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The Notion of Solidarity and the Secret History of American Labor Law

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The Notion of Solidarity and the Secret History of American Labor Law

THOMAS C. KOHLER†

“Few discoveries are more irritating than those which expose the pedigrees of ideas.”¹

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1. JOHN EMERICH EDWARD DALBERG-ACTON FIRST BARON ACTON, *Sir Erskine May’s Democracy in Europe*, in *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 62 (John Neville Figgis & Reginald Vere Laurence eds., 1907)

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I. INTRODUCTION

What comes to mind when you hear the word, solidarity? A strike or a union organizing effort perhaps? The faded rhetoric of some by-gone people’s democratic regime? European social policy? The remarkable Polish social movement of the 1980’s whose appearance helped to bring down the Soviet bloc? Something the Pope wrote? The protean character of the notion of solidarity and the astonishing extent of its influence reveal themselves in the rich and diverse associations the word evokes. Nevertheless, for most of us, the term has a distinctly foreign if not a vaguely mysterious ring about it. As Nathan Glazer recently observed, “Fraternity or solidarity are not familiar terms for us [Americans], and it would be interesting to explore why.”²

This paper attempts to respond to at least part of Glazer’s challenge. There is an important but little-known story behind the notion of solidarity, and it is high time that it be brought to the surface and critically examined. Despite the alien sound of the word, the story of solidarity is not primarily about movements, ideas and events that took place in the hazy past or in strange and distant places. The story is about us and about how an idea that migrated with waves of Jewish and Catholic immigrants came to play an immensely powerful role in shaping some of our central social and legal institutions.

At the heart of this story lie two competing visions of liberty, and ultimately, two competing accounts of what it means to be a human being. The dominant account—the one most of us use to explain the significance of our lives to ourselves—instrumentalizes our social ties and portrays us as sovereign, self-defining, auto-teleological selves. The alternative to this strongly individualistic and atomistic account is one that emphasizes our embeddedness in and dependence upon social and cultural ties. In the latter perspective, community mediates our understandings of ourselves and the world, and sets (or undermines) the conditions for authentic self-rule. Here, community has a normative function and represents the achievement of shared understandings, meanings, and values. In contrast to the dominant account that understands liberty in terms of an “unencumbered self,” the latter perspective sees personal liberty and self-sufficiency as states realized only through our ties with others.

2. Nathan Glazer, *Foreword* to PIERRE ROSANVALLON, *THE NEW SOCIAL QUESTION: RETHINKING THE WELFARE STATE*, at ix (Barbara Harshaw trans., Princeton Univ. Press 2000).

These bonds set the conditions for our freedom. Liberty does not represent an individual accomplishment, but a state of being only cooperatively achieved and maintained.

The notion of solidarity traces the fault lines that run through the foundations of our society and of modernity itself. As we shall see, solidarity represents a reaction to the sort of extreme and doctrinaire individualism that characterizes so much of Enlightenment political thought and the law it called forth. The word first appears in the late 1700's, in the wake of the French Revolution, and its use spread with the disruptions that accompanied the political, economic, and social "triple revolution" that transformed the patterns of life across the Western world during the Nineteenth Century.

The emergence of the term and its subsequent development reflect the efforts of a dizzyingly diverse array of theorists, politicians, religious thinkers, and social activists to respond to what early had become known as the "social question." Its appearance betrays a deeply-felt exigency, a recognition that a new way to conceive of social bonds had to be struggled toward in the unprecedented circumstances that people now confronted.

In its fullest significance, the social question raises the most fundamental issues about human nature and the frameworks and possibilities for pursuing life in common. It sweeps matters concerning political, economic, and legal arrangements, the character of the family, work, and other social relationships, the role of the state, the place of civil society, etc. within its scope. The contests over these issues characterize some of the most poignant struggles of the Nineteenth Century, and the debates around them have involved thinkers as diverse as Karl Marx, John Stuart Mill, Alexis de Tocqueville, Herbert Spencer, Max Weber, and the holders of the Chair of Peter, to name but a few. Far from resolved, the disputes over the social question continue unabated into the present, and if anything they have become more pressing. We may now live in one world, but how we should understand the character of our oneness in this world—where our contacts to one another edge ever-closer—remains tragically and dangerously unclear.

Solidarity sometimes seems to have as many meanings as it has users. To Europeans at least, solidarity not only constitutes one of the "indivisible, universal values"³ on which the European Union is founded, but also represents a body of substantive rights that the constitution will guarantee.⁴ Solidarity also constitutes one of the

3. Draft Treaty Establishing a Constitution for Europe, Dec. 16, 2004 O.J. (C310) 41 ("The Charter of Fundamental Rights of the Union.").

4. Title IV of Part II sets forth, at a fairly high level of abstraction, the rights solidarity encompasses. *See id.* at ¶¶ 87-98, at 47-49. Proclaiming solidarity a constitutionally guaranteed right is one thing. Determining in what solidarity might actually consist is another. On this theme, see the thoughtful essay by a former member of the German

core values of the labor movement, both in the United States and elsewhere. The term evokes the attitudes of unity, fraternal concern, and the “one for all and all for one” spirit of bondedness that form the foundation for any flourishing association or stable society. In many respects, solidarity serves as the contemporary replacement for the specifically civic form of friendship that the pre-moderns regarded as a requisite for any sort of political community because it sets the stage for personal excellence and willing co-operation.⁵

The present paper is a work-in-progress, and part of a larger project investigating the impact of the notion of solidarity on American and European law, in light of some of the concerns mentioned above. To some degree, at least, unions and labor law are familiar institutions to Americans. Consequently, they provide a good place to begin a discussion of the meaning and impact of the notion of solidarity.

II. THE CURIOUS CHARACTER OF AMERICAN LABOR LAW

There is something undeniably strange about the National Labor Relations Act (“NLRA”).⁶ A primary goal of the Act is to establish a legal structure through which employees can gain a voice in managerial decisionmaking. The scheme of employee participation that the Act establishes, however, runs contrary to nearly all of our expectations. In a legal system largely obsessed with the protection and promotion of individual choice, the Act paradoxically and consistently restricts it. A cornerstone of the statutory scheme, the Act’s exclusivity principle makes the union chosen by the greater share of employees the exclusive representative of them all.⁷ Majority rule displaces personal preference in all matters concerning wages and working conditions. Once the majority has designated a bargaining representative, the statute strictly forbids any form of individual or minority dealing. This is not law for the Marlboro Man or for the lone pioneer striking out on his or her own. Here, the group enjoys priority.

Few would associate rigidity with American society or with its institutions. A willingness to experiment and an eagerness to try new things goes hand-in-hand with the sort of individualism that characterizes American life. Once again, however, the Act confounds

Constitutional Court, Ernst-Wolfgang Böckenförde, *Grundlagen europäischer Solidarität*, FRANKFURTER ALLGEMEINE ZEITUNG, June 20, 2003, at 8.

5. The seminal formulation of this point can be found in Book 7 of Aristotle’s *Nicomachean Ethics* and it would remain a core theme of political thought until the time of Machiavelli and Hobbes.

6. 49 Stat. 449 (1935), amended by 29 U.S.C. §§ 151-69 (2000).

7. See 29 U.S.C. §159(a) (2000). For explication, see *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

our reasonable anticipations. Out of the many possible means for affording employees a voice in workplace decision-making, the NLRA sanctions only one: collective bargaining. It accomplishes this through the statutory requirement that any body through which employees participate in managerial decision making be structurally independent of the employer.⁸ This represents a carefully considered if highly controversial choice that lies at the very core of the NLRA. Regardless of employee sentiment, the Act broadly forecloses the use of participative schemes not anchored by and approved through a union. Consequently, in the absence of a collective bargaining representative, an employer's use of employee participative devices such as quality circles, semi-autonomous work teams, and even safety committees is almost always unlawful or arguably so.⁹

The labor law regime of no other legal system operates in this fashion. In German and Japanese law, for example, unions represent and have the authority to bargain only on behalf of their own members. The terms of the agreements that their unions make apply only to those employees who have accepted membership. Moreover, both systems permit individuals to bargain more favorable terms for themselves than those provided in the collective bargaining agreement. Such arrangements are widespread in Germany. Likewise, in both nations, plural unionism in the workplace is possible, and particularly in Japan, not uncommon. A mandatory system of representation such as ours would violate an individual's associational freedoms under the German Constitution,¹⁰ a problem that our Supreme Court, when directly confronted with the issue, nervously but scrupulously avoided.¹¹ Nevertheless, despite their many and striking differences, placing the American and German schemes of employee representation into comparative perspective reveals some surprising and almost entirely overlooked connections between the two.

The NLRA appears to present an unusual case of American exceptionalism. Not only does the Act have unique characteristics that sharply distinguish it from the labor relations law schemes of other nations, but its terms do not fit well within the American legal pattern either. It represents the only place in our highly-individualistically oriented legal system where the law seeks to protect and enhance the status of the individual through the formation and maintenance of freely-formed and autonomous associations. From nearly any vantage point one chooses to consider it, the NLRA represents something of an eccentricity. It is the legal

8. 29 U.S.C. §158(a)(2); *see* NLRB v. Newport News Shipbuilding & Drydock Co., 308 U.S. 241 (1939).

9. *See, e.g.*, *Electromation, Inc.*, 309 N.L.R.B. 990 (1992).

10. *See, e.g.*, GRUNDGESETZ [GG][Constitution] art. 9, abs.3; *id.* at art. 12.

11. *See*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

version of odd man out.

How can this be? What accounts for the peculiar character of the NLRA's scheme of employee participation in managerial decision making?

III. SOLIDARITY AND THE "UN-AMERICAN" CHARACTER OF AMERICAN LABOR LAW

Writing in the early 1930's, and some years before the enactment of the NLRA, the labor economist and historian, David J. Saposs, declared that

The significant and predominant role of the Catholic Church in shaping the thought and aspirations of labor is a neglected chapter in the history of the American labor movement. Its influence explains, in part at least, why the labor movement in the United States differs from others, and why it has become more and more reactionary.¹²

In the mid-1990's, the Swedish comparative law scholar, Reinhold Fahlbeck, published a provocative essay in which he reflected on "the un-American character of American labor law."¹³ This law, argued Fahlbeck, with its emphasis on collective action and on the formation of associations stands in such stark contrast to the attitudes of the "archetypal American" as to make the law appear, as Fahlbeck put it, "somehow un-American."¹⁴ From the viewpoint of the average American, Fahlbeck observes, "Those people who want and need concerted action and unions are not quite reliable. They are not like Americans-at-large."¹⁵

Understood in the way he is using the term, Fahlbeck has hold of something important. Our labor law and the institutions that support it do rest on understandings that lie outside the American mainstream, and precisely for the reasons that Saposs so long ago noted. Exact numbers are difficult to determine. Historically, however, rates of union membership among Catholics (and Jews) have been vastly out of proportion to their representation in the American population. This disproportionality becomes even more pronounced when the representation of these groups in union leadership positions is considered. In the United States at least, the labor movement has been largely a Catholic phenomenon.

12. David J. Saposs, *The Catholic Church and the Labor Movement*, 7 MODERN MONTHLY 225, 225 (1933).

13. Reinhold Fahlbeck, *The Demise of Collective Bargaining in the U.S.A.: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307 (1994).

14. *Id.* at 323-24.

15. *Id.* at 326.

What explains this curious fact? A facile response might be that Catholics and Jews, as largely poor and marginalized immigrant groups, readily organized themselves to improve their economic standing. Undeniably, there is something to this suggestion, but it does not go very far in explaining the traditionally heavily Catholic nature of the American labor movement. It is true that until 1965, when these trends reversed themselves, American Catholics had lower average incomes, held positions with lower occupational status and were less likely to attend college than Protestants. At the same time, however, Catholics always have constituted a relatively small minority of the U.S. population. For example, in 1935, when Congress passed the NLRA, just over 15 percent of the population was Catholic.¹⁶ Assuming for the moment that economic advantage acts as the chief motive for involvement in the labor movement, Catholics hardly constituted the only portion of the population with a substantial self-interest in unionizing. Nevertheless, non-Catholics consistently have proved considerably less inclined to organizing themselves.

If economic interest does not explain the Catholic character of the American labor movement, what does? Two factors, I believe, are crucial. The first concerns the manner in which Catholics understand the character of community, while the second relates to the Church's social teaching tradition and the consistent support it has given to organized labor and collective bargaining.¹⁷ Once again, there seems to be something rather unexpected here. What made one of the most socially conservative of institutions, the Catholic Church, such a staunch supporter of unions and the practice of collective bargaining? Further, how and in what ways did the Church's social teachings come to exert an influence upon the shape of the American labor law scheme?

Lord Wedderburn reminds us that "the language of a labour law system can be learned only from its social history, above all the history of its labour movement. Without a smattering of that vocabulary comparative conversation is impossible."¹⁸ In anyone's

16. THEODORE CAPLOW ET AL., *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900-2000* 111 (2001) (collecting data sources). Even today, and after a period of substantial growth during the past thirty years, Catholics still make-up less than a quarter of the Country's population.

17. This body of teaching is most authoritatively expounded in the Papal social encyclicals, a line that begins with Leo XIII's influential *Rerum novarum* of 1891 and continues into the present day. Encyclicals devoted largely to the themes of work and economic arrangements include *Quadragesimo anno* (1931), *Mater et magistra* (1961), *Laborem exercens* (1981), *Sollicitudo rei socialis* (1987), and *Centesimus annus* (1991). For an authoritative summary of the social teachings, see the recently published PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *CATHOLIC CHURCH, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH*, (Liberia Editrice Vaticana 2004).

18. Lord Wedderburn of Charlton, *The Social Charter in Britain—Labour Law and Labour Courts?*, 54 MOD. L. REV. 1, 7 (1991).

vocabulary, few terms probably bear a closer association with the labor movement than does the word solidarity. For many Americans, the terms “solidarity” and “forever” seem inexorably bound, even though most of us never learned the rest of the words to this rousing, old trade-union hymn. Solidarity is the glue that binds the movement and without which it cannot survive. It also represents a term with considerable political, social, and religious significance as well. Given our lack of familiarity with it, a short history of a complex concept is in order here.

IV. SOLIDARITY: A SHORT HISTORY OF A COMPLEX NOTION

A. *The Social Question and the Rise of the Notion of Solidarity*

Solidarity, it turns out, is a rather new word. Born out of the chaos that followed in the wake of the French Revolution, the term quickly migrated throughout the industrializing West, drawn along in the backdraft created by the collapse of long-standing relational structures and the gaping voids they left. Those first employing the term had plucked it from the Roman law, where a solidary obligation refers to a matter in which two or more people are entitled to or liable for the whole of a debt.

Although Napoleon Bonaparte is said to have coined the term,¹⁹ no one characterized the social question earlier nor more memorably than Edmund Burke. In the face of the forces then being unleashed, Burke warned that the “little platoons”²⁰ that gave society its structure would “crumble away, be disconnected into the dust and powder of individuality, and at length be dispersed to all the winds of heaven,”²¹ leaving men “little better than the flies of summer.”²² This is the era in which the term “civil society” first emerged and in which Alexis de Tocqueville, among others, famously began to insist upon the importance of associations as a crucial means for securing the well-being of individuals and democracies alike.

In matters dealing with intellectual or social transformations, identifying the moment when everything changed normally is impossible. Such events typically steal upon us step-by-step and identifying the point at which everything became new is a bit like attempting to peg the point at which orange turns to red. That is not the case with the wholesale upending of social relations that Burke

19. See 5 DAS WISSEN DES 20. JAHRHUNDERTS: DAS DEUTSCHE BILDUNGS-LEXIKON IN SECHS BÄNDEN, 654-55 (Institut für Bildung und Wissen 1965).

²⁰ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 53 (Thomas H.D. Mahoney, ed., Bobbs-Merrill (1955) (1790).

²¹ *Id.* at 109

²² *Id.* at 108.

decried.

The labor was a long one, and the birth pangs sharp, but modernity, with its thematic insistence on autonomous individualism, arrived during the night of Tuesday, August 4, 1789. François Furet comments that this

“is the most famous date in French parliamentary history: it marks the moment when a juridical and social order, forged over centuries, composed of a hierarchy of separate orders, corps, and communities, and defined by privileges, somehow *evaporated*, leaving in its place a social world conceived in a new way as a collection of free and equal individuals subject to the universal authority of law.”²³

Before this night had passed, “the whole structure of the old society came tumbling down: not only feudal dues but the whole social order defined in terms of collectivities granted certain privileges” had been swept away.²⁴ The first sentence of Article 1 of the “August Decrees” that effectuated the spirited declarations made that evening says it all: “The National Assembly entirely destroys the feudal regime.”²⁵ The venerable intermediary structures and bodies that anchored one’s place in the world, and that screened the individual from the power of the sovereign and its law, simply were obliterated.

Just as Martin Luther had understood the relationship between the soul and its Creator as directly confrontational and unmediated by institutions, tradition, or the community of believers (both living and dead),²⁶ the new regime declared every individual equal and autonomous and brought each of them into a direct and unintercessoried relationship with the authority of the newly imagined state. The law now applied directly to each individual and not mediately through the social body of which they previously had been a part. Formally, at least, the August Decrees removed all debilities. Henceforth, “All citizens, without distinction as to birth, can be admitted to all employments and ecclesiastical, civil and military dignities, and no useful profession shall constitute

23. François Furet, *The Night of August 4 in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION* 107, 107 (François Furet & Mona Ozouf eds., Arthur Goldhammer, trans., The Belknap Press of Harvard Univ. Press 1989). Furet continues: “The debate of August 4, 1789, held at night, was in fact associated with a very powerful feeling in all the deputies that they were witnessing twilight and a dawn. But even this classical simile cannot do full justice to the emotions of the participants in this celebrated session, who for a few hours felt as though they were virtually divine mechanics helping to bring about this incredible spectacle. This twilight and dawn were their work.”

24. *Id.* at 110.

25. *Décret Relatif a L [sic] Abolition des Privilèges*, August 11, 1789, 8 ARCHIVES PARLEMENTAIRES 397.

26. On these points, see PAUL VIGNAUX, *NOMINALISME AU XIVE SIÈCLE* (1948).

derogation.”²⁷ The ability of individuals freely to enter any occupation “consecrated the equality of individuals before the law, a condition of their union with the nation.”²⁸ In a direct reversal of the old order, the newly unencumbered individual was free to do anything not directly forbidden by the law. The ground for an egalitarian society of sovereign individuals who would act as the autonomous source of their own meaning had been established. The foundations of the world had shifted.

B. *The Liberal Prejudgment: Why We Distrust Associations*

i. Relational Society and the “Corporate Lifestyle”

The stunning events of August 4th may have come as a surprise to many members of the National Assembly,²⁹ but that does not mean that they were not carefully planned. A small group of about one hundred deputies of the Third Estate, known as the Breton Club, had met secretly throughout the night of August 3rd and “resolved to use a kind of magic, a temporary suspension of the Constitution to destroy all privileges of classes, provinces, cities, and corporations. It was with this intention that we entered the hall” of the National Assembly on the following evening. “Our committee alone was in on the secret.”³⁰

Because the abolition of the corporations constituted a key part of this program of thoroughgoing reform, it is appropriate to say a word or two about them here. To us, the term corporation suggests a very specific form of limited liability business organization, owned by shareholders, that enjoys special powers and immunities not available to other forms of business associations. In the usage of the time, however, the term had particular reference to the guilds and related associations, the traditional bodies through which the professions, trades, and most occupations were organized.³¹ The overlapping structures of these associations or “universities”³² of

27. 8 ARCHIVES PARLEMENTAIRES, *supra* note 23, at 398.

28. Furet, *supra* note 21, at 110.

29. The deputies to the National Assembly had been considering the text of the Rights of Man, but the rapidly spreading rural uprising, known as the Great Fear, forced the deputies to turn their attention to responding to this emergency. See 8 ARCHIVES PARLEMENTAIRES, *supra* note 23, at 339-43.

30. Furet, *supra* note 21, at 108. See also Spiros Simitis, *Die Loi le Chapelier: Bemerkungen zur Geschichte und möglichen Wiederentdeckung des Individuums*, 22 KRITISCHE JUSTIZ 157, 160 (1989).

31. Adam Smith observes that “[r]egulated companies resemble, in every respect, the corporations of trades so common in the cities and towns of all the different countries of Europe.” ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 733 (R.H. Campbell & A.S. Skinner eds., vol. 2 LibertyClassics 1981) (1776) [hereinafter II *WN*].

32. Smith notes that the incorporated trades “were antiently called universities; which

masters, which often dovetailed with statutorily established norms,³³ formed a comprehensive regulatory framework that gave them influence over nearly every aspect of economic life by permitting the guilds substantial control over the conditions of competition. The administration of apprenticeships by the guilds allowed the masters to restrict entry into the trades and to determine the number of openings available in the towns for those qualified to practice their arts. The apprenticeship corporations also determined the size of the skilled labor pool through their ability to limit the number of apprentices a master could take and to fix the number of years of service required of apprentices and journeymen before they qualified to practice their art independently. The guilds likewise possessed, among many other powers, the ability to set the prices for and to determine the range of goods a master could offer and to enforce standards for their quality.

Given our contemporary predispositions, it is easy to regard these partial trade associations simply from an economic perspective, but doing so both conceals their full significance as well as the reasons that members of the Breton Club and like-minded liberals in other places so earnestly sought their complete extirpation. Properly understood, the guilds constituted a set of integrated “cultural institutions” that performed a wide range of social, educational, moral, religious, fraternal, legal, administrative and welfare functions.³⁴ These diverse institutions sat at the center of society, embedding individuals within the structures of the local community³⁵ while forming a dense associational network that united localities, countries, and—not infrequently—trans-national regions through formal and informal ties. The English Company of Clockmakers did not exaggerate in their ultimately unsuccessful defense of the Elizabethan apprenticeship law when they claimed in a pamphlet issued in 1812 that the enemies of the corporations “at the same time

indeed is the proper Latin name for any incorporation whatever. The university of smiths, the university of taylors, &c. are expressions which we commonly meet with in the old charters of the antient towns.” I *WN* at 136.

33. In the English case, the most important enactment of this sort was the enormously influential Statute of Artificers, 5 Eliz. C.4 (1563) (Eng.). This far reaching statute touched on nearly every aspect of economic and social life, and its provisions on apprenticeships would remain in force until 1814. To be appreciated properly, the Statute must be considered in light of the extensive Elizabethan Poor Laws, with which it worked in tandem. As one commentator notes, the enactment of the Statute “unified the systems then in existence, some of which had been breaking down, and given them full legal recognition. It represented a shift to the state of what had previously been more a matter of local control.” K.D.M. Snell, *The Apprenticeship System in British History: the Fragmentation of a Cultural Institution*, 25 *HISTORY OF EDUCATION* 303, 304 (1996).

34. *Cf.*, Snell, *Apprenticeship System*, *supra* note 31, at 306.

35. Snell points out that guilds and apprenticeships were “intimately tied to ideas of the sense of place, ‘belonging,’” and in the case of England, to “poor-law entitlement.” *Id.* at 307. As we shall see, the fact that these institutions discouraged labor mobility would constitute one of the grounds upon which Adam Smith would condemn them.

condemn the whole political and commercial establishment of Britain; which is nothing other than a grand Corporation, composed of an infinity of smaller ones.”³⁶ One commentator observes that to their contemporaries, corporations and apprenticeships were “so overladen with social and other assumptions and expectations, so tied to administrative, moral and political considerations, that any ‘economic’ analysis which treated it as a distinct and separate activity would have been felt incongruous.”³⁷

Because they are so different than our own, the attitudes that supported the “corporate spirit” and the institutions that embodied it can be difficult for us to appreciate. They represent a different way of being and embodied a set of values and understandings that made life in a relational society both intelligible and possible.³⁸ From their inception, the guilds represent an attempt to secure conditions for some degree of shared self-determination. While they performed numerous regulatory and administrative tasks, these corporate institutions also functioned as fraternal and religious sodalities as well. In addition to caring for the temporal needs of their members, the guilds founded colleges, built churches, contributed altars, cathedral windows, and other memorials to their deceased members and families, and endowed Masses for the repose of their souls, a practice that continued in the Catholic regions of Europe until the eventual suppression of the guilds in the latter-part of the Nineteenth century. As one commentator characterized it:

The Gild, which, as we have shown, stood like a loving mother, providing and assisting, at the side of her sons in every circumstance in life, cared for her children even after death In this respect, the Craft-Guilds of all countries are alike; and in reading their statutes, one might fancy sometimes that the old craftsmen cared only for the well-being of their souls We find innumerable ordinances also as to the support of the sick and poor; and to afford a settled asylum for distress The chief care however of the Gildmen was always directed to the welfare of the souls of the dead.³⁹

36. *Circular to Members of the Trade* (Clockmakers’ Company), Sept. 25, 1812, *quoted in* T.K. Derry, *The Repeal of the Apprenticeship Clauses of the Statute of Apprentices*, 3 *THE ECON. HIST. REV.* 67, 71 (1931). Snell states that by the repeal of the apprenticeship clauses of the Statute of Artificers in 1814, the institution of apprenticeships in England “had probably been in decline for some decades” K.D.M. SNELL, *ANNALS OF THE LABOURING POOR: SOCIAL CHANGE AND AGRARIAN ENGLAND, 1660-1900*, at 228 (1985). Nevertheless, as Derry and Snell point out, there was widespread resistance to their repeal.

37. Snell, *Apprenticeship System*, *supra* note 31, at 305.

38. For a telling description of these relationships in a time of aristocracy, see Tocqueville’s description in his Introduction to *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835).

39. LUJO BRENTANO, *ON THE HISTORY AND DEVELOPMENT OF GILDS, AND THE ORIGIN OF TRADE-UNIONS* 69-70 (London, Trübner & Co. 1870). A distinguished economist and historian, Lujo Brentano was the brother of the noted philosopher, Franz Brentano, the teacher of, among others, Edmund Husserl.

At the opposite end of the life cycle, the apprenticeship system sponsored by the guilds involved far more than a period of skills-training. Lujo Brentano refers to it as “a kind of novitiate to citizenship.”⁴⁰ In keeping with the character of the relationship, the candidate’s reception into an apprenticeship typically took place in a solemn ceremony in the town or guild hall, in the presence of the members, and usually on the feast day of the guild’s patron saint.⁴¹ After hearing a recitation of the moral and practical duties pertaining to the relationship, an indenture was drawn and executed which memorialized the act and recited the special conditions under which the apprentice was placed with the master. The apprentice then became part of the master’s family. Training included not only instruction in the trade, but in literacy, numeracy, the management of a household and a business, as well as moral, religious and character formation.⁴² After completion, the apprentice then could be received once again into the guild and thereby become a citizen of the town.

Most of us probably would find the restrictions on individual choice that accompanied such a system cloying, and for many unacceptable. In contrast to our views, however, historian Jürgen Kocka observes that

[c]ertainly guild members themselves only very rarely would have found these limits as imposing a menacing dependency or as oppressively restrictive. No matter how much they may have treasured being the master of the workshop and the lord of the house, they did not aim at independence in the sense of a fully developed freedom of competition and a dynamism unburdened from the restrictions of tradition. To the trades, growth and accumulation, superiority and innovation did not appear worth striving after. Instead, they sought to secure a way of life appropriate to their place in life in honorable, respectful and fitting forms of work and living. The restrictions imposed by the guilds did not contradict the widely held ideal of the trades of an “honorable living.” Rather, as a rule, these restrictions were greeted as an important means to secure one’s living in an honorable way, through reliable work and a decent life, consonant with moral customs and not achieved at the cost of one’s fellow tradesmen. This last point is important. Formed by the centuries-old experience of an insufficient or only slowly growing food supply, members of the traditional trades—in contrast to the attitudes of the early merchant class—were stamped by the conviction that the advantage of one must come at the disadvantage of another. Not only the guild rules, but prevailing moral convictions forbade one from ruthlessly grabbing whatever chances the market offered, pursuing them to the full, and behaving like a capitalist entrepreneur. Defending independence was part of the comradely

40. *Id.* at 65.

41. WILLIAM H. SEWELL, JR., *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848*, at 34 (1980).

42. See BRENTANO, *supra* note 37 and Snell, *Apprenticeship System*, *supra* note 31. Snell notes that this training covered many female as well as male apprentices. On the apprenticeship of women, see SNELL, *supra* note 34, at 270-319, and Snell, *Apprenticeship System*, *supra* note 31, at 305 n.6 (collecting sources).

bond of guild membership—institutionally as well as a matter of social morality.⁴³

ii. Relational Society and its Critics—Why We Distrust Associations

A deep and abiding distrust of institutions of all descriptions, both sacred and secular, lies at the heart of modern liberalism, which regards them all as posing a constant threat to the status and freedom of the individual. This attitude of suspicion mirrors the political nominalism that informs the modern project and the anthropology that underlies it. This framework can account only for individuals. It regards association of whatever form either in terms of representing an instrumental and transient alliance among self-seeking but otherwise unassociated individuals, or it reifies the group (e.g., society) as the individual, seeing it as the place where the “I” and the “we” merge. In the narcissistic reverie this latter view posits, the individual is autonomous because the law that society imposes is identical with that which the individual has made. In either account, “partial associations” like the guilds or the myriad other institutions that Burke describes as society’s “little platoons” end-up being regarded as factions that threaten both individual freedom and social peace.

The progenitor of the first account, Thomas Hobbes, pungently describes corporations of all descriptions as an “infirmity . . . which are as it were many lesser Common-wealths in the bowels of the greater, like worms in the entrayles of a naturall man” and darkly warns that their existence “tend to the dissolution” of the state.⁴⁴

Hobbes’ greatest critic, Jean-Jacques Rousseau, agreed with him, at least on this point. In Rousseau’s view, the “general will” of the people “is always right and always tends toward the public utility.”⁴⁵ Nevertheless, Rousseau warned, “it does not follow that the people’s deliberations always have the same rectitude.” Although never corrupt, the people can be fooled. “If, when an adequately informed people deliberates, the citizens were to have no communication among themselves, the general will would always result,” Rousseau instructed. “But when factions, partial associations at the expense of the whole, are formed,” the will not of individuals,

43. JÜRGEN KOCKA, *WEDER STAND NOCH KLASSE: UNTERSCHICHTEN UM 1800*, at 143 (1990). Brentano states that “the principle of the trade-policy of the craftsmen, namely, that provision should be made to enable every one, wit a small capital and his labour, to earn his daily bread in his trade freely and independently, in opposition to the principle of the rich, ‘freedom of trade’.” BRENTANO, *supra* note 37, at 60.

44. THOMAS HOBBS, *LEVIATHAN* 375 (C. B. MacPherson, ed., Penguin Books 1981) (1651).

45. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* 61 (Roger D. Masters ed., Judith R. Masters trans., St. Martins Press 1978) (1762).

but only of the associations is stated. In this case, “there are no longer as many voters as there are men, but merely as many as there are associations.” As a result, “for the general will to be well expressed, it is therefore important that there be no partial society in the State, and that each citizen give only his own opinion.” Should it be impossible to suppress the partial societies, “their number must be multiplied, and their inequality prevented,” advice subsequently carefully attended to both by Adam Smith⁴⁶ and James Madison.⁴⁷

Modernity conducted its vigorous campaign to liberate the individual from institutions along a broad front. One of the leading figures in this long march against the structures was Adam Smith, an influential and implacable critic of apprenticeships, the “corporation spirit,” and of institutions generally.⁴⁸ Were he alive today, one could almost feature him wearing a “Rage Against the Machine” tee-shirt. Smith based his critique of the corporations, or what he called the “inequalities occasioned by the policy of Europe,” on both efficiency and liberty grounds. The efficiency argument was threefold. The policy of Europe, “by not leaving things at perfect liberty,” restrained “competition in some employments to a smaller number than would otherwise be disposed to enter them” while “increasing it in others beyond what it naturally would be.”⁴⁹ Lastly, it obstructed “the free circulation of labour and stock, both from employment to

46. This, for example, is Smith’s answer to the problem of religion: “The interested and active zeal of teachers of religion,” he states, “can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects” If, however, the “society is divided into two or three hundred, or perhaps into as many thousand small sects, of which no one could be considerable enough to disturb the publick tranquility.” II *WN*, *supra* note 29, at 793-94.

47. See THE FEDERALIST NO. 10 (James Madison).

48. Nathan Rosenberg notes that “[t]he *Wealth of Nations* can be read, and should be read as a systematic critique of human institutions” and that in his work, “Smith subjected most of the basic institutions of his day—including the economy, the government, the church and the educational system—to searching and far-reaching criticism.” Nathan Rosenberg, *Adam Smith as a Social Critic*, ROYAL BANK OF SCOT. REV., June 1990, at 17-33 (1990). Emma Rothschild observes that, “Smith believed that he was uncovering eternal truths about social institutions. These truths took the form, quite often, of abstract principles about personal character and personal oppression.” EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT* 114 (2001).

49. Smith’s prime example here is the Church. Both the public and the “piety of private founders have established many pensions, scholarships” and the like to support the education of churchmen, which results, Smith says, in “the church being crowded with people, who in order to get employment, are willing to accept a much smaller recompense” than their education otherwise would have allowed. He also unfavorably compares the Church in “England and in all Catholick countries,” where “the lottery of the church is in reality much more advantageous than necessary” to the “churches of Scotland, of Geneva, and of several other protestant churches” whose “much more moderate benefices will draw a sufficient number of learned, decent, and respectable men into holy orders.” I *WN supra* note __, at 146, 148.

employment and from place to place.”⁵⁰

Because such policies offend basic human liberty, they are unjust. In language firmly rooted in John Locke’s labor theory of property and value,⁵¹ Smith states that “[t]he property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man,” he continues, “lies in the strength and dexterity of his hands.” Consequently, “to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of this most sacred property.” Laws or other restrictions that hinder “one from working at what he thinks proper” and that obstruct “others from employing whom they think proper” constitute a “manifest encroachment upon the just liberty both of the workman” and those disposed to employ him.⁵² Justice lay in affording unrestricted individual choice.

Smith’s thoroughgoing distrust of institutions leads him to make a series of concrete suggestions for retarding the growth and spread of the “corporation spirit” that makes them possible.⁵³ “People of the same trade,” Smith tartly warned, “seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick . . .”⁵⁴ While the law “cannot hinder people of the same trade from sometimes assembling together,” Smith counseled, it should do nothing whatever to encourage their collaboration.⁵⁵ A regulation that requires the registration of all those practicing a particular trade, observes Smith, simply facilitates their organizing. Likewise, “[a] regulation which enables those of the same trade to tax themselves in order to provide for their poor, their sick, their widows and orphans” only conduces to give “them a common interest to manage” and renders their assembly necessary.⁵⁶

50. I *WN*, *supra* note ____, at 135. See generally ROTHSCHILD, *supra* note 46 at 87-115 (presenting a thorough analysis of the grounds of Smith’s opposition to apprenticeships and the corporation spirit).

51. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES ON GOVERNMENT* 265, 285-302 (Peter Laslett, ed., Cambridge Univ. Press 1988) (1689-90).

52. I *WN*, *supra* note ____, at 138.

53. The Church, that “great incorporation” represents a special target of Smith’s critique. Its clergy, Smith counsels, “can act in concert, and pursue their interest upon one plan and with one spirit, as much as if they were under the direction of one man; and they are frequently too under such direction.” II *WN*, *supra* note 29, at 797. Smith counsels that the “great antidote” to the “poison of enthusiasm and superstition” that religion induces is science. The second remedy, he suggests, “is the frequency and gaiety of publick diversions, “which would dissipate, in the greater part of them, that melancholy and gloomy humour which is almost always the nurse of popular superstition and enthusiasm.” For a summary of Smith’s critique of religion and the Church, see *id.* at 788-816.

54. I *WN*, *supra* note ____, at 145.

55. *Id.*

56. *Id.*

Lastly, an incorporation also “makes the act of the majority binding upon the whole” which permits much more effective restrictions on trade since it precludes individuals from withdrawing and thereby dissolving the combination.⁵⁷

Whatever else it might represent, the Enlightenment denotes both a set of wide-ranging philosophical attitudes as well as an intellectual and social movement, centered in France, but with its votaries united in a conversation that stretched across Europe and reached deeply into the United States. As the ties among the leading lights of the French and Scottish Enlightenment demonstrate, the members of this loose sect typically had a close familiarity with each other’s work, and not infrequently, personal relationships with one another as well. In 1776, for example, the abbé Morellet, a leading French economic theorist, political activist, and friend of, among others, Adam Smith, David Hume, Thomas Jefferson, and Benjamin Franklin, wrote to his colleague, the economist Turgot, to tell him that the police had seized a section of the *Wealth of Nations* dealing with corporations and apprenticeships that Morellet recently had translated at Turgot’s behest. Because the authorities regarded the extract from Smith as supporting Turgot’s criticism of the established order, the diarist Métra wrote that “one could never get permission” to publish it.⁵⁸ Just two years later, another of Turgot’s circle, Dupont de Nemours, wrote to Smith telling him that “[w]e are moving rapidly towards a good constitution,” and thanking him because “[y]ou have done much to speed this useful revolution.”⁵⁹

iii. Suppressing the Middle: The Loi de Chapelier

The abolition of every possible mediating group represented a crucial part of this revolutionary effort to reconstitute society for the new Adam, the human reconceived in the light of reason, a concept itself now newly understood. Nevertheless, despite their sweeping character, or perhaps precisely because of it, the August Decrees did not explicitly do away with the guilds. That would not occur until the enactment of Le Chapelier’s law nearly two years later. The cursory summary of resolutions reached by the National Assembly on the night of the 4th that appears in the Parliamentary Archives mentions only “the reformation of the guilds,” although it might be noted in passing that this synopsis reads a bit like a bleary-eyed celebrant’s morning-after attempt to reconstruct the events of a particularly cheery evening. The final decree, issued after a week of complicated and more sober wrangling, did not refer to the guilds at all. The closest mention it made to them was the abolishment of “the particular privileges of the provinces, principalities, regions, cantons,

57. *Id.*

58. ROTHSCHILD, *supra* note 46, at 87. On the extensive body of writing concerning Turgot’s influence on Smith, see the sources collected in *id.* at 281 n.52.

59. *Id.* at 54.

cities and communities of inhabitants.”⁶⁰

These efforts to root the middle out of society left the reformers with a difficult problem. It is one thing boldly to declare the abolishment of the feudal regime. It is another thing to determine just what this really means and how far the destruction job ought to go. The devil always lurks in the details, and the details in this case presented a particularly devilish dilemma. On the one hand, agreement existed all around that citizens had the right to assemble and to form associations. On the other, great concern existed that these associations not serve as replacements for the intermediary bodies and structures that the National Assembly had sought to abolish through the August Decrees. The needle to be threaded involved recognizing the right of individuals to associate with one another, but somehow preventing that activity from producing new intermediate institutions.

Condorcet well-captured the tension between these two positions in his 1789 pamphlet, *Declaration of Rights*,⁶¹ which deeply influenced the final version of the *Declaration of the Rights of Man*, which the National Assembly would enact just days after its issuance of the August Decrees. In a section of the pamphlet entitled, “Dangers to the Right of Equality,” Condorcet wrote that “[a]ll citizens enjoy the right to form free associations, but they cannot be recognized as such by the power of the legislature or by the government.” A group of nobles, lawyers or metalworkers may form an association for deliberation and debate as they choose. Nevertheless, Condorcet continued, such groups may not assume the form or function of an intermediate body or a corporation. “Citizens in the state are divided only by districts and by officials charged by the citizens with public functions; each association is thus necessarily a private association that has the right to be free, but that does not have the right to act as a corporation.”⁶²

Consequently, “bodies of priests of different religions, a military corps, or the corps of jurists have no right to a political existence different than those of theatre subscribers or of members of a club, without which natural equality would be destroyed.”⁶³ In other words, citizens were free to form groups, but as Spiros Simitis

60. 8 ARCHIVES PARLEMENTAIRES, *supra* note 23, at 398.

61. DÉCLARATION DES DROITS, *reprinted in* IX Marie Jean Antoine Nicolas de Caritat Marquis de Condorcet, OEUVRES at 208 (A. Condorcet O’Connor & M.F. Arago, eds., 1968) (1847-49).

62. *Id.*

63. *Id.* at 208-09. Thinking of priests, military officers, or lawyers as part of a corporate structure may seem odd to us, but as Sewell notes, “The nobility, the clergy, chivalric orders, and even orders of monks and friars were legally recognized, privileged, internally regulated, semiautonomous bodies organized in a fashion analogous to trade corporations,” as were the universities and the legal and medical professions. SEWELL, *supra* note 39, at 25.

observes, those groups would be tolerated “only as a means to the better preparation of individual activity.”⁶⁴ The freedom to associate could not be employed to restore the mediating institutions that only shortly before had given society its structure.

While the complete suppression of the guilds and corporations would not come until the passage of Le Chapelier’s Law in June, 1791, their eventual fate, like that of other forms of mediating institutions, was never in doubt. “There were no intermediate stops on the way to the individual,”⁶⁵ or on the way to the radically individualistic society that the reformers intended to create. The *Declaration of the Rights of Man* said nothing concerning the corporations, but in an accompanying enactment explicating the “application of the principles” set forth in the *Declaration*, the National Assembly stated in part that in order to secure the “blessings of liberty and the equality of rights...there are no longer *jurandes*,⁶⁶ nor corporations of the professions, the arts, or the trades.”⁶⁷ To drive home the point concerning groups and sodalities, the document further provided that “[t]he law recognizes neither religious vows nor any other engagement that would be contrary to natural rights or to the constitution.”⁶⁸ Like Luther’s understanding that the relationship between God and man is unmediated by the Church, visible or invisible, for the new state, neither one’s religious community nor one’s god could come between it and the individual citizen.

The National Assembly would take two cuts at addressing the status of the corporations before enacting Le Chapelier’s Law in June 1791. The first came through a proposal, made by the Committee on Taxation in February 1791, to impose a licensing fee on persons practicing their trade or profession. The “moderate” fee the Committee proposed would replace the membership charges levied by the guilds and professional bodies, and thereby do away with them altogether.

The Committee supported its proposal with equity arguments. The corporate system, it observed, imposed an indirect tax both on

64. Simitis, *supra* note 28, at 161.

65. *Id.*

66. The *jurande* was a “sworn trade” (a *métier juré*), “so called because its members were required to swear (*juré*) an oath of loyalty upon entering the mastership.” The *jurande* enjoyed a heightened legal status. Recognized as a constituting a single “body and community” (*corps et communauté*) which was invested with privileges and immunities, the *jurande* constituted a fictive person which stood in the place of individual persons. The grant of privileges allowed these bodies to make private law for their members, who were immune from the law of the community. See SEWELL, *supra* note 39, at 26-27.

67. MAURICE BOUVIER-AJAM, *HISTOIRE DU TRAVAIL EN FRANCE DES ORIGINES À LA RÉVOLUTION* 695 (1957).

68. *Id.* at 695.

consumers and producers. In language strongly reminiscent of Adam Smith's, the Committee argued that "the right to work is one of the first rights of man. This right is his property . . . it is without doubt the first property, the most sacred, the most imprescriptible."⁶⁹ The proposed law would "efface these last vestiges of servitude" that the "tyrannical" corporate system imposed and would respect "the property of the citizen, and above all, the liberty and dignity of man."⁷⁰ The National Assembly lost little time adopting it.

Several weeks later, the Assembly again addressed the question of associations when it took up a proposal, made by the Committee on the Constitution, to limit the right to petition the government strictly to individuals.⁷¹ "The right to petition is an individual right," insisted the Chair of the Committee, Issac René Guy Le Chapelier.⁷² "Consequently, no corps, no administration, no society can exercise the undelegable right of petition," and no petition can be made in a collective name.⁷³ Le Chapelier acknowledged that individuals enjoyed the right to associate with one another to discuss and deliberate about public issues. Nevertheless, he maintained, "if the law offers a means for publishing the result of their deliberations, [such groups] soon will become a subjugating body, a menacing authority, a power contrary to the whole system of representative government," whose views "necessarily will represent the results of the decisions taken by the majority" and not those of the objecting minority.⁷⁴

Among the most vociferous opponents of this proposal was Robespierre, who pointedly observed that "[t]he weaker and more unfortunate a man is, the more he is in need, the more he has need of the prayers of others."⁷⁵ The proposed law, he insisted, would injure the poor and the weak, who have the greatest need for collective action. In a voice shaking with passion, Robespierre argued that the proposal "is contrary to natural law, and I maintain that since each isolated individual has the right to petition, it is not possible for you to prohibit a collection of men, of whatever title or whatever name it carries, that you prohibit it, I say, the faculty of putting forward its views and addressing them" to those in power.⁷⁶ Robespierre's

69. *Rapport du Comité des Contributions Publiques sur les Patentes*, February 15, 1791, 23 ARCHIVES PARLEMENTAIRES 198, 199.

70. *Id.*

71. *Rapport du comité de Constitution sur la pétition faite à l'Assemblée nationale, le 26 avril 1791, par les administrateurs du département de Paris*, May 9, 1791, 25 ARCHIVES PARLEMENTAIRES 678.

72. *Id.*

73. *Id.* at 679.

74. *Id.*

75. *Id.* at 685.

76. *Id.*

objections, along with those raised by several other critics, including the Bishop of Blois and Pétion, were every bit as forceful as they were unavailing. The Committee's proposal became law a few days thereafter.

The final step in the movement that began on the fabled night of August 4, 1789 came nearly two years later with Le Chapelier's introduction of his law to outlaw all "assemblies of citizens of the same estate or profession."⁷⁷ Speaking on behalf of the Constitutional Committee that formally had proposed the law, Le Chapelier asserted that, in spite of the August Decrees, "many persons" had abused the freedom to associate "to attempt to recreate the abolished corporations in the form of assemblies of arts and trades" by organizing them in the names of their officers. "Without doubt, the right of assembly belongs to every citizen," Le Chapelier acknowledged, "but there is no right that permits citizens of certain professions to assemble for their pretended common interests." Then, in words that could have come from the mouth of Rousseau himself, Le Chapelier ringingly declared, "Corporations no longer exist in the state; there is only the particular interest of each individual and the general interest. No one is permitted to inspire an intermediate interest among the citizens that separates them from the state through a corporative spirit."⁷⁸

The true goal of these associations, Le Chapelier complained, had nothing to do with deliberations, but with attempts to establish work rules and wage rates for workers in various cities, and "to prevent workers and the individuals who employ them in their workshops from making private agreements" over such matters. The assemblies "had even employed violence" and "forced workers to quit their shops," he asserted, to obtain compliance with their demands. "Already several workshops [in Paris] have risen-up" and various other disorders have been reported.⁷⁹ Not only did these associations threaten public order. They also upset the principle of "free agreement" by which individuals are to establish the terms of their relationship themselves, through direct one-on-one negotiation, free of any form of third-party interference or intervention. Obstructing this freedom would lead only to a situation of "absolute dependence" that would push workers into privation and thereby, into a state "close to slavery."⁸⁰

Le Chapelier also accused the assemblies of having used "specious motives" to gain permission from the authorities to

77. *Rapport du comité de Constitution sur les assemblées de citoyens de même état ou profession*, June 14, 1791, 27 ARCHIVES PARLEMENTAIRES 210.

78. *Id.*

79. *Id.*

80. *Id.*

organize. Many of these associations, he maintained, claimed that they existed in part to supply aid to members of the same trade or profession who were ill, in need, or unemployed. Such “relief funds may appear to be useful,” Le Chapelier warned, “but one should make no mistake about this assertion.” Caring for the infirm, the unemployed and the needy, he insisted, is a task for the state and public officials, not for private bodies. The distribution of help by these private associations, when not made “dangerous by their bad administration, tends at the least to result in the rebirth of the corporations; it requires the frequent reunion of individuals of the same profession, the nomination of syndics and other officers, the formation of regulations” and the exclusion of those who have not “submitted” themselves to them.⁸¹

To preclude the “rebirth of privileges” and “to prevent the progress of this disorder” which “these wretched societies” had spread, Le Chapelier called for the enactment of a new law, the first article of which embodies both the spirit of the law and of the age: “The destruction of all types of corporations of citizens of the same estate and profession being one of the fundamental bases of the French constitution, it is forbidden to reestablish them under any pretext or form whatsoever.”⁸² Despite questions from the right about the effect of the law on political clubs and other associations, and requests for further deliberations about the impact of the law on the right of association, the National Assembly quickly passed Le Chapelier’s proposal. The work began the night of August 4th was now complete. The age of the emancipated individual had begun.

The passage of Le Chapelier’s Law also marked the end of his notable public career. A lawyer from Rennes, he had presided over the National Assembly on the night of the 4th and had played a leading role in many of the central events that occurred during the first years of the Revolution. Upon the expiration of his mandate, Le Chapelier returned home, but not to a quiet life. As the Revolution followed the increasingly violent path that Burke had foreseen, Le Chapelier was accused on several occasions of “moderatism,” and finally, of spying on behalf of England. He died on the guillotine on April 22, 1794, not quite three years after the passage of his namesake law.⁸³

iv. Summary and Assessment

Both the August Decrees and Le Chapelier’s Law proved to be far longer-lived than the man who had played such a key role in their enactment. As François Furet notes, while many of the institutions and legislative initiatives that the French Revolution produced were

81. *Id.*

82. *Id.*

83. On the details of le Chapelier’s biography, see Simitis, *supra* note 28, at 159-60.

temporary, “the most important thing” about the August Decrees and Le Chapelier’s Law, “was that they survived.”⁸⁴ Unlike nearly every other piece of legislation of the period, the latter statute remained unamended and only was repealed late in the Nineteenth Century.⁸⁵

The changes wrought by the “divine mechanics”⁸⁶ of the Enlightenment spread across Europe and left no place untouched. Everywhere, feudal arrangements were abolished and the structures, practices and institutions that once had given society its form were razed. The creation “without concessions” and within a very short period of time “of a wholly modern, individualistic society,” Furet observes, posed a truly novel and fundamental problem. “What had to be worked out now,” he remarks, for this completely new “society of free and equal individuals” would be the sense in which those sovereign, independent, rights-bearing individuals might be related to and united with one another.⁸⁷ This problem represents the very essence of the “social question.”

Attempts to respond to the social question dominate the history of the Nineteenth Century and many of the era’s bloodiest and most poignant struggles were fought over it. Marxism and the many strains of socialism, anarchism, various forms of nationalism, religious and secular utopian experiments, assorted initiatives to replace wage labor with producer co-operatives, worker movements of every stripe and a variety of employer sponsored programs of welfare capitalism represent just some of the attempts to address the social question. Each of these programmatic remedies sought to establish a new foundation for community and to resolve the exigencies that the new conditions had produced.

Despite the passage of time, the social question remains a pressing contemporary challenge. Once largely an American concern, the spread of a certain form of detached individualism now challenges the health of democracies everywhere. Likewise, even as our economies and our legal and political systems are becoming increasingly interdependent and globalized, the basis for our commonality in the still fragile and unsteadily evolving new world order remains unclear. The notion of solidarity stands as one of the most influential and significant attempt to respond to the issues that the social question poses.

84. Furet, *supra* note 21, at 112.

85. Simitis, *supra* note 28, at 158.

86. *See* BURKE, *supra* note 20, at 105.

87. Furet, *supra* note 21, at 113.

V. RESPONSE AND INNOVATION: THE SOCIAL QUESTION, SOLIDARITY
AND THE CATHOLIC CONTRIBUTION

i. Community and the “Catholic Imagination”

The collapse of the obsolete feudal and customary relational structures, the accompanying revolution in human self-understanding and mores, the subsequent extensions of political and economic rights, along with innovations in agricultural practices and industrial production had just the sort of atomizing and disorienting effects that Edmund Burke had predicted. These transformations and advances resulted in the formulation and extension of formal individual freedoms, at least to many, but they brought tremendous and wrenching social dislocations with them.

Emancipated from the hierarchical structures and social bonds that once determined their place in life, individuals also were placed outside the complex set of reciprocal duties that previously had protected the vulnerable through the obligations that they imposed on the strong. Without the presence of bodies that could mediate the relationship between them, increasing numbers of people stood exposed to the growing power of market institutions and to the expanding claims of the newly-rising state. Many contemporary observers also warned that the dissolution and fragmentation of social ties not only threatened the possibility of democratic self-rule, but the proper unfolding of human personality as well. Of particular concern in the debates over the social question were the problems of the growing numbers of industrial workers. Identifying and developing structures that would integrate them into society, relieve their precarious economic status, and afford them opportunities for effective and authentic self-determination became the primary, if never the exclusive focus of the social discussion.

Some sense of pre-Revolutionary society gives a better feeling for the challenges that those attempting to address the social question faced. Prior to the changes that occurred in the wake of the Revolution (changes that typically were initiated not from the bottom-up, but from the top-down), everyone, no matter how lowly their station, was woven into the social fabric and had an integral part in it. Historian Jürgen Kocka points out that in this social order, one might be “at the bottom, but included” [*unten, aber einbezogen*], and he uses the processions that traditionally accompany the celebration of the Catholic feast of *Corpus Christi* [the Body of Christ] to illustrate the point.⁸⁸ The rich symbolism surrounding this feast reveals much about distinctly Catholic understandings of and attitudes toward community that have shaped both the notion of solidarity as well as the character of the American labor movement and American labor law. Consequently, it is worth a moment or two

88. KOCKA, *supra* note 41, at 112-15.

to familiarize ourselves with its some of its meanings.

Corpus Christi celebrates the institution of the Eucharist, the central sacrament of the Catholic Church. According to Catholic belief, the bread and wine consecrated by the priest during the Mass become, as the classic formulation has it, “the body and blood, the soul and the divinity” of Christ. To Catholics, there is nothing symbolic about the Eucharist.⁸⁹ Instead, through their reception of it, the faithful understand themselves literally to be feeding on the divine body and blood of their Savior. In consuming the Eucharist, they become united with Christ to form a single body that transcends place and time. Consequently, the sacrament often is referred to as communion since it unifies the faithful, both living and dead, in one body, where the good of each is communicated to all the others. The pelican early became a symbol for Christ in the Eucharist, since it was thought that when the female bird lacked other food, she would peck at her breast and nourish her young with droplets of her own blood.⁹⁰

Corpus Christi embodies and represents these understandings. The feast falls in early summer and its celebration unfolds as a colorful, day-long event. In Catholic areas of Europe, towns were (and to a surprising extent, still are) hung with flags, banners and flowers to mark the day, and the squares and other public areas decorated with “living pictures” and with elaborate displays made of multi-colored soil. In older days, plays and pageant wagons illustrating religious themes often were part of the day’s proceedings. A procession with the Eucharist marks the high-point of the celebration, and in pre-Revolutionary Europe, also mirrored the community’s understanding of itself and its organic order.

During the procession, the priest or bishop walks beneath a canopy while carrying before him a consecrated host ensconced in a glass-fronted device called a monstrance. Nearly the entire adult population of the town would escort him, arranged in ranks reflecting the marcher’s station and role in the community, and accompanied by musicians. As one commentator noted, “generally speaking, the nearer the canopy, the more honorable the place.”⁹¹ Often, the

89. Flannery O’Connor pointedly summed-up the Catholic attitude toward the sacrament in her retort to the suggestion of her fellow novelist, Mary McCarthy, that one should understand the Eucharist as a symbol: “If it’s just a symbol, the hell with it.”

90. Not surprisingly, one of the great medieval hymns still traditionally sung on the feast of *Corpus Christi* also employs the imagery of the pelican: “Bring the tender tale true of the Pelican; Bathe me, Jesu Lord, in what thy bosom ran---Blood whereof a single drop has power to win, All the world forgiveness of its world of sin.” (Thomas Aquinas, *Adoro Te Devote (Lost, All Lost in Wonder)*, as translated by the poet, Gerard Manley Hopkins). (The whole of the Hopkins translation can be found in THE POETICAL WORKS OF GERARD MANLY HOPKINS at 112 (Norman H Mackenzie, ed., 1992).

91. ALOIS MITTERWIESER, *Geschichte der Fronleichnamspozession in Bayern*, 97 (1930), quoted in KOCKA, *supra* note 41, at 114.

canopy and the monstrance came at the rear of the procession. Marching before it would come the congregations of men and women religious, the mayor and town council, the merchants and traders, and then the various guilds, the masters and journeymen processing together, each corporate body carrying banners bearing the image of its patron saint and the symbol of its trade. Preceding them and also carrying their flags came the unskilled day-laborers, the shepherds and field-hands, and the town's poor. United by the Eucharist, the town's inhabitants marched as a host, with each of its members part of a smaller body that integrated them into the whole.

The place of the marcher in the procession reflects their place in the social, political, and economic order, but two points should be noted. Firstly, no matter how lowly, each part of the social body reflected in the processional order had a dignity of its own. Further, the honor of place in the procession is not a sign of the individual's own virtue or presumed favor in the eyes of the Deity. As Alexis de Tocqueville observed, "Among Catholics, religious society is composed only of two elements: the priest and the people. The priest alone is raised above the faithful: everything is equal below him." Consequently, in matters of faith and morals, "Catholicism places the same standard on all intellects; it forces the details of the same beliefs on the learned as well as the ignorant" and it "imposes the same practices on the rich as on the poor." The faith "compromises with no mortal, and applying the same measure to each human, it likes to intermingle all classes of society at the foot of the same altar, as they are intermingled in the eyes of God." For these reasons, Tocqueville adds, "If Catholicism disposes the faithful to obedience, it does not therefore prepare them for inequality. I shall say the contrary of Protestantism, which generally brings men much less to equality than to independence."⁹² The differences between the two attitudes illustrate the effects of what the sociologist Andrew Greeley calls "the Catholic imagination."⁹³

The rise of the notion of solidarity represents an effort to find substitutes for the integrated and compact social unity that the *Corpus Christi* procession once mirrored. The term suggests elements that its proponents found missing from the new order: a sense of unity and indivisibility, a recognition of individual interdependence and mutual obligation, a basis for co-operative relationships, an acknowledgement of duty of society toward its weakest members, the creation of conditions for the development of networks of small groups and associations through which individuals—and particularly the less strong—could gain concrete and significant opportunities for self-responsibility and self-determination. These things once formed the ingredients of the

92. Tocqueville, *supra* note 36, at 276.

93. See ANDREW GREELEY, *THE CATHOLIC IMAGINATION* (2000).

specifically political form of friendship that the ancients viewed as necessary to the maintenance of a flourishing polity. In the post-Enlightenment world, however, a coolly rational self-interest had supplanted the more optimistic idea of friendship as the basis for society. As Tocqueville commented, in this “world altogether new” the “instinctive love” that once bound people to their country and their fellow citizens, and that motivated “disinterested” and at times heroic efforts to secure their well-being “is fleeing away without return.”⁹⁴ A new word and a new sentiment had to be found to replace the old. For many, solidarity would come to be that substitute.

ii. Assessing the Catholic Contribution

Solidarity is a true *florilegium*, a collection of the ideas, experiences, reflections and insights of diverse individuals and groups across various places and times.⁹⁵ Prominent among those responsible for germinating, cultivating, and propagating the idea, however, has been a group of thinker-activists whose work makes-up an essential part of what now is known as the Catholic social thought tradition. From the start, those working in this tradition have played a leading role in working-out both the notion of solidarity and the practical means for its realization as they attempted to address the social question. As the political theorist, J.E.S. Hayward, notes, “it was amongst the Roman Catholic social theologians . . . that the idea of solidarity first achieved its pivotal social significance and underwent an evolution that prefigured its subsequent philosophic prominence and temporary political preeminence.” In Britain, Hayward continues, “Feudalism and Catholicism had been eliminated as major politico-social forces by the early nineteenth century.” In France (and in the Western and Southern regions of Germany), however,

Roman Catholicism remained an immensely powerful opponent of the individualist ideas that had swept all before them almost unopposed in Britain. It is therefore comprehensible that . . . the Church should have

94. Tocqueville, *supra* note 36, at 225-26

95. Remarking on the many meanings that the term solidarity has assumed, J.E.S. Hayward notes that

“[t]he ambitious attempt at fusion within a single concept—solidarity—of a plurality of distinct, often disparate and divergent ideas, led to confusion. It led to intellectual confusion: the imperfectly fused and imprecise elements subsumed under the denomination ‘solidarity’ meaning different things to different persons at the same time, and, frequently, different things to the same person at different times, owing to the changing emphasis on particular aspects of this principle, embarrassingly rich in its many facets The vacuum left by the retreat of religion was provisionally occupied by the laic dogma of ‘Solidarity’”

J.E.S. Hayward, *The Idea of Solidarity in French Social and Political Thought in the Nineteenth and Early Twentieth Centuries*, at vi-vii (1958) (unpublished Ph.D. dissertation, University of London) (on file with author).

initially become the rallying point for anti-individualism and that the appeal to solidarity should take the form of a campaign for a return to its politico-social constitution, even when its spiritual message had been rejected.⁹⁶

VI. SOLIDARITY AT WORK: THE SOCIAL THOUGHT TRADITION AND AMERICAN LABOR LAW

Writing in 1861, one of the most notable figures in the social tradition, Wilhelm Emmanuel von Ketteler, captured the disorientation and uncertainty that permeated the era, and the challenge to which the social tradition would seek to respond. “We are standing at the end of a time,” he observed, “in which all the old dwellings that our Catholic forebearers had furnished have been razed, and where we Catholics have not yet quite sorted out how we should take-up residence in the new order of things.”⁹⁷ Like many others, Ketteler would devote much of his life to puzzling out effective means to allow people to take up their home in a “world altogether new.”

What those active in the social thought tradition proposed as concrete solutions to the social question as it implicates economic arrangements, legal institutions and working-life took an astonishing variety of forms that evolved over time. From the beginning, however, proposals to afford workers status, participation in and responsibility for decisionmaking constituted a core part of their agendas. For example, as early as 1819, the romantic social critic, political economist and early Catholic social theorist, Adam Müller, called for the creation of a “reliable station in civil society” for the rising body of property-less workers then living on the shadowy periphery of what was still a class-based society, and affording them legal rights that would put them on a footing equal to that enjoyed by independent, middle-class citizens. Fifteen years later, Franz von Baader, another early contributor to the social-thought tradition, attempted to concretize some of Müller’s program by advocating the creation of a new legal framework that would have provided for the right of workers to be represented in the parliaments of the estates (*Ständeversammlungen*) and to participate in decisionmaking through self-elected representatives.⁹⁸

As the Century progressed, those active in the social thought movement proposed everything from romantic efforts to reconstruct

96. *Id.* at xl.

97. Wilhelm Emmanuel Freiherr von Ketteler, *Vorwort to FREIHEIT, AUTORITÄT UND KIRCHE in Ab.I, Bd.1, SÄMTLICHE WERKE UND BRIEFE: SCHRIFTEN, AUFSÄTZE UND REDEN 1848-1866*, at 227 (Erwin Iserloh, Christoph Stoll, Emil Valasek, Norbert Jäger, eds., 1977).

98. On these points and for further discussion, see Franz Josef Stegmann and Peter Langhorst, *Geschichte der sozialen Ideen in deutschen Katholizismus*, in WALTER EUCHNER ET AL., *GESCHICHTE DER SOZIALEN IDEEN IN DEUTSCHLAND: SOZIALISMUS—KATHOLISCHE SOZIALLEHRE—PROTESTANTISCHE SOZIALETHIK: EIN HANDBUCH 700 ff.* (Helga Grebing ed., 2000).

society by organizing workers of every description into occupational groups whose place in the social order would be determined not by the capital they owned, but the type and significance of the work they performed to society, to attempts to establish a network of producer co-operatives, profit sharing schemes, various sorts of worker representation schemes,⁹⁹ and a great deal else.¹⁰⁰ Because these experiments went forward over a number of decades, they changed in response to rapidly changing circumstances and to lessons taught through practical failures.

Regardless of their particular structure and details, however, all of the undertakings initiated by Catholic social activists shared three essential characteristics that have remained constant themes of the social tradition into the present day. Their proposals attempt in some way to ground individuals in a group, association or body of some sort. These structures provide individuals with defense in depth, since they buffer or mediate the relationship between their members and the large institutions of the market or the state. At the same time, through their involvement in them, each of these mediating structures also aims at enhancing the status of individuals by increasing their opportunities for effective self-determination, both within and without the workplace. Lastly, these mediating bodies tend to overlap or dovetail with each other, thereby building-up a new ecology of interwoven and interdependent social institutions that stand free of the state, and that put an emphasis on self-sufficiency.

As mentioned, one of the central figures in the formation of the social thought tradition and the development of the notion of solidarity is Wilhelm Emanuel Freiherr (“Baron”) von Ketteler (1811-1877). Trained as a lawyer, he resigned his position in the Prussian bureaucracy to protest the Prussian government’s policies concerning the church and its jailing of the Archbishop of Cologne, and studied for the priesthood. Consecrated as the Bishop of Mainz in 1850 when he was just 39 years old, Ketteler played a role in several of the significant events of his time. Among many other things in the course of a busy life, Ketteler was a delegate to the doomed Frankfurter Parliament of 1848 that proposed to give Prussia a constitutional monarchy and to guarantee basic civil liberties. Often at odds with the Prussian authorities, he was Bismarck’s great opponent during the “Kulturkampf” during which he was arrested twice. Along with the great British liberal, Lord Acton, Ketteler formed part of a minority group opposed to the declaration of papal

99. On the development of worker representation schemes, see FRANZ JOSEF STEGMANN, *DER SOZIALE KATHOLIZISMUS UND DIE MITBESTIMMUNG IN DEUTSCHLAND: VOM BEGINN DER INDUSTRIALISIERUNG BIS ZUM JAHRE 1933* (1978).

100. Some of these programmatic efforts calling for corporate representation of workers and employers anticipated the structures of that the great legal theorist, social democrat, and father of German labor law, Hugo Sinzheimer, would include in provisions in the Weimar Constitution.

infallibility by the short-lived First Vatican Council.¹⁰¹

Ketteler began his long engagement with issues surrounding the social question in a series of public lectures he held in 1848, the same year that Karl Marx and Friedrich Engels published *The Communist Manifesto*. Working within a moving viewpoint, Ketteler's positions evolved with time and experience. Deeply influenced by the then recently-rediscovered thought of Thomas Aquinas, Ketteler also drew from a wide variety of sources, including the renowned socialist, Ferdinand Lassalle, with whom Ketteler maintained for some time a correspondence, and Viktor Aimé Huber, one of the prominent early theorists of the Protestant social ethics movement.

Ketteler's support for self-organized worker associations, producer cooperatives and what now would be called employee stock-ownership programs, opening opportunities for worker participation in managerial decisionmaking, etc., not only set the stage for further developments in the social thought tradition's approach to work-life issues. It also reflects an ongoing and overarching concern with encouraging and sustaining mediating institutions of all descriptions, including families, social and political associations, economic self-help bodies, and other forms of sodalities. Ketteler's interest in promoting a wide-range of associational activity, enhancing opportunities for authentic self-determination and a keen appreciation of the impact of work on human character have remained central themes of the social thought tradition.

Despite the role of individuals like Ketteler, however, the social thought tradition never has been chiefly a clerically-driven or a narrowly sectarian undertaking. From the start, it has been a collaborative project which involved some of the leading figures interested in the social question. For example, Alexis de Tocqueville actively was engaged with Catholic social thought circles in Paris, while Max Weber carried out extensive research on the status of agricultural workers under the auspices of the Evangelical (Lutheran) Social Congress during the early 1890's.

While religiously committed or influenced figures and activists have played a leading role in developing the concept of solidarity and its associated ideas, solidarity itself is neither an expression of religious dogma nor a reflection of sectarian belief. It is a porous notion, whose insights draws from the experience of many and are available to all. Especially in the United States, however, the Catholic social tradition has acted as the prime transmitter of the notion and practices of solidarity. That tradition traveled with and

101. The Council was opened in December, 1869, interrupted by the outbreak of the Franco-Prussian war in 1870 and never resumed. Reflecting part of the basis of their opposition, Acton, Ketteler and others were referred to as the "Inopportunistes."

spoke first to the large body of Catholic immigrants who came in repeated waves to the United States during the Nineteenth Century from every part of the European Continent. They used it as a framework for the development of a thick web of social institutions that established their place in a new world and that assisted them in maintaining their identity in the face of an often suspicious, not infrequently hostile, and overwhelmingly Protestant American public.

The figure of Peter Dietz provides a good illustration of the ties between the social thought tradition, the Catholic immigrant community, and the American labor movement. Born of impoverished German immigrant parents in New York City in 1878, Dietz pursued part of his studies for the priesthood in Germany, where he went to familiarize himself with the work of Ketteler and his successors. After his return to the United States, Dietz gained strong ties to the labor movement and to its predominantly Irish Catholic leadership. Over time, he came to enjoy a remarkable influence in labor circles and with many in management as well. His friend, Samuel Gompers, once informed Dietz that he enjoyed “the unique distinction of having secured a reversal of decisions by the Executive Board of the AFL [American Federation of Labor].”¹⁰²

Through his work with the AFL and numerous other groups, Dietz played a major role in translating the first social encyclical, *Rerum novarum* (“On the Condition of Labor”),¹⁰³ into grass-roots action. He also was a precursor for the remarkable line of “labor priests,” who, like Dietz, sought to bring the social teachings into reality through their involvement in the labor movement. Their activities took a wide variety of forms, including an ambitious educational effort. For example, by the 1950’s, there were more than 100 “labor colleges” in the United States conducted by these priests and their lay colleagues. Courses in the social teachings, as well as in organizing, bargaining, labor law, economics, etc., were all part of the standard curriculum in these institutions. Through the decades, “labor priests” like Charles Rice (Pittsburgh), John Corridan (New York),¹⁰⁴ Clement Kern (Detroit), George Higgins (Washington, D.C.), and Edward Boyle (Boston), to name just a few, have played direct and significant roles in the labor movement and in educating the public generally about the Church’s social tradition.

The influence of the social thought tradition has not only occurred at a grass-roots level. It also made itself felt in the New Deal legislation of which the National Labor Relations Act was a

102. Mark Karson, *The Catholic Church and the Political Development of American Trade Unionism (1900-1918)*, 4 *INDUS. & LAB. REL. REV.* 527, 533 (1951).

103. See *supra* note 17.

104. The model for the Fr. Berry character in the movie, *ON THE WATERFRONT* (Columbia Pictures 1954).

part. For example, one commentator has described the “Bishops’ Program of Social Reconstruction,” promulgated in 1919 in the wake of the end of the First World War as “an ambitious statement that endorsed a minimum wage, subsidized housing, labor participation in industrial management, child labor laws, social insurance for the jobless, sick and old-aged, and other reforms—basically, the New Deal program, thirteen years before the New Deal.”¹⁰⁵

Priests active in social thought circles also played more direct roles in effectuating policies intended to further worker representation and civil rights within and without the workplace. For instance, a well-known labor arbitrator and social thought theorist, Fr. Francis J. Haas, among many other responsibilities, served as one of the original members of the State of Wisconsin’s Labor Relations Board and as a member of the first National Labor Relations Board. Additionally, President Roosevelt appointed him in 1943 the Chair of the Fair Employment Practices Commission and in 1947, President Truman named him to the President’s Committee on Civil Rights.

How much direct influence the social thought tradition had on Senator Robert Wagner, the author of the National Labor Relations Act, is not entirely known. Wagner did, however, carry on an extensive correspondence with Fr. Haas and with Fr. John A. Ryan, the architect of the 1919 Bishop’s statement and the foremost American social thought theorist of his time, often referred to as the “Right Reverend New Dealer.” It is also said that the 1931 social encyclical, “Quadragesimo anno,” provided Wagner with an intellectual framework for his legislative undertakings. We cannot know to what degree that is true. Nevertheless, among Wagner’s personal papers relating to the NLRA are two heavily annotated and underlined copies of the encyclical.

Certainly, the NLRA is the product of numerous sources, movements, experiences and historical accidents. Nevertheless, Fahlbeck is correct when he says that law is “somehow un-American.” In a real sense, that is true. It is also true, as Fahlbeck says, that those “who want and need concerted action” are “not like Americans at-large.”¹⁰⁷ Historically, a large proportion of them have not been, at least not in their attitudes toward community and in the way they understand the character of their ties and obligations to others. To this subgroup of Americans, solidarity is not an unfamiliar term. Instead, it describes the foundations for a rightly-ordered world.

If I am correct about its influence, some of the attitudes that

105. GEORGE G. HIGGINS WITH WILLIAM BOLE, *ORGANIZED LABOR AND THE CHURCH: REFLECTIONS OF A “LABOR PRIEST”* 27 (1993).

¹⁰⁷ Reinhold Fahlbeck *supra* note 13 at 326.

have informed the NLRA might also explain something about the difficulties the courts historically have had in interpreting and applying the statute's terms. At least in the case of the United States, I think the tension between the courts and labor is less a class-based clash than it is a head-on collision between the worlds of Thomas Hobbes and Thomas Aquinas. It is little wonder that the attitudes of labor often meet with so little comprehension in the minds of the judges. In many instances, rulings that appear regrettable or wholly inconsistent with the goals of the NLRA are less the product of bad faith or willfulness than a function of the encounter of incommensurable "faiths." Until the courts recognize the profound differences of the NLRA, they will continue to encounter enormous difficulties in construing and applying its terms.

VII. CONCLUSION

"To speak about solidarity," one German scholar recently noted, "for some time has appeared to be old fashioned, but it once again has become a cutting-edge topic."¹⁰⁸ As its central place in the draft European Constitution exemplifies, and as the growing attention paid to the topic by scholars in a variety of disciplines suggests, the question of solidarity is anything but outmoded.

The significance of the nation-state is waning, while the globalization of the economy has erased boundaries and pushed all of us into increasingly closer contact with one another. At the same time, mediating institutions and sodalities of every sort are weakening. Even social institutions like the family—which since ancient times grounded individuals and polities alike—fast are disappearing. Across the developed world, the numbers of people living alone, in single person "households," are at the highest levels ever recorded, while marriage and birth rates in the developed world are at the lowest levels ever seen, even in times of war or famine. More people across the world, especially including women, now participate in paid or "market" work than at any time in history. In addition to all this, the greatest migration of peoples the world has ever experienced, from East to West and South to North, is going forward. The social tradition and its understandings of solidarity can serve as important resources for addressing the challenges that these developments pose. In our own "world altogether new," solidarity is not just labor's question. It is more than ever our issue as well.

108. Franz Ruland, *Solidarität*, 48 NJW 3518 (2002).