
January 2006

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Recommended Citation

Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. (2005-2006).

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NEXT WAVE ORGANIZING AND THE SHIFT TO A NEW PARADIGM OF LABOR LAW

JIM POPE*

I. INTRODUCTION

Faced with the steady decline of unionism, labor activists have responded by developing a variety of creative new approaches to organizing workers. Some (like Justice for Janitors) seek to build unions, while others (like Working Today¹ and the Industrial Areas Foundation²) are experimental new forms. As these projects multiply and expand, activists and scholars are referring to them as the “next wave” of organizing.³ The recent split in the AFL-CIO is likely to accelerate this development, as each of the rival federations struggles to prove that it is the more creative and zealous organizing center.

The idea of a “next wave” implies that it follows and relates back to some previous wave. The obvious candidate for the predecessor is the New Deal organizing upsurge, the last time that worker organizing in the private sector amounted to anything approaching a “wave.” The New Deal upsurge ushered in the organizational paradigm of the industrial union along with the legal paradigm of collective bargaining by officially-sanctioned exclusive representatives. Will the next wave also produce paradigm shifts in worker organization and labor law?

It seems clear that there has already been a paradigm shift in business organization. The old model of geographically fixed, bureaucratic, industrial companies operating primarily in national

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1. See Sarah N. Kelly & Christine Tramontano, Organization Profile, *Working Today*, 50 N.Y.L. SCH. L. REV. 597 (2005-2006).

2. See Helena Lynch, Organization Profile, *Industrial Areas Foundation*, 50 N.Y.L. SCH. L. REV. 571 (2005-2006).

3. See Seth D. Harris, *Don't Mourn — Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. SCH. L. REV. 303 (2005-2006).

markets no longer prevails. There is uncertainty about what has replaced it, but some elements seem fairly clear. Flexibility and mobility — including mobility across national boundaries — have replaced predictability and stability as core values in business organization. Corporations increasingly resist long-term attachments of all types. Large-scale bureaucracies, which assign functions to internal divisions, are giving way to core firms that assign functions to “independent” contractors. In employment, the old imperative of retaining experienced workers is now less of a concern than the capacity to shed excess workers or recruit new ones in response to fluctuating market conditions.⁴

When the paradigm of business organization shifts, there is a general expectation that the paradigm of labor organization will follow suit. Craft unionism developed in response to craft production; industrial unionism arose out of mass production; and it seems to follow that some new paradigm of worker organization will develop in response to flexible production. Most American employers want the new paradigm to exclude unions or any other form of independent (meaning independent of employers) worker organization that is capable of exerting effective influence on employer policies.⁵ This article, however, is addressed to people who hope, for whatever reason, that any new paradigm will feature strong, independent worker organizations.

What might this new paradigm look like? Which elements of the old industrial union paradigm must be abandoned, and which should be retained? Part II of this article considers four possible paradigm shifts. Although none turns out to be a viable candidate for “the” dominant paradigm, there are important lessons to be learned from the proponents of each — lessons that lead to a proposal for a future paradigm in Part IV.

Of equal importance, how do we get from here to there? The political situation is so bleak for working people that talk of a new

4. CHARLES C. HECKSCHER, *THE NEW UNIONISM* 55–60 (1988); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 67–83 (2004); Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759 (1998).

5. For a discussion of the exceptional hostility of American management towards unionism, see NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 105–08 (2002).

paradigm — especially one that includes a major role for independent worker organizations — can seem like wishful thinking. The fact is that the labor movement is caught in a Catch-22. It must revive before it will be strong enough to win labor law reform, but it cannot revive under the current labor law. No matter how many resources unions pour into organizing, or how creative their tactics, unions will continue to decline as long as they remain within the constraints of the law.⁶ Likewise, no matter how much money unions spend on politics, or how clever their lobbyists, unions will not achieve labor law reform without first building the movement into a stronger political force.⁷ Part III of this article seeks a way out of this bind while considering a fifth proposed paradigm shift: from business unionism to social movement unionism.

Part IV proposes a paradigm for the future. This paradigm is far from new; in fact, it has a long and distinguished history. The paradigm is freedom of association, and the core idea is that workers, and not government or employers, should determine how, when, and in what forms workers organize. Part IV argues that this paradigm is a good fit both with the ascendant industrial paradigm of flexible production, and with the dynamics of achieving labor law reform.

II. FOUR POSSIBLE PARADIGM SHIFTS

This part will discuss four possible paradigm shifts: (1) from industrial unionism to worker associations; (2) from general unionism to industrial unionism; (3) from industrial unionism to community unionism; and (4) from industrial unionism to occupational

6. See Dorothee Benz, *Sisyphus and the State*, DISSENT, Fall 2004, at 78, 81–82 (explaining that although the most effective organizing unions can achieve some successes under current law, the process is too costly and time-consuming to permit gains on the scale necessary to reverse the movement's losses); Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973-1998*, 22 J. LAB. RES. 459, 480 (2001) (arguing that unions would have to spend more money on organizing than they currently have in their entire budgets merely in order to hold even in density). On the role of labor law in the decline of worker organization, see PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 105–18, 225–41 (1990); Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and the RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317 (1998).

7. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–42 (2002); see also *infra* text accompanying notes 47–48, 96–98.

unionism. Although the conclusion is that none amounts to a likely or desirable candidate for a new, dominant paradigm of labor organization and law, each is grounded on important truths about the current situation.

A. *From Industrial Unionism to Worker Associations?*

Among pro-labor analysts, Charles Heckscher stands out for his willingness to consider the possibility that unions and strikes will be peripheral to the new paradigm.⁸ He starts from the proposition that capitalists will not be displaced by workers as the leading organizers of the economy. That being so, the viability of worker organizations hinges on their ability to facilitate the functioning of an economy dominated by privately owned, profit-making companies.⁹ Of course, worker organizations also pursue other objectives, like fighting for worker interests and social justice, but they will not survive to pursue those goals unless they also prove their usefulness to capitalists. In the old business paradigm of bureaucratic, industrial companies, unions accomplished this aim at the micro level by helping to reduce turnover and to regulate labor-management conflict, and at the macro level by increasing the purchasing power of workers, thereby stimulating consumer demand (the Keynesian driver of economic growth in national economies). The paradigm of labor organization — industrial unions engaged in ritualized collective bargaining — mirrored the paradigm of business organization. Now that corporations seek flexibility and frown on long-term attachments, worker organizations must “go with the flow” and develop structures and activities that will permit corporations to shed unwanted workers or recruit new ones at a minimum cost.

On this view, there is nothing magical about the labor movement’s traditions of worker solidarity, strike action, or industrial unionism. In fact, the decline of those traditions constitutes evidence of their relative unsuitability to the new business model. Joint management-worker committees, worker associations (like Working Today), or associations based on other identities like race,

8. See Charles Heckscher, *Living With Flexibility*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 59, 61–62 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001) [hereinafter Heckscher, *Living with Flexibility*].

9. Heckscher, *Living With Flexibility*, *supra* note 8, at 63–64.

nationality, or sex may well replace unions as the predominant form of organization. If unions wish to survive in this new environment, then they will rely less on strikes and — like middle class advocacy organizations that claim to represent the “public interest” — more on publicity, lawsuits, and financial (e.g., pension fund) pressure.¹⁰

Heckscher has shed considerable light on developments in business organization and their implications for workers. However, I think that it is premature to suggest that unions and strikes can or should be displaced as the main forms of organization and power for working people. I say this for four reasons. First, workers should impose a high burden of proof on any argument that would have them turn away from their traditional, proven sources of strength. The power of workers to halt or slow production provides a form of leverage that is far more immediate and effective than publicity or financial pressure, and immensely more versatile than lawsuits. Unions are, by definition, the only form of organization that can deploy that type of power to influence the full range of employment conditions on a day-to-day basis. Compared to the various non-union forms of organization, including next wave projects like Working Today and the Workplace Project,¹¹ unions are sensationally successful at influencing wages, working conditions, and non-wage benefits.¹² They also outperform other types of organizations, including occupational safety and health committees and public interest legal organizations, at enforcing workers’ individual rights under law.¹³

Unions also surpass other forms of organization in providing workers with democratic influence in industry. Alone among social movements, the labor movement has routinely managed to create

10. HECKSCHER, *supra* note 4, at 6–12, 249–52.

11. See Emily Stein, Organization Profile, *The Workplace Project*, 50 N.Y.L. SCH. L. REV. 607 (2005-2006).

12. Richard B. Freeman & Joni Hersch, *Introduction*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 4, 6, 10 (Richard B. Freeman, Joni Hersch & Lawrence Mishel eds., 2005).

13. David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS, *supra* note 12, at 13, 36–37; Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS, *supra* note 12, at 141–74.

durable, democratic mass organizations that can function both locally and nationally. The fact that unions have much to learn from other movements, like the civil rights and the women's movements, should not blind us to the fact that those movements have rarely produced such organizations — except in the form of labor unions.¹⁴ This is no small matter. Most worker associations are not funded or controlled by the workers they serve. All that keeps organizational policy aligned with workers' interests are the good intentions of the organizers, who must make decisions with an eye to the preferences of outside funding sources. By comparison, union democracy — with all its flaws — places considerable constraints on union leaders, who rely on members' dues money for support.¹⁵ Compared to other institutions in American society, unions are among the most democratic. Especially at the local level, unions can give workers a substantial degree of control over their work lives.¹⁶ In sum, then, unions outperform worker associations by a huge margin at both raising standards and providing a mechanism for worker influence in industry. As long as there is any hope of reviving unions and restoring the effectiveness of labor non-cooperation, these objectives should remain top priorities.

Second, the associational model does not take adequate account of the dynamics of change. "Effective social action," says Heckscher, "has to come from understanding the basic nature of the current forces and the choices they allow; and then working toward the better options."¹⁷ If strike action is futile for most workers now, then realism suggests that workers might do better to look for other forms of pressure.¹⁸ But we cannot project the shape of a

14. See ADOLPH REED, CLASS NOTES 5–9 (2000) (mourning the failure of black Americans to develop mass organizations that can hold leaders democratically accountable, leading to opportunism on the part of self-appointed "spokespersons" for the black community). For examples of successful all-black and all-female unions, see LARRY TYE, RISING FROM THE RAILS: PULLMAN PORTERS AND THE MAKING OF THE BLACK MIDDLE CLASS (2004); DOROTHY SUE COBBLE, DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY (1991); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C. R.-C.L. L. REV. 395 (1993).

15. See Weil, *supra* note 13, at 13, 28, 36.

16. See RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? 207–13 (1984).

17. Heckscher, *Living with Flexibility*, *supra* note 8, at 80.

18. *Id.* at 70.

revived labor movement from trends established during a period of decline. If that were the dynamic, then industrial unions and strikes would have been obsolete as of the 1920s, and the 1930s would have ushered in a new era of something different, like employee representation plans.¹⁹ Judging from past experience, the labor movement as a whole rarely grows except during relatively brief periods of upsurge, when all sorts of previously inexorable trends are suddenly reversed. (This point is discussed in more detail in Part III, below.) One characteristic of such periods is that the constraints of a hostile legal regime (for example, the labor injunction at the turn of the century and during the 1930s, and public employee strike bans in the 1960s) give way, and forms of organization and activity that would have seemed suicidal during the period of decline suddenly become viable.²⁰ If we limit our vision of the future to include only approaches that work within the prevailing legal regime and balance of forces, then we are likely to be irrelevant when and if the opportunity for a paradigm shift arises.

Third, it is significant that worker association leaders do not claim to be displacing unions. To the contrary, worker associations are conceived as a specialized alternative to unions, to be used mainly where union organizing is not possible.²¹ This is not to say that worker associations will be unimportant in a future paradigm shift. Worker associations might play an important start-up role at companies like Wal-Mart, where the short-term prospects for unionism are bleak, but workers could find ready allies in local groups that are already mobilizing in opposition to the “Wal-Martization”

19. The 1920s was a decade of drastic membership losses for all of the major industrial unions (losses far greater than those of craft unions), and of spectacular strike defeats and sharp declines in strike activity. Meanwhile, employee representation plans burgeoned. *See* IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933* (1960).

20. During each of the three main periods of upsurge, workers used illegal forms of pressure, including sympathy strikes in violation of contract (turn of the century), obstructive mass picketing and sit-down strikes (1930s), and public employee strikes (1960s).

21. *See, e.g.*, JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 64–65 (2005) (describing immigrant worker centers as an appropriate form of organization where it is impossible to organize unions).

of their communities.²² Moreover, as Jennifer Gordon points out, it would be a serious mistake to devalue even small and temporary associations of the most vulnerable and exploited workers.²³ It is these associations that expose to the public the viciousness of the current regime and the imperative need to enforce labor standards.

Finally, it is not at all clear that the shift in business paradigms necessitates de-emphasizing unions or strikes. Consider, for example, the debate currently raging among labor leaders about general unionism and industrial unionism.

B. From General Unionism to Industrial Unionism?

A coalition of the Service Employees International Union (SEIU), the Laborers, the Teamsters, and UNITE-HERE, the core of the new “Change to Win” federation, has proposed a fundamental restructuring of the labor movement. Kim Moody, who developed the intellectual foundation for this proposal, agrees with Heckscher that “[l]abor organization largely reflects the structure of capitalism itself at a given time,” but sees far less need for change.²⁴ The problem with industrial unionism, he argues, is not that it is obsolete, but that it has already been abandoned in favor of a “formless type of general unionism” in which unions seek dues-paying members without regard to whether they share any community of interest based on trade, industry, or geography.²⁵ As a result, workers who do share a community of interest are split up among various general unions that lack the incentive, expertise, and density to exert a strong influence on their trades, industries, or areas. Moody calls for a return to industrial jurisdictions and the launching of massive, industry-wide organizing campaigns in industries like healthcare and retail — recommendations that are now at the core of the reform proposal.²⁶ He points out that the most rap-

22. Wade Rathke, *Leveraging Labor's Revival: A Proposal to Organize Wal-Mart*, NEW LAB. F., Summer 2005, at 59–66.

23. Jennifer Gordon, Strategic-ness and Sweatshop Work, Panel Remarks at the Next Wave Organizing Symposium (Jan. 27, 2005).

24. KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 193 (1988).

25. *Id.* at 196.

26. SEIU et al., RESTORING THE AMERICAN DREAM: BUILDING A 21ST CENTURY LABOR MOVEMENT THAT CAN WIN, May 16, 2005, <http://www.liuna.org/homeindex/platform.pdf>.

idly growing sector of the economy — service — increasingly resembles the manufacturing sector of the 1930s in its “concentration of capital in ownership, growing concentrations of employment, greater application of technology, intensified division of labor often involving deskilling or deprofessionalizing, and downward pressure on labor costs.”²⁷

Many of these conditions are exemplified in the Wal-Mart Corporation, the world’s largest profit-making enterprise and America’s “most admired” company as rated by *Fortune Magazine* in 2003. According to Nelson Lichtenstein, Wal-Mart is the “template business” of our era, just as General Motors was during the mid-twentieth century.²⁸ In its relentless effort to cut labor costs, Wal-Mart drives down the wage and benefit standards not only of its own 1.4 million employees, but also the employees of its suppliers, competitors (as demonstrated in the recent California supermarket strike), and even unrelated employees whose employers follow Wal-Mart’s lead.²⁹ If Lichtenstein is right, then the form that worker organization takes at Wal-Mart is likely to be at the center of any new paradigm. And because Wal-Mart is a giant corporation that cannot abandon regions without sacrificing markets, it looks like a good candidate for company-based organizing. True, Wal-Mart does appear virtually impregnable to organizing at the moment, but that is for reasons of power, not economic imperative. Wal-Mart looks invincible today for the same reasons that General Motors did during the 1920s: an unfavorable balance of political power and a hostile regime of labor law. Accordingly, one of labor’s most successful strategists has proposed that Wal-Mart be organized using techniques that worked in the 1930s: members-only unionism combined with active involvement from community-based organizations.³⁰

27. MOODY, *supra* note 24, at 204–06, 215–18, 341.

28. Nelson Lichtenstein, *Wal-Mart and the New World Order: A Template for Twenty-First Century Capitalism?*, NEW LAB. F., Spring 2005, at 21–23.

29. *Id.*

30. Rathke, *supra* note 22, at 64–66. For a discussion of the experience with members-only unionism and community involvement in the 1930s, see CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 20–22, 54–55, 82–85 (2004); ELIZABETH FAUE, *COMMUNITY OF SUFFERING & STRUGGLE: WOMEN, MEN, AND THE LABOR MOVEMENT IN MINNEAPOLIS, 1915–1945* 12–13

Although the SEIU and its allies seek a return to industrial jurisdictions, by no means do they support the continuation of old-style industrial unionism as a dominant paradigm. Their point is that unions should be organized to reflect common worker interests and to achieve worker unity “in their core industries in order to maintain and build bargaining power.”³¹ In practice, their organizing is, above all, innovative and pragmatic; they freely blend features of industrial and occupational unionism in their effort to solve the problems associated with organizing in a regime of flexible production.³² The coalition’s proposal allows for organizing along lines of employer and market, as well as industry and occupation. Some of their efforts have departed so far from traditional industrial unionism that analysts have posited that they amount to a new paradigm: “community unionism.”

C. From Industrial Unionism to Community Unionism?

Some analysts have suggested that we are moving toward a paradigm of worker organization based on geographic communities instead of work-related groupings like industry, craft, or workplace.³³ In part, community unionism is a response to the rise of flexible production. Because employer-employee relationships are increasingly unstable and fragmented, it has become more difficult to build durable worker organizations within them. By the time workers succeed in organizing a union at a particular workplace, they may find that their jobs have been moved out of the area, that their workplace has been closed, or that their company has been sold.³⁴ Moreover, the workers’ immediate employer may not be the entity that actually controls employment conditions. In the janitorial services industry, for example, building management companies hire cleaning contractors that, in turn, hire workers. If

(1991); Staughton Lynd, *Introduction*, in *WE ARE ALL LEADERS: THE ALTERNATIVE UNIONISM OF THE EARLY 1930S* 1, 2–4 (Staughton Lynd ed., 1996).

31. SEIU et al., *supra* note 26.

32. See Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 *RUTGERS L. REV.* 671–73, 684–87 (1993).

33. DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* 91–129 (2003); Paul Johnston, *Organize for What?*, in *REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY* 27, 54 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

34. STONE, *supra* note 4, at 208.

the workers at one contractor succeed in unionizing, the building owner simply terminates that contractor (which does not violate the labor law because the workers are not employees *of the building owner*).³⁵ A community-based movement can deal with instability on both sides of the employment relationship by following workers who switch employers and seeking out the real centers of business power across enterprise boundaries. During the Los Angeles Justice for Janitors campaign, janitors employed by a variety of contractors put direct pressure on building management companies by mobilizing their communities and engaging in protests and direct action. These tactics have been repeated elsewhere with considerable success.³⁶

In addition to organizing the community to support workers, community-based unions can contribute their resources and leadership to intervene on issues that are beyond the scope of the employment relation (not only in the legal sense of not being “terms or conditions of employment,” but also in the practical sense of being outside the direct control of employers), for example, affordable housing or immigration problems. Community unions conceptualize workers as citizens (in the broad sense of members of the community) concerned with the full range of issues affecting the well-being of the people.³⁷ Instead of forming coalitions at the leadership level, community unions rely on rank-and-file members to approach their own religious congregations and other community organizations. Soon, the union becomes the organizing center for addressing a whole range of problems that affect workers and poor people in a community. Then, when the union sets out to recruit workers at an employer, it is likely that some of them will have already seen the union in action, fighting for their interests. To date, this dynamic of mutually reinforcing community and workplace organizing has been strongest in communities where a large number of workers share ethnic or racial bonds and are linked to one another through churches and other community organizations. Out-

35. See GORDON, *supra* note 21, at 56–58.

36. Wial, *supra* note 32, at 678; STONE, *supra* note 4, at 219; Preston Rudy, “Justice for Janitors,” Not “Compensation for Custodians”: *The Political Context and Organizing in San Jose and Sacramento*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 133–49 (Ruth Milkman & Kim Voss eds., 2004).

37. STONE, *supra* note 4, at 228; Johnston, *supra* note 33, at 35–43.

standing examples include the Stamford Organizing Project, a multi-union effort, and the Workplace Project, a foundation-funded pilot.³⁸

Community unionism shares some features with the associational model; for example, operating outside as well as within the employer-employee relationship, and utilizing forms of pressure other than strikes. But unions and strike action (or, more broadly, non-cooperation in production) remain at the center of community unionism. Often, a strike or other direct action fails to bring success by itself, but forces the workers' needs onto the political agenda and draws in the support (in various forms, including legal assistance) necessary to prevail. Examples include the Movement of Drywall Hangers in Southern California and the organization of the Richmark curtain factory in East Boston. Or, in the case of the Workplace Project, workers who had experienced the strengths and limitations of directly regulating their own wages and working conditions mounted a successful campaign for state legislation.³⁹

Some "community unions," including the Workplace Project, do not define themselves as unions. But all of them seek to exert a day-to-day, pervasive influence over employment conditions and compensation. At their best, they operate democratically. And even where top-down control prevails (as appears to be the case in most, if not all, of the SEIU's Justice For Janitors efforts), community unions must be responsive enough to generate the worker support and active participation on which they depend for success.

Community unions are especially successful at involving women and people of color in labor activism. The goal of diversifying the labor movement is shared — at least rhetorically — by almost all labor leaders and activists these days, but it is at the local level that people of color enjoy real influence. Community unions thrive in areas where racial, ethnic, and class oppression overlap. They depend on the enthusiastic support and initiative of people who are actively involved in community institutions, many of whom

38. CLAWSON, *supra* note 33, at 108–22; GORDON, *supra* note 21; STEVEN C. PITTS, ORGANIZE TO IMPROVE THE QUALITY OF JOBS IN THE BLACK COMMUNITY: A REPORT ON JOBS AND ACTIVISM IN THE AFRICAN AMERICAN COMMUNITY 30 (2004). *See also* Stein, *supra* note 11.

39. CLAWSON, *supra* note 33, at 101–06; GORDON, *supra* note 21, at 92–93, 259–60.

are women.⁴⁰ As a result, community unions are more likely to generate the culture of inclusion that is necessary for genuine diversity.⁴¹

The proponents of community unionism fully recognize that while they are calling for localism, economic activity is increasingly organized on a global scale. So they join the call for international solidarity and joint action across national boundaries. They say, in effect: "Think and act locally; think and act globally." There is obviously some tension here. To my knowledge, community unions have not attempted to intervene in globalized sectors of the economy like retail sales. The mere threat of Wal-Mart extending its "super-center" network into California induced the existing supermarkets there to conduct an all-out assault on union standards.⁴² It will take national and international organization to deal with such pattern-setting centers of corporate power.

In sum, community unionism holds tremendous promise as a vehicle for reviving worker organization. It provides a solution to the problem of unstable employment relationships by finding an alternative, relatively settled organizational center in the community. Instead of giving up on workers' distinctive and proven sources of strength in unions and non-cooperation, it builds on them, broadening outward based on union members' community activities and concerns. It combines well with other promising proposals, like reviving some version of the directly affiliated federal labor unions of the old American Federation of Labor, forming community-based occupational unions of semi- and unskilled workers, organizing unions that bargain for their members only without waiting to obtain majority support, and campaigning for "high-road" economic policies in metropolitan areas.⁴³ A community union approach might have avoided the dismal showing of unions

40. CLAWSON, *supra* note 33, at 91–95, 109, 124.

41. See Bill Fletcher & Richard W. Hurd, *Is Organizing Enough? Race, Gender, and Union Culture*, NEW LAB. F., Spring/Summer 2000, at 59, 65–67 (discussing the culture of inclusion).

42. Lichtenstein, *supra* note 28, at 22.

43. Dorothy Sue Cobble, *Union Strategies for Organizing & Representing the New Service Workforce*, IRRRA 43rd ANNUAL PROCEEDINGS 76–83 (John Burton ed., 1990); Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in REKINDLING THE MOVEMENT, *supra* note 8, at 82–96; MORRIS, *supra* note 30.

in recent efforts to organize low-wage workers in New York City.⁴⁴ Moreover, community unionism is consistent with what we know about the dynamics of labor movement growth, the topic of Part III, below. However, the tension between the local and particularistic focus of community unionism and the global scope of trendsetting corporations like Wal-Mart makes it highly unlikely that community unionism will displace industrial unionism as “the” next paradigm of worker organization.

D. From Industrial Unionism to Occupational Unionism?

By now, the reader may be wondering how occupational unionism fits into the array of possible paradigms. Both the SEIU-led coalition and the proponents of community unionism endorse it in at least some circumstances. Could occupational unionism become the new, dominant paradigm?

Occupational unionism resembles craft unionism, the labor movement’s traditional solution to the problem of contingent, short-term employment. Craft unions organize workers by trade instead of enterprise or worksite. The classic example is construction, where workers move from project to project according to employer need. Members carry their union cards and benefits from job to job. Union hiring halls mitigate the uncertainties of temporary employment, distributing jobs among qualified workers based on seniority and need. Collective bargaining agreements or unilateral union rules regulate wages and conditions on a multi-employer, craft-wide basis within the union’s geographic jurisdiction.⁴⁵

Historically, craft unions have tended to be exclusive, limiting the supply of labor in order to raise wages. Until the enactment of anti-discrimination laws, most craft unions openly excluded women and people of color, and more subtle forms of discrimination remain a serious problem.⁴⁶ Not all craft unions are exclusive, however, and some scholars have suggested that occupational unions

44. See Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL’Y 3 (2004) (reporting on and analyzing the limitations of three low-wage worker organizing efforts).

45. See generally LICHTENSTEIN, *supra* note 5, at 66–71.

46. WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 281–82 (1977); HERBERT HILL, *BLACK LABOR AND THE AMERICAN*

could organize contingent workers on a nonexclusive basis. Successful examples include the Hotel and Restaurant Workers' waitress locals of the early and mid-twentieth century, the Theatrical and Stage Employees today, and the International Longshore and Warehouse Union then and now.⁴⁷ Nonexclusive occupational unionism can be combined with community unionism where workers move from job to job within compact geographic areas, as do janitors, food service workers, and clerical workers.⁴⁸

To my knowledge, nobody has proposed nonexclusive occupational unionism as the dominant paradigm of worker organization. This is because contingent employment, though clearly on the rise, is nowhere close to becoming the norm in industry.⁴⁹ Dorothy Sue Cobble, a leading proponent of occupational unionism, considers it to be one of a number of promising approaches. She stresses that the task for the labor movement "is not simply how to reinvent a new unionism; it is how to reinvent new *unionisms*."⁵⁰

Cobble's observation provides an apt conclusion to this review of possible paradigm shifts. Worker associations, community unions, and occupational unions could all help to revive the labor movement, but none is a serious contender to replace industrial unionism as the dominant paradigm.⁵¹ If independent worker organization is to gain a foothold at the giant, pattern-setting corporations of our day — Wal-Mart being the prime example — some variant of industrial unionism will probably be the vehicle. On the other hand, even the most aggressive proponents of industrial unionism refrain from advocating it as a one-size-fits-all model. The SEIU and its allies call for organizing on lines not only of industry,

LEGAL SYSTEM: RACE, WORK, AND THE LAW 235–47 (Bureau of National Affairs 1977); LICHTENSTEIN, *supra* note 5, at 69–70.

47. Dorothy Sue Cobble, *Organizing the Post Industrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (1991); STONE, *supra* note 4, at 220–23; LICHTENSTEIN, *supra* note 5, at 69.

48. Wial, *supra* note 32, at 695.

49. According to the Current Population Survey, contingent workers made up less than 5% of the labor force in 1999. STONE, *supra* note 4, at 74 n.20. Although job tenure is declining for a much broader group, this trend has a long way to go before contingent employment becomes the norm. *Id.* at 74–83.

50. Cobble, *Lost Ways of Unionism*, *supra* note 43, at 83.

51. Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2005-2006).

but also of occupation, employer, and market where necessary.⁵² Instead of a dominant paradigm, then, we are left with a picture of variation and flexibility in the forms of worker organization. This is hardly surprising; after all, we are searching for a labor paradigm that can respond to the industrial paradigm of *flexible* production. Part IV of this article proposes a future paradigm based on variability and flexibility. But first, it will be useful to consider the dynamics of change. The attractiveness of any proposed paradigm depends partly on its feasibility. And feasibility, in turn, depends on the dynamics of change – of how we get from here to there.

III. THE DYNAMICS OF CHANGE: FROM BUSINESS UNIONISM TO SOCIAL MOVEMENT UNIONISM

From about the late 1940s until at least the mid 1990s, most American labor leaders ran their unions like businesses, relying less on member activity and solidarity than on professional negotiators and lobbyists to win improvements. Administrative staffs burgeoned while membership participation atrophied. Unions looked inward, focusing on improvements for their own members. They presented themselves as service providers, delivering higher wages and improved working conditions through expert contract negotiation and enforcement. Most union officials shied away from alliances with social movements like the civil rights movement and the women's movement, viewing them as threats both to the stability of collective bargaining relationships and to their own job security as aging white men at the helm of increasingly diverse and female organizations.⁵³ Social movement unionism reverses these priorities, stressing worker initiative, union democracy, new organizing, strike action, inclusiveness, and unity with other progressive constituencies.

Unlike the associational and community paradigms, neither business unionism nor social movement unionism is tied to any particular form of production or business organization. Instead, these models ebb and flow in response to dynamics of collective action

52. SEIU et al., *supra* note 26.

53. See PAUL BUHLE, *TAKING CARE OF BUSINESS: SAMUEL GOMPERS, GEORGE MEANY, LANE KIRKLAND, AND THE TRAGEDY OF AMERICAN LABOR 173–75* (1999); MOODY, *supra* note 24, ch. 3.

and institutionalization. Craft unions, industrial unions, and public employee unions have all operated in both business union and social movement modes. At any given time, most unions exhibit features of both. This is because unions inevitably operate in two contexts: as market organizations (labor cartels) and as vehicles for worker power and solidarity (or, in the watered-down version, “voice”).⁵⁴

There is a cyclical element to the ebb and flow of business unionism and social movement unionism. It is commonplace that as unions “mature,” they become less militant (more responsible), less democratic (more centralized and disciplined), less participatory (more professionalized and bureaucratic), and less ideological (more pragmatic). The reverse tendency, from business to social movement unionism, receives less attention, but is equally strong. To begin with, worker organizations could not very well incline away from the social movement model unless they first inclined toward it. Typically, they do so out of necessity. Rarely do employers accept unions until after workers join together and apply the forms of pressure characteristic of social movements, especially disruptive non-cooperation. When such activities are limited to particular industries or localities, employers can usually defeat them in detail, as happened during the militant textile and coal mining strikes of the late 1920s and early 1930s. But when large numbers of workers perceive an opportunity for progress around the same time, organization and militancy can reach critical mass. Then, when workers in one trade, industry, or location launch a struggle, they find ready allies among workers who are already mobilizing elsewhere.⁵⁵ With so many workers in motion, the political balance of power shifts in their favor. If other social movements are also active and labor leaders are willing to unite with them, these effects can be magnified. The result is an upsurge in union organization.

54. DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 211 (Harvard Univ. Press 2000) (1960); FREEMAN & MEDOFF, *supra* note 16, at 5–7.

55. During the 1930s, for example, caravans of rubber workers, coal miners, and auto workers crisscrossed the Midwest supporting each others' struggles. See ART PREIS, *LABOR'S GIANT STEP, TWENTY YEARS OF THE CIO: 1936-55*, 60 (1964).

Everything we know about overall labor movement growth suggests that it happens mainly during such periods of upsurge. For example, union membership quadrupled between 1898 and 1904, and tripled from 1934 to 1941.⁵⁶ During those periods, “what yesterday had seemed impossible suddenly became commonplace. Cultural understandings shifted, the existing order was challenged in myriad ways, the establishment could no longer be confident that subordinates would know their place or do as they were told, and the world was turned upside down.”⁵⁷ The same could be said for the wave of public sector organizing during the 1960s.⁵⁸ During such periods, new unions are formed in a social movement mode (the United Rubber Workers, the United Automobile Workers, and other CIO unions, for example), and old ones move away from business unionism and toward that mode either in response to rank-and-file pressure (the United Mine Workers, the Textile Workers, and pieces of the Longshoremens and Teamsters unions during the 1930s) or because their leaders move to exploit the opportunity for revitalization (the Amalgamated Clothing Workers and the Ladies Garment Workers during the same decade).⁵⁹

Of course, we cannot expect a historical pattern to repeat unless there is some underlying cyclical dynamic. Here, there is one. Sociologists, economists, political scientists, and historians have all observed and explained the phenomenon of popular mobilization and rapid change followed by exhaustion and a turn toward private affairs. Consider this summary by Emile Durkheim:

The periods of creation or renewal occur when [people] for various reasons are led into a closer relationship with each other, when reunions and assemblies are most frequent, relationships better maintained and the exchange of ideas most active Once the critical moment has passed, the social life relaxes, intellectual and emotional

56. CLAWSON, *supra* note 33, at 16; *see also* Statement of Nelson Lichtenstein, in WHAT'S NEXT FOR ORGANIZED LABOR? REPORT OF THE CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS 49 (1999).

57. CLAWSON, *supra* note 33, at 17.

58. *Id.* at 16; Statement of Nelson Lichtenstein, *supra* note 56; STANLEY ARONOWITZ, FROM THE ASHES OF THE OLD! AMERICAN LABOR AND AMERICA'S FUTURE 59–80 (1998).

59. *See* James Gray Pope, Labor's Constitution of Freedom 214–31 (2004) (Ph.D. dissertation, Princeton University) (on file with author).

intercourse is subdued, and individuals fall back to their ordinary level.⁶⁰

Most labor activists do not need social scientists to tell them about this dynamic. Anyone who has participated in unions or other workplace formations has seen it in operation on the micro level. Activity and solidarity surge at contract time or when hot issues arise; rarely can they be sustained beyond a small, core group of activists once the moment has passed.

American political life as a whole has likewise alternated between periods characterized by public action, idealism, and reform on the one hand, and periods of private interest, materialism, and retrenchment on the other. A prolonged private period spawns orgies of corruption and extremes of wealth and poverty that, sooner or later, ignite passionate movements for reform.⁶¹ The public periods include the Jacksonian era, Reconstruction, the Populist era, the New Deal, and the 1960s. From the general trade unions and workers' parties of the Jacksonian era to the explosion of public worker unionism in the 1960s, labor upsurges have tended to overlap these periods of broader political mobilization and change.

Today, the top echelons of the American labor movement are in the midst of a turn — uneven and disorderly, but unmistakable — away from business unionism and toward social movement unionism. John Sweeney's election as AFL-CIO President in 1995 signaled both a shift in priorities toward organizing and a new openness to ideas. The Sweeney administration hired militant activists into high-level positions, enlarged the Executive Board to bring in women and people of color, and reversed the Federation's longstanding policy of hostility toward new immigrant workers.⁶² A

60. EMILE DURKHEIM, *SOCIOLOGY AND PHILOSOPHY* 91–92 (D.F. Pocock trans., 1965); see also FRANCESCO ALBERONI, *MOVEMENT AND INSTITUTION* 9 (Patricia C. Arden Delmoro trans., 1984). The economist Albert O. Hirschman explains this in terms of shifting preferences for private-oriented and public-oriented satisfactions. ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 3–8 (1982).

61. ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 24–26 (Houghton Mifflin 1986); ARTHUR M. SCHLESINGER, SR., *PATHS TO THE PRESENT* 80–84 (Macmillan Co. 1949); KEVIN P. PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (Random House 1990); SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (Harvard Univ. Press 1981). See generally Bruce Ackerman, *We the People: Foundations* (1991).

62. LICHTENSTEIN, *supra* note 5, at 260–61.

number of unions, including SEIU, UNITE, and CWA, took the lead in pioneering methods of organizing and collective bargaining centered on mobilizing workers and their communities. But the movement failed to hold steady in membership, much less to begin recouping the losses of the last half-century. The recent split of the AFL-CIO, in which both sides trumpeted the need for aggressive organizing, should trigger a vigorous competition to bring in new members. Meanwhile, at the local level, a number of unions and other worker organizations are experimenting with diverse ways of building a social movement of workers.⁶³

In the past, upsurges have always come from below, taking labor leaders by surprise. Never before, however, have the leaders of such a large and vibrant group of international unions stood ready to risk their unions' resources as well as their personal careers on a social movement approach to organizing. Judging from their practice at the local level, at least some of these leaders are convinced that unions cannot advance while conducting "business as usual" within the confines of an outmoded and skewed regime of labor law.⁶⁴ If they take the same approach to nationwide organizing at corporate giants like Wal-Mart — and hold firm when the inevitable backlash arrives — they might accelerate the achievement of critical mass for the next upsurge. If they do, however, the legal question will likely take center stage.

IV. TOWARD A NEW/OLD PARADIGM OF LABOR LAW: FREEDOM OF ASSOCIATION

At this point, it is tempting to propose that the new paradigm will be (drum roll, trumpet blast): No Paradigm. As we have seen, each of the proposed new paradigms may thrive in particular circumstances (for example, community unionism in densely populated areas where many workers share ethnic, racial, or religious bonds; and occupational unionism in trades where workers are hired primarily on a temporary basis), but none is a serious candidate to displace industrial unionism as a model for the entire economy. Instead, a variety of forms could prevail in different economic

63. See, e.g., Rudy, *supra* note 36; REKINDLING THE MOVEMENT, *supra* note 8; FREEMAN & HERSCH, *supra* note 12; see also *supra* Part II.

64. See CLAWSON, *supra* note 33, at 91, 98; Rudy, *supra* note 36.

sectors and geographic regions. “History shows,” as Dorothy Sue Cobble has pointed out, “that the labor movement thrived when it tolerated and even nourished multiple, and at times competing, models of unionism.”⁶⁵

But it is not enough to describe the new paradigm as “no paradigm.” Even if the labor law of the future allows for a wide variety of organizational forms, it will not be neutral among them. Choices are unavoidable. For example, the law of the future may — or may not — include protection for the right to organize, enforceable collective bargaining agreements, and company-dominated employee representation plans. The outcome of these and other issues will play a crucial role in shaping and selecting organizational forms.

We might usefully frame the new paradigm as “freedom of association.” The animating principle of this paradigm is that workers — and not employers or government — should determine how, with whom, and in what forms workers organize. Freedom of association can be the workers’ answer to the managerial mantra of “flexibility.” If managers need the flexibility to respond to changing markets, then workers need the freedom to respond to managerial flexibility by creating new organizational forms. And if managers require a “boundaryless workplace,” then workers must likewise be free to broaden their organization and solidarity to cross the boundaries of bargaining unit, enterprise, industry, and nation.

The freedom of association model incorporates a central lesson of the experience under the NLRA, namely that using the law to institutionalize any particular model or models of worker organization runs a high risk — approaching a certitude — of choking the movement as conditions change. Once passed, a statute is extremely difficult to alter. The process is long and arduous, and gives opponents numerous opportunities to weaken, sabotage, or block even a bill that has strong majority support in both houses of Congress. They can, for example, tie it up in committee, filibuster it in the Senate (which was the fate of the last two major efforts to achieve labor law reform), or obtain a Presidential veto.⁶⁶ If the law

65. Cobble, *Lost Ways of Unionism*, *supra* note 43, at 82, 83.

66. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1–2 (1982); Estlund, *supra* note 7, at 1532–42. Worse yet, for reasons discussed below, additional, formidable obstacles impede pro-worker labor law reform in particular. *See infra* text accompanying notes 87–89.

constrains the freedom of association in order to deal with particular problems, it is virtually guaranteed to become obsolete. For example, the system of government-determined bargaining units and government-run representation elections, which was specifically designed to overcome the divide-and-conquer tactics of mass production employers, now serves to block unions from adapting to flexible production. The freedom of association model minimizes the risk of obsolescence by focusing on broad associational rights and avoiding the legal institutionalization of particular forms of worker organization.⁶⁷

The remainder of this article sketches the freedom of association paradigm and argues that it fits not only the era of flexible production, but also the dynamics of labor movement revival as well.

A. Freedom of Association as a Paradigm of Labor Law

There is nothing new about the idea of freedom of association as a paradigm for labor law. In 1916, the United States Commission on Industrial Relations endorsed “the unlimited right of individuals to form associations, not for the sake of profit but for the advancement of their individual and collective interests.”⁶⁸ The Commission called for national legislation to protect this right, to prohibit the discharge of any person because of membership in a labor organization, to legalize concerted activity, and to require employers to meet and confer with the representatives of employees.⁶⁹ Bearing out its characterization of the associational right as “unlimited,” the Commission did not call for representation elections, government determination of bargaining units, limits on secondary concerted activity, or exclusions for agricultural workers, domestic workers, or other categories of employees.

67. Here, as everywhere in the law, there are difficult borderline cases. Does it constrain worker freedom of association, for example, to ban company-dominated unions? What if the workers genuinely and freely consent? The paradigm offers no easy solutions to such issues. An apparent restriction on the freedom may, in some cases, be necessary to make its actual exercise possible in a field of employer power. *See generally* SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* (1992).

68. U.S. COMM’N ON INDUS. RELATIONS, *FINAL REPORT*, S. DOC. NO. 64-415, at 67-68 (1916).

69. *Id.*

Not only has the idea of freedom of association been around for a long time, but efforts have been made to implement it. The Norris-LaGuardia Act of 1932 concisely summarized the basic idea:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁷⁰

To accomplish these aims, the Act prohibited what were then perceived as the two greatest threats to “full freedom of association,” namely, federal court injunctions against peaceful concerted activity, and federal court enforcement of yellow dog contracts (form contracts prohibiting employees from joining labor organizations not approved by the employer).⁷¹ Despite its limited reach (the Act imposed no restrictions on employer actions like retaliatory firings or refusal to bargain with unions), the Norris-LaGuardia Act may well have been the most effective pro-worker statute in U.S. history. The five years between its enactment and the Supreme Court’s validation of the NLRA (1932-1937) brought unprecedented gains for American labor. Although it would be a mistake to draw too many conclusions from the events of this brief and extraordinary period, it is at least suggestive that unions for the first time won collective bargaining agreements from mass production giants like General Motors and U.S. Steel.⁷² An “alternative union

70. 29 U.S.C. § 102 (1994).

71. *Id.*, §§ 3, 4.

72. LEON FINK, IN SEARCH OF THE WORKING CLASS: ESSAYS IN AMERICAN LABOR HISTORY AND POLITICAL CULTURE 162 (1994); *see also* David Brody, Workers in Industrial

movement” of democratic, community-based unions, among them many of the strongest local unions of the early CIO, sprang up in a wide variety of industries and locations.⁷³ Moreover, as recounted below, the Norris-LaGuardia Act stands alone as the only legislative protection for worker self-organization to be interpreted broadly by the federal courts.⁷⁴

The National Labor Relations Act of 1935 contained some elements that implemented the freedom of association model. Consistent with the U.S. Commission’s recommendations, the Act guaranteed the rights of self-organization and concerted activity, prohibited employers from interfering with those rights, and required employers to bargain with the representatives chosen by their employees.

But the Act departed from the Commission model in three crucial respects. First, it excluded millions of employees from coverage, including agricultural and domestic workers, most of whom were people of color. Later, the Taft-Hartley Act added another exclusion — this one for supervisors. This exclusion freed employers to transform the entire supervisory workforce into an anti-union political machine by requiring individual supervisors to campaign against unions.⁷⁵

Second, section 9 provided that if a union could demonstrate majority support in a government-determined “bargaining unit,” then it would become the exclusive representative of *all* workers in that unit. As interpreted by the NLRB and the courts, section 9 extinguishes the associational freedom of most workers most of the time. Until and unless a labor organization wins majority support in a unit, the workers in that unit have no right to associate together for the purpose of dealing with their employer. They can form an association and call it a “union,” but the employer may ignore it and insist on dealing with the members as individuals.⁷⁶

America: Essays on the 20th Century STRUGGLE 145 (1980) (observing that many unions benefitted more from Norris-LaGuardia’s protections of the rights to strike and boycott than from the NLRA).

73. Lynd, *supra* note 30, at 2–7.

74. *See infra* text accompanying notes 75–80.

75. *See* LICHTENSTEIN, *supra* note 5, at 118–22.

76. Alan Hyde, *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637, 639–40 (1993); *see also* Clyde Summers, *Unions Without Majority — A Black Hole?*, 66 CHI.-KENT L. REV. 531, 540 (1990). *But see* MORRIS, *supra*

Moreover, even a majority of workers cannot simply exercise their freedom of association by joining together in a union to deal with their employer. Management may decline to bargain until the union establishes its majority support in a government-run union representation election. These elections are conducted without any pretense of democracy. One party — the employer — may require voters to attend anti-union meetings, prohibit voters from expressing any dissent at those meetings, compel voters to meet individually with their supervisors to hear anti-union messages, bar everyone but itself from campaigning on work time, and exclude the other party's organizers from the workplace altogether.⁷⁷ Given this skewed process, it is not surprising that although more than 30 million non-union workers want union representation, only about 200,000 per year even participate in union representation elections.⁷⁸

The concept of bargaining units does not mesh well with flexible production. Workers who go through the arduous process of establishing a majority representative in their bargaining unit may suddenly find that their work has been contracted out, that they have been transferred outside the unit, that the unit has been moved overseas, that it has ceased to exist, or that the company has been sold to another employer. As a result, "in today's world of frequent movement, union gains are increasingly ephemeral from the individual's point of view."⁷⁹

The NLRA also departed from the freedom of association model in a third, crucial respect. The Commission had recommended that the freedom of association be incorporated "among

note 30, at 93–109 (pointing out that although this is the general understanding, it is not supported by any on-point holding, and making a compelling argument that employers should be under a duty to bargain with minority unions for their members). Furthermore, once a union does achieve exclusive representative status in a bargaining unit, the workers in that unit lose their freedom to take concerted action under most circumstances except as authorized by the exclusive representative. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 63 (1975).

77. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 539–40 (2004). The NLRB is prohibited from shaping bargaining units to fit the extent of existing organization. National Labor Relations Act, 29 U.S.C. § 159 (c)(5) (2000).

78. David Brody, *What Next for Labor Rights?*, DISSENT, Spring 2001, at 18, 19.

79. STONE, *supra* note 4, at 208.

the rights guaranteed by the Constitution,” and that statutes be enacted on that constitutional foundation. This could have been accomplished either by constitutional amendment or by reinterpretation. For example, in 1931 the American Federation of Labor proposed that the Norris-LaGuardia Act be grounded on Congress’s power to enforce the Thirteenth Amendment. Had the Federation’s proposal been adopted, the Act would have included the following as its first sentence:

Every human being has under the Thirteenth Amendment to the Constitution of the United States an inalienable right to the disposal of his labor free from interference, restraint or coercion by or in behalf of employers of labor, including the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such association to negotiate through representatives of their own choosing concerning the terms of employment and conditions of labor, and to take concerted action for their own protection in labor disputes.⁸⁰

Andrew Furuseth, the Federation’s leading constitutional thinker, urged Senator Robert Wagner to take the same approach with the NLRA,⁸¹ but Wagner chose to ground his bill on the power of Congress to regulate interstate commerce. Thus, the constitutional goal of the NLRA was not to protect workers’ freedom of association, but “to eliminate the causes of certain substantial obstructions to the free flow of commerce,” namely, strikes for union recognition. Protection for the workers’ “full freedom of association” was strictly a means to the end of facilitating commerce.⁸²

80. AMERICAN FEDERATION OF LABOR, TEXT OF THE ANTI-INJUNCTION BILL APPROVED BY THE EXECUTIVE COUNCIL OF THE AMERICAN FEDERATION OF LABOR 1 (1931).

81. Letter from Andrew Furuseth, President, International Seamen’s Union, to Senator Robert F. Wagner (Apr. 16, 1935) (in Robert F. Wagner Papers, Labor Series, box 4, folder 39, Georgetown Univ. Special Collections); Letter from Andrew Furuseth, President, International Seamen’s Union, to Senator Robert Wagner (May 28, 1935) (in Wagner Papers, *supra*).

82. 29 U.S.C. § 151 (1935). Every time workers’ rights are mentioned in the Act’s lengthy statement of “Findings and Policies,” they are clearly relegated to the status of means to the end of protecting commerce. *E.g.*, “protection by law of the right of employees to organize and bargain collectively safeguards commerce . . .”; “It is hereby declared to be the policy of the United States to eliminate the causes of certain substan-

The NLRA's commerce clause foundation had an immediate and disastrous effect on its interpretation. To obtain judicial enforcement, the NLRB struggled to prove that each of its orders was necessary to clear the flow of interstate commerce. Government lawyers defended the Act as an exercise of Congress's power to "control" and "punish" strikes under the commerce clause.⁸³ In order to drive home the point that strikes interfered with interstate commerce, they argued that strikes "disrupted" markets, "crippled" business, and caused "disorganization, obstruction, or even paralysis of interstate commerce."⁸⁴ Having been introduced to the Act in this fashion, the courts wasted no time cutting back on labor's rights. Employers had a ready argument that if the goal was to stop strikes, it would make far more sense to discourage them directly than to protect the freedom of association. Moreover, every time that the workers' freedom of association collided with employer property rights, employers could point out that property rights were enshrined in the Constitution, while the workers' freedom of association was merely a means to the end of facilitating commerce. This kind of thinking played a major role in the Supreme Court's creation of various rules that now exert a devastating effect on the labor movement, including the privilege of employers to permanently replace strikers, the disability of the NLRB to consider deterrence in remedying unfair labor practices, the right of employers to exclude union organizers from their property, and the right of employers to close whole enterprises for the express purpose of punishing workers who choose to unionize.⁸⁵

tial obstructions for the free flow of commerce . . . by protecting the exercise by workers of full freedom of association . . ." *Id.*

83. See *Arguments in the Cases Arising Under The Railway Labor Act and The National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937*, U.S. Cong., SEN. DOC. NO. 52 (75th Cong., 1st sess.) at 124 (reporting the government's argument that Congress has "control power" over strikes); *id.* at 171 (reporting the government's argument "that the power of Congress clearly includes the power to prevent a strike — rather, to punish a strike — called with the intent of affecting commerce . . .").

84. Brief of Petitioner at 21–24, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419).

85. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–46 (1938); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268–70 (1965). The employers' constitutional arguments and their role in shaping these deci-

At the same time that the Court narrowed the NLRA, it gave an expansive reading to the Norris-LaGuardia Act, which contained a very different statement of purpose. Although the American Federation of Labor had failed to insert an explicit reference to the Thirteenth Amendment, the statement (quoted above) did contain the core of the movement's constitutional theory without subordinating it to — or even mentioning — interstate commerce or any other goal.⁸⁶ When confronted with statutory ambiguity, the Supreme Court has interpreted the Norris-LaGuardia Act broadly, departing sharply from the deep structure of values and assumptions that is evident in its decisions construing the NLRA. Strikes over plant closings and other issues at the “core of entrepreneurial control” are immunized under Norris-LaGuardia, but prohibited under the NLRA.⁸⁷ Similarly, strikes about political issues that are remote from the immediate employment relationship are immunized under Norris-LaGuardia, but not under the NLRA.⁸⁸ The Court

sions are recounted in Pope, *supra* note 77. The Act's commerce clause foundation also played a crucial role in the Court's validation of section 9(h) of the Taft-Hartley Act, which required union officers to submit anti-Communist affidavits as a condition of their unions using the services of the NLRB. Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 724–25 (1985). Section 9(h) did more than purge a politically unpopular group from union leadership. It had far-reaching, detrimental effects not only on the labor movement, but also on the civil rights movement and other movements of the 1960s. See LICHTENSTEIN, *supra* note 5, at 117.

86. For the text of the statement, see *supra* text accompanying note 80, see also *Order of R.R. Telegraphers v. Chicago & Nw. Ry. Co.*, 362 U.S. 330, 336 (1960) (rejecting the dissent's argument that Congress's “over-all purpose” was “to prevent the devastating effects of strikes”). *Id.* at 344 (Clark, J., dissenting). See also Kupferberg, *supra* note 85, at 714. Kupferberg argues that the statute was intended to protect constitutional rights of expression and that this “helps explain the statute's continuing vitality even when its enactment is believed “responsive to a situation [the hostility of federal courts to labor] totally different from that which exists today.” *Id.* at 717 (quoting *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250 (1970) (brackets in original)).

87. See *Order of R.R. Telegraphers*, 362 U.S. at 330; *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 303 (1976). For analysis of judicial attitudes on insulating the “core of entrepreneurial control” from union influence, see JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 143–59 (1983); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1548–59 (1981).

88. *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 710–15 (1982) (holding that the Norris-LaGuardia Act's restrictions on labor injunctions apply to politically motivated work stoppages); *Int'l Longshoremen's Ass'n v. Al-*

has also declined opportunities to narrow the zone of conflict covered by Norris-LaGuardia, holding that it immunizes both secondary boycotts and protests by community organizations.⁸⁹ The Court has departed from this pattern of broad construction only where the Norris-LaGuardia Act runs up against the Taft-Hartley Act.⁹⁰

B. A Labor Law Based on Freedom of Association: Some Specifics

What would a labor law based on freedom of association look like? Clearly, it would include the three basic elements of the Commission's recommendations: (1) a guarantee of the freedom of association (including the rights to organize and strike) that is not merely a means to facilitate commerce; (2) an effective prohibition against employer discrimination or coercion of workers in the exercise of the freedom of association (as opposed to the current prohibition, which is rendered ineffective because of procedural delays and inadequate remedies⁹¹); and (3) a requirement that employers

lied Int'l, Inc., 456 U.S. 212, 225–26 (1982) (holding that where a union's sole complaint was with a foreign nation's foreign and military policy, boycotting cargoes to or from the foreign nation constituted an illegal secondary boycott under the NLRA). For analysis of judicial attitudes toward political labor protest, see Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981); see also Kupferberg, *supra* note 85.

89. Burlington N.R.R. Co. v. Bhd. of Maint. of Way Employees, 481 U.S. 429, 438 (1987) (holding that the Norris-LaGuardia Act divested federal courts of jurisdiction to enjoin secondary boycotts in railway disputes); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 559 (1938) (holding that the Norris-LaGuardia Act's restrictions on labor injunctions apply to protests by community organizations that concern employment conditions). For analysis of judicial attitudes about the scope of industrial conflict, see Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 793–814, 864 (1989); see also ATLESON, *supra* note 87, at 10, 70–71.

90. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (holding that section 301 of the Taft-Hartley Act, which gives federal courts jurisdiction to enforce collective bargaining agreements, repeals the Norris-LaGuardia Act's ban on anti-strike injunctions as to strikes in violation of collective bargaining agreements). But see *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976) (declining to extend *Boys Markets* to strikes over nonarbitrable issues); see also *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (same).

91. Thanks to inadequate remedies and procedural delays, employers stand to gain from violating workers' rights even when they are caught red-handed. If the employer averts even a small pay increase, it will save far more on wages than it is likely to spend on an NLRB back pay award. See Morris M. Kleiner, *What Will it Take? Establishing*

meet and negotiate with representatives chosen by the workers. There would be no flat ban on secondary labor or consumer boycotts, although a union would be barred from pressuring employers to bargain with it for workers who had not chosen that union — the evil that Taft-Hartley's secondary boycott ban was primarily intended to prevent.⁹² Economic strikers would be protected against permanent replacement. There would be no exclusions for agricultural workers, domestic workers, or other broad categories of employees.

Thus far, the proposal does little more than to bring U.S. law into compliance with international standards.⁹³ Even that would be a huge advance. But the freedom of association would also entail other changes. At a minimum, in the absence of a majority union, employers would be required to negotiate with unions on a members-only basis for the workers who had chosen that union.⁹⁴ Furthermore, a majority union would not have the power to extinguish the associational rights of the workers to protest employer or union policies.⁹⁵ Ultimately, full freedom of association might require the abolition of exclusive representation altogether, along with repre-

the Economic Costs to Management of Noncompliance with the NLRA, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 137, 140–46 (Sheldon Friedman et al. eds., 1994).

92. See 93 CONG. REC. 4131-32 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1056 (statement by Sen. Ellender: "A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employers to deal with them, even though the employees of that employer desire to be represented by other unions, or not to be represented at all"). See also CLYDE W. SUMMERS, HARRY H. WELLINGTON & ALAN HYDE, LABOR LAW CASES AND MATERIALS 495 (2d ed. 1982) (suggesting that in view of the testimony before Congress in 1947, "Congress could well have believed that unions employed boycotts entirely as an organizational device").

93. See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS at 18, 31, 171–90, 209–213 (2000) [hereinafter Human Rights Watch Report] (reporting that U.S. labor law deviates from international standards in numerous respects, including: (1) the inadequacy of current procedures and remedies for unfair labor practices, (2) the failure to protect economic strikers against permanent replacement, (3) the flat ban on secondary action, and (4) the denial of legal protection for the freedom of association to agricultural workers, domestic workers, and other categories of workers).

94. For a detailed examination of how members-only organizing and collective bargaining would work, see MORRIS, *supra* note 30, at 202–19.

95. See Iglesias, *supra* note 14, at 417–31. *Contra* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. at 68–71.

sentation elections and government-determined bargaining units.⁹⁶ Far from accomplishing its original purpose of uniting labor, exclusive representation now divides workers into bargaining unit boxes and places daunting obstacles in the path of worker self-organization.⁹⁷ To prevent employers from undercutting genuine unions by fostering employer-dominated alternatives, the current ban on company-created or dominated labor organizations would remain in force.⁹⁸ Abolition would, however, necessitate some alternative means of solving the free rider problem. One possibility would be to require workers to pay a representation fee or its equivalent, but to permit them to specify the recipient.⁹⁹

Unfortunately, all of this is nothing more than wishful thinking if there isn't a way to get from here to there. This brings us right back to the Catch-22 of labor movement resurgence — namely, that the movement must revive before it will be strong enough to put labor law reform on the agenda, but it cannot revive within the constraints of current law.

C. Solving the Catch-22: Freedom of Association and the Transition to a New Paradigm

“I’m tired of labor organizers whining about the law,” says Jonathan Lange of the Industrial Areas Foundation, one of the most successful next wave organizing projects.¹⁰⁰ Interestingly, the SEIU and its allies seem to agree. Their manifesto, *Restoring the American Dream*, does not even mention labor law or labor law reform. Instead, it takes the position that “our movement can and must organize and grow on a mass scale” before achieving political

96. See, e.g., George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975); LEADER, *supra* note 67, at 126. For a thoughtful defense of exclusive representation, see Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 133–40 (2002).

97. See *supra* text accompanying notes 68–69. See also Iglesias, *supra* note 14, at 499; Marion Crain & Ken Matheny, “Labor’s Divided Ranks”: *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1615–17 (1999).

98. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158 (2000); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992).

99. LEADER, *supra* note 67, at 126.

100. Jonathan Lange, Speech at the Next Wave Organizing Symposium (Jan. 27, 2005).

gains; until then, “even our maximum political efforts [will] fall short for the simple reason that we are too small.”¹⁰¹

Only one problem: How does the coalition plan to organize on a mass scale when the law gives employers so many ways to defeat unions? The manifesto doesn’t say, but it is easy to guess the authors’ solution from their practice. No industry is more cluttered with legal obstacles to organizing than janitorial services, where the SEIU has conducted a stunningly successful series of organizing drives. SEIU’s solution to the Catch-22 is to operate outside the bargaining unit/election process, and to use tactics that push, and sometimes exceed the limits of the law. Most of the union’s pressure tactics are “secondary” in the sense that they are directed not against the cleaning contractors that employ janitors (the “primaries”) but against the building owners who hold the power to select union or non-union contractors and to pay or not pay the contractors enough to fund union wages and benefits (the “secondaries”).¹⁰² As a result, the union must pay careful attention to the tricky legal line between non-coercive activity like leafleting, and so-called “coercive” activity like picketing with signs and noisy demonstrations. Once unions cross the line to “coercive” activity, no matter how peaceful and non-threatening, they are subject to injunctions and damage liability.¹⁰³ But the SEIU does not shy away from risk. Judging from the record, it appears that the union is willing to accept that in any given campaign employers are likely to file charges and that, if the charges reach a formal resolution, some will stick.¹⁰⁴ If the union had adopted a more cautious legal strategy, then the janitors would have been unable to direct the public’s

101. SEIU et al., *supra* note 26, at 1.

102. See Local 254, SEIU v. NLRB, 158 L.R.R.M. (BNA) 2896 (1st Cir. 1998) (Massachusetts Bay Community College); Local 32B-32J, SEIU v. NLRB, 68 F.3d 490 (D.C. Cir. 1995) (Nevins Realty Corp.); Hospital & Service Employees Union, Local 399, SEIU v. NLRB, 743 F.2d 1417 (9th Cir. 1984); Service Employees Union, Local 87, 312 N.L.R.B. 715 (1993) (West Bay Building Maintenance Co.); SEIU Local 525, 329 N.L.R.B. 638 (1999) (General Maintenance Service Co., Inc.); Service Employees Union, Local 87, 312 N.L.R.B. 715 (1993) (Trinity Building Maintenance Co.).

103. Catherine L. Fisk, Daniel J.B. Mitchell & Christopher L. Erickson, *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman, ed., 2000).

104. Justice for Janitors campaigns often result in unfair labor practice charges filed against the union. Stephen Lerner, the leading strategist behind the Justice for

attention toward the building owners, who are actually responsible for substandard labor conditions. Instead, the union would have faced the choice of using tactics (like leafleting without signs) that do not draw public attention, or propagating the government-mandated lie that the janitors' dispute was with the contractors and not with the building owners.¹⁰⁵ The Catch-22 would have remained effective, and Justice for Janitors would have gone nowhere.

The SEIU's approach reflects the lessons of history. Twice before, the movement solved the Catch-22 problem under conditions at least as daunting as today's: once around the turn of the century and once in the 1930s. Both times, the movement broke through the paradox by going outside the boundaries of the law; first with sympathy strikes and city-wide boycotts, and later with mass picketing and sit-down strikes. Public worker unions did the same during their sensational period of growth in the 1960s, systematically conducting strikes in the face of public employee strike bans.¹⁰⁶

Justice for Janitors has been sensationally successful without putting any special emphasis on law in general or freedom of association in particular. To the contrary, the SEIU has downplayed law, seeking to resolve issues outside the legal system to the extent possible. The coalition's manifesto reflects this approach. While making no mention of labor law reform, it calls on the labor movement to make its highest political priority "encouraging public officials to actively support workers who are trying to form unions, as well as to support the maintenance and growth of union jobs."¹⁰⁷ When unions can mobilize enough pressure to bring about a settlement of

Janitors approach, has argued for open disobedience. Stephen Lerner, *Reviving Unions*, BOSTON REV., Apr.-May 1996, at 3, 4.

105. In order to have a chance of establishing that an action is directed at a primary employer (e.g., the cleaning contractor in the Justice for Janitors campaigns), a union must state clearly that its dispute is solely with that employer. See JULIUS G. GETMAN, BERTRAND B. POGREBIN & DAVID L. GREGORY, *LABOR MANAGEMENT RELATIONS AND THE LAW* 281-82 (1999).

106. ARONOWITZ, *supra* note 58, at 59-80 (1998); JAMES R. GREEN, *THE WORLD OF THE WORKER: LABOR IN TWENTIETH CENTURY AMERICA* 233-35 (1980); LICHTENSTEIN, *supra* note 5, at 181-85; MOODY, *supra* note 24, at 81-83, 196-97, 212; Theodore W. Kheel, *Introduction: Background and History* to PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 1, 4-9 (1976).

107. SEIU et al., *supra* note 26.

the underlying issue of recognition or terms of employment, the legal question will usually disappear.

But if the coalition makes good on its promise to organize on a mass scale, the legal question will soon emerge to the forefront. It is not likely, for example, that an anti-union powerhouse like Wal-Mart will accept unionization — as have building owners — without exploiting its legal advantages to the maximum. Wal-Mart has remained union-free by spying on, harassing, and firing union supporters, holding captive-audience meetings, and — in the rare case where workers survive the onslaught and vote for a union — by shutting down the bargaining unit altogether. When an eleven-person unit of meat department employees in Jacksonville, Texas became the only Wal-Mart unit in the U.S. to vote successfully for union representation, the corporation shut down the department, disguising the anti-union motivation by simultaneously eliminating meat-cutting operations at 179 other stores.¹⁰⁸ Although unions have filed numerous unfair labor practice charges and prevailed on many, the remedies are too weak and too late to affect Wal-Mart's policy. It is highly unlikely that any union or combination of unions can respond effectively to such tactics while remaining within the constraints of today's labor law. And if unions push up to and beyond the limits of the law, Justice-for-Janitors style, a highly public confrontation over the law will likely ensue.

This is where the paradigm of freedom of association comes in. In each previous period of labor upsurge, industrial law and order became a major public issue. Workers and unions resorted to illegal tactics like sympathy strikes, general strikes, obstructive mass picketing, and sit-down strikes. Courts enjoined these activities to protect corporate property rights, but workers and unions defied the injunctions. They insisted that they were lawfully exercising their constitutional rights to organize and strike, and that it was the employers who were violating the law by interfering with their right to organize.¹⁰⁹ At a key moment in the Memphis sanitation strike of 1968, for example, the Mayor declared the strike illegal. Speak-

108. MORRIS, *supra* note 30, at 202–09; LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 196–200* (2004).

109. See WILLIAM A. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 130–41 (1991); Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958*, *LAW & HIST. REV.* (forthcoming 2006).

ing to a packed audience of strikers, the union's field director, P.J. Ciampa, replied:

I was advised that you are out of work in violation of the law. I don't know of any law in Tennessee that says you have to subject yourself to indentured servitude. And I don't think that I'm breaking the law one iota, because I think as a free American citizen I'm going to express myself. As a free American citizen you are expressing yourself by saying: "I am not working for those stinking wages and conditions."¹¹⁰

Labor's constitutional theory was simple: without the freedom of association, workers would be in a condition of involuntary servitude in violation of the Thirteenth Amendment. According to the Supreme Court, the purpose of the amendment was "to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit."¹¹¹ But, as recognized by both Congress and the Supreme Court, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."¹¹² Only by exercising the freedom of association could workers deal with corporate employers on a basis of equality. Although the individual right to quit represented a huge advance over slavery, it could not by itself render servitude "voluntary" because the worker who quit had no practical alternative but to enter into another unequal relationship of servitude.¹¹³ As Senator George Norris put it, labor in-

110. Documentary: *At the River I Stand* (David Appleby, Allison Graham & Steven Ross 1993) (on file with author) (showing footage of Ciampa making the statement). The union involved was the American Federation of State, County, and Municipal Employees.

111. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (striking down Alabama's debt peonage law).

112. Norris-LaGuardia Anti-Injunction Act of 1932 §2, 29 U.S.C. §102 (1994). *See also* NLRA § 1, 29 U.S.C. §151 (1935) ("[T]he individual, unorganized worker [is] helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living."); *Am. Foundries v. Tri-City Council*, 257 U.S. 184, 209 (1921) (Taft, C.J.) (stating that a "single employee was helpless in dealing with an employer," and so "union was essential to give laborers opportunity to deal on equality with their employer").

113. *See, e.g., Memorandum on Ball-Taft-Smith Bill: Hearings before the Comm. on Labor and Public Welfare, U.S. Senate, on S. 55 & S.J. Res. 22*, 80th Cong., (1st Sess. 1947) at

junctions brought about “involuntary servitude on the part of those who must toil in order that they and their families may live.”¹¹⁴ Senator Robert Wagner explained:

The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract.¹¹⁵

Unionists did not contend that the denial of freedom of association was the equivalent of chattel slavery. Instead, they claimed that it produced the same *kind* of evil, namely a condition of domination and subordination that was inconsistent with citizenship in a republic. This connection was especially clear to African-American unionists. “I was raised a slave,” explained one black coal miner after experiencing a labor injunction, “and I know the time when I was a slave, and I feel just like we feel now.”¹¹⁶ Members of the all-black Brotherhood of Sleeping Car Porters held that the Thirteenth Amendment would remain a “dead letter” until white employers dealt on an equal basis with black workers through their chosen union. Only by organizing could they win full citizenship and avoid the “lash of the master.”¹¹⁷

1145, 1150 (memorandum of Lee Pressman, CIO general counsel) (“The simple fact is that the right of individual workers to quit their jobs has meaning only when they may quit in concert, so that in their quitting or in their threat to quit they have a real bargaining strength It is thus hypocritical to suggest that a prohibition or restriction on the right to strike is not in practical effect a prohibition on the right to quit individually.”).

114. 75 CONG. REC. 4502 (1932).

115. 78 CONG. REC. 3679 (1934) (Address by Senator Wagner).

116. JOE WILLIAM TROTTER, JR., *COAL, CLASS, AND COLOR: BLACKS IN SOUTHERN WEST VIRGINIA 1915-32*, 114 (1990); see also James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 981-82 (1997) (quoting other black unionists).

117. BETH TOMPKINS BATES, *PULLMAN PORTERS AND THE RISE OF PROTEST POLITICS IN BLACK AMERICA, 1925-1945*, 89-90, 92-93 (2001).

This constitutional vision was well suited to the dynamics of paradigm-shifting in labor law. It functioned not only externally, as an appeal to the public, but also internally, to raise workers' expectations and stiffen their determination in the face of official disapproval.¹¹⁸ In 1909, the American Federation of Labor resolved that a worker confronted with an unconstitutional injunction had an "imperative duty" to "refuse obedience and to take whatever consequences may ensue."¹¹⁹ This policy, repeatedly reaffirmed over the years, made it clear that the labor movement was serious about workers rights. In practice, unions did not seek out opportunities to defy the law. But when workers were driven to do so, their actions dramatized the underlying clash between property rights and human rights. Corporations, newspapers, and courts castigated workers for willfully breaking the law and repudiating American values. When workers and unions insisted that they were merely exercising and enforcing rights guaranteed by the Constitution, they turned the spotlight on employer violations of the freedom of association. Centrist political leaders began to consider the possibility that industrial peace might be obtained more easily by recognizing and protecting the freedom of association than by trying to suppress it. By 1932, at a time when the labor movement was at a long-time low in membership and resources, huge majorities in both houses of Congress were ready to ban the issuance of federal court injunctions against organizing and peaceful strike activity.¹²⁰

This combination of institutional labor weakness and bold worker protest has characterized the lead-up to every major workers rights statute. Labor law reform happens when the normally hid-

118. Labor's constitutional ideology helped worker activists avoid co-optation (by creating a dualist system of values in which fundamental worker rights trumped immediate material gain), overcome collective action problems (by fostering a shift from first-order preferences for private gain to second-order preferences for meaningful public action), survive legal repression (by justifying resistance and affirming the law-abiding character of worker-activists), counter fatalism (by casting workers as "free men and women" charged with the historic mission of saving the Republic from industrial slavery), and politicize the labor question (by framing it as a moral issue of fundamental human rights, and not as a technical issue of economics). Pope, *supra* note 116, at 988-96.

119. AMERICAN FEDERATION OF LABOR, REPORT OF THE PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONVENTION 313-14 (1909).

120. See FORBATH, *supra* note 109, at 158-63 (1991).

den or ignored suppression of basic workers' rights becomes a visible problem for other sectors of society. And this, in turn, occurs when employers are unable to suppress worker organization and protest without extensive spillover effects. This generalization holds true from the Erdman Act of 1898 (the first railway labor law, which was a self-conscious response to the Pullman Strike of 1894) to the Wagner Act of 1935 (the most recent major labor rights statute, which was a reaction to the 1933 strike wave and the general strikes of 1934).¹²¹ It also holds for less sweeping reforms such as the enactment of state public employee collective bargaining laws in response to intense strike activity by public workers during the 1960s.¹²² Conversely, reform efforts that were not accompanied by extensive strikes and boycotts — like the campaign to repeal Taft-Hartley and the reform campaign of 1977-78 — fell flat.

Strikes and boycotts are the handmaidens of labor law reform not because workers choose them, but because employers block all other paths. While on many kinds of legislation the business community is split or passive, it is united in passionate opposition to bills that seek to enhance worker power in the employment relation.¹²³ And a united and mobilized business community has an effective veto power over legislation. In part, this is because corporations and wealthy individuals outspend unions and workers in political campaigns by a huge margin. Even if we consider only Political Action Committees, where labor is at its strongest, business

121. For citations to the historical literature, see James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 969 (1999). On the role of disruptive protest in achieving legislation to benefit poor people, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* (1977). Two comparative studies suggest that this dynamic is common to all of the first-wave industrialized countries. See James B. Atleson, *The Role of Law in Union Organizing: Thoughts on the United States and Canada*, in *Reflexive Labour Law* (Ralf Rogowski & Ton Wilthagen eds., 1994); Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 445-46 (1990).

122. See ARONOWITZ, *supra* note 58, at 64. This does not mean that political advocacy was unimportant. The first big breakthrough in public sector collective bargaining laws, for example, came as the result of union political strength in Wisconsin, without the aid of dramatic strikes. See JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962*, 195 (2004). State laws could well assist in the revival of the labor movement today. See Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337 (2005-2006).

123. See FREEMAN & MEDOFF, *supra* note 16, at 200-02.

prevails by a margin of 3 to 1. In fact, business PACs contribute more to the *Democratic Party* than do labor PACs.¹²⁴ But corporate wealth is not the only reason that business holds a veto. If corporations do not get what they want, they threaten to move their facilities out of state or overseas. Meanwhile, unions almost never threaten to strike for political reasons. The result is that politicians can usually afford to ignore unions, but they must do what it takes to obtain the cooperation of business.¹²⁵ Only by striking and boycotting can workers bring home the fact that their cooperation is also essential.

If the SEIU and its allies succeed in applying the Justice for Janitors model on a wide scale, they will need a public justification for pushing up to and beyond the limits of the law. Could the labor movement's old theory of a constitutional freedom of association serve once again? The theory finds little support in judicial precedent, but that was true during its heyday as well.¹²⁶ Developments

124. According to the Center for Responsive Politics, which bases its conclusions on data provided by the Federal Election Commission, business interests outspent labor by an overall margin of 10 to 1 during the congressional campaign of 2002. However, this margin could be inflated due to the fact that individual contributions of over \$200 (the only ones for which data are available) are automatically attributed to business if the donor's employer is a business. The figures for PACs can, however, be accurately linked to business and labor interests. Business PACs contributed \$200,212,839, of which \$73,801,403 went to Democrats, while labor PACs contributed \$60,277,966, of which \$54,151,258 went to Democrats. Business-Labor-Ideology Split in PAC, Soft & Individual Donations to Candidates and Parties, <http://www.opensecrets.org/bigpicture/blio.asp?Cycle=2002&display=pacs> (last visited June 15, 2005).

125. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 175-76 (1977) (explaining that business occupies a "privileged position" in our political system because government officials understand that "to make the system work government leadership must often defer to business leadership").

126. In two decisions, the Supreme Court upheld judicial and legislative restrictions on striking, but without addressing the basic question of whether the Thirteenth Amendment reaches concerted activity. See *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding anti-strike injunction without mentioning the union's Thirteenth Amendment challenge); *UAW Local 232 v. Wis. Emp. Relations Bd.*, 336 U.S. 245 (1949) (holding that the Thirteenth Amendment did not prohibit a state from outlawing intermittent "quickie" strikes, and asserting that the ruling covered only "the particular course of conduct" involved in the case). Some lower courts embraced labor's claim, but by the early 1950s, most agreed that the Thirteenth Amendment did not protect temporary or concerted cessations of work. See, e.g., *NLRB v. Nat'l Maritime Union*, 175 F.2d 686, 692 (2d Cir. 1949); *United States v. Martinez*, 686 F.2d 334, 345-46 (5th Cir. 1982). For examples of opinions recognizing a limited Thirteenth Amendment right to strike, see *Arthur v. Oakes*, 63 F. 310, 319-20, 327 (7th Cir. 1894)

over the past half century have, if anything, strengthened the underlying argument that organization and collective action are essential to basic labor freedom.¹²⁷ Today, the Thirteenth Amendment is the only rights-granting constitutional provision that has been judicially limited to individual — as opposed to collective — rights. Organized group property, in the form of the corporation, enjoys constitutional property rights.¹²⁸ Individuals have gained the right to associate in the exercise of advocacy rights, and advocacy organizations enjoy the full protection of the First Amendment.¹²⁹ Yet, the Thirteenth Amendment has yet to be extended beyond the individual right to quit. From this perspective, it is the judicial denial of a Thirteenth Amendment right to organize — not the proposal to recognize one — that is out of line with current doctrine.

This anomaly appears even more glaring when we consider the Court's treatment of the individual right to quit. Because the text of the amendment does not mention *any* particular right, the Court is forced to determine in each case whether a particular right is necessary to prevent slavery or involuntary servitude. According to the Court, the individual right to quit is essential because, without it, "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."¹³⁰ If this standard were applied to the rights to organize and strike, there is little doubt that they would be protected. Both Congress

(Harlan, J.) (overturning parts of strike injunction as violations of the Thirteenth Amendment); *Henderson v. Coleman*, 7 So. 2d 117, 121 (Fla. 1942) (holding that in the absence of a contractual relationship between employees and plaintiff, an injunction compelling employees to unload plaintiff's nonunion goods would violate the Thirteenth Amendment).

127. See Mark Dudzic, *Saving the Right to Organize: Substituting the Thirteenth Amendment for the Wagner Act*, NEW LAB. F., Spring 2005, 58–67; Kupferberg, *supra* note 85, at 735–36; Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World — Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 669–70 (2004); JIM POPE, PETER KELLMAN & ED BRUNO, *TOWARD A NEW LABOR LAW* (2003), available at <http://www.djdinstitute.org/laborlaw.pdf>.

128. See, e.g., *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

129. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Louisiana v. NAACP*, 366 U.S. 293 (1961).

130. *Pollock v. Williams*, 322 U.S. 4, 18 (1944) (holding that a Florida debt peonage law conflicted with the Thirteenth Amendment and the federal anti-peonage law, and explaining that the purpose of the amendment was "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit")

and the Supreme Court have long acknowledged that “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor” and that organization is necessary if workers are to deal with corporate employers on a basis of equality.¹³¹ Yet, as we have seen, the Court has never applied *any* standard to labor’s claimed rights.¹³²

In addition, labor’s constitutional theory has been bolstered by the recognition of the freedom of association in international law. The International Labor Organization has held, for example, that some important aspects of U.S. labor law, including the flat ban on secondary boycotts and the employers’ privilege to permanently replace economic strikers, violate the freedom of association.¹³³ If the Supreme Court continues its current, tentative, trend toward considering international norms in U.S. constitutional cases, this body of international law could be of assistance.¹³⁴

Ultimately however, the thinking of Supreme Court Justices is less important to the success of the model than that of labor activists. The main functions of the theory are, as we have seen, more political than jurisprudential. Does the Thirteenth Amendment idea still resonate with workers today? In arguing (correctly) that the Thirteenth Amendment is no magic bullet, Joshua Freeman suggests that “most Americans, including most workers, think that if you can quit your job whenever you want, you are not in involuntary servitude.”¹³⁵ I suspect that Freeman is right, in the sense that if you conducted a poll you would get that result. But I also suspect that most unionists believe that the rights to organize and strike are essential to the freedom and dignity of working people. The fact that they would not frame their claim in Thirteenth Amendment terms is not necessarily a reflection on the Thirteenth Amendment

131. See *supra* note 112 and accompanying text.

132. See *supra* note 126.

133. See *supra* note 83.

134. Cf. *County Sanitation Dist. v. L.A. County Employees Ass’n*, 699 P.2d 835, 838 n.8 (Cal. 1985) (overturning California’s common law ban on public employee strikes partly to avoid constitutional questions, and observing that the “United States is virtually alone . . . in upholding a . . . prohibition of public employee strikes”). *Id.* at 864–65 (Bird, C.J., concurring) (arguing that the common law ban violated the Thirteenth Amendment and other constitutional provisions).

135. Joshua B. Freeman, *The Thirteenth Amendment is No Magic Bullet: Joshua B. Freeman Replies to Mark Dudzic*, NEW LAB. F., Spring 2005, at 72, 73.

idea, especially since it has been more than half a century since the labor movement actively propagated it. American workers today are bereft of *any* legal theory to explain the injustice and illegitimacy of our labor law. When, for example, the public school teachers of Middletown, New Jersey stood up one-by-one in open court to defy the state's flat ban on public employee strikes, each was left to his or her own resources to develop and put forth a justification.¹³⁶

There is reason to believe that the Thirteenth Amendment can still provide a compelling and effective theory of labor liberty. As Jonathan Lange pointed out at the Next Wave Conference, the best time to learn about the need for labor law reform is in the midst of struggle. The experience of being on a picket line when the police arrive to enforce an injunction teaches more about the bias and injustice of the labor law than a thousand law review articles.¹³⁷ For people who have had such experiences, the Thirteenth Amendment theory resonates strongly. When the New Jersey Industrial Union Council presented an updated version to two hundred local union leaders and activists at its March 2003 annual meeting, the response was overwhelmingly positive. Twenty of the participants volunteered to attend a full-day training workshop to learn how to pass the Thirteenth Amendment idea on to others.¹³⁸

People of color were especially responsive, a fact that should not be surprising given that the Thirteenth Amendment speaks to subjugation based on race as well as class. As we have seen, black unionists drew on the Amendment to demand collective bargaining from white employers.¹³⁹ It was the Civil War and emancipation

136. For a brief account of the strike, see Freeda Condin, *Teachers in Handcuffs*, LABOR NOTES, Jan. 2002, available at <http://www.labornotes.org/archives/2002/0102/0102b.html>.

137. See RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION AND CONTEMPORARY AMERICAN WORKERS* (1988) for a case study of a strike in which workers who had experienced the enforcement of a labor injunction came to believe that the law was biased in favor of employers.

138. See Dave Ransom, *Labor Party Rolls Out Worker Rights Curriculum*, LAB. PARTY PRESS, April 2003, at 6-7; *Jersey Locals Ask for Rights Training*, LAB. PARTY PRESS, April 2003, at 7.

139. See *supra* notes 116-17 and accompanying text. Given the salience of slavery and emancipation to black political culture, it is possible that the Thirteenth Amendment theory might contribute to the development of a new language of resistance and empowerment along the lines proposed by Manning Marable. See Manning Marable, *Black Leadership and the Labor Movement*, in *Audacious Democracy: Labor, Intellectuals, and*

that first created the possibility for white workers to join with black workers in a non-racial struggle for labor freedom. With the enactment of the Thirteenth Amendment, white workers could no longer “derive satisfaction from defining themselves as ‘not slaves,’” and the struggle of black workers for freedom from slavery became a model for many white workers.¹⁴⁰ Although this moment of opportunity was soon eclipsed by a resurgence of white racism, echoes remained in the labor movement’s bitter denunciations of “Dred Scott decisions” and “Fugitive Slave Laws.”¹⁴¹ The Thirteenth Amendment offered the possibility of fusing civil rights and labor rights into a powerful new conception of freedom.¹⁴² The Department of Justice pursued this possibility for a time during and after World War II, developing “a definition of civil rights that included rather than disdained labor freedom alongside racial equality.”¹⁴³ Had this effort prevailed, then we might have ended up with a concept of civil rights that included minimum labor standards and effective empowerment as well as anti-discrimination. Now that the labor movement has abandoned its traditional hostility to new immigrants, the Thirteenth Amendment could also provide a constitutional foundation for full citizenship and workplace rights for immigrant workers.¹⁴⁴

Of course, some people today dismiss as absurd the claim that any American workers could ever be in a condition that resembles slavery or involuntary servitude. But this is a good point on which to join the issue. Either the rights to organize and strike are essential to labor freedom or they are not. If unions are to achieve any-

the Social Reconstruction of America 199, 211–12 (Steven Fraser & Joshua B. Freeman eds., 1997).

140. DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 170, 173–76 (Verso 1991).

141. *Id.* at 176.

142. See Ontiveros, *supra* note 127, at 670.

143. See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1685 (2001), which recounts efforts by the newly-created Civil Rights Section of the Justice Department to use the Thirteenth Amendment as a source of minimum labor standards for black workers in the South.

144. See Ontiveros, *Immigrant Workers’ Rights*, *supra* note 127, at 676–78; Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 754–55 (2003) (arguing that the denial of workers rights to immigrants in decisions like *Hoffman Plastic Compounds*, 535 U.S. 137, effectively reduces them to a condition of involuntary servitude).

thing more than a contingent legitimacy in American law, this issue will have to be resolved in the affirmative. Not until labor rights are recognized as fundamental freedoms, and not as mere means to the end of facilitating commerce, can they command the respect necessary to hold their own against corporate property rights.

V. CONCLUSION

No single model of independent worker organization appears destined to replace industrial unionism as the dominant paradigm. The models that have been proposed — worker associations, community unions, and occupational unions — may all play important roles in a labor resurgence. Each responds to the needs of important worker constituencies. None by itself, however, seems capable of dealing with the most influential and powerful employers. In fact, Wal-Mart — the apparent template corporation of the twenty-first century — carries forward many of the enterprise characteristics that sustained industrial unionism during the twentieth century, including centralized authority, limited geographic mobility, huge numbers of employees, and downward pressure on labor costs. If independent worker organization is going to exist at such corporations, it will probably be in the form of industrial unions. Most likely, then, a revived labor movement will include industrial unions, as well as a variety of different organizational forms adapted to different economic sectors and geographic regions.

This variety fits the current industrial paradigm of flexible production. If employers are to have flexibility in organizing production, then workers must have the organizational flexibility necessary to respond. The corresponding legal paradigm is freedom of association, the core principle of which is that workers, and not employers or government, should determine the form of worker organization. Freedom of association entails, at a minimum, effective protection for the rights to organize and engage in concerted activity and a duty on the part of employers to bargain with unions for their members. Full implementation would require the abolition of exclusive representation altogether, which would, in turn

necessitate some alternative means of assisting workers to overcome the free-rider problem.¹⁴⁵

In today's bleak political environment, the notion that we could move to a regime of freedom of association might seem unrealistic. But similarly daunting conditions prevailed before each previous advance in workers' rights. Everything we know about labor movement growth indicates that it comes in unpredictable upsurges. At those junctures, workers and unions exercise their freedom of association, breaking through the constraints of anti-labor laws. Hitherto, unrealistic legislative proposals suddenly become feasible. A new paradigm centered on the freedom of association can both justify the inevitable clash with contemporary law, and provide a program for labor law reform in the era of flexible production.

145. See *supra* text accompanying notes 81–88.

