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ARTICLE: The Emerging Organizational Structure of Unionism in Low-Wage Services

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SUMMARY:
... If American unions are to survive, they must organize workers in the large and growing, but heretofore unorganized, sectors of the economy. ... If, as I suggest in this article, a combination of geography and loose occupational categories is the appropriate basis for low-wage service worker organization, a "works council" could be organized on that basis. ... The model of union organizational structure that is emerging from current union efforts to organize low-wage service workers is one in which workers are organized geographically along loose occupational lines. ... From general geographical unionism, it takes the concepts of the geographically based local union as the primary unit of labor organization and of the ability of a union to represent workers even without a collective bargaining agreement. ... A union that organizes the relevant labor market can use collective bargaining on an area-wide, multiemployer basis to force all of the relevant employers to invest in training. ... However, these modestlegal reforms are insufficient to promote the formation of geographical/occupational unions of low-wage service workers because they do nothing to encourage multiemployer union organizing or multiemployer bargaining. ...

TEXT:
[*671] If American unions are to survive, they must organize workers in the large and growing, but heretofore unorganized, sectors of the economy. Low-wage service jobs--jobs in such fields as retail sales, clerical, food preparation and service, non-professional health care, cleaning service, and personal service work, typically located in service-producing rather than goods-producing industries--are a prominent feature of the "new" American economy. These jobs currently account for nearly one third of all jobs in the

United States n1 and are expected to experience substantial growth during the next decade. n2 They are among the lowest-paid jobs in the American [*672] economy. n3 They are also among the least likely to be unionized. n4

The sharp decline in union density during the 1980s has spawned a small, but influential, body of literature that argues that the basic structure of union organization in the U.S. must change in order for workers to have effective means of collective self-organization and representation in the workplaces of the future. n5 However, most of the models of worker organization and representation that emerge from this literature are, at least implicitly, based on the experiences of workers and unions in manufacturing or professional jobs rather than in low-wage service jobs. n6 Because low-wage service work is, in respects that are important for worker organization and representation, quite different from manufacturing or professional work, n7 the applicability of these models to low-wage service jobs is questionable at best. n8

This article argues that a new kind of union organizational structure n9 is needed in order to enable low-wage service [*673] workers to organize and achieve effective representation at work n10 and in order to induce employers to raise both wages and productivity in traditionally low-wage service jobs. Moreover, that new structure is emerging, in embryonic form, from current union efforts to organize low -wage service workers. In contrast to the worksite-based structure that characterizes most American unions today, (outside of the construction trades), the emerging structure of low-wage service unionism is one of geographically-based organization within loosely defined occupational categories that correspond to the job mobility paths n11 of low-wage service work. Collective [*674] bargaining on an area-wide, multi-employer basis is an essential feature of the new structure, but union activity within that structure is not limited to collective bargaining. This type of structure is inconsistent with some of the core assumptions about industrial relations that are built into American labor law. Hence, the implementation of the new structure will require substantial changes in the law.

The argument of this article is derived from open-ended interviews that I conducted with ten union organizers and officials. These organizers and officials were associated with the Service Employees International Union (SEIU), the Hotel and Restaurant Employees Union (HERE), the District 1199 Health Care Employees Union, the American Federation of State, County, and Municipal Employees (AFSCME), and the AFL-CIO. Most of the interviewees were organizers who have recently been active in organizing low-wage service workers in hotels and restaurants, building services, health care services, or clerical work. Some were people who, though not themselves organizers, were familiar with recent efforts to organize low-wage service workers. Finally, other interviewees were involved in the administration of the AFL-CIO's associate membership program; n12 this program, while not targeted at low-wage service workers, nevertheless has implications for the organization of those workers.

Although empirically based, this article is theoretical in intent. I do not report on all of the organizing activities or ideas about organizing that I discussed with my interviewees. Instead, I attempt to discern the kind of union organizational structure that is implicit in

the activities and ideas of the interviewees, but that has not yet been fully realized in practice. While the people whom I interviewed did not always agree about the best strategies, tactics, or structures for [*675] organizing, there were common themes that ran through many of the interviews. Taken together, these common themes supported and reinforced one another in a way that suggested that the interviewees had a broadly shared understanding of the organizing process. In this article, I refine and elaborate that understanding, contrast it with alternative interpretations, and suggest ways in which public policy might enable this organizational vision to be more fully realized in practice. n13

The remainder of the article is divided into five parts. Part I briefly considers the special features of low-wage service workers and jobs that are relevant to the design of union organizational structures. n14 Part II surveys and evaluates alternative models of union organizational structure (including those that currently exist or have previously existed in the United States and those that have been proposed in the recent literature). n15 Part III describes the basic elements of the model of union str ucture that emerged from the open-ended interviews, illustrates how those elements fit together, and incorporates examples of current union organizing efforts that make use of those elements. n16 Part IV explains how current American labor law is inconsistent with the new model. n17 Part V concludes the article with an examination of ways in which United States labor law might be changed in order to facilitate the adoption of this new model. n18

[*676] I. SPECIAL CHARACTERISTICS OF LOW-WAGE SERVICE WORKERS AND JOBS

Low-wage service workers and their jobs differ in several important respects from workers and jobs in traditional union strongholds such as manufacturing. Some of the differences reflect the characteristics of service work per se, while others stem from disparate characteristics of the work force or from differences in the organization of work. It is important to understand these differences in order to understand why organizational structures and strategies that are appropriate in other sectors of the economy may not be appropriate for low-wage services.

In many service jobs, the worker comes into direct contact with the final consumer of the service or (as in janitorial services) is at least able to see a direct relationship between her work and the "output" provided to the final consumer. This feature of service work often leads workers to be concerned with the quality of the service that they provide. n19 Organizing such workers in opposition to an employer that workers perceive as being concerned with service quality would, therefore, run counter to workers' ideals and aspirations. However, organizing in opposition to an employer that workers perceive as unconcerned with quality is a possibility. Another possibility, which was integral to the organization of waitresses in the early twentieth century, is for a union to organize around the issue of service quality and to play an active role in promulgating and maintaining quality standards; n20 this sort of organizing would not necessarily involve an adversarial relationship between the union and an employer. In addition, the service worker's close relationship with the final consumer enables a union to exert economic pressure on

employers via the consumer, e.g., by picketing or [*677] leafletting in places where customers are present, or by forming coalitions with community groups based outside the workplace in order to pressure the employer into recognizing the union.

Several of my interviewees pointed out that many contracts for low-wage service work are awarded by government agencies. This is the case, for example, when janitorial or food services in government buildings are contracted-out to private firms, or when state governments contract with private providers to operate residential facilities for the mentally retarded. Such an arrangement makes it possible for a union to use pressure on the relevant government agency as a form of secondary pressure on an employer who refuses to bargain with the union.

The low union density in low-wage service jobs n21 may make organizing difficult. Workers in occupations or industries that have low union densities and no tradition of union o rganization may be unfamiliar with unions and have little sense that a union would be appropriate for them. n22 A union that tried to organize these workers simply by targeting workplaces where high levels of worker dissatisfaction existed, promising the workers at those workplaces higher wages and fringe benefits, and handing out union literature and cards, would, therefore, be likely to fail. While this "traditional" organizing method may be appropriate for some manufacturing jobs, low-wage service union organizing requires a different strategy.

Women, racial minorities, and recent immigrants (including undocumented workers) make up a large share of the workforce in many low-wage service jobs. n23 This need not be a problem for organizing, since nonunion women and minorities are more likely than nonunion men and whites to favor [*678] unionization of their jobs, n24 but unions must be sensitive to the special concerns of these workers. In addition, the existence of non-workplace advocacy organizations for women and minorities creates possibilities for both conflict and cooperation between low-wage service unions and those organizations.

Service workers are employed at smaller n25 and more geographically decentralized worksites n26 than workers in manufacturing industries. While it is easier for a union to win a National Labor Relations Board (NLRB) election if a smaller number of workers are involved, n27 a union that organizes only one or a few small worksites in a much larger labor market will lack bargaining strength. Further, the geographical decentralization of service worksites implies that the organization of a single worksite is unlikely to encourage other workers in the same kind of job to unionize via geographical "spillover" or "demonstration" effect.

Low-wage service jobs are characterized by high labor turnover, n28 many temporary and part-time workers, n29 and the [*679] absence of firm-specific internal labor markets. n30 The absence of long-term attachments between low-wage service workers and particular employers makes the organization of these workers on an employer-specific basis (or, *a fortiori*, on a sub-employer basis, such as by worksite)difficult to begin and difficult to sustain.

In its lack of firm-specific internal labor markets, low-wage service work resembles work in the construction industry. But unlike construction work, low-wage service work does not, according to my interviewees, have the kinds of well-defined crafts and strong craft consciousness that would enable union organization to occur on a craft basis. To be sure, there are broad occupational categories in low-wage service work, but workers do not identify as strongly with such categories as construction workers do with their crafts. In addition, existing low-wage service work requires much less training than construction craft work. As a result, unionized low-wage service workers are more vulnerable to replacement than unionized construction workers.

Finally, subcontr acting (including contracting with temporary help services) is an important phenomenon in several low-wage service jobs. n31 This makes organization on an employer-specific or worksite-specific basis especially difficult. The responsibilities of the employer may be divided between the subcontractor and the final purchaser of the service (as, for example, is the case with temporary help services, which pay their workers, but leave responsibility for work assignments and discipline to the firms with which they contract). Although the NLRB may under certain circumstances permit the subcontractor and the final purchaser to be treated as "joint employers" for purposes of collective bargaining, n32 the potential instability of the relationship between subcontractor and final purchaser makes [*680] union organization difficult to sustain. If the responsibilities of the employer lie entirely with the subcontractor (as is often the case with food services and building services), organization on an employer-specific or site-specific basis is even more difficult. The final purchaser may decide not to hire a unionized subcontractor, and the legal restrictions on secondary pressures make it difficult for a union to exert economic pressure on the final purchaser. In addition, service subcontracting blurs the boundaries between industries, making union organization on an industry-wide basis difficult as well. If an insurance company, for example, hires its own janitors, then those janitors work in the insurance industry. If the same company subcontracts its janitorial work to a cleaning company, then the janitors, who may or may not be the same individuals previously employed by the insurance company, are employed in the building cleaning industry. The ease with which subcontracting allows the same work to be "shifted" across industrial lines suggests that industrial unionism is not appropriate in service subcontracting situations.

The special features of low-wage service work described above do not dictate any single structure or strategy for organizing low-wage service workers. They do, however, suggest that some structures (e.g., organization on the basis of worksite) are unlikely to succeed and that some promising strategies (e.g., alliances between unions and community organizations) will require new structures if they are to be effectively implemented. More generally, they may be thought of as a set of constraints within which any union of low-wage service workers must operate if it is to organize successfully. This is not to say that such a union must take the existing job structures of low-wage service work as given; indeed, one of the purposes of unionization is to enable workers to attempt to change those structures by means of collective bargaining and other forms of collective action. However, a union that hopes to succeed at the task of organizing an unorganized workforce must initially adapt its organizational structure to the existing job structure.

Only after workers have organized can they realistically attempt to change that structure.

II. ALTERNATIVE MODELS OF UNION ORGANIZATIONAL STRUCTURE

In this Part, I survey some alternative models of union organizational structure that either exist in the United States, [*681] have existed at some time in the Nation's history, or have been proposed in recent literature delineating new approaches to worker organization and representation. 5_Rutgers_L._Rev._671)_and_footnotes(n33); n33 Drawing on the material in Part I and on other findings from my open-ended interviews, I evaluate those models according to their applicability to low-wage service workers and their jobs.

A. *Worksite Unionism*

Worksite unionism is the form of union structure encouraged by the case law of the NLRB and towards which the existing structure of "industrial" unions in the United Statestoday is tending. n34 Under this form of union organization, workers are [*682] organized on the basis of the business establishment in which they work. Collective bargaining occurs at the establishment level as well, and workers' rights and benefits under the contract are tied, in the purest form of worksite unionism, to their status as workers at a particular establishment. n35 The employer is responsible for employee benefits, work discipline, hiring, and any necessary on-the-job training.

The works council, a form of worker representation that exists in several European countries and that some industrial relations scholars have recently proposed for the United States as well, n36 is a variant of worksite unionism. A works council is an establishment-level committee of workers that advises and consults with management about the organization of work and the work process at a particular establishment. It does not engage in collective bargaining and is organizationally independent of unions that do engage in collective bargaining. Indeed, a works council may exist even in the absence of a union.

If worksite unionism is an effective structure for worker organization and representation, it is effective only when workers have long-term attachments to particular worksites. Manufacturing workers have (or, at least until recently, have had) such attachments, while low-wage service workers [*683] typically have not. Worksite unionism is, therefore, inappropriate for low-wage service workers. Likewise, works councils, in their European form, are unlikely to be effective representational vehicles for workers who frequently move between worksites. However, the basic works council idea of labor-management information sharing and consultation, even in the absence of collective bargaining, may be useful for low-wage service workers. A service-sector "works council," however, would have to be organized on a basis broader than a single establishment or even a single employer. If, as I suggest in this article, a combination of geography and loose occupational categories is the appropriate basis for low-wage service worker organization, a "works council" could be organized on that basis. n37

B. *Enterprise Unionism*

Enterprise unionism is the form of worker organization that ostensibly exists in Japan today. n38 In this form of union structure, all of the workers in a single firm, except for high-level managers, are organized into a single union. Employee benefits, hiring, training, and discipline are the responsibility of the firm. Although the choice of the firm as the basis of organization does not logically preclude either collective bargaining or adversarial relations between the union and top management, the Japanese version of enterprise unionism presupposes an identity of interests among all who are employed by a particular firm; the enterprise union gives workers a vehicle of collective voice that is to be used for the good of the firm as a whole. n39

Enterprise unionism is an organizational form better suited to manufacturing or to some professional and technical jobs, where workers have long-term attachments to firm-specific internal labor markets, than to low-wage service work, where workers are transient across firms. In its Japanese variant, [*684] which emphasizes close cooperation between labor and management, enterprise unionism requires the existence of workers who, unlike low-wage service workers in the United States, have the firm-specific employment security and rights to due process on the job that could give them a long-term stake in the firm. It is difficult to see how workers without such a stake could conceive of a large zone of congruence between their workplace interests and those of top management.

C. *Industrial Unionism*

Industrial unionism, which was historically associated with mass-production industries in the United States and Europe, organizes workers on the basis of their employment in a particular industry. There may be local unions at the level of the firm, worksite, or small geographical area, but these are subordinate to the industry-wide national union. In the purest form of industrial unionism, an industrial union bargains collectively with an association of all firms in its industry at the national or regional level. In practice, such a high degree of centralization of bargaining existed in several European countries during the period from approximately 1945 to 1975, n40 but negotiations in the United States were rarely so centralized. Nevertheless, "pattern bargaining" in United States industries during the 1945-75 period created *de facto* industry-level determinations of key economic provisions of American collective bargaining agreements. n41

Industrial unionism is a plausible form of worker organization where, as in mass-production industries like automobiles and steel, clearly defined craft boundaries are absent but clear boundaries between industries exist. In much low-wage service work, however, the prevalence of subcontracting blurs industrial boundaries, bringing workers in the same general occupation but in nominally separate [*685] industries (e.g., secretaries in the insurance industry and the temporary personnel supply industry) into wage competition. Industrial unionism is economically inappropriate in such situations because an industrial union is unable to organize the relevant labor market so as to take wages out of competition. Industrial unionism is also inappropriate in such situations for

reasons of union identity, because workers who are easily shifted across industrial lines are unlikely to identify their interests with a particular industry.

D. *Craft Unionism*

Craft unionism was the dominant form of union structure in the United States prior to the rise of mass-production industries and is still the dominant form in the construction industry. Craft unionism was also the organizing principle for at least one group of low-wage service workers, waitresses, from the beginning of the twentieth century through the 1960s. On the basis of her study of the waitress union experience, Dorothy Cobble has proposed craft unionism as an appropriate organizational f orm for low-wage service workers today. n42

Craft unionism is characterized by four basic features. n43 First, workers are organized on the basis of occupation and share a strong occupational identity and a strong sense of loyalty to the traditions of their occupation. n44 Collective bargaining occurs on the basis of occupation, often although not always within a relatively small geographical area. (E.g., all waitresses in a particular city had the same contract.) Second, workers' rights and benefits are tied to their employment in an occupation rather than to any one firm. n45 Workers have no job security at particular worksites or with particular employers, but the union, through its hiring hall, attempts to provide them with employment security. Union-provided health insurance and other welfare benefits are [*686] portable between employers and are financed by contributions from all employers who are parties to the collective agreement. Third, the union controls the supply of labor within its occupation. n46 Employers are required to maintain closed shops and to hire only through the union's hiring hall. Workers are prohibited from soliciting work outside of the hiring hall. Finally, the union takes responsibility for service quality by promulgating standards of performance for its members (who include first-line supervisors), disciplining members who violate the standards, and training new members. n47

In some respects, the craft model of organization seems appropriate for today's low-wage service workers. The portability of worker rights and benefits between employers is ideally suited to workers who change employers frequently. An institution comparable to a hiring hall could also be attractive to such workers and could provide a measure of employment security to workers who work less than full-time/full-year. Union commitment to service quality fits in well with the values of service workers generally. Union-provided training and union-maintained performance standards could help to raise service workers' productivity and wages.

It is not clear, though, that the craft model of organization is applicable *in toto* to low-wage service workers today. Those workers at present lack the strong occupational consciousness that characterizes craft unions. To the extent that the other features of the craft model depend on this consciousness in order to function, the absence of this consciousness calls the entire model into question. n48 Moreover, low-wage service job structures themselves may not be sufficiently stable to enable workers to develop strong occupational consciousness. In addition, the ability of a union to control the labor supply

to jobs for which there are many demographically diverse sources of adequately skilled workers is problematic. n49 Furthermore, [*687] organizers with whom I discussed the subject did not believe that union control over the labor supply was necessary in order to decrease wage competition. They believed that union shops and a uniform wage scale within a geographical area were sufficient to decrease competition. Finally, my interviewees were skeptical of the idea of including first-line supervisors in the same unions as the low-wage service workers whom they supervise. In janitorial and food services, workers' grievances are often against their immediate supervisors, and organizers did not believe that their unions would be capable of handling those grievances if the supervisors were union members. If inclusion of first-line supervisors in the union is essential to the union's ability to enforce its quality standards, then it may be difficult for low-wage service workers' unions to enforce quality standards.

It is uncertain whether the craft model as a whole is an appropriate organizational form for low-wage service workers. However, some features of the craft model appear useful for those workers.

E. *Federated and Amalgamated Craft Unionism*

In the United States, federated and amalgamated craft unionism were transitional forms of union organization that existed from about the first decade of the twentieth century through the 1930s. n50 In these organizational forms, workers are organized on the basis of occupation, but the distinctions between occupations are less clearly drawn than in pure craft unionism. n51 In a federated structure, craft unions of workers in "related" occupations federate for limited purposes (e.g., organizing or collective bargaining) while maintaining their organizational autonomy. n52 In an amalgamated structure, workers in "related" occupations merge their separate craft unions into a single union. n53

[*688] The federated and amalgamated craft structures could be applicable to low-wage service workers who remain within a loosely defined occupation or group of occupations for an extended period of time but who lack the strong occupational consciousness that the pure craft model requires. Food-service workers, for example, might move between any of a number of tasks related to the preparation, serving, and selling of food (e.g., short-order cooking, serving, cashiering). They do not typically have a strong occupational consciousness with respect to any of the tasks or with respect to the "food-service occupation" as a whole. These workers might find an amalgamated union structure desirable. For occupations that are more sharply differentiated from one another, but that are still "related" (e.g., a set of occupations that makes up part but not all of an industry, such as the non-professional occupations in health care), a federated structure might be appropriate. Indeed, the geographical/occupational union structure proposed in this article might be seen as a geographically localized version of a federated or amalgamated structure.

Because federated and amalgamated craft union structures existed during a relatively short period in United States history and have not been extensively studied, the details of those structures are not clear. One could imagine such structures as incorporating cross-

employer portability of worker rights and benefits, union control over labor supply, and/or union responsibility for service quality, yet those structures do not seem to require any one of these features. This flexibility is a virtue for low-wage service workers, who might desire some but not all of the features of craft unionism.

F. *Associationa l Unionism*

Charles Heckscher has proposed a model of union organization that he calls "associational unionism." n54 In this model, groups of workers could organize on any basis that they believed appropriate, including (but not limited to) race, ethnicity, gender, geography, or occupation. n55 They could organize on different bases for different purposes if they so [*689] desired. The flexible worker associations that would result could provide training and other services to their members, develop general principles and standards for the workplace, and cooperate with non-labor organizations on matters of common interest, just as professional associations do today. The system of associational unionism would emphasize these "associational" activities and de-emphasize collective bargaining. The bargaining that did occur, however, would be flexible and multilateral. Different employers and worker associations would bargain together depending on the subject of bargaining. Agreements that emerged from the bargaining process would apply only to members of the associations involved in bargaining. Thus, there would be no exclusive representation on the basis of occupation, industry, employer, or worksite.

Flexibility is both the strength and the weakness of associational unionism. Heckscher's scheme easily accommodates a job structure that is in flux and a workforce whose organizational allegiances are also in flux. But by de-emphasizing collective bargaining and replacing bilateral bargaining n56 with multilateral negotiation, it dilutes the economic strength of workers in a way that is likely to be detrimental to low-wage service workers. Without bilateral bargaining on some basis that is rooted in the economic system, low-wage service workers will be unable to limit wage competition. Bilateral bargaining may also be necessary to give low-wage service workers the economic power to participate effectively in the governance of their workplaces. Finally, my interviews suggest that a degree of adversarialism between workers and employers may be important to the process of organizing at least some low-wage service workers. Janitors, for example frequently organize around demands for industrial justice, which are directed at employers. n57 By diluting those demands, associational unionism might prevent some low-wage [*690] service workers from achieving any kind of collective representation at work.

G. *General Geographical Unionism*

In general geographical unionism, workers are organized according to geography, without regard to the kinds of jobs that they hold. One version of general geographical unionism, proposed by Raymond Miles, is essentially a geographically based variant of Heckscher's associational unionism. n58 In Miles' model, unions would not be directworkplace representational organizations. n59 Instead, they would provide workers

in their geographical areas with an array of services that would increase worker productivity (e.g., training) and make workers highly mobile across employers and occupations (e.g., portable employee benefits, information about job availability). n60 They w ould also work with employers in their geographical areas, in a consultative rather than an adversarial fashion, to set pay ranges for broad groups of "comparable" jobs and establish norms of fair treatment applicable to all workers.

A very different model of general geographical unionism comes from United States and Canadian historical experience. During the 1910s and 1920s, the One Big Union (OBU), whose major strength was among miners, lumberjacks, and low-wage manufacturing workers in rural western Canada, n61 organized workers on a general geographical basis. n62 It adopted this organizational structure partly out of the belief that workers were more mobile across occupations and industries than geographically and partly out of the belief that worker [*691] solidarity would best flourish along geographical lines. n63 The basic organizational unit of the OBU was the local central labor council, which cut across craft and industrial lines. n64 At certain times and places, the OBU also had semiautonomous industrial divisions, but these remained under the control of the central labor council in each locality. n65 Unlike the general geographical unions proposed by Miles, the OBU was a class-conscious union. However, it steered a middle course between "business unionism" and "ideological unionism." It placed little emphasis on collective bargaining, n66 but it was also more concerned with exerting economic pressure on employers and governments than with revolutionary activity. n67 Its principal means of exerting such pressure was the general strike, for which its general geographical structure was well suited. n68

The general geographical organizational structure is appropriate in an environment in which workers are more mobile occupationally and industrially than geographically. For this reason, general geographical unionism may be attractive to low-wage service workers. However, neither Miles' proposal nor a revival of the OBU seems appropriate for those workers. Because of its de-emphasis of worker economic pressure on employers, Miles' proposal suffers from many of the same flaws as Heckscher's associational unionism. The OBU, on the other hand, lacked a means of regulating day-to-day industrial relations. The general strike cannot substitute for collective bargaining, although it may be a powerful instrument of economic pressure that could be incorporated into a system of collective bargaining. More generally, though, the special concerns of low-wage service workers are likely to be lost in any form of purely general geographical unionism. This suggests the possibility of a federal structure of geographical unionism, within which unions of low-wage service workers could cooperate with other unions but retain organizational and bargaining autonomy. The union structure proposed in this article does not preclude this sort of federation, but it does require, for both economic and social reasons, that loose occupational groupings within the low-wage service sector [*692] retain some autonomy with respect to both organization and collective bargaining.

III. ELEMENTS OF THE EMERGING MODEL OF UNION ORGANIZATIONAL STRUCTURE

The model of union organizational structure that is emerging from current union efforts to organize low-wage service workers is one in which workers are organized geographically along loose occupational lines. This model combines elements of craft, amalgamated and federated craft, and general geographical unionism. From craft unionism, it takes the principles of area-wide, multiemployer collective bargaining; cross-employer portability of worker rights and benefits; and some degree of union involvement in worker referral and training. From amalgamated and federated craft unionism, it takes the idea of a loose grouping of related occupations as a basis for organizing. From general geographical unionism, it takes the concepts of the geographically based local union as the primary unit of labor organization and of the ability of a union to represent workers even without a collective bargaining agreement.

The emerging model embodies a particular vision of the nature of a union. In this model, a union is both an economic pressure group and a social movement. As an economic pressure group, it uses collective bargaining to improve wages and working conditions and remove them from labor-market competition. In so doing, it induces employers to compete by adopting high-productivity methods of work organization. n69 As a social movement, it expresses members' sense of collective identity and promotes members' vision of social and economic justice. n70 Union organizational structure must be consistent with both of these aspects of unionism.

In the remainder of this part, I describe the basic elements of the emerging vision of unionism and show how the geographical/occupational structure enables those elements to be realized in practice. Because the Justice for Janitors organizing campaign of the Service Employees International [*693] Union (SEIU) has come closest to implementing the new vision and the new structure, I rely heavily on examples drawn from that campaign. However, there are other union organizing campaigns, as well as the AFL-CIO's associate membership program, that embody elements of the new vision and structure, and I sometimes draw examples from them as well. Because my purpose is to portray the new vision of unionism as an integrated whole, I do not describe any particular organizing effort in much detail.

A. *Geographical/Occupational Organizing and Bargaining*

At the economic core of the new vision is a uniform wage and benefit structure that covers a loosely defined occupational grouping within a localized geographical area. This wage and benefit structure is embodied in an area-wide, multiemployer collective bargaining agreement. SEIU's Justice for Janitors campaign has come closest to implementing this ideal. SEIU organizes all janitors in a single metropolitan area (or, in very large metropolitan areas, in a portion of an area in which there is a large concentration of office buildings) into a single local union and attempts to induce employers in the area to agree to a uniform set of economic terms. Other unions of low-wage service workers have moved in the direction of area-wide organizing as well. The Hotel and Restaurant Employees Union (HERE) has been able to organize all hotel workers in at least one city under a single contract, and is attempting to do so elsewhere

as well. (45_Rutgers_L._Rev._671)_and_footnotes(n71); n71 The District 1199 Health Care Employees Union is also experimenting with organizing chains of nursing homes on a geographical basis. n72

Unions that have moved toward the new model of organizing try to avoid NLRB elections. Their organizers believe that elections create delays that work to employers' advantage, n73 [*694] that elections detract from the task of building the union as a social movement, and that NLRB-determined bargaining units are not appropriate for low-wage service workers. n74 Therefore, organizers try to secure voluntary recognition by employers. In current practice, unions are not often able to secure an area-wide agreement in one stroke. In areas where they have previously organized only a few establishments, both SEIU (in organizing janitors) and HERE (in organizing hotel workers) have begun to build toward area-wide agreements by trying to get newly organized employers to agree to the basic economic (wage and benefit) provisions of the agreements that are already in force in the area. When a sufficiently large fraction of the jobs in an occupational group in a given area has been covered by these provisions, employers may agree to bargain on an area-wide, multiemployer basis.

In occupations like janitorial work, where workers move frequently between a large number of small worksites in a relatively small geographical area, the area-wide uniformity of wages and benefits that results from multiemployer bargaining raises workers' standard of living n75 and removes it from labor market competition. It also reduces employer resistance to unionization and collective bargaining by making labor costs uniform across firms that provide the same service in the same geographical area. In highly competitive service markets, such as those in which the employers of janitors, food-service workers, retail sales workers, and many other low-wage service workers operate, multiemployer bargaining is essential to a union's ability to raise wages and to achieve other bargaining goals that impose costs on employers. n76 If the union were [*695] unable to organize the entire service market, the unionized firms in that market would suffer a competitive disadvantage and could eventually be driven out of business.

Geographical/occupational organization also strengthens the union as a social institution by creating a relativelystable membership base. According to my interviewees, janitors, food-service workers, and clerical workers typically remain within their respective occupations within a single city or metropolitan area for a number of years, although they may change employers and worksites frequently.

It is difficult to specify, *a priori*, the precise geographical scope of each union under the new model. One SEIU organizer described the appropriate scope of organization as "whatever will give you power." This points to labor market and service (product) market considerations in taking wages out of competition. For services like building cleaning, retail sales, food services, and some health services, which each final consumer consumes frequently and for which the worker must be in the same location as the final consumer of the service, the geographic scop e of the labor market is identical to that of the service market. In these services, there is a determinate geographical scope to the appropriate union. n77 Where the geographical scope of the labor market differs from that of the

service market, n78 consideration must be given to the geographical scope of organization that will best take labor costs out of competition. n79

[*696] Likewise, it is difficult to say *a priori* what the appropriate occupational grouping is. In order to take labor costs out of competition, a union must include workers who are highly substitutable for one another in the provision of a service. In addition, the cohesiveness of the union as a social institution requires organization within the same union of jobs between which there is regular movement of workers. n80 It is for this reason that job mobility paths are important in setting boundaries on the occupational group that makes up a given union.

The concept of the job mobility path is premised on the assumption that regular movement of workers between jobs is structured by social rules that indicate that different jobs are occupied by members of the same social group. In order to make the union coextensive with one or more such groups, jobs that lie on the same mobility path should be organized into the same union, provided that they are located in the same geographical area.

Very little is known about the job mobility paths of low-wage service workers. The organizers with whom I spoke did not seem to know much about them, even though the logic of their approach to organizing suggests that they should. n81 Research on low-wage service workers' job mobility paths should be a high priority if the model of union organization outlined here is to be implemented. n82

The economic logic of area-wide organizing and bargaining suggests that organizing should be largely "top-down," that is, focused on organizing particular jobs rather than on organizing [*697] particular workers. One SEIU organizer said of the Justice for Janitors campaign, "the way to look at it is we're organizing the work." The social logic of the model, however, suggests a "bottom-up" emphasis on building a union that is the collective creation of its members and the institutional expression of their social groups' values and interests. The recent literature on organizing contains descriptions of successful "bottom-up" organizing among workers, such as female clerical workers at universities, who had no connection to a tradition of unionism. n83 The emerging model of unionism embodies a tension between these two modes of organizing, but the geographical/occupational structure seems to accommodate organizing activity that combines top-down and bottom-up features. The Justice for Janitors campaign, for example, relies heavily on coordinated, area-wide direct worker actions that express workers' demands for industrial justice in a highly adversarial manner. n84 These direct actions occur both at the workplace (e.g., one-day recognitional strikes, nd_footnotes(n85); n85 informational picketing, leafletting) and outside of the workplace (e.g., the mailing of trash to a building owner who refused to hire unionized cleaning contractors). They facilitate the area-wide unionization of jobs by imposing costs on building owners who will not agree to hire unionized contractors. n86 Simultaneously, they build area-wide worker solidarity and give workers a sense of their collective power. n87

[*698] Area-wide union organization also has the potential to bridge the gap between employment relation and non-work social relations. Churches, environmental groups, women's organizations, and organizations of racial and ethnic minorities are often organized on a geographical basis. A union that is structured along geographical lines can more easily portray its organizing effort as a matter of community interest. Therefore it can more readily enlist the support of community organizations than can a union that is structured along worksite lines. n88 Such a union can also more readily assist community organizations in their efforts to attack problems, such as racial and gender inequality, that arise both within and outside of the employment relationship. Furthermore, the large concentration of women and minority group members in low-wage service jobs suggests that geographical union structure could result in a substantial overlap between the membership of the union and the membership of women's and minority group organizations. The prospects for cooperation between a union and a community organization are enhanced if the members of the union and the members of the community organizations are largely the same people. n89

B. *Union Representation Prior to Collective Bargaining*

In the United States today, unions represent workers principally by negotiating and enforcing collective bargaining agreements. The organizing process itself is not a representational activity. In contrast, bottom-up organizing and alliances between unions and community groups at the pre-collective bargaining stage point toward a union role in representing workers prior to the collective bargaining agreement. The new model of union structure would broaden and institutionalize that role by makinga pre-collective [*699] bargaining association of workers an important part of the process that leads up to collective bargaining. Such an association would enable workers who have no tradition of unionism and who are not accustomed to collective action in the workplace to organize themselves into a cohesive political body that would be capable of engaging in collective bargaining. It would also provide workers who do not yet bargain collectively with a measure of collective self-representation in the workplace.

One of the AFL-CIO's associate membership programs provides a vague glimpse of what such an organization might look like. n90 Despite union intentions that they would do so, associate membership programs have rarely played a role in organizing workers for collective bargaining. However, the California Immigrant Workers Association (CIWA), an associate membership program in Los Angeles whose members and leaders are recent Latino immigrants, is an exception. otnotes(n91); n91 [*700] According to one of my interviewees, CIWA has assisted members in successfully organizing workers at one factory and is now attempting to promote organizing effort among airport hotel workers. CIWA serves solely as a pre-collective bargaining association. It is not part of any existing union but is instead affiliated directly with the Los Angeles central labor council. When CIWA members organize for collective bargaining, they leave CIWA and join an existing union.

While the CIWA experience is a useful starting point, a pre-collective bargaining association must differ from CIWA in two ways in order to be consistent with the logic of

the new model of unionism in low-wage services. First, it must be organized with regard to economic categories. If the pre-collective bargaining organization is to be an effective vehicle for promoting collective bargaining, it must be able to develop the detailed knowledge of the relevant labor and service markets that will enable collective bargaining ultimately to remove wages from competition. A purely general geographical association like CIWA is too diffuse for this purpose. Pre-collective bargaining associations should either be organized on the same geographical/occupational lines as the unions that will eventually engage in collective bargaining on their behalf or be geographically based federations of groups that are organized on those lines. This latter structure would resemble that of today's central labor councils.

Second, pre-collective bargaining associations should also depart from the CIWA model by representing workers in ways that will help them organize for collective bargaining. Following the Justice for Janitors model, these organizations could emphasize a highly adversarial approach to industrial relations. Alternatively, following the European works-council model, they could emphasize consultation and information-sharing with employers. Part V of this article presents some alternative proposals, both adversarial and non-adversarial, for establishing pre-collective bargaining associations.

C. *"Integrative" Union Activities: Employee Benefits, Referral, Training*

Even in a union, such as SEIU, that organizes around issues of economic justice, not all union activities involve conflict with [*701] employers. Industrial relations scholars have long recognized that while some collective bargaining issues are "distributive," or zero-sum as between unions and employers, others are "integrative," or positive-sum. n92 The emerging model of unionism in low-wage service jobs includes three "integrative" features that are reminiscent of craft unionism, but that do not necessarily take the same form as in craft unionism.

SEIU has negotiated for employee benefits, such as pensions and health insurance, that are portable across employers and worksites as long as the worker remains a janitor in a particular metropolitan area or sub-area. These are financed, as in the construction industry, through employer payments to a fund that the union and the relevant employers administer jointly. n93 The Hotel and Restaurant Employees have negotiated a similar agreement for hotel workers in at least one city in whichthey represent a high proportion of all hotel workers. n94 District 1199 also has portable benefit programs in some geographical areas, although not all unionized e mployers in an area participate. n95 These efforts suggest that portability of benefits within the union's geographical and occupational jurisdiction is a feature of the emerging low-wage service union model. In a labor market characterized by high mobility between worksites and firms and an absence of firm-specific skills, tying employee benefits to individual employers is undesirable to both workers and employers. Portability of benefits within the relevant labor market facilitates worker mobility between jobs in such a labor market while inducing workers to remain within that labor market.

Union referral of workers to jobs within the union's geographical and occupational

jurisdiction is another mobility-enhancing feature of the emerging model. Once again, SEIU has taken the lead here, with area-wide referral services for [*702] janitors and collective bargaining agreements that give the union the responsibility for referring workers at an employer's request. Except in San Francisco, where SEIU has long maintained a hiring hall for janitors, the union has not attempted to control the supply of labor in craft-union fashion and its organizers do not believe that removal of wages from competition requires union control over the labor supply. This may simply be a recognition of the fact that the union cannot hope to control the supply of labor to what are now low-skill jobs for which there is a surplus of available workers. However, even if the union were able to institute a program to train high-skill janitors and were able to bargain for job structures in which those janitors could be employed, it is unlikely that the union would be able to maintain complete control over the labor supply. Because it is very unlikely that the union would be able to maintain a permanent monopoly on the ability to train high-skill workers, there would eventually emerge a group of high-skill workers who, if excluded from union membership, would be willing to underbid union workers. Employers would actively seek out such workers. The result would be an end to the union's monopoly over the labor supply and an erosion of the union's ability to maintain area-wide wage standards, as well as the creation of a group of workers who were hostile to the union.

A final "integrative" feature of the emerging model is union involvement in training. This is an important means by which unions can help to transform what are now low-productivity, n96 low-wage service jobs into higher-productivity, higher-wage service jobs. n97 Because workers in low-wage services have few firm-specific skills and therefore are highly mobile among firms, no individual firm is willing to pay to train them. Under [*703] such circumstances, mainstream economic theory predicts that workers will bear the cost of training themselves, to the extent that they desire training. n98 However, there are obstacles to workers' ability to obtain training. For example, there are limitations on access to finance as well as the riskiness, undiversifiability, and uninsurability of training investments. n99 These obstacles make employer investment in training low-wage service workers valuable to both the workers and their employers, provided that all firms in the relevant labor market pay f or training. A union that organizes the relevant labor market can use collective bargaining on an area-wide, multiemployer basis to force all of the relevant employers to invest in training. On the other hand, a union that is organized on an employer- or worksite-specific basis is unable to do so. n100

Union involvement in training may take several forms. The union may bargain for a joint union-management program to train workers to perform their current jobs more productively. No union of low-wage service workers has yet done this, although some unions have bargained for employer contributions to very general training, such as English language instruction. Alternatively, the union may bargain for reorganization of job structures to enable low-wage service workers eventually to move into higher-wage jobs that are offered by the same employers for which they now work. For some kinds of low-wage service work, e.g., janitorial services and food services, there are few advancement opportunities within any one firm. If there are any opportunities for these

[*704] workers to advance to better jobs, workers must move between firms in order to take advantage of them. n101 The union could play an important role in facilitating this mobility by bargaining for rationalization of the job structure on an interfirm, area-wide basis.

However, the greatest productivity gains in what are now low-wage services may well come from a change in the scope of workers' duties and an accompanying change in the scope of their training. Much low-wage service work is currently organized according to the same principles of "scientific management" that have long governed work organization in American manufacturing. n102 Jobs organized according to these principles are defined very narrowly. They are designed so that workers do not need, nor are they able, to exercise independent judgment about the relationship between their activities and the product or service that they produce. All such judgment is the province of management. n103 Fast-food service work, in which each work task is performed in a standardized manner by a separate worker, is an example of low-wage service work that is organized according to the principles of "scientific management." n104 Two service-sector examples, though, [*705] suggest that more broadly defined jobs that require workers to exercise independent judgment can yield higher labor productivity than jobs organized according to "scientific management" principles.

Hotel Services. n105

In Germany, hotel workers have broadly defined jobs and receive broad training in preparation for those jobs. Most German hotel workers have completed apprenticeships, during which they learn all major features of hotel operation and must pass a nationwide examination. On the job, a German hotel receptionist will make reservations, book guests into rooms, supervise room-cleaning, provide information and advice, carry luggage, handle payments and accounts, run the switchboard, and sometimes prepare breakfast. The productivity of German hotel workers exceeds that of their British counterparts. British hotel workers are less likely to receive hotel-related training than German hotel workers. If they do receive training, it is less comprehensive than that provided by the German apprenticeships. British hotel jobs are also defined more narrowly than those in Germany. For example, each of the tasks performed by a German hotel receptionist is typically performed by a separate worker in Britain.

Clerical Work. n106

Many large insurance companies use computer software packages to generate the standard-form policies that make up the bulk of their business. Clerical workers in these companies must collect standardized information from customers and enter it into the computer system. Such workers have highly [*706] routinized jobs that offer little or no opportunity for skill development or on-the-job advancement. Firms that organize clerical work in this manner must also employ a small number of highly skilled workers to handle the specialized insurance policies that cannot be processed by computer. However, one insurance company has improved labor productivity by replacing this type of job structure with one that uses two categories of skilled clerical workers. In this company,

customer service representatives sell insurance and respond to customer questions and complaints, while claims representatives handle both routine and specialized claims. Workers in both categories receive five weeks of classroom training followed by three to six months of on-the-job training and are eligible for addditional employer-paid training throughout their careers. Four years after adopting this job structure, the company's main office was able to handle more business with 2300 workers than it had previously handled with five thousand workers under the conventional job structure.

If the examples of hotel and clerical work are, generally, a guide to the possibilities for improving productivity in low-wage service jobs, then there is an obvious union role both in bargaining and in providing training. The union should bargain for broader jobs that make greater use of workers' decision-making capacities. It should also work with employers to establish multiemployer training programs, perhaps modeled on the unionized construction trades' apprenticeship programs. These multiemployer training programs provide workers with the broader skills that they will need in order to perform the redesigned jobs. n107

IV. LIMITATIONS OF CURRENT AMERICAN LABOR LAW

It is no accident that union organizers who have moved toward the model of unionism outlined in Part III have attempted to avoid National Labor Relations Board elections if [*707] possible. Although neither a geographical/occupational union structure nor area-wide multiemployer bargaining is illegal under current American labor law, the basic policies of the National Labor Relations Act (hereinafter "the Act") n108 as amended by the Labor-Management Relations Act, n109 in combination with NLRB case law, create substantial obstacles to such broad organizational and bargaining structures. n110 This Part discusses two facets of the law that inhibit American unions' ability to implement the new structures: (a) the law of bargaining unit determination, and (b) the prohibitions on secondary pressures and associated legal doctrines.

A. *The Scope of Co llective Bargaining*

Strictly speaking, the NLRB's term "appropriate bargaining unit" is a misnomer; "appropriate bargaining units" are, formally, merely the units within which union representation [*708] elections occur. n111 Nevertheless, NLRB determinations of "appropriate bargaining units" influence both the structure of negotiation and the organizational structure of unions. Because, as I show below, the law makes it difficult for unions or employers to establish and maintain larger-scale negotiating units, negotiations usually occur in the "appropriate bargaining unit." Union structure also follows bargaining unit structure, because unions that are unable to gain voluntary employer recognition must win elections in order to bargain collectively, and because collective bargaining is the major function of American unions. Legal doctrine creates a strong presumption in favor of small, worksite-specific or, at most, employer-specific bargaining units, thereby discouraging unions from organizing and bargaining along the lines suggested in Part III. n112

The NLRB's putative criterion for grouping workers into bargaining units is that workers in a unit share a "community of interest." n113 The indicia that the Board uses in order to determine whether a group of workers shares a "community of interest" include the homogeneity and distinctiveness of the group; the extent to which workers in the group are interchanged with other workers in the production process; the extent of common supervision; previous bargaining history; geographical proximity; n114 commonality of wages, fringe benefits, and training opportunities; n115 commonality of skills and of working conditions; the degree of centralization of control over business operations and labor relations; n116 the extent to which the workers' tasks are functionally integrated; n117 and the extent of union organization. n118 The ostensible purposes of [*709] the "community of interest" standard are to promote effective bargaining by minimizing the prospect of conflicts of interest within units and to prevent minority interests from being submerged in large units. n119

The Board's criteria for ascertaining the existence of a "community of interest" make effective organization of low-wage service workers difficult. In part this is because, as Rogers has pointed out, most of the criteria are employer-determined and can, therefore, be manipulated by employers to inhibit the formation of economically effective and socially solidaristic units. n120 However, the problem for low-wage service workers' unions goes beyond the fact that "communities of interest" are creations of employers. These "communities" are creations of *individual* employers rather than of all employers in a labor market acting explicitly or implicitly in concert. Because factors such as supervision, wages, working conditions, control over business operations and labor relations, and even the interchange of employees n121 are under individual employers' control, the Board has given individual employers the power to thwart the formation of multiemployer units.

Another problem with the "community of interest" criteria is that, for many low-wage service workers, the criteria may not serve the purposes for which they are intended. In a world of [*710] employer-or worksite-specific internal labor markets, the Board's criteria may well identify groups of workers whose workplace interests are relatively homogeneous. However, in a labor market in which workers frequently change worksites and employers, workers who share some or even all of the "community of interest" criteria at a given point in time may not form discrete interest groups. Likewise, the rapidity of inter-site and inter-firm mobility among low-wage service workers suggests that the kinds of units that the "community of interest" standards create may not protect minority interests any better than units that encompass multiple employers.

Even if the "community of interest" criteria do identify groups of low-wage service workers with relatively homogeneous interests on some workplace issues, it does not follow that they do so with respect to all such issues. Workers in a particular labor market may have a widely shared interest in changing the structure of that labor market, even if they have divergent interests on other, less global issues. The Board's criteria simply do not acknowledge the possibility that workers might have the desire and ability to change the structure of their labor market if they are allowed to organize on a basis that cuts across the categories within which individual employers classify them. By bargaining

over training on a multiemployer basis, for example, a union might be able to improve the training opportunities available to all workers within an occupational/geographical cluster. Yet the Board's use of commonality of training opportunities as a criterion for aggregating worker interests embodies the tacit assumption that workers who share common training opportunities prior to collective bargaining must continue to share common (though perhaps improved) training opportunities once collective bargaining has been established.

The Board has explicitly adopted a presumption in favor of the appropriateness of single-employer units. n122 Whether the presumption is upheld depends on whether a particular employer has a history of multiemployer bargaining and on whether the employer intends to continue to participate in multiemployer bargaining. When an employer with a history of multiemployer bargaining intends to continue such bargaining, the Board creates a multiemployer unit. n123 However, if the [*711] employer has no history of multiemployer bargaining n124 or decides to discontinue multiemployer bargaining, n125 the Board upholds its single-employer presumption.

If a single employer operates multiple establishments, the Board carries its preference for narrowly defined units down to the level of the individual worksite. At least since the early 1960s, it has operated under a general presumption that a single-worksite unit is appropriate. n12 6 This presumption has been especially important for unions that have attempted to organize low-wage service workers in retail industries. Retail firms frequently operate as chain stores, with several different retail outlets located within a relatively small geographical area. Drugstores, fast-food chains, supermarkets, banks, and health-care chains n127 have all been subject to the Board's single-worksite presumption. n128 Thus, the Board has given unions in those industries a strong incentive to organize workers on a site-by-site basis.

It would be incorrect, though, to suppose that the NLRB could encourage unions of low-wage service workers to organize on an area-wide, multiemployer basis merely by creating a presumption in favor of multiemployer units for such workers and by making its "community of interest" criteria correspond to the job mobility paths of those workers. Since unions typically seek smaller bargaining units than employers, n129 these [*712] doctrinal changes, standing alone, would actually discourage unionization of low-wage service workers. Because American unions, with the exception of a few pioneers like SEIU, do not attempt to represent workers in any way without achieving the status of exclusive bargaining agent, unions focus their organizing efforts on achieving that status. Because they cannot achieve that status without winning elections (unless they are able to secure voluntary recognition from employers), they focus their organizing efforts on winning elections. Because elections are conducted in a legal environment that permits protracted election campaigns, allows employers to participate in campaigns, and fails to provide effective sanctions against unfair labor practices committed by employers during campaigns, n130 unions have difficulty in holding the support of large numbers of workers from the time that an organizing effort begins until the time an election is held. These features of American unionism and American labor law make unions prefer to organize small groups of workers so as to increase unions' probability of electoral

success. n131 Thus, the Board's single-employer and single-worksite presumptions actually facilitate unionization, given the background features of American unionism and labor law described above. n132 Part V will [*713] consider ways in which these background features might be changed in order to facilitate organizing on an area-wide, multiemployer basis.

Unlike multiemployer organizing, which unions have good reason to shun under current American labor law, multiemployer bargaining generally benefits unions, even under current law. n133 Yet NLRB doctrine favors not only small bargaining units (and, therefore, small-scale organizing), but also single-employer bargaining. The initial formation of a multiemployer negotiating unit, as well as the continuation of multiemployer negotiations from one contract to the next, is subject to the mutual agreement of the union and each individual employer. n134 Either the union or any individual employer is permitted to withdraw from an existing multiemployer negotiating unit before a new round of bargaining begins. n135 The law does offer some limited protection to multiemployer bargaining units during the process of collective bargaining; except in unusual circumstances, n136 neither a union nor an employer may withdraw from multiemployer bargaining once negotiations have begun without the consent of the other party. n137 Although some observers have regarded this limited protection as an attempt by the Board to encourage multiemployer bargaining, n138 it is difficult to see how existing [*714] legal doctrine on multiemployer bargaining, taken as a whole, can be said to encourage such bargaining.

Indeed, the law deprives unions of the most powerful economic weapons that they might use to induce employers to bargain on a multiemployer basis. It is an unfair labor practice for a union to strike or threaten to strike in order to compel an employer to participate in multiemployer bargaining. n139 It is a violation of the antitrust laws for a union and one or more employers to agree to impose the terms of their collective bargaining agreement on other employers who are not parties to that collective bargaining agreement. n140

Furthermore, if an employer does not agree to participate in multiemployer bargaining, a union may use only weak tools in order to attempt to remove workers' standard of living from competition across employers. It may, of course, seek the same terms and conditions of employment in all of the contracts that it signs with individual employers. It may seek, via individual employer bargaining, to induce an employer that does not participate in multiemployer bargaining to agree to the same terms and conditions as are contained in an existing multiemployer contract. n141 It may include members of unions in other bargaining units on its negotiating team, with an eye toward coordinating bargaining strategy across units that [*715] bargain separately. n142

A union may also picket an employer that does not adhere to area wage and benefit standards, n143 but the effectiveness of this tool as a means of removing workers' standard of living from competition is restricted by the narrow limits within which the NLRB has confined this doctrine. In order to keep "area standards" picketing from violating the Act's restrictions on recognitional picketing, n144 the Board permits such picketing only if the union does not intend to seek recognition from the picketed

employer. n145 The Board also forbids the union from seeking to force the picketed employer to adopt specific provisions of the union's area-wide collective agreement; it allows the union only to force the employer to maintain the same overall labor costs as employers who have signed the agreement. n146 Via this doctrine, the Board recognizes only one of the two reasons why a union might want uniform area-wide contract terms. It recognizes that a union has an interest in preventing non-union employers from using their lower labor costs to produce more cheaply than unionized employers. n147 However, it does not fully recognize the union's interest in removing workers' standard of living from competition, since workers may value different packages of wages, benefits, and working conditions differently even if those packages are equally costly to employers. n148 Finally, the Board has never [*716] made clear how many employers in a local labor market must agree to a particular level of labor costs before that level becomes an "area standard." If a large number of employers were required to agree in order to create an "area standard," then the "area standards" doctrine would be useful only to a union that had already secured the agreement of many employers on an "area standard," but not to a union that was trying to compel employers in a largely nonunion labor market to establish an "area standard" in the first place.

The problem of changing American labor law to facilitate area-wide multiemployer organizing and bargaining for low-wage service workers' unions is complex. Because a hostility toward even modestly centralized organizational and bargaining structures is deeply rooted in current law, simple tinkering with existing statutory provisions or NLRB doctrines will not be sufficient. In Part V, I will suggest some possible solutions to this problem.

B. *Restrictions on Secondary Pressures*

A special problem for union organizing in services characterized by extensive subcontracting (e.g., janitorial services) is that the final purchaser of the service (e.g., the building owner) has effective veto power over workers' ability to unionize through its decision about which contractor to hire. Suppose that the employees of one contractor vote for union representation or obtain the contractor's voluntary recognition of the union. The final purchaser, fearing higher costs and/or labor unrest, may simply dismiss the contractor at the earliest time allowed by the contract. n149 The final purchaser is then free to hire a nonunion contractor. If the new contractor's employees desire and achieve union representation, the final purchaser may dismiss the contractor and hire yet another. For this reason, a union that organizes workers in subcontracted services will want to direct its organizing efforts at the final purchaser at least as much as at the contractor. It may attempt to offset the cost advantage of nonunion contractors by raising the cost [*717] to the final purchaser of dealing with those contractors.

Although the Act allows the union to exert economic pressure on the contractor, n150 who is the direct employer of the workers whom the union seeks to organize, Section 158(b)(4) of the Act n151 imposes sharp restrictions on the union's ability to exert "secondary" pressure on the final purchaser. The union may not attempt to coerce the final purchaser (by means of picketing, for example) into signing an agreement with the

union requiring it to deal only with unionized contractors. n152); n152 It may not attempt to coerce the final purchaser into dismissing a nonunion contractor. n153 Nor may it attempt to coerce the final purchaser into recognizing or bargaining with the union. n154

SEIU's Justice for Janitors Campaign, in which the union pressures building owners for the purpose of inducing them to encourage their cleaning contractors to recognize the union, has tested some of the limits of the legal prohibitions on secondary pressures. Although the NLRB has not yet decided any secondary-pressure cases involving the Justice for Janitors Campaign, the NLRB General Counsel has issued advisory memoranda in three such cases. In one case, the General Counsel found a violation of Section 158(b)(4)(B) when SEIU picketed the properties of a building owner in order to induce him to encourage his cleaning contractors to recognize SEIU. n155 In a second case, SEIU members marched around the outside and through the lobby of a building whose management company hired only nonunion cleaning contractors. While marching, the union members handed out leaflets that stated that the building was cleaned by a nonunion contractor. Since the union did not picket, nor try to prevent anyone from entering, or from doing business with the management company or tenants, the General Counsel concluded that the union's activities were not illegal secondary pressure. n156 In a third case, [*718] SEIU distributed handbills to the tenants of a building where the management company refused to hire a unionized contractor. The handbills urged the tenants to pressure the management company into hiring a unionized contractor. Once again, because the union did not picket or otherwise directly attempt to prevent anyone from dealing with the management company, the General Counsel found no illegal secondary pressure. n157

These SEIU cases suggest that current law gives a union in a service-subcontracting situation some ability to exert pressure on the final purchaser, though it must stop short of actual picketing or direct coercion. n158 Whether the law on secondary pressures presents such a union with a practical obstacle to organizing depends on the value to the union of picketing as compared to more subtle forms of secondary pressure. To the extent that picket lines in contemporary America have lost the significance that they once had in the eyes of non-picketing workers and consumers, there may be little practical difference between unlawful secondary picketing and lawful marching or leafletting. However, as a matter of legal doctrine, the foregoing cases illustrate that Section 158(b)(4) draws a sharp distinction between permissible primary economic pressure and impermissible secondary pressure. The NLRB has attempted to justify this distinction by arguing that a "secondary" firm should be free from picketing in a labor dispute that is not of its making. n159 Even if one accepts this argument, the final [*719] purchaser of a subcontracted service is hardly the "innocent" or "uninvolved" party that the restrictions on secondary pressures were ostensibly intended to protect. Because the final purchaser has the ability to determine whether or not the contractor's workers are able to organize and bargain collectively, it makes no sense to protect the final purchaser from a union's economic pressure.

In a narrowly defined set of circumstances, the legal prohibitions on secondary pressures do not inhibit the organizing efforts of unions in subcontracted services. The law

sometimes treats the final purchaser and the contractor as "joint employers" for the purpose of collective bargaining and thereby allows the union to use the same kinds of economic pressures against both. The NLRB has used two different doctrinal tests for "joint employer" status in service subcontracting cases. One test looks to whether both the final purchaser and the contractor have the right to exercise substantial control over labor relations or over workers' wages, hours, and working conditions. n160 The other considers the extent to which the two firms have common operations, control over labor relations, management, and ownership and financial control. n161 Both tests are of only limited usefulness to unions seeking to organize low-wage service workers. Workers employed under contract with a temporary help service may be able to claim the benefit of the joint-employer doctrine, at least in its purely labor-related formulation, since those workers are typically supervised by the final purchaser but paid by the temporary help service. However, janitors and food service workers who are employed by contractors will rarely benefit from the doctrine, since the contractors are usually responsible for determining all terms and conditions of employment and generally have arm's-length business relationships with the final purchasers of their services. More generally, the joint-employer doctrine is susceptible to [*720] manipulation by the final purchaser; a final purchaser that wishes to escape any legal obligation to deal with the union may simply structure its relationship with a contractor so as to avoid joint-employer status. Thus, the joint-employer doctrine does not remove the final purchaser's ability to exercise an effective veto over workers' ability to organize.

Unlike the problem of promoting multiemployer organizing and bargaining, the problem of removing the final purchaser's veto over union organizing in subcontracted services is relatively easy to solve within the existing framework of American labor law. Section 158(e) of the Act permits a union and an employer in the construction industry to agree that the employer will "cease doing business with any other person" (including, of course, nonunion contractors), but prohibits such agreements in other industries. n162 The exception that is currently allowed for the construction industry could easily be extended to cover the kinds of service subcontracting situations with which this section has been concerned. Section 158(e) could be amended to allow a union and a firm to agree that the firm will not subcontract business to nonunion contractors n163 where the subcontracted work is to be performed on property owned or managed by the firm. In order to enable the union to picket the final purchaser for the purpose of securing such an agreement, Section 158(b)(4) could be amended to permit secondary picketing. If the general policy of prohibiting secondary picketing were thought to have some validity, then secondary picketing could be allowed only in cases where the "secondary" target has hired the "primary" employer (i.e., the contractor) to perform a service on property owned or managed by the "secondary" target. This amendment would allow secondary picketing in the kinds of service subcontracting cases discussed above, where the rationale for prohibiting secondary picketing is inapplicable.

V. FACILITATING GEOGRAPHICAL/OCCUPATIONAL UNIONISM AMONG LOW-WAGE SERVICE WORKERS IN THE U.S.

One of my interviewees volunteered a set of legal reforms [*721] that he believed would

facilitate union organizing in the United States, especially among service workers. His proposals included: (1) certification of a union's status as exclusive bargaining agent on the basis of a card majority rather than an election, or an expedited election procedure that would eliminate the election campaign or give the union and the employer(s) equal access to workers during the campaign; (2) elimination of the NLRB role in bargaining unit determinations in favor of a system in which the union would determine the basis on which workers would be organized; n164 (3) elimination of the legal restrictions on secondary pressures; (4) reduction of administrative delays in the NLRB's processing of unfair labor practice charges; and (5) interest arbitration of the first collective bargaining agreement between a union and an employer(s), in order to prevent workers from having to strike in order to obtain a first contract. These reforms are neither novel n165 nor incompatible with the basic institutional framework of current American labor law. By removing some existing legal obstacles to organizing, I believe that they would enhance the ability of unions to organize American workers.

[*722] However, these modestlegal reforms are insufficient to promote the formation of geographical/occupational unions of low-wage service workers because they do nothing to encourage multiemployer union organizing or multiemployer bargaining. In the remainder of this section, I suggest two alternative sets of legal reforms, one administrative and one "deregulatory." These reforms might encourage unions to organize and bargain at levels above that of the individual employer. My primary is less to advocate any particular strategy of legal reform than to lay out some feasible alternatives that might promote geographical/occupational unionism in the low-wage services.

A. *Administrative Solutions*

It would be relatively straightforward to encourage the formation of multiemployer negotiating units without altering much of the fabric of American labor law. The British Columbia Labour Board, which administers a statute that is similar to the NLRA, has a policy of favoring multiemployer negotiating units. n166 The British Columbia Board does not try to force unions to *organize* on a multiemployer basis. Instead, it has the power to require local unions that have organized separate groups of workers to join together into "councils" for negotiating purposes. It has used this power to aggregate workers (by occupation and/or industry, depending on particular economic circumstances) into multiemployer negotiating units. In addition, unions may petition the Board for council certification in cases where the Board has not mandated councils . The role of the council is restricted to negotiating; administration of the collective bargaining agreement is left to the individual locals that make up the council. n167

The British Columbia Board does not require employers to bargain on a multiemployer basis. However, once a British Columbia employer has chosen to join a multiemployer bargaining association, the employer may not withdraw from the association without convincing the Board that it has good cause for doing so. n168 According to Paul Weiler, who was the first chair of the British Columbia Board, this arrangement did not inhibit employers from joining multiemployer associations. On the contrary, British Columbia

employers usually welcomed [*723] multiemployer bargaining as protection against wage-whip-sawing by unions, while unions opposed it for the same reason. n169

The policy of the British Columbia Labour Board--voluntary or mandatory aggregation of union "bargaining units" accompanied by "voluntary-in, involuntary-out" aggregation of employers for negotiating purposes--is one model that the NLRB could adopt in order to facilitate multiemployer bargaining. This model would be compatible either with continued NLRB determination of the appropriate bargaining unit or with unilateral union determination of that unit. The NLRB could be given the power to determine which bargaining units should be aggregated into negotiating units, n170 subject to the general standard that negotiating units should be designed to minimize the influence of labor market competition on workers' standards of living. The implementation of this standard requires consideration of both labor market and product market structures. In the case of low-wage service workers, negotiating units should include all bargaining units within the geographical/occupational groupings discussed in this article.

Some variations on the British Columbia model are also worthy of consideration in the United States context. If the experience of SEIU is at all representative of the attitudes of low-wage service employers, then it is the employers rather than the union that should be required to bargain on a multiemployer basis, at least when the proportion of unionized employers in the relevant labor market is small. Once a sufficient fraction of employers has been unionized, employers welcome multiemployer bargaining, just as in Weiler's British Columbia experience. Therefore, the NLRB might be given the power to require all unionized employers in a given labor market to bargain on a multiemployer basis. n171 Alternatively, the [*724] NLRB might be given the power to require *all* employers in that labor market to bargain together, regardless of whether or not their workers are unionized, once a sufficient "triggering" proportion of the workers in that labor market have unionized. The latter proposal would have the advantage of more effectively promoting uniformity in wages and working conditions, and therefore, it would also more effectively take workers' standard of living out of competition. However, it would be less compatible with the American tradition of voluntarism in industrial relations, since it would require workers who had not voted for collective bargaining to accept collectiv ely bargained terms of employment that those workers had no part in formulating. If the "triggering" proportion of unionized workers were equal to a majority of the workers in the relevant labor market, this problem could be avoided. Once a majority of workers in the relevant labor market could be said to have expressed a preference for collective bargaining, it would be entirely compatible with the American industrial relations tradition to require all workers in that labor market to accept collective bargaining.

If mandatory market-wide multiemployer labor bargaining is rejected in favor of either the British Columbia system or mandatory multiemployer bargaining by unionized employers alone, there is an alternative policy option for eliminating wage competition. That option is the "extension law." Extension laws provide for the mandatory extension of some or all terms of a collective bargaining agreement to workers and employers that were not involved in the negotiation of that agreement. There is substantial variation among countries regarding: (1) the circumstances under which extension is permitted,

i.e., the percentage of workers in the relevant economic sector that must be covered by the negotiated agreement before the agreement may be extended; (2) the provisions of the agreement that may be extended; (3) the scope of the extension (e.g., occupational, industrial, geographical); and (4) whether approval of the extension by an administrative agency or arbitrator is required. n172

[*725] Quebec is the only jurisdiction that combines an extension law with a union certification and bargaining law that resembles the NLRA. Therefore, Quebec's law is a potential model for a United States extension law. The Quebec statute, "An Act Respecting Collective Agreement Decrees," n173 allows any union or employer that is already a party to a collective bargaining agreement to apply to the provincial Minister of Labour for an extension of that agreement. n174 The provincial government has a great deal of discretion in determining whether to order an extension and on what terms to do so. The government may order the extension of the agreement to "any trade, industry, commerce, or occupation" either throughout the province or in a portion of the province. n175 An agreement need not cover a majority of workers in the relevant sector before it can be extended. Instead, the Minister of Labour may recommend an extension "if he deems that the provisions of the agreement have acquired a preponderant significance and importance for the establishing of conditions of labour." n176 At a minimum, the wage and hour provisions of the relevant collective agreement are mandatory whenever an extension is granted, n177 but the government has the discretion to order the extension of other terms of the agreement as well. n178 Once the government has ordered an extension, the union(s) and employers in the economic sector covered by the extension are required to establish a joint committee to administer the extended agreement. n179

[*726] Quebec's ext ension law was enacted in 1934 as a means of taking wages out of competition in industries containing large numbers of small employers. n180 In 1991, it covered more than 140,000 workers and 16,000 employers, n181 and apparently has enabled collective bargaining to gain strength in such low-wage services as building cleaning and security guard services. n182 Quebec's extension law operates within a union certification system that is, in other respects, even more hostile to multiemployer union organizing and bargaining than the United States system; in Quebec, union certification and bargaining are required by law to occur at the level of the individual enterprise. n183

Quebec's extension law offers one possible model for the United States. The NLRB could be given administrative discretion to determine whether, after receiving a petition from a union(s) or employer(s), an extension should be required and, if [*727] so, on what terms. Congress could, of course, enact an extension statute that gives the NLRB less administrative discretion than Quebec's Minister of Labour possesses. For example, given American labor law's traditional attachment to majority representation as a prerequisite to collective bargaining, it might be appropriate to require a majority of workers in the relevant labor market to be covered by a collective bargaining agreement before extending that agreement to the entire labor market. n184

The combination of an extension law with a system of NLRB-mandated multiemployer

bargaining could take low-wage service workers' wages out of competition on a geographical/occupational basis and could promote the eventual formation of local unions organized on a geographical/occupational basis. Even if combined with the general labor law reforms suggested at the beginning of this section, however, these reforms embody an exclusively top-down approach to union organizing. They focus on aggregating jobs rather than on encouraging workers to form themselves into cohesive political bodies at a level above that of the worksite.

Part III of this article suggested that pre-collective bargaining associations of workers could help to accomplish the latter task. The law could encourage workers to form such associations by granting formal recognition and legal rights. Any association recognized by law would have the right to compel employers to provide it with information about human resource policies and terms, as well as conditions of employment that affected workers within the association's jurisdiction. The association would also have the right to consult regularly with relevant employers regarding subjects upon which the employers were required to provide information. These subjects could be specified by statute as "mandatory subjects of consultation," and refusal to provide information or to consult about them could be made an unfair labor practice. n185 The association [*728] would be allowed to consult with employers on other subjects as well, but only if both parties agreed to such consultation. Consultation could occur on either a single-employer basis or on a multiemployer basis, depending upon whether the subject of the consultation involve d an issue that was unique to a particular employer or one that was of concern to workers and/or employers throughout the association's jurisdiction. n186 Thus, an association could meet periodically with either an individual employer or a large group of relevant employers. Consultation would require only that the parties meet and confer. They would not be required to agree or to seek agreement on any issue. They would not be prohibited, however, from reaching informal agreements. "Integrative" subjects, such as worker referral or training, might be subjects on which the association could reach agreement with one or more employers.

Although the association would not bargain collectively, its functions need not be limited to information-sharing and consultation with employers. Because the association is intended, in part, to organize workers for eventual participation in collective [*729] bargaining, the association would be permitted to use the information that it received from employers for the purpose of formulating tentative bargaining positions. It could not impose those positions upon employers, however, unless the NLRB were to certify it as an exclusive bargaining agent. The association would also be allowed to use the information that it received in order to assist individual workers in enforcing their existing legal rights in the workplace. For example, a worker who wanted to make a legal claim against an employer for violation of occupational health and safety statutes would have access to any relevant information that his or her association possessed.

Finally, if the United States were to enact an extension law, the association could be given representational duties in the administration of an extended collective bargaining agreement. Unlike Quebec, which makes only the original parties to a collective bargaining agreement responsible for administering the extension of that agreement, the

United States might use the extension of a collective agreement as an occasion for granting formal representational rights and duties to the nonunion workers (and employers) covered by the extension. Thus, the United States might require that nonunion workers and employers covered by an extension, as well as the original parties to the agreement, be represented on the committee that administers the extension. Under such a system, a pre-collective bargaining association of workers could be given the responsibility to appoint or to conduct an election of nonunion worker representatives to the committee. The association could also be given legal responsibility to represent the interests of nonunion workers in the administration of the extended agreement. Thus, the association would have the duty to pursue grievances under the agreement on behalf of covered nonunion workers. n187

What should be the scope of the group of workers that would be subject to the jurisdiction of an association? Because one purpose of an association is to pave the way for eventual collective bargaining, one might argue that the NLRB should determine the boundaries of the association so that the effect of [*730] labor market competition on workers' standards of living would be minimized if the association were ever to become a negotiating unit. The association as such is not, however, a negotiating unit, and not every association will necessarily evolve into a negotiating unit. Therefore, the ideal negotiating structure is less imp ortant in determining the scope of the association than in determining the scope of a negotiating unit or of an extended collective agreement. While workers should be encouraged to organize associations along the lines of ideal negotiating units, the NLRB could frustrate the collective ability of workers to receive information from and to consult with employers if it were to insist that the jurisdiction of the association correspond to that of the ideal negotiating unit. The Board could be required by statute to adopt a set of presumptions about appropriate (but not necessarily ideal) jurisdictions of associations in various labor markets. n188 Any petition for an association that satisfied the relevant presumption would be automatically approved if it contained the requisite percentage of signatures. If a group of workers petitioned to organize an association on a basis that the Board did not find presumptively appropriate, the Board would be allowed to approve the petition if the petitioning workers showed that they had good cause for organizing on a different basis.

When confronted with rival petitions for associations that seek to represent overlapping jurisdictions, the Board might be required to choose the jurisdiction that most closely conforms to the ideal negotiating structure. This solution to the problem of potential inter-association rivalry would extend the principle of exclusive representation to the consultative association. However, the argument for exclusivity is less compelling for a consultative body than for a union that engages in collective bargaining, since a consultative body does not seek to exert economic pressure on employers. As an alternative to exclusivity, the NLRB might be required to certify any association that meets the appropriate structural presumption and that has demonstrated the required minimum level of worker support, even if this would result in overlapping associational jurisdictions. Associations with overlapping jurisdictions could be required to share information and to consult jointly with respect [*731] to workers who are represented by more than one association. This requirement might lead consultative associations to

form federations, just as American craft unions did during the early twentieth century. n189

Because the consultative association would not have any legally conferred coercive power over any worker, there is no reason to condition legal certification on a showing of majority status among the workers who would be subject to its jurisdiction. Upon petition by ten or, at most, twenty percent of the relevant group of workers, the NLRB should be required to certify an association that would represent that group of workers. n190 All of the workers to be represented would then have the right to vote for officers of the association and to participate periodically in new elections under the supervision of the NLRB. No employer would have standing to challenge any aspect of the certification or election process. Workers would be allowed to challenge only the validity of signatures on the petition for certification.

The precise representational structure of an association might vary depending on whether there were identifiable subgroups of workers in the association with discrete interests. For example, if workers were to have a substantial degree of worksite-specific commonality of int erests, then officers of the association could be elected from individual worksites even if the association's jurisdiction spanned multiple worksites. If, on the other hand, individual workers changed worksites so frequently that worksite-specific commonality of interests was minimal, then at-large election of officers throughout the association's jurisdiction would be appropriate. An intermediate possibility would be to have some officers elected at-large and others elected on a worksite-specific basis.

The legal reforms that I have discussed in this section--general reforms to encourage organizing, aggregation of bargaining units for negotiating purposes, extension of collective agreements to cover nonunion workers and employers, and consultative associations of workers--do not change the requirement that a union demonstrate majority support among a [*732] group of workers in order to become the exclusive bargaining agent for those workers. Taken together, though, they create an institutional arrangement that reduces the impact of the collective bargaining election unit on the structure of worker self-organization, particularly in low-wage service labor markets. If all of the reforms proposed in this section were implemented, the organization of low-wage service workers might proceed as follows. First, workers in a geographical/occupational grouping would form a consultative association or a federation of consultative associations. A local central labor council and/or an established national union might assist them, and the consultative association (or federation) could be affiliated with the central labor council and/or the national union. When at least some of the workers in the association were ready to bargain collectively, those workers would petition the NLRB to conduct an expedited union certification election or card-check in an election unit that was determined by the petitioning group of workers. Given the role of the consultative association in organizing the workers prior to collective bargaining, one would expect the petitioning workers to designate their consultative association as the union that they wished to have represent them in collective bargaining, but they would not be required to do so. If the workers in the unit voted to have their consultative association represent them in collective bargaining, then the consultative association could assume the role of

exclusive bargaining agent for that particular group of workers while continuing its purely consultative role for other workers. As additional groups of workers within the association voted for collective bargaining, the NLRB would enhance workers' bargaining power by aggregating those groups of workers into a single multiemployer negotiating unit. If more than half of the members of the consultative association were covered by a single multiemployer contract, the NLRB would extend at least the basic wage and hour provisions of the contract to cover all remaining members of the association. The association, along with the union and nonunion workers covered by the extended contract, would administer the extended contract. At this point, the association would function almost as a full-fledged geographical/occupational union. If the remaining nonunion workers in the association voted to have the association represent them in collective bargaining, the transformation of association into union would be complete.

Of course, there is nothing in the set of reforms proposed [*733] above that would require organization to proceed in this manner. Workers could still decide to bargain collectively without first forming an association. Likewise, workers who desire the representation of an association need not ever choose collective bargaining. However, the proposed reforms would be likely to increase the extent of collective bargaining among low-wage service workers. By supporting worker organization and bargaining on a multiemployer basis, they would make collective bargaining more attractive to workers by making it more effective economically. n191

In addition, by providing mechanisms to facilitate cross-employer harmonization of wages, working conditions, and industrial relations policies, the reforms would likely reduce employers' resistance to unionization. An individual employer would have less reason to fear that the unionization of its workers would place it at a long-term competitive disadvantage in the product market.

B. *"Deregulatory" Solutions*

The reforms suggested in the preceding section rely heavily on the NLRB for implementation. Because the precise scope of multiemployer bargaining, extended collective bargaining agreements, and consultative associations necessarily depends on the structure of the relevant labor market, and because that structure varies greatly across labor markets, it would be very difficult to draft a statute that would promote the "ideal" organizational form for each labor market. Therefore, it would be very difficult to avoid giving the NLRB a substantial amount of discretion in implementing the reforms proposed above.

In the United States today, however, a legal regime that depends heavily on the discretion of an administrative agency may be incapable of facilitating union organization and collective bargaining. United States-Canadian differences in political party interests and in the structure of political representation may make the executive and legislative branches of the United States government and consequently, the NLRB, less supportive of unionism and collective bargaining than their Canadian counterparts. n192 Even if

there were sufficient support in Congress [*734] to enact a British Columbia-style statute that allowed the NLRB to mandate multiemployer bargaining and a Quebec-style statute which allowed the NLRB to extend collective bargaining agreements, this support would not necessarily translate into a long-term political consensus in favor of the policies that inspired those statutes. The NLRB would not necessarily use the statutes, then, to produce the same kinds of bargaining structures as have its Canadian provincial counterparts.

An assessment of the foregoing argument would be well beyond the scope of this article. Nevertheless, it is worthwhile to consider the implications that the argument has for the creation of multiemployer organizing and bargaining structures in the United States. If additional administrative regulation is not an appropriate vehicle for the creation of these structures, then the best alternative may be to allow unions and employers to engage in economic conflict over them. If the NLRB cannot be relied upon to compel unions and employers to enter into multiemployer bargaining, then perhaps the parties ought to be allowed to use economic weapons to determine which bargaining units, if any, should be aggregated for negotiating purposes. In order to accomplish this change, Section 158(d) of the Act n193 would have to be amended to make the relationship between bargaining units and negotiating unitsa mandatory subject of bargaining. Likewise, an alternative to an extension law would be to allow a union to exert economic pressure on a nonunion employer for the purpose of inducing that employer to adhere to specific provisions of an area-wide collective bargaining agreement. This change in the law would simply expand the NLRB's current "area standards" picketing doctrine to specific contract provisions rather than restricting it to overall labor costs, n194 and could be accomplished by amending Sections 158(b)(4) and 158(b)(7) of the Act n195 to allow secondary picketing where the object is to compel a nonunion employer to adopt specific provisions of a collective agreement.

The existence of multiemployer bargaining and the extension of union contracts to cover nonunion workers and employers [*735] could be determined by economic conflict between unions and employers without undermining the basic structure of the NLRA. However, it is not clear that this applies to multiemployer union organizing. As long as majority support (whether demonstrated by an election or by a card-check) is required in order for a union to enjoy exclusive bargaining rights (whether in an NLRB-determined unit or in a unit chosen by the union), unions will have an incentive to organize small groups of workers. n196 Abolishing the requirement of majority support, though, would effectively abolish the mechanism that the NLRA introduced as a means of legitimating exclusive bargaining rights and of obviating unions' need to strike for recognition. The alternative to the majority-support requirement is either to eliminate exclusive representation or to permit unions to strike in order to achieve employer recognition. Although some scholars have proposed the elimintation of exclusivity in collective bargaining, n197 I do not consider this proposal here because eliminating exclusivity would undermine the inclusion of all workers in a labor market in a single, economically effective union.

The non-administrative legal strategy for promoting multiemployer organizing, then, is to

allow unions to strike for recognition. During the period 1933-35, after the passage of the Norris-LaGuardia Act n198 but prior to the enactment of the National Labor Relations Act, n199 the United States operated under a legal regime in which recognitional strikes were not subject to federal court injunctions n200 and were a common [*736] means of establishing collective-bargaining relationships. n201 This "deregulated" system of industrial relations proved hospitable to the initiation of geographical/occupational unionism in the International Brotherhood of Teamsters, which began to organize all trucking-related occupations on a geographical basis in 1934. n202

Today, there are those in both the labor movement n203 and the academy v._671)_and_footnotes(n204); n204 who believe that a return to the Norris-LaGuardia regime of "deregulated" industrial relations would enhance union organizing ability. Although an assessment of this belief is beyond the scope of this article, its truth or falsity is one consideration that advocates of low-wage service workers' unions ought to consider in deciding between administrative and "deregulatory" approaches to geographical/occupational organizing. If low-wage service workers' unions could generally succeed in achieving employer recognition by striking, then the "deregulatory" approach is at least a plausible option. If, on the other hand, those unions would generally lack the economic strength to induce employers to recognize them voluntarily, n205 then even a flawed administrative process may be superior to "deregulation."

The choice between administrative and "deregulatory" approaches to promoting geographical/occupational union organizing implicates not only the economic strength of unions but [*737] also the kind of union that emerges from the organizing process. A union that has to strike or otherwise exert economic pressure on employers in order to achieve recognition is one whose formative political experience is an intense confrontation with those employers. Such a union is likely to view, at least initially, its relationship with employers as primarily adversarial. An adversarial union will appeal to low-wage service workers who, like the janitors organized by SEIU, believe that they are being treated unjustly by their employers. Such a union may be very effective in extracting concessions from employers but might be quite ineffective in promoting "integrative" ventures, like training and referral, that require cooperation between the union and employers. On the other hand, a union that begins as a consultative association may be likely to view its relationship with employers as more cooperative than adversarial. Such a union may be good at "integrative" ventures but poor at extracting concessions from employers. Because the model of geographical/occupational unionism described in Part III of this article includes both adversarial and cooperative elements, both the administrative and "deregulatory" approaches to organizing are potential means of implementing that model. Which approach one prefers depends, in part, on whether one believes that adversarial elements or cooperative elements should dominate industrial relations in low-wage services. Different groups of low-wage service workers might have different beliefs about the proper mix of adversarial and cooperative elements; janitors, for example, might emphasize the adversarial elements, while secretaries might emphasize the cooperative ones.

C. *Concluding Comments*

The model of geographical/occupational unionism described in this article has the potential to foster a high-wage, high-productivity service sector, to provide workers in what are now low-wage service jobs with a means of exercising collective voice at work, and to reverse the decline of the American labor movement. Thus far, the new model has remained implicit in the ideas and practices of a few union organizers in the low-wage service sector. Glimpses of the model are also apparent in current public debates about labor law reform in Canada, n206 which, like the United States, has recently experienced [*738] rapid job growth in an overwhelmingly nonunion service sector. n207 However, the new model has not yet become part of the organizing or legislative agendas of the AFL-CIO, nor has it entered into the recent United States debates about labor law reform. By both laying out the new model's overall vision of unionism and suggesting options for translating that vision into concrete legal reforms, this article has sought to expand the scope of those debates.

FOOTNOTES:

n1 Sales workers in retail and personal services, clerical workers other than supervisors, mail handlers, and postal clerks, and workers in service occupations other than police and firefighters (including workers in private household service, food preparation and service, non-professional health service, cleaning and building service, guard, and personal service occupations) accounted for 33 percent of all employed workers in 1990. Calculated from data in 38 U.S. Dep't of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS 186-88 (Jan. 1991). Workers in the retail trade, hotel, personal service, building service, personnel supply service, nursing and personal care, hospital, detective and protective service, private household service, entertainment and recreational service, and social service industries made up 31 percent of the employed workforce in 1990. *See id.* at 198-99.

n2 According to U.S. Department of Labor projections, retail sales workers, janitors and cleaners, secretaries, cashiers, and food service workers will be among the occupations with the largest job growth during the 1990s. *See* George Silvestri and John Lukasiewicz, *Projections of Occupational Employment, 1988-2000*, 112 MONTHLY LAB. REV. 42, 60 (1989). Retail trade, health care, and business services (including personnel supply services and building services) are expected to be among the industries with the greatest employment growth during the 1990s. *See* Valerie Personick, *Industry Output and Employment: A Slower Trend for the Nineties*, 112 MONTHLY LAB. REV. 25, 27-30, 32 (1989).

n3 In 1990, service workers (other than police, firefighters, and guards) had the lowest median weekly earnings of any of the broad occupational groups in the U.S. Department of Labor's classification scheme, while workers in the retail trade and service industries had the lowest median weekly earnings of any of the private nonagricultural industrial groups. *See* 38 U.S. Dep't of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS 231 (Jan. 1991).

n4 While 12.1 percent of all private non-agricultural workers were union members in 1990, only 6.2 percent of workers in the retail trade industry and 5.7 percent of workers in the service industry belonged to unions. Among broad occupational groupings, sales occupations (5.0 percent union members) and non-protective service occupations (9.9 percent union members) had the lowest union densities of any non-professional occupations. *Id.* at 229.

n5 *See e.g.*, Dorothy Sue Cobble, *Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (1991); CHARLES G. HECKSCHER, THE NEW UNIONISM (1988); Raymond E. Miles, *Adapting to Technology and Competition: A New Industrial Relations System for the 21st Century*, 31 CAL. MGMT. REV. 9, Winter 1989, at 23-25.

n6 For example, Heckscher's "associational unionism" draws on the profession al association as a prototype for worker organizations. HECKSCHER, *supra* note 5, at 185-86. *See also* Miles, *supra* note 5, at 25.

n7 *See* Part I *infra.*

n8 These models are discussed and evaluated in Part II *infra.*

n9 In this article, "union organizational structure" refers to the "horizontal" organization of a union, which includes both the basis on which workers are grouped together in local unions and the relationships among local unions. *See* Jack Fiorito et al., *Union Structural Choices, in* THE STATE OF THE UNIONS 103, 114-16 (George Strauss et al. eds., 1991); George Strauss, *Structure: Union Research Agenda for the 1990s*, in PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, 310, 310-11, 313-15 (John Burton ed., 1990). In the U.S., where the main activities of unions are the negotiation and enforcement of collective bargaining agreements, union organizational structure is largely but not entirely a product of "bargaining structure," which includes the basis on which workers are grouped into "bargaining units" for purposes of NLRB elections, the basis on which workers are aggregated for purposes of collective bargaining, and the basis on which workers are directly affected by the terms of particular collective bargaining agreements. *See, e.g.*, Arnold Weber, *Stability and Change in the Structure of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 13, 14 (Lloyd Ulman ed., 1967). Because the union organizational structure proposed here is intended, in part, to facilitate collective bargaining, my discussion of organizational structure will include considerations of bargaining structure.

n10 The test of this article presents no explicit economic argument for the value of collective worker representation. However, economists have recently begun to develop arguments that collective representation can enhance the efficient operation of firms by promoting labor-management communication that would not otherwise occur. *See, e.g.*, Joseph Farrell & Robert Gibbons, Bargaining Power and Voice in Organizations (Oct.

1991) (unpublished paper on file with the RUTGERS LAW REVIEW). In the absence of collective representation, communication is inhibited by informational asymmetries and opportunistic behavior on the part of both workers and mangement. *Id.* at 3. Unionization may, therefore, be economically efficient even if, as neoclassical economists argue, it produces other market distortions. *Id.*

n11 By "job mobility path," I mean a sequence of jobs through which workers move, with some regularity, according to a socially defined transitional structure. The concept is intended to illustrate that job mobility, regardless of whether it occurs within a single firm or between firms, is channeled by social relations among workers, among employers, and between workers and employers. *See* Howard **Wial,** Job Mobility Paths of Recent Immigrants in the U.S. Labor Market 5 (October 1988) (unpublished paper prepared for U.S. Department of Labor). It is derived from the sociological concept of a "career line," which denotes "a work history that is common to a portion of the labor force." Seymour Spilerman, *Careers, Labor Market Structure, and Socioeconomic Achievement*, 83 AM. J. SOC. 551, 551 (1977).

n12 The associate membership program allows workers who are not currently represented by a union to become union members (at reduced dues) and to receive non-workplace benefits (e.g., inexpensive health insurance, discounts on consumer goods) similar to those that the union provides to full members. *See* ARTHUR SHOSTAK, ROBUST UNIONISM 63-64 (1991).

n13 The article, therefore, uses the method of "interpretive" social science. Alan Hyde describes the purpose of social science as an attempt to "capture, as much as possible, the background assumptions, intentions, shared and not shared social meanings, which inform the actions . . ." of the social actors who are the subject of the study. Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 451 (1990). For a succinct discussion of interpretive social science in the context of legal scholarship, see *id.* at 450-56.

Of course, the understanding of organizing that my interviewees shared is not the only possible approach to organizing low-wage service workers; alternative approaches might emerge from interviews with other organizers who have attempted to organize different low-wage service workers than the ones with whom my interviewees were concerned. Research on alternative approaches would be valuable in exploring the limitations of the approach that this paper outlines.

n14 *See infra* notes 19-32 and accompanying text.

n15 *See infra* notes 33-68 and accompanying text.

n16 *See infra* notes 69-107 and accompanying text.

n17 *See infra* notes 108-163 and accompanying text.

n18 *See infra* notes 164-208 and accompanying text.

n19 Interviewees who were familiar with janitorial and health care services specifically noted this concern for quality among workers in those services. *See also* James Green and Chris Tilly, *Service Unionism: Directions for Organizing*, in PROCEEDINGS OF THE 1987 SPRING MEETING, INDUSTRIAL RELATIONS ASSOCIATION 486, 488 (Barbara D. Dennis ed., 1987); Dorothy Sue Cobble, *Union Strategies for Organizing and Representing the New Service Workforce, in* PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 76, 77, 81 (John Burton ed., 1990).

n20 *See* Cobble, *Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism, supra* note 5, at 426-29.

n21 See *supra* note 4.

n22 Green and Tilly, *supra* note 19, at 487.

n23 Well over half of all workers in retail sales, secretarial, food preparation and service, personal service, and non-professional health service occupations are women. Secretaries, cashiers, food preparers and servers, cleaning and building service workers, non-professional health service workers, and personal service workers are more likely to be black than is the average American worker. *See* 38 U.S. Dep't of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS 186-88 (January 1991). Those of my interviewees who had experience in organizing janitors in the Northeast and California reported that many of those workers (in some locations, well over half) were recent immigrants.

n24 *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 29-30 (1984). However, undocumented workers do pose a problem for organizing because employers can rid themselves of union activists by calling in the Immigration and Naturalization Service.

n25 The average service-producing establishment has about 14 workers. Calculated from data in U.S. Dep't of Commerce, Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES 776 (1992) (1989 data).

n26 *See* Cobble, *Union Strategies for Organizing and Representing the New Servi ce Workforce, supra* note 19, at 77.

n27 Between 1979 and 1981, unions won 52 percent of NLRB elections in units with less than 50 workers but only 28 percent of elections in units with more than 500 workers. BUREAU OF NATIONAL AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES 100 (1985).

n28 There are no direct quantitative data on labor turnover, but a recent study of low-

wage employment in general (defined as employment that, if continued full-time for one year, would result in earnings below the poverty level for a family of four) found that eighty percent of all spells of low-wage employment are no more than two years long. Institute for Women's Policy Research, Low-Wage Jobs and Workers: Trends and Options for Change 97 (August 31, 1989) (unpublished report).

n29 Green & Tilly, *supra* note 19, at 488. Workers in sales and non-professional service occupations in retail trade, corporate service, and consumer service industries have some of the highest rates of less than full-time, full-year employment of all American workers. THOMAS M. STANBACK, JR. & THIERRY J. NOYELLE, CITIES IN TRANSITION 49 (1982). Recent case studies of the department store industry show that sales clerks in that industry are overwhelmingly part-time, short-tenure employees. *See* THIERRY J. NOYELLE, BEYOND INDUSTRIAL DUALISM 40-41 (1987); BARRY BLUESTONE ET AL., THE RETAIL REVOLUTION 82-86 (1981).

n30 STANBACK & NOYELLE, *supra* note 29, at 45.

n31 According to my interviewees, subcontracting of food service and building service operations to firms that specialize in such services is the norm in those industries. *See also* Cobble, *Union Strategies for Organizing and Representing the New Service Workforce, supra* note 19, at 77.

n32 *See* Part IV *infra.*

n33 The discussion in this section draws in part on a similar survey by Donna Sockell. *See* Donna Sockell, Research on Labor Law in the 1990s: The Challenge of Defining a Representational Form 14-31 (November 1990) (unpublished paper prepared for Second Bargaining Group Conference, Cornell University). However, I consider a broader range of alternative union structures than does Sockell, and I evaluate those structures here solely according to their relevance to low-wage service workers and jobs.

n34 Some students of industrial relations refer to the dominant contemporary American union structure as one of "industrial unionism." *See, e.g.*, Cobble, *Union Strategies for Organizing and Representing the New Service Workforce, supra* note 19, at 78; Sockell, *supra* note 33, at 25. This is somewhat misleading. Except in the construction industry, where local unions are organized on the basis of a combination of craft and geography, the basic organizational unit of most contemporary American unions is a local union that includes some or all workers at a particular business establishment (worksite) but does not cross worksite boundaries. This organizational pattern was already well-established by the early 1950s. *See* LEONARD SAYLES & GEORGE STRAUSS, THE LOCAL UNION 7 (1953). American unions generally bargain at the level of the individual worksite, and American labor law, as interpreted in NLRB decisions about bargaining units, multiemployer bargaining, and secondary pressures, encourages bargaining at this level and discourages more inclusive negotiating structures. (See Part IV *infra* for a survey of the relevant legal doctrines.) Even where, as in the automobile industry, unions negotiate "master" nationwide agreements at the lev el of the firm, local unions negotiate

supplemental agreements that govern the allocation of labor at a particular plant. Richard Edwards, *The Unraveling Accord: American Unions in Crisis*, in UNIONS IN CRISIS AND BEYOND 14, 23 (Richard Edwards, *et al.*, eds., 1986). Although local unions belong to national unions that are organized on an industrial basis, locals in many unions enjoy sufficient autonomy with respect to bargaining and contract enforcement policy that the national unions might, with only slight exaggeration, be described as loose federations of locals. *See generally* GORDON CLARK, UNIONS AND COMMUNITIES UNDER SIEGE (1989); Joel Rogers, *Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws,'* 1990 WIS. L. REV. 1. During the 1945-1975 period, the American union structure was closer to industrial unionism than it is today. Until the early 1980s, wage determination was *de facto* centralized at the industry level despite the formal bargaining autonomy of many locals. This centralization came about via "pattern bargaining," i.e., emulation of the terms of one collective bargaining agreement by other firms and unions bargaining in the same industry. HARRY KATZ, SHIFTING GEARS 30-38 (1985). However, industry-wide pattern bargaining broke down during the 1980s in major American manufacturing industries and was replaced by *de facto* determination of contract terms at the level of the firm or worksite. *See* THOMAS KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 128-130 (1986). Thus, it is more accurate to describe the dominant American union structure as being in transition from something close to industrial unionism to something close to worksite unionism than it is to characterize that structure as one of industrial unionism.

n35 Actual collective bargaining agreements negotiated at the worksite level may depart from the ideal type of worksite unionism by providing for worker rights and benefits (e.g., job-bidding rights, health insurance) that are transferable among different establishments operated by the same employer.

n36 *See, e.g.*, PAUL WEILER, GOVERNING THE WORKPLACE 283-95 (1990).

n37 *See infra* Part V for an elaboration of this idea.

n38 See Sockell, *supra* note 33, at 23-25, from which my description of enterprise unionism is drawn.

n39 Just as worker organization at the firm level does not logically entail the kind of labor-management cooperation that characterizes the Japanese system, such cooperation also does not logically entail worker organization at the firm level, but is consistent with organization on a sub-firm (e.g., worksite) basis. *See, e.g.*, Michael Piore, *The Future of Unions, in* THE STATE OF THE UNIONS 387, 399-400 (George Strauss *et al.* eds., 1991).

n40 *See* THOMAS KENNEDY, EUROPEAN LABOR RELATIONS 1-3, 45-46 (1980). As in the U.S., industrial union bargaining in several European countries became increasingly decentralized during the 1980s. *See* Richard Locke, *The Resurgence of the Local Union: Lessons for Comparative Industrial Relations Theory, in* Proceeding of the

Forty-Fourth Annual Meeting, Industrial Relations Research Association. 644, 647-48, 651 (John F. Burton, Jr., ed., 1992); Guido Baglioni, *Industrial Relations in Europe in the 1980s, in* EUROPEAN INDUSTRIAL RELATIONS: THE CHALLENGE OF FLEXIBILITY 1, 29-31 (Guido Baglioni *et al.* eds., 1990).

n41 *See supra* note 34.

n42 See Cobble, supra$ N note 5. For a more complete history of waitress unionism, see DOROTHY SUE COBBLE, DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY 137 (1991). Cobble uses the term "occupational unionism" rather than "craft unionism" in order to indicate that workers need not be highly skilled in order to organize according to the model that she describes, but the basic elements of "occupational unionism," as she describes it, are the same as those of traditional craft unionism. *See id.*

n43 *See* Cobble, *supra* note 5, at 421-29.

n44 *Id.*

n45 *Id.*

n46 *Id.*

n47 *Id.*

n48 It might be argued that unionization along craft lines would eventually *create* such consciousness in unionized workers, but this argument assumes a very strong causal relationship between social structure and beliefs.

n49 If the union were able to provide training to raise the productivity of its workers substantially above that of non-union workers, this might not be a problem, but even under this scenario it is likely that employers would eventually be able to locate sources of high-productivity nonunion labor.

n50 My account of federated and amalgamated craft unionism is drawn from MARION D. SAVAGE, INDUSTRIAL UNIONISM IN AMERICA 30-42, 58-59, 271-73, 325 (1971).

n51 *Id.* at 37-38.

n52 *See id.* at 37-42, 271-73.

n53 *See id.* at 30-37. For example, during the early 1930's in Detroit, the skilled metalworkers and maintenance workers (including tool and die makers, patternmakers, electricians, pipefitters, industrial carpenters, sheet metal workers, and metal polishers) in the automobile and related industries formed a single amalgamated craft union.

STEPHEN BABSON, BUILDING THE UNION 141-42, 148-153 (1991).

Historically, "related" trades were either all or some of those that worked in the same industry or all that worked with the same materials, SAVAGE, *supra* note 50, at 30, 33, but one could conceive of federations or amalgamations on other bases as well.

n54 HECKSCHER, *supra* note 5, at 9-11.

n55 *Id.*

n56 By "bilateral bargaining," I mean bargaining between a union or association of unions on one side and an employer or association of employers on the other. I do not mean to restrict the term to cases of single-union/single employer bargaining.

n57 See the description of the Service Employees International Union's "Justice for Janitors" campaign in Part III *infra. See also* David Brody, *Labor's Crisis in Historical Perspective, in* THE STATE OF THE UNIONS 277, 310 (George Strauss *et al.* eds., 1991) (noting that the appeal of union organization to American workers has historically come from identification of union with workers' demands for industrial justice).

n58 *See* Miles, *supra* Note 5, at 23-25.

n59 *Id.*

n60 *Id.*

n61 *See* DAVID J. BERCUSON, FOOLS AND WISE MEN 1-56 (1978); SAVAGE, *supra* note 35, at 179-80. The OBU also gained a foothold among similar workers in the western U.S. and among textile workers in Lawrence, Massachusetts. SAVAGE, *supra* note 50, at 181-82; DAVID GOLDBERG, A TALE OF THREE CITIES 110, 159-63 (1989).

n62 *See* SAVAGE, *supra* note 50, at 176-201; GOLDBERG, *supra* note 61, at 159; BERCUSON, *supra* note 61, at 149. The OBU is sometimes confused with the Industrial Workers of the World (IWW), but the two unions were distinct and rival entities. SAVAGE, *supra* note 50, at 195. Moreover, the IWW, unlike the OBU, was structured as a federation of industrial unions. *See* JOHN S. GAMBS, THE DECLINE OF THE I.W.W. 173-75, 225-28 (1966).

n63 GOLDBERG, *supra* note 61, at 159.

n64 BERCUSON, *supra* note 61, at 149.

n65 *Id.* at 162; SAVAGE, *supra* note 50, at 188.

n66 GOLDBERG, *supra* note 61, at 159.

n67 BERCUSON, *supra* note 61, at 259.

n68 *Id.*

n69 For examples of ways in which low-wage service work might be reorganized to improve labor productivity, *see infra* notes 80-86 and accompanying text.

n70 *Cf.* Piore, *supra* note 39, at 408-09 (stating that the union mediates between economic structure within which production occurs and social structure within which members define their personal identities).

n71 This information was obtained in an interview with an organizer of HERE.

n72 This information was obtained in an interview with an official of the District 1199 Health Care Employees Union.

n73 *Cf.* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (citing evidence that NLRB delays create opportunities for employers to discharge union activists and commit other unfair labor practices during protracted election campaign, thereby reducing unions' ability to win elections). *See also* Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections*, 1981 U. ILL. L. REV. 75, 94-95 (finding that employers benefit from NLRB election delays). *But see* Edward B. Miller, Paul Weiler's Funny Figures, Remarks Presented at American Bar Association Annual Meeting, Toronto (August 1988) (disputing Weiler's data and interpretations); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991) (questioning Weiler's interpretations). Weiler has responded to this criticism. *See* Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991).

n74 These beliefs were expressed during interviews with the organizers.

n75 A recent econometric study found that wages are twelve percent higher under multiemployer bargaining than under single-employer bargaining, controlling for worker and industry characteristics. *See* Wallace E. Hendricks & Lawrence M. Kahn, *The Demand for Labor Market Structure: An Economic Appraisal*, 2 J. LAB. ECON. 412 (1984).

n76 Some unions in American manufacturing industries seem to have recognized the usefulness of multiemployer bargaining under similar labor and product market conditions. In manufacturing, multiemployer bargaining is most likely to occur in industries characterized by small worksites and competitive product markets. *See* Wallace E. Hendricks & Lawrence Kahn, *The Determinants of Bargaining Structure in U.S. Manufacturing Industries*, 35 INDUS. & LAB. REL. REV. 181 (1982); Lawrence Mishel, *The Structural Determinants of Union Bargaining Power*, 40 INDUS. & LAB.

REL. REV. 90 (1986).

n77 In building cleaning, for example, janitorial contractors compete for contracts and janitors compete for jobs within a metropolitan area or, in large metro politan areas, within a part of a metropolitan area where there is a concentration of office buildings.

n78 This could be the case for specialized health care services that any given person would consume very infrequently, or for clerical work that, because of inexpensive communication technologies, could easily be performed at a location different from that of the final consumer of the clerical work product.

n79 If there is a very large difference between the geographical scope of the labor market and that of the service market, the geographical basis of organization is inapplicable. The services that have been used as examples in this article are organizable on a geographical basis because there is substantial geographical overlap between labor and service markets.

n80 If most of the workers in job A move on to job B and most of the workers in job B came from job A, the two jobs should be organized into the same union.

n81 This is not to say that the organizers were unaware of the existence of mobility paths. One organizer had considered doing a survey of the other jobs held by part-time janitors in his local, with an eye toward organizing in the same local any other jobs in which there were significant concentrations of janitors.

n82 If the model is implemented in a way that allows union organizers to determine the scope of organization, then such research will be essential to organizers. If, instead, an administrative agency such as the NLRB is to determine the scope of organization, then this research will be essential to the agency.

n83 *See, e.g.*, Richard Hurd, *Bottom-Up Organizing: HERE in New Haven and Boston*, 8 LAB. RES. REV. 5 (1986); Richard Hurd, *Learning from Clerical Unions: Two Cases of Organizing Success*, 14 LAB. STUD. J. 30 (1989). *See generally An Organizing Model of Unionism*, 17 LAB. RES. REV. (1991) (contrasting bottom-up "organizing" model of union purpose and activity with top-down "servicing" model).

n84 This information was related by union officials during interviews with the author.

n85 These are permitted under the National Labor Relations Act, which prohibits recognitional picketing that has been conducted without an NLRB election petition "being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ." 29 U.S.C. § 158(b)(7)(C) (1988).

n86 Union pressure on building owners must be crafted very carefully in order to avoid violation of Section 158(b)(4)'s prohibitions on secondary boycotts. See Part IV *infra.*

n87 On the combination of top-down and bottom-up objectives in organizing large groups of workers beyond the level of the individual worksite, see Stephen Lerner, *Let's Get Moving*, 18 LAB. RES. REV. 1, 5-7 (1991).

n88 For example, in Los Angeles, immigrant advocacy organizations assisted the Justice for Janitors campaign by participating in the janitors' marches through and near buildings and by putting public pressure on building owners who refused to recognize the union. *See* Andy Banks, *The Power and Promise of Community Unionism*, 18 LAB. RES. REV. 17, 23-24 (1991).

n89 A recent case study of union-community alliances found that interorganizational rivalry and coordination failures between community and union activities created barriers to the maintenance of those alliances. *See* James A. Craft, *The Community as a Source of Union Power*, 11 J. LAB. RES. 145, 153-56 (1990). Overlapping membership shou ld reduce the severity of these problems.

n90 Associate membership programs are intended as a means for workers who are not covered by collective bargaining agreements to maintain union affiliation. They provide associate members with an array of consumer benefits (e.g., credit cards, life insurance, discounts on legal services) and with some limited forms of education and training (e.g., English language classes for workers who live in Mexico and work in the U.S.), and serve as political advocacy groups. Associate membership programs also, in principle, promote collective bargaining by providing associate members with information about the benefits of union representation and by providing organizing assistance to those who desire collective bargaining. See SHOSTAK, *supra* note 12, at 63-64. The theory of the programs is that unorganized workers can be attracted to full union membership by means of consumer benefits. *Id.* This theory has been justly criticized as equating a labor union with a provider of consumer services. *See* Paul Jarley & Jack Fiorito, *Associate Membership: Unionism or Consumerism*, 43 INDUS. & LAB. REL. REV. 209, 210-13 (1990). The theory is certainly at odds with the idea of unionism on which the emerging low-wage service model is based. However, the idea of a worker association that serves as a precursor to collective bargaining and that actively promotes the organizing process is a potentially valuable one for low-wage service workers, who often lack traditions of unionism. For example, Ichniowski and Zax have shown that public sector unions in the United States often grew out of employee associations that did not engage in collective bargaining. Casey Ichniowski & Jeffrey Zax, *Today's Associations, Tomorrow's Unions*, 43 INDUS. & LAB. REL. REV. 191, 197-206 (1990).

n91 CIWA originated with an AFL-CIO effort to assist Latino immigrants in obtaining amnesty and U.S. citizenship under the Immigration Reform and Control Act of 1986. It has grown into a Latinoled organization of over 2500 members. *See generally* Robert Lazo, Latinos and the AFL-CIO: The California Immigrant Workers Association as an Important New Development 30-42 (Spring 1990) (unpublished manuscript on file with the RUTGERS LAW REVIEW).

n92 *See generally* RICHARD E. WALTON & ROBERT B. McKERSIE, A

BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 5 (1965) ("Integrative potential exists when the nature of a problem permits solutions which benefit both parties, or at least when the gains of one party do not represent equal sacrifices by the other.").

n93 Under current American law, the administration of such "multiemployer" employee benefit plans is regulated by the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) (1988).

n94 This information was obtained during an interview with an official of HERE.

n95 This information was obtained during an interview with an official of District 1199 Health Care Employers Union.

n96 Between 1983 and 1988, output per employee hour fell in such low-wage service industries as retail food stores, grocery stores, eating and drinking places, hotels and motels, and laundry and cleaning services. In contrast, output per employee hour rose during the same period in manufacturing industries and in the U.S. economy as a whole. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Productivity Measures for Selected Industries and Government Ser vices 6-8 (1990).

n97 Of course, a higher-productivity, higher-wage service sector is not costless. With higher productivity and wages, the growth rate of employment in service occupations and industries is likely to slow. However, this effect could be offset by other policies to promote overall economic growth. *See* LESTER THUROW, TOWARD A HIGH-WAGE, HIGH-PRODUCTIVITY SERVICE SECTOR 8-9 (1989) (Economic Policy Institute paper).

n98 *See, e.g.*, GARY S. BECKER, HUMAN CAPITAL 19-26 (2d ed. 1975).

n99 *See* Bernard Elbaum, *Internal Labor Markets and General Training, in* PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES 367 (John F. Burton, Jr., ed., 1990).

n100 Of course, it is possible for firms to establish multiemployer training programs even in the absence of a union. In some construction trades in a few states, nonunion construction firms have created multiemployer apprenticeship programs that attempt to mimic those of the unionized construction sector. However, these programs have higher dropout rates than their union-sponsored counterparts and have not diffused widely throughout the industry. In general, nonunion construction firms have succeeded in training workers in immediate, site-specific skills but have not been able to create training systems that produce the broad, general skills that characterize union apprenticeship programs. *See* CLINTON BOURDON & RAYMOND LEVITT, UNION AND OPEN SHOP CONSTRUCTION 54-55, 73 (1980).

n101 For example, the relatively small size of the typical restaurant sharply limits a kitchen worker's ability to develop a wide variety of cooking skills and, hence, to advance as a cook while remaining employed by a single restaurant. Workers who wish to develop such skills must, therefore, change employers. THOMAS R. BAILEY, IMMIGRANT AND NATIVE WORKERS: CONTRASTS AND COMPETITION 29-30 (1987).

n102 *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, U.S.-MEXICO TRADE: PULLING TOGETHER OR PULLING APART? 29 (1992) [hereinafter U.S.-MEXICO TRADE].

n103 The principles of "scientific management" were developed by Frederick Taylor. *See* FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911).

n104 Barbara Garson describes the organization of work at McDonald's as follows:
By combining twentieth-century computer technology with nineteenth-century time-and-motion studies, the McDonald's corporation has broken the jobs of griddleman, waitress, cashier and even manager down into small, simple steps. Historically these have been service jobs involving a lot of flexibility and personal flair. But the corporation has systematically extracted the decision-making elements from filling french fry boxes or scheduling staff. They've siphoned the know-how from the employees into the programs. They relentlessly weed out all variables that might make it necessary to make a decision at the store level, whether on pickles or on cleaning procedures.

BARBARA GARSON, THE ELECTRONIC SWEATSHOP 37 (1988). Garson also provides case studies of the use of "scientific management" in other low-wage service jobs, including secretarial work and the booking of airline reservations, and even in some professional services, such as social work. *Id.*

n105 This example is drawn from U.S.-MEXICO TRADE, *supra* note 102, at 29 (section written by the author) (citing S.J. Prais *et al., Productivity and Vocational Skills in Services in Britain and Germany: Hotels*, 59 NAT'L INST. ECON. REV. 52 (1989)).

n106 This example is drawn from U.S.-MEXICO TRADE, *supra* note 102, at 29 (section written by the author) (citing Eileen Appelbaum & Peter Albin, *Computer Rationalization and the Transformation of Work: Lessons from the Insurance Industry, in* THE TRANSFORMATION OF WORK 247 (Stephen Wood ed., 1989)).

n107 Why do low-wage service employers typically not make these productivity-improving changes in their job structures unilaterally, without pressure from unions? Part of the answer may stem from nonunion firms' difficulty in creating effective multiemployer training programs. *See supra* note 79. If they are unable to train workers to perform more broadly defined, high-productivity jobs, employers have no incentive to create such jobs. Faced with supplies of low-skill workers whom they are unable to train, employers will create jobs that require little skill. Thus, nonunion workers and employers

act in a way that prevents them from achieving the mutually preferable, high-productivity outcome.

n108 29 U.S.C. § 151-69 (1988).

n109 29 U.S.C. § 141-44 (1988).

n110 There are no current data on the actual extent of multiemployer bargaining in the United States. The most recent data on multiemployer bargaining is from 1980 and pertains only to "major" collective bargaining agreements ("Major" collective bargaining agreements are defined as agreements that cover at least one thousand workers). Among all workers who were covered by such agreements, 43% were covered by multiemployer agreements. In the retail, hotel, restaurant, and service industries combined, multiemployer agreements covered 72% of workers whose collective bargaining agreements covered at least one thousand workers. These statistics were calculated from data in U.S. Dep't of Labor, Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 2095, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1980, at 19 (1981). For several reasons the data is likely to over-state the true extent of multiemployer bargaining in the United States. First, the data exclude most workers who were represented by labor unions. In 1980, only 29% of all workers who were represented by unions were covered by "major" collective bargaining agreements; in the retail trade, hotel, restaurant, and service industries, the corresponding figure was only 12%. Calculated from data in *id.* at 19 and U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, Bulletin No. 2105, EARNINGS AND OTHER CHARACTERISTICS OF ORGANIZED WORKERS, MAY 1980, at 14-15 (1981). Second, "major" agreements are likely to contain a larger share of multiemployer agreements than are other collective bargaining agreements. Finally, there is anecdotal evidence that multiemployer bargaining was already declining by the early 1980s. *See* Robert B. Hoffman, *The Trend Away from Multiemployer Bargaining*, 34 LAB. L.J. 80, 80-81 (1983). This decline was part of the more general breakdown of centralized bargaining structures in the U.S. that was evidenced by the decline of pattern bargaining. *See supra* note 34.

n111 For this reason, industrial relations scholars have used the term "election unit" to refer to what the NLRB calls an "appropriate bargaining unit," and have used the term "negotiating unit" to describe the unit within which collective bargaining occur. *See* Weber, *supra* note 9, at 14.

n112 The basic argument is derived from Joel Rogers , *supra* note 34, at 121-25. I differ from Rogers mainly in my emphasis on the special problems of low-wage service employment and on my somewhat greater attention to doctrinal issues.

n113 *See, e.g.*, Frito-Lay, Inc., 202 N.L.R.B. 1011, 1013 (1973).

n114 *Id.*

n115 Brown & Root, Inc., 258 N.L.R.B. 1002, 1004 (1981).

n116 Globe Furniture Rentals, Inc., 298 N.L.R.B. 288, 288 (1990).

n117 77 Operating Co., 160 N.L.R.B. 927, 928-32 (1966), *enforced*, 387 F.2d 646 (4th Cir. 1967).

n118 Although the Act provides that "the extent to which the employees have organized shall not be controlling," 29 U.S.C. § 159(c)(5) (1988), in the Board's bargaining unit determinations, the Board has interpreted this statutory provision only as prohibiting it from basing unit determinations solely on the extent of worker organization and not as a ban on taking the extent of organization into account as one factor in unit determinations. Metropolitan Life Ins. Co., 156 N.L.R.B. 1408, 1413 (1966). The D.C. Circuit has endorsed this interpretation. *See* Local 1325, Retail Clerks Int'l Ass'n v. NLRB, 414 F.2d 1194, 1199-1201 (D.C. Cir. 1969). The Third Circuit, on the other hand, has required other "community of interest" factors to be sufficient to support a unit determination apart from the extent of organization. Metropolitan Life Ins. Co. v. NLRB, 328 F.2d 820, 829 (3d Cir. 1964), *vacated*, 380 U.S. 523 (1965) (remanded to allow the NLRB to articulate its reasoning for its decision).

n119 NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985).

n120 Rogers, *supra* note 34, at 122 n.342.

n121 The Board could have used its "employee interchange" criterion as a means of determining the extent of the labor market that would have to be organized in order to take wages out of competition or as a means of discovering the job mobility paths that would have to be organized in order to create a socially cohesive union. However, it has not done so. Rather, it has considered "employee interchange" only in its narrowest sense, as an element of an individual employer's personnel policy. *See, e.g.*, Frito-Lay, Inc., 202 N.L.R.B. 1011, 1012 (1973); Frisch's Big Boy Ill-Mar, Inc., 147 N.L.R.B. 551, 552 (1964), *enforcement denied*, 356 F.2d 795 (7th Cir. 1966).

n122 United Fryer & Stillman, Inc., 139 N.L.R.B. 704, 708 (1962); Cab Operating Corp., 153 N.L.R.B. 878, 879-80 (1965).

n123 *In re* Alston Coal Co., 13 N.L.R.B. 683, 688 (1939).

n124 *In re* Belle-Moc, Inc., 81 N.L.R.B. 6, 8 (1949).

n125 McAnary & Welter, Inc., 115 N.L.R.B. 1029 (1956); *In re* Johnson Optical Co., 87 N.L.R.B. 539, 541-42 (1949).

n126 Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962).

n127 *See, e.g.*, Sav-On Drugs, Inc., 138 N.L.R.B. 1032 (1962); Haag Drug Co., 169

N.L.R.B. 877 (1968); Frisch's Big Boy Ill-Mar, Inc., 147 N.L.R.B. 551 (1964), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966); Magic Pan, Inc., 234 N.L.R.B. 1 (1977); Renzetti's Market, Inc. 238 N.L.R.B. 174 (1978); Bank of Am. Nat'l Trust & Sav. Ass'n, 196 N.L.R.B. 591 (1972); Wyandotte Sav. Bank, 245 N.L.R.B. 943 (1979); National G. South, Inc., 230 N.L.R.B. 976 (1977).

n128 The single-location presumption is not irrebuttable. The Board has occasionally approved multiple-location bargaining units within a single employer's operation, especially if the employer moved workers between sites or exercised centralized control over worker supervision and discipline. *See, e.g.*, Kirlins, Inc. of Cent. Ill., 227 N.L.R.B. 1220 (1977); The Pep Boys--Manny, Moe & Jack, 172 N.L.R.B. 246 (1968); Twenty-First Century Restaurant Corp., 192 N.L.R.B. 881 (1971); Waiakamilo Corp., 192 N.L.R.B. 878 (1971).

n129 In all of the cases cited in the previous paragraph, the union sought a single-worksite unit and the employer sought a broader unit. In the rare instances in which the union has sought a broader unit than the employer, the NLRB has sometimes approved a broader unit when it could identify other "community of interest" criteria that supported a broader unit. *See* Carson Cable TV, 275 N.L.R.B. No. 201 (1985); Stop'N'Go, Inc., 279 N.L.R.B. 344, 352-53 (1986).

n130 Weiler, *supra* note 73, at 1775-78.

n131 As pointed out in note 27 *supra*, the union probability of electoral success increases as the size of the bargaining unit decreases. Of course, electoral success is not the only consideration in a union's organizing decision, even for a union that makes its organizing decisions according to strict cost-benefit criteria. Organizing has both benefits and costs for a union. Because organizing has fixed as well as variable costs to the union, a union that decided to organize at all might find that net benefits were maximized by organizing a relatively large group of workers if the union could be certain of winning an election. However, since unions cannot be certain of winning elections, net benefits must be multiplied by the probability of electoral success in order to determine the unit size that maximizes the union's expected net benefits from organizing. Since the probability of electoral success varies inversely with the size of the unit, considerations of electoral success decrease the size of the union's optimal unit. Unless net benefits increase very quickly with unit size, the probability of electoral success will dominate the union's cost-benefit calculation, leading the union to seek a small unit. For an alternative but complementary explanation ofunions' preferences for small units, see Rogers, *supra* note 34, at 124.

n132 The NLRB explicitly recognized this in Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 1035 (1962) (noting that its previous presumption in favor of multi-site units in retail chains operated to impede workers' ability to organize).

n133 *See* Hendricks & Kahn, *supra* note 75, at 432. Nevertheless, the statement in the text is only a statistical generalization. Under some circumstances, a union that engages

in single-employer bargaining may be able to "whipsaw" employers one by one into granting higher wages than would be possible under multiemployer bargaining.

n134 Charles D. Bonanno Linen Serv. Inc. v. NLRB, 454 U.S. 404, 412 (1982); York Transfer & Storage Co., 107 N.L.R.B. 139, 142 (1953); Van Eerden Co., 154 N.L.R.B. 496, 499 (1965); Steamship Trade Ass'n, 155 N.L.R.B. 232, 234 (1965); Sullivan Mining Co., 101 N.L.R.B. 1366 (1952).

n135 Retail Assoc., Inc., 120 N.L.R.B. 388, 393-94 (1958); Evening News Ass'n, 154 N.L.R.B. 1494, 1495 (1965).

n136 Extreme financial exigency on the part of an individual employer is an example of such a circumstance. *See* Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974).

n137 Teamsters Local 378, 243 N.L.R.B. 1086, 1088 (1979); John J. Corbett Press, Inc., 163 N.L.R.B. 154, 157058 (1979); Milk & Ice Cream Dealers, 94 N.L.R.B. 23, 24-25 (1951).

n138 *See* Steven Willborn, *A New Look at NLRB Policy on Multiemployer Bargaining*, 60 N.C. L. REV. 455, 463 (1982); Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 ("The Board has recognized the voluntary nature of multiemployer bargaining . . . . At the same time, it has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations.").

n139 United Mine Workers, Local 1854, 238 N.L.R.B. 1583, 1583 (1978). This holding is consistent with several Courts of Appeals' decisions that held the scope of a bargaining unit is a permissive rather than a mandatory subject of bargaining. Hence, neither a union nor an employer may use economic weapons in order to enforce a demand for a change in the scope of the unit. *See* Douds v. Int'l Longshoremens Ass'n, 241 F.2d 278, 282-83 (2d Cir. 1957); Newspaper Printing Corp. v. NLRB, 692 F.2d 615, 620 (6th Cir. 1982); Louisiana Dock Co. v. NLRB, 909 F.2d 281, 286-89 (7th Cir. 1990); Newspaper Printing Co. v. NLRB, 625 F.2d 956, 963 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); Idaho Statesman v. NLRB, 836 F.2d 1396, 1400 (D.C. Cir. 1988). No Court of Appeals has held to the contrary. The mandatory-permissive distinction was enunciated by the Supreme Court in NLRB v. Webster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), as an interpretation of sections 8(a)(5) and 8(d) of the Act. *Webster*, 356 U.S. at 348-49.

n140 United Mine Workers v. Pennington, 381 U.S. 657, 663-64 (1965).

n141 *Id.*

n142 *See* General Electric Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969).

n143 The Board introduced the "area standards picketing" doctrine in International Hod

Carriers Union Local 41, 133 N.L.R.B. 512 (1961). A recent application of the doctrine appears in Service Employees Union Local 77, 264 N.L.R.B. 628, 634 (1982).

n144 Sections 158(b)(4) and 158(b)(7) of the Act, 29 U.S.C. §§ 158(b)(4) and 158(b)(7), respectively, restrict recognitional picketing.

n145 *Service Employees Union Local*, 264 N.L.R.B. at 634.

n146 Retail Clerks Int'l Ass'n. Local 899, 166 N.L.R.B. 818, 823 (1967), *aff'd*, 404 F.2d 855 (9th Cir. 1968).

n147 Of course, this is an interest of the unionized employers as well as of the union. The Board, therefore, recognizes the union's interest to the extent that it coincides with the interests of some employers.

n148 Note that this union interest is not one that is necessarily shared by employers. In a situation of full employment or labor shortage, one would not expect this to be a problem. Under either of these scenarios, if all workers had the same preferences among equally costly packages, all employers competing for workers would be forced to offer the same package. On the other hand, if workers' preferences were heterogeneous, workers could sort themselves out among employers according to their preferences. In the more common situation of labor surplus, however, the market would necessarily compel employers to offer a uniform package, in the case of homogeneous worker preferences, or to offer a set of packages that corresponded to the preferences of workers, in the case of heterogeneous worker preferences.

n149 Contracts typically allow the final purchaser to terminate the contractor on short notice. According to interviewees who were familiar with janitorial services, building owners' contracts with cleaning contractors usually allow for termination of the contract on thirty days' notice.

n150 When the union's object is recognition, even this pressure is subject to the restrictions of 29 U.S.C. § 158(b)(7)(C) (1988), which limits the extent of recognitional picketing.

n151 29 U.S.C. § 158(b)(4) (1988).

n152 *Id.* § 158(b)(4)(A).

n153 *Id.* § 158(b)(4)(B).

n154 *Id.*

n155 SEIU Local 679 (Peachtree Center Management Co.), Mem. Off. General Counsel, Case No. 10-CC-1293, 1988 NLRB GCM LEXIS 149, at * 9-12 (NLRB, Dec. 27, 1988).

n156 SEIU Local 77 (Empire Industrial Maintenance, Inc.), Mem. Off. General Counsel, Case Nos. 32-CC-1226, 32-CP-361, and 32-CC-1230, 1988 NLRB GCM LEXIS 128, at * 6-9 (NLRB, May 27, 1988). The General Counsel relied heavily on the Supreme Court's opinion in Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). *See Empire Industrial M aintenance* Memorandum at * 5-6. The *DeBartolo* court held that Section 158(b)(4)(B) does not prohibit peaceful leafletting urging a consumer boycott of a "secondary" employer if the leafletting is not accompanied by picketing. 485 U.S. at 588. Thus, SEIU could legally have done more than it did in the *Empire* case; it could have handed out leaflets urging consumers not to patronize the building's tenants or urging the tenants not to renew their leases.

n157 SEIU Local 399 (Bradford Building Services, Inc.), Mem. Off. General Counsel, Case No. 31-CC-1964, 1990 NLRB GCM LEXIS 19, at * 4-6 (NLRB, May. 2, 1990). The General Counsel's reasoning was identical to that in *SEIU Local 679*, Lexis 128, at * 6-9.

n158 Presumably, union corporate campaigns directed at "secondary" employers are also lawful, although I know of no court or NLRB decisions that addressed their legal status under Section 158(b)(4).

n159 *See, e.g.*, Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547, 548-51 (1950).

n160 *See* Southern Cal. Gas Co., 302 N.L.R.B. No. 73, 1991-1992 NLRB Dec. (CCH) P16,593 (Apr. 5, 1991); Sun-Maid Growers of Cal., 239 N.L.R.B. 346, 348-51 (1978), *aff'd and enforced*, 618 F.2d 56 (9th Cir. 1980). In addition to the Ninth Circuit, the D.C. Circuit has endorsed this formulation of the joint-employer doctrine. *See* Int'l Chemical Workers Local 483 v. NLRB, 561 F.2d 253, 257 (D.C. Cir. 1977).

n161 *See* Dining & Kitchen Admin., 257 N.L.R.B. 325 (1981). The Eighth Circuit endorsed this doctrinal formulation in Pulitzer Publishing Co. v. NLRB, 618 F.2d 1275, 1278-79 (8th Cir.), *cert. denied sub nom.*, Miscellaneous Drivers and Helpers Union Local 612, 449 U.S. 875 (1980).

n162 29 U.S.C. § 158(e) (1988).

n163 Alternatively, Section 158(e) could be amended to allow a union and a firm to agree that the firm will not subcontract business to contractors that do not agree to a union representation election or card-check certification within a specified time period.

n164 If unions were allowed to determine "appropriate bargaining units" unilaterally, the NLRB would still presumably have to make unit determinations in cases where rival unions sought to represent distinct but overlapping groups of workers.

n165 For example, Paul Weiler has advocated first contract arbitration under some circumstances, *see* Paul Weiler, *Striking a New Balance*: *Freedom of Contract and the*

Prospects for Union Representation, 98 HARV. L. REV. 351, 405-12 (1984), and has proposed card-check certifications or expedited elections and has decried the NLRB's delays in processing unfair labor practice charges. *See* Weiler, *Promises to Keep*, *supra* note 73, at 1793. Card-check certifications and expedited elections are also used in Canada, where provincial labor laws resemble the NLRA. *Id.* at 1805. However, despite the recent enthusiasm for Canadian-style union certification procedures in both the American labor movement and the academy, it is important not to regard either these certification procedures or Canadian collective-bargaining laws as a whole as a panacea for union growth, particularly in low-wage services. Canadian labor laws contain some provisions that are even less conducive to the growth of low-wage service workers' unions than are the provisions of American labor law examined in Part IV *supra*. For example, the Ontario Labour Relations Board will not certify a union at a level above the individual worksite. Anne Forrest, Labour Law and Union Growth: The Case of Ontario 190-224 (Jan. 1988) (unpublished Ph.D. dissertation, University of Warwick). This legal restriction on the scale of union organizing may help account for the fact that union densities in Ontario's private-sector service industries, like those in their U.S. counterparts, are below ten percent. *Id.* at 60-61.

n166 *See* PAUL WEILER, RECONCILABLE DIFFERENCES 159-78 (1980).

n167 *Id.* at 165-69.

n168 *Id.* at 163.

n169 *Id.*

n170 The NLRB could be allowed to exercise this power unilaterally and/or in response to a union or employer petition.

n171 The NLRB, like its British Columbia counterpart, should also have the power to compel unions to participate in multiemployer bargaining. At least in the case of low-wage service workers' unions, though, it will probably not have to use this power as often with unions as with employers. Whether the Board actually exercises that power in any particular case should depend on the structure of the relevant labor market. The NLRB ought to exercise that power frequently in the case of low-wage service employers, but need not exercise it at all in other labor markets.

n172 *See* Ludwig Hamburger, *The Extension of Collective Agreements to Cover Entire Trades and Industries*, 40 INT'L LAB. REV. 153, 163-70 (1939). Extension laws currently exist in several European countries. *See, e.g.*, ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COLLECTIVE BARGAINING AND GOVERNMENT POLICIES IN TEN OECD COUNTRIES 38-40 (1979) (France); THOMAS KENNEDY, EUROPEAN LABOR RELATIONS 125 (1980) (Netherlands). Extension laws also exist in Quebec. *See infra* text accompanying notes 174-84. The Australian system of wage determination, under which a collective bargaining agreement that is ratified by the government's industrial relations commission effectively sets a

wage floor for an entire industry, is also an extension system. *See* LESLIE FALLICK, BROADER-BASED BARGAINING: THE AUSTRALIAN EXPERIENCE 22-23 (1992) (paper presented at Conference on Broadening Bargaining Structures in the New Social Order: International Perspectives for Ontario, May 7-8, 1992).

n173 An Act Respecting Collective Agreement Decrees, R.S.Q., ch. D-2 (1977) (Can.).

n174 *Id.* § 3.

n175 *Id.* § 2.

n176 *Id.* § 6.

n177 *Id.* § 9. The wage provisions of the extended agreement, however, generally only establish minimum wages for workers covered under the extension. Any employer covered by an extension decree is usually free to pay its workers higher wages than required by the decree. *Id.* at § 13.

n178 *Id.* § 10.

n179 *Id.* § 16.

n180 A. Brian Tanguay, Rediscovering Politics: The State, Business and Labour in Quebec, 1760-1985, at 34 (1989) (unpublished Ph.D. dissertation, Carleton University).

n181 Jean Bernier, Modernizing Juridical Extension 7 (May 7-8, 1992) (paper presented at Conference on Broadening the Bargaining Structures in the New Social Order: International Perspectives for Ontario, York University).

n182 Ontario Federation of Labour, The Unequal Bargain, at 7 (paper prepared for the 33rd Annual Convention of the OFL/FTO, Nov. 20-24, 1989) [hereinafter "The Unequal Bargain"]. The overall effect of the Quebec extension law on unionization is subject to an ongoing debate. According to the Ontario Federation of Labour, the rate of unionization in workplaces subject to extension decrees is twice the rate for Quebec's private sector as a whole, and the Quebec Federation of Labour has opposed attempts to repeal the extension law. *Id. But see* Tanguay, *supra* note 181, at 34 (asserting, without evidence, that Quebec's extension law inhibited unionization in sectors to which it applied). The most recent academic study of this question estimates that economic sectors with extension decrees have had higher union densities than the Quebec economy as a whole, although the differential is much smaller than the two-to-one ratio cited by the Ontario Federation of Labor, and there is no evidence that union densities have increased faster in sectors with decrees than in the economy as a whole. *See* Bernier, *supra* note 182, at 19.

n183 Fernand Morin & Claudine Leclerc, *The Use of Legislation to Control Labour Relations: The Quebec Experience, in* LABOUR LAW AND URBAN LAW IN CANADA 67, 92 (Ivan Bernier & Andree Lajoie eds., 1986). Quebec unions have

recently advocated the legalization of bargaining at localized geographical/occupational and geographical/industrial levels, while employers have opposed bargaining above the enterprise level. *Id.* at 92-93.

n184 The NLRB would have to determine the boundaries of the relevant labor market, just as it would have to do in deciding the scope of mandatory multiemployer bargaining. In so doing, it should again attempt to minimize the impact of labor market competition on workers' standards of living.

n185 Janice Bellace and Paul Weiler have proposed similar systems of mandatory consultation and information-sharing, but their proposalsaddress American versions of the employer-specific works councils that are found in several European countries. Bellace and Weiler contemplate consultation and information-sharing only between a single employer and an association of that employer's workers. *See* Janice Bellace, *Mandating Employee Information and Consultation Rights, in* PROCEEDINGS OF THE FORTY-THIRD ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 137 (John F. Burton, Jr., ed., 1990); Janice Bellace, *Mandatory Consultation: The Untravelled Road in American Labor Law, in* PROCEEDINGS OF THE FORTIETH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 78 (Barbara D. Dennis ed., 1987); WEILER, *supra* note 36, at 283-95. My proposal resembles Bellace's in structure, but generalizes the works-council idea beyond the individual employer.

n186 Multiemployer consultation between union and management representatives exists, for example, in the American motion picture industry, where the Alliance of Motion Picture and Television Producers ("AMPTP") and the International Alliance of Theatrical Stage Employees ("IATSE") interact based upon a preexisting system of cooperative committees.
The AMPTP and the IATSE have found that an expanded version of the old cooperative committee system can work even in a multiemployer, multilocal union context . . . . AMPTP company representatives and representatives of the international and local unions of the IATSE meet on a quarterly basis to discuss issues of mutual concern. Each side makes presentations as to matters that affect the indus try such as the economic state of the business, status and changes in the industry-wide pension and health plans, and new contracts and organizing efforts by the IATSE.

J. Nicholas Counter III, *New Collective Bargaining Strategies for the 1990s: Lessons from the Motion Picture Industry, in* PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 32, 36 (John F. Burton, ed., 1992).

n187 Unless other provisions for handling grievances were contained in the extension, nonunion workers' grievances would first go through their respective employers' internal grievance procedures (if any), then would proceed to the joint committee responsible for administering the agreement, and finally would be subject to arbitration if the joint committee were unable to resolve the grievance.

n188 For example, in low-wage service labor markets, it might presume that an appropriate jurisdiction would be geographically compact, would extend across more than one employer, and would include an occupation or set of related occupations.

n189 *See* SAVAGE, *supra* note 50, at 37-42, 271-73 (describing the federations of craft unions during the early twentieth century).

n190 *Cf.* Bellace, *Mandating Employee Information and Consultation Rights, supra* note 157, at 141 (proposing twenty percent worker approval requirement for legal certification of employer-based consultative committee).

n191 Recall that there is a wage premium associated with multiemployer bargaining. *See supra* note 75.

n192 *See* Peter G. Bruce, *Political Parties and Labor Legislation in Canada and the U.S.*, 28 INDUS. REL. 115 (1989) (arguing that Canadian unions have had more political influence than their U.S. counterparts because of Canada's parliamentary system of representation and because of existence of social-democratic political party in that system).

n193 29 U.S.C. § 158(d) (1973 & Supp. 1992).

n194 *See supra* text accompanying notes 143-48.

n195 29 U.S.C. §§ 158(b)(4) and 158(b)(7) (1973 & Supp. 1992), respectively.

n196 The strength of this incentive might be reduced if unions could be certified via card-checks or "instant" elections, since one reason why unions prefer to organize small groups is that large groups are more difficult to hold together during a protracted election campaign. Nevertheless, the basic cost-benefit analysis sketched in *supra* note 131 is still likely to favor small-group organizing efforts, since a union's probability of gaining majority support is likely to vary inversely with the size of the group that it seeks to organize. *See also* Rogers, *supra* note 34, at 124 (discussing unions' preferences for small units).

n197 *See, e.g.*, George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 U. PA. L. REV. 897 (1975).

n198 29 U.S.C. §§ 101-15 (1992).

n199 29 U.S.C. §§ 151-69 (1992).

n200 29 U.S.C. §§ 101, 104, 113 (1992). *See also* HECKSCHER, *supra* note 5, at 34 ("As late as 1932 the Norris-LaGuardia Act took a radical 'laissez-faire' approach,

exempting this whole domain of labor-management relations from most g overnmental sanctions.").

n201 MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 183 (1987).

n202 *See* FARRELL DOBBS, TEAMSTER POWER 23 (1973).

n203 AFL-CIO President Lane Kirkland recently stated that he would prefer "the law of the jungle" (presumably, the Norris-LaGuardia regime) to the current American legal regime. *Kirkland Says Many Unions Avoiding NLRB, Calls Board an "Impediment" to Organizing*, Daily Labor Report, August 30, 1989, at A-11. United Mine Workers President Richard Trumka also advocated repeal of the Norris-LaGuardia Act. Richard L. Trumka, *Why Labor Has Law Failed*, 89 W. VA. L. REV. 871, 881-82 (1987).

n204 Tomlins concluded a recent historical study of American labor law with the view that American unions were wrong in embracing a major governmental role in the regulation of industrial relations. *See* CHRISTOPHER TOMLINS, THE STATE AND THE UNIONS (1985).

n205 As SEIU's Justice for Janitors campaign illustrates, there are at least some low-wage service workers' unions that are capable of securing voluntary employer recognition, even under the current American legal regime. Those unions might be able to engage in successful recognitional strikes. The issue here, though, iswhether low-wage service workers' unions in general would have the economic strength to strike successfully for recognition.

n206 Canadian labor federations and government policymakers, unlike their U.S. counterparts, have placed worker representation in the service sector on their agendas for labor law reform and have considered legal reforms similar to (although less detailed than) those suggested in this article. The labor federations in Ontario and Quebec have advocated, in general terms, broadening the structure of collective bargaining beyond the single-employer basis that currently prevails in most of Canada. *See* Morin & Leclerc, *supra* note 184, at 92-93 (Quebec); The Unequal Bargain, *supra* note 183, at 8 (Ontario); Julie Davis, Exploring Broader-Based Bargaining, Address to Conference on Broadening the Bargaining Structures in the New Social Order: International Perspectives for Ontario (May 7-8, 1992) (Ontario). The Ontario Federation of Labour has also advocated legislative changes to deal with the problem of subcontracting in the service sector. *See* The Unequal Bargain, *supra* note 183, at 6. In addition, the government of Ontario has placed broader-based bargaining and the problems of service subcontracting on its policy agenda. *See* Ontario Ministry of Labour, Proposed Reform of the Ontario Labour Relations Act 27-28, 41-42 (Nov. 1991) (unpublished report).

n207 *See* Forrest, *supra* note 165, at 60-61.