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THE RELEVANCE OF THE NLRA AND LABOR ORGANIZATIONS IN THE POST-INDUSTRIAL, GLOBAL ECONOMY

By Charles B. Craver*

I. INTRODUCTION

When the National Labor Relations Act (NLRA)¹ was enacted in 1935, 13.2 percent of nonagricultural labor force participants were members of labor organizations.² The United States had been transformed from an agrarian to an industrial economy, as large manufacturing firms had been established to produce automobiles, steel, electrical equipment, and similar commodities. During the mid-1930s, the leadership of the American Federation of Labor (AFL) created the Committee for Industrial Organization that was intended to develop ways to organize these new manufacturing companies and divide the new members among existing AFL craft unions.³ When it became apparent that the skilled, semiskilled, and unskilled workers employed by large production companies could not be easily assigned to traditional craft unions, the Committee for Industrial Organization leaders formed the Congress of Industrial Organizations (CIO) and created new industrial unions including the United Automobile Workers Union, the United Steelworkers Union, the International Electrical Workers Union, and the United Rubber Workers Union.

From 1935 through the mid-1950s, union membership experienced the most rapid expansion in U.S. history, as the union density rate increased from 13.2 percent to 34.7 percent.⁴ Competition between AFL and CIO unions – and the unparalleled success of the newly created industrial unions – generated significant membership growth. As labor organizations enhanced their economic power, Congress amended the NLRA in 1947⁵ and in 1959⁶ to prohibit union unfair labor practices and to limit secondary activity by organized labor.

In the mid-1950s, the AFL and the CIO united into a single labor federation, and AFL-CIO unions agreed not to compete with one another to represent the same workers. Although union membership continued to grow, it did not expand as rapidly as the nonagricultural labor force. As a result, by 1970, the union density rate had fallen to 27.3 percent.⁷ Throughout the late 1970s, the U.S. experienced high inflation, fueled by the formation of OPEC and rapidly rising oil prices. Cost-of-living adjustment clauses contained in many collective bargaining agreements caused labor costs in unionized manufacturing industries to increase substantially compared to costs associated with unorganized workers not covered by such contractual provisions. As businesses sought to reduce labor costs, northern manufacturing jobs were moved to sunbelt states. Labor-intensive work was often relocated to Maquiladoro plants in Northern Mexico.⁸ Electrical manufacturing and clothing production was relocated to low wage Asian countries. Businesses that continued to produce goods in the U.S. demanded wage and benefit reductions from labor unions that would enable them to compete with facilities operated in lower wage areas of the world.

The American economy was being transformed from manufacturing to white-collar, service, and retail. By 1990, only 16.1 percent of nonagricultural labor force participants were union members.⁹ These new businesses were highly competitive, and they worked hard to discourage their employees from joining labor organizations. Private sector union membership began to decline substantially. By the end of 2005, only 7.8 percent of private sector, nonagricultural workers were members of labor organizations.¹⁰ If this trend continues, private sector labor unions will become almost entirely irrelevant in coming years.

Over the past ten to fifteen years, the American economy has changed radically. It has

been transformed not only from an industrial to a white-collar, service, and retail economy, but also from long-term, stable employment relations to shorter-term employment arrangements.¹¹ Companies do not hesitate to lay off large numbers of workers as necessary, and many firms use independent contractors and ‘permatemps’ retained from external employment agencies. Millions of manufacturing and service jobs have been outsourced to low-wage workers in countries like China, Malaysia, and India.

As union density has declined, employee job security and economic benefits have suffered. Few contemporary workers expect to be employed by the same firms throughout their adult lives. Over the past forty years, CEO compensation has risen dramatically¹² and the Dow-Jones average has gone from under \$1000 to over \$10,000.¹³ During this same period, the real wages and benefits of regular workers have been stagnant. Without a collective voice provided by union representatives – or at least the real threat of unionization – employees have not been able to share in the economic growth U.S. businesses have seen over the past fifteen years.¹⁴

A recent study by Professors Richard Freeman and Joel Rogers found that 87 percent of workers would like some form of collective influence regarding firm decisions that affect their employment conditions; almost half would like traditional union representation, but they fear employer reprisals if they openly support unionization.¹⁵ Many employers now recognize the minimal remedies available under the NLRA for unfair labor practices. If they illegally discharge union supporters, they only have to provide back pay and reinstatement – and these remedies often take effect several years after the union organizing campaigns in question. Threats of adverse consequences if workers select union representation do not result in any monetary remedies. The offending employers will merely be directed not to engage in similar behavior in

the future.

The NLRA has failed to keep up with economic developments over the past fifty years. The statute was designed primarily for large manufacturing firms that would have to accept the inevitability of unionization. It does not work effectively with respect to service and retail firms that are strongly opposed to union organizing and will work diligently to discourage collective efforts by their employees. The labor movement has similarly failed to adapt to contemporary employers and new-age workers. Many unions continue to use blue-collar organizing techniques to appeal to twenty-first century white-collar and service personnel who think of traditional unions as “working class” and unprofessional.

This article will explore changes that must be made in the NLRA if it is to be a meaningful force in the coming years. How should the law be applied to new-age workers? What economic weapons should be available to representative unions, and what unfair labor practice remedies should be provided to deter and correct improper behavior? We will also examine the moribund state of the American labor movement and discuss ways union leaders must adapt to changing circumstances. The recent formation of the Change-to-Win coalition is a step in the right direction, as leaders from unions like the SEIU, the UFCW, the Teamsters, the Laborers, and UNITE-HERE work to enhance their organizational strength.¹⁶

Labor and employment issues can no longer be considered on a national basis. Globalization has forced both American employers and workers to appreciate the fact they must structure their relationships in an environment in which they will be directly affected by employment policies in other nations. Large firms are no longer ethnocentric with loyalties to home nations; they are profit-maximizing geocentric entities with loyalties to shareholders but

not to particular countries or the employees at existing locations. Workers are disposable commodities who can be replaced by individuals in other areas of the world when it makes economic sense to make such changes.¹⁷ As business firms become more international, labor organizations may have to coordinate their efforts with unions in other parts of the world.

II. THE IRRELEVANCY OF THE NLRA IN THE TWENTY-FIRST CENTURY WORLD

Following its enactment in 1935, the NLRA had a significant impact upon American workers as the newly-formed industrial unions organized most of the mass production companies. By the mid-1950s, almost 35 percent of private sector employees were able to use the collective voice to influence their wages, hours, and employment conditions. Millions of unorganized workers were the indirect beneficiaries of unionized firms, as their employers maintained sufficiently competitive terms of employment to discourage unionization by their own personnel.¹⁸

The NLRA was a model statute for individuals who worked for large manufacturers. Industrial unions could represent expansive bargaining units that included production, maintenance, and even white-collar and clerical workers. Specialized craft unions could carve out separate units for skilled mechanics, plumbers, tool and die makers, and similar groups. In some competitive industries like trucking, multi-employer bargaining units were formed that allowed representative unions to negotiate uniform employment terms covering the vast majority of employers within the same industry.

By the late 1980s and early 1990s, the American economy began to change significantly. Well paid manufacturing workers began to lose their jobs to cost-saving technological developments and to outsourcing to low-cost foreign countries. Since the NLRA only regulates

domestic businesses, unions could not regulate the employment conditions of even U.S.-owned facilities in other areas of the world, and unions could not use that statute to try to organize the employees of foreign-owned firms in countries like China and India.

The decline in traditional manufacturing jobs was offset by the expansion of white-collar, service, and retail jobs. Many of the expanding corporations operated smaller facilities in many different locations. Unions could no longer organize thousands of individuals employed at huge manufacturing plants. They had to spend more time and money trying to reach workers at separate locations. Due to the highly competitive nature of these new-age businesses, these employers worked diligently to discourage worker unionization, fearing that increased labor costs would make it difficult for them to succeed.¹⁹

Employer opposition to unions has reached levels not seen since the early period of the NLRA. Although firms may lawfully “predict” the likely consequences of unionization if these statements are based on objective fact and reflect the probable consequences of collectivization,²⁰ companies may not make unsubstantiated threats of plant closures or job relocations. Nonetheless, there is little legal incentive to avoid such coercive behavior, due to the absence of any monetary consequences. The sole NLRA remedy consists of cease and desist orders directing the offending firms not to repeat their improper actions in the future.

It is not uncommon for anti-union employers to resort to more drastic conduct. Approximately one out of every twenty to thirty individuals who vote in favor of union representation in NLRB elections is illegally discharged during the organizing campaigns.²¹ These are usually visible union supporters, and their terminations significantly thwart labor drives. It generally takes a year or two before final Labor Board or court decisions direct their

reinstatement with back pay. By then, the unions have usually lost their campaigns, and the unlawfully terminated workers have found alternative employment. They thus decline their reinstatement offers. The minimal back pay cost to the offending employers is slight compared to the increased labor costs that would likely result from unionization.

Even when unions are able to overcome employer opposition and prevail in Labor Board certification elections, this does not guarantee them successful negotiations. Although the NLRA requires parties to bargain in good faith, the statute expressly states that this obligation does not require either party to agree to a particular term or to make a concession.²² As a result, it is often possible for newly-organized employers to avoid even initial bargaining agreements. Some firms thwart the bargaining process by engaging in disingenuous and unlawful surface bargaining where they have no intention of achieving collective contracts. The cost of such illegal conduct is minimal. There is no monetary remedy, but only an order directing future bargaining. The only cost to these companies concerns their legal fees.

Another problem associated with the antiquated NLRA concerns statutorily and judicially defined exclusions from the Act's coverage. Supervisors are expressly excluded to avoid the problem of dual loyalties by such persons to their employers and to representative unions. While this exemption makes sense with respect to real supervisors who possess the authority to hire, discipline, and meaningfully direct the work of others, the Supreme Court has expanded this category to include other persons who do not possess the managerial authority generally associated with supervisory status. Professional people, like licensed practical nurses and registered nurses, who in the ordinary course of their regular duties must give relatively rote directives to their assistants are precluded from organizing by Court decisions finding them

“supervisors.”²³

Similar exclusions are judicially provided for “managerial” personnel who formulate and effectuate management policies.²⁴ This exclusion also makes sense for persons who really determine company personnel policies, but it has been expanded beyond anything reasonably related to bona fide corporate needs. For example, in *NLRB v. Yeshiva University*,²⁵ the Supreme Court held that faculty members at mature colleges and universities are excluded “managerials” because of the fact they influence admission and graduation requirements and determine course contents. Even though they exercise no control over their wages and benefits and only minimal control over their working conditions, the Court seemed to think it would be unseemly for such well-educated people to resort to unionization.

An additional barrier to worker representation in the U.S. concerns the exclusivity doctrine codified in Section 9(a) of the NLRA.²⁶ Under this provision, the labor organization selected by a majority of the employees within a particular bargaining unit becomes the exclusive representative for all of the individuals within that unit. On the other hand, if a union is only able to generate support among 40 to 45 percent of the people in a unit, it may not be granted exclusive bargaining rights.²⁷ Although the union could seek to function on a members-only basis, representing only the individuals who have specifically authorized it to negotiate in their behalf, the Labor Board has not required employers to bargain with such minority unions.

If several modifications – most relatively minor – were made in the NLRA, it would become a more relevant and effective statute. Some of these could be accomplished through Labor Board or court decisions, while others would require legislative action. The NLRB should follow the high standard articulated by the Supreme Court with respect to the propriety of

employer “predictions” regarding the likely consequences of unionization. Such statements had to satisfy three critical requirements: “[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. . .”²⁸ Statements of possible plant closures or job losses that might result from unionization should be generally prohibited – unless the employer can demonstrate that the predicted consequences are almost certain to result from union-imposed labor cost increases.

The chilling effect associated with the unlawful termination of key union supporters during organizing drives could easily be diminished by a long-overdue change in Section 10(l) of the NLRA. When the law was amended in 1947, Congress recognized that there would be times when the delay associated with regular Labor Board adjudication procedures would preclude the effective remediation of unfair labor practices. It thus added Section 10(j)²⁹ which allows – but does not require – the Labor Board to petition a district court for temporary injunctive relief to restore the status quo ante while the unfair labor practice complaint is being adjudicated. Congress also added Section 10(l)³⁰ which *requires* the Board to seek such injunctive relief while charges involving secondary activities under Section 8(b)(4)³¹ or organizational or recognition picketing under Section 8(b)(7)³² by labor organizations are involved. Although resort to Section 10(j) relief is relatively rare, the use of mandatory Section 10(l) restraining orders has significantly reduced the impact of unlawful secondary boycotts and organizational and recognition picketing.

Section 10(l) should be amended to equalize the remedial scheme affecting labor and management. While such temporary relief should continue to cover coercive secondary activity and organizational and recognition picketing by unions, it should be expanded to cover certain

pernicious employer unfair labor practices. For example, Section 10(l) should require the Labor Board to seek the immediate reinstatement of employees who have been clearly discharged during organizing campaigns because of their union support, to prevent employers from benefitting from such illegal terminations throughout the entire campaign period. This remedy would be far more effective than enhanced monetary relief that could only be imposed long after the representation elections have been conducted.

Section 10(l) relief should also be mandated with respect to manifestly unjustified employer refusals to bargain with newly-certified labor organizations. When it is clear that employer bad faith is thwarting bargaining designed to achieve initial agreements, the Board should be required to seek temporary injunctive relief ordering the offending firms to bargain in good faith. Parties that fail to honor such court orders would be subject to civil and/or criminal contempt sanctions.

Section 2(11)³³ should be modified to make it clear that only individuals possessing real managerial authority should be excluded from statutory coverage as “supervisors.” They should have to have the power not only to meaningfully direct the work of others – but also to discipline such persons if they fail to carry out the supervisory directives. Professionals, like nurses, frequently work with nonprofessional assistants who must be told what to do. When these relationships are really those between professional and paraprofessional colleagues, non-supervisory status should be found with respect to the professionals involved.

Congress should similarly amend Section 2(3)³⁴ to limit the scope of the common law “managerial” exclusion. Only those persons who meaningfully participate in the determination of important management policies should be excluded from statutory coverage. People, like

academics, who minimally influence employment conditions should not be denied the opportunity to select bargaining representatives.

The last significant modification of NLRA coverage would pertain to labor organizations that are unable to attain majority support among the employees in specific bargaining units. Professor Charles Morris has cogently argued that the existing language contained in Section 8(a)(5)³⁵ actually requires employers to bargain with minority unions on a members-only basis.³⁶ He notes that such arrangements were common when the NLRA was originally enacted, and he believes that the exclusivity status accorded to majority representatives under Section 9(a) is entirely separate from the general bargaining duty imposed by Section 8(a)(5) with respect to both majority and minority unions. If this interpretation of the existing statute is not judicially accepted, Congress should carefully consider the impact of a provision that would require businesses to bargain with minority unions on a members-only basis. Such a scheme would clearly assist employees who authorize unions to bargain on their behalf, and it would probably also benefit the other workers who would presumably be given most of the benefits negotiated by the labor organization for its express supporters. On the other hand, Congress might have to consider how to deal with situations in which different unions seek members-only bargaining for diverse groups of employees within the same employment group. It could always limit members-only bargaining to the union that has obtained the support of the greatest number of workers within the same overall unit.

Even if the NLRA was modified to more effectively protect the right of workers to organize, it is likely that the vast majority of private sector personnel would remain nonunion. Under the American employment-at-will rule, which allows employers to terminate employees at

any time for almost any reason, workers would continue to have no real job security. In addition, they would have no way to meaningfully influence their basic terms of employment. They must either accept what is offered to them or seek work elsewhere.

During the 1980s and 1990s, many companies created worker participation committees designed to enhance productivity and quality. Most of these committees are selected by management officials, and they address issues formulated by corporate leaders. Efforts were made to change Section 8(a)(2),³⁷ which makes it an unfair labor practice for employers to dominate “labor organizations” which are defined to include even informal employee committees that represent the interests of other workers and which “deal with” employers over wages, hours, or working conditions.³⁸ Due to the one-sided nature of these entities, firms were able to benefit greatly from their existence without having to share the gains with contributing workers.

If America wants to provide true industrial democracy for the millions of private sector employees not represented by labor organizations, Congress should either amend the NLRA or enact separate legislation that would allow rank-and-file personnel to elect a certain percentage of corporate boards and require all board members to have a dual fiduciary obligation to shareholders *and* employees.³⁹ In addition, corporations should have to establish employee involvement committees that would work with management officials to further firm and worker interests.⁴⁰ Committee members would be elected by regular workers, and business leaders would be obliged to furnish committee members with information relevant to the employment conditions of persons represented by those committees. Management officials would be required to consult with involvement committees before implementing decisions that would significantly affect the job security or employment interests of regular workers. These employee involvement

committees would have far less power than the works councils in countries like Germany or Sweden, but they would recognize the critical input of workers to the success of corporate endeavors.

III. THE RELEVANCE OF LABOR ORGANIZATIONS IN THE TWENTY-FIRST CENTURY

In 1886, the AFL was formed and Samuel Gompers was elected that organization's first president.⁴¹ This was the beginning of "business unionism," with AFL entities operating primarily as trade unions and not as social or political institutions.⁴² They sought to organize individuals who worked in different trades and to advance their interests through the bargaining process. Although they frequently supported political candidates who were supportive of worker interests and lobbied in favor of legislation that benefitted employees,⁴³ these activities were secondary to the basic representational function advanced through conventional collective bargaining.

Despite strong employer opposition, union membership increased from 447,000 in 1897 to over 2,000,000 by 1904.⁴⁴ Most of these union members were men, because most AFL affiliates did not permit or did not encourage female membership. Even though female labor force participants grew from four million to over eight million between 1890 and 1910, only 73,000 women were union members by 1910.⁴⁵ During this period, AFL leaders did little to discourage gender-based restrictions imposed by member unions.⁴⁶ Nonetheless, some unions recognized the receptivity of female workers to labor entreaties, and representatives from the clerks, garment workers, and meat cutters unions created the Women's Trade Union League at the 1903 AFL convention.⁴⁷

Most AFL affiliates had a similar antipathy toward minority workers.⁴⁸ These exclusionary practices ultimately caused serious problems for unionized workers. Following World War I, many southern black workers relocated to northern cities. Since they were not able to obtain jobs with employers that had closed shop agreements with racially restrictive craft unions, many were induced to work as strike breakers.⁴⁹ Many of these discriminatory practices continued until the enactment of the Civil Rights Act of 1964.

By the time the NLRA was passed in 1935, AFL leaders were trying to decide how to handle the workers in mass production industries. They established a federal labor union for each industry that was supposed to organize the workers within each industry, then divide them among AFL affiliates having jurisdiction over their respective crafts.⁵⁰ At the 1934 AFL convention, William Green and John L. Lewis proposed the creation of new industrial unions, but this proposal was soundly defeated.⁵¹

In 1935, 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., and established the Committee for Industrial Organization.⁵² This committee created different organizing entities pertaining to the steel, textile, automobile, rubber, chemical, shipping, and electronics industries. AFL President William Green was concerned that the Committee for Industrial Organization would infringe the jurisdictions of existing AFL affiliates, and he demanded that this group be dissolved.⁵³ Nonetheless, the Committee for Industrial Organization continued with its plans to organize the mass production industries. When AFL opposition

stiffened, the unions participating in the Committee for Industrial Organization withdrew from the AFL and formed the Congress of Industrial Organizations (CIO).⁵⁴ During the next two decades, AFL craft unions and CIO industrial unions competed with one another to organize manufacturing workers.

Most of the newly-formed CIO unions were supportive of minority and female workers and welcomed them into their ranks. Due in large part to the success of CIO affiliates, the percent of nonagricultural labor force participants in labor organizations grew from under 15 in 1935 to almost 35 by the mid-1950s.⁵⁵ By the late 1940s, business leaders had become concerned about the expanding economic power of the labor movement, and they sought political assistance. The 1947 Taft-Hartley Act and the 1959 Landrum-Griffin Act amendments to the NLRA significantly reduced the ability of labor organizations to use secondary tactics to support primary disputes.⁵⁶

Despite the organizing achievements of CIO unions and the continued vitality of AFL affiliates, labor leaders did not like the inter-organizational competition that had existed since the formation of the CIO. In December of 1955, the AFL and CIO united into a single federation⁵⁷ that explicitly precluded the overt competition that had effectively strengthened the labor movement during the prior two decades. Although the absolute number of individuals in labor organizations grew from 17,000,000 in 1955 to 22,000,000 in 1980, the percent of nonagricultural labor force participants in unions declined from 35 to 23, because union expansion did not keep pace with the rapid growth of the labor force due to post-war, baby-boom entrants.⁵⁸

Since the early 1980s, the position of labor has declined in both absolute terms and as a percentage of the labor force. By 1990, there were 16,740,000 members comprising 16.1 percent

of labor force participants.⁵⁹ Today, there are 15,700,000 union members comprising 12.5 percent of labor force participants.⁶⁰ These figures mask the actual decline in private sector membership, because it includes the 36.5 percent of federal, state, and municipal personnel who are union members. There are presently only 8,255,000 private sector union members, representing a private sector union density of 7.8 percent.⁶¹

Diverse factors have contributed to the decline in private sector union membership.⁶² Female labor force participation has increased dramatically over the past three decades from 45 percent to almost 60 percent.⁶³ The labor force participation rate for African-American, Asian, and Hispanic workers has also expanded rapidly.⁶⁴ Due at least partially to historical exclusionary policies, female and minority employees have not been as easy to organize as white males.

The transformation of the U.S. economy from an industrial base to a white-collar, service, and retail base has weakened most of the traditional industrial unions like the Auto Workers, the Steel Workers, the Rubber Workers, and the Electrical Workers. Technological changes have eliminated many jobs, and increased globalization⁶⁵ has caused the outsourcing of many high-paying American jobs to lower-wage countries like China, Malaysia, and India. To retain their flexibility, many firms have ceased hiring people to work on a long-term basis.⁶⁶ Many positions are now short-term, causing workers to change jobs and even occupations frequently. Firms are increasingly using independent contractors and permatemps retained from outside employment agencies to perform job tasks previously performed by regular employees.⁶⁷

U.S. unions are feeling substantial pressure from multinational business firms seeking to reduce overall labor costs. If labor organizations seek to protect the wages and benefits enjoyed by American workers, the jobs of such persons may be transferred to other countries. If they

succumb to corporate demands to reduce wages and benefits, they generate dissatisfaction not only among the directly affected persons but also among workers in general who view unions as impotent institutions.

As a result of competitive pressures both within the U.S. and from global markets, corporate employers have become increasingly opposed to unions. They tell their workers that if they join unions and engage in work stoppages, they can be permanently replaced,⁶⁸ and they “predict” that increased labor costs will cause them to close plants and/or transfer work to lower-cost facilities in other countries. Employees reasonably fear that unionization will generate job losses, and they hesitate to vote for representation.

New-age workers also fear a decline in class position and professional status if they join traditional trade unions. Most Americans consider themselves to be “middle class.” While they can accept the thought of being lower middle class, they have an aversion to being lower class or working class.⁶⁹ Class-based concerns especially affect white-collar and semi-professional personnel. This concern allows anti-union employers to suggest during organizing campaigns that union membership by people employed in financial, insurance, health care, education, computer processing, and similar fields would be professionally demeaning. If twenty-first century labor unions hope to organize these types of workers, they have to transform themselves from blue-collar industrial entities into new-age institutions that will appeal to contemporary workers.

Some of the large U.S. businesses that perform services primarily within the U.S. remain unorganized. These include finance, health care, insurance, higher education, hardware and software providers, retail stores, and fast food chains. Labor officials recognize that they must be

able to organize these twenty-first century industries if unions are to remain relevant institutions. Most of the individuals who work in these job sectors have less job security than they previously enjoyed, and their wage and benefit packages have been stagnant or have declined when adjusted for inflation. Many would undoubtedly contemplate unionization if they did not fear negative employment consequences from such action.

AFL-CIO President John Sweeney acknowledges that affiliate unions have not committed sufficient resources to the organizing of new members. He recently proposed that half of the \$0.61 per-month per capita that affiliates contribute to the AFL-CIO for political and grassroots mobilization be committed to organizing activities.⁷⁰ He also proposed that up to \$15 million in rebates be provided to affiliate unions that devote thirty percent of their budgets to organizing endeavors.

A group of dissident union leaders have challenged President Sweeney to do more. Teamster President James Hoffa unsuccessfully sought a fifty percent rebate of the 61 cent per capita to affiliates that commit either ten percent of their total budgets or \$2 million to organizing.⁷¹ SEIU President Andrew Stern proposed that smaller AFL-CIO affiliates be merged to create larger organizations that would have the financial resources to compete with one another to organize targeted occupations and businesses like Wal-Mart.⁷² When union officials from the SEIU, UFCW, UNITE-HERE, the Laborers, and the Teamsters decided that AFL-CIO leaders were not doing enough to stem the decline of the labor movement, they withdrew their unions from the AFL-CIO and formed the Change-to-Win coalition.⁷³

Even though AFL-CIO and Change-to-Win officials are striving to reverse the declining fortunes labor organizations have experienced since the early 1980s, their efforts have continued

to be insufficient. Both groups have promised to commit greater financial resources to organizational activities, but they are continuing to employ twentieth century techniques and institutions to appeal to twenty-first century employees. They plan to use existing old-age unions to entice new-age workers. Despite the outstanding reputations of many labor organizations, they are not apt to generate enthusiasm among white-collar and professional personnel. AFL craft unions learned this lesson in the 1930s when they tried to maintain traditional craft jurisdictions while seeking to organize heterogeneous mass production occupations. It is time for AFL-CIO and Change-to-Win leaders to recognize that they are trying to do the same thing now with new-age workers.

When unions like the Teamsters, the UAW, or the SEIU endeavor to organize highly educated academic or health care professionals, they are met with understandable skepticism. How can organizations that have historically represented truck drivers, car manufacturers, or janitors appreciate and enhance the interests of professional workers? Individuals who join such trade unions are afraid that they will undermine their professional status. Similar problems would arise if conventional craft or industrial unions seek to organize white-collar personnel in finance, insurance, or computer occupations.

Existing AFL-CIO and Change-to-Win affiliates can be successful if they target employees within their existing jurisdictions. For example, the Retail Clerks and the SEIU should focus their efforts on retail clerks employed by grocery and department stores. A joint effort to organize Wal-Mart, K-Mart, and similar stores could succeed if sufficient funds and skilled organizers were dedicated to this substantial undertaking. Appropriate AFL-CIO and Change-to-Win unions should work together to reach Wal-Mart personnel. Most of these people

are underpaid compared to their unionized counterparts at firms like Costco, and their fringe benefits have been less generous.⁷⁴ A carefully coordinated, multi-union organizing campaign undertaken on a region-by-region basis may generate significant success among many of the 1.2 million persons employed by Wal-Mart.

Contemporary unions can no longer rely upon the communication avenues of the past. They need to utilize e-mail and the Internet. Employers may limit employee e-mail use to firm-related business, but few do so. If they allow their workers to use e-mail and Internet access for personal and non-business reasons, they may not prohibit use of these communication modes to discuss unionization issues.⁷⁵ Unions must send e-mail messages to every employee of targeted firms, establish worker chat rooms, and create flashy homepages that workers can visit to learn about the benefits of unionization.⁷⁶ They should also encourage firm employees to communicate with each other via e-mail during their non-work times regarding their interest in unionization.

Unions must employ a different approach with respect to new-age workers in academic, health care, finance, insurance, and computer occupations. It is in areas like this that labor leaders must learn from the lessons of the mid-1930s when the CIO was formed to appeal to workers in mass production industries. New labor organizations must be created that reflect the hopes and aspirations of persons employed in these white-collar and professional occupations. To avoid the professional and personal stigma associated with membership in traditional trade unions,⁷⁷ these institutions should be called professional associations.

When school teachers initially thought about the need for collectivization to enhance their economic and professional interests, they were attracted to the National Education Association a professional organization opened to all teachers and administrators. A number of teachers felt

more comfortable joining the NEA than the AFL-CIO affiliated American Federation of Teachers, even though the AFT did not have the word “union” in its title. They simply thought that becoming involved with a conventional trade union would be unprofessional and would cause them a loss of status. Similar considerations induced nurses to seek collective action through the American Nurses Association.

Labor officials seeking to organize new-age employees must appreciate the different interests of these individuals. Since their salaries are usually higher than those enjoyed by less educated workers, they tend to be more interested in professional development than economic issues. They desire respect for their work, and a reasonable degree to professional autonomy. They would like the opportunity to enhance their skills – and mobility – through additional education. This objective may be accomplished through formal degree or certificate programs, or less formal professional development courses. Since they tend to have a thorough understanding of their particular positions and where they fit within the overall structure of their employing firms, they often wish to have a more direct say in where their employers are heading. They want to be consulted before major decisions are made by management officials that will directly affect their work and their job security. Although they could attempt to achieve these objectives on an individual basis, they would be unlikely to have any bargaining power vis-a-vis their corporate employers. Only a form of collectivization would be able to provide them with the authority to influence their real employment conditions.

When the CIO was created, it established new industrial unions that would appeal to workers in mass production occupations. New labor entities should now be created with jurisdictions covering twenty-first century occupations. These organizations would not have to be

wholly independent entities – they could be affiliated with existing labor organizations. Current AFL-CIO and Change-to-Win leaders should create new affiliates with jurisdictions pertaining to the different new-age occupations. The Association of Finance Professionals could be used to organize people employed by commercial banks, mortgage companies, brokerage firms, and similar financial institutions. As these persons are forced to work longer hours and are affected by competition from workers in low-wage countries like India, they may become more receptive to unionization. The Association of Health Care Professionals could be established to organize registered and licensed practical nurses, other staff professionals, and even physicians employed by health maintenance organizations, public and private hospitals, and similar institutions. As huge for-profit firms take over more health care institutions, the nurses and physicians may feel more like regular employees than health care professionals. Patient care will increasingly become secondary to profit considerations, and the affected health care professionals may desire a collective voice to further their individual and professional interests. Both of these organizations could be affiliated with an entity like the SEIU, but they would have to be sufficiently autonomous to convince targeted persons that they are joining professional associations instead of regular unions.

The Association of Academic Professionals could seek to organize the growing number of adjunct professors employed on a relatively long-term basis to teach courses previously taught by tenure-track faculty members. If the *Yeshiva University* decision⁷⁸ finding that faculty members are “managerial” workers excluded from NLRA coverage could be judicially or legislatively overturned, many regular professors would undoubtedly contemplate the benefits of unionization as they have at state colleges covered by state public sector bargaining laws. In the

Brown University decision,⁷⁹ the Labor Board overturned precedent and held that graduate teaching and research assistants are students, rather than employees, who are thus excluded from NLRA coverage. If this determination was ultimately changed by judicial decision or congressional action, many under-paid and over-worked graduate teaching and research assistants would be likely to select union representation. The availability of a “professional association would undoubtedly be more appealing to such highly educated professionals than a traditional trade union. This organization could easily be affiliated with the NEA or the AFT.

The expansive insurance industry has not been particularly receptive to unionization. This is due to the fear the semi-professionals in this field have that collective action would erode their professional and class status. If an Association of Insurance Professionals was established – perhaps by the SEIU – and it hired educated organizers who could reflect the professional values of insurance industry workers, significant inroads could be achieved. Association organizers could focus on the need for on-going professional development and the need to limit outsourcing of work to low-cost foreign workers and to permatemps with limited attachment to the insurance firms using their services.

During the 1990s, computer firms flourished and many highly skilled workers became wealthy. Once the high-tech bubble burst and many industry professionals lost their jobs, many began to appreciate the need for a collective voice. An Association of Computer Professionals could be established to further the professional objectives of these individuals and to soften the impact of industry recessions.

Organizers working for these new professional associations would have to approach targeted employees carefully. They should emphasize that most U.S. businesses are members of

professional organizations they use to further their economic interests. Large groups like the U.S. Chamber of Commerce represent expansive industries, while more focused entities represent the plastics, chemical, pharmaceutical, and similar groups. The American Bar Association furthers the economic and professional interests of lawyers, while the American Medical Association serves the interests of physicians. Workers are the only major group without a collective voice. Organizers have to demonstrate to new-age workers how impotent they are when they interact individually vis-a-vis their corporate employers.

Professional association officials must appreciate the fact that many contemporary workers do not want to be associated with entities that operate on an adversarial basis.⁸⁰ In a highly competitive global world, employee representatives must cooperate with American firms to guarantee on-going viability. They need not, however, do this at the expense of the employees involved.

Labor organizers have to recognize that they are dealing with a highly diverse, twenty-first century work force. Almost half of labor force participants are women,⁸¹ and an increasing percentage consists of minority group members.⁸² Studies indicate that both female and minority employees are receptive to unionization.⁸³ To enhance their appeals to these labor force participants, organizers should establish relationships with special interest groups like 9-to-5, the National Organization for Women, MALDEF, and the NAACP. Unions should also use their existing affiliations with organizations like the Coalition of Labor Union Women, the Coalition of Black Trade Unionists, the Labor Council on Latin American Advancement, and the Asian Pacific American Labor Alliance.⁸⁴

Organizers must also emphasize issues of special interest to female and minority workers.

Women employees are more concerned about family obligations than many of their male cohorts, especially since more single-parent families are headed by females than males.⁸⁵ As a result, organizers need to discuss family leave policies, the availability of day care programs, and job sharing for parents who wish to work less than full-time to spend more time with their children. They should similarly emphasize ways to further female advancement within firms where managers are primarily male. Equal pay is another critical issue, since many women earn less than comparable male colleagues. Minority employees are similarly concerned about equal employment opportunities, and organizers need to stress the importance of nondiscrimination policies and their enforcement through grievance-arbitration procedures.

The formation of professional associations directed to persons employed in particular occupations and the use of organizing appeals designed to appeal to both new-age workers and the increasing numbers of female and minority labor force participants should allow organizers to expand the ranks of union members. As these representatives demonstrate their capacity to further worker interests and to provide individuals with a collective voice to influence their employment conditions, more employees would be likely to consider the benefits to be derived from unionization. Just as the American Nurses Association and the National Education Association were able to become established labor organizations, newly created professional associations could also experience significant success. Labor's decline reversed, and worker organizations could again become viable economic forces in twenty-first century employment settings.

IV. CONCLUSION

The NLRA has become an antiquated law that does not adequately protect the rights of

twenty-first century workers. It was designed for unions organizing mass production industries, and it functioned well in that regard. As the U.S. has been transformed from an industrial to a white-collar, service, and retail economy that is increasingly being affected by globalization and competition from foreign nations, employers have increasingly viewed representative unions as uncompetitive and inefficient institutions. Labor Board and court decisions have narrowed the scope of statutory protections provided to professional workers, and the statute's remedial provisions have become ineffective. Changes should be made in the statute to restore the scope of coverage and to more effectively counteract employer unfair labor practices.

The labor movement has also reached a moribund state, teetering on the brink of irrelevancy. The recent decision of several important unions to leave the AFL-CIO to form the Change-to-Win coalition may help to revitalize the movement as different entities compete with one another as CIO industrial unions competed with AFL craft unions during the late 1930s and 1940s. Nonetheless, many unions continue to use blue-collar techniques to organize new-age workers of the twenty-first century. To counteract the negative connotations associated with membership in traditional trade unions, AFL-CIO and Change-to-Win leaders should establish new professional associations that could more effectively appeal to white-collar and professional employees. Organizers should also work with special interest groups that could help them to appeal to female and minority workers. If union officials can adopt changes that will make their organizations more appealing to twenty-first century personnel, they can again become vital institutions that can meaningfully advance the interests of American workers.

ENDNOTES

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1. 49 Stat. 449 (1935), 29 U.S.C. §§ 151 et seq. (2000).
2. *See* Michael Goldfield, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl. 1 (1987).
3. *See* Philip Taft, *ORGANIZED LABOR IN AMERICAN HISTORY* 471-72 (1964).
4. *See* Michael Goldfield, *supra* note 2, at 10 tbl. 1.
5. Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947).
6. Pub. L. No. 257, 86th Cong., 1st Sess., 73 Stat. 519 (1959).
7. *See* Michael Goldfield, *supra* note 2, at 10 tbl. 1.
8. *See* Charles B. Craver, *CAN UNIONS SURVIVE?* 44-45 (1993).
9. *See* Daily Labor Report (B.N.A.) No. 26 (Feb. 7, 1991) at B-8.
10. *See* Daily Labor Report (B.N.A.) No. 14 (Jan. 23, 2006) at AA-1. Public sector union membership remained steady at 36.5 percent.
11. *See generally* Katherine V.W. Stone, *FROM WIDGETS TO DIGITS* 67-86 (2004).
12. In 2005, the median compensation of the CEOs at 350 large publicly traded companies was \$6.8 million *See* Daily Labor Report No. 69 (April 11, 2006, at A-9. CEOs who used to earn about 40 times what blue-collar workers earned in 1960 now earn almost 500 times what typical employees earn. *See* Jennifer Reingold, *Executive Pay*, *BUS. WK.*, Apr. 17, 2000, at 110.
13. *See* Floyd Norris, *With Bull Market Under Siege, Some Worry About Its Legacy*, *N.Y. TIMES*, Mar. 18, 2001, at 1.

14. *See generally* Century Fund, THE NEW AMERICAN ECONOMY: A RISING TIDE THAT LIFTS ONLY YACHTS (2004).
15. *See* Richard B. Freeman & Joel Rogers, WHAT WORKERS WANT 147 (1999).
16. *See* Daily Labor Report No.115 (June 16, 2005), at AA-1.
17. *See generally* Louis Uchitelle, THE DISPOSABLE AMERICAN (2006). With respect to the pressure on producers to relocate operations to low cost nations like China, *see* Charles Fishman, THE WAL-MART EFFECT (2006); Thomas L. Friedman, THE WORLD IS FLAT (2005).
18. *See* Richard B. Freeman & James L. Medoff, WHAT DO UNIONS DO? 150-161 (1984).
19. Even Wal-Mart, the largest employer in the U.S. with 1.2 million workers, comprising almost 1 percent of the entire work force, has to sell \$35 of merchandise to earn a profit of \$1. *See* Charles Fishman, THE WAL-MART EFFECT 23, 243 (2006),
20. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969).
21. *See* Paul C. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 238-39 (1990); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 961-69 (1991).
22. *See* 29 U.S.C. § 158(d) (2000) (defining the scope of the duty to bargain in good faith).
23. *See* NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).
24. *See* NLRB v. Textron, Inc., 416 U.S. 267 (1974).
25. 444 U.S. 672 (1980).
26. 29 U.S.C. § 159(a) (2000).

27. *See International Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (§ 8(a)(2) violation for the employer to extend such recognition and § 8(b)(1)(A) violation for the union to accept it).
28. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).
29. 29 U.S.C. § 160(j) (2000).
30. 29 U.S.C. § 160(l) (2000).
31. 29 U.S.C. § 158(b)(4) (2000).
32. 29 U.S.C. § 158(b)(7) (2000).
33. 29 U.S.C. § 152(11) (2000).
34. 29 U.S.C. § 152(3) (2000).
35. 29 U.S.C. § 158(a)(5) (2000).
36. *See Charles J. Morris, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005).
37. 29 U.S.C. § 158(a)(2) (2000).
38. 29 U.S.C. § 152(5) (2000) (defining term "labor organization"). *See generally* *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *affirmed*, 35 F.3d 1148 (7th Cir. 1994).
39. *See Charles B. Craver, Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees With Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 164-168 (1997).
40. *See id.* at 159-164.
41. *See Philip Taft, supra* note 3, at 113-16.
42. *See id.* at 117-18.
43. *See id.* at 242-42; 361-62.

44. *See id.* at 162.
45. *See* Donna Van Raaphorst, UNION MAIDS NOT WANTED: ORGANIZING DOMESTIC WORKERS 1870-1940 165 (1988).
46. *See* Alice Kessler Harris, OUT TO WORK 157 (1982).
47. *See* Philip Foner, WOMEN AND THE AMERICAN LABOR MOVEMENT 128-29 (1982).
48. *See* Philip Taft, *supra* note 3, at 666-67. *See generally* William B. Gould IV, BLACK WORKERS IN WHITE UNIONS (1977).
49. *See id.* at 671.
50. *See id.* at 464-65.
51. *See id.* at 468-71.
52. *See* Philip Taft, THE AFL FROM THE DEATH OF GOMPERS TO THE MERGER 141 (1959).
53. *See id.* at 472-79.
54. *See id.* at 528-29.
55. *See* Paul Weiler, *supra* note 201 at 8-9.
56. *See* 29 U.S.C. § 158(b)(4) (2000) (prohibiting most forms of secondary activity) and 29 U.S.C. § 8(e) (2000) (outlawing secondary “hot cargo” agreements).. *See also* 29 U.S.C. § 8(b)(7) (2000) (severely limiting organizational and recognitional picketing).
57. *See* Philip Taft, *supra* note 3, at 660-61.
58. *See* Michael Goldfield, *supra* note 2, at 10-11 tbls. 1 & 2.
59. *See* Daily Labor Report (B.N.A.) No. 26 (Feb. 7, 1991) at B-8.
60. *See* Daily Labor Report (B.N.A.) No. 14 (Jan. 23, 2006) at AA-1.
61. *See id.* at E-7 tbl. 3.

62. See Hoyt N. Wheeler, *THE FUTURE OF THE AMERICAN LABOR MOVEMENT* 12-13 (2002).
63. See Lawrence Mishel, Jared Bernstein & Silva Allegretto, *THE STATE OF WORKING AMERICA 2004-2005* 247 fig. 3R (2005).
64. See Hoyt N. Wheeler, *supra* note 612 at 30-31.
65. See *id.* at 25-27.
66. See Katherine V.W. Stone, *supra* note 11, at 67-86.
67. See *id.* at 68-69.
68. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
69. See generally Barbara Ehrenreich, *FEAR OF FALLING* (1990).
70. See Daily Labor Report (B.N.A.) No. 42 (March 4, 2005) at AA-1.
71. See *id.*
72. See *AFL-CIO Creates Web Site to Strengthen Labor Movement*, 176 LAB. REL. REP. (B.N.A.)103 (Jan. 10, 2005).
73. See Daily Labor Report (B.N.A.) No. 115 (June 16, 2005) at AA-1.
74. See Abigail Goldman & Nancy Cleeland, *The Wal-Mart Effect*, L.A. TIMES, Nov. 23, 2003, available at <http://www.latimes.com/business/la-fi-wal-mart23nov2003,1,1465953.story?ettrack=1&cset=true>
75. See *United Serv. Auto Assn.*, 340 N.L.R.B. No. 90, 173 L.R.R.M. 1331 (2003). See generally 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).
76. 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). See generally

Arthur B. Shostak, CYBER UNION: EMPOWERING LABOR THROUGH COMPUTER TECHNOLOGY (1999).

77. See Richard B. Freeman & Joel Rogers, *supra* note 145 at 150-51.

78. See note 25 and accompanying text, *supra*.

79. 342 N.L.R.B. No. 42, 175 L.R.R.M. 1089 (2004).

80. See Richard b. Freeman & Joel Rogers, *supra* note 15, at 141-42.

81. See Diane Balser, SISTERHOOD AND SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES 19 (1987).

82. See Lawrence Mishel, Jared Bernstein & Silvia Allegretto, *supra* note 63, at 247 fig. 3R.

83. See James L. Medoff, *Study for AFL-CIO on Public's Image of Unions*, Daily Labor Report (B.N.A.) No. 247 (Dec. 24, 1984) at D-2.

84. See Calvin William Sharpe, Marion 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).

85. See Divorce Magazine.com, <http://www.divorcemag.com/statistics/statsUS.shtml>