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Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power

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AVOIDING LEGAL SEDUCTION: REINVIGORATING THE LABOR MOVEMENT TO BALANCE CORPORATE POWER

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I. INTRODUCTION

Professor Dau-Schmidt makes a persuasive case for a more effective mechanism for employee voice. As befitting a lawyer, his solutions to the problem of the relative lack of employee voice are primarily legal. Historically, labor unions have served as the primary instrument for employee voice, but in recent years, unions have suffered substantial losses of membership and power.[1] The recent failure to enact even a modified version of the Employee Free Choice Act, despite an overwhelmingly Democratic Congress and a Democratic president who

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1. Both critics and supporters have identified numerous reasons for the decline. *See, e.g.*, Katherine V.W. Stone & Scott L. Cummings, *Labor Activism in Local Politics, From CBAs to "CBAS"* 2–7 (UCLA Sch. of Law Research Paper No. 10-34.), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719822&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719822) (last visited Mar 10, 2011); CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 34–35 (1993); PHILIP M. DINE, STATE OF THE UNIONS: HOW LABOR CAN STRENGTHEN THE MIDDLE CLASS, IMPROVE OUR ECONOMY, AND REGAIN POLITICAL INFLUENCE, at xxvi–xxviii (2008); JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS 16–22 (2010); WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 35 (1993); DANIEL NELSON, SHIFTING FORTUNES: THE RISE AND DECLINE OF AMERICAN LABOR, FROM THE 1820S TO THE PRESENT 131–55 (1997); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529–30 (2002); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 59 n.1, 62 n.14 (1993); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578–79 (1992); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983). *See generally* Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575 (1997).

were elected with crucial political support from unions, demonstrates the weakness of organized labor. Despite Professor Dau-Schmidt's convincing argument that employee voice is essential for the public good, unions seem unlikely to play a major role in creating that voice without significant changes in their strategies and tactics, their size, how they are perceived by the public, and the greater political climate. Moreover, the law is unlikely to change in the ways Professor Dau-Schmidt suggests without a revitalized labor movement. This Article argues that unions have been too dependent on the law and lawyers—a strategy that will ultimately be unsuccessful without a large, active, and loyal membership base and a network of supportive organizations advocating for the same causes.

For many years, my husband and I disagreed about the role of lawyers in the labor movement. As a long-time union officer, he asserted that labor lawyers ruined the labor movement. In his view, the labor movement needed only criminal lawyers. As a union-side labor lawyer, I resisted this notion mightily, arguing that lawyers only advised their clients, who then decided independently whether to follow the lawyer's advice. Over the years, however, perhaps aided by distance from my role as a lawyer representing unions, I have come to believe that he was on to something. While I disagree with his argument that the labor movement does not need labor lawyers, I have concluded that law's influence on the labor movement has not been entirely beneficial. The law is seductive. I use the term legal seduction in the title intentionally. Seduction means to "entice" a person or organization to do something not in their best interest or to abandon their duty.[2] Institutionalized unions have relied too heavily on legal action, contract enforcement, and electoral politics and, consequently, too little on engaging their own membership, organizing new members, and building coalitions with other organizations with similar aims.[3] Lawyers and the law have influenced the strategy decisions of the labor movement. While legal strategies can be one arrow in a quiver, in order for labor unions to play a significant role in providing employee voice in the future, they must broaden their vision. Law, and even collective bargaining agreements, must be instruments of the movement, but

2. RANDOM HOUSE UNABRIDGED DICTIONARY 1732 (2d ed. 1993).

3. My argument is, in part, a call for a return to social justice unionism, an argument that has been effectively made by other scholars. *See, e.g.*, GETMAN, *supra* note 1, at 1; MICHAEL SCHIAVONE, UNIONS IN CRISIS? THE FUTURE OF ORGANIZED LABOR IN AMERICA 61 (2008).

favorable law and contracts cannot be ends in themselves. Instead, a combination of returning to the tools that built the movement and adapting to the changed conditions of the global economy will enable trade unions to provide an important, and much-needed, counterbalance to corporate power.

This Article begins by briefly describing how legal and political action has come to be a central strategy for labor unions. Next, it analyzes the ways in which the law has failed the labor movement, reviewing various laws that have been enacted to protect employees, often at the behest of unions, and how those laws have been perversely twisted to the detriment of workers. The Article, then, looks at unions and employee movements that have succeeded in the face of unfavorable laws and analyzes the determinants of those union successes. Finally, based on these strategies, the Article provides suggestions about how the labor movement can expand its role in today's economy.

II. WHY LAW?

I do not seek to establish as an empirical matter that labor unions have focused "too much" on the law. "How much is too much" is a variable determination that depends on the situation. My argument is rather a cautionary tale: the law is limited as an avenue for change, especially when that change is sought without widespread political support from union members and other advocates. Its seductive power can distract from more important work that is necessary to sustain the labor movement. Excessive focus on the law can drain energy and resources from the grass roots movement, which is essential for change. Law is needed to support, but not shape, the movement's strategy. In addition, it should not be the principal strategy used to achieve the broader goals of the movement.

In part, my sense of the importance of law to labor comes from many years of working with the labor movement and hearing the refrain—"just wait until the next election; once when we elect the right people, things will improve." In support of my intuitive conclusion, data on union spending reflects substantial expenditures for both political contributions and campaigns,[4] and lawyers and litigation.[5] It is also

4. I consider political spending in the discussion of the law because its purpose is typically to elect those who will favorably influence law through legislation or appointment of judges and administrative agency officials. Labor unions accounted for seven of the top fifty organizations and two of the top ten organizations donating to state and federal political

evident that for many years increasing membership and developing relationships with other organizations with similar interests were not a priority for the labor movement.[6] In 2005, the labor movement split,

campaigns, political parties, and ballot measures in 2007 and 2008. FollowtheMoney.org, Top National Donors, http://www.followthemoney.org/database/top10000.phtml (last visited May 13, 2011). The top donor was the National Education Association, a public sector union, contributing over $56 million. *Id.* The Service Employees Union was number five on the list with over $35 million donated. *Id.* Total contributions of unions, however, are dwarfed by the contributions of businesses. As just one example, the finance, insurance and real estate industry alone donated more than all labor unions in 2008 and thus far in 2010. *Compare* FollowtheMoney.org, Industry Influence Table 1: Finance, Insurance & Real Estate Contributions to All Candidates and Committees, http://www.followthemoney.org/database/IndustryTotals.phtml?f=0&s=0&g[]=6 (last visited May 13, 2011) (stating that contributions from the finance, insurance and real estate industry totaled over $254 million in 2008 and more than $228 million in 2010), *with* FollowtheMoney.org, Industry Influence Table 1: Labor Contributions to All Candidates and Committees, http://www.followthemoney.org/database/IndustryTotals.phtml?f=0&s=0&g[]=12 (last visited May 13, 2011) (stating that contributions from labor totaled over $224 million in 2008 and more than $188 million in 2010). Political spending per union member has increased in recent years, as have overall political contributions which includes volunteer assistance in political campaigns. Morris M. Kleiner, *Follow the Leader: Are British Trade Unions Tracking the U.S. Decline?*, *in* TRADE UNIONS: RESURGENCE OR DEMISE? 199, 203 (Susan Fernie & David Metcalf eds., 2005). Political influence has not increased with increased contributions, however, because of the membership decline. *Id.* Based on data from LM-2s filed by labor unions with the U.S. Department of Labor, I have calculated the percentage of expenditures on political campaigning and lobbying by several national labor unions over the course of three years. The percentages vary by union and do not include expenditures by local or state affiliates. The UAW's percentages for 2009, 2008, and 2007 respectively are as follows: 3.46%, 3.41%, and 2.08%. The Service Employees Union's percentages for 2009, 2008, and 2007 respectively are as follows: 19.17%, 20.63%, and 12.44%. The IBEW spent the least for 2009, 2008, and 2007 respectively: 1.65%, 1.10% and 1.13%.

5. I have calculated the percentage of total expenditures spent on litigation and staff lawyers by several national labor unions over the course of three years by reviewing data from the LM-2s filed by labor unions with the U.S. Department of Labor. As noted in note 4, the percentages vary by union and do not include expenditures by local or state affiliates. The UAW's percentages for 2009, 2008, and 2007 respectively are as follows: 2.41%, 2.26%, and 1.88%. The Service Employees Union's percentages for 2009, 2008, and 2007 respectively, are as follows: 4.41%, 2.62%, and 2.87%. The IBEW spent the least for 2009, 2008, and 2007 respectively: 0.63%, 0.82% and 0.33%. Total expenditures for both litigation, and political campaigning and lobbying in 2009, 2008, and 2007 respectively, are as follows: UAW, 5.87%, 5.67% and 3.96%; SEIU, 23.58%, 23.25%, and 15.31%; IBEW, 2.28%, 1.92%, and 1.46%. These figures do not include the staff time other than attorney time spent on legal actions, including contract enforcement, which is a major part of staff responsibility for most unions, and may understate the costs in other ways as well.

6. George Meany, long-time president of the AFL-CIO, stated in 1972: "I used to worry about the size of the membership. But quite a few years ago I just stopped worrying about it, because to me it doesn't make any difference." CRAVER, *supra* note 1, at 3. Meany's view reflected a high level of complacency in the labor movement with respect to growing the membership and developing additional support. *Id.*; *see also* GETMAN, *supra* note 1, at 19, 305–07; NELSON, *supra* note 1, at 148–156 (describing union difficulties since the 1950s in organizing and limited, and unsuccessful, efforts by many unions to reverse the trend);

with seven unions leaving the AFL-CIO to form a new federation, Change to Win.[7] One major disagreement that led to the split was the AFL-CIO's greater focus on political activity as contrasted with the Change to Win unions' focus on building membership.[8] Yet following the split, the Change to Win unions spent more money on political activity than they did before the split.[9] Clearly the law remains an important focus of the labor movement.

The labor movement's dependence on the law is not surprising. Alexis de Tocqueville long ago recognized the unique role that the law plays in American society.

> Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in daily controversies.... [T]he spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contract the habits and the tastes of the magistrate.[10]

De Tocqueville further suggests that lawyers and the law exert almost imperceptible control over American society.[11] And thus, law is pervasive.

Law's pervasiveness in American society contributes to its seductive power. Successful use of the law enhances this power. A few significant legal victories make it is easy to believe that legal action is the answer to

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Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 147, 162 (noting the union shift in focus from organizing new members to servicing existing members). As one critical union official discussing the labor movement's failure to organize remarked, "There are international union presidents who actually have publicly said, '[w]e can't organize unless there is labor-law reform. We just can't.' So, what they believe their mission is, is politics." GETMAN, *supra* note 1, at 19, 306–07.

7. For a description of the formation of Change to Win, see SCHIAVONE, *supra* note 3, at 50–55.

8. *Id.* at 52–53; Ellie Levenson, *Interview: Andy Stern*, NEW STATESMAN, Sept. 12, 2005, at R10.

9. Linda Casey, *New Labor Union Employs Old Strategy*, FollowtheMoney.org, Jan. 9, 2008, *available at* http://www.followthemoney.org/press/ReportView.phtml?r=351.

10. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 223–24 (Bruce Frohnen ed., D.C., Regnery Publ'g, Inc. 2002) (1889).

11. *Id.* at 224.

most problems and that if only the right candidates win the election, unfavorable law can be changed. But as critical legal scholars and others have long recognized, law is a tool of the powerful.[12] And, if ever labor unions were among the powerful, they certainly are no longer.[13] In the nineteenth century, the law was used to frustrate labor organizing and to prevent employees from combining into unions to increase their power vis-a-vis their employers.[14] Time after time, nascent employee efforts to pressure their employers were enjoined and or punished by the courts. Despite these legal hurdles, however, labor unions grew in fits and starts in the latter nineteenth and early twentieth centuries.[15] As labor unions grew and their power increased, unions achieved what was viewed as a great political victory, the enactment of the National Labor Relations Act (NLRA) in 1935. The statute was a radical transformation of the law relating to labor unions. It passed despite substantial opposition from employers and despite the legal inability of unions to use combinations of employees to pressure employers. Early decisions under the statute from both the National Labor Relations Board and the courts were largely viewed as victories for organized labor.[16] The heady aura of success encouraged unions to utilize the new statute and heralded an era of union activism in organizing, negotiating

12. *See* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 837–38 (1998) (discussing the popular perception that law favors the rich and powerful); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 658–59 (1994) (stating that law is not a set of rigid rules but instead a flexible system that can be manipulated by skilled attorneys who represent the rich and powerful); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 150–51 (2010) (noting that the poor are less likely to utilize legal assistance or to view legal assistance as a solution to their problems); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1860–61 (2008) (stating that reforms, even those that are neutral in effect and beneficent in intent, cannot be enacted without the support of powerful interests); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 27 (1992) (noting that legal reform, no matter how limited, is impossible without the support of the rich and powerful).

13. This is not to suggest that labor unions currently have *no* power, but that power has been substantially reduced as unions have shrunk in size and resources.

14. JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 1 (2d ed. 1999).

15. *See* NELSON, *supra* note 1, at 3–4; SCHIAVONE, *supra* note 3, at 9–10.

16. Karl E. Klare has argued that some of those early decisions contained the seeds of "deradicalization" of the statute. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 270 (1978).

collective agreements, and litigation.[17] Labor unions, for a time, had the power to influence legislators and to some extent that power came from the law and the consequent ability of unions to organize members using legal means. Organizing brought resources, and resources increased power. The law helped build a powerful labor movement that was able to obtain political influence and succeed in litigation, as well as building membership and negotiating favorable contracts. In short, the NLRA began to shape the goals and strategies of the labor movement.

Law legitimizes.[18] With the passage of the NLRA, labor unions moved from "outlaw" organizations to accepted parts of society—from outsiders to insiders. Using the tools of the law, labor unions were able to build resources which enabled continued access to the powerful and success in negotiating agreements for their members. As legitimate societal organizations, labor unions became more shaped by societal norms.[19] Being an insider is enticing and provides benefits; acceptance of those benefits cements the organization's position as an insider.[20] As insider organizations accumulate resources, their willingness to take risks is reduced, as there is more at risk. Conservatism sets in.[21]

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17. *See* SCHIAVONE, *supra* note 3, at 10 (describing the 1930s and 1940s as the "glory years for organized labor and working people").

18. *See* Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 647–48 (David Kairys ed., 3d ed. 1998).

19. The literature regarding social norms is extensive and there is substantial debate about the explanation for compliance with social norms, which occurs even where such compliance is at odds with the best interests of the actor. *See* SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW, at xi–xii (Eric A. Posner ed., 2007); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 *passim* (1996). Norms generally operate within communities, however, and the sanctions for violation of norms may be effective only for those who are or desire to be a part of the community. *See* SOCIAL NORMS, *supra*, at xii, xiv (discussing consequences and sanctions such as loss of esteem or status and shaming); Sunstein, *supra*, at 914–20, 939–41 (discussing various reasons for compliance with and departure from norms). In the period prior to enactment of the NLRA, when unions were outsiders, they might be seen as norm changers. *See id.* at 929.

20. *See* SCHIAVONE, *supra* note 3, at 28–29 (discussing the iron law of oligarchy formulated by Robert Michels which argues that hierarchical leadership and conservative unions are inevitable). While I do not agree that this process is inevitable, there is a strong tendency in this direction, although as Schiavone shows, there are also regular efforts by challengers within at least some unions to change direction. *Id.* at 29.

21. *Id.* at 28–29; Howard Kimeldorf & Judith Stepan-Norris, *Historical Studies of Labor Movements in the United States*, 18 ANN. REV. OF SOC. 495, 505–06 (1992) (stating that American unions are driven by the desires of their memberships for traditional goals of higher wages and benefits and in the absence of a radical insurgency, they become conservative institutions working with corporate employers to achieve the goals of business); Judith Stepan-Norris & Maurice Zeitlin, *"Red" Unions and "Bourgeois" Contracts?*, 96 AM. J. SOC., 1151, 1154–55 (1991) (stating that that the more established unions become within the capitalist system, the more conservative they become as they become a part of the system

Preserving the organization (and its assets) for the good of all becomes a major goal. The advice of lawyers becomes crucial in reducing risk.

As insiders in a system of collective bargaining constructed by the law, unions naturally began to rely on the law to conduct their business. Organizing proceeded largely using the statutory mechanism of Board-conducted elections. Collective agreements became the source of rights and arbitration became the favored method of enforcement of those rights. Unions focused on negotiating and renegotiating contracts to confirm the terms and conditions of employment. Bargaining, too, was shaped by the law. Strategic bargaining positions and tactics were used to position the union and employer for any necessary legal actions relating to bargaining failures or strikes. And when problems arose, arbitration and litigation were the solutions. Strikes, when they occurred, related primarily to obtaining a new contract because agreements contained no-strike clauses, and even when contracts did not contain the clause, the courts read them into the agreement.[22] Various tactics for collective action were outlawed by statutory amendment or interpretation, restricting unions to the use of the one-shot strike.[23] When strikes failed, unions made strategic offers to return to work in order to place an onus of back pay on employers. The unions' strategies and tactics were thus shaped by the law.

I am not suggesting that the union should not utilize the law as an aid to bargaining and to obtain the best outcomes for its members. Instead my argument is that the law should be only one piece of the strategy and not the guiding light. As William Forbath has stated:

> In the past, the institutional framework and policies of labor law played a substantial part in shaping the character of the labor movement.... Thus the imagining

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they once challenged).

22. Teamsters v. Lucas Flour Co., 369 U.S. 95, 106 (1962) (holding that, although the contract did not contain a no-strike clause, it did contain an arbitration clause to settle disputes between the employer and the union, and therefore the union was foreclosed from striking during the term of the contract).

23. 29 U.S.C. § 158(b)(4), (7) (2006) (restricting secondary boycotts and recognitional picketing); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 44–66 (1983) (describing the role of employer-influenced assumptions in outlawing of collective tactics like sitdowns and slowdowns); WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 165–66 (1991) (describing statutory interpretation outlawing secondary picketing and boycotts); James Gray Pope, *Class Conflicts of Law I: Unilateral Worker Lawmaking Versus Unilateral Employer Lawmaking in the U.S. Workplace*, 56 BUFF. L. REV. 1095, 1104–1112, 1126 (2008) (describing the decisions finding sit-downs, slow-downs, and partial strikes unprotected by the NLRA).

> and scrutinizing of possible new institutions and new laws should be done with all the canniness labor and its friends can muster; for these institutions and laws may go a long way toward shaping the identity and the capacities for collective action of the labor movement of the future.[24]

That law shapes behavior is not unexpected. Indeed, it is the role of law to establish the rules that govern democratic society. William Forbath and other scholars have documented the role of law in the emergence of the American labor movement's voluntarist character.[25] The harsh treatment of workers in the courts in the nineteenth and early twentieth centuries led to a narrowing of labor's objectives and to labor's adoption of legal strategies to obtain them.[26] Labor was ultimately successful in recasting the law to protect labor rights to organize and strike, but a more radical vision of labor rights was lost in the process.[27] Law and its interpretation have continued to shape the strategies of the labor movement. By focusing unions on their relations with their employer rather than on broader class objectives, decisions under the NLRA, even those by decision-makers sympathetic to organized labor, have restrained the potential of the labor movement to achieve broader aims and helped support the characterization of labor as a narrow special interest.[28]

Professor Malin has documented the role of law in shaping the strategies and goals of public sector unions.[29] The law restricts bargaining on subjects that relate to inherent managerial prerogatives, thereby limiting the role of unions in these matters.[30] To the extent unions are allowed to bargain, they bargain about the effects of management decisions. The incentive for unions is to negotiate

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24. FORBATH, *supra* note 23, at 172–73; *see also* Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 69-70 (2005) (arguing that unions should view favorable law as a "window of opportunity" to assist the union in building its power).

25. *See id.* at 6.

26. *Id.* at 6–7.

27. *Id.* at 163–65.

28. George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 217–19 (1994).

29. *See generally* Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369 (2009).

30. *Id.* at 1389.

protections for employees, rather than participating in the decisions about what Malin calls the "risks of the public enterprise."[31] Accordingly, for example, teachers' unions negotiate protections from discharge and discipline rather than evaluation systems designed to improve teaching.[32] Instead of partnering to create an effective educational system, the union's role is limited to negotiating wages, benefits, and job security for teachers. One can observe a similar phenomenon in the private sector. Bargaining about entrepreneurial decisions is not required, even where there is a devastating effect on employee job security.[33] The employer is always required to bargain about the effects of the decision, however, and in many cases there will be some uncertainty about whether bargaining over the decision is required because the law applies a balancing test.[34] Thus, the incentive for the union is to use legal strategies to delay and hopefully derail the decision, rather than working with the employer to find a solution that meets the employer's needs and preserves jobs.

III. LAW IS NOT THE ANSWER

Law can be a tool of change, but there are major drawbacks to heavy reliance on the law. First, law is inherently unstable. Both statutory and decisional law change regularly, and often the change is the result of changes in the decision-makers. It is well documented that decision-makers exercise a great deal of influence over the interpretation of law.[35]

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31. *Id.* at 1391.

32. *Id.* at 1393–94.

33. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686 (1981).

34. *Id.* at 679 ("Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.").

35. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 227 (2d. ed. 2006) (indicating that the way that judges frame issues leads to varying statutory interpretation and that the ideologies and methodologies of the judges influence statutory interpretation); Cass R. Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302–307 (2004) (confirming the effects of ideology on judicial decision-making in many types of cases including affirmative action, sex discrimination, sexual harassment, disability discrimination and race discrimination); Adrian Vermeule, *New Perspectives on Statutory Interpretation: The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 563 (2005) (pointing out that the Supreme Court is intrinsically and naturally unstable because of its composition—nine regularly changing members with often widely varying backgrounds, experiences, and philosophies); *cf.* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional*

Second, those regulated by law eventually learn to avoid or minimize its impact.[36] And, third, there are various flaws in legal regulation, including difficulty in regulating with precision due to lack of information; regulatory delays due to bureaucracy; and resistance to implementation, lack of resources for regulation, and capture of the regulatory process by those intended to be regulated.[37]

Labor law provides a particularly illustrative example of the problems of legal regulation. During the early days of industrialization and worker unrest, judges regularly sided with employers, developing common law doctrines which initially criminalized worker combinations designed to assert workers' rights and later made them subject to quick ex parte injunctions enforceable with contempt citations.[38] Judges were drawn from the employer class and had little sympathy for, or understanding of, the plight of employees.[39] Ultimately, widespread recognition of judicial hostility to employees led to support for changes in the law. Congress passed the Norris-LaGuardia Act in 1932 and later the NLRA. The judicial hostility toward labor resulted in labor's support for an expert administrative agency to administer the statute. The NLRA created the National Labor Relations Board (Board). Although in theory the Board is an agency composed of experts, the members are political appointees.[40] Thus, the process of decision-making has an inherently political component and the vision of a panel of neutral experts has not been realized.[41] Board-initiated changes in the law have been particularly common since 1980. The Reagan and Bush Boards reversed a number of previous precedents.[42] The Clinton Board followed by reversing some of the cases decided by the Reagan and Bush Boards, and in addition, reversing other longstanding precedents.[43]

Defense of Judicial Power Over Statutory Interpretation, 96 NW. U. L. REV. 1239, 1245–46 (2002) (arguing that judges are generally impartial and consistent in their interpretation of statutes).

36. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 398, 444 (2004).

37. *Id.* at 444–45.

38. GETMAN ET AL., *supra* note 14, at 1.

39. *Id.*

40. *Id.* at 2, 9.

41. *See id.* at 9–10; Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 427–428 (1995) (noting criticism of the Board members for lack of experience and expertise in collective bargaining).

42. *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 248 (2005).

43. *Id.* at 249 n.137.

The Bush II Board followed the same path.[44] Appointments to the Board have become highly politicized and long delays in confirmation are common.[45] These delays have limited the ability of the Board to decide cases, impairing its effectiveness.[46]

A number of scholars have documented how the Board, and particularly the courts, have taken the fairly radical language of the NLRA and interpreted it narrowly, reducing the potential of the statute to make major changes in the power of unions and the collective rights of employees.[47] Employer property rights, not mentioned in the statute, have ascended in importance over the years, to the detriment of employee rights.[48] Courts, which have played an important role in interpretation of the NLRA, have retreated from support for collective bargaining and collective rights.[49] Evolution of collective rights has not occurred for several reasons.[50] Legislative efforts to amend the NLRA have failed due to lack of support in Congress or presidential veto.[51] Labor supporters have never achieved enough support to either override a veto or stop a filibuster.[52] The structure of the law, including preemption of state law and jurisdiction limited to the NLRB, has precluded development of the law through other means.[53]

Other employment laws, enacted with substantial support from

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44. *Id.* at 250.

45. *See id.* at 250–52.

46. Most recently and perhaps most egregiously, the Board had only two members for twenty-seven months. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2639 (2010). Despite the efforts by Board members to continue operations, the Supreme Court decided that almost 600 decisions by the two-member Board were invalid. *Id.* at 2638.

47. *See* ATLESON, *supra* note 23; CRAVER, *supra* note 1, at 29; ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 17–18 (2006); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572–80 (1996); Ellen Dannin, Hoffman Plastics *as Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 399 n.34 (2009) (documenting the courts' judicial amendment of the NLRA, particularly in the area of limiting remedies); Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union Side Apologia*, 15 EMP. RTS. & EMP. POL'Y J. (forthcoming 2011) (manuscript at 7–14, on file with author), *available at* http://ssrn.com/abstract=1751662 (discussing the evolution of labor law and indicating that the changes weakening labor rights were simply the result of powerful forces regaining the upper hand); Estlund, *supra* note 1, at 1535 n.33; Klare, *supra* note 16, at 270.

48. ATLESON, *supra* note 23, at 5–11. In this context, property rights include assumptions about the employer's right to control decisions relating to the workplace. *Id.*

49. *See* Brudney, *supra* note 47, at 1572–88.

50. Estlund, *supra* note 1, at 1529–30.

51. *Id.* at 1539–42.

52. *Id.*

53. *Id.* at 1530–31.

unions to protect all employees, have been interpreted by the courts in ways that limit employee rights and privilege employer interests. The Employee Retirement Income Security Act (ERISA) is a statute enacted to protect employee benefits such as pensions and health insurance.[54] The preemption provision of ERISA has been interpreted so broadly, however, and the remedies section so narrowly, that the result is a "grand irony."[55] State laws that might protect employee benefits are preempted while ERISA provides very limited rights and remedies, particularly in the area of health insurance.[56] In most cases, employees can only compel the employer to comply with the existing plan, which can be changed at any time. As Paul Secunda notes, the goal of employer cost containment has trumped the protection of employee rights.[57]

Employment discrimination laws have received similar treatment. In the case of these laws, however, civil rights advocates have been able to secure legislative amendment in many cases. A series of 1989 Supreme Court decisions cutting back on employee rights under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) and Section 1981 of the Civil Rights Act of 1866 led Congress to pass the Civil Rights Act of 1991 and the Older Workers Benefit and Protection Act, reversing most of the Court's decisions.[58] More recently, the *Ledbetter* decision was overturned by Congress.[59] A long series of restrictive decisions under the Americans with Disabilities Act (ADA) led to an abysmal win rate for employee plaintiffs under that statute.[60] In 2008, Congress amended the ADA to

54. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2006).

55. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 133 (2009).

56. *Id.* at 142–43.

57. *Id.* at 162.

58. Michele A. Estrin, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2050 (1992).

59. Fair Pay Act of 2009, 42 U.S.C.S. § 2000e-5 (2009) (superseding the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), which held that charges of sex-based discrimination in pay under Title VII of the Civil Rights Act of 1964 must be filed within 180 days of the original discriminatory act rather than within 180 days of the last paycheck reflecting the disparate pay).

60. *See* Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513–515 (2005) (finding plaintiff win rates to be as follows: 1992–1997, 7.9%; 1998, 5.7%; 1999, 4.3%; 2000, 3.6%; 2001, 4.3%; 2002, 5.5%; 2003, 2%; 2004, 3%). The decisions of the courts have weakened the protections of the Americans with Disabilities Act ("ADA"), and employers have prevailed at the trial court level 93% of the time in Title I ADA cases. Ruth Colker, *The Americans with*

reverse many of these decisions.[61] Labor law, however, has not been legislatively changed to reverse unfavorable decisions for either employers or unions. Both unions and employers have maintained sufficient power to block statutory change favorable to the other side, meaning that neither has had sufficient power to push through favorable changes.[62] The most recent example is the failure of unions to obtain passage of the proposed Employee Free Choice Act.[63]

As Professor Dau-Schmidt has noted, citing Marc Galanter, the more powerful (employers) will continue to litigate with the less powerful (employees) until their position prevails.[64] And, as discussed above, employers have been quite successful in using litigation to turn employee protective laws to their advantage. Dau-Schmidt also correctly notes that unions can play an important role in developing favorable law through litigation and lobbying for legislative change.[65] But without sufficient power, their success in developing favorable law through these means will be limited.

Recent scholarship on the Supreme Court has questioned the conventional wisdom that the Court, unlike the legislative and executive branches, is ruled by law, uninfluenced by the will of the majority.[66] This

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Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999).

61. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as 42 USC § 12101 (2008)) (overturning U.S. Supreme Court decisions in order to broaden the term "disability," and thereby increasing the number of people covered by the Act).

62. Professor Estlund has persuasively argued that this legislative impasse has been a major factor in the "ossification" of the law. Estlund, *supra* note 1, at 1532–44.

63. Raymond J. LaJeunesse, Jr., *The Controversial "Card-Check" Bill, Stalled in the United States Congress, Presents Serious Legal and Policy Issues*, 14 TEX. REV. L. & POL. 209, 210 (2010).

> As of this writing, proponents have been unable to obtain the votes needed in the Senate to invoke cloture on a threatened filibuster and thus obtain a vote on the bill itself. Nor, apparently, have they been able to agree upon an alternative version on which cloture might possibly be invoked, because no alternative has yet been introduced in the Senate.

Id. (footnotes omitted).

64. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 779 & n.67 (2011); *see also* Gordon, *supra* note 18, at 644 (discussing the weighting of the legal system toward the interests of the rich and powerful, and the backlash triggered by even limited legal victories of those who challenge powerful interests using the law).

65. Dau-Schmidt, *supra* note 64, at 807–08.

66. *See* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 82 (2007) (arguing that changing attitudes is ultimately what changes the law, even in the judicial branch, by creating majority support for change); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 366–70 (2009) (asserting that across a wide variety of civil

analysis further suggests that a favorable legal climate for labor unions will come only when unions have widespread community support.

Law is elitist. While the language of the law may be commonly used in the United States, litigation is the province of lawyers. Scholars studying the use of litigation for social change have concluded that when litigation is a primary strategy, the individuals represented are often disempowered and left out of the process.[67] Yet a tension exists because the legal expertise that is necessary to use legal tools to initiate change creates the risk that they will dominate the process.[68] Similarly, the essential union leadership required to negotiate and administer contracts may have the paradoxical result of disengaging the rank and file.[69] When workers are disconnected, their interest and participation wanes and any campaign for change loses power. As unions institutionalized, their focus became negotiation and enforcement of contracts, along with enforcement of legal rights. Members had little role in that process unless they served as union officials or had a contractual claim. As a result, it is easy for members to lose interest in the union and fail to recognize its value. If the union is unable to mobilize its members to support collective action in their own workplace or the political arena, its power in both arenas is limited. To the extent that legal expertise is required, the distancing effect may be even greater. Extensive litigation can also use resources that could be used for other purposes, including direct action that involves and engages the membership. And legal change is almost always a slow process. Keeping members engaged as cases wind their way through the courts

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liberties contexts, the Court explicitly and routinely decides constitutional protections based on the views of a majority of the states); Corinna Barrett Lain, *The Countermajoritarian Classics (and an Upside Down Theory of Judicial Review)* 2–5 (Aug. 31, 2010), (unpublished working paper, on file with the University of Richmond Law School), *available at* http://ssrn.com/abstract=1669560 (arguing that even seemingly countermajoritarian decisions like *Brown v. Board of Education* and *Roe v. Wade* were actually majoritarian because they were supported by a majority of the public, and only seemed countermajoritarian because they were opposed by economic and political elites in the democratic branches of the federal and state governments).

67. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604 (2009); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 455–56 (2001) (summarizing critiques); Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles*, 35 FORDHAM URB. L.J. 339, 353–54 (2008).

68. COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 22 (2009).

69. Getman notes that unions have placed too much value on professionalism which results in a gulf between the leadership and the rank and file. GETMAN, *supra* note 1, at 326.

or proposed bills segue through the legislative process can be challenging, especially if the legal issue is a centerpiece of the campaign. Finally, legal victory can seem like the end of the process, leading to membership drift after accomplishment of the major goal.

An example of how a legal action can undermine an advocacy campaign comes from the Garment Workers' Center in Los Angeles, which conducted a campaign against Forever 21 after documenting the abuses of workers employed in various factories that produced clothing for the retailer.[70] Legal actions were a major part of the campaign strategy.[71] In reflecting on the campaign, organizers concluded that the focus on legal actions created significant problems.[72] Despite their efforts, it was difficult to keep employees involved in the strategy decisions especially as long periods of time passed while the litigation was in progress.[73] The employees could not have full decision-making power because of the legal expertise needed.[74] The priorities of the campaign were driven by the lawsuit so that the focus became keeping public attention on the dispute rather than developing leadership in the organization.[75] The employees began to see the organization as only a service provider. The leadership and employees lost their connection, and the organization lost membership.[76] As a result, the organization altered its strategy to focus more extensively on employee involvement and leadership development.[77]

When legal actions play a major role in union advocacy, lawyers become important players in the decisions of the organization. Lawyers are trained to win cases.[78] They are judged by their success in litigation.[79] Their view of organizational goals may be limited by their legal

70. Nicole A. Archer, et al., *The Garment Worker Center and the "Forever 21" Campaign*, *in* WORKING FOR JUSTICE: THE LA MODEL OF ORGANIZING AND ADVOCACY 154, 160 (Ruth Milkman, et al., eds. 2009) [hereinafter WORKING FOR JUSTICE].

71. *Id.* at 160–64.

72. *Id.* at 162.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 162–63.

78. *See* SHDAIMAH, *supra* note 68, at 160, 169 (noting that lawyers are trained to focus on the case, the facts relevant to the case, and the objective of winning the legal claim and that legal victories encourage lawyers to continue their efforts).

79. Litigation may be "particularly ... disempowering" for clients. *See* SHDAIMAH, *supra* note 68, at 22.

training.[80] Their training encourages them to shape the facts to fit existing legal claims rather than envisioning a goal and designing a strategy to achieve it with the law as one tool. Additionally, what is needed to win a particular case or series of cases may not be what is in the long term interest of the organization.[81] Lawyers, with their particular expertise, may influence decision-makers to place too great an emphasis on the law in making decisions.[82] Strategy decisions must be made in consultation with lawyers, but by those who are looking at the bigger picture.

IV. VISIONS OF SUCCESS

Favorable law is helpful, but not essential to organizing and labor advocacy. And, in this regard, favorable law is preceded by union organizing. As discussed above, the NLRA resulted from union organizing and advocacy at a time when the law was overwhelmingly unfavorable to unions. In the public sector as well, unionization preceded favorable law in many jurisdictions.[83] There is debate about

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80. *See* SHDAIMAH, *supra* note 68, at 20. According to Shidaimah,

> Professions and professionals have the authority and the knowledge to decide what constitutes a legitimate problem or topic within their field. . . . The parameters of relevance set by professionals tend to ignore the contexts in which problems arise and often fail to fully comprehend the range of factors that clients deem relevant to their cases. . . . The ability of lawyers to set the parameters of interest, sometimes against the wishes of clients, is a symptom of, and can further exacerbate, an imbalance of power between professionals and clients.

Id. (citations omitted); *see also* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 403 (2008) (noting that legal training can narrow the lens through which lawyers see problems).

81. *See* SHDAIMAH, *supra* note 68, at 20.

82. *See id.* at 20, 23 (noting the tensions between the directive role and the role of eliciting participation from groups, and the risk of domination by the lawyers); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 302 (1996) (noting the power of lawyers and their potential for influence and even exploitation of clients, particularly those in less powerful positions).

83. *See* RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 59–60 (3d ed., 2001); R. Theodore Clark, Jr. & F. Donal O'Brien, *Illinois Public Sector Collective Bargaining Legislation: The First Fifteen Years*, *in* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 195, 195–99 (Joyce M. Najita & James L. Stern, eds., 2001); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 737–38 (2009) (describing unionization and the development of public sector law in Illinois).

whether the law is primarily a cause of organizing or an effect.[84] But almost certainly, it must be both.[85] Without union organization, there will not be sufficient support for changes in the law.[86] But, on the other hand, changes in the law can ease organizing.[87]

In the public sector, unionization is present, and in some cases, effective, even where the law remains unfavorable. In Virginia, for example, the law bans collective bargaining for public employees.[88] Yet in some Virginia public workplaces, unions are thriving.[89] Union leaders describe the need for continuous organizing to keep the membership involved and active.[90] Without a collective bargaining agreement and without any requirement for fair share fees[91] unions are dependent on continuing to involve the membership and provide them value to maintain their support. One leader of the firefighters' union insightfully noted that union leaders in other states were very comfortable with their ability to negotiate agreements.[92] The negotiation and enforcement of the agreements was their focus rather than developing continuing connections with and involvement of the members, which could be a weakness as well as a strength.[93] These leaders in other states were surprised that the firefighters in Virginia were able to obtain such high wages and benefits without the right to bargain.[94] Additional support from the public arises from the unions' donations of time and energy to community projects and nonprofit groups.[95] Public support is mobilized by the union when needed to encourage public officials to back union objectives.[96] In North Carolina, where public sector bargaining is also outlawed,[97] two successive governors have issued executive orders

84. PAUL JOHNSTON, SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE 25, 26 (1994).

85. KEARNEY, *supra* note 83, at 29, 60, 62.

86. *Id.* at 62.

87. *Id.*

88. *See* VA. CODE ANN. § 40.1-57.2 (2002); Commonwealth v. County Bd. of Arlington County, 232 S.E.2d 30, 44–45 (Va. 1977).

89. Hodges, *supra* note 83, at 753.

90. *Id.* at 751.

91. *Id.*

92. Interview with David Pulliam, Richmond Fire Fighters, (June 7, 2006) (copy on file with author).

93. *Id.*

94. *Id.*

95. Hodges, *supra* note 83, at 750–51.

96. *Id.* at 751.

97. N.C. GEN. STAT. § 95–98 (2009).

providing access and consultation rights to public sector unions.[98] Similarly, some unions in right-to-work states, where employees cannot be compelled to pay for union representation,[99] have successfully maintained strong memberships through internal organizing.[100] Thus, while favorable law can ease organizing, it can also seduce unions into reliance on the law to maintain membership, foregoing the internal organizing that is needed to maintain strong connections with the union.[101]

Similarly, worker centers and other worker advocacy organizations have been able to successfully organize and advocate for low wage and immigrant workers.[102] One can scarcely imagine a group with less job security and political clout than low wage, immigrant, and in some cases, undocumented workers. They are easily replaced, may risk deportation, have no funds to contribute to political candidates, and in some cases, cannot even vote. Yet, these organizing efforts have not been without success.

Worker centers are "community-based mediating institutions that provide support to low wage workers."[103] These institutions focus on three prongs: service, advocacy, and organizing.[104] Worker centers have documented successes in changing conditions for low wage workers,

98. *See* Exec. Order No. 45 (Jan. 21, 2010), *available at* http://www.governor.state.nc.us/NewsItems/UploadedFiles/9efcb131-fe7a-4acb-8e1f-c63a7db8de2c.pdf; Exec. Order No. 105, (Aug. 18, 2006), *available at* http://www.governor.state.nc.us/library/pdf/execOrderArchives/2006/08-August/18-To%20Facilitate%20Government%20Employee%20Access.pdf.

99. National Labor Relations Act, 29 U.S.C. § 164(b) (2006).

100. Michael M. Ostwalt, Note, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 704–05 (2007).

101. In describing the history of unionization in the 1930s, Nelson Lichtenstein stated: "Everyday, local leaders faced the task of justifying the union's existence to the rank and file to retain their loyalty.... Grievance battles were the order of the day, and local officers went about their jobs in an aggressive and energetic manner." Ostwalt, *supra* note 100, at 712 (quoting NELSON LICHTENSTEIN, LABOR'S WAR AT HOME 22 (2003)).

102. *See, e.g.*, JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 79–80, 82 (2006) (documenting the work of numerous worker centers around the country); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 149 (2005) (describing the Long Island Workplace Project); WORKING FOR JUSTICE, *supra* note 70, at 1–10 (describing various low wage worker campaigns in Los Angeles); Narro, *supra* note 67, at 344 (describing two campaigns of worker centers in Los Angeles). The United Farm Workers campaign leading to the passage of the California Agricultural Labor Relations Act offers another example of success. *See* Gordon, *supra* note 24, at 10–48.

103. FINE, *supra* note 102, at 2.

104. *Id.*

using law and organizing.[105] Often, these centers join forces with other worker advocacy organizations, including unions and community groups.[106] Workers from Long Island were able to change New York law, achieving enactment of the Unpaid Wages Prohibition Act, which improved enforcement of the law requiring payment of wages for time worked.[107] This success came only after building a strong coalition of labor, community, religious and even business groups, securing favorable media coverage, and direct lobbying by immigrant workers who had crafted the bill based on their own experiences and could communicate their stories with passion to the legislators.[108]

A coalition of worker advocacy and other community organizations worked with car wash workers in Los Angeles after discovering many legal violations and other abusive practices.[109] The coalition successfully represented workers to remedy violations of wage and hour laws, helped obtain reinstatement for workers fired for attempting to improve working conditions, and ultimately succeeded in obtaining legislation to regulate the industry to limit the most abusive practices.[110] The campaign also included a public education component.[111] As conceived by the advocates, the legislation provided a vehicle for organizing the car wash workers into a union, a campaign which was undertaken by a traditional labor union, the United Steelworkers of America, thereby creating a partnership between the worker centers, community organizations and traditional unions.[112]

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105. For a thorough review and analysis of various worker centers, see generally FINE, *supra* note 102.

106. *Id.*

107. GORDON, *supra* note 102, at 69; Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law* 1 (Carnegie Endowment for Int'l Peace, Working Paper No. 4, 1999), *available at* http://www.carnegieendowment.org/files/imp_wp4gordon.pdf. The article describes the act that significantly increases penalties for unpaid wages from a 25 percent civil fine to a 200 percent civil fine and from a misdemeanor with a maximum $10,000 penalty to a felony with a maximum $20,000 penalty. *Id.* The law also provides workers with more tools to collect back pay owed. *Id.*

108. Gordon, *supra* note 107, at 1, 23.

109. Narro, *supra* note 67, at 360.

110. *Id.* at 362–64.

111. *Id.* at 368.

112. *Id.* at 366–79. It may be somewhat ironic to use this example as it involves a campaign for legislation initiated by lawyers, which, as Narro points out, is at odds with the literature on law and organizing that suggests that the work of lawyers should be integrated into preexisting campaigns. *Id.* at 371. Nevertheless, the actions of the lawyers were still a means to an end and a part of an overall campaign to unionize car wash workers.

Day laborers, a group excluded from the protection of the labor and employment laws because of the nature of their employment, have established a national network supported by the two major labor federations.[113] Two community-based worker advocacy organizations in Los Angeles spearheaded efforts to organize the day laborers, which began as a small local effort and grew into the national organization that affiliated with the AFL-CIO and was composed of day labor organizations and worker centers around the country.[114] The campaign had two prongs: encouraging self-organization through leadership development and minimizing conflict between day laborers and community members, using conflict resolution.[115] The advocacy organizations worked to build the support and trust of the workers, developing solidarity and community support.[116] As the campaign developed, both lawsuits and lobbying for legislation were utilized to accomplish the goals.[117] Legal and legislative actions incorporated worker involvement through public protests.[118]

Most recently, Domestic Workers United, a nonprofit organization, spearheaded a successful campaign in New York to enact the first legislation in the country protecting the rights of domestic workers to overtime pay, freedom from discrimination, and a day off each week.[119] Domestic workers are excluded from the protection of virtually all labor and employment legislation and most are immigrant women of color, many with limited English proficiency, a group vulnerable to exploitation.[120]

The well-known and oft-reported Justice for Janitors campaign illustrates the use of alternatives to the NLRA organizing process to unionize a group of workers difficult to organize using traditional methods. The union used a variety of tactics including public pressure on building owners, civil disobedience, mass protests, community

113. Maria Dziembowska, *NDLON and the History of Day Labor Organizing in Los Angeles*, *in* WORKING FOR JUSTICE, *supra* note 70, at 141.

114. *See id.* at 141–53.

115. *Id.* at 142.

116. *Id.* at 146–47.

117. *Id.* at 142, 145, 151,152.

118. *Id.* at 145, 151.

119. Albor Ruiz, *Domestic Workers Bill of Rights Law Finally Grants Protection for Over 200,000 People*, N.Y. DAILY NEWS, Sept. 2, 2010, http://www.nydailynews.com/ny_local/brooklyn/2010/09/02/2010-09-02_finally_domestic_worker_rights_law.html#ixzz0yUXFwmGz.

120. *Id.*

support, legal actions, and corporate campaigns.[121] This campaign has even successfully organized janitors in Houston, located in a right-to-work state.[122] Not all tactics used by the union were lawful, and in addition, the union used such creative strategies as picketing the buildings at night, when the janitors were present, but rarely the tenants, to avoid liability for a secondary boycott.[123]

The Service Employees International Union organized a group of primarily African-American security officers in Los Angeles with the help of black community leaders, an accomplishment that required a rebuilding of trust with the African-American community.[124] Key aspects of the campaign involved union support for the broader interests of the community such as affordable housing, sharing of power between the union and community leaders, active protests by workers and community leaders, and the help of an Australian union to pressure a large employer with interests in Australian financing.[125]

V. EXPANDING THE ROLE OF LABOR UNIONS

The workers' rights advocacy campaigns outlined in the previous section illustrate several different models of combining legal strategies with organizing to achieve protection for workers. They demonstrate, not that the law is irrelevant, but that powerful organizations with the ability to influence terms and conditions of employment and obtain legislation favorable to workers can exist even in the absence of strong legal protection for workers' rights. The success of some public sector unions in states that outlaw collective bargain confirms that favorable law is not essential to a vibrant labor movement. Unions have focused substantial resources on legal changes that would ease the path to unionization. While there is no doubt that legislation prioritized by unions in recent years, such as the Employee Free Choice Act and banning striker replacement, would benefit the labor movement, it is increasingly clear that the election of Democrats supported by unions will not lead to favorable legislation at the federal level without more widespread support for the goals of the labor movement.

In order to return to their former position as a powerful institutional

121. SCHIAVONE, *supra* note 3, at 46–49.

122. *Id.* at 47.

123. *Id.* at 48–49.

124. Joshua Bloom, *Ally to Win: Black Community Leaders and the SEIU's LA Security Unionization Campaign*, *in* WORKING FOR JUSTICE, *supra* note 70, at 167, 169.

125. *Id.* at 183, 189–90.

actor in the American economy, labor unions must develop broad-based support.[126] Rebuilding such support will not be an easy task, but favorable law will follow. As noted above, favorable law comes from sympathetic legislators and legal decision-makers. Unions have recognized this fact, but have not successfully developed and maintained the continued broad-based support that leads to favorable law. Unions must begin by engaging their membership. Unions must become worker-centered.[127] Union leadership must involve and empower the membership to take leadership roles and become engaged and active participants, invested in the decisions of the organization.[128]

A second step is organizing new workers and building coalitions with organizations similarly interested in social justice.[129] The vision cannot be a narrow one. Many Americans are frustrated with the direction of the country. Unions must find a way to articulate a vision to draw in individuals from a wide spectrum of society.[130] Widespread support will lead to more favorable publicity for unions which will continue to build support.[131] A return to social justice unionism holds promise for drawing

126. I do not mean to simplify this task or to suggest that labor's focus on law is the sole or even the most significant reason for the decline of unionization in the United States. A number of factors have contributed to the phenomenon, many of which were outside the control of labor. *See supra* note 1. I focus here on actions that can be undertaken by the labor movement.

127. GETMAN, *supra* note 1, at 325 ("[Unions] must be not only for the people,... but also of the people ...."). Michael Duff says it this way: "The power of unions will never be restored without the basic courage of a worker to create tumult in the workplace when necessary." Duff, *supra* note 47, at 18.

128. Each of the successful campaigns discussed *supra* prioritized involvement of workers.

129. In some cases coalitions with groups not known for their interest in social justice may be possible and should be explored. The Workplace Project's campaign was able to draw business support for the Unpaid Wages Prohibition Act by emphasizing the message that businesses that did not pay their employees earned wages competed unfairly with law-abiding businesses. Gordon, *supra* note 107, at 14.

130. As noted by Philip Dine, unions have a unique history of "uniting people in common struggles across racial and ethnic divides, enabling them to pursue the American Dream, and helping them enter the middle class." Dine, *supra* note 1, at 258. As income inequality grows and the middle class shrinks, unions have an opportunity to reignite the vision of a more egalitarian society. Charles Craver suggests that unions must form professional associations to appeal to white collar workers. Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 339–44 (2010).

131. *See* CRAVER, *supra* note 1, at 53–54 (discussing the damage caused by unbalanced negative media portrayals of unions); DINE, *supra* note 1, at xxxiv, 151, 175–190 (discussing the lack of positive media coverage of unions despite many positive stories, analyzing the reasons for the lack of coverage, and suggesting strategies to improve the situation); *see also* Gordon, *supra* note 107, at 16–17 (discussing successful media campaign).

greater public support and building coalitions with other organizations, but there are many other possibilities for creative unions with broad vision.[132]

The successful worker advocacy campaigns discussed above support the conclusion that both organizing and coalition building are essential to reinvigorating unions.[133] Public sector unions in states like Virginia, without the ability to negotiate binding collective bargaining agreements or to strike,[134] use similar strategies. Organizing, however, is key.[135] Only after gaining the trust and support of workers will legal actions, whether lobbying, political activity, or litigation, be a viable strategy for long-term success.[136]

Unions have begun to move in this direction. Crisis can open people up to new ideas as they search for solutions. Traditional unions are utilizing alternative methods of organizing outside the structure of the

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132. *See* GETMAN, *supra* note 1, at 1; SCHIAVONE, *supra* note 3, at 61–62. Social justice unionism focuses on building democratic organizations; organizing using rank and file workers as key players; militancy in collective bargaining; and alliances with other organizations, locally, nationally and internationally. *Id.* at 62; *see also* Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773, 809–16 (2002) (describing a broader vision of citizen unionism not limited to dealing with particular employers but encouraging collective action on a broader basis).

133. And as evaluations of these campaigns note, legal success does not necessarily lead to increased membership and support. *See, e.g.*, Gordon, *supra* note 107, at 29–30.

134. While the workers affiliated with worker centers typically retain the right to strike, the centers rarely choose such a strategy. FINE, *supra* note 102, at 257–59.

135. I recognize that there are differences between worker centers, public sector unions, and private sector unions that may limit the utility of some of the strategies used by these organizations. Public sector unions have more direct avenues of political action since their ultimate employers are politically elected. Hodges, *supra* note 83, at 766–67. Most public employees have some protection against at will termination and thus are less at risk when they engage in union activity. *Id.* at 766. And public employers are typically less hostile to unionization than private sector employers. *Id.* at 766. Worker centers often build on ethnic bonds and are not subject to the restrictions imposed on traditional unions by the National Labor Relations Act. *Id.* at 769. At the same time, traditional unions have some advantages over the worker centers. "One of the major issues facing the worker centers is financing. Traditional unions can rely on member dues for financial stability if they are able to organize workers effectively or can lawfully negotiate a union security clause requiring payment of dues by bargaining unit members." *Id.*

136. As noted above, focusing on enforcement of the collective bargaining agreement poses some of the same risks as focusing on litigation. It moves the activity of the union further away from the workers and concentrates resources on enforcement rather than involvement of workers. Out of necessity, unions in states without such agreements use resources, both financial and human, for continual organizing of the membership. *Id.* at 770. This is not to suggest that unions should not enforce their agreements, but rather that enforcement should not eclipse efforts to foster worker engagement.

NLRA.[137] They are providing training and resources to members.[138] They are initiating and developing relationships with such diverse groups as international organizations, [139] student groups,[140] academics,[141] religious organizations,[142] nonprofits and other NGOs,[143] worker centers and other worker advocacy groups.[144] They are making efforts to expand support among younger workers, women, and people of color

137. *See* GETMAN, *supra* note 1, at 32; SCHIAVONE, *supra* note 3, at 81; *supra* notes 121–123 and accompanying text.

138. *See* Stone, *supra* note 132, at 808 (describing various union training programs).

139. *See, e.g.*, SCHIAVONE, *supra* note 3, at 42 (describing international strategy of AFL-CIO); Matthew Dolan, *UAW Sets a Strategy on Foreign Car Plants*, WALL ST. J., Jan. 3, 2011, at B1 (describing global actions planned by the UAW in support of organizing foreign car manufacturers); *U.S., French Labor Unions Complaints Allege Violations of Employees' Rights by Sodexo*, DAILY LAB. REP. (BNA) No. 149, at A-7 (Aug. 4, 2010) (describing cooperative efforts of U.S. and French labor unions to encourage compliance with international labor standards); *see also* STEVEN K. ASHBY & C. J. HAWKING, STALEY: THE FIGHT FOR A NEW AMERICAN LABOR MOVEMENT 292–93 (2009) (discussing union efforts to reach out to global unions during labor conflict with A.E. Staley).

140. *See, e.g.*, *ITUC Launches Campaign to Bring Youth into Unions*, DAILY LAB. REP. (BNA) No. 64, at A-12 (Apr. 6, 2010) (discussing efforts of U.S. and international trade union federations to include young people in the labor movement); *AFL-CIO to Establish Advisory Committee to Formulate Outreach to Young Workers*, DAILY LAB. REP. (BNA) No. 151, at B-1 (Aug. 6, 2010) (describing efforts to reach out to younger workers); *Union Summer 2010*, AFL-CIO, http://www.aflcio.org/aboutus/unionsummer/ (describing summer internships for students); Dolan, *supra* note 139, at B5 (describing UAW plan to create a global organizing institute to bring in student interns from other countries to assist in organizing).

141. *See* DINE, *supra* note 1, at xxxiv–xxxv, 146 (discussing union collaboration with academics on strategies to revitalize the labor movement).

142. *See, e.g.*, ASHBY & HAWKING, *supra* note 139, at 292–93 (describing union's work with religious coalition in labor dispute with A.E. Staley); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828 (2005) (noting unions' increasing use of relationships with religious organizations in organizing campaigns); Alisha Biggs, *Three Michigan Hospitals Refuse to Respect Workers' Freedom to Join Union, Report Says*, DAILY LAB. REP. (BNA) No. 141, at A-5 (July 23, 2010) (describing how organizers and workers in the campaign reached out to religious organizations to communicate the message that union organizing was consistent with various religious faiths and supported by faith-based organizations).

143. *See, e.g.*, SCHIAVONE, *supra* note 3, at 33–34 (describing union/community alliances to develop affordable housing and to keep plants open); Brudney, *supra* note 142, at 828 (noting unions' partnerships with community groups in organizing campaigns); Stone & Cummings, *supra* note 1 (discussing a number of collaborations between labor unions and community groups to obtain living wage ordinances and community benefit agreements); *supra* notes 124–125 and accompanying text.

144. *See, e.g.*, Michelle Amber, *AFL-CIO, Day Laborers Group Sign Pact to Advance Worker, Immigration Rights*, DAILY LAB. REP. (BNA) No. 154, at A-4 (Aug. 10, 2006) (describing agreement between union federation and day laborers organization to work in concert and support each other's agendas); *see also supra* notes 112, 114 and accompanying text.

who increasingly make up a large part of the workforce.[145] These efforts must be a major focus of the labor movement.

Legal seduction is not inevitable. Used correctly, law can be a powerful tool of workers. Labor union strategy must be developed with law as a one piece. The organizations discussed above demonstrate the importance of using legal action as a tool, rather than allowing the law to shape the organization's strategy. Indeed, the organizations sometimes use tactics of questionable legality or even clear illegality.[146] Law is used creatively to support the broader goals and strategies of the organization. And strategies to avoid the negative effects of existing law are employed as well.

Unions must be careful when utilizing litigation, lobbying, and political campaigning that these tools neither drive strategy nor eclipse the role of union members as direct actors. Further, the full costs and benefits of legal action must be considered in determining its use, including the potential for distancing workers from active participation.[147] Unions, in addition, must be sure that their lawyers understand and utilize the ideals of progressive lawyering—listening to and collaborating with the community and insuring client involvement in decision-making, while providing expert assistance.[148] While political campaigning and lobbying offer more opportunities for direct action than litigation, both can, but should not, be accomplished without significant involvement of workers. Accordingly, keeping the workers engaged must be the primary goal; legal actions and lawyers can neither

145. *See* Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 224–28, 228–29 (2002) (describing coalition of traditional union and African-American religious community to address racial discrimination and economic oppression and union efforts to organize immigrant workers by focusing on their unique needs); Linda Foley, *Stepping Up, Stepping Back: Women Activists 'Talk Union' Across Generations*, at 2–3 (Berger Marks Found. 2010) (critical report of a meeting of women activists of all ages discussing the barriers to participation of women and young people in the labor movement and strategies to address the issues); Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 417, 418–21 (Joanne Conaghan et al., eds., 2002) (describing union campaigns using identity-based organizing); *supra* notes 120, 140 and accompanying text.

146. To make a similar point, Professor Getman uses the example of the Solidarity movement in Poland which not only successfully organized workers by risking imprisonment for violating repressive laws, but indeed played a major role in the defeat of Communism in Eastern Europe. GETMAN, *supra* note 1, at 307.

147. "Litigation is attractive only if it is the most effective means of advancing broader objectives." Cummings & Rhode, *supra* note 67, at 615.

148. SHDAIMAH, *supra* note 68, at 22–23.

dominate the focus of the organization nor limit effective strategies.[149]

Sameer Ashar, building on previous work, describes a model of clinical legal education that suggests a model for labor unions' use of the law.[150] The clinic would focus not on a particular area of law but on a particular community, working with the community to support political organizing into collectives which would then determine the legal needs of the community to be served by the clinic.[151] Priority would be given to the legal needs determined by the collective rather than cases of unconnected individuals.[152] Among the advantages of the approach are the education about the interrelationship of law, politics, and justice; the accountability to the community; and the positioning of the legal claims within a larger campaign for justice. Following this approach—which is used in Ashar's clinic to work with some worker centers, among other organizations—unions should involve workers not only in decisions about collective action campaigns but also in the decisions about how and when to utilize legal action as a part of the campaign.[153] Involving union members will not only engage the membership in important decisions, but might also change the role of the law and lawyers. In addition to litigation, lawyers might be more involved in training the membership on legal issues, preparing position papers for lobbying efforts and accompanying the membership to legislative meetings, and researching the legality of various forms of direct action proposed by the workers.[154]

Another vision of use of the law by workers has been meticulously documented by James Pope. As Pope has demonstrated, workers can shape the law using constitutional and legal principles to create self-government, make and enforce rules in unionized shops, and even

149. Some unions are using local law to effectuate change. *See* Stone & Cummings, *supra* note 1, at 8–22 (providing numerous examples of union use of local law). Many of the examples discussed by Stone and Cummings involve collaboration with community groups as well. Use of local law eases the logistics of involving members in lobbying and litigation. These groups have moved beyond traditional labor and employment law, using local ordinances and land use authority to achieve benefits for workers.

150. *See* Ashar, *supra* note 80, at 356.

151. *Id.* at 356–57.

152. *Id.* at 356.

153. The duty of fair representation, requiring unions to represent all workers in the bargaining unit without discrimination, bad faith or arbitrary decisions, may impose some constraints on the ability to involve workers in decisionmaking about pursuing individual cases. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1966).

154. Ashar, *supra* note 80, at 397–98. Of course, union lawyers do some of this work already.

interpret official law in light of the experience and norms of workers.[155] While much of the worker-made law has been rejected by the formal legal system, reinvigorating worker resistance may lead to a new role for workers' law.

Worker engagement is a challenging ideal, particularly in large organizations.[156] Most of the examples I have cited involve organizations much smaller than many national unions. But in the end if labor unions are not about worker empowerment, they lose much of their value as important institutions in our society. It, thus, behooves the leadership to find ways to maximize the role of the members to insure that unions continue their vital role as a counterbalance to corporate power.

VI. CONCLUSION

As Professor Dau-Schmidt has so persuasively demonstrated, the labor movement has the potential to be a natural and necessary counterbalance to the growing corporate power in America. At present, however, it is doubtful whether the labor movement has the power to effectively combat dominant corporations.[157] While the legal changes he suggests would aid unions, favorable legal change is unlikely given the current weakened state of the labor movement. Indeed, I suggest that unions have been seduced by the prospect of legal change to focus too much on political activity, lobbying and litigation and too little on building the movement necessary to make such change a reality. A shift in focus might seem counterintuitive given the need to resist legal change even more favorable to corporations, but without it, unions will be unable to perform the essential role of offsetting corporate domination.

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155. Pope, *supra* note 23, at 1098–1103 (discussing unilateral "lawmaking" by unions); Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW AND HIST. REV. 45, 47–48 (2006).

156. In some ways, the reduced involvement of workers in union activities is a natural result of the growth of unions into large organizations, necessitating decision-making by a smaller group for efficiency reasons. The movement toward greater worker empowerment will take time, and will most effectively begin at the local level. *See* Selmi, *supra* note 6, at 163 (noting that unions are large bureaucratic organizations with all the problems that accompany such status).

157. As this article went to press tens of thousands of workers were rallying in Wisconsin in protest of a proposed bill to strip most collective bargaining rights from state workers. Many of the protesters were teachers whose actions might be construed to violate no strike laws in the state. It remains to be seen whether this is a foretaste of a coming union revitalization.