

## Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB

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On his first day in office, President Barack Obama elevated Wilma B. Liebman to the Chairmanship of the National Labor Relations Board (NLRB or Board). Now in the middle of her third six-year term on the Board, Liebman has developed strong views about its recent and future direction. During the months leading up to her elevation, she published an article and delivered a series of scholarly speeches hammering away on the theme that—in her memorable phrase—American labor law had been “turned inside out” by the Bush Board.<sup>1</sup> At the Twenty-fifth Anniversary Retrospective on James Atleson’s *Values and Assumptions in American Labor Law*,<sup>2</sup> she explained this phenomenon in stark terms. Business values drawn from outside the National Labor Relations Act (NLRA), she charged, now routinely trump the workers’ statutory rights to organize and engage in concerted activities for mutual aid or protection. Employee rights have yielded to the employer’s property interest in a “scrap of paper,” to considerations of “civility and decorum,” and to business interests that were not claimed by the parties. As a result, the limitations and exceptions to the workers’ statutory

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1. Wilma B. Liebman, *Labor Law Inside Out*, 11 WORKINGUSA: J. LAB. & SOC’Y 9, 10 (2008) [hereinafter Liebman, *Labor Law*]. Liebman delivered speeches on this theme in New York City on May 11, 2008, and in Buffalo on September 18, 2008. See Wilma B. Liebman, Speech, *Values and Assumptions of the Bush NLRB: Trumping Workers’ Rights*, 57 BUFF. L. REV. 648 (2009) [hereinafter Liebman, *Values*].

2. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

rights have become “central focus,” while the rights themselves have been relegated to the periphery.<sup>3</sup> The drumbeat of decisions accomplishing this transformation has been so relentless as to constitute “class warfare by one side.”

The present Essay takes Liebman’s “inside out” metaphor as its starting point and asks three questions. First, how have business values—imported from outside the NLRA—moved to the center of labor jurisprudence? Second, how have labor values—enshrined at the core of the NLRA in the Section 7 rights of “self-organization” and “concerted activity for . . . mutual aid or protection”<sup>4</sup>—drifted to the periphery? Third and finally, how can labor values be restored to their proper place at the center of the labor law? The Essay proposes the following, admittedly partial answers.<sup>5</sup> First, business values gravitated to the center of the labor law because they were grounded on a positive, coherent, and deeply rooted juristic understanding of business entrepreneurship. Second, labor values drifted to the periphery because they were not anchored to any comparably positive, coherent, or widely understood core theory or narrative of labor activity. Third, labor values can be restored to their rightful place at the center of the labor law by revitalizing the positive vision of labor activity that prevailed at the time the NLRA was enacted, namely that worker self-organization and concerted activity hinges on the generation of solidarity—an ongoing process that begins before union organization, continues afterward, and

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3. Liebman, *Values*, *supra* note 1, at 647-48.

4. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

5. The answers are partial because they address the problem only at the level of legal thought. One could say, and I would not disagree, that the labor law has been turned inside out because workers and unions suffered a series of disastrous political and economic defeats over the past six decades, and that the law can be turned right-side out only by a series of victories on a comparable scale. However, I am not claiming that the absence of a core theory of labor values *caused* the labor law to be turned inside out, or that the recognition of such a core theory will reverse that development. My claim is that the absence of a core theory systematically weakened the efforts of judges and NLRB members to enforce the workers’ statutory rights, and that the recognition of such a core theory will substantially improve the prospects of turning the labor law right-side out. To put it another way, political and economic developments create opportunities for juristic change; those opportunities are realized or squandered in part based on the quality of the contending legal strategies and theories.

conflicts fundamentally with the currently prevalent view that labor freedom consists of individual workers making rationally self-interested choices to vote for union representation or engage in concerted activity.

That positive vision was recently honored by President Obama on the same day that he elevated Liebman to the Chairmanship. In his inaugural address, the President observed that “it is ultimately the faith and determination of the American people upon which this nation relies,” and gave as an example “the selflessness of workers who would rather cut their hours than see a friend lose their job.”<sup>6</sup> On another occasion, he used the same example to illustrate “what is best in America.”<sup>7</sup> As Obama undoubtedly knew, workers collectively cutting their hours to prevent layoffs is a time-honored tradition of labor solidarity.<sup>8</sup> Consider this account, by a union organizer, of work sharing at a Connecticut factory called F-Dyne Electronic:

Under the contract, the layoffs went according to seniority. We felt terrible, thinking of some of the workers who would be put out on the street. There was a Portuguese woman named Albertina who had little children. She was crying, but she said, “It’s OK. It’s all right.” The other women said, “That’s unfair.”

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6. President Barack Obama, Inaugural Address (Jan. 20, 2009), *available at* <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>.

7. Presidential Candidate Barack Obama, Speech on the Economy in Canton, Ohio (Oct. 27, 2008) (as prepared for delivery), *available at* <http://www.clipsandcomment.com/2008/10/27/text-sen-barack-obama-speech-in-canton-ohio-%E2%80%98one-week%E2%80%99-the-closing-argument-%E2%80%93-october-27-2008/>.

8. See, e.g., GARY GERSTLE, *WORKING-CLASS AMERICANISM: THE POLITICS OF LABOR IN A TEXTILE CITY, 1914-1960*, at 143, 145 (1989) (describing the work-sharing practices of the Independent Textile Union in Woonsocket, Rhode Island); CARL D. OBLINGER, *DIVIDED KINGDOM* 20-21 (2d ed. 2004) (describing work-sharing demands by Illinois bituminous coal miners); Thomas Dublin, *The Equalization of Work: An Alternative Vision of Capitalism in the Anthracite Region of Pennsylvania in the 1930s*, 13 *CANAL HIST. & TECH. PROC.* 81, 86-87, 91-92 (1994); Mia Giunta, *Working-Class People Have a Very Deep Culture Based on Solidarity and Trust*, in *THE NEW RANK AND FILE* 31, 36-37 (Staughton Lynd & Alice Lynd eds., 2000) (describing work-sharing at a Connecticut electronics factory in the 1980s).

I am indebted to Staughton Lynd for suggesting citations. He also recounts his own experience at Northeast Ohio Legal Services, where the lawyers reduced their hours to four days per week in response to a twenty percent budget cut imposed by President Ronald Reagan. The lawyers did not ask anything of the secretarial staff, believing that they were underpaid to begin with.

When the next bunch of layoffs came along, somebody suggested, "We'll all work a few hours less each week. That way everybody can stay. Everybody will have health insurance." And . . . that became the tradition in that factory.<sup>9</sup>

This story illustrates distinctive dynamics of labor solidarity that are centrally important to worker self-organization and concerted activity, but have nevertheless been ignored or downplayed in American labor law. The tradition of work-sharing resulted from a collective decision-making process that bore little or no relation to the model of self-interested rational choice that currently dominates labor jurisprudence. Part I of this Essay suggests that work sharing and other solidaristic norms arise out of a culture of labor solidarity, developed by workers in opposition to the employer-promoted culture of rationally self-interested competition for employer approval. The conflict is so intense as to amount to a "culture war" in which workers self-identify either as seekers of individual gain (as opposed to idealistic chumps) or as union sisters and brothers (as opposed to scabs). When judges and NLRB members conceptualize workers as rationally self-interested market actors, they take the employer's side in this culture war.

Part II examines the theoretical dimension of the workplace culture war. It suggests that the model of decision-making as self-interested rational choice, which works well in an entrepreneurial context, does not fit the industrial relations context. Instead, it is the alternative model of "constitutive" decision-making that best describes the choice for or against self-organization and concerted activity. Instead of choosing whether to "purchase" union services, workers join together to enact and enforce norms of solidarity. This process typically begins before union recognition and, as in the case of the work-sharing norm at F-Dyne, continues afterward.

Part III traces the historical origins of unilateral worker norm creation and enforcement. Drawing on the work of John R. Commons, it depicts a pre-NLRA baseline not of exclusive employer control (a baseline that is said to justify the notion of reserved management rights), but of a competition between unilaterally created employer norms grounded on entrepreneurship, and unilaterally created worker norms grounded on solidarity.

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9. Giunta, *supra* note 8, at 36-37.

Part IV suggests that the NLRA was meant to endorse and incorporate worker-made norms of solidarity. It finds scattered elements of a juridical understanding of solidarity in past decisions of the Board and courts. Part V proposes changes in labor law doctrine that might result if those elements were assembled and expanded into a core theory and narrative of labor activity. Part VI focuses specifically on the current status and future prospects for a labor counterpart to the doctrine of the core of entrepreneurial control.

I should note at the outset that, according to the philosophy underlying our labor statutes, gains for solidarity need not come at the expense of entrepreneurship. The claim that norms and practices of solidarity should be central to American labor law in no way conflicts with a recognition that entrepreneurship is central to prosperity. Solidarity can both prevent the perversion of entrepreneurship into aristocratic arrogance, and ensure that the wealth generated by the combination of entrepreneurial initiative and productive labor are fairly distributed. Genuine entrepreneurship, as opposed to the shameless sense of entitlement recently exhibited by many corporate leaders, can thrive without the “inequality of bargaining power” that results when workers “do not possess full freedom of association or actual liberty of contract.”<sup>10</sup>

Finally, I should acknowledge that this Essay has its origin in James B. Atleson’s *Values and Assumptions in American Labor Law*. In the midst of criticizing the doctrine of entrepreneurial control, Atleson floated the notion of a “core of *union* concern.”<sup>11</sup> When I read the book as a law student in 1983, this idea triggered a question in my mind—one that I have pondered ever since. Why, given that the NLRA protects workers’ rights and does not so much as mention employer property rights, have courts and the NLRB developed a doctrine protecting the “core of

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10. NLRA § 1, 29 U.S.C. § 151 (2006). For an economic explanation of the compatibility of entrepreneurialism and economic efficiency with collective labor rights, see Bruce E. Kaufman, *Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS* (Kenneth Dau-Schmidt, S. Harris and O.Lobel eds., forthcoming 2009).

11. ATLESON, *supra* note 2, at 131.

entrepreneurial control” while neglecting to develop a labor counterpart? And, if they were to develop such a counterpart, what would be the labor equivalent of entrepreneurship? It is my hope that the answers proposed here will provide a modest illustration of the continuing vitality of *Values and Assumptions* as a generator of ideas today, a quarter century after its initial publication.

#### I. THE WORKPLACE CULTURE WAR BETWEEN ENTREPRENEURSHIP AND SOLIDARITY

The “core of entrepreneurial control” is a well-known doctrine in labor law. Justice Potter Stewart coined the phrase as a label for matters that, despite their direct and sometimes devastating impact on employees, are not among those “wages, hours, and other terms and conditions of employment” over which employers and unions must bargain.<sup>12</sup> The doctrine liberates employers to make decisions about matters that are said to be at the core of entrepreneurial control—for example capital investment and the basic “scope of an enterprise”—free from union economic pressure and the statutory obligation to bargain in good faith with the unions representing their employees.<sup>13</sup> The doctrine provides the focal point for a coherent and positive conception of employer interests that has come to permeate the labor law.<sup>14</sup> The term “entrepreneurial”—as contrasted with “managerial” or “administrative”—captures distinctive functions of business management that are widely valued in society and considered to be outside the expertise of unions: conceiving, shaping, and accepting the

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12. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

13. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 684 (1981). Unions are prohibited from striking over matters at the core of entrepreneurial control, and employers may implement decisions on such matters without notifying or bargaining with the union. *See, e.g., Id.*; *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); ATLESON, *supra* note 2, at 115, 133-34.

14. *See generally* ATLESON, *supra* note 2. This kind of thinking operates to shrink the scope of workers' rights. In *NLRB v. Local 1229 (Jefferson Standard)*, for example, a group of broadcast technicians who criticized a television station's programming found themselves outside the statutory protection for “concerted activity” partly because they were commenting on matters for which—in the words of the Supreme Court—“management, not technicians, must be responsible.” 346 U.S. 464, 476 (1953).

risks of operating a business enterprise.<sup>15</sup> Demonstrating the weightiness of entrepreneurial interests, the doctrine trumps competing concerns, for example the interest of workers in protecting their jobs from destruction due to plant closings or other capital investment decisions.<sup>16</sup>

The core theory and narrative of entrepreneurship is so compelling that it has the capacity to generate official protection for business interests that are not even claimed by the parties. In *First National Maintenance Corp. v. NLRB*, the authoritative decision on the core of entrepreneurial control, the Supreme Court hypothesized a host of possible employer interests in unilateral control over partial closing decisions, including “great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies,” need to control timing for tax and securities reasons, and need to avoid publicity that might disrupt the transition.<sup>17</sup> As Atleson pointed out, however, “none of these interests was implicated” in *First National*.<sup>18</sup> On the other hand, all are consistent with the standard narrative, deeply embedded in our culture, of the creative and resourceful entrepreneur developing a business strategy, committing capital, and accepting the risk of failure as well as the prospect of gain. Publically at oral argument, and privately in their internal deliberations, the Justices evinced a strong concern for the liberty of the employer to control investment-related decisions regardless of their impact on workers.<sup>19</sup> The doctrinal result was a balancing test that gave heavy weight to the employer’s interests while failing to mention the workers’ interests at all: “[I]n view of an

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15. See, e.g., AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 597 (4th ed. 2000) (defining “entrepreneur” as a “person who organizes, operates, and assumes the risk for a business venture”).

16. *Fibreboard Paper*, 379 U.S. at 223 (Stewart, J., concurring); see *First Nat’l Maint.*, 452 U.S. 666; ATLESON, *supra* note 2, at 126, 133-34.

17. 452 U.S. at 682-83.

18. ATLESON, *supra* note 2, at 134.

19. Alan Hyde, *The Story of First National Maintenance Corp. v. NLRB: Eliminating Bargaining for Low-Wage Service Workers*, in LABOR LAW STORIES 282, 297-305 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (reporting concerns at oral argument about the liberty of the employer who wanted to move operations overseas or simply would “rather spend his money in Florida than where he was,” and recounting efforts by Justice Powell to modify the opinion so as to provide categorical protection for employers against strikes by workers seeking to prevent the elimination of jobs).

employer's need for unencumbered decisionmaking, bargaining over management decisions that . . . [eliminate jobs] should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."<sup>20</sup> Ironically, the actual motivation of the employer—revealed afterwards by its attorney—was to prevent the “virus” of union organization from spreading to other facilities.<sup>21</sup>

Given that the NLRA protects workers' rights and says nothing at all about employer property rights, one might expect to find a labor counterpart to the core theory and narrative of business entrepreneurship. Labor law systematically pits the common law rights of employers, which pre-existed the NLRA, against the statutory rights of workers.<sup>22</sup> On the employer side, business values—openly endorsed and heavily weighted in the doctrine of entrepreneurial control—infuse employer common law rights with vitality. But on the labor side, one searches in vain for a corresponding theory or narrative of labor activity. When it comes time to balance employer common-law rights against workers' statutory rights, the employer's robust and coherent entrepreneurial interest is counterbalanced by a scattering of disconnected interests many of which are neutral in valence like employee “choice” or “stability in collective bargaining.”<sup>23</sup> Where labor's counterpart to the core of entrepreneurial control would logically lie, we find instead a feeble doctrine that protects unilateral union control only over “strictly internal union matters” like union dues and the selection of union officials.<sup>24</sup> The words of the NLRA remain, including not

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20. 452 U.S. at 679.

21. Hyde, *supra* note 19, at 291.

22. ATLESON, *supra* note 2, at 9-10.

23. See, e.g., Liebman, *Labor Law*, *supra* note 1, at 9; see also *supra* note 20 and accompanying text.

24. Quality House of Graphics, Inc., 336 N.L.R.B. 497, 508 (2002) (internal union fund). See, e.g., Int'l Union of Bricklayers and Allied Craftsmen, 306 N.L.R.B. 229, 235 (1992) (amount of union dues); Torrington Indus., Inc., 307 N.L.R.B. 809 (1992) (selection of grievance representative); Soc. Servs. Union Local 535, 287 N.L.R.B. 1223 (1988) (amount of union's “agency fees” non-mandatory), enforced in 905 F.2d 476 (D.C. Cir. 1990); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 698, 702-11 (2d ed. 2004). The fount of this doctrine is *NLRB v.*



only the specification of the various workers' rights but also—as pro-labor commentators never tire of pointing out—the official policy of “encouraging the practice and procedure of collective bargaining.”<sup>25</sup> But there is no positive juristic concept or standard narrative of worker self-organization and concerted activity.

In their absence, legal decision-makers rely on analogies and standard narratives drawn from the market in commodities, the institutional home of entrepreneurship. Lacking a notion of what it means to engage in “self-organization,” judges and NLRB members imagine each worker as a consumer, making an isolated, one-shot choice for or against unionized employment relations—a choice best made under “laboratory conditions.”<sup>26</sup> Lacking a concept of “mutual aid or protection,” they envision each worker as a self-interested trader, bartering assistance now for assistance in the future.<sup>27</sup> Lacking a concept of “concerted activity” or of “collective bargaining,” they imagine concerted and collective labor activity on a business model—tied to the presence or absence of a formally recognized, unitary institution that subsumes natural persons into an artificial legal entity—parallel to the corporation—namely, a union that has been recognized as the exclusive bargaining representative.<sup>28</sup>

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*Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), which held that unions enjoy the freedom to act unilaterally on matters involving “relations between the employees and their unions” as opposed to relations between employees and employer. *Id.* at 350.

25. NLRA § 1, 29 U.S.C. § 151 (2006).

26. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948); cf. Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 37-38 (2008) (characterizing the choice for union representation as a “purchase-of-services”).

27. 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 (1989).

28. See, e.g., *IBM Corp.*, 341 N.L.R.B. 1288, 1288 (2004) (overruling Board’s previous rule that workers in non-union workplaces enjoyed a right to have a co-worker present at a meeting that might result in discipline); Cindy Skrzycki, *A Renewed Bid For Mini-Unions*, WASH. POST, Sept. 4, 2007, at D1 (reporting on advice memo, issued by NLRB Associate General Counsel Barry Kearney, maintaining that in a workplace with no exclusive bargaining representative, employers have no duty to bargain with representatives chosen by their workers); cf. Bodie, *supra* note 26, at 41 (analogizing unions to commercial nonprofit corporations).

None of this would be legally objectionable if the statute adopted a market model of workers' rights. But the reverse is true. In the context of industrial relations, the market perspective is the partisan perspective of anti-union employers, legally sanctioned not in the statute but in the pre-NLRA common law. When workers think of themselves as consumers of union services or traders of support, they adopt a perspective that conflicts fundamentally with the philosophy underlying the social practices that are labeled by the statute as "self-organization" and "mutual aid." The choice to self-organize or to engage in concerted activity is a choice to reject individual market competition in favor of group advancement. If individual workers adopt the mindset of consumers or traders—who seek to maximize individual gain in each transaction—then they are likely to free-ride, shirk, or defect.<sup>29</sup> Accordingly, unions and labor activists engage in a culture war with employers, struggling to replace individual calculations of self-interest with a generalized commitment to mutual support. Slogans like "solidarity forever" and "an injury to one is an injury to all" reflect this effort. In the movement culture of labor, workers see themselves not as rationally self-interested consumers of unionism or traders of support, but as "sisters" and "brothers" bound together by workplace community, trade, industry, and class. In sharp contrast to the monolithic business corporation, unions are more-or-less democratic associations of workers that exist to propagate solidarity, enforce norms of solidarity, and parlay the collective power thus forged into gains for workers.<sup>30</sup>

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29. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard Univ. Press 1971) (1965). From the perspective of individual "choice," as Liebman points out, "Workers may view the employment relationship in purely individual terms and may fail to grasp common economic interests and the potential of collective action at work, as well as in the public sphere." Liebman, *Labor Law*, *supra* note 1, at 20; see also CLAUSE OFFE, *DISORGANIZED CAPITALISM* 183-84 (1985).

30. See generally RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1988); OFFE, *supra* note 29, at 170-207

## II. THE THEORETICAL DIMENSION OF THE CULTURE WAR: RATIONAL VERSUS CONSTITUTIVE CHOICE

Unfortunately, as Liebman has observed, NLRB members and judges evince a profound “discomfort with collective action and the zeal that often accompanies collective action.”<sup>31</sup> This discomfort will not be overcome if the alternative to rationally self-interested choice is irrationally altruistic choice. But the alternative to rational choice is not irrational choice. Nobody denies that the choice for unionism can be economically rational at the collective level; the difficulty for workers lies in how to make the shift from individually to collectively constructed interests.<sup>32</sup> This shift is best modeled not economically, as “rational choice,” but cognitively, as “constitutive” choice. Consider first the model of rational choice, which envisions individuals making instrumental choices about action in a three-stage process. Individuals (1) identify their goals or preferences, (2) consider alternative courses of action, and (3) select the alternative that maximizes goal attainment.<sup>33</sup> In choosing whether to follow a norm of solidarity rather than one of individualism workers compare the costs and benefits of each. They join unions when “the increased wages and benefits resulting from unions’ bargaining advantages exceed union dues and other cooperation costs.”<sup>34</sup> Once established in a workplace, a union can—at least theoretically—solve free-rider problems by providing

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31. Liebman, *Values*, *supra* note 1.

32. Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, at 446-48, 493 (1992) (analyzing employee organization as a public good and discussing the divergence of individual and collective interests in public goods); Alan Hyde, *Endangered Species*, 91 COLUM. L. REV. 456, 471 (1991) (observing that worker collective action hinges on workers shifting out of the rational choice mode to a different logic of collective action, and citing sources); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2722-27 (2008) (concluding, based on sociological scholarship, that the capacity for effective group action hinges on (1) the ability of group members to frame interests and solutions in collective terms and (2) the construction of a collective identity).

33. See Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 477 (summarizing the views of rational choice theorists).

34. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 143 (1996).

selective incentives, for example threatening workers who refuse to participate with expulsion or fines.<sup>35</sup>

Unfortunately for worker self-organization, however, the rational choice model provides no “rational” way for workers to begin challenging the employer’s norm of individual competition.<sup>36</sup> Before a new norm can become dominant, numerous individuals must choose to defy the old norm and begin enforcing the new. For the first few “norm entrepreneurs,” the costs of challenging the old norm are immediate and highly probable to occur, while the benefits are distant and speculative. At the beginning of a norm shift, the old norm’s enforcers—who have yet to be weakened by defections—can concentrate all their efforts on the first few proponents of the new norm. Retaliation is likely to be swift and damaging. It is estimated that for every five workers who vote union in a secret ballot representation election, one suffers discharge in retaliation.<sup>37</sup> Meanwhile, on the benefit side of the equation, norms are subject to “lock-in” effects. Since the value of a norm to any individual tends to depend heavily on whether it is followed by others, a new norm that is honored by only a few people is not likely to appear as an attractive alternative. Thus, each individual worker has an incentive to delay committing herself to the new norm until a critical mass of others has already made the leap.<sup>38</sup> If workers make

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35. *Id.* at 143.

36. Rational choice theory has long had problems explaining why anyone would choose to be the first, or among the first, to stand up to power. Early adherents of the model were cognizant of this limitation and acknowledged that their model did not account for an important segment of leaders. In his famous study of the Vietnamese revolutionary movement, for example, Samuel Popkin conceded that many leading activists “wanted only to help their country” and “to work for freedom and independence.” Prefiguring the constitutive model, he observed that they were “not stimulated by any expectation of future selective payoff,” but by “internalized feelings of duty or ethic.” SAMUEL L. POPKIN, *THE RATIONAL PEASANT: THE POLITICAL ECONOMY OF RURAL SOCIETY IN VIETNAM* 220, 223 (1979).

37. Lindsay Beyerstein, *Economist: One in Five Union Organizers Gets Canned*, WASH. INDEP., Jan. 14, 2009, available at <http://washingtonindependent.com/25398/economist-one-in-five-union-organizers-gets-canned> (reporting study by the Center for Economic Policy Institute). The study utilized methods developed by analysts at the University of Chicago and applied them to data collected by the NLRB.

38. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 833-36 (1998); see also Sachs, *supra*, note 32, at 2738-43.

decisions in accord with the rational choice model, then, it is unlikely that anybody will choose to step forward and support self-organization in its early stages. This helps to explain why employers support the model of rational choice so strongly, and why unionists resist it.

While the problem of activism tends to confound rational choice theory, it is easily explained by constitutive models of decision-making. Here, instead of calculating costs and benefits, individuals probe the meaning of action. They construct personal identities, take account of social roles, and make normative commitments. Again, a three-step process leads to action, as individuals ask: (1) "What kind of situation is this?"; (2) "What kind of person am I?"; and (3) "What is appropriate for a person like me in a situation like this?"<sup>39</sup> If a worker who is considering self-organization answers question number two by concluding that she is "a rational market actor—not a chump who falls for emotional appeals," then the answer to number three will likely be to avoid the risk of retaliation that comes with union activism, secure in the knowledge that if the union prevails she will receive the increased wages, benefits, and job protection anyway. But if the worker concludes that she is the kind of person who stands by her co-workers—that she is a union sister or brother, not a free-rider or scab—then she will likely assist in an organizing effort that has decent prospects of success. The constitutive model helps to explain why the initiators of self-organization and concerted activity tend to be distinguished by familial or experiential connections to traditions of unionism and solidarity.

Far from demonstrating irrationality, the choice for solidarity reflects a prioritization of values or, in economists' terms, satisfactions. Drawing on Harry Frankfurt's notion of "second-order preferences," Albert O. Hirschman explains that although a person might have a (first-order) preference for free-riding, she might also have a (second-order) preference about that preference—for example, a desire not to be the kind of person who takes free rides on the efforts of others.<sup>40</sup> An individual may tire of the demands and satisfactions of first-order, private-

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39. JAMES G. MARCH, *A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN* 58 (1994).

40. ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 3-8, 86 (1982).

oriented preferences and switch to second-order, collectively-oriented ones. No longer does she approach each decision by considering the costs and benefits to her of cooperating or free-riding. Instead, she commits herself to follow the social norm of solidarity. Thus, the meta-choice to move from first- to second-order satisfactions entails a shift from self-interested, instrumental decision-making consistent with the market model to norm-driven decision-making consistent with the constitutive model.<sup>41</sup>

This shift has been dramatized in film and literature. In the movie *Norma Rae*, for example, a young textile worker of that name is fired for leading the organizing effort at a large mill. As she is escorted out through a room full of thundering machines, she scrawls "UNION" on a piece of cardboard and holds it high over her head while standing on a table. The managers and the operators stare. Then, one operator throws the switch to kill her machine. After awhile, another follows. Tension mounts as everyone wonders whether more will join in. Each worker risks discipline or more subtle retaliation if she does, and the benefits of the job action are unclear. Even if it somehow contributes to unionization, the resulting benefits will be enjoyed by all without regard to participation. Yet, operator after operator shuts down, and a deafening silence ensues. Regardless of its immediate impact on the employer (none, apparently, as Norma is eventually arrested and led out by the sheriff) the action has demonstrated the capacity of the workers both to embrace solidarity in the face of individualized counter-incentives, and to engage in combined action that has the potential to offset employer power.<sup>42</sup>

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41. *Id.*; see also Hyde, *supra* note 32, at 471; Sachs, *supra* note 32, at 2722-27.

42. NORMA RAE (Twentieth Century-Fox Film Corp. 1979). A similar job action by tirebuilders is recounted in Ruth McKenny's novel, *Industrial Valley*. After the machines stopped, the "tirebuilders stood in long lines, touching each other, perfectly motionless, deafened by the silence. . . . Out of the terrifying quiet came the wondering voice of a big tirebuilder near the windows: 'Jesus Christ, it's like the end of the world.' He broke the spell, the magic moment of stillness. For now his awed words said the same thing to every man, 'We done it! We stopped the belt! By God, we done it!' And men began to cheer hysterically, to shout and howl in the fresh silence. . . . 'John Brown's body,' somebody chanted above the cries. The others took it up. 'But his soul,' they sang, and some of them were nearly weeping, racked with sudden and deep emotion, 'but his soul goes marchin' on.'" RUTH MCKENNY, *INDUSTRIAL VALLEY* 261-62 (1939).

As long as courts and NLRB members frame workers' rights in an individualistic, market vocabulary drawn from the business side of the culture war, employer interests will shape both sides of the labor law balance. The assumption of rational choice entails the rejection of solidarity. Conversely, if the NLRB were to embrace a positive understanding of solidarity as labor's counterpart to business entrepreneurship, new light would be shed on many, crucially important legal issues. A number of those issues are discussed in Parts IV and V below, but first it will be useful to correct the historical record on the origins of entrepreneurship and solidarity in labor law.

### III. THE HISTORICAL GENESIS OF ENTREPRENEURSHIP AND SOLIDARITY IN LABOR LAW

Courts, NLRB members, and labor arbitrators justify the zone of unilateral employer control by firmly asserting what Atleson calls a "Genesis' view" of industrial relations.<sup>43</sup> In the beginning, the story goes, management enjoyed the exclusive right to direct all aspects of the enterprise. Then, management's rights came to be limited in some respects by collective bargaining agreements and government regulation. Nevertheless (and here's the kicker), management retains all rights that have not been restricted by such agreements or regulation. "The power of an employer," concludes Atleson, "is analogized to a state, having all powers not expressly restricted in the state's constitution."<sup>44</sup>

Only one problem. The firmness of the Genesis claims "is only overcome," as Atleson wryly notes, "by the extent of their historical inaccuracy."<sup>45</sup> When we look back in time for the Genesis baseline of unchallenged employer control, we find that it never existed. Instead, we see *two* regimes in conflict: one of unilateral employer control and one of unilateral worker control. Prior to modern collective bargaining, unions unilaterally enacted rules governing a wide range of subjects including wages, hours, workplace

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43. ATLESON, *supra* note 2, at 122.

44. *Id.*

45. *Id.* at 122-23.

safety and production methods.<sup>46</sup> The scope and effectiveness of worker control varied hugely by industry, occupation, geographic location, and time period, but the overall picture was one of competing employer and worker jurisdictions, and not of unbounded employer control. As Atleson points out, for example, organized craft workers in the basic steel industry exercised unilateral control over many aspects of the production process. Later, the steel corporations broke the unions, but that was a result of political, economic, and paramilitary struggles culminating in the Homestead strike of 1892, and not of any natural tendency toward employer authority.<sup>47</sup> Other unions, for example the International Typographical Union, continued to exercise strict control even over what would now be considered management functions.<sup>48</sup> Less ambitiously, local unions of coal miners unilaterally enacted rules governing safety conditions, requiring work sharing to avoid layoffs, and barring members from working with miners who were not in good standing with the union. Even non-union, unskilled workers seized every opportunity to legislate limits on the pace of work.<sup>49</sup>

From a “Genesis” point of view, then, there were two zones of unilateral control—not one—prior to modern collective bargaining. Writing about a decade before the NLRA was enacted, leading labor scholar John R. Commons described these zones as conflicting common law regimes and identified the core values of each. On the one hand, the employers’ “historic common law springing from the customs of merchants and manufacturers” fostered

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46. See James Gray Pope, *Class Conflicts of Law I: Unilateral Worker Lawmaking versus Unilateral Employer Lawmaking in the U.S. Workplace*, 56 *BUFF. L. REV.* 1095, 1098-1103 (2008) (citing historical sources).

47. ATLESON, *supra* note 2, at 123; Katherine Stone, *The Origins of Job Structures in the Steel Industry*, in *LABOR MARKET SEGMENTATION* 27, 33-34 (Richard C. Edwards, Michael Reich & David M. Gordon eds., 1975).

48. SEYMOUR MARTIN LIPSET, MARTIN TROW & JAMES COLEMAN, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 24-26 (1956); Benson Soffer, *A Theory of Trade Union Development: The Role of the “Autonomous” Workman*, 1 *LAB. HIST.* 141, 152-53 (1960) (observing that the “laws” of the iron workers’ and typographers’ unions “gave them unilateral powers over management functions”).

49. For documentation, see James Gray Pope, *The Western Pennsylvania Coal Strike of 1933, Part I: Lawmaking from Below and the Revival of the United Mine Workers*, 44 *LAB. HIST.* 15, 45 (2003); Pope, *supra* note 46, at 1099 n.11.



“[i]nitiative, enterprise, ambition, [and] individual success”—all virtues associated with entrepreneurship.<sup>50</sup> By contrast, the workers’ “common law of labor springing from the customs of wage earners” rested on the core values of solidarity and fairness.<sup>51</sup> While entrepreneurship yielded success in business, solidarity provided essential “protection against the economic power of employers.”<sup>52</sup>

Courts enthusiastically embraced the common law of business which, by the time of the NLRA, they had been “defining and classifying for some 300 years.”<sup>53</sup> By contrast, courts looked with suspicion upon solidarity. “Initiative, enterprise, ambition, individual success, are quite contrary to the rules of solidarity and fair competition that characterize guilds and unions,” explained Commons.<sup>54</sup> “It is the judge who believes in the law and custom of business and not the judge who believes in the law and custom of labor, that decides.”<sup>55</sup> Courts could see no purpose to unions “beyond the supposed desirability of leveling inequalities of fortune”—an objective that they considered illegitimate and unconstitutional.<sup>56</sup> While workers insisted that solidarity was necessary to prevent economic coercion by employers, courts denied that a grown man of sound mind could be economically—as opposed to physically—coerced.<sup>57</sup> To the extent that the workers’ common law had won official recognition, it was through legislation—for example laws banning yellow dog contracts and labor injunctions.

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50. JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 305 (1924).

51. *Id.* at 304; *see also* DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* 171 (1987) (observing that in the late 19th and early 20th centuries “the ideology of acquisitive individualism, which explained and justified a society regulated by market mechanisms and propelled by the accumulation of capital, was challenged by an ideology of mutualism, rooted in working-class bondings and struggles”).

52. COMMONS, *supra* note 50, at 304.

53. *Id.* at 305. In particular, courts protected management decisions about capital investment by means of labor injunctions. ATLESON, *supra* note 2, at 127-28.

54. COMMONS, *supra* note 50, at 305.

55. *Id.* at 298.

56. *Id.* at 293 (quoting *Coppage v. Kansas*, 236 U.S. 1, 18 (1915) (invalidating state statute that prohibited yellow dog contracts as a violation of constitutional property and contract rights)).

57. COMMONS, *supra* note 50, at 304; *see also* *Lochner v. New York*, 198 U.S. 45, 57 (1905).

Unfortunately for workers, judges had struck down such legislation as unconstitutional, or narrowed it by construction.<sup>58</sup>

On the eve of the NLRA, then, the common law of entrepreneurship was well-established in judicial opinions, while the workers' common law of solidarity was, as Commons observed, "seeking recognition."<sup>59</sup>

#### IV. LEGAL FOUNDATIONS OF LABOR SOLIDARITY UNDER THE NLRA

As enacted, the NLRA did appear to incorporate the workers' common law. Section 7 guaranteed the right of workers to engage in "concerted activities for . . . *mutual aid or protection*,"<sup>60</sup> a phrase that referred to the labor movement's core principle of mutualism and solidarity.<sup>61</sup> In a direct repudiation of the judge-made common law, the Act condemned "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers" and affirmed that "the right of employees to organize and bargain collectively" was necessary to restore "equality of bargaining power between employers and employees."<sup>62</sup>

Labor's equivalent to business entrepreneurship is the generation of solidarity. While entrepreneurs raise and invest capital, labor activists create and sustain norms of solidarity. Just as capital is the key to creating and shaping a business, solidarity is the key to fostering any form of worker "self-organization" or "concerted activity for mutual aid or protection." What is needed, then, is a juridical understanding of the generation of solidarity that is comparable—at least within the sphere of labor law—to the juridical understanding of entrepreneurship. First and foremost, this understanding must take into account the dynamics of norm creation and enforcement, a subject that

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58. See COMMONS, *supra* note 50, at 298, 304-05; WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 37-58 (Harvard Univ. Press 1991).

59. COMMONS, *supra* note 50, at 307.

60. NLRA § 7, 29 U.S.C. § 157 (2006) (emphasis added).

61. See Fischl, *supra* note 27, at 850-51.

62. NLRA § 1, 29 U.S.C. § 151 (2006).

has attracted considerable attention in legal scholarship.<sup>63</sup> Elements of such an understanding appear in a number of scattered court and NLRB decisions.

In the familiar and foundational case of *J.I. Case Co. v. NLRB*,<sup>64</sup> for example, the Supreme Court read the NLRA to incorporate the core principle of the workers' common law. The employer had executed individual, written employment contracts with most of its employees. When a union was certified as exclusive bargaining representative, the company claimed that it could not agree to any collectively bargained terms that would conflict with the individual contracts. The Court held that the contracts could not bar or limit collective bargaining. After acknowledging that some individual workers might gain advantages over and above collectively negotiated standards, the Court explained that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages," which may be "earned at the cost of breaking down some other standard thought to be for the welfare of the group."<sup>65</sup> This characterization of the "practice and philosophy of collective bargaining" encapsulated the workers' core principle of solidarity in bargaining, according to which workers would advance together and not in competition with one another. Instead of imagining its own view of a rational worker's choice, as the NLRB and the courts would later come to do, the Court deferred to the union principle. Only the Court's failure to acknowledge the true source of the principle—not in some neutral notion of "collective bargaining," but in the workers' common law developed in opposition to the employers' common law—did *J.I. Case* hint at the future conceptual void on the workers' rights side of labor law balancing.

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63. See Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 175-76 (2004); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

64. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

65. *Id.* at 338.

In *NLRB v. Peter Cailler Kohler Swiss Chocolates Company*,<sup>66</sup> the Board reinstated a worker who had been discharged by a candy manufacturer for supporting a strike of dairy farmers. The Second Circuit Court of Appeals upheld the reinstatement, rejecting the employer's argument that because the worker did not benefit from the dairy farmers' strike, his action was not for "*mutual* aid or protection" as required by the statute. In a famous passage, Judge Learned Hand rejected this view on the ground that when workers

in a shop make common cause with a fellow workman over his separate grievance, . . . [they] know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.<sup>67</sup>

By "the solidarity so established," Hand meant the workers' norm of solidarity and not a tit-for-tat promise among the individuals involved.<sup>68</sup> By itself, the "support of the one whom they are all helping" would have been of little use to the workers. Their strike fostered not solely his obligation to help them in the future, but also the duty of each worker in the shop to support the others. This reading is confirmed by Hand's next sentence: "So too of those engaging in a 'sympathetic strike,' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased."<sup>69</sup> Although it is conceivable that workers in a single shop might generate a network of tit-for-tat expectations running among particular individuals, that

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66. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942).

67. *Id.* at 505-06.

68. Fischl, *supra* note 27, at 857 ("Judge Hand seems to suggest that the requisite 'mutual aid' lies not in the promise of reciprocal benefit itself, but rather in the 'solidarity' that is 'established' by workplace struggles of the sort fomented by the 'workman's separate grievance.' This view of Hand's reasoning would . . . bring it in line with the contemporaneous understanding of 'mutual support' . . . as an idea born of working-class experience, at odds with the crude individualism suggested by the mere promise of reciprocity, and steeped in notions of community and 'brotherhood.'").

69. *Peter Cailler Kohler*, 130 F.2d at 506.

possibility becomes implausible among workers separated by employer, geography, and even—as in *Peter Cailler Kohler*—industry. The sympathetic striker or secondary boycotter “assures himself, in case his turn ever comes,” not that he will be able to cash in obligations from the particular primary strikers he is assisting, but that the labor movement’s norm of solidarity will remain strong and workers who are in a position to render assistance will respect that norm when the time comes.<sup>70</sup>

The NLRB’s decision in *Business Services by Manpower*<sup>71</sup> further elucidates this view. Richard Cordes and Craig Monroe, two workers employed by a temporary agency, were sent to work at a bakery where they encountered and refused to cross a picket line. The agency fired them, and the NLRB ordered reinstatement. The Board dismissed the contention that because the workers acted out of “vague ideological reasons” their activity was unprotected. To the Board, honoring picket lines rested on “cardinal union principles” not vague ideology.<sup>72</sup> Despite the facts that Cordes and Monroe did not share a union affiliation or employer with the picketers, that the picketers were not employed at the bakery, and that the picketers did not ask Cordes and Monroe to turn back, the Board found that mutuality was established because, “[a]lthough reciprocity may be indirect, respect for another union’s picket line leads to a stronger labor movement.”<sup>73</sup> The Board did not explain further, but the decision appears to reflect an understanding that the general norm of respecting picket lines has value in the statutory scheme, and that the norm would be eroded if workers were to make case-by-case decisions to follow or violate it based on the likelihood of gains to themselves individually.

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70. See *NLRB v. S. Cal. Edison Co.*, 646 F.2d 1352, 1364 (9th Cir. 1981) (“Although reciprocity may be indirect, respect for another union’s picket line leads to a stronger labor movement.” (citing *Peter Cailler Kohler*, 130 F.2d at 505-06)).

71. 272 N.L.R.B. 827 (1984), *enforcement denied*, 784 F.2d 442 (2d Cir. 1986).

72. *Id.* at 828.

73. *Id.* (quoting *S. Cal. Edison*, 646 F.2d at 1364; see also *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir. 1971) (“It cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest.”)).

Finally, Justice William Brennan, writing for the Court in *NLRB v. City Disposal Systems, Inc.*,<sup>74</sup> depicted collective bargaining as a process driven by solidaristic lawmaking. In *City Disposal Systems*, James Brown was fired for refusing to drive a truck with faulty brakes despite a provision in the collective bargaining agreement that gave him the right to turn down unsafe vehicles.<sup>75</sup> The employer argued that since Brown had acted alone, he was not engaged in “concerted activity” protected by the Act. But in Brennan’s view, Brown was contributing to a collective process of norm creation and enforcement. “[W]hen an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone,” observed Brennan. “Instead, he brings to bear on his employer the power and resolve of all his fellow employees.”<sup>76</sup> Brennan concluded with a sentence that, given Brown’s failure even to mention the collective bargaining agreement, might appear far-fetched: “It was just as though James Brown was reassembling his fellow union members to *reenact their decision not to drive unsafe trucks.*”<sup>77</sup> This assertion is, however, entirely sensible on Brennan’s view that the assembly of workers to enact norms, along with the subsequent assertion and enforcement of those norms, is “a single, collective activity”—“beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement.”<sup>78</sup> Thus, a worker who stands up to management can contribute to the enforcement of a norm regardless of whether she is aware that the norm has been incorporated into a collective bargaining agreement.

I should confess that my defense of Brennan’s opinion is based partly on personal experience. In the late 1970s, I worked as a welder in a large shipyard. Each day, our crew of ten or so welders assembled to receive work assignments. Our foreman sent us off to different parts of the ship. If our work location was inclosed, we would pull a “blower,” a long tube connected to an air suction pump located outside, to

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74. 465 U.S. 822 (1984).

75. *Id.* at 839. The analysis presented here builds on insights presented in Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1427-28 (1984).

76. *City Disposal Sys.*, 465 U.S. at 832.

77. *Id.* (emphasis added).

78. *Id.* at 831-32.

the job site. If the blower did not reach all the way, or if it was not working properly, toxic welding fumes would gradually fill the tank. In that situation, an individual welder would have to decide whether to proceed with the job or risk the anger of his or her foreman by refusing. Our collective bargaining agreement obligated the company to “make provision for the safety and health of its employes during the hours of their employment,” and the regulations of the Occupational Safety and Health Administration included strict standards for shipyards.<sup>79</sup> Regardless of the individual’s motivation or knowledge of the standards, each decision either strengthened or weakened the norm requiring effective ventilation. During four years in the yard, I worked for a number of crews, and the strength of the norm varied tremendously among them. Some foremen succeeded in packing their crews with “heavy-hitters,” welders who would focus on production to the exclusion of health concerns. Others tended to respect the norm, focusing their efforts on maximizing production once the health concerns were met. But on every crew, the vitality of the norm was a day-to-day issue and topic of discussion. Whenever an individual welder was confronted with the choice of proceeding without adequate ventilation or refusing, she could not help but think of co-workers and their interests and attitudes. Were enough co-workers enforcing the norm so that her refusal would be expected? Or were so many “heavy-hitting” that she would be singled out as a trouble-maker? If she did the work, would crew members disapprove? And if she refused, would co-workers back her up, or would they stare at their boots and fidget? On the facts of *City Disposal*, the waste haulers were in a similar situation with regard to unsafe trucks. When James Brown refused his assignment, his co-workers were on his mind: “Bob, what [sic] you going to do,” he demanded, “put the garbage ahead of the safety of the men?”<sup>80</sup> Brennan sagely omitted this fact from his reasoning; for its absence would not have changed anything. Brown’s question merely

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79. Agreement Between General Dynamics Quincy Shipbuilding Division and Industrial Union of Marine and Shipbuilding Workers of America (IUMSWA) and Its Local 5, at 49 (1977) (on file with the author). See OSHA Regulations for Ship Repairing, Building, and Breaking, 29 C.F.R. pts. 1915-17 (1976).

80. *City Disposal Sys.*, 465 U.S. at 827.

manifested solidaristic thinking that would have been going on with or without overt verbalization.

A scattering of other cases have produced results that appear to reflect a positive understanding of solidarity. Consider two examples. First, in *Republic Aviation Corp. v. NLRB*,<sup>81</sup> the union established a network of stewards before it had achieved recognition from the employer. Several workers were discharged for wearing steward buttons. The NLRB reinstated them, and the Supreme Court upheld the reinstatements. Instead of asking whether the steward buttons provided information necessary for the employees to make a rational choice for or against unionization, the Court accepted the Board's conclusion that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity."<sup>82</sup> Neither the Court nor the Board explained this conclusion, which was not at all obvious given the long tradition of employers discharging workers for wearing such insignia. From a union point of view, however, the public display of insignia can alter the balance of power in the workplace by demonstrating that the union can survive out in the open. With a steward structure in place, the union can begin to implement norms of solidarity. Second, in *NLRB v. Washington Aluminum Co.*,<sup>83</sup> the Supreme Court upheld an order of the NLRB reinstating seven employees who had walked out in protest of cold on the job without first notifying their employer. The Court observed that the workers were "wholly unorganized" and that "they had to speak for themselves as best they could."<sup>84</sup> A few workers had complained individually of cold the day before, but the extreme conditions on the morning of the protest "finally brought these workers' individual complaints into concert so that some more effective action could be considered."<sup>85</sup>

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81. 324 U.S. 793 (1945).

82. *Republic Aviation*, 324 U.S. at 802 n.7 (quoting 51 N.L.R.B. 1186, 1187-88 (1943)).

83. 370 U.S. 9 (1945).

84. *Id.* at 14.

85. *Id.* at 15.



V. DOCTRINAL CHANGES ENTAILED BY  
THE CORE THEORY OF LABOR SOLIDARITY

Unfortunately for workers and unions, decisions like *Peter Cailler Kohler*, *Business Services by Manpower*, and *City Disposal* have not given rise to a coherent doctrine or juridical understanding of solidarity. *Peter Cailler Kohler's* norm-based understanding of solidarity has been misread to require tit-for-tat expectations of individual benefit.<sup>86</sup> The Second Circuit Court of Appeals refused to enforce *Business Services by Manpower*, finding the discharged workers' Section 7 interest to be "particularly weak" without even considering the Board's understanding that "cardinal union principles" were involved.<sup>87</sup> *City Disposal's* expansive approach to concerted activity has been limited to the already unionized workplace, despite the essential role of norm creation and enforcement prior to union recognition.<sup>88</sup>

If the Obama NLRB were to build on these decisions, bringing solidarity back to the center of the labor law, the official understanding of labor activity would change dramatically. Consider, for example, the process of union organizing. If, as posited by the market model of rational choice, it consists of individual workers gathering information and choosing between union and non-union employment relations (the currently dominant understanding), then there is nothing wrong with reducing unionization to a one-shot vote for or against union representation. But if unionization typically proceeds as a conflict between the employer's norm of individual competition and the union norm of solidarity, then success or failure will depend crucially on the ability of workers to forge solidarity and engage in concerted activity during the period leading up to union recognition. On this view, workers come to embrace unionism if they experience solidarity as empowering, and to reject it if employers succeed in dividing and discouraging them.<sup>89</sup> The employer

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86. Fischl *supra* note 27, at 791-92, 857.

87. *Bus. Servs. by Manpower v. NLRB*, 784 F.2d 442, 453 (2d Cir. 1986).

88. See Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1686-87, 1701-02 & n.133 (1989).

89. See Sachs, *supra* note 32 at 2738, 2743 (suggesting, based on a review of the economic literature, that workplace organizing follows "self-reinforcing

attempts to demonstrate its dominance through such tactics as excluding union organizers from the workplace, ordering workers to attend anti-union, captive audience speeches, compelling workers to hear anti-union messages in one-on-one meetings with their supervisors, “predicting” that the company will close if the workers organize, and illegally firing or otherwise retaliating against about one in five union supporters.<sup>90</sup> The workers respond by organizing group delegations, “taking over” captive audience meetings, building support in the community, and—where possible—staging strikes and job actions. The outcome depends heavily on the workers’ perception of their own capacity for successful, concerted activity in the face of employer resistance. The most successful union organizers depict the organizing process consistently with this view, as do labor scholars.<sup>91</sup>

This shift from a market to a solidaristic model of organizing could entail a number of changes in doctrine. First, the Bush NLRB took the position that the workers’ Section 7 right “to bargain collectively through representatives of their own choosing” is not triggered until

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dynamics of success and failure,” and that success in the “first stages of collective action sets in motion social-psychological dynamics that can lead to further success, while failure at these initial moments can lead to opposite dynamics and the end of organizational efforts”).

90. Beyerstein, *supra* note 37; see, e.g., LANCE A. COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 18-21, 71-74 (Cynthia Brown ed., 2000).

91. See FANTASIA, *supra* note 30, at 121-79 (describing the unionization process). For additional citations, see Pope, *supra* note 46, at 1101-02 nn.17-24. Nobody suggests that this is the only route to unionization, but it does appear to be the one that: (1) corresponds most closely to the statutory concept of “self-organization,” NLRA Act § 7, 29 U.S.C. § 157 (2006), (as opposed to unionization resulting from deals between employers and top union officials, which may come at the expense of previously organized workers), (2) is most likely to produce a new union strong enough to retain worker support while negotiating a first contract, (and thus to carry out the statutory policy of “restoring equality of bargaining power between employers and employees,” NLRA § 1, 29 U.S.C. § 151 (2006)), and (3) is most likely to produce a new union that operates democratically, in line with the policy of the Landrum-Griffin Act. See Labor-Management Reporting and Disclosure Act of 1959 §§ 101, 401, 29 U.S.C. §§ 411, 481 (2006) (guaranteeing to union members the freedoms of speech and assembly, and requiring that union officers be selected by a secret-ballot vote of the membership or by delegates selected by a secret-ballot vote of the membership).

a majority of workers select a representative to bargain for *all* workers in a unit.<sup>92</sup> But this all-or-nothing rule makes no sense if union organizing consists of a gradual process of forging solidarity. On this view, a fledgling union typically establishes its effectiveness prior to achieving majority support, and the employer's duty to bargain "with the representatives of his employees"<sup>93</sup> should include a duty to bargain with unions chosen by a minority of workers concerning the wages and conditions of those workers only. During the period immediately following enactment of the NLRA, the negotiation of agreements covering members only was commonplace, and the statutory text does not repudiate the practice.<sup>94</sup>

Second, the Bush NLRB limited the rule of *Weingarten* (according to which a worker has a right to insist upon having a co-worker present at any meeting with management that might result in discipline),<sup>95</sup> to unionized workplaces.<sup>96</sup> Although the Board engaged in forthright balancing, it did not consider the role of *Weingarten* rights in a non-union workplace where the norm of individual competition exists in tension with an incipient norm of solidarity. In such a workplace, when a worker requests to have a co-worker present, she is invoking the incipient norm of solidarity. The plight of one worker is a matter of concern for all. At a minimum, the co-worker can serve as a witness to the employer's handling of the matter, enabling the workers to develop their response based on a more accurate perception of the facts.

Third, and finally, the NLRB long ago held that workers who join together to regulate their pace of work may be discharged in spite of the statute's protection of "concerted activity for mutual aid or protection." The NLRB, which had previously protected similar activities, accepted the view of the Courts of Appeal that workers impliedly agreed to follow employer orders and to forego enacting their own norms

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92. Skrzycki, *supra* note 28 (reporting on advice memo, issued by NLRB Associate General Counsel Barry Kearney, which stated that the charge against an employer for failing to bargain with a minority union should be dismissed).

93. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (2006).

94. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 4-6, 29-30, 82-87 (2005).

95. NLRB v. *Weingarten, Inc.*, 420 U.S. 251, 260-64 (1975).

96. *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

concerning a fair day's work.<sup>97</sup> But if unionization proceeds in a series of contests between employer and union norms, then this notion of implied contract—imported from the common law of master and servant—could cripple self-organization. Workers are reduced to the alternatives of surrender, of conducting an outside strike (thereby giving the employer an opportunity to permanently replace pro-union workers with strike breakers), or of staging “delegations” and other actions that can be framed as “presenting grievances” as opposed to implementing solidaristic norms.<sup>98</sup>

#### VI. THE CORE OF SOLIDARISTIC CONTROL

As noted above, the existing labor counterpart to the core of entrepreneurial control lacks any unifying concept equivalent to entrepreneurship and exerts little influence on legal or industrial practice. It does, however, contain the seed of a more expansive doctrine. Unlike the core of entrepreneurial control, which draws its substance from the common law, the core of solidaristic control draws its substance from the statute. In the leading case of *Borg-Warner*, for example, the employer insisted that the union agree to a “ballot” clause barring future strikes until after the employer had enjoyed two opportunities to submit proposals to the workers for secret ballot referenda.<sup>99</sup> The Court held that the ballot clause was a non-mandatory subject of bargaining, and thus that the employer had violated the NLRA by insisting on it as a condition for agreement upon other, mandatory subjects.<sup>100</sup> In part, the Court reasoned that the ballot clause “substantially modifies the collective-bargaining system provided for in the statute” by “enabl[ing] the employer, in effect, to deal with its employees rather than with their statutory representative.”<sup>101</sup> In support of this proposition, the Court cited *Medo Photo Supply Corporation v. NLRB*, a case in which the employer was held to have violated the Act by

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97. *Elk Lumber Co.*, 91 N.L.R.B. 333, 335-39 (1950).

98. Pope, *supra* note 46, at 1113-14.

99. *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 343-46 (1958).

100. *Id.* at 349-50.

101. *Id.* at 350.

dealing directly with its employees instead of their union.<sup>102</sup> The Court's positive valuation of the union's ability to represent the workers parallels its positive valuation of "entrepreneurial control," with the statute replacing the common law as the source of values to be protected.

In *Borg-Warner* itself, this reasoning was not essential to the holding; the Court's alternative ground that the "ballot" clause involved "relations between the employees and their unions" and not between employees and employer was sufficient to support the result.<sup>103</sup> In later cases, however, it became clear that the classification of a subject as non-mandatory would rarely, by itself, suffice to protect a union decision against employer pressure, and sections 8(a)(1) and 8(a)(3) came to play a vital role.<sup>104</sup> This is because the classification of a subject as non-mandatory merely removes that subject from the scope of mandatory collective bargaining, returning the right of control to whichever party enjoys it under the common law.<sup>105</sup> And because the common law gives the employer the sole rights to possess, use, transfer, and exclude others (including workers) from the workplace, that controlling party is almost always the employer. (*Borg-Warner* itself was a rare exception, where the common law allocated the matter at issue—the union's process for assessing employer contract proposals—to the unilateral control of the union.<sup>106</sup>)

Consider, for example, the case of *Frankline Inc.*<sup>107</sup> In *Frankline*, the union notified the company that Gladys Cook had been elected steward of the upholstery department, but the company refused to recognize her and announced that it would continue to recognize the previous steward instead.

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102. *Id.* (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944)).

103. *Id.* at 349-50.

104. NLRA § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (2006). These sections state that it is an "unfair labor practice" for employers to interfere with the exercise of Section 7 rights or to discriminate based on union membership.

105. *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971) (employer's unilateral reduction of health insurance benefits for currently retired employees did not violate the statute because such benefits are a permissive subject of bargaining).

106. The employer could not unilaterally implement its proposal for the simple reason that it lacked control over the union's internal decision-making process.

107. 287 N.L.R.B. 263 (1987).

The administrative law judge held that the subject of steward selection was a mandatory subject of bargaining, and therefore the company had violated section 8(a)(5) by unilaterally terminating its policy of recognizing the union's choice of stewards.<sup>108</sup> But if steward selection were a mandatory subject of bargaining, then the employer would be privileged to insist upon its choice of stewards as a condition for concluding a collective bargaining agreement. Accordingly, the NLRB took the contrary view and ruled that steward selection is a non-mandatory subject.<sup>109</sup> Without more, however, that ruling would have left the employer free to implement unilaterally its policy of recognizing only stewards of which it approved. (Under the common law, employers enjoyed unilateral control over who they would deal with, just as they did over plant closings and other matters at the core of entrepreneurial control.) To solve this problem, the NLRB invoked *Borg Warner*: "An employer's insistence to impasse on a proposal regarding employees' choice of bargaining representative generally violates Sec. 8(a)(5) for the twofold reason that it 'settles no term or condition of employment' and that it 'weaken[s] the independence of the "representative" chosen by the employes [sic].'"<sup>110</sup> Without the second reason, the employer would have been freed of the duty to bargain without any obligation to refrain from exercising its common law prerogative to deal with whomsoever it pleased. With it, the NLRB carved out a zone of unilateral union control that is independent of the common law baseline.

If the NLRB were to define a core of solidaristic control, the shaping of steward systems would be an obvious candidate for inclusion. Given that the employer enjoys unilateral control over the structure of supervision, one might expect the union to enjoy equivalent control over the structure of representation. The shape of a steward system can exert a huge impact on union cohesion and effectiveness. Where stewards are numerous and accessible, members tend to be more active, more loyal to the union,

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108. *Id.* at 272.

109. *Id.* at 264 n.8.

110. *Id.* (quoting *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958)).

and more likely to enforce solidaristic norms.<sup>111</sup> Prior to the NLRA, unions unilaterally established steward systems and enacted rules requiring workers to deal with the employer through their stewards, and not directly.<sup>112</sup> It is true that, just as workers are directly affected by the structure of supervision, management is directly affected by steward structures. But allowing management to exert economic power to force changes in union steward structures makes no more sense than allowing unions to force changes in supervisory structures. In each case, the party exerting power has a strong interest in weakening the system at issue.

In the automobile industry, for example, the United Automobile Workers (UAW) convinced most of the major employers to recognize its unilaterally established steward systems, which typically included one steward for each foreman. General Motors, however, refused to recognize the stewards and successfully insisted on dealing with its workers through far less numerous committeemen.<sup>113</sup> As a result, GM's industrial relations system quickly became more bureaucratic and centralized, to the detriment of worker involvement and union responsiveness. Moreover, because of its leading position in the industry, General Motors "seemed the model upon which others in heavy industry must either mold their internal work regime or face extinction."<sup>114</sup> Eventually, the other companies forced their unions to accept systems of grievance processing modeled on GM's.<sup>115</sup> By controlling the union's structure of representation, GM was able to undermine membership involvement and solidarity throughout the industry.

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111. For citations to the social science literature, see Pope, *supra* note 46, at 1118-22 & nn.81-101.

112. See, e.g., James B. Atleson, *Wartime Labor Regulation, the Industrial Pluralists, and the Law of Collective Bargaining*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 142, 153 (Nelson Lichtenstein & Howell John Harris eds., 1993); *Midland Shop Rules*, reprinted in Hartley W. Barclay, *We Sat Down With the Strikers and General Motors*, *MILL & FACTORY*, Feb. 1937, at 46 (describing process as typical).

113. See Nelson Lichtenstein, *Great Expectations: The Promise of Industrial Jurisprudence and Its Demise, 1930-1960*, in *INDUSTRIAL DEMOCRACY IN AMERICA*, *supra* note 111, at 113, 124.

114. *Id.* at 138.

115. *Id.* at 138-39.

It is also possible that the workers' determination whether to organize should be located within the core of solidaristic control.<sup>116</sup> If unions are banned from using economic power to influence employer decisions concerning the "basic scope of the enterprise," then it would seem that employers should be banned from using their economic power to influence worker decisions about whether to organize. On this view, it would be unlawful for the employer to use enterprise property and supervisory structures (as opposed to expression through public channels like mass media) to force its anti-union message on employees. Captive audience meetings, compulsory anti-union campaigning by supervisors, and one-on-one anti-union meetings with supervisors would be banned under section 8(a)(1).

#### CONCLUSION

In the words of NLRB Member Wilma Liebman, American labor law has been turned "inside out." The focus of labor jurisprudence has been on the exceptions to workers' statutory rights instead of the rights themselves. Business values—imported from outside the NLRA—have gravitated to the core of labor jurisprudence, while labor values—originally enshrined at the heart of the statute—have floated to the periphery. The present essay argues that this reversal reflects the absence of a positive, juristic understanding of worker self-organization and concerted activity. While business values are grounded on a deeply rooted core theory and narrative of entrepreneurship, exemplified in the doctrine of the "core of entrepreneurial control," there is no labor equivalent. In its absence, legal decision-makers envision workers as rationally self-interested market actors—an approach drawn from the market in commodities, home of entrepreneurship.

The Essay proposes that labor's counterpart to business entrepreneurship is labor solidarity. Just as capital—and control over capital—is central to business entrepreneurship, so is solidarity—and the generation and enforcement of solidaristic norms—central to the statutorily protected activities of "self-organization" and "concerted activity for . . . mutual aid or protection." When legal

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116. I am indebted to Kenneth Dau-Schmidt for this suggestion.



decision-makers conceptualize workers as rationally self-interested market actors, they take the employer's side in what amounts to a culture war between individualism and solidarity in the workplace. While entrepreneurship fits the model of self-interested rational choice, solidarity is better explained by the model of constitutive choice, according to which individuals make decisions based not on calculations of individual gain, but on self-identification (e.g., as the kind of person who stands by her co-workers). Labor solidarity can be traced back to historical origins and legal sources that parallel those of entrepreneurship. The juristic understanding of entrepreneurship arose out of the customs and unofficial common law of business, which were incorporated by judges into the official common law. Solidarity arose out of the customs and unofficial common law of labor, which were incorporated by legislators into a series of statutes culminating in the NLRA. If our labor law is to be turned rightside-out, we will need to develop a positive juristic understanding of solidarity, including a core theory and narrative of the generation of solidaristic norms. Elements of such an understanding can be found in scattered decisions of the NLRB and courts, but they remain to be assembled and fleshed out.

At the beginning of this Essay, President Obama was quoted honoring "the selflessness of workers who would rather cut their hours than see a friend lose their job." Union organizer Mia Giunta, who assisted a group of workers in developing and enforcing a work-sharing norm, had this to say about the tradition of labor solidarity: "I get really angry when it is said that working-class people don't have culture. They have a very deep culture. It's a culture that's based on solidarity and trust and helping each other, and a dream for a better life for your children."<sup>117</sup> It remains to be seen whether our labor jurisprudence can comprehend and embrace the essential role of this culture in worker self-organization and concerted activity, or whether the values of rationally self-interested individualism, drawn from the culture of business, will continue to dominate our labor law.

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117. Giunta, *supra* note 8, at 36.