

A Tale of Two Statutes: Reflections on the "Digestibility" and the Realization of Rights under the NLRA and Title VII

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The National Labor Relations Act at 75: Its Legacy and its Future

I.

Even 75 years after the enactment of the National Labor Relations Act, the basic employee rights embodied in that law – the rights to form a union and bargain collectively – are recognized grudgingly at best, and more often vehemently resisted, by employers. No less unsettling are the deeply divided public attitudes toward unions and collective bargaining. Gallup in 2009 found that 48 percent of Americans "approve" of labor unions. That was the lowest level ever recorded, and compares to 59 percent just one year earlier, and to 72 percent in 1936.¹ The recent drop is alone intriguing, but we will not dwell on it here. Public attitudes toward unions are obviously divided – partly along class lines, but also along regional and ideological lines – and, across much of the spectrum, ambivalent.

The limited penetration of the values and ideals of the NLRA into public consciousness and corporate culture is especially striking by comparison to the flourishing of the antidiscrimination ideal.² In this tale of two statutes³ – the NLRA and Title VII of the Civil Rights Act – the former is still resisted by employers as an onerous external intrusion while the latter has become widely embraced and internalized into corporate culture. The contrast carries into the international arena as well. With regard to freedom of association and collective bargaining rights, the United States is often painted as a defiant outlier among developed countries, and a haven for scofflaw employers,⁴ whereas the U.S. has led the way on many dimensions of freedom from discrimination in employment.

One tempting explanation of the contrasting fates of the two statutes lies in their contrasting remedial schemes: Violations of the NLRA are met not with fines, penalties, large damages awards, or any other remedies that aim to deter misconduct, but only with "make-whole" equitable remedies that do not do even

¹ Public approval of unions was at 75 percent in 1957 and 66 percent in 1999.
<http://www.gallup.com/poll/122744/labor-unions-sharp-slide-public-support.aspx>

² See e.g., Estlund, *Ossification of American Labor Law*; FRYMER, BLACK AND BLUE.

³ I am not the first to use this Dickensian phrase to contrast two employment statutes. See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317 (1998).

⁴ See, e.g., HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004).

that.⁵ By contrast, remedies under Title VII and its successor antidiscrimination statutes, and under the array of state, local, and federal laws that reinforce and supplement those statutes, pack a bigger remedial punch. That surely is part of the explanation for the NLRA's relative failings; and yet it is one that begs important questions: Why has the public failed to demand stronger remedies under the NLRA that deter violations and convey public condemnation of illegal anti-union conduct? And why have the legal remedies for violating the NLRA not been effectively magnified by the powerful reputational sanctions that accompany serious charges of employment discrimination, and that have helped motivate corporations to posture themselves as leaders in workplace diversity and equal opportunity? The plotline of this tale of two statutes is more tangled than a simple story about the law's deterrent force.

In the past, I have explored the causes and consequences of the "ossification" of labor law -- its resistance to legislative reform, renovation from within, and private and state-based experimentation -- especially by contrast to the protean character of antidiscrimination law. And by now most readers will have already begun to spin out their own explanations for the contrasting fates of the two statutes. Surely it has something to do with the fact that the employee rights recognized in the NLRA represent a challenge to employer power and corporate profits in a way that the employee rights embodied in antidiscrimination law do not. There is much truth in that proposition, and I will return to it. But first I want to offer a more tendentious explanation for this tale of two statutes as a launching pad for a discussion of future possibilities.

The antidiscrimination norm embodied in Title VII was not only backed up by strongly deterrent remedies and penalties; it also took a form that was capable of being "digested" by employers -- that is, assimilated, domesticated, and internalized into corporate culture and practice -- under the pressure of those strong remedies. By contrast, the norms embodied in the NLRA -- freedom of association and workplace democracy through collective bargaining -- were not only backed up a weak remedial scheme, but had a form and a content that made them "indigestible" by firms. The latter point is underscored by Section 8(a)(2)'s prohibition of employer assimilation, domestication, and internalization of participatory norms.

The metaphor of "digestion" risks repelling some readers, especially if it calls to mind images of the end product. I mean to evoke not what is left over and cast off, but the nutrients that are taken in, transformed, and incorporated by the healthy organism. Even so, the idea of employers "digesting" the norms underlying worker rights is sure to meet a skeptical response, and that is as it should be.

Drawing lessons from the corporate response to Title VII, I will argue that a more "digestible" conception of the rights at stake in the NLRA might have paved

⁵ See PAUL C. WEILER, GOVERNING THE WORKPLACE 108-118 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1769-1803 (1983); Morris, *supra* note 3; Human Rights Watch, *supra* note 4.

the way – and might yet pave the way – for greater penetration of the values of employee voice and workplace democracy into public consciousness and organizational practice. The idea would be not to replace the right to form an independent union and bargain collectively, but to reframe that right as one embodiment of a more encompassing right of participation that employers would be not only allowed but encouraged to internalize and institutionalize. Employers' incentive to internalize the new participation norm would depend in part on a fortification of existing rights of self-organization. Their ability to do so would require a significant narrowing of the prohibition on company unions.

As that latter corollary suggests, this exercise inevitably evokes old debates about the scope of Section 8(a)(2). Hence, the inevitable rejoinder: A more universal and “digestible” right of workers to speak up and participate collectively in workplace governance would be meaningless or worse; employers would not so much digest as chew up and spit out the right of employees to choose unionization and collective bargaining. I do not expect to be able to dispel such doubts, but I do hope to unsettle them.

II.

I will return soon to the NLRA and its underlying ideals, and how they might be reshaped for a more promising future. But let us begin with a brief review of the success story -- relatively speaking -- of Title VII and its successor statutes, and their impact on the modern workplace. It is not a simple story of employers receiving and implementing the antidiscrimination mandate; nor is it a simple story of courts and lawyers bludgeoning recalcitrant employers into submission. Sociologists Frank Dobbin, Lauren Edelman, and their respective collaborators have chronicled a more complex process of mutual transformation: Large employers, faced with the threat of disruptive sanctions or loss of federal contracts, incorporated the antidiscrimination norm into corporate compliance structures and dramatically changed their employment practices; but at the same time they transformed and domesticated the antidiscrimination norm to better fit organizational imperatives. In the process, employers not only transformed the meaning of the antidiscrimination norm within their organization; in some ways they have succeeded in reshaping the meaning of antidiscrimination law and liability in the courts and within public consciousness.⁶

Title VII directed employers not to discriminate on the basis of race (and other traits) in hiring, firing, promotions, job assignments, pay, and other conditions of employment. The statute sought to reform a racially segregated labor market, to bring economic justice and equal opportunity, especially to long-

⁶ The following account draws primarily on the works of Dobbin and Edelman, including FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009); Lauren B. Edelman, Sally Riggs Fuller, & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 *AM. J. OF SOC.* 1589 (2001); Lauren B. Edelman, et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 *AM. J. SOC.* 406 (1999); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 *ANN. REV. OF SOC.* 479 (1997); Lauren B. Edelman, et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 *LAW & POL'Y* 73 (1991).

subordinated African Americans, and to attach both moral stigma and costly legal consequences to discriminatory conduct that was widespread. To those ends, Title VII empowered both the EEOC and alleged victims of discrimination to sue to enforce its commands. There many lawsuits, some of them very large, especially against major employers, especially in manufacturing and transportation. But most major firms got the message without being sued: They had to change the way they did business. (Indeed, many of those firms had begun to get that message long before Title VII was passed by way of a series of Executive Orders governing large federal contractors.)

The law obviously imposed costs on employers seeking to avoid litigation. Employers were required to give up discriminatory preferences, and even some "rational" forms of discrimination, such as those that indulged ingrained biases of customers and co-workers (though the latter "burden" was eased by the fact that the employers' domestic competitors in both product and labor markets were similarly bound). Employers were required to bear the cost of identifying non-discriminatory, job-related tests and qualifications to replace both subjective and objective criteria and tests that excluded too many minority applicants, as both became vulnerable to legal challenge. And employers had to devote resources and develop procedures to avoid, detect, and correct discrimination by the individuals through whom organizations make decisions. Those changes were not easy to bring about, given the entrenched conditions of segregation and subordination that black workers had long faced, especially but not only in the South.

The cost of complying with the basic antidiscrimination mandate fell not only on employers; it fell on white workers, who had to give up privileged access to the best jobs, compete with a segment of the labor force that had been excluded, and work side by side with black workers whom they had been socialized to despise or disdain. Indeed, once employers were forced or induced to integrate workplaces that had been all-white or sharply segregated, the antidiscrimination mandate potentially pitted co-workers against each other. One employee's claim of discrimination in a promotion decision threatened another's claim to that promotion; and it injected potentially explosive accusations of racial bias into workplace relations. Employers thus faced another sort of cost -- the cost of internal discord and racial conflict in newly integrated workplaces and layers of the workforce -- that might have been even greater than the more obvious costs of compliance.

The story of how workers learned, gradually and still incompletely, to work together productively and even amicably across racial lines is itself a complicated and interesting one.⁷ That process both helped to promote and was promoted by the public's fairly rapid acceptance of the basic norm of equal employment

⁷ See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

opportunity.⁸ But a significant part of the story lies in how managers, especially those in personnel and human resources departments, both embraced the antidiscrimination norm and adapted it to fit organizational imperatives and minimize internal conflict. The antidiscrimination norm has proven "digestible" by organizations: To an impressive degree, it has been accepted and internalized into the corporate body, and it has both transformed that body and been transformed by it in the process.

Morally-freighted complaints of racial discrimination and demands for racial justice, and the risk of litigation under uncertain legal standards, became leverage for personnel officers to press for the adoption of both old and new techniques for assessing qualifications, awarding promotions, and imposing discipline (all of which, incidentally, expanded the portfolio and raised the importance of the personnel function). But discrimination complaints were also transformed as they were implemented by complex organizations. Equal opportunity began to be understood in procedural terms, and individual complaints of discrimination were channeled into internal grievance procedures, where they were often transformed into ordinary personnel conflicts, supervisory missteps, or human relations "problems" to be resolved.⁹ Their moral and political sting, and some of their power, was defused even as problems were solved, missteps corrected, and biases combated.

Another kind of transformation took place once "affirmative action" came under political fire during the Reagan era. In response, the compliance-driven mission of "affirmative action" in support of equal employment opportunity was transformed into the business-driven mission of cultivating "diversity" and "inclusiveness."¹⁰ Diversity was defined primarily along lines of race, sex, religion and other legally salient traits, but also along other dimensions of difference in background, personality, and learning style. The message was played, musically speaking, both *forte* (and *piano*): "We are all different in some way, and differences entail new strengths and synergies (as well as potential frictions); this organization embraces all kinds of diversity (and provides ways to resolve all kinds of conflict)."

Once differences were transformed into "diversity," they were less threatening to the organization. Under that less threatening "diversity" rubric, employers began to sponsor separate employee affinity groups and networks. For

⁸ Already by 1972, 97% of U.S. respondents accepted the proposition that blacks should have "as good a chance as white people to get any kind of job." [http://www.uky.edu/AS/PoliSci/Peffley/491RacialTolerHandoutTRENDS%20IN%20WHITES\(10-2-01\).htm](http://www.uky.edu/AS/PoliSci/Peffley/491RacialTolerHandoutTRENDS%20IN%20WHITES(10-2-01).htm)

⁹ See, esp., the work of Lauren Edelman, cited in *supra* note --.

¹⁰ "Affirmative action" became politically controversial in the 1970s, helping to elect Ronald Reagan, who promised to dismantle affirmative action programs. Dobbin documents how human relations professionals responded to this threat to their favored organizational reforms: By recasting those programs as "diversity management," and by shifting from arguments based on morality and legal compliance to arguments based on business imperatives, the corporate civil rights agenda was largely insulated from retrenchment, and in fact extended to new programs, new groups, and smaller firms.

example, Allstate, Inc., maintains groups for women, African-Americans, Asian-Americans, Latinos, gay and lesbian employees, and young professionals.¹¹ Microsoft, Inc., maintains employee resource groups for those groups and also for parents and disabled workers.¹² A quick internet search reveals that these employer-sponsored affinity groups, though they are in no way required or even explicitly encouraged by the law, have become ubiquitous among firms seeking a reputation as diversity-friendly and inclusive (and that includes virtually all major firms these days). They are, in short, part of recognized "best practices" for building and managing a diverse workforce. These groups pose some risk for employers, for they might facilitate the path from individual gripe to group grievance. (Indeed, that very risk, by spurring and guiding prompt and constructive managerial responses, may be part of how these groups contribute to a diversity-friendly climate.) But they also allow employees to share perspectives and air concerns; and they allow the organization, and signal its willingness, to hear and respond to employee concerns within the organization in a non-confrontational and non-disruptive way.

Employers have good reason to respond to those concerns internally, even if they do so in a way that elides the charge of discrimination; for employees who do experience what they perceive as discrimination can always file a complaint or a lawsuit under Title VII (or the relevant statute).¹³ In that case, the court must address the complaint under the relevant legal doctrines. What the employer might have sought to treat as a personnel "problem" to be solved or a diversity management challenge to be met becomes an accusation of unjust, unlawful, and usually intentional discriminatory treatment or harassment. Such charges are costly to defend and, if vindicated, trigger costly remedies; they also bring reputational sanctions. Even in court, however, the employer's organizational efforts to avoid discrimination, including their grievance procedures and diversity programs, enter the frame. They might allow the employer to refute the basic claim that discrimination took place, to escape liability for some (intangible) forms of discrimination that did take place, or to escape some remedies that might otherwise follow from liability.¹⁴

The foregoing account glides over a great deal of turbulence and complexity, of course. Discrimination in employment, and especially in hiring, has not disappeared.¹⁵ African-Americans and Latinos, as well as women, remain grossly

¹¹ <http://www.allstate.com/diversity/employee-network-groups.aspx>

¹² <http://www.microsoft.com/about/diversity/en/us/programs/ergen/default.aspx>

¹³ I am ignoring for now the possibility that the employee is subject to a mandatory arbitration agreement.

¹⁴ See Faragher, Ellerth, Kolstad. Edelman shows that personnel professionals argued to employers that organizational reforms would help to avoid liability and sanctions well before the law actually recognized any such procedural defenses. See Edelman... This is one of the myriad ways in which, in Dobbin's formulation, corporate personnel officers "invented equal opportunity." See Dobbin, *supra*.

¹⁵ The best available studies on this complicated issue are those that use either matched pairs of black and white auditors or matched resumes with racially-identifiable names. Those studies find

underrepresented in many of the most rewarding jobs and occupations (in large part because of disparate life chances that are rooted in childhood and never overcome). Even within the Fortune 500, the story of steady progress and expansion of diversity initiatives is too rosy; after all, Number One on that list is Wal-Mart, Inc., defendant in the largest class action sex discrimination lawsuit of all time. Moreover, progress and innovation in the Fortune 500 has coincided with a trend among those same companies to contract out non-core functions, and especially labor-intensive functions, to smaller, less-visible, less “branded” firms in which compliance structures are rickety or non-existent and labor violations, including discrimination, are widespread.

Still, progress is undeniable. The most overt barriers to entry and advancement at work have been dismantled, and the more subtle barriers that remain within the workplace itself are less exclusionary. At least for those minority group members who manage to make it to adulthood with a decent basket of skills and educational qualifications, their prospects for employment and advancement in a wide variety of jobs and organizations, and their conditions of work within those organizations, are far better than they were fifty years ago.¹⁶ On this score at least, Title VII and the norm of equal opportunity must be judged at least a qualified success.

Both sides of that assessment -- the success of Title VII and its qualified nature -- may be traced partly to the way antidiscrimination norms became internalized, to a partial yet remarkable degree, into organizations' own processes and structures, their "corporate cultures," and their corporate images. Had the antidiscrimination norm somehow remained only a stark legal demand for racial justice, one that was imposed and enforced from without in one adversarial contest after another, it could not have had the same transformative impact on workplace practices.¹⁷ It also seems unlikely that the idea of equal employment opportunity would have achieved near-universal public acceptance (at least in principle), if major American institutions, including corporations, had not vocally raised its banner and invested in both promoting and managing diversity in their own ranks. (Indeed, I suspect we would not have the same President without those efforts.) Widespread public acceptance of the equal opportunity norm, in

that, while most pairs are equally unsuccessful in their applications, white (or white-sounding) applicants do significantly better on average than black applicants. [details]

¹⁶ There are many ways to make the point (and it can also be overstated). Here are some numbers: According to EEOC data, the percentage of "professionals" in the private sector who belonged to a "minority" group (Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native, Native Hawaiian, or mixed race) rose from 3.9% in 1966 to 23.8% in 2007; and among private sector "officials and managers," minority representation rose from 1.8% in 1966 to 19.5% (and Black and Hispanic representation rose from 1.5% in 1966 to 14.6%) in 2007. <http://archive.eeoc.gov/stats/jobpat/2007/indicators.html> Of course, minority group (and Black and Hispanic) representation in the labor force as a whole also rose during this period, but to a far lesser extent.

¹⁷ That is not easy to imagine, as the prospect of significant liability for whatever the law deems an injury and a wrong rather predictably induces precautions; and where it is an organization that faces liability, the precautions include affirmative organizational efforts to avoid triggering liabilities.

turn, reflects back on organizational practices, for it helps sustain the reputational returns to being seen as diversity-friendly and not as discriminatory, and amplifies the deterrent force of antidiscrimination law and litigation.

The embrace of the antidiscrimination principle by corporations and the general public may be linked as well to the conviction among many white Americans that black workers no longer face significant discrimination in employment.¹⁸ As corporations embraced a domesticated conception of equal opportunity that they could make their own, they may have deflected critical attention away from the subtle barriers that remain at the top of the labor market, within their own organizations, and the less subtle barriers that remain at lower levels of the labor market. So it is indeed a qualified, and not a complete, success that Title VII has achieved.

III.

But everything is relative, as the saying goes. Title VII has been a wildly successful statutory regime compared to the NLRA, the rights it established, and the norms underlying those legal rights. The highly-touted corporate embrace of equal employment opportunity and workforce diversity, and the real organizational resources devoted to their promotion, find their antithesis in near-universal and often open opposition to unionization.¹⁹ Corporate investments in promoting equal employment and diversity goals, and the growth of a whole profession of internal and external diversity experts, are matched by massive corporate expenditures on union avoidance and anti-union consultants.²⁰

Employers may concede in principle that their employees have the right to form a union (though few go so far as to advertise their recognition of that right, and the law does not require them to do so.) They surely vary in the aggressiveness with which they resist unionization on the ground, and in their willingness to violate the law to do so (though aggressive and illegal forms of resistance are common, perhaps increasingly so). And some firms cultivate constructive collective bargaining relationships once they are in place. But employer opposition to new unionization is nearly universal.²¹ This is familiar ground, and we will not dwell on it here, except to underscore the vivid contrast

¹⁸ <http://www.gallup.com/poll/123944/little-obama-effect-views-race-relations.aspx>

¹⁹ For a good recent account, see Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

²⁰ See John Logan, *Consultants, lawyers, and the 'union free' movement in the USA since the 1970s*, 33 INDUST. REL. J. 197 (2002).

²¹ This was not always so. During the 1950s and 1960s, collective bargaining was widespread and "normalized" within major sectors of the U.S. economy, particularly those in which there were high barriers to entry or regulated competition. See Wachter, *supra* note --. One might say employers did "digest" collective bargaining norms until the 1970s and 1980s, but then experienced "indigestion" as a result of deregulation and increased competition in product markets and neoliberal and anti-union policy and ideology under Reagan. The result was an escalation of union avoidance and union resistance among employers. This history complicates the story in ways that I have not yet worked through. Thanks to Ben Sachs for pointing out this complication.

between the corporate embrace of equal opportunity and workforce diversity and the corporate attitude toward unions and collective bargaining.

The steady drumbeat, and the occasional loud percussive outburst, of employer antipathy toward unions is probably not unrelated to the erosion in recent decades of public approval of unions. Not everyone is convinced by the corporate anti-union line, of course. Many non-supervisory employees who are not represented by a union wish they were (and the overwhelming majority of employees who are represented by a union are glad for that).²² But the “representation gap” among private sector workers is not unrelated to what we may call the “approval gap” – the gap between public approval of unions and the NLRA’s commitment to the right to form a union and bargain collectively. That connection may be most evident in the inability of the labor movement to garner the requisite supermajority in Congress for labor law reform, which many deem necessary to narrow the “representation gap” among workers. The unions’ recent top legislative priority, the Employee Free Choice Act, got virtually no Republican support and was not a high enough priority among Democrats after the 2008 election to push past the inevitable filibuster. But that is just the latest in a series of failed labor law reform efforts.²³ By contrast, consider the numerous legislative victories of civil rights advocates since 1964, extending the antidiscrimination agenda to new groups, new theories of liability, and new remedies, typically with bipartisan (and business) support.

IV.

So far our tale of two statutes is largely descriptive: We can observe a dramatic difference in the posture of employers, and especially major corporations, toward the employee rights embodied in the NLRA versus Title VII (and a parallel though less dramatic difference in the resonance of the two sets of rights with the general public). But let us turn to the task of explanation. In particular, why do employers so vehemently oppose the right to unionize – or at least its exercise – while they vocally embrace employee rights of equal opportunity and celebrate the value of workforce diversity?

One obvious explanation needs to be put on the table and unpacked: The NLRA is about power and redistribution; Title VII is not. The NLRA sought to give employees not just a “voice” at work but greater power in their efforts to constrain managerial discretion and to claim a bigger share of revenues. And the power that employees gained through the NLRA consisted largely of the ability to inflict economic disruption through the lawful use and threat of “economic

²² Richard Freeman reports that, in a 2007 survey, 32% of non-union, non-managerial private sector workers, and 90% of union workers, would definitely or probably vote for a union if there were an election. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, Economic Policy Institute Briefing Paper #182 (2/22/07), available at <http://www.sharedprosperity.org/bp182.html>.

²³ Indeed, a slightly hyperbolic account of the post-New Deal history of labor law reform efforts might conclude that labor cannot win a significant national legislative contest over undivided business opposition without both an economic calamity and widespread labor unrest tinged with revolutionary fervor.

weapons.” The NLRA sought to quell labor-management conflict by legitimizing its peaceful expression, channeling conflict away from the streets and into the bargaining process; but it assumed that conflict was unavoidable, and sought to better arm the weaker parties in that conflict. Title VII posed no comparable threat to managerial power, continuity of production, or profits. So it is unsurprising that the former would be resisted while the latter could more safely be embraced and internalized.

The point can be overstated. Title VII did confer on employees a kind of power – the power to vindicate their rights through litigation -- and correspondingly posed a serious threat to employers in the form of costly litigation and judicial intervention. Title VII also constrained managers’ discretion to hire, promote, and fire whomever they chose; and it raised the cost of employee recruitment, selection, and personnel management. Even putting aside the hurdles posed by entrenched biases among supervisors, co-workers, and customers, the organizational changes that Title VII brought about were significant, even transformative, and by no means costless. Title VII changed the managerial calculus, and introduced significant new variables into that calculus. But it did not alter the allocation of decision making power within the enterprise as collective bargaining does when it works. Moreover, the costs associated with Title VII compliance were imposed across the whole labor market. No employer could gain a competitive advantage by resisting Title VII’s mandates, for that would merely invite litigation.

By contrast, the main costs associated with the NLRA are visited on employers faced with a union organizing drive, and primarily on employers on the “losing end” of such a drive. Employers in the same product market that can avoid collective bargaining and the union wage premium can gain market share, higher profit margins, or both.²⁴ To be sure, there is an argument that unions can bring not only higher costs but higher productivity.²⁵ In some ways that is parallel to the “business case for diversity.” In fact, the empirical evidence for both propositions is mixed.²⁶ But the latter argument originated within leading corporations, who compete over how convincingly they can embrace workforce diversity; while the argument that unions are good for business is roundly rejected, with a few exceptions, by business itself.

The fact that unionized employers compete with non-union employers in most markets – and that it is entirely lawful for employers to operate on a non-union basis – points to another basic difference in the nature of the rights

²⁴ On the centrality of increasingly competitive product markets to union decline, see Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007).

²⁵ See RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?*, etc.

²⁶ On the economic impact of diversity, see Thomas Kochan, *et al.*, *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUMAN RESOURCE MGMT 3 (2003). On the impact of unions on economic performance, see Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, in *WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE* (James T. Bennett & Bruce E. Kaufman, eds., 2007).

embodied in Title VII and in the NLRA. Title VII creates inalienable rights to be free from certain kinds of discrimination. Employee choice has nothing to do with it. A firm cannot say “we accept our employees’ right to choose equal opportunity; but we oppose their making that choice.” Yet that very posture is available to firms under the NLRA. The right to form a union is an option that employees need not exercise. Employees do not have a right to be represented by a union; they have only a right to choose whether to be represented, provided that a majority of their co-workers make the same choice. (I leave aside here the well-documented hurdles to employees’ exercising that choice.) Moreover, employees’ choice on the matter of unionization is one that employers are free to oppose, as long as they do not do so in coercive or discriminatory ways. Much ink has been spilt on whether the law draws the right lines between legal and illegal forms of employer opposition. But the legality of employer opposition itself is logically (though not inevitably) linked to the freedom of employees to choose whether to unionize or not.

The optional nature of employees’ right to form a union, and the competitive advantages to employers that avoid employees’ formation of a union, give employers both an incentive and an ability to resist employees’ exercise of their NLRA rights that has no parallel in Title VII. The economic rationality of employer resistance to unionization is by no means an argument for abandoning those rights. It does explain why vindicating those rights is a constant struggle (the often-militant nature of which tends to reinforce employer hostility); and it underscores the importance of public enforcement of those rights, and seriously deterrent sanctions against their violation. But for present purposes it is also an explanation for why the NLRA and its basic normative commitments – far from being internalized by employers as a component of responsible corporate citizenship – have been consistently and even increasingly resisted by the same employers who proudly advertise their commitment to going beyond compliance on other fronts, especially with regard to workforce diversity.

V.

That brings us to the question whether there is an alternative formulation of the rights at stake in the NLRA that might function more like Title VII rights, and achieve something like the latter’s widespread acceptance and internalization. The foregoing account suggests two crucial features of the latter: First, the rights are mandatory and universal rather than optional, such that all employers are bound to respect them and cannot gain competitive advantage by avoiding their realization. Second, the rights are “digestible,” or capable of being accommodated and internalized by firms, and incorporated into their own self-governance structures; at a minimum that means that the rights are not intrinsically adversarial or oppositional.

Can those features be emulated within labor law’s normative universe without betraying current commitments to self-organization and redistributive bargaining? The idea is not to replace existing unionization rights but to subsume them under a larger umbrella right, a version of which could be adopted and internalized by employers. To underscore that point, we will add a third requirement to the first

two: The rights must be compatible with, and not undermine, the existing rights to form an independent union, to demand collective bargaining, and to engage in concerted activity.

It takes no great leap of imagination to conceive of a right of workers to participate in workplace governance and to have a voice in their terms and conditions of employment. That is a right that could conceivably be conferred on employees in the form of a mandate, much like the right to be free from discrimination or the right to a safe workplace, provided that we give up the notion that unionization and collective bargaining are the only appropriate institutional expressions of that right. It is not really conceivable in a democratic society to require all employees to be represented by a union.²⁷ But we could require all employers, or all employers above a certain size, to recognize workers' right to freely express themselves and communicate with co-workers and management (as Section 7 already provides), as well as to receive accurate information, and participate in decisions, about terms and conditions of work.²⁸

The justification for a universal right of workers to participate in workplace decisionmaking -- apart from the sheer fact that most workers want it -- has many facets, many of them familiar from old debates about "industrial democracy."²⁹ In my own writings I have emphasized the contribution of workplace expression and participation to civic skills and social capital, particularly given the comparative diversity among co-workers,³⁰ as well as the essential role that collective worker voice plays in promoting compliance with employment laws.³¹

Collective bargaining has long been the primary institutional vehicle of industrial democracy and collective participation, not only in the U.S. but throughout the industrial world. But the rest of the world, as we will see, has not followed the U.S. in making it the only such vehicle on the road.³² It is time for us to broaden our commitment to collective worker voice to accommodate a more diverse set of institutions, some of which can be fostered and embraced within corporations. For unions remain more controversial and less popular, even among workers, than the basic idea of and desire for some kind of institutional mechanism for collective expression and participation at the workplace.

²⁷ Benjamin Sachs concludes, rightly, I think, that it is not even possible to "switch the default" and confer union representation subject to employees' choice to opt out. See Sachs, *supra* note --.

²⁸ In principle, that sounds like it could be the mission of "American Rights at Work," <http://www.americanrightsatwork.org/about-us.html>, or of the AFL-CIO's "Voice@Work" campaign. <http://www.aflcio.org/joinaunion/voiceatwork/>. But those initiatives both promote unionization and collective bargaining as the only genuine vehicles of worker voice. Those efforts play a crucial role in attempting to build public support for unions and labor law reform. But they have not tapped into broader desires for non-adversarial forms of representation.

²⁹ See CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

³⁰ See ESTLUND, *WORKING TOGETHER*, *supra* note --.

³¹ See ESTLUND, *REGOVERNING THE WORKPLACE*.

³² See *infra* p. --.

Freeman and Rogers' landmark survey of worker attitudes in the mid-1990s drove that point home. They documented the much-discussed "representation gap" between what workers had and what they wanted. But the representation gap takes multiple forms. Freeman and Rogers found a significant unmet desire for union representation among non-union, non-managerial private sector workers (32 percent said they would definitely or probably vote for a union if they had the chance); but they found much wider support for some other kind of collective representation. When asked to choose between representation through a union and through joint management-employee committees, more than twice as many workers chose the latter (preferably with worker-elected representatives on those committees).³³ More recently, a Hart recent survey found that about 80 percent of workers would definitely or probably vote for an "association" of workers that was not a union and that would meet with management on workers' behalf.³⁴ The preference for non-union forms of representation is partly an "adaptive preference" shaped by employer opposition to unions. But the latter is a stubborn fact with which workers and their allies have to contend.

So workers' desire for some collective voice at work is far more widely shared when "unions" – with their combative history, their mixed reputation, and the hostility they inspire in management – are left unmentioned. That suggests a latent political demand for policy measures that encourage or require firms to institute some kind of representative structure through which workers can learn about and participate in decisions at and about work.

If this is beginning to sound like the idea behind European-style works councils, that is no accident. And the analogy suggests a few points. First, it is noteworthy that U.S. firms operating within Europe have already been compelled to come to terms with the norms and practices of worker participation under the European Works Council Directive. That experience may suggest that those firms could be induced to accommodate themselves to a worker participation mandate in the U.S.³⁵ Second, the works council analogy should offer some reassurance that a broader, less adversarial, more universal norm of employee representation is not inherently incompatible with or destructive of the right to form a union. At least in the European context -- which is admittedly different in a number of ways -- there is no obvious incompatibility. We will return to this point briefly below.

For fans of American-style collective bargaining (including me), the right to speak up, communicate with others, receive accurate information, and participate in decisions about work appears to be a very weak right compared to the right of collective bargaining, and that a works council-like body appears to be a weak and pallid substitute for a strong union. To be sure, any institution for employee

³³ Freeman & Rogers, *What Workers Want* (1999); Freeman, *supra* note --.

³⁴ *Id.*

³⁵ On the other hand, it is discouraging to note the extent to which European companies seem ready to adapt to prevailing anti-union mores in their U.S. operations. See Human Rights Watch, *A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations* (2010), available at <http://www.hrw.org/en/news/2010/09/01/us-european-corporate-hypocrisy>.

representation that is designed to be cooperative with, acceptable to, and, yes, "digestible" by employers will be less muscular and militant than a strong union, and unlikely to redistribute revenues and power. Non-union forms of worker participation thus compare poorly, from workers' economic standpoint, with a well-functioning collective bargaining relationship. But these alternative forms of representation are not meant to replace the latter; and they would be a significant improvement for the overwhelming majority of private sector workers who have no vehicle at all for collective expression or participation at work. Moreover, the experience of participation, if it is frustrating or too confined, might encourage rather than discourage aspirations to independent representation.

Of course now we are beginning to rehearse familiar arguments, not only about works councils, but for and against reforming and narrowing Section 8(a)(2)'s prohibition on employer-sponsored forms of employee participation. I think those arguments are well worth revisiting, but I do not mean to revisit them here. I mean to focus on what the history of corporate internalization of equal opportunity norms might suggest about the outlook for corporate internalization of a norm of worker participation – both whether and how it might unfold.

One lesson from the history of corporate EEO efforts and their steady expansion concerns the dynamic interaction of external legal pressures, moral claims, and internal constituencies within the business organization. The very uncertainty surrounding external legal pressures in the case of EEO efforts – the vagueness of the law's demands coupled with the prospect of judicial elaboration on those demands – gave corporate personnel experts leverage to promote their own prescriptions for internal reform as the best defense against liability or loss of government contracts (and as "the right thing to do").³⁶ Those reforms spurred the growth and elevation of the personnel function within the organization, creating an increasingly powerful constituency for more ambitious internal reforms.

It may seem fanciful to envision a similar dynamic in support of a worker participation norm. But consider that the corporate embrace of equal opportunity and diversity is only part of a larger commitment, endemic in Fortune 500 firms, to corporate compliance, "beyond compliance" and "corporate social responsibility." Perhaps most familiar on the labor front is the growth of internal occupational health and safety structures. Firms tout their "culture of safety" and commitment to exceeding OSHA standards, not only as a matter of legal compliance, but as a matter of good business and corporate responsibility. (The walk and the talk are hardly in lockstep; more on that shortly.)

It is striking that in the two areas of workplace regulation whose normative commitments have arguably been most successfully absorbed into corporate organization and culture among major firms – equal employment opportunity and worker safety – worker participation through organized employer-sponsored

³⁶ Many of those prescriptions came from a personnel "toolbox" that had developed in the wake of the Wagner Act to deal with unions, to avoid unions by copying some of its principles of fair treatment, and even to avoid unfair labor practice charges.

groups is common and widely assumed to be a necessary element of a successful corporate program. Labor-management safety committees are thought to play a crucial role in promoting safety, much as diversity support groups or employee resource groups are deemed essential to an inclusive and diverse workplace.

Let us bracket the question whether either diversity support groups or workplace safety committees violate Section 8(a)(2) (though some of them almost certainly do). For present purposes, what is important is that there is a significant constituency within large firms for corporate compliance, or even for “best practices” within the zones of social regulation; and that, within that corporate constituency, worker participation is widely assumed to be a necessary element of those best practices. Support for that assumption could be found in the scholarly literature on regulation, which confirms the importance of engaging the beneficiaries of regulatory interventions (workers, in the case of laws regulating work) in the internal self-regulatory processes on which the law increasingly depends for accomplishment of regulatory objectives.³⁷

So there already is, within large companies, both an internal constituency for promoting compliance and best practices in response to legal mandates -- especially those backed by strong normative support and reputational pressures -- and a recognition that engaging workers themselves is crucial to detecting and resolving grievances before they ripen into a legal dispute or a regulatory complaint. A newly framed societal demand for “worker participation” in a wide array of workplace concerns – and especially the many matters on which the law has something to say – would potentially find fertile ground within organizations’ compliance and CSR branches.

Of course, the corporate compliance/CSR phenomenon is a hotly debated one. To enthusiasts, it is as central to firms’ *raison d’etre* as the bottom line (or as crucial to the bottom line itself as market share). To critics it is a massive and expensive public relations strategy that obscures corporate depredation. It is a safe bet, in my view, that the truth resides in between: CSR in practice generally falls well short of what is advertised, but it also goes well beyond paper promises. The latter is perhaps most clear in the area of workforce diversity. More generally, there is a growing consensus that firms have the greatest propensity to make good on their “voluntary” commitment to social responsibility and “best practices” where law has real force – where there is a real threat of costly enforcement.³⁸ Social and reputational pressures are important, but law and sanctions against violators remain crucial. (That raises the question of what sanctions would back up any new worker participation norm; more on that below.)

The biggest problem with CSR in practice may be its limited reach. CSR structures and commitments are most developed within big branded firms; yet those firms have been busily contracting out many of their labor-intensive

³⁷ See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010).

functions to smaller or less reputation-conscious firms (often based and/or operating outside the U.S. and Europe), and doing so in a manner that virtually ensures that those contractors will squeeze wages and cut corners to cut costs. To be sure, CSR has an answer for that: responsible supplier programs, which are widespread among the Fortune 500. But that is the weakest link in the CSR system, for monitoring the labor practices of suppliers – and especially of foreign suppliers – has proved to be both very difficult and, let us say, inadequately motivated, as it depends almost entirely on social pressures without the crucial backing of external legal enforcement.

Putting aside the devilish difficulty of promoting compliance (even with minimum labor standards) in an age of outsourcing and contracting-out, the picture is not hopeless. The combined compliance-CSR constituency that already exist inside major U.S. (and European) corporations, and some of the “best practices” endorsed by that constituency, might offer some patches of fertile ground in which to cultivate the principle and the practice of worker participation and representation.

VI.

That brings us to the final question: If a norm of employee participation -- through unions or, in their absence, employer-sponsored workplace committees -- were to take hold, would the latter not inevitably become tools in the employers' already well-stocked anti-union toolbox? Here again we are covering territory that has been well covered before, particularly in connection with debates over the scope and wisdom of Section 8(a)(2) of the Act.³⁹ I will limit myself here to a few points, primarily those on which the comparison to Title VII might be instructive.

First, let us note that the U.S. stands alone in the breadth of its prohibition against employer-sponsored forms of worker participation.⁴⁰ Even Canada, whose labor laws are explicitly modeled on the “Wagner Act model,” including the ban on employer domination of labor organizations, did not adopt the extremely broad definition of labor organizations (and has even mandated joint health and safety committees).⁴¹ In short, no other nation so broadly discourages employers from creating non-union structures for worker participation. Indeed, as

³⁹ In the voluminous commentary for and against narrowing Section 8(a)(2)'s ban on most employer-sponsored forms of employee representation, see especially Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 879–983 (1994); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1443–46 (1993); 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, 149–55 (1994)

⁴⁰ See Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 196 (Bruce Kaufman & Daphne Taras eds., M.E. Sharpe, 2000).

⁴¹ See Daphne G. Taras, *Why Non-Union Representation is Legal in Canada*, 52 INDUSTRIAL RELATIONS 761-786 (1997).

we have noted, many developed countries now mandate (at a rather low threshold showing of employee interest) non-union structures for participation in the form of works councils. And yet most of those countries maintain significantly higher (though still declining) levels of unionization than the U.S. A “decent respect to the opinions of mankind” should cause U.S. unions to revisit their historic hostility toward non-union forms of employee participation, including those sponsored by employers.

Second, it is important to specify *how* a company’s creation of an internal employee representation structure is supposed to discourage unionization. If it is used as a shield against a majority demand for recognition of an independent union, then Section 8(a)(5) stands ready to back up the latter. If it is used to discriminate against supporters of independent unionization, then Section 8(a)(3) should be up to the job of defending the employee. (In both cases, I put aside the serious problem of inadequate remedies.) And if the problem is that workers will be fooled into thinking they do not need a union, then we should ask whether we should not trust workers to judge their employers, and their interests, for themselves.⁴² Giving workers an ostensible voice and then ignoring what they say does not sound like a successful union avoidance strategy.

It is certainly possible that internal worker representation plans might divert some pro-union sentiment and even some organizing by giving employees enough of a voice that they decide they do not need a union. Forcing employees to an all-or-nothing choice between union representation and no representation might make some more willing to undertake the arduous struggle for independent representation (though it leaves over 90 percent of workers with no collective voice). But this all-or-nothing feature is rather anomalous within a statutory scheme that, at least since 1947, is founded on employee “free choice.” Employers are otherwise able to offer employees positive inducements (“carrots”) to retain the non-union regime (as long as they do not do so in the midst of a representation campaign). Is employers' ability to offer employees a domesticated form of representation in workplace governance decisively different from their ability to offer higher wages, better benefits, a more humane and respectful work environment, or any of the other inducements by which employers may seek to avoid the discontent that may breed support for unionization?⁴³ If the path to independent unionization is clear of coercive and discriminatory barriers (“sticks”) – something that cannot be said under existing law – then perhaps employers should be permitted to offer participatory “carrots” as well as more tangible inducements to remain non-union (again, as long as they do so before the advent of union organizing).

Once again, I find myself reverting to familiar arguments for narrowing Section 8(a)(2). So let me return to the question whether experience under Title

⁴² The argument that employees will be deceived by employer-sponsored representation schemes has been examined elsewhere, see, e.g., Estreicher, *supra* note – at 197-99

⁴³ A richly layered case that employer-sponsored representation is different, and poses a unique threat to employees' freedom to form an independent union, is set out by Mark Barenberg, *Democracy and Domination*, *supra* note --.

VII offers any insights into the concern that encouraging employers to internalize employee rights may in fact undermine those rights.

The version of worker representation that employers could be encouraged to internalize under the threat of unionization would surely be more conciliatory, less combative, and less autonomous than unionization itself; and it would probably satisfy some of the demands that might otherwise translate into a desire for union representation. In some ways this is analogous to Edelman's argument that employers, in the course of internalizing equal employment principles, coopted morally clear and compelling demands for equality and justice and transformed them into organizationally-cognizable personnel issues; by preempting litigation, they dodged the social and political sanctions associated with judicial enforcement of fundamental public values. On the other hand, the relevant norms have almost certainly spread more widely, and been realized more thoroughly, than if they had only been enforced externally, over employer resistance, through thousands of lawsuits.

The analogy is imperfect, of course.⁴⁴ Most importantly, litigation is not generally seen as a good in itself, or as an essential expression of the underlying rights, but only as a means of enforcing rights. If employers succeed in preempting litigation by diverting potential claims into internal processes and more-or-less resolving them, then litigation will have done its job (even if there is an intangible loss of the moral lessons from public adjudication of public rights). But if employers succeed in preempting union organizing efforts by delivering just enough of what workers want, including a modicum of collective voice, then that may be another nail in the coffin for organized labor and its ability to represent workers elsewhere, including in the political process. And it may deal another blow to the social solidarity that unions embody and cultivate.

But perhaps we should recognize that unionization for most employees is primarily a means to various ends, most of which an enlightened employer – or an employer seeking to avoid the menacing fate of unionization – is capable of delivering on its own. A real threat of independent unionization – more real than it is now – can spur many employers to maintain decent working conditions, avoid the worst abuses, and even listen to workers. In other words, the threat of unionization can play a role similar to the threat of litigation under Title VII: Not only, or even primarily, by its actual deployment against all or even most employers, but mainly by its "threat effect": by inducing employers to alter their

⁴⁴ One difference that I do not explore here is that workers can sue their employer after leaving the job, when they are no longer under the employer's sway; but former employees cannot organize a union. That may make it harder for employers to shut down the threat of litigation (by coopting or coercing workers) than to shut down the threat of unionization. Again, the difference can be overstated, given employer efforts to avoid litigation by securing arbitration agreements up front, or waivers at the point of exit. See Estlund, *supra* note --. But those devices are subject to some kind of legal oversight, and are not necessarily available. It is inherent in conventional union representation that only current employees of a particular employer can vote for union representation.

behavior to better conform with, and indeed to internalize, the normative demands behind the threat in order to avoid its being carried out.

So the threat of unionization plays an essential role both in spurring responsible employers to internalize societal demands for decent work, including participatory and substantive norms, and in disciplining employers that violate those norms. For the threat of unionization to play that role, unionization must be more achievable than it now is. That brings us back to labor law reform of the more traditional sort. Professor David Doorey has recently argued in the Canadian context that there may be a constituency in the middle of the political spectrum (the Canadian political spectrum, that is) for labor law reforms that enable unions to punish "bad" employers by successfully organizing them, thereby keeping up the pressure on most employers to maintain decent conditions and good human relations management practices.⁴⁵ In the U.S., that might translate into a strategy for garnering a handful of moderate votes for labor law reform on the theory that, even if most employers can be trusted to treat their workers right, some employers are bad enough to deserve the dire fate of unionization, and that labor law reform is needed to make good on that threat.

The idea of a "union threat effect" that can induce managers to improve wages and working conditions is not new, of course.⁴⁶ What is new here is the idea that, following the model of antidiscrimination law and its internalization, the union threat effect could help to induce firms to internalize and "digest" not only norms of decent work, but newly framed norms of worker participation. This strategy would pose a serious threat to organized labor only if it surpassed the success of the equality and diversity norms that it would emulate -- indeed, only if it were so wildly successful that too few workers remained who lacked both voice and decent working conditions. If employers were to adopt and internalize employee participation norms throughout the labor market, and to begin falling over themselves to satisfy worker demands for voice and for decent wages and working conditions, then that would give unions reason to fear for their future. But only because workers no longer felt they needed them. That seems unlikely to happen in the U.S. corner of the global economy as we are coming to know it.

⁴⁵ See David Doorey, "Decentering the Law of the Workplace: Risk and the Polycentric Order" (unpublished paper, on file with author). He suggests that these moderate skeptics of collective bargaining could join with those who believe collective bargaining is an affirmative good to enact labor law reforms that have otherwise been elusive. The American political context is both more polarized and more strongly weighted against unions, but the idea does seem potentially translatable.

⁴⁶ What is new in Doorey's elaboration is the idea of putting the "union threat effect" at the center of the debate over labor law reform, placing the latter in the larger context of workplace regulation, and designing some reforms specifically to magnify and take advantage of the union threat effect to improve compliance with labor standards generally.