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Labor's Identity Crisis

Marion Crain†
Ken Matheny‡

In this Article, Professor Crain and Mr. Matheny assess the consequences of organized labor's appeal to unalloyed class consciousness in an increasingly diverse workforce. Tracing the historical evolution of labor's search for an ideology that would reach the hearts and minds of American workers and the public, the authors find that the marginalization of race, ethnicity, gender, and other social identities in labor's ideology has negatively impacted labor unionism. Labor law reflects and further cabins union ideology by severing social justice issues from class issues. Analyzing court decisions intended either to promote labor's interest in maintaining broad discretion to protect its workers' class-based interests or to protect individual minority workers whose interests were not prioritized by their unions, the authors show how race and sex discrimination were systematically defined as outside the purview of union concern and largely beyond the reach of the labor laws. Cases that undermine union power and split workers' class identities from their race, ethnic, and gender identities by permitting employers to circumvent unions and require workers to sign predispute arbitration agreements waiving their statutory antidiscrimination rights are the inevitable outcome. The authors suggest reforms aimed at centering social justice in union ideology and propose amending the labor laws to add antidiscrimination provisions that would impose an affirmative duty on unions to advocate for racial, ethnic, and gender justice.

Despite rising income inequality,¹ American workers' class consciousness is undeniably weak.² Labor union density has been declining
since the 1950s. The AFL-CIO’s efforts to regenerate class consciousness and rebuild unions by depicting income inequality as a moral wrong have not altered the American public’s indifference to labor unionism. Has class become irrelevant in the U.S.?


While the AFL-CIO’s New Voice program has stemmed the tide of declining union membership, union density is still dropping. AFL-CIO Focuses on Improving Organizing as Numbers Continued Declining in 2000, supra note 3, at AA-3 (reporting that unions had organized only 350,000 workers in 2000, compared with 600,000 in 1999, and characterizing organizing as “off pace”); cf. Unions: Number of Union Members Rose Slightly in 1999, But Percentage Remained Constant, Daily Lab. Rep. (BNA) No. 13, at AA-1 (Jan. 20, 2000) (reporting that union membership rose slightly in terms of absolute numbers, from 16.2 million members in 1998 to 16.5 million members in 1999, but percentage of the eligible workforce that is organized remained constant in 1999 at 13.9%). Organizing is concentrated in a relatively small number of unions. Ten unions are doing 75-80% of the organizing,
This Article argues that union efforts at revitalization around an ideology of class consciousness are inadequate to the task of mobilizing workers or significantly impacting the public perception of unions so long as they appeal only to the narrow aspect of workers’ economic identities that the labor law recognizes as legitimate terrain for unions. We make the case for a shift in union ideology and outline the changes in legal doctrine necessary to support it. By framing their appeal in narrow economic terms, unions paved the way for identity politics movements, antidiscrimination statutes, and court decisions that defined discrimination against workers on any basis other than union affiliation as a matter of individual rights, enforceable under statutory schemes other than the labor laws. Workers learned to individualize workplace concerns that implicated their racial, ethnic, or gender identities and to look to government agencies, private attorneys, and the courts for redress, rather than forming unions and invoking the power of collective action.6

We analyze case law that forcibly fragments workers’ race, gender, and class identities and explain how courts have extended doctrine initially designed to empower individual race-subordinated employees whose interests were not prioritized by their unions, in ways that undermine union power. The ultimate result is a legal framework that allows employers to deal directly with individual workers on matters vital to their economic well-being as long as some other aspect of the worker’s identity protected

and three of these are responsible for 50% of the organizing. AFL-CIO Focuses on Improving Organizing as Numbers Continued Declining in 2000, supra note 3, at AA-3.


It serves the interests of those who control most of the country’s wealth to minimize class consciousness and to fortify the American Dream of individualism and class ascension where possible because it channels worker energies towards individual achievement and away from collective organization and protest. VANNEMAN & CANNON, supra note 4, at 12-14, 257-58; Michael Lind, To Have and Have Not: Notes on the Progress of the American Class War, HARPER’S MAG., June 1995, at 35, 36-37; see also CHRISTOPHER LASCH, THE REVOLT OF THE ELITES 53-54, 56 (1995) (describing the American Left’s explanation of the barriers to building a working class consciousness in the United States as follows: “Americans clung to an utterly unrealistic conception of society as a ladder, which anyone with energy and ambition could hope to climb, whereas it should have been apparent that those at the top had pulled up the ladder after them.”) Thus, it is not surprising that workers are encouraged to assume responsibility for their own individual class positions. See RICHARD SENNETT & JONATHAN COBB, THE HIDDEN INJURIES OF CLASS 36 (1972).

The “self-help ideology” is sufficiently powerful that workers who do not rise through the class structure blame themselves for their own deprivations, while those who do ascend the ranks of class often feel ambivalent about their success, wondering if they truly “deserve” it. See id. at 36-37; LASCH, supra, at 54. Workers who share the racial, ethnic, or gender privilege of their employers are likely to be the least class-conscious because their hope of social class mobility is solidly intact. See SEIDMAN ET AL., supra note 2, at 10, 163; infra note 312 and accompanying text (discussing higher propensity for union membership and organizability of women and minorities than of white males).
through antidiscrimination statutes is involved. The current legal framework undermines union strength and betrays the National Labor Relations Act's ("NLRA") promise to equalize bargaining power between individual employees and employers organized in the corporate form. Employers can require as a condition of employment that individual workers waive statutory antidiscrimination rights in exchange for arbitration, and unions are helpless to resist even where they represent those same workers in that workplace. Race, ethnic, and gender discrimination are not, fundamentally, the union's business.

In Part I, we describe labor's historical search for an ideology and foundation for class solidarity. Part II explains how the labor law shaped, reflected, and ultimately reinforced labor's understanding of class, limiting the scope of union appeals and circumscribing labor's very identity. It also examines unions' participation in their own marginalization, particularly their role in shaping the law so that social justice issues were severed from class issues. Part III describes the ironic result: racism and sexism have become the enforcers of class exploitation, allowing employers to discipline the working class along gender and racial lines through the use of modern day "yellow-dog" contracts. Part IV both examines the risks of allowing the divide between economic justice and social justice to continue and suggests a more transformative union ideology that would place the interests of the most marginalized workers at the center of movement agenda. Part V examines the role law plays in shaping union identity and advances proposals for reform.

I
FROM SOCIAL JUSTICE TO BREAD-AND-BUTTER: THE STRUGGLE FOR LABOR'S IDEOLOGY

During the late nineteenth and early twentieth centuries, the American labor movement struggled to reconcile competing philosophies and to adapt to the shifting economy. The early progenitors of modern labor

7. See NLRA § 1, 29 U.S.C. § 151 (1994). The demise of collective consciousness and the rise of individualism are key contributing factors to the decline of the labor movement. See Sharon Rabin Margalioth, The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline, 16 Hofstra Lab. & Emp. J.L. 133, 133 (1998). Traditional unions are predicated on the yielding of individual interests to group interests, a notion that is antithetical to the modern American focus on individualism. Id. at 134.

8. Daniel Bell has characterized the American labor movement as swinging back and forth between a social justice orientation and a business unionism orientation between 1860 and 1940. According to Bell, the movement was primarily social justice-oriented from 1860-1880, was in conflict from 1880-1920 (the period when groups such as the Knights of Labor, the Industrial Workers of the World, and socialist unions battled with the AFL over the appropriate goals of the U.S. labor movement), struggled to accommodate the more ideological perspective of the CIO with the traditional economic focus of the AFL between 1920 and 1940, and committed itself to business unionism from 1940 on, particularly following the AFL-CIO merger in 1955. See Daniel Bell, The End of Ideology 217-18 (1961).
unions, the Knights of Labor ("Knights") and the Industrial Workers of the World ("Wobblies" or "IWW") sought to further a national debate about the implications of industrial capitalism, pursuing a grand vision of socialist consciousness and reform. The American Federation of Labor ("AFL") succeeded them, popularizing a narrower vision of craft unionism and job consciousness (concern with job security, working conditions, and wages for its organized membership). The booming manufacturing economy spawned the Congress of Industrial Organizations ("CIO"), which advanced a somewhat broader vision of class consciousness, "an economic 'consciousness of kind,'" among similarly situated workers regardless of craft or trade.

When the AFL and the CIO merged in 1955, the new AFL-CIO committed itself to an amalgam of job consciousness and class consciousness that came to be called business unionism. Business unionism does not challenge the fundamental hierarchies of class, race, and sex that characterize capitalism. Its main goal was, and is, to ensure that union members receive a fair share of the wealth that they create. In this Part, we trace the origins of the shift from a grand vision of social justice reform that characterized the Knights and the Wobblies to the more pragmatic business unionism of the AFL-CIO, and we evaluate the legacy each holds for the modern labor movement.

A. The Knights and the IWW

The Knights of Labor was founded in 1869 and enjoyed its heyday between 1879 and 1886, at which point its membership numbered approximately one million. Its membership base drew from coal miners and artisans and included recent immigrants, Blacks, and women as well as

10. Socialist consciousness is directly tied to a desire for basic social change. See SIDNEY M. PECK, THE RANK-AND-FILE LEADER 40 (1963) (defining socialist consciousness in trade unionism as advancing not only goals of increased job security, improved working conditions, and higher wages, but "superior standards of living for the working class" and the mobilization of "financial and political resources to initiate powerful movements leading to the basic transformation of capitalism") (emphasis omitted).
11. See id. at 39.
15. A prefatory note seems appropriate here. Throughout this Article, we use the terms Black and African American interchangeably, and follow the lead of feminists and critical race scholars who capitalize Black to denote the reference to a specific cultural group. See, e.g., Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination
The Knights’ critique of nineteenth century American industry included a scathing indictment of social inequality and an endorsement of a “worker’s republic” that would “revitaliz[e] democratic citizenship and safeguard[] the public good within a regulated marketplace economy.”

The Knights was an inclusive organization, embracing unskilled and semiskilled workers as well as skilled craftpersons. The Knights combined community issues and workplace concerns in its agenda, opening its ranks to family members as well as workers, a strategy that meshed well with its focus on political action. The Knights created labor parties, ran candidates for political office, and had many members elected to city and state government.

Despite the Knights’ progressive social and political ideology, the organization struggled with the biases of its times. Although some 60,000 Blacks joined the Knights, most were in segregated locals. The Knights did not admit women to membership until 1881, and when it did open its ranks to them, most were organized in separate assemblies known as “ladies’ locals.” Nonetheless, by 1887 the Knights boasted a female membership of approximately 65,000. That number included domestic workers, female agricultural laborers, and even housewives. Although the Knights’ commitment to race and gender equality dissipated along with its


22. Foner, supra note 14, at 47.


24. See Montgomery, supra note 23.

25. Foner, supra note 14, at 48; Montgomery, supra note 23, at 147. The Knights’ appeal to housewives and domestic workers as well as women wage earners in the public market was potentially revolutionary; it made direct involvement in the movement possible for women irrespective of their status in the labor market, and offered the possibility of understanding housework as “real” work, as well as exploring its role in supporting the capitalist structure. See Levine, supra note 23, at 328. Domestic workers (including paid and unpaid workers) constituted a full 25% of all women’s local assemblies. Id. However, the Knights’ commitment to equal rights for women existed in considerable tension with its vision of domesticity, and the proper role and right of women to work in that sphere. Id. at 328-29. While the Knights did support women’s right to equality with men in the waged labor market, it did not fully challenge the notion of a domestic sphere for women, limiting itself to efforts to elevate and extend women’s status in that sphere. Id. at 329, 337.
popularity, its perspective was progressive for the period. As one commentator put it, "[o]n the whole, it can be said that the Knights loomed in the mid-1880s as a beacon of racial enlightenment in a dark sea." The Knights' perceived willingness to undertake radical action to further its aims eventually sealed its fate in the public mind, and by 1895 the Knights had ceased to be a viable labor organization.

In 1905 thirty industrial unionists and socialists, including Mother Jones and socialist Eugene Debs, met in Chicago and formed the Industrial Workers of the World, also known as the "Wobblies." Like the Knights, the IWW was an inclusive organization that sought to create "One Big Union" by welcoming Blacks and immigrants while diligently organizing women. The IWW promoted a rigorous standard of racial equality, and strove to educate workers about the ways in which capitalists used race to undermine working class solidarity, pitting white and Black workers against one another. Like the Knights, the IWW stressed political action, usually supporting Socialist Party candidates such as Eugene Debs, who ran for President in 1912.

The IWW's commitment to direct action, such as sabotage at the point of production and strikes designed to "raise the workers' consciousness by

26. Upon its demise, the Knights became an apologist for white supremacy, announcing that the only solution for the "Negro problem" in the United States was to deport Blacks to Africa. FONER, supra note 14, at 62-63.
27. FINK, supra note 17, at 169.
28. The Knights fell into oblivion rather suddenly, following an 1886 labor rally at Haymarket Square which ended with a bomb tossed at police and the deaths of seven people. Many of the Knights' officers were arrested and charged with conspiracy; public opinion of the Knights suffered, and the Knights' membership plummeted. CRAVER, supra note 20, at 16; FINK, supra note 9, at 169.
29. FONER, supra note 14, at 63.
32. CRAVER, supra note 20, at 22; TAX, supra note 31, at 126. The Wobblies did not, however, acknowledge race or sex oppression as distinct from class oppression, and they apparently believed that an economic strategy could solve the problems of all workers, regardless of sex. TAX, supra note 31, at 126-27. Campaigns around issues perceived as relating to women's rights would have been seen as disrupting class unity and as transgressions against class solidarity. Id. at 128-29. Nevertheless, the IWW was the only labor organization to raise the issue of birth control and to connect it to issues of class subsistence, though its economic focus ultimately undermined its ability to effectively agitate around this issue. Id. at 127-29, 162. In short, although the IWW was well-intentioned, many of its polemics about sex equality amounted to little more than rhetoric. There were never sufficient numbers of women in the IWW to affect its gendered understanding of class unity. See id. at 132. Still, the IWW was clearly the most progressive labor organization for its time on gender issues: it was genuinely interested in organizing women and made significant contributions to the theory and practice of organizing women in the U.S. labor movement. See id. at 162.
33. See LEIMAN, supra note 21, at 60. Leiman refers to the IWW as "the most thoroughgoing antiracist union in American history," whose racial attitudes and practices "reflected no ambivalence or mere expediency." Id. at 59.
34. Id.
instilling in them a sense of their power as a class," rather than wage nego-
tiation, undermined its public acceptability.\textsuperscript{35} During World War I, the
IWW compounded its problems by engaging in incidents of work sabotage
that turned public opinion against it because it was perceived as attempting
to undermine the war effort.\textsuperscript{36} By the late 1920s, the IWW was defunct.\textsuperscript{37}

The Knights and the IWW are important because they demonstrated
the potential for labor unions to be agents of social transformation. These
organizations aspired to racial and gender equality and battled the biases of
their times. Though they sometimes yielded to the influences of those bi-
ases in their practices and philosophies, they were the first national labor
organizations to link struggles for class equality with struggles for racial
and gender equality. Although they ultimately lost the battle for the soul of
the labor movement, it does not follow that their vision of politicized un-
ions struggling for social justice was wrong. It only means that their ene-
mies were stronger.\textsuperscript{38}

\section*{B. The Ascendancy of the AFL and the CIO}
\subsection*{1. The AFL}

Despite the appeal of the Knights and the Wobblies to some workers,
the AFL emerged as the dominant labor union.\textsuperscript{39} In "a curious blending of
'defeatism' with complacency,"\textsuperscript{40} the AFL espoused a philosophy of job-
conscious unionism.\textsuperscript{41} The AFL's job consciousness was fundamentally
different from the socialist consciousness of the Knights and the Wobblies. Socialistic consciousness highlights and challenges the role of race and

\begin{itemize}
\item \textsuperscript{35} Faue, supra note 19, at 11; Leiman, supra note 21, at 59.
\item \textsuperscript{36} Leiman, supra note 21, at 59.
\item \textsuperscript{37} Government repression played an important role in the IWW's demise. Many states enacted
criminal syndicalist statutes which led to thousands of Wobblies being imprisoned, and in some
instances, deported. See id.
\item \textsuperscript{38} See Forbath, supra note 14, at 815 (warning that it is too simplistic to assume that the Knights
were "wrong" and the AFL was "right" in its choice of ideology simply because the Knights failed and
the AFL survived, and observing that "[i]f [the Knights'] efforts now appear 'utopian,' it is because of
the power-constellations and increasingly hostile legal and political world in which they emerged. . . ."); see also Fink, supra note 9, at 91 (arguing that "the history of the Knights of Labor
demonstrates the existence of a viable labor culture"); Jeremy Brecher, Strike! 102 (1972) (noting
that the IWW was more akin to a social movement than to a conventional union, even in its own
historical context).
\item \textsuperscript{39} See Forbath, supra note 16, at 15 (noting that the AFL dominated early labor unionism from
the 1890s on).
\item \textsuperscript{40} Selig Perlman, A Theory of the Labor Movement 232 (1928).
\item \textsuperscript{41} Peck, supra note 10, at 39-40. Peck described the AFL's job-conscious philosophy as
follows:

\begin{quote}
Job-consciousness is defined as that ideology most directly linked to concerns over
employment scarcity and thoughts of job insecurity. . . . [A] job-conscious outlook views the
business of trade unionism as that of providing: (a) increased job security; (b) improved
conditions of work; and (c) fair wages, for the organized worker in a given craft or plant in
return for dues rendered.
\end{quote}

These objectives are to be attained within the existing framework of socio-economic relations. Id.
\end{itemize}
gender exploitation in capitalism. Job consciousness, by contrast, is a protectionist ideology that lends itself to exclusionary practices and does not seek to challenge the basic structure of production. Thus, while the Knights’ and the Wobblies’ philosophies necessarily committed them to building interracial and gender-blended movements of workers, the AFL’s did not.

The AFL popularized craft unionism, in which the workplace was the site for union organizing, craft unions were the organizational vehicles, and white male shopfloor culture was the foundation of solidarity. The AFL leadership acceded to race and sex discrimination by its craft union locals, supporting policies excluding Blacks and women from membership. Women were thought of as properly existing outside the public sphere of work, their concerns relegated to the periphery of labor organizing and mobilization efforts. Because craft unions had the power to control whom the employer hired, they determined who got skilled jobs and who did not. The AFL’s focus on skilled workers and its racial biases resulted in the organization of only 82,000 Blacks (out of a total workforce of 2.5 million Blacks) by the mid-1920s.

42. See Peck, supra note 10, at 191, 205-06, 341.
46. For example, consumer-organizing tactics ignored the concerns of working-class women functioning as worker-consumers and treated them as if their only interest was congruent with that of their male partners. In promoting boycott strategies and urging consumers to buy items with a union label, AFL unions subordinated housewives’ labors of consumption to the interests of wage earners. Dana Frank explains:

[Boycott and look-for-the-union-label] campaigns involved an intensification of housewives’ labor as consumers. Assiduous pro-union consumption meant more time spent shopping, a restricted supply of available commodities and services, and, usually, higher prices, necessitating more labor in order to balance the household budget. Working-class housewives’ identification of their own concerns with those of wage earners in their families as part of a family economy could in part alleviate this tension. But for the most part the wives of union men proved unwilling to speed up their own labors on behalf of a “working class” movement not of their own making. As a result, the AFL unions’ efforts to mobilize consumption on behalf of a “class” agenda would always be limited by their inability to grasp the workplace concerns of female members of their class.

Dana Frank, PURCHASING POWER: CONSUMER ORGANIZING, GENDER, AND THE SEATTLE LABOR MOVEMENT 1919-1929, at 6-7 (1994). Frank argues that this oversight on the part of organized labor stemmed from a larger problem of focusing on the relations of production and relegating consumption—along with women, who are the predominant consumers in the course of performing their gendered roles as housewives—to the margins. Women’s interests thus found expression only indirectly, through their husbands’ connections with the production realm. Id. at 7.
47. LEITAN, supra note 21, at 72.
Nevertheless, the AFL continued to dominate labor organizing: it had a total membership far in excess of that of the CIO in the 1930s, grew as rapidly as the CIO in the 1940s, and had twice as many members by the late 1940s and 1950s. The AFL not only marginalized race and gender in its ideology, it exploited them for purposes of organizing. Exclusionary racial practices were central to the creation and maintenance of [white] working class solidarity. For example, AFL unions in Seattle used boycotts of firms owned by Japanese immigrants or by whites who employed Asian Americans to reinforce trade union solidarity: white workers’ sense of racial solidarity was used to construct a class identity and to mobilize the white working class. Racial exclusion was also gendered. White women participated in exclusionary racial practices as primary consumer-shoppers for working class families, heeding “look for the union label” boycott campaigns through which AFL unions pressured manufacturers to hire only white workers. Men of color sometimes mobilized around masculine identity.

Historically, then, the economic logic of interracial class unity did not triumph over white workers’ racial bias. White unionists expressed their racial antipathy (rooted in fears of declining social status if they associated with Blacks) toward Blacks by excluding them from membership in unions, even at the risk of creating a dual labor market in which Blacks served as a reserve source of labor available to undermine white workers’ wages and break strikes. The AFL’s philosophy of job consciousness was the underlying source of its exclusionary racial and gender practices. Exclusion reduced the labor market in the trades controlled by unions, causing a rise in the price employers were willing to pay for union labor and increasing whites’ job security. Worse, job consciousness exacerbated and ultimately justified the antagonisms between Black and white workers. Excluded from white unions, Blacks turned to strikebreaking as a means of economic survival and mode of entry into occupations previously

49. Frank, supra note 46, at 2.
50. See id. at 9.
51. Id.
52. Id. at 245.
53. See id. at 10. For example, Black sanitation workers marching in the Memphis, Tennessee strike just before Dr. King’s assassination wore billboards proclaiming “I Am A Man,” equating the insult to their masculinity posed by poor wages and working conditions with the denigration of their humanity as workers. Michael K. Honey, Black Workers Remember: An Oral History of Segregation, Unionism, and the Freedom Struggle 286-87 (1999).
55. Id. at 95; see also Lerman, supra note 21, at 72 (observing that racism reigned supreme in the craft unions until the CIO arrived on the scene).
controlled by unions.\textsuperscript{56} Having worked as scabs, however, Blacks were further barred from union membership by that stigma.\textsuperscript{57}

When the AFL did begin to bridge the racial divide, its actions arose from pragmatic pressures rather than from any moral concern rooted in notions of racial justice. Black workers became too numerous to ignore, and labor proved unable to control the racial composition of the labor force. Some union leaders concluded that it would be “safer to have blacks inside the labor movement—where they could be watched and controlled or where both groups could cooperate rather than clash—than outside of it.”\textsuperscript{58} Accordingly, AFL unions began organizing Blacks in separate locals within the same trade. Such biracial unionism allowed white labor “to acquire class consciousness while remaining race conscious.”\textsuperscript{59} Against the backdrop of the AFL’s history of racially exclusionary practices, the alternative of separate organization was welcomed by most Black union leaders of the time. These leaders fought for equal treatment and equal rights within the labor movement, not for integration.\textsuperscript{60} While hardly “paragons of interracial virtue,” interracial councils that mediated disputes between segregated locals were able to accommodate racial differences and bridge the divide between groups of workers, ensuring cooperation in times of crisis.\textsuperscript{61}

One must take care not to place all the blame for the less ambitious program of the AFL on labor leaders of the period. Many AFL activists initially shared the Knights’ more radical goals and subscribed to its socialist program.\textsuperscript{62} The logic of craft unionism and job consciousness, however, proved fundamentally inconsistent with such broad-ranging objectives. State repression and the constricting discourse of law gradually eroded commitments to social justice, ultimately ensuring the AFL’s adoption of a more self-interested and narrowly circumscribed economic ideology.\textsuperscript{63} The rise of the manufacturing economy and growth of unskilled jobs

\begin{itemize}
\item \textsuperscript{56} See Bernstein, \textit{supra} note 54, at 93-94 \& n.42 (describing how strikebreaking was instrumental in facilitating Blacks’ entry into the stockyards, steel, railroad, meat packing, coal, and brick-making industries).
\item \textsuperscript{57} See id.
\item \textsuperscript{58} Arnesen, \textit{supra} note 43, at 58.
\item \textsuperscript{59} Id. at 59 (quoting Thomas L. Dabney).
\item \textsuperscript{60} See id. at 61-62.
\item \textsuperscript{61} Id. at 63-64.
\item \textsuperscript{62} FORBATH, \textit{supra} note 16, at 14-16. This was particularly true at the national level. Samuel Gompers, the AFL’s first president, initially defined labor’s agenda broadly. Responding to the question “‘What does labor want?’,” he replied:
\begin{quote}
We want more school houses and less jails; more books and less arsenals; more learning and less vice; more constant work and less crime; more leisure and less greed; more justice and less revenge; in fact, more of the opportunities to cultivate our better natures . . . .
\end{quote}
\item \textsuperscript{63} See FORBATH, \textit{supra} note 16, at 168-69; see also infra Part II.
\end{itemize}
were incompatible with craft unionism and highlighted the AFL’s vulnerability to race-and-gender-based, divide-and-conquer strategies by employers. The stage was set for a new form of unionism.

2. The CIO

The rise of industrialism and the poor fit between the AFL’s craft unionism and the increasing numbers of workers employed in manufacturing processes led to the formation of a splinter group within the AFL, the Congress of Industrial Organizations.\(^{64}\) Formally organized in 1937 as a distinct entity from the AFL,\(^{65}\) the CIO promoted a class-conscious unionism that contemplated worker solidarity across craft lines, indeed across the entire working class.\(^{66}\) Working through the left wing of the Democratic Party, the CIO sought to advance the economic interests of the working class through lobbying for legislation that advanced the standard of living for all workers.\(^{67}\) As one scholar explained its potentially radical reach:

> Taken to the extreme,... [class] solidarity encompasses all workers, as distinct from all employers, within the relevant group.... It is the difference between talking about the “employees of an employer” and talking about “workers;” it is the difference between conceiving of a community of interests as defined by the boundaries of the craft, plant, or even the industry, and the conception that “an injury to one is an injury to all.”\(^{68}\)

The CIO’s identity as an industrial union (rather than as a craft union) meant that it worked to organize those already employed, whether in skilled or unskilled jobs. Because CIO unions did not control entrance to a skilled craft, they could not influence who was employed; thus, racism was

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65. Id.
66. Peck, supra note 10, at 39-40. Peck described class-conscious unionism this way:
[A] class-conscious outlook views the task of trade unionism as that of providing: (a) increased job security; (b) improved conditions of work; (c) fair wages; and, (d) higher standards of living, for all those who work for a livelihood in our society.... The trade union is viewed as the most potentially effective organizational instrument to improve the situation of the working class, as a whole, within the existing class-divided socio-economic structure.
68. George Feldman, Unions, Solidarity, and Class: The Limits of Liberal Labor Law, 15 Berkeley J. Emp. & Lab. L. 187, 201 (1994); see also Joel Rogers, Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,” 1990 Wis. L. Rev. 1, 47-59 (examining the unique decentralization of the American labor movement as constructed by the labor laws, which enforce a narrow vision of solidarity, including the limitation of bargaining to plantwide bases, the relative autonomy of local unions from their parent national and international unions, the proliferation of collective-bargaining agreements and lack of coordination among decentralized units, and the lack of political power enjoyed by the American labor movement).
counterproductive for CIO unions. Like the Knights and the Wobblies, the CIO advocated an inclusive labor movement that stretched across the boundaries of race, gender, and ethnicity. While race discrimination within CIO unions persisted, and the CIO did not directly challenge racial segregation by occupation, the CIO did "plant[] the seed" of interracial solidarity. Between 1935 and 1940, Black union membership increased dramatically, from 100,000 to 500,000 members. Nevertheless, the CIO unions that welcomed Black members urged them to "forget they [were] Negroes" and instead to concentrate on being Marxists, or Democrats, or members of the United Automobile Workers (UAW), and "balked at demands that they should serve as advocates for men and women who were the victims of racial discrimination in job assignments" even when those victims were dues-paying union members.

Meanwhile, the AFL continued to promote its racist philosophy, playing on fears of white workers during the 1930s and 1940s by denigrating CIO unions as advocates for Blacks who sought to deprive whites of jobs. The AFL also successfully pressured legislators not to insert an anti-race-discrimination clause into the Wagner Act.

C. Modern AFL-CIO Ideology: Business Unionism

The shortsightedness of expending labor's resources on competition between the AFL and the CIO for the same groups of workers became increasingly apparent, and by the 1950s pressure to reunify arose. The AFL and the CIO merged in 1955, following the purge of left-leaning communists from the CIO. The ideology of the American labor movement since World War II, called "business unionism," has been described as follows:

[U]nions exist in order to address the immediate and practical concerns of unionized workers. The objective of unions is to protect their members economically, primarily by negotiating and enforcing the union contract. Unions are seen essentially as service organizations, whose task is to insure fair wages, increase job security, protect against victimization, improve the conditions of

69. Leiman, supra note 21, at 72.
70. Forbath, supra note 44, at 70.
71. Leiman, supra note 21, at 73.
72. Id. The CIO was home to Communist Party organizers, who worked diligently to build interracial solidarity and encouraged whites to take the lead in combating racism. See Michael Honey, Anti-Racism, Black Workers, and Southern Labor Organizing: Historical Notes on a Continuing Struggle, Lab. Stud. J., Spring 2000, at 10, 16. Communist organizers also strove to link nondiscrimination and union organizing to broader social justice issues in society. See id.
73. Jones, supra note 48, at 344; see also Honey, supra note 72, at 15 (explaining that CIO organizers in the south sought to sidestep racial issues during the 1930s and 1940s).
74. See Jones, supra note 48, at 345.
75. Foner, supra note 14, at 215; see infra notes 175-178 and accompanying text.
76. Cox, supra note 64, at 87.
77. Zweig, supra note 5, at 50-51; see infra note 420 and accompanying text.
work, and provide additional economic benefits. . . . In the arena of politics, unions are concerned only with those issues that have a direct or indirect impact on unions, their members, and the industries in which they function.\textsuperscript{78}

This philosophy stemmed from an ideological stance that defended and espoused the virtues of capitalism, seeking to "make the world safe for U.S. business."\textsuperscript{79} Unions came to see themselves as allied with business and with government rather than as opposed to capitalist interests. The economic security of union members depended upon "shared prosperity;" "a rising tide lifts all boats."\textsuperscript{80} Business unionism explains labor's stance on issues ranging from immigration to its historical support for the Vietnam War.\textsuperscript{81}

Business unionism combines elements of both job consciousness and class consciousness. Although protectionist strategies still heavily influence AFL-CIO policies on, for example, the North American Free Trade Agreement ("NAFTA"), immigrant labor, and workfare issues,\textsuperscript{82} class consciousness is plainly visible in labor's recognition that political action is necessary to protect and extend gains won at the bargaining table.\textsuperscript{83} Some

\begin{itemize}
\item[79.] \textit{Id.} at 48. It should not surprise us that organized labor and the working class became aligned with capital and shared its goal of preserving the capitalist structure, rather than challenging the work process itself. \textit{See Bell, supra note 8, at 390-91} (arguing that unions have failed to seek control over the work process itself, a radical strategy that would also ultimately question the logic of a consumption economy); \textit{see also William Pfaff, Condemned to Freedom} 105-06 (1971) (arguing that unions have become "pillars of the Establishment," "profoundly conservative," and hostile to radical change); \textit{Seidman et al., supra note 2, at v-vi} (observing that labor's ideology in the United States is "not to overthrow American government, but to get everything possible within it"). If socioeconomic status is the measure of class and the goal of class activism is the realization of the American Dream (class ascension), the working class in America was destined to deradicalize itself. \textit{See, e.g., Bell, supra note 8, at 399} (suggesting that the working class has become content with and accommodated to its status in modern American society, and arguing that postindustrial affluence is itself a refutation of Marxist theory); \textit{see also Vanneman & Cannon, supra note 2, at 125-26} (describing thesis); \textit{Frederic Jameson, Postmodernism, or, The Cultural Logic of Late Capitalism} 346 (1992) ("The only Utopian gratification offered by the category of social class is the latter's abolition.").
\item[81.] \textit{See Mantsios, supra note 78, at 48.}
\item[82.] \textit{See infra Part IV.B.}
\item[83.] \textit{See Peck, supra note 10, at 336-37, 341-42; infra Part IV.B.} Still, many unionized workers see political action as outside the union's purview, and adhere to a job-conscious ideological view that unions should restrict their activity to in-plant matters. \textit{See Seidman et al., supra note 2, at 230-31}. Seidman's 1950s study of union members' views revealed that the vast bulk of union members were almost completely uninvolved in and uninformed about union political activity. \textit{Id.} at 231.
\end{itemize}

The law reflects and reinforces workers' perception of unions as narrow economic actors whose role as a political voice for workers is tangential, at best. \textit{See generally Alan Hyde, Economic Labor Law v. Political Labor Relations, 60 Tex. L. Rev. 1, 12 n.30 (1981)} (noting that the cases demonstrate "the judicial unease about political activity on the part of unions"). \textit{International Longshoremen's Ass'n v. Allied International, Inc.}, 456 U.S. 212 (1982), offers a powerful illustration of the Court's reluctance to acknowledge the legitimacy of political action by unions. In this case, the
of labor’s direct appeals to the public have contained indicia of a more class-conscious solidarity as well. Finally, organized labor has actively supported employment legislation that benefits workers generally.

1. Enter Identity Politics

Beginning in the 1960s, the scope of collective action covered by the NLRA contracted rather than expanded. Congress responded to “identity politics” movements that emerged from the Left by enacting a panoply of antidiscrimination statutes that made individual action, rather than collective action, the weapon of choice to fight discrimination. Movements

Longshoremen’s union, in protest of the Soviet Union’s invasion of Afghanistan, ordered its members not to handle any cargo bound for or arriving from the Soviet Union. Id. at 214. As a result of the boycott, Allied lost a significant amount of money, and, alleging that the Longshoremen’s union had engaged in an illegal secondary boycott, brought an action for damages in federal court. Id. at 216-17. Rejecting the trial court’s conclusion that the boycott was “purely political” and therefore not covered by the secondary boycott provisions of the NLRA, the Supreme Court held that the union had engaged in an illegal secondary boycott. Id. at 218. The Court emphasized that the union’s involvement in political activity was “far removed from what has traditionally been thought to be the realm of legitimate union activity.” Id. at 226 (quoting the Court of Appeals’ opinion at 640 F.2d 1368, 1378 (1981)). The Court pointed out the lack of direct economic benefit to the union from the boycott and noted that the union did not seek “any labor objective” from Allied or the other employers involved. Id. at 222-23. That the union’s objective was political instead of one of direct economic benefit to its members made the boycott “more rather than less objectionable.” Id. at 225.

84. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988) (discussing and upholding legality of secondary boycott where union’s appeal, which “pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace,” was protected by the First Amendment).

85. See Bell, supra note 8, at 212, 219. In addition, union support was essential to the passage of Title VII. Milton Derber, The American Idea of Industrial Democracy, 1865-1965, at 95 (1970).

Labor’s support for Title VII and similar social legislation, however, has often “represented more an expression of solidarity than an identification with a constituency.” Bill Fletcher, Jr., Seizing the Time Because the Time Is Now: Welfare Repeal and Labor Reconstruction, in Audacious Democracy, supra note 4, at 119, 127. Some suggest that the AFL-CIO’s eventual support for Title VII was conferred in the hope that a formal commitment to racial integration in principle through such a statute would relieve unions of responsibility for integration in practice; said one contemporaneous lobbyist working for the passage of Title VII, “[unions] had just been so beaten for their racism that they wanted a bill and then could blame it on the bill if it wasn’t enforced.” George Lipsitz, The Possessive Investment in Whiteness: How White People Profit from Identity Politics 40 (1998) (quoting from Herbert Hill, Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record, in Race in America: The Struggle for Equality 263, 267 (Herbert Hill & James E. Jones eds., 1993)).

86. “Identity politics” in this context refers to movements involving women, African Americans, gay males and lesbians, and members of the third world, who advocate a politics based on their own life experiences as members of socially subordinated groups. See Edward E. Sampson, Identity Politics: Challenges to Psychology’s Understanding, 48 Amer. Psychologist 1219 (Dec. 1993).

dedicated to issues of social justice, including the civil rights movement, the women’s movement, the gay and lesbian movement, and the movement for rights for the disabled, displaced labor unions as the relevant mobilization bases on the Left. These movements developed critiques of society along race and gender lines that sometimes challenged capitalist structures. Meanwhile, organized labor, and the working class more generally, came to be associated with a conservative defense of the status quo and white male privilege. Social justice movements and organized labor became estranged from one another. Labor clashed publicly with

88. See STANLEY ARONOWITZ, THE POLITICS OF IDENTITY: CLASS, CULTURE, SOCIAL MOVEMENTS 8 (1992); see also Cynthia Hamilton, Multiculturalism as Political Strategy, in MAPPING MULTICULTURALISM 167, 175-76 (Avery F. Gordon & Christopher Newfield eds., 1996) (arguing that the revival of ethnicity in the United States is a reaction to the loss of occupational identity and worker consciousness that accompanied changes in the domestic economy after World War II).

89. ZWEIG, supra note 5, at 53. Whether identity politics movements are in fact any more radical in their challenge to the capitalist structure than organized labor has been is a subject of some debate among scholars who analyze social movements. Christopher Lasch argues that identity politics movements are too fragmented to hold sufficient radical potential; their coherent aspiration is inclusion in the dominant society and culture, not transformation of it. LASCH, supra note 6, at 27; see also BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS 215-16 (1989) (opining that mainstream feminism in the 1970s came to stand for assimilation, rather than transformation, of the economic and social order); Angela Y. Davis, Gender, Class, and Multiculturalism: Rethinking “Race” Politics, in MAPPING MULTICULTURALISM, supra note 88, at 40, 41, 45-47 (suggesting that multiculturalism is vulnerable to cooptation by capitalists as a means of preserving power inequalities based on class, gender and race, and that multiculturalism does not ultimately challenge the capitalist hierarchy); Todd Gitlin, Beyond Identity Politics: A Modest Precedent, in AUDACIOUS DEMOCRACY, supra note 4, at 152, 152-53 (arguing that identity politics have left inequalities of wealth untouched, improving only the coloration and sex distribution of the wealth pyramid); David Reiff, Multiculturalism’s Silent Partner: It’s the Newly Globalized Consumer Economy, Stupid, HARPER’S Mag., Aug. 1993, at 62, 65 (arguing that multiculturalism supports, rather than undermines, capitalism); cf. Wendy Brown, Injury, Identity, Politics, in MAPPING MULTICULTURALISM, supra note 88, at 149, 152, 160 (suggesting that the pain associated with identity formation makes identity groups heavily invested in their own subordination and renders them impotent: reactive rather than active, reproaching power rather than aspiring to it).

90. ZWEIG, supra note 5, at 53 (explaining how “working class” came to be seen as synonymous with “reactionary white men”); Christopher Lasch, The Revolt of the Elites: Have They Canceled Their Allegiance to America?, HARPER’S Mag., Nov. 1994, at 39, 40 (“It is the working and lower middle classes who, after all, favor limits on abortion, cling to the two-parent family as a source of stability in a turbulent world, resist experimentation with ‘alternative lifestyles,’ and harbor deep reservations about affirmative action and other ventures in large scale social engineering.”). But see HOWARD KIMELDORF, BATTLING FOR AMERICAN LABOR: WOBBLIES, CRAFT WORKERS, AND THE MAKING OF THE UNION MOVEMENT (1999) (arguing that American workers historically have not been conservative; despite their rejection of the IWW and support of the AFL, their resistance to capitalism by direct action at the point of production on bread-and-butter issues demonstrates their militance).

anti-Vietnam War protesters, environmental groups, civil rights groups, and the women’s movement.91

2. The Divided Left

Subsequently, a schism developed between those scholars and union activists sympathetic to the labor movement who favored emphasizing class as the basis for solidarity and those who favored mobilization around other axes of identity, particularly race, ethnicity, and gender.92 The “class” position is that identity politics movements are “divisive and self-indulgent.”93 Class scholars and activists blame identity politics for the decline of unionism. They argue that identity politics movements highlighted divisions in the American working class and undermined solidarity, causing workers to fight amongst themselves rather than unite against capital.94 These writers and activists implicitly treat class movements and identity politics as dichotomous. Class movements for improved working conditions are seen as having nothing to do with one’s identity, dignity, or self-conception, and identity politics movements are viewed as primarily concerned with “symbolic” or cultural issues rather than as issues with real economic impact.95

The very characterization of identity politics issues like sexual harassment and abortion as symbolic, rather than intrinsically connected to workers’ economic futures, reveals the relegation of gender and race to the periphery in the construction of the experience of class. Sexual harassment has been theorized and litigated not only as involving domination on the basis of gender power, but also as a form of economic coercion; most

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91. Rose, supra note 67, at 4-5; Zweig, supra note 5, at 52-54; Rogers, supra note 68, at 82 n.222.
94. See Aronowitz, supra note 88, at 31 (“Class Identities, which received their underpinning from ideology as well as culture, are severely undercut by these competing identities, especially because [the new identities] have articulated new global ideologies that transgress the compromise that workers have conventionally made with the prevailing order and are linked to movements that are publicly visible.”); Davis, supra note 89, at 45 (making this point); Vanneman & Cannon, supra note 2, at 203 (summarizing and criticizing the argument); see also Todd Gitlin, The Twilight of Common Dreams: Why America Is Wracked by Culture Wars 33, 35-36 (1995) (describing the “squandering” of the Left’s energy on identity politics); Michael J. Piore, Beyond Individualism 19-20 (1995) (arguing that groups organized around sex, race, sexual preference, religion, ethnicity, and disability have drained the life from labor unions, and that the law has contributed to this process).
95. Piore, supra note 94, at 37-40 (suggesting that identity politics movements make demands “as much for their symbolic value as for their practical impact upon daily life,” and discussing abortion and sexual harassment as examples).
often, it is the product of a dynamic mix of gender and class interests.  

Similarly, the feminist movement's defense of abortion rights and reproductive choice is not only about sexual freedom, but also has consequences for women's economic independence.

The new social movements based upon identities other than class are more than class displacements; they are responses to the exclusion of gender and race equality issues from unionism. Just as race and gender have proved to be divisive forces within the labor movement, however, class differences similarly have divided the antiracist and feminist movements. Thus, neither the labor movement nor the social justice movements of the 1960s, '70s, and '80s adequately furthered the interests of the most oppressed workers.

D. A "New Voice" for Labor?

In 1995, a group of national union presidents committed to reversing labor's decline in membership persuaded John Sweeney to run for the AFL-CIO presidency. Sweeney, then president of the Service Employees'
International Union ("SEIU"), the fastest-growing and most demographically diverse union, represented labor's commitment to organizing and to social justice. He ran on a "New Voice" ticket, together with Rich Trumka of the United Mineworkers Union ("UMW"), who symbolized a commitment to militancy, and Linda Chavez-Thompson, who symbolized a commitment to women and people of color. Their group proclaimed itself "A New Voice for American Labor," critiquing the incumbent leadership and proposing a transformation in ideology from the prevailing business unionism to a social justice movement unionism.

Since Sweeney's ascendance to the presidency and the institutionalization of the New Voice platform, the AFL-CIO has made significant progress in revitalizing itself through a renewed commitment to organizing. In response to the AFL-CIO's urging, several affiliated service-sector national unions have committed to spend at least 30% of their annual budgets on organizing, with many more local unions committed to 20%—up from amounts as low as 1% in 1994. The Assistant Director of Organizing for the AFL-CIO has established a "Voice At Work" program that is designed to encourage community engagement in union organizing campaigns and ultimately reduce employer opposition to union organizing. The program will train central labor councils and state federation staffers, reach out to allies such as the NAACP and religious organizations in the communities where labor organizing is occurring, and actively support living wage legislation.

While Sweeney's AFL-CIO is less focused on servicing contracts than his predecessors' and more focused on social justice, it may well represent "an evolution, rather than a revolution" in movement ideology. Although today's AFL-CIO has many positive aspects, particularly in its openness to coalitions with other social movements and its emphasis on organizing, its limits can be discerned from its own rhetoric. In his book America Needs a
Raise, Sweeney seeks to endow the issue of income inequality, the wage gap between the rich and the working poor, with moral urgency.¹⁰⁷ The book’s title, which has become the AFL-CIO’s organizing slogan,¹⁰⁸ seeks to refocus public attention away from “narrow union issues like laws on organizing new members and the right to strike,” and toward “issues of pay that affect all working people.”¹⁰⁹ In fact, however, the slogan “America Needs a Raise” is strikingly reminiscent of the short version of Gompers’s description of labor’s goals: “labor wants more.”¹¹¹ A platform that seeks more, rather than different, risks getting “just more of the same.”¹¹¹

More fundamentally, although Sweeney touts union partnerships with allies within the civil rights and women’s movements,¹¹² the solidarity he champions is economic. By imploring management to return to the post-World War II social compact that produced a good standard of living for unionized production workers,¹¹³ Sweeney romanticizes the post-World War II period and risks recreating the gender and race-marginalizing policies of the 1950s.¹¹⁴ Moreover, Sweeney continues the pro-capitalist position of his predecessors, arguing that it is in the corporate interest to increase wages and improve benefits in order to increase profits and productivity and stimulate consumption.¹¹⁵

¹⁰⁷. See Sweeney, supra note 80, at 33-41. In this book, Sweeney makes the case that nonsupervisory and production employees, who comprise 80% of the workforce, have experienced a decline in real wages while those of the most privileged have skyrocketed. Id. at 33-34. Sweeney argues that employers have retained an increasing share of workers’ productivity gains in corporate coffers, passing the gains along only to executives and stockholders. Id. at 37.

Some have argued that Sweeney’s platform is not sufficiently radical even from within its own class perspective. For example, Sweeney might have militated for a “maximum wage” for the rich as a means of reducing income inequality and limiting the disproportionate impact of those with great wealth on America’s political and cultural agendas. See Mantisios, supra note 78, at 59 (calling for limits on wealth and profit as well as income); Sam Pizzagati, America Needs More than a Raise, WORKING USA, Sept./Oct. 1997, at 74, 76-77 (explaining link between income inequality and mean-spirited public policies toward the poor).

¹⁰⁸. See Sweeney, supra note 80, at 96 (explaining how he instigated the slogan in his acceptance speech).


¹¹⁰. Zweig, supra note 5, at 126-28; Mantisios, supra note 78, at 44; Sweeney, supra note 4, at 17, 20.

¹¹¹. See Mantisios, supra note 78, at 55; see also Stephanie Coontz, The Way We Never Were: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 30-31 (1992) (arguing that the image of the thriving nuclear family in the post-World War II era never tracked the lived experience of minority families, nor was it representative of the experience of many working class families).

¹¹². Mantisios, supra note 78, at 52-53.
Finally, despite his recognition of the increasingly gender and racially-diverse workforce, Sweeney’s vision of unionism does not assign a central role to race or gender identity in union ideology, nor does it seek to challenge the role of race, ethnicity, and gender in maintaining labor force hierarchies. A more transformative platform would challenge race and gender subordination as well as class exploitation, showing the ways in which various forms of exploitation reinforce one another. Instead, Sweeney urges workers to put aside race and gender interests, to reject efforts to divide them along lines of difference, and to focus on economic issues that will ultimately provide the pragmatic glue that binds working people together in solidarity:

[T]o have any power in the workplace, a union has to find a way to bring together all workers. That means putting aside anything divisive or offensive and making appeals that are unifying. Once working people understand that the only way to protect their paychecks is to stand together, they’re likely to look past their prejudices to their shared goals.... [S]uccessful organizers and union leaders must find ways to emphasize the things that unite us, not divide us.

E. Summary

The “New Voice” AFL-CIO continues an ideology that bears a closer resemblance to business unionism than to the social justice unionism of the Knights and the IWW. At best, the AFL-CIO has opted for a diluted form of the CIO’s class consciousness rather than embracing a vision of social justice. But “protect[ing] paychecks” is hardly the sort of moral high ground that will allow unions to command widespread public support for their message. So long as business unionism continues to be the dominant ideology of the labor movement, race, ethnicity, and gender issues will be marginalized in movement priorities and policies. Unionism’s challenge to class exploitation will be deradicalized by employers’ ability to exploit racial, ethnic, and gender hierarchies to divide workers against one another.


117. See Mantsios, supra note 78, at 59.

118. Sweeney, supra note 80, at 58, 153; see also Michael Kazin, Doing What We Can: The Limits and Achievements of American Labor Politics, New Lab. F., Fall/Winter 1999, at 21, 30 (calling for a labor politics that “acknowledges race and gender but transcends them”).

119. See Sweeney, supra note 80, at 33-45 (emphasizing labor’s focus on income inequality).

120. Zweig, supra note 5, at 128.
II
HOW LABOR LAW CIRCUMSCRIBES UNION IDENTITY

The labor law has proved constitutive of labor movement ideology, though in some important ways the premises of the law are derived from union ideology as well. Despite its radical potential, the Wagner Act was never intended to encourage broad social justice unionism that would challenge labor force hierarchies. On the contrary, the Wagner Act relegated unions to an instrumental role in achieving uninterrupted production. The courts enforced this vision of unionism, employing legal doctrine and legal language to further restrict the realm of labor's activism. Ultimately, unions internalized this ideology and succumbed to the pressures of depoliticization and worksite-specific representation. It is fair to say that the law shaped union identity, both internally and externally. This Part considers several key areas in which the law defined the limits of union ideology as economic, and excluded race, ethnic, and gender justice from labor’s agenda.

A. **Entrenching the Divide Between Labor Unionism and Social Justice: Defining a Labor Union**

The very definition of a labor union reveals the Act's economic focus. The Act defines a labor organization as “any organization of any kind... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Under the Act, the proper scope of union activity is limited to matters of direct and immediate importance to union members: wages, hours of work, and working conditions. This narrow range of legitimate union activity is reinforced by section 8(d) of the Act, which requires

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121. See Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 62 MINN. L. REV. 265, 265 (1978) (arguing that the Wagner Act “was perhaps the most radical piece of legislation ever enacted by the United States Congress”).

122. The legislative history indicates that channeling and restricting class-based militancy was an important motivation behind enactment of the Wagner Act. Feldman, supra note 68, at 187.

123. The Act’s statement of purpose made it clear that promoting industrial peace and removing “recognized sources of industrial strife and unrest” were critical justifications for protection of the right to organize and to bargain collectively. National Labor Relations Act (NLRA) § 1, 29 U.S.C. § 151 (1994); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 45 (1937) (holding the Wagner Act constitutional and highlighting the industrial peace rationale for its enactment: “The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace.”).


employers and employee representatives to bargain in good faith "with re-

2.spect to wages, hours, and other terms and conditions of employment."127

The NLRB often has been called upon pursuant to the Act to distin-
guish between labor organizations with an economic focus and organiza-
tions that exist to promote social justice. In a case typical of those it has
confronted, the Board was asked to decide whether the Center for United
Labor Action ("CULA") was a "labor organization" subject to the Act's
secondary boycott provisions. Center for United Labor Action128 involved a
labor dispute between the Amalgamated Clothing Workers of America and
Farah Manufacturing. The Center for United Labor Action was an organi-
ization comprised of both unionized and nonunionized workers "devoted to
the improvement of working conditions and the advancement of all
workers of all races and nationalities in the struggle against the U.S.
corporations," who sought "not only . . . higher wages, but also . . . equal
treatment for women and racial minorities."129 CULA supported the cloth-
ing workers' strike against Farah by trying to persuade consumers to boy-
cott stores that were selling Farah's products.130 One of the department
stores charged CULA with engaging in a secondary boycott in violation of
sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the Act.131

Because section 8(b)(4) only applies to labor organizations, the main
issue before the NLRB was whether CULA was a labor organization. The
NLRB found that CULA was not a labor organization because it was not
selected and designated by employees to resolve conflicts with their em-
ployers and also because CULA was not involved in "dealing with" em-
ployers as required by section 2(5) of the Act.132 In reaching this
conclusion, the NLRB sought to distinguish between labor organizations
and social justice organizations. The majority stressed the difference be-
tween organizations that support the cause of labor from organizations that
seek to represent employees.133 The majority noted that there are people
who view labor disputes as involving not just the workplace affected by the
dispute but also the community at large or the nation as a whole. Hence,
the majority stated, "[i]n such circumstances, it is not unusual for social
activist groups . . . to actively support the employees' cause and to seek to
marshal public opinion in support of it."134 However, the opinion contin-
ued, it would be "ridiculous on its face" to conclude that an organization is

127. 29 U.S.C. § 158(d) (1994). Although the phrase "terms and conditions of employment" might
have been susceptible to a broad interpretation, the Court chose to interpret the phrase as "words of
129. Id. at 874.
130. Id.
131. Id. at 876.
132. Id. at 873.
133. Id.
134. Id.
a labor organization merely because it engages in strike-supporting activities. Only those organizations that expressly or implicitly seek to deal with employers over matters affecting employees can be considered labor organizations under the NLRA.\textsuperscript{135}

Thus, at least in part because CULA's activism and areas of concern extended beyond a group of employees employed at a single worksite, it was not a labor organization as defined by the Act. Ironically, the NLRB viewed CULA's broad solidarity with all workers as a reason to find that CULA was not a labor organization, thus affording it protection from the sanctions that could be imposed under the Act's secondary boycott provisions. Such tortured reasoning was necessary because of the law's hostility to collective action and class protest, particularly as expressed in the Taft-Hartley amendments (which include the secondary boycott provisions).\textsuperscript{136}

In another well-known decision, the Board found that the 9 to 5 Organization for Women Office Workers ("9 to 5") was not a labor union.\textsuperscript{137} 9 to 5, an organization devoted to securing better pay and working conditions for female clerical workers, was active on the campus of Northeastern University in Boston. Northeastern established a "Weekly Staff Cabinet" that purported to represent all employees who were not exempt from the Fair Labor Standards Act ("FLSA"), except for custodial employees, who were unionized.\textsuperscript{138} 9 to 5 filed a charge alleging that the "Weekly Staff Cabinet" was a labor organization illegally dominated by the university in violation of section 8(a)(2) of the Act.\textsuperscript{139} It also alleged that Northeastern had violated section 8(a)(1) of the NLRA by discriminating against one employee because of her membership in 9 to 5 and by refusing to allow 9 to 5 to hold a meeting in a room at the student center, which both university and nonuniversity groups were permitted to use.\textsuperscript{140}

A threshold question raised by this case was whether 9 to 5 was a labor organization as defined by the NLRA. The NLRB agreed with the administrative law judge's finding that 9 to 5 was not a labor organization.\textsuperscript{136} In his dissent, Member Kennedy pointed out that CULA, a national organization, had been involved in such activities as joining picket lines, leafleting employers, raising funds for strikers, assisting union-organizing drives, and representing employees before government agencies, all of which amounted to dealing with employers at a practical level. Member Kennedy therefore concluded that CULA was a labor organization.\textsuperscript{135} at 874-75 (Member Kennedy, dissenting).

\begin{itemize}
\item \textsuperscript{135} \textit{Id.} In his dissent, Member Kennedy pointed out that CULA, a national organization, had been involved in such activities as joining picket lines, leafleting employers, raising funds for strikers, assisting union-organizing drives, and representing employees before government agencies, all of which amounted to dealing with employers at a practical level. Member Kennedy therefore concluded that CULA was a labor organization.\textit{Id.} at 874-75 (Member Kennedy, dissenting).
\item \textsuperscript{136} \textit{See} Crain, supra note 101, at 1976-81 (explaining how courts have afforded higher levels of protection against secondary boycott laws for civil rights groups than they have to similar protests by organized labor); \textit{see generally} James J. Brudney, \textit{Reflections on Group Action and the Law of the Workplace}, 74 Tex. L. Rev. 1563, 1564 (1996); Klare, \textit{supra} note 121, at 293-336.
\item \textsuperscript{137} The opinion addresses three consolidated cases: Northeastern Univ. & 9 to 5 Organization for Women Office Workers; Northeastern Univ. Chapter & The Weekly Staff Cabinet, Party in Interest; Northeastern Univ. & Janine Bernier & Kathy Dangle-Killen, 235 N.L.R.B. 858 (1978), \textit{enforced in part}, 601 F.2d 1208 (1st Cir. 1979).
\item \textsuperscript{138} 235 N.L.R.B. at 858.
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 863, 864-65.
\end{itemize}
organization. Citing Center for United Labor Action, the judge concluded that an organization that assists women workers in their struggle against employers but that "eschews a collective-bargaining role is not a labor organization within the meaning of the Act."

Most recently, community-based organizations such as the Asian Immigrant Women Advocates (AIWA) have been characterized as "not-unions." Willing to invest years in building community, furthering workers’ education, and encouraging collective activity, advocacy organizations like AIWA do not function like unions to represent workers in dealing with a particular employer, but instead seek to support and empower workers who share a common ethnicity to represent themselves. For example, when twelve seamstresses employed by Lucky Sewing Company to do piecework for fashion dresses produced under the Jessica McClintock label came to AIWA to complain about nonpayment of below-minimum wages, AIWA assisted them in conducting a public pressure campaign aimed at Jessica McClintock, seeking payment of the back wages owed them by the now-bankrupt contractor, Lucky Sewing. McCintock responded by filing unfair labor practice charges with the Board, seeking to limit picketing by arguing that AIWA was a labor organization subject to the restrictions of the NLRA. The Asian Law Caucus and the ACLU provided legal counsel to AIWA, and the charges were dismissed.

These decisions clearly illustrate how the Act itself incorporates a narrow conception of unionism. It seems remarkable that militant pro-worker organizations, such as CULA, 9 to 5, and AIWA, are not encompassed by the Act’s definition of a labor organization. Ironically, the Board has strained to define them as not-unions in order to afford them more protection for their activities. The Board’s decisions that these groups were not subject to the Act enhanced their rights to advocate on behalf of their clients, particularly in seeking to mobilize public support for their causes. The law’s encouragement of the divide between unionism and social justice movements, reinforced by these cases, is only one example among many of the ways in which labor law “aims at particularizing rather than generalizing workers’ struggles; . . . directs them towards their relationship with

141. Id. at 865. Although the NLRB decided that 9 to 5 was not a labor organization, it still concluded that Northeastern violated 8(a)(1) by interfering with the 9 to 5 members’ section 7 right to engage in concerted activity to improve their wages, hours, and working conditions. Id. at 865. The court of appeals agreed. 601 F.2d at 1217. Protection for concerted activity under sections 7 and 8(a)(1) is not contingent on workers’ union affiliation or aspirations to become union members.
142. 235 N.L.R.B. at 859.
143. See Ruth Needleman, Organizing Low-Wage Workers, WORKINGUSA, May/June 1997, at 45, 49 & n.2.
144. Id. at 45, 49.
145. Id. at 50.
146. Id.
their employer, rather than to the relationship of their class and to work; ... [and] privatizes and depoliticizes those struggles.”

B. The Legal Limits of Solidarity: Bread-and-Butter Issues

Two well-known U.S. Supreme Court decisions further illustrate how the law encourages unions to narrow their constituencies and to focus only on "bread-and-butter" issues of direct concern to their members rather than on a more ambitious agenda of social transformation. In Allied Chemical & Alkalai Workers of America v. Pittsburgh Plate Glass Co., the employer canceled a health insurance policy for retirees without bargaining with the union. The Court had to decide whether the employer had violated section 8(a)(5) of the NLRA: If retirees are employees for purposes of NLRA coverage, the employer was obligated to bargain with the union before taking action to cancel the insurance policy. If retirees were outside the bargaining unit, however, the employer had no bargaining obligation. The Court held that retirees are not employees covered by the NLRA, and accordingly the employer did not violate section 8(a)(5) because health insurance for retirees is not a mandatory subject of bargaining. In reaching these conclusions, the Court placed considerable emphasis on the purposes of the NLRA. The Court stressed that the stated purpose of the Act is to reduce disruptions to commerce by encouraging collective bargaining. Because retirees are no longer active members of the work force, they are not in a position to disrupt commerce; therefore, finding them to be covered employees under the NLRA would not promote the Act’s main purpose of promoting industrial peace. The Court stated that the appropriate test for determining if a third party’s concern is a mandatory subject of bargaining is whether the concern vitally affects the terms and conditions of the bargaining unit’s employment. According to the Court, retirees’ benefits did not satisfy that standard.

147. Feldman, supra note 68, at 187. A number of scholars have documented painstakingly the ways in which the Supreme Court subsequently has limited the scope of union activity to the workplace and to economic issues, circumscribing union influence in society and short-circuiting union efforts to raise the larger issue of class conflict. See, e.g., id. (cataloguing and analyzing the ways in which the Court limited union influence through its decisions dealing with the definition of “employee” covered by the NLRA, the constitution of an appropriate bargaining unit, the purposes for which unions may collect dues from nonconsenting “members,” and the forms of economic pressure allowable under the Act); see generally JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1987) (identifying unstated values and assumptions underpinning legal doctrine restricting workers’ concerted activity); Klare, supra note 121 (analyzing how impact of restrictive Supreme Court interpretations of the Wagner Act laid the foundations for deradicalization and cooptation of the labor movement).

149. Id. at 172-82.
150. Id.
151. Id. at 166.
152. Id.
153. Id. at 182.
Through the lens of *Pittsburgh Plate Glass*, unions become mere instruments to promote the smooth functioning of the capitalist system. The myopic, self-centered unionism that lies at the heart of *Pittsburgh Plate Glass* is far removed from the ambitious agendas of the Knights and the IWW. *Pittsburgh Plate Glass* teaches unions that they should be concerned solely with matters of immediate interest to their members. Even the fact that the retirees in *Pittsburgh Plate Glass* had once been union members and continued to be members of the same socioeconomic class as the current employees was irrelevant. The Court viewed the labor issues so narrowly in *Pittsburgh Plate Glass* that the realities of shared employment history, social class, friendships, family relationships, and community ties were erased from the picture.  

Such an impoverished view of solidarity has important consequences for unionism. First, a limited notion of solidarity isolates unions from the community, even when the successful mobilization of workers depends upon the support and involvement of family and community members. Isolation from family members historically has devalued and de-emphasized women’s contributions to the labor movement, particularly in times of labor strife. Ultimately, it has deepened the divide between women and organized labor. As Elizabeth Faue’s study of the Minneapolis labor movement prior to the enactment of the Wagner Act demonstrated, then-prevalent community-based unionism blurred the lines between home and workplace, established connections between local institutions and other labor organizations, and brought women and children into the labor movement in significant numbers. With the advent of industrial capitalism and the enactment of the Wagner Act, women were marginalized, their protest defined as “outside” the labor movement. Collective protest was understood in militant, warlike terms; the strike and the picket line became the only legally cognizable methods of protest, and violence was romanticized within the labor movement. Eventually, the Taft-Hartley Act  

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154. That the Court could ignore the concrete life experiences of workers when determining whether a matter “vitaly affects” them illustrates what Professor Klare has called the alienated character of lawmaking under capitalism. This alienation is a consequence of law’s being “made by experts socialized in elite institutions and distant from the lived reality of everyday life in capitalist society.” Klare, *supra* note 121, at 338. The NLRA as interpreted by the Court is not intended to encourage the formation of a labor movement broadly concerned with the welfare of others, even if the others are neighbors, friends, and relatives. *Cf. Justice in the Coalfields* (Appalshop Film and Video 1995) (on file with the University of North Carolina Law Library) (video portraying the interaction between community and union during the UMWA’s Pittston coal strike in Virginia in the late 1980s and early 1990s).


156. Faue, *supra* note 19, at 4-5.

157. Id. at 5.

158. *See id.* at 73-78 (describing the militant imagery and masculine character of the Minneapolis labor movement in the 1930s).
codified this by restricting the community-based strategies, such as boy-
ccotts, in which women had played a key role and by more narrowly cir-
sumscribing labor's political role.\textsuperscript{159}

Similarly, the law's limitation of solidarity to the worksite has had negative consequences for the labor movement's efforts to mobilize Blacks. Community and neighborhood-based organizing is particularly important to organizing the Black working class since a significant number of them are unemployed or tenuously employed\textsuperscript{160} and will not be reached through a workplace-based strategy.\textsuperscript{161} At the same time, since economic insecurity tends to correlate with class and race consciousness, the unem-
ployed or underemployed may be a surprisingly organizable and militant group.\textsuperscript{162}

Finally, the labor movement's traditional and continuing focus on
"bread-and-butter" unionism (the economic aspects of jobs) is at odds with
the primacy of expressive individualism (the desire for subjective expres-
sion at work).\textsuperscript{163} Increasing numbers of American workers no longer see
work in solely utilitarian terms (as a job, earning money and paying the
bills, a means toward an end); instead, they think of work in terms of a "ca-
reer" that allows for individual growth and personal achievement through-
out life (an endeavor that enhances prestige and self-esteem).\textsuperscript{164} Modern
workers who seek control over their work and participation in workplace
decision-making affecting matters such as job design and work goal-
setting, in addition to influence over wage-setting and attaining economic
gains through bargaining with management, are less likely to favor unions
than they are employee-management cooperative structures.\textsuperscript{165}

\textsuperscript{159} See id. at 13, 145-46.

\textsuperscript{160} See Robert W. Fairlie & William A. Sundstrom, The Emergence, Persistence, and Recent
(documenting unemployment by race and finding that Black unemployment was more than double the
white unemployment rate by the 1990s; in 1997, the unemployment rate of Black men was 2.4 times
that of white men); Sumner M. Rosen, Jobs: New Challenges, New Responses, 544 ANNALS AM.
ACAD. POL. & SOC. SCI. 27, 34 (March 1996) (describing high job displacement rates for Black and
Hispanic workers in manufacturing, and lower likelihood of re-employment for Black workers than for
displaced white workers).

\textsuperscript{161} See JOHN C. LEGGETT, CLASS, RACE, AND LABOR: WORKING-CLASS CONSCIOUSNESS IN

\textsuperscript{162} Id. at 79-81, 94. Leggett's research suggests that unionism could help to engender class as
well as race consciousness among unemployed Blacks, particularly if it were situated in the relatively
small and racially homogenous residential areas in which urban Blacks tend to be clustered. See id. at
82-83, 149-50.

\textsuperscript{163} See Margalioth, supra note 7, at 134-35.

\textsuperscript{164} See id. at 141.

\textsuperscript{165} See id. at 150-51.
C. Self-Interested Action

The labor law's definition of "concerted activity" that is entitled to protection under the NLRA\textsuperscript{166} is another indication of the narrow scope of unionism in labor law. Of particular note is the law's requirement that the activity be self-interested. As a number of commentators have explained, the law's requirements as interpreted by the Court have translated even solidaristic social justice appeals by unions into "calculated appeal[s] to the pocketbook[s]" of self-interested employees.\textsuperscript{167} For example, in \textit{Eastex, Inc. v. NLRB}, employees sought to distribute a union newsletter in non-working areas of their employer's plant during nonworking time.\textsuperscript{168} The newsletter discussed the importance of union solidarity, urged employees to write their legislators to oppose a proposal to incorporate "right to work" provisions in the state constitution, criticized the president for vetoing an increase in the minimum wage, and urged employees to register to vote.\textsuperscript{169} The union contended that the employer's effort to prohibit distribution of the newsletter violated section 8(a)(1) of the Act,\textsuperscript{170} which forbids employers from interfering with, restraining, or coercing employees in the exercise of the rights protected by section 7 of the Act.\textsuperscript{171} Hence, the Court had to decide whether distribution of the newsletter was protected by section 7.

Although the Court found in favor of the union, it "accepted without discussion the underlying premise that protester self-interest was a necessary prerequisite to section 7 coverage."\textsuperscript{172} The Court found that the actions urged by the newsletter were protected by section 7 because they promoted the employees' own interests and potentially strengthened the

\textsuperscript{166.} NLRA § 7, 29 U.S.C. § 157 (1994). "Concerted activity" is activity that is engaged in by two or more employees, or by one employee acting as the representative for two or more employees. Prill v. NLRB, 835 F.2d 1481, 1483 (D.C. Cir. 1987). Where the employees are unionized, it is activity by one employee invoking rights protected under the collective-bargaining agreement. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 831 (1984). The activity must be directed toward an appropriate objective, \textit{Eastex, Inc. v. NLRB}, 437 U.S. 556 (1978), and utilize permissible means, \textit{NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)}, 346 U.S. 464 (1953). In the context of a unionized workforce, concerted activity is protected (so that employer action in retaliation constitutes an unfair labor practice) only where the employees' action is neither contrary to the terms of a collective-bargaining agreement, nor violent, unlawful, or disloyal. Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1190-92 (D.C. Cir. 2000); see also \textit{NLRB v. Washington Aluminum Co.}, 370 U.S. 9, 18 (1962) (summarizing and citing the Court's rulings to this effect).


\textsuperscript{168.} 437 U.S. 556, 558 (1977).

\textsuperscript{169.} \textit{Id.} at 558-59.


\textsuperscript{172.} Fischl, supra note 167, at 797.
union's position at the bargaining table. Right-to-work laws, the Court explained, would directly affect the employees by weakening unions, thereby giving employers a bigger edge at the bargaining table. Additionally, because the minimum wage could potentially influence the employees' wages by raising wages generally, the Court found that it promoted the employees' interests to have an increase in the minimum wage.

While superficially plausible, the Court's reasoning in *Eastex* is dangerous. Although the union was able to frame its argument strategically in terms of self-interest, showing a link between its members' economic interests and the larger political goals served by the union's efforts, the Court's reasoning ultimately reinforces an economic perspective on unionism. The business unionism that underlies, and is reinforced by, *Eastex* ultimately isolates the labor movement from social justice movements, reinforcing the image of labor as a special interest group concerned primarily with protecting the privileges of an ever-shrinking number of relatively elite workers.

**D. Race and Gender Justice Are Not Proper Subjects for Collective Action**

Labor unions have not always chafed under the imposed restrictions handed down by Congress or the courts. In some areas, labor itself has supplied the chains that now constrain it. From the beginning, organized labor resisted efforts to inject antiracist politics into labor law. Black leaders at the NAACP and the National Urban League sought to include in the Act a clause barring racial discrimination by unions. The AFL resisted inclusion of the antidiscrimination clause, taking the position that it would prefer to see the entire statute defeated rather than suffer the inclusion of such a clause. The Act passed without the antidiscrimination clause. Taken in combination with its exclusivity principle and majority rule doctrines, as well as the then-permissible closed shop and prevalent racially

174. *Id.*
176. *Id.*
177. The principles of exclusivity and majority rule are doctrines that require the employer to deal exclusively with the representative selected by a majority of its workers. Once the workers have selected a representative, the employer may not deal with individual workers, groups of workers, or other unions. NLRA § 9(a), 29 U.S.C. § 159(a); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944); see also Marion Crain & Ken Matheny, "Labor's Divided Ranks: Privilege and the United Front Ideology," *84 Cornell L. Rev. 1542* (1999) (critiquing role of exclusivity and majority rule in maintaining gender privilege in the labor movement).
exclusionary union policies, the Wagner Act initially countenanced the exclusion of Blacks from union jobs.\textsuperscript{178}

Subsequent developments in labor law doctrine demonstrate the long-range impact of this initial clash between labor and groups devoted to antiracist politics. Unions came to be seen as a vehicle for the advancement of employees' economic interests, as distinct from worker interests in being free from race and sex discrimination. Collective activities protected by the NLRA became identified at law with race and gender-privileged workers—white males. Minority interests were cast as "individual" and channeled into individual rights statutes such as Title VII.\textsuperscript{179} This was so even though claims under the individual rights statutes could be, and frequently were, asserted by groups of minority employees in class action litigation.\textsuperscript{180} Ultimately, labor law doctrine came to reflect the view that racial and sexual subordination/discrimination are peripheral to union activism; race and sex discrimination claims are more appropriately raised by individuals in litigation pursuant to antidiscrimination statutes.

\textsuperscript{178} Some commentators have gone much further, arguing that unions actively worked to exclude Blacks from the labor market, restricting competition for jobs and seeking to maintain a monopoly for white workers. See Bernstein, supra note 54, at 95-96.

\textsuperscript{179} See Budney, supra note 136, at 1564-72, 1589-91 (describing evolution of a system of workplace regulatory statutes focused on individual employee rights which have subordinated the role of employee group action under the NLRA in the workplace); see also Louise Sadowsky Brock, Note, Overcoming Collective Action Problems: Enforcement of Worker Rights, 30 U. Mich. J.L. Reform 781, 785-86 (1997) (distinguishing between two categories of non-NLRA statutory rights for workers, "individual" rights such as antidiscrimination laws, and "public" rights such as the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Worker Adjustment and Retraining Notification Act).

Characterizing the claims of the less-privileged as individual, and thus as unique and even exceptional, is a well-established legal mechanism for maintaining the privilege of the dominant group. Prior to the conceptualization of sexual harassment as a form of sex discrimination cognizable under Title VII because it happened disproportionately to working women and constituted a form of economic coercion, sexual harassment was conceived of as a personal, private, individual injury cognizable only at tort law. See Catharine A. MacKinnon, Feminism Unmodified 106-07 (1987); Catharine A. MacKinnon, The Sexual Harassment of Working Women 164-74 (1979). Individualism and racial and/or gender privilege are intimately connected. See Martha R. Mahoney, Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite, 85 Cornell L. Rev. 1309, 1325-26 (2000).

I. Emporium Capwell: Minority Employees’ Interests in Challenging Race Discrimination Are Cast as Individual Concerns

In Emporium Capwell Co. v. Western Addition Community Organization,\textsuperscript{181} Black workers who were dissatisfied with their union’s efforts to address their employer’s racially discriminatory policies\textsuperscript{182} held a press conference criticizing these policies, promoted a boycott, and picketed and leafleted the employer’s department store.\textsuperscript{183} The Court held that these workers could not avail themselves of the protection of the NLRA when they were fired.\textsuperscript{184} Agreeing with the Board, the Court reasoned that permitting separate activity by dissident minorities would undermine the union’s power to act as exclusive representative of the employees; the workers’ protest was effectively an attempt to circumven the union and to bargain directly with the employer.\textsuperscript{185} While acknowledging the importance of Title VII’s codification of the national labor policy against race discrimination, the Court rejected the argument that the policy justified protecting protest and bargaining efforts by dissident minority workers under the NLRA.\textsuperscript{186} Instead, the existence of potential avenues of redress under Title VII became a justification for denying protection for collective action by dissidents under the NLRA.\textsuperscript{187}

Justice Marshall, writing for the majority, explained that the interests of racial minorities within a bargaining unit must yield to the overriding goal of class solidarity embodied in the doctrine of exclusivity. Allowing minority employees to bargain separately with employers could fragment the workers and weaken the union, adversely affecting its long-range efforts to combat race discrimination.\textsuperscript{188} Since the picketing was inconsistent

\begin{footnotes}
\footnote{181. 420 U.S. 50 (1975).}
\footnote{182. At the behest of employees, the union had announced a policy of processing every race discrimination grievance to arbitration. \textit{Id.} at 55. Some employees felt that the arbitration and grievance machinery would not be effective in redressing the company’s racially discriminatory practices because it operated at an individual level; the employees sought a systemic solution. \textit{Id.} at 55-56.}
\footnote{183. \textit{Id.} at 56-57.}
\footnote{184. \textit{Id.} at 71-72.}
\footnote{185. \textit{Id.} at 60-61, 66, 70. The Board had adopted the trial examiner’s conclusion that the NLRA did not protect the picketing because the workers’ protest was effectively an attempt to circumvent the union and to bargain directly with the employer. See 192 N.L.R.B. 173, 185-86 (1971). The Court of Appeals for the District of Columbia reversed the Board, finding that the legislative priority of ending race discrimination, expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), mandated that courts give special latitude to collective action aimed at ending an employer’s racial discrimination. Western Addition Community Org. v. NLRB, 485 F.2d 917, 928 & n.33 (D.C. Cir. 1973).}
\footnote{186. \textit{Emporium Capwell}, 420 U.S. at 66-68.}
\footnote{187. \textit{See id.} at 71-74 (finding that the appropriate remedy, if any, for the employees in this case was under the retaliatory discharge provisions in Title VII).}
\footnote{188. \textit{Id.} at 67-70. Justice Marshall’s authorship of the Court’s opinion has provoked some interesting analyses; some have seen it as evidence of judicial restraint in the face of political pressure. Professor Sharpe has argued that \textit{Emporium Capwell} illustrates Justice Marshall’s commitment to “judging in good faith”—upholding the labor law even when it meant ruling against his predilections.}
\end{footnotes}
with the exclusivity doctrine embodied in section 9(a) of the Act, and more specifically since it was an effort "to bypass the grievance procedure" in the collective-bargaining agreement,\(^8\) it was not protected concerted activity under section 7. Accordingly, the Black employees had no remedy under the NLRA for their discharges.\(^9\)

*Emporium Capwell* makes clear the Court's view that the elimination of race discrimination, while an important national labor policy, must yield to the doctrine of exclusivity in collective bargaining.\(^1\) Several scholars have criticized the potential breadth of the doctrine articulated in the decision and argued for narrow application.\(^2\) Professor Iglesias has leveled an especially powerful critique of *Emporium Capwell*, bringing to bear the

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Others have characterized Marshall's position in more overtly political terms. Justice Marshall was hostile to direct action techniques associated with the Black nationalist movement, and committed himself instead to a legalist conception of racial justice as achievable "by mastering the elite discourse of the white power structure in order to integrate that power structure." Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 814-15 n.115. His opinion in *Emporium Capwell* is consistent with the theme of promoting integrationism and empowerment through existing institutional structures rather than pursuing direct action separately. See also infra note 190.

189. *Emporium Capwell*, 420 U.S. at 67; see also Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1193 n.12 (D.C. Cir. 2000) (distinguishing *Emporium Capwell* on this basis). Subsequent courts have read *Emporium Capwell* as barring only minority actions directed toward forcing the employer to bargain with the minority group. Thus, even dissident minority actions that are in conflict with the collective-bargaining agreement and are not authorized by the union may be protected. Wildcat strikes, for example, have been held to be protected concerted activity as long as they are not an attempt to bargain directly with the employer and do not undermine the union's performance as bargaining representative. E.g., East Chicago Rehabilitation Ctr., Inc. v. NLRB, 710 F.2d 397, 402 (7th Cir. 1983); NLRB v. Bridgeport Ambulance Serv., 966 F.2d 725, 730 (2d Cir. 1992).

190. *Emporium Capwell*, 420 U.S. at 73. Professor Sharpe has argued that this result is explicable and justifiable because the dissident employees used unprotected means to press their position, ignoring the grievance procedure available to them under the contractual antidiscrimination provision, and potentially threatening the long-term viability of the management-labor relationship. Calvin William Sharpe, "By Any Means Necessary"—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act, 20 Berkeley J. Emp. & Lab. L. 203, 237-38 (1999).

191. *See Emporium Capwell*, 420 U.S. at 69-70 ("Whether [the employees'] right to be free of racial discrimination is] thought to depend upon Title VII or have an independent source in the NLRA, [i]t cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. . . . The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination.")

intersectionality thesis developed by critical-race feminists.\textsuperscript{193} She argues that the Court's decision fragmented the doctrinal areas of race discrimination and class exploitation, treating the two statutes as if they were aimed at separate non-intersecting harms.\textsuperscript{194} At the same time, the Court characterized actions challenging employer race discrimination as "individual" claims, distinct from the collective or group-based harms that workers experience at the hands of the employer in the realm of class exploitation; thus, the individual rights created by Title VII could not be enforced through the procedural mechanisms of the NLRA.\textsuperscript{195} Elsewhere, we have extended that argument to the context of gender, focusing particularly on the minimal role that unions and the NLRA have played in eradicating sex discrimination while simultaneously advancing workers' economic/class interests.\textsuperscript{196}

2. \textit{The Stage Is Set for "Divide and Conquer"}: Gardner-Denver

Since it is the union, rather than individual employees, which is party to a collective-bargaining agreement with the employer, the question arises to what extent the union in its representative capacity may waive individual employees' statutory rights vis-a-vis the employer.\textsuperscript{197} In general, union waivers of individual employee rights are legally enforceable, although the waiver may be reviewed under different standards depending upon which statutory scheme confers the rights being waived.\textsuperscript{198}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 424.
\item \textit{Id.}. This reasoning is particularly ironic in light of the facts of the case before the Court. The union and the picketing Black workers did not disagree on the underlying fact that the employer practiced race discrimination. 192 N.L.R.B. at 180. Rather, they disagreed over the means appropriate to ending the alleged discrimination. The union had chosen to challenge the employer's discriminatory policies on a case-by-case basis, while the Black workers insisted that because racial discrimination is a group injury, the union should address it collectively, not individually. \textit{Id.} at 181.
\item Crain & Matheny, supra note 177, at 1601 (analyzing union inability to mount an effective challenge to sexual harassment of its female members by their male coworkers illustrated by \textit{EEOC v. Mitsubishi Motor Manufacturing} and advocating repeal of majority rule and exclusivity doctrines).
\item Individual employees are third party beneficiaries of the collective agreement rather than parties to it. J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944) ("an employee becomes entitled by virtue of the Labor Relations Act ... as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms"); Ronald Turner, \textit{Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum}, 49 EMORY L.J. 135, 163-64 (2000).
\item Waivers of collective rights conferred by the NLRA, such as reinstatement rights following a strike, the right to strike itself, or the right to union representation in an investigatory interview which the employee reasonably believes will lead to disciplinary action, are enforceable, although they must be "clear and unmistakable." See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); see also IAM v. United, 534 F.2d 422 (2d Cir. 1975) (upholding waiver of reinstatement rights following a strike settlement); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (finding that the union may waive employees' rights to engage in an economic strike); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956) (holding that the union may waive the right to strike against unfair labor
\end{enumerate}
\end{footnotesize}
A great deal of ink has been spilled over the question whether a union may waive employees' individual statutory rights to litigate claims under Title VII or comparable antidiscrimination statutes when the collective agreement provides for arbitration of such claims. 199 In Alexander v. Gardner-Denver Co., 200 the Court held that an employee who had pursued arbitration of a race discrimination claim with the assistance of his union pursuant to the arbitration mechanism in the collective-bargaining agreement was not barred from bringing suit in court on the same claim under Title VII. 201 The Court reasoned that Title VII protects individuals against race discrimination, while the NLRA confers rights upon the union to challenge employer practices under the labor arbitration machinery in a collective-bargaining agreement. 202 The employee's statutory and contractual rights are independent and may be separately asserted and enforced in their respective fora. 203 Because of the risk that the union might compromise the individual employee's statutory rights in its effort to advance the rights of the group, the Court held that the union could not waive an individual employee's rights under Title VII. 204 An individual's Title VII rights could "form no part of the collective-bargaining process," including the continuation of bargaining under the arbitration and grievance provisions of the labor contract. 205 In subsequent cases, the Court clarified and

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201. Id. at 51-52.

202. Id. at 58 n.19.

203. Id. at 49-50.

204. Id. at 51-52. "In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." Id. at 58 n.19.

205. Id. at 51. The Court went further still, finding that because arbitral processes were inferior to judicial processes for protecting statutory rights, claim preclusion did not apply even if the facts
expanded upon the principle that the union was the guardian of employees' collective rights rather than the enforcer of individual employee rights conferred by other employment law statutes. Individual rights conferred by the Fair Labor Standards Act and by section 1983 were also found to be non-waivable.206

Though a necessary step for the full protection of minority employees' rights against the backdrop of a labor movement disinterested in or even hostile to the interests of women and minorities, the exclusion of discrimination claims from the ambit of union arbitration clauses set the stage for the further narrowing of union ideology. Increasingly, labor unions promoted the rights of the white male majority membership that defined the labor force sectors where union density was strongest.207 Civil rights and feminist organizations picked up the slack, advocating on behalf of union members in discrimination claims under Title VII that often targeted the unions as well as the employer as defendants.208

III

DIVIDE AND CONQUER: THE YELLOW-DOG CONTRACTS OF THE 1990s

More than a decade after the Court's decisions in Emporium Capwell and Gardner-Denver, there was a cataclysmic wave of litigation involving the enforceability of waivers of statutory rights in exchange for arbitration of such claims made by individual employees not represented by a union. Called by some the "yellow dog contracts of the 1990s,"209 such contracts typically condition employment on the employee's waiver of the right to proceed in court on statutory antidiscrimination claims (as well as claims founded in contract or tort) and an agreement to submit all such claims to underlying the Title VII claim had already been the subject of arbitration under a labor contract that prohibited race discrimination and provided a remedy for it. Id. at 56-69. The arbitral decision was admissible as evidence and was entitled to whatever weight the court hearing the statutory claim deemed appropriate. Id. at 60 n.21.

206. McDonald v. City of West Branch, 466 U.S. 284, 289-90 (1984) (allowing an employee who had already pursued a claim arising out of the same facts under the arbitration provisions in his collective-bargaining agreement to proceed in federal court on a section 1983 claim); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (finding that employees who had unsuccessfully pursued their contractual claims in grievance arbitration under the labor contract could nevertheless proceed with minimum wage claims arising from the same facts under the FLSA in federal court).

207. See Crain & Matheny, supra note 177, at 1571-72.

208. See id. at 1548-52; Crain, supra note 96, at 10-13.

an arbitrator whose conclusion will be final and binding. Once the Court
determined that such contracts between employers and individual employ-
ees did not offend public policy, it was only a matter of time before the
question would arise in the union context. Ultimately, the Court’s decision
in Gardner-Denver relieved unions from the burden of challenging all
race-discriminatory employment practices through arbitration under the
collective-bargaining agreement, and was extended by the D.C. Circuit to
permit employers to strip unionized employees of “individual” statutory
rights without bargaining with the unions that represent them. The logical
extension of Emporium Capwell and Gardner-Denver blocks unions from
protecting the most vulnerable workers from overreaching by employers.
Further, it belies the NLRA’s promise to equalize bargaining power be-
tween the employer and its workers, undercutting union efficacy and repre-
sentative ability for all workers.

A. The Non-Union Context: Gilmer and Adams

In Gilmer v. Interstate/Johnson Lane Corp., the Court enforced an
individual employee’s waiver of statutory rights against age discrimination
conferred by the Age Discrimination in Employment Act. Interstate had
hired Robert Gilmer as manager of financial services in 1981 and termi-
nated him six years later when he was 62 years old. As a condition of his
employment, Gilmer had registered with the New York Stock Exchange,
which required him to agree to arbitrate any dispute he had with Interstate.
Accordingly, when Gilmer filed a claim under the ADEA in federal court,
Interstate filed a motion to compel arbitration under the New York Stock
Exchange agreement. The district court denied the motion, but the Fourth
Circuit reversed, finding “nothing in the text, legislative history, or under-
lying purposes of the ADEA indicating a congressional intent to preclude
enforcement of arbitration agreements.”

The Supreme Court affirmed the Fourth Circuit decision, relying
heavily on the policy favoring arbitration articulated in the Federal
Arbitration Act, and concluding that statutory antidiscrimination claims
could be the subject of an arbitration agreement. The Court brushed aside
Gilmer’s arguments that arbitration is not a satisfactory substitute for court

211. Id. at 23.
212. Id. at 24.
213. Id. at 23-24.
214. Id. at 24 (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir.
1990)).
fora to enforce the ADEA, and found "[m]ere inequality in bargaining power" between employers and individual employees an insufficient basis on which to hold arbitration agreements unenforceable in the employment context. The Court distinguished Gardner-Denver and its progeny on the basis that they were collective-bargaining cases, noting that in the union context there is "[a]n important concern [for] the tension between collective representation and individual statutory rights" that is absent outside this context. The Court also noted that the arbitrator in Gardner-Denver lacked the power to resolve the statutory claims asserted by the employee, and that the case was not decided under the FAA. Because the Court emphasized the obsolescence of Gardner-Denver's view that arbitration is inferior to litigation for resolving statutory claims, the Court's opinion has generally been interpreted as encouraging the promulgation of arbitration systems by employers. By 1994, more than 100 major companies had made it a condition of employment that an applicant agree to a

217. Gilmer argued that arbitration panels would be likely to have a pro-employer bias, that the limited discovery permitted in arbitration would make it more difficult for employees to prove discrimination, that appellate review would be more difficult to obtain since arbitrators often do not issue written opinions, and that arbitrators lack the power that courts possess to provide broad equitable relief. Id. at 30-32.

218. Id. at 33.

219. Id. at 35. Some scholars consider this the principal basis for the Court's ruling in Gardner-Denver. E.g., Reginald Alleyne, Arbitrating Sexual Harassment Grievances, 2 U. PA. J. LAB. & Emp. L. 1, 9 n.32 (1999) (arguing that the potential for union-employer collusion in arbitration cases involving allegations of racial discrimination is "the dominant rationale" underpinning the Gardner-Denver ruling). But see David E. Feller, Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright, 16 Hofstra Lab. L.J. 53, 77-78 (1998) (acknowledging the collusion rationale but arguing that the potential conflict between the union's collective mission and the workers' individual statutory rights is ameliorated where the union has negotiated a clause in the labor contract prohibiting discrimination and fully incorporating workers' statutory rights into the contract).

220. See Gilmer, 500 U.S. at 35.

221. See id. at 34 n.5. In 1996, the Fourth Circuit took the step the Supreme Court had eschewed in Gilmer: determining that Gardner-Denver could not survive the Court's reasoning in Gilmer. In Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996), the Fourth Circuit held that an arbitration provision in a collective-bargaining agreement required a discharged employee to submit to arbitration her claims under Title VII and the Americans with Disabilities Act. Id. at 878-79. No other circuit has followed the Fourth Circuit. See Hodges, supra note 199, at 132-39 (discussing cases that reject employer efforts to compel arbitration of statutory claims under collective-bargaining agreements).

222. See Grodin, supra note 199, at 1; Attorney Urges Employers to Adopt Mandatory Programs as Risk Management, Daily Lab. Rep. (BNA) No. 93, at A5 (May 14, 2001) (reporting management-side attorney's advice that employers should implement predispute mandatory arbitration programs to limit damages and eliminate class actions); see also Jess Bravin, California Court Limits Firms in Requiring Worker Arbitration, WALL ST. J., Aug. 25, 2000, at B8 (reporting that employer-side lawyers praised the California Supreme Court's recent opinion in Armendariz v. Foundation Health Psychcare Servs., Inc., despite the fact that the Court ultimately found an employer's predispute arbitration agreement unconscionable and therefore unenforceable because the Court confirmed that predispute arbitration agreements are generally enforceable and established guidelines for assessing unconscionability).
mandatory arbitration provision covering her statutory employment rights. By 1999, conservative estimates suggested that 8-10% of the U.S. workforce was covered by such contracts.

The Court’s decision in *Gilmer* did not completely resolve the question of the enforceability of waivers of statutory rights in individual employment contracts. State contract principles generally applicable to any contract, such as fraud, duress, or unconscionability, may still be applied to render arbitration agreements unenforceable. Any effort to hold arbitration agreements to a higher standard of enforceability than other contracts under state law, however, is inconsistent with the FAA and is therefore preempted. Similarly, federal courts may examine waivers of federal statutory forum rights to determine whether “grounds exist at law or in equity” for revocation of the contract; arbitrability is a question for the court.

More fundamental is the question whether some statutory forum rights are such important statements of public policy that they should be non-arbitrable. In the wake of *Gilmer*, all circuit courts except the Ninth Circuit upheld the validity of predispute agreements to arbitrate employment disputes.

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227. 9 U.S.C. § 2 (1994). Many such agreements require the employee to waive rights to punitive damages, consequential damages, attorneys’ fees, injunctive relief, reinstatement, or other remedies that might be available in court. Stone, *supra* note 209, at 1039. A number of courts have found predispute arbitration agreements involving overreaching by the employer unenforceable. E.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (finding overreaching where arbitration agreement was “so one-sided as to undermine the neutrality of the proceeding”); Shankle v. B-G Maintenance Management of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) (refusing to enforce agreement requiring complainant to share in payment of arbitrator’s fees); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (finding mandatory employment arbitration agreement enforceable only if it provides for neutral arbitrators, allows more than minimal recovery, requires a written award, authorizes all types of relief that would be available in court, and does not require employees to pay unreasonable costs or arbitral fees as a condition of access to arbitration); see generally Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. Rev. 687, 719-42 (1997) (discussing the applicability of the FAA to employment disputes); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 729-31, 741-44 (1999) (discussing considerations of public policy as the basis for exceptions to the application of the FAA).
discrimination claims in the non-union setting.\textsuperscript{228} The Ninth Circuit, however, found Title VII statutory forum rights to be non-waivable.\textsuperscript{229} Subsequently, in \textit{Craft v. Campbell Soup Co.}, the Ninth Circuit refused to apply the FAA to any situation involving an employment contract.\textsuperscript{230} In so ruling, the court sought to harmonize sections 1 and 2 of the FAA, which purport respectively to exclude from the FAA’s pro-arbitration mandate contracts of employment of workers “engaged in” interstate commerce, and to include all contracts “involving” commerce.\textsuperscript{231} The court examined the legislative history and concluded that the FAA’s pro-arbitration policy was intended to apply to commercial disputes, not employment disputes.\textsuperscript{232} The inherent tension between the two sections had earlier been addressed by Justice Stevens’ dissenting opinion in \textit{Gilmer}.\textsuperscript{233} Although the statutory interpretation question was not directly raised in \textit{Gilmer} because the arbitration provision at issue there was contained in the New York Stock Exchange registration agreement rather than in an individual employment contract between Gilmer and his employer,\textsuperscript{234} Justice Stevens thought its resolution was evidence of congressional intent in enacting the FAA. Accordingly, he looked to the legislative history of the FAA and concluded that the statute was intended only to “overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.”\textsuperscript{235}


\textsuperscript{229} Duffield v. Robinson Stephens & Co., 144 F.3d 1182, 1199 (9th Cir. 1998) (finding \textit{Gilmer} inapplicable to Title VII claims).

\textsuperscript{230} 177 F.3d 1083, 1094 (9th Cir. 1999). \textit{Craft} involved a unionized employee and the arbitration agreement was part of a collective-bargaining agreement; the court’s reasoning and dicta extended well beyond that situation, however. \textit{Id.} ("[W]e hold that the FAA does not apply to labor or employment contracts.").

\textsuperscript{231} \textit{See infra} notes 246-254 (discussing Circuit City Stores, Inc. v. Adams, 529 U.S. 1129 (2000)).

\textsuperscript{232} \textit{Id.} at 1089-91.


\textsuperscript{234} Justice White, writing for the majority, explained that “it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment.” \textit{Gilmer}, 500 U.S. at 25 n.2.

\textsuperscript{235} \textit{Gilmer}, 500 U.S. at 39 (Stevens, J., dissenting). In support of his position, Justice Stevens quoted the chairperson of the committee that had drafted the bill: "[T]he bill] is not intended [t]o be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.” \textit{Id.} (quoting \textit{Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923)}).
The Ninth Circuit’s reluctance to apply the FAA to employment contracts led ultimately to a grant of certiorari by the Court in a case that directly raised the question reserved in Gilmer. In Circuit City Stores, Inc. v. Adams, 236 the Ninth Circuit found that a district court lacked jurisdiction to stay Saint Clair Adams’ state court action alleging employment discrimination and to compel arbitration of Adams’ claim. As a condition of his employment, Adams had signed a Dispute Resolution Agreement (“DRA”) requiring employees to submit all claims and disputes to arbitration. 237 Although the DRA explicitly stated that it was not a contract of employment, the Ninth Circuit found that it was, since signing the DRA was a condition precedent to employment. 238 Accordingly, the FAA did not apply, and pursuant to the court’s earlier reasoning in Craft v. Campbell Soup Co., 239 the employer could not compel arbitration of Adams’ employment discrimination claim. 240

In Craft, the Ninth Circuit had refused to compel arbitration of Anthony Craft’s Title VII race discrimination claim under a collective-bargaining agreement because it believed that Congress had not intended for the FAA to apply to any employment contracts. 241 The court observed that the vast majority of circuits had held that the FAA applied to all employment contracts except those of employees who actually transport people or goods in interstate commerce. 242 Nevertheless, the Ninth Circuit rejected this interpretation because those courts had analyzed Congressional intent in light of contemporary understandings of terms used in the FAA, rather than those likely to be prevalent at the time. 243

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236. 194 F.3d 1070, 1072 (9th Cir. 1999), rev’d and remanded, 121 S. Ct. 1302 (2001).
237. Id. at 1071.
238. Id. at 1071-72.
239. 177 F.3d 1083 (9th Cir. 1999).
240. Circuit City Stores, 194 F.3d at 1072.
241. Craft, 177 F.3d at 1085.
243. Craft, 177 F.3d at 1086. Because the prevailing understanding of Congress’s Commerce Clause power in 1925 was very narrow, Congress would more likely have concluded that it did not have the power to regulate all employees, and that its power was limited to those who are specifically excluded from coverage in section 1 of the FAA: seamen, railroad employees, and workers engaged in foreign or interstate commerce. By specifically excluding this group, Congress indicated that the FAA did not apply to any contracts of employment, but only to merchants involved in commercial dealings. See id. at 1087, 1089.
The Supreme Court granted certiorari in Adams to resolve the circuit split between the Ninth Circuit and all other circuits that had addressed the question.244 The Court reversed the Ninth Circuit in a 5-4 opinion, holding that the FAA applies to all employment contracts other than those pertaining to transportation workers.245 The Court rejected Adams’ argument that the Act’s coverage provision (section 2)246 applied only to commercial contracts and did not sweep employment contracts into the FAA’s pro-arbitration mandate. The Court reasoned that such an interpretation would render the Act’s exclusion provision (section 1)247 superfluous.248 Turning to section 1, the Court opined that the phrase “engaged in . . . commerce” used in section 1 is narrower than the phrase “involving commerce” in section 2, justifying a narrow reading of section 1’s exclusion provision.249 Accordingly, only contracts of employment of transportation workers are excluded from the FAA’s pro-arbitration mandate.250

While the Court’s decision on such a narrow statutory ground might appear superficial, the Court was well aware of the larger public policy ramifications of its decision. Interpreting section 1’s legislative history, the Court noted that Congress had carved out as exclusions to the FAA those disputes involving employees who were already subject to a system of mediation and arbitration, namely those covered by the Railway Labor Act of 1926.251 The Court also noted the widespread use of arbitration in the employment context and praised its advantages, indicating a reluctance to interfere with settled alternative dispute resolution systems prevalent in employment across the nation.252 The dissenting justices looked to the legislative history of the FAA, particularly organized labor’s expressed concern that “the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements,” and interpreted section 1’s exclusion clause as the congressional response to that concern.253 Justice Stevens explained that labor’s opposition was predicated on the potential disparity in bargaining power between the individual worker and the employer and argued that awareness

244. Circuit City Stores, Inc. v. Adams, 529 U.S. 1129 (2000). The Court limited its grant of certiorari to the statutory interpretation issue of the FAA’s applicability to contracts of employment, declining to review the Ninth Circuit’s holding that the DRA was a contract of employment. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1307 (2001).
245. Circuit City Stores, 121 S. Ct. at 1306.
246. Section 2 provides that the FAA applies to “any maritime transaction or a contract evidencing a transaction involving commerce.” 9 U.S.C. § 2 (1994).
247. Section 1 excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (1994).
248. Circuit City Stores, 121 S. Ct. at 1308.
249. Id. at 1309.
250. Id. at 1311.
251. Id. at 1312.
252. Id. at 1313.
253. Id. at 1315-16 (Stevens, J., dissenting).
of the disparity ought to influence the Court's resolution of the statutory interpretation issue.\textsuperscript{254}

Although \textit{Gilmer} and \textit{Adams} did not involve unionized workplaces, they are the logical outcome of severing employment discrimination issues from issues of economic justice. Because labor law never imposed a duty on unions to enforce antidiscrimination norms on behalf of workers\textsuperscript{255} and because unions have only rarely assumed the task voluntarily,\textsuperscript{256} the burden of enforcement has fallen upon individual employees, nonlabor social justice groups, and government agencies.\textsuperscript{257} The amicus briefs filed on behalf of Saint Clair Adams illustrate this trend. Although amicus briefs were filed by a number of social justice organizations dedicated to defending individual employee rights and to combating discrimination on the basis of race and sex, organized labor did not participate in the case.\textsuperscript{258}

\textbf{B. The Union Context: Wright}

The Court's approach to arbitration of individual statutory rights proceeded along a parallel path in the context of workers represented by a union and covered by a collective-bargaining agreement. Retreating from its absolute bar on union waivers of individual workers' statutory rights in \textit{Gardner-Denver}, the Court subsequently implied that a union could waive

\begin{itemize}
    \item \textsuperscript{254} \textit{Id.}
    \item \textsuperscript{255} See infra Part V.A.
    \item \textsuperscript{256} But see Kim Moody, \textit{Telephone Workers Fight Discrimination at Ameritech}, \textit{Labor Notes}, June 1999, at 3 (describing CWA's decision to cosponsor a class action race and disability discrimination action brought by a rank and file organization of African American technicians and service representatives called An Alliance of Ameritech Employees for Equality).
    \item \textsuperscript{257} See Crain & Matheny, \textit{supra} note 177, at 1605 (analyzing role of nonlabor social justice groups and private attorneys in defending victims' rights in workplace sexual harassment cases). Although the EEOC is dedicated to enforcing antidiscrimination laws, it is hopelessly overwhelmed, with a backlog of over 100,000 cases. Estreicher, \textit{supra} note 209, at 1349, 1356-57 (explaining that "overworked, understaffed administrative agencies" will offer the only enforcement option for many prospective Title VII claimants and advocating the use of private arbitration as a supplementary mechanism for enforcing statutory rights); Theodore J. St. Antoine, \textit{Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?}, 15 \textit{T.M. Cooley L. Rev.} 1, 8 (1998) (describing the predicament of the "severely overburdened" EEOC). Some scholars have suggested reforms that would move the EEOC out of the enforcement loop altogether on the basis that it has actually become a hindrance to enforcement rather than an aid to employees. E.g., Michael Selmi, \textit{The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law}, 57 Ohio St. L.J. 1 (1996) (critiquing the EEOC's performance and proposing its elimination or substantial revision).
    \item \textsuperscript{258} The groups filing amicus briefs on behalf of Saint Clair Adams included the National Employment Lawyers Association, the Attorneys General of 21 states, the National Association for the Advancement of Colored People, the NAACP Legal Defense and Educational Fund, the Mexican American Legal Defense and Education Fund, the National Women's Law Center, and the National Organization for Women Legal Defense and Education Fund. The AFL-CIO did not file a brief. Daily Lab. Rep. (BNA) No. 17, at S-24 (Jan. 25, 2001). The AFL-CIO has, however, supported legislation designed to preclude predispute arbitration agreements. Feller, \textit{supra} note 219, at 1-2 (discussing S. 121 which would amend the FAA to exempt antidiscrimination claims based on race, color, religion, sex, age, or disability).
such individual rights when conferred under antidiscrimination statutes in favor of arbitration under the collective-bargaining agreement, as long as the waiver was "clear and unmistakable."\textsuperscript{259} In \textit{Wright v. Universal Mar. Serv. Corp.}, the Court was required to decide whether a general arbitration provision in a collective-bargaining agreement required the petitioner employee to arbitrate his claim that the employer had violated the Americans with Disabilities Act ("ADA").\textsuperscript{260} After being declared permanently disabled under both the Longshoremen and Harbor Workers' Compensation Act and the Social Security Act, Caesar Wright returned to work as a stevedore in 1995.\textsuperscript{261} When the stevedoring companies that employed him discovered his permanent disability characterization, they discharged him.\textsuperscript{262} Wright filed a complaint under the ADA in federal district court, which was dismissed because he had failed to pursue the grievance procedure available to him under his collective-bargaining agreement; the Fourth Circuit affirmed.\textsuperscript{263} The Supreme Court reversed.

Addressing the tension between \textit{Gardner-Denver} and \textit{Gilmer}, the Court observed that \textit{Gilmer} could be understood to either 1) differentiate between union-negotiated waivers and individually executed contracts, permitting waiver in the latter but not the former situation, or 2) completely overrule the \textit{Gardner-Denver} line of cases in favor of a policy enforcing contractual waiver of federal forum rights in exchange for arbitration, whether agreed to by the individual or by the union.\textsuperscript{264} The Court refused to decide the issue, concluding that whether or not \textit{Gardner-Denver}'s absolute prohibition on union waivers of federal forum rights survives \textit{Gilmer}, it "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective-bargaining agreement]."\textsuperscript{265} The clause at issue in \textit{Wright} did not meet that standard, since it did not explicitly incorporate the provisions of antidiscrimination laws, or indeed contain any prohibition on discrimination.\textsuperscript{266} The Court did imply, however, that a clear and unmistakable waiver could occur if the collective-bargaining agreement

\textsuperscript{259} Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79-80 (1998) (stating that while an employee's claim under the Americans with Disabilities Act is "distinct from any right conferred by the collective-bargaining agreement," the union could waive that right; however, such a waiver must be "clear and unmistakable").

\textsuperscript{260} \textit{Id.} at 74.

\textsuperscript{261} \textit{Id.}

\textsuperscript{262} \textit{Id.}

\textsuperscript{263} \textit{Id.} at 75.

\textsuperscript{264} \textit{Id.} at 77.

\textsuperscript{265} \textit{Id.} at 80.

\textsuperscript{266} \textit{Id.} at 73. The clause was a generic provision indicating that arbitration was required of "all matters affecting wages, hours, and other terms and conditions of employment;" the agreement also contained a provision stating that "no provision or part of this Agreement shall be violative of any Federal or State Law." \textit{Id.} It did not contain an antidiscrimination clause, nor was there reference to any specific state or federal law. \textit{Id.}
incorporated by reference statutory antidiscrimination provisions. Also unresolved is the issue whether labor arbitration of a grievance stemming from employer discrimination is a remedy that must be exhausted before a judicial remedy may be pursued on a statutory claim.

In the wake of Wright, most courts to have considered the issue have assumed that union waiver is possible, but have applied the "clear and unmistakable waiver" standard strictly. The Sixth and Second Circuits, for example, have refused to read a general antidiscrimination clause in a collective-bargaining agreement as amounting to a union waiver of individual employee rights to litigate claims under antidiscrimination statutes. The Fourth Circuit, by contrast, has applied Wright liberally to uphold union waivers of statutory rights, even where doing so cuts off the individual employee's right to control the processing of such claims in any forum. Only the D.C. Circuit has held, post-Wright, that unions may not validly waive the employee's statutory rights to a judicial forum.

267. See id. at 80.
269. Kennedy v. Superior Printing Co., 215 F.3d 650, 653 (6th Cir. 2000) (finding that arbitration of an employee's disability discrimination claim under a collective-bargaining agreement clause including a general antidiscrimination provision does not waive the employee's right to proceed on his ADA claim in federal court); Rogers v. N.Y. Univ., 220 F.3d 73, 76 (2d Cir. 2000), cert. denied, 121 S. Ct. 626 (2000) (holding that litigation in federal court on an individual employee's FMLA, ADA, and state law rights was not barred by a provision in the collective-bargaining agreement explicitly agreeing to submit all individual statutory claims to arbitration and an antidiscrimination provision referencing the relevant federal and state laws).
270. Safrit v. Cone Mills Corp., NO. 99-2677, 2001 U.S. App. LEXIS 7738, at *6, (4th Cir. Apr. 27, 2001) (enforcing a provision in a collective-bargaining agreement subjecting Title VII sex discrimination claims to binding arbitration and analogizing union waivers of the right to litigate statutory claims to union waivers of the right to strike). The collective agreement in Safrit gave the union, rather than the employee, the exclusive right to determine whether to proceed to arbitration following the processing of a grievance. Id. at *2. Nevertheless, the court found a clear and unmistakable waiver where the agreement contained a commitment to abide by the requirements of Title VII and a promise to arbitrate all unresolved grievances arising thereunder. Id. at *5.
The Court’s decision in *Adams* does not resolve the continuing uncertainty about the enforceability of union waivers of individual employees’ statutory forum rights. While the dissenting Justices in *Adams* would almost certainly contend that the legislative history of the FAA’s section 1 exclusion indicates congressional intent to exempt the collective-bargaining context from the FAA’s pro-arbitration reach,\(^{272}\) the majority’s reasoning is technically applicable to non-transportation employees covered by the NLRA and represented by a union.\(^{273}\) Thus, the critical debate in a collective-bargaining case would still revolve around the union’s power to waive employees’ federal statutory forum rights and the standards by which purported waivers should be evaluated. This, in turn, depends upon the labor law status of workers’ antidiscrimination rights under federal statutory antidiscrimination schemes: is protection of such rights sufficiently central to the union’s mission that the union may require an employer who seeks a contractual waiver of federal forum rights to litigate these claims to bargain with the union rather than negotiating directly with the workers themselves?

C. *Antidiscrimination Law Is Not the Union’s Business: Air Line Pilots Ass’n, International v. Northwest Airlines*

The Court’s effort in *Emporium Capwell* to prevent race discrimination claims from being used to undermine class-based solidarity should be viewed in combination with its ruling in *Gardner-Denver* protecting minority employees from the strictures of exclusivity as practiced by a union that might itself be discriminating. Together, these cases send a message that challenging race and sex discrimination is not the union’s job. The lesson of the Court’s holding in *Wright* is that a union wishing to take on the role of defending workers’ rights against discrimination through the grievance arbitration machinery in its labor contract may actually harm the interests of those workers through its efforts. Specifically, if the union succeeds in incorporating by reference statutory antidiscrimination

\(272\) See Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1315-16 (Stevens, J., dissenting).

\(273\) It is therefore unclear to what extent the Ninth Circuit’s ruling in *Craft v. Campbell Soup*—which did arise in a collective-bargaining context, see supra note 230—survives *Adams*. Since the *Craft* court found that the FAA did not apply to any employment contract, whether an individual contract or a collective-bargaining agreement, the court did not consider whether, even if individual contracts were covered by the FAA, collective-bargaining agreements were not. Moreover, to the extent any such conclusion in *Craft* was based upon its construction of the phrases “involving commerce” in section 2 and “engaged in commerce” in section 1, *Craft* is no longer good law, and *Adams* controls. Alternatively, the court might have implicitly concluded that the union did not make a clear and unmistakable waiver of the employee’s Title VII rights, although this seems unlikely. The collective-bargaining agreement in *Craft* contained a specific clause prohibiting discrimination on the basis of race, color, religion, sex, age, or national origin, and a clause requiring that “[d]isputes under this provision shall be subject to the grievance and arbitration procedure [provided by the collective-bargaining agreement].” *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1084 n.1 (9th Cir. 1999).
provisions, it may thereby waive covered employees’ rights to litigate discrimination claims in judicial fora. After Wright, a union that wishes to actively work against discrimination on the basis of race or gender should either avoid the issues in bargaining or seek to negotiate the most vague and general arbitration clause possible. The more specific it is in providing a ground upon which to arbitrate an antidiscrimination claim, the more likely it is that the union has waived employees’ federal or state forum rights.

In a case of first impression, the D.C. Circuit extended Gardner-Denver to its logical extreme. In Air Line Pilots Ass’n, International v. Northwest Airlines, Inc. (“ALPA”), newly hired pilot trainees were asked to sign individual employment contracts with the airline in which they agreed to binding arbitration of any statutory employment discrimination claims they might possess. The union challenged this practice, arguing that the employer could not require such a prospective waiver of statutory rights without first bargaining with the union over the issue. The court ruled that the arbitration of statutory discrimination claims was not a mandatory subject of bargaining and therefore the employer had not violated the Railway Labor Act. The court reasoned that while an individual may waive her statutory rights in exchange for an arbitration agreement, the union may not, citing Gardner-Denver. Since the union could not legally agree to the provision the employer sought to have the employees sign, the topic could not be a mandatory subject of bargaining. Therefore, the employer was free to deal directly with the employees over the arbitration of statutory employment discrimination claims.

The court rejected the union’s argument that Gilmer and Wright controlled the question and should allow the union to waive the employees’ statutory right to litigate such claims. The ALPA court explained that Gardner-Denver controlled instead, “stand[ing] as a firewall between...

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275. Railway Labor Act, 45 U.S.C. § 152 Seventh (1994). Although the case was decided under the RLA rather than under the NLRA, decisions under the RLA are generally highly persuasive precedent for NLRA cases because of the similarity of the two statutes; the NLRA was modeled on the RLA. Under either statute, a mandatory subject of bargaining is one over which the parties have a statutory duty to bargain and a right to insist to impasse. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Mandatory subjects include those which relate to employees’ wages, hours or conditions of employment, or which “vital[ly] affect” these matters even though they do not directly affect employees. Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176 (1971).

276. *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 484.

277. *Id.* at 479, 484.

278. *Id.* at 486; see also J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

279. *Air Line Pilots Ass'n, Int'l*, 199 F.3d at 484.
individual statutory rights the Congress intended can be bargained away by
the union, and those that remain exclusively within the individual’s
control. The union’s majoritarian concerns make it inappropriate for the
union to offer waivers of individual employee’s statutory rights as a
“bargaining chip” in exchange for group benefits. Nor could the union
play any role in negotiating with the employer over procedural rules for the
arbitration of individual claims. On this reasoning, although the em-
ployer may not obtain from the union a waiver of individual employees’
statutory rights to litigate an antidiscrimination claim, it may pursue this
goal incrementally by obtaining waivers from each new hire individually as
a condition of employment. It may do so without affording any benefits to
the employees as a group in exchange.

1. Discrimination as a Subject of Collective Bargaining

The logic of the ALPA v. Northwest Airlines case has not yet been
adopted by another circuit. Nevertheless, the D.C. Circuit’s decisions on
labor issues are afforded great deference by other courts because of the
D.C. Circuit’s expertise in labor matters. Moreover, at least one scholar has
defended the holding on the same grounds on which Gardner-Denver is
defended: that unions are not trustworthy guardians of minority employee
rights, and that enforcement of union-negotiated waivers of statutory em-
ployment rights would therefore undermine minority and women workers’
willfulness to vote for a union (since by doing so they would cede their
statutory antidiscrimination rights to the union). Moreover, giving unions
the authority to waive individual workers’ statutory rights would increase
federal involvement in the substance of collective bargaining, interfere in
union discretion to make resource allocation decisions (since the pressure
to arbitrate individual employee claims of discrimination would increase),
and require significant alterations in the duty of fair representation doc-
trine.

It is certainly true that unions have a mixed record on challenging race
discrimination, and that preserving federal forum rights against race and
sex discrimination has been essential in a labor law regime featuring

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280. Id. (citation omitted).
281. Id. at 485-86.
282. Id. at 485.
283. Turner, supra note 197, at 196-99. This analysis suggests that the real problem is not the
waiver doctrine, but the underlying principles of exclusivity and majority rule. Were it possible for
employee interests to be represented by an organization that was committed to the identity-based
workplace concerns of its members rather than to its role as a majoritarian representative, such conflicts
would not exist. See Crain, supra note 96, at 66-68; Crain & Matheny, supra note 177, at 1565-66,
284. Turner, supra note 197, at 201-03.
exclusivity and majority rule.\textsuperscript{285} Indeed, we have argued previously that traditionally male-dominated unions are unlikely to make combating gender discrimination central to their mission in a labor law regime that obligates them to function as majoritarian representatives.\textsuperscript{286} But continuing a two-track approach in which workplace race and gender discrimination are forcibly severed from issues of class oppression reinforces the divide between unionism and social justice movements. Channeling race and sex discrimination claims into Title VII while issues of “pure” economic oppression are left to unions risks substituting the EEOC and nonlabor social justice groups for unions as the effective representatives of workers who lack race and gender privilege.\textsuperscript{287} Splitting workers’ race, gender, and class interests ensures that the least powerful workers will be required to choose between aspects of their identities, ignoring the intersectional nature of the oppression they experience in the workplace.\textsuperscript{288} Channeling race and gender discrimination claims into Title VII and away from the NLRA also characterizes race and sex discrimination as individual harms at law; only economic oppression is treated as a group harm.\textsuperscript{289} Ultimately, the two-track approach permits employers to deal individually with workers on issues of race and sex discrimination, strengthening employers at the expense of workers and unions.

As for federal oversight of the substance of collective bargaining, that has already occurred. The Court’s recognition in \textit{Wright} that a union may waive workers’ statutory forum antidiscrimination rights if that waiver is clear and unmistakable has already sent courts down this path.\textsuperscript{290} Further, the labor law already prescribes subjects that must be bargained


\textsuperscript{286} Crain & Matheny, supra note 177, at 1600 & n.281.

\textsuperscript{287} Indeed, a case now pending before the Court reifies this risk in the context of predispute arbitration agreements. See EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (2001). \textit{Waffle House} presents the question whether the EEOC is bound by a predispute arbitration agreement signed by an individual employee waiving his right to litigate ADA claims. 193 F.3d at 806. The underlying tension in \textit{Waffle House} is between the federal pro-arbitration policy and the rights of individuals to contract freely with regard to the terms of their employment on the one hand, and the public interest in eradicating employment discrimination on the other. The EEOC functions as more than just an enforcer for individual employee rights against discrimination, it is the watchdog for the public’s interest. Like labor unions, then, the EEOC makes resource allocation decisions about which claims it will pursue based on its assessment of the most significant impact for workers as a whole. See id. at 810. The difference is that the EEOC’s goal of promoting antidiscrimination norms means that it promotes the interests of the most economically vulnerable workers, women and people of color.

\textsuperscript{288} See Iglesias, supra note 193, at 424.

\textsuperscript{289} See id.; supra note 195 and accompanying text.

\textsuperscript{290} See supra notes 269-271 and accompanying text.
over: wages, hours, and terms and conditions of employment. Surely it may also establish statutory floors beneath which bargaining may not sink. Our position is that interference by law in union discretion to make resource allocations in ways that center rather than marginalize race and gender discrimination is warranted, even essential, if unions are to prosper. Injecting consciousness of race and gender privilege into labor law is the explicit goal of the proposals we advance here. Accordingly, we consider significant alterations in the duty of fair representation doctrine a necessary evil.

ALPA’s message, then, is far broader than its holding with regard to the union’s authority to waive individual employees’ rights to litigate statutory antidiscrimination claims. ALPA reflects an understanding of the union’s role that ensures union irrelevance in a world where statutorily-confferred employee rights have proliferated. The ALPA court framed the issue in a way that allows employers to use statutorily-confferred rights as a weapon to divide workers and to undermine their right to organize and bargain with the employer as a group, through their unions. When the court asked whether a union could waive an individual’s Title VII rights, the answer, applying Gardner-Denver, was no. Yet this case did not arise in the context of an employee’s effort to litigate statutory claims in a judicial forum and an employer’s response that the rights had been contracted away by the union. That situation would have squarely raised the issue the court purported to address. Instead, the case arose when the union sought to require the employer to bargain with it over the validity of individual waivers of such rights. In other words, the union sought to interpose itself between an employer and individual workers from whom the employer sought to obtain waivers of statutory rights as a condition of employment. Such a

292. See Marion Crain, Expanded Employee Drug Detection Programs and the Public Good: Big Brother at the Bargaining Table, 64 N.Y.U. L. Rev. 1286 (1989) (arguing for categorization of drug testing programs as a mandatory subject of bargaining, and suggesting that the government’s role be limited to legislating minimum general standards in order to further public safety considerations).
293. See infra Part V.A.
294. Some have suggested that the answer should be yes, and have called for a re-examination of the premises of Gardner-Denver. Samuel Estreicher, Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism, 71 N.Y.U. L. Rev. 827, 845-47 (1996) (suggesting that employers and unions should be permitted to negotiate arbitration clauses that would bar covered employees from asserting statutory antidiscrimination claims in court, on the basis that otherwise Gardner-Denver discourages employers from agreeing to just cause provisions and grievance arbitration machinery in collective-bargaining agreements, thus disadvantaging the class of workers represented by the union as a whole).
295. The employer’s strategy might be thought to be blocked by the exclusivity rule as expressed in J.J. Case Co. v. NLRB, 321 U.S. 332, 337 (1944). On the other hand, employees represented by a union are nevertheless free to contract with the employer on an individual basis so long as their agreements do not undermine the collective bargain that the union has struck, and the union’s position as exclusive representative is not undermined. Id.; see also Milne Employees’ Ass’n v. Sun Carriers,
framing of the question turns *Gardner-Denver* on its head, enforcing the spirit of *Gilmer* (that employees will be held to contractual waivers of their statutory rights) to deprive employees of their statutory antidiscrimination claims in a context where employees have selected the union as their bargaining representative.

If the court had perceived the union’s role more broadly, regarding it as the representative of the employees in all aspects of their work experience, it might instead have asked whether employers should be required to bargain with a union over the employer’s policy pertaining to racial or sexual discrimination. Had the issue been framed in this way, the answer would have been a resounding yes: employment discrimination is a mandatory subject of bargaining because it affects (potentially) wages and working conditions. Thus, the court might have concluded that the

Inc., 960 F.2d 1401, 1407-10 (9th Cir. 1991) (finding that unionized employees may sue in state court to enforce employer’s promise of job security made directly to the employees in speeches).

296. See IUE v. NLRB (Westinghouse Elec. Corp.), 648 F.2d 18, 25 n.6 (D.C. Cir. 1980) ("elimination of discrimination is a mandatory subject when raised on either side of the collective bargaining table") (citing Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 69 (1975)); see also NLRB v. United States Postal Serv., 18 F.3d 1089, 1098-99 (3d Cir. 1994) (finding that employer hiring practices are mandatory subjects of bargaining when the union has an "objective basis for believing [the practice] to be discriminatory"); Star Tribune v. Newspaper Guild of the Twin Cities, 295 N.L.R.B. 543, 548-49 (1989) (finding that where there was evidence that the employer administered drug testing differently for male and female applicants, the employer was obligated to furnish the union with requested information concerning alleged sexually discriminatory hiring practices, since discrimination in hiring "vitaly affects" employees’ terms and conditions of employment, and is therefore a mandatory subject of bargaining); Jubilee Mfg. Co., 202 N.L.R.B. 272, 273 (1973) (ruling that while discrimination on the basis of sex or race is not per se an unfair labor practice violative of section 8(a)(1) or (3) absent proof of nexus between the alleged discriminatory conduct and the interference with or restraint of employees’ exercise of the rights to organize and bargain, discrimination does directly affect terms and conditions of employment, and the employer is obligated to bargain in good faith with the union concerning the elimination of existing or alleged discrimination), aff’d, 504 F.2d 271 (D.C. Cir. 1974); cf: United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1135-36 (D.C. Cir. 1969) (finding that an employer’s policy and practice of racial discrimination is itself a violation of section 8(a)(1) because it divides groups of workers against one another and creates a docility in the members of the disadvantaged group, frustrating the possibility for collective action; the employer’s refusal to bargain with the union over the subject of ongoing racially discriminatory practices also violated section 8(a)(5)); Local Union No. 12, United Rubberworkers v. NLRB, 368 F.2d 12, 14 (D.C. Cir. 1966) (finding that aggrieved workers who are victims of race discrimination may proceed under Title VII or with unfair labor practice charges under the NLRA, or both).

One indicator of whether a subject is mandatory under the NLRA is its prevalence in the industry. Ford Motor Co. v. Huffman, 345 U.S. 330, 333 (1953). A substantial majority of employers and unions have negotiated antidiscrimination pledges in their collective-bargaining agreements, across all industries. 71% of labor agreements expiring in 2000 contain formal commitments to equal employment opportunity; 60% contain sexual harassment policies; 57% contain pledges to comply with the Family and Medical Leave Act; and 53% include promises to abide by the Americans with Disabilities Act. *Employer Bargaining Objectives: A BNA Special Report*, Daily Lab. Rep. (BNA) No. 4, at S-28 (Jan. 6, 2000). The Report concludes that

[p]ledges to comply with laws and regulations are among the most likely candidates for addition to collective bargaining agreements. Among companies without sexual harassment policies in their current contracts, 18 percent plan to incorporate such pledges into their new labor settlements. . . . Nearly as many employers will consent to ADA and FMLA compliance
employer could not circumvent the union and deal directly with the individual employees because the employer’s entire policy pertaining to employment discrimination was a matter which should be referred to collective bargaining. This was the course chosen by the Fifth Circuit in an earlier case, U.S. v. Allegheny-Ludlum Industries, Inc., where the court found that, while the union could not waive individual employees’ Title VII rights in collective bargaining, neither could the employer “approach the employee directly in an effort to obtain a prospective waiver ‘as part of the economic bargain’ with the union. . . .”

Moreover, the ALPA court was incorrect in stating that bargaining would be fruitless if the union were not empowered to waive the employees’ rights to a statutory forum for their antidiscrimination claims. The court’s premise that the union would be only too willing to waive statutory forum rights and that the employer would be interested in nothing else is flawed. Bargaining might still have been productive had the union sought an agreement from the employer to cease requiring new employees to sign waivers, giving in exchange a concession on some other issue. Similarly, the court gave short shrift to the union’s alternative argument that at the very least the procedures to be used in arbitration ought to be a subject of bargaining.

The court’s decision on this point is premised on its assumption that discrimination affects only the individual [minority] employees subject to it and therefore is not the union’s concern.

Id. at S-29.

Cf. Ann C. Hodges, Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?, 16 Ohio St. J. Disp. Res. 513, 521-39 (2001) (analyzing case law and concluding that the waiver of an employee’s right to a judicial forum for a statutory antidiscrimination claim is not a mandatory subject of bargaining under the NLRA, but acknowledging that nondiscrimination clauses are mandatory subjects of bargaining).

517 F.2d 826 (5th Cir. 1975) (holding that the employers’ duty to bargain in good faith included a duty to supply information requested by union bargaining representatives which was necessary for the union to negotiate and enforce antidiscrimination provisions in the collective-bargaining agreement, including pay rates of women and minority workers, and a list of all discrimination complaints filed by workers against the employers). Implicit in the Fifth Circuit’s ruling was the conclusion that while the union could not bargain away the statutory rights conferred on individual employees by Title VII, it could negotiate for contractual rights against discrimination, which would be collective rights enforceable by the union through the arbitration machinery. See id. at 857.

Id. at 858. The court was operating, of course, in a pre-Gilmer, pre-Adams environment; it believed that an employer could not approach its employees directly to seek waiver of statutory rights even in the absence of a union, something which Gilmer and Adams now clearly authorize.

See Air Line Pilots Ass’n, Int’l, 199 F.3d at 486.

The court dismissed the union’s argument that arbitration procedures should be considered a mandatory subject of bargaining because of the potential impact of an arbitral remedy on such matters as pay rates or seniority principles applicable to all employees. The court observed, “We fail to see how a remedy imposed by an arbitrator in a proceeding involving only the employer and an individual
2. Unions for the White Majorities

ALPA reinforces the schism between issues of racial, ethnic, and gender justice on the one hand and economic justice on the other that originated in the clash between the AFL and the NAACP over the inclusion of an antidiscrimination clause in the Wagner Act. The ALPA court's description of Gardner-Denver as creating a "firewall" between individual employees' Title VII rights and the legitimate scope of union activity concerning workers' economic interests reflects the court's assumption that the only role for union activism under the NLRA (or RLA) lies in the economic sphere, narrowly construed. This vision of the purposes of labor law and collective action stems from the assumption that labor law and labor unions are designed for white workers, whose interests and concerns define the majority class interests which unions are bound to advance. Title VII and parallel employment discrimination statutes are designed to protect minority rights, which the Court views as individual in character. Because individual employees can deal directly with the employer on issues of individual, personal concern that do not affect the interests of the group, the employer need not bargain with the union; it may approach the workers directly. This analysis forcibly separates the race and class interests of minority employees, as Professor Iglesias has eloquently argued.

Even more insidious is the ALPA court's premise that this result does not harm the white majority of workers that the union ostensibly represents. The court treats discrimination as if it were a potential harm visited on the individual employee (or at worst, upon a group of minority employees) by the employer. It sees discrimination as an individual injury because race discrimination does not injure white workers. Since the [white] majority's interests are not implicated, discrimination is outside the union's legitimate purview.

employee could have any adverse effect upon the working conditions of the employees in the bargaining unit." Id. at 485.

303. In this Part, we deal primarily with the issue of racial justice and its marginalization in unionism and labor law. We have articulated a parallel analysis with regard to gender in an earlier article, "Labor's Divided Ranks," which examines the particular bases for resistance to centering issues of gender justice in unionism and in labor law. Crain & Matheny, supra note 177, at 1593-1600.

304. See supra notes 175-178 and accompanying text.

305. ALPA, 199 F.3d at 484.


307. Iglesias, supra note 193, at 433-34.

308. Of course, to the extent that the court's reasoning rests on the assumption that unions as a whole continue to possess a majority white and male constituency, it is fatally flawed. See supra note 116 (observing that the majority of union members are no longer white and male). However, the new nonwhite and/or female majority is not equally distributed across all workforces and unions. Many workforces featuring union representation continue to be predominantly white and/or male as a result of race and/or sex segregation in employment. See Marion Crain, Skinwalking in Labor Law, UCLA L. Rev. (forthcoming 2002) (race); Crain & Matheny, supra note 177, at 1590 (gender).
Pragmatic Concerns

A narrow vision of unionism that assumes that white workers lack interest in discrimination issues is risky for unions seeking to survive in the new millennium. Clinging to a unidimensional vision of labor's role as guardian of workers' economic interests is poor strategy in an increasingly diverse workforce. The "new working class" is a mix of pink collar, white collar, female, African American, Asian American, and Latino/a workers.\(^3\) Whites will decline precipitously to 64% of the labor force in 2025, down from 74% in 1998 and 82% in 1980.\(^{310}\) Women are projected to increase their share of the labor force, moving from 46.3% to 48% during the period between 1998 and 2015.\(^{311}\) For this workforce, racial, ethnic, and gender equality issues that intersect with class oppression or are expressed as economic harms will likely eclipse "pure" class concerns. In order to attract and mobilize these workers, the labor movement must evolve to address their concerns.

Exciting new research indicates that workforce diversity presents growth opportunities for unions as Blacks and women have the highest union organizability rates.\(^{312}\) But these same workers are also the most likely to look to antidiscrimination statutes for protection against workplace practices that disadvantage them on the basis of their racial, ethnic, or gender identities. If unions' role in advocating for these workers is narrowly circumscribed, the EEOC, the courts, and nonlabor social justice groups will usurp this role, and policies respecting wages, hours, and working conditions that affect labor's traditional membership (white male

\(^{309}\) Robin D.G. Kelley, The New Urban Working Class and Organized Labor, New Lab. F., Fall 1997, at 7, 8 (noting that "between 1976 and 1988, while the nation's overall labor force grew by 26%, the number of black workers rose by 38%, Asian American workers by 103%, and Latinos by 110%; between 1986 and 1995, white male membership dropped from 55.8% to 49.7%, and by 1996, women made up 37% of organized labor's membership"). Gender, racial, and ethnic diversity will be on the upswing in the next twenty-five years. Futurework: Trends and Challenges for Work in the 21st Century, Daily Lab. Rep. (BNA) No. 170, at E-1 (Sept. 2, 1999) (Executive Summary, Labor Day 1999: A Report of the U.S. Dep't of Labor, Alexis M. Herman, Sec'y).

\(^{310}\) Howard N. Fullerton, Jr., Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025, Monthly Lab. Rev., Dec. 1999, at 11. Hispanics will account for 17% of the total labor force by 2025, and will outstrip Blacks as a proportion of the labor force by the year 2010. Id. at 11-12. Blacks' share of the labor market will increase marginally, from 11.6% in 1997 to 13.4% in 2025. Id. at 12. Asians and others will comprise 7.7% of the labor force in 2025, compared with 4.6% in 1998. Id.

\(^{311}\) Id. at 3, 7, 11.

\(^{312}\) See Kate Bronfenbrenner & Tom Juravich, It Takes More than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy, in Organizing To Win: New Research on Union Strategies 19, 32 (Kate Bronfenbrenner et al. eds., 1998) (noting that unions are more successful in elections in units with a majority of women and/or people of color); Ruth Milkman, Union Responses to Workforce Feminization in the U.S., in The Challenge of Restructuring: North American Labor Movements Respond 226, 237-38 (June Jensen & Rianne Mahon eds., 1993) (reporting particularly high union win rates in elections where the work unit is gender-female homogenous); Hector L. Delgado, Immigrant Nation: Organizing America's Newest Workers, New Lab. F., Fall/Winter 2000, at 29, 36 (reporting that the union membership rate for Blacks is 17.2%, as compared with 13.5% for whites).
LABOR'S IDENTITY CRISIS

workers) will be established without labor's input. Thus, labor's continued isolation from social justice issues will compromise its ability to represent the interests of its traditional white male membership.

We recognize that emphasizing race, ethnicity, and gender in union organizing and representation risks alienating labor's historical membership base. Pragmatic concerns nonetheless militate in this direction. For unions to be effective in the next century, they must not only continue to strive to attract new membership from the diverse workforce, but also demonstrate to other progressive social justice groups the depth of their commitment to issues that are important to those groups. Unions cannot reverse their decline unilaterally. Civil rights organizations, community-based social justice organizations, and other similar groups can be powerful allies. Such alliances will be forged only if unions move race, ethnicity, and gender equality issues from the periphery to the heart of their mission. Doing so may cost unions the loyalty of some of their traditional membership base, but we doubt that this cost will be unacceptably high. The economic benefits of union membership are significant, and a stronger labor movement would make these benefits even more significant. Even if some conservative white male members disagree with the new labor movement's focus, most will prioritize economic self-interest over political ideology. Hopefully, as they experience the benefits of labor's growth and enhanced political power, they will acknowledge the wisdom of a social justice focus.

b. The Moral Imperative

Our argument for a broader role for unions rests upon more than pragmatic strategy considerations, however. It is also a moral claim. To sway public opinion and to move workers to risk joining unions, labor must transcend its image of economic self-interest and protectionism. Poverty and wealth inequality in this country are deeply raced and gendered. A social justice movement that claims to exist to combat wealth inequality lacks moral legitimacy unless it acknowledges these realities and addresses them in its platform for change. Unions thus need to persuade courts that combating discrimination is central to the union's business: that the union

313. See Crain, supra note 96, at 13 (describing sexual harassment policy drafted by plaintiffs' attorneys from NOWLDEF in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), and its consequences for male union members whose interests were unrepresented by the union due to its nonparticipation); Crain & Matheny, supra note 177, at 1605 (describing how the nonlabor group Women Employed became the oversight watchdog group for the unionized women's rights against sexual harassment under the EEOC's settlement of its class action against Mitsubishi Motors, assuming a role that ultimately affected the implementation of policies impacting the white male majority).

314. Collins & Yeskel, supra note 1, at 39-51; Crain, supra note 308, at 6-14 (Part I.A).
stands for racial and gender justice, and that these concerns are a part of class solidarity.

Some of labor’s allies have argued that a class-based solidarity that will explicitly appeal to white workers is key to improving the positions of minorities and women in the labor force (a rising tide lifts all boats),\textsuperscript{315} or that appealing to white workers’ class-based self-interest in avoiding the undercutting of wages by race or gender discrimination is an important organizing strategy to persuade whites to join the fight against suppressed wages or poor benefits for people of color and women.\textsuperscript{316} While strategically useful, such arguments risk reinforcing the message that unions are primarily dedicated to protecting white male privilege; racial and gender discrimination will be challenged only where it is in the interests of the relatively privileged white workers to do so. Indeed, an appeal to class-based self-interest risks entrenching job consciousness\textsuperscript{317} and portrays unions as economic actors rather than as social justice organizations.\textsuperscript{318}

Instead of trying to persuade whites to join people of color in the fight for racial justice by illuminating the personal advantage they will enjoy by doing so (and so reinforcing the image of unions as self-interested and job-conscious), the labor movement should promote a social justice unionism that resonates in a higher moral and ethical register: that race and gender discrimination are wrong, and that a just society and labor market cannot countenance them.\textsuperscript{319} While maintaining the narrow conceptualization of unions as bargaining agents preserves the relative privilege of the organized, it does so at the expense of the unorganized. Ultimately, it condemns the movement to irrelevance.

More fundamentally, the modern union philosophy of self-interested business unionism risks reinforcing the worst aspects of job consciousness advocated by the AFL, which ultimately increased racial hostility between white workers and workers of color\textsuperscript{320} and yielded only the narrowest of social reforms.\textsuperscript{321} Rather than continuing an updated version of job consciousness, modern unions should look to the Knights and the Wobblies for inspiration. Their effort to effect a social transformation was predicated on an egalitarian vision of worker solidarity. Their socialist consciousness, particularly that of the Wobblies, contained the seeds of an intersectional

\textsuperscript{315} Gitlin, supra note 89, at 157.
\textsuperscript{316} Martha R. Mahoney, Constructing Solidarity: Interest and White Workers, 2 U. PA. J. LAB. & EMP. L. 747, 748, 762 (2000).
\textsuperscript{317} See supra note 41.
\textsuperscript{318} See Bill Fletcher, Jr. & Richard Hurd, Is Organizing Enough? Race, Gender, and Union Culture, NEW LAB. F., Spring/Summer 2000, at 59. In this approach, organizing becomes a “pragmatic extension of the union’s basic responsibility to bargain effectively on behalf of its members.” Id. at 61.
\textsuperscript{319} See Michael Eric Dyson, The Labor of Whiteness, The Whiteness of Labor, and the Perils of Whitewashing, in AUDACIOUS DEMOCRACY, supra note 4, at 164, 169.
\textsuperscript{320} See supra note 56 and accompanying text.
\textsuperscript{321} See supra notes 58-60 and accompanying text.
challenge to class, race, and gender oppression.\textsuperscript{322} While the social and economic conditions facing today's labor movement are certainly different from those encountered by the Knights and the Wobblies, the AFL-CIO can still borrow from its forebears much that is vital to its survival. All great social justice movements require an animating vision. The Knights' and the Wobblies' grand vision of a more egalitarian society makes the AFL-CIO's "America Needs a Raise" campaign seem dull and uninspiring. Unless labor mounts a challenge to racial, ethnic, and gender hierarchies as well as class hierarchies, it truly is simply another special interest group. Participation in the labor movement should involve a moral call to arms, not an appeal to economic self-interest.

IV
CENTERING RACE AND GENDER IN UNION IDEOLOGY

Those who are most marginalized have long contended that failure to challenge oppression and exploitation at the margins will deradicalize any social change agenda. The major systems of oppression, racism, sexism, classism, and heterosexism\textsuperscript{323} are interlocking; each serves as the enforcer for the others.\textsuperscript{324} Thus, one form of oppression cannot be eliminated as long as the others remain intact.\textsuperscript{325}

Labor has repeated the mistake that many other social justice movements have made: it has sought to use "the master's tools" to "dismantle the master's house."\textsuperscript{326} Single-category movements consistently reproduce the existing structure of society. They are vulnerable to being co-opted because they accept the existing distribution of power, seeking redistribution of wealth rather than a role in determining how wealth is created and

\textsuperscript{322} See supra notes 10, 33 and accompanying text.

\textsuperscript{323} This Part deals primarily with the significance of placing antiracism at the center of union ideology. We have already made the case for the need to place sex equality at the center of union ideology in our earlier Article, "Labor's Divided Ranks," and need not repeat that analysis here. Crain & Matheny, supra note 177, at 1593-99, 1601-05 (assessing the particular risks of marginalizing sex equality concerns). Though the literature addressing the union role in combating heterosexism is less well-developed, activists have recently begun to make a parallel case in that context. Desna Holcomb & Nancy Wohlforth, The Fruits of Our Labor: Pride at Work, NEW LAB. F., Spring/Summer 2001, at 9 (describing AFL-CIO's fledgling efforts to recognize and integrate concerns of gay and lesbian workers into its agenda).

\textsuperscript{324} See Combahee River Collective, A Black Feminist Statement, in This Bridge Called My Back: Writings by Radical Women of Color 210 (Cherrie Moraga & Gloria Anzaldua eds., 1983) [hereinafter This Bridge Called My Back].

\textsuperscript{325} See Bell Hooks, Feminist Theory: From Margin to Center 35 (1984); Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 BERKELEY WOMEN'S L.J. 16 (1995).

\textsuperscript{326} Audre Lorde, The Master's Tools Will Never Dismantle the Master's House, in This Bridge Called My Back, supra note 324, at 98, 99 ("For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those . . . who still define the master's house as their only source of support.").
power distributed. They suppress differences within the movement and, as a result, tend to define issues too narrowly.\textsuperscript{327} Resisting the claims of women and minority workers, excluding them from membership, or relegateing “their” issues to lower priority status devalues their struggles and, in the end, their humanity; it treats them as second-class citizens.\textsuperscript{328} Especially because of the history of division between labor and social justice movements, labor must make the concerns of those most marginalized in the labor force central to its mission.\textsuperscript{329}

In order for more thorough-going change to occur, “difference must be not merely tolerated, but seen as a fund of necessary polarities.”\textsuperscript{330} Rather than clinging to a pretense that differences among workers do not exist, or that the differences are without significance, labor must embrace them and make them a source of strength; it must create a “culture of inclusion.”\textsuperscript{331}

It will not be sufficient for those who have historically “owned” the labor movement to invite in as “guests” those whose race, ethnicity, and gender differ from the dominant group’s.\textsuperscript{332} Indeed, it is in labor’s own interest to aggressively target these workers. Those who have the most to gain and the least to lose also possess the largest investment in society’s change.\textsuperscript{333} This Part outlines a re-visioned agenda for the labor movement of the next millennium. It describes lessons learned in the past about the risks of protectionism, and catalogues the ways in which placing race, ethnicity, and gender at the core of labor’s mission could change the substance of its bargains as well as the constituencies to which it is able to appeal.

\textsuperscript{327} See Rose, supra note 67, at 28 (critiquing labor unionism); Kimberle Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex}, 1989 U. CHI. LEGAL F. 139 (critiquing feminist movement and civil rights movement).

\textsuperscript{328} See Lichtenstein, supra note 92, at 64 (describing how an exclusive emphasis on class politics to the exclusion of other identities that have served as the basis for social justice struggles denigrates those efforts).

\textsuperscript{329} As Michael Dyson explains:

\textsuperscript{[]Identity politics has always been at the heart of labor movement, both to deny black workers, for instance, their rightful place in unions and as wage earners in the workplace, and to consolidate the class, racial, and gender interests of working elites against the masses of workers. The identity politics now allegedly ripping apart the labor movement . . . is a response to a predecessor politics of identity that was played out without being identified as such.}

\textsuperscript{Dyson, supra note 319, at 170.}

\textsuperscript{330} Lorde, supra note 326, at 99.

\textsuperscript{331} Fletcher & Hurd, supra note 318, at 60.

\textsuperscript{332} Hooks, supra note 325, at 53 (making a similar point with regard to white women’s ownership of the feminist movement and tendency to marginalize women of color).

\textsuperscript{333} See Andrea Canaan, \textit{Brownness, in This Bridge Called My Back}, supra note 324, at 232, 237.
A. Asking the "Other" Question

Because members of a movement tend to be unaware of the areas in which they enjoy privilege, a single-issue movement that aspires to bring the margins to the center must actively work to "ask the other question." In a class-based movement where the common interest binding members together is class disadvantage, the "other" questions would concern race, ethnicity, gender, sexual orientation, or other axes along which discrimination and disadvantage has historically occurred. Thus, in analyzing any situation that at first blush appears to raise issues of class, leaders should ask how the situation, or the solution proposed by labor, might implicate these "other" questions. By asking the "other" questions, issues are formulated more broadly, and alliances with other social justice movements become possible. Moreover, because the risks of being co-opted are minimized, a more fundamental challenge to the underlying system will emerge.

Some will worry that emphasizing "other" aspects of identity besides class risks dividing the workers over their differences rather than uniting them around their strengths. While there are undeniably times when it is important to emphasize commonality in order to build unity, suppressing differences only replicates racial, ethnic, gender, and heterosexual privilege within the workforce. Every issue is potentially raced and gendered; the determining factor in whether the racial or gender issue is visible lies in the viewpoint of the worker. Thus, in a struggle for justice it is essential to

334. See Barbara J. Flagg, "Was Blind but Now I See:" White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 957 (1993) (explaining that white privilege is transparent to those who possess it); Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 70, 81 (Margaret L. Andersen & Patricia Hill Collins eds., 1992) (observing that interlocking oppressions "take both active forms that we can see and embedded forms that members of the dominant group are taught not to see"). See generally STEPHANIE M. WILDMAN & ADRIENNE D. DAVIS, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 13-14 (1996) (describing privilege and its role in maintaining subordination).

335. See Mari J. Matsuda, Beside My Sister, Facing the Enemy: Legal Theory out of Coalition, 43 Stan. L. Rev. 1183, 1189 (1991) (implo ring activists and scholars to increase understanding of the connections between various forms of subordination by looking at a practice or incident that appears racist and asking, for example, "[w]here is the patriarchy in this?").

336. See, e.g., McUsic & Selmi, supra note 285, at 1341 (suggesting that "emphasizing the differences among workers ... presents the substantial possibility that all workers will ultimately be left worse off as a result of the loss of power that will likely correspond to a divided workplace").

337. E.g., Fletcher & Hurd, supra note 318, at 65-66 (explaining that unions can simultaneously organize for inclusion and attend to issues of diversity without necessarily driving a wedge between groups of workers); Reverend Nelson Johnson, Reflections on an Attempt to Build "Authentic Community" in the Greensboro Kmart Labor Struggle, 2 U. Pa. J. Lab. & Emp. L. 675, 677-78 (2000) (discussing intertwining of race and class issues and necessity to preserve the wholeness of the struggle rather than allowing the parts to be aligned in opposition to one another in the struggle for better wages for the predominantly Black workers at Kmart in Greensboro, N.C.).

338. See Dyson, supra note 319, at 169-70 (describing "whitewishing," the notion that whiteness is neutral and objective and that other perspectives are "special interests").
explicitly confront issues of diversity around race, ethnicity, gender, and sexual orientation, rather than to appeal solely to class-based self-interest. \(^{339}\)

Indeed, ignoring these “other” issues may block the union’s ability to organize workers or to adequately represent them. In Los Angeles, for example, the influx of Latino/as into formerly African American neighborhoods and jobs has engendered bitter conflict between the two races. \(^{340}\)

Because employers perceive immigrants as more compliant, industrious, and exploitable, they prefer immigrant workers for jobs historically held by Blacks. \(^{341}\)

Although employers created the interracial tensions through their preference for the more exploitable immigrant workers, Black workers blamed the undocumented immigrants for the resulting job displacement. \(^{342}\)

Ultimately, these tensions manifested themselves within the union that had organized them (SEIU Local 399), and the international union was forced to impose a trusteeship and to address the interracial tensions directly. \(^{343}\)

Another powerful illustration of a situation where the union labored in vain to avoid confronting the intersection between class, race, and ethnicity issues appears in *Family Service Agency San Francisco v. NLRB*. \(^{344}\) In this case, the SEIU sought to organize teachers and administrators at a day care center. The Black and Latina workers had divided along racial lines as a result of employer policies that included occupational segregation and

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339. See Fletcher & Hurd, *supra* note 318, at 66-67. The authors add, however, that effective locals concentrate on building unity, handling race or gender issues “with finesse” rather than always “confronting problems head-on.” *Id.* at 66.


341. This is particularly evident in the service sector. While janitorial positions, garment manufacturing, construction and construction clean-up, and hotels, motels, restaurants, and taxi services were once occupations where Blacks predominated, immigrants now outnumber them. *Lipsitz, supra* note 85, at 51. In 1970, 33% of the janitorial positions in L.A. were occupied by African Americans, while Latinos filled only 7% of the positions. Roger Waldinger et al., *Justice for Janitors: Organizing in Difficult Times*, 44 Dissent 37, 38 (Winter 1997). By 1990, Latino immigrants occupied 61% of the janitorial jobs, and Blacks’ share of the jobs had declined proportionately. *Id.* at 38. As immigrants have replaced African Americans in these sectors, wage rates have declined—from $13 per hour to just over the minimum wage. Johnson et al., *supra* note 340, at 64.

342. *See Johnson et al., supra* note 340, at 65; *Lipsitz, supra* note 85, at 52.

343. David Bacon, *Contesting the Price of Mexican Labor*, in *BEYOND IDENTITY POLITICS: EMERGING SOCIAL JUSTICE MOVEMENTS IN COMMUNITIES OF COLOR*, at 87, 107-09 (John Anner ed., 1996) (describing tensions within Local 399 between Guatemalan immigrants and the predominantly African American union leadership, and SEIU intervention). As it happened, the trusteeship offered the opportunity for centralized control by the International, which ironically was a central ingredient in the union’s successful Justice for Janitors movement. Unhampered by the protectionist political concerns of incumbent local union leadership, the International’s organizing staff committed itself wholeheartedly to radical and militant organizing strategies. Waldinger et al., *supra* note 341, at 41.

344. 163 F.3d 1369 (D.C. Cir. 1999).
English-only language rules in the classroom and front office. Although it was not responsible for the creation of racial divisions in the workforce, the union ended up exacerbating them through the pragmatics of its organizing campaign. The union sought to minimize conflicts between groups of workers by redirecting ethnic concerns to a social justice organization. When the Latina employees raised the language issue with the union organizer (who was himself Latino), the organizer referred them to La Raza Central Legal, a public interest law organization specializing in Latino/a issues. However, the organizer conducted union organizing meetings primarily in Spanish, with English translation, did the bulk of the organizing during the Latina lunch hour, and neglected to provide African American workers with union literature or ask them to sign authorization cards.

The racial divide widened when a television station featured the English language policy and interviewed Latina workers at the center during their lunch hour. The Latina employees accused the employer of preventing them from speaking Spanish on the job through harassment and intimidation; no African American employees were interviewed. Subsequently, the union organizer contacted Spanish-language radio media about the language policy at the center, and the station featured an interview with him and two of the Latina employees. As the union focused increasingly on the Latina employees, the union campaign hardened the racial divisions between Latinas and African Americans. The union won the election by a vote of 25 to 12, and the employer filed objections, asserting that the union’s inflammatory racial message and targeting of Latina employees tainted the election results. Although the D.C. Circuit enforced the Board’s ruling, rejected the employer’s challenge to the election, and ordered the employer to bargain with the union, the class interests of all the workers were compromised by the long delay between the union’s election victory and the start of bargaining. Had the union confronted the racial and ethnic tensions more directly during its organizing campaign and prevented

345. Id. at 1373 (noting that “racial discord already characterized relations between African-American and Latina employees” when the union began its campaign and giving as an example the racially segregated lunch breaks taken by the employees, with Latinas eating from 12:30-1:30 and African Americans eating from 1:30-2:30).
346. Id. at 1374. The union had originally assigned an African American female organizer, but she played a lower profile role once the Latino organizer came into the picture. See id. at 1376 & n.5.
347. Id.
348. Id. at 1374-75. The union organizer explained that since supervisors ate during the African American lunch hour, he visited the Latina lunch hour instead. See id. at 1375 n.4.
349. Id. at 1375. It was unclear whether the television station was contacted by the union organizer, by a lawyer from La Raza, or by the Latina employees themselves. See id.
350. Id.
351. Id. at 1372, 1377.
352. See id. at 1377.
the workers from dividing along racial/ethnic lines in the election voting, the employer’s challenge to the election might have been averted.

*Family Service Agency* clearly illustrates the conundrum for the union when it faces an already racially-divided workforce with workplace issues that center around ethnic or race discrimination by the employer. Most unions in this situation will choose either to suppress issues of ethnicity or race, or to redirect them to another organization, as this union did. Failing either of these strategies, the union is likely to focus on the issues dear to the numerical majority of the workers in that unit, a practice which is a direct outgrowth of the exclusivity/majority rule doctrine. We have argued elsewhere for abolition of that doctrine because of its propensity to preserve white male privilege inside the labor movement. Here we argue an alternative position: even within a system characterized by majority rule, the union should integrate issues of race, ethnic, gender, and sexual orientation justice into its message.

B. The Persistence of Protectionist Policies Designed to Preserve Union Privilege

In this Part, we illustrate our suggestion that unions will benefit by asking the “other” questions, canvassing areas where the labor movement’s failure to do so has caused it to miss opportunities for more transformative change.

1. The Case of Immigrant Labor

Until very recently, organized labor pursued a job-conscious strategy with regard to immigrant labor, actively seeking to exclude immigrants from the United States in order to preserve American jobs for American workers. In 1986, for example, the AFL-CIO supported the passage of the Immigration Reform and Control Act, which imposes sanctions on employers who hire immigrant workers. Recently, however, pragmatic concerns have prompted the AFL-CIO to alter its position on immigrant workers. Projections of increasing diversity of the workforce attributable to immigration leave labor little choice but to organize immigrants, particularly Latino/as. In 1998, Latino/as constituted 10.4% of the labor force, and they are projected to make up 17.2% of the workforce by 2025. Immigrants are also heavily concentrated in areas of labor market growth, specifically the light manufacturing and service sector areas of the economy.

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353. Cramin & Matheny, *supra* note 177, at 1613-20 (explaining how the united front ideology perpetuated by the exclusivity and majority rule doctrines submerges the voices of women and minority workers, and arguing for a system of multiple representation).


356. *See id.*
Labor's altered perception of immigrant workers as a population ripe for organizing and as a potential base for rebuilding union strength combined with an aggressive INS workplace enforcement program that provided employers a weapon against nascent union organizing of immigrant workers\textsuperscript{357} to cause a shift in the AFL-CIO's internal politics.\textsuperscript{358} In October of 1999, the AFL-CIO National Convention adopted a resolution opposing the INS enforcement program and calling for a repeal of employer sanctions for hiring immigrant workers.\textsuperscript{359} In February 2000, the AFL-CIO Executive Council unanimously approved a resolution supporting a new program providing amnesty to undocumented immigrants and an altered system of employer verification of eligibility to work in the U.S.\textsuperscript{360}

Labor's ambivalence about pursuing a strategy of inclusion remains, however. Other commentators have noted that the Executive Council's resolution distinguishes between immigrant workers and undocumented workers, according immigrant workers full workplace rights but seemingly affording a lesser set of protections to undocumented workers. This stance leaves labor vulnerable to wage undercutting by employer exploitation of the undocumented.\textsuperscript{361} The resolution thus preserves the core of business unionism, favoring a reduction in undocumented immigration and seeking to maintain a partnership with business that preserves jobs for American workers.\textsuperscript{362}

\textsuperscript{357} Under the Clinton administration, the workplace became the focus of immigration restrictions rather than the country's borders. Bacon, supra note 354, at 11. The INS implemented this focus by stepping up its enforcement of IRCA sanctions against employers who failed to collect information on the immigration status of their employees. Employers reacted by selectively requiring workers to reverify their immigration status. Union activism and support for contemporaneous organizing drives dropped off dramatically as fearful workers became loathe to attract the employer's attention. Id. at 10.

\textsuperscript{358} See id. at 15.

\textsuperscript{359} Id. at 16-18.

\textsuperscript{360} Delgado, supra note 312, at 29.

\textsuperscript{361} Id. at 32.

\textsuperscript{362} See id. (referring to labor's support of business initiatives such as education of workers to "enhance our shared economic prosperity"); AFL-CIO Executive Council Actions, Immigration, New Orleans, Feb. 16, 2000, at http://www.aflcio.org/pubsstatements/feb2000/immigr.htm.

Similarly, organized labor resisted the North American Free Trade Agreement ("NAFTA") primarily on the basis of the potential for job loss for its members. Bruce Nissen, \textit{Alliances Across the Border: U.S. Labor in the Era of Globalization}, WomanUSA, May/June 1999, at 43, 48. The AFL-CIO's posture on NAFTA allowed NAFTA proponents to portray labor as protectionist and reactionary, as a special interest group advocating only on behalf of its members, selfishly blocking greater progress for the nation and for Mexican workers. Id. at 49. Labor's strategy pitted U.S. workers against Mexican workers in a win-lose competitive posture: job loss for U.S. workers meant job gains for Mexican workers. See id. at 48. It also undermined efforts to forge long-term international labor alliances. Understandably skeptical about U.S. labor's motives, which appeared to be just a cover for protectionist concerns, labor leaders in Mexico and other Third World countries have questioned whether U.S. laborers are truly "brothers," and they have sometimes refused to support conditions on trade that require respect for worker rights. Id. at 50-51.

Further, had African Americans' interests been represented in the upper echelons of AFL-CIO leadership, different and more powerful arguments might have been raised in the battle over NAFTA. Instead of being presented only as a workers' issue of threatened job loss through employer relocation
Placing ethnicity at the center of union praxis would result not only in organizing that targets immigrant workers, but also contract language keyed to immigrant workers' needs. For example, contracts negotiated on behalf of predominantly immigrant workforces might include extended leave policies to facilitate immigrants' needs to return to their countries of origin to attend to family matters, attend funerals, or visit sick relatives. Contract provisions might also include protections for workers against negative employment consequences in the event of a name change or change in social security number, the addition of immigration assistance to group legal benefit plans; clauses prohibiting employers from requiring that only English be spoken; education-fund benefits covering training in English as a second language; and child/eldercare benefit provisions covering "informal care" (to accommodate the immigrant practice of relying on extended family to provide caregiving services for dependents). Without an overt focus on ethnicity, such issues are unlikely to be seen as union issues that can be addressed through the collective-bargaining process.

2. The Case of Workfare

Similar pressures for exclusion and, subsequently, reluctant and pragmatic inclusion can be seen in the dilemma over the relationship between workfare and unionism. On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act became law. This statute, commonly referred to as "workfare," abolished centralized federal entitlements to welfare and replaced them with a system of block grants to the states. These grants were conditioned on work requirements and the imposition of a cap on the receipt of benefits. Because the new law injected hundreds of thousands of previously unemployed persons into of work or plants to Third World countries and declining pay standards as the race to the bottom materialized, NAFTA might have been framed as a civil rights issue. The agreement allowed corporate interests to abandon urban communities where African Americans were dependent on employment, disproportionately harming inner cities and the Black community. See Kelley, supra note 309, at 9.

363. Such clauses would protect workers who used false names or social security numbers before their immigration status became lawful and subsequently sought to change them after attaining legal status.


the workforce in sectors that were heavily unionized, such as municipal employment, organized labor took an immediate interest.

From the start, labor pursued a protectionist strategy. Worried that workfare would depress wages and allow employers to displace union workers with workfare workers, many labor leaders initially opposed workfare. More compliant labor leaders lobbied Congress to include protective provisions in workfare legislation, preventing the displacement of existing employees to make way for workfare workers. Since the eventual bill’s prohibition of direct replacement of current employees with workfare recipients did not block cities from freezing hiring and filling all new vacancies with workfare workers, or from downsizing the permanent workforce, unions also negotiated for more protective provisions in their own collective-bargaining agreements. Unions supplemented protection for existing members by bargaining for provisions in their collective agreements to ease the impact of job displacement on members, to make job displacement issues subject to arbitration procedures under the contract, or to eliminate the two-tiered system altogether by requiring payment of the same wages and benefits to workfare workers as those paid to existing employees in the same job categories.

Initially, AFL-CIO unions whose public sector membership was affected by workfare programs did not seek to organize workfare workers, leaving the task to community organizations like the Association of Community Organizations for Reform Now (“ACORN”) and People Organized to Win Employment Rights (“POWER”). Because workfare workers served as a source of cheap, exploitable labor for state, county, and city governments with shrinking budgets and rising costs, public sector employers began using workfare workers to replace unionized staff, hiring them to do the same work at far lower wages. Unable to reverse the trend

367. Janet Bass, Mixed Reaction to Workfare for AFDC Recipients, UPI, Feb. 24, 1986, AM CYCLE, REGIONAL NEWS, MADISON, Wisc. The most egregious situations created by the new workfare law are best described as “musical chairs” scenarios: In these situations, unionized employees are displaced to make way for workfare workers. Having lost their jobs, the previously unionized employees go on public assistance. Eventually, they are recycled into the workfare workforce and sometimes end up doing precisely the same jobs they were doing as union members, albeit for a fraction of the wages and no benefits. These workers are unable to move off workfare because there are no job openings—since they themselves are doing the very jobs for which they are applying! See Benjamin Dulchin, Organizing Workfare Workers, 73 St. John’s L. Rev. 753, 757 (1999).


371. See Vanessa Tait, Knocking at Labor’s Door: Workfare Workers Organize, NEW LAB. F., Fall/Winter 1998, at 139.

372. See id. at 140.
of hiring workfare workers to replace unionized workers, labor unions began competing with community groups such as ACORN to organize workfare workers, hoping to raise their compensation and benefits so that their pay would not undercut the pay of union members. A schism developed between the relevant community organizations and some AFL-CIO unions, notably AFSCME District Council 37 in New York City and SEIU locals in San Francisco. Taking the position that “servicing current members is the union’s top priority,” labor union leaders justified their initial refusal to organize workfare workers on the basis that they were not “employees,” but were instead a “problematic and sometimes dangerous underclass that threatens union members’ pocketbooks (as taxpayers) or their jobs (if hired as strike-breakers).” Welfare recipients were viewed as free-riders on the backs of the working class, deadbeats who received benefits for not working that were funded through tax monies derived from those who were. Myths of the undeserving poor combined with racialized stereotypes about welfare recipients as being lazy and to blame for their own impoverishment. Racial divisions within the workforce hardened.

Realizing the short-sightedness of this approach, more progressive unions began seeking to educate existing members about the interests they shared with workfare workers. Some established joint organizing programs with community-based organizations, attempting to organize not only workfare workers, but other low-waged workers in the private sector, including day laborers, day care workers, and immigrant workers.

While laudable, labor’s belated effort to pursue a more inclusive strategy was motivated by the same self-interest that prompted inclusion at other junctures where the risk of having job security and wages undercut by a rapidly growing, more exploitable workforce materialized. At

373. See Steven Greenhouse, Union Seeks to Enlist 35,000 in New York City’s Workfare Program, N.Y. Times, June 29, 1997, § 1, at 23.
374. See Tait, supra note 371, at 142-45.
375. Id. at 145.
376. Id.
377. See John E. Tropman, Does America Hate the Poor? The Other American Dilemma 6-15 (1998).
378. For example, in one revealing exercise designed to uproot stereotypes about unionists and welfare recipients, a welfare-labor coalition called Working Massachusetts asked unionists to name three stereotypes describing welfare recipients and three describing unionists. The results, described by UAW Local 2324 Vice President Elly Leary, were that “[w]elfare recipients are perceived to be black women, while labor is perceived to be white men.” Tait, supra note 371, at 146.
379. See Fannell, supra note 370, at 765-66.
381. See Leslie Kaufman & Andrew Murr, Welfare’s Labor Pains, Newsweek, Mar. 31, 1997, at 39 (reporting that the AFL-CIO “makes no secret of having its own selfish reason for joining the fight [to organize workfare workers]: it’s worried that a flood of cheap labor will undermine the job security of already unionized municipal employees”); Steven Greenhouse, Labor Leaders Seek to Unionize Welfare Recipients Who Must Go to Work, N.Y. Times, Feb. 19, 1997, at A18 (explaining that
bottom, labor's strategy amounts to a defense of privilege: In order to pre-
serve the privileges (job security, wages, and benefits) afforded to union
workers by virtue of their membership in a labor organization, unionized
workers must embrace the unorganized poor. Welfare recipients tend to be
the least privileged, lowest waged, and most marginalized members of so-
ciety, and thus workfare workers are predominantly women, immigrants,
and people of color who had previously been doing the unwaged work of
raising children or working in the underground economy. Labor's inclusive
strategy is not predicated on a challenge to capitalist hierarchies; no
fundamental shift in the attitudes of relatively privileged unionized workers
regarding those who have traditionally made up the underclass in the U.S.
economy is contemplated.

Labor's self-interested shift toward organizing the most exploitable
workers is an insipid version of the more transformative ideology we have
in mind. The weakness of labor's commitment to the project is evidenced
by the fact that city leaders prefer dealing with established unions to deal-
ing with community groups such as ACORN because ACORN takes a
more radical approach, organizing street protests and challenging power in
more direct ways. If workfare programs were seen as an opportunity for
building a more inclusive solidarity among diverse groups of workers
rather than as a threat to the economic privilege enjoyed by already-
organized workers, the possibilities would be limitless.

organized labor believes "it is important to recruit workfare employees into unions because they are one
of the fastest-growing labor pools in the country," as well as because of the risk they pose to the job
security of higher-paid unionized workers); Steven Greenhouse, City Labor Director Backs Efforts to
Organize Workfare Participants, N.Y. TIMES, Feb. 9, 1997, § 1, at 39 (reporting that labor fears that
workfare workers "not only will be used to replace unionized workers but will put downward pressure
on wages").

382. See Crain & Matheny, supra note 177, at 1571-73 (describing privilege conferred on
unionized workers by virtue of their membership in the ranks of organized labor).

383. See Tait, supra note 371, at 146.

384. See Crain & Matheny, supra note 177, at 1571-73.

385. See Steven Greenhouse, supra note 373, § 1, at 23 (reporting that New York City Mayor
Rudolph Giuliani would "much prefer having AFSCME District Council 37 represent workfare
participants than Acorn, since [Acorn] had never been bashful about attacking the Mayor or organizing
street protests"); see also Kaufman & Murr, supra note 381, at 39 (describing ACORN rally in
Washington D.C. attended by marchers from New York City who protested that "workfare is trying to
make us into slaves again").

386. As one nonprofit community organizer explains:

There has been a tremendous interplay between unemployed poor and working poor, but in
the past there has always been a great political and organizing divide between the two groups.
The working poor are sometimes reluctant to identify with their less fortunate neighbors, the
non-working poor. For the first time, by recreating welfare recipients as workers, there is the
possibility of an alliance between these two groups. The issues are essentially the same, and
the lower end of the working class and the non-working poor have the same concerns of
adequate pay, health, and safety. Organizing to achieve these tangible goals has great
potential.

Dulchin, supra note 367, at 759.
The future of the labor movement lies in its past, in the passion for social justice that animated the Knights and the Wobblies. When the law sends the message that racial and gender justice have nothing to do with economic justice, it fragments workers' identities and saps the moral power from the labor movement's call to arms. It is time to bridge the legal divide between social justice and workers' rights created by the omission of an antidiscrimination provision in the Wagner Act and subsequent labor law jurisprudence entrenching a two-track system. We propose two reforms directed toward this end. First, we join other scholars in advocating for engrafting a civil rights discourse onto the NLRA and for creating a platform for union action on social justice issues. We move beyond these proposals for altering the discourse by suggesting that the NLRA impose an affirmative duty on unions, as part of their central mission, to militate against racial, ethnic, and sex discrimination and to work for social justice. Second, and perhaps more controversially, we support overruling Gardner-Denver and Emporium Capwell as first steps toward eliminating the schism between civil rights and workers' rights.

A. Workers' NLRA Rights Should Include Civil Rights

Several scholars have suggested that labor should adopt the transformative ideology of rights discourse advanced by the civil rights and women's movements during the 1960s and 1970s in an effort to eliminate "the sharp dichotomy that puts the 'civil rights' of workers in one conceptual box and the collective workplace rights of those same employees in quite another."387 The rights discourse developed during this era provides fertile ground for an invigorated public debate in which labor can and should be an active participant. The American public largely supports workers' rights to be free of racial, ethnic, sex, and religious discrimination; the categories protected under Title VII.388 Indeed, "Americans consider discrimination on the basis of race and religion ... un-American."389 So great is the public opposition to discrimination on the basis of identifying characteristics and so constitutionally well-grounded are the prohibitions against it that Title VII inspires respect and fear in employers who

387. E.g., Lichtenstein, supra note 92, at 62.
388. Id. at 62. Lichtenstein notes the ongoing debate about the meaning of the term "discrimination," but brackets this as analytically separate from the public's acceptance of an antidiscrimination norm. See id. at 63.
389. Id. at 63.
must comply with it. For example, employer response to potential liability for sexual harassment under Title VII and parallel state laws led to an urgent push for clarification of employer performance standards. On the other hand, NLRA violations carry limited legal remedies and are associated with little or no public opprobrium. As one writer concluded, "discriminating against workers because of gender is a big deal; discriminating against them for union membership is a joke." Legal scholars have theorized enhancing legal protection for the right to organize, either by recasting it as a civil right or by situating it within the Constitution.

As exciting as these possibilities are for those on the Left, they do not go far enough. While exporting the right to organize for economic justice out of the weakened labor laws and into the civil rights laws or the Constitution may strengthen these rights, it would do nothing to alter the substance of the bargain struck between union and employer in collective bargaining. The union's representative role once the workers were organized would remain limited to advancing workers' economic interests, narrowly defined. We advocate importing antidiscrimination norms into the labor law, so that the scope of union representation expands to encompass all aspects of the workers' identities made relevant by employer practices or policy. To this end, we urge an interpretation of the Act that would redefine labor unions as social justice organizations. Such an interpretation would broaden the scope of concerted activities protected under section 7 to include activities that are not purely economic and "self-interested." Further, the antidiscrimination provisions in the Act, particularly section 8(a)(3) (prohibiting employer discrimination in hiring, firing, or other terms of employment on account of union membership or activity) and section 8(b)(2) (prohibiting union discrimination against employees on the basis of non-membership, and union participation in employer discrimination), should be amended to include discrimination on the basis of the categories currently covered by Title VII.

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390. See John P. Mello, Jr., A Shield for the Workplace Wars: As the Cost of Defending Employee Claims Soars, Carriers Suddenly Come Up with Meaningful Products, CFO, THE MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, May 1998, at 73 (describing pressure on the insurance industry to provide coverage for employers seeking to minimize liability for employment discrimination, particularly after the enactment of the Civil Rights Act of 1991).
391. See David Brody, A Question of Rights, New LAB. F., Fall/Winter 1998, at 129.
392. Id.
393. Joshua Freeman, Organizing Is a Civil Right, New LAB. F., Fall/Winter 1998, at 95-96.
395. Cf. supra Part II.A. (describing narrow definition of labor union by reference to scope of its activities under prevailing law).
Finally, the sections of the Act pertaining to the scope of the union's duty to represent workers and to bargain on their behalf should be interpreted to impose an affirmative duty on unions to militate against discrimination on the basis of the identity categories covered by Title VII. Thus, union inaction, passivity, or negligence in the face of employer discrimination on the basis of race, ethnicity, or sex would violate the union's duty of fair representation. In addition, section 2(5) (defining the purposes and legitimate activities of a labor organization), and sections 8(d) and 9(a) (specifying the subject matter of collective bargaining and the parameters of the duty to bargain) should be amended to include all matters affecting, directly or indirectly, the prevention and elimination of discrimination on the basis of the protected categories in Title VII. Such subjects should be considered mandatory subjects of bargaining so that a failure to deal on them would constitute a violation of section 8(a)(5) (prohibiting employer refusals to bargain) or section 8(b)(3) (prohibiting union refusals to bargain).

These statutory reforms would make challenging discrimination the union's business and would obligate labor to put race, ethnic, and gender justice at the center of its ideology. The remainder of this Part outlines how imposing an affirmative duty on unions to work against racial, ethnic, and sex discrimination would alter current law and impact the union's role as representative of the employees.

1. The Existing Legal Framework

Currently, Title VII's antidiscrimination norms serve as the primary federal curb on employer and union conduct pertaining to race, ethnic, or sex discrimination in employment. Intentional discrimination by a union in carrying out its obligations to represent members violates Title VII. The Supreme Court has not ruled directly on whether mere passivity, inaction, or acquiescence in the face of employer discrimination is sufficient to support union liability under Title VII. The lower courts are split on the

397. See Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987) (holding that a union's failure to challenge racially discriminatory practices, failure to assert racial discrimination as a ground for grievances under the labor contract, and toleration of the employer's racial harassment, violated Title VII); Laborers Int'l Union v. Alexander, 177 F.3d 394 (6th Cir. 1999) (holding international union that instigated a membership rule with a disparate impact on African Americans liable for a violation of Title VII because it breached its affirmative duty to investigate the local union's discriminatory conduct in maintaining union hiring hall), cert. denied, 120 S. Ct.1158 (2000); Marquart v. Lodge 837, 26 F.3d 842, 853 (8th Cir. 1994) (stating that "[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under... Title VII... ") (citation omitted).

398. See Goodman, 482 U.S. at 665-66 (implying that mere passivity or union acquiescence in employer discrimination would not ground liability, but refusing to reach the question in the case before it because the record showed more than mere passivity on the part of the union).
While some courts have implied that unions have a duty to protect unit members from employer discrimination originating either under Title VII or from their implied duty of fair representation, few have grounded liability on unintentional acts.

Although the Board considers both union failures to represent minority workers fairly in contract-making and to process grievances alleging discriminatory job conditions actionable as unfair labor practices under the Act, past discrimination will not block union certification by the Board. To rule otherwise would cast the Board in the role of the EEOC,

399. Compare York v. Am. Tel. & Tel. Co., 95 F.3d 948, 955-57 (10th Cir. 1996) (finding that mere inaction by a union will not ground liability; there must be knowledge that prohibited discrimination has occurred and a decision not to assert the discrimination claim), Martin v. IAM Local 1513, 859 F.2d 581 (8th Cir. 1988) (finding union not liable for mere acquiescence in employer's discriminatory conduct), and Catley v. Graphic Communications Int'l, Local 277-M, 982 F. Supp. 1332, 1344 (E.D. Wisc. 1997) (dismissing plaintiff's Title VII claim asserting union liability on theory of "mere acquiescence"), with Woods v. Graphic Communications Union Local 747, 925 F.2d 1195, 1200, 1203 (9th Cir. 1991) (holding that a union may be liable under Title VII and for breach of its duty of fair representation for acquiescing in a racially discriminatory work environment where union intentionally and knowingly failed to file grievances asserting racial harassment on behalf of Black employee, and union shop stewards participated in the harassment), Romero v. Union Pacific R.R., 615 F.2d 1303, 1310-11 (10th Cir. 1980) (allowing employee to proceed on Title VII claim against union on a "mere acquiescence" theory), and Macklin v. Spector Freight Sys., 478 F.2d 979, 989 (D.C. Cir. 1973) (finding that the union had conspired with the employer to deny Black workers access to remunerative over-the-road drive jobs and had failed to negotiate an antidiscrimination clause in its labor contract, and concluding that such union acquiescence in employer discriminatory practices violates both the union's duty of fair representation and Title VII).

400. See, e.g., EEOC v. Foster Wheeler Constructors, Inc., No. 98C 1601 (N.D. Ill. Jan. 6, 2000), reported in Construction Firm to Pay $1.33 Million to Settle Racial, Sexual Harassment Case, Daily Lab. Rep. (BNA) No. 5 (Jan. 7, 2000) (consent decree against employer approved in Title VII action alleging racial and sexual harassment against union where EEOC argued that union had a responsibility to provide a workplace free of discrimination); Local Union No. 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966) (holding that union breached its duty of fair representation in violation of section 8(b)(1)(A) of the Act by refusing to process grievances of Black workers concerning segregated plant facilities and discriminatory application of seniority provisions).

401. See, e.g., Rainey v. Town of Warren, 80 F. Supp. 2d 5, 19 (2000), reported in Daily Lab. Rep. (BNA) No. 13, at A-4 (Jan. 20, 2000) (finding that union's failure to file a grievance challenging the sexual harassment of one of its female members rose to the level of "deliberate acquiescence" in the employer's discriminatory practices and was sufficient to ground a Title VII claim against the union); see also Jackson v. T & N Van Service, No. CIV.A.99-1267, 2000 WL 792888, 164 L.R.R.M. (BNA) 2697 (E.D. Pa. June 20, 2000) (denying union's summary judgment motion and finding that African American worker can proceed with his claim that his union aided and abetted the creation of a racially hostile work environment in violation of New Jersey law by defending the plaintiff's coworkers in a grievance proceeding stemming from a mock lynching).

402. Independent Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573, 1594 (1964) (finding violations of sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the NLRA); Miranda Fuel Co., 140 N.L.R.B. 181, 190 (1962) (ruling that discrimination unrelated to union membership is sufficient to establish unfair labor practice by employer and union), enforcement denied, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). See generally Plass, supra note 199, at 800-05 (discussing case law).

403. Handy Andy, Inc., 228 N.L.R.B. 447 (1977); Bell & Howell & Local 399, Int'l Union of Operating Eng'r's AFL-CIO, 220 N.L.R.B. 881 (1975), as supplemented, 230 N.L.R.B. 420 (1977), enforcement, 598 F.2d 136 (D.C. Cir. 1979), cert. denied, 442 U.S. 942 (1979); see also Iglesias, supra note 193, at 435-38 (explaining that the Board used the availability of remedies under both Title VII
duplicating efforts of a more expert agency. Further, no violation of section 8(b)(2) (making it an unfair labor practice for a union to “cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) [which prohibits employer action encouraging or discouraging membership in a labor organization]”) exists unless the union has engaged in a positive act directed towards the employer.

Finally, unions are afforded a “wide range of reasonableness” in fulfilling the duty of fair representation imposed on them as the exclusive representatives of employees in an organized bargaining unit. A union violates the duty of fair representation only if it acts in a manner that is “arbitrary, discriminatory, or in bad faith,” or “wholly irrational.” Passivity or inaction in the face of employer discrimination does not violate the duty of fair representation. Negligent performance by a union of duties specified in a collective-bargaining agreement, or “mere negligence” in the enforcement of the agreement, does not breach the union’s duty of fair representation. Moreover, even when unions do breach the duty of fair representation, their liability is limited to the damages attributable to actual acts of the union.

and duty of fair representation suits to justify its decision that Board certification did not amount to “state action” for purposes of the Fifth Amendment; “the Board’s Handy Andy analysis suggests that Title VII eliminates any constitutional responsibility the Board has to address the problem of race discrimination under the NLRA”).

404.  Bell & Howell, 598 F.2d at 147-48. The court carefully distinguished cases invoking the Board’s Sewell rule to set aside union certifications based upon elections tainted by an inflammatory appeal to racial prejudice. Id. at 149 n.40. The court noted that union certification did subject the union to additional sanctions for future discrimination through actions brought under Title VII or alleging a breach of the duty of fair representation. Id. at 149-50.


406.  Glasser v. NLRB, 395 F.2d 401, 406 (2d Cir. 1968); NLRB v. Jarka Corp., 198 F.2d 618, 621 (3d Cir. 1952). But cf Jacoby v. NLRB, 233 F.3d 611, 618 (D.C. Cir. 2000) (remanding case to Board to “consider whether, given the union’s heightened duty of fair dealing in the context of a hiring hall, the union’s negligent failure to adhere to its referral standards was an unfair labor practice” in violation of sections 8(b)(1) and 8(b)(2)); Boilermakers Local No. 374 v. NLRB, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (finding that “[a]ny departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant” breaches the high standard of fair dealing required of a union operating an exclusive hiring hall, and violates sections 8(b)(1) and (2) of the Act).


409.  Air Line Pilots Ass’n, Int’l, 499 U.S. at 78.

410.  Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974) (finding that union’s failure to protect employees from employer’s discriminatory policy does not breach union’s duty of fair representation); Glasser v. NLRB, 395 F.2d 401, 406 (2d Cir. 1968) (no NLRB section 8(b)(2) violation unless union directly approaches employer and causes it to discriminate).


2. An Alternative Landscape

In sum, neither Title VII, the NLRA, nor the duty of fair representation arising therefrom imposes an affirmative duty on unions to promote racial, ethnic, or gender equality for the workers it represents. The labor law's half-hearted commitment to unions' role in combating racial and sexual discrimination is an outgrowth of the schism between social justice issues and class issues codified by the growth of individual employment law rights. Yet it is more than the mere existence of individual rights statutes that creates the schism. The Fair Labor Standards Act ("FLSA"), the Occupational Safety and Health Act ("OSHA"), and the Family and Medical Leave Act ("FMLA") have all been used as swords by unions; they create potential additional rights for union members and establish a floor from which bargaining is conducted.\footnote{413} Title VII (as well as the ADA), by contrast, has served largely as a curb on discriminatory union action and as a justification for unions who wish to rationalize staying out of these areas.\footnote{414} Sometimes the union's economic bargain with the employer has been raised as a bar to the enforcement of statutory

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\footnote{413} Whether unions should have a general obligation to protect public law rights of organized workers is a question beyond the scope of this Article. For a thoughtful discussion of these issues, see Robert J. Rabin, The Role of Unions in the Rights-Based Workplace, 25 U.S.F. L. Rev. 169 (1991). In some contexts, unions lack standing to assert workers' public law rights. See Brock, supra note 179, at 819 (discussing ways in which FLSA limits the role of unions by disallowing representational suits). In the organizing context, union financing for the assertion of public law rights may even amount to an unfair labor practice if construed as providing a "benefit" which unduly influences employee voting in a union election. E.g., NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1)(1998); Freund Baking Co. v. NLRB, 165 F.3d 928, 935 (D.C. Cir. 1999) (holding that union announcement and sponsorship of class action lawsuit to enforce employees' rights to overtime pay under state law may even amount to an unfair labor practice if construed as providing a "benefit" which unduly influences employee voting in a union election). See generally Michael Carlin, Note, Are Union-Financed Legal Services Provided Prior to a Representation Election an Impermissible Grant of Benefit? An Analysis of Nestle, Novatel, and Freund, 79 N.C. L. Rev. 551 (2001) (analyzing case law and proposing alternative strategies for unions).

\footnote{414} See Crain, supra note 96, at 34-35 (explaining that many unions view challenging sexual harassment of unit members by coworkers as beyond the purview of union action); Crain & Matheny, supra note 177, at 1603 (reporting that the UAW in the high-profile class action suit for sexual harassment at Mitsubishi Motors considered sexual harassment to be "the employer's problem"; its priority was protecting its members' jobs); see also Note, Reconsidering Union Class Representation, 95 Harv. L. Rev. 1627, 1641 (1982) (stating that if unions are allowed to intervene at all in Title VII cases challenging discriminatory employer practices, it should be as defendants, not as plaintiffs, since the interest of nonclass employees are usually antagonistic to those of class members; were the union to serve as a plaintiff, its duty of fair representation would prevent the defense of nonclass employee interests, contravening national labor policies). But cf. Craig Becker, Elections Without Democracy: Reconstructing the Right to Organize, New Labor F., Fall/Winter 1998, at 97, 108 (describing successful efforts of United Food and Commercial Workers' Union to enforce FLSA and Title VII rights on behalf of workers in nonunion grocery chains and retail stores).
antidiscrimination claims by individual race or gender-subordinated workers, or disabled workers. Alternatively, the availability of a Title VII remedy for race and gender-disadvantaged groups has been said to both remedy and ultimately justify the exclusion of racial issues from the ambit of labor law.

Imposition of an affirmative legal duty on unions to promote a workplace free of discrimination would make a difference. Significant benefits have been achieved in cases where courts have imposed liability for union failure to address discrimination in the workplace. Unions can be prompted to create internal structures dedicated to advancing and addressing issues faced by women and people of color, to more aggressively pursue grievances by monitoring the employer’s hiring, termination, and promotion practices for discriminatory impact, and to establish diversity training programs for union officers, business agents, and stewards. Moreover, organized labor’s failure to respond to Martin Luther King’s call to “root out vigorously every manifestation of discrimination’ in internationals, locals, and central labor bodies,” as well as its failure to actively challenge discrimination in the workplace, is especially jarring when contrasted with labor’s aggressive response to the perceived threat of communism in its ranks. Prompted by the Taft-Hartley Act of 1947, which required union leaders to forswear Communist Party loyalties on penalty of losing NLRA protections, and responding to public opinion and heavy pressure from the Democratic Party during the red-baiting era, the AFL-CIO was quick to use its centralized power to stamp out communism by expelling unions

415. See, e.g., EEOC v. Indiana Bell Tel. Co. d/b/a Ameritech Indiana, 214 F.3d 813 (7th Cir. 2000) (vacating jury verdict against employer on sexual harassment claims of workers because collective-bargaining agreement constrained the employer’s ability to discipline or discharge harassing employee), reh’g en banc granted, 214 F.3d 813 (2000) (issue on rehearing will be whether an employer’s obligations under its labor contract outweigh its obligations under Title VII; specifically, whether the district court erred in refusing to admit evidence of the requirements imposed by the labor contract which led to a damage award against the employer on the employees’ sexual harassment claims); see also Crain & Matheny, supra note 177, at 1543-44 n.5, 1548.

416. Professor Brudney explains that the individual rights statutes codifying antidiscrimination norms (such as Title VII, the Equal Pay Act, the ADEA, and the ADA) were in part a response to the problem created by the collective-bargaining regime and seniority systems, through which past racially discriminatory practices were perpetuated. Brudney, supra note 136, at 1568. Because labor unions and collective-bargaining agreements were seen as part of the problem, rather than part of the solution, a separate remedial statute with its own enforcement mechanisms was necessary. Ultimately, “the individual rights regime assigns unions cameo appearances or even casts them as villains impeding employees’ economic progress.” Id. at 1571; see also Plass, supra note 199, at 807 (“In many ways the enactment of title (sic) VII provided the Board with a statutory excuse for avoiding discrimination claims.”).


418. Honey, supra note 72, at 11.

with communist leadership.\textsuperscript{420} In the context of racism, however, it refused to act, deferring to the ""local autonomy"" of its member unions.\textsuperscript{421} The expelled communist locals also had been among the most militant on the subject of racial rights and had practiced multi-racial unionism most effectively.\textsuperscript{422} Undoubtedly, the Communist Party's effort to link antiracism with class-based organizing, and to merge moral and economic goals, was perceived as a dangerous threat to the social order as well as to the capitalist hierarchy.\textsuperscript{423}

While one might theorize that the AFL-CIO would respond to the pragmatic need to combat race and gender discrimination in order to increase its appeal to the new working class, so far this has not been the case. There are two reasons for this. First, the law itself operates to constrain union activity that is not economically self-interested.\textsuperscript{424} Second, what is pragmatic for the long term will often have immediate negative fallout for elected union officials. Union leaders who seek voluntarily to center race, ethnicity, and gender issues in union praxis risk the ire of the existing core membership, many of whom hold powerful positions within union ranks. Imposition through law of an affirmative duty to eradicate racist and sexist ideology and practices in the workplace would address both hurdles. If the AFL-CIO was capable in the 1950s of deradicalizing itself in response to legal and public pressure to eradicate communism, surely it is capable, with sufficient legal motivation, of re-energizing itself by eradicating racist and sexist ideologies, practices, and leadership within its ranks.

\section*{B. Overruling Gardner-Denver}

It is tempting to argue that \textit{Gardner-Denver} should be reaffirmed and \textit{ALPA} overruled, thereby allowing race or gender-subordinated workers aggrieved by employer action two or even three bites at the apple (an action under Title VII, a claim under the arbitration provisions of their labor contracts, and an unfair labor practice charge). We eschew that course,

\begin{itemize}
\item \textsuperscript{420} See Honey, supra note 72, at 19. Between 1949 and 1950, the CIO expelled eleven local unions with close to one million members, including some which had been key sites of southern interracial organizing. \textit{Id.} The CIO also prohibited the holding of elected national office in the CIO to all members of the Communist Party and supporters of its activities or aims. \textit{See id.}
\item \textsuperscript{421} Honey, supra note 72, at 11. This was particularly ironic, since organizers within the Communist Party saw antiracism as central to building solidarity unionism: they actively sought to educate white workers to the fact that racism divided the workforce against itself and profited capitalists, not workers, and advocated that whites take the lead in fighting racism. \textit{See id.} at 16-17.
\item \textsuperscript{422} See Ruth Needleman, \textit{Union Coalition Building and the Role of Black Organizations: A Study in Steel}, 25 LAB. STUD. J. 79, 90 (2000).
\item \textsuperscript{423} Some theorize that banishing labor's most radical elements was instrumental in narrowing the labor movement's moral vision, shifting its orientation ever more firmly in the direction of a special interest group and away from a social justice orientation. See Ellen Schrecker, \textit{McCarthyism and Organized Labor: Fifty Years of Lost Opportunities}, WorkingUSA, Jan./Feb. 2000, at 93, 100.
\item \textsuperscript{424} See supra Part II; see also Crain, supra note 308 (arguing that inflammatory appeals to racial and ethnic identity doctrine constrain organizing efforts that connect race and class oppression).
\end{itemize}
however, because the basic rationale of *Gardner-Denver* entrenches the two-track system: as long as *Gardner-Denver* continues to coexist with *Adams*, *Gilmer*, and *Wright*, unions will have a powerful disincentive to negotiate for antidiscrimination provisions in labor contracts because they risk waiving unit members’ rights to proceed in court with statutory anti-
discrimination claims.\(^4\)\(^2\)\(^5\) Instead, we support overruling *Gardner-Denver* so that workers represented by unions will pursue antidiscrimination claims triggered by employer action only through the arbitration processes available under their labor contracts, or through unfair labor practice proceedings under the NLRA. Accordingly, *Wright* would be largely moot under our proposal, and *ALPA’s* rationale would be removed; employers would be required to negotiate with unions over all aspects of the arbitration process covering grievances based on racial, ethnic, or sex discrimination.

A number of commentators have argued quite forcefully that the arbitration of employment discrimination claims is not a fair substitute for litigation, at least when the arbitration agreements are imposed upon individual workers who lack union representation.\(^4\)\(^2\)\(^6\) Yet when workers are represented by unions, arbitration processes may be a fair and pragmatic substitute for litigation. While the informality of arbitration risks creating a “second class” justice because rules of law (substantive as well as evidentiary) do not necessarily apply or because their application cannot be

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425. *See supra* Part III.B.

426. *E.g.*, \(\text{Bales, supra note 227, at 739-40 (pointing out that the damages an employee can obtain through arbitration are not comparable to those that can be awarded by courts); Eduard A. Lopez, Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for LAI, Duffield, and Rosenberg, 4 EMPLOYEE RTS. & POL’Y J. 1, 4-5 (2000) (arguing that mandatory arbitration provisions in employment contracts are invalid under the reasonable expectations doctrine of adhesion in contract law and that most mandatory arbitration agreements in employment contracts are unenforceable waivers of the Seventh Amendment right to a jury trial); Rosetta E. Ellis, Note, Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against Barring Statutory Discrimination Claims from Federal Court Jurisdiction, 86 VA. L. REV. 307, 335-40 (2000) (discussing how the structural biases in arbitration and arbitrations’ insufficient remedies disadvantage employees). But see St. Antoine, supra note 257, at 8 (arguing that for a large number of employees the cheaper, simpler process of arbitration is more feasible than litigating a court case).*
effectively reviewed, this need not be the case where a union negotiates the parameters of the system.

Imposition on unions of an affirmative duty originating in labor law to work against race or sex discrimination is especially compelling in a post-Adams, post-Gilmer world. After Gilmer and Adams employers are free to impose arbitration on employees as a substitute for litigation of statutory rights. Under ALPA employers may do so even when a union represents the workers. Thus, the question is not whether to utilize arbitration as an alternative dispute resolution mechanism, it is who will negotiate its substantive coverage and procedural protections, and whether employees will have representation in the process. Overruling Gardner-Denver would transform the employer’s ability to require waiver of an individual worker’s statutory discrimination rights into a powerful incentive for workers to join unions. Unions are likely to be far more effective than individual employees in negotiating for procedural and substantive protections in an arbitration system, particularly for the most oppressed workers. Since predispute waivers of statutory antidiscrimination rights negotiated on an individual basis will disproportionately impact women and people of color, the most likely victims of discrimination, it is particularly vital that these groups have representation.

Some commentators have argued that alternative dispute resolution mechanisms are risky for women and minorities because they coerce engagement between persons of unequal power in a context where fault is

427. See Beth E. Sullivan, The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry, 26 Fordham Urb. L.J. 311, 340 (1999); see also Harry T. Edwards, Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?, 16 Ga. St. U. L. Rev. 293, 295 (1999) (stating that “[w]hen public laws are enforced in private fora... we have no assurance that the underlying public interests are fully satisfied”); Stone, supra note 209, at 1020 (arguing that the trend toward mandatory arbitration of statutory employment rights “threatens to deprive workers of their statutory rights altogether”); Colin P. Johnson, Comment, Has Arbitration Become a Wolf in Sheep’s Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements In Employment Contracts and Statutorily Created Rights, 23 Hamline L. Rev. 511, 514 (2000) (explaining how “compulsory, pre-dispute arbitration clauses in employment contracts allow employers to subvert and defect the impact of statutes that were created by Congress to protect employees from injustices of employers”).


429. Because those at the bottom of the class hierarchy tend to lack the sense of entitlement possessed by those in higher strata, they are likely to negotiate less just bargains; “freedom of contract” is especially illusory for this group. See Jeffrey L. Harrison, Class, Personality, Contract, and Unconscionability, 35 Wm. & Mary L. Rev. 445, 448-50 (1994).

de-emphasized and the legal language to name injuries is not readily available.\textsuperscript{431} Moreover, the assertion of rights in an adversarial context may be advantageous because it enhances group consciousness and builds a sense of collective identity, which might be sacrificed in an alternative dispute resolution system.\textsuperscript{432} These criticisms are inapplicable to the employment arbitration context, particularly where a union represents the aggrieved workers. The arbitration process is itself an extension of the collective action that produced the collective-bargaining agreement; it is predicated on the assertion of rights defined in the agreement. Moreover, arbitration, unlike mediation, is an adversarial process in which the expression of anger and conflict are legitimated, albeit channeled away from litigation,\textsuperscript{433} and in which lawyers or representatives for each party are typically actively involved.\textsuperscript{434}

Overruling Gardner-Denver has several additional advantages for unions and workers. From the union vantage point, it is likely to afford leverage in persuading an employer to sign a first contract. Employers with an increasingly diverse workforce likely would welcome the opportunity to relieve themselves from the burden of defending against Title VII actions brought by individual employees, and of defending the provisions of predispute arbitration agreements against due process and overreaching challenges in court, particularly where the employer operates in a variety of jurisdictions with differing rules on the subject. From the worker’s standpoint, inserting unions into the bargaining relationship where an employer would otherwise seek a waiver of statutory rights from an unrepresented individual worker (as it is permitted to do under Adams and Gilmer) would dramatically shift the balance of power in the bargaining relationship. Instead of holding individual, unrepresented workers to mandatory predispute arbitration contracts that are essentially contracts of adhesion,\textsuperscript{435} unions could negotiate for adequate procedural protections, processes to ensure competent and unbiased arbitrators, effective remedies, written opinions, and a meaningful scope of judicial review. With these protections, arbitration of discrimination claims may prove at least equal, and potentially far superior to the existing statutory fora and remedies.\textsuperscript{436} At the

\textsuperscript{431} See, e.g., Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1565, 1549-50 (1991) (suggesting that mandatory mediation in the divorce context poses particular dangers to women, who may be disposed to maintain a connection with the other party to their detriment).
\textsuperscript{432} See id. at 1566-67.
\textsuperscript{433} Cf. id. at 1572-81 (discussing risks for women and minorities of delegitimating emotion and suppressing anger, particularly in the divorce context).
\textsuperscript{434} Cf. id. at 1597-1600 (discussing risks of excluding lawyers from mediation).
\textsuperscript{435} See Lopez, supra note 426, at 4-5.
\textsuperscript{436} See Edwards, supra note 427, at 308; see also Ware, supra note 226, at 712-27 (arguing that the Court’s effort to separate the procedural and substantive aspects of federal rights in the arbitration context is not persuasive because judicial review of arbitration decisions is narrowly circumscribed).
very least, many more "ordinary claimant[s]" who lack the resources to hire an attorney to litigate their cases in court, or who cannot persuade an attorney to take the case because the potential recovery is too low, would be afforded an avenue of relief.437

Far more troubling is the question whether unions can be trusted to adequately represent the interests of minority workers and women. Our argument that the duty of fair representation be strengthened and that unions be held to a more demanding standard of representation for minority interests is an integral part of our proposal because it mitigates the risk that unions will fail to adequately represent the interests of minority workers and women. We recognize that our proposal exacerbates role strain for unions in a diverse workforce.438 This role strain is actually a byproduct of the united front ideology, which gave rise to the exclusivity and majority rule doctrines.439 Although we continue to believe that abolition of the exclusivity and majority rule doctrines is preferable and necessary to eliminate the inherent role conflict built into the representative structure established by the NLRA,440 we offer this proposal as a partial step. Further, as other commentators have suggested, role conflict for unions subject to majority rule doctrine could be alleviated by permitting other interested social justice organizations to represent a worker or group of workers in arbitration or mediation where the union's role conflict is unresolvable.441

Finally, importing antidiscrimination norms into the NLRA would open up possibilities for unions to market themselves to nonunion workers who are unfamiliar with them and to demonstrate their continuing utility. Unions might add to other services currently provided to nonunionized

438. See Rabin, supra note 413, at 205, 244-46; Reconsidering Union Class Representation, supra note 414, at 1631 (arguing that a union's role as a Title VII class representative detracts from its ability to function as a collective-bargaining agent, putting it in a conflicted position between the interests of class members and the interests of nonclass members, both of whom it has a duty to fairly represent). But see Barbara C. Deinhardt, Potential Conflict of Roles and a Possible Solution, 1 Indus. Rel. L.J. 755, 770 (1977) (arguing that courts that deny unions standing as class representatives in Title VII cases because of a presumed role conflict proceed on the erroneous assumption that nonclass members have no interest in eliminating discrimination).
439. See Crain & Matheny, supra note 177, at 1555-56. These doctrines mandate that a union is obligated to pursue an agenda beneficial to the majority of workers in the unit of employees that the union represents, while simultaneously acting as the exclusive representative of all the workers in the unit (who may not circumvent the union to bargain separately from the majority even if they believe their interests are being overlooked). See id. at 1556-62.
440. See Crain & Matheny, supra note 177, at 1614-20.
441. See, e.g., Gould, supra note 268, at 58-65 (proposing third party intervention in labor arbitrations where necessary to adequately represent minority interests within the union, particularly racial minorities); Yelnofsky, supra note 283, at 613-21 (considering potential role of identity caucuses in employee representation in mediation processes under Title VII).
workers through "associate memberships," offering a package of services pertaining to advising and representing nonunion workers covered by predispute arbitration agreements.

CONCLUSION

Those who argue that the labor movement has been undermined by the growth of identity politics movements are right about one thing: "the issue of class [has become] an issue of identity." Labor cannot afford to ignore racial, ethnic, and gender differences between its historical membership base of blue-collar white males and the new workforce. Identities are complex and overlapping, and narrow appeals to workers' class identities may reach the mind ("America Needs a Raise"), but miss the heart.

The NLRA's reference to the inequality of bargaining power between the individual worker and the employer organized in the corporate form rings as true today as it did when the Wagner Act was passed. We have argued that both union ideology and labor law should expand to meet the needs of a diverse workforce, and have offered specific suggestions about how this might be achieved. Lest unions and labor law go the way of the dinosaurs, evolution is imperative.

Our proposals will be controversial on both the left and the right because they would fundamentally alter the nature and purpose of unions. Labor's mission under our proposal would become broader, overtly dedicated to pursuing social justice and civil rights as well as economic equality. Unions would be more explicitly politicized and would become involved in issues previously considered outside their realm of activism. Labor would no longer be politically isolated and would more readily forge alliances with other social justice groups on the left. In short, labor's identity crisis would be alleviated if its commitment to social justice were transformed from rhetoric to a substantive promise backed up by the force of law.

442. The AFL-CIO's associate membership program establishes a category of membership which allows workers unrepresented by a union in their workplace access to limited union benefits, including group health or life insurance, consumer discounts, discounts on legal services, and educational programs. See Shostak, supra note 90, at 63-64; see also Howard Wial, The Emerging Organizational Structure of Unionism in Low-Wage Services, 45 Rutgers L. Rev. 671, 701 & n.90 (1993) (explaining that associate membership may promote union organization efforts in a newly targeted industry or market sector by providing information about what unions do and demonstrating their value to workers).
