October 1993

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THE OVERLOOKED MIDDLE

THOMAS C. KOHLER*

If the inhabitants of democratic countries had neither the right nor the taste for uniting for political objects, their independence would run great risks, but they could keep to their wealth and their knowledge for a long time. But, if they did not learn some habits of acting together in the affairs of daily life, civilization itself would be in peril.¹

In democratic countries knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others . . . . If men are to remain civilized or to become civilized, the art of association must develop and improve among them.²

INTRODUCTION

Humans can ignore anything, G.K. Chesterton observed, as long as the thing being ignored is big enough. The contemporary discussion swirling about the issue of labor law reform well illustrates the curious truth of Chesterton's remark. Despite the intensity with which this debate has been conducted and the air of scientific objectivity and certainty that frequently permeates it, we have managed to overlook some pretty big things. For example, we completely have failed to appreciate the fact that the better than thirty-year long decline of unions is not an isolated occurrence. Instead, it is part of a much broader and deeply troubling trend that has affected every sort of mediating group in our society. Our blinkered insistence on treating the deterioration of autonomous employee associations as a solitary phenomenon has precluded us from comprehending either the complexity of its causes or the full extent of its implications. We similarly are inclined to look past the significance of collective bargaining as a social institution as well as the conditions necessary to stable and ongoing cooperation, whether in the workplace or anywhere else.

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2. Id. at 517.
The unifying theme in all this is our pronounced tendency to overlook the importance of the middle. By middle, I mean families, religious congregations, service and fraternal groups, grassroots political clubs, unions and like institutions that mediate the relation between individuals and the large institutions of market and state that characterize so much of public life today. The healthy functioning of these mediating bodies—which Edmund Burke described as the “little platoons” of society—is of crucial concern. For it is through these bodies that we literally learn and practice the habits necessary for self-rule at both the individual and social level. This fact explains why Tocqueville placed such stress on the importance of associations and mediating groups and their potential to act as “schools for democracy.” As he so clearly understood, individuals and societies alike become self-governing only by repeatedly and regularly engaging in acts of self-government. It is the habit that sustains the condition.

Succinctly stated, we cannot learn toleration and respect for others in a vacuum. Nor can we learn or practice self-rule in isolation. As humans, we are not self-sufficient beings. We only learn who we are, and gain some sense of the fullness of our human character, through dealing with others. Hence, it is the small associations and mediating bodies, where society is realized, that act as the seedbeds for the civic virtues. For it is in them that we learn the habits necessary to sustain democratic political life. To leave these seedbeds untended is to put the entire project of self-rule at grave risk. Our tendency to overlook the middle grows out of our curious propensity to ignore the biggest thing of all: what we are as human beings and the intrinsically social character of our personhood. By so doing, we sell ourselves short and trade over our full status for a pot of message. While we—and, more importantly, those who come after us—are bound by such exchanges, we cannot help ultimately but to be both disappointed and injured by them.

One of the most complicated parts of all of this arises from the fact that the well-being of these various mediating bodies is deeply interdependent. Their existence is mutually conditioning, and the

5. See Tocqueville, supra note 1, at 63.
health of any one of them has an impact on the rest. In short, there is more involved and more at stake in labor law reform than we may think. What follows is a brief outline of a few of the things I believe are too big to ignore in considering the shape labor law reform may take.

I. Does the Employment Order Matter? Does It Matter in the Way We Typically Think It Does?

Just as we have sold the character of our personhood short, so do we tend to understate the significance of the order that shapes the employment relationship. It is tempting to ascribe this restraint to modesty, but that is one characteristic for which lawyers and academics generally are not well-known. Rather, we tend to understate the function and importance of this order because we understate or misconstrue the character of our personhood. There may be a further reason as well. Perhaps none of us really want to own-up to the responsibility that comes with suggesting and promoting a framework of norms by which peoples’ lives should be conducted.

As Aristotle, Montesquieu, and Tocqueville (among others) are at pains to point out, people’s habits are of more significance than their law. Yet, as they also make clear, law performs a pedagogical function. It thereby plays a direct role in shaping and developing the habits that undergird the legal order. In short, the law and the culture stand in a reflexive, mutually conditioning relationship. To understand the meaning of either, or their long-term effects and direction, one must take account of both.

The big problem with taking labor and employment law as seriously as we ought is that it is basically, well, a bit scruffy. Like family law (from which it developed), labor law deals with messy things like personal relationships and seemingly mundane day-to-day issues. It lacks the cool hauteur of constitutional law and the sort of cachet that attaches to model building and theory spinning. Consequently, it is relatively easy to assign the law governing employment a low status in the legal hierarchy.


Nevertheless, it is precisely its impact on the daily, the concrete, the particular, that marks the real significance of the law governing work. People are self-constituting beings. We make ourselves to be what we are through the activities in which we habitually are engaged. Consequently, it is the seemingly insignificant routines and actions of everyday life that make all the difference. For it is through them that we literally are forming ourselves as individuals and as a society.

As David Feller pointed out twenty years ago, the law governing the work relationship touches employees more directly and frequently than virtually any other aspect of the public ordering regime. That statement remains true. But it is now true of far more people, and of a far greater proportion of our populace. Indeed, the overall increase in labor force participation is one of the most striking social developments of the past forty years.

A few statistics help to illustrate the point. Currently, about ninety-three percent of adult males are in the labor force—a figure that has remained roughly steady for some decades. Since 1950, however, women’s participation in the workforce has climbed by more than two hundred percent. Presently, seventy-four percent of women aged twenty-five to fifty-four are employed, the overwhelming proportion of them full-time. Not surprisingly, working hours for women have been increasing steadily over the past twenty years. Additionally, one recently published major study shows that after

12. Working Women: A Chartbook, supra note 10, at 48. In 1990, of 9 industrialized nations (the United States, Australia, Canada, France, Italy, Japan, The Netherlands, Sweden, and the United Kingdom), only Sweden and Canada had greater female workforce participation than the United States. Since 1970, the participation gap between Sweden and the United States narrowed, while the rate for Canadian women grew rapidly and now narrowly surpasses the U.S. rate. Significant increases in workforce participation by women since 1970 also occurred in the United States, Australia, and The Netherlands. Italy’s rate of 30% was the smallest portion of the nations for which data was available. Id. at 9-10.
13. Id. at 13. The Bureau of Labor Statistics (BLS) figures show that 77% of employed adult women worked 35 or more hours weekly. Among unemployed women, 80% were seeking full-time work. Also see figures in Table A-16, at 48.
14. Thus, between 1970 and 1989, the proportion of women working on a full-time, year round basis grew from 41 to 51%. Bureau of Labor Statistics, supra note 10, at 13.
years of gradual decline, the normal work week for Americans has increased to the point where the average employee now works the equivalent of an additional month more than was worked in 1970.15

The long and short of it is this: Working for pay now occupies more of the time of more of our populace than ever. The job has become a central part of most adults' lives and being employed (by one or more employers) is the way people spend the major share of their waking hours. Consequently, anyone with serious concerns about the kind of people we are making ourselves to be over the long run, and whether we can sustain the sorts of habits necessary to the well-being of a democracy, must pay close and critical attention to employment and the way that relationship is ordered. Briefly stated, the employment order involves far more than simply wage rates, power relationships, productivity, quality, or workplace voice. It quite literally involves the constitution of human beings.

Any extended discussion of collective bargaining is out of place here. Nevertheless, since it is the system that we are considering reforming, a few remarks about its distinct character are warranted. The term collective bargaining virtually is synonymous with the Wagner Act.16 The core goal of that statute is the protection and enhancement of individuals' status through the defense and maintenance of freely-formed employee groups. This feature defines the statute and the unique position that the Wagner Act holds in American law. It represents the only place in our otherwise highly individualistically-oriented jurisprudence where the law has encouraged the formation of mediating groups that foster individual empowerment and promote self-determination.

It may be old news to observe that collective bargaining can provide an unmatched opportunity to involve people in making and administering the law that most directly determines the details of their daily lives. It may be slightly more novel, or at least more important, to point out that in contemporary society, work has become a—and perhaps for many the—primary source of common life for adults. As Durkheim understood, work creates a moral environment, and its influence extends to nearly every sphere of life.17 Similarly, work is the

chief—and again for many the only—place outside the family where people are engaged in a common undertaking.

These points highlight one of the key aspects of collective bargaining. Unions are autonomous bodies. They stand independently both of the state as well as the organizations that employ their members. They come into being as a result of employee self-organization, and their well-being depends on the ability of the members to maintain solidarity. Winner-takes-all attitudes don’t produce enduring relationships or democracies. Healthy and well-functioning employee associations can provide a place where people learn to lose a point without resentment, prevail on an argument without triumphalism, and most importantly of all, practice the art of reasonable compromise.

As things now stand, the town meeting, the neighborhood ward, grassroots political organizations, and many of the other places where these sorts of skills might be learned and practiced are withering or absent altogether. Given the degree to which people now are tied to the market, employee associations would seem to be the natural thing to stand in the place of these other institutions. The fact that unions themselves virtually have disappeared turns us to consider briefly why this is so.

II. UNIONS AND THE VANISHING MIDDLE

Accounting for the decline in union membership has become something of a cottage industry for academics during the past several years. Theories abound, some of them most ably and intelligently discussed in the other articles in this Symposium. Prominent explanations that have been put forward during the past decade include structural changes in the economy; peculiar characteristics of American labor law, combined with its weak or unsympathetic enforcement; and stiff but sophisticated employer opposition to worker self-organization. Added to these is the undoubted fact that incidents of corruption, mob influence, and wrongdoing of various sorts by union officials have had a marked and lasting impact on our attitudes toward unions.

All of the reasons offered to explain union decline have some force. But none of them, either singly or in combination, adequately account for the long and steady decline in union membership that has

occurred in the United States since the late 1950s. They don’t because once again, we have overlooked the significance of the middle. Scholars and commentators seem invariably to neglect the point. Yet the plain fact of the matter is that unions went into decline in the United States at roughly the same time that all other sorts of mediating institutions began to unravel,\textsuperscript{19} and for strikingly similar reasons. As Americans, we are deeply and increasingly ambivalent toward association in almost any form. The decline of unions is but part of a much larger story.

Once again, any lengthy discussion of that story exceeds the limited bounds of a commentary. A brief comparison of union decline with the steady withering of mainline religious denominations may help to illuminate my point.\textsuperscript{20} As has been frequently observed, Americans are among the most religious people on Earth. Over nine in ten Americans claim they believe in the existence of God,\textsuperscript{21} and a huge proportion states that religion is “very important” (fifty-four percent) or “fairly important” (thirty-two percent) in their lives.\textsuperscript{22} Likewise, about six in ten Americans “believe that religion can answer all or most of today’s problems.”\textsuperscript{23} Despite this, George Gallup and Jim Castelli report that “while Americans attach great importance to religion, they do not equate religion with church membership or attendance.”\textsuperscript{24} Gallup and Castelli also found that a vast majority of Americans believe that one can be a good Christian or Jew without being part of a religious congregation.\textsuperscript{25}

These figures take on great interest for our purposes when they are compared with American attitudes toward unions. As Seymour Martin Lipset points out, extensive survey data repeatedly show that “the majority of Americans believe that unions are essential and do


20. The decline experienced by these religious congregations began around 1963, just a few years after the steady fall in union membership rates commenced. On this decline, see BENTON JOHNSON ET AL., \textit{VANISHING BOUNDARIES: THE RELIGION OF MAINLINE PROTESTANT BABY BOOMERS} (1994).


24. \textit{Id.} at 45.

25. \textit{Id.} at 252.
more good than harm, [and] that without unions employers would maltreat workers.”

Most Americans—six in ten in the most recent poll—also indicate that they “approve” of unions and an overwhelming proportion of the population believes that “workers should have the right to join unions.”

Despite all this, only about three in ten workforce participants indicated that they would join a union if given the opportunity.

Briefly stated, notions of self-sovereignty and misgivings about reliance on a mediator of whatever character are pervasive. For example, ninety percent of Americans say that they pray. Nevertheless, Americans also state that they rely on themselves “rather than an outside power such as God,” to resolve life’s problems. Similarly, while a substantial majority of Americans approve of the functions unions perform in society and think unions are necessary to protect employees and to give them a voice in the workplace, nearly the same proportion believe that they don’t need a union to get fair treatment.

In short, we think unions, churches, and the other mediating institutions that compose civil society are great—but, for somebody else.

We should not be surprised that union decline has occurred at the same time that families, churches, fraternal and service groups, local political clubs, and similar mediating institutions began to deteriorate. No single mediating structure of whatever description is likely to survive in the absence of others. All require and can ingrain the same sorts of habits: decision, commitment, self-rule, and direct responsibility. No single institution alone can inculcate or restore these habits. The existence and decline of all these bodies is mutually conditioning. The collapse or deformation of any one of them threatens the rest.

Indeed, it seems likely that the correlation between the decline of unions and religious congregations is stronger than it may first appear. For example, Catholics and Jews traditionally have been thought to be


29. Id.

30. Gallup & Castelli, supra note 22, at 45.

31. Id. at 69-71.

32. Lipset, supra note 26, at 302-03.

33. Perhaps it is not surprising that Gallup and Castelli also report that “Americans are, in fact, the loneliest people in the world” and that “four in ten Americans admit to frequent or occasional feelings of intense loneliness.” Gallup & Castelli, supra note 22, at 253.
more hospitable to union organization than other portions of the populace, and persons from Catholic or Jewish backgrounds still tend to be predominant in union leadership positions. There undoubtedly are a great many reasons for this, one of the most obvious being that as members of immigrant groups, many Catholics and Jews had strong financial incentives to become active in and to support unions.

But, I think there is more involved in all this than simple economic interest alone. For instance, Southern workers have had similar financial reasons to join unions, yet they traditionally have been resistant to organization. To condense a lot into a sparse description: Habits of thought related to these two religious traditions may have had rather a lot to do with the general willingness of Catholics and Jews to become involved in or to support unions. Both traditions, for instance, place an enormous emphasis on community. Similarly, neither would tend to understand community—at least in its most profound forms—simply in terms of a voluntary association of like-minded individuals. Accordingly, neither tradition emphasizes the supremacy of individual conscience over the norms authoritatively transmitted through the community. As Tocqueville observes, “Catholicism may dispose the faithful to obedience, but it does not prepare them for inequality.” In contrast, however, “Protestantism in general orients men much less toward equality than toward independence.”

One can add to this the fact that since the issuance of the first “social encyclical” in 1891, the Catholic Church officially and continuously both has sanctioned and encouraged the formation of unions.

34. This may also in some way be reflective of long-standing habits. For example, writing in 1835, Tocqueville observes that the habits of direct self-rule that characterize New England town-government were not so frequently found in the South. See, e.g., Tocqueville, supra note 1, at 33-35, 80-82.

35. Such views are characteristic of the modern liberal conception of association, which also portrays all forms of association as being instrumental. See Thomas C. Kohler, Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo, 1990 Wis. L. Rev. 149, 182-86. They also tend to be far more typical of the Protestant conception of religious community, which also tends to conventionalize all forms of association.

36. Tocqueville, supra note 1, at 288.


38. The most recent statement of such support is contained in the 1991 encyclical Centesimus Annus.
In short, whether they themselves were in any sense "religious," unions and the sorts of habits they require to sustain themselves may have been particularly intelligible to persons of Jewish or Catholic backgrounds. As both groups have become more assimilated, so has the special intelligibility of unions (and other mediating bodies) faded.\footnote{39}

The accuracy of this thesis notwithstanding, it seems likely that for the foreseeable future, we can expect a continued decline in mediating groups generally. As a nation, we fast are losing the habit of participating in organizations that require more than dropping a check in the mail. Moreover, we increasingly no longer see the need for or the significance of these mediating bodies. What we characteristically do and the sorts of things we are open to understanding—indeed the very sorts of questions that are likely to occur to us—go hand-in-hand. Since we increasingly don’t participate in them, mediating bodies have lost their meaning for us. We won’t make a commitment to what we don’t understand. And increasingly, we don’t understand what things like unions, churches, Lions’ Clubs, or the Lower West Side Democratic Club have to do with anything.

Of course, the problem is that we cannot sustain a healthy democracy or polity without these bodies. So, the question is how we can intelligently and effectively work toward setting the conditions for their restoration. I do not mean to suggest that if unions were somehow magically restored, everything else would follow. Moreover, whatever form they take, autonomous employee associations will have to take on different, or at least additional, forms and function in somewhat different ways than they have during the past fifty years.\footnote{40}

\footnote{39. One can speculate that the labor and the civil rights movements have had rather similar experiences in this regard. Of course, the religious voice played a central role in the civil rights movement—in this case, that voice emanated from the African-American Protestant churches. But, as that voice has receded in its predominance and has been replaced almost entirely by our dominant (and largely legalistic) rights discourse, so too does it seem that the movement’s urgent moral claims on the Nation’s conscience has been lost in the welter of contemporary rights’ claims.}

\footnote{40. As noted above, the great French sociologist Emile Durkheim had significant interest in the work-life sphere. \textit{See} text accompanying note 17. He agreed with Tocqueville’s emphasis on the importance of mediating bodies, but he believed that the traditional mediating structures of town, religious congregation, and family were doomed to decline in modern conditions. He saw “occupational associations” (corporate groups of persons exercising the same trade or occupation) as their replacement. What he did not realize was how unstable both the employment relationship and life-long devotion to a trade or occupation would become. (Witness the constant recitation of the need of the workplace for perpetual “retraining.”)

Of course, along with the decline of the middle has come a significant loosening in the employment bond itself. Contingent employment arrangements are on the rise, as is the tendency of people to have two or more jobs. In these conditions, employee associations may take...}
What is clear is that any sort of responsible labor law reform will have to take into account the centrality of employment, its function in inculcating habits, and its role in creating a moral environment. In short, responsible reform will have to take the middle into account, and the intrinsic interdependence of mediating groups upon one another. The costs of overlooking the role and contributions of autonomous employee associations to grounding the conditions for authentic self-rule are simply too high.\footnote{For a further elucidation of these points, see also Kohler, supra note 35, at 180-86, 200-11. Of great value is Xavier Blanc-Jouvan's incisive piece \textit{Individualisme et \textquotedblright{communautarisme\textquotedblright} en droit français: le cas des relations de travail}, 1993 B.Y.U. L. REV. 693.}

III. ALTERNATIVES TO AUTONOMY: NEW FORMS OF REPRESENTATION

We must live in the world as it is. And as it is, unions currently constitute a fading presence on the American scene. What sort of promise do alternative forms of worker representation hold for us? What can we do for the unorganized? Once again, these are large topics to which I can devote but a few words.

Perhaps we first should consider some of the central features of the scheme we may be reforming. Contrary to others, I see little in the essence of the Wagner Act that is tied to, or a direct result of, the patterns of economic organization of the nation in the mid-1930s. It is true enough that unions historically represent a response to changes in social organization that occurred through the rise of liberal economies. And, it is also true that the patterns of union organization and bargaining reflect the shape of industrial arrangements.

Nevertheless, little about these patterns is compelled by the statute or important to the Wagner Act's central scheme. To boil a lot down to a few words: In enacting the Wagner Act, and in sharp contrast to the course taken by the rest of the industrialized world, Congress deliberately opted for a law-making system that would involve minimal state intervention in the employment relationship. The Act stands as an example of what Gunther Tuebner calls a "reflexive" legal scheme.\footnote{Gunther Teubner, \textit{Substantive and Reflexive Elements in Modern Law}, 17 \textit{Law & Soc'y Rev.} 239, 254-55 (1983).} In this sort of regime, the state establishes and sanctions a voluntary ordering system, but leaves the outcomes achieved through the process to be determined by the parties themselves, free of state influence. The goal of reflexive law, Tuebner suggests is "reg-
ulated autonomy," or structured self-regulation. As such, reflexive schemes represent a sharp departure from statist ordering regimes.

The Act also represents an attempt to apply the principle of subsidiarity. Simply put, subsidiarity is an organizational norm. It recommends that institutions of all sorts be ordered so that decision making can occur at the lowest capable level. The principle rests on the idea that the state and all other forms of association exist for the individual. Thus, organized bodies should not take up what individuals can do, nor should larger groups assume what smaller associations can accomplish. Conversely, the state and other large institutions have the positive responsibility to undertake those activities that neither individuals nor smaller associations are capable of performing. In this perspective, associations and social relationships exist to supply help (subsidium) to individuals in assuming self-responsibility. Hence, the subsidiary function of associations of any sort consists not in displacing but in setting the conditions for authentic self-rule. A key feature of the subsidiarity principle rests in its emphasis on the middle, i.e., the fostering of autonomous mediating groups in which civil society exists and through which individual self-realization can occur. Not incidentally, the principle's development has stressed the importance of work, beginning with the inherent dignity of the human who performs it, as well as the social function of autonomous employee associations.

In brief, the Act sought to establish a private ordering system for developing and administering the law that governs one of the most important of relationships in modern times: employment. This was a far bolder move than it may first appear to us, the inhabitants of the modern regulatory state. It must be remembered that there was relatively little employment law in the United States in 1935. In the sixty or so years preceding passage of the Act, the ordering of the relationship had been increasingly left to the market. Other industrialized states had responded to the call for the reformation of this sort of system by legal regimes that involved rather heavy state intrusion into and regulation of the employment relationship. As noted, we went in precisely the opposite direction. The Wagner Act held out the promise of a highly flexible scheme that would permit the parties directly affected to come up with an order appropriate to their circumstances. To paraphrase the late, great Harry Shulman, this was a system that

43. *Id.*
was intended to keep the state out, and ("mind you") to keep the lawyers' role in it properly understood.\textsuperscript{45} That properly apprehended role for lawyers would be as counselors and problem-solvers, not as litigators and appellate advocates. Ultimate responsibility was to rest with reasonable and responsible actors at the ground level, not with agents of the state.\textsuperscript{46}

In sum, the Act's central scheme avoids what Max Weber called the "iron cage"\textsuperscript{47} in which we imprison ourselves when we see bureaucracies or the market as the sole available ordering solutions. It should come as no surprise that the piecemeal and \textit{ad hoc} regulation of the employment relationship has grown markedly in direct correlation with the decline of the practice of private ordering through collective bargaining. The past seventy-five years, and particularly the past twenty, have taught us a clear lesson concerning employment: If ordering does not occur through the organs of civil society, it will occur through the state—whose guarantees may be more formal than effective, and whose methods will be far less supple and adaptive than privately arrived at solutions.

Our experience with the development of common law wrongful termination doctrines is illustrative in this regard. A recent study conducted by the Rand Corporation shows that as a result of a jury trial of a wrongful discharge claim in California, "the majority of employees can expect a payment that, in present value dollars, is the equivalent of a half year of work."\textsuperscript{48} The same study found that because of the high transaction costs associated with a trial, "95 percent of all cases settle for an average of about $25,000."\textsuperscript{49}

These findings are eerily reminiscent of the common law order that obtained generally in England and in some American jurisdictions through the middle part of the Nineteenth Century. Broadly speaking, in this regime, an employer could discharge an employee only upon proper notice, save in those cases where good cause existed


\textsuperscript{46} It only seems fair to point out here that the source of much of the rigidity and perceived inflexibility in the Act rests not in its own terms, but in the judicial accretions with which it has been loaded over the years.

\textsuperscript{47} \textit{Max Weber, The Protestant Ethic and the Spirit of Capitalism} 181 (Talcott Parsons trans., 1930).


\textsuperscript{49} \textit{Id}. The authors also found that fear of liability on the part of employers may have led to some increased job security generally, but at the cost of aggregate levels of employment. \textit{Id.} at 36-45.
for not giving such notice. The amount of notice required turned on the character of the plaintiff's position, e.g., one month's notice for household help, up to six months for more highly compensated employees. The reported cases from this period appear not to inquire into the question of cause, but instead deal with the nature of the plaintiff's job and whether the parties intended for their relationship to be on terms other than those established by the general rules. The remedy for discharge in the absence of proper notice was the income the plaintiff would have received had that person worked through the end of the notice period.

Because they turn on the question of the existence of good cause, modern trials over wrongful discharge may be more involved, more expensive, and more intrusive upon the employer-employee relationship than their Nineteenth Century predecessors. Taken as a whole, however, (and assuming that California is any guide) the modern doctrines seem to have developed a sort of de facto common law rule that permits plaintiffs roughly half a year's pay in cases where some question exists about whether they were discharged with just cause. Given the costs and uncertainties associated with litigation, and the results that litigation on average produces for plaintiffs, perhaps we eventually will see a statutory regime that would require that persons to be discharged receive notice of some stated period (e.g. six months), and in its absence, "severance pay" in the amount of a half year's salary, or some combination of the two, save in a presumably narrow band of cases (which would be statutorily defined) where "good cause" exists to give neither. I am not urging the desirability of such a scheme. But, I think it does typify the sorts of limited results one can expect from reliance upon a public ordering regime. And indeed, it is just the sort of regime that exists in jurisdictions that do not rely upon collective bargaining systems.

In sharp contrast to bureaucratically oriented regimes, the whole scheme of the Act revolves around the formation and maintenance of autonomous employee associations. Thus, the Act's section 8(a)(2) was intended to do far more than settle a long-standing squabble about how employees might achieve voice in managerial decision making. It would also serve to anchor what was supposed to be a


51. On section 8(a)(2) see Thomas C. Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C. L. Rev. 499 (1986).
A comprehensive system for ordering all aspects of the employment relationship.

Section 8(a)(2) had some other, undoubtedly unintended but nevertheless important, benefits as well. One of the most notable and far reaching benefits is this: Given the importance of the work-life sphere in contemporary culture, the promotion of employee self-organization could serve as a buffer against the sort of fragmentation of the polity that Tocqueville understood would deform and pervert a democracy. This fragmentation results when people lose the ability to settle on and engage in undertaking a common purpose.

The rise of this sort of fragmentation is as insidious as it is pernicious. As the circles within which they act shrink, people literally lose touch with one another, and thereby the commonality of understandings, sentiments, judgments, and goals that sustain willing cooperation and a healthy polity dissipate. The idea of some common good is replaced by factional interest, and worse, a sense of individual helplessness vis-a-vis the state or the large institutions of the market. With the habits of self-action weak or in desuetude, and the sentiments necessary to sustain commonality lax, people drift into a state of atomistic isolation and effective dependency on the state or other large institutions. Common action comes to appear at best a romantic yearning "for a simpler era" and self-government another way of saying every man or women for him or herself. Interest groups narrowly described replace the middle, and increasingly, only the institutions of market or state are seen as credible.

Whatever else they may do, alternative forms of "worker representation" will not truly take the place of those anchored by and developed through free-standing employee associations. The alternatives will (or, do) not represent the product of self-organizational activity. They are not autonomous. As such, they do not constitute a part of the crucial middle that I have been describing.

Nor, of course, are the alternatives intended to perform the same functions as the autonomous employee association. As George Strauss and Eliezer Rosenstein pointed out nearly twenty-five years ago, participative management theory springs from entirely different sources and assumptions, and is intended to serve a rather different and far more restricted set of goals, than is the so-called collective bargaining model. Briefly stated, those goals are organizational ef-

53. On these points, see Kohler, supra note 51, at 513-18.
fectiveness (as bureaucratically defined), not private ordering or employee self-determination.

These differences raise many issues. One of them is this: Do participative schemes unanchored by an autonomous employee association promise more than they deliver? There is much reason to believe that this is the case. As is frequently pointed out, “participation” is a managerial ethic. The ethic rests on the creation of an atmosphere of trust between the parties that will set the grounds for the willing and intelligent cooperation by employees with organizational goals, which ultimately are established and controlled by management.

A relationship of trust implies a selflessness among the parties, for the one trusted must be constantly willing to put the others' good before his or her own. In short, trust involves a sort of self-transcendence and, as Aristotle observes, it is a hallmark of the most authentic sort of friendship. Succinctly stated, participative management theories make self-transcendence easy. For they rest on the idea that there are no inherent conflicts of interest among people in work organizations that demand structural accommodation. Thus, pace Adam Smith, the interests of employer and employed are identical. Trust as selflessness thus involves no real moral or intellectual conversion in the sense suggested by traditional religious thought or classical political philosophy. People, including those with ultimate decisional authority, simply will act in a trustworthy (i.e., selfless) manner once they understand that they should. In other words, being “good” is a matter of education, because people will do the “right” thing once they know what it is. To use Etienne Gilson's description, such ideas represent a species of “angelism.” But, of course, as James Madison points out, men are not angels, and hence attention must be paid to structures that can accommodate conflicting interests and to limit the libido dominandi that is so much a part of all of us. It comes as no surprise that participative schemes like TQM (Total Quality Management) are spoken of by their proponents as a new religion. But, like the new religion proclaimed by the boy prophet in Flannery

54. For a brief description of the conditions necessary to sustain cooperation, see Kohler, supra note 44. On the underlying cooperationist scheme of the Wagner Act, see the thoughtful piece by Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 Harv. L. Rev. 1379 (1993).

55. ARISTOTLE, NICOMACHEAN ETHICS 207-66 (Terence Irwin trans., 1985) (Books 8, 9). He goes on to observe that people should count themselves lucky if they have two or three real friends during the course of their lifetime. E.g., id. at 263 (Book 9, 1171a20).

56. E.g., ADAM SMITH, THE WEALTH OF NATIONS chs. 6, 8 (1776).

O'Connor's *Wise Blood*—the Church of Christ without Christ—it seems to be missing something.

Participative management theories have another deeply troubling aspect as well. Corporate bodies of whatever description, whether they be business organizations, political communities, voluntary groups, etc., all face a common issue: How we can be both one and many, or to put the matter just slightly differently, how each person can be a distinct and unique individual, yet be related to and operate cooperatively with other distinct and unique individuals. Participative management techniques attempt to resolve this problem by seeking to create a state of complete identity between the individual and the group. In other words, they reify the group as the sole individual. They do this by seeking to replace individual attitude and conscience with a group conscience, which in turn is given its shape and orientation by corporate leadership. In short, this is why participative theory techniques represent a bureaucratic adjunct. They are intended to achieve a mass that will act efficiently and as one. To use Tatsuo Inoue's term, such schemes can produce a form of "companyism" that may deny individual status altogether. In the theoretical perspective from which these schemes tend to proceed, individuals exist only in and through the group; they have no separate character outside it.

I do not mean to suggest that there is nothing whatever of value to participative management schemes. That is plainly not the case. As a managerial ethic, participative schemes can enhance the scope of the individual workers to make workplace decisions *vis-a-vis* other style of managing. By increasing the organization's reliance upon the good sense of the man or woman on the spot best to figure out how to accomplish a task, such schemes also are intelligent. But, given the foregoing, perhaps it is no surprise that the data show that participation plans function best, and have the best chance for survival, when they are anchored by an autonomous employee association. Our do-

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60. Maryellen Kelley and Bennett Harrison have found that the introduction of participation schemes in "U.S. manufacturing workplaces has mainly been part of an effort by managers in large bureaucracies to overcome the rigidities associated with this organizational form." Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in *Unions and EconomicCompetitiveness* 247, 263 (Lawrence Mishel & Paula B. Voos eds., 1992).

61. E.g., id. There is nothing fundamental to the scheme of collective bargaining that requires its narrow focus simply on wage rates and benefits. Indeed, the basic scheme of the Act is
mestic experience is confirmed by the experience of other nations, which shows that devices like works councils only function well, and achieve significant results for employees, when they exist in an organized context.62

Like the original debate over its terms, much of the current discussion over labor law reform is concentrated upon the provisions of section 8(a)(2). Certainly, a lot has changed during the nearly sixty years that have intervened since the Act's passage. The one thing that remains constant, however, is human character. In revisiting these provisions, we revisit an ideological debate that had been fully rehearsed before Congress. By striking off in an entirely different direction, we will be attempting to do something that no one else in the world has been able to achieve: make participative devices function without some form of autonomous employee body to ground them. We will be doing more as well. We will be giving public sanction to yet another turn away from one of the institutions that grounds the middle. It may be more prudent to inquire in the other direction and to ask what sorts of steps we can take to sustain and restore these crucial institutions, including autonomous employee bodies. Problems rarely are solved by furthering the types of actions that brought the problem on in the first place.

CONCLUSION

Wholes cohere about a middle. But, even as they described the crucial role mediating institutions play in a liberal democratic order, the farseeing amongst us continually have warned about the destructive pressures that the institutions constituting the middle would face. At first glance, these sorts of issues would seem far removed from labor law and the employment order. The more one looks into the matter, however, the more clear it becomes how deeply interrelated the problems of the middle are with the seemingly mundane world of work. Indeed, the whole question of labor law reform presently confronts us because of the general decline in mediating institutions, including unions, and the increasing laxness in our habits of association.

consistent with broad-based cooperation. The main contribution of participative schemes to organized settings may rest simply in reawakening our imaginations as to the great flexibility inherent in the collective bargaining model.

Succinctly stated, our ability to "compete" is not a mere matter of technology, of selecting and properly employing the right management techniques. Maintaining a liberal political and economic order is truly hard work. It requires that people possess a certain sort of discipline. However inconvenient, the plain fact remains that there is no replacement for individual goodness, intelligence, reasonableness, and responsibility. But, these characteristics are virtues. A virtue is an operative habit, and habits require inculcation and practice. In short, the health and competitiveness of our polity and our economy depend on the existence of functioning schemes that can regularly and recurrently assist people in obtaining the sorts of habits on which a liberal order depends. We must never forget that we do not just trade in time, but we constantly are trading across time as well. What we have is not solely our creation, and the effects of the order we are establishing will be felt less by us than by those who come after us.

Labor law reform confronts us with some enormously difficult and complex problems. It is tempting to ignore them, but pretending they aren't there won't make them go away. Looking past our difficulties only makes them more acute. If we are to deal with these problems in an effective and responsible way, however, we must go beyond our well-worn, comfortable because familiar, but all-too-narrow analytical boundaries and habits of thought. The employment order involves much more than we typically think.

As we consider the shape labor law reform might take, one more thing must be kept in mind: Institutional orders inconsistent with our character as humans will not survive. Consequently, the most pressing question we face is whether and to what degree our notions of ourselves as human actors is accurate. Everything turns on the answers to this query. Bluntly stated, try as we might, in the final analysis, we can't get past ourselves. We're simply too big to ignore.