

NOT PART OF THE BARGAIN: WORKER CENTERS AND LABOR LAW IN SOCIOHISTORICAL CONTEXT

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The American labor movement is in trouble. As union density declines and worker organizing becomes more difficult, a relatively new model, the worker center, has emerged to organize low-wage immigrant workers. Worker centers devise a broad range of strategies and internal structures to meet the challenges of the contemporary organizing landscape, and these strategies would not be possible were worker centers considered labor organizations under labor law. Recently, anti-union groups and members of Congress have shifted focus to worker centers, urging that they be regulated under the National Labor Relations Act. By examining the history of labor law and the structure of worker centers, this Note argues that regulation of worker centers under the NLRA would be inappropriate, ahistorical, and an unreasonable restriction on the associational rights of workers.

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INTRODUCTION

It is by now a cliché among labor scholars and organizers that the National Labor Relations Act (NLRA, or the Act) is ill-adapted to the contemporary American economic and political context.¹ The Act was developed at a historical moment when the United States economy was dominated by large domestic manufacturing corporations and amended when labor unions were at the apex of their economic power and political voice.² The subsequent precipitous decline of traditional labor unions is well documented: From 1973 to 2013, union density declined from 24.0% to 11.2% of all employed workers³ and from 24.2% to 6.7% of private sector workers.⁴ While much of this decline has occurred for reasons independent of the legal backdrop of the NLRA,⁵ it is undeniable that the Act has failed in its stated goal of “encouraging the practice and procedure of collective bargaining.”⁶

In the wake of the NLRA’s failure to encourage, or even to protect, collective action through the traditional labor union model, community organizations have developed outside the strictures of the NLRA to protect the rights of, and encourage collective action among, low-wage workers.⁷ These organizations, often referred to by the umbrella term “worker centers,” aim to organize workers whom

¹ See, e.g., Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 126 (2003) (“[A]fter many years of working with the NLRA, optimism has given way to cynicism and despair about the law’s ability to protect workers and enhance collective bargaining.”); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2685–86 (2008) (“Seventy years later, most scholars believe that the NLRA is a failed regime.”).

² See *infra* Part I.A (describing the historical processes behind the development of the NLRA and its amendments).

³ Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database*, <http://unionstats.gsu.edu/> (follow “html” or “Excel” hyperlinks under “All Wage & Salary Workers”) (last updated Jan. 25, 2014) [hereinafter Hirsch & Macpherson, *Union Membership Database*]; see also Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349, 349–52 (2003) (describing methodology).

⁴ Hirsch & Macpherson, *Union Membership Database*, *supra* note 3 (follow “html” or “Excel” hyperlinks under “Private Sector”).

⁵ See *infra* note 114 (offering alternative explanations for the decline of organized labor).

⁶ 29 U.S.C. § 151 (2012).

⁷ See, e.g., 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, 410–15, 428–30 (1995) (discussing the unique organizing challenges faced by undocumented workers and the formation of an early worker center to serve them).

the NLRA excludes by statute or are otherwise difficult or impossible to organize by traditional means.⁸ The term worker center encompasses a broad range of organizations with differing internal structures, visions, and strategies,⁹ all of which aim broadly to build power among marginalized and low-income workers.¹⁰ Despite their small size and limited resources, worker centers have successfully obtained meaningful benefits for low-wage workers.¹¹

Worker centers have recently become a target of business groups and their allies in Congress, who assert that the centers should be required to comply with regulations applicable to labor unions.¹² Business organizations and their supporters have argued that worker centers are mere fronts for unions¹³ and have criticized the philanthropic foundations that fund worker centers.¹⁴ These business groups point to concerns about fairness and democracy in proposing that the NLRA's restrictions and obligations should apply to worker centers, but I will argue in this Note that this misses the mark.

United States labor law and the worker center movement grew out of vastly different sets of circumstances. Labor law was a response to the economic and political demands of labor and capital as they existed in the first half of the twentieth century.¹⁵ The rules restricting

⁸ See Jennifer Hill, *Can Unions Use Worker Center Strategies?: In an Age of Doing More with Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. REV. 551, 556 (2010) ("Worker centers operate on a scale and in industries inhospitable to traditional collective bargaining.").

⁹ See Janice Fine, *A Marriage Made in Heaven? Mismatches and Misunderstandings Between Worker Centres and Unions*, 45 BRIT. J. INDUS. REL. 335, 337 (2007) ("Worker centres vary in terms of their organizational models, how they think about their mission and how they carry out their work.").

¹⁰ *Id.* at 555–56. For a discussion of the concept of "building power," see *infra* note 146.

¹¹ See *infra* notes 133, 203–08 and accompanying text (describing some of these successes).

¹² See Kevin Bogardus, *Chamber Turns Up Heat on Worker Centers*, HILL (Feb. 26, 2014, 6:00 AM), <http://thehill.com/policy/finance/199258-chamber-turns-up-heat-on-worker-centers> (describing the anti-worker center campaign). For an example of the current spate of negative coverage of the worker center movement, see Kris Maher, *A Backdoor Approach to Union Organizing*, WALL ST. J., July 23, 2013, at A1.

¹³ See Ryan Williams, *How Union Fronts Miss the Point*, WASH. TIMES, Oct. 16, 2013, at B3 ("Big Labor has seized on the worker center movement as the perfect way to circumvent . . . rules [governing workplace relations].").

¹⁴ See JAROL B. MANHEIM, U.S. CHAMBER OF COMMERCE, *THE EMERGING ROLE OF WORKER CENTERS IN UNION ORGANIZING: A STRATEGIC ASSESSMENT* 13–27 (2013), available at <http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011-21-2013.pdf> (analyzing the funding relationships between worker centers and foundations).

¹⁵ See Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1417 (1971) ("[L]egislators in the United States have been more concerned [than those in other industrialized Western countries] with regulating and promoting collective bargaining and less inclined to pass laws that actually fix the terms

union activity and structure, in particular, were specifically designed to respond to a perception of corruption and concentration of economic power in increasingly bureaucratic and unresponsive unions.¹⁶ These rules were a conscious compromise between principles of associational freedom and the economic realities of the day.¹⁷ Whatever the wisdom of such an approach as it applies to labor unions today, worker centers—and to a large extent the workers they seek to organize—were never considered in this bargain.¹⁸ Application of labor law to these organizations would be illegitimate, damaging, and unnecessary.

Federal labor law imposes a number of restrictions on labor unions that are fundamentally incompatible with the worker center model. Other scholars, notably David Rosenfeld and Eli Naduris-Weissman, have comprehensively addressed the legal question of whether and how the NLRA applies to worker centers.¹⁹ This Note aims to expand upon their work by examining the social and historical context in which American labor law was formed, with a particular focus on the rules governing organizational structure and the socioeconomic conditions in which worker centers organize in the present day.²⁰ Since the relatively sparse statutory text has been essentially unchanged for half a century,²¹ application of labor law to

and conditions of employment.”); *id.* at 1424–27, 1430–31 (describing American laws on union formation and collective bargaining as products of the structure of the United States economy and its history of labor conflict).

¹⁶ See Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 851–53 (1960) (describing the passage of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) as a result of both highly publicized disclosures of corruption and political errors by several major unions).

¹⁷ See *infra* notes 92–93 and accompanying text (noting congressional awareness of the LMRDA’s impact on workers’ freedom of association).

¹⁸ See *infra* Part I.B (describing the economic structure of contemporary low-wage work and noting its incompatibilities with traditional labor law).

¹⁹ See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009) (concluding that worker centers should not be regulated as labor organizations so long as they do not directly negotiate working conditions with employers); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006) (concluding that worker centers may become subject to labor regulation if their labor organization-like activities expand).

²⁰ My historical analysis is informed by the critical labor law framework described by Professor Karl Klare as a process of “decoding” the “doctrinal literature” of labor law in an “effort . . . to uncover the constellation of assumptions, values and sensibilities about law, politics and justice these texts evince, to reveal their latent patterns and structures of thought about legal and industrial issues and about the possibilities of human expression in the workplace.” Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 451 (1981).

²¹ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–33 (2002).

modern challenges draws heavily upon national labor policy and the context of the Act.²² An understanding of the historical context of labor law, the tradeoffs inherent in its formation, and the distinct challenges faced by workers and organizers in the contemporary global economy should therefore guide the debate on whether application of labor law to worker centers is appropriate.

This Note will proceed as follows: Part I provides a brief examination of the context in which the NLRA was developed as well as the economic and political changes that have diminished its ability to protect the associational rights of low-wage workers. Part II describes the worker center movement from a structural and purposive perspective and examines the internal structures that allow worker centers to exert power and create change. Part III analyzes the application of the NLRA and the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)²³ to particular worker centers, noting the structural constraints that could interfere with worker centers' work. The Note concludes that NLRA and LMRDA regulation of worker centers is inconsistent with the history and goals of labor law. Regulation of worker centers without regard for their dramatic institutional differences from unions would be both unjustified and unnecessary.

I

THE MISMATCH BETWEEN LABOR LAW AND CONTEMPORARY ORGANIZING

The backbone of American labor law, the NLRA, has not been substantively amended since 1959.²⁴ Unsurprisingly, economic, political, and social circumstances have changed dramatically in the intervening half-century. This “ossification”²⁵ of labor law gives unusual relevance to the legislative purposes and policy behind the enactment of the NLRA and its amendments as the National Labor Relations

²² See *infra* note 27 (citing cases analyzing the NLRA by reference to its legislative history and stated national labor policy); cf. Estlund, *supra* note 21, at 1558–64 (discussing interpretation of the NLRA in light of its sparse statutory text and the limited room in which the NLRB has to operate given the substantial weight of precedent reading that text).

²³ Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531 (2012)). The LMRDA comprehensively regulates internal union affairs, provides specific rights to union members, and imposes particular forms of accountability on officers. See *infra* notes 82–90 and accompanying text (detailing relevant provisions of the LMRDA).

²⁴ Estlund, *supra* note 21, at 1532–33; see also James J. Brudney, *Gathering Moss: The NLRA's Resistance to Legislative Change*, 26 A.B.A. J. LAB. & EMP. L. 161, 170–75 (2011) (cataloging several failed efforts to amend the NLRA).

²⁵ Estlund, *supra* note 21, at 1527.

Board (NLRB)²⁶ and courts seek to give contemporary meaning to its broad, unchanged statutory text.²⁷ Knowing the social and historical context of labor law is essential to understanding where its application is appropriate.²⁸ This Part briefly describes the political context and purposes driving the passage of the original NLRA and its subsequent amendments. It then proceeds to explain how the resulting regulatory scheme retains little relevance for broad swaths of workers in the contemporary global economy.

A. *Labor Law's Historical Assumptions*

American labor law reflects a particular conception—or rather, a small number of competing but fixed conceptions—of the economic role of organized labor and the law's place in regulating the relationship between labor and capital. These conceptions, informed by historical context, legislative intent, and judicial interpretation,²⁹ result in legal structures that constrain the organizational forms that a union may take.³⁰ The history of the NLRA and its amendments reflect both the basic conflict between management and labor and repeated attempts by Congress to counteract perceptions that one side had

²⁶ The National Labor Relations Board is a quasi-judicial body tasked with adjudicating most disputes between employers and unions under the Act and administering representation elections. See Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1520 n.5 (2006) (discussing the structure and authority of the NLRB). The five-member Board delegates much of its authority to regional offices and administrative law judges and generally only addresses cases on appeal. See *id.* at 1520 n.6 (discussing organizational practices). The Board also has rulemaking authority, but the vast majority of Board interpretations of the NLRA arise from individual adjudications. Estlund, *supra* note 21, at 1565.

²⁷ See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 581–88 (1988) (recounting and analyzing the legislative history of the NLRA and LMRDA in interpreting the ban on secondary picketing); *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 64–71 (1964) (same); *Brennan v. United Mine Workers of Am.*, 475 F.2d 1293, 1296 (D.C. Cir. 1973) (interpreting the term “labor organizations” in the LMRDA with reference to congressional intent).

²⁸ See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511–14 (1981) (describing how “the assumption that management and labor have equal power in the workplace” embedded in labor law by its historical context has become “the lens through which all issues that involve class relations have come to be viewed”).

²⁹ See Joel Rogers, *In the Shadow of the Law: Institutional Aspects of Postwar U.S. Union Decline*, in *LABOR LAW IN AMERICA* 283, 284–85 (Christopher L. Tomlins & Andrew J. King eds., 1992) (describing the mutual influences of industrial reality and labor legislation by noting the dual role of the Taft-Hartley Act as both a “product” and a “producer” of the institutional structure of industrial relations).

³⁰ See Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 820–21 (1960) (describing the economic and political factors that led to the structural rules of the LMRDA).

gained too much at the expense of the other.³¹ As I will show, this complex balance arose in response to an economic and institutional context that bears little resemblance to the labor sectors in which contemporary worker centers organize.

1. *The Ascendancy of the Labor Question*

Before statutory protection for collective bargaining existed, courts often treated associations of workers as illegal conspiracies in restraint of trade.³² Without protection from employer retaliation and in the face of outright legal hostility, labor organizing was risky and overtly political.³³ Strikes were frequent, violent, and disruptive.³⁴ The “labor question”—that is, the solution to the social strife and miserable conditions produced by the newly ascendant industrial capitalism—was central in late nineteenth- and early twentieth-century political discourse.³⁵ The labor community largely rejected Congress and the courts as sources of protection and instead deployed a strategy of “voluntarism” that sought to construct a mechanism of industrial governance outside of the state.³⁶

Though the union movement had largely abandoned hope for a supportive state regulatory apparatus, economic conditions soon changed that calculus. The Great Depression and the subsequent dramatic sociopolitical transformations of the New Deal era rendered

³¹ See Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 178 (2001) (“[T]he Wagner Act [was] biased in favor of unions and against employers, and the Taft-Hartley and Landrum-Griffin Acts [were] biased in favor of employers and against unions.”).

³² See, e.g., *Loewe v. Lawlor*, 208 U.S. 274, 292 (1908) (finding that a picket and boycott aimed at compelling a manufacturer to recognize a union violated the Sherman Act); *Vegelahn v. Guntner*, 44 N.E. 1077, 1078 (Mass. 1896) (holding a labor association picket illegal and entering an injunction prohibiting further picketing); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1258 (1989) (discussing the legal antipathy and corporate-sponsored violence directed at labor organizations prior to the New Deal).

³³ See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 98–118 (1991) (discussing the relationship between judicial hostility and state-sponsored violence).

³⁴ *Id.* at 105–10.

³⁵ See, e.g., NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 4 (rev. ed. 2013) (“The question which stands at the front of all others amidst the present great awakening is the question of labor . . . how are the men and women who do the daily labor of the world to obtain progressive improvement in the conditions of their labor, to be made happier, and to be served better by the communities and the industries which their labor sustains and advances.” (quoting President Woodrow Wilson in 1919) (alterations in original)).

³⁶ See *id.* at 11 (describing how the labor movement rejected efforts to raise the social wage). See generally FORBATH, *supra* note 33, at 128–66 (discussing the fraught and complex relationship between labor and the law in the period prior to the passage of the Wagner Act).

state regulation a seemingly viable path forward, even to a labor movement accustomed to judicial and state hostility.³⁷ Business remained staunchly opposed to government protection for independent unions; however, its power to deter dramatic reforms with the threat of economic harm was severely constrained by the economic stagnation of the Depression.³⁸ Workers engaged in frequent and disruptive strikes and demanded a seat at the bargaining table.³⁹ Thus the economic and political conditions were ripe for the Wagner Act, “perhaps the most radical piece of legislation ever enacted by the United States Congress” at the time of its passage.⁴⁰

The strongly pro-labor Wagner Act responded specifically to the challenges of the era. “Company unions,” nominal labor unions dominated by an employer, had grown popular in the 1930s “as a subterfuge for union representation.”⁴¹ Robert Wagner, the Act’s chief sponsor and architect, perceived company unions as an existential threat to independent unionism—that is, to the existence of a worker organization capable of expressing the will of the workers themselves without interference from outside interests.⁴² For Wagner, independent unionism was essential to counteract the dehumanizing impact of working in a large, centralized factory and to achieve legitimate consent to employer authority.⁴³ Congress’s direct response was to prohibit employers from dominating labor organizations,⁴⁴ but the NLRA’s emphasis on exclusive workplace representation selected by majority vote can also be traced to a fear of company unions.⁴⁵ The

³⁷ See LICHTENSTEIN, *supra* note 35, at 25–27 (describing how New Deal reforms transformed the relationship between the federal government and the working class).

³⁸ See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1397 (1993) (describing business’s “‘structural’ veto,” that is, its ability “to induce an unfavorable business climate, an investment slump, and a popularity-damaging economic downturn” in response to radical economic reforms, but noting that “[w]hen business activity is already locked in a low-level equilibrium [such as the Great Depression], radical reforms . . . cannot make the climate for investment and consequent macroeconomic performance significantly worse than they already are”).

³⁹ See Goldfield, *supra* note 32, at 1270–77 (discussing the influence of militant labor on the passage and subsequent Supreme Court acceptance of the Wagner Act).

⁴⁰ Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978).

⁴¹ Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1655 (1999).

⁴² Barenberg, *supra* note 38, at 1452–53.

⁴³ See *id.* at 1422–23 (discussing Wagner’s views of commercial relations).

⁴⁴ National Labor Relations Act, Pub. L. No. 74-198, § 8(2), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(2) (2012)).

⁴⁵ See Barenberg, *supra* note 38, at 1453 n.317 (“Only the NLRA itself combined the company union ban with exclusive representation. That combination accords with

Act ensured enforcement of the exclusive representation framework by giving the newly created NLRB authority to certify appropriate bargaining units and administer elections.⁴⁶

The Wagner Act provided for a broad range of restrictions on employers and no comparable restrictions on labor, but the political context of the time led to certain features being included that tempered its pro-labor bent. Perhaps the Act's largest flaw—which still affects workers and organizers to this day—is its exclusion of large groups of workers, such as agricultural workers, domestic workers, and independent contractors, from its ambit.⁴⁷ Fearful of the threat to the Southern social order that would result from the unionization of black workers, Southern Democrats demanded these exclusions in the Act.⁴⁸ This cynical compromise has left many of the most precariously positioned and marginalized workers unprotected from discrimination on account of their organizing activities.⁴⁹

The definition of “labor organization” in the Act is broad enough to cover activities beyond traditional collective bargaining,⁵⁰ and it must be understood in the context of Congress's desire to prohibit the company unions of the era.⁵¹ In fact, the definition was extended to cover any form of “dealing with” an employer outside the exclusive representation context specifically to ensure that any possible form of company union was outlawed.⁵² The Wagner Act simply did not contemplate the existence of truly independent worker organizations that did not seek to bargain collectively under the Act.

Wagner's ultimate view that only autonomous unions acting as exclusive representatives could provide sufficient organic solidarity and collective empowerment to achieve genuine consent [to managerial authority].”)

⁴⁶ National Labor Relations Act § 9(b)–(c).

⁴⁷ *Id.* § 2(3).

⁴⁸ LICHTENSTEIN, *supra* note 35, at 111. For further analysis of the broad impact of this “Southern veto” throughout the New Deal and World War II, see Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283 (1993).

⁴⁹ The NLRA provides broad protection from employer discrimination that is not limited to specifically union-related activity. Apart from ensuring that employees can form a union and bargain collectively, it protects their right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

⁵⁰ Briefly, the NLRA requires that a labor organization be made up at least in part of statutory employees and exist for the purpose, in whole or in part, of dealing with employers concerning conditions of work. Naduris-Weissman, *supra* note 19, at 279. The focus is generally on the “dealing with employers” requirement, as the other criteria are usually trivial to meet. *Id.*

⁵¹ See *id.* at 292–95 (discussing the company-union context of the labor organization definition).

⁵² *Id.* at 294.

2. *Growth and Reaction*

After the passage of the Wagner Act, and particularly after the Supreme Court unexpectedly⁵³ held the Act constitutional,⁵⁴ the ranks of the American labor movement expanded dramatically.⁵⁵ The dramatic increase in demand for domestic production engendered by World War II,⁵⁶ combined with the increasingly prominent role that labor leaders played in setting the national economic agenda, solidified labor's popularity and influence.⁵⁷ Between 1933 and 1945, the number of union members more than quadrupled, from under three million to over fourteen million.⁵⁸ While organized labor's political and economic power relative to capital during this period may be overstated—even at their postwar height, unionized workers made up only 28% of all employed workers⁵⁹—the major unions had clearly become a formidable political force.⁶⁰ A wave of crippling strikes following World War II both proved this newfound power and provoked a hostile public reaction that culminated in the Taft-Hartley Act of 1947.⁶¹

This marked the beginning of the long, steady decline of the American labor movement.⁶² After a Republican sweep of both

⁵³ See MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 142–45 (1994) (discussing expectations among both management and labor that the Supreme Court would strike down the Act in keeping with its prior decisions).

⁵⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

⁵⁵ LICHTENSTEIN, *supra* note 35, at 52–53.

⁵⁶ *Id.* at 56.

⁵⁷ See MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 305 (8th ed. 2010) (explaining the rising power and influence of labor in the 1930s).

⁵⁸ GERALD MAYER, CONG. RESEARCH SERV., *UNION MEMBERSHIP TRENDS IN THE UNITED STATES* app. A, at 22 tbl.A1 (2004), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace.

⁵⁹ *Id.*

⁶⁰ See LICHTENSTEIN, *supra* note 35, at 54 (discussing the breadth of postwar union activity and its impact on politicians and the judiciary).

⁶¹ See DUBOFSKY & DULLES, *supra* note 57, at 317–23 (describing the strike wave); *id.* at 325 (noting the strike wave as a major motivating factor in the passage of the Taft-Hartley Act).

⁶² See LICHTENSTEIN, *supra* note 35, at 115 (“Passage of the Taft-Hartley Act proved a milestone, not only for the actual legal restrictions the new law imposed on the trade unions but as a symbol of the shifting relationship between the unions, the state, and the corporations at the dawn of the postwar era.”). Though the percentage of the workforce belonging to a union continued to increase until 1954, MAYER, *supra* note 58, at 22 tbl.A1, Taft-Hartley marked a fundamental shift in the political economy of the United States and in the relationship between labor and the state. See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 *CATH. U. L. REV.* 763, 765 (1998) (“[Taft-Hartley] was part of a larger contestation in which the entire structure of the political economy and the postwar political culture was involved.”).

houses of Congress in the 1946 election,⁶³ labor law reform was at the top of the agenda. Business groups and conservatives had never fully accepted the collective bargaining regime introduced by the Wagner Act, and many used the perception that unions had become too powerful and irresponsible to seek dramatic changes in the structure of collective bargaining.⁶⁴ Business leaders feared the loss of managerial prerogatives to a strong and government-supported union movement.⁶⁵ Critically, the original Wagner Act regulated exclusively corporate behavior; it imposed no restrictions on union activities, making the need for some modification apparent.⁶⁶ Largely as a result of a political miscalculation by labor to oppose any amendments whatsoever to the Wagner Act,⁶⁷ the resulting legislation, passed over President Truman's veto, was heavily slanted against labor organizations.⁶⁸

Taft-Hartley's prohibition on secondary boycotts exemplifies the narrative of newly resurgent business striking back against powerful unions. Secondary boycotts, defined generally as protests or pickets by a union against a business with which it does not have an actual or potential bargaining relationship, can be powerful tools to build worker power and solidarity beyond an individual worksite.⁶⁹ Busi-

⁶³ Though the causes of the postwar Republican resurgence are complex, the 1946 election victory was engendered in part by “[p]opular resentment against the demands of unionized workers and dictatorial labor bosses.” DUBOFSKY, *supra* note 53, at 201.

⁶⁴ See DUBOFSKY & DULLES, *supra* note 57, at 325 (“The corporate community and its conservative congressional allies unleashed a propaganda campaign that portrayed organized labor as a selfish special interest that ill-served the public. . . . The antiunion drive coalesced in 1946 around the demand for the amendment of the Wagner Act of 1935.”); Lichtenstein, *supra* note 62, at 767–70 (discussing the employer hostility to unionism driving the passage of the Taft-Hartley Act).

⁶⁵ See Lichtenstein, *supra* note 62, at 770–71 (describing American business's fiercely protective stance towards independent management).

⁶⁶ See DUBOFSKY & DULLES, *supra* note 57, at 325 (“By outlawing unfair management practices only, the union critics contended, the Wagner Act left labor free to engage in all kinds of improper and sometimes coercive behavior.”).

⁶⁷ See *id.* at 329 (“[I]n refusing to suggest any alternative measure to meet the alleged inadequacies, if not unfairness, of the Wagner Act, they reinforced the widespread view in Congress that organized labor had become increasingly irresponsible in the exercise of monopolistic power.”).

⁶⁸ See Joseph A. McCartin, *Solvents of Solidarity: Political Economy, Collective Action, and the Crisis of Organized Labor, 1968–2005*, in *RETHINKING U.S. LABOR HISTORY: ESSAYS ON THE WORKING-CLASS EXPERIENCE, 1756–2009*, at 217, 221 (Donna T. Haverty-Stacke & Daniel J. Walkowitz eds., 2010) (“When Congress amended the Wagner Act in 1947 by passing the Taft-Hartley Act over the veto of President Harry S. Truman, a number of provisions were written into law that proved disastrous for labor over decades.”).

⁶⁹ See LICHTENSTEIN, *supra* note 35, at 118 (“To understand the potency of this lost weapon, one might recall the political, as well as the economic, effectiveness of the boycott against non-union grapes deployed by Caesar Chavez, whose farmworker constituency lay

ness groups viewed them, together with industry-wide bargaining, as existential threats to managerial prerogatives when exercised by a powerful union.⁷⁰ Secondary boycotts had long been prohibited during the period of judicial hostility towards unions,⁷¹ and labor's opponents sought to recreate that restriction in the Taft-Hartley labor relations scheme.⁷²

3. *Union Corruption and the LMRDA*

Taft-Hartley had focused on the balance between labor and capital and did little to regulate the internal affairs of unions.⁷³ But as sensational stories of union corruption began to gain valence with the public,⁷⁴ Congress began investigating the internal affairs of unions.⁷⁵

In 1957, the Senate established a committee, headed by John McClellan of Arkansas, to investigate corruption within organized labor.⁷⁶ The evidence presented to the McClellan Committee

outside the labor law during the 1960s.”); Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 138 (1990) (arguing that restrictions on secondary activity contribute to the lack of coordination and decentralization of the American labor movement).

⁷⁰ See Lichtenstein, *supra* note 62, at 787 (noting that restrictions on industry-wide bargaining and secondary boycotts were central political goals of the National Association of Manufacturers during the Taft-Hartley debates).

⁷¹ See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (finding a secondary boycott to be an unlawful restraint of trade in violation of the Clayton Antitrust Act); see also *supra* note 32 and accompanying text (describing judicial hostility in the early twentieth century).

⁷² See Theodore J. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 U. DETROIT L.J. 189, 189–90 (1962) (describing Senator Taft's opposition to any form of secondary boycott as an example of Congress's dim view of the practice).

⁷³ See Aaron, *supra* note 16, at 851 (explaining that Taft-Hartley “included only a few provisions purporting to regulate the conduct of union government” because “Congress was then more concerned with collective bargaining than with internal union affairs”). In this void, “the race discrimination practiced by some unions, particularly the railroad Brotherhoods, was so egregious that the courts even created a new cause of action in a limited effort to curb it,” eventually leading to the development of the broad duty of fair representation. Michael J. Goldberg, *An Overview and Assessment of the Law Regulating Internal Union Affairs*, 21 J. LAB. RES. 15, 18 (2000) (citations omitted). With the passage of Title VII, the anti-discrimination aspect of the duty of fair representation has waned in importance, but the duty to represent all members fairly and equally “evolved into an important promise of protection for all bargaining unit members against arbitrary, discriminatory, or bad-faith grievance handling or contract negotiation.” *Id.* (citation omitted).

⁷⁴ One prominent example of the focus on union corruption is Elia Kazan's classic film *ON THE WATERFRONT* (Columbia Pictures 1954), a dramatization of organized crime and violence among longshoremen's unions on the docks of New York.

⁷⁵ See DUBOFSKY & DULLES, *supra* note 57, at 348 (“[O]rganized labor's own voluntary attempts to root out corruption were insufficient to ward off congressional investigation of union behavior.”).

⁷⁶ *Id.*

“revealed a larger degree of dictatorial union leadership . . . and more corruption, racketeering, and gangsterism on the part of union officials than even labor’s severest critics had suspected.”⁷⁷ While the Committee unearthed outright corruption and racketeering within only a few unions, this reputation was imputed to the entire labor movement.⁷⁸

In response to these revelations, Congress passed the LMRDA, also known as the Landrum-Griffin Act.⁷⁹ The legislative history of Landrum-Griffin is complex and sometimes contradictory,⁸⁰ and the resulting bill was a compromise between liberal labor reformers pursuing internal union democracy and conservatives who sought to use the reexamination of existing law as an opportunity to weaken labor overall.⁸¹

The Act imposed a broad range of administrative constraints governing both the internal structure of labor organizations and their relationships with their members. Title I of Landrum-Griffin,⁸² often referred to as the “Union Members’ Bill of Rights,”⁸³ provides that each union member has an equal right to the benefits of membership.⁸⁴ The statute also requires detailed financial reporting by both labor organizations and individual officers.⁸⁵ Officers are subject to fiduciary duties to members,⁸⁶ and every officer responsible for any

⁷⁷ *Id.* at 349.

⁷⁸ *See id.* (noting that the McClellan Committee’s discovery of unsavory practices within a limited number of unions “served to cast suspicion on the entire labor movement”); LICHTENSTEIN, *supra* note 35, at 163 (“Most of the distinctions between mob-connected criminality, autocratic leadership, hard bargaining, and industrywide negotiating strength were purposefully lost on those who saw these labor corruption scandals as an opportunity to reopen the assault on the union movement.”).

⁷⁹ Professor Archibald Cox identifies two additional motivations for the LMRDA: pressure from, among others, academics and the ACLU to strengthen internal union democracy, and the business community’s opportunistic use of corruption concerns in a bid to further weaken the labor movement. Cox, *supra* note 30, at 820–21.

⁸⁰ *See* Aaron, *supra* note 16, at 853–61 (discussing the LMRDA’s winding path through Congress).

⁸¹ *See* Cox, *supra* note 30, at 821–23 (describing various House and Senate bills and proposals that were ultimately pieced together in the enacted version of the LMRDA).

⁸² 29 U.S.C. §§ 411–15 (2012).

⁸³ Goldberg, *supra* note 73, at 22 (emphasis omitted).

⁸⁴ *See* Cox, *supra* note 30, at 833–42 (describing rights granted by Title I). The statute also grants protections against union restrictions on members’ exercise of free speech that exceed even the First Amendment’s protections against the government. Goldberg, *supra* note 73, at 22.

⁸⁵ *See* 29 U.S.C. §§ 431–41 (setting forth reporting requirements). Labor organizations are required to file an annual financial reporting form with the Department of Labor. *Id.* § 431(b).

⁸⁶ *See* 29 U.S.C. § 501(a) (delineating specific duties owed by union officers to both the members and the organization). *See generally* LABOR UNION LAW AND REGULATION 137–79 (William W. Osborne, Jr. ed., 2003) (providing detailed analysis of the fiduciary

organizational funds must be bonded.⁸⁷ Selection of officers is also specifically prescribed. Elections must be held regularly,⁸⁸ every member is eligible to be an officer,⁸⁹ and each member gets one vote.⁹⁰

These specific and detailed governance rules were based upon a particular notion of institutional democracy in which unions were treated essentially as microlegislatures.⁹¹ In this legislative metaphor, representative democracy is taken as a given. The major unions had grown dramatically and developed complex bureaucracies that often insulated officers from accountability. Therefore the traditional legislative model was the most rational response to the large, already deeply bureaucratic industrial unions examined by the McClellan Committee.

The Act's legislative history indicates that its drafters designed this detailed series of rules governing the internal structure of labor unions as a specific response to the corruption and lack of internal democracy identified by the Committee.⁹² At least some members of Congress were aware of the serious ramifications for freedom of association in prescribing specific rules for the governance of a private association, but the conclusion appears to have been that interference was justified in response to the specific problems identified by the

duty); John M. McEnany, Note, *The Fiduciary Duty Under Section 501 of the LMRDA*, 75 COLUM. L. REV. 1189, 1190–93 (1975) (examining cases concerning the extent of the fiduciary duty).

⁸⁷ 29 U.S.C. § 502.

⁸⁸ See 29 U.S.C. § 481(a)–(b), (d) (specifying maximum intervals between elections for various labor organizations).

⁸⁹ See 29 U.S.C. § 481(e) (providing that “every member in good standing” is eligible for office, subject to certain limitations).

⁹⁰ See *id.* (“Each member in good standing shall be entitled to one vote.”).

⁹¹ See Klare, *supra* note 20, at 458–62 (noting and critiquing the prominence of the “legislative metaphor” in labor law).

⁹² See Aaron, *supra* note 16, at 856–60 (discussing how the McClellan Committee's revelations shaped the various drafts and revisions of Landrum-Griffin). The definition of “labor organization” in the LMRDA, 29 U.S.C. § 402(i), was also broadened specifically to include the intermediate labor councils and conferences that were otherwise excluded from the NLRA definition. See *id.* at 879–80 (discussing the legislative history that led to the broader definition). Beyond this specific expansion, scholars disagree over whether the LMRDA definition of labor organization is substantively broader than that of the NLRA. Compare Naduris-Weissman, *supra* note 19, at 287–89 (arguing that the LMRDA definition requires that an organization fall under one of the explicitly defined categories in section 3(j) of the statute), with Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 79, 84–85 (2012) (arguing that section 3(j) does not constrain the general definition in section 3(i) and that the general definition is broader than that of the NLRA).

Committee.⁹³ Key to this conclusion is the degree of government coercion inherent in the Wagner Act model.⁹⁴ Because individuals may be compelled by law either to pay dues to a union or lose their jobs, government interference in union affairs is allowed where it otherwise would not be in an entirely voluntary association.⁹⁵ This is justified on the grounds that because the state has already interfered with private choice by mandating exclusive representation and compelling workers to pay dues to a union, it is justified in further interfering with private choice to the extent that it promotes accountability within the union. Whatever the appeal of this logic for large unions pursuing exclusive representation, it simply does not apply where a private, voluntary organization otherwise has no special relationship with the state.

B. Socioeconomic Transformations

In the decades since the last substantial change to the structure of United States labor law, the domestic and global economies have undergone a number of dramatic transformations. With the fall of trade barriers and the rise of privatization,⁹⁶ international competition has increased and employer antagonism towards organized labor has intensified dramatically.⁹⁷ Global competition has tightened the labor

⁹³ See S. REP. NO. 86-187, at 5 (1959) (“In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees.”); *id.* at 7 (“The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization.”).

⁹⁴ See *id.* at 6 (“The internal problems currently facing our labor unions are bound up with a substantial public interest. Under the National Labor Relations Act and the Railway Labor Act, a labor organization has vast responsibility for economic welfare of the individual members whom it represents.”).

⁹⁵ Though thoroughly explaining this argument is impossible within the confines of this Note, it may be that the degree of interference with internal organizational structure entailed by worker center regulation under the LMRDA would infringe upon the associational freedom of worker-members sufficiently to render it unconstitutional as applied. The Supreme Court has held that a central principle of freedom of association is the right of the members of a private organization to decide who may become a member or representative leader, and the method by which leaders are selected. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts of America have a constitutional right to exclude gays and lesbians from membership); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 569, 586 (2000) (holding that California’s blanket primary procedure infringed on the associational rights of political parties to select the candidate of their choice). LMRDA rules regarding voting and officer eligibility may be justifiable where an organization voluntarily accepts the benefits of government regulation of its activities, but the same cannot be said for worker centers, which do not seek exclusive representation.

⁹⁶ See *infra* notes 99–103 and accompanying text (discussing the economic impact of globalization).

⁹⁷ See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1882–85 (2007) (discussing the relationship between trade liberalization and employer opposition to organized labor).

market and resulted in increased competition for the jobs still available. Changes in immigration patterns have radically modified the composition and social structure of the working class and challenged the traditional union model. This Subpart seeks to describe these two related socioeconomic transformations and to analyze how labor law, constructed in a dramatically different historical context to address very different organizational issues and economic relationships, fails to ensure a meaningful right to organize among low-wage workers.⁹⁸

1. *The Changing Nature of Global Capital*

Beginning in the 1970s and accelerating through the 1980s and '90s, both the doctrine and the practice of neoliberal globalization⁹⁹ have transformed the global economy. While capital mobility¹⁰⁰ had limited worker organizing in the past to some extent,¹⁰¹ the elimination of trade barriers has made it increasingly possible for employers to respond to union demands by credibly threatening to shut down or move altogether.¹⁰² Where once unions could hope to organize entire industries to alleviate the competitive disadvantage the union contract would introduce, employers increasingly are competing with foreign corporations with much lower costs of production.¹⁰³

⁹⁸ I do not attempt to provide a complete explanation for the decline of traditional organized labor; many scholars have ably analyzed that complex issue. *See, e.g.*, MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 231 (1987) (providing a qualitative and quantitative analysis of the decline and concluding that it was “primarily due to [certain] aspects of the changing relation of class forces”); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 4–12 (1993) (noting employer opposition as one of several possible causes for the decline). I seek merely to note some important economic and social changes that have complicated worker organizing and led to the need for innovative strategies such as those implemented by worker centers.

⁹⁹ *See* Ashar, *supra* note 97, at 1882–83 (defining neoliberal globalization as the package of policies implemented since the 1980s by the World Bank, IMF, and other organizations pursuing global market integration, consisting of “fiscal austerity and cutbacks in social programs, privatization of nationalized industries, . . . and market liberalization through lowered trade barriers and less government intervention in the workplace and in transactions between private actors”).

¹⁰⁰ By “capital mobility,” I mean the ability of businesses and investors to easily shift their allocation of capital between workplaces, industries, and locations.

¹⁰¹ *See* LICHTENSTEIN, *supra* note 35, at 114, 224–25 (noting that numerous manufacturers moved their operations from the unionized North to the significantly more anti-union South following World War II).

¹⁰² *See* DUBOFSKY & DULLES, *supra* note 61, at 372 (“As the United States enthusiastically promoted free trade policies globally . . . , domestic manufacturers and capitalists moved their production facilities abroad to capitalize on cheap labor or invested directly in overseas enterprises that exported their products to the United States.”).

¹⁰³ *See id.* (noting that U.S. manufacturers must compete with foreign nations that enjoy lower labor and production costs).

Accompanying this increase in global competition has been an increasing trend among employers of shifting the risks of competition onto subcontractors and low-wage workers themselves.¹⁰⁴ Employers have systematically cut pay and benefits and moved to eliminate guarantees of job security.¹⁰⁵ As manufacturing jobs have disappeared, the service sector has dramatically expanded, creating millions of decentralized, low-wage and part-time jobs “characterized by generally impermanent relationships between individual employers and employees.”¹⁰⁶ Employers have classified a growing number of workers as temporary or independent contractors,¹⁰⁷ which may not only increase employers’ flexibility and decentralize production,¹⁰⁸ but also exclude these employees from coverage under a range of employment statutes.¹⁰⁹ The trend towards decentralization and contingent

¹⁰⁴ See Ruth Milkman, *Introduction* to *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* 1, 4–5 (Ruth Milkman et al. eds., 2010) [hereinafter *WORKING FOR JUSTICE*] (reporting the effects of this trend on workers in Los Angeles).

¹⁰⁵ See Ruth Milkman, *Introduction* to *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 1, 6 (Ruth Milkman & Ed Ott eds., 2014) [hereinafter *NEW LABOR IN NEW YORK*] (noting, in addition to outright violations of minimum wage and overtime laws by employers, that benefits can often be legally circumvented by nontraditional forms of employment, such as independent contracting, that fall outside the National Labor Relations Act or the Fair Labor Standards Act).

¹⁰⁶ JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 31 (2006); cf. Rebecca Smith, *Legal Protections and Advocacy for Contingent or “Casual” Workers in the United States: A Case Study in Day Labor*, 88 *SOC. INDICATORS RES.* 197, 198 (2008) (reporting that as of 2005, contingent workers, defined as workers who do not have standard full-time employment, made up 31% of the total U.S. workforce). This expansion of service sector employment in the face of global competition is in large part due to the immobile nature of some types of service jobs. Geographically outsourcing domestic work, for instance, would be impossible. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 44 (2004) (noting that immobile sectors tend to achieve flexibility by employing mobile workers, i.e., immigrants).

¹⁰⁷ Milkman, *supra* note 104, at 4–5.

¹⁰⁸ See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 *BERKELEY J. EMP. & LAB. L.* 251, 253–55 (2006) (“The trend toward decentralized production has developed at the same time that an important change has occurred in firms’ employment practices. In the past two decades, many firms have departed from a system that offered long-term stable employment and adopted instead a free agency model of employment.”); cf. SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 31 (2012) (“[W]hat makes these workers vulnerable to abuse—their illegal status in a cheap and flexible labor force that lacks effective government oversight for worker rights—is often also precisely what allows many employers to be viable and profitable.”).

¹⁰⁹ See Stone, *supra* note 108, at 256–70, 281–83 (examining the applicability of minimum wage and overtime, health and safety, employment discrimination, family and medical leave, unemployment compensation, workers compensation, and collective bargaining statutes to “atypical” workers, concluding that temporary employees receive some limited protection, but independent contractors receive virtually none).

work¹¹⁰ has undermined solidarity across job categories and further battered the struggling union movement.¹¹¹

Taft-Hartley's restrictions on secondary boycotts¹¹² seem particularly dated in the industries in which worker centers organize. As global supply chains have proliferated, capital mobility has increased, and the connection between a worker's direct employer and the entity holding the ultimate economic control has become increasingly attenuated, the threat of a powerful union shutting down an entire industry has dissipated. On the other hand, the secondary boycott has become nearly essential to impose any sort of accountability on small, mobile employers capable of shutting down and relocating with ease. While it may be that the restrictions on secondary boycotts were necessary to protect supposedly neutral third-party employers at the height of union power, the large retail conglomerates targeted by worker center campaigns are hardly neutral with regard to the labor practices of their contractors.

The transformation of global capital has also undermined social support for traditional unions and made it more socially acceptable for employers to implement increasingly severe anti-union strategies.¹¹³ In the past, capital had grudgingly accepted the role of organized labor in certain industries and participated in a "privatized welfare-state equivalent," if only as an alternative to greater government control over provision of social services.¹¹⁴ But the expansion of

¹¹⁰ "Contingent work" means part-time, temporary, piece-work, or other forms of employment defined by their lack of permanence or opportunity for advancement. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Contingent and Alternative Employment Arrangements, February 2005, at 1 (July 27, 2005), available at <http://www.bls.gov/news.release/pdf/conemp.pdf> ("Contingent workers are persons who do not expect their jobs to last or who reported that their jobs are temporary.").

¹¹¹ See Frances Fox Piven & Richard A. Cloward, *Power Repertoires and Globalization*, 28 POL. & SOC'Y 413, 421–22 (2000) (discussing the negative impact of temporary work and outsourcing on worker solidarity).

¹¹² See *supra* notes 69–72 and accompanying text (discussing the prohibition on secondary boycotts).

¹¹³ See LICHTENSTEIN, *supra* note 35, at 220 ("The competitive challenge from [foreign manufacturers] undermined a key pillar of New Deal-era labor law and politics: trade unions are good for industrial society because they raise wages, not only for union members themselves but for the entire working population. . . . But now such ideas seemed counterproductive, divisive, and vaguely unpatriotic.").

¹¹⁴ *Id.* at 126. Under this model, an individual receives health care, pensions, and other social services through one's employer, as compared to the European model where such goods are provided by the state. See *id.* (explaining that the American unions' goal of a private welfare state was modeled on those achieved by European governments). Employer opposition to new unionization, however, was always notably more strident and hostile in America than elsewhere in the world. See *id.* at 105–09 (explaining this "American Exceptionalism" as a product of individualist ideology, decentralization, and resistance to New Deal reforms more generally); cf. Samuel Estreicher, *Freedom of*

capital mobility has dramatically increased employer hostility to unionization,¹¹⁵ and employers have expressed this hostility both legally and illegally.¹¹⁶

2. *Immigration and Low-Wage Workers*

As the domestic economy has become increasingly oriented towards global competition, immigration to the United States has transformed as well. Increasing numbers of immigrants have come to the United States, mainly from Latin America, over the past thirty years.¹¹⁷ At the same time, the steady growth in the number of immigrant employees continued until the recent economic crisis,¹¹⁸ fundamentally changing the nature of low-wage work in the United States.

As of 2009, twenty-four million out of the 151 million workers in the United States were foreign-born.¹¹⁹ About eight million were undocumented.¹²⁰ Many were familiar with or had participated to varying degrees in organizing and popular education activities in their home countries.¹²¹ But most importantly, documented and undocumented immigrants alike predominantly work in the growing low-wage service sector.¹²² Undocumented workers in particular are relegated to the bottom of the employment ladder and frequently obtain

Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism, 71 N.Y.U. L. REV. 827, 834–35 (1996) (arguing that employer resistance is the most likely response to the uncertainty that stems from employers' inability under U.S. law to negotiate with unions without granting them formal recognition).

¹¹⁵ See Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 916 (2007) ("Employers are more concerned with ensuring low prices and flexibility in production than with maintaining production or a stable workforce. As a result, employers are more inclined to resist employee organization and take advantage of the many strategies for delay and intimidation available under the current law.").

¹¹⁶ In 2006, employers engaged in 28,000 reprisals against union members resulting in an award of back pay. *Id.* at 916. One often-cited statistic estimates that one in twenty union supporters are illegally fired. *Id.* at 916 n.60 (citing Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983)).

¹¹⁷ See FINE, *supra* note 106, at 28–31 (describing this phenomenon as a "second great migration" (internal quotation marks omitted)).

¹¹⁸ Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 A.B.A. J. LAB. & EMP. L. 295, 296 (2011).

¹¹⁹ *Id.* at 295.

¹²⁰ *Id.* at 295–96.

¹²¹ See FINE, *supra* note 106, at 30 (noting that some Eastern European and Latin American immigrants had been exposed to worker organization and had participated in or even led labor movements).

¹²² See GORDON, *supra* note 106, at 20–23 (describing how Long Island's immigrant population labors largely in low-wage service jobs).

only contingent work.¹²³ Conditions in these jobs are often dangerous, demeaning, and illegal.¹²⁴ For example, one recent study found that twenty-six percent of the surveyed low-wage workers were paid below the minimum wage in a given week, and that seventy-six percent of those who worked over forty hours in that week were not paid the legally mandated overtime rate.¹²⁵ Even where their wages meet the legal minimum, workers' take-home pay often falls below the federal poverty line.¹²⁶ Immigrants without legal status are especially vulnerable to exploitation, as employers can use their knowledge of a worker's immigration status to prevent the worker from seeking help.¹²⁷ As sociologist Janice Fine notes, "[t]he silent compact between employers and [undocumented] employees is simple: in exchange for corporate indifference to their legal status, workers will not make a fuss about conditions or compensation."¹²⁸

¹²³ See Smith, *supra* note 106, at 203–04 (noting that a number of undocumented workers turn to day labor “as their only viable employment option”); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 561–62 (2010) (noting that undocumented workers “are concentrated in sectors ranging from construction to food services to janitorial work, industries known to be particularly subject to workplace violations” (citations omitted)).

¹²⁴ See, e.g., Nicole A. Archer et al., *The Garment Worker Center and the “Forever 21” Campaign*, in WORKING FOR JUSTICE, *supra* note 104, at 154, 156 (describing numerous health and safety, wage and hour, and other labor law violations by Los Angeles garment manufacturers); Kathleen Dunn, *Street Vendors in and Against the Global City: VAMOS Unidos*, in NEW LABOR IN NEW YORK, *supra* note 105, at 134, 135–36 (describing the persecution suffered by street vendors in New York); Andrew Friedman & Deborah Axt, *In Defense of Dignity*, 45 HARV. C.R.-C.L. L. REV. 577, 577–78 (2010) (describing wage theft, harassment, and discrimination suffered by low-wage workers); Editorial, *For Many Restaurant Workers, Fair Conditions Not on Menu*, BOS. GLOBE, Feb. 16, 2014, at K4, available at <http://www.bostonglobe.com/opinion/editorials/2014/02/16/service-not-included-restaurant-industry-serves-injustice-workers/NNnE0dNzQ8dLne00EjbxZJ/story.html> (discussing the long hours, low pay, and rampant wage theft endured by restaurant workers).

¹²⁵ ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATION OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2 (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>. On average, low-wage workers lost fifteen percent of their earnings to wage theft, equivalent to \$2634 per year. *Id.* at 5.

¹²⁶ See Friedman & Axt, *supra* note 124, at 578 (“Even without garnished or stolen wages, the New York low-wage worker would only be paid an average of \$20,644 annually, a figure which still falls below the much-maligned official federal [poverty] standard for a family of four.”); see also Justin McDevitt, Note, *Compromise Is Complicity: Why There Is No Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 A.B.A. J. LAB. & EMP. L. 101, 107 (2010) (“[T]he average day laborer in New York, for example, earned about \$11,850 per year in 1999.”).

¹²⁷ See FINE, *supra* note 106, at 27 (reporting on intimidation tactics and retaliatory measures employers use to prevent workers from complaining about abuses).

¹²⁸ *Id.*

To be sure, many native-born Americans also labor in harsh conditions and suffer severe exploitation.¹²⁹ But immigration trends have dramatically expanded the class of “precarious” workers¹³⁰ and fundamentally transformed the socioeconomic context within which low-wage workers labor.

II ORGANIZING THE UNORGANIZABLE: THE WORKER CENTER MODEL

The worker center model arose largely in response to these broad macroeconomic trends and from the failure of traditional organized labor to acknowledge and organize low-wage immigrant workers.¹³¹ Worker centers have multiplied in recent years—while in 1992 only four centers operated, by 2014 the number was 214.¹³² They have had a number of high-profile successes,¹³³ and the traditional union movement has increasingly adopted worker center techniques.¹³⁴ However, worker centers remain distinct organizations with very different internal structures. They are entirely voluntary, highly participatory, and generally small and tightly knit¹³⁵—a long way from the large, bureaucratic, and unresponsive unions that the Taft-Hartley Act and LMRDA were designed to regulate.¹³⁶ They rely on flexibility to suc-

¹²⁹ See Milkman, *supra* note 105, at 6–7 (“U.S. citizens or authorized immigrants . . . are joining the precariat as well.”).

¹³⁰ See *id.* at 2 (coining the term “precariat” to refer to workers who “typically have no employment security,” most of whom “are excluded from the legal protections that the organized labor movement struggled to achieve for the proletariat over the past century”).

¹³¹ FINE, *supra* note 106, at 32–33; Milkman, *supra* note 105, at 5.

¹³² Milkman, *supra* note 105, at 2–3.

¹³³ For instance, Domestic Workers United successfully advocated for the passage of a Domestic Workers Bill of Rights in the New York legislature in 2010. Domestic Workers Bill of Rights, ch. 481, 2010 N.Y. Sess. Laws 1315 (McKinney) (codified at N.Y. EXEC. LAW §§ 292, 296-b (McKinney 2014); N.Y. LAB. LAW §§ 2, 160–61, 170, 651 (McKinney 2014); N.Y. WORKERS’ COMP. LAW § 201 (McKinney 2014); see Ai-jen Poo, *A Twenty-First Century Organizing Model: Lessons from the New York Domestic Workers Bill of Rights Campaign*, NEW LAB. F., Winter 2011, at 51–55 (describing the legislation and documenting the movement, headed by Domestic Workers United, that led to its passage). The Bill of Rights gave over 200,000 domestic workers, otherwise excluded from most employment laws, a number of basic employment rights such as overtime pay, protection from discrimination, and at least one day off per week. Poo, *supra*, at 133. A few other recent successes will be noted in Part III in discussing particular examples of worker centers.

¹³⁴ See Hill, *supra* note 8, at 568–71 (describing instances of union and worker center strategy “convergence”).

¹³⁵ See *infra* notes 151–60 and accompanying text (discussing the size and membership structure of worker centers).

¹³⁶ See *supra* Part I.A (exploring the legislative history and industrial context of these acts).

ceed in the extremely difficult sectors in which they organize.¹³⁷ This Part will examine some basic organizational features of worker centers, note the normative and practical problems that would arise from regulating worker centers as unions, and describe the recent attempt by the business lobby to force worker centers to abide by the constraints of labor law.

A. *Organizational Basics*

Worker centers incorporate diverse organizing theories, structures, and campaign goals and strategies.¹³⁸ Professor Fine's definition, which has framed much of the subsequent literature,¹³⁹ is therefore quite broad: "Worker centers are community-based mediating institutions that provide support to and organize among communities of low-wage workers."¹⁴⁰

For the most part, worker center activities can be divided into three categories: service provision, advocacy, and organizing.¹⁴¹ Most centers provide services, such as wage enforcement and English language classes,¹⁴² but they generally do not seek to make service provision the center of their organization. Instead, it is treated as a method for making initial contact with potential future members and building their confidence in the center's organizational capacity.¹⁴³ Many centers also perform advocacy work, such as publishing research-based reports and lobbying legislators.¹⁴⁴ Finally, organizing is at the core of the worker center model.¹⁴⁵ Centers aim to build power¹⁴⁶ among

¹³⁷ See *infra* notes 148–50 and accompanying text (describing the adaptability of the worker center model).

¹³⁸ See Jacob Lesniewski, *Workers' Centers, the Labor Movement, and the Neoliberal Moment: A Critical Review*, 38 CRITICAL SOC. 325, 329 (2012) ("Workers' centers differ not only in how they conceive of the community that they are mobilizing, but also in how they choose which campaigns to work on, . . . their relationships with labor unions, and how they relate to the legal system and government bureaucracies.").

¹³⁹ See, e.g., Naduris-Weissman, *supra* note 19, at 237 n.6 (quoting Fine's definition); Rosenfeld, *supra* note 19, at 471 (same).

¹⁴⁰ FINE, *supra* note 106, at 11.

¹⁴¹ *Id.* at 12.

¹⁴² See *id.* at 76–77 (listings examples of services provided by several worker centers).

¹⁴³ See *id.* at 72–73 (discussing the role of service provision among worker centers); see also Rebecca J. Livengood, Note, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325, 330–32 (2013) (describing how centers bring lawsuits against employers upon initial contact with workers in the hope that the lawsuits will lead to greater worker participation).

¹⁴⁴ FINE, *supra* note 106, at 12.

¹⁴⁵ See *id.* at 2 ("The combination of *organizing* with service and advocacy is what sets these centers apart.").

¹⁴⁶ Many worker centers borrow from the Alinskyite tradition of community organizing, which is centered on the concept of "building power." Mark Engler & Paul Engler, *Why Saul Alinsky, Author of "Rules" for Social Change, Would Probably Break Them Today*,

low-wage workers so that they can assert their own interests through economic action and policy formation.¹⁴⁷

The diversity of approaches used by worker centers is critical to their successes. These organizations work primarily in sectors that, until recently, the traditional labor movement had considered “unorganizable”—that is, the scale and uncertainty of the workplace and its employees render it difficult or impossible to engage in a traditional union organizing campaign.¹⁴⁸ Employers in sectors susceptible to the subcontracting trends described above are generally small and mobile, and immigrant workers face severe intimidation at any hint of organizing.¹⁴⁹ To counter these difficulties, worker centers have had to adopt creative strategies to build power among marginalized communities and to adapt campaigns to local economic conditions.¹⁵⁰ In other words, where capital is mobile and flexible, worker centers have learned that labor organizing must be equally so. Within this flexible framework, worker centers have adopted several common structural features that have proven effective in sustaining organizational strength. These strategies could be undermined by the constraints of labor law.

First, centers generally have a relatively small, involved, and *voluntary* membership. Membership is frequently treated as a privilege that must be earned through participation in meetings, classes, or committees, not just through paying dues¹⁵¹—many do not even charge dues or membership fees.¹⁵² Largely as a result, centers’ formal

YES! MAG. (Apr. 10, 2014), <http://www.yesmagazine.org/people-power/saul-alinsky-author-rules-for-radicals-would-probably-be-breaking-them-today>. Organizational power can be defined roughly as the ability to obtain the outcome the organization favors, and power derives in large part from the strength of the membership base. See SAUL D. ALINSKY, *RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS* 113 (1971) (“Change comes from power, and power comes from organization. In order to act, people must get together. . . . Power and organization are one and the same.”).

¹⁴⁷ FINE, *supra* note 106, at 2; cf. Steve Jenkins, *Organizing, Advocacy, and Member Power: A Critical Reflection*, WORKINGUSA, Fall 2002, at 56, 57–58 (critiquing worker center organizing that focuses on pressuring elite decision makers and ignores objective power dynamics as “transforming the appearance *but not the substance* of what are, in effect, traditional advocacy campaigns,” and arguing that advocacy work fails to build sustainable worker power).

¹⁴⁸ Milkman, *supra* note 118, at 299–300.

¹⁴⁹ See *supra* Part I.B (discussing the impact of globalization and immigration on the effectiveness of organizing).

¹⁵⁰ See Naduris-Weissman, *supra* note 19, at 241–42 (“The specific types of activities that centers engage in usually depend on local conditions and the needs of the communities they seek to serve.”); *infra* Part III.B (describing particular worker centers’ adaptations to changing conditions).

¹⁵¹ FINE, *supra* note 106, at 210, 232.

¹⁵² See *id.* at 220 (stating that forty-eight percent of the studied centers charged dues, but that they were generally five to ten dollars per month, and that most centers had no

membership sizes tend to remain relatively modest.¹⁵³ This decision is strategic; many organizations have found that, unless they treat membership as a privilege, workers will simply leave once they have received legal services.¹⁵⁴ Critically, membership is completely voluntary. Members are not compelled by a collective bargaining agreement or by labor law to become a member of a worker center or to be represented by one.¹⁵⁵ If a member disagrees with the organization's actions or management, he or she may leave the organization without significant cost.¹⁵⁶ The voluntariness and ease of exit of the worker center model provide a sharp contrast to the compulsory membership and government intervention that justified restrictions on freedom of association in the LMRDA.¹⁵⁷

Second, worker centers are generally small organizations¹⁵⁸ with limited funds. Most of their budgets come from grants from external foundations instead of membership dues.¹⁵⁹ The fear of an overly powerful, unresponsive union implicit in the LMRDA does not apply to organizations of the size and scale of most worker centers, and these characteristics of worker centers would render the administra-

infrastructure to collect dues). In fact, this has frequently been cited as one of the key weaknesses of the worker center model. *See, e.g., id.* at 254–55 (questioning the sustainability of worker centers' dependence on foundation funding); Livengood, *supra* note 143, at 330 (citing systematic collection of dues as an advantage that unions have over worker centers).

¹⁵³ FINE, *supra* note 106, at 232.

¹⁵⁴ *See* GORDON, *supra* note 106, at 192–94 (describing the struggles of a particular worker center in balancing legal work with organizing). Gordon notes that legal services provision can both overwhelm an organization's limited resources and “coopt[] potential leaders” by providing a reason to leave the organization once their case has been handled. *Id.* at 193.

¹⁵⁵ *Cf. supra* notes 41–46 and accompanying text (discussing the exclusive representation model of the Wagner Act).

¹⁵⁶ The low barrier to exit from a worker center is key to understanding the distinction between worker centers and unions within labor law. While the exclusive representation rule of the NLRA means that one must change jobs if one does not wish to be represented by a union, leaving a worker center generally requires nothing more than no longer attending meetings. *See* Benjamin Sachs, *Worker Centers and the “Labor Organization” Question*, ON LABOR (Sept. 1, 2013), <http://onlabor.org/2013/09/01/worker-centers-and-the-labor-organization-question/> (“This constraint on choice supplied a critical piece of the justification for the governmental mandates about internal governance. . . . [B]ecause workers' exit options were restricted by the rules of exclusive representation, it made sense for the government to mandate that they have a certain type of voice within the union.”).

¹⁵⁷ *See supra* notes 92–95 and accompanying text (discussing the justification for the LMRDA).

¹⁵⁸ *See* FINE, *supra* note 106, at 209 fig.9.1 (providing membership statistics for twenty-three worker centers and concluding that a majority have under 550 members).

¹⁵⁹ *See* Janice R. Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 REL. INDUSTRIELLES / INDUS. REL. 604, 610 (2012); FINE, *supra* note 106, at 232–33, 254–55 (arguing that this dependence on external funding hurts worker centers in terms of organizational power as well as financial stability).

tive costs of such compliance particularly burdensome. Indeed, most worker centers run on tiny budgets with only a few employees.¹⁶⁰ The same temptations of corruption that influenced union officials in charge of multibillion-dollar pension funds¹⁶¹ do not exist.

Moreover, most worker centers are classified as nonprofit organizations for tax purposes.¹⁶² In order to maintain tax-exempt status, the centers are required to make significant financial disclosures, both to the IRS and to the public.¹⁶³ While the required disclosures do not meet the extremely detailed and time-consuming reporting requirements provided for under the LMRDA,¹⁶⁴ worker centers have not shown the type of irresponsibility that arguably made such requirements necessary.¹⁶⁵

Third, centers are strongly committed to internal democracy and leadership development,¹⁶⁶ and this commitment is a significant factor in their success.¹⁶⁷ Centers place a focus on developing members into leaders, organizers, and staff.¹⁶⁸ Internal decision-making structures vary, but all heavily involve membership.¹⁶⁹ This cooperative form of decision-making allows for tactical flexibility in response to changing conditions, a nimbleness lacking in the traditional union and one that could be severely constrained by the application of LMRDA standards. These horizontal structures rarely seem to involve formal one-person-one-vote elections, the model mandated by the LMRDA.¹⁷⁰

¹⁶⁰ FINE, *supra* note 106, at 214.

¹⁶¹ See James B. Jacobs, *Is Labor Union Corruption Special?*, 80 SOC. RES. 1057, 1067 (2013) (noting two major instances of union corruption involving large sums of money).

¹⁶² Fine, *supra* note 159, at 606.

¹⁶³ See FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* ch. 33 (2012) (detailing the disclosure and recordkeeping obligations of tax-exempt organizations).

¹⁶⁴ See *supra* note 85 and accompanying text (detailing the LMRDA's reporting requirements).

¹⁶⁵ See *supra* notes 75–78 and accompanying text (describing the corruption revelations that motivated the passage of the LMRDA). In the course of researching this piece, I was unable to locate a single instance where a worker center was shown to have embezzled funds or otherwise abused its authority.

¹⁶⁶ Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 403 (2004) (“Among workers’ centers, there is an emphasis on leadership and decision-making by the workers themselves, rather than by a national union or outside organizers.”).

¹⁶⁷ See, e.g., *infra* notes 210–14 and accompanying text (describing the value of participatory democracy in the organizing model of Make the Road New York); *infra* notes 234–36 (same for the Restaurant Opportunities Center of New York).

¹⁶⁸ See FINE, *supra* note 106, at 211–17 (describing the leadership development strategies of several worker centers).

¹⁶⁹ See *id.* (chronicling internal governance mechanisms and staffing procedures).

¹⁷⁰ See *infra* notes 210–14 and accompanying text (discussing the participatory democracy model of one worker center).

Such a disconnect is hardly surprising—the internal structure of worker centers draws far more on the civil rights movement and social activist groups than traditional unions.¹⁷¹

Finally, worker centers generally focus more on a broad political agenda than on becoming the exclusive representative at a particular workplace.¹⁷² Though they do spend a good deal of time on individual employment issues,¹⁷³ the organizations are structured to encourage workers to think about the institutional causes of their job conditions and to become more politically involved.¹⁷⁴ The greatest successes of worker centers in recent years have come at the legislative and policy levels.¹⁷⁵ Attempts to organize individual workplaces are relatively rare, but when they do occur, centers either hand the campaign off to a traditional labor union¹⁷⁶ or create a new, independent union.¹⁷⁷ No worker center has ever participated in an NLRB election or sought to become the exclusive representative of a group of employees enjoying the formal benefits of labor law.

The relationship between worker centers and the traditional labor movement has changed dramatically in the past decade. In 2006, when Professor Fine published her study, unions and worker centers

¹⁷¹ See FINE, *supra* note 106, at 9–11, 34–37 (discussing the genesis of early worker centers in the civil rights movement and the similarities with settlement houses of the early 1900s); cf. Gordon, *supra* note 7, at 445–50 (1995) (discussing the social movement model of the Workplace Project).

¹⁷² See Fine, *supra* note 9, at 337 (“Centres have a social movement orientation and organize around both economic issues and immigrant rights. They pursue these goals by seeking to impact the labour market through direct economic action, on the one hand, and public policy reform, on the other.”).

¹⁷³ See FINE, *supra* note 106, at 12 (noting that most worker centers provide services for individuals).

¹⁷⁴ See *id.* at 206–08 (describing worker centers’ pedagogical technique based upon the popular education work of Paolo Freire and focusing on the underlying causes of injustice).

¹⁷⁵ See, e.g., *supra* note 133 (describing the passage of the Domestic Workers Bill of Rights); *infra* note 176 (discussing the legislative success of a Los Angeles organization in passing a law regulating car washes); *infra* notes 204–05 and accompanying text (discussing legislative and policy victories by Make the Road New York).

¹⁷⁶ This was the approach followed by the Coalition of Low-Wage and Immigrant Worker Advocates, a coalition of several Los Angeles worker centers and legal aid organizations, which successfully lobbied for a bill regulating the car wash industry and making it easier to organize workers. See Susan Garea & Sasha Alexandra Stern, *From Legal Advocacy to Organizing: Progressive Lawyering and the Los Angeles Car Wash Campaign*, in *WORKING FOR JUSTICE*, *supra* note 104, at 125 (describing this campaign). The actual organizing work was done by the United Steelworkers. *Id.* at 138–39.

¹⁷⁷ The Koreatown Immigrant Workers Alliance, a Los Angeles–based worker center, campaigned to form an independent union, which complied with relevant labor laws, in order to organize a local supermarket. See Jong Bum Kwon, *The Koreatown Immigrant Workers Alliance: Spatializing Justice in an Ethnic “Enclave,”* in *WORKING FOR JUSTICE*, *supra* note 104, at 23, 39–46 (describing the campaign and its aftermath). The NLRB-supervised election ended in a tie. *Id.* at 41.

often distrusted each other and rarely worked together.¹⁷⁸ Since then, a number of collaborations between unions and worker centers have emerged. Unions have adopted worker center strategies,¹⁷⁹ and worker centers and unions have increasingly led joint campaigns.¹⁸⁰

However, worker centers and unions remain distinct organizations with different structural models, and this still contributes to tensions between them. Worker centers frequently balk at unions' narrow organizational structure and the lack of input from rank-and-file workers.¹⁸¹ Unions often see worker centers as impractical and politically radical.¹⁸² A further complication is the fraught relationship that many major unions have had with immigrants in the past.¹⁸³ This is not to say that unions and worker centers do not work together; they often do, sometimes with great success. It is only to make the point that the argument made by many current advocates of increased regulation of worker centers—that the organizations are merely “union fronts”—is inconsistent with the practical realities of both worker center and union organizing.

B. *The Backlash*

Business groups and Congressional Republicans have recently begun criticizing worker centers for failing to abide by the NLRA and

¹⁷⁸ See, e.g., FINE, *supra* note 106, at 120–25 (describing the fraught relationship between one worker center and a union local attempting to organize the center's members); Fine, *supra* note 159, at 610 (noting the lack of communication between unions and worker centers as of 2006).

¹⁷⁹ See Hill, *supra* note 8, at 568–71 (describing the convergence between union and worker center strategies).

¹⁸⁰ See, e.g., Fine, *supra* note 159, at 617–19 (describing a successful collaboration between the Laborers International Union and the National Day Labor Organizing Network); Jane McAlevey, *Love and Agitation*, NATION, June 10, 2013, at 15 (describing Make the Road New York's coalition effort with the Retail, Wholesale and Department Store Union to regulate and organize car washes).

¹⁸¹ Fine, *supra* note 9, at 341.

¹⁸² See *id.* (“Ideologically, some unions are annoyed by some centres' anti-capitalist rhetoric and are perplexed by their tendency to focus on the distant horizon as opposed to shorter-term political, policy and industry organizing goals.”).

¹⁸³ The traditional narrative is that, until quite recently, unions were universally opposed to immigration as a threat to domestic jobs. See Brian Burgoon et al., *Immigration and the Transformation of American Unionism*, 44 INT'L MIGRATION REV. 933, 934–35 (2010) (describing the United States's “strong nativist traditions” and noting the typical view that “interactions between immigration and unions have been fundamentally adversarial throughout U.S. history”). However, the relationship between the big unions and immigrant workers is more complex than a simple hostility to immigration or immigrants. Many unions did oppose large-scale immigration through the 1980s and '90s, but even that opposition caused a great degree of internal dissension, and policies were somewhat more nuanced than is commonly asserted. See *id.* at 938–56 (analyzing the historical relationship between unions and immigration policy).

LMRDA.¹⁸⁴ Representative John Kline has led the legislative charge, demanding explanations from the Department of Labor regarding the lack of regulation generally¹⁸⁵ and from the Department of Health and Human Services about a particular worker center, Restaurant Opportunities Center (ROC), which he alleged serves as a “navigator” for the Affordable Care Act.¹⁸⁶ At congressional hearings in September 2013, management-side labor attorneys made the case for worker center regulation under the LMRDA.¹⁸⁷ They argued that LMRDA regulations are designed to ensure the rights of union members and responsibility among union officers, and that the incremental cost of imposing the requirements on worker centers is outweighed by the benefit in internal democracy and accountability.¹⁸⁸ This Note asserts that this argument far overstates the benefits and underestimates the costs of such regulation.

Meanwhile, the Chamber of Commerce¹⁸⁹ and the Center for

¹⁸⁴ See Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES, Jan. 17, 2014, at B1 (“After ignoring these groups for years, business groups and powerful lobbyists, heavily backed by the restaurant industry, are mounting an aggressive campaign against them, maintaining that they are fronts for organized labor.”); Lee Fang, *Former Walmart Exec Leads Shadowy Smear Campaign Against Black Friday Activists*, NATION (Nov. 26, 2013, 4:26 PM), <http://www.thenation.com/blog/177376/former-wal-mart-exec-leads-shadowy-smear-campaign-against-black-friday-activists> (exploring the origins of the representatives of the anti-worker center campaign).

¹⁸⁵ Letter from John Kline, Chairman, House Comm. on Ed. and the Workforce, to Thomas E. Perez, Secretary, U.S. Dep’t of Labor (July 23, 2013), available at http://edworkforce.house.gov/uploadedfiles/07-23-13_letter_dol_worker_centers.pdf.

¹⁸⁶ Letter from John Kline, Chairman, House Comm. on Ed. and the Workforce, to Kathleen Sebelius, Secretary, U.S. Dep’t of Health & Hum. Servs. (Nov. 1, 2013) (expressing concern that a workers’ rights organization may not be providing unbiased information), available at http://edworkforce.house.gov/uploadedfiles/11-01-13-hhs-worker_centers.pdf. Health care navigators receive grants from the federal government to provide information and guidance to individuals seeking health insurance from the marketplaces established under the Affordable Care Act. See *In-Person Assistance in the Health Insurance Marketplaces*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/assistance.html> (last visited Aug. 4, 2014) (laying out the basics of the navigator program).

¹⁸⁷ *The Future of Union Organizing: Hearing Before the Subcomm. on Health, Emp’t, Labor, and Pensions of the H. Comm. on Ed. and the Workforce*, 113th Cong. (2013) (statement of Stefan Marculewicz, Shareholder, Littler Mendelson), available at <http://edworkforce.house.gov/uploadedfiles/marculewicz.pdf>.

¹⁸⁸ *Id.*; see also Marculewicz & Thomas, *supra* note 92, at 90 (making the same argument).

¹⁸⁹ See, e.g., WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS (2014), available at <http://www.workforcefreedom.com/sites/default/files/WFI%20Worker%20Center%20Study%20-%20New%20Model%20of%20Representation.%20Final%20version%20downloaded%202.20.14.pdf> (analyzing alleged links between specific worker centers and labor unions); WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, THE BLUE EAGLE HAS LANDED: THE PARADIGM SHIFT FROM MAJORITY RULE TO MEMBERS-ONLY REPRESENTATION (2014), available at <http://www.workforcefree>

Union Facts¹⁹⁰ have begun a campaign against worker centers generally and against both ROC¹⁹¹ and OUR Walmart¹⁹² in particular. The campaign attempts to portray worker centers as well-funded “union fronts” trying to trick workers into joining a large, corrupt union,¹⁹³ and it argues that worker centers are exploiting a “loophole” in labor law.¹⁹⁴ Ironically, the organizations behind these campaigns for transparency refuse to identify their financial supporters, but many are linked to Richard Berman, a prominent lobbyist who has received millions of dollars from business to conduct anti-union campaigns.¹⁹⁵

The lobbying campaigns against worker centers present far more rhetoric than fact or argument, drawing instead on vague assertions of union links¹⁹⁶ and demonization of worker center leaders.¹⁹⁷ However, some scholarly literature makes a logical appeal to organizational democracy and financial transparency, arguing that worker centers need external regulation in order to assure accountability to members and to deter corruption.¹⁹⁸ But, as I will show in Part III, the

dom.com/sites/default/files/REPORT%20WFI_MembersOnlyUnions_Report_FIN.pdf (assessing the impact of worker centers on exclusive representation).

¹⁹⁰ CTR. FOR UNION FACTS, <http://www.unionfacts.com/> (last visited Aug. 5, 2014).

¹⁹¹ ROC EXPOSED, <http://www.rocexposed.com/> (last visited Aug. 31, 2014). For further discussion of ROC, see *infra* Part III.B.

¹⁹² OURWALMART FACTCHECK.COM, <http://www.ourwalmartfactcheck.com/> (last visited Mar. 18, 2014).

¹⁹³ In reality, worker centers often operate on shoestring budgets. See Stephen Lee, *Worker Centers Push Back Against Allegations of Being Union ‘Front Groups,’* 27 Labor Relations Week (BNA) 1590, 1590 (2013) (“[Centers] piece [their funding] together with a little foundation money, a little Presbyterian money, and then they do barbecues and little fiesta dances. For anyone to suggest that these are well-funded operations is just absolutely not accurate.” (quoting Kim Bobo, the Executive Director of Interfaith Worker Justice, a coalition of worker centers) (second alteration in original)). And while worker centers and unions have increasingly formed alliances and learned from each other’s successes, *supra* notes 178–80 and accompanying text, the framing of worker centers as “union fronts” is incompatible both with their historical origins and with their current activities, *infra* Part III.

¹⁹⁴ *Labor’s Loophole*, WORKERCENTERS.COM, <http://workercenters.com/labors-loophole/> (last visited Mar. 18, 2014).

¹⁹⁵ See Greenhouse, *supra* note 184 (discussing the links between Berman, the Center for Union Facts, and the campaigns against ROC and OUR Walmart); BERMAN EXPOSED, <http://www.bermanexposed.org/> (noting Berman’s numerous links with a variety of anti-union organizations).

¹⁹⁶ See Richard Berman, Op-Ed., *Fast Food Strikes That Aren’t*, S. FLA. SUN-SENTINEL, Dec. 5, 2013, at A16 (“Worker centers look like unions, spend like unions, and protest like unions.”).

¹⁹⁷ See *Saru Putin: Unifying the Empire*, ROC EXPOSED, <http://www.rocexposed.com/saru-putin-unifying-the-empire/> (last visited Aug. 4, 2014) (describing Saru Jayaraman, Executive Director of ROC United, as a “despot” and comparing her to Russian president Vladimir Putin).

¹⁹⁸ See Marculewicz & Thomas, *supra* note 92, at 79 (“Without the restrictions of the NLRA and LMRDA, these organizations can avoid the legal duty of accountability to the

labor regulation model that they seek to apply would provide little benefit and would seriously distort the internal structure of worker centers. The voluntary nature of worker centers and their already robust internal and external governance mechanisms render such regulation both burdensome and unnecessary.

III

APPLYING THE CONSTRAINTS OF LABOR LAW

The remainder of this Note will apply the preceding contextual framework to particular worker centers, focusing on the organizational constraints of labor law.¹⁹⁹ As these examples will show, the current legal framework governing the structure and activities of traditional labor unions—last meaningfully modified over half a century ago—simply did not anticipate the growth of worker centers, the internal governance mechanisms that drive their development, or the way these centers would interact with the communities they organize. Because these centers do not seek the benefits of that framework, and have developed alternative internal governance structures at least equal in accountability to the LMRDA model, it would be both inappropriate and institutionally damaging to apply such a model to these nascent institutions.

A. *Make the Road New York*

Make the Road New York (MRNY) is “the largest nonunion membership organization of immigrants in New York City.”²⁰⁰ It has over 14,000 members and a hundred full-time staff.²⁰¹ In terms of size

workers they represent. . . . [T]he laws that provide protections to workers *vis a vis* their labor organizations were designed precisely to establish that accountability.”).

¹⁹⁹ This Part focuses on worker centers that organize statutory employees, as there is no question that an organization made up solely of NLRA-exempt employees would not be considered a labor organization. However, if an organization consists in any part of employees covered under the Act, even if such members are a small minority, it could be considered a labor organization. Naduris-Weissman, *supra* note 19, at 280.

²⁰⁰ Jane McAlevey, *The High-Touch Model: Make the Road New York's Participatory Approach to Immigrant Organizing*, in *NEW LABOR IN NEW YORK*, *supra* note 105, at 173, 174. These are the most recent published statistics, but MRNY is growing rapidly, and the numbers will likely be out of date by the time this Note is published. The organization was formerly known as Make the Road by Walking, an homage both to a classic book by Paulo Freire and Myles Horton and to Jennifer Gordon's groundbreaking early law review article on her worker center. MYLES HORTON & PAULO FREIRE, *WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE* (1991); Gordon, *supra* note 7. The name changed to Make the Road New York in 2007 after a merger with the Latin American Integration Center. Friedman & Axt, *supra* note 124, at 580. Its website is located at <http://www.maketheroadny.org/>.

²⁰¹ McAlevey, *supra* note 200, at 174.

and success, MRNY is an outlier among worker centers.²⁰² But as the recent pressure to regulate worker centers has focused on the larger and more successful organizations (for obvious reasons), the example will be helpful in examining the impact of labor law on worker centers. MRNY's internal structure and campaign strategies, while perhaps more complex than average, draw upon organizing theories and decision-making structures used by a broad range of worker centers.

MRNY has achieved several important, high-profile victories in recent years, "during a time when many other organizations were experiencing setbacks and defeats."²⁰³ For instance, in 2010 and 2011, MRNY led a successful coalition effort to pass the New York State Wage Theft Prevention Act, which increases civil and criminal penalties for employers who underpay their employees.²⁰⁴ Also in 2011, the organization, along with others, succeeded in convincing the New York state government and the New York City Council to cease cooperating with Immigration and Customs Enforcement's "Secure Communities" initiative.²⁰⁵

Along with these legislative initiatives, MRNY engages in direct action against specific employers who exhibit a pattern of exploiting their workers.²⁰⁶ This direct action ranges from mere discussions with an employer to demonstrations, boycotts, and litigation.²⁰⁷ While these direct action strategies may be unlikely to have a transformative

²⁰² See *id.* at 175 ("MRNY has won a series of significant victories involving immigrants, poor people, and low-wage workers during a time when many other organizations were experiencing setbacks and defeats."); cf. FINE, *supra* note 106, at 209 & fig.9.1 (estimating that the majority of worker centers have fewer than 550 members).

²⁰³ McAlevey, *supra* note 200, at 175.

²⁰⁴ *Id.* at 177. The coalition consisted of New York State and City Council legislators, several union locals based in New York, and a broad range of legal and employment nonprofit organizations. *MRNY's Landmark Wage Theft Prevention Act Takes Effect*, MAKE THE ROAD N.Y. (Apr. 8, 2011), <http://www.maketheroad.org/article.php?ID=1782> (listing coalition members).

²⁰⁵ McAlevey, *supra* note 200, at 179. "Secure Communities" is a federal program wherein local law enforcement officials cooperate with agents from Immigration and Customs Enforcement (ICE) to detain undocumented immigrants. *Id.* at 178–79.

²⁰⁶ See Friedman & Axt, *supra* note 124, at 581–85 (discussing and critiquing MRNY's direct action strategies).

²⁰⁷ *Id.* at 581. A small sample of these efforts includes a picket at clothing retailer J. Crew's Fifth Avenue store over discrimination against transgender job applicants, Erica Pearson, *Report Says J. Crew Biased in Its Hiring*, N.Y. DAILY NEWS, Mar. 14, 2010, at 26, litigation and boycotts against local retailers engaged in wage theft, Editorial, Francis X. Clines, *Regulating the 99-Cent Store*, N.Y. TIMES, Oct. 21, 2008, at A28, and a collaboration with the New York Attorney General to settle claims of unpaid wages at car washes for nearly \$4 million, Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Nearly \$4m Settlement with Two NYC Car Wash Chains for Underpaying Workers and Other Violations (Mar. 6, 2014), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-nearly-4m-settlement-two-nyc-car-wash-chains-underpaying>.

impact on low-wage work generally, they obtain significant benefits for the workers affected: Between 2007 and 2010, MRNY won over \$25 million in settlements for back pay and wrongfully denied benefits.²⁰⁸ In addition, these incremental techniques can be powerful strategies to gain members and build worker confidence in pursuing larger-scale goals.²⁰⁹

MRNY's success stems in large part from its internal structure and organizing strategies. The internal governance model is highly collaborative and participatory, and the organization places significant emphasis on leadership development.²¹⁰ Members organize their own committees, and each committee defines its particular decision-making process.²¹¹ There is an involved leadership development process: A member who wants to join the board of directors must first meet with organizers from each campaign and demonstrate the ability to organize a meeting.²¹² This adaptive, participatory model serves to build members' long-term capacity and resilience in the contemporary struggle for basic rights.²¹³ Importantly, many participatory democracy models require consensus for major decisions, thereby embedding strong accountability into the decision-making process. If any individual abuses her authority, she will not be able to accomplish much on her own. In fact, the primary critique of participatory democracy essentially argues that the focus on accountability and consensus building in decision-making makes it difficult for a group to act as decisively as may be necessary.²¹⁴

These same structural features would make the application of labor law to MRNY inappropriate. As described in Part I, the structure of American labor law was designed for large, centralized blocs

²⁰⁸ McAlevey, *supra* note 200, at 177.

²⁰⁹ See FINE, *supra* note 106, at 82 ("Helping workers file wage and other claims is the best recruitment and legitimating mechanism most centers say they have got.").

²¹⁰ *Id.* at 175–76.

²¹¹ *Id.* at 182. Some of these committees are permanent and are tied to MRNY's core issues, including immigrant rights, affordable housing, workers' rights, and environmental justice, while others are tied to particular campaigns such as the Wage Theft Prevention Act. *Id.*

²¹² *Id.* at 182–83.

²¹³ See FRANCESCA POLLETTA, FREEDOM IS AN ENDLESS MEETING: DEMOCRACY IN AMERICAN SOCIAL MOVEMENTS 7–12 (2002) (discussing the benefits of participatory democracy in building organizational capacity and solidarity among members with potentially differing views), *cited in* McAlevey, *supra* note 200, at 182.

²¹⁴ See *id.* at 214 (discussing the potential preoccupation with process over goals). Despite MRNY's success, the organization is still susceptible to the "endless meeting," or a surplus of discussion and accommodation at the expense of action. See McAlevey, *supra* note 200, at 183 (noting the "democracy fatigue" that can result from the participatory model).

of employees negotiating with equally large employers,²¹⁵ essentially the antithesis of the contingent and marginalized workers that make up MRNY's membership. Indeed, many of these sectors are excluded from labor law coverage altogether.²¹⁶ Moreover, MRNY's decision-making process bears no resemblance to the autocratic regimes at which the LMRDA was targeted.²¹⁷ The organization does not have a problem with internal governance; if anything, there is too much of it. There is a hypothetical argument for requiring some financial accountability, as unlike many worker centers, MRNY does have a substantial budget. But the same internal governance mechanisms that make the organization responsive to its membership, combined with the disclosures required of a 501(c)(3) tax-exempt organization, already provide significant oversight of organization funds.

As is likely clear, this model would be fundamentally distorted by labor law regulation. The concept of one-person-one-vote democracy is essentially the antithesis of participatory democracy—that is, it reduces democracy to a single act instead of a collaborative process. Imposing fiduciary duties and bonding requirements on officers could deter leaders with significant organizing potential, especially those who may be undocumented. Equality of membership could undermine the “earned” membership model that MRNY and many other worker centers use to ensure that members are involved and committed.²¹⁸ Rules on secondary boycotts could make it nearly impossible for MRNY to target the small, mobile manufacturers responsible for many of the worst abuses.

By any rational metric, MRNY is not a union or anything close. Forcing it into the industrial union model of the 1950s would not only be contextually and normatively inappropriate, but would likely eliminate the structural flexibility that has helped foster the organization's success in organizing and building power among marginalized workers.

²¹⁵ See *supra* Part I.A.2 (contextualizing the Taft-Hartley Act as a response to an unchecked increase in union power).

²¹⁶ See *supra* notes 47–49 and accompanying text (noting the broad exclusions from coverage under the Wagner Act).

²¹⁷ See *supra* Part I.A.3 (describing the corrupt and autocratic unions that provoked the internal governance mandates of the LMRDA).

²¹⁸ Indeed, the lack of participation among traditional union members in organizational governance has been noted as a reason for the decline of American unions. See Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 507–08 (noting the general lack of participation among union members, though arguing that this is a rational economic choice); Michael J. Goldberg, *In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 762–63 (2008) (advocating “participatory democracy” as a means of revitalizing the labor movement).

B. Restaurant Opportunities Center

The Restaurant Opportunities Center of New York (ROC-NY)²¹⁹ is one of the most well-studied worker centers,²²⁰ and it has also been a common target for those who seek to regulate worker centers under labor law.²²¹ This is perhaps not surprising, given ROC-NY's relative success and its organizing strategies. Indeed, several of ROC-NY's strategies appear similar to traditional union strategies at first glance, but some fundamental differences make the application of labor law inapposite.

ROC-NY organizes low-wage restaurant workers, predominantly those at the “back of the house.”²²² The organization formed following September 11, 2001, to support the families of the unionized workers at Windows on the World, the restaurant at the top of the World Trade Center.²²³ Although originally a project of the Hotel Employees and Restaurant Employees (HERE) Local 100, ROC-NY was officially founded in 2003 as an independent organization led by Saru Jayaraman, an established worker center leader.²²⁴ It challenges wage theft, discrimination, and dangerous conditions in upscale restaurants in New York,²²⁵ and it organizes workers to lobby for legislative changes such as increasing the minimum wage and mandating paid sick leave.²²⁶ ROC-NY operates a cooperative worker-owned restaurant in New York, publishes regular reports listing restaurants with “high road” employment practices, and engages in partnerships with employers to raise their employees' working standards.²²⁷

²¹⁹ RESTAURANT OPPORTUNITIES CENTER OF N.Y., <http://www.rocny.org/> (last visited Aug. 4, 2014).

²²⁰ See, e.g., Naduris-Weissman, *supra* note 19, at 251–55, 331–32 (describing ROC-NY and analyzing whether it should qualify as a labor organization); Marculewicz & Thomas, *supra* note 92, at 84 (same); Marnie Brady, *An Appetite for Justice: The Restaurant Opportunities Center of New York*, in *NEW LABOR IN NEW YORK*, *supra* note 105, at 229 (analyzing ROC-NY's organizing strategies and campaign results).

²²¹ See *supra* note 191 (citing a Chamber of Commerce–sponsored website dedicated to “expos[ing]” ROC-NY).

²²² Brady, *supra* note 205, at 234–35. Back of the house workers, such as prep cooks, dishwashers, and bussers, “are typically immigrant Latino, Asian, and African men.” *Id.* at 235.

²²³ *Id.* at 230–31.

²²⁴ Saru Jayaraman, *From Triangle Shirtwaist to Windows on the World: Restaurants as the New Sweatshops*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 625, 632 (2011); see Brady, *supra* note 220, at 231 (noting Jayaraman's background as an organizer with the Workplace Project).

²²⁵ *Id.* at 641; Brady, *supra* note 220, at 230.

²²⁶ *Id.* ROC is now a national organization, *id.*, but this Subpart focuses on the founding New York chapter.

²²⁷ *Id.*

Much of the group's work involves litigation against employers, and organizers strive to involve members at every stage of the litigation process.²²⁸ Litigation is treated as a campaign, frequently involving demonstrations at the target employer.²²⁹ Suits are often settled with a requirement that the employer take affirmative steps to ensure compliance with the law in the future.²³⁰ While ROC-NY has little capacity to actually monitor these settlements,²³¹ their seeming resemblance to a collective bargaining agreement has led some to conclude that ROC-NY should be treated as a labor organization.²³² However, in the only official interpretation of the NLRA as applied to worker centers to date, the NLRB General Counsel in 2006 concluded that ROC-NY's participation in a settlement agreement was insufficient to render ROC-NY a labor organization.²³³

As with MRNY, ROC-NY's system of leadership development would be significantly disrupted by application of labor law. Like MRNY, the organization treats membership as a privilege to be earned. Workers seeking help with an employment issue must first attend meetings on employment rights, research and policy work, and health and safety rights.²³⁴ The choice of campaigns and issues is made by the membership.²³⁵ The LMRDA's particular vision of internal democracy directly conflicts with the political education and leader-

²²⁸ Brady, *supra* note 220, at 235–37 (“[T]he organization is committed to a worker-centered organizing approach, rejecting traditional legal interventions that reinforce workers’ dependence on legal expertise.”).

²²⁹ *Id.* at 236. To the extent that the demonstrations are interpreted as organizational picketing, the NLRA would prohibit them after thirty days. 29 U.S.C. § 158(b)(7)(C) (2012).

²³⁰ Brady, *supra* note 220, at 236.

²³¹ *Id.* at 236–37.

²³² See, e.g., Marculewicz & Thomas, *supra* note 92, at 89 (arguing that ROC-NY should be regulated as a labor organization); Letter from John Kline, *supra* note 185 (including ROC-NY in the list of organizations about which Congressman Kline demands an explanation for lack of regulation).

²³³ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Celeste Mattina, Reg’l Dir., Region 2, NLRB, on Rest. Opportunities Ctr. of N.Y., Cases Nos. 2-CP-1067, 2-CB-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073, & 2-CB-20787, 1–4 (Nov. 30, 2006), available at <http://mynrlb.nlr.gov/link/document.aspx/09031d4580010c5a>. The General Counsel concluded that negotiation of a settlement agreement did not constitute the necessary “pattern or practice” of dealing with an employer. *Id.* at 3. However, the logic of the General Counsel’s opinion has been questioned. See Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 135–36 (2007) (arguing that ROC-NY’s pursuit of settlement agreements with multiple employers constitutes a pattern or practice of dealing and should qualify it as a statutory labor organization).

²³⁴ Brady, *supra* note 220, at 239.

²³⁵ *Id.* at 240.

ship development goals of ROC-NY, which an organizer termed a “vital element of the organization’s work.”²³⁶

The fact that ROC-NY has neither experienced nor sought the benefits of labor law regulation also suggests that curtailing the organization’s associational freedoms would be unwarranted. In ROC-NY’s campaigns, organizers have been very clear that they do not seek to become the exclusive representative in a particular workplace.²³⁷ Their campaigns are broader and sometimes directed towards consumers. To the extent that labor law would constrain the internal structure and external actions of ROC-NY, such regulation would severely impinge on the associational freedoms of its employee-members. The tradeoffs made in developing labor law did not account for an organization, such as ROC-NY, that consists of employees and seeks better conditions throughout an industry without using the mechanism of exclusive representation.²³⁸ It should not be forced into such an inappropriate mold.

MRNY and ROC-NY would not be financially destroyed by application of labor law. These organizations have the funding and capacity to comply with reporting, bonding, and auditing requirements, though many smaller worker centers do not. But the structures of these organizations rely critically on flexibility and adaptability, terms not often associated with the National Labor Relations Act. The proponents of labor regulation of worker centers have shown no evidence that worker centers have abused their limited power or that the corporations targeted are being treated unfairly. Without such evidence of abuse and corruption, the misconduct that justified the LMRDA’s intrusion into union tactics and internal affairs, it is undeniable that the costs of regulating worker centers under the NLRA and LMRDA would vastly outweigh any possible benefit.

CONCLUSION

American labor law can be viewed as a series of compromises defining the relative power of labor and capital. These compromises were highly dependent upon the nature of the institutions they sought to regulate: large, industrial unions and large, centralized businesses.

²³⁶ *Id.*

²³⁷ See *SMJ Grp., Inc. v. 417 Lafayette Rest. LLC*, 439 F. Supp. 2d 281, 286 (S.D.N.Y. 2006) (quoting a flyer distributed by ROC-NY as stating that “ROC-NY is not a labor organization and does not seek to represent the workers or be recognized as a collective bargaining agent of the workers at this restaurant”).

²³⁸ Recall that Congress justified the LMRDA’s encroachments on associational freedoms by pointing to the Wagner Act’s authorization of compulsory union representation in a workplace. *Supra* notes 93–95 and accompanying text.

The world has changed, and many of these rules no longer seem rational even for the traditional labor movement. But at the very least, we can say that traditional labor took part in a conscious bargain in which it gave up certain associational rights and flexibility in exchange for government support and protection. Congress, labor, and capital never considered worker centers, nor the workers they organize, to be part of this bargain. And crucially, worker centers have never attempted to gain the protections of labor law or to achieve exclusive representation of a workplace. It is simply unjustifiable to subject these voluntary, member-driven organizations to restrictions only deemed acceptable because of the potentially coercive effect of exclusive representation.

The organizational model of the worker center also renders LMRDA protections for members unnecessary. Worker centers are devoted to organizational democracy; they spend considerable time on self-critique and improving relationships between staff and workers. The degree of participation by a member of an average worker center is both quantitatively and qualitatively different from that of an average union member. Members are assured accountability because their involvement itself holds the organization accountable. And if the organization becomes corrupt or simply ineffective, members are free to leave at little to no cost.

On the other hand, applying these restrictions would dramatically impact the worker center movement. The flexibility and nimbleness of the model is crucial to counterbalance the mobile employers of the contemporary economy. The worker center movement is the most promising recent development in the work lives of low-wage immigrant workers, and its critical feature is flexibility. It would be both needless and out of line with history to destroy that flexibility by applying labor law regulation to worker centers.