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THE CHANGING FACE OF COLLECTIVE REPRESENTATION: THE FUTURE OF COLLECTIVE BARGAINING

KENNETH G. DAU-SCHMIDT*

“Change is inevitable, progress is optional!”
Change to Win Coalition Slogan

INTRODUCTION

In many ways, these are among the darkest days for the American labor movement. Union membership has declined from 35% to 12% from the 1950s to the present.¹ The percentage of private-sector workers in unions fell to 7.4%, the lowest percentage since the early 1900s. Large organized companies like Ford, GM, and their parts suppliers are in bankruptcy, or threatening the same, and drastically cutting their work forces and demanding wage cuts and benefit reductions.² The largest private employers in the economy, Manpower Inc. and Wal-Mart, steadfastly resist organization and adopt policies promoting low wages.³ Real wages in the economy as a whole have remained stagnant for almost three decades now, as more and more manufacturing jobs are sent overseas

* Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University, School of Law–Bloomington. J.D., University of Michigan, 1981; Ph.D. (Economics), University of Michigan, 1984. I dedicate this essay to two forward-thinking American labor organizations: the United Auto Workers, who gave me the chance to clerk for their legal department while I was in law school; and the International Brotherhood of Teamsters, who I had the pleasure to represent many times while I was in practice. I would also like to thank my research assistant, Art Traynor, for very able assistance on this essay.

1. Membership continues to decline. See Steven Greenhouse, *Sharp Decline in Union Members in '06*, N.Y. TIMES, Jan. 26, 2007, at A17, available at http://topics.nytimes.com/top/reference/timestopics/people/g/steven_greenhouse/.

2. Doron Levin, *New Investors Could Take Hard Line at Delphi—Push for Concessions From UAW May Continue*, BUFFALO NEWS, Dec. 25, 2006, at B7; Jason Roberson, *Delphi's Last Day for a Deal Is Here*, DETROIT FREE PRESS, Jan. 31, 2007, at 3E, available at <http://www.freep.com/apps/pbcs.dll/article?AID=/20070131/BUSINESS01/701310323/1014/BUSINESS>.

3. Conrad MacKerron, *Investors Ask Wal-Mart to Obey Fair Labor Laws; History of Violation of Labor Laws, Intimidation of Workers Cited*, ASCRIBE NEWSWIRE, Apr. 3, 2006; Karen Winegardner, *Who Are Your Employees? Contingent Workers on the Rise*, THE CAPITAL (Annapolis, MD), Apr. 1, 2001.

or disappear altogether due to technological innovations.⁴ Finally, until the most recent election, the Republican party—no friend of labor’s—controlled the Presidency, Congress, the Supreme Court, the National Labor Relations Board (“NLRB”), and a majority of governorships and state legislatures. Even with the Democrats’ recent electoral gains in Congress and the states, the prospects for labor’s legislative agenda seem dim.⁵

Yet this is also a time of great innovation and excitement in the labor movement. The “Justice for Janitors” movement has organized and negotiated minimum terms for cleaning personnel employed by cleaning contractors to clean and maintain office buildings in Los Angeles, New Jersey, and elsewhere in the country.⁶ The “Coalition of Immokalee Workers” led a successful three-year boycott against Taco Bell to convince its parent company, “Yum Foods,” to pressure growers who supply the chain to raise wages for agricultural workers.⁷ New York freelancers in writing, art, financial advice, and computers have organized themselves for the purchase of health insurance and other benefits in the organization “Working Today.”⁸ Farm laborers from Mexico and the United States have combined to support the organization of apple pickers in Washington State, filing complaints under the NAFTA agreement accusing the apple industry of violating labor rights and threatening the health and safety of migrant labor.⁹ The AFL-CIO hopes to organize millions of working people through community-based organizations in its new political affiliate association “Working America.”¹⁰ Finally, seven powerful unions have organized themselves in the new “Change to Win Coalition,” promising

4. Karen Krebsbach, *Changing the Way We Work; Globalization Is Wreaking Havoc on America's Labor Market, With More Jobs Lost to Outsourcing and Wages of Remaining Jobs Lagging Inflation. The U.S. Must Adapt or Die.*, U.S. BANKER, Mar. 2006, at 22; Tom Petruno, *As Earnings Sizzle, a Chill for Workers; Firms and Investors, Not the Rank and File, Reap Gains From Globalization and Labor Productivity*, L.A. TIMES, Dec. 18, 2006, at C1.

5. Dale Russakoff, *Labor to Push Agenda in Congress It Helped Elect*, WASH. POST, Dec. 8, 2006.

6. L.M. Sixel & Alexis Grant, *Janitors' Protests Hit the Road; Union Taking Its Message to Other Cities*, HOUSTON CHRON., Nov. 1, 2006; see also Justice for Janitors, <http://www.seiu.org/property/janitors> (last visited Mar. 29, 2007).

7. Lucas Benitez, *Coalition of Immokalee Workers, Taco Bell Reach Groundbreaking Agreement*, BUSINESS WIRE, Mar. 8, 2005.

8. Clem Richardson, *A Healthy Plan Group Aids N.Y.'s Uninsured Workers*, DAILY NEWS (New York), Aug. 4, 2003, at 26.

9. Molly Moore, *Mexican Farmhands Accuse U.S. Firms; Panel Hears Washington Apple Pickers*, WASH POST, Dec. 3, 1998, at A36; Press Release, Int'l Labor Rights Fund, *Faulting U.S. Labor Laws, Mexican Unions File "Broadest" NAFTA Labor Complaint on Washington State Apple Industry* (May 27, 1998), available at <http://www.laborrights.org/press/apple052798.htm>.

10. Alison Grant, *AFL-CIO Eyes Nonunion Effort: New Affiliate Intended to Expand Activism Past Traditional Role*, SEATTLE TIMES, Sept. 1, 2003, at C4.

innovative strategies for organizing and representing the interests of working people.¹¹

Why do we see such innovation, even excitement, in the American labor movement at a time when, by all objective measures, the movement is flat on its back? I will argue that recent changes in the American labor movement represent the beginning of its adaptation to changes in the employment relationship that have occurred as we have moved from production organized according to industrial technology to production organized under the new information technology in the global economy. A previous change from artisanal to industrial methods of production around the beginning of the twentieth century presaged great change and growth in the American labor movement. Similarly, as the American economy transitions from industrial methods of production to adopt new structures utilizing information technology, the American labor movement is being prompted to organize and undertake collective action in new ways that will hopefully lead to the movement's resurgence. The innovations in the American labor movement to adjust to this change in technology and the employment relationship are what account for the current excitement in the movement.

In this paper, I will present a brief history of the American economy and trace how changes in the methods of production led to changes in the employment relationship and the collective organization of workers. After a brief discussion of the transition from artisanal to industrial production, I will focus on the more recent changes engendered by the new information technology and the globalization of the economy. My hope is that this discussion will illuminate the significance of recent developments in collective organization and help us divine the future course of the American labor movement.

I. INDUSTRIAL PRODUCTION AND INDUSTRIAL UNIONISM: FROM FORDISM TO SATURN

A. *The Rise of Industrialism*

Prior to the industrial period, manufacturing was undertaken under the artisanal system of production. Under this system, skilled craftsmen worked in a quasi-partnership with their employers to produce goods for

11. Steven Greenhouse, *New Labor Group Beginning Drive for Higher Pay*, N.Y. TIMES, Apr. 22, 2006, at A12; see also *Change to Win*, <http://www.changetowin.org> (last visited Mar. 20, 2007).

local or regional consumption.¹² The craftsmen supplied the knowledge and tools necessary for production while the employer provided materials, a work place, and marketing. The compensation the craftsmen received varied with production and the market price of the goods. The craftsmen themselves employed lesser-skilled apprentices and laborers to aid in production, and paid them out of the craftsmen's share of the proceeds from sales. The technical knowledge of production of the day existed primarily in the heads of the skilled craftsmen. Their investment in learning their trade made them hard for the employer to replace and led them to look forward to a life-long career working in the trade. As a result, craftsmen readily organized along craft lines, because they knew they would enjoy future benefits from organization and were less likely to suffer costs. Moreover, once they organized they enjoyed a fair amount of bargaining power in negotiations with their employers and the ordering of their lives. Accordingly, at the dawning of the twentieth century, trade unions were organized in most American crafts from cigarmakers, cordwainers, and seamstresses to teamsters, railwaymen, and machinists.¹³

During the period of roughly 1890 to 1920, changes in technology and accompanying management practices led to the decline of artisanal production and the rise of the industrial system of production. Improvements in transportation and technology led to the production and distribution of goods on a national basis. Manufactories became larger, with a single employer employing many more "hands." As a result, the interests of the classes of skilled tradesmen and owners became more distinct, since the change in production scale meant that fewer workers could realistically become owners.¹⁴ Moreover, the method of production was changed so that much of the knowledge necessary to produce the good was incorporated into the capital used in production. Under the principles of "scientific management" and the assembly line, the production process was broken down into smaller and smaller steps, many of which could be performed by lesser-skilled production employees. This change dissolved the traditional "partnership" between the skilled tradesmen and owners and undermined the bargaining power of the skilled trades.¹⁵ Finally, industrial management adopted employee benefit programs and "job ladders" to

12. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 15–18 (2004).

13. FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 150–65 (3d ed. 1966).

14. SIDNEY WEBB & BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM (2d ed. 1896). The Webbs referred to the separation of interest as we moved from small manufacturers under the artisanal system to large manufacturers under the industrial system as "the divorce of capital and labor."

15. STONE, *supra* note 12, at 22–24.

encourage the long-term retention of employees and promotion within the firm. These “corporate welfare” programs were designed to ensure the employer a reliable source of semi-skilled and skilled labor and set employers up as the primary source of job skills.¹⁶

The rise of industrial methods of production was problematic for the traditional craft unions.¹⁷ First, employers consciously undertook to destroy the old craft union system to wrest control of the knowledge of production from the skilled craftsmen and adopt the new industrial methods of production. Beginning in the 1890s, many employers formed trade associations and national organizations like the National Association of Manufacturers to wage a concentrated “open shop campaign” against the existing unions.¹⁸ Beginning with the Homestead Strike in 1892, several large American employers undertook lockouts or suffered strikes with the purpose of destroying their craft unions and operating “union free.”¹⁹ Second, the increased organization of employers on a national basis led to the need for unions to increase their efforts to organize on a national basis. If unions were going to be able to exert effective economic pressure on and bargain with national corporations they were going to have to organize workers on a national basis.²⁰ Third, the rise in long-term employment and corporate welfare programs decreased, at least initially, the need for workers to organize into unions. Under these programs the employer assumed the role of providing benefits, training, and job security, in part subsuming the unions’ traditional role.²¹ Finally, the change in the method of production required a change in the basis on which workers organized. With the growth in the importance of semi-skilled production and assembly employees to the production process came the accompanying need to organize all of these employees on an “industrial” basis. In order to have sufficient bargaining power with industrial employers, unions needed to organize all of their employees, not just the skilled craftsmen.²²

Although the need for fundamental change in the American labor movement had been apparent for some time, the opportunity for change did not come until the Great Depression. With the collapse of the nation’s economy, employers reneged on the promises of the industrial system of

16. *Id.* at 38–41.

17. JOHN A. FOSSUM, LABOR RELATIONS: DEVELOPMENT, STRUCTURE, PROCESS 30–33 (1979).

18. STONE, *supra* note 12, at 25.

19. *Id.* at 24–26.

20. HAROLD W. DAVEY, MARIO F. BOGNANNO & DAVID L. ESTENSON, CONTEMPORARY COLLECTIVE BARGAINING 18–19 (4th ed. 1982).

21. *See* STONE, *supra* note 12, at 41–43.

22. DAVEY ET AL., *supra* note 20, at 28–29.

benefits and long-term employment.²³ The failure of the corporate welfare programs made it clear that unions and the government played vital roles in administering and securing such benefits. To fulfill their role, Franklin Delano Roosevelt and the Democratic Congress enacted the “New Deal” legislation, which sought to guarantee certain minimal employment benefits under the Social Security Act and to foster employee organization under Senator Wagner’s National Labor Relations Act (“NLRA”).²⁴ As will be seen, the legislative solutions of the NLRA were specifically designed to address the employees’ problems of organization under the industrial system. At this time, the American labor movement also benefited from the efforts of a group of labor leaders who understood the need for a new system of organization within the industrial system of production. In 1935, John L. Lewis of the United Mine Workers, David Dubinsky of the Ladies Garment Workers, Charles Howard of the International Typographical Union, and Sidney Hillman of the Clothing Workers formed the Congress of Industrial Organizations (“CIO”), for the purpose of “wall to wall” organization of all employees in the basic mass production industries of steel, autos, glass, and rubber—not just the skilled craftsmen.²⁵ Finally, the economic calamity of the Great Depression radicalized American workers, and left them ready to undertake extraordinary efforts on behalf of new ideas to preserve their interests in the economic order. The economic exigencies of the Great Depression provided the fuel necessary to power the CIO’s ambitious organizing drive.²⁶ The confluence of these factors led to the most successful period of employee organization in American history. Although a mere 11.6% of the American workforce was organized in independent unions in 1930, by 1940 that proportion had climbed to 27%.²⁷ These gains were consolidated during the national armistice between labor and capital during World War II.

B. Post WWII America: the Golden Age of Industrial Unionism

The American labor movement hit its stride in the period after World War II. The percent organized in the private sector grew to a post-war high of 33.2% in 1955.²⁸ Even the limitations on union power sought in the

23. DULLES, *supra* note 13, at 260–61.

24. *Id.* at 265–67, 274–76, 281–83.

25. FOSSUM, *supra* note 17, at 30–31.

26. RICHARD O. BOYER & HERBERT M. MORAIS, *LABOR’S UNTOLD STORY* 290 (3d ed. 1976).

27. BRUCE E. KAUFMAN & JULIE HOTCHKISS, *THE ECONOMICS OF LABOR MARKETS* 720 (5th ed. 2000).

28. *Id.*

Taft-Hartley amendments did little to check the effective operation of American unions during this time.²⁹ This was because the methods of organization and representation that developed during this time fit well with the post-war economic environment, the prevailing management practices under industrial technology, and the system of regulation under the NLRA.

The United States emerged from WWII as the only intact industrial power in the world. Indeed due to government investment in production facilities during the war, the United States emerged from the war even stronger economically than when it entered.³⁰ During the next three decades, while the rest of the industrialized world rebuilt, the United States' economy operated largely free of international competition. As a result, American industry and labor enjoyed profits and wages unburdened by the pressure of international competitors, and the American regulatory scheme operated effectively without the need to coordinate with an international legal regime.

During this post-war period, America's captains of industry believed that the "best" management practices were to build a large, vertically integrated firm, supported by a stable workforce.³¹ Firms vertically integrated to ensure coordination of production and to achieve economies of scale. A classic example of such integration was Ford's River Rouge plant where it was bragged that the production process went "from iron ore to Mustangs under one roof!" Firms wanted a stable work force to ensure their supply of this valuable resource in coordinating production. To maintain workforce stability, firms developed administrative rules for the retention, training, and promotion of workers within the organization. Economists refer to these systems of administrative rules as the "internal labor market," because, although these decisions are made in reference to external market forces, they define the terms of compensation and promotion within the firm in a way that is not directly determined by the "external" market.³²

The vertical integration of firms facilitated the retention of employees for long periods of time, because there were layers of positions within the

29. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2006)).

30. STEPHEN A. HERZENBERG, JOHN A. ALIC & HOWARD WIAL, *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* 7 (1998).

31. Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 *IND. L.J.* 1, 9 (2001).

32. PETER B. DOERINGER & MICHAEL J. PIRE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 1-2 (1985).

firm among which employees could progress over the course of their careers. For example, at IBM from the 1950s to the 1980s, Thomas Watson, Jr., was famous for fostering a program of hiring employees largely on the basis of “character” and then training them for different positions within the firm as they progressed through their career.³³ Thus, the employer became a major source of training and security throughout the course of the employee’s life.

The NLRA system of choosing an exclusive representative through an election in an appropriate unit and resolving employment issues through collective bargaining worked relatively well in this environment. Although never perfect, the mechanisms for organizing under the NLRA functioned adequately through the 1960s. Because of the large-scale vertical integration of production, the NLRA definition of who was an “employer” generally defined the party that had control over issues of concern to the people defined under the NLRA as the relevant “employees.”³⁴ The troubling problems of contingent, employment-independent contractors, sub-contracted employees, and part-time employees were yet to achieve full fruition. Moreover, because jobs were well-defined and long-term, bargaining units and their work were relatively well-defined and stable. Employees had a long-term interest in their jobs and a particular employer and thus had incentive to invest in organizing a workplace to reap future benefits. Employers were relatively insulated from international competition and were more concerned with maintaining production than maintaining low prices. Thus, they had less reason to resist organization than they do in the current economic environment.

Moreover, the NLRA’s traditional single-unit, bread-and-butter collective bargaining worked well as a system for resolving disputes during this time.³⁵ Traditional collective bargaining gave employees a useful voice in the administrative rules of the internal labor market, allowing them to address the issues of greatest concern to them in their work life. Employees could collectively bargain about everything from wages, hours, and seniority to the price of snacks in company vending machines.³⁶ Their

33. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 70–72 (1999).

34. See 29 U.S.C. § 152(2) (definition of “employer” under the NLRA); *id.* § 152(3) (definition of “employee” under the NLRA).

35. See Dau-Schmidt, *supra* note 31, at 20 (“Unions . . . functioned well in enforcing long-term promises in the administrative bureaucracy of the internal labor market . . .”).

36. *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (describing mandatory subjects of bargaining under the NLRA as “issues that settle an aspect of the relationship between the employer and employees”); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979) (in-plant food services and prices are subject to mandatory bargaining). Recently, the NBA Players’ Association

demands for benefits, seniority, and job security were compatible with management's objective of the long-term retention of skilled workers. Moreover, due to the large-scale vertical integration of most firms, employees could address their concerns to the party with control over those issues—their employer under the NLRA. The firm that signed their paycheck was also the firm that decided how much to produce, what methods to use, and how to market production. Employee co-determination and enforcement of the administrative rules of the internal labor market played an important role in the best management practices.³⁷ Union representation and its accompanying system of grievance and arbitration provided a fair and efficient means of enforcing the agreed-upon administrative rules of the workplace.³⁸

Finally, during this time the political arm of America's unions was an effective counterbalance to corporate interests in state and national politics. Although never as politically aggressive or ambitious as their counterparts elsewhere in the world, the American labor movement supported successful candidates, who in turn supported a moderate legislative agenda establishing workers' compensation benefits, unemployment compensation benefits, prevailing wage legislation, minimum wage increases, civil rights, health and safety regulation, government sponsored training programs, and outlawing discrimination in the workplace.³⁹ This legislative agenda benefited both organized and unorganized workers.⁴⁰ Although this agenda was fairly modest and unambitious, it was all the American labor movement needed within the context of its success under traditional collective bargaining.

filed a charge claiming that the type of ball used in NBA play is a mandatory subject of bargaining. Liz Robbins, *A Whole New Game Ball? N.B.A. Admits Its Mistake*, N.Y. TIMES, Dec. 6, 2006, at D1.

37. See William N. Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 INDUS. & LAB. REL. REV. 594 (1993); Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197 (1999); David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 INDUS. & LAB. REL. REV. 339 (1998).

38. HOYT N. WHEELER, BRIAN S. KLAAS & DOUGLAS M. MAHONY, *WORKPLACE JUSTICE WITHOUT UNIONS* 32–44 (2004) (discussing arguments for and against employment arbitration); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

39. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, (codified at 42 U.S.C. § 2000e-2 (2006)); Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. § 654); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. § 1001).

40. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 160–61 (1984).

II. THE RISE OF THE NEW INFORMATION TECHNOLOGY AND THE GLOBAL ECONOMY: THE MARKET-DRIVEN WORKFORCE

In the 1970s, the economic and demographic factors that shaped the employment relationship in America, and therefore served as the foundation for the system of industrial unionism under the NLRA, began to change.⁴¹ First, international competition became an important factor in the American economy.⁴² With the rebuilding of Europe and the rise of the “Asian tigers,” international trade began to make serious inroads into the American economy. The impact of international trade was first felt in low-capital industries such as textiles and shoes, but the oil crisis of the 1970s facilitated significant inroads into even the capital-intensive auto and steel industries. With the quadrupling of the price of oil after the 1973 OPEC embargo, the auto and steel manufacturers in Europe and Asia enjoyed some real competitive advantages with more up-to-date production facilities, superior management, and lower wages. Manufacturing jobs began to migrate overseas or disappear as industry strived to become more efficient. As a result, the American economy became more service-oriented. The 1960s, '70s, and '80s also saw great changes in the demographics of the American work force.⁴³ African Americans took advantage of new opportunities afforded by the civil rights movement and began to move into jobs from which they had previously been excluded. Women took on new roles and entered the paid labor force in numbers that had previously not been experienced. At the same time, men began to suffer obstacles to educational opportunities that had previously been open to them, thus limiting the types of jobs they could get.⁴⁴ Also during this

41. CAPPELLI, *supra* note 33, at 4–5 (describing economic and market developments that changed the nature of the traditional employment relationship); Dau-Schmidt, *supra* note 31, at 10–13.

42. See Frances Lee Ansley, *Rethinking Labor Law in Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 371–72 (1998).

43. See KAUFMAN & HOTCHKISS, *supra* note 27, at 8–9.

44. The obstacles that women and minorities have faced in the labor market are well documented in the academic literature. Much less attention has been paid to the obstacles men face in education. Currently, boys are only 46% of High School graduates, and 40% of college graduates. Among African Americans, the statistics are even more depressing with men constituting only 43% of Black high school graduates and 33% of Black college graduates. JAY P. GREENE & MARCUS A. WINTERS, MANHATTAN INSTITUTE FOR POLICY RESEARCH, LEAVING BOYS BEHIND: PUBLIC HIGH SCHOOL GRADUATION RATES 10–11 (2006), available at http://www.manhattan-institute.org/html/cr_48.htm; see also Tom Chiarella, *The Problem With Boys*, ESQUIRE, July 2006, at 96, 97. One reason for this problem is that, since the 1980's, the percentage of female teachers and administrators in primary and secondary education has increased from 80% to 90% with a corresponding increase in reliance on teaching methods and definitions of “intelligence” and “good behavior” that are geared to girls. *Id.*; Thomas S. Dee, *The Why Chromosome: How a Teacher's Gender Affects Boys and Girls*, EDUC. NEXT, Fall 2006, at 71, available at <http://www.hoover.org/publications/ednext/3853842.html>; see also Thomas S. Dee, *A Teacher Like Me: Does Race, Ethnicity or Gender Matter?*, 95 AM. ECON. REV. 158, 162 (2005); Thomas S. Dee, *Teachers and the Gender Gaps in Student Achievement*, J. HUM.

time, the United States experienced a boom in immigration, primarily from Latin American countries.⁴⁵ Service employees, women, and minorities all proved less amenable to organization under the traditional industrial model. In part this was because some of these workers had less stable work patterns than white male manufacturing employees, and in part this was because there was an unfortunate lack of affinity, perhaps even hostility, between these workers and the white male manufacturing employees of the industrial unions.⁴⁶

In the 1980s, new information technology accelerated globalization and allowed for the efficient horizontal organization of firms. Information technology allowed employers to coordinate production among various suppliers and subcontractors around the world. Employers no longer had to be large and vertically integrated to ensure efficient production, they just had to be sufficiently wired to reliable subcontractors. The “best business practices” became those of horizontal organization, outsourcing, and subcontracting as firms concentrated on their “core competencies.”⁴⁷ In this economic environment, employers sought flexibility, not stability, in employment; the number of contingent employees reached new heights in the American economy, and Manpower, Inc. became the nation’s largest employer.⁴⁸ The new horizontal organization of firms broke down the job ladders and administrative rules of the internal labor market, and firms became more market driven. New technology allowed “bench-marking,” or the checking of an internal division’s efficiency against external suppliers and subcontractors, thus bringing the market inside the firm in a way not previously experienced. Perhaps the most extreme example of these horizontal methods of production is the Volkswagen truck plant in Resende, Brazil, where the employees of various subcontractors, under one

RESOURCES (forthcoming) (manuscript at 2), available at <http://www.swarthmore.edu/SocSci/tdee1/Research/jhrforthcoming.pdf>. Express discrimination against boys is also not uncommon as teachers and administrators create “opportunities for girls” at the primary, secondary and tertiary levels, especially in math, science and accelerated learning programs. This implicit and express discrimination does indeed seem to limit the jobs men are able to get. See generally Louis Uchitelle & David Leonhardt, *Men Not Working, and Not Wanting Just Any Job; The New Gender Divide: Men, Idle and in Their Prime*, N.Y. TIMES, July 31, 2006, at A1 (noting the growth of a significant sector of men in our society who are under-educated, unemployed and unmarried).

45. George J. Borjas & Lawrence F. Katz, *The Evolution of Mexican Immigrants in the U.S. Workforce, 1900–2000*, in *MEXICAN IMMIGRATION IN THE UNITED STATES* (George J. Borjas ed. 2007); Gordon H. Hanson, *Illegal Migration from Mexico to the United States*, 44 J. ECON. LITERATURE 869, 870 fig.1 (2006).

46. However, there was no lack of interest in organization on the part of these workers. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 71 (1999).

47. See CAPPELLI, *supra* note 33, at 99–100.

48. Winegardner, *supra* note 3; Manpower Inc., <http://www.us.manpower.com> (last visited Mar. 9, 2007).

roof, assemble trucks made from parts from around the world, with only a handful of actual Volkswagen employees on hand to perform quality control.⁴⁹ New information technology also facilitated the rise of Wal-Mart and other “big box” retailers, who used this technology to master inventory control and coordinate international supply sources. The simple bar code allowed Wal-Mart to grow into an international economic powerhouse with unprecedented power to determine wholesale prices and employment. This power in the retail market allows the “big box” retailers to determine the wages and employment of retail production employees, even though they bear no legal relation to those employees under the NLRA. For example, in 1995 when Rubbermaid sought to raise its prices to cover an increase in the cost of plastic resin, Wal-Mart refused, resulting in wage cuts and layoffs for Rubbermaid’s production workers.⁵⁰ Moreover, the “big box” retailers provide an extensive retailing network for foreign producers, facilitating the inroads of foreign production into the American economy and accelerating globalization.⁵¹

Finally, in the 1990s the global labor market experienced a near doubling of the relevant labor force with a concomitant downward pressure on wages and benefits that is yet to be fully felt in the American economy.⁵² Since 1990, the collapse of communism, India’s turn from autarky, and China’s adoption of market capitalism have led to an increase in the global economy’s available labor force, from 3.3 billion to 6 billion. Because all of these countries were relatively capital poor, their entry into the global economy has brought no corresponding increase in global capital, and as a result, the capital-to-labor ratio in the global economy has dropped approximately forty percent.⁵³ This abrupt change in the ratio of available labor and capital in the global economy has put tremendous

49. CAPPELLI, *supra* note 33, at 104; Jane Slaughter, *Modular Assembly: The Ultimate in ‘Contracting Out’ Comes to North America*, LAB. NOTES, May 1999, at 8.

50. *Is Wal-Mart Good for America?*, (PBS Frontline Report 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/walmart/view/>. Rubbermaid, with its primary production facility in Wooster, Ohio, had a reputation as a good employer who produced quality plastic products. Indeed, in 1994, Rubbermaid was voted the “most admired” American company in Fortune Magazine. In the late 1990s Rubbermaid suffered an increase in the cost of plastic resin that it tried to pass on to consumers in the price of its goods. Although most retailers accepted this price increase, Wal-Mart, by then Rubbermaid’s largest customer, refused, and declined to stock many of Rubbermaid’s products for several years. The loss of sales to Wal-Mart put Rubbermaid into an economic decline from which it has not yet recovered. In 2004 much of its manufacturing machinery was sold, and one of the largest buyers of this machinery was China. *Id.*

51. *See id.*

52. RICHARD B. FREEMAN, AMERICA WORKS: CRITICAL THOUGHT ON THE EXCEPTIONAL U.S. LABOR MARKET 128–40 (2007).

53. *Id.*

downward pressure on wages and benefits in global competition.⁵⁴ Low wage competition from elsewhere in the world has contributed to American employers' desire to subcontract work to low-wage countries and to entice the legal and illegal immigration of low-wage employees from Central and South America. The downward pressure on wages and benefits exists not only in manufacturing, but in any service in which work can be digitalized and sent to qualified people elsewhere in the world.⁵⁵

The NLRA system of collective bargaining through an exclusive representative chosen by an election in an appropriate unit does not work very well in this environment.⁵⁶ The NLRA definitions of who is an employee, who is an employer, and what constitutes an appropriate bargaining unit have all become increasingly irrelevant—at least as interpreted by the Supreme Court.⁵⁷ Workers may labor as subcontractors, temporary workers, subcontracted workers, or employees of a subcontracting employer when the *real* economic power in the relationship resides with a “third party” producer or retailer. Jobs are not well-defined or long-term, as employees work in situations of decentralized decision making and progress through their careers among multiple employers. The decentralization of decision making in the new economic environment poses a particular problem for the definition of employees and employers under the NLRA due to the Court's broad interpretation of the supervisory and managerial employee exceptions.⁵⁸ As the NLRA definitions of employee and employer have lost their meaning in the new economy, so

54. See Alan V. Deardorff, *The General Validity of the Law of Comparative Advantage*, 88 J. POL. ECON. 941 (1980). It has also put tremendous upward pressure on the price of capital and natural resources.

55. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 12–16 (2005); *THE NEW MARKET FOR SCIENTISTS AND ENGINEERS: THE SCIENCE AND ENGINEERING WORKFORCE IN THE ERA OF GLOBALIZATION* (Richard B. Freeman & Daniel F. Goroff, forthcoming 2007) (discussing the downward pressure on wages and benefits in engineering, accounting, law, and medicine).

56. See STONE, *supra* note 12, at 124–26.

57. The Supreme Court has rejected the Board's interpretations of the provisions of the Act regarding aspects of the definition of employee, supervisor, and professional employee in a number of cases. See *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706 (2001) (holding that the Board erred in finding no “independent judgment” where nurses use ordinary professional or technical judgment in directing less-skilled employees); *NLRB v. Healthcare & Ret. Corp. of America*, 511 U.S. 571 (1994) (holding that the Board erred in finding a nurse's supervisory activity that was incidental to patient care was not exercised “in the interest of the employer”); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (disagreeing with the Board's assessment that faculty members of a university should not be considered “managerial”); see also Gary Knapp, Annotation, *Who Is “Employee” Within Meaning of § 2(3) of National Labor Relations Act, as amended (NLRA) (29 USCS § 152(3))—Supreme Court Cases*, 133 L. Ed. 2d 931 (1999).

58. See Knapp, *supra* note 57, at 944–49.

too has the definition of an appropriate bargaining unit, which depends on these definitions.

Even putting aside the problems of definitions under the NLRA, employees and employers are less amenable to traditional NLRA organization in the new economic environment. In the new economy, employees have less long-term interest in the job and thus less incentive to organize a particular employer. Why should employees incur the risks and costs of organizing a particular employer when they may well be working for a different employer next year? Employers are more concerned with ensuring low prices and flexibility in production than with maintaining production or a stable workforce. As a result, employers are more inclined to resist employee organization and take advantage of the many strategies for delay and intimidation available under the current law. Although the potential remedial awards that could be levied against an employer for engaging in strategies of intimidation or delay are relatively small, such employer tactics can significantly raise the costs of organizing to employees and unions.⁵⁹ Statistics suggest that employers engaged in approximately 28,000 instances of reprisals against union proponents last year, with an average back pay award of only \$2,700.⁶⁰ Because the

59. Employers can complicate organizational efforts through delay. See Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 372, 381–82 (2001); see also William B. Gould IV, *The Labor Board's Ever Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505, 1510–12 (1999) (discussing the effects of institutional delay in the National Labor Relations Board's resolution of cases on organizational rights). Employee organizational rights are impaired because unions do not have adequate or equal access to them. Randall J. White, Note, *Union Representation Election Reform: Equal Access and the Excelsior Rule*, 67 IND. L.J. 129, 142 (1991). Employers exercise significant power over career employees to dissuade them from organization simply because employees are reluctant to forego accrued benefits to fight for improved terms in the workplace. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 21–22 (1990). The number of unfair labor practice (“ULP”) charges filed against employers increased from approximately 6,000 in 1955 to nearly 40,000 in 1978. Myron Roomkin, *A Quantitative Study of Unfair Labor Practice Cases*, 34 INDUS. & LAB. REL. REV. 245, 246 (1981). In 1997, 25,809 ULP charges were filed against employers. 62 NLRB ANN. REP. 6 (1997). In 2005, alleged violations of the Act by employers were filed in 18,304 cases, a decrease of 8 percent from the 19,946 filed in 2004. 70 NLRB ANN. REP. 7 (2005). A steady decline in the number of ULP charges filed against employers over the last decade can be attributed to a recent change in union organizing strategy whereby labor is organizing workers outside of the traditional NLRB representation process. See Hartley, *supra* (discussing the new approach of union organizing that “largely bypasses” the NLRB).

60. Employers are not deterred from committing unfair labor practices by inadequate backpay awards. Robert M. Worster, III, Case Note, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1083–87 (2004). In 2005, the number of employees receiving backpay from either employer or union was 31,497, and the total amount of backpay awarded was \$84,313,802—an average of \$2,676.88 per recipient. 70 NLRB ANN. REP. tbl. 4 (2006). One commentator has estimated that one in twenty union supporters are unlawfully discharged. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983). Professor Weiler's estimate is

workforce has become more diverse, it has become more costly to organize on an industry-wide basis. Employees need to overcome the socially constructed divisions of race, ethnicity, and nationality and the socially constructed portion of the division of gender in order to organize for their mutual aid and protection. Of course, employers sometimes attempt to exacerbate these divisions as a means of preventing worker solidarity, and can now do so on an international basis in the new global economy. An AFL-CIO estimate suggests that it costs a union as much as one thousand dollars per worker to undertake an organizing campaign.⁶¹ Finally, the increased flux in work and production in the new economy makes maintaining a given level of organization in a given industry more difficult. Due to increased employee turnover, employer reorganization, and outsourcing, workers who are organized do not necessarily stay organized long. A recent AFL-CIO estimate suggests that it will take twenty percent of the organization's budget just to organize and replace those members who are lost due to attrition, reorganization, and outsourcing.⁶²

Finally, traditional single unit, "bread-and-butter" collective bargaining does not always work well in the new economic environment.⁶³ Unions have had trouble delivering on higher wages and benefits in recent years. The entry of the former Soviet Republics, India and China into the world economy has ensured that there are some real wages and benefits bargains available to employers in sectors that are open to international trade. New information technology allows employers to more easily relocate or outsource work to replace employees and cut wage costs. Moreover, in the new economic environment, employers strive to maintain flexibility in production and employment and to resist the promises of job security, seniority, and benefits that employers once used to bind employees to their jobs. With the decline of the internal labor market and the rise of a market-driven workforce, there are less managerial rules for unions to help determine and administer, and thus less for unions to achieve through traditional collective bargaining. Finally, the new decentralized

based on the fact that, in 1980, the NLRB secured reinstatement for more than 10,000 employees who had been illegally discharged and obtained back pay settlements for another 5,000 employees, and on the fact that a number of additional affected employees did not file charges. *Id.* at 1780–81. He then suggests that of the at least 10,000 employees who were fired in 1980 for involvement in representation campaigns, the employees most at risk were among the 200,000 who voted for union representation in 1980; hence, the one-to-twenty ratio. *Id.* at 1781.

61. Richard B. Freeman & Joel Rogers, *A Proposal to American Labor*, THE NATION, June 24, 2002, available at <http://www.thenation.com/doc/20020624/rogers>; see also Paula B. Voos, *Union Organizing Costs and Benefits*, 36 INDUS. & LAB. REL. REV. 576, 584 (1983) (estimating the organizing cost in 1980 at between \$434 and \$1,429 per worker).

62. See Freeman & Rogers, *supra* note 61.

63. See Dau-Schmidt, *supra* note 31, at 20–22.

organization of production among contractors and subcontractors, rather than in large, vertically integrated firms, and the rise of the “big box” retailers means that workers are less likely to be “employed” by the party with real economic power in their employment relationship. The restrictive definition of employer and the existing restrictions on “secondary” boycotts under the NLRA significantly hamper workers’ ability to address the issues of most concern to them with the party having control over those issues through traditional collective bargaining.⁶⁴

III. OPPORTUNITIES FOR UNIONS IN THE NEW ECONOMIC ENVIRONMENT

The rise of the global economy and the implementation of new information technology pose some serious problems for traditional organizing and collective bargaining under the NLRA. Because of the changes in the employment relationship these developments have wrought, the costs of traditional organizing have increased while the benefits of traditional collective bargaining have decreased. It is thus not surprising that the percent of the private sector workforce organized in the United States has declined precipitously over the past thirty years.⁶⁵ There currently exists a vigorous debate within the American labor movement as to how to respond to this problem. The crux of the debate seems to be whether to commit resources to innovative methods of organizing and then to rally the new membership to address limitations in the current law, or to commit resources to politics in hopes of amending the law to facilitate future organizing. Although I cannot resolve this debate, I would like to point out that the current economic environment also presents some interesting opportunities for the labor movement.

First, and most obviously, new information technology provides new means for communication and coordination. In undertaking any form of collective action, there are major problems and costs associated with collecting and dispersing information and coordinating efforts. To the extent that new information technology lowers these costs, it can be a boon to employee organizing and collective action. Moreover, each new generation of workers shows more adaptation to, and reliance on, new information technology to conduct their lives. Unions are beginning to use new information technology to transmit information on wages, benefits,

64. Restrictions on secondary boycotts hurt unions more in today’s economy of fluid and ambiguous production relationships. STONE, *supra* note 12, at 209–12.

65. BRUCE E. KAUFMAN, *THE ECONOMICS OF LABOR MARKETS* 492–519 (4th ed. 1994) (discussing the costs and benefits of unions and the decline of unionization over time); Voos, *supra* note 61 (same).

work disputes, and boycotts, as well as to coordinate efforts in collective action both locally and around the world.⁶⁶ The labor movement should fully exploit this new technology, especially as it attempts to organize the e-generation.

Second, the vertical disintegration of firms and the rise of contingent employment have created a need for an institution to coordinate benefits and training over the course of employees' careers and to represent their interests on a multi-employer and societal basis. Private firms could offer benefit plans for individual purchase; the government could also increase its health insurance and pension programs. However, unions seem well situated to marshal the necessary resources and to administer these benefits on an industry-wide basis in the absence of long-term employment with a single employer. Indeed, unions have an ample history of administering multi-employer benefit programs in the construction industry, where worker-union affiliation is more stable than the typical employment relationship.⁶⁷ Similarly, unions or professional associations could coordinate employee training and advancement among multiple employers to provide some semblance of career ladders in the new information age. As discussed below, some unions and professional organizations have already started to focus on promoting training and career continuity for their members over the course of their work lives.⁶⁸ Also, even in the absence of traditional collective bargaining agreements, workers need labor and professional organizations to represent their interests in their respective industries, as well as in society at large. Labor organizations and professional associations can represent their members by providing aid and expertise in the negotiation and enforcement of individual contract rights and in the promulgation and enforcement of statutory and constitutional rights. Indeed, as discussed below, the implementation of new information technology and the rise of the global economy have raised some important issues of risk bearing and equity that will need to be addressed on a societal or international level. Unions can play a pivotal role in representing workers' interests in these debates.

Finally, the adoption of new production methods and the rise of the global economy raise important issues that need to be addressed on a collective basis. The utilization of new information technology to adopt decentralized production methods—which involve more short-term

66. Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 2–3 (Nat'l Bureau Econ. Research, Working Paper No. 11298, 2005).

67. HERZENBERG ET AL., *supra* note 30, at 131–33.

68. See Dau-Schmidt, *supra* note 31, at 18–20.

employment relationships—has led to the devolution of risk from employers to employees.⁶⁹ As the provision of benefits as a method to bind employees to employers has declined, employees have come to shoulder a greater share of the risk of illness and disability and have taken on greater responsibility for the marshaling and investment of their retirement resources. As employers have abandoned lifetime employment schemes, employees have also taken on greater responsibility for retraining if their skills become obsolete, and shoulder a greater risk of periods of unemployment during their work lives.⁷⁰ This devolution of risk onto individual employees aggravates important problems that can be addressed on a collective basis, either at the firm, professional, or societal level. Indeed, the problem can perhaps *best* be addressed through a collective plan for direct risk reduction and efficient risk spreading. The only question is whether such collective solutions should be undertaken through the market, internal employer rules, or societal programs. It would seem that these risk issues raise an important question for workers to address through collective workplace or political action.

Moreover, although globalization of the economy has led to economic growth, it has also led to inequality and economic dislocation. Even simple economic models of international trade demonstrate that although it may increase total wealth, international trade is not Pareto superior in that not all people will necessarily benefit from it.⁷¹ The model of comparative advantage demonstrates that, as high-wage, capital-rich countries trade with low-wage, capital-poor countries, in the capital-rich states downward pressure will be put on wages and upward pressure will be put on payments to capital, while in capital-poor states the reverse will be true.⁷² In capital-rich countries such as the United States, international trade will increase income inequality by increasing payments to capital and to some high-skilled workers who do well in international competition, while decreasing payments to other workers who are underbid by foreign competition. Data on the United States confirms that during the last three decades, wages have remained flat and income inequality has grown.⁷³ In 2003, the average real wage for American production workers was \$15 an hour, almost

69. HERZENBERG, ET AL., *supra* note 30, at 29–30.

70. See Dau-Schmidt, *supra* note 31, at 14.

71. See R. Dornbusch, S. Fischer & P.A. Samuelson, *Comparative Advantage, Trade, and Payments in a Ricardian Model with a Continuum of Goods*, 67 AM. ECON. REV. 823 (1977).

72. See *id.*

73. LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, *THE STATE OF WORKING AMERICA: 2004/2005*, at 58–107, 120 (2005).

precisely the same amount as it was in 1971.⁷⁴ Moreover, since 1979, the pretax household income of the lowest quintile has grown 6.4% in the United States, while the pretax household income of the highest quintile has grown 69.6%. Over this same period, the pretax household income of the highest 1% grew 184.1%.⁷⁵ This issue of increased income inequality in the United States, and developed countries in general, poses another important question for workers to address through collective action in the workplace and in the political arena.

The need to address the issues of dislocation, risk, and income inequality provides a basis for a broad-based social and political labor movement. Globalization may be inevitable, but it is still an open question whether we will use the process to raise everyone up or leave some workers behind. Since we use the market as a means for rationing so many things, including medical care and education, this question goes to the fundamental fairness and structure of American society. Furthermore, the growing inequality appears to be undermining the functioning of our democracy.⁷⁶ There is also a need to readdress the government's role in helping people to bear risk, save for retirement, and obtain useful training. Our system has long been a mixed system of basic government programs and private-employment-based benefits and training. As employment becomes more contingent and less long-term, employers will be less willing to invest in benefits and training for a given employee because she will reason that the employee may soon be working for someone else. Moreover, the competition of the global economy will mean that private employers cannot provide benefits unless they directly and immediately increase productivity. As a result, we will have to rely more on government programs to meet these needs. At a minimum, there is a need to retrain employees displaced from their jobs by the machinations of the global economy. Unions and professional organizations can play an important role in promoting, shaping, and monitoring the administration of such programs in workers' interests. This discussion must be conducted on a larger societal basis, or even an international basis, because such problems can no longer be effectively addressed at the employer level in a global economy.

74. *Id.* at 120 fig.2A.

75. *Id.* at 78 fig.1N.

76. See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL L. REV. 591, 609–11 (2005) (analyzing empirical literature that indicates political contributions cause subtle changes in policy that are “under the radar screen” rather than buying votes or elections). See generally Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); *Big Givers*, WASH. POST, Feb. 10, 2007; Steve Weissman, *How “Soft Money” Corrupts Public Policy*, PUB. CITIZEN NEWS, Sept.–Oct. 1999, at 7; Jill Zuckman, *Money the Root of All Politics*, CHI. TRIB., Feb. 8, 2007.

V. WHAT CAN UNIONS DO? HOW WILL THEY PROGRESS?

Globalization and new information technology have forever changed the ways that unions can operate and be successful. Traditional collective bargaining will survive but only in sectors insulated from international competition. Even in these sectors, unions will need to adopt new strategies to succeed in organizing and representing workers. Service Employees International Union (“SEIU”) President Andy Stern, of the “Change to Win” Coalition, has argued that unions need to specialize in certain industries, organize on a multi-employer or industry basis, and coordinate their efforts with other unions organizing workers in the same industry or geographic area.⁷⁷ This strategy of targeting and coordination allows unions to achieve economies of specialization and scale and reverse the trend of rising organizing costs. An example of a current multi-union organizing campaign on an area basis is the campaign in Florida currently undertaken by the “Change to Win” Coalition.⁷⁸ Moreover, unions that organize all of the employers in a relevant market will take wages out of competition and lower employer incentive to resist. For example, the SEIU consciously undertook to organize all of the cleaning-service people in northern New Jersey for the purpose of taking wages out of competition and reducing employer resistance.⁷⁹ Of course, in the global economy, organization and collective action often will need to be coordinated with like-minded workers in other countries. The SEIU presents an example with its efforts to pressure European hoteliers to raise wages and benefits of their employees in the United States, by appealing to the companies’ European workers and their influence over the employer.⁸⁰

Where unions have some economic, legal, or political leverage over existing employers, they should use this leverage to negotiate private agreements on a system for determining representation that is more fair and more efficient than the cumbersome NLR election system. These private agreements can take many forms, but they generally try to achieve one or more of the following objectives: (1) committing the employer to remain neutral in a future organizing campaign; (2) specifying the procedure for determining majority representation, including specifying the appropriate unit and election date, specifying a private system of election, or agreeing on a simple card check to determine representation; (3) securing union

77. Matt Bai, *The New Boss*, N.Y. TIMES MAG., Jan. 30, 2005, at 38, 43.

78. Devona Walker, *Unions Making Headway in Florida*, SARASOTA HERALD-TRIB., Jan. 15, 2007.

79. Bai, *supra* note 77, at 42.

80. *Id.* at 45.

access to new employees for organizing purposes, either by giving them access to the workplace or the employees' phone numbers and addresses; and (4) producing a conditional outline of the terms and conditions of employment if union representation is achieved. In their simplest form, such agreements have been held enforceable under Section 301 of the Labor Management Relations Act.⁸¹ However, they have been held to violate Section 8(a)(2) of the NLRA as unlawful employer "domination or assistance" when they give one union too much access to the employees,⁸² or when any outline of future contract terms looks too much like an actual collective bargaining agreement.⁸³ Professor Sam Estreicher has argued that such agreements should be allowed and be enforced as fair and efficient methods of determining representation status.⁸⁴ Estreicher even supports the enforcement of "framework" or "prehire" agreements that outline the terms of any future collective bargaining agreement—arguing that such agreements give the workers important information on what their wages and benefits will be if they choose the union, and that such agreements give the employer notice of what will be the costs of a newly

81. See 29 U.S.C. § 185 (2006); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (reversing a district court decision that an employer-repudiated contract was the primary jurisdiction of the NLRB and holding that § 301 provided the district court with jurisdiction); *Brylane, L.P.*, 338 N.L.R.B. 538 (2002); *New Otani Hotel & Garden*, 331 N.L.R.B. 1078, 1082 (2000); *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464 (1999).

82. The point at which employer cooperation crosses the line and becomes unlawful "support" is not susceptible to precise measure. Instead, the Board assesses each case based on its own particular facts and the totality of the employer's conduct. See *Miller Indust. Towing Equip., Inc.*, 342 N.L.R.B. 1074 (2004); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992); *Kaiser Found. Hosps., Inc.* 223 N.L.R.B. 322 (1976); *Longchamps, Inc.*, 205 N.L.R.B. 1025 (1973). The Board has found that an employer may go so far as to require employees to attend meetings with the union, pay employees to attend these meetings, and testify to the potential benefits that will result from unionization. *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1 (2001); *Jolog Sportswear, Inc.*, 128 N.L.R.B. 886 (1960), *aff'd*, 290 F.2d 799 (4th Cir. 1961). However, the employer's cooperation may constitute unlawful support if the employer accompanies union representatives while they solicit signatures on cards, does not re-emphasize its neutrality after discussing the potential benefits of unionization, does not give equal access to competing unions, and does not have the asserted majority independently verified by a third party or a secret ballot election. *Planned Bldg. Servs.*, 347 N.L.R.B. No. 64, 2006 WL 2206975, at *9 (2006); *Duane Reade, Inc.*, 338 N.L.R.B. 943, 944 (2003); *Shore Health Care Ctr., Inc.*, 317 N.L.R.B. 1286, 1289 (1995); *Vernitron Elec. Components, Inc.*, 221 N.L.R.B. 464, 466 (1975); *Peter & John's Rest. Corp.*, 213 N.L.R.B. 450, 453 (1974).

83. The Supreme Court has held that for an employer to negotiate a collective bargaining agreement with a union in advance of establishing majority status conveys a "deceptive cloak of authority" on the union, which is a marked advantage in securing employee support. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 736 (1961); accord *Ryder Integrated Logistics, Inc.*, 329 N.L.R.B. 1493, 1500 (1999); *Grocery Haulers, Inc.*, 315 N.L.R.B. 1312, 1318 (1995).

84. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834–39 (1996) [hereinafter Estreicher, *Freedom of Contract*]; Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 521; Samuel Estreicher, *Labor-Management Partnership Agreements: Re-examining the Legal Barriers*, Charles H. Goldstein Labor Law Symposium, George Washington University Law School, Feb. 17, 2006.

Why then, one might ask, do many sources—such as those identified by the majority in *Lockwood*¹³⁶—state that the writ of *scire facias* was only used to invalidate patents based on fraud? The likely answer to this question becomes apparent when considering the process by which inventors had obtained their patents in England:

The Attorney-general, or officer who advises the Crown, must in every case in which the grant of a patent is not opposed, rely solely on the statements of the person petitioning for the patent, and no one can be present on behalf of the public to controvert any of the statements he may make in support of his claim for a patent. Even in opposed cases the party opposing can obtain no information respecting the nature of the invention for which a patent is sought, except what he may acquire from the title of the invention inserted in the petition

. . . .

. . . The law, therefore, takes especial care to protect the Crown against false petitions and representations. It is accordingly laid down that it is the duty of every one obtaining a grant from the Queen, to see that she is correctly informed respecting the grant. . . . And *when facts are recited in a patent respecting the subject-matter of the grant, it will be presumed that the statements contained in the recital were represented or suggested to the Queen by the patentee.*

The material particulars respecting an alleged invention for which a party seeks to obtain a patent, must . . . be stated in the petition for the patent. *The petition must therefore state, that the petitioner is the inven-*

the King; as in the instance of an unfounded patent for an invention, or where the specification is incorrect." (footnotes omitted)); FOSTER, *supra* note 108, at 242, 245–46 ("Every such grant by letters patent of the sole right to make, use, exercise, and vend any invention, is void, if the invention was 'not invented or found out' by the grantee, or first introduced into the kingdom by him; and also if the invention is not new, and useful to the public. It is also void for uncertainty, or for being too general; for misrecitals; for false suggestions, by which the Queen has been deceived or misinformed in her grant, or where she has granted more than she lawfully may, or what may be to the prejudice of the commonwealth, or to the general injury of the people; or where she has granted the same thing to two persons. . . . If a patent be void for any of the reasons which have been briefly assigned, as sufficient to invalidate the grant, the Queen . . . may have a *scire facias* to repeal her own grant. A *scire facias* is the only means which the law provides for the repealing of letters patent The subject also who is prejudiced by a grant may of right petition the Queen for leave to use her name in a writ of *scire facias* for its repeal." (footnotes omitted)); RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT; WITH AN INTRODUCTORY BOOK ON MONOPOLIES; ILLUSTRATED WITH NOTES OF THE PRINCIPAL CASES 195–96 (London, Joseph Butterworth & Son 1823) ("[T]he grant is invalid when the patentee is not the *inventor*, when its *object* is not a manufacture, and when the *specification* is not sufficiently correct Upon these grounds letters patent are voidable in themselves, but cannot be treated as of no effect in law until they are cancelled by the legal process of a writ of *scire facias* . . ." (footnotes omitted)); W.M. HINDMARCH, A TREATISE ON THE LAW RELATING TO PATENT PRIVILEGES FOR THE SOLE USE OF INVENTIONS; AND THE PRACTICE OF OBTAINING LETTERS PATENTS FOR INVENTIONS; WITH AN APPENDIX OF STATUTES, RULES, FORMS 378 (London, V. & R. Stevens & G. S. Norton & W. Benning & Co. 1846) ("[T]he law provides a remedy for the public by action of *scire facias*, . . . and if *any* valid objection is sustained, the result is, that the patent is repealed or annulled, and ordered to be cancelled." (emphasis added)).

136. See, e.g., *Ex parte Wood & Brundage*, 22 U.S. (9 Wheat.) 603, 609 (1824) (stating *scire facias* is used "to repeal patents which have been obtained surreptitiously, or upon false suggestions").

access to new employees for organizing purposes, either by giving them access to the workplace or the employees' phone numbers and addresses; and (4) producing a conditional outline of the terms and conditions of employment if union representation is achieved. In their simplest form, such agreements have been held enforceable under Section 301 of the Labor Management Relations Act.⁸¹ However, they have been held to violate Section 8(a)(2) of the NLRA as unlawful employer "domination or assistance" when they give one union too much access to the employees,⁸² or when any outline of future contract terms looks too much like an actual collective bargaining agreement.⁸³ Professor Sam Estreicher has argued that such agreements should be allowed and be enforced as fair and efficient methods of determining representation status.⁸⁴ Estreicher even supports the enforcement of "framework" or "prehire" agreements that outline the terms of any future collective bargaining agreement—arguing that such agreements give the workers important information on what their wages and benefits will be if they choose the union, and that such agreements give the employer notice of what will be the costs of a newly

81. See 29 U.S.C. § 185 (2006); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (reversing a district court decision that an employer-repudiated contract was the primary jurisdiction of the NLRB and holding that § 301 provided the district court with jurisdiction); *Brylane, L.P.*, 338 N.L.R.B. 538 (2002); *New Otani Hotel & Garden*, 331 N.L.R.B. 1078, 1082 (2000); *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464 (1999).

82. The point at which employer cooperation crosses the line and becomes unlawful "support" is not susceptible to precise measure. Instead, the Board assesses each case based on its own particular facts and the totality of the employer's conduct. See *Miller Indust. Towing Equip., Inc.*, 342 N.L.R.B. 1074 (2004); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992); *Kaiser Found. Hosps., Inc.* 223 N.L.R.B. 322 (1976); *Longchamps, Inc.*, 205 N.L.R.B. 1025 (1973). The Board has found that an employer may go so far as to require employees to attend meetings with the union, pay employees to attend these meetings, and testify to the potential benefits that will result from unionization. *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1 (2001); *Jolog Sportswear, Inc.*, 128 N.L.R.B. 886 (1960), *aff'd*, 290 F.2d 799 (4th Cir. 1961). However, the employer's cooperation may constitute unlawful support if the employer accompanies union representatives while they solicit signatures on cards, does not re-emphasize its neutrality after discussing the potential benefits of unionization, does not give equal access to competing unions, and does not have the asserted majority independently verified by a third party or a secret ballot election. *Planned Bldg. Servs.*, 347 N.L.R.B. No. 64, 2006 WL 2206975, at *9 (2006); *Duane Reade, Inc.*, 338 N.L.R.B. 943, 944 (2003); *Shore Health Care Ctr., Inc.*, 317 N.L.R.B. 1286, 1289 (1995); *Vernitron Elec. Components, Inc.*, 221 N.L.R.B. 464, 466 (1975); *Peter & John's Rest. Corp.*, 213 N.L.R.B. 450, 453 (1974).

83. The Supreme Court has held that for an employer to negotiate a collective bargaining agreement with a union in advance of establishing majority status conveys a "deceptive cloak of authority" on the union, which is a marked advantage in securing employee support. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 736 (1961); *accord* *Ryder Integrated Logistics, Inc.*, 329 N.L.R.B. 1493, 1500 (1999); *Grocery Haulers, Inc.*, 315 N.L.R.B. 1312, 1318 (1995).

84. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834–39 (1996) [hereinafter Estreicher, *Freedom of Contract*]; Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 521; Samuel Estreicher, *Labor-Management Partnership Agreements: Re-examining the Legal Barriers*, Charles H. Goldstein Labor Law Symposium, George Washington University Law School, Feb. 17, 2006.

organized workplace.⁸⁵ Unfortunately, the Board seems poised to significantly limit the use of framework and prehire agreements in determining representation questions. In the pending case of *Dana Corp.*,⁸⁶ the Board has indicated that it may lower the value of voluntary recognition and revive the *Majestic Weaving* standard that has lain dormant for almost forty years.⁸⁷

Another organizing strategy that allows unions to avoid the pitfalls of the NLRA election system and reduce organizing costs is minority representation. In the decades before and after the passage of the NLRA, American unions would commonly organize workers without an election and negotiate a collective bargaining agreement on a “members only” basis.⁸⁸ If the workers showed sufficient solidarity, such organization was done for the low cost of collecting signatures. Moreover, if the minority union had sufficient bargaining power, it might have a significant impact on the terms and conditions of employment and running the firm. American unions got out of the habit of organizing in this way during the heady days of the 1950s when the NLRA’s election system served American unions well. However, there is no reason why unions cannot still organize in this fashion under the NLRA, and the only real question is whether the employer would have a legal obligation to negotiate with a minority union on the terms covering its members.⁸⁹ Building on work by Professor Clyde

85. Estreicher, *Freedom of Contract*, *supra* note 84, at 834–39 & n.17 (noting that pre-hire agreements have been enforced in the construction industry for years and that the organization of the industry around the union, rather than a particular employer, is a model for employee organization in the information economy). Within the context of the bargaining model, these agreements allow exchanges of information that encourage cooperative resolution of the prisoners’ dilemma “game” of employee organizing. Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 487 (1992).

86. *Dana Corp.*, 341 N.L.R.B. 1283 (2004).

87. In *Dana Corp.*, the General Counsel alleges that the UAW and the company entered into an unlawful agreement that set forth the terms and conditions of employment to be negotiated in a collective bargaining agreement should the UAW obtain majority status. As part of the remedy, the General Counsel asks for the voiding of any membership cards collected by the UAW since entering into the agreement. *Dana Corp.*, 7-CA-46965, 2005 WL 857114, at *1 (N.L.R.B. Apr. 11, 2005). The General Counsel’s position in *Dana Corp.* is based on *Majestic Weaving Co.*, 147 N.L.R.B. 859, 860–62 (1964), where the Board held that the employer had placed an imprimatur of legitimacy on the union, and abridged his employees’ rights by discussing conditional contract proposals with the union in advance of a demonstration of majority status. The *Majestic Weaving* decision overruled prior Board law on the issue and has been ignored for some time. Thus, it was a surprise to many in the labor law community that the General Counsel would seek to resuscitate the doctrine. *See, e.g.*, Jonathan P. Hiatt & Craig Becker, *At Age 70, Should the Wagner Act Be Retired? A Response to Professor Dannin*, 26 BERKELEY J. EMP. & LAB. L. 293, 302 (2005).

88. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 184 (2005).

89. Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True’s Review Essay on The Blue Eagle at Work, and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179, 187 (2006) (book review).

Summers,⁹⁰ Professor Charlie Morris has argued that the words and legislative history of the NLRA establish the obligation of employers to negotiate with minority unions.⁹¹ This proposition is currently being tested before the Board.⁹²

In the future, however, we are likely to see employee organization that surpasses the traditional jurisdictional basis of organizing a particular employer or craft within the context of a regional or national industry. As employers become “boundaryless” using the new information technology in the global economy, unions will have to become “boundaryless” and organize on multi-employer, sectoral, occupational, professional, national, or international bases.⁹³ Organization on an occupational or professional basis will help meet the needs of employees for continuity in the provision of benefits, training, and opportunities over the course of their careers in the new economy. The unions in the building and construction trades have administered benefit and training programs for years, but now employee organizations in other industries are adopting these practices.⁹⁴ New York freelancers in writing, art, financial advice, and computers have organized themselves for the purchase of health insurance and other benefits in the organization “Working Today.”⁹⁵ Perhaps the most interesting innovation of such programs currently in existence is the Wisconsin Regional Training Partnership, a partnership among forty different manufacturing concerns and their unions to provide training for laid-off employees in the Milwaukee area.⁹⁶ Coordination among unions in organizing campaigns,

90. Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

91. MORRIS, *supra* note 88, at 215–19.

92. Dick’s Sporting Goods, 6-CA-34821, 2006 NLRB GCM LEXIS 35 (N.L.R.B. June 22, 2006) (“This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and/or (5) by refusing to recognize and bargain with the Charging Party as the minority bargaining representative for its members.”); see also Charles J. Morris, *Members-Only Collective Bargaining: Rejecting Conventional Wisdom*, PERSPECTIVES ON WORK (Fall 2005), available at <http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Fall05-morris.htm>.

93. See STONE, *supra* note 12, at 217–19. Richard Freeman and Joel Rogers use the term “open-source unionism” to refer to organizing employees on different bases than the traditional industrial unions and to address a broader array of worker interests. Freeman & Rogers, *supra* note 61, at 19. This term has the advantage of alluding to the vocabulary of the information age.

94. HERZENBERG ET AL., *supra* note 30, at 131–33.

95. Sarah N. Kelly & Christine Tramontano, *Working Today*, 50 N.Y.L. SCH. L. REV. 597 (2006); Steven Greenhouse, *Labor Union, Redefined, For Freelance Workers*, N.Y. TIMES, Jan. 27, 2007.

96. HERZENBERG ET AL., *supra* note 30, at 135–36. Herzenberg, Alic, and Wial also document broad-based, union-initiated training programs in the hotel industry, computer software industry, and healthcare industry. Of particular note: the alliance between Wash Tech (one of the Communication Workers of America’s “virtual union” affiliates designed to address the needs of workers in the high-tech industry) and Cisco company providing training for high-tech workers in the Pacific Northwest, Danielle D. Van Jaarsveld, *Collective Representation Among High-Tech Workers at Microsoft and Beyond: Lessons from WashTech/CWA*, 43 INDUS. RELATIONS 364 (2004); and the District 1199

both within countries and across borders, will be necessary to lower organizing costs and apply effective economic pressure on boundaryless employers. The member organizations of the “Change to Win” Coalition have been the greatest advocates of this tactic and have employed it to good effect in organizing campaigns in Florida and in coordinating trans-Atlantic pressure on major European hotel chains operating in the United States.⁹⁷ Perhaps the best example of cross-border coordination involving American workers occurred in the organization efforts of the Washington apple pickers who used consumer boycotts in Mexico to pressure growers in America’s Pacific Northwest to improve working conditions in accordance with NAFTA provisions and accept a card-check procedure in an organizing drive.⁹⁸

Similarly, we are likely to see organizational objectives that transcend the objectives of higher wages and benefits from a particular employer sought through traditional bread-and-butter collective bargaining. Higher wages and better working conditions will of course remain one of the primary objectives of worker organizations, but they may be achieved within the context of larger area standards contracts, corporate codes of conduct, local and state laws, national laws, or international treaties. Good examples of this already exist. The International Alliance of Theatrical and Stage Employees (“IATSE”) have negotiated a collective agreement that establishes certain minimum terms, but allows “embedded” individual contracts and does not guarantee employment.⁹⁹ As Professor Katherine Stone points out, such exercises in the “new craft unionism” attempt to establish certain market- or industry-wide minimum terms, while still

initiative in Philadelphia and New York to help hospital workers train for promotions and career advancement. Joan Fitzgerald & Virginia Carlson, *Ladders to a Better Life*, AM. PROSPECT, June 19, 2000, at 54, 56–57.

97. Bai, *supra* note 77, at 45.

98. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 135–42 (2000). There was no small irony in the fact that many of the apple pickers who were organizing in America’s Northwest were of Mexican descent. Organization is also currently happening based on ethnicity. The growth in the number of Latino Worker Centers from a handful to over a hundred in the course of the last decade is an important development in the American labor relations landscape. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2006); see also Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2006). Such organization hearkens back to the prior organization of American immigrants along ethnic lines and can serve to lower the costs of organizing and take advantage of ethnic solidarity in perspectives and interests. However, the organization of American workers according to separate ethnic groups could also be a divisive factor within the American labor movement. In order to address the larger issues of risk, inequality, and the ordering of interests in the new economy, workers will need to organize based on larger social or political identities on a national or even international basis.

99. STONE, *supra* note 12, at 221.

allowing the employer flexibility as to how many of the employees work and in what capacity—employee, subcontracted employee, or subcontractor. Similarly, Casa Mexico and the New York AFL-CIO, in conjunction with the New York Attorney General's Office, negotiated a corporate code of conduct to establish minimum standards for employees of the greengrocers in New York City and to address labor code violations, even though they do not represent the employees in a formal collective bargaining relationship.¹⁰⁰ Such local codes of conduct hearken to the international codes of corporate conduct negotiated by human rights groups and labor organizations to establish minimum labor standards for workers in developing countries. Human rights and labor organizations have used the power of consumer boycotts in developing countries to gain compliance by such corporate giants as Nike and Chiquita.¹⁰¹ Workers in consumer countries can use the political process to exert similar pressure on a larger scale to achieve international treaties on minimum working conditions.¹⁰²

Finally, we are likely to see more employee collective action that surmounts the traditional strategies of withholding labor or boycotting goods to achieve higher wages and benefits for the employees of a particular employer. Not that strikes and boycotts won't continue to be

100. N.Y. Office of the Attorney Gen., Greengrocer Code of Conduct, *available at* http://www.oag.state.ny.us/labor/final_ggcode_english_long.pdf. Not everyone has been satisfied with the results of this code of conduct. Compare Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183 (2003) (optimistic), with Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599 (2004) (pessimistic).

101. See César Rodríguez-Garavito, *Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas*, 13th Annual Ind. Journal of Global Legal Studies Symposium: Globalization and the New Politics of Labor (Feb. 12, 2005); Nike Inc., Nike's Code of Conduct, Mar. 1997, <http://www.itcilo.it/english/actrav/telearn/global/ilo/code/nike2.htm> (last visited Apr. 22, 2007). Lone Riisgaard has outlined the Chiquita Code of Conduct and the experiences of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Association ("IUF"); the Latin American Coordination of Bananas Workers Unions ("COLSIBA"); and Chiquita in negotiating and implementing the agreement. Lone Riisgaard, *The IUF/COLSIBA—CHIQUITA Framework Agreement: A Case Study* (Int'l Labour Office—Geneva, Working Paper No. 94, 2003), *available at* <http://www.ilo.org/public/english/employment/multi/download/wp94.pdf>. The International Metalworkers' Federation, The Group Global Works Council, and Volkswagen have also set forth an international code of corporate responsibility for Volkswagen, although, to my knowledge, threats of consumer boycotts were not necessary to get Volkswagen's agreement to this document. Declaration on Social Rights and Industrial Relationships at Volkswagen, June 6, 2002, http://www.imfmetal.org/main/files/Sozialcharta_eng31.pdf.

102. See, e.g., Convention Concerning the Promotion of Collective Bargaining, June 19, 1981, 1331 U.N.T.S. 267; Convention Concerning Private Employment Agencies, Int'l Labour Org. Conference No. 181, June 19, 1997. Of course, producer countries can also exert pressure to keep labor standards low. See N. Vasuki Rao, *India Opposed to Broad WTO Agenda*, J. COM., Apr. 30, 1999, at 19; Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001).

important weapons in labor's arsenal. Indeed, boycotts of the powerful retail chains are perhaps the most effective direct economic pressure that can be levied against these economic behemoths at the current time. Organized labor has to address the problem of the large, powerful, unorganized, and unaccountable "big box" retailers bent on providing the lowest cost goods, with the lowest cost labor, and possessing unprecedented market power over manufacturers.¹⁰³ But they also will use other weapons—supporting and organizing worker efforts to enforce their legal rights outside of the collective bargaining relationship and using the political process to achieve successes that cannot be won at the bargaining table. A prime example is the United Food and Commercial Workers' ("UFCW") Worker Advocacy Program ("WAP"). Under this program, the UFCW has solicited minimum-wage and maximum-hour claims from members and non-members to prevent the undermining of union contracts with employment practices that violate the Fair Labor Standards Act ("FLSA").¹⁰⁴ Similarly, the Garment Workers Center, an unaffiliated workers' center in Los Angeles, coordinated a successful consumer boycott in the "Forever 21 Campaign" to attain payment of FLSA wage claims.¹⁰⁵ In conjunction with local unions, the workers advocacy group "Young Workers United" has used common FLSA wage claims as an organizing tool among San Francisco Bay area restaurant workers,¹⁰⁶ although the D.C. Circuit's decision in the *Freund Baking Company* case impinges on this strategy.¹⁰⁷ In the political process, workers' organizations have used local political power to establish minimum labor standards for public employees and the employees of public contractors through the "Living Wage Campaign."¹⁰⁸ It is hoped that these efforts help to raise competition for labor and wages in the affected areas. Labor organizations have also

103. There are some signs that they are beginning to address the problem. See, e.g., Stephanie Luce, *Chicago Living Wage Activists Take on 'Big Box' Retailers*, LABOR NOTES, Sept. 2006, at 1; Wendy Zellner with Aaron Bernstein, *Up Against the Wal-Mart: Labor, Antisprawl Activists, and Grocery Rivals Link Hands to Battle the Retail Giant*, BUSINESSWEEK ONLINE, Mar. 13, 2000, http://www.businessweek.com/2000/00_11/b3672108.htm.

104. *Food Lion Sues Union, Alleges Abuse of Process*, DALLAS MORNING NEWS, Feb. 23, 1993, at 4D.

105. Narro, *supra* note 98, at 471–81; see also Garment Worker Ctr., Forever 21 Campaign Archives, <http://www.garmentworkercenter.org/forever21.php> (last visited Mar. 1, 2007).

106. David Bacon, *No Sitting Down On the Job*, S.F. CHRON., Feb. 9, 2005, at B9.

107. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) (holding that a union violates the NLRA's requirements for a fair election by offering free legal representation to employees who will vote in a union election). Compare *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995) (in agreement with *Freund*), with *Novotel N.Y.*, 321 N.L.R.B. 624, 636–38 (1996) (contra *Freund*), and Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002).

108. See generally ACORN's Living Wage Resource Center, <http://www.livingwagecampaign.org/> (last visited Apr. 22, 2007).

been behind recent efforts to require large employers to provide health insurance or pay a tax to cover the cost to the taxpayers of uncovered workers.¹⁰⁹ Maryland passed such a “Fair Share” healthcare tax in 2006, and other states, including California, Pennsylvania, and New Jersey, are seriously considering such legislation, although there is a question of whether it is preempted by ERISA.¹¹⁰ The AFL-CIO has seriously stepped up its associate membership program, “Working America,” which attempts to unite and motivate working people on larger social and political issues of common concern even if they do not currently work in a union workplace. The program currently has almost a million members.¹¹¹ These efforts are perhaps the first steps in renewed national and international political activity among working people, which should be fostered by worker organizations.

CONCLUSION

Although the obstacles appear daunting, this is an exciting time to be involved in the American labor movement. Just as the movement had to adapt as the methods of production changed around the dawn of the twentieth century, so too must it now adapt to the changed circumstances of the working people under the new information technology in a global economy. Employee interest in some form of representation or mutual aid and support remains high,¹¹² as workers confront issues of increased risk, lower job security, and pervasive downward pressure on wages and benefits. The labor movement is in the process of harnessing this energy and responding to the challenges of the new economic environment in new and creative ways. Hopefully, the Board and the courts will have the wisdom to let these experiments flourish and not to constrain them with restrictive and counterproductive interpretations of the National Labor Relations Act. It is a new economic day, and we need to develop a new labor movement to fulfill the purposes of the Act of creating equity in

109. Tom Hamburger & Ricardo Alonso-Zaldivar, *Health-care Reform Finds Allies*, SEATTLE TIMES, Jan. 16, 2007, at A4. Employers who provide health insurance and have to compete with those who do not provide it have also supported this cause, and it has raised the larger issue of how our companies will compete globally with companies from countries with more efficient universal healthcare systems.

110. See *Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006), *aff'd* 475 F.3d 180 (4th Cir. 2007); Kim Krisberg, 'Fair Share' Health Care Law Dealt Setback, as States Wait for Appeal, NATION'S HEALTH, Sept. 2006, at 6.

111. Kelly & Tramontano, *supra* note 95, at 591.

112. FREEMAN & ROGERS, *supra* note 46, at 56. Even employers seem to desire increased opportunities to talk to employees and routinely complain about Section 8(a)(2) limitations on employer organized employee committees.

bargaining power and industrial peace. Perhaps it is best to close this paper by letting some of the innovative leaders of the American labor movement speak for themselves on the continuing need and vitality of the movement. Although they may differ on how best to respond to the current challenges, they remain united on the ultimate objective.

As it has over the decades, the union movement stands for the fundamental moral values that make America strong: quality education for our children, affordable health care for every person—not just some—an end to poverty, secure pensions and wages that enable families to sustain the middle-class life that has fueled this nation’s prosperity and strength. Union members and other working family activists don’t just vote our moral values—we live them. We fight for them, day in, day out. Our commitment to economic and social justice propels us and everything we do.¹¹³

—John Sweeney, AFL-CIO President, 2004

Today I send this message to every emerging global corporation: “justice; family, community, and union” are the same in every language and, wherever you go and whatever you do, a new global labor movement is coming to find you.¹¹⁴

—Andy Stern, SEIU President, 2005

113. Culture of Peace Initiative, Labor Quotes, <http://www.cultureofpeace.org/quotes/labor-quotes.htm> (last visited June 16, 2007).

114. *Id.*

STUDENT NOTES

