

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

2002

### New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement

Ruben J. Garcia

*University of Nevada, Las Vegas – William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Labor and Employment Law Commons](#)

---

#### Recommended Citation

Garcia, Ruben J., "New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement" (2002). *Scholarly Works*. 659.

<https://scholars.law.unlv.edu/facpub/659>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

# New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement

*by*  
RUBEN J. GARCIA\*

## Table of Contents

Introduction.....	81
I. A Brief History of Minority Voice in the Labor Movement—The Historical and Contextual Need for Identity Caucuses in Unions .....	92
A. Racism, Sexism, and Anti-Immigrant Sentiment in the Labor Movement .....	92
B. Black Caucuses, 1964–1975 .....	94
C. Rank-and-File Protest Outside the Auto Industry.....	97
D. Chicano/Chicana Insurgency .....	100
E. Immigrant Caucuses.....	100
F. From Caucuses to Constituency Groups, 1972–1995 .....	102
(1) A. Phillip Randolph Institute (APRI) and Coalition of Black Trade Unionists (CBTU) .....	102
(2) The Coalition of Labor Union Women (CLUW) .....	103
(3) Labor Council on Latin American Advancement (LCLAA) ..	106
(4) The 1990s: APALA, PAW and AFL-CIO Recognition of Identity Caucuses as “Constituency Groups” .....	108
(5) Internal Union Caucuses and Committees.....	110
G. The Difficulty in Defining “Identity Caucuses” .....	111
II. The “Problem” of Multiple and Distinct Voices in Unions: A Theoretical and Empirical Perspective .....	113
A. Analytical Framework: Critical Realism .....	114

---

\* Visiting Professor of Law, University of California, Davis, King Hall School of Law, 2002–2003; William H. Hastie Fellow, LL.M. 2002, University of Wisconsin Law School; J.D. 1996, UCLA School of Law; A.B. 1992, Stanford University. This Article was supported by a research grant from the University of Wisconsin Law School. I thank Jane Larson, Carin Clauss, Joel Rogers, David Schwartz, Jim Jones, Kim Crenshaw, Rick Abel, Laura Gómez, Lisa Iglesias and Frank Valdés for all of their advice and support. Above all, my thanks and love go to my wife Tori Carreón, for her support, advice, and faith in me.

B.	Identity-Based Organizing and Its Critics .....	117
III.	The Legal Environment for Minority Voices at Work.....	122
A.	The Exclusive Representative Rule .....	122
B.	<i>Emporium Capwell</i> and Its Implications for Identity Caucuses .....	125
C.	Envisioning Broad Use of the Proviso to NLRA Section 9(a) .....	130
D.	Exit, Voice, and Exclusivity .....	133
E.	Exclusivity and Labor's Civil Rights Agenda .....	137
IV.	How Power Is Being Voiced at Work Today .....	140
A.	A Realistic View of Worker Power in the Contemporary Context .	140
(1)	Rank-and-File Caucuses Not Sanctioned by Union Leadership.....	142
(2)	Work Stoppages Not Authorized By the Union Leadership ....	143
(3)	Union Democracy Caucuses .....	143
(4)	Rank-and-File Gay and Lesbian Caucuses .....	145
B.	Field Research: The Reach of Exclusivity.....	146
(1)	Why Field Research Is Needed .....	146
(2)	Scope and Methodology .....	147
(3)	Observations and Survey Data .....	148
(4)	Implications of the Study.....	151
V.	How New Voices Can Be Heard: Representative Union Governance 153	
A.	Caucuses and the Law of Union Democracy .....	155
B.	Race-Balanced Leadership and Landrum-Griffin's Neutral Principles.....	157
C.	A New Vision of Union Democracy for Women and People of Color.....	160
	Conclusion .....	162
	Appendix: Methodology .....	164

## Introduction

“I believe in my union.”<sup>1</sup>

“I believe in my caucus!”<sup>2</sup>

Immigrants, people of color, and women form the backbone of the United States economy today, and they are a substantial presence in America’s labor unions.<sup>3</sup> The labor movement has struggled to cope with the increasing diversity of its membership, and to change its often-negative image on race issues, gender relations, and immigration policy.<sup>4</sup> Meanwhile, people of color and women have banded together in caucuses and constituency groups when they felt that the leadership in their unions has not addressed their concerns. Throughout the 1960s and 1970s, caucuses were formed out of rank-and-file discontent within unions. But, in recent years, internal union caucuses have become less prevalent, and have evolved into nationwide “constituency groups” that have become a mainstream part of the umbrella organization to which most U.S. unions belong—the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

This Article examines the operation of new voices at work through race and gender identity caucuses within the U.S. labor movement in relation to the development of the legal doctrine that defines the extent to which minority groups have bargaining power with their employers and their unions. The legal landscape is dominated by the “exclusive representative rule,” by which the majority union is the sole bargaining representative of all employees in the unit whether or not they are also members of a minority

---

1. Interview with Subject No. 11, Black female member of the Service Employees International Union African American Caucus, in Chicago, Ill. (Aug. 3, 2001). Pursuant to the Human Subjects protocol under which this research was conducted, I promised confidentiality to the people I interviewed for this Article. I will refer to the respondents as “Subject No. \_\_,” and give their affiliations and relevant identifying information.

2. Survey Response from Subject No. 10, Black male member of the United Auto Workers and the Black Rank and File Exchange (Dec. 29, 2001) (on file with author).

3. In 1986, according to the Bureau of Labor Statistics, Department of Labor, 34% of American union members were women and 21% were Black or Hispanic. In 1998, women made up 39%, and Blacks and Hispanics comprised 24% of union members. PAUL F. CLARK, *BUILDING MORE EFFECTIVE UNIONS* 161 (2000).

4. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) is the parent organization of affiliated unions representing approximately thirteen million workers. The AFL-CIO’s recent campaign to increase union representation, called “Voice@Work,” has targeted the large numbers of unorganized women, immigrants and workers of color as fertile ground for building the kind of density the union movement needs to survive in the Twenty-First Century.



caucus.<sup>5</sup> Several scholars have argued that the exclusive representative rule is outdated and should be repealed in order to increase participation in the labor movement as a whole.<sup>6</sup> Feminist and critical theorists have added that the exclusive representative rule prevents women and racial minorities from having their concerns heard in white male dominated unions, and should be abolished or relaxed to require employers to bargain with racial minorities or women at the groups' request.<sup>7</sup>

In light of the foregoing debate, the questions examined in this Article are: (1) Would immigrants, racial minorities and women, if given the opportunity, prefer to bargain separately with employers if their unions are unresponsive to their needs?; (2) Does the existence of identity caucuses within the labor movement threaten unity within unions or serve as an aid to unions' efforts to organize women and people of color?; (3) What legal options are currently available for dissatisfied minority union members and how could those options be enhanced?; and (4) Are there reforms to internal union governance which would serve the interests of women and people of color even under the current legal regime?

In this Article, I argue that some scholars overstate the barriers posed by the exclusive representative rule to the advancement of women and people of color in their unions. Instead, the historical evidence and my field research show that members of race and

---

5. 29 U.S.C. § 159(a) (1998) (emphasis added) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

6. Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975); Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791 (1998); CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 174-76 (1988).

7. Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1619 (1999) [hereinafter *Labor's Divided Ranks*]; Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 66 (1995) [hereinafter Crain, *Women, Labor Unions*]; Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

gender identity caucuses have not favored the right to bargain separately from their unions but instead prefer formal and informal caucuses as reform movements within their unions. In fact, under current law a minority caucus has several options aside from separate bargaining that might be more effective at making its concerns a central part of the union's agenda. Indeed, because of the weakness of the employer's duty to bargain with majority unions as interpreted by the courts, the interests of minorities and women are more likely to be served by increasing the bargaining power of caucuses within unions.

Recently, identity caucuses have attracted the attention of a number of scholars. Some scholars have studied identity caucuses in nonunion professional environments as alternatives to unions.<sup>8</sup> Scholars also have studied the effects of minority caucuses in non-union environments, such as caucuses of minority professionals in California's Silicon Valley and large corporations.<sup>9</sup> Other scholars have argued that identity caucuses in unionized workplaces impede solidarity among all workers and stifle the formation of a united front against the employer.<sup>10</sup> In this Article, I argue that identity caucuses

---

8. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 161-62 (1993) [hereinafter Hyde, *Employee Caucus*]. On caucuses within unions, Hyde writes:

I see the continued existence of caucuses within labor unions as a potential antidote to some of the problems of unions: their bureaucracy, weak internal democracy, and low rates of participation. An active caucus system could encourage participation, provide loyal opposition to union leadership and create a richer internal union political life without weakening the union in its relations with employers.

*Id.* See also Alan Hyde, *Employee Identity Caucuses in Silicon Valley: Can They Transcend the Boundaries of the Firm?*, 48 LAB. L.J. 491, 491-97 (Aug. 1997).

9. Raymond A. Friedman, *Network Groups: An Emerging Form of Employee Representation*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL MEETING 241 (Paula B. Voos ed., 1996) (examining the success of minority "network groups" among Black professionals in largely non-union settings); John Brown Childs, *Beyond Separatism and Integration: The Ramifications of African-American Caucus Groups for Today's Institutions*, 12A STUD. L., POL. & SOC'Y 177 (1992); Roy B. Helfgott, *The Effectiveness of Diversity Networks in Providing Collective Voice for Employees*, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 348 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

10. Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339 (1997); TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURAL WARS 226 (1995) [hereinafter GITLIN, TWILIGHT OF COMMON DREAMS]; MICHAEL J. PIORE, BEYOND INDIVIDUALISM 164-66 (1995); Todd Gitlin, *Beyond Identity Politics: A Modest Precedent*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL

are important checks on the white male majority rule still present in many unions. Even in a labor movement that is continually becoming less white and less male, caucuses will play an important role to ensure that immigrants, people of color, and women in positions of power reflect the interests of their constituencies. Further, my research shows that identity caucuses in the contemporary context have not been a source of division as feared by some. My research also suggests that identity caucuses do not wish to supplant the role of traditional unions. Instead of changing the law governing the bargaining relationship between the employer and the union, the law of internal union governance should be reformed to provide greater voice for caucuses within unions.

Part I of this Article, *The History of Minority Voices in the Labor Movement*, begins by examining the development of race and gender identity caucuses in the context of the historical discrimination against immigrants, women, and people of color within U.S. unions. In the 1960s and 1970s, caucuses manifested minority discontent within largely white male unions. The legal obligations placed upon unions by the Civil Rights Act of 1964 to prevent discrimination against women and minorities shifted the locus of minority protest within unions from rank-and-file rebellion to the courts.

In the last quarter of the Twentieth Century, the character of union caucuses changed to nationwide networks and formalized civil rights committees in many union locals. The nationwide networks have chapters in most large cities and recently have been officially recognized by the AFL-CIO. In 1995, the AFL-CIO elected John Sweeney, Richard Trumka, and Linda Chavez-Thompson to lead the labor federation as the "New Voice" slate, promising a more inclusive and invigorated labor movement. As one of its first official acts, the leadership officially recognized nationwide identity caucuses, or "constituency groups," as referred to by the AFL-CIO, which have members in a variety of affiliated unions and chapters in most large cities. These AFL-CIO "support groups" include the long-existing Coalition of Black Trade Unionists (CBTU), the A. Phillip Randolph Institute, the Labor Council on Latin American Advancement (LCLAA), the Coalition of Labor Union Women (CLUW) (all existing since the early 1970s), as well as the more recently-formed Asian Pacific American Labor Alliance (APALA) and Pride at Work (PAW) for gays and lesbians. In addition, the AFL-CIO and many

locals have Civil Rights and Women's Committees, while the Service Employees International Union (SEIU) and other large unions such as the Amalgamated Transit Union have nationwide African American, Latino/a and Women's caucuses. This Article explores whether these internal committees and caucuses function as identity caucuses under several possible definitions of the term "identity caucus."

There is little dispute among the current leaders of the AFL-CIO that certain identity caucuses should exist in the labor movement. Indeed, the AFL-CIO has encouraged its affiliates and central labor councils to encourage the formation of multi-union groups such as CBTU and LCLAA. However, there is little discussion of exactly what role these groups should play within unions themselves. The roles that the caucuses currently play in unions, and whether and how their role should be strengthened, are central questions addressed by this Article. Part I concludes by searching for a definition of identity caucuses, even though I recognize that "caucuses" are often informal networks and community organizations that defy easy categorization.

In Part II of this Article, The "Problem" of Multiple and Distinct Voices, I examine the shifting and temporal nature of identity, as well as the multiple and intersectional identity clusters that many workers hold. I analyze the arguments for and against caucuses using a framework I call critical realism. In brief, this model is the merger of Critical Legal Theory and Legal Realism in order to determine social conditions as they are. In short, critical realism accepts the "critical" view of the endemic nature of racism and sexism in the workplace, but seeks to be "realistic" using social science methods in designing legal reform programs in light of contemporary realities and the limits of legal change. Thus, my analysis is based on the contemporary realities of severe management resistance to unions in the private sector economy and the enduring force of racism and sexism in the United States.

Because the U.S. system of worker representation is founded on employee choice, reforms to the system must be favored by workers in order to reverse the precipitous decline of unionization in the American economy. Based on my field observations of caucus activity, I challenge the notion that identity caucuses are inherently separatist and serve to fragment identities and solidarity among all workers, because: (1) most caucuses do not exclude based on race or gender, and many identities are represented; (2) many workers are members of more than one caucus; and (3) caucuses have not sought to change the bargaining relationship with the employer. I argue that

caucus activity is not only a drive for greater leverage of minorities within the labor movement, but also a move for union democracy that is based on group recognition rather than just individual rights. Race and gender caucuses, I argue in Part II, are essential elements of a union movement that respects race and gender difference and accords women and people of color equal share of governance in white male dominated unions. In this regard, I question the views of scholars who believe that race or gender caucuses serve to harm worker solidarity.<sup>11</sup> On the contrary, identity caucuses have been central to the formation and strengthening of unions in several cases.<sup>12</sup> I base this argument on my field observations of race and gender identity caucuses in the labor movement. Further, to submerge race and gender identity fails to appreciate the permanence of racism and sexism in the workplace and the need for bargaining structures to ameliorate the current workplace problems faced by people of color and women. Building the bridges to the community organizations that are essential to the success of the labor movement will begin with labor constituency groups and caucuses.<sup>13</sup>

Feminist and critical theorists correctly point out that constituency groups “ensure a mechanism for the voice of the most oppressed groups in the decision making process” of the union.<sup>14</sup> Some of these scholars also argue for the repeal of the exclusive representative rule, and argue that groups such as CBTU, LCLAA,

---

11. McUsic & Selmi, *supra* note 10; GITLIN, *TWILIGHT OF COMMON DREAMS*, *supra* note 10, at 226; Gitlin, *Beyond Identity Politics*, *supra* note 10, at 152; PIORE, *supra* note 10, at 164–66. In *BEYOND INDIVIDUALISM*, Piore writes:

[M]ost important for an understanding of social policy at the current juncture, among the structural changes that have worked to undermine the position of trade unions in American society has been the gradual emergence of strong organizations and group affinities based on sex, sexual preference, racial and ethnic ties, religion, physical handicap and the like. These new affinities have severely compromised the status of trade unions as representatives of social grievances of any kind.

*Id.* at 19.

12. Ruth Needleman, *Space and Opportunities: Developing New Leaders to Meet Labor's Future*, 20 *LAB. RES. REV.* 5 (1993) [hereinafter Needleman, *Space and Opportunities*] (“independent spaces” like caucuses are places where diversity can be encouraged and where women and people of color can gain leadership experience); Ruth Needleman, *Union Coalition Building and the Role of Black Organizations: A Study in Steel*, 25 *LAB. STUD. J.* 79 (2000).

13. Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together to Organize Low-Wage Workers*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 71 (Kate Bronfenbrenner et al. eds., 1998).

14. *Labor's Divided Ranks*, *supra* note 7, at 1619; Iglesias, *supra* note 7, at 496.

and other community groups could replace traditional unions as bargaining representatives for minority employees.<sup>15</sup> However, I suggest that these scholars overstate the benefits and understate the potential costs to minority employees if the exclusive representative rule was to be repealed. Instead, I argue that efforts should be made to institutionalize and strengthen the role of identity caucuses *vis-à-vis* majority representatives. In effect, I argue for a revitalized union democracy movement that privileges group interests over individual rights, particularly with respect to race and gender concerns in the workplace. I will also explore the views of people of color and women in unions, as to whether they would prefer a system of separate bargaining over a system that gives caucuses more bargaining power. At the heart of this Article is the problem of trying to achieve the elusive optimal mix of “exit” and “voice” in unions—not just from the economic standpoint of making employees more successful at the bargaining table, but from the standpoint of making unions more democratic institutions that are responsive to minorities even in a system of majority rule.<sup>16</sup> This Article argues for the enhancement of the voices of minorities and women within unions, rather than making exit from the union easier, because of the wholesale legal changes that would have to take place to make exit a desirable option. Finally, an exit strategy would leave union decisions in important areas, such as union endorsement of political candidates, untouched. Because imminent and wholesale reform of the law of union-management bargaining looks very unlikely in the current political environment, I conclude that it is more realistic to fashion a system of enhanced internal union bargaining to increase the power of caucuses and constituency groups.<sup>17</sup>

The current legal options of union minorities are examined in Part III, The Legal Landscape for Minority Voices at Work. This landscape is dominated by the United States Supreme Court’s 1975 decision in *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>18</sup> where the Court, in an opinion by Justice Thurgood

---

15. See *Labor’s Divided Ranks*, *supra* note 7, at 1617 nn.372–74.

16. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 55 (1970).

17. Although labor law reform has often been touted as one of the labor movement’s top priorities, it did not occur during the eight-year Clinton Administration and does not appear to be imminent during the George W. Bush Administration. See *Outlook for Labor Law Largely Unchanged by Election*, *AFL-CIO General Counsel Says*, 19 DAILY LAB. REP. (BNA), Jan. 29, 2001, at A-10.

18. 420 U.S. 50 (1975).

Marshall, held that the employer had no duty to bargain with a dissident group of African Americans who felt that the employer and the union had failed to address discrimination in the workplace. *Emporium Capwell* has been the target of justified criticism by many scholars.<sup>19</sup> The Court concluded that the Black employees engaged in separate bargaining, and refused to hold that their activity might be protected under section 7 of the National Labor Relations Act (NLRA) or the proviso to section 9(a) of the NLRA.<sup>20</sup> *Emporium Capwell*, however, does not present a substantial barrier to the greater bargaining power of identity caucuses. Although a private sector employer clearly has no duty under federal labor law to bargain with identity caucuses and may even commit an unfair labor practice by “bargaining” with an employee organization that does not represent a majority of employees in the unit, this begs the question of what caucus activity will constitute “bargaining” with the employer in derogation of the exclusive representative. In Part III, I examine the limits of *Emporium Capwell* and outline other options available to dissident minority and female union members. These options include decertification of the majority union, job actions not authorized by the union, duty of fair representation litigation against the union, and getting elected to union leadership. I examine the merits of each alternative with a critical wariness of rights reforms, and the realization that some modicum of legal protection is necessary for people of color in unions.<sup>21</sup> I also discuss whether

---

19. WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 256–66 (1977); *Labor's Divided Ranks*, *supra* note 7, at 1560–62; Iglesias, *supra* note 7, at 422–28; Hyde, *Employee Caucus*, *supra* note 8, at 160 n.38:

[T]he employees in *Emporium Capwell* could have negotiated binding individual or group promises on job discrimination, had the employer been willing, and could have enforced those promises in suit in state court. Nor were the employees in *Emporium Capwell* unprotected because of the manner in which they sought separate negotiations (that is, picketing the store); the Board had not found that conduct “disloyal”; the Court of Appeals had remanded for just such findings; but the Supreme Court held that § 7 did not protect minority bargaining no matter how that demand was advanced.

20. The proviso to section 9(a) of the National Labor Relations Act protects the right of

any individual employee or a group of employees . . . at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect.

29 U.S.C. § 159(a) (1998).

dissidents' use of these remedies might lead to more strife within unions than caucuses. I conclude that the present alternatives are not effective at bringing minority concerns to the forefront of union agendas. Instead, the greatest gains made by women and people of color might be attained through organized caucuses that have greater institutional status under federal labor law.

In Part IV, titled *How Power Is Being Voiced at Work Today*, I examine case studies of people of color, immigrants, and women asserting power in their unions. Ordinarily, these efforts have coalesced around informal groups of workers of similar ethnic and gender backgrounds seeking greater decision-making power in white male dominated locals. Their concerns have often dovetailed with those of the union democracy movement, joining forces with union democracy "reform caucuses" such as Teamsters for a Democratic Union (TDU) or the New Directions movement within the United Auto Workers (UAW) to assert member control over union leadership. This has particularly been the case with Latino/a immigrants who in several historical examples have sought to assert democratic power within their unions rather than attempting to bypass the majority union. I argue that the goals of reform caucuses and identity caucuses have converged and complemented one another to increase minority clout within unions while at the same time furthering the goal of union democracy. Besides case study accounts of how workers of color and women have challenged power in their locals as a means of determining whether identity caucuses can serve as alternative representatives, I surveyed members of identity caucuses in the labor movement today and found that they have a strong faith in traditional unionism.

Finally, in Part V, or *How New Voices Can Be Heard*, I set forth a framework by which the bargaining power of the caucuses may be strengthened under federal labor law.<sup>22</sup> In doing so, I am cognizant of

---

21. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994); Derrick A. Bell, Jr., *Racial Realism*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 302 (Kimberlé Crenshaw et al. eds., 1995); Linda Greene, *Race in the Twenty-First Century: Equality Through Law?*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* at 292.

22. Although my proposals will focus primarily on defining and empowering race and gender caucuses in labor unions, the legal framework could be utilized by "reform caucuses" which seek more democratic unions but are not focused specifically on the needs of people of color or women. For a discussion of reform caucuses in unions, see MIKE PARKER & MARTHA GRUELLE, *DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP* 67-83 (1999).



various pitfalls. First, the unwieldy, bureaucratic nature of the National Labor Relations Board (NLRB) cautions against creating new structures to enforce rights. Second, critical theorists have cautioned against placing too much reliance on legal remedies as a means of liberation for minorities and women.<sup>23</sup> Third, the existing law governing the relations of unions to their members—the Landrum-Griffin Act of 1959 (“Landrum-Griffin”)—has been criticized for being cumbersome and individualized.<sup>24</sup> Finally, as stated above, there remain many avenues in the existing labor law structure for the operation of minority caucuses within and outside of majority rule labor unions. Still, the bargaining power of minority caucuses could be enhanced by reforms aimed at regulating the relationship between the caucuses and the majority representative union. In addition, as one scholar has pointed out, the caucuses can play an important role in providing workers representation and mediation of their grievances in cases involving discrimination.<sup>25</sup>

The reforms that I propose relate to the nature of bargaining and collective power, and are central even after race and gender minorities attain leadership positions in their unions.<sup>26</sup> Landrum-Griffin should be amended to ensure that caucuses are not ensnared by reasonable union rules against “dual unionism” and “disloyalty.” Other amendments might be necessary to allow for representation of caucuses in union governance, in light of court decisions that have struck down voluntary affirmative action programs designed to diversify union leadership.<sup>27</sup> These reforms will serve the caucuses’ interest in internal reform while preserving the unified bargaining strength of traditional unions.

Caucuses have played an important role in helping women and minorities win elections for union offices.<sup>28</sup> However, the power of incumbency and the usually uncontested nature of union elections

---

23. See authorities cited *supra* note 21.

24. Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247 (2000); Steve Fraser, *Is Democracy Good for Unions?*, DISSENT, Summer 1998, at 33–39.

25. Michael J. Yelnosky, *Title VII, Mediation and Collective Action*, 1999 U. ILL. L. REV. 583 (1999) (discussing the role of identity caucuses in mediating Title VII disputes).

26. Other scholars have explored methods of achieving greater minority leadership in unions. See Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983); Michael J. Goldberg, *Top Officers of Local Unions*, 19 LAB. STUD. J. 3 (1995). For recommendations concerning proportional representation and other voting schemes to increase minority participation in union leadership, see McUsic & Selmi, *supra* note 10, at 1371–72.

27. *Donovan v. Illinois Education Ass’n*, 667 F.2d 638 (7th Cir. 1982); *Shultz v. Local 1291, Int’l Longshoremen’s Ass’n*, 338 F. Supp. 1204 (E.D. Pa. 1972).

28. Needleman, *Space and Opportunities*, *supra* note 12.

mean that people of color and women cannot simply rely on the political processes within their unions to assert greater power. This Article concludes by acknowledging that even in unions comprised predominantly of women and people of color, internalized hierarchies of race, color, ethnicity, national origin, and immigration status may prevent solidarity among those of the same race or ethnic group. As Marion Crain has argued, the ideologies of the labor movement cannot continue unchanged if it is to fully incorporate women and people of color into its ranks.<sup>29</sup> In order to give caucuses a greater role, labor's ideology of "local autonomy," which insulates local leadership from "outside agitators," must change. Caucuses and constituency groups should be allowed to play a role in the processing and mediation of grievances in order to assure minorities and women that union officials who cannot relate to their concerns are not ignoring their grievances. In order to regulate conflicts among caucuses, the AFL-CIO can create policing structures similar to those it has in place for the adjustment of jurisdictional disputes between unions and the "no-raiding" clause of its constitution.<sup>30</sup> The AFL-CIO could also serve to facilitate cooperation between community groups and local unions under this rubric. This kind of intervention may be particularly important in the case of immigrant workers, who for a variety of reasons may have greater ties to community groups such as workers' rights centers.<sup>31</sup>

At its core, this Article seeks an accommodation between the current trend in labor and employment law toward individual rights, and the principles of collective strength that make unions stronger and more accountable to their members. Bargaining is too often seen as a diametric employer/union process rather than a multilateral process of negotiation *within* unions. In order for the labor movement to survive, its leaders must recognize the need not only to attract minority and female members into its ranks, but also to foster and retain a sense of commitment by these members to the union movement. It is too often assumed that unions should speak with only one voice. However, I argue that the many voices within unions

---

29. *Labor's Divided Ranks*, *supra* note 7, at 1553–55.

30. AFL-CIO, CONSTITUTION art. III, § 8 (as amended Dec. 3–6, 2001) [hereinafter AFL-CIO CONST.], available at [http://www.aflcio.org/about/constitution\\_main.htm](http://www.aflcio.org/about/constitution_main.htm) (also on file with author).

31. In this way, identity caucuses may also serve as centers of the kind of "citizen unionism" which Katherine Stone advocates. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

need to be institutionalized and legitimated through caucuses that reflect workers' diverse and multiple identities.

### **I. A Brief History of Minority Voice in the Labor Movement—The Historical and Contextual Need for Identity Caucuses in Unions**

“At one point, everyone thought we [in CBTU] were communist sympathizers. But CBTU was an advocate. . . . Groups like CBTU and CLUW serve as escape valves.”<sup>32</sup>

In order to determine the propensity of people of color and women to demand changes in the way their relationship with their unions is structured, it is useful to examine the historical context in which identity caucuses arose. Viewing the history of mobilization by people of color, and how it informs current debates about legal issues, is consistent with the critical realist approach that I will take in this Article.<sup>33</sup> History is rife with examples of the union movement subordinating the interests of people of color, immigrants, and women to the interests of white men.<sup>34</sup> The question then is how these groups mobilize given these constraints, and what they believe to be the most appropriate route to reverse their subordination. My reading of history supports the conclusion that race and gender caucuses found the basic representational regime that they were confronting to be unproblematic and sought instead to influence power within that structure. I will then examine how identity caucuses have evolved into mainstream organizations in the U.S. labor movement.

#### **A. Racism, Sexism, and Anti-Immigrant Sentiment in the Labor Movement**

The history of discrimination in the labor movement, and the parallel history of subordination against minorities, women, and

---

32. Interview with Subject No. 6, Black female member of Coalition of Black Trade Unionists, Coalition for Labor Union Women, and United Auto Workers, in Milwaukee, Wis. (Apr. 3, 2001).

33. I define “critical realism” to be an approach that takes into account historical and contemporary contextual evidence with the goal of challenging existing power inequalities. *See infra* Part II.

34. *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATION, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (arguing that African American interests were not adequately represented in the union lobbying that led to the New Deal legislation establishing minimum wage and collective bargaining rights).

immigrants in the United States, is well-documented.<sup>35</sup> I endeavor here not to catalog all of that discrimination, but to give a brief context for the rise of identity caucuses in the era after the Civil Rights Act of 1964. Before the creation of the AFL-CIO in 1955, there was a division between the skilled laborers in the American Federation of Labor (AFL), and the unskilled, more racially and ethnically diverse Congress of Industrial Organizations (CIO). Even after the merger of the AFL and CIO, many unions continued to actively support and condone the segregationist ways of life in mainstream society. The specter of Jim Crow that pervaded so much of American society was also present in unions. Segregated locals existed side by side throughout the first half of the Twentieth Century, and into the 1950s, even after the merger of the AFL and CIO. Six years after the merger, the National Association for the Advancement of Colored People was still concerned about the "failure of the AFL-CIO . . . to take decisive action against the continued existence of segregated locals . . . ."<sup>36</sup>

As a result of continued discrimination, Black labor groups such as Coleman Young's National Negro Labor Council (NALC) (1951-1955) and A. Phillip Randolph's Negro American Labor Council (1959-1965) were formed to advocate for the needs of Black workers within the labor movement. In Randolph's words, the NALC "reject[ed] black nationalism as a doctrine and practice of racial separatism . . . ."<sup>37</sup> Detroit also had been a source of early groups of Black unionists because of the confluence of the large numbers of Blacks in the city and especially in the auto industry. The National Association of Negro Trade Unionists formed in Detroit in 1956.<sup>38</sup> Meanwhile, the Trade Union Leadership Conference (TULC) sought

---

35. See, e.g., PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER, 1619-1973* (1974); *LABOR DIVIDED: RACE AND ETHNICITY IN UNITED STATES LABOR STRUGGLES, 1835-1960* (Robert Asher & Charles Stephenson eds., 1990); DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

36. RICHARD ITON, *SOLIDARITY BLUES: RACE, CULTURE, AND THE AMERICAN LEFT* 71 (2000).

37. *Id.* NALC became the A. Phillip Randolph Institute in 1965.

38. NATIONAL ASSOCIATION OF NEGRO TRADE UNIONISTS, *RULES AND BY-LAWS*, available in Ernest Dillard Collection, Box 2, Folder 2-50, Archives of Labor and Urban Affairs, Wayne State University. The Preamble to the Rules and Bylaws states, in part, "We declare that we as Negro Trade Unionists have a special responsibility for winning our union organizations within the labor movement to the struggle for the rights of the Negro people and other minority groups." *Id.*

to organize Black autoworkers to address issues concerning Blacks and labor starting in 1957.<sup>39</sup>

Even though the Civil Rights Act of 1964 granted formal equal opportunity to people of color and women, unions continued to resist consent decrees implementing affirmative action plans designed to increase the numbers of minorities and women in previously segregated workforces. Minority caucuses and separatist unions gave voice to people of color and women who opposed unions' discriminatory attitudes. I will now focus on the role of caucuses and constituency groups in the post-Civil Rights Act era.

### B. Black Caucuses, 1964–1975

Black<sup>40</sup> caucuses arose out of the tension between “integrationist” and “separationist” strains of African American thought, and as a manifestation of the “Black Power” movement of the 1960s.<sup>41</sup> Much Black unionist activity paralleled the unrest in urban centers where large steel and auto factories stood. From the start, there was tension between a vision of Black power that wanted to separate from established unions and one that sought to create a Black workers organization auxiliary to the union. The first manifestation of the latter strategy was the Trade Union Leadership Conference (TULC), organized by Black unionists with UAW Local 600 at Ford's River Rouge plant.<sup>42</sup> Georgakas reports that TULC was part of the UAW bureaucracy by 1961.<sup>43</sup>

The Dodge Revolutionary Union Movement (DRUM), often cited as the prototypical example of Black separatism, burst onto the Detroit scene in the late 1960s.<sup>44</sup> DRUM sought to improve the conditions of Black workers in unions. However, DRUM was not only concerned with the status of Blacks, and many whites joined

---

39. ITON, *supra* note 36, at 71.

40. I use “Black” to denote a specific social group, and because it was common among the Black Caucuses of the time. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

41. Childs, *supra* note 9, at 182.

42. DAN GEORGAKAS & MARVIN SURKIN, *DETROIT: I DO MIND DYING* 43 (2d ed. 1998).

43. *Id.*

44. 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, 289 (Herbert Hill & James E. Jones, Jr. eds., 1993); Charles Denby, *Black Caucuses in the Unions*, in AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR 137 (Burton Hall ed., 1972).

DRUM's wildcat strikes (work stoppages unauthorized by the union) at Dodge's main plant.<sup>45</sup> DRUM also advocated on behalf of Arab immigrants in the plant, and reached out to them by distributing leaflets written in Arabic.<sup>46</sup> Revolutionary Union Movement caucuses soon spread to other UAW-represented plants,<sup>47</sup> such as FRUM at Ford's River Rouge Plant, ELRUM at Chrysler's Eldon Avenue plant, and CADRUM at Cadillac.<sup>48</sup> Militant activity was not limited to the UAW in Detroit. In the late 1960s, the United Black Brothers of the UAW organized wildcat strikes in other parts of the country.<sup>49</sup> Black aviation workers in California and electrical workers in Chicago also engaged in wildcat strikes in the mid-1960s.<sup>50</sup>

The tension between separatism and integration was most pronounced in the Detroit UAW. The older Black workers of the UAW formed the Ad Hoc Committee of Concerned Negro Auto Workers, which was not prone to the same radical tendencies as younger members of the League of Revolutionary Black Workers (the "League").<sup>51</sup> The UAW responded to the Committee's demands by appointing a Black to the International Executive Board and opening staff jobs to "moderate" Blacks.<sup>52</sup> Meanwhile, the League had more radical demands, including (1) recognizing the League and its affiliates as bargaining representative of the Black workers with the power to call officially sanctioned strikes; (2) doubling the wages of all production workers; (3) reducing work hours to a five hour day and a four day week; (4) refurbishing the grievance system so that grievances are settled immediately on the shop floor; (5) calling a general strike to achieve the end of the war in Vietnam.<sup>53</sup> Despite the demand for separate bargaining, Philip Foner states that it was not

---

45. GEORGAKAS & SURKIN, *supra* note 42, at 43. A "wildcat strike" is a work stoppage not authorized by the certified bargaining representative. Employees may be disciplined or discharged for participating in such an action.

46. *Id.* at 50. Arab auto workers soon had their own caucus. See Michael W. Suleiman, *The Arab-American Left*, in *THE IMMIGRANT LEFT IN THE UNITED STATES* 233 (Paul Buhle & Dan Georgakas eds., 1996) (describing the support of the two-thousand member Arab-American Caucus for wildcat strikes called by the League of Revolutionary Black Workers).

47. GEORGAKAS & SURKIN, *supra* note 42, at 51.

48. ROD BUSH, *WE ARE NOT WHAT WE SEEM: BLACK NATIONALISM AND CLASS STRUGGLE IN THE AMERICAN CENTURY* 207 (1999).

49. Hill, *supra* note 44, at 289.

50. *Id.*

51. FONER, *supra* note 35, at 420.

52. *Id.* at 421.

53. *Id.* at 417-18.

clear whether the League sought a separate Black union or a transformed UAW.<sup>54</sup>

James Geschwender's portrait of the League provides several reasons for the League's success in the 1960s, and later demise, which are probably applicable to many of the early Black caucuses.<sup>55</sup> First, the civil rights, antiwar, and Black power social movements of the 1960s provided ferment to the caucuses' activities.<sup>56</sup> Further, Black autoworkers were entering the auto industry work force in large numbers, especially in Detroit, so that certain shifts were comprised entirely of Black workers. Finally, communist influences in the union, which had been the only consistent voice for Black advancement, encouraged the most separatist leaders of the caucus to become leaders.<sup>57</sup>

The Black caucuses of the UAW shared a vision of union governance that transcended liberal reform. Instead, they sought a transformation of all aspects of society, beginning at the workplace, to a communist vision. Dan Georgakas and Marvin Surkin report that DRUM publications regularly stated that the "overall struggle must be fought on class rather than racial lines."<sup>58</sup> The leaders of DRUM mixed socialism with revolutionary Black Nationalism, while consistently seeking shop-floor action on grievances.<sup>59</sup> However, these communist ideologies also served to undermine the caucus, by causing the League's list of external enemies to include not only the UAW's leadership but also law enforcement agencies seeking to root communism out of the labor movement. Other defects centered on the League's position with other activists in the Black community of Detroit. Those who were not willing to embrace the League's ideology were attacked and alienated. Finally, the deteriorating economy in the early 1970s proved to be fatal to the League's existence as the auto industry faced massive layoffs, especially as the

---

54. *Id.*

55. JAMES A. GESCHWENDER, *CLASS, RACE AND WORKER INSURGENCY: THE LEAGUE OF REVOLUTIONARY BLACK WORKERS* (1977) (historical and sociological analysis of Black workers organization operating within the UAW in Detroit).

56. *Id.* at 162-66.

57. *Id.* at 172.

58. GEORGAKAS & SURKIN, *supra* note 42, at 44. Georgakas and Surkin challenge the premise that DRUM was a caucus—"at least not a caucus of the type that UAW had dealt with for thirty years. Caucuses fought within the union for control of the union." *Id.* The authors argue that DRUM "did not want a reformed union per se, but to bypass the existing organization and form a new one uncorrupted by past habits and customs." *Id.* I proceed in this Part from the assumption that DRUM was a caucus, but I will discuss the broad and narrow definitions of caucuses at the end of Part I.

59. *Id.* at 25.

seniority system disproportionately affected Black workers. All these factors led to the League's disappearance by 1971. Even after the demise of the League, unauthorized worker actions erupted in the Detroit auto industry during the early 1970s, though not all of them led by Black caucuses. For example, a group called the United Justice Caucus, a rank-and-file caucus within UAW Local 7, launched a wildcat strike at a Chrysler plant in 1973.<sup>60</sup> Both Blacks and whites participated in the Caucus's actions, but the majority of the group's demands centered on firing a racist supervisor.<sup>61</sup> The United National Caucus in UAW Local 3 also sought to unify Black and white workers.<sup>62</sup>

DRUM maintained relations with the Harvester Revolutionary Union Movement (HARUM) in Chicago, and the United Black Brotherhood at the auto plant in Mahwah, New Jersey, and the Black Panther caucus of the UAW at the General Motors plant in Fremont, California.<sup>63</sup> RUM caucuses also emerged at the United Parcel Service (UPRUM), and among healthcare workers.<sup>64</sup> By and large, however, most activity took place within the Detroit auto industry, where Blacks were 30% of the UAW membership.<sup>65</sup>

### C. Rank-and-File Protest Outside the Auto Industry

Caucuses and wildcat strikes were not limited to the auto industry. A nationwide caucus of Black steelworkers called the Ad Hoc Committee picketed the United Steelworkers 1968 convention for more Black leadership in the union.<sup>66</sup> At the convention, the caucus also demanded the resignation of the white director of the AFL-CIO Civil Rights department to be replaced with "a Black trade unionist who can honestly represent Negro workers and act on their behalf."<sup>67</sup> There was also caucus activity in the International Ladies Garment Workers Union, when a dissident group called the Rank and File Committee made up of Blacks, Hispanics, and Asians

---

60. GESCHWENDER, *supra* note 55, at 190–93.

61. *Id.* at 190–91.

62. Mark Levitan, *The Growth of the United National Caucus*, in NETWORK: VOICE OF UAW MILITANTS (Aug. 1975), available in Enid Eckstein Collection, Box 1, Folder 6, Archives of Labor and Urban Affairs, Wayne State University.

63. *Black Caucus Program: An Interview*, in THE MOVEMENT (1969), reprinted in THE BLACK PANTHERS SPEAK 254 (Philip S. Foner ed., 1970).

64. BUSH, *supra* note 48, at 207.

65. *Id.* at 206.

66. Hill, *supra* note 44, at 310.

67. *Id.* at 327.



initiated a Department of Labor investigation of the union's lack of minority leadership in the 1970s.<sup>68</sup>

The United Paperworkers International Union (UPIU) also had some Black caucuses, most notably the Black Association of Millworkers (BAM) which was formed in Georgia in 1970.<sup>69</sup> BAM gave bargaining proposals to the UPIU and demanded "black shop stewards on every shift and black representation on the international union's executive board."<sup>70</sup> When BAM's proposals were ignored by the UPIU, the organization participated in litigation titled *Myers v. Gilman Paper*, alleging violations of the duty of fair representation and Title VII of the Civil Rights Act.<sup>71</sup>

In 1968, Black bus drivers in Chicago formed a caucus in the Amalgamated Transit Union (ATU) called Concerned Transit Workers (CTW), which staged a wildcat strike to protest the lack of Black leadership in a local which was 60% Black.<sup>72</sup> The strike was settled temporarily when the local's president agreed to the strikers' demands to improve working conditions, refrain from taking reprisals against the strikers, and to ban retirees from voting for union officials, because they almost always favored white candidates.<sup>73</sup> After the union repudiated the agreement, the CTW decided to strike again and to form an independent union. The CTW petitioned the NLRB for recognition, but the NLRB dismissed the petition for lack of jurisdiction.<sup>74</sup> In light of this and other legal setbacks, as well as the continued opposition of the employer, city officials, and the union, CTW disbanded, but Blacks soon after won a number of seats on the union's executive board.<sup>75</sup> The CTW's struggle for greater Black control of union governance is emblematic of the difficulties faced by people of color in unions even when they are a numerical majority of the union.

Another municipal transit caucus formed in the late 1960s at a time when membership in Local 100 of the Transport Workers Union (TWU) in New York City was estimated to be between 50% and 70%

---

68. *Id.* at 304.

69. TIMOTHY J. MINCHIN, *THE COLOR OF WORK: THE STRUGGLE FOR CIVIL RIGHTS IN THE SOUTHERN PAPER INDUSTRY, 1945-1980*, at 117 (2001).

70. *Id.* at 118.

71. *Id.*

72. FONER, *supra* note 35, at 402.

73. *Id.* at 403.

74. *Id.* at 404. The NLRB has no jurisdiction over public entity employers, because those employers are exempt from the NLRA. 29 U.S.C. § 152(2) (2002).

75. FONER, *supra* note 35, at 404.

Black and Puerto Rican.<sup>76</sup> The TWU Rank and File Committee worked on a petition to decertify Local 100 as the bargaining representative but was unable to obtain the necessary signatures. The caucus aimed to change the leadership but was not opposed to having white leaders. According to a leader of the committee: “We welcome white participation both in leadership and membership in this struggle; we never opposed it. We are not a black separatist group, we seek change for all workers.”<sup>77</sup>

Foner reports that most caucuses chose to remain in the union rather than become independent unions. There were, however, some exceptions. Unlike the Ad Hoc Committee of the Steelworkers that fought inside the union unsuccessfully for two decades for greater representation on the Executive Board, the Black union members at Bethlehem Steel in Sparrows Point, Maryland, formed an independent Black union.<sup>78</sup> Blacks in Philadelphia formed a union independent of the American Federation of Teachers (AFT), but soon dissolved after finding that they could have little influence with the school district, since AFT was the exclusive bargaining representative. They soon joined the existing Black caucus inside the AFT fighting for diversity on the AFT staff and community control of schools.<sup>79</sup> A few independent Black unions also formed in the building trades, notoriously one of the most exclusionary segments of organized labor. The United Community Construction Workers of Boston and the Trades Union Local 124 in Detroit were both begun in the late 1960s as an attempt to get Black workers onto federally subsidized construction projects.<sup>80</sup>

With a few exceptions such as DRUM and the League of Revolutionary Black Workers, most of the Black caucus activity of the 1960s and early 1970s centered not on demands for separate bargaining or all-Black unions, but instead on multiracial activity

---

76. *Id.*

77. *Id.*

78. *Id.* at 408. Foner states: “The group partially won its campaign for job equity and then dissolved, having achieved more in a short time by acting outside the union than the black caucus within the steelworkers’ union had accomplished in nearly a decade.” *Id.*

79. *Id.*

80. *Id.* at 409. The construction industry, while governed by the National Labor Relations Act and the exclusive representative rule, operates under different rules that make multi-union representation the norm. Because there are many trades at a job, the employer is required to recognize and bargain with several different unions, and the disputes center around jurisdictional conflicts between the different trades, which are usually fought out by the unions. For this purpose, the AFL-CIO maintains a jurisdictional dispute resolution system. AFL-CIO CONST., *supra* note 30.

seeking to change the structure of union governance. These groups rarely made a demand to bargain separately with the employer. Even DRUM and the League, which made demands for separate bargaining, did not place a high value on essentially becoming a Black version of the UAW, which they saw as a partner with the company in the exploitation of labor.

#### **D. Chicano/Chicana Insurgency**

There are several examples of insurgency by Chicanos and Chicanas in the late 1960s and early 1970s. For example, the Steelworkers faced increasing militancy by Chicano/a workers at the same time it faced the challenges posed by the Black caucuses. The Steelworkers' merger in 1967 with the International Union of Mine, Mill and Smelter workers brought an additional 100,000 members to the Steelworkers, many of them Latinos/as.<sup>81</sup> During 1971, a group formed called the Mexican American Union Council, also known as the "Chicano Caucus." Initially formed to increase Latino political education and participation, it organized chapters in several major cities and steel strongholds.<sup>82</sup> In Los Angeles alone, three thousand members of Steelworkers Local 2018 were in the caucus.<sup>83</sup> The Comité Obrero, or Workers Committee, asked for increases in wages and benefits and a bilingual contract. On June 16, 1974, Comité Obrero called a wildcat strike that lasted nearly two months. The company responded by suing the union, which did not approve of the strike at first, but after a month recognized and ratified the strike. The company obtained a restraining order and \$290,000 in damages. The workers returned after the union leadership reached a settlement with the company, who agreed to withdraw the suit for damages. Although the workers were dispirited after the strike, their contract improved by the next round of negotiations in 1977, according to Gómez-Quíñones.<sup>84</sup>

#### **E. Immigrant Caucuses**

Wildcat strikes led by Chicanos and Chicanas continued into the 1970s. However, there were several instances of organizations of immigrants that grew out of the labor movement as caucuses and

---

81. JUAN GÓMEZ-QUIÑONES, *MEXICAN AMERICAN LABOR, 1790-1990*, at 269-70 (1994).

82. *Id.* at 272.

83. *Id.*

84. *Id.* at 273.

support organizations in their own right. The Comisión de Asuntos Obreros y Sindicales was an arm of the CASA-HGT, a Mexican civil and workers rights organization.<sup>85</sup> They led a walkout at Price Pfister's Pacoima plant in Los Angeles, California. Under the leadership of Comité Obrero en Defensa de Indocumentados/das en Lucha (CODIL), an organization for undocumented workers, a thousand employees engineered a decertification of the union at Price Pfister.

In the early 1950s, two trade union leaders in San Diego named Phil and Albert Usquaino set out to do what many unionists believed was impossible—to organize the undocumented. At that time, it was not illegal for employers to hire undocumented workers, but the threat of deportation was still used like a club whenever immigrants tried to organize.<sup>86</sup> The Usquainos formed Hermandad Mexicana Nacional, the Mexican National Brotherhood, as an organization of Spanish-speaking immigrants. With chapters in the cities of National City, Oceanside, Escondido, and nearby San Diego, the membership of Hermandad was comprised mostly of members of the Carpenters and Laborers Union.<sup>87</sup> By 1973, the Hermandad had several thousand members servicing about 60,000 immigrants, and had opened chapters throughout the greater Los Angeles area, as well as Oakland, San Antonio, Chicago, New York, and Seattle.<sup>88</sup> The Hermandad had no paid staff, but members paid fifteen dollars a year to defray the costs borne by the volunteers.<sup>89</sup> Hermandad also played an important role organizing its members into labor unions such as the Teamsters, the National Maritime Union, the UAW, and the Longshoreman's Union.<sup>90</sup> Because of the lack of Spanish-speaking organizers on the staffs of these unions, Hermandad members were put on the payroll to organize immigrant workers and translate leaflets into Spanish.<sup>91</sup>

---

85. *Id.* at 221.

86. This organizing took place before employing the undocumented was made illegal by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2002), and before *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), where the U.S. Supreme Court held that threatening deportation of undocumented workers trying to organize a union is an unfair labor practice under the NLRA. The effectiveness of *Sure-Tan* has been diminished by the Court's recent decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002), in which an undocumented immigrant fired in violation of the NLRA was not entitled to the back pay because of his immigration status.

87. MARIO T. GARCÍA, MEMORIES OF CHICANO HISTORY: THE LIFE AND NARRATIVE OF BERT CORONA 291 (1994).

88. *Id.* at 293–94.

89. *Id.* at 294.

90. *Id.* at 296.

91. *Id.*

Hermandad continued its activities with unions into the 1960s and 1970s, but its focus turned to advocating for changes in immigration laws and providing services for immigrants, as well as addressing housing and health problems.<sup>92</sup>

With a few exceptions, rank-and-file caucuses worked with the labor movement to improve the situation of their members with “established” channels of dissent—litigation, decertification, and challenging union leadership in elections. The caucuses rarely made an attempt to replace the diametric employer-union bargaining relationship into a multi-sided affair that had them bargaining alongside the certified majority representative. As the social movements of the 1960s and 1970s subsided, this orientation toward established channels of dissent became more pronounced with mainstream organizations like the A. Phillip Randolph Institute and the Labor Council on Latin American Advancement.

#### **F. From Caucuses to Constituency Groups, 1972–1995**

The identity caucuses of the 1960s were largely made up of members either of a single local or international union. The early 1970s saw the origins of multi-union caucuses of people of color and women. At first, these organizations were looked at with some suspicion by the leaders of the labor movement, but by 1995 they had become official partner organizations of AFL-CIO, and are now called “constituency groups.”

##### *(1) A. Phillip Randolph Institute (APRI) and Coalition of Black Trade Unionists (CBTU)*

The A. Phillip Randolph Institute (APRI) arose out of the Negro American Labor Council (NALC) in 1965, headed by A. Phillip Randolph and Bayard Rustin. APRI adopted an explicit accommodationist stance, refusing to challenge the leadership of the AFL-CIO but instead choosing to organize Blacks to support the Federation’s goals. This would include supporting the candidates for political office backed by the AFL-CIO, including Richard Nixon in the 1972 presidential election.

In 1972, a group of Black workers from approximately thirty-seven different unions gathered in Chicago to protest the AFL-CIO’s neutral stance in the 1972 presidential election and to oppose the re-election of Richard Nixon.<sup>93</sup> The group also called for the AFL-CIO

---

92. *Id.* at 320.

93. FONER, *supra* note 35, at 433.

to organize the substantial number of Black nonunion workers, to increase the number of Blacks in union leadership, to help end the Vietnam War, and to support greater federal investment in Black communities.<sup>94</sup> By the time the organization met the next year in Washington, D.C., it was officially denominated the Coalition of Black Trade Unionists (CBTU), intending to work within the trade unions on behalf of Black workers and their communities.

The new coalition caused concern among some members of the AFL-CIO establishment, especially those who were working to make Blacks an accepted part of the labor establishment, such as Randolph and Rustin.<sup>95</sup> Rustin believed that APRI had the support of the AFL-CIO and its president George Meany, in its goals of encouraging Black political participation and providing Blacks with the training necessary to assume leadership roles in their unions.<sup>96</sup> As such, he felt that the CBTU was unnecessary and implied that it may in fact be counterproductive. CBTU co-founder William Lucy of the American Federation of State, County & Municipal Employees, for his part, argued that the APRI might itself be counter to Blacks' interests because of its "unqualified defense of the status quo in the unions."<sup>97</sup> However, CBTU maintained that it was not a "black separatist" group and that it would not endorse separate bargaining.<sup>98</sup>

## (2) *The Coalition of Labor Union Women (CLUW)*

At the same time that Blacks were organizing into caucuses, union women were working within the labor movement in informal networks without institutional support. Dennis Deslippe states that women embraced a strategy of pushing for increased interest within their respective unions in "women's issues," and of seeking allies outside unions to meet their goals.<sup>99</sup> Their national efforts centered around "a loosely formed coalition sponsored by the Women's Bureau of the U.S. Department of Labor" called the Women's

---

94. *Id.*

95. See *All About APRI*, at <http://www.aprihq.org> (last visited Jan. 28, 2002).

96. FONER, *supra* note 35, at 434.

97. *Id.*

98. *Id.* This remains the philosophy of the organization today. See *About CBTU*, at <http://www.cbtu.org/cbtuabout.html> (last visited Jan. 16, 2002):

CBTU is not a black separatist or civil rights organization. It is the fiercely independent voice of black workers within the trade union movement, challenging organized labor to be more relevant to the needs and aspirations of Black and poor workers.

99. DENNIS A. DESLIPPE, "RIGHTS, NOT ROSES": UNIONS AND THE RISE OF WORKING-CLASS FEMINISM, 1945-80, at 25 (2000).

Bureau Coalition, which included nonlabor women's interest groups and professional organizations.<sup>100</sup> This coalition lasted into the 1970s. In addition, a short-lived group called United Union Women held a convening conference in Chicago in 1968 but the organization was inactive by the early 1970s.<sup>101</sup>

In 1973, a group of eight women from industrial trade unions in the Midwest convened a meeting that attracted about two hundred women. The large turnout called for a national conference the next year.<sup>102</sup> Thus, the Coalition for Labor Union Women (CLUW) was formed in 1974.<sup>103</sup> According to Nancy Gabin, CLUW was committed to "advancing the position of women both as workers and as unionists" by organizing women workers, demanding "sex-blind" treatment in the workplace, and encouraging women to become more active and to gain a larger share of power in their unions.<sup>104</sup> Deslippe describes CLUW's philosophy as follows: "[Women in CLUW] criticized organized labor's practices but also rejected solutions that bypassed unions."<sup>105</sup> CLUW vice-president Addie Wyatt of the Amalgamated Meatcutters union told those in attendance at the inaugural Chicago meeting:

Remember, we are not each other's enemies . . . . Our unions are not the enemies, because we are the unions . . . . We are telling our unions that we are ready and capable to fight. . . . CLUW president Olga Madar suggested in the group's newsletter that women workers hold men 'accountable through the political process' in union elections.<sup>106</sup>

CLUW feminists placed most of the blame for inequality on employers.<sup>107</sup> Although they educated women in general terms about Title VII, CLUW leaders did not promote the filing of charges against unions.<sup>108</sup> Leaders of CLUW also supported union seniority systems in the face of Equal Employment Opportunity Commission challenges under Title VII. The closest thing to an official position on the issue was the statement that "[b]rother and [s]ister workers should not be penalized for the past discrimination of

---

100. *Id.*

101. NANCY F. GABIN, *FEMINISM IN THE LABOR MOVEMENT: WOMEN AND THE UNITED AUTO WORKERS, 1935-1975*, at 225 (1990).

102. *Id.* at 226.

103. DESLIPPE, *supra* note 99, at 8, 143-45. Deslippe examines other instances where union women differed with the goals of other feminist organizations, such as the Equal Rights Amendment and the Equal Pay Act.

104. GABIN, *supra* note 101, at 226.

105. DESLIPPE, *supra* note 99, at 193.

106. *Id.* at 143-44 (internal citations omitted).

107. *Id.* at 193.

108. *Id.*

management”—the import of which clearly sought to preserve union seniority principles even as it recognized that management had engaged in unlawful discrimination against women.<sup>109</sup> A dissident group within CLUW believed that the leadership was wrong in not challenging the seniority system. The organization avoided a more serious rupture by virtue of the Supreme Court’s decisions upholding seniority systems but ordering remedial measures for the victims of discrimination.<sup>110</sup> CLUW President Gloria Johnson spoke in 1974 of the need to avoid forming a “feminist union”: “We already have the structure to make change . . . . If there are women who feel unions are not doing enough then it points up the need for them to become more involved and initiate change.”<sup>111</sup> CLUW officer and Amalgamated Clothing Workers leader Joyce Miller added in 1975: “We are loyal to our unions. Within that framework, we want to advance the role of women.”<sup>112</sup>

CLUW was at the center of what Deslippe describes as the “fragile coalition between working-class and middle-class feminists” as both camps worked for pay equity, the Equal Rights Amendment, and reproductive rights.<sup>113</sup> CLUW’s membership increased from six thousand members in the late 1970s to eighteen thousand members in the mid 1980s.<sup>114</sup> Although CLUW advocates plainly created the organization as a “separate space” for women, there were union leaders both inside and outside the organization that feared the consequences of such a move.<sup>115</sup> CLUW leaders cautioned that too much separation from the mainstream would lead to divisive and counterproductive “antimale attitudes.”<sup>116</sup>

The divisions among CLUW members show the internal rifts between feminists over labor’s policy choices. Eventually, these rifts were either healed or made moot by events such as court decisions. However, on both sides of these policy debates lay the fundamental

---

109. *Id.*

110. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353–54 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

111. DESLIPPE, *supra* note 99, at 188–89.

112. GABIN, *supra* note 101, at 226.

113. DESLIPPE, *supra* note 99, at 190.

114. *Id.* at 191.

115. See Enid Eckstein, *The Two Souls of CLUW*, in NETWORK: VOICE OF UAW MILITANTS (Nov. 1975), available in Enid Eckstein Collection, Box 1, Folder 6, Archives of Labor and Urban Affairs, Wayne State University; Cindy Jaquith, *Setting the Record Straight on Debate at CLUW Convention*, THE MILITANT (Dec. 1975); Janna Pellusch Collection, Archives of Labor and Urban Affairs, Wayne State University.

116. Lois S. Gray, *The Route to the Top: Female Union Leaders and Union Policy*, in WOMEN AND UNIONS: FORGING A PARTNERSHIP 378, 390 (Dorothy S. Cobble ed., 1993).



assumption that women should continue to work within their unions for change. There is little evidence that women sought to form separate women's unions or bargain with their employers in all-female units. One counterexample is the separation of the virtually all-female Association of Flight Attendants (AFA) from the male Allied Pilots Association in the 1960s. This is an odd case, however, because the nature of the work of the attendants and the pilots was so different that hierarchy and discrimination were bound to result within the union.<sup>117</sup> In addition, many of the waitresses in the Hotel and Restaurant Employees Union wanted to maintain separate locals in the 1960s, but this wish was complicated by the legal environment changed by the passage of the Civil Rights Act of 1964.<sup>118</sup> Like the Black caucuses, however, there were only isolated examples of women calling for separate bargaining. By and large, these groups formed internal caucuses within the exclusive representation system.

(3) *Labor Council on Latin American Advancement (LCLAA)*

At about the same time as the formation of the CBTU and CLUW, the Labor Council on Latin American Advancement (LCLAA) began at a founding conference in Washington, D.C., in November 1973. LCLAA began as a way to increase Latino/a participation in the labor movement. Its founding was met with some disdain from rank-and-file activists who saw it as simply an arm of George Meany, then-president of the AFL-CIO. Meany, in fact, spoke at LCLAA's founding convention, where he pledged the Federation's full support and cooperation, and "rhetorically insisted on [LCLAA's] independence."<sup>119</sup> LCLAA's primary function was to enhance the AFL-CIO's electoral influence by mobilizing Latino/a voters in support of candidates and community issues favorable to labor.<sup>120</sup> Although LCLAA favored greater organizing of the Latino community, this was a secondary goal that it did not support with any

---

117. GEORGIA PANTER NIELSEN, *FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION* (1982); *see also* SAMUEL B. BACHARACH ET AL., *MUTUAL AID AND UNION RENEWAL: CYCLES OF LOGICS OF ACTION* 93-127 (2001) (history of AFA).

118. *See* DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 186, 200 (1991) (despite the discrimination faced by female waitresses in HERE, they did not seek to form their own national division or international union). *See, e.g.*, *Evans v. Sheraton Park Hotel*, 5 Fair Empl. Prac. Cas. (BNA) 393 (D.D.C. 1972) (court held that maintenance of sex-segregated locals is a per se violation of the Civil Rights Act).

119. *See* GARCÍA, *supra* note 87, at 228.

120. *Id.* at 230.

resources.<sup>121</sup> By 1986, there were eighty-seven chapters in twenty-six states, but when membership in industrial unions such as the UAW and the Steelworkers decreased, LCLAA membership also declined.

By 1988, LCLAA's effectiveness at raising awareness of Latino issues in the labor movement was criticized even by its leaders. In his speech to the 1988 LCLAA national convention, LCLAA president Jack Otero said, "there are many in the house of labor today who are still deaf and blind when it comes to Hispanics, our issues, our aspirations."<sup>122</sup> LCLAA was not in step with other Latino/a organizations when it decided to endorse the Simpson-Mazzoli bill in 1986—the legislation that eventually imposed employer sanctions for the hiring of undocumented immigrants. LCLAA's isolation on this issue from other Latino/a advocacy groups is not surprising given the AFL-CIO's position in support of the Immigration Reform and Control Act of 1986. LCLAA did very little independent advocacy on the bill, leaving that mostly to the AFL-CIO. This history suggests that differences between immigrant workers and established Latino/a caucuses necessitate immigrant-worker centered caucuses and constituency groups.<sup>123</sup>

The continuing influx of immigrants into the labor force, even after the passage of Immigration Reform and Control Act in 1986, has caused the AFL-CIO to reevaluate and change its position on sanctions. Even before the labor federation's official policy change, some in LCLAA were advocating the need to unionize both documented and undocumented immigrants.<sup>124</sup> At the same time, LCLAA recently has taken a greater role in helping local unions to organize the immigrant workforce in some cities where bilingual

---

121. *Id.*

122. *Id.* at 231.

123. Many immigrant worker centers started during the 1990s. See MIRIAM CHING YOON LOUIE, *SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL ECONOMY* (2001) (exploring Asian Immigrant Women Advocates in Oakland and Korean Immigrant Workers Advocates in Los Angeles); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995). The AFL-CIO in California also started a program specifically for immigrant workers—the California Immigrant Workers Association. Robert Lazo, *Latinos and the AFL-CIO: The California Immigrant Workers Association as an Important New Development*, 4 LA RAZA L.J. 22 (1991).

124. See Alma Flores, *Latinos, Immigration & Labor: A Critical Challenge to the Labor Movement*, in PROGRAM OF THE LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT TWELFTH NATIONAL MEMBERSHIP MEETING IN SAN JUAN PUERTO RICO, AUG. 19–23, 1998, at 12 (on file with author); LCLAA Writers Committee, *LCLAA Pushes Amnesty and Right to Organize at People's Economic Summit*, AFL-CIO MILWAUKEE LABOR PRESS, Dec. 13, 2001, at 16.

organizers are few and far between. Certain individual chapters have taken a role in local union affairs on behalf of monolingual Spanish speakers, where English-speaking union staffs are unable to communicate with immigrant members. LCLAA members in Milwaukee, for example, helped to organize a steel plant with a large immigrant Latino/a workforce, and have assisted by translating the collective bargaining agreement into Spanish.<sup>125</sup> Like other constituency groups, LCLAA sees itself as an aide to organizing, rather than a potential replacement for traditional unions. The president of the Milwaukee chapter of LCLAA, Joe "Pepe" Oulahan, summed it up as follows: "While the focus of our organization is on the issues related to Latina and Latino workers, LCLAA is fundamentally dedicated to broadening and strengthening a unified labor movement."<sup>126</sup>

(4) *The 1990s: APALA, PAW and AFL-CIO Recognition of Identity  
Caucuses as "Constituency Groups"*

The 1990s saw the continued efforts of constituency groups in elections of governmental representatives and to stabilize gains made by women, Blacks, Latinos/as. The early 1990s also saw the formation of caucuses for union members who were still fighting for visibility and legal rights. The Asian Pacific American Labor Alliance (APALA) formed in 1992 to encourage greater participation of Asian Americans within unions, and to support stronger relations between the labor movement and the Asian American community.<sup>127</sup> This agenda has resulted in such concrete projects as translating union campaign literature into Asian languages, working with the AFL-CIO to design a program to recruit and train new Asian organizers, and working politically on behalf of immigrants and affirmative action.<sup>128</sup>

---

125. *Steelworkers at Kramer Okay First Contract*, AFL-CIO MILWAUKEE LABOR PRESS, Aug. 31, 2000, at 7 (how LCLAA served as an interpreter for steelworkers in a plant that was 89% Latino/a); LCLAA Writers Committee, *Milwaukee LCLAA Assists USWA in Kramer Victory*, AFL-CIO MILWAUKEE LABOR PRESS, Dec. 16, 1999, at 9 (quoting United Steelworkers of America organizer Debra Rutkowski: "They [LCLAA] really helped us get through the language barrier. There's a need for this kind of organization.").

126. *LCLAA's Oulahan Speaks for Latino Workers*, AFL-CIO MILWAUKEE LABOR PRESS, May 25, 2000, at 12 (quoting Oulahan's speech at a rally on in support of Steelworkers union members).

127. May Chen & Kent Wong, *The Challenge of Diversity and Inclusion in the AFL-CIO*, in *NEW LABOR MOVEMENT FOR THE NEW CENTURY* 185, 192 (Gregory Mantsios ed., 1998).

128. *Id.* at 195.

Pride at Work (PAW) has the challenge of advocating on behalf of lesbian, gay, bisexual, and transgender workers even as anti-gay sentiment continues to be open and virulent in the workplace.<sup>129</sup> PAW formed in 1994 as a vehicle to end homophobia in the labor movement and win things important to gays and lesbians at the bargaining table, such as domestic partner benefits.<sup>130</sup> By its 1996 meeting, PAW adopted a resolution supporting affiliation with the AFL-CIO as a recognized constituency group on a par with CBTU, LCLAA, APALA and other such groups. That affiliation came a year later. Official recognition eventually resulted in the AFL-CIO committing funds to opening a national office and hiring an executive director.<sup>131</sup>

The leadership that the AFL-CIO elected in 1995—Sweeney, Chavez-Thompson, and Trumka—ran with a campaign promise to bring identity caucuses, or “constituency groups” as they are called by the AFL-CIO, into the mainstream of the labor movement. Once elected, the leadership passed a resolution supporting the constituency groups.<sup>132</sup> This support included providing each group with funding for an executive director position and national office in Washington, D.C. Chapter activities are funded by the local chapters themselves and rely heavily on the volunteer efforts of the chapter members. As in the past, these groups have continued to mobilize around candidates for state and local elected offices, and political issues such as immigrant rights and international issues germane to their communities. Being financially supported by the AFL-CIO means that dissent from the federation’s policies is less likely, but most activists in the constituency groups feel that there is less reason to criticize the New Voice leadership of the AFL-CIO than with prior leaders of the federation.<sup>133</sup> Still, constituency group leaders have

---

129. See Miriam Frank, *Hard Hatted Women: Lesbians in the Building Trades*, 8 NEW LAB. F. 25 (Spring/Summer 2001); Desma Holcomb & Nancy Wohlforth, *The Fruits of Our Labor: Pride at Work*, 8 NEW LAB. F. 9 (Spring/Summer 2001).

130. Christian A. Bain, *A Short History of Lesbian and Gay Labor Activism in the United States*, in LABORING FOR RIGHTS: UNIONS AND SEXUAL DIVERSITY ACROSS NATIONS 58, 76–77 (Gerald Hunt ed., 1999).

131. Kent Wong, *Toward a Gay-Labor Alliance*, in OUT AT WORK: BUILDING A GAY-LABOR ALLIANCE 240, 241 (Kitty Krupat & Patrick McCreery eds., 2001).

132. AFL-CIO, 21ST BIENNIAL CONVENTION RESOLUTION (Sept. 1995) (on file with author).

133. Chen & Wong, *supra* note 127, at 186–87. Dissent does occur despite the financial support identity caucuses receive from the AFL-CIO. In the early 1990s, APALA was one of the first union organizations to oppose sanctions imposed on employers for the hiring of undocumented workers. The AFL-CIO in 1999 changed its policy to oppose sanctions. Holcomb & Wohlforth, *supra* note 129, at 10.

sometimes questioned whether official recognition by the AFL-CIO has co-opted the constituency groups.<sup>134</sup> Kent Wong and May Ying Chen, leaders of APALA, recently wrote:<sup>135</sup>

[Constituency] groups have had mixed success. Where they have played a strong role as forums for discussion, mutual support and leadership development, they have produced committed and effective new leaders to diversify the AFL-CIO, and they have informed and changed the union's usual mode of business. On the other hand, where they have been marginalized and reduced to the status of tokens within the wider labor movement, they have simply provided perks and rewards for obedient minority-group members of organized labor.<sup>136</sup>

The measure of constituency group effectiveness, according to Chen and Wong, is the character of the leadership and their willingness "1) to press labor unions and the AFL-CIO to provide meaningful representation and equal treatment; and 2) to build solidarity across diverse communities within the labor movement, breaking beyond the specific agendas of particular groups."<sup>137</sup> Chen and Wong conclude that even as "token organizations," the groups are a statement of the need for "organized labor to respond to all of its diverse members in the patchwork quilt of union democracy."<sup>138</sup>

The constituency groups of the AFL-CIO thus are varied in their approaches to serving their communities and constituencies, and in their attitudes about their proper function in the broader labor movement. The groups also differ in their rules about who can be a member, which will be described in greater detail below. Moreover, the individual chapters are also diverse not only in their tactics and willingness to involve themselves in local union politics, but also the racial and gender makeup of the organizations. As a consequence, the effectiveness of the constituency groups in representing the interests of workers of color and women workers will vary from state to state. These variances will be discussed further below.

(5) *Internal Union Caucuses and Committees*

In addition to the constituency groups that consist of a number of different unions, many unions have caucuses for their own members. Thus, the Teamsters have a Women's Caucus, a Hispanic Caucus, a

---

134. See, e.g., Holcomb & Wohlforth, *supra* note 129.

135. Chen & Wong, *supra* note 127, at 191.

136. *Id.*

137. *Id.* at 192.

138. *Id.*

National Black Caucus, and a Gay, Lesbian, Bisexual and Transgender Caucus.<sup>139</sup> The Amalgamated Transit Union (ATU) has a Latino Caucus and a Women's Caucus.<sup>140</sup> The Service Employees International Union (SEIU) has a National African American Caucus (AFRAM), as well as a Lavender Caucus.<sup>141</sup> Although historically caucuses were based in local unions, few local unions today have their own identity caucuses. Instead, many locals have Committees on Civil Rights or Human Rights that may function like internal caucuses. The Committees have degrees of responsibility that vary from union to union, but in some cases, like in the UAW, they serve an adjudicative function for grievances relating to discrimination against individuals in protected categories.<sup>142</sup>

Unlike the multi-union constituency groups, the internal caucuses have an expertise with their unions that gives them an advantage in dealing with internal union matters. However, the internal union caucuses and committees have been subject to the same criticisms as the constituency groups in that they are often seen as beholden to the union leadership.<sup>143</sup> Nonetheless, these committees and caucuses in many unions are relatively new phenomena and a response to the increasing diversity of unions. The role of the committees in most unions does not include direct involvement in bargaining or grievance processing.<sup>144</sup>

### G. The Difficulty in Defining "Identity Caucuses"

The many forms that worker protest and organization have taken throughout history highlight the difficulty in achieving a definition of

---

139. See *Teamsters Online: Human Rights Commission*, at <http://www.teamsters.org/hrc/about.htm> (last visited Jan. 15, 2002).

140. *Amalgamated Transit Union*, available at <http://atulc.50megs.com> (last visited Jan. 15, 2002).

141. Miriam Frank, *Lesbian and Gay Caucuses in the U.S. Labor Movement*, in *LABORING FOR RIGHTS: UNIONS AND SEXUAL DIVERSITY ACROSS NATIONS* 87, 95 (Gerald Hunt ed., 1999).

142. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CONSTITUTION art. 26, § 5 (adopted June 1992) [hereinafter UAW CONST.].

143. Bill Fletcher, Jr., *Whose Democracy? Organized Labor and Member Control*, in *NEW LABOR MOVEMENT FOR THE NEW CENTURY* 202, 221 (Gregory Mantsios ed., 1998) ("All too often membership committees serve as rubber stamps for the union staff."); Wong & Chen, *supra* note 127, at 191 ("Some [ethnic and women's committees] have failed to provide meaningful political representation for the excluded groups, or have served only as social organizations, supporting the union agenda without criticism.")

144. One exception is the UAW Constitution, which requires all grievances involving race, sex, and disability to be processed by the Civil Rights Committee, which is mandatory in each local union. See UAW CONST., *supra* note 142, art. 26, § 5.

“identity caucus” that would apply to all types of worker organizations within unions. In the late 1960s, rank-and-file protest movements such as DRUM erupted at different worksites but were largely confined to members of one international union—the UAW. Starting in the 1970s, networks such as CBTU and LCLAA were created to consist of members of many different unions. These networks had different goals than the early revolutionary caucuses, but they remained largely outside of the mainstream of the labor movement until the mid-1990s. The formation of identity groups for Asian Pacific Americans (APALA) and gays and lesbians (PAW), provided further impetus for the AFL-CIO to recognize these constituency groups. Other groups, such as AFRAM and the ATU caucuses, although not with the same official status as the AFL-CIO’s “constituency groups,” currently are mainstream entities accepted by their unions.<sup>145</sup>

The one thing that all these groups have in common is their specific appeal to racial, gender, or other identities in addition to unionism. Thus, any definition of identity caucuses would have to include this as a starting point. Typically, caucuses are thought of as subunits within a larger body.<sup>146</sup> However, the membership of CBTU, LCLAA, and other recognized AFL-CIO “constituency groups” is comprised of many different unions. In some ways, such multi-union constituency groups might remain above the fray of local union politics better than internal caucuses or committees. In this way, they can operate as a pressure point that is both external to the local union and accepted within the labor movement.

For the purposes of this Article, I consider race and gender “constituency groups” that take their members from many unions to be the same as identity caucuses comprised of members from a single union. The goals of these organizations are the same—to increase the voice of their constituencies—regardless of whether they draw their members from one union or several unions. Like the dissident movements that predated the formation of CBTU and LCLAA and other officially recognized groups, the organizations are open to people of diverse races and genders, as long as they subscribe to the goals of the organization. The differences between DRUM, the League, and the Comité Oberero and the caucuses of today, however,

---

145. Interview with Subject No. 12, member of Amalgamated Transit Union (ATU) and ATU Latino Caucus, in Chicago, Ill. (Aug. 3, 2001).

146. In work environments where there is no union, caucuses or “network” groups usually exist company-wide in different locations. See Friedman, *supra* note 9; Helfgott, *supra* note 9; Hyde, *Employee Caucus*, *supra* note 8.

lie in the ultimate goals of the organizations, and the attitudes of minority and female workers toward their unions, as I will describe in Part IV. However, all such groups will be considered “identity caucuses” for the purposes of this Article.

In summary, while the character of identity caucus activity has changed somewhat, the basic goals of the caucuses have remained consistent in the years after passage of the Civil Rights Act of 1964. Throughout this period, the caucuses sought to change power dynamics within their unions rather than attempting to bargain separately with the employer. The AFL-CIO’s official recognition of identity caucuses like CBTU, CLUW, and other “constituency groups” is a welcome sign at the highest levels, but questions remain whether this change will filter down and affect workers of color and women workers in local unions. There are also questions about the effect law has on the identity caucuses taking a broader role in traditional union functions such as bargaining, organizing, and grievance processing. In addition, there are lingering questions about whether the mere existence of identity caucuses is a threat to union solidarity. I will take up these objections in Part II below.

## **II. The “Problem” of Multiple and Distinct Voices in Unions: A Theoretical and Empirical Perspective**

“I am a member of LCLAA, because a voice is needed for Latinos. But I am also a member of CLUW, because I feel their issues relate to other organizations, like LCLAA.”<sup>147</sup>

The history of identity caucuses such as DRUM, the League, and Comité Obrero shows that they have often been a thorn in the side of union leadership—often engineering the ouster of the union when they believed their constituencies were not being served. At times, litigation has been initiated against unions by caucuses that has attracted the attention of scholars who believe that caucuses have served the employers’ interests by dividing the workplace along race and gender lines and enhancing the many advantages held by employers in their struggle to keep their workplaces union-free.<sup>148</sup>

---

147. Survey Response from Subject No. 14, Latina member of Labor Council on Latin American Advancement, Coalition of Labor Union Women, and United Auto Workers (on file with author).

148. Lawsuits have been brought primarily in police and fire departments by minority organizations over seniority practices that disadvantage nonwhites. *United Black Firefighters Ass’n v. City of Akron*, 976 F.2d 999 (6th Cir. 1992); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991); *Guardians Ass’n v. Civil Serv. Comm’n* 630 F.2d 79 (2d Cir. 1980); *NAACP v. Detroit Police Officers Ass’n*, 591 F. Supp.



Given the turmoil that they have the potential to cause, I will now examine the question of whether identity caucuses are ultimately beneficial for unions and the labor movement. I conclude that identity caucuses are necessary checks on union leadership that, in many parts of the United States, is still predominantly comprised of white men. Further, my research shows that identity caucuses in the contemporary labor movement are a source of strength, rather than division.

### A. Analytical Framework: Critical Realism

In examining the frameworks in which identity caucuses operate, I am guided by two traditions. First, legal realism sought to bring social and empirical understandings to bear on debates of legal issues. Legal realists greet overarching doctrinal claims with skepticism, and seek to test how legal rules and institutions actually affect people's lives.<sup>149</sup> This aversion to overarching formalist claims has led to the modern law and society movement.<sup>150</sup> Law and society research is marked by methods of empirical social science inquiry such as interviews, surveys and participant observation.<sup>151</sup> Realism, as I use it, is not strictly a method to arrive at an answer, but also an assessment of the realistic possibilities for law reform in light of contemporary

---

1194 (E.D. Mich. 1984), *rev'd*, 821 F.2d 328 (6th Cir. 1987). As employees of local governments, police and fire employees are subject to state and local laws, which may or may not incorporate the exclusive representative principle of the NLRA. Further, the uniquely conservative nature of police and fire unions make them anomalous case studies of identity caucuses within unions. In private sector unions, the exclusivity principle has been used to argue against allowing caucuses to be party plaintiffs in Title VII actions against employers and unions. See GOULD, *supra* note 19, at 56–58 (discussing the court's dismissal of the Association for the Betterment of Black Edison Employees (ABBEE) as a party plaintiff from early 1970s Detroit Edison race discrimination litigation). See also the briefs and order regarding the motion to dismiss ABBEE in *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), which are available in William B. Gould IV Collection, Box 1, Folders 9-14, Archives of Labor and Urban Affairs, Wayne State University.

149. JOHN H. SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

150. See Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC. REV.* 409 (1998); Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 *LAW & SOC. INQUIRY* 237 (1998); Jonathan Simon, *Law After Society*, 24 *LAW & SOC. INQUIRY* 143 (1999).

151. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 97 (“For most legal realists, social science was realism.”) (1995); Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 *LAW & SOC. REV.* 1243–65 (1994); Susan Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 *LAW & SOC. REV.* 165–174 (1987).

realities. In the labor context, these realities include the decades-long declining membership in labor unions and the increased willingness of employers to use legal or extralegal means to prevent unionization.<sup>152</sup> Any potential reforms should be judged in the global economic context faced by workers and unions today.<sup>153</sup>

The second tradition, broadly speaking, is critical legal theory. An outgrowth of legal realism and critical legal studies, Critical Race Theory seeks to highlight the ways that law disenfranchises people of color. Critical Race Theory is closely related to other scholarly movements such as LatCrit Theory and Critical Race Feminism.<sup>154</sup> Feminist theory is also a close cousin of these strands of legal thought, sometimes grouped together as “outsider jurisprudence.”<sup>155</sup> I will refer broadly to these schools of thought as Critical Legal Theory. These two traditions form the basis for this Article—the merger of which I will call critical realism.<sup>156</sup> I will use this lens to address the question of whether identity caucuses should exist within unions.

Theorists of outsider jurisprudence have shown the negative effects of suppressing race, culture, and identity, and the ways that a lack of “consciousness” about race and gender reinforces race and

---

152. Kate L. Brofenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform in RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 80 (Sheldon Friedman, et al. eds., 1994) (finding that more than 75% of employers ran anti-union campaigns that utilized both legal and illegal means to prevent unionization).

153. KIM MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* (1997).

154. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 6 (2001); *CRITICAL RACE FEMINISM: A READER* (Adrienne K. Wing ed., 1997); *GLOBAL CRITICAL RACE FEMINISM* (Adrienne K. Wing ed., 2000).

155. See Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of ‘Community’ to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB. & EMP. L. 773 (2001); Francisco Valdés, *Theorizing “Out-Crit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999). See generally *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998).

156. Critical realism is related to critical empiricism as identified by David Trubek. David Trubek, *Where the Action is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984); see also Silbey & Sarat, *supra* note 151; David Trubek & John Esser, “Critical Empiricism” in *American Legal Studies: Paradox, Program or Pandora’s Box?*, 14 LAW & SOC. INQUIRY 3 (1989). Critical realism takes the empirical aspect of realism a step further by asking whether particular legal reforms are realistic given current political conditions. Further, the label “empiricism” suggests a sole reliance on scientific inquiry and observation to reach my conclusions. Legal realism utilized social science inquiry but not to the exclusion of other perspectives. See Trubek, *supra*, at 586 (on the loaded meanings of the term “empiricism”).

gender hierarchies.<sup>157</sup> They argue that refusing to permit “space” for race and gender in the name of class solidarity is not only counterproductive to the interests of the collective, but also subordinates race and gender oppression to class oppression.<sup>158</sup> Reflecting on the tensions between Black nationalist thought and integrationism, Gary Peller wrote in 1990:

Instead of comprehending racial justice in terms of the relations of distinct, historically defined communities, the embrace of integrationism has signified the broad cultural attempt not to think about race at all. Integrationists filter discussion of the wide disparities between African-American and white communities through the nonracial language of poverty and class.<sup>159</sup>

Three years later, Alex Johnson critiqued the U.S. Supreme Court’s handling of litigation finding de facto discrimination against traditionally Black colleges in Mississippi, resulting in the traditionally Black colleges merging into the traditionally white public colleges.<sup>160</sup> Johnson wrote: “The assimilationist version of integrationism, premised on traditional liberalism, presupposes a homogenous community in which all members of society inhabit one cultural community.”<sup>161</sup> However, Johnson does not conclude that integration will not occur, only that “African-Americans should have as much influence on whites as whites have on African-Americans” when integration occurs.<sup>162</sup> Given the dominance of assimilationist messages in American society, it is likely that identity caucuses pose a threat not to class solidarity or to union bargaining power, but instead to the idea of a race- and gender-blind society. The reaction against identity caucuses might also be a reaction to the increased diversity of American society and the workforce.<sup>163</sup> Identity caucuses within unions thus can be seen as a way to preserve race and gender identities within assimilationist institutions.

---

157. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1 (1991); LESLIE G. CARR, *COLOR-BLIND RACISM* (1997).

158. Labor historians such as David Roediger have powerfully argued the historical construction of class identity as “white.” See ROEDIGER, *supra* note 35.

159. Gary Peller, *Race Consciousness*, DUKE L.J. 758, 845 (1990).

160. Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African Americans—Again*, 81 CAL. L. REV. 1401 (1993).

161. *Id.* at 1452.

162. *Id.*

163. See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 900 (1993) (on separate institutions: “Since people of color generally lack control over mainstream institutions, they ought to be allowed to maintain an environment where they can function autonomously.”).

The merger of critical theory and empiricist legal realism is not new. "Racial realism" has been recognized by critical race theorist Derrick Bell and indeed goes back to the legal thought of Charles Hamilton Houston and Karl Llewellyn.<sup>164</sup> Racial realism to Bell meant being realistic about the ability of legal structures to eradicate racism. In addition, Bell argued: "Empiricism is a crucial aspect of racial realism. By taking into account the abysmal statistics regarding African Americans, their oppression is validated."<sup>165</sup> These scholars have sought to shed light on the ways that formalism and legal ideology worked to the detriment of socially subordinated people. Critical theory thus seeks to determine how reform programs would affect those who are "at the bottom" of racial and gender hierarchies. As Mari Matsuda has argued, we should test potential legal reform programs as to whether they better the situation of the worst off. If the reforms do not meet this test, or if they make matters worse, they should be rejected.<sup>166</sup>

Thus, in studying the role and place of identity caucuses within labor and employment law context, I draw scholarly traditions into what I call critical realism. A critical realist approach (1) recognizes that law and society are ingrained with racism and sexism; (2) seeks to determine the goals and wishes of people of color, immigrants, and women who must negotiate racist and sexist structures; and (3) seeks to determine the effect of solutions to legal and political problems of subordinated groups, and their workability in the real world. In short, critical realism thus accepts the "critical" view of the endemic nature of racism and sexism in society but seeks to be "realistic" about potential legal reform programs in light of contemporary realities and the limits of legal change.

## **B. Identity-Based Organizing and Its Critics**

In the midst of a proliferation of identity caucuses, some commentators question whether the caucuses are helpful or harmful to worker solidarity in unions. To some, the race and gender caucuses are symptomatic of the fragmentation of the working class

---

164. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); see also Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1608 (1995).

165. Bell, *supra* note 164, at 365 n.4.

166. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

and the withering of the left in the last quarter century.<sup>167</sup> Some theorists also question whether single-issue caucuses can fully represent workers with both race and gender identities.<sup>168</sup>

The problem with these arguments is that they privilege class identity above all other identities. Further, they assume that the modern labor movement has been, or could be, completely class-centered. Some observers argue that the post-war labor movement should return to its class-conscious beginnings.<sup>169</sup> However, the success of the movement in bringing unionization to many different occupations, ranging from screenwriters to physicians, makes it questionable as to whether class will remain a basis for solidarity across the labor movement.<sup>170</sup>

The better approach is to see class as one of many identities that workers hold, in addition to other identities, such as race and gender. Thus, even when class is dissimilar, common bonds sometimes can be forged on the basis of race or gender. Workers move between many identities, depending on the situation, and workers' decisions to become active in one caucus or another does not preclude them from adopting other identities at appropriate times. Workers long have split their allegiances between many different groups, and unions are only one of them. But, the consequences of not recognizing and suppressing the assertion of workers' identities in the name of any other identity poses the greatest threat to solidarity. In addition, identity caucuses represent concrete examples of the kind of multiple consciousness which Mari Matsuda has identified.<sup>171</sup>

---

167. GITLIN, TWILIGHT OF COMMON DREAMS, *supra* note 10; PIORE, *supra* note 10; McUsic & Selmi, *supra* note 10; ITON, *supra* note 36.

168. McUsic & Selmi, *supra* note 10, at 1354.

[I]f identity caucuses were implemented in a workplace, it is quite possible that an individual would be required to choose among various interests in order to determine to which caucus she belongs . . . . At the same time, if identity caucuses are treated as fluid or contingent, thus allowing individuals to move in and out of caucuses, the concept begins to resemble the original union model where individuals seek out commonality rather than difference.

*Id.*

169. Patricia Lippold & Bob Kirkman, *Blocking Bridges: Class Based Politics and the Labor Movement*, in NEW LABOR MOVEMENT FOR THE NEW CENTURY 219, 221 (Gregory Mantsios ed., 1998).

170. For this reason, many have begun to see class as an identity that exists alongside race, gender, and sexual orientation, rather than on top of these identities. See MICHAEL ZWEIG, THE WORKING CLASS MAJORITY 132-33 (2000).

171. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); DELGADO & STEFANCIC, *supra* note 154, at 55-56 (multiple consciousness "holds that most of us experience the world in different ways because of who we are").

The charge that identity caucuses are exclusionary is difficult to support in light of how the caucuses actually function today.<sup>172</sup> The membership of most caucuses is not limited to members of an individual identity group. Many caucuses require that its members belong to a specific union; others require only that its members belong to a “bona fide” union.<sup>173</sup> The requirements of union membership can sometimes drive wedges between the union and the unorganized, but some caucuses attempt to deal with that by creating classes of “associate members,” who do not have the privilege of voting or running for office of their local chapters.<sup>174</sup> Even without the rigid boundaries of membership in these identity caucuses, they provide something that their unions do not currently offer them—otherwise, they would not invest the time nor the minimal dues that these organizations assess.<sup>175</sup> For people of color and women in workplaces where their numbers are small, identity caucuses provide an opportunity, as a member of the CBTU put it, “to get together and compare notes . . . [a]nd to understand we’re not alone.”<sup>176</sup>

Indeed, the problem of essentialism—the notion that individuals of similar gender or race share certain essential characteristics that results in unanimity of thought among the group—is lessened by the fluidity of the membership in identity caucuses. For example, the Coalition of Black Trade Unionists has a Women’s Committee that focuses on the needs of Black women, and most identity caucuses are liberal with regard to race and gender in their membership eligibility guidelines.<sup>177</sup> Black and Latino/a identity caucuses in some geographic areas also have a number of white members.

---

172. McUsic & Selmi, *supra* note 10, at 1356 (“By emphasizing how we are different from one another, we create ‘others’ in an exclusive and divisive way.”).

173. SEE ABOUT CBTU, COALITION OF BLACK TRADE UNIONISTS, at <http://www.cbtu.org/cbtuabout.html> (last visited Mar. 26, 2002).

174. LABOR COUNCIL ON LATIN AMERICAN ADVANCEMENT, NATIONAL BYLAWS § 2(1) (as revised Aug. 9–13, 2000), available at <http://www.lclaa.org> (last visited Mar. 25, 2002).

175. Annual dues range from \$15 to \$25 a year in the AFL-CIO “constituency groups.” See generally *Constituency Groups: A Bridge to Communities*, at <http://www.aflcio.org/unionand/bridge.htm> (last visited Jan. 16, 2002).

176. Rob Zaleski, *Issues Spur Black Labor Coalition*, CAPITAL TIMES (Madison, Wis.), Sept. 4, 2000, at 1C (quoting teacher Mike Hibbler of the Madison Metropolitan School District).

177. See, e.g., COALITION OF BLACK TRADE UNIONISTS, MADISON, WIS. CHAPTER, BYLAWS art. III (Oct. 14, 2000) (on file with author) (membership open to all “who belong to a workers union or have the potential to so belong” and without regard to “race, creed, color, national origin, gender, sexual orientation, political belief or religion”); see also COALITION OF BLACK TRADE UNIONISTS (CBTU), NATIONAL CONSTITUTION AND

Although some have argued that identity politics privilege the individual over the collective, I argue that identity caucuses actually privilege collective action over individual rights. Many so called “identity movements” have become the bases for collective voice, such as the civil rights and women’s movements. In fact, seeing race and gender identity through the lens of class, and vice versa, is an exciting new development in traditional class analysis.<sup>178</sup> Most labor scholars see identity caucuses as important bridges to the communities that the labor movement needs to connect with to remain relevant in the Twenty-First Century.<sup>179</sup>

Finally, some might ask whether identity caucuses are necessary anymore because racism and sexism are things of the past. Unions are like most other social institutions that have had a historical problem with racism and sexism that continues to a lesser, and different, extent today. But it is precisely because we expect unions to be at the forefront of social change that they are held to a higher standard than other social institutions. Despite gains made by the labor movement in eradicating racism and sexism and the stated goals of the AFL-CIO’s New Voice leadership to increase diversity in the leadership and membership ranks of organized labor, race and gender remain potent issues in the new labor movement. Because of labor’s decreasing numbers in the private sector workforce, and the increasing diversity of the workforce, the emerging consensus among the labor movement is that unions must target women and people of color as new union members to reverse unions’ declining members in the context of global economic environment of capital mobility. The ultimate success of this campaign depends on changing entrenched attitudes throughout the labor movement as to the proper place of

---

BILL OF RIGHTS art. XI (as amended May 21–26, 1997) (regarding the CBTU National Women’s Committee) (on file with author).

178. See ZWEIG, *supra* note 170, at 133 (“[A] working class movement that focuses only on the injuries of class will ignore the many injuries people suffer in other aspects of their lives.”); Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CAL. L. REV. 1767, 1825 (2001) (“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.”).

179. Dan Cornfield, et al., *In the Community or in the Union? The Impact of Community Involvement on Nonunion Worker Attitudes about Unionizing*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 247 (Kate Brofenbrenner, et al. eds., 1998) [hereinafter ORGANIZING TO WIN]; Katherine Sciacchitano, *Finding the Community in the Union and the Union in the Community: The First-Contract Campaign at Steeltech*, in ORGANIZING TO WIN, *supra* at 150, 153 (discussing the role of the Milwaukee chapter of the CBTU and other community groups in the United Electrical Workers’ first contract campaign at a Milwaukee steel company).

women and racial minorities in unions—whether as mere “numbers” needed to achieve density or as leaders of the movement. Five years after the New Voice leadership took office, some studies of local unions have revealed lingering instances of institutionalized discrimination. For example, Bill Fletcher and Richard Hurd conducted five years of fieldwork studying about thirty large local unions and found instances where unions remained primarily loyal to their historic white male constituencies.<sup>180</sup> One of the subjects in Fletcher and Hurd’s study, an African American female union staff member, stated that “You could characterize it as a good old boy system . . . . [They] still prefer leadership that is male. . . . I always need to be superior plus.”<sup>181</sup> An African American district director of a large union was even more damning in his comments: “Sure there’s one black here, one Asian there; they locate folk of color who can kiss ass, follow instructions, follow proper procedure and put them in positions that appear to be positions of authority. But the decision loop stays the same. The labor movement is still exactly where it was in the 40s and 50s.”<sup>182</sup>

Whether or not scholars view caucuses as beneficial to the labor movement, the fact is that people of color and women will continue to form caucuses and constituency groups. The relevance of the organizations will be dependent on a number of factors. But union attempts to suppress or disband them will serve only to drive deeper wedges between union leadership and rank-and-file minorities. Given the attention to race and gender issues by the new leaders of the labor movement, and the changing demographics of the labor force, the major threat to identity caucuses is not active suppression, but rather the benign neglect of the labor movement and the fact that there are several legal rules that would seem to make their existence irrelevant. Having concluded that identity caucuses are beneficial for the labor movement as a whole and women and people of color specifically, I will now discuss the legal environment in which identity caucuses function.

---

180. Bill Fletcher & Richard W. Hurd, *Is Organizing Enough? Race, Gender and Union Culture*, 6 NEW LAB. F. 59–70 (Spring/Summer 2000) (recounting, for instance, one African American woman’s promotion from steward to business agent, which required her to assist in the office while white male business agents were assigned to the field).

181. Fletcher & Hurd, *supra* note 180, at 67.

182. *Id.* at 68.



### III. The Legal Environment for Minority Voices at Work

“Union members have many legal options if they are dissatisfied with their union, including decertification. But the best option is to change the leadership.”<sup>183</sup>

The legal environment in which identity caucuses function should be examined to determine the extent to which exclusive representation is problematic for the assertion of power by identity caucuses within unions. Moreover, legal constraints on labor’s ability to organize workers, and workers’ legal options for exit from the union, should be examined to determine potential ramifications if the exclusive representation system were to be ended.

The NLRA requires that the union selected by the majority of employees at a given workplace be the exclusive bargaining agent, also called “exclusivity.” Scholars have taken issue with this rule and argue that majority unions have disenfranchised women and people of color and that these groups should be allowed by federal labor law to bargain separately with their employers, perhaps through identity caucuses or other minority representatives.<sup>184</sup> In order to examine the case for the end of exclusivity, I will first examine the legal environment for identity caucuses. In so doing, my perspective again will be informed by a critical realist approach. Critical theorists have examined how law has operated to the detriment of people of color, and have also suggested ways that subordinated groups might utilize law for social change. Proposals for legal reform, however, must be judged in the context of whether the intended beneficiaries of the regulation would be helped by the reform.

#### A. The Exclusive Representative Rule

A central feature of U.S. labor law since its inception in 1935 has been the “exclusive representative rule.” This rule is at the center of the National Labor Relations Board (NLRB) procedure for organizing a union.<sup>185</sup> In brief, the NLRB procedure requires the union to obtain signed cards from employees authorizing it to bargain for them from at least 30% of the eligible employees at the targeted worksite, and to present those cards to the NLRB with a petition for a

---

183. Interview with Subject No. 7, Black male, member of Coalition of Black Trade Unionists and American Federation of Teachers, in Madison, Wis. (Apr. 18, 2001).

184. *Labor’s Divided Ranks*, *supra* note 7; HECKSCHER, *supra* note 6.

185. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2002).

secret ballot election.<sup>186</sup> Once the NLRB determines the cards are valid, and deals with any questions relating to the appropriateness of the unit in a representation hearing, an election date will be set. If the union wins the support of the majority of the employees in the appropriate bargaining unit, the NLRB will certify the union as the “exclusive bargaining agent” of the entire unit pursuant to NLRA section 9(a), requiring the employer to bargain in “good faith” with the representative pursuant NLRA section 8(a)(5). Section 9(a) states:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive bargaining of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.<sup>187</sup>

Exclusivity was a basis for the Supreme Court’s 1944 holding that “direct dealing” or individual contracts between employees and their employers were illegal if meant to undermine the union certified as exclusive bargaining representative.<sup>188</sup> In this way, the law protects against the employer dividing the loyalties of the unit and

---

186. 29 U.S.C. § 159(e)(1) (emphasis added). A union may bypass the NLRB procedure, provided the employer voluntarily recognizes the union upon a showing that it represents a majority of the workers in the proposed bargaining unit. Because of the cumbersome nature of the NLRB processes, campaigns pursuing voluntary recognition are becoming increasingly frequent. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *INDUS. & LAB. REL. REV.* 42 (2001) (finding an increasing number of unions organizing outside the NLRB election process).

187. 29 U.S.C. § 159(a). I will refer to both of the provisos to section 9(a) collectively as “the proviso to section 9(a),” as the Supreme Court did in *Emporium Capwell*. See *infra* Part IIIB.

188. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). It is important to note, however, that *J.I. Case Co.* does not prohibit individual negotiations in all situations, especially when the Union allows it. “[W]here there is great variation in the circumstances of employment or the capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining.” *Id.* at 338. Dealing directly with a represented employee, however, without the union’s consent, is a violation of the duty to bargain. See *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678, 684 (1944).

undermining the union by negotiating better deals with some employees than others. Section 9(a), and other sections of the Act that deal with the union's presumption of majority status and when petitions by rival unions can be acted upon by the Board, also guarantee the union some stability against competitors, whether they be minority caucuses or other unions.<sup>189</sup>

Several commentators have questioned whether exclusivity is in the best interest of the labor movement, in that it focuses too much attention on winning workplace majorities, and that it results in a membership that is unevenly committed to the goals of the union that is ultimately elected by a majority of the bargaining unit.<sup>190</sup> The United States is one of the few countries to adopt exclusivity as its organizing principle of industrial relations.<sup>191</sup> European countries rely less on majority rule and a union representing a minority of the workforce can compel an employer to bargain.<sup>192</sup> Some scholars believe that members-only bargaining is allowed by the present regime, even if the union does not represent a majority at the workplace. Others argue that recognition and bargaining with a minority union might be an unfair labor practice in itself. The few studies of minority bargaining are inconclusive either in showing its

---

189. 29 U.S.C. § 159(c)(3) provides for an absolute bar against any election for one year after a valid election has been held: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." Further, the NLRB will entertain a decertification petition in a bargaining unit only (1) once every three years; (2) if supported by at least 30% of the employees in the unit; and (3) if filed within a limited "window" period no earlier than ninety days and no later than sixty days before contract expiration. 29 U.S.C. § 159(e).

190. See authorities cited *supra* note 6.

191. For a more detailed comparative analysis of nonexclusive bargaining, see Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 COMP. LAB. L. & POL'Y J. 47 (1998) (although many European countries mandate unions or works councils at firms, individuals are free to make and enforce individual contracts concerning the terms of their employment).

192. Race caucuses also exist in European countries. For example, Satnam Virdee and Keith Grint studied a Black caucus in the British National and Local Government Officers union. Separate bargaining was not the goal of that caucus. As one member of the caucus put it:

It is not self-organization for the sake of being separate. It is to ensure exactly the opposite—that black issues and rights are addressed by the trade unions [to] which we belong in a way acceptable to black members. As black trade unionists we believe in the principles of solidarity and support but these can never happen if they work only for some.

Satnam Virdee & Keith Grint, *Black Self-Organization in Trade Unions*, 42 SOC. REV. 203, 209–10 (1994).

effectiveness for its members or the sustainability of a legal challenge to the practice.<sup>193</sup>

As I will argue in more detail below, the effectiveness of members-only, identity based bargaining units for women and people of color must be viewed from several perspectives, including the willingness of women and people of color to participate in such organizations. First, however, I will examine the legal dimensions of the exclusive representative rule.

### **B. *Emporium Capwell* and Its Implications for Identity Caucuses**

The central Supreme Court decision relating to the bargaining power of identity caucuses actually did not involve a caucus at all, but it has implications for the legal context in which identity caucuses operate. In *Emporium Capwell v. Western Addition Community Organization*<sup>194</sup>, the Court set the parameters of the “exclusive representative” rule, and what constitutes a “demand for bargaining” with the employer outside of the union’s duty and right to bargain with the employer as a certified representative. The union in *Emporium Capwell* represented employees of the department store chain in San Francisco.<sup>195</sup> Several Black employees had grown dissatisfied with the pace of promotions and hiring for Black employees.<sup>196</sup> On April 3, 1968, they presented a list of grievances to the union, which included the Company’s alleged race discrimination as their chief concern.<sup>197</sup> Union officials reported to the company that

---

193. On “members-only bargaining,” see Wade Rathke, *Letting More Flowers Bloom Under the Setting Sun*, in WHICH DIRECTION FOR ORGANIZED LABOR? ESSAYS ON ORGANIZING, OUTREACH, AND INTERNAL TRANSFORMATIONS 75 (Bruce Nissen ed., 1999); Bruce Nissen, “Building a Minority Union”: *The CWA Experience at NCR*, 25 LAB. STUD. J. 36 (2001) (arguing that a members-only contract might be illegal as a violation of NLRA section 8(a)(2) as discrimination on the basis of union status); Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531, 548 (1992) (arguing that NLRA section 8(a)(3) prohibits only discrimination against workers for union membership, not more favorable treatment which may be obtained under a “members-only” contract). This Article does not address the arguments for or against minority unionism, because, as scholars have argued, the labor movement could commit itself to organizing minority unions in addition to majority exclusive representatives under the current legal regime. See Alan Hyde, Frank Sheed, & Mary Deery Uva, *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637 (1993). However, the fact that unions have not put much energy into organizing minority unions thus far does not indicate that a change in the legal regime would significantly increase union density.

194. 420 U.S. 50, 53 (1975).

195. *Id.* at 52–53.

196. *Id.* at 53.

197. *Id.*

there was a “possibility of racial discrimination” and that “explosive” events could occur if action was not taken.<sup>198</sup> The Company promised to “look into the matter.”<sup>199</sup> The union called a meeting with Company officials, the California Fair Employment Practices Commission, and a local anti-poverty agency.

After investigation, the union concluded that the Company was discriminating and told the employees that it would process each grievance over race discrimination to arbitration, if necessary.<sup>200</sup> The problem was that the employees did not believe that individual grievance arbitrations were sufficient to deal with the systemic nature of the discrimination, and refused to participate in any of the grievance proceedings. The employees instead sought a meeting with the Company president, who, in the ordinary course of affairs, was not involved in the bargaining for this unit. When this meeting was refused, they initiated a leafleting and community boycott campaign with the help of San Francisco’s Western Addition Community Organization. A group of employees also held a press conference, carried on local TV and radio, where they denounced the Company’s policies as racist and expressed a desire to meet with “the top management” of the Company to discuss minority employment conditions.<sup>201</sup> Two Black employees, Tom Hollins and Joseph Hawkins, received written warnings for this conduct, threatening discharge if the activities continued.<sup>202</sup> The employees continued their leafleting of the store, and were ultimately terminated.<sup>203</sup>

With the help of Western Addition Community Organization, Hollins and Hawkins filed charges with the National Labor Relations Board, alleging that their terminations violated section 7 of the NLRA.<sup>204</sup> Under section 7, employees cannot be terminated for engaging in “concerted activities,” unless they are violent, disloyal, or not related to wages, hours, and working conditions.<sup>205</sup> The charges became a complaint that was rejected by an NLRB Administrative Law Judge (ALJ). The ALJ found as a factual matter that the employees were engaged in separate bargaining, and that such

---

198. *Id.* at 53–54.

199. *Id.* at 54.

200. *Id.*

201. *Id.* at 55.

202. *Id.* at 56.

203. *Id.*

204. *Id.* at 57.

205. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *NLRB v. Local 1299, IBEW (Jefferson Standard)*, 346 U.S. 464, 473–75 (1953); *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294–95 (4th Cir. 1991).

activity was in derogation of the rule of exclusive representation, and thus would not be protected by section 7.<sup>206</sup> The NLRB in Washington, D.C., upheld the ALJ's decision.<sup>207</sup> The employees then appealed to the D.C. Circuit, which reversed the Board.<sup>208</sup> The court proposed a new standard that asks whether the union is most effectively remedying the alleged discrimination, and if not, whether the employees' actions were "so disloyal to their employer as to deprive them of Section 7 protections . . . ."<sup>209</sup> The D.C. Circuit held that the employees' actions were protected concerted activities.

The Supreme Court reversed the D.C. Circuit in an opinion authored by Justice Thurgood Marshall. The Court held that the employees' conduct was protected neither by section 7 of the NLRA nor by Title VII of the Civil Rights Act ("Title VII"), because the employees' actions conflicted with the exclusive representation principle embodied in section 9(a) of the NLRA. The Court held that the proviso to NLRA section 9(a), which by its terms seems to authorize adjustment of grievances without the union's intervention, would not protect the employees from discipline, because it was intended to protect the employer from unfair labor practice charges for dealing directly with the employees. It did not give the employees any protection from discipline for attempting to adjust grievances with the employer without the intervention of the union.<sup>210</sup>

The Court in *Emporium Capwell* paid insufficient attention to the direct applicability of the proviso to section 9(a) to the facts of the case, which has been pointed out by several commentators.<sup>211</sup> The crux of the dispute in *Emporium Capwell* dealt with the "presentation of grievances" to the employer by a group of employees outside of the union, which is within the ambit of section 9(a). The only remaining question was whether the presentation of a "group grievance" relating to discrimination against Black employees would have contravened the terms of the collective bargaining agreement

---

206. *The Emporium & W. Addition Cmty. Org.*, 192 N.L.R.B. 173 (1971).

207. Two Board members dissented from this holding. Member Jenkins concluded that because the conduct dealt with working conditions within the purview of section 7, the employees were illegally discharged. Member Brown agreed, but also disputed the ALJ's factual finding that the employees were "bargaining" rather than simply urging the Company to take action about important workplace issues. *The Emporium*, 192 N.L.R.B. at 173-77.

208. *Western Addition Cmty. Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *rev'd*, *Emporium Capwell Co.*, 420 U.S. 50 (1975).

209. *Emporium Capwell Co.*, 420 U.S. at 60.

210. *Id.* at 61 n.12.

211. *Labor's Divided Ranks*, *supra* note 7; *Iglesias*, *supra* note 7, at 416-17 n.66.

between the union and the Company. But the Court never reached the question of whether a group grievance would have been allowed under the contract. Instead, it dispatched the proviso in a footnote by pointing out that it did not grant a right to bargain the way that section 8(a)(5) did: "The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of Section 8(a)(5)."<sup>212</sup> Instead of analyzing whether the employees' actions were protected by the proviso, the Court decided whether the exclusive representative rule must yield to Title VII in cases dealing with race discrimination.<sup>213</sup>

When cast as a battle between the NLRA's and Title VII's objectives, *Emporium Capwell* is a classic example of the workforce being divided along class and race lines.<sup>214</sup> However, the Court too broadly defined what the employees wanted as "bargaining" with the employer, and paid insufficient attention to the proviso to section 9(a) as a legitimate avenue that they could have pursued. The union made no claim that what the employees wanted, essentially a group grievance, would violate the collective bargaining agreement. In fact, the union agreed that the Company was discriminating and filed a grievance according to the collective bargaining agreement. However, the dissidents believed the grievance procedure was inadequate to address their concerns.

*Emporium Capwell* has become the leading symbol of the legal rule governing "dissident activity" within unions. However, it has also become a symbol of how labor unions have interacted with community groups, often to the detriment of the movement itself. When community groups have sought to involve themselves in

---

212. *Emporium Capwell Co.*, 420 U.S. at 61 n.12.

213. *Id.* at 52.

214. The tension between Title VII and the NLRA was also identified by Justice Douglas in his dissent in *Emporium Capwell*, where he stated: "[I]n the area of racial discrimination the Union is hardly in a position to demand exclusive control, for the employee's right to nondiscriminatory treatment does not depend upon Union demand but is based on the law." *Id.* at 75. This tension promises to be important in the future. The Supreme Court's recent decision in *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998), did not resolve the question of whether a union can ever waive an employee's Title VII rights with a clear and unmistakable waiver in a collective bargaining agreement, but at least one circuit has answered that question affirmatively. See *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (waiver of union member's right to bring a Title VII claim was accomplished by "clear and unmistakable" waiver in collective bargaining agreement), *cert. denied*, 122 S.Ct. 464 (2001).

unions, they have found an ideology that is partly driven by law but partly rooted in notions of hierarchy and the legal entitlement to exclusively speak for workers. These attitudes are beginning to change, however, and many see the new identity caucuses and constituency groups as a way to change the labor movement's reputation with community groups.<sup>215</sup>

*Emporium Capwell* seems to have had a profound impact on what it means for informal groups of employees in the union to "bargain" with the employer. The proviso to section 9(a) is rarely invoked since its evisceration in *Emporium Capwell*. Theorists of legal consciousness might conclude that the lack of attempts to bargain means that *Emporium Capwell* served to snuff out union groups by embedding exclusivity in the collective consciousness.<sup>216</sup> For several reasons that I will describe further below, *Emporium Capwell* should not be seen as the reason for the lack of attempts at separate bargaining. The first reason for this lies in *Emporium Capwell* itself. The Black employees, Hollins and Hawkins, were not disciplined for requesting to bargain with the employer; rather, they were disciplined for leafleting and media activities which labeled their employers as racists.<sup>217</sup> It is unlikely that the mere request to bargain separately with the employer would have led to discipline unless associated with some other activity deemed "disloyal." On its facts,

---

215. See Chen & Wong, *supra* note 127.

Constituency groups within the AFL-CIO, who have long served as a voice for people of color and women, are strategic bridges between labor unions and neglected communities. To serve this function well, constituency groups must be self-critical, and must transform their practices to support and embrace an organizing culture and the new spirit of change within labor.

*Id.* at 201.

216. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS 5 (1990).

The ways people understand and use law I term their *legal consciousness*. Consciousness, as I am using the term, is the way people conceive of the "natural" and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world. The consciousness I am describing is not only the realm of deliberate, intentional action but also that of habitual action and practice.

*Id.*

217. The handbill asking for a community boycott read in part:

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. THE EMPORIUM MUST PAY FOR THESE INSULTS.

*Emporium Capwell Co.*, 420 U.S. at 55 n.2.



then, *Emporium Capwell* does not present a substantial barrier to demands for bargaining among any group of employees, but of course, the employer has no legal duty to respond to the demand.

If *Emporium Capwell* is not a major hindrance to groups of employees bringing grievances to their employer outside of the majority union, then one might ask why more internal union groups have not pursued bargaining with their employers, or at least sought to communicate their grievances directly to the employer in more instances. One might point to the end of organized rank-and-file minority protest in the early 1970s as roughly coextensive with the *Emporium Capwell* decision in 1975. Scholars who study law's effect on people's behavior might conclude that *Emporium Capwell* effectively sent the message that the union was the sole avenue for bargaining with the employer, and any other attempts to communicate with the employer would lead to discipline.

However, as I will show below in Part IV, a more likely explanation for union members' choice to work within the union's established channels has to do with their desire to work out matters within the union, rather than through legal regimes. In fact, it seems that workers of color and women in unions have assimilated an idea of majority rule that goes beyond legal regimes, but which appears to have its root in the democratic principles embedded in society at large. In other words, providing greater voice for workers of color and women in the unions may have less to do with the principle of exclusivity, i.e., the legal rules that define the interactions of workers with their employer, but instead "majority rule"—the intraunion democratic governance structures that come from embedded notions of democracy in our society.

### C. Envisioning Broad Use of the Proviso to NLRA Section 9(a)

The proviso to section 9(a), though eviscerated in *Emporium Capwell*, would seem to give dissident union members the ability to be heard, and have their grievances adjusted, as long as the union was present and any resolution was not in conflict with the terms of the collective bargaining agreement. The language of the proviso would seem to protect the rights of employees from discipline for seeking a meeting with the employer, provided the other conditions are met. Indeed, the employees in *Emporium Capwell* were not disciplined for seeking a separate meeting with the employer, but instead for the unauthorized picketing in which they participated. The question then is whether the proviso alone is adequate to enhance minority voice in

the workplace, and whether or not it should be amended to explicitly take into account *Emporium Capwell*.

As Justice Marshall stated in his opinion in *Emporium Capwell*, the proviso does not confer a “right” on employees to present grievances to the employer “by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize a resort to economic coercion.”<sup>218</sup> The question then is whether the employer should be required to listen, and who decides whether or not the resolution is consistent with the collective agreement.

The tension that Justice Marshall pointed to between individualized justice and collective action should not be underestimated.<sup>219</sup> The proviso potentially gives the employees the incentive to rally others to their cause, and parallels the law of section 7, which protects “concerted activity” with regard to wages, hours, and working conditions, but only if the employee engages in the protected activity with at least one other employee. Ideally, the union would be backing the employees’ demands without need for resort to the proviso. If that is not the case, however, what if a subgroup of employees not in the majority backed the employees’ demands? Here is where identity caucuses might play a role. The prospect of an identity caucus seeking resolution to the problem may be more troubling for the union and the employer because it changes the interaction from a “few disaffected employees” to a struggle between the union leadership and “factions” in the union. However, if some accommodation between exclusivity and minority rights is to be worked out, voices within the union should be heard.

My research suggests that most identity caucuses do not have much interest in seeking “proviso” meetings with their employers if they feel that their unions are not serving their needs.<sup>220</sup> The stamp of approval of a caucus should not be necessary, though, and employees

---

218. *Id.* at 61 n.12.

219. Citing legislative history, Justice Marshall pointed out: “The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive representative, a violation of Section 8(a)(5).” *Id.* While it is the case that the main purpose of the proviso was to protect employers from liability, it does not necessarily follow that the employees can face discipline for attempting to utilize the proviso, especially in light of section 7’s protection of “concerted activity.” However, this should be made explicit by the statute, and would probably also necessitate an amendment to section 8(a), adding “refusal to entertain a meeting under the proviso to Section 9(a)” to the list of employer unfair labor practices.

220. *See infra* Part IV.

should be allowed to petition their employer in whatever configurations that they deem best. At a minimum, the proviso grants the employer and the union the ability to agree to a grievance procedure that gives employees the right to bring individual grievances.<sup>221</sup> Identity caucuses could argue for a formal role in the contractual grievance process as well. Practically, however, few unions or employers are willing to recognize multiple grievance representatives. However, identity caucuses might still be able to utilize the proviso as written when they believe it is necessary.

Would greater use of the proviso lead to discord and division, thereby increasing the already large advantage that employers have in their dealings with unions? This is a significant concern, and one that all labor supporters should give serious attention. These same concerns should attend any move to repeal the exclusive representative rule to improve the voice of people of color within unions, since such good intentions often are co-opted by those who would prefer to destroy the labor movement.<sup>222</sup> However, the revitalization of the proviso would simply reaffirm the right of employees to communicate grievances to their employers, once the contractual process with the union has been exhausted, and simply require the employers to listen.<sup>223</sup> First, the union, upon notice that its members are dissatisfied with the contractual process, would have an incentive to prevent the employees from going to the employer because of its desire to show unity before the employer. This is a strong incentive that will resolve most problems before they ever reach the employer.

Further, the proviso as written gives employees “the right . . . to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or

---

221. See *Black-Clawson Co. v. Int'l Assoc. of Machinists Lodge 355, Dist. 137*, 313 F.2d 179 (2d Cir. 1962) (the collective bargaining agreement must provide employees the right to bring grievances individually, otherwise the employer entertaining an individual grievance would contravene the proviso's requirement that the grievance adjustment be consistent with the collective agreement).

222. See, for example, The Institute for Justice's work to repeal prevailing wage statutes and the National Right to Work Foundation's desire to protect dissenters within their unions.

223. Exhaustion of internal union procedures is generally required in grievance processing. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (“As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.”) (citation omitted).

agreement then in effect . . . .”<sup>224</sup> Thus, the union will also wish to prevent disputes with the employer and its members over whether the adjustment of the grievances is consistent or not with the collective bargaining agreement. In sum, the threat that groups of employees will go to management to make a separate agreement that may in fact be inconsistent with the collective bargaining agreement should be enough of a threat to the union’s “united front” that the union will do what it can to resolve the matter before a “proviso meeting” occurs. Most unions adhere to best practices as a matter of principle and service to their members, but not all unions are consistent in their practices.

If the proviso is such a weapon, then why have groups of employees used litigation, decertification, and wildcat strike remedies instead of the proviso? The answer may be the extent to which knowledge about the proviso is disseminated, which is related to the Supreme Court’s dismissive attitude towards the proviso in *Emporium Capwell*. Certainly, many union members have engaged in litigation, decertification of their union, and wildcat strikes when they felt their needs were not being met. However, as shown by my survey research in Part IV below, the “united front” ideology is well disseminated, and it is not clear that a change to the legal rules would increase the desire of union members to bargain separately with their employers.

#### **D. Exit, Voice, and Exclusivity**

Before discussing my empirical research suggesting that members of identity caucuses do not find exclusive union representation problematic, I will first explain why changes in exclusivity are not in the interests of women, people of color, or the labor movement. Several scholars criticize exclusivity as counterproductive to the fortunes of the labor movement.<sup>225</sup> With exclusivity comes the legal

---

224. 29 U.S.C. § 159(a) (1998).

225. Finkin, *supra* note 6; Summers, *supra* note 6. James Gray Pope and others voice a middle position of “deliberative reflection” on exclusivity. James Pope, Peter Kellman & Ed Bruno, *Toward a New Labor Rights Movement*, 4 WORKINGUSA 8, 26 (2001) (calling for a deliberative discussion about the utility of the American rule of exclusive representation, given that other countries without it have higher union density: “[T]he fact that the overwhelming majority of industrialized countries reject exclusive representation should give us pause. At a minimum, we should reassess our commitment to the principle, and consider possible alternatives and modifications that might better serve labor freedom.”); *see also* STANLEY ARONOWITZ, FROM THE ASHES OF THE OLD: AMERICAN LABOR AND AMERICA’S FUTURE 222, 226 (1998) (calling for more debate

duty to represent all employees in the union's bargaining unit fairly, whether or not the employees support the union or not. Without exclusivity, unions would be freed from defending duty of fair representation litigation, since the duty of fair representation unions owe to their members was created because of the union's power as exclusive bargaining representative.<sup>226</sup> The need for the union to obtain majority support in given bargaining units would also disappear if the unions did not seek to be the exclusive bargaining representative for the unit. Unions could focus on only those members who choose to be represented by them. Alan Hyde and others have written about how unions that command less than a majority can still be effective employee representatives.<sup>227</sup>

Other scholars, such as Marion Crain, point to exclusivity as a barrier to the assertion of the voices of people of color and women in the labor movement.<sup>228</sup> These scholars argue for the repeal of exclusivity in order for people of color to have their own bargaining representatives with management. The doctrines of exclusivity and majority rule, they argue, inhibit people of color from having the voice that unions are supposed to guarantee. According to Crain, a better system would allow workers of color and women workers to bargain separately with their employer through representatives who better understand their issues. Crain has suggested that the legal framework should be changed so that constituency groups such as the CBTU and CLUW, as well as community groups, might serve in representative capacities on behalf of workers of color and women.<sup>229</sup>

Replacing traditional unions with identity caucus members as representatives has some advantages. First, these workers, as fellow trade unionists, are well situated to know how collective bargaining works. Many of them, as leaders in their unions, already have a good deal of bargaining experience. Finally, by their membership in identity caucuses, these workers betray a sense that race and gender matter in the workplace. As shown by the historical and

---

around proposals that would cancel bargaining as the exclusive right of unions, such as a replication of the works councils model in Europe).

226. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (finding the duty of fair representation implicit in the Railway Labor Act's exclusivity principle); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944) (finding the duty implicit in section 9(a) of the NLRA).

227. Hyde, Sheed, & Uva, *supra* note 193.

228. *Labor's Divided Ranks*, *supra* note 7.

229. *Id.* at 1617 (citing to organizations listed in the Resource Directory in ARTHUR B. SHOSTAK, *ROBUST UNIONISM* (1991), including APRI, CBTU, LCLAA, CLUW and the North Carolina-based Black Workers for Justice).

contemporary context, however, these groups have shown little interest in usurping the role of the union as exclusive bargaining representative. There is also reason to question whether such groups have the institutional capacity to function in such a role. In many cases, their members are already serving in leadership capacities in their unions, and dealing with work and family responsibilities. Thus, the practical limitations of identity caucus bargaining seem to outweigh the benefits.

There are other reasons why exclusivity should not be ended with respect to women and people of color. A.O. Hirschman's classic work *Exit, Voice, and Loyalty* provides a good example. Hirschman studied the conditions under which customers of a business or members of an organization, among other social institutions, would choose to exit the organization, or use voice to change the institution. Among other factors, Hirschman found that loyalty to the firm or institution was an often ignored, but important, factor in the calculation. Hirschman concluded that a no-exit organization will be superior to a system with some limited exit options on two conditions: "(1) if exit is ineffective as a recuperation mechanism but does succeed in draining from the firm or organization its more quality-conscious, alert and potentially activist customers or members; and (2) if voice can be made into an effective mechanism once these members are locked in."<sup>230</sup> Thus, increasing voice, rather than allowing freer exit, is preferable for most institutions.

Hirschman concluded that because of the cumbersome legal process involved in decertifying unions, dissatisfied workers are "much more likely to make an effort at revitalizing the union with which they are affiliated."<sup>231</sup> There are few exit options available to union members in most states—if members refuse to pay dues to the union, they can be fired. However, the exit option of decertification is available in all states and can be quite damaging to the union and the employees—since it often means that the union will not be replaced with another one but instead that there will be no union at all.<sup>232</sup> Decertification is not the only exit option, however. In the

---

230. HIRSCHMAN, *supra* note 16, at 55.

231. *Id.* at 80.

232. This is due partly to rules that prevent affiliates of the AFL-CIO from raiding other affiliated unions. AFL-CIO CONST., *supra* note 30, art. 20, § 2: "No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate." Of course, the AFL-CIO Constitution applies only to those unions affiliated with the AFL-CIO, but currently the vast majority of existing unions are so affiliated. The only two notable exceptions are the

“right-to-work” states found mostly in the southern United States, workers can refuse to pay any dues to the certified exclusive representative.<sup>233</sup> The relative weakness of unions in the South, then, suggests that a nonexclusive bargaining regime would significantly weaken union bargaining strength overall. Further, members can resign their membership at any time, losing all participatory rights in the union’s democracy but also immunizing them from union discipline.<sup>234</sup>

A further question is whether given the choice of exit or voice, women and people of color prefer first to utilize exit or voice to deal with problems with their employers and their unions. Besides the difficulties generally inherent in exit, Hirschman emphasized that loyalty must be taken into account in the exit-voice calculation.<sup>235</sup> “Loyalty” in the union context might mean more than loyalty to one’s union, but also loyalty to the ideals of the union movement, as I will discuss further in Part IV. Such loyalty might transcend any calculation about the ramifications—legal or otherwise—of choosing exit or voice. In general, stronger loyalty will result in preferring voice to exit.

There are other reasons for enhancing voice rather than facilitating exit options that have to do with the legal environment for exit. The willingness of employers to break or exploit the weaknesses of labor law also has been shown by many studies.<sup>236</sup> The desire to thwart unionization by their employees will also lead employers to use race or gender differences as a wedge issue. The weakness of the current law on bargaining is also a reason to ask why separate

---

United Electrical Workers (UE) and the National Education Association (NEA). About thirteen million of the nation’s 16.3 million unionized workers are in AFL-CIO affiliated unions. Pam Ginsbach, *BLS Reports Union Membership Unchanged at 16.3 Million*, 13 DAILY LAB. REP. (BNA), Jan. 18, 2002, at AA-1. An end to exclusive representation would have little effect on the AFL-CIO’s domination of the “market” for representational services.

233. See 29 U.S.C. § 164(b) (1998): “Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”

234. *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95 (1985).

235. HIRSCHMAN, *supra* note 16, at 33–34; see also Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1289–90 (1992) (in the context of sexual harassment, structural barriers and loyalty to the firm often make exit difficult or undesirable).

236. See Brofenbrenner, *supra* note 152; Richard B. Freeman & Morris Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351–65 (1990); Morris Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionism in the Private Sector*, 22 J. LAB. RES. 519 (2001).

bargaining would be an overall benefit to female and union members of color.<sup>237</sup> Many unions have found that the employer's duty to bargain is a hollow one if the employer pushes its duty to bargain to its legal (and sometimes extralegal) limits. The distinction between mandatory and permissive subjects of bargaining has also hampered the ability of unions to determine which issues are worth striking over.<sup>238</sup> Even when it finds a violation of the NLRA, the NLRB's effectiveness in providing immediate relief has been questioned. Thus, the law of bargaining is yet another area where many in the labor movement have called for labor law reform.<sup>239</sup> A realistic perspective leads to the prediction that wholesale labor law reform is unlikely in the near future. The Bush Administration certainly has no interest in labor law reform, and even under President Clinton no large-scale effort was mounted to level the legal playing field between unions and employers. Thus, it is unclear that providing women and people of color the right to bargain separately from the union would accomplish much without wholesale changes to the law of bargaining.

#### **E. Exclusivity and Labor's Civil Rights Agenda**

A critical theory examination of the legal history of the labor and civil rights movements also suggests that the interests of people of color and women would not be served by the repeal of exclusivity. The history of discrimination practiced by labor unions is well-documented, but discrimination and segregation was most virulent in the days before the National Labor Relations Act governed labor relations. Before 1935, unions segregated into white and nonwhite locals. The number of segregated locals decreased after 1935 because, for the first time, unions could claim to represent all workers in a given bargaining unit of the employer, whether or not the employees were members of the union. However, segregated locals were not made illegal until the passage of Title VII of the Civil Rights Act in 1964. Prior to that law, unions could choose to organize their

---

237. See, e.g., *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (employer need not bargain with the union over the decision to close part of its business); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (courts cannot compel the acceptance of specific bargaining demands by one side or another); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395 (1952) (employer can refuse to bargain over matters which are "management functions" even if they touch on conditions of employment).

238. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 39-40 (1993) (arguing for the end of the distinction between mandatory and permissive subjects of bargaining).

239. WILLIAM B. GOULD, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 171-73 (1993).



locals in any way they chose.<sup>240</sup> The doctrine on the Board's certification of segregated bargaining units moved back and forth from 1935 until 1964, when the Board finally adopted a per se rule against certification of segregated bargaining units.<sup>241</sup> The union's obligation to fairly represent nonwhite and female employees in its bargaining unit led to eventual acceptance of nonwhites and women. Ending the duty to represent all members of the bargaining unit would also reduce the union's incentive to serve women and people of color who choose to stay in the bargaining unit.<sup>242</sup> The labor movement's willingness to advocate for civil rights causes would be decreased, and these movements would suffer. One might ask why the union movement has been so recently interested in the issues of women, people of color, and immigrants, and the answer lies in the decreasing share of the labor market that unions represent. Unions will be more likely to advocate on behalf of people of color and women if the potential exists for some increase to their membership.<sup>243</sup>

Although discussion of the effect of ending exclusivity usually focuses on the inconvenience to the employer or the reduced economic power of the bargaining unit, there are other reasons that go to labor's power as a movement and its willingness to take up civil rights causes that should not be overlooked. Many labor scholars believe that unions must take a "social movement" orientation to survive in the new century.<sup>244</sup> The end of exclusivity and labor's need

---

240. 42 U.S.C. § 2000e-2(c) (1994).

241. Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935-1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55 (1991).

242. Duty of fair representation (DFR) litigation has not been a panacea for plaintiffs, whether they are white, nonwhite, male or female. This is for a variety of reasons, including lack of access to competent attorneys, a short statute of limitations (six months), and a high standard of proof. Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89 (1985) (examining the low success rates of DFR plaintiffs). However, the mere threat of such litigation sometimes provides a limited incentive for unions to fairly conduct grievance procedures.

243. See, e.g., Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747, 760 (2000) ("Racial and ethnic minorities and women of all races need to find or forge solidaristic ties with each other to pursue shared interests, as well as needing at times to work with white men.").

244. Lowell Turner & Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 9, 11 (Lowell Turner et al. eds., 2001) (social movement unionism is characterized by greater rank-and-file participation than business unionism, where leaders make deals with management with little input from membership).

to broaden its appeal and interest to a greater number of people will lead it to narrowly define its interests. This narrowing of interests likely will lead to a return to the “craft unionism” of the AFL, rather than the broad “wall to wall” organizing strategy of the CIO. The negative history of the AFL compared to the CIO on race and gender issues suggests that the interests of women and people of color would be harmed if exclusive representation were ended.

Further, there is some historical precedent for labor unions’ unwillingness to organize in what they deem to be adverse legal environments. The solidly “right to work” southern United States is one geographic area that has a modified form of “members-only” unionism—that is, workers who are in the union’s bargaining unit, but are not required to pay dues to the union.<sup>245</sup> Historically, the labor movement has not placed a high priority on organizing the South, usually citing the right-to-work legal environment as the major obstacle. The replication of a “right to work” model on a nationwide scale would result in union leadership committing only to organizing those who they believe to be most willing to be in a union. In the past, assumptions about who is most “organizable” have contributed to a historic unwillingness by unions to organize women, people of color, and immigrants.<sup>246</sup>

In summary, a critical realist perspective shows that proposals to change the legal structure of the bargaining relationship between employers and unions are not necessary, and indeed may be counterproductive to the interests of people of color and women in unions. Indeed, commentators suggest that the key to the labor movement’s greater sensitivity to matters of race and gender, as well as sexual orientation, is more organizing.<sup>247</sup> Changes to legal rules that remove incentives to wide-scale organizing are likely to lead to union complacency about the necessity of organizing and a return to the business unionism that historically has excluded women and people of color. Instead, the internal workings of unions and the law governing union democracy should be examined to deal with issues of

---

245. See 29 U.S.C. § 164(b) (1998).

246. See HECTOR DELGADO, *NEW IMMIGRANTS, OLD UNIONS* (1993) (refuting assumptions about immigrants’ desire to organize unions); Marion Crain, *Gender and Union Organizing*, 47 *INDUS. & LAB. REL. REV.* 227 (1994) (refuting the thesis that women are “unorganizable”); Michele M. Hoyman & Lamont Stallworth, *Participation in Local Unions: A Comparison of Black and White Members*, 40 *INDUS. & LAB. REL. REV.* 323 (1987) (contradicting previous studies that Blacks participate in unions less than whites).

247. Fletcher & Hurd, *supra* note 180, at 61 (advocating “organizing for inclusion,” which explicitly confronts issues of race, gender, ethnicity, and sexual identity).

race and gender in a way that does not undermine the interests of the bargaining unit and the interests of women and people of color. As an alternative to ending exclusivity, Dorothy Sue Cobble has argued for the creation of “intraunion bargaining structures” to facilitate participation and to better protect the rights of minorities.<sup>248</sup> “In contrast to the repeal of the exclusivity doctrine, the promotion of such formalized intraunion bargaining structures would ensure that the class needs of employees are met along with the needs that flow from their different racial, ethnic, and gender identities.”<sup>249</sup> I will now address identity caucuses as a kind of “intraunion bargaining structure” being utilized today in the unions where exclusivity is the legal norm.

#### IV. How Power Is Being Voiced at Work Today

Lack of numbers in our union caucus has inhibited us from having influence with the union leadership and subsequently the negotiation process with the local and international. So the only way to change that is to have more numbers in our rank and file caucuses so they will take us seriously.<sup>250</sup>

##### A. A Realistic View of Worker Power in the Contemporary Context

As I have argued above, my approach includes ascertaining the extent to which workers might prefer identity caucuses as their bargaining representatives to traditional unions. In addition, the realist perspective looks at available evidence about social conditions to determine whether people of color and women would benefit from a change to the exclusive representative rule. These questions are particularly critical now that union density currently hovers around 10% of the private sector.<sup>251</sup> At the same time, the race, gender, and

---

248. Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 285, 302 (Sheldon Friedman et al. eds., 1994). As an example of an “intraunion bargaining structure,” Cobble points to her earlier work examining gender issues in waitress locals where gender representation on joint boards or councils was “often some combination of interest and proportion, not unlike the representation system operating in the U.S. House (proportional) and the Senate (interest).” *Id.* (citing DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY 184–87* (1991)).

249. *Id.* at 302.

250. Interview with Subject No. 10, Black male member of the United Auto Workers and the Black Rank and File Exchange, in Detroit, Mich. (July 13, 2001).

251. See *AFL-CIO Focuses on Improving Organizing As Numbers Continued Declining in 2000*, *DAILY LAB. REP.* (BNA), Feb. 16, 2001, at AA-3. See also Ginsbach, *supra* note 232.

national origin diversity of the workforce has continued to grow. Studies have shown that people of color have a stronger preference than whites for unions. In their study, *What Workers Want*, Richard Freeman and Joel Rogers found that most workers, and especially African American workers, had a strong preference for some form of employee representation in the workplace.<sup>252</sup> Other studies have found that immigrants, particularly those from Latin America, have a stronger preference for unions than native-born workers.<sup>253</sup> These studies suggest that unions, as they exist today, are still popular institutions with women and people of color.

Thus, it is unclear what would be accomplished by giving women and people of color the right to bargain separately in race and gender identity caucuses. Many contemporary examples suggest that women and people of color, as well as union democracy advocates and sexual minorities, do not seek to bargain directly with the employer, but instead seek to influence power in caucuses, through means that are either extra-legal or legally invisible.<sup>254</sup> These include: (1) rank-and-file caucuses not sanctioned by union leadership; (2) work stoppages unauthorized by the union leadership; (3) "union democracy" caucuses; and (4) gay and lesbian caucuses. There are interrelationships between these categories, but I will discuss each category in turn.

---

252. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999) (Most workers want a voice in workplace management, support unions, and want more nontraditional forms of labor-management committees to run the organization and settle disputes). These findings are buttressed by the AFL-CIO's internal surveys. African Americans older than thirty-five, for example, are the strongest backers of unions, with 93% saying it is essential or very important to protect the right to join a union. AFL-CIO REPORT, BASED ON A SURVEY BY PETER D. HART RESEARCH ASSOCIATES, *WORKERS' RIGHTS IN AMERICA: WHAT WORKERS THINK ABOUT THEIR JOBS AND EMPLOYERS* 28 (Sept. 2001); see also Gregory Defreitas, *Unionization Among Racial and Ethnic Minorities*, 46 *INDUS. & LAB. REL. REV.* 284 (1993) (Blacks exhibit a markedly stronger demand for union representation than whites, Asians or Hispanics).

253. See *ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* (Ruth Milkman ed., 2000) [hereinafter *ORGANIZING IMMIGRANTS*].

254. "Legal invisibility" defines institutions that operate in the margins of social and legal life, but whose existence does not violate any law. Wildcat strikes, except in cases where worker safety is threatened, are almost always illegal. Union caucuses, on the other hand, are not illegal, but neither are they recognized at all by statutory labor law. See Part V *infra*. The caucuses in this Part are often not even officially recognized by their union. This marginalization is compounded when lesbians and gays, who often lack the same level of legal protection as other subordinated groups, form caucuses in their unions.

(1) *Rank-and-File Caucuses Not Sanctioned by Union Leadership*

Several case studies show that workers, when they have had differences with union leadership, have attempted to resolve those differences through caucuses working to reform their unions.<sup>255</sup> I have already described some of the more revolutionary versions of these reform caucuses, such as DRUM in 1960s Detroit. These organizations did not work to establish a second channel for people of color to bargain with the employer, but instead sought a radical restructuring of their workplace. By contrast, modern caucuses not sanctioned by union leadership have been able to achieve gains by attempting to reform their unions. For example, in the United Furniture Workers of America, Black and Latino/a caucuses worked within the union to increase the representation of their constituencies in union leadership.<sup>256</sup> In Hotel Employees and Restaurant Employees (HERE) Local 2 in the mid-1980s, reform caucuses of Latino/a workers worked to educate the union on the need to translate collective bargaining agreements and other vital union documents into Spanish.<sup>257</sup> By the 1990s, HERE was at the forefront of immigrant organizing and providing multilingual representation to workers in the service sector.<sup>258</sup> HERE's changed attitudes toward practices that marginalized people of color and women is not due solely to the pressure of the caucuses, but the caucuses are another

---

255. PATRICIA ZAVELLA, *WOMEN'S WORK AND CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY* (1987) (regarding Mexican cannery workers in the Santa Clara Valley as they strive to build a rank-and-file caucus within the Teamsters Union); DAN LA BOTZ, *RANK-AND-FILE REBELLION: TEAMSTERS FOR A DEMOCRATIC UNION* (1990).

256. DANIEL B. CORNFIELD, *BECOMING A MIGHTY VOICE: CONFLICT AND CHANGE IN THE UNITED FURNITURE WORKERS OF AMERICA* 191 (1989).

257. Hector Ramos, *Latino Caucuses in US Labor Unions*, RACE AND CLASS 68-78 (Spring 1986) (a study of insurgent Latino movements in three largely Latino unions); see also Dorothy Sue Cobble & Michael Merrill, *Collective Bargaining in the Hospitality Industry in the 1980s*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 447 (Paula B. Voos ed., 1994) (discussing HERE's mixed record on gender and race issues in the 1980s).

258. See Patricia Lee, *Sisters at the Borders: Asian Immigrant Women and HERE Local 2*, in BUILDING BRIDGES: THE EMERGING GRASSROOTS COALITION OF LABOR AND COMMUNITY 38 (Jeremy Brecher & Tim Costello eds., 1990); Miriam J. Wells, *Immigration and Unionization in the San Francisco Hotel Industry*, in ORGANIZING IMMIGRANTS, *supra* note 253, at 109 (how immigrant incorporation into HERE Local 2 shaped the forms and outcomes of union mobilization); Lou Siegel, *Local 11 Takes on L.A.*, 20 LAB. RES. REV. 21 (1992) (regarding contractual protections for immigrants won by HERE Local 11).

example of how people of color and immigrants worked within the union to achieve change.<sup>259</sup>

(2) *Work Stoppages Not Authorized by the Union Leadership*

Some informal groups or caucuses have chosen to deal with dissatisfaction with their union by staging wildcat strikes and unauthorized work stoppages. Wildcat strikes could be seen as “working outside the union” because they are a direct challenge to the union leadership and the employer.<sup>260</sup> However, it is unusual to call such actions “separate bargaining.” A wildcat strike may indeed be a violation of the collective bargaining agreement that seeks to change the union’s position *vis-à-vis* the employer, but it is hard to call it “bargaining” in the traditional sense because a wildcat strike is not the kind of activity that receives the imprimatur of the legal system the way that bargaining does.

Workers who engage in this form of protest usually have not sought to bargain with the employer apart from their union.<sup>261</sup> As one example, the frustration of immigrant workers with a Teamster local in Washington State led to a wildcat strike in June 1999.<sup>262</sup> One of the leaders of that strike, Maria Martinez, is now the chief steward of the local.<sup>263</sup> These and other workers who have engaged in wildcat strikes have successfully transformed their unions from the inside.

(3) *Union Democracy Caucuses*

The goals and actions of caucuses of people of color and women are similar to the “reform caucuses” present in many unions. These

---

259. Judicial interpretations of labor laws have contributed to these changes. In *Retana v. Apartment, Motel, Hotel, and Elevator Operators, Local No. 14*, 453 F.2d 1018, 1023 (9th Cir. 1972), the Ninth Circuit Court of Appeals held that failure to provide translations of essential union documents for Spanish speaking workers violated the duty of fair representation. In *Zamora v. Local 11, Hotel Employees and Restaurant Employees International Union*, 817 F.2d 566, 570 (9th Cir. 1987), the same court held that where 48% of the union membership spoke only Spanish, the Landrum-Griffin Act required translators at union meetings. See David Gregory, *Union Leadership and Workers’ Voices: Meeting the Needs of Linguistically Heterogeneous Union Members*, 58 U. CIN. L. REV. 115 (1989).

260. James B. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751 (1973).

261. See Magdalena Mora, *The Tolteca Strike: Mexican Women and the Struggle for Union Representation*, in MEXICAN IMMIGRANT WORKERS IN THE U.S. 111 (Antonio Rios-Bustamante ed., 1981).

262. Martha Gruelle, *Teamsters Meat Packers Take on IBP with Little Support From Their Union*, LAB. NOTES, Aug. 1999, at 1 (wildcat strike involving Mexican, Central American, Lao, Vietnamese and Bosnian immigrants).

263. *Id.*

groups are nationwide networks of union members committed to “union democracy.” Reform caucuses such as Teamsters for a Democratic Union (TDU) and New Directions in the United Auto Workers began in the late 1980s, seeking to make union leadership more accountable, rather than seeking to bargain directly with the employer or decertify the union.<sup>264</sup> Although these groups have endorsed and utilized the weapon of wildcat strikes, their strategy is more often a direct challenge to the union leadership than a demand to bargain with the employer.<sup>265</sup>

Reform caucuses have been largely white and male, although they have often supported the demands and struggles of workers of color and women and are becoming more diverse. As part of the “union democracy movement,” Black workers formed a group called the Black Rank and File Exchange (the “Exchange”), which had chapters in Detroit, Milwaukee, and Chicago in the late 1980s but then became dormant by the end of the 1990s with the loss of many jobs in the auto industry.<sup>266</sup> The caucus received support from Labor Notes, a Detroit-based publication dedicated to union democracy. Selwyn Rogers, the group’s national chair, identified the group’s concerns as follows: “We feel that there’s not a proportional Black representation in our various unions. But we also feel that the union leadership generally attracts Black leadership that tends to go along with their mind-set and their way of running the union.”<sup>267</sup> The Exchange shares the goals of the union reform movement and does not endorse separate bargaining or decertification. At its height, the Exchange counted about eighty members from a variety of unions in its ranks. Membership dropped off in the early 1990s, but organizers have recently begun a drive to renew the Exchange.<sup>268</sup>

---

264. See LA BOTZ, *supra* note 255.

265. See MIKE PARKER & MARTHA GRUELLE, *DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP* 67–83 (1999).

266. Interview with Subject No. 10, *supra* note 250.

267. DAN LA BOTZ, *A TROUBLEMAKER’S HANDBOOK: HOW TO FIGHT BACK WHERE YOU WORK—AND WIN!* 175 (1991) (quoting Selwyn Rogers).

268. Interview with Subject No. 10, *supra* note 250. Another rank-and-file group in Detroit is called An Alliance of Ameritech Employees for Equality (AAEE), comprised of members of Communications Workers of America Local 4100. This group, along with the union, filed a discrimination complaint against Ameritech in 1999. Kim Moody, *Telephone Workers Fight Discrimination at Ameritech*, LAB. NOTES, June 1999, at 1. One of the group’s goals is the “restoration of union solidarity in the workplace.” *Id.*

(4) *Rank-and-File Gay and Lesbian Caucuses*

Gay and lesbian caucuses are alternative avenues of advocacy within unions. Besides the AFL-CIO constituency group, Pride at Work (PAW), rank-and-file lesbian, gay, bisexual, and transgender (LGBT) caucuses have organized in response to the lack of legal protection for LGBT workers, and employer and union response to homophobia in the workplace.<sup>269</sup> For LGBT workers, caucuses have been instrumental in putting gay rights on the bargaining agendas of unions.<sup>270</sup> One large caucus is the Lesbian and Gay Issues Committee (LAGIC) of New York City municipal employees.<sup>271</sup> In 1993, LAGIC fought for and obtained domestic partner health benefits in contract negotiations between its union and city government.<sup>272</sup> According to Desma Holcomb and Nancy Wolforth: "Caucuses are the best vehicles for changing union policy and supporting a bargaining agenda of nondiscrimination clauses and domestic partners (including pensions)."<sup>273</sup> These caucuses provide important examples for race- and gender-oriented identity caucuses.

In sum, the history of caucuses and insurgent movements has not borne out a need for the end of exclusive representation. Most caucuses have not sought to bargain separately with their employer, and wildcat strikes have been primarily a means to exert pressure on the union's leadership in negotiations rather than a direct appeal to the employer. However, it is unclear to what extent this orientation is due to legal rules or notions of unionism that constitute the mythos of the labor movement. Many union members, even those that are part of reform movements, believe that unions should be reformed from within, rather than by creating new unions. Even those who support exit do not endorse direct bargaining with the employer, possibly because of the labor ideology that no member should make individualized deals with the employers. The question I now address is whether members of identity caucuses, if given the choice, would prefer to bargain separately if they became dissatisfied with their unions.

---

269. See Holcomb & Wohlforth, *supra* note 129, at 11.

270. *Id.* at 15.

271. See Frank, *supra* note 141, at 96. LAGIC is part of American Federation of State County Municipal Employees (AFSCME) District Council 37, which represents 110,000 New York City employees in fifty-six separate local unions. *Id.*

272. Tamara L. Jones, "Top Down" or "Bottom Up"? *Sexual Identity and Workers Rights in a Municipal Union*, in *OUT AT WORK: BUILDING A GAY-LABOR ALLIANCE* 172, 188 (Kitty Krupat & Patrick McCreery eds., 2001).

273. See Holcomb & Wohlforth, *supra* note 129, at 12.



## B. Field Research: The Reach of Exclusivity

### (1) *Why Field Research Is Needed*

So far, I have shown in different examples that women and people of color have chosen to resolve problems within their union without attempting to go directly to the employer, or seeking other representatives to intervene in the dispute. But one can glean only so much about the nature of legal consciousness from what people do. Consistent with the critical realist framework that I am taking in this Article, the researcher must also ask the people who inhabit social settings about their understanding of the legal constraints on their behavior in order to determine the effect of legal rules. My hypothesis is that the exclusive representative rule is not what keeps workers of color and women from seeking to bargain with their employer. Rather, it is a faith in traditional notions of unionism that makes workers seek change from within.

In order to confirm this hypothesis, I surveyed and interviewed women and people of color who are members of multi-union, AFL-CIO-endorsed constituency groups such as CBTU, LCLAA, CLUW, APRI, and internal union caucuses such as the SEIU African American Caucus and the ATU Latino/a and Women's caucuses. I also made contact with a multi-union group called the Black Rank and File Exchange. I chose to focus on these groups for several reasons. First, Marion Crain has identified these groups as potential alternative representatives to unions if the system of exclusive representation was ended.<sup>274</sup> Second, even though the AFL-CIO and its affiliated unions officially recognize some of these groups, groups such as the Black Rank and File Exchange are informal, and not officially sanctioned by union leadership. I chose to interview union members and former union members in these groups because they were most likely to know about the system of exclusive representation and have an opinion about how bargaining worked. Finally, although the orientation of some of these groups generally is not to interfere in local union affairs, the nature of these groups lends itself to providing assistance with individuals who are having problems with their unions. So, the extent to which the members of these caucuses would be willing to serve as bargaining representatives

---

274. See *Labor's Divided Ranks*, *supra* note 7, at 1617 & nn.372-74 (discussing the potential role of community organizations including CBTU and LCLAA in representing workers if exclusivity were repealed).

for women and people of color will determine how successful a nonexclusive bargaining regime would be.

(2) *Scope and Methodology*

I should first note some of the methodological aims and constraints of the research. As I argued above, I do not purport with this research to give the definitive answer to the question of whether all workers of color or women would prefer to bargain with employers in race- or gender-separate unions. The necessary sample size to make that claim is beyond the reach of this limited study. Nor do I aim to make such a claim even about members of race and gender caucuses—for even though that number of workers would be much smaller, I obtained a relatively small response to the 120 surveys that I distributed to members of race and gender caucuses during 2001.<sup>275</sup> Twenty-nine members of these caucuses participated in my study. I conducted in-person interviews with seventeen of the subjects and received completed questionnaires from twelve additional individuals that I have not met. Thus, the sample is also a mix of random and self-selected participants. I sent surveys to the contacts I made throughout 2001 and asked them to distribute the surveys to their members. Most of the subjects live in the upper-Midwest states of Wisconsin, Illinois, and Michigan. The only exceptions were the surveys sent to the Asian Pacific American Labor Alliance, which were sent to the Los Angeles Chapter, and a respondent in Seattle, Washington. The research is intended to be a starting point for further inquiry, and even in its limited scope, confirms the arguments and historical evidence that I have presented above. That evidence was largely in the form of the statements of the national leaders of the identity caucuses; many of them are national leaders in the labor movement as well. In contrast, the purpose of my field research was to get the perspective of more members of the caucuses in local chapters, and to attempt to determine the extent to which their perspective is shaped, or constrained, by legal rules such as exclusivity.<sup>276</sup>

---

275. The surveys were distributed as follows: Coalition of Black Trade Unionists (20); Labor Council on Latin American Advancement (20); Asian Pacific American Labor Alliance (10); A. Phillip Randolph Institute (20); Coalition of Labor Union Women (10); Amalgamated Transit Union Women's Caucus (10); Amalgamated Transit Union Latino Caucus (10); SEIU African American Caucus (10); and Black Rank and File Exchange (10).

276. In this regard, I am attempting to discern the "legal consciousness" that members of the identity caucuses have about the exclusive representation rule—the extent to which

(3) *Observations and Survey Data*

Because of the small size of my sample, and the varying degrees of willingness to participate in the study, there are differences in the demographic makeup of my subjects and the demographics of union members as a whole. However, the demographics of members of the identity caucuses are more difficult to determine, and the sample may be closer to approximating those figures. My sample was 68% men and 32% women. This differs from the ratio of men to women members in unions, where, according to the latest data from the Bureau of Labor Statistics (BLS), 41% of union members are women.<sup>277</sup> Blacks comprised 43% of my sample, Latino/as totaled 36%, and whites and Asians were 10.5% each. The number of whites in my sample, of course, is far lower than the nearly 77% that whites comprise of total union membership, but that is to be expected from a sample of this nature. The total number of Black union members in 2001 was approximately 14% and Hispanics were 9% of union members in 2001. Whether the number of Asians tracks total union membership is hard to determine because data about Asian union membership is not available from BLS.

The interviews and surveys that I conducted have revealed that twenty-eight of the twenty-nine subjects (96%) in the study feel that bargaining is something that should be accomplished by the union, rather than by caucuses or individually.<sup>278</sup> However, a member of the UAW, who believed that bargaining should be done on the "local union level," also wanted his union replaced by the Black Rank and File Exchange. He was the only respondent to want his current union replaced.<sup>279</sup> A consistent theme was the need for larger, broad-based unions, rather than specialized unions, in the current economic climate that unions face today. A Black female member of the A.

---

it is the chief barrier to separate bargaining or whether it is so ingrained that it simply is the "natural . . . normal . . . and . . . commonsense understanding" of how unions should work. Merry, *supra* note 216, at 5; Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 *LAW & SOC. REV.* 1055, 1059 (2001) ("Put simply, legal consciousness is how people think about law. . . . Legal consciousness is also how people do *not* think about law; that is to say, it is the body of assumptions people have about the law that are simply taken for granted. These assumptions may be so much a part of an individual's worldview that they are difficult to articulate.").

277. Bureau of Labor Statistics News Release, *Union Members in 2001* (Jan. 17, 2002).

278. This is based on the responses to Question 36 of my Survey Questionnaire, which asked: "If you had to pick one, how do you think bargaining with your employer should be conducted: (1) International Union level; (2) Local Union level; (3) Caucuses; (4) Individually."

279. See Subject No. 10, *supra* note 2.

Phillip Randolph Institute voiced a consistent theme when she told me that “numbers mean strength.”<sup>280</sup> Another Black female, a member of the Coalition for Labor Union Women, also expressed a need for unity when she said that bargaining in identity caucuses would not be better than the current system because everyone needs to be united.<sup>281</sup> Members of these caucuses seem to take for granted that collective bargaining, no matter how it is conducted, will always lead to the dissatisfaction of some. A Black male worker told me: “I’ve been dissatisfied, but that’s the collective bargaining process. Unions are about raising all boats. One way to change the union’s positions on racial issues is more participation from Black members.”<sup>282</sup>

The number of workers who wanted caucuses to bargain on their behalf was slightly higher when the subjects were in a hypothetical conflict with their union. Seven subjects (24%) answered that they would want identity caucuses to bargain with their union on their behalf *if they disagreed* with the union’s policies.<sup>283</sup>

I asked about the respondents’ experience with discrimination at the workplace to get an idea of how those experiences might affect support for identity caucuses as bargaining representatives. Twenty-nine of the people in the study (69%) reported having been discriminated against in a job that they held.<sup>284</sup> Thus, most of the workers that I interviewed had encountered some incident of racism and/or sexism from the employer, fellow employees, and in some cases, union staff and representatives. Although many pointed out that such instances were more numerous in the past, there continued to be contemporary occurrences of racism and sexism, even after workers of color and women have achieved leadership positions in their unions and in some cases a numerical majority. Members of these groups have resolved disputes involving race or gender informally, or by using the union’s established procedures, rather

---

280. Interview with Subject No. 13, Black female member, A. Phillip Randolph Institute and Communications Workers of America, in Milwaukee, Wis. (Aug. 24, 2001).

281. Interview with Subject No. 16, Black female member, Coalition of Labor Union Women and American Federation of State, County and Municipal Employees, in Milwaukee, Wis. (Sept. 28, 2001).

282. Interview with Subject No. 7, Black male member, Coalition of Black Trade Unionists, and American Federation of Teachers, in Madison, Wis. (Apr. 19, 2001).

283. Subject No. 10, *supra* note 2; Survey Response from Subject No. 19, Asian Pacific Islander male, member of United Auto Workers, Asian Pacific American Labor Alliance, Coalition of Black Trade Unionists, and “similar Latino caucuses” (Nov. 10, 2001) (on file with author).

284. Subject Nos. 14, 17, 19, 20.

than going directly to the employer or to the courts. The caucuses have sometimes played a role in grievance processes, but tend not to get involved in local politics. None of the workers in the study has filed a charge or lawsuit with a government agency alleging race, sex, or national origin discrimination.<sup>285</sup> Despite incidents of discrimination, the people I interviewed generally preferred racially integrated and gender diverse unions to bargaining units that were comprised solely of members of similar racial and gender backgrounds. A Black female member of CLUW, who reported that she had been the victim of discrimination in promotions, said, "We do not need to be separated. We need each other until we have the power that we don't have right now."<sup>286</sup> The subjects also stressed the importance of identity caucuses in their unions. According to one Black female: "I think caucuses are a place for whatever group to bring forward minority issues that may not have been raised. They are a way to bring attention, open doors, and have a conversation."<sup>287</sup>

Finally, the subjects were asked whether they would vote to keep the union, get rid of the union, or replace it with another union in a decertification election. Twenty-eight of the twenty-nine subjects said that they would vote to keep the union that they have now. These findings are consistent with the extensive studies of Freeman and Rogers on worker attitudes toward unions.<sup>288</sup>

Thus, workers in identity caucuses seem to have little trouble with the legal regime that they have been dealt as far as exclusive representation. Most groups have neither the desire nor the institutional capacity to represent workers in dealings with their local unions or employers. These organizations have no more than one paid staff member and their members often serve in a representative role in their own unions. In the case of nationwide networks like CBTU and LCLAA, members may come from different unions and industries and may find a difficult time relating to the industry or

---

285. This is consistent with other studies of the low incidence of sexual harassment and discrimination claims, even in light of evidence that shows a high incidence of sexual harassment and discrimination. Beth Quinn, *The Paradox of Complaining: Law, Humor and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151 (2000); David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285 (2001) (Relatively few rights violations actually lead to explicit or formal invocations of the law; the primary effect of the ADA on careers can be profound but is primarily indirect or symbolic.).

286. Subject No. 16, *supra* note 281.

287. Subject No. 11, *supra* note 1.

288. FREEMAN & ROGERS, *supra* note 252, at 69 (finding 90% of union members would vote to keep their current union).

union-specific issues. In other cases, it might simply be an orientation of non-intervention into local union affairs, one of the ideologies cultivated over many years by the labor movement. In spite of this, two of the people I interviewed reported that they had called the union representative of a fellow identity caucus member who had complained of poor representation by his local. Neither of the respondents reported it going any further than that.

(4) *Implications of the Study*

My study focuses only on those union members who are also members of identity caucuses. These union members might be predisposed to certain attitudes about unions that make them less likely than other workers to favor nonexclusive representation schemes. As described earlier, many of the subjects in the study currently hold or have held leadership positions in their unions, which certainly explains a good deal of their faith in traditional unions.

However, my interviews suggest that women and people of color, whatever their position in the union, have instrumental reasons for favoring traditional unions over identity caucuses. The people that I interviewed consistently voiced an opinion that they were better off in broad-based, traditional unions, than by bargaining in identity caucuses. This was evident in comments such as this one:

Numbers mean strength. A lot of things that we enjoy today would not be possible without unions. I think for me personally, the union has allowed me to have a good living status, and provided me with the ability to get involved in a lot of arenas in which I would not have gotten involved.<sup>289</sup>

This quote exemplifies a commitment to a large, broadly-based union because of the benefits, material and otherwise, that accrue to people in unions. Gary Chason and Barbara Bigelow's recent work on commitment to unions also suggests that instrumental reasons are important reasons why many union members support their unions.<sup>290</sup> The same person, when talking about why she was a member of the A. Phillip Randolph Institute, also expressed ideological reasons why she supports the union, and her identity caucus: "I believe in A. Phillip Randolph's message, that we represent and encompass all

---

289. Subject No. 13, *supra* note 280.

290. GARY CHASON & BARBARA BIGELOW, UNIONS AND LEGITIMACY 31-33 (2002).

people. . . . He had strong stands on labor unions. . . . He believed we should have no boundaries of race, age, or ethnic background."<sup>291</sup>

This union leader, like many others in the study, is supportive of her union. However, the views of rank-and-file members who have never held any leadership position are consistent with those of the union leaders that I surveyed. Further, I actively sought the views of an explicitly rank-and-file caucus, the Black Rank and File Exchange, though many of its members have held union leadership positions. Despite its reformist stance, the views of members of this identity/reform caucus on the role of the union in labor-management bargaining are not uniformly different than those of other identity caucuses.

My research suggests that people of color and women do not necessarily want race- or gender-separate bargaining units or alternative representatives with the employer.<sup>292</sup> Thus, it seems that repeal of the exclusive representative rule is not what these workers want. A cornerstone of the U.S. labor law system is employee choice. Thus, if few workers desire identity caucuses instead of unions, a change in legal rules would seem both unwarranted and ultimately unsuccessful. Besides the interests of workers, however, there are other reasons why repeal of the exclusivity might not be in the best interests of workers of color and women. The rapidly increasing share of workers of color and women in labor unions has resulted in a larger number of women and people of color as leaders of local unions. This trend only promises to increase. Indeed, only five of the twenty-nine people in the study reported never holding any elected or appointed union office.<sup>293</sup>

Further, it is important not to conflate the concepts of exclusivity and majority rule. Exclusivity is a legal rule that governs the relationship between the bargaining units certified by the National Labor Relations Board. Majority rule is an ideology that has often, in the name of democracy, been used to marginalize minorities and women. The NLRB and the courts have never had a role in requiring unions to operate by majority rule, proportional representation, or any other internal governance system. The next Part, then, explores what changes to the law of union governance might be appropriate to

---

291. Subject No. 13, *supra* note 280.

292. To reiterate, further research is needed to come to a definitive answer to that question for all women and people of color. My research on the members of race and gender identity caucuses, and other available evidence such as participation rates of women and people of color in unions, suggests that the results would be similar.

293. Subject Nos. 1, 18, 20, 21, 23.

enhance the voices of people of color and unions given that workers do not seem to have a quarrel with exclusivity.

### **V. How New Voices Can Be Heard: Representative Union Governance**

“I won’t be satisfied with the influence I have over union decisions until I see diversity. There are no Blacks on my union’s executive board. The election process is not working.”<sup>294</sup>

Although my conclusion is that the repeal of exclusive representation is not desired by, and indeed might be counterproductive to, the interests of members of race and gender identity caucuses, there are modifications to the law of internal union governance that would serve the interests of member race and gender caucuses, and would allow unions flexibility to design leadership structures that approximate the race and gender makeup of their unions. I have established that identity caucuses are not currently a threat to internal union solidarity, nor do members of the caucuses have a problem with the rule that makes the union the exclusive bargaining representative. This Part examines whether the law of internal union democracy can and should be reexamined to increase the role of identity caucuses in union governance.

Even in exclusive representative systems, we should ask whether and how law facilitates the existence of identity caucuses “as self-identified collectivities . . . by creating structural arrangements through which institutional power can be more effectively and equally distributed among these various self-determined groupings.”<sup>295</sup> Some might argue that union members’ satisfaction with the basic rule of exclusive representation makes any changes to union governance unnecessary. However, the case studies that I have presented where reform caucuses sought to change unions suggest otherwise. Although some unions, particularly on the West Coast, are increasingly race and gender diverse in their leadership and rank-and-file, there are many unions that continue to be dominated by white men. As explained in Part IV, the composition of unions as a whole

---

294. Interview with Subject No. 1, Black male member, Laborers International Union of North America (construction), and the Coalition of Black Trade Unionists, in Madison, Wis. (Mar. 17, 2001).

295. Iglesias, *supra* note 7, at 483 (characterizing other internal union reform proposals such as Eileen Silverstein’s proposal for interest group certification and veto power over majority rule union decisions, and George Schatzki’s proposal to end exclusive representation). See Silverstein, *supra* note 6; Schatzki, *supra* note 6.



in 2001 was still 77% white and 59% male.<sup>296</sup> As described in Part II above, several researchers have gathered evidence of entrenched attitudes about the inability of women and people of color to be union leaders.<sup>297</sup> Although the top leadership of the AFL-CIO has undergone change since 1995 when the New Voice leadership took over, change is slow to filter into many local unions.<sup>298</sup> Race- and gender-conscious leadership structures serve important representational needs besides cultivating labor's ties with civil rights organizations.

Another reason why the content of union democracy must be examined has to do with the exclusive representation principle itself. If workers are bound by the results of union elections based on majority rule, then they should have democratic rights to influence the organization. If exclusivity were to be abolished, there would be little reason for the relatively high level of government regulation placed on unions relative to other membership organizations.<sup>299</sup> Preserving union democracy, then, might be another reason to keep exclusive representation.

Assuming unions are to be democratic, what level of union democracy is required? In this regard, the battle is over interpretations of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA or "Landrum-Griffin"). To some, Landrum-Griffin is simply a morass of technical requirements that does not further the cause of union democracy.<sup>300</sup> To the reformers, the courts have eviscerated Landrum-Griffin and its guarantees of formal democracy such as freedom of speech within unions.<sup>301</sup>

---

296. See Bureau of Labor Statistics News Release, *supra* note 277.

297. See Fletcher & Hurd, *supra* note 180.

298. The New Voice slate included Linda Chavez-Thompson, a Latina, as Executive Vice President. Public employee and service sector unions now have several women and people of color in their leadership. See Michael Goldfield, *Race and Labor Organization in the United States*, in *RISING FROM THE ASHES? LABOR IN THE AGE OF "GLOBAL" CAPITALISM* 87, 97 (Ellen Meiksins Wood et al. eds., 1997) (contrasting the public sector union AFSCME with other unions that have been much slower to change their leadership composition, even when their membership base has changed substantially).

299. See Clyde W. Summers, *From Industrial Democracy to Union Democracy*, 21 J. LAB. RES. 3, 3 (2000) (noting the lack of social concern about democratic decision-making in other social institutions such as corporations, chambers of commerce and groups like the National Rifle Association).

300. See Estrieher, *supra* note 24 (Landrum-Griffin does not further the cause of union democracy because of the low rates of member participation in unions); Fraser, *supra* note 24 (Landrum-Griffin should be rejected, in part, because it was passed with the help of big business in order to weaken unions).

301. See Summers, *supra* note 299; Michael J. Goldberg, *An Overview and Assessment of the Law Regulating Internal Union Affairs*, 21 J. LAB. RES. 15 (2000) ("[U]nion

Since I argue for essentially keeping barriers to exit from unions, it follows that voice mechanisms must be maintained and examined to ensure that they function properly, especially for women and people of color. Critical theorists have questioned whether long-held notions of liberal democracy are adequate for the protection of women and people of color, especially when they make up minorities within social institutions.<sup>302</sup> Given that the members of identity caucuses generally do not wish to have identity caucuses bargain on their behalf, but favor the role of caucuses in the labor movement today, the law of union reform should allow caucuses full freedom of association, and traditional unions should have the ability to design schemes that allow for race and gender caucuses to have a role in union governance. Unfortunately, a critical examination of the law of union democracy shows its formal guarantees of democracy are indifferent to caucuses and to race and gender diversity in unions. First, I will describe some basic principles of Landrum-Griffin, how they have operated in the context of dissident caucuses and plans to increase the representation of women and people of color. Finally, I will put forth an alternative vision of union democracy that takes into account race and gender caucuses in unions.

#### A. Caucuses and the Law of Union Democracy

The Landrum-Griffin Act was passed in 1959 with the stated purpose of ending union practices which “have the tendency or necessary effect of burdening or obstructing commerce . . . .”<sup>303</sup> Congress also found “from recent investigations in the labor management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct . . . .”<sup>304</sup> As such, the Act gave members the ability to inspect union records and immunity from retaliation for testifying in any proceeding against the union.<sup>305</sup>

---

democracy is an important factor, perhaps a critical one, in protecting and preserving democracy itself.”).

302. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 21, at 205, 227; LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

303. 29 U.S.C. § 401(a) (1998).

304. *Id.* § 401(b).

305. *Id.* § 431(a).

Section 2 of the Landrum-Griffin Act also provides for a “Bill of Rights” for members of labor organizations, which includes the right to free speech and assembly:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: *Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.*<sup>306</sup>

The proviso to section 2 (italicized above) thus allows unions to limit the exercise of free speech and assembly pursuant to “reasonable rules” designed to further the union’s contractual or legal obligations. Such reasonable rules have allowed unions to enforce discipline for dual unionism, belonging to more than one union at a time, without running afoul of the free speech or assembly provisions.

While the right to form a caucus is protected by the free speech or assembly provisions, there is reason to believe that unions could use the “dual unionism” rule as a pretext to prevent identity caucuses from obtaining power in the union.<sup>307</sup> In recent cases involving “reform caucuses,” in fact, caucus members have been brought up on internal charges for being in a caucus.<sup>308</sup> Even caucuses that are not specifically “identity caucuses” but are made up of workers of color may find union leaders are using dual unionism as a means to keep the caucus from gaining power. This conflict erupted recently in the International Longshoreman’s Association (ILA) between a caucus and the international union over the international’s lack of democracy and militancy.<sup>309</sup> These disputes highlight the flaws in Landrum-Griffin’s formal promise of democracy, and the sometimes-elusive character of the right to free association.

---

306. *Id.* § 411(a)(2) (emphasis added).

307. At least one court has held that Landrum-Griffin protects union members’ rights to form dissident caucuses. See *Kuebler v. Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359, 364 (6th Cir. 1973).

308. Leah Samuel, *Union Leaders Suspended for Being Part of Reform Caucus*, LAB. NOTES, Mar. 2000, at 1.

309. Carl Biers, *Caucus of Longshore Workers Seeks Greater Democracy and Militancy*, LAB. NOTES, Aug. 2001, at 3.

If Landrum-Griffin is to mean anything in practice, broad principles like the right of free assembly must be given particular content. This content must include the notion that effective democracy requires unions to allow groups within them to flourish. This egalitarian pluralist vision might seem to some to be a recipe for faction, but as Joel Rogers and Joshua Cohen have argued, this might make the institutions more democratic in the end.<sup>310</sup> This can be facilitated by explicit recognition of caucuses as an associative element of union democracy in Landrum-Griffin.

Of course, the definitional problems of what is a “caucus” that I have described in Part II above will hamper substantive reforms. The difficulties are not intractable, however. To start, those constituency groups that are officially recognized by the AFL-CIO, such as the Coalition of Black Trade Unionists and others, could be considered secondary associations that deserve protection. Other caucuses might be recognized based on some minimum number of membership cards signed by their members. Since most caucuses eschew the right to bargain on behalf of their members with the employer, they will not likely violate prohibitions against dual unionism. The caucuses would still be subject to reasonable rules against dual unionism and disloyalty, but the caucus itself would be a legitimate institution of democratic union governance.

#### **B. Race-Balanced Leadership and Landrum-Griffin’s Neutral Principles**

The cornerstone of Landrum-Griffin’s union member’s bill of rights is the “Equal Rights” provision:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations of voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s bylaws.<sup>311</sup>

By its terms, the equal rights provision applies to elections of union officers. Another provision of LMRDA defines officers as “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its

---

310. Joel Rogers & Joshua Cohen, *Secondary Associations and Democratic Governance*, in ASSOCIATIONS AND DEMOCRACY 7–8 (Erik O. Wright ed., 1995).

311. 29 U.S.C. § 411(a)(1).

executive board or similar governing body."<sup>312</sup> Courts have refused to interpret the equal rights provision as requiring one-member, one-vote systems.<sup>313</sup> Thus, unions can experiment with cumulative voting and proportional representation schemes in electing their leaders.

The reach of the equal rights provision has been tested when unions attempted explicitly to make their governance structures racially representative. For example, in *Donovan v. Illinois Education Ass'n*, the teachers' union had set aside a minimum of 8% of its elected Representative Assembly and four seats on the governing board for Blacks, Asians, Hispanics, and American Indians.<sup>314</sup> The board could appoint additional members of the protected groups to the Assembly if these groups totaled less than 8% after the elections. The Secretary of Labor sued the union, claiming a violation of section 401(e), Landrum-Griffin's equal rights provision. The district court agreed that the plan violated Landrum-Griffin, and the union appealed to the Seventh Circuit.

In its opinion affirming the district court, the court held that the plan would violate section 401(e) unless the union's justifications could withstand close scrutiny. Judge Richard Posner, writing for the court, rejected the union's justification for the plan. According to the court, there had been no prior history of discrimination in the union, and the union's distribution of seats did not match the racial or ethnic composition of the union.<sup>315</sup> The court was also disturbed by the potential that the plan would be used for internal political maneuvering and the absence of any mechanism to prevent such maneuvering.<sup>316</sup>

*Donovan* has been criticized for its insensitivity to the labor movement's earnest efforts to correct past and present racial imbalances.<sup>317</sup> Other courts have also been wary of such plans as possible violations of Title VII.<sup>318</sup> Union affirmative action programs

---

312. *Id.* § 402(n). Business agents and shop stewards who solicit members, present grievances and perform other ministerial functions, are not officers unless so designated in the union's constitution. MARTIN H. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 206-07 (1988) (citing 29 C.F.R. § 452.19 (2002)).

313. *Denov v. Chicago Fed'n of Musicians, Local 10-208*, 703 F.2d 1034, 1041 (7th Cir. 1983); *O'Doherty v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 618 F.2d 484 (8th Cir. 1980); *Fritsch v. Dist. Council No. 9*, 493 F.2d 1061, 1063 (2d Cir. 1974); *Gordon v. Laborers' Int'l Union of N. Am.*, 490 F.2d 133, 137-38 (10th Cir. 1973).

314. 667 F.2d 638 (7th Cir. 1982).

315. *Id.* at 641.

316. *Id.* at 642.

317. See Goldberg, *supra* note 26; Iglesias, *supra* note 7; Mahoney, *supra* note 243.

318. See Shultz v. Local 1291, ILA, 461 F.2d 1262 (3d Cir. 1972).

designed to fill elective offices that are not carefully crafted are subject to being voided by courts. On the other hand, a system of proportional representation based on caucuses might be less subject to attack. There is nothing in Landrum-Griffin that prohibits the apportionment of seats based on proportional representation. In fact, the court in *Donovan* faulted the union plan at issue because it was *not* based on the proportions of racial and ethnic minorities actually in the union. Because the caucuses function as “mini-democracies,” there is also some protection against caucuses being used by the leadership for political maneuvering, which was another concern of the court in *Donovan*. Finally, because most caucuses admit members of all races and sexes, the Title VII concerns that the courts have had with union affirmative action plans are lessened. Thus, a system of proportional representation based on caucuses would focus more on membership in a secondary association to the union, rather than a person’s particular race or gender. This remedy is explicitly race- and gender-conscious, and it could result in more diverse leadership bodies within the boundaries of Landrum-Griffin’s promise of free assembly.<sup>319</sup> It would also endorse a political vision of identity, in the way that scholars such as Amy Gutmann, Lani Guinier, and Gerald Torres have addressed the political dimensions of race and gender identities.<sup>320</sup>

Of course, the ideal option would be for Landrum-Griffin to explicitly legitimize voluntary affirmative action programs created by unions as not in violation of the equal rights provision. Given the reality of the political climate concerning affirmative action, however, this alternative is not likely to be implemented at any time soon. In the meantime, a system of proportional representation for caucuses might serve the same purposes.

---

319. Under a program called The New Alliance, the AFL-CIO is encouraging state and local labor councils to create opportunities for constituency group representatives to serve on executive boards. *A New Alliance*, AFL-CIO AMERICA@WORK, Nov./Dec. 2001 (describing implementation of New Alliance plans in Maryland and Washington, D.C., with seats for representatives of AFL-CIO constituency groups on a new state federation executive council); see also AFL-CIO, BUILDING AND LEADING A 21ST CENTURY LABOR MOVEMENT, RESOLUTION 11 AT THE 24TH BIENNIAL CONVENTION, LAS VEGAS, NEV., DEC. 2-5, 2001, available at <http://www.aflcio.org/convention01/resolutions.htm> (last visited Apr. 3, 2002).

320. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER AND TRANSFORMING DEMOCRACY* (2002) (articulating the concept of “political race” as a transformative and aspirational tool); K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 151-62 (1996) (arguing that race is consonant with representation in a democracy).

### C. A New Vision of Union Democracy for Women and People of Color

In addition to the challenge of making Landrum-Griffin's promise of formal democracy a real one that does not place unnecessary burdens on unions, one must consider other ways to conceive of "union democracy" and "democracy" that explicitly take into account the needs of people of color and women. This means going beyond concepts of formal democracy and majority rule that critical theorists have argued do not always live up to their promises for people of color and women.<sup>321</sup> It would involve a greater role for identity caucuses in unions, in everything from grievance processing to bargaining. Several unions have Civil Rights Committees that hear the grievances of protected groups. However, some have pointed to these committees as simply controlled by union leadership. Members of identity caucuses and constituency groups could serve in the role of a third-party mediator when conflicts arise. If local unions are serious about building bridges to the AFL-CIO's constituency groups, then giving identity caucuses a more formal role in union governance would be a good way to show that commitment. The lack of institutional support of the constituency groups to maintain such a function remains, but it is not likely that the demand for such representatives would be overwhelming.

Unions could also give identity caucuses a greater role in bargaining, either through designated seats on appointed bargaining committees or through proportional representation in elections.<sup>322</sup> These reforms could benefit all caucuses, whether or not they are comprised mainly of women and people of color. However, the problems described earlier in defining an "established" caucus would make such a requirement difficult. Chapters of the officially recognized caucuses of unions probably would not face definitional problems. What about more informal caucuses? What standard should unions use to decide whether to recognize caucuses, and by what standard should the union's refusal to recognize a caucus be enforced? To start, the AFL-CIO could encourage its affiliates to recognize any of its official constituency groups as alternative

---

321. See STANLEY ARONOWITZ, FROM THE ASHES OF THE OLD: AMERICAN LABOR AND AMERICA'S FUTURE 221 (1998) ("With some exceptions, rank-and-file and other opposition groups have difficulty gaining equal access with the leadership caucus to the union's newspaper and mailing lists, and often are forced to make complaints to the Labor Department or to conduct lawsuits to bring leadership to heel.").

322. Robert Richie & Steven Hill, *The Case for Propositional Representation*, in REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 3 (Joshua Cohen & Joel Rogers eds., 1999).

representatives of workers in its unions. As for more informal caucuses, local unions could recognize any caucus that is supported by at least 30% of the workers in a bargaining unit—the number of workers required to file a decertification petition with the NLRB. “Recognition” of a caucus by a union might include seats on the bargaining committee, proxy authority at union votes, guaranteed access to official union communications, and the right of workers to choose caucus members as grievance representatives.<sup>323</sup> Race- and gender-designated seats on an elected bargaining committee would violate Landrum-Griffin, but unions could draft their constitutions to avoid this obstacle by making election by the caucus the touchstone for a seat on the bargaining committee. Union practices such as these would better serve the interest of union democracy than Landrum-Griffin’s sometimes-empty promise of formal democracy.

However, the prospects of amending Landrum-Griffin are as bleak as any other labor law reform in the near future, so the best intermediate step is for courts to recognize that unions can place members of race and gender identity caucuses in positions of power, without offending Landrum-Griffin or Title VII. Further, it should be recognized that unions have a large degree of latitude in how they structure their internal affairs, and that statutory amendments might hamper, rather than encourage, experiments in representative union governance structures. Thus, rather than requiring a certain kind of leadership scheme, unions and caucuses should be encouraged to experiment with a variety of different plans to have leadership bodies that are more proportional and more reflective of their membership.

Finally, what about the fact that people of color and women are, or will soon be, numerical majorities in many unions? One advantage of a system of proportional representation of caucuses is that it provides a democratic means of evaluating the commitment of people of color and women union leaders to their constituencies. Instead of simply relying on a leader’s race or gender as a proxy for whether workers of color and women are represented by the leadership, the caucus system puts such questions to a vote of the members. Under this scheme, the quality of representation is not merely measured

---

323. Others have advocated caucuses taking up such roles. See Michael D. Yates & Patrick L. Mason, *Organizing African Americans: Some Legal Dimensions*, in *AFRICAN AMERICANS, LABOR & SOCIETY: ORGANIZING FOR A NEW AGENDA* 87, 100 (Patrick L. Mason ed., 2001) (“Members of African American caucuses should be included on bargaining teams, at least for negotiating over racially sensitive issues.”); Yelnosky, *supra* note 25, at 613 (referring to the possibility of caucuses mediating in Title VII cases).



quantitatively, but in a deliberative process designed to keep leaders of all races and sexes accountable to members.

### **Conclusion**

At its core, this Article attempts to find an accommodation between the need to recognize distinct and multiple identities within unions, and the principles of collective strength to make unions stronger and more accountable to their members. The leaders of the labor movement recognize the need to recruit and retain women workers and workers of color in order for the labor movement to survive in the Twenty-First Century. In order to do so, the many voices within unions need to be legitimated through recognized caucuses that reflect workers' diverse and multiple identities. If one accepts that law plays a role in shaping collective consciousness, a few incremental reforms, and the revitalization of long-established rights, would give women, people of color, and other minorities a greater voice in their unions' affairs.

The labor movement today faces the question of its own survival. The participation of women and people of color will be essential to unions' survival and this is recognized by many of the new leaders of the movement. Critical theory, history, and contemporary evidence show that women and people of color are committed to unions but want a reciprocal commitment to nondiscrimination and equity in the governance of unions. In order for labor unions to survive in the inhospitable global economy, unions must become numerous enough to compete on the scale of global corporations. The increased numbers of new members needed, however, means that unions must find new ways to keep their governance structures democratic and representative of the diversity of the new movement. Identity caucuses can serve important functions in this regard. Even though official recognition of the caucuses presents the risk of co-optation, they still represent an opportunity for race and gender consciousness within unions. The multi-union composition of constituency groups such as CBTU, CLUW, and LCLAA has the advantage of keeping members from being co-opted by the leadership of any particular local union, but it also minimizes the influence that caucus members might have on local union matters. For this reason, members of constituency groups should be more involved in local union matters and the legal and ideological barriers to this involvement should be removed.

The labor movement is becoming less white and less male every day. To some, this means that race and gender differences will no longer be relevant to union organizing and governance and majority rule will eventually correct the problems of racism. This view ignores the fact that race and gender minorities have been a significant bloc in organized labor for some years now, but there are still vestiges of prior discrimination in place. Even when change does occur, there is a danger that leaders who fit a certain race or gender profile will not serve the members that they represent. There will always be the option of "voting the bums out," but that will not always be a realistic option.

In addition, there are other mechanisms besides majority rule that unions can implement that would provide better representation for people of color and women and better unions overall. I have found an uneven level of involvement by identity caucuses in traditional local union functions such as organizing and grievance processing. Most identity caucuses are interested more in broad policy issues than in representing workers on the local level. This suggests that the identity caucuses would not be good substitutes for traditional unions. However, identity caucuses should be given greater legitimacy and power *within* unions. Whether or not that will occur is largely up to the caucuses themselves and the willingness of the labor movement's leaders to recognize the benefits and importance of identity caucuses. Law, while not the sole determinant of those changes, is an important factor in the equation that should be examined for how it facilitates or hinders the distribution of power within unions. Moreover, a critical realist account of the roles and experiences of women and people of color *within* the labor movement is needed even if the legal structure of union-management relations remains unchanged.

The evidence that I have gathered shows that, far from being a threat to union solidarity, identity caucuses in today's labor movement are an important component of the diversity needed to build the movement in the Twenty-First Century. In addition, identity caucuses can also be important elements of union governance and democratic union representation, and labor unions should experiment with ways to incorporate them into existing union structures.

### **Appendix: Methodology**

In writing this Article, I conducted field interviews with participants and gathered extensive first-hand impressions of the Coalition Black Trade Unionists (CBTU) Chapters in Madison, Wisconsin, and the Labor Council on Latin America for Latin American Advancement (LCLAA) in Madison, Milwaukee, and Janesville, Wisconsin, from Fall 2000 to Spring 2002.

I conducted private interviews with members of the chapters of the A. Philip Randolph Institute (APRI), CBTU, and LCLAA in Wisconsin, Chicago, Detroit, and Los Angeles. This group included mostly union members, but I also interviewed some former union members who were active participants in the CBTU and LCLAA. My interviews with these individuals generally lasted approximately one to one and one-half hours. I generally conducted these interviews in person, though some were done on the telephone. My questions focused on the views of union members in constituency groups and the federal labor law regime in which they operate. The interviews were confidential and each subject gave written consent before the interview took place. Thus, I do not identify any of these individuals by name.

I also spoke to people of color in a variety of smaller, more specialized caucuses, such as the Black Rank and File Exchange, the Amalgamated Transit Union Latino Caucus, and the African American caucus of the Service Employees International Union. Most of these individuals were current union members, though some were former union members.

I made contacts for these interviews by attending various labor conferences and being an active participant in the CBTU and LCLAA. I made announcements at these meetings, and sent out a letter to solicit subjects among these groups, and then followed up with phone calls to specific individuals. Thus, some amount of selection bias is present in the people I chose to interview. I sought to account for this by using a standard interview form, but often the standard questions seemed repetitive or inapplicable once the tenor of the interview had been set.

The strengths and weaknesses of participant accounts as evidence are a common theme in law and society literature.<sup>324</sup> Michael Burawoy has detailed the delicate balance that a participant observer must walk between pure positivism—the idea that truth can be ascertained in a detached scientific study—and postmodernism, or the idea that nothing makes sense except with reference to the subject.<sup>325</sup> This line is even more difficult to walk for me because I come to the study with a background representing labor unions as an attorney and during the study I took a leadership role in a university union. I tried to minimize my background by not assuming leadership roles in the constituency groups, and by not surreptitiously steering the group's agenda in a particular way. Moreover, I made sure that people knew when they were “on the record” for my study, and several times reminded people in these organizations that I was doing a study on organizations like theirs.

---

324. See David M. Engel, *Making Connections: Law and Society Researchers and Their Subjects*, 33 *LAW & SOC'Y. REV.* 3 (1999); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 *GEO. L.J.* 179, 260 (1995).

325. Michael Burawoy, *Reconstructing Social Theories*, in *ETHNOGRAPHY UNBOUND: POWER AND RESISTANCE IN THE MODERN METROPOLIS* (Burawoy et al. eds., 1991).

\*\*\*