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# THE CONTINUING RELEVANCE OF SECTION 8(a)(2) TO THE CONTEMPORARY WORKPLACE

Michael C. Harper\*

## I. INTRODUCTION

After embarking on his illustrious career as a legal academic, Theodore St. Antoine, through a multitude of roles, including those of scholar, teacher, administrator, pragmatic law reformer, and arbitrator, made innumerable contributions to the practice and development of many parts of American law. For most of us, however, as a scholar he will be associated primarily with the system of collective bargaining established and encouraged by the National Labor Relations Act (NLRA) and its progeny.<sup>1</sup>

During the first part of Professor St. Antoine's years as an academic, this system continued to flourish in America, as he, along with other legal scholars of his generation, helped explain how and why.<sup>2</sup> By the end of the 1970s and Professor St. Antoine's decanal years, however, as the decline in union density spread to industries such as construction, manufacturing, and transportation, where unions had been most successful,<sup>3</sup> the erosion of the system could no longer be ignored.<sup>4</sup> In the 1980s and 1990s, the decline of unions

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1. The NLRA, originally enacted in 1935 and alternatively named for its sponsor, Senator Wagner, has been amended several times and is currently codified at 29 U.S.C. §§ 141-188 (1994).

2. See, e.g., Theodore J. St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971*, 6 U. MICH. J.L. REFORM 269 (1973); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977); Theodore J. St. Antoine, *Judicial Valour and the Warren Court's Labor Decisions*, 67 MICH. L. REV. 317 (1968); Theodore J. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 U. DET. L.J. 189 (1962).

3. As explained by Joel Rogers in *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 108-09, 115-16, before the inflationary shock induced by the oil shortage of the early 1970s, most of the decline in union density in the private sector in the United States could be explained by sectoral shifts away from industries in which union density had been high into sectors, such as service and finance, in which unions had not worked hard to organize.

4. It was Professor Paul Weiler, Professor St. Antoine's somewhat younger and Canadian-bred colleague on the United Auto Workers Public Review Board, who announced forcefully to the legal academic community that the emperor of collective bargaining was

and collective bargaining in the private sector has continued in the shadow of expanding global competition, international capital mobility, and associated economic deregulation.<sup>5</sup> In response, a range of legal academics have argued that the labor law taught by Professor St. Antoine must be significantly transformed in order to fulfill collective bargaining's appealing promise to American workers of having a democratically based and independent influence on their conditions of employment.<sup>6</sup>

Although I am not certain how Professor St. Antoine assesses these variant proposals for enhancing the opportunity of American workers to secure some level of democracy at their workplaces, I am confident that his sharp political sensibilities and knowledge of labor history tell him that any proposed regulations that would augment the capacity of the providers of labor to influence the terms by which that labor is combined with the capital that it enriches must hibernate in today's political climate. Given Professor St. Antoine's pragmatic bent, I therefore intend to resist the temptation to provide a critique (or supplementation) of such proposals. I instead intend to focus on a particular proposal for *deregulation*

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rapidly losing its clothes as the National Labor Relations Board, wielding a flawed and toothless statute, could only look on. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises to Keep*]; Paul Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1983). Professor Weiler relied strongly on the empirical work of two Harvard labor economists. See generally the work compiled in RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984).

5. In 1996 unions represented only 11.2% of employed private nonagricultural wage and salary workers. See BUREAU OF LAB. STAT., U.S. DEPT. OF LAB., *EMPLOYMENT AND EARNINGS* 213 (1997). Only 10.2% of employed private and nonagricultural wage and salary workers were union members. See *id.* In the late 1950s, about one out of every three employed private nonagricultural wage and salary workers was a union member. See MICHAEL C. HARPER & SAMUEL ESTREICHER, *LABOR LAW* 108-09 tbl.1, 111 tbl.3 (1996).

For fuller explanations of the decline of union density, see MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987); THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 47-80* (ILR Press 1994) (1986); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351 (1990); Rogers, *supra* note 3.

6. Professor Weiler proposed modest reforms in the NLRA system that would both reduce employers' incentives and opportunities for union avoidance and also enhance union bargaining leverage. See articles cited *supra* note 4. In a later book he expanded these proposals to include German-type works councils. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

See also, e.g., *RESTORING THE PROMISE OF AMERICAN LABOR LAW* (Sheldon Friedman et al., eds., 1994) [hereinafter *RESTORING THE PROMISE*]; Michael H. Gottesmann, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 69 (1993); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97 (1993).

For a particularly creative and more transformative proposal, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 928-83 (1994).

that has been openly advanced in the current Congress under a banner of claims that this deregulation would provide more opportunities for American workers to influence their workplaces.

But for President Clinton's veto authority, the current Republican Congress indeed would have enacted legislation purporting to provide more opportunity for employee democracy through a significant compromise of one of the NLRA's primary regulatory commands, the prohibition of company unions in section 8(a)(2) of the Act.<sup>7</sup> Congressional critics of section 8(a)(2) charge that this prohibition must be narrowed to permit nonunion employers to implement freely new employee relations systems, most often denominated "employee-involvement programs," designed to make American companies more productive and competitive.<sup>8</sup> Employee-involvement programs are said to enhance productivity through greater utilization of the skills and knowledge of production workers and through an enhancement of morale and identification with the firm's competitive mission.<sup>9</sup> Since some employee-involvement programs may be covered as labor organizations under judicial and Labor Board interpretations of the definition of this

7. Section 8(a)(2) provides:

"It shall be an unfair labor practice for an employer —

. . . .

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (1994).

On July 30, 1996, see *Clinton Vetoes TEAM Act Despite Pleas from Business for Passage*, Daily Lab. Rep. (BNA) No. 147, at AA-1 (July 31, 1996), President Clinton fulfilled his promise to veto an amendment to this provision that would have provided:

That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization . . . .

Teamwork for Employees and Managers Act (TEAM Act), H.R. 743, 104th Cong. § 3 (1996). This amendment was reintroduced in the current Congress last year. See S. 295, 105th Cong. (1997); H.R. 634, 105th Cong. (1997).

8. The proposed "findings" contained in the TEAM Act state that "the escalating demands of global competition have compelled an increasing number of employers . . . to make dramatic changes in workplace and employer-employee relationships" for "enhancing . . . productivity and competitiveness," which are "threatened by legal interpretations of the prohibition against employer-dominated 'company unions.'" S. 295 § 2(a)(1), (4), (7); H.R. 634 § 2(a)(1), (4), (7).

9. See, e.g., S. REP. NO. 105-12, at 2-4, 11 (1997); *Statement by Congressman Steve Gunderson Before the Employer-Employee Relations Subcommittee on the Introduction of the Teamwork for Employees and Managers Act*, Daily Lab. Rep. (BNA) No. 20, at E-32 (Jan. 31, 1995) [hereinafter Gunderson Statement]; 141 CONG. REC. S1787 (daily ed. Jan. 30, 1995) (statement of Sen. Kassebaum).

term in the NLRA,<sup>10</sup> such programs may be treated as illegal company unions under section 8(a)(2) to the extent they are supported by, interfered with, or dominated by firm management.<sup>11</sup>

The critics of the current section 8(a)(2) further contend that it does not provide significant benefits in today's economy to compensate for the costs of discouraging productivity-enhancing and employee-enriching employee-involvement programs. They contend that a company union prohibition need do no more than proscribe the negotiation of collective bargaining agreements with a labor organization that is dominated or supported by the employer.<sup>12</sup> Most contemporary managers, the critics suggest, understand that their firms can be better served by cooperative rather than adversarial labor relations, and that employee cooperation is best secured through real employee involvement rather than through the manipulative union avoidance schemes engaged in by employers over a half century ago when section 8(a)(2) was enacted.<sup>13</sup>

In this article I evaluate the claims of the critics of the current section 8(a)(2). I do so, as I believe would Professor St. Antoine,<sup>14</sup> with an eye toward the historical development of new production systems in America and the concomitant development of personnel policies to fit those systems. I consider the purposes for which firm managers seemed to establish and control employee advisory com-

10. The NLRA states:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5); *see also infra* text accompanying notes 19-41.

11. *See infra* text accompanying notes 42-50.

12. *See, e.g.,* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994). Professor Estreicher would limit the Act's definition of a "labor organization" protected from employer interference by § 8(a)(2) to entities that bargain collectively with employers for enforceable contractual agreements. *See id.* at 150.

13. *See, e.g., id.* at 133-39; S. REP. NO. 105-12 at 18 (1997); Gunderson Statement, *supra* note 9, at d25; *see also* Statement of Daniel V. Yager, Labor Policy Association, before the Commission for the Future of Worker-Management Relations (Jan. 19, 1994) 4-6 [hereinafter Yager Testimony] (transcript on file with author). The Labor Policy Association, which has been at the forefront of the lobbying effort to weaken § 8(a)(2), represents "senior human resources executives of more than 200 major U.S. companies." *Id.* at 1.

The TEAM Act's proposed "findings" assert that "employers who have instituted legitimate Employee Involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham 'company unions' to avoid unionization." H.R. 634 § 2(a)(6).

14. But he would not necessarily draw the same conclusions. *See* Theodore St. Antoine, *The Legal and Economic Implications of Union-Management Cooperation: The Case of GM and the UAW*, in 1988 PROC. N.Y.U. 41ST ANN. CONF. ON LAB. § 8.04 (Bruno Stein ed.).

mittees before passage of the NLRA and the purposes for which managers seem to establish and control such committees in today's economy. I conclude that these purposes have not substantially changed. Managers before passage of the Act, like today's managers, sometimes used employee-involvement programs to enhance employee morale both by identifying the concerns of employees and by providing employees with a process that created at least the perception of some influence at the workplace.<sup>15</sup> Similarly, just as managers before passage of the Act used employee-involvement committees directly to avert having their employees choose to be represented by independent unions, so have managers in the modern economy.<sup>16</sup> Moreover, today's managers, like managers in earlier stages of American industrialization, often use employee committees to achieve greater control over employees and their use of time, rather than to enrich employee skills and responsibility and thus autonomy.<sup>17</sup> I therefore question the contention that any changes in industrial relations or work processes should cause Congress to strike a different policy balance than that set in section 8(a)(2).

My skepticism concerning the claims of the critics of section 8(a)(2) is compounded by an analysis of the kind of employee involvement, participation, and influence on managerial policy that is allowed in the nonunion workplace under current section 8(a)(2) doctrine. This analysis, to which I turn first to frame the historical review, suggests that the doctrine only minimally constrains employers hoping to enhance productivity either by amplifying employee voice or by expanding utilization of employee skill and responsibility. Given the threats to NLRA-protected employee rights that historical developments indicate are still posed by at least the forms of employee participation constrained by the doctrine, the case for diluting section 8(a)(2) thus seems particularly weak.

## II. THE PERMISSIVE SECTION 8(A)(2)

As noted above,<sup>18</sup> the critics of section 8(a)(2) claim that the provision inhibits employer implementation of programs designed to enlarge employee influence over and involvement in the setting

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15. See *infra* text accompanying notes 73-99.

16. See *infra* text accompanying notes 100-28.

17. See *infra* text accompanying notes 138-99.

18. See *supra* text accompanying notes 8 & 13.

of firm policy. The critics suggest that such programs not only provide benefits for employees, but also enhance productivity and thus are attractive for shareholders and their managerial agents. Under the critics' benign view of these programs, they may enhance productivity for two reasons. First, such programs may induce employees to work harder for the firm at relatively low compensation levels because the programs both provide a low cost, but especially valuable, process benefit for employees, and also enable employers to understand better what other process and substantive benefits employees would most value. Second, employee-involvement programs are said to enhance firm productivity by facilitating the greater utilization of the employees' skills, responsibility, and human potential. By involving employees in firm management they reduce the need for layers of middle management and mine the lodes of expertise possessed by front line production employees.

To evaluate the affirmative case for weakening section 8(a)(2), it is critical to analyze the extent to which current section 8(a)(2) doctrine might inhibit the structuring of employee-involvement programs to meet either of these productivity-enhancing goals. Central to this analysis must be an appreciation of the limitations that the Board has woven into its interpretation of the definition of labor organization in section 2(5) of the Act. For if an employee-involvement program does not create structures that can be viewed by the Board as labor organizations, the employer creating that program need not be concerned that its control of the program will be treated as a violation of section 8(a)(2).

Parsing the language of section 2(5); the Board has explained that an "entity is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work,' grievances, labor disputes, wages, rates of pay, or hours of employment."<sup>19</sup> The first condition, requiring employee participation, does not limit the reach of section 8(a)(2) for employee-involvement programs because such programs by definition involve employees. However, each of the other two conditions does significantly limit section 8(a)(2)'s scope.

Notice first how the third condition protects employee-involvement structures intended to increase productivity by utilizing the skills and knowledge of all, or at least more, employees in

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19. E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993); *accord* Electromation, Inc., 309 N.L.R.B. 990, 994 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

firm management. This condition insulates from the force of section 8(a)(2) any entity that does not treat the kind of topics over which an employer must bargain with majority-supported independent unions. This means that employers can freely establish any schemes whatsoever to involve nonmanagerial employees in decisionmaking about production process or product quality improvements or other operational concerns such as waste management<sup>20</sup> as long as the employees are directed and required to focus on how the firm and production can be better managed rather than on how working conditions can be improved. Employers can delegate any degree of managerial authority they wish to any combination of purely managerial and primarily nonmanagerial employees. Or they can establish any kind of managerial advisory committee with any type of mixed purely managerial and primarily nonmanagerial membership they prefer. This third condition alone deflates the arguments of section 8(a)(2) critics that the section prevents employers from enriching the work experiences of employees while improving productivity by garnering these employees' insights on firm management.

As some critics have noted,<sup>21</sup> employers establishing employee advisory committees or employee teams with some degree of delegated managerial authority cannot be certain that employee members will not indulge their natural urge to attempt to utilize such committees or teams to press their own agendas for improving their working conditions. Employers also cannot be certain that all of their agents will scrupulously enforce policies against allowing employees to discuss working conditions and other bargaining topics in management-influenced advisory-committee or work-team meetings. Thus, employer establishment of such committees or teams could be discouraged if the Board were to interpret the third condition strictly so that sporadic or intermittent lapses into discussion of working conditions would render them subject to section 8(a)(2). The Board, however, does not so interpret the definition of labor organization in section 2(5).

In *Vons Grocery Co.*,<sup>22</sup> for instance, the Board held that a "Quality Circle Group" formed for the discussion of particular operational issues and problems was not converted into a labor organization under the NLRA simply because, after several years of

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20. See *Electromation*, 309 N.L.R.B. at 1001-02 (Devaney, Member, concurring); 309 N.L.R.B. at 1004 (Oviatt, Member, concurring).

21. See, e.g., Estreicher, *supra* note 12, at 146-48.

22. 320 N.L.R.B. 53 (1995).



acceptable focus, the group considered employee concerns about a dress code and an accident point system, and then even developed proposals to address these concerns.<sup>23</sup> The Board stressed that the employer had promptly cut off discussions of such working-condition topics after complaint from the incumbent union, and that the isolated incident did not establish a pattern or practice of making proposals to management on how working conditions should be improved.<sup>24</sup>

The critics of section 8(a)(2) might retort that some employers want to gain the benefits of employee self-management on personnel issues, like scheduling of overtime, approval of sick leave, and discipline assessment, as well as on production and quality maintenance issues. Some employers might feel that their front line production employees have the most to contribute to firm management through the control of their fellow employees. These employers also might argue that these employees would feel even more empowered by having some authority over personnel issues than they would by having authority over production decisions.

It is true that the third condition in the definition of labor organization would not offer insulation from section 8(a)(2) for any sharing of managerial authority over personnel issues with nonmanagerial employees covered by the NLRA. However, the second condition in the definition, the requirement that any entity must "deal with" the employer in order to be covered as a labor organization under the Act, does enable an employer actually to delegate to teams or committees of NLRA-covered employees a significant level of authority over issues that would be subject to collective bargaining.

This condition was more fully formulated by the Board in its 1993 decision in *E.I. du Pont de Nemours & Co.*<sup>25</sup> The *du Pont* Board acknowledged the Supreme Court's holding in *NLRB v.*

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23. See 320 N.L.R.B. at 54.

24. See also *Stoody Co. Div. of Thermadyne, Inc.*, 320 N.L.R.B. 18 (1995) (single meeting of committee formed for limited purpose of revising employee handbook to conform to current practices did not constitute a "pattern or practice" of making proposals on working conditions simply because proposals on vacation time were discussed in contravention of limited purpose).

25. 311 N.L.R.B. 893 (1993). This decision seems to have been intended to address the regulation of modern employee involvement programs in the union workplace as the more celebrated *Electromation*, 309 N.L.R.B. 990, decision was to have addressed the regulation of these programs in the nonunion workplace. But the *du Pont* decision's formulation of the definition of labor organization has been more quoted and relied upon by the Board in its recent nonunion workplace, as well as union workplace, § 8(a)(2) cases. The *Von's Grocery* decision discussed above, *supra* text accompanying note 22, is an example.

*Cabot Carbon Co.*<sup>26</sup> that the “dealing with” phrase in section 2(5) encompasses more than the process of collective bargaining, during which the parties “seek to compromise their differences and arrive at an agreement.”<sup>27</sup> The Board stressed, however, that “dealing with” nonetheless requires that there be some “bilateral mechanism” between the employees and management that would at least “ordinarily entail[ ] a pattern or practice in which a group of employees, over time, makes proposals to management [and] management responds to these proposals by acceptance or rejection by word or deed.”<sup>28</sup> The Board further stated that “[i]f the evidence establishes such a pattern or practice . . . the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management . . . the element of dealing is missing.”<sup>29</sup>

The “isolated instances” qualification, in tandem with the third condition as discussed above,<sup>30</sup> ensures that the Board finds no section 8(a)(2) violation in cases like *Von's Grocery* where there are only isolated proposals on issues that could be viewed as concerning working conditions. However, the requirement that there be “proposals” that are accepted or rejected by management suggests an even more important insulating barrier. As the Board recognizes, the requirement enables employers to delegate to employees any kind of managerial authority, whether or not related to working conditions, as long as the delegation is real and not simply formal. As explained by the Board in *du Pont*, there is no “dealing with” if a committee of employees protected by the Act has the “power to decide matters for itself, rather than simply [to] make proposals to management,” whether that management is formally within or without the committee.<sup>31</sup>

Similarly, in *Electromation* the Board stressed that “an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5).”<sup>32</sup> The Board cited three 1977 decisions for this prop-

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26. 360 U.S. 203 (1959).

27. *Du Pont*, 311 N.L.R.B. at 894.

28. *Du Pont*, 311 N.L.R.B. at 894.

29. *Du Pont*, 311 N.L.R.B. at 894.

30. See *supra* text accompanying notes 20-24.

31. *Du Pont*, 311 N.L.R.B. at 895.

32. *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). Members Devaney and Oviatt also stressed this point in their separate concurring opinions in *Electromation*. See 309 N.L.R.B. at 1002 (Devaney, Member, concurring); 309 N.L.R.B. at 1004 (Oviatt, Member, concurring).

osition, which together signaled the Board's early expressed intent to ensure that sincere attempts by progressive employers to delegate real authority to employees not be impeded by section 8(a)(2). In two of these cases the Board refused to treat as labor organizations committees granted actual authority to resolve employee complaints or grievances.<sup>33</sup> In the third case the Board upheld an Administrative Law Judge's finding that work teams established by an employer were not labor organizations, even though the teams made decisions on such personnel topics as "job assignments to individual team members," "job rotations," and "overtime among team members."<sup>34</sup> The Board in this last case adopted the Judge's findings that the teams' power to regulate their own members' working conditions reflected not "dealings" with management, but rather delegated authority as part of the workers' duties.

The Board continues to adhere consistently to the limitation on the meaning of "dealing with" established by these three cases. For instance, in *Keeler Brass*, the Board treated an employer-established grievance committee as a labor organization only after concluding that it, unlike the committees in the first two 1977 cases,<sup>35</sup> could not "resolve grievances without further recourse to the employer."<sup>36</sup> The *Keeler Brass* committee, the Board stressed, could only recommend or propose some level of discipline to management for management's rejection or acceptance.<sup>37</sup>

The distinction between delegated authority to decide and limited authority only to recommend, moreover, should not be difficult for employers to understand. In order to insulate self-managing work teams of NLRRA-protected employees from section 8(a)(2) challenges, employers need only allow the protected employees' decisions on subjects appropriate for collective bargaining to be implemented without review by managers. This qualification need not impede a firm maintaining ultimate hierarchical control. Like any managerial decisions made at any level of a firm, the decisions of self-managing teams can be reversed by higher level management without causing section 8(a)(2) exposure. They simply must be able to become effective before being considered for reversal. They

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33. See *Mercy-Memorial Hosp.*, 231 N.L.R.B. 1108 (1977); *John Ascuaga's Nuggett*, 230 N.L.R.B. 275, 276 (1977).

34. *General Foods Corp.*, 231 N.L.R.B. 1232, 1233 (1977).

35. See cases cited *supra* note 33.

36. See *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110, 1114 (1995).

37. See *Keeler*, 317 N.L.R.B. at 1114.

must, in other words, be more than proposals or recommendations for management's rejection or acceptance.

The "dealing with," or second, condition in the NLRB's definition of labor organization also should ensure that employers are able to attempt to enhance employee morale by offering their employees the opportunity to voice their most salient concerns about their own working conditions. The Board in *du Pont*, after elaborating the definition of "dealing with" quoted above, distinguished the "group action" required by this definition from the "individual communication" that it does not cover.<sup>38</sup> In so doing, it noted at least three "safe havens" that employers can be assured constitute only mechanisms for establishing lines of communication.

First, it noted that "brainstorming" sessions where employees are encouraged to present "a whole host of ideas," rather than develop particular group proposals, do not constitute an entity that facilitates employees as a collectivity "dealing with" management.<sup>39</sup> Such sessions are instead a means by which management can determine the concerns and priorities of individual employees. Similarly, employers, without "dealing with" their employees as a collectivity, can establish written channels for communication, such as a "suggestion box," by which "employees make specific proposals to management . . . individually and not as a group."<sup>40</sup> Finally, the Board stated that employee committees do not deal with an employer if they only provide its management with information, presumably including the thoughts and ideas of individual employees, but do not advance group proposals.<sup>41</sup>

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38. *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

39. *Du Pont*, 311 N.L.R.B. at 894.

40. *Du Pont*, 311 N.L.R.B. at 894.

41. *See du Pont*, 311 N.L.R.B. at 894; *see also* *Sears, Roebuck and Co.*, 274 N.L.R.B. 230, 244 (1985) (finding that the "communications committee" on which all employees served on a rotating basis was not a labor organization because employees only provided individual input to management).

The *du Pont* Board's distinction of communication with individual employees from group action or the conveyance of collective proposals, along with its explanation that "dealing with" can occur on, as well as outside, an employee committee, 311 N.L.R.B. at 894-95, explains the limited sense that the "dealing with" condition requires that an employee committee or team must be "representative" of other employees in order to be treated as a "labor organization." *See also* *Electromation, Inc.*, 309 N.L.R.B. 990, 994 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994) (suggesting that being representative is a fourth condition of coverage as a labor organization). Employers should not assume that language in *Electromation*, or in *General Foods*, *see supra* note 34 and accompanying text, frees management to control in any fashion any employee-involvement program that includes all employees as participants, rather than just a representative sample. When a committee or team of front-line employees develops proposals to improve working conditions and then has some member of the committee, whether or not a managerial employee, convey these proposals to more senior managers, the conveyor becomes a representative of the group. Even when group proposals are

Furthermore, the Board has clearly signaled in its contemporary cases that section 8(a)(2) need not restrict even employers who want their employees to have the opportunity to voice collective proposals on topics appropriate for bargaining through structures that would therefore be treated as labor organizations. In *Electromotion* the Board stressed that Senator Wagner, the primary sponsor of the NLRA in general and section 8(a)(2) in particular, “made a distinction . . . between *interference* and *minimal conduct* — ‘merely suggesting to . . . employees that they organize a union or committee’ — that the nation’s experience had shown did not rob employees of their right to a representative of their own choosing.”<sup>42</sup> The question of whether an employer has violated section 8(a)(2) with interference, domination, or support of a labor organization, in Senator Wagner’s view, should turn on whether “an employee organization is entirely the agency of the workers.”<sup>43</sup>

This suggests, at the least, that an “employer should not be penalized for merely suggesting to his employees that they organize a union or a committee”<sup>44</sup> that is independent of any outside union. Moreover, if this were not the intent of Senator Wagner, it certainly must have been the intent of the Taft-Hartley Congress, which affirmed in section 8(c) of the Act that nonthreatening speech cannot alone constitute an unfair labor practice.<sup>45</sup> This provision should make clear that an employer is free to explain to its employees not only its opposition to outside unions in general, but also its support of a particular kind of independent internal employee organization.<sup>46</sup>

Admittedly, it is not fully clear how much more than verbal encouragement section 8(a)(2) allows an employer to provide employees who may wish to influence their workplace through some kind of committee that is independent of outside unions as well as the employer. However, as long as the employer allows the employee committees to meet outside the presence of management, to control

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only made to a management representative on the committee for the representative’s acceptance or rejection by word or by deed, however, the individual employees are represented by the group proposal, and are not directly communicating with management. *See du Pont*, 311 N.L.R.B. at 895.

42. *Electromotion*, 309 N.L.R.B. at 993-94.

43. *Electromotion*, 309 N.L.R.B. at 994.

44. *Electromotion*, 309 N.L.R.B. at 993.

45. *See* 29 U.S.C. 158(c) (1994).

46. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (“[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’”).

their own agendas and structure, and to conduct independent elections to select their members, the employer should be able to allow the committees to meet on plant property during work time and to present proposals for management's acceptance or rejection.<sup>47</sup> That seems to be the view of recent NLRB Chairman Gould.<sup>48</sup> The Board has never held otherwise; and given the general tendency of the courts to be even less strict interpreting section 8(a)(2) than has the Board,<sup>49</sup> no employer should fear some sudden invigoration of the section against an employer's consideration of proposals from truly independent employee committees that it has encouraged its employees to form.<sup>50</sup>

In sum, section 8(a)(2) as interpreted by the Board proscribes only a narrow range of clearly defined employee-involvement programs. It prohibits only employee committees or teams: (1) that are in some substantial way under employer control or dependent on employer support and (2) that convey to management for pre-implementation acceptance or rejection proposals (3) that represent some collectivity of employees (4) and that concern personnel topics encompassed by the definition of labor organization in section 2(5) of the Act.<sup>51</sup>

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47. But they could not present a proposal for negotiation of an agreement in the manner of collective bargaining. See *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731 (1961) (upholding § 8(a)(2) violation where employer recognized independent, but nonmajority union as collective bargaining agent).

48. See, e.g., *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110, 1118-19 (1995) (concurring opinion); see also William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3 (1996).

49. See, e.g., *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262 (4th Cir. 1994); *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955). At least the Sixth Circuit has also interpreted the "dealing with" condition in § 2(5) to require more to qualify as a "labor organization" than has the Board or probably the Supreme Court in *Cabot Carbon*. See *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989); *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982).

50. See also *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1170 (7th Cir. 1994) ("[T]he principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions.").

51. The minimal impact on employee-involvement programs of § 8(a)(2) as interpreted by the Board is confirmed by James R. Rundle's comprehensive study of all § 8(a)(2) cases before the Board during the period from 1972 to 1993. See James R. Rundle, *The Debate over the Ban on Employer-Dominated Labor Organizations: What Is the Evidence?*, in *RESTORING THE PROMISE*, *supra* note 6. Rundle found only two cases in this twenty-two year period "in which there were no other ULPs found and the committee that was disestablished had not been established in the course of a union organizing campaign." *Id.* at 166 (emphasis omitted). One of those cases was *Electromation*, where the employer formed employee committees that treated only personnel concerns that had nothing to do with product quality or productivity issues or real employee empowerment, just before the beginning of a union cam-

To be sure, critics of section 8(a)(2) can still argue that even such a permissive section 8(a)(2) restrains employers who wish to obtain collective employee input on personnel issues, but who are unwilling either (1) to empower employees who are not primarily managerial to participate in actual managerial decisionmaking, or (2) to encourage the existence of truly independent employee committees that could develop into oppositional forces or even independent unions seeking collective bargaining authority. This more limited argument, however, does not support the claim that employee-involvement programs are generally threatened by the current section 8(a)(2). Rather, the question reduces to whether the narrow kind of management-controlled employee involvement that section 8(a)(2) does inhibit might be more attractive to employers today than the kinds of programs section 8(a)(2) permits, primarily because the management-controlled programs better serve asserted productivity- and participation-enhancing goals, or rather because these management-controlled programs can be better utilized to discourage what the NLRA was intended to protect — collective bargaining and “other concerted activities” for employee “mutual aid or protection.”<sup>52</sup>

This question can be answered in part through logical analysis. The kind of management-controlled programs that the Board interprets section 8(a)(2) to prohibit at least pose a greater risk of manipulation of employees to inhibit their choice of the independent collective action protected by the NLRA. Unlike channels for the expression of the views and proposals of individual employees, a committee that can make collective employee proposals on personnel issues for management’s acceptance or rejection can be presented to employees as an alternative to the collective voice promised by independent unions.<sup>53</sup> Even without much managerial

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paign. The other case involved a committee that circumvented an incumbent union by the consideration of personnel grievances. See *Alta Bates Hosp.*, 226 N.L.R.B. 485 (1976); see also *Rundle*, *supra*, in *RESTORING THE PROMISE*, *supra* note 6, at 166-73. The ubiquity of unions in § 8(a)(2) cases also reflects the unlikelihood of individual employees filing unfair labor practice complaints with the Board in the absence of protection by an independent union.

52. 29 U.S.C. § 157 (1994).

53. Some commentators have suggested that employee representational schemes are like any other benefits, such as wage bonuses or pension plans, which employers can provide their employees to reduce their desire to be represented by a union. See, e.g., *WEILER*, *supra* note 6, at 214. Employee representation schemes, unlike substantive economic benefits, however, are a direct procedural alternative to collective bargaining and the channel for a collective employee voice that it provides. Furthermore, substantive benefits cannot be used as fora for the manipulation, division, and isolation of employees, as can employee representational schemes. See *infra* text accompanying note 57.

control, at least over the short run such a committee can pose psychological and practical barriers to the development of independent unions. Psychologically employees may perceive less of a need for independent collective bargaining where an employer offers channels through which employees may convey collective proposals.<sup>54</sup> Practically many employees with leadership skills will have their organizational energies diverted into such channels.

In the longer run, as employees come to understand the limitations on their influence, employer-established or -encouraged committees that have developed independent of continuing managerial control can further develop into real labor organizations that may claim the authority to bargain collectively with management.<sup>55</sup> Nonetheless, continuing managerial control of employee committees not only can ensure the abortion of any such developments, but also can provide further opportunities for managerial manipulation of employees away from independent collective action.<sup>56</sup> The discussion of personnel issues in management-controlled committees can be utilized to identify and highlight issues that divide groups of employees. Such discussions also may be directed to isolate and embarrass potentially disruptive dissident employees who could lead some independent employee resistance to managerial priorities. Perhaps most important, sophisticated management that remains in control of the agenda and proposal development of

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54. See Barenberg, *supra* note 6, at 804-07 (noting application of this theory in early Labor Board § 8(a)(2) cases).

55. American workers have shown themselves capable of taking control of plans originally encouraged by employers, at least where those plans were not under the continuing control of management. See, e.g., IRVING BERNSTEIN, *THE TURBULENT YEARS 455-57* (1970) (workers at U.S. Steel); John N. Schacht, *Toward Industrial Unionism: Bell Telephone Workers and Company Unions*, 16 LAB. HIST. 5-36 (1975); see also Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 J. LAB. RES. 387 (1995) (history of company unions being turned into independent unions). Professor Barenberg's brilliant, exhaustive application of social science insights to explain the possible effects of employee-participation schemes, see Barenberg, *supra* note 6, also includes a catalogue of theories (under such descriptive sobriquets as "whetting the appetite" and "runaway legitimation") to explain why company unions under certain conditions may encourage the development of independent unions. See *id.* at 831-35.

56. Section 8(a)(2) does not rest on some general theory of "false consciousness" of American workers. See Estreicher, *supra* note 12, at 131-32. Section 8(a)(2) instead was intended to provide prophylactic protection against managerial manipulation. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1456-59 (1993) (noting legislative history that indicates Senator Wagner's concern with managerial penetration of workplace to distort employee deliberation, as well as employee interest distortion); see also Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 6-9 (1988) (detailing legislative history and stressing prophylactic protection); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 530-34 (1986) (detailing legislative history and stressing statutory choice of autonomous employee selection of representatives).



employee committees can continue to create the illusion of responsiveness to employee voice, while attempting to orchestrate that voice to make proposals in tune with management.<sup>57</sup>

Where the employee committees or teams are delegated real authority by management, however, the opportunity for managerial manipulation is reduced just as the actual influence of the employees over firm policy is enhanced. Employees should be able to understand more easily their actual level of authority in the firm if they are granted some reviewable discretion to make managerial decisions for the firm, rather than to make proposals on behalf of employee interests for managerial consideration. A managerial reversal of a work team decision directly announces limitations on the team's authority, while the rejection of a collective employee proposal may be presented with the promise of future compromise. Employees can appreciate that they are being asked to help direct the firm for the general success of the firm, rather than for the employees' particular interests. Furthermore, managerial agents on employee work teams must be constrained to pay attention primarily to production concerns, rather than to the control of personnel, when actual managerial decisions are being made by the teams.

Therefore, all of the conditions placed by the Board on the reach of section 8(a)(2) seem appropriately designed to ensure inhibition of only that form of employee involvement that carries the most risk of managerial discouragement of NLRB-protected collective action.<sup>58</sup> Any argument that section 8(a)(2) nonetheless must be diluted to permit even what it now prohibits must rest on the empirical claim that the incentives to use employee involvement programs in today's economy, unlike the incentives that motivated managers in the first half of the century, primarily are benign. The critics of section 8(a)(2) have the burden of establishing that some historical development or developments, in technology, in industrial processes, or in human relations theories, have antiquated the empirical assumptions underlying section 8(a)(2). My own quick

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57. See *infra* text accompanying notes 115-28; see also Barenberg, *supra* note 6, at 786-89 (explaining how company-controlled unions can facilitate coercion and manipulation of employees).

58. Thus, management attorney and past Labor Board Chairman Edward B. Miller candidly acknowledged after the Board's decisions in *Electromation* and *du Pont*:

It is indeed possible to have effective programs . . . in both union and non-union companies without the necessity of any change in current law. . . . While I represent management, I do not kid myself. . . . If section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur.

*Former NLRB Chairman Miller Calls Electromation Problem "Myth"*, Daily Lab. Rep. (BNA) No. 201, at A5 (Oct. 20, 1993).

review of the history of this century casts doubt on the ability of the critics to carry this burden.

### III. A BRAVE NEW WORLD? — THE HISTORICAL AND CONTEMPORARY USE OF EMPLOYEE-INVOLVEMENT PROGRAMS

As explained above,<sup>59</sup> critics of section 8(a)(2) claim that, in contrast to the period during which section 8(a)(2) was enacted, employers today most often establish committees to facilitate the communication of employees' views to management not to discourage employees from choosing independent unions, or more generally to weaken employee autonomy, but rather to increase the employees' productivity by deepening their commitment to the production enterprise and by utilizing employees' insights on how production can be most efficient and consistent. My survey of the modern economy suggests that this contrast is overdrawn. Modern employers in America continue to utilize involvement programs to discourage unions and employee autonomy, often in more sophisticated and effective ways than the employers of the thirties. Moreover, the industrial relations theory that management-controlled employee-involvement programs can enhance the productivity of workers by deepening their commitment and loyalty to the goals of the firm for which they work antedates the NLRA and was rejected as a rationale for narrowing section 8(a)(2).<sup>60</sup>

More important, the modern use of employee-involvement programs often represents an application of a "human relations" personnel theory for how management can obtain greater control over workers' time, which was first articulated before passage of the NLRA and which has been further developed in the last two decades to assist in the implementation of the much heralded Japanese "lean production" system. This system, far from offering American workers greater control over their work and enriched jobs, provides management with the tools to obtain minute control over every movement of front-line workers and to demand from them more intense and stressful performance. Utilization of some of these tools, however, depends upon the extraction of both front-line employee commitment and knowledge about the production process. Management-controlled employee-involvement programs,

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59. See *supra* text accompanying notes 8-13.

60. See Owen E. Herrstadt, *Section 8(a)(2) of the N.L.R.A.: The Debate*, 48 LAB. L.J. 98, 103-06 (1997); Kohler, *supra* note 56 at 532-33.

therefore, may be attractive to employers, not only to help avert independent unions, but also to avert other forms of employee resistance to the implementation of a system that ultimately makes work more difficult for employees. Far from offering employees half of the loaf of independent unions, management-controlled programs thus may threaten to place employees in a position worse than that of having no formal representational system.

The actual achievement of many of the purported goals of employee involvement — specifically, jobs requiring enhanced skills and more individual and collective employee control over work processes — is desirable, both for American workers in particular and for the American economy in general. Absent the emergence of an international labor movement that can exercise some control over global labor markets, skill enhancement may offer American workers their only real chance to achieve job security and some wage premium over that which can be extracted in less developed, and less democratic, countries. Furthermore, notwithstanding the use of employee-involvement programs by many employers to avoid or erode unions or to implement more oppressive production processes, some programs may provide real skill enhancement and power to American workers.

The best preliminary evidence, some of it from outside the United States, however, indicates that the use of employee committees for skill enhancement and real worker job control is much more likely where strong, independent unions have been able to convince management to employ new technology for these purposes. Retaining a viable section 8(a)(2) to help protect the development of unions thus is likely to encourage, rather than discourage, new forms of worker empowerment. Furthermore, the narrowly framed section 8(a)(2) described above allows nonunion employers to transfer real decisionmaking authority to their employees, while only inhibiting illusory and manipulative participation programs designed to facilitate implementation of the more oppressive forms of the Japanese lean production system.

#### A. *The Critics' Story*

Most contemporary critics base their case against section 8(a)(2) on the claim that the employee-involvement programs established and administered by modern employers are fundamentally different in purpose and effect from the company unions that were the origi-

nal targets of the section.<sup>61</sup> Congress enacted section 8(a)(2), the story runs, to counter the efforts of employers in the thirties to engage in 'sham collective bargaining' with management-controlled employee organizations designed to thwart the burgeoning union organization of the time. Today, the critics claim, employers most often establish and administer employee committees that might be prohibited by a strict reading of section 8(a)(2) in order to increase the productivity of employees, rather than to use fake collective bargaining to avert real bargaining through independent unions. Enlightened modern employers are said to understand that workers may be more easily convinced that their interests are consonant with those of the firm and thus more productive when the workers feel they have some opportunity to influence the conditions of their work. Modern employers are also said to be more likely than their predecessors to understand that workers engaged in production may possess better knowledge of how to make the production process more efficient. Modern employee-involvement programs are thus claimed to be no more than an effort by sensitive employers to make the firm's command structure less hierarchical.

Proponents of contemporary employee-involvement programs contend that they are part of a transformation of American production processes from the system of scientific management spawned

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61. This story, in whole or in part, has been recounted by numerous employer representatives in testimony before Congressional Committees considering the TEAM legislation and before the Commission on the Future of Worker-Management Relations, created by President Clinton. See, e.g., S. REP. NO. 105-12, at 2-4 (1997); Yager Testimony, *supra* note 13; Statement of Richard A. Beaumont, President of Organization Resources Counselors, Inc., Management Consultants, before the Commission for the Future of Worker-Management Relations, Jan. 19, 1994 (on file with author).

All, or at least part, of this story also has now been rehearsed in numerous law and business review articles and notes. See, e.g., Jon Blumenthal, *Remedying Electromation, Inc. v. NLRB and its Progeny: The Future of Employee Participation Programs*, 5 KAN. J.L. & PUB. POLY. 193 (1996); Estreicher, *supra* note 12, at 129-39; Charles C. Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809 (1977); Nancy K. Kubasek et al., *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 HARV. J. ON LEGIS. 53 (1997); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 901 (1993); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159 (1996); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571 (1992); Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985). For a more balanced view, see Rafael Gely, *Whose Team Are You On? My Team or My TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323 (1997).

in the 1920s by the theories of Frederick Taylor.<sup>62</sup> The essential aspects of Taylorism are said to be: first, the separation of the intellectual work of production conception and design from the manual work of production execution; and second, the breaking down of this execution into a series of separable, easily learned repetitive work steps specified by industrial engineers. In this system production workers are simply assigned one or more of these repetitive tasks by foremen; they are not allowed to determine how best to complete work for which they are responsible. The pace of their work is controlled by the speed of an assembly line or by individual quotas based on time and motion studies of workers by production engineer specialists.

Some tellers of this story view industrial unionism, as it developed in the middle of this century, as a response to a hierarchical production system defined by Taylorism. Unions helped workers moderate the speed and intensity of production. They did so in part by creating a culture of solidarity among workers to restrict management's ability to create competition among workers based on achieving rewards from supervisors. They also protected workers from supervisors' favoritism by negotiating detailed collective bargaining agreements that not only required just cause for discipline, but also defined workers' rights to particular jobs on the basis of seniority. Unions, however, basically accepted management's control over the delineation of job tasks. The unions only insisted that the jobs be narrowly classified so that seniority, rather than supervisory discretion, could govern job assignment and thus career advancement. As American mass production thrived in a world of limited international competition and expanding demand into the 1960s, unions also could successfully obtain for their members continual increases in wages and other benefits as part of their ongoing bargain with a management that retained control of production decisions.<sup>63</sup>

Some proponents of modern employee-involvement programs explain the proliferation of such programs in the United States in the last two decades as part of the breakdown of Fordist mass production. Mass production in the United States, the story continues, has been challenged by the saturation of world consumer markets

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62. For treatments of Taylor, see ROBERT KANIGEL, *THE ONE BEST WAY* (1997); DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* (1980).

63. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 28-29 (1986); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984).

for standardized goods and services, by the emergence of new foreign competitors, especially in the Asian rim, and by the adoption by some of these competitors of more efficient production processes.<sup>64</sup> Critics of section 8(a)(2) contend that in order to meet this new international competition employers of American workers also have had to adopt new production processes that may break down the divisions between management and labor in ways that at least in a nonunion workplace could be challenged under section 8(a)(2), but which nonetheless are ultimately enriching for the workers.<sup>65</sup>

These new production processes, it is said, depart from Taylorism and mass production in a number of significant ways, some of which have been made possible by technological advances primarily associated with computers.<sup>66</sup> Machines no longer need to be permanently dedicated to the production of particular goods, but are now able to be reprogrammed to adapt to rapidly changing market demand and the search for new market niches. To meet the flexibility of their machines, workers also must become flexible. They must be able and willing to change the particular work they do and the machines they operate as market demand shifts. This flexibility requires some degree of worker influence over the production process, because only workers directly involved in production can understand how to make quick readjustments. It also requires a broadening and deepening of the skills of production workers, as workers are required to perform multiple tasks, to understand the capabilities of the machines they operate, and to be able to adjust the machines' operation.

Production processes are not to be rigidly set even for those firms continuing to use assembly lines for large markets; instead workers must cooperate with management in a continuous effort to make production more efficient and flexible. The contribution of workers directly involved in production is critical to achieve such improvements because only those who actually do production work fully understand the need for each detailed motion that they make. Try as they might, Taylorist industrial engineers could not determine the most efficient modes of production by having specialists

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64. See, e.g., BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE* 60-79 (1992).

65. See, e.g., Estreicher, *supra* note 12, at 133-39.

66. See, e.g., MARTIN KENNEY & RICHARD FLORIDA, *BEYOND MASS PRODUCTION* (1993); PIORE & SABEL, *supra* note 63; JAMES P. WOMACK ET AL., *THE MACHINE THAT CHANGED THE WORLD* (1990).

conduct time and motion studies without the active cooperation of the workers being studied.

Proponents of employee involvement also contend that such involvement can make firms more efficient by substituting collective employee self regulation for wasteful layers of management hierarchy. New production processes may require employees to set up and make at least minor repairs on their own machines. They also may require production employees to do inspections on the work of other employees with whom they work. Groups or teams of employees may even allocate jobs and assign overtime between team members. Teams may have a role in recommending discipline, promotions, or even hiring or new admissions into the team.

All of these developments are viewed by the critics of section 8(a)(2) as beneficial for American workers, not only because they may enhance the workers' job security and compensation by enabling the firms for which they work to compete more effectively in product markets, but also because the new processes directly enrich the jobs of the workers. Workers feel better about their work when they have some opportunity to influence its content, rather than simply taking orders from supervisors. Furthermore, it is said, these programs provide workers with the satisfaction of feeling that they understand and have made an intellectual contribution to the production process of which they are a part. This conventional description of the impact of recent production modifications also assumes that these modifications deepen as well as broaden the skills of the workers they touch, thus presumably making work more engaging as well as more stimulating.<sup>67</sup>

### B. *Continuities with the Past*

Although aspects of the critics' story are accurate, it nonetheless exaggerates the contrast between the "company union" movement that preceded the Wagner Act and the employee-involvement movement that emerged in the 1970s. This contrast misrepresents both the past and the present.

It misrepresents the past by simplifying the purpose and function of pre-Act "employee representation plans" or "works councils" — what company unions were called at the time by their

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67. See, e.g., Ryan, *supra* note 61, at 579-88; Madelyn Carol Squire, *Reality or Myth: Participatory Programs and Workplace Democracy — A Proposal For A Different Role for Unions*, 23 *STETSON L. REV.* 139, 150-52 (1993).

proponents.<sup>68</sup> Contemporary critics of section 8(a)(2) are correct to note that company unions were condemned by the Act primarily because Senator Wagner and his allies viewed them for good reason as a major impediment to the development of independent unions.<sup>69</sup> The attention given company unions, and to section 8(a)(2), in the legislative debates on the Wagner Act reflected their proliferation as an alternative to independent unions in the early 1930s,<sup>70</sup> especially after the National Industrial Recovery Act provided that employees had “the right to organize and bargain collectively through representatives of their own choosing.”<sup>71</sup> However, in attempting to create a false contrast with modern employee-involvement programs, today’s section 8(a)(2) critics have ignored the broader purposes and functions of the pre-Wagner Act schemes. The employee-representation plan movement was not simply generated as a strategy to avert unions, nor did it attempt to accomplish its goals only by presenting the illusion of collective bargaining.

The employee-representation plan movement represents one of several strategies tried by American employers in the first third of this century to better achieve what always has been the primary labor relations goal of managers with responsibilities to maximize returns for the providers of capital — the extraction of the maximum production out of labor input relative to the cost of that input. Managerial efforts toward this goal confront the special problem of human control — a problem that of course does not burden efforts to maximize returns from the capital input of production. Workers of course resist control not simply to retain the satisfaction of inde-

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68. See, e.g., DONALD M. WELLS, *EMPTY PROMISES, QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT* 126 (1987); David Brody, *Section 8(a)(2) and the Origins of the Wagner Act*, in *RESTORING THE PROMISE*, *supra* note 6, at 34.

69. In retrospect, labor historian Irving Bernstein concluded that employee-representation plans were “the most important device employers used to prevent or undermine labor organization” before the post-Act organization victories of the late 1930s. IRVING BERNSTEIN, *THE LEAN YEARS* 156 (1972).

70. Senator Wagner, for instance, viewed employer-dominated employee-representation plans as “the greatest obstacles to collective bargaining.” He argued that “the abolition of the employer-dominated union” had to be “the very first step toward genuine collective bargaining.” 78 CONG. REC. 3443 (1934).

71. Pub. L. No. 73-67, §§ 7(a)(1), 15, 40, 48 Stat. 195 (1933). Senator Wagner cited a 1933 study finding that the number of employees covered by employer-dominated employee-representation plans increased “from 432,000 in 1932 to 1,164,000 in 1933, representing a gain of 169 percent. More than 69 percent of the company-union schemes . . . [were] inaugurated in the brief period [after] the passage of the Recovery Act.” 78 CONG. REC. 4230 (1934).



pendence, but more importantly to moderate the pace and intensity of their work.<sup>72</sup>

Early entrepreneurial capitalists were able to maintain tight control of their workforces in small firms through a combination of both unlimited discretionary power to discipline, fire, and promote, and also the development of employee loyalty through personal interactions.<sup>73</sup> As firms increased in size, as owners became much more removed from contacts with workers, as layers of management were added to firm hierarchies, and as more integrated production required greater coordination between workers, employers became more dependent on the "stick" of uncontrolled supervisory authority. The authority of foremen to coerce workers through the docking of pay, suspension, discharge, physical abuse, eviction from company housing, and even blacklisting for employment elsewhere in the industry, was of course usually effective in the short run. However, the harsh and negative nature of this authority provoked equally negative reactions from workers, increasingly concentrated in large numbers in huge plants. The labor violence and militancy of the early twentieth century was the result.<sup>74</sup>

Employers responded by softer methods of labor control, attempting to direct employees' loyalty toward the firm rather than toward their peers. One strategy, which generally was not successful in avoiding labor strife and did not survive the depression in most firms,<sup>75</sup> was to induce workers to accept authoritarian control by the provision of welfare benefits, such as insurance for work-caused injuries, pensions, and stock purchase opportunities.<sup>76</sup> Another related strategy was the employee-representation plan move-

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If there is one undisputed finding of industrial sociology, it is this: In every known society in which the division of labor is not fixed by custom, workers doing related tasks attempt to gain control over their workplace. This struggle for autonomy concerns every aspect of productive activity: the way tools and machines are used, and by whom; the determination of wages and income; patterns of recruitment and promotion; standards of satisfactory performance and penalties for failing to meet them; and so on.

PIORE & SABEL, *supra* note 63, at 111.

73. See RICHARD EDWARDS, *CONTESTED TERRAIN, THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 23-27 (1979).

74. See *id.* at 53-57.

75. As Sanford Jacoby has stressed in his writings, however, welfare capitalism has had a continuous existence in some firms. See SANFORD JACOBY, *MODERN MANORS* (1997).

76. See LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939*, at 179-89 (1989); EDWARDS, *supra* note 73, at 91-97. Most of the benefit plans could be and often were discontinued as abruptly as they were introduced. They were also frequently used to discipline disloyal employees as well as to reward loyal service. See ROBERT OZANNE, *A CENTURY OF LABOR-MANAGEMENT RELATIONS AT McCORMICK AND INTERNATIONAL HARVESTER* 71-95 (1967).

ment. In the view of one contemporary expert proponent<sup>1</sup> of the movement, "employee representation was the main weapon of the welfare arsenal in the businessman's thrust toward [his] goal" of "smooth labor waters, untroubled by strikes and agitation which threatened the power and authority of the employer."<sup>77</sup> Although by the time of World War I the catalyst for adoption of an employee-representation plan was most often a desire to avert an independent union,<sup>78</sup> the plans were more broadly designed to achieve enhanced managerial control over unrepresented workers.

Illustrative is the Works Council system established by International Harvester in 1918. At each of its plants Harvester used the Works Councils, whose membership, agenda, and decisions were dependent on management approval,<sup>79</sup> to have certain privileged workers govern other workers in the interest of the company. For instance, after unsuccessful strikes in 1919, the Councils were given the responsibility of determining which strikers to rehire.<sup>80</sup> Through domination of the agenda and resources of the Councils, management was later able to use them to help resist cost-of-living increases in wages during an inflation and recommend wage cuts during a recession.<sup>81</sup>

A more general study of industrial Chicago during this pre-Wagner Act period found that employers used employee-representation plans not only to resist unions, but more broadly to "legitimate firing strikers, reducing wages, and enacting unpopular policies."<sup>82</sup> This study also found that employee representation plans of this period had the ancillary benefit of enabling senior company management to exert more direct control over the workforce and thereby reduce the agency costs of having foremen use their discretionary power for their own personal and often

77. William M. Leiserson, *Contributions of Personnel Management to Improved Labor Relations*, in WERTHEIM LECTURES ON INDUSTRIAL RELATIONS 1928, at 148, 154 (Otto S. Beyer et al. eds., 1929). Andrew Carnegie agreed that some form of employee representation was necessary to maintain managerial control in the modern hierarchical firm. See ANDREW CARNEGIE, *THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS* 103-04 (1933).

78. The first pre-war employee-representation schemes, such as the one instituted at Filenes in the first years of the century, seem not to have been at all concerned with unions, however. See Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination*, 56 BUS. HIST. REV. 335, 339-40 (1982).

79. See 1 Toni Gilpin, *Left by Themselves: A History of the United Farm Equipment and Metal Workers Union 1938-1955*, at 44-50 (1992) (unpublished Ph.D. dissertation, Yale University) (on file with author).

80. See *id.* at 51-54.

81. See EDWARDS, *supra* note 73, at 107-08; Gilpin, *supra* note 79, at 58, 61-62.

82. COHEN, *supra* note 76, at 172.

prejudiced ends.<sup>83</sup> By making foremen subject to review by management-controlled, employee committees, the front-line supervisors could be forced to be "more careful and liberal in their actions and decisions as they come in contact with the workmen from day to day."<sup>84</sup>

Furthermore, the typical functioning of employee-representation plans of this period indicates that they were designed not simply to avert unionization through creating an illusion of collective bargaining for workers, but rather to create an unfertile environment for any robust collective worker resistance to company directives. The principal function of most employee-representation plans was to provide some formal mechanism for the consideration of individual employee grievances, usually based on allegations of a foreman's failure to treat an employee fairly under work rules set by higher management.<sup>85</sup> For instance, a plan might establish a joint employee-management shop committee to consider individual grievances initially, as well as a plant-wide joint committee to eventually consider appeals.<sup>86</sup>

At least before the NIRA's mandate of collective bargaining,<sup>87</sup> these representation plans did not, however, generally provide any avenue for pressing collective interests, such as some form of pseudo-bargaining over wages or work rules. The plans also did not make provisions for employee representatives to meet with their constituents or with their peers in other committees or in parallel structures in other plants.<sup>88</sup> The purpose clearly was to identify the

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83. *See id.* at 172-73. One historian's analysis of the extant records of the pre-Wagner Act Industrial Assembly of the Goodyear Tire & Rubber Company and the Cooperative Association of the Leeds & Northrup company reached a similar conclusion: "Their work extended the managerial hierarchy to the shop floor, enlarging the realm of the personnel officials, curtailing the prerogatives of the line supervisors and enlisting lower echelon employees in the operation of the firm." Nelson, *supra* note 78, at 352.

84. SWIFT & COMPANY, YEARBOOK OF 1923, at 46, *quoted in* COHEN, *supra* note 76, at 173.

85. *See, e.g.,* EDWARDS, *supra* note 73, at 105-07 (principal discussion of General Electric plan at Lynn works); COHEN, *supra* note 76, at 173 (noting Wisconsin Steel and Swift & Co. plans).

86. *See* EDWARDS, *supra* note 73, at 105-07.

87. For a description of the impact of the NIRA on employee-representation plans, principally in the steel industry, see RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE 40-47 (1992). Neither this account nor others indicate that plans were greatly engaged in collective bargaining on general issues rather than in the consideration of individual grievances, although Hogler and Grenier report that employee representatives at Weirton Steel at one point demanded and received a 10% pay increase. *See id.* at 46.

88. *See* EDWARDS, *supra* note 73, at 107.

discontent of groups of workers and then to isolate and channel this discontent away from collective action.<sup>89</sup>

Beyond grievance processing, the works councils of this period also were used by management to focus workers' attention on the need to reduce wasteful production processes<sup>90</sup> and employee turnover.<sup>91</sup> When general wage and working conditions were addressed by the councils, as in the Harvester example, it was to serve the objectives of management. The general announced purpose of the employee-representation plans was to increase industrial efficiency by ensuring labor's identification with the goals of management.<sup>92</sup> John Leitch, an influential business consultant of the day, for instance, sold employee-participation schemes as a way to reduce production costs and increase profits.<sup>93</sup> Lowering labor costs through increased cooperation was also the stated goal of the seminal representation plan devised for the Colorado Fuel and Iron Company by Canadian industrial relations expert W.L. Mackenzie King upon the direction of its owner, John D. Rockefeller, Jr., after the famous Ludlow Massacre of militant workers and their families exposed the limits of coercive control.<sup>94</sup>

Rockefeller also funded Industrial Relations Counselors, the primary business research and consulting operation propounding employee-representation plans in the pre-Wagner Act era. This operation was headed by Arthur H. Young, a leading opponent of the enactment of section 8(a)(2) by the Wagner Congress and the operator of the Harvester plan in the early 1920s. Young viewed his mission as promoting the cooperation of capital and labor.

Confidence and good will are the foundations of every successful enterprise, and these can be created only by securing a point of contact between employer and employee. They must seek to understand each other's problems, understand each other's opinions, and maintain that unity of purpose and effort upon which the very existence of the com-

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89. See COHEN, *supra* note 76, at 173.

90. See Nelson, *supra* note 78, at 346.

91. See STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 123-28 (1991). High turnover had become a special concern of large industrial manufacturers in the 1920s, and was generally one of the targets of the welfare capitalism and associated employee-representation plan movement of this period. See COHEN, *supra* note 76, at 174-75; Nelson, *supra* note 78, at 342.

92. One industrialist (Henry S. Dennison of Dennison Manufacturing) wrote that the purpose of these plans was "to put across to the employees the idea that the company — its success, its policies and its reputation — belongs as much to them as it does to the management." Nelson, *supra* note 78, at 346.

93. See HOGLER & GRENIER, *supra* note 87, at 17.

94. See generally HOWARD M. GITELMAN, *LEGACY OF THE LUDLOW MASSACRE: A CHAPTER IN AMERICAN LABOR RELATIONS* (1988).

munity which they constitute and the whole future of democratic civilization depend.<sup>95</sup>

Young's boss at Harvester, Cyrus W. McCormick, shared the same vision. McCormick, like Rockefeller, and like today's business proponents of employee-involvement programs, considered his own industrial relations policies much more enlightened than those of his predecessors: "the difference [was as] between a feudalistic state . . . and a democracy. . . . If people have a voice in the making of the regulations which affect them, they are more able to understand and accept law."<sup>96</sup>

Thus, for Rockefeller and McCormick as industrial entrepreneurs, as for Young and Leitch as business consultants, the ultimate goal of employee-representation plans was to achieve labor cooperation in the achievement of the primary goal of the firm, the maximization of the firm's returns for its controlling owners. The employee-representation movement was a strategy to control labor toward that end without direct coercion. As one leading labor historian of the period concluded, "[f]or an ambitious minority of . . . firms the installation of a company union was the final step in the process of organizing and controlling the labor force."<sup>97</sup>

Not surprisingly, the opponents of section 8(a)(2) attacked the provision before the Wagner Congress not only by contending that workers should have the option of employer-initiated unions, but also by extolling what they perceived as the virtues of employee-representation plans. The opponents' testimony repeatedly asserted that such plans should be valued because they can enhance labor cooperation and productivity, while also satisfying the needs of workers to participate in decisionmaking about their workplace.<sup>98</sup> The passage of the Wagner Act thus represents a rejection, at least for that day, of rationales for managerial involvement in employee-representation schemes that are the direct antecedents of today's arguments against section 8(a)(2).<sup>99</sup>

In order to understand fully the connection between pre-Wagner Act employee-representation plans and modern employee-involvement programs, however, the contemporary section 8(a)(2)

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95. Brody, *supra* note 68, at 35.

96. James R. McIntyre, *The History of Wisconsin Steel Works of the International Harvester Company* 40 (typescript, available at Southeast Chicago Historical Project Archives), quoted in COHEN, *supra* note 76, at 171-72.

97. Nelson, *supra* note 78, at 343.

98. 1 NLRB, LEGISLATIVE HISTORY OF NLRA, 1935, at 911-920, 949-62, 435-38, 1057.

99. This is the thesis of Professor Kohler's forceful essay, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, *supra* note 56.

critics' distortion of the present as well as the past must be clarified. For the critics have attempted to sever the historical connection not only by ignoring the broader purposes of the pre-Act schemes, but also by ignoring the anti-union purposes and effects of the more modern programs.

The effect of modern employee-involvement programs on union organizing has been well documented. One study of union certification elections in the early eighties found that unions won only three of nineteen elections in bargaining units that included management-employee advisory or discussion committees, commonly called Quality of Work Life Programs at the time. The study concluded that "[q]uality of work life programs efficiently thwarted unionization."<sup>100</sup> Other studies published later in the 1980s also found that a variety of employee-involvement programs substantially reduced the chances of union organization.<sup>101</sup> Indeed, in their influential *The Transformation of American Industrial Relations*, Professors Thomas A. Kochan, Harry C. Katz, and Robert B. McKersie conclude that when employers adopted employee-participation schemes along with other employee benefits, such as incentive pay for skill development and flexible hours, as part of a new management model, "they were essentially immune to unionization in the 1970s."<sup>102</sup> In a later study of 165 Board-conducted representation elections in the 1990s, Professor James Rundle found that unions confronted employee-involvement programs in thirty-two percent of organizing campaigns, that unions were more than fifty percent more likely to be successful in the absence of such programs and that employers with programs "ran more aggressive antiunion campaigns."<sup>103</sup>

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100. See AFL-CIO, AFL-CIO Organizing Survey 6 (Feb. 1984) (unpublished manuscript, on file with author); see also Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates* 13 tbl.5, 14 (Econ. Policy Inst. Working Paper No. 113, 1995). Most union organizing directors affirm that modern employee-involvement programs have made organizing more difficult. See *Bargaining Stressed as Basis of Worker Participation Plans*, AFL-CIO News, Nov. 20, 1982, at 3.

101. See John Evansohn, *The Effects of Mechanisms of Managerial Control on Unionization*, 28 INDUS. REL. 91 (1989); Jack Fiorito et al., *The Impact of Human Resource Policies on Union Organizing*, 26 INDUS. REL. 113 (1987); Thomas A. Kochan et al., *The Effects of Corporate Strategy and Workplace Innovations on Union Representation*, 39 INDUS. & LAB. REL. REV. 487 (1986).

102. KOCHAN ET AL., *supra* note 5, at 64.

103. See James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 213, 218, 219 tbl.13.1, 220 (Kate Bronfenbrenner et al. eds., 1998) (unions won 30% of elections when confronted with employee-involvement programs, and 48% when such programs did not exist); see also Bronfenbrenner & Juravich, *supra* note 100.

This evidence does not of course indicate that any particular employee-involvement program or even most such programs have been motivated primarily by a desire to avoid unionization. Analysis of the intellectual origins and of the design and operation of such programs, however, certainly indicates that impeding unionization is at least often part of their general objective.

The intellectual theory of modern employee-involvement programs can be traced back to the beginning of the human relations school of personnel management in the decade before passage of the Wagner Act. The famous experiments of Professor Elton Mayo at the Hawthorne plant of the Western Electric Company in Chicago convinced the researchers and other social scientists that management could use insights from the new disciplines of psychology and sociology to control the culture of the workplace to direct workers' attitudes and values toward cooperation rather than contention with management's goals.<sup>104</sup> The human relations approach, like the employee-representation plan movement of the 1920s, first focused on isolating the grievances of individual workers;<sup>105</sup> but the human relations experts soon shifted their attention to the social psychology of small group behavior and started counseling employers to channel rather than suppress the normal human need for group action. Employers were advised that productivity could be increased not only through convincing individual workers that their voice was heard by management, but also by marshalling such social psychological forces as group identification and peer group pressure for the firm.<sup>106</sup>

The theories of the human relations experts were utilized by some firms, beginning in the 1950s and 1960s, and by many more in the 1970s, to develop a human resources model of personnel management as an alternative to the industrial relations model of collective bargaining.<sup>107</sup> The behavioral science training of human resource specialists did not consider how collective bargaining could be made effective for a firm. Organizational behavior theory posited a unitary view of the firm in which unions representing separate employee interests had no legitimate role and existed only because management had not competently developed the appropri-

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104. See WELLS, *supra* note 68, at 126-27; see also F.J. ROETHLISBERGER, *MANAGEMENT AND MORALE* (1947).

105. See COHEN, *supra* note 76, at 173-74.

106. See *id.* at 171-72.

107. See EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE* 18-21 (1994); KOCHAN ET AL., *supra* note 5, at 62-65.

ate culture.<sup>108</sup> Thus, like the original human relations theories, the organizational behavior theory underlying the human resource model was concerned with the development of employee commitment to firm goals through individual and group participation programs.<sup>109</sup>

This period of course also witnessed the increasingly rapid decline of union density in the United States.<sup>110</sup> This decline has been associated with increased employer resistance to unions.<sup>111</sup> The resistance has been shown to have taken the form both of augmented legal and illegal coercive tactics during union organizational campaigns,<sup>112</sup> and perhaps more importantly, of massive relocation of work to new nonunion sites.<sup>113</sup> However, the proliferation of the human resource model of personnel management in both old and new nonunion work sites during this period and the lack of union organizing success where it was adopted as noted above, strongly suggest that it was in part embraced as another barrier against collective bargaining.<sup>114</sup>

It is not difficult to understand how management-controlled employee advisory committees, discussion groups, or "quality circles," as they were often called in the 1970s,<sup>115</sup> can be used as a tool of the

108. See APPELBAUM & BATT, *supra* note 107, at 19-20.

109. See KOCHAN ET AL., *supra* note 5, at 62.

110. In the mid-1950s union membership as a percentage of the nonagricultural workforce peaked at around 34%. See FREEMAN & MEDOFF, *supra* note 4, at 221. This percentage had declined to about 19% by the mid-1980s. See Larry T. Adams, *Changing Employment Patterns of Organized Workers*, MONTHLY LAB. REV., Feb. 1985, at 25, 26 & tbl.1; Weiler, *Promises to Keep*, *supra* note 4, at 1771. The decline has continued to below 11%, less than the aggregate union density at the time of the passage of the Wagner Act. See *supra* note 5.

111. See, e.g., Weiler, *Promises to Keep*, *supra* note 4, at 1773-74.

112. See FREEMAN & MEDOFF, *supra* note 4, at 233-39.

113. See KOCHAN ET AL., *supra* note 5, at 66-76.

114. This is certainly the view of Kochan, Katz, and McKersie. They describe employee participation as the "cornerstone" of the human resource management policy and union-avoidance strategy of the typical nonunion firm in the 1970s. See KOCHAN ET AL., *supra* note 5, at 56-57.

115. The designation "quality circle," like other management terms — such as "quality of work life" program — in vogue in this period, can of course be applied to any structure that management chooses. However, quality circles have almost always included only small numbers of employees from the same work unit functioning as an off-line advisory group that functions parallel to, rather than as part of, the production process. Quality circles have been set up to identify and address quality and productivity problems, and often also end up treating other issues of concern to employee participants. They have been nominally voluntary in nature, though attendance at meetings is usually compensated at the worker's regular hourly rate and participation can also be encouraged by supervisors' favoritism. Only limited training, in nonproduction skills such as communication and group problem solving, is offered participants. See APPELBAUM & BATT, *supra* note 107, at 76. See generally David I. Levine & Laura D'Andrea Tyson, *Participation, Productivity, and the Firm's Environment*, in PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 183 (Alan S. Blinder ed., 1990).



human resource behavioral scientists to create a workplace culture that is unfriendly to union organization.<sup>116</sup> Management can assign employees to groups with an eye toward isolating prounion employees from potential converts. The isolation of potential dissidents can be furthered if control of the committee rests in a group leader or facilitator who moves the discussion toward criticism of the views of the identified pariah.<sup>117</sup> The group leader or facilitator can encourage employees to identify these views as destructive of the cooperation necessary for the successful operation of the firm and of the job security that success can ensure. Management also can use a committee to shape the values and perceptions of employees by controlling the information made available to the committee and by keeping direct, though often subtle, control of its agenda.<sup>118</sup> Organizational behavior theory holds that individuals, perhaps to avoid what psychologists call cognitive dissonance, can be moved to become psychologically committed to organizational goals not dictated by their self-interest when the costs of rejecting the goals are high and alternative goals are not readily available. Thus, interaction in an employee group can confirm commitment to firm goals when dissent is penalized and alternative goals stifled.<sup>119</sup>

Examples of how employers have used "quality circles" to avert unions can be found in one of the few in depth studies of the use of a "quality circle" program as part of an alternative human resources system of personnel management.<sup>120</sup> The researcher began his study of a nonunion suture manufacturing plant expecting to show how the plant's use of quality circles increased productivity by reducing worker alienation and job dissatisfaction.<sup>121</sup> In the midst of his study, however, the researcher realized that the circles were designed and operated to maintain management control and to avert unionization. The goal, to use the words of the social psychologist responsible for the system, is to have "puppet[s] without

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116. See Gerald R. Salancik & Jeffrey Pfeffer, *A Social Information Processing Approach to Job Attitudes and Task Design*, 23 *ADMIN. SCI. Q.* 224, 247-48 (1978).

117. See GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY* 68, 75-76, 92 (1988).

118. See *id.* at 17-18.

119. See JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES* 122-23 (1990); Jeffrey Pfeffer & John Lawler, *Effects of Job Alternatives, Extrinsic Rewards, and Behavioral Commitment on Attitude Toward the Organization: A Field Test of the Insufficient Justification Paradigm*, 25 *ADMIN. SCI. Q.* 38, 43-44 (1980); Gerald R. Salancik, *Commitment and the Control of Organizational Behavior and Belief*, in *NEW DIRECTIONS IN ORGANIZATIONAL BEHAVIOR* 1, 16 (Barry M. Staw & Gerald R. Salancik eds., 1977).

120. See GRENIER, *supra* note 117.

121. See *id.* at xvi.

strings . . . . I plant the seed in you to make you think the idea of doing what I want you to do was yours.”<sup>122</sup>

The means are the techniques noted above. Meeting agendas are controlled by facilitators and leaders based on directions from upper-level management; although the facilitators present themselves as having open minds, the intended results of meetings are predetermined.<sup>123</sup> Dissenting workers are isolated and criticized in the management-controlled circle meetings.<sup>124</sup> Peer pressure is marshaled to direct employees toward firm goals; rewards and punishments depend on peer evaluations that are based not only on production criteria, but also on such considerations as “maintains positive attitude towards self and others,” “commitment to company philosophy,”<sup>125</sup> and “mutual commitment to achieve our goal[ ] of productivity.”<sup>126</sup> The teams are used to generate conflicts between workers, so that they blame each other rather than management for problems.<sup>127</sup> The desired result is employees’ commitment to their work situation based on appreciation of their “inability to change it.”<sup>128</sup>

The critics of section 8(a)(2) would claim that this description of the use of quality circles is not representative. The critics highlight a benign face of human resource management, one that truly does look toward increasing productivity by actually making jobs more satisfying and less alienating.<sup>129</sup> It is impossible to determine definitively whether this face presents an illusion, but there is no evidence that the quality circle movement of the 1970s and early 1980s brought lasting improvements in employee productivity and job satisfaction. Some employers of course claimed such success, and studies since Elton Mayo’s pre-Wagner Act experiments at the Hawthorne plant have shown that an increase in the attention paid to workers, almost regardless of the form it takes, can lead to temporary improvements in labor morale and productivity.<sup>130</sup> However, objective empirical research has failed to establish a

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122. *Id.* at 125.

123. *See id.* at 49.

124. *See id.* at 77-78, 83, 92-93.

125. *Id.* at 47.

126. *Id.* at 48; *see also id.* at 83.

127. *See id.* at 91.

128. *Id.* at xviii.

129. *See supra* text accompanying notes 62-67.

130. *See KOCHAN ET AL., supra* note 5, at 87. One study found that “[s]ome consultants and managers . . . simply advocated change for change’s sake” based on a desire to achieve what has been called a “Hawthorne effect.” *See APPELBAUM & BATT, supra* note 107, at 74.

significant relationship between such programs and job satisfaction or productivity.<sup>131</sup> In 1990, employee-involvement advocates David Levine and Laura Tyson concluded that the half-life of consultative quality circles is under three years and that "quality circles and other purely advisory shopfloor arrangements are not likely to achieve sustainable improvements in productivity."<sup>132</sup>

As Levine and Tyson also stress, and as others have more recently iterated, some studies of modern employee-participation programs do purport to show that programs that do more than only provide channels for collective employee advice can enhance productivity.<sup>133</sup> However, some of these studies may treat employee-participation schemes in countries with very different industrial relations systems.<sup>134</sup> Many of the studies of American firms must be qualified by serious methodological limitations.<sup>135</sup> One more tightly controlled study that attempted to transcend these limitations found that, at least in nonunion workplaces, employee-management committees were to a significant extent negatively associated with efficiency, as measured by production time per unit of output.<sup>136</sup>

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131. The literature is reviewed in Thomas R. Bailey, *Discretionary Effort and the Organization of Work: Employee Participation and Work Reform since Hawthorne*, 21-25 (Jan. 1993) (unpublished manuscript, on file with author). See, e.g., THOMAS KOCHAN ET AL., *WORKER PARTICIPATION AND AMERICAN UNIONS: THREAT OR OPPORTUNITY?* 63-64 (1984); Edward E. Lawler III & Susan A. Mohrman, *Quality Circles: After the Honeymoon*, *ORGANIZATIONAL DYNAMICS*, Spring 1987, at 42-43. See also APPELBAUM & BATT, *supra* note 107, at 20, 70.

132. Levine & Tyson, *supra* note 115, at 197.

133. See *id.* at 197-201.

134. See, e.g., John R. Cable & Felix R. FitzRoy, *Productive Efficiency, Incentives and Employee Participation: Some Preliminary Results for West Germany*, 33 *KYKLOS* 100 (1980); John F. Krafcik, *Triumph of the Lean Production System*, *SLOAN MGMT. REV.*, Fall 1988, at 41-52.

135. The domestic studies often rely on the perceptions of managers, and perhaps employees, rather than directly testing the effects of participation on the behavior of managers and employees. Most studies also fail to make comparisons with a control group of firms or plants without employee involvement. Almost none take into account the effect of unionization. Some may incorporate bias. See Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 247, 249, 258-59 (Lawrence Mishel & Paula B. Voos eds., 1992).

136. In this study Maryellen Kelley and Bennett Harrison examined a representative sample of all manufacturing activity in the United States using machine tools (one-fourth of total manufacturing). They found no evidence that the presence of an employee-involvement program lowered machining production time per unit of output. They also found that the presence of such a program in the absence of a union did not increase employment security as measured by the outsourcing of work, or job enrichment as measured by whether blue collar workers were allowed to program their own tools. See Kelley & Harrison, *supra* note 135, at 250-51.

Kelley and Harrison's conclusion that employee-involvement programs are more likely to enhance productivity and worker participation in the presence of unions is supported by other research. See William N. Cooke, *Employee Participation Programs, Group-Based*

The most important flaw in the section 8(a)(2) critics' depiction of contemporary employee-involvement programs, however, is not reflected in the contrast of the uncertain impact of employee-involvement schemes on productivity with their clearer impact on union organizing. It admittedly does not seem likely that the great proliferation of such programs since 1980<sup>137</sup> can be explained by a further increase in American management's resistance to unions. While the continuing decline in union density during this period suggests that unions have not posed an increasing threat, during the same period American firms have been confronted with increasing international competition and consequent pressures to adopt new production techniques to enhance returns on capital.

The most important flaw in the critics' story is instead that the primary new production model, the Japanese system of "lean production," has been embraced by employers of American workers to increase profits not through enhanced employee morale and job satisfaction, but rather, in the tradition of the pre-Wagner Act employee-representation schemes and the human resource theory of management, through gaining more effective control of and more intense efforts from workers.<sup>138</sup> Since the desire to use management-controlled employee groups to facilitate the implementation of new techniques of lean production, more than the desire to thwart unions, may provide the primary impetus for management's contemporary campaign against section 8(a)(2), it is important to examine both the myths and the realities of the Japanese system of production that has been imported into the United States.

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*Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 *INDUS. & LAB. REL. REV.* 594, 606 (1994); Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, in *UNIONS AND ECONOMIC COMPETITIVENESS*, *supra* note 135, at 173, 174-75.

137. One survey concluded that more than 9 of 10 employee involvement programs extant in 1986 were established after 1980. William N. Cooke, *Factors Influencing the Effect of Joint Union-Management Programs on Employee-Supervisor Relations*, 43 *INDUS. & LAB. REL. REV.* 587, 591 (1990). The proliferation has apparently continued into the 1990s. See EDWARD LAWLER ET AL., *EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT: PRACTICES AND RESULTS IN FORTUNE 1000 COMPANIES* 115-18 (1992).

138. For instance, one study of 53 auto plants in the 1980s found that the actual use of production teams had no positive impact on labor productivity or product quality, but that associated greater management discretion over work pace, allocation of overtime, layoffs, and transfers did increase productivity. See Harry C. Katz et al., *Industrial Relations and Productivity in the U.S. Automobile Industry*, 3 *BROOKINGS PAPERS ON ECON. ACTIVITY* 685, 705, 708 (1988).

### C. *Lean Production and Employee Involvement*

In the 1980s American management experts and consultants began a major effort to convince American corporations that meeting the expanding international challenge required a transformation of the system of mass production that had earlier served American manufacturing predominance. Not surprisingly, the primary model for an alternative system was drawn from the nation at that time posing the most significant challenge to the American economy — Japan. One particularly influential and widely read book (*The Machine That Changed the World*), reporting on an international study of the automotive industry at the end of the 1980s, concluded that the diffusion of the Japanese system, which it dubbed “lean production,” was “one of the most important issues facing the world economy in the 1990s.”<sup>139</sup>

At the same time the book stressed that the diffusion had already made a very significant beginning, including in the United States at such sites as New United Motor Manufacturing Inc. (NUMMI), the General Motors/Toyota joint venture in Fremont, California.<sup>140</sup> The diffusion has continued: lean production, or Total Quality Management as it is often called, has spread to what may now be a majority of major American manufacturing corporations.<sup>141</sup> This diffusion has been encouraged by Congress since 1988 through funding of an award, the Malcolm Baldrige National Quality Award, for fulfillment of process criteria based on the Japanese production system.<sup>142</sup> There have been several hundred applicants for the award and thousands of other companies have been influenced by lectures and conferences by managers of winning firms.<sup>143</sup>

Exactly what is the Japanese lean production system and its relevance for employee-involvement programs? Advocates of the Japanese system claim that it constitutes a rejection of the Taylorist separation of intellectual and manual work, that it is designed to call on the creative and intellectual contributions of front line pro-

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139. WOMACK ET AL., *supra* note 66, at 69.

140. *See id.* at 82-88, 240-45.

141. “In the last decade U.S. industry at all levels and in all sectors has embraced some form of Total Quality Management,” the more formal name for the Japanese lean production system. H.K. Klein & Philip Kraft, *Social Control and Social Contract in NetWORKing: Total Quality Management and the Control of Work in the United States* 6 (1994) (unpublished manuscript, on file with author); *see also* Sandy Fife, *The Total Quality Muddle*, REP. ON BUS. MAG., Nov. 1992, at 67 [hereinafter *The Total Quality Muddle*] (one third of 500 U.S. corporations report positive results).

142. *See* 15 U.S.C. § 3711a (1994).

143. *See* APPELBAUM & BATT, *supra* note 107, at 129.

duction workers by asking them to take more responsibility and continually to develop ideas to make their part of the production process more efficient.<sup>144</sup> It is said that the greater intellectual involvement of all workers in production, along with guarantees of lifetime job security, produces more motivated workers who wish to cooperate in achieving managerial goals and thus boost productivity. These general descriptions apparently have convinced at least some employee-involvement advocates that the imported Japanese system in plants like NUMMI, including the use of quality circles attempting to solve production problems, represents a successful participatory system.<sup>145</sup>

Those who have more closely studied production in Japan and in Japanese-controlled plants in North America and Europe, paint a very different picture. First, they note that Japanese management does not reject Taylorism. Scientific management made a major impact on Japanese manufacturing when first promulgated and the job of industrial engineer that it spawned continues to be even more important there than here.<sup>146</sup> Indeed, one of the reasons for the techniques of lean production is to solve the production problem with which Taylor was primarily concerned — employee “soldiering,”<sup>147</sup> or what contemporary economists might call employee “slack”: workers producing at less than their maximum rate.<sup>148</sup> To understand how lean production helps solve this problem, Taylorism must be more precisely described.

Taylor did not invent mass production or the standardization or specialization of tasks. Taylor developed a “scientific” theory for how management could best control workers engaged in standardized work. Taylor thought that in order for management to gain maximum production from its labor force and to direct work tasks

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144. See WOMACK ET AL., *supra* note 66, at 13-14, 100-02. Former Secretary of Labor Ray Marshall, a member of the Dunlop Commission on the Future of the American Work Place, apparently told a management conference that the NUMMI plant had “done away with Taylorism.” Mike Parker & Jane Slaughter, *Management by Stress: Behind the Scenes at Nummi Motors*, N.Y. TIMES, Dec. 4, 1988, at F2.

145. See Paul S. Adler, *The ‘Learning Bureaucracy’: New United Motor Manufacturing, Inc.*, 15 RESEARCH IN ORGANIZATIONAL BEHAVIOR 111 (1992); Levine & Tyson, *supra* note 115, at 205.

146. See RICHARD J. SCHONBERGER, JAPANESE MANUFACTURING TECHNIQUES 192-93 (1982). Schonberger is an advocate of Japanese production techniques for American managers. He is “astounded” by claims that the Japanese reject Taylorism “in favor of a more humanistic approach.” He explains that the “Japanese out-Taylor us all — including putting Taylor to good use in QC circles or small group improvement activities.” *Id.* at 193.

147. The word “soldiering” is derived from the practice of exempting soldiers transported by the navy from having to perform the chores of the naval crew. See KANIGEL, *supra* note 62, at 163.

148. See EDWARDS, *supra* note 73, at 97.

precisely, it would have to secure from workers their knowledge of how the work could be most quickly completed.<sup>149</sup> Taylor proposed that industrial engineers time and record the movements of the most skillful workers and then specify how each elemental part of a job should be performed. Specialized foremen could then conduct comprehensive performance evaluations and a piece-rate system could provide incentives to meet the pace of the best workers, the "first class men," rather than that of the least efficient.<sup>150</sup>

The scientific management techniques proposed by Taylor, however, were never fully successful.<sup>151</sup> Workers understand that their limited control of the pace and substance of their work depends on their having more knowledge about the work than their supervisors. Superior knowledge allows them to reduce the intensity of work when they are tired or distracted, and to increase their pace when necessary to meet some emergency or to aid another worker. Superior knowledge allows them to vary their motions to avoid oppressive repetition even if one particular set of motions is the most efficient. Superior knowledge also affords workers leverage against what they may perceive as unfair managerial directives. Not only does knowledge provide some protection against replacement during a strike,<sup>152</sup> it also may make "working to rule" an effective alternative to a complete work stoppage, for if managerial rules do not define the most efficient process, working in accord with these rules may significantly inconvenience management.<sup>153</sup>

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149. Taylor asserted that the greatest obstacle to management's getting full "cooperation" from its workforce "lay in the ignorance of the management as to what really constitutes a proper day's work for a workman." FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911), reprinted in FREDERICK WINSLOW TAYLOR, *SCIENTIFIC MANAGEMENT* 53 (1947).

150. See EDWARDS, *supra* note 73, at 100-01; HARLEY SHAIKEN, *WORK TRANSFORMED: AUTOMATION AND LABOR IN THE COMPUTER AGE* 22-25 (1984).

151. See EDWARDS, *supra* note 73, at 101-04.

152. Not surprisingly, there are reports of firms attempting to use employee-involvement programs to document job procedures for replacement workers to be employed during an impending strike. See Mike Parker & Jane Slaughter, *Should the Labor Movement Buy TQM?*, *J. OF ORGANIZATIONAL CHANGE MGMT.*, Oct. 1993, at 51.

153. Consider this description by a researcher with experience in a machine shop:

When workers feel harassed, they often begin producing parts exactly 'according to the print.' This 'refusal to redesign' can be even more disruptive than a strike. In a strike, production is halted, but 'work to rule' can produce mountains of scrap. Take the case of a machine repair shop in the auto industry. . . . When management initiated a campaign to strictly enforce lunch periods and wash-up time, the judgment of some machinists began to fade. At about this time a foreman dashed up to the shop with a 'hot' job that was needed to keep the production machines operating. . . . Anxious to get the job done quickly, the foreman insisted that the machinist run the lathe at a high rate of speed and plunge the large drill through the part. Under normal circumstances the machinist would have tried to talk the foreman out of this approach but now was only too happy to oblige what were, after all, direct orders. The part not only turned out to be

Even workers without unions therefore have resisted being studied by engineers and foremen. Mass production workers of course also have not been fully successful in resisting having their jobs minutely defined and their work pace accelerated. Industrial engineers gradually have been able to determine the best ways to complete most assembly line tasks, for instance. But the increase in the pace of product change demanded by more sophisticated consumers requires more frequent changes in production processes and augments the problem that Taylor highlighted.

The techniques of lean production, however, have enabled the Japanese, and their imitators throughout the world, to make Taylorism much more effective. These techniques advance Taylorism in two interrelated ways: first, by enlisting lower-level workers in the evaluation and criticism of fellow workers; and second, by eliminating buffers, such as inventory stocks and extra work time and replacements, that protect workers from production irregularities. The result, in the words of one proponent of lean production, is "work . . . regimented in its minutest gestures."<sup>154</sup> The Malcolm Baldrige Award, far from honoring employee empowerment, evaluates companies on the consistency and control of their processes, so that any substitute employees would make the same product.<sup>155</sup>

The Japanese achieve this result in part by more effectively extracting employees' knowledge of the production process. Their time and motion studies are conducted either by lower-level supervisors, who can better see through the strategies of workers to hide their shortcuts, or by training quality circles of workers to conduct

scrap, but part of the lathe turned blue from the friction generated by the high speed.

The disciplinary campaign was short-lived.

SHAIKEN, *supra* note 150, at 19-20.

154. Adler, *supra* note 145, at 113. Professor Adler based his description on work at the NUMMI plant. Studies of other work sites using the Japanese production system have reached similar conclusions.

For instance, a comprehensive study of CAMI, the General Motors and Suzuki joint venture in Ingersoll, Ontario, found jobs there to be

repetitive and machine paced. Job design is premised on rigidly prescribed routines and short cycle times and conforms to an industrial engineering set of strictures: jobs must be broken down into small units of discrete tasks; each job must have a detailed definition so that it can be easily reassigned; each job must be balanced in terms of time; the skill level required for each task must be limited so that it can be learned quickly.

DAVID ROBERTSON ET AL., CAW-CANADA RESEARCH GROUP ON CAMI, THE CAMI REPORT: LEAN PRODUCTION IN A UNIONIZED AUTO PLANT 9 (1993) [hereinafter CAMI REPORT]. The CAMI training manual states: "The standardized operation shows the best methods of performing every operation in a process which any associate must strictly observe in doing the job. . . . Improved efficiency begins with standardized operations. . . . Everyone performs the same operation the same way." JAMES RINEHART ET AL., JUST ANOTHER CAR FACTORY? LEAN PRODUCTION AND ITS DISCONTENTS 28 (1997) (quoting CAMI training manual) (internal quotation marks omitted).

155. See 15 U.S.C. § 3711a(d) (1994).



their own studies.<sup>156</sup> At NUMMI, for instance, “work teams” are asked to improve continuously, or, in the Japanese production vernacular, to “kaizen” their production process by studying their work motions and to develop suggestions to enhance quality or productivity and reduce waste.<sup>157</sup> These suggestions cannot be implemented autonomously; they must be negotiated with teams upstream and downstream in the production process and in other shifts. They also must be approved by management, for “the methods in place at any given time [are] to be respected down to the second.”<sup>158</sup> The quality circles or work team meetings are utilized to make the workers feel that they are contributing to the definition of their jobs, even as they assist management in determining the standardized system that insures the employees will add value to their product for the most seconds in every minute and the most minutes in every hour.<sup>159</sup>

The ability of the Japanese and their American imitators to achieve the Taylorist ideal of minute standardization of job routines

156. See Knuth Dohse et al., *From “Fordism” to “Toyotism”? The Social Organization of the Labor Process in the Japanese Automobile Industry*, 14 *POL. & SOC.* 115, 128-29 (1985); see also JOSEPH J. FUCINI & SUZY FUCINI, *WORKING FOR THE JAPANESE: INSIDE MAZDA’S AMERICAN AUTO PLANT 78* (1990) (describing how Mazda workers were trained and induced to do time studies on themselves).

157. A manager at NUMMI described employee involvement there as follows:

The first thing you do is teach workers the techniques of work analysis. Next you get the workers as a group to time each other with a stopwatch. . . . After everybody has been timed, workers analyze what they think is the best performance and break that process down into little pieces. . . . The best way of doing the job is codified and people then do the job as we’ve specified in the standardized work definition.

Adler, *supra* note 145, at 141 (quoting interview with Bill Borton, Stamping Dept. Manager, NUMMI, in Fremont, Cal. (1987)).

158. Adler, *supra* note 145, at 113. A study of another much cited example of the use of Japanese lean production in the United States — the Mazda plant at Flat Rock, Michigan — discovered the same rigid job control:

Each worker in the plant is required to follow a Programmed Work Sheet (PWS) that describes the job cycle in minute detail, including specific tasks, their sequence, and the number of seconds allotted for each. The PWS is prominently posted near each work station; most allow a total cycle time of one or two minutes.

Steve Babson, *Lean or Mean: The MIT Model and Lean Production at Mazda*, *LAB. STUD. J.*, Summer 1993, at 6-7. See also FUCINI & FUCINI, *supra* note 156, at 79 (“For example, the programmed worksheet for the one-minute-and-four-second job of applying exterior sealant to the driver’s side of a two-door car lists 14 illustrated steps . . . [I]t had to be followed to the letter without variation, every time a job was performed — no exceptions.”).

159. See Adler, *supra* note 145, at 145 (“Standard IE [Industrial Engineering] times at GM-Fremont [NUMMI’s traditional predecessor plant] were set . . . [so] as to occupy the experienced worker approximately 45 seconds out of a hypothetical cycle time of 60 seconds. NUMMI’s norm is closer to 57 seconds out of 60.”); CAMI REPORT, *supra* note 154, at 21 (noting that CAMI work specifications are timed within centiminutes); see also FUCINI & FUCINI, *supra* note 156, at 37 (ascribing the productivity gains of the Japanese system to working each worker more intensely each minute: a plant with 2000 workers which extracts 10 seconds more work out of each worker each minute gains the equivalent of 333 extra workers).

by utilizing worker knowledge to determine the motions of the most efficient worker, however, is not based solely on the use of quality circles and other tools of group psychology. The failure of quality circles in the absence of a simultaneous redesign of the production process at many American plants illustrates that independent American workers continue to be resistant to attempts to trade their independent knowledge for some feeling of participation. More successful American advisory work-team programs have integrated quality circles with the lean production process itself, including its core aspect — the elimination of the buffers that protect the production process and workers from emergencies in the traditional plant.

In the first place, the elimination of buffers makes quality circles more effective because it results in workers pressuring their fellow workers in their own circle or team and in other circles or teams to contribute ideas, and perhaps more importantly, to accept the ideas of others on how to accelerate work.<sup>160</sup> Eliminating buffers prevents workers from controlling the pace of their work without impinging upon fellow workers. For instance, the just-in-time delivery of parts and supplies to the next stage of the production process prevents workers from working intensely for a period to build a cushion for a more moderate pace later. The just-in-time system also means that the hastening of work in one area puts pressure on work teams both upstream and downstream to figure out some way to further accelerate their work as well.<sup>161</sup>

The practice of providing labor power somewhat below rather than above that calculated as necessary to meet an assembly line speed<sup>162</sup> means that a reduction of pace by one worker will immediately affect her peers. Her absence from work will produce an even greater burden; since there are no reserve workers allotted as

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160.

The Japanese no longer accept the buffer principle. Instead of adding buffer stocks at points of irregularity, Japanese production managers deliberately expose the work force to the consequences. The response is that workers and foremen rally to root out the causes of irregularity. To ignore it is to face the consequences of work stoppages.

. . . In the Toyota kanban system, for example, each time that workers succeed in correcting the causes of recent irregularity (machine jamming, cantankerous holding devices, etc.), the managers *remove still more buffer stock*. . . . Toyota's small group improvement activities (SGIAs) never run out of new challenges.

SCHONBERGER, *supra* note 146, at 32.

161. See FUCINI & FUCINI, *supra* note 156, at 33-34; LAURIE GRAHAM, ON THE LINE AT SUBARU-ISUZU 77 (1995) (describing her experience with just-in-time assembly line production, in which "team members found themselves running flat-out down the line in search of the material handler to warn that they were dangerously low on a part").

162. See Dohse et al., *supra* note 156, at 129.

replacements,<sup>163</sup> regular team members, including any group leader, must compensate with even more intense work. The elimination of some extra planned time for emergencies means that the overtime extension of an already stressful day is regularly required.<sup>164</sup> The inevitable result is significant peer pressure to work intensely, to avoid absences and line stoppages, and to share knowledge to ensure maximum production.<sup>165</sup>

In addition, the “bufferless” lean production techniques enable managers to determine continuously where there may be additional, or, with a new product, fresh slack to be squeezed from workers. Consider, for instance, the “andon” system, under which workers are told to pull one cord to brighten a yellow light if they wish the assembly line to slow or another cord for a red light if they wish the line to stop. Red lights are seldom brightened; managers frown on the line actually stopping,<sup>166</sup> and, for the reasons noted in the last paragraph, workers share this aversion. Management, however, wants to see yellow lights shine. Yellow lights prove that the system is stressed to capacity at some points. Where it is not stressed, lean production theory requires that workers be eliminated until it becomes so.<sup>167</sup> The primary purpose and effect of the much hailed andon system thus is not to empower workers — that is, to give them real control of the line to enhance their morale. Rather it is to provide information to management so that management can reduce the capacity of workers to vary from the rigors of the detailed motions that will maximize production.<sup>168</sup>

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163. *Id.* at 130; see also CAMI REPORT, *supra* note 154, at 18.

164. See, e.g., CHRISTIAN BERGGREN, ALTERNATIVES TO LEAN PRODUCTION, WORK ORGANIZATION IN THE SWEDISH AUTO INDUSTRY 39 (1992); RINEHART ET AL., *supra* note 154, at 84.

165. See BERGGREN, *supra* note 164, at 38-39; FUCINI & FUCINI, *supra* note 156, at 136-37; GRAHAM, *supra* note 161, at 131; CAMI REPORT, *supra* note 154, at 30; Dohse et al., *supra* note 156, at 129-33.

166. See Adler, *supra* note 145, at 139. Apparently at Mazda, pulling yellow cords stops the line. Supervisors treated those who stopped the line harshly, accusing them of loafing and at least threatening them with written reprimands. See FUCINI & FUCINI, *supra* note 156, at 152; see also MIKE PARKER & JANE SLAUGHTER, CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT 173 (1980) (using example from General Motors' Van Nuys plant).

167. See SCHONBERGER, *supra* note 146, at 91 (description of trouble lights in a Kawasaki plant in the United States under Japanese management).

168. Overtime is monitored for the same purpose. Taichi Ohno, the primary developer of lean production at Toyota, would give his department managers only 90% of the labor, machinery, and space needed to meet quotas without overtime. The managers and workers were expected to kaizen until the department could meet its quotas without overtime. When this occurred, Ohno would again remove 10% of the resources. See Masaaki Imai, *The OH! NO! Management System*, KAIZEN COMMUNIQUE (Kaizen Inst. of America, Camarillo, Cal.) Winter 1988-89, at 1, cited in Babson, *supra* note 158, at 8-9 (advocating use of Ohno's technique).

Furthermore, despite the claims of proponents of the Japanese system that it leads to skill enhancement and thus job enrichment, lean production represents an implementation of, rather than departure from, Taylor's project of transferring the control of job skills from workers to management. It is true that the lean production system demands that workers be able to rotate into other jobs in order to fill in for absent co-workers or to respond to frequent rebalancing of jobs to ensure that every worker has no idle time. The system thus may lead to a broadening of the skills of some workers as they learn to do a number of rigidly controlled, short-cycle tasks. Skills, however, are not deepened.<sup>169</sup> Cross-training is typically for similar jobs within a work team.<sup>170</sup> The new jobs may indeed be so similar and simple that a few hours, or even minutes, of training suffice.<sup>171</sup> Workers are thus not given skills of general value to the labor market. Moreover, doing a few simple, rigidly defined, short-cycle tasks every few months is at best marginally more stimulating than doing one such task; and being vulnerable to sudden transfers may make work more burdensome.<sup>172</sup> Indeed, a worker who retains some control over the specific movements she utilizes on one task, as well as the pace of those movements, may find her job not only less stressful, but also somewhat more stimulating.<sup>173</sup>

In any event, even job rotation between several controlled jobs within a team is often more an ideal than a reality; when production is at full pace, management wants the speed of specialization, as well as the flexibility of limited cross-training.<sup>174</sup> At least in the

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169. Some commentators have described the job training in lean production systems as "multitasking" rather than "multiskilling." See, e.g., RINEHART ET AL., *supra* note 154, at 44-45, 51-52, 60-62.

170. See *id.* at 38-39; FUCINI & FUCINI, *supra* note 156, at 39.

171. See CAMI REPORT, *supra* note 154, at 10. After two and one-half years of production, almost three out of every four randomly interviewed CAMI workers "said that, as a result of training, they are no more skilled because all the jobs are about the same." *Id.* at 26 fig.1. See also SHIGEO SHINGO, THE TOYOTA PRODUCTION SYSTEM 132 (1981) (Toyota system requires that "the machines . . . be improved by the plant people so that even temporary workers 'could work independently' after three days of training.").

172. See BERGGREN, *supra* note 164, at 30. There is some evidence that in lean production systems when management does not push for job rotation, but allows workers some discretion in choosing movement between simple jobs, most workers prefer a steady assignment. See PARKER & SLAUGHTER, *supra* note 166, at 124 (citing reports from General Motors plants in Shreveport, Louisiana, and Orion, Michigan).

173. See RINEHART ET AL., *supra* note 154, at 60-63, 142.

174. See FUCINI & FUCINI, *supra* note 156, at 160-61. Job rotation in fact has not been a central part of the lean production system in Japan. See CAMI REPORT, *supra* note 154, at 24. It also has not always been practiced on a regular basis in lean production systems in North America. See *id.* (noting that job rotation is "a unique CAMI type of thing"). Managers may feel that after workers have the minimal cross-training necessary for flexibility, more

absence of organized pressure from workers,<sup>175</sup> job rotation in a lean production system is limited to that level necessary to give management flexibility to reassign workers when rebalancing — and often eliminating — jobs, and to make it more difficult for any workers to develop special “secret” knowledge about a job.<sup>176</sup>

Contrary to the naive misconceptions of some employee-involvement advocates,<sup>177</sup> moreover, lean production systems such as NUMMI are designed to reduce the special skills of craft workers. The cross-training of skilled workers is also designed to broaden, rather than deepen, their skills. Cross-training in the skills of other crafts is generally at a superficial and firm-specific level.<sup>178</sup> It is designed to reduce the number of skilled workers in the plant<sup>179</sup> and to make management less dependent on any particular craft.<sup>180</sup> Tasks requiring the most sophisticated skills are either sub-contracted<sup>181</sup> or performed by management.<sup>182</sup>

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intense production can be achieved by keeping workers in the same job as much as possible. Furthermore, the discretion given supervisors to distribute jobs after cross-training, and in the absence of any restrictive job classifications, provides an effective tool of favoritism to control workers. See Babson, *supra* note 158, at 10. Adler, *supra* note 145, at 151-53, also acknowledges favoritism as a major problem at NUMMI.

175. See CAMI REPORT, *supra* note 154, at 25.

176. In lean production systems production workers may also be assigned certain minor maintenance and quality testing tasks. These tasks, such as sticking a component under a gauge, are also often routine and simple, however. See John Tomaney, *The Reality of Workplace Flexibility*, CAPITAL AND CLASS, Spring 1990, at 29, 48-49.

177. For instance, National Labor Relations Board Chairman William Gould, an apparent advocate of the NUMMI system of lean production, claims that “[t]here is a considerably higher ratio of skilled tradesmen to production in the NUMMI plant . . . as compared to the old General Motors Fremont facility which it replaced . . . .” WILLIAM GOULD, AGENDA FOR REFORM 123-24 (1993). Gould offers no support for this other than an undocumented comparison with the General Motors Saturn facility, another plant using lean production. See *id.*

178. See FUCINI & FUCINI, *supra* note 156, at 93-94.

179. One analysis concluded that Mazda and NUMMI both employed fewer than one half the number of skilled workers of many comparable, more traditional U.S. auto plants. See PARKER & SLAUGHTER, *supra* note 166, at 80; see also BERGGREN, *supra* note 164, at 44.

180. The merging of crafts under lean production is thus an extension of the gradual loss of craft identity in the United States described by PIRE & SABEL, *supra* note 63, at 122-24. As this has happened, the basis of the craft form of shop control has been undermined. The more the crafts consist of heterogeneous tasks, the greater the danger that craftsmen lose their capacity to solve problems, which underpins their shop-floor power — they no longer understand what they are doing any more than the semiskilled worker in mass production.

*Id.* at 123-24. Compare the decline in craft work in the steel industry described in DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 215-16 (1987).

181. See FUCINI & FUCINI, *supra* note 156, at 94; PARKER & SLAUGHTER, *supra* note 166, at 84.

182.

For example, one of the new areas of work and corresponding skill acquired by electricians in the past decade has been troubleshooting and programming devices called “programmable controllers” — specialized computers which control the operation of

In accordance with the general purposes of pre-Wagner Act employee-representation schemes, lean production is also designed to reduce the numbers and layers of middle management,<sup>183</sup> not only to save on indirect labor costs, but also to give central management more direct control over production workers. Additional responsibility may be imposed on front-line workers to supervise their co-workers. Extra training may be given in group interaction and problem solving for this purpose. But this extra responsibility does not entail greater control over the organization of work.

Professors H.K. Klein and Philip Kraft, for instance, concluded from their study of the TQM system of a plant of an unidentified aerospace defense manufacturer that, despite the delegation of authority to production teams to divide production tasks and to schedule work to fulfill quotas, "there was little communal decision-making or emancipation from authoritarian control. Multifunctionality meant rotation between repetitive manual tasks, scheduling of team tasks and quality control. It did not mean design."<sup>184</sup> As at NUMMI, a team's practical suggestions could only be translated into production design changes after review and approval by engineers and managers.<sup>185</sup> And, in accordance with the theory of lean production and the goals of Taylor,<sup>186</sup> control of the production workers was centralized more with senior managers rather than low-level supervisors, through highly automated and computerized production systems "used to inform managers of the activities and the location of all workers at all times."<sup>187</sup>

An understanding of how the Japanese production system enables management to exert greater control over each second of the individual worker's work day exposes the myth that its accompanying employee-involvement system empowers employees collectively. Such an understanding belies Paul Adler's claim that the Japanese system as practiced at NUMMI represents a "democratic" form of Taylorism in which procedures seem "designed not primar-

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individual machines and sections of assembly lines. The technology which now allows electronic communication between these programmable controllers and central computers also allows management or non-union personnel to take over from floor electricians the job of troubleshooting and programming.

PARKER & SLAUGHTER, *supra* note 166, at 82.

183. For instance, a NUMMI enthusiast reports that there "are only four supervisory levels at NUMMI, compared to six or seven at other U.S. plants." See Paul D. Staudohar, *Labor-Management Cooperation at NUMMI*, 42 LAB. L.J. 57, 59 (1991).

184. Klein & Kraft, *supra* note 141, at 34.

185. See *id.*

186. See *supra* text accompanying note 149.

187. Klein & Kraft, *supra* note 141, at 34.

ily as instruments of domination, but as elements of productive technique recognized by participants as being tools in their own collective interests."<sup>188</sup> It is revealing that other studies have found that, at least after an initial introductory period, quality circles are increasingly used to obtain approval of production process changes already designed by management rather than to solicit ideas from workers.<sup>189</sup> Adler himself acknowledges that the NUMMI work teams have to obtain approval for any change they conceive and that there is not only low individual autonomy, but also low work group autonomy at NUMMI.<sup>190</sup> Adler offers no support for his claim that the lean production procedures, including the accompanying employee-involvement program, are designed, used, or perceived as tools for the "collective interests" of employees. The reality at NUMMI, and at other plants using lean production,<sup>191</sup> is that any accompanying employee-involvement program is used to extract the knowledge and consent of workers, rather than to enable workers to control production in their own interests.<sup>192</sup>

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188. Adler, *supra* note 145, at 165.

189. See, e.g., FUCINI & FUCINI, *supra* note 156, at 137-38, 151-52; CAMI REPORT, *supra* note 154, at 34-35. Adler presents evidence for this at NUMMI as well. See Adler, *supra* note 145, at 153.

190. See Adler, *supra* note 145, at 174.

191. See, e.g., CAMI REPORT, *supra* note 154, at 35 (describing an example of management unilaterally reversing a team's attempt to use work design authority to ease their work day, rather than to intensify work effort).

An example from a report book kept by supervisors at CAMI reveals

that workers' participation in line rebalancing is orchestrated from the top, part of a strategy to continuously reduce the number of workers needed to handle a given amount of work. Workers are drawn into a pre-planned exercise, the goals of which, they are led to believe, they have had a hand in forming.

*Id.* at 41.

192. See Robert M. Marsh, *The Difference Between Participation and Power in Japanese Factories*, 45 INDUS. & LAB. REL. REV. 250 (1992) (data on 48 Japanese manufacturing plants in 1983 suggests that firms allow workers to present ideas and suggestions, but deny workers the authority to make decisions).

At least some management advisors have recognized that lean production is in direct tension with worker empowerment. Professor Janice Klein, for instance, acknowledged this after observing the effects of the introduction of aspects of the Toyota production system at a plant of a large American engine company where work teams previously had been given some real autonomy to control work processes and participate in other managerial kinds of decisions. See Janice A. Klein, *The Human Costs of Manufacturing Reform*, HARV. B. REV., Mar.-Apr. 1989, at 60. She notes that the just-in-time system and the rigid cycle times it entailed reduced both the autonomy of individual workers and the autonomy of teams. See *id.* at 61, 64. She concludes that management "ought not to promise workers autonomy when they mean them to deliver an unprecedented degree of cooperation." *Id.* at 66. By cooperation, she presumably means "compliance with managerial goals." See also Janice A. Klein, *A Reexamination of Autonomy in Light of New Manufacturing Practices*, 44 HUM. REL. 21, 25 (1991) ("The Japanese definition of employee participation focuses primarily on information sharing as opposed to low level decision making or autonomy.").

Furthermore, even if work teams were given collective discretion to redesign work in order to better achieve managerial control of the time of individual workers, the claim that lean production enriches jobs is unconvincing. There is strong evidence that lean production renders jobs more intense, more stressful, and less satisfying. Workers at lean production facilities typically report that they work not just "smarter," but also harder than at traditional plants.<sup>193</sup>

For instance, surveys of workers at the Mazda lean production facility in Flat Rock, Michigan found that three out of four workers thought that they would be injured or worn out before retirement.<sup>194</sup> The likelihood of being worn out before normal retirement age is also increased by the elimination of job classifications, by mandatory job rotation through tightly balanced jobs, and by the increased need for overtime caused by the elimination of buffers.<sup>195</sup> Workers cannot use seniority to claim jobs that may be somewhat less demanding.<sup>196</sup> The likelihood of certain injuries, such as carpal tunnel syndrome and other cumulative traumas, is increased by the

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193. For instance, 78% of the randomly selected group of workers surveyed at the General Motors-Suzuki CAMI lean production facility reported that they worked harder than workers in "traditional" auto plants. See CAMI REPORT, *supra* note 154, at 23. Workers at Nissan's Smyrna, Tennessee plant have described their work as "eight hours of aerobics." Carl H.A. Dassbach, *Lean Production, Labor Control, and Post-Fordism in the Japanese Automobile Industry*, in NORTH AMERICAN AUTO UNIONS IN CRISIS 19, 28 (William C. Green & Ernest J. Yanarella eds., 1996); see also W. Lewchuck & D. Robertson, *Production Without Empowerment: Work Reorganization from the Perspective of Motor Vehicle Workers*, 63 CAPITAL & CLASS 37 (1997) (reporting on worker perceptions of work intensity at General Motors, Ford, Chrysler, and CAMI).

Japanese auto companies utilizing lean production have had increasing difficulties recruiting workers. A large survey of Japanese auto workers in 1989 found that only 4% would clearly recommend that their children take a job in the industry. Forty-three percent said they would not and 43% had difficulty answering the question. The main reasons the autoworkers gave for their hesitancy included the difficulty and intensity of the work and the high level of overtime and holiday work. See BERGGREN, *supra* note 164, at 251-52. Two proponents of lean production assert that 60% of the members of the All Toyota Union are chronically fatigued and that Japanese workers in lean production typically work hundreds of hours more each year because of the regular demands of overtime. See M. KENNEY & R. FLORIDA, *BEYOND MASS PRODUCTION: THE JAPANESE SYSTEM AND ITS TRANSFER TO THE U.S.* 10 (1993).

194. See Babson, *supra* note 158, at 12. A local union's survey in 1992 of 1,000 workers at the General Motors-Suzuki lean production joint venture in Ontario found that only half thought they could stay healthy and reach retirement age if the intensity of their work continued.

The Mazda workers' fears that they could not continue their pace until retirement seem confirmed by the experience of auto workers in Japan. The practice of the Japanese automakers has been to move older workers out to the lower paying jobs of suppliers controlled by the main producers.

195. See SATOSHI KAMATA, *JAPAN IN THE PASSING LANE* (1980) (cited in Tomaney, *supra* note 176, at 37).

196. See FUCINI & FUCINI, *supra* note 156, at 97; Adler, *supra* note 145, at 140 (quoting interview with Rick Madrid, Team Leader, Quality Control, NUMMI, Fremont, CA (1987)).



frequency of repetitive movements under lean production.<sup>197</sup> The likelihood of injuries from machine breakdowns is augmented by the reduction in the number and skills of maintenance workers.<sup>198</sup> Moreover, it is likely that most workers prefer having the intensity of their effort being monitored only by limited and identifiable agents, rather than by all their co-workers, themselves under great pressure to maintain a torrid work pace.<sup>199</sup>

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197. See FUCINI & FUCINI, *supra* note 156, at 178-82. An independent study of Michigan workers' compensation records by the *Detroit Free Press* found that the rate of serious injuries at Mazda's Flat Rock lean production plant was triple the general rate for General Motors and Ford. See Babson, *supra* note 158, at 13 (citing Jane Daugherty et al., *Danger Rises in New Auto Jobs*, DETROIT FREE PRESS, July 7, 1990, at 1A [hereinafter *Danger Rises*]). The study was conducted during a period of peak production at Mazda, but there are similar reports from other lean production plants in the United States. See BERGGREN, *supra* note 164, at 52-53 (citing *Danger Rises, supra*); GRAHAM, *supra* note 161, at 86-93. Some of the worst stories, for instance, are about the Nissan plant in Smyrna, Tennessee, where the high rate of injuries and intense work caused one manager to quit after he became convinced that Nissan effectively was exhausting workers in a few years. See PARKER & SLAUGHTER, *supra* note 166, at 220-21.

Based on a more recent study of what he acknowledges to be an "unimpressive" record on injuries from repetitive stress at NUMMI, even Professor Adler concludes that aspects of the "Toyota Production System," including "short-cycle jobs performed in a standardized way and without any 'wasted' seconds of inactivity" may be partially responsible. See Paul S. Adler et al., *Ergonomics, Employee Involvement, and the Toyota Production System: A Case Study of NUMMI's 1993 Model Introduction*, 50 INDUS. & LAB. REL. REV. 416, 432-33 (1997).

198. See PARKER & SLAUGHTER, *supra* note 166, at 184-87.

199. Adler reports that NUMMI's workers have a low absenteeism rate, a high rate of participation in a suggestion program, and a high rate of satisfaction with work. See Adler, *supra* note 145, at 130. The low absenteeism at least in part may be explained by a strict no-fault attendance policy. See *id.* at 126. Participation in the suggestion program may be induced by supervisory pressure. It is difficult to evaluate Adler's claims about job satisfaction because he seems to have spoken only to managers and a handful of workers. See *id.* at 115-17. It is also not clear why Adler rejects the likelihood that semiskilled workers with little formal education and little prospect of finding alternative employment at comparable wages would be affected by NUMMI's extensive efforts to sell their system to the workers. See *id.* at 130-31. NUMMI hired many workers from the old General Motors Fremont plant who could not find comparable jobs until NUMMI gave them a second chance. See BERGGREN, *supra* note 164, at 40.

A close reading of Adler's report reveals that the few workers he interviewed agreed that they are working harder and more intensely, but accept this condition because they are convinced that international competition demands such work and because they have been convinced their opinion is valued. See Adler, *supra* note 145, at 145-46. In addition, the NUMMI workers undoubtedly felt a part of something new that became economically successful, have thus far seen promises of job security fulfilled, and at least initially had requests for amenities like a robot for installing a spare tire promptly approved. See *id.* at 151. That lean production is a bitter pill is not contradicted by Adler's own claims, based on his random, limited interviewing, that NUMMI workers embraced their jobs because greater standardization of their work at least made them feel "competent" and because of a "Freudian" "reality principle" (they believed if they did not, the cold reality was that competitors would take their jobs). See Adler, *supra* note 145, at 169-71.

D. *A Potential Role for Section 8(a)(2) in a World of Lean Production*

The NLRA in general and section 8(a)(2) in particular do not prohibit employers from implementing lean production systems that more effectively extract information from employees and then use that information to demand more intense and controlled work. Section 8(a)(2), however, does help serve the NLRA's goal of protecting the development of collective employee resistance to such systems. The NLRA allows employers to offer any working conditions that they wish, but it also empowers workers to join together to attempt to demand better conditions.

Thus, the inherent unattractiveness of the lean production system, as described above, is relevant to section 8(a)(2) because such a system places a premium on breaking employee resistance to strict management control. Section 8(a)(2) may be critical in an era of lean production to the extent that it can inhibit the use of management-controlled employee involvement to undermine the development of employee autonomy. The nature of lean production suggests that quality circles, or some other type of advisory off-line employee-involvement committees, are important not only for the extraction of employee knowledge, but also to control employee autonomy and to engender employee commitment to the system. Worker commitment is especially important within lean production, because, as Womack, Jones, and Roos stress, the bufferless nature of the system makes it "fragile" and vulnerable.<sup>200</sup> With limited inventories and no extra manning or time to buffer breakdowns, the system is dependent on the willingness of workers to compensate with extra effort, perhaps on different tasks. Work slow-downs in one area can quickly affect a plant's entire operation.<sup>201</sup>

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200. See WOMACK ET AL., *supra* note 66, at 102-03. Other accounts also have noted that bufferless production and just-in-time delivery of parts make plants more vulnerable to strikes. See, e.g., *In Wake of G.M. Strike, a Bolder "Big Labor,"* CHRISTIAN SCI. MONITOR, July 30, 1998, at 1 (noting that "labor strife can shut down numerous plants within minutes") (quoting Danny Hoffman, University of Michigan Institute of Labor and Industrial Relations); Donald W. Nauss, *Progressive Parts Management Left G.M. Vulnerable*, L.A. TIMES, July 8, 1998, at D1; Floyd Norris, *Did You Notice? There's an Automobile Strike*, N.Y. TIMES, July 23, 1998, at A1.

201. "Because a JIT plant cannot draw on backup inventories, any worker who does not complete his or her job cycle on time interrupts the flow of parts and supplies, throwing off the entire production process." FUCINI & FUCINI, *supra* note 156, at 40.

Some evidence suggests that lean production therefore results in a denser staffing of shop floor management.<sup>202</sup> At the same time, however, lean production's oppressiveness and fragility renders more valuable the use of management-controlled employee committees to stifle employee dissent through the above noted techniques,<sup>203</sup> including the identification and isolation of dissidents and the dividing of small groups of workers from other small groups.<sup>204</sup> To the extent that team leaders are controlled by management and thus function as the modern equivalent of "straw bosses," these techniques also can be used in tandem with the traditional tools of favoritism.<sup>205</sup>

Moreover, lean production may make more important the use of employee committees to induce workers to identify with management and its goals.<sup>206</sup> This is a primary purpose of the training for participation in quality circles.<sup>207</sup> Management-trained team leaders also use meetings to solicit workers' opinions in a manner that enables the workers to feel that they have contributed to a final decision management has already made.<sup>208</sup> In Japan the contingency of a significant portion of wages on supervisors' evaluations of productivity,<sup>209</sup> and the associated defeat of any independent la-

202. See, e.g., BERGGREN, *supra* note 164, at 32; Norbert Altmann, *Japanese Work Policy: Opportunity, Challenge or Threat?*, in ENRICHING PRODUCTION 329, 341 (Åke Sandberg ed., 1995) (noting that the number of supervisors in Japanese manufacturing is relatively high); Lewchuck & Robertson, *supra* note 193 (discussing closer monitoring in lean production plant in Canada).

203. See *supra* text accompanying notes 115-28.

204. See, e.g., PARKER & SLAUGHTER, *supra* note 166, at 223 (discussing example from Nissan plant in Smyrna, Tennessee).

205. See Barenberg, *supra* note 6, at 908-09 (citing sources); RINEHART ET AL., *supra* note 154, at 106.

206. See, e.g., GRAHAM, *supra* note 161, at 106-08 (describing attempts "to shape workers' culture through the team structure").

207. See, e.g., FUCINI & FUCINI, *supra* note 156, at 137.

208. See *id.* at 137-38. Management may encourage a quality circle to examine a problem that has an obvious solution in order to have the workers feel that they have participated in plant management and thereby become more invested in managerial goals. See CAMI REPORT, *supra* note 154, at 37 (offering possible example).

The Japanese use other techniques to discourage workers from identifying themselves as "non-management." These techniques include management's use of common uniforms, common parking areas, and common cafeterias with front-line workers, as well as informal management-worker dialogues. In addition, front-line workers are given titles such as production or maintenance "associate." See CAMI REPORT, *supra* note 154, at 1; FUCINI & FUCINI, *supra* note 156, at 41-43.

209. See Altmann, *supra* note 202, at 344-45; Babson, *supra* note 158, at 20, 20 n.20 (citing sources).

The importers of the Japanese system to the United States, including NUMMI and Mazda-Flat Rock, generally have not adopted the Japanese discretionary pay structure. An accommodation to American culture and union pressure, for instance, caused both NUMMI and Mazda-Flat Rock to adopt an egalitarian wage structure. However, supervisors' author-

bor movement,<sup>210</sup> made the 'commitment generating' function of quality circles less important.<sup>211</sup> In the United States, however, bufferless, lean production can be threatened by the deterioration of an associated employee-involvement system.<sup>212</sup>

The importance of breaking down any employee resistance to the lean production system was surely understood by Japanese management when it moved to introduce that system in North America in the 1980s. The Japanese understood that the dependence of the stress-ridden lean production system on the willing cooperation of employees is potentially a more serious problem when workers are organized in a strong independent union which could lead employee resistance.<sup>213</sup> Thus, having implemented lean pro-

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ity over job assignments and over the implementation of work rules on issues like absences and tardiness is not cabined effectively by collective agreement, and the favoritism this allows, *see* Adler, *supra* note 145, at 151-53, provides management with an effective incentive to induce compliant worker behavior. *See* FUCINI & FUCINI, *supra* note 156, at 140-41.

210. Japanese companies defeated the independent labor movement in the late 1940s and early 1950s. Major companies refused to bargain with independent national unions, recognizing instead "second unions," led by an identified core of cooperative workers and representing only workers at a single firm. The key battle in the auto industry took place in 1953 at Nissan, when an independent union challenged management's right "unilaterally to order overtime and reassign labor." BERGGREN, *supra* note 164, at 25. A "second union," loyal to Nissan, was formed and recognized. The national auto workers' union was dissolved in 1954. *See id.* at 24-25; *see also* John Price, *Lean Production at Suzuki and Toyota: A Historical Perspective*, in *LEAN WORK* 81, 96-97 (Steve Babson ed., 1995); Tomaney, *supra* note 176, at 38; Yamamoto Kiyoshi, *Labor-Management Relations at Nissan Motor Co., Ltd. (Datsun)*, 1980 *ANNALS OF THE INSTITUTE OF SOCIAL SCIENCE* 24. Yamamoto describes how the leaders of the enterprise union at Nissan kept power through votes registered in front of managers and shop stewards, *see id.* at 29-30, and avoided strikes or even contentious bargaining by moderating their proposals to those that management was prepared to grant, *see id.* at 31.

211. Some ascribe the success of lean production in Japan to its retention of some of the aspects of feudal culture, including a heavy valuation of self-sacrifice and respect for authority. *See, e.g.,* FUCINI & FUCINI, *supra* note 156, at 41.

The acceptance of lean production by Japanese workers may also have been eased by promises of lifetime employment from large employers like Toyota. At least until the last few years, large Japanese employers have been able to keep such promises because of the expanding market for their goods, the use of second-class temporary workers not given the same promises, the extensive use of overtime, and the increased outsourcing of work during periods of high production. Greater job security for the aggregate work force is not a component of lean production.

212. The Mazda-Flat Rock plant provides an example. The failure of the employee-involvement program there contributed to the success of a dissident movement, hostile to aspects of the lean production system, within the United Auto Workers local there. *See* FUCINI & FUCINI, *supra* note 156, at 192-210. This election ultimately resulted in the negotiation of a new collective bargaining agreement that modified the system in ways that may result in some real worker empowerment. *See* Babson, *supra* note 158, at 17-19 (noting that team leaders are elected and subject to recall). *See also* RINEHART ET AL., *supra* note 154, at 84 (describing how Canadian Auto Workers negotiated buffers to soften lean production at CAMI).

213. For instance, Ohno Taichi, the father of the Toyota Production System, once stated that he "might have been murdered" had he attempted the system's intensification of work in the presence of an independent American union in the 1950s. *See* Price, *supra* note 210, at 98.

duction in their Japanese plants with cooperative enterprise unions, the Japanese auto manufacturers preferred to operate nonunion plants in the United States.<sup>214</sup> When they opened new plants at rural "greenfield" sites, such as the Nissan plant in Smyrna, Tennessee, they selected carefully a work force not favorable to unions from a large pool of workers who had not had other opportunities to earn comparable wages.<sup>215</sup> After the initiation of lean production in these plants, employee-involvement programs have been part of the strategy to avoid subsequent union organization.<sup>216</sup>

Furthermore, employee-involvement programs have been used in ways other than the discouragement of unionization to break down employee resistance to lean production. Such programs have even been implemented for this purpose in unionized plants. For instance, when the Japanese manufacturers entered into joint ventures with American auto companies, such as General Motors at NUMMI and Ford at Mazda-Flat Rock, that had longstanding relationships with the United Auto Workers (UAW), a nonunion strategy was not feasible.<sup>217</sup> Instead, the Japanese manufacturers adopted an alternative strategy of attempting to tame the UAW through a combination of hard initial bargaining and employee-involvement programs. Because the Japanese companies were offering the promise of many high paying jobs to a union threatened by the decline of American auto manufacturers, the companies' hard bargaining for the relaxation of work rules, such as job classifications, that would hinder lean production was basically successful.<sup>218</sup> Forcing the relaxation of work rules and other contractual concessions, however, could not ensure cooperative unions. To avert union resistance, the Japanese manufacturers also induced the unions to accept the kind of employee-involvement programs that had been part of the lean production system in the Japanese, enterprise-union work place.

The type of employee-involvement program that is protected by section 8(a)(2) from managerial control under the definition of a labor organization in section 2(5) of the Act<sup>219</sup> can affect the capacity of the leadership of an incumbent union to oppose manage-

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214. See FUCINI & FUCINI, *supra* note 156, at 14.

215. The first 2000 Nissan employees were selected after extensive interviewing and testing from a pool of 130,000 applicants. See PARKER & SLAUGHTER, *supra* note 166, at 219.

216. See *id.* at 223.

217. See FUCINI & FUCINI, *supra* note 156, at 7-9, 15; Adler, *supra* note 145, at 117, 119.

218. See FUCINI & FUCINI, *supra* note 156, at 17-18; Adler, *supra* note 145, at 117-19.

219. See *supra* text accompanying notes 18-58.

ment's control of labor.<sup>220</sup> Off-line employee committees, such as quality circles, provide employees at a unionized work site with a mechanism for influencing firm policy that is an alternative to the traditional mechanism offered by the union. Management can manipulate this alternative to make it look more effective than traditional collective bargaining. For instance, management may quickly respond to every simple grievance voiced during a quality circle meeting, while diverting all the difficult grievances that it intends to resist to the formal collectively bargained grievance process.<sup>221</sup> On the other hand, if the union concentrates on traditional collective issues such as wages and fringe benefits during collective bargaining and allows the quality circles to treat new topics like the introduction of new technology or work rules, the union can seem less and less relevant to the predominant concerns of many workers.

Management can magnify this effect by appointing union-represented employees to serve as group or team "facilitators" or "coordinators" or "leaders." Whatever the term used, and whether or not the union participates in the appointment of the facilitators, management can use extensive training, the incentives of further promotions and perquisites, and its control of resources available to the facilitators' groups, to induce these employees to embrace management's goals and perspectives.<sup>222</sup> Many other employees, however, may perceive the facilitators not as management, but as role models who are able to address problems more effectively than union stewards.

Union stewards may try to make their union seem more significant by attending and participating in quality circle meetings, but this course is also fraught with danger. Management, through its control of the agenda of such meetings and through its superior knowledge of the company and its superior resources, can make stewards seem ill-prepared and ineffectual. Stewards may have particular difficulty countering this because they are responsible for

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220. The TEAM Act, at least in its current incarnation, however, would not apply when there is an incumbent union representative.

221. See *Defense Logistics Agency*, No. 9-CA-20241, 1982 WL 23451, at \*10 (FLRA Dec. 28, 1982) ("It is evident that if employees can get a quick response from management on issues raised in quality circles, they will naturally channel their work-related concerns to the quality circles, rather than through the resources provided in the collective bargaining agreement."); see also Robert B. McKersie et al., *The Changing Role of Union Leaders* 22 (Alfred P. Sloan School of Management Working Paper No. 1964-87, 1987) ("Those [grievances] that are filed tend to concern issues that are particularly difficult to resolve. As the grievance procedure becomes more limited in scope, the result is a potentially more contentious system.").

222. See MIKE PARKER, *INSIDE THE CIRCLE* 37-40 (1985).

workers in many teams and cannot attend all meetings. They therefore may often seem like outsiders at team meetings. Stewards who try to keep the union totally involved in all quality circle activity may find themselves exhausted with no time to discharge traditional union duties, such as grievance processing.

Furthermore, management can cause a steward and her union to seem to be an obstacle to worker goals by moving a quality circle to propose an idea that has negative consequences for other workers in the bargaining unit, as well as for principles embodied in the collective agreement. On the one hand, if the steward supports the suggestion, workers in other work areas may resent the union.<sup>223</sup> On the other hand, if the steward raises an objection, the union seems to become the problem rather than the solution for the first group of workers.

Moreover, to the extent management can use small quality circles to define workers' needs narrowly and in opposition to the needs of workers in other small groups, the union's ability to present itself as a representative of a unified bargaining unit is generally undermined.<sup>224</sup> Management also can use quality circles to divide workers who participate from those who do not. The nonparticipants may resent the participants for currying management's favor. The participants, who may view the nonparticipants as obstructionists and trouble makers, may support setting aside union-negotiated principles like seniority that protect against favoritism.<sup>225</sup>

#### IV. CONCLUSION — SECTION 8(A)(2) AS A STIMULANT OF REAL EMPLOYEE INVOLVEMENT

In sum, the critics of section 8(a)(2) are wrong to claim that modern employee-involvement programs pose no threat to American workers comparable to the pre-Wagner Act company union movement. Modern programs, like their pre-Wagner Act antecedents, are often designed and used to secure greater managerial con-

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223. See WELLS, *supra* note 68, at 87.

224. See *id.* at 113.

225. See *id.* at 96-97. One empirical study found that employee-involvement programs in which incumbent unions are not involved decrease employee union satisfaction and involvement. See Anil Verma & R.B. McKersie, *Employee Involvement: The Implications of Noninvolvement by Unions*, 40 INDUS. & LAB. REL. REV. 556 (1987). Other research also suggests that by becoming a joint sponsor of an employee-involvement program, a union may actually increase employee satisfaction with and involvement in the union. Anil Verma, *Joint Participation Programs: Self-Help or Suicide for Labor?*, 28 INDUS. REL. 401 (1989). This research may suggest that many unions are meeting the challenges noted in the text, but the research does not consider the long-run impact on unions' ability to provide an independent voice and initiative for workers.

trol of the work force, perhaps through the avoidance of an independent union movement or other forms of collective employee resistance to managerial control, perhaps through the neutralization of an incumbent independent union. Most significantly, employee involvement has been used as part of a new system of 'lean production' that represents an accentuation of the principles of Taylorism and managerial control that many critics of section 8(a)(2) laud modern employers for transcending.

Proponents of employee involvement might respond in two ways. First, they might argue that regardless of its relationship to Taylorism and its impact on employees, lean production must be embraced by American employers who hope to remain competitive in the global market place. If employee-involvement programs that are impeded by section 8(a)(2) are a necessary part of lean production, then section 8(a)(2) must be modified to allow American employers to be competitive. The second, and somewhat contradictory, response might be that not all modern employee-involvement programs are associated with efforts of senior management to obtain greater control of the work force. Even if some modern programs, like those of the pre-Wagner Act company unions, are implemented for purposes of extending managerial control, some modern programs also in fact represent an effort to motivate and utilize the minds of more employees by actually delegating decisionmaking authority.

The first argument of course in part rests on the economic claim that lean production represents the best way for American employers to compete globally. In fact, there is mixed evidence to support this claim. A close study of the NUMMI plant in 1986 found impressive productivity and quality gains over traditional American auto manufacturing plants,<sup>226</sup> and the authors of *The Machine That Changed the World* concluded that the extent of adoption of lean production explains variations in productivity and quality in auto assembly plants throughout the world.<sup>227</sup> However, there is no strong empirical evidence that total quality management techniques have been generally successful outside the automobile industry.<sup>228</sup>

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226. See John Krafcik, Learning from NUMMI (MIT International Motor Vehicle Program Working Paper, 1986).

227. See WOMACK ET AL., *supra* note 66, at 75-103. But see Dan Jonsson, *Lean production in the automobile industry: Second thoughts*, in ENRICHING PRODUCTION, *supra* note 202, at 367, 370-74 (challenging the conclusions of the Womack study and noting flaws in its methodology, including its failure to consider overtime).

228. Most claims about enhancements of productivity from employee involvement are based on anecdotal reports or surveys of managers. See, e.g., EDWARD F. LAWLER ET AL., EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT (1992). Moreover, as noted



Some surveys suggest that a clear majority of firms have not realized significant results from the use of these techniques.<sup>229</sup> It may be that lean production's application of Taylorism is only effective in industries in which standardized and restricted jobs dominate.<sup>230</sup>

Moreover, even within such industries, it is not clear that all aspects of the total quality management system, including those that impinge on the work pace and autonomy of workers, contribute substantially to the productivity gains. One study of American automobile plants in the 1980s concluded that the most important determinant of productivity was the intensity of plant capacity utilization.<sup>231</sup> Another major study of Swedish bus and car assembly plants in the 1970s and 1980s concluded that these plants' efforts to escape Taylorism with long cycle times for workers and truly autonomous work teams were compatible with world class competition.<sup>232</sup> The author concluded that some aspects of the Japanese management system, such as the close collaboration with suppliers and the use of statistical analysis to discover deviations from consistent quality, can be adopted without

the regressive working conditions in the Japanese system, including the widespread fragmentation and intense machine pacing of human tasks; the rigid demands to fulfill production quotas in all parts of the tightly coupled system, which require unconditional employee flexibility, including a willingness to work overtime on very short notice; the close surveillance of the individual and excessive regimentation of the workplace; and the failure to adapt the working environment, ergonomic conditions, and work pace to long-term human requirements.<sup>233</sup>

Furthermore, even a demonstration that lean production increases productivity by accelerating work pace and enhancing management flexibility to assign overtime and layoff and transfer

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above, *see, e.g.*, Jonsson, *supra* note 227 at 367, 370-74, research on employee involvement and productivity generally has been inconclusive because of methodological limitations. *See* Kelley & Harrison, *supra* note 135, at 258-59.

229. Of 500 U.S. firms surveyed by Arthur D. Little, only one-third reported that their TQM programs had a significant impact on their competitiveness. Of 100 British companies surveyed by A.T. Kearney, only one-fifth reported that their TQM program had produced tangible results. *See The Total Quality Muddle*, *supra* note 141, at 67.

230. *See* BERGGREN, *supra* note 164, at 247.

231. *See* Daniel Luria, *Work Organization and Manufacturing Performance in the U.S. Automotive Sector, 1982-1992*, in *DIE ZUKUNFT DER ARBEIT IN DER AUTOMOBILINDUSTRIE* 299, 316 (1988); *see also id.* at 312-16.

232. *See* BERGGREN, *supra* note 164, at 241-43, 248-49.

233. *Id.* at 251; *see also* Jonsson, *supra* note 227, at 374-78 (suggesting that the superior productivity of Japanese automobile plants can be accounted for by the manufacturability of their products, by their level of automation, and by the selection and effort of workers, without placing further weight on other aspects of the production system).

workers does not make a strong case for weakening section 8(a)(2).<sup>234</sup> To the extent that employee-involvement programs enable management to obtain employee acceptance of greater managerial control, they may contribute to at least short-run productivity for these reasons. But the same would be true of a paradigmatic company union prohibited by section 8(a)(2), or for that matter of a range of coercive and discriminatory employer actions to discourage unions condemned by other provisions of the NLRA. Nothing in the NLRA, including section 8(a)(2), prevents an employer from attempting to convince its workers that the onerous aspects of lean production are necessary in order for its business to be able to compete.<sup>235</sup> The NLRA simply condemns particular coercive, discriminatory, and manipulative methods of persuasion.

There is, moreover, an even more fundamental flaw in the argument that employee-involvement programs must be allowed to operate unrestrained in order to facilitate the implementation of lean production systems that can insure American competitiveness. Regardless of how the NLRA is weakened, it seems doubtful that an American blue collar work force, sharing a middle class culture with more privileged professional and managerial workers, will ever be as docile as the blue collar work force in developing countries. Any strategy to enhance American competitiveness through the assertion of greater control over the American worker seems doomed to failure because this strategy can be better used by less developed countries. The increasing resistance in Japan to the lean production system<sup>236</sup> reflects the higher expectations brought about by economic development and belies the claim that the harsher aspects of lean production are the necessary wave of the future in industrialized countries.

Many proponents of modern employee-involvement programs would agree that it is in the long-run interest of the American economy and polity to create more jobs that engage the intellect of

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234. Not surprisingly, some research on the auto industry does suggest that a faster pace of work and greater management control over the allocation of overtime, layoffs, and transfers increase productivity. See Katz et al., *supra* note 138.

235. Indeed, § 8(c) of the Act, 29 U.S.C. § 158(c) (1994), protects any such noncoercive speech from being treated as an unfair labor practice.

236. See, e.g., BERGGREN, *supra* note 164, at 251-52; Kazuo Sugeno, *Japan: The State's Guiding Role in Socioeconomic Development*, 14 *COMP. LAB. L.J.* 302 (1993). Indeed, at least until the recession of the early 1990s in Japan worsened, Toyota itself was suffering from a labor shortage and high turnover and started to take steps to soften the impact of its system on workers. See Paul Lillrank, *Social Preconditions For Lean Management and Its Further Development*, in *ENRICHING PRODUCTION*, *supra* note 202, at 427, 429; Koichi Shimizu, *Humanization of the Production System and Work at Toyota Motor Co. and Toyota Motor Kyushu*, in *ENRICHING PRODUCTION*, *supra* note 202, at 383, 389.

American workers by providing more collective and individual autonomy and requiring deeper skills. These proponents might respond to the above description of the use of employee involvement in the modern lean production system by claiming that this also presents an incomplete and thus distorted picture of employee involvement in firm decisionmaking. In their view, there has been at some work sites a real delegation of decisionmaking authority from management to groups or teams of front-line workers as well as an associated enrichment of work for many employees.

Given the broad brush typically used to describe examples of employee involvement, it is difficult to evaluate the claim that it has often resulted in the actual empowerment of workers or the enrichment of jobs. There are many reports of some delegation to work teams of authority over such decisions as work allocation, hiring, compensation, and in some cases even work design.<sup>237</sup> In most instances, however, the teams seem to be directed by a management-trained and controlled leader.<sup>238</sup> Moreover, there has been scant documentation of teams being given the discretion to escape Taylorism by designing work to enhance the autonomy of individual workers over their work pace or to reduce the repetitiveness of jobs. The now-closed Volvo car assembly plant in Uddevalla, Sweden, where teams of only a few workers would assemble an entire car in about two hours, for instance, seems to have no North American heavy manufacturing analogue.<sup>239</sup>

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237. See, e.g., APPELBAUM & BATT, *supra* note 109, at 85-88, 136-43; BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE* 174-79 (1992).

238. See APPELBAUM & BATT, *supra* note 107, at 87.

239. See BERGGREN, *supra* note 164, at 148-55. Uddevalla represented the most extensive attempt of the Swedish automotive industry to provide more appealing working conditions to attract a more stable work force in the tight Swedish labor markets of the 1970s and 1980s. See *id.* at 10-14. Berggren concludes from his rigorous surveys of workers at five of the other innovative plants "that the content of basic production tasks is of decisive importance for workers. . . . The further from traditional line assembly a plant moves, the better the outcomes in terms of variation, prospects for personal growth, the taking of responsibility, and the opportunity to use one's skills." *Id.* at 242. For other descriptions of the Uddevalla plant's "Reflective Production System," see ENRICHING PRODUCTION, *supra* note 202, at 37, 104 (collecting papers on Volvo's innovative Uddevalla and Kalmar plants).

Uddevalla was not closed because its production design could not be competitive with lean production. The prospects for Uddevalla reaching the productivity of Volvo's most efficient plant were good. Moreover, Berggren argues that Volvo's general performance gap with the Japanese could have been closed by improving the manufacturability of its parts and by improving the quality of its components industry. BERGGREN, *supra* note 164, at 164-65. In any event, Volvo's decision to close the Uddevalla plant in 1993 derived from a decline in the demand for Volvos and the political pressures from the Swedish auto workers' union to keep older, larger plants in operation. See APPELBAUM & BATT, *supra* note 107, at 32-33; Åke Sandberg, *The Uddevalla Experience in Perspective*, in ENRICHING PRODUCTION, *supra* note 202, at 1, 9-13.

The General Motors experiment at Saturn, trumpeted as the showcase of American employee involvement through autonomous work teams, does allow work teams to elect their own leaders and to have control over work assignments and scheduling and such personnel matters as hiring, vacation approvals, and absenteeism.<sup>240</sup> However, the Saturn plant uses Japanese-style just-in-time assembly line production.<sup>241</sup> The praise of Saturn has included no discussion of work teams at Saturn having authority to enrich the jobs or enhance the autonomy of individual workers.<sup>242</sup>

The limits on the delegation of decisionmaking authority through American team production are highlighted by a study of relatively autonomous teams of production workers at a plant of an integrated manufacturer of electronics and aerospace equipment for the Department of Defense.<sup>243</sup> The teams elected their own leaders, typically for a half year period, and were given authority to assign jobs and, within limits, to schedule work. But the teams were not empowered to implement product design or manufacturing process changes in the interest of worker autonomy. Any proposed changes had to be approved by managers and production engineers. The teams were used by senior management to substitute collective peer supervision, as "supplemented by computer-based continuous feedback loops and reporting systems," for traditional forms of direct supervision.<sup>244</sup> Jobs remained fragmented, with job enrichment being limited to the rotation between repetitive tasks, and involvement in statistical quality control and team decisionmaking.<sup>245</sup>

Proponents of employee involvement may nevertheless argue that however bounded at most American workplaces, the delegation of some degree of authority to front-line workers represents a desirable democratization of the American workplace. Some informal surveys of workers who have experienced American team pro-

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240. See Saul Rubinstein et al., *The Saturn Partnership: Co-Management and the Reinvention of the Local Union*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 339, 343 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993).

241. See APPELBAUM & BATT, *supra* note 107, at 209.

242. In any event, General Motors has taken no steps to expand on its Saturn experiment, apparently instead viewing NUMMI as its model for future plants. See Keith Bradsher, *G.M.'s Plant in Brazil Raises Fears Closer to Home*, N.Y. TIMES, June 17, 1998, at A1; Keith Bradsher, *Labor's Peace with G.M. Unraveling at Saturn Plant*, N.Y. TIMES, July 22, 1998, at A1.

243. See Klein & Kraft, *supra* note 141.

244. See *id.* at 28.

245. See *id.* at 33-35.

duction, including Paul Adler's interviews at NUMMI,<sup>246</sup> suggest that at least some American workers value the feelings of greater involvement in firm management afforded by even tightly controlled work teams.<sup>247</sup> Workers may prefer the enhanced responsibilities of collective self-supervision, even when those responsibilities do not enable individual workers to achieve greater autonomy or enriched experiences at work.

Furthermore, the proponents of employee involvement can argue that the level of democratization of the American work place is both varied and dynamic. Whatever the dominant model today, it may be that American management will gradually come to appreciate that it is in their interest to delegate more and more authority to cooperative work teams.<sup>248</sup> There is indeed some evidence that increasing the autonomy of individual workers and returning to a higher skilled quasi-craft mode of production may provide many manufacturers with a competitive advantage.<sup>249</sup> Recent technological advances can be used not only to enhance central management's ability to control and monitor workers,<sup>250</sup> but also to en-

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246. See Adler, *supra* note 145, at 174 ("[W]hen workers can establish a feeling of organization-wide responsibility for the effectiveness of their work, they will accept sacrifices of individual autonomy and even sacrifices of work-group autonomy. . . . Autonomy is the absence of external constraint; but the more important factor behind motivation and satisfaction might be the obverse — self-efficacy . . .").

247. See Richard Freeman & Joel Rogers, *What Do Workers Want? Voice, Representation and Power in the American Workplace*, 1998 PROC. N.Y.U. 50TH ANN. CONF. ON LAB. (Samuel Streicher ed., forthcoming).

248. There is some limited empirical support for team production yielding productivity gains in the United States. See, e.g., Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44 INDUS. & LAB. REL. REV. 241 (1991) (study of Xerox).

249. This is the theme of Michael Piore's and Charles Sabel's widely discussed book, *The Second Industrial Divide*, see PIORE & SABEL, *supra* note 63. They cite, for instance, the example of mini-mills in the German steel industry where "workers are given basic courses in metallurgy and plant operation and briefly apprenticed in all the mill's operating units before they receive intensive theoretical and practical instruction in the area in which they will eventually work." *Id.* at 210. The success of German manufacturing plants relative to those in Britain and France has been attributed to the use of higher skilled workers in Germany. See Paul Attewell, *Skill and Occupational Changes in U.S. Manufacturing*, in TECHNOLOGY AND THE FUTURE OF WORK 46, 71 (Paul S. Adler ed., 1992); see also Peter J. Senker, *Automation and Work in Britain*, in TECHNOLOGY AND THE FUTURE OF WORK, *supra*, at 89. The utilization of comparatively high skill levels in Germany has been attributed to the strength of the German labor movement and its use of the independent works council system. See APPELBAUM & BATT, *supra* note 107, at 41-42.

250. See SHAIKEN, *supra* note 150, at 177-90 (describing computer systems that provide management with detailed reports on all movements of workers, "bringing the equivalent of assembly line discipline to those jobs that were technically impossible to police fully before"). Klein & Kraft, *supra* note 141, also describe how computers are used by central management to monitor more closely the compliance of workers with rigid task specifications. See *id.* at 28.

able more workers to contribute intellectual energy to the firm.<sup>251</sup>

These arguments do not, however, establish a case for the weakening of section 8(a)(2). What they suggest is that American employers can frame decisionmaking systems and production design in technologically modern plants either to enrich or to devalue the work experience of their employees. Employee-involvement programs can provide a real step toward democratization of the work place, or they can be used to facilitate the further intensification, standardization, and fragmentation of work.

Section 8(a)(2), and the definition of labor organization in section 2(5) on which it depends, has been interpreted, consonant with the underlying principles of the Act, to discourage the latter choice. Section 8(a)(2) thwarts the use of employee-involvement programs to inhibit concerted worker resistance to a management controlled work place, without also prohibiting the delegation of real authority to groups of workers. Section 8(a)(2) allows management to allocate managerial authority in any way it chooses; it allows management to solicit individual employee voice on personnel issues and individual or collective employee voice on other managerial issues, such as product definition and design and quality control; and it allows management to attempt to centralize and intensify managerial control over employee time. Section 8(a)(2) prohibits management only from subverting employee efforts to resist such control by manipulating channels for collective employee voice on person-

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251. Computerized numerical control of machines, for instance, has been used in Germany to enhance the skills and augment the intellectual contributions of craft workers. German firms have found advantageous the flexibility provided by having numerically controlled machines programmed on the shop floor. See PTORE & SABEL, *supra* note 63, at 232-33. The Kelley and Harrison study, *supra* note 135, found that in many American plants "some blue collar machining operations" included "major programming responsibilities." *Id.* at 272; see also Horst Kern & Michael Schumann, *New Concepts of Production and the Emergence of the Systems Controller*, in TECHNOLOGY AND THE FUTURE OF WORK, *supra* note 249, at 111, 133-35 (1992) (describing the proliferation in Germany of "systems controllers," workers requiring higher skills to monitor and repair machines than those of traditional mass production workers, albeit less individual autonomy than traditional craft workers).

However, numerical control of machines, like other technologies, can also be used to centralize control and to make work less autonomous for operatives. Kelley and Harrison found that in large multiplant enterprises "the chances of blue collar programming are very small," and that job enrichment is not significantly associated with quality circles or other collaborative committees. *Id.* at 273. Thus, in many firms, the new computerized technology for control of machines seems to have resulted in the de-skilling of machine jobs and an associated increase in centralized managerial control, in accord with the technology's original marketing. See SHAIKEN, *supra* note 150, at 66-135; see also *id.* at 67 ("[N]umerical control reflects the social criteria of design . . . : fewer skills, less worker input, and increased managerial control. Once a program is tested, a high level of skill is permanently embodied in it. That skill ceases to be the property of the worker and therefore no longer can be used at the discretion of the machinist.").

nel issues. Far from being outdated by contemporary developments, section 8(a)(2) should remain as a central bulwark of the NLRA both in the nonunion and the unionized work place. Ironically, it is the strong, yet permissive, section 8(a)(2) that the Board has elaborated that best serves the goals claimed by the section 8(a)(2) critics.

In my view the basic goals and compromises of the NLRA, the statute of Theodore St. Antoine and other leading employment lawyers of his generation, remain as relevant today as when the statute was passed. To achieve those goals and more fully effect those compromises the statute clearly must be modified. But a complete picture of the contemporary workplace suggests that the dilution of section 8(a)(2) cannot be part of that modification.