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INTRODUCTION

A central task of feminist legal scholars is to deconstruct systematically, from a feminist perspective, existing law and the institutions that it creates.[1] The effort to reveal and to challenge the male-centered attitudes that structure the law has as its goal the introduction of women's perspectives and a consequent transformation of the law.[2] An underlying premise of some feminist efforts, including this one, is that such a transformation will not only render

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[1] *See* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1906 (1988). "A major shared premise [of feminist work] is that knowledge of the world is constructed from one's viewpoint and that what has been assumed (by some) as a universal viewpoint is, in fact, a viewpoint of some men, who have articulated a vision of reality and claimed it to be true for us all." *Id.*

[2] *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1185, 1192 (1989). Katherine Bartlett describes feminist method as asking "the woman question":

> The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.

Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

the law more inclusive of the experiences of previously marginalized groups,[3] but also assure that the law is, in some overriding sense, fairer.[4]

In this article, I undertake a feminist deconstruction of the labor laws and the activities of the institutions created by them, labor unions.[5] Some scholars might question the relevance of such

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[3] Abrams, *supra* note 2, at 1247–48 (feminist task of transforming workplace norms seeks to teach men to "see beyond a workplace made in their own image, to numerous inhabitants who are not (male)").

[4] *See, e.g.*, Leslie Bender, *Feminist (Re)Torts: Thoughts On the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 888 (applying feminist analysis to mass tort disputes and suggesting rules or techniques to equalize the parties' power, ultimately increasing the likelihood of just results); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure Of Problem-Solving*, 31 UCLA L. REV. 754, 840–41 (1984) (arguing that following a problem-solving approach in legal negotiations rather than engaging in a traditional adversarial negotiation process produces a broader array of solutions and, ultimately, more satisfactory resolutions, because the focus of problem solving is on addressing the underlying real needs of the parties rather than on winning the game; this problem-solving approach enables parties to negotiate more equitable solutions that meet their long- and short-term interests and hence produces a greater commitment to abide by the agreement reached); *see also* Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations On A Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 52–58 (1985) (observing the connection between the development of Alternative Dispute Resolution and cooperative forms of negotiation, and the scholarly development of a feminist perspective, and arguing that importing feminist insights into the law and legal institutions potentially benefits all lawyers).

[5] The phrase "labor law" refers to the National Labor Relations Act, 29 U.S.C. §§ 141–187 (1988). This article builds upon previous work in which I issued a call to feminist scholars to begin deconstructing the labor laws. *See* Marion Crain, *Feminizing Unions: Challenging The Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1159 (1991). Aside from my own work, the only legal scholarship that has addressed sex equality arguments in the context of the labor law (as opposed to employment discrimination or employment law) has been in the area of pay equity. *See, e.g.*, Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1798–1801 (1986) (arguing that comparable worth might be made a subject of collective bargaining). Most of this work is not explicitly feminist in orientation or method. *See id.* Although many feminist legal scholars have written on the subject of male-centered workplace norms, all have done so in the context of employment discrimination, and consequently have focused on title VII or on constitutional law rather than on the labor laws. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN—A CASE OF SEX DISCRIMINATION 4–6 (1979) (analyzing workplace sexual harassment as a form of sex discrimination that reinforces and expresses women's traditional subordinate role in the work force, and outlining legal arguments for reform under title VII and the Equal Protection Clause of the Fourteenth Amendment); Abrams, *supra* note 2, at 1186 (analyzing sexual harassment and the relationship between career advancement and parenting responsibilities in context of the "primary litigation tool," title VII); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004–08 (1986) (comparing and contrasting the efficacy of principles of anti-subordination and anti-differentiation in affirmative action cases under the Equal Protection Clause); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1122–42 (1986) (examining treatment of maternity issues in the workplace under title VII); Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 58–61 (1979) (analyzing title VII and equal

an inquiry, in view of the rapidly dwindling share of the work force represented by labor unions.[6] I have argued elsewhere that unions

protection doctrine for strategies to challenge employment policies that burden working mothers); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002, 1008–13 (1984) (proposing strict constitutional analysis of sex-based laws and laws governing reproductive issues in the workplace where laws operate to perpetuate sex inequality); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1754–69 (1990) (examining judicial treatment under title VII of phenomenon of sex segregation in occupations); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 800–02 (1989) (challenging relational feminists' theory and description of gender differences, showing how employers have turned relational feminist theory against women under title VII, and proposing gender neutral reforms designed to alter the existing vision of the ideal worker, which is constructed around male norms, while simultaneously refusing to institutionalize a correlation between gender roles and biological sex differences).

It is possible that the dearth of feminist legal scholarship in this area is attributable primarily to the paucity of female labor law professors. Women are also underrepresented on industrial relations faculties. *See* Lois S. Gray, *Professional Careers for Women in Industrial Relations*, *in* WORKING WOMEN: PAST, PRESENT, FUTURE 225, 239 (Karen Shallcross Koziaria et al. eds., 1987) (only 12% of members of Industrial Relations Research Association involved in research, teaching or administration in industrial relations were women). In fields where women are more commonly found teaching, such as sociology, much has been written on the subject of the relationship between feminism and labor unions. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 389, Table No. 645 (47.6 % of all social scientists and urban planners are women, but only 19.3 % of lawyers are women); *see, e.g.*, DIANE BALSER, SISTERHOOD AND SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES (1987); LINDA M. BLUM, BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARABLE WORTH MOVEMENT (1991); ALICE KESSLER-HARRIS, OUT TO WORK (1982); RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II (1987).

Nevertheless, the failure of feminist legal scholars to concentrate on a body of law primarily affecting the rights of working class women, and their tendency to prefer to engage in analyses of workplace norms that primarily affect middle- and upper-class professionals and semi-professional women (usually white women), raises the familiar specter of essentialism in feminist theory. *See* BLUM, *supra*, at 15 (mainstream feminist movement has overlooked centrality of class in determining women's experiences); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 34–35 (1984) (failure to emphasize necessity for mass-based feminist movement addressing concerns of poor women and women of color helped marginalize feminism; a fundamental change in strategy and focus of feminist movement is required if it is to realize its transformative potential); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that the work of feminists Catharine MacKinnon and Robin West relies on gender essentialism, "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"). *See generally* ELIZABETH SPELMAN, THE INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988) (examining essentialism in feminist theory).

[6] Union density has declined dramatically over the last four decades: between 1953 and 1989, density in the private sector fell from 35 percent to 12 percent. Robert J. LaLonde & Bernard D. Meltzer, *Hard Times For Unions: Another Look At the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 953 (1991). In 1991, private sector union density stood at 11.9%. *Union Membership Unchanged At 16.1 Percent of Employment in 1991*, Daily Lab. Rep. (BNA) No. 28, at B–1 (Feb. 11, 1992). This figure is projected to drop below 10 percent by

should be relevant, particularly to the women's movement, because they are properly situated to effect significant economic, political and social advances for working women.[7] Moreover, even if unions themselves are irrelevant, the issues raised by their decline are not.[8] The labor laws that have shaped the course of union representation for workers are modeled on the larger political structure of representative democracy, serving as a "charter of industrial democracy" for workers.[9] Consequently, "labor law as a representative democracy promises the same rewards and confronts the same problems as its parent and archetype, liberal democracy."[10]

Although a few scholars[11] and labor leaders[12] have advocated the abolition of labor law, the vast majority remain committed to the philosophy and structure of labor law in the United States, and advocate its reform and transformation, rather than its abolition.[13]

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the year 2000. Paul Weiler, *Hard Times For Unions: Challenging Times For Scholars*, 58 U. CHI. L. REV. 1015, 1017 (1991).

[7] *See* Crain, *supra* note 5, at 1156.

[8] CHARLES HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 12 (1988).

[9] *See* Steven L. Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. REV. 725, 725 (1984).

[10] *Id.*

[11] *See* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983) (proposing that "a sensible common law regime relying heavily upon tort and contract law" should replace the NLRA) [hereinafter Epstein, *A Common Law For Labor Relations*]; Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 982 (1984) [hereinafter Epstein, *Contract at Will*] (championing the adequacy of protection afforded individual employees by idealized, freely functioning labor market); *see also* Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. CHI. L. REV. 1012, 1019 (1984) (advocating reconsideration of the premise that the best protection of worker interests is accomplished through restructuring of the market, with guaranteed access to the process of bargaining in which the strength of workers' position is assured through the monopolistic principle of exclusive representation; Fried proposes direct imposition of minimal standards and removal of the governmentally sheltered status of labor unions); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1002 (1984) (labor law and unionization function to cartelize the labor supply at the expense of productivity, competition, consumer welfare and the remainder of the labor market).

[12] *See* Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 871, 877 (1987) (United Mineworkers president advocates repeal of labor law; unions should wage battles in state courts and in political arenas); *Kirkland Says Many Unions Avoiding NLRB*, 132 Lab. Rel. Rep. (BNA) 13 (Sept. 4, 1989) (AFL-CIO president Lane Kirkland would prefer no labor law because current law "forbids us to show solidarity and direct union support").

[13] Most propose incremental reforms. *See, e.g.*, PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 185 (1990) [hereinafter WEILER, GOVERNING THE WORKPLACE] (proposing reforms designed to realign the balance of power in the union organization phase and to expand protection for union economic weapons); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983

I join the chorus of voices defending the philosophy of American labor law, but for a fundamentally different reason.[14] I argue that

U. ILL. L. REV. 633, 635–36 (1983) (arguing that unions must organize white-collar workers and those who work with new technology, and include these highly educated workers in expanded participatory management schemes, as well as attend to the need to adapt to a global economy); David L. Gregory, *Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions*, 65 NEB. L. REV. 75, 82–84 (1986) (advocating the formation of a federal Labor Court of Appeals to hear all NLRB cases in order to coordinate and centralize NLRB jurisprudence and end inter-circuit conflicts); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 658–62 (1985) (arguing that state and local government workers should be governed by a national employment law and that employee participation in workplace management should be mandatory); Clyde Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFF. L. REV. 9, 19 (1982) (suggesting that the use of collective bargaining should be expanded and encouraged and, in the absence of a union, alternative forms of worker representation should be implemented); Paul Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1805 (1983) [hereinafter Weiler, *Promises To Keep*] (proposing union certification on basis of signed authorization cards rather than after prolonged organizing campaign and election); Paul Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 404–19 (1984) [hereinafter Weiler, *Striking a New Balance*] (suggesting recourse to compulsory arbitration of deadlocks in first union contracts, reversal of rule allowing permanent replacement of strikers, loosening of secondary boycott restrictions, and increased union power to discipline members).

Others, especially Critical Legal Studies scholars, focus on the original radical potential of the Wagner Act, and argue that judicial interpretation of the Act has undermined it; accordingly, transformative, re-radicalizing efforts are required. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 143–60, 171–80 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–41*, 62 MINN. L. REV. 265, 270, 336–39 (1978) [hereinafter Klare, *Judicial Deradicalization*]; Karl E. Klare, *Labor Law as Ideology: Toward A New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 459, 465, 481–82 (1981) [hereinafter Klare, *Labor Law as Ideology*]; Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda For Legal Reform*, 38 CATH. U. L. REV. 1, 5, 16–17 (1988) [hereinafter Klare, *Workplace Democracy & Market Reconstruction*]. *See generally* Peter E. Millspaugh, *America's Industrial Relations Experiment: Legal Scholarship Assesses the Wagner Act*, 32 ST. LOUIS U. L.J. 673, 673–74, 711 (1988) (summarizing critiques of labor law and proposals for its reform advanced in the last decade).

The commitment of these scholars is especially clear with regard to the following attributes of labor law created by the Wagner Act: an individual rights-based system of protection for employees; an adversarial structure with a balance of power between capital and labor as the goal; industrial democracy, with unions serving as the voice of employees; and collective bargaining in the individual workplace. *But see* HECKSCHER, *supra* note 8, at 254–56 (arguing for evolution of unionism toward "associational unionism," a new, more flexible form of unionism for which it is necessary to "turn the Wagner Act upside down").

[14] I share with some of the scholars cited at note 13, *supra*, a focus on increasing employee empowerment through participation in the process of workplace governance, rather than through the safeguarding of individual entitlements, or rights. *See* Klare, *Judicial Deradicalization*, *supra* note 13, at 336–39; Klare, *Labor Law as Ideology*, *supra* note 13, at 481–82; *see also* Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1058–59 (1984) (significance of Wagner Act is that it creates a right to a process of workplace decisionmaking; goal is to generate employee participation). I identify that commitment to ensuring voice, rather than ensuring rights, as more consistent with a commu-

the Wagner Act was a jurisprudentially unique attempt to construct a system of representative government to institutionalize the dynamics of a communitarian social order, the labor movement.[15] Both the communitarianism typified by the early labor movement and modern relational feminism envision an individual's fulfillment as achieved through connection and community, rather than through separation and autonomy.[16] Moreover, collective action is consistent with a radical feminist theory of economic and political empowerment.[17] Thus, the Wagner Act is consistent in its basic philosophy with women's values and experience, and offers an effective route to collective empowerment for working women.

Unlike the system of individual rights created by liberal legal theory as a check on government power, the effort by labor law to protect group rights and to codify the experience of direct self-government is fundamentally compatible with feminist method and theory. The Wagner Act was intended to advance the larger political democracy by empowering workers and by promoting industrial

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nitarian system of power allocation in the workplace than it is with the existing republican/liberal focus on individual rights, increasingly reflected in labor law jurisprudence and scholarship. See *infra* notes 160–90 and accompanying text for a discussion of the republican/liberal system of power allocation.

[15] The Wagner Act was the original piece of federal labor legislation that established the federally protected status of unions; encouraged employees to organize collectively to counterbalance the economic power of employers; granted statutory protection for concerted employee activity, including the right to strike; and prescribed a legal framework favoring collective bargaining between unions and employers. National Labor Relations (Wagner) Act, Pub. L. No. 74–198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–187 (1988)). The Wagner Act and its subsequent amendments, see The Labor-Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (1988)), and The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86–257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 153–187 (1988)), are collectively referred to as the National Labor Relations Act, and are codified at 29 U.S.C. §§ 141–187 (1988).

[16] *Compare* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 32 (1989) (communitarian conception of the common good emphasizes the importance of participating as a group member to process of self-realization) *with* CAROL GILLIGAN, IN A DIFFERENT VOICE 148 (1982) (describing decision-making, in a context where interests conflict, from a cultural feminist perspective, as "the process of making decisions with care, on the basis of what you know, and taking responsibility for choice while seeing the possible legitimacy of other solutions") *and* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14, 17 (1988) (feminist works focus on connection and relationships, rather than on separation and autonomy, as the fundamental difference between (respectively) female and male perspectives).

[17] *See* Jeanne L. Schroeder, *Abduction From the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 195 & n.272 (1991) (describing radical feminists, particularly MacKinnon, as supporting collective action by women because it is an effective political strategy for empowerment).

democracy in the workplace.[18] These goals rested upon the assumption that the union's ability to influence decisionmaking in the workplace would emanate from its power as the employees' majority representative to speak on behalf of its members. The union's power, then, derived from the community of workers, and its strength rested directly on the bonds between community members.[19] Union power was effectuated through protection of the collective right to "engage in concerted activity for mutual aid or protection," a "translation into law of the labor movement concept of 'solidarity.'"[20]

Nevertheless, the Wagner Act is also riddled with patriarchal assumptions about power and its allocation that are fundamentally incompatible with feminist method and theory. The primary goal of the Wagner Act was to create ("restore") a "balance of power" between capital and labor in order to ensure industrial peace.[21] This goal rested on an image of management-labor relations as inherently adversarial, necessarily entailing a struggle for power that could only be resolved when one succeeded in dominating and controlling the other. Because the employer's role as the senior "partner" in the relationship with labor was assumed, labor's role as the junior subordinate "partner" was inevitable.[22] Such a concept of power relations, which I have defined elsewhere as "patriar-

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[18] *See* ATLESON, *supra* note 13, at 41; Willborn, *supra* note 9, at 725.

[19] As Staughton Lynd put it, because union members perceived that "'an injury to one is an injury to all,'" they were willing to place their own jobs in jeopardy to protect another member's rights. Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 1981 INDUS. REL. L.J. 483, 494.

[20] *See* National Labor Relations Act, § 7, 29 U.S.C. § 157 (1988); Lynd, *supra* note 19, at 494.

[21] National Labor Relations Act, § 1, 29 U.S.C. § 151 (1988). Section one provides:

> The inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce . . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by removing certain recognized sources of industrial strife and unrest . . . and by restoring equality of bargaining power between employers and employees.

Id.; *see also* SELIG PERLMAN, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 279 (1923) ("[T]he social order which the typical American trade unionist considers ideal is one in which organized labor and organized capital possess equal bargaining power.").

[22] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981) ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."); *see also* PERLMAN, *supra* note 21, at 279 (noting that the American trade unionist, while desiring an equal voice with the employer in fixing wages and working conditions, did not aspire to the task of "running industry without the employer").

chal,"[23] is inconsistent with a feminist understanding of power. Feminist power is conceived of as a relation between people; it is based in community and is exercised as energy, ability or capacity, rather than through domination and control of another.[24]

The purpose of this article is to expose how these contradictory underlying assumptions about power cause tension between labor law's twin goals of industrial democracy and industrial peace, to show how these assumptions are reflected in the National Labor Relations Act ("NLRA") and its jurisprudence, and to suggest how the NLRA might be altered to become a more significant tool in a feminist agenda challenging the economic, political and social disempowerment of working women. Today, the predominant image of power reflected in the NLRA and perpetuated in labor law jurisprudence is the patriarchal vision of power as domination and control. Such a limited understanding of power affects the way power is exercised as well as who exercises it.[25] Ultimately, it ensures that worker solidarity and power is never truly realized, and that capital retains control.[26]

In this article, I describe the patriarchal vision of power (domination and control) that pervades labor law, examine how it affects labor law jurisprudence, and inquire how the law might differ if the alternative image of power (community-centered), which is also present in the NLRA, assumed preeminence. I argue that a com-

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[23] *See* Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. (forthcoming May 1992) (manuscript at 12–13, on file with the BOSTON COLLEGE LAW REVIEW) (patriarchal definition of power revolves around a hierarchical paradigm in which one dominates and another submits, one controls and another is controlled; because it is founded on a material base and controls the dispersion of the fruits of capitalism in a sexist hierarchy where women occupy the bottom rungs, its exercise ultimately oppresses women). It is not surprising to find a patriarchal understanding of power reflected in law, since the essence of law itself is patriarchal: "The whole structure of law—its hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values—defines it as a fundamentally patriarchal institution." Diane Polan, *Toward A Theory of Law and Patriarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294, 301 (David Kairys ed., 1982); *see also* Janet Rifkin, *Mediation From A Feminist Perspective: Promises and Problems*, *in* 2 LAW & INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 21, 22 (1984) (patriarchal paradigm of law is hierarchy, combat and adversarialism).

[24] Crain, *supra* note 23, at 55–56.

[25] *See* Jane S. Jaquette, *Power As Ideology: A Feminist Analysis*, *in* WOMEN'S VIEWS OF THE POLITICAL WORLD OF MEN 9, 10–11 (Judith W. Steihm ed., 1984).

[26] Our continued reliance on an adversarial paradigm of labor law serves as an effective barrier to transforming the law. *See* William B. Gould IV, *Reflections on Workers' Participation, Influence, and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 383 (1989) ("A major obstacle in reshaping relationships in this country . . . has been our adherence to traditional adversarial attitudes, and the fact that labor law has based its assumptions upon the model of conflict.").

munitarian-based theory of power allocation is more likely to produce worker empowerment, particularly for women workers, than the predominant liberal/republican paradigm of power allocation. Section I describes the patriarchal ideology of power that shapes our adversarial system, and more particularly, the republican system of power allocation reflected in our labor laws and jurisprudence.[27] Section II articulates a feminist theory of power, assesses its compatibility with communitarian theory, and examines its foundations in Wagner Act jurisprudence.[28] Section III analyzes other proposals for labor law reform that call for reconsideration of its adversarial nature, and contrasts those proposals with the feminist/communitarian perspective described in Section II.[29] Section IV sets forth a blueprint for a labor law jurisprudence that would reflect this alternative conception of power and further worker participation and empowerment.[30]

I. Patriarchal Images of Power in Labor Law

The law both articulates and reflects patriarchy: "it is both real and ideal; it both constructs reality and mirrors it; it is both determined and determining."[31] Zillah Eisenstein argues that, because the law controls the dynamics of patriarchy and so helps to maintain the status quo, the law is a proper target for feminists who seek to change patriarchy.[32] With that end in mind, I turn to a deconstruction of the patriarchal images of power that are embedded in the structure of labor law.

A. *The Patriarchal Conception of Power*

Political theorists and sociologists, assuming that conflict of interests and goals is inevitable in a materialistic society possessing scarce resources, have equated power with domination, control and

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[27] *See infra* notes 31–146 and accompanying text.

[28] *See infra* notes 147–222 and accompanying text.

[29] *See infra* notes 223–40 and accompanying text.

[30] *See infra* notes 241–76 and accompanying text.

[31] Zillah R. Eisenstein, Feminism and Sexual Equality: Crisis in Liberal America 97 (1984).

[32] *Id.* Although Eisenstein concedes that challenges to the law are alone insufficient to dethrone patriarchy in society, she argues that struggles within the law are an essential part of the process of challenging patriarchal privilege because changing the law changes patriarchy as it *presently* exists. *Id.* at 100.

coercion.[33] Often conceptualized as "power over" others because of its relative nature, such power usually is dispersed through and exercised within a hierarchical, competitive system.[34] The key to power in a materialistic society is the possession of or access to scarce resources.[35] Ultimately, because power brings increased access to resources, power itself becomes a scarce resource.[36]

Feminist theory posits that an understanding of power as domination, control and coercion is patriarchal because it is materially based and is exercised within a hierarchical paradigm in which one person or group dominates and another submits.[37] This vision of power is predicated on the following assumptions:

> that there exists a fixed quantity of resources that all desire equally, creating an inherent conflict of interest which is exacerbated by existing power differentials; that resources are distributed according to a hierarchical power structure; that one's position in the hierarchy is achieved through competition characterized by overt conflict; that such competition takes the form of dominating those less powerful than oneself; and that the desire to dominate is natural, inevitable, and is sex itself.[38]

The patriarchal definition of power has shaped law generally, particularly its adversarial character.[39] Patriarchal notions about power

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[33] *See* Crain, *supra* note 23, at 17; *see also* NANCY C.M. HARTSOCK, MONEY, SEX AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM 2 (1983) (summarizing Bertrand Russell's view of power as "the ability to compel obedience"); STEVEN LUKES, POWER: A RADICAL VIEW 23–24 (1974) (most insidious exercise of power is to influence and shape people's perceptions so that "they accept their role in the existing order," thus preventing conflict from arising in the first instance); DENNIS H. WRONG, POWER: ITS FORMS, BASES AND USES 23–35 (1979) (power takes one of four distinct forms: force, manipulation, persuasion and authority); Talcott Parsons, *On The Concept of Political Power, in* POLITICAL POWER: A READER IN THEORY AND RESEARCH 251, 256 (Roderick Bell et al. eds., 1969) (power is defined as "the generalized capacity to secure the performance of binding obligations").

[34] *See* STEWART CLEGG, THE THEORY OF POWER AND ORGANIZATION 65–67 (1979) (discussing work of theorists who conclude that power distribution is "zero-sum" and therefore necessarily entails competition and conflict); MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN AND MORALS 506–07 (1985) (noting propriety of the "power over" label).

[35] Crain, *supra* note 23, at 14.

[36] *See* Anthony Giddens, *Power in the Recent Writings of Talcott Parsons*, 2 SOCIOLOGY 257, 264–65 (1968). In more colloquial terms, "the rich get richer."

[37] Such a paradigm is patriarchal even when it exists between and among men. Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation By Sex, in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 206, 232 n.1 (Zillah R. Eisenstein ed., 1979).

[38] Crain, *supra* note 23, at 17.

[39] Labor law provides a particularly clear illustration of the adversarial nature of law. *See infra* notes 120–46 and accompanying text.

also have been instrumental, however, in structuring systems of power allocation and management, otherwise known as political theory. Because an understanding of the political model for labor law is essential to the illumination of the role of power in framing adversarial labor law, I address the political model of labor law first.

B. *The Republican Model of Power Dispersion*

Labor law has been justified and legitimated through an analogy to the larger political democracy. The National Labor Relations Act functions as the constitution in this "mini-democracy," providing the organizational structure and ensuring basic individual rights for workers.[40] Under its auspices and the watchful eye of the National Labor Relations Board ("NLRB"), workers elect unions to represent them in the "legislative process" of collective bargaining.[41] The labor agreement, once negotiated, becomes the industrial code applicable to the particular workplace.[42] Private arbitrators serve as the judiciary to resolve disputes arising under the labor agreement.[43] In short, the NLRA was modeled after a republican system of government, with power dispersed through a representative democracy.[44]

1. Republican Systems of Power Allocation in the Larger Political Context

Republicanism, by which I mean the political theory of power dispersion and management on which our political structure is based, is currently undergoing a "revival" among legal scholars and political theorists.[45] This revival has brought to light new insights

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[40] Willborn, *supra* note 9, at 729.

[41] *Id.* at 728–29.

[42] *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."); J.I. Case Co. v. NLRB, 321 U.S. 332, 334–35 (1944) ("Collective bargaining . . . negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.").

[43] Willborn, *supra* note 9, at 728.

[44] *Id.* at 731.

[45] The theory is so trendy that the *Yale Law Journal* recently devoted an entire issue to a symposium on republicanism and its revival. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). See also the comments following the principal articles, at 97 YALE L.J. 1591–1723. The dialogue has occupied some of the most "provocative and insightful constitutional [and other] scholars." *See* Richard H. Fallon, Jr., *What Is Republicanism, and is it Worth Reviving?*, 102

about the advantages and disadvantages of republicanism for oppressed groups within the citizenry. Republicanism is a philosophical doctrine concerning the distribution of power among the citizenry and in politics. This doctrine is associated with the work of Pocock and Shalhope.[46] There exists no unitary conception of politics that can be described as republican.[47] The underlying assumption of all republican theory, however, is that freedom can be best attained through participation in a community, wherein citizens place the public good above their individual interests.[48] By contrast, liberalism seeks freedom through negative means, and assumes that true freedom inheres only in autonomy, or the right to be let alone.[49]

Scholars have identified two distinct forms of republicanism, classical republicanism and Madisonian republicanism. Classical republicanism focuses on the deliberative process of politics as the means of freedom for a participating citizenry.[50] Decisionmaking under classical republicanism occurs through a process of dialogue

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HARV. L. REV. 1695, 1695 (1989). Most of the scholars who have engaged in this debate have contrasted republicanism (sometimes erroneously confused with communitarianism because of the centrality of the republican value of civic virtue, or the good of the community) with liberalism, and its focus on individual rights. Because individual rights are "conflict notions," they arguably have no place in an intimate or harmonious community; indeed, recognizing individual rights may actually have a deleterious effect on the commitment of individuals to the community. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1986) (feminine jurisprudence might embrace and adapt "communitarian and virtue-based framework of Jeffersonian republicanism"); Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581, 583 (1991) (republican revivalists draw upon "communitarian aspirations for public-spirited citizenship"); *see also* John Tomasi, *Individual Rights and Community Virtues*, 101 ETHICS 521, 521–22 (1991) (articulating the tension between rights and community, but concluding that individual rights are compatible with the virtues of community); *cf.* James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 296 (1990) (emphasizing "political design features" of republicanism rather than its ethical foundations, and therefore contrasting republicanism with interest group pluralism rather than liberalism in the abstract).

[46] *See* Fallon, *supra* note 45, at 1696 n.9 (attribution of theory); *see also* Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1655 (1988) ("result (if not goal) of republican approach is dispersion of power within the political process").

[47] Sunstein, *supra* note 45, at 1547; Ward, *supra* note 45, at 584.

[48] *See* Pope, *supra* note 45, at 296–97. The "allure" of republicanism lies in its hope of a "'constitutive' community." Fallon, *supra* note 45, at 1721 (quoting MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150–51 (1982)). Such a community is one in which there exists "a deep and ongoing political dialogue through which we open ourselves to others, shape and are shaped by others, and experience an enriching and ennobling integration of self and community." *Id.*

[49] Pope, *supra* note 45, at 296.

[50] Sunstein, *supra* note 45, at 1547–48.

in politics conducted by citizens who participate as equals, in pursuit of a common good.[51] "Civic virtue" is a "central organizing feature" of classical republicanism.[52] The assumption is that every citizen is virtuous, or has the potential to be so, and hence will strive toward realization of the common good. Indeed, participation in politics is assumed to be self-actualizing for the citizenry.[53]

Madisonian republicanism, by contrast, envisions participation through the deliberation of virtuous representatives elected by the people, but far enough removed from them to avoid the tyrannies of faction and corruption.[54] Madison eschewed direct citizen participation in the processes of government, believing that national representatives of the populace, "operating above the fray," would possess the virtue necessary to further an "objective" conception of the public good.[55] Representatives were made accountable to the polity through the imposition of political checks, including electoral supervision and other safeguards.[56] Republican revivalists have tended to focus on Madisonian republicanism rather than on classical republicanism.[57]

Cass Sunstein describes four attributes of republicanism that give it a "contemporary appeal." First, republicanism offers an opportunity for deliberation in government. Such deliberation would allow existing desires to be revised according to collective discussion, in light of alternative perspectives and additional information that may arise. Republicanism uses deliberation to arrive at a decision that will best serve the community in general, based on notions of civic virtue.[58] Second, republicanism requires political equality; that is, all individuals and groups must be afforded access to the political process.[59] Third, republicanism seeks universality of norms, or

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[51] Michelman, *supra* note 45, at 1503.

[52] MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 10 (1988) (in its classical form, republican theory mandates participation among virtuous citizens "who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create"); Sunstein, *supra* note 45, at 1548.

[53] *See* Michelman, *supra* note 45, at 1503. Hannah Arendt argues that the Aristotelian pursuit of civic action is good for the soul. *See* HANNAH ARENDT, THE HUMAN CONDITION 7–8, 10, 175–81 (1958); HANNAH ARENDT, ON REVOLUTION 15 (1963).

[54] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38–48 (1985).

[55] *Id.* at 42.

[56] *Id.* at 46–47, 85.

[57] *See, e.g., id.* at 30.

[58] Sunstein, *supra* note 45, at 1549–50.

[59] *Id.* at 1552. For some, but not all, republican theorists, the commitment to political equality also includes a commitment to economic equality. *Id.* at 1552–53.

agreement as a regulative ideal. Rather than suggesting that there exists a common understanding of a unitary public good, Sunstein argues that universality refers to a belief in the process of mediating differing views of the public good through dialogue.[60] The final attribute is the significance of citizenship, specifically the right to participate in the political process, with the purpose of monitoring the behavior of representatives. Small, decentralized republican systems have been considered most likely to be true to the deliberative process.[61] Although Sunstein's vision of the deliberative process is representative, and therefore Madisonian in nature, he advocates direct participation of the citizenry at the local level.[62]

Sunstein notes that a serious shortcoming of republicanism is its historical strategy of exclusion of the non-propertied—women, Blacks and other minorities; he notes that the common good was defined in relation to these practices of exclusion.[63] The assumption that a unitary common good exists ignores the needs and interests of those who, because of their disempowerment, do not participate at any level in defining the public good.[64] Classical republicanism is especially hostile toward women; it "is militaristic, . . . associating political behavior with warfare, and valuing in politics the characteristics prized during times of battle."[65] Moreover, classical republicanism is consistent with the existence of rigid social hierarchies, and emphasizes the role of tradition in according status within them.[66] Finally, it is a highly rationalistic political theory, emphasizing deliberation as a means of transcending the affective side of humanity, and devaluing the private sphere as part of "nature."[67]

Nevertheless, Sunstein defends a form of liberal republicanism with a new twist. He argues that the principles of this liberal republicanism provide the basis for reform that could support a theory of social subordination reinforcing constitutional protections against discrimination.[68] He proposes proportional representation

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[60] *Id.* at 1554–55.

[61] *Id.* at 1555–56.

[62] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 429 (1987).

[63] Sunstein, *supra* note 45, at 1539.

[64] *Id.* at 1540.

[65] *Id.* at 1564.

[66] *Id.* at 1565.

[67] *Id.*

[68] *Id.* at 1580–81. This is apparently an oblique reference to the work of feminist legal scholars, in particular Catharine MacKinnon, who have constructed equality arguments—under the Constitution and title VII—on a theory of social and economic subordination. *See*

in government of disadvantaged groups in order to remedy the problem of access to the deliberative process.[69]

Sunstein's defense of modified republicanism is incomplete, however, particularly on the question of the fate of the rights of oppressed groups under the "new republicanist" tradition. Republicanism's search for a "common good" assumes a moral consensus on values, and ignores the fact that republicanism is by nature hostile to those whose voices threaten disruption of its normative unity. In an incisive critique, Derrick Bell and Preeta Bansal note that the emphasis on reasoned deliberation, with its aura of passionless objectivity, is distinctly male and distinctly white.[70] They point out that the backdrop of "shared values" against which decisions concerning the public good have been made include a belief in the propriety or naturalness of the inferior, subordinate position that Black Americans have occupied relative to whites.[71]

Kathleen Sullivan dubs the Sunstein version of republicanism (shared in its significant respects by Frank Michelman) "rainbow republicanism," to capture the idea that the heterogeneity of the modern populace and its variety of perspectives could be a virtue of republicanism, rather than a vice.[72] Sullivan eschews rainbow

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CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40–41 (1987) (arguing that an equality question is a question of power and its distribution; thus, sex equality issues are raised by the socially situated subordination of women accomplished through women's assignment to low-paying sex-segregated work, the high incidence of sexual violence directed against women, including rape, sexual assault, domestic violence, and sexual harassment, and the continued growth of industries trafficking in female flesh, including prostitution and pornography); *see also* Colker, *supra* note 5, at 1007–16; Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 Fla. L. Rev. 45, 59–61 (1990) (summarizing arguments of feminist anti-subordinationists, notably Catharine MacKinnon, Mary Becker and Ruth Colker, that the social subordination of women by men is the target of the Equal Protection Clause, and substantive equality its goal).

[69] *Id.* at 1588.

[70] *See* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610 & n.4 (1988) (citing feminist critiques by Carol Gilligan, Catharine MacKinnon and Suzanna Sherry).

[71] *Id.* at 1611. This "common good" sanctioned slavery for centuries, and continues to promote racial domination through a consensus ideology that, while promising non-discrimination, reinforces the racial disadvantages of our blatantly racist past. *See id.*; *see also* Ward, *supra* note 45, at 604–05. Ward argues that proportional representation of disadvantaged groups in governmental bodies is incompatible with republicanism. *Id.* She argues that such group representation accepts the notion that the political interests of racial and ethnic minorities are "irreducibly opposed" to those of the white (male) majority, and that only members of those disadvantaged groups can represent the groups' interests in government. *Id.* In contrast, Ward notes that republicanism's goal is "dialogic empathy between equal citizens" working together toward some common good; thus, group representation is "communo-pathic." *Id.*

[72] Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1713–14 (1988).

republicanism because of its focus on immutable differences—sex, race, physical disability, sexual orientation—and its consequent tendency to institutionalize involuntary group cleavages in politics.[73] The historian Linda Kerber points out that the exclusion of oppressed, non-propertied groups was "*essential* to the republican view of the world, not an easily correctable accident."[74] Thus, despite the efforts of republican revivalists to offer up a republican theory shorn of its exclusionary aspects, the relationship between the politics of patriarchy and republican tradition is too complex and too intertwined to be so easily dismissed.[75] As Kerber explains, both patriarchy and the institution of slavery (or racial subordination) reinforce republicanism: "the [male] head of the family represents the family [and its servants and slaves] in its relationship to the state."[76]

Richard Epstein reinforces these critiques in his argument that republican theory, though portrayed by Michelman and Sunstein as procedural, actually assumes certain substantive norms and values.[77] For example, Epstein argues that Sunstein assumes that "correct" deliberation on anti-discrimination legislation will show the value of government regulation.[78] Epstein contends that because serious deliberation might actually yield the opposite result, a possibility that Sunstein ignores, Sunstein's theory is actually substantive, rather than solely procedural. Yet Sunstein makes no explicit defense of his theory's substantive assumptions, that is, that race and gender discrimination are evils that should be addressed through the political process.[79] In other words, Sunstein assumes that a definition of the public good will be conducted by reference to shared social norms that are liberal in character, rather than market-oriented.

In short, exclusion of subordinated groups is itself a shared social norm, although it is rarely acknowledged. The social reality is that subordinated groups do not possess, and have not possessed,

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[73] *Id.* at 1716. Sullivan proposes a philosophy of normative pluralism that would avoid any quest for agreement upon a single common good and would instead emphasize *voluntary* group affiliations, independent of the state, as the relevant centers of value formation and social interaction. *Id.* at 1714.

[74] Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1665 (1988).

[75] *See id.* at 1668.

[76] *Id.*

[77] *See* Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1639–43 (1988).

[78] *Id.* at 1646.

[79] *Id.*

an equal right of access to the community of participation and deliberation.[80] Their exclusion from access begins in patriarchal institutions such as the family, is reinforced by a hierarchically structured workplace featuring white men in positions of power—with women, Blacks and other subordinated groups in servile roles[81]—and is continued by republican political theory reinforcing the isolation of the populace from their representatives (who, of course, are predominantly white males). The federal legislative process, distant as it is from the daily experience of most citizens, is unlikely to alleviate this exclusion.[82] Indeed, Madisonian republicanism has historically emphasized the insulation of representatives from the populace, in order to protect representatives from public pressure and to foster deliberation rather than an "unreflective representation of popular will."[83]

The inherent elitism in republican theory makes republicanism an unlikely vehicle for eliminating the subordination of oppressed groups. As James Pope has argued, the initial Michelman/Sunstein approach of locating republicanism in the judiciary, despite Michelman and Sunstein's personal aversion to elitism, demonstrates how elitism is hopelessly intertwined with republican theory.[84] If our goal is to recast the role of popular participants in decisionmaking for the community, "it seems odd to look for primary guidance from the courts."[85] Reliance on the judiciary as the watchdogs of republicanism impacts most heavily on women, Blacks and other oppressed groups because the judiciary is predominantly comprised of white males.[86]

Subsequent proposals by Michelman and Sunstein to place republican self-government in local communities and other intermediate groups also evidence elitist attitudes, although in more subtle

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[80] *See* Kerber, *supra* note 74, at 1671.

[81] *See* ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION 4–5 (1977) (analogizing corporate structure to stereotypical family patriarchal structure).

[82] Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1604 (1988).

[83] Fitts, *supra* note 46, at 1653.

[84] *See* Pope, *supra* note 45, at 300–01 ("To suggest that judges, who are typically white, male, and rich, can virtually represent the rest of us is to forget the legacy of legal realism, something that I doubt Michelman intends.") (footnote omitted).

[85] Abrams, *supra* note 82, at 1604.

[86] *See* THE FEMINIST MAJORITY, THE FEMINIZATION OF POWER: WOMEN IN THE LAW 3 (1990) (women represent only 7.2% of state court full-time judges (25 states have no woman serving on the state supreme court), 7.4% of the full-time federal judges, 9.5% of the U.S. circuit judges, and 11.1% (1 out of 9) of the United States Supreme Court justices; statistics for African-American women are even lower).

form.[87] For example, the Michelman/Sunstein formulation of republicanism relies upon the judiciary to help ensure that legislators do not "reflexively" follow their constituents' interests.[88] Similarly, Sunstein's description of the process of deliberation reveals his continuing preoccupation with the need for representatives who are more likely to make "intelligent and virtuous decisions for the public good than is the public itself,"[89] a concept of deliberation that is inconsistent with his concern for broad participation in the political process.[90] In short, modern republicanism continues the tradition of an insulated, representative democracy,[91] thus reinforcing the social realities of patriarchy and racial subordination.

2. The Republican Model in Labor Law

The Wagner Act, modeled on the larger political democratic structure, imports a republican model of representative government into the workplace. Although the drafters of the Wagner Act were concerned primarily with establishing a balance of power between individual employees and employers in order to avoid strikes and the consequent interruption of commerce, they were also interested in empowering workers economically and in promoting workplace democracy, which was thought to enhance political democracy.[92]

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[87] *See* Pope, *supra* note 45, at 302 & n.66.

[88] Fitts, *supra* note 46, at 1653.

[89] H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1708 (1988).

[90] *Id.*

[91] *See* Fitts, *supra* note 46, at 1653.

[92] Some commentators have argued that Congress's primary concern in enacting the NLRA was the protection of employee rights, rather than the prevention of industrial strife. *See* Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1759 (1985). The Act's legislative history and historical context, however, make this position "virtually indefensible." Shaun G. Clarke, Note, *Rethinking The Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2033 (1987); *see also* Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint For Worker Empowerment*, 74 MINN. L. REV. 953, 965–66 (1990) (preserving industrial peace and flow of commerce was basis for congressional jurisdiction to legislate in the area and key to political feasibility of its passage).

Whatever can be said about Congress's original intent, the Supreme Court has made it clear that the attainment of industrial peace takes precedence over protecting employee rights or insuring workplace democracy. The Court has consistently resolved the tension between protecting employee rights, and preserving industrial peace and the uninterrupted flow of commerce, in favor of the latter. *See, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981) (no duty to bargain over management decision to partially close business when burden placed on conduct of business outweighs benefit to collective bargaining process); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104–06 (1962) (no-strike clause implied in collective bargaining contract containing arbitration clause to preserve

Like its prototype, republican democracy, the Wagner Act assumed that democracy was best attained through a militaristic, win-lose competition between the interests of the relevant constituencies—here, employers and employees engaged in a struggle for control of the workplace, production and the distribution of profits. With the explicit goal of copying republican, representative democracy, Congress established an adversarial system of rights, rules and processes within which the contest was to be waged, and authorized representatives on each side (managers for the companies, unions for the employees) to conduct the battle. To help even out the economic scales, individual employees were afforded a right to organize against employers "organized in the corporate [form],"[93] and a right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[94]

Collective bargaining was chosen by Congress as the preferred means for resolving conflicts between workers and employers.[95] Collective bargaining is directly analogous to the legislative process in the larger political democracy. Its primary goal is the efficient management of the enterprise, which in turn leads to industrial peace and uninterrupted production. The underlying assumption is that the workplace is hierarchically ordered and that workers, who occupy the bottom rungs on the hierarchy, must be con-

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industrial peace); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 256 (1939) (sitdown strikes unprotected by Act because they interrupt production); NLRB v. Mackay Radio & Tel., 304 U.S. 333, 345–46 (1938) (employer may permanently replace striking employees in order to continue business).

[93] National Labor Relations Act, § 1, 29 U.S.C. § 151 (1988). Section one states:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . . [P]rotection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce . . . by restoring equality of bargaining power between employers and employees.

Id.

[94] National Labor Relations Act, § 7, 29 U.S.C. § 157 (1988). As one writer summarized the Act's approach:

> The essential idea embodied in the [Wagner] Act is that worker representation involves *balancing* the power of management by building a parallel organization of workers. One behemoth, according to this logic, can best be controlled by another one. The concept requires the drawing of a series of lines to establish the field of battle: one defining workers as opposed to management, another defining the issues about which they must bargain, and a third marking legitimate tactics in the contest.

HECKSCHER, *supra* note 8, at 7.

[95] *See* National Labor Relations Act, § 1, 29 U.S.C. § 151 (1988).

trolled.[96] The concept is made more palatable through the use of democratic rhetoric: the workplace is a place that must be "governed," and the workers may "choose" their "representative" in the legislative process.[97]

Scholars associated with the Critical Legal Studies movement have argued persuasively that collective bargaining law "aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace," and that it has "evolved an institutional architecture . . . that reinforces this hierarchy and domination."[98] Accordingly, labor law "promises a modicum of democratic participation to encourage worker acceptance of," and consent to, the hierarchical and authoritarian character of the workplace.[99] "Liberal labor theory," as Karl Klare has dubbed the legislative analogy and the assumptions supporting it, thus utilizes collective bargaining law as a means of coopting the labor movement into a "junior partnership" role with management.[100]

Perhaps most strikingly reminiscent of republican tradition, the Wagner Act sought to ensure an autonomous representative for employees—the labor union—exclusively through which employees would advance their interests.[101] Congress defined who was covered by the NLRA (and so who might organize);[102] regulated when,

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[96] Some scholars have assumed that authoritarian structure and hierarchy in the workplace are "inevitable," because such a structure emanates from the very "nature of the modern industrial enterprise." David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 721 (1973).

[97] *See id.* at 726, 742; Klare, *Labor Law as Ideology*, *supra* note 13, at 460.

[98] *See* Klare, *Labor Law as Ideology*, *supra* note 13, at 452.

[99] *Id.* at 459–60 (1981) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 582 (1960)).

[100] *See id.* at 455 n.17; *see also* ATLESON, *supra* note 13, at 8.

[101] *See* National Labor Relations Act, § 7, 29 U.S.C. § 157 (1988) ("Employees shall have the right to . . . bargain collectively through representatives of their own choosing . . . .").

[102] The Taft-Hartley Act of 1947 effectuated management's need for faithful agents to represent it by excluding supervisors from the definition of "employee" in the Act. *See id.* § 2(3), 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor."). The Supreme Court, reasoning that because managerial employees were higher in the authority structure than supervisors, has held that managerial employees and confidential employees with a "labor relations nexus" were also representatives of the employer rather than "employees" covered by the Act. *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 187–88 (1981) (confidential employees assisting or acting in a confidential relation to persons exercising managerial functions in the field of labor relations); NLRB v. Bell Aerospace Co., 416 U.S. 267, 283–84 (1974) (managerial employees). *See generally* Crain, *supra* note 92 (arguing that attempt to draw the line between covered employees and excluded supervisors, managers and confidential employees stratifies the laboring class and undermines labor solidarity).

where, and by whom organizing might be accomplished;[103] and established an election system to determine whether a particular union represented a majority of the employees.[104] Finally, Congress enacted section 8(a)(2), which ensured that unions were free from employer domination or assistance, and section 9(a), which afforded unions exclusivity in representing employees on issues of wages, hours, and terms and conditions of employment.[105] Both sections advanced the notion, typical of republicanism's aspirations of achieving the public good, that the good of the group takes precedence over the good of individuals.[106]

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[103] *See, e.g.*, Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 848 (1992) (rejecting Board's *Jean Country* balancing test and reaffirming and narrowing *Babcock & Wilcox* rule: no balancing of employees' Section 7 rights against the employer's property rights is appropriate unless non-employee union organizers lack reasonable access to employees outside the employer's property; such access is absent only where the location of the plant and the living quarters of the employees place them beyond the union's reach, and not where access is merely cumbersome or difficult, as in a large metropolitan area); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (non-employee organizers may not trespass on employer's property in order to communicate information about the union to employees unless there exists no other means of access); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8, 803 (1945) (upholding NLRB determination that employees may organize before and after working hours, during rest periods and lunch breaks, but not during "working time").

[104] Section 9 of the Act establishes the electoral procedure for selection of the union authorized to represent the employees. *See* 29 U.S.C. § 159(a) (1988) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .").

[105] *Id.* §§ 158(a)(2), 159(a).

[106] *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (invalidating individual contracts of employees with employer where they served as limits on rights of the employees under the collective bargaining agreement). The *J.I. Case* Court stated that "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *Id.* The strength of this principle has been reinforced in the duty of fair representation cases, where the courts have consistently held that, although the union does owe a duty of fair representation to its individual members, the union's primary duty is to serve the good of the membership in general, rather than the individual. *See* Vaca v. Sipes, 386 U.S. 171, 190, 195 (1967) (breach of union's duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"; thus, individual employee has no absolute right to have his grievance taken to arbitration); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944) (if union is to enjoy the cloak of exclusivity conferred by section 9(a), it owes a correlative duty to represent all employees within the bargaining unit "without hostile discrimination, fairly, impartially and in good faith").

This principle is referred to by students in my labor law classes as the "Spock" rule, in reference to a statement made by Spock during one of the *Star Trek* movies, as he sacrificed his own life (temporarily, as sequels later disclosed) to save the crew of the starship Enterprise. Spock justified his own demise with the declaration that "the good of the many outweighs the good of the few . . . or the one." STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982).

Once the union is authorized to serve as the employees' exclusive representative, the Wagner Act imposed an obligation to bargain in "good faith" over "wages, hours, and other terms and conditions of employment,"[107] and otherwise left the parties to the "'free play of contending economic forces'" in negotiating a labor contract.[108] Nevertheless, the NLRA undertakes to regulate the use of economic weapons by both parties by affording protection to some employee activities (the primary strike),[109] leaving others unprotected (the sitdown strike,[110] wildcat strikes,[111] and the slowdown),[112] and prohibiting certain others (secondary boycotts,[113] organizational or recognitional picketing,[114] and hot cargo

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[107] National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (1988).

[108] *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 n.4 (1976) (quoting Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469, 478 (1972)). The Court also quoted with approval the following remarks by Archibald Cox regarding the congressional intent behind the NLRA:

> An appreciation of the true character of the national labor policy expressed in the NLRA [National Labor Relations Act] and the LMRA [Labor Management Relations Act] indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.

Id. at 140 n.4 (quoting Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972)).

[109] *See* National Labor Relations Act, § 7, 29 U.S.C. § 157 (1988) ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."); *see also id.* § 13, 29 U.S.C. § 163 ("Nothing in this Act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike . . . .").

[110] *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 254–55 (1939) (illegal sitdown strike by trespassing employees in response to employer unfair labor practices removes the right to reinstatement that employees would otherwise possess).

[111] Wildcat strikes—strikes that are unauthorized by the union, although otherwise lawful—are characterized as unprotected activity in some circuits, either because they derogate from the union's status as exclusive representative, or because they undermine the institutionalized collective bargaining structure. *See, e.g.*, NLRB v. Shop-Rite Foods, 430 F.2d 786, 791 (5th Cir. 1970) (stating that an unauthorized walkout to protest an employee's discharge "could only undermine the goals of democracy in the union and effective labor adjustment through the bargaining process"). *See generally* ATLESON, *supra* note 13, at 77–81; Gould, *The Status of Unauthorized and Wildcat Strikes Under the NLRA*, 52 CORNELL L.Q. 672 (1967).

[112] *See* Elk Lumber Co., 91 N.L.R.B. 333 (1950) (slowdown in work production not protected concerted activity). *But see* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960) (slowdowns, while unprotected, do not constitute bad faith bargaining; nevertheless, employer can sanction employees by discharging them).

[113] *See* National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988).

[114] *See id.* § 8(b)(7), 29 U.S.C. § 158(b)(7).

agreements).[115] Similarly, although the NLRA explicitly forbids employers from utilizing certain economic weapons (discriminatory or retaliatory discharges),[116] the Supreme Court has protected certain employer activities designed to maintain production in the face of employee unrest. These activities include the right to permanently replace economic strikers,[117] the right to close a business completely without liability for discrimination,[118] and the right to purchase a business without assuming its labor contract.[119]

In short, Congress's initial assumption, that employees and employers possess a fundamental conflict of interest in how the workplace is to be run and how the profits of the enterprise are to be distributed, dictated an adversarial approach to the process of allocating power between employees, the union and the employer. Judges attempting to interpret the labor laws have necessarily focused on creating rules and drawing lines to enhance the fairness of the adversarial game; hence, the insistence upon drawing a line between employer and employee, between when and where union organizing may and may not take place, between when employer anti-union campaigns may and may not be conducted, between mandatory and permissive subjects of bargaining under the NLRA, between good faith and bad faith bargaining, and between what is and what is not protected economic activity.

C. *The Adversarial Model of Power Allocation Under Labor Law*

The Department of Labor has described the framework of United States labor law as "tending to produce collective bargaining relationships that are legalistic, rule-driven, and confrontational."[120]

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[115] *See id.* § 8(e), 29 U.S.C. § 158(e).

[116] *See id.* §§ 8(a)(3), 8(a)(4), 29 U.S.C. §§ 158(a)(3), 158(a)(4).

[117] *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938) (despite the explicit protection afforded the right to strike in the Act, an employer does not lose "the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.").

[118] *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (decisions to end a business are "so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3)").

[119] *See* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 288 (1972) (Court refused to "saddle" new employer with terms and conditions of employment contained in its predecessor's labor contract because to do so might discourage the transfer of capital).

[120] BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: FINAL REPORT 141 (1989).

At the heart of the labor laws is a belief that the interests of labor and capital are necessarily adverse, and that labor and capital are therefore adversaries. The assumption that the employer and the employees have antithetical interests is reflected in three basic tenets of the NLRA: first, the division of workers into two categories, "employees," who are represented by the union, and "supervisors" or "managers," who represent the employer; second, the definition of a labor organization by reference to its dealings with the adverse party, the employer, and an accompanying proscription against employer domination or support of labor organizations; and third, the principle of exclusive representation of employees by the labor organization.

1. The Definition of "Employees" Covered Under the NLRA

Under the NLRA, collective bargaining is carried out between two independent players with inevitably conflicting interests: the employer, represented by supervisory and managerial personnel, and the union, representing the other employees. In the adversarial model of the NLRA, the centrality of separation of the competitors is clear; strict separation between the parties to collective bargaining must be maintained for bargaining to be fair.[121]

The separation between employees and employers is maintained at the individual level through the definition of "employee" in section 2(3) of the NLRA, which excludes supervisors from the definition of "employee."[122] The rationale for the exclusion of supervisors is the employer's need for front-line representatives in its dealings with employees; it was considered vital that supervisors' loyalties not be divided between the employer and the union.[123] The

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[121] The NLRA's adversarial model and the separation of parties that it requires has received a great deal of criticism from scholars. *See, e.g.*, Michael C. Harper, *Reconciling Collective Bargaining With Employee Supervision of Management*, 137 U. PA. L. REV. 1, 7–9 (1988); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 513–16 (1986); Clarke, *supra* note 92, at 2022 & n.7; Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1673–80 (1983) [hereinafter *Collective Bargaining as an Industrial System*]. *See generally* Robert A. McCormick, *Union Representatives As Corporate Directors: The Challenge to the Adversarial Model of Labor Relations*, 15 U. MICH. J.L. REF. 219 (1982) (discussing limitations the adversarial model imposes on union influence on business decisions, and considering implications for employees of affording labor a broader role in corporate governance).

[122] Section 2(3) of the NLRA provides: "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1988). The term "supervisor" is defined in § 2(11), 29 U.S.C. § 152(11).

[123] *See* Crain, *supra* note 92, at 972–73.

exclusion was later expanded to include employees acting in managerial or confidential capacities.[124] As I have argued previously, this division of the work force siphons off some of the most educated and most powerful members of the work force, factionalizing the work force and hampering effective collective resistance to employer power.[125]

2. The Definition of a Labor Organization by Reference to Its Dealings with the Opposition and to the Proscription Against Employer Domination or Support

The exclusion of supervisory and managerial employees from the union ranks is balanced by section 8(a)(2) of the NLRA, which makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[126] Section 8(a)(2) was designed to eradicate the "company union," a company-controlled organization instituted by employers to pacify employees and thereby stave off union organizing efforts, especially those conducted on a multi-shop scale.[127]

Since section 8(a)(2) applies only to employer domination, interference or assistance with a "labor organization," a threshold

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[124] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 187–90 (1981) (confidential employees who assist or act in a confidential relation to persons exercising managerial functions in the field of labor relations are excluded from NLRA coverage); NLRB v. Bell Aerospace Co., 416 U.S. 267, 283–84 (1974) (managerial employees implicitly excluded from coverage under NLRA because they are higher than supervisors in the authority structure of the workplace).

[125] Crain, *supra* note 92, at 1006 (labor laws ensure that the most powerful employees are alienated and isolated from the laboring class). The ideology of individualism reflected in the Taft-Hartley Amendments to the NLRA is perhaps the Act's most harmful legacy for American workers. *See id.* at 1008, 1013 & n.346 (nonunionized middle-level employees vulnerable to discharge are victims of their own individualistic philosophy); *see also* Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 8–9, 144 (arguing that the Taft-Hartley Amendments codified and furthered the weakness of American unions because they fragmented organized labor by imposing limits on coordinated bargaining strategies, and encouraging the pursuit of particularistic bargaining strategies; Rogers dubs this approach the "divide and conquer" strategy).

[126] National Labor Relations Act, § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988).

[127] *See* 78 CONG. REC. 3443 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15–16 (1949) (statement of Senator Wagner). Senator Wagner was especially concerned with the possibility that company unions would limit employee collective action to a single shop, operating to deprive workers of the "wider cooperation [across employer units] which is necessary . . . to stabilize and standardize wage levels . . . ." *Id.*

issue is the status of an entity as a labor organization. The term "labor organization" is identified by reference to a group's dealings with the employer. Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[128]

In recent years, many employers have initiated "participatory management" schemes in an effort to forestall worker dissatisfaction and to increase productivity. These organizations take various forms, each tailored to the employer's primary goal in implementing it. The three most popular are Quality Control Circles, which are organized on a department level and focus on increasing production and improving product quality; Quality-of-Work-Life programs, which give employees a limited hand in shaping their immediate work environments, and which typically originate as an effort to generate loyalty and stem dissatisfaction; and Board of Director Participation programs, which place a worker representative on a company's board of directors, usually with the goal of obtaining concessions from labor by nominally involving it in the strategic corporate planning process.[129]

The courts, torn between striving to prevent the resuscitation of the company union by another name and the desire to encourage efforts at cooperation between parties that have historically been hostile, have carefully scrutinized these organizations to determine whether they qualify as "labor organizations" under the NLRA. They have developed three methods of determining status as a labor organization under section 2(5): looking to the form it assumes, the subject matter it deals with, or the function it serves.[130] To be classified as a labor organization, an entity may assume virtually any structure, must deal with the employer over "conditions of work" (broadly construed), and must exist to represent its member-employees.[131]

The circuit courts are split in applying the standard. The Seventh and Second Circuit courts construe the term labor organization

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[128] National Labor Relations Act, § 2(5), 29 U.S.C. § 152(5) (1988).

[129] *See* Andrew A. Lipsky, Comment, *Participatory Management Schemes, The Law, and Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667, 673–75 (1990).

[130] *Id.* at 688–89.

[131] *Id.* at 689–90.

very broadly, finding labor organization status even in the absence of formal structure, constitution or bylaws, officers, dues requirements or continuing existence.[132] This broad construction of section 2(5) operates to disestablish many participative management schemes because they involve employer domination or assistance that violates section 8(a)(2) of the NLRA. By contrast, the Sixth Circuit Court of Appeals has imposed a more restrictive definition of a labor organization, resulting in the conclusion that many employee committees are not section 2(5) labor organizations, but merely part of an "enlightened personnel policy"; hence, they do not violate section 8(a)(2).[133]

The legislative history of section 8(a)(2) indicates that Congress intended to promote communication between management and labor.[134] Nevertheless, it is clear that Congress also intended to limit the realm in which permissible cooperation between capital and labor might occur.[135] Cooperation was to be accomplished by good faith bargaining between two independent entities—employer and union—over terms and conditions of employment.[136] The courts have struggled with application of the section 8(a)(2) "domination or support" test where employers have sought to cooperate directly with employees in cooperative management programs that fit within the definition of a labor organization under section 2(5) of the Act.

In *Newport News Shipbuilding & Drydock Co.*, the Supreme Court originally interpreted section 8(a)(2) very strictly, mandating the disestablishment of employer-assisted representation plans regardless of the employees' satisfaction with the plan and the employer's

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[132] *See* NLRB v. Ampex Corp., 442 F.2d 82, 84 (7th Cir. 1971) (informal, randomly chosen "communications committee" that employer claimed acted as glorified suggestion box, was deemed to be a labor organization); Pacemaker Corp. v. NLRB, 260 F.2d 880, 883 (7th Cir. 1958) (lack of officers does not prevent finding of section 2(5) status); NLRB v. Stow Mfg. Co., 217 F.2d 900, 903–04 (2d Cir. 1954) (informal monthly meeting sufficient to indicate section 2(5) labor organization), *cert. denied*, 348 U.S. 964 (1955); NLRB v. Indiana Metal Prods. Corp., 202 F.2d 613, 620–21 (7th Cir. 1953) (lack of constitution or bylaws does not preclude finding of section 2(5) labor organization status); NLRB v. American Furnace Co., 158 F.2d 376, 378 (7th Cir. 1946) (finding labor organization status despite lack of continuity); Wyman-Gordon Co. v. NLRB, 153 F.2d 480, 482 (7th Cir. 1946) (finding labor organization status despite absence of dues).

[133] *See* NLRB v. Streamway Div. of Scott & Fetzer, 691 F.2d 288, 295 (6th Cir. 1982).

[134] *See* Lipsky, *supra* note 129, at 697–98 (congressional committee eliminated proposed terms "initiate" and "influence" in drafting section 8(a)(2), which demonstrates that Congress intended to permit communication and to promote cooperaton accomplished through collective bargaining).

[135] *Id.*

[136] *See* National Labor Relations Act §§ 8(a)(2), 8(d), 9(a), 29 U.S.C. §§ 158(a)(2), 158(d), 159(a) (1988); Lipsky, *supra* note 129, at 696–97.

motives in establishing it.[137] Subsequently, however, the circuit courts have again split on the question of how to treat employer-initiated employee participation plans. The First, Sixth, Seventh and Ninth Circuits, reasoning that courts should encourage cooperative labor-management relations, have refined the Supreme Court's test. These courts have upheld participatory plans where there is no evidence of anti-union animus on the employer's part, and no employee dissatisfaction with the plan.[138] A few circuits have followed a more traditional approach, striking down such employee participation plans in the absence of clear anti-union animus or employee dissatisfaction with the employee committee.[139]

Section 2(5) and 8(a)(2) are instrumental in shaping the structure and culture of organized labor along oppositional lines. By defining labor unions as "other," and by setting them up in opposition to organized capital, the law ensures that labor unions will

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[137] 308 U.S. 241, 251 (1939).

[138] *See* NLRB v. Northeastern Univ., 601 F.2d 1208, 1214 (1st Cir. 1979) (changing conditions in labor-management relations suggest need to allow alternatives to traditional adversary model); Hertzka & Knowles v. NLRB, 503 F.2d 625, 631 (9th Cir. 1974) (condemnation of cooperative model reflecting employees' free choice would condone adversarial model of labor relations); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967) (assistance from employer not necessarily tantamount to support or domination); Chicago Rawhide Mfg. v. NLRB, 221 F.2d 165, 167–68 (7th Cir. 1955) (cooperation between labor and management is primary goal of NLRA).

[139] *See, e.g.*, Irving Air Chute Co. v. NLRB, 350 F.2d 176, 180–81 (2d Cir. 1965) (finding 8(a)(2) violation where there was employer support, but no domination). The question of how to interpret sections 2(5) and 8(a)(2) is currently before the Board in the Electromation, Inc. case, N.L.R.B. No. 25–CA–19818. In that case, an administrative law judge ruled that "employee action committees" formed by the employer in response to employee discontent, for the purpose of providing input on mandatory bargaining subjects (overtime, tardiness, wages, bonuses, attendance, bereavement leave, sick leave and incentive pay), were labor organizations within the meaning of section 2(5) of the Act. *See* Charles J. Morris, *National Labor Policy: Worker Participation and the Role of the NLRB*, Daily Lab. Rep. (BNA) No. 43, at E–1, E–2 (Mar. 4, 1992) (containing text of speech presented February 6, 1992, at the 1992 Southern California Labor and Employment Law Symposium, Los Angeles, California). The administrative law judge also concluded that the employer had violated section 8(a)(2), reasoning that the employer had unlawfully dominated and supported the action committees by initiating them; choosing the employee representatives who would sit on them; determining the subject matter to be discussed; determining size and composition of the committees; paying employees for attendance at committee meetings; holding all meetings on company premises and providing company support services; and continuing to encourage the joint-committee process during and after the union organization and election process. *Id.* at E–3. As Morris points out, *Electromation* should be an "easy case" because it does not involve the sort of worker participation entailed in work teams, quality circles or groups concerned with the manner of job performance. *Id.* at E–1. Morris predicts that the Board "will have no choice but to uphold the administrative law judge's determination," despite an aggressive campaign by the organized management community to influence the Board to reverse the administrative law judge's decision. *Id.* at E–1, E–3.

strive to conform to the structure and function of capital. Otherwise, unions would risk becoming marginalized. In effect, the law establishes an organizational norm—that of a bureaucratic, militaristic organization where power is centralized—to which unions must adhere if they desire to compete with capital on the legal playing field. Sociological studies show that unions have done exactly that.[140] Because unions' source of power has historically been the sense of solidarity and community inspired by working together toward a common, positive end (producton of goods or the provision of services), power has been expressed in a decentralized, spontaneous form. The shift to reliance on centralized decisionmaking and to the exercise of power in a militaristic fashion has altered the character of the modern union, straitjacketing unions into corporate bureaucratic styles and, ultimately, disempowering them.[141]

3. Exclusive Representation of Employees by the Union

Section 9(a) of the NLRA completes the foundation of the adversarial model; it guarantees that only bargaining units approved by the NLRB may bargain with employers on behalf of employees over "rates of pay, wages, hours of employment, or other conditions of employment."[142] Under the so-called "exclusivity doctrine" established by section 9(a), a duly certified union is the sole representative with which the employer may deal concerning mandatory subjects of bargaining.[143] Its corollary, the duty of fair representation owed by the union to its members individually and collectively, is designed to deter discrimination against minority interests within the union.[144]

Section 9(a) thus affords unions monopolistic status as the voice of employees. Operating against the backdrop of an exclusionary and discriminatory union structure,[145] section 9(a) ensures that the

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[140] Crain, *supra* note 23, at 24–28 (parallelism in organizational philosophy, structure and tactics of oppositional groups within a common legal environment is predictable; organizations will tend to model themselves after more legitimate, successful oppositional organizations, particularly where one organization is dependent on another).

[141] *See id.* at 28–31.

[142] National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1988).

[143] Lipsky, *supra* note 129, at 702–08.

[144] *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967) ("[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any . . . .").

[145] There can be no doubt that modern union structure continues a tradition of discrimination against women and minorities, systematically excluding them from representation and power. *See* DAN LA BOTZ, RANK AND FILE REBELLION 79 (1990) (describing sweetheart

most oppressed workers—typically women and minorities—will have no voice at all in the workplace.

These three fundamental principles, embodied in four sections of the Act—section 2(3), defining individuals as employees or representatives of the employer; section 2(5), defining a labor organization and the subject matter over which it is to deal; section 8(a)(2), prohibiting employer domination and interference with labor unions; and section 9(a), conferring exclusive representative status on NLRB-certified labor unions—collectively represent Congress's conclusion that channeling conflict into collective bargaining is the surest route to industrial peace.[146] These provisions reflect underlying assumptions that the interests of employees and employers are necessarily in conflict, that confrontation over the division of scarce resources is inevitable, and that such conflicts are best resolved exclusively through participation in an adversarial process of decisionmaking. In my view, these assumptions are all based upon a patriarchal understanding of power.

II. A Feminist Theory of Power and Its Allocation

The labor laws, as well as the history of labor unionism, help to institutionalize what one commentator has dubbed the "adversarial culture in American labor-management relations."[147] As I discuss in this section, American labor law essentially translated the early communitarianism of the labor movement into two separate and opposing communities—a community of workers and a community of managers—and sanctified them by law. Because theories of community are implicitly theories of power,[148] I turn first to an examination of an alternative theory of power that would support a more liberating restructuring of workplace communities.

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deals in Teamsters Union contract negotiations in which the rights of women and racial minorities were compromised in return for benefits to white male majority members); Crain, *supra* note 5, at 1168–69, 1183–84 (gender stereotypes held by union members are reflected in a paucity of women in the ranks of union officers and organizers, as well as in the failure to close the wage gap between the sexes in collective bargaining).

[146] *See Collective Bargaining as an Industrial System*, *supra* note 121, at 1678.

[147] Clarke, *supra* note 92, at 2042. Indeed, the adversarial stance taken by unions operating under the labor laws has led some commentators to conclude that American unions and unionism are fundamentally incompatible with cooperative approaches designed to enhance productivity and insure industrial peace. *See, e.g.*, *id.* at 2039–49 (advocating repeal of section 8(a)(2) to facilitate labor-management cooperation).

[148] *See* Hartsock, *supra* note 33, at 3.

A. *A Feminist Theory of Power*

Feminists who have undertaken a reevaluation of the concept of power have uniformly rejected understandings of power that focus on domination and control.[149] Instead, feminists have defined power as referring to energy, ability, capacity and freedom.[150] This vision of power, often referred to in the sociological and political literature as "power to," as distinguished from "power over,"[151] is uniquely feminine because it is a product of women's experience of power through motherhood. As mothers, women create life and nurture children; consequently, women develop a form of female power that is creative, beneficent and generative.[152] I refer to this understanding of power as feminist because its focus is on empowerment, whether achieved through the direct production of ideas or art, through stimulating productive effort in others, or through heightening vitality.[153]

In contrast to patriarchal forms of power, which are grounded upon material resources, feminist power is a capacity or relation between people, and thus draws its legitimacy from the existence of a community.[154] Power in the community emanates horizontally and is distributed in a web-like pattern; those who exercise power are positioned at the center of the group, where they act to mobilize others.[155] Such a structure exists in marked contrast to patriarchal distributions of power, which are typically envisioned as hierarchical, with the power-wielders positioned at the top of a pyramidal structure.[156]

Finally, feminist power is realized by acting collectively through communities to accomplish change. Feminine leadership is empowering and participatory in nature.[157] Grassroots feminist mobilization has followed this pattern of collective empowerment, empow-

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[149] *Id.* at 225–26.

[150] *See, e.g.*, JEAN B. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN 116 (2d ed. 1986) (power may be defined as "the capacity to implement," or the ability to influence others without controlling, limiting or destroying them).

[151] *See* FRENCH, *supra* note 34, at 505.

[152] *See* ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 73 (1976); HAUNANI-KAY TRASK, EROS AND POWER: THE PROMISE OF FEMINIST THEORY 149 (1986).

[153] *See* Crain, *supra* note 23, at 55–56.

[154] HANNAH ARENDT, ON VIOLENCE 44, 52 (1969).

[155] Crain, *supra* note 23, at 66–71 (describing empirical evidence of existence of distinctly feminine style of exercising power).

[156] FRENCH, *supra* note 34, at 299–300; Crain, *supra* note 23, at 18.

[157] Crain, *supra* note 23, at 68.

ering individual women through group consciousness-raising that examines women's position within their families, within their social units, and ultimately, within the larger political context.[158] The development of a bond between women based upon common membership in a marginalized and oppressed group has helped to prevent the replication of patriarchal concepts and practices of power. Women's awareness of the reality of interdependence and women's experience with caring and nurturing tends to result in an assumption of responsibility for others, rather than an urge to dominate them.[159]

B. *The Communitarian Model of Power Dispersion*

Feminist power, with its emphasis on community, connection and cooperation, is most consistent with communitarianism, a theory of power allocation that favors similar values.[160] Some scholars have characterized the cultural feminist work of Gilligan as itself embodying an articulation of a communitarian philosophy because it privileges values of connection and caring, and thus contains an implicit critique of individualism.[161]

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[158] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83–90 (1989) (describing process of consciousness-raising through which contemporary feminist analysis of women's social condition has been shaped and shared).

[159] *See* GILLIGAN, *supra* note 16, at 30. Of course, this has not been universally true. For example, the white, middle and upper class women's "equal opportunity" movement has historically excluded women of color and working class women. *See supra* note 5 and accompanying text. In the process, it has often replicated the patriarchal practice of power by privileging some women (white, middle and upper class women) at the expense of others (women of color and working class women) who occupy lower status positions in the social hierarchy. *See* Crain, *supra* note 23, at 77.

[160] A number of writers have noted the similarity between cultural feminist values (such as those articulated by Carol Gilligan and her disciples) and communitarian values. *See, e.g.*, Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 ETHICS 275, 275–77 (1989) (anti-individualist developments in feminist thought are strikingly similar to those in new communitarianism); Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775, 783 (1990) (much feminist jurisprudence is communitarian, emphasizing ideals of cooperation and connection instead of competition and autonomy); Joan C. Williams, *Feminism's Search for the Feminine: Essentialism, Utopianism, and Community*, 75 CORNELL L. REV. 700, 708–09 (1990) (feminism, like communitarianism, struggles to resolve tension between value of connection and tendency toward essentialism and devaluation of diversity); *see also* Alex M. Johnson, *The New Voice of Color*, 100 YALE L.J. 2007, 2054 n.198 (1991) (arguing that critical race theory, like the "difference" strand of feminist theory, is communitarian).

[161] *See* Stephen L. Pepper, *Autonomy, Community and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 941–42 (1990) (Gilligan's message resonates with and reinforces the message of communitarians that connection and relation are as important as freedom and independence).

Communitarians perceive the self as a being shaped and defined by its attachments, including its social relationships, family and community ties, and its historical context.[162] The self is contextual, and the individual "is viewed as part of the community, simultaneously shaping the community to which [s]he belongs and being shaped by it" through a continuing dialogue.[163]

The "new communitarianism" that has spawned such popular books as *Habits of the Heart: Individualism and Commitment in American Life*[164] has evolved largely as a critique of possessive individualism. The essence of communitarianism is described as "a *deemphasizing* of *individualism* and *individual rights*—which are so important for the liberal view of self—and privileging of the individual's role in the community so as to realize the attainment of right actions that lead to good consequences within the larger community."[165] Communitarians acknowledge the inherent potential for tension between the larger good and self-interest, and suggest that our contemporary understanding of love is predicated on an individualism so deeply ingrained that it shapes the very meaning of love, creating conflict where there may be none.[166] They posit a form of individualism that is fulfilled in community rather than against it.[167]

Some feminists have criticized communitarian theory because its historical focus on traditional communities, particularly the family, condones traditional communal norms of gender subordination.[168] Nevertheless, communitarian theory retains sufficient appeal to justify efforts at re-conceptualizing it within the context of chosen, voluntary communities, rather than limiting it to the traditional communities of family, neighborhood, school and church.[169] Marilyn Friedman goes further, displaying a willingness to demarcate pro-active[170] communities by reference to immutable

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[162] *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179–81 (1982); Friedman, *supra* note 160, at 275–76; Alexander, *supra* note 16, at 23; *see also* ALASDAIR MACINTYRE, AFTER VIRTUE 6–21 (1981); Amy Gutman, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 310 (1985).

[163] Johnson, *supra* note 160, at 2056.

[164] ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

[165] Johnson, *supra* note 160, at 2055.

[166] *See* BELLAH ET AL., *supra* note 164, at 108.

[167] *Id.* at 162.

[168] *See* Friedman, *supra* note 160, at 280–81.

[169] *Id.* at 287–88. Kathleen Sullivan has expressed similar ideas in the context of republican theory. *See* Sullivan, *supra* note 72, at 1714.

[170] By "pro-active" I refer to chosen, voluntary communities; but it means more than

traits such as sex and race. To this end, Friedman defines a "community of choice" as "a community of people who share a common oppression."[171]

Indeed, gender subordination norms have been so central to communitarianism that the characteristics that distinguish it from republicanism, which shares a similar exclusionary history, are often overlooked.[172] Suzanna Sherry has argued that a feminine perspective is most consistent with a classical republican (Jeffersonian) system of power allocation, in contrast to a masculine perspective, which parallels pluralist liberal theory.[173] Sherry uses the terms "republicanism" and "communitarianism" interchangeably, ignoring fundamental differences between the two traditions.[174] In com-

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that here—it connotes the formation of groups initiated by their members for the purpose of ending oppression.

[171] Friedman, *supra* note 160, at 289–90. Sullivan disagrees with such an approach in republican theory because it tends to institutionalize involuntary group cleavages in politics. *See supra* note 72 and accompanying text.

[172] *See supra* text accompanying note 63.

[173] *See, e.g.*, Sherry, *supra* note 45, at 543. Sherry is careful to distinguish a "feminine" perspective from a "feminist" perspective. In her view, the former refers to the theory of women's moral and psychological development articulated by Carol Gilligan, Nel Noddings and Jean Baker Miller. *See id.* at 580 n.168. The latter, exemplified by the work of Zillah Eisenstein, Jean Bethke Elshtain, Catharine MacKinnon and Diane Polan, is associated with a political agenda. *See id.* at 583 & n.172.

[174] *See id.* at 592, 601, 604. Sherry is not alone. See also Johnson, *supra* note 160, at 2011, who uses the two terms together as synonyms ("communitarian/republican"). Johnson acknowledges that a "semantic distinction" can be drawn between communitarianism as a political philosophical theory of the individual's role within a community, and republicanism as a vision of participatory government that is grounded in communitarianism. *Id.* at 2054 n.195.

Sherry describes the republican value of community and argues that republicanism is group-focused, exalting the "good of the whole over the good of its individual members." Sherry, *supra* note 45, at 551. The anti-pluralist nature of republicanism follows inevitably from its anti-individualism; an important object of republican government is to structure a shared, common value system for the community. *Id.* at 555. Thus, a republican system of government has as its primary purpose the definition and prioritization of community values and the creation, through education of the citizenry, of the public and private virtue necessary to achieve those values. *Id.* at 551–52.

Although citizens in the republic have a right to participate in defining the public good, their means of participation is not so clear. *See id.* at 555. Because Sherry favors the concept of direct popular representation that is central to classical republican theory, she eschews the "elitist, anti-egalitarian" features of Madisonian republicanism. *Id.* at 552 n.26. Nevertheless, she acknowledges the value of "wisdom and judgment" in government, and thus necessarily accepts along with it the elitist assumption that only certain citizens are sufficiently virtuous to serve as representatives of the populace in government. *See id.* at 555. Eventually, Sherry argues, both Hamilton and Jefferson came to doubt the capacity of the common people for virtue; Hamilton sought to address the problem by limiting participation in government to the wealthy, who were ostensibly of better moral character than the poor, while Jefferson abandoned virtue altogether as the basis of good government, turning to a system of a

munitarianism, unlike republicanism, control is from the bottom up, rather than from the top down. Participatory government, rather than representative democracy, is the goal, and consensus, rather than majority rule, is the guiding principle. Further, instead being a means to an end—for example, establishing rules to govern the community or to further virtuous ideals that the government has selected—the process of participatory government *is* the end.

It is the process of decisionmaking in communitarian systems that renders communitarianism compatible with feminist theory. The process of participating fully and directly in community value-setting is itself a source of empowerment. This is a central tenet of both cultural and radical feminism.[175]

Perhaps it is understandable that legal theorists who have focused on republicanism have ignored the significance of participatory democracy, thereby blurring the distinction between republicanism and communitarianism.[176] Most theorists have considered communitarianism either as an ethical/jurisprudential concept,[177] or as political theory suitable for adoption in national government.[178] Undeniably, participatory democracy, focused as it is on the elimination of hierarchy and on decentralization, works best in small, homogeneous communities.[179] Size restriction enables the maintenance of collective control and the development of a sense of com-

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balance of powers in government to maintain order among competing factions. *Id.* at 557–59. Ultimately, Sherry explains, the triumph of modern liberalism was the result of the Jeffersonian shift in focus from ennobling the human spirit to regulating conflicting interests characteristic of the "baser aspects" of human nature. *Id.* at 559–61.

[175] According to Gilligan, both men and women recognize the need for agreement on common values, but they see the process of reaching agreement as mediated in different ways: for men, the process is to be handled "impersonally through systems of logic and law," for women it must be achieved "personally through communication in relationship." GILLIGAN, *supra* note 16, at 29. According to MacKinnon, feminist efforts are directed not only toward obtaining for women the right to "play with the boys," but also toward obtaining the right to participate in the process of rule-making, "to question why the point and ethic of sports is competition." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 28 (1987).

[176] *See* Pope, *supra* note 45, at 303 (as republicanists have moved toward a focus on direct participation by ordinary citizens in government, they have been confronted by the dilemma of size: "[h]ow are disempowered groups to engage in nationwide dialogue and law making?").

[177] *See, e.g.*, Sherry, *supra* note 45, at 592 (describing the feminine communitarian jurisprudence of Justice O'Connor).

[178] *See, e.g.*, Michelman, *supra* note 45, at 1493–94; Sunstein, *supra* note 45, at 1539; Sunstein, *supra* note 54, at 47–48; Sunstein, *supra* note 62, at 429.

[179] *See* JOYCE ROTHSCHILD & J. ALLEN WHITT, THE COOPERATIVE WORKPLACE: POTENTIALS AND DILEMMAS OF ORGANIZATIONAL DEMOCRACY AND PARTICIPATION 137–41 (1986) (describing conditions that facilitate participatory democracy).

munity, while homogeneity fosters group cohesion and eases the process of consensus decisionmaking.[180]

Nevertheless, the possibility that communitarianism might function well in groups whose composition is determined through voluntary associations based upon common oppression[181] remains relatively uncharted territory.[182] Several characteristics suggest that the workplace might provide a fertile ground for such communities. Work is a primary source of civic virtue.[183] A primary goal of communitarianism in the context of the workplace would be the alteration of the meaning of work in our society, a "reappropriation of the idea of vocation or calling, a return in a new way to the idea of work as a contribution to the good of all and not merely as a means to one's own advancement."[184]

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[180] *Id.*; *accord* Staughton Lynd, *Prospects For the New Left*, *in* STAUGHTON LYND & GAR ALPEROVITZ, STRATEGY AND PROGRAM: TWO ESSAYS TOWARD A NEW AMERICAN SOCIALISM 1, 25 (1973).

[181] *See supra* text accompanying note 169.

[182] Such voluntary associations based upon a common oppression are typically organized on a model of participatory democracy. In a limited-scope empirical study of workplace collectives and cooperatives, Rothschild and Whitt describe the following structural attributes as typical of these communitarian groups: (1) authority resides in the collective as a whole, rather than attaching to individuals by virtue of their status in the hierarchy; (2) compliance with the group's goals is determined by consensus of the collective, rather than by fixed rules implemented by leaders; (3) there exists a practice of addressing problems on an ad hoc, individualized basis, guided by ethics, rather than a practice of resolving dilemmas by application of fixed and rigid rules; (4) social control is maintained through personal or moral appeals rather than through standardized rules and sanctions; (5) an ideal of community, rather than of impersonality, is observed; (6) solidarity incentives are primary, while material incentives are secondary; (7) employment is based on socio-political values and personality, rather than upon formal credentials; (8) there exists a lack of hierarchy, characterized by an egalitarian structure; and (9) division of labor and segmentation of role or function are minimized, replaced by wholistic roles. *See* ROTHSCHILD & WHITT, *supra* note 179, at 50–64; *see also* Joyce Rothschild-Whitt, *The Collectivist Organization: An Alternative to Rational-Bureaucratic Models*, 44 AM. SOC. REV. 509, 519 (1979) (table outlining dimensions).

[183] *See* BELLAH ET. AL, *supra* note 164, at 288.

[184] *Id.* at 287–88. The authors' concern is with worker isolation and alienation. Where work is interesting but lacks social utility (e.g., that done by many professionals), we must cultivate a sense of the institution's contribution to the public good. Where routine work is involved, it can be improved by affording workers a voice in the running of their enterprises. *Id.* at 288.

In this regard, the authors echo the concerns of Karl Klare, Erich Fromm and Michael Lerner. *See* ERICH FROMM, THE SANE SOCIETY 121–22 (1955) (modern workers' lack of control over what is made, how it is made and how it will be used causes them to be alienated from their work); MICHAEL LERNER, SURPLUS POWERLESSNESS 101, 333–34 (1986) (roots of occupational stress lie in lack of power workers have to control production); Karl E. Klare, *The Labor Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 44 (1988) (advocating goal of active self-actualization and realization in work, an experience of work that is developmental).

Second, employer opposition to the organization of workplace communities of employees would strengthen, rather than weaken, such an organization: the community's solidarity and sense of purpose tend to solidify in response to opposition, rendering it an ideal "alternative" form of organization.[185] Third, communitarism is most likely to succeed where it is combined with a social movement orientation, such as the labor movement, because orientation to a larger movement lessens the risk of cooptation.[186] Finally, participation in cooperative institutions organized around a communitarian perspective itself educates members and generates further participation by positively reinforcing earlier efforts.[187] Direct action participation in such organizations teaches members how to participate effectively in governance. Once they become accustomed to self-governance, they will want more, and will generalize their experience to the national level.[188] Unlike the defensive nature of participation in a republican system of representative government, which exists to protect private interests, direct participation is power-generating.[189] Consequently, communitarianism holds greater transformative potential to redistribute power to working people, particularly women, than does republicanism.[190]

C. *The Communitarian Model in Labor Law Jurisprudence*

The original craft unions typical of the early labor movement were communal in character, and sought to advance egalitarian values and radical social ideals.[191] The communitarian character of the labor movement continued into the late nineteenth century, encompassing unskilled worker organizations.[192] By the late nineteenth century, however, labor leaders had abandoned their original communal structure in favor of a bureaucratic structure that mir-

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[185] RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION AND CONTEMPORARY AMERICAN WORKERS 25 (1988).

[186] ROTHSCHILD & WHITT, *supra* note 179, at 140.

[187] *Id.* at 14.

[188] *See id.* at 13.

[189] *Id.*

[190] Because of their commitment to providing working models for future society, members of cooperatives and collectives see themselves as engaged in a process of "'pre-revolutionary structure-making.'" *Id.* at 17 (quoting MARTIN BUBER, PATHS OF UTOPIA (1960)). They are "'creating organizations of people's power'" in opposition to capitalism. *Id.* (quoting a subject in the author's study of communitarian groups).

[191] HECKSCHER, *supra* note 8, at 16–17; Crain, *supra* note 23, at 20.

[192] HECKSCHER, *supra* note 8, at 16–17.

rored the large corporations they opposed.[193] Along with this change in structure came a shift in labor's philosophy of unionism towards a focus on wage gains and concrete benefits, and away from radical political goals.[194]

Some commentators believe that the shift away from communitarianism as the system of power allocation, became inevitable as the labor movement aged and grew. James Morone has theorized that Americans feel a "democratic wish," the motivating force that drives us toward communal democracy and results in institution-building, but is nevertheless ultimately destined to fail.[195] Morone describes the "democratic wish" as a vision of "a single, united people, bound together by a consensus over the public good which is discerned through direct citizen participation in community settings."[196] Ironically, although it is our suspicion of state power that propels our democratic impulse, our efforts toward achieving direct democracy have, in the end, only served to strengthen the bureaucracy of government.[197] However radical they may be at their outset, the institutions we create only succeed in further bureaucratizing and empowering the government.

Though it makes for powerful rhetoric, "the people" is merely a political fiction, the "democratic wish" a utopian vision that cannot be achieved; thus, communal democracy is a myth.[198] It accomplishes "large changes but small victories."[199] Morone explains this process of de-radicalization through invocation of the "democratic wish." In his analysis, pressure for government action is blocked by the checks of a liberal state; entrenched interests mobilize conservative allies by raising the specter of socialism, and existing bureau-

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[193] *See* Crain, *supra* note 23, at 21.

[194] *See id.*

[195] JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 5, 7 (1990). According to Morone, Americans experience simultaneous dread and yearning with regard to the allocation of power; we dread the power of the state, which poses a threat to individual liberty, while we yearn for direct, communal democracy. *Id.* at 1.

[196] *Id.* at 7. The democratic wish has four components: an image, a method, an assumption and a setting. *Id.* at 5–7. The image is of the people as a single, united political entity, an alternative locus of political authority. *Id.* at 5. The method is direct citizen participation in politics, filtered through small republics. *Id.* at 5–6. The assumption is that the people form a homogeneous body with a consensus about the shared public interest. *Id.* at 6. The setting is the community. *Id.* at 7.

[197] *Id.* at 1.

[198] *Id.* at 4.

[199] *Id.* at 9.

cracies limit the possibilities for government action.[200] Reformers overcome the standoff by calling on the people, thereby invoking the "democratic wish."[201] The issues are returned to the relevant "community," which implements new programs, only to have the imagined consensus of the people deteriorate into a clash of interests, with previously suppressed groups vying for political legitimacy.[202] Retrenchment follows, as the imperatives of organizational maintenance replace the enthusiasm of mobilization.[203] Ultimately, the new groups are incorporated into the existing structure, and the administrative power of the government is extended still further.[204]

Applying his analysis to the organized labor movement, Morone argues that President Roosevelt's call to the people, using rhetoric drawn from the republican tradition, triggered the mobilization of workers into labor unions.[205] The union structure reconfigured patterns of representation within the labor movement, and the issue of the conflict between the interests of labor and capital was returned to the workplace, with "industrial democracy" framed as the common goal.[206] The search for community yielded conflicts between workers as well as between capital and labor, and the newly-created administrative organizations wielded new state authority in labor relations.[207] Ultimately, a new class of political participant was legitimated: the labor union.[208] Class struggle was transformed into a dispute over representation.[209] The workers themselves were induced to restructure the labor movement, and to create the bureaucracy that now restrains them.[210] Labor unions now fight for "marginal gains, their own stability and the preservation of the new institutional status quo."[211]

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[200] *Id.* at 27.

[201] *Id.* at 27–28.

[202] *Id.* at 28.

[203] *Id.* at 28–29.

[204] *Id.* at 29.

[205] *Id.* at 146.

[206] *See id.* at 145–85.

[207] *Id.*

[208] *Id.* at 184.

[209] *See id.* at 145–85.

[210] *Id.* at 184–85.

[211] *Id.* at 185. In the end, Morone says, "a less grandiose democratic conception might offer more real power to real people." *Id.* at 7. Morone calls for a refocusing on communitarian values, which he contends are more fragile than individualistic values. *Id.* at 335. Despite the fact that the communal impulse has not yet found a permanent home at the center of our political institutions, the democratic wish has endured, constantly resurfacing

Nevertheless, labor law itself continues to reflect the "democratic wish." In contrast to liberal political theory, with its focus on individual rights, the labor laws revolve around a qualitatively different kind of right: workers' right, guaranteed in section 7 of the NLRA, "to engage in . . . concerted activities for . . . mutual aid or protection."[212] As Staughton Lynd has described it, the right guaranteed in section 7 is a "translation into law of the labor movement concept of 'solidarity.'"[213] That right resonates with its communitarian underpinnings.

The National Labor Relations Board originally held that an employee covered by a collective bargaining agreement engages in protected concerted activity whenever she exercises a right guaranteed by the agreement, whether she acts on her own or in connection with others.[214] Subsequently, the NLRB concluded that, even in the absence of a collective bargaining agreement, the efforts of a single worker could constitute protected activity if the worker sought to address safety concerns that all employees might reasonably be expected to share.[215] These NLRB rulings captured the essence of the group right protected in section 7: one person's enjoyment or exercise of a collective right does not subtract from another's enjoyment or exercise of the same right.[216]

In the 1980s, however, the NLRB reversed itself, ruling that a solitary employee's action is not concerted unless it is engaged in "with or on the authority of other employees."[217] The Board reasoned that the NLRA requires "some linkage to group action" in order for an individual employee's activity to be deemed "con-

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in the shape of a new social movement. *Id.* at 336–37. We must, Morone suggests, search for a more workable form of popular participation that will "marr[y] democratic wishes to contemporary institutions." *Id.* at 335–36.

[212] 29 U.S.C. § 157 (1988).

[213] Lynd, *supra* note 19, at 494; *see also* Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 850–51 (1989) (elaborating on the origin of section 7's "mutual aid or protection" language in the labor movement and its ethos of class-based solidarity).

[214] *See* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1301–02 (1966) (holding that complaints concerning working conditions covered by the collective bargaining agreement were protected activity).

[215] *See* Alleluia Cushion Co., 221 N.L.R.B. 999 (1975) (solitary employee's complaints about safety conditions in workplace, where no collective agreement was in effect, were protected activity).

[216] *See* DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 2–4 (1991) (goals such as civil rights, women's rights and peace are public goods, and the benefits of these goods are not susceptible to "crowding").

[217] Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (*Meyers I*).

certed."[218] The D.C. Circuit Court of Appeals affirmed the Board's interpretation of the NLRA;[219] the Second Circuit has concurred.[220]

The NLRA's statutory right to engage in collective action, unique in our jurisprudence, is central to the essence of what labor unions are, or could be, about. I join Staughton Lynd in suggesting that this right should serve as a building block in a new movement to restore "from below" the vigor of the labor movement.[221] The right to engage in collective action is a clear reflection of Morone's "democratic wish," although it remains dormant as a result of union complacency, powerlessness, and the NLRA interpretations that have undermined its efficacy. An infusion of new ideas, strategies and goals is required to resuscitate it, lest the labor movement sink further into stagnation.[222]

III. Critiques of the NLRA and Proposals for Reform

Labor scholars have mounted numerous critiques of the labor laws, the system of collective bargaining and labor unions themselves.[223] The vast majority of these critiques either accept the fundamental premises and values of the adversarial system—hierarchy, competition and linear, bi-polar thinking—or they proceed from an individualistic, rights-based approach that necessarily entails privileging the rights of one individual or group "over" those of another, which is a more subtle form of hierarchy.[224] Thus, both lines of analysis revolve around a partriarchal conception of power as one individual's ability to control another.[225] Neither critique is predi-

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[218] Meyers Indus., Inc., 281 N.L.R.B. 882, 883–84 (1986) (*Meyers II*) (on remand from the D.C. Circuit Court of Appeals, which had required further explication of the Board's reasoning and its basis in the NLRA, in Prill v. NLRB, 755 F.2d 941, 956–57 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985)).

[219] Prill v. NLRB, 835 F.2d 1481, 1485 (D.C. Cir. 1987).

[220] *See* Ewing v. NLRB, 861 F.2d 353, 361 (2d Cir. 1988).

[221] *See* Lynd, *supra* note 19, at 494–95; *see also* Staughton Lynd & Alice Lynd, *Labor in the Era of Multinationalism: The Crisis in Bargained-For Fringe Benefits*, 93 W. Va. L. Rev. 907, 912, 944 (1991) (advocating a "rebuilding of the labor movement from below by grassroots direct action," "in the spirit of 'an injury to one is an injury to all'").

[222] *See* Chong, *supra* note 216, at 197.

[223] *See supra* note 13 and sources cited therein.

[224] The sole exception is the communitarian critique articulated by Staughton Lynd. *See supra* notes 19, 180, 213 and accompanying text, and works of Staughton Lynd cited therein.

[225] Indeed, both theories can be conceptualized as dealing with an individual's or group's entitlement to property or resources over and against another's entitlement. *See* Lynd, *supra* note 19, at 494.

cated on the feminist conception of power described in Section II.A.[226]

A. *The Adversarial Theory*

Adversarialists picture the interests of labor and management as inherently conflicting, and either support collective bargaining as an appropriate mechanism for channeling that conflict, or criticize it for masking and defusing workers' power. In either event, they view labor-management relations as a struggle for control: over the production process, over working conditions, and ultimately, over distribution of the profits.[227]

Adversarialists who defend the collective bargaining system as a proper channeling of the inevitable conflict between employers and employees typically propose incremental reforms in the labor laws.[228] Paul Weiler is a well-known incrementalist. He articulates coherent proposals for repair of existing labor laws that are nonetheless loyal to the adversarial underpinnings of the NLRA.[229] Clyde

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[226] *See supra* notes 149–59 and accompanying text.

[227] *See, e.g.*, Barbara Reisman & Lance Compa, *The Case for Adversarial Unions*, HARV. BUS. REV., May-June 1985, at 22, 30 (healthy conflict is organic to capitalist system).

[228] *See* Millspaugh, *supra* note 13, at 697–98 (incrementalists do not challenge fundamental assumptions of existing regime, preferring to focus on adjustments to existing structure). Some adversarialists, of course, do not propose any changes at all. *See, e.g.*, *Collective Bargaining as an Industrial System*, *supra* note 121, at 1680 (defending adversarial model of labor relations because it confines industrial strife within "relatively stable bounds," and advocating strict judicial construction of section 8(a)(2) to promote necessary separation between employer and workers). The author of the above-cited work worries that even incremental reforms may undermine the adversarial nature of the Act. *See id.* at 1682 ("The courts that have attempted to reinterpret section 8(a)(2) [to permit cooperative employee representation plans] have failed to recognize that pulling this single thread may ultimately threaten the entire fabric of the Act.").

[229] *See* Fried, *supra* note 11, at 1017–18. Fried cites and briefly discusses two of Weiler's works: *Promises To Keep*, *supra* note 13 (suggesting reform modeled on Canadian labor law to allow union certifications based upon authorization card counts), and *Striking a New Balance*, *supra* note 13 (proposing compulsory arbitration over deadlocks in first union contracts, reversal of the *Mackay Radio* rule allowing permanent replacement of strikers, relaxed rules against secondary boycotts, and firmer union controls over workers through increased power to discipline members). *Id.*

In his most recent work, Weiler continues to defend the collective bargaining system, attributing unions' decline primarily to two factors: increased employer opposition and cumbersome legal procedures blocking unionization. *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 108–18. Although Weiler also makes brief reference to changes in popular attitudes toward unions, and calls for the union movement itself to "refurbish its own structure, platform, and image," he apparently sees union structure and image as a problem only with respect to the "new breed" of worker (white-collar, technical, administrative and professional employees) to whom the traditional union is unappealing. *Id.* at 106–08. As one commentator has noted, Weiler's focus on employer anti-union efforts and legal

Summers, another prominent incrementalist, advocates shoring up the collective bargaining system in unionized workplaces, and extending it to cover non-unionized employees.[230]

Other adversarialists, sometimes contradictorily referred to as "cooperationists," are critical of the collective bargaining system *because* it promotes confrontational behavior on the part of unions.[231] They too subscribe to the underlying assumption that a struggle for control between employers and workers is inevitable; their position is that openly confrontational strategies promote unnecessary hostility between management and labor, ultimately leading to inefficiency.[232] Cooperationists strive to make the inevitable struggle between labor and management "kinder and gentler" by

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obstacles to unionization prevents him from examining more closely unions' failure to adapt to changing workplace realities. *See* Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 630 (1990) (book review). Ultimately, Weiler concedes that incremental labor law reform may be insufficient to accomplish the broader goal of an independent employee voice in the corporate system, but remains optimistic about the potential of the combined effects of social and institutional changes and serious statutory reform. *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 275–79.

[230] *See* Summers, *supra* note 13, 19–34.

[231] By "cooperationists," I refer to those who advocate new forms of cooperative ventures in which "management forms a long-term partnership with labor and engages labor's input in the early stages of planning, decision-making, and development," but that leaves the ultimate decisionmaking power with management. *See* Lori M. Beranck, Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173, 179 (1987). *See also infra* note 234 and accompanying text.

[232] Adversarialists and cooperationists are often portrayed in the industrial relations literature as having antithetical positions. The adversarial versus cooperation debate usually takes the form of disagreement over the interpretation of section 8(a)(2). *See supra* note 121 and accompanying text. Many commentators have assumed that the adversarial and cooperative models are distinct, alternative and fundamentally incompatible. *See* Clarke, *supra* note 92, at 2021, 2023 (describing the cooperative model as "diametrically opposed" to the adversarial model, and proposing that workers be offered the choice between adversarial or cooperative representation); Kohler, *supra* note 121, at 499–500, 513, 517–18. As others have pointed out, however, the polarization between the two positions is exaggerated, and reforms that blend the two are possible. *See, e.g.*, Klare, *supra* note 184, at 51, 60 ("[P]roductive cooperation *requires* the existence of autonomous, collective organization of workers, a central feature of adversarialism."); Lipsky, *supra* note 129, at 669–70 ("The adversarial model, based on scientific management theories, and the cooperative model, based on humanistic theories, are not mutually exclusive.").

In short, the adversarial and cooperative models, rather than being antithetical, are correspondent. Differences between them are superficial. Adversarialists posit "pure conflict"—that the interests of labor and management are irreconcilable, and therefore favor direct confrontation. Cooperationists purport to ignore the conflicts and argue that "pure consensus" exists—that the interests of labor and management in such matters as efficiency and productivity are identical. *See* Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44 INDUS. & LAB. REL. REV. 241, 242 n.1 (1991). A few, more sophisticated commentators acknowledge the simultaneous possibility of a conflict and a convergence of interests. *See* Klare, *supra* note 184, at 62.

proposing modifications to, or broader interpretations of, NLRA section 8(a)(2) in order to pave the way for cooperative ventures.[233] Many cooperationists assume that the employer is entitled to control the workplace as a matter of right; participatory methods are utilized to make this reality more palatable for employees.[234] Other cooperationists simply value profitability, and the ability to compete internationally, more highly than the minimal additive value of the opportunity to express their hostility at the bargaining table.[235]

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[233] *See, e.g.*, David H. Brody, Note, *The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act*, 41 VAND. L. REV. 545, 574 (1988) (arguing for relaxed judicial interpretation of section 8(a)(2) that would permit cooperative employee committees that promote employee free choice); Clarke, *supra* note 92, at 2022, 2023 (proposing congressional repeal or modification of section 8(a)(2) to facilitate cooperative representation and worker participation plans, while harnessing section 8(a)(1) as a vehicle to prevent employer domination or coercion); Lipsky, *supra* note 129, at 670, 716–19 (1990) (proposing legislative and judicial changes to accommodate two-tiered "cooperative" structure with labor representatives on board of directors, with traditional adversarial relationship during bargaining at the board of director level, and cooperative, yet organized structure on the shop floor).

[234] *See* Kohler, *supra* note 121, at 547 (cooperative model is merely subtle tool for management subjugation of worker self-determination; participatory associations are "more manipulative than democratic in intent"); Sar A. Levitan & Clifford M. Johnson, *Labor and Management: The Illusion of Cooperation*, HARV. BUS. REV., Sept.-Oct. 1983, at 8 (in its present form, participative management is a placebo that "gives workers the trappings of decision-making power"); *Collective Bargaining as an Industrial System*, *supra* note 121, at 1662 n.2 (many union supporters "consider even 'benign' employee representation plans a management device to undermine union solidarity").

In effect, then, many forms of participative management only seek to sugarcoat the gap between the interests of labor and management with goodwill and improved communication. *See* Levitan & Johnson, *supra*, at 7. Indeed, some participative management schemes are inherently inconsistent with the spirit of genuine cooperation because management retains the ultimate control, exercising its power to ignore labor's demands when they conflict with profit-maximization goals. *Id.* at 9. Genuine cooperation would require that labor contribute not only to the solution of problems, but also to their perception and definition. *Id.* at 16. Karl Klare expresses the weaknesses of the pure cooperative model most succinctly, suggesting that it is characterized by "an overly exclusive focus on efficiency at the expense of the other dimensions of the employment relationship; overemphasis on attitudes, which prevents the cooperationists from seeing the historical basis of adversarialism; and failure to take account of the true structure of power within the firm." Klare, *supra* note 184, at 61.

[235] *See, e.g.*, BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, *supra* note 120, at 141 (describing review of labor laws conducted by Department of Labor to determine whether labor laws impede efforts at labor-management cooperation; Department believes such cooperation is necessary for America to return to predominance in the world market); Klare, *supra* note 184, at 58–60 (describing call for cooperative approach to industrial relations as stressing cessation of hostilities in order to increase productivity and competitiveness of the firm; goal is to achieve voluntary alignment of the individual worker's loyalties with the objectives of the firm, as ultimately defined by management).

B. *Individual Rights Theorists*

Individual rights theorists also assume an inevitable conflict of interest between management and labor, but approach the issue on an individual level rather than on a group or class-based level. These theorists argue for radical, innovative reform that purports to give maximum rein to individual employees in realizing their interests. The conservative line of critical attack is led by Richard Epstein, who advocates deregulation and proposes that the NLRA be replaced by a common law regime based on tort and contract law.[236] Another prominent conservative, Charles Fried, proposes replacing collective bargaining with improved legislation setting minimal terms of employment, thus specifically conferring rights on individual employees.[237]

At the opposite end of the political spectrum, but nevertheless equally concerned with individual employee rights, are the Critical Legal Studies scholars. These academics oppose deregulation and privatization because such reforms effectively reinforce pre-existing disparities in power between management and labor.[238] Although supportive of unionism and collective bargaining as tools to further workplace democracy, Critical Legal Studies proponents are troubled by the lack of efficacy of these tools in the context of the existing legal and social structure.[239] Nevertheless, such scholars share the assumption that the interests of labor and capital conflict, and believe that a rights-based system offers the best form of protection in a society where power between capital and labor is unbalanced. Accordingly, Critical Legal Studies writers propose reforms, based on direct governmental intervention guaranteeing individual rights to employees and substantive protections to unions

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[236] *See* Epstein, *A Common Law for Labor Relations*, *supra* note 11. *See generally* Epstein, *In Defense of the Contract at Will*, *supra* note 11 (defending contract of employment at will, arguing that evolving doctrine of wrongful discharge undermines basic individual liberty of contract).

[237] *See* Fried, *supra* note 11, at 1036–37.

[238] *See* Katherine Van Wezel Stone, *The Future of Collective Bargaining: A Review Essay*, 58 U. CIN. L. REV. 477, 487 (1989) (book review).

[239] Karl Klare summarizes the common themes running through the work of Critical Legal Studies advocates, as follows:

> First, we argue that collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace. The second theme is that collective bargaining law has evolved an institutional architecture, a set of managerial and legal arrangements, that reinforces this hierarchy and domination.

Klare, *Labor Law as Ideology*, *supra* note 13, at 452.

under labor law, that are designed to alter the power imbalance between employees and employers.[240]

In the next section, I articulate a "re-vision" of labor law that is predicated upon a feminist conception of power. Because I begin with the assumption that the process of empowerment is as important as the immediate substantive outcome, I reject reforms accomplished solely through government intervention. My concern is not only with correcting the imbalance of power, but with defining and building a new form of power.

IV. An Alternative Vision

In a companion article, I argue that unions must forge a solidarity that stretches across class, gender and race boundaries to re-radicalize the labor movement.[241] In that article, as in this one, I suggest that a labor movement allied with the feminist movement and organized around a feminist conception of power would bring new vitality to unions as they struggle to empower workers, particularly women.[242] The other piece of the program for this revitalization is explored in this section: the labor laws must be altered to foster a new understanding of the exercise and allocation of power between labor and capital.

The feminist vision of power outlined above suggests different, and more radical, transformative possibilities for legal reform. The intervention strategies suggested by those who subscribe to a patriarchal understanding of power are based upon a paternalistic model, in which protectionist strategies are employed in aid of the disempowered group, labor. In this model, labor continues to be

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[240] *See, e.g.*, Klare, *Workplace Democracy & Market Reconstruction*, *supra* note 13, at 3, 13 (proposing market reconstruction at the governmental level in support of collective bargaining); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. Chi. L. Rev. 73, 152–61 (1988) (arguing that the law should be modified to give labor access to conventional levers of power, including representation on corporate boards and expanded rights to deal with corporate creditors, so that labor can pursue its interests in competition with the other constituencies of the corporation).

[241] *See* Crain, *supra* note 23, at 113–15. A simultaneous challenge to class, gender and race barriers is likely to be even more powerful than the sum of its parts. A community cannot be dealt with apart from its context, and class is not the only linkage, or even the most important linkage, among workers in a particular community. Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 3 Yale J.L. & Feminism 63, 102 (1991). My focus here is on gender, a context that has historically been overlooked by the labor movement. *See* Crain, *supra* note 5, at 1159–84.

[242] *See* Crain, *supra* note 23, at 115. Some express hope that the feminization of unions will initiate a new "social unionism" reminiscent of the radical, communitarian union spirit that pervaded the 1930s. *See, e.g.*, Blum, *supra* note 5, at 11.

overpowered or controlled, but it is the government rather than the employer that exercises control. By contrast, a model of intervention based on a feminist vision of power utilizes power-balancing strategies that facilitate the disempowered party's efforts to empower itself.[243] The feminist model is preferable because it enhances opportunities for autonomy, dignity, choice and decisionmaking, rather than simply substituting the court's power for that of the unempowered party, and because it is fairer, in a distributive sense.[244]

In this section, I outline the foundation of a feminist program for the feminization of the labor laws.[245] I describe a system in which (1) rights of individual workers are expanded but also are collective in nature; (2) workers could join together in decentralized "unions" only vaguely resembling those with which we are now familiar; (3) such unions would reject the narrow goal of commercial empowerment for workers in favor of a broader goal of economic, social and political empowerment; (4) participatory democracy would be the norm rather than the exception; (5) decisions would be made by persuasion and consensus rather than majoritarian vote; and (6) unions would deal with the employer in a coordinated fashion on all subjects that concern capital and labor, cooperating where possible to avoid conflict and confronting conflicts where they do exist.

Because the labor laws are explicitly designed to strike a balance of power between labor and capital, I begin with the deconstruction of the patriarchal concept of power that lies behind the labor laws. In general, I suggest abandoning the rigid, adversarial, "win-lose" mindset underlying the labor laws, in favor of a more flexible, cooperative, "win-win" philosophy. At the heart of my argument is an assumption that the interests of labor and capital are not always,

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[243] Bender, *supra* note 4, at 892–93. Leslie Bender has made a similar argument in the context of protecting plaintiffs in tort law. *See id.* at 890–91. In *Feminist Re (Torts)*, Bender advocates that courts adopt a feminist strategy of power-balancing (through burden-shifting rules, rebuttable presumptions concerning liability, and immediacy of remedy) that would empower plaintiffs in mass tort cases who face corporate defendants with greater resources, knowledge and access to information. *Id.* at 893–94. Bender refers to this feminist modality of power as "'empowering or power-balancing,'" and contrasts it with a masculine modality of power, which she terms "'overpowering or controlling/protecting.'" *See id.* at 892; *see also* Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759, 762–63 (1990) (synthesis of same arguments).

[244] *Id.* at 890–91.

[245] This proposal builds on the general outlines I suggested for the feminization of labor law in a previous work. *See* Crain, *supra* note 5, at 1214–19.

inevitably, in conflict. Thus, it is simultaneously possible for them to share some common goals and to clash over others, or to agree on goals but disagree on the means of achieving them. My argument also assumes that the relationship between labor and capital is far more complex than the simplistic adversarial cast it has acquired through tradition and law. In short, I suggest that the law should reflect the reality that the relationship between employer and employees, like any continuing relation, is multi-faceted and entails both conflict and cooperation.

My paradigm of a reconstituted labor law overlaps with some of the suggestions made by others; however, it differs in significant ways because of my focus on eliminating the patriarchal norms of power and power allocation, which are encoded as republicanism in the labor laws. The proposal that is most compatible with a feminist re-visioning is that advanced by Charles Heckscher. Heckscher is critical of the "balance of power" ideology that permeates labor law. He contends that the balance created by establishing two parallel adversaries is rigid, slow to adapt, and ill-suited for dealing with diversity among workers.[246] Heckscher advocates in its place a more flexible form of unionism, "associational unionism."[247]

A key feature of associational unionism is its tolerance for multiple forms of worker representation that would coordinate diversity within unions, thereby capitalizing on workers' ties with other social movements, such as the women's movement.[248] Another characteristic of associational unionism that is consistent with a feminist model is its mechanism for resolution of disputes, which includes extended negotiation, direct participation, deliberate clarification of values and interests, and aspirations toward consensus-building.[249]

Nevertheless, Heckscher's proposal places the burden solely on unions to transform themselves; he makes no concrete suggestions as to how the law ought to be modified in order to accommodate associational unionism. This is of particular concern because, as he acknowledges, the energy for change is centered in groups located outside the traditional labor relations system.[250] Many of these groups, such as Blacks and women, already shoulder the additional

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[246] HECKSCHER, *supra* note 8, at 7.
[247] *See id.* at 8.
[248] *Id.* at 177, 189–90.
[249] *Id.* at 193–94.
[250] *Id.* at 191, 256.

burden of fighting oppression based on gender and/or race. Thus, Heckscher's system would place the responsibility for initiating change on these groups, rather than shifting the onus onto unions to mobilize for change through institutional restructuring.

James Pope has offered a more concrete suggestion in support of associational unionism.[251] Because the law has traditionally maintained a rigid division between labor activities (covered by the NLRA) and community protests (for which First Amendment protection is available), Pope urges a reexamination of the law to accommodate labor-community boycotts.[252] He believes that labor-community boycotts could provide a source of economic power for unions because such boycotts are a vehicle for unions to engage allies from other social movements, such as the women's and the civil rights movements, to put pressure on employers.[253] He envisions these boycotts as a practical "testing ground" for the viability of Heckscher's associational unionism.[254] Nevertheless, rather than proposing change in the labor laws or directly challenging the artificial dichotomy in the law's treatment of industrial and community activism, Pope advocates classifying labor-community boycotts in the political sphere, and according them expanded First Amendment protection because they are more political and less coercive in nature than traditional labor boycotts.[255]

Paul Weiler has articulated some useful arguments for a feminist reconstructive reform of the labor laws. Weiler accepts the balance of power ideology and adversarial assumptions behind the law, and proposes legal reforms designed to shift the balance of power toward labor's side of the equation.[256] Although Weiler does

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[251] James G. Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

[252] *Id.* at 897.

[253] *Id.* at 912–13. Pope points out that both movements boast networks of experienced, committed activists that could be effective in conducting boycotts and in appealing to workers to join unions. *Id.*

[254] *Id.* at 913.

[255] *Id.* at 919–20, 973; *cf.* James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984) (describing artificial dichotomy in First Amendment law and arguing for expanded First Amendment protection for labor speech).

[256] *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 275 (arguing for redesign of representation process and process by which unions negotiate first contracts). Weiler refers to this type of labor law reform as "reconstructive," in the sense that the changes proposed would "reconstruct" the background labor law, and contrasts it with a regulatory model, which, in his view, entails excessive reliance on external NLRB or judicial regulation. *Id.* at 253. The reconstructive model is superior because it enlists the workers themselves in the struggle to gain fundamental rights. *Id.*

not mount a challenge to the definition of power itself, some of his proposed reforms have the potential to modify the culture of the union and the way in which it exercises power. For example, his proposals with regard to restructuring first contract negotiations[257] and providing recognition through card counts rather than resorting to elections[258] are consistent with a feminist modality of empowerment. These proposals could establish conditions facilitating mobilization, while leaving the process of empowerment in the hands of the workers.

On the other hand, Weiler has also suggested a "constitutive" model of change, in which government legislation would guarantee all employees access to a basic level of participation in a specified range of workplace decisions.[259] I disagree with this approach because it reinforces patriarchal power and disregards the significance of the organizing process itself. Moreover, Weiler's approach devalues the process of establishing and nurturing relationships, building a community, and developing a collective rapport. These aspects of the organizing process are central to the empowerment process.[260]

A. *Eliminating the Adversarial Premise*

In order to alter the understanding of power in the labor laws at the most fundamental level, I begin with the cornerstones of the adversarial labor law system: the definition of an employee (NLRA section 2(3)), the definition of a labor organization and its relationship to the employer (NLRA sections 2(5) and 8(a)(2)), and the exclusivity provisions limiting employee voice (NLRA section 9(a)). These are the constitutive aspects of labor law, and they are the places in the law where the line-drawing that reinforces the adversarial system is anchored. All are predicated on a conception of power as domination and control, and its exercise as creating a hierarchical relation.

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[257] *See* Weiler, *Striking A New Balance*, *supra* note 13, at 405–12; *see also*, Weiler, *Promises to Keep*, *supra* note 13, at 1805.

[258] *See* Weiler, *Promises to Keep*, *supra* note 13, at 1805.

[259] WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 282. Weiler proposes adoption of Employee Participation Committees ("EPC's"), modeled on the West German Works Council. *Id.* at 284. In such a system, the Works Council deals directly with management within the individual enterprise about the application of industry-wide standards contained in umbrella agreements negotiated by unions. *See id.* at 293–94. In Weiler's vision, EPC's would serve as a safety net for the vast majority of unorganized, unrepresented employees, and could coexist with unions to reinforce worker rights. *Id.* at 282–95.

[260] *See* Crain, *supra* note 23, at 89–96.

I have argued elsewhere that the NLRA's definition of employee should be modified to encompass the entire laboring class.[261] My explicit premise was that there exists no natural, inevitable "line" between management and labor, or insurmountable conflict of interest for managers who simultaneously seek to protect their own interests while serving those of the employer.[262] Accordingly, section 2(5) would be modified to include organizations of "employees," as newly defined in section 2(3). These changes would result in the broadest possible definitions of employees and labor organizations, enhancing the potential for worker solidarity and bringing as many workers and worker organizations as possible under the umbrella of the NLRA.

Section 8(a)(2), prohibiting employers from dominating, interfering with or assisting the formation or administration of a labor organization, should be repealed. It reinforces the "line" between employer and employees, and essentially further divides them by blocking efforts at cooperation. Moreover, section 8(a)(2) incorporates a paternalistic assumption that labor unions will not be capable of remaining loyal to their members if subjected to pressure and/or temptation from the employer. While the repeal of this section might be of some concern in the context of a dichotomy between employees and managers, and a system of exclusive union representation that encourages entrenched, centralized power, it should not present a danger to workers in a modified environment of broader NLRA coverage and non-exclusive representation.

Repeal of section 9(a)'s principle of exclusive representation is essential to a feminist reform of the labor laws. The "tight solidarity of collective action" is neither feasible nor desirable in a work force as heterogeneous as the current and projected population of workers. Consequently, unions must forego the security of exclusive representation in order to accommodate multiple, overlapping communities of workers within the same workplace unit.[263] The prin-

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[261] *See* Crain, *supra* note 92, at 1015–20 (proposing amendment to delete exclusion of supervisors, managerial employees and confidential employees from NLRA coverage).

[262] *See id.* at 983–92.

[263] *See* HECKSCHER, *supra* note 8, at 183; *see also* Craver, *supra* note 13, at 655 (noting tension between the increasing heterogeneity of the work force and the section 9(a) exclusivity provision, and suggesting either repeal of section 9(a) or modification to provide a limited veto power for minorities, overridable only by a weighted majority); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 938 (1975) (suggesting that abolition of exclusivity rule, particularly in light of the context of a Board unit determination process that neglects

ciple of majoritarian representation does not adequately safeguard the interests of women and minorities, given their history of exclusion from, and continuing lack of power in, labor unions. A system of coordinated diversity will contribute to a decentralized union structure and help to ensure participatory democracy rather than the re-creation, in union structure, of the hierarchical, exclusionary structure of capital. Repeal of section 9(a) will require corresponding changes in the duty of fair representation doctrine, a requisite corollary to the exclusivity doctrine under existing law.[264] The duty of fair representation, if it continued to exist at all, would likely evolve into an equal protection model of representation.[265]

B. *Additional Reforms*

Although it will not be clear exactly what further reforms are needed to conform labor law to the new unionism until these fundamental changes have been made and we gain some experience with this new unionism, I outline below some reforms that appear necessary in light of the experience of a few feminized unions. Although many of the doctrines or provisions discussed below appear to reflect neutral values, their interaction with the disparate economic power of capital and the current nature of male-dominated unions produces a decided "tilt" against a new form of union that includes previously marginalized workers, particularly women.[266]

1. Organizing

It is obvious that unions require increased access to workers in order to organize them. The existing doctrine governing union access to employees for organizational purposes gives exaggerated weight to the employer's interests in maintaining control over its property, blocking effective union access to the vast majority of

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employees' community of interest, would democratize unions, make them more responsive to members' concerns, and relieve the Board of its election responsibilities).

[264] *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[265] *See* Michael C. Harper & Ira C. Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211, 1216–17 (1985) (arguing that politically weak or unpopular minorities can be protected in democratic unions through application of a coherent theory of equal protection as the model for the duty of fair representation).

[266] *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 228; *see also* Bender, *supra* note 4, at 884–85 (exploring concept of "equality-before-the-law," which ignores the realities of power differences and employs "neutral" rules that are "blind" (like justice) to these power imbalances).

employees.[267] It is no accident that initial success with clerical workers has been achieved in the university setting; the distinctive openness of the academy for employees and outside organizers has been a significant factor in the ability of union organizers to reach women workers, who often find it difficult to attend after-work meetings because of their double burden of child care and domestic responsibilities.[268]

Paul Weiler's suggestion that we abandon the election system in favor of instant recognition based on a super-majority card count would be helpful here.[269] The current election system is consistent with an adversary system based upon an individualistic ethic of justice. The system assumes that those who did not wish to be represented by a union will be content to live with one because the election process was fair.[270] This misconstrues the goal of unionism: an association of workers who are bound together by a perception of common interest and a feeling of community, rather than by the application of legal principles of majoritarian rule. A system of instant recognition based upon a super-majority card count, in combination with abolition of the exclusive representation principle, would be more consistent with a feminist method of empowerment and participatory democracy, which relies on consensus as the source of group power and cohesiveness. Under this system, nonsigners would be free to change their minds and join the recognized group following recognition, or to form a separate organization, or to form none at all. In this way, the incentive for the organizer to

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[267] The doctrine respecting access by outside union organizers accords undue deference to the employer's rights to control its physical property, and to protect it against trespass. *See* Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) and NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), discussed *supra* note 103. The law governing solicitation by employees on company property permits undue employer control over workers' labor—viewed by the Court as another form of company "property"—through no-solicitation rules. *See* Republic Aviation v. NLRB, 324 U.S. 793 (1945), discussed *supra* note 103.

[268] *See* Craig Becker, *Unions on Campus: Lessons of the Harvard Drive*, THE NATION, Feb. 12, 1990, at 196.

[269] *See* WEILER, GOVERNING THE WORKPLACE, *supra* note 13, at 253–61. Some unions have successfully utilized an 8(b)(7) strategy to obtain an expedited election, which accomplishes the goal of avoiding a lengthy campaign period while simultaneously exerting economic pressure. Once the union has enough signed authorization cards to suggest likely success in an election, it demands recognition, and when the employer refuses, the union establishes a picket with non-employees, and instructs employees to continue working. Within thirty days of the commencement of the picketing, the union files a petition for an election, validating the continuation of the picketing under § 8(b)(7)(C). *See* Bernard L. Samoff, *What Lies Ahead for the NLRB?*, 38 LAB. L.J. 259, 266–67 (1987).

[270] *See* Robin Leidner, *Stretching the Boundaries of Liberalism: Democratic Innovation in a Feminist Organization*, 16 SIGNS 263, 283 (1991).

build a large community remains intact, but the inevitable dissidents do not remain to dilute the union's power by undermining solidarity.

2. Bargaining

Two areas of reform are immediately apparent in the process of bargaining. First, as multilateral negotiation techniques are developed in order to accommodate bargaining between multiple parties, the dynamics of bargaining will change.[271] Concepts such as the duty to bargain "in good faith" must evolve in order to be meaningful in a multi-party situation. Bargaining "to impasse," for example, which normally means negotiating until the parties' positions become fixed and a stalemate occurs,[272] would take on an entirely different meaning because multiple parties would be much less likely to polarize. Because bargaining to impasse is the prerequisite to the employer's ability to implement unilateral changes in working conditions (mandatory subjects),[273] it has been a vital tool in determining the extent of employee participation in workplace governance.

Second, the implicit restrictions that the NLRA places on bargaining, by explicitly including some subjects and implicitly excluding others (the mandatory/permissive subject dichotomy), must be eliminated. These implicit restrictions are contained in section 2(5) (defining labor organizations as those that deal with employers "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work"), section 8(d) (defining duty to bargain collectively in good faith only "with respect to wages, hours, and other terms and conditions of employment"), and section 9(a) (specifying that a labor organization is the exclusive representative for the purpose of bargaining "in respect to rates of pay, wages, hours of employment, or other conditions of employment"). The subjects limitation of the NLRA serves not only to remove some of the most important decisions from the collective bargaining process, but also reinforces prevailing patterns of power in industrial life

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[271] *See* HECKSCHER, *supra* note 8, at 200 (multilateral negotiation is not just a bigger form of bilateral collective bargaining).

[272] *See generally* David G. Epstein, Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769, 777 (1966) (impasse requires (1) a deadlock in negotiations and (2) good faith bargaining, with particular attention to factors such as use of a mediator, changes in bargaining position, desire to continue negotiations and the frequency of bargaining negotiations).

[273] *See* NLRB v. Katz, 369 U.S. 736, 741–43 (1962).

and, ultimately, limits our imagination in rethinking issues of workplace governance.[274]

3. Concerted Activity As a Means of Economic Pressure

The collective right to engage in "concerted activities . . . for mutual aid or protection" afforded employees by section 7 of the NLRA is at the heart of the NLRA's communitarian basis. This right is an attempt to codify the experience of solidarity, and should be construed as broadly as possible. A broad construction of the "concert" requirement would recognize the industrial reality that the action of an individual worker is experienced by other workers as one in which they have a long-term stake.[275] A broad construction of the "mutual aid or protection" requirement would pave the way for innovative strategies of collective economic resistance.[276]

CONCLUSION

Labor law and labor unionism are at a crossroads. Pressure from employers and from competition with foreign businesses has ensured that "[t]he labor movement does not have the luxury of continuing with business as usual, even if it could somehow induce its disillusioned membership to do so."[277] I suggest that organized labor must build a new form of solidarity that is not solely class-based, but is instead forged in the common experience of oppression across race, gender and class. Feminist visions and practices of power, exercised within communitarian structures of power allocation, provide a hospitable environment for constructing the

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[274] *See* Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475, 479 (1983).

[275] *See* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1426 (1984); *see also* Robert A. Gorman and Matthew W. Finkin, *The Individual and the Requirement of "Concert" under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329 (1981) (calling for broad reading of concert requirement in section 7); B. Glenn George, *Divided We Stand: Concerted Activity and the Maturing of the NLRA*, 56 GEO. WASH. L. REV. 509, 511 (1988) (same). *But cf.* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 942, 967 (1992) (arguing for interpretation of section 7 that would protect the rights of employees to communicate and protest about matters beyond the terms and conditions of their employment; under this proposal, the concert requirement would remain intact, but determination of appropriate subjects of employee concern would be left to employees).

[276] *See* Estlund, *supra* note 275, at 967; Pope, *supra* note 251, at 912–13; Crain, *supra* note 23, at 107–13.

[277] Lynd & Lynd, *supra* note 221, at 944.

bridge of empathy that must serve as the connecting and stabilizing element in this new solidarity.

In a previous article, I articulated a feminist strategy for empowerment that unions might adopt in organizing, bargaining and exerting economic pressure.[278] A critical factor in its success, however, is a legal environment that facilitates, or at least is not hostile to, such routes to empowerment.[279] In this article, I have sketched the outlines of a labor law framework that would facilitate the feminization and re-radicalization of labor unions. In particular, I have argued that the current republican system of allocation, with its overlay of representation and exclusivity predicated on both internal and external union hierarchies, reinforces and perpetuates the internal division and factionalization of the labor movement. In its place, I propose the adoption of a communitarian structure, wherein multiple and overlapping communities of workers can cooperate with one another in the process of direct action empowerment.

Such a "re-visioning" of labor law will require major structural changes in the present labor laws. This is not unique to a feminist approach; in the context of the current labor crisis, most scholars agree that fundamental change is necessary.[280] What is unique about the feminist strategy I have advanced is that it proposes transformation, rather than reform; it questions fundamental, underlying assumptions about the nature of power and its exercise as reflected in our labor laws and, ultimately, in our larger political democracy. Grounded in concrete, grassroots activism, it proposes that working people "shatter the self-reflecting world which encircles [them] and . . . project [their] own image onto history" by re-visioning their own power in a revolutionary way.[281]

Perhaps what is most needed in the labor movement is a combination of revolutionary vision, anger and strength of heart. The working class movement, after all, is a social movement; its ends—political, economic and social empowerment—are far broader than the narrow "business" unionism, with its singular focus on obtaining marginal economic gains, that is commonplace in labor unions today. Unions must inspire workers by appealing to more than their

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[278] *See* Crain, *supra* note 23.

[279] *See* CHONG, *supra* note 216, at 173–74 (noting that a sympathetic government or one that is perceived as responsive will encourage collective action).

[280] *See, e.g.*, sources cited *supra* note 13.

[281] *See* MACKINNON, *supra* note 158, at 84.

economic rationality. Instead, an appeal must be made to their emotional, affective side, and workers must be persuaded to undertake the difficult task of empowering themselves from the inside out.[282] The concept is eloquently expressed in this excerpt from a poem by Donna Kate Rushin, written for women of color:[283]

> [B]reathe
> Before you suffocate
> Your own fool self
>
> Forget it
> Stretch or drown
> Evolve or die
>
> The bridge I must be
> Is the bridge to my own power
> I must translate
> My own fears
> Mediate
> My own weaknesses
>
> I must be the bridge to nowhere
> But my true self
> And then
> I will be useful

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[282] *See* Alan Hyde, *Endangered Species*, 91 COLUM. L. REV. 456, 471 (1991) (reviewing WEILER, GOVERNING THE WORKPLACE, *supra* note 13). Hyde points out that unions cannot survive or flourish if they limit themselves to economic appeals, because rational workers will choose "free ridership." *Id.* Idealistic, visionary appeals have constructed a strong collective identity, succeeding where more limited, rational approaches failed. *Id.*

[283] Donna K. Rushin, *The Bridge Poem*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR at xxi, xxii (Cherrié Moraga & Gloria Anzaldua eds., paperback ed. 1983).