Workplace — Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism

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The idea of workplace democracy is to apply public-related institutions in the sphere of private enterprise, thereby creating a process of isomorphism between public and private entities. One formulation of this idea argues that the workplace is a community in which democratic values and institutions should be implemented, while another formulation claims that the organization of the workplace is important to the quality of democracy at the state level. Despite the host of justifications and a plurality of institutions that are associated with workplace democracy, there has been a gradual move away from tying democracy and work in favor of a liberal script that acknowledges the need to prescribe some employment-related rights, but keeps the private and public separate. The Article attributes this change to two processes — marketization and globalization, both affecting the sense of community in which democratic practices prevail, whether the place of work or the state. However, the Article identifies a growing reliance on process-based law that governs work. Process-based law integrates proceduralism — that is, norms that require public values such as due process, visibility, accountability and deliberations; and layering — the congruence of norms at multiple levels that engage a diverse set of agents. This new emphasis in labor law, broadly defined, provides an opportunity for reintroducing democratic values and practices throughout different spheres that are associated with the world of work.

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INTRODUCTION

Workplace democracy can be viewed as an oxymoron — the juxtaposition of a publicly oriented percept with a market-governed location. However, since the nineteenth century the term has also been used to designate a moral or institutional alternative to the public/private divide.[1] This is an option that calls for congruence between traditionally public and private institutions.

The term *workplace democracy* used to be associated with very particular institutions — such as a worker-owned economy (the "Yugoslav model"),[2] workers' co-ops,[3] the Swedish model of broad tripartite representation of interests,[4] and even employee stock ownership plans (ESOPs).[5] At a more general level, it can be designated as a normative ideal that requires the deployment of democratic institutions and norms at different types of locations, public and private alike, *inter alia* the workplace. Hence, one formulation of workplace democracy was that the workplace is a community in which democracy should be practiced. At the same time, the term also carried a second formulation — the idea that the organization of the workplace is instrumental to the quality of state democracy. For example, more egalitarian wage scales can aid in preventing the fragmentation of class that is claimed to undermine the social cohesion necessary for the practice of democracy.[6] The difference between the two formulations was based on whether the workplace community is an end in itself, or the means to the state-level community.

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1   Beatrice Webb & Sidney Webb, Industrial Democracy (Nabu Press 2011) (1897).

2   On the Yugoslav model, see Monty Lynn, Matjas Mules & Karin Jurse, *Democracy Without Empowerment: The Grand Vision and Demise of Yugoslav Self-Management*, 40 Mgmt. Decisions 797 (2002).

3   On workers' co-ops, see Joyce Rothschild & Allen Whitt, The Cooperative Workplace: Potentials and Dilemmas of Organizational Democracy and Participation (1986).

4   On the "Swedish model," see Mark Blyth, *The Transformation of the Swedish Model: Economic Ideas, Distributional Conflict and Institutional Change*, 54 World Pol. 1 (2001).

5   On ESOPs see Joseph R. Blasé, Employee Ownership: Revolution or Ripoff? (1988); Andrew Pendleton, Employee Ownership, Participation and Governance: A Study of ESOPs in the UK (2001); Daryl D'Art & Thomas Turner, *Profit Sharing and Employee Share Ownership in Ireland: A New Departure?*, 27 Econ. & Indus. Democracy 543 (2006).

6   Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 Am. Pol. Sci. Rev. 69 (1959).

Engagement with the idea of workplace democracy peaked in the heyday of the post-World War II recovery, with the consolidation of the welfare state and the stability associated with the Fordist labor market. In later years, particularly towards the end of the previous century, the interest in workplace democracy gradually dwindled.[7] This can be attributed to several complementary reasons. First, there seems to have been a growing sense of disenchantment, or at least economic sobriety, with regard to some of the institutional forms of workplace democracy — particularly the cooperative forms. The termination of the Yugoslav model, together with the Cold War, distanced alternatives to the capitalist system from the roster of options discussed in most developed economies. The cooperative movement continued to present a sustainable alternative to the capitalist firm, but its scope remained narrow, and it did not succeed in moving away from the alternative lifestyle tag that was stapled to it, despite some examples of successful large industrial co-ops, such as the Mondragon conglomerate in the Basque region in Spain.[8] Less far-reaching institutional forms of democracy, such as trade unions and collective bargaining, also encountered a challenge in many developed countries.[9]

Second, both formulations of workplace democracy relied on assumptions of stable workplaces in developed states. For the first formulation, enterprises in which workers enjoyed ongoing and even lifelong employment served as communities in which democracy was practiced. For example, workers *qua* owners voted and deliberated over the co-op's management; and trade unions negotiated collective agreements that governed lifelong tenure. The second formulation assumed other forms of stability and unity. For example, corporatist statewide bargaining, coupled with a universal and sector-based social security system, sought to advance a relatively egalitarian distribution of wages and opportunities. States were considered to be both the source of regulatory provisions that advance democratic alternatives within economic enterprises, overstepping the public/private divide, and the location where democracy should be improved. However, since the mid-1970s the stability that accommodated democratic practices — at the enterprise level, at the state level, and at the interface between them — has been replaced by marketization.

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7   There are still sporadic yet rigorous attempts to draw on democracy as a prominent value in designing various institutional components of labor law. *See, e.g.*, ALAN BOGG, THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION (2009).

8   On Mondragon and its adjustment to the changing environment, see WILLIAM F. WHYTE & KATHLEEN K. WHYTE, MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX (2d ed. 1991).

9   David G. Blanchflower, *International Patterns of Union Membership*, 45 BRIT. J. INDUS. REL. 1 (2007).

The regime of accumulation that was associated with the Fordist system has been replaced by a post-Fordist regime that is characterized by more frequent transitions to and from employment, a growing disparity between primary and secondary labor markets, the disintegration of organizational hierarchies and a diversified workforce.[10] At the same time, processes of globalization have undermined the state's regulatory power, particularly in attempts to fully cover the scope of the relevant marketplace. Together, the two processes have undermined all of the components that underscored the assumptions of stable communities — whether the workplace or the state.

With the loss of communal stability, a sense of anomie emerged. Increasing opportunities for exit (as opposed to loyalty and voice) and growing inequality within the nation-state, between states, between classes, sectors and occupations, have rendered the praxis of democracy more difficult to carry out.[11] At the same time, individual preferences and group identities have diluted collective democratic practices. Some have observed the substitution of identity politics for class politics.[12] Others have highlighted the rise of the new X- and Y-generations, who are concerned with individual rights and self-fulfillment, rather than with collective power and social goals.[13] As both cause and outcome, these factors have assisted in relegating the idea of workplace democracy to the realm of idealistic historicism.

Against this backdrop, debates over the role of the state in governing the labor market persist and questions about the telos of labor law are as relevant as ever. However, the nature of the debate has changed, and currently some claim that traditional objectives such as economic redistribution continue to be relevant, while others argue that labor law must be reframed in efficiency terms to make sense and gain a stronger consensus in a growingly market

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10 On regimes of accumulation, see ROBERT BOYER, THE REGULATION SCHOOL: A CRITICAL INTRODUCTION (1990); REGULATION THEORY — THE STATE OF THE ART (Robert Boyer & Yves Sailard eds., 2002).

11 On growing inequality, see Brian Goesling & David P. Baker, *Three Faces of International Inequality*, 26 RES. SOC. STRATIFICATION & MOBILITY 183 (2008); and Nina Pavcnik, *Globalization and Within-Country Income Inequality*, *in* MAKING GLOBALIZATION SOCIALLY SUSTAINABLE 233 (Mark Bacchetta & Marion Jensen eds., 2011). For a review of the empirical difficulties underlying the claim connecting globalization to various forms of inequality, see Berhnhard Gunter & Rolph van der Hoeven, *The Social Dimension of Globalization: A Review of the Evidence*, 143 INT'L LAB. REV. 7 (2004); and Melinda Mills, *Globalization and Inequality*, 25 EUR. SOC. REV. 1 (2009).

12 NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION (1997); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2000).

13 Susan Eisner, *Managing Generation Y*, 70 SAM ADVANCED MGMT. J. 4 (2005).

environment.[14] In this ongoing legal and political debate, the underlying premises of workplace democracy have been marginalized. These premises included the objective of forging congruence between the public polity and private communities; viewing both spheres as instrumental each to the integrity of the other, and encouraging active participation and deliberations in both spheres alike. To what extent is it possible to reclaim workplace democracy as a descriptive and normative theory, even if detached from the original institutions with which it was associated? What is the nature of the interface that connects the new *workplace*, in its global post-Fordist setup, and *democracy*? How can democracy be nested in communities that are becoming ever more fluid?

I argue that workplace democracy brings with it the understanding of public and private isomorphism, that is — values that are shared, practiced and imitated by both spheres. However, with the weakening of stable communities, state or workplace, which can rely on the traditional institutions associated with democracy, it is necessary to examine whether isomorphism can adapt and take on new appearances. I identify changes in labor law and the labor process that aid in blurring the public/private divide, injecting renewed meaning into the juxtaposition of the workplace with democracy. These changes renew a process-based focus that is characterized by two features — proceduralism and layering. Proceduralism suggests, for example, that due process applies to terminations in the workplace, to the same extent that it is warranted for decision-making in the democratic polity. Layering refers to the multiple venues in which proceduralism is practiced, the forms of representation that voice the interests of workers, and the methods of the actors' engagement. Hence, social responsibility is placed on both the state and the private organization, norms are developed through dispersed engagement of different actors, and enforcement is carried out by multiple agents but not necessarily by traditional means such as public inspections and private litigation.

The first Part of this Article summarizes the objectives that constitute the case for workplace democracy. Part II suggests an institutional framework that underscores the search for democratic practice. Part III describes the way in which marketization and globalization have undermined the nexus of objectives and institutions that characterized the idea of workplace democracy in the past. Part IV looks at the growth of process-based regulation as a form of workplace democracy, and demonstrates the nature of current democratic

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14   For a historicized account of the debate on the purpose of labor law, see Judy Fudge, *Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law*, *in* THE IDEA OF LABOUR LAW 120 (Guy Davidov & Brian Langille eds., 2011).

practices taking place in multiple venues and communities, at multiple levels. Part V concludes by addressing challenges to the alleged connection between the new forms of labor law and workplace democracy.

I. THE CASE FOR WORKPLACE DEMOCRACY AND ITS INSTITUTIONAL INTERFACE

The literature on workplace democracy is eclectic. Some of it can be found sitting on the shelves of political theory, usually commencing with a theoretical claim concerning the need to expand democratic practices beyond the nation-state and beyond the practices associated with representative democracy. Such claims commonly end with a comprehensive, albeit theoretical, vision for the reorganization of the economy. Other volumes on workplace democracy are scattered along the shelves of business and organizations. These studies commence with a type of organizational practice, such as ESOPs, and develop the democratic claim as a form of justification for it as well as for the state's intervention in the market for the purpose of facilitating or encouraging such institutions. Consequently, it is difficult to pinpoint the linkage between the objectives of workplace democracy and its institutional design.

To maintain a core understanding of the linkage between the organization of work and democracy, it is better to consider democracy as an organizing principle that connects various justifications and normative benchmarks with a set of institutions. Both ends of this relationship – justifications and institutions – are not fixed. The relationship between democracy and productive organizations would benefit from maintaining pluralism and a toleration of different institutional forms. In an attempt to highlight the added value of workplace democracy, the current Part presents four justifications for democratizing the workplace. Despite the common engagement with democracy as a normative benchmark for the organization of private enterprises, the justifications also point at differences that translate into variations in the kind of institutions that should be associated with it. The following Section attempts to start at the other end, that of institutional design, and identifies three core concerns that animate institutional choices for a democratic workplace.

A. The Deontological (or the "All Affected") Justification

A prominent deontological argument favoring the introduction of democratic structures into the workplace is that proposed most eloquently by Robert Dahl: "If democracy is justified in governing the state, then it is also justified

in governing economic enterprises. What is more, if it cannot be justified in governing economic enterprises, we do not quite see how it can be justified in governing the state."[15] The premises underlying this view are that (a) in any association where people have to reach collective decisions that will be binding on all members, decisions should be made by all those subject to the decision, as the good of each person is entitled to equal consideration; (b) in general each person in the association is entitled to be the final judge of her own interests; and (c) each adult individual is roughly equally well qualified to decide which matters should be directly decided by the individual and which should be delegated to others. To these premises Dahl adds (d) the principle of fairness, according to which scarce resources should be fairly distributed, and (e) the rule that in determining what fairness entails, the considerations of *each affected individual* should be taken into consideration.[16] These premises apply equally to both the citizenry of the nation and the stakeholders of an economic enterprise.

The deontological nature of the "all-affected" argument seems to create the strongest argument in favor of workplace democracy. The requirement for democracy in the workplace is rooted in the nature of the economic enterprise itself (a place in which decisions are made that affect the many individuals who are associated with it), and not in some external value (such as workers' self-fulfillment or the quality of democratic practice outside the economic enterprise).

At the same time, like other deontological assumptions, its truism is a matter of controversy. For example, Dahl does not account for the reason why the relevant "association" is the workplace (i.e., a place with a diverse constituency, which includes, at least, the workers of the enterprise), rather than the association of capital owners who hire the services of labor. Otherwise put, Dahl provides a theory of democratic governance, but not of membership. Implicitly acknowledging this method, and in order to sustain the congruity of his argument, Dahl ends up recommending the transformation of the economy into one where ownership of the firm will be by workers through collective ownership, in combination with some national-level profit-sharing arrangements.[17]

Unlike the deontological orientation of the first justification, the other justifications are teleological in nature. These justifications are derived from

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15   Robert A. Dahl, Preface to Economic Democracy 134-35 (1985).

16   *Id.* at 56-62.

17   *Id.* 136-50; *see also* David Ellerman, The Democratic Worker Owned Firm (1990); David Ellerman, Property and Contract in Economics: The Case for Economic Democracy (1992).

the positive values associated with work: self-fulfillment, economic wellbeing, and the wellbeing of others — individuals, communities, and the general social good.

B. The Justification from Self-Fulfillment

The workplace must be organized in a democratic manner, because participation is an activity, fulfilling in itself, that should be equally enjoyed by all autonomous agents. According to this view, work has become the center for personal development, matched only by one's interpersonal relations. Work has become the most time-consuming activity an individual pursues in her personal life. If democracy is intended to enhance self-development, then a democratic process must be implemented in small communities where personal development actually takes place, predominantly the workplace.

The argument from self-fulfillment emphasizes active participation, rather than a general requirement of democracy.[18] Participation at work should be part and parcel of an active democratic environment at multiple levels. Participation and deliberations with others endogenize preferences, encourage a learning process, and enable individuals to assert a multidimensional form of voice (as a citizen, worker, parent, environmentalist and more).[19]

This claim does not suggest that merely deliberating is a good in itself, regardless of the content of deliberations. A participatory environment is not agnostic to all preferences and interests. It seeks to foster participation for the sake of "self-realization."[20] Self-realization is defined as an act aimed at the achievement of an *external objective*, in the process of which the individual (a) *develops capacities* that can be used repeatedly; (b) *deploys these capacities*; and (c) makes use of them in some way that benefits a community in which she is member (*externalization*).[21] The argument from self-fulfillment therefore needs to be tested against the actual outcomes of the deliberative process and its contribution to the goals of enhancing self-development.

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18   Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 Theoretical Inquiries. L. 125 (2014).

19   *See* The Multiple Self (Jon Elster ed., 1986); Cynthia Estlund, Working Together: How Workplace Bonds Strengthen a Diverse Democracy (1st ed. 2003).

20   Jon Elster, *Self Realization in Work and Politics: The Marxist Conception of the Good Life*, *in* Alternatives to Capitalism 127 (Jon Elster & Karl Ove Moene eds., 1989).

21   *Id.* at 130-33.

C. The Workplace as a Learning Laboratory

Participatory democratic behavior has a spillover effect on the political climate of higher-level decision-making processes, all the way up to the national level. This justification shares with the argument from self-fulfillment the emphasis on practices of deliberative democracy and active engagement in decision-making, but it is distinct in two important respects. First, the former argument assumes that the individual can enjoy a higher degree of self-fulfillment when participating in the governance of her workplace. By contrast, the democratization of the workplace as a learning laboratory seeks to improve the political process outside the workplace. The workplace here is instrumental to a broader social reform, not an end in itself. A second difference, implied by the above distinction, is that the previous argument focused on individual objectives — promoting self-fulfillment — while the ends promoted by the current argument emphasize a social good (the improvement of the political process). Consequently, the two justifications may indicate different paths if a democratic structure and job enrichment are found to have differing effects. Complex task assignment — for example, teamwork in research and development — may be more satisfying with regard to individual self-fulfillment, self-esteem and general interest, but may not necessarily contribute to democratic practice and may actually attract the workers' attention and devotion away from political activity outside the workplace. By contrast, active political participation at work may be experienced by some as tiring and unappealing, although it may have a positive spillover effect outside the workplace.

The underlying empirical assumption in this context holds that work (including the nature of work, occupation, and degree of participation in the workplace) shapes the individual's outlook (including beliefs and ideologies), her habits and lifestyle, her status in society and self-esteem. A more social good-oriented hypothesis is that participation in the workplace may increase group and community identification through the formation of shared interests, as well as increase the legitimacy granted to collective actions and compliance with them.[22] Thus individuals are expected to be willing to cooperate in work (and consequently in arenas outside work), and to accept the system in which they are members (the work system, and consequently the larger

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22   This point is emphasized most clearly by CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 43 (1970) ("Participation has an integrative effect and it . . . aids the acceptance of collective decisions"); *see also* Robert T. Golembiewski, *Toward a Positive and Practical Public Management: Organizational Research Supporting a Fourth Critical Citizenship*, 21 ADMIN. & SOC'Y 200 (1989).

political system).[23] It is therefore necessary to provide individuals with fora that replicate the grand political process to the greatest extent possible, and where they will be able to engage *as equals* in decision-making processes, and in intersubjective exchanges of interests and ideals.[24] The workplace is an appropriate arena owing to the similarity of the decisions it requires to those made in the political state.[25] Like the previous justification, the view of the workplace as an effective laboratory that improves on the quality of democratic practice at the nation-state level rests on an empirical assumption. Despite the pervasiveness of this argument in the literature, the empirical studies are not sufficiently robust.[26]

D. The Justification from Economic Wellbeing and Political Empowerment

Proponents of this justification start with the view of the workplace as the main source of individuals' earnings. For most people, work is the main source of income (compared with a minority whose main source of income is from capital investments, and another minority whose main source of income is welfare), and eliminating patterns of socioeconomic stratification should be achieved by empowering workers in their workplaces, thereby strengthening their market power to affect their wages. Because economic status is an important determinant of political clout, and because workers, as individuals and a collective, do not usually match the economic power of capital, economic empowerment is tightly linked to the political quality of the national-level democratic regime.[27]

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23   *See* ESTLUND, *supra* note 19.

24   TOM SCHULLER, COMMON DISCOURSE: THE LANGUAGE OF INDUSTRIAL DEMOCRACY 158 (1980). Similar arguments have been made in ESTLUND, *supra* note 19; RONALD M. MASON, PARTICIPATORY AND WORKPLACE DEMOCRACY: A THEORETICAL DEVELOPMENT IN THE CRITIQUE OF LIBERALISM (1982); and PATEMAN, *supra* note 22. Generally, this view can be traced back to Antonio Gramsci who used the teacher-pupil terminology to explain his focus on certain work structures (most notably — work councils) as advancing the democratic ideal. *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (1971); *see also* DARROW SCHECTER, GRAMSCI AND THE THEORY OF INDUSTRIAL DEMOCRACY (1991).

25   The workplace is not the only venue for implementing democracy in small communal settings, and it serves as a guiding principle for governing social relationships generally. *See* IAN SHAPIRO, DEMOCRATIC JUSTICE (1999).

26   For an extensive survey of studies, see STEVEN A. PETERSON, POLITICAL BEHAVIOR: PATTERNS IN EVERYDAY LIFE (1990).

27   THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS (1950).

Unlike the justifications presented earlier, the emphasis of this argument is ultimately on *economic* empowerment, and it is therefore this argument that most directly deals with the distributional question. Because the question posed is how to provide for an equitable distribution of income, the answer may not necessarily be through the democratization of the workplace itself. This is an empirical question. For example, some opt for tax and subsidies as equally valid means of distribution, and more efficient at that,[28] while others hold protective and safety-net regulation to be the optimal method.[29] Alternatively, this argument with some variations has been used to endorse unionism, workers' ownership, or the development of social-democratic politics at the national level. Common to all such arguments is the focus on economic stratification of the broader (national) society rather than on the organizational design of the particular *workplace*.

Nevertheless, the rationale associated with the economic justification for workplace democracy insists on a distinctive link to the organization of work. Instead of widening the social-welfare safety net, which is a defensive strategy, providing workers with influence and control at work enables them to extract higher income and non-income benefits (health and safety), while maintaining institutions of competitive markets. The democratic workplace, with its focus on sharing control among the owners of the various production factors, allows a more egalitarian distribution of power that includes the property rights to financial resources, which translates in turn into power over the political institutions that generate and determine future distributions of economic gains and power.

The democratic nature of this argument lies in its focus on a redistribution of access to power-generating institutions, rather than on episodic redistribution of wealth. As such, it is an important component of a third-way theory: one that accepts an institutional structure in which economic power gained through markets is translated into political power, yet, at the same time, insists on integrating distributive considerations into the structure of markets.[30]

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28   Louis Kaplow & Steve Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

29   David M. Beatty, *Industrial Democracy: A Liberal Law of Labour Relations*, 19 Val. U. L. Rev. 37 (1984); Charles Fried, *Individual and Collective Rights in Work Relations*, 51 U. Chi. L. Rev. 1012 (1984).

30   On traditional "third way theory," see (despite the title) A Fourth Way? Privatization, Property and the Emergence of New Market Economies (Gregory Alexander & Garzyna Skapska eds., 1994). It is important to distinguish between previous third-way theories and more contemporary ones, such as that advocated by Anthony Giddens, The Third Way: The Renewal of Social Democracy

In sum, the four justifications for workplace democracy identify a relationship between the organization of work, the work*place*, the labor market, and democratic values. The reliance on democracy as an organizational form undermines distinctions between the public and private spheres. Instead of drawing on property and contract rights for the governance of private enterprises, the public values of democracy prescribe distinct institutional forms. The democratic arguments may be seen as reinforcing one another, but they do not fully overlap. They may have very different implications. Participatory management may be found to have economic outcomes that undermine the justification of economic wellbeing. Statewide institutions of voice, such as corporatist bargaining, may undermine the attempt to construct the workplace as a learning laboratory.

II. The Institutional Interface of Workplace Democracy

The various justifications for workplace democracy are associated with a wide range of practices, ranging from a wholesale transformation of the economy to narrow prescriptions for employee participation. In attempting to characterize the institutional design of the democratic workplace, it is difficult to identify any single practice as the *sine qua non* component that distinguishes the democratic from the autocratic firm, the latter designating a shareholders' regime in which workers are subordinated hierarchically to the orders of managers and earn their market-governed share in the form of wages. Despite the variety, it is possible to draw on democratic theory and identify three concerns that animate the institutional design of workplace democracy. First, it assumes the existence of a community. Second, it requires participatory processes that secure a roughly equal distribution of effective power among the community's constituents. And third, it acknowledges the need for substantive rights to protect individuals and groups from unwarranted use of power by others. I will elaborate shortly on each.

A. The Community

The existence of a community is the key for considering democratic institutions. The different justifications suggest multiple assumptions regarding the role of the workplace community. Some arguments view the organization of work as instrumental to the democratic quality of the political community (the state).

(1998). With processes of neoliberalism, the economic left-right continuum slides to the right and the third-way focal point slides as well.

Others emphasize the work*place* as the basic unit within which democratic practices must take place. The latter option should be further unpacked. Some seek to create a homogeneous community in which all the constituents are equally situated. Various forms of workers' ownership (the Yugoslav model of a worker-owned economy, workers' co-ops and, to a lesser degree, ESOPs[31]) seek to establish a community in which all the constituents are workers, and no other constituents besides the workers themselves exist. This is the unitary model of the community.[32] Alternatively, others view the organization as a community of dual or plural distinct constituencies.[33] Traditionally, trade unionism was viewed as creating a system of co-governance in which labor and capital are ideally placed in a situation of parity. Other plural forms of community include, for example, the view of the firm as a multi-constituency forum, which is responsible to the interests of various stakeholders.[34] In such plural forms it is important to distinguish between the requirements for internal democracy *within* each constituency and between the coming together of the constituencies to formulate a democratic environment of difference.

The workplace community is different from the nation-state; intuitively, it at first resists the application of democratic practice. It is embedded in a social, political and economic environment and the constituents are therefore intrinsically limited in the spectrum of decisions in which they can participate

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31   *See supra* notes 2-3.

32   The unitary view has been most developed by human resource scholars, such as Chester Barnard, The Functions of the Executive (1938). A revival of such an approach in legal scholarship can be viewed in Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 Geo. L.J. 39 (1992).

33   Richard Hyman, Industrial Relations: A Marxist Introduction (1975). Bogg, *supra* note 7, takes the dualist notion further, matching conceptions of democracy with detailed rules for trade union organizing and collective bargaining. However, a variation of this argument is often developed by economic skeptics of workplace democracy. Their argument usually focuses on the lack of homogeneity between capital and labor owners, and particularly among workers, making any effort to integrate the two groups into one community likely to fail. The problem is thus not rooted in "class conflict," but caused by heterogeneity that is viewed as inhibiting economic competitiveness. Henry Hansmann, The Ownership of Enterprise (1996).

34   On stakeholder/constituency statutes, see generally Keay Andrew, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little?*, 22 Eur. Bus. L. Rev. 1 (2011). On its relationship to the "third way" ideology, see Sarah Wheeler, Corporations and the Third Way (2002).

and on which they can decide. It takes part in a competitive market and its
ability to compete is therefore circumscribed according to the dictates of the
market. It is also part of a broader economic system in which rules of entry
and exit seem to trump voice and loyalty. Although such arguments aid in
identifying differences between the nation-state and the workplace, these
differences do not necessarily undermine the view according to which the
workplace is a relevant community for democratic praxis. Similar arguments
can be made with regard to local communities, yet it is common wisdom
that localities should be democratically managed. In fact, with the blurring
of the private/public distinction, it is commonly demonstrated that localities
and even the nation-state are currently, more than ever before, organized in
accordance with market dictates.[35]

   These arguments oscillate between the claim that the workplace is a
communal setting that is appropriate for democratic practice and the recognition
of its particular attributes. On the one hand, they do not suggest that the
workplace replicates other communities, and the following institutional
concerns display adaptation to its particular features. Moreover, despite the
claim that the workplace *can* sustain democratic practices associated with
territorial communities, in the following Sections I argue that it is the fuzzy
boundaries of the workplace that have become a critical factor in the gradual
disappearance of the normative vision of a democratic workplace. On the other
hand, it is important to acknowledge that the traditionally public and private
spheres are going through similar crises and there is a sense of a democratic
deficit that uniformly cuts across the public/private divide. Consequently, it
is necessary to rethink the institutions associated with democracy in all types
of community in which it takes place.

B. The Democratic Constitutional Order

Within the workplace community, a *democratic constitutional order* must
prevail. A *constitutional order* prescribes the fundamental rules of the game
and is therefore process-oriented.[36] Rules that prescribe the constitutional
order of a firm may be found in the company's bylaws, in external regulation
(such as laws that mandate co-determination on the board or works councils
within the firm), or in collective agreements (e.g., basic agreements that set
up employees' participation). Being polycentric and strongly embedded in

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35   Yishai Blank, *Spheres of Citizenship*, 8 Theoretical Inquiries L. 411 (2007).

36   Charles Sabel, *Constitutional Ordering: Trust Building and Response to Change*,
     in Contemporary Capitalism: The Embeddedness of Institutions 154 (Robert
     Boyer & Rogers Hollingsworth eds., 1997).

other orders (industrial, national, and occupational), these rules are different, in form and substance, from the typical constitutional order of the state, which is typically enshrined in formal documentation.

What renders a constitutional order democratic? Conventionally, the public firm is a shareholders' democracy. When considering the very same organizations as a form of workplace democracy, we seek to increase the scope of "the people" — the sovereign — and to study the way in which management can be made accountable to a more inclusive set of interests. An important aspect of a democratic order is that each individual or constituency should have roughly the same degree of power to affect the outcomes of the firm's decision-making processes at all levels of decision making. Power in this context encompasses two forms of power. Negative power ("exercising power over") is the power of some to overcome that of others and affect outcomes, for example by majority vote, restricting the voting agenda, or shaping the constituents' consciousness regarding feasible outcomes. The positive notion of power (the "power to act collectively") refers to the capacity of constituents to identify shared interests and to act in concert to advance them.[37] Working with both types of power requires designing a democratic system that is measured by its success in forging trust and legitimacy.[38] Trust is concerned with the relationship between the individual constituents of the community.[39] The legitimacy of the organization is twofold: first, in the eyes of the community's constituents (internal legitimacy), and second, in the eyes of those outside the community (external legitimacy).[40]

There is no simple blueprint for devising a democratic order. For example, a democratic order is often associated with voting and a one-person/one-vote (OPOV) principle. Some institutional practices of workplace democracy may be linked to voting — for example, self-management in workers' co-ops, shareholders' voting in fully ESOP firms, voting rules on boards of directors in which workers are represented (co-determination), and even majority rules

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37   STEVEN LUKES, *Introduction*, *in* POWER 1 (Steven Lukes ed., 1986); *see also* Jane Mansbridge, *Using Power/Fighting Power*, 1 CONSTELLATIONS 53 (1994). The positive aspect of power is best considered within Arendt's framework, as presented in HANNAH ARENDT, ON REVOLUTION (1963).

38   ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS (1974).

39   Donald C. Langevoort, *The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 96; Claus Offe, *How Can We Trust Our Fellow Citizens?*, *in* DEMOCRACY AND TRUST 42 (Mark E. Warren ed., 1999).

40   Cathryn Johnson, Timothy J. Dowd & Cecilia L. Ridgeway, *Legitimacy as a Social Process*, 32 ANN. REV. SOC. 53 (2006); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571 (1995).

for ratification of industrial action and collective agreements. However, voting rules generally, OPOV in particular, are not in themselves adequate to secure a democratic order, and they may also be unnecessary. Three arguments suggest the need to consider democratic practices that extend beyond a focus on equal voting rules. These point at the problem of identifying complex power relations within the workplace, the need to transcend voting and supplement it with deliberative practices, and the exclusionary tendencies that characterize various governance schemes.

First, although an OPOV principle may be an adequate institutional adaptation of democracy at work, it is more likely to be so in small ideological co-ops. However, voting is simply one form of negative power in which some succeed in overriding the power of others. Even studies of small co-ops demonstrate that aside from voting, other negative power relations exist, often found in informal communications or in the "tyranny of structurelessness" that characterizes self-management in small communal settings.[41] Hence, even where voting is a feasible method of self-governance, it cannot capture the actual distribution of effective power in the community. Power dynamics are even more difficult to even out in plural workplace communities, where OPOV must withdraw in favor of multidimensional formulas of effective power. Decision-making should factor in how one constituency decides with another (for example, workers and shareholders), and how decisions are made within each constituency.

Second, voting demonstrates one of the simple (and legitimate) institutional forms allowing some to exert power over others. However, at least some of the justifications for workplace democracy seek to remedy the problems associated with representative democracy.[42] This is best seen, for example, in the arguments favoring democracy at work for reasons of fostering self-fulfillment and drawing on the workplace as a laboratory of democracy. Applying the principle of subsidiarity to democracy is intended to encourage an active democratic environment. The negative use of power must be complemented with positive forms of power that encourage individuals and groups to recognize each other's interests, deliberate, and come together in action.[43] Infusing communicative action into economic enterprises provides for assimilatory participation and contributes to participation in the public sphere. It shifts the enterprise from the alienating locus of individuals merely engaging in

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41   JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980).

42   *See* Lustig & Benvenisti, *supra* note 18.

43   HANNAH ARENDT, THE HUMAN CONDITION (1958); Jürgen Habermas & Thomas McCarthy, *Hannah Arendt's Communications Concept of Power*, 44 SOC. RES. 3 (1977).

production, to an environment in which men and women interact together, working toward a jointly defined goal.[44] It reshapes the dichotomy between everyday life at work and political life.[45] Communicative action thus provides for more than the neoclassical ideal of free flow of information.

Finally, the simplicity of voting is also its major drawback. Voting and even deliberations to reach consensus are wholly removed from a host of market practices such as subcontracting, temping, hourly workers, off-shoring and informal patterns of work. These are practices that segment the workplace community, wherefore the rights of some at the core of the enterprise are not accorded to those employed at its periphery. Consequently, a democratic order should consider multiple forms of participation, empowerment, and equality of status within and across the boundaries of the workplace. Considerations of democracy should be included at each and every level — from the design of production, through the division of labor and work processes, to organizational structure and political representation.

C. The Constituents' Bill of Rights

The requirement for a democratic constitutional order within the workplace community (or communities) is process-oriented. It seeks to enable the constituents in either a unitary or plural workplace environment to engage in self-governance. However, reliance on process alone risks unwarranted outcomes. Democratic theory commonly engages with the additional substantive layer of fundamental rights that protect individuals and collectivities from the tyranny of the majority. Although the requirement to transcend representative forms in order to engage in trust-building and fulfilling encounters seems to reduce the perils of tyranny, there are strong arguments in favor of adherence to a bill of rights.

Basic rights in the workplace can be defined as legitimate and enforceable claims to some desired treatment, situation or resource.[46] Yet not all rights defined as such enter the constitutional order of the firm. Our concern here is only with those fundamental rights that define the "basic structure" of the

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44 STANLEY A. DEETZ, DEMOCRACY IN THE AGE OF CORPORATE COLONIZATION: DEVELOPMENTS IN COMMUNICATION AND THE POLITICS OF EVERYDAY LIFE (1992).

45 *Cf.* Michael J. Piore, *Work, Labor and Action: Work Experience in a System of Flexible Production*, *in* TRANSFORMING ORGANIZATIONS 307 (Thomas A. Kochan & Micael Useem eds., 1992).

46 RICHARD EDWARDS, RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST UNION ERA ch. 2 (1993). While Edwards deals with individual rights, the definition here is intentionally open to group rights as well.

democratic community.[47] These rights derive from the status of membership in the workplace community, and not from the contractual arrangements prevailing within the community.

The sources of the constituents' rights are twofold: sources exogenous to the workplace itself, and sources within. The former include general legislation, industrial custom, collective bargaining agreements applied at the national or sectoral level, and the like. The latter include company policy, localized collective bargaining and individual contracts. Not all sources are equal in terms of the right's strength and the legitimacy accorded to the right. Often there may be a trade-off between the two measures.[48] Rights that are imposed on the workplace community from the outside may be stronger in the sense that they are not dependent on the goodwill of the workplace constituency. By contrast, rights that are established by the community itself emerge from the constitutional decision-making process. As such, they can be altered by the same procedure, unless voluntarily entrenched. At the same time, rights that are imposed on the constituency from the outside may be less acceptable to the workplace constituents than those that are decided by the constituency itself. The more those benefiting from and constrained by these rights are engaged in the deliberation over the definition of the rights themselves, the more likely they are to feel committed to these rights and to their observance.

The presumable trade-off between the degree of protection and the legitimacy a right enjoys is mitigated, to some extent, by the fact that rights need to be enforced and protected. Unless an elaborate mechanism for the enforcement of rights exists outside the workplace, they need to be protected by internal mechanisms. "Authoritative" rights that are imposed from the outside but are not legitimated by the constituents of the workplace community are likely to be de facto weaker than intended, and a greater discrepancy may be expected between the formal constitutional order and its "order in action."[49] Conversely,

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47 The term "basic structure" refers to John Rawls, A Theory of Justice 7 (rev. ed. 1999).

48 The trade-off described is closely related to the critique of excessive juridification of the workplace. *See* Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-Trust, and Social Welfare Law (Gunther Teubner ed., 1987); *see also* William McCarthy, *The Rise and Fall of Collective Laissez Faire*, *in* Legal Intervention in Industrial Relations: Gains and Losses 1 (William McCarthy ed., 1992).

49 *See, e.g.*, Anna Pollert, *Injustice at Work: How Britain's Low-Paid Non-Unionised Employees Deal with Workplace Problems*, *in* Challenging the Legal Boundaries of Work Regulation 285 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds., 2012); David Weil, *A Strategic Approach to Labour Inspection*, 147 Int'l Labour Rev. 349 (2008).

rights that seem to be "flimsy," having been devised from within through a power mechanism that can also serve as the vehicle for their amendment, are likely to be respected if they succeed in capturing the constituents' recognition of their importance.

The list of rights will generally match those of public rights — including civil liberties and social rights, with necessary adaptations. The negative dimension of rights is generally similar, because the principle of "do not infringe on someone's right" can be applied regardless of the public or private setting, and indeed some countries apply basic rights to the private sphere as well. The positive dimension is different. The workplace is a source of positive rights (e.g., the right to livelihood), but its obligations to constituents are different from those of the state. However, its role in fulfilling rights may be as important, with the (relative) declining power of the nation-state and rising power of the multinational corporation (MNC). For example, MNCs arguably hold a responsibility toward the workers in communities from which they draw their source of labor power, and toward their families.[50] Hence, the bill of rights is not an attenuated form of national rights, and the rights *vis-à-vis* the organization where one works are not a subset of the state's duties. However, the same set of rights needs to be adapted to different organizational settings, and derived from universal perceptions of humanity.

III. Losing the Community and Searching for It All Over Again

The three institutional concerns of workplace democracy — community, a democratic constitutional order, and the protection of rights — provide a framework for a descriptive analysis, but they do not offer a precise institutional blueprint. They aid in descriptively highlighting democratic qualities and deficiencies in existing institutions. The justifications for workplace democracy intersect with these concerns, and together they also provide a normative trajectory. They can serve as a benchmark, whether in pragmatic incremental reforms or in tracing the contours of a democratic utopia. Like the descriptive component, the normative aspect is not intended to fix a particular institutional setting. However, despite the rich set of values and the institutional methods that democracy offers, and the many possibilities of integrating them, the

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50   *Cf.* OECD, OECD Guidelines for Multinational Enterprises 14 (2008), *available at* http://www.oecd.org/corporate/mne/1922428.pdf.

discussion of workplace democracy has gradually declined.[51] This can be explained as an outcome of several processes, of which I would like to emphasize what I view to be two dominant and interrelated factors — marketization and globalization.

A. Marketization

At the methodological level, marketization accounts for the growing neoclassical-neoliberal emphasis on unfettered markets as the preferred institutional form. Furthermore, it is associated with the sole benchmark of efficiency and economic Darwinism as dictates of institutional choices.[52] With regard to the organization of the workplace, it refers to the gradual decline in stable work communities, a growing reliance on peripheral, secondary and precarious workforces, as well as a growing disparity between the primary and secondary workforces. It involves rising labor market inequality, declining mobility, and growing insecurity.[53]

The implicit image associated with workplace democracy is often of an archipelago of workplaces where autonomous self-management is practiced. The state's role is to establish the regulatory infrastructure for such democratic subsystems. Once an individual leaves one island, she is assumed to immediately join another. The theory of workplace democracy does not address the situation of being stranded at sea, that is — experiences associated with being outside the labor force altogether, unemployment, transitions between work, peripheral work and informal work. This industrial image avoids the fundamental problem of exclusion from the workforce. At the time of the Fordist regime, percepts of workplace democracy resonated with the image of democratic stability — an internal labor market with a guarantee of tenure, above-market wages, mutual lock-in of labor and capital, and an almost seamless integration of local residence, economic dependence, social rights and cultural obligations.[54] While generally far from the ideal benchmark of democracy, there was a

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51   Steven Deutsch, *A Researcher's Guide to Worker Participation, Labor and Economic and Industrial Democracy*, 26 Econ. & Indus. Democracy 645 (2005).

52   David Harvey, A Brief History of Neoliberalism (2005).

53   Judy Fudge, *Blurring Legal Boundaries, Regulating for Decent Work*, Challenging the Legal Boundaries of Work Regulation 1 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds., 2012); Mick Marchington, Damian Grimshaw, Jill Rubery & Hugh Willmott, *Introduction*, *in* Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies 1 (Mick Marchington et al. eds., 2006).

54   For a description of the Fordist era see Peter Cappelli et al., Change at Work chs. 1, 3 (1997).

defined community, some form of power sharing (e.g., through collective bargaining), and a certain level of workers' rights enshrined in collective agreements and/or statutes. Absent direct treatment of those left outside the workplace polity, the radical discussion of workplace democracy at the time was at risk of being elitist. It was somewhat similar to Athenian democracy for the men-heads of households, although it did lay the foundations for thinking about democracy and work in a more inclusive fashion.

With the gradual move to post-Fordism starting from the mid-1970s, any attempt to continuously adhere to the image of an archipelago collapsed. The share of workers taking part in a stable workplace community where the traditional institutions of workplace democracy can be implemented gradually declined. Some institutions that had been traditionally associated with workplace democracy remained isolated national practices, for example board-level co-determination. Others declined, although not in all nation-states and not to the same level, as was the case of trade-union representation. Some arrangements expanded, but in a restricted manner within the Western democracies, most notably in Europe — for example, works councils.[55] Some new institutional forms associated with workplace democracy were for the most part loose market-based mechanisms in which the details revealed little conformance with the justification of workplace democracy and its central institutional tenets, as was the case of ESOPs.[56]

In this new market environment, the unfettered market is not the only solution on the map of ideas. In keeping with Karl Polanyi's "double movement,"[57] marketization is often followed by various forms of regulation, for example growing reliance on employment standards,[58] and attempts at improving the integration between activity in the labor market and the social

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55   Council Directive 94/45 of 22 September 1994 on the Establishment of a European Works Council, 1994 O.J. (L 254) (EC) (amended by Directive 2009/38, of the European Parliament and of the Council of 6 May 2009, 2009 O.J. (L 122) (EC)). On the prevalence of works councils, see EUR. COMM'N, DIRECTORATE-GEN. FOR EMPLOYMENT, SOC. AFFAIRS & INCLUSION, *Variations and Trends in European Industrial Relations in the 21st Century's First Decade*, *in* INDUSTRIAL RELATIONS AND SOCIAL AFFAIRS 2010, at 17 (2011) (based on a draft by Jelle Visser of the Amsterdam Institute for Advanced Labour Studies (AIAS, University of Amsterdam)).

56   *See supra* note 5 and the accompanying text.

57   KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIMES (Beacon Press 2001) (1944).

58   CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990). Employment standards also assume

sphere.[59] The push and pull forces of marketization/regulation and efficiency/distribution are guided for the most part by acceptance of the following liberal script: labor, production and the organization of work are guided by private considerations, and the public (the nation-state) guides the private by a set of substantive norms ("employment standards") and only to a limited degree by the establishment of labor market institutions and intervention in the labor process.[60] Intervention can sometimes be justified in terms of efficiency, while at other times it is weighed against distributional concerns ("workers suffer from intrinsic market weakness and therefore labor rules correct the weakness"). This script views discussions of the workplace community as some form of category mistake; it brackets the attempt to forge a deliberative democratic process and accords weight to the protection of workers' rights — not as the democratic rights of constituents in a polity, however, but as a remedy for private-market inefficiencies or inequalities. The script is not wholly unrelated to the justifications of workplace democracy. It is associated more closely with some justifications (economic inequality) than with others (the deontological argument, self-fulfillment, and the workplace as a learning laboratory). However, it is no longer rehearsed in democratic terms.

B. Globalization

The hyper-marketization of the labor market is accompanied by hyper-globalization, which affects both the private and public spheres.[61] Globalization interacts with marketization in two ways. It reduces the regulatory capacity of the state, and at the same time it opens options for further disintegration of the workplace community.

In the past, institutional examples of workplace democracy were either a matter of local evolution (e.g., the Mondragon conglomerate of cooperatives),[62] or the outcome of regulatory intervention (e.g., shop-floor and board-room

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a similar role at the international level, *see* Kimberly A. Elliott & Richard Freeman, Can Labor Standards Improve Under Globalization? (2003).

59 Gunther Schmid, *Towards a Theory of Transitional Labour Markets*, *in* The Dynamics of Full Employment: Social Integration Through Transitional Labour Market 151 (Gunther Schmid & Bernard Gazier eds., 2002).

60 Richard Freeman, *Labor Market Institutions Without Blinders: The Debate Over Flexibility and Labor Market Performance*, 19 Int'l Econ. J. 129 (2006).

61 Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy (2012).

62 Whyte & Whyte, *supra* note 8.

level co-determination in Germany).[63] The former are not necessarily affected by globalization; the latter are. To the extent that regulatory attempts to foster workplace democracy encounter the resistance of capital, processes of globalization introduce more opportunities for forum shopping to avoid such regulation. Effective regulation requires "trapping" the relevant segment of the economy (the labor market as a whole, or the sector) in full. The capacity of organizations to sidestep the regulatory provision creates an incentive for others to do the same, regardless of the effects of such evasion strategy on the net social gain. In the past, states developed various strategies to ensure broad coverage of labor market norms, such as universal statutory provisions, extension decrees, or sector-wide bargaining. The growing cleavage between primary and secondary working arrangements can be contained to an extent by regulatory provisions and collective agreements. These institutional solutions are only effective within the confines of the nation state. However, the labor market is no longer similarly confined. The nation-state can attempt to induce a stronger sense of community by rendering subcontracting more difficult, but its power to contain off-shoring to other countries is severely limited. Globalization therefore weakens the regulatory state and opens a host of opportunities for doing away with the a priori notion of workplace community.[64] It should be emphasized that while some sense of "workplace" can remain when part of production or services is subcontracted to workers who work on the premises (the "place"), global arrangements send production and services to faraway and remote places, spread risk by dividing production between numerous contractors in many countries, and do away with a sense of shared "place" to begin with.

Marketization and globalization share a common feature — they both disintegrate a sense of community in the traditional sense, including state and workplace communities. It bears emphasis that I state this in a value-neutral way. Communities are a safe haven, but also a source of exclusion.[65] Moreover, current processes also accommodate new forms of local and transnational communities, such as identity communities (gender, people with disability), professional communities (e.g., physicians and lawyers acting together to promote professional and ethical values), consumers acting in concert (e.g.,

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63   Carola Frege, *The Discourse of Industrial Democracy: Germany and the US Revisited*, 26 Econ. & Indus. Democracy 151 (2005).

64   Guy Mundlak, *De-Territorializing Labor Law*, 3 Law & Ethics Hum. Rts. 189 (2009).

65   Sheldon Wolin, *Fugitive Democracy*, 1 Constellations 11 (1994).

using boycotts),[66] and new forms of occupational solidarity (e.g., port-workers acting in solidarity with their peers overseas).[67] Whether the old sense of community was preferable to the contemporary fluidity of communities is of no direct concern to us here. Regardless, I claim that the two processes are crucial to the loss of interest in the idea of workplace democracy. Considering the organization in which people work to be a "work-*place* community" is a relic of past arrangements that enjoyed only partial coverage and remain relevant to an ever-shrinking share of the workforce.

This process actually matches and trumpets the concerns about the future of state-place democracy. Oddly, to the extent that the concept of workplace democracy sought to synchronize the organization of the public and the private, its decline is due to the two being closely synchronized in their transformation.

C. Searching for a Renewed Version of the Work-Place Democratic Nexus

Marketization and globalization have eradicated the assumption of stable communities that animated past attempts to link the justifications of workplace democracy with the various institutions associated with it. Once it is no longer clear what the relevant work and state communities and their boundaries are, the other institutional concerns become enigmatic as well: whose democratic order is it and how should democratic practices such as representation and deliberations address the fragmented sense of community? Whose rights should be upheld and fulfilled, and who is responsible for securing them? Are the relative disintegration of traditional work-place communities and the dilution of state-place communities detrimental to the concept of workplace democracy?

Looking at the four justifications that have traditionally been offered, not all are damaged to the same extent. The justification from economic wellbeing remains intact, even if the work*place* is fragmented. Moreover, with the expansion of the labor market beyond the borders of the nation-state, it is necessary to consider the target community for enhanced economic wellbeing, because globalization affects inequality both *within* and *between*

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66   Gay Seidman, Beyond the Boycott: Labor Rights, Human Rights, and Transnational Activism (2007).

67   Noel Castree, *Geographic Scale and Grass-Roots Internationalism: The Liverpool Dock Dispute, 1995—1998*, 76 Econ. Geog. 272 (2000); *see also* Mitchel Lasser, *Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms*, 15 Theoretical Inquiries. L. 229 (2014).

nation-states.[68] The justification from economic wellbeing emphasizes the organization of work, but accepts various measures that can promote economic empowerment. The challenge of globalization and marketization has actually stirred a growing interest in social rights and progressive versions of the right to development as a transformative practice that can be associated with the economic justification. The scholarly work on developing capabilities further integrates justifications that are associated with economic wellbeing, but also with the justification from self-fulfillment.[69]

The view of the workplace as a learning laboratory for democratic practice at the state level remains relevant, although the two ends of the equation seem to have been considerably toned down. The work*place* is no longer the central locus for the practice of democracy, and the nation-state is not necessarily the ultimate end towards which democracy should be practiced. Instead, there is a growing emphasis on multiple representations of identities in numerous arenas, constituting an active civil society that cuts across geographical borders.[70] The importance of learning remains, but the process of learning cannot be conducted merely at the class-based location of work. Democratic practice should therefore be interwoven through dynamically intersecting communities rather than nested in a fixed and stable workplace community.

Dahl's' "all-affected" argument remains particularly compelling and timeless because of its deontological nature, but it is also the most difficult to decipher in light of marketization and globalization. The argument reflects the sense of a democratic deficit that is gradually growing with the loss of community; a new anomie of sorts. Who are "all those who are affected"? Who should be accorded power and rights, and who are the bearers of duty?[71]

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68   Bernhard G. Gunter & Ralph van der Hoeven, *The Social Dimension of Globalization: A Review of the Literature*, 143 INT'L LAB. REV. 7 (2004).

69   The capabilities approach is based first and foremost on the works of Amartya Sen and Martha Nussbaum. Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, *in* THE QUALITY OF LIFE 242 (Martha C. Nussbaum & Amartya Sen eds., 1993); Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE, *supra*, at 30. On the matter of self-fulfillment that connects some of the concerns of traditional workplace democracy and the capabilities approach, see ALAN GEWIRTH, SELF-FULFILLMENT (1998).

70   NANCY FRASER, SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD (2010); SEIDMAN, *supra* note 66.

71   On the problems in developing a sound theory of global justice generally, see Christian Barry & Thomas Pogge, *Introduction*, *in* GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE 1 (Christian Barry & Thomas. W. Pogge eds., 2006). In the labor context, note in particular Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365 (2004).

The growing cleavage between primary and secondary labor markets and the extension of the labor market beyond the boundaries of the nation-state severely problematize the image of congregating all those in the community who are affected by decisions to take part in the democratic process.[72]

Consequently, the objectives and justification of workplace democracy remain in place, but in attempting to point at what they suggest we need to abandon the assumption that an economic organization can perform in a manner that is similar to the participatory Athenian town meeting or the representative democratic system in a small community. Solutions that were established in the heyday of the Fordist regime, such as collective bargaining and co-determination, and even those that were developed in later years, such as ESOPs, cannot fully contend with the eradication of stable work-place and state-place communities and the derivatives of securing a democratic order and rights. How is it possible to revive the attempt to forge a public/private isomorphism that ties together the organization of enterprises and the democratic polity?

IV. Changing Focus in Labor Law — Beyond Employment Standards

The most evident contribution of labor law, broadly defined, to constituting democracy in the workplace was its attempt to forge deliberative engagement in the workplace by means of workers' collective representation. Representation could take various forms, including co-op members' joint decision making, collective bargaining by trade unions and employers, works councils, board-level co-determination, sector-wide wage councils, and tripartite consultative institutions. Marketization reduced the impact of these arrangements, and a growing share of the workforce is employed in establishments where they have no impact. As a response, the liberal script suggests that substantive employment standards (such as minimum wage or working-time regulation) are expected to fill the gap. However, these standards in themselves do not fully substitute for the traditional labor market institutions associated with the various objectives of workplace democracy. They secure basic protections, but do not engage workers actively and render them merely passive recipients of rights (hence not satisfying the justifications from self-fulfillment and the workplace as a learning laboratory); they may empower workers economically, but they are difficult to enforce and only partially cover workers employed in precarious employment relations and in informal arrangements (hence not

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72   Lustig & Benvenisti, *supra* note 18.

satisfying economic wellbeing); and as such they make no attempt to secure that all those who are affected will be able to voice their interests and impact decisions that govern their lives (hence falling short of the "all-affected" justification).

However, side by side with the surge in employment standards that secure minimum rights, there is a growing emphasis on process-based forms of regulation seeking to foster deliberative engagement at sites related to work. There are two important components to this new regulatory method. First, there is proceduralism itself — regulation that prescribes procedures for the organization of work. Second, procedures accommodate active engagement with the organization of work at multiple levels — global, national, municipal, and even non-territorial (sectors or MNCs). I refer to this feature as "layering," suggesting a web of arrangements that fit into a coherent form. Consequently, proceduralism and layering together accommodate practices that transcend the public/private distinction at times when the traditionally private and public communities' boundaries are blurred. The following Sections elaborate on the two components.

A. Proceduralization of Labor Law

The new proceduralism has many manifestations. With regard to employment standards, there is a turn to process-based law. Dismissals require due process hearings (Israel, France[73]) and layoffs require preparation of a social plan (Germany[74]). Workers' privacy requires clear guidelines and consultation with works councils (Italy[75]) or information and monitoring by a privacy ombudsman.[76] Companies are required to conduct self-audits to guarantee

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73   Sharon Rabin Margalioth, *Regulating Individual Employment Contracts Through Good Faith Duties*, Comp. Lab. L. & Pol'y. J. 663 (2011).

74   Clyde Summers, *Worker Dislocation: Who Bears the Burden: A Comparative Study of Social Values in Five Countries*, 70 Notre Dame L. Rev. 1033 (1994-1995).

75   Lawrence E. Rothstein, *Privacy or Dignity: Electronic Monitoring in the Workplace*, 19 N.Y.L. Sch. J. Int'l & Comp. L. 379 (2000).

76   On the importance of an ombudsman and an internal grievance mechanism for the clarification of norms, see Karen D. Loch, Sue Conger & Effy Oz, *Ownership, Privacy and Monitoring in the Workplace: A Debate on Technology and Ethics*, 17 J. Bus. Ethics 653 (1998). Internal procedures may be mandated by law (e.g., as indicated in Israeli case-law, in National Labor Court 90/08, Issakov-Inbar v. Commissioner for Women's Work (Feb. 8, 2011) (Isr.)), or promoted as a model business practice (e.g., in Australia: *Best Practice Guide: Workplace Privacy*, Australia Fair Work Ombudsman, Australian Government, http://www.

compliance with wage requirements as well as with occupational health and safety standards, which reduces the heavy hand of the public regulator.[77] Antidiscrimination and equal opportunities regulation requires explicitly or implicitly well-documented diversity programs.[78] Sexual harassment is a matter for internal self-monitoring and enforcement within organizations.[79] Standardized terms in sector- and nation-wide collective agreements can be derogated at the enterprise level following consultation.[80]

The current wave of proceduralization is closely linked to traditional forms of collective representation, but sidesteps them as well, admitting a more diverse set of collective voices, while encompassing issues that were not governed by the traditional collective agents.[81] New process-based labor law is emerging in different regions and types of industrial relations systems. Cynthia Estlund's study of procedural developments in the United States attributes them in part to the "ossification of American labor law."[82] David Doorey offers a similar account that is embedded in Canadian law, but based on general premises that connect proceduralization, with an emphasis on decentering, and democracy.[83] Similar developments are also documented

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fairwork.gov.au/BestPracticeGuides/08-Workplace-privacy.pdf (last visited July 28, 2013)). Internal procedures are also suggested as sound business policies in the shadow of law. *See, e.g.*, Ian Turnbull, Privacy in the Workplace (2009).

77 Eric Tucker, *Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom* (York Univ. Osgoode Hall Law Sch., Osgoode CLPE Research Paper No. 38/2012, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167425.

78 Frank Dobbin, Kim Soohan & Alexandra Kalev, *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 Am. Soc. Rev. 386 (2011).

79 Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm (2002).

80 Derogation rules in Europe vary from clauses in legislation that enable derogation in collective agreements or even in negotiations with works councils, and derogation that takes place in the interaction between sectoral and enterprise bargaining. In the context of wage bargaining, see, for example, Maarten Keune, Eurofound, Derogation Clauses on Wages in Sectoral Collective Bargaining in Seven European Countries (2010), *available at* http://www.eurofound.europa.eu/pubdocs/2010/87/en/2/EF1087EN.pdf.

81 Seidman, *supra* note 66; Guy Mundlak, *Labor Rights as Human Rights: Why Don't the Two Tracks Meet?*, 34 J. Comp. Lab. L. & Pol'y 7 (2012).

82 Estlund, *supra* note 58.

83 David Doorey, *A Model of Responsive Workplace Law*, 50 Osgoode Hall L.J. 47 (2012).

within European states, as well as at the European level.[84]

This new trajectory is no longer confined to regulatory provisions authored by states. International, supranational and transnational law also point at new processes. The International Labor Organization (ILO) has maintained its emphasis on the freedom of association, but is also seeking to forge global dialogue that engages in questions of job creation, rather than just setting standards on substantive rights at work.[85] The United Nations and the International Migration Organization similarly endorse the High Level Dialogue on Migration.[86] Policymaking and deliberations also prevail in regions, most aptly demonstrated by the European Employment Strategy, which is based on the open method of coordination.[87] Attempts to foster global deliberations are complemented by a growing responsibility of states to report and self-enforce some international employment standards and human rights that concern workers, coupled with greater use of critical shadow reports prepared by trade unions and nongovernmental organizations.[88]

Rankings of business environments and employment rights are benchmarked by distinctly different systems of measurement.[89] International institutions, such

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84 Simon Deakin & Ralf Rogowski, *Reflexive Labour Law, Capabilities and the Future of Social Europe*, *in* TRANSFORMING EUROPEAN EMPLOYMENT POLICY: LABOUR MARKET TRANSITIONS AND THE PROMOTION OF CAPABILITY 229 (Ralf Rogowski, Robert Salais & Noel Whitesdie eds., 2012).

85 ILO, JOBS AND LIVELIHOODS AT THE HEART OF THE POST-2015 DEVELOPMENT AGENDA (2012), *available at* http://www.ilo.org/global/topics/post-2015/documents/WCMS_193483/lang--en/index.htm.

86 Declaration of the High Level Dialogue on Migration and Development (draft resolution), U.N. GAOR, 68th Sess., U.N. Doc. A/68/L.5 (Oct. 1, 2013), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/68/L.5.

87 On the open method of coordination, see DIAMOND ASHIAGBOR, THE EUROPEAN EMPLOYMENT STRATEGY: LABOUR MARKET REGULATION AND NEW GOVERNANCE (2006); and Jonathan Zeitlin, *Is the Open Method of Coordination an Alternative to the Community Method?*, *in* THE COMMUNITY METHOD: OBSTINATE OR OBSOLETE? 135 (Renaud Dehousse ed., 2009).

88 Miriam Hartlapp, *On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO*, 45 J. COMMON MKT. STUD. 45 (2007).

89 Compare, for example, three indexing attempts with a distinctly different ideological undertone and focus: THE WORLD BANK, DOING BUSINESS, http://www.doingbusiness.org (last visited Nov. 20, 2013) (ranking states' regulatory provisions); OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org (last visited Nov. 20, 2013); and ILO DECENT WORK MEASUREMENTS, http://www.ilo.org/integration/themes/mdw/lang--en/index.htm (last visited Nov. 20, 2013). For a critical review of current indexing attempts, see Simon Deakin, *The Evidence-*

as the ILO and the World Trade Organization, are gradually increasing access to the representation of new interests.[90] There are budding attempts, although currently limited in scope, to increase the deliberative space in the making of norms and the resolution of transnational disputes.[91] Forms of transnational cooperation between workers, trade unions and social organizations foster attempts to bridge the gaps between international norms and local realities.[92] These interactions cannot be described merely as attempts to implement fixed substantive norms. They enable to develop the norms on the basis of deliberations and confrontations at different points of political exchange.

Complementing the local (national) and transnational emphasis on process, corporate social responsibility (CSR) has gained more attention, as well as controversy. Codes of conduct and practice that are developed within MNCs are complemented by international standards.[93] Some of these standards set substantive norms (such as SA 8000), while others require corporations to comply with their own self-imposed standards (such as ISO 26000).[94] In addition, a host of reporting requirements, such as the Equator Principles, has generated a growing need for corporations to document and demonstrate the extent of their engagement with social (labor or "green") issues, even if they have chosen to maintain a level of minimal compliance.[95] Such requirements also appear in the bylaws of stock exchanges, which require companies whose

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Based Case for Labour Regulation Research, *in* REGULATING FOR DECENT WORK: NEW DIRECTIONS IN LABOUR MARKET REGULATION 31 (Sangheon Lee & Deirdre McCann eds., 2011).

90 ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER (2011); Marcos A. Orellana, *WTO and Civil Society*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 671 (Daniel Bethlehem et al. eds., 2009); Andrew Lang, *Trade Agreements, Business and Human Rights: The Case of Export Processing Zones* (Corporate Social Responsibility Initiative, Working Paper No. 57, 2010).

91 *See* Judy Fudge & Guy Mundlak, *Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State* (Eur. Univ. Inst. Dept. of Law Working Papers, Working Paper No. 2013/06, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293969.

92 *See infra* notes 99-103 and accompanying text; Guy Mundlak & Hila Shamir, *The Global Governance of Domestic Work*, *in* CARE AND MIGRANT LABOUR WORK (Bridget Andersen & Isabel Shutes eds., forthcoming 2014).

93 Dara O'Rourke, *Multi Stakeholder Regulation*, 34 WORLD DEV. 899 (2006).

94 Dirk Ulrich Gilbert, Andreas Rasche & Sandra Waddock, *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23 (2010).

95 John M. Conley & Cynthia Williams, *Global Banks as Global Sustainability Regulators: The Equator Principles*, 33 LAW & POL'Y 542 (2011).

stocks are being traded to demonstrate a well-ordered and documented set of human resource practices.[96]

I argue that the proceduralization of labor law and the labor process can be viewed as an institutional interface of the justifications underlying the work-democracy nexus. Identifying the connection between the institutional developments and the normative idea can aid in clarifying the partial nature of this democratic development, its limitations, and the way to draw on proceduralization in the future.

Where traditional institutions prevail, such as trade unions, works councils and co-determined boards, the new process-based law need not undermine them.[97] However, the new proceduralization is more evident in organizations where such formal institutions are absent. It therefore features more inclusive coverage in response to processes of marketization, and can reach workers who are otherwise marginalized from traditional instruments of representation yet still affected by some of the regulatory provisions.[98] Even the informal sector is often not wholly devoid of standards and some forms of procedures, such as those established by corporate codes of social responsibility, which may affect informal workers.

Process-based standards seek to introduce what result-oriented standards avoid — a deliberative encounter between individuals and groups, who

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96   Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603 (2011).

97   The legislative recognition of nonunion forms of representation and processes in the workplace that bracket adequate workers' representation, however, have possible implications. They may impair existing institutions of voice and representation through the legitimacy granted to lesser forms of representation that coopt the workers' interests and power into the structure of the autocratic firm. *See* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753 (1994).

98   LEAH F. VOSKO, MANAGING THE MARGINS: GENDER, CITIZENSHIP AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT (2011). It is noteworthy that the discussion addresses *workers*, rather than employees, assuming a loose meaning that is intended to capture a host of relationships that extend beyond the formal employment relationship. MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2011). This is particularly important because institutions of workplace democracy in the past sought to develop alternative means of obtaining work and services, to prevent the dilution of the workplace community. Such practices were fatal to the democratic quality of the community and in some institutional configurations led to their demise (e.g., the degeneration of workers co-ops).

hold different interests, where they can dispute the norms, listen, use force, reason, decide to litigate or even strike, sabotage, or cooperate. These are the encounters that, when performed at their best, make it possible to assess one's interests in light of those of others, persuade, listen, identify cooperative solutions, legitimize tradeoffs, test performance of promises and forge trust. There is no need to idealize the deliberative moment, and it is often conducted under circumstances of distorted communication. But process-based norms at least open possibilities for interactive iterations that can be followed upon.

In itself, proceduralization may compensate for the inadequate liberal script that replaces the institutions of workplace democracy with passive employment standards. However, the move from substantive standards to process alone cannot contend with the challenge of globalization, which still renders regulatory attempts by one state vulnerable to the pressures of off-shoring and in general reduces the regulatory power of the state, leading to enclaves of companies that respect and implement procedures and a broader environment that easily avoids them. Layering is therefore a necessary ingredient as well.

B. Layering

The new proceduralization takes place at multiple levels, enabling congruence, or at least complementarity, in the exercise of process-based norms. In this, current practices have moved away from the concerns of organizing the single workplace in a democratic fashion. In the past, it was somehow assumed, less frequently practiced, that the representation of workers in the democratic firm would also translate into an improved democratic process in the public sphere. However, it was rarely made clear how the organization of work at the shop-floor and enterprise levels translates into democracy at the state level. Similarly, corporatist nationwide bargaining was possibly related to enterprise-based participation, but not necessarily so. As marketization and globalization fragmented the organization of work, these possible connections became even more tenuous. What is striking about the current emergence of process-based norms is that norms of different kinds draw on similar ideas of visibility (information-forcing rules), due process, and accountability. These are the staples of administrative law, traditionally considered to be the body of law governing the exercise of authority in the public sphere. These norms' congruence results from the fact that they currently govern different types of relationships — the enterprise *vis-à-vis* its workers, the state *vis-à-vis* plural voices of work communities, the state *vis-à-vis* other states, international organizations *vis-à-vis* member states and international NGOs and trade unions, and MNCs *vis-à-vis* consumers, organizations and financial institutions.

In consideration of the multiple relationships in which proceduralism is emerging, there is no longer an assumption that workers are constituents of a stable work community. Instead, a more radical form of democracy is being practiced. In this new form, work — rather than a well-defined work*place* — is part and parcel of a broader engagement in which agents of different sorts are taking an active part in transformative practices.

It is best to demonstrate the meaning of the new form of workplace democracy to which I am referring by pointing at several studies that designate "best practice," all of which are deservingly cautious. Because globalization is a crucial factor in disrupting the workplace-state nexus, I draw on transnational examples to demonstrate the effects of layering. These examples refer to the type of workers least likely to be covered by the former methods associated with workplace democracy. They are followed by a demonstration of the concept's applicability in local settings as well.

Richard Locke and Monica Romis look at Nike's self-monitoring system, in which a corporate code is applied to and monitored in hundreds of suppliers worldwide.[99] The quantitative data suggest that corporate codes are hardly a panacea for constant improvement, but they also indicate that self-monitoring and enforcement by a multinational company can work in some places and some of the time. In a qualitative study that compares two similarly situated plants in Mexico, both of which manufacture for Nike, they attempt to identify what makes one factory's performance better than the other's. The factory with slightly higher labor costs enjoys better productivity. Although it shares with the other factory adherence to the minimum wage and minimum labor standards, it has adopted teamwork incentives, offers overtime as a gainful option rather than a mandatory requirement, involves workers in participatory management, engages in collaboration with the local trade union, and has initiated joint committees in areas such as health and safety. It was found that the factory welcomed Nike's headquarters' intervention in its human resource management, working in collaboration on improving human resource practice as part of the production design. This factory is contrasted with the other in which hierarchical relationships prevail, the union is avoided to the extent possible, and the relationship with both the state and the MNC is hierarchical and minimized as well. Consistent with these findings, the level of workers' satisfaction in the collaborative plant was higher than in the hierarchical one.

This comparison provides a stylized contrast between democratic and nondemocratic work-related arrangements. The layering of democratic practice

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99   Richard M. Locke & Monica Romis, *The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organization in Two Mexican Garment Factories*, 17 Rev. Int'l Pol. Econ. 45 (2010).

in this example is revealed in the integration of shop-floor level participation and deliberations, interaction between management and the external union (representing a broader set of interests than merely those of the plant's workers), collaboration of the supplier and the MNC, and pressure on the MNC by consumers worldwide. The case study demonstrates that workplace democracy should not be thought of merely as a practice confined to an institutional design within a workplace community; rather, it is important to think of any workplace as part of multiple communities that partially overlap and are not assumed to be stable over time. Achievements in one factory may affect other factories that manufacture for Nike in other countries as well, other factories in the local community, and consumers' communities and trade unions in the region. The study indicates the importance of self-fulfillment at work, of a democratic laboratory that extends beyond the single workplace and includes other meaningful constituencies, such as consumers worldwide, of economic and political power that is achieved through trade-union representation, and of the importance of devising new norms and institutions for transparency, accountability and deliberations.

The linkage between layering and the introduction of proceduralism in the liberal script is further highlighted in César Rodriguez-Garavito's study of transformative action taken in textile plants in Mexico and Guatemala.[100] Like Locke and Romis's conclusions on their study of Nike's sub-contractors, he warns that CSR in itself is not enough and emphasizes the role of external social agents — trade unions and social movements — that draw on CSR instruments to induce change. To further their capacity to do so, he recommends strengthening "enabling rights," that is, rights that enable individuals and groups to voice their concerns and make their demands. The workers' participation in successful instances of change was nested in a closely-knit community, with the local government's support, unlike other instances where the workers were on their own. Enabling workers' voice made it possible to apply local pressure, rather than merely rely on the power of consumers worldwide. He identifies successful change as being constituted by new international communities of accountability. Although he recognizes that workers' voice makes it possible to apply local pressure, he warns against the unfounded belief that merely the opportunities for deliberations are enough, noting that grave inequalities persist, hence making representation of and support by various communities necessary, as well as the maintenance of minimum international and national labor standards.

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100 César A. Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 Pol. Soc'y 203 (2005).

Mark Barenberg looks at transnational enforcement mechanisms nested in trade law, international labor standards and private self-enforcement measures.[101] Carefully observing the advantages of multiple domains of enforcement, he also observes their cumulative weakness, leading to a recommendation of essential ingredients of effective enforcement. What makes the project important is the integration of regulatory technique with the emphasis on components of democracy. One recommendation addresses democracy explicitly, stating:

> Ensure that the commissions are democratic in the sense that (a) the bodies that formulate the criteria and performance measures and that oversee the investigative staff are comprised of worker representatives and jurists, and (b) prior to worker representatives' and jurists' promulgation of the criteria and measures, other interested and knowledgeable actors, such as domestic enforcement officials, specialists in production systems, specialists in occupational health, managerial representatives, representatives of the informal sector, women's organizations, and village associations, participate in the bodies' deliberations.[102]

Moreover, he advocates the active participation of workers, and enhancing administrative, employers' and workers' capacities to engage in the enforcement process. Finally, his proposal brings together a host of public and private measures that equally rely on decision making in both the highest international fora and at the shop-floor level of a local community.[103]

These examples emphasize a renewed conception of the work-democracy nexus in a transnational setting, but they can be viewed in local settings as well. For example, studies of successful local living wage campaigns, which usually take place in small localities (municipalities), emphasize the need for layering as well.[104] They are based on the capacity of workers to organize in

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101 Mark Barenberg, *Sustaining Workers' Bargaining Power in an Age of Globalization* (Econ. Pol. Inst., Briefing Paper No. 246, 2009), *available at* http://www.epi. org/publication/bp246/.

102 *Id.* at 23.

103 For similar recommendations that tie the right to development with the need to devise institutions that span the global and local levels, see Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 Wake Forest L. Rev. 355 (2010). In the related environmental context, see Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 Theoretical Inquiries L. 517 (2011).

104 Stephanie Luce, Fighting for a Living Wage (2004); Charles Hecksche & Franciose Carré, *Strength in Networks: Employment Rights Organizations and the Problem of Co-Ordination*, 44 Brit. J. Indus. Rel. 605 (2006); Jane Holgate, *Contested Terrain: London's Living Wage Campaign and the Tensions Between*

trade unions within different workplaces in the region, as well as actively engage in other forms of associations that advocate for workers' rights and the wellbeing of the local community as a whole. Together, workers and social advocates instigate a public discussion that seeks to identify the level of wages that should be associated with adequate living standards in the community. Outcomes of such campaigns may be formalized in local ordinances, but also promoted through process-oriented supervision of public tenders and the exposure of prevailing wage rates and compliance with living wage standards, thereby integrating "hard" and "soft" forms of governance.[105] In these instances we see a process of two-sided interaction where public change and the organization of work affect one another.

Under the notion of democracy that is advocated here, democratic practice is not relegated solely to forms of regulation by democratically elected representatives, but there is no assumption either that direct democracy in the manner of old town-hall meetings is feasible. Identifying these interactions *within* and *between* workplaces and other spheres of action deviates from the traditional conception of the workplace as a discrete venue of action. Marketization and globalization render the focus on the discrete firm ineffective at best, but also potentially precarious — because the effects of improving the lot of insiders may harm those who remain outside.[106]

The growing reliance on self-regulation, private governance and soft-law methods obscures public/private distinctions. States and localities compete among themselves over direct foreign investment in a private-like manner, while MNCs are held accountable for social rights in a public-like manner. The state, the firm, the community, and the organizations of civil society are not all one and the same, but they are gradually becoming subjects of a similar set of values. Consequently, there is an extensive reliance on legal rules and social norms that admit new players, legal and social processes that facilitate interaction or aid in forming and resolving social disputes,

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Community and Union Organising, *in* Community Unionism: A Comparative Analysis of Concepts and Contexts 49 (J. McBride & I. Greenwood eds., 2009).

105 *Cf.* Katherine Stone & Scott Cummings, *Labor Activism in Local Politics: From CBAs to 'CBAs,'* *in* The Idea of Labour Law, *supra* note 14, at 273 (studying the transformative employment practices in a "place" (Los Angeles)).

106 Anne C.L. Davies, *Identifying "Exploitative Compromises": The Role Of Labour Law in Resolving Disputes Between Workers*, 65 Current Legal Probs. 269 (2012); Guy Mundlak, *The Third Function of Labor Law*, *in* The Idea of Labour Law, *supra* note 14, at 315.

and incremental congruence between different layers of norms — local and international, hard and soft.[107]

Looking back at the three concerns that animate institutional choices,[108] the examples point at the following conclusions. First, the community of work is disassociated from a "place" and decentered at multiple venues that affect the experience of workers. There is no work*place* that corresponds to the image of the archipelago, but multiple communities that constitute the experience of work — state, locality, sector, occupation, gender, consumers, and others. Democracy is not a practice that should be installed in one single overriding community, but rather should span across all these communities. Second, process remains a central aspect of the democratic order, drawing predominantly on legal concepts that originally governed the public sphere, such as due process, accountability, and transparency. These same values currently govern the various types of communities, regardless of their traditional affiliation to the public or the private spheres. Third, rights remain an essential ingredient for democratic quality. These include rights of entry (right to work); procedural rights of participation (including traditional rights to associate in a trade union or participate in elections to a works council, but also alternative forms, such as the rights to protest and demonstrate, to display solidarity with others, and to speak and persuade within and outside the work communities); and substantive rights that increase the workers' wellbeing.

V. Conclusion: Caution and Promise in Rethinking Workplace Democracy

Two opposite claims can be made regarding the proposed view of workplace democracy. On the one hand, it could be argued that looking at the move towards new forms of process-based labor law as a form of workplace democracy is giving up on the radical transformative potential of what the discourse on workplace democracy was all about — realigning property rights, changing the nature of production, and constituting communities of value. On the other hand, the favoring of renewed and reinvigorated interest in enabling rights and process-oriented labor law can be seen as an attempt to admit a social-democratic agenda through the backdoor; slightly dressed up and modernized, but still an outdated attempt in a changing post-Fordist regime.

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107 Diane Frey, *A Diagnostic Methodology for Regulating Decent Work*, *in* Regulating for Decent Work 339 (Sangheon Lee & Deirdre McCann, ILO eds., 2009).

108 *See supra* Part II.

The first claim requires strong consideration because the studies on process-based law indicate that processes may be reduced to rituals or window-dressing, particularly in the absence of formalized labor collectivities and representation in their traditional form.[109] The challenge is not to assume that all players are held equal in the new process, but to underscore the ongoing inequality of power and draw on it as a point of departure for institutional design. This requires to acknowledge the differences among stakeholders in their capacity to exercise the right to collective action and exert negative forms of power, side by side with developing the positive forms of power that accommodate a robust democratic order.[110] Process-based law cannot substitute for and replace substantive standards and struggles for expanding minimum rights in the global labor market. Process-based law aids in identifying who can take part in these struggles and what makes the use of power effective, and it presents entry ports through which social agents can impact the organization of work and the labor market. The rights component of democratic theory is as relevant today as it ever was, in the workplace, the local community, the state and the global labor market.

In this sense, the emphasis of workplace democracy is not on making the free market/regulation or the efficiency/distribution debates outdated. Instead, it should be viewed as an added layer that looks at values that are bracketed or marginalized — self-fulfillment, participation as an end in itself, the positive effects of deliberations, and economic inclusion. These values are translated into institutions that seek to expand the capacities for impacting further change, empowering individuals and groups, and creating bases of power that sustain over time. There is probably no off-the-rack universal prescription for reinstating the concern for democracy at work. Some attempts, perhaps many, fail, but others succeed. In itself, the liberal script, which serves as the common alternative to process-based law, is not effective in changing power structures. At times when the notion of community is punctured, command and control regulation and even the tweaking of property rights is distant and remote, haphazard, and does not necessarily withstand empirical tests. Any loss that results from shifting the focus away from expanding the list of employment standards, at a time when regulatory public bodies are weakening, may be

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109 There are various formulations of this critique. See, for example, the words of caution voiced by Harry Arthurs on new trajectories for labor law, in Harry Arthurs, *Labour Law After Labour*, *in* THE IDEA OF LABOUR LAW, *supra* note 14, at 13.

110 Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67 (1980).

offset with gains in the internal legitimacy of norms that are the outcome of ongoing deliberations. A multilayered democratic involvement of multiple agencies in intersecting communities can also increase the external legitimacy awarded to changes within private organizations.

The response to the first critique also leads to the second. Labor market inequalities, the distinction between "contract makers" and "contract takers," the oppressive nature of the autocratic hierarchy in the workplace and the positive externalities of democratic practice at different levels are all relevant at present, as they were in the past. This does not render the normative trajectory of workplace democracy or the institutional prescription of process-based law a mere rehearsal of archaic institutions. On the contrary, the renewed focus expresses a strong adaptation, given the changing nature of states and enterprises alike.

The theory of workplace democracy always embraced different institutional orientations, including more far-reaching approaches that sought to rewrite the norms of property and contract, and approaches that nested comfortably within neoliberal writings and sought to improve workers' productivity and advance the joint interests of labor and capital. The added value of workplace democracy to current debates on regulation and governance of the labor market and the organization of human resource management should not be measured simply as a matter of weighing baggage. What it does add is the framing of values and objectives that both the "Washington consensus institutions" and traditional agents of workers' voice should be concerned with.