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# PROMOTING EMPLOYEE VOICE IN THE NEW AMERICAN ECONOMY

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When Dean Joseph Kearney of the Marquette University Law School graciously invited me to organize a labor and employment law symposium in partnership with the Marquette University Law Review at Marquette's new Eckstein Hall Law Building, I naturally jumped at the opportunity. In deciding on a topic, I asked myself: what, more than anything else, concerns me about the current state of labor relations in the United States? The answer is that I find myself most worried about the lack of employee voice in the American workplace.

In this age of the far-flung global economy and increased outsourcing of American jobs, it has become more difficult for workers to get themselves heard by their employers. The traditional vehicle of collective voice in the workplace, the bread-and-butter unionism of Samuel Gompers,<sup>1</sup> has found itself surviving in fewer and fewer industries and with its corporate opponents seeking to stomp out collective employee action once and for all. Recent attacks on public sector unionism in Wisconsin and other states is just the most recent and notorious example.<sup>2</sup>

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\* Associate Professor of Law, Marquette University Law School. I wish to thank first and foremost Dean Joseph Kearney of the Marquette University Law School for his invaluable financial and other contributions to this Symposium and for his support of the larger Marquette University Labor and Employment Law Program. Thanks are also due to Editor-in-Chief Justinian Koenings and Managing Editor Paul Shirk for their tireless and top-notch work on producing this excellent issue. I dedicate this Symposium to the rank-and-file workers of the United States of America, who deserve to be heard.

1. "Samuel Gompers, the undisputed leader of the early trade union movement, was a special interest pragmatist. He demanded bread and butter gains for his craft union members and was completely uninterested in redistributing wealth or challenging class structure, as compared to his European counterparts who fomented revolution in nearly all European countries." Mary Ann Mason, *The Burden of History Haunts Current Welfare Reform*, 7 HASTINGS WOMEN'S L.J. 339, 340 (1996).

2. See, e.g., Todd Richmond, *Tens of Thousands at Pro-Labor Rally in WISCONSIN*, MSNBC.COM, Mar. 12, 2011, [http://www.msnbc.msn.com/id/42047717/ns/politics-more\\_politics/t/tens-thousands-pro-labor-rally-wisconsin/](http://www.msnbc.msn.com/id/42047717/ns/politics-more_politics/t/tens-thousands-pro-labor-rally-wisconsin/) ("Madison Police estimate Saturday's crowd as the largest at 85,000 to 100,000 by late afternoon."); A.G. Sulzberger & Monica Davey, *Union Bonds in Wisconsin Begin to Fray*, N.Y. TIMES, Feb. 21, 2011, available at <http://www.nytimes.com/2011/02/22/us/22union.html> ("Mr. Walker, the new Republican governor who has proposed the cuts to benefits and bargaining rights, argu[es] that he

Of course, another source of the lack of meaningful employee voice in the workplace is the anachronistic nature of the National Labor Relations Act (NLRA),<sup>3</sup> due to the political stalemate that has left the law basically unchanged in its current form for over fifty years, even as the labor, capital, and products markets have changed dramatically. As I recently wrote elsewhere:

Not only is traditional labor failing workers in providing adequate voice in the workplace through union representation, but its *de facto* replacement, employment law, is a multi-headed hydra made up of a confusing array of minimum labor standards and workplace rights. Additionally, private litigation in the area has been substantially diminished by a U.S. Supreme Court seemingly set on an anti-litigation agenda in the civil rights context.<sup>4</sup>

With this void in workplace representation, some labor and employment law scholars have called for an embrace of a “new governance” model of workplace relations. For instance, Professor Cynthia Estlund in her recent book, *Regoverning the Workplace: From Self-Regulation to Co-Regulation*,<sup>5</sup> has called for “regulated self-regulation” in the workplace. This workplace governance model focuses on “the idea of ‘decentering the state’ and elevating the regulatory role of other nongovernmental actors, including regulated entities themselves; and the idea of ‘reflexivity’ in law—of replacing direct regulatory commands with efforts to shape self-regulation and self-governance within organization.”<sup>6</sup> More specifically, Estlund argues for “‘co-regulation,’ a system of workplace governance by which corporate self-governance is tempered through use of two procedural mechanisms: (1) inside employee representation and (2) independent outside monitors.”<sup>7</sup>

I and others have been frankly skeptical of the new governance model and worry that it will lead to further diminishment of employee rights, even though cosmetic improvements will doubtlessly be made by

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desperately needs to bridge a deficit expected to reach \$3.6 billion for the coming two-year budget.”).

3. 29 U.S.C. §§ 151–169 (2006).

4. Paul M. Secunda, Book Review, 64 *INDUS. & LAB. REL. REV.* 203, 203 (2010) (reviewing CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010)).

5. See generally ESTLUND, *supra* note 4.

6. *Id.* at 136.

7. Secunda, *supra* note 4, at 204.

many employers. Without truly independent, outside union representation, employees must remain essentially mute in the workplace, given a power dynamic suffused with employer control over the employee's job. In short, employees will only be able to meaningfully govern the workplace in partnership with their employers through reforms which change the power dynamic of the workplace.

One potential way to increase employee voice in the workplace in the new global economy is by pushing for not only workplace governance reform, but simultaneously for corporate governance reform. One of the pioneers of business models where employee voice is encouraged is Professor Ken Dau-Schmidt, the Willard and Margaret Carr Professor of Labor and Employment Law at Indiana University—Bloomington, Maurer School of Law. Indeed, it was based on his unique and innovative scholarship at the intersection of workplace governance and corporate governance theory that I invited Professor Dau-Schmidt to be the principal speaker at Marquette's labor and employment law symposium. In addition, I invited six eminent labor and employment law scholars from across the country to challenge different aspects of Professor Dau-Schmidt's reform proposals and make additional suggestions of their own. I think the reader will agree with me that the product of the "Promoting Employee Voice in the New American Economy" Symposium has produced a rich body of new scholarship and resources for practitioners, academics, and government officials to draw upon in determining the appropriate, future direction of workplace governance.

In his principal contribution to the Symposium, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, Professor Dau-Schmidt lays out his basic theory of how employee voice can be increased in the workplace. Dau-Schmidt takes corporate governance models to task for not taking seriously the role that employees should play in the modern workplace. These traditional models focus on shareholders and corporate officers, but make little mention of the employees of the firm as stakeholders. Although there are many reasons for the plight of rank-and-file workers in the American economy of the 21<sup>st</sup> Century, Dau-Schmidt emphasizes the lack of employee voice for the various ills that employees face in the modern day workplace.

By allying the interests of labor and shareholders, Dau-Schmidt argues that labor can finally obtain a meaningful place at the bargaining table with employers. Not only can this be done through unions gaining

a place on corporate boards, but also through a package of proposals that increase labor's role in making the American production system once again without equal. To bolster his argument, Dau-Schmidt considers comparative models from the law and practice of corporate governance and labor relations in Germany and Japan. Although he concedes that, "a proposal to promote employee voice by necessity must favor the interests of labor over those of capital," he seeks also "to include a balance of initiatives, some of which will probably appeal to employers,"<sup>8</sup> with the hope this this collection of workplace reform proposals will be politically feasible in the current polarized political environment of the United States.

The first two responses and critiques to Professor Dau-Schmidt's proposal to reform both corporate governance and labor relation models in the United States come from different historical perspectives. In the first piece, Professor Aditi Bagchi seeks to examine more closely the historical meaning of voice in *Who Should Talk? What Counts as Employee Voice and Who Stands to Gain*. Bagchi maintains that "voice" is an ambiguous concept and Dau-Schmidt overstates the value of "hard" employee voice, which means voice that can be backed up with some measure of power. Instead, Bagchi focuses on employees' right to information. Although the right to information is not usually considered a form of "voice," Bagchi maintains that this form of voice has proven "more attainable" historically than other forms of voice that Professor Dau-Schmidt advocates. Such rights to information also have the benefit of imposing less burdensome requirements on corporations. In the end, Bagchi prefers workplace policies that focus more on what employees hear, and less on what they have to say.

In the second response based on history, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, Professor Laura Cooper discusses the critique that Section 8(a)(2) of the NLRA unnecessarily interferes with employee voice in the workplace by not permitting joint employer-employee committees to prevent the establishment of "company unions." Cooper goes back to the debate surrounding the enactment of the NLRA in 1935 and discovers that, "history tells a somewhat ironic story: Employee voice was abundantly present in the legislative history of the NLRA, but members of Congress failed to heed those voices, paternalistically dismissing the employees

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8. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 768 (2011).

who spoke to them as mere puppets of their controlling employers.”<sup>9</sup> Cooper then considers whether allowing company unions and other forms of employer-employee cooperation to exist might have led to greater employee voice in today’s workplace.

The next series of responses come from lessons learned from public sector labor law. These lessons are particularly apt given the closing gap between employee voice concerns in the public and private workplace as public employees increasingly find themselves scapegoated for state budget woes. In the first piece, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, Professor Ann Hodges takes issue with an over-legalized approach to increasing employee workplace voice in both the public and private sector workplaces. Rather than focusing on law and lawyers, Professor Hodges contends that the labor movement itself must grow to be successful; it must be large, active, and loyal. It also must be supported by organizations advocating for the same causes. Unions, rather than being seduced by electoral political gains or favorable contract settlements, must return to the historical work of building a labor movement in order to be able to support a more significant employee voice in the American workplace. In short, Hodges asserts, unions need to return to their roots to counterbalance corporate dominance of the workplace in a meaningful way.

Next, Professor Joseph Slater draws directly from public sector unionism in thinking about promoting employee voice in the workplace. In *Lessons from The Public Sector: Suggestions and a Caution*, Slater notes that public sector unions have had greater success in promoting employee voice in the workplace, but still adds a word of caution about following that experience too closely. More specifically, Professor Slater discusses possible alternatives to traditional NLRA-style, exclusive, majority representatives and seeks to make a broader point about the culture of American employers. He also stresses the potential usefulness of just-cause discharge rules for employee voice.

In the final set of responses and critiques, Professors Scott Moss and Michael Fischl seek to provide some ideological insights from different perspectives on Professor Dau-Schmidt’s comprehensive reform proposal for increasing employee voice in the American Workplace. In *Labor Law, The Left, and The Lure of the Market*, Professor Fischl provocatively questions the usefulness of economic analysis to the

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9. Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 838 (2011).

employee voice conundrum. Fischl maintains that labor markets just do not work the way other markets do. For instance, “[w]idgets would know *exactly* what to do if their current price left them lingering in the stockroom, but people—and sometimes very large numbers of people—can sit on the shelves a long time before any downward pressure on wages makes itself felt.”<sup>10</sup> Professor Fischl’s larger point is that he seriously doubts that American employers will agree to a law reform proposal which would increase employee voice, even if economic theory supports such labor rights, because that would be against their larger interests. Rather than following economic arguments that will lead to labor failure, Fischl wants fellow academics and policymakers to start from a different analytical departure point: where labor markets are thought of as social institutions rather than as a type of product market.

In *Yes, Labor Markets are Flawed—But So is the Economic Case for Mandating Employee Voice in Corporate Governance*, Professor Moss recognizes the flaws in economic theory that Professor Fischl points out and agrees that the economic case for mandating employee voice as a part of corporate governance is weak. While Moss agrees that there should be a robust role for union voice in labor relations, he is not persuaded that there should be union voice on corporate boards. He concludes that, “[e]mployee voice in corporate governance, as a prescription, over-targets and mis-targets its disease. It goes beyond the market flaws it targets, yet it would not redress key flaws like short-term corporate thinking and the manufacturing decline underlying wage decline.”<sup>11</sup>

In all, Professor Dau-Schmidt’s thoughts, insights, and proposals on how to increase employee voice in the new American economy has led to an array of innovative and thoughtful critiques and responses from the Symposium panelists in this Symposium Issue of the Marquette University Law Review. What Dau-Schmidt’s labor, corporate, and economic thoughts on this topic suggest is that there is certainly more than one way to solve an intransigent problem like the promotion of employee voice in the workplace. Yet, in the end, all Symposium participants recognized the importance of employees having more voice in the workplace and merely diverged on the best way to obtain that desirable goal. The hope is that this Symposium discussion and its

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10. Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 948 (2011).

11. Scott A. Moss, *Yes, Labor Markets Are Flawed—But So Is the Economic Case for Mandating Employee Voice in Corporate Governance*, 94 MARQ. L. REV. 959, 960 (2011).

papers will keep this important workplace law issue front and center and that the ideas, suggestions, and thoughts shared herein will lead to the eventual realization of a considerable and meaningful voice for American workers in the new global economy of the 21<sup>st</sup> Century.