

THE LABOR MOVEMENT NEEDS  
A TWENTY-FIRST CENTURY  
COMMITTEE FOR INDUSTRIAL ORGANIZATION

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I. INTRODUCTION

The American labor movement is in a moribund state. The percentage of private sector workers in unions has steadily declined from a high of 34.7 in 1954<sup>1</sup> to 7.9 today.<sup>2</sup> AFL-CIO leaders are exploring ways to reverse this ominous trend and reestablish the economic and political power of unions.<sup>3</sup> In an effort to enhance organizing capacity, the AFL-CIO will eliminate 167 traditional jobs and create sixty-one new positions that will pertain to organizing and member mobilization.<sup>4</sup>

AFL-CIO President John Sweeney plans to dedicate more efforts to grass roots organizing. Union leaders from the Service Employees International Union (SEIU), the United Food and Commercial Workers (UFCW), the clothing, restaurant, and hotel workers (UNITE-HERE), the Laborers International Union (Laborers), and the International Brotherhood of Teamsters (Teamsters) formed the Change to Win Coalition to generate inter-union cooperative organizing initiatives,<sup>5</sup> and this

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1. MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 (1987).

2. John Sullivan, *Union Membership Rate Dropped in 2004 to 12.5 Percent, Continuing 20-Year Decline*, BNA/DAILY LAB. REP. (Wash., D.C.), Jan. 28, 2005, at AA-1.

3. Michelle Amber, *Strong Divisions Persist Among Leaders as Three-Day Executive Council Meeting Ends*, BNA/DAILY LAB. REP. (Wash. D.C.), Mar. 4, 2005, at AA-1.

4. Michelle Amber, *167 AFL-CIO Positions to be Eliminated; 61 New Jobs to be Created in Restructuring*, BNA/DAILY LAB. REP. (Wash., D.C.), May 4, 2005, at A-11.

5. Michelle Amber, *Five Unions Form Coalition to Pressure AFL-CIO Leadership, Push for Change*, BNA/DAILY LAB. REP. (Wash., D.C.), June 16, 2005, at AA-1.

group of unions disaffiliated from the AFL-CIO.<sup>6</sup> Despite the rhetoric of these two groups, it is clear these labor officials plan to continue to use conventional organizing techniques to appeal to new-age white-collar and service sector employees. Although the use of greater resources and more organizers may enable trade unions to slow their decline – or even achieve some gains – it should be clear that these activities are unlikely to provide a real solution.

American labor leaders are focusing so much on their future organizing efforts that they are unable to appreciate the potential lessons they could learn from their past endeavors. In 1935, when the National Labor Relations Act (NLRA)<sup>7</sup> first provided private sector employees with the statutorily protected right to form and join labor organizations and to bargain collectively through union representatives of their own choosing, there were only 3,584,000 union members comprising 13.2 percent of nonagricultural workforce participants.<sup>8</sup> The vast majority of these workers were members of craft unions affiliated with the AFL. The traditional craft-oriented jurisdictions of most AFL unions did not fit the myriad of skilled, semi-skilled, and unskilled jobs associated with the mass production industries that were taking over the U.S. economy. AFL leaders initially sought ways to organize these manufacturing jobs and then divide the new union members among the existing craft unions.<sup>9</sup> When they realized that this method would not work efficiently, a group of rogue leaders decided to create industrial unions that were specifically designed to deal with these huge industries. The Unions then proceeded to organize the automobile workers, the steel workers, the rubber workers, the electrical manufacturing workers, and employees at other production firms.<sup>10</sup> By 1945, there were 14,322,000 union members, comprising 35.5 percent of nonagricultural workers.<sup>11</sup>

Contemporary AFL-CIO leaders face a situation quite similar to that confronted by AFL officials in 1935. As a result of the transformation of the economy from a primarily industrial base to a white-collar and service base, existing unions no longer reflect the hopes and aspirations of new-age workers. When entities like the Service Employees Union try to organize well-educated academic personnel, these workers are

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6. *Change to Win Constitution Commits Most Taxes to Organizing*, 178 LAB. REL. REP. (BNA) 4-5 (Oct. 3, 2005).

7. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169(2000)).

8. GOLDFIELD, *supra* note 1, at 10.

9. See PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 464-65 (1964).

10. *See id.* at 484-528.

11. *See* GOLDFIELD, *supra* note 1, at 10.

often concerned about being represented by an organization that represents janitors. When conventional industrial or service sector unions try to appeal to health care, financial, or high-tech employees, these individuals are afraid their professional status will be diluted if they join entities that represent blue-collar employees. To overcome the concerns of the twenty-first century worker, AFL-CIO leaders should take the time to revisit their roots and appreciate how successfully they adapted to prior economic trends. If they can replicate their efforts of the 1930s and 1940s, they could once again become significant economic forces.

## II. PREVIOUS LABOR MOVEMENT TRANSFORMATIONS

Trade unions existed in the United States as early as the eighteenth century. These entities were guilds comprised of skilled artisans who produced and sold their own products.<sup>12</sup> They worked to preserve professional standards by prescribing apprenticeship rules and exercising control over the work of masters. It was not until 1792 that a continuing organization of wage earners was created. The Philadelphia shoemakers formed a trade union that existed for less than a year.<sup>13</sup> Other craft unions subsequently formed. While many of these initial entities functioned as social orders, soon they began to work for higher wages, shorter hours, the enforcement of apprenticeship rules, and a closed shop precluding the employment of nonmembers.<sup>14</sup>

The first national trade organization was formed in 1834, with the creation of the National Trades Union (NTU).<sup>15</sup> The NTU constitution explicitly precluded political action, but it quickly became apparent that the organization's objectives could not be attained without direct political involvement. Members thus formed the Working Men's Party, the first political labor party of workers in the world.<sup>16</sup> This political group was not warmly received by existing political leaders who sought to divert the worker candidates into conventional party channels.<sup>17</sup> The party sought to maintain its separate worker identity, but never became a significant political force. It became defunct by 1931.<sup>18</sup>

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12. See TAFT, *supra* note 9, at 3-5.

13. *Id.* at 5.

14. See *id.* at 6-8.

15. *Id.* at 24-28.

16. See *id.* at 15.

17. See *id.* at 16.

18. *Id.*

In 1866, seventy-seven delegates from different craft organizations convened to form the National Labor Union (NLU).<sup>19</sup> This was a loosely connected federation of national trade unions, city trade assemblies, local trade unions, and different reform organizations. NLU leaders opposed work stoppages, which they considered adverse to the interests of working people.<sup>20</sup> They lobbied for eight-hour statutes, equal pay for equal work regardless of race or gender, and full employment rights for both women and blacks.<sup>21</sup> Despite these egalitarian principles, William Sylvis, one of the NLU founders, suggested that women did not belong in the labor force.<sup>22</sup> Sylvis did concede, however, that given the large increase of working women during the Civil War Era, wage standards for all women, even those working in traditionally male-dominated fields, needed to be equalized.<sup>23</sup> Even though NLU officials advanced a national agenda, most member organizations were primarily interested in local issues.<sup>24</sup> Following the death of Sylvis in 1869, the NLU began to decline, and it became defunct in 1872.<sup>25</sup>

In 1869, a group of Philadelphia tailors established the Noble Order of the Knights of Labor.<sup>26</sup> The leaders of this new organization recognized that the impotence previously exhibited by unions was substantially affected by the lack of worker unity.<sup>27</sup> They thought economic and political power would come from a consolidation of all labor groups in a single organization that included both skilled and unskilled workers.<sup>28</sup> They welcomed all workers to become members regardless of their race or gender.<sup>29</sup>

The Knights of Labor adopted broad goals. They sought to secure for workers "a proper share of the wealth that they create; more of the leisure that rightfully belongs to them; more societal [sic] advantages; more of the benefits, privileges and emoluments of the world. . . ."<sup>30</sup> The Knights called for the creation of producer and consumer cooperatives

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19. *Id.* at 60.

20. *See id.* at 61.

21. *See id.*

22. PHILIP. S. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT* 55 (1982).

23. *Id.*

24. TAFT, *supra* note 9, at 60.

25. *Id.* at 63-65.

26. *See id.* at 84-85.

27. *See id.* at 85.

28. *See id.*

29. *See id.* at 665.

30. The Knights of Labor: Preamble to the Knights of Labor Constitution (1878), <http://www.uwm.edu/Course/448-440/preamble.htm>.

that would advance worker interests.<sup>31</sup> Like the NLU, the Knights lobbied for eight-hour laws and laws mandating equal pay for equal work regardless of gender.<sup>32</sup> When the lobbying efforts did not prevail, the Knights resorted to more direct political action by running candidates in state races; Terence Powderly, one of the leaders of the Knights simultaneously served as mayor of Scranton, Pennsylvania.<sup>33</sup>

One of the greatest achievements for the Knights occurred when they negotiated employment terms for the employees of Jay Gould's Wabash Railroad.<sup>34</sup> However, by 1886 membership in the Knights had declined.<sup>35</sup> During a strike by employees of the McCormick Reaper Company, union leaders called for a rally in Haymarket Square in Chicago.<sup>36</sup> During the large demonstration, a bomb was tossed into the crowd causing the death of seven people, including several police officers.<sup>37</sup> Public officials blamed the Knights for this incident, and by the late 1880s, the organization had lost its vitality.<sup>38</sup>

By the late 1870s, American labor leaders began to appreciate the need for a large federation of trade unions. The Knights did not fulfill this objective, because of its expansive membership policy including skilled and unskilled workers.<sup>39</sup> In 1881, following a meeting of labor officials in Terre Haute, Indiana, the Federation of Organized Trade and Labor Unions emerged.<sup>40</sup> In 1886, the Federation held a conference of trade unions in Columbus, Ohio, hoping to encourage the formation of trade assemblies and to solidify the trade union movement.<sup>41</sup> Subsequently, the Federation transformed into the American Federation of Labor (AFL), with Samuel Gompers elected as the first AFL president.<sup>42</sup> Gompers led the AFL for thirty-eight years and ushered in what has become known in the U.S. as "business unionism."<sup>43</sup>

Unlike the Knights, the AFL refused membership to organizations that did not function primarily as trade unions, and it worked to preserve

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31. See TAFT, *supra* note 9, at 89.

32. KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY* 82 (1993).

33. TAFT, *supra* note 9, at 90.

34. *See id.* at 99-100.

35. *See id.* at 120-21.

36. *See id.* at 130-31.

37. *Id.* at 131.

38. VOSS, *supra* note 32, at 78.

39. See TAFT, *supra* note 9, at 107.

40. *Id.* at 93-94.

41. *Id.* at 113.

42. *Id.* at 115-16.

43. *See id.*

the craft exclusivity of each affiliate.<sup>44</sup> AFL leaders also refused to endorse the People's Party, which the Knights supported.<sup>45</sup> The AFL preferred to work with candidates from the Democratic and Republican parties and used traditional lobbying efforts to further their legislative objectives.<sup>46</sup> Although they were successful in procuring the enactment of various laws enhancing worker rights, conservative judges often struck down these statutes as inappropriate interferences with contractual freedom.<sup>47</sup>

By the end of the nineteenth century, AFL leaders began to realize that political efforts could not always generate lasting results. They decided that they could more effectively achieve worker advancements through the traditional collective bargaining process. Even though they continued to seek gains through the political process, they worked to negotiate contractual provisions that protected employee interests. As trade unions attained bargaining gains, employer opposition to labor grew.<sup>48</sup> By the early 1900s, most corporate employers were completely opposed to unionization.<sup>49</sup> Business organizations were concerned about the growing economic power of trade unions, and they encouraged their employer-members to thwart labor expansion.<sup>50</sup>

Despite strong business opposition, union membership increased from 447,000 in 1897 to over 2,000,000 by 1904.<sup>51</sup> At this point, the AFL business union philosophy was challenged from the opposite direction. In June 1905, a group of revolutionary activists convened a conference in Chicago, which culminated in the formation of the Industrial Workers of the World (IWW).<sup>52</sup> The opening line of the IWW preamble declared that "[t]he working class and the employing class have nothing in common."<sup>53</sup> IWW leaders decided to endorse both industrial and political action.<sup>54</sup> Although the organization abandoned the extreme anarchistic Socialists in its ranks, it did support Socialist Party candidates who ran for public office.

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44. *See id.* at 117-18.

45. *See id.* at 119.

46. *See id.* at 241-42.

47. *See id.* at 361-62.

48. *See id.* at 136.

49. *See id.* at 162.

50. *See id.*

51. *Id.*

52. *See id.* at 290.

53. *Id.*

54. *Id.*

During World War I, IWW supported strikes in the lumber and copper industries, incited severe public attacks from people who accused IWW leaders of sabotaging America's war efforts.<sup>55</sup> Many IWW members were prosecuted under newly enacted criminal syndicalist statutes. Such statutes made it illegal to advocate violence or sabotage as a means of industrial or political reform.<sup>56</sup> By the mid-1920's, the IWW had ceased to be a significant labor entity.<sup>57</sup>

Although the IWW had aggressively sought to organize female employees, most AFL affiliates were not supportive of women workers. From 1890 through 1910, the number of female labor force participants grew from four million to over eight million, but by 1910, only 73,000 women were trade union members.<sup>58</sup> As AFL leaders began to appreciate the threat posed by unorganized women to the negotiated wages of union men, they began to encourage affiliate unions to bring women into their ranks.<sup>59</sup> Despite these attempts, the AFL did nothing to discourage gender restrictions imposed by member unions.<sup>60</sup>

The dearth of female union members was not caused by women's lack of interest in labor organizations. Representatives from the clerks, garment workers, and meat cutters unions created the separate Women's Trade Union League (WTUL) at the 1903 AFL convention.<sup>61</sup> Over the next fifteen years, WTUL affiliates, comprised primarily of women workers, grew substantially.

AFL unions treated minority workers as badly as they treated female employees.<sup>62</sup> Despite efforts by Samuel Gompers to have affiliate craft unions eliminate constitutional provisions limiting membership to white males, many affiliates continued to exclude minority workers.<sup>63</sup> After World War I, thousands of southern black workers migrated to northern metropolitan areas.<sup>64</sup> Since they were not allowed to obtain skilled jobs with employers that had closed shop agreements with racially restrictive craft unions, many were induced to work as strike-

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55. *See id.* at 334-36.

56. *See id.* at 336-37.

57. *See id.* at 337.

58. DONNA VAN RAAPHORST, *UNION MAIDS NOT WANTED: ORGANIZING DOMESTIC WORKERS 1870-1940* 165 (1988).

59. *See FONER, supra* note 22, at 247.

60. *See ALICE KESSLER HARRIS, OUT TO WORK* 157 (1982).

61. FONER, *supra* note 22, at 128-29.

62. *See TAFT, supra* note 9, at 666-67.

63. *See id.* at 666.

64. *Id.* at 670-71.

breakers.<sup>65</sup> In subsequent years, many AFL unions eliminated their racially restrictive membership rules. For some, it was not until the enactment of the Civil Rights Act of 1964 that the remaining affiliates finally discarded this practice.

When Congress enacted the NLRA in 1935, there were 3,584,000 union members in the U.S., most of whom were members of AFL craft unions.<sup>66</sup> The passage of this critical statute coincided with an important structural change taking place within the American labor movement. This change was designed to enhance the capacity of unions to organize workers in the emerging mass production industries. Traditional craft unions were still limiting membership to highly skilled artisans, which made it difficult to organize the skilled, semiskilled, and unskilled individuals employed by manufacturing firms.<sup>67</sup> To overcome this structural deficiency, groups like the United Mine Workers, the Amalgamated Clothing Workers, the Pacific Coast Longshoremens, and the Teamsters began to unionize the heterogeneous people working in the coal, clothing, long-shore, and trucking industries.<sup>68</sup> Other labor leaders began to recognize that such comprehensive organizing efforts would have to be employed if unions were going to successfully organize the individuals employed in the automobile, electrical manufacturing, rubber, steel, chemical, glass, and other mass production industries.

AFL officials initially sought to shoehorn manufacturing employees into conventional craft unions. For each large industry, they established a federal labor union that would conduct a coordinated organizing campaign.<sup>69</sup> Once the workers had been induced to join the federal union, the skilled workers were assigned to the trade unions having jurisdiction over their respective crafts.

At the 1934 AFL convention, William Green and John L. Lewis proposed the creation of new industrial unions.<sup>70</sup> After acrimonious debate, this proposal was soundly defeated.<sup>71</sup> The industrial union issue was reintroduced at the 1935 convention. Although the Resolutions Committee rejected the propriety of separate industrial unions, a strongly worded minority report eloquently stated why new industrial organizations were needed.

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65. *See id.* at 671.

66. *See* GOLDFIELD, *supra* note 1 and accompanying text.

67. *See* TAFT, *supra* note 9, at 464-65.

68. *Id.*

69. *Id.*

70. *See id.* at 468-69.

71. *Id.* at 471. The proposal failed by a vote of 18,024 to 10,933.

The time has arrived when common sense demands [that] the organization policies of the American Federation of Labor must be molded to meet present-day needs. In the great mass-production industries and those in which the workers are composite mechanics, specialized and engaged upon classes of work which do not fully qualify them for craft union membership, industrial organization is the only solution. Continuous employment, economic security and the ability to protect the individual worker depends upon organization upon industrial lines.<sup>72</sup>

When Carpenters Union President William Hutcheson objected to the presentation by United Mine Workers President John L. Lewis in support of new industrial unions, fistfights resulted and the proposal was again rejected.<sup>73</sup> Following the 1935 convention, officers from the United Mine Workers, the International Typographical Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Textile Workers, the Oil Field, Gas Well, and Refining Workers, the United Hatters, Cap, and Millinery Workers, and the Mine, Mill, and Smelter Workers met in Washington, D.C., to create the Committee for Industrial Organization.<sup>74</sup>

The Committee for Industrial Organization created a series of specific organizing committees pertaining to the steel, textile, automobile, rubber, chemical, shipping, and electronics industries. AFL President Green contacted the leaders of the Committee for Industrial Organization and expressed his “feelings of apprehension over the grave consequences which might follow from the formation of [such an industrial union] organization within the American Federation of Labor.”<sup>75</sup> Although the leaders of the Committee for Industrial Organization indicated that they did not intend to infringe the jurisdictional coverage of existing AFL affiliates, they decided to continue their industrial organizing. When Green demanded that they dissolve the different industry organizing committees, they ignored his directive.<sup>76</sup>

At the 1937 AFL convention, trade union leaders expressed their concern that the Committee for Industrial Organization was already granting charters to industrial unions that would evolve from the specific industry organizing committees that had been established.<sup>77</sup> Convention delegates authorized the AFL Executive Committee to revoke the char-

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72. PHILIP TAFT, *THE A.F. OF L. FROM THE DEATH OF GOMPERS TO THE MERGER* 141 (1959).

73. *See* TAFT, *supra* note 9, at 471-72.

74. *Id.*

75. *See id.* at 472.

76. *See id.* at 472-79.

77. *See id.* at 480.

ters of any AFL affiliates that engaged in “dual unionism” by supporting these industrial union efforts.<sup>78</sup> In November of 1938, the unions participating in the Committee for Industrial Organization formally withdrew from the AFL and formed the Congress of Industrial Organizations (CIO).<sup>79</sup> During the following two decades, AFL craft unions and CIO industrial unions competed with one another to organize workers employed in the mass production industries.

Most of the industries organized by the CIO unions employed numerous minority and female workers. The CIO affiliates welcomed these individuals into their ranks and worked hard to advance their employment interests. The Women’s Trade Union League enthusiastically supported the organizing efforts of these industrial unions because they appreciated the desire of female employees to obtain union representation.

The competition between AFL craft unions and CIO industrial unions generated substantial representational achievements. Union membership expanded from under fifteen percent of nonagricultural workers in 1935 to over thirty-five percent by the mid-1950s.<sup>80</sup> By this time, corporate leaders had become concerned about the diminishing profits caused by the increased labor costs associated with unionization and the collective bargaining process.<sup>81</sup> As a result, an expanding number of unorganized firms redoubled their efforts to prevent the unionization of their employees.

Business leaders decided to resort to political activity to curtail the rights of labor organizations and their members. In 1947, they induced the conservative Eightieth Congress to enact the Labor Management Relations Act (LMRA)<sup>82</sup> amendments. These amendments created union unfair labor practices and specifically limited secondary activity by unions engaged in bargaining disputes. The LMRA amendments deprived unions of the ability to control the supply of labor. Under the original NLRA, representative labor organizations could negotiate closed shop union security agreements which required employers to hire only union

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78. *Id.*

79. *Id.* at 528-29.

80. PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 8-9 (1990).

81. See Craig A. Olson & Brian E. Becker, *The Effects of the NLRA on Stockholder Wealth in the 1930s*, 44 INDUS. & LAB. REL. REV. 116, 123 (1990) (stating that business experts estimated that the enactment of the NLRA and resulting unionization of millions of workers caused a 15.9 percent decline in shareholder wealth).

82. Pub. L. No. 80-101, 61 Stat. 136 (1947).

members.<sup>83</sup> Individuals denied union memberships were not eligible for employment. The LMRA changed this by providing that new employee “membership” in representative unions could not be mandated until after their thirtieth day of employment.<sup>84</sup> In addition, “membership” meant only “financial core” membership – employees had to tender the initiation fee and the monthly dues, but they did not have to become actual union members.<sup>85</sup>

Business groups induced Congress to further narrow worker and union rights in the 1959 Labor Management Reporting and Disclosure Act (LMRDA)<sup>86</sup> amendments to the NLRA. The LMRDA expanded the scope of proscribed secondary activity and outlawed many forms of organizational and recognitional picketing.<sup>87</sup> The amendments also regulated internal union affairs. It required annual financial reports, and imposed fiduciary obligations on labor officials.<sup>88</sup>

Despite the organizing achievements of CIO affiliates and the continued vitality of AFL unions, labor leaders did not like the overt competition between the AFL and CIO. Throughout the 1940s, AFL President Green and CIO President Murray explored ways to unite their respective unions. Unfortunately, they were unable to agree upon ways to resolve jurisdictional issues.<sup>89</sup> In November of 1952, both Green and Murray passed away; they were replaced by George Meaney and Walter Ruether, respectively.<sup>90</sup> Meaney and Ruether worked hard to form a single labor federation. In December 1955, the merger of AFL and CIO unions was finally achieved,<sup>91</sup> reuniting labor organizations with over fifteen million members. It was agreed that unions with overlapping craft jurisdictions would be encouraged to merge, and independent CIO industrial unions would be permitted to maintain their separate industry-specific identities.

Although the reunited AFL-CIO decided not to form a separate labor party, the labor movement did exert substantial political influence.<sup>92</sup>

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83. THEODORE J. ST. ANTOINE ET AL., *LABOR RELATIONS LAW: CASES AND MATERIALS* 112 (11th ed. 2005).

84. 29 U.S.C. § 158(a)(3) (2000).

85. *See* Union Starch & Ref. Co., 87 NLRB 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951).

86. Pub. L. No. 86-257, 73 Stat. 519 (1959).

87. 29 U.S.C. §§ 158(b)(4) & (b)(7) (2000).

88. 29 U.S.C. § 431 (2000).

89. *See* TAFT, *supra* note 9, at 647-52.

90. *Id.* at 652-55.

91. *Id.* at 660-61.

92. *Id.* at 609-17.

Political action committees contributed considerable financial support to individuals supportive of worker rights. AFL-CIO affiliates lobbied in favor of social legislation designed to protect employee rights. Some of the beneficial enactments that received labor support include the Equal Pay Act of 1963,<sup>93</sup> precluding compensation differentials between men and women performing equal work; Title VII of the Civil Rights Act of 1964,<sup>94</sup> prohibiting employment discrimination based upon race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967,<sup>95</sup> prohibiting employment discrimination against individuals forty and older; the Occupational Safety and Health Act of 1970,<sup>96</sup> protecting the employment environments of workers; the Employee Retirement Income Security Act of 1974,<sup>97</sup> safeguarding employee pension and welfare benefits; and the American's with Disabilities Act,<sup>98</sup> enhancing the employment rights of individuals with significant disabilities. Organized labor also lobbied for employee rights under worker and unemployment compensation statutes, and a myriad of other laws designed to further worker interests.

Business opposition to unions grew exponentially during the inflationary years of the 1970s, as cost-of-living adjustment clauses in bargaining agreements required employers to increase wage levels with rising consumer prices. Companies began to work diligently to reduce labor costs. Some transferred production to lower wage areas within the U.S., some relocated to other countries, while others demanded concession bargaining that forced unions to agree to wage and benefit reductions.

Labor organizations were not only being challenged by these developments, but also by significant demographic, technological, industrial, and international changes which hastened the loss of union employment opportunities.

From the mid-1950s through 1980, union membership increased from 17,000,000 to 22,000,000. However, the percentage of nonagricultural labor force participants actually declined from 35 to 23 because union growth did not keep pace with labor force growth.<sup>99</sup> During the 1980s and 1990s, the position of organized labor declined in both abso-

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93. Pub. L. No. 88-38, § 102, 77 Stat. 56-57 (1963).

94. Pub. L. No. 88-352, §§ 701-03, 78 Stat. 241, 253-58 (1964).

95. Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967).

96. Pub. L. No. 91-596, § 284 Stat. 1590 (1970).

97. Pub. L. No. 93-406, § 2, 88 Stat. 832, 833 (1974).

98. Pub. L. No. 101-336, 104 Stat. 327 (1990).

99. GOLDFIELD, *supra* note 1, at 10-11 tbls.1 & 2.

lute terms and as a percentage of the nonagricultural labor force. By 1990, there were only 16,740,000 trade union members in the U.S., comprising a mere 16.1 percent of labor force participants.<sup>100</sup> Today, there are only 15,470,000 union members, comprising 12.5 percent of labor force participants.<sup>101</sup> This figure masks the true decline in private sector membership, because it includes the 36.4 percent of government personnel who are union members. When only private sector workers are considered, the number of union members falls to an anemic 8,205,000 consisting of 7.9 percent of employed persons.<sup>102</sup>

Various factors have contributed to the decline in private union membership.<sup>103</sup> The changing composition and geographical distribution of labor force participants have eroded traditional union strength. Female labor force participation has increased dramatically over the past thirty years from approximately forty-five percent to almost sixty percent.<sup>104</sup> Despite the growth in female labor force participation, the vast majority of women continue to be employed in four lower-wage job categories: clerical, health and education, domestic service, and “peripheral industries,” including light manufacturing and retail trade.<sup>105</sup> These are areas in which unions have not yet achieved substantial organizational strength. They will have to do so if they hope to expand female membership.

The gender gap between the earnings of females and males has narrowed in recent years, with the median wages of women increasing from 63.1 percent of the median wages of men in 1973, to 81 percent by 2003.<sup>106</sup> Nevertheless women have a long way to go before they achieve compensation parity. Some labor organizations have worked to alleviate this differential through both legal actions and the collective bargaining process. To the extent unions demonstrate their commitment to the elimination of gender-based inequalities, they can more efficiently encourage female workers to consider the benefits of unionization.

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100. See *Union Membership Stays on Downward Trend, Falling to 16.1 Percent of Employment*, 26 BNA/DAILY LAB. REP. (Wash. D.C.), Feb. 7, 1991, at B-8.

101. See Sullivan, *supra* note 2, at AA-1.

102. *Id.* at E-4 tbl.3. The other 7,267,000 union members are federal, state, and local government employees.

103. See HOYT N. WHEELER, *THE FUTURE OF THE AMERICAN LABOR MOVEMENT* 12-13 (2002).

104. See LAWRENCE MISHEL, JARED BERNSTEIN & SILVIA ALLEGRETTO, *THE STATE OF WORKING AMERICA 2004/2005* 247 Fig.3r (2005); WHEELER, *supra* note 103, at 30-31.

105. See DIANE BALSER, *SISTERHOOD AND SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES* 21 (1987).

106. See *id.* at 165-66; see also FONER, *supra* note 22, at 474.

The labor force is becoming increasingly non-white. The percentage of Hispanic workers is expected to rise from 7.4 in 1988 to 12.7 by 2008.<sup>107</sup> Similarly, Asian and African-American participation is expected to increase.<sup>108</sup> Historically, these groups' unions have not found it easy to organize, in part because of past labor exclusionary practices – especially among traditional craft unions.

Another momentous labor force change concerns the impact of an aging post-war baby boom generation. While only twenty percent of Americans were fifty-five and older in the late 1980s,<sup>109</sup> by the year 2030, such individuals will constitute almost one third of the general American population.<sup>110</sup> U.S. residents sixty-five and older will comprise about fourteen percent of the population by 2010, and over twenty percent by 2030.<sup>111</sup> Many of these people will continue to work either by personal choice or economic necessity. Some will work full-time, while others will fill part-time positions. Older, part-time workers have not been historically inclined to seek union representation. As more of these workers view their employment situations as long-term, they may become more receptive to appropriate union appeals.

Although most workers have resisted technological advances, including those threatening their job security, such developments have contributed to the erosion of union strength. Business firms are constantly searching for ways to streamline the production process or their service capabilities. Both means serve to reduce labor costs and enhance product or service quality. We have witnessed extraordinary industrial developments over the past century. Perhaps the most remarkable aspect of these developments concerns the accelerating rate of change. Although it took 56 years (1820-76) to develop the telephone, 35 years (1867-1902) to generate the radio, and thirteen years (1923-36) to invent the television, it took only five years (1948-53) to create the transistor.<sup>112</sup> This voracious developmental process will undoubtedly continue, as unimagined technological advancements significantly transform future employment environments. Robotics play an integral part of most manufacturing facilities today. Most travelers no longer talk to airline personnel

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107. See WHEELER, *supra* note 103, at 30-31.

108. *Id.* at 31.

109. See STAFF OF S. COMM. ON AGING, 101ST CONG., REPORT ON AGING AMERICA: TRENDS AND PROJECTIONS 1 (1988).

110. See BNA, OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS, 15 (1987).

111. *Id.* at 15.

112. See GILES RADICE, THE INDUSTRIAL DEMOCRAT 34 (1978).

when they obtain boarding passes; they insert their credit cards, select their seats, and withdraw their passes. Grocery store shoppers are increasingly being checked out by automated scanners that add up the total due and take credit cards or cash payments. Most fast-food chains use automated devices to cook different items to minimize their dependency on human beings.

The continued substitution of capital-intensive technology for traditional blue-collar production workers will further erode the traditional membership base of industrial unions.<sup>113</sup> These developments have depleted the ranks of major unions like the Steelworkers, the Auto Workers, the Electrical Workers, and the Chemical Workers. As robots displace service sector and retail personnel, the Retail Clerks and the Service Employee unions will sustain significant employment losses.

As blue-collar manufacturing jobs have declined, we have witnessed significant growth in white-collar and service occupations.<sup>114</sup> Between 1900 and today, the white-collar sector of the labor force grew from one-fourth to three-fourths.<sup>115</sup> These white-collar personnel will most likely continue to identify more with management rather than with the workers, making it difficult for traditional unions to organize them.

During the twentieth century, many firms hired individuals to work on a relatively on-going basis. It was not unusual for people to work for the same company for many years. In recent years, the nature of employment relationships has been changing.<sup>116</sup> Many positions are short-term, and workers are expected to change jobs frequently. Firms increasingly rely on temporary employment agencies, like Manpower, Inc., to satisfy their flexible employment needs. These “permatemps”<sup>117</sup> do the work of previously long-term employees, but they have more tenuous relationships to their employing firms. They are not sure whether to identify with the regular employees of the borrowing firm or with the personnel for the temporary employment agency that directly pays their wages and benefits.

Globalization has also had a substantial impact on the employment opportunities and compensation levels of American workers.<sup>118</sup> Large corporations are no longer ethnocentric entities with ties to particular na-

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113. See WHEELER, *supra* note 103, at 33-38, 58.

114. See *id.* at 29.

115. See Ronald Kutscher & Valerie Personick, *Deindustrialization and the Shift to Services*, 109 MONTHLY LAB. REV. 4 (June 1986).

116. See generally KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 67-86 (2004).

117. See *id.* at 68-69.

118. See WHEELER, *supra* note 103, at 25-27.

tions. They are increasingly becoming geocentric, with operations in different countries around the world. They constantly search for lower-cost labor to maximize shareholder returns. When it is more efficient to have labor-intensive tasks performed by workers in low-wage emerging nations, they establish factories in those areas.<sup>119</sup> Huge retailers like Wal-Mart strongly encourage its major goods suppliers to open factories in China to enable it to keep product costs low.<sup>120</sup> It is extremely difficult to purchase electrical products today that have been manufactured entirely in the U.S. Almost all electrical items have had their parts produced in countries like China or Malaysia, even if the parts were finally assembled in America. Similarly it is difficult to find clothing or sporting goods produced within the U.S.

The number of personal services conducted abroad is astounding.<sup>121</sup> Many toll-free, help-line numbers are serviced by people in India or Ireland.<sup>122</sup> CAT-scans and X-rays are now being read electronically by individuals in India. I have been told that some international law firms use lawyers in India to carry out legal research. Accounting firms are similarly employing low-cost foreign accountants to perform professional services. Computer experts in Bangalore can develop computer software programs for companies at one-tenth the cost of American programmers.

American labor organizations are feeling significant pressure from international business firms. If these unions seek to protect the wages and benefits enjoyed by U.S. workers, they risk the transfer of their positions to low-cost countries around the world. If they succumb to corporate demands to reduce labor costs, it will generate employee dissatisfaction.

Corporate employers are increasingly opposed to unions. They regularly retain the services of labor relations consultants or aggressive law firms to oppose union organizing campaigns. Employers may post anti-union messages on firm bulletin boards, conduct "captive audience speeches," which employees may be required to attend. During these speeches they urge workers to reject unionization. The employers apply additional pressure by having supervisors talk to small groups of workers about the negative effects of organization.<sup>123</sup> Although employers

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119. See STONE, *supra* note 116, at 100.

120. See Nancy Cleeland, Evelyn Iritani & Tyler Marshall, *The Wal-Mart Effect*, L.A. TIMES, Nov. 24, 2003, at A-1.

121. See *id.*

122. See Jonathan Weisman, *Bush Reports Offers Positive Outlook on Jobs*, WASH. POST, Feb. 10, 2004, at E-1.

123. See *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

may not threaten workers about the possible adverse effects of unionization, they may make “predictions” regarding unionization’s economic consequences.<sup>124</sup> Thus, it is easy for employers to chill employee enthusiasm for organizing activities.

The American mindset may also cause many workers to hesitate joining labor organizations. The vast majority of Americans consider themselves to be “middle class.” Most believe that upward mobility is available to anyone willing to work hard and strive for success. Stories are told about individuals who developed special skills or obtained advanced education and moved up the socio-economic ladder. Following the tenets of this American dream, those unable to achieve economic success have only themselves to blame.<sup>125</sup>

Although Americans can accept the thought of being lower middle-class, they have an aversion to the possibility of becoming lower class.<sup>126</sup> The media and the business community have repeatedly portrayed union members as “working class,” with the implication that “working class” equates to “lower class.”<sup>127</sup> Many middle and upper-class Americans think of union members as bigoted and semiliterate. Similarly, television and newspaper reporters treat wrongdoing by labor and business leaders quite differently. When labor officials misappropriate thousands of dollars, they are charged with embezzlement and sent to prison for a number of years. Conversely, when corporate officials cheat shareholders and employees out of tens of millions of dollars, they are charged with white-collar offenses and sent to minimum-security facilities for an insignificant amount of time.

Class-based propaganda has been especially persuasive with respect to white-collar personnel. As the U.S. has transformed from a production economy into a white-collar service society, corporate leaders have subtly suggested to lower level management workers that they have more in common with their highly paid superiors than they do with their blue-collar compatriots.<sup>128</sup> Whenever labor unions begin to organize banking, insurance, health care, computer processing, and similar industries, the affected employers disseminate anti-union literature suggesting that per-

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124. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 577-78 (1969).

125. See MICHAEL MANN, *CONSCIOUSNESS AND ACTION AMONG THE WESTERN WORKING CLASS* 30-31 (1973).

126. See generally BARBARA EHRENREICH, *FEAR OF FALLING* (1990) (examining the insecurities of the middleclass over the last two decades)

127. See *id.* at 140-41.

128. See C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASS* 319 (1951); STANLEY ARONOWITZ, *FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS* 292-93 (1973).

sons employed in such white-collar occupations will lose their professional status if they succumb to unionization.

Business leaders often suggest that unions are antiquated institutions that no longer provide essential services. They believe that more humane employment policies and generous compensation packages make labor organizations obsolete. On the other hand, many contemporary employees are not satisfied with their working conditions. They increasingly realize how tenuous their continuing employment relationships are, and they feel that their respective employers have virtually no interest in their future careers.<sup>129</sup> These firms utilize their services only to the extent they cannot substitute permatemps, robots, or foreign workers to perform those employees tasks for less money.

A recent study by Professors Richard Freeman and Joel Rogers found that 87 percent of workers would still like some form of collective influence regarding firm decisions that affect their employment terms.<sup>130</sup> They realize that as individuals they possess no meaningful bargaining power vis-à-vis their corporate employers. They merely have the "exit voice" – *i.e.*, they can depart from their present employers if they are dissatisfied with their working conditions. Employees are starting to appreciate the need for a collective voice to influence their employment situations, because changing their employment positions is not an easy task. On the other hand, many of the people who would like representation would prefer to have less adversarial labor-management relationships.<sup>131</sup>

### III. CREATING NEW UNIONS TO ORGANIZE NON-UNION OCCUPATIONS

Some of the largest American industries that perform services primarily within the U.S. remain unorganized. These include health care, finance, insurance, hardware and software computer producers, retail stores, and fast food chains. Labor leaders realize that they must appeal to workers in these twenty-first century industries if unions are to remain viable institutions. However, the leaders do not agree upon the proper approach. AFL-CIO officials have suggested modest changes designed to enhance the organizing capabilities of current affiliates. Other labor leaders have proposed more dramatic changes.

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129. See STONE, *supra* note 116, at 68-72.

130. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 147 (1999).

131. See *id.* at 150-52.

AFL-CIO President John Sweeney recently recommended that half of the 61 cent per member per month tax that affiliate unions pay to the AFL-CIO for political and grassroots mobilization be earmarked for organizing activities.<sup>132</sup> He also proposed that up to \$15 million in rebates be provided to affiliate unions that devote thirty percent of their budget to organizing, have formally trained organizers, and create strategic plans to organize their core industries.<sup>133</sup> Although these plans were approved by the AFL-CIO Executive Committee at its March 2005 meetings in Las Vegas, the Committee defeated a proposal by Teamsters Union President James Hoffa. Hoffa's proposal called for a fifty percent rebate of the sixty-one cent per capita tax to unions that commit either ten percent of their budgets or \$2 million to organizing their core industries.<sup>134</sup>

Service Employees (SEIU) President Andrew Stern believes that union fragmentation has undermined labor movement strength. He has suggested that the current smaller AFL-CIO affiliate unions be consolidated into twenty or fewer larger entities.<sup>135</sup> He would designate up to three lead unions for each major industry that would compete with each other to organize targeted occupations. Special funds should also be set aside to target firms like Wal-Mart that have worked diligently to avoid unionization.

Union officials from the SEIU, UFCW, UNITE-HERE, the Laborers, and the Teamsters recently formed the Change to Win Coalition which they hope will stir more expansive changes.<sup>136</sup> They hope to further the suggestions of President Stern and to induce AFL-CIO leaders to devote a greater percentage of union funds to organizing efforts. They also believe the AFL-CIO created ULLICO, primarily an insurance provider, should be converted into a broad-based financial services firm that would assist all workers with their financial planning.<sup>137</sup>

Although the AFL-CIO leaders and the union officials who created the New Unity Partnership are endeavoring to reverse the declining fortunes that labor organizations have experienced over the past twenty-five years, their efforts are insufficient. This fact was recently acknowledged

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132. See Amber, *supra* note 3, at AA-1.

133. See *id.*

134. See *id.*

135. See *AFL-CIO Creates Web Site Section to Strengthen Labor Movement*, 176 LAB. REL. REP. (BNA) 103 (Jan. 10, 2005).

136. See Amber, *supra* note 5, at AA-1.

137. *Unions Offer Different Recommendations On Restructuring AFL-CIO Labor Movement*, BNA/DAILY LAB. REP. (Wash. D.C.), Jan. 24, 2005, at C-1.

by labor study professors Dorothy Sue Cobble of Rutgers University and Richard Hurd of Cornell University who spoke at a meeting of the Labor and Employment Relations Association in Philadelphia.<sup>138</sup> Professor Cobble noted that labor unions thrived when AFL craft unions and CIO industrial unions competed with one another to organize the workers in the mass production industries from 1935 through 1955.<sup>139</sup> While the expenditure of more money on organizing campaigns today would undoubtedly generate a few more union victories in Labor Board representation elections, this approach would be unlikely to produce the dramatic results unions must achieve if they hope to regain their once vaulted status.

The primary problem may be that union leaders are unwilling to think outside the box. They are trying to use twentieth century institutions to deal with twenty-first century problems. They hope to use existing old-age unions to appeal to new-age workers. Despite the excellent reputations of many existing unions and their historical organizing successes, they are not apt to generate enthusiasm among white-collar and professional personnel in contemporary occupations. AFL craft unions learned this lesson in the 1930s, when they tried to maintain strict homogeneous craft jurisdictions while trying to organize heterogeneous mass production occupations. It is time for AFL-CIO leaders to acknowledge that they are trying to do the same thing now with new-age workers.

When unions like the Teamsters or the SEIU organize highly educated academic personnel or health care professionals, they are met with extreme skepticism. How can organizations that represent truck drivers and janitors understand and advance the interests of professional workers? Individuals who join such trade unions may undermine their professional status – and risk being viewed as “working class.” Similar difficulties will arise if conventional craft or industrial unions seek to represent white-collar personnel in finance, insurance, or computer fields.

Existing AFL-CIO affiliates can succeed if they work within their existing jurisdictions. For example, the Retail Clerks and the SEIU should focus their efforts on retail clerks at grocery and department stores. A concerted plan to organize Wal-Mart and similar targets could succeed if sufficient funds and organizers were dedicated to this substan-

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138. *Restructuring Plans Not Likely to Revitalize Labor Movement*, 176 LAB. REL. REP. (BNA) 126-27 (Jan. 17, 2005).

139. *Id.* at 126.

tial task. In this regard, the recently articulated plans of John Sweeney, James Hoffa, and Andrew Stern could prove decisive. Coordinated efforts by all AFL-CIO affiliates to assist the union(s) chosen to target Wal-Mart employees should be used. Most Wal-Mart personnel are underpaid compared to their union counterparts at firms like Costco, and their fringe benefits are less generous. It takes months before regular Wal-Mart employees become eligible for health care coverage, and a year or two before part-time workers qualify. Employee premiums exceed \$1000 per year, creating a significant burden for individuals earning very modest incomes.<sup>140</sup> An all-out union movement undertaken on a region-by-region basis may lead to inroads and eventually, the organization of most of the 1.2 million persons employed by Wal-Mart.<sup>141</sup>

To reach the employees at firms like Wal-Mart, unions need to better utilize the Internet. Although employers may restrict employee e-mail use to firm-related business, almost none do so. If an employer allows workers to use e-mail for personal and non-business purposes during work-time, it may not limit employee electronic communications.<sup>142</sup> Unions must send e-mail messages to every employee of the targeted firms, and establish flashy homepages that workers can visit to learn about organizing efforts.<sup>143</sup> They should also encourage firm employees who support the union campaign to communicate with their fellow workers – during their non-work times – regarding their desire for union representation. These communication channels are inexpensive and effective. No longer do organizers have to make phone calls, send home mailings, and hold off-work meetings in order to find new members to unionize.

An entirely different approach, however, must be used with respect to new-age workers in academics, health care, finance, insurance, and computers industries. It is in these areas that union officials must learn from the previous efforts of the Committee for Industrial Organizing. New labor organizations must be created specifically designed to reflect

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140. Abigail Goldman & Nancy Cleeland, *The Wal-Mart Effect*, L.A. TIMES, Nov. 23, 2003, available at <http://www.latimes.com/business/la-fi-walmart23nov2303,1,1465953.story?ctrack=1&cset=true>

141. *Id.*

142. See United Serv. Auto. Ass'n., 340 NLRB No. 90, 173 LRRM 1331 (2003); Christine Neylon O'Brien, *The Impact of Employer E-mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573 (2002).

143. See Martin H. Malin & Henry H. Perritt, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000), for a discussion of access to employees in electronic workplaces; see generally ARTHUR B. SHOSTAK, CYBER UNION: EMPOWERING LABOR THROUGH COMPUTER TECHNOLOGY (Daniel J.B. Mitchell ed., 1999) (discussing the origin, components, and future of the CyberUnion).

the hopes and aspirations of persons employed in these industries. Specific entities must be established for each major group. In addition, to avoid the professional stigma associated with conventional trade “unions,”<sup>144</sup> these institutions should be characterized as professional associations.

When schoolteachers first contemplated collectivization to enhance their economic and professional interests during government cutbacks, they were initially attracted to the National Education Association a professional organization opened to all teachers and administrators.<sup>145</sup> Many teachers felt more comfortable using this association to further their representational interests as opposed to the American Federation of Teachers, the AFL-CIO affiliate. I can recall talking with NEA members who were highly offended when I referred to that entity as a “labor union.” They felt that joining a trade union was unprofessional and would undermine the teachers’ occupational status. Similar circumstances influenced nurses who were comfortable seeking collective action through the American Nurses Association, rather than through an organization with the word “union” in its name.

Early AFL leaders established the Committee for Industrial Organization in the mid-1930s after recognizing that AFL craft unions could not effectively reach workers in the mass production industries. Likewise, current AFL-CIO officials should establish a Committee for Professional Organizations that would create new affiliates with jurisdictions pertaining to new-age occupations. The Association of College Professionals could be used to organize the growing number of adjunct professors employed on a relatively long-term basis to teach courses previously taught by regular faculty members.<sup>146</sup> This entity could also seek to organize graduate teaching and research assistants. Although the Labor Board held in the *New York University* case<sup>147</sup> that graduate teaching assistants are “employees” covered by the NLRA,<sup>148</sup> in the more recent *Brown University* decision,<sup>149</sup> it held that the NLRA excluded some individuals because they are “students.” Even without a new Board decision, this association could work to represent such individuals at col-

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144. See FREEMAN & ROGERS, *supra* note 130, at 150-51.

145. See *id.* at 150.

146. See *id.* (stating that the National Education Association and Association of University Professors often defeat AFL-CIO affiliates in union representation elections because those entities are not viewed as unions).

147. 332 N.L.R.B. 1205 (2000).

148. See also *Boston Med. Ctr. Corp.*, 330 NLRB No. 30, 152 (1999) (holding that interns and residents at private hospitals constitute covered “employees”).

149. 342 N.L.R.B. No. 42, 175 LRRM 1089 (2004).

leges willing to recognize their right to organize on a voluntary basis. If a court of appeals or a new Labor Board majority were to return to the *New York University* approach, these individuals would enjoy full statutory rights. This association could also organize thousands of people teaching at community colleges and state universities covered by separate public sector labor relations laws. To be successful, this organization would have to be led by people who understand and reflect the hopes and aspirations of professional educators, and the organizers employed to reach these persons would have to be specifically trained to reflect the values of the teachers being targeted. To provide this group with a solid economic and administrative foundation, it should become a semi-independent branch of the American Federation of Teachers (AFT),<sup>150</sup> which represents thousands of public school teachers throughout the United States.

An Association of Health Care Professionals could be established to organize nurses, staff professionals, and even physicians employed by health maintenance organizations, public and private hospitals, and similar institutions. Supreme Court decisions have excluded all registered nurses and licensed practical nurses, who direct the work of orderlies as part of their regular duties.<sup>151</sup> However, the Labor Board has sought to distinguish between nurses who actually supervise the work of others and those whose positions necessitate the giving of routine directives to others whom they do not have the authority to hire or discipline.<sup>152</sup> As larger for-profit firms take over more health care institutions, the nurses and physicians may feel more like rank-and-file employees than traditional health care professionals. Patient care becomes secondary to cost-cutting considerations. Individual nurses and doctors affected by these changes may depart if they are no longer satisfied with their personal situations. As they begin to appreciate the need for a collective voice,

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150. WILLIAM B. GOULD, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 115 (1993).

151. *See* *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571 (1994) (holding nurses who direct work of less skilled aids or orderlies constitute “supervisors,” where Board’s test for determining supervisory status was inconsistent with federal statute); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 707 (2001) (registered nurses who use “ordinary professional or technical judgment” to direct the work of orderlies are still excluded as “supervisors” so long as these actions involve “independent judgment” in their activities).

152. *See generally* Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status—Fertile Delta or Bermuda Triangle?*, in *LABOR LAW STORIES* 353, 398 (Laura J. Cooper & Catherine L. Fisk eds., 2005) (discussing the ongoing battle between the NLRB and the judiciary in defining who constitutes a “supervisor”).

they may contemplate representation by an Association of Health Care Professionals.

The Association of Finance Professionals could be created to organize people working for commercial banks, mortgage companies, brokerage firms, and similar financial institutions. As these individuals are forced to work longer hours and are affected by competition from workers in low cost countries like India, they may become more receptive to unionization. The Association could tailor its appeals to their particular needs by emphasizing the need for employer-provided training courses designed to keep worker skills current with respect to the latest computer technologies. The Association could also address the need to limit the outsourcing of jobs to foreign workers and/or to provide for retraining and relocation opportunities for persons displaced by outsourcing decisions. Additionally, profit sharing compensation packages could also be considered to allow employees to share directly in the financial gains they help to generate.

The expansive insurance industry has not been especially receptive to union appeals. I think this is due in large part to the apprehension insurance employees have to being viewed as working class or blue-collar. If the AFL-CIO established the Association of Insurance Professionals and hired educated organizers who could reflect the professional values of insurance industry personnel, significant inroads could be achieved. The insurance business is highly competitive, and firms are constantly trying to devise ways to reduce labor costs and to increase worker productivity. Employees affected by these business practices should be susceptible to unionization – so long as they do not think they are actually joining a “union.” Association organizers should emphasize the need for on-going professional training to keep their skills up to date. Organizers should also look for ways to limit outsourcing to foreign workers and the use of permatemps to keep labor costs down.

During the early 1990s, Silicon Valley businesses flourished and many capable workers became wealthy. Almost none of these highly mobile hardware and software specialists contemplated collectivization. Once the high-tech bubble burst and many skilled professionals lost their jobs, many began to appreciate the minimal nature of their individual bargaining power. An Association of Computer Professionals could be formed to convince these high tech employees of the possible gains which could be made through concerted action. This Association could focus on professional training programs, and ways to minimize the adverse consequences associated with industry vicissitudes. It could also work to minimize the impact of foreign outsourcing.

The associations covering health care, financial, insurance, and technological professionals could be semi-autonomous outgrowths of the SEIU. This arrangement would provide these new entities with strong leadership, effective legal assistance, and a solid financial base. Their status as separate professional associations is critical, however, if they hope to appeal to new-age workers in these industries in ways that old-line unions could not.

Organizers working for these new professional associations would have to approach targeted employees carefully. They would have to emphasize that most American businesses have created professional associations to further their economic interests. Large groups such as the U.S. Chamber of Commerce<sup>153</sup> and the National Association of Manufacturers<sup>154</sup> represent expansive industries, while narrower entities represent the plastics, chemical, pharmaceutical, and similar industrial groups. For example, the American Bar Association furthers the interests of attorneys, while the American Medical Association serves a similar purpose for physicians. Workers are the only major group without collective representation. AFL-CIO leaders have to demonstrate to new-age employees how powerless they are when acting individually. Thus, the employees must either accept the terms unilaterally set by their employers or look for positions elsewhere.

Professional association organizers must realize that the shareholders who cooperate to form corporate firms certainly do not view collectivization as unprofessional or working class. These stockholders are quintessential capitalists who have combined their economic efforts to enhance their personal wealth and economic power. As Congress recognized in the original NLRA, individual employees lack the ability to counteract corporate power except through united efforts.<sup>155</sup>

Professional association leaders must also acknowledge that many new-age workers do not wish to join organizations that plan to foster adversarial relationships with their employers.<sup>156</sup> They would prefer more cooperative interactions. In a highly competitive global economy, employee representatives must cooperate with U.S. firms to create success-

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153. See BRUCE E. KAUFMAN, *THE GLOBAL EVOLUTION OF INDUSTRIAL RELATIONS: EVENTS, IDEAS AND THE IIRA* 134-35, 221 (2004).

154. See *id.*

155. See 29 U.S.C. § 151 (2000) (in which Congress noted “[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate or other forms of ownership . . .”).

156. FREEMAN & ROGERS, *supra* note 130, at 141-42.

ful businesses. They need not, however, do this at the employee's expense.

Over the past thirty years, shareholder wealth has grown steadily as the Dow-Jones average rose from under \$1000 to over \$10,000.<sup>157</sup> Corporate CEOs who used to earn 40 times what blue-collar workers earned now receive compensation packages almost five hundred times what typical employees receive.<sup>158</sup> Employee compensation has barely kept pace with inflation. Generous health coverage has been diluted or terminated. Pension plans have been replaced with less generously defined contribution plans, and in some cases nothing. Why have workers fared poorly? Simply put, these workers lack a collective voice.

The rights of individual employees have declined correspondingly to the decline in union density rates. If unions were to virtually disappear, workers would be completely powerless. As a consequence, corporate employers would be able to dictate their parsimonious terms of employment. Business organizations have greatly expanded their power during the same period through both commercial endeavors and political action. If AFL-CIO leaders could convince American workers of the need for a similar collective voice to advance their interests, they could make inroads not seen since the hay day of competition between AFL craft unions and CIO industrial unions. A Committee for Professional Organization should be created to establish new professional associations designed to appeal to new-age employees in specific industries. These new entities could revitalize the labor movement. Just as industrial unions had to be created to organize mass production industries in the mid-1930s, new professional associations must be created today to appeal to the millions of unorganized white-collar and professional employees in our post-industrial economy.

What else can be done by union organizers to appeal to twenty-first century workers? The time has come to cease focusing on issues that were relevant when most targeted employees were white males who were the principal family wage earners. Today, spouses and significant others also contribute to family economic viability. Almost half of labor force participants are women.<sup>159</sup> A growing percentage consists of minority group members.<sup>160</sup> Many current workers are over fifty or even sixty years of age. Studies indicate that both female and minority em-

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157. See Floyd Norris, *With Bull Market Under Siege, Some Worry About Its Legacy*, N.Y. TIMES, Mar. 18, 2001, at 1.

158. See Jennifer Reingold, *Executive Pay*, BUS. WK., Apr. 17, 2000, at 110.

159. BALSER, *supra* note 105, at 19.

160. MISHEL ET AL., *supra* note 104, at 247 fig.3R.

ployees are receptive to collectivization.<sup>161</sup> As an increasing number of older persons retain full or part time jobs following retirement, many of them will be concerned about their basic wages and the health care coverage available to supplement Medicare. The workers might then begin to appreciate the benefits unionization can provide. Union organizers need to appeal to these growing labor force participants. First, they should establish relationships with existing special interest organizations, like 9-to-5, the National Organization for Women (NOW), MALDEF, the NAACP, and AARP. Local community groups may also be good organizing partners. Labor leaders have to convince these entities that they plan to advance the particular interests of these members.<sup>162</sup> The unions should use their existing affiliations with organizations such as the Coalition of Black Trade Unionists, the Labor Council on Latin American Advancement, the Coalition of Labor Union Women, the Asian Pacific American Labor Alliance, and Pride at Work to advance their efforts to reach out to diverse groups.<sup>163</sup>

Women workers are more concerned about family obligations than many of their male cohorts. Far more single-parent families are headed by females than males.<sup>164</sup> Correspondingly, unions need to discuss family leave policies, the availability of day care for young children, and job sharing for parents who wish to work less than full-time in order to spend more time with their children. Organizers must also emphasize efforts to further female advancement within business firms where managers are predominantly male. Another significant issue is balancing compensation equity, because many women earn less than comparable male colleagues.

Minority employees are similarly concerned about equal employment opportunities. Too many are in lower positions. Unions could work to obtain necessary job training to qualify people for advanced positions, and promote equal employment opportunity policies that will insure fair treatment. Even though federal civil rights laws do not currently prohibit

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161. See James L. Medoff, *Study for AFL-CIO on Public's Image of Unions*, 247 BNA/DAILY LAB. REP. (Wash. D.C.), Dec. 24, 1984, at D-2.

162. In 2001, the AFL-CIO established the Alliance for Retired Americans which is designed to address issues of interest to retirees. See WHEELER, *supra* note 103, at 63. "A similar Alliance of Older Workers" could be created to work with the AARP to focus on topics of interest to senior labor force participants.

163. See Calvin William Sharpe, Marion G. Crain & Reuel E. Schiller, *The Story of Emporium Capwell: Civil Rights, Collective Action, and the Constraints of Union Power*, in LABOR LAW STORIES 241, 277 (Laura J. Cooper & Catherine L. Fisk, eds., 2005).

164. See Divorce Magazine.com, <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Dec. 1, 2005).

discrimination based upon sexual orientation, unions should also work to prohibit such pernicious discriminatory treatment.

The average age of labor force participants continues to rise. This is primarily due to the impact of the post-war baby boom generation and Social Security benefits failure to keep pace with inflation. Seniors who once considered their post-retirement positions of secondary importance will begin to rely upon the income from these jobs to supplement their retirement payments. As the elder employees begin to view these positions as long term, many may contemplate unionization. Union organizers should talk about Medigap medical insurance to supplement decreasing Medicare coverage, long-term nursing home insurance, policies precluding discrimination against older workers, and similar issues of interest to elder employees.

The majority rule concept incorporated in the NLRA continues to make it especially difficult for unions to organize U.S. workers and to engage in interest group organizing. Under Section 9(a),<sup>165</sup> labor organizations selected by a majority of the employees within an appropriate bargaining unit become the exclusive bargaining agents for all of the individuals within that unit. What if a union is unable to attain majority status? The common wisdom would suggest that the labor organization would have to give up. In a recent book, Professor Charles Morris<sup>166</sup> challenged this view. He examined the practices which existed just before and after the enactment of the NLRA in 1935 and noted that members-only bargaining was common during that period.<sup>167</sup> Many companies negotiated with labor organizations about the wages and benefits received by actual union members. He then carefully explores the legislative history and language of the NLRA and argues that Congress intended to oblige employers to bargain in good faith with labor organizations that do not have majority support on a members-only basis.<sup>168</sup>

Union lawyers should explore Professor Morris' interpretation of the relevant NLRA provisions and look for ways to test his theories before the Labor Board and the courts. If they could generate judicial recognition of this critical legal theory, it would allow unions to gain footholds on a members-only basis in many establishments in which they could not obtain majority status. If these labor organizations successfully

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165. 29 U.S.C. § 159(a) (2000).

166. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK* xii (2005) ("Morris meets head on the notion that a minority union has no legal bargaining rights and can negotiate on behalf of its members only at the sufferance of the employer.").

167. *Id.* at 55.

168. *Id.* at 56-80.

advanced the employment interests of their members, other employees would undoubtedly consider union membership. Once a majority of bargaining unit members supported the union's bargaining efforts, exclusive bargaining relationships could be created. If courts were to reject Professor Morris' statutory interpretation of current NLRA provisions, AFL-CIO leaders should lobby Congress for statutory changes that would formally recognize this members-only bargaining right. Although business firms would undoubtedly oppose such legislative changes, if union officials could convince the vast majority of labor force participants to support their lobbying efforts, even moderate representatives might listen and be induced to vote for these NLRA modifications.

A members-only bargaining right would also further promote group organizing. Where an employer has recognized a majority-designated union as the exclusive representative, a group purporting to speak for only a minority of employees would have no statutory rights. If the firm were to deal with such a minority entity, it would impermissibly derogate from the exclusive bargaining status of the majority union.<sup>169</sup> On the other hand, where no majority representative has been selected, under Professor Morris' thesis, AFL-CIO affiliates could join with MALDEF, NAACP, 9-to-5, NOW, AARP, and similar entities to demand bargaining rights on a members-only basis.<sup>170</sup> Such joint ventures might focus exclusively on the rights of African-American, Hispanic, Asian, elder, homosexual, or female workers.

Several similar identity-based labor organizations could simultaneously seek to negotiate on behalf of their respective members without contravening NLRA exclusivity principles. Although this could force a single employer to negotiate with several separate entities, such circumstances are not unprecedented. Many business firms presently negotiate with different craft unions over the working conditions of electricians,

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169. See *Emporium Capwell Co. v. W. Addition Cmty. Organ.*, 420 U.S. 50 (1975). See Norman L. Cantor, *Dissident Worker Action After THE EMPORIUM*, 29 RUTGERS L. REV. 35, 51-52 (1975); Charles B. Craver, *Minority Action Versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L.J. 1 (1974) (providing a critical evaluation of the *Emporium* decision while suggesting an approach which combines the policies of both the NLRA and Title VII); Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979).

170. See Ruben J. Garcia, *New Voices at Work: Race and Gender Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 124 (2002); Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front*, 84 CORNELL L. REV. 1542 (1999) ("If labor abandoned the united front ideology, non-labor groups with an interest in supporting workers could engage and represent workers, either separately or in cooperation with an established labor union.").

plumbers, tool and die makers, and similar craft groups within their overall maintenance unit.<sup>171</sup>

If different identity-based groups representing different workers in a single firm ultimately aggregated their support into a single organizational unit they could demand exclusive bargaining rights for all of the individuals employed in that unit. This result might make it easier for the employer, since it would only have to deal with one union, instead of three or four members-only organizations. This would also give the unified labor organization greater bargaining power, because it could threaten a work stoppage by all unit employees.<sup>172</sup> On the other hand, the different identity-based groups involved might not like their ethnic or gender identities submerged into a more expansive organization that might not be as sensitive to the special interests of each unique group of workers.<sup>173</sup>

#### IV. CONCLUSION

During the 1800s and early 1900s, most labor organizations were AFL unions with memberships limited to skilled craft workers. When the NLRA was enacted in 1935, AFL leaders sought to organize the mass production industries through federal labor unions that would then distribute the new members among the different craft affiliates. This was to be accomplished through the Committee for Industrial Organization. When innovative leaders suggested the establishment of industrial unions, their efforts were rebuffed. They then broke away from the AFL and formed the Congress of Industrial Organizations with unions designed to organize the steel, auto, rubber, and electrical manufacturing industries. The percentage of workers in unions grew rapidly from 13.2 percent of labor force participants to 35 percent in 1955 when the AFL and CIO unions reunited in the AFL-CIO. Thereafter, the union density rate began to decline. By 1980, 23 percent of labor force members were union members, and today only 12.5 percent are in such organizations. A mere 7.9 percent of private sector workers are union members.

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171. Each craft group would technically constitute a separate unit for bargaining purposes, but the overall situation within the maintenance department would be similar to what would occur if identity-based organizations bargained on a members-only basis for particular groups of employees within the same overall department.

172. Crain & Matheny, *supra* note 170, at 1620-25.

173. Such a unified organization might endeavor to protect the special interests of each identity-based group by requiring the approval of negotiated agreements by a majority of the members of *each* identity-based group as part of the ratification process.

During the past fifty years, union membership has been significantly affected by the transformation of the American economy from a mass production society to a white-collar and service economy. Automation caused the loss of many production and service jobs. Additionally, the use of permatemps and outsourcing have combined to displace more employees. AFL-CIO leaders are endeavoring to develop new ways to organize new-age workers. They plan to spend more money on organizing and to devise new organizing strategies. Unfortunately, they are simply redoing what AFL officials tried to do in the mid-1930s.

The AFL-CIO needs to learn from its past successes. Instead of the old Committee for Industrial Organization, it needs to create a Committee for Professional Organization that will appeal to new-age workers in academics, health care, finance, insurance, and computers. Furthermore, in order to avoid the negative connotation most educated employees have about unions, the new entities should be called associations. The unions must also avoid anything that would undermine the professional image these workers have of themselves. Different entities must be created to cover new jurisdictions. The Association of University Professionals, the Association of Health Care Professionals, the Association of Finance Professionals, the Association of Insurance Professionals, and the Association of Computer Professionals should be established to appeal to the educated individuals employed in their respective sectors. These organizations would have to reflect the aspirations of these employees, as well as seek to advance their professional goals.

Old and new unions should also seek to advance their interests by working with identity-based groups like MALDEF, NAACP, 9-to-5, and AARP to appeal to minority, female, elder, and homosexual employees. They might initially seek to accomplish their objective on a members-only basis, supporting the theory of Professor Morris that the current NLRA actually obliges employers to deal with unions that wish to represent employees on a members-only basis. When such entities perform well and gain support among a majority of workers within specific units, they could seek exclusive bargaining rights that would cover everyone within those units.

Unions are facing a life-or-death situation. If they continue to decline as they have over the past fifty years, they will soon become irrelevant, with no real economic power outside limited industries. On the other hand, if they can use a Committee for Professional Organization to create twenty-first century unions that will appeal to new-age white-collar and professional employees, they can once again become formidable entities advancing the rights of millions of workers who have suf-

ferred economically or emotionally over the past few decades. To accomplish this result, AFL-CIO leaders must remember the lessons of the past. Leaders must create new organizations similar to those established in the mid-1930s to deal with the challenging circumstances they faced then as a result of changes in the American economic system.