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A RETURN TO GOVERNANCE IN THE LAW OF THE WORKPLACE (AND THE QUESTION OF WORKER PARTICIPATION)

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Cynthia Estlund

Abstract: Governance-based strategies of regulation, which seek to channel regulatory resources inside regulated entities, often with the help of non-state actors, toward the accomplishment of public objectives, are supplanting “command-and-control” strategies across many areas of regulation in much of the world. But governance-based regulatory strategies are not especially new in the labor field. Indeed, collective representation and bargaining in the workplace within a publicly administered legal framework – let us call it “Old Governance” – has many features associated with “New Governance.” In the U.S., which is the main focus of this article, the decline of Old Governance has coincided with the rise of new forms of governance-based workplace regulation, or “regulated self-regulation.” But the latter defy key prescriptions of New Governance theory, in which “good governance” means participatory governance; for they have mostly failed to incorporate any organized, collective voice for affected workers. Labor unions might supply that voice for some workers, but are unlikely to do so for the large majority of workers who need representation (for reasons that would be only partly addressed by labor law reform). Yet the labor unions’ attachment to collective bargaining and the goal of labor law reform, coupled with abiding employer resistance to any form of robust worker representation, has inhibited exploration of alternative forms of representation. The institutions and habits of Old Governance may thus be impeding the emergence of participatory forms of New Governance in the workplace.

Key words: Workplace regulation, Workplace governance, Collective bargaining, New Governance, Labor regulation.

A Return to Governance in the Law of the Workplace (and the Question of Worker Participation)

Introduction

All of the major economies of the world are now largely market-based; most goods and services are produced by private economic organizations and networks subject to the pressures and rewards that markets entail. Those private economic actors are not only the primary engines of economic growth and prosperity, but also the locus of harms that societies seek to control: pollution and destruction of natural resources, dangerous products and processes, defrauding of consumers and investors, and discrimination, to name several. A major challenge – one that has become more acute with increasing globalization of production and investment – has been controlling those harmful social spillover effects without smothering or driving away the engines of economic growth. In response, developed societies in the last thirty years have turned away from primary reliance on direct regulation toward governance-based approaches to social control of economic actors.¹ This aspect of the turn to governance, or “New Governance,” reflects in part the recognition that powerful dynamics and incentives operating *within* regulated organizations and networks can either frustrate societal objectives or potentially help to accomplish them; and that direct regulation is not always the best way of channeling those organizational dynamics in a socially-productive direction.²

One major arena of social regulation for well over a century has been the workplace, and the terms and conditions under which members of the society are employed, especially within private firms. When it comes to regulation of the workplace, however, it is not a turn to governance but a *return* to governance, or a shift in the nature of governance, that we are seeing today. For governance-based approaches to regulation of wages and working conditions – in the form of collective bargaining – took root across the industrializing and industrialized world even before

there was much by way of direct regulation of the workplace. These structures of shared self-governance became the centerpieces of national labor legislation in the early to mid-twentieth century, with direct regulation often playing a decidedly secondary role in improving terms and conditions of employment.

The decline of what we may call “Old Governance” in the workplace sets the stage for the rise of “New Governance.” At the same time, the institutions of “Old Governance” will play crucial roles in speeding or slowing, and in any case shaping, the development of “New Governance” strategies.

The Rise and Fall of “Old Governance”

Governance-based approaches took hold in the workplace context so long ago, practically with the emergence of wage-based employment itself, because the workers whose wages and working conditions were at stake were (mostly) competent adult participants in the organizations that society sought to regulate. In most regulatory contexts – pollution, unsafe or deceptive consumer products, or financial fraud, e.g. – society is moved to address harms that emanate from inside economic organizations but that primarily affect those outside the organization. Even when those affected are physically inside the organization, like hospital patients, or in contractual privity with it, like investors and some customers, they are not integral participants in the organizations' daily operations. But workers are just that, and they began demanding a role in workplace governance from the earliest emergence of the factory system. Moreover, those demands had clout behind them, for workers' role in production gave them a source of potential power. Strikes and labor unrest got the attention of both employers and policymakers, bringing the "labor question" to the top of national political agendas and amplifying workers' political demands for legal recognition of their chosen vehicles for participation in workplace governance. Across the Western market economies, national legislation created frameworks for collective bargaining through labor unions, and “industrial self-governance” became a primary mode of workplace regulation (Commons 1921; Stone 1981).

In recent decades, however, the centrality of collective bargaining has faded. The reasons are many and complex, and surely include, at least in the U.S., intensified

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employer resistance and the law's inadequate response (Estlund 2010; Kaufman 2007; Weiler 1983). But unions have lost membership and power across the developed world with the greater mobility of people, production, and capital, the rise of globalized and competitive product markets, and the shift from large integrated manufacturing enterprises to flexible and fractured networks and supply chains (Stone 2007; Wachter 2007). New workplace concerns gained political traction, while unions' capacity to address both old and new concerns seemed to erode. As a consequence, direct regulation of wages and working conditions, legislation of workers' rights, and litigation over those rights have mushroomed since the 1960s (Estlund 2010). That is the background against which some proponents of social regulation of work, wages, and working conditions have turned again to the idea of governance.

There is of course considerable diversity among labor relations systems in the developed economies. In democratic nations with a strong corporatist dimension to their labor relations systems, and in the European Union (E.U.), the trade unions have an institutionalized political voice that is not strictly dependent on their membership. Institutions of "social dialogue," in which the major trade union federations are lead actors, exist alongside electoral mechanisms of political representation (European Commission 2008; Bercusson & Estlund 2007). There one also sees the emergence of additional structures of worker participation in workplace governance, such as works councils and "co-determination" through employee representation on corporate boards, to which I will return. In the U.S., by contrast, unions have no comparable institutionalized role in the political process. The term "social dialogue" in the U.S. is likely to evoke puzzlement (or to be confused with what occurs at a cocktail party). The unions have been unable to muster the political muscle to secure labor law reform that might help reverse their decades-long decline, and unwilling to support alternative forms of worker representation that might become rivals and threats to their own shrinking role in workplace governance. So it is in the U.S. that the return to governance, and the development of new forms of workplace governance in addition to collective bargaining, is both most urgent and most difficult.

New Governance and the Rise of Regulated Self-Regulation

Modern governance-based approaches to workplace relations aim to take account of the prodigious internal regulatory capacity by which large firms manage both their response to proliferating regulatory demands of governments and the increasingly complex networks through which they produce and deliver goods and services (Ayres & Braithwaite 1992; Estlund 2010; Parker 2002; Lobel 2005; Lobel 2004). Corporate compliance systems make up an important part, but still only part, of firms' "self-regulatory" capacity.³

In a sense, governance has long been part of the regulatory repertoire, for governments activate firms' internal self-regulatory capacity, even without paying explicit attention to it, by imposing traditional forms of *ex ante* regulation and *ex post* enterprise liability rules. If the law requires a particular kind of machine guard, and penalizes its absence, firms will deploy rules, resources, and procedures to ensure that the guards are in place (provided that the penalties and probability of detection are large enough). And if tort law makes firms liable for injuries caused by their products, or antidiscrimination law holds a firm liable for racially discriminatory discharges, firms will presumably put in place organizational precautions against such incidents (subject to the same proviso). So even the most conventional "command-and-control" forms of regulation, when applied to complex organizations, trigger and rely on governance mechanisms within those organizations (Estlund 2010). But traditional regulators treat the regulated organization as a "black box," looking strictly at outputs while ignoring internal organizational dynamics. The "return to governance" here is meant to capture the trend toward explicit public engagement with and shaping of organizations' internal governance mechanisms. The national systems of collective bargaining that arose in the 20th century are systems of governance in that sense; the precautions that firms took on their own under the growing shadow of regulation and litigation were not.

The traditional "black box" approach to organizations' internal structures left organizations to figure out for themselves what precautions – what internal organizational techniques and incentive structures, e.g. – will reduce bad, socially-sanctioned outcomes (to the point that additional precautions will cost more than the

liability and sanctions they avoid). Regulators are presumably less adept than organizations at these fine-grained judgments. But the "black box" approach has serious weaknesses, too. It may invite firms to take "precautions" that reduce the risk of detection or punishment without reducing bad outcomes (Arlen 1994; Arlen & Kraakman 1997; Khanna 2000). Moreover, the "black box" approach ignores wide variations in the disposition and capacity of regulated actors to comply with social norms, thus wasting regulatory resources on those that can regulate themselves and devoting inadequate resources to policing those that most need policing (Ayres & Braithwaite 1992).

These are some of the considerations that have led regulators and courts to attend explicitly to firms' internal structures in deciding how rigorously to police firms and how to deal with incidents of non-compliance – whether through harshly deterrent sanctions, milder sanctions, or more supportive, capacity-building remedial approaches. Braithwaite's influential model of "responsive regulation," for example, would place firms that maintain mechanisms of effective self-regulation on a more cooperative regulatory track. Crucially, firms that fail to engage in effective self-regulation, whether for lack of capacity or of will, should garner closer scrutiny and harsher sanctions; that helps to drive firms to invest in self-regulation and protects self-regulators from destructive competition, and it is part of what distinguishes regulated self-regulation from deregulation (Ayres & Braithwaite 1992; Braithwaite 1985; Braithwaite 2008). Such regulatory strategies have been taking hold across the developed world and across many arenas of social regulation (Braithwaite & Drahos 2000).

Consider the evolution of antidiscrimination law and practice in the U.S. (Dobbin 2009; Edelman 1999; Edelman 1992; Edelman 1993). First, the prospect of costly discrimination lawsuits (or loss of federal contracts) led sizable firms to institute internal equal employment opportunity (EEO) structures. Initially employers' EEO programs had no direct bearing on their liability, except perhaps by preventing or remedying discrimination before it reached the courts. But eventually the courts began to take explicit notice of "effective" internal EEO programs, and to mitigate some elements of liability for firms that maintained them; that, of course, gave further momentum to the adoption of internal anti-discrimination procedures. The resulting

growth of an internal EEO constituency helped to generate corporate support for "diversity" and "inclusion" initiatives that firms embraced as their own. The transformation of corporate attitudes toward previously excluded groups suggests some of the positive potential that lies in the "return to governance" in the law of the workplace.

The Question of Participation in Workplace Governance

The scholarly proponents of governance-based approaches to regulation emphasize the need to engage stakeholders -- workers in the case of labor standards and employee rights -- to monitor self-regulation and to guard against cheating and regulatory capture (Ayres & Braithwaite 1992; Estlund 2010; Parker 2002; Lobel 2009; Parker 2007). It is not clear, however, that we should *define* governance-based regulatory strategies as involving stakeholder participation. Not all governance is good governance, and not all governance is participatory; even autocrats engage in governance. Similarly, a regulatory strategy that relies on, engages with, and shapes organizations' internal self-regulatory mechanisms -- like the judicial doctrines tailoring employment discrimination liability in part on the basis of internal EEO procedures -- is a governance-based strategy even if it fails to ensure workers a meaningful role in governance.

So even as regulators carry out a "return to governance" in the workplace, that may or may not signify a return to *participatory* governance. Where workplace regulators allocate scrutiny, rewards, and sanctions based on firms' maintenance of particular compliance structures, will they require worker participation as part of those structures? Thus far, at least in the U.S., the answer is mostly no; and that is a problem, particularly as regulators increasingly rely on self-regulation to advance societal objectives (Estlund 2010). Participatory self-governance mechanisms (at work as elsewhere) have both intrinsic and instrumental virtues. They enable workers to engage cooperatively with fellow citizens to shape decisions that affect them; and they also help ensure compliance with publicly-mandated labor standards and employee rights. Collective bargaining, that most venerable form of participatory workplace governance, was once expected to deliver those intrinsic and instrumental

benefits for most workers. As collective bargaining has waned in power and reach, however, a crucial question is whether alternative mechanisms for employee participation in workplace governance can promote at least the instrumental goals of participation, and perhaps the intrinsic goals as well.

Forms of Worker Participation: A Taxonomy and a Paradox

So let us turn to the question of what forms worker participation in workplace governance might take in a world in which industrial self-governance through collective bargaining must be regarded as merely one possibility. Some sort of taxonomy seems in order. Let us begin by arraying forms of workplace participation in terms of their “democratic-ness,” or their resemblance to democratic modes of collective decisionmaking.

It is worth observing at the outset that, on a yardstick of “democratic-ness,” collective bargaining is a decidedly truncated form of worker participation in governance. Workers elect their own representatives, to be sure; but those representatives have no decisionmaking power in the enterprise. They can only attempt to wrest concessions from management by exerting whatever “bargaining power,” or economic leverage, they can muster given extant labor market conditions, workers’ position in production, and their solidarity. Other forms of worker participation in governance are obviously more democratic, including worker-ownership, with election of management by all workers in the enterprise (Dow 2003). But collective bargaining may be the most democratic form of worker participation that is historically consistent with capitalism and the modern private corporation as we know them in most of the world. In particular, U.S.-style collective bargaining, where it exists, gives workers genuine collective influence in workplace-level disputes through jointly-administered grievance-arbitration procedures. We will work our way back to collective bargaining in due course.

At the other end of the spectrum, the least democratic level of worker participation that is practicable within the modern corporation is far from zero. At a minimum, workers participate within the modern corporation as ordinary employees; employees, with varying degrees of autonomy and authority, make and carry out

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organizational decisions of all kinds. Moreover, employees whose skills are scarce and highly valued may have considerable individual “voice” within their organizations by virtue of their market power and their ability to threaten exit. These individual, market-inflected forms of employee involvement might not be conceived of as “participation” in governance at all. But much as autocratic governance is still governance, it may be analytically cleaner to define these forms of involvement as “participation” – not recognizably democratic, nor effective for most rank-and-file employees, but quite effective for others. This usage suggests, controversially, that there is an irreducible minimum of “participatory governance” in the modern corporation, however hierarchical. But it highlights the fact that employees inevitably play crucial roles within the governance of their organizations because organizations are made up of employees; that sets them apart from other external stakeholders, and may provide a platform for more extensive forms of participation.

So, for example, one organizational innovation that has become ubiquitous in internal compliance systems is the creation of reporting systems through which employees can report violations of internal rules or external laws, anonymously or otherwise, to managers responsible for compliance (Lobel 2009). Those internal reporting systems are supposed to improve compliance with environmental laws, securities laws, and consumer safety laws, among others; they are among the formal requisites of effective self-regulation within some regulatory schemes (U.S. Sentencing Commission 2009, § 882.1). In the case of employment laws, these reporting systems play a larger role, for employees are not only observers and potential monitors but also victims of misconduct with formal recourse to judicial or administrative remedies against the employer. Employee reporting systems in the employment context tend to be more elaborate, often with one or more levels of appeal. These systems may be mere formalities, or they may be formal manifestations of a broader organizational commitment to procedural fairness and to a “culture of compliance” that is a linchpin of effective self-regulation (Tyler et al. 2008). Either way, employee reporting systems have become virtually obligatory within large and medium-sized corporations (Edelman 1999).

The dual role that employees play within a workplace grievance program – as both monitors and victims of non-compliance – captures a paradox in the nature of

self-regulation of employment practices, and a challenge for the return to governance in the workplace. On the one hand, self-regulation of employment practices may be strengthened by the convergence of self-interest and insider knowledge that employees bring to the self-regulatory process. On the other hand, employees might be bribed, threatened, or pressured into silence by the organization that employs them; and that vulnerability potentially undermines their role both in internal compliance and in external enforcement of workplace laws. In the case of laws protecting consumers, the environment, or investors, the victims of misconduct are outside the firm's control; their private remedies, judicial and administrative, supplement both self-regulation and public enforcement. In employment law, however, both private enforcement litigation and internal complaints emanate from within the regulated organization, from employees who are subject to both economic pressures and subtler pressures of organizational loyalty.⁴ The threat of external enforcement through litigation helps to keep internal compliance systems honest and to motivate employers to invest in them. Yet that threat is muffled by the same fears and pressures that can undermine employees' willingness to utilize internal reporting systems. The paradoxical mix of strengths and vulnerabilities that employees bring to their role in mechanisms of both internal compliance and external enforcement thus gives a distinctive character to the return to governance in the workplace.

The solution to this paradox is neither mysterious nor novel: Employees need independent collective representation -- with a foot both inside and outside the organization -- in order to overcome the social and economic pressures that inhibit individual efforts to redress grievances both internally and externally (Estlund 2010). Collective representation can also solve the collective action problems that plague individual efforts to redress shared grievances. Many workplace violations stem from conditions or policies that inevitably affect many workers at once; the benefits realized by any one complainant are swamped by both the collective benefits to employees and the cost of redressing those grievances. Collective representation is a well-understood solution to the collective action problems that result (Freeman & Medoff 1984). U.S.-style unions rather neatly resolve both the collective action problems and the fear of reprisals that inhibit individual participation in workplace governance and internal compliance mechanisms. Not surprisingly, employee rights

and labor standards are more reliably respected in unionized workplaces (Wachtman 1994; Weil 1991).

Thus does the agnosticism of our definitions give way to a preliminary conclusion: While governance-based strategies do not necessarily entail *participatory* governance, and employee participation is not necessarily *collective* participation, for the run of cases and employees covered by the law of the workplace, *effective* governance-based regulatory strategies generally do require collective employee participation in governance.

Of course that brings us back to the problem that underlies the return to workplace governance: the decline of collective bargaining. Collective bargaining still dominates the law and the politics of employee participation in workplace governance, at least in the U.S., where federal labor law bars most alternative forms of employee representation.⁵ Unions in the U.S. tend to regard alternative structures for employee representation more as rivals than as aids in the protection of workers' interests (Dunlop Commission 1994). So they hold fast to the 75-year old ban on "company unions," and pin their hopes on labor law reforms that would better enable workers to form a union and bargain collectively. But when we pause to consider that even a near-miraculous tripling of union density in the U.S. would leave three-fourths of the private sector workforce without collective representation, it seems inescapable that alternatives are needed. The crucial challenge facing the return to workplace governance in the U.S. is whether we will see the rise of institutions of collective representation other than unions and collective bargaining.

New Forms of Collective Worker Representation: Old Governance versus New Governance?

In Europe, Australia, and elsewhere, union decline has been both less dramatic and less consequential for workers. That is because unions effectively represent many non-members through corporatist channels, including mechanisms of "social dialogue" and sectoral wage agreements, and because many workers are represented through works councils as well as through unions.⁶ Elected works councils are entitled to receive information and to consult (but not usually bargain) with employers on a range of matters affecting employees (Rogers & Streeck 1994). Works councils

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may work best in conjunction with a union, and the possibility of industrial action, to back up employee voice. Indeed, works councils may help fill what might otherwise be a workplace “representation gap” in Europe, for collective bargaining generally takes place at the sectoral level, and does not serve as the sort of vehicle for workplace-level participation and dispute resolution that it does (where it exists) in the U.S.

Works councils may thus compare unfavorably to a well-functioning U.S.-style collective bargaining relationship. But for non-union workplaces, works councils would represent a big step toward participatory governance, and are seen by some U.S. labor scholars as a potential solution to the “representation gap.” (Levine 1998; Weiler 1990; Befort 2004; Hirsch & Hirsch 2007; Kochan 2006). Unfortunately, the academy appears to be the only constituency in the U.S. for works councils; neither unions nor employers have shown the slightest inclination to go down that road.⁷ Employers vehemently oppose them, fearing they will open the door to unionization, while most union observers view them as a potential rival and impediment to unionization. (And if the unions changed their minds, employers would surely redouble their opposition.)

More plausible politically is the notion of loosening the statutory ban on voluntary, employer-sponsored vehicles of employee representation.⁸ While the unions are largely hostile to this notion, history suggests that the experience of collective representation, even if coopted by the employer, might nudge some employees down the path toward independent union representation (Barenberg 1994). Many employers, for their part, see potential operational value in non-union forms of employee representation that they can control (even if they also see a risk, again, of shortening employees’ path to unionization). That suggests a possible reform strategy: If a regime of “effective self-regulation” of employment practices qualified an employer for regulatory concessions, and if an appropriate structure of employee representation were held to be one element of “effective self-regulation,” employers would be more inclined to take what they apparently regard as a risky step toward employee participation in governance.

Politics aside, this reform strategy would make sense only if the law included adequate safeguards against employer capture and manipulation of employee

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representatives, and only if the resulting structures of “effective self-regulation,” with employee representation, actually did improve compliance with employee rights and labor standards beyond what can be achieved through traditional forms of regulation. It is a major challenge to identify criteria of “effective self-regulation” that are strong enough to ensure efficacy, while at the same time congenial enough to employers to nudge them toward the self-regulatory high road. A crucial part of the calculus will be the nature of the default regime for non-self-regulators. Tougher regulatory scrutiny and sanctions on low-road employers will both make the high road more appealing and protect responsible self-regulators from unfair competition.

The challenge of identifying the necessary elements of genuinely effective self-regulation epitomizes the challenge facing the turn to governance itself. At least in North America, much of the vocabulary of new governance – terms like “cooperation,” “voluntary compliance,” and “self-regulation” – has been badly tarnished by its use as a thin cloak for a neo-liberal deregulatory agenda (Arthurs 2002; Blackett 2001; Krawiec 2003). For their part, the proponents of new governance-based approaches to regulation, while keen to distance themselves from that agenda, acknowledge the difficulty of developing reliable indicators of both good faith and capacity on the part of supposedly responsible self-regulators (Parker 2002). How can regulators and the public be confident that the appearance of self-regulation is real rather than a ploy to garner the less vigilant policing and less punitive sanctions that are reserved for those taking the high road?

In the context of workplace regulation and governance, the central challenge is sharpened as it is refracted through the institutional legacy of “old governance” – the labor movement and its long history of collective self-help and collective bargaining on behalf of workers. Even as their membership and power have declined, the unions are loathe to give up the symbolic and political primacy of collective bargaining in favor of alternatives that appear untested, toothless substitutes for union representation. At least in the U.S., all talk of alternative forms of employee representation is clouded by historic battles against “company unions” and current battles against sophisticated anti-union strategies.

So “new governance” is a very hard sell among the unions in some quarters of the developed world. That is a serious problem. For unions remain the only broad-

gauged representatives that working people have within the political process. If they do not participate constructively and vigorously in policy discussions about new approaches to workplace regulation, then those new approaches are likely to evolve without adequate provisions for worker participation – and probably without adequate attention to the need for a strong backdrop of public enforcement. We are more likely to see flawed and undemocratic forms of governance-based regulation than a reinvigoration of stronger and tougher adversarial enforcement.

In the U.S. at least, progress toward participatory forms of New Governance" may be stalled at least until labor law reform makes it reasonably possible for workers to choose collective bargaining if that is what they want. The freedom of employees to form a union and bargain collectively remains a crucial part of the labor landscape, as well as a core labor right under international law. Unions themselves are still the best collective representatives for workers within a governance-based regulatory strategy. And even though unions cannot be the only institutions through which workers participate in workplace governance, the option of union representation must be a real one. For the "threat" of unionization encourage non-union employers to maintain decent working conditions and respect for workers' rights, much as the background threat of adversarial public enforcement helps to encourage firms to self-regulate (Doorey 2010). In other words, union representation -- the one comparatively democratic form of workplace governance now available to U.S. workers -- is so vehemently opposed by employers that it may function as the looming threat, equivalent to onerous fines or other coercive sanctions, that induces firms to comply with decent labor standards and employee rights. Labor law reform is needed, on that account, to make real the threat of unionization and to deter serious labor violations. This is ironic, of course. But more than that, it underscores the need to couple traditional labor law reform in the U.S. with other, less "threatening" mechanisms for employee participation in the self-regulation of labor standards and employee rights.

In the U.S., unions are currently shaping the rise of new governance-based approaches to regulation mainly by their absence from the discussion and their insistence on a restoration of traditional collective bargaining mechanisms (and traditional adversarial enforcement). Fortifying those traditional mechanisms is

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necessary but not sufficient to meet the challenges facing workers in the 21st century. In Europe and elsewhere, unions have retained enough political and economic power, even as membership ebbs, to participate more confidently and creatively in the development of institutions for participatory workplace governance. One way or another, the institutions of “Old Governance” in the workplace will play a crucial role in shaping “New Governance” institutions and in representing many workers within those new institutions.

Endnotes

- ¹ By "governance-based approaches" to regulation, I mean strategies such as "regulated self-regulation" that deliberately seek to steer organizations' internal governance mechanisms toward regulatory objectives.
- ² My focus here is on how societies pursue their regulatory objectives, not on what those objectives are or how they are chosen. I assume (heroically, perhaps) that societal objectives, including labor rights and standards, are determined through a functioning democratic political process.
- ³ At least for large branded firms, both the operational and compliance sides of the self-regulatory enterprise increasingly extend to suppliers. Multinational firms have thus become not only part of the problem of exploitation of workers and resources in developing countries, but potentially part of the solution (Braithwaite 2008; Fung et al. 2001, Gereffi, et al. 2005).
- ⁴ Employees rarely sue their current employer (Donohue & Siegelman 1991; Estlund 2007). The predominance of ex-employee plaintiffs tilts private enforcement toward laws regulating discharge (versus laws ongoing conditions such as harassment or unpaid overtime); and toward retrospective, monetary relief (versus prospective remedies that benefit current and future employees) (Estlund 2007).
- ⁵ The NLRA prohibits employer assistance or domination of "labor organizations," which include "any organization of any kind ... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers" on terms and conditions of employment. Nat'l Labor Relations Act, 29 U.S.C. §§ 152(5), 158(a)(2) (2006).
- ⁶ Workers are also represented on firms' boards of directors pursuant to "co-determination" schemes pioneered in Germany (European Commission 2008).
- ⁷ Indeed, a 1995 proposal for mandatory workplace safety committees, as part of an occupational safety and health reform bill, met both strong employer opposition and union skepticism (Estlund 2010).
- ⁸ A proposal to loosen the NLRA's restrictions on employer-sponsored forms of employee representation narrowly passed both houses of Congress in 1996 but was vetoed by President Clinton (Estlund, 2010).

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