Worker Participation, Employer Anti-Unionism, and Labor Law: the Case of the Steel Industry, 1918-1937

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I. INTRODUCTION

Addressing the Denver Civic and Commercial Club in June 1918, John D. Rockefeller, Jr. urged his fellow industrialists to adopt a program of personal communications between themselves and their employees. “I am profoundly convinced,” Rockefeller said, “that
nothing will go so far toward establishing Brotherhood in industry and insuring industrial peace... as the general and early adoption by industry of this principle of [employee] representation, the favorable consideration of which cannot be too strongly urged upon leaders in industry." Rockefeller's sentiments concerning industrial democracy have a particularly modern tenor. For example, in a recent study of American economic policy, former Secretary of Labor Ray Marshall argued that "improved U.S. economic performance and competitiveness require greater worker participation."2 Similarly, an influential and popular book on management theory compared Japanese management styles with those of American organizations and concluded that the most important characteristic of the Japanese system is "their participative approach to decision making."3 Another scholar has urged increased employee involvement in the workplace as a means of meliorating the adversarial positions of management and organized labor in American industry.4 On the practical level, even the "notoriously hierarchical" General Motors is now "waking up with the repentant fervor of Ebenezer Scrooge on Christmas morning. The world's largest industrial company proclaims that it has discovered the real path to corporate health: listening to, and trusting, its people."5

But despite the fervor with which participatory schemes are promoted, some critics regard them as a subtle, insidious instrument of managerial power used to deflect potential unionizing efforts among workers.6 Others believe that participatory projects erode the effectiveness of existing collective bargaining relationships.7 American workers and union leaders exhibit the same fragmentation of opin-

1. Address by John D. Rockefeller, Jr., Brotherhood of Men and Nations 11 (June 13, 1918). Other speeches by Rockefeller on the subject of employee representation are collected in J. Rockefeller, Jr., The Personal Relation in Industry (1923).
2. R. Marshall, Unheard Voices: Labor and Economic Policy in a Competitive World 3 (1987); see also The Payoff from Teamwork, Bus. Wk. 56, 56 (July 10, 1989) (stating that employee involvement "may be American industry's best hope of competing with the Japanese and Europeans, as well as low-wage, Third World producers.").
ion. Thus, dissident members of the United Auto Workers Union (hereinafter "UAW") recently threatened to form an organization to oppose the UAW's program of "cooperation" with automobile manufacturers, and although a majority of union members indicated its approval of the current leadership's policies, the militant faction vows to continue its campaign. Legal commentators likewise offer conflicting interpretations of section 8(a)(2) of the National Labor Relations Act (hereinafter "NLRA" or "the Act") and its applicability to worker participation programs. Scholars contend on the one hand that section 8(a)(2) should be strictly construed to preserve adversarial, arms-length collective bargaining between labor and management. Others assert that the competitive economic environment demands newer, more flexible forms of industrial organization, and a constricted approach to section 8(a)(2) defeats the underlying policies of the Act itself. The first position is generally consistent with precedent of the National Labor Relations Board, while the latter phi-


9. "New Directions promotes a more militant stand against corporations that employ UAW members." Patterson, UAW Dissidents Mull Formation of Outside Group, Wall St. J., June 19, 1989, at B8, col. 5. "New Directions also criticizes the union's recent efforts to increase cooperation between its hourly workers and company managers." Id.

10. UAW leadership claimed to have the support of over 90 percent of convention delegates. Wall St. J., June 21, 1989, at A2, col. 4.

11. 29 U.S.C. § 158(a)(2) (1976) provides in part that "[i]t shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." A proviso to the section permits employees to confer with the employer during working hours without loss of time or pay. Id.


14. E.g., Homemaker Shops, Inc., 261 N.L.R.B. 441 (1982), modified, 724 F.2d 535
Employee Representation Plans (hereinafter "ERPs") first appeared in the steel industry in 1918.18 Between 1918 and 1933, a number of steel companies instituted plans, but with the notable exception of the employee committee at Bethlehem Steel Company, those plans enjoyed only sporadic and desultory success. Following the economic upheavals of the Depression and the enactment of the National Industrial Recovery Act in 1933,17 there was a resurgence of interest in representation plans as an effective means of combatting the threat of unionization. Workers, however, increasingly chose to engage in collective bargaining through the alternative of trade union organization. The activities of certain employee representatives on behalf of the Steel Workers Organizing Committee significantly contributed to U.S. Steel's recognition in 1937 of the Committee for Industrial Organization and its capitulation to the bargaining demands of John L. Lewis.18 That event was one of the pivotal occurrences in American labor history and a crucial factor in the development of the modern labor movement.19

The history of representation programs in the steel industry provides a useful context for the contemporary debates regarding section 8(a)(2) and the formulation of appropriate labor relations policies.20 In the first place, the creation and evolution of the ERPs

(6th Cir. 1984) (reversing determination of Administrative Law Judge and ordering disestablishment of a labor organization dominated and assisted by employer).

15. E.g., NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 545 (6th Cir. 1984) (holding that the Board's order was not supported by substantial evidence because "[n]ot all cooperation and assistance between management and a union is proscribed by the Labor Act").

16. William B. Dickson, vice-president of the Midvale Steel & Ordnance Company, developed the first of the steel industry plans. See infra notes 70-124 and accompanying text.


18. The Committee for Industrial Organization was formed on November 9, 1935 by Lewis and seven other union presidents. See I. Bernstein, Turbulent Years: A History of the American Worker: 1933-1941, at 400 (1970) [hereinafter Turbulent Years]. Two years later, on November 14, 1938, its name officially became the Congress of Industrial Organizations. Id. at 697.

19. According to Bernstein, Lewis regarded "the organization of steel, the nation's basic industry and its citadel of antiunionism, [as] CIO's most urgent task, a necessary safeguard to the [United Mine Workers'] flank in the captive mines and the key to CIO success in other industries." Id. at 435.

illustrates their primary use as a managerial strategy of anti-unionism. Equally important is the experience of rank and file workers under the plans, which demonstrates, the powerful appeal that such techniques can exert in the workplace. When, in 1936, workers reacted against the plans and sought to displace them with independent trade union representation, that movement displayed a high degree of autonomy, internal dynamism, and fluidity.21 Taken together, the salient characteristics of the steel industry plans suggest a means of reconciling the rights of American workers to engage in collective activity, the fundamental policies of our national labor law, and the perceived organizational imperatives of the modern corporation.

II. THE MOVEMENT TOWARD INDUSTRIAL DEMOCRACY

By the 1920's, the concept of "industrial democracy" was familiar in the American workplace.22 Prompted by the relatively successful efforts at labor-management cooperation during World War I, labor relations specialists urged that those efforts be expanded to create a new industrial system grounded on the mutuality of interests of labor and capital.23 As one contemporary authority described
the industrial relations environment in the post-war era:

[T]he more intelligent and liberal industrial executives, labor leaders, publicists and statesmen, because of the remarkable achievements of industry during the war arising from the unprecedented spirit of cooperation which prevailed between employers and employees, hoped, in part, at least, to see this spirit carried over into the normal times of peace.24

But industrial democracy already had an extensive pedigree dating from the previous century.25

What is usually regarded as the first significant attempt to provide worker participation in an American firm occurred at the William Filene's Sons Company, a retail clothing establishment in Boston.26 In 1898, William Filene organized the Filene Co-operative Association, and delegated authority to employees to maintain certain welfare programs, such as the lunchroom and entertainment

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25. Versions of the representation plan have been traced to the early 19th century. For example, Stuart Brandes states (with no citation of authority) that "shop committees existed as early as 1833 and the 'shop council' was put forward as an antidote to the labor strife of 1886. . . ." S. BRANDES, AMERICAN WELFARE CAPITALISM, 1880-1940, at 121 (1976). He continues that "no important American company adopted employee representation until almost the turn of the century." Id. David Montgomery notes that "Straiton and Storm had developed a plan for its many cigar workers in the late 1870s," but he does not discuss the plan. D. MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE AND AMERICAN LABOR ACTIVISM, 1865-1925, at 350 (1987).

In 1883, Straiton & Storm was the largest cigar manufacturer in the United States and possibly in the world. 2 REPORT OF THE COMMITTEE OF THE SENATE UPON LABOR AND CAPITOL 815 (1885). According to George Storm, the company had instituted a board of arbitration in 1879, which consisted of delegates elected by employees and representatives of the company appointed by management. See id. The arbitration board resolved any matters of wages or working conditions that were in dispute. See id. In his testimony before a Senate committee, Storm praised the plan as a method of eliminating labor-management conflict within the firm:

By the method here adopted, and the certainty that any difficulty that arises will be adjusted, and believing than any such difficulty will be settled upon a fair basis, it has enabled us to use all our energies in the natural pursuit of our business, without giving the question of labor half of our time, or being constantly troubled with the nightmare that perhaps there may be a strike tomorrow morning; hence, I believe we have been more prosperous and our business has been more satisfactory than it was prior to the existence of this board.

Id.

26. See M. LA DAME, THE FILENE STORE: A STUDY OF EMPLOYEE'S RELATION TO MANAGEMENT IN A RETAIL STORE (1930) (offering a description and analysis of employee relations policies at the Filene Company from its founding through the late 1920's).
funds. The experiment was sufficiently successful so that in 1903, under the leadership of Edward A. and A. Lincoln Filene, the Association was given a constitution. Eventually, the Filenes created a representation structure known as the Cooperative Associational Council and, in 1901, they added an Arbitration Board which was empowered to resolve disputes between employees and management.27

The philosophy underlying the Association was the enhancement of service and profitability. "Sharing both management and ownership embodied the conviction that only by enlarging the scope of employees' responsibility and by endowing them with power commensurate with that responsibility could they give their best to the business."28 Edward Filene personally believed that "industrial democracy, under which employees will have an adequate voice in the policies of industry and an adequate stake in the profits of industry," had become inevitable. Not only because industrial democracy was "theoretically right," Filene said, but because the nation had committed itself "to political democracy, because we have given to the masses of employees who far outnumber the employers a political vote with which they can get anything and everything they find themselves unable to get by industrial methods."29 For the immediate future, consequently, managers had an obligation to "be as autocratic as necessary and as democratic as possible" in maintaining a profitable operation while educating workers for participation in the democratic processes which would attend the coming industrial transformation.30 Nor did the Filenes oppose trade union membership as an interference with their program of worker participation.31

In another important early effort at industrial democracy, H. F. J. Porter instituted a "factory committee" at the Nernst Lamp Company in Pittsburgh. Porter is sometimes credited with the "pioneer installation" of a shop committee in the United States, although his

27. The Arbitration Board had authority "to act as a final court of appeal in all cases of controversy between the company and an employee and between one employee and another." Id. In one case, for example, an elevator operator discharged for insubordination appealed to the Board and was reinstated with a two-week suspension. Id. at 237-58.
28. Id. at 72.
30. Id. at 160.
31. In one instance, the Filene management accommodated union members who offered to resign from their unions in order to secure all the benefits of the Filene Co-operative Association. See M. LA DAME, supra note 26. For a period of time, union members were denied bonuses and vacations, but they were eventually afforded full status in the Association and were urged to remain in good standing in the union. Id. at 134-38.
system did not confer any delegated authority to the committee. The committee, which consisted of representatives from the clerical force, the factory operatives, and the foremen, served largely as a vehicle of communication for matters of concern to employees. A secondary function was to administer the “suggestion system” which Porter installed as a part of the committee’s purpose. That feature, Porter noted, was extremely beneficial to both workers and the company:

As soon as the opportunity was offered, and each operative found that it would be not only perfectly safe to offer a suggestion which would even at first glance deprive him or her of a livelihood, but that such a suggestion would lead to instant remuneration and to more profitable occupation, there soon blossomed in an apparently barren field a rich crop of ideas.

Porter described contemporary management as having lost the “close touch” between owner and worker which characterized the older methods of employment. To elicit the intelligence and “spontaneous helpfulness” of employees, Porter urged a broad program of welfare in the workplace, and the Nernst plan incorporated procedures which dealt with employee education, safety and health, and cultural activities such as the “Musical and Dramatic Association.” Those methods, according to Porter, “furnished an incentive on the part of the employees to give to the employer the best there was in them, and not only during working hours but at all times, the forces of personal interest, enthusiasm, and individual capacity were directed toward the welfare of the company.” Regarding promotion of the plan, Porter explained that the company resisted invitations to advertise its personnel policies “on the principle that one should not advertise the fact that he is doing simply what is right.” In any event,

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33. French notes that the Porter committee “was merely an organ through which the employees might make known their wants to the management and through which the management might get into closer touch with the men.” Id. at 113.
35. Id. at 648.
36. Id. at 642.
37. Porter argued that “health, character, and education are the factors in the make-up of the employee which must receive the serious consideration of the employer, and their relative importance is shown by the order in which they are named.” Id. at 653.
38. Id. at 655.
39. Id.
employees learned of the superior working conditions at the company, "and the list of applications for positions by the very best class of employees from other factories, not only in the neighborhood but at a distance, was a long one." There was, of course, an important financial incentive for employers to follow such methods: "It was the intelligent and vital force of this organism that put the company on a paying basis, testifying to the efficiency in the industrial world of the ethical laws that 'right makes might.'"

The techniques of worker participation were taken up by popular writers such as John Leitch, who extolled industrial democracy as a panacea for labor unrest and low production. Leitch claimed that 60 percent of American industrial capacity was lost due to strikes and labor disputes; he also claimed that labor-management conflict could be eliminated by the new methods of employee relations and offered his experience at the Packard Piano Company during 1912 as proof. Following an unsuccessful strike, the company suffered from declining productivity, poor quality, and lower profits, and subsequently hired Leitch as an industrial consultant. By instituting a regular series of plant meetings and a sharing arrangement for increased savings, Leitch realized a 5.5 percent savings in production costs within one month. Similar economies were realized over a period of several years. As for the "union troubles" at the company, "[t]hey got lost in the shuffle." Leitch reports that other instances of union threats similarly disappeared in the presence of industrial democracy.

40. Id.
41. Id.
43. According to Leitch, the "wastage" of strikes and labor hostility was caused by the lack of a common ground of understanding. Id. at 16-29.
44. Id. at 30-62.
45. Id. at 62. For a recent example attesting to the durability of Leitch's managerial strategems, see Charlier, At an Arizona Mine Workers Were Wooed Away From the Union, Wall St. J., Aug. 8, 1989, at A1, col. 6, A6, cols. 1-3 (discussing the Cyprus Mineral Company and how it "wooed" its workers away from a fifty-year history of union representation at an Arizona copper mine). The employer relied in part on traditional incentives to workers such as raises, job training, and workplace safety. Id. But Cyprus introduced another important innovation: "To win the hearts and minds of the union work force, the company ... used a mesmerizing psychological campaign that included seminars — 'charm school' sessions — the workers called them — to close the decades-wide gulf between managers and workers." Id. Increased worker participation in operational decisions led not only to union decertification, but to increased production, improved quality, and an "eightfold increase in earnings the past two years." Id.
46. Leitch rejected the contention that trade unionism and industrial democracy were incompatible, because workers were free to choose between the two systems. See J. Leitch, supra note 42, at 191-92. At the Printz-Biederman Company in Cleveland, the Garment Mak-
Leitch's plan was based on the model of the United States Government, and his version of industrial democracy was defined as "[t]he organization of any factory or other business institution into a little democratic state, with a representative government which shall have both its legislative and executive phases."47 In addition to a House of Representatives, elected by workers, and a Senate composed of appointed members from the ranks of foremen, Leitch provided for a Cabinet consisting of the executive officers of the company with the president as chairman. The Cabinet was not elective and possessed a power to veto the "legislation" emanating from the shop floor.48 In practice, the Leitch proposal differed significantly from the actual practices of the American government; nevertheless, "because of the superficial resemblance to the American governmental structure and procedure, the Leitch plan captivated the imagination of not a few employers and wage earners."49

A number of other employers introduced plans between 1904 and 1914. Among the more significant were the "advisory committee" at the American Rolling Mill Company, the "works council" at the Nelson Valve Company, the "trade board" at Hart, Schaffner & Marx, the "shop committee" at the White Motor Company, and the "welfare association" at the Philadelphia Rapid Transit Company.50 Most influential, however, was the Rockefeller plan at the Colorado Fuel & Iron Company (hereinafter "CF&I") which marked a transition from the early phases of industrial democracy to a form of organizational control directly related to the collective activities of workers.

The CF&I plan was put into effect as an immediate consequence of one of the most bitter industrial conflicts of the era. In

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47. Id. at 140.
48. Id. at 140-46.
50. See generally NATIONAL INDUSTRIAL CONFERENCE BOARD, WORKS COUNCILS IN THE UNITED STATES 4-6 (1919); E. BURTON, EMPLOYEE REPRESENTATION 25-44 (1926).
September 1913, the United Mine Workers commenced a recogni-
tional strike against CF&I and other Colorado coal
operators. The
miners established tent colonies at various locations, the largest of
which was Ludlow. When the Colorado militia attacked the colony,
eleven children and two women were burned to
death. The intense
public reaction against the CF&I, and against Rockefeller person-
ally, prompted Rockefeller to action. With the advice of Mackenzie
King, a Canadian expert on labor relations, Rockefeller developed
the representation plan and submitted it for the approval of his em-
ployees in October 1915.

The motives of Rockefeller and CF&I executives with respect to
the plan are debatable. A majority of workers did in fact support the
measure; a total of 2,846 votes were cast in a secret election, and
2,404 or 84 percent, favored representation. The philosophy under-
lying the plan — at least the philosophy publicly expounded by
Rockefeller — was that “the interests of the various parties in indus-
try are identical and not opposed to one another, and that the indus-
trial problem is largely the result of the loss of personal relations
between owners and wage-earners.” Elaborating on that point,
President Welborn of CF&I insisted that “[t]he intent of our repre-
sentation plan has never been to use it as a subterfuge to combat
unionism.” But despite the company’s evidently benign purposes,
the United Mine Workers made no further progress toward unioni-

51. For detailed accounts of the causes and consequences of the strikes see generally B.
Beshoar, Out of the Depths: The Story of John R. Lawson, A Labor Leader (1942);
G. McGovern & L. Guttridge, The Great Coalfield War (1972); G. West, United
52. See Beshoar, supra note 51, at 166-79 (describing the massacre in a vivid — and
highly partisan way).
53. The relationship between Rockefeller and King is treated in an excellent recent
study see H. Gitelman, Legacy of the Ludlow Massacre: A Chapter in American
Industrial Relations (1988). Gitelman sets forth one of his major premises as follows:
Though worker rights are the central issue around which the narrative revolves,
workers themselves play little part. This is a story of power wielded over workers
not by them. In a similar vein, no effort has been made to estimate the consequences
of company unions for worker productivity. The record reveals that not one of the
firms that adopted employee representation at the urging of Rockefeller or with the
assistance of King, did so with productivity or any aspect of work performance in
mind. Power more than profits appears to have been their primary concern.
Id. at xv.
54. B. Seleman & M. Van Kleek, Employees’ Representation in Coal Mines: A
Study of the Industrial Representation Plan of the Colorado Fuel and Iron Com-
pany 27 (1924).
55. Id. at 28.
56. Id. at 36.
zation in the mines over the next two decades.\footnote{57}

George West, a contemporary analyst of the strike and its implications, was more forthright in his assessment of the situation. According to West, one of the fundamental causes of the labor dispute was Rockefeller's indifference to the actual conditions in the mines owned by his company. Through the early months of the strike, Rockefeller had directed Welborn to continue his policy of active resistance to and suppression of the union effort, regardless of the effects suffered by the miners and their families. West further concluded that the representation plan itself was designed "to deceive the public and lull criticism, while permitting the Company to maintain its absolute power."\footnote{58} Testimony presented to the Industrial Commission made it clear, in West's opinion, that CF&I officials had acted to defuse public support for President Wilson's plan of conciliation, which would have involved a comprehensive scheme of labor relations with substantial incursion into managerial prerogatives.\footnote{59} Whether or not West's criticisms were justified, the CF&I

\footnote{57. Rockefeller's public statements in 1915 before the Commission on Industrial Relations reflect the inherent contradiction in the managerial view of representation schemes. On the one hand, workers were "free" to select representatives, but they were not permitted to choose an independent trade union representative, which might force unwilling workers to belong to a "closed" shop. \textit{Commission on Indust. Relations, Final Report and Testimony}, S. Doc. No. 415, 64th Cong., 1st Sess. 7838 (1916). Chairman Frank Walsh forcefully reminded Rockefeller that Rockefeller had persistently supported Welborn's resistance to the strike and had in fact previously admitted stating that "we believe so sincerely that that interest demands that the camps shall be open camps that we expect to stand by the officers at any cost." \textit{Id.} Rockefeller replied that his earlier testimony had been "unfairly construed as being a declaration on my part of warfare against the unions." \textit{Id.} Continuing, Rockefeller clarified his understanding of "freedom" in the workplace:

\textit{The opinion expressed there relates, to no extent at all, to the question of unionism as unionism. The point there was that the officials of the company had stated that if the principle of unionism was to be admitted in connection with the mines of the Colorado Fuel & Iron Co., it would involve the discharge of all of the employees in the company who were not union men. On that principle of the right of every man to determine for himself whether he should join the union or not, I said what you have read. For I felt it was a principle of justice and of right that every man should be accorded freedom under the Constitution to determine whether or not he would work independently or with others . . . . But it is in no sense a declaration that my attitude was antagonistic to labor unions, because, as I have stated in my statement yesterday, and many times since, I firmly believe in the organization of labor.}

\textit{Id.} In Gitelman's incisive recapitulation of Rockefeller's beliefs, he stated that "[h]is interest in employee representation can most charitably be characterized as one of industrial peace at any price, save unionization." H. Gitelman, \textit{supra} note 53, at 337. "He did not care for workers or their welfare but only for their acquiescence." \textit{Id.}

\footnote{58. G. West, \textit{supra} note 51, at 186.}

\footnote{59. See B. Selekman \& M. Van Kleek, \textit{supra} note 54, at 12 (discussing Wilson's plan). Welborn, with the assistance of publicist Ivy Lee, wrote to President Wilson on September 18, 1914, declining to implement the government's proposal. G. West, \textit{supra} note 51, at http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss1/1}
plan became a focal point of capital’s emerging labor relations strategies.

During World War I, representation systems were established in a number of enterprises under the auspices of the War Labor Board. The Board’s avowed purpose was to reduce strikes and labor conflict, and its approach was characterized by “a steady and almost severe insistence that collective dealing be established as a normal process in industry.” To accomplish its objective, the Board issued more than 125 awards mandating installation of shop committees. A number of employers also voluntarily adopted plans after 1918, including such well-known concerns as American Telephone and Telegraph, Eastman Kodak, National Cash Register Company, and the Consolidation Coal Company. The “Works Council” at the International Harvester Company, which also dated from the period, particularly illustrates Rockefeller’s influence and the effectiveness of the Colorado plan in defusing trade union momentum.

Throughout the 1920’s, the ERP served as part of a broad program of employer welfarism. One leading historian suggests that

174. Welborn assured the President that the company was “developing an even more comprehensive plan, embodying the results of our practical experience, which will, we feel confident, result in a closer understanding between ourselves and our men.” Id. at 175. In fact, there was no such plan, as Welborn indicated the following day in a letter to Rockefeller’s legal advisor, Starr Murphy. Id. at 174-75.

60. The Board’s activities are described in U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL WAR LABOR BOARD: A HISTORY OF ITS FORMATION AND ACTIVITIES, TOGETHER WITH ITS AWARDS AND THE DOCUMENTS OF IMPORTANCE IN THE RECORD OF ITS DEVELOPMENT, BULLETIN No. 287 (1922) [hereinafter DEP’T OF LABOR, NAT’L WAR LABOR BOARD].

61. French, supra note 32, at 123.

62. Id. at 122.


64. In his authoritative treatment of industrial relations at International Harvester, Robert Ozanne observes that in 1918, Rockefeller assisted the McCormicks by releasing Arthur Young, then in Rockefeller’s employ, to direct the new industrial relations department at International Harvester. R. OZANNE, A CENTURY OF LABOR-MANAGEMENT RELATIONS AT MCCORMICK AND INTERNATIONAL HARVESTER 117 (1967). Ozanne further states that Young had anticipated the “strike holocaust” following the end of the war and took preventive action: As early as October 1918 he called in his mentor at Colorado Fuel, the internationally famous labor relations consultant McKenzie [sic] King, whose novel and ingenious “company union” plan had succeeded in rescuing the Rockefeller from the United Mine Workers. Together they drew up for International Harvester a slightly modified version of the Colorado Fuel plan. As the postwar strike activity began to crackle like fire around International Harvester, this plan was the backfire that Young set to protect the company from advancing unions. Id. Young later became a vice-president at U.S. Steel and was instrumental in establishing ERPs at that corporation in 1933.

65. See N. MITCHELL, THE GENEROUS CORPORATION: A POLITICAL ANALYSIS OF ECONOMIC POWER (1989) (providing a recent study of the ideology of capitalist welfare policies in
the plans “seemed the capstone of welfare capitalism,” and adds that “[c]learly [they] were intended to substitute for trade unions, both as a justification to the public and an answer to employee needs.” Moreover, as the well-known industrial relations scholar Sumner Slichter concluded in 1929, welfare policies had the very important tendency to diminish workers’ awareness of class. “Modern personnel methods are one of the most ambitious social experiments of the age,” he wrote, “because they aim, among other things, to counteract the effect of modern [technology] upon the mind of the worker and to prevent him from becoming class conscious and from organizing trade unions.” Between 1926 and 1932, there was a decline in the number of employees covered by representation plans, but the passage of the National Industrial Recovery Act in 1933 prompted renewed interest in employee representation as an alternative form of collective bargaining under the federal statute. The events in the steel industry typify the growth and decline of the ERPs in the three decades following Ludlow.

relation to the national political environment). Mitchell's thesis is that a shift in corporate philosophy occurred during the 1920's which reflected changing public attitudes toward business. See id. Mitchell explains that “[o]pinion is shaped, and legitimacy is provided, by ideology.” Id. at 7. “Corporate social policies originated as an expression of a new ideology of business power.” Id. “They represented an attempt to legitimize that power in the eyes of government and other groups.” Id.

66. D. Brody, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 58 (1980); see also S. Brandes, supra note 25, at 119-34.


68. Slichter, The Current Labor Policies of American Industries, 43 Q.J. ECON. 393, 432 (1929); see also Douglas, Shop Committees: Substitutes for, or Supplement to, Trades Unions? 29 J. POL. ECON. 89 (1921) (stating that “[t]here can be but little doubt that the recent enthusiasm for shop committees on the part of the employers has been due to their belief that here was a ready substitute for the unions.”). Id. at 91. For other studies of the employer offensive against trade unions during the early 1920's and the role of the representation plans, see generally R. Dunn, COMPANY UNIONS: EMPLOYER'S "INDUSTRIAL DEMOCRACY" (1927) (treatment of the "open shop" movement from a radical unionist perspective); Hurvitz, Ideology and Industrial Conflict: President Wilson's First Industrial Conference of October 1919, 18 LAB. HIST. 509 (1977) (analyzing employer anti-unionism and the significance of employee representation systems at the beginning of the post-World War I era).

69. The absolute number of firms with employee representation plans reached a peak in 1926 and had declined by 27.5 percent as of 1932. NATIONAL INDUSTRIAL CONFERENCE BOARD, COLLECTIVE BARGAINING THROUGH EMPLOYEE REPRESENTATION 3-17 (1933). The plans were increasingly adopted by larger employers, however, and the decline in the number of employees covered by plans was only 7.9 percent during that period. Id. Significantly, in 1932, the American Federation of Labor represented 1,251,500 employees in mining and manufacturing; 932,270 employees in those industries, or 74.4 percent of the AFL total, were covered by representation plans. Id.
III. THE ORIGINS OF THE STEEL PLANS

The first system of employee representation in the steel industry was conceived in 1918 by William Dickson, Vice-President of Midvale Steel Company, and a noted advocate of labor reform. Dickson was one of the foremost contributors to the development of enlightened, humane personnel policies in the industry between 1901 and 1923, despite frequent resistance from his superiors at U.S. Steel and later at the Midvale company. Yet even Dickson’s reasons for creating a representation plan were less the product of idealism than of threatened governmental interference and an impending union drive at Midvale.

The Association of Machinists (hereinafter “IAM”) commenced an organizing campaign at Midvale in April 1918. Following a strike in June, which disrupted production of war materials, the company came under pressure from Secretary of the Navy Josephus Daniels to institute a system of collective bargaining. Daniels sent a strongly-worded telegram to Midvale officials on September 13 reminding them that an inspector had discovered labor difficulties resulting in “serious delays in vitally important ordinance work” at a specified Midvale plant. Daniels was “surprised and somewhat disturbed” that the company had refused to cooperate with the National War Labor Board (hereinafter “NWLB”) by submitting the labor dispute to arbitration, and he emphasized that the Midvale workers had returned to their jobs only because of the NWLB intervention. Consequently, Daniels informed Midvale executives:

The mere fact that men going back in good faith pending arbitration, in accordance with President’s proclamation, are now working, and that there is no strike for the moment at your plant, obviously makes acquiescence on your part of the agreement to arbitrate a matter of honor, as well as common sense.

He urged the company to “inform the Taft-Walsh Board immediately of your entire willingness to submit your side of the case” and emphasized that “the matter is urgent and serious.”

Dickson regarded the Daniels telegram as an opportunity to ini-

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72. Id.
73. Id.
tiate meaningful labor reforms. In his personal diary for September 16, Dickson noted that he had received a "very important message" from Daniels dealing with the labor problems at the Nicetown plant. He continued, "We are nearing a crisis which I believe must end in the acceptance of some form of collective bargaining. I am advocating this in a quiet way somewhat along the lines of the Colorado system." But Dickson was concerned about the reaction of his fellow officials. Another vice-president, E. E. Slick, was "a reactionary," while Chairman W. E. Corey and President A. C. Dinkey were "on the fence." In any event, Dickson mused, "[t]he question seems to me to be '[s]hall we jump or wait to be pushed'?" Midvale executives chose to jump, and on September 19, Corey wrote to Daniels that Midvale would cooperate with the NWLB. Corey added that, with respect to collective bargaining, "we believe it may be of interest to you to know that we are about to invite our employees to meet with the officers to consider a plan of this nature, which will be thoroughly democratic and devoid of all possibility of interference."

Dickson was extremely active in promoting his version of industrial democracy. On September 18, he met with Judge Elbert Gary, the president of the American Iron and Steel Institute and the most influential individual in the steel industry. Dickson explained to Gary that federal officials had urged Midvale to comply with a recommendation of the NWLB that Midvale engage in collective bargaining with the Machinists. The government action, Dickson said, was a violation of President Wilson's policy of maintaining the relative positions of labor and capital during the war, and it indicated the "beginning of a well-organized campaign to force the unionization of all our plants. . . ." Should the industry not react promptly on a united front, Dickson cautioned, it would soon be "completely dominated by irresponsible labor leaders," to the detriment of the country as a whole.

74. W. Dickson Diary (1918) (copy in Dickson Papers, supra note 71, Box 2).
75. Id.
76. Id.
77. Id.
78. Letter from W. E. Corey to Hon. Josephus S. Daniels (Sept. 19, 1918) (copy in Dickson Papers, supra note 71, Box 5, Folder 5).
79. The Dickson collection includes fragments of an unpublished memoir. See Dickson Papers, supra note 71, Box 2, Folder "Memoirs." Chapter X of that document, from which the quotation is drawn, is devoted to employee representation. Id.
80. Id.
In this connection, our company now has under consideration and will probably adopt, a system of collective bargaining with its employees, along somewhat the same lines as that adopted some years ago by the Colorado Fuel and Iron Company, and we believe that the adoption of such a plan will furnish a complete answer to objections which have been raised as to the present system.\(^{81}\)

Dickson was thoroughly familiar with the CF&I plan, having conferred some time earlier with officials of that company and having reviewed their plan in detail. Indeed, according to his biographer, Dickson “not only consulted with officials of Rockefeller's Colorado Fuel & Iron Company about their plan of employee representation, he also borrowed freely from it, paraphrasing its language and adjusting its specific provisions to the situation at Midvale.”\(^{82}\)

Following the session with Gary, Dickson met with the Midvale general superintendents on Thursday, September 19, and they agreed to recommend a plan of representation to the Midvale Board of Directors. Dickson prepared a notice to be posted in the various works informing employees of the new program. Under the signature of Midvale President A.C. Dinkey, the notice invited workers “to meet with the officers of their respective companies for the purpose of considering, and if practicable, adopting, a plan of representation by the employees, which shall be thoroughly democratic and entirely free from interference by the companies, or any official or agent thereof.”\(^{83}\) Dickson next drafted a tentative plan of representation and, on Saturday, September 21, he conferred with company officials in Philadelphia. By Sunday morning, arrangements had been made for the initial meetings with employees, and Dickson assembled the elected representatives in the Widener Building in Philadelphia the following Wednesday. Concerning the importance of the undertaking, Dickson enthusiastically remarked:

> I regard this step as marking a distinct epoch in the history of American business, and feel that without question, all other steel companies, including the United States Steel Corporation, will be forced to follow our lead in this matter.

> Personally, I have no regret at having to take this action, as I am profoundly convinced that however disturbing it may be in its initial stages, the plan proposed for the first time in the history of

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81. Id.
82. G. Eggert, supra note 70, at 115.
83. Notice from A.C. Dinkey, President, to Midvale Steel and Ordone Co. and Cambria Steel Co. Employees (n.d.) (copy in Dickson Papers, supra note 71, Box 2, Folder “Memoirs”).
industrialism, recognizes the principle of democracy as the only proper basis upon which an industrial system can be built which will receive the approval of that great final Court of Last Resort,—Public Opinion.84

Dickson spoke to the employee delegates in similar terms. Reminding the workers of their heritage from the “Revolutionary days,” he explained that the sentiment of the American people had been “slowly crystalizing [sic] around the idea of industrial democracy.”85 The company, in “complete sympathy” with that notion, had implemented its system of collective dealing. Dickson thereupon presented them with the representation plan, which provided for the annual nomination and election of representatives, a procedure for handling and arbitrating grievances, and rules governing discharge. The delegates adopted the plan by unanimous vote and agreed to submit it “for final ratification and adoption.”86

Dickson’s strategy for thwarting the IAM drive and circumventing an order of the War Labor Board was a complete success. At the NWLB hearing on November 2, 1918, the union attacked the representation plan as a creature of management, dominated by nonsalaried foremen acting as representatives, for whom workers had been forced to vote. Frank Mulholland, attorney for the Machinists, asked Dickson whether or not under all the circumstances, “the employees would have the right, and be justified in a suspicion that this plan was brought forward for the purpose of avo[i]ding a plan that might be later suggested in these hearings before the War Labor Board.”87 To that, Dickson conceded, “[s]uch a supposition on the part of the employees who had lost confidence in the management might be natural.”88 Dickson then added that “the evidence which has been brought before you this morning shows, I think, that the matter had been under consideration for months, prior to any difficulty between the company and its employees arose.”89 Despite such dissembling, the company’s true motive was clearly established in a further exchange between Mulholland and Dickson:

84. Id.
85. Minutes of Conference (Sept. 25-26, 1918) (copy in Dickson Papers, supra note 71, Folder “Memoirs”).
86. Id.
87. Transcript of Hearing, Midvale Steel & Ordnance Co. 417 (Nov. 12, 1918) (Docket No. 129, Nat’l War Labor Board (W.W.I)) (available in Record Group 2, National Archives, Suitland, MD).
88. Id.
89. Id.
Q. Have you not purposely, intentionally, adopted this plan, in
order to try to initiate your ideal, or accomplish your ideal [of col-
lective bargaining] without dealing . . . through organized labor?
A. Yes, without dealing with organized labor as it is at present
administered; kindly underline those last words.80

Following an investigation by a NWLB hearing officer, the Board
approved Dickson's plan, and it became entrenched throughout the
Midvale operation.

By 1920, certain weaknesses in the Midvale ERP were appar-
ent. Dickson admitted that at the Johnstown plant, the plan was "a
complete failure"91 in preventing labor conflict because strikers had
shut down the Johnstown works during the Great Steel Strike of
1919. One important reason for the union's strength in Johnstown,
according to Dickson, was the symbolic importance of the ERP to
organized labor. The American Federation of Labor "believe[d], and
rightly, that the so-called Company Union is the greatest menace to
its autocratic and irresponsible domination of American industry,
and therefore it concentrated on Johnstown, because the Midvale
Steel and Ordinance Company was the first large steel company east
of the Mississippi to adopt this plan."92 A second reason for the
plan's failure, in Dickson's view, was that the previous management
at Johnstown had never fully supported it.93 A third reason for the
union victory, which Dickson ignored, was that workers were not
uniformly in favor of the plan. As machinist Walter Wentz said of
the ERP, "'[t]he thing has not proven better than a union, and
never will, because the company saw to it that their own men were
elected as representatives.'"94

Dickson's experiments with industrial democracy came to an
end when the Midvale Corporation was acquired by the Bethlehem
Steel Company in 1923. Bethlehem, for the next decade, preserved
the techniques of employee representation and played the leading
role in disseminating company unions throughout the steel industry
during the first months of the National Industrial Recovery Act in
1933-34.

90. Id. at 423.
91. Extracts from Minutes of a Conference on Labor, 2 Remarks of W. B. Dickson
(Feb. 1920) (copy in Dickson Papers, supra note 71, Box 5, Folder 5).
92. Id.
93. Id.
94. Detailed Survey of Plan of Representation of the Midvale Steel & Ordnance Com-
pany 4 (Oct. 1918) (copy in Dickson Papers, supra note 71, Box 5, Folder 5). Eggert attrib-
utes this document to the NWLB investigator John O'Brien, but the eventual circumstances of
its publication are unknown. G. EGGERT, supra note 70, at 123.
Almost simultaneously with Dickson's plan at Midvale, Bethlehem had voluntarily introduced ERPs at its Steelton, Lebanon, and Sparrows Point works in October 1918. The main Bethlehem plant was subject to an order of the War Labor Board, which determined in July 1918 that the dissatisfaction of the Bethlehem employees had a detrimental effect on the war effort, that the conflict between workers and management at the plant was of "unquestionable significance" to the NWLB, and that one major cause of unrest was the absence of "any method of collective bargaining." Among its express objectives, the NWLB award gave employees a "direct voice in determining their working conditions," provided a method of bargaining and a means of conference between employees and employer, and permitted the "prompt adjustment of all differences." The NWLB reiterated that "[t]he right of employees to bargain collectively is recognized by the National War Labor Board; therefore the employees of the Bethlehem plant should be guaranteed this right."

To effectuate collective bargaining, the NWLB instituted the committee system which it had fashioned in the General Electric case at Pittsfield, Massachusetts. Subsequently formalized in April 1919, the Bethlehem plan of collective bargaining provided for the annual election of representatives, procedures for nomination and voting, and protections against discrimination because of representative status; the plan also provided for the adjustment of grievances through a process culminating in arbitration by the NWLB itself.

The reactive strategies followed by Bethlehem management to eviscerate the effects of NWLB regulation can be traced directly to John D. Rockefeller, Jr.'s labor policies. Dickson, as noted, acknowledged the influence of the CF&I plan. Charles Schwab, chairman of Bethlehem, summoned Dickson to a conference in early 1918, and,

95. DEP'T. OF LABOR, NAT'L WAR LABOR BOARD, supra note 60, at 138-39.
96. Id. at 143.
97. Id. at 139.
98. Id. at 140-42. The industry's trade journal offered the following evaluation of the award and its broader implications:

The National War Labor Board, in one of the most extraordinary and certainly in the most important decision it has yet rendered, makes a sweeping finding against the Bethlehem Steel Co. on all points in the controversy between that concern and its employees who have recently been on strike. While the board states that the decision "affects approximately 28,000 workers," as a matter of fact it directly and indirectly affects labor conditions in the great majority of manufacturing plants not thus far thoroughly unionized, and will encourage union leaders everywhere to seize upon the national war emergency to organize every plant heretofore maintained as a non-union or open shop.

Labor Board's Award in the Bethlehem Case, The Iron Age, Oct. 24, 1918, at 326.
after that meeting, industrial relations at both companies “followed parallel courses.” 99 By autumn, having experienced an IAM drive and a NWLB investigation, both companies “had set up employee representation plans in order to escape recognizing or dealing with regular unions.” 100 To assure its success in defeating unionism, Bethlehem also acquired the services of Rockefeller’s two most impressive talents. Bethlehem President Eugene Grace contacted Mackenzie King in the summer of 1918 and discussed a plan of representation. King subsequently drafted several memoranda outlining a plan and the method of its implementation. Although Grace expressly denied that the pressure of the NWLB was a factor in King’s employment, the evidence suggests that “King’s primary purpose was to shield the company from the [National] War Labor Board. It also indicates the lengths to which [King] was prepared to go to help the company accomplish this end.” 101 In addition, Grace relied on Schwab’s — and formerly Rockefeller’s — publicity agent, Ivy Lee, to promote the Bethlehem plan. Lee worked “tirelessly” to attain favorable publicity in the New York Times and trade journals, and between November 1918 and February 1919, the company plan won “reluctant acquiescence” from the NWLB as a substitute for its own committees. 102

By 1923, the Bethlehem corporation employed more than 55,000 employees at seven steel plants in Pennsylvania, Maryland, and New York. In John Calder’s favorable assessment, workers at each operation were “happily functioning under the [representation] plan . . . .” 103 Calder extolled the Bethlehem system as a model of industrial democracy based on trust and cooperation. Its “unique feature” was that “the employees of each of its plants are trusted to organize as a body, to meet through their collective representatives

100. Id.
101. H. Gitelman, supra note 53, at 254. Gitelman adds that King was “sufficiently troubled” by his experience at Bethlehem “not to want to return.” Id. He probably “sensed that Grace and his colleagues had no intention of seriously consulting with or listening to their employees.” Id.
102. M. Reutter, Sparrows Point: Making Steel—The Rise and Ruin of American Industrial Might 152-53 (1988). The Iron Age published a copy of the Bethlehem plan in its issue of October 24, 1918 and predicted that “[i]t will be studied with interest not only by steel manufacturers but by other employers in [related industries].” Bethlehem Plan of Employee Representation, The Iron Age, Oct. 24, 1918, at 1020-22. The influence of the WLB was evident in Bethlehem’s policy toward union membership, for the plan “expressly concedes the right of employees to belong to unions.” Id.
of their own choosing and to formulate their opinions or requests.\textsuperscript{104} Grievances or requests were channeled through a series of steps involving the employee representative, the management representative, a joint appeals committee, the president of the corporation, and an outside arbitrator. According to the Calder report, a striking indication of the success of the plan was that in five years, no case proceeded to arbitration, and only one case in more than 2,400 went beyond the joint appeals committee.\textsuperscript{105} That fact, Calder pointed out, did not signify that President Grace was removed from the process; his office maintained detailed records of all cases taken up by all representatives in the various plants. Statistics compiled by Calder reveal that the majority of cases involved employment and working conditions, with the issue of compensation being the next most important category. Others dealt with safety, health, transportation, pensions, housing, and recreation. Of a total number of 2,365 cases, Calder states that 1,682 were settled in favor of employees, and 330 against.\textsuperscript{106}

The Bethlehem Plan was particularly significant as a source of employee representation techniques in the early 1930's. Robert R. Brooks determined that at the end of 1934, the number of plans in the steel industry had increased from 7 to 93, and the percentage of workers covered by company plans had correspondingly expanded from approximately 20 percent to more than 90 percent. Moreover, "[t]he great bulk of the industry, including United States Steel, followed the Bethlehem [ERP]. Most of the plans were put into effect in June, 1933, and were almost universally initiated and sponsored by management."\textsuperscript{107} The thrust of those plans, quite obviously, was directed against the New Deal legislation intended to promote collective bargaining.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{104} Id. at 1692.
\item \textsuperscript{105} Id. at 1694.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} R. Brooks, supra note 21, at 79.
\item \textsuperscript{108} According to one contemporary analysis, the labor environment of the early New Deal was marked by national resistance to rising union membership:
\begin{quote}
From November 1933 to March 1934 the strike movement subsided somewhat and union growth went forward at a slower rate. This paralleled to some extent a recession during the same period in industrial activity. But the scene was being set for greater labor unrest in the future. During the first phases of the N[ational] R[ecoration] A[dministration], anti-union employers were somewhat uncertain as to just what the NRA meant to do about labor organization. But after a brief interval these employers concluded that the field was open to them to fight the unions if they could. Hastily, but systematically, the anti-union employers began to form employee representation plans and to discharge workers, so it was complained, for trade union
\end{quote}
\end{itemize}
President Roosevelt signed the National Industrial Recovery Act (hereinafter “NIRA”) into law on June 16, 1933. Section 7(a) of the NIRA provided that employees had the right to “organize and bargain collectively through representatives of their own choosing,” free from coercion by the employer. No employee, as a condition of employment, would be forced “to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.” By mid-1934, the majority of steel employers had implemented employee representation plans, generally adopting the position articulated in 1918 before the NWLB that such plans were a legitimate method of collective bargaining and satisfied the federal imperative.

In a pamphlet published by the Iron and Steel Institute, the Institute attacked the “public misconception” that the steel industry was opposed to collective bargaining. To the contrary, the Institute asserted that steel companies stood “squarely in favor of the right and the practice of collective bargaining with its employees.” However, the critical issue “involve[d] the form of such bargaining.” The Institute opposed labor unions on the ground that unions claimed an “exclusive right to represent the employees of the Industry, despite the fact that their membership in the groups does not, and never has embraced more than a negligible minority of employees.”

Regarding the extent of representation plans, the Institute cited a survey conducted by the National Industrial Conference Board showing that in 3,314 companies employing 2,585,740 employees, 45 percent were covered by representation plans, as contrasted with 9.3 percent of employees bargaining through labor unions. The term “company union,” according to the Conference Board, was appropri-
ate to signify a method of collective bargaining, but "the implication . . . that management controls the affairs and decisions of the employee organization is absolutely unwarranted." An essential feature of a successful ERP was that "employees be given the right of independent meetings, elections and conclusions." Drawing a comparison to the "American Federation of Labor Plan," the Institute pointed out that ERPs were superior in a number of respects. They were constructed upon the theory that harmony, confidence, and understanding could be developed in the work relationship. The AFL, however, advocated the theory that "the interests of capital and labor are inevitably antagonistic — that there must be, in the nature of things, a perpetual conflict between employer and employees." Such a view exacerbated class differences and promoted "bitterness and hostility, foster[ed] suspicion and friction, and drives a wedge between men and management." ERPs had the further advantage of protecting individual rights, accommodating local conditions, and improving the employees' understanding of the employer's business operation. Last, and of particular importance to the Institute, the representation plans satisfied both the letter and the spirit of section 7(a) of the NIRA. Having implemented its own system of collective bargaining, the steel industry insisted that no further protection of its employees was necessary. "Today collective bargaining is an established and a legal fact. It needs no walking delegates to assure it; no labor politicians to demand it."

The proliferation of ERPs in the steel industry spearheaded a national campaign. Company unions were actively promoted by other employers as early as July, 1933, with the encouragement and support of the steel companies. The National Association of Manufacturers (hereinafter "NAM") undertook a fund-raising campaign to promote ERPs, and it raised a total of $7,000.00, approximately one-half of which was contributed by the Iron and Steel Institute. Part of those funds were expended on the study conducted by the National Industrial Conference Board which figured so prominently in the Institute's report. Additional amounts were given to the Mandeville Press Bureau, which distributed press releases favorable to

116. Id.
117. Id.
118. Id. at 7-8.
119. Id.
120. Id. at 14.
the plans. As the La Follette Committee concluded, the intimate relationship between the public relations experts and the industrialists was not generally known.

The evidence is unmistakable that in the promotion of employee representation plans, the [NAM] employed the National Industrial Conference Board to accumulate data for which they paid the cost, and used the Mandeville Press Bureau to disseminate publicity throughout the country in favor of such plans. Neither editors nor the reading public knew that the “fact-finding and statistical organizations” — the National Industrial Conference Board — and the Mandeville Press Bureau, were both acting for the National Association of Manufacturers.122

In addition to the publicity campaign, a number of regional conferences were arranged for the promotion of ERPs; the specific thrust of that activity was to convince employers who did not have plans to adopt them in their best interests as employers.

To contemporary observers, the underlying anti-union purpose of the new ERPs was empirically demonstrable. A Bureau of Labor Statistics study conducted in 1935 revealed that 41.6 percent of the employers surveyed had instituted ERPs because trade unions were threatening organization in the locality.123 Despite their prevalence and the amassed managerial power underlying them, however, the plans did not in every instance provide a sufficient bulwark against trade union organization. The most important defeat of the company unions occurred in 1936 in the plants of the Carnegie-Illinois Corporation.124

122. Id. at 91.

123. Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 634, Characteristics of Company Unions 81, table 28. The report identifies the following four factors as being of “outstanding importance” to the creation of company unions:

(1) strike situations; (2) trade-union activity in the particular plant or in the locality; (3) a desire to comply with section 7(a) of the N.I.R.A., which was widely interpreted as making necessary some form of organization of employees; and (4) a desire to improve personnel relations without any significant stimulus from external forces.

Id. at 80-81.

124. Bernstein observes that by the end of 1936, “it was evident that the steel organizing drive was already a success, perhaps to become a great success, and that SWOC had made decisive gains among U.S. Steel's employees.” Turbulent Years, supra note 18, at 467. The accord reached between Myron Taylor and John L. Lewis “converted the Steel Workers Organizing Committee from an aspiration into a trade union, one of the largest and most powerful in the American labor movement.” Id. at 473.
IV. THE STEEL WORKERS ORGANIZING COMMITTEE AND THE ERPs

In November 1935, as indicated, John L. Lewis and other dissident labor leaders founded the Committee for Industrial Organization to undertake mass unionization.\textsuperscript{125} One problem which immediately confronted Lewis was the lack of an institutional base in the steel industry. Historically, the Amalgamated Association of Iron, Steel and Tin Workers had assumed jurisdiction over union activities in steel. While "[t]he CIO knew that it could not organize steel through the Amalgamated, ... neither was it willing, at a time when its future ties to the AFL were uncertain, simply to ignore the jurisdictional rights of the Amalgamated,"\textsuperscript{126} Lewis's solution was an agreement in June 1936 between the CIO and the Amalgamated, pursuant to which the Steel Workers Organizing Committee (hereinafter "SWOC") was granted the "power. . . to handle all matters relative to the organizing campaign other than the issuance of charters."\textsuperscript{127} The CIO, in return, contributed an organizing fund of $500,000.00.\textsuperscript{128} Lewis appointed Philip Murray, a United Mine Workers vice-president, as chairman of SWOC,\textsuperscript{129} and on June 17, SWOC held its first official meeting. Among those present was Clinton Golden, whom Lewis had named as SWOC Regional Director for the Pittsburgh area.\textsuperscript{130} At that meeting, SWOC issued a public announcement declaring:

The objective of the Committee is to establish a permanent organization for collective bargaining in the steel industry. . . . Once a substantial proportion of the steel workers have signified their desire to enjoy the benefits of collective bargaining through a genuine labor union, we shall approach steel management and request that they observe the public policy of the United States by peacefully negotiating a collective bargaining agreement.\textsuperscript{131}

\textsuperscript{125} Id. at 400.
\textsuperscript{126} Brody, \textit{The Origins of Modern Steel Unionism: The SWOC Era}, in \textit{Forging a Union of Steel: Philip Murray, SWOC, and the United Steelworkers} 20 (P. Clark, P. Gottlieb & D. Kennedy eds. 1987)[hereinafter \textit{Forging a Union of Steel}].
\textsuperscript{127} V. Sweeney, \textit{The United Steelworkers of America: Twenty Years Later}, 1936-1956, at 11 (1956).
\textsuperscript{128} Id.
\textsuperscript{129} See generally Dubofsky, \textit{Labor's Odd Couple: Philip Murray and John L. Lewis}, in \textit{Forging a Union of Steel}, supra note 126, at 30-44.
\textsuperscript{130} T. Brooks, \textit{Clint: A Biography of a Labor Intellectual}, Clinton S. Golden 157 (1978). Golden previously had been Director of the National Labor Relations Board's 6th Region. \textit{Id.} He was instrumental in persuading leaders of the Amalgamated to accept Lewis's offer of support. \textit{Id.} at 154-57.
\textsuperscript{131} V. Sweeney, supra note 127, at 12.
Four days later, SWOC held a mass rally on the banks of the Youghiogheny River near McKeesport, Pennsylvania. Murray and Golden addressed the assembled steel and coal workers, and Murray pledged that, "[t]he drive to unionize the steel industry will continue if it takes 10 years!"132

SWOC's campaign largely focused on the representation plans which had been created after enactment of the NIRA. In a memorandum of September 11 to his sub-regional directors, Murray discussed "certain recent significant and healthy developments in the direction of independent thinking and action among employee (company union) representatives of certain subsidiaries of the U.S. Steel Corp., and particularly the Carnegie-Illinois Steel Co."133 Murray said that the employee representatives had formed a joint Chicago-Pittsburgh Council on August 25 and had held a second meeting in Pittsburgh on September 9. On that latter date, they had requested a conference with officials of U.S. Steel, but the company had refused. Consequently, the representatives were planning a series of sub-regional conferences in the Pittsburgh and Chicago areas, the ultimate goal of which was a national convention attended by delegates of all company facilities. Assessing the situation, Murray outlined a strategy for the field organizers:

In view of the foregoing, I want you to devote more of your time to the work of contacting the employee representatives in your territory. It is important that you establish a personal and wherever possible, a friendly contact with them either as individuals or as groups. Explain this program to them — interest them in it and then enlist their active volunteer support in getting as many of the employees whom they represent in the mills to sign up as possible. Endeavor to get them interested in attending one of the three sub-regional conferences which will be held in the near future. . . . I want to know as a result of your personal contacts just which of the employee representatives in your territory are in sympathy with this program. I want you to send me their names and addresses and tell me something about them. Likewise, I want to know which of the employee representatives in your territory are actively opposing independent action by their groups.134

Murray cautioned the organizers to proceed with care and to avoid

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132. Id. at 14.
133. Letter from Philip Murray, Chairman, to Sub-Regional Directors (Sept. 11, 1936) (copy in Penn. State Univ. Labor Archives, Harold J. Ruttenberg Papers, Box 3, Folder 14) [hereinafter Ruttenberg Papers].
134. Id. at 2-3.
taking “uncalled for and unnecessary chances” so as to minimize the risk of retaliatory discharges. Murray said that as a result of his communications with the representatives, he was convinced “that hundreds of them are willing and anxious to cooperate with us in this campaign.” To assist the organizers, Murray explained that he was assigning Harold Ruttenberg and John Mullen “to concentrate on this work.”

The key in-plant organizer for SWOC in the Pittsburgh region was Elmer Maloy. Maloy was employed at the Duquesne plant of Carnegie-Illinois, where, he said, Arthur Young had developed a representation plan and appointed the first group of representatives in May 1934. Maloy was disenchanted with the operation of the plan and its lack of effectiveness, and he decided in early 1935 to run for the position of representative. That election was a mandate for the emerging progressive faction among the representatives. As Maloy recalled:

All the walks were painted with my check number and name, the water tower, clear up for 50 feet in the air, and down in the open hearth and all the buildings and everything. Everybody knew that Maloy was running, there was no question about that. Well, I got twice as many votes as the two old representatives.

Maloy was appointed to the rules committee of the representation plan, and he immediately became aware of the limitations of the ERP relative to managerial control. At his first committee meeting, Maloy proposed to amend the rules governing the ERP. One of the employer’s representatives supported the motion and suggested that it be put to a vote, but the ubiquitous Arthur Young informed the

135. Id. at 3.
136. Id.
137. Id. Harold Ruttenberg was the “brash young intellectual of the rank-and-file movement” and served as the SWOC research director under Golden’s direction. T. Brooks, supra note 130, at 180-81. Mullen had been employed in the heating department of the coke works at the Carnegie-Illinois Clairton plant until January 1936, when he obtained a job in local government. Interview with John R. Mullen 4-8 (Feb. 1966) (transcribed copy in Penn. State Univ. Labor Archives). Elected an employee representative in 1934, Mullen continued to serve in that capacity after his separation from employment, even though the company “put on a terrible campaign” to defeat his re-election bid. Id. Mullen was particularly active in the initial formation of the joint committee structure during the first months of 1936, and he arranged the first Pittsburgh-Youngstown conference at the Fort Pitt Hotel in January. Id. Out of that meeting came the central committee, of which Mullen was chair. He was also a paid SWOC member from June 16, 1936. Id.
139. Id. at 11.
The Case of the Steel Industry, 1918-1937

committee that no changes would be made. Maloy recalled Young's statement to the group: "'You're not going to change any rules in this plant. If you change one rule in this plant, you can change them all. And when any changes are made, I'll make them.'" Maloy declared that Young's statement was hardly surprising to Maloy; in fact, he had anticipated such a response and later remembered, "'Well, then, that was one of the things that we wanted to prove, that the ERP didn't mean a damn thing.'" In September, Maloy officially joined SWOC, although he had in fact been receiving compensation from the union for some time.

In the Chicago region, George Patterson had succeeded in organizing an independent association numbering some 3,000 employees from the South Works of Carnegie-Illinois. Under his leadership, rank and file steelworkers formed the Associated Employees union in September 1936. Patterson, meanwhile, continued to act as Chairman of the Calumet Council of Employee Representatives. Throughout the early part of 1936, Patterson remained in contact with Lewis, who advised Patterson that if he "just kept [his] shirttail in the CIO would be there." Management attempted to thwart the impending alliance between SWOC and the employee representatives by offering the representatives a written labor contract which, according to Patterson, was actually executed by both parties. Some months later, Patterson and Maloy arranged a meeting with Secretary of Labor Frances Perkins, who assured them that agreements between management and employee representatives were not legally binding. Meanwhile, Patterson formally delivered his organization to Murray and accepted a SWOC charter on July 16, 1936.

The diverse organizational strands coalesced in the last four months of 1936 when representatives of the Pittsburgh-Youngstown central committee and five Chicago area representatives claiming a constituency of 40,000 workers met in Pittsburgh on August 25. Although a majority of the representatives declined at that time to openly affiliate with SWOC, they formulated a list of demands and presented them in person to L. H. Burnett, a Carnegie-Illinois vice-

140. Id. at 12.
141. Id.
142. Id. at 22.
144. Id. at 10-11.
145. See generally id. at 1-22 (giving an account of Patterson's union activities during the period).
president, and by letter to President Benjamin Fairless. The demands included a universal 40-hour week, a 25 percent wage increase, a permanent plan of paid vacations, weekly paychecks, and "just seniority rights.”

On September 9, the new Chicago-Pittsburgh Council convened at the Roosevelt Hotel in Pittsburgh. The minutes of that meeting summarized and incorporated the August 25th list of demands sent to Benjamin Fairless. Fairless had responded neither to those demands nor to the request for an interview, and the Council "deplored the lack of courtesy shown by the Management of the C.I.S. Corp. in the refusal to reply to this communication." One of the representatives of the Sheet and Tin Company inquired whether the purpose of the present meeting was to "endorse the C.I.O. drive," at which point the Chair opened the meeting for consideration of that item. Next, the representatives discussed what might be done to obtain the concessions earlier demanded from the company. They telephoned the company offices to request a meeting with an appropriate official, but Fairless was absent on a business trip, and Burnett "was enjoying his vacation, while the Manager of Industrial Relations had arranged to visit the 'mills' and consequently could not meet [the] council.” Later that day, the representatives took direct action to engage the corporate management:

Upon reconvening at 1:50 p.m. it was decided to visit the offices of the C.I.S. Corp. in the Carnegie Bldg. in the hopes that a meeting might be arranged with officials of the Corp. The Council was informed that no one in authority could meet with them.

After visit to Carnegie Bldg., meeting came to order to complete business of the day. Motion by Maloy seconded by Ostrowski that invitation be extended to all Representatives in the Steel Industry to join this Council. Motion carried.

The employee representatives continued to pressure Carnegie-Illinois for economic concessions, and the company agreed in November 1936 to grant a wage increase. However, not all representatives were willing to sign the agreement proposed by the company.

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147. Letter from Joint Committee of Employee Representatives to B. F. Fairless (Aug. 25, 1936) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6).
148. Minutes of Meeting of Chicago-Pittsburgh Council of Employee Representatives of C.I.S. Corp. (Sept. 9, 1936) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6) (handwritten by John Kane, acting Secretary).
149. Id. at 1.
150. Id. at 3.
151. Id.
because wage increases were tied to price increases, and thus there was no real increase in wages. Also during this period, the company merged the steel group with the sheet and tin group, which increased the central committee of the representation plan to seventeen plants. Maloy was able, by adroit maneuvering, to gain enough votes to insure his election as chair of the central committee. The central committee subsequently accepted Carnegie-Illinois’ proposed pay increase, but rejected the linkage of pay raises with price increases.\(^\text{152}\) Maloy and Patterson, in the interim, had obtained the opinion from Secretary Perkins that any arrangement entered into between the company and its representatives would not be deemed enforceable in court.\(^\text{153}\)

The most important meeting of employee representatives was held on December 20, 1936, at the Fort Pitt Hotel in Pittsburgh; 244 delegates from 42 plants were in attendance, and they formally declared their support for the CIO.\(^\text{154}\) The delegates’ first order of business was to unanimously elect Maloy as chairman. Various speakers then criticized the company’s representation plan. Mr. Ramsay of Bethlehem described the plan “as a whip held over the men by a dominant management."\(^\text{155}\) Mr. Garrity of the Edgar Thompson works “called on the proponents of the plan to defend it. No person present made any defense of the plan.”\(^\text{156}\) The delegates’ views of employee representation were ultimately embodied in Resolution No. 1, notable for its energy and candor:

> Whereas; The management in the steel industry finances, controls, dominates, and intimidates the company union, and . . . [t]he company union is a device of the management to prevent bona fide industrial organization of the steel workers, and . . . [t]he Federal Congress and President of United States have outlawed company unions financed or dominated by employers, and . . . the company union is powerless to win substantial gains from the management, and . . . the company union is simply a committee of men from different departments in the mill and is denied the right to hold meetings of the men, issue membership cards, or collect dues, and . . . it is as difficult to find a needle in a haystack as it is to find a steel worker who will defend the company union; therefore, BE IT NOW RESOLVED: That the progressive representatives here as-

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152. See R. Brooks, supra note 21, at 101.
153. Id. at 103.
154. Minutes of Meeting of District Representatives Council (Dec. 20, 1936) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6).
155. Id. at 1.
156. Id. at 2.
sembled condemn the company union as a farce, a sham, an insult to the intelligence of steel workers, and a Rip Van Winkle form of collective bargaining where the company union representatives try to bargain and the management actually does the collecting.157

Following a speech by Philip Murray, the delegates adopted a number of resolutions, including Resolution No. 1. To provide a new organizational structure, the respective district councils of Pittsburgh, Youngstown-Cleveland, and the Eastern District merged together into a Regional Council which was to be known as the “C.I.O. Representatives Council.”158 Maloy was elected president of that body, and three vice-presidents were chosen from each district. The delegates also adopted a “Declaration of Principles” which reiterated the link between unionization and the employee representation plan.159 The first principle adopted by the Council was that “all steel workers be organized into a National Industrial Union.”160 The remaining three principles translated the general objective into a specific strategy to elect employee representatives within the plants who would “use their influence to enroll the steel workers into the Steel Workers Organizing Committee’s campaign.”161 With respect to the workers’ view of the ERPs, the Council proposed that “all steel workers be thoroughly informed by employee representatives who know from experience that the company union is a device of the management and totally unable to win any major concessions for the steel workers.”162 Last, the Council agreed that “C.I.O employee representatives remain inside the company unions for reasons obvious to all.”163

Despite its overwhelming success, the SWOC domination of the company unions was not unopposed. An articulate and vocal minority of representatives, headed by “Colonel” Fred Bohne, persistently argued against trade union affiliation. In a revealing portrait, SWOC District Director Elmer Cope astutely analyzed Bohne’s character and attachment to the principle of company unionism.164

157. Id. (Resolution No. 1.).
158. Id. (Resolution No. 4.).
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Letter from Elmer Cope to Harold Ruttenberg (Oct. 20, 1936) (copy in Ruttenberg Papers, supra note 133, Box 3, Folder 19). Cope was a graduate of Brookwood Labor College and for some time an activist in the radical Conference for Progressive Labor Action. T. Brooks, supra note 130, at 138. He became a SWOC staff member and remained a union
Cope and another SWOC staff member, Tommy Evans, visited Bohne at his home on October 19. Cope remarked first on Bohne's age—"at least sixty"—and secondly on Bohne's "obvious sincerity and crusading spirit." Bohne's beliefs were a curious mixture of populism and company loyalty:

It is his contention that he has always been in favor of Industrial unions and that he would do nothing to stand in the way of seeing a strong union develop. He believes, and with sincerity, that the company union can be developed into an effective collective bargaining instrument for the workers in steel. When I pressed him for his views regarding our movement he simply stated that he believed that by gradually extending the powers and scope of the representative bodies they could be welded into the kind of thing we are after. He visualized one big employee representative organization which would eventually embrace the workers throughout the steel industry. He even went so far as to suggest that perhaps in due time we would find ourselves united.165

Unconvinced by Bohne's arguments, Cope noted that if Bohne "really is sincere he is having a pipe dream."166 Nevertheless, the force of Bohne's opposition could not be discounted: "He's a pretty slick article and the company certainly knows what it is doing when it caters to him. Of course, his influence must be destroyed."167 Cope suggested that the pro-SWOC representatives, such as Maloy, "will have to be pretty careful and pretty shrewd if they are to swing him our way or to discredit him."168 Above all, Cope thought, the organizing activity would have to be carried out "in such a way as not to solidify the representatives around him."169

Near the end of 1936, Bohne and other Carnegie-Illinois employees sympathetic to the ERP formed a "Defense Committee" to marshal support for the company. During its brief existence, the Committee held several meetings, retained its own legal counsel to represent members in NLRB hearings, and produced an anti-union publication.170 The Committee also contacted Benjamin Fairless to

165. Letter from Elmer Cope, supra note 164, at 1.
166. Id.
167. Id. at 2.
168. Id.
169. Id.
170. Minutes of Meeting of the Defense Committee of Employee Representatives (Jan. 18, 1937) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6); Press Release from the Editorial Bureau of Defense Committee of Employee Representatives (Jan. 14, 1937) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6).
inform him of its activities and received his enthusiastic endorsement. Fairless wrote, "I can assure you that the writer and his associates will cooperate in every possible way with your Committee as it is our firm conviction that the Plan of Employee Representation in effect in the Plants of the Corporation is the best Plan for collective bargaining so far devised."  

In the leaflet addressed to "Our Fellow Employees of the Carnegie-Illinois Steel Corp.," the Defense Committee attacked the trade union campaign and its leadership. Committee members were "convinced without a shadow of a doubt that with very little expense to us, without a closed shop and WITHOUT STRIKES, we can secure with our own organization more than we can attain with Mr. Lewis' CIO." According to the Defense Committee, Lewis enjoyed an annual income of "two and one-half million dollars per year" from the United Mine Workers, and he was the "sole and final authority" regarding disbursement of that money. The Committee also rejected charges that the ERPs were dominated and coerced by management. "This not only is a rank falsehood, but we resent being pictured as a bunch of chuckle-headed stool-pigeons." The leaflet concluded with a plea for unity which echoes Rockefeller's declarations two decades earlier:

The employer and employees must work together for their common good. There must be a spirit of co-operation and brotherhood if both are to progress materially and socially. They must cease to regard each other as enemies, and recognize themselves as joint trustees of one of the most important elements of our national life.

Within months, however, the struggle for unionization at U.S. Steel was over.

On January 9, 1937, John L. Lewis met with Myron Taylor, chairman of the board of U.S. Steel, to discuss recognition of SWOC. Taylor contacted the heads of the subsidiary operations to

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171. Letter from B.F. Fairless to Owen Jones, et al. (Jan. 9, 1937) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6).
172. Defense Committee, To Our Fellow Employees of the Carnegie-Illinois Steel Corp. (1936) (copy in Ruttenberg Papers, supra note 133, Box 4, Folder 6).
173. Id. at 2 (emphasis in original).
174. Id.
175. Id.
176. Id. at 8.
177. It Happened in Steel, 55 Fortune 91 (May 1937) (discussing the Taylor-Lewis meetings and Taylor's motives for dealing with Lewis); see also Turbulent Years, supra note 18, at 466-73 (giving an account on how recognition was achieved).
ask if they would sign a labor contract in accordance with current practices under the ERPs. Shortly thereafter, the board of directors agreed that Benjamin Fairless of Carnegie-Illinois should negotiate the preliminary agreement with Philip Murray, and on March 2, Fairless and Murray "set their signatures to the most important single document in the history of the American labor movement."\textsuperscript{178}

The disagreement among workers at U.S. Steel over trade unionism versus employee representation reflects competing and incompatible ideologies. Arguments concerning freedom, coercion, autonomy, and industrial power are articulated in the respective views of the participants. Identical contentions are embedded in the legislative history of the Wagner Act and illuminate the deeply divisive nature of the question. At a basic level, the dialogue concerning employee representation recapitulates a fundamental dichotomy inherent in the policies of our labor law. Conceived in a period of unparalleled economic crisis, the New Deal collective bargaining legislation attempted simultaneously to further the redistribution of national wealth through trade union development while insuring that workers remained free to select any form of collective bargaining organizations they wished.\textsuperscript{179} The debates concerning the legislation, as well as its subsequent interpretation, reflect those two irreconcilable themes.\textsuperscript{180}

Emphasizing the uniqueness of the NIRA, President Roosevelt

\textsuperscript{178} R. BROOKS, supra note 21, at 108. The terms of the Carnegie-Illinois labor agreement and its impact on the steel industry are analyzed in F. HARBISON, COLLECTIVE BARGAINING IN THE STEEL INDUSTRY: 1937, A FACTUAL SUMMARY OF RECENT DEVELOPMENTS (1938).

\textsuperscript{179} See C. TOMLINS, supra note 20, at 122-23. In his influential recent study of the Wagner Act, Christopher Tomlins points out that the legislation was "qualitatively different" from previous conceptions of collective bargaining. See id. Tomlins argues that the intention of the New Deal lawmakers was:

To give unambiguous public support to independent unionism as a means to promote collective bargaining, not in the interest of stabilizing relations between existing organized parties — the rationale of previous legislation — but in vindication of the tangible public interest in the stabilization of the wages, hours and working conditions of the labor force at large. \textit{Id.} at 122. That policy had a direct bearing on the issue of company unionism, because no policy could succeed "unless it also simultaneously recognized that company unions were institutionally incapable of contributing to the achievement of [such] stability." \textit{Id.} at 123.

\textsuperscript{180} See Gross, Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making, 39 INDUS. & LAB. REL. REV. 7, at 14-18 (1985). James Gross, a leading scholar of the development of the NLRA, has cogently summarized the inconsistent policies of the Act. See id. He comments, "[I]nterweaving assumptions of employee free choice (the right to refrain [from union activities]) and equality of rights between labor and management, for example, lead to conclusions that are unfavorable to the encouragement of collective bargaining . . . ." \textit{Id.} at 14. The result is that "our national labor policy is at cross-purposes with itself." \textit{Id.} at 18.
described the law as perhaps "the most important and far-reaching legislation ever enacted by the American Congress." Administration of the labor provisions of the NIRA was entrusted to the National Labor Board (hereinafter "NLB"), chaired by Senator Wagner. Between August 1933 and July 1934, the NLB issued a number of decisions which laid the foundation for a "common law" of American labor relations. To provide a more permanent statutory basis for collective bargaining, Wagner introduced his Labor Disputes Bill in 1934. He withdrew the bill at the end of the Congressional session, choosing instead to endorse President Roosevelt's extension of the NIRA in Public Resolution No. 44. The Resolution created the first, or "old" National Labor Relations Board, which continued the administration of section 7(a) of the NIRA. Subsequently, in February 1935, Wagner proposed the legislation eventually passed in 1935 as the National Labor Relations Act. The debates on the various legislative drafts and enactments, as well as the decisions of the NLB and first NLRB, are central to the meaning of section 8(a)(2).

V. LEGISLATIVE HISTORY

From the earliest days of the New Deal, Senator Wagner was

181. NATIONAL RECOVERY ADMINISTRATION, supra note 108, at 3.
184. H.J. Res. 375, 73d Cong., 2d Sess., reprinted in 1 LEG. HIST. NLRA, supra note 183, at 1255B-56 (Public Resolution No. 44). The circumstances relating to the demise of S. 2926 and Congressional approval of Roosevelt's temporary expedient are described in NEW DEAL COLLECTIVE BARGAINING, supra note 17, at 76-83.
the key figure in the development of labor legislation. He and Donald Richberg, for example, "were nearest to occupying the role of official sponsorship" of the NIRA.\textsuperscript{187} Just prior to enactment of the NIRA, Wagner addressed the Senate to "explain the provisions of the pending bill and the policy behind it . . . ."\textsuperscript{188} Most important, Wagner said, the NIRA "is an employment measure. Its single objective is to speed the restoration of normal conditions of employment at wage scales sufficient to provide a comfort and decency level of living."\textsuperscript{189} To accomplish that objective, it was first necessary to reduce concentrations of corporate wealth and power. As Wagner explained:

During the present century we more than doubled our national wealth. But we made no progress in distributing it more equitably. From the most comprehensive study of income in the United States . . . we learn that less than 9 percent of the people in the United States receive one third of the total national income, that one thirtieth of the population receive one tenth of the national income, while three quarters of the population receive incomes below the standards of comfortable living set by the United States Bureau of Labor Statistics.\textsuperscript{190}

According to Wagner, disparity of wealth was a major cause of the economic catastrophe. Corporate earnings during the 1920's rose substantially faster than rates of wages. In turn, "[t]his led to an overexpansion in productive equipment, particularly machinery and plant facilities. The great mass of consumers did not receive enough pay to take the goods off the market."\textsuperscript{191} Such conditions could be prevented by "a well-planned wage program, dispersing adequate purchasing power throughout the economic system."\textsuperscript{192} The dispersal

\begin{itemize}
  \item \textsuperscript{187} NATIONAL RECOVERY ADMINISTRATION, supra note 108, at 19. Concerning the objectives of the NIRA, Lyon summarizes one view as follows:
  There were other persons who thought the act was meant primarily to implement certain advantages, both for recovery and for long-range business stabilization, which were supposed to derive from redistributing income more heavily toward the lower income brackets. These in some degree coincided with those who thought the bill to be among other things a charter of liberties to labor unions.
  \textit{Id.} at 24.
  
  \item \textsuperscript{188} 77 CONG. REC. 5152 (1933).
  
  \item \textsuperscript{189} \textit{Id.}
  
  \item \textsuperscript{190} \textit{Id.}
  
  \item \textsuperscript{191} \textit{Id.} at 5153.
  
  \item \textsuperscript{192} \textit{Id.} at 5153-54. Wagner also perceived a moral basis for the legislation. \textit{See id.} He noted that "from ten to fifteen million families have been reduced to dire want" and argued that those figures "make the wage situation more than an economic problem in the narrow sense." \textit{Id.} at 5154. "It is a situation tending to destroy health and morals, and should be dealt
\end{itemize}
of purchasing power, of necessity, would justify vigorous and effective independent trade unions and corresponding regulation of company unions. That point became more explicit as the legislation progressed.\textsuperscript{193}

In March 1934, shortly after the introduction of the Labor Disputes Act, Wagner published an article in the New York Times asserting that the company union “runs antithetical to the very core of the new-deal philosophy.”\textsuperscript{194} Employer-dominated organizations of employees had increased substantially between 1932 and 1934, Wagner said, pointing out that the number of employees covered by company unions rose from 432,000 in the former year to 1,164,000 in the latter, or an increase of 169 percent.\textsuperscript{195} Wagner attributed high levels of industrial conflict to the existence of the company unions and perceived two undesirable consequences if their deployment was not checked. “One is that the employer will have to maintain his dominance by force, and thus swing us directly into industrial fascism and the destruction of our most-cherished American ideals; the other is that employees will revolt, with wide-spread violence and unpredictable conclusions.”\textsuperscript{196}

Wagner based his arguments against the company unions on two distinct grounds. The first line of attack was the institutional one which asserted that a system of bargaining confined to a single plant or employer could not adequately strengthen the position of workers with in the same firm manner that we are accustomed to employ in such instances.” \textsuperscript{Id.}

193. The importance of economic theory in Wagner’s thought has been explained by Leon Keyserling, who was Wagner’s chief aide during the drafting of the NLRA. Keyserling observed that one purpose of the legislation was to reduce industrial conflict. Nevertheless, he continued, labor strife remained only a tangential policy consideration for Wagner:

But Senator Wagner’s central argument for his bill was always on general economic and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted.

It was for this reason that the Senator insisted that the declaration of policy of the bill, which rested its claim to constitutionality upon the power of the Congress to regulate interstate commerce, should stress not only the damaging effects of work stoppages upon such commerce, but also the damaging effects of inequality of bargaining power and consequent deficiencies in consumer purchasing power upon the volume of economic activity moving through the streams of commerce.


195. \textit{Id.}

196. \textit{Id.} at 25.
in an industrial economy. Conceding that the company union often improved personal relations between employer and employee on a local level, Wagner insisted nevertheless that "it has failed dismally to standardize or improve wage levels, for the wage question is a general one whose sweep embraces whole industries, or States, or even the Nation." Further, plant-level bargaining denied the worker expert assistance with problems of industrial relations and perpetuated a relation of subservience between the representatives and the employer with whom they dealt. Company unions, then, were an impediment to the formation of durable structures for the conduct of bargaining.

With respect to the needs of individual workers and their freedom of choice, Wagner explained that the Labor Disputes Act did not preclude competition between trade unions and company unions "in an open field." At the same time, the right to freely choose representatives "is a mockery when the presence of a company union firmly entrenched in a plant enables an employer to exercise a compelling force over the collective activities of his workers. Freedom must begin with the removal of obstacles to its exercise." Underlying this aspect of Wagner's critique of company unions are crucial assumptions about power in industrial society. Those assumptions were explored in Wagner's candid exchange with Senator Millard Tydings of Maryland on June 16, 1934, the day Wagner withdrew...
his bill in favor of Roosevelt's joint resolution.\footnote{201}{See \textit{id.} at 1181-84 (statement of Wagner's reasons for his support of President's substitute bill).}

In a discussion concerning certain amendments offered by Senator La Follette, Tydings referred to "a very significant letter" sent to him by workers at the Bethlehem plant at Sparrows Point.\footnote{202}{S.J. Res. 143, 73d Cong., 2d Sess., reprinted in 1 \textit{LEG. HIST. NLRA}, supra note 183, at 1219-20 (containing letter from Charles H. Weaver & Albert Crew to Hon. Millard Tydings (June 13, 1934)).}

Charles Weaver, chairman of the employee representatives committee, urged Tydings to oppose any legislation resulting in a closed union shop. "The plan of employees' representation has been functioning at this plant for 17 years," Weaver wrote, "and furnishes us with a highly satisfactory method for the settlement of the various problems arising in our employment relations."\footnote{203}{Id. at 1219.}

Weaver perceived that "the entire labor situation appears to be greatly clouded by misinformation, and if the absolute truth were told by everybody concerned in the present labor controversy, our plan of employees' representation would need no defense."\footnote{204}{Id. at 1220.} Tydings claimed that the letter "speaks for itself" and "expresses the untrammeled and actual sentiment of the employees of that plant who in normal times number about 12,000 to 14,000."\footnote{205}{H.J. Res. 375, 73d Cong., 2d Sess., reprinted in 1 \textit{LEG. HIST. NLRA}, supra note 183, at 1234.}

Wagner did not permit Tydings' characterization of the labor bill as "an invasion of the liberty of the worker" to pass unchallenged. "May I briefly explain to the Senate," Wagner inquired, "the plan which the Senator from Maryland says protects the freedom of the worker, while he claims that the legislation we propose is intended to deprive the worker of his just freedom?" Wagner then provided the Senators with an example based on testimony before his committee:

Here is an actual case. I am giving evidence now; I am standing at my machine, working. The foreman walks over to me and says, "Here is your constitution." He goes along throughout the entire shop and says to each worker, "Here is your constitution ... ." The worker takes the constitution and put[s] it in his pocket. He has no alternative. Refusal means the loss of his job. That is the way a company-dominated union is organized.\footnote{207}{Id. Wagner also observed that the Bethlehem corporation, to which Tydings referred, "has had a representative plan for many years, but it has nevertheless possessed the}
Not content with the debate, Tydings protested that he merely wanted to ensure that workers desiring the representation plan should not be "coerced into taking a plan they do not want."208 Chairman Walsh then asked Wagner if Wagner knew "of any way to prevent any employee from coercing another employee to join or not join a union."209 In reply, Wagner pointed out that "there is no possibility that the same coercive power can be exercised by one employee against another that can be exercised by the employer against the employee."210 When Tydings insisted that he was representing a sizeable group of constituents who feared that "they will be compelled or coerced to join a union which they do not want to join,"211 Wagner angrily dismissed Tydings' criticisms of the proposed legislation: "Here is all there is to it. We are extending the right to the workers to elect any individual or organization they choose, instead of being restricted. How is that compelling anybody to do anything? The charge of compulsion is a gross misrepresentation that has circled the country."212 Yet, in fact, Wagner's defense of individual free choice was conceptually at odds with the furtherance of independent collective bargaining relationships throughout American industry toward the end of a more equitable distribution of wealth. Consequently, opponents of the legislation could recast the discourse in terms of employer-employee cooperation as against the class warfare of radical unionism.

Among the more prominent defenders of the representation plans was Arthur Young, the architect of many important plans and a knowledgeable exponent of the ideology of participation. Testifying before the Committee on Education and Labor in April 1934, Young began by rebuking a previous witness who had disparaged Rockefeller's Colorado plan as a "subterfuge." Young vindicated his former employer by insisting that "[n]o one who has ever dealt with Mr. Rockefeller could ever question his absolute sincerity of purpose and act."213 In the U.S. Steel subsidiaries, Young continued, ERPs were
introduced with the overwhelming support of employees, who would attest to the benefits of the plans. “There is no resentment on their part, no suspicion of hidden coercion or intimidation or subterfuge, because the initiation of these endeavors finds its fruit in a mutually satisfactory agreement on policies.” More rhetorically, Young likened the development of sound and harmonious relationships between men and management to the working out of a sound and harmonious relationship in marriage between a man and his wife. Both depend upon a mutual conviction that their interests in life are largely in common, at least to the extent that they should form an alliance.

Young concluded his testimony with an allusion to the precepts of the “Carpenter of Nazareth” as a guide to industrial conduct: “Gentlemen, I say to you in all the sincerity at my command, the works council plan is likewise a supplement to the Golden Rule.” Thus, like Rockefeller some two decades earlier, Young drew upon broad humanitarian and religious themes in exalting the ideal of communal harmony in the workplace.

Employers in steel were also highly visible during the hearings. Joseph Larkin, Vice-President of Bethlehem Steel, presented the case for employee representation as a means of “having the employee and employer sit down together in a friendly and constructive atmosphere and, with a first-hand practical knowledge of their problems, work out a fair and equitable solution.” The cooperative approach was “the strength of employee representation as contrasted with other forms of collective bargaining which seek to organize employees and employers into separate camps with drawn battle lines.” Larkin perceived that the Labor Disputes Act aimed at a specific form of organization for workers: “My general criticism of the Wagner bill is not so much that it supports unionization as that it will in operation result in enforced unionization for every kind and condition of collective bargaining.”

214. Id. at 764.
215. Id. at 766.
216. Id. at 767.
217. Id. at 819.
218. Id.
219. Id.

Larkin’s testimony was given on April 5, 1934. On March 26, 1935, he appeared at the hearings on S. 1958 and submitted a written statement of his previous testimony. See S. 1958, 74th Cong., 1st Sess., reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1373 (1985) [hereinafter 2 LEG. HIST. NLRA]. He added that in the annual elections for 1935, “92.2 percent of the 45,950 workers operating under the employees’ representation plans cast their ballots,” thereby constituting a “virtually
For the United States Steel Corporation, Raoul Desvernine presented a brief opposing the Act. He argued that collective bargaining was already in place at U.S. Steel, where "approximately 129,798 eligible employees" were employed, and more than 83 percent of them had voted for the adoption of representation plans. Desvernine noted that "There has been comment that these plans are objectionable because we, in the first instance, had something to do with suggesting their form." Regardless, he asserted, "[a]s long as the plans are voluntarily chosen by the employees and the plans are working effectively and satisfactorily to the employees, it is submitted that how the plans originated is immaterial." Embedded at the core of the proposed law, then, was a flawed conception of the employment relationship:

The trouble with the whole bill is that it is designed to prevent any cooperation between an employer and his employees. It is designed to throw them into controversy and dealings at arms' length instead of setting forth certain basic rights of employees and imposing penalties for violation of those rights of employees.

A number of workers also appeared before the Committee and advocated the employee representation plans over the Wagner bill. John Collins, who worked in a filling station in New York City, said that he represented about 1,000 employees of Sobol Bros., a Standard Oil subsidiary. Workers at the company had recently chosen to continue their representation plan by a margin of 816 to 76, Collins testified, and he regarded that vote as a mandate to oppose the pending legislation. Particularly, Collins feared that the bill would prohibit plans such as the one at Sobol Bros. The following discussion then took place between Chairman Walsh and Collins:

The CHAIRMAN: I think I can assure you, young man, that this

unanimous endorsement of the plans . . . in the face of organized agitation against them from the outside." Id. at 1753.
220. 2 LEG. HIST. NLRA, supra note 219, at 1746.
221. Id. at 1747.
222. Id.
223. Id. at 1749. Desvernine also served as chairman of the National Lawyers Committee, which led the legal attack on the NLRA after its passage. See NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935).
224. S. 2926, 73d Cong., 2d Sess., reprinted in 1 LEG. HIST. NLRA, supra note 183, at 503.
225. Id. When asked who had sent him and his co-worker to testify at the hearings, Collins replied, "[n]o one sent us down here. I read in the paper Saturday that the opponents of the Wagner bill would be heard." Id. at 502.
committee, so far as I know the sentiment of it, does not intend to recommend any legislation that will outlaw any union that the employees themselves desire to set up for the purpose of engaging in collective bargaining with their employers, provided that union is independent of domination and control by the employers.

Mr. Collins: Yes, sir; but the bill itself says, even if the company should initiate or participate in it, that that would be considered an unfair labor practice, and while the company does participate in it and has initiated it, nevertheless, we have substantially collective bargaining, and the others are just modes rather than the essence of collective bargaining.  

Walsh was so sufficiently impressed by the distinction that he informed Collins, "You ought to be a lawyer instead of a service-station man."  

And indeed, Collins cogently posed the problem of an employee representation plan which, although initiated, participated in, and supported by the employer, was freely chosen by employees as a bargaining vehicle. Senator Wagner, who was present at the hearing, took the opportunity to assure Collins "that if this is the kind of an organization that the employees want, that is what I am for 100 percent." Wagner went on to capture the paradox of the legislation in a single sentence: "All I am trying to do, and I think, you believe me when I say that, is to make the worker a free man to join any organization that he wishes to join and, at the same time, to have genuine collective bargaining."

The tension between the aggressive promotion of collective bargaining under the auspices of powerful trade unions and an extreme solicitude for the preferences of the individual worker is thus amply evident in the legislative history. As the next section of this Article demonstrates, that underlying ambiguity pervades the legal doctrine emanating from section 8(a)(2). The Board, with the approval of the Supreme Court, quickly developed a strict interpretation of the law. Gradually, however, a more lenient and "enlightened" approach has emerged from the decisions of the federal circuit courts. The juridical discourse has in turn given rise to renewed debate over legal policy.

VI. TRADITIONAL INTERPRETATIONS OF SECTION 8(a)(2)

The National Labor Board adopted flexible standards in dealing
with company unions under section 7(a) of the NIRA and applied three general criteria to determine the validity of an existing company plan. Those criteria included the presence of employer coercion in instituting and maintaining the plan, the employees' opportunity to accept or reject the plan, and their alternative to choose an outside union. Where the evidence showed that the employer had interfered with workers' free choice, the NLB would require an election. Conversely, the NLB permitted an inside union to continue its bargaining relationship with the employer if the organization demonstrably served the interests of the employees. In Federal Knitting Mills, for example, the NLB dismissed the claim of the United Textile Workers' Union that the employer interfered with employees' right of self-organization by creating a company union. Dismissing the charge, the NLB made the following findings:

The record . . . reveals that the workers were afforded the fullest opportunity to choose between inside and outside unions. In each plant a preliminary election was held to determine whether the workers desired to be represented by an inside union or an outside union, or whether they desired to bargain individually with their employers. The inside union was selected by an overwhelming vote. Constitutions were thereupon prepared by the employees for the creation of an inside organization. Thereafter representatives were selected in each plant for the purpose of collective bargaining. No evidence was presented that any interference, restraint or coercion was practiced by the employers.

Accordingly, the inside unions were legitimate bodies for the conduct of collective bargaining.

The first National Labor Relations Board generally followed the flexible principles established by the NLB. It sometimes determined to nullify the company union altogether. But in other instances, the Board allowed the company union to be represented on the ballot in a Board election even though the inside organization had been

230. L. Lorwing & A. Wubnig, supra note 182, at 143.
231. Id.
233. Id. at 69-70.
234. See, e.g., Danbury & Bethel Fur Co., 2 Decisions of the National Labor Relations Board, July 9, 1934-Dec. 1934, at 195 (1935). In this case, the Board found that the representation plan had been imposed on the employees through intimidation and coercion. See id. To remedy the unlawful acts, the Board ordered the company to cease any further recognition of the company union and to recognize and bargain with the United Hat Fur Workers Union. Id. at 200.
supported by the employer, as in *Firestone Tire & Rubber Co.* In the *Firestone* case, the Board found, among other things, that the company had

actively participated in the drafting, adoption and financing of the Employees Conference Plan; that the Plan has never been put to a vote of the employees for acceptance or rejection; [and] that the employees have never had an opportunity of voting on whether they wanted to be represented as provided in the Plan or by [United Rubber Workers] Local #18321, of which a large number of Firestone employees are members.\(^{238}\)

Despite such evidence, the Board concluded that the Plan was entitled to take part in the election. That decision, the Board explained, was consistent with the notion of "free choice" under the law. Because elections were intended to facilitate free selection of a representative, the Board might in "extreme cases" refuse a place on the ballot "to an organization or plan of representation which by its very terms is incapable of serving as a collective bargaining agency."\(^{237}\) The Board cautioned, however, "This . . . we should rarely do have occasion to do, since ordinarily the choice, good or bad, is for the employees to make."\(^{238}\) Permitting free employee choice, "good or bad," had thus become one of the old Board's primary concerns. But the Board also emphasized the economic policy of the Act in an extremely important case.

The most controversial decision of the original NLRB was issued in *Houde Engineering Corp.*,\(^{239}\) which held that the representative selected by a majority of voters was the exclusive representative of all employees within the bargaining unit. In the *Houde* opinion, the Board articulated a theory of collective bargaining which rested not on employee freedom of choice, but on national economic prerequisites. Custom and precedent, the Board said, demanded that the NIRA's conception of collective bargaining be interpreted as "that long-observed process whereby negotiations are conducted for the purpose of arriving at collective agreements governing terms of employment for some specified period."\(^{240}\) The emphasis on labor contracts was inseparably linked with the statutory purposes of the

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235. *Id.* at 173.
236. *Id.* at 175.
237. *Id.* at 175-76.
238. *Id.* at 176.
239. *In the Matter of Houde Eng'g Corp. & UAWFL, No. 18839* (decided Aug. 30, 1934).
240. *Id.* at 36.
The Case of the Steel Industry, 1918-1937

NIRA, starting from the proposition that "[t]he fundamental aim of the Act was to restore prosperity by increasing purchasing power." To that end,

Industry was to be stabilized by permitting employers to combine together, immune, to a large extent, from the restrictions of the anti-trust laws, for the purpose of eliminating cut-throat competition, waste, and the grosser evils of unplanned production. At the same time, hours were to be reduced, wages increased, and reemployment effected on the largest possible scale. These vital readjustments could not be brought about by the law alone. Close and continuing cooperation between management and labor was essential in working out the readjustments and in seeing to it that the gains which industry might derive from its new powers to control production and prices would be equitably shared with the wage-earners, and thus serve to increase purchasing power.

Within the redistributive framework, "[c]ollective bargaining and the collective agreements resulting therefrom would be an essential part of this process." Negotiated labor contracts were at the core of the NIRA policy, first, as a means of stabilizing conditions of employment, and secondly, to insure that those conditions would eventually become "reasonably uniform within each particular industry." Accordingly, the employer was ordered to bargain only with the majority representative and to cease any further dealings with the company union. The Houde decision provoked substantial employer resistance and generated immediate legal challenge to the Board's authority, but the potential significance of the case was eclipsed by passage of the National Labor Relations (Wagner) Act.

On August 24, 1935, the Wagner Act NLRB came into existence with the appointment of Edwin S. Smith, John M. Carmody, and J. Warren Madden. In its first published decision, Pennsylvania Greyhound Lines, Inc., the Board rendered an interpretation of section 8(2) which conflated the institutionally-based approach to

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241. Id.
242. Id.
243. Id.
244. Id. at 37.
245. See P. Irons, supra note 185, at 216-18 (describing the NLRB's efforts to obtain enforcement of the Houde decision through Department of Justice litigation).
246. J. Gross, supra note 185, at 149-52. The Board was committed to the creation of a "legal discourse" as a means of implementing the provisions of the Wagner Act, a course which preferred statutory procedures over the traditional practices of the AFL. C. Tomlins, supra note 20, at 150-60.
collective bargaining with the Act's "freedom of choice" policy rationale. The Pennsylvania Greyhound Lines instituted an Employees Association in July 1933. Management designed the Association and imposed it on workers without their consent. Through a committee system and a "memorandum of understanding," employees might appeal disciplinary action and complaints about working conditions; there was no mechanism for collective negotiations. Based on such evidence, the Board concluded that the employer dominated and controlled the entity and that the Association satisfied the statutory definition of a labor organization:

It was planned by the management, initiated and sponsored by it, and foisted upon the employees who had never requested it. The initial elections were conducted by the management, its organization chartered by the management and its By-Laws written by the management. Its functions were described and given to it by the management. 248

Thus, the Board reasoned, "[t]here can be but one way of remedying the unlawful conduct in this case and that is a complete withdrawal of all recognition from the Association as representative of the employees, in addition to the order requiring cessation of such domination, interference and support." 249 The employer's influence had so completely permeated the Association's structure that only the disestablishment of the Association would protect "genuine employee organization." 250

The Board's reasoning and remedy in Pennsylvania Greyhound Lines, Inc., were approved by the U. S. Supreme Court. 261 Conceding that it had created and dominated the Association, the company argued that disestablishment was too severe a remedy. 262 The Court disagreed, noting that the "company union [was] so organized that it [was] incapable of functioning as a bargaining representative of em-

248. Id. at 13.
249. Id.
250. Id. at 44. For an analysis of the Board's remedy of disestablishment, see THE DEVELOPING LABOR LAW 276-81 (C. Morris, 2d ed. 1983). Typically, a labor organization which is "dominated" by the employer will be disestablished; in contrast, if the organization merely has received unlawful support or assistance, a less severe remedy, such as a cease-and-desist order, is appropriate. See also id. at 302-03 (citing extensive Board precedent).
252. The Third Circuit Court of Appeals accepted the employer's argument that the Association should be entitled to compete in a secret ballot election with the outside union. NLRB v. Pennsylvania Greyhound Lines, Inc. 91 F.2d 178 (3d Cir. 1937), aff'd, 303 U.S. 261 (1938).
ployees.’ It had no power to convene meetings, to assemble its membership, or to make changes in its by-laws. The Court concluded:

In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization.

The Board and the Supreme Court, accordingly, took the position that representation schemes initiated or dominated by the employer were inherently destructive of free employee choice. That view of the law soon crystallized.

In its 1938 decision in *Newport News Shipbuilding & Drydock Co.*, the Board disestablished a representation plan which had been in existence since 1927, with various revisions. After the *Jones & Laughlin* decision upholding the constitutionality of the Act, the company proposed changes in the plan to bring it “‘within the letter as well as within the spirit of the Wagner Act.’” The changes included eliminating compensation for the employee representatives and the removal of management representatives from the committee structure. The Board held that “‘[t]he provisions of the plan as revised, no less than the manner of its revision, indicate that it is still the creature of the employer.’” Because the character and structure of the plan had been determined by the company and could not be changed without the consent of the company, the company had unlawfully interfered with the employees’ rights of organization. Accordingly, the Board ordered that the Employees Representative Committee be completely disestablished.

Denying the Board’s petition for enforcement, the Fourth Circuit relied on “certain facts that were proved either by uncontradicted evidence or by stipulation of counsel.” Those facts, the

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254. *Id.* at 271.
255. 8 N.L.R.B. 866 (1938), aff’d, 308 U.S. 241 (1939).
257. 8 N.L.R.B. at 872.
258. *Id.*
259. *Id.* at 872-73.
court said, "must be taken into consideration since they bear directly upon the inquiry whether or not the Employees' Representative Committee is capable of representing the employees in collective bargaining, free from domination or interference by the employer." The court's review of the evidence showed that a substantial majority of employees had, on various occasions, indicated their support for the plan. On June 7, 1938, after the Board's trial examiner recommended disestablishment of the Committee, the employees held a referendum on the plan. A total of 4,068 workers voted in the election, and 3,455 voted to continue the plan. Further, the company had removed all provisions in the plan objectionable to the Board. For those reasons, the court said, the Board's conclusion that the Committee remained the "creature of the company" was not supported by the evidence. Nor, the opinion continued, did the order of disestablishment comport with the policies of the Act:

The National Labor Relations Act [citation omitted] was designed to deal with the actualities of industrial life in this country, and to promote peace in relations between employer and employees by securing to employees the right, too frequently denied in the past, to organize and bargain collectively, with complete freedom and independence through representatives of their own choosing. The purpose of the Act will not be served by destroying an organization that is without doubt the chosen representative of the great majority of the employees, even though it may be thought that their decision to restrict their spokesmen to American born fellow workmen is unwise. To deny them this right is to ignore the express command of the statute.

Therefore, the Committee was entitled to retain its status as the employees' representative.

Reversing the Court of Appeals, the Supreme Court adopted an interpretation of section 8(2) which abandoned the economic rationale for independent trade union representation in collective bargaining and indulged itself in a vapid excursus on the nature of free choice. The Court first conceded that the result of the employees' referendum election was properly included as part of the record on appeal and was therefore appropriate evidence for the Court's consideration. But despite such undisputed proof of employee prefer-

261. Id. at 846.
262. Id.
263. Id. at 847.
ences, the Board's determination was not erroneous. The Court stated:

While the men are free to adopt any form of organization and representation whether purely local or connected with a national body, their purpose so to do may be obstructed by the existence and recognition by the management of an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law.\textsuperscript{264}

The Board's remedial power was appropriate if it effectuated the policies of the Act, and "[o]ne of these is that the employees shall be free to choose such form or organization as they wish."\textsuperscript{265} Concerning the problematic fact that employees had voted for the Committee in an election sponsored and conducted by themselves, the Court simply commented that "the provisions of the statute preclude such a disposition of the case."\textsuperscript{266} The Board could find that "the purpose of the law could not be attained without complete disestablishment of the existing organization which has been dominated and controlled to a greater or less extent by the [employer]."\textsuperscript{267} And, under the statute, the Court said, "it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives."\textsuperscript{268}

The result of the Board's harsh attitude to representation plans, and the Supreme Court's languid acquiescence, was a per se doctrine of illegality. "Freedom of choice" was, by definition, impossible in the environment of the company union. Particular manifestations of employee desires were overridden by an institutional imperative no longer anchored in wealth redistribution, but predicated on psychological assumptions regarding the nature of organizational power.\textsuperscript{269}

\textsuperscript{265} Id.
\textsuperscript{266} Id. at 251.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} One commentator suggested that the reasoning in the Board's early cases was based upon the Board's presumption that workers suffered from a "false consciousness." J. Rosenfarb, The National Labor Policy and How It Works 130-31 (1940). The author summarized the argument as follows:

In analyzing evidence of employer domination of company unions the board considers evidence of satisfaction by employees with the organization in question or of "voluntary" joining such organization, elicited either in the form of petitions or as testimony at board hearings as being immaterial to the issue of domination. The rationale of this position lies in the fact that such evidence is no indication of absence of employer domination and interference but, on the contrary, may indicate its
Nor did illegality require a showing of the employer's unlawful intent under the Court's reasoning; an infringement of section 8(2) might be an "incidental" one arising out of a "good motive." Thus, the Board presumed that coercive configurations of power inhered in the basic structures of company unions.270

VII. COOPERATION ENCOURAGED:
A MODERN AND "ENLIGHTENED" JUDICIAL VIEW

Beginning in the 1950's, federal courts of appeal began to fashion an interpretation of section 8(a)(2) which focused on employee free choice and emphasized the cooperative aspects of labor relations. That interpretation, which adopts a "nonadversarial" perspective of employment, encompasses two separate lines of evolution. The first theoretical development is the distinction drawn between the employer's unlawful "support" of a labor organization and its permissible "cooperation."271 The second and more recent doctrinal innovation focuses on the definition of a labor organization under section 2(5) of the Act.

The policy basis for cooperative labor relations was articulated in several early cases. In NLRB v. Valentine Sugars, Inc.,272 for example, the Fifth Circuit denied a Board order requiring the employer to withdraw recognition from the Valentine Independent Union ("the Independent"), which had negotiated contracts on be-

effectiveness. First, fear of retaliation may be the motivating force. Moreover, the most effective and subtle type of employer domination would result in a complete lack of awareness on the part of the employees that they are joining a union of the employer's choice.

Id.; see also id. at 533-41 (discussing the remedy of disestablishment); Crager, Company Unions Under the National Labor Relations Act, 40 Mich. L. Rev. 831 (1942) (analyzing Board and judicial precedent between 1938-1941).

270. Scholars have frequently criticized the Board for its per se approach to section 8(a)(2). One commentator, for example, argues that:

Jackson, supra note 13, at 815 (emphasis in original) (footnotes omitted).


272. 211 F.2d 317 (5th Cir. 1954).
half of the Valentine employees. The Board found that the Independent was unlawfully supported by the employer through such assistance as providing meeting rooms, meals, transportation, and payment for time spent in negotiations. Those activities, the court said, could not be characterized as unlawful under the statute: "The Act itself makes plain that it was not enacted to produce or encourage feelings or relations of hostility and enmity between employer and employee, but to assuage such feelings and change such relations." Actions of the employer which were "courteous and friendly, or even generous," were not proscribed by section 8(a)(2) absent proof of the "forbidden thing, trying by purchase or coercion to acquire for management a kept and dominated vote." Because the Board found no evidence of company domination of the Independent, the court of appeals deferred to the employees' apparently free choice of representatives. The Independent "had been a really independent union which had given the employees adequate representation, and no complaint of it had ever been made." Further, "it had been chosen by [employees] in two elections despite the organizing efforts of the charging union in this case, and had been duly certified by the Board."

The employee free choice analysis implicit in Valentine Sugars was extended one year later in the leading decision of Chicago Rawhide Manufacturing Co. v. NLRB. The Chicago Rawhide Company established a shop committee in 1950 to handle grievances and administer recreational programs. When the Fur and Leather Workers Union commenced an organizational drive in 1951, a majority of employees petitioned the employer for recognition of the committee, and in a subsequent Board election, employees rejected the Fur and Leather Workers Union by a vote of 299 to 49. The employer then recognized the in-plant committee and began bargaining with that entity. The Board found a violation of the Act, reasoning that "there

273. Id. at 320.
274. Id.
275. Id. at 321.
276. Id. at 320-21. Judge Rives in dissent pointed out that Congress had enacted a specific proviso to section 8(a)(2) authorizing an employer to confer with employees during working time without loss of pay. Id. at 324-25. In view of the proviso, he inquired, "how can it be doubted that permitting the Independent's officers to take not one but four trips on company time without loss of pay, two of those trips in respondents' motor vehicles, and one of them with all expenses paid by respondents, amounted to contributing 'financial or other support to it'?" Id. at 325.
277. Id. at 321.
278. 221 F.2d 165 (7th Cir. 1955).
279. Id. at 167.
are ample indications of Employer assistance and of potential if not actual control." But potential domination, the appeals court held, was not sufficient proof of an unfair labor practice: "The employer-employee relationship itself offers many possibilities for domination, which is one of the reasons for the original enactment of the Wagner Act, but actual domination must be shown before a violation is established." Nor was the employer's assistance unlawful, since it amounted only to mere cooperation. Importantly, the employees had expressed an uncoerced choice of representatives, and that choice was determinative of the unfair labor practice issue. Quoting earlier precedent, the court stated that "'[t]he test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.'" The Chicago Rawhide theory of employee free choice recurs in numerous appellate cases denying enforcement of Board orders.

In Hertzka & Knowles v. NLRB, employees voted to decertify their union representative. Following the election, management solicited suggestions for establishing a management-employee "dialogue," and the employees proposed a committee system composed of management and employee representatives. The Board found that the committees violated section 8(a)(2) and ordered their disestablishment. Denying enforcement, the Ninth Circuit asserted that the "literal prohibition" of the statute should be "tempered by the recognition of the objectives of the NLRA." The purpose of the Act as a whole, according to the court, was "fostering free choice." That

280. Id.
281. Id. at 167-68 (emphasis in original).
282. Id. at 168 (quoting NLRB v. Sharples Chems., Inc., 209 F.2d 645, 652 (6th Cir. 1954)). The Sharples decision, however, upheld a Board's order of disestablishment of a dominated organization. See 209 F.2d 645. In context, the cited language reads as follows:

[t]he disestablishment of a company dominated employee organization may be necessary to completely dissipate the former relationship. The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees. The complete disestablishment of the organizations was within the discretionary power of the Board.

Sharples Chems., Inc., 209 F.2d at 652.

As support for its statement, the Sharples court cites the Supreme Court's decision in Newport News. See 209 F.2d at 652 (citing NLRB v. Newport News, Co., 308 U.S. 241, 250-51 (1939)). Thus, the most plausible reading of the Sixth Circuit's opinion is that the Board need not make an "objective" evidentiary showing that an employer exercised power over an employee organization, but rather that the Board, on a given set of facts, might infer that employees were subject to being influenced by the employer's actions. The Chicago Rawhide case simply inverts the meaning of the Sharples opinion. See 221 F.2d 165 (7th Cir. 1955).

283. 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975).
284. Id. at 630.
285. Id.
The Case of the Steel Industry, 1918-1937

statutory purpose was the source of the enlightened judicial view of labor relations: "courts have emphasized that there is a line between cooperation, which the Act encourages, and actual interference or domination considered from the standpoint of the employees, which the Act condemns."\textsuperscript{286} Proof of a section 8(a)(2) violation, the court stated, "must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue."\textsuperscript{287} Although management was represented on the committees — a traditional indicia of domination under Board law — the Ninth Circuit dismissed that fact by noting that "the employees can easily outvote him."\textsuperscript{288} Most importantly, the court reasoned that "to condemn this organization would mark approval of a purely adversarial model of labor relations."\textsuperscript{289} Any "cooperative arrangement reflect[ing] a choice freely arrived at," and which was "a meaningful avenue for the expression of employee wishes," was "unobjectionable under the Act."\textsuperscript{290}

A more recent example of the free choice analysis is found in \textit{NLRB v. Homemaker Shops, Inc.},\textsuperscript{291} in which the Sixth Circuit disagreed with the Board's finding of domination. Concluding that there was not substantial evidence supporting the Board's order, the court reiterated the judicial standard emanating from the early 1950's. "Not all cooperation and assistance between management and a union is proscribed by the Labor Act. The test of whether there is unlawful domination or assistance by the employer is a subjective one, turning on whether the employees are in fact being deprived of their freedom of choice."\textsuperscript{292} The providing of financial support, likewise, was characterized as cooperation and not unlawful assistance on the ground that a narrow view of section 8(a)(2) would undermine the free choice policy supporting the Act; in the court's words: "[s]o long as there is effective representation of employee interests by the Committee — which the record does not substantially dispute — peaceful cooperation between the Company and the Committee should be encouraged, not chastised."\textsuperscript{293} Regarding contrary Supreme Court precedent, the Sixth Circuit dismissed that doctrine as antiquated and outmoded:

\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} Id. at 631.
\textsuperscript{289} Id.
\textsuperscript{290} Id.
\textsuperscript{291} 724 F.2d 535 (6th Cir. 1984).
\textsuperscript{292} Id. at 545.
\textsuperscript{293} Id. at 547.
Whatever value a per se prohibition on employer support of unions may have had in early cases arising under the Labor Act, e.g., Newport News Shipbuilding & Dry Dock Co. . . ., a rigid rule, requiring a "purely adversarial model of labor relations," Hertzka & Knowles v. NLRB, 503 F.2d at 631, runs contrary to more recent trends — the decline of the notorious "company unions," the change in public policy from nurturing the nascent labor movement to regulating and limiting management and labor excesses alike, and the change in employee attitudes toward employer-employee relations.294 Consequently, to disestablish or withdraw recognition from the committee at issue "would be to take away the employees' freedom of choice much more surely than by anything management has done."295

As the above analysis illustrates, judicial doctrine has avoided the apparent severity of section 8(a)(2). The distinction between cooperation and unlawful forms of assistance, and its grounding in the freedom of choice policy dimension, permits substantial employer intrusion into collective affairs of workers. A similar tendency is evident in cases dealing with section 2(5), which broadly defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."296

In NLRB v. Cabot Carbon Co.,297 the Supreme Court interpreted section 2(5) broadly so as to encompass almost all forms of employee organization. In that case, the employer established a sys-

294. Id. at 547, n.12.
295. Id. at 547.
296. 29 U.S.C. § 152(5)(1976). The Labor Disputes Act (S. 2926) defined "labor organization" as "any organization, labor union, association, corporation, or society of any kind in which employees participate. . . ." 1 LEG. Hist. NLRA, supra note 183, at 2. Professor Edwin Witte argued that the language did not cover the employee representation committees, which in many cases lacked an ascertainable form. See id. at 270-72. His recommendation was to add the words "employee representation plan." Id. at 272. In S. 1958, section 2(5) appears in its present form. Id. at 1296. The comparison of S. 2926 and S. 1958 indicates that the provision was addressed to employee representation plans:

It has been argued frequently by employers as well as by protagonists of the bill last year that an employee representation plan or committee arrangement is not a labor organization or a union but simply a method of contact between employers and employees. But the act is entitled to prescribe its own definitions of labor organizations . . . .

Id. at 1347.
tem of employee committees to further labor-management communications and to discuss problems of mutual concern. The committees routinely met with management and presented proposals encompassing basic aspects of the employment relationship; at no time, however, did the committee attempt to enter into a formal labor agreement with the company. Based on those facts, the trial examiner found, and the Board agreed, that the committee arrangement was a labor organization unlawfully dominated and assisted by the employer.\textsuperscript{298} The Fifth Circuit denied enforcement, concluding that the organization did not fall within the statutory definition because it did not engage in bargaining and therefore was not “dealing with” the employer.\textsuperscript{299}

According to the Supreme Court, nothing in the plain terms of the statute or its legislative history suggested that “‘dealing with’ should be limited to and mean only ‘bargaining with’” as the appellate court incorrectly concluded.\textsuperscript{300} By handling grievances, transmitting proposals and requesting action on a variety of employment matters, and by engaging in discussions with plant officials, the committees performed functions expressly comprehended within the terms of the Act. It was immaterial, the Court added, that “the proposals and requests amounted only to recommendations and that final decision remained with [the employer],” for that same principle applied to trade union negotiations.\textsuperscript{301}

Moreover, the Court said, section 2(5) had not been modified by the Taft-Hartley amendments of 1947.\textsuperscript{302} Although Representative Hartley proposed the addition of a new section to the Act, which would authorize employee committees, the provision was not accepted.\textsuperscript{303} Instead, the conferees determined that other amendments


\textsuperscript{299} Cabot Carbon Co. v. NLRB, 256 F.2d 281 (5th Cir. 1958), \textit{rev'd}, 360 U.S. 203 (1959). After a lengthy review of the legislative history, the court of appeals concluded: The Act permits, and Congress intended that it should permit, the existence of employee-management committees which provide a forum for discussion of matters of mutual interest, but which are not formal organizations, do not follow collective bargaining procedures (formally or informally), have no powers to bargain collectively, and take no action inconsistent with the terms of an existing collective bargaining agreement.

\textit{Id.} at 289. The Fifth Circuit reversed itself in Pacemaker Corp. v. NLRB, 260 F.2d 880 (5th Cir. 1958).

\textsuperscript{300} 360 U.S. at 211-12.

\textsuperscript{301} \textit{Id.} at 214.

\textsuperscript{302} Ch. 120, 61 Stat. 136 (1947).

\textsuperscript{303} In H.R. 3020, 80th Cong., 1st Sess. (1947), which was introduced on April 10, Representative Hartley added section 8(d)(3) to the Act. The language provided that the fol-
to section 9 of the Act and the existing language of the statute ade-
quately protected an employee's right to confer with his employer.\textsuperscript{304} The Court held that neither section 9 nor any other provisions of the
Act permitted an employer to "form or maintain an employee com-
mittee for the purpose of 'dealing with' the employer, on behalf of
employees, concerning grievances."\textsuperscript{305} Consequently, the appellate
court's opinion had the effect of incorporating the defeated Hartley
proposal into the law.\textsuperscript{306} Despite the Supreme Court's clear and une-
quivocal opinion in Cabot Carbon, one court of appeals has constructed an “enlightened” interpretation of section 2(5) using the policy rationale of the Chicago Rawhide line of precedent.

In NLRB v. Streamway Division of the Scott & Fetzer Co., the employer devised a committee system for the purpose of establishing a closer relationship between management and workers. Each department selected an employee representative who was to serve for a specified period of time, meeting with management on a regular basis during working time. The election of representatives was also conducted during working time, and the employer furnished, distributed, and tallied the ballots. At the ensuing meetings, the representatives discussed a variety of work-related concerns which management in turn addressed. On one occasion, for example, the representatives criticized the company’s vacation policy, and it was thereafter modified according to the employees’ suggestions. Based on those facts, an administrative law judge (hereinafter “ALJ”) determined that the plan violated section 8(a)(2) and ordered the employer to discontinue it. The Board adopted the ALJ’s findings and conclusions.

The Sixth Circuit denied enforcement of the Board’s order. It agreed that the employer had dominated the entity, but it concluded that the committee arrangement was not a labor organization within the statutory meaning of the term. The determinative point, according to the court, was whether or not the representatives were “dealing with” the employer through the committees. Limiting the Supreme Court precedent to its particular facts, the court of appeals announced a more “modern” and “enlightened” rationale for its decision. In its view, cooperative relationships between labor and management were to be fostered and encouraged rather than constricted by a parsimonious interpretation of the law. “[N]ot all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act,” the court stated, for “[a]n overly broad construction of the statute would be as destructive of the objects of the Act as ignoring the provision entirely.” Interpretation of section 2(5) was guided by reference to

compels the conclusion that the Conference Committee and the Senate thought that section 9(a) was broad enough to permit what section 8(d)(3) specifically condoned.” Id. at 382.

307. 691 F.2d 288 (6th Cir. 1982).


“employee free choice,” which by analogy to section 8(a)(2) doctrine, became the touchstone of legality. In the court’s words:

Just as the Act provides democratic machinery to protect the employees’ choice to bargain collectively, so equally it protects the employees’ right to forego those benefits, if in their judgment their interests are best served by this course. There has been no evidence of company hostility toward the union and no evidence that the Company itself interfered with any exercise of employee rights to bargain collectively, unless it might be said that an enlightened personnel policy led them to be content with the status quo. This was their choice.310

Thus, considerations of employer motivation and employee perceptions of free choice were to prevail in interpretations of section 2(5), despite the weak and unpersuasive reasoning supporting such a conclusion.311

The judicial liberalization of section 8(a)(2) is advocated by some analysts and opposed by others. The objections to the judicial trend are cogently developed in a 1983 article in the Harvard Law

310. Id. at 295.
311. The authors of a leading labor law treatise comment as follows on the Scott & Fetzer decision:

The opinion is laden with questionable analytic and historic statements. Characterizing meeting of a formally structured representation committee as “individual” dealing is a feat of linguistic interpretation available only to those for whom an outcome rather than language is the standard. Moreover, the legislative history, broad language, and traditional interpretation of section 8(a)(2) have all heretofore made clear that resemblance to a traditional union is irrelevant, as is employer motive. It is clear that the court was straining the language in order to avoid the conclusion implicit in Cabot Carbon that section 8(a)(2) limits employer ability to communicate directly with its employees in innovative and non-adversarial ways.


The Sixth Circuit subsequently distinguished Scott & Fetzer as a “narrow holding” where there was individual rather than representational communication and no anti-union animus was present. Lawson Co. v. NLRB, 753 F.2d 471 (6th Cir. 1985). But more recently, it has reverted to the analytical mode of Scott & Fetzer predicated on employer motive. In Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989), the court denied enforcement to a Board order which derived in part from the Board’s finding of a section 8(a)(2) violation. It ruled that the committee system established by the employer was not an illegal organization because the committee “did not involve itself in or purport to accomplish the settling of ‘grievances,’ nor did it attempt to resolve ‘labor disputes’ with individual employees before the [union representation] election in question.” Id. at 1295. More importantly, there was no substantial evidence in the record to prove that the committee “inhibited adversely the organizational campaign of the Union when only one meeting took place during the course of a nearly two-month campaign and when the participants at the meeting considered and discussed only rules of worker conduct and sick day attendance proposals.” Id. at 1298.
Review, which argues that the structure of collective bargaining depends upon the institutional autonomy of unions. To focus exclusively on "employee free choice" as the criterion of section 8(a)(2) violations "neglects the historical purposes of the Act [and] [t]he Act was not designed solely, or even primarily, to preserve employee free choice in the broadest sense of that term." More accurately, the purpose of the statute is to promote a vigorous, arms-length bargaining relationship within a broader framework of conflict resolution.

Further, the author contends, if the current economic environment warrants revision of our labor law, such revision should be undertaken by Congress rather than by the courts' dubious interpretations of the Act. "Major revision of a social compact such as the Act is a job for Congress, not for the courts."

From the opposing perspective, other commentators have advocated continued judicial flexibility in interpreting section 2(5) and section 8(a)(2). Recognizing that "[t]raditional analysis under sections 2(5) and 8(a)(2) leaves little, if any, opportunity for employers to initiate participatory management techniques in nonunion settings," one author recently argued that the Sixth Circuit's approach in Scott & Fetzer reflects the proper policy toward participatory activities. The basis of the argument is that Congress intended, through the Labor Management Relations Act of 1947, "to expand opportunities for labor-management cooperation" while still prohibiting company unions. Thus, courts should draw a distinction under section 2(5) between those organizational forms which are merely participatory and those which are designed to be representational. Such a distinction, according to the author, "leaves intact a strong prohibition of traditional company unionism while at the same time allowing employers to experiment with more humane and cooperative modes of industrial relations so long as the employees raise no objections."

312. See Note, supra note 12.
313. Id. at 1673.
314. The author argues that "[f]ar from mandating a system of adversarial relations and class conflict, . . . the requirement that management and employees deal at arms length serves to confine industrial strife within relatively stable bounds." Id. at 1680.
315. Id.
316. Legal commentary has applauded the "freedom of choice" thesis since its judicial inception. See Section 8(a)(2), supra note 13, at 365 (citing Chief Judge Magruder's concurring opinion in Coppus Eng'g Corp. v. NLRB, 70 F.2d 564, 573 (1st Cir. 1957) as an example of the better construction of section 8(a)(2) based on employee free choice).
317. Participatory Management, supra note 13, at 1750.
318. Id. at 1767.
319. Id. at 1768. That interpretation is criticized in Rethinking the Adversial Model,
As the commentary on the Act suggests, several significant issues emerge from section 8(a)(2) and 2(5) jurisprudence. First, participatory programs are increasingly an important part of the organization of the American workplace. Second, the effectiveness of our labor law in dealing with such innovations is questionable. Third, and perhaps most importantly, a significant institutional issue is at stake — that is, should courts interpret the law according to their concepts of labor relations policy, or should Congress reform the NLRA to permit new participatory forms in the workplace? The steel industry's experience with employee representation plans offers guidance in developing policies which allow organizational innovation while simultaneously protecting the rights of workers under the law.

VIII. A PROPOSED REVISION OF THE ACT

A. Policy Considerations

Historically, participation programs have served a variety of managerial interests; in the modern industrial organization, their importance is well established. Over the past decade, intensified global economic competition has spurred interest in workplace innovation as a means of improved industrial productivity. Adversariness in labor relations is correspondingly viewed as wasteful and destructive, placing American industry at a great disadvantage in the world economy. The federal government, for that reason, endorses an unequivocal statement of policy: “The Department of Labor has taken a strong position in support of labor-management cooperation as an important prerequisite to America’s return to preeminence in the world marketplace.” Even scholars generally critical of American capitalism dismiss rigid adversarialism as a means of securing

supra note 13, at 2034, where the writer asserts that the plain language of section 2(5) does not require that the organization be representational in nature, but only that “employees participate.” The authors of a Department of Labor study, conversely, believe that Congress in 1935 was concerned with plans based on representation and that Board cases allow an interpretation which focuses on that element of section 2(5) as determinative of legality. U.S. DEP'T OF LABOR, BUREAU OF LABOR-MANAGEMENT RELATIONS & COOPERATIVE PROGRAMS, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, FIRST INTERIM REPORT 42-59 (BLMR No. 113, Feb. 1987) [hereinafter DEP'T OF LABOR, FIRST INTERIM REPORT].  

320. For a positive appraisal of participation programs during the 1970s, see Walton, Work Innovations in the United States, 57 HARV. BUS. REV. 88 (July-Aug. 1979).  

greater liberty for workers. Thus, any labor law reform must logically accommodate managerial discretion in developing responses to global economic conditions.

At the same time, neither should the rights of workers to pursue collective goals be diminished. One principle, which was embedded in the Wagner Act and which remains politically viable today, is workers' freedom of choice to select representatives for the purposes of collective bargaining. Protection of workers necessitates the regulation of managerial tactics that would coerce or restrain employees in forming organizations. As important recent studies demonstrate, anti-unionism is an enduring managerial trait which is perhaps the single most significant cause of declining union membership. Consequently, an expansion of capitalist power to restructure employer-employee relationships must be coupled with more effective safeguards for workers.

Further, changes in the labor law must consider the institutional needs of the organized labor movement, which has continued to deteriorate as a force in industrial life over the past three decades. The Wagner Act explained the institutional role of trade unions in terms of their ability to redistribute wealth, and true to the legislative per-


Acclaim for the adversary model characteristically suffers from certain weaknesses: reliance on an idealized portrait of collective bargaining; an inability to see the need and contemporary potential for democratic work reorganization; and the failure to come to grips with the present context of profound economic transformation and of crisis within the labor movement.

Id. at 69.

323. The defeat of the Labor Reform Act of 1977 makes abundantly clear that no legislative change can succeed in the face of employer opposition, even where change might be of some long-term advantage to employers. See Mills, Flawed Victory in Labor Law Reform, 57 HARV. BUS. REV. 92 (May-June 1979).

324. See, e.g., R. Freeman & J. Medoff, What Do Unions Do? (1984); M. Goldfield, The Decline of Organized Labor in the United States (1987); T. Kochan, H. Katz, & R. McKersie, The Transformation of American Industrial Relations (1986); Weller, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769 (1983). Freeman and Medoff reviewed the literature on union elections prior to 1984 and reached the following conclusion: "Despite considerable differences among studies, . . . virtually all tell the same story: Managerial opposition to unionism, and illegal campaign tactics in particular, are a major, if not the major, determinant of NLRB election results." R. Freeman & J. Medoff, supra at 233. But see Troy, The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR, in Unions in Transition: Entering the Second Century 75, 100 (S. Lipset ed. 1986) (stating that "[w]hile employer opposition plays a role in thwarting the organizing of the unorganized, most of the decline in membership is associated with losses in employment.")

325. For a detailed analysis of membership trends since the 1930's, see M. Goldfield, supra note 324, at 3-25.
ception, unions have demonstrated a significant "monopoly" effect on wages by consistently attaining wage differentials substantially higher for union workers than for comparable nonunionized workers. But the monopoly wage effect, in today's economic environment, is often criticized by market-oriented economists as inefficient and socially detrimental. Morgan Reynolds, for example, contends that:

Labor monopolies are a serious disharmony that keeps production, employment, and economic expansion below their potentials here and around the world. The cost of unions in the U.S. private sector is at least $126 billion per year, or 3.15 percent of gross national product (GNP), and a good case can be made for much higher estimates.

Thus, rather than a justification for the existence of trade unions, the monopoly effect constitutes an argument for elimination of federal labor law. A Congressional policy of wealth redistribution through rejuvenated unionism, then, is unlikely to attract significant support in the modern economic climate. Yet if the original economic policy rationale of the Wagner Act is to be discarded as unacceptable, legislators might subscribe to a political one.

326. See R. Freeman & J. Medoff, supra note 324, at 43-60.
327. Even in Canada, for example, where union penetration is substantially greater than in the United States, a recent study attacks the monopoly feature of collective bargaining as economically unsound and proposes a system of wage arbitration. See D. Winch, Collective Bargaining and the Public Interest: A Welfare Economics Assessment (1989). The author argues that public opinion in Canada has shifted against strikes and union power and that unions do in fact "impose inefficiency costs on society." Id. at 5.
329. Reynolds asserts that "[t]he proper remedy is deregulation. . . . [t]his prescription includes getting rid of the Railway Labor Act of 1926, the Norris-LaGuardia Anti-Injunction Act, the National Labor Relations Act of 1935 (Wagner Act) as amended, and their pro-bargaining counterparts in the public sector." Id. at 192-93; see also Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L. J. 1357, 1361 (1983) (stating that "[t]o be sure, the common law theory developed here finds no place for the redistribution of wealth from rich to poor so characteristic of the modern state.").
Commentators increasingly advocate the expansion of democratic processes within the workplace. The eminent political scientist Robert Dahl, for example, argues that "if democracy is justified in governing the state, then it must also be justified in governing economic enterprises; and to say that it is not justified in governing economic enterprises is to imply that it is not justified in governing the state." Respected legal scholars likewise contend that democracy in the industrial enterprise enhances democratic tendencies throughout our society. Within the specific confines of collective bargaining, Freeman and Medoff advance the concept of "voice," or an effective channel through which workers can improve their working conditions, as an acceptable tradeoff to the union wage effect. They support legal change which would facilitate union organizing on the ground that "continued decline in unionization is bad not only for unions and their members but for the entire society." Because unions "do much social good," they continue, "we believe the 'union-free' economy desired by some business groups would be a disaster for the country." Thus, there is ample academic foundation for labor laws which acknowledge unions as valuable political instruments in the workplace entitled to legislative solicitude.

Last, reform is necessary from the perspective of the legal system. As a highly-publicized recent study concludes, we can "ill afford to continue the escalation of confrontation that has traditionally divided labor and management . . . . If our statutes and practices are an impediment to change, we must be willing to consider reasonable

331. R. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 111 (1985) (emphasis in original). Dahl argues in favor of "self-governing enterprises" which would constitute "one part of a system of equalities and liberties in which both would . . . be stronger, on balance, than they can be in a system of corporate capitalism." Id. at 162.

332. Professor Clyde Summers has observed that "our emphasis on efficiency of production, our dispute over division of shares, and our concern with industrial conflict have caused us largely to forget the more fundamental values of democracy and human dignity." Summers, INDUSTRIAL DEMOCRACY: AMERICA'S UNFULFILLED PROMISE, 28 CLEV. ST. L. REV. 29, 43 (1979). "These are the values which must again become central in developing our national labor policy." Id. Karl Klare advances a similar thesis, arguing that:

Unions, as institutions of working people, can contribute to civic and political democracy. This is particularly so in a political system like ours, which lacks an established social democratic tradition and major labor or social democratic parties. For these and other reasons, it is unfortunate that there is at present no consensus in the United States on the enduring value and potential of collective bargaining to democratic life.

Klare, WORKPLACE DEMOCRACY & MARKET RECONSTRUCTION, supra note 330, at 4.


334. Id. at 250.

335. Id.
alterations in that basic framework to encourage a process that will ultimately benefit society as a whole." A new, "postindustrial" model of the employment relationship would ideally further both economic efficiency and employee self-realization through a democratized workplace; the transition to such an environment demands a "creative interaction" between the traditional adversarial model and the revitalized trend toward labor-management cooperation. Courts are institutionally incapable of formulating broad policy objectives developed through open public debate and dialogue. As cases such as Scott & Fetzer demonstrate, the worst extremes of judicial policymaking are typically accomplished only through a tortured manipulation of fact and law.

B. Lessons from the Steel Industry

The history of representation plans in the steel industry substantiates the ambivalence of managerial motives which attend participative techniques. Even a reformer of William Dickson's integrity succumbed to anti-union sentiments when defending the Midvale representation plan. That particular aspect of workplace participation has been explicitly present since the Rockefeller experiment at Colorado Fuel & Iron, and it resurfaces in the strategic planning of such progressive modern corporations as Johnson & Johnson. The objectives of section 8(a)(2) — to prohibit organizational impediments to independent unionism — should, therefore, be retained as part of our labor law. At the same time, those objectives can be met through means other than the express proscriptions of section 8(a)(2).

With respect to workers' freedom of choice, the steelworkers' experience illustrates the attraction to workers of internal participative schemes. Bohne, and many other rank and file steelworkers, were sincere in their dedication to the representation plans, and the legislative history is replete with similar positive experiences of workers in other steel companies and in other sectors of industry. Those plans offered the promise of individual expression and personal autonomy within the corporate bureaucracy; such an inducement has a

338. See supra text accompanying notes 87-90.
339. G. Grenier, supra note 6.
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powerful ideological appeal for American workers.340

A third facet of the SWOC drive is that the collective mobilization of the steelworkers was a highly contingent, intensely localized activity which occurred within a unique industrial setting and was aimed toward precise ends. Steelworkers did not engage in a broad national project of “class” empowerment; they were predominantly concerned with the immediate matters of their daily working lives. Consequently, the analysis of legal policy within a framework of class adversarialism perpetuates an abstraction which obscures other approaches to statutory reform. It is more meaningful to focus on the “conflictual context” of workers’ organizations, recognizing that they are shaped by the interaction of workers and managers under specific conditions.341 The validity of that observation is borne out in recent case studies of collective action.342 One logical deduction, accordingly, is that legal reform should concern itself more with the direct processes of collective action and less with ceremonies that are removed from meaningful application to workplace behaviors.

Supporting that point, historical analysis indicates that labor law played at best a minor part in the SWOC organizing campaign. The rights guaranteed to workers in the Wagner Act were actively resisted by most employers, who believed the law to be unconstitutional; their “bitter opposition to the law made it impossible for the NLRB to function as Congress intended until the Act was sustained by the Supreme Court [in 1937].”343 Karl Klare’s assessment is particularly apt as applied to the steelworkers; he concludes that “[t]he Act ‘became law’ only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers.”344 The objective of statutory reform must be to translate abstract “rights” into a practical avenue of redress for workers who are confronted with organizational forms unilater-

340. See Frug, The Ideology of Bureaucracy in American Law, 97 HARV. L. REV. 1276, 1286 (1984) (proposing an analysis of the ideological “stories” which justify the existence of corporate bureaucracies and their power over individuals, particularly stories which attempt “to show that the bureaucratic organization does not limit the opportunity for personal self-expression.”).


342. See generally id. at 75-225 (providing a description and analysis of collective activities of workers at three separate firms).

343. J. Gross, supra note 185, at 3; see also R. Cortner, The Wagner Act Cases 89-105 (1964)(examining the legal opposition of employers to the Board’s efforts to enforce the Act).

ally adopted and maintained by the employer, even when those structures are opposed by a majority of the work group.

C. A New Section: 8(c)(2)

Drawing on the foregoing policy considerations and the history of the steel industry, an appropriate resolution of the section 8(a)(2) issue would be to modify the NLRA so as to permit employers to introduce any organizational schemes they desire, including dealing with employees through a system of representation. But to ensure that employees are not coerced by anti-union strategies, the Act should be further modified to require an employer to bargain with any representative who demonstrates through authorization cards, without the requirement of an election, that a majority of employees desire representation by the agent for purposes of collective bargaining. The result would be "immediate recognition" and bargaining, as is presently the case in Canada. That modification could be achieved by repealing section 8(a)(2) and adding a second clause to the present language of section 8(c) of the Act. The clause would consist of Rep. Hartley's proposed section 8(d)(3) and new language dealing with union recognition. Specifically, Congress should amend the NLRA by inserting section 8(c)(2), which would read as follows:

The forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions shall not constitute or be evidence of an unfair labor practice under any other provisions of the act, provided the Board has not certified or the employer has not recognized a representative as their representative under section 9; and provided further, that if a majority of the employees in the appropriate unit designate a collective bargaining representative through authorization cards, the Board shall order the employer to bargain with the representative.

The modification, which combines the language of the proposed Hartley bill and a provision for recognition without an election, accommodates the interests of both employers and employees. Employers would be at liberty to implement participation plans without fear of legal repercussion; and if workers were dissatisfied with the employer's program, they could promptly exercise "freedom of choice" without the intervention of a governmental bureaucracy and without

345. Professor Paul Weiler suggests that this method of recognition be made available to American workers to counteract the anti-union strategies of employers. Weiler, supra note 324, at 1805.
being subjected to the employer's protracted anti-union election campaign.

The balancing of worker, union, and managerial interests is predicated on two basic points. First, the period of delay between the filing of an election petition and the election enables the employer to erode the momentum of the organizing drive and thwart the attempt at unionization; as Professor Weiler's study convincingly demonstrates, "[t]he time required for the formal certification procedure gives the employer a chance to reverse the initial employee enthusiasm for union representation and presents the employer with a strong temptation to use illegal coercion for this purpose." Second, "freedom of choice" for workers has little meaning until it is actualized in the particular industrial environment. The object of our labor policy should be to facilitate, not ritualize, the dynamics of group action. The example of Elmer Maloy, John Mullen, George Patterson, and other rank and file steelworkers during the crucial months of the SWOC drive reveals the potential transformative power of participation programs and the ways in which entities created by an employer can, in fact, contribute to the formation of independent unions. Assuming a more democratic, participatory workplace to be a true goal of our labor law in the post-industrial global economy, the ossified circumscriptions of section 8(a)(2) may well have outlived their usefulness, and it should be admitted that the law no longer has sufficient vigor to serve the interests of workers or society.

IX. CONCLUSION

This study has demonstrated how representation plans in the steel industry were crucial to the evolution of modern American trade unionism. Those plans, both in their origins and in their subsequent treatment by the Board and the courts, provide valuable insights for the contemporary situation. If our labor law is to be reformed consistent with the needs of workers, employers, and organized labor in the modern environment, section 8(a)(2) is the appropriate focal point of change. From that perspective, the lesson of the steel industry speaks directly to the condition of American workers today.

346. Id.