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Freedom in an Atmosphere of Bondage: The Functions of Public Policy in the Democratization of Work

by

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Introduction

"The purpose of economics is to make simple things complicated so as to exclude most of the public from debates on the most important policy issues that affect their lives."

– Dean Baker

The United States' liberal constitutional tradition has been, for the most part, historically resistant to labor regulation, unions, and state affirmation of workers' rights generally. When labor regulations first began to appear in response to the changes brought by the Industrial Revolution, the Supreme Court initially maintained that the 14th Amendment to the Constitution protects against infringement on "liberty of contract," unless that legislation meets a high standard of fulfilling some other necessary public interest. Yet the Court has also expanded this caveat to provide that "peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression" (*West Coast Hotel Co. v. Parrish*, 1937). Any attempt to restrict what employers can do must necessarily contend with this tension between the public interest of the state in insuring freedom from oppression with the negative right of the individual against any "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract" (*Lochner v. New York*, 1905).

This becomes relevant in discussing the possibility of legal restrictions on the authority relation inherent to the employment contract, as some critiques of capitalism are based on ethical frameworks that claim that intrinsic characteristics of labor render the traditional employment contract

presumed in the standard model of the capitalist owned firm as unjust or ethically invalid. For example, philosopher David Ellerman argues that the domination of investor or capital ownership of the firm is dependent on a "fundamental myth" that the property rights of capital confer "residual claimancy," or formal control rights over the outputs of the firm and therefore its profits as well as managerial authority.[1] Based on the observation that labor is not alienable in the way capital is, Ellerman compares this kind of contract to that of voluntary slavery, which similarly conflicts with our intuitions about the alienability of individual rights. Democratic theorist Robert Dahl similarly makes a deontological argument, positing that the democratic rights of the citizen ought to be extended to the "private" sphere as much as possible, including within private enterprise. Where there is not a clear and convincing reason that it is in conflict with some other principle, Dahl argues there is a moral obligation to provide democratic rights associated with employment akin to those of citizenship becomes stronger. The conclusion of these kinds of categorical arguments is that the dominant structure in market capitalist societies of the capital-managed firm, in which workers have neither formal control nor beneficial rights, are incompatible with such ethical precepts; that is, ethics dictates that the system as a whole needs to be replaced or restricted.

This school of thought has been labeled as *economic democracy*, which means that democratic rights of participation must to be extended to the

[1] This is based on the idea that appropriation of the outputs of the firm (i.e. profits) is a contractual right that is distinguishable from a property right of "owning" the firm. David Ellerman, *Property and Contract in Economics: The Case for Economic Democracy* (Cambridge, MA: Blackwell, 1992)*:* 6, 10-12.

"private" economic sphere, such that firms organize themselves democratically. In order to realize these alternative visions, it would seem necessary to redefine property rights or dictate a singular model enterprise organization. A business running democratically might take the form of workers electing their managers, participating directly in shop-floor level decisions through consensus-like decision-making practices, and electing representatives to participate in higher level decisions: in other words, bottom-up rather than top-down organization. Consequentially workers might choose to establish collective ownership of capital or financial participation rights in the form of profit-sharing. Whatever precise organizational form workers choose or the economic implications thereof, at its most basic, the idea of economic democracy is that firms as social bodies are "democratically governed by all the people who work in them."[2]

I submit that the philosophical orientation of economy democracy underestimates the significance of considerations of "liberty of contract," meaning the right of individuals or organizations to enter into agreements as they see fit. Moreover, this consideration helps to explain why the United States has developed neither plant-level works councils nor the kind of mandates for participation in corporate law that exist in some European nations such as Germany's policy of "co-determination," which requires as a condition of incorporation a system of labor representation within the corporate structure. What has been largely insufficiently explored in the various theoretical and empirical approaches to the study of enterprise

[2] Robert Dahl, *A Preface to Economic Democracy* (Berkeley, CA: University of California Press), 91.

structure and industrial relations policy has been the tension between the autonomy of firms, individuals (workers) and unions, and the coercive power of the state in "intervening" in economic activity. The lack of a codified system of participation rights causes a failure of workers' voices to be institutionalized and therefore realized, while either rigid adherence to or a singular promotion of a particular system risks both precluding the positive benefits of other forms of enterprise or violating the rights of the people the policy is intended to promote. A successful policy that promotes worker participation would reorient the organizational system to incentivize firms to improve participation, not simply meeting the arbitrary minimum ascribed in law, but adapting procedures in accordance with their local needs, while guaranteeing basic protections to protect workers who are most vulnerable by empowering them with more rights vis-à-vis their employer.

One of the more salient of the common criticisms of economic theory is that in its search to describe the functioning of, say, the functioning of a firm within a market system, it can tend to unquestioningly accept institutions as given, or presume a particular institutional structure.[3] This tendency is no more relevant than with the organization of labor within the firm. The employment relationship is not merely the exchange of a factor of production for compensation in the same way it would be for other factors of production like capital assets. Since labor cannot be alienated from an individual in the way that any other asset could, the employment relationship also involves an authority relationship whereby the employer exercises power in the sense

[3] Oliver E. Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1987), 240.

that the employer is to affect the decisions and actions of the worker.[4] This sort of relationship, wherein workers are required to obey the decisions and instructions of their employers as a condition of employment, without any power of the worker in affecting such decisions intrinsic to the nature of the relationship, is assumed under models of firms' behavior, but is not self-evidently necessary for the firm's productive efficiency. That is, in the abstracted employment relation, the firm's management by default retains all rights to regulate the individual members choices while they are acting in the capacity of employees, regardless of the entrepreneurial necessity of this authority relation, and without any democratic accountability over the managerial power. This may be a central reason that explicitly normative approaches to enterprise structure, those that involve questions of how work within the firm ought to be organized, power ought to be allocated, and decisions ought to be made, often have trouble accepting the validity of empirical or positive approaches to the structure of firms as having socially useful implications, in light of this "deafening silence of conventional economics concerning the application of the principle of democracy to the productive enterprise."[5] The most useful applications of economic theory will consider not only the nature firms as the economic institutions as they actually are, but to use this in service of discovering what can become of them.

[4] Herbert A. Simon, "A Formal Theory of the Employment Relationship," *Economica* 19:3 (1951), 294.
[5] David P. Ellerman, "The Theory of Legal Structure: Worker Cooperatives," *Journal of Economic Issues* 18.3 (1984), 862.

Many explanations exist for why workers would not form cooperative or democratic enterprises themselves given workers' apparent interest in doing so, as well as the labor-managed firm's theoretical (and sometimes empirical) viability, and this remains somewhat of an unsolved problem in economics. The most compelling explanations recognize that market mechanisms do not lend themselves often to the kind of cooperation necessary to incorporate a firm, even though such an organization may be to the benefit of those involved once established.[6] Worker participation generally and labor-management in particular could thus be construed as having some features of public goods, which are subject to market failures. This suggests that while cooperatives may have the potential to be at least as good if not better than capitalist enterprises once they are established, the market will not necessarily respond to preferences to produce organizational forms with authentically cooperative labor-management authority structures. Providing the public good of worker participation rights requires going beyond the market and finding strong sources of institutional support (e.g. unions, a social movement or political party, or, most significantly, the government) to provide financial, legislative, and other resources to implement it. Workers' rights to substantive participation in the control of the firm depend strongly on the wider legal infrastructure that interacts with the organizational forms that firms adopt, and the nature of this interaction will have significant policy implications.

[6] Justin Schwartz, "Where Did Mill Go Wrong?: Why the Capital- Managed Firm Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies," *Ohio State Law Journal* 73.2 (2011), 219-85.

For the purposes considered here, labor management is treated as a "public good" in the sense that within the organization of the firm, the democratic controls rights over the firm would be non-exclusive and to the benefit of all members. This suggests that the capital-managed firm dominates (implying that workers do not voluntarily form the institutions that act in their own interest) not because of any intrinsic defect on the part of labor-managed firms or because of an inherent superiority of capital-managed firms, but rather because the capital-managed firm is evolutionarily stable given the conditions of market capitalism, that is, the institutional framework which determine the conditions of incorporation.[7] But in this case, the logic of collective action to correct this is not so straightforward, given that firms remain private institutions, meaning cooperative management is not obviously a public good in terms of all of society, such that there would be an obvious case to be made that state power can correct this apparent inefficiency. This observation serves to show why considering merely the proliferation of cooperative management in a market economy is an inadequate measure of worker's control over their interests in working lives.

Yet regardless of any particular explanation for why these forms of enterprise structure are empirically rare, the failure of both workers' ability to form their own cooperatives on large scale, and of workers' ability to use their options of "exit" and "voice" to promote their interests vis-à-vis

[7] Masahiko Aoki, *The Co-operative Game Theory of the Firm* (New York: Oxford University Press, 1984), 3-9.

different countries: for cultural reasons, or as a result of industrial innovation, or through the agitation of labor or political movements. For whatever reason these practices were adopted, some types of worker participation within the framework of capital-managed firms have been proven to be at least viable in the sense that they are evolutionarily stable, that international competition from less participatory enterprises have not seemed to have obviously diminished the extent of these norms of industrial relations.

The main lesson of these experiences is that even when internally institutionalized participation is effective, it does not often come solely from pressures from workers themselves or from workers either forming or reforming institutions on a private individual basis. Such schemes do not generally come about as a result of workers voicing a concern over the management of the firm, and management adopting the workers' concerns or allowing them a formal voice out of fear the workers will leave. While worker participation may sometimes in the interests of management (the Japanese system was likely adopted in large part because of its perceived efficiency gains), it is hard to imagine a circumstance where firms voluntarily formally recognize the voice and input of workers on the basis that it is economically necessitated.

Evaluating the effectiveness of the use of public policy intervention involves a considerable degree of subjectivity: To what degree does the private nature of the firm temper the public interest in promoting the welfare of worker's within the context of the firm? Do considerations of economic

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Politics of Reform, ed. Carmen Sirianni (Philadelphia: Temple University Press, 1987), 57.

freedom and liberty of contract necessarily conflict with the public interest in promoting positive participation rights of workers? The analytical contribution of this thesis will be to synthesize to analyze actual and hypothetical policies that mandate or encourage worker participation and consider whether they can adequately and effectively result in positive contributions to the welfare of workers without seriously conflicting with other ethical (violating individual liberty of contract) or pragmatic considerations (such as the of imposing unnecessary costs onto firms that reduce the actual outcome of labor welfare). I will evaluate changes with these concerns in mind namely with respect to labor relations laws that ascribe collective bargaining rights, public incorporation laws that dictate the terms of legal incorporation, and the standards for tax exemption in employee stock ownership plans that provide a legal avenue for employee ownership.

I aim to provide a guide of reconciling the claims of participatory democratic theory and the claims of the theory of economic democracy with the concerns of liberty of contract and economic efficiency, as well as the empirical findings of the efficacy of different forms of participation in realizing the goals of cooperative management and economic democracy. This can be accomplished by considering the degree to which possible policy alternatives—a system of "economic democracy" where all firms are democratized, by mandating co-operative management through corporate law, by encouraging cooperative ownership through tax incentives for stock ownership plans, or by ascribing formal positive participation rights of workers that can be exercised at the discretion of workers—expand the

choices of individuals by empowering the disempowered, or whether they restrict them.

By building on existing frameworks of worker's rights and government oversight of the organization of enterprise, the potential conflict with economic freedom/liberty of contract concerns and the burden of proof required to re-conceptualize the public-private relationship will be ameliorated. Rather than categorically outlawing or invalidating capital-management structures (since, as noted previously, this approach would conflict with certain principles of liberalism or individual liberty), or imposing a particular model of the firm (as in the market socialist system imposed in the former Socialist Federal Republic of Yugoslavia), using existing policy frameworks maximizes the potential for state action to promote worker power and agency without constricting liberty. Given the political contentious of any true economic reform in the United States, the argument for mandated worker participation will be the most convincing where it can demonstrate relative advantages over the not only the marketplace, but with respect to the limitations of collective bargaining and direct labor regulation in particular.

The existing literature leaves behind a conspicuous gap between the theoretical and the empirical or between philosophical and economic perspectives on the value of worker democracy or the democratization of work. The aim of this thesis is to examine how state power interacts with worker participation in the enterprise, and determine how to evaluate public policy responses given some of these limitations and tensions. I will begin by considering the source of the public interest in the employment contract and

why participation rights are a necessary policy response. Then I will examine why the scope of worker's rights has been so limited thus far in American labor policy, consider the potential ways that participation can operate within industrial relations systems, and suggest ways that policies to encourage participation might be able to operate in the American context to close the participation and representation gap that workers face.

Chapter 1
The Firm As Quasi-"Public" Institution

"Labour is only another name for a human activity which goes with life itself."

Karl Polanyi

The nature of the private occupies a central place in the nexus between political philosophy and economic theory: commonly used terms like "private enterprise," "private sector," and "private property" themselves entail a whole set of philosophical assumptions underlying the economic applications of those ideas. The private firm, as the institution that forms the basic unit of productive activity in economic theory, has the potential to wield enormous economic power, not only in society at large but also within its own boundaries, through hierarchical organizational structures where employees are subject to a broad array of decisions made by the firm's management.[10] While the nature of this private activity within the boundaries of the firm is of great importance to other disciplines that concern themselves with the social significance of economic activity, the significance and implications of the "private" power yielded by firm's management has been largely under-recognized within the realm of economic theory, in large part

[10] For the purposes of this thesis, a firm can be defined as "a set of agents supplying inputs to a common production process, where the productive activities of the agents are coordinated through an authority structure and the resulting outputs are sold on a market." Gregory K. Dow, *Governing the Firm: Workers' Control in Theory and Practice* (New York: Cambridge University Press, 2003), 92.

due to the difficulty of defining the bounds of this power.[11] As Ronald H. Coase noted, in his attempt to formalize the definition and significance of the firm's boundaries, "Economic theory has suffered in the past from a failure to state clearly its assumptions."[12] Specifically, his clarification of the firm's distinctness as not merely an economic unit but moreover as a special way of organizing human relations was necessary not only to prevent misunderstanding of the theory of the firm, but also "because of the extreme importance for economics of good judgment in choosing between rival sets of assumptions."[13]

The nature of the private power exercised within the firm's boundaries carries a conspicuous weight in economic theory. One of Coase's main insights in defining the firm is the recognition of a distinction between productive activities coordinated through a market (price) mechanism and those made through internal organization.[14] The boundary of the firm is defined in this sense by the scope of the authority of management.[15] While these decisions may be influenced by market conditions, the actual coordination of activities that the firm undertakes are not made by free rational agents contracting with one another to maximize their own individual utility. Rather they are coordinated by whatever mechanisms the firm itself chooses to govern this process. While the firm may legally or theoretically be treated as having a singular objective of maximizing profits in

[11] Kaushik Basu, *Prelude to Political Economy: A Study of the Social and Political Foundations of Economics* (Oxford University Press, 2000), 132.
[12] Ronald H. Coase, "The Nature of the Firm," *Economica* 4.16 (1937), 386.
[13] *Ibid.*, 386.
[14] *Ibid.*, 392.
[15] Dow, *Governing the Firm*, 92-93.

the interest of its owners or shareholders, one can easily imagine that there are a diversity of interests being represented by different kinds of economic actors that all involved in the firm's activity, namely the firm's shareholders, the managers, and the rest of the employees. Yet, the firm as an institution nonetheless is usually treated in microeconomic theory as a monolithic unit with one set of interests. The larger the firm becomes in terms of the number of employees organized within the scope enterprise's managerial agency, the more problematic it becomes to view the firm's internal organization as a "black box."[16] The de facto relegation of the firm's internal governance to the so-called private sphere has overwhelmingly benefitted the liberty of the employer at the expense of the liberty of the employed. It is therefore incumbent on us to define precisely what is the private nature of the firm, or conversely its public nature, in order to understand why this is so.

The theoretical justification for hierarchical organization within firms might be attributable to the assumption that markets theoretically lead to "efficient" outcomes, which would imply an evolutionarily stable outcome is necessarily the most efficient. Consider how the first welfare theorem of economics: if the conditions of perfect competition are satisfied, the competitive equilibrium that results is Pareto-optimal, meaning there is no other outcome that could benefit any individual without leaving another worse off.[17] The implication is that inefficient outcomes are the result of market imperfections, so either the market has imperfections or the outcome

[16] The "black box" metaphor for the firm is frequently used to characterize both the neo-classical model of the firm in economic corporate legal theory, e.g. Masahiko Aoki, *The Co-operative Game Theory of the Firm,* 4.
[17] Basu, *Preface to Political Economy*, 69.

is efficient. Yet regardless of the validity of theory of self-regulating efficient markets, even the most fervent defenders of this perspective generally recognize the potential for market failures, either because of free-rider problems in the case of public goods, externalities, imperfect information.[18] While this is a simplification of the argument and market imperfections are recognized as endemic to the nature of real economies, this formulation of the nature of markets still leaves much to be desired when applied to the conditions of labor. Whether or not this orientation explicitly considers the outcome (i.e. a hierarchical employment relation) as a function of the preferences of the "consumer" (i.e. the worker accepting the job), it implicitly places the burden of proof on the subjugated to identify the specific way in which this outcome deviates from the model of competitive equilibrium in order to demonstrate that the result is, in whatever way, suboptimal.

While this strand of criticism of the hypothesis of the efficiency of markets in economics is relatively well developed in relation to private goods in consumer theory, or correlatively to the inefficiency of markets with respect to externalities and public goods, the first welfare theorem is less insightful with respect to understanding the significance of power in economic relations.[19] The relevance of this is that the intrinsic characteristics of the employment relationship are such that labor markets do not lead to efficient market outcomes in terms of the conditions for work that workers

[18] E.g., Carl F. Christ, "The Competitive Market and Optimal Allocative Efficiency," *Competing Philosophies in American Political Economics*, eds. John E. Elliott and John Cownie (Pacific Palisades, CA: Goodyear), 1975.
[19] Basu, *Preface to Political Economy*, 132.

would prefer under different institutional circumstances.[20] While government intervention in specific transgressions of employers over the employed have long been used to justify certain kinds of regulations that intervene in the employment contract, the significance of the power structure in the capitalist employment relation in the sense that it confers a public element has been largely under-studied as an integral component to the governance of firms. In this way, fundamental interventions in the nature of employment practices that are endemic to capitalism are elusive, as the formal element of the relationship that it is possible to transform has not been consistently identified on its own terms.

It is therefore necessary to identify the precise nature of power within the firm through other means, in order to demonstrate that there is in fact some degree of an inherently public aspect to the firm.[21] It will follow that regardless of the ultimate source of this power relationship, the employment relation confers some element of "public-ness" the operation of the firm that provides a basis if not a duty for collective or public action.

The argument that the firm is a quasi-public institution, or alternately that there is a public element to the employment relationship, requires several prerequisite propositions to be established. First, the employment

[20] Consider, e.g., Albert O. Hirschman's differentiation between "market" and "non-market" forces in achieving an equilibrium, *Exit, Voice and Loyalty*, 18; or Aoki's proposition of the indeterminate optimality of different institutional arrangements, in *Toward a Comparative Institutional Analysis* (Cambridge, MA: MIT Press, 2001), 228.
[21] Hirschman, *Exit, Voice and Loyalty*, 101-102. "Public" here is defined in the sense of that a situation is "public" to the extent that it is difficult or costly to avoid or exit. Correspondingly, "private" would refer to sets of relations that are voluntary in the sense that they are easy to avoid. "Quasi-public" is used here in a somewhat ill-defined way to refer to a situation that is partially or inconsistently costly or difficult to exit.

relationship is a special kind of contract that has features unlike any other form of contract between consenting parties, such that a belief in the inherent autonomy of privately negotiated contracts need not dominate the significance of the power element. Second, the power imbalance is relevant to the consideration of the public interest in the relation, in terms of it being a relationship from which it is difficult or costly to exit. Note that it is not necessarily prove that the capitalist employment relations necessarily violate pre-conceived standards of legitimate forms of human relations in order to demonstrate some public interest in intervention or even some public element to the relationship. This is because other restrictions on employer power, such as the requirement that contracted parties be able to exit, are not merely interventions from the state on the autonomy of the private contract, but rather an effort to encourage a fair process for and provide agency on behalf of those that are subjected to power in contracted relationships.

The authority relationship inherent to the standard capitalist employment contract is not often well formulated in economic theoretical treatments of firm behavior. The employment contract is a unique from a sale contract or other kinds of contracts. The distinction, first elucidated by Herbert A. Simon, is in the observation that the employment relation necessarily entailed endowing the employer with some authority in order for the worker to be upholding the contract.[22] Economic theory up to that point had treated workers in two functions: first as the "owners" of labor as a factor of production insofar as they are able to decide to accept an employment contract (i.e. sell or rent their labor) in exchange for a wage, secondly as

[22] Simon, "A Formal Theory of the Employment Relationship," 294-295.

"passive factors of production."[23] Once employed, the employee no longer has control over and is uniquely responsible for their own actions; rather, their choices are regulated and controlled by the firms' directives. A constituent part of what distinguishes the contract as "employment" is that the worker is an *internal* constituent of the firm rather than a private contractor. The relationship between private contractors more closely parallels a sales relationship: as they are contracted to perform a single designated duty in exchange for a wage and is presumed to have the liberty to perform whatever service however they like. The consequence of the employment contract being distinct from sales contracts is that the exchange of labor from the worker to the employer establishes the as an organization with an identifiable inside (those subject to the governance of the firm) and outside (those who are not), rather than an agglomeration of different contracts. The distinguishing feature of the employment contract is therefore that it is inherently incomplete: not every aspect of the service the employee can be easily defined *ex ante* or the nature of the work involved requires the worker to be under the constant discretion of the firm's management; a service contract requires one to provide a service, whereas an employment contract requires one to obey. If all of economic activity were organized merely by a system of private "sales" contracts between individual actors, it would be meaningless to refer to economic actors as firms at all.[24]

Employment contracts need not be formally outlined or codified completely, rather, an employment contract could be defined as any case

[23] Cf. Simon, "A Formal Theory of the Employment Relationship," 293 and David Ellerman, *Property & Contract* (Blackwell Publishing, 1993), 3.
[24] Coase, "The Nature of the Firm," 404-405.

when a worker submits some to the authority of an employer in exchange for a wage. The power that is conferred to the employer (or more precisely to the manager of the firm) supposedly has some basis that the decisions made by management are relevant to the internal organization of the firm:

> Rules prescribed by management are subject to arbitrator review, but they carry a presumptive validity and will be upheld so long as they are reasonably related to achieving efficient operation and maintaining order and are not manifestly unfair or do not unnecessarily burden employees' rights.[25]

Despite the often-informal nature of the employment contract, it is inherently based on an authority relationship more than simply an agreement over the division of labor, within certain limits. While the specific bounds of this relationship may or may not be adequately defined in law, it has nonetheless been formalized as such:

> Management … is entitled to have its orders obeyed and may discipline employees for refusing to obey even improper orders. Arbitrators almost uniformly hold that an employee must obey first and then seek recourse through the grievance procedure, except where obeying would expose him to substantial risks of health and safety.[26]

Even if one were to accept the basis of these limitations, this still demonstrates a profound ambiguity concerning the limitations of the manager. Nothing about the employment contract necessitates any grievance procedure, nor is there any reason within this formulation that the powers of the employer need be logically or economically justified. This formulation seems to confirm that the elusiveness of the economic definition of power has contributed to its under-consideration within economic theory.

The authority of the employer is, according to this formulation, without limit except where it is limited by liberal civil or human rights that

[25] H.A. Simon, quoted in Williamson, *Economic Institutions of Capitalism*, 249.
[26] Williamson, *Economic Institutions of Capitalism*, 249.

are external impositions on the employment contract, including the practical natural right of the employee to exit, which theoretically could be subject to terms stipulated within the contract. Thus the authority of the employer necessarily extends beyond a *quid pro quo* as it would in the sales contract case or in the individual contractor case.[27] When the worker is an employee that is internal to the firm rather than an individual contractor agreeing to a specific task, not all of the terms of employment can possibly be decided in advance.[28] The worker submits not only to conditions, but also to whatever conditions of employment the employer acting in the function of the manager of the firm decides. This definition makes clear that the purpose of the power of employers is a hierarchy of relations. To speak meaningfully of there being a function called "the employer" and a function called "the employee" necessitates not merely a delineation of responsibilities but the construction of a system of power.

John R. Commons, one of the founders of the institutionalist school, held a view of the employment relation that emphasized its at-will nature, insisting that the reality of employer and employee's option to end the relationship at any time meant that there was no real contract at all:

> The free laborer is employed at will--no obligation arises on the part of the employer to keep him, and no obligation on the part of the laborer to continue at work. … The labor contract therefore is not a contract, it is continuing implied *renewal* of contracts at every minute and hour, based on the continuance of what is deemed, on the employer's side, to be satisfactory service, and on the laborer's side, what is deemed to be satisfactory conditions and compensation.[29]

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[27] Coase, "The Nature of the Firm," 404.
[28] Oliver E. Williamson, *Markets and Hierarchy: Analysis and Antitrust Implications* (New York: Free Press, 1975), 71.
[29] John R. Commons, *Legal Foundations of Capitalism* (Madison, WI: University of Wisconsin Press, 1959), 284-285.

Practically speaking, however, there is nothing that precludes either side (including via collective bargaining agreements) from imposing rigidities in this contract such as requiring advanced notice, even if such terms would not be legally enforceable. As Samuel Bowles and Herbert Gintis argue, the "at-will" nature of the employment relationship is but one model of this is a strategy of "contingent renewal" of an employment contract is but one way of approaching the relationship.[30] Moreover, they say that this strategy, which would be introduced by the employer, is a result of the problem of monitoring the employees' behavior with respect to their proclivity towards effort or shirking. Whether this qualifies the employment contract as not a contract at all is probably a semantic distinction, because the most important consequences of this are first that the employment "contract" or "agreement" or "relationship" is intrinsically distinct from other forms of contracts, and second that this difference likely means that labor markets would not clear in the same way that a goods market would, establishing asymmetric power by means of the employer's market power.[31]

Regardless of how the nature of this power is defined, the need for the authority aspect of the employment relationship is usually not given explicit justification with regards to its economic necessity, though many have

[30] Samuel Bowles and Herbert Gintis, "The Demand For Workplace Democracy," *Democracy and Efficiency in the Democratic Enterprise,* eds. Ugo Pagano and Robert Rowthorn, 70-71*;* see also Archer, *Ibid.,* 27. Additionally, it is necessary to note that at-will employment relation can actually be quite specific to the paradigm of labor law, as national employment protection policies can be considerably stronger outside Anglo-American countries.
[31] Bowles and Gintis, "Demand for Workplace Democracy," 71-73.

attempted justify it.[32] The economic function of this power, that is, its utility, is either presumed or ignored by standard microeconomic literature and has only been investigated at length. The economic justification for hierarchy of the sort that concerns theorists of economic democracy is far from obvious.[33] However, we can nonetheless identify certain characteristics that define the relationship:

> It is [the master's] right of control… which is the dominant characteristic in this relation and marks off the servant form an independent contractor. … In the latter case, the contractor or performer is not under the employer's control in doing the work or effecting the service; he has to shape and manage his work so as to give the result he has contracted to effect.[34]

The institutional approach explores the bases of economic decision-making that are made by institutions rather than on the market, for example the logic of the decisions that firms make about their internal organization and therefore labor relations. Oliver Williamson attempts to find the source of the kind of hierarchy in employment relations that is inherent to the modern-day capitalist enterprise as a function of rational choices on the part of the firm's management to organize economic activity efficiently. This approach finds that for the firm to advance beyond the private contracting of individuals such that there are multiple functions for different people within the firm as the division of labor requires, this necessitates, practically speaking, some

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[32] Williamson writes that this model of the authority relation as a *quid pro quo* "is simply silent with respect to the efficient properties of alternative contracts in which adaptability is featured," *Markets and Hierarchies*, 72.
[33] See Gregory K. Dow, "The Function of Authority in Transaction Cost Economics, *Journal of Economic Behavior and Organization* 8 (1987), 13-38. A notable, if not widely accepted, approach from a historical perspective on the function of economic authority of management is offered by Stephen Marglin, "What Do Bosses Do?" *Review of Radical Political Economics* 6 (1976), 60-112
[34] Coase, "The Nature of the Firm," 404.

delegation of tasks and therefore delineation of decision-making power.[35] Is hierarchy and imbalanced power relations therefore inherent to the nature of what it means to be a firm at all? Coase's formalization of the functional boundaries of the firm specifies that "the legal concept of "employer and employee" and the economic concept of a firm are not identical," but that the former may be necessary condition for the latter.[36]

It is easy to see to see that the technical conditions of employment contracts which depend on this "right of control or interference" do not lead to a particular degree of coerciveness, but a range of them. Even the staunch libertarian F.A. Hayek, who asserted, "Freedom does not mean that we can have everything as we want it," and therefore that workers who accept employment cannot be "under normal conditions unfree in the sense of being coerced," recognizes that the freedom of the individual worker is dependent on their being the ability to find alternative employment.[37] This is would be what Karl Marx would have characterized as "socially involuntary" employment; however, this is relatively less useful as it fails to identify anything intrinsically problematic with the employment contract as an institution.[38]

We would need to look outside of the bounds of pure economic theory to see the scope of the problem. In contrast to the assumptions of the kind of employer-employee relation that underlie traditional economic theory, advocates of the theory of economic democracy contend that such a relation is

[35] Williamson, *Markets and Hierarchies,* 72, 80-81.
[36] Coase, "The Nature of the Firm," 403-404.
[37] F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 120-121.
[38] Ellerman, *Property and Contract*, 71.

inherently in tension with liberal democratic values. Generally speaking, economic democracy could be thought of as a system whereby economic decision-making is subject to democratic processes, or that the rights that are necessary for democracy extend to the economic (or private) sphere as well. This puts a different sort of burden of proof on the employment relation. Since the employment relation as it has been defined thus far involves some degree of power by which the employer can affect the actions of the employed, the theory of economic democracy would ask on one basis could this relationship be made legitimate.

Given this orientation, the philosopher David Ellerman confronts the logical basis for the limits of power in the employment contract more directly than usually given credence in economy theory. He points out that there voluntary slavery was legal prior to the abolition of all forms of slavery, a kind of contract that was not merely tolerated as a special case but in fact employed quite often.[39] The possibility of voluntary slavery presents a paradox for the freedom of contract approach to employment relations: What differentiates the ability of a person to enter into a contract that would submit themselves to voluntary slavery from the employment contract, under which the employee implicitly agrees? Presumably, the inability of the employed to exit the contract renders it invalid, but why?

Economists only occasionally consider the problem of the bounds of what creates the legitimate terms of an employment contract in this way. Hayek considers that contracts must be non-coercive, defining coercion in line with the classic definition of power that has been used thus far, "when

[39] Ellerman, *Property and Contract*, 63.

one man's actions are made to serve another man's will, not for his own but for the other's purpose."[40] His formulation view of the "freedom of the employed" does give some guidance as to what is different about voluntary slavery:

> The law wisely does not recognize contracts for the permanent sale of a person's labor and, in general, does not even enforce contracts for specific performance. Nobody can be coerced to continue to work under a particular boss, even if he is contracted to do so; and, in a normally operating competitive society, alternative employment will be available even though it may often be less remunerative.[41]

This seems reasonable in that he seeks to apply a consistent standard of voluntariness to a contract: it must be both freely entered and freely able to be exited. Yet as obvious as this seems, it begs the question: Why cannot a person freely enter a contract that has a stimulation that they cannot exit so long as the other conditions of voluntariness are satisfied, namely that they are aware the contracted agent is aware that they are forfeiting this right?[42] What makes this *necessarily* incompatible with the principle of non-coercion, and therefore undeserving on the law's recognition? It is certainly possible to imagine *sales* contracts that can legally be constructed in a way where the participants cannot.[43] If one were not able to choose the conditions of contract on their own terms would seem to be as much a violation of liberty as any intervention in the contract. The caveat that one must be able to exit an

[40] Hayek, *Constitution of Liberty*, 135.
[41] *Ibid*., 121.
[42] The conditions of voluntariness are not given exhaustive treatment here but refer to the reality that contracts may be rendered invalid for various other reasons: if the terms are fraudulently presented, if one of the signatories enters into it under duress, etc. A comparison for the sake of argument might be made to whether the law must respect the right of people who choose to die, such as the issue of terminally ill patients who request doctor-assisted suicide.
[43] To give just one example, student debt in the United States cannot be discharged under the normal terms of bankruptcy.

employment contract in order for it to be legitimate and thus recognized by law is therefore an limitation on the private contract that is external to the original definition of the employment contract itself. The fact that the goal of this restriction is to uphold rather than impede on the "voluntariness" of the contract is relevant, but it does not change the fact that this constitutes a limit to the power of the employer and thus an imposition on the terms of the contract.

What differentiates the necessity to require the exit option in the employment contract is precisely the power aspect previously mentioned, that the employee is internal to the firm and subject to the power of the employer.[44] The lack of the exit option would confer a power to the employer that would have the effect of enabling degrees of coercion that is essentially absolute, even though the contract could be considered valid in every other way. Bowles and Gintis find that "the advantageous and asymmetric exercise of sanctions is a sufficient condition for the existence of a power relationship," which makes the discretionary decisions of the employer afforded to it by the contractual incompleteness of the employment contract sufficient to establish employment as a form of authority. This helps elucidate that the exit option has a special sort of significance in the employment contract (where there power is given to one party over another) that is beyond that of a sales contract, in that the conditions of exit make the

[44] A formal conception of power is defined thusly: "A has power over B if, by imposing or threatening to impose sanctions on B, A is capable of affecting B's actions in ways that further A's interests, while B lacks this capacity with respect to A." This definition is the same as used by Coase and Williamson. Bowles and Gintis find that "the advantageous and asymmetric exercise of sanctions is a sufficient condition for the existence of a power relationship," "The Demand for Workplace Democracy," 68.

voluntariness of the agreement more or less true in its consequence rather than in its form. Hayek's argument for the formal connection between liberty and the market (and therefore of the private nature of the employment relation) depends at least implicitly on act of compensation conferring consent. Under this view, the fact that the employed continues to receive a wage for their work mitigates the coercive aspect of the power relationship, as the remuneration compensates the aggrieved party for the aspect of the liberty that they've alienated. The explicit consequence Hayek seeks to prove is that market transactions could not be coercive since those involved have an option as to whether to accept the offer or not. The problem with equating consent with the transaction of compensation is that "getting something by making a compensation has an important element of symmetry, and it is therefore not a convenient instrument for defining power, which, by its very nature, is asymmetric."[45]

The problem of asymmetric power can be seen as a problem of determining consent.[46] Just as a consumer's choice as to whether to buy a product or continue to buy a product does not necessarily constitute an implicit endorsement of the firm's practices, or individuals in society agreeing to does not legitimate the state, neither is the choice of to remain employed in the firm indication that the employees consent to the conditions of the firm. An obvious limitation is completeness of information: a worker does not know the full range of policies they will be subjected to in their employment in the firm, just as a consumer cannot know all of the practices

[45] Basu, *Preface to Political Economy,* 135.
[46] *Ibid.,* 134.

of a firm from whom they purchase a good or service. A worker's decision to remain employed would under normal circumstances be far less elastic to working conditions as a consumer's decision to continue to purchase a product. However, both face some similar circumstances: either monopsony in the case of the worker or monopoly in the case of the consumer can both enable those with market power to engage in practices that would not be accepted under competition, or contracts can introduce rigidities that make it hard to switch to another employer or provider of a service.

While consumer preferences form much of the basis of the conclusions from welfare economics as they relate to public policy, even here it can be shown that regardless of the circumstances of competition, firms as institutions can fail to respond to preferences.[47] Empirical research helps to give weight to the hypothesis that the market fails to institutionalize workers interests, therefore their ability to actually give consent to employment practices.[48] Not only do workers have different expectations from the kind of workplaces that they would like to see (i.e. that there are demands that are not being supplied), but also that they believe existing laws inadequately protect their interests in the workplace.[49] What workers want cannot be guaranteed by a free labor market in part because workers do not want a purely "free" market when it comes to employment practices.

Recognizing that capitalism involves some authority relation for which

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[47] Hirschman, *Exit, Voice and Loyalty*, 26.
[48] Richard B. Freeman and Joel Rogers, *What Workers Want* (Ithaca, NY: Cornell University Press, 1999), 4-8. These findings will be elaborated later, but they demonstrate that despite diverse working conditions, American workers consistently favor more cooperation and participation in decision-making practices than they currently receive.
[49] *Ibid.*, 6.

the bounds are difficult to delineate as has been developed thus far, the economic democracy framework seeks to draw a comparison between the rights of workers with the rights of citizens and argue for participation in the governance of the firm on similar grounds to the duty of states to legitimate their authority through rational means. Democratic theorist Robert Dahl posits that the democratic rights of citizens ought to be extended to the "private" sphere as much as possible, and if there is not a clear and convincing reason that it is in conflict with some other principle, then it becomes a moral obligation.[50] This is based on an analogy, albeit an imperfect one, that between the power of firms over their employees and the power of states over their subjects. If we really believe that power ought to be democratically accountable, why do we distinguish the power of firms as private and unaccountable? Put another way, if "citizens have an unalienable right to influence the laws that govern them," then "when a company can punish or control an employee, that employee has a fundamental right to democratically influence the company."[51] If we accept the principles of democracy as operating in this sense, we must not only identify how a state or political system is different from firm, but why the difference between participatory rights of individuals in one kind of institution and those in another is related to inherent differences between the nature of the two institutions.

David Ellerman proposes a distinction of property rights and personal

[50] Robert A Dahl, *Preface to Economic Democracy* (Berkeley, CA: University of California Press, 1985), 90-91.
[51] David I Levine, *Reinventing the Workplace: How Businesses and Employees Can Both Win* (Washington, DC: Brookings Institution, 1995), 8.

rights to demonstrate a similar principle as Dahl, which is useful in considering the nature of participation rights. Ellerman's framework of personal rights demonstrates that an enterprise constructed on the basis of the consent of the governed (i.e. the employed) would entail rights that are non-transferrable to anyone outside in the firm in the same way that labor cannot be alienated from the individual, because "the democratic principle of government assigns those direct control rights to the people who fall under the command, authority, and jurisdiction of the firm's management."[52] Membership rights in this sense are distinct from ownership or residual claimant rights (rights to the profits from the sale of the firms outputs): rather than being a salable asset, they are held by individuals as a institutional mechanism conferred by their membership role, meaning that the status of consenting to giving up power by joining the organization ought to necessarily come with it the same kinds of rights that come from being a part of any government.[53] The personal right of the employed is thus analogous to political rights in classical liberal thought. Notably, Ellerman explicitly characterizes the normative conclusions from his form of political economic theory as deontological in opposition to the supposed utilitarianism of neo-classical theory.[54]

The common thematic element among theories of economic democracy lies in the unique nature of the employment relationship, in that it involves

[52] David Ellerman, "Works' Cooperatives: The Question of Legal Structure," *Worker Cooperatives in America,* Robert Jackall and Henry M. Levin, eds. (Berkeley: University of California Press, 1984), 266.
[53] *Ibid.*, 266.
[54] Ellerman, "The Theory of Legal Structure," *Journal of Economic Issues* 18 No. 3 (1984), 862.

not only an exchange of assets but also a construction of a relationship of power. Personal rights that follow from the fact of being governed are distinct from property rights, but because labor is treated as a factor of production, the significance of these personal rights is obfuscated by the implicit obligation of the worker to obey their employer. The very fact that such categorical claims about the ethical invalidity of employer-employee relations requires certain normative presuppositions that potentially conflict with what Hayek referred to as the "freedom of the employed" suggests part of the problem. Proponents of economic democracy like Ellerman and Dahl varyingly appeal to *a priori* normative principles that so differ from their traditional applications that their practical application to the actual nature of employment relations seems questionable. The deontological approach of theorists of economic democracy underestimates or inadequately addresses the significance of considerations of individual liberty, particular "liberty of contract," meaning the right of individuals or organizations to enter into agreements as they see fit: specifically, why workers should not be able to choose to join firms?

I submit that what is quasi-public about the employment relation and therefore of the capitalist firm is directly related to the inability to draw a line around exactly where the power of the employer becomes problematic. Robin Archer elucidates this by arguing that employee voice is the necessary response to the application of democratic criteria to the employment relationship, which offers a means of evaluating when the kind of power that associations yield can be legitimated. Whereas "exit control" is a relevant and sufficient countervailing power for "indirect" forms of control, "voice

control" is the correlative response to direct power which is not offered in the traditional employment contract.[55] Shareholders can in fact have some voice in management via control rights even though they are certainly not the subjects of the firm. Note that the difference arises to due the intrinsic differences between capital, which is alienable, and labor, which is not. Labor's subjugation is in this view a direct result of its inalienability:

> While I am using your capital you can do something else, but while I am using your labour power you cannot. Since capital can be separated from the capitalist, the firm's authority does not extend to the capitalist. The firm can issue orders about how its capital will be utilized but it cannot tell the capitalists themselves what to do. Who has ever heard a company manager yelling at the shareholders to 'invest harder'? Since the shareholders are not subject to the authority of the firm they should not have direct control over it.[56]

This is why the kinds of rights that would be necessary to make the authority of management legitimate are personal rights that cannot be alienated. While it could be said that workers who choose to work in a hierarchical firm implicitly express a lack of preference for participation (or at least that they do not value this right enough for it to affect their choice), they must be offered the set of choices in the first place in order for these preferences to be revealed. Under normal circumstances, they will not be. As workers are generally on the "short side" of the labor market, meaning it is easier for the employer to replace an employee than for an employee to find another employer, the marginal employee is not presented with options for participation rights in their choice of employer.[57] Even if participation were widely accepted as mutually beneficial, firms are not likely to offer

[55] Archer, "Philosophical Case for Economic Democracy," 21.
[56] Archer, "Philosophical Case for Economic Democracy," 25.
[57] Bowles and Gintis, "The Demand For Workplace Democracy," 74.

substantive participation voluntarily in an environment where workers are not recognized as stakeholders both because the marginal payoffs are low when most of the economy and because it requires management relinquishing some of its power.[58] When the right to participate is recognized and guaranteed as a personal right to hold managers democratically accountable on the basis of the employees being managed, only then would it be understandable as a right analogous to the right to vote or petition government. Just as liberal democracies usually prohibit individuals from selling their right to vote, we could not argue either that the employee voluntarily enters employment or that they are compensated automatically extinguishes their participation rights.

What follows is, at the least, a moral foundation for an approach to economic organization that empowers those who are most affected by the decisions of enterprise, the workers who are subjugated via the nature of the employment contract, to be able to exert influence on the organization of power. Existing labor regulations intervene directly in the employment contract to establish negative forms of liberty of workers: minimum wage, child labor laws, all constitute direct interventions on the relationship without actually altering the nature of relationship. These types of interventions are analogous to human rights that are conferred on the basis of being employed, whereas the kinds of rights that would intervene fundamentally to empower

[58] Levine identifies some of the market conditions that create this in "Public Policy Implications of Worker Participation," 181-203; Aoki provides a game theoretic account where he describes this result as an "organizational equilibirum," in *The Co-operative Game Theory of the Firm*, 73.

workers are political rights in that they are actionable mechanisms of power ascribed to the employed on the basis of being managed or governed.

Changes to the employment relation do not generally appear to come about purely through economic pressures from workers themselves. That is, such schemes do not generally come about as a result of workers voicing a concern over the management of the firm, and management adopting the workers' concerns or allowing them a formal voice out of fear the workers will leave. While worker participation may or may not be in the interests of management, it is hard to imagine a circumstance where firms voluntarily formally recognize the voice and input of workers on the basis that it is economically necessary. An institutional deficiency therefore enables this collective action problem to result in a socially suboptimal level of employee participation.

The apparent moral uncertainty of what is problematic about the employment relation as it has been characterized thus far does not by itself dilute the public element of the employment relations and by extension the firm as an institution. The nature of the problem would be quite different if it were easy to identify a specific transgression of some pre-existing right of individuals. The problem that is relevant to the formulation of public policy is precisely the fact that there is an uncertain possibility of the abuse of the kind of power inherent to the employment relation without the corresponding direct control or "voice" rights. Workers cannot predict perfectly when deciding to accept a job what conditions they will be subjected or what orders of management they will be compelled to obey. Yet the preceding findings

reveal some degree of consensus over the limits to the power that the employer is able to command via the mandate of the consent of the employee.

First, not all rights can be alienated through voluntary contract. That voluntary slavery is not recognized in modern liberal societies as a valid form of contract indicates that there are decisions over which one person cannot alienate or give up their power. The fact that this kind of contract is not generally accepted indicates that there can be impositions on the employment contract that are in service to rather than in conflict with the principle of upholding the voluntariness and therefore the legitimacy of the employment relationship. Second, the possibility of very high exit costs necessarily mitigate the degree to which the theoretical option of exit itself can be said to confer non-coerciveness to the employment contract. In the cases of pure monopsony or high unemployment, the costs of exit could be claimed to be so high as to make employment effectively coercive. The corresponding consequence of high exit costs in the political realm is that some degree of democracy is required.[59] But this need not be necessarily the case; rarely is the moral duty of democratic political systems contingent on, say, the relative ease of immigration. While exit costs may contribute to force of the argument for democracy or other formal mechanisms of empowerment as a means of legitimating unbalanced power relations, they are not a necessary condition.

These two observations indicate only the beginning of what is potentially problematic of the vagueness of the employment relation. The problem of liberty of contract is that it implies that an individual's decision to

[59] This might be compared to the principle that contracts can be voided if it can be shown one of the persons who entered the contract did so under duress.

submit to an employment contract gives implicit consent to obey their superior and forgo any formal or institutionalized decision-making power, what John Kenneth Galbraith termed "compensatory power." [60] The alternative is not to allow the employee to revise the terms of contract or of employment unilaterally, but to reform the internal dynamics of the relationship by prescribing positively-defined rights to the employed that are commensurate to the power conferred to the employer. The idea that the legitimacy of the employment contract is contingent on employers providing the option of voice is no more or less restrictive or arbitrary than the requirement that the employers provide some option of exit (that is, the restriction on voluntary slavery). Mitigating the potential power imbalances, such that workers are afforded more formal decision-making power is only one possible application of the principles mentioned here, but it is one that is conspicuously necessary given the problems that have been identified.

There are several possible arguments for alternative kinds of employment relations or enterprise structures, and the power aspect developed here is only one of them. Public policy action through changes in employment law and corporate governance laws can not only be made compatible with existing policy concerning enterprise but can effectively address this power imbalance. The public nature of the firm that I have identified is not necessary categorical. Rather the degree to which public policy can address this problem is in proportion to the degree to which there

[60] This is distinguished from "condign power" which is attained by intimidation or the threat of harm, and "conditioned power" which is submission to power due to ingrained norms where the submitter is unaware of being oppressed. Basu, *Prelude to Political Economy*, 134; see also John K. Galbraith, *The Anatomy of Power*.

is a problem to be addressed, meaning in proportion to the degree of "publicness" of the firm. As I intend to show in the following chapters, the legitimacy of policy action can be judged by the degree to which it expands, rather than constrains, worker choice and agency within the firm's boundaries.

There are therefore both theoretical and practical limitations of the exit option in protecting to the positive liberty of workers. A critical limitation of exit control is that it is indirect, and is also only effective under particular circumstances.[61] It is indirect in the sense that an individual worker's "veto" via exit can send a signal to management. In the capital-managed firm, both shareholders and workers have indirect exit control but only shareholders have direct voice control. It is notable this feature of corporate government is also generally regulated by law to ensure that it is functioning.[62]

Several different levels or areas of decision-making can be disaggregated, such as the organization of work, the condition of work, the distribution of tasks, hiring and firing policies, the organization and planning of tasks, product design and production decisions, and high-level financial decisions like financing and budgets and investment.[63] Since all of these areas of control can affect workers in unique ways, affect different workers in different ways, and are relevant to different firms in different ways, what makes management sufficiently participative will be heterogeneous across

[61] Archer, "The Philosophical Case for Economic Democracy," 20.
[62] Consider the function of legislation like the Sarbanes-Oxley Act of 2002, which reaffirmed certain rights of shareholders to oversee and audit management's activities, as one example of a government response to perceived deficiencies in the corporate governance system to enhance such direct voice control to preserve the owners' monitoring abilities.
[63] *Ibid.*, 30.

firms. Granted, both managers, acting on behalf of the owners of the firm to maximize profit, and individual workers, who are required to be subject to the effects of all of these policies in order to receive their wage, will have diverse interests and potentially competing interests in these areas. However, in a system where the firm's essentially autocratic management has the sole prerogative to decide all of these, management is not required to formally consider the or that they justify the human costs on workers, so whatever potential disagreements could arise are not resolved, they are merely ignored by the hierarchical structure. The only formal choice of the worker is to accept all of the decisions made by management, or to leave.

In order to demonstrate why the exit option is not sufficient to justify the kind of power retained by the employer, the analogy between firms and states remains useful. Dahl compares a worker leaving a firm to a citizen leaving a municipality or state if they disagree with or do not wish to obey its laws. It is easy to imagine that under some circumstances it could be equally costly for a worker to leave one's job as it would be to leave one's country. The mere existence of the exit option does not nullify the authority of the state's power, just as the mere existence of inconvenience of exit (i.e the existence of transactions costs) would not by itself make this authority illegitimate. After all, the right of citizens to participate in the process (or more specifically to be represented in the process) of creating the state's laws is not contingent solely on the impossibility of exit. The nature and organization of authority is a distinct but no less important feature of the relationship: "a dictatorial and a democratic state do not become identical

simply because the members of each are able to exit."[64] The difficulty of exit is relevant but is not the only feature that defines authority. The scope of the authority is also relevant. There is, theoretically, no limit to the control exerted by management of the worker who is subject to the firm's policies is unless the power of management is directly restricted through the individual or collective contract, or state intervention. Voice then becomes a necessary mechanism because, as Archer emphasizes, "Even if workers can leave a firm they are still subject to its authority while they work for it," and in this way they are under the direct control that is distinct from the indirect control that other potential stakeholders (consumers, local residents) can claim. The decision is of whether or not to obey the authority's imperative, which theoretically can be arbitrary, is distinct from the decision of whether or not to exit the association. When a subject has no voice and presumably if such disobedience will result in dismissal anyway, these decisions are construed as one in the same, because there are only two real options: obey or leave. While it is possible that threat of exit could incite renegotiation, there remains no formal mechanism that allows the subject voice against this direct control.

Towards Economic Citizenship

Under a democratic view of worker-management relations, the worker is more than either a seller of labor or a passive consumer of employment contracts, they are a member of the firm in the way that a citizen is a member of a polity.[65] The argument for democratic citizenship rights in states usually

[64] Archer, "The Philosophical Case for Economic Democracy,"24.
[65] *Ibid*.," 14-17.

hinges on a few crucial stylized facts regarding nation-states, for example: that the political decisions of the state have significant consequences for people living within their jurisdiction; that the decisions of the state are unavoidable to the extent that it is drastic, costly or difficult to move out of the state's jurisdiction; and that the right of democratic citizenship are able to safeguard these people's fundamental interests. These contentions are true to some extent to firms even though neither are necessarily true for states. First, democratic citizenship does not mandate that individuals' political power be perfectly aligned with the extent to which political decisions affect them directly. The political decisions of the state do not necessarily need to have significant consequences for the people in order for the people to have a right to participate (directly or indirectly) in the process under the principles of democratic governance. Second, political power can also be concentrated in regional or local government where mobility may be less drastic of an obstacle. It is possible to imagine that switching jobs may be more disruptive than moving from one town to another, although this is not strictly necessary to prove that the power yielded by both states over their subjects and firms over their workers are significant enough to make a case for the necessity of democratic accountability.[66] It should be easy to see how the decisions of the firm have significant consequences of its workers, since most working people presumably spend more of their waking lives at work than anywhere else.

Participation rights are analogous to political rights in that they are attached to a person: contingent on the status of being an employee. In this sense participatory rights could be said to confer their own form of

[66] Bowles and Gintis, "The Demand for Workplace Democracy," 74.

citizenship based on the membership of an organization with a common goal, that of the firm's productive activity of providing a good or service. The fact that the organization has a common purpose toward which the success of the firm generally depends on the labor and sacrifice of its members does not supplant the fact that by being a member it is subjected in a unique way to the policies of the firm. This does not preclude workers from choosing or consenting to hierarchical organization, as it would be in the common interest of workers to support it where it enhances the viability of the firm. The burden must be on those in power to justify hierarchy's entrepreneurial function.[67] The difference between the standard capitalist employment structure and a participatory firm is that is that under a system of participatory rights, hierarchical organization is democratically accountable by some means.

Democratic principles require that authority or power be accountable to those over which the power is exercised. Economic theory has made some claims to the economic function of hierarchy, but cannot guarantee that the authority granted is justified economically. This power can be used in arbitrary ways unrelated to its economic function, but is nonetheless immune to democratic oversight either from indirectly from a monitoring body or directly from those subjected to this power.[68] While such uses of power may be subject to state intervention in other ways, it will not always be possible or effective to define what is morally permissible through the use of the state's intervention. Though the neo-classical view of the firm in which shareholders

[67] Bowles and Gintis, "The Demand for Workplace Democracy," 74.
[68] *Ibid.*, 74.

are the sole proprietors of the firm and therefore have the sole prerogative to oversee or monitor managers, not only are shareholders' rights limited in practice, but more importantly shareholders' only interest under this model is profit maximization and thus an interest-alignment problem as well as a monitoring problem clearly precludes owners from an oversight function that would be compatible with principles of democratic rights.[69]

The lack of direct control rights by workers in this way constitutes a unique public policy problem not addressed either by state interventionist regulations, or by collective bargaining rights, in which an outside agency bargains with the employer over that which can be contracted. The fundamental issue is the contractual incompleteness of the employment contract leading to potentially arbitrary exercises of power, which is the distinguishing feature of what creates the hierarchical authority structure in the organization of the enterprise. Such rights would not solve all problems faced by workers in a market capitalist economy, nor could they guarantee that workers interests are realized. However, employee voice in the form of participation rights are an appropriate mechanism by which to preserve the positive liberty of employee from the power of the employer, and the necessity of guaranteeing this mechanism through policy measures is commensurate with the manager's interest or ability in wielding this power.

[69] *Ibid.*, 75.

Chapter 2:
The Scope of Workers' Rights in American Labor Policy

While the dominant method of organization of large firms is control by shareholders with no institutional role for the voice of workers, many firms all over the world incorporate collective or representative decision making as a constitutive part of the governance of the firm. Unlike European countries like West Germany, The Netherlands, France, Sweden, Italy, and Spain, where forms of worker representation were the subject of major legislation after the Second World War "as a counterbalance to institutionalized adversarialism,"[70] labor policy in the United States has not meaningfully addressed the issue of worker participation or the institutionalization of workers' voice within firms beyond the limited scope afforded to unions.[71] As such, even though firms theoretically are free to develop their own systems of representation within the terms of corporate governance law and some forms of cooperative or participatory management can increase productivity, the United States has virtually no experience with employee representation on corporate boards or substantial public policies that promote participatory rights.[72]

[70] Wolfgang Streeck, "Works Councils in Western Europe: From Consultation to Participation," from *Workers Councils, Consultation, Representation, and Cooperation in Industrial Relations* (Chicago: University of Chicago Press), 1995.
[71] David I. Levine, "Public Policy Implications of Imperfections in the Market for Worker Participation," *Economic and Industrial Democracy* 13 (1992), 183.
[72] Clyde W. Summers, "Codetermination in the United States: A Projection of Problems and Potentials," *Journal of Corporate Law and Securities Regulation* 4 (1982), 155.

Why has greater voice for workers within firms and substantial reform of labor-management relations so rarely been the subject of serious national discussion or public inquiry in the United States, and why has it never been a goal of the American labor movement as it was in some other nations? It is not merely that no one had thought of the idea, nor that workers themselves lacked a desire for representation or participation in their own workplaces. Opposition to or avoidance of worker participation as a matter of public policy is not due solely to its economic implications, but rather a confluence of political and philosophical factors. An ideological heritage resistant to labor legislation, as well as a historical tendency to channel workers rights through unions and therefore a public policy focus on collective bargaining laws, have together crowded out the reformation of labor-management relations on a policy level. Additionally, both employers and organized labor fear that direct employee representation or substantive participation in the decision making of the firm would pose threats to their power.

There are several distinct strategies or mechanisms labor regulation can use as possible instruments of public policy. One is collective rights, consisting of legal recognition for organized labor and a system of collective bargaining with prescribed legal rights for employees to form or join unions, as well as the establishment of institutions to facilitate centralized arbitration. A second is regulatory intervention, which is how most Americans (most of whom are not unionized and therefore receive little direct benefit from collective bargaining) experience the reach of public policy in their working life. This includes health and safety regulations, minimum wage laws, child labor laws, etc., where the decision is made on behalf of the worker to restrict

what the employer can or cannot do, and sometimes to impel firms to provide benefits to their workers. A different form would come from legally enforceable individual rights that come from employment standards where the individual can have rights against the employer enforceable through a civil litigation, as is the case with sexual harassment law or employment law. These strategies all either prescribe in a top-down way the bounds of what the employer can and cannot do usually without any power or voice for the workers, or they leave labor to negotiate disagreements privately without being able to participate in management in the first place.

None of these options afford workers with enforceable legal rights to either directly participate in or control the substantive decisions that regulate or substantively affect their working lives, nor do they encourage cooperation in labor relations as some legislation in other countries has done. This chapter aims explain why the development of United States' industrial relations policy has ignored worker representation, despite some evidence that workers want both a greater degree and different forms of participation than afforded by current law, and discuss the implications of this legacy for new policy.

Historical resistance to worker's rights

A major reason for the lack of substantive legislation concerning workers' participatory rights within firms is the United States' ideological heritage of prioritizing property rights and fairly reticent attitude toward what is viewed as state intervention in private contacts. This has resulted in both an institutional and philosophical resistance to regulations that

intervene in the labor-management relations. The judicial interpretation of the National Labor Relations Act and subsequent legislation all cemented a collective bargaining model as the dominant mechanism of worker power, channeling workers' rights into the institutions that are dominated and regulated by the state while putting the onus on labor themselves to organize and defend their interests through private negotiation.

The use of state power to regulate labor relations has consistently faced resistance on an individual rights basis. When labor regulation first began to appear in response to the changes brought by the Industrial Revolution, the Supreme Court initially maintained in *Lochner v. New York* that the 14th Amendment protects against infringement on "liberty of contract," until the caveat was introduced that legislation can be justified if it meets a high standard of fulfilling some other necessary public interest.[73] If we were to accept the idea of "liberty of contract" as a principle that is negative right (i.e. inalienable and not determined by the recognition by the state of that right) of individuals against being either coerced into a contract or prevented from freely entering into a contract of their choosing, then regulatory intervention would be prohibited. Under what was called the Lochner era, most legislative attempts to regulate working conditions or intervene in employment relations on behalf of workers were overturned by the courts on the basis of infringement of the liberty of the worker to contract their labor as they wish—viewing with skepticism. The Court later eased this stance to find that there was a public interest in that "peace and good order may be promoted through regulations designed to insure wholesome conditions of work and

[73] *Lochner v. New York,* 198 U.S. 45 (1905).

freedom from oppression."[74] The court subsequently allowed labor regulations where the state prescribed, on this basis, the principle remained that the individual's liberty of contract is a protected right under the 14th Amendment and subject to due process protection. As established in the previous chapter, the nature of the employment contract is distinct from other kinds of contracts, so what constitutes a liberty of contracts workers is much more complex. Reconciling these competing considerations in practice has shaped much of American employment policy, as the interpretation of what constitutes a valid contract and how it is to be enforced has been informed by philosophical views as to what labor-management relations ought to look like.

The dominant judicial interpretation of labor legislation and of collective bargaining laws in the United States constitute what legal scholar Katherine Van Wezel Stone characterized as an ideology of "industrial pluralism" that not only presumed several contentious premises about the nature of the firm but also cemented in place a "prescriptive vision of class relations in industrial society."[75] Under the "industrial pluralism" model, management (implicitly, capital) and labor are viewed s constituents operating in self-contained "mini-democracy," assuming that labor and management enter the arena of the organization of the firm as parties with *ex ante* equal bargaining power where they use their own private system of

[74] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[75] Katherine van Wezel Stone, "The Post-War Paradigm in American Labor Law," *Yale Law Journal* 90.7 (1981), 1511.

arbitration to come to a mutually agreeable decisions.[76] It is presumed that absent state intervention, firms where collective bargaining is present are essentially private and the worker-management relations are analogous to a political system where its participants freely negotiate the outcome.[77] Union representatives, presumably chosen by a process privately determined by workers, advance the interests of labor at the institutional level as boards of directors or their delegates advance the interests of capital or the shareholders of the firm. This is both a descriptive and prescriptive interpretation of labor policy: descriptive in that it treats labor relations as a self-governing system, and prescriptive in that the state ought not intervene in these relations.

The presumption that labor relations were a private matter allowed the state to ignore employers' violations of agreements as courts denied that unions could even act as legitimate representatives of workers. For much of early American history through the 19th century, the courts were generally hostile to collective action on the part of employees and suits by unions were rarely accepted. The courts often did not allow unions to bring suit because they were unincorporated and thus had no standing, even though the suits alleged breach of private contract, which the judicial system would otherwise have an obligation as an independent arbiter to enforce contracts as a normal and essential function of the judiciary.[78] In one case, the courts rejected the claim of a union seeking compensation for withheld wages and wrongful termination on behalf of a worker in part because the worker was not explicitly named in the agreement, thereby effectively extinguishing all of the

[76] *Ibid.*, 1515.
[77] *Ibid.*, 1516.
[78] Stone, "The Post-War Paradigm in American Labor Law," 1518.

rights in the collective contract.[79] Since the terms of employment contracts are often implicit and by their nature cannot perfectly describe all aspects of the employment relationship, many disagreements between labor and management could potentially arise for which only civil suits and union representation could act as means of arbitration. Yet these decisions effectively meant that collective bargaining agreements conferred no actual enforceable rights to the employees. In an opinion concerning an individual suing an employer for lost wages due to wrongful termination on the basis of terms spelled out in the collective bargaining agreement, indicative of the philosophy used in the early 20th century until at least 1920, the court prescribed an extremely limited role of unions:

> [T]o induce employers to establish usages in respect to wages and working conditions which are fair, reasonable, and humane, leaving to its members each to determine for himself whether or not and for what length of time he will contract in reference to such usages.[80]

The court denied that individuals could hold their employers accountable to the terms of collective bargaining agreements because the collective bargaining agreements were not really contracts at all. This indicates that judicial interpretation and the ideological orientation of the law can preclude private contracts from effectively protecting worker's rights within the firm, meaning unions did not constitute a useful legal tool for workers seeking remedy for specific grievances as there was not institutional mechanism to enforce them.[81] Even if employers agree to collective bargaining, which they were not compelled to do, the decision of the state not to enforce privately

[79] *Ibid*., 1519.
[80] *Hudson V. Cincinnati, N.O. & T.P. Ry.* 152 Ky. 711, 154 S.W. 47 (1913), qtd. In Stone, "Post-War Paradigm in American Labor Law," 1519.
[81] Stone, "Post-War Paradigm in American Labor Law," 1519-1520.

negotiated collective agreements meant that unions afforded workers no effective rights at all.

The National Labor Relations Act of 1935, while not the first piece of federal legislation to deal with labor relations, composed the most dramatic change in American labor law to date both in comprehensively defining specific rights both to employers and workers, and in advancing the federal government as an institution as an arbiter of industrial relations. Its initial clauses immediately demonstrate the historical impetus for its passage, namely to efficiently resolve labor disputes as to avoid the stoppage of work at a time when the economy was particularly vulnerable.[82] As in the post-war participation policies developed in European countries where maintaining the free flow of commerce was equally pressing, the NLRA served the function of protecting industry from unwanted labor strife. While its effect was to give unions new power, the pragmatic function of this and subsequent policy was to channel and restrict the scope of what worker's rights could be.

The Taft-Hartley amendments to the NLRA changed the original legislation significantly restored power to management by creating higher standards for unionization and restricting their purview, which further necessitated unions to take an adversarial approach to relations with management.[83] It reiterated the purpose of labor legislation as primarily to prevent work stoppages, first and foremost "to promote the full flow of commerce" and establish procedures to do so, and additionally "to protect

[82] National Labor Relations Act, 29 U.S.C., §151.
[83] During this time period, labor-management cooperative bodies that had been established during the Second World War were dismantled. Mark Barenberg, "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation," *Harvard Law Review* 7.106 (1993): 1492.

the rights of individual employees in their relations with labor organizations" by making it easier for those who do not wish to join a union to resist unionization, which is to say that the act empowers individuals against unions as institutions rather than against management.[84] The question remained as to the judiciary's power to enforce collective bargaining agreements with the force of the state involving suits brought by unions. Such judicial enforcement would have challenged to the view of labor relations as an essentially private process.[85] The courts have interpreted the amendments in order to elevate the method of arbitration, that is private negotiation over violations of collective bargaining agreements, as opposed to judicial enforcement of union contracts. In practice this has diminished the force of collective bargaining agreements by limiting workers' rights to have collective agreements be legally enforced, and instead negotiated through a process that presumes unions and employers are already on equal terms.[86]

The spirit of NLRA's provisions has been further weakened by states passing right-to-work laws, as allowed by Taft-Hartley. Such laws forbid the existence of a "closed-shop" firm, where all employees are as a condition of employment in the firm required to join the union that the workers had already chosen to represent them. However, as the NLRA already established, an employer cannot discriminate for or against union members, nor can it make private agreements with individual employees that conflict or

[84] Labor Management Relations Act, 29 USC 7 § 141.
[85] Stone, "The Post-War Paradigm in American Labor Law," 1525.
[86] Katherine Van Wezel Stone, "Testimony of Katherine Van Wezel Stone before the Commission on the Future of Worker-Management Relations," 5-6, Cornell University School of Industrial and Labor Relations site: <http://digitalcommons.ilr.cornell.edu/key_workplace/381/>.

circumvent a collective agreement, meaning collective bargaining agreements must apply to all employees.[87] A closed-shop provision merely resolves the free-rider problem stemming from when workers are able to avoid union membership (and therefore dues) while receiving the benefits of their representation through collective bargaining agreements. Since those who do not want to accept the kind of employment contract offered by a closed-shop firm are free to join another firm, in order to establish such a "right," the law has to make illegal certain kinds of collective bargaining agreements. This means that laws that seek to limit the power of unions can depend on the government intervention in the private liberty of contract of individuals that are supposedly inconsistent with American constitutional principles.

That these labor policies specifically concern themselves with defining the scope of workers' rights, and do so through defining workers' rights of representation through union rights, actively limits the reach of labor's power. Labor law scholar Clyde Summers argued that the letter of the law affords unions the power to potentially represent workers to negotiate in the firm's decisions which, "in other countries, might be reached only through statutory works councils or employee representation on corporate boards."[88] However, real employee participation through collective bargaining in practice rarely involves substantial issues that are not directly related to the specifics of labor conditions. This is not only because so few private sector are now unionized, meaning that most provisions in labor relations law do not affect most workers, but also through the nature of the laws. Collective

[87] Summers, "Codetermination in the U.S.," 158-159.
[88] Summers, "Codetermination in the U.S.," 159.

agreements typically contain clauses that preclude unions from the right to participate in major business decisions even though workers may have a significant stake in the consequences.[89] Major business decisions over which collective bargaining could theoretically address are not among the issues over which employers would be compelled to bargain. This means that not only do unions have a monopoly on employee representation due to the restriction on employer-sponsored legislation, but also that labor relations policy defines and restricts the power that they do have and by extension that workers can have vis-à-vis management.

That unions have struggled for so long to restore the full provisions of the NLRA in the shadow of the Taft-Hartley amendments help to explain union reticence to policies regarding non-union forms of employee representation or participation in decision-making. Primary among the stated concerns of American union leaders is disbelief that cooperative relations with management can be beneficial to American workers. Lane Kirkland, President of AFL-CIO during the period of the Dunlop Commission, expressed skepticism of employee representation or other forms of capital-labor partnerships typical of American union leaders:

> [The American worker] is smart enough to know, in his bones, that salvation lies—not in reshuffling the chairs in the board room or the executive suite – but in the growing strength and bargaining power of his own autonomous organizations.[90]

The emphasis of the labor movement in resisting greater employee involvement outside the dominant method of collective bargaining assumes that this is necessary to protect the power of the union as an institution. This

[89] *Ibid.*, 159-160.
[90] Quoted in Summers, "Codetermination in the United States," 154.

is based in part of history of company unions, which are restricted by the NLRA. The NLRA establishes collective bargaining not only as a codified system of representing labor interests, but as the only representatives of labor as the NLRA states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit.[91]

While the NLRA empowered labor in new ways, the centralized arbitration system (the NLRB) thus also subjugated the realm of possibility for labor to advance its interests to the power and discretion of the state. Similarly, employee involvement programs that aim at improving quality of working-life are susceptible to the perception that they are coopting labor support and designed to undermine unions or discourage unionization.[92] Additionally, even as unionization fades dramatically[93], unions remain the dominant source of worker's power and advancements in working life, either directly through advancements gained through collective bargaining or indirectly through union lobbying for labor regulations.

Yet while political opposition either from business groups of from organized purpose helps explain why worker participation was not historically on the agenda for American labor policy, the more significant element politically is that because labor law affords collective bargaining as the extent to which workers have power within their own workplaces, non-

[91] National Labor Relations Act, 29 U.S.C. § 159(a)
[92] Carmen Sirianni, "Worker Participation in the Late Twentieth Century: Some Critical Issues," from *Worker Participation and the Politics of Reform* (Philadelphia: Temple University Press, 1987), 21.
[93] Union membership for workers in the private sector nationwide was 6.6 percent in 2012 according to the Bureau of Labor Statistics' Current Population Survey.

union forms of participation lack the same legal mechanisms of enforcing workers' rights when labor and management disagree. In such a system, unions become the sole political outlet for worker power that stands in contrast to the bureaucratic system of interventionist regulations.[94] The nature of the employment relation itself and the organization of power at the workplace remain mostly out of the scope of American labor relations policy.

Participation's Moment in the Spotlight: The Dunlop Commission

The limitations of American labor policy is further manifested by the stunted attempts to encourage consider worker participation as a matter of public policy. Since the modern paradigm of labor law was established with the NLRA and subsequent legislation, interest in worker participation and cooperative management in the United States was nascent for most of the 20th century. Its height was in the early 1990s after a resurgence of academic work in "industrial" or "economic democracy" that was complemented by an increased focus in new industrial relations on the importance of conditions of working life and of labor relations as a matter of public importance.[95] These developments crossed over into becoming a matter of public in were largely responses to increasing competition to foreign firms like Japan that have a tradition of more participatory industrial relations compared with the United

[94] Sirianni, *Worker Participation and the Politics of Reform*, 21.
[95] Daniel J.B. Mitchell and Mahmood A. Zaidi, "The Dunlop Commission's Omissions on American Labor Market Policy," *Contemporary Economic Policy* 15 (1997), 108.

States' legacy of Taylorism and combative relations with unions.[96] This culminated with the Commission on the Future of Worker-Management Relations, a joint initiative by the Department of Labor and the Department of Commerce (also known as the Dunlop Commission after the labor economist who headed the effort), to make policy recommendations to facilitate labor-management cooperation.

The motivation for the Dunlop Commission, as suggested by its Fact Finding Report, was based in larger economic trends that were upsetting the paradigm of labor-management relations and tempering the existing policy framework's ability to respond to innovation and the changing dynamics of American working life. The decline of union membership alongside the diminishing relevancy of unions to the fasting growing sectors of the economy made the lack of policies concerning workplace relations and dispute resolution outside of collective bargaining conspicuous.[97] The Report in particular emphasizes that its recommendations "are designed to contribute to the achievement of the goals and relationships required for the 21st Century workplace," implying a more dynamic and decentralized approach rather than new institutions or regulations.[98] The interest in worker participation and alternative measures were limited generally to concerns of

[96] David I. Levine, "Public Policy Implications of Imperfections in the Market for Worker Participation," *Economic and Industrial Democracy* 13 (1992), 183.
[97] Gould, William. B., IV. (January 9, 1995), "William B. Gould IV, Chairman, National Labor Relations Board; Statement in response to Dunlop Commission Report," http://digitalcommons.ilr.cornell.edu/key_workplace/465.
[98] U.S. Commission on the Future of Worker-Management Relations, "Dunlop Commission on the Future of Worker-Management—Final Report," 14.

efficiency and productivity rather than questions of workers' power or whether the dominant form of employment relations was just or desirable.[99]

Worker participation had several potential effects that were relevant to the business focus of the commission. The development of human capital was noted as increasingly important as the United States became increasingly service-oriented, and because information technology was not only changing the nature of work, but also the structure of workplaces and the way employees related to one another.[100] However, in the tradition of treating labor relations as an obstacle to economic objectives, the project was at once conciliatory to business interests. Not only were business groups like the Chamber of Commerce and the National Association of Manufacturers well-represented in accordance with the commission's "integrated approach," but labor interests were also mostly channeled through existing institutions, mainly well-established union leaders like the AFL-CIO. While the Commission was concerned with reducing conflict and improving labor relations, yet the stated focus on the United States' "competitiveness" and "productivity growth" informed many aspects of the inquiry.

Most of the Dunlop Commission's conclusions were fairly modest. They proposed clarifying existing law and encouraging more cooperation across governmental agencies. While the agency held hearings legal barriers to cooperative work arrangements and the legal framework that could be used to encourage non-union employee participation plans, the

[99] Mitchell and Zaidi, "The Dunlop Commission's Omissions on American Labor Market Policy," 108-109.
[100] U.S. Commission on the Future of Worker-Management Relations, "Fact Finding Report of the Dunlop Commission," 6.

Commission's recommendations nonetheless "effectively leave those barriers in place."[101] Some union representatives were resistant even to the Report's suggestion that the law "clarify" the section of the NLRA that posed a legal a significant legal barrier for employee representation.[102] This controversial part of the law forbids employers from negotiating "conditions of employment" with committees of employees.[103] While they considered the merits of mandating participative management or employee representation on corporate boards, other than recommending simplifying the language of existing laws and making NLRB practices more consistent, their recommendations concerning worker participation were essentially vague or perfunctory leaving the same legal framework in place.[104] The Report made no judgments as to whether that participation or cooperative labor-management had intrinsic value or were more just, and as such no the Commission ultimately made no real recommendations as to reforming the nature of labor relations.[105]

What Do Workers Want?

While the conclusions of the Dunlop Commission were fairly modest in the way of substantial labor law reform, the potential of a new industrial relations policy was underlined by the results of the Workplace

[101] Meghan Clendenny (January 9, 1995),"LPA Reacts to Dunlop Commission Report," from Cornell University School of Industrial and Labor Relations site, <http://digitalcommons.ilr.cornell.edu/key_workplace/466/>.
[102] Douglas A. Fraser (January 3, 1995), "Dissenting opinion of Douglas A. Fraser,"Submitted to the Commission on the Future of Worker-Management Relations, <http://digitalcommons.ilr.cornell.edu/key_workplace/424>.
[103] National Labor Relations Act, 29 U.S.C.
[104] "Dunlop Commission-Final Report," 8-14.
[105] Mitchell and Zaidi, "The Dunlop Commission's Omissions," 113.

Representation and Participation Survey, a survey of the preferences of private sector employees undertaken by Professors Richard B. Freeman and Joel Rogers. Freeman had served on the Dunlop Commission and took on the project based on his perception that the Commission was dominated by "insiders" without much empirical evidence of what workers themselves wanted from the workplace.[106] Their results underline how the reticence to consider worker participation an has failed to result in the kind of cooperative labor-management relations that workers prefer.

While surveys in job satisfaction and other measurements of quality of working life are commonplace, rarely does such research incorporate perceptions and effects of employee involvement programs and participation schemes, that is, range of specific mechanisms by which workers could participate in the governance of enterprise within the institution of the firm. They found that while workers can have diverse preferences for various mechanisms to address employee concerns, by and large workers support employee-involvement programs and desire policies that would provide them a greater capacity to have a say in the decisions that affect their working lives. [107] The preference for more employee involvement in workplace decisions as well as a gap between the actual and desired amount of participation was not only very common, but also constant across most demographic variables.

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[106] Richard B. Freeman and Joel Rogers, *What Workers' Want* (Ithaca NY: Cornell University Press, 1999), 2. The Worker Representation and Participation Survey (WRPS) was conducted in 1994. The complete data are available via the National Bureau of Economic Research at <http:/users.nber.org/~freeman/wrps.html>
[107] Freeman and Rogers, *What Workers Want*, 116.

The empirical research on employee preferences challenged several assumptions made by representatives of employers and unions at the Dunlop Commission. While business associations claimed in the Dunlop Commission's testimony to be in favor of greater legal flexibility to form employer-sponsored institutions (i.e. internal to the firm rather than through union representation), workers most frequently cited opposition from management as the chief reason for labor's lack of power in the workplace and the chief impediment to the sharing of power.[108] The union leadership's view that employee representation within the firm poses a threat or cannot achieve workers' goals in the workplaces also appears out of line with what workers want. While many nonunion workers did say they wanted to be unionized, non-managerial employees not only overwhelmingly desire the kind of employee participation programs, but also that workers largely prefer management-cooperation to employee-only organization.[109] There is a general perception that in resolving labor disputes, labor-management cooperation is more effective than a strong labor organization against management, a perception that remains regardless of the respondents' union status.[110] Such results suggest a serious disconnect between what workers actually want from their workplaces and what employers and labor organizations are willing to facilitate.

Of course, worker participation refers to a whole spectrum of practices that do not necessarily fundamentally reorganize the power relations of the

[108] *Ibid.*, 60.
[109] *Ibid.*, 56. 85% of workers responded that they would choose an organization run jointly by management and employees to facilitate workplace decisions over an employee-only organization.
[110] *Ibid.*, 57.

firm. While human resource departments have become widespread and alongside them more employee involvement in place of strict hierarchy in workplace organizations, the existence of such polices can often be perfunctory and most firms tend to have only a few of the policies that Freeman and Rogers called "advanced human resource practices," meaning employer-initiated employee involvement policies.[111] Unsurprisingly, firms with the highest prevalence of these practices were significantly more likely to have workers that were satisfied with their jobs. However, this would not prove that these practices caused higher per se, especially considering that when the practices are rated individually, they have only limited effectiveness.[112] The most is that workers of all types desire a greater voice in their workplaces and want to be able to participate substantively to the decisions that affect their lives, but the status quo is not meeting their expectations.

The New Deal paradigm of labor relations discussed previously was historically specific to the needs and concerns of labor and business at the time in a way that, while not irrelevant, "appear increasingly inapposite to present circumstance."[113] The attitudes of union leadership are clearly circumscribed to negotiating over a limited range of issues that do not seriously challenge the fundamental organization of power, as confirmed by then-president of the AFL-CIO George Meany:

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[111] *Ibid.*, 90.
[112] *Ibid.*, 98-99.
[113] Joel Rogers, "United States: Lessons from Abroad and Home," *Works Councils,* eds. Joel Rogers and Wolfgang Streeck (Chicago: University of Chicago Press, 1995), 376.

> Those matters that do not touch a worker directly, a union cannot and will not challenge. These may include investment policy, a decision to make a new product, a desire to erect a new plant so as to be closer to expanding markets, etc. … But where management decisions affect a worker directly, a union will intervene.[114]

Of course, the degree to which business decisions "affect a worker directly" may be ambiguous in modern labor relations especially as the category of "worker" and "management" is blurred or complicated. As both unionization and the prevalence of the industrial manufacturing job through which union power originally came about has decline precipitously since then, the way that a labor relations policy will deal with reconciling competing interests in these decisions will necessarily be different in the 21st century than it was during the Great Depression. The relevant lesson is that not only are workers are effectively denied voice by this paradigm of labor relations, but also choice of its form, hence the interest in participation as an expansion of the view of what workers' own rights are from the perspective of the law.

Why Participation?

As indicated by empirical research into the workers' attitudes toward the kind of workplace they desire, the market appears to produce firms that have employment relations with suboptimal levels of worker participation in substantive decision making. Capital-managed firms, where firms are controlled by the owners of capital and management is controlled by a board of directors chosen by shareholders, are the dominant form of enterprise organization in the United States as in other developed capitalist market economies. Such firms have no reason intrinsic to their organizational form to

[114] Quoted in *Ibid.*, 376.

provide the kind of workplace relations that workers desire. Why do workers not form cooperatives themselves where they themselves are the owners and managers in order to create the kind of working environments they prefer?

There are, of course, many firms in the United States both contemporarily and historically that could qualify as worker cooperatives.[115] There has long been interest in cooperatives as an alternative to capitalist firms, not only for the potential for goals that are compatible with capitalist objectives like increasing productivity and job satisfaction. Yet non-hierarchical, democratically-managed firms are anomalies, rarely adopted in on a large-scale such that they compete directly with their mainstream counterparts. Some elements of worker-ownership like profit sharing schemes or employee stock ownership plans (ESOPs) have become widespread but are largely prevalent in firms that are otherwise indistinguishable from hierarchically organized capital-managed firms.[116]

The meaningfulness of the designation of "firm" as a subject of inquiry into working life is also questionable. Most Americans are employed in service occupations in organizations quite far from the firm of microeconomic theory. As Hansmann points out, many businesses where the most important source of capital is a specialized or credentialed kind of human capital, as in law firms, accounting firms, graphic design firms, etc., are often owned by the workers themselves since the workers are also in a sense the owners of the means of production. Since these kinds of enterprises are distinct legal forms from the modern corporation, democratizing the workplace for these kinds of

[115] Robert Jackall and Henry M. Levin, *Worker Cooperatives in America*,
[116] David Ellerman, "The Question of Legal Structure," *Worker Cooperatives in America*, 265.

employees impose challenges distinct from the kind of corporate reform considered here.

The scarcity of labor-managed firms given their theoretical viability is something of an unsolved problem in economics. There is likely no single explanation since it is no easier to answer than why capitalism itself is dominant as an economic system. The confines of existing legal structures, access to capital, culture, and all favor the reinforcement of the status quo.[117] The pressure of the environment external to the firm can clearly lead to a suboptimal degree of participation in the workplace even if workers themselves prefer more participatory workplaces, not simply because such ways of organizing workplaces are unworkable or unprofitable.[118] Henry Hansmann's survey of the range of organizational forms of enterprise in the United States reveals a huge diversity in ownership structures. He argued it was unlikely that "lack of experience with collective decision making in general is a major obstacle to the viability of employee ownership," given the prevalence of collective governance institutions in American culture. Rather the greater obstacle would be the "lack of knowledge about, or experience with, the specific types of governance mechanisms that are needed to permit employees to act collectively in managing industrial enterprise."[119] Regardless of Americans' cultural propensity or lack thereof for collective governance, this underplays the significance of those specific types of governance mechanisms, particularly the potential mechanisms that could only come

[117] Robert Jackall and Henry Levine, "Work in America and the Cooperative Movement," *Worker Cooperatives in America,* 14.
[118] David Levine, "Public Policy Implications of Worker Participation," 183.
[119] Hansmann, *Ownership of Enterprise,* 116.

about state intervention. As the organizational diversity of enterprises in the United States reveals, the mere fact of employee ownership is distinct from employee participation or cooperative management not only in the theory but also in practice. In fact, many firms, especially professional services with few employees, could be accurately described as "employee-owned," but this does not necessarily imply any linkage to collective control rights for all employees.[120] While effective forms of participation may "fall short of true ownership," it is not self-evident what "true ownership" maximizes.[121]

Many explanations exist for why workers would not form cooperatives themselves given workers' apparent interest in and the labor-managed firms theoretical (and sometimes empirical) viability. One salient argument about workers' control of enterprise centers on the alleged inefficiencies of collective governance. Hansmann argues the costs of collective decision making are high when the owners of the firms have heterogeneous interests—labor tends to involve more heterogeneous interests, so the viability of worker-owned firms depends on the homogeneity of workers' interests. This suggests worker-owned firms would be less organizationally stable. Yet, as he concedes, "Organizational innovations may yet make employee ownership viable in circumstances where it has previously failed to make present."[122] This may help explain the challenges worker cooperatives face, but does not explain why workers do not see cooperatives as an alternative and attempt to develop institutional innovations to make collective governance viable.

[120] *Ibid*,; Dow, *Governing the Firm,* 83.
[121] Hansmann, *Ownership of Enterprise*, 119.
[122] *Ibid.*, 119.

The most compelling explanations recognize that market mechanisms do not lend themselves often to the kind of cooperation necessary to incorporate a firm, even though such an organization may be to the benefit of those involved once established. Intrinsic differences between capital and labor could mean that worker-owned firms could face difficulties with access to capital and external financing not faced by capital-controlled firms, but since cooperatives have on average a lower failure rate it could not be argued that workers do not form cooperatives because they expect them to fail.[123] Legal scholar Justin Schwartz, in finding that the major explanations for the rarity of cooperative management are insufficient, gives a straightforward but somewhat novel explanation:

> Cooperatives may or may not do better than capitalist enterprises once they are established, but the market will not grow cooperatives. Creating the public good of labor management requires going beyond the market and finding strong sources of institutional support, e.g. in the unions, a powerful political party, or the government, to provide financial, legislative, and other resources to implement it.[124]

This suggests that the capital managed firm (meaning that workers do not voluntarily form the institutions that act in their own interest) dominates not because of any intrinsic defect on the part of labor-managed firm or because of an inherent superiority of capital control, but rather because the capital managed firm is evolutionarily stable given the conditions of market capitalism, that is, the institutional framework. But in this case, the logic of collective action to correct this is not so straightforward, given that firms

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[123] Gregory K. Dow, *Governing the Firm: Worker's Control in Theory and Practice* (Cambridge, UK: Cambridge University Press, 2003), 227.
[124] Justin Schwartz, "Where Did Mill Go Wrong? Why the Capital- Managed Firm Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies," *Ohio State Law Journal* 73.2 (2012), 283.

remain private institutions; meaning cooperative management is not obviously a public good in terms of all of society, such that there would be an obvious case to be made that state power can correct this apparent inefficiency.[125]

This observation helps explain why workers do not (or can not) often take it upon themselves to create the kinds of work structures they prefer, namely that the existing institutional framework is insufficient and that public policy action would be necessary. The United States' ideological legacy that has been historically resistant to both labor legislation and the scope of worker's rights, as well as a political opposition from unions and employers' groups, have precluded worker participation rights as a constituent part of labor policy, even though the American constitutional tradition is certainly not incompatible with the principle of worker participation. While employee preferences for more involvement in the workplace make a strong case for employment policy reform at the national level, any worker participation program at the policy level would need to contend with these legal, philosophical and political issues.

[125] Dow, *Governing the Firm,* 132.

Chapter 3
Worker Participation In Labor Relations Systems

As we saw in the last chapter, Freeman and Rogers' results show that across the board in the categories observed, workers have less say in management decisions than they would like. That American workers appear to be dissatisfied with the level of participation they have in the workplace poses a challenge to the institutional framework of American labor policy. Yet, the official labor relations policy of the United States precludes most forms of participatory or representative labor-management cooperation that are internal to the firm's organization, since the company union rule disqualifies employers from "dominating, interfering, or supporting" any organization that has a claim to represent employees. Even where internal nonunion "advanced human resource" practices exist to facilitate cooperation or consultation, these practices are in effect disqualified from actually advancing workers' interests in the managerial policy or governance of the firm since employers cannot be a part of any institution that represents employees' interests regardless of whether workers are actually represented by a union.[126] Management could consult workers through advisory panels or delegate them discretion over some aspects of their own work, but workers as a group are almost never granted institutional power to participate in managerial policy or corporate governance. Even if the kind of participation

[126] 29 U.S.C. § 152(5) defines a "labor organization" that the employer interference rule applies to as "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

that workers want (or are entitled to) remains to be defined completely, the absence of discussion of worker's rights within the firm from contemporary American policy debates is conspicuous given the demonstrable public interest in preventing oppressive employment relations.

Whatever the reasons for the decline in unionization in the United States, including workers' disinclination to join unions, the fact that unions are formally the only countervailing force to management's power means that workers' voices have been effectively shut out from the process. Moreover, the fact that the right of workers to join unions was enshrined in law, contingent only on the status of being employed, signifies that the existing paradigm has failed the many workers who have little means to advance their interests. The categorical right to unionize is an implicit recognition that workers must be endowed with legal rights in order to protect a legitimate process for their interests to be advanced through their relations with employers. When the only way to countervail the power exercised by management is consistently underutilized and limited in its scope, the case for other innovations becomes increasingly strong.

This motivates the interest in other forms of worker participation. What are the features of successful worker participation programs, and how do they advance workers' interests? Are they always impositions of the state, and how can the use of public policy to encourage its effectiveness? Some lessons can be learned from the worker participation programs and industrial relations policies of other countries, while recognizing that they are operating in heterogeneous contexts of corporate governance law and other institutional differences. Looking at the experiences of other (market

capitalist) countries' industrial relations policies and workers' participative schemes, we find that these legal infrastructures were developed in response to specific political concerns, although it may be hard to tell whether such national differences are attributable to cultural factors rather than specific laws, which may limit the applicability of these lessons. Regardless, the diversity of ways that workers can participate in different institutional context reveals the relationship between public policy and worker participation.

The functional differences between "advanced human resource practices" or "human resource management" forms and institutionalized worker representation and participation remain to be defined, in light of the normative concerns of power imbalance and lack of voice identified previously. We could identify a successfully participatory system as where employees as a group are "explicitly or implicitly recognized as a constituent of the firm and its interests are considered in the formation of managerial policy" similarly to how shareholders are recognized and their interests are considered in the neo-classical model of the firm.[127] One could go further and say that participatory systems are sufficiently democratic where they enable employees to advance their own interests as subjects to the firm's policies. This could be contrasted with human resource management practices by noting that changing any one aspect of the firm's procedures to allow workers to merely consult or voice grievances does not require the employer to relinquish any power or final say their own practices. Rather, worker

[127] Masahiko Aoki quoted in David I. Levine, "Public Policy Implications of Imperfections in the Market for Worker Participation," *Economic and Industrial Democracy* 13 (1992), 183

participation is a system of rights that views workers as co-equal stakeholders with the formal "owners" of the firm and consequentially all stakeholder would co-determine the policies of the firm through inclusive processes.

Underlying these questions is the issue of the goals of worker participation or participatory rights: what do they maximize or seek to achieve? Are they means or ends? Several distinct and potentially competing motivations inspire the interest in workers' self-management and cooperative labor-management relations. Much of the literature comes from the field of industrial relations and examines the productivity effects of participation, and secondly the effects on the organizational efficiency of the enterprise. The vague goal of promoting better labor relations treats worker participation as an instrument to reduce alienation, preventing costly labor disputes. The instrumentalist objectives motivated the failed attempts to encourage or mandate worker participation as a matter of national industrial relations policy in Anglo-Saxon legal systems, namely the Dunlop Commission in the United States and the Bullock Report in the United Kingdom. The normative questions of the justness of the authority relation or rights to democratic participation are quite distinct from the utilitarian considerations of increasing productivity or of avoiding conflict. In discussing the advantages or disadvantages of forms of worker participation, these distinct motivations must be kept in mind.

Forms of worker participation that employers voluntarily implement are generally aimed at straightforwardly economic purposes: facilitating information sharing and improving organizational efficiency, issues of practical importance to management. Consultative councils, which are often

formed ad hoc, may deal with issues of mutual significance, such as the organization of work.[128] Consultation of this sort is particularly relevant and popular with determining occupational health and safety policies. Since employees perform work that management does not, they have better access to information about where potential safety concerns may arise. More effective ways of dealing with such issues is of mutual benefit because it protects workers health and safety and allows management to avoid inappropriate risks. Additionally, this allows firms to localize such procedures beyond what the law prescribes, thereby supplementing state's limited ability to monitor workplaces.

Whereas advisory committees and quality circles are established first and foremost by management for the interests of management, works councils are by contrast created with the purpose of representing workers' interests in the firm's decisions. The main limitation of the consultative council is its purview is usually limited and its form is incapable of being representative of workers' own interests. Employer-dominated participatory management is generally uncontroversial even by those who deny that democratic or cooperative functions of participation schemes are necessary or normatively valuable. Corporate law scholar Stephen Bainbridge, for example, views the limited adoption of more participatory management practices as a natural adaptation to the increasing complexity and size of workplaces in the era of the large multinational corporation. Workers are, at

[128] Joel Rogers and Wolfgang Streeck, "The Study of Works Councils: Concepts and Problems," *Works Councils* (Chicago: U. Chicago Press, 1995), 10.

best, indirect beneficiaries of these practices.[129] While he uses this observation to defend the shareholder sovereignty model to argue that participatory mandates are unwarranted, this explanation actually helps reinforce the view that the degree of participation is strongly influenced the institutional structure.[130] We could take this to mean that even where gains from cooperative management or consultation exist, the employer-dominated authority structure remains relatively organizationally stable. Masahiko Aoki provides an alternate model where the organizational form of the enterprise as the result of a bargaining game, where the spectrum of possible institutional arrangements affects the representation of constituents' interests. This helps explain the full range of possibilities of the different balances of power that can all exist in market systems, where the neo-classical model reflected in Bainbridge's shareholder sovereignty view is a special case that is specific to a particular "domain" or institutional arrangement.[131] This helps explain how the institutional arrangement can promote an organizational equilibrium where it is costly for participants to bring about unilaterally a redistribution of decision-making power.

In the previous chapter, we saw that the conditions of the American labor-management system established since the Wagner Act were highly specific to the historical context as a bargain between the political power of the labor movement and business interests. National industrial relations

[129] Stephen Bainbridge, "Participatory Management Within a Theory of the Firm" (SSRN Working Paper, 1996), 31-32.
[130] Bainbridge provides an account that acknowledges that other models of the firm exist but defends the wisdom of Anglo-Saxon corporate governance policy on the grounds of protecting shareholders against the agency problems of giving employees managerial input.
[131] Aoki, *Co-operative Game Theory of the Firm*, 73.

policies established in the 20th century are generally the product of longer political dialectic of industrializing nations striving for social order in a time of upheaval, and the subsequent formation of new institutions to manage the new industrial state. Internationally, industrial democracy gained hold as a sort of trend in many post-war countries in Europe, after workers' self-management had long been a goal of some strands of socialist movements in Europe. In this sense they may contain features that may be highly specific to the political contexts of the country or that may no longer be especially pertinent. However, these policies innovations help demonstrate the range of ways that public policy can interact with worker participation programs and how this might inform policy discussions for other market capitalist countries.

National Industrial Relations Systems

The German labor relations system, most notably its policy of mandated codetermination (*Mitbestimmung*), is one of the most salient examples of national policy that both prescribes workers unique legal rights vis-à-vis their employers independent of collective bargaining, and that is widely accepted as part of the modern social fabric. While the system is not without its critics, even the Chancellor Angela Merkel spoke of the system of worker representation as "an essential part of Germany's social market economy."[132] However, works councils in Germany have had a long and contentious history in Germany since the 19th century, being used as a tool throughout

[132] Quoted in Hugh Williamson, "Merkel Backs Workers in Board Decisions," *Financial Times*, August 6, 2006, http://on.ft.com/10E0OgF, accessed March 4, 2013.

the labor movement's history. The political contentiousness and shifting status of participation in the workplace is somewhat unique to the political history of Germany and the evolving status of the German labor movement.[133] At one point, German unions and socialists once echoed the modern American opposition of workers committees in opposing participatory councils as "fig-leaves of capitalism."[134] It's notable to mention that the early days the labor movement was particularly sensitive to cooptation the subversion of its principles, given Otto van Bismarck's simultaneous banning of the Social Democratic Party and the cooption of labor movement agenda items like the extension of the welfare state in order to subvert the labor movement. At other times, parts of the labor movement embraced worker participation as the only way to "democratize" economic development during a time of significant social change, and worker participation was practiced in various forms long before its current model.[135] Ultimately the system of co-determination that West Germany formalized in the 1970s was a compromise designed to prevent labor strife, but its unique form reflected an ideological orientation toward viewing labor as stakeholders in the firm's decisions rather than contracted actors or economic inputs. It affords a strong role for the state in intervening in the process of corporate governance and is oriented toward institutionalized cooperation

[133] Christopher S. Allen, "Worker Participation and the German Trade Unions: An Unfulfilled Dream?" *Worker Participation and the Politics of Reform,* ed. Carmen Sirianni (Philadelphia: Temple University Press, 1987), 174.
[134] August Bebel, leader of the German Social Democratic Party, quoted in Walther Müller-Jentsch, "Germany: From Collective Voice to Co-management," *Works Councils,* eds. Wolfgang Streeck and Joel Rogers (Chicago: University of Chicago Press), 53.
[135] Allen, "Worker Participation and the German Trade Unions," 182-83.

between labor and management. The stakeholder view of the firm asserts a right for both capital-owners (shareholders) and workers (stakeholders) to "co-determine" the decisions of the firm, implicitly recognizing the interdependence of the interests of labor and capital.[136]

The first level of institutionalized employee involvement in this system is mandated employee representation on corporate boards. German law establishes two different decision-making bodies for corporate governance: a managing board of directors and an independent supervisory council. The supervisory council may review the board of directors' decisions, but cannot issue binding directives to the managing board. The law provides quite specific procedures for election of representatives to the supervisory board and for the process of decision-making, including provisions specifying the number of seats for different kinds of workers, a balancing of power between different constituencies, and procedures to overcome deadlock.[137] The decision making process is therefore highly controlled and standardized, especially in comparison to the policies in countries like Sweden and Norway, which have official codetermination polices but largely defer to the collective bargaining process to define the substantive form of the process.[138] In practice, it is widely perceived that the workers' powers to be involved in forming policy through German co-determination at the board-level is somewhat limited, and their institutional powers through works councils are

[136] Aoki, *Co-operative Game Theory of the Firm*, 155.
[137] *Ibid.*, 158.
[138] Helen A. Tsiganou, *Workers' Participative Schemes: The Experience of Capitalist and Plan-Based Societies* (New York: Greenwood, 1991), 60-61.

more directly useful.[139]

The other sphere of participation rights is the right to form works councils, organizations that oversee the management of enterprises on a more localized level. Whereas board-level representation is directly mandated, the works council is an opt-in system that enables workers to initiate a works council at their own discretion but which requires the employers to comply. German works councils are notable in that they both have fairly wide discretion over plant-level decisions. Workers have a right to create a works council that they can use at their own discretion. The power of codetermination comes mainly from the ability of a united worker force to veto board initiatives that would require an equally united shareholder vote to overcome. The lack of direct decision-making power for workers is both a result of sub-parity representation in most firms and the indirect nature of the power of the supervisory boards. Additionally, worker representation has the secondary effect of institutionalizing communication between labor and management. It can therefore be seen as a mechanism for information sharing (beyond the "consultative" nature of voluntary quality circles or advisory committees), which can empower workers in the exercise of power elsewhere, such as collective bargaining or works council negotiations. Works councils

[139] A possible economic reason for this beyond the legal issues is hinted at by German social theorist George Teubner who argued that co-determination would be indistinct from any other form of management under systems of perfect competition, because there is little room for boards of directors of any constituency to maneuver outside the pressure of market forces. Works councils deal with more internal decisions of the firm that are less directly under the pressure of market forces per Williamson's efficiency hypothesis. It is where there are market imperfections where individuals have greater discretionary power and therefore who makes the decisions matters more. See Katherine Stone, "Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities," *U. Chicago Law Review* 55 (1998), 171.

are generally recognized as the greater source of power for the issues that most directly affect workers, whereas codetermination complements the work of works councils across the firm.[140] The German system is instructive both in that it is reflective of a coherent view of how power should be organized in the firm, and extensively lays out the mechanisms by which labor can participate in management.

While the most extensive forms of participation rights involves some form of mandate, the centralized, top-down model of Germany's industrial relations system is not the only way that participation can be institutionalized in the law. The Netherlands adopted an industrial relations system with a similar level of state-prescribed participatory rights of workers similar to those of the German system, but without mandating co-determination. Prior to the establishment of a national industrial relations policy, Dutch employers initiated their own works councils that were akin to what Rogers and Streeck termed "paternalistic councils," existing solely for the employers' interests. The law changed over time and eventually came to require all firms over 50 employees to create worker-controlled councils (*Ondernemingsraad*) with discretion over a broad swath of issues (with more relaxed provisions for smaller firms).[141] Dutch works councils are distinct in that the law mandates that employers provide them without any action being required by

[140] Müller-Juntsch, "Germany: From Collective Voice to Co-management," *Works Councils,* 60.
[141] Robbert Van Hart Karr, "The Netherlands: Industrial Relations Profile," European Industrial Relations Observatory, http://www.eurofound.europa.eu/eiro/country/netherlands_4.htm. A large majority of firms comply with the mandate. Workers and unions rarely assert their right to form works councils by bringing suit against noncomplying firms so in practice the mandate is only indirectly enforced.

employees or unions.[142] Works councils have the rights to "consultation, co-determination, and monitoring" with respect to the firm's activities.[143] A critical feature is that while many aspects are mandated in law, the councils have discretion over how to exercise their rights, and a minority of them actually use their full rights, since the applicability of their use is heterogeneous across different plants and firms.[144] The councils' decisions are legally enforceable via a labor appeals court, but the law also specifies a process for firms to independently evaluate the councils' objections such that the courts will only deal with claims that are irreconcilable through independent means. This works council model has generally been viewed favorably by employers and workers alike, and has remained in consistent use independently of the decline in unionization.[145]

In addition to national industrial relations policies, the European Union has undertaken some steps to promote transnational harmonization of labor practices, especially in order to promote their use in multinational corporations that operate in multiple European countries. Works councils that have some basis in statutory guarantees have been established in nine EU member states: Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Norway, and Spain, while some have some status through collective bargaining initiative in Denmark, Italy, Norway, and Sweden.[146]

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[142] Jelle Visser, "The Netherlands - From Paternalism to Representation," *Works Councils,* 85.
[143] *Ibid.*, 80.
[144] *Ibid.*, 123.
[145] *Ibid.*, 111.
[146] Mark Carley, Annalisa Baradel, and Christian Welz. "Works Councils: Workplace Representation and Participation Structures," *European Foundation for the Improvement of Living and Working Conditions* (2005),

Proposals to harmonize company law had been developing in Europe long before the European Union was formed. In the 1970s, as worker participation and industrial democracy became more popular as goals of the labor movement throughout much of Europe, the European Economic Community began to consider whether to use its power in order to force member states to comply with efforts to harmonize company laws.[147]

In response, the United Kingdom, which had no explicit policy on worker participation in corporate governance, formed a commission to evaluate the European Council's recommendations and consider how employee representation could be reconciled with UK corporate law. The Bullock Commission, officially "the Committee of Inquiry on Industrial Democracy," proposed a system similar to the stakeholder approach of the German co-determination model, stating: "if our proposals are adopted, the new concept of a partnership between and labour in the control of companies will supersede the idea that a company and its shareholders are one in the same thing."[148] The content of the committee's recommendations was in effect quite modest in terms of creating industrial democracy, because while it would have mandated employee representation on the existing board of directors for most firms, these bodies have limited power of their own and mostly oversee the senior management. The most significant change would have come from more specifically prescribed decision making powers

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http://www.eurofound.europa.eu/pubdocs/2004/143/en/1/ef04143en.pdf , 6-8. This mainly considers worker participation in market-based economies.
[147] Aoki, *Cooperative Game Theory of the Firm*, 153.
[148] The Bullock Committee (1977), 80, from *Ibid.*, 156.

between the shareholders, boards, and management.[149] The committee's recommendations were controversial among unions and business groups alike and never adopted. The experience of the U.K. demonstrates that while there exists a potential legal basis for mandating participation in the Anglo-American corporate legal system, where the shareholders are traditionally viewed as the sole proprietors of the firm, it is politically unpopular and would requires significant reform of shareholder's in order to realize substantive participatory rights for workers in terms of the philosophical orientation of the law.[150]

Canada has a policy toward labor-management cooperation that suggests how worker participation could be facilitated in countries with an Anglo-Saxon legal heritage. While Canada's major labor legislation was modeled after the American Wagner Act, it did not include prohibit workers from negotiating with employers independent of unions, while also allowing more decentralization of discretion over alternative forms of representation than the American system allowed to the states.[151] Consequently, provinces began requiring occupational health and safety worker-management committees in firms over a certain number of employees, whether unionized or not. The law mandates employee participation and employer compliance in drafting shop-floor health and safety policies. In order to have these committees be effective regardless of union status, employee representatives

[149] Paul Davies, "The Bullock Report and Employee Participation in Corporate Planning in the U.K., " *Journal of Comparative Corporate Law and Securities Regulation* 1 (1978), 257.
[150] Aoki, *Cooperative Game Theory of the Firm,* 155.
[151] Richard B. Freeman, *What Workers Say: Employee Voice in the Anglo-American Workplace* (Ithaca: ILR Press, 1997), 21.

are elected through unions in unionized firms, and directly by employees in non-unionized firms.[152] Employee preferences are given legal weight by requiring arbitration for any disputes, though this is rarely necessary. While in these councils have had limited purview, they do show how legal mandates for participation can be reconcilable with systems that otherwise take a decentralized approach to labor relations.

These experiences help demonstrate how industrial relations policies can incorporate participation of workers in ways that are reconcilable with the legal systems and other labor market or institutional factors (like union density) while actively facilitating employee voice. Participation rights do not necessarily conflict with or substitute for collective bargaining, rather unions can take on a representative role as an extension of their bargaining practices, as is the case in Sweden and Norway, or can be used to put forward representatives on corporate boards or on works councils as in central European countries. Whatever the form of industrial relations, where participation is viewed as a personal right of workers it is most effective and far-reaching when this practice in integrated in the legal system through some form of mandate. While countries that mandate this practice might have a different legal heritage or norms regarding the role of the state, the fact that some form of legal mandate for worker participation has not clearly disrupted the ability of enterprises to be efficient. The variety of institutional circumstances represented by these few countries is only the beginning of the possibilities of how labor policy can facilitate worker participation, but they

[152] Roy J. Adams, "Should Works Councils Be Used As Industrial Relations Policy?" *Monthly Labor Review* 108.7 (1985), 26.

are demonstrative of some of the ways that objections to legal approaches to participatory management can reconcile competing concerns in the context of a national policy.

Financial Participation

A distinct form of worker participation that has been somewhat less controversial is financial participation, where workers share in the firm's profits rather than merely receiving a wage. Profit sharing schemes are often considered alongside employee involvement schemes, but they do not inherently involve greater voice or power for workers. The motivations for profit sharing schemes are, however, similar to many of the attractions to cooperative management: aligning workers' interests with the firm, facilitating employee loyalty, and encouraging productivity growth. Additionally, they are often but not exclusively influenced by the existence of institutional government supports such as tax incentives, which makes the forms of financial participation that exist quite heterogeneous across countries. The most common form of profit sharing in the United States is the Employee Stock Ownership Plan, or ESOP. In theory, since owning stock makes employees shareholders and therefore owners of the firm, their interests are brought more in line with those of the firm, thereby helping to resolve the separation of interests between shareholders and employees. In practice, ESOPs rarely provide employees with a significant stake in the firm,

and even if the employee stake is significant, it does not guarantee that their voices are institutionalized.[153]

The little-known philosophical basis of profit-sharing was developed by economist and banker Louis Kelso. In Kelso's view, the nature of capitalism was widely misunderstood. While he granted the legitimacy of many popular criticisms of capitalism, such as those concerning wealth inequality and workers' alienation, he wrote that these problems were not intrinsic to capitalism as an economic or philosophical system but rather due to consolidation of wealth-generating capital in the hands of a few while the rest of the population continued to have only their labor power to sell.[154] As private property rights enabled owners of capital to extract profits that increased with technological progress, capital ownership thus represented the freedom from economic insecurity and the need to do unpleasant work for low wages. He concluded that the true foe of the working class was therefore the concentration of the ownership of capital, not the rights of private property or the system of capitalism, and proposed that public policy facilitate the expansion of the ownership of capital without the direct redistribution of income or property.[155] While the proliferation of the Employee Stock Ownership Plans by most accounts has not fundamentally transformed capitalist society, the appeal of Kelso's vision has not been altogether forgotten; in 2012, the British Deputy Prime Minister Nick Clegg expressed support for expanded national policies to enable employee buyouts

[153] Dow, *Governing the Firm,* 82.
[154] Louis O. Kelso and Mortimer J. Adler, *The Capitalist Manifesto* (New York: Random House, 1958), 101-103.
[155] *Ibid.*, 169

of any firm, saying, "We don't believe our problem is too much capitalism - we think it's that too few people have capital."[156] This is a compelling idea from the economic democracy standpoint, because it posits that public policy measures to spread the ownership of capital would fundamentally change the relation of people to their labor.

In their most limited (and popular) form, ESOPs are found in otherwise conventional corporations that allow only a minority of their stock to be offered to employees, as an extension of pension plans.[157] The empirical evidence on ESOPs as they are implemented in the United States is mixed. Firms with ESOPs do enjoy higher levels of productivity growth in the aggregate than those without them.[158] However, the extent that stock ownership confers control rights in the United States is extremely limited. Denmark by contrast requires the tax incentive for profit-sharing schemes to be contingent on employees being guaranteed maximum voting rights.[159] The mere fact of employee ownership of stocks does not guarantee control rights, and policies to support financial participation run the risk of inducing firms to merely go through the motions in order to receive the subsidy.[160] However, it could still be used as an avenue to enhance workers participation, both in the legal sense and because if financial participation becomes significant it may bolster the argument and for increased voice control rights for workers since they have an even greater stake in the success of the enterprise.

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[156] Quoted in " Nick Clegg Plans More Employee Ownership," *BBC News*, http://www.bbc.co.uk/news/uk-16570840, last updated 16 January 2012.
[157] Dow, *Governing the Firm*, 45.
[158] *Ibid.*, 182.
[159] Milica Uvalic, People's Capitalism: Profit-Sharing and Financial Participation in Capitalist Enterprises," *Democracy and Efficiency in the Democratic Enterprise,* 259.
[160] *Ibid*, 260.

Evaluation of Participation Policies

With this knowledge of how national industrial relations policies have been implemented, we can identify a few competing but not necessarily mutually exclusive considerations regarding whether a labor-management system or policy is justified. Economically, objections to mandated forms of worker participation arise from meaning the imposition of costs and concerns over inefficiencies. A second major concern is individual rights, such as the property right of owners of the firm, or that of the liberty of contract as was previously considered. It should be reiterated here the finding that there is some public interest in the employment contract (which has in the United States been upheld albeit in limited form by the body of labor law and the upholding of its constitutionality by the Supreme Court) that does not strictly dominate the individual's negative liberty but could be used to further individuals' positive liberty. Legalistically, the state's role in the legal incorporation the firm in some way is sufficient to establish the state's right to establish the basic governance conditions of the firm, but it must be justified as advancing a public interest.[161] The final and most directly important consideration for this discussion is the policy's efficaciousness, i.e. the policy achieves what it intends to do: enabling workers to advance their interests in the decisions they are subjected in order to increase their welfare. It is difficult

[161] "Only a government can create a corporation as a legal entity with its own rights and privileges, the most important of which is limited liability. As a condition of gaining corporate status, the government can and does set rules for corporate governance. In a world where the government by definition sets the rules for corporate governance, any set of rules necessarily involves government intervention." Dean Baker, *The Conservative Nanny State* (Washington: Center for Economic and Policy Research, 2006), 7.

to say with certainty whether the gains from worker participation would be strictly be mutually beneficial.

With this knowledge, we can identify a few competing but not necessarily mutually exclusive considerations for whether a labor-management system or policy is justified. Economically, objections arise from efficiency concerns, meaning the imposition of costs. This is a complex but not irresolvable issue. A second major concern is individual rights, such as the property right of owners of the firm, or that of the liberty of contract as was previously considered. It should be reiterated here the finding that there is some public interest in the employment contract (which has in the United States been upheld albeit in limited form by the body of labor law and the upholding of its constitutionality by the Supreme Court) that, while not strictly dominating the individual's negative liberty, but could be exercised through policy in order to further individuals' positive liberty. Legalistically, the state's role in the legal incorporation the firm in some way is sufficient to establish the state's right to establish the basic governance conditions of the firm, but it must be justified as advancing a public interest.[162] The final and most directly important consideration for this discussion is the policy's efficaciousness, i.e. the policy achieves what it intends to do: enabling workers to advance their interests in the decisions they are subjected in order to increase their welfare.

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It is difficult to say with certainty whether the gains from worker participation would strictly be mutually beneficial. The empirical literature of the productivity effects of employee participation tends to find that different forms of worker's control or participatory rights may be less than effective or even costly on their own, but they are more effective when complementary.[163] Since studies of productivity effects are typically limited to specific kinds of programs, the evidence on their effects can be ambiguous. However, when looking at the econometric evidence overall, employee involvement programs in economic returns seem to lead to the greatest productivity effects when these rights are linked to participation in control.[164] While the causal relationship is inconclusive from this evidence, this result confirms that management offering financial participation as a benefit to workers is not a substitute for the empowerment or recognition that comes with broader forms of participation.

One way that participation can be harnessed to enhance the quality of decision-making is by including the interests of more of the relevant parties in the process. Bilateral information sharing combined with good faith participatory decision making can lead to mutually advantageous outcomes. Freeman and Lazear provide some anecdotal evidence of how this can function from interviews with managers and laborers in firms with cooperative management:

> In one major enterprise, management told the works council that the enterprise had to save a certain amount of money to maintain an

[163] Avner Ben-Ner. Tzu-Shian Han, and Derek C. Jones, "The Productivity Effects of Employee Participation in Control and in Economic Returns," *Democracy and Efficiency in the Economic Enterprise,* 236.
[164] *Ibid.*, 240-241.

> engineering facility. Devising a plan to provide the savings was left to the workers. Schemes that management thought were infeasible turned out to be feasible, presumably because management did not have an accurate reading of what could be done or of the sacrifice workers would make to save the facility.[165]

Without reliably accurate information from management, the workers might not have trusted that the cost savings were necessary and chosen to strike or withhold information rather than make the sacrifices to which they ultimately agreed. Without the information from workers, management would not know what workers preferences were or what kinds of cost savings were possible. By having management define the amount of cost-savings ensured that the owner's interests are satisfied, while having workers deciding the form of the cost-savings ensured their own interests were satisfied. It is easy to see that under a different decision-making procedure, the result might have been layoffs, a strike, or shut-down. The quality of the decision making here is unambiguously better than if information had not been shared and the decision had not been made cooperatively.

Productivity growth is an understatement of the possible mutual gains from participatory management. It is used as an observable proxy for social welfare because it is more descriptive than profit maximization, but it only indirectly captures the qualitative mutual gains from cooperation. Mechanisms that establish job security, for example, can have positive effects on reducing alienation and inducing effort. These results are clearly not automatic; for example, if job security mechanisms make it more difficult to fire employees whether via collective bargaining agreements or otherwise,

[165] Richard Freeman and Edward Lazear, "An Economic Analysis of Works Councils," *Works Councils*, 47.

the gains from this would be clearly asymmetric. On the other hand, guarantees of job security or closer identification with the firm's interests can promote shared gains from productivity increases: workers will not avoid increasing productivity for fear of layoffs, and increasing the incentive to forgo short-term gains at the expense of the long-term viability of the firm.[166] There has also been consensus in industrial relations research that American firms tend to under-invest in training and human capital investment, especially compared with firms in other industrialized nations.[167] Additional investment in human capital investment is also likely to be mutually beneficial in the longer term, which reinforces the job security and interest alignment aspects of worker participation.[168]

Earlier when considering the abstracted employment contract, we saw that the employer was under no obligation to provide workers voice in the firm. But given some of the research why could it not be Pareto-improving to provide greater levels of productivity and therefore offered voluntarily? A number of theoretical problems could lead to a suboptimal (inefficient) level of employee participation in a free market. Since markets only indirectly affect the internal governance of the firm and markets for participation are incomplete, inefficiently or unnecessarily hierarchically managed firms may not choose increase worker participation or more democratic organization even if it is Pareto-improving.[169] Even if increased employee involvement

[166] Levine, "Public Policy Implications of Imperfections in the Market for Worker Participation," 187.
[167] Levine, *Reinventing the Workplace,* 134.
[168] *Ibid.*, 93.
[169] Namely, issues of path-dependence and frequency dependence are offered in response to Williamson's efficiency hypothesis, as summarized in Geoffrey M.

were to lead to higher total output, a firm may adopt less employee involvement because there would be less pressure to distribute a more equitable distribution of the rents. A firm operating in the free market could therefore be operating a suboptimal level of both employee satisfaction and productivity growth.[170] However, given the framework set out in the initial chapter, we have good reason to be skeptical of how the evidence on productivity ought to be interpreted. From a philosophical perspective, it would be unbecoming to make if one is sympathetic to the notion that workers ought to have control rights as a realization of democratic principles.[171]

In order to be efficacious, programs must ascribe sufficient power to workers independent of the employer. This is in part to shield these worker participation programs from cooptation, where workers' interests are impeded by the dominance of employers' control of the process and scope of employee involvement. The solution suggested by the market failure view of is to establish institutional mechanisms whether by legal mandate or collective bargaining agreement that limits how much employers can to intervene in the process to advance their own interests. Forms of worker participation may be more successful under some institutional regimes and

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Hodgson, "Organization Form and Economic Evolution: A Critique of the Williamsonian Hypothesis," *Democracy and Efficiency in the Economic Enterprise*, 109-110.

[170] Levine, *Reinventing the Workplace,* 98-99. See also Aoki, *Toward a Comparative Institutional Analysis,* 233.

[171] Daniel Mitchell and Mahmood A. Zaidi wrote of these kinds of considerations: "Making such issues depend on economic benefits is risky since the evidence is ambiguous. Suppose by analogy that arguments for voting rights in the larger political process were based only on the proposition that voting raises the GDP!" from "The Dunlop Commissions Omissions on American Labor Market Policy," *Contemporary Economic Policy* 15 (1997), 108-109.

not others. Legal mandates or institutionalization appears to be necessary or at least useful to give representative or participatory bodies such as workers councils a basis of power, as the incomplete market for worker participation fails to provide a mechanism to establish worker power independently in otherwise capitalist firms.[172] Such institutionalization enables both their content and form is both free from arbitrary employer interference, and such that they are authentically representative in the sense that workers have the ultimate power beyond information sharing or consultation. In other words, works councils are successful where they are provided with sufficient institutional power or the means to exact substantial change in the decision making of the firm.

Evaluating Worker Participation

The main challenge of worker participation is the unintended consequences induced by mandated programs or policies, whether they are unforeseen costs or efficiency disadvantages or costs that are not justified by what they accomplish in terms of increasing workers' agency. Programs and institutions decided by and controlled by the government are not necessarily any more relevant to the specific concerns of employees in specific firms than those employer or third-party initiative. Government programs and legal mandates are equally susceptible to design flaws as schemes initiated by any other source. Efficiency is only one kind of cost consideration. Simple subsidies for worker participation in a world of otherwise hierarchically

[172] Richard B. Freeman and Edward P. Lazear, "An Economic Analysis of Works Councils," *Works Councils*, 28.

dominated firms in a liberal market capitalist economy, like the tax benefits for ESOPs in the United States, are likely to induce firms to shift their practices only enough to get the subsidy without delivering on the sharing of control, that is substantive participation. On the other hand, top-down legal mandates like codetermination laws cannot by themselves or automatically change corporate culture. In such a scenario, the form does not change the content, so there is no way we could consider such policies successful.

There are a few major ways that state powers can be relevant to the question of worker participation outside that of arbitration of labor-management disputes and direct regulation of labor practices. One is the facilitation of worker-owned firms. The second is the use of institutionally recognized works councils. The third is employee representation on boards of directors. Recall the considerations of the authority relation from economic theory in the first chapter and the formal definition of power: "A has power over B if, by imposing or threatening to impose sanctions on B, A is capable of affecting B's actions in ways that further A's interests, while B lacks this capacity with respect to A."[173] Bowles and Gintis posited that even the asymmetric application of sanctions, clearly within the intrinsic powers of the employer, is sufficient to demonstrate the existence of a power imbalance. Even if the fundamental nature of the relationship is still asymmetric, countervailing power could exist when B has a capacity "that can be strategically deployed towards further one's interests," even if such capacity

[173] Samuel Bowles and Herbert Gintis, "Is the Demand for Workplace Democracy Redundant in a Liberal Economy?" *Democracy and Efficiency in the Democratic Enterprise*, 68.

does not guarantee that their interests will be realized completely.[174] From this framework, we can see that institutional mandates that encourage worker participation in ways that allows workers to advance their interests within the firm have the potential to legitimate the power imbalance defined in this way.

The relevance of management's interests, while sometimes overly emphasized in the more technocratic industrial relations and human resource management literature, cannot be dismissed even from a perspective sympathetic to democratic concerns over power balances. In the case where employee involvement programs are supplementary to the corporate governance system, in order to obtain good faith cooperation from management, management may need to justify the costs of any voluntary compliance with employee initiatives and demonstrate to shareholders that they do not introduce risk. Finally, of course, managers are employees as well. Even managers that do yield potentially arbitrary asymmetrical power over their subordinates, are equally subject to the policies of the firm generally and may face the same lack of voice with respect to the firm as an institution in areas where they do not have control. This is increasingly true as a rigidly Taylorist model of work organization because decreasingly relevant and there becomes less of a clear distinction between employee-workers and employee-managers. As the categorical separation of workers and management, employers and employees are not always easy to distinguish, from a democratic perspective the same would need to apply regardless of job title, though not necessarily in the same way.

[174] *Ibid.*, 72.

Such problems, however, also have cultural bases as well as institutional or organizational. An essential goal of the most effective quality circles, such as in the otherwise quite hierarchical Japanese human resource management practices, is precisely to deal with this kind of problem. Hansmann's conclusion that worker-managed or collectively managed firms may be more susceptible to problems of collective action due to heterogeneous interests highlights this difficulty, though it is not necessarily unresolvable or intrinsically more difficult than the problems faced raised by managerial autonomy.[175] Rarely does informed research conclude that works councils *ipso facto* produce deleterious effects with respect to the political or justice-oriented concerns of workplace democracy, efficiency of firms, or monitoring ability. Rather the research is divided on the "robustness" of the effects alternative to other possibilities and the necessary policy implications of these results.[176] The chief concern from the labor side around labor participation is facilitating cooptative or perfunctory "company unions," which would both be (an unfortunate waste of an opportunity) by itself, in addition to potentially undermining the collective bargaining strategy. The most fundamental objection from the efficiency standpoint is of the cost of collective decision-making. Critics allege having workers act as representatives of a constituency while acting in service of the firm creates a conflict-of-interest.[177] The evidence that national industrial relations policies that institutionalize worker representation suffer enormously from costly

[175] Henry Hansmann, *The Ownership of Enterprise*, 119.
[176] Joel Rogers, "United States: Lessons from Abroad and Home," *Works Councils*, 379.
[177] E.g., Bainbridge, *Participatory Management*, 96-97.

decision making practices is limited. For example, a small minority of works council agreements in either Germany or the Netherlands actually require arbitration.[178] This reinforces the conclusion that conflicts of interest and labor-management adversarialism are not endemic to cooperative forms of management, or at least that the heterogeneity of interests when all stakeholders have a place at the bargaining table is not an insurmountable obstacle.

The preceding analysis shows a few potential paths as well as their obstacles. The empirical studies comparing profit sharing and control rights indicate that a complentarity of rights is much more efficacious both in terms of productivity advantages. Second, there does seem to be some need to provide an adequate legal structure to facilitate participation. Ineffective programs or programs where the benefits are asymmetric, such as if management is able to control the form and content of worker participation, or only some workers are the beneficiaries of employee involvement, may induce skepticism over future cooperative efforts. Equally important is that the justification for worker participation not hinge solely on its potential for mutual gains. Under a system with no participation or representation, management has the power to unilaterally impose polices that make workers as a group worse off without needing to justify it to workers since they are subjects and not stakeholders of the firm. There is more than one way to judge or interpret the quality of the firm's decisions. A participatory system will necessarily introduce the possibility that workers' may be able to use

[178] Roy J. Adams, "Should Works Councils Be Used As Industrial Relations Policy?" 28.

their power to advance their interests at the expense of the interests of the owners (after all, this would be true of the collective bargaining as well). In any social system where individuals may have different preferences, the difficulty of consensus over whether an alternative policy is mutually superior increases with the number of people involved. The question is how the unique powers of public policy can be used to empower workers so that their interests are on more equal footing, not to directly resolve questions of corporate governance or managerial policy on behalf of firms.

The legal infrastructure of national industrial relations policies interacts strongly with the organizational equilibrium of the dominant form of enterprise. Recognizing the possibility that introducing intrafirm structures like works councils could potentially compete with and therefore weaken unions, not all features of industrial relations systems necessarily replace union functions as they can be designed to provide adequate protection of existing union practices, and may offer new functions for unions to undertake to remain relevant and effective organizations. Institutionalized avenues of worker's representation in the form of co-determination rights or works councils facilitates decision making that may delay some decisions, but improves their quality. This can help in turn prevent labor strife, shirking and alienation, which ought to command broad support across political factions. The main difficulty from a worker democracy perspective is reconciling increased employee choice with the need for public oversight to prevent employer's domination or avoidance of worker organizations, within the larger cultural and political context that informs how such policies will be received.

Chapter 4
Toward American Economic Democracy—
Closing the Participation and Representation Gap

"There can be no freedom in an atmosphere of bondage."[179]
-Senator Robert F. Wagner

The interest of academics, labor advocates and policy wonks in both the principle of workers' self-management and the potential of workers' participation to improve the governance of enterprises has waned substantially as labor policy has largely disappeared from the American political agenda since the 1990s.[180] Yet the importance and potential of labor relations policy reform remains the same: American workers continue to face, among other problems, increasing income inequality, stagnant wage growth, uncertain job security, and structural unemployment, as the American labor movement continues to diminish in influence and relevancy to most workers and a consequent lack of voice in the workplace.[181] As countries like the United States de-industrialize and the social stability brought by employment becomes increasingly elusive, the 20th century promise of "industrial democracy" now sounds obsolete or alien to contemporary circumstances. Why, then, should we continue to care about economic

[179] Speech on the National Labor Relations Act (February 21, 1935), *Congressional Record*, 74th Congress, 1st session, Vol. 79, 2371-72. Wagner was defending the provision excluding company unions.
[180] The Teamwork for Employees and Managers Act (the "TEAM Act"), introduced in 1997 to codify some of the recommendations of the Dunlop Commission, was vetoed by President Clinton, and when reintroduced again, died in committee. It faced resistance from both the right and the left. See Charles B. Craver, "Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees With Meaningful Industrial Democracy," *George Washington University Law Review* 66 (1997), 8-9.
[181] Katherine Stone suggests that there is a direct relationship the changing nature of work and increased resistance to and declining power of unions. "A New Labor Law for a New World of Work: The Case for a Comparative National Approach," *UCLA Law & Economics Research Paper Series*, http://ssrn.com/abstract=964685, 8.

democracy? What relevance could it have in the 21st century economy?

Briefly, the main arguments I have tried to elucidate thus far are as follows: First, there is a public interest in the employment relation arising from the potentially arbitrary abuse of power of the employer over the employee, and the employee's lack of voice in the enterprise is in tension with democratic values. Second, there exists a participation and representation gap between what workers in the United States want and what they receive at the workplace, due in part to part to incomplete markets for representation, and also due to legal restrictions and an insufficient institutional framework. Finally, there is a precedent for national industrial relations policies that recognize employers as stakeholders in the operations of the firm and institutionally guarantee the rights of worker participation, and that successful policies to facilitate participation often but not always include legal mandates. What remains to be demonstrated is how these lessons can be synthesized to form a coherent basis for the evaluation of future public policy measures to encourage worker participation in the context of American labor law.

The decline of manufacturing and the rise of information technology and globalization have significantly changed the kind of work most Americans do and the nature of the modern workplace in a way that has significant implications for contemporary policy. Labor law, insofar as it enables workers to represent their own interests (as opposed to direct regulation by the state), has not changed significantly since the National Labor Relations Act of 1935, except to further restrict the ability of employees to form unions (e.g. Taft-Hartley, local "right-to-work" laws). Cultural and

technological change necessitates the reconsideration of not just the text of the law itself, but also the fundamental premise of labor policy, which is to say, the state's prescriptive vision of labor relations.[182] The argument for worker participation depends on several stylized facts about the nature of employment that may not hold given this evolving paradigm. The kinds of worker participation discussed thus far have been predicated on an understanding of the employee as a member of the organization of the firm (whether formally recognized as such or not) by nature of their employment relation. The argument for voice rights and worker power has thus depended in large part on the nature of power in an employment contract that was distinguishable from a normal sales contract in which parties are presumably equal. The reality that workers are increasingly employed as independent contractors in the new economy necessarily calls into question the meaningfulness of the argument for workplace democracy that depends on the condition of the employment.[183] The practical demand for flexibility in hiring to meet firms' needs as well as a desire on the part of employers to deliberately avoid the rigidity of employment contracts could both contribute to this "implicit deregulation" of employment that results from having workers who fall through the cracks of employment law.[184] However, these

[182] Michael H. Leroy, "Employee Participation in the 21st Century: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA," *Southern California Law Review* 72 (1999), 1666.
[183] Kerry Rittich, "Between Workers' Rights and Flexibility: Labor Law in an Uncertain World," *Saint Louis University Law Journal* 54 (2010), 569.
[184] Rittich defines "implicit deregulation" as simply the failure to alter and update labor laws and employment standards to adequately protect workers in the type of work, and under the work relations, in which they currently find themselves and extend real—as opposed to theoretical— opportunities to bargain collectively and influence the terms and conditions of work. *Ibid.* 573.

trends also more directly reveal the increasing obsolescence of the existing paradigm of labor and employment law, and how the reality of present circumstances is increasingly distant from the intent of these laws.[185]

Academic debates around economic democracy that focus on property rights and efficiency considerations do not satisfactorily address how the lack of employee voice in the firm can be reconciled with democratic values.[186] The focus on "cooperative" labor-management reforms is also subject to criticism from more radical perspectives that any such programs are doomed to cooptation, or even worse, allow a fundamentally unjust or problematic system to perpetuate itself. The portrayal of worker participation as "mere fig-leaves of capitalism" thus also deserves consideration. Labor law reform therefore is likely to face philosophical limitations on several fronts.

As discussed previously, an overriding concern with respect to the American legal context is the traditional reticence to accept government intervention in private contracts. Despite Justice Oliver Wendell Holmes's famous dissent that a "constitution is not intended to embody a particular economic theory," a legal institutional framework necessarily interacts with and helps to shape the social economic order.[187] The opinion of Justice Hughes in the landmark *West Coast Hotel Co v. Parrish* (1937), which ruled minimum wage laws constitutional, is illustrative of the tension in economic policy about individual liberty, specifically with respect to the freedom of contract concern that not only defined labor policy in the early 20th century,

[185] *Ibid.*, 573.
[186] Samuel Bowles and Herbert Gintis, "Is The Demand for Worker Democracy Redundant in a Liberal Economy?" *Democracy and Efficiency in the Economic Enterprise,* 66.
[187] Justice Holmes' dissent, *Lochner v. New York,* 198 U.S. 45 (1905).

but which also reflects a philosophy similar to those adopted by libertarian critics of mandated worker participation. Justice Hughes wrote of freedom of contract:

> Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[188]

Thus we can understand liberty of contract as a means rather than an end, having instrumental value to ensure the autonomy of the individual.[189] Originally, liberty of contract was considered as the means by which individuals realize their property rights, such as the property right that an individual has over their own labor-power. It was on this basis the Supreme Court established in *Lochner v. New York* that the state could not limit the number of hours an employee worked. Under this view, the state's intervention in the employment contract violated the liberty to use one's own property, which is explicitly delineated in the Constitution as a right protected by due process.[190] The precedent established subsequently by *West Coast Hotel Co v. Parrish* is by contrast that regulations of contracts must merely be relevant to some other state goal or public interest, and that the legitimacy of the regulation is subject only to the reasonableness of the regulation itself in furthering that goal.

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[188] *West Coast Hotel Co v. Parrish*, 300 U.S. 379 (1937).
[189] John J. McCall, "Employee Voice in Corporate Governance: A Defense of Strong Participation Rights," *Business Ethics Quarterly* 11:1 (2001), 204.
[190] "It is a question of which of two powers or rights shall prevail,-the power of the state to legislate or the right of the individual to liberty of person and freedom of contract." Justice Rufus W. Peckham, opinion of the court, *Lochner v. New York.*

These conditions already seem to apply to the near-universal classical liberal position as to the illegitimacy of voluntary slavery: liberalism insistence on individual liberty considers the parties' ability to be able to exit freely from a contract a prerequisite for the legitimacy of the agreement.[191] Yet such is a condition is more or less arbitrary since it requires the definition of some right, the right of exit, that cannot be alienated voluntarily through any contract, therefore paternalistically depriving anyone of the "right" to enter into certain contracts voluntarily on their own terms. The reality that there is already an established state interest in regulating contracts in this way demonstrates some valid regulation of contracts as a means of protecting individuals' contractual rights, that is, their liberty.[192] The legitimacy of the regulation of employment and of employment relations, and by extension, of the use of state power to encourage worker participation or self-management, will depend on how the regulations uphold and protect the liberty of workers against the employer's ability to exercise arbitrary or coercive power.

By this principle we can establish some means of evaluating the legitimacy of a given policy. The principle of legitimate regulation need not be in conflict with the principle of liberty of contract. Rather these can be aggregated into a test where state regulations to ensure "wholesome conditions of work and freedom of oppression" will be valid provided that they are not "unreasonable, unnecessary and arbitrary" interferences. Constitutional principles only set the boundaries of legislative power, they do

[191] The philosophical genesis of this argument is dealt with extensively by David Ellerman, *Property & Contract*, 70-80.
[192] Clyde W. Summers, "The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will," *Fordham Law Review* 52.6 (1984), 1108.

not define it, since only the legislative branch as the deliberative body of government has the prerogative to set economic policy in this way. The determination of whether a legal statute obeys or violates this principle therefore must be open to a democratic political process.

Employee Involvement: Cooperation or Domination?

The legal prohibition on employer involvement in worker involvement and the effect of certain court decisions on employee involvement is significant in that it informs our evaluation of the extent current law allows workers with the capacity to further their interests in the workplace. The labor relations paradigm since the National Labor Relations Act and its regulation of employee's rights at work thus helps to illustrate the challenges of labor law reform. The NLRA, taken at face value, establishes labor rights as fundamental rights that workers have merely by the existence of an employment relationship, guaranteeing employees "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." [193] This makes clear certain fundamental assumptions about the nature of employment and the public interest in defining categorical legal rights in order to make employment practices fair.

Certain assumptions about how labor-management relations ought to work clearly informed the judicial branch's reasoning in upholding the National Labor Relations Board's harsh view of workplace cooperation. In a

[193] 29 U.S.C. § 157.

significant court case, *Electromation, Inc. v. National Labor Relations Board* (1994), the Seventh Circuit Court of Appeals upheld an NLRB decision to designate cooperative employee involvement "action committees," to which employees were elected as representatives, as unfair labor practices.[194] In the case, the company contended that the Board unfairly had unfairly judged the employers' actions without respect to the employees' preferences:

> The company… suggests that the words "dominate" and "interfere with" in Section 8(a)(2) are relational terms, which require consideration of both the subject and the object for their complete meaning. In other words, you cannot find that X dominates Y simply by looking at the actions of X; to so find, you must evaluate X's conduct and its effect upon Y's rights and wishes. Under this theory, the same conduct of X, if viewed from an objective standpoint, can be construed as either illegal domination or lawful cooperation, depending entirely upon what Y's rights and wishes are.[195]

This directly relates to the public interest in the employment contract considered earlier. Is an employer-dominated form of participation still cooptative if it nonetheless is effective at realizing the interests of the workers? According to the company's claim, the NLRB decision was made without respect to the preferences of the employees, which not only helped bring about the participatory bodies, but also did result in substantive changes in company policy when the firm was under no other legal obligation to respond. Importantly, the company's workers were not unionized at the time when the employer set up the committees, and the committees were a response to worker discontent in which the ability to voice their preferences through a representative did have an effect on managerial policy. While the court tried to provide some guidance for what distinguishes

[194] Leroy, "Employee Participation in the New Millennium," 1680-1681.
[195] *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

cooperation from domination, by ruling against employer cooperation in any "labor organization" that deals with the kind of issues a union would, they effectively preclude employers from institutionalizing employee voice.

The Court found that "the Board focused its analysis on the relationship between Electromation's actions in creating and administering the action committees and the resulting effect upon its employees' rights under the Act" and therefore rejected the company's claim that the Board acted without regard for the employee's rights. Yet the employees' preferences are considered irrelevant. Notably the problem of the overly broad definition of a labor organization was not directly addressed. The concerns of the NLRB that employer-dominated committees coopt worker's rights are legitimate, and the details of the case do suggest that the form of the committees in question were employer-dominated.[196] This nonetheless expresses a surprisingly paternalistic view of the way the NLRA confers rights on workers and is indifferent to the practical difficulties employees actually face in achieving meaningful representation of their interests in company decisions and provides no guidance towards resolving some of the issues of participation in nonunion environments.

Employer-dominated human resource management practices that include employee involvement do not constitute a re-conception of the employment relationship or of workers as members of the firm. Such practices could accomplish the same goals as participatory mandates if

[196] Michael Leroy found that in 9 out of 10 cases where NLRB ruled employers violated Section 8(a)(2), the employers violated worker's protected rights in other ways. However, a sample of adjudicated cases would be biased to cases where there was some union-organizing present in order to file a claim. "Employee Participation in the New Millenium," 1668.

implemented in good faith, and therefore remain relevant to this discussion.[197] However, employee involvement in management is distinct from worker democracy. Voluntary human resource practices do not give workers the capacity to codetermine corporate policy and substantively participate in the decisions that affect them, as these practices are not intended to be representative of worker interests. They are viewed neither as a direct threat to employer's interests, since they do not meaningful challenge employer's power, nor post a threat to union's power, since they rarely deal with the kinds of issues to which unions are given discretion. The *Electromation* case demonstrated that employer-facilitated forms of representation are excluded by currently law precisely on the basis that they are or claim to be representative, thereby *potentially* precluding independent forms of representation: the law precludes cooperative participation on the basis that, by the nature of the form of the participatory bodies as "labor organizations", they would constitute a threat to independent representation.

The lasting effect of this decision is therefore to cement Section 8(a)(2)'s overly constrictive definition of a labor organization, which "confine[s] workers to the choice of independent representation or no representation at all."[198] The company union prohibition is not the only way the NLRA creates a participation gap. For example, the NLRA requires firms to bargain with unions only when workers overcome the significant hurdle (and collective action problem) of majority support, where the union will then be required to act on behalf of all employees. Moreover, unions normally do not have

[197] Craver, "Mandatory Worker Participation," 26.
[198] Samuel Estreicher, qtd. in Leroy, "Employee Participation in the New Millennium," 1668-1689.

prerogative over managerial decisions that affect employees, while union representatives are beholden only directly to their membership. These factors combine to create a system where employee involvement in decision-making is substantially limited by the law.[199] The Anglo-American corporate law-industrial relations paradigm reinforces a particular model of the relationship between labor and management and of the function of labor in the economic enterprise. Even to the extent that collective bargaining rights are protected, the strategy of increasing bargaining power necessarily has a limited purview to the areas of employment that can be made explicit through contracts. Since the employment contract is by its nature incomplete, union density or protection for the collective bargaining process alone will not fundamentally allow the firm to internalize the interests of employees into the decision-making structure of the firm. The idea of industrial democracy would require their right to participate in the management of the firm itself to be not recognized by law and accepted by all parties that determine the firm's policies.

Why Participation Rights?

There is a misconception that the extension of workplace democratic rights entails the imposition of institutions directly analogous to resulting from political rights. Labor rights must be thought of as a form of or integral component of democratic rights. Economic democracy is not necessarily a particular system or model of society, and it certainly is not "an" economic

[199] Clyde Summers, "Co-Determination in the United States: A Projection of Problems and Potentials," *Journal of Comparative Corporate Law and Securities* Regulation 4 (1982), 159.

theory, but rather a socioeconomic philosophy or value system. It emphasizes the expansion of the conception of the stakeholders in the firm to those who are directly subject to rules and regulations in the process of decision-making, and recognizes the special dynamics of firm behavior. The goal of participation rights to expand options, not reduce them.

Democracy is a process as much as it is a system composed of a defined set of procedures, institutions, or legal rights. Participatory rights are aimed at facilitating a redistribution of power to better serve the possibility that otherwise autonomous economic institutions can be democratically accountable. However, the provisioning of procedural rights to meet a normative end does not imply that we claim access to knowledge about whether an outcome is objectively just, or that any particular system is necessarily demanded by a particular set of ethically prior principles:

> Commitment to the idea that democratic procedures are justified insofar as they protect fundamental rights does not presuppose that anyone is ever in a uniquely privileged position to judge authoritatively what fundamental rights people truly possess. … [O]ur judgments as to what procedural rights should be accorded are always provisional and liable to be overturned by future insights into what rights people have and by increased understanding of how best to secure them.[200]

Much of the debate on participatory rights has focused on the allegedly socially suboptimal level of worker participation, but a central planner or benevolent dictator is unlikely to find an objectively socially optimal "level" of participation. The public policy problem therefore arises from the lack of

[200] Richard J. Arneson, "Democratic Rights at National and Workplace Levels," *The Idea of Democracy*, eds. David Copp, Jean Hampton, and John E. Roemer (New York: Cambridge University Press, 1993), 118-119. Ironically for my purposes, Arneson argued against the necessity of democratic rights at the workplace level. Bowles and Gintis discuss the implications of his argument in "The Demand for Workplace Democracy."

legal recognition of the legitimacy of these alternative forms of participation and representation. Legal participatory rights are justified insofar as they expand, rather than constrict, the range of options available to workers to advance their interests. The challenge reconciling such rights with both the larger institutional framework and the need for (or obligation to protect) flexibility and autonomy for individual firms arises. Inevitably, some decisions made by management will be the same regardless of the degree of employee voice. The nature of democracy, however realized, is that we cannot know its outcome *ex ante*, so the legitimacy of procedural rights cannot be held to a prediction of the justness of their outcomes.

The most important claim here is that lack of legal infrastructure to support cooperative models of enterprise governance reinforces an inefficient and normatively inferior organizational equilibrium. The enormous discrepancy between the kind of control rights of shareholders as proprietors and those of employees, remains a serious dilemma for legal theory. The worst irony of the existing industrial relations paradigm is that the dominant legal interpretation of labor law, in light of an implicit assumption of well-functioning labor markets and the system of collective bargaining powers as enshrined in law, interprets the labor-management relationship as a private form of a "mini-democracy."[201] Such a view does not consider the degree to which the privatized system of collective bargaining that has emerged under the NLRA fails to protect labor from the adverse consequences of corporate decisions, especially decisions that involve major investments or

[201] "A collective agreement is an effort to erect a system of self-government." *United Steel Workers vs. Warrior & Gulf Nav. Co.* 353 U.S. 574 (1960).

transformations in corporate form–decisions of the sort made by boards of directors. This not due to any single legal provision but a confluence of the circumscribed role for unions, a hidebound view of the forms that worker representation can take, and a reticence to impel arbitration. The legal definition of a corporation as beholden uniquely to its shareholders itself imposes some kind of intervention of the government. This is a marriage of the law with the normative implications with the neo-classical model of the firm (and indirectly of labor markets). Furthermore, this view fails to recognize that workers do want increased participation and different forms than are currently available, as discussed in Chapter 2. One of the bases for employment law itself is formalizable in a similar way to the idea of economic democracy: that workers have some normative basis for expecting to be able to participate, whether directly through individual bargaining with their employer or mediated through representative institutions, in the decisions that critically affect their lives as workers.[202] These demands for increased participation themselves demonstrate the limited ways that workers may be represented are no longer satisfactory, at least from labor's point of view. In this way, the conclusion that the free market labor enjoys an adequate alternative bilateral governance structure is, at the least, problematic, but the fact that this view is dominant does not mean that alternatives to this approach are irreconcilable with the constitutional limitations of economic policy. The limitations of the current system might thus be thought as legal or

[202] Roy J. Adams, "Should Works Councils Be Used as An Industrial Relations Policy?" *Monthly Labor Review* 108:7 (1985), 25.

institutional, but intellectual.[203]

A broad program of closing the representation and participation gap could consist of both easier legal facilitation of unionization through easier processes for granting recognition and allowing plural unionism, as well as encouragement or requirement of joint labor-management committees and a relaxing of labor law provisions to facilitate employee involvement programs that allow localized enforcement of employment law by unions or works councils.[204] The experience of European industrial relations policies shows us that mandates requiring representation can function without creating irresolvable moral hazards or inefficiencies, but mandatory board-level co-determination as in the German model or mandated works councils in all firms as in the Dutch model are less likely to be as successful in the United States. This is not because they would be categorically unconstitutional or even because they would be politically unpopular per se, but because top-down government mandates are too far out of step with the current paradigm to be received in the same way. A more decentralized approach is to allow the formation of both joint company unions at the firm level or European-style works councils at the shop or plant level, under the same model established through the NLRA that unions use to compel negotiation and arbitration of collective bargaining through employee initiative, but in order

[203] "Codetermination conceives of the corporation as an operating institution combining capital and labor in productive activity and affirms that employees are members of that institution as much as shareholders. Once this conception of the corporation is accepted, then most of the conceptual obstacles to codetermination disappear." Summers, "Codetermination in the United States," 178.
[204] Bruce Kaufman, "The Employee Participation/Representation Gap: An Assessment and Proposed Solution," *University of Pennsylvania Journal of Labor & Employment Law* 3.3 (2001), 491.

to cooperatively participate directly in the management of the firm.

Alternative mechanisms of participation can supplement and reduce the limitations of the existing methods of protecting worker's rights. With each piece of interventionist legislation aimed at protecting worker's interests--from the occupational health and safety regulations, to the WARN Act that requires notification for mass layoffs—so long as the views these regulations as a cost of doing business, the incentive will remain for some employers to avoid the regulation.[205] Participation rights could both improve the effectiveness of monitoring of these kinds of regulations and supplement the desired result.[206] Alternately, delegation of monitoring of employment legislation to local labor-management cooperative bodies, with the power of arbitration when necessary, could help close regulatory gaps while allowing businesses to avoid more intrusive or unnecessarily burdensome labor regulation.[207] This enforcement responsibility need not or burden workers unnecessarily (the law could for example require that the workers serving on committees be justly compensated, perhaps in exchange for), nor supplant the role of the state in setting a baseline of work standards to protect the most vulnerable workers. Rather, a more cooperative role for workers in determining optimal regulation could find solutions not imaginable by only the employer or the government bureaucrat, while potentially offering the more qualitative benefits of increasing workers' identification with the firm

[205] McCall, "Employee Voice in Corporate Governance," 209. Even when this kind of legislation levies significant fines, they can usually be reduced on appeal, significantly tempering the disincentive to circumvent or break the law.
[206] Joel Rogers, "United States: Lessons From Abroad and Home," *Works Councils*, 388-389.
[207] Craver, "Mandatory Worker Participation," 9-10.

and sense of agency.

The provisions that circumscribe what defines and prescribes a role for a "labor organization" can be revised or expanded to allow employer facilitation of organizations that are representative of employee's interests with similar legal protections against employer domination as exist for unions. In the most basic form, this could be achieved by allowing for "labor organizations" internal to the firm in which employers participate to be brought about through avenues that are already in place to facilitate the creation of independent unions with numerous legal oversights to protect the integrity of the process.[208] Such protections would require the use of secret ballots, a threshold of workers (such as a simple majority) to initiate the process, requirements for renewal, and protection against firing for employees who dissent.[209] This would allow employee's choice of the form of representation to be respected, and thus resolve the problem of employer "domination." [210] Legal institutional avenues for alternative forms of participation could in this way help to close the participation and representation that workers face in a way that gives agency to workers and empowers them to realize their own interests in the workplace.

Aiming at the Heart: Some Policy Implications

Upton Sinclair famously remarked of the reception to his novel *The*

[208] Joel Rogers, "United States: Lessons from Abroad and Home," *Works Councils*, 401.
[209] *Ibid*., 401; see also Clyde Summers, "Codetermination in the United States," 158-159.
[210] An example of a joint company union agreement and the kinds of protections against domination that would be necessary are offered in Leroy, "Employee Participation for the 21st Century," 1714-1723.

Jungle, which inspired legislation to regulate the meat-packing industry, that he had "aimed for the public's heart, and by accident hit its stomach." Sinclair, an avowed socialist, sought to expose what he saw as the intrinsic inhumanity of the new industrial capitalism, but instead provoked legislation to temper some of its less palatable effects. Much of the history of American labor policy has functioned in a similar way. The use of state regulatory power to define the boundaries of acceptable or unacceptable practices, whether through (e.g.) health and safety regulations or minimum wage laws, is inherently limited if it does not address the basic nature of the employment relation or of the authority structure of the firm. Even union rights, at least as they have be recognized in the United States, are only effectively able to facilitate participation in limited areas of corporate policy. Some legal institutionalization of participatory rights can help to resolve the conspicuous gap in employee's right to voice in a way that more directly addresses the issue of making work a democratic activity.

The dominant concerns in American labor policy debates are not how to best protect employees' interests or help them have control over input into the conditions that affect them, but on how satisfy business interests and induce labor market participation, while holding workers largely responsible for their own economic security.[211] Policy debates have been silent on the distribution of power in the workplace less because the politics of worker representation are unworkable but rather because to do so would require recognition of the political struggle between labor and capital – a reality that is readily recognized even by those on the right in countries with strong labor

[211] Rittich, "Between Workers' Rights and Flexibility," 574-6.

movements, but considered radical in the American ideological landscape. It requires the recognition both that current corporate law cements a model of not only property rights and responsibilities but also a power structure, as well as the recognition of collective instead of solely individual interests for workers.

Several different features of the current American labor relations system combine to effectively deprive workers sufficient voice to protect their freedom in the workplace, so there is not one single policy that will clearly resolve all of the current deficiencies in the law. Overall, we can see that a commitment to democratic principles in an economic system would require the state to provide workers with the capacity to directly participate in the control of the firm to protect their positive liberty in the workplaces. Even labor advocates or those sympathetic to unions who are nonetheless skeptical of legal prescribing participation rights should recognize that alternative forms of participation and representation could not only complement workers' other rights (such as through localized monitoring or by providing a new role for unions), but also that such a system could accomplish what other functions of public policy cannot, namely affecting the nature of labor-management relations.

Examining the range of organizational forms of enterprise within market systems, we can see that public policy and legal institutions interact significantly with the distribution of power within firms. The prevalence of avenues for workers' economic participatory voice rights legitimate the governance structures of a firm in a way similar to political participatory rights because workers are *subjects* to the authority of the firm. While firms

and states are fundamentally different types of institutions, it is not simply a question of exit costs since workers no doubt can face very high exit costs, and political rights are not, for example, contingent on the difficulty of emigration. Rather, political rights are conferred on the basis of being governed or managed by the state's power. Participatory rights can be considered useful at achieving normative ends of economic democracy even if it is difficult to define a single means of evaluating where the productive enterprise is sufficiently "democratic." Under a participatory system, workers remain free to alienate their ability to participate voluntarily, as democratic practices may delegate powers to hierarchical relationships for legitimate reasons. Such a system allows for cooperation despite diverse or conflicting preferences much in the way that in a democratic political system, one may obey laws that are inconvenient or with which one disagrees because of a belief in the greater basic reasonableness of the decision-making process that created the laws. A hierarchical decision making structure without democratic accountability does not provide for this and thus makes the capitalist firm an institution often at odds with the precepts of a democratic society.

Democracy is by its nature a deliberative process for which the outcome cannot be known in advance since, not unlike activity coordinated via a market mechanism, preferences are revealed through the process of democracy itself. If firms are truly to internalize a principle of considering the voice of workers-as-stakeholders as an essential part of its internal decision-making, a new organizational equilibrium would be established. Crucially, a stakeholder-oriented distribution of power is not intrinsically more or less

predictable, efficient, or economically viable than any other possible distribution of power. Given the changing nature of work, that workers are increasingly called on to take on more dynamic roles for which the old model of labor management may prove counterproductive, the recognition of the worker as a human being rather than an economic input is not only beneficial but also necessary. While the 20th century paradigm of industrial citizenship may seem decreasingly relevant to current experience, the necessity of new forms of employee participation and new strategies in labor policy will only become greater as the function of work in the economy and the nature of workplaces continue to evolve.

However, even if worker participation does help advance the values of economic democracy, it is not a panacea to solve all economic problems endemic to capitalism as proponents of economic democracy have sometimes tended to suggest in the past. The use of state power as it functions in labor policy is a significant, but ultimately limited, means of affecting the organization of power in private economic institutions. When institutions and attitudes are embedded in society, legal changes can only do so much to change the underlying structures of the economy.[212] Furthermore, many of the rights for labor now enshrined in law historically were able to come about only after considerable social movement mobilization. It is hard to see many of the changes considered here being realized without considerable attention being brought to them through a politically mobilized social movement.

[212] "A mere change in a statutory law is not an institutional change unless it simultaneously and systematically alters the perceptions of individual agents as regards how the pattern of their strategic interaction is formed and accordingly induces a qualitative change in their actual strategic choices in critical mass." Aoki, *Toward a Comparative Institutional Analysis*, 233.

Whether or not the content of the conclusions reached here will be realized are beyond what any individual can claim, but the need to reconcile the realities of the current economic system with democratic values requires us to give them serious consideration. Worker participation in its various forms can fulfill the normative ends of economic democracy without requiring any particularly radical redefinition of property rights or state relationship, but such a change does require some need to recognize the political or quasi-public nature of the firm as an institution, or a collective affirmation of an ethical imperative to expand participatory democratic principles to the workplace.

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