

Bargaining for the Future:
Rethinking Labor's Recent Past and Planning Strategically for Its Future

a report by

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1. Introduction

With President Obama's election behind us, questions about the future direction of organized labor and its allies have become more pressing. Four years ago, Obama's election raised hopes that great changes were in the offing. While significant reform was enacted in the form of the Affordable Care Act, hoped for breakthroughs in union rights never materialized. The Employee Free Choice Act was bottled up in the Senate; the White House Middle Class Task Force proved unable to advance a range of desired administrative reforms; and courts blocked the significant rule changes that were drawn up by a friendlier National Labor Relations Board (NLRB). Despite the large role that unions played in turning out the vote for Obama and Democratic candidates in the Senate and House in 2012, there is little reason to believe that labor's successful political work will translate into a successful national legislative or administrative agenda during the next two years.

In some ways, the lack of a realistic labor law reform agenda for the next two years provides us an opportunity to think strategically about the future of worker representation, free from the need to advance a particular piece of legislation. It is this sort of thinking that we most need to engage in today. In the wake of the attacks on collective bargaining that disrupted the American landscape in 2011, the Kalmanovitz Initiative for Labor and the Working Poor (KI) set out to assess the implications of these attacks in ways that could help us see beyond them to the revival of worker organization in the 21st century. This project was rooted in the KI's mission to provide a space to foster innovative thinking about the future of labor and democracy, and it was undertaken independently, but in consultation with leaders in the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Change to Win (CtW), and other workers' organizations.

This paper is a product of that undertaking.¹ It is based on four basic observations arrived at after consultation with a wide variety of practitioners, a review of scholarship and data, and an exploration of recent US labor history. The four basic points are these:

- The collective bargaining regime that was built by unions over the course of the twentieth century in both the public and the private sectors is being increasingly isolated, undermined, and weakened, and its chances of survival as a significant feature of American life are increasingly in doubt.
- The cause for the continued erosion of the collective bargaining regime cannot be laid to outdated labor laws and employer resistance alone, but rather is systemic in nature, flowing from a constellation of forces and developments, which include (but are not limited to) changes in structure of the national and global economy, the role that government and the courts play in regulating economic life, the structure and function of corporations and financial markets, the decreased leverage that the workplace holds as an arena for coalescing and deploying collective power, the privatization of public services

¹ We gratefully acknowledge the assistance of Seth Newton Patel, who helped conceptualize and draft early versions of portions of this paper, and Michael Paarlberg and Christine Sigurdson who assisted with research. We are also grateful to Craig Becker, David Blitzstein, Janice Fine, Stephen Lerner, Kris Rondeau, John Schmitt, Dave Snapp, and Joe Uehlein for their comments on earlier drafts.

and underfunding of the public sector, and degree to which the political system has become polarized and paralyzed.

- Recent history both illustrates the systemic nature of the problem that labor confronts and furnishes some insights into how labor might come to terms with this systemic problem.
- This history further suggests that the revival of worker organization will require more than a greater commitment to new organizing or to the drafting and passage of labor law reform, but rather requires a thoroughgoing strategic approach to diagnosing labor's problem and planning for its future in light of the vast systemic transformation through which we are now living.

The paper below develops these points. Its purpose is not to provide a ready answer to the problem of how to revive worker organization in the United States. That task is beyond the competency of the KI—or any one individual or small group. Rather it aims to provide the basis for convening a focused discussion to define the terms of the debate, asking: What are the key questions facing the labor movement? What is the nature of the problem it faces? What ongoing or recent organizing experiments suggest insights into the nature of the problem or strands of possibility for the future? What are the best ways forward?

The Crisis of Collective Bargaining and the Need for Strategic Thinking

The stakes for this undertaking are high; its timing is urgent. And the necessity of taking a strategic approach to the problem has become increasingly undeniable.

Clearly, the widespread institution of collective bargaining in both the public and private sectors was one of the most important achievements of the United States in the 20th Century. In its heyday, collective bargaining fulfilled many purposes it: acted as a mechanism to align wage and benefit growth with the growth of productivity; served as a form of economic citizenship and introduced a measure of democracy and workplace rule of law into the employment relations; had a large ripple effect that extended well beyond unionized workplaces, influencing the behavior of non-union employers and improving the wages and benefits of workers who had never been unionized; provided a coherent way of solving problems at the level of the shop, the firm, and in some cases even the sector; and in some areas even provided a non-governmental, decentralized substitute for economic planning by the government. Significantly, it placed an important check on economic inequality. It is no coincidence that the years when collective bargaining was most stable, 1945-75, were the years that saw inequality at its lowest levels of the past century.

Over the past thirty years, however, the institution of collective bargaining has been in retreat in the private sector, and often on the defensive in the public sector (especially in recent years). Multiple developments contributed to this problem. These included the shift in job growth away from industries and regions in which collective bargaining was firmly rooted; revolutions in transportation (deregulated trucking and container ships), communications (satellites, computers, and later the Internet) and logistics combined with policies promoting freer trade (NAFTA, WTO) which brought labor markets around the world into direct competition with the US labor market; changing patterns of corporate structure and finance as

well as changes in capital markets that led investors and managers alike to adopt new expectations regarding profits and that increased the incentives for employers who sought to avoid collective bargaining; basic employer opposition, including tactics to undermine the election process, striker replacement, and bargaining in bad faith; and the rise of undocumented immigration, which has led to a workforce whose members became vulnerable to exploitation.

As the foundations underpinning private sector collective bargaining eroded, collective bargaining in the public sector was inevitably affected. Just as the rise of private sector collective bargaining after World War II prepared the way for its introduction in the public sector in the 1960s and 1970s, the decline of private sector bargaining placed increased pressure on the public sector. The stagnation of incomes for most Americans gave rise to increasing resentment of and resistance to taxation, creating incentives for public employers to resist union demands. With union density declining in the private sector, public sector unions were more isolated politically. Although some large groups of public sector workers organized successfully over the past two decades (including home health care workers in several states), the density of union membership in the public sector overall declined. Attacks on public sector unions, which became more virulent during times of recession and budgetary crisis, became increasingly sophisticated over time. The Great Recession, the most significant economic downturn since collective bargaining came to the public sector, created the opportunity for a massive assault on public sector bargaining. Although that assault was repulsed in Ohio and contained in some states, it resulted in a terrible defeat in Wisconsin, which has inspired anti-union forces in other states who are determined to follow Wisconsin's example.

The social costs of the decline of union organization and collective bargaining are growing ever more clear. Nothing illustrates these costs more clearly than the disjuncture that has occurred between productivity and wages over the last thirty years. In the mid-20th century, when private sector unionization was above twenty percent, real wage growth closely tracked productivity growth. In recent decades, as union power has diminished, that no longer held true. While productivity continued to rise, wages stagnated. A recent study by David Madland and Karla Walter points out that “if American workers were rewarded for 100 percent of their increases in labor productivity between 1980 and 2008—as they were during the middle part of the 20th century—average wages would be \$28.53 per hour—42.7% higher than the average real wage in 2008.”² These figures explain more about America's growing problem of inequality than any others.

Unfortunately, the multiple causes for the decline of collective bargaining suggest that no single policy intervention could arrest or reverse that decline in the near term. While government's support for and encouragement of collective bargaining was essential to its spread in the half-century after the passage of the Wagner Act, the effectiveness of government's role in facilitating collective bargaining has eroded in recent decades as its capacity to regulate an economy and labor markets that are increasingly transnational diminishes, the polarization of the political parties accelerates, and the hope of winning a supermajority capable of enacting a significant policy change recedes. While state-level action can still effectively protect and in

² David Madland & Karla Walter, “Unions Are Good for the American Economy,” Center for American Progress (Feb. 18, 2009), <http://www.americanprogressaction.org/issues/labor/news/2009/02/18/5597/unions-are-good-for-the-american-economy-2/>. See also Lawrence Mishel, Josh Bivens, Elise Gould & Heidi Shierholz, *The State of Working America* (12th ed. 2012).

some cases extend workers' ability to bargain with employers, it is not capable of producing any significant change in the overall trend.

The fading hope that government will intervene in a significant way to protect and restore workers' bargaining power highlights a central problem for labor in the early 21st century. Since the rise of industrial capitalism, collective bargaining had functioned in most settings as a three-cornered relationship in which the bargain struck between employers and workers received direct or indirect support from the state through a web of regulations and political relationships. Workplace bargaining power thus almost always relied on structures of power outside of the workplace. As these structures erode, the labor movement has yet to find a way to compensate for their erosion.

At the same time, the erosion of collective bargaining prompted what in some ways has been an exciting burst of creativity among labor activists. We see signs of this creativity all around us, particularly in the activism of excluded workers—those who have not been protected by the National Labor Relations Act (NLRA)—who have begun to develop a wide variety of organizational innovations. The worker center model has proliferated thanks in large part to the energy of immigrant workers. Interfaith Worker Justice alone claims a national network of 26 worker centers. Networks of excluded workers have also emerged, including the National Day Laborers Organizing Network, the Domestic Workers' Alliance, and the Restaurant Opportunity Center. Working America has begun to experiment with ways to leverage its neighborhood organizing into a workplace presence. Walmart workers have begun to use direct action as a tool to bring attention to the practices of the nation's largest private employer. Some of these organizations have even begun to experiment with new ways to embody workers' voices and to negotiate agreements with employers.

Our review of this recent history has led us to four conclusions about this experimentation:

- Unions have devoted more energy, resources, and creativity to organizing over the last thirty years than most people (even inside the labor movement) realize.
- Successful organizing campaigns undertaken during recent years tended not to focus on the problem of organizing by itself, but rather developed creative ways of addressing bargaining power within the sectors that they were organizing. Organizing success thus depended upon the existence of a bargaining strategy and often on the development of mechanisms that could either prod government into supporting or encouraging bargaining relationships or create extra-governmental forms of pressure or encouragement.
- Innovative organizing and bargaining strategies tended to emerge in an ad hoc fashion to address deep-seated dysfunctions in the labor relations system. Their ad hoc nature is such that they could be characterized as workarounds or “hacks.”
- There has been no recent systematic effort across the labor movement (including both labor federations, alternative worker organizations, policymakers, academics, and progressive allies) to learn from recent organizing history and experimentation and to develop a strategic approach that might respond to or compensate for the systemic erosion of collective bargaining.

2. Understanding the Recent History of Organizing

By the early 1980s, the labor movement could see the coming crisis. In 1984, union membership dropped below twenty percent of the workforce. In 1985, the AFL-CIO's Committee on the Future of Work published a report titled "The Changing Situation of Workers and their Unions," describing the difficulties—falling membership, changes in workplace structures, and so on—that would worsen over the next decades. Amending the NLRA to permit union recognition based on card checks or quick elections would be ideal, said the Committee, but was unlikely in the current climate. In the meanwhile, the Committee proposed a set of ideas for strengthening labor's hand in bargaining, such as using union pension funds and shareholder strategies to pressure employers and developing closer links with community groups. But the labor movement itself was also part of the problem, the report said. "We are a terribly parochial movement," AFL-CIO secretary-treasurer Thomas Donahue told a union conference in September 1985.³ Unions should reach beyond their traditional ranks to organize professional workers and service workers, create associate membership programs, and elevate women and people of color to leadership roles. And unions should transform their internal governance, merging smaller unions into larger ones and reducing disputes among unions. "The Changing Situation of Workers and their Unions" reflected a broad consensus of thinkers across the labor movement about what unions could and should try to reverse their decline. Over the next thirty years, the labor movement would put all these ideas into practice.

The recent history of organizing in the American labor movement is not well known, even to many of the union organizers and leaders who conceived and led the organizing campaigns. Over the past thirty years or so, national unions and labor federations have exerted tremendous effort to unionize unorganized sectors and maintain existing collective bargaining across the economy. This effort has involved a massive investment in new organizing, and required individual unions to substantially remake their operations, governance, and bargaining practices to sustain organizing investments. In scale and scope, and in its sophistication, creativity, and methodical approach, labor's recent organizing effort far surpasses any other undertaking in American labor history, even the CIO's drive in the 1930s.

One reason for this obscurity is the institutional and industrial focus of most analysis and writing about the labor movement. Reporters, academics, and unionists alike tend to describe the fortunes of particular unions, such as the United Auto Workers (UAW) in the auto sector, or the outcomes of emblematic conflicts, such as the 1997 Teamster strike. Union cultures and personalities play an outsized role in these stories and tend to overshadow the similarities across unions and sectors that become visible from a distance. While the particular circumstances of each union varied over time, in retrospect it is clear that the entire American labor movement grappled collectively with a common set of political, economic, and institutional challenges. Our survey of recent organizing history charts these trends with the broadest strokes, forgoing fine distinctions among unions and industries in an effort to illuminate larger themes.

Setting the Stage

³ *N.Y. Times*, September 22, 1985.

By the early 1980s, union membership was in the middle of a long-term transformation from its traditional base in private-sector manufacturing, transportation, and building trades to a majority of public sector workers with a strong contingent of health care workers. During the 1960s, with support from the AFL-CIO's Industrial Union Department among others, 22 states and numerous cities enacted collective-bargaining laws for public sector workers. Organizing campaigns among government workers and teachers made the American Federation of State, County and Municipal Employees (AFSCME) and the American Federation of Teachers (AFT) the largest unions in the AFL-CIO by 1989. In the same period, amendments to the National Labor Relations Act extended federal bargaining rights to non-profit health care institutions, setting off a surge of health care organizing. These drives brought millions of women and people of color into a labor movement formerly dominated by white men. Meanwhile, in the 1960s and 1970s, feminist organizing produced new collectivities of women and new styles of organizing that aimed to transform women's consciousness and alter traditional hierarchical gender relations. Organizations like 9 to 5 and Coalition of Labor Union Women (CLUW) organized women workers into unions that attempted to integrate feminism with collective bargaining. The Harvard Clerical Workers Union was one of the most creative of these efforts. As women workers dominated health care jobs and clerical work in many public-sector workplaces, ideas and activists moved frequently between women's organizations and unions.

In these years, union membership fell precipitously in manufacturing, and unions had little presence in retail trade or other service sector jobs. By 1978, union membership began to drop in absolute numbers, not just as a percent of the workforce. The gains in public sector and health care membership were not enough to offset losses in unions' former strongholds.

Thinkers across the labor movement, such as the AFL-CIO's Committee on the Future of Work, argued that reversing this decline was possible, but the challenge was daunting. The impediments to unionization were devilishly entwined in a tight knot. Amending the NLRA to compel union recognition more quickly would help, but labor's declining political power made it harder to muster the strength to win legislative changes. Combative employers made new organizing and bargaining harder and more expensive, requiring substantial investments of staff and money, while membership drops stretched union treasuries. And in sectors with little union presence such as retail, organizing a single firm or location risked making that employer uncompetitive within an industry or market, but simultaneously organizing an entire sector or market was hard to envision.

Labor never gave up on the idea of amending the NLRA, and whenever a political opportunity seemed propitious, unions pushed hard for changes in the law. In the 1990s, unions hoped that President Clinton's Dunlop Commission could broker a deal by trading relaxations of restrictions on company unions for expedited union recognition; with the election of President Obama, labor hoped to win card check and first-contract arbitration amendments through sheer political muscle. Neither strategy worked. Lacking a legislative fix, unions dedicated themselves to changing what they could.

Organizing

A first step was developing a massive corps of professional organizers. Reasoning that better tactical sophistication could increase unions' chances of winning union elections, in the late 1980s the AFL-CIO created the Organizing Institute (OI). With initial funding from the Service Employees International Union (SEIU), the Amalgamated Clothing and Textile Workers Union (ACTWU) (a forerunner of Union of Needletrades, Industrial and Textile Employees [UNITE]), AFSCME, the United Food & Commercial Workers International Union (UFCW), and the Steelworkers, the OI developed a training program available for any affiliated union. The OI recruited trainees from university campuses as well as union rank-and-file memberships, and thousands of organizers got their start as OI trainees. Numerous unions created their own organizing training programs as well.

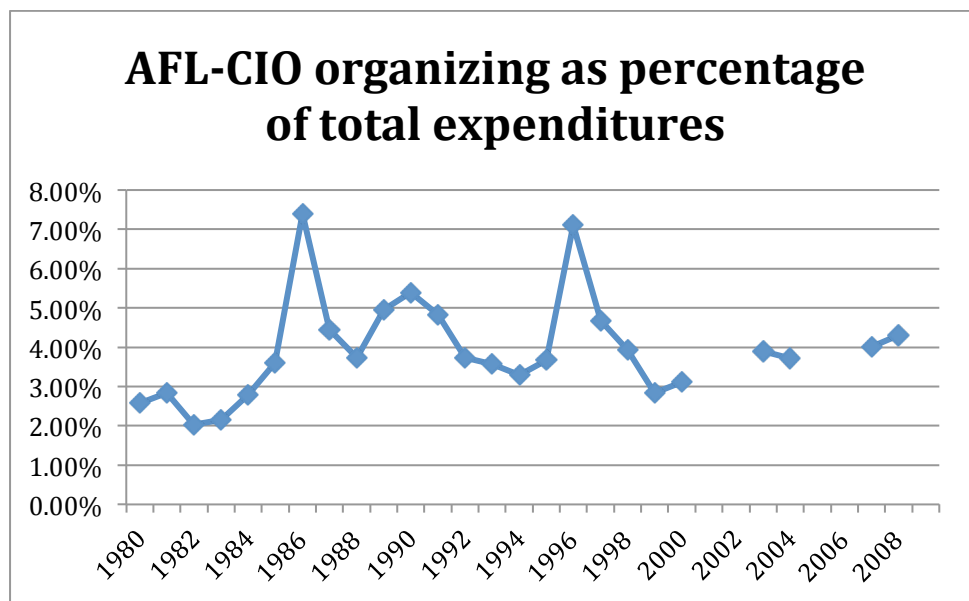
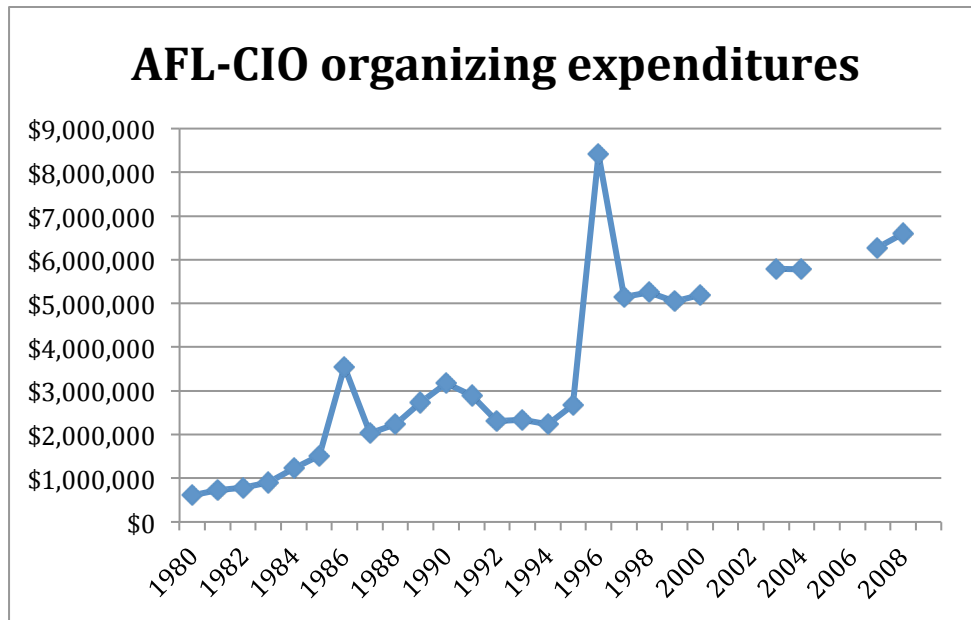
To fund these drives, some unions raised, by labor's standards, vast sums of new money. For example, in 1998 the Steelworkers boosted its organizing budget from \$13 million to \$40 million in 1998, funded by a special dues assessment, and AFSCME increased dues to generate an additional \$8 million for organizing. In 2002, the Teamsters pledged to spend \$60 million per year on organizing. The AFL-CIO issued a Federation-branded credit card and used the profits to create a special organizing fund. In some cases, these new investments were more apparent than real, as unions simply reclassified existing expenditures as organizing. Nevertheless, from the early 1990s through the first decade of the 2000s, unions publicly committed to an enormous investment in new organizing.

At the same time, unions began to use a set of strategies known as a "corporate campaign" in new organizing. This corporate accountability campaign sought to enlist corporate shareholders, customers, and regulators to put the spotlight on employers who were refusing to respond to workers' demand for a fair opportunity to organize. These tactics grew out of contract fights in the 1970s, and relied on elaborate analyses of employers' business plans and potential exposure to public pressure. Increasingly, unions began using corporate social responsibility campaigns to attempt to encourage employers to provide a free and expedited recognition procedure through which workers could choose whether or not to unionize. Unions created a large corps of campaigners to match its organizer force. The AFL-CIO established the Center for Strategic Research in 1996 to train and conduct such campaigns, and many hundreds of staffers and leaders developed a shared expertise in corporate analysis even as employers began to push back using the threat of civil lawsuits under the Racketeer Influenced and Corrupt Organizations Act (RICO) to try to stifle corporate social responsibility campaigns.

A Note on Data

It should be noted, however, that it is hard to quantify the scope or scale of this investment from publicly available sources, and some evidence contradicts some unions' public claims. For example, the AFL-CIO's annual convention reports show isolated spikes of increased organizing investments within a stable baseline trend. Between 1980 and 2010, the AFL-CIO increased its average annual organizing expenditures from under \$1 million to around \$6.5 million, an impressive bump. Yet the Federation's overall budget also increased dramatically in this period; as a result, organizing as a percentage of total expenditures remained relatively constant. Although in 1995 AFL-CIO president John Sweeney promised to devote

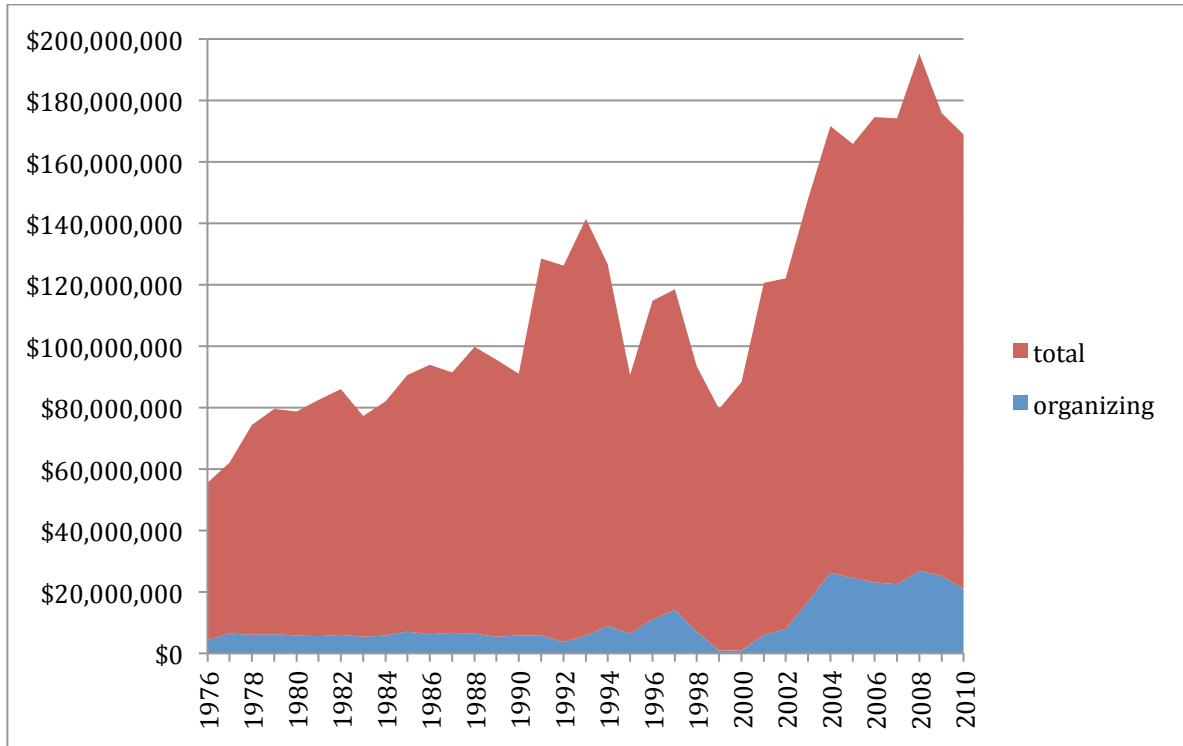
30% of the Federation’s budget to organizing, the organizing budget hovered around 4% most years. Also, these numbers are nominal expenditures and do not adjust for inflation.



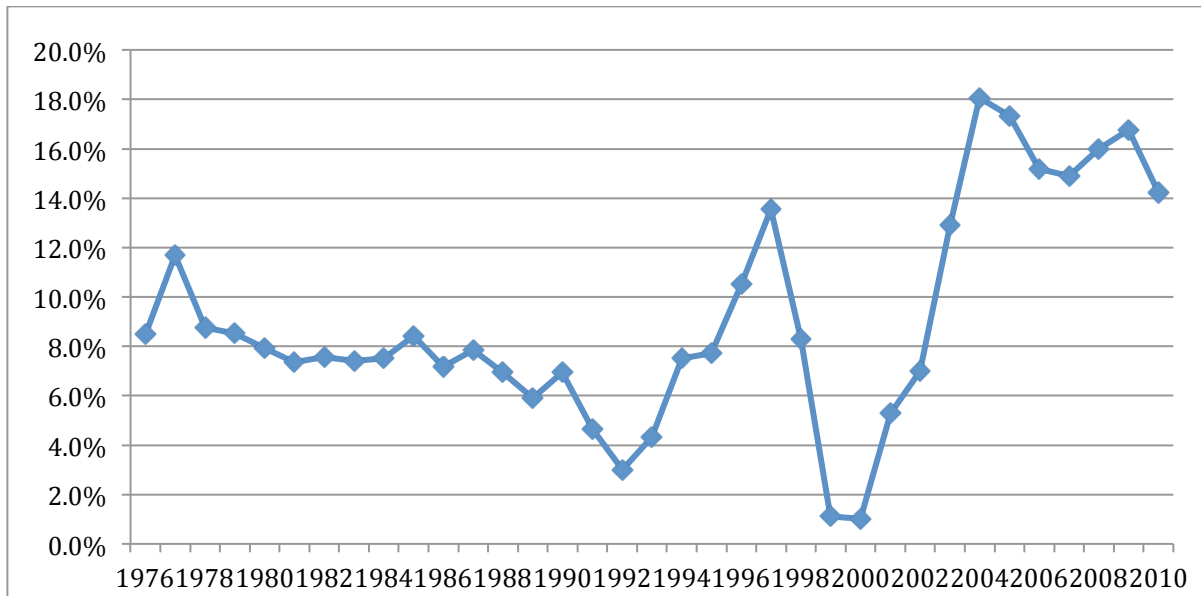
Source: Financial Reports, AFL-CIO Executive Council Reports, 1980-2009. No data available for 2001-2002 and 2005-2006.

By contrast, the Teamsters made a later but more sustained organizing investment, increasing its annual organizing budget to about \$20 million in the early 1990s, and increasing the organizing investment up to almost one-fifth of the union’s entire budget in 2004 and hovering around 14-16% of total expenditures through the 2000s:

Teamster IU total expenditures, 1976 - 2010



Teamster organizing as a percentage of total expenditures, 1976 - 2010

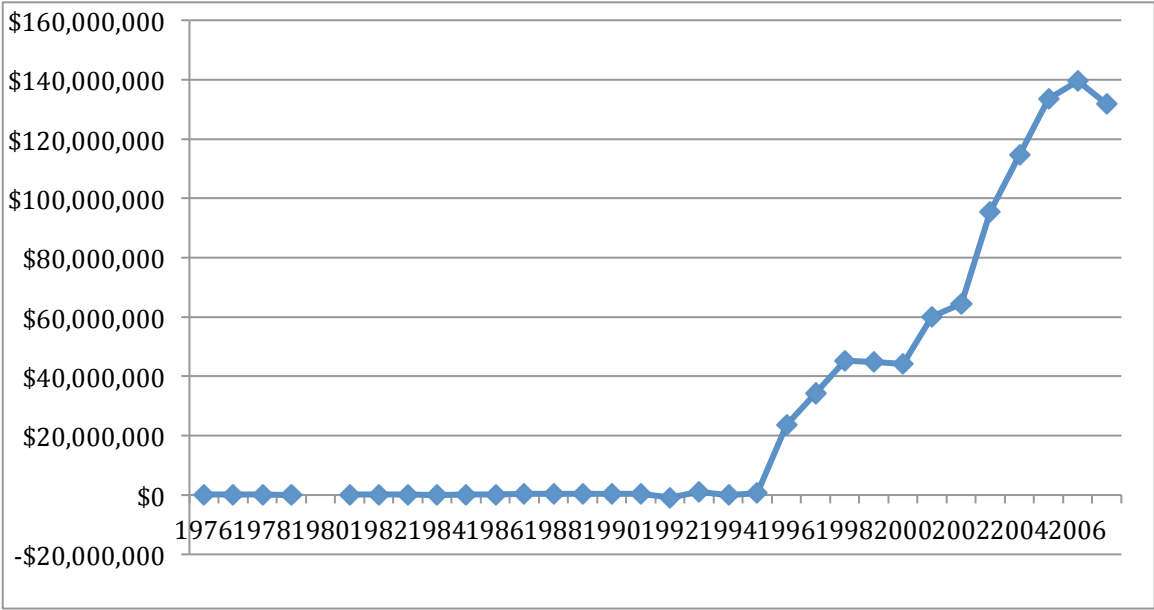


Sources: Audited financial statements

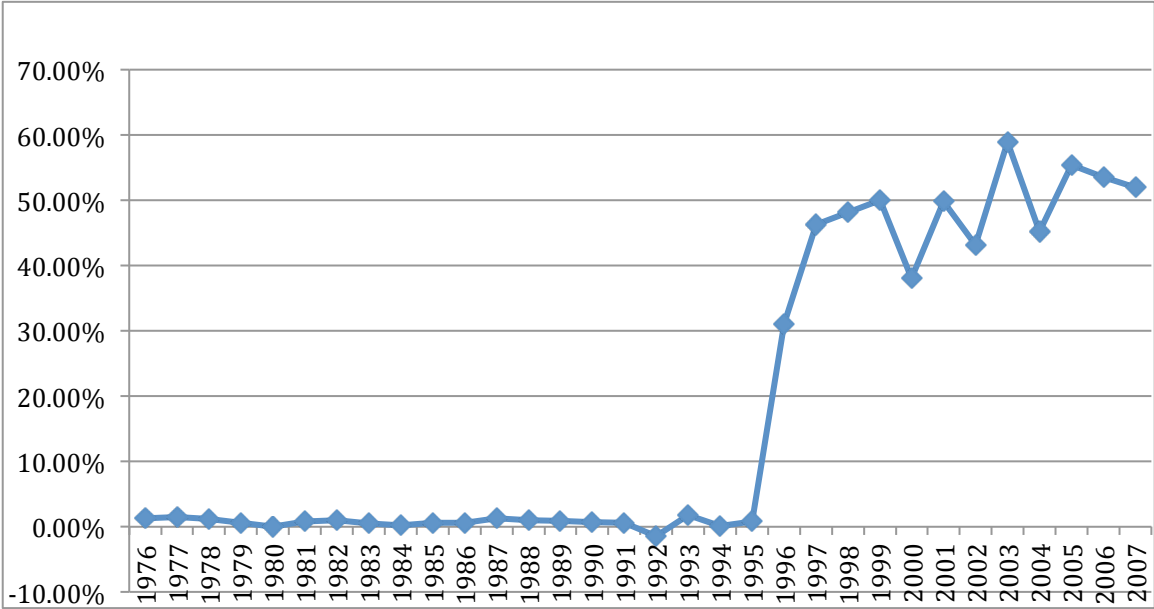
SEIU likewise dramatically increased organizing investments after 1995, dedicating nearly 60% of its total budget to organizing:

In 1996, SEIU’s organizing investment shot up to about thirty percent of overall expenditures, putting real dollars into President Sweeney’s vision for change. SEIU’s overall organizing expenditures floated between forty and sixty percent of overall spending through the 2000s, peaking at about \$140 million in 2006.

SEIU organizing expenditures, 1976 – 2007



SEIU organizing as a percentage of total expenditures, 1976 - 2007



Note: IU expenditures only
 Source: Audited financial statements

Numerous problems with available data make such comparisons dubious. First, there is no uniform standard for allocating expenses as “organizing,” “representational,” or otherwise. Second, some unions fund and operate organizing drives out of local budgets, while others do it through national budgets (which further skews national organizing data). Third, there is no standard reporting of union organizing expenditures (and unions’ federal financial reports for the Department of Labor [DOL] do not break out organizing costs). Most of the above data comes from union convention reports, which are designed to support unions’ leadership agendas and thus should be read with caution. Further, there is very little publicly available data on the numbers of organizers and researchers trained and deployed by the AFL-CIO or affiliated unions. The Food and Allied Services Department and Industrial Union Division of the AFL-CIO were also a prime training ground for researchers and campaigners. But the DOL reports include lists of staffers designated as organizers and researchers, but little more.

Lacking better data, researchers can only rely on what is publicly available. Unions are often chary of releasing detailed information about internal operations. Yet unions might reflect on the fact that research teams such as the Kalmanovitz staff are not able to substantiate claims that unions made a substantial organizing investment, despite their subjective belief that this is so.

As a result of these initiatives, by the early 2000s the labor movement had a large cadre of organizers and campaigners trained in central institutions in common practices of organizing and strategy. A shared approach to organizing and bargaining prevailed across the labor movement. Within the unions, debates flared about the merits of particular unions’ decisions or staffers, but from a distance, it is clear that all the unions’ strategic approaches resembled each other more than they differed. Shared premises included the notion that membership density in a particular sector was required for effective bargaining (sometimes expressed as “density is destiny”); that bargaining worked best when only one or two unions represented members in a sector or firm, and thus unions should be confined to, and take responsibility for, “jurisdictions”; and that any particular union might seek its own survival by adopting a new jurisdiction, regardless of other union presence. Although the latter should be condemned in general, it was difficult to police in the event. Additionally, unions’ decisions to target particular employers and industrial sectors for new organizing implicitly rested upon often unspoken estimations about the viability of bargaining contracts. Thus, unions avoided sectors dominated by small privately-owned firms, such as agency home care, most of FIRE, light manufacturing, and so on.

From the early 1990s through 2008 or so, unions launched an astonishing number of massive organizing drives. These included the decades-long Walmart campaign and geographic campaigns to organize citywide in places like Stamford, Connecticut, or Silicon Valley. Campaigns also organized workers in nursing homes, hospitals, and airports; workers in the auto parts, transplant auto manufacturing, casino gaming, hotel, industrial laundry, coal mining, over the road trucking, and wireless telecoms industries; employees of companies like Amazon and Delta; as well as school bus drivers, janitors, and graduate students.

Fissures

Mustering the resources to conduct all these drives strained the internal politics of many unions. Funds and staff previously dedicated to serving the needs of existing members—handling grievances, bargaining contracts, organizing social and educational programs—were

redirected to recruiting new members. This reallocation of institutional capacity—termed “change to organize”—sometimes involved centralizing political control through merging union locals and appointing staff leaders who were committed to new organizing. Likewise, many unions attempted to embed organizing demands in negotiations to renew existing contracts, in what was termed “bargaining to organize.” The weakness of their bargaining positions with many employers made such demands hard to win.

Strains among unions were more visible, and volatile. The AFL-CIO had been constituted as a weak governing body from its start, charged mainly with arbitrating jurisdictional disputes between unions and coordinating political action. The federation had little ability to enforce demands or decisions on its affiliated unions. As unions stepped up their organizing activity, rivalry among them increased. Competition to organize public-sector workers and health care workers, both of which were seen as easier to organize (the former due to lack of employer opposition, the latter because corporate health care indignities outraged caregivers) escalated. When states passed new public-sector bargaining laws, such as Kentucky or New Mexico, organizers from numerous unions swarmed. Unions often demanded that the AFL-CIO arbitrate these disputes, but frequently refused to abide by the arbitrators’ decisions. Mineworkers organized nurses, the UAW organized graduate students, and the Teamsters organized school workers. Unions that claimed these occupations as their jurisdictions were outraged.

John Sweeney’s election to the AFL-CIO presidency in 1995 was an early sign of the growing strife. A number of unions banded together to override the heir apparent to the federation presidency and elevate Sweeney, who was seen as a representative of the new organizing cadres in the labor movement. Within a few years, though, dissatisfaction with the AFL-CIO’s leadership mounted. Sweeney’s administration had attempted to compel affiliates to organize within their designated jurisdictions, through awarding special organizing grants and developing strategic plans for unions. Few affiliates abided by AFL-CIO directives. Leaders at SEIU, HERE, and UNITE argued that the proliferation of small unions and the jurisdictional promiscuity of large unions created structural impediments to new organizing. Unions should merge and swap members, creating single unions dedicated to industrial sectors, and they should create a strong central governing body able to enforce discipline and broker coordination among unions sufficient to win large-scale organizing campaigns.

Ten years after Sweeney’s election, seven unions broke from the AFL-CIO to create a new labor federation, Change to Win, which proclaimed itself dedicated to the principles of industrial organizing and shared discipline. In some ways, the CtW break was a rerun of the 1995 conflict, with many of the same protagonists; this time, they abandoned hopes of transforming the entire labor movement, and instead aimed to create a coalition of likely survivors. CtW soon ran into some of the same problems that had stymied the AFL-CIO. Political conflict split up UNITE-HERE (a merger of a union with a good jurisdiction but no money with another with a weak jurisdiction but a big bank account) and SEIU attempted to organize among hotel workers. CtW’s governance proved no more able to solve jurisdictional squabbles than the AFL-CIO, and UNITE-HERE soon decided to return to the AFL-CIO.

Although CtW did not achieve the breakthrough that its supporters had hoped for in 2005, it did set up a Strategic Organizing Center that initiated far-sighted campaigns including efforts to organize port truckers and Walmart associates, and a push to finally win victory in the

long struggle to organize the meat packers of Smithfield. As animosities unleashed by the 2005 labor split cooled down, some AFL-CIO unions, including the United Automobile Workers and the Communication Workers of America began working with the Strategic Organizing Center, strategizing campaigns together.

The Strategic Organizing Center might now provide the best hope for the development of movement-wide collaborations on large-scale organizing campaigns. Significantly, when the United Food & Commercial Workers left CtW to rejoin the AFL-CIO, it did not leave the Strategic Organizing Center. Instead, the UFCW helped broker an agreement that provided for official AFL-CIO representation on the SOC for the first time. This has brought the AFL-CIO and CtW closer to healing the breach of 2005. Although the SOC has yet to fulfill the hopes that many hold for it as a center that can catalyze mass organizing, and while jurisdictional disputes and institutional rivalries continue to hamper labor unity, the SOC now provides the best vehicle to transcend these barriers that labor has possessed in recent times.

Alternative Worker Organizations

As unions struggled to overcome their divisions and rekindle organizing, a different kind of worker movement with a different set of organizations had been quietly growing among immigrant workers in the late 20th century. Immigration reform in 1965 opened American borders to Asians, Africans, and South Americans, while also criminalizing the longstanding migration circuit between the US and Mexico. Amnesty in 1986 and NAFTA after 1994 brought floods of new immigrant workers, mostly Latino and Asian, to the US. Many of these workers labored in sectors excluded from the NLRA, such as domestic and agricultural work, or in sectors sparsely penetrated by unionization such as restaurants.

“Worker centers” sprang up across the country in the 1970s and 1980s. In several cases, immigrant workers created mutual-aid organizations, organized along ethnic lines and providing benefits such as English-language classes and housing advocacy, and later added worker issues to their portfolios. In other cases, legal clinics and social service clinics for immigrants began concentrating on workplace advocacy. Worker centers used legal tactics to demand enforcement of basic labor standards such as the minimum wage for members, and were often led by lawyers who knew how to navigate regulatory bureaucracies. With low-wage members usually dispersed across employers and industries, early worker centers could not win improvements above regulatory standards for members, as unions generally could, and they lacked stable funding. However, worker centers did not suffer from many of the structural challenges facing unions. Members could easily “join,” and the worker center’s survival did not depend on winning contracts with particular employer or industry.

Beginning in the late 1990s, some worker centers sought to organize more deliberately by sector or occupation and to use legal tools like lawsuits and boycotts to secure benefits for their members as a group. Groups like the Restaurant Opportunities Center and the Taxi Worker Alliance began to occupy a middle ground between traditional unions and lobby groups, taking advantage of their status as institutions that were not defined as “labor organizations” that sought “collective bargaining” under federal labor law, they were able to use tools forbidden by federal law to unions.

The institutional labor movement began to take notice of, and embrace, some of the tactics and organizations from the worker center movement. Many unions had noted the militancy of immigrant workers and sought to recruit them and borrowed ideas from worker centers to connect with immigrant workers. In other cases, unions saw worker centers as a way station for entry to the institutional labor movement, hoping to accrete or affiliate them. Finally, in some cases, unions saw worker centers as an instructive alternative to the problems plaguing traditional unions; worker centers did not require certification by the NLRB or recognition by employers to take action. At the same time, worker centers had limited power to win gains for their members beyond those already guaranteed in the law, if not enforced. Worker centers seemed like one way to solve the problem of organizing, but not of bargaining.

In the early 2000s, organized labor embraced the worker center movement wholeheartedly. The AFL-CIO affiliated several worker centers as formal members of the federation, while other unions simply created their own worker centers.

Results

Unions achieved the most organizing successes in property services, the public sector, and in health care organizing. The biggest gains arose from unions' creative collaboration with friendly state and local governments to classify home-care and child-care providers who received public subsidies as state workers who could bargain collectively with state and local governments. But most organizing campaigns failed to achieve the goal of bringing new members under contract. These failures spanned the labor movement; outside of health care and the public sector, very few new organizing campaigns succeeded, regardless of the union responsible.

Today, it appears that the organizing push has run its course. The number and scale of union organizing campaigns has dwindled dramatically. Many of the institutions created to sustain new organizing like the OI or Center for Strategic Research are greatly reduced. Many of the major campaigns underway, like OUR Walmart or Warehouse Workers United, explicitly aim to create non-union workers organizations as an intermediate step, with NLRA-certified recognition and bargaining envisioned as a remote hope.

A detailed look at some case studies of labor's organizing efforts of the past two decades and some of the creative workarounds those efforts deployed can help to sharpen our sense of the *systemic nature* of the problem that labor is confronting.

3. Lessons from Individual Case Studies

This paper began as an effort to illuminate the hard work and good thinking that's gone on inside the labor movement over the past twenty-five years. Unions have devoted more energy, resources, and creativity to organizing than most people (even inside the labor movement) realize. As we discover in our analysis of recent organizing history, however, the organizing campaigns themselves reveal structural phenomena far deeper than workplace dynamics. Worker organizing campaigns attempt to tackle core structural transformations in the economy—globalization, financialization, fissured industries, technological advance, and complex supply chains and raise fundamental questions about the current policy framework for

collective bargaining, collective action, and the sustainability of democratic worker organizations.

Structural Challenges & Creative Responses (“Hacks”)

For the past year, we’ve looked across unions, worker centers, geographies, and sectors to survey the landscape of worker organizing campaigns—from farmworkers to port truck drivers and freelancers. The diagram below (designed by Seth Newton Patel) offers one way to conceptualize a taxonomy of the various tools and strategies that worker organizations have employed in an effort to organize and bargain. Some have focused on the employer, some on the worker, and some on legal, political, international or community based approaches. Many campaigns made use of multiple tools.

As the labor movement experimented with a range of strategies to win organizing, contract, and policy campaigns over the past three decades, labor organizations implemented a range of tactics that worked around the many constraints of the NLRA regime. These innovations push against the structure of current law. The NLRA codifies a three-step process for collective bargaining, establishing the rules of play for organizing, representation, and the bargain itself. Federal labor law structures the bargain as between an individual employer and a specific bargaining unit. Organizing campaigns, out of necessity, looked beyond the employer to other sources of capital and leverage up and down supply chains, used other legal and political mechanisms to get to recognition, worked in solidarity globally and with community groups on multi-issue campaigns, and developed new types of worker organizations that fall outside traditional NLRA boundaries. Sophisticated organizing campaigns include “pre-bargaining” strategies, looking ahead to structural labor market limitations that limit employers’ ability to bargain and redefining who should be the employer (or joint employer) for the purposes of collective bargaining.

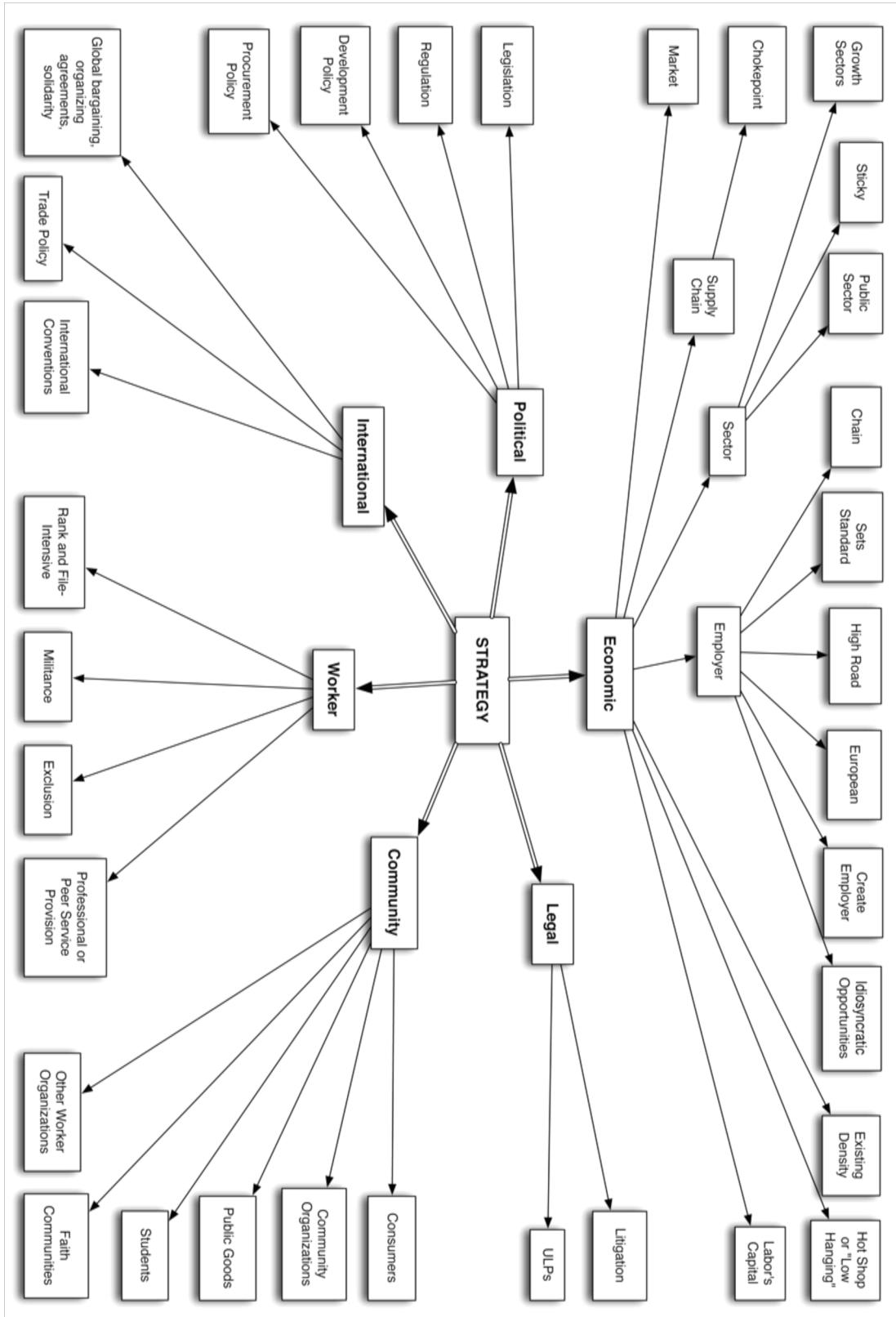
Through this persistence, organizing campaigns have pushed the bounds of the current system and come up with ways around usual ways of doing labor relations. We call these workarounds “hacks,” borrowing a term used in computer science to describe an “elegant technical accomplishment . . . a clever routine in a computer program . . . a temporary, jury-rigged solution.”⁴ In this context, hacks creatively circumvented structural challenges to organizing and bargaining, usually in a one-off fashion. Hacks often go underreported and unanalyzed. We believe these hacks contain seeds for thinking about new frameworks for labor relations.

Looking across the labor movement, we identified six key hacks to the current system.

Reconstructing the bargain: strategies to organize and bargain beyond the individual employer, such as organizing entire markets rather than individual companies, bargaining with purchasers or financiers up and down supply chains, establishing public authorities as employers of record for collective bargaining, securing retention agreements with public authorities, and creating public and private mechanisms to enforce such agreements.

⁴ Greenie, “Hack,” *Urban Dictionary* (Mar. 24, 2004), <http://www.urbandictionary.com/define.php?term=hack&defid=576436>.

Taxonomy of worker organizing campaigns



“Public goods” unionism: strategies that align organizing and bargaining with community interests such as living wage, affordable housing, environmental justice, public health, or food justice demands.

Capital strategies and public investment: using investment strategies, such as shareholder mechanisms, private equity, and public financing, to drive organizing and collective bargaining objectives within the confines of legal obligations.

Alternative institutions and outcomes: creating alternative forms and organizations that support worker collective action and improve wages and working conditions but do not engage in traditional collective bargaining, including minority unions, worker centers, open source organizations.

Worker militancy: militant collective action, through work stoppages, civil disobedience, and other forms of social protest, including occupations, wildcat strikes, and mass protest.

Alternate union-recognition-seeking strategies: Unions have employed a variety of mechanisms to avoid bitterly contested elections under an NLRB regime in which the employer holds the balance of power.

Below we outline each of these hacks in more detail, but first we highlight four points in regard to our analysis:

- This paper is not intended to catalogue every worker organizing strategy attempted over the past thirty years. Rather, we highlight examples of campaigns that “hack” around the current system and point to key insights about labor relations in the new economy.
- This paper does not suggest any one of the “hacks” is a model for the future. Indeed, no one of these workarounds has gone “viral” or changed the overall trajectory of declining labor union membership. And many have been wholesale failures.
- Instead, the analysis scans the landscape of organizing over the past thirty years and helps give that landscape some shape by identifying trends that hack around the current system of labor relations and expose weaknesses in the current framework. These trends point to the tough questions and can help bridge the lessons and hard work of the past with conversations about the future.
- Finally, the analysis documents a great deal of creativity in worker organizing and numerous large-scale “hacks” that attempt to overcome the deficits of the NLRA. Many of these innovations pointed to serious deficits in federal law that EFCA rightly sought to resolve. But in many ways the level of investment and experimentation in organizing surfaces a deeper and more existential question about collective bargaining: explicitly.

Successful organizing campaigns over the past thirty years tended not to focus on the problem of organizing by itself, but also developed creative ways of addressing bargaining power within the sectors that they were organizing. The cause for the failure of these many different and varied forms of organizing cannot be laid to outdated labor

laws and employer resistance alone, but rather is systemic in nature, flowing from a constellation of forces and developments. These include (but are not limited to) changes in structure of the national and global economy, the role that government and the courts play in regulating economic life, the structure and function of corporations and financial markets, the decreased leverage that the workplace holds as an arena for coalescing and deploying collective power, and degree to which the political system has become polarized and paralyzed. The hacks expose points of friction between the current system of labor relations and the economy, business dynamics, and political and social norms that have grown up around it.

Hack	Example 1	Example 2	Example 3
<p><u>1. Reconstructing the Bargain</u></p> <p>Dealing with actors up the supply chain to overcome employer resistance</p> <p>Redefining “employer” for purposes of bargaining</p> <p>Increasing wages through contracts with actors up the supply chain</p> <p>Organizing independent contractors</p> <p>Experimenting with enforcement mechanisms</p>	<p><u>Justice for Janitors</u></p> <p>Secondary activity aimed at negotiation with building owners</p> <p>Density trigger for bargaining across local labor market</p> <p>Private trust fund to ensure compliance across the local industry</p>	<p><u>Coalition for Immokalee Workers</u></p> <p>Dealt directly with food retailers to increase worker wages a “penny per pound”</p> <p>Established a code of conduct with tomato growers</p> <p>Private enforcement mechanism for the code -- agreements with food retailers to pull supply contracts with growers who don’t comply with codes</p>	<p><u>SEIU Public Authority</u></p> <p>Publicly-funded home health care workers (independent contractors) negotiate wages and working conditions with a local public authority, including consumer and community representatives</p> <p>Elderly and people with disabilities retain the ability to hire and fire home care workers but are not employers for purposes of bargaining</p>
<p><u>2. Public Goods Unionism</u></p> <p>Aligning worker interests with community interests.</p> <p>Constructing coalitions and institutions to negotiate diverse stakeholder interests.</p> <p>Addressing structural challenges in federal law and policy that stand in the way of worker-community collaboration.</p> <p>Reinventing the role of unions, including watchdog capacity</p>	<p><u>Community Coalitions</u></p> <p>Environment and Worker Justice: Clean and Safe Ports Campaign</p> <p>Food Justice: MOSES Supermarket Task Force in Detroit/UFCW</p> <p>Recycling and Waste Management: LAANE’s “Don’t Waste LA”</p>	<p><u>Community Benefits Agreements</u></p> <p>LAANE and UNITE-HERE hotel development, securing card check, neutrality, prevailing wage, etc.</p> <p>Airport concession</p>	<p><u>Shared Interests/Watchdogs</u></p> <p>Union workers’ role as watchdogs in public service delivery, bank practice, environmental standards, etc.</p> <p>Market intermediary, Writers Guild screen credit determination Unions as social service provider</p>

<p><u>3. Capital Strategies and Public Investment</u></p> <p>Investing in quality jobs with public and private resources.</p> <p>Using capital as leverage</p> <p>Securing contract language on profit sharing, executive compensation, etc.</p> <p>Revitalizing training programs in the trades</p>	<p><u>Pension Fund Investments</u></p> <p>AFL-CIO’s Housing Investment Trust and Building Investment Trust)</p>	<p><u>Private Equity Deals</u></p> <p>SEIU and US Steelworkers efforts to influence leveraged buyouts, get bargaining language for profit sharing, controls over executive compensation, etc.</p>	<p><u>Public Investment</u></p> <p>Green jobs: Community Labor United’s Green Justice Coalition and the Emerald Cities Collaborative</p> <p>Government Purchasing and Personnel Contracting</p>
<p><u>4. Alternative Institutions and Outcomes</u></p> <p>Range of organizing strategies, including use of NLRA’s “protected concerted activity”</p> <p>Primary goal other than collective bargaining (e.g., judicial settlement agreements, one-off worksite solutions, legislative efforts)</p> <p>Use of technology to build solidarity with beyond the worksite</p>	<p><u>Minority Unions</u></p> <p>Alliance at IBM, Washington Alliance of Technical Workers, and Texas State Employees Union</p> <p>Organization United for Respect at Walmart (OUR Walmart)</p>	<p><u>Worker Centers</u></p> <p>Path to unionization for non-union workers (9to5, Retail Action Project)</p> <p>Use of wage and hour law and non-discrimination lawsuits to secure better wages and working conditions</p> <p>Dynamic relationships between traditional labor and worker centers (e.g., AFL-CIO agreements with taxi workers, day laborers, and domestic workers)</p> <p>Representation of excluded workers</p>	<p><u>Open Source Union</u></p> <p>Occupational or craft association (e.g., Freelancers Union)</p> <p>Non-union workers united around union goals (e.g., AFL-CIO’s Working America or SEIU’s Purple Ocean)</p> <p>Web based platforms to create common cause between consumers, community, and workers (e.g., Coworker.org petition model)</p>
<p><u>5. Worker Militancy</u></p>	<p><u>Wildcat Strikes and Worker Actions</u></p> <p>Pittston Strike</p> <p>United Electrical, Radio and Machine Workers of America (UE) at Republic Windows in Chicago, negotiated a deal for severance directly with banks</p>	<p><u>Occupy</u></p> <p>Direct action on economic issues -- finance, housing, prison industrial complex, etc.</p>	<p><u>Immigrant Rights</u></p> <p>Broad based social movement with close ties to labor and</p>

<p><u>6. Alternate Union Recognition-Seeking Strategies</u></p> <p>Unions have pursued a variety of strategies to avoid bitterly contested elections under an NLRB regime in which the employer holds the balance of power.</p>	<p><u>Card Check</u></p> <p>Unions push employers to agree to union recognition by accepting a majority or a super-majority of signed authorization cards as evidence of union support in lieu of a contested election under the supervision of the NLRB.</p> <p>Example: UNITE HERE organizing in hotels and food service.</p>	<p><u>Neutrality Agreements</u></p> <p>Unions obtain agreements from employers—often those who collective bargain in some settings—in which employers agree to neutrality in a union’s bid for recognition in an unorganized workplace (with recognition often to be secured through a card check rather than an election).</p> <p>Example: UAW organization of the Dana Corporation.</p>	<p><u>Election Procedure Agreements</u></p> <p>Unions negotiate an agreement with employers regarding the “rules of engagement” that govern a union election campaign. Both sides agree not to use certain weapons and elections are expedited.</p> <p>Example: SEIU’s organization of Catholic Healthcare West.</p>
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Six Key Hacks to the System

Category #1: Reconstructing the Bargain

The reorganization of economic power in the US economy, including the fissuring of business operations among layers of subcontractors and concentrations of equity and capital at the top of the chain, has required the labor movement to experiment with a variety of strategies to organize to scale. The NLRA constructs the collective bargaining relationship as between a union and individual employer, ignoring the reality of subcontractors, supply chains, and greater and greater specialization of services.⁵ Of course, unions and community-based worker organizations confront these realities every day. In response, they have constructed strategies to bargain beyond an individual employer— bringing more powerful economic actors to the bargaining table and establishing employers with whom to bargain where none exist. Strategies include: organizing entire markets rather than individual companies, bargaining with purchasers further up supply chains in addition to direct employers, establishing public authorities as employers of record, securing retention agreements with public authorities to ensure that facilities remain unionized as employers change, and developing mechanisms to systematically enforce such agreements.

Justice for Janitors: Organizing a Fissured Labor Market

The Service Employee International Union (SEIU)’s Justice for Janitors campaign is an example of a strategy that has organized local markets of janitors working for cleaning contractors. While the campaign is perhaps best known for its use of militant tactics (famous for shutting down Washington DC’s 14th Street bridge during rush hour), its strategic decisions to

⁵ David Weil, “Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division” (2010) available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

target building owners, not the janitorial subcontractors themselves, and then establish a “density trigger” for bargaining, were critical to its ongoing success in the organizing campaign and at the bargaining table.⁶

SEIU established a centralized campaign apparatus for the Justice for Janitors campaign and targeted labor markets where the local union would work closely with the international. The union recognized two conditions in the janitorial labor market: (1) if they were to succeed at organizing any cleaning contractors, they would have to organize most of the contractors in a market and (2) to do that the unions needed to agree to not bargain wage or benefit increases until a majority of the contractors had recognized the union, so as to not put organized contractors out of business. Justice for Janitors launched in Denver and had some success using local political pressure to move janitorial contractors to the table. The campaign had less success using a similar political tactic in Atlanta. In Washington, DC and Los Angeles, however, Justice for Janitors hit upon its winning formula. Using militant tactics, workers targeted the building owners and used secondary tactics that skirted the edge of the law, picketing the buildings themselves and showing up at building owners’ homes, country clubs, and restaurants. In DC, they also used municipal law to shake up the owners, slowing down real estate and development zoning requests. Ultimately this pressure worked, bringing building owners to the table and forcing card check neutrality agreements with the subcontractors.

Once the janitors were signed up for the union, Justice for Janitors turned its attention to the bargaining table. Contractors were much more likely to recognize the union or pay higher wages if they knew they would not face a competitive disadvantage, so J for J relied on a “density trigger.” Once a large percentage of contractors recognized the union, they would begin negotiations for wage and other economic benefits. The campaign took this one step further, lining up the end dates for janitorial contracts in various cities and effectively triggering a nationwide negotiation with janitorial service contractors when the contracts were up.

While the density trigger facilitated bargaining across entire labor markets, the “density” of the labor market standards established through those campaigns needed to be supported and maintained over time. Non-union contractors had to be discouraged from undercutting collective bargaining agreements through lower wages and violations of wage and hour laws or worker’s compensation insurance or payroll tax requirements. Borrowing a page out of the Building Trades’ tactics to enforce union standards across markets, SEIU’s local in southern California created an employer-funded, jointly governed watchdog organization to facilitate enforcement actions against contractors who undercut union standards.⁷ The Maintenance Cooperation Trust Fund (MCTF) was included as part of the 2000 collective bargaining agreement with janitorial contractors in Los Angeles. In addition to facilitating monitoring and compliance with basic labor standards, the MCTF has won a class action lawsuit and participated in efforts to pass favorable wage and hour legislation.

⁶ Jennifer Luff, “Justice for Janitors,” *Encyclopedia of U.S. Labor and Working-Class History, Volume 1*, edited by Eric Arnesen, (New York: Routledge, 2007), 729-731.

⁷ Karina Muñiz, “The Janitorial Industry and the Maintenance Cooperation Trust Fund,” *Working for Justice: The L.A. Model of Organizing and Advocacy* 211, edited by Ruth Milkman, Joshua Bloom, & Victor Narro, (Ithaca: ILR Press, 2010); Cynthia Estlund, *Regoverning the Workplace*, (New Haven: Yale University Press, 2010).

SEIU organized LA, DC, and other urban and suburban markets. Workers won substantial wage increases and family health insurance after lining up contracts across markets. SEIU also attempted to adapt the density trigger to other industries, achieving success in organizing security guards, but failing to organize nursing homes with the “JfJ” model.

Coalition of Immokalee Workers: Negotiating up the Supply Chain

The Coalition of Immokalee Workers (CIW) Campaign for Fair Food also developed a strategy that aims up and over the direct employer. Unlike janitors, farmworkers fall outside the protections of the NLRA. But, as “excluded workers” they are also free to engage in secondary boycotts and “hot cargo” agreements that would otherwise be restricted by federal law. The CIW brings retail purchasers in tomato farm workers’ supply chain into agreements that directly fund wage increases through a “penny per pound” premium.

Like the cleaning contractors in the Justice for Janitors’ campaigns, Florida tomato growers face tremendous competitive pressures and tight margins, while fast food, food service, and supermarket companies purchasing tomatoes have greater resources, reach, and brand vulnerability relative to the growers. Food retailers agree to a “premium payment” (known popularly as a “penny per pound”) that is delivered through workers’ paychecks in a line item marked “Fair Food Program,” not as part of the wage itself. This is both a symbolic and practical distinction, communicating to tomato workers that the bonus is a direct result of the Coalition’s collective action as well as establishing a new form of “wage” that is sourced from a “secondary” employer up the supply chain, not the primary employer.⁸

With its national boycott of Taco Bell, CIW began winning agreements in 2005 and began implementing them in 2010.⁹ Through well-orchestrated boycotts in coalition with the Student Farmworker Alliance, faith groups, and high profile public figures, CIW secured private contracts with purchasers such as Yum Brands (including Taco Bell), McDonald’s, Burger King, Whole Foods, Bon Appétit, Aramark, Compass, Trader Joe’s, and Sodexo. As with Justice for Janitors, a key variable in CIW’s success has been the secondary boycott—using moral and consumer power to shame retailers into “penny per pound” agreements.

In addition to the “penny per pound” wage supplement, the CIW negotiated a “Fair Food Code of Conduct” with the “Fair Food Alliance”—made up of food retailers and the Florida Grower’s Association. The Code of Conduct covers a range of workplace conditions such as breaks, health and safety, and advancement.¹⁰ Growers agree to independent monitoring and an investigation and remediation process. The Fair Food Standards Council, an independent non-profit, manages the monitoring and enforcement scheme. If Growers violate the code they face penalties, including an end to their contracts with retailers in the Fair Food Alliance.

⁸ Nancy Kinnally, “Schell defends workers who say their pay didn’t add up to beans,” *The Florida Bar Foundation*, <http://www.flabarfdn.org/about/news-publications/newsletter/Migrant.aspx>.

⁹ Barry Estabrook, *Tomatoland: How Modern Industrial Agriculture Destroyed Our Most Alluring Fruit* (Kansas City: Andrews McMeel Publishing, 2011).

¹⁰ *Fair Food Standards Council*, <http://fairfoodstandards.org/code.html> (last visited Sept. 26, 2012). The Coalition is launching a grassroots worker education campaign in an effort to ensure grower and purchaser compliance

The CIW refined and expanded upon supply chain strategies used in the international context. Garment worker advocates, including United Students Against Sweatshops and the Worker Rights Consortium, have been at the forefront of developing, monitoring, and enforcing codes of conduct governing the production of university apparel.¹¹ For example, when Russell Athletic closed a unionized factory in Honduras, students successfully pushed universities to drop nearly 100 licensing deals; in 2009 Russell agreed to rehire 1,200 union workers and abide by collective bargaining agreements. An early campaign to influence these innovations is the Asian Immigrant Worker Advocates' successful campaign to hold the Jessica McClintock apparel brand responsible for paying wages owed by one of the designer's garment factories.¹²

Homecare Workers/SEIU: Establishing an Employer of Record

Homecare workers are often independent contractors, which poses a challenge to any organizing effort as the workers are often dispersed, working in different locations and are not considered "employees" under most labor and employment law.¹³ In California, publicly funded home health care services were increasingly provided primarily through the "independent provider" model, also known as "consumer-directed care." Under this model, people with disabilities and the elderly hire home health care aides and have the authority to fire workers. But those same home care aides are paid through the In-Home Supportive Services (IHSS), the division of the California Department of Social Services that administers public financing for elderly and disability social welfare programs. As a result, there are multiple actors involved in the employer-employee relationship, creating one more challenge for contract workers who want to identify an "employer of record" for bargaining purposes.

The most direct route would have been for the state to hire home health care workers as employees. But for various reasons—including state budgets—SEIU had to develop some other mechanism that would allow for collective bargaining. In 1990, an SEIU task force began to develop the parameters of a "public authority" that would provide home health care workers the ability to bargain collectively without becoming traditional public employees.¹⁴ Initially, a 1991 budget rider permitted counties to establish a public authority that would serve as an employer of record for homecare workers. Public authorities could be the local Board of Supervisors or an independent, freestanding organization separate from the county legislature. Several counties established public authorities for homecare workers by the mid-1990s and soon after that the California state legislature passed legislation requiring every county to get a public authority up and running by 2003.¹⁵

The California home health care model redefined employer-employee relations in the public sector, moving beyond the assumption that the state, or a single employer, controls every

¹¹ Dan Clawson, *The Next Upsurge: Labor and the New Social Movements*, (Ithaca: ILR Press, 2003).

¹² Miriam Ching Yoon Louie, *Sweatshop Warriors: Immigrant Women Workers Take on the Global Factory* (Cambridge, MA: South End Press, 2001); Clawson, *supra* note 11.

¹³ Linda Delp & Katie Quan, "Homecare Worker Organizing in California: An Analysis of a Successful Strategy," *27 Labor Studies Journal* 1 (2002).

¹⁴ Eileen Boris & Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* (New York, NY: Oxford, 2012).

¹⁵ *Id.*; A.B. 1682, 1999 Leg., 1999-2000 Sess. (Ca. 1999).

aspect of the bargain. In this instance, the unions conceded the right to hire and fire home health care aides to consumers of the services—people with disabilities and the elderly—because of the very personal nature of the relationship. The state budget office effectively set wage rates and the public authority regulated specific labor markets. As a result, the “employer” side of the equation included three relevant actors—the public authority (wage levels and working conditions), the consumers themselves (hire and fire decisions), and the state government (budget).

SEIU’s campaign organized more than 100,000 homecare workers in California alone. Based on the California success, SEIU and the American Federation of State, County, and Municipal Employees (AFSCME) began homecare and childcare worker organizing campaigns in other states.¹⁶ The public authority model certainly falls short of labor’s ideal—making home health care aides public employees. But public authority and political oversight have enabled unions to organize and bargain on behalf of independent contractors.

The SEIU home health care victory was in the context of public financing and a heavily regulated social service system. Other domestic worker organizations continue to wrestle with the question of how to best organize and bargain beyond individual employers in the private market. New York State’s Domestic Worker Bill of Rights established labor standards for domestic work and directed the New York State Department of Labor (NYDOL) to issue a report on the “feasibility” of collective bargaining for state domestic workers.¹⁷ The NYDOL report found it would be quite easy to give domestic workers the legal protections of labor law—simply change the definition of “employee” to include them—but the actual “implementation of collective bargaining for domestic workers . . . would be much more complicated.”¹⁸

Domestic workers are often paid “off the books” and, like California’s home health care aides, their work is highly decentralized, working at various locations for different employers. The NYDOL report identified solutions similar to SEIU’s public sector model—centralizing the “employer of record” in a private agency that covered a neighborhood or was made up of a voluntary network of employers and allowing workers to enter into a “master agreement” for wages and working conditions within that network.¹⁹ But the logistics of pulling this off would be difficult. The report also recommended a closer look at the trades’ hiring hall model—where the worker organization would provide training, establish health insurance pools, and perhaps

¹⁶ See also ACORN’s United Labor Unions efforts. Vanessa Tait, *Poor Workers’ Unions: Rebuilding Labor from Below*, (Cambridge, MA: South End Press, 2005).

¹⁷ Ai-jen Poo, *Organizing with Love: Lessons from the New York Domestic Workers Bill of Rights Campaign* (2010). *But see* veto message on California Assembly Bill 889, Governor Edmund G. Brown, Jr. (rejecting AB 889 due to questions about the budget and labor market consequences for “an untested legal regime for those that work in our homes”).

¹⁸ *Id.*

¹⁹ *Id.* (“For example, in New York City the ‘Employers for Justice Network,’ a project of Jews for Racial and Economic Justice (JFREJ), is a network whose members are present and former, full-time and part-time employers of nannies, housekeepers and elderly caregivers who, through the Network, have made concrete improvements in their employment practices.”).

establish some sort of certification for domestic workers along with setting wage rates and establishing employer codes of conduct.²⁰

Observations

Justice for Janitors, the Immokalee’s Campaign for Fair Food, and homecare worker campaigns have reconstructed the bargaining relationship in ways that go well beyond the NLRA regime.

- These strategies challenge the assumption that the collective bargaining relationship is a one-to-one, employer to union, relationship.
- NLRA restrictions on secondary boycotts and other secondary pressure limit unions’ ability to engage/target actors other than the direct employer.
- Workers look to other sources of capital to increase wages (e.g., brand-name retail outlets and public budgets) or other mechanisms to improve working conditions (e.g., codes of conduct or public authority regulation).
- These campaigns expand negotiations beyond an individual employer and include multiple actors with different sets of authority over the employment relationships (e.g., Campaign for Fair Food’s Fair Food Standards Council, public authority for home health care workers, or local real estate development boards).
- Supply chains and low wage labor markets require tools and tactics that are not reflected in current law (e.g., labor market “trigger agreements” and private market enforcement mechanisms) or are explicitly prohibited under the NLRA (secondary boycotts).

Category #2: Public Goods Unionism

The power of employers to effectively prevent workers from organizing and bargaining collectively on a mass scale has led unions to build campaigns alongside organizations committed to other public goods. This category of hacks involves campaigns that align organizing and bargaining with living wage, affordable housing, environmental justice, public health, or other social justice demands.

Community Coalitions: Joining Worker Interests with Community Interests

First, public goods unionism—not unlike community unionism—has meant building labor-community coalitions that have more power to win demands, and that have developed a deep, durable solidarity. While coalition building is surely not a new tactic in union campaigns, recent and ongoing examples of public goods unionism suggest models that go beyond simple coalition work and suggest ways to integrate worker and community interests in public policy campaigns and even on the job.

²⁰ See discussion of alternative forms of worker organizations for variations on this theme, including the Freelancers Union.

Beginning in 2006, the Change to Win federation, the Teamsters, and the Los Angeles Alliance for a New Economy (LAANE) built a coalition with nearly 40 environmental, public health, and community organizations to clean up the port trucking industry and organize port truck drivers at the Ports of Los Angeles and Long Beach.²¹ Their shared goal was to improve community health, enhance air quality, and improve wages and working conditions for port truck drivers. Decades earlier, federal legislation deregulated the trucking industry, ending industry rate setting, making it easier for companies to enter the market, and increasing competition. As a result, truck companies changed their business model and hired drivers as independent contractors rather than employees. Wages went down, union jobs declined, and drivers incurred additional operating costs, responsible for their own benefits and forced to buy their own trucks and pay for maintenance.

These drastic shifts in the labor market for truckers—moving from employees to independent contractors, from union to non-union jobs, and from middle class to low wage work—had direct consequences for the local communities near the ports of Los Angeles and Long Beach. As independent contractors, port truck drivers had to compete for business by charging less for their services. They did not have the financial resources to invest in new, environmentally friendly trucks and their old trucks spewed smoke as they drove to and from the ports through local neighborhoods and there were measurable impacts on air quality and public health.

The Port of Los Angeles had wanted to expand and enhance its capacity for increased trade with Asia since the mid-1990s, but was stymied by environmental and community activists—first for violations of the California Environmental Quality Act (including an \$80 million settlement agreement) and then by the threat of an injunction, which would halt another effort to expand. In response to this litigation, the Port of Los Angeles adopted a Clean Air Action Plan (CAAP) that included a commitment to reduce total emissions by 45% by 2012.²²

The CAAP presented an opportunity for the Clean and Safe Ports Campaign. The campaign proposed the “Clean Trucks Program,” limiting access to the Los Angeles and Long Beach ports to trucking companies who accepted a direct contractual relationship with the ports (known as a “concession agreement”) and agreed to a range of standards—new, clean trucks; restrictions on truck routes through local neighborhoods; preferential hiring for the existing workforce; and an “employee provision” that truck drivers be employees of trucking companies,

²¹ Jon Zerolnick, “The Clean and Safe Ports Campaign: False dichotomies and the underground economy versus coalition building and the power of local government,” Paper presented at the Right to the City Conference, UC Santa Cruz, 26 February 2011.

²² *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384 (2011). Certiorari to the United States Supreme Court granted in part on questions related to the “market participant doctrine” and federal transportation law. See *American Trucking Ass'ns, Inc. v. City of Los Angeles*, Cal., 133 S.Ct. 927, (Jan 11, 2013)

not independent contractors.²³ The Los Angeles Port adopted the coalition’s recommendations and incorporated the “Clean Trucks Program” into the CAAP.²⁴

In the past three years, however, the Campaign’s initial political success stalled in the courts. The American Trucking Industry challenged the authority of the Port to require the concession agreement. The Ninth Circuit upheld every element of the Clean Trucks Program except the “employee provision,” suspending the requirement that truck drivers move from independent contractor status to employees and effectively ending that campaign strategy. The Court found the Port went beyond the “market participant” doctrine when it required that independent contractors become employees and crossed the line into regulating trucking companies’ labor practice, in violation of federal law.²⁵ The Supreme Court granted certiorari in the case and will hear oral arguments on April 16, 2013.

Two other examples of community coalitions built around both union organizing and public goods are the national Caring Across Generations campaign and the MOSES Supermarket Task Force in Detroit. Caring Across Generations brings together the National Domestic Worker Alliance, the Direct Care Alliance, SEIU, AFSCME, and disability and aging consumer organizations to address the projected shortage and poor working conditions of direct care workers by passing legislation to: create three million direct care jobs, legalize one million domestic workers, establish a career ladder and labor standards, and establish a direct care tax credit. The CARE coalition is dealing with issues important to workers—the creation of quality of jobs and a path to citizenship—and consumers—quality services at an affordable price.²⁶

The MOSES Supermarket Task Force is made up of Metropolitan Organizing Strategy Enabling Strength (a group of 60 local congregations), UFCW Local 876, and others; the Task Force aims to eliminate food deserts in Detroit by developing community-run grocery stores that provide good jobs to local residents and reinvest profits in the community. The Task Force joins organizations and coalitions across the US struggling for food justice.²⁷ And LAANE is starting up a new effort—“Don’t Waste LA”—to transform the waste and recycling industry in Los Angeles. Right now Los Angeles grants permits to about 150 private waste and recycling companies and most of the workforce is non-union. “Don’t Waste LA” would require those companies to meet certain environmental and labor standards before they could get a city contract.²⁸

²³ http://www.portoflosangeles.org/ctp/CTP_Concession_Agreement.pdf (The employee provision required truck companies to transition their workforce from independent contractors to employees over a period of years, with the goal of having 100% employees for every concessionaire by 2013. Petitioner’s brief for cert).

²⁴ Concessionaire Agreement – Part III(d), available at http://www.portoflosangeles.org/ctp/CTP_Concession_Agreement.pdf (employee provision permanently enjoined in September, 2011). http://www.portoflosangeles.org/ctp/CTP_Notice_of_Court_Decision_Oct26.pdf http://www.portoflosangeles.org/pdf/Notice_of_September_2011_Court_Decision.pdf.

²⁵ *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384 (2011).

²⁶ <http://www.caringacrossgenerations.org/>.

²⁷ See Mark Bittman, *The 20 Million*, N.Y. TIMES, June 12, 2012, available at http://opinionator.blogs.nytimes.com/2012/06/12/the-20-million/?nl=opinion&emc=edit_ty_20120613.

²⁸ Peter Dreier, “Moving in the Labor LAANE,” *20 New Labor Forum* 88, (2011).

Community Benefit Agreements/Project Labor Agreements

A second core strategy developed to use progressive political power and policy to work around the traditional NLRA recognition process is embodied in the community benefits agreements, living wage ordinances, and subsidy accountability agreements won in municipalities across the US. Often driven by labor-community coalitions, such agreements lift oversight from the administrative to the political sphere, using political power to attach labor and community standards—especially organizing rights—to public investment or use of public property.

Pioneered by the Los Angeles Alliance for a New Economy (LAANE) and HERE's (now Unite Here) new hotel development program, community benefits agreements are legally-binding documents signed between grassroots coalitions and a project developer, committing the developer to such measures as card check union recognition and neutrality, prevailing wage construction, local hiring, affordable housing, living wage requirements, space and funds for childcare centers, and resources for community development projects. One variation on community benefits agreements—subsidy accountability agreements—are measures that require subsidized firms to commit to job numbers, for example, and require them to pay back subsidies for jobs that don't materialize, or impose harsh penalties for breaking labor and environmental laws.²⁹

LAANE's early innovations included a 1995 worker retention law saving Los Angeles International Airport (LAX) jobs threatened by privatization, followed by a landmark living wage law covering LAX workers and workers at other locations whose employers received municipal subsidies. LAANE then secured agreements covering major development projects—one hotel and office complex in Hollywood and the Staples Center. These two agreements would be among the first of many community benefits agreements that would facilitate union organizing campaigns in hotels across the US.³⁰ Project labor agreements are being used from Seattle to Pittsburgh relying on a nationwide network, the Partnership for Working Families, for guidance and expertise.³¹

Shared Interests

In some case, workplace demands themselves are synonymous with a public good, if properly identified and prioritized. A classic example of this third variety of public goods unionism is the California Nurses Association's (CNA) successful campaign to win nurse-patient staffing ratios in many of their contracts. After a thirteen-year campaign, CNA won the RN-to-patient ratio law, mandating minimum, specific RN-to-patient ratios (as well as numerous provisions to protect these staffing levels). Taking effect in all California acute-care hospitals in 2004, the ratios led to improved care for patients and the addition of 100,000 new nurses. The California law has become a model for proposed legislation in other states, including

²⁹ Amy B. Dean & David B. Reynolds, *A New New Deal: How Regional Activism Will Reshape the American Labor Movement*, (Ithaca: ILR Press, 2009).

³⁰ Dreier, *supra* note 28.

³¹ Julian Gross, Madeline Janis-Aparicio, & Greg LeRoy, *Community Benefits Agreements: Making Development Projects Accountable* (2005), *available at* <http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf>.

Massachusetts, Illinois, Texas, Arizona, Ohio, Pennsylvania, and Nevada. The CNA needed to build alliances with patients to succeed, identifying and prioritizing a workplace issue synonymous with the public good of quality patient care is innovative and noteworthy.

Workers in the Public Interest

A fourth—and largely untested—strategy of public goods unionism can be found in visions of union members working in the public interest, as consumer watchdogs, improving service delivery, or delivering social services. In the 2000s, for example, SEIU implemented a model of public sector organizing that identified and celebrated front-line workers' ideas to improve public service delivery; the union organized 330,000 public service workers between 1996 and 2010 (this figure includes affiliations and campaigns run jointly with other unions).³² While a campaign is yet to be launched, in the wake of the 2008 financial crisis, one labor strategist envisions a strategy that would organize a union of bank workers and develop these tellers' capacity to intervene when their banks offered financial services or products harmful to consumers.³³ More concretely, the International Longshore and Warehouse Union (ILWU) has acted intermittently as a public interest watchdog: longshore workers conducted work stoppages in 1984 against apartheid in South Africa and in 2008 against the Iraq War.

Environmental sustainability is one arena that offers a great deal of potential for integrating worker and community interests. When Ford Motor Company built a new truck manufacturing plant at the River Rouge location they decided to build the world's most sustainable truck plant, and did it with the full involvement of UAW Local 600. On the front end, workers can improve sustainable workplace practice and job design and serve as watchdogs, securing whistleblower protection and health and safety training through collective bargaining.

In at least one case, a union has successfully positioned itself as a market intermediary, enabling workers to regulate intellectual property rights for their industry. In 1942, the Writers Guild of America (WGA) won their demand for control over the film industry's screen credit determinations—the decisions that identify which writers to credit for the writing in each film. Also in charge of administering the industry's script registry, the WGA was able to survive the de-unionization plaguing other industries in part because the union serves as an intermediary adding value by collectively managing their labor and idea markets.³⁴ Based on this example, winning intermediary rights would appear to be most likely in largely unregulated industries, or industries in the early stages of building regulatory regimes. For example, the Future of Music Coalition is working with unions in the entertainment industries to develop intellectual property regimes that respond to the fast-paced changes in music distribution and the financing for music production. Looking beyond the labor regime in the United States, some European tripartite labor regimes have demonstrated that unions can also function as intermediaries for administration of social programs such as unemployment insurance.³⁵

³² Don Stillman, *Stronger Together: The Story of SEIU*, (White River, VT: Chelsea Green Publishing, 2010).

³³ Stephen Lerner, "Headed to the Bank? Tell Bank Employees About New Whistleblower Protections," *Huffington Post* (Sept. 14, 2010), http://www.huffingtonpost.com/stephen-lerner/new-whistleblower-protect_b_714592.html.

³⁴ Catherine Fisk, "Screen Credit and the Writers Guild of America, 1938-2000: A Study in Labor Market and Idea Market Intermediation." Paper, 2010, *in* From the Selected Works of Catherine L Fisk, *available at* http://works.bepress.com/catherine_fisk/1.

³⁵ Matthew Dimick, "Labor Law, New Governance, and the Ghent System," 90 *N.C. L. Rev.* 319 (2012).

Observations

All four varieties of public goods unionism discussed above expand narrow conceptions of what makes something a “worker issue.” Some of these strategies have successfully used political power to attach standards to public investment and ownership. Others imagine additional seats on labor’s side of the bargaining table or new roles that empower workers to look out for the public.

- Working in the public interest requires collaboration with a range of actors outside the realm of labor relations. Structures for coalitions and mechanisms for power sharing are needed to support ongoing, complex negotiations between labor and community interests (e.g., LAANE, public authorities).
- Unions may need to expand their role in the community to allow for more “give and take” with the public and build community interests into the work of labor organizations (e.g., consumer watchdogs or social service providers).
- Traditional collective bargaining deals with wages and working conditions. Community organizing strategies, however, inevitably include interests outside the workplace including environment, public health, quality of life, and local economic growth.
- Local government and the public sector are directly involved in all kinds of development projects, public service delivery, and social programs that set wages and working conditions for various workers.
- Climate change and technological breakthroughs are forcing major changes in all kinds of industries. Labor could establish a role in these new markets and help shape public-private regulatory structures as watchdogs, consultants on workplace design, or market intermediaries.

Category #3: Capital Strategies & Public Investment

Another set of hacks involves influencing investment itself—public and private—to realize organizing and collective bargaining objectives.

Public Investment

One strategic use of public investment involves driving investment to labor-friendly projects. For example, a handful of labor-community coalitions supported by Partnership for Working Families-affiliated organizations are pushing local governments to use public investments to create green union jobs, hire locally, train workers, and work towards environmental justice through weatherization programs. While still at an early stage, Community Labor United’s Green Justice Coalition has built a coalition of influential organizations in Massachusetts to bring home energy jobs to low income communities, included its priorities in the statewide energy efficiency plan, and participated in negotiating pilot projects in four cities. A similar campaign in New Jersey encountered major hurdles, however, when the

Laborers Union refused to treat community organizations as equal partners and chose to target the Weatherization Assistance Program (WAP), alienating well-established community development institutions central to the WAP.³⁶ The Emerald Cities Collaborative is a national effort aiming to drive public and private investment into similar projects in ten cities across the US, to create green union jobs, hire and train local workers, and “green” the cities. And over the past few years the Sweatfree Purchasing Consortium, working in collaboration with the Harrison Institute for Public Law at Georgetown, drafted a model Sweatfree Purchasing policy to help local governments purchase goods that are made under fair working conditions, including the right to join a union.³⁷

Private Investment

Unions’ influence over investments has not been limited to public investment, but has extended to unions’ stewardship of its significant pension and health and welfare funds. The AFL-CIO’s Housing Investment Trust and Building Investment Trust, for example, invest union pension funds to finance housing and building projects to secure competitive returns for pension plan participants and create union jobs. In addition to direct investment, and also based on their fiduciary responsibility, unions have chosen to intervene in private equity deals to achieve the “corollary outcomes” of organizing rights. For example, SEIU sought to influence the largest leveraged buyout for its time, Bain Capital, Kohlberg Kravis Roberts, Merrill Lynch, and the Frist family’s 2006 buyout of the hospital giant HCA, and the Carlyle Group’s 2007 buyout of nursing home operator HCR Manor Care. Through their involvement in private equity deals, unions have negotiated non-traditional language including profit sharing, controls over executive compensation, and organizing rights.³⁸ And the United Steelworkers of America have done as much as anybody to leverage bankruptcy and structuring buyouts to account for worker interests.

Category #4: Alternative Institutions and Outcomes

As reviewed in the previous section, many conditions—including the exclusion of certain workers from the NLRA’s protections, the tremendous barriers workers face should they organize a union, ossification of the NLRA, and changes in the economy—have led to the development of alternative labor organizations that aim to organize workers and win alternatives to the collective bargaining agreement. Although not always “labor organizations” under the NLRA,³⁹ these organizations serve to organize and/or represent workers in a way that improves

³⁶ Janice Fine, “When the Rubber Hits the High Road: Labor and Community Complexities in the Greening of the Garden State,” *Labor Studies Journal* 36, no. 1 (2011): 122-61.

³⁷ See Model Sweatfree Purchasing Policy, *Sweatfree Purchasing Consortium*, http://buysweatfree.org/model_policy (last visited January 15, 2013).

³⁸ Larry W. Beeferman, “Private Equity and American Labor: Multiple, Pragmatic Responses Mirroring Labor’s Strengths and Weaknesses,” *Journal of Industrial Relations* 51, no. 4 (2009): 543-556.

³⁹ The National Labor Relations Act 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.” Quite intentionally, this definition means that just about all private sector labor organizations hoping for contract negotiations with employers are covered under federal labor law. There are exceptions, however. Certain workers are excluded from the protections of the NLRA—agricultural workers, domestic workers, and independent contractors, for example—and their worker organizations fall outside the

wages, benefits, and/or working conditions. We observe three general categories of alternative organizations—minority unions, worker centers, and open source organizations.

Minority Unions

Minority unions are union-supported, workplace-based organizations that have not been officially recognized by employers or certified as collective bargaining representatives by the NLRB. They remain minority unions because they do not enjoy majority worker support or the workers do not have the right to organize under federal or state statutes. Several minority unions are affiliated with the CWA—minority unions such as Alliance at IBM, Washington Alliance of Technical Workers (WashTech), and Working at GE (WAGE) formed in response to imminent company takeaways or a failed organizing campaign (in the case of WAGE).⁴⁰ Another CWA affiliate, the Texas State Employees Union, exists as a minority union due to the restrictions on collective bargaining for public employee in Texas. Other examples of minority unions include the Graduate Employees and Students Organization (GESO), affiliated with Unite Here, and Dick’s Employee Council, affiliated with the Steelworkers. In 2006, the Steelworkers attempted to use Dick’s Employee Council as a test case for a legal theory that the NLRA allow collective bargaining for minority unions; the NLRB declined the Steelworkers’ complaint and has yet to take action on two different union petitions for minority bargaining rights.⁴¹ While these minority organizations do not have the right to bargain collectively with their employers, they take collective action and have won improvements in wages, benefits, and/or working conditions as a result.

The Organization United for Respect at Walmart (OUR Walmart) is a more recent initiative by the United Food and Commercial Workers union (UFCW) to organize workers in the world’s largest retail chain.⁴² OUR Walmart membership is made up of about 5,000 past and present Walmart employees from over 600 stores in over 43 states.⁴³ The campaign started up two years ago and has been described in various ways: a grassroots effort,⁴⁴ a loosely knit

NLRA definition. Other worker organizations do not seek to negotiate contracts with employers but rather organize workers into employment law litigation and other collective activity. And still other “worker” organizations, such as many of the open source platforms, do not seek to negotiate with employers at all but simply support and amplify worker voice on the job and in policy debates.

⁴⁰ David Nack & Jimmy Tarlau, “The Communications Workers of America Experience with “Open-Source Unionism,” *WorkingUSA* (2005): 721-732.

⁴¹ U.S. National Labor Relations Board, Office of the General Counsel, Advice Memorandum, June 22, 2006, to Gerald Kobell, Regional Director Region 6, Regarding Dick’s Sporting Goods, Case 6-CA-34821 530-3067. *See also* Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions: Thoughts on the Arguments for and Against Members-Only Bargaining*, Paper for Panel on Developments in the Law under the NLRA, ABA Labor and Employment Section Mid-Winter Meeting, Lanai, Hawai’I, Feb. 29, 2011.

⁴² Hadley Malcolm & Jayne O’Donnell, “Some Walmart workers want better wages, affordable benefits,” *USA Today*, Jun. 8, 2012, <http://usatoday30.usatoday.com/money/industries/retail/story/2012-06-05/walmart-workers-air-complaints/55450634/1>.

⁴³ Bernice Napach, “Wal-Mart Veteran “Loves the Company”, Wants Change, CNBC, October 2, 2012, <http://www.cnbc.com/id/49244410>.

⁴⁴ Steven Greenhouse, “Wal-Mart Workers Try the Nonunion Route,” *N.Y. Times*, June 14, 2011, www.nytimes.com/2011/06/15/business/15walmart.html?pagewanted=all&_r=0..

organization,⁴⁵ and an informal group of workers.⁴⁶ Its mission is to get its members more respect at work, better pay, improved health care, and predictable scheduling. In the fall of 2012, Walmart workers walked off the job in multiple states, protesting working conditions and retaliatory actions against OUR Walmart members.⁴⁷ The key characteristic of OUR Walmart is that it is not seeking recognition as a union and does not seek to secure collective bargaining rights or a contract.⁴⁸ In fact, the Wal-Mart corporation challenged this premise in an unfair labor practice charge to the NLRB last November that resulted in the UFCW voluntarily suspending OUR Walmart picketing for 60 days.⁴⁹ To be sure, if minority unions—known as nascent unions by some—could win union recognition and operate as full-fledged unions under the NLRA, they would certainly do so. But in the meanwhile, how minority activism intersects with labor law and traditional organizing campaigns is in motion.

Worker Centers

As detailed earlier, worker centers and other community-based worker organizations make up a category of alternative labor organizations that have blossomed over the last three decades. For the most part, such organizations do not have the ability or aim to form NLRB-recognized unions, though they often recruit members, organize collective action-based advocacy campaigns, and/or represent workers with legal claims, with the goal of building the power of workers to win improvements in wages, benefits, and/or working conditions.⁵⁰ Domestic Workers United advocates for minimum labor standards for its members, such as the New York State Domestic Workers Bill of Rights. Other worker centers work broadly on immigration policy and employment law.

9to5, a national working women’s membership organization, was experimenting with worker center strategies in the 1970s and 80s. It built its base through media savvy campaigns—“Heartless Employer Award” on Valentine’s Day or “Scrooge of the Year” at Christmas—and used the threat of anti-discrimination lawsuits effectively. Like some of the worker centers, when its members want to engage in collective bargaining, it turned to its sister union—SEIU local “925”—for organizational support.⁵¹ Today 9to5 supports women in low-wage work and functions as a more traditional advocacy organization with a heavy emphasis on organizing.

A subset of worker centers aim to memorialize victories in legal agreements, and have developed innovative strategies to secure variations on the collective bargaining agreement. The

⁴⁵ Malcolm, *supra* note 42.

⁴⁶ Spencer Woodman, “Labor Takes Aim at Walmart – Again,” *The Nation*, January 4, 2012, <http://www.thenation.com/article/165437/labor-takes-aim-walmart-again>.

⁴⁷ Steven Greenhouse, “Walmart Workers Stage a Walkout in California,” *N.Y. Times*, October 4, 2012. *See also* Micah Uetricht, “Why Walmart, Why Now?,” *In These Times*, October 10, 2012 (interview with Nelson Lichtenstein).

⁴⁸ Lila Shapiro, “The Walmart Problem: Uncovering Labor’s Place In An Era Of Joblessness,” *The Huffington Post*, December 12, 2011, http://www.huffingtonpost.com/2011/12/12/our-walmart-labor-unions_n_1143527.html.

⁴⁹ Letter from UFCW to the National Labor Relations Board, January 29, 2013.

⁵⁰ Fine *supra* note 36.

⁵¹ Kathleen Banks Nutter, Voices of Feminism Oral History Project, in *Sophia Smith Collection*, Smith College, (interview with Karen Nussbaum, December 18–19, 2003).

Restaurant Opportunities Center in New York City (ROC-NY, now a part of ROC-United, an umbrella group that includes ROCs in eight cities), for example, has filed lawsuits on behalf of workers for discrimination and wage and hour violations, and secured settlement agreements that include not only damages, but workplace improvements such as raises, paid leave, and promotions.⁵² This strategy falls outside the purview of the NLRA because ROC does not seek to represent workers over time but rather represents their legal interests under civil rights and employment statutes.⁵³ The Coalition for Immokalee Workers, discussed above, secured contracts with both food purchasers and growers on behalf of farmworkers excluded under the NLRA.

A few worker centers actively facilitate union organizing among their members. The Retail Action Project (RAP) was started with the support of the Retail, Wholesale and Department Store Union (RWDSU), and will pivot from worker center strategies to union organizing campaigns should RAP members decide they want a union. The CLEAN Carwash Initiative is also a hybrid model—relying on traditional labor union strategies but also serving community interests, providing social, cultural and educational services. Since 2006, the AFL-CIO and United Steelworkers have collaborated with a local Community Advisory Board (CAB), including workers centers, community groups, and immigrant rights organizations, to develop a strategy that includes enforcement of wage and hour laws alongside union organizing campaigns.⁵⁴ And Voces de la Frontera, a worker center in Milwaukee, is playing a similar “hybrid” role in a worker organizing effort at Palermo Pizza Company. Since 2008, Voces has represented worker interests generally in conversations with Palermo. More recently, however, it has taken a more active role in the union organizing drive, helping to coordinate a national boycott to build awareness of the campaign among consumers and accepting contributions to the strike fund.⁵⁵ Last year, workers filed an election petition with the NLRB as an unaffiliated union and within days the company sent a letter to workers asking them to verify their immigration status. Voces is working closely with the AFL-CIO and numerous labor unions to support the organizing drive and ensure a fair election, including pushback on the anti-immigrant tactics being used by the employer.

One of the most interesting developments in the past five years has been the move to formalize relations between worker centers and the traditional labor movement. Six years ago the AFL-CIO entered into an agreement with the National Day Laborers Organizing Network (NDLON) and more recently with Domestic Workers United.⁵⁶ Those agreements facilitated a closer working relationship on some key issues, including an International Labor Organization charter on domestic work, collaboration on various immigration policies, and numerous “peace agreements” between local trade unions and day laborer organizations.

⁵² Rinku Sen & Fekkak Mamdouh, *The Accidental American: Immigration and Citizenship in the Age of Globalization* (San Francisco: Berrett-Koehler Publishers, 2008); Estlund; (over the last ten years has won more than ten workplace campaigns, \$5 million in lost wages and damages).

⁵³ Eli Naduris-Weissman, “The Worker Center Movement and Traditional Labor Law: A Contextual Analysis,” 30 *Berkeley J. Emp. & Lab. L.* 232 (2009).

⁵⁴ Ana Avendaño & Jonathan Hiatt, *Movement Building with Community-Labour Partnerships: The AFL-CIO’s Experience Toward Worker Self Organization in the New Economy* (forthcoming).

⁵⁵ Voces de la Frontera, www.vdlf.org (last visited Sept. 26, 2012).

⁵⁶ Avendaño, *supra* note 54.

And the AFL-CIO went one step further welcoming the New York Taxi Workers Alliance (NYTWA) (and its 15,000 members) as a charter member in the summer of 2011. This is the first time a new union has been given a charter in over fifty years and the AFL-CIO looks at the Taxi Workers Alliance as an “organizing committee”—similar to those that formed the basis for CIO industrial unions. Taxi drivers are classified as independent contractors so fall outside the protections of the NLRA and do not have traditional collective bargaining agreements. Instead, the Taxi Workers Alliance works to increase drivers’ income and improve working conditions through a range of tactics, including establishing a living wage standard, securing federal funds such as post 9-11 disaster assistance, challenging unlawful license suspensions, and providing discounted or pro bono legal, financial management, and health’s services to its members.⁵⁷ Last spring, Richard Trumka, president of the AFL-CIO, joined taxi workers in a march to protest high lease rates and other unfair practices in the taxi industry.

Open Source Union

A third variety of alternative labor organization is the so-called “open source” union. Such organizations tend to be either an occupational or craft association—such as the Freelancers Union or National Writers Union—or a loose association of workers united by their commitment to broad union goals—such as the AFL-CIO’s Working America or SEIU’s Purple Ocean. Open source unions aim to unite individual workers across non-union workplaces, workers with nontraditional workplaces, or workers without hope of organizing their workplace, and provide members with services such as low-cost health insurance or career development trainings, or opportunities to engage in political action.⁵⁸

Working America, a project of the AFL-CIO, has over three million members and offers them a voice in national economic debates as well as “access to research, tools and assistance to help you get ahead ... benefits like a prepaid debit card, credit and budget counseling, and discounts on things like car rentals, cell phone service and auto insurance through our Union Plus benefits program.”⁵⁹ The initial thinking behind Working America can be found in the AFL-CIO’s 1985 report from its Committee on the Evolution of Work. The report included recommendations for new categories of union membership for workers in non-union workplaces and suggested non-union workers should be able to receive certain types of “employment-related services (such as job-training) and fringe benefits (such as supplemental medical insurance) that are not normally available to them.”⁶⁰

The Freelancers Union is another iteration of the open source model with over 200,000 members nationally (membership is free; the organization finances itself off modest benefit

⁵⁷ [Nytwa.org, http://www.nytwa.org/campaigns/](http://www.nytwa.org/campaigns/) (last visited Jan. 14, 2013) (Key taxi worker campaigns include: “Raise the Fare; Freeze the Leases,” “Stop Garage/Broker Overcharges,” “Taxi Driver Protection Act,” and “Stop Illegal Pick-Ups.”).

⁵⁸ Richard B. Freeman & Joel Rogers, “A Proposal to American Labor,” *The Nation*, June 24, 2002, available at <http://www.thenation.com/article/proposal-american-labor?page=0,1>.

⁵⁹ [workingamerica.org, http://www.workingamerica.org/membership/benefits](http://www.workingamerica.org/membership/benefits) (last visited Jan. 14, 2013).

⁶⁰ AFL-CIO Committee on the Evolution of Work, *The Changing Situation of Workers and Their Unions* (1985), 21.

commissions), many of whom have bought health insurance through the organization.⁶¹ According to Sarah Horowitz, the “freelance surge” is not a fringe element of our economy or something that will fit into old workplace structures. Rather, Horowitz notes that freelancers make up about one-third of the workforce and argues they are constructing a new social bargain that maps a modern value system.

Web-based platforms offer some very simple open source models, creating petitions to “crowd” interest on certain issues or offering an open platform to problem-solve collectively. Last year a Target worker posted a petition on Change.org protesting the retailer’s decision to stay open on Thanksgiving and over 200,000 people joined the call to “Save Thanksgiving.”⁶² More recently, two former union staffers are building a new online platform to make collective action at work easier. Coworker.org will enable workers to easily organize around an issue at work—paid sick days, new uniforms, secure storage lockers—by posting a petition and gathering support from colleagues on the job and the public more generally.⁶³

Observations

Alternative labor organizations—minority unions, worker centers, and open source unions—and the alternative private contracts a few of these organizations have achieved—represent rich innovations that work around the NLRA organizing and bargaining regime. As such, these organizations raise many critical questions about organizing and representing workers, and bargaining collectively.

- Alternative worker organizations exist alongside traditional labor unions. The AFL-CIO has taken some important steps to rationalize the relationship between these two tracks of worker organizations through its agreements with worker centers and its own experiment with Working America, but these collaborations are still fairly new and the AFL-CIO is undergoing a process to connect traditional labor and alternative worker organizations as part of a common or comprehensive strategy.
- Alternative worker organizations often represent workers excluded from the protections of labor or employment law and thus experiment with forms of worker organizations and representation and bargaining that fall outside the NLRA.
- Alternative worker organizations often have informal membership networks and do not use formal election procedures, raising questions about the role and form of democracy in modern labor institutions.
- There is a major question about how to finance labor institutions outside the context of collective bargaining and membership dues.

⁶¹ The Ideas Economy Symposium (Sept. 27, 2012), *information available at* <http://www.economist.com/events-conferences/americas/human-potential-2012> (sponsored by The Economist).

⁶² *Change.org*, www.change.org (last visited Sept. 26, 2012).

⁶³ *Coworker.org*, www.coworker.org. Cf. Paul M. Secunda, “The Wagner Model of Labor Law is Dead, Long Live Labor Law!,” *Marquette Law School Legal Studies Paper No. 12-15* (2012).

Category #5: Worker Militancy

A basic way that workers can work around the NLRA regime is to take militant collective action. A foundation of the labor movement prior to and following the development of the NLRA organizing and collective bargaining regime, strikes, work stoppages, civil disobedience, and other militant collective action exert worker power in ways that can at times realize sweeping demands for improvements in working conditions, legislative action, or enforcement of existing statutes. While corralled by the NLRA and collective bargaining agreements, militant worker action sometimes disregards such restrictions, hacking around the existing regime.

Examples over the last three decades include wildcat strikes, occupations, and mass marches. In 1989, 37,000 mineworkers in Virginia, West Virginia, and Kentucky participated in a wildcat, or unsanctioned, strike, joining 1,900 already striking Pittston Coal mineworkers. Striking in response to Pittston's termination of health care and retirement benefits, mineworkers won an agreement after a bitter yearlong struggle, and would see the 1992 Coal Act mandate that companies provide certain health and retirement benefits.⁶⁴ In 1998, the non-NLRB union, the New York Taxi Workers Alliance (NYTWA), organized nearly 40,000 taxi drivers to strike, and in 2004 would win the first living wage standard for taxi drivers in the US. The NYTWA would organize another citywide strike in 2007, and become the first non-union organization to be granted an AFL-CIO charter in 2011.

In 2008, United Electrical, Radio and Machine Workers of America (UE)-represented Republic Windows & Doors workers in Chicago occupied their plant the day it was to close, demanding their unpaid vacation and 60 days severance pay. Capitalizing on national anger at bank bailouts and foreclosures, four days into the occupation the workers secured a deal not with Republic Windows & Doors, but with banks that financed the company, Bank of America and JPMorgan Chase.⁶⁵

More recently, non-workplace-based occupations in 2011—including the occupation of Wisconsin's state capitol and the Occupy Wall Street movement—have captured the imagination of hundreds of thousands of workers, and have involved broad labor movement participation or support.⁶⁶ Some Occupy activists have proposed that workers form their own general assemblies in workplaces across the US. While these occupations have certainly changed the tenor of the national conversation on the US economy, it is too early to tell whether and how these occupations will work around the existing organizing and collective bargaining regime.

In addition to wildcat strikes and occupations, mass mobilizations can take on militant qualities. Between March and May of 2006, five million mostly Latino immigrant workers demonstrated for immigrant rights in over one hundred cities—one of the largest mobilizations

⁶⁴ Richard A. Brisbin Jr., *A Strike Like No Other Strike: Law and Resistance During the Pittston Coal Strike of 1989-1990* (Baltimore: The Johns Hopkins University Press, 2010).

⁶⁵ Kari Lydersen, *Revolt on Goose Island: The Chicago Factory Takeover, and What it Says About the Economic Crisis* (Brooklyn: Melville House Publishing, 2009).

⁶⁶ Erica Sagrans ed., *We Are Wisconsin: The Wisconsin Uprising in the Words of the Activists, Writers, and Everyday Wisconsinites Who Made it Happen* (Minneapolis: Tascara Books, 2011).

in US history. Many chose to boycott work, school, and business. Immigrant rights organizations, Spanish language media, worker centers, and unions mobilized the immigrants who were furious about, and fearful of, the anti-immigrant Sensenbrenner Bill (H.R. 4437) pending in Congress that would criminalize undocumented immigration. While immigration enforcement actions and anti-immigrant initiative campaigns would escalate across the US, there are also indications that the mobilizations had their desired effect: the Sensenbrenner Bill was killed, a significant proportion of the immigration-related bills introduced in state legislatures in 2007 sought to expand immigrants' rights and access to services, these bills passed at higher rates, and politicians who ran on strong anti-immigrant platforms in 2008 elections did poorly.⁶⁷

Observations

Strikes, occupations, and other militant mobilizations have the power to change the terms and conditions of employment and muster the political will for legislative or regulatory change.

- Militancy can provide opportunities for mainstream worker organizations and policymakers to advance formal bargaining or legislative proposals.
- Militancy establishes a cultural and political framework for worker organizing campaigns.
- Militancy is not a viable game-changer unless certain other structural conditions are also present.

Category #6: Alternate Union-Recognition-Seeking Strategies

Finally, unions have pursued a variety of strategies to avoid bitterly contested elections under an NLRB regime in which the employer holds the balance of power. Because employers can so easily disrupt or sidetrack organizing campaigns that lead to NLRB-supervised elections through drawn out appeals, the use of anti-union consultants who are adept at fragmenting or undermining union support in a workplace, or simply violating the law to fire or penalize workers who openly harbor union sentiments (recognizing that the penalties for such behavior are not serious), unions have sought other ways to achieve union recognition that would allow them to proceed to a collective bargaining process. Unions have made use of three primary approaches in this respect: card check recognition, neutrality agreements, and election procedure agreements.

Card Check Recognition

⁶⁷ Irene Bloemraad, Kim Voss, & Taeku Lee, "The Protests of 2006: What Were They, How Do We Understand Them, Where Do We Go?," in *Rallying for Immigrant Rights: The Fight for Inclusion in 21st Century America*, edited by Kim Voss & Irene Bloemraad, (Berkeley: University of California Press, 2011); Victor Narro, Kent Wong, & Janna Shaddock-Hernández, "The 2006 Immigrant Uprising: Origins and Future," *New Labor Forum* 16, no. 1 (2007): 49-56.

Card check recognition is a strategy by which unions push employers to agree to union recognition by accepting a majority (or a super-majority) of signed authorization cards as evidence of union support in lieu of a contested election under the supervision of the NLRB.

From the beginning the NLRA did not require elections to be held in order for unions to be certified as lawful representatives of workers for the purposes of collective bargaining. If a majority of workers signed authorization cards, the law allowed for the employer to voluntarily recognize the union and waive the right of seeking a union election. Card check recognition in lieu of elections was common prior to the passage of the Taft-Hartley Act of 1947. While that act did not take away the card check option, it did empower employers to oppose unions more vigorously leading to the ascendancy of the “secret ballot” union election as the primary means of securing recognition. Nonetheless, unions continued to seek card check recognition from employers, and both the NLRB and the U.S. Supreme Court upheld the card check process against the complaints of “right-to-work” activists who claimed that the failure to hold a secret ballot election deprived anti-union workers of their rights. As the NLRB process became increasingly frustrating for unions, more and more of them decided to pursue card check recognition rather than to seek elections.

By the end of the 20th century, some unions were dropping efforts to seek NLRB elections and opting for the card check strategy as a matter of course. One of the leading practitioners of this approach was UNITE HERE. Because the union organized a large jurisdiction of hotel and food service providers, whose shops were often small and scattered, it viewed the pursuit of elections as a resource-sapping and usually disappointing strategy. Thus it pressed hoteliers such as Hyatt and food service providers such as Aramark to agree to card check recognition in their establishments. Although the union did not win company-wide adoption of card check from such employers, in individual settings the union did win card check agreements. This approach allowed the union to expand its membership in industries in which union density remained low.

Neutrality Agreements

Neutrality agreements were another tool unions adopted, often using them in conjunction with card check recognition. The most common form of neutrality agreement occurs when an employer and a union bargain over the use of a neutrality agreement at an unorganized workplace (or future workplace) of that employer. Such agreements can extend beyond the employer’s voluntary decision to avoid contesting a union’s bid for recognition to include such things as a “gag order,” in which the employer voluntarily restricts the volume, tone, and content of employers’ speech regarding a union in a certification bid or even an agreement by the employer to provide the union with an early list of the names and addresses of workers in an agree-to unit.

A recent success story involving the use of a neutrality agreement occurred at the Dana Corporation, an auto parts manufacturer. In the 1980s, 25 Dana plants had collective bargaining agreements with the UAW. By 2007 that number had dropped to 9 and threatened to drop further with the planned closure of two unionized plants and the company’s filing for bankruptcy under Chapter 11, which threatened to wipe out all of its collective bargaining agreements. To avoid this outcome, the UAW teamed with the United Steelworkers of America, which represented some Dana workers, to forge the UAW Dana National Framework Agreement,

which was ratified by Dana workers on July 24, 2007. The agreement saw the unions agree to the creation of a voluntary employee beneficiary association (VEBA) that helped the company reorganize financially in return for an agreement governing the recognition of unions at unorganized Dana plants. Within a year 11 new Dana plants were organized through a card check recognition process.

Election Procedure Agreements

Another innovation unions have developed is the “Pre-Recognition Framework Labor Agreement,” otherwise known as the Election Procedure Agreement (EPA), a variation on the neutrality agreement in which employers and unions agree beforehand on the terms that will govern a union recognition election. In such agreements employers pledge neutrality on the question of union representation, accept an expedited election process, provide lists of employees to the union, and agree to the use of an arbitrator to settle disagreements related to a planned election.

The union that has been most successful in the use of EPAs is SEIU. The breakthrough in the union’s use of these devices came at Catholic Healthcare West (CHW). In 1998, SEIU launched an effort to organized CHW, then California’s largest healthcare chain. Managers at many CHW facilities, included St. Francis Medical Center in Lynwood, California, fought SEIU’s organizing drive using tactics not much different from other antiunion employers despite the Catholic Church’s social teachings on the rights of workers to organize and bargain collectively. The conflict at these California facilities led then Speaker of the California Assembly Antonio Villaraigosa to create a Fair Elections Oversight Commission to examine CHW’s conduct. Under pressure from the bad publicity created by this investigation and with the encouragement of Cardinal Roger Mahoney of Los Angeles, CHW reached an agreement with SIEU in April 2001 which gave 10,000 healthcare workers the right to decide for themselves whether to unionize. The agreement provided for elections to be held within 35 days of the filing of authorization cards, prohibited the use of pressure or intimidation for or against the union, and provided for arbitration to resolve any disagreements leading to an election. Within a year, SEIU organized 45 new facilities under the terms of this agreement.

Observations

- Strategies to avoid bitterly contested elections under an NLRB regime, including card check recognition, neutrality agreements, and election procedure agreements have led to important gains for unions in industries ranging from hospitality, to health care, to auto parts manufacture.
- It is difficult to scale these approaches since they respond to specific opportunities where unions are well positioned to bring pressure or to make trade-offs in which they can offer employers something in return for expedited or uncontested organization. In many settings, unions do not possess the leverage or the bargaining power to be able to employ these approaches.
- Card check recognition and neutrality agreements are prone to attack by those who assert that unions have engaged in a corrupt bargain in order to win recognition and that such organizing models contribute to the creation of passive union members. While the EPA

effectively deflects such charges, they require a higher level of employer cooperation than most employers are inclined to give.

4. The Significance of the Organizing History and Case Studies

The history of organizing and the detailed discussion of the creative workarounds or “hacks” that organizing campaigns have used over the last two decades make clear that the labor movement has not been sitting on its hands. Significant energy and resources have been poured into organizing and ranges of creative “hacks” have been used to try to overcome organizing problems.

Both the history of organizing and the discussion of these hacks demonstrate that the difficulty of organizing was inseparable from the problem of labor’s deteriorating bargaining power and leverage. What we discovered through our analysis is that the issue of bargaining power proved to be the more profound and intractable one over time. In many cases where unions possessed the will and the means of bringing workers into an organization, they were unable get workers to endure the risks that organization entailed because the promise of reward was so doubtful.

This in turn helps to highlight the systemic nature of the problem that unions and other emerging workers’ organizations face in the 21st century. Devoting more money and energy to organizing alone is unlikely to reverse the direction of events; nor is a quick legal or policy fix akin to the Employee Free Choice Act likely to be enough. Labor will need to develop new methods of marshaling bargaining power harnessed in many cases to new organizational forms that are adapted to the changed context that we now face. Moreover, labor must be prepared to develop these methods and forms as the trade union pioneers of the nineteenth century once did: largely in the absence of supporting public policies—at least in the short term. If major policy breakthroughs do come, they will be more likely to emerge in response to rather than prior to a revival and reframing of collective action.

We can learn much from our recent organizing history about how to develop the new methods and forms. But that history suggests the need for the labor movement and its allies to address three fundamental issues as they look to the future:

Bargaining Power: Labor’s recent crisis should be seen as a crisis of bargaining power. The “hacks” include recent initiatives and ways of redefining both the “collective” and the “bargaining” aspects of worker representation and advocacy. In some cases, like Justice for Janitors, traditional labor stretched the bounds of the law by targeting actors up the chain and engaging in secondary activity to pressure employers from the top down. Once employers were at the table they held off on negotiating until they hit a density trigger and could negotiate on behalf of the majority of the labor market. Other campaigns, like CIW, secured higher wages and improved working conditions through negotiations with more powerful corporate actors, skipping over the direct employer altogether. And still others, like the Restaurant Opportunity Center and LAANE, used legal mechanisms other than the contract to create a substitute for traditional collective bargaining that was able to secure increased wages and improved working conditions. In each of these examples, organizations transcended the usual methods of bargaining, suggesting new ways of approaching negotiation in the current economic

environment, and allowing us to imagine ways in which future organizations might build worker power in a fissured industry or even “negotiate with the one percent.”

Collective Action: In many ways the declining ability of workers to engage in collective action has been even more profound and damaging than the erosion of union density over the last generation. Labor’s increasing reliance on political action, community coalitions, and secondary activity (such as corporate campaigns), has not compensated for the declining utility and effectiveness of strikes and other traditional forms of collective action. The history of US labor suggests that the creation of new forms of organization has depended upon (and followed rather than preceded) the creation of new ways of acting collectively. We must consider new forms of collective action that might be capable of providing leverage for workers in a new bargaining framework, forms of engagement that do not rely on full-scale strikes. These new forms might include ways of taking advantage of “protected concerted activity” in non-unionized settings as provided under the NLRA; staging minority strikes as the OUR Walmart campaign has done; engaging in First-Amendment based uses of the boycott; or using Internet-based platforms to advance workplace-focused demands.

Democratic Sustainability: It has been challenging to develop new forms of worker organization that are both financially sustainable and democratically accountable to those whom they represent. This is in part because of the existing labor movement’s commitment to democracy and sustainability. Unions, democratically accountable to their members and functioning under their own increasing financial pressures, naturally find it difficult to take the risks inherent in investing in new models at this critical juncture. There has been some experimentation through worker centers, minority unions, and online activism, but as yet no durable new model has emerged. Creating such models is a necessity, and as we search for them it is important that we see democratic accountability as a necessary component of the new labor order. For unless worker organizations are accountable to workers, how will they help us create a more democratic social order? How will they defend their legitimacy as vehicles for workers’ aspirations when they endure inevitable attack from their opponents? Therefore we need to promote democratic accountability in ways that support—or at least do not inhibit—new and different methods of building sustainable economic power for workers.

5. Where Do We Go From Here?

As Harold Meyerson observed in a recent article on the future of labor, it is no longer very difficult to “imagine an America without unions.” Glimpses of that alternative future are now all around us. “In much of America unions have already disappeared,” Meyerson noted. “In the rest of America they’re battling for their lives.”⁶⁸

This is not the first time that American unions have faced such a moment. In the early twentieth century organized labor confronted a similar situation. Then, as now, new technologies were transforming the organization of work in ways that undermined union strongholds in the economy; then as now the law afforded little protection for workers’ rights to organize and placed enormous constraints on workers’ ability to engage in collective action; then, as now, the demographics of the labor force were rapidly changing due to immigration; then, as now, the union movement was riven by rivalries and differences over tactics and

⁶⁸ Harold Meyerson, *If Labor Dies, What's Next?*, THE AMERICAN PROSPECT, Sept. 13, 2012.

methods of organization; then, as now, unions found it difficult to mobilize a broken political system.

It was not until the second third of the 20th century that unions were able to organize the mass production industrial economy. Labor would not have been prepared for its 1930s breakthrough had it not been incubating new ideas in places like Brookwood Labor College, new tactics like the sit-down strike that the Industrial Workers of the World introduced at General Electric in 1906, new forms of industrial unionism pioneered by efforts like Chicago's Stockyards Labor Council of the World War I era, and creative leaders educated at places like the Bryn Mawr College Summer School for Women Workers.

Labor faces a similar challenge today. There are signs that labor is now stirring to meet that challenge. The AFL-CIO, SEIU, and several other unions are now advancing "futures" projects, thinking systematically about how to adapt the union model to the new conditions labor now faces. At its 2013 convention, the AFL-CIO welcomed workers centers, allied worker advocates, and others to participate for the first time in its deliberations. The convention also ratified a historic resolution on September 9, 2013, to expand union membership to workers not covered by a collective bargaining agreement. The collaboration now developing among the AFL-CIO, UAW, CWA, UFCW, and SEIU through CtW's Strategic Organizing Center provides an important opportunity to conceptualize and execute a large-scale strategy involving multiple unions free of jurisdictional conflict.

At this important juncture, it is vital that labor proceed quickly in the task of laying the groundwork for the next breakthrough. There are several premises that we believe should inform discussions about the future of labor:

- The causes of labor's current crisis are multiple, and do not stem only from employer hostility, inadequate legal protections, or the inability or reluctance of unions to respond to the challenges they face. The problem facing the labor movement must be understood in a holistic and systematic way—we are witnessing the rapid erosion of an entire institutional regime as larger historical and economic forces transform the social foundations upon which the 20th century labor movement was built.
- The range and creativity of recent experiments to build organizing capacity and alternative worker organizations are greater than many realize, and there is much to learn both from what these experiments accomplished and what they failed to accomplish. They offer a valuable starting place for a discussion of how to move forward.
- The discussion of the future of worker organization cannot presume that there will be any assistance forthcoming in the foreseeable future from federal laws and regulations.
- The discussion of organizing models must be inseparable from a discussion of new models of bargaining or other forms of advocacy and representation.
- The bilateral (employer-union) model of collective bargaining is breaking down in much of the private labor market—due to the impact of financialization, the casualization of the labor market, the proliferation of subcontracting and other developments—and the rebuilding of worker power will require that we adjust to the breakdown of bilateralism

by developing new ways of bargaining over gains in wealth and productivity, incorporating a wider range of stakeholders in the bargaining process.

- A discussion of the future of the labor movement necessarily includes a discussion of its institutions, existing unions, worker centers, and possibly new structures and funding mechanisms to complement or support the labor movement's goals.
- Democratic representation and accountability must be built into the next wave of labor activism in ways that support innovation and bargaining power.
- Before we can develop a strategic approach to new forms of organizing and bargaining or new policy initiatives, we must consider the first principles upon which a revived worker movement should be built.

We recognize that the task of envisioning a way forward is large and daunting. Many organizations and initiatives must collaborate in that work if it is to be successful and a variety of perspectives will demand consideration. We have begun our own contribution to this thinking by convening a diverse group to explore three interrelated problems whose resolution is crucial to labor's future: finding new ways for workers to bargain in the 21st century economy even as we try to preserve the gains that traditional collective bargaining delivered in the 20th century; creating new forms of collective action that can that can empower workers in an era when traditional strikes have become a rarity; and fostering new, democratically accountable, and sustainable forms of worker organization even as we try to preserve existing organizational forms. In the months ahead, we will explore these issues more deeply and we welcome the opportunity to collaborate with allies and colleagues in organized labor, academia, and other worker or advocacy organizations who share our concerns.

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