The Worker Center Movement and Traditional Labor Law: A Contextual Analysis

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Adjudicators and scholars have yet to work out the labor law implications of an emerging form of worker-advocacy organization—the worker center. Today, over 160 worker centers in the United States assist low-wage, often immigrant workers by providing legal and other services, advocating on their behalf through publicity and legislative campaigns, and organizing them to take action for economic and political change. While many worker centers seek to vindicate employment rights and may target employers, they generally avoid bargaining with employers.

This Article explores how traditional labor laws, primarily the National Labor Relations Act (NLRA) and the Labor Management Reporting and Disclosure Act (LMRDA), should apply to worker centers. While worker centers can use labor law’s protections for any workers who qualify as statutory employees, it is less clear whether the law’s restrictions on union activities—such as prohibitions on secondary boycotts and intensive reporting requirements, which apply to statutorily-defined “labor organizations”—should apply to worker centers. Whether a worker center should be considered a “labor organization” depends on its particular activities. The Article suggests a framework that analyzes worker center activity through three lenses: a traditional statutory analysis based on section 2(5) of the NLRA and section 2(5) case law, a contextual analysis based on the policies that animate different parts of the NLRA, and a purposive analysis that considers constitutional concerns in regulating associational activity that may merit First Amendment protection. The Article applies this three-tiered framework to four worker centers that exemplify different aspects of the worker center movement, in order to determine which worker center activities are most likely to confer “labor organization” status. Viewed through all three lenses, labor law regulation of most worker centers is unlikely, so long as the centers do not seek to directly bargain with employers over working conditions. Worker centers may also avoid becoming “la-

† Law Fellow, Service Employees International Union. Boalt Hall, J.D., 2006. I thank David Rosenfeld for helping me think through many of the ideas in this Article, Alan Hyde and Tom Fritzsche for their thoughtful comments on earlier drafts, and Sara Flocks, Saru Jayaraman, Yungsuhn Park, and Hillary Ronen for sharing their experiences of the worker center movement with me. I’m also grateful to Ilana Waxman for her careful reading, suggestions, and encouragement. This article was supported by the University of California Labor and Employment Research Fund.

bor organizations" if they limit any such bargaining to the settling of litigation arising from individual employment claims (such as wage and hour, discrimination, and workers' compensation claims). However, when worker centers seek to resolve workplace disputes by engaging in sustained back-and-forth dealings with the employer, as they may in some code-of-conduct campaigns, they run a risk of being brought under the purview of traditional labor law. The Article concludes by suggesting additional legal quandaries that may arise as worker centers grow, undertake partnerships with unions, and confront other areas of law in which the courts have accorded special protections to labor unions.

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PROLOGUE: The Daniel Workers Campaign

Workers at Daniel, an upscale restaurant in Manhattan, thought their
employer was violating the law. They complained of numerous wage and
hour violations. They also believed the employer had engaged in unlawful
discrimination, sexual harassment, and retaliation. The restaurant workers
contacted a nonprofit organization that connected them with several lawyers
who believed the workers had a colorable legal claim.

At first the nonprofit sought to resolve the problem outside the courts.
The organization drafted a demand letter with a request to meet with the
restaurant’s management. With the goal of settling the issue and avoiding
litigation, the restaurant agreed. At the meeting, the nonprofit presented a
list of demands that Daniel workers generated in meetings with the non-profit. True to its mission, the organization sought to reach a settlement that would improve the conditions of all of the restaurant’s workers, not merely those who initially raised the complaints. In addition to back pay for the complaining workers, the nonprofit put forth a comprehensive proposal that included wage increases and a seniority provision for bussers, a promotion policy, installation of a punch-card system for “back of the house” employees, sick days, a grievance procedure, an “on-call” system, a uniform allowance, and a progressive discipline policy. The proposal also called on the employer to post labor law notices, to receive training on labor law compliance, and to develop a sexual harassment policy and a procedure for dealing with managers under the influence of drugs or alcohol.

In addition, the proposed agreement contained two distinctive provisions aimed at ensuring compliance. First, the agreement specified that in the event of a planned discharge, the employer would have to give the nonprofit organization three days’ notice to assess whether the motive was retaliatory and thus in violation of the agreement. Second, either party would have the right to take disputes over compliance with the settlement agreement to a third party arbitrator so long as the agreement was in effect.

The nonprofit and the restaurant met numerous times to discuss the proposal. But Daniel rejected their offer and the nonprofit and Daniel’s workers decided to file a discrimination lawsuit.\(^1\) The nonprofit also organized demonstrations near the entrances to the restaurant, in which workers chanted, made noise, passed out handbills, carried picket signs, and displayed a giant inflatable cockroach. The protests continued on a weekly basis for many months.

The employer, for its part, also took legal action. But it did not go to a court of law—it went to an administrative agency, the National Labor Relations Board (NLRB). The employer’s contention was that the organization in question, known as the Restaurant Opportunities Center of New York (ROC-NY), was a “labor organization” under the National Labor Relations Act (NLRA or Act) whose activities constituted an unfair labor practice—i.e. picketing the employer with the goal of obtaining voluntary recognition without filing an election petition within a reasonable period of time.\(^2\)

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2. The NLRA defines “labor organization” 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.

NLRA Section 2(5), 29 U.S.C. § 152(5) (2006). It is an unfair labor practice for a “labor organization” to engage in “recognitional” picketing as alleged. NLRA Section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C). Other limitations on activity by “labor organizations” are discussed in Part III.B.
But unlike typical "labor organizations," ROC-NY was not a labor union. Although Local 100 of the Hotel and Restaurant Employees Union (HERE) had played a role in the organization's founding, and initially donated to ROC-NY, the worker center did not itself engage in collective bargaining or seek to become certified as the exclusive representative of workers under the NLRA.

Faced with this situation, the regional NLRB office that had received the complaint, along with the complaints of two other restaurants that ROC-NY targeted, submitted the cases to headquarters for advice. The General Counsel of the NLRB, in an advice memorandum, concluded that ROC-NY was not a labor organization under section 2(5) of the Act. The NLRB Regional Director subsequently refused to issue a complaint and the General Counsel upheld this refusal on appeal.

This result was prefigured by a decision reached by the Board some thirty years prior on what it means to be a labor organization. In that case, a worker-advocacy organization known as the Center for United Labor Action (CULA) had engaged in picketing and other activities at a department store, asking consumers not to patronize the store unless it agreed to cease stocking clothes from a manufacturer involved in a national labor dispute. Finding that CULA did not seek to represent workers in the collective bargaining process, the NLRB held that CULA was not a "labor organization" and thus could not have violated the NLRA's restrictions on secondary boycotts.

I. INTRODUCTION

ROC-NY is an example of a new crop of worker-advocacy organizations known as "worker centers" that have grown up in recent years.


4. Letter from Ronald Meisburg, General Counsel, NLRB, to Peter M. Panken, Esq., Epstein, & Pecker & Green, PC (Mar. 19, 2007) (by Office of Appeals) (on file with author). However, in a subsequent letter in response to the employer's motion for reconsideration, the General Counsel suggested its conclusion that ROC-NY was not "labor organization" was less definitive, and focused instead on the fact that even if it were a labor organization it did not violate NLRA § 8(b)(7). See Letter from Ronald Meisburg, General Counsel, NLRB, to Thomas W. Budd, Esq., Clifton, Budd, and Demaria, LLP (Aug. 23 2007) (on file with author) [hereinafter, Meisburg, ROC-NY Reconsideration Letter].

5. Center for United Labor Action [CULA], 219 N.L.R.B. 873 (1975). The case is discussed in Part V.C.

6. See Janice Fine, Worker Centers: Organizing Communities at the Edge of the Dream (2006). Professor Fine defines worker centers as "community-based mediating institutions that provide support to and organize among communities of low-wage workers." Id. at 11. In her book, Fine focuses
These organizations seek to improve the lot of employees in marginal industries but do not aspire to negotiate with employers, and have for the most part shied away from using NLRB processes to protect worker rights. Although the NLRB ruled that ROC-NY was not a "labor organization" by virtue of its Daniel campaign, the question of the status of worker centers under the NLRA remains an open question, especially as worker centers continue to evolve.7

Applying federal labor laws to worker centers would dramatically alter the legal landscape in which they operate. As the ROC-NY example indicates, worker centers that use aggressive tactics will inevitably face employer-initiated litigation seeking to restrict their activities. While worker centers can assist workers in exercising their rights as "employees" under the NLRA regardless of whether they are "labor organizations," falling under this category would subject the centers to restrictions on picketing and organizational activity. This classification could also potentially subject worker centers to the reporting and internal governance requirements of the Labor Management Reporting and Disclosure Act (LMRDA) of 1959.8

This Article explores how traditional labor law should apply to worker centers, in both its protective and restrictive aspects. The Article proceeds as follows. In Part II, I describe the emergence of the worker center movement and profile four organizations that illustrate different tendencies within the movement. Part III outlines specific provisions of the NLRA and LMRDA that could affect worker center activity: first exploring how worker centers can assist their members to engage in collective activity in the workplace that is protected by the NLRA, and then canvassing the restrictions that federal labor law would impose if a worker center were deemed a statutory "labor organization." This critical question is introduced in Part IV, which sets out the NLRB’s general approach to statutory interpretation questions and examines the Board’s leeway in determining whether worker centers are labor organizations. I next propose, in Part V, a three-tiered framework for analyzing how the "labor organization" definition should apply to non-traditional groups like worker centers, drawing from different strands of NLRA and First Amendment case law. The first level of analysis, the "traditional analysis," assesses "labor organization"

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status based on NLRA case law examining so-called “employee-participation plans,” without reference to the attendant legal or social context. The remaining two tiers of analysis examine the “labor organization” question in a purposive manner. The “policy-context” analysis explores how the Board has emphasized policy concerns specific to the legal context in which the question has arisen in past cases. The third tier, the “constitutional-purposive” analysis, assesses the status of worker centers in light of their hybrid nature as social movement organizations engaging in the types of activity that have been afforded greater constitutional protection when pursued by non-labor groups and when not directed at work-related issues. In Part VI, I apply the three-tiered analysis to the organizations profiled earlier, and conclude in Part VII with thoughts on the future of labor law regulation of worker centers.

Driving the purposive analyses in this Article is the idea that historical change should inform the law; that a new form of worker-advocacy organization, arising in an economic and political context unimaginable at the time of the NLRA’s passage, and representing an approach to worker organizing unlike that pursued by traditional labor unions, should be treated differently under the NLRA. While the labor movement in this country has secured a relatively good standard of living for those lucky enough to be union members, the rate of unionization as well as the viability of the NLRA face considerable doubt as the Act passes its seventy-year mark. It is not surprising, then, that most worker centers forego traditional representation processes in favor of private litigation based on federal and state employment laws regulating wages, hours, and occupational safety. The worker centers’ focus on statutory employment standards also reflects the fact that they often aim to serve workers with the least stable employment and lowest wages, in order to ensure minimum compliance with the law. This commitment to the rights of the underserved in society also marks the worker center movement’s common heritage with its civil rights counterpart. In the civil rights struggle, participants waged a political and legal battle for equal treatment under the law, as well as a social struggle to eliminate a caste system. Today’s marginalized and undocumented foreign workers wage a similar battle. These parallels help explain worker centers’ use of civil rights rhetoric and tactics to improve the conditions of the workers they support. The danger is that through their aggressive protests worker centers could lose their status as advocates for basic legal rights and

9. See Benjamin I. Sachs, Labor Law Renewal, 1 HARV. L. & POL’Y REV. 375, 389-93 (2007) (describing flaws in NLRA regime that have caused worker advocates to turn to employment statutes as a basis for collective action) [hereinafter Sachs, Labor Law Renewal]. Professor Sachs has also developed a theoretical account of ways in which employment law can function as a substitute form of labor law that acts as both “the locus of workers’ organizational activity and as the legal mechanism that insulates that activity from employer interference.” Benjamin I. Sachs, Employment Law as Labor Law, 29 CARDOZO L. REV. 2685, 2689 (2008) [hereinafter Sachs, Employment Law as Labor Law].
become subject to the familiar restrictions our system of labor laws imposes upon picketing workers. By understanding the contours of that system, worker centers can avoid classification as labor organizations while making the most of the protective aspects of labor law.

II. THE WORKER CENTER MOVEMENT

A. Defining the Worker Center

As of 2007, there were at least 160 worker centers in the United States that assist low-wage workers in a variety of industries, with a majority focusing on immigrant workers. Their missions vary: some are basic clinics that provide advice and legal services to specific types of workers; others organize workers to become active advocates for themselves and for other workers; still others mount campaigns to target specific employers, or to change state and local laws.

There is a long history of community-based efforts to assist poor and immigrant workers in this country. However, the growth of worker center organizations in the past thirty years, combined with the emerging centrality of economic justice to their missions and the increasing communication and mutual support that many of them share, has created what has been called a "worker center movement." There are two basic and interrelated explanations for this rise. In part, worker centers are a response to the increasing numbers of vulnerable immigrants working in industries that are abusive or fail to meet minimum employment standards set by law. Worker centers also fill a vacuum of workplace leadership in industries in which unions have, for one reason or another, been unable to establish a substantial presence.


12. For an explanation of the rise of worker centers as filling the gap left by unions, see Saru Jayaraman & Immanuel Ness, Models of Worker Organizing, in THE NEW IMMIGRANT WORKFORCE 71 (Sarumathi Jayaraman & Immanuel Ness, eds. 2005). Fine recounts the emergence of African-American worker centers in the South that arose in the late 1970s and early 1980s in response to the rise of manufacturing and "big box" retail, the lack of labor unions to organize them, and racism in employment. Fine, supra note 6, at 9. Later, immigrant worker centers emerged as offshoots of social service agencies or other nonprofits and have coincided with immigration waves and settlement patterns. After flagship organizations were started in major cities in the 1970s and 1980s, followed by another crop in the late 1980s and 1990s that focused on new groups of Latino and Southeast Asian immigrants in urban areas, a third wave has emerged since 2000 in more suburban and rural areas and among a greater range
B. Worker Center Activities and Legal Status

The status of these new worker organizations is not clearly defined under existing labor laws. While all workers who qualify as "employees" under the NLRA have a protected right to engage in certain concerted activities, worker centers must worry about the possibility that by engaging with employers they could become subject to the same regulations that restrict some labor union activities. Worker centers largely eschew the collective bargaining role common to traditional unions. However, it is unclear whether nontraditional engagement with employers should bring them within the Act's regulatory jurisdiction as "labor organizations."

How labor laws apply to worker centers will depend on the goals and activities they pursue. Worker center organizing activity can be considered both as social movement activity (in its focus on public policy and political organizing) and as an appeal to employers (in its focus on improving conditions in individual workplaces). Worker centers pursue these goals through three basic types of activities. First, centers deliver services, such as legal representation to recover unpaid wages, rights education, English classes, and access to community resources. Second, centers engage in advocacy by publicizing information about low-wage industries, initiating lobbying and grassroots-mobilization campaigns to change employment laws, working with government agencies to improve enforcement of employment laws, and bringing lawsuits against employers. Third, centers organize workers to take action on their own behalf, through political education, leadership training, and by building ongoing organizations. As Professor Fine argues, what makes worker centers unique is the way in which they bring these elements together.

Most worker centers are nonprofit organizations with often informal structures. Many admit members and require dues or other participation obligations, although few have formal dues-collection systems or deny services for refusal to pay. The specific types of activities that centers engage in usually depend on local conditions and the needs of the

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13. See infra Part III.A. discussing protected concerted activity.
14. In the words of Janice Fine, "most worker centers, even those with a strong industry-specific focus, have not yet become full-blown unions. But perhaps a better way to understand today's industry-based efforts of worker centers is that they are functioning as 'preunions' that are laying the groundwork for a more systematic union organizing effort." Fine, supra note 6, at 247.
15. Id. at 2.
16. Id. at 219-220 (noting that although 48 percent of centers reported having membership dues requirements, few had systemized collection and reported that payment is often irregular).
communities they seek to serve. According to Fine’s study, fifty-six percent of worker centers engage in industry-specific organizing, meaning that they build organizations of workers and engage in campaigns intended to improve wages and working conditions in a particular industry in some geographic area. Of these, the most common industries targeted were Day Labor/Construction (25%), Hotel/Restaurant/Casino (19%), Agricultural (16%), and Domestic Workers (13%). The remaining forty-four percent of worker centers organize workers in a specific geographic area on non-industry specific issues, such as general employment policy, legal aid, housing, healthcare, or education.

While worker centers mostly operate independently of one another and in a local context, there are national networks of worker centers that are giving shape to a national identity for the movement. Some worker cen-
ters also have relationships with unions, but so far the two generally do not engage in joint organizing campaigns.\textsuperscript{21}

C. A Profile of the Worker Center Movement

Understanding the potential legal ramifications of worker center activities requires a fuller picture of how the centers pursue their goals. This section profiles four worker centers in the following categories: immigrant day-laborer worker centers, ethnic community worker centers, and industry-based worker centers.\textsuperscript{22} I return to these profiles in Part VI to determine whether the centers should qualify as "labor organizations" under the analytical framework I develop in this Article.

1. Immigrant Day-Laborer Worker Centers

One major category of worker centers is day laborer worker-centers. They organize mostly immigrant workers who work in "day labor"—generally short-term manual-labor projects in the construction and landscaping industries, but also farm work, cleaning, and moving.\textsuperscript{23} A 2004 survey of the day labor industry concluded that over 100,000 people work as day laborers.\textsuperscript{24} The vast majority of day laborers congregate at informal hiring sites near home-improvement stores, gas stations, busy thoroughfares, and expressway onramps.\textsuperscript{25} About one-fifth of these workers seek work through day-laborer centers that operate hiring halls to match employers

\begin{itemize}
\item \textsuperscript{21} See infra note 463 (describing incipient collaborations between worker centers and traditional labor unions).
\item \textsuperscript{24} \textit{Id.} at 4.
\item \textsuperscript{25} \textit{Id.}
with those seeking work. The study's authors identified sixty-three day-laborer worker centers across the country, the majority having been established after 2000. Of these, forty-three were operated by community organizations, ten by city government agencies, and ten by church groups. The study also found that most day-laborer worker centers do the following: (1) provide a defined space for workers to assemble, as well as a job-allocation system (either a lottery, list of available workers, or some other selection mechanism) that imposes order or a hiring queue on the day-laborer hiring process; (2) require job seekers and employers to register with center staff, which helps workers identify employers and hold them accountable to labor standards; (3) set minimum wage rates; and (4) monitor labor standards, employer behavior, and worker quality.

a. The Day Labor Program of La Raza Centro Legal

La Raza Centro Legal, a thirty-five-year-old legal service organization in San Francisco, operates a worker center that is typical of many centers that assist day laborers. Through its Day Labor Program (DLP), the center serves as a hiring hall for day laborers, and also provides training in occupational health and safety, job skills, English, and political and rights education. The hiring hall is run by La Raza staff and worker-members of the Day Laborer Worker Association, which elects leaders and democratically sets policies and terms of employment, such as the minimum-hiring wage. La Raza also runs a similar program for domestic-women workers, called the Women's Collective (La Colectiva). In addition to the hiring hall component, both programs seek to build collective power among members and raise community awareness about the status of immigrant workers.

As part of the DLP, La Raza in 2004 launched a legal clinic that focuses on recovering unpaid wages and remedying other employer abuses through the legal system. Unlike most worker centers, the clinic is run by day laborers and domestic workers who receive training in employment law. Most individuals who come to the clinic work in construction. Common complaints include failure to receive overtime pay, payment of less than the minimum wage, and violation of state-mandated meal and rest breaks. Clinic volunteers provide advice to those who come to the clinic in consultation with a staff attorney, and often attempt to settle the dispute on the spot by calling the employer to negotiate. When no settlement is possi-

26. Id.
27. Id. at 6.
28. Id. at 7.
29. Id. at 7-8.
30. See La Raza Centro Legal website, http://www.lrci.org. In addition to its worker-oriented programs, the center has a senior law unit, a youth law project, a housing unit, and an immigration and naturalization unit.
31. Telephone Interview with Hillary Ronen, La Raza Centro Legal (Sept. 24, 2007) (on file with author).
ble, an official complaint is made to the state administrative agency that handles wage complaints.\(^3\)

DLP members also participate in political campaigns run by La Raza, demonstrating the center's "social movement" face. These campaigns have included joining other local groups to advocate for federal immigration reform, campaigning for the city to install public bathrooms near sites where day laborers congregate, and pressuring a local developer sell a portion of land in the local neighborhood for the development of low-income housing and a renovated day-laborer center.

b. **La Raza's Campaigns Against Employers**

Although the center focuses on individual complaints, it has also planned more aggressive campaigns directed at employers who fail to respond to settlement offers or administrative agency efforts to recover wages, as well as "repeat offenders" that mistreat multiple workers. In one typical campaign, the center held a rally outside the office of an elusive contractor who stiffed ten workers out of over $20,000 in unpaid wages.\(^3\)

The clinic has also made efforts to systematically improve workplaces with known wage violations. In 2005, as part of a $15,000 settlement with a small cleaning agency that failed to pay overtime and all regular wages, give proper meal and rest breaks, and provide a safe working environment, the clinic was allowed to make four workers' rights presentations for the domestic-worker employees during work time. More recently, the clinic has engaged in roving pickets outside the multimillion-dollar house of a Silicon Valley couple that underpaid a longtime live-in housekeeper.\(^4\)

La Raza's status under traditional labor laws is not entirely clear. The organization may invoke the protections of labor law for most of its members (who would qualify as statutory "employees" even if they are undocumented), except those who act as independent contractors and are excluded from the Act's purview.\(^5\) But because La Raza regularly interacts with employers through its hiring hall, it is possible that labor law restrictions would apply to the organization as well. Although its organizational model focuses on individual representation, La Raza sometimes engages in collec-

\(^3\) Id. Between 2005 and 2007, La Raza recovered approximately $400,000 in wages for about 375 workers.

\(^3\) La Raza worked with the local district attorney, who investigated and ultimately arrested the contractor for labor theft, forcing the contractor to settle with La Raza for the stolen wages. Interview with Hillary Ronen, supra note 31.


\(^5\) Ronen estimates that ten to twenty percent of workers who come to the clinic seeking payment for work performed are not protected because of their status as independent contractors. Clinic volunteers also seek to determine if workers who are nominally independent contractors are actually "employees" under control of the employer, and therefore able to make claims for underpayment of wages and other employment law violations. Interview with Hillary Ronen, supra note 31.
tive action—and potentially action restricted by the NLRA—when similarly-situated workers are mistreated or when its members make common cause with an aggrieved fellow worker. Whether day-laborer worker centers that operate hiring halls should be classified as “labor organizations” under labor law thus raises potentially difficult questions that are examined more fully later in this Article.\(^\text{36}\)

2. **Ethnic Community Worker Centers that Target Employers**

Rather than defining themselves in relation to specific types of work, some worker centers identify themselves in relation to particular ethnic communities.\(^\text{37}\) Like day-laborer worker centers, these groups often grew out of civil-rights campaigns to improve the social and political position of people of color. Some of these organizations specifically target employers from the ethnic community, such as the Koreatown Immigrant Workers Alliance (KIWA) in Los Angeles and the Chinese Progressive Association in San Francisco. Other groups, such as the Asian Immigrant Workers Association (AIWA), target corporate employers that take advantage of workers in particular ethnic groups.\(^\text{38}\)

a. **Koreatown Immigrant Workers Alliance**

Korean-American labor activists established KIWA in 1992 with a mission “to empower low wage immigrant workers to develop a progressive constituency and leadership amongst low wage immigrant workers in Los Angeles that can join the struggle in solidarity with other under-represented communities for social change and justice.”\(^\text{39}\) The organization, whose first major campaign assisted Korean and Latino workers harmed by the Los Angeles riots, focuses on organizing restaurant and grocery-store workers in L.A.’s Koreatown, with an emphasis on worker leadership development and education.\(^\text{40}\)

b. **KIWA’s Campaigns Against Employers**

KIWA’s efforts to support workers in Koreatown have gone through several stages. Originally, KIWA operated a Workers’ Empowerment

\(^{36}\) See infra Part VI.B.1.

\(^{37}\) In California, for example, there are worker centers operating in the Korean-American community, the Filipino-American community, and the Chinese-American community. See FINE, supra note 6.

\(^{38}\) AIWA’s campaign against Jessica McClintock, in which McClintock brought NLRB charges asserting that AIWA had engaged in illegal secondary activity, is discussed infra in Part V.C.1.c.


\(^{40}\) Id. at 77-78. Originally known as the Korean Immigrant Worker Advocates, the name was changed several years ago to reflect its work with non-Korean workers. E-mail message from Yungsuhn Park, Attorney, Asian Pacific American Legal Center (April 6, 2008) (on file with author).
Clinic that provided legal representation to individual workers.\textsuperscript{41} The clinic evolved into the Restaurant Workers Justice Campaign, which was launched in 1997 to increase compliance with minimum wage laws in the restaurant industry.\textsuperscript{42}

In 2000, KIWA began two membership-based organizing projects. First, it created the Restaurant Workers Association of Koreatown (RWAK), a quasi-union that offers a medical clinic, English classes, wage claim advice, and other benefits for members.\textsuperscript{43} RWAK works to build worker power in the industry through leadership development—through such programs as organizing-oriented trainings on the minimum wage—and direct action to improve industry standards, including weekly protests outside of a non-complying local restaurant.\textsuperscript{44} Although RWAK is based at KIWA, it is an independent organization that had about 350 members in 2004.\textsuperscript{45}

At the same time, KIWA began an effort to organize an independent union among the workers of Koreatown’s seven major grocery stores, which it called the Immigrant Workers’ Union (IWU).\textsuperscript{46} In the words of KIWA’s former organizing director, the organization had “a community based union idea as opposed to an industry-specific idea,” which focused on drawing public support for the grocery workers based on the organization’s connections to Korean consumers.\textsuperscript{47} Though originally a KIWA campaign, IWU was launched in 2001 as an organization independent from KIWA, with its own constitution and bylaws. In Fall 2001, IWU circulated authorization cards for an NLRB election at the Assi Super Market, a prominent Koreatown market.\textsuperscript{48} After resolving initial competition from the United Food and Commercial Workers, IWU faced a sophisticated employer-run antiunion campaign.\textsuperscript{49} In March 2002, an intense ten-week organizational effort came to an unsuccessful end in a very close vote.\textsuperscript{50} Although IWU attempted to run a card check campaign after the vote, it lost support in the aftermath of the employer’s aggressive campaign.\textsuperscript{51}

\textsuperscript{41} Park, \textit{supra} note 39, at 78.
\textsuperscript{42} \textit{Fine}, \textit{supra} note 6, at 25.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 112.
\textsuperscript{45} \textit{Id.} at 111.
\textsuperscript{46} \textit{Id.} at 139.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 140.
\textsuperscript{49} \textit{Id.} at 141.
\textsuperscript{50} \textit{Id.} For an exploration of the union campaign and the causes of its defeat, see Park, \textit{supra} note 39.
\textsuperscript{51} See Park, \textit{supra} note 39, at 98-99. The employer’s post-election campaign included bringing in temporary replacements and suspending fifty-six workers who had received letters from the Social Security Administration (SSA) indicating that their social security numbers did not match the SSA’s records. Ultimately, the employees enjoyed some vindication after Assi settled a discrimination and wage and hour lawsuit for over one million dollars in 2007. See John Lee, \textit{Labor and Delivery}, availa-
KIWA's newest approach is the "Fair Share Campaign." The campaign hopes to achieve living wages in Koreatown markets through voluntary wage agreements with private employers. In May, 2005, two markets signed an agreement setting a wage floor of $8.50 per hour and committing to adjust the floor annually by up to three percent based on inflation.

KIWA's next goal is to make the living wage an industry standard and expand it to Koreatown's remaining supermarkets.

KIWA's unique approach to employer-targeting presents difficult questions about how the organization should be treated under federal labor law. For example, although the IWU was nominally independent, KIWA staff played an essential role in its creation and development, raising the question of whether this participation rendered KIWA itself a "labor organization." However, the petition for an election was signed in the name of IWU, solidifying its independence as an organization. Furthermore, KIWA's "fair share" campaign arguably placed KIWA in the position of a traditional labor organization seeking to secure employer assent to its wage and other employment demands. These issues raised by KIWA's campaigns are explored in more detail later in this Article.

3. Industry-Based Worker Centers

Worker centers that directly target specific industries are closer to traditional labor organizations than the organizations profiled above, and for this reason are more likely to face charges of violating federal labor law restrictions. Below, I consider two organizations that focus on the restaurant industry: Young Workers United (YWU) and the Restaurant Opportunities Center of New York (ROC-NY).

a. Young Workers United

i. Background

YWU is a San Francisco-based organization engaged in organizing young and immigrant workers in the restaurant industry. Since its found-
ing in 2002, YWU has worked closely with the local branch of HERE. With only four employees, the organization relies on unpaid volunteers and an active core of committed members to pursue its work. Unlike many other worker centers, YWU does not have any attorneys on its staff. YWU members serve on four committees that coordinate programs and develop proposals for organization-wide policies that are adopted by member consensus (or by vote in the event of deadlock) at general meetings. In addition to education and policy committees, there are two worker justice committees, one for English-speaking and another for Spanish-speaking workers. New members are brought in through YWU's political and workplace organizing campaigns, as well as through direct outreach at local colleges, culinary programs, and large restaurants.

ii. YWU Campaigns

YWU's organizing activities are split between efforts to pass legislation to improve work conditions and employer-based campaigns that focus on workplace policies. On the policy front, YWU members were active in campaigning for several San Francisco laws affecting low-income workers, including a groundbreaking law requiring employers to provide paid sick leave. YWU has also led a number of organizing campaigns directed at specific employers over issues such as nonpayment of wages and overtime, failure to pay the minimum wage, withholding of tips, and sexual harassment.

YWU's employer-directed campaigns begin when a worker comes to one of YWU's worker justice committees with a complaint. Committee members, who have been trained to take employment claims through the

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57. Telephone Interview with Sara Flocks, Co-Director, Young Workers United (Oct. 3, 2007) (on file with author). Although the jurisdiction of HERE (now UNITE-HERE) includes restaurant workers, the union has primarily organized workers in the hotel industry and supports YWU's efforts. The two organizations nevertheless operate independently, although staff members have supported each others' campaigns and considered a joint project unrelated to worker organizing. Id.; See also Fine, supra note 6, at 134-35.

58. Asher, supra note 56. YWU defines members as those who actively work for the organization, and does not require any dues. About 65 active members staff the committees, although the organization has an outreach list of over a thousand workers. Interview with Sara Flocks, supra note 57.

59. New members often learn about YWU from their co-workers, as the industry has a high degree of lateral movement between restaurants. Interview with Sara Flocks, supra note 57.

60. Asher, supra note 56. YWU was also involved in the campaign to raise San Francisco's minimum wage in 2003, a campaign against proposed changes to California's meal-break regulations, and a 2006 campaign to support an ordinance to set up a comprehensive health care system for San Francisco's uninsured residents. YWU also hopes to train members to seek elected office. Interview with Sara Flocks, supra note 57.


62. While YWU prefers campaigns that involve workplace-wide policies, the committee has decided to also pursue individual employment claims as time permits. Interview with Sara Flocks, supra note 57.
state administrative-enforcement process, first try to resolve the dispute directly with the employer. If they are unsuccessful, they file an administrative claim while continuing to seek negotiated options. As an initial step, YWU members deliver a letter to the employer stating their settlement demands and asking for direct negotiations, and progressively raise the pressure until the employer will negotiate.63

In its largest employer campaign to date, YWU challenged the pay and personnel practices of the Cheesecake Factory in San Francisco. This eventually resulted in the filing of over 120 wage claims, YWU’s participation in a statewide settlement of $4.5 million, and policy changes at every Cheesecake Factory restaurant in California.64 The campaign began in 2003 with a core group of workers who filed claims with a state enforcement agency complaining that the restaurant had failed to give them the meal and rest breaks required by law.65 The Cheesecake Factory responded by changing employee schedules but did not rectify past violations.66 A year later, the complaining workers met with YWU, which formed a Cheesecake Factory Organizing Committee to develop a strategy to confront the unresponsive company. YWU staff trained the committee on employment rights and media strategies. After formulating basic demands, the committee planned protests and leafleting to pressure the company. During the campaign, YWU members also designed a code of conduct and called upon the Cheesecake Factory to sign the code in several highly-publicized protests.67 Despite all of YWU’s efforts, the Cheesecake Factory manage-

63. Id.

64. The settlement was reached in a separate class-action lawsuit, although YWU’s campaign against the restaurant was ongoing throughout the period leading to the agreement. For an account from YWU, see YWU, Cheesecake Factory, http://www.youngworkersunited.org/article.php?list=type&type=12 (last visited Nov. 27, 2007).

65. Workers in California are entitled to one hour of pay for each work day in which a meal or rest period was not provided. See CAL. LAB. CODE § 226.7(b) (2006).

66. The Cheesecake Factory first implemented a new scheduling system in which workers were required to report an hour earlier to do preparatory work and then take a thirty-minute break before beginning a six-hour shift with no other rest periods. When this system proved ineffective, the restaurant implemented a “breaker” system, designating relief employees to work a special “breaker” shift in which their only job would be to give breaks to co-workers, who would tip them out five dollars to take the break. See Rachel Brahinsky, Unjust Desserts, S.F. BAY GUARDIAN, Aug. 17-24, 2004, available at http://www.sfbg.com/38/47/news_cheesecake.html.

67. See Carinna Acevedo, Youth Workers Protest Cheesecake, THE GOLDEN GATE [X]PRESS ONLINE, Oct. 2, 2004, available at http://www.xpress.sfsu.edu/archives/news/001923.html. According to Fine, the code of conduct was “similar to a union contract” and would have designated a “special master” to resolve disputes over its interpretation. The code included paid breaks, holidays, sick leave, and health benefits for employees who work more than twenty hours weekly. It also included two provisions modeled after union collective bargaining agreements: an employee right to be accompanied by “employee leaders” in disciplinary meetings, similar to Weingarten rights enjoyed by union employees, see NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), and an appeals process for disciplinary action that an employee believes to be without just cause. See Fine, supra note 6, at 134. The company also appears to have treated YWU’s campaign like a union campaign, holding captive audience meetings and employing other techniques often used by employers to defeat union organization drives. Interview with Sara Flocks, supra note 57.
ment would not negotiate directly with YWU staff or its members. After a series of YWU protests in the summer of 2005, the Cheesecake Factory entered into separate settlement negotiations with lawyers representing a parallel class action lawsuit over the company's meal and rest-break violations statewide.68

Although it never dealt directly with YWU,69 the company responded to YWU's pressure tactics and implemented some of its demands—replacing an unpopular supervisor and reforming the personnel system.70 YWU also trained a team of workers to act as monitors to ensure that future violations would not occur, which has resulted in greater responsiveness to workplace grievances.71

Much of YWU's work is aimed at improving the conditions of low-wage workers through legislation and industry targeting. While YWU has continually eschewed a collective bargaining role—seeking to complement rather than replace established labor unions—its activities are similar to those of traditional unions seeking to organize a workplace.72 Like unions, YWU helps workers to develop a list of grievances to present to their employer for consideration and negotiation. But YWU does not seek exclusive recognition, and its campaigns generally grow out of claims that the employer's policies violate employment laws rather than starting as efforts to raise standards above statutory minimums. Whether these activities are enough to give rise to "labor organization" status is explored more fully in Part VI.73

To date, YWU has not entered into agreements with employers concerning terms and conditions of employment. The organization that I discuss next has taken this additional step.

b. Restaurant Opportunities Center

i. Background

The Restaurant Opportunities Center (ROC-NY) is a nonprofit worker center that seeks to organize restaurant workers in New York City. ROC


69. The restaurant did, however, negotiate with a group of sixty line-cooks who spontaneously walked off the job in response to the firing of a fellow employee. After negotiating with management on the spot over the firing, the employee was rehired. Interview with Sara Flocks, supra note 57.

70. Id. The breaker's wage was raised to $15 per hour, so that workers seeking breaks no longer had to "tip out" the breaker five dollars to take a break. See supra note 36.

71. Id.

72. Organizer Flocks has stated that YWU has considered various types of relationships it may have with HERE, such as affiliation or becoming an independent local, and that the possibilities remain open. However, YWU values the flexibility of not having to service union contracts and the power it can achieve through collective action by a strong minority of workers. See Fine, supra note 6, at 134-35.

73. See infra Part VI.B.3.
was founded with assistance from HERE Local 100, after the union set up a
temporary relief center for restaurant workers affected by 9/11.74 Today,
ROC-NY is a dynamic organization of approximately 1,950 members and is
leading some of the most ambitious organizing campaigns of any worker
center in the country.75 In addition to traditional worker center programs,
such as job-search support, classes, and assistance with individual legal
claims, ROC-NY also engages in targeted campaigns against employers
who have violated the law. ROC-NY has also helped launch an independent
cooperative luxury restaurant in New York City that operates as a re-
taurant worker training center in the day.76

ii. Organizing Strategies

As of October 2007, ROC-NY has engaged in eight restaurant organiz-
ing campaigns.77 ROC-NY chooses campaigns with the potential to effect
workplace- and industry-wide change as opposed to simply assisting indi-

gual workers. It does this by only getting involved in a campaign if work-
ers commit to organize their co-workers, and by targeting high-end dining
establishments with the potential to generate publicity. In addition to pres-
suring employers to voluntarily improve employment standards, ROC-NY
publishes reports suggesting legislative solutions to conditions in the restau-
rant industry.78 It has also promoted “high road” practices directly by
launching a worker-run restaurant and by organizing the Restaurant Indus-
try Roundtable, an employer group that seeks to improve working condi-
tions. The Roundtable’s twenty-five members have signed a code of
conduct pledging to treat workers well, to provide a baseline of benefits,
and to allow workers to mediate any disputes over code compliance with a

74. Jayaraman, ROCing, supra note 22, at 143. Although ROC-NY initially used the 501(c)(3)
organization set up by Local 100 as its fiscal agent, within a few years it established its own nonprofit
entity without further funding from the union. Telephone Interview with Saru Jayaraman, Restaurant
Opportunities Center of New York (Sept. 27, 2007).

75. ROC-NY has stated that its objective is to organize all unorganized restaurant workers in New
York City. Jayaraman estimates that in 2005 around 99% of New York City’s 165,000 restaurant work-
ers are unorganized. Jayaraman, ROCing, supra note 22, at 143-44. In 2008, ROC-NY launched a
national worker center, ROC-United, to assist in the formation of regional worker centers for restaurant
workers. See infra note 462.

76. ROC-NY is a part owner of the restaurant, known as Colors, whose non-managerial employ-
ees are union members in HERE. See John Lawrence, COLORS Restaurant, DOLLARS & SENSE (Issue

77. These include campaigns against the Smith & Wollensky Restaurant Group (Park Avenue
Café and Cité); the SMJ Group, Inc (Trattoria Dell’Arte & Brooklyn Diner); 65 Restaurant Opportuni-
ties (Restaurant Daniel); and the Fireman’s Hospitality Group (Shelly’s Restaurant, Redeye Grill, Café
Fiorello, and several other establishments). Interview with Saru Jayaraman, supra note 74.

78. In 2007 ROC pushed the New York City Council to introduce a bill that would require the city
to review employment law violations when considering applications to renew a restaurant operating license. See Press Release, Brennan Center for Justice, New Responsible Restaurant Act Will Help Food Industry Fight Wage Violations (May 9, 2007), available at http://www.brennancenter.org/con-
tent/resource/new_responsible_restaurant_act_will_help_food_industry_fight_wage_violation.
neutral party. Participating employers also agree to allow ROC-NY members to give on-site worker trainings about their rights under the code of conduct. 79

iii. Campaigns and ROC-NY’s Use of the Law

Through ROC-NY’s confrontations with employers, the organization has become an experienced legal actor, able to use the law as both sword and shield. After workers come to ROC-NY with complaints of employer misconduct, ROC-NY staff and the workers develop a campaign to pressure the employer to improve conditions through a combination of legal action, publicity, and public rallies. Many ROC-NY campaigns begin by threatening or filing lawsuits, usually for discrimination and wage and hour violations. 80 Other ROC-NY campaigns have succeeded through pressure alone. 81

ROC-NY has also faced a multitude of lawsuits for its activity, and charges that it is a “labor organization” engaging in prohibited activities. 82 In response, ROC-NY is careful to include a disclaimer on its signs whenever it engages in public pickets, disavowing the goals of collective bargaining or interfering with deliveries. 83

In several major campaigns, ROC-NY has reached long-term settlement agreements that provide workers with job guarantees and a mecha-

79. Through the Roundtable, ROC-NY worked with other groups to put together a manual on how to comply with applicable labor and employment laws, which was funded by the city and is distributed to restaurant owners by the city’s Department of Consumer Affairs. See Mayor’s Office of Immigrant Affairs, City of New York, New York City Restaurant Owners Manual (2006), available at http://www.nyc.gov/html/dca/downloads/pdf/NYC_restaurant_guide.pdf.

80. ROC has also successfully made claims with the NLRB, despite the lengthy and imperfect process, when workers were retaliated against for organizing activity. Interview with Saru Jayaraman, supra note 74.

81. In one campaign, ROC successfully pressured the former owner of Windows on the World to hire multiple Windows workers for a new restaurant he opened in 2002, after he initially objected to hiring former employees. Jayaraman, ROCing, supra note 22, at 145.

82. ROC has been sued for defamation and unfair competition, and in one case trademark infringement, based on its distribution of leaflets containing a restaurant’s logo. See SMJ Group, Inc. v. 417 Lafayette Restaurant LLC, 439 F. Supp. 2d 281 (S.D.N.Y. 2006). The “labor organization” charge was first brought by the Smith & Wollensky restaurant group, and was followed up by the NLRB unfair labor practice charges filed by Redeye Grill, Fireman Hospitality Group, and the proprietor of Restaurant Daniel. See Kearney, supra note 3. The Fireman group also attempted to have ROC’s 501(c)(3) status revoked but received no response from the IRS. Interview with Saru Jayaraman, supra note 74.

83. For example, the leaflets used by ROC when it targeted Trattoria Dell’Arte & Brooklyn Diner included the following text on the backside:

The Restaurant Opportunities Center of New York (ROC-NY) is a non-profit organization that seeks improved working conditions for restaurant workers citywide. ROC-NY assists restaurant workers seeking legal redress against employers who violate their employment rights. ROC-NY seeks to provide customers and the public with information about the litigation in this restaurant through these handbills, not to picket or interfere with deliveries. ROC-NY is not a labor organization and does not seek to represent the workers or be recognized as a collective bargaining agent of the workers at this restaurant.

SMJ Group, 439 F. Supp. 2d at 286 (emphases added).
nism to enforce them, in exchange for a promise from ROC-NY not to protest the employer. 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.  

The results have been impressive. As discussed in the Prologue, ROC-NY helped workers at Restaurant Daniel reach a comprehensive settlement in 2007 after years of regular picketing and legal actions. The workers involved had filed EEOC charges in 2005 alleging that the restaurant owner discriminated against them based on their race by using racial slurs and promoting less experienced white French workers ahead of non-white workers. When an early effort at negotiations broke down, both sides filed suit. However, after weekly protests and other pressure from ROC-NY, as well as a city councilmember serving as a broker, the parties finally reached an agreement. Under the settlement, the restaurant agreed to pay a total of $80,000 to eight workers, to set up a promotion policy, and to grant eight-percent raises to busboys and runners. The restaurant management also agreed to attend racial sensitivity trainings and to distribute manuals to employees that explain their rights. The agreement, which will remain in effect for five years—during which time ROC-NY has agreed not to hold any rallies against the restaurant—has unique enforcement mechanisms. The agreement requires that the restaurant give ROC-NY's lawyers three days' notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation. Further, the agreement builds in EEOC and state attorney general monitoring. Either party has the right to take agreement compliance disputes to an independent arbitrator. As this example demonstrates, ROC-NY uses the law in a sophisticated manner in pursuit of organizing, familiar with the protections afforded by the NLRA yet evading its restrictions. ROC-NY Staff Attorney Saru Jayaraman has described four reasons why ROC-NY prefers to avoid classification as a "labor organization": (1) to avoid duties associated with the union-member relationship that could distract from ROC-NY's organizing.

84. Interview with Saru Jayaraman, supra note 74.
85. Ellick, supra note 1. ROC has sought similar agreements in other campaigns. In 2005, the organization settled a $164,000 claim with Smith & Wollensky for twenty-three Mexican workers who claimed they were discriminated against and received no pay for up to fifteen hours of overtime per week. The agreement included the same provisions, as well as provisions requiring the restaurants to provide a week of vacation and three paid sick days per year. See Steven Greenhouse, Two Restaurants to Pay Workers $164,000, N.Y. TIMES, Jan. 12, 2005, at B3, available at http://www.nytimes.com/2005/01/12/nyregion/12wage.html; see also Steven Greenhouse, Judge Approves Deal to Settle Suit Over Wage Violations, N.Y. Times, June 19, 2008, available at http://www.nytimes.com/2008/06/19/nyregion/19wage.html (discussing federal court approval of $3.9 million settlement in wage-violation lawsuit against the Redeye Grill, a restaurant owned by the Fireman Hospitality Group, which, in addition to money damages, called for the setting up of a grievance procedure for worker complaints over discrimination, sexual harassment, or wage issues).
model, such as servicing contracts, arbitrating grievances, and the duty of fair representation; (2) to avoid filing financial reports under the Labor-Management Reporting and Disclosure Act (LMRDA); (3) to avoid restrictions on organizational picketing; and (4) to be able to partially own a separate business as a 501(c)(3) organization. Although the NLRB General Counsel found that ROC-NY was not a statutory labor organization, ROC-NY's efforts to settle workplace grievances have brought it close to the threshold of dealing with employers without passing into the zone of federal labor law regulation. The analytical framework I propose supports the conclusion that ROC-NY is not a labor organization, yet makes clear that the organization must be careful to guard it unregulated status.

III. HOW THE PROTECTIONS AND RESTRICTIONS OF THE NLRA COULD APPLY TO WORKER CENTERS

The NLRA is a potential source of rights for almost every worker as well as restrictions for "labor organizations." One way to understand the Act is to focus on what scholar Alan Hyde has described as its three "crucial concepts": (1) the rights of "employees" to engage in "concerted activities for mutual aid or protection," protected by NLRA section 7; (2) the status of a "labor organization," defined in section 2(5) of the NLRA; and (3) the status of "exclusive representative for purposes of bargaining" given to "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes," regulated under section 9(a) of the Act. Because each concept is legally independent of the others, worker centers that do not qualify as "labor organizations" may nevertheless encourage and promote the use of section 7 rights among their members.

While most worker centers actively use federal, state, and local employment laws to protect the rights of workers, as the profiles indicate they have generally avoided the NLRB. In the sections that follow, I describe

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86. See Alan Hyde, What is Labour Law?, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 37, 44-45 (Guy Davidov & Brian Langille eds., 2006) [hereinafter Hyde, Labour Law]. Professor Hyde disagrees that there are legal impediments to union involvement in employee ownership. See id. at 45 n.21. But see Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954) (sustaining employer refusal to bargain when union had established a company in direct competition with employer).

87. See discussion infra Part VI.B.4.


89. One reason is the ineffectiveness of the NLRB's remedial regime, due both to the content of its remedies and the long delays workers must wait to obtain relief. See Sachs, Labor Law Renewal, supra note 9, at 390 (discussing the lack of punitive damage awards under NLRA, and the nearly two year median time wait from filing of a charge alleging employer misconduct to the issuance of a final Board decision). While there are important counterexamples of worker centers that have sought unioni-
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<td>La Raza Centro Legal</td>
<td>Some employees, some independent contractors.</td>
<td>Day Labor Construction</td>
<td>Some targeting of employers who repeatedly violate the law.</td>
<td>Mostly individual cases, although some rallies in significant cases.</td>
<td>Job placement through Hiring Hall (DLP); Individual claim settlement.</td>
<td>N/A</td>
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<td>KIWA</td>
<td>Yes</td>
<td>Grocery &amp; Restaurant</td>
<td>Industry-wide targeting (seven main supermarkets).</td>
<td>Union-organizing drive (IWU); Protests.</td>
<td>Seeking voluntary compliance with living wage standard.</td>
<td>Voluntary “Fair share” campaign with several signatories.</td>
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<td>ROC-NY</td>
<td>Yes</td>
<td>Restaurant</td>
<td>Yes: Legislative lobbying.</td>
<td>Handbilling Protests; Use of inflatable rats in front of employer’s establishment.</td>
<td>Claim settlement arising out of employment lawsuits leading to broader agreements.</td>
<td>Litigation settlement agreements with arbitration provisions; Seeking code of conduct with Restaurant Roundtable members.</td>
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how worker centers can take advantage of NLRA rights on behalf of the workers they serve, and then discuss how designation as a "labor organization" would affect worker center activity.

A. Protected Worker Center Activity: Concerted Activity for Mutual Aid or Protection

Section 7 protects the rights of employees "to form, join, or assist labor organizations," and "to bargain collectively" with their employer "through representatives of their own choosing." In addition to the unionization process, section 7 also grants employees the right "to engage in . . . concerted activities for the purpose of . . . other mutual aid or protection." The right to engage in concerted activity can encompass a wide range of actions and expressions of "common cause," even when the employees involved have no goal of forming a union.

1. Who is Protected in the Exercise of Concerted Activity

Section 7 rights apply to all "employees," a term of art under the NLRA. Although generally broad, several exclusions from the definition bear on worker centers, such as the exclusions for agricultural laborers, certain domestic workers, and independent contractors. According to Fine, sixteen percent of worker centers that organize by industry target agricultural employees. Thirteen percent target domestic workers. Domestic

zation and successfully vindicated NLRA rights, these experiments are not the norm. See supra Part II.C.2 (chronicling KIWA's unsuccessful attempt at unionization); supra note 80 (discussing ROC-NY's successful use of NLRB); FINE, supra note 6, at 160 (reporting worker center use of the NLRB in response to employee dismissals for concerted activity); Ashley Furniture Industries, Inc., 353 N.L.R.B. No. 71 (Dec. 31, 2008) (finding an employer violation in unfair labor practice charge filed by worker center "Voces de la Frontera" on behalf of immigrant workers who were prohibited by employer from discussing "no-match" letters received from the Social Security Administration).

Indeed, scholar Ben Sachs has argued that rather than resorting to the NLRB, worker centers and other advocates for non-union workers are instead developing a new form of labor law through the innovative use of statutory employment law. See Sachs, Employment Law as Labor Law, supra note 9.


92. NLRA § 2(3), 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . .").

93. FINE, supra note 6, 23 fig. 1.7. Although agricultural employees lack protection under the NLRA, several states have instituted collective bargaining statutes that cover them. See, e.g., California Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140 – 1167 (2006); Hawaii Employment Relations Act, HAW. REV. STAT. §§ 377-1 – 18 (1993).

94. FINE, supra note 6, at 23 fig. 1.7. Notwithstanding the exclusion, domestic worker organizations have engaged in significant campaigns to pass state and municipal laws that increase worker protections. See id. at 174-76 (describing campaign to pass the Domestic Workers Bill of Rights in New
workers lack section 7 rights unless they work for a company or other entity that provides in-home services rather than working directly for a family or homeowner.95 Many immigrants, especially in construction, operate—at least nominally—as independent contractors and would thus be unable to invoke the NLRA to act in concert with other similarly-situated independent contractors.96

Notably, workers who lack legal status to work under federal immigration laws are still “employees” under the Act, but their protection is severely limited by the Supreme Court’s ruling that such immigrants may not receive backpay remedies for illegal discharges.97 Approximately seventy-five percent of day laborers are unauthorized workers98 and the majority of worker centers were started to serve immigrant populations either predominately or exclusively, without regard to their authorization to work.99

Finally, the NLRB has discretionary limitations on its jurisdiction that may apply in the worker center context. Although the Act is worded broadly to give the NLRB the power to cover employers “affecting commerce,” the Board has historically limited its reach to enterprises that exceed certain dollar minima.100 Notwithstanding these restrictions, the NLRA likely protects the majority of workers in worker centers.

95. The Board analyzes the employment relationship by focusing on the “principals to whom the employer-employee relationship in fact runs and not merely on the . . . ‘domestic’ nature of some of the services rendered.” Ankh Servs., Inc., 243 N.L.R.B. 478, 480 (1979) (finding that employees employed by privately-owned for profit corporation that provided in-home service workers, care and housekeeping services to aged and disabled individuals clients, who were paid by the employer rather than the clients, and who were controlled by the employer, were not exempted from the coverage of the Act by the “domestic service” exclusion); see also 30 Sutton Place Corp., 240 N.L.R.B. 752, 753 n.6 (1979); Shore Club Condo. Ass’n v. NLRB, 400 F.3d 1336 (11th Cir. 2005).

96. Although not covered by the Act, there are worker organizations composed entirely of independent contractors who have organized to improve their working conditions. For example, the New York Taxi Workers Alliance, which has a membership of over five thousand drivers, has engaged in actions very similar to those of a union. See Fine, supra note 6, at 138. In principle, other types of independent contractors may organize to advocate for their interests in the face of government regulation or common large contractors. Although not protected by the Act, neither does the Act restrict such activity, although some collective activity by independent contractors may violate antitrust laws. See Elizabeth Kennedy, Freedom from Independence: Collective Bargaining Rights for Dependent Contractors, 26 BERKELEY J. EMP. & LAB. L. 143 (2005).


98. See VALENZUELA ET AL., supra note 23, at 17.
99. Fine, supra note 6, at 18.

100. These standards were first announced in 1958, Siemons Mailing Serv., 122 N.L.R.B. 81 (1958), but by statute the Board cannot set the bar any higher to limit its jurisdiction. NLRA § 14(c)(1),
2. Types of Concerted Activity that Are Protected

To be protected by section 7 of the NLRA, worker activity must: (1) be concerted, (2) be for the objective of mutual aid or protection, and (3) not lose its protected status because of the objective sought or the manner in which the activity is conducted.

To be concerted, activity normally must be undertaken by more than one employee. Actions of a single employee can be concerted in some cases, however, either if the activity is taken on behalf of other employees with their authority, or if it furthers group goals in other ways. The courts and the NLRB have taken a broad view of what activity qualifies as “mutual aid or protection,” interpreting it to reach activity that supports employees generally rather than co-workers who work for the same employer. Protections extend to concerted activity and political advocacy for issues that affect workers outside the employer’s direct control.

29 U.S.C. 164(c)(1) (2006). These limits have the potential to exclude from coverage some workers who work in very small operations—such as non-retail firms who have less than $50,000 in annual flows of goods and services either purchased or sold, and retail firms who have less than $500,000 annual gross volume of business. Although the dollar minima are not very high—and are not indexed to inflation—it is estimated that several million employees are excluded from the Act because of them. ARCHIBALD COX, ET AL., LABOR LAW: CASES AND MATERIALS 95 (13th ed. 2001). For a list and explanation of the standards, see NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES §1-200 (2005), available at http://www.nlrb.gov/publications/manuals/r_-_case_outline.aspx [hereinafter NLRB, REPRESENTATION CASES].

101. See Meyers Indus., Inc. (II), 281 N.L.R.B. 882 (1986). The NLRB has not protected as “concerted” single-employee action to enforce statutory rights without some evidence of explicit or tacit agreement from others, such as when an employee asserts a right rooted in a collective bargaining agreement. See id. at 885 (requiring that individual employees act “with or on the authority of” their fellow workers for their activity to qualify as “concerted”). As some have noted, this requirement restricts the ability of individual employees to act “concertedly” in the non-unionized workplace. See William R. Corbett, The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability, 27 BERKELEY J. EMP. & LAB. L. 23 (2006) [hereinafter Corbett, Narrowing]. However, the Board has also protected activity by individuals that seeks to induce group action, see, e.g., Martin Marietta Corp., 293 N.L.R.B. 719 (1989) (affirming ALJ’s finding that employee’s action of posting a notice urging fellow workers to join him in appearing on local television to speak about the health conditions at their workplace was protected by section 7), or where “the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group.” Mike Yurosek & Son, 306 N.L.R.B. 1037, 1038 (1992), aff’d, 53 F.3d 261 (9th Cir. 1995) (protecting refusal by individual members of a work group to work an additional hour as ordered, where the group had earlier engaged in collective protest regarding reduction in work hours), supplemented, 310 N.L.R.B. 831 (1993), enforced, 53 F.3d 261 (9th Cir. 1995); see also Timekeeping Systems, Inc., 323 N.L.R.B. 244 (1997) (affirming ALJ’s finding that individual employee’s sending of email to co-workers complaining about proposed vacation policy was protected concerted activity).

102. See Eastex v. NLRB, 437 U.S. 556, 564 (1978) (recognizing that the broad definition of “employee” makes the “mutual aid and protection” clause applicable to efforts “in support of employees of employers other than their own”); see also Ellen Dannin, Not a Limited, Confined, or Private Matter—Who is an “Employee” Under the National Labor Relations Act, 59 LAB. L.J. 5, 8 (2008).

103. Eastex, 437 U.S. at 569-70 (upholding the Board’s determination that distributing a union newsletter urging opposition to a state right-to-work law and criticizing a presidential veto of a federal minimum wage law was protected under the NLRA).
Worker centers can make use of these protections by promoting concerted activity as a tool for workplace organizing. For example, worker centers can help members send delegations to their employer to present a workplace related grievance or petition;\(^\text{104}\) share information that benefits employees collectively (such as flyers on workplace rights or the services of the worker center, so long as the activity takes place on nonworking time and in the case of flyers is distributed only in nonworking areas);\(^\text{105}\) or challenge employer rules that prohibit the exercise of protected employee rights (such as prohibiting discussion of wages or overly-broad no-solicitation rules).\(^\text{106}\)

Section 7 can supplement organizing activity pursuant to other rights. For example, employees may refuse work assignments that they deem unsafe, even if the work would not violate federal or state workplace safety laws, or the refusal was not separately protected by whistleblower laws.\(^\text{107}\) Employee action to protest unlawful discrimination is also protected when the concerted activity is aimed at employees generally, and not merely for the aid of the victim of the alleged discrimination.\(^\text{108}\)

Section 7 also protects appeals regarding employee actions that take place outside the workplace, such as writing letters to or otherwise contacting politicians.\(^\text{109}\) Appeals to the press may also be protected, although in this context the employees must be careful not to publicly disparage the employer or otherwise show "disloyalty." Moreover, the NLRA protects concerted appeals "to administrative and judicial forums,"\(^\text{110}\) such as pursuing claims for unpaid wages or breaks or presenting concerns to govern-

\(^{104} \) See Corbett, Waiting, supra note 90, at 287-90.

\(^{105} \) See Eastex, 437 U.S. at 572. Oral solicitation is protected from discipline even in work areas so long as it is not during working time. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

\(^{106} \) See Corbett, Waiting, supra note 90, at 291-95.


\(^{109} \) Eastex, 437 U.S. at 565 (holding that section 7 protections extend to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship").

\(^{110} \) Id. at 566. Although many employment laws include anti-retaliation laws for the employee filing the claim, section 7 broadens such protection to include employees who assist in developing the claim or who publicize it to coworkers. See, e.g., Vought Corp.-MLRS Sys. Div., 273 N.L.R.B. 1290 (1984), enforced, 788 F.2d 1378 (8th Cir. 1986) (holding that employee who informed other employees of potential race discrimination in a recent promotion decision was engaged in protected activity); Ellison Media Co., 344 N.L.R.B. 1112 (2005) (ruling that employee who previously complained about sexually offensive comments made by a supervisor was engaging in protected activity when he encouraged another employee who experienced similar comments to report the supervisor to management).
mental agencies dealing with occupational safety, employment standards, or related issues.

3. **Limits on Protection**

Employee activity that meets the concerted and mutual aid prongs can nevertheless lose its protected status in certain instances, either due to the objective of the activity or the means employed in carrying it out. The Act protects vigorous contestation. But as protest activity escalates from employee speech to greater disobedience, the risk that the activity will lose protection increases. Section 7 rights are at a maximum when they do not impinge on employer interests directly (such as through protests that occur off-duty and off the employer’s premises) and when employees do not publicly exhibit disloyalty to the employer. Work stoppages and other refusals to work, although protected in theory, can lose protection under a variety of circumstances: if they are calculated to harm the employer’s property, if they exhibit excessive disloyalty, or if they include illegal methods such as sit-down strikes or systematically-planned recurring work stoppages short of a strike. The subject matter of worker protests also bears on

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111. GORMAN & FINKIN, supra note 108, at § 16.10. Such cases include employee protests that cause excessive harm to employer property or endanger customers. See, e.g., NLRB v. Marshall Car Wheel Co., 218 F.2d 409 (5th Cir. 1955) (holding that an unannounced walkout when molten iron was being held in a cupola that could have damaged equipment was "irresponsible" and therefore unprotected).

112. See generally GORMAN & FINKIN, supra note 108, § 16.11. In the leading "disloyalty" case, the United States Supreme Court held that television technicians who were on strike were not protected when they distributed leaflets criticizing the quality of programming offered to the public by the television station for which they worked. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard Broadcasting), 346 U.S. 464 (1953). Criticisms relating to product quality or safety are more likely to be protected when workers connect their criticisms to a labor dispute. See Cynthia Estlund, What do Workers Want? Employee Interests, Public Interests, and Freedom of Expression under the National Labor Relations Act, 140 U. PA. L. REV. 921, 921-22 (1992). However, the contours of the "disloyalty" test are unclear and some decisions continue to take a harsh view of employee disloyalty. See Matthew W. Finkin, Disloyalty! Does Jefferson-Standard Stalk Still?, 28 BERKELEY J. EMP. & LAB. L. 541, 546-47 (2007) (discussing D.C. Circuit's decision in Endicott Interconnect Technologies, Inc. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006), in which the court found that employee's communication in the press and on a newspaper website was "detrimentally disloyal" and thus unprotected even though made in reference to a labor dispute and was not misleading, reckless, inaccurate or malicious, reversing the Board's contrary finding).

113. See generally GORMAN AND FINKIN, supra note 108, §§ 16.9 & 16.13. Slowdowns, partial strikes (refusing to work on certain tasks while being paid), and "intermittent" strikes (a series of concerted refusals to work during a short interval, followed by a resumption of work) will not be protected when they are viewed as a "systematic scheme by employees to extract a concession from the employer." Id. § 16.13, at 429. The Board has explained that work stoppages become unprotected when "the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." Polytech, Inc., 195 N.L.R.B. 695, 696 (1972). Single protests, as well as spontaneous protest activity by non-unionized employees will more often be protected because they are less likely to be part of a systematic plan. See, e.g., Mike Yurosek & Sons, Inc., 306 N.L.R.B. 1037 (1992) (single refusal of a group of nonunion employees to work extra hour requested was protected). See also W. Melvin Haas, III & Carolyn J. Lockwood, The Elusive Law of Intermittent Strikes, 14 LAB. LAW. 91 (1998).
section 7 protections—as the NLRA does not protect political activity that lacks reference to workers' employment.114

Worker centers must proceed with particular care when political protests occur during work time. Off-site employee protests that require absence from work and that concern subject matter out of the employer's control may be unprotected although they fit within the broad category of employee-related speech that was protected in Eastex. The NLRB General Counsel took that approach to firings resulting from worker participation in massive immigration rallies in 2006, which called upon Congress to reject a law that would have classified employees working without proper immigration documents as felons. Known as "days without immigrants," a number of the protests occurred on traditional work days and called upon workers to miss work to attend the rallies. When various employers fired workers who participated, worker advocates filed charges with the NLRB. Although no Board decision was issued on the topic, in a series of advice memoranda the NLRB General Counsel avoided addressing whether attendance at such a rally was protected "concerted activity," but found that other factors justified a loss of protection in each case.115 In a subsequently-issued guideline memorandum, the General Counsel indicated that while the immigrant protests fell within the scope of the "mutual aid or protection" clause, and would be protected if they took place during the employee's own time and in non-work areas, leaving work to engage in advocacy concerning issues beyond the employer's control would not be treated as an economic strike and could be the basis for discharge.116

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114. See Eastex, 437 U.S. at 567-68 ("[S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly" be viewed as within the meaning of mutual aid and protection). For example, while some employment-related immigration issues—like the treatment of immigrants in the workplace—would be protected if the subject of workplace protest or appeals to Congress, it is less likely that a similar protest to secure the right of unauthorized immigrants to be granted drivers licenses would be protected, except perhaps in an industry for which permission to drive is central to employment, such as trucking. See, e.g., Kaiser Engineers, 213 N.L.R.B. 752, enforced, 538 F.2d 1379 (9th Cir. 1976) (holding to be protected appeals to Congress by a group of engineers opposing the liberalization of the immigration of foreign engineers, as concerted activity for mutual aid due to a concern over job security).

115. The issue is thoroughly examined by Professor Duff, who argues that the memoranda misread the case law by failing to apply principles from prior "work stoppage" cases to the days without immigrants rallies. See Duff, supra note 7, at 109-13.

Employees also have a right to strike for economic reasons independently of section 7. However, exercise of that right carries greater risks than concerted activity short of a strike, because an employer has the right to permanently replace employees who strike for economic reasons.  

B. Restrictions on Worker Centers if They Are Classified as “Labor Organizations”

In addition to protecting the organizational activities of employees, federal labor law also regulates the activity of organizations representing workers. The key question in determining whether worker centers will be subject to these restrictions is whether they should be considered “labor organizations” under the NLRA and LMRDA. Although there are some neutral or ambiguous consequences of being recognized as a “labor organization,” there are few discernable benefits to that status for organizations that do not seek to collectively bargain with employers.

The NLRA and LMRDA regulate labor organizations in different ways. The NLRA restricts organizational activity, boycotts, and pickets; regulates how a hiring hall may operate; and governs the representation process. The LMRDA requires labor organizations to file annual financial reports with the Department of Labor, make other public disclosures, and sets out a Bill of Rights for union members that requires regular election of union officers and provides remedies when those rights are violated.

1. The NLRA: Restrictions on Organizing Activities

a. Restrictions on Picketing

Congress passed section 8(b)(7) as part of the 1959 Landrum-Griffin Act to prevent so-called “extortion” or “blackmail” picketing. \[118\] NLRA section 8(b)(7) prohibits labor organizations that are not certified as exclusive representatives from picketing or threatening to picket an employer with a “recognitional” or “organizational” goal in three situations: (1) when the employer has already lawfully recognized another union and it is not an appropriate time to raise a representation question; \[119\] (2) when a valid representation election has occurred within the last twelve months; \[120\] and (3)
when the picketing goes on for over thirty days without the filing of a petition seeking representation through an election.\textsuperscript{121}

Although the statute does not define "picketing," or threats to picket, the paradigmatic example is a group of workers patrolling the employer's premises with signs. Some other activity aimed at inducing collective action or furthering union causes can also constitute picketing.\textsuperscript{122} The restrictions on picketing only apply, however, when the object of the picketing is "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees" or "forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative."\textsuperscript{123} Although functionally similar, picketing with the first object is called "recognitional," as it is directed towards the employer,\textsuperscript{124} and picketing with the second object is generally called "organizational," as it is directed at employees. There is no prohibition on picketing with the sole object of protesting an unfair labor practice, forcing the employer to conform to area standard wage rates, or obtaining reinstatement of a discharged employee.\textsuperscript{125}

Even if classified as a "labor organization," the provisions of 8(b)(7) will likely not present a problem for a worker center that disavows representation, because the center's picketing will not be considered recogni-

\textsuperscript{121} NLRA Section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C).

\textsuperscript{122} For example, picketing has been found in situations where signs were placed near the employer's premises and union members were stationed in cars nearby, see Local 182, Int'l Bhd. of Teamsters (Woodward Motors), 135 N.L.R.B. 851 (1962), enforced, 314 F.2d 53 (2d Cir. 1963), or even where, without signs, collective action was signaled to those entering the employer's premises, see Local 282, Int'l Bhd. of Teamsters, 262 N.L.R.B. 528, 541 (1982). Handbilling is generally not considered picketing, although can be in situations where it is accompanied by conduct suggesting a purpose of inducing collective action against the employer rather than to simply convey information. See Lawrence Typographical Union Local 570, 169 N.L.R.B. 279, 282-84 (1968); Local 137, Sheet Metal Workers (Walter Sign Corp.), 260 N.L.R.B. 1332 (1982); see also Chicago Typographical Union 16 (Alden Press), 151 N.L.R.B. 1666, 1669 (1965) (describing the creation of "a confrontation in some form" between picketers and the employees, customers, or suppliers of the picketed premises as an element of "picketing") (quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964)). As in the section 8(b)(4) context, no clear definition of picketing has emerged outside of the paradigm situation. See Kate L. Rakoczy, Comment, On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech, 56 Am. U. L. Rev. 1621, 1636-37 (2007).

\textsuperscript{123} NLRA Section 8(b)(7), 29 U.S.C. § 158(b)(7).

\textsuperscript{124} Recognitional picketing has been defined as "any picketing that seeks to establish a union in a continuing relationship with an employer with regard to matters which could substantially affect terms or conditions of employment." IBEW, Local 453 (Southern Sun Electric), 252 N.L.R.B. 719, 723 (1980) (quoting NLRB v. IBEW, Local 265 (RP&M Electric), 604 F.2d 1091, 1097 (8th Cir. 1979)). But see Nat'l Packing Co. v. NLRB, 377 F.2d 800, 804 (10th Cir. 1967) (finding recognitional picketing even where labor organization did not seek to establish a continuing relationship).

\textsuperscript{125} See How TO TAKE A CASE BEFORE THE NLRB 645 (eds. Brent Garren et. al, 7th ed. 2000). In all of these situations, questions of motive may remain. The Board will look at the totality of the circumstances, such as the language of pickets and prior and contemporaneous conduct of the labor organization, to determine if picketing activity has a tacit recognitional or organizational object. Id. at 645-46.
tional. Although such picketing arguably has a purpose of "organizing" employees to join the worker center, it does not come within the proscribed objective because it does not aim to persuade workers to choose the worker center "as their collective bargaining representative." 126

In some situations a worker center protest may appear to ask the employer to negotiate with the center—if, for example, the center demands reinstatement of a discharged employee. The General Counsel advice memorandum concerning ROC-NY's labor organization status (hereafter the "ROC-NY Advice Memo") considered a similar situation. The General Counsel concluded that even if ROC-NY were found to be a labor organization, its picketing of Daniel would be protected because it sought to "publicize the discrimination claims and pressure the Employers to engage in or resume settlement negotiations." 127 The General Counsel reasoned that a demand to resume settlement negotiations is not equivalent to forcing an employer to recognize and bargain with a labor organization, noting that the terms "recognize" and "bargain" in section 8(b)(7) define different types of conduct than the more amorphous "dealing with" language in section 2(5). 128 According to the General Counsel, lawsuit activities are not equivalent to representational activities even if an organization maintains an ongoing oversight role after settling a lawsuit, as ROC-NY did. 129 So long as settlement proposals "seem reasonably related"—in the General Counsel's words—to the legal claims instituted by the worker center, they will not be viewed as an underground attempt to achieve recognition. 130

The ROC-NY Advice Memo conveys the message that even if a worker center were considered a labor organization, it can avoid the strictures of section 8(b)(7) by making clear that it does not seek to bargain with

126. See, e.g., Retail Clerks Int'l Ass'n (J.W. Mays, Inc.), 145 N.L.R.B. 1091, 1095 (1964) ("Accordingly, on the foregoing facts, and in view of the admitted organizational objective prior to the picketing, I find and conclude that an object of the picketing in this case was to force or require the employees of Mays to accept or select Respondents, or one of them, as their collective-bargaining representative, and hence was violative of Section 8(b) (7) (C)." (emphasis added)). Although decisional law prior to the passage of the LMRDA had distinguished "organizational" from "recognitional" picketing, section 8(b)(7) treats them as mirror images of each other, in each case requiring a demand for collective bargaining to apply. See Bernard D. Melzer, Organizational Picketing and the NLRB: Five on a See-saw, 30 U Chi. L. Rev. 78, 79 n.10 (1962) ("[C]ommentators have generally agreed that this distinction is essentially verbal and that both forms of picketing should be given identical treatment . . . ").

127. See Kearney, supra note 3, at 5-9.

128. Id. at 7 (citing NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 (1959)).

129. Id. at 7-8.

130. Id. at 8. In the ROC-NY case, the General Counsel found that ROC-NY's proposals were aimed at "fostering job actions based on objective, non-discriminatory bases, giving all employees equal opportunities in job promotions and scheduling, and redressing the alleged underpayment of the 'back of the house' positions . . . "; the proposals were thus related to ROC-NY's discrimination claims. Id. The General Counsel also found that the arbitration clause did not transform the agreement into a desire for recognition, but was "merely an enforcement mechanism like those routinely included in settlement agreements." Id.
the employer, or at least does not seek to bargain outside the legal claims it asserts.

b. Restrictions on Secondary Activity

NLRA Section 8(b)(4) prohibits labor organizations or their agents from applying economic pressure upon a person with whom the union has no dispute regarding its own terms of employment, in order to pressure another employer—the primary employer—with whom the union does have such a dispute. The prohibition applies to two types of conduct, if undertaken with a forbidden objective—most commonly an aim to induce a secondary target to cease doing business with a primary employer. The first type of conduct includes work stoppages, strikes, refusals to handle goods, or acts that encourage such behavior. The second type includes threats, coercion, or restraint directed at employers or their employees.

Secondary boycott issues are most likely to arise for worker centers in industries in which subcontracting is common, or where the worker center targets the conditions under which a commercial product is made. For example, a labor organization would run into trouble if it picketed a building manager who hired a nonunion cleaning service, for this would be an attempt to coerce the manager to cease doing business with a nonunion contractor in violation of section 8(b)(4). In construction, a labor organization would run afoul of section 8(b)(4) if it picketed subcontractors or a general contractor at a construction site rather than its employer or the entity with which it has a dispute. In the clothing industry, a labor organization that focuses on the conditions of garment factory work could engage in a secondary boycott if it were to picket the retailer or distributors of the clothing made. For example, the restriction could have applied to the 1995 public demonstrations by the worker-advocacy group Sweatshop Watch targeting retailers that did business with an infamous garment sweatshop, the “El Monte Sweatshop,” where seventy-two Thai immigrants worked in slave-like conditions.

131. NLRA Section 8(b)(4), 29 U.S.C. § 158(b)(4)(A)-(D). Other prohibited objectives are seeking to: (1) force an employer or a self-employed person to join a union; (2) force an employer to enter into a “hot-cargo” agreement, i.e., an agreement not to handle the goods of another employer; (3) force another employer to recognize an uncertified union; (4) force any employer to recognize and bargain with the union if another union is certified; and (5) force the assignment of certain work to one union instead of to another. Id.

132. Id. The law of section 8(b)(4) is complex. See also Richard A. Bock, Secondary Boycotts: Understanding NLRB Interpretation Of Section 8(B)(4)(B) of The National Labor Relations Act, 7 U. PA. J. LAB. & EMP. L. 905 (2005).


135. See LORA JO FOO, ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND RESPONSIVE HUMAN AND CIVIL RIGHTS ADVOCACY 43 (2003). A similar protest by the worker center AIWA is discussed infra, in Part V.C.1.c.
The NLRA also restricts labor organizations’ attempts to target suppliers. In the restaurant industry, for example, a labor organization in a dispute with a restaurant cannot picket its food suppliers. Labor organizations can also be found in violation of section 8(b)(4) if they engage in boycott activity in protest of political disputes over which neutral employers have no control.136 Under this rationale, when a labor organization organizes employees to stop work for political purposes, such as to attend a rally about issues beyond the employer’s control, the secondary boycott prohibition may apply if substantial loss to the unoffending employers is foreseeable.137

The Act does not proscribe non-picketing appeals to consumers which urge consumers not to patronize a neutral employer but fall short of coercion.138 This includes truthful handbilling, peaceful demonstrations, advertising, and meetings with delegations to a neutral party. The treatment of conduct that falls between handbilling and picketing—such as mock funerals and the display of giant rat balloons and large banners—is an unresolved question. While such protests have been found to be prohibited secondary conduct in some instances, they are arguably protected by the First Amendment so long as they do not coerce neutral parties to take (or refrain from taking) some action.139 Moreover, “product” picketing, which seeks only to persuade consumers not to buy merchandise of a primary employer with whom a labor organization has a dispute, is protected, unless it “reasonably can be expected to threaten neutral parties with ruin or substantial loss.”140

136. See Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc., 456 U.S. 212 (1982) (holding that refusal, by members of the Longshoreman’s Association union, to handle cargoes arriving from or destined for the Soviet Union, in protest of Russian invasion of Afghanistan, was a prohibited secondary boycott as it targeted neutral employers—the importer, the owner of the ships, and the stevedoring company employing longshoremen to do the unloading who brought the charge). See also Duff, supra note 77, at 128-29 & n.204 (discussing Int’l Longshoremen’s Ass’n as an example of a boycott found to be illegal even in the absence of a traditional primary target, because neutral parties were injured); Bock, supra note 132, at 917 (“As set forth above, albeit in language that would make even the most experienced lawyer cringe, section 8(b)(4)(B) prohibits certain conduct which enmeshes parties neutral to the dispute between the union and its more direct target. The legislative purpose is to shield the unoffending party from pressure imposed due to controversies not its own.”).

137. This argument is developed and analyzed in Duff, supra note 7, with reference to workers who missed work to participate in large-scale rallies to protest Congressional immigration proposals.


139. The D.C. Circuit recently overturned an NLRB determination that a mock funeral which involved the patrolling by members in front of a hospital violated section 8(b)(4). Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB, 491 F.3d 429, 439 (D.C. Cir. 2007) (holding that union’s secondary mock funeral was constitutionally protected speech). Although the NLRB has not decided the legality of displaying rat balloons and large banners, several administrative law judges have found them to be akin to picketing and thus in violation of section 8(b)(4)(ii)(B). The cases are discussed in Rakoczy, supra note 122, at 1644-45 & nn. 139 & 140.

140. NLRB v. Retail Store Employees (Safeco), 447 U.S. 607, 614-15 (1980). The caveat applies when the “neutral” employer relies heavily on the products of the primary employer subject to the labor dispute. In Safeco, the union had a dispute with Safeco, an insurance underwriter. Safeco filed an unfair labor practice charge after the union picketed five land title insurance companies that only sold insur-
Worker centers must be careful to avoid these prohibitions. In response to a secondary boycott, an employer may file an unfair labor practice charge, petition the NLRB to seek injunctive relief in court, and pursue damages under section 303 of the Labor Management Relations Act.

2. The NLRA: Restrictions on Organizational Form and Operations

a. Regulation of Hiring Halls

A hiring hall is an arrangement in which an organization, usually a labor union, serves as a job-referral service and a clearinghouse between employees and employers for the assignment of jobs. This arrangement is common in industries characterized by irregular and short-term employment opportunities, such as construction and day labor, and is often established through collective bargaining agreements that lay out the terms of job assignment.

Labor organizations that run "exclusive" hiring halls—those in which the employer may not hire from other sources—must be careful not to violate the anti-discrimination provisions of NLRA sections 8(a)(3) and 8(b)(2). These antidiscrimination provisions forbid a union or employer from requiring membership in the labor organization as a condition of referral and employment. However, labor organizations that operate "non-exclusive" hiring halls—which is more likely in industries like day labor where repeat employers are relatively rare—are not subject to these restrictions.

It is unlikely that a worker center would operate an exclusive hiring hall. If one did, it could avoid the NLRA's strictures by ensuring that the hall's operation would not discriminate in a way that encourages membership in the labor organization, or by relying on those factors that NLRB case law has determined to be non-discriminatory.
b. Duty to Members and Relations with Employers

In addition to the regulation of hiring halls, NLRA case law imposes several other restrictions on labor organizations' manner of operation. Certified labor organizations owe a duty of fair representation to their members to "represent fairly the interest of all bargaining-unit members during the negotiation, administration, and enforcement of collective bargaining agreements." Because the duty only applies to labor organizations acting as an exclusive bargaining representative, it will not apply to worker centers that do not seek such status.

Labor organizations and their officers are also unable to receive funds or loans from employers, except for certain enumerated purposes. While there is no record of such employer giving to worker centers, this possible collaboration would be foreclosed if the latter were characterized as "labor organizations."

3. The LMRDA: Reporting Requirements and Members' Rights

a. Overview of the LMRDA

Congress passed the LMRDA—also known as the Landrum-Griffin Act—in 1959 after a series of highly publicized investigations into union corruption and racketeering revealed a number of labor union abuses, including the misuse of union funds by labor leaders, bribes by union officials in return for "sweetheart" contracts, and violence and fraud in union elections. The law's declaration of findings, purposes, and policy states that in order to achieve the NLRA's collective bargaining objectives, "labor organizations, employers, and their officials must adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations."

Described as the "first comprehensive regulation by Congress of the conduct of internal union affairs," the LMRDA has six titles covering the rights of union members and regulation aimed at curbing union abuse.

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148. See Labor Management Relations Act § 302(a), 29 U.S.C. § 186(a) (2006) ("It shall be 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 employee representative, labor organization, or its officers); id. § 186(c) (listing exceptions).


150. Id. § 401(a).

The Secretary of Labor is charged with investigatory authority regarding violation of any part of the law.  

b. Provisions Potentially Affecting Worker Centers

If a worker center were construed to be a "labor organization" under the LMRDA, it would be subject to reporting requirements, fiduciary duties, obligations to protect members’ rights, and requirements for the election of officers.  

The LMRDA requires labor organizations to adopt and file with the Secretary of Labor a constitution and bylaws and to file annual financial reports “in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year.” Willful violations of these requirements, as well as false statements and willful false entries, can subject the responsible individual to large fines and up to one year of imprisonment.  

Title I of the LMRDA, also known as the “Union Bill of Rights,” guarantees certain rights to individuals qualifying as “members” of a labor organization. If a worker center admits workers as “members” and is interpreted to be a “labor organization” under the LMRDA, it would need to afford such members equal rights and privileges with respect to participation in internal union affairs, the right to run for office, the right “[t]o meet and assemble with other members . . .” and to express any view regarding the labor organization’s affairs, “due-process”-type protections in any discipline meted out by the worker center, and limited rights to information about the labor organization.  

Under Title V of the LMRDA, labor organization officers have a fiduciary duty to the organization’s members, and must hold money and prop-

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153. For a comprehensive source on the LMRDA, see Labor Union Law and Regulation (William W. Osborne, Jr., ed. 2003).
155. Id. § 431(b). Records necessary to verify these annual reports must be kept for at least five years after the reports are filed. Id. § 436. These reports must be shared with members with “just cause.” 29 C.F.R. § 403.8(a), and are public information subject to the Freedom of Information Act. See 29 C.F.R. § 70.1-70.54.
157. The LMRDA defines “member” to include “any person who has fulfilled the requirements for membership in such organization,” and has neither voluntarily quit nor been expelled. 29 U.S.C. § 402(o).
158. Id. § 411(g)(1).
159. Id. § 481(e).
160. Id. § 431(a)(2).
161. Id. § 431(a)(5).
162. Id. § 431(c).
property “solely for the benefit of the organization and its members.” 163 Title V also has protections for union funds, in the form of bonding requirements and restrictions on the making of loans to labor organization employees, 164 and is enforceable by labor organization members. 165

Lastly, Title IV of the LMRDA regulates elections for labor organization officers, requiring elections every five years for national or international unions and every three years for local labor organizations. 166 The Act also has a series of campaign safeguards that considerably regulate the election process, which are enforceable by the Secretary of Labor or labor organization members. 167 As this simple summary suggests, LMRDA regulation would seriously challenge the ability of worker centers to operate as they do today. However, as discussed below, there are important textual and purposive reasons why the LMRDA should not apply to worker centers. 168

IV.
THE "LABOR ORGANIZATION" QUESTION

As the preceding section makes clear, a worker center’s designation as a “labor organization” would have critical consequences for the types of organizing activities it could undertake and the regulations to which it would be subject. While no worker center has been determined to be a labor organization thus far, the growth of worker centers and the expansion of their activities will likely result in further consideration of their status under federal labor law. This section discusses how the adjudicatory context will frame analysis of the labor organization question.

It is likely that the NLRB will be the primary arbiter of the statutory meaning of “labor organization.” Therefore, it is important to understand the legal framework governing how administrative agencies determine questions of statutory construction, and the NLRB’s approach to such questions in particular, in order to assess how the Board may consider the labor organization status of worker centers.

163. Id. § 501(a). The fiduciary duty may also extend more broadly to the manner in which the labor organization officers comply with provisions of the labor organization constitution and respect members’ rights under the LMRDA. See Osborne, supra note 153, Ch.2.III.C.2.b.


165. Id. § 501(b). In addition, embezzlement or unlawful conversion of the funds by officers, including imprisonment of up to five years and a fine of up to $10,000. Id. § 501(c).

166. Id. § 401. The LMRDA generally requires election by secret ballot for local labor organizations. Id.; 29 C.F.R. §452.26 (2008). Every member in good standing is eligible to run for office. 29 U.S.C. § 401(e).

167. See Osborne, supra note 153, Ch.3.XI.A. Enforcement is governed by 29 U.S.C. § 402.

168. See infra Part V.A.A.
A. The Adjudicatory Context of the "Labor Organization" Question

There is no official registry of statutory "labor organizations." As such, the threat of "labor organization" classification for worker centers will depend on how the law is enforced. Because it is most likely that the issue will be raised by an employer who has been targeted by a center’s organizing activities, it is important to consider the legal forums in which such charges may be raised. One way an employer could raise an organization’s status as a "labor organization" under the NLRA is by filing an unfair labor practice charge with the NLRB. Although the U.S. Department of Labor determines the status of a "labor organization" under the LMRDA and in principle the Secretary of Labor enforces that status at his/her discretion, nothing stops an aggressive employer from bringing the issue to the Department’s attention. However, the status of an organization under one law does not determine the organization’s status under the other, as the legal definitions differ and the laws are enforced separately.

In what follows, I focus primarily on how the NLRB, rather than the Department of Labor or the courts, would approach the labor organization question. This is appropriate for several reasons. First, the NLRB, as an established tribunal for unfair labor practices, is more likely to hear com-

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169. The DOL does provide, however, copies of reports that labor organizations file with the department. See Office of Labor-Management Standards, Department of Labor, Online Public Disclosure Room, http://www.dol.gov/esa/olms/regs/compliance/rrlollmrda.htm (providing copies of reports filed since 2000 and allowing users to order earlier reports).

170. This is in fact what happened in the ROC-NY case. See Kearney, supra note 3. In limited circumstances, an employer could raise the issue directly in federal district court, such as a suit for damages caused by an illegal secondary boycott prohibited by NLRA section 8(b)(4). See 29 U.S.C. § 187(b) (2006). Another possible scenario is enforcement actions by worker center members or the public under the LMRDA.

171. This works both ways. The NLRB does not consider a union’s compliance with the LMRDA in determining whether it is a "labor organization" under the NLRA. See Desert Palace, Inc. v. Local 711 Union of Gaming, 194 N.L.R.B. 818, 818 n. 5 (1972) ("The NLRB is not entrusted with the administration of the [LMRDA]. An organization’s possible failure to comply with that statute should be litigated in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration . . . ."). This issue has been unsuccessfully raised in several cases in which the employer argues that a labor union should not be entitled to an order directing an election because of internal problems or mob influence, evidenced by noncompliance with the LMRDA. See, e.g., Alto Plastics Mfg. Corp., 136 N.L.R.B. 850, 851, 853 (1962) (holding that evidence of LMRDA compliance is "not relevant or material to the issue of [the Union’s] status as a labor organization," as "[t]he theory underlying this type of remedial legislation [the LMRDA] is not to ‘illegalize’ the organization itself, but to afford protection to all parties concerned by creating specific Federal rights and remedies whereby the activities of the organization and its officers and agents are regulated and subjected to judicial review in vindication of those rights."); see also Family Service Agency San Francisco v. NLRB, 163 F.3d 1369, 1383-84 (D.C. Cir. 1999) ("Section 2(5) of the NLRA . . . makes no reference to [LMRDA] reporting requirements . . . ."). Likewise, the fact that the NLRB declines to exercise jurisdiction over a labor matter because the employer is not in its jurisdiction does not determine coverage under the LMRDA. Hawaii Gov’t Employees Ass’n, Am. Fed’n of State, County and Mun. Employees, Local 152 v. Martoche, 915 F.2d 718, 727 (D.C. Cir. 1990) ("We perceive no error or injustice in binding Local 152 to the records-production requirement of the LMRDA while the Center remains free of regulation under the LMRA.").
plaints that a worker center is acting as a "labor organization.""172 Second, as the administrative agency with recognized expertise in the field and a primary role in developing labor-relations case law through adjudication, NLRB determinations are afforded a certain amount of deference by reviewing courts.173 Indeed, it is likely that the Secretary of Labor would draw upon Board law when interpreting the LMRDA definition of "labor organization."174 Third, Board interpretations have a greater effect on the development of labor law than those of appellate courts, because the vast majority of Board actions are resolved at the agency level and the Board regularly refuses to acquiesce to appellate court decisions with which it does not agree.175 Accordingly, in the following section I discuss statutory interpretation by administrative agencies to set the stage for understanding how the Board should determine the labor organization status of worker centers.

B. Methods of Statutory Interpretation and the Labor Board

The meaning of "labor organization" will depend, as an initial matter, on the theory of statutory interpretation applied.176 There are two primary methods of statutory interpretation that courts employ: textualism and intentionalist theories. Textualists focus on a statute's text, which they interpret in light of the common meaning of words used and their context within the statute.177 Rather than adhering strictly to the text, intentionalists instead focus on the "intent" of a statute, either to clarify ambiguous language or in some cases to trump unambiguous language.178 Under one version of inten-
tionalism, the interpreter focuses on the legislative intent, considered either the original intent of the enacting body, or a reconstruction of how that legislature would confront a contemporary problem that it did not originally consider. Under another intentionalist approach, known as “purposivism,” interpreters employ a more general notion of the intent of a statute that may afford greater flexibility when interpreting the application of a statute to changed circumstances.

Because each of these methods of statutory interpretation may yield different outcomes, it is important to understand which methods will be applied by adjudicators facing the question of whether a worker center is a “labor organization.” In a recent article, Professor Daniel P. O’Gorman has suggested that administrative agencies, and the NLRB in particular, should interpret statutes differently than a court would. This conclusion stems largely from the standard of judicial review of agency decisions established by the Supreme Court in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* When interpreting statutes, administrative agencies like the NLRB must first determine whether Congress has “directly spoken to the precise question at issue,” in which case the agency must apply Congress’s determination of the issue. If, however, the statute does not address the particular issue, or leaves the issue ambiguous, the agency has discretion to construe the statute in any way so long as it is a “permissible construction” and a “reasonable policy choice for the agency to make.”

In O’Gorman’s view, *Chevron* recognizes that administrative agencies are expected to make policy choices rather than simply interpret the law as

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179. Intentionalists in the first group focus on what has been called “specific intent.” ESKRIDGE, ET AL., supra note 177, at 214-18. The second group applies an idea called “imaginary reconstruction,” in which the interpreter tries to discover “what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.” *Id.* at 218-19 (quoting Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907)).

180. Purposivists, who have been described as relying on “general intent,” reach to a higher level of generality to discover the broad goal sought by a law’s drafters. This approach focuses on questions about which there may have been a greater degree of consensus in the enacting legislature and is often more adaptable to new or unforeseen circumstances. *Id.* at 220-22. Accordingly, some scholars have developed theories of “dynamic” statutory interpretation, which view statutory regimes as evolving over time. See generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).


184. *Id.* at 843.

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courts do.\textsuperscript{186} Congress intended the Board to act in a policymaking role.\textsuperscript{187} O’Gorman believes that taking this role seriously requires that agencies like the NLRB abandon textualism and intentionalism when they encounter an interpretive question that Congress has not addressed clearly. In his proposed model, once the Board has identified the permissible constructions under the second step of \textit{Chevron}, it should “use its expertise to predict the consequences of each construction and then adopt the construction that it believes best furthers the Act’s purposes, taking into consideration, however, relevant policies and principles external to the Act.”\textsuperscript{188} This view accords a high degree of discretion to the Board to interpret and weigh the relevant purposes, policies, and principles—which may conflict with one another.\textsuperscript{189} It follows from O’Gorman’s view that the Board should not be bound by the doctrine of \textit{stare decisis} to the same extent as courts are, because doing so would conflict with its role as a policymaker responsive to changing circumstances and political conditions.\textsuperscript{190}

There are alternatives to O’Gorman’s theory of agency statutory interpretation as policymaking. In particular, administrative law scholars have expressed different views about how agencies should decide among permissible interpretations of an ambiguous statute under \textit{Chevron}, including the view that weight should be given to the statutory language,\textsuperscript{191} that a “dy-

\textsuperscript{186} O’Gorman, \textit{supra} note 181, at 205-217. The Court has acknowledged that filling in the gaps of ambiguous statutory terms “involves difficult policy choices that agencies are better equipped to make than courts.” \textit{Brand X Internet Servs.}, 545 U.S. at 980.

\textsuperscript{187} O’Gorman, \textit{supra} note 181, at 182-83 (discussing reasons Congress favored an administrative agency to develop labor policy).

\textsuperscript{188} Id. at 217. Courts have afforded less deference to administrative agencies on questions that concern policies external to their mandate, to ensure, for example, that Board judgments do not undervalue constitutional concerns. See, e.g., Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199, 1214 (9th Cir. 2005) (“[T]he NLRB’s determination of the reach of [NLRA] § 8(b)(4) is not entitled to the usual deference accorded the agency, because the statutory question must be answered with awareness of the line between constitutionally-protected speech and unprotected activity.”).

\textsuperscript{189} O’Gorman, \textit{supra} note 181, at 218. The Act’s purposes, many of which are expressed in the policy statement of section 1 of the Act, include reducing strikes and other forms of industrial strife, encouraging collective bargaining, and protecting the rights enshrined in section 7. NLRA § 1, 29 U.S.C. § 151. The Taft-Hartley Act added the purpose of giving employees the right to refrain from concerted activities. See NLRA § 7, 29 U.S.C. § 157.

\textsuperscript{190} O’Gorman, \textit{supra} note 181, at 218. While the Board frequently changes course on particular issues, it must follow judicial constructions that definitively interpret the terms of the NLRA. See NLRB v. Lechmere, 502 U.S. 527, 536-37 (1992) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of \textit{stare decisis}, and we judge an agency’s later interpretation of the statute against our prior determination. . . .”). However, where a court merely supplies a permissible interpretation of a statute, rather than one it finds to be compelled by the statute, an agency may later interpret the statute differently. See \textit{Brand X Internet Servs.}, 545 U.S. at 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to \textit{Chevron} deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

\textsuperscript{191} \textsc{Kent Greenawalt}, \textit{Legislation: Statutory Interpretation: 20 Questions} 62 n.79 (1999) (“[A]dministrators should give some weight to the apparent force of the language.”).
dynamic" approach to statutory interpretation should be followed,\textsuperscript{192} that decisional factors in the statute must be interpreted and applied,\textsuperscript{193} and that policy choices inevitably involve interpretation of a statute's purpose.\textsuperscript{194}

Moreover, labor law scholars have taken different views of the proper interpretation of the NLRA's purposes when construing the Act, and have debated the extent to which the Act dictates certain policy outcomes.\textsuperscript{195} The Supreme Court itself has acknowledged that labor law may be developed through an evolutionary process.\textsuperscript{196}

In practice, the Board does not consistently apply a single approach. O'Gorman notes that when the Board has decided issues of statutory interpretation, it has acted more like a court following traditional methods of statutory construction than an agency free to make policy.\textsuperscript{197} However, it appears that Board members engage in policymaking "under the guise of statutory interpretation," employing divergent methods of statutory interpretation to reach desired outcomes.\textsuperscript{198} Therefore, predicting the manner in which the Board will interpret the Act requires attention to the Act's purposes, to its historical approach to specific questions, and to the prevailing winds of Board policymaking.


\textsuperscript{194} See Jerry L. Mashaw, Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation, 59 ADMIN. L. REV. 889, 896-97 (2007) (explaining that the Supreme Court's position in \textit{Chevron} is "not that interpretation disappears when policy intrudes, but that the connection between interpretation and policy choice is sufficiently close that courts should defer to the agency's interpretation.").

\textsuperscript{195} See, e.g., Ellen Dannin, \textit{At 70, Should the National Labor Relations Act Be Retired?: NLRA Values, Labor Values, American Values}, 26 BERKELEY J. EMP. & LAB. L. 223 (2005) (arguing that courts have given short-shrift to many employee-friendly NLRA policies); Dannin, \textit{supra} note 102, at 8 (arguing that NLRA's definition of "employee," and legislative history behind that definition, require a broad interpretation that encompasses by-standers and passers-by to whom picketing employees might call on to make common cause regarding their labor dispute).

\textsuperscript{196} See NLRA v. J. Weingarten, Inc., 420 U.S. 251, 265 (1975) ("The nature of the problem, as revealed by unfolding variant situations, invariably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience.") (quoting Elec. Workers v. NLRB, 366 U.S. 667, 674 (1961)).

\textsuperscript{197} O'Gorman, \textit{supra} note 181, at 235. O'Gorman discusses the inconsistent approaches applied by the Board in two cases. In Brown University, 342 N.L.R.B. 483 (2004), the Republican-appointed majority adopted a liberal, intentionalist approach to conclude that the definition of "employee" does not apply to graduate students, while the Democratic-member dissent adopted a conservative, textualist approach to find otherwise. The hats switched in Oakwood Healthcare, Inc., 348 N.L.R.B. 686 (2006), where the conservative majority felt bound to a strict textualism when interpreting the meaning of supervisor under the act, in contradistinction to the Democratic minority, which applied a more intentionalist approach.

\textsuperscript{198} O'Gorman, \textit{supra} note 181, at 235.
C. Board Discretion in Determining the Meaning of “Labor Organization”

The Congress that enacted the NLRA in 1935 did not contemplate the rise of nonprofit worker-advocacy organizations that assist employees in pursuing statutory and other claims but have no interest in collective bargaining with employers. In addition, the definition of “labor organization” is broad and somewhat ambiguous, and a critical phrase in the definition—“dealing with employers”—is notoriously imprecise. Therefore, to determine whether the definition of “labor organization” includes worker centers, the Board must consider various meanings of the definition, and decide how it applies to worker centers based on its view of the Act’s purposes. In making this assessment, the Board will be constrained by external policies, such as constitutional values, and the body of case law by the Board and reviewing courts analyzing whether specific groups of workers are “labor organizations.”

V. Worker Centers as “Labor Organizations”: A Three-Tiered Approach to the “Labor Organization” Question

In order to account for the various sources the Board should refer to in addressing the “labor organization” question, I have developed a three-tiered framework that incorporates existing case law, relevant purposes of the Act, and external policy concerns. I call the three-tiers of analysis the “traditional” analysis, the “policy-context” analysis, and the “constitutional-purposive” analysis.

Under the “traditional” analysis, the Board will apply the accumulation of “labor organization” case law to determine the status of anomalous worker groupings. This case law, consisting of Supreme Court precedent, circuit court rulings, and Board law, constrains the Board in interpreting what constitutes a “labor organization.” This analysis is “traditional” both because it consists of the familiar act of applying precedent to new situations, and because it views statutory language as fixed.

The second level of analysis, the “policy-context” analysis, starts from the idea that adjudicators should, with attention to the Act’s policies, approach the “labor organization” question differently depending on the legal question before them. Thus, while there is the dominant jurisprudence of “labor organization” in the “company union” context, cases concerning union unfair labor practices, the notice requirements for strikes at health

199. The Board’s construction of the phrase “dealing with” is discussed infra, Part V.A.2.b.
200. Although O’Gorman suggests that the Board should not feel as bound by stare decisis as courts do, it is bound by judicial interpretations of the NLRA, see supra note 190, and regularly follows Board precedent in the manner of a common-law court.
care institutions, and those in the representation area, suggest other concerns that may guide the "labor organization" inquiry. In each case, the Board and the courts appear to approach the labor organization question with an eye to the purpose of the NLRA provision at issue and not simply as a matter of interpreting section 2(5). As an expert policymaker concerned to effectuate the underlying purposes of the Act, this attention to legal context is appropriate.

Lastly, I discuss what I call the "constitutional-purposive" analysis, which applies a broad purposive notion to the question of what constitutes a labor organization coupled with a constitutionally-based caution against unduly regulating social movement organizations. The purposive concern asks whether the organization in question is the type of organization to which Congress intended the NLRA and subsequent enactments (the Taft-Hartley Act and the LMRDA) to apply, or whose regulation otherwise serves the Act's purposes. The constitutional concern, based in the First Amendment value of unfettered political expression of associations, counsels that adjudicators construe the definition of "labor organization" narrowly to avoid infringing upon the free speech rights of worker centers, expressed both through protest and litigation activity.

When confronted with worker centers and other organizations that resemble them, the Board thus far seems to prefer the "traditional" analysis. Strikingly, in the few cases on point, it has applied that analysis to find that the worker centers in question were not labor organizations.\(^{201}\) The additional analyses I suggest have not been explicitly adopted by the Board. Nevertheless, their value lies in explaining why the Board reaches the conclusions it does in many cases, and in suggesting reasons the Board will approach worker centers cautiously, even if facially applying the "traditional" law defining a "labor organization." The analyses also add up to a normative account of how the Board should weigh different policy concerns when it encounters worker center organizing.

A. First Tier: The "Traditional" Analysis

The Board has not been entirely consistent in how it defines "labor organization." Rather, as perhaps intended by the Act's framers, interpretation of the term has evolved over time and in light of experience.\(^{202}\) The "traditional" analysis begins with a straightforward interpretation of the basic elements of the "labor organization" definition, guided by case law interpretations of these elements. It is traditional in that it seeks to define "labor organization" in a mostly ahistorical and decontextualized manner,

\(^{201}\) See Kearney, supra note 3, at 1-4; infra Part V.C.1.c (discussing memorandum concluding that the Asian Immigrant Women Advocates was not a labor organization).

\(^{202}\) As described infra in Part V.B, contextual factors have affected this evolution in the Board's approach.
contemplating a stable meaning of the term that does not depend on the legal context in which the question is raised or the social context in which the organization operates, even though the bulk of the case law has been developed in the "company-union" context.\textsuperscript{203}

As will be seen, the most important element of the "labor organization" inquiry is the question of what constitutes "dealing with employers." In a series of cases in the 1990s, the Board has moved towards a narrower definition in which "dealing" depends on a bilateral back-and-forth exchange that persists over time. Although these cases considered the issue when deciding whether an employee-group was an employer-dominated labor organization, according to the traditional approach the Board will apply this more precise definition across cases regardless of context. If so, many worker centers that might be considered to "deal with" employers under a broader understanding of the term "dealing" would be excluded from the "labor organization" definition.

After discussing the "traditional" analysis of the labor organization question under the NLRA, I touch on important differences in the LMRDA definition that limit its applicability to worker centers.

1. \textit{The Basic Elements}

The "labor organization" definition can be broken up into the following elements:

(1) An organization of any kind (or any agency or employee representation committee or plan),

(2) In which employees participate,

(3) And which exists for the purpose, in whole or in part, of dealing with employers,

(4) Concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.\textsuperscript{204}

The first, second, and fourth elements are usually of trivial concern in defining a labor organization. The "organization" requirement has been construed broadly, with numerous cases holding that even informal organizations that lack a constitution, by-laws, officers, dues, or any formal struc-

\textsuperscript{203} I use the term "company-union context" to refer to those cases that consider whether a "labor organization" has been unlawfully dominated or assisted by the employer under NLRA Section 8(a)(2), 29 U.S.C. § 158(a)(2). See infra Part V.B.1.

\textsuperscript{204} The text is provided supra, at note 2. Many cases overlook the "organization" requirement because it is generally obvious and not at issue. The Board in \textit{Electromation, Inc.} analyzed the other three factors, and also added the additional factor of employee representation in the case of an "employee representation committee or plan," a special type of labor organization that exists only within a particular firm. 309 N.L.R.B. 990, 997 (1992). The committee or plan category of labor organization is discussed in Part V.B.1.
ture can qualify as labor organizations. However, there must be some organization, and for this reason the courts have rejected the idea that a single person can constitute a labor organization and in some cases have found that ad hoc groupings of employees that arise spontaneously are not "organizations." Worker centers are clearly "organizations."

The requirement that "employees participate" is also relatively uncontroversial. First, the organization must be composed of statutory employees. Although some worker centers represent workers who are not employees under the Act, such as domestic workers and independent contractors, the "employee" requirement is met as long as some worker-center participants are employees. The "participation" aspect of this prong is not rigorous, and there is little case law on the question, although some cases equate participation with the admission of employees as members. Most worker centers would satisfy the "employee participates" element even if the participation aspect were given a rigorous interpretation, because worker centers are often based on minimal membership requirements and include workers in decision-making processes.

The fourth requirement, which lists the statutory subjects of bargaining, is also likely to apply except in the rarest cases because most dealing...
with employers pertains to the enumerated subjects. Assuming arguendo that worker centers "deal" with employers, it is clear that they address the listed subjects. The determinative question is whether a particular worker center has a "dealing-with" purpose.

2. "[W]hich exists for the purpose . . . of dealing with employers"

In order to be a labor organization, the entity must have the purpose of "dealing with" statutorily-defined "employers" concerning the enumerated subjects. Although nearly all of the cases interpreting the "dealing with" requirement arise in the "company-union context" of 8(a)(2), the Board has traditionally applied its interpretations of the phrase in the same way regardless of the legal question presented.

In analyzing "dealing with," it is not dealing per se that is required, but that an organization has dealing as its purpose. So long as "dealing with employers" is one of an organization's purposes, the entity will be classified as a labor organization. The Board has held that the purpose inquiry concerns "what the organization is set up to do" and may be shown by "what the organization actually does." For this reason, the focus is usually on actual activity, except in rare instances where purpose may be shown by other means.

212. The Board has found that even organizations that exist primarily for charitable, social, and recreational purposes can be "labor organizations" if they deal to some extent with the employer on collective-bargaining subjects. See Raybestos-Manhattan, Inc., 80 N.L.R.B. 1208 (1948); NLRB v. Jas. H. Matthews & Co., 156 F.2d 706 (3d Cir. 1946). In one case, a picnic committee that talked with the employer about extra holidays and wash-up time was found to be a "labor organization." Walker Process Equip., Inc., 163 N.L.R.B. 615 (1967).

213. Although I focus primarily on the "dealing with" part of this phrase, the employer in question must also be a statutory "employer." Some organizations will be excluded because, although they "deal," the employing entity is part of the public sector or certain trades covered by the Railway Labor Act, and thus not within the statutory definition of "employer." See NLRA, 29 U.S.C. § 152(2) (2006). However, worker centers do not typically target workers in these sectors. See supra discussion Part II.B (describing most common industries in which worker centers organize).

214. See supra note 212. One court has stated that "if [the organization] existed, even in small part, for the purpose of dealing with employers concerning grievances or disputes, or conditions of work it was a 'labor organization.'" Local No. 2, Operative Plasterers & Cement Masons Int'l Ass'n (OPCMIA) v. Paramount Plastering, Inc., 310 F.2d 179, 187 (9th Cir. 1962).


216. The purpose aspect may come into play to include incipient organizations that intend to but have not yet had the chance to deal with employers. See Coinmach, 337 N.L.R.B. 1286 (upholding Regional Director's decision directing an election for newly formed union, when intervenor union with collective-bargaining agreement encompassing the petitioned-for unit claimed that petitioner was not a labor organization within the meaning of section 2(5)). Another logical possibility is that an organization that does not have the purpose of dealing may be excused for "dealing" on one or two occasions for incidental reasons unrelated to its overall purpose.
a. Cabot Carbon: "Dealing with" as Broader than Collective Bargaining

The critical question for the labor organization analysis, then, is what activities qualify as "dealing with" the employer. As a broad and ambiguous term, the meaning of "dealing" would ordinarily be left to the Board to clarify. However, the Supreme Court long ago gave a broad interpretation to the phrase "dealing with" that limits the range of permissible interpretations the Board may choose under *Chevron*. In the 1959 company union case, *NLRB v. Cabot Carbon Co.*, the Court held that the term "'dealing with'” should [not] be limited to and mean only 'bargaining with.'” The employee committees in that case therefore qualified as labor organizations despite the absence of bargaining.

At issue in *Cabot Carbon* was whether certain "employee committees" established by the employer at several of its manufacturing plants were "labor organizations" such that the employer's domination of and interference with the organizations violated section 8(a)(2). The employee committees had been established with the stated purposes of "meeting regularly with management to consider and discuss problems of mutual interest, including grievances, and of handling 'grievances at nonunion plants and departments.'” The committees discussed and submitted various proposals to management relating to terms and conditions of employment, and the employer sometimes granted the requests. At some plants where certified labor organizations existed and had negotiated collective bargaining agreements, the employee committee functions were reduced "to plant efficiency, production promotion and the handling of grievances for employees who are not included in the bargaining units.” Having concluded that "dealing with" was broader than "bargaining with,” the Court held that the employee committees' activities qualified them as statutory labor organizations.

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217. *See supra* note 190. This limitation on the Board's discretion was explicitly recognized by Board Member Raudabaugh with reference to *Cabot Carbon* in his concurring opinion in *Electromation*. *See* 309 N.L.R.B. at 1007 (Raudabaugh, Member, concurring). However, as discussed, the term's contours were not fully defined.


219. Section 8(a)(2) 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." NLRA, 29 U.S.C. § 158(a)(2) (2006).

220. *Cabot Carbon*, 360 U.S. at 204.

221. *Id.* at 207-08. These proposals were made by the plant committees themselves as well as by a "central committee" consisting of the chairmen of the several plant committees, who met annually at the head office of the employer's Director of Industrial Relations. *Id.*

222. *Id.* at 209.

223. The Court also rejected the employer's argument that there was no dealing because the proposals and requests made by the committees were only recommendations, with the final decision remaining in the employer's hands. *Id.* at 214. This, the Court noted, "is true of all such 'dealing'” by labor organizations. *Id.*
b. Electromation and Du Pont: "Dealing with" as a "bilateral mechanism" and a "pattern or practice"

_Cabot Carbon_'s broad definition is potentially problematic for worker centers. But although the decision indicated that "dealing with" was a broad term, it did no more to indicate the lower limits of conduct that the term describes. Indeed, as one Board member observed: "'[I]f 'dealing with' is less than bargaining, what is it more than?'"

In the 1990s, the _Cabot Carbon_ interpretation was refined in a way that might exclude most worker centers from its ambit. The NLRB revisited the meaning of "dealing with" in two modern "company union" cases. However, by this time the debate had shifted from denouncing the sham unionism of the Act's early days to a new consideration of the merits of labor-management cooperation as a way to increase the competitiveness of U.S. firms. The Board's decisions made clear that regular back-and-forth communication between labor organization and employer, what it termed a "bilateral mechanism" and a "pattern or practice," was key to the meaning of "dealing with." In effect, the Board narrowed the definition of "dealing with" to accommodate the changing sentiment in favor of cooperative management.

The first of these cases was _Electromation, Inc._, in which the Board found (and the Seventh Circuit agreed) that five "action committees" established by the employer were labor organizations that were dominated by the employer in violation of section 8(a)(2).

The facts of _Electromation_ illustrate the bilateral mechanism in practice. The employer had set up five action committees, made up of six employee volunteers and two to three members of management, which addressed Absenteeism, No Smoking policy, Communications Network, Pay Progression for Premium Positions, and Attendance Bonus Policy. The company's President explained that the action committees "would meet and try to come up with ways to resolve ... problems; and if they came up with solutions that were, that we believed were within budget concerns and that they generally felt would be acceptable to the employees, that we would implement those suggestions." One committee submitted a proposal that the company considered but rejected, and then developed a second proposal that was not considered because of the union campaign.

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225. A plethora of employer and employee groups, as well as academics, filed amici curiae briefs in the _Electromation_ case. See id. at 990 n.2. In the end, all five members of the Board in _Electromation_ were unanimous in finding that the "action committees" were labor organizations—in an opinion signed by each of the five. Nevertheless, the opinion generated three separate concurrences, by Members Devaney, Oviatt, and Raudabaugh. See id. at 998-1015.
226. Id. at 991. Although management discontinued active participation on the committees after the Teamsters—who brought the 8(a)(2) charge that was the genesis of the case—petitioned for an election, some continued to function.
227. Id. at 991-92.
In concluding that the “action committees” engaged in “dealing with” the employer, the Board paid special attention to the circumstances in which the committees were created (i.e., in response to employees’ disaffection concerning changes in conditions of employment) and the bilateral process they pursued.228 The Board specified that “dealing with” involves “a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management.”229 As such, “dealing with” did not include unilateral mechanisms, such as suggestion boxes, brainstorming groups, or other information exchanges. Organizations with a managerial or adjudicative purpose were also excluded.230

This “bilateral mechanism” language was elucidated further in E.I. Du Pont De Nemours & Company,231 decided six months after Electromation. In Du Pont, the Board clarified that the bilateral mechanism “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 “[I]solated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed,” on the other hand, do not constitute “dealing with.”233

Later cases have confirmed that to qualify as “dealing with,” the organization in question must have a “pattern or practice” of relations with management rather than mere “isolated instances.” The Board has held that when an organization discusses statutory subjects with the employer in a single instance, it does not “transform a lawful employee participation group into a statutory labor organization.”234 Even written complaints con-

228. Id. at 997.
229. Id. at 995 & n.21.
230. Id. at 995; see also Mercy-Memorial Hosp. Corp., 231 N.L.R.B. 1108 (1977) (holding that joint employee-employer grievance committee did not deal with employer although committee discussed individual employee grievances and in some cases engaged in dialogue with management officials).
231. 311 N.L.R.B. 893 (1993). The facts of Du Pont were similar to those in Electromation: the company had established several committees to deal with safety issues and recreation without negotiating with the incumbent union. The Board found a violation of 8(a)(2) after finding that the committees were “labor organizations.”
232. Id. at 894.
233. Id.
234. Vons Grocery Co., 320 N.L.R.B. 53, 54 (1995) (finding no dealing where a quality circle group, which usually considered operational concerns and problems, ended up discussing a dress code and an accident point system, topics which the union had pursued in the past in bargaining). Similarly, in Stoody Co., the NLRB found that a single one-hour meeting of an employer-created handbook committee, in which concerns about vacation time were presented to attending managers, was not a pattern or practice of any kind, and thus that the committee did not constitute a “labor organization.” 320 N.L.R.B. 18, 19 (1995).
cerning management decisions, followed by action in protest, will not transform a concerned group of employees into a labor organization.235

Understanding "dealing with" as requiring some type of "bilateral mechanism" recasts the purpose question as well. Electromation and its Board progeny show that an organization only has a purpose of "dealing with" employers if its goal, realized or not, is to engage in this type of back-and-forth bilateral mechanism with the employer.236

3. Worker Centers and "Dealing"

Several commentators suggest that worker centers do "deal with" employers, thus making them labor organizations.237 This conclusion is based on an overly-broad view of "dealing with" that is inconsistent with the case law discussed above.

There are two possible ways, under the "traditional" analysis, to analyze the "dealing with" issue in the context of worker centers. One would be to take Cabot Carbon's instruction that "dealing with" is broader than "bargaining with," and conclude that the phrase includes most activities directed at the employer that fall within a commonsense understanding of "dealing"—even though Cabot Carbon did not establish a threshold of activity that constitutes dealing. This approach fails to heed the "bilateral mechanism" theory elaborated in Electromation and Du Pont, either by reverting to a more colloquial and textualist reading of "dealing" or by focusing on whether it is the organization's purpose to deal.238

235. See Vencare Ancillary Servs., 334 N.L.R.B. 965, 966 (2001), enforcement denied on other grounds, 352 F.3d 318 (6th Cir. 2003). In Vencare, a group of five employees began a work stoppage after they met and "decided to draft a memo to the [employer] expressing their dissatisfaction with the [employer's] decision to cut their wages." Id. at 966. The Board, noting that the committee was formed in response to a single issue and incident, found that there was no "pattern or practice." Id. at 968.

236. This proposition, although never stated explicitly by the Board, follows logically from the Electromation cases. The "pattern or practice" logic has been criticized, however, because it appears to put the employer in charge of whether "dealing" occurs, as the employer may refuse to meet with or implement the proposals received from employees, thus eliminating the possibility of a bilateral mechanism. See Rosenfeld, supra note 7, at 488-91. Indeed, the "bilateral mechanism" analysis makes the distinction between purpose and practice somewhat elusive. Assuming worker centers do not want to be considered labor organizations, and consistent with that desire overtly eschew the bilateral relations elaborated in Electromation and its progeny, analyzing practice may be the best—and sometimes only—way to get at purpose, as is done in other contexts where motive must be assessed.

237. See Hyde, New Institutions, supra note 7, at 408-09; Duff, supra note 7, at 133-36 (suggesting that settlement agreement between ROC-NY and employer constituted "dealing"); Rosenfeld, supra note 7. Julie Yates Rivchin, on the other hand, suggests that most worker centers would not be considered labor organizations under the holding of Center for United Labor Action (which is discussed infra in Part V.C.1). Julie Yates Rivchin, Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies, 28 N.Y.U. REV. L. & SOC. CHANGE 397 (2004).

238. For example, although Professor Hyde acknowledges that the line is elusive, he suggests that "raising grievances with particular employers on behalf of particular employees" is enough to constitute dealing, and he singles out the Workplace Project and ROC-NY as likely to be statutory labor organizations because they play this role. See Hyde, New Institutions, supra note 7, at 408. Rosenfeld's
The other traditional approach to "dealing with" is to recognize the Board’s role in giving meaning to an ambiguous term and apply the bilateral theory the Board has adopted. This approach is "traditional" in that it resolves the statutory interpretation question without regard to the social or legal context in which the question arises. When the General Counsel determined that ROC-NY was not a labor organization by virtue of its protest and settlement activities directed at three New York restaurants, it was applying such a decontextualized approach. The General Counsel framed the issue as "whether in its role as legal advocate, ROC-NY’s attempt to settle employment discrimination claims has constituted ‘dealing with’ the Employers over terms and conditions of employment under Section 2(5)." Applying the "bilateral mechanism" language of Electromation and the "pattern or practice" interpretation of Du Pont, the Advice Memo concluded that ROC-NY’s “attempts to negotiate settlement agreements with the Employers” were “discrete, non-recurring transactions” that, “[a]lthough stretching over a period of time . . . were limited to a single context or a single issue,” and thus did not constitute “dealing.” The General Counsel noted that the agreement was limited to the dispute at hand, namely the resolution of ROC-NY’s “attempts to enforce employment laws,” did not “impl[y] an ongoing or recurring pattern of dealing over employment terms and conditions” beyond that dispute, and that “settlement of lawsuits is not generally something that can be accomplished in a single meeting.”

Even an arbitration provision in the proposed settlement agreement for settling future disputes over the agreement’s terms did not establish a “pattern or practice” necessary for “dealing with.” Instead, the General Counsel characterized these provisions as “merely contract enforcement mechanisms that do not imply a continuing practice of ‘dealing,’” and compared them to adjudicatory functions that the Board has previously found do not constitute dealing.

Analysis similarly suggests that a worker center likely engages in “dealing” when it pursues administrative claims on behalf of employees, because such claims usually involve associated talks with the employer regarding litigation and settlement, and because these claims are often pursued as part of a broader effort to improve working conditions. See Rosenfeld, supra note 7, at 496-98. Rosenfeld also suggests that a “pattern or practice” may be established where a worker center deals with multiple employers, because the definition uses a plural object (employers) in discussing with whom a labor organization deals. Id. at 494, 498 (citing Eastex v. NLRB, 437 U.S. 556 (1978)). Focusing on organizational purpose, Professor Duff implies that ROC-NY has a purpose of “dealing” because its website advises restaurant workers to contact the organization if they “ha[ve] problems with [their] employer.” Duff, supra note 7, at 135. Like Rosenfeld’s analysis, this approach oversimplifies the bilateral mechanism requirement.

239. See Kearney, supra note 3, and accompanying text.
240. Id. at 2.
241. Id. at 3.
242. Id.
243. Id. at 3-4. See supra note 230 and surrounding text.
The ROC-NY Advice Memo suggests that mere efforts to influence an employer do not constitute "dealing" and that the Board will apply the "bilateral mechanism" concept rigorously to worker center activity, giving paramount importance to the "pattern or practice" notion. A pattern is not established merely by repeated meetings or meetings over a prolonged period. Rather, the conferring must extend beyond a single issue or dispute, and have some recurring character. While this memorandum does not establish binding precedent, it suggests the way the Board may develop these issues, and, importantly, indicates that the General Counsel will likely not bring "labor organization" charges against typical worker centers.

Therefore, even under this "traditional" analysis, most worker-center activity will not be considered "dealing with" the employer if it is related to lawsuit-activity, if the interactions are not sufficiently bilateral, or if the communications do not recur over time.

4. "Labor Organization" Status Under the LMRDA

The LMRDA definition of "labor organization" is in one sense broader than the NLRA definition, as it was meant to reach intermediate labor organizations, while at the same time more narrowly targeted at union affairs. The structure and purpose of the statute, however, suggest that it should not apply to worker centers.

The definition has two parts. First, LMRDA section 3(i) has a general definition of "labor organization" that closely mirrors the NLRA definition, with two basic changes: (1) it specifies that a labor organization is "a labor organization engaged in an industry affecting commerce" and (2) it adds to the definition intermediate labor organizations—conferences, general committee joint system boards, and joint councils—that do not deal with employers and in which employees do not directly participate. This section is followed by section 3(j), which delineates five specific categories of "la-

\[244\] One commentator has described the General Counsel’s approach as creating a "safe harbor for worker centers to negotiate with employers over terms and conditions of employment without becoming section 2(5) labor organizations.” Kent Y. Hirozawa, Member Column, 2(5) or Not 2(5): A Question for Worker Centers, AFL-CIO Lawyers’ Coordinating Committee Newsletter (July 2007). Hirozawa also suggest that “[d]iscussion of a multi-issue lawsuit should also be safe,” noting that ROC-NY’s original complaint against the Redeye Grill contained over ten causes of action. \[id\].

\[245\] Professor Duff questions the utility of the pattern or practice approach taken by the General Counsel because it fails to provide clear notice to organizations like ROC-NY of how to avoid crossing the labor organization “line.” Duff, supra note 7, at 100, 136. Duff also suggests that a pattern or practice is evident from statements on ROC-NY’s website, which he interprets as a sign that ROC-NY will continue its activities of pressuring the employer if future discrimination arises—even after the settlement agreement. \[Id\]. This points to problems of proof in determining an organization’s purpose, alluded to previously, supra note 236, that have typically been resolved by focusing on an organization’s actual activity rather than expressed or assumed intentions. However, the ROC-NY memo opens a new conceptual defense for worker centers, suggesting that if the recurrent interactions with an employer are over a singular, lawsuit-related issue, they will not establish a pattern or practice requisite for “dealing” even if the parties plan to continue these interactions in the future.

\[246\] The general definition provides:
ber organizations”—each corresponding to labor union or union-affiliated bodies—that the statute declares “shall be deemed to be engaged in an industry affecting commerce.”

There are two ways to read the two provisions. In one reading, section 3(i)’s general definition is paramount, and section 3(j) merely provides illustrative examples of labor organizations that will meet the “engaged in an industry affecting commerce” requirement. A second interpretation is that the two sections must be read together, with section 3(j) specifying the particular types of labor organizations that fall within the Act’s coverage so long as the general definition is also met.

There is no definitive guidance on which reading is correct. While Department of Labor regulations indicate that the term “labor organization” will be interpreted broadly, these regulations also suggest that a “labor organization” means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged 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, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization or local central body.

LMRDA § 3(i), 29 U.S.C. §402(i) (2006) (emphasis added to note differences from NLRA definition). Another change is the addition of the terms “group” and “association.” While at first glance this change would seem to expand the NLRA definition, when read as part of the larger phrase “any agency, or employee representation committee, group, association, or plan” it becomes clear that the added terms specify particular types of company unions—commonly referred to as employee representation committees and plans—rather than expanding the definition to any “group” or “association” of employees. See Electromation, Inc., 309 N.L.R.B. 990, 999-1001 (1992) (Devaney, Member, concurring) (discussing specific references in debates by the Senate Labor and Education Committee to “employee representation committees” and “employee representation plans”); see also infra Part V.B.1.a (discussing reference to company unions in the legislative history of section 2(5)).

247. Section 3(j) states that a labor organization will be “deemed to be engaged in an industry affecting commerce if it”: (1) is a certified representative under the NLRA or the Railway Labor Act; (2) is a national or international labor organization, or a “local labor organization recognized or acting as the representative of employees;” (3) is a labor organization that has chartered local labor organizations or subsidiary bodies which represent or seek to represent employees; (4) is such a chartered labor organization or subsidiary body; or (5) is a “conference, general committee, joint or system board, or joint council,” that are subordinate to national or international labor organizations. LMRDA § 3(j), 29 U.S.C. §402(j).

248. No case has directly addressed the issue. Some courts have suggested that meeting both parts of the definition is required. See, e.g., United States v. Dicus, 229 F. Supp. 282 (E.D. Ark. 1964) (concluding that a union’s pool arrangement “meets the requirements defining a labor organization engaged in an industry affecting commerce, in Section 3(i) and (j) of the Labor-Management Relations Disclosure Act, so as to give the Court the jurisdiction to determine the merits of the indictment”). On the other hand, other courts have been satisfied if an organization meets the general definition in section 3(i) and also clearly affects commerce. See, e.g., United States v. Morales-Rodriguez, 467 F.3d 1 (1st Cir. 2006) (holding that Puerto Rican police union, which does not qualify under any of the LMRDA section 3(j) categories because its members work for the state and not a statutory employer, nevertheless qualifies as a “labor organization engaged in an industry affecting commerce” because, inter alia, the officers use firearms, cars, and helicopters that must be purchased from the continental United States).

249. The Secretary of Labor’s interpretive regulations state that the definition “is deemed sufficiently broad to encompass any labor organization irrespective of size or formal attributes.” 29 C.F.R. § 451.3(a) (2008).
organization” must meet the general definition of section 3(i) as well as one of the categories of section 3(j) to be subject to LMRDA requirements.250

On balance, the inclusion of the specific union-related categories, combined with LMRDA’s clear focus on labor union affairs, supports the second reading—i.e. that both section 3(i) and section 3(j) must be met.251 The LMRDA was passed in response to the abuses revealed by the McClellan Committee. In its first interim report, the committee made five legislative recommendations, providing for the regulation of union pensions and union funds, and the protection of union democracy.252 Both legislative bodies referenced this backdrop when they passed the LMRDA, with the Senate Committee on Labor and Public Welfare referring to “[t]he problems of this now large and relatively strong institution [the labor union].”253 and the House Committee on Education and Labor discussing the abuses in certain trade unions and the growth of “bureaucratic tendencies and characteristics.”254 Thus, while Congress used an expanded version of the NLRA’s “labor organization” definition to include intermediate labor bodies,255 the section 3(j) categories reveal the law’s primary focus on traditional labor union structures in existence at the time.256

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250. See 29 C.F.R. §451.4(a) (“Section 3(j) sets forth five categories of labor organizations which ‘shall be deemed to be engaged in an industry affecting commerce’ within the meaning of the Act. Any organization which qualifies under section 3(i) and falls within any one of these categories listed in section 3(j) is subject to the requirements of the Act” (second emphasis added)).

251. Several canons of statutory construction support this reading. First, as a general rule, specific terms in a statute trump general ones. Second, by not relying on the general definition of section 3(i) alone, this interpretation avoids such absurd results as requiring LMRDA compliance for ephemeral groupings of workers that have been considered section 2(5) “labor organizations” in some cases. See infra Part V.B.2. In addition, specific language in section 3(j) reinforces the interpretation that a labor organization must fall within one of its classifications for the LMRDA to apply. Rather than a broad term like “including,” section 3(j) uses a restrictive term (“if it”) to delineate whether a labor organization meets the “engaged in an industry affecting commerce” requirement. LMRDA § 3(j), 29 U.S.C. §4020.


254. H.R. REP. No. 86-741 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2428. The House report also discussed the growth of trade unions from “relatively small, closely knit associations of workingmen” to unions whose members numbered in the hundreds of thousands, and in some cases over one million members at the time of the law’s passage. Id.

255. Writing several years after the passage of the LMRDA, one scholar described the main purpose of the LMRDA’s expanded definition of “labor organization” as its inclusion of intermediate labor bodies that are not necessarily composed of employees nor deal with employers. See Julius Rezler, The Definitions of LMRDA, in LMRDA SYMPOSIUM, supra note 118, at 263. Rezler concluded that “[d]ue to the broad definition of a labor organization, only a few types of trade union organizations were exempted from” coverage, including state and central labor bodies, international and national unions composed entirely of government employees, and independent local unions which deal with employers but are not engaged in industries affecting interstate commerce. See id. at 268.

256. Indeed, the Congressional committee reports accompanying the LMRDA explain section 3(j) in terms that make clear its connection to traditional collective bargaining. See S. REP. No. 86-187 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2370; H.R. REP. No. 86-741 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2451 (“This definition, like others in this section, is intended to provide comprehen-
It is unlikely that a worker center would fit into any of the categories of section 3(j). Of the five, only section 3(j)(2)’s reference to “local labor organizations” could potentially apply to worker centers. Although that term is not defined, section 3(j)(2)’s coverage extends only to “local labor organization[s] recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce.”

A closer look at the definition suggests that it does not encompass organizations like worker centers. For one, the word “local”—also not defined in the statute or regulations—likely refers to union locals, the constituent of a larger parent union that operates in a specific locale or represents workers of a particular employer or set of employers. Secondly, the use of the phrase “recognized or acting as the representative of employees,” rather than mere “employee participation” as found in NLRA section 2(5), suggests that unlike an NLRA “labor organization,” an LMRDA “local labor organization” must represent employees for collective bargaining. Looking at the first part of this phrase, the term “recognized” suggests a specific connection to the representation processes set out in NLRA section 9.

Indeed, some courts have connected the “representative” aspect of the definition with the purpose of collective bargaining.

Id. 1959 U.S.C.C.A.N. at 2322


258. In Donovan v. National Transient Division, the court, citing the need to construe “local” in light of its ordinary meaning and congressional purpose, interpreted the term “local labor organization” with reference to the “typical union structure [of] a three-tier hierarchy.” 736 F.2d 618, 622 (10th Cir. 1984). The court explained that a national or international organization is made up of subordinate locals, which “provide day-to-day services to the membership, such as policing collective bargaining agreements, disposing of grievances, collecting membership dues and disciplining dissident members.” Id. (citing THEODORE KHEEL, LABOR LAW § 3.01, 3.03[1] (1980)). Although some independent unions are not part of larger federations, they nevertheless fulfill the functions described in Donovan.

259. Section 9 of the NLRA regulates the process by which a labor organization may become the exclusive representative of a group of employees. 29 U.S.C. § 159 (2006). Section 9(c)(1)(A) governs representation petitions filed by employees or their representatives, who “wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative.” Id. § 159(c)(1)(A). NLRA Section 8(b)(7) also restricts “recognitional” picketing in certain circumstances. See id. § 158(b)(7); supra notes 123 & 124 and surrounding text.

260. In Rodriguez v. Haynes, the district court held that a local labor union is not subject to LMRDA regulation if it merely has employees within its membership but does not represent them. 341 F. Supp. 2d 416, 423 (S.D.N.Y. 2004). The court employed a purposive analysis, stating that “unless a union’s leadership is susceptible to abusing power, power that was created as a result of its representation of private sector employees, the Act’s protection is unnecessary.” Id. Such power was equated with the right to bargain collectively and to use economic weapons to gain concessions from employers. Id.; see also Wright v. Baltimore Teachers Union, 369 F. Supp. 848, 856 (D.Md. 1974) (“The purpose of a labor union is to represent employees in collective bargaining with their employer. This fact is emphasized in Section 402(j) wherein the several subparagraphs speak to the representation of employees. It is evident, then, that the concept of ‘representation’ encompasses far more than just ‘membership.’” (emphasis added)). Some federal courts, however, have construed “representative” more broadly. See Donovan, 736 F.2d at 621-22 (“[I]f the organization represents its members regarding grievances, labor
Therefore, for reasons of statutory text as well as purpose, regulation of worker centers by the Department of Labor is unlikely. First, worker centers may not meet the LMRDA’s general “labor organization” definition for the same reasons they would fail to qualify under NLRA section 2(5). Even if a worker center were to pass the section 3(i) threshold, it would generally not fit within the LMRDA’s more specific regulatory targets set out in section 3(j). An intentionalist reading supports this textual analysis. The “evil” which Congress intended to correct by passing the LMRDA was union corruption, a worry quite removed from today’s growing group of nonprofit worker centers that mostly lack mandatory dues-paying members, do not have established relationships with employers, and have limited financial resources. Although worker centers may be susceptible to the same corruption, Congress did not intend that they would be subject to a regulatory scheme designed for labor unions.

B. Second Tier: The Policy-context Analysis: Labor Organization as a Socio-Legal Construct

The second tier of my analysis focuses on the legal context in which “labor organization” status is adjudicated and the NLRA policies relevant to these adjudications. There is evidence from the legislative history that the definition of labor organization in section 2(5) was intentionally expanded to address the issue of company-dominated unions. This raises the question of how a law that was developed to deal with a particular concern applies in the novel context of employer charges against a worker center.

Although the Board has mostly applied the term “labor organization” consistently, the context of the “labor organization” inquiry is important. First, the legal context brings into play different parts of the Act and thus implicates distinct purposes that Congress intended the Act to achieve. Second, even if adjudicators do not explicitly refer to contextual considerations, the legal and factual setting in which they address “labor organiza-

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261. Asking what “evil” a statute seeks to address is a basic style of purposive analysis. See Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892) (“[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”). See supra note 179 (discussing intentionalism).

262. Worker centers are already regulated in some fashion by the Internal Revenue code as organizations with 501(c)(3) tax status. Such “nonprofit” organizations (serving “charitable purposes”) are exempt from federal income taxes as well as many state taxes, and donations to them are incentivized through tax deductions for donors. However, 501(c)(3) organizations may not directly or indirectly attempt to influence legislation or become involved in political campaigns for public office. By contrast, labor unions, as 501(c)(5) organizations, are exempt from federal income tax but do not receive deductible-charitable contributions, and are not restricted by the IRS from engaging in political activity. See HOWARD L. OLECK & MARTHA E. STEWART, NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS, Ch. 12 (6th ed. 1994).
tion” status shades their interpretation. Attention to context shows that the Board has exercised discretion when applying the term “labor organization,” guided by the policy concerns underlying the NLRA provision being adjudicated.

1. The “Company Union” Context: Section 8(a)(2)

Eliminating the company-dominated union was a key motivation behind the Wagner Act. The Act’s legislative history makes clear that “labor organization” was defined broadly in order to encompass all forms of existing company unions within section 8(a)(2)’s company-union prohibition, and the NLRB and the courts have consistently construed section 8(a)(2) cases in light of this broad purpose. The centrality of the company-union context to the legislative history of section 2(5), reinforced by subsequent interpretations of the Act, suggests that adjudicators should be cautious about applying the definition to organizations that exist in an entirely different social context and will be adjudicated outside of section 8(a)(2).

a. Company Unions and the Passage of the Wagner Act

The NLRA’s drafters were keenly attentive to the problem of company unions, and thus made sure that the Act’s proscription on employer-domination was targeted to apply to certain forms of company unions in existence at the time. Organized employer groups initially opposed unionization in all forms through the “open shop” campaign. However after World War I they shifted gears to espouse substitutes for collective bargaining: the “shop committee” and the “employee representation plan.” These orga-

263. For example, one possible interpretation of the General Counsel’s approach to the ROC-NY case is that it found ROC-NY not to be a “labor organization” in part because it did not believe it would have been violating the Act even if it were a labor organization, an interpretation bolstered by the General Counsel’s later reconsideration of the “labor organization” question focusing instead on the unfair labor practice charge. See Meisburg, ROC-NY Reconsideration Letter, supra note 4.

264. See supra note 219 (describing NLRA section 8(a)(2)).


266. The National Association of Manufacturers spearheaded the “American-plan” campaign to promote the “open shop” at the beginning of the twentieth century. Kohler, supra note 265, at 519. The shift to company unionism was influenced by the federal government's wartime experience with the National War Labor Board, which had used shop committees as a dispute settlement tool. Id. at 522-23. After the war, company unions swiftly grew from sizable competitors to independent labor unions, tripling in number from 1919 to 1932 (at which time they represented 1.2 million members) and ballooning to 2.5 million members by 1935, after the passage of the National Industrial Recovery Act in 1933. Moe, supra note 265, at 1134, 1137. Meanwhile, organized labor suffered a forty percent loss of membership between 1919 and 1932. In the words of Professor Kohler, “from roughly 1915 until 1935,
organizations came to be known as “company unions”—an originally neutral term that encompassed well-intentioned efforts to increase employee participation as well as employer-controlled “sham” unions.267

There were essentially two types of company unions. Prior to 1933, they often took the form of joint committees on which both employee and employer representatives sat. The employer regularly set the terms of such committees in advance,268 and the committees usually focused on such matters as grievances and personnel matters, safety issues, and production methods, rather than core collective bargaining concerns like wages, hours, and work rules. In fact, the committees did not collectively bargain in the modern sense at all; their recommendations had only an advisory character.269

Employers adopted a second type of company union after the passage of the National Industrial Recovery Act (NIRA) in 1933 in response to fears that the new law would challenge existing company unions. Post-NIRA company unions used employee-committee arrangements rather than joint-committees, and allowed for elected officers, bylaws, and formal membership.270 Although company unions resembled independent unions, they remained a management creation and lacked actual bargaining power.271 They met infrequently and with management present, seldom achieved written agreements and lacked the funds to finance independent employee action because they did not charge dues.272 Their dealings amounted to discussion rather than bargaining, and they primarily worked on grievance and personnel matters.273

The initial drafting of the NLRA in 1934 was clearly intended to oust company-dominated unions.274 As historian David Brody recounts, this drafting process proceeded along two tracks: “one leading to a viable framework for free collective bargaining, the other to the expurgation of the rival workplace representation system.”275 The latter goal was codified in

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267. See Cox, et al., supra note 100, at 192.
269. Id. at 525. Some plans also delegated to employees responsibility for managerial tasks, including hiring, promotion and discharge, solicitation of orders, and determinations of production schedules. Id. at 525-26.
270. Id. at 528-29; Moe, supra note 265, at 1136.
272. Kohler, supra note 265, at 529 (monthly meetings).
273. Id. at 529-30.
274. Upon introducing the first version of the Bill in 1934, Wagner stated that “the very first step towards genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.” Id. at 530 (quoting S. 2926, 73d Cong., 1st Sess. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 16 [hereinafter NLRA L.H.]).
section 8(a)(2), which outlawed employer "interference" and "domination" of "labor organizations." Accordingly, the more broadly "labor organization" was defined, the more company unions the prohibition would capture.276

Therefore, from the beginning, the definition of labor organization was shaped explicitly by Congress's intent to eliminate the company union. In the original draft of the NLRA, the term "labor organization" was limited to organizations whose purpose was to deal with employers on issues of wages, hours, or working conditions. But to ensure that the prohibition on employer domination would cover the many company unions that did not address issues of wages and hours, the definition was expanded in the final version to incorporate "grievances" and "labor disputes" as subjects pertaining to labor organizations.277 The revised draft also added the word "plan" to the list of organizational types, in order to reach a common type of company union known as the "employee representation plan."278

Even the key phrase "dealing with" was chosen intentionally to cover company unions that seldom engaged in actual collective bargaining. During the 1935 Congressional session, Labor Secretary Frances Perkins suggested that the term "bargain collectively" replace "dealing with" in section 2(5).279 Wagner's aide, Leon Keyserling, explained that if this change were made, "most of the activity of employers in connection with the company unions we are seeking to outlaw would fall outside the scope of the Act."280

276. In the words of Professor Brody, "workplace organization is encompassed by 2(5) so that it can be excluded in 8(a)(2)." Id. at 41.

277. Kohler, supra note 265, at 534-35. As a Senate Committee Report explaining the change commented, "[t]he importance of this is that an employer is now not permitted to organize a shop committee to present grievances on questions of safety and other minor matters even though he does not use such shop committee as a subterfuge for collective bargaining on the essential points of wages and hours." Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) Senate Committee Print, in 1 NLRA L.H., supra note 274, at 1320.

278. Then-Chairman of the National Mediation Board William Leiserson, a noted labor relations scholar, said at the time that "it is clear that unless these plans, etc. are included in the definition, whether they merely 'deal' or 'adjust' or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act. The act would thus be entirely nullified." Id. at 1326. Leiserson also explained the inclusion of the terms "grievances" and "labor disputes" as follows:

In most cases employee representation plans or committees are nothing but agencies for presenting and discussing grievances or other minor matters, and do not address themselves at all to the fundamental issues of collective bargaining agreements as to hours, wages, and basic working conditions. To exclude the term "grievances" particularly would exclude from the provisions of this act the vast field of employer interference with self-organization by way of such plans or committees. Id.

279. See Brody, supra note 265, at 41. This proposal is also recounted in NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 (1959).

280. Brody, supra note 265, at 41 (quoting Leon Keyserling, undated memo (1935), Folder 9, Box 1, Keyserling Papers). Keyserling continued: "If, as employers insist, such 'plans,' etc., are lawful representatives of employees, then employers' activity relative to them should be clearly included,
As this history makes clear, the broad definition given to the term "labor organization" in the NLRA was intended to be an expansive prohibition against employer domination through company unions.

b. The Policy of a Broad Definition of "Labor Organization" Outside the Company-Union Context

The vast majority of cases adjudicating section 2(5) issues arise in the context of alleged employer domination or interference under section 8(a)(2). In Electromation, the NLRB studied the legislative history and acknowledged that the prohibitions on company-dominated labor organizations are central to the overall purpose of "eliminating industrial strife through the encouragement of collective bargaining." The Board recognized that the term "labor organization" was broadly defined precisely because of "the Wagner Act's purpose to eliminate employer dominated unions." Member Devaney, concurring, opined that section 2(5) encompassed two general types of organizations: "first, an external organization or agency . . . . and second, an 'employee representation committee or plan.'"

Although the Board formally employs separate analyses of whether a labor organization exists and whether the organization has been dominated by the employer, it is evident that the concern for employer domination has influenced the broad reading of "labor organization" in the company-union context. Notably, to the extent that Electromation and its progeny have narrowed the "dealing with" element so as to allow for unilateral communication schemes in the workplace, it has been in service of another policy—allowing some range of employer-employee communication that falls short of employer-domination.
Because the broad definition was originally intended for company unions and external organizations that normally engaged in collective bargaining, it is not clear how the company union cases should apply to organizations like La Raza, KIWA, YWU, or ROC-NY that fit neither category. The policies behind section 2(5) and section 8(a)(2) do not shed light on whether Congress sought to regulate organizations like the modern worker center that eschew collective bargaining or even the less formal back-and-forth dealing undertaken by company unions. On the contrary, these sections are concerned with relationships within the workplace. Indeed, Professor Mark Barenberg has put forward the view that, in enacting these sections, Wagner and his allies sought to enshrine "the principle of workers' absolute free choice over modes of workplace governance." Such concerns have little to do with how labor organization is defined outside the company-union context, or how these policies might translate to the realm of external worker centers. Therefore, in order to shed light on how the "labor organization" definition should operate when company-union concerns are not present, below I examine how the definition is treated in other legal contexts.

2. Other Contexts for the "Labor Organization" Question

The NLRB has strived to apply the "labor organization" concept in the same way regardless of the legal context in which the question has been raised. This approach is supported by the general presumption of consistency in how legislatures use their terms, especially terms explicitly defined by the statute. However, this rule has exceptions: "[i]dentical words may have different meanings where 'the subject-matter to which the words refer is not the same in the several places where they are used, or the problem, because the employee committees were found not to be labor organizations. 334 N.L.R.B. 669, 669 (2001).

286. As Professor Hyde acknowledges, "this area of law [section 2(5)] . . . seems unhelpful in determining the rather different policy questions" about whether worker centers "should have to disclose their finances or be liable for unfair labor practices." Hyde, New Institutions, supra note 7, at 407-08.

287. Barenberg, supra note 265, at 1450-51. According to Professor Barenberg, Wagner believed that to achieve this free choice the Act needed to undercut direct coercion of worker choice as well as the more subtle distorting effect that the company union structure could have on workers' perceptions of their interests. Id. at 1458-60.

288. Eskridge, et al., supra note 177, at 264-66; see also Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995) (favoring an interpretation of a statute "as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout."); Comm'r v. Keystone Constr. Indus., Inc., 508 U.S. 152, 159 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citing Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

289. See Robinson v. Shell Oil Co., 70 F.3d 325, 328 (4th Cir. 1995) ("If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute"), rev'd on other grounds, 519 U.S. 337 (1997); 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:7 (7th ed. 2007).
The term “labor organization” is employed across varying NLRA subjects. Thus, the Board may properly exercise discretion, as an administrative agency, to interpret the ambiguous definition of “labor organization” differently as used in different sections to comport with its view of labor policy in a particular context. While the Board has ostensibly adhered to a consistent meaning of “labor organization,” in the following cases it has approached the question contextually and purposively, drawing on both policy factors and the traditional analysis described above.

a. Protecting Concerted Activity

Before the Electromation line of cases added some measure of precision to the “labor organization” inquiry, the Board and the courts exhibited different tendencies in how they approached the issue. Perhaps most fluid was the question of how to treat informal groups of employees who engaged the employer in some way—either through a delegation, a spontaneous walk out after the presentation of some demand, or more traditional pickets and strikes—but did not seem sufficiently well formed to have clearly-established purposes. Several cases in this area indicate that rather than applying a black-letter analysis of section 2(5), the Board and courts answered the “labor organization” question in ways that would allow the Act to protect concerted activity.

In several cases, courts have interpreted protesting employee groups to be “labor organizations” in order to bring them within the protections of the NLRA’s anti-discrimination provision. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate with respect to any term of employment “to encourage or discourage membership in any labor organization.” Although this provision has been interpreted broadly to encompass protected concerted activity generally (itself illustrating a policy choice), courts in several early decisions read the provision literally to re-
quire that there be a "labor organization" for which membership is either encouraged or discouraged. In the 1950 case of *NLRB v. Kennametal, Inc.*, for example, the discharge of four employees for their role in leading a work stoppage was actionable only because the court determined that the employees constituted a "labor organization." The Third Circuit found it "perfectly clear" that the informal group of employees—that began as seven or eight employees and "swelled to approximately 100" when they presented their wage grievance to the company's president—was a "labor organization," and accordingly enforced the Board's order that section 8(a)(3) had been violated.

In contrast to *Kennametal*, the Board in *Harold Fuel Company* found that similarly ad hoc groups of roving miners did not constitute a labor organization where the consequence of finding otherwise would have been charging the group with illegal restraint of their fellow employees. The coal miners in *Harold Fuel Co.* were concerned about the potential loss of special medical benefits available to miners whose employers paid into a United Mine Workers' (UMW) fund, after some miners received letters informing them that they would lose the benefits because of their employer's failure to pay. While the local unions held a meeting to discuss the issue, a separate group of employees held several meetings and formed what the ALJ termed "roving pickets" that would go from mine to mine in the area. At each mine, the group would speak to employees, ask them their pay rate and whether they were receiving welfare and other benefits, and ask them to quit work and join the group. The groups also spoke to mine operators. These discussions were mostly limited to asking permission to talk to employees. However, in several instances more extensive interac-

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293. The Supreme Court has endorsed the broader conclusion. See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) ("Section 8(a)(3) not only proscribes discrimination that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act"); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42 (1954). The Board has found 8(a)(3) violations for discharges unrelated to membership in a labor organization. See, e.g., *Kaiser Engineers*, 213 N.L.R.B. 752, enforced, 538 F.2d 1379 (9th Cir. 1976); *see also Giant Foods Mkts.*, 241 N.L.R.B. 727, 728 n.5 (1979) (stating that the Act, including section 8(a)(3), protects "members of the working class generally").

294. 182 F.2d 817, 818 (3d. Cir. 1950).

295. *Id.* See also *Smith Victory Corp.*, 90 N.L.R.B. 2089, 2089-90 (1950) (deciding that employer's discharge of employee who served as spokesman for group of workers and sought to discuss wage increase with employer violated Section 8(a)(3) because group of employees constituted a "labor organization").


297. *Id.* at 654-55.

298. *Id.* at 655-56. Although designated "roving pickets," the group did not in fact carry physical picket signs.

299. *Id.* at 656.
tion took place,\textsuperscript{300} and the group had several meetings with mine operators—at the operators' request—in which they discussed working conditions.\textsuperscript{301}

The Employer had charged that the roving groups, as well as the certified unions involved, had violated section 8(b)(1) through mass picketing and threats of violence because they blocked ingress to and egress from the place of work.\textsuperscript{302} In a decision affirmed by the Board, the ALJ concluded that because the roving groups focused on speaking to employees, they did not evince a purpose of "dealing with" employers, and could not be subject to unfair labor practice liability as "labor organizations."\textsuperscript{303} To reach this result, the ALJ minimized evidence that the groups had attempted to impress their position upon mine operators, stating that "'o[ccasional 'dealing' is not enough (even if it existed here) unless it is so widespread as to lead reasonably, as a matter of evidence, to the conclusion that this was the purpose of its existence.'"\textsuperscript{304} This stands in marked contrast to the treatment of the "labor organization" issue in cases like \textit{Kennametal}, where the spontaneously-formed group seemed to have no more an intention to "deal with" the employer than the miners who attempted to persuade a supervisor to shut down operations. One explanation for the difference is that the Board did not wish to restrict the miners' concerted activity, so it declined to characterize them as a labor organization subject to unfair labor practice charges as a union.

On the other hand, the Board has had no trouble finding "labor organizations" where such a finding would serve the Act's policy of preventing employers or outside groups from undermining concerted activity. In \textit{Porto Mills, Inc.}, the Board found that an anti-union group that had rallied to force the employer to fire a union supporter was a labor organization in violation of NLRA section 8(b)(2), despite the fact that the group made no request to negotiate with the employer.\textsuperscript{305} Sometime after a union organizational campaign had begun at the company, a prominent union supporter,

\begin{itemize}
  \item \textsuperscript{300} These incidents included asking one mine operator to work under a UMW contract and asking a mine superintendent to shut down his area of the plant to force the operator to pay into the UMW fund. \textit{Id.} at 656-57.
  \item \textsuperscript{301} The primary discussion at these meetings was the operators' request that the groups cease their picketing activities, but "conditions which had brought about the picketing were discussed," albeit in general terms, and no specific demands to the operators were made. \textit{Id.} at 657.
  \item \textsuperscript{302} \textit{Id.} at 653. Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce ... employees in the exercise of the rights guaranteed in Section 7." NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a) (2006).
  \item \textsuperscript{303} \textit{Id.} at 659.
  \item \textsuperscript{304} \textit{Id.} Even though the roving employee groups complained to employers about low wages and poor working conditions, the ALJ characterized these as "'[i]solated instances of vague suggestions that wages should be higher or that general working conditions in the coalfields should be improved.'" \textit{Id.}
  \item \textsuperscript{305} 149 N.L.R.B. 1454 (1964). Section 8(b)(2) provides that it is an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." 29 U.S.C. § 158(b)(2).
\end{itemize}
Luz Maria Rios, was discharged. Meanwhile, employees opposed to unionization formed two organizations—including the Comite Pro-Defensa de Los Trabajadores De Porto Mills—that distributed leaflets and attended rallies opposing the organizational effort. When Rios was offered reinstatement and set to return to work, the anti-union group struck to force the employer to terminate her.

In a finding upheld by the Board, the ALJ concluded that the Comite attempted to cause unlawful discrimination against Rios, and that it was a labor organization that could be liable for a section 8(b)(2) violation. Even though the Comite’s apparent purpose was to “fight the unionists,” and it never made any request to the company to negotiate on behalf of the company’s employees, the ALJ found that the Comite nevertheless had a purpose of dealing with the employer because, by refusing to work with Rios, it was “asserting a grievance and seeking to effect a change in their working conditions.” Admitting that it “appear[ed] anomalous” that a militant antiunion group could qualify as a labor organization, the ALJ explained this result by referring to the Congressional purpose “to cover more than the conventional type of labor organization so as to reach others that ‘may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining.’” The Comite did not intend to actually “deal” with the employer; but only wished to remain free of the union and of Rios. Porto Mills thus illustrates that “labor organization” may be construed more loosely to thwart antiunion activity that would surely offend the Act’s sponsors.

A similar result was reached in S & W Motor Lines, Inc., where the NLRB held that an employer violated 8(a)(2) by encouraging a group of employees—which it categorized as a “labor organization”—to decertify their union. The incident occurred in the midst of contentious labor negotiations, during which the employer expressed its desire to end the collective bargaining relationship at the expiration of the contract, and its driver-employees eventually went on strike. A supervisor in attendance at an eight-person meeting called by the employees suggested that they form a

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306. 149 N.L.R.B. at 1460.
307. Id.
308. Id. at 1471. The ALJ characterized her as “persona non grata” among the other employees.
309. Id. at 1454, 1472.
310. Id. at 1471.
311. Id. at 1472 (quoting NLRB v. Pa. Greyhound Lines, 303 U.S. 261, 266 (1938)). The ALJ also noted that “one of the major purposes of the comprehensive statutory definition was to reach antiunion and company-dominated organizations which performed but few, if any, of the functions usually embraced under the term ‘collective bargaining.’” Id.
313. Id. at 940.
company union, and encouraged the employees to attempt to decertify the union.\textsuperscript{314}

The ALJ found that the supervisor’s actions and statements violated both section 8(a)(1) and section 8(a)(2).\textsuperscript{315} As a prerequisite for the latter violation, the ALJ held (and the Board agreed) that the ad hoc group that met with the supervisor was a labor organization, because it “existed in part for discussing their grievances with [the employer] in an effort to resolve those grievances to the exclusion of the Union.”\textsuperscript{316} To reach this result, the ALJ hypothesized that the meeting was a first step towards establishing a more formalized organization, and that the group had the “object of eventually negotiating a collective-bargaining agreement with Respondent following the demise of the Union.”\textsuperscript{317} The ALJ also justified the result through reference to the Act’s purpose of protecting employee choice.\textsuperscript{318} Rather than characterizing the ad hoc group as a “labor organization” dominated by a supervisor, a more plausible story is that they were a group of employees whom a scheming supervisor was illegitimately influencing. While such activity clearly merited a section 8(a)(1) charge, analysis under section 8(a)(2) appears gratuitous and had no meaningful effect on the remedy.\textsuperscript{319} However, this recharacterization allowed for legal sanction of behavior that was clearly at odds with the Act.

These cases show that the Board often uses the labor organization definition to further the Act’s purposes. Informal employee groups will be considered “labor organizations” in some cases where such a finding is necessary to punish employer activity that trenches on section 7 rights. However, where a finding of “labor organization” would subject the informal group to liability, as in the Harold case, the definition of labor organization loosens in order to protect concerted activity by employees.\textsuperscript{320}

\textsuperscript{314} Id. at 941. The supervisor, who was the son-in-law of the company’s president, offered to pay a motel for meeting space and to bring the company president when he first heard of the meeting. Instead, the supervisor arrived alone and offered to bring their concerns to the company president. \textit{Id.}

\textsuperscript{315} Id. at 942.

\textsuperscript{316} Id.

\textsuperscript{317} Id.

\textsuperscript{318} The ALJ stated that its “broad construction [of ‘labor organization’] is consistent with an effort to reach” the organizations that obstruct employee choice, citing \textit{Porto Mills} and \textit{Pennsylvania Greyhound Lines}. \textit{Id.} Having established that the ad hoc group was a “labor organization,” the ALJ found that the Supervisor had supported it, solicited its grievances, encouraged the formation of a company union, attended a meeting, and rendered financial assistance in violation of section 8(a)(2). \textit{Id.}

\textsuperscript{319} Because of the section 8(a)(2) violation, the Board ordered the employer to cease and desist encouraging or assisting the no-longer-existent ad hoc employee group. \textit{Id.} at 959. This stands in contrast with the more typical remedy for section 8(a)(2) violations of disestablishing the dominated labor organization.

\textsuperscript{320} The Board has also found that ad hoc groups constitute labor organizations where the effect is to protect stable collective bargaining relationships or the will of employees not to have a union. \textit{See}, \textit{e.g.}, National Packing Company v. NLRB, 377 F.2d 800, 803 (10th Cir. 1967) (finding that group of employees who, after a failed union campaign, formed a committee that met with management several times, and struck and picketed after the employer failed to provide a pay increase it believed was prom-
b. Strike Notification in the Health Care Industry: Section 8(g)

NLRA section 8(g) requires labor organizations to give ten days' notice before any strike or concerted refusal to work at a health care institution. The Board confronted this issue in the 1977 case of Walker Methodist Residence and Health Care Center, Inc., where two unrepresented nurses' aides in a nursing home were terminated when they left their shifts to present a grievance to their employer. The Board concluded that the discharge violated section 8(a)(1), because it discouraged concerted protected activity. However, the Board first considered whether the discharged employees were required to give notice of their work stoppage under section 8(g), a position the employer urged based on language in the legislative history suggesting that the notice requirement applied to all strikes at a health care institution.
Relying upon its reading of the legislative history and "an examination of policy considerations," the Board rejected this contention, and concluded that the notification would only apply to a "labor organization" as indicated by the statutory text.\(^{327}\) In addition to citing a statement in the legislative history indicating that the legislation was a compromise that should be construed strictly, the Board in large part supported its position on policy grounds. The Board noted that Congress was concerned that "sudden, massive strikes could endanger the lives and health of patients in health care institutions," and reasoned that Congress would have been particularly concerned about the potential for greater and longer work stoppages by labor organizations, which could involve picket lines that disrupt supply lines.\(^{328}\) The Board thus concluded that no violation of section 8(g) took place, implicitly ruling that the nurses' aides did not constitute a labor organization.

Section 8(g) issues have also been raised with respect to greater workplace disruptions. In *East Chicago Rehabilitation Center, Inc. v. NLRB*, the Seventh Circuit held that a spontaneous walk-out by seventeen hospital employees did not trigger the section 8(g) notice requirement because the employees were not a "labor organization."\(^{329}\) In response to an employer announcement of a more restrictive lunch policy, employees gathered in small groups, and management held two meetings with them to explain the new policy. After the second meeting, the employees walked out and were subsequently terminated.\(^{330}\) Although represented by a union, the union played no role in encouraging the walk-out, and even asked the workers to return to work when it learned of the action.\(^{331}\)

The employer had argued that the employees' wildcat strike violated section 8(g), and that to hold otherwise would allow workers to get around the notice requirement by striking without union authorization.\(^{332}\) Writing for the majority, Judge Richard Posner rejected this proposition, and concluded that the "labor organization" requirement was plain. Judge Posner validated the requirement as rational policy, reasoning that union-led strikes are more costly, "apt to last longer, involve more workers, and command more support from other unions" than wildcat strikes.\(^{333}\) As part of its holding, the majority also rejected the argument that the striking workers comprised an "informal labor organization," finding neither the organiza-

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327. 227 N.L.R.B. at 1630.
328. *Id.* ("The legislative history stresses that the purpose of the notice provision is to allow a health care institution to make arrangements for the continuity of patient care in the event of a strike or picketing by a labor organization.").
330. 710 F.2d at 399.
331. *Id.*
332. *Id.* at 403.
333. *Id.*
tion nor the requisite purpose. In Judge Posner's view, requiring all concerted activity by health care workers to comply with section 8(g) would restrict more section 7 activity than Congress intended.

While both Walker Methodist and East Chicago focused on the statutory question of whether a "labor organization" was legally required to trigger a section 8(g) notice, more remarkable for our purposes is the fact that no labor organization was found in either case. Indeed, the opinion in East Chicago drew a vigorous dissent that would have found the striking nurses to constitute a "labor organization." According to the dissent, the employees were an "organization," because they had met twice before the walkout, and had the requisite dealing-with purpose because they wished "to coerce their employer into abandoning its new lunch period policy."

Of course, the Board could have found the striking employees to be a labor organization. Given the cases discussed above, where recently-formed groups with unclear intentions directed at the employer were deemed to have satisfied the "dealing with" requirement, this is arguably a permissible reading of the statute. However, it appears that the policy goals of section 8(g), coupled with concern about stifling section 7 rights, caused the Board and the Seventh Circuit to find that these groups of protesting workers were not labor organizations. These policy goals would not be served by applying the strike notice requirements to such informal groups, where no serious harm to patients resulted, and where doing so would threaten section 7 activity.

In short, these section 8(g) cases show that while the Board and the courts will treat "labor organization" cases as a uniform body of law, their conclusions about an organization's status under the Act are often influenced by the specific policy context in which a case arises.

c. Representation Petitions

A final area in which the "labor organization" question may arise is in the process of selecting a representative for collective bargaining. Section 9(c)(1)(A) provides that employees may be represented "by an employee or group of employees or any individual or labor organization." After a

334. Id. at 404.
335. Id. See also Civil Serv. Employees Ass'n, 569 F.3d 88 (noting that section 8(g) "does not state that an employee who [strikes or pickets without giving notice] commits a violation").
336. Id. at 411 (Coffey, J., dissenting).
337. Id. (Coffey, J., dissenting).
338. See supra Part V.B.2.a.
339. See also Vencare Ancillary Services, Inc., 334 NLRB 965, 969 (2001), enforcement denied on other grounds, 352 F.3d 318 (6th Cir. 2003) (reaching a similar result—that a group of five employees who presented a memorandum to management complaining about a wage cut before walking off the job was not subject to the notification requirement—but under the "bilateral mechanism" analysis) 
petition is filed, the Board will direct an election and issue certification.\textsuperscript{341} The Board has stated that "the choice of a bargaining representative rests upon the desires of the employees,"\textsuperscript{342} and that so long as the organization petitioning to represent the employees qualifies as a "labor organization," the Board will not refuse to process the petition based on its alleged shortcomings.\textsuperscript{343}

However, the Board has refused to direct an election in some instances. In one line of cases, the Board has dismissed petitions on policy grounds—not implicating the "labor organization" definition—by finding the organization "disqualified" to represent the unit employees.\textsuperscript{344} The Board has also rejected election petitions from petitioners found not to be bona fide "labor organization."\textsuperscript{345} For example, in \textit{Harrah’s Marina Hotel and Casino}, the Board affirmed the Regional Director’s decision that a union of casino police and security, whose officers had embezzled union funds, was not a labor organization within the meaning of the Act.\textsuperscript{346} The Regional Director, having found that the union’s officers were operating the union “as their personal business and for their personal profit,”\textsuperscript{347} concluded that the petitioner and its parent federation “are not organizations dedicated to the interests of the employees as a bona fide collective bargaining representative, that they are not organizations in which employees participate to any significant extent in the governance and administration of the organization, and that they are not labor organizations within the meaning of section 2(5) of the Act.”\textsuperscript{348} The Board agreed on the narrower ground that the union and federation failed to establish that they “exist, either in

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\item[341.] See NLRB, \textit{Representation Cases}, supra note 100, at 51.
\item[342.] Auto Transps., Inc., 100 N.L.R.B. 272 (1952).
\item[343.] See Alto Plastics Mfg. Corp., 136 N.L.R.B. 850, 851-52 (1962) ("If an organization fulfills [the requirements of being a 'labor organization'], the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.").
\item[344.] See \textit{Garren et al.}, supra note 125, at 95. This finding can arise due to conflicts of interest, as when the union competes with the employer for business, see, e.g., Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954), or because supervisors participate in the internal affairs of the organization. See Sierra Vista Hospital, Inc., 241 N.L.R.B. 631, 632 (1979). The underlying principle of such cases is that “[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests.” \textit{Id.} (quoting Nassau and Suffolk Contractors’ Ass’n, Inc., 118 N.L.R.B. 174, 187 (1957)). The Board has also withheld its election processes from unions that excluded employees from membership because of their race, based on constitutional concerns. See Indep. Metal Workers Union, Local No. 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); \textit{see also} E. & R. Webb, Inc. (\textit{Town & Country}), 194 N.L.R.B. 1135 (1972) (finding that Christian Labor Organization was a bona fide labor organization because it did not restrict its membership on religious grounds).
\item[345.] See NLRB, \textit{Representation Cases}, supra note 100, at 51.
\item[346.] 267 N.L.R.B. 1007 (1983).
\item[347.] \textit{Id.} at 1011.
\item[348.] \textit{Id.} at 1012.
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whole or in part, for the purposes set forth in the statute." Notably, at no point in Harrah's Marina Hotel did the Board or the ALJ discuss whether the union had dealt with or had the purpose of dealing with employers. Presumably, as an established labor union, it had engaged in such dealing in the past, despite its illicit character.

Clearly, it was the organization’s basic incompatibility with the Act’s principles that influenced the Board’s assessment of the petitioner’s “labor organization” status, rather than a plain textual analysis of whether the organization met the elements of section 2(5). Although the cases following Harrah’s Marina Hotel are few, they demonstrate that the question of what constitutes a labor organization involves more than decontextualized statutory application.

3. The Contextual Analysis for Worker Centers

The foregoing cases make clear that adjudicators take into account purposive and policy considerations specific to the legal context in which the “labor organization” question is raised. While the Board strives for definitional consistency, the purposes behind the labor laws influence decision-making at a subterranean level.

The policy-context analysis calls upon the Board to exercise its policymaking power when assessing charges against non-traditional worker organizations that do not seek status as the exclusive representative of employees. The most important application of this analysis for worker centers involves the Act’s restrictions on picketing and secondary activity under section 8(b). These provisions are based in the Taft-Hartley and LMRDA era concerns of preventing corrupt union practices that could ensnare large industries and preventing strikes that disrupt the flow of commerce. Under the policy-context the Board must determine whether regulating nonprofit worker centers would fulfill these policies. The generally circumscribed geographical focus, smaller scale of employer operation, and restricted scope of worker center activities—along with the constitutional concerns discussed below—shift the policy-balance against regulation of most worker centers.

C. Third-Tier: The Constitutional-purposive Analysis: Worker Centers as Social Movement Organizations

The third tier of analysis in the framework I propose addresses the tension between First Amendment associational rights and restrictions...
deemed appropriate in the labor context. Because worker centers are more like social movement organizations than traditional labor unions, and their activity is often based in the exercise of constitutional rights of association, the Board and the Department of Labor should exercise greater restraint in regulating their activities.

Worker center activity falls both outside the area Congress sought to regulate through the NLRA, and inside the tradition of First Amendment social movement speech. The goal of the NLRA was to establish a well-defined system of industrial relations through which employee organizations and employers could manage conflict. Organizations like worker centers, which do not seek to represent employees over day-to-day workplace conflicts, do not fit well within this system. Rather, many worker centers can better be classified as civil rights and social movement groups who engage in the type of speech and litigation activity that has been accorded the highest degree of First Amendment protection.351

This section proceeds in two parts. First, I discuss the published Board decision that has come closest to considering whether organizations like worker centers are "labor organizations." The thirty-year-old case, Center for United Labor Action (CULA),352 stands for the principle that an organization should not be regulated by the NLRB if it does not fit within the system of labor-management relations that the Board and the courts have developed from the NLRA. Second, I discuss the first amendment constitutional concerns that undergird CULA and which represent fundamental external policies that guide interpretation of the NLRA.

1. The Center for United Labor Action

The Center for United Labor Action, or CULA, was a labor support group with a national headquarters and branches in several major cities. Its publications described it as "an association of working men and women devoted to the improvement of working conditions and the advancement of all workers of all races and nationalities in the struggle against the U.S. corporations [which] helps to organize the unorganized and aims to make

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351. See Fine, Mismatch, supra note 10, at 346 ("[Worker centers] are relatively young organizations which have more in common with social movement or community organizing groups in their spontaneity and informal leadership and organization than they do with contemporary labour unions.").

352. 219 N.L.R.B. 873 (1975) [hereinafter, CULA]. The CULA case has been the focus of several commentators' assessments of the status of worker centers and similar groups under the NLRA. See, e.g., Rosenfeld, supra note 7, at 486-89 (arguing that the majority's reasoning in CULA was flawed and agreeing with the dissent that CULA existed at least in part for the purpose of dealing with employers); Yates Rivchin, supra note 237, at 413 ("Under this holding [CULA], most workers' centers would not be considered a 'labor organization.'"); see also James Gray Pope, Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution, 69 Tex. L. Rev. 889, 944-52 (1991) (discussing CULA as "the leading NLRB decision on labor support groups"); Marion Crain & Ken Matheny, Labor's Identity Crisis, 89 Cal. L. Rev. 1767, 1788-92 (2001) (examining CULA as an illustration of the Act's narrow conception of unionism that focuses on economic issues and excludes matters of social justice).
existing labor organizations more effective.” It typically did this by supporting employees through fund-raising on behalf of strikers and picket support.

CULA reached the NLRB in the context of a national boycott called by the Amalgamated Clothing Workers of America against the products of the Farah Clothing Manufacturing Company. While the union had picketed a Rochester, New York clothing store asking customers not to purchase Farah clothes, the Rochester branch of CULA took the further step of asking consumers not to patronize the store altogether so long as it sold Farah products—a clear violation of the secondary boycott restrictions if undertaken by a labor organization. The retail clothing store filed unfair labor practices charges alleging that the local CULA branch had engaged in prohibited secondary activity.

The administrative law judge (ALJ) assigned to the case determined that the threshold issue was whether CULA was a “labor organization.” The ALJ concluded that CULA was not a “labor organization,” and the NLRB, in a 2-1 decision, affirmed the order while refining the ALJ’s reasoning.

The only question regarding CULA’s labor organization status was whether it had the purpose of “dealing with employers,” as it was clearly an organization in which employees participated. The ALJ determined that CULA dealt with the employer in part, but nevertheless found it not to be a “labor organization” because “such a result tends to warp the structure and distort the policy and purposes of the Act.” The Board agreed with the ALJ’s conclusion, but on the ground that CULA did not deal with the employer at all. Instead, the Board characterized CULA’s activities as support for a “social cause” and not “a desire to represent the individuals in the furtherance of their cause.”

a. The CULA Principle: Social Causes and “Representation”

The activities of modern-day worker centers differ in important respects from the group analyzed in CULA. CULA was explicitly a labor-

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353. 219 N.L.R.B. at 874.
354. Id. at 873.
355. Id. at 876. CULA had picketed the Rochester retail store “with signs urging customers to boycott” the store and “distributed leaflets and literature in the Rochester area requesting that customers boycott.”
356. Id. at 879.
357. Id. at 873. The dissent would have found that CULA did have a purpose of “dealing” with the employer, based on the organization’s admitted purposes of “picketing for reinstatement of discharged employees, for a boycott of a manufacturer with whose labor policies it disagrees, or to aid and indeed finance employee organizing activities.” Id. at 875 (Kennedy, Member, dissenting). Member Kennedy relied in part on Porto Mills, Inc., discussed supra Part V.B.2.a, in which the Board concluded that an anti-union group had dealt with the employer by virtue of its demand that an employee leading a union organization drive be discharged. See id.; Porto Mills, Inc., 149 N.L.R.B. 1454 (1964).
support group, which primarily supported labor struggles initiated by established unions.\textsuperscript{358} When it did engage employers, it was usually through concerted actions such as pickets and boycotts rather than direct requests to negotiate.\textsuperscript{359}

Nevertheless, the overriding principle of CULA—that social movement organizations that do not seek to represent employees in their conflicts with employers should not be subject to NLRA regulations—is broadly applicable. The Board expressed this idea succinctly:

Support for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.\textsuperscript{360}

In highlighting the idea of "representation," the Board was expressing its agreement with the ALJ, who focused on the Act's purpose of regulating organizations involved in the representation process.\textsuperscript{361}

The ALJ decided that even though CULA did "deal with employers" within the "literal definition of labor organization," classifying CULA as a "labor organization" would be inconsistent with the underlying policy and purposes of the Act.\textsuperscript{362} In the ALJ's view, the "labor organization" question must be interpreted in light of the central role the NLRA assigns to organizations that act as employee representatives. The ALJ stated:

It is a basic tenet of the Act that by investing the employees' chosen representative with authority to deal with the employer and \textit{to resolve labor disputes with the employer} in the interests of the employees, a degree of regularity and stability can be achieved in labor relations which would diminish burdens on and interruptions to interstate commerce. It is thus the purpose of the Act to create circumstances favorable to the resolution of such labor disputes.

From the outset, Congress clearly expected, as has since normally been the case, that labor organizations would be the representatives chosen to carry out the purposes of the Act.\textsuperscript{363}

The ALJ concluded that "the authors of the original Act, as well as those who have since worked to amend it, intended that the term 'labor organiza-

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\item[358.] \textit{Id.} at 877 (describing CULA's strike-support activities in three different campaigns).
\item[359.] The chairwoman of the Rochester CULA branch testified that the branch often engaged in picketing activities but did not approach employers directly on behalf of discharged employees. \textit{Id.} at 877-78.
\item[360.] \textit{Id.} at 873.
\item[361.] The Board made clear that it agreed with the ALJ's reasoning. \textit{See id.} ("We agree with the Administrative Law Judge's conclusion that Respondent CULA is not a labor organization within the meaning of Section 2(5) of the Act and his reason for reaching this conclusion.").
\item[362.] \textit{Id.} at 879. In support of this argument the ALJ invoked the broad purposive idea that regulation of organizations like CULA was not within the "spirit" of the Act. \textit{Id.} (quoting NLRB v. Fruit \& Vegetable Packers, Local 760, 377 U.S. 58, 72 (1964)). The source of this quote is \textit{Church of the Holy Trinity v. United States}, 143 U.S. 457, 463 (1892), discussed \textit{supra} at note 261.
\item[363.] \textit{Id.} at 879-80.
\end{footnotes}
"... as used in the Act should be applied to organizations selected and designated by employees (who are, or may be, members of or participants in such organizations) for the purpose of resolving the employees' conflicts with employers."364

The ALJ's intentionalist reasoning has important antecedents. His emphasis on the role of labor organizations in "resolving" employee-employer conflict accords with prevailing industrial relations theories of the day, which contemplated a stable system of industrial democracy in which unions and management worked on a level playing field to adjudicate workplace problems.365 The "pattern or practice" theory developed in Du Pont shares the same premise of an ongoing relationship geared towards dispute resolution. In these ways, the ALJ's discussion highlights the Act's purpose of regulating labor organizations in the process of exclusive representation for collective bargaining, from overseeing the certification process to monitoring the duty to bargain.366

The Board, seeking to find textual as well as purposive consistency with the Act, reached its conclusion that CULA was not a labor organization by a different route, finding that the organization did not seek to deal with the employer, "expressly or implicitly . . . over matters affecting the employees."367 But the Board made clear that it agreed with the ALJ's reasoning, recasting it as a rule 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"—a test that CULA did not meet.368

The Board emphasized that CULA was acting as a social movement organization concerned with labor rights extending beyond the workplace. In explaining the distinction between support for a "social cause" and "representation" the Board stated the following:

Many present day labor disputes are viewed by some as problems which extend beyond the confines of the plant involved and have an impact on the community at large or, in some instances, on the Nation itself. In such circumstances, it is not unusual for social activist groups, newspapers, and clergy to actively support the employees' cause and to seek to marshal public opinion in support of it . . . . But are we then to conclude that any organization which engages in strike-supporting activities exists, at least in

364. Id. at 880.
366. Section 9 of the Act regulates the process by which a labor organization may become the exclusive representative of a group of employees. 29 U.S.C. § 159 (2006). NLRA section 8(a)(5) imposes upon employers the duty to bargain with the exclusive representative in good faith. 29 U.S.C. § 158(a)(5).
367. 219 N.L.R.B at 873. The Board rejected the ALJ's notion that CULA had dealt indirectly with Farah by virtue of its "picketing, leafleting, and related activities . . . designed to cause the employer [Farah's] to act in accordance with [CULA's] expressed desire." Id.
368. Id.
part, for the purpose of dealing with employers over employee labor relations matters? We believe that such a conclusion would be ridiculous on its face.369

Thus, the Board reasoned that the Act should not regulate social cause organizations that do not seek to represent employees or deal with employers over “employee labor relations matters.”370

By focusing on the goals of employees in selecting an organization, as opposed to looking only at the types of interactions the organization had with the employer, the CULA Board signaled that representation in the collective bargaining process is a core part of what it means to be a “labor organization.” Even the words the Board used to express the idea—that an organization must be “selected and designated by employees for the purpose” of resolving conflicts371—suggestively track the language of NLRA section 9 describing the exclusive representation process: the exclusive representatives are those “[r]epresentatives designated or selected for the purposes of collective bargaining . . . .”372

b. The Purposive Thrust of the “Representation” Principle

Casting the role of representation in the collective bargaining process as essential to “labor organization” status is consonant with industrial relations precepts at the core of the NLRA.373 Indeed, Professor Sachs has argued that the higher priority the Act places on representation issues—what he calls the Act’s “relational” project of regulating the union-employer relationship—rather than the “constituitive” project of fostering worker organizing, has served to undermine the effectiveness of modern labor law.374 The representation concept is also consistent with the multitude of NLRB and court decisions that have found “labor organization” status for organizations that seek recognition as bargaining agents, and even for intermediate labor organizations that, although not seeking recognition

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369. Id.

370. Id. One important consequence of this “representation” principle for worker centers is that it is not considered “dealing with employers” under section 2(5) when an organization pursues legal representation of employees through adjudicative forums rather than through direct negotiation with employers themselves. In the Board’s view, CULA’s representation of employees before state administrative agencies and commissions “has no bearing on [its] status as a labor organization.” Id. at 873-74. The Board also made clear that the goals of individual members cannot easily be ascribed to the organization at large; thus, CULA would not be “bound by the individual action of its members” who formed delegations confronting the employer. Id. at 873.

371. Id.

372. NLRA § 9(a), 29 U.S.C. § 159(a) (emphasis added).

373. See Lichtenstein, supra note 365.

374. See Sachs, Employment Law as Labor Law, supra note 9, at 2745-48. According to Professor Sachs, the Act’s close regulation of the duty to bargain, the permissible subjects of bargaining, the time at which bargaining can take place, and the employer’s role in worker organizations all introduce rigidities into U.S. labor relations. Sachs argues for a “great trade in labor law reform,” whereby a redesigned labor law would place much greater emphasis on the early stages of collective action in exchange for reduced intervention in the parties’ bargaining once employee representation has been achieved. Id.
themselves, "pool and coordinate the power of organizations that do." These cases show that the Board will classify as labor organizations those that play familiar roles in the labor relations sphere, such as seeking recognition or representing organizations that themselves negotiate with employers. In other words, the Act’s basic purpose of regulating the representation process must inform how “labor organization” status is determined. Without engaging in representation, social movement organizations are square pegs that cannot fit through the round hole of the statutory “labor organization.”

Constitutional values also reinforce CULA’s purposive approach. Professor Pope has argued that the Board’s conclusion that CULA is not a labor organization “is best understood as an attempt to avoid infringing the first-amendment rights of CULA members.” Although neither the Board nor the ALJ invoked the Constitution, Pope notes that their "reasoning resonates strongly with constitutional decisions protecting the freedoms of association and protest." Indeed, as explored in the next section, constitutional protection can play a more explicit role in insulating worker centers from NLRA regulation.

375. As these organizations scarcely “deal with” employers, and are made up of labor organization members rather than “participating” employees, Professor Pope characterizes them as the “exception that proves the rule” of the representation concept’s importance. Pope, supra note 352, at 948. In support, Pope cites two federal cases in which employers had sought orders enjoining trade union councils from threatening employers from doing business with nonunion companies in violation of NLRA section 8(b)(4)’s restrictions on secondary activity by “labor organizations.” Id. In both cases, labor organization status was found despite scant evidence of employer dealing or employee participation. In NLRB v. Omaha Building and Construction Trades Council, the Eighth Circuit held that the trade council was a labor organization subject to secondary boycott restrictions even though its dealing was limited to mediating jurisdictional disputes among various labor unions and their employers. 856 F.2d 47, 50-51 (8th Cir. 1988). Similarly, in Levine v. United Brotherhood of Carpenters, a district court held that the “Mutual Assistance Committee,” for which there was “reasonable cause to believe that the organization has involved (if it does not consist solely of)” business representatives of unions involved in labor disputes at the picketed site, was a labor organization even though it purported to be a consumer protection group. 93 L.R.R.M. (BNA) 2663, 1976 WL 1569 (N.D. Ohio 1976); see also Bldg. & Constr. Trades Council of Reading & Berks County, 155 N.L.R.B. 1184, 1186-87 (1965) (adopting ALJ’s finding that trades council was a “labor organization,” because craft unions operate through the council as a unit, the council organizes employees of nonunion contractors for constituent locals, and because such activity may result in the recognition of constituent locals, and “as recognition is the sine qua non to negotiation of a collective-bargaining agreement and is within the broad term ‘dealing with’ in Section 2(5) of the Act”).

376. As a corollary, Pope argues that organizations that do not seek to represent employees should not be regulated as “labor organizations,” because they cannot “enjoy the prime organizational benefit of the labor law—the possibility of attaining exclusive representative status . . . .” Pope, supra note 352, at 947.

377. Although in one sense this approach conflates two legally independent sections of the Act—those concerning representation and those concerning “labor organization” status, see Hyde, New Institutions, supra note 7—the Board’s reasoning is based on a connection between the various parts of the Labor Act, with the goal of implementing its basic purposes.

378. Pope, supra note 352, at 946-47.

379. Id. at 947.
Arguably, CULA does not apply to modern-day worker centers that more directly "represent" workers and engage employers. Yet the broader principles of the CULA decision may still have bearing. Its constitutionally-infused purposivism suggests that when an organization fighting for broad social causes attempts to vindicate rights in the workplace, the normal "labor organization" test may not apply. Indeed, if the organization seeks no role in the traditional scheme established under the NLRA, either by attempting to organize a union or to bargain with an employer, the Board may prefer to keep it outside of the Act's regulatory scope.

c. The Life of CULA

Despite its provocative analysis, the CULA decision has for most part lain dormant since it was written over thirty years ago. It has been referenced in only one subsequent Board opinion in clear dictum, and has been cited without comment in one federal district court decision on dissimilar issues. Several General Counsel advice memoranda dating from the 1970s cited CULA in analyzing the labor organization status of various employee groups, but their applications were somewhat ad hoc and did little to clarify or develop the rationale of CULA. Instead, starting with Electro-
the "dealing with" question has focused on the quality and extent of bilateral communication rather than the representation concept.383

However, CULA's salience for worker centers is apparent from its application in a 1994 case in which an NLRB Regional Director declined to

demands, made it clearer that the employee groups were attempting to "deal with the employer." Cf. Cent. Ariz. Minority Employment Plan, Case 28-CC-623 (Nov. 30, 1977) (on file with author) (although finding that group picketing a subcontractor’s minority-employment practices was not a labor organization, because no employees participated and it was closer to a "social protest organization," nevertheless recommending that section 8(b)(4)(ii)(B) charge issue on the theory that CAMP was an agent of a labor union that had previously complained to the school district about the work of several nonunion contractors and whose business agent also participated in the picket). On the contrary, a less directed, spontaneous protest uttering community demands for employment was found not to be that of a labor organization. See Michael E. Drobney, an Agent of Laborers Local 498, Cases 8-CC-835; 8-CB-3229 (Dec. 30, 1976) (on file with author) (finding that "un-named and unidentified" group of individuals who picketed construction employer to protest its use of out-of-state labor and to demand jobs for picketers, was not a labor organization, where the protest arose spontaneously, the group was not selected or designated by employees to represent them, and did not indicate any purpose of dealing with the employer; citing CULA for distinction between acting as a collective bargaining representative and acting in support of some "social" cause). In memoranda dealing with ethnicity-based organizations, the General Counsel in one case found that a nonprofit group supporting Latinos was not a labor organization, Casa Aztlán As'n. Proderechos Obreros, Case 13-CG-5 (Mar. 17, 1976) (on file with author) (finding that nonprofit social service agency serving Latinos on a volunteer basis, which picketed hospital demanding jobs and protesting its policies towards minorities and women, was not a labor organization triggering the section 8(g) notice requirement, but was more akin to a civil rights organization supporting the "employment related rights" of a minority group), and in another case found that employee caucuses in the workplace representing different minority groups were labor organizations, but in that case this finding was pursuant to a section 8(a)(2) charge concerning employer domination and assistance of such groups. Leland Stanford Jr. University and Stanford University Hospital, Case 20-CA-10117, NLRB Advisory Memorandum (Feb. 20, 1976) (on file with author) (finding that Black Advisory Committee, and Alianza Latina, both organizations of hospital employees that consulted with Hospital Director about employee problems, were labor organizations for which employer assistance could violate section 8(b)(2); also noting that the two groups have not worked in cooperation with unions seeking certification, but have campaigned against them). This result can be explained by the remedial purpose of finding labor organization status—as the employee groups had opposed unionization efforts and shared some similarities with traditional company unions.

383. The Board majority in Electromation did deal with "representation" in another sense, stating that one of the "definition elements" of section 2(5) is that "if an 'employee representation committee or plan' is involved, evidence that the committee is in some way representing the employees." Electromation, Inc., 309 N.L.R.B. 990, 996 (1992), discussed supra Part V.A.2.b. Since it found that the Action Committees in question did act in a representative capacity, the Board expressly declined to decide "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." 309 N.L.R.B. at 994, n.20. However, one Board Member would have so required. Id. at 1002 (Devaney, Member, concurring); see also E.I. Du Pont De Nemours & Co., 311 N.L.R.B. 893, 903 n.11 (1993) (Devaney, Member, concurring) ("I would require that an employee committee act in a representative capacity in order to be found a statutory labor organization."). Unlike CULA, however, the representation issue considered in Electromation is limited to the context of "employee representation committee[s] or plan[s]" rather than labor organizations generally. See 309 N.L.R.B. at 1007 n.13 (Raudabaugh, Member, concurring) (rejecting argument "that the factor of representation is an additional defining characteristic and must be present before a finding of labor organization status can be made under Sec. 2(5)," because the term only modifies "employee committee or plan"). One text has suggested that while it is not clear whether "acting in a representative capacity" is a necessary condition for finding a labor organization, it clearly is a sufficient one. GORMAN & FINKIN, supra note 108, § 9.2, at 262 (citing NLRB v. Webcor Packaging, Inc., 118 F.3d 1115, 1120 (6th Cir. 1997)).
issue a complaint charging a worker-advocacy organization with illegal secondary activity.\textsuperscript{384} The Asian Immigrant Women Advocates (AIWA) had sporadically picketed a San Francisco Jessica McClintock clothing company store as part of a national campaign to pressure the clothing label to take responsibility for the labor conditions of its contractors.\textsuperscript{385} The campaign began when twelve seamstresses, who were employed by Lucky Sewing Company to do piecework for Jessica McClintock dresses, complained to AIWA that the company left months of wages—which in any case were below the minimum wage—unpaid after its bankruptcy.\textsuperscript{386} Citing \textit{CULA}, the Regional Director determined that AIWA was not a labor organization because it did not exist, either in whole or in part, “for the purpose of dealing with employers concerning employee labor relations matters.”\textsuperscript{387} Rather than such traditional concerns, the Regional Director explained that AIWA “seeks to improve the living and working conditions generally of all low-income Asian immigrant women.”\textsuperscript{388} The Director noted that AIWA had no collective bargaining relationships, had never filed for a representation election, and was not officially a membership organization.\textsuperscript{389} The letter also observed that AIWA’s primary purpose was providing social services to Asian immigrant women at no cost, and that the nonprofit organization was funded through charitable donations.\textsuperscript{390} Therefore, even though AIWA had engaged in a two-year campaign against McClintock, in which it sent formal demands, attempted to meet, and targeted the company in national media and in demonstrations across the country, the Director could not get over the basic mismatch between the goals and structure of AIWA and those of traditional labor unions regulated by the NLRA.

Notably, the ROC-NY Advice Memo—the only recent consideration of a worker center’s status under the Act—did not cite \textit{CULA}.\textsuperscript{391} This may indicate that the General Counsel doesn’t believe the Board still views


\textsuperscript{385}. \textit{See} Crain & Matheny, supra note 352, at 1791. For an extensive discussion of the AIWA campaign against Jessica McClintock, and the ultimate settlement reached, see Randy Shaw, Reclaiming America: Nike, Clean Air, and the New National Activism, 97-109 (1999).

\textsuperscript{386}. Crain & Matheny, supra note 352, at 1791.


\textsuperscript{388}. \textit{Id.} at 1.

\textsuperscript{389}. \textit{Id.}

\textsuperscript{389}. \textit{Id.}

\textsuperscript{391}. \textit{See} Kearney, supra note 3. \textit{See supra} discussion Part V.A.3. The lack of reference to \textit{CULA} cannot be said to have been inadvertent, as the case had been raised to the NLRB Region handling the unfair labor practice charge. Letter from Daniel E. Clifton, Partner, Lewis, Clifton & Nicolaides, to Celeste Mattina, Reg’l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. of N.Y., 2-CB-20643 and Cases 2-CP-1067 (Mar. 27, 2006) (on file with author).
CULA as good law, or distinguishes it from the situation of ROC-NY, which had directly organized the workers’ campaign rather than taking a supporting role like CULA. The ROC-NY Advice Memo instead followed the “traditional” analysis and concluded that settlement negotiations arising out of a single issue or lawsuit did not evince a “pattern or practice” of dealing. Although not specifically invoked, however, the spirit of CULA lived on.

But it is CULA’s constitutional residue that may prove its greater legacy. After an unsuccessful appeal in the ROC-NY case, the employer sought a motion for reconsideration of the decision. Although the General Counsel denied the motion, it backed away from its earlier conclusion that ROC-NY was not a labor organization, concluding instead that no charge was warranted because there was no evidence that ROC-NY had a recognition objective. But the General Counsel did bring up another point: that prosecuting a charge could interfere with ROC-NY’s First Amendment right to petition, citing a recent D.C. Circuit case emphasizing that the “‘canon of constitutional avoidance’ requires that the NLRA’s prohibitions be construed, if possible, to avoid creating First Amendment problems.”

2. The Constitutional Backdrop

According to the canon of constitutional avoidance, courts should avoid interpreting a statute in a way that creates serious constitutional questions. In applying the constitutional avoidance canon to matters regulated by the NLRA, courts generally seek to determine whether a statutory proscription that appears to prohibit a constitutionally-protected activity can permissibly be interpreted not to encompass the activity in question. In Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, the Supreme Court applied this doctrine to the NLRA’s restrictions on secondary activity under section 8(b)(4)(ii). At issue in DeBartolo was whether peaceful consumer handbilling was prohibited by section 8(b)(4)(ii)’s restriction on labor organization activity that “threaten[s], coerce[s], or restrain[s] any person engaged in commerce or in an industry affecting commerce” if the labor organization engaging in such activity does so with a prohibited objective. Although the Court ac-

392. See Meisburg, ROC-NY Reconsideration Letter, supra note 4.
393. Id. at 2 (quoting Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB, 491 F.3d 429 (D.C. Cir. 2007)).
395. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (“W]here an otherwise acceptable construction of [the Act] would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); see also Sheet Metal Workers’, 491 F.3d at 437 (“[T]he canon of constitutional avoidance is not suspended merely because a secondary boycott is at issue.”).
knowledged that an interpretation of 8(b)(4)(ii) restricting such activity would be reasonable, it found no clear intent to reach peaceful consumer handbilling.\textsuperscript{397} In this fashion, the Court avoided what it considered the "serious constitutional questions" that would arise if such activity, which it suggested merited First Amendment protection, were prohibited.\textsuperscript{398}

As \textit{DeBartolo} demonstrates, the canon is a means of narrowly interpreting prohibitory NLRA provisions that may threaten constitutionally-protected activity. However, there is no reason why the Board may not employ an extra measure of constitutional caution by construing whether an organization is a "labor organization"—a threshold question for many of the Act's proscriptions—in the negative, so as to remove the organization from the reach of the prohibitory NLRA provision. Constitutional values are external policy concerns that the Board may heed when interpreting the Act.\textsuperscript{399} Indeed, even if adjudicators do not explicitly invoke the avoidance canon, narrowly interpreting the term "labor organization" to not apply to constitutionally-protected worker center activity would be a tacit means of alleviating the same constitutional concerns.\textsuperscript{400}

There are two constitutional norms derived from the First Amendment that suggest areas where adjudicators should be cautious in applying NLRA restrictions to worker center activity: the right to political expression through assembly, and the right to petition.

\textbf{a. Right to Political Expression Through Assembly: Claiborne Hardware}

In \textit{NAACP v. Claiborne Hardware Co.}, the Supreme Court found that the First Amendment protected nonviolent picketing by civil rights protesters in their effort to publicize a boycott of white merchants who opposed racial integration.\textsuperscript{401} The local branch of the NAACP had initiated the boycott after government officials, some of whom were the boycotted merchants, refused demands by the protesting citizens to end discrimination against African-Americans.\textsuperscript{402} To enforce the boycott, black citizens picketed white-owned stores and ostracized (and in a few instances used violence against) other black citizens who did not observe the boycott.\textsuperscript{403} White business-owners sued the protestors and the NAACP on a number of

\textsuperscript{397} \textit{DeBartolo}, 485 U.S. at 578-88.
\textsuperscript{398} \textit{Id.} at 575-76, 588.
\textsuperscript{399} \textit{See supra} Part IV.B (discussing policies external to the NLRA as appropriate for the Board to consider when engaged in statutory interpretation of ambiguous statutes).
\textsuperscript{400} Indeed, Professor Pope suggests that the \textit{CULA} case may have been decided in this manner. \textit{See supra} discussion at notes 378 & 379.
\textsuperscript{401} 458 U.S. 886, 918-19 (1982). The First Amendment prohibits government infringement upon "the right of the people peaceably to assemble and to petition the government for a redress of grievances." \textit{U.S. Const.} amend. I.
\textsuperscript{402} 458 U.S. at 898.
\textsuperscript{403} \textit{Id.} at 902-04.
theories, and the Mississippi Supreme Court upheld a tort judgment against the picketers.\textsuperscript{404}

The Supreme Court overturned the damages award, holding that the First Amendment protected all peaceful aspects of the citizens' protest, even if the protest coerced some citizens to participate.\textsuperscript{405} The Court noted that each element of the boycott was a "form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendment,"\textsuperscript{406} and that "speech does not lose its protected character simply because it may embarrass others or coerce them into action."\textsuperscript{407} In the Court's words, "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."\textsuperscript{408}

The \textit{Claiborne Hardware} case suggests that peaceful worker-center protests cannot be proscribed without offending the Constitution. However, the Court has not extended the First Amendment protections enshrined in \textit{Claiborne Hardware} to the field of labor disputes, where such picketing would constitute an illegal secondary boycott. Commentators have suggested two reasons why the Court afforded special status to the NAACP's protest: because it was political rather than economic in nature; and because it did not fit within the special balancing Congress has developed to regulate labor picketing so as to prevent industrial strife.\textsuperscript{409}

The economic-political divide was subsequently reinforced in \textit{F. T. C. v. Superior Court Trial Lawyers Association}, where the Court rejected the claim of a large group of court-appointed criminal defense attorneys in the District of Columbia that the First Amendment protected their boycott to

\textsuperscript{404} \textit{Id.} at 894.

\textsuperscript{405} \textit{Id.} at 910-11.

\textsuperscript{406} \textit{Id.} at 907.

\textsuperscript{407} \textit{Id.} at 910.

\textsuperscript{408} \textit{Id.} at 914.

\textsuperscript{409} \textit{See} Julius Getman, \textit{The National Labor Relations Act: What Went Wrong; Can We Fix It?}, 45 B.C. L. Rev. 125, 141-42 (2003). The Court stated that it "has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association," and specified that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" 458 U.S. at 912 (quoting NLRB v. Retail Store Employees (Safeco), 447 U.S. 607, 617-618 (1980) (Blackmun, J., concurring in part)). But the Court found no "comparable right to prohibit peaceful political activity such as that found in the boycott in this case." \textit{Id.} at 913. The singling out of labor picketing as an area of limited First Amendment protection has been severely criticized. \textit{See} Dan Ganin, \textit{Note, A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts}, 92 Minn. L. Rev. 1539 (2008) (describing the rise of a "First Amendment double standard" with respect to public-issue picketing and labor picketing, based on four unpersuasive rationales, that the author labels the "inherently coercive" rationale, the "speech-plus" rationale, the "special Congressional balancing" rationale, and the "labor-speech-as-commercial-speech" argument); Pope, \textit{supra} note 352, at 923-24; Getman, \textit{supra} (describing \textit{Claiborne Hardware} rationale as "weak and inconsistent with general First Amendment jurisprudence").
increase their hourly pay. The Court emphasized that unlike the civil rights protestors, who would gain no particular economic advantage from their boycott and sought the nobler goals of equal treatment under the law, the Superior Court Trial lawyers’ “immediate objective was to increase the price that they would be paid for their services.” The Court noted that while the lawyers’ publicity and lobbying efforts were protected by the First Amendment, their refusal to work until they received a pay increase was a per se unlawful horizontal restraint of trade, and therefore not immune from antitrust liability. Rather, the Court recalled that “[s]uch an economic boycott is well within the category that was expressly distinguished in the Claiborne Hardware opinion itself”—the carve-out for unfair trade practices and secondary activity by labor unions that may be restricted pursuant to Congress’s efforts to regulate the economy.

Although labor unions engaged in secondary activity have received limited First Amendment protection, worker centers stand a better chance of claiming the associational rights expressed in Claiborne Hardware. Such First Amendment protection would immunize worker centers from potential antitrust or tort liability and provide a strong argument that NLRA restrictions on “labor organizations” should not apply to worker centers that engage in constitutionally-protected activity.

There are several reasons Claiborne Hardware should apply to worker centers with greater force: worker center activity is more “political” than labor union activity; it is not part of the system Congress sought to regulate with the federal labor laws; and it is more like social-movement speech than labor-protest speech.

First, while worker center actions often are based in some type of economic demands, their actions in many cases have broader political goals. This is clearly the case when protests are based on discrimination claims or such political issues as immigration reform, which are akin to the claims underlying the Claiborne Hardware boycott. Actions by ethnicity-based worker centers are also similar to the NAACP-approved boycott in Claiborne Hardware insofar as their demands for better treatment in the workplace relate to racial stigma in other domains. Even worker centers that do not organize along racial lines often frame their organizing around demands for “equal treatment” with respect to other bases of identity, such as status

410. 493 U.S. 411 (1990); see also Pope, supra note 352, at 921-24.
411. Id. at 427. In describing the different goals of the boycotters in Claiborne Hardware, the Court described the NAACP picketers in lofty terms, stating that “they sought only the equal respect and equal treatment to which they were constitutionally entitled,” and struggled “to change a social order that had consistently treated them as second class citizens.” Id. at 426 (quoting Claiborne Hardware, 458 U.S. at 912).
413. Id. at 427-28 & n.12.
414. Professor Pope has made similar arguments with respect to community groups supporting labor boycotts. See Pope, supra note 352, at 924-27.
as immigrants, as women, as young people, or simply as low-wage workers. Moreover, worker centers that advocate for changes in the law often explicitly link this advocacy to elevating the status of worker center members. For these reasons, worker center activity is generally more "political" in nature than typical labor union concerns.

Second, it is unlikely that Congress considered organizations like worker centers in the careful regulatory balance between labor unions and management that the Court approved in \textit{Claiborne Hardware}.\footnote{See \textit{supra} note 409.} Worker center campaigns against employers target practices that often violate statutory employment laws rather than federal labor law. To the extent that worker centers seek to ensure employer compliance with these laws, protests to vindicate employment rights would in many cases be consonant with the will of Congress,\footnote{This is particularly so when a worker center alleges violations of federal employment laws. To the extent that state law protections are not preempted by federal law, they form a minimum standard not subject to the free play of economic forces that characterize federal labor policy. See \textit{Fort Halifax Packing Co. v. Coyne}, 482 U.S. 1, 20 (1987) (holding that state law requiring a one-time severance payment in the event of a plant closing was not preempted by the NLRA, because the NLRA is "concerned with ensuring an equitable bargaining process, not with the substantive terms . . . from such bargaining").} and in any event do not form part of the balance Congress struck in the NLRA to minimize "industrial strife."\footnote{See \textit{Claiborne Hardware}, 458 U.S. at 912; \textit{supra} note 409.}

Third, to the extent that regulation of communicative conduct by labor unions engaging in secondary activity is justified based on the "speech plus" or "signal" theory—that picketing may be regulated because it "calls for an automatic response to a signal, rather than a reasoned response to an idea"\footnote{NLRB v. \textit{Retail Store Employees Union (Safeco)}, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).}—there is less reason to believe that worker center protests profit from the same automatic garnering of support attributed to labor union activity.\footnote{See \textit{Overstreet v. United Bhd. of Carpenters}, 409 F.3d 1199, 1215 (9th Cir. 2005) (holding that speech directed at the public, rather than other union members, is not an inducement or encouragement prohibited by NLRA section 8(b)(4)(ii)(B)). \textit{Cf.} Pope, \textit{supra} note 352, at 932-33 (arguing that traditional union boycott appeals based on class or union sympathy no longer automatically generate support, and do not apply in the context of labor-community boycotts because social groups must be convinced that union demands are worthy of support). \textit{See also} Lee Goldman, \textit{The First Amendment and Nnopicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act}, 36 \textit{VAND. L. REV.} 1469, 1482–86 (1983) (discussing "speech plus" theory).} Because they operate largely outside the established traditions and symbols of labor protest, and because their activity is in many cases not directed at co-workers, the signal theory should not apply to worker centers, leaving their expressive protest activity more like the political speech protected in \textit{Claiborne Hardware}.

However, restrictions on secondary boycotts also derive their support from other theories, such as protection against coercion described in \textit{Claiborne Hardware}, and therefore worker center activity that rises to the level
of coercion risks losing its claim to First Amendment protection. On balance, whether *Claiborne Hardware* will protect worker center activity will depend on the nature of the protest at issue. But worker centers’ civil rights background, their goals of achieving compliance with statutory law, and the community-oriented nature of their protests increase the likelihood that adjudicators will afford them greater constitutional protections than those traditionally enjoyed by labor unions.

**b. The Right to Petition: BE&K Construction**

The First Amendment protects not only protests that implicate neutral employers, but also the right to file a lawsuit as part of a campaign for social change. To the extent that worker center activity grows out of lawsuits, adjudicators should be wary of subjecting such centers to NLRA regulation by categorizing them as “labor organizations.”

The Supreme Court recognized the right to petition the government for redress as a right to bring lawsuits in *NAACP v. Button*. In *Button*, the NAACP challenged a Virginia law that would have prevented the organization from soliciting plaintiffs for civil rights lawsuits. The Court concluded that the right of association encompassed the bringing of lawsuits as “a form of political expression.” Especially as used by the NAACP, the Court found that litigation is “not a technique of resolving private differences” but a “means for achieving the lawful objectives of equality of treatment by . . . government.”

The litigation right acknowledged in *Button* has been extended to non-political groups and has also been specifically recognized in the context of NLRA regulation. The right to bring litigation does not depend on the type of claim being asserted. Thus, in *Bill Johnson’s Restaurant v.*
NLRB, when the Supreme Court considered whether the NLRB could enjoin an employer’s on-going tort action filed during an organizing campaign, the Court made clear that “the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances,” and that due regard to such First Amendment values must be made when construing the NLRA.\textsuperscript{427}

In \textit{BE&K Construction Co. v. NLRB}, the Supreme Court expanded the protections of the Petition Clause in the NLRA context, holding that the First Amendment afforded some level of protection to unsuccessful employer lawsuits that are not objectively baseless.\textsuperscript{428} The Court thus concluded that the Board’s prior test for determining whether an unsuccessful lawsuit violated section 8(a)(1)—whether the lawsuit was filed with a retaliatory motive—was overbroad and therefore invalid.\textsuperscript{429} Because the prior standard “broadly covers a substantial amount of genuine petitioning,” the Court construed section 8(a)(1) not to require such a reading, and remanded the case to the NLRB for further consideration.\textsuperscript{430} On remand, the Board found that all reasonably-based lawsuits are immune from unfair labor practice liability, regardless of motive.\textsuperscript{431}

Although \textit{BE&K Construction} focused on employer lawsuits, the constitutional dimension of the petition rights identified by the Court clearly applies to worker-center lawsuits as well.\textsuperscript{432} The burdens on the right to petition that the Court identified—the imposition of liability and associated penalties for petitioning activity, and reputational harm that may result—would equally affect worker centers.\textsuperscript{433} Adding to this list, the Board further noted that “the very prospect of liability may deter prospective plaintiffs from filing legitimate claims.”\textsuperscript{434}

Based on these considerations, worker center should not be subject to the Board’s processes when it would burden their constitutionally-protected pursuit of litigation to vindicate statutory rights, nor for activities that sup-

\textsuperscript{427} 461 U.S. 731, 741 (1983).
\textsuperscript{428} 536 U.S. 516 (2002). The Court identified several values that could be served by unsuccessful lawsuits that are reasonably based, namely allowing the public airing of disputed facts, raising matters of public concern, promoting the evolution of the law, and adding legitimacy to the court system as an alternative to force. \textit{Id.} at 531-32.
\textsuperscript{429} \textit{Id.} at 537.
\textsuperscript{430} \textit{Id.} at 533.
\textsuperscript{431} 351 N.L.R.B. 451 (2007).
\textsuperscript{432} Several courts have assumed that labor unions enjoy a right to petition, although they have restricted exercise of that right within the “critical period” before a representation election. \textit{See}, \textit{e.g.}, Freund Baking Co. v. NLRB, 165 F.3d 928 (D.C. Cir. 1999).
\textsuperscript{433} \textit{See BE&K Constr. Co.}, 536 U.S. at 529-30.
\textsuperscript{434} 351 NLRB at 457.
port litigation objectives—as in the ROC-NY protests pressuring restaur-

ants to settle ROC's discrimination and other legal claims.\footnote{Recognizing this, the General Counsel cited \textit{BE&K Construction} as partial justification for its refusal to prosecute a complaint that ROC-NY engaged in recognitional picketing based on a lawsuit and related picketing activity against the Fireman Group. \textit{See} Meisburg, \textit{ROC-NY Reconsideration Letter}, supra note 4.} Litigation-
support activities should include settlement negotiations, and may also ex-
tend to picketing and handbilling undertaken to support settlement or public-

ize a grievance.\footnote{See id.\footnote{Indeed, the fact that many courts encourage settlement suggests that negotiations toward set-
tlement should be considered an exercise of First Amendment petitioning rights. \textit{See, e.g.}, Thompson v. Cleland, 783 F.2d 719, 722 (7th Cir. 1986) (holding that lower court lacked authority to dismiss lawsuit merely because a “settlement proposal requested relief beyond that which the court thought appropriate,” and observing that “it is quite proper for a court to encourage settlement negotiations . . . ”). Moreover, negotiators are encouraged to reach for unconventional options in settlement. \textit{See} Charles B. Craver, \textit{Effective Legal Negotiation and Settlement} (5th ed. 2005).} Even settlement negotiations that go beyond the form of the lawsuit, or achieve outcomes not obtainable as judicial remedies should be considered part and parcel of worker center petitioning rights, and therefore not a basis for NLRA regulation, so long as they bear a reason-
able relationship to the exercise of petition rights.\footnote{See id.} To avoid the po-
tentially serious constitutional questions raised by restricting the litigation-
related activities of worker centers, the Board should not interpret these activities as evidence of a purpose to “deal with” employers.

VI.

\textbf{APPLYING THE FRAMEWORK TO WORKER CENTER ACTIVITY}

\textbf{A. A Unified Approach to “Labor Organization” Status}

Under each tier of the analytical framework I propose, the question of whether an organization is a “labor organization” requires a careful factual analysis of the activity in which a purported labor organization has engaged or intends to pursue, and close attention to the context in which the question is raised. All of the analyses suggest that typical worker centers would not qualify as section 2(5) labor organizations.

The “traditional,” “contextual,” and “constitutional” tiers of analysis can be used together as a unified framework for determining whether an organization qualifies as a “labor organization.” The “traditional” test elaborated in \textit{Electromation} and its progeny—equating “dealing” with a “pat-
tern or practice” and “bilateral mechanism”—creates a threshold for determining whether an organization has the requisite purpose of “dealing with” employers, which the Board has applied across various statutory contexts. When the threshold has been passed or when the issue is unclear, the two purposive analyses may come into play. The policy-context analysis directs adjudicators to engage in a broader inquiry to determine whether treating the organization as a labor organization would serve the purpose of
the statutory proscription at issue. The constitutional-purposive analysis, in turn, puts the focus on the activities engaged in by the purported labor organization, assessing whether they fit within the recognized labor-relations schema and whether they involve potentially protected First Amendment activities. In addition to providing guidance to adjudicators, these different levels of analysis help explain the often unstated rationales in cases that treat alternative organizations like worker centers differently than traditional labor unions.

An important final question is whether a worker center could constitute a “labor organization” for some purposes but not for others. If so, an organization could be immune from labor law regulation when acting as a service organization or legal clinic, but not when attempting to deal with the employer. The NLRB has expressed some disapproval of this possibility. However, section 2(5)’s concern with an organization’s purpose indicates that a change in labor organization status is possible. As we have seen, a worker center may attempt a unionization drive but reorient itself after the drive is unsuccessful. Therefore, while an organization of employees is a labor organization as long as one of its purposes is to deal with employers, that status may change if the organization changes its mission.

B. Are the Worker Centers Profiled Labor Organizations?

Most adjudication of worker center status will not pass the threshold “traditional” analysis, because worker center communications with employers are usually irregular and evince no pattern or practice of bilateral relations. Raising singular protests to the employer and engaging employees in action over workplace issues that do not address the employer would also fall outside the “bilateral mechanism” requirement. As the ROC-NY Advice Memo indicates, even repeated negotiations that are restricted to a single issue or grow out of a single lawsuit will not amount to a “pattern or practice” of dealing.

The policy-context analysis also casts doubt on worker center regulation under the NLRA. To begin with, Congress meant the broad definition

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438. See Air Line Pilots Ass’n (ABX Air), 345 N.L.R.B. 820, 821 n.4 (2005) (“We are not aware of any case which holds that an entity can be a labor organization for some purposes under the Act and not for other purposes under that same Act. The language of the Act is plain. Once an entity is found to be a labor organization, it is subject to all of the prohibitions of Sec. 8(b) of the Act”), enforcement denied on other grounds, 525 F.3d 862 (9th Cir. 2008). At issue in ABX Air was whether the Air Line Pilots union had engaged in secondary activity, for which a threshold question was “labor organization” status. Id. This hinged on whether statutory employees participated in the organization. Although the vast majority—99.973%—of ALPA pilots were not, id. at 824-25 (Liebman, Member, dissenting), the union conceded that it was a “labor organization,” a statement it qualified by adding “at least for some purposes we’re a labor organization.” Id. at 830 n.7 (ALJ decision). The rebuke of this notion by the two-member Board majority came in response to the dissent’s reiteration of the admission’s qualified nature. Id. at 821 n.4.

439. See discussion supra Part V.A.2.a.

440. See supra Part II.C.2.b (discussing KIWA’s efforts after failed unionization campaign).
of "labor organization" to combat a particular evil—the company union—that is not implicated in cases concerning the status of worker centers. Such cases will involve prohibitory provisions of the Act that are similarly ill-suited for regulating worker centers. In particular, restrictions on picketing and secondary activity were intended to apply to ascendant labor unions with the capacity to control industries, a far cry from the often-fledgling nonprofits of the worker center movement. The same considerations bolster the textual argument that the LMRDA should not apply to worker centers.

The constitutional-purposive analysis provides additional reasons that worker center activity should be treated differently than that of labor unions. As CULA demonstrates, organizations that do not fulfill traditional roles within the labor law system—such as bargaining with the employer or seeking to represent employees in their disputes with the employer—are ill-fitting subjects for NLRA regulation. Because of their different goals and history, worker centers are entitled to greater constitutional protection from NLRA strictures than that afforded to labor unions. Although both serve workers and their interests, worker centers often do so in broader capacities, by combining education, leadership development, and direct services with their advocacy. Worker center campaigns also generally have political goals that extend beyond the workplace, such as increasing enforcement of existing legal guarantees, improving treatment of all workers of a certain class, and passing legislation directed at their condition. At the same time, in organizing directed at particular employers, worker centers typically fight for compliance with statutory employment laws, rather than extra-legal terms and conditions. In these ways, worker centers and the workers they represent stand outside the industrial relations system developed by Congress to regulate labor unions vis-à-vis employers. Their petitioning activity, pursued through administrative and judicial forums, and associational activity, in the form of protest, should therefore receive greater constitutional protection, and not serve as the predicate for labor organization status.

With these general principles in mind, I now examine how the combined framework applies to the worker centers profiled earlier in Part II of this Article (summarized in the "Characteristics of Worker Centers Relevant to Their Status Under Labor Law" chart).

I. Immigrant Day-Laborer Organizations: Hiring Halls and Multi-Service Organizations

Many immigrant day laborer organizations, like La Raza Centro Legal, focus on individual job placement and employment claims rather than collective approaches to engaging employers. Even when a group like La Raza engages in collective activity or makes demands of employers, it often

441. See supra Part II.C.1 for background on La Raza's activities.
does so in support of legal claims for wage enforcement that the center may seek to litigate. These activities should therefore not be the basis for labor organization status, both on the traditional ground that such dealings do not establish a "pattern or practice" of dealing, and because to find otherwise would encroach upon La Raza’s First Amendment right to petition on behalf of its members.

However, day-laborer hiring halls—such as the Day Labor Program (DLP) at La Raza Centro Legal—present different concerns. Clearly, DLP "deals" in some sense with employers over statutory subjects when negotiating employment terms and dispatching employees. Statutory employees also participate in the program, even setting working standards through a democratic process. However, it is not clear that the "dealing" in this case is sufficient to establish a "pattern or practice" as required under the traditional analysis.

First, worker center hiring halls must be distinguished from the familiar hiring halls run by labor unions in the construction trades and in dock work. Labor unions that run hiring halls do so pursuant to collective bargaining agreements that set out in detail the employer’s hiring rules. These agreements are the product of extensive negotiation that itself provides a sufficient predicate of "dealing" by such unions. Worker center hiring halls, which are usually not based on pre-negotiated agreements, are a different matter. For example, La Raza’s DLP serves a wide variety of clients on generally small labor projects rather than repeat clients. Even when employers seek DLP services on multiple occasions, a new negotiation—unrelated to the prior employment—takes place each time. Moreover, there is significant doubt whether the dispatching process would be categorized as "bilateral."

Rather than back-and-forth of proposals, the DLP’s dispatch process depends more on basic information-sharing necessary to match the customer with the day laborer, similar in ways to job referral agencies. Most terms are not subject to negotiation by the program, as the center sets a minimum wage level with which the hiring employer must comply. Any further negotiations are between the individual and the employer and do not involve the DLP. In such a system, DLP serves more as an agent for workers to find jobs, albeit with minimum terms, rather than a pre-negotiated system of work assignments. It is therefore unlikely that the DLP hiring hall meets the traditional "dealing with" test.

The question of how the various subunits of worker centers interact also raises potential difficulty for worker centers that operate hiring halls. Because the DLP is restricted to hiring hall functions, it is in some ways insulated from the collective activities taken by other parts of La Raza. But if all of these activities are considered part of one entity, i.e., La Raza Cen-

442. The NLRB has not addressed the particular question of whether communications for the purpose of matching employees with jobs constitutes "dealing with."
tro Legal, then the combined entity might be considered a labor organization by virtue of potential dealing that takes place in the hiring hall. The center would thus be responsible for the activity of all its branches. On the other hand, because the legal clinic and other units that protest employers do not engage in dealing with employers independently of the hiring hall, they may merit treatment as separate organizations. However, based on the analogy to labor unions that also house multiple functions within a single entity, the Board is unlikely to adopt this approach. Therefore, worker centers should recognize the potential problem of having some programs that "deal with" employers, albeit in the limited manner of a hiring halls, alongside other branches that exert direct pressure on employers—and would be wise to partition these elements off into separate organizations to the extent possible.

2. KIWA: Industry-Wide Codes of Conduct Based on Community Standards

Similar issues confront KIWA, which has spawned several organizations that are tied to it but nominally independent, such as the RWAK and the IWU. Clearly, the IWU was a labor organization—it had a clear purpose to represent employees in dealings with the employer as the employees' certified exclusive representative. However, might KIWA be considered a labor organization because of IWU's efforts, in which KIWA members were actively involved? Despite some suggestive precedent, the Board has not confronted such a scenario.

If so, does the fact that the effort failed—with IWU closing up shop—mean that KIWA no longer has the purpose of dealing with employers in this matter, removing the "labor

443. See supra Part II.C.2.b. (discussing KIWA's Restaurant Workers Association of Koreatown and the Independent Workers' Union).

444. More clear is that KIWA could incur liability as an agent of IWU. NLRA section 8(b) is addressed to the unfair labor practices of "a labor organization or its agents, and has been interpreted to allow imposition of independent liability on those acting as agents. See, e.g., Nat'l Marine Eng'rs Beneficial Ass'n, AFL-CIO v. NLRB, 274 F.2d 167, 171 (2d Cir. 1960) ("We think the Board is right in construing § 8(b) as empowering it to fasten independent liability on an agent of a labor organization, whether this be an individual, a labor union or any other entity, just as it could in the case of an employer."). Common law principles of agency are applied in the NLRA setting. Int'l Bd. of Elec. Workers, 342 N.L.R.B. 740, 741-42 (2004). The Board has also applied a "joint venture" theory—from partnership law—to find joint and several liability when unions act according to a common plan, see id., although the courts have been less receptive to this theory, see NLRB v. Sheet Metal Workers' Int'l Ass'n, Local Union No.19, 154 F.3d 137 (3d Cir. 1998), denying enforcement of 316 NLRB 426 (1995).

See also Pope, supra note 352, at 949-56 (discussing agency principles in the context of community group support for labor unions).

The separate question of whether KIWA could be a labor organization by virtue of IWU's activities is less clear, because in such a case KIWA itself would not be the organization dealing with employers or with such a purpose. An affirmative answer might depend on an analogue to the "alter ego" doctrine, in which the Board may find one entity has violated the act based on the activities of another company with the same management, business purpose, operation, supervision, and ownership. See Crawford Door Sales Co., 226 N.L.R.B. 1144 (1976).
organization” taint? As discussed, the most logical interpretation is that “labor organization” status depends on current purpose and thus can change over time.445

KIWA’s “fair share” campaign also raises the specter of “labor organization” status. Under a traditional analysis, KIWA arguably “deals with employers” by asking them to raise wages and sign on to the campaign. The issue is not clear, however, and code of conduct campaigns like this raise distinct issues in the “labor organization” analysis.

First, it may be questioned whether employees “participate” in this campaign. Although grocery workers clearly participate in some of KIWA’s programs, such as the legal clinic and other areas, the “fair share” campaign may be run by the organization’s staff without involvement from KIWA’s employee participants. This is the “top-down” form that other “code of conduct” campaigns in the consumer advocacy area generally take, in which organizations, often nonprofits, make demands that corporations abide by certain standards and employ varying degrees of monitoring to verify compliance.446 Such campaigns, which were originally aimed at employers’ overseas operations, are beginning to emerge as domestic strategies.447 To the extent that KIWA acts as a community representative rather than an employee representative in making these demands, it is incongruous to attribute the campaign to an employee-membership organization. However, because of the minimal requirements for employee participation that have been approved by the Board,448 it is likely that the Board would conclude that employees “participate” in KIWA and its fair share campaign.

A stronger argument may be that the “fair share” campaign does not involve “dealing,” because it does not depend on a “bilateral mechanism” in order to achieve employer sponsorship. The campaign sets a universal standard, which is not negotiable by individual employers, and merely asks employers to sign on. This unilateral strategy requires only “isolated instances” of “ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed,” precisely the type of

445. See supra note 438 and surrounding text.

446. “Codes of Conduct” are increasingly used by workers’ rights organizations to ensure compliance with minimum labor standards or in some case “fair” standards that are above legal requirements. Whether efforts to enlist employers as “signatories” to such codes constitute “dealing with employers” has not been considered by the Board. See Cynthia Estlund, Something Old, Something New: Governing the Workplace by Contract Again, 28 COMP. LAB. L. & POL’Y J. 351, 373 (2007) (discussing codes of conduct as a form of “policymaking by contract” with the potential to thrive where collective bargaining regimes have failed).

447. See id. at 361-63 (discussing: the Green Grocer Code of Conduct in New York, which was initiated by a union and worker center but overseen by the New York Attorney General; the Maintenance Cooperation Trust Fund, a nonprofit that targets the employment practices of nonunionized janitorial companies, and was founded with support by the SEIU; and The Coalition of Immokalee Workers, a bona fide worker organization that concluded a “code of conduct” with Taco Bell’s parent company, Yum Brands).

448. See supra text at notes 209–211.
interaction that the Board in *Du Pont* distinguished from "dealing with" employers. While some communications with employers to acquire their assent can be expected, a sustained back-and-forth bilateral mechanism is not necessary. An employer can even join the campaign voluntarily without being addressed directly. Therefore, it is questionable whether KIWA has contemplated, much less demonstrated through its campaign, an organizational purpose to form an ongoing bilateral relationship with the signatories.

KIWA's "fair share" campaign may be an exception in this regard, as many codes of conduct will be the product of negotiating terms between worker-advocacy organizations and their employer targets. Moreover, efforts to enforce codes of conduct substantially raise the prospect that an organization will engage in direct back-and-forth communications with the employer, potentially sufficient to demonstrate "dealing with." Because of this risk, worker centers like KIWA might consider alternative approaches to enforcement, such as having a third-party monitoring group or self-reporting. Another approach worker centers may consider is to take their compliance demands to the community by making compliance information publicly available and protesting working conditions without directly engaging the employer.

Reaching beyond the traditional analysis, KIWA's fair-share approach shares striking similarities with the civil-rights protesters in *Claiborne Hardware*, raising the question of constitutional protection. Like the NAACP-inspired boycott, KIWA's campaign is undertaken on behalf of workers in a specific geographical community, and makes appeals enunciated in terms of racial equality and fair treatment. Unlike the advocacy in *Superior Court Trial Lawyers Association*, KIWA's campaign is not merely self-interested and does not involve per se violations of antitrust laws. In this way, the campaign falls closer to the "political" side of the economic-political divide, and resembles the efforts of the *Claiborne Hardware* protestors "to change a social order that had consistently treated them as second-class citizens."

450. In considering the efficacy of the code of conduct model, Estlund pays particular attention to the problems that organizations with limited resources may have in enforcing them. See Estlund, *supra* note 446, at 366-68. In this regard, Estlund notes trends towards greater worker participation in monitoring mechanisms, which may or may not involve the employees who are participants in the labor organization. Estlund also highlights another force that may aid code of conduct enforcement: the incentives companies have to develop internal compliance mechanisms to avoid litigation and regulation. While the prospect of self-regulation is less likely in the smaller and less formal industries that worker centers tend to target, the example shows there is room for creative thinking in how to bring about compliance without "dealing" with employers.
452. *Claiborne Hardware*, 458 U.S. at 912.
On the other hand, to the extent that KIWA is trying to set a level of working conditions beyond that mandated by law, its actions in the marketplace might be considered economic weapons that Congress meant to regulate through the national scheme of labor laws, even though the campaign grew out of earlier efforts to target substandard employer behavior. KIWA's demands also lack the quasi-constitutional character of the NAACP protestors' call for equal treatment by governmental actors, and do not depend on petitioning activity or employment statutes. These factors weigh against extending to the campaign the constitutional protections enunciated in *Claiborne Hardware* and *BE&K Construction*, in which case only "traditional" labor organization principles would apply.

Overall, the fair share campaign raises several indices of "dealing with" that may confer "labor organization" status upon KIWA, although the issue is far from clear-cut and involves potentially difficult constitutional questions. In light of this risk, organizations like KIWA should consider separating the directorship of "code of conduct" campaigns from their employee-member programs, and should refrain from engaging in regular back-and-forth communications with targeted employers as part of their campaign efforts.

3. **YWU: Targeting Codes of Conduct to Particular Employers**

YWU's aggressive organizing directed at individual employers in some ways looks very much like traditional union activity. In particular, YWU's effort to convince the Cheesecake Factory to sign on to a code of conduct arguably evinces a purpose of "dealing with" the employer in a manner similar to KIWA's fair share campaign. Unlike KIWA, however, because the code was developed by an employee committee of YWU and presented by employees to the employer, YWU cannot defend itself by claiming that employees did not participate in this campaign. What's more, YWU's code campaign was designed specifically for the Cheesecake Factory rather than as a general code. As such, it can be imagined that YWU would have negotiated specific terms with the restaurant if given the chance, indicating that such negotiations were within YWU's purpose. Because YWU's proposed code was never consummated and was eventually abandoned, YWU could plausibly argue that it did not retain its purpose of engaging the employer in this fashion. Although the employer's intransigence may save YWU from "labor organization" status in this case, the risk of employer-tailored codes of conduct is clear.

453. While the First Amendment is not limited to advocacy for constitutional compliance, the lofty nature of the boycott in *Claiborne* may have been a factor entitling it to protection as political speech. *See supra* note 411.

454. YWU's campaign activities are profiled *supra*, Part II.C.3.a.ii.

455. *See supra* note 67 (describing YWU's proposed code of conduct).
The fact that YWU's initial demands and subsequently proposed code grew out of administrative wage claims suggests another avenue of defense. Because YWU had a First Amendment right to bring these claims, associated demands like the demand that payment for rest-time abuse be immediate should arguably be protected from government interference as part of the overall petitioning activity. The ROC-NY Advice Memo also states that settlement negotiations pertaining to a single issue or lawsuit do not evince the type of "pattern or practice" required to show a purpose of dealing.\footnote{See Kearney, supra note 3, at 3; discussion supra Part V.A.3.}

Unanswered by the memo, however, is the extent to which proposals that encompass multiple areas not related to the initial legal claim may still fall within the "single context" or "single issue" safe harbor.\footnote{See supra text at notes 239-245 and note 244.} YWU's Code of Conduct would have covered a variety of issues not directly relevant to the underlying administrative claim, and contemplated several enforcement mechanisms that could create an ongoing relationship. As the number and variety of issues that a worker center seeks to address in settlement-related talks increases, the ROC-NY "safe harbor" may be stretched to a breaking point. Therefore, worker centers are advised to ensure that their informal demand-making bear some relationship to their prior litigation activity, lest such demands be equated with union-like collective bargaining proposals.

Codes of conduct directed at one employer are of a different nature than those that seek to impose an industry-wide or geographically-based standard. As KIWA does, worker centers can escape this problem by constructing codes of conduct that are addressed to multiple targets. By setting a common standard and ensuring that debate about its adoption takes place in the public forum, centers may avoid extensive negotiations with individual employers that might be interpreted as "dealing with" them.

In the end, whether a code of conduct campaign involves "dealing with employers" will depend on a close analysis of the manner in which the campaign is pursued. Although YWU might argue that its proposed code was more of a "one-shot" tactic than a broader campaign extending towards multiple employers and continuing over time, the tactic carries a high degree of risk when it appears to be a stand-in for a traditional collectively-bargained agreement.

4. ROC-NY: Caution in the Face of Legal Uncertainty

Although ROC-NY has gone furthest in the direction of negotiated agreements with employers, the NLRB has already deemed this activity in-
sufficient to designate ROC a "labor organization." This result is supported by each of the analyses discussed above. Under the "traditional" analysis, ROC's single-focus meetings with the employer did not rise to the level of a "pattern or practice" of dealing sufficient to confer "labor organization" status. The result is also supported by the policy-context analysis, according to which the restrictions on picketing were not meant to apply to organizations that do not seek recognition; by the purposive concerns expressed in CULA to avoid regulation of social cause organizations that do not act as employee representatives; and by the canon of constitutional avoidance, which counsels against regulation of litigation activity protected by the First Amendment.

Despite this initial success, ROC-NY has shown signs that it will seek to avoid confrontation with NLRB strictures. For one, by pursuing "code-of-conduct"-like efforts—through its Restaurant Roundtable—that seek to honor good employers rather than punish bad ones, ROC may avoid the types of confrontational tactics most likely to lead to adjudication of its labor organization status. ROC-NY also appears to have built parameters into its employer-directed campaigns to avoid entanglement with the NLRB. For example, when protesting, ROC-NY uses pickets or handbills that contain express disclaimers clarifying that ROC-NY's actions are based in legal claims for violation of employment rights, and that the organization does not seek to represent employees as a collective bargaining agent. This language is clearly used to avoid charges that ROC-NY is engaged in recognitional picketing. ROC-NY is thus already acting like an organization regulated by the NLRA, prudently trying to avoid its restrictions. By not pressing the issue, ROC-NY may avoid the administrative and legal difficulties that may attend should it be ruled a "labor organization."

The real nightmare for an organization like ROC-NY would be a determination by the Secretary of Labor that it is a labor organization subject to LMRDA reporting and organizational requirements. The ensuing administrative cost, and changes to ROC's organizational culture required, would be devastating. Although there are strong textual and purposive arguments that LMRDA regulation would not follow even if an organization passed the NLRA section 2(5) threshold, ROC-NY wisely seeks to avoid entanglement with the NLRB should Department of Labor scrutiny follow. This caution is sound in the face of uncertain legal development in an area that has yet to be settled determinatively.

458. ROC-NY's campaign activities are profiled supra, Prologue and Part II.C.3.b.iii. See also Kearney, supra note 3; supra text at notes 239-245.
459. See supra note 83.
460. See discussion supra Part V.A.4.
461. See Meisburg, ROC-NY Reconsideration Letter, supra note 4.
VII.

CONCLUSION: THE FUTURE OF WORKER CENTERS AND LABOR LAWS

As worker centers continue to expand in markets underserved by traditional unions, and further innovate in their campaign tactics, questions about the applicability of labor law to their conduct will surely arise in new contexts.

Several trends will accelerate this reckoning. First, the continuing growth of worker centers and expansion of their activities will attract attention to their organizing and bring increased public scrutiny.462 Second, the emergence of partnerships between worker centers and traditional unions may lead to situations in which the Board must adjudicate the status of worker center conduct in campaigns on behalf of or in partnership with labor unions.463 In addition, it is likely that, over time, worker centers will increase their resort to the NLRB to vindicate workers' right to act in con-

462. In January 2008, for example, ROC-NY created a national worker center, ROC-United, that will help to launch regional branches across the country, into a network that already covers Chicago, New Orleans, Michigan, and Maine. See ROC-United, What We Do, http://www.rocunited.org/what-we-do (last visited September 3, 2008).


While such collaborations are still in their infancy, worker centers must be sure to avoid acting as mere proxies in labor union disputes. Doing so could make the union responsible for the worker center conduct on a theory of agency, and the risk of raising the "labor organization" status of worker centers
cert, at least as an additional tool in their arsenal of rights. Although the law was designed to protect pre-union organizational activity ("employee" rights) independently of the later-added prohibitions on union unfair labor practices (for "labor organizations"), the Board may see things differently. As it becomes familiar with groups that file charges on behalf of their worker members, the Board may take an interest in regulating their behavior—at least when they engage in activities that the law prohibits of unions. In the same vein, if worker centers flagrantly engage in such activity—like secondary boycotts—the historically objectionable nature of such boycotts would make it more likely that adjudicators would develop a looser view of "labor organization" status in order to apply the restrictions to perceived wrongdoers.\textsuperscript{464}

Even a ruling that worker centers are \textit{not} statutory labor organizations would raise potentially vexing questions: Are worker centers entitled to the accommodations designed to protect labor union activity in other regulatory regimes, such as antitrust\textsuperscript{465} and common-law defamation?\textsuperscript{466} It is unclear how a half-century's worth of case law intended to balance these statutory

to the NLRB or other forums would be greatly increased. Independent liability as an agent is also possible without a finding of "labor organization" status. See supra note 444.

\textsuperscript{464} See \textit{Gorman \& Finkin}, supra note 108, at 315 ("Since its adoption... the interpretation of section 8(b)(4)(A) as amended has been guided in only slight measure by the text and far more significantly by the legislative object of outlawing the common labor secondary boycott.").


A preliminary analysis suggests that because the "statutory" labor exemption is tied to the existence of a "labor dispute"—as defined in federal statutes—it could apply to worker centers even if they were not considered "labor organizations." Under the "statutory" labor exception, antitrust immunity extends to all cases "involving or growing out of any labor dispute," a term defined by the Norris-LaGuardia Act to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act §§ 4, 13(c), 29 U.S.C. §§ 104, 113(c).

Based on the breadth of the definition of "labor disputes," in several cases the statutory labor exemption has protected non-union community groups involved in labor disputes, including a civil rights group protesting racial discrimination in employment, \textit{New Negro Alliance v. Sanitary Grocery Co.}, 303 U.S. 552, 563 (1938) (reversing lower court order enjoining New Negro Alliance's picketing and boycott of grocery stores to demand better employment for African-Americans because the case arose out of a "labor dispute"), and, more modernly, a community group coordinating a consumer boycott in support of a union. \textit{Adolph Coors Co. v. Wallace}, 1984 WL 2944, 115 L.R.R.M. 3100 (N.D. Cal. February 17, 1984) (dismissing claim by Coors' corporation that the Coors Boycott Committee, a coalition of citizens organizing a consumer boycott of Coors' products, violated the Sherman Act, because the controversy grew out of a "labor dispute," since the boycott was prompted by an earlier strike and the organization had concerns related to terms and conditions of employment). These cases suggest that worker center actions, if they grow out of a "labor dispute" and concern some condition of employment, may be protected from antitrust liability under the statutory exemption.
mandates with federal labor policy should apply to the new forms of organizing that worker centers represent. Reaping the benefits of labor law protections without suffering the negative consequences may strike some as an unfair or "strategic" use of the law, and a sense of equity may influence adjudicators to avoid this result. For this reason, cases brought in these areas could prove ample testing ground for the placement of worker centers within the broader scheme of laws regulating labor union activity.

What is clear, however, is that the law as it stands is unfit to regulate worker center activity that does not seek collective bargaining. The relevant statutes were created in a different time and for different types of employer-employee relationships. As a policymaking body, the Board should therefore decline any invitation to regulate worker centers. Until worker centers explicitly seek to take on collective bargaining roles, or until a new law is developed, worker center protest activity should be accorded the same protections that other social movement organizations enjoy.

466. In order to accommodate the NLRA's policy in favor of employee expression, the Supreme Court has ruled that defamation actions in labor disputes could only proceed under a federal standard of care, in which liability can be imposed only if the utterances were made with actual knowledge of their falsity or "reckless disregard" for the truth, rather than mere negligence. See Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) (extending Linn protections beyond speech that occurs in representation election campaigns, based on section 7's broad protections for concerted activity).

Although these cases concerned activity by labor unions, their logic suggests that any employee statements made while engaging in activity protected by section 7 should be entitled to the malice defamation standard. Thus, when worker centers assist employees in exercising their right to act in concert for mutual aid or protection, they may be protected from liability for negligently-made defamatory statements, even though such worker centers would not be regulated by other parts of the Act. See also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191, 195 (8th Cir. 1994) (holding that Linn standard should track the NLRA definition of "labor dispute," 29 U.S.C. § 12(9), and extending protection to picketing or boycott situations where no organizing has been attempted, so long as the protesting employees "act[ ] for some arguably job-related reason and not out of pure social or political concerns"). But see Letter Carriers, 418 U.S. at 279 ("[W]hether Linn's partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of Linn must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.").

467. As Professor Hyde notes, because the law "pins different status to the boundaries of employment—wherever, and however broadly, it draws those boundaries—it invites employers, workers, and their organizations (e.g. Restaurant Opportunities Center) to treat that boundary strategically." Hyde, Labour Law, supra note 86, at 48.