{318} The current crisis of the economy, however, also holds out bleaker possibilities. McLeod sounds a warning that "[t]oday's cooperation rhetoric, unfortunately, does not extend workers an invitation, but often simply provides a soundtruck for corporate aggression."\textsuperscript{319} If corporations insist on fighting the empowerment of employees through independent self-organization and on undermining the legal framework that protects such autonomous organization, the prospects for meaningful voice and authentic freedom of choice are limited. In that case, the resemblance of "economic democracy" to real democracy would be remote indeed; the term instead would merely serve as the label for the latest technique for management

\textsuperscript{313} Id. at 194-96. They stress the importance of productivity bargaining in achieving labor receptivity to flexibility in work processes and to technological innovations.

\textsuperscript{314} Id. at 198. Worker voice is especially important in designing participatory programs in their initial stages and in diffusing these experiments, as well as in winning workers' voluntary cooperation. Eaton and Voos's argument for collective voice based on social science research lends empirical support to the Structural Autonomy model's claim that genuine cooperation requires independent self-organization of workers.

\textsuperscript{315} Id. at 198.

\textsuperscript{316} Id. at 199.

\textsuperscript{317} Id. at 199-200.

\textsuperscript{318} Kohler, supra note 7, at 550.

\textsuperscript{319} McLeod, supra note 13, at 289.
control of employees. Then the promises of "participation" and "self-direction" at work would amount to little more than the velvet glove hiding the powerful fist of managerial prerogative.\textsuperscript{320}

\textsuperscript{320} NLRB v. Exchange Parts, 375 U.S. 409 (1964). Bertram Gross, Friendly Fascism: The New Face of Power in America (1980), paints the harshest picture of such a sham participatory future. The outcome he fears would be starkly authoritarian, but with the veneer of "participatory democracy" to disguise its true nature and to make it more palatable to our democratic ideals. Gross calls this worst-case scenario "friendly fascism." The quality of participation that provides the democratic facade to this grim possible future, and which may not differ significantly from the participation offered by many employee involvement schemes, is captured by this version of how to conjugate the verb "to participate":

- I participate.
- You (singular) participate.
- He, she, or it participates.
- We participate.
- You (plural) participate.
- THEY decide.

\textit{Id.} at 5.