

1-1-2007

The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations

Michael M. Oswalt
Duke University School of Law

Follow this and additional works at: http://scholarship.kentlaw.iit.edu/louis_jackson

 Part of the [Law Commons](#)

Recommended Citation

Oswalt, Michael M., "The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations" (2007). *Louis Jackson National Student Writing Competition*. 24.
http://scholarship.kentlaw.iit.edu/louis_jackson/24

This Article is brought to you for free and open access by the Institute for Law and the Workplace at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Louis Jackson National Student Writing Competition by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

The Grand Bargain: Revitalizing Labor through NLRA Reform and Radical Workplace Relations

Michael M. Oswalt
michael.oswalt@law.duke.edu

The seventieth anniversary of the enactment of the National Labor Relations Act¹ (NLRA or Act) prompted renewed reflection on its viability to effectively govern relations between labor and management in the modern workplace.² For supporters of the American labor movement, the occasion was not a cause for celebration.³ Although surveys showed that a clear majority of workers would vote for a union if an election were held in their workplace,⁴ by 2006 the percentage of private wage-earners in unions had shrunk to 7.4 percent,⁵ less than a third of the level reported in the early 1970s.⁶ That the statute valiantly proclaimed the protection of the

*JD, Duke University School of Law, expected May, 2008; MTS, Duke University School of Divinity, expected May, 2008; BA, Haverford College, 2000. I am enormously grateful to Professor Catherine Fisk for her encouragement, guidance, and support of this paper from its earliest stages. I am truly lucky to have her as an inspiration and an example.

¹ 29 U.S.C. §§ 151-169 (2000).

² See, e.g., Ellen Dannin, *Forum: At 70, Should the National Labor Relations Act Be Retired?: NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223 (2005); Daily Lab. Rep. (BNA) No. 103, at A-1 (May 31, 2005) (reporting on the American Bar Association's Section of Labor and Employment Law conference marking the seventieth year of the Act); Charles B. Craver, *The National Labor Relations Act at Seventy: Rapidly Approaching Irrelevance*, LERA, Fall, 2005, <http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/>.

³ See, e.g., Jack Rasmus, *Reorganizing American Labor*, Z MAGAZINE, July-August, 2006, <http://zmagsite.zmag.org/JulAug2006/rasmus0706.html> ("At no time in the past 70 years have American workers and unions been under more direct and intense attack by corporate America. Moreover, that attack continues to show signs of becoming increasingly virulent and bold."); Julius Getman, *The National Labor Relations Act at Seventy: The Decline of Unionization and Collective Bargaining in America*, LERA, Fall, 2005, <http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/> ("There is little reason to celebrate. The NLRA no longer serves. . . its founding principles. . .70 years later, optimism has given way to cynicism and despair").

⁴ *Labor Day 2005: The State of Working America*, HART RESEARCH ASSOCIATES TELEPHONE SURVEY (For the AFL-CIO), Aug. 2005, available at http://www.aflcio.org/aboutus/laborday/upload/ld2005_report.pdf.

⁵ Press Release, Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

⁶ Eduardo Porter, *Unions Pay Dearly for Success*, N.Y. TIMES, January 29, 2006, at D1.

right to self-organization to be the “policy of the United States”⁷ served only as a sardonic reminder of the gulf between the Act’s ideals and the everyday realities of union organizing.⁸ Some called for various reforms of the Act,⁹ others for its repeal,¹⁰ while Jonathan Hiatt, AFL-CIO General Counsel, simply wondered “how much of the Act would be left” by its seventy-fifth anniversary, given the rate at which long-standing labor law doctrines had been undermined by the National Labor Relations Board in just the previous twelve months.¹¹

Yet, notwithstanding the diversity of thought regarding the usefulness or uselessness of traditional labor law to revive workplace democracy, the labor movement has largely coalesced around a legislative proposal to reform the NLRA, the Employee Free Choice Act (EFCA).¹²

⁷ 29 U.S.C. § 151 (2000).

⁸ Representative, first-person accounts of the perils involved in organizing a union are powerfully presented in *Some of Them Are Brave The Unfulfilled Promise of American Labor Law* (Am. Rights at Work), 2003, <http://www.americanrightsatwork.org>. A comprehensive empirical discussion of the same phenomenon is outlined in Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Organizing Campaigns* (Ctr. for Urban Econ. Development, Univ. of Illinois at Chicago) Dec. 2005, available at <http://www.americanrightsatwork.org>.

⁹ See, e.g., Dannin, *supra* note 2 (harnessing a novel litigation strategy to reinvigorate the enforcement powers of the NLRA); Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C.L.REV. 125 (2003) (criticizing the Act and suggesting avenues for reform); Paul Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177 (2001) (setting out various possible amendments to make the Act more favorable to workers seeking to form a union).

¹⁰ See, e.g., Anton G. Hajjar & Daniel B. Smith, National Labor Relations Interference With Private Representation Agreements – Is Repeal of the National Labor Relations Act the Answer? (May 13, 2004)(Paper presented to the Pacific Coast Labor & Employment Law Conference) (considering the ramifications of repealing the Act); Rick Valliere, *Organized Labor Would Fare Better Under State Labor Laws, Professor Says*, LABOR RELATIONS WEEK, Jan. 19, 2006. And, to be sure, calls for repeal of the Act, even emanating from within the mainstream of the labor movement, were documented as long ago as the 1980s. See Cathy Trost & Leonard M. Avcar, *AFL-CIO Chief Calls Labor Laws a Dead Letter*, WALL ST. J., Aug. 16, 1984, at 8 (advocating repeal of the NLRA).

¹¹ Jonathan Hiatt, General Counsel, AFL-CIO, Address at the ABA Labor and Employment Law conference marking the seventieth anniversary of the Act: The NLRA at Seventy: The Immediate View (May, 2005).

¹² S. 1041, 110th Cong. (2007). H.R. 800, 110th Cong.(2007).

EFCA is presently the centerpiece of the AFL-CIO's Congressional lobbying efforts, occupying a prominent location on its website,¹³ and it is the subject of aggressive petition, email, and organizational endorsement campaigns.¹⁴

It is also ambitious. EFCA would eliminate the traditional secret-ballot NLRB election in favor of certifying a union pursuant to a Board finding that a majority of employees had signed authorizations designating the union as its bargaining representative.¹⁵ It would also provide for first contract mediation and arbitration if an employer and a union were unable to reach a contract agreement within ninety days.¹⁶ And it would increase the penalties assessed to employers who committed unfair labor practices against employees during a union campaign or first contract negotiation, including treble back pay, civil penalties, and a requirement that the NLRB seek a federal court injunction against an employer it finds has significantly interfered with employee rights during an organizing or first-contract campaign.¹⁷

Nonetheless, many doubt if NLRA reform beneficial to the labor movement is even possible, regardless of which party controls the White House or Congress. In meticulously tracing the roots of what she terms the "ossification of labor law,"¹⁸ New York University Law School Professor Cynthia Estlund notes that "for many decades, both organized labor and especially employers have had enough support in Congress to block any significant amendment

¹³ AFL-CIO, America's Union Movement, <http://www.aflcio.org> (last visited Aug. 21, 2006).

¹⁴ Employee Free Choice Act, <http://www.aflcio.org/voiceatwork/joinaunion/efca> (last visited Aug. 21, 2006).

¹⁵ S. 1041, 110th Cong. § 2 (2007) (amending section 9(c) of the Act). H.R. 800, 110th Cong. § 2 (2007) (amending section 9(c) of the Act).

¹⁶ S. 1041, 110th Cong. § 3 (2007) (amending section 8 of the Act). H.R. 800, 110th Cong. § 3 (2007) (amending section 8 of the Act).

¹⁷ S. 1041, 110th Cong. § 4 (2007) (amending sections 10(1), 10(c), and 12 of the Act). H.R. 800, 110th Cong. § 4 (2007) (amending sections 10(1), 10(c), and 12 of the Act).

¹⁸ See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1611 (2002) (noting a longstanding political impasse has blocked any major congressional revision of the NLRA since 1959).

that either group strongly opposes.”¹⁹ The bar for “enough support,” of course, is rather low: “it means a minority that is big enough, well organized enough, and committed enough to tie up a bill through the arcane supermajority requirements of the Senate.”²⁰ That labor law reform proposals provoke such committed opposition leads Estlund somewhat dreadingly to conclude that labor’s best hope for change might be to rally public support for workers’ rights,²¹ eschewing labor law legislative efforts altogether.²²

A New Direction

The project of this Article is to argue that major NLRA reform—reform calculated to vivify the labor movement through revitalized organizing and internal activism—is possible. Central to this claim is that a grand compromise between entrenched labor and management interests can be reached, but only if the stakes are drastically raised. Labor must receive what is central to its strategy and rhetoric, and business must receive what is central to its anti-union, free-market ideology. The key is that the reform management believes would cripple the American labor movement is, in fact, vital to its survival.

¹⁹ *Id.* at 1540.

²⁰ *Id.* Indeed, although in the newly Democratic 110th Congress EFCA passed the House with a sizable majority, its supporters failed to overcome a Senate filibuster. Even so, President Bush promised to veto the legislation, a move Congress probably would not have been able to override. Steven Greenhouse, *Clash Nears in Senate on Legislation Helping Unions Organize*, N.Y.TIMES, June 20, 2007, at A1; Steven Greenhouse, *Senate Republicans Block Bill on Unionizing*, N.Y.TIMES, June 27, 2007, at A1.

²¹ Unfortunately, Estlund may not have considered well-documented evidence of bias in the media’s coverage of the labor movement, which might negatively affect labor’s ability to shape public consciousness. See, e.g., Bradford Plumer, *Production Values: Figuring out what’s wrong with the media’s coverage of organized labor*, MOTHER JONES, Sep. 7, 2005 (citing empirical research suggesting that media coverage of strikes focuses primarily on how consumers will be affected by the labor disputes).

²² Estlund, *supra* note 18, at 1611-12.

The grand bargain I propose amends the NLRA to abolish the secret ballot union election in favor of a universal “card-check” procedure,²³ in exchange for nationalizing the so-called “right-to-work” regime currently in force in twenty-two states. Both changes, as will be shown, are beneficial to labor.

Part I of this Article provides an overview of the benefits of card-check to workplace organizing efforts, showing why labor vigorously supports the procedure and management strenuously opposes it. Part II briefly traces the history of right-to-work, some conventional research attesting to its deleterious effects on unions, and how the legal gulf between the right-to-work and non-right-to-work models is less stark than is commonly presumed. In Part III, legal, sociological, and political theory scholarship are used to argue that unions not only can survive in a right-to-work environment, they can thrive. The “right-to-work” regime, counter-intuitively, does not necessarily weaken unions, but instead can strengthen them.

PART I

Card Check in Union Organizing

The phrase “card check” actually refers to a process whereby an employer promises to recognize a union as the exclusive bargaining representative if a majority of workers in a unit sign cards supporting unionization.²⁴ Sometimes a card-check pact is coupled with a more general “neutrality agreement” or arrangement crafted by the union to ease employer opposition during the organizing drive.²⁵ For instance, a neutrality agreement might require that the

²³ A concept taken directly from section two of the Employee Free Choice Act. *See* S.1041, 110th Cong. § 2 (2007) (amending section 9(c) of the Act); H.R. 800, 110th Cong. § 2 (2007) (amending section 9(c) of the Act).

²⁴ Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 383 (2001).

²⁵ *Id.* at 377.

employer not engage in certain speech or intimidation tactics while the union is collecting cards, or it might allow organizers greater access to the employer's property than is legally compelled.²⁶

That card check agreements, with or without a neutrality agreement, circumvent the traditional Board election does not detract from their legitimacy.²⁷ Rather, consistent with NLRA aspirations promoting workplace cooperation and harmony,²⁸ courts have consistently held that employers may voluntarily contract to recognize a union by means other than an election, including a specified majority of signed authorization cards.²⁹ Indeed, when a card check agreement is signed and fully integrated, courts will enforce them against a recalcitrant employer.³⁰

Recently, card check agreements have become the rule rather than the exception in organizing campaigns.³¹ In 2005, card check was the genesis for over seventy-percent of newly unionized workers, compared to just five percent in the mid-eighties.³²

²⁶ *Id.* at 380-84. The mere existence of a neutrality agreement does not foreclose the possibility of a traditional NLRB election. Like any contract, its content will vary by the parties' intent, thus a union seeking to circumvent the Board would have to specifically negotiate a card check clause. *See id.*

²⁷ *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969) (a union need not be certified as the winner of a Board election to become the exclusive bargaining representative).

²⁸ *See* NLRB v. American National Insurance Co., 343 U.S. 395, 401 (1952) ("The [National Labor Relations Act] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.").

²⁹ Card check arrangements have been uniformly endorsed by the Board and courts. *See, e.g.,* NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 750 (7th Cir. 1981); NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978); Terracon, Inc., 339 NLRB No. 35, slip op. at 5 (2003), *affd.* 361 F.3d 395 (7th Cir. 2004); MGM Grand, 329 NLRB 464, 466 (1999).

³⁰ *See, e.g.,* Snow & Sons, 134 NLRB 709, 710 (1961) (employer must honor the results of a card check agreement), *enfd.* 308 F.2d 687 (9th Cir. 1962); Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993) (enforcing card check and neutrality agreement pursuant to Section 301 of the Labor-Management Relations Act).

³¹ *See, e.g.,* Rick Valliere, *Unions Turning Away from NLRB Elections as Primary Way of Organizing*, *Raynor Says*, LABOR RELATIONS WEEK, Jan. 19, 2006.

The rationale behind unions' increasing reluctance to engage the formal NLRB election process is captured succinctly by AFL-CIO lobbyist Andy Levin: "The NLRB election route is a death trap."³³ Though this is perhaps overstated, it is true that in representation elections overseen by the Board, employers frequently and aggressively partake in both legal and non-legal anti-union tactics. A report by the University of Illinois at Chicago's Center for Urban Economic Development found that in the lead-up to NLRB elections, fifty-one percent of employers use bribery or favoritism to persuade workers to oppose the union, forty-nine percent threaten to close a worksite if the union prevails, ninety-one percent require employees to attend anti-union meetings with supervisors, and thirty percent fire workers allied with the union.³⁴

In contrast, the likelihood and opportunity for management to intimidate and coerce is greatly lessened under the card check paradigm, especially when combined with an employer-neutrality clause.³⁵ As Stewart Acuff, the AFL-CIO's Organizing Director explains: "We prefer card check because people can do it off premises, can do it in their homes, can do it without the employer looking over their shoulder."³⁶ Acuff's anecdotal experiences are supported empirically. Forty-six percent of workers involved in Board elections report having experienced employer coercion leading up to the vote, while only twenty-three percent of workers engaged in card check campaigns report that their supervisors pressured them not to sign authorization

³² Steven Greenhouse, *Employers Sharply Criticize Shift in Unionizing Method to Card From Elections*, N.Y. TIMES, Mar. 11, 2006, at A1.

³³ George Raine, *A high-stakes labor card game; Organizing strategy has hotel workers avoid secret ballot*, S.F. CHRON., Mar. 28, 2006, at A1.

³⁴ Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, (Ctr. for Urban Econ. Development, Univ. of Illinois at Chicago) Dec. 2005, available at <http://www.americanrightsatwork.org>.

³⁵ Hartley, *supra* note 24, at 383 (citing a study suggesting enhanced organizing prospects when a neutrality agreement is combined with card check).

³⁶ Anya Sostek, *Debate over union voting procedures may be topic at AFL-CIO meeting here*, PITTSBURGH POST-GAZETTE, Apr. 4, 2006, at A1.

cards.³⁷ Probably in turn, unions are significantly more likely to prevail in card check campaigns than in Board sponsored elections.³⁸

Part of the proposal advanced here would remove card check from its current framework as an agreement between a union and employer and formalize it statutorily. Tracking the language in EFCA, once the Board finds that a majority of employees in a bargaining unit have signed cards designating the union as their bargaining representative, the Board would be required to certify the union, avoiding the traditional election. This aspect of the proposal is of clear benefit and interest to the labor movement. The following section discusses a trade-off that, in response, would be of interest and presumed benefit to the business community, nationalized “right-to-work.”

PART II

Union Security and The Right-to-Work Regime

Union security “refers to an agreement between an employer and a union under which an employee must either join the union or satisfy a financial obligation to the union as a condition of employment.”³⁹ The ultimate form of such security, where an employer agrees to hire only pre-existing union members,⁴⁰ was lawful under section 8(3) of the NLRA up until 1947, when Congress revised the Act through the Taft-Hartley amendments.⁴¹ Taft-Hartley emerged partly

³⁷ *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*, ISSUE BRIEF (Am. Right at Work, Washington, DC), Mar. 2006.

³⁸ Sostek, *supra* note 36, at A1 (“Unions are successful a little more than half the time in formal NLRB elections, versus nearly eighty percent with card check.”).

³⁹ LABOR UNION LAW AND REGULATION 423 (William W. Osborne, Jr. ed., 2003).

⁴⁰ *Id.* at 425 (“nothing in this Act...shall preclude an employer from making an agreement with a labor organization...to require as a condition of employment membership therein”).

⁴¹ Osborne, *supra* note 39, at 427.

in response to increasing attacks that this powerful arrangement, known as the closed shop, was a discriminatory barrier to free employment⁴² and threatened individual liberty.⁴³

But Congress also understood the union concern that, as explained by Senator Taft, “if there is not a closed shop those not in the union will get a free ride [while] the union does the work get[ting] the wages raised.”⁴⁴ In turn, section 8(a)(3) of the amended Act continued to sanction union-management partnerships that, in more limited forms, sought to provide union security so that employees who “share [in] the benefits of what unions are able to accomplish through collective bargaining . . . pay their share of the cost.”⁴⁵ For instance, “union shop” agreements, under which non-union members can obtain initial employment but must become members within a certain period of time, are allowed by section 8(a)(3).⁴⁶

Yet in section 14(b), Congress also allowed states the power to restrict or prohibit union security agreements altogether,⁴⁷ carving out an exception to the NLRA’s default preemption

⁴² See S. REP. NO. 80-105, at 6 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948) (“the closed shop and the abuses associated with it . . . create too great a barrier to free employment to be longer tolerated”); Osborne, *supra* note 39, at 426.

⁴³ The House Committee on Education and Labor stated rather hyperbolically that the American worker “has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolies.” H. REP. NO. 80-245 (1947) reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948).

⁴⁴ Osborne, *supra* note 39, at 426; S. REP. NO. 80-105, at 6 (1947) reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948).

⁴⁵ Osborne, *supra* note 39, at 426; NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (quoting S. REP. NO. 80-105, 1st Sess., at 6, LMRA LEG. HIST. 412).

⁴⁶ See 29 U.S.C. § 158 (2000) (“nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment”).

⁴⁷ 29 U.S.C. § 164(b) (2000) (“Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law”). The constitutionality of 14(b) was upheld in *Lincoln*

rule.⁴⁸ Twenty-two states have exercised this power, and their resulting statutes make up what is colloquially known as the “right-to-work.”⁴⁹ Although states differ in the extent to which they utilize 14(b) to restrict security agreements, as is noted by a prominent labor law treatise, “every state with a right-to-work law prohibits unions and employers from conditioning employment on any type of union ‘membership,’ even if a union has been chosen by a majority of employees as the exclusive bargaining representative.”⁵⁰ In so doing, state right-to-work laws—either explicitly or as interpreted judicially—bar most union security agreements, including agency fee arrangements,⁵¹ which obligate nonmembers to pay the equivalent of union dues and fees for the union’s services.⁵²

Those allied with the labor movement vigorously oppose the right-to-work regime. At the state level, votes on right-to-work spur aggressive union counter-mobilizations,⁵³ which often

Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) and *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538 (1949).

⁴⁸ Osborne, *supra* note 39, at 516.

⁴⁹ The following states have enacted “right-to-work” provisions: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Osborne, *supra* note 39, at 915.

⁵⁰ *Id.* at 518.

⁵¹ See Osborne, *supra* note 39, at 518 (Except for seven states, all of the right-to-work states “expressly prohibit agreements conditioning employment on either membership or payment of dues or fees. In six of the remaining states, the courts or the Attorney General have interpreted right-to-work laws to prohibit agency shop arrangements.”).

⁵² See *Motor Coach Employees v. Las Vegas Stage Line*, 319 F.2d 783 (9th Cir. 1963) (“[An agency shop] agreement provides that employees who do not join the union will pay the regular initiation fee and dues to the union, and that if they do not make these payments, the employer will discharge them.”).

⁵³ See Working Families Celebrate Victory in New Hampshire, <http://blog.aflcio.org/?p=303> (Mar. 23, 2006, 15:57 EST) (“On March 22, after a working families’ mobilization plan that showed lawmakers just how deeply right-to-work laws go against the grain of New Hampshire voters, the latest RTW proposal again failed.”).

recast the legislation as the “right-to-work for less.”⁵⁴ The modified moniker, in fact, references a phenomenon borne out by data. The average worker in a right-to-work state earns \$5,333 less annually than workers in other states.⁵⁵ Moreover, an analysis of Census Bureau statistics has shown that both per capita income and union density are negatively correlated at statistically significant levels with right-to-work laws.⁵⁶

Union hostility to “right-to-work” is not just a reaction to such points. At a very basic level, the “right-to-work” paradigm is threatening to a movement that owes its existence to its ability to collect dues from its members. It is assumed that where union security agreements exist, the union shop and a steady stream of weekly or bi-weekly dues follow.⁵⁷ In contrast, where right-to-work reigns, the union shop is outlawed and free riders may flourish, enjoying the contractual benefits of union membership without actually paying for them. Indeed, as the duty

⁵⁴ THE TRUTH ABOUT RIGHT-TO-WORK FOR LESS, RIGHT-TO-WORK HURTS EVERYONE (2006), <http://www.aflcio.org/issues/legislativealert/stateissues/upload/rtw.pdf>. President Harry Truman is quoted to have said: “You will find some people saying that they are for the so-called right-to-work law, but they also believe in unions. This is absurd. It is like saying you are for motherhood but against children.” See Open Shops in the 21st Century Workplace: Hearing Before the H. Subcomm. On Oversight and Investigations, 106th Cong. 4 (2000) (opening statement of Ranking Member Tim Roemer, quoting President Truman).

⁵⁵ See AVERAGE ANNUAL PAY FOR 2000 AND 2001 AND PERCENT CHANGE IN PAY FOR ALL COVERED WORKERS (2002), <http://www.bls.gov/news.release/annpay.t01.htm> (calculated by author).

⁵⁶ Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right-to-work: Colorado’s Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 927-28 (1999).

⁵⁷ There is, however, an intermediate step. Section 302(c)(4) of the NLRA sanctions an arrangement called “checkoff,” where an employer will automatically deduct from an employee’s pay the dues owed to the union and transfer the dues directly to the union. LABOR UNION LAW AND REGULATION 530 (William W. Osborne, Jr. ed., 2003). Thus, while “union security” refers to an employer-union agreement to ensure workers pay dues as a condition of employment, “checkoff” is a means of facilitating such payments. *Id.* at 531. Since the agreements are separate, a union may have a security agreement without checkoff, or even checkoff without union security. *Id.* Unions in non-right-to-work states, of course, will attempt to negotiate for both union security and check-off, ensuring a constant and efficient flow of dues to the union each pay period.

of fair representation⁵⁸ is owed to all union-represented employees, including nonmembers, unions must expend resources advocating for individual nonmembers but are prohibited from charging for those services.⁵⁹

Yet, after granting the unique budgetary constraints faced by unions in right-to-work states, it is worth considering that labor's troubles there⁶⁰ cannot be blamed entirely on section 14(a). Given a number of judicial interpretations, union security is simply never complete, no matter the state. For example, even the vaunted "union shop" agreement, which ensures full membership, provides only partial security. That is because "membership" has been interpreted narrowly, requiring employees to satisfy certain financial obligations to the union like basic dues and initiation fees, but not requiring them to join⁶¹ or support the union's political efforts, external organizing ventures, or any other activities unrelated to "bargaining, contract

⁵⁸ This duty permits employees to challenge the quality of their union representation under a common law standard of "basic adequacy." Osborne, *supra*, note 39, at 281. As such, the union may not discriminate against the members or nonmembers it represents. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 198 (1944).

⁵⁹ See *Hughes Tool Co.*, 104 N.L.R.B. 319 (1953) (explaining that by requiring a fee from a nonmember in a right-to-work state, "for services which are due the [employee] as a matter of right . . . the [union] has, in effect, taken the position that it will only represent its members in the important area of contract administration," thereby unlawfully discriminating against the nonmembers). *Cf. Cone v. Nevada Service Employees Local 1107*, 998 P.2d 1178, 1182 (Nev. 2000) (holding that a union's practice of "charging nonmembers fees for individual [grievance] representation" did not violate Nevada's right-to-work laws because the state statute explicitly authorized nonunion members to act on their own behalf and pay for their own representation).

⁶⁰ For 2005, the five states with the lowest levels of unionization were right-to-work states: Arkansas, North Carolina, South Carolina, Utah, and Virginia. See Press Release, *supra* note 5. For a detailed history of labor's decline and weakness in the right-to-work states, see Raymond Hogler, *The Historical Misconception of Right-to-work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101 (2005).

⁶¹ See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) ("It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.").

administration, or grievance adjustment.”⁶² Thus, though the union shop assures a minimum financial infusion each month, dollars can fluctuate as members join or drop out, just like under the right-to-work regime. In turn, the union must still service its “members” to avoid apathy, justify external organizing and political lobbying expenses, and stave off decertification efforts.

Every union, right-to-work or not, must therefore navigate economic trade-offs. It is true that a union in a right-to-work state must compensate for the possibility of a more precipitous drop in resources, but it is equally true that as that same union approaches the vigor of full membership, differences between it and a union in a non-right-to-work state become almost wholly rhetorical.⁶³ A strong union, one might say, is a strong union in any state.

In all, right-to-work laws surely affect unions’ fortunes in tangible ways. But to attribute labor’s difficulties in right to work states solely or even primarily to section 14(a) may be simplistic.

Part III

Yet this Article’s challenge is not to show that right-to-work’s negative impact on unions is overstated or does not really exist, but rather to argue that when properly oriented, unions can prosper in a right-to-work environment. Indeed, right-to-work can be beneficial. And because right-to-work is perceived to weaken unions and nicely complements business’s free-market schema, labor’s embrace of it could expose a rare space for legislative reform, allowing unions to

⁶² *Communications Workers v. Beck*, 487 U.S. 735, 738 (1988).

⁶³ *See, e.g.*, James W. Kuhn, *Right-to-Work Laws – Symbols or Substance?*, 14 *INDUS. & LAB. REL. REV.* 587, 588 (1961) (“If all workers within a bargaining unit always sought membership and willingly paid their dues, right-to-work laws could have little significance for collective bargaining.”).

gain what all agree is obviously to their benefit, card-check.⁶⁴ Part III will thus attempt to demonstrate both that unions can thrive in a right-to-work setting and that the legal regime itself can facilitate stronger unions.

Defying Assumptions in the Right-to-Work Setting

Amid conspicuously low unionization rates in right to work states⁶⁵ there are unions that defy conventional wisdom⁶⁶ and function well even in the absence of union security. Right-to-work Nevada boasts one of the highest unionization rates in the nation, equal to the rate in Pennsylvania, higher than the rate in Maryland, and a shade below the rate in Massachusetts, three states that allow for the union shop.⁶⁷ Overall, Nevada's unions represent 158,000 workers, ninety-two percent of whom voluntarily retain their union membership.⁶⁸ In fact, Culinary Workers Local 226, the Las Vegas hotel local of UNITE HERE, is the largest and fastest-growing local union in the United States, having doubled its membership since the 1980s even as hotel union membership declined nationally.⁶⁹ United Electrical (UE) Local 1111, though

⁶⁴ This proposal also has a certain inherent logic. Many would probably concede that in an ideal system of labor-management relations, those wanting union representation should be able to achieve that goal efficiently, while those who do not should not be forced to pay for it.

⁶⁵ See Press Release, *supra* note 5.

⁶⁶ See, e.g., BARBARA S. GRIFFITH, *THE CRISIS OF AMERICAN LABOR: OPERATION DIXIE AND THE DEFEAT OF THE CIO* (1988) (concluding that the failed results of "Operation Dixie," the CIO's attempt to organize the southern right-to-work states en masse in the late 1940s, was inevitable).

⁶⁷ In 2005, 13.8 percent of Nevada's workers were unionized, compared to 13.3 percent in Maryland, and 13.9 percent in Massachusetts. See Press Release, *supra* note 5.

⁶⁸ In 2005, 145,000 of Nevada's workers who were represented by unions maintained their membership. See Press Release, *supra* note 5.

⁶⁹ Harold Meyerson, *Las Vegas as a Workers' Paradise*, *THE AMERICAN PROSPECT*, Jan. 1, 2004; *Employment and Labor Relations in Nevada*, JUSTICE & DEMOCRACY FORUM ON THE LEADING SOCIAL INDICATORS IN NEVADA (Social Health of Nevada Report, Las Vegas, NV), Nov. 5, 2004, available at <http://www.unlv.edu/centers/cdclv/healthnv/labor.html>.

located in non-right-to-work Wisconsin, chooses not to bargain for union security yet presently maintains ninety-seven percent membership.⁷⁰

What accounts for such anomalies? The robustness of unions like Local 226 in Nevada and Local 1111 in Wisconsin could be a result of a conscious tendency towards internal activism, a trait some have suggested is critical to interior union strength. As labor journalist Abe Raskin once opined, “reorganizing the organized must transcend all other union priorities . . . without internal revival, all of labor’s other good intentions will falter and probably fail.”⁷¹

Sure enough, Local 226’s resurgence—in the mid-1980s six hotels decertified from the union and the union’s health-care plan approached bankruptcy—coincided with the arrival of John Wilhelm, who had recently orchestrated a successful union drive at Yale University using a novel approach: allowing the workers to act as organizers.⁷² Wilhelm brought this model to Las Vegas, instituting workers’ committees empowered to organize street rallies and union events without major interference from paid staff.⁷³ With this new sense of purpose, the committees turned militant, culminating with a strike at the Horseshoe Casino in 1989 that led to hundreds of arrests.⁷⁴ In preparation for the 2002 contract negotiations, the committees organized a rally at Las Vegas’ Sports Arena attended by over 23,000 local members.⁷⁵ Local 1111, for its part, attributes high membership rates to a “constant shop-floor presence . . . on the lookout for young workers willing to stand up to management . . . send[ing] them to its shop steward training

⁷⁰ United Electrical, Radio & Machine Workers of America (UE) Local 1111, <http://www.ue1111.org/whoweare.htm>.

⁷¹ A.H. Raskin, *New Directions for the AFL-CIO*, NEW MANAGEMENT, Winter, 1986, at 12-13.

⁷² Meyerson, *supra* note 69.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

program to develop their ability to be an effective voice for their co-workers.”⁷⁶ And Tom Wetzel, who has conducted hundreds of interviews with union workers in the right-to-work state of Iowa, reports that strong membership there is buoyed by peer pressure on the shop floor: “If a worker refused to join the union, co-workers would refuse to lend him or her [tools] or do other favors that make life on the job more bearable. The attitude was: ‘If you won’t support us, you’re on your own, Jack. But if you do support us, we’ll watch your back.’”⁷⁷

Business Unionism and its Evolution

Of course, just because certain unions have found some success in the right-to-work environment using tactics a few theorize should indeed be helpful does not mean that the experiences of, for example, Local 226 can be replicated nationally, or even anywhere else. In fact, so-called “labor realists” disparage attempts at internal organizing as circular efforts that merely re-activate the already activated.⁷⁸ Members, it is argued, receive the quality of unionism they demand and little can be done to alter their levels of involvement.⁷⁹

Such thinking may have helped to usher in the era of “business unionism” in the 1970s and 1980s, whereby unions hoped to parry business animus and reverse shrinking rolls⁸⁰ by adopting less activist and more conciliatory postures.⁸¹ The approach, it was thought, would

⁷⁶ Tom Wetzel, *Unionism and Workers’ Liberation*, Z MAGAZINE, May 31, 2006.

⁷⁷ *Id.*

⁷⁸ ARTHUR B. SHOSTAK, ROBUST UNIONISM 101-109 (1991).

⁷⁹ *Id.* at 101.

⁸⁰ In 1972 AFL-CIO President George Meany astonishingly remarked: “Why should we worry about organizing . . . Frankly, I used to worry about the membership, the size of the membership. But quite a few years ago, I just stopped worrying about it, because to me, it doesn’t make any difference.” RICK FANTASIA & KIM VOSS, HARD WORK 125 (2004).

⁸¹ As Ian Robinson described the strategy: “[U]nions would downplay their adversarial traditions and become partners in the intensifying international competitive struggle. Labor’s contribution to this partnership would be greater flexibility in workplace organization, and more positively, the encouragement of productivity-enhancing employee voice.” Ian Robinson, *Neoliberal*

both ease employer opposition to labor law reform and lead them to recognize that increased productivity and efficiency could best be achieved through cooperation with labor.⁸²

The strategy failed. Rather than join with unions, employers simply avoided them, a choice that seemed to guarantee higher profits without the inconvenience of partnership.⁸³ In response, instead of reversing course, many unions quixotically adopted an even *less* activist stance, muting external organizing efforts,⁸⁴ discouraging rank-and-file participation in existing unions, and fostering workers' dependence on professional union staff.⁸⁵ Workers, in turn, began to view unions as a service they might consider purchasing, as opposed to a collective movement they might join.⁸⁶

But as sociologists observed that organized labor had become more like an institutionalized interest group than a movement, some unions began to change.⁸⁷ Shifting away from the failed values of business unionism, activists sought to transform the goals and tactics of organizing, as well as the roles of current union members.⁸⁸ Campaigns would treat unions not as a commodity to be sold, but as a vehicle for solidarity in service to collective action in the workplace and in society.⁸⁹ This would require radically new levels of commitment, courage, and participation by current members, who needed to be schooled in methods of direct action and

Restructuring and U.S. Unions: Toward Social Movement Unionism?, 26 CRITICAL SOCIOLOGY 127 (2000).

⁸² STEVEN H. LOPEZ, REORGANIZING THE RUST BELT 4 (2004).

⁸³ *Id.* at 5.

⁸⁴ The United Auto Workers, for example, shunned new, non-union auto parts contractors, and local officials of the United Food and Commercial Workers reshaped their jurisdictional boundaries so that they could discontinue organizing department stores. RICK FANTASIA & KIM VOSS, HARD WORK 125 (2004).

⁸⁵ LOPEZ, *supra* note 82, at 59.

⁸⁶ *Id.*

⁸⁷ Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. OF SOCIOLOGY 303, 304 (2000).

⁸⁸ *Id.* at 312-13.

⁸⁹ RICK FANTASIA & KIM VOSS, HARD WORK 127 (2004).

remolded in the ethics of community-mindedness and movement politics.⁹⁰ Dubbed “social movement unionism,” the new philosophy would also rely on “corporate” or “comprehensive” campaigns, which try to turn a company’s social network of customers, investors, Board members, and even religious allies against it by unearthing and publicizing embarrassing or hypocritical corporate facts and practices.⁹¹ Social movement unionism additionally attempts to expand the arena of conflict into the greater community and society, often linking an organizing campaign at a particular firm to a social justice issue generally.⁹² Surprising, creative, and multiple tactics are also emphasized; in fact, the “card-check” innovation itself sprang from the experimentalism fostered by social movement unionism, and today comprehensive campaigns are ubiquitously coupled with demands for card-check agreements.⁹³

The Service Employees International Union’s (SEIU) “Justice for Janitors” (J for J) campaign in Los Angeles is probably the paradigmatic example social movement unionism.⁹⁴ Combining shrewd corporate research,⁹⁵ the media, and escalating guerilla tactics ranging from health and safety inspections to street theater to outright trespass,⁹⁶ J for J showcased a torrent of

⁹⁰ *Id.* at 127-28.

⁹¹ *Id.* at 128-29.

⁹² *Id.* at 129-31.

⁹³ *Id.*

⁹⁴ *Id.* at 134.

⁹⁵ SEIU initially hired a full-time researcher assigned the sole task of uncovering the ownership and management architecture of Los Angeles commercial cleaning companies. Later projects revealed that the salient industry power-brokers were not small sub-contractors, but large international corporations, which were much more vulnerable to public opinion and social disruption. *Id.* at 139-40.

⁹⁶ As portrayed in the movie “Bread and Roses” starring Adrien Brody and directed by Ken Loach, janitors cleaned a mock office in the middle of rush-hour, shutting down traffic. BREAD AND ROSES (Alta Films S.A. 2000). The J for J campaign also engaged in “shaming rituals,” for instance, crashing high-level business meetings, chanting loudly, and throwing bags of trash around the room. RICK FANTASIA & KIM VOSS, *HARD WORK* 142 (2004).

public support and collective activism unseen since the 1930s.⁹⁷ In just two years, J for J helped ninety percent of Los Angeles’s high-rise janitors gain the wages and benefits of a collectively bargained agreement.⁹⁸ Perhaps J for J’s greatest accomplishment, however, was in allowing space for an unprecedented level of activism by the janitors themselves. As summarized by sociologists Rick Fantasia and Kim Voss:

“[T]he campaign uncovered unexpected levels of solidarity and daring on the part of Los Angeles’s immigrant janitors. Far from being the docile wage slaves that many union officials predicted and that employers smugly expected, immigrant janitors proved to be quite militant, capable of quickly marshalling support not only among their fellow janitors but also among family, friends, and neighbors. Everyone, from employer-side lawyers to old-guard officials to the J for J staff, was astonished at these workers’ willingness to overtake the paid J for J staff members in their intensity and commitment.”⁹⁹

Fresh from J for J and other similarly successful campaigns, SEIU quickly grew dissatisfied by the AFL-CIO’s lack of financial and strategic commitment to new organizing ventures, leading SEIU and seven other unions to break away and form a new federation called “Change to Win,” which the unions claimed would embody an even more aggressive and worker-fueled approach to organizing.¹⁰⁰

Social Movement Unionism: Implications for the Right-to-Work Setting

The advent of Change to Win, the massive import placed on card-check agreements,¹⁰¹ and the demonstrated success of social movement unionism¹⁰² might portend a turning point in

⁹⁷ RICK FANTASIA & KIM VOSS, *HARD WORK* 144 (2004).

⁹⁸ *Id.*

⁹⁹ *Id.* at 144-45.

¹⁰⁰ Steven Greenhouse, *Breakaway Unions Start a New Federation*, N.Y. TIMES, Sep. 28, 2005, at A17.

¹⁰¹ The agreements themselves are often achieved through the threat or use of a comprehensive campaign. See David Moberg, *Paradigm Shift*, IN THESE TIMES, Feb. 2006, at 41 (“unions are changing the model for winning recognition . . . by using direct action to gain employer neutrality and card check rights”).

American labor organizing. The retreat from the conciliatory, professionalized ethic of business unionism may be complete, while the shift towards the creative, adversarial, and amateurized philosophy of social movement unionism may be total.¹⁰³

If so, there are crucial implications relating to unions' ability to survive in the right-to-work environment. Stemming from sociologist Erving Goffman's hypothesis that the levels and forms of participation in organizational structures can instigate or hinder levels of activism in other organizations later,¹⁰⁴ Linda Markowitz has studied how organizing strategies influence workers after campaigns end.¹⁰⁵ Markowitz closely followed two successful organizing campaigns.¹⁰⁶ One, at Geofelt Manufacturing, trained workers in organizing techniques and encouraged their participation in the drive, and the other, at Bob's Grocery Stores, relied primarily on paid union staff to stage the campaign.¹⁰⁷ Both campaigns then sharply restricted worker participation in the protracted contract negotiations that followed.¹⁰⁸

¹⁰² See, e.g., Robert Bussel, *Southern Organizing in the Post-Civil Rights Era: The Case of S. Lichtenberg* 52 *INDUS. & LABOR RELATIONS REV.* 528 (1999) (use of comprehensive campaign tactics including gathering support of the local faith community, training workers to use collective power, and broadening the campaign to encompass issues of gender inequality led to the union's victory after two earlier campaigns, which did not utilize such a comprehensive strategy, were defeated); Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, *INDUS. & LAB. REL. REV.* 505 (1990) (corporate campaign tactics present a serious new challenge to employers).

¹⁰³ See generally BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS* (1992) (citing a current in the labor movement pushing unions to become more participatory with respect to their members).

¹⁰⁴ ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974).

¹⁰⁵ See generally LINDA MARKOWITZ, *WORKER ACTIVISM AFTER SUCCESSFUL UNION ORGANIZING* (2000).

¹⁰⁶ *Id.* at 12.

¹⁰⁷ Linda Markowitz, *After the Organizing Ends: Workers, Self-Efficacy, Activism, and Union Frameworks*, 45 *SOCIAL PROBLEMS*, Aug. 1998, at 356.

¹⁰⁸ *Id.*

Workers at Bob's reported feelings of dissatisfaction with the union and a generalized helplessness during the talks.¹⁰⁹ Lacking the experiences and training that might have been assimilated through active organizing, the workers floundered, trading agency for marginalization by failing to learn about their rights and neglecting opportunities to push for change within the union or company.¹¹⁰ Half reasoned against participation by anemically asserting that "activism was not part of their role as a 'union member.'"¹¹¹ Explained one worker: "I don't need to become involved. We pay people to do that. . . If they're doing their jobs, I shouldn't have to participate."¹¹²

Workers at Geofelt were similarly frustrated that the union had excluded them from contract talks, but responded quite differently.¹¹³ Five workers who had been extremely active in the organizing campaign formed an informal committee to persuade co-workers that the union was "untrustworthy" and had abandoned them.¹¹⁴ The committee decided to try to replace the union with a rival, going so far as to research the official decertification process with the National Labor Relations Board.¹¹⁵ Markowitz stresses that "what is notable is that the action these employees took to redress their dissatisfaction imitated the action they had engaged in to create a union. Because they had learned only the specific skills associated with conducting an organizing drive, they began another organizing campaign to replace the union."¹¹⁶ That is, workers used the skills they had been taught.

¹⁰⁹ MARKOWITZ, *supra* note 105, at 152.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 152-53.

¹¹³ *Id.* at 157.

¹¹⁴ *Id.* at 157-58.

¹¹⁵ *Id.* at 158.

¹¹⁶ *Id.*

Markowitz's research would seem to refute the labor realist perspective that levels of union member activism are indigenous and immune to manipulation. Instead, it may be that in workers' minds, the meanings and expectations of union membership are not predetermined but evolve through experience.¹¹⁷ If so, the activism and collective spirit of Nevada's Local 226 is not anomalous but could be replicated elsewhere, the burgeoning social justice unionism model exemplified by J for J is not just an effective campaign strategy but a blue-print for union strength in the post-contract period, and innovators like Jennifer Gordon, whose "Workplace Project" conditions legal services on participation in organizing activities¹¹⁸ are shaping a consciousness that could undergird a new brand of internal unionism. In short, unions *can* survive in the right-to-work setting. Some already do. And on their heels a new generation of members, molded by the efforts of social movement unionism, is primed to embody the activist spirit essential to union life in a post-union security world.

The Union Benefits of Right-to-Work

Having suggested that the presence of a vibrant membership undermines the conventional presumption that right-to-work necessarily saps union strength, the remainder of Part III attempts to show that the right-to-work setting can actually benefit the labor movement.

Suppressed Activism and the Core of the Union Shop

Labor's allies have not always viewed union security agreements as desirable to the movement. Samuel Gompers himself is widely quoted to have said that "the workers in America adhere to voluntary institutions in preference to compulsory systems which are not only

¹¹⁷ *See id.* at 176.

¹¹⁸ JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 198 (2005).

impractical but a menace to their welfare and their liberty.”¹¹⁹ And even the most ardent unionist might secretly concede Selwyn Torff’s observation that “there is something disquieting about any organization that demands the law give it the right to compel where it has failed to persuade.”¹²⁰

Today, the few who believe that labor would be strengthened by abandoning union security argue that the agreements foster a detached leadership out of touch with the membership. This is the view of U.S. Representative Bob Goodlatte of Virginia: “[U]nions are alive and well in right-to-work states, but there is a very significant difference that I argue improves the unions . . . if members aren’t satisfied, they can vote with their feet and walk away . . . it makes the leadership of the union more responsive to the members.”¹²¹

Indeed, simple logic suggests that when dues are guaranteed, attentive member servicing may not be,¹²² cultivating a frustrated and apathetic rank and file. The right-to-work environment, alternatively, stands in sharp relief. Where dues are linked to member satisfaction, leadership’s responsiveness embodies a special urgency,¹²³ as intimated by Representative Goodlatte and as portrayed by labor historians like Nelson Lichtenstein who describes 1930s

¹¹⁹ See, e.g., *Open Shops in the 21st Century Workplace: Hearing Before the H. Subcomm. On Oversight and Investigations, 106th Cong. 5 (2000)* (statement by Representative Bob Goodlatte of Virginia, quoting Samuel Gompers); Lawrence W. Reed, *Labor Freedom Makes Sense, Morally and Economically*, MACKINAC CENTER FOR PUBLIC POLICY, Nov. 7, 2002, <http://www.mackinac.org/print.asp?ID=4828>

¹²⁰ Selwyn H. Torff, *The Case for Voluntary Union Membership*, IOWA L. REV., Summer, 1955, at 623.

¹²¹ *Open Shops in the 21st Century Workplace: Hearing Before the H. Subcomm. On Oversight and Investigations, 106th Cong. 5 (2000)*.

¹²² See PAUL SULTAN, *RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT* 123 (1958) (“Under compulsory union provisions, leadership becomes further entrenched and increasingly indifferent to the wishes of the rank and file.”).

¹²³ See *id.* at 122 (“the employee must be allowed some effective device for showing his disapproval of union policies. The only effective way . . . is to withhold financial support from the union.”).

unionism, which lacked union security entirely, as bustling with internal activism: “Everyday, local leaders faced the task of justifying the union’s existence to the rank and file to retain their loyalty. . . Grievance battles were the order of the day, and local officers went about their jobs in an aggressive and energetic manner.”¹²⁴ From the individual member’s perspective, this servicing incentive might be viewed as an advantage of the right-to-work regime. From the union’s perspective, it might not be.

The union might be wrong. Servicing indeed imposes administrative costs and burdens, which may be higher in right-to-work states as unions try to enhance worker satisfaction and minimize free-riding. Such added costs are often cited as evidence that the right-to-work model hurts unions.¹²⁵ But the servicing and the interactions it spurs could also be viewed as an opportunity, and here radical democratic theory is instructive.

The Radical Opportunities of Member Servicing

Political theorists have long identified a progressive atrophy in Americans’ civic and political engagement.¹²⁶ But according to Princeton theorist Jeffrey Stout, if the rise of such arms-length democracy has an antidote, it is embedded in the honesty of a decentralized, face-to-face conversation. Indeed, for Stout, democratic activism resides in the “continuing social process of holding one another responsible . . . the practice of giving and asking for ethical

¹²⁴ NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME* 22 (2003).

¹²⁵ *See, e.g.*, Right to Work For Less, <http://www.aflcio.org/issues/legislativealert/stateissues/work/> (“Right to work laws just aren’t fair to dues paying members. If a nonunion worker is fired illegally, the union must use its time and money to defend him or her, even if that requires going through a costly legal process. Everyone benefits, so all should share in the process.”).

¹²⁶ *See, e.g.*, ROBERT D. PUTNUM, *BOWLING ALONE* 46 (2000) (“since the mid-1960s, the weight of the evidence suggests, despite the rapid rise in levels of education Americans have become . . . roughly 40 percent less engaged in party politics and indeed in political and civic organizations of all sorts.”). Surely, in today’s context DeTocqueville’s observation that American democracy produces “an all-pervading and restless activity, a superabundant force” seems rather quaint. PAUL SULTAN, *RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT* 112 (1958).

reasons.”¹²⁷ In Stout’s terms, a political culture that restricts democratic practice to passive acceptance of shallow sound-bytes and a trip to the voting booth every two to four years breeds detachment and apathy, while scattered, impromptu, informal, reasoned conversations energize civic activity:

“The social practices that matter most directly to democracy, as I have argued at length, are the discursive practices of ethical deliberation and political debate. The discursive exchange essential to democracy is likely to thrive only where individuals identify to some significant extent with a community of reason-givers. At the local level, this may be the community constituted by arguments over who does the dishes, what to do with the garbage we produce, how the police are behaving, and what should be covered in a high school curriculum.”¹²⁸

Thus for Stout, the true democratic activist is marked less by an interest in cable news and more by habits, dispositions, and practices that tend toward close relations with others, are spread neighbor to neighbor, and are imbued by an immediate culture that questions reality and demands explanation—even if the question is why is it always *my* turn to pick up the kids.

Stout’s prescription for civic engagement is familiar to those experienced in community organizing, where face-to-face encounters form the foundation for collective action and power. Indeed, Edward Chambers, Executive Director of the Industrial Areas Foundation (IAF), the most prominent community organizing network in the nation, has called the “relational meeting” the “most radical thing [we] do.”¹²⁹ In IAF parlance, “relational meeting” is a technical term for building relationships, which leads to issue targets and the identification of indigenous leaders.¹³⁰ Before an IAF organization even formally exists, organizers and initial leaders conduct up to ten-

¹²⁷ JEFFREY STOUT, *DEMOCRACY AND TRADITION* 6 (2004).

¹²⁸ *Id.* at 293.

¹²⁹ EDWARD T. CHAMBERS, *ROOTS FOR RADICALS* 13 (2006).

¹³⁰ *Id.* at 46,49.

thousand of such meetings over three to four years.¹³¹ A skilled organizer uses a relational meeting not to sell or push an issue, but to listen and ask short succinct questions in hopes of eliciting anecdotes and personal narratives, which reveal the underpinnings of one's motivation or lack of motivation.¹³² Chambers explains:

“The relational meeting is the entry point to public life . . . [it] isn't chitchat, like the usual informal exchange over coffee or drinks. In causal meetings, we take people as they present themselves. We don't push. We don't dig. We don't ask why or where a notion came from. We don't probe an idea. We don't raise possibilities. We don't ask questions that engage the imagination: “Well, what if you looked at it this way?” “How would your parents have reacted?” “How would you feel if you were the other person?” . . . [the relational meeting] is an attempt to find the other's center . . . Stories don't rest on the surface, to be picked up in casual chatter. Only concerted and intentional encounters will bring them to light.”¹³³

Mark Warren, an anthropologist at Fordham University who has studied the IAF method extensively, concludes that relational meetings work for IAF because “it is in community connections that individuals can develop the will to act collectively.”¹³⁴ Moreover, “when people are placed in interdependent situations where they believe that they need each other, they forego initial prejudices and enact cross-ethnic and cross-racial helping.” The “challenge,” he argues, “is to create these interdependent and cooperative forms.”¹³⁵

The American workplace is well-suited to Warren's challenge because such an interdependent cooperative form already exists: the labor union. The acute goal, then, is to reorient labor to use IAF-type relational tactics *internally*, which political theory suggests and community organizing shows can incite individuals' mobilization and create opportunities for collective action. In short, unions must be transformed into what Stout terms a “community of

¹³¹ *Id.* at 48.

¹³² *Id.* at 50-51.

¹³³ *Id.*

¹³⁴ MARK R. WARREN, DRY BONES RATTLING 23 (2001).

¹³⁵ *Id.* at 27.

reason-givers,” with members and officials discussing internal union matters honestly, seriously, and often.

The rise of social movement unionism, in combination with Markowitz’s research, suggests that the newest generation of union members may be especially receptive to internal relational tactics. But member receptivity may not be enough. Union officials may need to be compelled to initiate relational contact in the vein of radical democratic theory and IAF practice.

Nationalized right-to-work might obligate just such a commitment. Right-to-work at a national level, when viewed not as a demoralizing drain on resources but as an opportunity for relation-renewal, could drastically reframe the consciousness of union officials and the implicit expectations of union membership. The tactics used and the culture shaped by Las Vegas’s Local 226 and UE Local 1111 would no longer be anomalous, but the rule. National right-to-work would institutionalize interior relation-building, which would institutionalize interior activism, which would institutionalize stronger unions.¹³⁶

¹³⁶ I am not suggesting that right-to-work laws embody some intangible power that morphs the interactions of union members and officials. There are many unions in right-to-work states that are weak, dysfunctional, and hobbled by non-contributing free-riders. These unions probably do poor relational work, have been largely abandoned by the national labor movement, and the presence of right-to-work does little to provoke a change in their tactics. What I am suggesting is that if right-to-work were extended nationally, labor as a whole would have utmost incentive to overhaul its internal strategies in a universal and intentional manner. The most likely and effective strategic shift, I argue, would be reform in the vein of IAF practice and radical democratic theory. I believe the widespread acceptance of social movement unionism as an organizing model would make this shift easier than at any time in recent history. I also recognize it would require extreme tactical changes and perhaps large training costs. But there are some unions, as described here, which have already implemented IAF-type internal strategies successfully in the right-to-work environment. They are thriving. That may – in part – be attributable to member servicing and activism pressures exerted by right-to-work itself. Ultimately, I speculate that the short-term costs of internal union reform would be outweighed by the long-term benefit of hundreds of newly responsive unions and millions of newly activist and radicalized unionists.

UPS Teamsters

The union culture at the United Parcel Service (UPS) exemplifies this progression well. UPS is a large global company with a unionized workforce that spans right-to-work and union security states alike.¹³⁷ As Harvard public policy professor Robert Putnam, who has studied UPS's employee culture has observed, "UPS exemplifies relational work."¹³⁸ Putnam's word choice is deliberate. "Relational work" is a technical reference to IAF organizing philosophy. Indeed, Putnam compares UPS union practices to the community organizing techniques employed successfully by Valley Interfaith, the IAF affiliate in southern Texas.¹³⁹ For UPS Teamsters, face-to-face conversation is expected and institutionalized:

"Every morning, in every UPS hub and center, drivers gather for a brief prework communication meeting, or PCM, before they go out on the road. Every day, all around the country, drivers meet at lunchtime in parks and parking lots to talk, mixing social conversation with work: veterans help newcomers find obscure addresses or solve other problems; the drivers exchange missorted packages or balance their remaining loads to make sure everything gets delivered on time . . . A lot of conversation takes the form of storytelling . . . Veteran drivers recount tales of their early difficulties to encourage newcomers and to communicate some of the tricks of the trade. They also recall the veterans who shared stories with them when they were new: The tales, for instance, of winter deliveries in rural Wisconsin that includes tips for preventing ice from forming on the steering wheel and how you are likely to find your farmer-customers at different places, depending on the weather."¹⁴⁰

Such relational work has led to what Putnam describes as an almost unprecedented culture of internal cohesion: "Tales of cooperation are part of the company's folklore . . . the brown worn by every driver represents membership in a collective enterprise, commonality over

¹³⁷ UPS has 370,000 employees world-wide. The company's drivers and package sorters and loaders are unionized at its various hubs and commercial locations. ROBERT D. PUTNUM & LEWIS M. FELDSTONE, *BETTER TOGETHER* 210-11 (2003).

¹³⁸ ROBERT D. PUTNUM & LEWIS M. FELDSTONE, *BETTER TOGETHER* 212 (2003).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 212-13.

individuality.”¹⁴¹ In turn, as IAF philosophy and radical democratic theory predicts, internal relation-building has catalyzed external and internal activism at UPS. Putnam quotes Linda Kaboolian, a labor relations expert specializing in the history of the Teamsters: “employee groups and union locals are very active in civic life — there is a real occupational community among UPS workers. Historically, there has been more union democracy and less corruption in UPS locals than in other parts of the Teamsters.”¹⁴²

There is probably no better portrayal of how internal relation-building, sparking activism, translates into union strength than the 1997 national UPS Teamsters strike. The catalyst for the strike itself was a testament to the unity and selflessness of UPS union members across the country, as full-time workers stood with their colleagues not over an issue central to their own work-life, but to demand that UPS improve the lives of part-timers by converting them to full-time.¹⁴³ With the strike fund nearly empty and facing one of the largest and most profitable employers in the country, business analysts predicted the union’s collapse.¹⁴⁴

But with an already united and activist workforce schooled in the fundamentals of relational organizing, the union was uniquely prepared.¹⁴⁵ As The New York Times reported, “by the time the July 31 strike deadline approached, the Teamsters had turned their UPS

¹⁴¹ *Id.* at 211-12.

¹⁴² *Id.* at 216.

¹⁴³ *See id.* at 217.

¹⁴⁴ *See* Nathan Newman, *Why the Victory at UPS Matters*, CENTER FOR COMMUNITY ECONOMIC RESEARCH, Aug. 1997, http://www.nathannewman.org/other/why_ups_strike_matters.html.

¹⁴⁵ *See* Steven Greenhouse, *Yearlong Effort Key to Success for Teamsters*, N.Y. TIMES, Aug. 25, 1997, at A1 (“Though it was four months before their contract expired, four months before a strike deadline, these workers in Saddle Brook, like those rallies in 30 other cities around the country that morning, were already gung-ho volunteers in the teamsters’ efforts to mobilize members to stand up to U.P.S. . . . The teamsters yearlong mobilization included scores of rallies at U.P.S. sites as well as other major efforts, like sending questionnaires to 185,000 teamsters asking what they wanted from the U.P.S. negotiations and collecting 100,000 signatures backing the union’s demands. But the union did not neglect minor details: at one point, it distributed 50,000 whistles for use at the rallies.”).

membership into a Juggernaut that the company's executives underestimated."¹⁴⁶ Indeed, ninety-five percent of the workers voted to strike, and only a few thousand workers crossed the picket lines.¹⁴⁷ The result was a resounding labor triumph, the first in many years.¹⁴⁸ UPS agreed to transform ten thousand part-time jobs into full-time positions, to raise part-time starting pay for the first time in fifteen years, and to discard a major pension change the union had strongly opposed.¹⁴⁹ In return, the union acceded only to the company's desire for a five-year collective bargaining agreement.¹⁵⁰

For the UPS Teamsters, an ingrained practice of member activism, cultivating a tradition of cooperation and cohesion shaped the union into a formidable collective force. But fundamentally, an established union is a bureaucracy, and it is reasonable to question if a constant undercurrent of collective activism is possible, or even desirable.¹⁵¹

Is Sustained Internal Activism Possible?

It is possible. As Linda Markowitz notes at the conclusion of her study, activism within a bureaucracy requires skills different from those applicable to a strategic social movement.¹⁵² Thus, activists must be taught not only how to win a campaign, but how to properly orient a

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See PAUL SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 119 (1958) (“[T]he union begins as a protest movement. There is excitement and drama as the union strives for membership and recognition. The interest and participation of members are high, as each new member knows he can help determine the character and destiny of the organization. But over time, grass-roots participation diminishes, and union meetings lose their early New England town-meeting characteristics. Once the union’s survival is no longer in serious doubt, once it is recognized as a permanent institution in the plant, the stimulus for participation in the day-to-day affairs of the union decreases”).

¹⁵² LINDA MARKOWITZ, WORKER ACTIVISM AFTER SUCCESSFUL UNION ORGANIZING 162 (2000).

union so that energies are seamlessly transferred to more bureaucratic yet equally critical tasks.¹⁵³

For unions, proper orientation seems to embody two components, both previously intimated. One, face-to-face interaction must be conceived not as a burdensome administrative task or just another union picnic, but as continuing opportunity for relationship renewal and member activation. Sociologist Steven Lopez, for instance, describes a union's successful efforts to survive after the company had unilaterally suspended dues deductions this way:

“If dues could not be collected, the union would appear in an important sense to have ceased to exist. But instead of lamenting the lack of dues deduction, the union viewed collecting dues one on one as an opportunity for continuing the face-to-face interaction that kept it together during the darkest days of the [initial organizing] struggle.”¹⁵⁴

Two, an incessant current of activism requires a constant simmering of minor conflict. Having examined the interaction between union culture and worker mobilization, sociologist Rick Fantasia notes that “cultures of solidarity are formed out of friction and opposition itself. That is, solidarity is to a considerable degree formed and intensified in interaction with the opposition.”¹⁵⁵ Fantasia does not promote unbridled or open antagonism. Rather, he hints at a crucial element of sustained union vigor: the urgent awareness that left unchecked, the workplace naturally tends against workers' safety, rights, and freedom. In turn, a union bureaucracy that enables activism ensures that workers both identify employer coercion and understand that struggles do not cease with certification and a contract, nor might they ever.¹⁵⁶ Lopez, for instance, describes a union that established a twenty-four hour hotline for workers to report

¹⁵³ *Id.*

¹⁵⁴ STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT 193 (2004).

¹⁵⁵ RICK FANTASIA, CULTURES OF SOLIDARITY 233 (1988) (in original “interaction” is italicized).

¹⁵⁶ See LOPEZ, *supra* note 154, at 193 (“The first task of continuing internal mobilization and organization was to convey to the rank and file. . . that the struggle was continuing, that there was important work for them to do”).

unfair labor practices or OSHA violations.¹⁵⁷ Once leaders encouraged its use, the system ensured that the employer's potential to infringe rights remained central in workers' minds,¹⁵⁸ promoting an everyday friction Fantasia would argue stokes solidarity and action.

The right-to-work environment may produce a similar effect. As right-to-work pressures union officials to dramatize the services they provide to justify dues,¹⁵⁹ they may implicitly (or explicitly) project an "us versus them" oppositional framework. Workers, in turn, may slowly internalize this mentality, cementing an atmosphere of slight but omnipresent tension.

More critically, right-to-work begs a perpetual, internal union question: "Why should I pay dues?" While the answer to this question is important, the act of answering is more so; participation in the "community of reason-givers" begins where the union official crafts a thoughtful, reasoned response. The community is sustained when the question arises again and again across many actors. It is this repetitive back and forth exchange, Stout and other radical democrats would assert, that is the very engine of mobilization.

Is Sustained Internal Activism Desirable?

A sustained current of intra-union activism is not just possible, it is also desirable. Some historical, theoretical, and narrative evidence in support of that desirability has already been recounted, but a broader explanation remains, one that suggests an exotic quality of collective action: It is infectious. Put differently, it is through the experience of collective action that workers are stimulated and transformed. As Fantasia maintains: "[I]n collective action . . .

¹⁵⁷ *Id.* at 194.

¹⁵⁸ *Id.*

¹⁵⁹ SULTAN, *supra* note 151, at 124.

something new is created . . . [a]n emergent culture is created in which new values are incubated, new forms of activity generated, and an associational bond of a new type formed.”¹⁶⁰

This phenomenon is apparent in Fantasia’s participation in and anatomy of two wildcat strikes at a small New Jersey iron foundry, Taylor Casting. Using a meticulously catalogued first-person narrative, Fantasia shows how the shape of the second strike was a largely a “function of the process manifested in the first.”¹⁶¹ That is, in the later strike workers appeared not only to have learned from the first action, some were concretely transformed by it. Indeed, Fantasia cites how in the second strike workers committed to solidarity not spontaneously, as in the first strike, but the day before the action occurred, how only before the second strike did workers think to secure tentative solidarity commitments from workers in areas of the factory not directly affected by the primary grievance, and how workers planned to coordinate their dress on the morning of the second strike as evidence of maturing collective tactics gained through experience.¹⁶² Moreover, new leaders emerged and solidarity was achieved more quickly in the second strike. The four workers who catalyzed the second action were enthusiastic participants but not instigators of the first strike; by January they were ready to embrace leadership roles.¹⁶³ Fantasia hints at deep relational implications of this transformative experience:

“Two of them worked closely together on a daily basis (as inspectors), but the other two (a welder and a heat-treatment furnace operator) worked at opposite ends of the department and had previously had little contact with each other. Race and ethnicity were not binding elements; two of the workers were black, one white, and the other Hispanic.”¹⁶⁴

¹⁶⁰ FANTASIA, *supra* note 155, at 174.

¹⁶¹ *Id.* at 100.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 100-101.

Fantasia's analysis of the two strikes adds credence to the hypothesis that shop-floor relational banter, which was embedded in the Taylor employment experience as workers interacted with one another constantly throughout the day, can lead to an incipient solidarity. At Taylor, this came to be expressed on two otherwise ordinary mornings as overt activism. Through an organic process of interrelation, an ad hoc leadership hierarchy took shape and activist energy swelled among the broader workforce, ready for release.

Of course, relational organizing at Taylor Casting should not have arisen organically. It should not have been merely a fortuitous byproduct of workers' arrangement on the factory floor. It should have been planned, practiced, and promoted by union leadership. Though effective, the strikes highlighted a drastic disconnect between the union's formal and informal leadership,¹⁶⁵ a ripe target for future exploitation by management. They were also illegal.

Alternatively, had the official union leadership been committed to internal relational organizing in the months and years prior to the first wildcat, solidarity and energy would have still resulted, but it could have been harnessed strategically toward methodic collectivism practiced within the bounds of the collective bargaining agreement. As this article has sought to argue, the introduction of nationalized right-to-work, combined with a union movement primed to take advantage of what that environment requires *relationally* for unions to thrive, might institutionalize this scenario. When right-to-work is viewed as an opportunity, not an albatross, the resulting practices double as intensive preparation for collective action.

CONCLUSION

The "grand bargain" cannot be separated from its two underlying idealisms. First, workers who want to form a union community should not have to weigh incredible odds, a

¹⁶⁵ See *id.* at 92 ("The wildcat strike brought into sharp focus the day-to-day relationship between rank-and-file workers and the union leadership.").

bulwark of legal impediments, and the possibility of personal financial destruction before they even begin. And second, true community leaves no room for involuntary members.

But today, in states with union security, labor law facilitates the reverse: The campaign is hellish, but later, membership is guaranteed. And in right-to-work states, labor law is simply punitive: The campaign is hellish, and later, membership may evaporate.

The grand bargain reworks both scenarios, presuming that the toughest union work should be reserved not for the beginning of a campaign, but after its conclusion. Prior to recognition, a worker should face a single choice, unfettered and without anxiety: “To sign or not to sign?” After recognition, a worker should face hundreds of difficult choices: “How on earth am I going to arrange all of these relational meetings?” In *Beloved Community*, Charles Marsh denotes this latter struggle, which also confronted the civil rights movement, as the “more difficult work” of *sustaining* that follows the merely “difficult work”¹⁶⁶ of *creating*: “the daily disciplines and sacrifices required to sustain beloved community . . .begin . . .in a whole lot of waiting around for car rides, in tedious organizational meetings and arguments about strategy, around the mimeograph machine.”¹⁶⁷

A union’s “more difficult work” encompasses Marsh’s talk of car-pooling and copying, but also the ribaldry of a buzzing union hall and its constituent parts: the scribbled events calendar, the old confetti lodged in a matted carpet that could use a good steam-cleaning, the

¹⁶⁶ See CHARLES MARSH, *THE BELOVED COMMUNITY* 5 (2005) (“The new legions of Christian radicals working in rural and urban areas remind us of the sobering fact that beyond the difficult work of achieving legal equality awaits more difficult work . . .”).

¹⁶⁷ *Id.*

concrete walls adorned with memories of events and people past, and the ever-evolving phone-tree.¹⁶⁸ Through it all, the essence of union community is revealed.

Of course, such “work” does not come naturally to all unions. But just as Stout believes accountable relationships can cure a political culture that cultivates bad democrats, so too might they cure a union culture that cultivates bad unionists. When properly conceived, a prime incubator for such relationships may be the right-to-work environment. Proving that has been the primary challenge of this Article.

Rick Fantasia’s conclusion that “the character of the labor movement is crucial in shaping the content and shape of collective action by workers”¹⁶⁹ is not rhetorical filling. It is a challenge, one that summons a slew of simple diagnostic questions: How many relational meetings are automatically scheduled for new hires?; Which and how many committees are they expected to join?; What are their responsibilities in the union hall?; If the union across town strikes, how many extra meals should be prepared for the strikers’ families?

Organized workers *can* pursue better wages, better benefits, more fairness, and more dignity, but to actually be effective as a union, they *must* pursue internal, relational, community. The questions above simply point to some natural expectations of a functioning relational community. In such an environment, that a worker could technically “opt-out” of the community is not a relevant consideration. There will be as many reasons as there are relationships not to.

¹⁶⁸ See RICK FANTASIA, CULTURES OF SOLIDARITY 243-44 (1988) (“The union presence at the local level must be experienced as more than a bureaucratic labyrinth through which grievances are channeled; the union hall should be a rich center of cultural life and education that cultivates traditions and practices of solidarity.”).

¹⁶⁹ *Id.* at 233.

