

How Worker Centers Can Build Working Class Solidarity Outside of Traditional American Labor Law

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Those who believe in the power of the labor movement have struggled to process the continued, seemingly unstoppable decline in union membership over the last 50 years. The percentage of the American workforce that is represented by a union fell to a significant low in 2020.¹ The causes of this decline are hotly debated, but globalization, hostile political attacks, a changing national economy, and unions' own complacency are often cited as contributing factors.² Although the outlook for the labor movement is far from rosy, there are buds of hope that have arisen in the last several years. Popular support for unions is at one of its highest points in 50 years, and a record number of workers say they would join a union if given the opportunity.³ Pro-union sentiment among the public has been accompanied by renewed political focus on class-based issues like income inequality and stagnant minimum wages.⁴ Within the labor movement, ideas dismissed as overly radical or militant in past decades are gaining momentum, with a focus on

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1. Eli Rosenberg, *Workers Are Fired Up. But Union Participation Is Still on the Decline, New Statistics Show*, WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/business/2020/01/22/workers-are-fired-up-union-participation-is-still-decline-new-statistics-show/> [<https://perma.cc/5WLM-V8CJ>].

2. Dwyer Gunn, *What Caused the Decline of Unions in America?*, PAC. STANDARD MAG. (Apr. 24, 2018), <https://psmag.com/economics/what-caused-the-decline-of-unions-in-america> [<https://perma.cc/4JPM-MURY>].

3. Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High*, GALLUP (Aug. 28, 2019), <https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx> [<https://perma.cc/NTV3-YHQ4>]; Rosenberg, *supra* note 1.

4. Hadas Thier, *Bernie Sanders Lost, But He Advanced the Class Struggle*, JACOBIN MAG. (July 9, 2020), <https://www.jacobinmag.com/2020/06/bernie-sanders-campaign-2020-presidential-election-biden-trump> [<https://perma.cc/W347-DMPE>].

building power through strikes, an unabashed left-wing ideological commitment, and a community focus that goes beyond purely workplace concerns.⁵

These forces led to a historic year of labor activism in 2021,⁶ culminating in the remarkable victory of the Amazon Labor Union in Staten Island in April 2022.⁷ The newsworthy victories instilled many advocates with hope for a labor resurgence, but unionization rates continued to decline nationwide.⁸ The contrast between the national energy in favor of worker organizing and the unforgiving statistics on unionization led commentators to redouble their calls for legal and political changes.⁹

The public is demanding creative responses to a form of capitalism that has left many workers behind, but the government and the law have been slow to respond. The National Labor Relations Act (NLRA) and the broader framework of labor law is increasingly considered irredeemably stale; the recent Trump-era National Labor Relations Board (NLRB) was historically hostile to union-organizing,¹⁰ and agencies charged with enforcing workplace laws are systematically understaffed or asleep at the wheel.¹¹ This has led to broad under-enforcement of laws protecting workers and daunting obstacles to forming unions, particularly in low-wage sectors.¹² Pro-worker nonprofits have stepped into the breach, engaging with workers in hard-to-unionize sectors, bringing

5. Lee Sustar, *Toward a Renewal of the Labor Movement*, INT'L SOCIALIST REV. (May 2013), <https://isreview.org/issue/89/toward-renewal-labor-movement> [<https://perma.cc/B2AP-BNXS>].

6. Lizzie Widdicombe, *This Year in Labor Strife*, NEW YORKER (Dec. 31, 2021), <https://www.newyorker.com/news/2021-in-review/the-year-in-labor-strife> [<https://perma.cc/7M24-XR3A>].

7. Jodi Kantor & Karen Weise, *How Two Best Friends Beat Amazon*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/02/business/amazon-union-christian-smalls.html> [<https://perma.cc/2UQ7-ZH6S>].

8. Heidi Shierholz, Margaret Poydock, John Schmitt & Celine McNicholas, *Latest data release on unionization is a wake-up call to lawmakers*, ECON. POL'Y INST. (Jan. 20, 2022), <https://www.epi.org/publication/latest-data-release-on-unionization-is-a-wake-up-call-to-lawmakers/> [<https://perma.cc/KRH7-UC96>].

9. *Id.*; Binyamin Appelbaum, *The People United, Must Fight Hard or Be Defeated*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/opinion/amazon-workers-union.html> [<https://perma.cc/5LQR-C3SP>].

10. Paul Prescod, *Trump's Anti-Worker Labor Board*, LABORNOTES (Oct. 8, 2020), <https://labornotes.org/2020/10/trumps-anti-worker-nlrb> [<https://perma.cc/Y3DA-E8YN>].

11. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 6, 39 (2016).

12. *Id.* at 38–40.

attention to labor law noncompliance,¹³ advocating for political change,¹⁴ and providing a host of other services to working class communities.¹⁵

Worker centers that organize and support low-income workers outside of their specific workplaces represent a theory of organizing that builds working class power outside of the traditional union structure.¹⁶ These worker centers have at times worked closely with government officials to “co-enforce” workplace laws, and at other times have served as feeders for union organizing.¹⁷ They have developed a considerable amount of controversy over their position within the labor movement and how they should be legally classified within the modern labor law framework.¹⁸ This Note will place the worker center model within the larger story of the American labor movement, examine the current debates about how worker centers fit into that story, and offer some ideas on what the growth of worker centers could mean for the future of working class movements in the United States. Ultimately, this Note claims that worker centers’ legal position outside of the NLRA orients them towards the creative and disruptive organizing that builds effective working class solidarity.

13. Aditi Mayer, *Inside the Fight to End Labor Exploitation in L.A. Garment Factories*, FASHIONISTA (Oct. 13, 2020), <https://fashionista.com/2020/10/la-garment-workers-ethical-fashion-manufacturing-sweatshops> [<https://perma.cc/VE2B-VFDN>].

14. Sally Goldenberg, *As Two-Thirds of City Council Prepares to Leave Office, Activist Groups Ready to Shape Races*, POLITICO (Sept. 20, 2020), <https://www.politico.com/states/new-york/albany/story/2020/09/20/as-two-thirds-of-city-council-prepares-to-leave-office-activist-groups-ready-to-shape-races-1317591> [<https://perma.cc/65U9-U8S9>].

15. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y. L. SCH. L. REV. 417, 418, 420 (2005).

16. *Id.* at 417, 420.

17. Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811, 831 (2019). *See, e.g.*, Steven Greenhouse, *Twin Cities janitors declare victory in union fight after 44-month campaign*, GUARDIAN (Oct. 13, 2016) <https://www.theguardian.com/money/2016/oct/13/twin-cities-janitors-union-fight-minneapolis-equal-pay> [<https://perma.cc/MBD4-YM3F>] (describing how a workers’ center in Minneapolis known as CTUL spearheaded “probably the most successful effort to unionize retail store janitors in the US.”).

18. *See, e.g.*, Dayne Lee, *Bundling “Alt-Labor”: How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.L. L. REV. 509 (2016) (examining policy reforms to promote engagement with worker centers).

I. Background

A. *How an Ideological Conflict Between Collectivism and Individual Rights Animates American Labor Law and History*

To properly understand worker centers, it is essential to understand how they fit into the broader history of the labor movement and the framework of modern American labor law. The story of American labor law is one of contrasts and conflict, with a precipitous rise of labor power in the post-war years followed by a steady retrenchment of capitalist power in the modern era. The heart of the conflict in American labor law and labor history is between individualistic, classically liberal rights, and collectivist conceptions of power and freedom.

The early American labor movement was forced to be improvisational and confrontational by judicial, governmental, and capitalist hostility. Prior to the New Deal, many *Lochner*-ian¹⁹ courts held that labor unions were illegal conspiracies to restrain trade.²⁰ Collective labor actions were met with violence orchestrated by corporations and the government.²¹ In the struggle against aggressive repression, the structures of pre-New Deal labor organizations were diverse and flexible.²² Early labor unions were

19. *Lochner v. New York*, 19 U.S. 45, 53 (1905) (standing for the principles of freedom of contract: the idea that the law should not restrict contracts between two parties).

20. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1908) (holding that union activity was a violation of the Sherman Antitrust Act and that individual union members could be held liable for the damages caused by their union); *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 F. 994, 1000 (E.D. La. 1893) ("The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country.").

21. *See, e.g.,* ROBERT SHOGAN, *THE BATTLE OF BLAIR MOUNTAIN: THE STORY OF AMERICA'S LARGEST LABOR UPRISING* (Basic Books 2004); Univ. of Denver, *A History of the Colorado Coal Field War*, COLO. COAL FIELD WAR PROJECT (2000), <https://www.du.edu/ludlow/index.html> [<https://perma.cc/8FJR-4UC4>]; *see also* WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 98–118* (Harv. Univ. Press 1991) (examining the connection between judicial hostility and state-sponsored violence).

22. *See, e.g.,* FORBATH, *supra* note 21, at 98–118; Ron Grossman, *Chicago Sweep, Palmer Raids Were the Apex of the Red Scare*, CHI. TRIB. (Jan. 3, 2015), <https://www.chicagotribune.com/history/ct-red-scare-flashback-0104-20150103-story.html> [<https://perma.cc/A2TB-KXGN>] (describing how state and federal governments attacked union halls and radical bookstores in 1920); IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–1941*, at 309–10 (Houghton Mifflin 1970) (describing how textile mill owners responded to

forced to be militant, radical, and creative in their efforts to challenge management and ownership.²³ Labor agitators used strikes, sabotage, sit-downs, public demonstrations, and combative political appeals in an effort to improve working conditions.²⁴ Labor actions were as varied in their aims as they were in their tactics; they could be focused on bringing specific employers to the bargaining table, improving conditions in a broad sector or community, enacting minimum standards through legislation, or protesting specific acts of workplace injustice.²⁵ Early labor organizations were also often centered around ethnic identities and communities, especially those of recent immigrants.²⁶ Significantly, it is impossible to know whether these unions had majority support among their workplaces, though they seemed to have broad support among workers and working class communities.²⁷

The Great Depression crashed into this heady milieu of labor relations, leading to a profound re-invention of American labor law, codified in the NLRA. During those dire economic times, increasingly desperate workers started to take increasingly confrontational collective actions.²⁸ These actions culminated in a series of massive strikes from 1933–1935 which included the complete shutdown of two thousand miles of Pacific coastline by the San Francisco longshoreman,²⁹ a violent takeover of Minneapolis by teamsters,³⁰ and a 376,000-person textile worker strike throughout

striking workers “by importing armed guards and spies for their mills and by bringing pressure upon public authorities to evict strikers’ families, to cut off relief, to terrorize union leaders and sympathizers, and, above all, to have the governors in the textile states call out the National Guard”).

23. FRED THOMPSON, *THE INDUSTRIAL WORKERS OF THE WORLD: ITS FIRST FIFTY YEARS* 5–10 (I.W.W. Press 1955) (describing the founding of one of the most influential pre-NLRA labor organizations).

24. *See generally* IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933* (Houghton Mifflin 1960) (detailing the early history of the American labor movement).

25. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 220–21, 224–26 (HarperCollins Publishers 1990) (describing working class strikes, riots, formations of political parties and protests during the mid-19th Century).

26. *Id.* at 220–21, 226.

27. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 21–23 (Cornell Univ. Press 2005) (describing the prevalence of minority unions prior to the passage of the NLRA).

28. *See* BERNSTEIN, *supra* note 22, at 217 (“In 1934 labor erupted. There were 1856 work stoppages involving 1,470,000 workers, by far the highest count in both categories in many years.”).

29. *Id.* at 252–98.

30. *Id.* at 229–52; *see also* CHARLES RUMFORD WALKER, *AMERICAN CITY: A RANK AND FILE HISTORY OF MINNEAPOLIS* (Univ. of Minn. Press 2005) (describing the Teamster takeover of Minneapolis by a rank-and-file Teamster turned journalist, originally published in 1937).

the South.³¹ All of these strikes involved illegal worker actions,³² were discouraged by moderate union leadership,³³ and generated harsh reactions by corporate and state power.³⁴ In response to nationwide labor strife, the Wagner Act of 1935 was passed in an effort to promote “sound and stable industrial peace.”³⁵

The NLRA, also called the Wagner Act, is considered by some to be “the most radical piece of legislation ever enacted by the United States Congress.”³⁶ The Act protected a worker’s right to strike, picket, form unions, and collectively bargain for improved working conditions by banning employers from retaliating against workers engaged in “concerted activities for mutual aid and protection.”³⁷ The Act also institutionalized workplace unions through a process that gives unions who win workplace elections the right to be the *exclusive* bargaining agents of *all* bargaining unit workers.³⁸ The NLRA requires employers to bargain in good faith with these majority unions.³⁹ While imperfect,⁴⁰ the passage of the NLRA represented a landmark victory for collective activity.

The ideological pressures that led to the NLRA’s passage provide important context for comprehending the development of American labor law. Historians have argued that fear of radical labor advocates forced the government to make concessions to labor’s more moderate wing in an effort to undercut the movement’s revolutionary elements and channel the radical grassroots energy

31. BERNSTEIN, *supra* note 22, at 298–317.

32. *See, e.g., id.* at 263–65 (describing battles between police and striking longshoreman in San Francisco).

33. *See, e.g., id.* at 263 (“[T]he [union] membership suspended Holman as president of [the local] for being ‘too conservative.’”).

34. *Id.* at 263–65.

35. National Labor Relations Act, 29 U.S.C. § 171 (2018).

36. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978). The fact that the NLRA is considered so radical may be more of a commentary on American politics than on the radical nature of the Act.

37. National Labor Relations Act, 29 U.S.C. § 151 (2018); Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 (2018).

38. National Labor Relations Act, 29 U.S.C. § 159 (2018).

39. *Id.* § 158.

40. Most notably, the Act is often criticized for having excluded domestic and agricultural workers from its scope, likely due to the racial make-up of the workers in those sectors and the influence of southern Democrats in the New Deal coalition. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011) (noting that the NLRA still does not protect domestic and agricultural workers).

into activity that was less threatening to the capitalist order.⁴¹ Historical radicals and modern commentators⁴² argue that the Act's promotion of workplace-specific unions fractures broader class-focused solidarity. On the other end of the political spectrum, pro-business voices argued that unions were unconstitutionally coercive actors who were granted too much power by the NLRA.⁴³ Conservative critics of unions have consistently argued that individual workers should have a right to *not* join unions in their workplaces.⁴⁴

While the post-Great Depression strike wave led to the codification of collective action, post-World War II strike waves led to political backlash that gave conservative critics of the NLRA a chance to make reforms based on a more classically liberal, individualistic conception of rights. In response to concerns about union coercion and corruption, several reforms were passed to promote transparency and union democracy.⁴⁵ These reforms limited unions' ability to engage in more class-focused labor actions, such as secondary strikes,⁴⁶ solidarity strikes,⁴⁷ and wildcat

41. Most of the socialist, communist and anarchist factions of the labor movement actually opposed the firm-based framework of the Wagner Act (some even opposed any signing of collective contracts at all as too restrictive on labor activity). See Perea, *supra* note 40, at 122 (citing that passage of the bill was more important than protecting agricultural and domestic workers); BERNSTEIN, *supra* note 22, at 338–39 (describing the Communist Party's opposition to the Wagner Act).

42. Andrias, *supra* note 11, at 46 (“[N]ew movements, more so than their predecessors, are refusing labor law’s orientation around the employer-employee relationship.”).

43. Andrew Glass, *FDR signs National Labor Relations Act, July 5, 1935*, POLITICO (July 5, 2018), <https://www.politico.com/story/2018/07/05/fdr-signs-national-labor-relations-act-july-5-1935-693625> [<https://perma.cc/JWK5-JPEZ>] (describing how conservative groups “viewed the act as a threat to American freedom and engaged in a campaign to repeal what it termed ‘these socialist efforts’”).

44. See, e.g., Steven Greenhouse, Scott Walker Woos CPAC by Boasting About Crusade Against Wisconsin Unions, GUARDIAN (Feb. 27, 2015), <https://www.theguardian.com/world/2015/feb/27/scott-walker-wisconsin-unions-cpac-right-to-work> [<https://perma.cc/U554-22KZ>] (“Walker and other Wisconsin Republicans say they have lofty reasons to enact right-to-work – to make their state more attractive to business and to promote employee freedom (by banning any requirement that workers pay union fees against their will).”).

45. See Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §§ 141–197; Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401–537. See generally Richard M. Lyon, *The Labor-Management Reporting and Disclosure Act, 1959*, 9 DEPAUL L. REV. 159 (1960) (explaining the key provisions of the LMRDA).

46. Strikes that are targeted against other companies associated with the primary target, like companies that contracted them, their banks, or their business clients. *Ways to Strike*, LABORNOTES (Oct. 17, 2019), <https://www.labornotes.org/2019/10/ways-strike> [<https://perma.cc/K5AL-ZMVP>].

47. Strikes in support of other unions' labor disputes. *Id.*

strikes.⁴⁸ They also required union leaders to file affidavits declaring that they did not support the Communist Party.⁴⁹ These reforms emphasized workers' rights to choose their union leadership and kick unions out of their workplaces.⁵⁰ They also imposed stricter financial reporting duties on unions.⁵¹ While in principle these reforms seemed to promote more democratic, transparent labor relations, they ultimately may have had a corrosive effect on worker solidarity.⁵² Ideologically, these reforms focused on protecting individual workers' rights within their union against the right of the union writ large (this ideology has been taken to an ultimate conclusion in the legislative and judicial push for "right to work").⁵³ These reforms demonstrated how labor activism can generate reactionary backlash, and how individualized, classically liberal rights can undermine labor solidarity.

The balance between classically liberal, individualistic rights and collective power has been referred to as the constitutionally anomalous quid pro quo of American labor law.⁵⁴ On one hand, unions are given unique power over individuals' working lives. The right of exclusive representation means that individual workers within a union bargaining unit cannot bargain individual contracts with their employers.⁵⁵ The duty on employers to bargain in good faith is a serious limitation of ownerships' power over the workplaces that they own.⁵⁶ Finally, unions are also allowed to collect fees from nonmembers' paychecks to cover the cost of bargaining for them in many jurisdictions.⁵⁷ In exchange, unions

48. Strikes conducted without the endorsement of union leadership. *Id.*

49. 29 U.S.C. § 159. This provision was subsequently repealed.

50. Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §§ 141–197; Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401–537.

51. *Id.*

52. Jedidiah J. Kroncke, *The False Hope of Union Democracy*, 39 U. PA. J. INT'L L. 615, 616 (2018) (“[T]he emphasis on internal union democracy has left unions susceptible to judicial and political assaults across the globe which exemplify the limits of negative liberal rights to address social power asymmetries, especially in common law countries.”).

53. See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 180 (2015) (“[T]he ‘right-to-work’ advocates sought to salvage an individual constitutional right to work from the general disrepute into which the old ‘liberty of contract’ doctrine had recently fallen. But they also relied on newly emerging constitutional case law protecting minority and individual rights . . .”).

54. *Id.* at 169–70, 175.

55. *Id.* at 197–98.

56. *Id.*

57. *Id.* at 174, 176.

are burdened with constitutionally unusual restrictions. For one, unions' and union members' First Amendment rights are limited by the prohibitions against secondary and solidarity picketing.⁵⁸ Unions are also held to higher standards of democratic governance and financial transparency than most other nongovernmental organizations.⁵⁹ Unions are required to represent all members fairly, and are limited in their ability to discipline their own members.⁶⁰ The quid pro quo of American labor law means that unions are somewhere between governmental actors and private organizations in terms of their regulatory powers and responsibilities.

In the post-war years, the American labor law framework built a strong, heavily unionized middle class.⁶¹ This success seemed to undermine the Act's more radical detractors, who claimed it would undermine worker power.⁶² The passage of the NLRA at first led to a huge growth in union membership and labor power.⁶³ The NLRA set up a system where disputes would be settled without the need for as much disruptive collective action. While the impressions of the more radical labor actions lived in society's collective memory, workers had broad political support, and the NLRA system was beneficial to the working class.⁶⁴ In that legal and social context, workers had the leverage necessary to compel significant concessions from capital.⁶⁵

However, the NLRA framework's effectiveness for working people has been greatly undermined in subsequent decades by political, legal, and economic changes. Legal and political attacks led to a steady chipping away of union membership and labor power, giving more credence to the argument that the NLRA is

58. *Id.* at 201.

59. *Id.* at 202–03.

60. *Id.* at 203.

61. DAVID MADLAND, KARLA WALTER & NICK BUNKER, *UNIONS MAKE THE MIDDLE CLASS 2* (Center for American Progress ed. 2011).

62. *See* Perea, *supra* Note 40.

63. Union membership peaked in 1954 with 34.8% of the workforce belonging to a union. *Union Members Summary*, U.S. BUREAU LAB. STAT. (Jan. 22, 2021), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/7ANW-6XE6>].

64. *See, e.g.*, Henry S. Faber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, Abstract, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2020), <https://www.nber.org/papers/w24587> [<https://perma.cc/3WPM-EQQK>] (“[W]e find consistent evidence that unions reduce inequality, explaining a significant share of the dramatic fall in inequality between the mid-1930s and late 1940s.”).

65. *Id.*

ineffectual in building sustainable working class power.⁶⁶ The increasingly global economy and the increasing ease of capital mobility has led to many large employers simply taking their ball and leaving when challenged with worker organizing.⁶⁷ The growth of low-wage work in difficult-to-organize sectors has compounded that problem.⁶⁸ And the lack of labor militancy has done little to rebuild the working class's ability to sustain disruptive collective action.⁶⁹ All of these developments have left many workers' advocates feeling like workers are getting the raw end of the NLRA's constitutionally anomalous quid pro quo.

B. What is a worker center? Understanding How Non-NLRA Labor Organizations Have Won Victories for Workers

Given the collapse of union power under the NLRA system, workers and their advocates have sought new models to rebuild labor's capacity for disruptive collective action. Worker centers may provide a format that is well-suited to do just that.⁷⁰ Worker centers are a relatively new concept that can be difficult to define due to

66. Currently, only 11% of the workforce is unionized and as a result, middle- and low-income wage growth has been persistently slow since 1980. *Union Members Summary*, *supra* note 63.

67. See, e.g., Charles R. Perry, *Outsourcing and Union Power*, 18 J. LAB. RSCH. 521, 532 (1997) (describing how outsourcing diffuses or diminishes union membership).

68. *Occupational Outlook Handbook: Most New Jobs*, U.S. BUREAU LAB. STAT. (Sept. 1, 2020), <https://www.bls.gov/ooh/most-new-jobs.htm#> [<https://perma.cc/GTP8-MKG4>] (projecting occupations with biggest job growth in next decade to be home health, counter workers, and restaurant jobs).

69. JANE F. MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* 186 (2016).

70. *Alt-labor* and *minority unions* are two additional terms that commentators use when discussing organizations that support workers and workers' rights without being exclusive bargaining agents under the NLRA. Each phrase denotes a slightly different organizational emphasis, though they are sometimes used interchangeably along with worker centers. *Minority unions* are workplace-specific unions that do not have majority support in their workplaces, like Google's Alphabet Union. These organizations seek to leverage their minority membership to push management to make concessions, and often aspire to exclusive bargaining status and a collective contract. *Alt-labor* is a broader term that likely encompasses minority unions. It is generally used for non-NLRA workers' organizations that focus on specific employers or industries, like the Uber Guild, for example. (It may be instructive to note that Google's Alphabet Union and the Uber Guild have both been referred to as *alt-labor*, but only Google's Alphabet Union is an example of a minority union because Uber drivers, as independent contractors, cannot form unions.) By comparison, the term *worker center* generally implies a more community-focused non-profit organization that provides other services in addition to workplace advocacy. This Note will focus on worker centers, but the analysis will likely be applicable to other non-traditional workers' organizations like *alt-labor* and *minority unions* as well.

their diverse structures and membership bases.⁷¹ They are also prone to experimentation and change.⁷² Generally speaking, worker centers are community-led organizations focused on improving conditions for workers through some combination of political advocacy, protest, legal action, and direct services.⁷³ Worker centers often involve workers who have been historically difficult to unionize and work in industries with broad labor law noncompliance issues.⁷⁴ Many early worker centers began in low-income immigrant communities to address industry-specific abuses, such as the underpayment and unsafe conditions faced by undocumented day-laborers.⁷⁵ Because they often arise out of very specific exploitative situations, worker centers often reflect the distinct ethnic or cultural identities of the workers they represent.⁷⁶

Although worker centers are distinct, they share features with other nongovernmental organizations. Worker centers bear some similarities to advocacy organizations like the Sierra Club⁷⁷ in their focus on pushing policy makers to adopt their favored positions.⁷⁸ They are similar to traditional labor unions in that they focus on improving working conditions through organizing, though they generally do not seek to be exclusive bargaining agents that negotiate collective bargaining agreements on behalf of their members.⁷⁹ They also bear similarities to direct service non-profits, such as legal aid organizations or charitable funds, because they provide services such as translation help, know-your-rights workshops, and even food shelves.⁸⁰ Finally, worker centers' neighborly atmospheres resemble the decaying fraternal and community organizations of years past, as they often involve social events, potlucks, and meetings in church basements.⁸¹

71. Fine, *supra* note 15, at 420.

72. *Id.* at 455.

73. *Id.* at 420.

74. *Id.* at 442.

75. *Id.* at 420.

76. *Id.*

77. See generally *About the Sierra Club*, SIERRA CLUB, https://www.sierraclub.org/aboutsierraclub?gclid=CjwKCAjwrqqSBhBbEiwAlQeqGi4Y6FvUViIlgqXaUPM1poToq6eXzQYbJvAxJova09RKeiPVN5dEiRoCUrcQAvD_BwE [<https://perma.cc/XM2H-B9XW>] (describing the Sierra Club as a “grassroots environmental organization” whose mission includes promoting responsible use of the Earth’s resources and educating people on how to protect the environment).

78. Tabatha Abu El-Haj, *Making and Unmaking Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J.L. REFORM 63, 90 (2019).

79. *Id.* at 92–93.

80. Fine, *supra* note 15, at 420.

81. MCALEVEY, *supra* note 69, at 193.

One important characteristic shared by most worker centers is their emphasis on being led by their community and membership bases.⁸² Indeed, worker centers consider community-governance to be one of their great strengths and a foundational decision-making principle.⁸³ These organizations emphasize an organizing model that seeks to build up community members as leaders. To that end, they often have democratic structures where leadership is voted on by members.⁸⁴ Decision-making is mostly done in community meetings, where those most affected by the issues at hand are encouraged to take the lead.⁸⁵ Paid staff or organizers are tasked with supporting the decisions made by the community by providing structure and strategic advice, but are not the final decision-makers.⁸⁶ These practices are based on a belief that those most affected by the issues know best what needs to change, and that too often marginalized groups are pushed aside by policy, legal, and political “experts.” As such, the executive directors, funders, and lawyers for these organizations are often not the leaders of these organizations, although their longer-term influence on their organizations can be considerable.⁸⁷

For a relatively new phenomenon, worker centers have an impressive list of achievements that have resulted from their political advocacy. Chief among them is the adoption of fifteen dollar per hour minimum wages in jurisdictions across the country.⁸⁸ Worker centers in New York City were some of the earliest advocates in the campaign for a fifteen dollar per hour minimum wage.⁸⁹ The fight has been taken up by other centers across the country, to great success.⁹⁰ As of November 2019, minimum wage increases have provided over \$68 billion in

82. *Id.*

83. Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS. 141, 144 (2019).

84. *Id.*

85. *See, e.g., id.* at 168.

86. *See, e.g., id.* at 150.

87. *Id.* at 168–76.

88. Chris Marr, *States with \$15 Minimum Wage Laws Doubled This Year*, BLOOMBERG L. (Mar. 23, 2019), <https://news.bloomberglaw.com/daily-labor-report/states-with-15-minimum-wage-laws-doubled-this-year> [<https://perma.cc/W5ZJ-WGBG>].

89. Wendi C. Thomas, *How New York’s “Fight for \$15” Launched a Nationwide Movement*, AM. PROSPECT (Jan. 4, 2016), <https://prospect.org/economy/new-york-s-fight-15-launched-nationwide-movement/> [<https://perma.cc/AKL4-DX22>].

90. *Id.*

additional income for over 22 million workers across the country.⁹¹ Advocacy from worker centers has also led to widespread adoption of paid sick and safe leave laws across the country.⁹² Worker centers cannot take sole credit for these changes, but it is fair to say they are often the leading coalition partners in these campaigns.⁹³ Advocating for political changes has been a particularly fruitful activity for worker centers and will likely continue to be a central part of their work.

Worker centers have also had success in workplace- or industry-focused organizing around specific issue-based campaigns. This organizing has taken many different forms, from creating hiring halls in specific industries to improve working conditions and wages⁹⁴ to pressuring “secondary employers” to make sure that the contractors they hire are following labor and employment laws⁹⁵ to pushing for the adoption of state-wide industry standards.⁹⁶ These campaigns are more similar to traditional union organizing and have sometimes led to full-fledged unionization of workplaces,⁹⁷

91. *Fight for \$15's Four-Year Impact: \$62 Billion in Raises for America's Workers*, NAT'L EMP. L. PROJECT (Nov. 29, 2016), <https://www.nelp.org/news-releases/fight-for-15s-four-year-impact-62-billion-in-raises-for-americas-workers/> [<https://perma.cc/B7KH-WT72>].

92. David Rolf, *A Roadmap to Rebuilding Worker Power*, CENTURY FOUND. (Aug. 9, 2018), https://production-tcf.imgix.net/app/uploads/2018/07/08103822/DavidRolf_All.pdf [<https://perma.cc/SU8V-AR9M>].

93. Dominic Rushe, *'Hopefully It Makes History': Fight for \$15 Closes in on Mighty Win for US Workers*, GUARDIAN (Feb. 13, 2021) <https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights> [<https://perma.cc/9LX9-CUJU>] (describing the movement for a \$15 per hour minimum wage).

94. See, e.g., Liz Jones, *The Seattle Woman Who Made a Home for Day Laborers*, KUOW (Feb. 9, 2016), <https://kuow.org/stories/seattle-woman-who-made-home-day-laborers/> [<https://perma.cc/YAM9-JDSP>] (describing Casa Latina's campaign to create a hiring hall for day laborers).

95. *After Years of Fighting, Janitors Celebrate Historic Agreement with Target*, UNION ADVOC. (June 11, 2014), <https://advocate.stpaulunions.org/2014/06/11/after-years-of-fighting-janitors-celebrate-historic-agreement-with-target/> [<https://perma.cc/5T2S-GJZ8>] (describing Centro de Trabajadores Unidas en la Lucha's campaign to pressure Target to drop certain janitorial contractors).

96. Dan D'Ambrosio, *'Everything Is better': Effort Grows to Improve Working Conditions on Vermont Dairy Farms*, BURLINGTON FREE PRESS (Oct. 7, 2020), <https://www.burlingtonfreepress.com/story/news/2020/10/07/milk-dignity-conditions-improving-migrant-workers-vermont-dairy-farms/5907222002/> [<https://perma.cc/S2S5-ZLVE>] (describing worker center Migrant Justice's Milk with Dignity campaign to enforce improved working standards in the dairy industry).

97. See, e.g., MCALEVEY, *supra* note 69, at 189–91 (describing how a worker center campaign resulted in car washers in New York City becoming increasingly unionized).

leading some corporate critics to argue that worker centers are simply “fronts” for labor unions.⁹⁸

Worker centers have done considerable work in attempting to address labor law noncompliance and under-enforcement. Recent studies have found broad under-enforcement of labor laws across the country.⁹⁹ For example, recent studies estimate that between ten and twenty percent of low-wage workers earned less than the minimum wage in the past month.¹⁰⁰ A study of New York City, Los Angeles, and Chicago estimated that wage theft resulted in almost \$3 billion of annual underpayments to low-wage workers.¹⁰¹ Because noncompliance with labor and employment law is especially common in low-wage sectors, these problems disproportionately affect immigrants, women, and people of color.¹⁰² The billions of dollars stolen from workers’ wages is money that could have gone to caring for children, investing in struggling communities, and providing working people joyful experiences. Instead, working class families face the stress of not having as much money as they expected, leading to countless harmful results.¹⁰³

Worker centers have worked to remedy such issues by identifying noncompliance problems in hard-to-reach sectors, bringing cases themselves, and working alongside regulators to ensure compliance with new and existing labor laws.¹⁰⁴ Some

98. U.S. CHAMBER OF COMMERCE, *THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS* (2013), https://www.uschamber.com/assets/archived/images/documents/files/wfi_worker_center_study_new_model_of_representation_final_version_downloaded_2.20.14.pdf; Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, 13 *ENGAGE* 64, 64 (2012).

99. Annette Bernhardt, Ruth Milkman & Nik Theodore, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, NAT’L EMP. L. PROJECT (Sept. 21, 2009), <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/> [<https://perma.cc/WN4C-C29K>].

100. E. RSCH. GRP., INC., *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK 2–3*, 26 (2014), <https://www.dol.gov/asp/evaluation/completedstudies/wageviolationsreportdecember2014.pdf> [<https://perma.cc/U7RP-9E3C>].

101. Bernhardt, Milkman & Theodore, *supra* note 99, at 50.

102. Laura Huizar & Tsedeye Gebreselassie, *What a \$15 Minimum Wage Means for Women and Workers of Color*, NAT’L EMP. L. PROJECT (Dec. 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> [<https://perma.cc/R7BJ-GHET>].

103. Michael Marmot, *The Influence of Income on Health: Views of an Epidemiologist*, 21 *HEALTH AFFAIRS* 31 (2002).

104. *See, e.g.*, Andrew Elmore, *Collaborative Enforcement*, 10 *NE. U. L. REV.* 72 (2018); Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 *MINN. L. REV.* 811 (2019).

worker centers have legal departments that bring employment cases that plaintiff-side firms would normally not take¹⁰⁵ in addition to providing other services, such as immigration representation.¹⁰⁶ Their work as co-enforcers with government actors takes the form of either “remedial” or “grant-based” enforcement.¹⁰⁷ Remedial enforcement involves bringing clients and cases to government enforcers and assisting them with their litigation.¹⁰⁸ Grant-based enforcement involves accepting government funding to investigate noncompliance and educate workers and employers about their rights and obligations.¹⁰⁹ Worker centers and activist pro-worker state attorneys general in particular have found themselves working together to enforce and expand state-level worker protection.¹¹⁰ Worker centers foresee continued work in ensuring the enforcement of labor laws and opportunities to occupy a more central role in the legal framework of labor and employment.

Finally, worker centers have been praised for building stronger communities and fostering civic participation. Many social and political commentators have lamented the dwindling membership of formerly strong community organizations like church groups, fraternal societies, and traditional labor unions.¹¹¹ These commentators argue that the lack of participation in such groups undermines civic ties that are essential to a well-functioning democracy.¹¹² Worker centers often attribute their success to their social, communal atmospheres, and have been cited for their potential ability to revitalize local communities.¹¹³ Many worker centers have specific social rituals, like potlucks and open-discussion meeting formats that build a sense of togetherness among members.¹¹⁴ Worker centers can be places of community support during crises. For example, during the widespread uprising following the death of George Floyd in the summer of 2020, worker centers often found themselves as focal points for shelter and

105. Elmore, *supra* note 104, at 82–83.

106. *See* Fine, *supra* note 15, at 431.

107. Elmore, *supra* note 104, at 80.

108. *Id.* at 102.

109. *Id.* at 107.

110. *Id.* at 100.

111. *See, e.g.*, Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67–69, (Jan. 1995) (arguing that the decline of in-person social discourse undermines civic engagement required for a strong democracy).

112. *Id.* at 77.

113. MCALEVEY, *supra* note 69, at 27.

114. *Id.* at 186 (describing a typical meeting at Make the Road New York, a leading worker center in New York City).

community discussion.¹¹⁵ Advocates of the worker center model pride themselves in how the centers build strong, civic-minded communities.¹¹⁶

II. Analysis: How Do Worker Centers fit into the Ideological Struggle Between Individualism and Collectivism at the Heart of American Labor Law?

Worker centers do not fit neatly into modern American labor law. In fact, they often explicitly seek to address the pitfalls and cracks in the modern American labor law framework. Worker centers operate outside of the labor law framework most explicitly by organizing workers who are exempted from the NLRA.¹¹⁷ Even if worker center members have the legal ability to form NLRA unions, they are often in sectors that have proven extremely difficult to unionize.¹¹⁸ Significantly, these sectors are also some of the fastest growing in the economy.¹¹⁹ The position of worker centers outside of the NLRA and outside of the traditional labor movement has caused controversy and discussion among labor law experts.

Given the failure of the contemporary NLRA framework to build sustained power in working class communities, the proliferation of non-NLRA worker organization models should not be surprising. In many ways, worker centers are analogous to pre-NLRA labor organizations: they attempt to organize workers and push for changes without the legal institutionalization of the NLRA. Like those pre-NLRA labor organizations, worker centers have to be creative about how they seek to build their power and improve their members' lives. As in pre-NLRA labor-management disputes, employers have no duty to bargain with worker centers, so they use

115. Ben Rodgers, *This Is a Community Building: Local Worker Advocacy Group Opens Space to Offer Mutual Aid, Organizing Following Floyd Death*, KSTP MINNEAPOLIS (June 11, 2020), <https://amp.kstp.com/articles/this-is-a-community-building-local-worker-advocacy-group-opens-space-to-offer-mutual-aid-organizing-follow-george-floyd-death-5756049.html> [https://perma.cc/D8KQ-88DU].

116. See Fine, *supra* note 15, at 452.

117. Thomas I.M. Gottheil, *Not Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 N.Y.U. L. REV. 2228, 2248 (2014).

118. Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 609 (2016).

119. *Union Members Summary*, *supra* note 63.

a variety of tactics, including public demonstrations,¹²⁰ litigation,¹²¹ and collaboration with government allies¹²² to encourage employers to act. They often use historically popular tactics that labor unions are not allowed to use under the NLRA and LMRDA, like secondary pickets and boycotts.¹²³ Furthermore, they do not gain dues-paying members from their organizing campaigns, and rely on voluntarism.¹²⁴ As such, they must ensure members remain active by achieving tangible results, providing a variety of services, and fostering community spaces.

The most discussed legal controversy facing worker centers is whether or not they *should* be considered “labor organizations” under the NLRA and other labor law statutes. Some corporate attorneys and pro-business elected officials have argued that the definition of labor organization should encompass worker centers.¹²⁵ Whether or not a worker center is considered a “labor organization” per the NLRA depends upon whether the organization “exists for the purpose, in whole or in part, of dealing

120. See, e.g., Saurav Sarkar, *Tennessee Janitors Convince Target to Drop Dirty Cleaning Contractor*, LABOR NOTES (May 9, 2019), <https://labornotes.org/2019/05/tennessee-janitors-convince-target-drop-dirty-cleaning-contractor> [<https://perma.cc/92A7-YFA2>] (“After a public demonstration at a Brentwood, Tennessee, Target location, the corporation finally met with the group at its headquarters in Minnesota. It agreed to cut ties with Diversified in Tennessee and conduct a national audit of its relationship with the contractor.”); Adam Belz, *Twin Cities Retail Janitors Threaten to Strike on Black Friday*, STAR TRIB. (Nov. 11, 2014) <https://www.startribune.com/twin-cities-retail-janitors-threaten-to-strike-on-black-friday/282216001/> [<https://perma.cc/4S9D-ZGQV>] (“Several dozen supporters and four workers who are members of the worker center CTUL held a protest in the snow and cold near the Home Depot in Richfield just off Highway 77 and 66th Street on Tuesday.”).

121. See, e.g., Annie McDonough, *Amid Building Boom, Amazon Faces Complaints from Warehouse Workers*, CITY & STATE N.Y. (Feb. 16, 2021), <https://www.cityandstateny.com/articles/policy/labor/amid-building-boom-amazon-faces-complaints-warehouse-workers.html> [<https://perma.cc/GKF2-LVWG>] (describing a lawsuit filed on behalf of an Amazon worker by an attorney with worker center Make the Road New York).

122. See, e.g., Brianna Provenzano, *What AOC Means By ‘Tax The Rich’ & Why It Makes People Scared*, REFINERY 29 (Aug. 4, 2020) <https://www.refinery29.com/enus/2020/08/9946146/andrew-cuomo-opposes-aoc-tax-plan> [<https://perma.cc/DA72-ZG2T>] (describing a video posted on worker center Make the Road New York’s twitter page featuring Alexandria Ocasio-Cortez voicing support for their agenda).

123. UNION ADVOC., *supra* note 95 (describing the victory of a worker center, Center of Workers United in Struggle, in getting the Target Corporation to implement a Responsible Contractor Policy).

124. U.S. CHAMBER OF COM., *THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS* 7, 10, 14, 17, 21 (2013); Marculewicz & Thomas, *supra* note 98.

125. See U.S. CHAMBER OF COM., *supra* note 124; Marculewicz & Thomas, *supra* note 98.

with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”¹²⁶ However, “[u]nder longstanding precedent, ‘dealing with’ is not limited to collective bargaining, but includes a pattern of bilateral exchange between employee groups and employers.”¹²⁷ Worker centers may be unable to survive if subject to the regulatory obligations of traditional labor unions due to their shoestring budgets and the costs of maintaining compliance.¹²⁸ Many commentators have made strong arguments for why worker centers should not be considered labor organizations, both doctrinally and based on policy considerations.¹²⁹ They argue that most worker centers do not seek to be exclusive “representatives” for their members, do not seek to bargain a contract for their members, and as such do not “exist for the purpose, in whole or in part, of *dealing with* employers.”¹³⁰ The argument touches on the constitutionally “anomalous quid pro quo at the heart of labor law:” worker centers do not seek to impose the NLRA’s bargaining duties on employers, nor do they represent all workers in a bargaining unit, so they should not be subject to the restrictions that come with those powers.¹³¹

As of 2020, no worker center has been forced into the labor organization designation by courts or the NLRB, despite several challenges.¹³² The first attempt by pro-business actors to push worker centers into the “labor organization” designation came in 2013, when two Republican legislators sent a letter to the Department of Labor claiming that worker centers should be classified as labor organizations because they picket and boycott companies, advocate for political changes, and conduct industry

126. 29 U.S.C. § 152(5) (2012).

127. Estlund, *supra* note 53, at 229.

128. See Kati L. Griffith & Leslie C. Gates, *Worker Centers: Labor Policy as a Carrot, Not a Stick*, 14 HARV. L. & POL’Y REV. 231 (2019) (examining how worker centers can use the NLRA to their advantage by enjoying its protections while avoiding its limitations by not directly bargaining with employers); Gottheil, *supra* note 117.

129. See U.S. CHAMBER OF COM., *supra* note 124; Marculewicz & Thomas, *supra* note 98.

130. 29 U.S.C. § 152(5) (2012) (emphasis added).

131. Estlund, *supra* note 53, at 193.

132. On occasion, the NLRB has designated small groups of coworkers as “labor organizations,” although not in the context of imposing regulatory burdens on the groups. See Estlund, *supra* note 53, at 228–30 (describing the precedent of employer-created groups of coworkers being classified as “labor organizations” to combat illegal company-formed unions).

organizing campaigns.¹³³ The Department of Labor rejected their argument, stating that worker centers do not become labor organizations “simply by engaging in the routine activities of legal service providers and activities targeting employers such as picketing, handbilling and protesting.”¹³⁴ The issue was put to the NLRB by an employer complaint in 2006,¹³⁵ and to the Department of Labor’s Office of Labor-Management Standards in 2008,¹³⁶ both in regards to the worker center Restaurant Opportunities Center of New York (ROC-NY). In both cases, the agencies concluded the worker center was not a “labor organization” per the NLRA and LMRDA. The NLRB deemed that lawsuit settlement provisions negotiated between an employer and ROC-NY that included arbitration enforcement mechanisms did not constitute “a pattern and practice of dealing over time” as it did not contemplate new proposals and negotiations.¹³⁷ Similarly, the Department of Labor concluded that ROC-NY was not a “labor organization” because it did not handle grievances or other continued exchanges with the business.¹³⁸

Though the labor organization designation debate has not yet had any legal impact on the worker center model, it illuminates the fault lines that exist within modern labor law. On one hand, conservative, anti-labor forces seem to want to force worker centers into the NLRA framework.¹³⁹ On the other, advocates who support the worker center movement argue against classifying them as labor organizations.¹⁴⁰ This flip-flopped role of business and worker as it pertains to the NLRA is evidence in itself of that system’s

133. Letter From Comm. on Educ. & the Workforce, U.S. House of Representatives to Thomas Perez, U.S. Dep’t of Labor (July 23, 2013) (on file with the Chamber of Comm.), https://www.uschamber.com/sites/default/files/09-19-13-dol-worker_center_follow-up_with_enclosure_0.pdf.

134. Gayle Cinquegrani, *Worker Centers Provide Necessary Outreach, Supporters Say: Opponents See LMRDA Issue*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 27, 2003), <https://news.bloomberglaw.com/daily-labor-report/worker-centers-provide-necessary-outreach-supporters-say-opponents-see-lmrda-issue> [https://perma.cc/9A9G-7TL5].

135. Memorandum from the U.S. Gov’t Nat’l Lab. Relations Bd. Off. Gen. Couns. on Restaurant Opportunities Center of NY to Celeste Mattina (Nov. 30, 2006) (on file with Lexis Nexus).

136. Letter from Andrew Davis, Pol’y & L. Advisor, Div. of Interpretations & Standards, to Beverly Walker, Chief, Div. of Interpretations & Standards (Jan. 16, 2008) (on file with author).

137. Memorandum from the U.S. Gov’t Nat’l Lab. Relations Bd. Off. Gen. Couns., *supra* note 135, at 3.

138. *See* Letter From Comm. on Educ. & the Workforce, *supra* note 133.

139. *See* Marculewicz & Thomas, *supra* note 98.

140. *See, e.g.,* Oswalt, *supra* note 118, at 609–10 (considering worker centers as “alt-labor”).

failure for workers, and thinkers have taken note, predicting that trends of anti-union jurisprudence will push workers towards non-NLRA workers' organizations.¹⁴¹ However, other pro-worker advocates defend traditional, firm-based organizing, arguing that the worker center model is a half-measure and is no substitute for workplace-specific organizing.¹⁴² Worker centers' awkward fit within the traditional American labor law framework raises serious questions about the viability of the NLRA framework itself.

III. How Worker Centers Can Position Themselves to Promote Class-Based Solidarity in Proposals for Labor Law Reform

Given the questions about the current NLRA-based labor law system, some pro-labor legal thinkers have called for radically restructuring American labor law. The victory of Joe Biden in the most recent presidential election, coupled with the incoming Democratic majorities in the Senate and the House of Representatives, have made many of these advocates hopeful about the possibility of meaningful pro-worker labor reform.¹⁴³ Of course, any serious reform of the NLRA would likely require a 60-vote majority (barring any changes to the filibuster), which still seems improbable in the near to mid future.¹⁴⁴ That being said, there are several proposals for reforms suggested by labor advocates and their political allies, and worker centers should consider how they fit in to these plans. For one, the Protecting the Right to Organize (PRO) Act, which passed in the House of Representatives in February 2020 has been pushed strongly by unions and their allies

141. See Estlund, *supra* note 53 (arguing that continued judicial and legal attacks on the NLRA based on "Right to Work" principles will push labor advocates away from the NLRA).

142. Matthew Ginsburg, *Nothing New Under the Sun: 'The New Labor Law' Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 YALE L.J. FORUM 488, 488 (2017) ("The labor movement's economic and political power rests on the existing infrastructure of collective bargaining; there is no realistic path towards rebuilding labor's voice in society that does not begin with organizing key firms in industries with significant existing union density.").

143. See, e.g., Benjamin Sachs, *ACS Essays on New Policy Possibilities*, ONLABOR (Jan. 14, 2021), <https://onlabor.org/acs-essays-on-new-policy-possibilities/> [<https://perma.cc/W7CL-JFKH>].

144. Ian Millhiser, *Joe Manchin Just Took an Important Filibuster Reform Off the Table*, VOX (Mar. 17, 2021), <https://www.vox.com/2021/3/17/22336181/joe-manchin-filibuster-reform-41-votes-talking-jeff-merkley-senate-rules> [<https://perma.cc/6AGA-GYCE>].

on the hill.¹⁴⁵ Other proposals, like co-enforcement, can be adopted without requiring legislative action. Worker centers should engage with these proposals through the lens of whether they promote broader working class solidarity.

These policy proposals suggest a new labor law that would lessen the need for firm-based NLRA-style labor organizing. These proposals focus on sectoral (or tripartite) bargaining, a system where minimum standards are set on the sector level in negotiations between workers, businesses, and the government.¹⁴⁶ They also argue for greater co-enforcement of labor law where unions and worker organizations are institutional partners in regulatory investigation. Finally, they propose that unions and worker organizations could administer worker benefits, like unemployment insurance, in order to promote worker engagement. Versions of these proposals are included in the PRO Act.¹⁴⁷ Worker centers could have a role in any of those three major sectoral labor law reform proposals (sectoral bargaining, co-enforcement, or benefit administration).

One very specific reform would have obvious benefits to the worker center organizing model: a legislative narrowing of the definition of “labor organization” for the purpose of the NLRA and other labor laws. This reform would end the “labor organization” debate, giving worker centers the peace of mind to continue their activism without fear of conservative adjudicators imposing regulations that could drive them out of existence. Worker centers could also find important roles in a variety of other sectoral or tripartite policy proposals. Worker centers could operate as portable benefit centers or hold seats on sectoral bargaining councils. However, these actions would likely entail significant changes in worker centers’ structures and would likely involve greater regulation of worker center activity.¹⁴⁸ For that reason, traditional unions may be a better fit for these proposals, as they already engage in highly regulated bargaining, have roles in providing worker benefits like healthcare and retirement, and have to comply with regulatory burdens on their structures and finances.

145. Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Union*, WASH. POST (Feb. 6, 2020), <https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions/> [https://perma.cc/QMA9-ARLS].

146. *Id.*

147. *Id.*

148. Griffith & Gates, *supra* note 128, at 621–27.

Worker centers seem to have a natural position in co-enforcement proposals, which are already being adopted by regulators without the need for federal labor law reforms. The proliferation of co-enforcement between worker centers and government regulators has been cited as a sort of proto-tripartite system.¹⁴⁹ Co-enforcement provides benefits for both regulators and worker centers. For worker centers, regulators bring the power of the government to bear for their communities and can provide worker centers with institutional legitimacy and even funding. For regulators, worker centers can find cases in insulated sectors and ensure that worker-plaintiffs remain engaged in the litigation process. The combination of government-backed litigation and worker center activism can have broad reaching consequences in bringing up working standards.

Co-enforcement is not without its drawbacks from the perspective of working class solidarity, however. The main problems with co-enforcement are that the informal relationships can be fleeting and the collaboration between government and workers' advocates can lead to conflicts of values and interests.¹⁵⁰ Commentators have suggested several ways in which to formalize the relationship to make it more permanent and effective.¹⁵¹ One novel proposal that could benefit more established worker centers that have legal departments is the use of contingency fee arrangements between government officials and worker center attorneys.¹⁵² This would create a more formal co-enforcement relationship and provide some funding for worker centers while providing cost-effective enforcement for the government regulator. That being said, worker centers' independence is central to their solidarity-building potential. Worker centers should be careful not to develop a reliance on their relationships with government officials. To that end, worker centers should seek to engage government regulators strategically, only when the presence of a government regulator can build the power of their members.

More broadly, any policy proposals that free workers to be more active in standing up for their interests would promote worker centers and their efforts to build solidarity. For example, greater protections for protesters would benefit worker centers. Broadening First Amendment principles in the workplace would almost certainly promote worker activism. Requiring "good cause"

149. Andrias, *supra* note 11, at 81–99.

150. *Id.* at 74–75.

151. *Id.* at 96–97.

152. *Id.*

termination would similarly allow workers to raise their voices and support each other without as much fear of losing their jobs. Similarly, any proposals aimed towards building a stronger safety net that disconnects life essentials, like healthcare, from employment relationships would limit the damage employer retaliation could cause through adverse actions. In the same vein, a stronger unemployment insurance program would allow workers to be less afraid about job loss when engaging in solidarity.

IV. Worker Centers' Role Outside of Traditional Labor Law and Movements Positions Them Towards Class-Based Solidarity

Understanding worker centers' position within American labor law, how should pro-worker advocates proceed? They should proceed with solidarity for workers struggling to enforce and expand their rights against a system that has undermined the power of collective action. Worker centers' independence from both traditional labor law and the traditional labor movement makes them well-suited to channel working class solidarity towards structural change that fosters collective action rather than individual rights.

Many aspects of American labor law are aimed at protecting individual workers' rights, which can be destructive to worker solidarity. Some of the most significant reforms and changes of labor law have been based on these classically liberal principles: the duty of fair representation to all members, the prohibition on closed shops, and the prohibition on spending union dues on political activity, all center the rights of individual workers against the rights of the union writ large.¹⁵³ As noted previously, right-to-work demonstrates the ultimate, solidarity-destroying conclusions of these principles. Worker centers do not have to worry about these "minority rights" principles, as membership in them is completely voluntary. Worker centers' voluntarism is significant in several respects. For one, it is a strong argument against them being designated as NLRA "labor organizations," as the concerns about coercion of dissenting union members are not present, thus their regulatory protection is not necessary. The voluntarism of worker centers also creates a very low barrier to entry for engagement with these organizations. Workers can engage without committing to expensive dues payments or long-term commitments. The take-it-or-leave-it nature of worker center engagement also allows the

153. *See* 29 U.S.C. §§ 151–69 (2012).

centers to put forward more radical proposals and tactics without worrying about alienating more conservative demographics. They can also engage in organizing and activism without worrying about whether the activities will “pay off” with the ultimate result of dues-paying members. Ideally, if worker center organizing leads to a situation where a firm-based union would be appropriate, they could hand off the campaign to a union that is able and willing to take on the burdens of the NLRA for the benefits it provides, as several worker centers have done.

Worker centers’ freedom from the NLRA also orients them away from specific workplaces and towards the broader interests of working class communities. As noted, worker centers have had success in advocating for broad workplace policy reforms, like the Fight for \$15, but they have also advocated strongly for non-workplace policies that affect working class communities, like immigration, policing, and racial justice reforms.¹⁵⁴ Traditional unions have also fought alongside worker centers in these struggles,¹⁵⁵ however, the primary focus of traditional unions must be their workplaces, while worker centers can focus their organizing on a more community-wide basis. Freedom from the NLRA also allows them to use more aggressive actions that are more focused on generating public or community support in promotion of those interests.

Finally, worker centers’ independence from traditional organized labor frees them from the baggage that traditional unions carry, like perceptions of corruption,¹⁵⁶ racism,¹⁵⁷ sexism,¹⁵⁸ and cronyism with the Democratic Party.¹⁵⁹ Whether or not these

154. See Fine, *supra* note 15, see also Make the Road N.Y., *Immigration*, <https://maketheroadny.org/issue/immigration/> [<https://perma.cc/38YH-Y9R6>].

155. Cherrene Horazuk, Labor Fights for George Floyd in Twin Cities, LABOR NOTES (June 3, 2020), <https://labornotes.org/2020/06/labor-fights-george-floyd-twin-cities> [<https://perma.cc/LWK7-KHV2>].

156. Marick F. Masters, *Opinion: Labor Must Fight the Perception of Corruption. Here’s How*, DETROIT FREE PRESS (Jan. 14, 2018), <https://www.freep.com/story/opinion/contributors/2018/01/14/labor-corruption/1026435001/> [<https://perma.cc/W66V-WNG7>].

157. Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 2, 189 (1996) (describing unions’ discriminatory practices throughout American labor history).

158. Maureen Baker & Mary-Anne Robeson, *Trade Union Reactions to Women Workers and Their Concerns*, 6 CANADIAN J. SOCIO. 1 (1981) (describing how unions have been male-dominated, despite having an ideological commitment to equal rights, because men made up the majority of workers for much of modern history).

159. E.g., Andrew Cline, *Public Sector Unions Need to Serve Their Members, Not the Democratic Party*, USA TODAY (Aug. 31, 2018), <https://www.usatoday.com/story/>

perceptions are deserved, many people associate organized labor with various historically disreputable behaviors. Worker centers are free from those associations. Worker centers' lack of association with the Democratic Party in particular could be useful for developing working class solidarity. Within Democratic areas, worker centers can function as oppositional forces to the status quo Democratic positions pushing Democratic leadership to adopt more pro-worker policies. Outside of Democratic areas, worker centers can market themselves as more independent organizations, which could cause working class rural communities to be more inclined to engage with them. Overall, a reputation for independence could provide worker centers some advantages over traditional unions in building broad working class solidarity.

Ultimately, worker centers demonstrate the shortfalls of the NLRA system. However, the NLRA system has the benefit of being enshrined in law, which gives workers real rights, not just ideological principles. If the worker center movement is serious about structural change, it must aim towards making legal changes that encourage the collective solidarity that these organizations inspire.

Conclusion

Progress towards a more just society in the United States seems to follow a pattern: decades of ahead-of-its-time radical pressure that is pushed to the forefront by a crisis, leading to transformational changes in the structure of society. The early labor union advocates were marginalized, repressed, and dismissed by American institutions for decades. Then the Great Depression caused millions of American workers to look for a more stable and just vision of the economy. Because of the pioneering work of early labor advocates, labor unions were able to channel frustrations towards change, and the New Deal was born. A similar story could be told of the Civil Rights movement, where racial justice prophets labored for years in the wilderness before the unrest of the 1960s opened the door to radical change. Eras of crisis and unrest provide opportunities for progressive change.

We are currently in the midst of a time of crisis and opportunity. Worker centers find themselves in the eye of that storm. The good news is that worker centers are well-prepared to channel frustrations toward constructive change when faced with

crisis. They have direct experience in organizing frustrated workers, in finding the pressure points in systems of power to make change, and in providing support for communities in pain. As these crises continue to unfold, worker centers' flexibility and freedom make them well-oriented to agitate for transformative change for their communities. Attorneys who support worker centers should respect that community leadership and support demonstrations of solidarity however possible.