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RECONSTRUCTING AMERICA'S SOCIAL CONTRACT IN EMPLOYMENT: THE ROLE OF POLICY, INSTITUTIONS, AND PRACTICES

THOMAS A. KOCHAN*

The primary challenge facing labor and employment policies in the next decade is to reconstruct the social contract between the American workforce and employers in ways that address the needs and realities of a modern economy and society. To do so, the country will need to modernize the labor and employment policies carried over from the New Deal era and foster innovations in labor unions, labor market institutions, corporations, and in their relationships.

Unfortunately, the political will to take on this task is absent at the national level of policy-making and political discourse. Instead, the failed efforts at incremental reforms in labor policy have characterized the past two decades, starting with the 1977 labor law reform debate and more recently illustrated by the failure of the Dunlop Commission to break the political impasse over labor and employment policy.¹ The result is that analysis and debates over these issues have been marginalized as “special interest politics.”

How then should we proceed? Perhaps we should return to our roots and take a lesson from the work of John R. Commons and his associates, whose work in the early years of this century eventually laid the intellectual foundation for the New Deal labor and employment policies. I believe we are in an environment similar to the one these pioneers of labor policy faced, a point I will return to at the end of this essay. In the intervening sections, I will attempt to outline the changes in national policies and institutions that I believe

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1. See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT OF COMMERCE AND LABOR, FACT FINDING REPORT (May, 1994).

are needed to support workers and employers in their efforts to renegotiate a social contract suitable for the modern economy and workforce.

I. WHAT IS MEANT BY THE TERM "SOCIAL CONTRACT"

The term social contract is often used but seldom defined. I use it to characterize the mutual expectations and obligations that employees, employers, and society at large has for work and employment relationships. These expectations and obligations are derived from a constellation of factors, including one's career aspirations, occupational norms, education and professional training, macro economic trends and performance, and societal values regarding democracy, freedom of expression and association, equity and fairness, etc. The social contract that is under duress today grew up over the decades following World War II in which an expanding economy produced a set of rising expectations and aspirations in society that carried over to relations at the workplace. While a caricature, the features of that social contract generally included the expectation that wages and earnings would rise in tandem with increasing productivity and prosperity of employers and economy. Hard work and good performance, and loyalty would be rewarded with security, fair treatment, dignity, and status. With increased tenure at a firm came certain "property rights" to a job. That is, job and income security would accumulate over time with tenure, thereby producing an upward sloping age-earning profile, rising standards of living, and savings for retirement.

At the macro level, the economy has performed relatively well in generating new jobs, reducing unemployment, controlling inflation, and improving the competitiveness of American firms in global markets. Compared to historical standards, however, the economy has performed relatively poorly when measured against improvements in real earnings, income inequality, employment security, and income security for workers displaced due to economic and organizational restructuring. Therefore, improving the quality of jobs and employment outcomes must be a primary objective.

The United States has performed poorly on another dimension of national welfare that does not show up in aggregate economic statistics: it has allowed its basic labor market institutions and their relationships to deteriorate and become more adversarial, thereby reducing their capacity to innovate and adjust to the changing

workforce and economy. A critical task for labor and employment policy makers lies in fostering innovations within these institutions and reconstructing positive relations among them. The starting point for this effort is to update how we view employment relationships today.

II. TRADITIONAL PERSPECTIVES ON THE EMPLOYMENT RELATIONSHIP

For more than sixty years, American labor and employment policies have been predicated on a view of work and employment as a long-term relationship between a large firm competing mostly in an expanding domestic market involving one of two types of employees, hourly wage workers or salaried managers, with a spouse at home attending to family and personal matters. However, today's labor force and employment practices vary considerably from this standard picture. The distinction between management and labor or exempt and non-exempt is increasingly blurred by the movement to decentralize decision-making to lower organizational levels and the growth in technical, middle and lower level managerial, and professional occupations. The increased labor force participation of women has not only changed the demographic make-up of the labor force, but also challenged deeply engrained assumptions about the relationships of work, family, and personal life. The prevalence of part-time work and the growth of temporary, contract, and self-employed workers, along with the increased risk of permanent job loss, adds further variation to the nature and duration of employment relationships.

The New Deal employment policies were enacted with a focus on the domestic economy. The underlying objective of these policies has been to standardize conditions at the high levels that Americans expect and thereby "take wages and terms of employment out of competition." However, globalization of product markets, along with increased product market competition and ease of entry into highly differentiated domestic markets, render efforts to take wages out of competition through standardization difficult if not impossible. In the absence of a policy that promotes improvements in labor force quality, availability, and utilization, this inability to standardize wages leads to both "a race to the bottom" *i.e.*, a decline in wages of those lacking the skills needed to provide firms with a competitive advantage on the basis of product quality, technological innovation,

and customer service, and to an increase in the premiums offered to those who have the skills and abilities needed by firms seeking to compete on these other grounds. Thus, the future of the overall wage structure and income distribution in the United States will be determined by the ability of our policies and institutions to supply a labor force with the skills needed to compete on bases other than wages and labor costs and to encourage American firms to compete on this basis, rather than get mired in a fruitless “race to the bottom.”

The New Deal labor policies were based on a fundamental premise that continues to be valid and useful in an economy with highly varied employment relationships. That is, the premise underlying collective bargaining has always been that the parties closest to the problems of their workplace are best positioned to shape the terms and conditions of employment that suit their needs and circumstances. This, I would argue, is a first principle to which we need to return if we are to reconstruct a social contract suited to today’s economy and workforce. To implement this principle in an effective way in today’s economy; however, will require several fundamental changes in perspectives.

First, the implicit model of the standard employment relationship needs to be replaced with a more accurate view of the range of employment settings observed in today’s economy. The starting premise must recognize and build on the variations found in contemporary employment relationships. The goal should be to encourage continuous upgrading and improvement in employment practices and standards in ways that allow for flexibility in how the underlying policy goals are achieved.

Second, employment policies should anticipate and support mobility across jobs and employers. Policies designed to encourage high and improving employment standards and practices within individual firms and employment settings need to be integrated with policies designed to encourage mobility so that the costs of job changing are reduced and the costs to employers of hiring and developing new employees are likewise lowered.

Third, the enforcement and monitoring of employment regulations should also build on the variations in employment settings by encouraging the development and maintenance of democratic self-governance processes among the parties to employment relationships. By recognizing that the parties closest to the workplace know the most about how to adapt broad principles to fit their particular circumstances, and by giving them the opportunities to implement

this principle in practice, we can achieve the goals of our national policies both more efficiently and effectively and encourage practices and innovations that move us above the minimum standards required by law.

Finally, the twenty-year record of failed efforts at incremental reforms or negotiated compromises within the existing policy framework suggest that a different approach is also needed to the design and enactment of labor and employment policies. The marginalization of these issues to the status of "special interest politics" and the inability of the traditional interest groups—labor and business—to negotiate compromise or incremental reforms in the face of mounting problems suggest new participants need to be brought in to the process of policy formation and debate. In short, a broader constituency needs to be created that sees an effective and modern labor and employment policy vital to its goals and aspirations. Workers at all occupational levels are an important part of this constituency and therefore we need to listen attentively to their voices and bring them into the policy making process.

III. THE SUBSTANTIVE CHALLENGES

The foundation of a policy that supports renegotiating the social contract in employment lies in the rules governing interactions between employees and employers in negotiating the terms and conditions of employment and their day-to-day administration. Unfortunately, this aspect of American labor law is perhaps the most outdated and ineffective of all components of employment policy. This was one of the basic conclusions documented in the *Fact Finding Report of the Commission on the Future of Worker Management Relations*.² Three sets of problems were identified.

A. *Failure of Labor Law*

A basic tenet of the National Labor Relations Act is that employees should be able to choose whether or not they wish to be represented by a labor union for the purpose of collective bargaining. This is a bedrock principle for labor policy in any democracy and remains as valid and necessary today as it was when first embodied in national policy in the 1930s. Unfortunately, rather than a free choice, the process by which employees gain access to union representation

2. See generally *id.*

today often resembles a highly pitched, high-stakes battle in which the benefits to the winners and the costs to the losers are very high. Consider the basic facts:

1. The level of conflict, as measured by the number of unfair labor practices that occur and the likelihood of legal challenges that extend the time required to complete a representation election process, has increased over the years resulting in increased frustrations among workers and unions with these procedures. The reality today is that only a very small number of workers and unions trust and use the election procedures to gain recognition (in the 1990s, on average, less than 250,000 workers voted in certification elections per year, out of approximately sixty-five million non-union workers eligible under the law).
2. The probability that a worker will be discharged or discriminated against for attempting to organize a union increased over the past twenty years. Approximately twenty-five percent of representation election processes result in at least one worker being illegally discharged.
3. Where unions win elections, approximately one-third fail to achieve a first contract as the battle over initial recognition continues into the negotiations process.

These problems could be addressed by making improvements in the procedures and legal remedies that govern current organizing and representation election procedures. Unnecessary delays in the election process could be reduced by broader use of injunctions to put workers discharged during organizing campaigns back to work immediately. Challenges to bargaining units could be heard by the National Labor Relations Board after the election is held and the results tabulated. Arbitration of first contracts could be provided in those cases where it is necessary to achieve a fair first contract. Indeed, these are essential starting points for remedying long-standing and clearly documented injustices in the law as it is actually experienced by workers and employers today.

But these changes are only a starting point. Alone, they do nothing to address the deeper structural limitations of the National Labor Relations Act (“NLRA”). The basic structural problem can be summarized as follows: the only way to gain union representation is for a worker to convince a majority of his or her peers that management cannot be trusted (or, in plain English, that the employer is a bastard) and that collectively they should run the risk of

losing their jobs to gain representation. If a majority cannot be convinced to do so, or if the majority is not successful in overcoming the delays, employer opposition, and workplace tensions that accompany the union recognition and first contract bargaining process, no individual gets representation even if up to forty-nine percent want to be represented. If the workers are successful in establishing a bargaining relationship, they can expect the employer to resist contract improvements to the extent that competitors are not also organized and likely to match the union negotiated gains.

The fact is that the U.S. has the most rigid and high cost system of worker representation of all the industrialized democratic countries. The risks and costs to workers come in the difficulty any individual has in gaining access to representation under the law. The costs to employers come if it does get unionized and must compete against other non-union domestic employers or with firms from a low wage country.

The result of this limited system and the difficulties workers encounter in gaining access to it and using it to address their key interests are visible in worker surveys dating back from the 1970s to now. About one-third of the non-union workforce express an interest in joining a union. This implies that nearly twenty-five million workers want to be represented by a union but cannot gain access to representation.³ These same surveys consistently find that there is a latent demand for another form of representation not anticipated or supported within traditional labor law. Approximately seventy to eighty percent of the respondents to these surveys indicate an interest in being a part of a process that consults and has significant influence in decisionmaking, but that has the cooperation, not the opposition, of management. The clear and consistent message is that workers want more varied forms of participation and representation than the type promised but not realized in the NLRA.

Given that the primary focus of collective bargaining remains wages, benefits, and working conditions, employers have strong incentives to resist unions, and, once organized, must compete with non-union firms that are on average likely to experience at least (and in some cases more) ten to twenty percent lower wage and benefit costs. This further reinforces the adversarial tendencies of the U.S.

3. See Thomas A. Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV., Apr., 1979, at 23, 23-31; See also RICHARD B. FREEMAN & JOEL ROGERS, *THE WORKER REPRESENTATION AND PARTICIPATION SURVEY* (Princeton Survey Research Center 1994).

labor relations system. While some of these costs to employers are unavoidable, the trade-off between representation and employer costs could be reduced by opening the law up to allow for alternative types of representation in addition to exclusive representation under collective bargaining. Some of these might involve the type of direct employee participation that will be discussed below, however, others could involve a variety of elected or jointly selected workplace or enterprise councils that involve the full range of employees found at the workplace and worker representation in corporate governance structures, etc. One advantage of opening the law up to allow for these alternative structures and processes is that it would encourage the type of institutional innovation in labor organizations that will be called for in a later section of this paper.

B. Failure of Labor Law to Promote Direct Participation⁴

In response to intensified competition and worker expectations for a voice in workplace affairs, a majority of American employers have introduced one or more types of direct employee participation. Recent surveys find these programs equally likely to be in unionized workplaces as in non-union workplaces.⁵ Employee surveys indicate both a high level of interest in having the opportunity to participate directly in workplace decisions affecting their job and, where present, the majority of employees want to see these practices sustained. The evidence to date suggests that the broader the scope of the innovations, the bigger their effects on productivity and quality.⁶ Yet the broader their scope, the more they are likely to also violate provisions of the NLRA. Thus, another limitation of the labor law inherited from the New Deal era is that it not only does not encourage and support new forms of employee participation within the workplace that hold promise for improving economic performance and worker welfare, but also some of the law's provisions may limit the development and diffusion of new approaches to employee participation in workplace problem-solving,

4. See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 1.

5. See generally THOMAS A. KOCHAN & PAUL OSTERMAN, *THE MUTUAL GAINS ENTERPRISE* (1994); RICHARD B. FREEMAN & JOEL ROGERS, *supra* note 3; Seymour Martin Lipset & Noah M. Meltz, *Canadian and American Attitudes Toward Work and Institutions*, 1:3 PERSPECTIVES ON WORK, 1419 (1997).

6. See Casey Ichniowski et al., *What Works at Work: Overview and Assessment*, 35 INDUS. REL., 299-333 (1996).

enterprise decision-making and governance.

These limitations could, in theory, be addressed by eliminating or modifying section 8(a)(2) of the NLRA that limits employee participation in non-union settings. The problem with this type of surgical excision is that it would not only leave the other problems with the law unaddressed, but would also make it more difficult for workers to gain access to independent representation since one of the most effective union avoidance strategies an employer can mount is the promise of an employee participation program. Thus, any easing or elimination of the restrictions on employee participation need to be accompanied by increased opportunities for individual workers to choose the forms of participation and representation that best suit their circumstances and needs. As will be noted below, opening up labor policy in this comprehensive way would also help to foster the institutional innovations needed to improve the efficiency and effectiveness of workplace regulations.

C. Increased Regulations, Declining Enforcement⁷

A third problem relates to the range of regulations governing specific issues or practices in the workplace. The number of regulations has grown, the number of claims brought before enforcement agencies has increased, even as staffing levels and other resources have been kept flat or declined, and the number of members of the labor force that are either excluded de facto for lack of resources or de jure for falling outside the definition of a "covered employee" renders these legal protections meaningless for large numbers of labor force participants. Thus, an overhaul is needed of both the scope of coverage and the means used to enforce and monitor compliance with these regulations. Recently, the Occupational Safety and Health Administration ("OSHA"), the Equal Employment Opportunity Commission ("EEOC"), and the regulatory agencies administered within the Department of Labor all announced initiatives designed to encourage use of alternative means for resolving problems and increasing compliance. OSHA, for example, has encouraged state and regional experimentation with self-governance programs in which it reduces the use of its inspection and penalties in workplaces that have in place comprehensive safety and health programs that include a role for employee participation.

7. See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 1.

The EEOC and the Department of Labor are experimenting with use of voluntary mediation and arbitration to resolve claimed violations of employees' statutory rights. But all of these efforts run the risk of violating labor law by encouraging employee participation on working conditions covered under the NLRA. Safety, for example, is a mandatory subject of bargaining. Labor management committees in non-union settings that make effective recommendations on safety issues would likely be in violation of section 8(a)(2) of the NLRA.

Similar problems are likely to exist with the expanded use of ADR techniques to resolve workplace disputes involving statutory rights. Most experts agree⁸ that ADR techniques work best when they are part of a comprehensive system of workplace justice that includes, among other things, internal grievance and appeal procedures that often involve employee committees or peer review panels to hear complaints and recommend resolutions.⁹ Again, these types of processes, which more and more firms are implementing to address the diverse types of conflicts that arise in workplaces today, run afoul of the NLRA's restrictions on employee participation in non-union settings.

A second challenge to the use of ADR and workplace self governance procedures as alternatives to traditional regulatory strategies is that individual workers are at a significant power disadvantage in processing a complaint or raising a safety concern vis-a-vis their employer. Civil rights advocates, women's groups, and union representatives have voiced this critique with particular passion.¹⁰ To the extent that this is a problem, the obvious solution is for unions and/or other advocacy groups to provide representation services to individuals and groups that have a need for this type of representation. I believe this is a challenge and an opportunity for labor organizations. Again, however, it will take the reforms in labor law proposed above to open the law to this type of institutional innovation and new type of representation.

D. Lagging Changes in Labor Markets

So far all of the changes in labor policies and regulations

8. See Mary Rowe, *Options and Choice for Conflict Resolution in the Workplace*, in *NEGOTIATIONS: STRATEGIES FOR MUTUAL GAINS*, 105, 105-19 (Lavinia Hall ed., 1993); See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 1.

9. See Rowe, *supra* note 8.

10. See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 1.

suggested focus on relationships inside the firm, or between workers and individual employers. Yet increasingly, workers' economic security and advancement are determined by their ability to move across jobs and employers. Wage inequality has increased dramatically in response to increased premiums firms are placing on education, skills with new technologies, work practices, and behavioral attributes. Permanent job loss has increased relative to temporary layoffs and spread to a broader range of occupations, therefore increasing the importance of policies designed to support mobility without large losses in earning power and income security. This, in turn, increases the importance of life-long learning and human capital development and maintenance.

Given these new realities, labor market policies need to be updated to lower the costs of transitions across employers to both individuals and firms. This implies the need to decouple provisions of health insurance coverage from individual firms, increasing the portability of pension benefits and other retirement savings plans, modifying unemployment insurance coverage to cover employees with shorter employment durations with single employers, and allowing for continuation of benefits to employees who invest in training or retraining when making a transition between jobs. Indeed, it may be time for a detailed and comprehensive look at labor market policies to ask how they might be reformed to accommodate a more mobile and transient work force.

IV. COMPLEMENTARY INSTITUTIONAL REFORMS

A. *Full Service Unions*

In a session at the 1994 Industrial Relations Research Association devoted to honoring Jack Barbash,¹¹ I argued the need for the development of a new brand of unionism: "Full service" unions—representative institutions that provide the full range of services discussed above, including: individual representation and labor market service to workers over the course of their careers, regardless of where and for whom they work; support and training for direct employee participation; collective bargaining; and representation in corporate governance structures and processes.

11. See Thomas A. Kochan, *Trade Unionism and Industrial Relations: Notes on Theory and Practice for the 1990s*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, at 185-95 (1994).

The changes in policy discussed above would both create a market and a need for this array of services. Existing union and professional associations, perhaps along with new employee organizations that would likely emerge in response to this demand, would compete for members. In this way, workers might regain control over whether or not and by what type of organization they will be represented.

The new leadership of the AFL-CIO has instilled both a renewed sense of mission and commitment to organizing, both in traditional and in new ways. In addition, organizations such as Working Today¹² and the Workplace Partnership, affiliated with the San Jose, California, Central Labor Council, are springing up and experimenting with ways of providing labor market services and a voice to contingent workers and others that are not organizable under a workplace based exclusive representative collective bargaining policy. Coalitions of community and labor organizations are at work in various cities such as Baltimore, Boston, Milwaukee, and others seeking to promote "living wage" campaigns. These are just examples of what I believe will be needed to identify the mix of different labor organizations and forms of representation and service delivery that I believe are needed today and in the future.

B. Human Capital and the American Corporation

American corporations will need to undergo equally significant changes if they are to do their part in renegotiating and updating their social contracts with the American workforce. The legal rules specifying that the goal of the American corporation is to maximize shareholder wealth grew out of an environment in the early part of this century when it was necessary to pool large amounts of finance capital to build the large scale companies capable of serving the expanding mass markets that were developing at the time.¹³ Thus, the owners of finance capital became the primary "residual risk" bearers of the firm and the most powerful beneficiaries of the success of the firm. If we are to re-negotiate the social contract in employment, we may need to open up a debate over the goals of the corporation, its governance structures and processes, and particularly over the role of

12. See Sara Horowitz, *A New Labor Market Structure for a Transient and Mobile Workforce*, 1:1 PERSPECTIVES ON WORK, at 50, 50-52 (1997).

13. See generally CARL KAYSER, *THE AMERICAN CORPORATION TODAY* (1996); MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS* (1994).

human capital as both a critical asset and a residual risk bearer.¹⁴ In many cases today, the human assets are the firm's most critical resource, yet both employment and corporate laws, and the ideologies that support them, deter employees and their representatives from participating in corporate governance and shaping corporate practices in ways that might achieve mutual gains or more equitable trade-offs and distributions of rewards to all the stakeholders who bear residual risks should the corporation fail. But the law is neither the only, nor perhaps the most critical problem. Managers and union leaders also need to have the vision and leadership styles needed to implement a stakeholder model of the firm. How we move beyond the rhetoric of the notion that employees are critical and legitimate stakeholders in corporations to the concrete changes in legal doctrines, ideology, and organizational practices is a key challenge that, if left unaddressed, will continue to limit the sustainability of many of the other policy and institutional innovations discussed above. Thus, this issue deserves a place on the policy agenda if we are to update the full range of institutions that influence the nature of social contracts in employment relationships.

CONCLUSIONS AND IMPLICATIONS

The above discussion suggests that there is no one single new social contract that will meet the needs of the economy and the labor force of the future. Thus, the challenge lies in providing the parties to employment relationships with the tools they need to re-negotiate their relationships in ways suited to their needs. For those employees with sufficient skills and labor market power this might be done on an individual basis. For many, however, it will require the modernization of labor and employment laws and institutions outlined here.

This is a tall order, and one that presently lacks a significant political constituency. It includes several changes favored by labor and opposed by management, and vice-versa, and ideas that neither interest group favors and both perceive as a threat to their interests. But this is what I believe is needed to break the political logjam that has been reinforced by years of failed efforts at incremental reforms within the prevailing legal structures. Nevertheless, there is little reason to believe significant change will be forthcoming in the short

14. See generally MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* (1995).

run. Instead, a more realistic hope might be that sufficient experimentation is fostered at the grass roots level with new approaches to addressing the issues facing employers and workers that creates the empirical basis for policy and institutional innovations when the pressures to do something can no longer be avoided.

What is our role in all of this? I mentioned at the outset of this essay that we may be in a time period similar to the one John R. Commons and his associates encountered at the beginning of this century. The dominant “labor problems” of that era were the poor working conditions found in the newly emerging mass production industries, the lack of unions or other institutions capable of providing workers with a voice in determining and improving these conditions, and the inadequacies of the common law doctrines as legal principles for governing employment relationships. Commons, his students, and his associates labored for over two decades documenting employment practices, studying newly emerging forms of unions and collective bargaining, and proposing new public policies at the state level before their ideas and research findings provided the intellectual foundation for the New Deal labor and employment laws and administrative procedures. We are now in a similar situation. While it is impossible to know how long it will take for the political pressures to build to the point where it becomes necessary and possible to enact a new set of principles and laws governing employment relations, our generation of researchers and professionals will be judged by the power of the ideas and evidence we bring to bear on these debates, if and when they occur.