

# BUILDING POWER AMONG LOW-WAGE IMMIGRANT WORKERS: SOME LEGAL CONSIDERATIONS FOR ORGANIZING STRUCTURES AND STRATEGIES

JULIE YATES RIVCHIN\*

## I.

### INTRODUCTION

Many immigrants come to the United States seeking better economic opportunities than they can find in their native countries.<sup>1</sup> Unfortunately, they often arrive to find that the jobs waiting for them are exploitative, difficult, and dangerous.<sup>2</sup> Asserting their legal and human rights to dignified and fair treatment in the workplace is not a simple endeavor.<sup>3</sup> While labor unions are essential tools enabling workers to collectively stand up for their rights, the

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1. It has been estimated that there are between twenty-eight and thirty million immigrants living in the United States, and there are as many as five million undocumented workers employed in the U.S. economy. Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 597–98 (2003–04).

2. *Id.* at 5–6 (finding that immigrant workers are more likely to be employed in the lowest-paying and most dangerous jobs in the economy, and citing a recent study which found that foreign-born Latino men are more than twice as likely to be killed on the job than the average U.S. worker).

3. Not only are there increasing restrictions on the legal rights of workers and immigrant workers, *see* sources cited *infra* note 8, but the last decade has seen an assault on the rights of immigrants generally in such laws as the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3360 (codified as amended at 8 U.S.C. § 1324a (2000)), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.), the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.), and the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a (2000 & Supp. I 2001)). Employer threats to contact the Bureau of Immigration and Customs Enforcement (BICE, formerly the Immigration and Naturalization Service) in retaliation for organizing are far from empty threats given the severity of these deportation laws. For a contrasting approach, *see In re Herrera-Priego*, Immigration Court, No. A 72-465-549 (Dep't of Just. July 10, 2003) (Immigration Court decision finding that evidence obtained in a workplace raid prompted by employer's retaliatory call to INS must be suppressed and ordering deportation proceedings terminated). For an overview of the 1996 laws, *see*, for example, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

strength of American labor unions is declining.<sup>4</sup> Many low-wage immigrant workers, in particular, find that representation from unions is either inadequate or unavailable to them.<sup>5</sup> These workers may turn for assistance to other social service providers like government agencies and legal services organizations, where they will generally find that protections are under-enforced and services are severely limited.<sup>6</sup> Even if a worker is fortunate enough to obtain legal rep-

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4. In 2002, 12.9% of the American workforce was represented by a union, down from 20.1% in 1983. Press Release, Bureau of Labor Statistics, Union Members in 2003 (Jan. 21, 2004), available at <ftp://146.142.4.23/pub/news.release/union2.txt> (last visited Mar. 10, 2004). For explanations of this decline, see Paula Voos, *Introduction—An Economic Perspective on Contemporary Trends in Collective Bargaining*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 1, 2–8 (Paula B. Voos ed., 1994) (attributing the decline in unionization to factors such as economic policies encouraging competition based on low labor costs; labor laws allowing management to avoid collective bargaining; bargaining agenda set by employers using threats of work relocation and hiring permanent replacements in strike situations; as well as macroeconomic conditions such as an excess labor supply). See also James T. Bennet & Jason E. Taylor, *Labor Unions: Victims of Their Political Success*, 22 J. LAB. RES. 261 (2001) (arguing that legislative success on issues such as hours, workers compensation, and pensions has displaced union roles in the workplace); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529–30 (2002). But see Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 370–74 (2000) (discussing how unions have defied predictions of decline).

5. For a discussion of the historically troubled relationship between immigrants and organized labor, see, for example, José A. Bracamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN DIEGO L. REV. 29, 32–35 (1983) (analyzing the historical and contemporary tensions between organized labor and immigrant workers). Contemporary commentators have argued that racial biases in the labor law itself have contributed to the labor movement's failure to reach immigrants and people of color. See, e.g., Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 228–29 (2002) [hereinafter Crain, *Whitewashed Labor Law*] (arguing that union organizing which “deliberately frame[s] organizing campaigns around the needs of immigrant workers and seek[s] contracts protecting the particular interests of immigrants . . . [is] promising . . . [but] a poor fit with existing labor law doctrines, which adopt a colorblind vision of organizing.”); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001) (arguing that the labor law and labor movement's vision of class as divorced from race, gender, and other social identities undermines union power). For a discussion of a specific community's experiences with unions, see PETER KWONG, *THE NEW CHINATOWN* 137–159, 196–201 (1996) (describing the experience of Chinatown garment workers and restaurant employees with the International Ladies Garment Workers Union, and the Hotel and Restaurant Employees and Bartenders Union, respectively). But see LEAH A. HAUS, *UNIONS, IMMIGRATION, AND INTERNATIONALIZATION: NEW CHALLENGES AND CHANGING COALITIONS IN THE UNITED STATES AND FRANCE* 68–103 (Martin A. Schain ed., Europe in Transition: The NYU European Studies Series, 2002) (arguing that labor unions in the U.S. have departed from their earlier anti-immigration position). For a proposal of concrete ways to remedy these troubled relations, see Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 112 (2002) (arguing that identity caucuses can take an active role in democratizing unions in order to make them more responsive to the interests of women, immigrants, and people of color).

6. See, e.g., JENNIFER GORDON, *THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW* 4–6 (Carnegie Endowment for Int'l Peace, Working Paper No. 4, 1999) [hereinafter GORDON, *LATINO IMMIGRANTS*] (describing the New York State Department of Labor's systematic under-enforcement of wage and hour violations and unresponsiveness to immigrant workers' complaints); Laura K. Abel & Risa E. Kaufman,

resentation, she will be faced with the fact that legal protections for workers,<sup>7</sup> and especially for undocumented workers, are minimal. *Hoffman Plastic Compounds, Inc. v. NLRB*<sup>8</sup> recently increased restrictions on the legal rights of undocumented immigrant workers, holding that undocumented workers dismissed by employers in retaliation for union activities are not entitled to backpay awards.

Given these conditions, collective action is an essential means of building power and defending the rights of immigrant workers in low-wage jobs. In immigrant communities around the country, workers and their advocates have joined together to form “workers’ centers” as structures for engaging in collective action on workplace justice issues.<sup>9</sup> These structures have also provided

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*Preserving Aliens’ and Migrant Workers’ Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003) (discussing the barriers to civil legal services faced by many immigrant workers); 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, 415 (1995) [hereinafter Gordon, *Workplace Project*] (discussing problems immigrant workers face in obtaining social services from state agencies and legal services organizations).

7. For recent commentary on the weakness of labor law protections, see William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002) (arguing that an expansion of existing concerted activity protections for nonunion employees will reinvigorate the NLRA, labor rights, and the labor movement itself); Estlund, *supra* note 4 (arguing that the ineffectiveness of U.S. labor law and the weakness of the labor movement are due, in part, to labor law’s “ossification” as it has been largely sealed off from legislative, judicial, or administrative revision).

8. 535 U.S. 137 (2002). For criticism of the *Hoffman* decision, see, for example, Sarah H. Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers’ Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 822-50 (2003) (arguing that the *Hoffman* decision violates international norms of nondiscrimination and the freedom of association); Estlund, *supra* note 4, at 1564 (arguing that by overturning the NLRB’s decision, the *Hoffman* decision “targets the Board’s ability to vindicate the rights of a vulnerable but growing segment of the American labor market, and its ability to reconcile the unchanging but open-textured provisions of the NLRA with the changing shape of less ossified bodies of law”); Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 336-39 (2003) (arguing that *Hoffman* is a flawed decision that effectively undermines the associational rights not only of undocumented workers but of all workers); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. (forthcoming 2004) (providing criticism of the *Hoffman* decision and an overview of the post-*Hoffman* status of labor rights for undocumented workers). For pre-*Hoffman* commentary on labor law’s limited protections for immigrant workers, see Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 348 (2001) (arguing that the interplay of immigration and labor law means that immigration law is enforced and interpreted so as to make labor law remedies meaningless for undocumented workers).

9. For a general discussion of workers’ centers, see MIRIAM CHING YOON LOUIE, *SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY* 15 (2001) (arguing that workers’ centers have succeeded in creating profound change both in the lives of immigrant women who are involved in them as well as in individual workplaces and in the garment industry more broadly); Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 470-473 (2001) (discussing workers’ centers as an important and prominent outgrowth of the collaboration between activists and lawyers); Janice Fine, *Non-*

important tools for organizing communities around workplace rights issues that profoundly affect their daily lives and their larger goals for life in the United States. Workers' centers are typically based in specific ethnic communities and draw much of their strength from having deep roots in those particular communities.<sup>10</sup> Within the workers' center model there are variations with respect to the balance of law and organizing, and while some workers' centers focus solely on issues of workplace justice, others are components of broader community organizations.<sup>11</sup> Miriam Ching Yoon Louie asserts that workers' centers "have pioneered creative organizing campaigns and scored precedent setting victories [and] have often played the role of small innovators within the broader labor and anti-sweatshop movements."<sup>12</sup> She argues that their successes have resulted from strategies that "are tailored to the specific gender, ethnic, cultural, workplace, national, and local characteristics of the workers they are organizing."<sup>13</sup>

While workers' centers were created in response to a void in services from other social institutions, the lack of representation by unions is perhaps the most troubling absence. Labor unions have historically been unable to meet the needs of many women, people of color, and immigrant workers.<sup>14</sup> This failure reflects not only the traditional white male dominance in organized labor, but also the racial biases within the labor law itself. The National Labor Relations Act ("NLRA," or the "Act")<sup>15</sup> excluded from its protections workers in occupations dominated at the time by African-Americans<sup>16</sup> in a political compromise orchestrated to appease Southern politicians and maintain the racial dynamics of Southern socio-economic structures.<sup>17</sup> The exclusion from the Act of domestic

*Union, Low-Wage Workers Are Finding a Voice as Immigrant Workers Centers Grow*, LAB. NOTES No. 293, Aug. 2003, at 5.

10. Like many non-profits, workers' centers receive their funding in large part from private donors and foundations. Analysis of the effect of these funding structures is beyond the scope of this article, but may be a useful area for further research.

11. Specific workers' centers are profiled in Steve Jenkins, *Organizing, Advocacy, and Member Power: A Critical Reflection*, WORKING USA, Fall 2002, at 56 (discussing campaigns by Make the Road by Walking); KWONG, *supra* note 5, at 137-201 (discussing the origins and evolution of the Chinese Staff and Workers' Associations (CSWA)); LOUIE, *supra* note 9 (profiling the CSWA, Fuerza Unida, and the Korean Immigrant Worker Advocates (KIWA)); Gordon, *Workplace Project*, *supra* note 6 (discussing the origins and strategies of the Workplace Project); Daisy Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 ASIAN L.J. 111 (2001) (providing a critical analysis of organizing efforts by KIWA); Saru Jayaraman, *Letting the Canary Lead: Power and Participation among Latina/o Immigrant Workers*, 27 N.Y.U. REV. L. & SOC. CHANGE 103 (2001-2002) (discussing the evolution of the Workplace Project); Benjamin Marquez, *Organizing Mexican-American Women in the Garment Industry: La Mujer Obrera*, 15 WOMEN & POL. 65 (1995) (profiling La Mujer Obrera).

12. LOUIE, *supra* note 9, at 15.

13. *Id.* at 233.

14. See sources cited *supra* note 5.

15. ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-164 (2000)).

16. The statutory definition of "employee" explicitly excludes, *inter alia*, agricultural laborers, domestic workers, independent contractors and supervisors. 29 U.S.C. § 152(3) (2002).

17. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 76-77

workers and farmworkers impacts what are now heavily immigrant workforces. Additionally, organized labor's focus on organizing large workforces often means that immigrants in smaller workplaces are not offered the opportunity for union membership.

The distinct goals of community labor organizations and labor unions and the troubled history of relations between them have created deep-rooted contrasts between the two types of organizations. The workers' center model focuses on community-based organizing, developing grassroots leadership among its membership, and addressing workplace rights within a broader social justice framework.<sup>18</sup> These goals are in direct contrast to a "business unionism" model that focuses on servicing dues-paying members, immediate material interests, and using the political process to protect jobs and economic interests.<sup>19</sup> However, many unions are moving toward a social-movement unionism model<sup>20</sup> and taking steps to reach out to immigrants.<sup>21</sup> At the same time, some workers' centers are asking how to gain more power for their members, and have begun to consider organizing projects that are more ambitious in scope. As this transition progresses, the goals of workers' centers and unions begin to converge. To the extent that they still possess different strengths, collaboration would maximize the complementary strong points of each model. Moreover, each model has much to learn from the other in developing organizing strategies that will overcome the immense challenges currently facing immigrant low-wage workers.

While workers' centers have made important strides in fighting for the rights of low-wage immigrant workers, they can continue to develop their strategies in order to build power among immigrant workers. This paper suggests how workers' centers can draw on legal protections both inside and outside of labor law as they evolve. U.S. labor law contains both more and fewer protec-

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(1999) ("By allying with northern Republicans, or by threatening to do so, [Southern Democrats] stripped all the main pieces of New Deal legislation of any design or provision that threatened the separate southern labor market and . . . its racial segmentation . . . . [T]he National Labor Relations [Act was] tailored in this fashion."). See also HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 102-38 (1978).

18. Gordon, *Workplace Project*, *supra* note 6, at 429.

19. Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, *PERSP. ON POL.*, Mar. 2003, at 46.

20. *Id.* at 47 ("While still in the minority in the United States, social-movement unions are emerging again, and more of the traditional business unions recognize the importance of concerning themselves with issues additional to those that directly serve their members."). The social unionism model is concerned with the economic well-being of members as well as internal democracy, engagement in larger social justice issues, and economic equality. *Id.* at 46. See also *infra* text accompanying notes 173-174 (describing the New York Civic Participation Project as a joint project of unions interested in developing social unionism).

21. For example, Ruth Milkman argues that in California, "meeting the larger challenge of rebuilding the labor movement inherently demands an effort to reach out to the vast and growing population of working-class immigrants." *Introduction to ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* 11 (Ruth Milkman ed., 2000) [hereinafter *ORGANIZING IMMIGRANTS*] (compiling case studies of recent California union organizing campaigns that focused on immigrant workers).

tions than is commonly thought: there are more protections for the rights of nonunion employees than might be expected, but many of the protections for both union and nonunion employees are weak and difficult to enforce. The implication of this reality is that for a workers' center looking to build power among its members, organizing a union is one of many avenues available for meeting that goal. In large part due to the limitations of labor law protections, organized groups of workers have created many alternative models for workplace organizing. A workers' center may wish to take advantage of more labor law protections and may consider pursuing exclusive representation and collective bargaining rights; or it may pursue an alternative strategy, depending on many factors, including the type of work and whether the workers are covered by the NLRA. Because the power of workers' centers comes from members serving as the decision-makers in pursuing strategies based on the specific needs and circumstances at hand, this article cannot endorse any single option as superior. Instead, I will attempt to lay out a range of different models and discuss their strengths and weaknesses, primarily in terms of legal rights and consequences.

Section II describes workers' centers generally, and more specifically details the workers' center that prompted this research, the Workplace Project in Long Island, New York.<sup>22</sup> Taking the Workplace Project as an example, this article proceeds to examine additional structures and strategies for organizing, beginning with unions certified by the National Labor Relations Board ("NLRB"). Section III analyzes the legal benefits and limitations of the NLRA for unions, and also describes rights available to nonunion employees under the NLRA. Section IV looks at examples of labor organizations established outside of the NLRB context. Section IV first describes non-majority unions, which utilize NLRA rights available to nonunion employees. The section then proceeds to discuss organizing efforts of two groups of workers statutorily excluded from the NLRA: farmworkers and domestic workers. The examples of these groups provide useful alternative models to organizing a union outside the NLRB context. Section V considers the implications of the discussion in Sections III and IV on potential organizing strategies, including collaboration between workers' centers and unions.

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22. The questions posed by this article were inspired by the semester I spent working as a legal intern at the Workplace Project/El Centro de Derechos Laborales, a workers' center located in the Latino immigrant community in Nassau County, Long Island, New York. This article is influenced by that experience and by my own position as a white, Jewish, third-generation American working from a legal academic point of view. I have based my research primarily on secondary sources, and acknowledge that there is a wealth of experience among organizers and lawyers that is beyond the scope of this research to collect. It is my hope that this article will prompt publication of more of these insights, which will in turn enrich the discussion and analysis of immigrant labor organizing.

## II. WORKERS' CENTERS

### A. Workers' Centers Generally

Workers' centers make important contributions to the labor movement based on some common features of the workers' center model. Most fundamentally, a workers' center is an "organization doing innovative organizing in a low-wage community."<sup>23</sup> 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.<sup>24</sup> Generally located in a particular ethnic community, a workers' center can be sensitive to the particular dynamics and concerns of that community. Workers' centers have emerged as part of a broader law and organizing movement that creatively uses lawsuits and legal strategies as organizing tools. While some commentators view the workers' center model as a commendable example of law and organizing in which "[s]ophisticated practitioners . . . deftly integrate different community-based techniques to achieve clearly defined strategic goals,"<sup>25</sup> they also caution that lawyers may exert undue influence in this model.<sup>26</sup>

While all workers' centers organize around workers' rights and workplace justice issues, some are part of larger community groups with a mission of organizing around a range of issues,<sup>27</sup> while others focus primarily on workplace rights and other organizing may grow out of this primary focus.<sup>28</sup> Within the latter group, some groups organize across industries, while others focus on a particular industry.<sup>29</sup> A workers' center is generally rooted in a single ethnic

23. GORDON, *LATINO IMMIGRANTS*, *supra* note 6, at 39 n.3.

24. Gordon, *Workplace Project*, *supra* note 6, at 430.

25. Cummings & Eagly, *supra* note 9, at 484. Both the Workplace Project and Make the Road by Walking were founded by law school graduates.

26. Cummings and Eagly suggest that "it is necessary for thoughtful practitioners to develop mechanisms to ensure that community members participate in organizing campaigns out of a commitment to collective action rather than a feeling of coercion." *Id.* at 497-98. This sense of coercion may come from "[t]he imposition of an organizing model on clients who are seeking legal services," or more generally from having "privileged professionals, such as lawyers . . . play critical roles" in organizing. *Id.* at 496 (offering a critique of the law and organizing model). Steve Jenkins contends that the law and organizing model often fails to account for objective social conditions, with the result that these campaigns are often more like traditional advocacy work than they claim to be. Such efforts often rely on appeals to elite institutions, like government or the media, rather than creating power among members to build their ability to achieve structural changes. Jenkins, *supra* note 11, at 57-58.

27. An example is Make the Road by Walking, in Bushwick, Brooklyn, which also includes projects around welfare rights, education, environmental justice, and youth empowerment. *See* Jenkins, *supra* note 11, at 58.

28. Examples include the Chinese Staff and Workers, *see* KWONG, *supra* note 5, the KIWA, *see* Ha, *supra* note 11, LOUIE, *supra* note 9, at 209, and the Workplace Project, *see* Gordon, *Workplace Project*, *supra* note 6.

29. For those organizing across industries, *see* each of the groups listed *supra* note 25.

community, although some recent groups have started to organize across ethnic lines. Many of these also organize in a single industry, making them more analogous to the traditional union model, though they draw on workers' centers' innovative organizing techniques and emphasize leadership by workers themselves.<sup>30</sup>

Another common feature of workers' centers is an emphasis on organizing the most vulnerable workers.<sup>31</sup> These include restaurant workers, garment workers who work in sweatshop conditions, day laborers, and domestic workers. Workers' centers have pioneered innovative organizing strategies in large part due to the necessity of dealing with difficult conditions for workers in those industries.

### B. *The Workplace Project/El Centro de Derechos Laborales*

The Workplace Project, or as it is more commonly referred to by its members, El Centro de Derechos Laborales, is a community-based organization that provides a structure for workers to join together to fight against workplace exploitation.<sup>32</sup> Members, who are part of the Latino immigrant community in Nassau and Suffolk Counties in Long Island, New York, have emigrated primarily from El Salvador, Mexico, Colombia, and other Latin American countries.

The Workplace Project offers a weekly workshop on labor and employment law in which a lawyer addresses workers' complaints and problems in a group setting, while also providing workers with an overview of their workplace rights. There are two routes to membership: a worker can either graduate from an eight-week course in labor law and organizing, or can graduate from a two-day course in law and organizing and participate in an industry-specific organizing committee. Currently, the Workplace Project includes industry-based committees focusing on: factory workers, cleaning workers, live-in domestic workers, and three location-specific groups of day laborers, as well as a house cleaning workers' cooperative.

The most common problems faced by Workplace Project members are

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Groups that organize in a single industry include Fuerza Unida. See LOUIE, *supra* note 9, at 207 (organizing Latina women in the garment industry).

30. These include the Restaurant Opportunities Center of New York (ROC-NY), which organizes restaurant workers in New York City. Saru Jayaraman, *In the Wake of September 11: New York Restaurant Workers Explore New Strategies*, LAB. NOTES No. 293, Aug. 2003.

31. Jenkins, *supra* note 11, at 56-7.

32. The information in this section is drawn largely from my experience as a legal intern at the Workplace Project from September 2002 through January 2003, sponsored by a grant from the New York University School of Law Public Interest Law Foundation. A number of other sources also discuss the Workplace Project, which, according to one source, is "the most frequently cited example" of the workers' center model. Cummings & Eagly, *supra* note 9, at 471. This is due in large part to the seminal article on the workers' center model written by the Workplace Project's founder, Jennifer Gordon. Gordon, *Workplace Project*, *supra* note 6. For a more recent discussion of the Workplace Project, see Jayaraman, *supra* note 11.

unpaid and underpaid wages, unjust termination, verbal harassment and abuse, and health and safety problems. In dealing with these issues, the Workplace Project employs various strategies. In a typical case, members may send a letter to the employer from the committee, organize a protest, and hold a press conference. A campaign may also target unresponsive union representatives as well as the employer. Other strategies include legal actions, including a claim for back wages filed against an employer in federal court, charges against the union filed with the NLRB, and a claim of discrimination on the basis of immigration status filed with Department of Justice Office of Special Counsel. In these cases, the Workplace Project generally completes the initial work of developing a case, and the case is later joined or taken over by a legal organization with more resources, which in the past have included the Center for Constitutional Rights and the NYU School of Law Immigrant Rights Clinic.

In addition to campaigns fighting specific workplace abuses, the Workplace Project also engages in longer term, advocacy campaigns. One notable past project was an advocacy and lobbying campaign that ultimately succeeded in the New York State Legislature's passage of the Unpaid Wages Prohibition Act.<sup>33</sup> The law sharply raises civil and criminal penalties against employers who fail to pay wages owed to employees.<sup>34</sup> More recently, the Workplace Project succeeded in a local political campaign in Freeport, New York, to create a safe and enclosed site for day laborers and contractors to meet, as a substitute for the street corners and parking lots that had been their previous meeting places.

While the mission of the Workplace Project—to organize members of the Latino immigrant community working in low-wage sectors in Long Island—has remained constant, the models and strategies with which this goal is accomplished have been reevaluated and fine-tuned throughout the years.<sup>35</sup> Workplace Project staff and directors have asked whether adopting a more traditional labor organizing structure is desirable in order to strengthen organizing and provide additional benefits to members. We might also ask, what other legal protections are available to immigrant workers and what other organizational structures are available to a workers' center? In answering these questions, I will use the Workplace Project as an example, and ask generally if workers' centers' goals can be achieved through existing structures or if they would be better attained through new models.

### III.

#### LABOR ORGANIZATIONS AND WORKER PROTECTIONS UNDER THE NLRA

The NLRA is the basic instrument defining the legal rights of organized groups of workers and workers in the process of organizing. The NLRA governs

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33. See GORDON, *LATINO IMMIGRANTS*, *supra* note 6, at 1.

34. The Unpaid Wages Prohibition Act is codified at N.Y. LAB. LAW § 198-a.

35. See Gordon, *Workplace Project*, *supra* note 6, at 428-30; Jayaraman, *supra* note 11, at 103-05.

organizing activities, regulates collective bargaining, and creates the NLRB which hears labor disputes and certifies the results of union recognition elections. In addition to regulating union activities, the Act confers rights to any group of workers acting in concert for mutual aid or protection, regardless of their organizing goals or union status.<sup>36</sup> However, in addition to protecting workers' rights to collective action, the NLRA also places restrictions on the types of organizing activities in which workers and unions may engage.<sup>37</sup>

The increased legal rights and job benefits of unionized employees may lead a workers' center to consider whether it would be beneficial to establish a union among workers not currently unionized. This consideration is complicated by the social dynamics of the relationship between immigrant workers and organized labor, including negative experiences workers' centers and immigrant workers may have had with unions previously.<sup>38</sup> Workers may have been let down by a union that ceased organizing efforts after a failed election.<sup>39</sup> There may also have been situations in which a union agrees to represent workers who have already been organized in the workers' center context, but then devotes insufficient resources to the campaign, thus weakening those organizing efforts already in progress. These experiences may understandably color workers' and organizers' views of large unions, leading them to consider the possibility of forming independent unions. This consideration encompasses both legal and extra-legal factors,<sup>40</sup> but must be grounded in an understanding of the specific legal status and protections accorded to a bargaining representative as compared to other types of labor organizations. Moreover, in order to understand the context, strengths, and weaknesses of the alternative organizing structures described in Section IV, the benefits and limitations of labor law must first be understood. It is only against this backdrop that alternatives can be considered and evaluated.

#### A. Protections of NLRA Labor Organizations

The NLRA is most commonly associated with traditional trade unions, but it defines "labor organization" broadly in its provision of rights and protections for organized workers. The statutory definition of "labor organization" is "any

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36. 29 U.S.C. § 157 (2000). These rights are commonly referred to as "section 7 rights." See discussion *infra* Section III.B.

37. The Norris LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 158 (2000)), governs union unfair labor practices. See *infra* Section III.B.

38. See sources cited *supra* note 5.

39. See, e.g., Clyde Summer, *Unions Without Majority – A Black Hole?* 66 CHI.-KENT L. REV. 531, 533–34 (1990) ("When the union loses the election, it commonly abandons the field, seldom attempting to maintain a functioning organization in the plant . . . [it] ceases to exist as an organization representing the interests of those who supported it, and leaves the local leaders in the plant who declared their support of the union to the tender mercies of the employer.").

40. Extra-legal concerns include the workers' center's resources, whether workers are in a unionized industry, the workers' center's relationships with unions, and other considerations similar to those a union would analyze in making such decisions, for example, the composition of the workplace.

organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>41</sup> Similarly, the rights of workers under the NLRA are defined broadly, protecting the right to join labor organizations, to engage in concerted activities for the purposes of mutual aid and protection, and to bargain collectively through representatives of their choosing.<sup>42</sup>

At the heart of the legal rights afforded to a union is the NLRA’s regulation of collective bargaining. Judicial opinions and administrative decisions interpreting the NLRA cover a broad spectrum of activity related to collective bargaining. These rules govern representation elections, held to demonstrate that a union represents the majority of the workers; the conduct of employers and employees in an election campaign; the actual bargaining process; and the enforcement of rights under a collective bargaining agreement. The NLRA establishes the National Labor Relations Board as the regulatory and adjudicative agency to govern compliance with the Act.<sup>43</sup> Duly electing a bargaining representative through NLRA procedures triggers an obligation on the part of the employer to bargain in good faith with the union.<sup>44</sup>

A collective bargaining agreement provides greater rights for workers than the law alone provides, and also establishes procedures for addressing violations of those contractual rights. Under the NLRA, wages, hours, and terms and conditions of employment are mandatory bargaining topics.<sup>45</sup> A collective bargaining agreement also typically establishes a grievance system. If the union or a union member believes that a term has been violated, the union or the employee may file a grievance according to the contractual grievance procedures. Typically, the contract will provide for various stages of dispute resolution, beginning with informal discussions between union stewards and low-level management, and proceeding through mediation and more formal arbitration.

The tangible benefits of unionization and a collective bargaining agreement should not be understated.<sup>46</sup> For example, following the Service Employees

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41. 29 U.S.C. § 152(5) (2000).

42. § 157.

43. § 153. Under 29 U.S.C. § 164(c), a state court or agency may only adjudicate a dispute within the scope of the NLRA when the NLRB has declined jurisdiction over it.

44. § 158(a) (“It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . .”); § 158(d) (“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.”).

45. § 158(d).

46. TERRY L. LEAP, *COLLECTIVE BARGAINING AND LABOR RELATIONS* 18 (2d ed. 1995) (listing a standard wage scale, seniority provisions, and benefit programs as common substantive collective bargaining provisions). See also John W. Budd & In-Gang Na, *The Union Membership*

International Union's ("SEIU") Justice for Janitors organizing campaign in New York City, nonunion janitors earned an average hourly wage of \$6.50, while unionized janitors earned \$17.00 per hour and received family health insurance.<sup>47</sup> A collective bargaining agreement can include specific provisions that protect the rights of immigrant workers, and notably, undocumented workers. For example, in recent years the Union of Needletrades, Industrial and Textile Employees ("UNITE") has successfully negotiated clauses requiring employers to bar INS raids unless agents have a search warrant, and to notify the union if it learns of a raid.<sup>48</sup> Other clauses of a collective bargaining agreement can provide that the employer must rehire workers dismissed based on improper documentation at their former seniority and salary levels, if they obtain and provide proper working documentation.<sup>49</sup> A violation of any of these terms would constitute a violation of the contract and could be the subject of a grievance.

### B. NLRA Protections for Concerted Activities

In addition to the rights the NLRA confers on labor organizations, it also provides protections to workers acting in concert. Section 7 of the Act protects the right to form or join labor organizations, as well as the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection."<sup>50</sup> These protections apply to all workers statutorily covered by the Act,<sup>51</sup> regardless of membership in an elected labor organization or coverage by a collective bargaining agreement. Any employee or group of employees has the right to file

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*Wage Premium for Employees Covered by Collective Bargaining Agreements*, 18 J. LAB. ECON. 783, 802 (2000) (finding that across industries, workers belonging to unions receive a wage premium over nonunion workers also covered by collective bargaining agreements). *But see* Joel Cutcher-Gershenfeld & Patrick P. McHugh, *Competition and Divergence: Collective Bargaining in the North American Auto Supply Industry*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR, *supra* note 4, at 225, 244 (arguing that outsourcing of work and increased imports have "undermined" collective bargaining in the auto supply industry); Richard Vedder & Lowell Gallaway, *The Economic Effects of Labor Unions Revisited*, 23 J. LAB. RES. 105, 120-25 (2002) (finding that unions adversely effect employment growth and depress income levels in the labor force).

47. Ben Sachs, SEIU Staff Attorney, Comments at the Rebellious Lawyering Conference, Yale Law School (Feb. 22, 2003).

48. Louis Uchitelle, *I.N.S. Is Looking the Other Way as Illegal Immigrants Fill Jobs*, N.Y. TIMES, Mar. 9, 2000, at A1.

49. *Id.*

50. 29 U.S.C. § 157 (2000). The definition of "concerted" has been highly contested; for a decade, the definition covered implied or constructive concerted activity, which included actions by a single employee for the benefit of other employees. *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). This interpretation was overruled in 1984, and the current standard protects an employee's activity only when the employee can prove that she "engaged in [the activity] with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 268 N.L.R.B. 493, 497 (1984) [Meyers I], *rev'd sub nom.* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *decision on remand*, *Meyers Indus.*, 281 N.L.R.B. 882 (1986) [Meyers II], *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987).

51. The NLRA definition of "employee" excludes, *inter alia*, agricultural workers, domestic workers, independent contractors, and supervisors. 29 U.S.C. § 152(3) (2000).

a complaint with the NLRB alleging as an unfair labor practice a violation of workers' section 7 rights to self-organization and concerted activity. The concerted activity rights, commonly referred to as "section 7 rights," are broader than generally thought. Professor William Corbett has argued, "[t]he scope of coverage of section 7 and its application to nonunion employees may [be] one of the best-kept secrets of labor law."<sup>52</sup> The exercise of section 7 rights provides a way for workers' centers to take advantage of NLRA protections short of forming a union and attempting to create a collective bargaining agreement.

Courts have recognized that workers in nonunionized workplaces are entitled to *Weingarten* rights,<sup>53</sup> which are the rights of employees to request representation from co-workers when meeting with a supervisor to discuss disciplinary matters.<sup>54</sup> While *Weingarten* rights are limited in scope and power, scholars have suggested that exercise of these rights can "provide[] an excellent training opportunity for nonunion employees to acquire and improve their organization skills."<sup>55</sup> The *Weingarten* court held that section 7 created a statutory right for workers in unionized workplaces to refuse to submit to an investigatory or disciplinary meeting with an employer without union representation.<sup>56</sup> Recently, in *Epilepsy Foundation*, the NLRB held that an extension of the rights set out in *Weingarten* to workers in nonunion workplaces was consistent with the *Weingarten* Court's reliance on section 7, which applies to all workers, whether unionized or not.<sup>57</sup> The NLRB held that the right to request the presence of a co-worker in investigatory and disciplinary meetings was just as vital in nonunion workplaces in order to effectuate the section 7 "right to engage in 'concerted activities for the purpose of mutual aid or protection.'"<sup>58</sup> Indeed, some workers' rights organizations have found that exercising *Weingarten* rights is a useful organizing tool for nonunionized workers.<sup>59</sup>

The right to engage in concerted activity can be useful in many other ways. Professor Clyde Summer argues that an important use of the concerted activity protections of section 7 is in providing workers with more rights than they would otherwise have under other worker protection statutes. For example, while OSHA and whistleblower statutes provide only limited protections to an individual employee's refusal to perform dangerous work, the support of other workers "can convert the individual's action into concerted action within the

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52. Corbett, *supra* note 7, at 267. "For the potential of section 7 to be fully realized in nonunion workplaces, however, it needs some tinkering. Even without adjustments, however, it still constitutes a useful and underused right." *Id.* at 277.

53. Established in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975).

54. *Epilepsy Found. of N.E. Ohio*, 331 N.L.R.B. 676 (2000).

55. Corbett, *supra* note 7, at 278 (citing Charles R. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1749 (1989)).

56. *Weingarten*, 420 U.S. at 256.

57. *Epilepsy Found.*, 331 N.L.R.B. at 678.

58. *Id.*

59. See discussion *infra* Section IV.A.

protection of section 7, even though it does not fall within the limited protection of OSHA."<sup>60</sup> These rights may be called upon to protect employee expression in the workplace,<sup>61</sup> to challenge employer rules alleged to restrict conduct protected by section 7,<sup>62</sup> and to conduct work stoppages.<sup>63</sup>

### C. *Limitations of NLRA Protections and Restrictions on Union Activity*

These benefits of a collective bargaining agreement may be persuasive reasons for a workers' center to attempt to form an independent union in industries amenable to collective bargaining. However, while a collective bargaining agreement has the ability to provide job security and other protections for workers, there are also many limitations, both legal and practical, to this organizing model.<sup>64</sup> While attempting to unionize a workplace requires large amounts of financial and personnel resources, the law does not provide any guarantee that an attempt at organizing will result in a favorable collective bargaining agreement. Moreover, the wholesale exclusion of workers in certain industries makes the NLRA a limited tool for organizing immigrant workers. Finally, the Act's strict regulation of organizing tactics may present difficulties for a workers' center, and even undermine the ability of a campaign to meet the center's overall goals. The NLRA prohibits secondary boycotts under most circumstances,<sup>65</sup> places restrictions on picketing,<sup>66</sup> and also limits the way in which racial issues can be addressed in union certification election campaigns.<sup>67</sup>

Attempts at organizing for a union representation election (and ultimately for a collective bargaining agreement) require organizers to devote a large amount of economic resources and personnel time. Mobilizing the resources necessary to win a representation election may not be possible for an organization attempting to manage limited funds while organizing workers in multiple workplaces and industries. Winning the right to conduct an election is an important first step, but representation elections are successful only fifty percent

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60. Summer, *supra* note 39, at 544-45. The Occupational Safety and Health Act provides that employees can refuse to perform dangerous work "only when there is a reasonable apprehension of death or serious injury and reasonable belief that no less drastic alternative . . . is practicable." *Id.* at 544.

61. Corbett, *supra* note 7, at 287, 295.

62. *Id.* at 291.

63. *Id.* at 297.

64. See Garcia, *supra* note 5, at 136-37 (arguing that "[t]he weakness of the current law on bargaining is also a reason to ask why separate bargaining would be an overall benefit to female and union members of color," and proposing involvement of community labor groups as identity caucuses rather than separate bargaining units).

65. 29 U.S.C. § 158(b)(4).

66. See text accompanying *supra* notes 84-92. See also § 158(b)(7)

67. See Sewell Mfg. Co., 138 N.L.R.B. 66 (1962). See also Crain, *Whitewashed Labor Law*, *supra* note 5, at 251 (arguing that the Sewell doctrine assumes a racially neutral, economic vision of class that excludes people of color).

of the time.<sup>68</sup> Moreover, victory in a representation election does not guarantee that a first contract or subsequent contracts will be successfully negotiated or that these will include terms favorable to workers. Winning a representation election earns only the obligation on the part of the employer to bargain a first contract in good faith—once this is won, achieving favorable contract provisions, subsequent contracts, and other gains is based on economic pressures and organizing efforts and is not legally required. In all, less than one-third of the workers who attempt to organize each year end up being covered by collective bargaining agreements.<sup>69</sup>

There are also structural impediments to organizing in industries where immigrants are frequently employed, including the exclusion from the NLRA of many categories of workers,<sup>70</sup> the mobility of capital in subcontracted industries,<sup>71</sup> and temporary or individual employment relationships.<sup>72</sup> The Act's exclusion of various categories of employees from the statutory definition (among them, agricultural laborers, domestic servants, independent contractors, and supervisors) may be of particular concern to workers' centers.<sup>73</sup> Due to this exclusion, a workers' center's consideration of forming an independent union must begin with the question of what kinds of workers it is concerned with organizing. Many recent organizing efforts by community groups have focused on domestic workers and day laborers, including projects at the Workplace

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68. Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES, 19–20 (Kate Bronfenbrenner et al. eds., 1998) [hereinafter ORGANIZING TO WIN].

69. *Id.* at 20.

70. 29 U.S.C. § 152(3) (excluding domestic and agricultural workers from the definition of employees covered by the NLRA).

71. Sweatshop Watch, *What is a Sweatshop?*, at <http://www.sweatshopwatch.org/swatch/industry/> (last visited Mar. 10, 2004) (noting the capital mobility of garment sweatshops).

72. See Kristi L. Graunke, "Just Like One of the Family": *Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 160–63 (2002) (noting the uniquely isolating experience facing domestic workers); Aaron B. Sukert, Note, *Marionettes of Globalization: A Comparative Analysis of Legal Protections for Contingent Workers in the International Community*, 27 SYRACUSE J. INT'L. L. & COM. 431, 440–41 (2000) (noting that problems of temporary workers disproportionately affect immigrants). In considering whether immigration status relates to organizability, sociologist Hector Delgado detailed a study of a union organizing campaign in a workforce composed primarily of undocumented immigrant employees, in which he argued that undocumented workers were far from "unorganizable," and at times "participate[d] actively, and even militantly" in the campaign. HÉCTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS* 141 (1993). Delgado suggests that immigrant status would have an adverse affect on organizability under certain conditions: lack of protection of undocumented workers under federal labor law; intensified enforcement of IRCA employer sanctions; and organized labor's failure to aggressively organize undocumented workers. *Id.* at 141–42.

73. U.S. DEPT. OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY: 1997–1998, at 5, 24 (2000) (noting that eighty-one percent of all farmworkers in 1997–98 were foreign-born and worked an average of twenty-four weeks or less); Graunke, *supra* note 72, at 152–56 (discussing the effect of immigration status on the experiences of domestic workers).

Project, but these groups of workers are difficult to organize due to the structure of their respective industries.<sup>74</sup> Day laborers are largely employed in temporary positions, and domestic workers are often in individual employment relationships, rather than part of one large workforce with a single employer, which is the traditional model for labor organizing. In addition, many immigrants work in small factories and sweatshops, which subcontractors can easily shut down and restart somewhere else. In these situations, the relationships between subcontractors (the direct employer of the workers) and manufacturers are often unstable and leave the subcontractors in a vulnerable position themselves.<sup>75</sup>

Further, NLRA restrictions on organizing tactics impact the kinds of organizing in which the workers' center can engage.<sup>76</sup> The NLRA prohibits secondary boycotts that are aimed at "forcing or requiring any other employer to recognize or bargain with a labor organization."<sup>77</sup> This restriction prohibits a union that has a dispute with employer A from attempting to cause a strike or other action at the premises of employer B, with the goal of pressuring B to stop doing business with A.<sup>78</sup> Generally, secondary boycott activities have been defined as those which are calculated to involve neutral employers and their employees in a union's dispute with the primary employer.<sup>79</sup> This restriction can create difficulties for organizing in heavily subcontracted industries. SEIU's Justice for Janitors campaign in California demonstrated how these restrictions can impact organizing in a heavily immigrant workforce. In a case challenging the SEIU's tactics in protesting a building manager who hired a nonunion cleaning service, the NLRB found that the protest was an attempt to coerce the manager to cease doing business with the nonunion contractor, and therefore violated the secondary protest regulations.<sup>80</sup> It should be noted, however, that the restrictions on secondary boycotts apply only to appeals to secondary em-

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74. See text accompanying *infra* notes 131-150.

75. Jenkins, *supra* note 11.

76. The limitations on union activities under the NLRA may suggest the potential benefits of organizing outside the NLRB context. The restriction on secondary boycotts has important implications for organizing campaigns throughout the supply chains of immigrant-dominated industries and may undermine cross-industry and community organizing. Restrictions on appeals to race may also pose an obstacle to workers' centers' emphasis on organizing based in a specific ethnic community. Finally, NLRA regulations of picketing may be inconsistent with workers' centers' use of pickets to mobilize public protest.

77. § 158(b)(4)

78. See *id.*

79. *Iron Workers Dist. Council v. NLRB*, 913 F.2d 1470 (9th Cir. 1990). For example, a union at a garment manufacturer cannot encourage workers at a retailer to refuse to sell or work with products made by the manufacturer in order to pressure the manufacturing employer.

80. *Service Employees Union Local 87*, 312 N.L.R.B. 715, 756 (1993) (finding that the Justice for Janitors campaign "engaged in confrontational, coercive, and disruptive tactics to achieve its secondary aims at no less than seven commercial office buildings in downtown San Francisco."). See also Catherine L. Fisk, et al., *Union Representation by Immigrant Janitors in Southern California: Economic and Legal Challenges*, in *ORGANIZING IMMIGRANTS*, *supra* note 21, at 199.

employees at the secondary location, and not to direct appeals to customers of the secondary enterprise.<sup>81</sup>

The secondary boycott restriction applies only to a “labor organization,” as statutorily defined, which excludes organizations not created for the purpose of “dealing with” employers.<sup>82</sup> In *Center for United Labor Action*, the NLRB determined that a group whose activities included joining strike pickets, leafleting employers, and fund-raising on behalf of striking workers, was not a “labor organization” because it had never “sought to deal directly with employers concerning employee labor relations matters.”<sup>83</sup> Under this holding, most workers’ centers would not be considered a “labor organization”; however, to the extent that members of a workers’ center establish a committee or union intended to “deal with” the employer in employment matters, the prohibition on secondary boycotts may apply.

The NLRA also regulates union picket activities, restricting both picketing and threats of picketing when the object is to force an employer to recognize or bargain with a labor organization as the representative of the employees, or to pressure workers to accept or select a labor organization as their collective bargaining representative.<sup>84</sup> Picketing for these purposes is prohibited in three situations: where another union has been lawfully recognized; where a valid NLRB election has been held in the past year; and where there has not been an election in the past year and no petition is filed within thirty days from the start of picketing.<sup>85</sup> The NLRA allows unions to picket in protest of grievances or unfair labor practices, but the Board determines, by examining the totality of the circumstances, whether the object of the picket is recognition or correction of unfair practices.<sup>86</sup>

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81. In order for the protection to apply, the communication with consumers must be “mere persuasion” and not “threats, coercion or restraints.” *Edward J. DeBartolo, Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988) (distributing leaflets to individuals entering shopping mall, explaining labor dispute with company doing construction work for mall, and requesting that they not shop in the mall was permissible activity under the NLRA).

82. 29 U.S.C. § 152(5) defines a labor organization as an organization which “exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

83. *Ctr. for United Labor Action*, 219 N.L.R.B. 873, 873 (1975) (“Support for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.”).

84. *See Int’l Hod Carriers Local 840*, 135 N.L.R.B. 1153 (1962) (interpreting restrictions on picketing under section 8(b)(7) of the NLRA). The NLRB and the courts have defined picketing as posting signs together with personal confrontation; generally, carrying signs is the touchstone of picketing. JULIUS G. GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW* 267-68 (2d ed. 1999).

85. *Int’l Hod Carriers*, 135 N.L.R.B. at 1156-57.

86. *See, e.g., Plumbers Local 32*, 315 N.L.R.B. 786, 792 (1994).

With respect to the Act's restrictions on picketing—even more than secondary boycotts—a workers' center as currently organized will likely be able to escape restrictions because they are not intended to pressure the employer or workers to recognize the organization as a bargaining representative.<sup>87</sup> While any worker advocacy organization must comply with the law of libel and slander,<sup>88</sup> nonunion organizations may enjoy broader rights than unions in the context of picketing.<sup>89</sup> In *NAACP v. Claiborne Hardware Co.*,<sup>90</sup> the NAACP's protests against racial inequality in the workplace were challenged as illegal picketing and secondary boycotts. The Supreme Court held that the activities were "political" and thus deserving of greater protection than the economically-oriented labor picketing which the government has a right to regulate.<sup>91</sup> A labor organization is permitted to picket for the purpose of "truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization."<sup>92</sup>

Formulating a campaign that connects a union struggle to issues of race and class requires organizers to consider the consequences of an employer's potential challenge to election results under what is known as the *Sewell* Doctrine. This rule regulates the way that issues of race can be used in an election campaign by allowing the NLRB to set aside the results of an election in which one side has used campaign propaganda that "seek[s] to overstress and exacerbate racial

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87. However, once a workers' center establishes an organization interested in becoming the bargaining representative for employees, the restrictions are likely to apply. See *Ctr. for United Labor Action*, 219 N.L.R.B. at 873 ("[T]o qualify as a labor organization under [the NLRA] the organization must be selected and designated by employees for the purpose of resolving their conflicts with employers.").

88. A labor organization's conduct may be subject to state libel law in addition to federal labor law, but will not be found to constitute defamation *per se*. See *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) (holding that in the context of labor disputes, statements were protected speech in the absence of proof of falsity, malice, and injury).

89. See James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 944–948 (1991) (explaining that the decision in *Center for United Labor Action* that CULA, a labor support group, was not a labor organization, was rooted in the court's reluctance to infringe on the freedoms of association and protest. An organization not seeking to represent employees, i.e. a nonlabor organization, "cannot enjoy the prime organizational benefit of the labor law—the possibility of attaining exclusive representative status—and thus should not forfeit the constitutional rights enjoyed by nonlabor groups." Pope explains further that a restriction on picketing and protest would "single out" advocates focused on labor rights, while allowing other activists to participate in secondary boycotts.). *But cf. Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1009 (9th Cir. 2002) (stating that "[f]reedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate," and citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964), a foundational First Amendment case).

90. 458 U.S. 886 (1982).

91. *Claiborne Hardware*, 458 U.S. at 911–13.

92. 29 U.S.C. § 158(b)(7)(C); see also *Plumbers*, 315 N.L.R.B. 786.

feelings.”<sup>93</sup> It was originally created to address an employer’s appeals to workers’ racial prejudice to create anti-union sentiment,<sup>94</sup> but recently has more often been applied to overturn union victories.<sup>95</sup> Regardless of the Board’s decision, an employer’s challenge to an election causes a loss of momentum for an organizing campaign, which can threaten the continuation of the campaign after an election.

While the *Sewell* Doctrine should by no means override more pressing considerations that may weigh in favor of forming a union, such as increasing workers’ power in the workplace, it is useful to recognize that such a campaign may be forced to diverge from workers’ centers’ previous activities. Professor Marion Crain argues that organizing efforts outside of the NLRB are “not limited [] to an economistic vision of class. They have, therefore, been more effective in reaching populations traditionally thought to be difficult to organize because of their vulnerability to employer exploitation.”<sup>96</sup> She argues that organizing efforts carried on in accordance with the broad *Sewell* Doctrine “may fail to reach those whose experience of class oppression is other than the white experience.”<sup>97</sup> However, while the appeal to ethnic solidarity and organizing around class, race, and ethnicity has vitally contributed to the effectiveness of the organizing by workers’ centers,<sup>98</sup> a union organizing campaign may have to take a different tact.

Each of these limitations on organizing within the NLRB model points not only to drawbacks or precautions, but also demonstrates an advantage that workers’ centers currently possess over unions. That advantage, however, may be outweighed by the additional power that comes with the exercise of collective bargaining rights. As the following sections will demonstrate, however, there are additional legal rights and sources of power that a labor organization outside of the NLRB context can command, and thus the choice between the workers’ center model and the NLRB collective bargaining model is a complicated one in which many factors must be carefully weighed.

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93. *Sewell*, 138 N.L.R.B. at 72. The purpose of the rule is to address comments that “‘so cloud . . . the election atmosphere’ that laboratory conditions [are] destroyed and a fair election [can] not be held.” *Zartic, Inc.*, 315 N.L.R.B. 495, 498 (1994) (citation omitted). The rule has been applied to speech related to national origin and ethnicity as well as race. *YKK (U.S.A.) Inc.*, 269 N.L.R.B. 82, 84 (1984) (union’s use of racist epithets concerning Japanese management was cause to set aside election results), *Zartic*, 315 N.L.R.B. 495 (union appeals to Hispanic employees based on ethnicity was cause to set aside election results).

94. *Sewell*, 138 N.L.R.B. 66.

95. See e.g., *Zartic*, 315 N.L.R.B. 495; *Carrington S. Health Care Ctr., Inc. v. NLRB*, 76 F.3d 802 (6th Cir. 1996) (setting aside election result where union portrayed management as racist).

96. Crain, *Whitewashed Labor Law*, *supra* note 5, at 253–54 (citing the Workplace Project as one of these “more effective” organizations).

97. *Id.* at 251.

98. See *id.* at 253–56; see also LOUIE, *supra* note 9.

## IV.

## LABOR ORGANIZATIONS OUTSIDE THE NLRB CONTEXT

Many groups of workers, such as those specifically excluded from the NLRA, have successfully organized outside of the NLRB-union model, either by choice or by necessity. Despite the exclusion of agricultural and domestic workers from the NLRA,<sup>99</sup> these groups have successfully organized to fight for increased workplace rights. Other groups of workers have organized outside of the NLRB by choice and have formed non-majority unions or alternative structures that draw on NLRA protections for nonunion employees. This section examines the organizational structures of non-majority unions, farmworker unions, and domestic workers' organizations. Of the examples provided in this section, non-majority unions are the most similar to traditional trade unions. Farmworker organizing differs largely as a result of the NLRA's exclusion of agricultural workers. Domestic worker organizing is the most distinct from the traditional model due to both legal necessity and industry structure. The non-majority union example illustrates the potential strengths of using section 7 rights, both generally and as a precursor to seeking majority representation. Farmworker organizing has demonstrated the power of the secondary boycott and the ability to use economic tools to organize large unions without NLRA protections. Finally, domestic workers have created cooperative structures and engaged in law reform campaigns to either create workers' rights or transform an industry to make it more conducive to traditional labor organizing. Taken together, these examples demonstrate that the NLRA industrial organizing model is only one of many strategies available to groups of workers interested in labor organizing, and that other laws and economic tools can provide important means for building workers' power.

*A. Non-Majority Unions*

Non-majority unions ("NMUs") provide an interesting example of labor organizations that have had successes in organizing and reforming workplaces without exclusive representation and bargaining rights, illustrating the potential scope of application of section 7 rights in terms of both legal and organizing benefits. Professor Carol Brooke defines an NMU as "an independent organization formed by a group of workers to foster activism around issues of concern to workers, provide mutual support, hold job training or other skills-building sessions, or form coalitions with other labor or community organizations."<sup>100</sup> She notes that "NMUs closely resemble unions," but are distinct from unions because they have not held an election to prove that they represent a

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99. See *supra* note 70.

100. Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 CHI.-KENT L. REV. 1237, 1239 (2000).

majority of workers and, as such, cannot engage in collective bargaining.<sup>101</sup> A non-majority union, unlike a workers' center, focuses on a particular workplace rather than a specific community, and in this way, is much closer to the traditional workplace-based trade union model. An examination of non-majority unions is useful for two reasons. First, it is an alternative structure for labor organizing outside of the NLRB collective bargaining scheme. Second, and even more instructive, is the fact that NMUs have tested the legal boundaries of the NLRA's protections for non-traditional labor organizations and the limits on what concerted activities such an organization may undertake.

For many workers involved in NMUs, the organization represents an intermediary step toward building a majority-union with exclusive representation and collective bargaining rights. Some NMUs have been formed in order to continue organizing after a close defeat in a union recognition election. In one such case, the Workers Unity Committee ("WUC") at the Consolidated Diesel Plant in North Carolina formed after a defeat in an election by electing officers and shop stewards, setting dues for voluntary members, drafting bylaws, and writing to company officials informing them of the union's elected officials and asking for recognition.<sup>102</sup>

NMUs have found that the NLRA's concerted activity protections can provide protections for their members and strengthen their organizing work. Workers in NMUs have exercised *Weingarten* rights,<sup>103</sup> by requesting that their union steward be their co-worker representative.<sup>104</sup> The Workers Unity Committee also employs legal strategies, including NLRB filings and other federal and state law actions, to assert the rights of its members.<sup>105</sup> One such case resulted in a Fourth Circuit decision upholding the NLRB finding that Consolidated Diesel had violated section 8(a)(1) of the NLRA by interfering with workers' section 7 right to self-organization.<sup>106</sup> In that case, WUC brought charges of unfair labor practices after workers were disciplined for distributing the WUC newsletter in break rooms during non-work times.<sup>107</sup>

While many NMU activities are essentially the same as those conducted by the Workplace Project and other workers' centers, the distinction is that NMUs provide an organization of workers dedicated to a particular workplace. NMUs create a long-term plan with consistent strategies for addressing problems within a workplace. The Workers Unity Committee established an informal grievance procedure in which a shop steward reacts to a grievance by organizing a petition

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101. *Id.* at 1239-40.

102. Jim Wrenn, *The United Electrical Workers' 'Non-Majority' Union: Organizing the Old-Fashioned Way*, LAB. NOTES No. 281, Aug. 2002, at 8-10.

103. *See supra* text accompanying notes 53-58.

104. Wrenn, *supra* note 102.

105. *Id.*

106. *Consol. Diesel Co. v. NLRB*, 263 F.3d. 345 (4th Cir. 2001).

107. *Id.* at 349.

to management from work team members.<sup>108</sup> During the petition campaign, NMU members wear buttons and dress in black. The campaign within the workplace is accompanied by rallies and press conferences with community allies and by sending a letter to corporate headquarters. These petition campaigns have led to successes for WUC, including the reinstatement, with backpay, of workers unjustly fired, as well as the addition of new members to the union.<sup>109</sup>

A workers' center, whether or not it intends to form an independent union with bargaining rights, may seek to establish an NMU, at least as a preliminary step. Once a workers' center focuses on organizing within a given workplace, an NMU allows workers to begin to deal with an employer regarding employment matters and creates an entity with which to attract co-workers. The advantages of an NMU over a traditional union are that workers can create a lasting organization whether or not an election is won and are able to devote attention and resources to a variety of matters before engaging in the all-consuming work of petitioning for recognition.

An NMU's effectiveness may be limited in many of the same ways that traditional industrial organizing is limited, particularly in industries where traditional organizing is not easy. The potential of an NMU is limited where workers are excluded from NLRA protections. Additionally, in the case of immigrant workers, section 7 rights are limited by the *Hoffman Plastic* holding that undocumented workers are ineligible for backpay awards.<sup>110</sup> The NMU model is useful to draw from in considering a workers' center's next step in workplace organizing, but may be limited in its scope of potential application.

### *B. Agricultural Workers*

Historically, farmworkers have been one of the most successful examples of labor organizing outside of the NLRB structure. They have responded to their exclusion from the NLRA by utilizing organizing tactics unavailable to workers covered by the Act. Due to their exclusion, farmworkers cannot force an employer to the bargaining table through an NLRA-regulated election. However, many different groups of farmworkers have successfully obtained union recognition and collective bargaining agreements by applying economic pressures and using public relations tactics. United Farm Workers ("UFW"), the Farm Labor Organizing Committee ("FLOC"), and most recently, the Coalition of Immokolee Workers ("CIW") have used strikes, boycotts, and marches to pressure agricultural growers and processors for benefits and protections. The CIW and FLOC have also used consumer boycotts and corporate campaigns as effective tools in negotiations with agribusiness corporations and their intermediaries.

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108. Wrenn, *supra* note 102.

109. *Id.*

110. 535 U.S. 137. See sources cited *supra* note 8.

UFW, under the leadership of Cesar Chavez, may be the most well-known example of farmworker organizing using a campaign of economic tools.<sup>111</sup> Between 1965 and 1970, UFW used strikes, marches, product boycotts, and secondary boycotts to pressure California grower-processors to recognize the union and negotiate collective bargaining agreements. In 1965, UFW coordinated a strike of 3000 workers employed by multiple grape growers. As part of that campaign, the union reached out to labor and civil rights groups and college students, drawing on the strong social justice sentiment of the era. They also organized a 300-mile march that protested grower violence toward picketing workers, gained publicity, and reached out to farmworkers in communities along the way. When UFW found that it did not have the large funds necessary to maintain a strike, it began to focus on what became a boycott of all grapes in 1968.<sup>112</sup> UFW achieved recognition, elections, and some contract negotiations during this time, but its biggest success was in 1970 when nearly all of the grape growers agreed to negotiate. UFW negotiated three-year contracts with growers representing eighty-five percent of the state industry; these contracts included wage increases, a union hiring hall, formal grievance procedures, pesticide regulations, and a health plan.<sup>113</sup> Significantly, UFW was successful in using secondary boycott tactics that were available to them because the NLRA's restriction on labor activity did not apply to their organizing.

Building on the UFW model from the 1960's, farmworker unions in other states have successfully employed economic pressures where legal means for recognition and bargaining rights remain unavailable. One notable example of such a union is the Farm Labor Organizing Committee, which has organized workers in the Midwest.<sup>114</sup> In 1987, FLOC succeeded in negotiating a three-year, three-party contract, signed by the union, Campbell's Soup, and Campbell's growers in the Midwest.<sup>115</sup> Without the legal procedures established by the NLRA, FLOC used economic and organizing tools to bring Campbell's to the table. An eight-year strike and six-year national consumer boycott were supported by other means, including: organizing the strike-breakers farmers had hired as replacement workers; outreach to religious, labor, and community

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111. See MARALYN EDID, *FARM LABOR ORGANIZING: TRENDS & PROSPECTS* 34–43 (1994); SUSAN FERRISS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* (Diane Hembree ed., 1997); PATRICK H. MOONEY & THEO J. MAJKA, *FARMERS' AND FARM WORKERS' MOVEMENTS: SOCIAL PROTEST IN AMERICAN AGRICULTURE* 150–183 (1995).

112. Interestingly, the initial impetus for making it a full product boycott was a defensive move that came when a targeted grower began simply shipping under the names of other growers. MOONEY & MAJKA, *supra* note 111, at 160.

113. *Id.* at 163–64.

114. Mooney and Majka state that FLOC is an “exception” to the general trends in farmworker organizing, in which campaigns were “of short duration” and “gains tended to be temporary.” MOONEY & MAJKA, *supra* note 111, at 199–200. Edid states that FLOC is “one of the few successful farm labor unions in the country.” EDID, *supra* note 111, at 58.

115. EDID, *supra* note 111, at 59.

organizations; rallies and marches; and a corporate campaign focusing on shareholders and investors.<sup>116</sup> FLOC was able to capitalize on Campbell's powerful position in relation to the small growers by initiating what would otherwise have been a secondary boycott of Campbell's. The three-party contracts are significant in recognizing that corporate processors like Campbell's are the real powers in the industry, even though their growers are the immediate employers of workers. The contract established hourly wage rates, seniority-based hiring, grievance procedures, and pesticide safety measures.<sup>117</sup> Additionally, the unique three-party contract provides protections to the family farms that contract with Campbell's and serve as intermediaries between Campbell's and the farm laborers.<sup>118</sup> The contracts arguably ensure that growers will not be penalized for using union labor, a problem in industries where a subcontractor fears losing the business of the corporate contractor if his wages and benefits, and therefore costs, increase. This model may be useful for other industries, such as the garment industry, where work is subcontracted by image-conscious corporations that may be able to pressure their contractors to recognize unions, while agreeing not to pull out their work from unionized factories.<sup>119</sup>

In a more contemporary campaign, the Coalition of Immokalee Workers, a Florida-based workers' center with 2000 members, has used a nationwide consumer boycott of a secondary employer in its campaign for better conditions.<sup>120</sup> Taking advantage of the NLRA exclusion, CIW has boycotted Taco Bell because it is a purchaser of Florida tomatoes.<sup>121</sup> CIW's boycott campaign has included numerous strategic alliances: college students have led campaigns resulting in at least fourteen campuses asking Taco Bell to leave,<sup>122</sup> and labor unions including UFW, Hotel Employees & Restaurant Employees International Union ("HERE"), and the Orange County Labor Coalition took part in CIW's five-day demonstration at Taco Bell corporate headquarters.<sup>123</sup> The boycott,

116. MOONEY & MAJKA, *supra* note 111, at 203–06.

117. EDID, *supra* note 111, at 59–60.

118. *Id.* at 60.

119. *See, e.g.*, MOONEY & MAJKA, *supra* note 111, at 210 ("Such three-party agreements—virtually unique in American labor relations—may . . . be applicable outside agriculture."). *But see* EDID, *supra* note 111, at 87 ("The FLOC model . . . is unlikely to be replicated elsewhere . . . because the circumstances are unusual.").

120. N. Renuka Uthappa, *Florida Farmworkers Stage Ten-Day Hunger Strike at Taco Bell Headquarters*, LAB. NOTES No. 289, Apr. 2003, at 5.

121. This campaign would arguably be otherwise covered by the NLRA secondary boycott prohibition which declares that it is an unfair labor practice "to threaten, coerce or restrain any person engaged in commerce . . . [where an object thereof is forcing] . . . any person to cease . . . dealing in the products of any other producer . . . or to cease doing business with any other person . . ." 29 U.S.C. § 158(b)(4).

122. Duncan Campbell, *Taco Bell Tomato Pickers on Slave Pay: Dispute over Poor Pay by Contractors Highlights Plight of Immigrant Workers*, THE GUARDIAN (London), Mar. 17, 2003, at 18.

123. Uthappa, *supra* note 120.

which has lasted for more than two years,<sup>124</sup> has been accompanied by a hunger strike, work slow-downs, protest marches, and notably, several successful federal prosecutions of agricultural contractors for involuntary servitude.<sup>125</sup> CIW pressured the Department of Justice Civil Rights Division for over a year before DOJ agreed to prosecute the three recent cases in 2002,<sup>126</sup> which resulted in jailing contractors for terms ranging from 17 to 25 years, with penalties up to \$3 million in asset seizure.<sup>127</sup>

There are other innovative strategies to learn from the farmworker example. Recent CIW and FLOC campaigns have formed strategic alliances with small, family farm owners in larger campaigns against corporations that contract work to smaller growers. CIW has recruited the support of the National Family Farm Coalition and Family Farm Defenders,<sup>128</sup> and FLOC has created contracts that benefit not only workers, but small farmers as well. These relationships illustrate that the NLRA's assumption of a polarized employee-employer workforce is not always an accurate description of the dynamics in small businesses or heavily subcontracted industries.<sup>129</sup> As immigrant workers are increasingly employed in industries that are heavily subcontracted, workers' centers may consider attempting to form these strategic alliances in campaigns that target, for example, the garment industry or cleaning workers. However, the ability to target companies at the top of an industry "food-chain" may in other contexts be weakened by the NLRA restriction on secondary boycotts.<sup>130</sup> Despite this limitation, innovative efforts to forge alliances with subcontractors and small business owners in some fashion, while at the same time targeting the more powerful entities in an industry, may be a promising strategy for workers' centers to consider. This type of campaign may require an industry-wide approach emanating from a coalition of groups, rather than from a single workers' center.

These various examples of agricultural worker organizing demonstrate the potential success of using economic tools and organizing tactics to pressure companies to the negotiating table. In particular, each of these farmworker groups has taken advantage of its ability to use secondary boycotts in its larger strategies. Whether through boycotts, strategic alliances, or public relations

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124. *Id.*

125. Campbell, *supra* note 122; Amy Driscoll, *Former Migrant Organizes Workers*, MIAMI HERALD, May 9, 2000, at 1B; Micah Maidenberg, *Florida Employers Guilty of Slavery: Citrus Workers Held in Debt Bondage*, LAB. NOTES No. 281, Aug. 2002, at 3.

126. Maidenberg, *supra* note 125.

127. *Id.*

128. Coalition of Immokalee Workers, *Family Farm Organizations Endorse Taco Bell Boycott* (Mar. 19, 2003), at <http://www.corpwatch.org/bulletins/PBD.jsp?articleid=5988>.

129. For other examples, see Ha, *supra* note 11 (discussing the difficulty of organizing Korean restaurant workers employed by small business owners within the Korean-American immigrant community); Jenkins, *supra* note 11, at 65-66 (noting that in the garment industry subcontracting system, "[e]ven if a given contractor were to raise its labor standards, it would most likely lose the business of the manufacturer and be replaced.").

130. See *supra* text accompanying notes 76-83.

efforts, these organizations demonstrate potential avenues for workers organizing outside of the NLRB context to effectively utilize economic pressure.

### C. Domestic Workers

Workers employed in the domestic or household context are statutorily excluded from the labor protections of the NLRA.<sup>131</sup> Moreover, the NLRA-established collective bargaining scheme reflects industrial assumptions that may make traditional organizing methods ill-suited for domestic workers.<sup>132</sup> The employment structures for domestic workers have necessitated creative solutions in efforts to organize home-care workers, live-in domestics, house cleaners, and other household workers who provide individualized services to a household which is often both employer and consumer.<sup>133</sup> Professor Peggie Smith has argued that the structure of domestic service work limits what these workers have to gain from a conventional organizing model.<sup>134</sup> Traditional industrial organizing, focused on establishing parties for bargaining purposes, assumes a “group of workers employed at a common job site by a single employer,” and employs an “us-them” strategy that “does not begin to capture the interpersonal dynamics that define many paid household relationships.”<sup>135</sup> Moreover, organizing conditions for domestic workers are complicated by immigration status; many are undocumented immigrants or legal immigrants on an employer-sponsored work visa, and thus are scared to speak out against their employer for fear of deportation or losing their immigration sponsorship.<sup>136</sup>

These difficulties may be challenging, but they are not insurmountable. Domestic worker organizing has addressed these obstacles through community-based activism and legislative reform campaigns. In New York City, workers’ centers that focused on organizing domestic workers within specific ethnic communities joined together in 2000 to form Domestic Workers United (“DWU”).<sup>137</sup> These women came together, expanding on their previous community-based strategies, to create DWU because they saw a “need for an

131. See sources cited *supra* note 73 and accompanying text. For an overview of the lack of legal protections for domestic workers, see Melanie Ryan, *Swept Under the Carpet: Lack of Legal Protections for Household Workers—A Call for Justice*, 20 WOMEN’S RTS. L. REP. 159 (1999). The exclusion of domestic workers from the NLRA is also reflective of the racially-exclusive dynamics of labor protection. See also *supra* note 17.

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

133. *Id.* at 69. For a general discussion of the dynamics of household labor, see BRIDGET ANDERSON, *DOING THE DIRTY WORK?: THE GLOBAL POLITICS OF DOMESTIC LABOUR* (2000); GRACE CHANG, *DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY* (2000).

134. Smith, *supra* note 132, at 68.

135. *Id.* at 69–70.

136. See Graunke, *supra* note 72, at 152–56.

137. DOMESTIC WORKERS UNITED, FACT SHEET (on file with author) (DWU was formed by the Women Workers Project of CAAAV Organizing Asian Communities; Andolan, organizing South Asian workers; and an unaffiliated group of Caribbean women.).

industry-wide strategy that builds power for all domestic workers.”<sup>138</sup> Through the “Dignity for Domestic Workers” project, DWU began a campaign to pass a set of regulations through the New York City Council and has expanded its legislative campaign to the statewide level.<sup>139</sup> As a result of DWU’s successful advocacy efforts, the City Council passed a bill regulating employment agencies, and a resolution affirming the rights and value of domestic workers. The final resolution recognizes “the rights of all workers to regularize their immigration status, [and] to organize”; it also calls for reforms to labor laws that exclude domestic workers.<sup>140</sup> The law requires employment agencies to notify workers of their rights under state and federal law and to maintain records on employment placements, including terms of employment, names and addresses of the parties, and wages and hours.<sup>141</sup> The Dignity for Domestic Workers campaign also includes advocating for the use of a standard contract in employment agencies.<sup>142</sup> DWU is working to reinforce these reforms through a statewide campaign for fair labor standards and state labor law protections.<sup>143</sup>

According to DWU organizers, the Dignity for Domestic Workers campaign began on a citywide level in order to test out legislative advocacy as a possible strategy, develop leadership, and gain media attention. Organizers had also decided they “needed a winnable campaign to help give workers hope that change is possible.”<sup>144</sup> Hope was essential in motivating workers to organize because “in this industry, many workers are doubtful that conditions can change, because they have essentially stayed this way since slavery.”<sup>145</sup> Rather than immediately approaching the problem on a larger scale, DWU found that local regulation of employment agencies was a goal that could effect some change in the industry while testing whether a legislative strategy would be an effective way to build power among domestic workers. At the same time DWU members were able to develop their lobbying, media, and leadership skills.<sup>146</sup> While it is still too early to know how successful the DWU Dignity for Domestic Workers campaign will be, the campaign is notable for its approach to the problems of

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138. Interview with Ai-Jen Poo, Organizer, Domestic Workers United (Sept. 8, 2003) (notes on file with author).

139. *Id.*

140. New York, N.Y. Resolution No. 135-A (May 1, 2003), available at <http://www.council.nyc.ny.us/textfiles/Res%200135-2002A.htm>. See also Chisun Lee, *Domestic Disturbance: The Help Set Out to Help Themselves*, VILLAGE VOICE, Mar. 13, 2002.

141. New York, N.Y. Local Law No. 33 (June 3, 2003), available at [http://www.council.nyc.ny.us/pdf\\_files/bills/law03033.pdf](http://www.council.nyc.ny.us/pdf_files/bills/law03033.pdf).

142. Press Kit, Dignity for Domestic Workers (on file with author).

143. Interview with Ai-Jen Poo, *supra* note 138.

144. *Id.*

145. *Id.*

146. DWU asserts that “[w]orking in the isolation of private households, domestic workers are not organized or able to benefit from the contractual protections arising out of traditional forms of collective bargaining. Standardizing working conditions through the contract is a necessary and effective substitute.” Press Kit, Dignity for Domestic Workers, *supra* note 142, at 4.

NLRA exclusion and industry structure. Attempts at collective bargaining would not be realistic since individual households rather than employment agencies employ workers. Accordingly, DWU has chosen a legislative campaign, combined with other measures, as a strategy for organizing domestic workers.

In another statewide legislative campaign, the Service Employees International Union organized similarly situated employees through a unique strategy. SEIU led a successful campaign to organize home-care workers in California in what was one of the largest and most important organizing drives in modern history.<sup>147</sup> Home-care employees share organizing constraints similar to domestic workers, as they also depend on private, individual household-based employment.<sup>148</sup> In order to overcome this obstacle, SEIU's organizing project began with a legislative campaign to create a single employer for home-care workers. The campaign began by successfully lobbying the state legislature to create a public authority for California home-care workers, which would serve as a single employer against which collective bargaining could be targeted.<sup>149</sup> Once it had achieved this legislative goal, SEIU engaged in a union organizing campaign that combined its institutional resources with community-focused outreach and local alliances. By 1999, following an intensive organizing campaign joined by community-based organizations like the Domestic Workers Association of CHIRLA, SEIU had organized 74,000 employees in the largest union victory in the U.S. in decades.<sup>150</sup>

The organizing strategies discussed in this section have responded to the unique structural and legal challenges facing domestic workers. In an industry where traditional labor organizing is unavailable and practically inapplicable, these examples demonstrate ways of adapting to adverse conditions. The DWU campaign used local pressure to create protections for domestic workers, and seeks to create additional protections through a statewide legislative campaign. The SEIU approach in organizing home-care workers in California provides an alternative vision for overcoming the obstacle of individual employment relationships. Rather than approaching the problem directly through workplace relations, SEIU seeks to use law reform to transform the structure of the industry. Both strategies highlight the potential utility of a legislative campaign, as well as the importance of accompanying an industry-wide campaign with alliances among locally-focused community groups.

## V.

### MOVING FORWARD: BUILDING ON THE COMPLEMENTARY ADVANTAGES OF

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147. Nancy Cleeland, *Home-Care Workers' Vote for Union a Landmark for Labor*, L.A. TIMES, Feb. 26, 1999, at A1.

148. Smith, *supra* note 132, at 73-74.

149. Cleeland, *supra* note 147 (the creation of the public board changed workers' status from independent contractors to employees); Smith, *supra* note 132, at 74-76.

150. Smith, *supra* note 132, at 73.

## WORKERS' CENTERS AND ORGANIZED LABOR

Workers' centers are an important new form of labor organizing: created in response to the limitations of old structures, these community organizations are interested in developing a labor movement that more fully champions the rights of working-class immigrants. However, new forms of organizing must still consider the contours of labor law and the range of legal rights and restrictions accompanying various organizing models. This article looks at the intersections between organizing and law as it affects this population of workers, and suggests some considerations that may come into play in designing an organizing strategy. Strategic choices will depend on workers' goals and workers' status under the labor law. An overview of this range of strategies suggests that collaborations between workers' centers and organized labor may effectively combine the assets of each group in terms of organizational strengths, legal rights, and power bases, and may provide the strongest support to immigrant workers.

*A. Workers' Goals*

The workers' center model places particular emphasis on workers themselves choosing their goals and strategies. Given this philosophy, workers' goals are a paramount factor in choosing the appropriate model for an organizing campaign. Workers' goals may extend from individual and family-level concerns to national and industry-wide issues, including everything in between.

One possible goal of worker organizing may be to cultivate leadership and facilitate active participation among workers; the workers' center model seeks to emphasize these goals. Workers' centers' long-term, holistic commitment to workers, emphasis on leadership by workers themselves, and sensitivity to the specific concerns of a community—including its ethnic, cultural, or linguistic distinctiveness—provide important lessons for and contributions to labor organizing generally.<sup>151</sup> While a focus on identity issues may arguably limit larger goals by fragmenting workers' collective power, community-specific concerns can also complement coalition-building efforts and facilitate collective action.<sup>152</sup>

The workers' center model's emphasis on the centrality of identity and culture stands in contrast to the traditional union model's focus on economics and industry-wide demographics.<sup>153</sup> Workers' centers have a holistic vision of

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151. Miriam Ching Yoon Louie argues that workers' centers "are breathing new life into labor and community organizing," due to their strong roots in a community. LOUIE, *supra* note 9, at 233.

152. Garcia, *New Voices at Work*, *supra* note 5. In considering how identity caucuses can play an important role in the democratization of unions, Garcia suggests giving identity caucuses a key role in processing and mediating grievances "in order to assure minorities and women that union officials who cannot relate to their concerns are not ignoring their grievances." *Id.* at 91.

153. Crain, *Whitewashed Labor Law*, *supra* note 5, at 253 ("Workers' organizations that are not affiliated with organized labor and are not governed by labor law have not limited themselves

their role as having a deeper impact on the life of a worker and a community than simply changing the economic relations in a single workplace.<sup>154</sup> This outlook facilitates their continuous support of workers, both in the long-term time frame of various stages of an organizing campaign,<sup>155</sup> and across a range of issues affecting workers' lives.<sup>156</sup> Unlike the traditional union, which in the event that it loses the election, "ceases to exist as an organization representing the interests of those who supported it,"<sup>157</sup> the workers' center seeks to play a continuing role in the community.

It is likely that one goal of workers is to change the power dynamics in a given workplace, but a group of workers may also have the goal of transforming the practices of an entire industry. This goal may stem from workers' realizations that change in a single workplace is simply impossible for various reasons. Among the unstable employers of the garment industry, for example, it may be difficult to organize a workplace because the employer's business will be transferred to other nonunionized entities, or the owner will close his business and relocate elsewhere.<sup>158</sup> In the case of home-care workers and domestic workers, it may be that the law itself needs to be changed in order to facilitate any serious organizing efforts. Additionally, workers may decide that as a strategic matter, their campaign will be stronger if it targets industry-wide practices. Finally, workers may seek to address broader social or political issues. For many undocumented immigrant workers, issues of status legalization through amnesty campaigns, for example, may offer more lasting solutions to continuing problems.<sup>159</sup>

### B. Worker Status Under Labor Law

In addition to these various goals, organizers choosing between potential strategies will need to consider the labor law status of workers, and accordingly, the strategic options available to them. For workers covered by the NLRA, organizing considerations will need to take into account both the potential benefits

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to an economic vision of class. They have, therefore, been more effective in reaching populations traditionally thought to be difficult to organize.").

154. In addition to improving workplace conditions, the UNITY cooperative at the Workplace Project, for example, seeks to provide English classes and promote women's rights. Interview with Nadia Marin-Molina, Executive Director, Workplace Project (Sept. 26, 2003).

155. LOUIE, *supra* note 9.

156. These include providing English classes, support around immigration issues, and in some cases, organizing workers within a community group that organizes across a range of issues. *See supra* note 27.

157. Summer, *supra* note 39, at 534.

158. *See supra* notes 73–74 and accompanying text.

159. *See* Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547 (2003–04) (discussing the connection between amnesty campaigns and immigrant worker rights).

and the restrictions of the NLRA.<sup>160</sup> These workers, who include those employed in restaurants, garment factories, and many other industrial and service settings, may choose to create an NLRB-certified union. While highly resource-intensive, a campaign to certify a union as the exclusive representative of workers may lead to collective bargaining for the workplace, thus consolidating workers' collective power.

Workers who are covered by the NLRA can also take advantage of the concerted activity protections provided by section 7. Where workers are covered by the Act and yet not already part of a union, it may be that there are obstacles to achieving exclusive representation in their workplace.<sup>161</sup> In this case, forming an NMU would allow workers to begin organizing with the assistance of labor law protections. A workers' center may also form an NMU as a precursor to seeking exclusive representation and collective bargaining. Either way, NLRA-covered workers may need to factor NLRA restrictions into their organizing strategies because restrictions on organizing tactics, such as those limiting picketing and prohibiting secondary boycotts, may apply to their activities.<sup>162</sup>

For groups of workers excluded from the NLRA, many of these options are not available. These workers include farmworkers, domestic workers, and workers classified as independent contractors. Excluded workers can draw on the UFW example to use economic tools like strikes and boycotts to gain union recognition and contract negotiations. These tactics are available to them due to their exclusion from the NLRA's restrictions on organizing activities.<sup>163</sup>

Workers in this category might also consider legislative campaigns like the ones engaged in by DWU and SEIU. These campaigns can fight for additional legal protections or can use the law to restructure an industry in a way that makes it more conducive to consolidating workers' power to organize collectively. On the other hand, UFW's legislative campaign in the early 1970s, leading to the creation of a state law governing California agricultural relations, suggests that economic tools may sometimes be preferable to political ones.<sup>164</sup> Commentators have suggested the subsequent setbacks to farmworkers<sup>165</sup>

160. See *supra* notes 76-98 and accompanying text.

161. These include cultural or linguistic divisions among workers, an unstable employer, high turnover rates, or other factors.

162. See *supra* notes 76-98 and accompanying text.

163. See *supra* notes 111-30 and accompanying text.

164. UFW shifted its strategy from a focus on using economic tools to the legislative campaign in what can be seen as a defensive measure prompted by growers' and conservative politicians' successful efforts to pass laws restricting the organizing tactics of farmworker unions. MOONEY & MAJKA, *supra* note 111, at 167-69. UFW had considered advocating for inclusion of agricultural workers in the NLRA, but ultimately decided that the secondary boycott prohibition was reason enough not to advocate for such a law, and focused instead on a state remedy. *Id.* at 162.

165. Corporate interests succeeded in blocking funds for the Agricultural Labor Relations Board for a period of time, which resulted in the permanent resignation of various pro-labor staff and board members. During this time, many farmworkers grew disillusioned when all of the ALRA-related activity stalled: contract negotiations were postponed even after a successful

occurred because “[t]he struggle was taken out of terrain familiar to the UFW and transferred into the legislative arena where agribusiness in California traditionally has had enormous influence.”<sup>166</sup> While legislative reforms may increase vital legal protections, these critiques suggest that such campaigns place too much emphasis on the law and shift workers’ and organizers’ focus away from the economic tools through which they had earlier been able to achieve power relative to the employers.<sup>167</sup>

There is a small category of workers whose status under the NLRA is contested. These include day laborers, who may be construed as independent contractors but are more likely temporary employees, as well as employees performing industrial functions on agricultural products, who may be construed as farmworkers.<sup>168</sup> These workers’ organizing activities may be challenged by employers whether they choose to organize within the NLRB or not: if they organize within NLRB structures, their employer may argue that they are excluded from NLRA protections, but if they use tactics like secondary boycotts and certain kinds of picketing, their employer can file an unfair labor practices charge against them and argue that they are subject to the restrictions of the Act. Thus, considering that a legal battle may ensue either way, organizers of workers in this category should consider whether it would be more advantageous to have the benefit of NLRA protections, or to be free of its restrictions.

### *C. Possibilities for Collaboration Between Workers’ Centers and Unions*

Many goals and strategies of workers will best be accomplished through collaboration between NLRB unions and workers’ centers. There are many ways in which workers’ centers and unions may be able to bring important and distinct organizing tools and legal rights to a collaborative relationship. A workers’ center’s focus on grassroots organizing and promoting leadership among immigrant workers, and a union’s strength in industry-wide organizing and negotiating, may complement each other if they can be effectively harmonized. In targeting a particular union with which to join forces, a workers’ center should bear in mind that

[t]he relationship between the centers and unions depends principally on the politics of the particular union, including its stance towards employers; its willingness to fight for the rights of workers; the weight

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election, elections were postponed after initial organizing, and organizers postponed their organizing efforts until elections could again be certified. MOONEY & MAJKA, *supra* note 111, at 174–78.

166. *Id.* at 178 (arguing that “[t]he suspension of ALRB’s operations demonstrated the drawbacks of a legislative solution”).

167. *See* Jenkins, *supra* note 11 (critiquing reliance on advocacy power, which employs traditional legal and legislative tools, as opposed to utilizing social power).

168. *See* Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) (upholding NLRB decision that certain categories of farm employees were not agricultural employees and were thus covered by the NLRA).

it gives to organizing, education, training and promotion of rank-and-file leadership; and its relationship with community and other social movements.<sup>169</sup>

Alliances between workers' centers and unions may allow them to combine aspects of these strategies in ways that create legal flexibility in strategic approach. The examples of farmworkers' successful use of secondary boycotts suggest one area where the relative legal rights and restrictions of workers' centers and unions might successfully complement each other in "extend[ing] the range of available tactics in an organizing campaign."<sup>170</sup> In a similar vein, collaboration between workers' centers and unions may also enable a campaign to avoid other organizing restrictions, such as picketing rules and *Sewell* doctrine limitations on the use of race in a campaign.<sup>171</sup> The division of labor between the workers' center and the union would also affect whether the activities are controlled by the NLRA.<sup>172</sup>

Different kinds of coalitions may be formed to collaborate on advocacy around political and social issues outside of the workplace. The New York Civic Participation Project ("NYCPP") is one model for such collaboration.<sup>173</sup> NYCPP was formed in the aftermath of September 11 by a coalition of union locals, community groups, and immigrant worker advocates, with the mission of organizing union and community members around issues affecting their communities, such as education, housing, health, and local immigrant rights issues.<sup>174</sup> This effort by unions to reach out to immigrant workers is a deliberate step to draw on the holistic aspects of community organizing and workers' center models. In the NYCPP approach, leadership and activism can translate between the community and the workplace, giving union and nonunion

169. LOUIE, *supra* note 9, at 221.

170. Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together to Organize Low-Wage Workers*, in ORGANIZING TO WIN, *supra* note 68, at 85. Needleman provides the example of a campaign by Asian Immigrant Women Advocates (AIWA) against dressmaker Jessica McClintock, which was supported by UNITE's predecessor, the International Ladies' Garment Workers' Union (ILGWU). When McClintock filed unfair labor practices against AIWA, alleging unfair use of a secondary boycott, the NLRB dismissed the charges, holding that AIWA was not a labor organization subject to the NLRA restriction. *Id.* (NLRB decision not reported). Analysis of the precise contours of such a legal strategy, while beyond the scope of this article, is an important issue for further inquiry.

171. See *supra* text accompanying notes 84–98. For example, the NLRB found in *Center for United Labor Action* that the organization's protest activities in support of a strike did not violate the NLRA because the group was not a labor organization. 219 N.L.R.B. 873.

172. Under the *Center for United Labor Action* analysis, *supra* note 83, the NLRB would consider whether the workers' center seeks to represent the employees in "dealing with" the employer.

173. Interview with Sam J. Miller, Zahida Pirani, and Angel Vera, Organizers, New York Civic Participation Project (Nov. 24, 2003) (notes on file with author).

174. The groups which formed NYCPP are Service Employees International Union ("SEIU") Local 32BJ, Hotel Employees and Restaurant Employees International Union Local 100 ("HERE"), American Federation of State, City and Municipal Employees ("AFSCME") District Council 37, the National Employment Law Project ("NELP") and Make the Road by Walking. *Id.*

community members a sense of the union as a democratic structure in which they actively participate, and as something more than just a service provider of job benefits. Such collaborations can play an important role in democratizing unions and healing relationships between community groups, social justice advocates, and unions.<sup>175</sup>

## VI.

### CONCLUSION

The labor movement faces a time of transition and revitalization as workers' centers and unions learn from each other's unique strengths and insights in their efforts to organize today's low-wage immigrant workers. The efforts of workers' centers, unions, and other workers' rights advocates are all essential in facilitating this movement.

*Hoffman Plastic*<sup>176</sup> may be seen as a setback to organizing immigrant workers and to the labor movement as a whole; yet, it can also be viewed as a call to action to galvanize organizing efforts. While viewing *Hoffman*'s restrictions on remedies for labor violations as a potential obstacle to organizing, we should also consider that organizing under labor law has always faced multiple constraints: the limitations on remedial provisions, the excessive regulations and restrictions placed on organizing, and the extensive resources required for organizing under the NLRB system. The examples of workers who have organized outside of the NLRB model pose alternatives to traditional union organizing and in turn may suggest the limitations of *Hoffman*'s impact. *Hoffman* may not pose a major obstacle to alternative organizing campaigns, or to workers who have long organized outside the protections of the labor law. Creative organizers can draw on these examples to develop strategies that minimize the impact of *Hoffman*. This could be done by focusing on consolidating workers' economic power and de-emphasizing the need for legal interventions, or by pressing for legislative change, rather than by focusing on workplace-based solutions. As workers' centers continue to design new models for collective action, and unions increase their efforts to reach out to immigrant workers, they may find that combining their institutional strengths through different methods of collaboration will be an important step toward building power among low-wage immigrant workers, and in turn, strengthening the larger social movement for workers' rights.

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175. NYCPP organizers see their work as a step toward healing these relationships. *Id.*; see also, Garcia, *New Voices at Work*, *supra* note 5, at 160 (proposing that workers' centers and community groups create identity caucuses to work for internal union reform and make unions more representative of the concerns of particular groups within the union); Levi, *supra* note 19, at 55 (suggesting ways that institutional arrangements and credible commitments can overcome distrust between community groups and unions).

176. 535 U.S. 137. See also sources cited *supra* note 8.