



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Articles and Chapters

ILR Collection

2020

Worker Centers: Labor Policy as a Carrot, not a Stick

Kati L. Griffith

Cornell University, kategriffith@cornell.edu

Leslie C. Gates

Binghamton University--SUNY

Follow this and additional works at: <https://digitalcommons.ilr.cornell.edu/articles>

 Part of the [Unions Commons](#)

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the ILR Collection at DigitalCommons@ILR. It has been accepted for inclusion in Articles and Chapters by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact web-accessibility@cornell.edu for assistance.

Worker Centers: Labor Policy as a Carrot, not a Stick

Abstract

Worker centers empower communities of workers that are challenging for labor unions to organize. This includes immigrant workers and other vulnerable workers in high turnover jobs. These centers often organize workers that fall within the definition of “employee” under the Depression-era laws designed to protect some forms of collective worker activity from employer retaliation. Although employees associated with these centers can benefit from labor law’s carrot, worker centers are not “labor organizations” subject to labor law’s vast reporting requirements and restrictions on associational behavior (labor law’s stick). We use an original study of worker centers’ filings to the Internal Revenue Service to reveal that worker centers are more similar to nonprofits, than labor organizations. Both First Amendment and labor law principles affirm the characterization of worker centers as organizations that are not subject to labor law’s stick. Providing worker centers access to labor law’s carrot, but not its stick, is particularly compelling given that they are operating at a historical moment when income inequality parallels New Deal levels and hostility to worker organizations and workers’ rights is pervasive. Our carrot-but-not-a-stick approach has implications for the vitality of American labor policy. It opens up space for emerging worker centers to expand their efforts to amplify employee voice and improve the working lives of the growing low-wage workforce.

Keywords

worker centers, labor unions, union organizing, labor law

Disciplines

Unions

Comments

Required Publisher Statement

© [American Constitution Society](#). Reprinted with permission. All rights reserved.

Suggested Citation

Griffith, K. L., & Gates, L. C. (2020). Worker centers: Labor policy as a carrot, not a stick [Electronic version]. *Harvard Law & Policy Review*, 14(1), 601-627.

Worker Centers: Labor Policy as a Carrot, not a Stick

*Kati L. Griffith and Leslie C. Gates**

Worker centers empower communities of workers that are challenging for labor unions to organize. This includes immigrant workers and other vulnerable workers in high turnover jobs. These centers often organize workers that fall within the definition of “employee” under the Depression-era laws designed to protect some forms of collective worker activity from employer retaliation. Although employees associated with these centers can benefit from labor law’s carrot, worker centers are not “labor organizations” subject to labor law’s vast reporting requirements and restrictions on associational behavior (labor law’s stick). We use an original study of worker centers’ filings to the Internal Revenue Service to reveal that worker centers are more similar to nonprofits, than labor organizations. Both First Amendment and labor law principles affirm the characterization of worker centers as organizations that are not subject to labor law’s stick. Providing worker centers access to labor law’s carrot, but not its stick, is particularly compelling given that they are operating at a historical moment when income inequality parallels New Deal levels and hostility to worker organizations and workers’ rights is pervasive. Our carrot-but-not-a-stick approach has implications for the vitality of American labor policy. It opens up space for emerging worker centers to expand their efforts to amplify employee voice and improve the working lives of the growing low-wage workforce.

INTRODUCTION	602			R
I. THE DEBATE: ARE WORKER CENTERS LABOR ORGANIZATIONS “DEALING WITH” EMPLOYERS?	606			R
II. ORGANIZATIONAL RESEARCH: WORKER CENTERS ARE NOT SET UP TO “DEAL WITH” EMPLOYERS	610			R
A. Do Not Exhibit Purposes to “Deal With” Employers	611			R
B. Too Small to “Deal With” Employers	612			R
C. Too Reliant on External Funding to Deal With Employers	613			R
III. LEGAL DOCTRINAL RATIONALES FOR INTERPRETING “DEALING WITH” TO EXCLUDE WORKER CENTERS	614			R
A. Constitutional Law Only Permits Labor Law’s Stick in Exchange for Collective Bargaining Privileges	614			R
B. Labor Law’s Inequality of Bargaining Power Purpose Forbids Use of Labor Law’s Stick on Worker Centers	616			R

* Griffith is Associate Professor of Labor & Employment Law, Cornell ILR School & Associate Member of the Cornell Law Faculty. Gates is Associate Professor and Director of Graduate Studies at Binghamton University’s Department of Sociology. This work benefited from presentations at NYU School of Law, Cornell University and the Labor and Employment Relations Association and from conversations with Joseph Bazler, Austin Case, Samuel Estreicher, Matthew Ginsburg, Louis Hyman, Michael Iadevaia, Wilma Liebman and Julie Ulmet. We thank Nathan Pflaum for his superb research assistance, Christopher Ioannou for his extensive editing and Matthew Ginsburg and César Rosado Marzán for their careful feedback on a prior draft. We also appreciate Janice Fine for her continued generosity and insight and all of the individuals who helped put together the dataset on worker center funding, including Carunya Achar, Joseph Bazler, Aliqae Geraci, Benjamin Hollander, Jonathan Kim, and Zane Mokhiber. All errors and omissions are our own. A special thanks goes out to Michael Svedman and the editors of the *Harvard Law & Policy Review* for providing comments that deepened the contribution of this piece.

IV. POLICY RATIONALES FOR INTERPRETING “DEALING WITH”		
TO EXCLUDE WORKER CENTERS	621	R
A. <i>Worker Centers Organize the Marginalized</i>	622	R
B. <i>Inequality Parallels New Deal Levels</i>	623	R
C. <i>Hostile Environment for Workers’ Rights</i>	624	R
V. WORKER CENTERS AND THE FUTURE OF LABOR POLICY ...	625	R
CONCLUSION	627	R

INTRODUCTION

A novel worker organizational model called worker centers has helped to raise minimum wages at the state and local levels in the United States, despite persistent wage policy stagnation at the federal level.¹ Worker centers have improved wages and working conditions for their participants through a combination of policy advocacy, collaborations with worker rights enforcement agencies,² service provision, and pressure on employers. Even though there are only approximately 226 centers nationwide,³ worker centers have stoked policy debates in Washington about whether U.S. labor law restrictions apply to these groups.⁴

U.S. labor law provides employees with protections in some circumstances, and imposes restrictions on labor organizations in others. Through the National Labor Relations Act of 1935 (the NLRA) labor law protects some forms of collective activity among statutorily-defined “employees” to improve their work lives from employer interference (labor law’s “carrot”).⁵ Employers cannot reprimand someone for joining in various types of collective actions with their peers. They cannot impose seemingly neutral, but overly restrictive, policies that limit employees’ ability to communicate with one another.⁶ Employers cannot restrict employees, for instance, from dis-

¹ Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 7 (2016) (attributing wage increases and other work benefits at the local and state levels to the efforts of alternative labor groups). See also Marion Crain & Ken Matheny, *Reimagining Labor Law: Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 562–65 (2014) (“The best hope for a revived labor movement appears to lie with new actors such as workers’ centers . . . that can work in partnerships with established unions; class action plaintiffs’ firms dedicated to enforcing workplace rights; and government agencies and attorneys general.”); Héctor Cordero-Guzmán, *Worker Centers, Worker Center Networks, and the Promise of Protections for Low-Wage Workers*, 18 JOURNAL OF LABOR & SOC’Y 31, 32–33 (2015) (identifying worker centers’ network power).

² See e.g., Janice Fine et al., *Understanding Worker Center Trajectories*, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE (2018); Andrew Elmore, *Collaborative Enforcement*, 10 NORTHEASTERN UNIV. L. REV. 72, 77–83 (2018); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 157–79 (2006).

³ See Fine et al., *supra* note 2, at 10.

⁴ See *infra* Part I.

⁵ 29 U.S.C. § 157 (2012).

⁶ *Republic Aviation v. NLRB*, 324 U.S. 793, 796, 803 (1945) (describing employer’s “long standing” and general rule against distribution of literature, which was neutrally worded and adopted before union activity, as an interference with employees’ NLRA rights).

curring their wages and working conditions with each other during non-work time.⁷

Along with providing rights to employees engaged in collective action, labor law, through the NLRA and its sister statute the Labor-Management Reporting and Disclosure Act (the LMRDA), also imposes restrictions and obligations on statutorily-defined “labor organizations” (labor law’s “stick”). Specifically, the NLRA restricts organizations that exist for the purpose of “dealing with employers” from such activity as secondary boycotts. The LMRDA requires labor organizations to fulfill extensive reporting requirements about their finances and internal affairs.⁸ Powerful forces in Washington argue that worker centers are “labor organizations” and thus subject to labor law’s stick.

A heated labor law controversy concerning worker centers is somewhat surprising given private sector labor law’s waning relevance. Indeed, it is now customary for labor scholars and commentators to disparage private sector labor policy, molded in the Depression era of the 1930s. They portray it as eviscerated by court decisions and out of touch with a modern economy increasingly characterized by service and technology.⁹ In this vein, one scholar recently described contemporary private sector labor law as an “unrecognizable nub,” compared to its revolutionary beginnings in 1935.¹⁰

The controversy is also unexpected because worker centers tend to organize hard to reach, marginalized groups of workers. These groups include low-wage workers in high turnover industries that are largely passed over by labor unions, the central protagonists of labor law.¹¹ In these industries, labor unions struggle to sustain long-term worker organizing efforts and to achieve their primary goal—contractual gains for workers through compulsory collective bargaining. In addition, some worker center organizing has occurred among workers—such as aspiring fashion models and Amazon Mechanical Turk gig workers—that straddle the consequential legal line between employee status (labor policy beneficiary) and independent contractor status (beyond labor policy’s reach).¹²

⁷ *Id.* at 801.

⁸ See 29 U.S.C. § 158(b) (2012); 29 U.S.C. § 402(i) (2012). Labor scholars often treat the NLRA, the Taft-Hartley Amendments to the NLRA and the Landrum-Griffin Act “as a unified statutory scheme for collective labor relations.” See also Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 213 (2015).

⁹ See, e.g., Andrias, *supra* note 1, at 7 (referring to some as rejecting “the project of labor law altogether, concluding that unionism in the contemporary political economy is hopeless”); Benjamin I. Sachs, *Employment Law as Labor Law*, 36 CARDOZO L. REV. 2685, 2686 (2008); Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 139–46 (2003).

¹⁰ Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 477 (2015) (“Supreme Court . . . has whittled away at the rights of workers until only an unrecognizable nub remains”).

¹¹ See Fine et al., *supra* note 2, at 12.

¹² See Leon Neyfakh, *Not Your Grandpa’s Labor Union*, BOS. GLOBE (Apr. 06, 2014), <https://www.bostonglobe.com/ideas/2014/04/05/how-labor-advocacy-changing/QKULXuazXGHMW7EBBe6IKJ/story.html> [<https://perma.cc/6YWG-6RN9>]; Kati L. Griffith, *The FLSA at 80: Everything Old is New Again*, 104 CORNELL L. REV. 101, 133 (2019) (“The

Moreover, the push to apply labor law's restrictions to worker centers is puzzling because worker centers, unlike traditional labor unions, very rarely turn to labor law to protect individuals that participate in their activities. Only a small subset of worker centers has successfully turned to private sector labor law to date.¹³ As one of our authors has argued elsewhere, worker centers could (and should) take more strategic advantage of the NLRA. Employees involved in worker centers that have turned to the NLRA "have generally fared well."¹⁴ In the bulk of these cases, the NLRA's enforcement agency found an employer had illegally interfered with collective activity and awarded remedies to the employees. These remedies include reinstatement and lost pay. Even so, only a small group of worker centers has used the carrot of private sector labor law to advance the interests of workers.

These observations notwithstanding, employer groups and their Congressional allies are raising questions about whether worker centers are subject to labor law's restrictions on labor organizations (the stick). If employees engaged with worker centers can deploy the benefits of protections afforded by the NLRA's labor policy (the carrot), can worker centers then avoid labor law's many restrictions on associational activity and cumbersome reporting requirements for "labor organizations"? Or, can worker centers enjoy the relative freedom in their associational activity, and the less burdensome reporting requirements, accorded to non-profit associations and civil rights organizations?¹⁵

The answers to these questions have implications for the future viability of the American labor policy in the 21st century—most notably, its ability to offset inequality of bargaining power between employers and individual low-wage workers (and the injustices such inequality fosters in the workplace). The application of labor law's stick would be "fatal" for most worker centers, which do not have the financial resources or staff to respond.¹⁶ Worker cen-

FLSA's legislative history instructs that formalities, like independent contractor labels, that businesses assign to a relationship should not exclude true employment relationships from the Act's coverage.").

¹³ Kati L. Griffith, *Worker Centers and Labor Law Protections: Why Aren't they Having Their Cake?*, 36 BERKELEY J. EMP. & LAB. L. 331, 336 (2015) (confirming only seven worker centers who have participated in "twelve different NLRB charges" and highlighting worker centers' underutilization of the NLRA's carrot).

¹⁴ *Id.* at 337–38 (describing the success of unfair labor practice charges before the National Labor Relations Board).

¹⁵ For other scholars who have signaled the importance of these questions, see Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 853–60 (2014); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 334–35 (2009); David Rosenfeld, *Worker Centers: Emerging Labor Organizations - Until They Confront the National Labor Relations Act*, 27 BERKELEY J. OF EMP. & LAB. L. 469, 472–74 (2006); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y. L. SCH. L. REV. 385, 385–86 (2006).

¹⁶ Estlund, *supra* note 8, at 229 ("[Labor law] burdens weigh heavily on traditional trade unions—with their thousands of members, millions of dollars in membership dues, and sizable organizations and staffs. These burdens would be fatal—as they are likely intended to be—for most worker centers."). See also Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQ. L. 101, 103–04 (2016) (mak-

ters that must respond to NLRA claims against them would need legal advocates to navigate the labor law bureaucracy successfully. If they must fulfill the reporting requirements of the NLRA, rather than the reporting requirements governing nonprofits, they would need more costly accounting assistance.

This Article contends that the NLRA's carrot extends to worker centers who organize NLRA "employees," but the NLRA's stick does not apply to the vast majority of centers because they are not "labor organizations" within the meaning of the Act.¹⁷ The "labor organization" designation does not, and should not, encompass every organization that works with individuals who enjoy the NLRA's protections from employer retaliation for "employees" engaged in group action (its carrot).

Part I sets the stage for the law and policy debate about the application of labor law's stick to worker centers as "labor organizations." It clarifies that, as a legal matter, only organizations that "deal with" employers are labor organizations subject to labor law's stick. Part II draws on our original research into the filing practices and funding profiles of more than 100 worker centers to argue that the vast majority of worker centers are not set up to deal with employers, and thus are not labor organizations.

Part III puts forth doctrinal arguments for our carrot-but-not-a-stick approach. It relies on First Amendment jurisprudence and Professor Cynthia Estlund's theory of the "grand bargain" to argue that worker centers cannot be subject to labor law's stick. Applying labor law's restrictions on associational activity to worker centers, as we know them today, would run counter to First Amendment principles. The government can only place restrictions on organizations that actively seek to become the exclusive collective bargaining representatives of employees. Part III also discusses the U.S. Supreme Court's labor law jurisprudence to reveal that our carrot-but-not-a-stick approach is in line with the NLRA's fundamental goal of reducing the coercive effects of inequality on employer-employee relations. The U.S. Congress, with the NLRA, provided protections meant to strengthen, not weaken, nascent worker organizing efforts on behalf of vulnerable workers.

Part IV presents policy rationales for our approach. A time series of income inequality shows that inequality today parallels inequality during the 1930s. We are also currently in a historical moment of intense hostility to worker organizing and workers' rights. The power of unions is in decline. In this context, worker centers can and should use the NLRA's "carrot" on behalf of the workers they assist and should not be subject to its "stick." Our carrot-but-not-a-stick approach has implications for the vitality of American labor policy. It opens up space for emerging worker centers to expand their efforts to improve the working lives of the growing low-wage workforce.

ing the case that we should consider the "legal regulation of organizational governance" for "new organizational models.").

¹⁷ Fisk, *supra* note 16, at 116 ("Federal law regulates the internal affairs of labor organizations far more intensively than the internal affairs of almost any other private organization except a publicly traded corporation.").

I. THE DEBATE: ARE WORKER CENTERS LABOR ORGANIZATIONS
“DEALING WITH” EMPLOYERS?

The debate is not about the NLRA’s carrot. Employees are entitled to NLRA protections because of their status as employees, not the nature of the group with which they associate. Labor law’s protections apply when employees associate with a labor organization, a worker center, or without the involvement of any external organization. The key to labor law’s carrot is that employees engage in protected activity for mutual aid or protection.¹⁸ The applicability of labor law’s stick, however, turns on something quite different. It requires the existence of a “labor organization,” and has generated considerable debate for more than a decade.

In 2006, the agency that enforces restrictions on labor organizations’ associational activity under the NLRA, the National Labor Relations Board (NLRB), issued guidance suggesting that it did not consider one of the most high-profile worker centers to be a labor organization.¹⁹ It concluded that the worker center involved in an employer complaint to the agency—the Restaurant Opportunities Center of New York (ROC-NY)—was not an NLRA labor organization for purposes of the NLRA’s 8b restrictions on labor organizations engaged in picketing.²⁰

The NLRB concluded that the worker center’s negotiations with employers about a lawsuit settlement was not “a pattern or practice of dealing over time,” even though the settlement discussions “stretched over a period of time.”²¹ This was the case because the interactions related to a discrete issue, which was the worker center’s “attempts to enforce employment law.”²² The NLRB came to this conclusion even though the settlement agreement created arbitration provisions as enforcement mechanisms that would involve ongoing interaction between the employers and the worker center. It reasoned that these lawsuit settlement provisions were “merely contract enforcement mechanisms” rather than bilateral exchanges about other wages and

¹⁸ 29 U.S.C. § 157; Kati L. Griffith, *Worker centers and labor law protections: Why aren’t they having their cake?*, 36 BERKELEY J. OF EMP’T AND LABOR LAW 331 (2015) (illustrating the applicability of labor law’s protections and theorizing why worker centers do not take more advantage of these protections than they have to date); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 118-19 (1995) (NLRA “protects speech about unionization or other forms of employee representation, discussion of work-related grievances, and petitioning for their redress.”).

¹⁹ Restaurant Opportunities Center of NY, 2006 NLRB GCM LEXIS 52 (2006) (employer alleged that worker center engaged in unlawful recognitional picketing and coerced employees, among other things).

²⁰ It also concluded that even if it was a labor organization, its pressure on the employer “to enter into lawsuit settlement agreements” that set forth “numerous terms and conditions of employment” did not amount to a violation of NLRA 8(b)(7)(C)’s restrictions on recognitional picketing. Restaurant Opportunities Center of NY, 2006 NLRB GCM LEXIS 52 (2006).

²¹ *Id.* at *4-5.

²² *Id.* at *5.

working conditions over time.²³ As the NLRB put it, “[t]hey do not . . . contemplate any bilateral offer or consideration of new proposals.”²⁴

Two years later, in 2008, the federal agency in charge of overseeing labor organizations’ reporting and internal governance under the LMRDA similarly weighed in on ROC-NY’s status.²⁵ This agency, the Department of Labor’s Office of Labor-Management Standards (DOL), concluded that ROC-NY did not qualify as a labor organization because it did not engage in grievance handling or other kinds of ongoing exchanges with employers.²⁶

However, these agency positions, and apparent agency reluctance to conclude that worker centers are labor organizations, have not settled the debate. Some continue to make the case that worker centers fit labor law definitions of “labor organizations” such that they are subject to labor law’s stick: the heightened NLRA 8b restrictions on associational activity and its burdensome reporting and internal governance requirements under the LMRDA.²⁷ President Trump’s election in 2016 intensified debate about whether worker centers are labor organizations, subject to labor law’s stick.²⁸ Worker center critics hope that Trump’s administration will deem many worker centers as “labor organizations.”²⁹

As a legal matter, the key to determining whether an organization is a “labor organization” is if it exists for the purpose of “dealing with employers” on issues such as wages and working conditions.³⁰ Congress certainly intended “dealing with” to cover collective bargaining, as well as ongoing exchanges between employers and worker organizations about wages and working conditions.³¹ Case law in this area establishes that “dealing with” encompasses “a pattern of bilateral exchange between employee groups and

²³ *Id.* at *6.

²⁴ *Id.*

²⁵ Letter from Andrew Davis, Policy and Law Advisor, Division of Interpretations and Standards, to Beverly Walker, Chief, Division of Interpretations and Standards (Jan. 16, 2008).

²⁶ *See id.*

²⁷ *See* 29 U.S.C. § 402(i) (2012) (“Labor organization” means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment”).

²⁸ *See* Benn Penn & Jacquie Lee, *‘Worker Center or Union’ Probe May be Sign of Things to Come*, BLOOMBERG L.: DAILY LABOR REP. (March 15, 2018, 8:41 AM), <https://news.bloomberglaw.com/daily-labor-report/worker-center-or-union-probe-may-be-sign-of-things-to-come> [<https://perma.cc/FG6G-QY9A>].

²⁹ *Id.*

³⁰ 29 U.S.C. § 152(5) (2012). Labor law restrictions on internal governance and reporting adds the additional element of requiring the group to be “engaged in an industry affecting commerce” to satisfy the definition. 29 U.S.C. § 402(i) (2012); *see also* 29 U.S.C. § 402(j) (2012) (further defining industry affecting commerce).

³¹ *See* NLRB v. Cabot Carbon Co., 360 U.S. 203, 211–13 (1959) (“dealing with” includes employer exchanges with an employee committee about terms or conditions of employment); *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992) (same); *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1271 (4th Cir. 1994) (“[I]f there are only isolated instances in which

employers.”³² Many of these cases involve employer-created committees and whether they were “labor organizations” that the employer had illegally interfered with (in violation of the NLRA’s company union prohibition). In *Cabot Carbon*, the U.S. Supreme Court clarified that employer exchanges with an internal employee committee about terms and conditions of employment constituted “dealing with.”³³

Thus, the debate ultimately concentrates on what Congress meant by “dealing with employers.” Did it mean to cover groups, like worker centers, that lack an intent to engage in ongoing interactions with particular employers but try numerous strategies to improve wages and working conditions for low-wage workers? Worker advocates and their policymaking allies answer this question in the negative, characterizing “dealing with” more narrowly than their opponents. They allege that groups only “deal with” employers when they engage with particular employers over time, such as when they handle employer-employee grievances or attempt to secure a contract (a collective bargaining agreement) with an employer.

The Executive Director of the Korean Immigrant Workers’ Association (KIWA), for example, characterized KIWA as a worker center, not a union, because of its focus on community issues rather than collective bargaining outcomes.³⁴ She stated that she aims to promote workers’ rights in general, but not to engage in ongoing negotiations with employers about contracts or to process grievances.³⁵ Ana Avendaño, then the AFL-CIO Director of Immigration and Community Action, said that the distinguishing feature of worker centers is representation.³⁶ Worker centers, she said, are community organizations that serve the needs of workers, while labor organizations represent workers with respect to their employers.³⁷

Business groups, conservative think tanks, and their allies in Congress characterize “dealing with” more broadly. They argue that worker centers “deal with” employers because they continuously pressure employers to improve wages and working conditions.³⁸ A January 2018 letter from Republi-

the group makes ad hoc proposals to management followed by a management response or acceptance or rejection by word or deed, the element of dealing is missing.”)

³² Estlund, *supra* note 8, at 229 (analyzing the relevant precedent).

³³ 360 U.S. at 204–05, 214.

³⁴ Gayle Cinquegrani, *House Republicans Ask Perez to Clarify LMRDA Filing Terms for Worker Centers*, BLOOMBERG L.: DAILY LABOR REP. (Aug. 1, 2013, 12:00 AM), <https://news.bloomberglaw.com/daily-labor-report/house-republicans-ask-perez-to-clarify-lmrda-filing-terms-for-worker-centers> [https://perma.cc/6SPK-EAU7].

³⁵ *Id.*

³⁶ Gayle Cinquegrani, *Worker Centers Provide Necessary Outreach, Supporters Say: Opponents See LMRDA Issue*, BLOOMBERG L.: DAILY LABOR REP. (Nov. 27, 2003, 12:00 AM), <https://news.bloomberglaw.com/daily-labor-report/worker-centers-provide-necessary-outreach-supporters-say-opponents-see-lmrda-issue> [https://perma.cc/5779-HFLZ].

³⁷ *Id.*

³⁸ Ben Penn, *U.S. Chamber Report Casts Worker Centers As Means for Unions to Circumvent NLRA*, BLOOMBERG L.: DAILY LABOR REP. (Feb. 26, 2014, 12:00 AM), <https://news.bloomberglaw.com/daily-labor-report/us-chamber-report-casts-worker-centers-as-means-for-unions-to-circumvent-nlra> [https://perma.cc/D84K-EM9H]; Stephen Lee, *Worker Centers Push Back*

can legislators on the US House of Representatives' Committee on Education and the Workforce ("House Workforce Committee") asserted that worker centers deal with employers and are essentially "union fronts" funded and/or controlled by unions.³⁹ Worker center critics allege that these groups are labor organizations because they engage in picketing and boycott activity, some of which is NLRA 8b-restricted for labor organizations.⁴⁰ In 2018, the DOL was asked to investigate the Centro de Trabajadores Unidos en Lucha (CTUL-Center for Workers United in Struggle), in part because it used a secondary boycott to pressure retailers to use union labor.⁴¹

Along similar lines, in July 2013, two Republican legislators from the House Workforce Committee wrote to the DOL alleging that worker centers are indeed labor organizations because (similar to unions) they engage in industry wide organizing, push for legislative change, and engage in picketing and boycotting as a strategy.⁴² It noted that KIWA picketed and boycotted over a dozen restaurants to help organize low-wage workers and to improve their wages. The DOL responded, however, by clarifying that worker centers do not become labor organizations "simply by engaging in the

Against Allegations of Being Union 'Front Groups,' BLOOMBERG L.: DAILY LABOR REP. (Aug. 13, 2013, 12:00 AM) (noting that House republicans and a business group called Center for Union Facts argue that worker centers are skirting labor regulations), <https://news.bloomberglaw.com/daily-labor-report/worker-centers-push-back-against-allegations-of-being-union-front-groups> [<https://perma.cc/56V9-Z3PD>]. A business advocate contended that unions have "hijacked" worker centers because they are "more publicly acceptable" to the broader public. Martin Berman-Gorvine, *At SHRM Meeting, Worker Centers Draw Ire of Industry Executives, Management Attorney*, BLOOMBERG L.: DAILY LABOR REP. (March 19, 2014, 12:00 AM), <https://news.bloomberglaw.com/daily-labor-report/at-shrm-meeting-worker-centers-draw-ire-of-industry-executives-management-attorney> [<https://perma.cc/PWN5-FDRF>]; Ben Penn, *Chamber Turns up Heat on Labor Dept. to Probe Worker Centers (1)*, BLOOMBERG L.: DAILY LABOR REP. (April 25, 2018, 2:47 PM), <https://news.bloomberglaw.com/daily-labor-report/chamber-turns-up-heat-on-labor-dept-to-probe-worker-centers-1> [<https://perma.cc/DR37-5MUF>] (U.S. Chamber of Commerce released a report on April 25, 2018 saying that the DOL should probe whether or not certain worker centers are "labor organizations").

³⁹ Letter from the Comm. Educ. & Workforce, U.S. House of Representatives, to Alexander Acosta, U.S. Dep't of Lab. (Jan. 18, 2018) ("[S]o-called worker centers have become front groups controlled by big labor special interests and [under the Obama administration] were largely allowed to operate outside of the legal requirements [of the LMRDA]"), <https://republicansedlabor.house.gov/news/documentsingle.aspx?DocumentID=402413> [<https://perma.cc/974B-464C>].

⁴⁰ See 29 U.S.C. § 158(b)(4) (2012).

⁴¹ Penn & Lee, *supra* note 28. For more on the debate see Janice Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 INDUS. REL. 604, 605-06 (2011); U.S. Chamber of Commerce, *The New Model of Representation: An Overview of Leading Worker Centers* 1-2 (2014).

⁴² Letter From Comm. on Educ. & the Workforce, US House of Representatives to Thomas Perez, US Dep't of Labor (July 23, 2013), https://www.uschamber.com/sites/default/files/09-19-13-dol-worker_center_follow-up_with_enclosure_0.pdf [<https://perma.cc/92GS-N3MX>]; Cinquegrani, *supra* note 34; Memorandum from Brian V. Kennedy, Assistant Sec'y, Office of Cong. & Intergovernmental Affairs, to John Kline, Chairman, Comm. on Educ. & the Workforce (August 26, 2013).

routine activities of legal service providers and activities targeting employers such as picketing, handbilling, and protesting”⁴³

In the sections that follow, we take up the question raised by this debate and argue that worker centers do not “deal with” employers in the labor law sense. As a result, they are not subject to labor law’s stick.

II. ORGANIZATIONAL RESEARCH: WORKER CENTERS ARE NOT SET UP TO “DEAL WITH” EMPLOYERS

Our original empirical research on worker centers’ legal filings with the Internal Revenue Service (IRS) illustrates that most worker centers are not set up to “deal with” employers. Admittedly, whether a particular worker group “deals with” an employer will ultimately depend on the adjudication of particular facts considered on a case-by-case basis. There are some similarities across the vast majority of worker centers, however, that permit us to make some useful generalizations about labor law’s applicability. For example, as we will elaborate upon below, the vast majority of centers pursue missions that are broader than dealings with particular employers. Moreover, most are too small, and too dependent on external funders, to engage in ongoing dealings with particular employers about wages and working conditions.

For the remainder of the Article we will continue to use the umbrella term “worker centers” to refer to the large subset of worker centers that look like nonprofit organizations. We are not referring to the small subset of organizations that call themselves “worker centers,” but are really subsidiaries of labor unions or are actively engaging in collective bargaining with employers. For our organizational research, we collected data on Janice Fine and Nik Theodore’s comprehensive list of all worker centers (as of 2012) from government and other relevant sources.⁴⁴ We found IRS data for 104 nonprofit worker centers in 2012, which represented 60% of the groups in Fine and Theodore’s list. We confirmed that an additional 23% of groups on their 2012 list functioned as non-profit organizations, even though they were IRS exempt from filing as non-profits. The latter worker centers did not need to file with the IRS because they were part of larger non-profits, too small, or

⁴³ Cinquegrani, *supra* note 36. In other words, for the DOL, engaging in tactics such as picketing and boycotting to pressure a particular employer did not amount to “dealing with” a particular employer for labor law purposes.

⁴⁴ See Janice Fine and Nik Theodore, *Worker Centers 2012—Community Based and Worker Led Organizations*, RUTGERS UNIVERSITY CENTER FOR REMOTE SENSING AND SPATIAL AWARENESS, (2013), <http://bit.ly/2JLVQXS> [<https://perma.cc/NXU6-C3ZR>]. We collected data on revenue and funding sources from the US Internal Revenue Service, the US Department of Labor and the Foundation Directory Online database. For more information about our research see Leslie C. Gates et al., *Sizing Up Worker Center Income (2008–2014): A Study of Revenue Size, Stability and Streams*, in *NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE* 39–40 (2018).

fit an IRS filing exemption (e.g. for religious organizations).⁴⁵ These IRS filings are helpful data sources because they require yearly reporting on organizational purposes, budgets and general categories of income sources.

A. Do Not Exhibit Purposes to “Deal With” Employers

The IRS filings we studied portray that worker centers provide services for vulnerable populations of working people, rather than existing for the purpose (in whole or in part) of dealing with particular employers over time.⁴⁶ For instance, almost 60% of the 104 worker centers that filed an IRS 990 form in 2012 reported income from program services that they provided to low-wage workers and their communities.

A comprehensive review of worker centers’ mission statements confirmed that even those worker centers that did not gain revenue from program services described services to the low-wage public as key to their organizational missions. This is not particularly surprising, given that the IRS’ nonprofit tax exempt status partially relies on centers’ provision of services to the “poor,” the “distressed,” and the “underprivileged.”⁴⁷ While IRS and labor law have their own unique set of definitions, labor law’s stick has not traditionally applied to nonprofit organizations whose purpose is to help the poor and vulnerable. This has been the case even when those organizations work with some individuals who enjoy NLRA protections as “employees.”

Worker centers do more than provide services and advocate for workers’ interests at the firm level. They are also social movement organizations⁴⁸ that seek broader societal change.⁴⁹ Our review of worker center purposes revealed that worker centers often focus on large-scale concerns such as ameliorating income inequality in the U.S., promoting humane immigration policies at the state and federal levels, and addressing racial injustice in the

⁴⁵ Fifteen percent did not file because they were part of larger nonprofits, 5 percent did not file because the federal government does not require small nonprofits to file (those with budgets less than \$50,000) and 3 percent did not file because their religious purposes exempts them from filing. Gates et al., *supra* note 44, at 41.

⁴⁶ See, e.g., Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L. J. 891, 912–23 (2008) (describing collaborations between worker centers and public interest lawyers to enforce low-wage workers’ rights).

⁴⁷ Gates et al., *supra* note 44, at 52.

⁴⁸ Julie Yates Rivchin, *Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L & SOC. CHANGE 397, 400 (2004) (“Workers’ centers are typically based in specific ethnic communities and draw much of their strength from having deep roots in those particular communities. Within the workers’ center model there are variations . . . some workers’ centers focus solely on issues of workplace justice, others are components of broader community organizations”).

⁴⁹ See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 429 (1995).

workplace.⁵⁰ Their efforts have helped to put “issues about low-wage work and the shrinking middle class at the forefront of public debate.”⁵¹

Drawing on participant observation of a Chicago worker center and the sociological literature, Professor César F. Rosado Marzán contrasts worker centers with labor unions, describing the former as “rich in social and symbolic capital.”⁵² There may be exceptions, such as worker centers that are a legal subsidiary of a labor union, but worker centers generally do not intend to limit their activities to ongoing dealings with employers; nor do they intend to become the collective bargaining representatives of the majority of workers at a particular establishment.⁵³

B. Too Small to “Deal With” Employers

Our organizational research into worker center funding revealed that worker centers tend to be small organizations, similar to other nonprofits.⁵⁴ Unlike labor unions, worker centers do not tend to have the funding capacity to engage in ongoing dealings with employers on behalf of their worker constituents. Worker centers as we know them today do not, then, generally have the financial capacity to engage in collective bargaining, administer contracts, or repeatedly negotiate with particular employers—even if they wanted to.

As Figure 1 shows, the median worker center’s annual budget in 2012 was \$410,000.⁵⁵ Even if we compare this median to small labor union locals, we see how much smaller worker centers tend to be. A UNITE-HERE Local in Chicago reported a revenue of \$9 million in 2012.⁵⁶ According to Figure 1, only a handful of worker centers in 2012 had revenue that exceeded \$1 million. An even more striking contrast is to the Service Employee International Union, which reported a total of \$78 million in 2012.⁵⁷

⁵⁰ See generally FINE, *supra* note 2.

⁵¹ Fisk, *supra* note 16, at 102 (describing worker center success at raising wages through statutory reform at the state and local level and by “putting issues about low-wage work and the shrinking middle class at the forefront of public debate.”).

⁵² César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing*, 2017 U CHI. LEGAL FORUM 409, 411 (2017) (“Social capital enables worker centers to construct effective political coalitions. Symbolic capital lends prestige to the worker center and helps it to draw significant public attention. Finally, worker centers can frame issues in broad, moral ways that help them to garner popular support. Broad moral framing contributes to a rekindling of social and legal norms for a worker-based moral economy.”).

⁵³ Naduris-Weissman, *supra* note 15 at 238 (2009); Richard B. Freeman, *What Can Labor Organizations Do for U.S. Workers When Unions Can’t Do What Unions Used to Do?*, in WHAT WORKS FOR WORKERS?: PUBLIC POLICIES AND INNOVATIVE STRATEGIES FOR LOW-WAGE WORKERS 50, 64 (Stephanie Luce et al. eds., 2014).

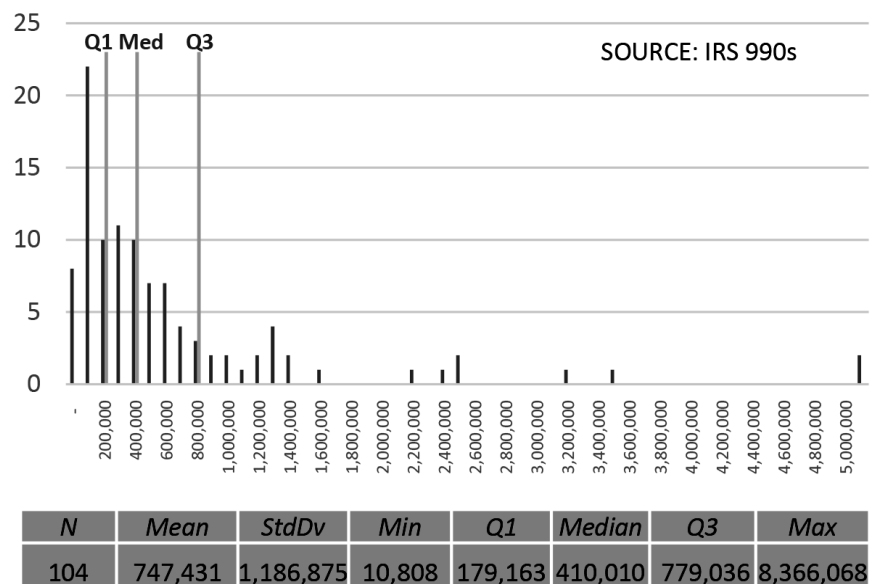
⁵⁴ KIRSTEN A. GRØNBJERG, UNDERSTANDING NONPROFIT FUNDING xi (1993).

⁵⁵ Gates et al. *supra* note 44, at 43.

⁵⁶ *Id.*

⁵⁷ *Id.*

FIGURE 1: DISTRIBUTION OF WORKER CENTERS BY TOTAL REVENUE, 2012



What our organizational research portrays is that the vast majority of worker centers today do not have the capacity to engage in collective bargaining or other ongoing dealings with particular employers.

C. Too Reliant on External Funding to Deal With Employers

Worker centers’ reliance on external, rather than internal, sources is another indicator that worker centers are not set up to “deal with” employers in the labor law sense. Reliance on external sources is a typical characteristic of all nonprofits.⁵⁸ Indeed, more than 80% of worker center income in our study came from external sources such as government and foundation grants and charitable donations from individuals.⁵⁹ In contrast, worker centers in our study reported that less than 2% of their income came from dues paid to them by their organizational membership.⁶⁰

Reliance on government or foundation grants can orient the group to efforts that will “please” funders and respond to priorities that are set outside of the organizations’ constituents.⁶¹ Government grants focus on things like facilitating the government’s workplace health and safety enforcement, and most foundations are interested in economic justice outside of the collective

⁵⁸ GRØNBJERG, *supra* note 54, at 72.

⁵⁹ Gates et al., *supra* note 44, at 50.

⁶⁰ *Id.*

⁶¹ *Id.* at 55–56.

bargaining context. Lack of internal funding sources makes it more challenging for worker centers to represent employees in ongoing dealings with particular employers.

Thus, the purposes and size of worker centers and their sources of funding support the view that most worker centers are not set up to “deal with” employers. Worker centers do not dedicate their efforts to, nor do they have the capacity to, engage in ongoing interaction with individual employers over time—the activities that have traditionally justified the application of labor law’s limitations to certain organizations. Therefore, labor law’s stick is not appropriate as worker centers do not “deal with” employers in the ways labor law contemplates.

III. LEGAL DOCTRINAL RATIONALES FOR INTERPRETING “DEALING WITH” TO EXCLUDE WORKER CENTERS

Thus far, we have used our organizational research to characterize worker centers as not having the organizational purposes or capacity to “deal with” employers. Here, we advance two legal doctrinal rationales based on constitutional law and labor law. While both of our doctrinal rationales specifically address the NLRA, but not the LMRDA, they implicate the definition of labor organization under both statutes. This is the case because the LMRDA’s definition of labor organization is narrower than the NLRA’s definition and the U.S. DOL does consider NLRB determinations in its own reviews of labor organization status.⁶²

A. Constitutional Law Only Permits Labor Law’s Stick in Exchange for Collective Bargaining Privileges

Constitutional law protects worker centers from being subject to labor law’s limitations on associational activity like boycotts and picketing. In these situations, the First Amendment requires that we interpret “dealing with” more narrowly to include only organizations engaged in the enterprise of collective bargaining.⁶³

Voluntary associations that are not labor organizations enjoy considerable First Amendment protections of their organizing activity. For instance, the U.S. Supreme Court, in a case involving the National Association for the Advancement of Colored People (NAACP), held that the First Amendment protects civil rights picketing in support of a secondary boycott from govern-

⁶² Naduris-Weissman, *supra* note 15, at 273.

⁶³ See Duff, *supra* note 15, at 860 (“Courts have previously utilized avoidance canons when interpreting portions of the NLRA that might have rendered predominantly expressive activity unlawful under the statute. . . . Broadly interpreting the labor organization definition in such a way as to convert social advocacy groups into labor organizations subject to NLRA injunction carries obvious chilling potential. Therefore, courts may in protest contexts interpret the definition of “labor organization” narrowly once it is clear that there is no union activity involved.”).

ment interference.⁶⁴ The NLRA would prohibit this activity if it was initiated by a “labor organization.” Nonetheless, because the NAACP was not a “labor organization,” the First Amendment’s full protection applied to the NAACP. The principles that apply to the NAACP should apply to worker centers.⁶⁵

Labor scholars have roundly critiqued the NLRA’s 8b restrictions on unions’ associational activity, with some arguing that these restrictions are unconstitutional as applied to labor organizations.⁶⁶ There are serious Constitutional questions about the application of labor law’s stick to union activity. Professor Cynthia Estlund provides a potentially viable doctrinal reason for restricting First Amendment protections for labor organizations’ associational activity. Her rationale relies on collective bargaining protections as an offset. Specifically, Estlund argues that because the law provides additional powers to unions beyond the carrot, it may be constitutional to curtail their powers in other ways.⁶⁷ One notable benefit is that employers are legally required to bargain with unions once the union gains majority support.⁶⁸ Estlund calls this compromise the “grand bargain” and proposes that it is a way of understanding labor law’s misfit with Constitutional principles that apply to all other private voluntary associations in the United States.⁶⁹ She notes, “unions’ unusual legal privileges and powers might justify some of the unusual restrictions on their freedom and autonomy.”⁷⁰

Labor law restrictions, and other exceptions to First Amendment protections, are incongruous with worker centers as we know them today. While they enjoy the carrot of employee protection from employer retaliation, they

⁶⁴ See generally *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁶⁵ For an argument that recent First Amendment jurisprudence supports treating worker centers differently see Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 *CARDOZO L. REV.* 1455, 1464 (2016) (“While this Court’s First Amendment is commonly understood to help corporations over workers, it may also be a tool with which to challenge and creatively destroy bans on company support that are, today, not only impediments to the development of new forms of worker organizations but are also good for companies that promote themselves as doing well by their workers . . .”).

⁶⁶ Crain & Matheny, *supra* note 1, at 562–65 (contending that labor rights should be reframed as “assembly rights” to expand labor rights and to buttress our democracy as well as our democratic institutions); Hallett, *supra* note 10, at 511 (using constitutional arguments to give labor more protection, what she calls “a labor organizing privilege”).

⁶⁷ Estlund, *supra* note 8, at 169.

⁶⁸ *Id.* at 193 (“The sui generis powers and privileges of unions under the NLRA were chiefly embodied in the original Wagner Act of 1935, which imposed a duty on employers to recognize a union selected by a majority of workers in an appropriate bargaining unit as the exclusive representative of all workers in the bargaining unit, whether union members or not, and a duty to bargain with that union in good faith.”). See also Fisk, *supra* note 16, at 116 (“[T]he goal of the legal regulation is to force unions to govern themselves so as to protect dissenting employees, and the law does so because unions are the exclusive representatives of employees with the power to affect conditions of employment and also to waive individual employee rights.”).

⁶⁹ Estlund, *supra* note 8, at 177–78 (“The claim that worker centers are ‘labor organizations’ under the NLRA attempts to divorce labor law’s quid from its quo—to impose the extraordinary restrictions of federal labor law on voluntary associations of workers that neither exercise nor claim the special privileges and powers of unions.”).

⁷⁰ *Id.* at 177.

should not be subject to the labor organization stick. Because worker centers do not seek the powerful benefits of mandatory bargaining and exclusive representation that labor unions enjoy, there is no (even arguable) legal justification for limiting their full freedom of assembly under the Constitution. Thus, worker centers should be subject to the same Constitutional entitlements as other nonprofits and voluntary associations.

Even if our argument about a conflict with the First Amendment is disputable, deeming worker centers as labor organizations would at minimum raise a constitutional question. Thus, the constitutional avoidance doctrine would call for protecting worker centers from labor law's stick. Since the meaning of "deal with" is ambiguous, the constitutional avoidance doctrine requires a narrow interpretation of its meaning. Such an interpretation would protect worker centers from labor law's stick. As we show next, labor law itself provides another justification for protecting worker centers from labor law's stick.

B. Labor Law's Inequality of Bargaining Power Purpose Forbids Use of Labor Law's Stick on Worker Centers

A key purpose of labor law, to offset inequality of bargaining power, counsels against the application of labor law's stick to worker centers. It instructs us, similar to constitutional law, to have a narrower interpretation of "dealing with" in the worker center context. Worker centers organize economically vulnerable workers, which means they work to offset inequality of bargaining power even though they are not organizations set up to deal with particular employers.

As we will detail below, the U.S. Supreme Court's labor law jurisprudence confirms the expansiveness of labor law's goal to offset inequality of bargaining power, to enhance protections for vulnerable workers outside of the labor union context, and to infuse consideration of inequality of bargaining power into labor law interpretations, especially before the collective bargaining stage.

1. Inequality of Bargaining Power is Fundamental Purpose

The NLRA's underlying inequality of bargaining power rationale was/is that individual vulnerable workers may accept sweatshop conditions created by "chiselers" (as they had been known during the Great Depression era)⁷¹ if those conditions were a requirement of gaining employment. But, Congress posited, groups of workers would be in a better position to demand humane wages and working conditions if they confronted their employers through

⁷¹ Anne Marie Lofaso, *Jobs and the American Worker: What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 95–96 (2011) (connecting inequality of bargaining purposes to "the lack of economic diversification, a dearth of job opportunities, health and safety risks inherent to one of the region's higher paying jobs—combined with a history of worker exploitation and hostility to workers' attempts to help themselves.").

collective actions. Congress intended to empower employees and their nascent organizing efforts to address the injustices that arise from employers' superior market power over workers.⁷² Worker centers do just that.

Some downplay the NLRA's purpose to redress unequal bargaining power and concentrate more on the NLRA's purpose to promote industrial peace.⁷³ Nonetheless, its salience as a fundamental underlying labor law policy is indisputable given that the need to address inequality of bargaining power is stated in the statute itself.⁷⁴ Also, the U.S. Supreme Court has repeatedly affirmed Congress' purpose of equalizing bargaining power between employers and employees over the decades since the NLRA's enactment,⁷⁵ and has referred to it as "fundamental" to labor policy.⁷⁶

2. *Enhanced Protections for Organizing Before Collective Bargaining*

The U.S. Supreme Court has deemed that inequality of bargaining power merits enhanced protections for activity that occurs among employees who are acting collectively but are not represented by a union.⁷⁷ In *Washington Aluminum Co.*, a seminal labor law case, the Court concluded that a

⁷² Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 293, 334-35, 368-70 (1993) (advancing that NLRA does not promote employee loyalty but instead intends to strengthen employees' protections); Sergio Gamonal & Cesar F. Rosado Marzan, *Protecting Workers as a Matter of Principle: A Latin American View of U.S. Work*, 13 WASH. U. GLOBAL STUD. L. REV. 605, 647-49 (2014) (emphasizing statutory language on this point).

⁷³ Branscomb, *supra* note 72, at 334-35, 368-70 (1993) (describing scholarship that de-emphasizes inequality of bargaining power purpose and instead emphasizes industrial peace).

⁷⁴ 29 U.S.C. § 151. *See also* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991) ("In § 1 of the NLRA Congress made the legislative finding that the "inequality of bargaining power" between unorganized employees and corporate employers had adversely affected commerce and declared it to be the policy of the United States to mitigate or eliminate those adverse effects "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

⁷⁵ *See, e.g.*, Am. Comm. Ass'n v. Douds, 339 U.S. 382, 387-89 (1950) ("That Act was designed to remove obstructions caused by strikes and other forms of industrial unrest, which Congress found were attributable to the inequality of bargaining power between unorganized employees and their employers. It did so by strengthening employee groups, by restraining certain employer practices, and by encouraging the processes of collective bargaining."); Am. Hosp. Ass'n, 499 U.S. at 609 (same); Brown v. Pro Football, 518 U.S. 231, 253 n.1 (1996) (same); Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 75354 (1985) (same).

⁷⁶ NLRB v. J. Weingarten, Inc., 420 U.S. 251, 261-62 (1975) (referring to inequality of bargaining power as a fundamental right); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (same); Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 46-47 (2007) ("The main object of labour law has always been . . . to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."); Andrias, *supra* note 1 at 9 (describes "labor law's most fundamental commitments" as achieving "greater economic and political equality in society.").

⁷⁷ WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 99 (2013) (referring to *Washington Aluminum* and stating that the "Court has held that walkouts, with or without the presence of the union, are protected activity regardless of the judges' view about the wisdom of the action.").

group of non-union workers who spontaneously walked out of their factory to protest extremely cold conditions engaged in NLRA protected activity. In coming to this conclusion, the Court invoked the vulnerability of the unrepresented employees.⁷⁸ It stated:

The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative . . . to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. . . . [A]fter talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the “miserable” conditions of their employment.⁷⁹

The Court concluded that this was protected concerted activity because the workers did not yet have a union. The Court’s reliance on the lack of a union signals that the Court would have employed a more limited view of protection if there had been a union in place. Unionized workers would, as the *Washington Aluminum* Court put it, have a representative that could “present their grievances to their employer.”

3. *Inequality of Bargaining Power Purpose as Key Interpretive Tool Before Collective Bargaining Stage*

Inequality of bargaining power is so salient to labor policy that the Court uses it as an interpretive tool when applying the NLRA. This is especially the case before the employees have reached the collective bargaining stage.

The Court, for example, instructed the NLRB to consider this purpose when it interprets the impact of employer statements on employees. In the worker center context this would mean interpreting the NLRA’s labor organization definition to exclude worker centers. In *Gissel Packing Co.*, the Court stated that the NLRB should account for power imbalances when considering whether an employer’s statement before a union election is an implicit threat of retaliation. In other words, rather than considering how an objective person would interpret seemingly benign predictions about the effects of unionization, the Court concluded that the NLRB should consider how an economically dependent worker would interpret the statements.⁸⁰

⁷⁸ NLRB v. *Washington Aluminum Co.*, 370 U.S. 9 (1962).

⁷⁹ *Id.* at 14–15.

⁸⁰ NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 617–18 (1969). The Court stated, “Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. . . . [It] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of

They might be more prone to “pick up intended implications” of the employer’s statement that otherwise might “be more readily dismissed by a more disinterested ear.”⁸¹

In another seminal labor law case, the Court concluded that the NLRB should even broadly consider the inequality of bargaining power of union represented workers in some circumstances. In *J. Weingarten Inc.*, the Court concluded that a represented employee has the right to bring a union representative with him/her in an investigatory interview that could result in disciplinary action or discharge. The Court largely relied on the underlying policy of the Act stating, that

[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided “to redress the perceived imbalance of economic power between labor and management.”⁸²

Those arguing for the need to apply *Weingarten* rights to all employees, even non-union employees, similarly call upon the NLRA’s inequality of bargaining power rationale.⁸³

Supreme Court case law on whether particular workers are “employees” shows a similar concern with the vulnerability of the workers involved and an expansive consideration of inequality of bargaining power. In a case declaring that unauthorized immigrant workers can be NLRA “employees” with collective action rights under the Act, the Court harkened back to the NLRA’s goal of reducing the imbalance in bargaining power. It reasoned that if the NLRA withholds protections, this would create a “subclass” of workers. The “subclass” of unauthorized immigrant workers would be problematic for labor policy because they would not have “a comparable stake in the collective goals of their legally resident co-workers” and because their

legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.” *Id.*

⁸¹ *Id.*

⁸² *J. Weingarten*, 420 U.S. at 261–62 (1975) (quoting *Am. Ship Bldg. Co. v. NLRB.*, 380 U.S. 300, 316 (1965)). See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984) (“Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.”).

⁸³ See Christine Neylon O’Brien, *When Union Members in a Members-Only Non-Majority Union (MONMU) Want Weingarten Rights: How High will the Blue Eagle Fly?*, 10 U. PA J. BUS. & EMP. L. 599, 621–22 (2008) (arguing that conclusion that individual employees have a right to union representation at investigatory interviews relates to the idea of inequality of bargaining power).

inferior rights would create incentives for employers to prefer the unauthorized population over the authorized population.⁸⁴

Inequality of bargaining power shows up in other Court interpretations of “employee” status as well. In *E.C. Atkins & Co.*, the Court concluded that private plant guards were employees because of the “inequality of bargaining power [they experience] and [because] their need for collective action parallels that of other employees” under the NLRA.⁸⁵ In a case concluding that retired employees were no longer NLRA “employees,” the Court’s rationale relied on the inapplicability of the NLRA’s inequality of bargaining power purpose to that population.⁸⁶ It stated that “[t]he inequality of bargaining power that Congress sought to remedy was that of the “working man.”⁸⁷

There are Supreme Court cases that deemphasize inequality of bargaining power, but they are not applicable to nonprofit associations (like worker centers) that do not aim to become collective bargaining representatives. These cases de-emphasize the NLRA’s inequality of bargaining power purpose once a labor organization becomes the collective bargaining representative of a majority of employees and the employer has a legal duty to bargain with it. Once unions have reached the collective bargaining stage, these court rationales posit, employees have the “opportunity to deal on equality with their employer.”⁸⁸ Thus, in the eyes of the Court, the NLRA’s purpose to offset power imbalances largely has been realized in such cases.

In *Insurance Agents’ Int’l Union*, the Court used this reasoning to justify a holding that the NLRB should have a hands-off approach to regulating

⁸⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). *But see* *Hoffman Plastic Compounds vs. NLRB*, 535 U.S. 137, 139 (2002) (leaving *Sure-Tan’s* holding on employee status intact but removing unauthorized employees’ access to NLRB back pay remedy when they suffer a labor law violation).

⁸⁵ *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 404 (1947). The court went on to reason that “[w]ithout collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work”. *Id.* *But see* Sergio Gamonal C. & César F. Rosado Marzán, *PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD* (forthcoming in 2019) (describing restriction of using the NLRA’s purposes to answer questions of employee versus independent contractor status). Marc Linder, *Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-like Persons*, 66 U. DET. L. REV. 555, 560 (1989) (same).

⁸⁶ *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). For another broad reading of the scope of employee see *Eastex, Inc. v. NLRB*, 437 U. S. 556, 567 (1978).

⁸⁷ *Allied Chem.* 404 U.S. at 166. Scholars have similarly argued for labor law’s inclusion of now-exempt groups, such as domestic workers who take care of children or the aged, because those groups are particularly vulnerable and face extreme inequalities of bargaining power. *See, e.g.*, Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 21 N.C. L. REV. 45, 109-10 (2000) (arguing for NLRA coverage of domestic workers because they are a group with very little bargaining power); Michael C. Duff, *Union Salts as Administrative Private Attorneys General*, 32 BERKELEY J. EMP. & LAB. L. 1, 2 (2011) (“[S]alts have served a legitimate function that is often overlooked: by exposing unlawful, anti-union employment practices - especially unlawful hiring practices - salts facilitate the implementation of federal labor law policies designed to maintain industrial peace and to equalize employee bargaining power.”).

⁸⁸ *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 506 (1960).

bargaining and thus should not find bad faith bargaining based on a union's, or an employer's, use of economic pressure. The *Insurance Agents* Court, in 1960, noted that inequality of bargaining power has less salience once the parties are at the bargaining table. It stated:

In view of the economic and political strength which has thereby come to unions, interpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power.⁸⁹

In a collective bargaining labor law case from 1981, *First National Maintenance Corp.*,⁹⁰ the Supreme Court again downplayed inequality of bargaining power at the bargaining stage. That case set out a legal principle for determining when an employer decision to close part of its business is a mandatory subject of bargaining that an employer must bargain about in good faith. The *First National Maintenance* legal principle gives more consideration to employer business interests, and less consideration to inequality of bargaining power, in part because the “inequalities” that the Act meant to redress are less of a concern at the bargaining stage of the relationship.⁹¹

In sum, worker centers squarely address the central purpose of the NLRA: to offset inequality of bargaining power. As we established above, however, they do so not by aiming to represent workers in collective bargaining or other ongoing dealings with particular employers. Instead, they engage with workers who are more akin to the loose-knit workers in *Washington Aluminum* that walked out of their workplace due to the intolerably cold conditions on that Chicago morning. As we will elaborate upon next, the fact that worker centers endeavor to offset the weak bargaining power of some of the nation's most vulnerable, underrepresented, employees at a time of heightened inequality and hostility against workers' rights further underscores the relevance of extending worker centers the carrot of labor law, without subjecting them to labor law's stick.

IV. POLICY RATIONALES FOR INTERPRETING “DEALING WITH” TO EXCLUDE WORKER CENTERS

Along with legal arguments, there are normative policy rationales supporting our carrot-but-not-a-stick approach. Worker centers should enjoy the carrot, but not the stick, of labor law because they assist some of the most vulnerable workers and do so at a time of heightened inequality of bargaining power. Indeed, the inequality of bargaining power between workers and employers today is by some measures comparable to, if not worse than, the inequality which the NLRA's architects sought to rectify. Further-

⁸⁹ *Id.* at 507.

⁹⁰ *See* *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 683 (1981).

⁹¹ *Id.* at 682–83.

more, worker centers fulfill the mission of the NLRA in a hostile environment for advocates of workers' rights. For these reasons, we argue that the NLRA's protections for associational activity should extend to worker centers, without burdening worker centers with its cumbersome stick of reporting and associational restrictions.

A. Worker Centers Organize the Marginalized

Labor law's concept of "dealing with" should not be interpreted broadly to include worker centers because they organize some of the most marginalized employees in the U.S. economy. Worker centers do not serve as a substitute for collective bargaining and the long-term contractual benefits that can result. They do important work, however, to improve conditions for some of the most disadvantaged populations of workers in the United States. They often organize employees whose basic rights to minimum wage, overtime premiums, and workplace safety are routinely violated.

In his study of black worker centers, Steven Pitts notes that even though a significant number of black workers have jobs, "the quality of those jobs is poor."⁹² Indeed, black workers still face a multiple decades-long employment crisis, marked by poor job quality and disproportionate unemployment (when compared to white workers).⁹³ The National Black Worker Center Project, and its worker center affiliates, addresses these inequities through organizing, policy campaigns, and other efforts to bring the voices and experiences of Black workers into the solutions to the Black job crisis.

Worker centers also participate in wide-scale efforts to address challenges faced by low-wage immigrant worker communities. Immigrant worker centers often engage with immigrants who work in low-paying, isolated, and small workplaces that are challenging for labor unions to reach and organize. Sometimes they organize workers who have particularly precarious situations because they are employees under labor law, but unauthorized individuals under immigration law.⁹⁴

In short, worker centers tend to represent precarious and low-wage populations with few resources.⁹⁵ Thus, the imposition of labor law restrictions on their public protest tools and the addition of compliance costs would be particularly harmful given the thin-resourcing of many worker cen-

⁹² Steven Pitts, *The National Black Worker Center Project: Grappling with the Power-Building Imperative*, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 115, 115 (2018).

⁹³ See *id.* at 118–26.

⁹⁴ See Xochitl Bada et al., *Union Organizing, Advocacy, and Services at the Nexus of Immigrant and Labor Rights*, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 91, 91–93 (2018).

⁹⁵ Crain & Matheny, *supra* note 1, at 562–65 (2014) ("Some of these mobilization efforts mirror pre-NLRA worker organizing, crossing workplace, industry, and geographical boundaries, and connecting economic issues with political and social justice."); Rosenfeld, *supra* note 15, at 472–73.

ters. This outcome would conflict with a central purpose of the NLRA to offset inequality of bargaining power.

B. *Inequality Parallels New Deal Levels*

Another policy rationale for our approach is that worker centers combat inequality which parallels New Deal era levels. Income inequality, which we might conceive of as the underlying structure of bargaining inequality, is on the rise. The top ten percent, those families whose incomes were higher than 90 percent of American families, have captured a growing share of income since the 1970s.⁹⁶ Their share expanded from around 33 percent in the early 1970s, to 50.1 percent in 2017, only slightly less than its peak of 50.6 percent in 2012.⁹⁷ In the past quarter century (since 1993), the incomes of the vast majority of Americans, those with incomes in the bottom 99 percent, grew by 15.5 percent.⁹⁸ Meanwhile, the incomes of the top 1 percent catapulted by 95.5 percent, capturing just over half (51 percent) of the overall economic growth of real incomes during this period.⁹⁹

Worker centers operate in a context of income inequality that is comparable to that which New Deal advocates and legislators faced in the 1930s.¹⁰⁰ In 2007, just before the 2008 economic crash, the top 1 percent's share of income soared to its recent nadir of 23.5 percent, nearly returning to its 1928 peak of 24 percent.¹⁰¹ Furthermore, the top ten percent's share of income now exceeds its prior height of 48 percent in 1928, just before the stock market crash of 1929.¹⁰²

Unions, the organizations conceived of as the bulwark against inequality of bargaining power, have withered. The percent of employed workers who are members of a union has decreased from its peak of 33.4 percent in 1945 to 24.1 percent in 1979 and to 10.4 percent by 2017.¹⁰³ Private sector

⁹⁶ Thomas Piketty & Emanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q.J. ECON. 1, 2 (2003).

⁹⁷ Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (Updated with 2017 Final Estimates) 1, 4-5 (Mar. 2, 2019) (unpublished manuscript), <https://eml.berkeley.edu/~saez/saez-UStopincomes-2017.pdf> [<https://perma.cc/F4BE-CRAG>].

⁹⁸ *Id.* at 5.

⁹⁹ *Id.* The top one percent of earning families, those with incomes above \$460,000 in 2017, increased their share of income from around 9 percent in the 1970s to around 20 percent since the early 1990s. The top one percent enjoyed 22 percent of income in 2017, down just slightly from its peak in 2007 of 23.5 percent. *Id.* at 1, 5.

¹⁰⁰ See Andrias, *supra* note 1, at 2, 5 ("Economic inequality is at its highest point since the Gilded Age, when unionization rates were similarly low."). For a discussion of the relative power of business in the lead up to, and during, the New Deal period, see Leslie C. Gates, *Theorizing Business Power in the Semi-Periphery: Mexico 1970-2000*, 38 THEORY & SOC'Y 57, 62-64 (2009).

¹⁰¹ Saez, *supra* note 97, at 5.

¹⁰² *Id.* at 4-5.

¹⁰³ Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 INDUS. & LAB. RELATIONS REV. 349 (2003) (updated annually at unionstats.com [<https://perma.cc/36CD-QSLF>]).

unionization rates have shrunk even more precipitously, from 24.2 percent in 1973 to just 6 percent of private sector workers since 2010.¹⁰⁴

Leaving aside fierce debates about whether union decline is a cause or consequence of income inequality, the coincidence of low unionization rates and high income-inequality makes our present era strikingly similar to the early 1930s. New Deal architects considered inequality and its resultant ills in the workplace to have reached intolerably high levels. Figure 2 illustrates how unionization rates have sunk to their early 1930s level, even as the share of income consumed by the top ten percent has increased.

FIGURE 2: UNION MEMBERSHIP AND SHARE OF INCOME GOING TO THE TOP 10 PERCENT



Source: Union membership data from U.S. Census Bureau accessed at <http://www.unionstats.com/>; Top 10 percent share of income from Piketty and Saez data updated as of 2017, and first published in 2007.

As inequality reaches historic levels and unions’ organizational strength wanes, worker centers play a critical role in addressing inequality of bargaining power.

C. Hostile Environment for Workers’ Rights

Worker centers not only confront a historical return to heightened inequality in bargaining power, they do so at a time of increasing hostility towards workers and their advocates. This serves as the final policy rationale underlying our approach. Some courts, employers, conservative groups, and local governments have become more hostile towards labor unions.¹⁰⁵ Strik-

¹⁰⁴ Jeffrey M. Hirsh & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 *FORDHAM L. REV.* 1727, 1729 n. 6, 1730 (2018); Hirsch & Macpherson, *supra* note 103, at 349.

¹⁰⁵ Andrias, *supra* note 1, at 6 (describing reasons for labor’s decline as delay, weak penalties, under-enforcement, unresponsive to supply chain in global economy and lack of support for industry wide bargaining); Kate Bronfenbrenner, *Employer Behavior in Certification Elec-*

ing, organizing, and bargaining has become incredibly difficult for unions.¹⁰⁶ Labor scholars elaborate how courts and the NLRB have enhanced the NLRA's stick (restrictions on union activity)¹⁰⁷ and have reduced labor law's carrot (protections of employee collective activity).¹⁰⁸ This is what Karl Klare famously called the "judicial deradicalization" of 1935 labor law (the NLRA), which in the eyes of many scholars was the "most radical piece of legislation [Congress] ever enacted."¹⁰⁹

Worker centers are, thus, often "scrambling" to find whatever "leverage" they can muster "within an increasingly hostile economic, political and legal environment."¹¹⁰ Even if worker centers do not take advantage of the carrot, labor law's stick should not get in the way of worker centers' efforts on behalf of vulnerable groups of low-wage workers at a time of such acute inequality of bargaining power.

V. WORKER CENTERS AND THE FUTURE OF LABOR POLICY

Worker centers cannot overcome the heightened inequality of bargaining power rooted in labor's waning organizational power and the nation's rising income inequality. As a new experimental model, however, worker centers provide a glimmer of hope in an otherwise bleak environment for workers' rights advancement. Worker centers, along with labor unions and other worker advocates, can and should experiment with "improvisational" organizing efforts that can shift the practices of twenty-first century companies.¹¹¹

In this context, our carrot-but-not-a-stick approach opens up space for emerging worker centers to expand their efforts to improve the working lives of the growing low-wage workforce. It provides an additional tool in worker centers' toolkit that has the potential to protect their constituents when they face employer retaliation.

tions and First-Contract Campaigns: Implications for Labor Law Reform, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 75 (2001) (documenting hostility).

¹⁰⁶ The public sector is not immune. In its most recent public sector labor law decision, *Janus v. AFSCME*, the U.S. Supreme Court struck a blow to labor law in the public sector. 138 S.Ct. 2448 (2018). It made it harder for public sector unions to collect payment from employees who benefit from a contract the union negotiated and administers on their behalves. *Id.*

¹⁰⁷ See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532 (2002).

¹⁰⁸ Crain & Matheny, *supra* note 1; see also Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1611 (2016) (describing court rulings curtailing labor law protection); Estlund, *supra* note 8, at 177 ("As a policy matter, I join the legions of labor law scholars who contend that the "delicate balance" struck by Congress is far out of whack and sharply tilted against workers' ability to claim union representation and the benefits of collective bargaining.").

¹⁰⁹ Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 63 MINN. L. REV. 265, 265 (1977).

¹¹⁰ Janice Fine, et al., *Introduction to NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY AND MOVEMENT FOR A NEW ECONOMIC AGE 1* (2018).

¹¹¹ Michael Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597, 669 (2016) (concluding that new efforts will be impactful if they can get companies to the negotiating table).

As such, our approach proposes one way that labor law remains relevant without legislative reform. While legislative change is appealing,¹¹² the prospects for labor law reform, which improves upon existing New Deal legislation and policy directives, seems exceedingly dim.¹¹³ Even if legislative reform were possible, it would be hard to replicate the New Deal economic and social conditions that gave rise to labor law protections for employee organizing. It would be difficult to match, let alone improve upon, the existing language of the NLRA.

Corporations have gained enormous power in American politics and the economy since the 1970s.¹¹⁴ In the 1970s, for instance, the business community mobilized to defeat a number of efforts to regulate the workplace, including a Labor Law Reform Bill. They successfully championed bills that favored business and increased income inequality, such as the Economic Recovery Tax Act.¹¹⁵ Since then, corporations, especially transnational corporations, have further tightened their hold on power by successfully elevating the locus of key policy-making to international agencies and quasi-judicial bodies far removed even from the US legislative process.¹¹⁶

As we consider how to reinvigorate labor policy we must keep these realities in mind. As Professor Lance Compa compellingly put it, we “must be careful” and not “so frustrated with problems and so enamored of novelty that we undermine hard-won foundations in our labor law system.”¹¹⁷ In this spirit, we should take care to preserve (and ideally, to revive) the lofty New Deal goal of addressing inequality of bargaining power in the workplace.

¹¹² See Kate Andrias, *supra* note 1, at 8 (proposing “a new labor law” that would draw from European models to combine “bargaining that occurs in the public arena on a sectoral and regional basis—with both old and new forms of worksite representation.”).

¹¹³ See Matthew Ginsburg, *Nothing New Under the Sun: “The New Labor Law” Must Still Grapple With the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 *YALE L. J. F.* 488, 489 (2017) (challenging the notion that advocates should take eye off of “employer-employee dyad,” highlighting the urgency of “self-financing of worker organizations,” and contending that mandatory sectoral bargaining is not viable).

¹¹⁴ Michael Dreiling & Derek Darves, *Corporate Unity in American Trade Policy: A Network Analysis of Corporate-Dyad Political Action*, 116 *AM. J. SOC.* 1514, 1514 (2011); Kevin A. Young et al., *Capital Strikes as a Corporate Political Strategy: The Structural Power of Business in the Obama Era*, 46 *POL. & SOC’Y* 3, 28 (2018); see generally Harland Prechel, *Corporate Power and US Economic and Environmental Policy, 1978-2008*, 5 *CAM. J. REGIONS ECON. & SOC’Y*, 357 (2012); WILLIAM DOMHOFF, *WHO RULES AMERICA? THE TRIUMPH OF THE CORPORATE RICH* vi (2014).

¹¹⁵ Patrick Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 *AM. SOC. REV.* 597 (1992).

¹¹⁶ Nitsan Chorev, *REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION* 10 (2007); see generally AMY QUARK, *GLOBAL RIVALRIES* (2013).

¹¹⁷ Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 *U.C. IRVINE L. REV.* 609, 612 (2014); see also *id.* (“Scrapping the NLRA and sanctions-based employment laws for untested alternatives could put workers and unions in a deeper hole. Instead of giant leaps in reforming labor and employment laws, we have the hard, unromantic job of making small steps forward.”).

CONCLUSION

American labor law provides basic rights to “employees,” not labor organizations. So, as long as worker centers are organizing individuals who fit the NLRA definition of employee, labor law’s protections against employer retaliation (its carrot) applies. While it is not a cure-all for extreme income inequality and formidable challenges to worker organizing efforts, our proposed carrot-but-not-a-stick approach is a step toward supporting the broad-based associational experimentation needed to forge a more equal and just society in the future.

We advanced a number of rationales for why worker centers are not labor organizations subject to labor law’s restrictions on some organizing activity and heightened government reporting requirements (its stick). We drew from our original research on the filing and funding profiles of more than a 100 worker centers to argue that worker centers are not set up to engage in ongoing interactions with employers over time. They do not have the intent, or organizational capacity, to deal with employers in the labor law sense.

We made doctrinal arguments under Constitutional and labor law to support a narrower reading of “labor organization” in the worker center context. First Amendment principles implore us to apply labor law’s stick only to groups that have the extraordinary privilege of exclusivity and collective bargaining protections. Moreover, the underlying inequality of bargaining power rationale of U.S. labor law directs us to exclude worker centers, and their nascent organizing efforts, from the reach of labor law’s stick.

There are compelling policy reasons supporting our approach. American labor policy’s destiny is connected to how it treats innovative nontraditional organizing efforts. Worker centers are voluntary associations that offset the very inequality of bargaining power labor policy intends to address—an inequality that, like the New Deal period, is at historic levels. These centers provide an alternative approach to worker organizing, outside of the traditional labor union context, which is essential at a time of extreme hostility against unions and workers’ rights. Thus, worker center constituents can and should enjoy the carrot of labor law protections, but worker centers as organizations should not suffer the stick assigned to labor organizations.

