

Making Labor's Rhetoric Reality

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LABOR LAW AND UNIONS are nearly irrelevant to the vast majority of American workers. By the end of 2000, unions represented only 13.5% of eligible workers, and less than 10% of private sector workers.¹ Although organized labor appeared resigned to its waning influence in the 1980s and early 1990s, the election of John Sweeney to the AFL-CIO Presidency in 1995 signaled a dramatic shift. Sweeney and the AFL-CIO seek to revitalize unions by characterizing income inequality as a moral wrong.² An increased emphasis on organizing and the dedication of resources to marketing labor's appeal to workers through the slogan "America Needs

A Raise" have so far produced new excitement within the labor movement and a brief hiatus in the decline in union density, but little reaction from most workers and the general public.

Can labor's rhetoric become reality? Notwithstanding rising income inequality and a steady upward redistribution of wealth,³ American workers' class consciousness remains weak. Most workers internalize responsibility for their positions in the class hierarchy, aspiring to transcend it through individual effort rather than to confront it on a structural level by challenging inequitable wealth distribution through collective action.

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- 1 See AFL-CIO Focuses on Improving Organizing As Numbers Continued Declining in 2000, DAILY LAB. REP. (BNA), Feb. 16, 2001, at AA3.
- 2 See John J. Sweeney, AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE 33-41 (1996).
- 3 See Jeffrey Madrick, THE END OF AFFLUENCE: THE CAUSES AND CONSEQUENCES OF AMERICA'S ECONOMIC DILEMMA 137-39 (1995) (income gap in U.S. was wider in the 1990s than at any time since the end of the Great Depression, and represented the most unequal income distribution in all developed countries); Holly Sklar, CHAOS OR COMMUNITY? SEEKING SOLUTIONS, NOT SCAPEGOATS, FOR BAD ECONOMICS 5-8 (1995) (noting that combined wealth of the top 1% of American families is almost the same as that of the bottom 95%).

Income inequality is part of the foundation of capitalism, and the American Dream of a meritocracy provides a powerful psychological opiate for those who might otherwise rebel.

Yet income inequality in the United States closely tracks race, ethnicity and gender, exposing meritocracy as myth. People of color are disproportionately concentrated in low-waged service sector jobs where union density is lowest.⁴ The Black unemployment rate is more than double that of whites.⁵ Blacks and Hispanics are more than twice as likely as non-Hispanic whites to be poor, and nearly 40% of Black and Hispanic children live in poverty.⁶ Similarly, women of all races remain over-represented in low-paying, dead-end, nonunion jobs with minimal benefits, and female-headed households are disproportionately impacted by income inequality.⁷

Despite the structural character of income inequality and the interplay between race, ethnicity, gender and class status, labor's efforts to challenge income inequality are hobbled by labor laws that render the race, ethnicity, and gender of workers legally irrelevant. The labor laws assume a race and sex-privileged worker who is exploited only along the dimension of economic class. Challenges to employer practices that combine elements of race and class

(such as race discriminatory policies controlling promotion opportunities), ethnicity and class (such as employer English-only policies or policies that disadvantage undocumented workers), or gender and class (such as sexual harassment of female workers) are channeled into the separate track of employment discrimination law. Such harms are cast as individual and primarily social wrongs rather than being seen as structural mechanisms for maintaining an economic caste system demarcated by race, ethnicity, and gender. In the context of a workforce whose demographic diversity has grown by leaps and bounds, this two-track legal regime is a recipe not only for the demise of the labor movement, but for the eradication of workers' rights.

I. THE ANTIQUATED LABOR LAW

The most recent census figures tell a powerful story, showing the Black population increasing by 15.6% and the Hispanic population increasing by 57.9% between 1990 and 2000. By contrast, the white non-Hispanic population grew only 5.9% from 1990 to 2000.⁸ Yet the Wagner Act initiated a labor law regime that is implicitly raced (white) and gendered (male).⁹ The Act was intended to address

4 See Dalton Conley, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA II* (1999); *Latinos Hold Disproportionate Share of Low-Wage Jobs, La Raza Report Says*, DAILY LAB. REP. (BNA), July 6, 2000, at A-6.

5 Conley, *supra* note 4, at 11.

6 See Benjamin I. Page & James D. Simmons, *WHAT GOVERNMENT CAN DO: DEALING WITH POVERTY AND INEQUALITY 21* (2000); Michael Zweig, *THE WORKING CLASS MAJORITY: AMERICA'S BEST KEPT SECRET 88* (2000).

7 Naomi Barko, *The Other Gender Gap*, THE AMERICAN PROSPECT, June 19-July 3, 2000 (reporting that women's earnings continue to average 74 cents for each dollar earned by men, with the impact strongest on the poorest women because of their disproportionate location in low-paying stereotypically female occupations); Celine-Marie Pascale, *Normalizing Poverty*, Z MAGAZINE, June 1995, at 38.

8 See www.census.gov.

9 For a more in-depth examination of the Act's inherently white/male worker model, see Marion Crain & Ken Matheny, "Labor's Divided Ranks: Privilege and the United Front Ideology," 84 CORNELL L. REV. 1542 (1999) (gender); Marion Crain, *Skinwalking in Labor Law*, 49 UCLA L. REV. (forthcoming 2002) (race).

industrial unrest in specific sectors of the economy: large manufacturing workplaces where the workers were overwhelmingly white and male. The Act excluded from coverage categories of workers, such as agricultural workers and domestic servants, who did not conform to the law's image of a white, male worker.¹⁰ Moreover, influenced by the AFL's economic strategy of privileging class issues over race and other social justice issues, Congress rejected attempts by the NAACP to include a clause in the Wagner Act barring racial discrimination by unions.¹¹

The Wagner Act's failure to bar racial discrimination by labor unions had lasting effects on both the law and the labor movement. Unions could – and did – lawfully block Blacks and women from the highest paying jobs, either by excluding them from union membership or penalizing them through seniority structures. Although the Supreme Court eventually imposed on unions a duty to fairly represent all workers employed in units where the union enjoyed rights as the exclusive representative,¹² the duty of fair representation has been interpreted by the courts to provide unions with broad discretion to balance the interests of the [white, male] majority against the interests of numerical minorities within the unit. Unions are afforded

a “wide range of reasonableness” in fulfilling their duty of fair representation.¹³ Only union conduct that is intentionally discriminatory will expose the union to liability; passivity in the face of employer discrimination or negligence in enforcing the collective bargaining agreement will not.¹⁴ Meanwhile, the twin labor law doctrines of majority rule and exclusivity require the employer to deal exclusively with the representative selected by a majority of the workers; once a union is in place, the employer cannot deal with individual workers, groups of workers, or other unions, even if those workers are minorities who claim that their interests in racial equality are not being served by the union.¹⁵

Ultimately, the labor law's united front ideology – the notion that a single union should speak with a single voice on behalf of all workers doing the same type of work at a common worksite – suppressed racial and gender issues within the labor movement and paved the way for the development of separate social justice movements dedicated to advancing race and gender justice. Unions became identified with reactionary politics, opposition to the civil rights struggles of the twentieth century, and support for the Vietnam war. Instead of appreciating and supporting the moral energy emanating from the civil rights and feminist

10 See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 58-68 (2000).

11 Melvyn Dubosky, *THE STATE AND LABOR IN MODERN AMERICA* 129 (1994).

12 See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (union violates duty of fair representation if its conduct is “arbitrary, discriminatory, or in bad faith”).

13 See *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 75-78 (1991); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

14 See *United Steelworkers of America v. Rawson*, 495 U.S. 362, 376 (1990) (“mere negligence” in enforcing collective bargaining agreement does not violate duty of fair representation); *Williams v. General Foods Corp.*, 492 F.2d 399, 405 (7th Cir. 1975) (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 (2nd Cir. 1968) (no NLRA section 8(b)(2) violation unless union directly approaches employer and causes it to discriminate).

15 See NLRA section 9(a), 29 U.S.C. section 159(a) (1988); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 60-61, 66, 70 (1975).

movements and student anti-war protests, organized labor saw these other movements as a diversion of political energies from labor's primary commitment to economism. Many on the Left who otherwise might have been sympathetic to the labor movement came to view it instead with suspicion and hostility.

Hence, when Congress responded to the civil rights movement by enacting the Civil Rights Act in 1964, it prescribed no role for the labor movement or for collective action in effectuating the goals of the Act. Indeed, Title VII of the Civil Rights Act was as much a reaction to union discrimination against minorities as it was a response to employer discrimination. Ultimately, Title VII became a justification for denying protection under the NLRA for collective action by dissident minority workers.¹⁶ Worse, Title VII eschewed the labor law's focus on group rights and explicit protection of rights to engage in collective action, pursuing an individual focus instead.

II. EMPLOYMENT DISCRIMINATION LAW

Although the civil rights and feminist movements were rooted in collective action – practiced on the streets, in the workplace and in the courtroom – the body of law that emerged from these movements focuses on wrongs done to individuals rather than on the harm done to the group by assumptions made on the basis of race or sex. Thus, challenges to racial, ethnic, and gender inequality are understood to invoke

individual rights against discrimination, with the harm primarily social rather than economic in character. The poorest workers must recognize the harms done to them as legal wrongs, identify as victims, and look to civil rights groups, feminist groups, government agencies, private attorneys, and the courts for redress. Rather than functioning as agents using the law to empower themselves, for example by forming unions and mounting a simultaneous challenge to the economic, racial, and gender-based oppression they experience because of their race, ethnicity, gender, and/or class, they became victims dependent on the law's largesse.¹⁷

The law's individual enforcement mechanisms have proved grossly inadequate to the scope of the problem. The EEOC has a backlog of over 100,000 cases,¹⁸ and with a Republican administration in power, it is unlikely to receive increased resources. Some believe that the agency is actually a hindrance to workers seeking to enforce their rights, and have called for its elimination.¹⁹ The EEOC has dealt with its crushing workload by being very selective in the cases it investigates, which means that the costs of litigating discrimination cases – when they are litigated – increasingly fall on individuals. Because the costs of litigating the typical discrimination case are high, most victims of discrimination never find lawyers to take their cases.²⁰ Even if workers find their way to the federal courts, the courts themselves are overburdened. Between 1970 and 1998, employment discrimination claim-filing increased twenty-five fold.²¹

¹⁶ See *Emporium Capwell*, 420 U.S. at 71-74.

¹⁷ See Kristin Bumiller, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988).

¹⁸ Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998).

¹⁹ See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

²⁰ See Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 91 (2001) (estimating that only 5% of potential litigants succeed in obtaining counsel).

²¹ See Evan J. Spelfogel, *Mandatory Arbitration of Employment Litigation*, 54 DISP. RESOL. J. 78 (1999).

An inevitable byproduct of the overburdened litigation system has been the courts' increasing receptivity to alternative dispute resolution in the employment context, a shift which tends to perpetuate the tremendous power disparity between individual workers and their employers. In a series of cases, the Supreme Court has made clear its fondness for individual arbitration as an alternative to antidiscrimination litigation. Despite the risk of coercion inherent in allowing employers to compel workers to waive their right to a judicial forum for employment discrimination claims as a condition to obtaining or keeping their jobs, the Court upheld such a waiver in *Gilmer v. Interstate/Johnson Lane Corp.*, an age discrimination case.²² The Court gave short shrift to *Gilmer's* argument that the agreement should be unenforceable because of the inequality of bargaining power between employer and individual employee, and praised arbitration as a system of resolving workplace disputes.²³ Following *Gilmer*, courts in every circuit but one upheld the validity of predispute agreements to arbitrate employment discrimination claims. This year the Supreme Court brought the lone dissenting circuit into line when it decided *Circuit City Stores, Inc. v. Adams*.²⁴

Predispute employment agreements waiving statutory forum rights in exchange for arbitration have proliferated in the wake of *Gilmer*: by 1999 such agreements bound approximately 10% of the U.S. workforce.²⁵ The resulting privatization of employment discrimination law has potentially grim consequences for individual workers who are not represented by unions. Arbitrators are not

necessarily lawyers and often lack the expertise to resolve statutory claims. Further, they are not bound to apply statutory law and typically need not issue written opinions. Nor are their decisions subject to more than cursory review by the courts. Because employers are "repeat players" and individual workers are not, arbitrators may be expected to tilt in favor of employers who provide them with frequent business. Unlike antidiscrimination statutes, arbitral procedures typically do not provide for broad equitable relief, class actions, or punitive damages. Since employers draft the arbitration agreements and individual workers are presented with only the choice to accept or reject them, meaningful bargaining does not occur. Thus, most agreements will be decidedly one-sided.

While *Gilmer* did not involve a unionized workplace, its rationale has been influential in the union context as well. Initially, the Supreme Court held in *Alexander v. Gardner-Denver* that a union worker who had pursued his race discrimination claim through the arbitration process available to him under a collective bargaining agreement could bring a separate suit in federal court under Title VII on the same claim.²⁶ Seeking to protect minority employees from unions who might compromise an individual worker's statutory rights in an effort to advance the rights of the group of workers as a whole, the Court drew a bright line between collective rights conferred by the labor laws and individual rights conferred by antidiscrimination statutes, holding that the latter could not be part of the collective bargaining process (which extends to arbitration).²⁷ In the wake of *Gilmer*,

22 500 U.S. 20, 35 (1991).

23 *Id.* at 33, 34.

24 121 S. Ct. 1302, 1306 (2001).

25 David E. Feller, *Putting Gilmer Where It Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 1 (2001).

26 415 U.S. 36, 51-52 (1974).

27 *Id.* at 51.

however, the Court implied that *Gardner-Denver's* protection of individual statutory rights in the union context was not absolute, stating in *Wright v. Universal Maritime Serv. Corp.* that a union waiver of an individual worker's statutory rights in favor of arbitration under the collective bargaining agreement might be upheld if the waiver was "clear and unmistakable."²⁸

The waiver cases reveal the danger of conceptualizing employment discrimination as an individual, rather than a collective, concern. When a court reads *Gilmer* and *Gardner-Denver* together, it can conclude, as the D.C. Circuit did in *ALPA v. Northwest Airlines, Inc.*, that unions have no right to intervene when an employer compels unionized workers to sign individual waivers of their statutory forum rights under federal antidiscrimination laws.²⁹ Explaining that the union's majoritarian concerns made it inappropriate for the union to offer waivers of individual workers' statutory rights as a bargaining chip in exchange for group benefits, the court permitted the employer to obtain such waivers individually in exchange for nothing. The message was clear: employment discrimination is an individual matter rather than a group concern, and therefore is not the union's business.

While preserving federal forum rights against sex and race discrimination has been essential in a labor law regime featuring exclusivity and majority rule, continuation of a two-track legal regime risks severing issues of class oppression from racial, ethnic, and gender justice, and reinforces the schism between unions and social justice movements to the detriment of workers. The least powerful workers will be required to choose between aspects of their identities, ignoring the intersectional nature of their experience as workers. As unions struggle to represent increasingly

diverse workforces within the confines of majority rule, minority workers and women will come to see unions as representing race- and gender-privileged workers at the expense of those who are historical outsiders. Worse, employers are permitted to divide workers against one another, dealing individually with them on issues of race and sex discrimination even when the workers have chosen a union as their representative.

III. IMAGINING A NEW LABOR LAW

As the labor movement discovered during the 1930s and the civil rights and feminist movements discovered in the 1960s and 70s, only collective action can effect fundamental change. Law can be an effective strategic tool in a struggle for power, but even the best-crafted statute cannot confer power; only self-organization and activism (supported by law) can. We outline below an alternative system in which labor law and employment discrimination law are merged in a single law which would follow generally the form of the *NLRA*, protecting collective rights, but which would make race and gender justice central to the achievement of economic justice for workers. The artificial distinction between labor law and employment discrimination law would disappear, with the result that labor unions would become socially progressive organizations working side by side with civil rights organizations to fight for workers' rights. Collective action would once again become the weapon of choice against employment discrimination.

1. Recast collective bargaining as a civil right

The new labor law should characterize

²⁸ 525 U.S. 70, 80 (1998).

²⁹ 199 F.3d 477 (D.C. Cir. 1999), *enforced on reh'g en banc*, 211 F.3d 1312, *cert. denied*, 121 S. Ct. 565 (2001).

organizing and collective bargaining as fundamental civil rights.³⁰ Recasting the right to collective bargaining as a civil right means that the state will no longer be neutral regarding the right to unionize but will actively promote that right by shaping the law so that collective bargaining will be available to as many people as possible. The right to participate in decisions that affect one's daily life is a fundamental right in a democratic society, and the state should not be neutral about the right to collective bargaining any more than it should be neutral about the right to be free of racial or sexual discrimination. The consequences of such a shift are far-reaching. Perhaps most significantly, the NLR's coverage would be broadened. Currently, the NLR's restrictive definition of "employee" excludes over half the private sector workforce.³¹ The new labor law would offer the right of collective bargaining to workers who are currently excluded, such as domestic servants, agricultural workers, supervisors, many confidential employees, and lower- and mid-level managers. Collective bargaining should be more than merely a means to the end of industrial peace. It is the keystone of economic democracy, an end in itself.

2. Abolish majority rule/ exclusive representation

The new law should eliminate the doctrines of majority rule and exclusive representation which underpin the NLR's united front ideology, substituting in their place a "members only" form of representation.³² Any organization that is designated through signed authorization cards as the representative of a significant minority of workers sharing a

common occupation at a worksite (expressed as a minimum percentage of the workforce – perhaps 20%), would automatically become the legal representative of those workers without the need for an election. Gone would be the bitter, costly, all-or-nothing representation elections currently legislated under the NLR. Union membership would undoubtedly rise, and much of the hostility and adversarial character of the employer-union relationship established during an election process would be avoided, setting the stage for more productive bargaining.

Two other benefits to unions would result from eliminating majority rule/exclusive representation. Because the duty of fair representation is a function of these doctrines, eliminating them will also negate the need for breach of the duty of fair representation actions. Further, abolishing majority rule also removes the major objection to unions' political activities – their supposed power to extract dues from unwilling members to pay for political activities they do not support. In members-only representation, unions would be free to spend dues on political objectives.

3. Expand the definition of labor organization in the Act to include organizations that exist to advocate for racial, ethnic, or gender justice

Encouraging civil rights, community, and identity-based organizations to organize workers along racial, ethnic and/or gender identity lines and affording them the same protections the new law would extend to traditional unions reintroduces collective action as the primary means of challenging income inequality and

30 For a more in-depth discussion of the significance of revising the right to organize and to bargain collectively as fundamental civil rights, see Joshua Freeman, *Organizing Is A Civil Right*, NEW LAB. F., Fall/Winter 1998, at 95-96; David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C.L. REV. 135 (1998).

31 Gregory, *supra* note 30, at 143.

32 For a more detailed defense of this proposal, see Crain & Matheny, *Labor's Divided Ranks*, *supra* note 9.

discrimination, whatever its basis.³³ We welcome this linkage between workplace struggles and broader community struggles as a means of creating a more politicized labor movement that encompasses activism for social and economic justice beyond the workplace. By involving civil rights and community organizations in workplace issues, labor disputes will be recast as public disputes, involving not only workers but the communities where they live. Further, alliances between the labor movement and social justice movements will be more easily constructed as traditional unions invest in combating workplace discrimination and protecting the civil rights of workers.

4. Make gender & racial justice, including antidiscrimination measures, mandatory subjects of collective bargaining

The new law would encourage a much wider scope of collective action to promote not only workers' pure economic class interests, but those that spring from all of workers' identities that are made relevant by employer practices or policy. "Bread and butter" economic issues will remain important, but social justice issues that are not purely economic and self-interested would be placed on equal footing with traditional wage and hour issues.

5. Overrule *Gardner-Denver* & substitute arbitration under collective bargaining agreements for court enforcement of antidiscrimination rights

Workers who choose the new members-only organizations as representatives and negotiate through them a labor contract that provides for arbitration of workplace disputes would be limited to arbitration as a mechanism for

enforcing their rights against discrimination. Union-negotiated arbitration procedures are likely to have adequate procedural protections to ensure first class justice for workers, and the union's assistance in pursuing grievances would assure representation for a much larger segment of workers and would obviate the need for outside agencies, private lawyers, and courts. Employers' ability under *Gilmer* to require predispute waivers of statutory forum rights on antidiscrimination claims as a condition of employment would provide a powerful incentive for workers to join unions. At the same time, employers would benefit from a collectively-bargained arbitration mechanism that avoids costly defense of each predispute waiver against charges of overreaching and adhesion.

6. Eliminate the ban on secondary boycotts

How will organizations that represent less than a majority at a workplace have enough leverage to effectively represent their members? In the global economy the primary strike has proven to be a weak weapon even under majority rule/exclusive representation and a legally coerced "united front" of workers. Clearly, an organization that represents less than a majority of employees will need more weapons in its arsenal than the primary strike to be effective. Fortunately, at least two alternatives are available: the secondary boycott and interest arbitration.

The secondary boycott prohibition is among the most constitutionally questionable of the NLRA's provisions.³⁴ Recasting collective bargaining as a civil right and importing anti-discrimination norms into labor law would further strain the tenuous distinction between

33 For a more in-depth discussion of this proposal and the next two, see Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 90 CALIF. L. REV. (forthcoming 2001).

34 See James Gray Pope, *Labor and Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

labor speech and political speech that supports the prohibition.³⁵ Moreover, the secondary boycott prohibitions deprive workers of essential leverage in balancing power between employers and workers.³⁶ Under the law we envision, collective action will no longer be primarily vertical – between workers and their employer – it will also be horizontal, building solidarity among diverse workers at multiple worksites.


7. Provide for interest arbitration as a mechanism for settling labor disputes

A radical labor law need not eschew peaceful settlement of disputes. Interest arbitration is a rational alternative to economic warfare. When Congress enacted the Wagner Act, it provided that parties would settle their disputes primarily by waging economic warfare through strikes, picketing, and lockouts. The economic warfare model is both raced and gendered because the workers that Congress had in mind when it endorsed the economic warfare model were primarily white, male industrial workers in large oligopolistic industries, such as steel and automobile manufacturing, who possessed the economic clout to batter powerful employers.

The NLRA's exclusive reliance on economic warfare deprives some of our country's most vulnerable employees of the right of collective bargaining. Poorly paid, low-skilled service workers are not ordinarily in a position to successfully bring economic pressure on their employers, and lack the leverage to make the

existing law work for them. Mandatory interest arbitration of disputes arising during collective bargaining would equalize power and has the potential to expand radically the number of employees who could enjoy the benefits of a labor contract.



Markets and labor supply/demand are notoriously difficult to predict. The only thing that we can say with confidence about the future of labor law is that our present course will condemn the NLRA and unions to the fate of the dinosaurs. In a market characterized by burgeoning income inequality, this would truly be a loss. On the other hand, the persistence of a weak labor movement provides only an illusion of economic justice, and serves only a fraction of the workers in today's economy. It is time to imagine a new law which might pave the way for labor's rhetoric about ending the moral wrong of income inequality to become reality. We have offered an initial blueprint for legal reform that would facilitate the merger of legal activism pertaining to racial, gender, and economic exploitation of workers, extend collective bargaining to many more workers, foment a politicized labor movement deeply invested in the struggle for racial and gender justice, elevate the right to collective bargaining to a civil right, and emphasize the importance of collective action in the struggle for equality for minorities and women. 

35 See Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1996-99 (1994) (suggesting that the secondary boycott prohibitions are unconstitutional as applied to labor speech raising issues of race and gender equality).

36 See, e.g., Charles Craver, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 145-46 (1993); Paul Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 272-73 (1990); Theodore St. Antoine, *Federal Regulation of the Workplace in the Next Century*, 61 CHI.-KENT L. REV. 631, 653-54 (1985).