

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2016

Rethinking the Ban on Employer-Labor Organization Cooperation

Heather Whitney

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Heather Whitney, "Rethinking the Ban on Employer-Labor Organization Cooperation," 37 *Cardozo Law Review* 1455 (2016).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

RETHINKING THE BAN ON EMPLOYER-LABOR ORGANIZATION COOPERATION

Heather M. Whitney[†]

As a result of a variety of changed conditions, traditional union density is at an all-time low. But while only 6.6% of private sector workers are unionized, the rest of the workforce has not been without collective voice; nontraditional forms of worker organizations continue to emerge. Fast Food Forward, the Coalition of Immokalee Workers' Fair Food Program, Google's LGBT Employee Resource Group, and nascent organizing of "on-demand economy" Uber and Lyft drivers are a few examples of nontraditional worker organizations providing gains for workers.

The success of many of these organizations has depended on avoiding the National Labor Relations Act and the restrictions it places on "labor organizations." Recognizing this, the U.S. Chamber of Commerce and the Center for Union Facts have pushed the National Labor Relations Board to classify these organizations as "labor organizations." While labor scholars have begun to realize some of the costs such classification would impose, one important cost has been neglected: it would effectively prohibit some of these organizations from cooperating with and taking financial support from employers. Scholars have failed to grapple with this consequence because they have yet to recognize that some of these organizations—organizations heralded as the next wave of workers' collective voice—are succeeding as a result of their ability to leverage consumer demand for "ethical" companies in order to get reputation-sensitive employers to sign agreements and create co-run organizations that improve conditions for these companies' and their suppliers' workers. If these collaborations were prohibited, workers would be constrained in their ability to improve their conditions in a dominantly post-union world.

[†] Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School. Faculty Affiliate, Berkman Center for Internet & Society. The author wishes to thank Will Baude, Omri Ben-Shahar, Zach Clopton, Paul Crane, Ryan Doerfler, Cynthia Estlund, Samuel Estreicher, Christopher Franco, Jack Goldsmith, Todd Henderson, Aziz Huq, John Inazu, Genevieve Lakier, Saul Levmore, Richard McAdams, Nadia Nasser-Ghods, Martha Nussbaum, Michael Oswald, Eric Posner, John Rappaport, Benjamin Sachs, Rachel Sachs, Geoffrey Stone, Laura Weinrib, and participants at the University of Chicago Work in Progress Workshop, 2015 Colloquium on Scholarship in Employment and Labor Law, 2015 Marco Biagi Conference, Spring 2015 Chicago Junior Faculty Workshop, 2015 Internet Law Works-in-Progress Conference, and 2014 Digital Labor conference. The author also wishes to thank the editors of the *Cardozo Law Review* for their excellent help throughout the editing process.

This Article explores, for the first time in the literature, the various collaborations that have developed between new forms of worker organizations and employers. It then explains why these organizations are vulnerable to “labor organization” classification and the bans on company support found in section 8(a)(2) of the National Labor Relations Act and section 302 of the Labor Management Relations Act. The Article ends by suggesting that the Roberts Court’s deregulatory First Amendment opens up a possible tool for dramatically curtailing these bans on free speech grounds. Other labor scholars’ work on the First Amendment right of assembly provides another.

TABLE OF CONTENTS

INTRODUCTION	1457
I. CHANGING CONDITIONS	1464
A. <i>Company-Worker Relations</i>	1465
B. <i>The Current NLRA and LMRA Regimes</i>	1469
C. <i>The Consumer Market for “Ethically Made” Goods and Services</i>	1475
II. CASE STUDIES OF EMPLOYER-LABOR ORGANIZATION COLLABORATIONS.....	1479
A. <i>Examples from Outside NLRA Coverage</i>	1480
1. <i>Industry-Wide Organizations</i>	1481
2. <i>Vertical Organizations</i>	1483
B. <i>Examples from Within NLRA Coverage</i>	1487
1. <i>Industry-Wide Organizations</i>	1487
2. <i>Intra-Company Organizations</i>	1492
III. “LABOR ORGANIZATIONS” AND THE BAN ON COMPANY SUPPORT	1494
A. “ <i>Labor Organization</i> ”	1495
1. <i>Employee Status</i>	1495
2. <i>Employee Participation</i>	1497
3. “ <i>Dealing with</i> ” the Employer	1497
a. <i>An Uncertain Representational Requirement for</i> “ <i>Dealing</i> ”	1500
B. <i>Section 8(a)(2) of the NLRA</i>	1503
1. <i>Domination or Interference with Formation or</i> <i>Administration</i>	1503
2. <i>Financial or Other Support</i>	1504
C. <i>Section 302 of the LMRA</i>	1506
IV. PARTIAL AND POTENTIAL SOLUTIONS.....	1508
A. <i>Administrative or Legislative</i>	1509
B. <i>Judicial</i>	1511
1. <i>Right of Assembly and Expressive Association</i>	1511

2. Free Speech	1513
CONCLUSION.....	1519

INTRODUCTION

Traditional unions—the ones that bargain with employers under the National Labor Relations Act (NLRA)¹ regime—are in decline. In 1959, 32.3% of the private sector labor force was unionized.² In 2005, only 7.8% of workers in the private sector were.³ By 2011, that number was down to 6.9%,⁴ and in 2014 that number dropped again, to 6.6%.⁵ Earlier scholarship attempted to diagnose the causes of union decline, pointing to hostile and outdated labor laws, globalization, deregulation, and digitization as partial culprits.⁶ Whatever the causes, many thought the effect was clear: the death of organized labor.⁷

Eventually, however, others began to point out that while *traditional* unions and *traditional* channels for collective action were blocked, new channels were opening. Workers were continuing to organize, but in different and more heterogeneous ways. Scholarship began to examine these alternative methods, discussing, for example, the use of employment law,⁸ the development of worker centers,⁹ a new

¹ National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

² See LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY app. A at A-1 (1st ed. 1985).

³ News Release, Bureau of Labor Statistics, Union Members in 2005 (Jan. 20, 2006), http://www.bls.gov/news.release/archives/union2_01202006.pdf.

⁴ *Union Membership, 2011*, ECON. DAILY (Jan. 30, 2012), http://www.bls.gov/opub/ted/2012/ted_20120130.htm.

⁵ Union Membership (Annual) News Release, Bureau of Labor Statistics, Union Members—2014 (Jan. 23, 2015), http://www.bls.gov/news.release/archives/union2_01232015.htm.

⁶ See, e.g., PAUL OSTERMAN, *SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT* (1999); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) [hereinafter Estlund, *The Ossification of American Labor Law*]; Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795 (1983).

⁷ See, e.g., Estlund, *The Ossification of American Labor Law*, supra note 6 at 1527 (“Evidence of morbidity abounds.”).

⁸ See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008) [hereinafter Sachs, *Employment Law as Labor Law*]. But for limits on this tactic see Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002) (discussing the ways labor law restricts union use of employment law litigation to advance worker interests); Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164 (2013) (discussing

“tetralogy” of representation for low-wage service workers,¹⁰ and private ordering between employers and unions outside of the NLRA regime.¹¹ Scholars recognized that a “new wave” of worker organization was arriving and it resisted generalization.¹²

Riding this new wave, labor scholars continued to not just rethink labor law, but also reimagined what the future of labor itself might look like in a world of dramatically changed work, economic, and doctrinal conditions. Professor Benjamin Sachs suggested unbundling unions from economic bargaining, allowing them to act as purely political organizations.¹³ Professor Cynthia Estlund put forward a way to use the rise of company self-regulation to push for the fortification of employee rights and improved labor standards.¹⁴ Professor Katherine Stone has looked internationally and described alternative forms of worker organizations in places like Australia, the European Union, and Japan.¹⁵ And yet, for all this rethinking and reimagining, it appears few have been willing to rethink the ban on company support of, and membership in, “labor organizations” found in section 8(a)(2) of the National Labor Relations Act,¹⁶ and the prohibition on employers giving

employers conditioning employment on workers signing arbitration agreements, thereby curtailing group employment litigation as a means of achieving workplace change).

⁹ See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006).

¹⁰ See Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL’Y 599 (2004) (explaining that the “tetralogy” is one where unions either compete or cooperate with legal advocacy groups, public officials, and ethnic or immigrant groups to advocate for low-wage service workers).

¹¹ See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

¹² See Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y. L. SCH. L. REV. 515, 534–35 (2005) (“[A] variety of forms could prevail in different economic sectors and geographic regions. ‘History shows,’ . . . ‘that the labor movement thrived when it tolerated and even nourished multiple, and at times competing, models of unionism.’” (quoting Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in *REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY* 82–83 (Lowell Turner et al. eds., 2001))).

¹³ Benjamin I. Sachs, Essay, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013) [hereinafter Sachs, *The Unbundled Union*].

¹⁴ Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) [hereinafter Estlund, *Rebuilding the Law of the Workplace*].

¹⁵ Katherine Van Wezel Stone, *Green Shoots in the Labor Market: A Cornucopia of Social Experiments*, 36 COMP. LAB. L. & POL’Y J. 293 (2015).

¹⁶ National Labor Relations Act, ch. 372, sec. 8(a)(2), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(2)) (making it “an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”).

money and other things of value to a “labor organization” found in section 302 of the Labor Management Relations Act (LMRA).¹⁷

Scholars have largely failed to grapple with the effects of section 8(a)(2) of the NLRA and section 302 of the LMRA because they have yet to recognize that some of these worker organizations—organizations heralded as the next wave of worker collective voice—are succeeding as a result of their ability to leverage consumer demand for “ethical” companies. For example, workers will get their reputation-sensitive employers to sign agreements and create co-run organizations designed to improve conditions for these companies’ and their suppliers’ workers.¹⁸ In other words, scholars have yet to recognize that many of these new organizations are creating agreements and accepting financial contributions from employers that would often be prohibited if the organizations were “labor organizations.”¹⁹ The shadow of sections 8(a)(2) and 302 is not illusory: organizations like the U.S. Chamber of Commerce and the Center for Union Facts continue to push the National Labor Relations Board (Board) to classify these new organizations as “labor organizations” for purposes of the NLRA.²⁰ Thus, it is important to understand both the ways in which these organizations have already begun working with employers and how labor law may come to bear on them; that is the aim of this Article.

Before going further, a clarification: It is not the case that labor scholars have *never* called for rethinking the ban on company support of labor organizations. In the 1990s, such a rethinking was called for, but in order to make room for a particular type of company-worker collaboration that was on a far smaller scale, and with far different purposes, than the sorts of collaborations at stake today.²¹

¹⁷ Section 302 of the LMRA, a criminal statute, makes it unlawful for

any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

Labor Management Relations Act, ch. 20, sec. 302, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 186(a)(2) (2012)). Estlund, for one, has considered the section 8(a)(2) problem that worker centers face, although she argues that such organizations should not be deemed “labor organizations” at all. See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 181–85 (2010).

¹⁸ See Section I.C.

¹⁹ See Section III.A.

²⁰ See U.S. CHAMBER OF COMMERCE, *THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS* (2014) [hereinafter *AN OVERVIEW OF LEADING WORKER CENTERS*].

²¹ See, e.g., Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 879–928 (1994).

While “vigorous enforcement of [s]ection 8(a)(2) [of the NLRA] erased company unionism . . . as a central issue in labor law,” the question of company support reemerged starting in the late 1960s.²² Scholars posit at least two reasons: labor unrest starting in the early 1970s and the continuing transition to a more competitive global economy, and with it, the pressure for increased productivity and creativity. In particular, Japan began to be seen as a major competitor, and academics hypothesized that their ability to create high-quality products at lower costs was the result of their superior forms of management, which included quality circles and team-based work systems.²³ Hoping that imitating Japanese management style would increase U.S. competitiveness, companies began experimenting with these different organizational structures, all of which fell under the general category of Quality of Work Life (QWL) or “participative management” programs.²⁴ The issue of company support of labor organizations then arose because some of the QWL programs, like quality circles, arguably constituted “labor organizations” that employers were unlawfully “interfering” with or “supporting,” in violation of section 8(a)(2).²⁵

That quality circles were “labor organizations” and that company support of them was unlawful was not a foregone conclusion in either

²² *Id.* at 879.

²³ See George Munchus, III, *Employer-Employee Based Quality Circles in Japan: Human Resource Policy Implications for American Firms*, 8 ACAD. MGMT. REV. 255 (1983); see also Barenberg, *supra* note 21, at 887–88.

A quality circle is a group of employees that meets regularly to solve problems affecting its work area. Generally, 6 to 12 volunteers from the same work area make up the circle. The members receive training in problem solving, statistical quality control, and group process. Quality circles generally recommend solutions for quality and productivity problems which management then may implement. A facilitator, usually a specially trained member of management, helps train circle members and ensures that things run smoothly. Typical objectives of QC programs include quality improvement, productivity enhancement, and employee involvement. Circles generally meet four hours a month on company time. Members may get recognition but rarely receive financial rewards.

Edward E. Lawler III & Susan A. Mohrman, *Quality Circles After the Fad*, HARV. BUS. REV., Jan. 1985.

²⁴ See Takao Kato & Motohiro Morishima, *The Productivity Effects of Participatory Employment Practices: Evidence from New Japanese Panel Data*, 41 INDUS. REL. 487, 516–17 (2002); David Lewin, *The Future of Employee Involvement/Participation in the United States*, 40 LAB. L.J. 470, 470 (1989); Munchus, *supra* note 23.

²⁵ See Lewin, *supra* note 24. “Labor organization” is defined broadly as “any 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.” 29 U.S.C. § 152(5) (2012).

law or legal scholarship.²⁶ Far from it: quality circles were quite popular starting in the late 1970s and early 1980s. In 1982, forty-four percent of all companies with more than 500 employees had quality circle programs, with some estimating that 75% of those started after 1980.²⁷ Over ninety of the Fortune 500 companies likely had quality circle programs, including IBM, Honeywell, Westinghouse, and Xerox.²⁸ Courts, too, were frequently looking for a way to make room for the types of worker organizations companies were insisting were necessary to stay competitive while also enforcing section 8(a)(2). To that end, the courts began to develop two paths around section 8(a)(2) violations: First, and more frequently, courts held that while quality circles and entities like them were labor organizations, section 8(a)(2) was only violated where there was actual “domination” and not just “support,” despite the plain language of the NLRA.²⁹ Other courts and the Board tried to make room for QWL organizations by avoiding section 8(a)(2) in the first instance by narrowing the definition of “labor organization.”³⁰ This relaxing of section 8(a)(2), and with it the trend of incorporating modified versions of Japanese organizational structures, came to a halt with the Board’s early 1990s decisions in *Electromation*³¹ and, six months later, in *E. I. du Pont de Nemours*.³² These two seminal

²⁶ See, e.g., Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986) (arguing section 8(a)(2) should prohibit some of these new employee-participation groups); John R. McLain, Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985) (arguing that participatory management programs initiated by employers in nonunion settings should be permissible); Joseph B. Ryan, Comment, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571, 634 (1992) (arguing for the adoption of an “actual” rather than “potential” domination standard).

²⁷ See Lawler & Mohrman, *supra* note 23.

²⁸ *Id.*; see also *Electromation, Inc.*, 309 N.L.R.B. 990, 1005 (1992) (Raudabaugh, concurring) (“Employee participation in decision-making in the workplace and cooperative efforts between employers and employees began to emerge as significant phenomena in the late 1970s.”), *aff’d sub nom. Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

²⁹ See, e.g., *Classic Indus., Inc. v. NLRB*, 667 F.2d 205, 209 (1st Cir. 1981); *NLRB v. Ne Univ.*, 601 F.2d 1208, 1214 (1st Cir. 1979) (“[I]f anything, changing conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model.”); *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967); *Chi. Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167 (7th Cir. 1955). *But see NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (finding employer interfered with the formation of a labor organization by contributing support to a competing outside union).

³⁰ See, e.g., *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977) (holding that a grievance committee is not a labor organization because it performed only adjudicative functions), *rev’d on other grounds*, 623 F.2d 571 (9th Cir. 1980).

³¹ *Electromation, Inc.*, 309 N.L.R.B. 990.

³² *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

cases made clear that QWL organizations were often “labor organizations” and actual domination was not necessary for the employer to have violated section 8(a)(2)—mere interference or financial support was enough.

In the wake of *Electromotion*, the Board saw very few section 8(a)(2) cases³³ and industry argued that the decision “and its progeny . . . had a chilling effect on employers’ willingness to initiate and/or continue employee participation committees, at the very time these committees have become widely recognized as a major means of improving productivity and enhancing product quality.”³⁴ In response, companies pushed Congress to override *Electromotion* through passage of the Teamwork for Employees and Managers (TEAM) Act, which “would have amended section 8(a)(2) to allow employers to establish employee participation programs ‘to address matters of mutual interest (including issues of quality, productivity, efficiency) and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements [under this Act] with the employer.’”³⁵ While the TEAM Act eventually passed both houses of Congress, its supporters were unable to override President Bill Clinton’s veto.³⁶

It was during the time of quality circles and the TEAM Act that scholars last thought seriously about the ban on company support of labor organizations. Those who supported a narrowing or repeal of the ban were looking to make room for intra-company quality circles, which were thought to increase productivity and U.S. competitiveness.³⁷ The thought of employers funding or participating in larger nontraditional worker organizations was not on the table, nor was the realization that some of these organizations would negotiate with employers outside the auspices of the NLRA regime. And for good reason: the next wave of worker organizations had yet to arrive.

³³ See *The Teamwork for Employees and Managers Act of 1997: Hearing on S. 295 Before the S. Comm. on Labor and Human Resources*, 105th Cong. 49 (1997) (statement of Sen. Edward M. Kennedy) (“Since the National Labor Relations Board decided the *Electromotion* case in 1992, the Board has resolved only 16 cases—out of 54,919 cases considered—in which part of the remedy required dissolution of employee teams.”); see also Michael H. LeRoy, “*Dealing with*” *Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromotion*, 73 NOTRE DAME L. REV. 31, 42 (1997) (“The NLRB rarely adjudicates section 8(a)(2) cases.”).

³⁴ *The Teamwork for Employees and Managers Act of 1995: Hearing on S. 295 Before the S. Comm. on Labor and Human Resources*, 104th Cong. 67 (1995) (statement of Daniel V. Yager, Assistant General Counsel, Labor Policy Association).

³⁵ Cynthia L. Estlund, *The Ossification of American Labor Law*, *supra* note 6, at 1541 n.64 (quoting The Teamwork for Employees and Managers Act, S. 295, 104th Cong. § 3 (1995)).

³⁶ *Id.* at 1541.

³⁷ See *id.*

Since the 1990s, new forms of worker organization have indeed proliferated, and with them, more complex relationships with employers. Specifically, today we see new forms of worker organizations forging partnerships with companies as a result of at least two strategies. First, some target reputation-sensitive employers with campaigns that expose the conditions those companies' workers, or those companies' suppliers' workers, face. Recognizing that some consumers and regulators penalize companies that treat workers poorly, these companies come to various agreements with the worker organizations.³⁸ The Coalition of Immokalee Workers' Fair Food Council (the Council) used this first strategy as a way to get companies like Whole Foods to "donate" money to the Council and require their suppliers to agree to Council monitoring.³⁹

The second method is to work proactively with companies looking to distinguish themselves as particularly good to workers, through the creation of organizations like Restaurant Opportunities Centers United, which in turn promotes consumer awareness of (and spending at) "high road" restaurants.⁴⁰ Both these relationships and the effect labor law has on their possibility moving forward are topics left largely unaddressed in the literature; this Article seeks to fill that gap.

The Article proceeds in four parts. Part I outlines the changing conditions that have contributed to the decline of traditional unionization and the creation of new worker organizations, including those that benefit from collaborations with companies. In particular, Part I discusses the leverage that consumer demand for "ethically" created goods has given new forms of worker organizations in their interactions with reputation-sensitive companies. While outside the

³⁸ See Steven Greenhouse, *Fight for \$15: The Strategist Going to War to Make McDonald's Pay*, GUARDIAN (Aug. 30, 2015, 10:42 AM) [hereinafter Greenhouse, *Fight for \$15*], <http://www.theguardian.com/us-news/2015/aug/30/fight-for-15-strategist-mcdonalds-unions> ("Already, as a result of the Fight for \$15's prodding, Brazilian prosecutors are investigating alleged wage theft, child labor and unsafe conditions at McDonald's franchised operations, while the European Union is investigating it for more than \$1bn in alleged tax evasion. In New York, a panel appointed by Governor Andrew Cuomo ruled that the state's 180,000 fast-food workers should be paid a minimum of \$15 an hour, in response to protests and pressure from Fight for \$15."). As I explain below, while the SEIU has given money to Fight for \$15, it is not actually a part of the SEIU. See *infra* Section II.B.1. This is precisely why the Chamber of Commerce has pushed the Board to recognize Fight for \$15 and other organizations like it as "labor organizations"—because, while they are not officially part of traditional unions, they get funding from them. See *infra* text accompanying note 264.

³⁹ See Press Release, Ahold USA, Ahold USA Joins the Coalition of Immokalee Workers' Fair Food Program, (July 29, 2015) [hereinafter Ahold USA Press Release], <http://www.prnewswire.com/news-releases/ahold-usa-joins-the-coalition-of-immokalee-workers-fair-food-program-300120235.html>.

⁴⁰ See *Our Work*, RESTAURANT OPPORTUNITIES CENTERS UNITED, <http://rocunited.org/our-work> (last visited Jan. 5, 2016).

NLRA regime, the ability to expose companies to reputational harm for failing to live up to their “do good” marketing has paved the way for a variety of worker-company partnerships that have helped workers but would likely violate the NLRA if they occurred under that regime.⁴¹

Part II presents accounts of a variety of nontraditional worker organizations and describes how they have partnered or could partner with companies as a means to achieving their ends. Part III explains the problem: the broad definition of covered “labor organizations,” and the broad interpretation of what counts as unlawful “support” and “interference” under section 8(a)(2), and what counts as a “thing of value” under section 302.

Part IV briefly discusses various potential solutions to the ban on company support and highlights that the speech and association-based constitutional challenges labor scholars have begun to develop in other areas of labor law, aided by the Roberts Court’s increasingly deregulated First Amendment, may be of use.⁴² While this Court’s First Amendment is commonly understood to help corporations over workers, it may also be a tool with which to challenge and creatively destroy bans on company support that are, today, not only impediments to the development of new forms of worker organizations but are also good for companies that promote themselves as doing well by their workers, reap benefits in the market by selling that goodness, and yet systematically fail to make good on those promises.

I. CHANGING CONDITIONS

Developments in three areas have contributed to the creation of new forms of worker organizations that have used support from companies to help further their ends. The first involves changes to the nature of work and company-worker relations. The second is the state of the NLRA and LMRA regimes and more recent doctrinal shifts by the Supreme Court. And the third—a consumer market for “ethically created” products and services—is a market that worker organizations have begun to leverage as a means to get reputation-sensitive companies to support developing forms of nontraditional worker organizations. I discuss each in turn.

⁴¹ I put both “ethically” and “do good” in quotations merely to register that what counts as “ethically” created is no doubt contestable. I discuss the legal risks these organizations face in Part III.

⁴² See, e.g., Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791 (2015).

A. *Company-Worker Relations*

Whether one supports unionization or not, the NLRA was originally intended to protect “full freedom of association [and] self-organization” for workers.⁴³ As Benjamin Sachs, Professor of Labor and Industry at Harvard Law School, has pointed out, most scholars believe it has failed to do this for one of two reasons: the statute is too weak, and thus unable to do the necessary protecting, or the statute is too rigid, unable to keep pace with changes in the composition and nature of work.⁴⁴ An examination of modern company-worker relations speaks to the latter reason.

NLRA-style unionization is premised on the notion of a single company that acts as a stable employer of long-term, full-time employees.⁴⁵ But a number of transformations to the nature of work have rendered anachronistic this conception, and with it the possibility of 1935-era unionization, increasingly impracticable.

Perhaps most significantly, the modern workplace is fissured.⁴⁶ “Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment—hiring, evaluation, pay, supervision, training, and coordination—are now the result of multiple organizations.”⁴⁷

Supply chains and outsourcing more generally provide one example of this. A basic question a company must answer is whether a particular activity it needs done (be it manufacturing, marketing, or inventing) occurs within the corporation itself.⁴⁸ This choice may be

⁴³ 29 U.S.C. § 151 (2012); accord Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 574 (2014) (“The protection afforded by the Wagner Act for concerted activity broke new ground in the embrace of group action by workers in the private sector.”).

⁴⁴ See Sachs, *Employment Law as Labor Law*, *supra* note 8.

⁴⁵ See STONE, *supra* note 6, at 3; Stone, *supra* note 15, at 298 (“[T]he New Deal labor law—the National Labor Relations Act—organized collective bargaining rights according to stable bargaining units within firms. The law assumed employees had long-term employment relationships and facilitated unionization for employees in large firms that offered long-term employment.”).

⁴⁶ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

⁴⁷ *Id.* at 7. Whereas forty-three percent of companies used temporary workers in the early 2000s, with temporary workers making up approximately 8.7% of their workforce, in 2013 approximately ten percent of the entire American workforce was employed through a temporary staffing agency. See Peter H. Cappelli & J.R. Keller, *A Study of the Extent and Potential Causes of Alternative Employment Arrangements*, 66 IND. & LAB. REL. REV. 874, 884 (2013); Ronald A. Wirtz, *Temporary Employment Sector: Matchmaker, Matchmaker*, FEDGAZETTE (Jan. 23, 2014), <https://www.minneapolisfed.org/publications/fedgazette/temporary-employment-sector-matchmaker-matchmaker>.

⁴⁸ See Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

influenced by a variety of considerations, but for corporations with the exclusive goal of maximizing shareholder value, the answer will be straightforward: which is cheaper? In the past, the direct costs of producing a cell phone in China or a lower-cost area in the United States might be far lower than those associated with producing it in house at the company's headquarters in Silicon Valley; other transaction costs, like those associated with transportation and monitoring, were sufficiently high that cheaper labor did not always translate to cheaper production, all things considered.⁴⁹ Today, however, those transaction costs are going down. Flying to China to check on manufacturers is cheap and email and surveillance technologies make monitoring far-flung factories cheaper.⁵⁰ Additionally, by contracting out a particular project or job, companies can take advantage of the downward pressure facing smaller companies that compete to win bids for those jobs.⁵¹ If a hotel is looking to outsource its room-keeping, it can create a bidding war between vendors, who in turn cut worker wages or risk losing the contract.

Supply chains makes traditional unionization ineffective, if possible at all. With outsourcing, even if the workers are able to successfully unionize the supplier, the supplier itself is intensely competing for bids against other, non-unionized competitors, in low-margin markets.⁵² The result will often be that the unionized workforce simply does not win contracts for work at all. And in cases where suppliers win and workers subsequently unionize, there is simply not enough money to go around, and the lead company is always free to choose a cheaper (typically non-unionized) supplier during the next round of bidding.⁵³ Thus, unionization of a single low-level supplier is not an effective strategy for workers looking to better their position.

Franchises are another method of fissuring.⁵⁴ As one way to lower costs while increasing profits, companies focus on creating and developing a brand while outsourcing day-to-day business operations to franchisees.⁵⁵ Companies like McDonald's use this strategy; they create strong brand identities and then sign franchise agreements whereby franchisees agree to abide by strict quality standards.⁵⁶ In exchange, the

⁴⁹ See WEIL, *supra* note 46, at 168.

⁵⁰ See *id.*

⁵¹ See *id.* at 15.

⁵² See *id.*

⁵³ See *id.* at 77.

⁵⁴ See *id.* at 122–58.

⁵⁵ See *id.*

⁵⁶ This can include dictating store hours, pricing, and staffing levels. See *Who's the Boss? The "Joint Employer" Standard and Business Ownership: Hearing Before S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 1 (Feb. 5, 2015); see also Chris Opfer, *Senate Panel*

franchisee gains access to a consumer-trusted brand while starting their business.

The franchise arrangement used by companies like McDonald's render traditional unionization difficult and ineffective. First, the nature of franchisee-franchisor relation often puts downward pressure on wages, which results in low-wage and part-time work, as a means to avoid triggering additional benefits.⁵⁷ This combination, in turn, leads to high turnover and workers juggling multiple jobs, both of which leave them with little time and motivation to unionize a bad but ultimately short-term workplace.⁵⁸

Moreover, franchisee workers can typically only unionize on a franchisee-by-franchisee basis, since the franchisee of each in particular location traditionally stands as the sole employer of the workers in its particular establishment. This is a problem for workers who want to use collective action as a way to negotiate for improved conditions, since the inaccessible franchisor can maintain significant control over rules about employee scheduling and human resource activities and yet are not at the bargaining table.⁵⁹ Thus, even if unionization efforts are successful, the franchisor's control means franchisees have little room to meaningfully negotiate on issues like wages and working conditions.⁶⁰ While the answer here may be that the franchisors that exert substantial control over the terms and conditions of work most salient to workers should be held a joint employer, the litigation required to achieve that outcome is time-consuming and costly.⁶¹

As a result of globalization and new technological developments, companies have also moved further away from long-term employment

Eyes Joint Employer Liability, as Opponents Get Ready for NLRB Decision, BNA LABOR REL. WK. (Feb. 11, 2015).

⁵⁷ Franchisees pay royalties based on revenue, not profit. As a result, franchisees benefit from increased profit per sale while franchisors benefit from increased sale volume. As a result, the franchisor structures franchise agreements to maximize sale volume. See WEIL, *supra* note 46, at 122–58. Thus, franchisees are in turn incentivized to cut unfixed costs, which often means labor costs and health and safety. One study found the probability of noncompliance to be 23.6% higher among franchisee-owned restaurants than among similar company-owned ones. See *id.* at 131 (citing Min Woong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchising on Labor Standards Compliance* (2009)).

⁵⁸ See *id.*; see also Steven Greenhouse, *In Drive to Unionize, Fast-Food Workers Walk Off the Job*, N.Y. TIMES (Nov. 28, 2012) [hereinafter Greenhouse, *Fast-Food Workers Walk Off the Job*].

⁵⁹ See Greenhouse, *Fast-Food Workers Walk Off the Job*, *supra* note 58.

⁶⁰ See WEIL, *supra* note 46, at 122–58.

⁶¹ By way of example, a set of cases claiming McDonald's (the franchisor) exerts sufficient control over individual franchisee restaurants such as to be a joint employer and is thus jointly liable for labor law violations are ongoing though they have been litigated *since November 2012*. See McDonald's USA, LLC, 36 N.L.R.B. 144 (2016).

promises.⁶² In the June 2013 issue of the Harvard Business Review, Reid Hoffman, co-founder of LinkedIn, and co-authors argued that globalization and the Information Age had eroded stability, put adaptability and entrepreneurship front and center, and “demolished the traditional employer-employee compact and its accompanying career escalator in the U.S. private sector.”⁶³ In this world, they recommended workers think of themselves as “free agents” and the development of a new employer-employee compact based on “tours of duty,” where employees are hired for a specified number-of-year “tours,” typically two to four, with specific and tangible goals.⁶⁴ While commentators often assume this shift to a “gig economy” is a bad thing, not all workers are opposed. Younger workers especially embrace the role of freelancer in the knowledge economy.⁶⁵ But regardless of one’s views on long-term versus short-term employment, the less time workers expect to spend at a particular company, the less likely they will be willing to organize to improve the terms and conditions of working there.⁶⁶

Not all workers have experienced the full-force of the fissuring and precarious employment practices described above. Like the welfare capitalists of the 1920s, some companies have found it in their interest to invest in sophisticated human resource practices designed to earn employee trust and loyalty, which in turn contributes to increased productivity.⁶⁷ Some younger workers are especially drawn to this strategy, as they seek out jobs that give them a sense of meaning,⁶⁸ and

⁶² See Stone, *supra* note 15, at 298; see also Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 5 (1993).

⁶³ See Reid Hoffman, Ben Casnocha & Chris Yeh, *Tours of Duty: The New Employer-Employee Compact*, HARV. BUS. REV., June 2013.

⁶⁴ See *id.*

⁶⁵ STONE, *supra* note 6.

⁶⁶ See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (discussing the exit versus voice mechanisms).

⁶⁷ Research shows that when workers feel connected to the larger company “mission,” they also work harder. See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543, 546–50 (1982). “Welfare capitalism” describes the ethos that emerged in the 1920s that companies could do well by doing good for employees. Profit sharing and stock bonuses, designed to align employee interests with the company’s success, were first seen at this time. Cooperative employer-employee relations were also exemplified through the emergence of group insurance policies, pensions, free clinics, employee cafeterias, and human resource departments and company unions that ran picnics, glee clubs, dances, and plant-sponsored recreational events. See MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 230–31 (8th ed. 2010); see also SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1998).

⁶⁸ See, e.g., Rachel Feintzeig, *I Don’t Have a Job. I Have a Higher Calling*, WALL ST. J. (Feb. 24, 2015, 7:39 PM), <http://www.wsj.com/articles/corporate-mission-statements-talk-of-higher-purpose-1424824784>. While we might imagine companies only make do-good commitments to in-demand workers, that is not the case. As a Kohl’s executive was recently quoted as saying in

will explicitly forgo increased monetary compensation in order to work for a company that aligns with their moral convictions.⁶⁹ And while the ability to work for a company that aligns with a worker's personal convictions creates an opportunity for low-wage workers as well as high to find dignity and meaning in the workplace, strong identification with the employer and its mission makes traditional 1930s unionization less appealing.⁷⁰

B. *The Current NLRA and LMRA Regimes*

Federal labor law also makes traditional unionization both difficult to achieve and less attractive when it is because of both its weak protection of unionization efforts and recent doctrinal shifts concerning how unions are paid for their efforts.

Start with obstacles to unionizing. As many scholars have explained, while the NLRA is meant to protect workers as they exercise their rights to organize and act collectively for their mutual aid and protection, the statute fails to adequately disincentivize employers from infringing on that right.⁷¹ Workers who are wrongly discharged in retaliation for engaging in protected activity can at most receive back pay; punitive damages are unavailable. While reinstatement of wrongly discharged workers is an available remedy, the delays involved in those proceedings have made them insufficient, costly, and capable of chilling worker activity.⁷² And, given an employer can frequently quash organizing drives by simply firing (albeit unlawfully) a few union supporters, it is rational for them to do so.⁷³ And employers do; one

an investor call, if retail associates “can truly relate their work to some higher purpose,” they will sell more products. *See id.*

⁶⁹ See Michel Anteby, *Identity Incentives as an Engaging Form of Control: Revisiting Leniencies in an Aeronautic Plant*, 19 *ORG. SCI.* 202, 215 (2008) (noting that identity incentives may lessen the importance of financial compensation); *see also* Akerlof, *supra* note 67 (hypothesizing the same).

⁷⁰ See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 *IOWA L. REV.* 1179, 1219 (2010) (“[An] association with a powerful or desirable brand thus offers a dignified and empowering alternative to the reality of most low-waged workers’ lives.”).

⁷¹ See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 *TEX. L. REV.* 1563 (1996); Estlund, *The Ossification of American Labor Law*, *supra* note 6; Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 *N.Y.U. L. REV.* 827 (1996); Katherine V. W. Stone, *Rethinking Labour Law: Employment Protections for Boundaryless Workers*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 155 (Guy Davidov & Brian Langille eds., 2006); Weiler, *supra* note 6.

⁷² See Sachs, *Employment Law as Labor Law*, *supra* note 8, at 2694–95; *see also* Estlund, *The Ossification of American Labor Law*, *supra* note 6; Weiler, *supra* note 6.

⁷³ See Sachs, *Employment Law as Labor Law*, *supra* note 8, at 2695 (citing Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 *EMP.*

study found that one in five workers who takes an active role in organizing their workplace is illegally discharged for doing so.⁷⁴ The courts also restrict union organizing and economic activity in ways that would seem constitutionally problematic if done to other forms of voluntary associations: organizing drives and peaceful campaigns have been blocked by RICO,⁷⁵ secondary boycotts are prohibited, as is recognitional and secondary picketing.⁷⁶

The conditions for workers with joint employers has also changed significantly over time, though recently in a way that makes finding a joint-employer relationship easier than it has been for almost thirty years. While between 1947 and 1984 joint employer status was found where an employer had indirect control over, or authority under the contract to control, a contractor's employee's terms and conditions of work (e.g., wages) and joint-employer status was necessary for bargaining to be meaningful,⁷⁷ that test was curtailed over time. From the mid-1980s until August 2015, the Board has looked at whether the putative joint employer had direct and immediate control over things like hiring, firing, supervision, and direction.⁷⁸ After failing to revise this stricter standard in at least three cases,⁷⁹ in *Browning-Ferris Industries of California*, the Board decided in a 3-2 split on political lines to return to the pre-1980s common law test.⁸⁰ But while the Board's reversal, if conservatives and business interests are unable to get Congress to roll it back legislatively,⁸¹ will certainly give more contingent and contract

RTS. & EMP. POL'Y J. 317, 338 (1998)); see also Estlund, *The Ossification of American Labor Law*, *supra* note 6, at 1537.

⁷⁴ See Sachs, *Employment Law as Labor Law*, *supra* note 8, at 2697 (citing JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POL'Y RES., *DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS* (2007), http://www.cepr.net/documents/publications/unions_2007_01.pdf).

⁷⁵ See Crain & Matheny, *supra* note 43, at 577-78 (describing the use of RICO); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617 (2011).

⁷⁶ See National Labor Relations Act, ch. 372, § 8(b)(4), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 158(b)(4), (b)(7) (2012)).

⁷⁷ See, e.g., *Floyd Epperson*, 202 N.L.R.B. 23 (1973), *enforced*, *NLRB v. Epperson*, 491 F.2d 1390 (6th Cir. 1974); *Jewel Tea Co.*, 162 N.L.R.B. 508 (1966) (finding respondent, who had indirect control over wages and discipline, joint employer).

⁷⁸ See *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enforced*, *Harvey v. New Jersey*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984).

⁷⁹ See *AM Prop. Holding Corp.*, 350 N.L.R.B. 998 (2007); *Airborne Freight Co.*, 338 N.L.R.B. 597 (2002); *M. B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000). In June 2014, the NLRB General Counsel filed an amicus brief in *Browning-Ferris Industries of California, Inc.*, NLRA Case No. 32-RC-109684, asking the Board to reconsider the joint employer standard.

⁸⁰ See *Browning-Ferris Industries of California, Inc.*, NLRA Case No. 32-RC-109684 (Decided Aug. 27, 2015).

⁸¹ See Chris Opfer, *Joint Employer Opponents Turn Attention to Congress*, *Daily Lab. Rep. (BNA)* No. 166, at AA-3 (Aug. 27, 2015); Lydia DePillis, *Bracing for Labor Board Decision, Franchises Spend Recess Courting Democrats*, *WASH. POST: WONKBLOG* (Aug. 25, 2015), <http://>

workers the ability to negotiate with, for instance, franchisors, workers face another hurdle to bargaining: while a union can organize a bargaining unit that consists of both temporary and jointly employed workers with workers who are solely employed by one of those employers, they can do so only if both employers consent.⁸²

In addition, two recent cases underscore how labor law imposes additional costs on unionizing efforts while also shedding light on the obstacles the law creates for workers and employers to cooperate.

During its October 2013 Term, the Supreme Court heard oral arguments in *Unite Here Local 355 v. Mulhall*, a case that was simultaneously described as “under-the-radar” and “the most significant labor case in a generation.”⁸³ On the surface, the case concerned the legality of a Memorandum of Agreement (MOA) between a corporation and union in Florida. In the agreement, the union promised to expend money and other resources to support a ballot measure that, if passed, would allow the company to get a gaming license.⁸⁴ The union also agreed to forgo its right to put economic pressure on the employer.⁸⁵ In exchange, the company agreed that if it got the gaming license, it would remain neutral on union organizing, agree to a card check, and permit the union access to its property and employees, above what the law already required.⁸⁶ This seemed like a win all around: the company got help getting the license it needed in order to operate, and the union, while by no means guaranteed that the company’s employees would elect it as their bargaining representative, would have ground rules that would make it easier to promote itself to them for that purpose. The workers also benefited from both the availability of more jobs (assuming the company got its license) and additional information about what one union that wanted to represent them would and would not be able to do on their behalf if elected (e.g., bargain but not boycott). The plan started well. The union expended upwards of \$100,000 promoting the initiative,

www.washingtonpost.com/news/wonkblog/wp/2015/08/25/bracing-for-labor-board-decision-franchises-spend-recess-courting-democrats.

⁸² See *H.S. Care L.L.C.*, 343 N.L.R.B. 659 (2004). The prior test found that the scope of the bargaining unit should be determined by the work being performed—if both temporary and regular employees were doing the same work, a single bargaining unit would be appropriate without employer consent. See *M. B. Sturgis*, 331 N.L.R.B. 1298. The Board is set to revisit this question in *Miller & Anderson, Inc.*, Case No. 05-RC-079249 (May 18, 2015) (granting review of 2012 decision dismissing union election petition).

⁸³ See Josh Eidelson, *Scalia’s Chance to Smash Unions: The Huge Under-the-Radar Case*, SALON (Nov. 13, 2013, 8:30 AM), http://www.salon.com/2013/11/13/scalias_chance_to_smash_unions_the_huge_under_the_radar_case.

⁸⁴ See *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012).

⁸⁵ See *id.*

⁸⁶ See *id.*

which passed, and the company received a gaming license.⁸⁷ Soon, however, the company told the union that it would not honor its side of the bargain.⁸⁸ It did not have to do so, the company asserted, because the entire MOA was illegal from the start.⁸⁹ Section 302(a)(2) of the Labor-Management Relations Act makes it a crime for an employer “to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value” to “any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer.”⁹⁰ And, as the company now saw it, the MOA was a thing of value; it had agreed to pay or deliver to the union. Parting ways with both the Third and Fourth Circuits, which both held MOAs were not “things of value” implicating section 302 at all, the Eleventh Circuit held that MOAs could indeed violate section 302, depending on the intent of the parties.⁹¹ The Supreme Court granted certiorari and heard oral arguments. However, because the Court eventually dismissed the writ as improvidently granted, the circuit split remains.⁹² Where MOAs are vulnerable to section 302 challenges, we should expect to see less unionization. While unions win approximately seventy-eight percent of campaigns conducted under MOAs that include card checks, without them, that number drops to forty-five percent.⁹³

Both section 302 and section 8(a)(2) were also in play in the recent Volkswagen unionization efforts. In February 2014, employees at the German car manufacturer’s Chattanooga, Tennessee assembly plant voted on whether to join the United Auto Workers (UAW). While no foreign car manufacturer has ever successfully been unionized in the United States, VW “hinted [it] might even prefer having a union.”⁹⁴ The reason: VW’s international labor relations. Specifically, VW has work

⁸⁷ See *Mulhall v. Unite Here Local 355*, 618 F.3d 1279 (11th Cir. 2010).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ As will also be relevant, section 302 prohibits an employer to provide things of value to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing.

29 U.S.C. § 186(a)(3) (2012).

⁹¹ See *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008); *Hotel Emp.’s & Rest. Emp.’s Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

⁹² See *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (Breyer, J., dissenting).

⁹³ See *Labor’s Supreme Test*, WALL ST. J. (Nov. 14, 2013 9:58 PM), <http://www.wsj.com/articles/SB10001424052702303460004579191820419342020>. That is to say nothing of how many unions never get sufficient worker support to even have an election in the first instance.

⁹⁴ Steven Greenhouse, *Outsiders, Not Auto Plant, Battle U.A.W. in Tennessee*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/business/outside-not-auto-plant-battle-uaw-in-tennessee.html?_r=0.

councils for blue and white-collar employees outside of the United States, with each of its over one-hundred major factories holding a seat on the VW Global Group Works Council.⁹⁵ Each, that is, except Chattanooga.⁹⁶ VW wanted to change that. As VW said in a joint press release with the UAW, VW saw giving workers an “integral role in managing the company” as “a fundamental part of their global business model and . . . a key factor in Volkswagen’s success.”⁹⁷ The work council was how VW went about doing that.

The problem, though, was that bringing the VW Global Group Works Council structure to Chattanooga was thought to violate both section 8(a)(2) of the NLRA and 302 of the LMRA. Similar in scope to section 302 of the LMRA, section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”⁹⁸ In other words, VW creating or even contributing financially to the work council, which would meet the definition of a “labor organization,” was unlawful. The company thought the solution was to enter into an MOA with the UAW whereby Volkswagen would stay neutral on organizing in exchange for, among other things, the UAW’s support, if elected, in creating a work council that would not violate section 8(a)(2).⁹⁹

In response, the National Right to Work Legal Defense Foundation filed suit on behalf of a few VW workers, alleging the MOA violated section 302.¹⁰⁰ The lawsuit was later withdrawn, however, when the UAW lost 712-626.¹⁰¹ As a result, Chattanooga remains unrepresented on the VW Global Group Works Council. Instead, VW created a

⁹⁵ See Andreas Cremer, *VW Paves Way for UAW Representation at U.S. Plant*, REUTERS (Nov. 12, 2014, 3:01 PM), <http://www.reuters.com/article/2014/11/12/us-volkswagen-uaw-idUSKCN0IW2EP20141112>.

⁹⁶ *Id.*

⁹⁷ Press Release, Volkswagen Grp. Of Am. & United Auto Workers, *Co-Determining the Future: A New Labor Mode* (Mar. 12, 2014), <https://web.archive.org/web/20140312152105/http://uaw.org/sites/default/files/VW%20Media%20Background%20Sheet.pdf>.

⁹⁸ 29 U.S.C. § 158(a)(2) (2012).

⁹⁹ See Complaint, *Burton v. UAW*, No. 1:14-cv-00076 (E.D. Tenn. Mar. 12, 2014), <http://nashvillepublicmedia.org/wp-content/uploads/2014/03/1-Complaint.pdf> (No. 1:14-cv-00076).

¹⁰⁰ *Id.* at 1.

¹⁰¹ Paul M. Barrett, *UAW’s Devastating Defeat in Tennessee: Four Blunt Points*, BLOOMBERG BUS. (Feb. 17, 2014), <http://www.bloomberg.com/bw/articles/2014-02-17/uaws-devastating-defeat-at-a-tennessee-volkswagen-plant-four-blunt-points>. The loss came after Tennessee lawmakers threatened to withhold tax incentives from VW if the union won. See Gabe Nelson, *Tenn. Politicians Threaten to Kill VW Incentives if UAW Wins Election*, AUTOMOTIVE NEWS (Feb. 10, 2014, 4:23 PM), <http://www.autonews.com/article/20140210/OEM01/140219986/tenn.-politicians-threaten-to-kill-vw-incentives-if-uaw-wins-election>; see also Benjamin Sachs, *Conditioning Tax Incentives on VW’s Union Status?*, ONLABOR (Feb. 11, 2014), <http://onlabor.org/2014/02/11/conditioning-tax-incentives-on-vws-union-status>.

Chattanooga-specific representation system it believes complies with section 8(a)(2). Under the adopted system, VW created tiers, in which labor organizations get different privileges depending on the percentage of workers they represent. The top level, which UAW achieved with forty-five percent of workers, provides access to plant property for meetings with members and the company. Unlike the Global Work Council, though, the UAW does not get to actually bargain with VW.¹⁰² In other words, while VW wanted to work and bargain with its Chattanooga employees through its robust Global Work Council, which has the power to negotiate with VW over a litany of issues ranging from workplace conditions to job security, federal labor law prohibited VW from doing so.¹⁰³

Twenty-five states and counting have also passed “right to work” legislation—legislation that imposes financial costs on unions that are elected.¹⁰⁴ Under these laws, employers and unions are statutorily prohibited from contracting to require non-union members of bargaining units to pay for the services the union is *legally required* to provide them.¹⁰⁵ And when state-level right to work laws have failed, right to work activists have pushed local governments to pass city versions.¹⁰⁶ A de facto right to work regime may also be coming soon to public sector workers. In June 2015, the Supreme Court granted certiorari in *Friedrichs v. California Teachers Association*, where the Court will decide whether requiring union-represented public sector employees to pay their share of the costs that the union bears in negotiating and executing the collective bargaining agreement violates the First Amendment.¹⁰⁷ The Court already held such arrangements violate the First Amendment for home health care providers in *Harris v.*

¹⁰² VOLKSWAGEN GRP. OF AM., COMMUNITY ORGANIZATION ENGAGEMENT (2014), <http://onlabor.files.wordpress.com/2014/11/vw-communityorganizationengagement.pdf>.

¹⁰³ As discussed in Part III, some would argue that even this limited recognition and dealing violates section 302. See *infra* Section III.A.

¹⁰⁴ See Alejandra Cancino, *Illinois Unions Ramp Up to Thwart “Right to Work”*, CHI. TRIB. (Mar. 13, 2015, 4:08 PM), <http://www.chicagotribune.com/business/ct-right-to-work-illinois-0316-biz-20150313-story.html>.

¹⁰⁵ For scholarly criticism of the federal duty of fair representation and state rules prohibiting compensation for those costs, see Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work*, 4 U.C. IRVINE L. REV. 857, 857–59 (2014).

¹⁰⁶ See Cancino, *supra* note 104 (“In Kentucky[,] . . . conservative groups are pushing for local right-to-work laws after statewide proposals have failed. At least 10 Kentucky counties have approved the measures, which unions are fighting in courts, arguing that only states have the power to enact such laws.”); *Right-to-Work: Local Governments Test Limits of Labor Laws*, ST. J. (Aug. 5, 2015, 8:33 AM), <http://www.state-journal.com/zillow/2015/08/05/right-to-work-local-governments-test-limits-of-labor-laws>.

¹⁰⁷ Petition for Writ of Certiorari, *Friedrichs v. Cal. Teachers Ass’n*, 135 S. Ct. 2933 (2015) (No. 14–915), 2015 WL 393856.

Quinn.¹⁰⁸ In short, the federal labor law regime makes traditional unionizing both difficult and costly. It is not surprising that workers look to non-union alternatives.

C. *The Consumer Market for “Ethically Made” Goods and Services*

While the changing nature of work and current labor law motivate workers to find alternative means of organizing, consumer demand for ethical companies and products has also affected the development and strategies of these worker organizations.¹⁰⁹

Throughout history, those concerned with the treatment of workers have developed initiatives designed to increase consumer demand for ethically sourced products. Quaker abolitionists promoted the buying of slavery-free cotton and fruit, workers politicized consumption through boycotts, cooperatives, and the promotion of “union made” labels,¹¹⁰ and at least since the mid-1980s “fair trade,” “locally made,” and “sweatshop-free” labels attempt to do the same.¹¹¹ Companies, aware of this consumer demand and the fact that some consumers are willing to pay a premium for products they believe to be ethically sourced, have tried to capitalize on this by positioning themselves as socially responsible sellers of ethically produced goods.¹¹²

Consumer demand for products made by workers who are treated “well” has the potential to help improve the conditions of work. If a

¹⁰⁸ Harris v. Quinn, 134 S. Ct. 2618 (2014).

¹⁰⁹ See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 573 (2009) (defining this as the “market for altruism,” a demand for the good-feeling that comes when others’ lives are improved).

¹¹⁰ See DANA FRANK, PURCHASING POWER: CONSUMER ORGANIZING, GENDER, AND THE SEATTLE LABOR MOVEMENT, 1919–1929, at 225 (1994).

¹¹¹ The Fair Trade label can be traced to 1988 and a church-based NGO in the Netherlands. The first “fair trade” started in the 1950s when the European Alternative Trade Organization began direct trade with producers in developing countries thought disadvantaged.

¹¹² See Jens Hainmueller et al., *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242 (2015), http://www.mitpressjournals.org/doi/abs/10.1162/REST_a_00467#.VjUcRoS4k0o (“[S]ales of the two most popular coffees rose by almost 10% when they carried a Fair Trade label as compared to a generic placebo label. Demand for the higher-priced coffee remained steady when its price was raised by 8%, but demand for the lower-priced coffee was elastic: a 9% price increase led to a 30% decline in sales.”); Michael J. Hiscox et al., *Consumer Demand for Fair Labor Standards: Evidence from a Field Experiment on eBay* (Apr. 12, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811788 (finding that consumers on eBay were willing to pay a 45% premium for shirts labeled SA8000-certified over unlabeled shirts); Remi Trudel & June Cotte, *Does it Pay to Be Good?*, MIT SLOAN MGMT. REV., Winter 2009, <http://sloanreview.mit.edu/article/does-it-pay-to-be-good/> (“Consumers are in fact willing to pay more for ethically produced goods. Consumers will demand a substantial discount from companies that produce goods in an unethical manner.”).

company realizes it can increase profits by paying its workers more, the company has a good reason to do so. The danger, from the perspective of the would-be worker beneficiaries, is the possibility that some companies that promote itself as paying its workers a “living wage” or “fairly” (or whatever else consumers want), are able to reap the benefits of those commitments without actually making good on them.

Take Wal-Mart for example. Wal-Mart has a “Responsible Sourcing” Code of Ethics with which its suppliers are to comply. The first line of the Code states, “[t]he safety and well being of workers across our supply chain is the Responsible Sourcing group’s top priority.”¹¹³ It includes things like prohibitions on slave, child, and indentured labor, human trafficking, and requires suppliers to take steps to prevent workplace health and safety hazards. There is also a provision protecting worker freedom of association and collective bargaining.¹¹⁴ This all sounds like Wal-Mart is improving the conditions of work for workers in its supply chain, something traditional unions attempt to achieve through collective bargaining, and something conscious consumers would find attractive. But as a recent report from the Food Chain Workers Alliance notes, “Walmart’s commitments to improving standards appear to be mostly a public relations stunt and haven’t translated to improvements in conditions for most of its food supply chain.”¹¹⁵ The co-director of the Food Chain Workers Alliance states, “[t]here is absolutely no way of verifying their claims or of ensuring that the claims are systemic and creating the kinds of conditions, in terms of workplaces and environment, that we need for food to be healthy and procured without suffering.”¹¹⁶

Nestlé provides another example. One of its corporate business principles is the protection of human rights and the elimination of all forms of forced or compulsory labor, stating publically that it “require[s] [its] suppliers, agents, subcontractors and their employees to . . . adhere to [its Supplier Code],” which itself states that “Supplier must under no circumstances use, or in any other way benefit, from forced labour.”¹¹⁷ However, a July 2015 New York Times exposé

¹¹³ *Standards for Suppliers*, WALMART, <http://corporate.walmart.com/global-responsibility/ethical-sourcing/standards-for-suppliers> (last visited Oct. 31, 2015).

¹¹⁴ *See id.*

¹¹⁵ FOOD CHAIN WORKERS ALL., *WALMART AT THE CROSSROADS: THE ENVIRONMENTAL AND LABOR IMPACT OF ITS FOOD SUPPLY CHAIN 1* (Erika A. Inwald ed., 2015), <http://foodchainworkers.org/wp-content/uploads/2015/06/Walmart-at-the-Crossroads-FINAL-06.04.15.pdf>.

¹¹⁶ Eliza Barclay, *The Salt: Why Wal-Mart’s Labor Issues Run Deeper than Too Much Justin Bieber*, NAT’L PUB. RADIO (June 5, 2015, 1:41 PM), <http://www.npr.org/sections/thesalt/2015/06/05/411978638/why-wal-marts-labor-issues-run-deeper-than-too-much-justin-bieber>.

¹¹⁷ *See* NESTLÉ, *THE NESTLÉ SUPPLIER CODE 2* (2013), <https://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>.

documented how Nestlé and other companies used fish caught by “sea slaves” in their pet foods like Fancy Feast.¹¹⁸ While the company’s “Nestlé in Society Full Report 2014,” which discusses its human rights program, states that its main seafood supplier in Thailand is working with an independent consulting firm to trace its products through the supply chain, the report does not disclose whether there have been any known instances of forced labor in its supply chain.¹¹⁹ Instead it merely states that its “ambition is to confirm that the fish and seafood [it] source[s] comes from healthy fisheries or from fisheries and farms engaged in improvement projects.”¹²⁰ Now, some California Fancy Feast purchasers have filed a class action against the company for violations of California’s consumer protection laws. Among other things, the plaintiffs allege that the company’s failure to disclose the use of forced labor in its supply chain was a material omission.¹²¹

The combination of consumer demand for ethically-created products and the difficulty of distinguishing the wheat from the chaff poses a real risk for the workers who stand to benefit.¹²² When consumers continue to receive the utility from *thinking* they purchased from morally preferred companies, and dishonest companies continue to receive undue profits, the very workers consumers are trying to benefit are potentially left in a worse position. If the segment of the public who cares about workers enough to pay for their better treatment thinks they are already helping them, those same people may be less inclined to look for other ways to help those same workers.¹²³ For

¹¹⁸ See Ian Urbina, ‘Sea Slaves’: *The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>.

¹¹⁹ See NESTLÉ, NESTLÉ IN SOCIETY: CREATING SHARED VALUE AND MEETING OUR COMMITMENTS 2014, at 122, http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-csv-full-report-2014-en.pdf.

¹²⁰ See *id.*

¹²¹ See Complaint, Barber v. Nestlé USA, Inc., No. 8:15-cv-1364 (C.D. Cal. Aug. 27, 2015), 2015 WL 5062446.

¹²² This is the labor equivalent of “greenwashing.” That is, spending money on advertising and marketing that lets the company claim to be green or good to workers instead of actually becoming so, which would require the implementation of new business practices. See *About Greenwashing*, GREENWASHING INDEX, <http://www.greenwashingindex.com/about-greenwashing> (last visited Mar. 23, 2016). An example in the greenwashing context being “a hotel chain that calls itself ‘green’ because it allows guests to choose to sleep on the same sheets and reuse towels, but actually does very little to save water and energy where it counts—on its grounds, with its appliances and lighting, in its kitchens, and with its vehicle fleet.” *Id.* If hotel guests think the hotel is already “green,” there is less a chance those consumers will pressure the company to change its practices to do more. *Id.*

¹²³ This of course assumes that if the consumer willing to pay a \$x premium for products made by workers treated well knew that that product was in fact not made by workers treated well, she would look to put \$x toward another product or initiative that did satisfy her desire to help workers.

consumers and the general public to think their purchase decisions are helping workers when they are not is particularly bad for workers today, when a majority of Americans are concerned about income inequality,¹²⁴ and support for minimum wage increases is up.¹²⁵ If the public thinks companies are improving their employment practices, momentum for legislative action may wane.

This same difficulty of distinguishing among companies in this market also makes it harder for workers to leverage consumer demand for the improved treatment of workers in the future. As economists would say, we have the makings of a “market for lemons.”¹²⁶ That is, because companies can reap the benefits of making commitments to do good things without following through, those companies that truly are committed to, for example, treating workers well, have less of an incentive to do so, as they cannot reap the benefits, but do still pay the higher costs.

Recognizing the limits of market and litigation-based solutions,¹²⁷ workers have responded to the potential and pitfalls of this consumer

¹²⁴ See Aaron Blake, *Why Income Inequality Is No Silver Bullet for Democrats and Hillary Clinton*, WASH. POST (May 6, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/06/why-hillary-clintons-income-inequality-argument-is-no-silver-bullet> (“Poll after poll shows a huge majority of Americans are concerned about income inequality. A recent Washington Post-ABC News poll showed 83 percent of Americans say the wealth gap is a problem . . .”).

¹²⁵ See Andrew Dugan, *Most Americans for Raising Minimum Wage*, GALLUP (Nov. 11, 2013), <http://www.gallup.com/poll/165794/americans-raising-minimum-wage.aspx> (“With momentum building at the federal and state level to increase hourly base pay, more than three-quarters of Americans (76%) say they would vote for raising the minimum wage to \$9 per hour (it is currently \$7.25) in a hypothetical national referendum, a five-percentage-point increase since March.”). In August 2015 the Democratic National Committee voted unanimously to approve a resolution to support raising the federal minimum wage to \$15 an hour. See Chris Opher, *Democrats Unanimously Back \$15 Minimum Wage*, BLOOMBERG BNA (Sept. 8, 2015), <http://www.bna.com/democrats-unanimously-back-n17179935669>.

¹²⁶ See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanisms*, 84 Q.J. ECON. 488 (1970).

¹²⁷ By way of example, the enforceability of commitments made in employee handbooks is a source of constant uncertainty. While today the majority of courts find that employee handbooks *can* alter the employment contract (typically changing the employment relation from at-will to for-cause), many of the sorts of more generalized commitments and policy statements workers rely on when choosing where and how hard to work are often not definite and specific enough to receive protection under contract law. See *Avoiding & Def. Wrongful Discharge Cl. § 2:24* (2015). And at least nine jurisdictions find that unless the handbook promises are put in an express employment contract, they do not create enforceable employment contracts at all. *Id.*; see also Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 674 (1984) (discussing how low quality sellers mimic the disclosure of facts buyers can verify while “making bogus statements about things” they cannot); Estlund, *Rebuilding the Law of the Workplace*, *supra* note 14, at 322 (“Observers from a range of perspectives have argued that the postwar regime of command-and-control regulation is losing its grip in the face of rapidly changing markets, technology, and firm structures; and that civil litigation is a costly, slower, and often inaccessible mechanism for

demand by putting pressure on reputation-sensitive companies to agree to outside monitoring by, among others, alternative forms of worker organizations.¹²⁸ And for good reason: experience has shown monitoring company compliance with worker-focused laws is more effective when workers themselves are involved.¹²⁹

II. CASE STUDIES OF EMPLOYER-LABOR ORGANIZATION COLLABORATIONS

When Americans think of worker organizations, they think of unions. I suspect they think of a teachers' union striking in Chicago, Sally Fields holding up a "UNION" sign in *Norma Rae*, or, if they watched *The Wire*, a union leader who becomes involved in organized crime as union work dries up. But regardless of which specific image comes to mind, underneath I suspect Americans think of self-funded organizations comprised of workers and union leaders that bargain exclusively, as a matter of NLRA-given right, with those workers' employer. While prevalent, this image of worker organization overlooks a wide swath of non-union worker organizations that also can provide benefits to workers.¹³⁰ And indeed, the confluence of changes in the nature of work, an increasingly unattractive labor law regime, and consumer demand for companies that treat workers well, has pushed workers to experiment with these nontraditional forms.¹³¹ And among these organizations, there has been further experimentation with regards to employer collaborations.

There are various explanations for why these organizations find relationships with employers advantageous. For one, because non-union forms of worker organizations lack dues-paying members, they also lack

securing workplace rights." (footnote omitted)); Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 765 (1997); William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253 (2003) (arguing that, after citing scholars who have criticized corporate health and safety reports as "simply token efforts" lacking credible and verifiable information finds, "relying on the integrity of corporate representations should seem increasingly naïve to those inside and outside the SRI community, particularly in the wake of the recent accounting scandals in the United States").

¹²⁸ See discussion *infra* Part II.

¹²⁹ See Estlund, *Rebuilding the Law of the Workplace*, *supra* note 14, at 372 ("Experience under the code of conduct regimes has suggested that effective monitoring requires the participation of workers.").

¹³⁰ Indeed, the public perception of unions today glosses over the heterogeneity of even more traditional unions' goals of the early twentieth century. See DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 6 (1987).

¹³¹ See Crain & Matheny, *supra* note 43, at 580 ("Union decline has not spelled the end of group action by workers."); Sachs, *Employment Law as Labor Law*, *supra* note 8.

revenue.¹³² Relationships with employers may be a partial solution to a funding problem. Alternatively, the organizations may come to believe that supply chains and other fissured workplaces are best improved by creating an ongoing relationship with the longest-term player: the end-of-chain, brand name company. And, these organizations may also recognize that at least some brand name companies are selling themselves to consumers as being ethical, which makes those companies vulnerable to the sorts of reputational damage the worker organization could inflict if the company fails to make good on its do-good commitments. And that risk, in turn, may make negotiating a mutually beneficial partnership with such companies possible and worthwhile. For other companies, working with worker organizations may make sense as a way to distinguish themselves as particularly good for workers. Employers have made such a calculus in the past. During the widespread promotion of the “buy union” label in the 1910s, for instance, companies realized that “label endorsement could often be so lucrative as to allow a manufacturer to forgo advertising altogether, as the free publicity more than compensated for higher production costs.”¹³³

Regardless of the reasons, experimentation with company partnerships has begun between organizations supporting workers both within and outside of NLRA coverage. However, because labor law prohibits employer support of “labor organizations,” experimentation for workers within NLRA coverage requires inefficient workarounds and behaviors that may ultimately be held unlawful. Below are examples of nontraditional worker organizations and collaborations happening today. Each provide reasons to believe that collaborations with companies have, or in the future could, provide additional benefits to workers.

A. *Examples from Outside NLRA Coverage*

While the NLRA covers employees, it does not cover all employees, let alone all workers. Agricultural laborers, domestic workers, and independent contractors are examples of groups excluded.¹³⁴ For these workers, who make up an increasingly large share of the American

¹³² See Crain & Matheny, *supra* note 43, at 579 (“Alternative forms of worker advocacy face the twin challenges of sustaining themselves over time without a stable membership base and a source of revenue.”).

¹³³ See FRANK, *supra* note 110, at 206.

¹³⁴ 29 U.S.C. § 152(3) (2012).

workforce, NLRA-backed unionization is not available.¹³⁵ And it is because these organizations fall outside of NLRA coverage that we see cooperation between these organizations and companies in ways that has helped some of the worst off workers. The following are a few examples.

1. Industry-Wide Organizations

Worker centers, while hard to define, are community-based organizations that provide support to and help organize communities of low-wage workers who do not have access to a traditional union.¹³⁶ They have “emerged in response to the decline of institutions that historically provided workers with a vehicle for collective action.”¹³⁷ Much like the mutual aid societies of the pre-NLRA nineteenth and early twentieth century, these organizations vary in their shape and size but generally provide some combination of: services (e.g., legal assistance to health clinics and education), advocacy (research, lobbying, and monitors), organizing outside the workplace (for economic action and policy change), and coalition building (with religious groups, government agencies, and other community organizations).¹³⁸

The New York Taxi Workers Alliance is a worker center. The organization started in 1997 in New York City as an offshoot of the Leased Drivers Coalition.¹³⁹ While in the past taxi drivers were the employees of medallion owners, over time, medallion owners realized the benefits of classifying taxi drivers as independent contractors who leased out the right to use their medallion (and thus drive a taxi).¹⁴⁰ Once independent contractors, the drivers were unable to unionize under the NLRA.¹⁴¹ With traditional unionization and collective bargaining off the table, a group created the Alliance, which advocated

¹³⁵ A study by the Bureau of Labor Statistics and the Government Accountability Office show that there are over 20 million independent contractors today. A 2006 report from the Government Accountability Office, the last one released, showed that 42.6 million workers, thirty percent of the American workforce, were independent contractors or contingent. One highly cited 2010 study estimates that by 2020, more than forty percent of the U.S. workforce, sixty million people, will be “contingent workers,” which means either contractors, temps, or independent contractors. INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 20–21 (2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf.

¹³⁶ See FINE, *supra* note 9, at 12–14.

¹³⁷ *Id.* at 14.

¹³⁸ See *id.* at 12–14.

¹³⁹ See *id.* at 137. Mutual aid societies “were once central to the provision of sickness, burial, and life insurance.” *Id.* at 36.

¹⁴⁰ See *id.* at 136.

¹⁴¹ See 29 U.S.C. § 152(3) (2012).

on drivers' behalf with the regulatory authorities, in addition to providing free and discounted legal support on taxi-related issues and help on issues surrounding immigration, health, and computer training.¹⁴²

Partnerships between the Taxi Worker Alliance and medallion owners could come in a variety of shapes.¹⁴³ To the extent the market for taxi drivers is competitive, medallion owners need to offer drivers additional compensation. Drivers, as independent contractors, do not receive health and other benefits as part of their compensation from medallion-owning companies. We can imagine, however, that medallion owners might want to find a way to offer those benefits while not taking on employer status. Offering to subsidize drivers' membership fees in the Alliance is one way to do that. For a medallion owner, subsidizing the Alliance is in essence a way to efficiently outsource the provision of certain goods workers demand. And indeed, something like this is already developing for on-demand drivers. Groove, which sells itself as a driver "clubhouse," offers San Francisco "on demand" drivers from companies like Lyft and Uber a 24-hour community space where they can get free coffee, access Wi-Fi, access a bathroom, and buy food.¹⁴⁴ Groove is also working on providing additional services in the future, including classes on how to get better tips, use technology, and manage income.¹⁴⁵ As Groove told reporters, while it currently charges drivers thirty dollars per month for membership, they "hope[] . . . ride companies will buy memberships for their fleets."¹⁴⁶ Breeze, a company that leases cars to ride-service drivers, has already done so.¹⁴⁷

While Groove is nascent, it hints at how a non-union form of worker organization could partner with companies to provide workers the kinds of goods they want but companies may find too costly to provide directly. The worker organization develops, gains recognition and credibility in the driver market, and then partners with employers. The employer subsidizes worker membership and in exchange can signal to the driver market the credibility of its commitment to treat its

¹⁴² See FINE, *supra* note 9, at 137.

¹⁴³ However, antitrust worries will persist in the background. While Norris-LaGuardia and the Clayton Act expressly make antitrust laws inapplicable to labor organizations and labor groups, *see* 15 U.S.C. § 17 (2012); 29 U.S.C. §§ 101, 105, the Supreme Court has held that does not include an organization of independent contractors. *See* H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704 (1981); *United States v. Hutcheson*, 312 U.S. 219 (1941).

¹⁴⁴ See Carolyn Said, *There's Now a Clubhouse for Uber, Lyft, Sidecar Drivers*, SFGATE (Jan. 8, 2015, 6:46 PM), <http://www.sfgate.com/business/article/There-s-now-a-clubhouse-for-Uber-Lyft-Sidecar-6002951.php>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

drivers well. At the same time, the employer reaps potential reputational benefits if the worker organization then promotes its company over others.

Depending on the particulars, this arrangement could avoid sections 8(a)(2) and 302. If all drivers are independent contractors, the NLRA is avoided. However, as discussed in Part III, the classification of these drivers as independent contractors has been hotly contested, with the California Labor Commissioner finding an Uber driver an employee and a California district court denying Uber's motion for summary judgment that the Plaintiff-drivers were independent contractors as a matter of law.¹⁴⁸ If we then assume the organization caters to both drivers who are employees and independent contractors, the bans on company support may still be avoided, so long as the organization does not "deal with" employers over "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."¹⁴⁹ However, if the organization begins putting pressure on companies to subsidize their workers' membership in the organization or has discussions with companies about which benefits to provide or how much money the employer companies should pay, dealing may be present, and the relevant bans will kick in.

2. Vertical Organizations

In addition to worker centers, workers who fall outside NLRA coverage have also created organizations that resemble trade associations. These organizations are particularly interesting, having helped some of the worst off workers by creating highly effective company partnerships whereby the partnership organization not only sets standards but provides direct goods to workers and acts as a third-party monitor of the company's commitments—and they do all this by accepting funding from companies.

One example begins with the Coalition of Immokalee Workers, a worker center started in 1993 by Florida tomato pickers as a way to fight low pay, slavery, and indentured servitude among Florida farm workers.¹⁵⁰ In 2011, the Coalition launched the Fair Food Program.¹⁵¹

¹⁴⁸ See Order, *Barbara Ann Berwick v. Uber Technologies, Inc.*, Case No. 11-46739, Labor Commissioner of the State of California (June 3, 2015); Order, *O'Connor v. Uber Technologies, Inc.*, Case No. C-13-3826 (March 11, 2015).

¹⁴⁹ 29 U.S.C. § 152(5) (2012).

¹⁵⁰ The Coalition describes itself as a "worker-based human rights organization." *About CIW*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/about> (last visited Oct. 31, 2015). Agricultural laborers have been described by the Department of Labor as "a labor force in significant economic distress" with "[l]ow wages, sub-poverty annual earnings, [and]

The Program creates a partnership among farm workers, Florida tomato growers, and buyers, whereby buyer-companies, from Whole Foods to Walmart, sign a binding Fair Food Agreement that requires them to pay a premium on the price for tomatoes.¹⁵² That premium, a cent per pound, goes directly to workers as a line-item bonus.¹⁵³ Buyers who sign onto the Program also agree to only buy from farms that adhere to the Fair Food Program Code of Conduct.¹⁵⁴ In other words, signatories agree to require all the tomato suppliers in their supply chain to agree to the Fair Food Program Code of Conduct as a condition of doing business.

The Code of Conduct requires supplier-farms to allow the Coalition to go on-site to provide workers education and monitor ongoing compliance.¹⁵⁵ The Fair Food Standards Council oversees compliance; its Board of Directors includes a retired judge, academics, human rights workers, the General Counsel of the Coalition of Immokalee Workers, and two other members of the Coalition.¹⁵⁶ The Program has received a number of awards and was declared the “single most effective prevention program in the U.S. agricultural industry” by PBS Frontline.¹⁵⁷

In January 2015, Fresh Market, a small competitor of Whole Foods, signed a Fair Food agreement with the Coalition. The company said, “being a part of the FFP [Fair Food Program] helps us to know we are sourcing from growers whose practices are fair and socially responsible. This allows us to provide our customers with food they can feel good about purchasing and enjoy sharing with friends and family.”¹⁵⁸ As part

significant periods of un- and underemployment.” U.S. DEP’T OF LABOR, THE AGRICULTURAL LABOR MARKET—STATUS AND RECOMMENDATIONS (2000), https://migration.ucdavis.edu/rmn/word-etc/dec_2000_labor.htm.

¹⁵¹ See *About CIW*, *supra* note 150.

¹⁵² See *id.*

¹⁵³ See *id.*; Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES (Apr. 24, 2014) [hereinafter Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*], <http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html>.

¹⁵⁴ See Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, *supra* note 153.

¹⁵⁵ See *id.*

¹⁵⁶ See FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2014 ANNUAL REPORT, <http://www.fairfoodstandards.org/reports/14SOTP-Web.pdf>.

¹⁵⁷ FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: REPORT, 2011–2013 (2013), <http://fairfoodstandards.org/cms/wp-content/uploads/2015/08/13SOTP-Web.pdf>; Richard Chin Quee, *Rape in the Fields: A Frontline/Univision Investigation*, WGCU (June 19, 2013), <http://news.wgcu.org/post/rape-fields-frontlineunivision-investigation>.

¹⁵⁸ Press Release, Coal. of Immokalee Workers, Fresh Market Signs Fair Food Agreement with CIW! (Jan. 8, 2015), <http://ciw-online.org/blog/2015/01/fresh-market-signs>.

of the agreement, Fresh Market agreed to make an annual contribution to support the Council.¹⁵⁹

In July 2015, Ahold USA, the parent company of Stop & Shop, Giant Foods, Martin's, and the online grocer Peapod, also signed on to the Fair Food Program. As part of the agreement, Ahold USA agreed to require its Florida tomato farmers to permit the Coalition on for inspections and audits, pay a premium on tomatoes, provide the organization with marketing and advertising, including in-store displays, and provide financial support for the Fair Food Standards Council.¹⁶⁰ So long as this program only supports agricultural workers, who are not covered by the NLRA, sections 8(a)(2) and 302 are not a problem.¹⁶¹

Outside the United States, another example of a company-labor partnership that takes the form of a hybrid trade association/third-party monitor is the Accord on Fire and Building Safety in Bangladesh. In April 2013, the Rana Plaza factory collapsed in Bangladesh, killing more than 1100 people and injuring 2000 more. It remains the deadliest garment factory accident in history.¹⁶² The event also became something of a public relations nightmare once it came out that a number of high-profile clothing companies outsourced manufacturing to the factories housed in the buildings, where safety violations were rampant and oversight non-existent.¹⁶³

In response, a combination of 200 apparel companies and retailers signed on to the Accord, along with both unions and human rights organizations.¹⁶⁴ The Accord is described as a “five year independent, legally binding agreement between global brands and retailers and trade unions designed to build a safe and healthy Bangladeshi Ready Made Garment (RMG) Industry.”¹⁶⁵ Under the agreement, signatories commit

¹⁵⁹ See *id.*

¹⁶⁰ See Ahold USA Press Release, *supra* note 39.

¹⁶¹ See 29 U.S.C. § 152(3) (2012).

¹⁶² See Sarah Butler, *Bangladesh Garment Workers Still Vulnerable a Year After Rana Plaza*, GUARDIAN (Apr. 24, 2014, 2:48 PM), <http://www.theguardian.com/world/2014/apr/24/bangladesh-garment-workers-rights-rana-plaza-disaster>; Jim Yardley, *Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html>.

¹⁶³ See Steven Greenhouse, *3 Retailers Give Aid to Bangladesh Workers*, N.Y. TIMES (Mar. 28, 2014), <http://www.nytimes.com/2014/03/29/business/international/3-retailers-give-to-aid-bangladesh-workers.html>; Amber Hildebrandt, *Bangladesh's Rana Plaza Factory Collapse Spurs Change, Finger-Pointing*, CBC NEWS CAN. (Apr. 24, 2014, 9:33 PM), <http://www.cbc.ca/m/touch/news/story/1.2619524>.

¹⁶⁴ *Signatories*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://bangladeshaccord.org/signatories> (last visited Jan. 19, 2016).

¹⁶⁵ *About the Accord*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://bangladeshaccord.org/about> (last visited Oct. 31, 2015).

to establish a fire and building safety program in Bangladesh that covers all suppliers producing products for the signatory companies.¹⁶⁶ The signatories' suppliers are then required to undergo safety inspections, remediation, and fire safety training.¹⁶⁷ The Accord's Steering Committee oversees and approves of the inspection programs¹⁶⁸ and has equal representation of brand name companies and trade unions, along with a neutral chair from the International Labour Organisation.¹⁶⁹ In addition to inspections and training, the Accord mandates the creation of worker-management safety and health committees, where workers in the individual factories have the power and support to contribute to inspections, monitoring, and implementing safety provisions.¹⁷⁰ Where unions are not present, the Accord facilitates the elections; where there are unions, no less than 50% of the committee must be chosen by the union.¹⁷¹ The entire Accord receives financial support from each company signatory, set annually based on a sliding scale with a maximum contribution of \$500,000 per year.¹⁷²

By creating an organization comprised of companies, worker organizations, and other human rights groups, the parties created a monitoring system that benefits both the companies, vis-à-vis their relationships with consumers and potential regulators, and Bangladeshi workers, who otherwise have almost zero bargaining power. And, in order to have that desired effect, companies and workers saw it in their interest to create not only a third-party monitor but also an organization that could go into the factories and provide training and on-the-ground resources that facilitate ongoing compliance. For such a large undertaking, the financial support of the reputation-sensitive brand name companies was likely necessary. And indeed, such support makes sense; those companies stand to benefit financially from the cleaner supply chain the organization's work facilitates.

¹⁶⁶ BANGLADESH ACCORD SECRETARIAT, ACCORD ON FIRE & BUILDING SAFETY IN BANGLADESH, INTRODUCTION TO ACCORD ON FIRE & BUILDING SAFETY IN BANGLADESH (2015), http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

¹⁶⁷ *See id.*

¹⁶⁸ *See* ACCORD ON FIRE & BUILDING SAFETY IN BANGLADESH, REGULATIONS (ADOPTED 24TH SEPTEMBER 2013)—AMENDED AT SC MEETING 10TH JULY 2014 [hereinafter BANGLADESH ACCORD REGULATIONS], <http://bangladeshaccord.org/wp-content/uploads/Governance-Regulations.pdf>.

¹⁶⁹ *See Governance*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://bangladeshaccord.org/governance-policies> (last visited Mar. 23, 2016).

¹⁷⁰ *Worker Participation & Training*, ACCORD ON FIRE & BUILDING SAFETY BANGLADESH, <http://bangladeshaccord.org/worker-participation-training> (last visited Oct. 31, 2015).

¹⁷¹ BANGLADESH ACCORD SECRETARIAT, *supra* note 166.

¹⁷² *See* BANGLADESH ACCORD REGULATIONS, *supra* note 168.

B. Examples from Within NLRA Coverage

While workers outside of the NLRA's purview have experimented with alternative forms of worker organizations and company collaborations, so too have workers within its coverage. But for them, looking for alternative methods of collective action has taken place under the NLRA's shadow. Below are two examples of the results. In both, traditional unions have been an ill-fit, but for different reasons. The first example involves employees within a franchise system: fast food workers. The second involves workers at Google, where workers often align with the company (as Googlers) and the company has created a culture where at least some workers look to exercise a voice from within, with employer involvement in that process welcome.

1. Industry-Wide Organizations

As described in Part I, franchise relationships make traditional unionization difficult and ineffective. But those challenges notwithstanding, fast food workers remain in difficult circumstances.¹⁷³ As a result, they have looked for alternative means of collective voice. Fast Food Forward is one example.¹⁷⁴

Fast Food Forward has been described as a “campaign,” “a movement,” and its work as “part of a broader political project.”¹⁷⁵ Its primary goal is an industry-wide raise to fifteen dollars an hour. It has also targeted unsafe working conditions, calling for the Department of Labor to investigate.¹⁷⁶ November 29, 2012 marked its first public act—a

¹⁷³ One study found that fifty-two percent of the families of front-line fast-food workers are enrolled in one or more public assistance programs (compared to twenty-five percent of the workforce overall), which comes out to nearly seven billion dollars a year in public assistance directly to families of fast-food workers. See SYLVIA ALLEGRETTO ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH & EDUC., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST-FOOD INDUSTRY 1 (2013), http://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf.

¹⁷⁴ This movement is also known as “Fight for \$15.”

¹⁷⁵ Crain & Inazu, *supra* note 42; Jordan Weissmann, *The Fast-Food Strikes Have Been a Stunning Success for Organized Labor*, SLATE (Sept. 7, 2014, 8:00 PM), http://www.slate.com/blogs/moneybox/2014/09/07/the_fast_food_strikes_a_stunning_success_for_organized_labor.html; see also *Latest from the Campaign*, FAST FOOD FORWARD, <http://fastfoodforward.org> (last visited Feb. 7, 2016); William Finnegan, *Dignity: Fast-Food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 15, 2014), <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

¹⁷⁶ A petition to the Department of Labor called for an investigation into unsafe work conditions and improper treatment of injuries, particularly burns. *Third-Degree Burn. McDonald's "treatment"? MUSTARD*, FIGHT FOR \$15, <http://fightfor15.org/petition/burns> (last visited Mar. 23, 2016).

one-day strike of about two hundred workers from around forty fast food restaurants in New York City.¹⁷⁷ In December of 2013, workers in over a hundred cities coordinated one-day walkouts.¹⁷⁸ On Labor Day 2014, President Obama endorsed the campaign in a speech and a few weeks later workers in 150 cities took action with sit-ins.¹⁷⁹

Since Fast Food Forward started, minimum wage increases have been seen across the country, with minimum wage increases winning on the November 2014 ballot in even red states.¹⁸⁰ But while the organization has done much to push minimum wage increases, its interest in dealing directly with fast food restaurants continues unabated. In an August 30 interview, the organization's chief strategist—an organizing director from the SEIU—explained that if McDonald's refuses to hold talks with the movement's leaders, the company would face more protests across the United States and increased efforts to get governments around the world to take action against it.¹⁸¹ And more specifically, the organization's strategist explained that in those talks the organization would press McDonald's to lift wages for both company-owned and franchise restaurant workers, in addition to other things.¹⁸²

But while Fast Food Forward has organized workers for collective action, received tens of millions of dollars in funding from the Service Employees International Union (SEIU), and has even described what it is doing as a form of “collective bargaining” and itself as a “union,”¹⁸³ if it is a “labor organization” under the NLRA or else some of its most

¹⁷⁷ Finnegan, *supra* note 175.

¹⁷⁸ See *id.*; Steven Greenhouse, *Fast-Food Workers Seeking \$15 Wage Are Planning Civil Disobedience*, N.Y. TIMES (Sept. 1, 2014), <http://www.nytimes.com/2014/09/02/business/fast-food-workers-seeking-higher-wages-plan-another-strike.html>.

¹⁷⁹ See Finnegan, *supra* note 175.

¹⁸⁰ See Peter Coy, *Why Red States Voted Blue on the Minimum Wage*, BLOOMBERG (Nov. 5, 2014), <http://www.bloomberg.com/bw/articles/2014-11-05/why-red-states-voted-to-raise-the-minimum-wage>; see also Weissmann, *supra* note 175. Weissmann also points out that Google searches for “minimum wage” have steadily increased since 2013. While tying these successes directly to Fast Food Forward's efforts is difficult, in cities like Seattle, where it focused early efforts, there is evidence of politicians supporting a higher minimum wage and explicitly invoking Fast Food Forward. See *id.*

¹⁸¹ Greenhouse, *Fight for \$15*, *supra* note 38.

¹⁸² *Id.*

¹⁸³ *Id.* (“I would call what happened [in New York] collective bargaining, and I would call that a union,” [Fight for \$15's chief strategist] said, even though there was no ‘bargaining’ with employers.”). Identifying these tactics as those of a union is perhaps not surprising. Since the early 1900s unions have supported the Democratic Party as a means of achieving gains through politics. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 73 (2005). One-day strikes also have a place in labor's history. See *id.*

effective economic-based tactics would be restricted.¹⁸⁴ And, if it is a labor organization, it cannot legally sit down with employers and negotiate conditions to end particular strikes (e.g., a wage increase) until it has been chosen by the relevant workers as their bargaining representative through an election or other type procedure, nor negotiate new safety procedures and training, its comments that it demands the same notwithstanding.¹⁸⁵ But here note the contrast between the limits placed on Fast Food Forward's ability to go to the bargaining table with McDonald's and those on the Immokalee Worker's Fair Food Program. As discussed previously, because the Fair Food Program currently helps workers in Florida who are not covered by the NLRA, section 8(a)(2) and 302 problems are avoided because it is not a "labor organization." The Immokalee Workers can directly sit down with companies to create agreements that result in increased pay and benefits for workers. But, in a world of low-wage service jobs and franchisee relationships, the power available to the Immokalee Workers may be just as beneficial for fast food workers as they are for agricultural ones.

Another example of an industry-wide nontraditional worker organization is provided by the Restaurant Opportunities Centers United (ROC), an organization comprised of "13,000 restaurant workers, 100 high-road employers, [and] thousands of engaged consumers united for raising restaurant industry standards."¹⁸⁶ The organization was founded with support from a union, HERE Local 100, as a relief center for restaurant workers affected by 9/11.¹⁸⁷ The organization states that it has a "tri-pronged" strategy: (1) organizing workplace campaigns that "demonstrate public consequences for employers who take the 'low-road' to profitability" (i.e. protests, boycotts, etc.); (2) "promoting the high road to profitability through partnerships with responsible restaurateurs, cooperative restaurant development, and a workforce development program that moves low-income workers into living wage jobs; and (3) research and policy work."¹⁸⁸ The organization has had notable successes while avoiding

¹⁸⁴ Extended picketing and secondary boycotts are two examples. See NLRA § 8(b)(4), 29 U.S.C. §§ 158(b)(4), (b)(7) (2012).

¹⁸⁵ See *infra* Part III for an explanation of these restrictions.

¹⁸⁶ *About Us*, RESTAURANT OPPORTUNITIES CENTERS UNITED, <http://rocunited.org/about-us> (last visited Jan. 5, 2016); see also Caroline Lange, *High Road Restaurant Week Urges Diners to Consider Who's in the Kitchen in Addition to What's on the Plate*, EDIBLE MANHATTAN (Mar. 27, 2014), <http://www.ediblemanhattan.com/foodshed-2/people-foodshed-2/local-heroes/high-road-restaurant-week-urges-diners-consider-whos-kitchen-addition-whats-plate>.

¹⁸⁷ See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 252 (2009).

¹⁸⁸ *Our Work*, *supra* note 40. This method has historical roots. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE*

labor organization classification. One common sequence of events begins with an employee coming in to complain about an employer's unlawful treatment (e.g., failure to pay overtime). The organization then creates a campaign to pressure the employer to improve overall conditions and rectify the discrete issue the complaining employee raised through tactics that include threatening to file lawsuits against the employer for its unlawful activity. In order to settle the lawsuit, ROC requires the restaurant to sit down and work out a long-term agreement that looks remarkably similar to a normal collective bargaining agreement.¹⁸⁹

This strategy was used effectively to fight purported discrimination against Hispanic and Bangladeshi employees who applied for positions as waiters at the famous New York restaurant, Daniel.¹⁹⁰ The organization began with demonstrations outside the restaurant with a twelve-foot-tall inflatable cockroach and eventually entered into a confidential settlement with Daniel owner and famous chef, Daniel Boulud.¹⁹¹ A similar strategy also worked against a Mario Batali restaurant, with a final settlement that required the restaurant to pay \$1.15 million in misappropriated tips and unpaid overtime.¹⁹² It also required new policies for paid sick days and promotions.¹⁹³ But while these settlements look like forms of collective bargaining agreements, the organization states they are not, but instead, settlements of lawsuits.¹⁹⁴

ROC is distinguishable from Fast Food Forward with regards to the second prong of its strategy—its partnerships with “good” employers. In particular, ROC not only has “high road” employers as members (to join, the restaurant fills out an application indicating whether it provides its workers things like paid sick days, seven dollars or more an hour for the lowest paid employees who earn tips and ten dollars or

(2005) (discussing the Blue Eagle “Codes of Fair Competition” created under section 7(a) of the National Industrial Relations Act. Under the Blue Eagle program, businesses that supported the National Recovery Administration and created such codes of fair competition were permitted to place the Blue Eagle symbol on their goods and in their stores. While voluntary, the seal was popular with consumers and workers).

¹⁸⁹ See Naduris-Weissman, *supra* note 187, at 254 (“The expansive nature of the gains achieved in these agreements is the product of ROC-NY’s collaborative process: the center works with complaining employees to develop a list of workplace changes and then brings these demands to the bargaining table after initial pressure campaigns against the employer.”).

¹⁹⁰ See Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES, Jan. 17, 2014, at B1.

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

more an hour for the lowest non-tipped employees),¹⁹⁵ but also promotes those restaurant-members through its annual dining guide, where it lists New York restaurants and gives them a thumbs up or down depending on how they treat their employers (e.g., whether the restaurant gives paid sick days).¹⁹⁶ It also runs a “High Road Restaurant Week.”¹⁹⁷ While the below involves fictitious names, it illustrates the organization’s partnerships with employers but applied in the Fast Food Forward context. If ROC or Fast Food Forward are labor organizations, this strategy will be prohibited.

Imagine a McDonald’s competitor, Better Burger (BB), sympathizes with Fast Food Forward’s goals. BB’s mission is to provide fast food while paying workers and suppliers well. Indeed, BB already pays its workers fifteen dollars an hour. Suppose that at a recent meeting, a BB employee told BB that the workers were getting behind the Fast Food Forward Movement. BB is not surprised. In fact, a light goes off: BB is an example of what the Movement is trying to create throughout the fast food industry. The Movement might benefit from promoting BB as a viable alternative for ethically-minded consumers looking for burgers and fries, perhaps through a “Fast Food Forward Approved Restaurant” campaign. And of course BB would benefit from increased publicity and sales. To that end, BB contacts Fast Food Forward, recommends the relationship, and agrees to donate the funds the Movement needs to get such a “Fast Food Forward Approved Restaurant” program off the ground.

A partnership between BB and Fast Food Forward appears mutually beneficial: the company gets positive press and a type of accreditation that marks it as being the sort of do-good company it tries to be;¹⁹⁸ its own workers have the psychic benefit of knowing their employer is meaningfully committed to the do-good aims it espouses, and Fast Food Forward gains both financial support and a credibility boost to the extent the BB brand is well established and something consumers positively perceive.

¹⁹⁵ See *Restaurants Advancing Industry Standards in Employment (RAISE) Membership Form*, RESTAURANT OPPORTUNITIES CENTERS UNITED, <http://rocunited.org/raise-application-form> (last visited Mar. 23, 2016).

¹⁹⁶ See *id.*

¹⁹⁷ *About Us*, *supra* note 186; see also Lange, *supra* note 186.

¹⁹⁸ For companies like BB that face a market for lemons problem, partnering with an outside organization that can verify and certify its practices is a recognized strategy. See Easterbrook & Fischel, *supra* note 127, at 674.

2. Intra-Company Organizations

Collective voice vehicles and the desire to improve the terms and conditions of work are not the sole province of low-wage workers. However, a number of factors make it the case that the forms of collective action higher-powered workers use will often differ from both traditional unions and the political-based organizing strategies of fast food workers. As Part II briefly explored, like the welfare capitalists of the 1920s, companies with an in-demand workforce are motivated to treat its workers well and earn their trust and loyalty.¹⁹⁹ Employee bonding encourages creativity, cooperation, and retention.²⁰⁰ But the more employees identify with the company, the less likely they will identify with an outside union. Yet, because these workers are in-demand, companies will often want to create or support conditions in which workers feel comfortable voicing concerns instead of quitting.

Google is one example. From the outset, it made clear that its focus was on innovating and its mission, “to organize the world’s information and make it universally accessible.”²⁰¹ To do this, Google hires top talent and strives to create an environment where that talent can thrive.²⁰² Its Google Careers page sheds light on these efforts. One headline reads, “creating an office for work and play,” and explains “we aim to make our offices a place that Googlers want to be” as “data shows that these spaces have a positive impact on productivity, collaboration and

¹⁹⁹ Welfare capitalism is the term used to describe the ethos that emerged in the 1920s that companies could “do well by doing good for employees.” See DUBOFSKY & DULLES, *supra* note 67.

²⁰⁰ Cynthia Estlund has extensively discussed the non-economic benefits workers can and should get from the workplace. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 7 (2003); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 674 (2008). It is a natural extension of her work to suggest that the more these benefits are realized at a particular workplace, the more likely workers will seek out voice mechanisms instead of exit strategies.

²⁰¹ *Company Overview*, GOOGLE, <http://www.google.com/about/company> (last visited Jan. 19, 2016).

²⁰² I do not mean to suggest that all people who, speaking colloquially again, “work for” Google enjoy these benefits, as the recent unionization efforts by Silicon Valley shuttle drivers shows. See Kristen V. Brown, *For Google Shuttle Drivers, It’s a Grueling Ride*, SFGATE (Sept. 28, 2014, 6:54 AM), <http://www.sfgate.com/news/article/For-Google-shuttle-drivers-it-s-a-grueling-ride-5785556.php>; Steven Greenhouse, *Facebook’s Shuttle Bus Drivers Seek to Unionize*, N.Y. TIMES (Oct. 5, 2014), http://www.nytimes.com/2014/10/06/business/facebook-bus-drivers-seek-union.html?_r=1; Tyrone Richardson, *Facebook Shuttle Bus Drivers in California Unanimously Ratify Their First Labor Contract*, BNA DAILY LAB. REP. (Feb. 23, 2015).

inspiration.”²⁰³ Visitors also see an interview where co-founder Larry Page said, “[m]y job as a leader is to make sure everybody in the company has great opportunities, and that they feel they’re having a meaningful impact and are contributing to the good of society.”²⁰⁴ Asked more about the employee experience Google is trying to design, he said,

[i]t’s important that the company be a family, that people feel that they’re part of the company, and that the company is like a family to them. When you treat people that way, you get better productivity. Rather than really caring what hours you worked, you care about output. We should continue to innovate in our relationship with our employees and figure out the best things we can do for them.²⁰⁵

“Employee resource groups” are an example of the collective voice organizations that exist within Google.²⁰⁶ The Gayglers, Google’s LGBT group, is one example. Structurally, the group has both local chapters that put on and support local events and a larger Gaygler Steering Committee.²⁰⁷ The group has a say on Google policies.²⁰⁸ Google also supports the group in a variety of other ways: from letting the group use its in-house studio to create and distribute an It Gets Better Project video to supporting internal Gayglers events and providing funding for Gayglers to buy tables at LGBT fundraisers.²⁰⁹

In the case of the Gayglers, it makes sense that the company has an interest in funding the organization and working with it when developing both recruiting initiatives and internal policies surrounding workplace harassment and discrimination. The workers, too, seem to benefit. The organization itself is international, thereby allowing for a system of support for a specific set of workplace issues that might

²⁰³ See *Creating an Office for Work and Play*, GOOGLE CAREERS, <http://www.google.com/about/careers/lifeatgoogle/creating-an-office-for-work-and-play.html> (last visited Mar. 23, 2016).

²⁰⁴ Adam Lashinsky, *Larry Page: Google Should Be like a Family*, FORTUNE (Jan. 19, 2012, 12:00 PM), <http://fortune.com/2012/01/19/larry-page-google-should-be-like-a-family>.

²⁰⁵ *Id.*

²⁰⁶ *Foster a Fair and Inclusive Google*, GOOGLE, <http://www.google.com/diversity/at-google.html#tab=black-googler-network>.

²⁰⁷ See Kevin Burns, *Interview with Shwetha Pai, Gaygler, Google*, LGBT INCLUSIVE WORKPLACES, <http://www.lgbtinclusiveasia.org/2013/03/461/3> (last visited Mar. 23, 2016) (discussing Gaygler experiences in India); see also Bryan Moore, *Inside Talk: Gay at Google*, FORTWONINE (Jan. 29, 2015), <http://dot429.com/articles/401-insider-talk-being-gay-at-google>.

²⁰⁸ Google states on its site that “[t]he Gayglers not only lead the way in celebrating Pride around the world, but also inform programs and policies.” See *Foster a Fair and Inclusive Google*, *supra* note 206.

²⁰⁹ Ludwik Trammer, *Talking Gayglers with Google’s Bennet Marks*, GOOGLE: BLOGSCOPED (June 18, 2007), <http://blogscoped.com/archive/2007-06-18-n44.html>; see also Moore, *supra* note 207.

otherwise be overlooked in smaller foreign offices, which often have less legal protection for LGBT workers.²¹⁰ Members, it is reasonable to assume, are also best equipped to speak to the conditions on the ground and know what sorts of training and processes might make the workplace better for its members. That the company recognizes the Gayglers comparative advantage and seeks to harness it when crafting workplace harassment and discrimination policies makes sense for the company and Gayglers alike. The problem, however, is that labor law casts a shadow of uncertainty over the legality of at least some versions of this collaboration. While marginal players like Google may be willing to take the risk, the vast majority of companies may not.

III. “LABOR ORGANIZATIONS” AND THE BAN ON COMPANY SUPPORT

The above examples are designed to highlight some of the important work company-worker partnerships and joint organizations can and already are doing for workers. For workers the NLRA does not cover, we see robust and highly effective organizations like the Fair Food Council that challenge the orthodox view that company support of worker organizations is merely a union-avoidance technique.²¹¹ Supply chains and franchise arrangements call for different sorts of organizational strategies. For instance, larger trade association-like organizations where workers and reputation-conscious companies come together to set standards—a strategy workers within NLRA coverage may find worth exploring more in the future. Other, often more powerful workers like those discussed at Google, have found it in their interest to organize internally through affiliation groups that receive company funding and support.²¹² Yet when these affiliation groups are open to all workers, including managers, and companies reach out and discuss relevant policies with those organizations, section 8(a)(2) of the NLRA and 302 of the LMRA loom large.²¹³

In this Part, I explain in more detail the ways in which labor law limits these various forms of collaboration. And, in so doing, at least some ways organizations may avoid NLRA coverage entirely (by failing to be a “labor organization”) or, though covered, avoid violating the relevant bans on company support. As Fast Food Forward has shown, while avoiding the ban is possible in some cases, it is not without costs—costs that call for a rethinking of the bans.

²¹⁰ See Moore, *supra* note 207.

²¹¹ See *supra* Section II.A.

²¹² See *supra* Section II.B.2.

²¹³ See *infra* Section III.A.

A. “Labor Organization”

“Labor organization” is defined broadly as “any 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.”²¹⁴ The definition is intentionally broad; Congress wanted to cover “all organizations of employees that deal with employers.”²¹⁵

When determining whether a specific organization counts as a labor organization, Board and court analysis focuses on three interpretative thickets: (1) who is an employee, and what (2) “employee participation” and (3) “dealing with” amount to.

1. Employee Status

To be an employee under the NLRA, an individual must first satisfy the common law agency test for employee status.²¹⁶ Independent contractors, as a result, are exempt from coverage while undocumented workers who meet the agency test are included.²¹⁷ After the common law test is met, the NLRA makes further express exclusions.²¹⁸ The excluded include: agricultural laborers, domestic workers employed by a family or person at his home, those employed by their parents or spouse, and any person employed as a supervisor or subject to the Railway Labor Act.²¹⁹ Public sector employees are also excluded.²²⁰ Thus, an organization consisting solely of managers, agricultural workers, or independent contractors is not a “labor organization” under the Act and the ban on company support will not apply.²²¹

Given talk that we are moving toward a “gig economy,”²²² where a sizable portion of the American workforce will be classified as independent contractors, this might seem like good news for future

²¹⁴ 29 U.S.C. § 152(5) (2012).

²¹⁵ See *Hearing on S. 1958 Before the S. Comm. on Educ. and Labor*, 74th Cong. 1 (1935).

²¹⁶ See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

²¹⁷ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

²¹⁸ 29 U.S.C. § 152(3).

²¹⁹ See *id.*

²²⁰ The NLRA does not cover federal, state, and local governments as employers. See 29 U.S.C. § 152(2).

²²¹ See, e.g., *Int'l Org. of Masters, Mates & Pilots of Am. v. NLRB*, 351 F.2d 771, 775 (D.C. Cir. 1965); *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir. 1951).

²²² See, e.g., Arun Sundararajan, *The ‘Gig Economy’ Is Coming. What Will it Mean for Work?*, *GUARDIAN* (July 15, 2015), <http://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy>.

worker-company partnerships. At least for those workers, the thought goes, workers and companies can create whatever sorts of collaborative organizations they see fit. But even putting aside the antitrust problems such organizations would face,²²³ the imagined organizations are likely to remain under the shadow of the NLRA.

Worker misclassification cases are front and center in the news today, and an organization that helps only independent contractors today may discover after litigation that it helps both independent contractors and employees. In June 2015, an officer for the California Labor Commissioner ruled that one Uber driver was an employee.²²⁴ There will likely be many more employee misclassification cases as the “on demand” economy continues—and, indeed, some companies in this sector have already converted large parts of their independent contractor-dominated workforce into employees.²²⁵

This uncertainty is not unique to the likes of Uber. FedEx recently settled a number of class action lawsuits brought by drivers who argued that they were misclassified, and when given the chance, courts have agreed.²²⁶ As a result, the worker organizations that are forming to help putative independent contractors must remain aware of the possibility that these workers’ status may change and that those changes will have legal ramifications for the scope of permissible corporate collaboration.

Relatedly, while labor organization designation requires employee participation, it need not be the case that *only* employees participate.²²⁷ Thus, if Uber drivers are employees but Lyft drivers are not, an organization that caters to both still satisfies the employee participation requirement and, thus, may be a labor organization.

²²³ While Norris-LaGuardia and the Clayton Act expressly make antitrust laws inapplicable to labor organizations and labor groups, the Court has held that does not include an organization of independent contractors. See 15 U.S.C. § 17 (2012); *H.A. Artists & Assocs. v. Actors’ Equity Ass’n*, 451 U.S. 704 (1981); *United States v. Hutcheson*, 312 U.S. 219 (1941).

²²⁴ See Order, *Barbara Ann Berwick v. Uber Technologies, Inc.*, Case No. 11-46739, Labor Commissioner of the State of California (June 3, 2015).

²²⁵ See Brad Stone, *Instacart Reclassifies Part of Its Workforce amid Regulatory Pressure on Uber*, BLOOMBERG (June 22, 2015, 3:00 AM), <http://www.bloomberg.com/news/articles/2015-06-22/instacart-reclassifies-part-of-its-workforce-amid-regulatory-pressure-on-uber>.

²²⁶ See Peter Fimrite, *FedEx Agrees to Pay \$227 Million to Short-Changed Workers*, SFGATE (June 12, 2015, 6:47 PM), <http://www.sfgate.com/bayarea/article/FedEx-agrees-to-pay-227-million-to-short-changed-6324745.php>; see also *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66 (Kan. 2014).

²²⁷ See *Int’l Org. of Masters, Mates & Pilots of Am. v. NLRB*, 351 F.2d 771, 776 (D.C. Cir. 1965) (finding organization comprised of both employees and non-employees a “labor organization”), *enforcing* 146 N.L.R.B. 116 (1964); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948) (“Although the definition requires that employees participate in the organization in order to make it a labor organization, it does not require that the organization be composed exclusively of employees.”).

2. Employee Participation

The participation requirement has not been a source of significant dispute up to this point, as the standard for participation has been low. Employees need not be members of the organization to “participate” in it.²²⁸ For instance, returning to Fast Food Forward, the movement is financially supported, in part, by the SEIU. Even if we assume there are no employees participating in the day-to-day activities of Fast Food Forward (and there are), union leaders are, and the Board has held that that is sufficient to meet the participation requirement.²²⁹

3. “Dealing with” the Employer

A difficult issue going forward will likely be whether the organization is “dealing with” an employer. The Board’s “dealing with” jurisprudence is inconsistent, making it difficult to predict how it will be applied to different forms of worker organizations and worker-corporate partnership organizations.

At base, the Supreme Court held that “dealing” encompasses more than just the negotiation of a collective bargaining agreement.²³⁰ Making recommendations to the employer where the final decision is left up to the employer, for example, still involves dealing though it does not involve collective bargaining.²³¹ The Board provided additional guidance in the wake of that decision, defining “dealing” with as a “bilateral mechanism between two parties” that “ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”²³² However, even the Board’s meatier definition has been inconsistently interpreted.

The Board’s “pattern or practice” requirement has already been of some use to nontraditional worker organizations looking to avoid labor organization designation. For instance, in an advice memorandum discussing whether Restaurant Opportunities Center United was a labor

²²⁸ See, e.g., *NLRB v. Metallic Bldg. Co.*, 204 F.2d 826, 827 n.2 (5th Cir. 1953) (holding that a trade council, to which no individual union member belonged, but which was composed of affiliated unions, where each sent a delegate, was a “labor organization”).

²²⁹ See *id.*

²³⁰ See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211–12 (1959).

²³¹ See *id.* at 205, 208 (describing an employer-created committee allowing employees to discuss “ideas and problems of mutual interest” with management, where management was free to accept or reject the proposals, were labor organizations).

²³² *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

organization, the General Counsel concluded that it was not one because while the organization was picketing in front of Daniel, a restaurant, in order to pressure the employer to engage in settlement negotiations concerning ongoing litigation regarding its treatment of workers could “arguably be considered ‘dealing’” under section 2(5), there was no evidence that this conduct constituted a pattern or practice of dealing over time.²³³ However, as these organizations continue using these strategies on an ongoing basis, such a requirement seems met.

What counts as a bilateral mechanism is another issue. One-way mechanisms, like brainstorming sessions and organizations that merely facilitate passive information sharing do not count.²³⁴ In contrast, when organizations have been designed to discuss the terms and conditions of work and make proposals to and receive responses from management,²³⁵ or deal with employee grievances²³⁶ (i.e., more robust activities of the sort the Fair Food Council and other worker-company partnerships engage in), a bilateral mechanism was found. The Board has also found bilateralism satisfied when the practice at issue involved only employees making general recommendations concerning the terms and conditions of work.²³⁷ As for when there is or is not a pattern or practice is another issue. Isolated and ad hoc proposals will not count and a limited number of meetings is also okay, though how many meetings is too many, nobody knows.²³⁸ More recently the Board has found the pattern or practice condition satisfied when there was no pattern or practice yet, but the group was established for that purpose

²³³ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. to Celeste Mattina, Reg'l Dir. Region 2 (Nov. 30, 2006). The General Counsel hedged further, however, by stating that even if ROC were a labor organization, the complained-of activity did not violate the NLRA. *See id.*

²³⁴ *See, e.g.,* Miller Indus. Towing Equip., Inc., 342 N.L.R.B. 1074, 1089 (2004); *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894.

²³⁵ *See E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894.

²³⁶ *See* Polaroid Corp., 329 N.L.R.B. 424, 445 (1999).

²³⁷ *See* NLRB v. Peninsula Gen. Hosp. Med. Ctr., 36 F.3d 1262, 1272–74 (4th Cir. 1994), *denying enforcement of*, 312 N.L.R.B. 582 (1993) (finding no pattern or practice because the proposals came up in isolated incidents); *see also* Note, *Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 HARV. L. REV. 678, 685 (1994) (“The NLRB has interpreted *Cabot Carbon* to bring almost all employee groups within the realm of section 2(5), with the exception of programs that include *all* of a company’s employees and programs that constitute *total* delegations of traditional management functions to a group of employees.” (footnote omitted)).

²³⁸ *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894 (finding that “isolated instances” where a group makes “ad hoc proposals to management” do not entail dealing); *Peninsula Gen. Hospital Med. Ctr.*, 36 F.3d at 1274 (refusing to enforce Board order because the committee only met on a limited number of times and thus did not “constitute a ‘pattern or practice’ so as to fall within the Board’s ‘bilateral mechanism’ analysis”).

and the employer intended to hold meetings of the team in the future in order to learn about the group's views on issues such as pay.²³⁹

One exception to labor organization classification occurs when the organization is delegated managerial authority. In such cases, the employer is simply dealing with managers.²⁴⁰ Unsurprisingly, the Board's threshold for finding delegation has changed across Boards. Originally, the employer had to "flatly delegate" managerial authority.²⁴¹ Later, however, the Board dramatically softened its view and found purported labor organizations to be managerial when there was less than flat delegation.²⁴² As the Board said, worker organizations delegated "managerial authority such that the committees function as part of management with the power to implement solutions within certain parameters," can count.²⁴³ The organization need not even have final or absolute authority.²⁴⁴ However, if "the [company] and the Committee [go] back and forth explaining themselves until an acceptable result was achieved" the Board the managerial exception will not apply.²⁴⁵

The managerial exception could, depending on how the Board interprets it in the future, make room for at least some types of worker-company partnerships. If the Gayglers or another company-sponsored affiliation group like it were given a domain in which it could make decisions (e.g., which community events to sponsor, which workers get a day paid off to march, what sexual orientation training looks like, etc.), a sympathetic judge could find that organization was delegated managerial authority such that there was no dealing between the organization and the employer. That said, there are at least two unresolved issues for these organizations.

First, finding a delegation of managerial authority does not insulate the organization against labor organization designation: if the group also met with or engaged in an ongoing dialogue with management on a

²³⁹ See *Danite Holdings, Ltd.*, 356 N.L.R.B. 124, 10 (2011).

²⁴⁰ See *Crown Cork & Seal Co.*, 334 N.L.R.B. 699 (2001); *Gen. Foods Corp.*, 231 N.L.R.B. 1232, 1235 (1977).

²⁴¹ See *Gen. Foods Corp.*, 231 N.L.R.B. at 1235; *Mercy-Mem'l Hosp. Corp.*, 231 N.L.R.B. 1108, 1121 (1977).

²⁴² See *Crown Cork & Seal Co.*, 334 N.L.R.B. at 699. For scholars noting the significance of the shift, see Joseph D. Richardson, Comment, *In Name Only: Employee Participation Programs and Delegated Managerial Authority After Crown Cork & Seal*, 62 ADMIN. L. REV. 871, 872 (2010), and Gerald L. Pauling II & M. Andrew McGuire, *The Implications of Crown Cork & Seal Co. for Employee Involvement Committees as Labor Organizations Under the NLRA: What Constitutes "Dealing with" Pursuant to Section 2(5) of the Act Since Electromation, Inc.?*, 18 LAB. LAW. 215 (2002).

²⁴³ *Stabilus, Inc.*, 355 N.L.R.B. 836, 881 (2010).

²⁴⁴ See *Crown Cork & Seal Co.*, 334 N.L.R.B. 699.

²⁴⁵ See *Keeler Brass Auto. Grp.*, 317 N.L.R.B. 1110, 1114 (1995).

regular basis to discuss and propose workplace policies, those types of interactions look like bilateral mechanisms. And second, while the managerial exception means there is no dealing between the organization and employer, there may be dealing between employees and the company within the organization itself. For instance, if there are managers as group members.²⁴⁶ But nonetheless, the managerial exception does provide some cover for at least some organizations.

Putting the managerial exception aside, the ability of the discussed organizations to work around a finding of dealing will vary. Start with the Fair Food Council. There we have an organization that both develops and then monitors compliance with standards for worker treatment. The organization also negotiates with brand name companies, like Whole Foods, in the hopes of getting that end-of-supply-chain company to require its suppliers to abide by those agreed-to standards as a matter of contract. In this case, it is hard to get around dealing. Within the Fair Food Council itself there may be negotiation between representatives of workers, companies, and outside non-profits over the standards. Then, there is likely a back-and-forth between the organization and companies over whether the company will require supplier compliance and whether the company will help fund the Council itself, as Fresh Market did.²⁴⁷

For other organizations, dealing may be less of an issue. In the case of Groove, we can imagine a situation where the organization makes no arrangements with companies like Uber or taxi medallion owners at all. It is merely an organization that provides drivers with benefits, if they pay for membership. In such a case, dealing is avoided, but at some cost. Thinking of Fast Food Forward, the organization may be able to more generally protest and promote boycotts in the hopes that such actions will indirectly result in companies providing additional goods for their workers but the organization is unable to, even if successful, then sit down and discuss what sort of increases the organization demands in order to stop its economic pressure. However, sitting down with McDonald's is precisely what it is now calling for.²⁴⁸

a. An Uncertain Representational Requirement for "Dealing"

If an organization had to stand in a representational capacity vis-à-vis employees, some of the more innovative forms of worker organization and collaboration described in Part II would avoid NLRA coverage. As discussed, Fast Food Forward represents workers through

²⁴⁶ See *Crown Cork & Seal Co.*, 334 N.L.R.B. at 701 n.2.

²⁴⁷ See *supra* note 158 and accompanying text.

²⁴⁸ See Steven Greenhouse, *Fight for \$15*, *supra* note 38.

political and consumer-based activity but does not “represent” them in any direct negotiations with employers. This question of whether dealing is representational activity is open.²⁴⁹ Section 2(5) does not expressly require a representational component, it reaches “any organization of any kind” that deals with employers over the covered topics, but the Board’s stance on the issue has shifted over time.²⁵⁰

In earlier decisions a representational capacity was required while in more recent decisions the Board has reversed course, suggesting the issue remains unsettled.²⁵¹ Nonetheless, the earlier decision deals expressly with the classification of nontraditional worker organizations and as such provides a useful framework.²⁵² There, the Board was confronted with the Center for United Labor Action (CULA). The CULA was an organization with the general aim of assisting minorities, women, consumers, and workers in their struggles against adverse organizations. In the employment context, that meant the organization supported employee protests, joined and supported strikes through picketing and leafleting, and engaged in fundraising on behalf of strikes.²⁵³ The group had no formal membership.²⁵⁴

The Administrative Law Judge held that while CULA did technically “deal with employers” within the meaning of the Act, because the *purpose* of the Act was to provide a procedure for employees to choose representatives who deal with their employer and protect them in that choice, “deal with” should be read with a further representational requirement.²⁵⁵ Because CULA was not in a representational relationship with the workers it supported, it was not a labor organization under the Act.²⁵⁶

In a 2-1 decision the Board agreed with the ALJ’s conclusion that CULA was not a labor organization but rejected the ALJ’s “dealing with”

²⁴⁹ See Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125, 144–46 (1994).

²⁵⁰ See 29 U.S.C. § 152(5) (2012).

²⁵¹ Compare *Ctr. for United Labor Action*, 219 N.L.R.B. 873 (1975), with *Electromation, Inc.*, 309 N.L.R.B. 990, 994 n.20 (1992) (“Because we find . . . that employee-members of the Respondent’s Action Committees acted in a representational capacity, it is unnecessary to the disposition of this case to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees.”).

²⁵² 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 (1991).

²⁵³ See *Ctr. for United Labor Action*, 219 N.L.R.B. at 873.

²⁵⁴ See *id.* at 873–74 n.2.

²⁵⁵ See *id.* at 875. Here, representational organizations are understood as “only [those] selected and designated by employees to bargain with employers on behalf of that employer’s employees.” *Id.*

²⁵⁵ See *id.* at 880.

²⁵⁶ See *id.*

analysis. The Board held that “to qualify as a labor organization under our Act the organization must be selected and designated by employees for the purpose of resolving their conflicts with employers.”²⁵⁷ And here, CULA never “sought to deal *directly* with employers concerning employee labor relations matters.”²⁵⁸

The dissent, in contrast, thought labor organization designation followed directly from the Board’s decision in *Porto Mills*.²⁵⁹ In *Porto Mills*, the Board adopted the ALJ’s finding that Comite Pro-Defensa de los Trabajadores de Porto Mills was a labor organization, albeit an anti-union labor organization, under section 2(5) even though it never sought to bargain or negotiate a contract with the employer. Instead, it “dealt with” the employer when it demanded the discharge of an employee who was a union organizing leader.²⁶⁰ As the dissent saw it, if Comite was a labor organization under those conditions, then CULA, which had the purpose of picketing for reinstatement of discharged employees, boycotting a manufacturer whose labor policies it disagreed with, and aiding and financing employee-organizing activities, was too.²⁶¹

Some scholars have suggested the Board’s reasoning was flawed.²⁶² For one, the Board’s decision likely rests labor organization designation in the hands of employers. That is, it seems plausible that CULA *would* have sat down and negotiated labor matters with the employer if the employer would have agreed to it (much like the leaders of Fast Food Forward might like to do the same). The Board’s decision thus puts organizations like CULA to a difficult choice: boycott freely, without labor organization designation, or choose to sit down and negotiate with a willing employer about precisely the thing you are boycotting and immediately risk labor organization designation.

What role, if any, CULA will play as the Board comes to grips with new forms of worker organizations remains unclear in light of the Board’s most recent backtracking. Yet, the fact that the Board found sufficient representational activity in the case in which it backtracked, *Electromation*, suggests that the level of representation required, if any, is not high. There, the Board did not suggest that the employees who signed up to participate on action committees were speaking on behalf

²⁵⁷ *Id.* at 873.

²⁵⁸ *Id.* (emphasis added).

²⁵⁹ *Porto Mills, Inc.*, 149 N.L.R.B. 1454 (1964).

²⁶⁰ *See Ctr. for United Labor Action*, 219 N.L.R.B. 873, 874–75 (1975).

²⁶¹ *Id.* at 875.

²⁶² *See, e.g.*, Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 862–63 (2014); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 487 (2006).

of, or representing the interests of, employees not on the committee (i.e., that they were representatives of anybody but themselves at all). Instead, employees self-selected for membership.²⁶³

What all this means for whether new forms of worker organizations or the third-party monitoring organizations they create with employers constitute labor organizations is uncertain. While there is some case law, the Board has simply had little occasion to build up a coherent doctrine in this space. But given both the case law and continual pressure from organizations like the Chamber of Commerce for these organizations to be so classified,²⁶⁴ it is a risk companies and worker organizations have to confront when creating organizations that can help companies keep their promises to do good for and by their workers.

B. Section 8(a)(2) of the NLRA

Once the Board determines a particular organization is a “labor organization,” an employer can violate section 8(a)(2) by “dominat[ing],” “interfer[ing] with the formation or administration of,” or “contribut[ing] financial or other support” to it.²⁶⁵ These violations are examined separately.

1. Domination or Interference with Formation or Administration

When employer participation in a labor organization constitutes domination or interference is tricky. Supervisors, though unprotected by the NLRA, are not statutorily prohibited from joining labor organizations.²⁶⁶ In reality, though, supervisor membership is virtually never upheld against a section 8(a)(2) challenge.²⁶⁷ Management’s membership in a labor organization suggests its preference for that organization, which has been thought to impermissibly coerce employees into joining it over other options.²⁶⁸ At most, courts have

²⁶³ *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992).

²⁶⁴ See AN OVERVIEW OF LEADING WORKER CENTERS, *supra* note 20.

²⁶⁵ 29 U.S.C. § 158 (2012).

²⁶⁶ See *id.* § 164(a).

²⁶⁷ For instance, the Board and courts have found the presence of supervisors in labor organizations to constitute unlawful interference even when the employer knew of but did not authorize the supervisor to join. See *Local 636 of United Ass’n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. of U.S. & Canada, AFL-CIO v. NLRB*, 287 F.2d 354, 359–60 (D.C. Cir. 1961).

²⁶⁸ See *Stevenson Equip. Co.*, 174 N.L.R.B. 865 (1969) (management membership implies favoritism, may coerce employees to vote for that union out of fear of employer retaliation).

upheld supervisor membership against section 8(a)(2) challenges when those supervisors were members in name only.²⁶⁹

But employers need not join the labor organization in order to interfere or dominate with its formation or administration. In virtually every case where the employer participated in the creation of the worker organization or maintains some control over its operations, structure, or funding, there has been a finding of interference or domination.²⁷⁰ Whether or not employees want employer participation does not determine whether that participation constitutes domination or interference.²⁷¹ In short, once the Board has determined an organization is a labor organization, the involvement of the employer will very likely lead to a finding of at least interference.

2. Financial or Other Support

Today, the question of whether an employer has “supported” a labor organization boils down to whether the employer has crossed the line from giving “lawful cooperation” to “unlawful support.”²⁷² Like all standards, such line drawing is fraught as “the quantum of employer cooperation which surpasses the line and becomes unlawful support is

²⁶⁹ See, e.g., *Boyle’s Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 167 (8th Cir. 1968), *denying enforcement*, *Boyle’s Famous Corned Beef Co.*, 168 N.L.R.B. 299 (1967).

²⁷⁰ See, e.g., *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993) (finding domination of six employee committees though the employer only participated in the formation of one. Employer retained power over operations, meetings, and had a veto power over committee actions); *Electromation, Inc.*, 309 N.L.R.B. 990, 995–96 (1992) (finding domination when employer announced the formation of employee committees, asked employees to voluntarily sign up, had a member of HR sit in on the meetings, and thanked employees for their participation).

²⁷¹ See *Electromation v. N.L.R.B.*, 35 F.3d 1148, 1168 (7th Cir. 1994) (“To focus exclusively on employee subjective reactions in order to demonstrate a Section 8(a)(2) violation would, it seems to us, contravene the purpose of the Act. It is entirely possible that an extremely well-constructed employer-dominated labor organization could be so ‘camouflaged’ as to persuade employees that it represented their best interests and preserved their free choice when in fact it did not. After all, this type of “company union” was precisely the conduct which the Wagner Act sought to eradicate from the workplace.”).

²⁷² See *Dana Corp.*, 356 N.L.R.B. No. 49, *1, *5–6 (2010). If an employer gives or offers to give a labor organization financial support via a direct monetary contribution, the employer will likely have violated section 8(a)(2); see also, e.g., *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 268 (1938) (“The Board’s . . . findings of fact fully sustain its conclusion that respondents had engaged in unfair labor practices, by active participation in the organization and administration of the Employees Association, which they dominated throughout its history, and to whose financial support they had contributed . . .”); *Dixie Bedding Mfg. Co.*, 121 N.L.R.B. 189, 196 (1958), *enforced* *Dixie Bedding Mfg. Co. v. NLRB*, 268 F.2d 901 (5th Cir. 1959) (finding employer violated section 8(a)(2) by both (1) paying the union initiation fees of its employees who signed authorization cards before a specified date, and (2) providing the union an amount that exceeded what it was legally due for those employees).

not susceptible to precise measurement.”²⁷³ This uncertainty is all the more true given the Board’s fluctuating position on the line over time, and seemingly in response to the forms of labor organization the Board confronts.²⁷⁴ Here, I discuss two areas most likely to come up for the non-union forms of labor organizations described above: MOAs and Letters of Agreements (LOA), and financial support.

The Board has held a Memorandum of Agreements (MOA) or Letter of Agreement (LOA) that “set forth certain principles that would inform future bargaining on particular topics—bargaining contingent on a showing of majority support” did not constitute unlawful support.²⁷⁵ This even though in the LOA the parties committed “that in no event will bargaining between the parties erode current solutions and concepts already in place” to deal with the cost of quality healthcare for employees, which included premium sharing and deductibles.²⁷⁶ In contrast, when LOAs between employers and labor organizations without majority status are in essence completed collective bargaining agreements that will go into effect if the union achieves majority status, the Board finds unlawful support.²⁷⁷

The cooperation-support line nonetheless may provide some protection for the sorts of worker-company collaborations and organizations discussed. For instance, the Fair Food Council and other organizations dedicated to improving working conditions throughout complex chains make progress on these goals by pressuring end-of-chain companies to require, as a matter of contract, their suppliers to abide by a supplier code of conduct that, among other things, requires that supplier to allow members from the labor organization to enter its premise, monitor for compliance, and train the supplier’s workers.²⁷⁸ But these agreements between the Fair Food Council and end-of-chain companies are themselves the result of bargaining. Unlike what is imagined in LOA contexts, there will never be an employee vote. The LOA between such an organization and employer *is* the completed bargaining agreement. Whether the Board will see these arrangements,

²⁷³ *Dana Corp.*, 356 N.L.R.B. at *6 (quoting *Longchamps, Inc.*, 205 N.L.R.B. 1025, 1031 (1973)).

²⁷⁴ See Note, *Worker Ownership and Section 8(a)(2) of the National Labor Relations Act*, 91 YALE L.J. 615, 620 (1982) (“Judicial interpretation of section 8(a)(2) has evolved from an initial belief that free choice requires nearly total insulation of employee labor organizations from management to a recognition that it permits a degree of “cooperation” between management and workers’ organizations.”) (Note predates the Board’s decision in *Electromation*, where the Board swung back to something closer to near total insulation).

²⁷⁵ *Dana Corp.*, 356 N.L.R.B. at * 9.

²⁷⁶ *Id.* at *22.

²⁷⁷ *Id.* at *8–9 (discussing *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964)).

²⁷⁸ See *supra* Section II.A.2.

in the context of a world without labor organization elections, is difficult to predict.

Some might argue that such an arrangement looks like the employer is treating the organization as if it had majority status when it does not. And, LOAs aside, recognizing minority unions before elected has been held unlawful support.²⁷⁹ That said, regardless of what the Board does, the incentives are odd. If a fully fleshed out bargaining agreement set out in an LOA constitutes impermissible support in cases where the organization will eventually attempt to win majority status but is permissible so long as the organization bypasses the election altogether, then employees may have less voice in the organizations purporting to represent them (since they never ratify the agreement by vote at all). Then again, a rule that would allow industry to write its own and supplier codes of conduct so long as those codes are written without the input of labor organizations (with or without a vote by the affected workers) seems to only hurt the workers themselves.

As for financial support, the answer is plain: seemingly any financial contribution from an employer to a labor organization that falls outside of those expressly permitted by the Act, constitute unlawful support.²⁸⁰ Given this, it is unlikely that an employer could lawfully provide money to a labor organization as a sign of goodwill, smart marketing, or to help the organization develop something like the Fast Food Forward Seal of Approval or ongoing monitoring system, like the Fair Food Council.

C. *Section 302 of the LMRA*

Section 302(a)(2) of the LMRA makes it a crime for an employer “to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value” to “any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer.”²⁸¹ Section 302(a)(3) makes it a crime for an employer to provide the same “to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group committee directly or indirectly to influence any other employees in the exercise of the

²⁷⁹ See *Int'l Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 737 (1961).

²⁸⁰ See, e.g., *Dixie Bedding Mfg. Co.*, 121 N.L.R.B. 189, 196 (1958), *enforced in Dixie Bedding Mfg. Co. v. NLRB*, 268 F.2d 901 (5th Cir. 1959) (finding employer violated section 8(a)(2) by both (1) paying the union initiation fees of its employees who signed authorization cards before a specified date, and (2) providing the union an amount that exceeded what it was legally due for those employees).

²⁸¹ 29 U.S.C. § 186 (2012).

right to organize and bargain collectively through representatives of their own choosing.”²⁸² Violators of section 302 face up to \$15,000 in fines and five years in prison.²⁸³

Congress passed section 302 to, in part, prevent the payment of bribes by an employer to its employees’ representatives and extortion or shakedowns of employers by employees’ representatives.²⁸⁴ That said, the Board and courts have found section 302 violations when employers have not only blatantly bribed union officials but also for payments to funds where no corruption was alleged and paid leaves of absence for employees to work full-time for the union.²⁸⁵ Indeed, courts have held that an arbitration award requiring an employer to pay its employee’s union the amount equal to the dues the union would have collected if the employer had not used non-union workers violated 302 because such payments were things of value and did not fall under potential exceptions.²⁸⁶ HR professionals are warned,

an employer who donates old equipment to the union to be used for training purposes may be giving the union a “thing of value.” Even providing certain items at a discount—such as tickets to a reception at prices otherwise offered only to management—likely violates the law, as the difference in price could be a “thing of value.”²⁸⁷

In one important case for purposes of the arrangements discussed here, the Ninth Circuit reversed the district court and held that a joint labor-management “industry board” established by a collective bargaining agreement with an outside union was itself a labor organization and an employer’s payments to the joint board violated section 302, even though there was no allegation of corruption.²⁸⁸

²⁸² *Id.* § 186(a)(3). There are some exceptions built into 302, for instance for dues check-offs, but they will not be helpful here. *Id.* § 186(c).

²⁸³ *Id.* § 186(d).

²⁸⁴ See 93 CONG. REC. 4678 (1947) (statement of Sen. Ball); 93 CONG. REC. 4746 (1947) (statement of Sen. Taft); S. REP. NO. 80-105, at 52 (1947); see also *United States v. Ryan*, 225 F.2d 417, 426 (2d Cir. 1955).

²⁸⁵ See, e.g., *Walsh v. Schlecht*, 429 U.S. 401 (1977) (holding payments by an employer to a trust fund on behalf of employees of a subcontractor who was not a signatory to the collective bargaining agreement violated section 302(a)(1)); *Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int’l Union*, 734 F.3d 708 (7th Cir. 2013) (holding employer violated section 302 when it agreed to pay union officials’ full-time salaries of the President and Benefit Representative of the union representing the company’s employees). The *Titan* court found its holding to “further[] the statutory purpose of preventing conflicts of interest.” *Id.* at 712.

²⁸⁶ See *N.Y. Tel. Co. v. Commc’ns Workers of Am. Local 1100, AFL-CIO Dist. One*, 256 F.3d 89 (2d Cir. 2001).

²⁸⁷ See Arthur P. Murphy & Emel G. Wadhvani, *Think Twice Before You Pick Up the Lunch Tab*, 11 No. 6 HR ADVISOR: LEGAL & PRAC. GUIDANCE ART 2 (2005).

²⁸⁸ See *Sheet Metal Contractors Ass’n of S.F. v. Sheet Metal Workers Int’l Ass’n*, 248 F.2d 307 (9th Cir. 1957).

The most recent issue, as *Mulhall* and the VW example both illustrate, is whether a pre-bargaining Memorandum of Understanding violates the ban. Put another way, do such agreements entail an employer “deliver[ing]” or “agree[ing] to deliver” a “thing of value” to a labor organization. The Third and Fourth Circuits have said no while the Eleventh Circuit has said it can.²⁸⁹ Again, how the Board and courts would view agreements between employers and labor organizations that, at least are not currently, attempting to unionize the workplace is also unclear. What seems more straightforward is that an employer providing money to that labor organization will almost certainly violate section 302, yet such financial support seems crucial to the creation of organizations that have the capacity to act as third-party monitors of corporate practices.

IV. PARTIAL AND POTENTIAL SOLUTIONS

The doctrinal discussion in Part III illustrates the section 8(a)(2) and 302 vulnerabilities faced by nontraditional worker organizations designed to help NLRA-covered workers. For organizations that create general codes of conduct and then try to get reputation-conscious companies to agree to not only abide by them but require their suppliers to do the same, like the Fair Food Council, the only question is whether the organization is a labor organization under section 2(5).²⁹⁰ If it is, then the combination of employer funding and employer membership almost surely violate the relevant bans. The same can be said for organizations like Restaurant Opportunities Centers United. For affiliation groups within companies like Google, if the company does or intends to work with that organization on the development of company policies, then the company’s funding of the organization will almost certainly also violate the bans.²⁹¹ As discussed in Part I, current economic, doctrinal, and consumer conditions have led to the development of these nontraditional forms of organization. And those discussed here have enjoyed success and hold promise for workers looking to organize for mutual advantage going forward—an express policy of the United States.²⁹² Because sections 8(a)(2) and 302 have the

²⁸⁹ Compare *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008) (finding such agreements do not implicate section 302), and *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206 (3d Cir. 2004) (same), with *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012) (finding such agreements may violate section 302, depending on the intent of the parties).

²⁹⁰ See *supra* Section II.A.2.

²⁹¹ See *supra* Section III.A.

²⁹² See 29 U.S.C. § 151 (2012).

potential to end the sorts of relationships between workers and employers discussed, there are reasons to rethink the bans. While fully fleshed out solutions are beyond the scope of this Article, below I sketch out a few ways those looking to narrow, repeal, or overturn the bans might go about doing so.

A. *Administrative or Legislative*

A partial solution is a narrowing of either the definition of labor organization in section 2(5) or of support, interference, and things of value in sections 8(a)(2) and 302.²⁹³ Such narrowing could be achieved through either congressional action or Board interpretation.

If the various forms of worker organizations discussed simply fell outside the scope of the NLRA, sections 8(a)(2) and 302 would no longer stand in the way of cooperation with employers. Narrowing the definition of “labor organization” has been recommended by scholars in the past, as a way to make room for the productivity-enhancing quality circles favored by business in the 1990s.²⁹⁴ The limits of this method are of course tied to how the narrowing is achieved. If, as Professor Samuel Estreicher has previously called for, the definition is limited to those organizations that “bargain with” employers over the terms and conditions of work, problems remain for the organizations described in Part II.²⁹⁵ Affiliation groups are, when robust, bargaining over the terms and conditions. And larger organizations like Fast Food Forward may benefit from being able to sit down with employers and bargain directly, instead of being forced to stay outside the front doors picketing and protesting (employers would surely prefer that in some cases).²⁹⁶ Nonetheless, while not a full solution, a narrowed version of “labor organization” would help. Fast Food Forward and other more political and consumer-facing organizations like it could continue as they currently operate. Whether Restaurant Opportunities Centers United would avoid problems remains unclear and depends on, among other things, whether the fact that employers and employees are both members of the organization making standards means those parties are “bargaining” when they create standards and codes of employer conduct that the organization pressures restaurants to adopt.²⁹⁷

²⁹³ See *id.* §§ 152(5), 158(a)(2), 186(a).

²⁹⁴ See Estreicher, *supra* note 249, at 150; Naduris-Weissman, *supra* note 187, at 287–91.

²⁹⁵ See Estreicher, *supra* note 249, at 150.

²⁹⁶ See Greenhouse, *Fight for \$15*, *supra* note 38 (“The Fight for \$15 is giving McDonald’s a stark choice: either sit down and work together with us to find a way to lift hundreds of thousands of low-wage McDonald’s workers or face continued economic war.”).

²⁹⁷ See *supra* notes 142–47 and accompanying text.

Both narrowing and repealing sections 8(a)(2) directly were also proposed by scholars in the 1990s.²⁹⁸ And the Teamwork for Employees and Managers Act (TEAM Act), which made it through both houses of Congress but was ultimately vetoed by President Clinton, would have done so.²⁹⁹ After courts began applying section 302 to once common labor practices, like employers granting paid leaves of absence to employees to work full-time for their unions, a few commentators began calling for congressional amendment.³⁰⁰

As between Congress and the Board, congressional gridlock makes congressional action seem unrealistic, particularly when organizations like the Chamber of Commerce and the Center for Union Facts are already fighting for the opposite—that is, they continue to argue for a more expansive definition of labor organization as a way to impose additional costs on worker centers and the Fast Food Forward movement.³⁰¹ Thus, though contingent on the makeup of the Board, a narrowed interpretation is less costly and something we have seen in here before. After the Supreme Court's broad interpretation of "dealing with" in *Electromation*, there was substantial backlash in the business sector and a "firestorm of protest from Republicans in Congress, led by Newt Gingrich."³⁰² The Board's subsequent definition of "dealing" as a bilateral mechanism was understood as an attempt to respond to the backlash. However, a narrow interpretation by one Board does not protect against a more expansive one under a different administration.

²⁹⁸ Often as part of larger packages of reforms. See, e.g., PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 225–306 (1990); Barenberg, *supra* note 21, at 936–40 (discussing proposals); see also Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 51 (1988).

²⁹⁹ S. REP. NO. 104-259 (1995); see also Estlund, *The Ossification of American Labor Law*, *supra* note 6, at 1612 (discussing the proposal).

³⁰⁰ See, e.g., Christopher J. Garofalo, Note, *Section 302 of the LMRA: Make Way for the Employee-Paid Union Representative*, 75 N.Y.U. L. REV. 775 (2000). The Supreme Court granted certiorari in *Caterpillar, Inc. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* to decide whether such grants of paid leave violated section 302 but the case settled and certiorari dismissed. 523 U.S. 1015 (1998).

³⁰¹ See AN OVERVIEW OF LEADING WORKER CENTERS, *supra* note 20, at 9 (“[T]he NLR defines labor organizations to include organizations that seek to deal with employers, regardless of whether the organization seeks recognition as the certified bargaining agent of employees. OUR Walmart has not abandoned its demands that Walmart change terms and conditions of employment in its stores. As such, it continues to have the requisite purpose for a finding that it is a labor organization.”); Richard Berman, *The Labor Movement's New Blood: 'Worker Centers' Stage Strikes with Few Actual Employees and Do an End-Run Around Federal Laws Governing Unions*, WALL ST. J. (Sept. 12, 2013, 7:13 PM), <http://www.wsj.com/articles/SB10001424127887324549004579066724265410410>; Ben Penn, *U.S. Chamber Report Casts Worker Centers as Means for Unions to Circumvent NLRA*, Daily Lab. Rep. (BNA) No. 38, at A-12 (Feb. 26, 2014).

³⁰² Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1682 (1999).

B. Judicial

Beyond the Court's narrowing the relevant statutes in the ways described above, there are also a variety of First Amendment arguments that could require a dramatic narrowing of sections 8(a)(2) and 302. Labor law scholars have recognized the potential of First Amendment arguments in other areas of labor law.³⁰³ Here I mean to only sketch how these arguments might look, saving a deeper look for future work.

As labor scholars know, the Court has historically ignored significant tensions between labor law and First Amendment rights of speech and association, treating labor law as a First Amendment "black hole,"³⁰⁴ where "labor unions receive less protection than other social movement groups, and their speech sometimes receives less protection than even commercial speech."³⁰⁵ However, both labor scholars and the Supreme Court have provided new arguments that could be applied to the ban on company support and interference with labor organizations in section 8(a)(2) and section 302's broad prohibition on employers giving things of value to labor organizations. In particular, the First Amendment protection of assembly and speech provide two avenues worth further exploration.³⁰⁶ Here I begin to sketch out how those arguments might apply.

1. Right of Assembly and Expressive Association

While often taking a backseat to speech, the First Amendment also protects the right to "peaceably assemble." As Professor Michael

³⁰³ Recent work includes: Crain & Inazu, *supra* note 42; Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561 (2014); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023 (2013); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 COLUM. L. REV. 800 (2012).

³⁰⁴ See James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder."). Criticizing the Court's First Amendment jurisprudence in the area of labor is not new. See, e.g., Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951); Crain & Inazu, *supra* note 42; Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1321-22 (2005) (arguing that the Court's treatment of picketing in labor is inconsistent with its treatment of picketing outside that context).

³⁰⁵ Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 17 (2011).

³⁰⁶ I limit my inquiry here, as in the paper, to private sector unionism.

McConnell has argued and other scholars endorsed, “freedom of assembly was understood to protect not only the assembly itself but also the right to organize assemblies through more or less continual associations and for those associations to select their own members by their own criteria.”³⁰⁷ Scholars have recently attempted to “re-assemble” labor law around this right.³⁰⁸ Though their work has not been directed at allowing employers to join labor organizations as members, it is worth exploring whether or not their arguments might support that position nonetheless.

Scholars have used association-based arguments to argue that classifying worker centers, one type of the nontraditional worker organizations described above, as labor organizations is constitutionally problematic.³⁰⁹ Recognizing that such a classification would put in play a variety of restrictions on worker centers, like peaceful picketing and certain financial reporting and disclosure requirements, Estlund asked “[w]hat is the justification—the constitutional justification—for imposing the manifold restrictions of labor law on voluntary associations of workers engaged in peaceful advocacy and organizing? Indeed, one might ask: What justifies imposing these restrictions on ordinary unions?”³¹⁰ As she saw it, while traditional unions are involved in a larger regulatory quid pro quo whereby the law empowers them and restricts them, worker centers do not exercise the special powers given to traditional unions (e.g., they do not claim the right to compel employers to bargain with them once majority status is achieved), and thus, they are simply voluntary associations.³¹¹ As such, there is no constitutional justification for failing to provide worker centers with the full freedoms of assembly and association other voluntary associations receive.³¹² Given this, Estlund suggests that doctrine of constitutional avoidance alone suggests courts should construe “dealing with” in a way that avoids classifying these organizations as labor organizations under the NLRA.³¹³ But, on that view, we may also ask whether, as voluntary

³⁰⁷ See Michael W. McConnell, *Freedom by Association Neglect of the Full Scope of the First Amendment Diminishes Our Rights*, FIRST THINGS (Aug. 2012) <http://www.firstthings.com/article/2012/08/freedom-by-association>; accord Crain & Inazu, *supra* note 42, at 12–13 (citing same); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (holding freedom of speech entails the ability of the parade to choose what other speakers to include and exclude in its parade).

³⁰⁸ See Crain & Inazu, *supra* note 42.

³⁰⁹ See Cynthia Estlund, *Guest Post: Worker Centers as Labor Organizations? Labor Law’s Quid Without the Quo*, ONLABOR (June 11, 2015), <http://onlabor.org/2015/06/11/worker-centers-as-labor-organizations-labor-laws-quid-without-the-quo>.

³¹⁰ *Id.* Others have made a similar point. See Naduris-Weissman, *supra* note 187, at 318.

³¹¹ Naduris-Weissman, *supra* note 187.

³¹² *Id.*

³¹³ *Id.*

associations, these organizations also have a right to choose who joins their ranks, as members. While one might be tempted to say the association does not get to have employers as members because doing so violates sections 8(a)(2) and 302, the Court has made clear in other contexts that expressive association rights can trump otherwise legitimate laws.³¹⁴

2. Free Speech

From the start, the Court has never interpreted the First Amendment as literally prohibiting all abridgments of free speech.³¹⁵ Nor has the Court ever treated all types of restrictions on speech the same, its occasional statements to the contrary notwithstanding.³¹⁶ Title VII prohibits sexually harassing speech in the workplace that would receive First Amendment protection outside of it.³¹⁷ Copyright law continues to both expand and successfully restrict the sale of works that the First Amendment would almost certainly protect outside the intellectual property context.³¹⁸ Trademark originally only protected against fraud but it too has expanded, now prohibiting a wide swath of

³¹⁴ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

³¹⁵ Justice Black's hopes notwithstanding. See *Smith v. California*, 361 U.S. 147, 157 (1959) ("I read 'no law abridging' to mean *no law abridging* . . .").

³¹⁶ For a discussion of the ways in which the Court has treated different speech differently see, for example, Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 278 (2009) (finding that the Court has, prior to now, always "rejected . . . the quest for a unitary standard of review"); see also Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–53 (1983).

³¹⁷ In *R.A.V. v. City of St. Paul*, the Court attempted to explain away this issue by pointing out that sexual harassment laws only "incidentally" sweep up "sexually derogatory 'fighting words'" while prohibiting sexually discriminatory conduct, but for the reasons the plurality points out this is unconvincing. See 505 U.S. 377, 389, 409–10 (1992) (White, J., concurring); accord Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 2 (1994) (finding that "First Amendment doctrine divides into distinctive spheres or categories," which includes a workplace sphere).

³¹⁸ Compare *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (finding that a law that allowed convicted convicts to publish books about their crime but forbade them from profiting off of those books violates the First Amendment), with 17 U.S.C. §§ 101, 106(2) (2012) (granting copyright owners the exclusive right to prepare derivative works); see also Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 230–31 (2008) (discussing how in the period after the Civil War onward "the scope of copyright protection and the tests for infringement were expanded well beyond verbatim copying and came to cover increasingly abstract and remote zones of similarity to the protected work"); Oren Bracha, *Commentary on Stowe v. Thomas (1853)*, PRIMARY SOURCES OF COPYRIGHT (1450–1900) (2008) (detailing the dramatic expansion of copyright from its original role as a "publisher's trade privilege").

expressive uses.³¹⁹ Recent scholarship suggests that the post–New Deal Court simply invented categories of what it deemed low value speech and then granted Congress the ability to create content-based regulations of them while avoiding the strict scrutiny that would normally apply.³²⁰ In short, context matters, and that context has changed.

The Roberts Court First Amendment has taken a decisively “deregulatory” turn.³²¹ And it is this turn, which has been seen most clearly in the Court’s treatment of commercial speech, which invites a challenge to the restrictions on an employer’s ability to give financial support to labor organizations.³²²

Sorrell v. IMS epitomizes the shift.³²³ There, the Court dramatically jettisoned intermediate scrutiny of commercial speech and gave restrictions on its content the same treatment as it did for restrictions on speech in other areas of public concern.³²⁴ As the *Sorrell* Court saw it, “[t]he First Amendment requires heightened scrutiny *whenever* the government creates ‘a regulation of speech because of disagreement with the message it conveys.’ . . . *Commercial speech is no exception.*”³²⁵ The Court went on to find that the Vermont law restricting the sale of and use of prescriber-identifying information for marketing purposes

³¹⁹ See William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, in EIGENTUMSKULTUREN IM VERGLEICH 1, 2 (Vandenhoeck & Ruprecht trans., 1999) (“The history of each of these [IP] doctrines (like the histories of most areas of law) is involuted and idiosyncratic, but one overall trend is common to all: expansion. With rare exceptions, the set of entitlements created by each of the doctrines has grown steadily and dramatically from the eighteenth century to present.”)

³²⁰ See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

³²¹ See, e.g., Johanna Kalb & Burt Neuborne, *Introduction: Building a First Amendment-Friendly Democracy or a Democracy-Friendly First Amendment*, 89 N.Y.U. L. REV. ONLINE 10, 12 (2014) (“Over the last decade, the conservative majority on the Roberts Court has invoked free market metaphor to turn the First Amendment into a deregulatory device.”); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.”); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (“Once the patron saint of protesters and the disenfranchised, the First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint.”).

³²² See Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMM. L.J. 579, 581–82 (2011) (“When it comes to freedom of speech, the Roberts Court has been very much a conservative court. . . . The one place where the Roberts Court has been protective of speech is with regard to the ability of corporations by implications union [sic] to spend money.”).

³²³ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

³²⁴ *Id.*

³²⁵ *Id.* at 2664 (emphases added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

was a restriction on speech that involved both content and, “in practice,” viewpoint-based discrimination.³²⁶ As a result, regardless of whether it was commercial speech, heightened scrutiny applied.³²⁷

As the dissent recognized, the Court’s treatment of a regulation on the sale and use of certain information constituted a departure from precedent regarding the treatment of commercial speech.³²⁸ Specifically, in the context of regulatory programs, the dissent pointed out that regulations are frequently speaker and content-based.³²⁹ The FDA, for instance, regulates the activities and speech related to the sale of drugs, not furniture.³³⁰ And within that domain, the FDA controls what certain speakers (e.g., pharmaceutical firms) can and cannot say to potential purchasers (e.g., doctors). For instance, the FDA prohibits pharmaceutical companies from suggesting that doctors use a drug for an “off label” purpose, regardless of whether the company thinks that use a good one for patients. As the dissent saw it, if *that* was now unconstitutional, “[The Court] has embarked upon an unprecedented task—a task that threatens significant judicial interference with widely accepted regulatory activity.”³³¹ Six months later the Second Circuit did just what the dissent found unbelievable when it overturned a conviction for off-label promotion, holding that the prohibition of off-label promotion by pharmaceutical manufacturers and their representatives by the FDA violated the First Amendment.³³²

While the Court’s treatment of corporate speech in *Sorrell* makes a First Amendment challenge on the bans plausible, regardless of the fact that the ban exists within a larger regulatory framework, the critical question is whether giving financial support or other things of value to a labor organization constitutes speech. As other scholars have pointed

³²⁶ *Id.* (“[This law] imposes a speaker- and content-based burden on protected expression . . . and, in practice, [is] viewpoint-discriminatory. . . . This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.”).

³²⁷ *See id.* at 2664 (“[The law] is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. . . . [T]he ‘Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.’” (quoting *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000))).

³²⁸ *See id.* at 2677 (“Nor has this Court *ever* previously applied any form of ‘heightened’ scrutiny in any even roughly similar case. . . . [N]either of these categories—‘content-based’ nor ‘speaker-based’—has ever before justified greater scrutiny when regulatory activity affects commercial speech.”).

³²⁹ *See id.* at 2677–78.

³³⁰ *See id.* at 2677.

³³¹ *Id.* at 2678.

³³² *See United States v. Caronia*, 703 F.3d 149, 168–69 (2d Cir. 2012). The FDA did not seek rehearing en banc, nor did it file a petition for a writ of certiorari. *Id.*

out, the threshold question of whether the thing regulated is speech at all is often, and mistakenly, assumed.³³³

There are two ways in which an employer giving money to a labor organization might constitute speech: either the giving of the money itself is a form of speech or the money enables speech. We can look at each in turn. As for whether the provision of money itself is speech, the Supreme Court's analysis in *Harris v. Quinn* provides one avenue for finding it does.³³⁴ In *Harris*, the Court held that requiring certain quasi-public sector workers to pay fair share fees violated the First Amendment.³³⁵ In reaching this conclusion, the Court found that compelling those workers to give money to the union constituted a form of compelled speech.³³⁶ The majority said, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves," and that the compelled funding of union speech fell into this category.³³⁷ Thus, because that compelled funding presented the same dangers as compelled speech, it would be treated as such.

Here we have the opposite: the government prohibits employers from funding labor organizations. If compelled funding of a labor organization's speech can violate the First Amendment, can a prohibition on funding that labor organization's speech violate the First Amendment as well? Or put differently, if money is treated like speech when funding a union is compelled, will money be treated like speech when funding a union is prohibited?

As scholars have explained, those who passed section 8(a)(2) offered two justifications for it. The first concerned employer coercion; the statute was designed to prohibit companies from creating company unions, which were frequently used as a means of avoiding outside unionization efforts.³³⁸ The second, a larger and more theoretical justification, was that only a worker suffering from a version of false consciousness would ever choose an employer-supported labor

³³³ See Genevieve Lakier, *The Invention of Low-Value Speech* 3–4 (Pub. L. and Legal Theory, Working Paper No. 488, 2014) ("[S]cholars have devoted little attention to describing, let alone analyzing, the principles courts actually use to determine what counts as speech for constitutional purposes."); see also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) ("[T]he question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed.").

³³⁴ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

³³⁵ *Id.*

³³⁶ See *id.* at 2639 ("[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012))).

³³⁷ *Knox*, 132 S. Ct. at 2288.

³³⁸ See Estreicher, *supra* note 249, at 129–31.

organization over a fully independent one. As a result, in order to support employee free choice among rational alternatives (e.g., competing independent unions), employer support of unions had to be prohibited.³³⁹ Both of these justifications are susceptible to the Court's criticism of compelled funding in *Harris*: the government is, in some sense, "compel[ing] the endorsement of ideas that it approves" by prohibiting employers and labor organizations from engaging in the construction of labor organizations that go against the government's idea of what a labor organization ought to be.³⁴⁰ The rationale is also, like *Harris*, paternalistic, and runs counter to evidence that the majority of workers, when asked, would choose a union supported by their employer over an entirely independent one.³⁴¹ While more needs to be done here, there is a colorable argument that the treatment of compelled funding in *Harris* paves the way for the prohibition on funding in sections 8(a)(2) and 302 to also receive First Amendment scrutiny.

The alternative way the Court finds the giving of money to constitute speech occurs when that money enables the speech of another. This method was used in the campaign contribution cases. Looking back to *Buckley*, the Court recognized that "virtually every means" of effectively communicating ideas requires spending money and restrictions on an individual's ability to spend money on behalf of a candidate or to fund one's own candidacy thus constituted direct restrictions on the ability of that individual to engage in political expression.³⁴² Now, the Court has never said that every time one spends money, one engages in political expression.³⁴³ It was the fact that money

³³⁹ See *id.* at 131–32; see also Barenberg, *supra* note 21, at 776. At the time section 8(a)(2) was passed, it was suggested that an employee "freely" choosing a company-supported union over a wholly independent one was analogous to a person "freely" choosing slavery. See *Labor Disputes Act: Hearing on H.R. 6288 Before the H. Comm. on Labor, 74th Cong.* (1935) (statement by Sen. Wagner), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 2489 (1949) ("[T]o argue that freedom of organization for the worker must embrace the right to select a form of organization that is not free is a contradiction in term. There cannot be freedom in an atmosphere of bondage."); see also Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1460 (1993) ("[W]orkers' acceptance of company unions had to be due either to systematic coercion (Wagner's primary view) or illegitimate distortion of preferences (the Board's view) by management.").

³⁴⁰ *Knox*, 132 S. Ct. at 2639.

³⁴¹ See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 174–80 (1999); Estreicher, *supra* note 249, at 128 (finding the false consciousness rationale to "reflect[] an attitude of paternalism that . . . is no longer appropriate given the level of education and consciousness of rights that American workers possess today").

³⁴² *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); see also *Citizens United v. FEC*, 558 U.S. 310 (2010).

³⁴³ See *Buckley*, 424 U.S. at 16 ("Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.").

was given to or spent on behalf of candidates in an election, where that money, aggregated with other people's money, allowed for political expression that made restrictions on that money subject to First Amendment scrutiny.³⁴⁴ Thus, we need to know why employers give money to labor organizations and whether those organizations are speaking.

The Court has previously answered the second question: labor organizations speak and speak in a variety of registers, including political and expressive ones.³⁴⁵ And indeed, as Justice Frankfurter observed long ago in dissent, and the *Sorrell* Court seemed to endorse in the commercial speech context, “[t]he notion that economic and political concerns are separable is pre-Victorian. . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor.”³⁴⁶ Thus, for purposes of speech analysis, an employer giving money to a labor organization seems importantly analogous to that employer giving money to a political campaign.

The campaign finance context may also suggest what sorts of support and financial contributions from employers sections 8(a)(2) and 302 can constitutionally prohibit. As the Court has said in the political context, the government has a compelling interest in prohibiting quid pro quo corruption and its appearance.³⁴⁷ While the current interpretations of both section 8(a)(2) and 302 prohibit a far broader swath of employer influence on labor organizations than that, a Court may use a corruption interest to narrow it without fully striking the bans down. Of course, figuring out what corruption looks like in both the traditional and nontraditional worker organization context is

³⁴⁴ See *id.* at 19 (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” (footnote omitted)).

³⁴⁵ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); see also Sachs, *The Unbundled Union*, *supra* note 13, at 152 (“At the peak of union strength, more than twenty million Americans—nearly all within the income classes for whom representational inequality is now a problem—exercised collective political voice through the union form. Unions have successfully mobilized their membership to vote, and, by aggregating millions of small-dollar donations from these members, have built effective lobby operations, led extensive independent electoral efforts, and positioned themselves as leading campaign contributors.” (footnote omitted)).

³⁴⁶ *Int’l Ass’n of Machinists v. S.B. Street*, 367 U.S. 740, 814–15 (1961) (footnote omitted).

³⁴⁷ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (“Any regulation [of the political process] must instead target . . . ‘quid pro quo’ corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. ‘The hallmark of corruption is the financial quid pro quo: dollars for political favors.’” (citation omitted) (quoting *McCormick v. United States*, 500 U.S. 257, 266 (1991))); see also *Citizens United*, 558 U.S. 310.

far from clear. Unions and employers that engage in pre-organizing MOAs with employers must not believe that all cooperation between employers and labor organizations is a form of corruption. And, indeed, the Court's analysis in *Sorrell* seems to support this position. As discussed, there Vermont wanted to limit the relationship between doctors and pharmaceutical company marketers in order to, among other things, ensure the doctors were making decisions on behalf of patients without commercial interference. Here, the restrictions on company support are similarly designed to preserve a particular type of relationship between labor organizations and workers. But, at least under the Court's reasoning in *Sorrell*, it does not appear this Court finds third-party influence on such important relationships a form of corruption.³⁴⁸

Determining what corruption of non-traditional worker organizations looks like, though, requires more thought. Such organizations often help workers but do so without forming any sort of contractual relationship with them. And yet these organizations, which have the potential to dramatically help workers, may take hundreds of thousands of dollars a year from employers, as is the case with the Accord after the Rana Plaza tragedy.³⁴⁹ Without those large contributions, such organization may not have the resources necessary to provide the on-the-ground monitoring and training likely necessary to be effective. Similarly complicated is the question of whether a corruption analysis should change when employers are also members of the organization they are financing, as is the case with the Restaurant Opportunities Centers United and the Googler's LGBT affiliation group.

CONCLUSION

A variety of economic, doctrinal, and consumer shifts have together motivated the development of new and heterogeneous forms of worker organization.³⁵⁰ While these shifts have made certain types of bargaining with employers impracticable for a large share of Americans,

³⁴⁸ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messenger."); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 487, 518 (1996) (Thomas, J., concurring) (striking down a ban on price advertising on alcohol that was justified on the grounds that such ads might persuade people to do something bad (drink more), the majority said, "in cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech").

³⁴⁹ See discussion *supra* Section II.A.2.

³⁵⁰ See discussion *supra* Part I.

they have also made working with and receiving funding from reputation-conscious employers a different, and potentially powerful, tool for the improvement of work.³⁵¹ In its current formulation, the definition of “labor organization” and the broad reach of sections 8(a)(2) of the NLRA and 302 of the LMRA cast a shadow of uncertainty over the legality of many of these organizations.³⁵²

While there are colorable constitutional arguments against the current scope of sections 8(a)(2) and 302,³⁵³ the question remains whether the various types of privately negotiated agreements between these nontraditional worker organizations and companies are normatively desirable. Answering this question requires one to answer hard questions about, among other things, what the goals of labor organizing should be—both today and looking forward to a world of evolving worker-employer relations; what companies owe or ought to provide to workers; what and whose goods we are interested in increasing; whether and to what extent intervention by our government at this point in time is likely to help or hinder the achievement of those ends, and whether that government intervention is legitimate, regardless of its potential effects.

These are difficult questions. If one thinks, as those at the time section 8(a)(2) was passed did, that there is a fundamental antagonism between workers and employers, one might be skeptical of the possibility that relationships between workers and employers that rely on anything other than enforceable contracts will help workers achieve long-term gains.³⁵⁴ For those committed to workplace democracy as well as democratic structures within labor organizations, the desirability of privately negotiated agreements between nontraditional worker organizations and companies may be unclear. While the Immokalee Worker’s Fair Food Council is not chosen by the workers who benefit from its actions via a democratic process, and the organization itself makes no commitments to internal democracy, it has been able to demand the creation of health and safety councils for workers.³⁵⁵ And, once in place, those councils give workers the opportunity to exercise voice in workplaces where they otherwise likely could not. Time

³⁵¹ See discussion *supra* Part II.

³⁵² See discussion *supra* Part III.

³⁵³ See discussion *supra* Section IV.B.

³⁵⁴ This also echoes the concerns labor had in response to the rise of welfare capitalism and company unionism in the 1920s. See, e.g., DUBOFSKY & DULLES, *supra* note 67, at 209–38; WILLIAM GREEN, THE SUPERIORITY OF TRADE UNIONS OVER COMPANY “UNIONS” 7 (1926) (“In exercising control over company unions employers accomplish a double purpose. They satisfy the instinct of the workers to organize and they completely dominate and control the company union with which the workers are identified.”).

³⁵⁵ See discussion *supra* Section II.A.2.

horizons are also a question. While one may think the arrangements discussed in this paper are good because they better conditions for some of those worst off workers today, what if in the long-term such arrangements result in fewer benefits than a world in which sections 8(a)(2) and 302 do more to prohibit them?

This paper takes the position that privately negotiated agreements between various nontraditional worker organizations and companies can be good because they are, today, resulting in improved conditions for workers. In future work I will look more closely at whether that position is normatively sustainable, and if so, on what basis. For now, it is important to simply recognize that these arrangements are occurring, they are heterogeneous, and there are reasons to believe labor law will come to regulate them moving forward. And, in the face of changing working conditions, there is at least *prima facie* evidence that these relationships have helped improve conditions for workers—from tomato pickers in Florida to the lesbian software engineers in California. As a result, it is time to once again rethink these bans. There are a variety of ways this rethinking could go and this Article introduces a few.