

Does Federal Labor Law Preemption Doctrine Allow Experiments with Social Dialogue?

*Wilma B. Liebman**

This article was prepared for a workshop conducted at the Harvard Law School on September 19, 2017, in cooperation with the Economic Policy Institute, to examine whether federal labor law preemption doctrine would allow experiments in labor law reform at the state and local level of government to enable more workers to engage in collective bargaining and collective action. The ultimate question posed was whether modifying NLRA preemption would be a net positive or negative for workers and collective bargaining. The focus of this article is whether works councils – looking to European and German examples – provide a possible model for experimentation at the state or local level. The article also explores two alternative models.

I. Introduction

While the term “social dialogue” is largely foreign on our side of the Atlantic, it nonetheless captures what is sorely missing in our labor relations – and, indeed, broader political – culture.¹ In the United States, the institutional context for “social dialogue” is the 1935 National Labor Relations Act (NLRA) collective bargaining framework, including its § 9 principles of exclusivity and majoritarianism and §§ 2(5) and 8(a)(2)

* Chairman, National Labor Relations Board (NLRB) (2009-2011); Member, NLRB (1997-2009); Visiting Professor, Rutgers University School of Management and Labor Relations (2015-2017). I thank Marcha Isabelle Chaudry for her excellent assistance with this article, and Lynn Rhinehart and Matthew Ginsburg for their insightful comments.

¹ “Social dialogue is defined by the International Labor Office to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management . . . , with or without indirect government involvement. . . . The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work. Successful social dialogue structures and processes have the potential to resolve important economic and social issues, encourage good governance, advance social and industrial peace and stability and boost economic progress.” Social Dialogue, INTERNATIONAL LABOR ORGANIZATION, <http://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm> (last visited Oct. 2, 2017).

strictures on other forms of employee representation.² But with only this collective bargaining model, and without other formal institutional mandates or machinery for a social dialogue – in contrast, e.g., with German co-determination law or European Union works council directives – opportunities for expanding worker voice and power and for improving labor-management relations are circumscribed. Describing the system, “where no individual gets representation unless fifty percent of his or her peers also choose to join the same organization (and together they survive the organizing gauntlet...),” Thomas Kochan wrote, on the occasion of the 75th anniversary of the NLRA, “[n]o rational organizational or legal scholar would invent such a system today if starting with a clean sheet of paper.”³

The dilemma is, of course, compounded by a labor law that is weak, outdated, highly resistant to change, a lightning rod, and never fully accepted as legitimate.

Experimenting with works councils to catalyze a social dialogue at the state and local level would be a stab at circumventing this dilemma. As such, the idea is surely worth exploring and below I present some general thoughts, in an historical context.

But experimentation with government mandated works councils would undoubtedly re-ignite longstanding debates over both § 8(a)(2) and federal labor law preemption doctrines. As an alternative to wading too deeply into that tangle, I propose two different approaches that draw on existing models: (1) an incremental step, to focus on expanding or reinforcing existing state and local requirements that firms of a certain size establish safety and health committees – essentially works councils dedicated to one discrete set of workplace issues; and (2) to renew encouragement of area (and perhaps industry) wide labor management committees, as contemplated by the 1978 Labor Management Cooperation Act.⁴ Both models have had successes, albeit often fragile and limited in scope, duration, effectiveness, and power. The ultimate goals would be to create some

² 29 U.S.C. § 159 (2012), 29 U.S.C. § 152(5) (2012), 29 U.S.C § 158(a)(2) (2012).

³ Thomas A. Kochan, *Rethinking and Reframing U.S. Policy on Worker Voice and Representation*, 26 ABA J. LAB. & EMP. L. 231, 242 (2011).

⁴ Pub. L. No. 95-524 (codified at 29 U.S.C. § 175a (2012)). Tripartite wage boards in New York and elsewhere are another model worthy of exploration, but beyond the scope of this paper.

constructive dialogue between workers and their employers, and to promote a tripartite dialogue in communities engaging labor, business, and the state, in order to foster relationships of trust, and to provide effective forums or mechanisms for sharing information, addressing problems, and resolving conflict.

II. Pre-Wagner Act experiments with worker representation

Beginning in the late 19th century, during the Gilded Age, the notion of “industrial democracy” came to be widely regarded as necessary to resolve the “labor question.”⁵ But what industrial democracy meant was open for debate, subject to diverse interpretations. Prior to 1935, experimentation with forms of employee representation took place, with “battle lines” drawn over “which form industrial democracy should take.”⁶ As Clyde Summers explains, “[s]ome unions advocated worker ownership of factories.... Workers purchased shares of stock, had the right to vote, selected management, and determined major policies through group discussion. The Knights of Labor sought to establish ‘cooperative institutions, such as [would] supersede the wage system’ and ‘eventually make every man his own master – every man his own employer.’”⁷ The American Federation of Labor advocated the formation of strong independent trade unions and participation through collective bargaining to determine the rules governing the workplace.⁸

Employers, for their part, were eager to “forestall the emergence of powerful, independent union officials.”⁹ Some experimented with various forms of employee representation and employer sponsored employee involvement programs, including works councils. As Bruce Kaufman has written, during the First World War a number of leading companies

⁵ Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*; 28 CLEV. ST. L. REV. 29, 29-33 (1979). See generally JOSEPH A. MCCARTIN, *LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921* (1998).

⁶ Summers, *supra* note 5, at 33.

⁷ *Id.* at 29.

⁸ *Id.* at 30.

⁹ *Id.* at 33.

sought to promote employee participation and a sense of fair dealing by creating shop committees, works councils, and employee representation plans. Billed as a nonunion form of “industrial democracy,” these representational structures were typically established, operated, and financed by the company and were limited in coverage to a particular department, plant, or company. They provided for periodic joint meetings between elected worker representatives and selected management representatives, and purportedly promoted improved communication, problem-solving, and dispute resolution with respect to both production and employment issues. The representational structures emphasized conciliation, cooperation, and mutual gain....¹⁰

Kaufman writes that the “heyday of this form of nonunion industrial democracy was the 1920s, an historical period now commonly referred to as the ‘welfare capitalism’ era, when several hundred medium-large employers...established representation plans covering a total of more than one million workers.”¹¹ But by 1935, the welfare capitalism model –

lay in tatters, with ... its crown jewel – the nonunion employee representation plans – outlawed by the newly enacted National Labor Relations Act. The explanation for this turnabout is found in the events of the Great Depression and, particularly, in the macroeconomic recovery program adopted by the newly elected administration ... in the summer of 1933.¹²

Jefferson Cowie and Nicholas Salvatore argue that pre-New Deal “welfare capitalism” did not just break

down of its own accord with inevitable rise of the welfare state and the modern union movement. Had it not been for the economic, and thus political, trauma of the thirties, the course of corporate paternalism might well have continued uninterrupted as the main current of American industrial relations even in the postwar era. Sanford Jacoby builds on this, showing the enduring but overlooked legacy of welfare capitalism even at the height of the New Deal’s powers and certainly long after their decline.¹³

¹⁰ Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL’Y REV. 729, 735-736 (1999).

¹¹ *Id.* at 735-736.

¹² *Id.* at 737.

¹³ Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History*, 74 INT’L LAB. & WORKING-CLASS HIST. 3, 21-22 (2008) (citing SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1998)).

Industrial democracy ultimately came to have meaning in the United States through the institution and practice of collective bargaining. But that did not happen overnight. The ongoing battles were not resolved until the economic crisis of the 1930s, with the array of New Deal legislation including the Wagner Act.¹⁴ With the passage of the Wagner Act and its collective bargaining model in place, worker ownership efforts fizzled (although these are now being explored again), and employer sponsored employee participation programs were outlawed by § 8(a)(2) of the NLRA.

III. Section 8(a)(2) and works councils

Discussions of works councils in the United States were revived several years ago when Volkswagen explored creating one at its Chattanooga plant. At the time, there was a fairly widely held view that if a non-union employer in the United States were to *unilaterally* establish a works council, at least one akin to the German model, it would violate § 8(a)(2). Conversely, there seemed to be a fairly widely held view that Volkswagen could negotiate the creation of a works council with a lawfully recognized or certified union representative, like the United Auto Workers.¹⁵ The Chamber of Commerce took issue with that proposition.¹⁶

The “primary legislative purpose” of § 8(a)(2) “was to eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions.” Senator Robert Wagner explained that “[g]enuine collective bargaining is the only way to attain equality of bargaining

¹⁴ See Summers, *supra* note 5, at 34; MCCARTIN, *supra* note 5, at 7-8, 225.

¹⁵ Steven Greenhouse, *VW and Its Workers Explore a Union at a Tennessee Plant*, N.Y. TIMES, Sept. 6, 2013, <http://www.nytimes.com/2013/09/07/business/vw-and-auto-workers-explore-union-at-tennessee-plant.html>; Matthew Finkin & Thomas Kochan, *The Volkswagen Way to Better Labor-Management Relations*, L.A. TIMES, Jan. 20, 2014, <http://articles.latimes.com/2014/jan/20/opinion/la-oe-finkin-vw-work-councils-20140120>.

¹⁶ U.S. Chamber of Commerce Workforce Freedom Initiative, *A New Organizing Paradigm? Works Councils and the National Labor Relations Act* 11 (Nov. 2015), <https://www.uschamber.com/workforce-freedom-initiative>.

power.... The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity....”¹⁷

In outlawing employer domination or support of “labor organizations” in § 8(a)(2), Congress clearly intended by the expansive definition of “labor organization” in § 2(5) to “bring within its definition a broad range of employee groups, and to expressly include an ‘employee representation committee.’”¹⁸ Senator Wagner justified this broad scope by stating that “unless these plans, etc., are included in the definition...most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act.”¹⁹

As Devki Virk has written, a review of “the legislative history of the NLRA reveals that Congress faced a ... tide of public and business opinion in favor of employer-initiated ‘employee representation’ plans. Despite volumes of testimony from protesting business leaders and from employees participating in these programs, Congress nevertheless chose to prohibit such organizations as inimical to the Act’s objectives.”²⁰

There is little doubt that a works council patterned, for example, on the European Union²¹ or the German²² model (even short of co-determination rights) would meet the § 2(5)

¹⁷ *Electromation, Inc.*, 309 N.L.R.B. No. 163, 1010 (Dec. 16, 1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

¹⁸ *Id.* at 994.

¹⁹ *Id.*

²⁰ Devki K. Virk, Note, *Participation with Representation: Ensuring Workers’ Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 731 (1994); see also Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 868 (2011).

²¹ European Works Councils, required by European Union directives, represent the European employees of a transnational corporation. Through the councils, workers are informed and consulted by management on the progress of the business and any significant decision at European level that could affect their employment or working conditions. Member states must provide for the right to establish European Works Councils in companies or groups of companies with at least 1000 employees in the EU (and the other countries of the European Economic Area), when there are at least 150 employees in each of two Member States. Resources on European Works Councils can be found on Employment Social Affairs & Inclusion, EUR. COMMISSION, <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211> (last visited Oct. 5, 2017), and European Work Council Database, EUR. TRADE UNION INST., <http://www.ewcdb.eu/> (last visited Oct. 5, 2017).

definition of a “labor organization.”²³ Indeed, it would resemble the type of employee representation plans that proliferated before the NLRA was enacted and that Congress had in mind in expanding the § 2(5) definition to cover “employee representation committees.”²⁴

Further, if the works council were created, maintained and financed by a nonunion employer, and empowered to act in a representative capacity and to engage in bilateral dealings with the employer over statutory subjects, that would violate § 8(a)(2)’s domination, interference and support prohibitions.²⁵ Absent a statutory mandate in the United States for instituting a works council (as exists in German law), an employer that sought to create one would be “the impetus behind the formation.”²⁶ The employer would, at the outset, control the choice whether to set up a works council and the process of formation. If it also determined its structure and purpose, it would be imposing its own unilateral choice of dealing and endowing the representative body with specified, rights, powers and functions. This would be considered unlawful control, not the free choice guaranteed by §§ 7 and 8(a)(2) of the NLRA.²⁷

²² Under the German Works Constitution Act, works councils may be elected in establishments with at least 5 employees. The costs of the works council are borne by the employer. Works councils enjoy specified rights under the Works Constitution Act, ranging from the right to information and consultation (e.g., over dismissals, introduction of new technology, operational changes) to the right of co-determination over social matters (e.g., company rules, working hours). Betriebsverfassungsgesetz, Sept. 25, 2001, BGBl. I at 2518, last amended by Gesetz, July 29, 2009, BGBl. I at 2425 (F.R.G.); translated at BETRIEBSVERFASSUNGSGESETZ DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, http://www.gesetze-im-internet.de/englisch_betrvg/works_constitution_act.pdf (last visited, Oct. 5, 2017). See also Rebecca Page, *Co-Determination in Germany – A Beginner’s Guide* (Hans Bockler Stiftung, Working Paper No. 33, June 2011), https://www.boeckler.de/pdf/p_arbp_033.pdf; Walther Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 53 (Joel Rogers & Wolfgang Streeck eds., 1995).

²³ A works council so modeled would easily satisfy the *Electromotion* framework, under which the Board will find that a committee is a “labor organization” if (1) employees participate; (2) the organization exists at least in part for the purpose of “dealing with” employers; and (3) these dealings concern conditions of work or concern other subjects listed in § 2(5), such as grievances, labor disputes, wage, rates of pay or hours of employment. “Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of ‘employee representation committee or plan’ under Section 2(5). . . .” *Electromotion*, 309 N.L.R.B. No. 163 at 994.

²⁴ *Id.* at 993.

²⁵ 29 U.S.C. § 158(a)(2) (2012).

²⁶ *Electromotion*, 309 N.L.R.B. No. 163 at 996.

²⁷ 29 U.S.C. §§ 157 and 158(a)(2) (2012).

Discussing the proscriptions of § 8(a)(2), with the broad definition of labor organization, Joel Rogers has written that:

For at least some nonunion employers, this imposes a restraint on desired innovations in worker participation and ‘empowerment’ in workplace governance. E.g., an employer that set out the purposes and powers of a committee making decisions concerning the terms and conditions of employment (e.g., on health and safety or the use of a new technology), subsidized that committee, or appointed some of its managers to it – even if it permitted workers free choice in selecting their representatives to it— would likely be in violation of section 8(a)(2).²⁸

During the 1980s and 90s, cooperative or participative management practices gained momentum with many firms. Employee involvement, quality circles, quality of work life, and team approaches won advocates in business, policy and academic circles. Proponents viewed these structures as crucial to economic vitality and competitiveness. “The structures and, in many cases, the rationales, of these programs bear striking similarity to the welfare capitalism initiatives undertaken” before the 1935 NLRA was enacted and outlawed most of them.²⁹

These efforts led to the 1992 NLRB decision in *Electromation*, which provides the current framework for analyzing the legality of these practices, and the “courts have consistently interpreted § 8(a)(2) as a broad proscription against employer formation of or participation of almost any kind in employee committees or organizations which function in a representational capacity.”³⁰ While there may be a widely held view that greater employee involvement and participation in managerial decision making should be “facilitate[d],” to the extent that “employers turn to a form of representational employee participation structure, in which a subset of employees represent their peers in meetings

²⁸ Joel Rogers, *United States: Lessons from Abroad and Home*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 377 (Joel Rogers & Wolfgang Streeck eds., 1995).

²⁹ Virk, *supra* note 20, at 731.

³⁰ *Electromation v. NLRB*, 35 F.3d 1148, 1164 (7th Cir. 1994).

and discussions with management....it is at this point that nonunion employers run into the constraints” of the NLRA.³¹

Employers, of course, may introduce legitimate employee participation practices without violating § 8(a)(2), especially those that do not function in a representational capacity, and which focus solely on increasing company productivity, efficiency, and quality control. The NLRB has itself described “safe havens” for participation programs.³² But a works council, at least as commonly envisioned, would not fit within these parameters. Nor, in my view, would a works council functioning in a representational capacity and engaging in bilateral dealings with the employer be the equivalent of the employee teams and committees created by Crown Cork & Seal and delegated substantial managerial authority, found by the NLRB *not* to be employer dominated labor organizations.³³

Today, however, the plain fact is that within much of industry, modern management practices of employee involvement of one sort or another are institutionalized, and many probably run afoul of § 8(a)(2), although most are unchallenged. Is this unilaterally imposed modern management “dialogue” a return to 1920s welfare capitalism? Would mandated works councils be something different?

IV. State or local mandates to establish works councils—

A. Legal issues

If a works council model for state/local mandate were to be designed, basic questions would have to be addressed, including:

- What would be the nature of the participation rights afforded the works council, ranging from the narrower right to information and consultation, as in the European Union, to the far broader co-determination right, as German law requires for certain social matters;

³¹ Kaufman, *supra* note 10, at 737-738.

³² *See, e.g.*, Polaroid Corp., 329 N.L.R.B. 424, 425 (1999); E.I. du Pont & Co., 311 N.L.R.B. 893, 894 (1993).

³³ Crown Cork and Seal Company, Inc., 334 N.L.R.B. 699, 706 (2001).

- Who would bear the costs of the works council;
- Who would be represented on the works council and how would works council members be chosen, specifying, e.g., how members would be chosen in a unionized workplace;
- What subjects would be within the works council's authority;
- Who would set the agenda for meetings;
- How would disputes within the council and with the firm be resolved; and
- In a unionized workplace, how would the works council interact with the union representative?

Presumably, a state law could be drafted that contained specific requirements for the works council's purpose, structure, composition, and functions, and if it also provided for joint determination of the works council's agenda by workers and management, the state law arguably would protect the works council from employer domination or interference. A good argument could be made that because a state mandated works council would have the state's imprimatur, the employer would not then be "the impetus behind the formation" and thus would not run afoul of § 8(a)(2). In other words, the mandate for creating the works council and all of the structural and other arrangements of the council – including employees' selection of their own representatives – would be specifically set forth by statute rather than by employer fiat, and the employer would not be free to terminate the works council at will. In this situation, employees would seemingly have a meaningful involvement in workplace issues, free of unlawful employer domination or interference within the meaning of § 8(a)(2), because the employer would be acting pursuant to a mandate of external law rather than undertaking unilateral action freely determined.³⁴

But beyond that legal question, any mandated works council initiative would raise a serious question whether federal labor law would preempt the state law. The NLRA is largely silent as to preemption, but the Supreme Court has interpreted it to be broadly preemptive of state regulation that conflicts with it. The *Garmon* preemption doctrine

³⁴ Gregory Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J. L. & PUB. POL'Y 65, 72-73 (1994); *Vanalco, Inc.*, Case 36-CA-7612, NLRB General Counsel's Advice Memorandum 4 (Aug. 21, 1996), (hereinafter *Vanalco* Advice Memo).

concerns the core of the activity covered by the NLRA and sets forth the “general rule” that “States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.”³⁵ In *San Diego Building Trades v. Garmon*, the Supreme Court declared that:

[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law...[t]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.³⁶

The Court has explained, “The [Garmon] rule is designed to prevent ‘conflict in its broadest sense’ with the ‘complex and interrelated federal scheme of law, remedy, and administration.’”³⁷

A basic question is whether the NLRA’s uniform scheme of national labor policy – including its collective bargaining model – provides “a ceiling that prevents states from affording ... alternative forms of representation.”³⁸ Surely, a state law mandating the creation of works councils would create a “substantive conflict” with the federal scheme by requiring a “supplemental” system of representation that Congress *expressly rejected* in enacting § 8(a)(2).³⁹ And, the substantive conflict over the form of employee representation would touch a core concern of the federal law’s “comprehensive regulation of industrial relations.”⁴⁰ While creating the works council pursuant to state mandate would arguably immunize the “domination” element of § 8(a)(2), I question

³⁵ *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286-287 (1986).

³⁶ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 237 (1959) (emphasis added).

³⁷ *Id.* at 244. See also *Gould*, 475 U.S. at 284 (holding the state’s policy of refusing to purchase goods and services from recidivist NLRA violators was preempted because it imposed a “supplemental sanction” that conflicted with the NLRA’s “integrated scheme of regulation”).

³⁸ ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW ANALYSIS AND ADVOCACY* 1239 (2013).

³⁹ *Brown v. Hotel & Restaurant Employees Int’l Union Local 54*, 468 U.S. 491, 503 (1984); *Gould*, 475 U.S. at 286-287.

⁴⁰ *Brown*, 468 U.S. at 503; *Gould*, 475 U.S. at 286, 288.

whether that circular reasoning would defeat a preemption claim. It is difficult to see how under existing preemption doctrine a state law compelling an employer to engage in conduct that under federal law would otherwise be an unfair labor practice – i.e., dealing with a company-supported employee organization over wages, hours, working conditions or other mandatory bargaining topics – would *not* be preempted. Thus, a state mandate to create a works council may save an employer from violating § 8(a)(2), but that same mandate would tend to show that the state law is an attempt to evade the federal prohibition on company-dominated employee organizations and thus would be preempted.

Preemption doctrine as developed by the courts is confusing. But the mandated works council scenario does not, in my view, present an optimal case for seeking to modify preemption doctrine to allow more innovation, as it would implicate what is – for better or worse – a central feature of the law. Pursuing that path would likely be either futile or risky (unless gradual erosion of the core statutory scheme by conflicting state regulation is an acceptable outcome). The real “culprit” here in terms of impeding innovation with forms of representation is more §§ 8(a)(2) and 9 than it is preemption doctrine. To the extent that preemption doctrine protects core NLRA rights from state interference, that would seem to be a net positive for workers and collective bargaining, especially at this historical moment. There are surely other contexts for testing the limits of federal preemption.⁴¹

⁴¹ For a useful discussion urging that pressing the limits of federal preemption is worth considering, however, see Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. REG. 355, 361 (1990), suggesting that *Garmon* might “permit some meaningful facilitation of collective bargaining by the states,” and proposing areas where this could be possible. I do not deal here with the type of state and local intervention, termed “tripartite lawmaking” by Benjamin Sachs, that skirts preemption in rewriting federal labor law rules of organizing and bargaining through non-traditional “political exchanges,” e.g., granting of zoning and development permits, merger approval or changes to Medicaid reimbursement. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1171 (2011). In brief, though, if a hypothetical attempt were made to include a works council requirement in such a tripartite ordering, it would still entail mandating something expressly prohibited by the NLRA, at least in the context of an unorganized worksite -- as opposed, e.g., to requiring behavior allowed, but not required, by the NLRA, such as card check and neutrality. That seems to be a significant difference. On the other hand, an argument could perhaps be made that since the agreement to create a works council as part of a tripartite “exchange” includes an *agreement* between an

B. State or local mandates to establish works councils: strategic questions--

Beyond the preemption debate, an initiative to mandate works councils would also likely reignite earlier arguments over the wisdom of § 8(a)(2).⁴² These vigorous debates came to a head over the Teamwork for Employees and Managers (TEAM) Act passed by Congress but vetoed by President Clinton in 1996.⁴³ The legislation would have added a proviso to § 8(a)(2) to allow a nonunion employer to “establish, assist, maintain, or participate” in an organization in which employees participate to “address issues of mutual interest” outside of collective bargaining.⁴⁴

On one side of the debate, for example, Thomas Kohler has written that

[P]articipative theories have been formulated on management’s behalf and are intended to secure worker cooperation and identity with the goals and directives of their employers. The use of integrative devices may help to promote the belief in and acceptance of managerial authority amongst employees by making them feel as if they have a share in its exercise. Such schemes thus serve to palliate the austereness of managerial power without fundamentally shifting the locus of ultimate decisional authority. At base, then, they can be viewed as devices that are more manipulative than democratic in intent. This is not to suggest that participatory theories and programs are wholly without value.... But their nature and limits must be kept in perspective.... [they] are not some strife-free form of collective bargaining.... Control over the relationship in these schemes ultimately remains with management.⁴⁵

Responding to Kohler, see, e.g., Shaun G. Clarke (“Professor Kohler frames the issue as if repeal of section 8(a)(2) will mean the end of collective bargaining. But repeal is not an ‘all or nothing’ choice between the two models.”).⁴⁶ See also Karl Klare (“It is a

independent trade union and an unorganized employer, that would not violate the §8(a)(2) restriction on domination and unlawful control, as it would not be unilateral employer action.

⁴² See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1417-1418 (1993) (discussing “jurisprudential debates over the ban on collaborative workplace entities.”).

⁴³ Teamwork for Employees and Managers Act (TEAM Act) of 1995, H.R. 743, 104th Cong. (1996).

⁴⁴ *Id.*

⁴⁵ Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 499 (1986).

⁴⁶ Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2041 (1987).

mistake to imagine that we face a choice between adversarial and cooperative industrial relations models. Democratic values and economic growth possibilities will be sacrificed unless the design of workplace structures aims to combine adversarial and cooperative institutions and practices.”⁴⁷

There are, of course, strong calls for lifting the § 8(a)(2) restrictions to allow innovation in workplace relations, even aside from the TEAM Act. These have likely increased over the years as the labor law has aged and collective bargaining has declined. For example, on the occasion of the NLRA’s 75th anniversary, Richard Freeman advocated removing the § 8(a)(2) restrictions on company-sponsored organizations. He reasoned that the

[S]tanding of the law suffers more from outlawing common practices than from firms that talk with worker representatives. Throughout the advanced world works councils perform this function, usually with members elected by employees independently of collective bargaining. Canada, whose labor relations system is closest to the United States, allows management to deal with groups of nonunion employees on any issue of concern, including the terms and conditions of employment, as long as these discussions and potential agreements do not interfere with collective bargaining... The Canadian system works reasonably well. American employers who want to deal with their workers as a collective group short of collective bargaining should not have to break the law to do so. Make these organizations legal and give the workers involved some legal protections...⁴⁸

To the best of my knowledge, however, there is still no consensus on the wisdom of the § 8(a)(2) restrictions, and certainly no consensus about the wisdom of *state mandated* works councils, especially in non-union workplaces. Labor would likely be split (although some may now have second thoughts about the TEAM Act veto), and business, while welcoming freedom from § 8(a)(2) restrictions, would surely resist any such mandates.

⁴⁷ Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L.L. REV. 39, 52 (1988).

⁴⁸ Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 ABA J. LAB. & EMP. L. 327, 342-343 (2011).

Another practical and important consideration is whether, in a nonunion workplace, the works council would actually give workers any real power. Laura Cooper has written about the dozens of employees who testified before Congress in 1934 and 1935 in favor of their company's representation plans and the workplace voice they were afforded. Some of the plans introduced into the record "make clear that many such plans offered protections for employees that in some cases only became commonplace in collective bargaining agreements decades later."⁴⁹

But Clyde Summers has argued, with respect to the pre-Wagner Act experiments, that although employers often created company unions in the name of industrial democracy, these seldom gave workers an effective voice.⁵⁰ They had little economic strength and had no financial resources, as they were economically dependent on the employer. The workers elected had no training or experience to be effective representatives. They had no one whom they could call for help, and they were completely subservient to the employer's control because they had no protection against retaliation for speaking up. (Now, of course, § 8(a)(1) would afford protection.) "Instead of providing industrial democracy, company unions provided an empty form which served to obstruct collective bargaining."⁵¹

Kohler has observed that, "in the presence of a union, worker participation programs can produce important benefits for all the parties to the employment relationship... In the absence of a self-organized, autonomous employee association, however, the degree of worker participation in management decision making will remain, at best, superficial."⁵² More recently, a European expert who advises companies on their European Works Councils has made the case to me that in workplaces without a trade union the works councils are generally weak and ineffective. This is not to say that the notion should not be explored. There are legitimate ways to enhance workplace committee effectiveness.⁵³

⁴⁹ Cooper, *supra* note 20, at 844-845.

⁵⁰ Summers, *supra* note 5, at 33.

⁵¹ *Id.*

⁵² Kohler, *supra* note 45, at 547.

⁵³ See *infra* text accompanying note 21.

And a “foot in the door” to introduce workplace consultation to a broader audience of workers may have value in and of itself, even if not the equivalent of real collective bargaining. But there are numerous strategic questions, as well as legal obstacles.

V. State laws mandating workplace safety and health committees

An alternative, more incremental step to increasing worker voice and/or collective action in the workplace would be through state laws giving workers a means to participate in safety and health issues. As of 2014, there were sixteen states that required some or all employers to establish safety and health committees (SHCs) with management and employee representatives.⁵⁴ These requirements are imposed through state occupational safety and health or workers’ compensation laws, which vary in their provisions.⁵⁵ Washington State has required joint safety and health committees for employers with eleven or more employees since 1945.⁵⁶ Today, in states regulated by the federal Occupational Safety and Health Act, employers are not required to establish SHCs. Other countries, however, have adopted similar requirements, including Canada. Each of its provinces and the federal government have required at least some employers to have SHCs.⁵⁷

In the 1990s, Congress considered (but never enacted) the Comprehensive Occupational Safety and Health Reform Act (COSHRA), whose central focus was the requirement that all employers with eleven or more employees establish joint SHCs comprised of management and employee representatives.⁵⁸ At the time, there were already twelve

⁵⁴ Thomas J. Bukowski, *Effective Safety Committees*, SAFETY & HEALTH MAG. (May 23, 2014), <http://www.safetyandhealthmagazine.com/articles/10413-effective-safety-committees>. In addition to the sixteen states listed, “states not included may have mandatory safety committee requirements for certain industries, sectors or organizations using specific work processes. These states also may offer incentives such as reduced workers’ compensation premiums or reduced violation penalties.”

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See OSH Answers Fact Sheet, CAN. CTR. OCCUPATIONAL HEALTH & SAFETY (Oct. 23, 2017), <https://www.ccohs.ca/oshanswers/hsprograms/hscommittees/whatisa.html>.

⁵⁸ S. 575, 103rd Cong. (1993). See generally Watchman, *supra* note 34, at 71 (discussing COSHRA).

states with similar requirements.⁵⁹ Gregory Watchman was chief labor counsel to the Senate labor subcommittee that was managing the proposed legislation. Examining the state landscape as of 1994, he concluded that

[A] review of this broad-based experience with SHCs yields substantial evidence – both systemic and anecdotal – that SHCs can be adapted to a wide range of workplaces and that they reduce workplace fatalities, injuries, and illnesses. SHCs also improve labor-management relations by allowing workers and management to work together toward a mutual goal and by offering a more cooperative alternative to OSHA inspections and enforcement.⁶⁰

He rejected as “unfounded” claims that these state-mandated SHCs would “run afoul of Section 8(a)(2)” as employer-dominated employee representation committees.

The proposed SHCs are fully consistent with the NLRB’s recent interpretations of Section 8(a)(2). COSHRA’s statutory scheme sets forth specific requirements for the SHCs purpose, structure, composition and functions. By providing for joint determination of the SHC’s agenda, COSHRA protects SHCs from employer domination or interference.⁶¹

I am aware of no case where a court or the NLRB itself has ruled on whether these state SHC requirements conflict with § 8(a)(2), but the Division of Advice issued two determinations in the mid-1990s.⁶² In both cases the committees were found to be § 2(5) labor organizations, but the two cases reach different results on the question whether the

⁵⁹ Watchman, *supra* note 34, at 71.

⁶⁰ *Id.* at 72.

⁶¹ *Id.* The Board has found that *employer* created safety committees are unlawfully dominated §2(5) labor organizations where the committees engaged in a bilateral dealing with the employer, where the employer retained veto power over any committee action, and employees had no independent voice in determining any aspect of the composition, structure or operation of the committees. But it also identified safe havens for lawful cooperation. *See, e.g.,* E.I. du Pont & Co., 311 N.L.R.B. 893 (1993) (employer unlawfully dominated and dealt with safety committees, but all-day safety conferences were not unlawful because they were more like brainstorming sessions and did not decide on proposals for improved safety). The *E.I. du Pont* Board also clarified that “dealing” does not occur if the committee is governed by “majority decision-making, management representatives are in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management.”

⁶² Goody’s Family Clothing, Inc., Case 10-CA-26718, NLRB General Counsel’s Advice Memorandum (Sept. 21, 1993) (hereinafter *Goody’s* Advice Memo); *Vanalco* Advice Memo.

employer unlawfully dominated or interfered with the committee by establishing it pursuant to state mandate.

In *Vanalco, Inc.*, the general counsel dismissed a charge that the employer unlawfully assisted a safety committee it established to comply with Washington State law by paying employees for meetings and by providing meeting space.⁶³ The general counsel found no unlawful interference or support with the committee.⁶⁴ There was “no evidence that when the Employer initially set up the committee it took full responsibility and employees were not then aware of the mandate of the state code.”⁶⁵ Noting that the employer also asserted that both federal and state wage and hour laws required its payment of employees while sitting on the committee, the memo concluded “this is hardly a case where an employer initiated the establishment of a safety committee....”⁶⁶

In *Goody's Family Clothing, Inc.*, the general counsel authorized complaint alleging that the employer violated § 8(a)(2) by reformulating and maintaining an earlier established safety committee, shortly after its employees voted to unionize, and in response to a new State of Tennessee statute mandating establishment of such committees.⁶⁷ The employer had refused the union's request to discuss the procedure for selection of employee representatives to the committee.⁶⁸ (The Advice memorandum stated that a § 8(a)(5) complaint alleging various violations was to issue, but those issues were not submitted for advice.)⁶⁹ The Advice memo concluded that the Employer unlawfully created and dominated the Committee when, in reformulating the safety committee, it

added additional Employer representatives, revamped the Committee's procedures, told the members that they would now act in conformity with the Tennessee law, provided space for the Committee's meetings, and paid

⁶³ *Vanalco* Advice Memo, at 4.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Goody's* Advice Memo, at 1.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

the Committee members for the time spent in meetings.⁷⁰ Furthermore, the Employer's refusal to accede to the Union's demands for bargaining over the procedures for the selection of employee members additionally demonstrates the Employer's unlawful control over the Committee.⁷¹

The general counsel also rejected the Employer's defense that the state law required it to deal with the safety committee concerning mandatory subjects of bargaining, finding that the Tennessee law was preempted because it was written in such a way that an employer would necessarily violate § 8(a)(2) by complying with it.⁷² The general counsel concluded that the Tennessee law was preempted because it "actually conflicts" with the §§ 8(a)(2) and (5) prohibitions, and "directly undermines the Congressionally-recognized policies supporting these prohibitions."⁷³ As the advice memo explained, the law:

requires that the committees be set up in such a way that they are inevitably dominated by employers within the meaning of Section 8(a)(2) – i.e., employers create the committees, determine their structure and procedures, set their agenda in accordance with the law, pay employees to attend meetings, and even determine which employees will serve on the committees.⁷⁴ It also requires employers to 'deal directly' with their employees serving on the committees, as this concept has been defined under Section 8(a)(5) in derogation of the exclusive representative status of elected collective bargaining representatives.⁷⁵

No further litigation of this case is apparent from the Board's docket, and no apparent preemption claim was made in *Vanalco*. Nor, to the best of my knowledge, has there been any NLRA preemption litigation over these state safety and health laws. These two Advice cases can perhaps be reconciled on the basis that *Goody's* involved a unionized facility where the employer bypassed the union in setting up the committee, including the selection of members, demonstrating actual employer control of the committee.

⁷⁰ *Id.*

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 4 (footnotes omitted).

Preemption claims about state safety and health committee laws might be more easily defeated than preemption claims about state works council mandates. The latter, in requiring an alternative form of worker representation to be created, would be a far broader interference with the NLRA collective bargaining model than a safety and health committee. While both types of committees would presumably be empowered by state law to deal with mandatory subjects of bargaining, the SHC would have a narrower mandate and one that would serve primarily to advance the purposes of federal and state occupational safety and health laws, as well as workers compensation laws. The SHCs would give workers a chance to have a voice on those issues, but the state laws' primary goal would be to afford safe workplaces and not alternatives to collective bargaining. (Another factor in a preemption analysis would be just how specific the state mandate is, or, conversely, how much control the laws actually afford the employer in initiating, structuring, and operating the committee.)

With respect to competing federal laws, the Supreme Court in *Southern Steamship* reminded the Board that it may not effectuate the policies of the NLRA “so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”⁷⁶ Rather, as the Court cautioned, the “entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.”⁷⁷ The Occupational Safety and Health Act (OSHA) itself specifically contemplates employee participation in the enforcement process, such as walk-around rights during physical inspections, and that states may design their own plans that are at least as effective as the federal scheme.⁷⁸ In fact, OSHA routinely has approved state plans in states that include mandatory SHCs. In this context, and in harmony with the *Southern Steamship* principles, there is a strong argument that any tension between the requirements of the NLRA and OSHA should be reconciled to permit state-mandated SHCs as long as the state law mandating the committee is sufficiently tailored as to not permit employer domination or to allow the

⁷⁶ *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

⁷⁷ *Id.*

⁷⁸ See 29 U.S.C. § 657(e) (2012) (walk-around rights); 29 U.S.C. § 667 (2012) (state plans).

committee to deal with workplace issues other than health and safety – basically, the sort of law at play in *Vanalco*.⁷⁹

Business may be less resistant to the idea of state/local mandates to create SHCs than to more broad based works council mandates. Thousands of employers already have established SHCs voluntarily or through collective bargaining. Most employers are (or at least should be) concerned about costs associated with safety and health violations, and many acknowledge the value of employee involvement in making workplace safety and health programs effective. A 2013 article posted on the website of the Society for Human Resource Management confirms that “[e]stablishing workplace-safety committees is one way management can encourage employees to participate in implementing and monitoring the company’s safety program.”⁸⁰ To have a truly effective safety committee, it explains, “you must be prepared to invest time and energy in developing it.”⁸¹ It lays out “reasons why a safety committee loses or never attains effectiveness,” including “[f]ailure to articulate a purpose and top-heavy management representation,” undefined roles, lack of training, insufficient budget, inadequate size, lack of formal meeting agenda, lack of communication, lack of follow-up, lackluster participation, management domination, and inability to effect change.⁸² These points are generally relevant to making workplace committees of all kinds effective, especially in nonunion firms.

VI. Labor-management committees and the law

U.S. labor law is widely viewed as promoting an adversarial collective bargaining process between an employer and an independent trade union, but that is not the whole

⁷⁹ But see *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 73 (1975), where even the objective of eliminating race discrimination in employment was held not to supersede the §9 exclusive representation principles. “The policy of industrial self-determination as expressed in §7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.” *Emporium Capwell* at 70.

⁸⁰ Roy Maurer, *Making Workplace-Safety Committees Work*, SOC’Y HUM. RESOURCE MGMT. (Aug. 8, 2013), <https://www.shrm.org/ResourcesAndTools/hr-topics/risk-management/Pages/Workplace-Safety-Committees.aspx>.

⁸¹ *Id.*

⁸² *Id.*

story. Clearly, cooperation is envisioned.⁸³ Collective bargaining itself is a process of negotiation, compromise and agreement, but U.S. labor law does not mandate cooperative dealings or mechanisms comparable, for example, to those dictated by German co-determination principles.

A little known 1978 amendment to the labor law does, however, reinforce labor-management cooperation as a policy goal. As Senator Jacob Javits described the measures enacted as the Labor-Management Cooperation Act:

The collective bargaining process is, of course, our principal means for joint determination of the terms and conditions of employment. But there is a need for a new, supplemental dimension in labor management relations in our country, to wit: a forum in which an ongoing dialog could be established, to discuss and involve workers in matters not addressed normally in the framework of collective bargaining... joint labor-management cooperative committees can do much to harmonize the relationship between labor and management in the workplace – and stabilize the labor relations climate – in a particular area and bring out new values.⁸⁴

These committees have a long history in the United States, on a plant, area, and industry level.⁸⁵ Not viewed as substitutes for the bargaining process, but rather as complementary to it, these committees attempt to resolve problems in a nonadversarial manner. They can, Senator Javits added, “do much to enlarge the community of interests between workers and management and assist both in recognizing mutually beneficial solutions to common problems.”⁸⁶

Senator Javits was the principal sponsor of the Labor Management Cooperation Act. It amends the NLRA (§ 205A) and authorizes the Federal Mediation and Conciliation

⁸³ Barenberg, *supra* note 42, at 1388; *Electromation*, 309 N.L.R.B. No. 163 at 1010.

⁸⁴ Remarks by U.S. Senator Jacob Javits on Aug. 22, 1978, regarding the portion of S. 2570 later codified at 29 U.S.C. § 175a (Labor Management Cooperation Act), 124 CONG. REC. 27,239 (1978).

⁸⁵ Richard D. Leone & Michael F. Eeley, *Research Summaries: The Origins and Operations of Area Labor-Management Committees*, MONTHLY LAB. REV., May 1983, at 41.

⁸⁶ 124 CONG. REC. 27,239 (1978).

Service to assist (including by financial grants) in the establishment and operation of plant, area and industrywide labor management committees that are for the purpose of:

- Improving labor management relationships, job security, organizational effectiveness;
- Enhancing economic development; or
- Involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.⁸⁷

Section 205A(a)(1) of the Labor Management Cooperation Act authorizes the FMCS to provide assistance in the establishment and operation of plant, area and industry wide labor management committees which “have been organized jointly by employer and labor organizations representing employees in that plant, area, or industry” for the above specified purposes.⁸⁸ Section 205A(b)(1) directs that no assistance may be provided to a *plant* labor management committee unless the employees in the plant are represented by a union with a collective bargaining agreement in place.⁸⁹

Notably, however, § 205A(b)(2) expressly states that nothing in the provision prohibits the participation in an *area or industrywide committee* by an employer whose employees are *not* represented by a labor organization.⁹⁰ In other words, even absent government mandated works councils, state and/or local governments could initiate the formation of area (or industry) wide labor management committees to address the purposes spelled out in the Labor Management Cooperation Act, as described by Senator Javits. As long as unionized employers are part of the committees, non-union firms could participate.

Participation by non-union employers in these industry or area committees would allow their employees to join in programs alongside unionized workers, such as job training, problem solving or communication skills coaching, or outreach to local political and

⁸⁷ 29 U.S.C. § 175a (2012). The Labor Management Cooperation Act also amended §302 of the Labor Management Relations Act to permit employer contributions to LMCs established for one or more of these purposes. See 29 U.S.C. § 186(c)(9) (2012).

⁸⁸ 29 U.S.C. § 175a(a)(1).

⁸⁹ 29 U.S.C. § 175a(b)(1).

⁹⁰ *Id.*

community leaders, especially around issues of economic development. The nonunion employees would have the chance to learn about the experience of unionization from unionized employees in their area or industry. Of course, the involvement of non-union firms in these committees would not mean that their workplaces were de facto unionized. For example, requiring works councils to be created in a non-union firm, in the guise of “improving labor management relationships,” would likely still run into § 8(a)(2) or preemption problems, or perhaps even run afoul of § 205A(b)(3), which prohibits FMCS grants to LMCs that discourage the exercise of § 7 rights (including the right to refrain from unionization).⁹¹

In the 1970s, a number of area-wide labor management committees were created, mainly in the throes of an immediate crisis and largely in the Northeast and Midwest, where the local economic base was deteriorating.⁹² Different in focus than plant or industry committees, the area committees generally “bring together the chief spokespersons of local labor unions and business organizations in an effort to resolve problems affecting the economic well-being of an entire community, rather than a particular worksite or industry.”⁹³

The Jamestown, New York experience was typical. The city was experiencing loss of manufacturing jobs, attempts to attract new business were failing, and the population was declining. Jamestown Mayor (later Congressman) Stan Lundine took the lead meeting with local business and union leaders. (He co-sponsored the Labor Management Cooperation Act with Senator Javits.) Eventually a joint committee structure was adopted to “begin addressing issues which affected the community as a whole.” Jamestown became the model for future area committees. Area committees, in turn, have furnished technical expertise and support to worksite joint labor-management committees in their communities.⁹⁴ But today few such area committees remain.

⁹¹ 29 U.S.C. § 175a(b)(3) (2012).

⁹² Leone & Eleey, *supra* note 87, at 37.

⁹³ *Id.*

⁹⁴ *Id.*

Thomas Kochan and others have emphasized the importance of these kinds of structural arrangements in U.S. history.⁹⁵ In the early post-Wagner Act years, a number of institutions emerged to reinforce the law's development. The War Labor Board guided labor management relations during World War II.⁹⁶ A tripartite body, with government, business, and labor leaders, it kept wartime production going without work stoppages and kept inflation in check.⁹⁷ Other organizations such as the National Planning Association (founded in 1934 as a "nonprofit, nonpolitical organization, ... devoted to planning by Americans in Agriculture, Business, Labor, and the Professions") included tripartite discussion forums that played key roles in adapting the collective bargaining process to the needs of the parties and the public.⁹⁸

While the notion of a post-World War II accord between labor, business and government is questioned ("the very idea of such a harmonious accord is a suspect reinterpretation of the postwar industrial era"),⁹⁹ institutions did exist that enabled labor, business and government to meet and engage in a dialogue. Obviously, this did not mean that there was no conflict. There were abundant strikes and shop floor disputes. There was vigorous corporate anti-unionism, especially but not strictly in the southern states. And business strongly opposed government intervention in labor markets and regulation of labor relations. But, for several decades, business operated with more of a "sense of community and responsibility" than we have witnessed in the last three decades, "perhaps along with the balance of power that came from the strength of the labor movement."¹⁰⁰ The "balancing of the interests of multiple stakeholders – investors, employees and communities" – was dramatically altered in the 1980s and has not been recovered.¹⁰¹ "The regulated and more equitable capitalism of the mid-[twentieth] century has morphed

⁹⁵ Kochan, *supra* note 3, at 246.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ NELSON LICHTENSTEIN, STATE OF THE UNION 98 (2002).

¹⁰⁰ THOMAS A. KOCHAN, SHAPING THE FUTURE OF WORK, WHAT FUTURE WORKER, BUSINESS, GOVERNMENT, AND EDUCATION LEADERS NEED TO DO FOR ALL TO PROSPER 54 (2016). *See also* JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 175 (2010).

¹⁰¹ KOCHAN, *supra* note 100, at 56.

into a far harsher system.”¹⁰² Labor’s bargaining power was obviously an essential element of this balancing, but the importance of the post-War institutional arrangements should not be discounted.

These institutions have largely vanished. Today, no comparable forums exist where labor, business and government could come together to have a dialogue, develop relationships of trust and solve problems affecting a local economy. As Professor Kochan wrote in 2010 on the occasion of the 75th anniversary of the NLRA:

Union decline and increased polarization between business and labor also have created a void in political discourse at the national, sector, and community levels. All of the national civic forums in which labor and business leaders met to discuss issues of mutual concern such as the National Planning Association, Work in America Institute, and the Collective Bargaining Forum have disappeared. So too have many of the various industry-university-labor forums that were created as part of the Alfred P. Sloan Industry Studies program in the 1990s, At one point more than twenty community-level labor-management committees were in operation, but few of these still function. These were settings in which these leaders engaged in discussions of a broad range of topics within and beyond the scope of labor-management relations. In doing so, personal relationships were developed, which were then often called on to help resolve problems or address crises when the need arose. But even in the face of significant national traumas such as the terrorist attacks of September 11, 2001, or Hurricane Katrina in 2005, or the economic collapse following the meltdown on Wall Street in 2009, national leaders rejected calls to bring business and labor leaders together to help mobilize their collective resources to respond to the security and recovery challenges. It is not surprising that the severe and sustained hardships of the Great Recession have produced an angry, alienated, and increasingly polarized public. The only thing uniting citizens and voters today is the view that the country is headed in the wrong direction and that their children will not reach the same standard of living as their parents’ generation.¹⁰³

¹⁰² Harold Meyerson, *Democrats Lost Because They Didn’t Deliver Broad Prosperity*, WASH. POST (Nov. 5, 2014), https://www.washingtonpost.com/opinions/harold-meyerson-democrats-lost-because-they-didnt-deliver-broad-prosperity/2014/11/05/db11a196-6517-11e4-9fdc-d43b053ecb4d_story.html?utm_term=.2aa64da6a914.

¹⁰³ Kochan, *supra* note 3, at 235.

VII. A Cautionary Note

Our sorry state of politics highlights the utter failure of the “social dialogue.” Formal institutions of social dialogue have not, of course, prevented populist waves in Europe. In a sobering New York Times op-ed, a French writer recently explained, “Why my father votes for LePen”:

My father had felt abandoned by the political left since the 1980s, when it began adopting the language and thinking of the free market. Across Europe, left-wing parties no longer spoke of social class, injustice and poverty, of suffering, pain and exhaustion. They talked about modernization, growth and harmony in diversity, about communication, *social dialogue* and calming tensions. My father understood that this *technocratic vocabulary* was meant to shut up workers and spread neoliberalism. The left wasn’t fighting for the working class, against the laws of the marketplace; it was trying to manage the lives of the working class from within those laws.¹⁰⁴

In our very divided society, we face a challenge in how to enable workers to collectively address their economic hardships and how to alleviate their alienation from existing institutions (as well as the attendant political risks). Enhancing their voice and bargaining power is obviously key. Establishing local area forums where workers, business and the state could convene might be a tiny step towards starting a social dialogue by building trust, jointly addressing local problems, and growing an area’s economy, especially if they afforded workers in the community a place to be heard. It is hard to quarrel with the concept and purpose of these types of committees, but Édouard Louis’ portrayal of his father highlights the risk that talk of a “social dialogue” may be viewed with suspicion.

¹⁰⁴ Édouard Louis, *Why My Father Votes for LePen*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/opinion/sunday/why-my-father-votes-for-marine-le-pen.html> (emphasis added).