SOMETHING OLD, SOMETHING NEW: GOVERNING THE WORKPLACE BY CONTRACT AGAIN

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Collective bargaining in the private sector has been declining steadily for decades, to the point where it cannot serve as the exclusive or even primary mechanism for workers' participation in workplace governance. Yet the need for such a mechanism has hardly been superseded by the proliferation of regulatory statutes setting minimum labor standards and of employee rights enforceable through private litigation. Regulatory approaches are plagued by both inflexibility and underenforcement, especially in unorganized low-wage workplaces. Litigation, though it has stimulated some real workplace reforms, is too costly and time-consuming to serve as an adequate mechanism for resolving most workplace disputes. And neither regulation nor litigation purported to give workers a role in workplace governance. The decline of collective bargaining has left a yawning democratic deficit that workplace rights and regulations do not address.

That is the crisis of workplace governance that Paul Weiler illuminated over fifteen years ago in his groundbreaking book, *Governing the Workplace*.[1] Of course the decline of collective bargaining in the United States was clear to all; but Weiler led the scholarly pack in seeking to explain that decline. In his book he both underscored the role of employer resistance and flawed labor laws and recognized deeper causal forces at work.[2] Weiler also saw that government regulation of terms and conditions of employment is a

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1. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990).

2. *Id*. at 105–18. *See also* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises to Keep*]; Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 361 (1984) [hereinafter Weiler, *Striking a New Balance*].

"blunt instrument" that cannot capture the range and variety of either workers' interests or firms' capabilities; uniform minimum standards inevitably demand too little of some firms and too much of others. And even sensible labor standards are bound to be underenforced without active worker involvement.[3]

Especially impressive in hindsight is Weiler's critique of litigation and legal rights as a response to workplace grievances, in what now seems to have been their heyday. He recognized that the public policy doctrine was never destined to be more than an occasional rebuke and a modest deterrent to the most abusive exercises of the power to terminate at will. And he deflated the notion that emerging employee-friendly contract doctrines would lead to widespread job security, given that employers were willing and able to make their contrary intentions explicit and legally binding through the simple device of a disclaimer.[4] As for the law-and-economics case for relying on managers and markets to meet workers' demands, Weiler explained that the market gave managers little incentive to satisfy the demands of inframarginal workers—those who wielded no realistic exit threat because their skills were readily available in the external labor market or because they had invested many years of their lives in acquiring firm-specific human and social capital.[5] In bygone days, those workers might have benefited from the threat of unionization, a potent spur to reform in non-union workplaces. But with the decline of unions, workers who lacked individual market power increasingly found themselves with no effective voice in their working lives.

Weiler saw many dimensions of the problem in 1990, and his proposed solution operated on multiple dimensions as well. He prescribed a program of labor law reforms—enhanced remedies for unfair labor practices, arbitration of first contracts, instant elections, and an enhanced right to strike—and, more ambitiously, a system of mandatory enterprise-based representation along the lines of European works councils.[6] Most of Weiler's proposed reform program still has wide appeal to labor's allies. But labor law reform has proven to be as elusive as the Holy Grail. The Employee Free Choice Act, which tracks some of Weiler's reform proposals, is edging toward majority support in Congress, but is nowhere near the veto- and filibuster-proof supermajority that it would likely take to become

3. WEILER, *supra* note 1, at 157–58, 280–81.
4. *Id.* at 54.
5. *Id.* at 15–22, 63–78.
6. *Id.* at 282–306.

law.[7] In that light, the more ambitious proposal for works councils looks today like a pleasant pipe dream.

So what is to be done? We might start by asking what is being done already by workers who are struggling to secure an effective voice in their working lives. One familiar development is the rise of neutrality and card-check agreements (which I will call simply "neutrality agreements" here) by which unions are seeking to straighten and shorten the path to more-or-less traditional union representation and collective bargaining in the face of an ineffectual and delay-ridden NLRB regime for securing representation. This effort to use private contract to improve upon public policy is intriguing in part because of its parallels with another development: The negotiation of codes of conduct and monitoring schemes (which I will call "monitoring agreements"), by which some worker associations and advocacy groups in the United States are seeking to improve labor standards especially in low-wage workplaces.

Both neutrality agreements and monitoring agreements respond to the inadequacies of public policy and public enforcement by turning to contract, though decidedly not the model of individual contract that some economists pine for. Through both neutrality agreements and monitoring agreements, worker advocates contract with private employers (and sometimes indirectly with the employers with whom they do business) for higher standards of workplace conduct and more effective and efficient enforcement mechanisms than public law provides. Both represent a kind of "governance by contract," or, more tendentiously, "policymaking by contract." At the same time, both call to mind the system of collective bargaining itself, the New Deal proponents of which envisioned as a system of quasi-private self-governance based on collective freedom of contract. The question is whether these new forms of "governance by contract" can thrive where collective bargaining has not. Through a brief comparison of neutrality agreements and monitoring agreements with each other and with collective bargaining itself, I aim to sketch a possible path toward a revival of decent workplace governance.

I. SOME CONTEXT FOR THE CRISIS

Since Weiler wrote, the malaise of workplace governance has deepened. Union density has slipped to 8% of the private sector

7. That remains true after the 2006 midterm sweep by Democrats. *See* Steven Greenhouse, *Labor Dusts Off Agenda as Power Shifts in Congress*, N.Y. TIMES, Nov. 11, 2006, at A13.

workforce.[8] The wrongful discharge wave appears to have crested, largely along lines foreseen by Weiler but with the added impetus of mandatory arbitration, barely a gleam in employers' eyes back in 1990. The internal labor markets that offered workers some protection from the whims of the external market have dramatically eroded.[9] And of course the globalization of capital and of production has accelerated, and with it firms' incentive and ability to escape the reach of both unions and legal mandates that raise labor costs. The productivity and efficiency gains that might flow from skilled and loyal workers in a cooperative labor relations environment, on which the hopes of labor's allies have been pinned since the 1980s, are now swamped in many sectors of the economy by the dramatically lower cost of labor in developing countries, as well as the increasing quality and transportability of its outputs.

The crisis of workplace governance has its particular shape and pathos, but it is part of a broader set of challenges to public efforts throughout the world to exercise effective social control over the increasingly footloose, flexible, fast-changing organizations and networks through which most goods and services are produced. The market is now unrivaled as a basic way to organize the economy. But markets have defects—they produce externalities, they underproduce public goods, and they multiply and reproduce the advantages of those with wealth, scarce skills, and information. The developed nations and regions of the world are all struggling to develop institutions that can regulate externalities, promote public goods, and abate inequalities without smothering or driving away the capitalist engines of wealth and growth.

In response to these forces, scholars and regulators in the United States and abroad have gravitated toward a loosely allied set of new approaches to regulation—new ways to understand and control the socially undesirable dimensions of corporate conduct and to promote public values within an increasingly fluid and boundariless economic environment. These scholars share a conviction that so-called "command-and-control" regulatory systems must give way to systems that energize and motivate regulated actors themselves to collaborate in both the shaping and the enforcement of regulatory norms. They aim to replace the rigid, uniform, centralized, and adversarial

8. That is just over half the level that Weiler observed in the late 1980s, and about what he projected as a matter of "simple extrapolation" in the absence of some dramatic development. WEILER, *supra* note 1, at 10.

9. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR A CHANGING WORKPLACE 67–83 (2004).

approaches that grew up in and after the New Deal with more flexible, responsive, decentralized, cooperative, and democratic forms of social control over market actors.[10] These emerging "New Governance" ideas vary from each other along several dimensions, including the centrality of the state in orchestrating the regulatory strategy.[11] But the idea of "decentering the state" and elevating the regulatory role of other non-governmental actors is one of the unifying themes.[12]

New Governance ideas have only recently begun to gain adherents among American labor and employment law scholars.[13] That is surprising, for New Governance seems tailor-made for workplace governance; indeed, some of the most interesting applications are drawn from the workplace, albeit mostly overseas.[14] Moreover, many New Governance ideas should sound familiar to our ears. Collective bargaining itself looks like a New Governance approach to governing a post-command-and-control and litigation-weary workplace: It is potentially flexible, responsive to local conditions and changing needs, decentralized, cooperative, and democratic. The New Deal supporters of collective bargaining, and of its built-in system of dispute resolution, proclaimed its superiority to centralized regulation of terms of employment; and they took for granted its superiority to individual litigation of workplace disputes. Now that the systems of regulation and rights that have grown up since the New Deal are wearing thin, collective bargaining deserves a new look.

Yet the domain of collective bargaining and of its essential institutional agents, labor unions, has shrunk to a small fraction of the American workforce. The reasons are many and complex, but some

10. For an overview of these related strands of scholarship, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

11. *Compare* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992) (setting out a state-centered strategy for responsive regulation) *with* ARCHON FUNG , DARA O'ROURKE, & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS? (2001) (setting out a virtually stateless strategy for improving labor standards).

12. *See* Lobel, *supra* note 10, at 344.

13. *Id.*; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001)

14. *See*, *e.g.*, AYRES & BRAITHWAITE, *supra* note 11; REFLEXIVE LABOUR LAW: STUDIES IN INDUSTRIAL RELATIONS AND REMPLOYMENT REGULATION (Ralf Rogowski & Ton Wilthagen eds., 1994); FUNG, O'ROURKE, & SABEL, *supra* note 11; Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1 (2003); Orly Lobel, *Beyond Experimentation: Governing Occupational Safety in the United States (or - Core and Periphery in Regulation Governance)*, *in* NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE UNITED STATES (Grainne De Burca & Joanne Scott eds., 2006).

explanations converge on the ways in which the realities of unions and collective bargaining have diverged from their idealized potential. Actual unions have sometimes become mired in bureaucratic turf-protection or corruption.[15] Actual collective bargaining and the agreements it has produced have sometimes been inflexible, unresponsive to changing conditions, and adversarial rather than cooperative.[16] That is partly the product of union distrust of management that has mostly been grudging at best toward unions. In any case, there is tension between what unions have conventionally sought—taking wages "out of competition" and constraining managerial discretion—and what firms in many sectors both need to remain competitive and can get by filling their demand for labor beyond the reach of unions.[17] Globalization has both intensified firms' incentive to avoid unionization and enhanced their ability to do so by moving or credibly threatening to move production elsewhere.

The mobility of production and capital is not always seamless or inexorable, and the impact of globalization and the decline of unions have not been uniform throughout the economy. Much of the economy, especially in the service sector, is largely insulated from trends toward importing, outsourcing, and offshoring.[18] It is there, as well as in the public sector, where the most dynamic unions are focusing their organizing efforts. Moreover, higher wages may be sustainable if they come with productivity or quality improvements, or if they attract customers who are willing to pay more for goods and services that are produced domestically under decent labor conditions. And of course a higher-wage labor force may generate collective benefits for the community as a whole: a stronger tax base and

15. On the history of mob involvement in some unions, see JAMES JACOBS, MOBSTERS, UNIONS AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT (2006).

16. WEILER, *supra* note 1, at 186-92, 309.

17. Michael Wachter argues that unions' goal of "taking wages out of competition" was consistent with the ideal of "fair competition" and the quasi-corporatist system that was inaugurated in the early New Deal; but it became increasingly anomalous as the ideal of "free competition" and deregulation gained sway. *See* Michael Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PENN. L. REV. 581 (2007). For my response to Wachter, see Cynthia Estlund, *Are Unions Doomed to Being a "Niche Movement" in a Competitive Economy? A Response to Professor Wachter*, 155 U. PENN. L. REV. PENumbra 101–08 (2007), *available at* http://penumbra.com.

18. *See* Daniel Gross, *Why 'Outsourcing' May Lose Its Power as a Scare Word*, N.Y. TIMES, at 5 (Aug. 13, 2006). Insulation from global competition may stem from the high cost of transportation, as in the case of goods that are bulky (large appliances, assembled vehicles) or time sensitive (e.g., trendy apparel, perishable foods). Some industries extract and process natural resources that are scarce enough to be worth extracting domestically (oil and gas, lumber, coal). Many services must be performed near customers or users, such as hospitality, entertainment, health care, construction and maintenance of buildings and infrastructure, and domestic transportation of goods and people.

consumer economy, stronger families, less crime, and so forth. So a decent society in a global economy has good reason to promote higher wages and labor standards than the market would otherwise produce.[19]

To be sure, workers and their organizations as well as governments must pursue these objectives in ways that take account of both intense competitive pressures on firms and the multitude of means that firms have to respond to or escape those pressures. The range of responses will vary from sector to sector, firm to firm, locality to locality, and time to time. Collective bargaining, with its underlying architecture of contract, is well suited in principle to accommodating the varied and changing needs and possibilities that firms and workers face throughout the economy. Organized labor needs to attend closely to those changing needs and possibilities.

But society, for its part, needs to make it possible for labor to organize—to exercise their internationally recognized freedom to associate and bargain collectively—even in the face of managerial opposition. That is what the labor laws have failed to do. The delay-ridden and designedly adversarial process by which organizing campaigns are conducted and representation disputes are resolved under the NLRA has become a last resort for most private sector workers seeking to form a union.

II. THE RISE OF NEUTRALITY AGREEMENTS AND MONITORING AGREEMENTS

Instead, unions have turned again to contract. They have sought to persuade and pressure employers to enter into "neutrality agreements" that establish ground rules for the representation campaign that are designed to allow employees to make their choices in a less heated and less adversarial setting.[20] A neutrality agreement aims to achieve by contract many of the reforms that unions have failed to secure by statute, such as organizer access to the workplace and restrictions on anti-union campaigns and "captive audience" meetings.[21] Many agreements provide for card-check recognition in

19. For a game-theoretic account of why societies gain from higher labor standards and yet may be induced to "defect" and compete to attract low-wage jobs, see Alan Hyde, *A Stag-Hunt Account and Defense of Transnational Labour Standards: A Preliminary Look at the Problem*, *in* GLOBALIZATION AND THE FUTURE OF THE LABOUR LAW (John D.R. Craig & S. Miles Lynk eds., 2006).

20. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

21. *Id.*

lieu of elections, and for arbitration of disputes under the agreement; some agreements commit the employer to extend the same rules of engagement to employers with whom they do business. Probably more than half of the workers who have been organized in the private sector in the past six to eight years have been organized under neutrality agreements rather than through the traditional NLRB election process.[22] Neutrality agreements have been hailed as the harbingers of a "new paradigm" for the conduct of organizing and representation campaigns—one that both smoothes the path to union representation and lays the groundwork for a more cooperative labor relations climate.[23]

The agreements are presumptively enforceable as "contracts between an employer and a labor organization" under federal labor laws.[24] But the success of neutrality agreements has provoked a number of legal objections that are now in the hands of an NLRB majority that has been assailed for a string of anti-union decisions.[25] Some objections arise from the tactics by which unions secure neutrality agreements: Did the union unlawfully target neutrals or deploy coercive tactics? Is picketing in support of a neutrality agreement equivalent to a demand for recognition that triggers the thirty-day limit on recognitional picketing?[26] But the more troubling challenges to neutrality agreements question whether it is lawful for employers to agree to them, however voluntarily. Do employers who give up the right to oppose unionization unlawfully deprive workers of their "right" to a vigorously contested representation campaign?[27] Does an employer's acceptance of a neutrality agreement that includes proposed terms of an eventual collective bargaining agreement—thus allowing both employees and employers to make a more informed choice—unlawfully favor the signatory union over

22. *See id.* at 828–30.

23. *See id*. For empirical data on neutrality agreements, see Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45 (2001).

24. *See* Labor-Management Relations Act of 1947, §301, codified at 29 U.S.C. §185. *See generally* Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts, *Resisting Its Own Obsolescence—How The National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 524 (2006) (on the general enforceability of neutrality agreements and voluntary recognition).

25. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J 221, 221-22 (2005); Matthew W. Finkin, *Employer Neutrality as Hot Cargo: Thoughts on the Making of Labor Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 542 (2006).

26. *See* Marriot Hartford Downtown Hotel, 347 N.L.R.B. No. 87 (2006) (finding, by a 3-2 vote, a material issue whether the union was seeking recognition when it pressured Marriot to sign a neutrality agreement by picketing).

27. Shaw's Supermarkets, 343 NLRB No. 105 (2004)

rival unions in violation of Section 8(a)(2)?[28] Is the voluntary recognition of a union pursuant to a neutrality agreement entitled to the standard one-year moratorium on decertification or competing election petitions?[29] Does an employer's agreement to do business only with other employers that sign a neutrality agreement constitute a "hot cargo" agreement in violation of Section 8(e) of the Act?[30] Beyond these legal challenges lie efforts to amend the Act, purportedly in the name of democracy, to prohibit recognition based on anything other than secret ballot elections.[31]

Many of these questions revolve around a single axis: Is labor-management antagonism mandatory under the Act?[32] An affirmative answer would shock its framers, who hoped that the Act would usher in a new era of cooperative labor relations.[33] However, that seems to be the premise of the multifaceted campaign to delegitimize employers' voluntary adoption of a neutral stance toward unionization. The Board is thus giving serious consideration to deploying the Act—much criticized for its rigidity in the face of changing labor relations and labor markets—to disable one major source of dynamism in the contemporary labor relations scene.

Unions that turn to contract to address deep dissatisfaction with public labor law and its enforcement find an intriguing parallel in another contemporary effort by worker advocates to fill a gap in workplace governance: Codes of conduct and monitoring agreements. Codes of conduct (or "supplier codes") were initially adopted by multinational corporations seeking to fend off criticism of the wretched conditions under which garments and other consumer goods are produced in developing countries where neither unions nor regulatory institutions had much of a presence.[34] However, the code of conduct model took a contractual turn when anti-sweatshop activists pressed to make the codes meaningful by introducing monitoring of compliance.

28. Dana Corp., JD-24-05 (NLRB Div. of Judges Apr. 8, 2005) ("Dana II"). This is known among labor lawyers as the "Majestic Weaving" issue, after Majestic Weaving Co., 147 NLRB 859 (1964), enf. denied, 355 F.2d 854 (2d Cir. 1966).

29. Dana Corp., 341 NLRB No. 150 (2004)

30. Heartland Industrial Partners, LLC, JD(NY)-23-05 (NLRB Div. of Judges, June 16, 2005). For an illuminating analysis of the "hot cargo" issue, see Finkin, *supra* note 25.

31. *See* Brudney, *supra* note 20, at 841–44.

32. Professor Brudney dismantles the "mandatory antagonism" premise and several of its doctrinal expressions. *See* Brudney, *supra* note 20, at 844–63.

33. *See generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1465–89 (1993).

34. For an excellent history and evaluation of the code of conduct approach to global sweatshops, see JILL ESBENSHADE, MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY (2004).

The codes are grounded in two crucial features of the big global garment brands, such as Gap and Nike: The brands, lured by low labor costs, were compelled to develop the capacity to monitor the quantity and quality of goods produced in far-flung factories; and they were also extremely sensitive to consumer perceptions, which could be made to depend partly on working conditions in those same factories. Many companies, seeking a "sweat-free" reputation, began to promulgate supplier codes by which suppliers were required to comply with basic labor standards.

As the failings of the first generation of corporate supplier codes became evident, worker advocates pressed for more specific codes and more rigorous monitoring of factory compliance. They have sought to insure that monitors are independent of employers, have access to complete information about factory locations, make unannounced visits, and conduct confidential interviews with workers; and they have sought to make workers aware of code provisions and to protect them against retaliation.[35] A refinement of the independent monitoring model, adopted recently by the Worker Rights Consortium (WRC), aims to address some of the flaws in the monitoring model that stem from the sheer size and fluidity of brands' supply chains. The WRC's "Designated Supplier Program" seeks to close the set of supplier factories, to build closer relationships between brands and suppliers, and to impose more rigorous conditions on both (e.g., by requiring brands to pay a contract price that covers the costs of decent wages and labor conditions).[36] The jury is still out on whether supplier codes will significantly improve labor standards at the bottom of global production chains.[37] However, one must hope for their success, for they are the most promising strategy on the

35. *Id.* at 60–119.

36. For a description of the Designated Supplier Program (DSP), see http://www.workersrights.org/dsp.asp. The DSP replaces a WRC model that did not certify factories' compliance but rather investigated workers' complaints, usually in factories where workers had achieved some level of mobilization. The WRC's investigations were models of thoroughness and independence; it aspired to empower workers themselves and to build local regulatory competency rather than to ignore or supplant it. *See* ESBENSHADE, *supra* note 34, at 186–91; *see also* Mark Barenberg, *Toward a Democratic Model of Transnational Labour Monitoring?* (Oct. 10, 2004) (unpublished manuscript on file with the Columbia Law Review). But it was able to reach only a handful of factories, which then became vulnerable to losing their contracts. The original WRC model might be best conceived as a useful adjunct to independent monitoring systems. *Id.* at 192–97. The new DSP may suggest the WRC's recognition that ongoing oversight and monitoring has greater promise as a regulatory model; but it also represents an important advance in the efficacy and transparency of factory monitoring.

37. A recent empirical study found that monitoring did improve standards under certain conditions (conditions that are not always met). *See* Richard M. Locke et al., *Does Monitoring Improve Labor Standards?: Lessons from Nike*, MIT Sloan Research Paper No. 4612-06, available on SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916771.

horizon for achieving a form of public accountability for factories in the developing world.

The global supplier codes cover some U.S. factories, which make up a small fraction of global garment production. What I want to explore here is mainly the smaller scale experiments with codes of conduct within the United States. Those experiments build on the experience with global supplier codes, but they do so within a very different regulatory landscape. Here there is a functioning though inadequate regulatory regime and an extensive array of formal worker rights—some privately enforceable labor standards, rights against employer retaliation, and a right to unionize—as well as an independent court system, a private bar that can represent employees, and many independent worker advocacy organizations, including unions. Yet in the large majority of workplaces in which workers lack collective representation, there remains a severe democratic deficit as well as an enforcement deficit. The question I address briefly here is whether and how the code of conduct model might be part of the solution to those deficits.[38] Three examples will suggest potential strengths (and some weaknesses) of this strategy.

One is familiar to readers of the *New York Times*: The Green Grocer Code of Conduct. A union seeking to organize workers in New York City's small "green groceries" found rampant wage and hour violations, and started bringing cases to the state Attorney General's Labor Bureau. The cases were largely open-and-shut and produced ruinous backpay liability. In hopes of finding a better prospective solution to the problem of noncompliance among hundreds of green groceries, the AG brought representatives of employers and of workers (including Casa Mexico, an advocacy group for Mexican-American workers) to the bargaining table, where they devised a "Green Grocer Code of Conduct" (GGCC).[39] A merchant's acceptance of the GGCC secured provisional amnesty for past violations of wage and hours laws in exchange for promises to comply with wage and hour laws and other labor laws, keep records, undergo training and allow employees to do so, post notices advising employees of their rights, and submit to regular inspections by independent monitors appointed by the AG. Monitors make unannounced visits, inspect payroll records, interview employees,

38. I began to explore these issues, including the first two examples discussed below, in Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 350–54 (2005). I continue this work in a book-in-progress.

39. The text of the GGCC is *available at* http://www.oag.state.ny.us/labor (last visited Aug. 16, 2006).

assist with compliance, and report violations to the AG's office and to a Code of Conduct Committee. The Committee, which oversees the Code, settles disputes, and certifies new signatories, consists of three members representing the AG, employers, and workers (the representative of whom was designated by Casa Mexico). As of 2005, monitors had found significantly improved rates of compliance with wage and hour regulations.[40]

Another example of the code of conduct model is in janitorial services, a chronically low-wage sector in which many employers operate in violation of immigration laws, tax laws, wage and hour laws, and other labor protections. As a result of the SEIU's "Justice for Janitors" campaign, however, some janitors are unionized, and receive at least the lawful minimum wage and overtime premium, and usually health and other benefits. Recognizing that the outlaw sector threatened to undercut them both, the SEIU and unionized employers created a non-profit watchdog organization, the Maintenance Cooperation Trust Fund (MCTF), to investigate labor violations among janitorial contractors and to pursue public or private enforcement actions. In the case of Global Building Services, whose janitors cleaned Target Stores in California and much of the West, MCTF brought evidence of widespread wage and hour violations to the U.S. Department of Labor, which sued Global and settled for $1.9 million in back wages for 775 workers.[41] In the view of MCTF, however, the settlement did not exhaust Global's past liabilities, nor did it ensure improved conditions for Global's workers. Faced with the threat of further litigation as well as a damaging publicity campaign, Global entered into an agreement with MCTF to clean up its payroll practices and to submit to monitoring of its compliance with wage and hour laws. Under the agreement, MCTF inspected records and job sites and met with workers to ensure compliance.[42]

A final example comes from agriculture, which is still beyond the reach of the NLRA and many other labor laws. The Coalition of Immokalee Workers (CIW), an organization of tomato pickers centered in Florida, conducted a successful boycott against Taco Bell and its parent company, Yum Brands, based on the low pay and appalling working conditions (sometimes including slavery) in the

40. That is, they had paid workers at least the minimum wage plus one-and-a-half times the minimum wage for hours beyond forty. Because of how the overtime laws compute hourly wages and overtime premium, this leaves many employers in technical violation of the laws.

41. *See* Steven Greenhouse, *Labor Department Wins $1.9 Million in Back Pay for Janitors*, N.Y. TIMES, Aug. 26, 2004, at A16.

42. *See* Estlund, *supra* note 38, at 352–54.

tomato fields. In March 2005, the boycott was ended with Yum's agreement to "work with the CIW to improve working and pay conditions for farmworkers in the Florida tomato fields."[43] The agreement provides for Taco Bell to pay 1 cent per pound more for tomatoes, and to insure that the increase is passed on to workers, nearly doubling their pay. Implementation of this and other improvements in working conditions is through "the first-ever enforceable Code of Conduct for agricultural suppliers in the fast-food industry," with CIW itself making up part of the monitoring body. Among other things, the Code requires Taco Bell to provide records of all Florida tomato purchases, and growers to provide all their wage records, to the CIW. The CIW is seeking to extend the boycott, and eventually the code of conduct, to McDonalds and other fast-food companies.[44]

It is too early to say whether agreements like these are the leading edge of an important trend or even whether they are sustainable and effective in their original settings.[45] But the importance of the code of conduct model is suggested in part by its striking parallels with neutrality agreements (which are in fact sometimes called "codes of conduct"). Both neutrality agreements and codes of conduct respond to the inadequacies of public policy and public enforcement by inducing private employers, sometimes on behalf of those with whom they do business, to *agree* to standards of conduct or enforcement mechanisms (or both) that go beyond what public law provides. The proponents of both rely on a variety of tactics—legal actions, politics, and publicity aimed at consumers, shareholders, or the general public—to induce firms to enter into these contractual arrangements. Both neutrality agreements and codes of conduct represent a kind of private ordering that we might call "policymaking by contract."[46]

43. The boycott and agreement are described on the CIW's Web site, http://www.ciw-online.org/agreementanalysis.html.

44. *Id.*

45. According to MCTF's director, Lilia Garcia, the Global agreement recently lapsed due to the loss of Target's business. As for the GGCC, the original agreement was to last for two years, and was not renewed. But the NY Attorney General's Office appears to have returned to prosecution mode, see http://www.oag.state.ny.us/press/2006/oct/oct12a_06.html, in what may be an effort to revive the GGCC from its seemingly dormant state. I plan to undertake a broader review of these developments for a current book project on "the fall and rise of workplace governance."

46. An important related development is the "global framework agreement" (GFA), by which an international union and a multinational corporation agree upon both substantive (international) labor standards and provisions governing organizing for the multinational's far-flung operations (sometimes including suppliers). For an illuminating description of the GFA model, see Judith Scott, *The Enforcement Challenge of Corporate Social Responsibility:*

III. "POLICYMAKING BY CONTRACT": COMPARING AND ASSESSING NEUTRALITY AGREEMENTS AND CODES OF CONDUCT

At first blush, the notion of privately contracting over public policy (and arguably around it) might seem in tension with some basic tenets of democratic governance. Private parties, unsatisfied with the laws and mechanisms supplied by public law, are writing their own private labor and employment laws. Of course, public law and regulatory mechanisms have long coexisted with contractual mechanisms for private ordering, and in effect with private governance mechanisms. Public law sets boundaries on private ordering, for example, through "public policy" limits on enforceability of contracts. But it is a signal virtue of liberal market-based democracies that they leave room for private ordering, much of it through express and implied contract.

Indeed, collective bargaining itself has long been understood as a well-developed form of private ordering through contract.[47] Collective bargaining agreements establish a "law of the shop" that imposes higher labor standards and stricter constraints on management than public law provides, and a private system of enforcement, mainly through grievance and arbitration procedures.[48] Unions' aspiration to exercise a form of sovereignty over labor relations was part of what rendered them suspect to some Gilded Age courts, which sought to place individual liberty of contract largely beyond even legislative reach.[49] At the same time, the pre-New Deal labor movement's resort to voluntarism and private ordering was partly a response to the courts' obstruction of broader legislative strategies.[50]

So there is something reassuringly, or perhaps eerily, familiar about these newer forms of private ordering. Neutrality agreements in particular can be seen as a return to voluntarism after a generation of failed law reform efforts. But we should not overstate the

International Codes of Conduct, Global Framework Agreements and Related Strategies (unpublished manuscript, Oct. 13, 2006, on file with author). The GFA is a hybrid of the neutrality agreement, the code of conduct, and the collective bargaining agreement. I do not discuss it further here because I am chiefly concerned here with developments that affect the U.S. workplace.

47. *See* Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 14 (1988); Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969).

48. For one well-known critique of this system of privatized self-governance, see Katherine V.W. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

49. *See* In re Debs, 158 U.S. 564 (1895).

50. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

resemblance: Collective bargaining was eventually blessed by Congress in the New Deal and ensconced within an elaborate public law framework. There is no comparable legal blessing or framework for neutrality agreements and codes of conduct. That does not mean that they threaten to run amok in defiance of public policy; they operate, as all contracts do, within the broader framework of public law and policy (as the many legal controversies surrounding neutrality agreements demonstrate). But for the time being these new forms of private ordering operate on the frontiers of the law, with neither the affirmative support nor the potentially suffocating restrictions of a public law framework.

In some sense, then, neutrality agreements and codes of conduct harken back to the distinctively American history of labor movement voluntarism. But one might also see these two new forms of workplace "policymaking by contract" in highly contemporary terms as illustrations of New Governance in action. These new instruments are flexible and responsive to the varied and changing conditions and capabilities of economic actors; they build, and build upon, trust and cooperation among and within organizations; and they seek to channel rather than defy the human and economic forces that motivate market actors. Even among New Governance approaches, these are among the least state-centered of schemes. Still, we may be seeing the beginnings of something new and important in workplace governance in the rise of neutrality agreements and code of conduct schemes.

Of course there are also significant differences between these two developments, and they, too, may be instructive. One important difference is the role of unions in neutrality agreements. Unions have the expertise and economic wherewithal to negotiate decent terms and to monitor and enforce compliance with those terms. They have the crucial advantage of a strong footing both inside and outside the particular workplace: Their presence inside the workplace gives them the information and leverage that the workers themselves have, while their presence outside the workplace makes them less vulnerable to employer cooptation and coercion. Moreover, the union's capabilities and incentives match up neatly with the goals of a neutrality agreement: The agreement is operational only so long as the union is directly engaged in seeking to organize a group of workers. If the union fails, the agreement lapses and the union moves on. If it succeeds, it secures another sort of contract—a collective bargaining agreement—with its own legal and institutional moorings. The

neutrality agreement is a designedly temporary launching pad for a long-term contractual relationship.

By contrast, some of the organizations that are pioneering the code of conduct model within the United States—putting aside the exemplary role of the New York Attorney General's Office—are generally poorer, smaller, and less well-organized than unions; and they often have a more tenuous connection to the workers whose terms and conditions of employment are affected.[51] Yet these weaker organizations often seek to enter into and enforce agreements that govern a wide range of workplace issues over a long period, even indefinitely. The hurdles to effective monitoring under those circumstances are daunting at best, especially in the case of supplier codes of conduct (like the CIW's Code), in which agreements with one entity purport to reach many suppliers that are scattered, sometimes unidentified, or subject to change.

So the aspirations of the code of conduct model are in a sense greater than the aspirations of a neutrality agreement; they aim not merely to launch but to constitute a system of workplace governance. Yet the worker organizations behind the code of conduct model typically have more limited resources than do the unions that promote neutrality agreements. This sounds like a recipe for abject failure for the code of conduct model. But let us take a closer look.

The code of conduct model in its early iterations ran into heavy criticism from worker advocates for reflecting its corporate origins.[52] The well-grounded fear was that firms would succeed in coopting and deflecting anti-sweatshop sentiment among rich-world customers with vague and toothless commitments. The development and refinement of independent monitoring regimes have narrowed, though not closed, the gap between promise and reality. In particular, there is a growing commitment among anti-sweatshop activists to finding ways to engage workers themselves in monitoring.[53] The most promising freestanding

51. Casa Mexico and MCTF are both bona fide worker advocacy organizations; but neither has the kind of organizational existence and membership inside the workplace that unions do, even in the organizing phase under neutrality agreements. (The MCTF does, however, have the backing of the SEIU.) The CIW is an organization of the workers themselves, but it lacks the economic base that unions gain from mandatory dues. For a useful preliminary taxonomy of not-quite-unions like these, see Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L.S. L. Rev. 385 (2005–06).

52. *See*, *e.g.*, ESBENSHADE, *supra* note 34, at 52–59; Harry W. Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 471, 485–87 (Joanne Cohaghan et al. eds., 2002).

53. *See* KIMBERLY ANN ELLIOT & RICHARD FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 71–72 (2003).

experiments in the United States with codes of conduct have learned those lessons, and in one form or another aim to tap into workers' own monitoring capacities and to promote rather than replace workers' freedom of association—freedom to unionize or to affiliate with other worker organizations that are behind these efforts. Indeed, both the GGCC and the MCTF/Global agreement show conventional unions playing unconventional roles in either securing or supporting these new governance devices. If the code of conduct schemes can acquire or tap the organizational resources that allow unions to check employer abuse and opportunism both in neutrality agreements and in collective bargaining agreements, their prospects will improve. And to the extent that unions direct some of their resources in this direction—as the SEIU has in the janitorial sector—they may find new ways to represent workers in a changing economy.

So the code of conduct approach can be strengthened—and can acquire some of the advantages that neutrality agreements have—by working with organized labor, following its footsteps into the workplace, and liberating and amplifying workers' own voices. But once we peer inside the workplace, we find not only workers but managers. Both neutrality agreements and codes of conduct aim to change the conduct of managers; more precisely, they seek to activate the prodigious regulatory resources that managers have at their disposal, and to channel them toward workers' goals. Of course, firms and their managers are necessary parties to both neutrality agreements and codes of conduct. But that alone hardly guarantees their wholehearted support for either the principles of neutrality or the employment policies embodied in the agreements. Given uncertainties surrounding the enforceability of these agreements and the difficulty of maintaining the extralegal pressures—publicity or boycotts or the like—that often are required to secure the agreements, it matters a great deal whether firms and managers have other incentives that converge with the goals of the agreement. And that is where the code of conduct proponents may find resources that the union proponents of neutrality agreements do not.

In the developing world, codes of conduct were designed to fill a regulatory vacuum; they operate without the benefit of any legal threat—any "shadow of the law"—to spur management to comply with the norms they embody. In the United States, however, litigation and regulation, though both episodic and inadequate, cast a long-enough shadow to produce their own pressure toward internal law enforcement. In that context, the code of conduct, with its central

focus on enforcing existing legal norms, may converge with firms' own development of internal compliance mechanisms.

Take Wal-Mart, Inc., the reigning nemesis of organized labor and other employee advocates. It is worth noting that Wal-Mart maintains its own supplier code of conduct, or "Standards for Suppliers," which requires suppliers to comply with local and international labor standards, and which subjects them to monitoring by Wal-Mart or its agents.[54] The failings of that "first generation" code—for example, monitoring is not independent and is rarely unannounced—has provoked a class action lawsuit on behalf of workers in China, Bangladesh, Indonesia, Swaziland, and Nicaragua who charge that Wal-Mart "reign[s] over a sweatshop gulag that condemns workers around the world to provide forced and uncompensated labor."[55] In response, Wal-Mart contends that its standards create no contractual duty toward workers at supplier factories, nor even a duty to inspect factories, but at most a contractual right on Wal-Mart's part to monitor the factories.[56] This important litigation breaks new ground in the development of global labor standards.

But let us return to the domestic front, where "uncompensated labor"—off-the-clock work—is one of the many complaints that Wal-Mart has faced from its own employees. Frustrated by opposition to its expansion plans and battered by legal challenges under wage and hour laws, immigration laws, labor laws, and a monumental class action lawsuit charging sex discrimination,[57] Wal-Mart announced the creation of a "Corporate Compliance Team" in 2004. The world's largest private employer vowed to use its legendary organizational capabilities, along with new technology and compensation policies, to become "a corporate leader in employment practices." According to the company, new software ensures that workers are taking required breaks and not working "off the clock"; a new job classification and pay structure will ensure pay equity; managers' compensation will reflect in part their achievement of "diversity goals."[58] The

54. *See* http://www.laborrights.org/projects/corporate/walmart/Supplier-Standards-2005.pdf.

55. For information about the lawsuit, including court filings, see http://www.laborrights.org/projects/corporate/walmart/demands091305.htm.

56. *See* Wal-Mart's Motion to Dismiss, *available at* http://www.laborrights.org/projects/corporate/walmart/DefsMotion2Dismiss0206.pdf

57. *See generally* Sanhita SinhaRoy, *Wal-Mart Shows a Pattern of Labor Violations*, AUGUSTA CHRONICLE, July 1, 2004, at A-5 (mentions five of the biggest recent lawsuits brought against Wal-Mart); Lewis L. Laska, Wal-Mart Litigation Project, *at* http://www.wal-martlitigation.com (discusses past and pending actions, including but not limited to labor-related litigation).

58. Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices, News release, June 4, 2004, *available at* http://www.walmartfacts.com/articles/3744.aspx.

discrimination charges appear to pack a particularly big punch, and have forced the firm to invite a kind of external scrutiny of its labor practices.[59] In April of 2006, Wal-Mart announced the appointment of an "Employment Practices Advisory Panel," which would "work with Wal-Mart's senior management to develop and implement progressive enhancements to equal employment opportunity and diversity initiatives for the nation's largest private workforce." The Panel included Dennis Archer and Vilma Martinez, both respected civil rights leaders.[60]

What are we to make of this? There is no doubt that Wal-Mart is capable of monitoring itself, if it could be motivated to do so. It has organizational tools that are the envy of the business world, and that regulators can only dream of.[61] Wal-Mart now claims to have deployed those organizational tools to the end of becoming "a corporate leader in employment practices." But Wal-Mart can hardly expect its critics to simply trust in its representations. At best, worker advocates might adopt a posture of "trust, but verify." A logical (if not easily achieved) next step in the evolution of Wal-Mart's compliance system might be an agreement with a credible outside organization to monitor compliance with labor and employment laws and to ensure workers' own freedom to report violations.[62] That would create a potent package of reforms.

Wal-Mart is in some ways unique. It is uniquely demonized by labor and its allies, and it is uniquely renowned for its organizational capabilities. But it is far from unique in its vulnerability to reputational and legal pressures, nor in its turn to internal compliance

59. It is worth noting that all but a fraction of Wal-Mart's own publicity about its employment practices focuses on diversity issues; very little of it concerns practices relating to immigration laws, off-the-clock work, child labor, union suppression, or other practices that contribute directly to Wal-Mart's famously low labor costs. But the sensitivity to diversity issues has led Wal-Mart to post unusually detailed statistics on the demographics of its workforce. *See* http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=597.

60. *See* http://www.walmartfacts.com/articles/1647.aspx.

61. For a description of Wal-Mart's vaunted managerial methods, see James Hoopes, *Growth Through Knowledge: Wal-Mart, High Technology, and the Ever Less Visible Hand of the Manager*, *in* WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 83–104 (Nelson Lichtenstein ed., 2006).

62. Monitoring might also be a logical element of a remedial decree or settlement of private litigation over labor violations, for example, child labor or off-the-clock violations. Private discrimination litigation has sometimes led to outside monitoring by plaintiffs' attorneys or their appointees. For divergent assessments of such efforts, compare the favorable view of Sturm, *supra* note 13, with the less favorable view of Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003).

structures as a response to those pressures.[63] Those features of the modern firm provide an opening into which the code of conduct approach potentially fits. Of course if it fits too easily (like Wal-Mart's global supplier code), it may be nothing but the public relations stunt that early detractors claimed. Therein lies the challenge.

The potential fit between external codes of conduct and internal compliance mechanisms is both a strength and a weakness of the former. It is a strength in that it can activate the regulatory capabilities of firms and managers, which almost certainly, and increasingly, dwarfs those of government.[64] But that convergence also suggests limitations of the code of conduct approach. If codes of conduct are dependent on external law for their content, it is hard to see how they can deliver anything beyond minimum standards; and if the codes depend on external law for the incentive to comply, it is hard to see how they could meaningfully extend much less supplant an outgunned regulatory system. However, both codes of conduct and corporate compliance systems tend to aspire to more than compliance and legal minima.[65] The public relations element, maligned though it often is, can spur firms to aspire (or appear) to be not only law-abiding but model corporate citizens. Worker advocates—unions, attorneys, and other organizations—can make the public relations element work for workers by drawing public attention to labor practices, by articulating the demand for higher standards, and by keeping the firms honest. On the other hand, none of this may be enough, at least for firms that are committed to competing through low labor costs, without an external threat of public and private law enforcement, as well as reputational and political sanctions.

Neutrality agreements do not converge in this way with firms' internal organization and the incentives produced by the shadow of the law. Their goal of neutrality runs against the grain of an anti-union culture that is almost universal among American managers and

63. On the rise of internal compliance systems, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 488–90 (2003). Krawiec finds reason for skepticism about the efficacy of these internal systems. *Id.* at 491-95.

64. That is one of the key tenets of New Governance theory. *See* AYRES & BRAITHWAITE, *supra* note 11.

65. Internal compliance mechanisms, at their best, reflect managerial commitments to "continuous improvement," benchmarking, internal competition, and the development of "best practices." Those commitments originated in the quest for ever-greater productivity, profits, and market share, and are not oriented to the achievement of minimum standards. For a sophisticated theoretical treatment of these issues, see Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

the expression of which is entirely lawful within wide bounds.[66] The whole point of neutrality agreements is to alter the ground rules of federal labor law that allow managers to aggressively oppose unionization. That means that unions cannot count on external sanctions to motivate firms to comply and cannot label recalcitrant employers as lawbreakers in their campaigns for public support. Even where the agreements might overlap with external law (for example, in prohibiting reprisals against union supporters), the law casts a notoriously pale shadow.[67]

IV. CAN NEW FORMS OF POLICYMAKING BY CONTRACT AVOID THE FATE OF COLLECTIVE BARGAINING? OR REPLICATE ITS SUCCESSES? OR NEITHER?

Let us circle back now to the comparison with that older form of private ordering: collective bargaining. The relationship between neutrality agreements and collective bargaining is pretty straightforward: Collective bargaining is the ultimate objective of the neutrality agreement, which alters the rules of engagement for the organizing process. Both resonate with a deeply voluntarist strain within the American labor movement: This is not the first time that American unions, frustrated in their public law reform efforts, have fallen back on their own organizational resources and economic leverage to construct a more labor-friendly regime based on contract.

The relationship between collective bargaining and the codes of conduct is more complex. As compared to the latter, a collective bargaining agreement is usually more comprehensive, detailed, and ambitious in its terms, with a more developed enforcement apparatus and a more powerful institutional advocate for workers. Some code of conduct proponents as well as critics see the codes as a feeble substitute for unionization and collective bargaining,[68] or perhaps, if outside monitoring can help to secure workers' freedom of association, a step toward unionization. In other words, one might see both neutrality agreements and codes of conduct as aiming toward the

66. *See* WEILER, *supra* note 1, at 109; Sanford M. Jacoby, *American Exceptionalism Revisted: The Importance of Management*, *in* MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS 173 (Sanford Jacoby ed., 1991);

67. *See* WEILER, *supra* note 1, at 247–48; LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 10–16 (2000).

68. *See* Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001)

very collective bargaining relationship that other observers see as approaching extinction.[69]

If codes of conduct as well as neutrality agreements are merely stepping stones to unions and collective bargaining, they may appear doomed to the latters' fate. At least that is true if the decline of collective bargaining stems from the nature of collective bargaining itself, and from a basic mismatch with the demands of globally competitive labor markets, as some observers claim.[70] On the other hand, Weiler and others contend that the decline of collective bargaining stems largely from barriers to entry—employer resistance and an inadequate and unwieldy legal regime for combating that resistance and gaining representation rights.[71] If these new kinds of contracts can help overcome those barriers to entry, they may lead to a modest revival of collective bargaining. That is clearly the impetus behind neutrality agreements; it is one possible trajectory for the codes of conduct. For that to happen, the worker organizations behind the codes of conduct will need to develop or borrow the kind of bargaining power that unions have traditionally wielded.[72]

The code of conduct model has other possible trajectories. It might become one tool of organizations that have their main locus outside the workplace—organizations that abjure the path of exclusive representation and seek to advance their constituents' prospects in the external labor market and the political arena. These organizations might assist workers in training and job placement and in lobbying for improved labor standards and enforcement as well as in enforcing their existing legal rights against employers. But employers still control much of what workers want. If a code of conduct expands its scope to reflect a wider range of worker concerns within the workplace, if it engages workers in formulating their own demands on employers, and if it encompasses dispute resolution among its aims—in other words, I am tempted to say, if it becomes an

69. *See* Wachter, *supra* note 17.

70. *Id.*

71. WEILER, *supra* note 1, at 103–18.

72. Therein lies another possible dilemma. Some means by which unions have historically sought to protect their power may have had undesirable side effects. For example, unions tend to regard compulsory dues exaction as a necessary antidote to free-riding by employees; to oppose competition among unions as a power-sapping betrayal of solidarity; and to resist demands that they demonstrate current majority support in order to continue representing workers. The law has been moderately supportive of those preferences, which may enable conscientious unions to better represent their members. Yet these guarantors of a stable income without the ongoing need to cultivate workers' active support (either through competitive markets or competitive elections) might have contributed in some unions to debilitating patterns of turf-protection, empire-building, and corruption. *Cf.* JACOBS, *supra* note 15

effective instrument of workplace governance—the more it will resemble collective bargaining. The challenge, once again, will be to identify and avoid the features of collective bargaining that have contributed to its decline, and to strike bargains that allow both workers and firms to thrive.

Part of the challenge, too, will be to avoid the legal entanglements that may have contributed to that decline. For overhanging these musings on the direction of labor relations are some potentially bothersome questions about the impact of existing labor law on these new instruments of workplace governance. Federal labor law defines "labor organization" broadly enough to potentially encompass some of the workers' centers, watchdog organizations, and other advocacy organizations that are a source of innovation and vibrancy in the current labor landscape.[73] Organizations "in which employees participate," and which exist "for the purpose, in whole or in part, of dealing with employers concerning . . . conditions of work," are labor organizations under the NLRA. That would make them subject, for example, to the Act's restrictions on secondary activity.[74] And it potentially brings their contracts with employers within the jurisdiction of Section 301[75] (making them enforceable in federal court and governed by the "federal common law" governing labor agreements), and their internal operations under the Landrum-Griffin Act's burdensome reporting and disclosure requirements.[76] In other words, the code of conduct risks becoming entangled in the web of federal labor law that has arguably contributed to the morbidity of collective bargaining.

Whether or not that comes about, it seems unlikely that the code of conduct approach will remain unregulated for long if it becomes more than a trivial force in domestic labor relations. (It is already more than a trivial force in the global arena, where other regulatory institutions are weak or absent.) For the law, like nature, abhors a vacuum. Conflicts over the campaigns that induce firms to enter a code of conduct and disputes arising under the codes are bound to generate litigation and lobbying from one side or the other. Existing labor law may come to regulate some of those disputes, as it seems about to do with neutrality agreements; labor law preemption may

73. *See* Hyde, *supra* note 51, at 406–09.
74. 29 U.S.C. § 158(b)(4).
75. 29 U.S.C. § 185.
76. 29 U.S.C. § 401 et seq. The Landrum-Griffin Act reaches "labor organizations" that are "recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce." 29 U.S.C. § 402(i), (j).

block some state and local regulation. Given the recent history of labor law reform efforts, there seems to be little prospect for constructive federal legislation under the umbrella of labor law.[77]

So if law there is meant to be, we might look for a legal foothold outside the quicksand of labor law. We might find it in the law of corporate compliance. The problem of corporate wrongdoing has attracted a wide and ideologically mixed constituency; it does not divide legislators in the same way that labor law reform does. Legislators in that setting have recognized the value of internal compliance structures and the essential roles of both employees and genuinely independent monitors or auditors in achieving compliance and bringing wrongdoing to light.[78] We could imagine state or federal legislation encouraging firms to enter into agreements with independent non-profit organizations for monitoring of compliance with legal norms—labor standards, environmental laws, creditor and consumer laws, for example; enabling employees to report concerns without fear of retaliation to higher-ups within the firm, to monitors, and to regulators; and punishing firms' deception and retaliation. Even these broad brush strokes suggest potential pitfalls and vulnerabilities of such a regime; this would be challenging legislation to craft as well as to enact. I do not propose to try to work out those problems here. However, I would suggest that integrating approaches to workplace governance and regulation into the broader currents of corporate governance, regulation, and compliance holds out some promise of unsettling the legislative deadlock that has repeatedly doomed labor law reform.

V. CONCLUSION

Paul Weiler got a head start, and gave us all a leg up, in identifying the nature and extent of the crisis of workplace governance that we face today. His proposed reforms—both those designed to smooth the path to collective bargaining and the works council alternative to collective bargaining—might have slowed or modestly reversed the decline of collective bargaining by better enabling unions to grow within growing sectors of the economy. Weiler did not imagine that his proposed reforms would be easy to

77. *See generally* Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

78. The Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq., reinforced these pillars of corporate compliance in the securities context. *See generally* John C. Coffee, Jr., *A Brief Tour of the Major Reforms in the Sarbanes-Oxley Act*, ALI-ABA CLE, Dec. 5, 2002.

achieve; however, he saw reason for optimism, as he explained in the last sentence of his book:

> If I am correct in concluding that it is not just the American worker, but the American political economy as well that will benefit from an independent employee voice in the business firm, I am confident that there will be political leaders who will make this quest their cause for the nineties.[79]

Unfortunately, even in the face of a large and well-documented "representation gap" between American workers' desire for a collective voice and the reality they face,[80] the few political leaders who could be said to have "ma[d]e this quest their cause" have failed to galvanize public debate and to make this an issue on which elections turned. The last decade has left us in a deeper crisis and with more pessimism than ever about the prospects for legislative labor law reform.

I have suggested that we look for solutions elsewhere, in the emerging efforts by unions and other worker advocates to draw employers into alternative, contractually-based workplace regimes, and in the convergence of some of these regimes with the internal compliance structures on which regulators and scholars in other areas of the law pin their hope for effective regulation of corporate conduct. My powers of prognostication are surely no better than Professor Weiler's; indeed, they may be compromised by the same willed optimism to which he was perhaps prone in 1990. But those footsteps seem worth following.

79. WEILER, *supra* note 1, at 311
80. *See* RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 41 (1999).