COOPERATION OR CONFLICT?
GIVING EMPLOYEES A VOICE IN THE MODERN ECONOMY

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The decline of traditional unionism has been well-documented and widespread.[1] Union density rates have faced steep declines in the U.S.—and to a lesser extent, many other countries—over the last couple of decades.[2] Yet, worker demand for representation and voice in the workplace appears as strong as ever. This paper explores possible ways to bridge the gap between workers' desires and the severe limitations of the traditional collective bargaining envisioned by the Wagner Act.

It is important to note at the outset that although such options exist, they do not hold much hope for substantial increases in unionization. The barriers to union representation are quite high and, especially given the important role of global trade, are largely outside the bounds of any realistic reform measures. Accordingly, the options explored here are not panaceas for the labor movement. Instead, they are alternatives to the traditional collective-bargaining process that might do a better job at fulfilling some of workers' unmet desires.

Given this gloomy status quo, why seek any improvements? Although no magic bullet exists, improving workers' voice and opportunity to participate in workplace decision-making promises gains for workers, as well as society as a whole. The NLRA and other labor laws were enacted, at least in part, for the purpose of improving the U.S. economy and improving workers living standards. Those policy goals still resonate—particularly given the recent economic troubles—yet, the traditional Wagner model leaves many of them unmet. Addressing that shortcoming, even only in part, could have real, positive impact for many people.

The starting point for possible reforms are traditional labor unions. Although traditional, private-sector unionization is particular low, the fact remains that unions are the largest, best organized, and most funded employee-side groups in the U.S. This paper will discuss non-traditional groups and their potential contribution to expanding employee participation and voice, but those groups are nowhere close to having the strength of unions. Thus, the initial question is what can unions do to change the current dynamic.

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[1] *See* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 584-85, 588-90, 598, 606-07, 613 (2007) (arguing that decline in unionization is largely the result of the NLRA's failure to adopt a corporatist model) [add more cites]

[2] Private-sector union density in the U.S. peaked at 35.7% in 1953 and is down to 6.6% as of 2012. *See* Union Membership and Coverage Database, http://www.unionstats.com; LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY A-1, A-2 (1985). Although exact comparisons between countries' is difficult because of data differenecs, virtually all developed countries show significant declines in union membership over the past few decades. *See* Organisation for Economic Co-operation and Development, *Trade Union Density 1960-2007*, *available at* http://www.oecd.org/dataoecd/25/42/39891561.xls (showing, among other countries, France falling from 21.3% in 1977 to 7.8% in 2007, Germany from 35.3% to 19.9%; the United Kingdom from 51.1% to 28%; and Canada from 35.1% to 29.4%). [update]

I. The Need for More Cooperation

Unions gained significant strength and power through their strong opposition to employers and their treatment of workers. Armed with protections of the Wagner Act, union membership and influence increased exponentially. The large number of union members gave organized labor tremendous resources, both in terms of finances and individuals committed to fighting for their other employees' working conditions. The steep decline in those numbers is accompanied by a similar decrease in unions' power. But there is another, less obvious cost to this decline. As union membership dwindled, the public became less aware of unions' role. Many, if not most, individuals do not personally know anyone in a union, so they lack an appreciation for the benefits that unions can provide. Combine this lack of awareness with the strong public relations campaigns that employers use to attack unions, and it is no surprise that their popularity is weak.[3] This weakness, in turn, has reduced employees' ability to participate in the workplace and seek improvements in their working conditions.

Although many of the causes of this declining power are structurally economic and largely outside of unions' control, it also seems apparent that a contributing factor is a serious public relations problem for unions. The simple fact that unions are under assault in Michigan, Ohio, and Wisconsin—three states long know for union strength—illustrates the degree to which unions have lost political and popular support. The story is more complex, of course. Unions still wield significant political power, as they remain among the most important campaign contributors and source of campaign labor for Democratic politicians. Moreover, voters in Ohio overturned the legislature's anti-union measures and Wisconsin witnessed an outpouring of opposition against that state's anti-union legislation. But the fact that there was these legislative measures occurred in the first place speaks volumes about unions' overall support among the public.

Given the low density rate and poor public perception, unions should consider ways to bolster their popular support. As the recent state attacks on unions and the debate over Employee Free Choice Act show, support among the public—even individuals who are not union members or likely targets of future union campaigns—can have a significant impact on organized labor. The traditional Wagner organizing is simply not enough in this economy to maintain broad support for unions. The difficulty is how unions might turn that trend around.

Although there is no magic bullet for turning around unions' fortunes and increasing employee voice,[4] there does appear to be more that unions can do to achieve greater support than their current conflict-oriented model. One option is a broad public relations campaign. Through advertising and other types of outreach, unions could attempt to bolster their image among the general public in the hopes that it will stave off some of the attacks that seem to be cropping up more frequently. But the focus of this paper will be other measures, particularly those that

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[3] [polling data on unions]

[4] *See* Paul M. Secunda, *The Wagner Model of Labour Law is Dead, Long Live Labour Law!*, 38 QUEEN'S L.J. 549, 559-566 (2012) (discussing obstacles to private-sector, union-related voice such as captive-audience meetings, weak NLRB remedies, difficulty in unions' achieving first contracts, and permanent replacements for strikers).

implicate ways in which unions, and other groups, can help to expand employees' participation at work.

The common theme to these alternatives is the need for unions and other advocates for workers to adopt more of a cooperative strategy.[5] That is not to say that conflict with employers is unwise; indeed, unions should still fight hard for employees where it is warranted. But a permanently adversarial posture does not seem to be serving unions well. A willingness to engage in more cooperative relationships with employers and, at times, to forgo some goals normally associated with unionization may provide greater gains in the long-run. If employers view unionization as being less costly than they do now, in many instances they may be more accepting, or at least less resistant, to unions. Employer resistance will always remain a serious issue and, for many employers, there is nothing a union can do to mitigate that hostility. Yet, other employers may view the costs of fighting unionization—costs that include financial expenditures and decreased employee morale—as being less worthwhile if the prospect of a union presence is less restrictive that it appears to be now. Few employers are likely to welcome unionization, but even a reduction in the level of hostility could have a significant impact on unions ability to represent or assist workers.

There are many ways in which unions and employee-side groups could engage in more cooperation with employers, both large and small. This paper will discuss a few more prominent options, such as unions negotiating pre-recognition framework agreements; unions increasing their willingness to allow more non-union (at least non-traditional union) employee voice mechanisms; and unions and employee groups focusing more on the provision of services, rather than classic collective representation.

II. Cooperative Strategies

A. Pre-Recognition Framework Agreements

A pre-recognition framework agreement is basically what is sounds like. It is an agreement between a union and employer that outlines basic principles that will govern their future relationship. The key feature, and a potentially troublesome one from a legal perspective, is that this agreement occurs before the union has achieved support from a majority of employees. Thus, the agreement is conditional on the union ultimately obtaining that support. Often, these agreements will also cover the process of unions trying to achieve that aim by including promises by the employer to remain neutral[6] or voluntarily recognize the union when appropriate.[7] Of the more cooperative options discussed in this paper, these framework agreements most closely resemble the traditional collective-bargaining model. But the stress on

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[5] *See* Samuel Estreicher, *Strategy for Labor Revisited*, 86 ST. JOHN'S L. REV. 413 (2012) (discussing potential arguments for and against more cooperative strategies).

[6] The employer might also promise to give the union access to employees at the worksite; to provide the union with employee contact information, such as e-mail addresses; and to not engage in a lockout if the union promises not to strike in return.

[7] For instance, the agreement in *Dana Corp.*, discussed *infra*, determined the union's majority status through a card-check procedure overseen by a neutral third party. For employers that are opposed to card-check agreements, other options are available, such as a private, third-party-run election.

a cooperative approach makes them substantially different from the conflict-based union recognition and bargaining approach that is more typical of American unionization.

For many years scholars have argued that the NLRB should do more to encourage pre-recognition framework agreements.[8] Such agreements promise a more conciliatory relationship between a union and employer, with the hope that employer hostility can be substantially reduced by a union showing—before recognition occurs—that it is willing to allow the employer autonomy over certain areas. For employers that fear the effect that unionization may have on its business, yet are not wholly opposed to unions, these framework agreements can provide a useful sign of what the union relationship will look like and, ideally, reduce employers' opposition. In other words, these agreements are a perfect example of the cooperative strategies that unions should be pursuing.

Despite the promise of pre-recognition framework agreements, many hurdles—both practical and legal—exist. On the practical side, the reality is that many employers will remain hostile to all unionization attempts, no matter how much a union is willing to give. Thus, unions with little power or support will often find it difficult to get employers to even explore a framework agreement, much less sign one.[9] Similarly, even if an employer is open to signing a framework agreement, it is not certain that a majority of employees will subsequently choose union representation. One of the labor movement's critical problems is that opposition is not limited to employers; many employees also have an agnostic or even antagonistic view of unionization. In short, framework agreements can be useful in many instances, but not where employers or employees have strongly held resistance to unions.

If these practical obstacles can be overcome, there remains several legal issues that may derail a pre-recognition framework agreement. These issues present themselves at all phases of an agreement, from its negotiation, signing, and ultimate enforcement.

The NLRB's recent decision in *Dana Corp.*[10] clarifies the Board's review of pre-recognition framework agreements and, in so doing, effectively puts them on more certain legal footing. [Add description of *Dana* agreement.] However, parties interested in pursuing these agreements must still be very mindful of several significant legal limits to their negotiation and implementation. Moreover, questions still exist about the ability of parties to enforce these agreements—questions that the NLRB should consider addressing in the future, lest uncertainty limit their use.

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[8] *See* Estreicher, *Strategy*, *supra* note 5, at 422; Martin H. Malin, *The Canadian Auto Workers-Magna International, Inc. Framework of Fairness Agreement: An U.S. Perspective*, 54 ST. LOUIS UNIV. L. REV. 525 (2010); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. Rev. 827, 834-39 (1996); *cf.* See Zev J Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 697 (2012) (advocating that parties adopt set of moral principles that would encourage fairer certification of unions).).

[9] *See* Secunda, *supra* note 4, at 578.

[10] *Dana Corp.*, 356 N.L.R.B. No. 49 (2010), *enforced sub nom. Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

Most of the legal limits on pre-recognition framework agreements derive from the Section 8(a)(2)[11] concern with an employer unlawfully recognizing a union that lacks majority support. Indeed, that concern motivated the dissent in *Dana Corp*., which argued that the agreement in question amounted to illicit recognition.

It has long been established that an employer is prohibited from formally recognizing or promising to recognize a union as its employees' collective-bargaining representative before the union can show valid support from a majority of the employees.[12] This is true even if the union subsequently obtains such support.[13] Yet, problems can still arise when this formal recognition is absent.

The central problem is that the employer must avoid acting in a manner that creates de facto recognition of the union, as the NLRB has cautioned that an agreement making unionization a *fait accompli* is unlawful under Section 8(a)(2). This problem is particularly germane with regard to framework agreements because the union's agreement to waive its right to bargain over certain issues is generally made in exchange for the employer's agreement to remain neutral and possibly voluntarily recognize the union if it ultimately gains majority support.[14]

One measure that appears essential to avoiding the Section 8(a)(2) is express language that protects employees' right to reject the union. The employer's actions, however, must not undermine that promise.[15] Thus, the employer cannot engage in activities that show undue favoritism toward a union or provides the union with assistance in its drive to achieve majority support. In a pre-*Dana Corp.* case, the NLRB noted several factors that it will take into account when determining whether an employer's support for a union goes too far. These non-dispositive factors include: whether the employer initiated contact with the union, particularly by a high-ranking official; how much the employer acquiesced to the union's organizational campaign; whether the employer helped to set up meetings between the union and employees; whether employer officials were present at meetings between the union and employees; whether the employer coerced employees to support the union; and, if there were multiple campaigns,

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[11] 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization").

[12] [citation]. Reflecting this law, the *Dana* agreement stated that the employer "may not recognize the Union as the exclusive representative of employees in the absence of a showing" of majority status.

[13] *Int'l Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961) (holding that a promise of recognition as part of an agreement to settle a strike—even when the parties thought, incorrectly, that the union had majority support—was an unlawful "*fait accompli*").

[14] That said, the penalties for violating Section 8(a)(2) are quite low, so parties can negotiate even a more aggressive agreement without fear of harsh consequences. In particular, if the NLRB finds a Section 8(a)(2) violation, it will typically require require the employer to provide employees with a notice informing them of the NLRB finding and order the employer to cease recognizing, assisting, and negotiating with the union as long as it lacks majority support and to cease giving effect to the unlawful agreement. But the NLRB has no power to issue fines or other non-backpay financial awards.

[15] *See NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663 (5th Cir. 1968) (finding 8(a)(2) violation despite employer disclaimer because manager called meeting with union and designated employees to solicit union cards from other employees). *But see Longchamps, Inc.*, 205 N.L.R.B. 1025 (1973) (finding that employer did not violate Section 8(a)(2) when it turned over company meeting to union for the purpose of soliciting cards and when it told some employees to meet with union representatives).

whether the employer favored one union over another.[16] Similarly, in order to prevent a presumption that the employer is using the agreement for improper means, the employer should not have committed unfair labor practices near the time of negotiations and must negotiate at arm's length with the union.

In addition to Section 8(a)(2) concerns, pre-recognition framework agreements may prompt objections from dissenting employees. Once potential tools for these dissenters and their backers is a Section 302 lawsuit.[17] Under Section 302 of the Labor Management Relations Act (LMRA or Taft-Hartley Act), it unlawful for an "employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . ." A dissenting employee may argue that employer promises to the union to remain neutral in an organizing campaign; to voluntarily recognize the union if it achieves majority support; or to abide by other ground rules—such as access to the employer's premises—constitutes a prohibited grant of benefits in violation of Section 302.

Whether these types of promises qualify as a "thing of value" under Section 302 remains an open question. Most courts have rejected that the argument that these employer promises are covered by Section 302.[18] However, in a recent case, the Eleventh Circuit held that Section 302 may be triggered if an employer makes similar promises with the intent to corrupt a union or in the face of extortion.[19] Yet, the court stressed that neutrality and other similar agreements are lawful if they do not implicate Section 302's goal of prohibiting for bribery or extortion.[20]

Although most pre-recognition agreements would likely avoid trouble, even under the Eleventh Circuit's holding, the uncertainty may chill some employers or unions from entering into these agreements. More circuit court decisions, or even a Supreme Court ruling, supporting these agreements could enhance their use in the future.

In addition to the actions and promises surrounding the negotiation of a framework agreement, the parties must be careful about the substance of the agreement's provisions. In particular, the NLRB made clear in *Dana Corp*. that a pre-recognition agreement cannot be as specific and complete as a collective-bargaining agreement. The fear is again that a pre-recognition agreement makes unionization appear to the employees as a foregone conclusion. This means, for example, that an agreement cannot alter existing terms and conditions; instead, changes must come about as a result of "substantial negotiations" with the union after it has achieved majority status.[21]

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[16] NLRB v. Midwestern Personnel Services, Inc., 322 F.3d 969 (7th Cir. 2003).

[17] [Note interview with Right To Work Foundation attorney and the difficulty in challenging these agreements because employers and unions often try to keep them secret.]

[18] *See, e.g., Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel & Restaurant Employees Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004).

[19] *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012).

[20] *Id.* at 1215 ("Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.").

[21] *Id.* (comparing lawful pre-recognition agreement with other agreements that would not trigger the NLRB's contract-bar doctrine).

Although these substantive limits are real, they still provide the parties significant room to shape a potential bargaining relationship in the future. For instance, the agreement in *Dana Corp.* spelled out several principles informing this possible relationship, including the use of team-based approaches, an "idea program" to give employees an opportunity to provide input about firm's operations or work conditions, and other matters regarding terms and conditions of work. These general principles might also include a commitment to employer discretion or flexibility. As a result, a pre-recognition agreement might allow a union to assuage some of the employer's fears about unionization. However, the ameliorative effect of the assurances may be countered by a further issue—the ability to enforce an agreement.

The relative novelty of pre-recognition framework agreements means that there are no cases directly confronting a party's attempt to remedy a breach of such an agreement. Yet, neutrality and voluntary recognition agreements appear to be close parallels—ones that are often part of framework agreements. If this comparison holds up in court, a party alleging breach of a pre-recognition framework agreement could seek enforcement in federal court through a Section 301(a) suit.[22] But the availability of a cause of action does not eliminate the enforcement problem. The lack of specificity required in a valid pre-recognition agreement presents a real hurdle for any party alleging breach. It is one thing to allege that an employer has violated a promise to remain neutral during a union campaign or to recognize a union that gained a card-check majority, but an entirely different matter to prove that a party has failed to comply with its promise to recognize "team-based approaches" or other general principles as a goal. The gray area in the meaning of such general terms can be vast. Thus, there will often be an inherent tension between limiting specificity enough to keep the agreement valid while having enough specificity to allow for enforcement should a party renege on its promises. This tension may reduce the value that pre-recognition agreements provide employers already reluctant about unionization. Further compounding this issue for employers is the reality that it is difficult to unseat an incumbent union.[23] As a result, there is a risk for employers that unions' commitment to the goals of a pre-recognition framework agreement will diminish over time and they will be stuck in a collective-bargaining relationship that is more hostile than they anticipated.

The NLRB's willingness to allow certain types of pre-recognition framework agreements provides unions with a significant opportunity to engage in more cooperative relations with employers. There are significant practical and legal hurdles to this opportunity, but attempting to clear those hurdles could provide unions—and the employees they represent—significant benefits in the right circumstances.

B. Employee Participation Groups

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[22] Lower courts have frequently permitted Section 301 suits alleging a breach of a neutrality or voluntary recognition agreement. *See, e.g.*, *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *HERE Local 2 v. Marriot Corp.*, 964 F.2d 1464 (9th Cir. 1992); *see also Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) (holding that Section 301 is not limited to breach of collective-bargaining agreement).

[23] Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 522 (2000) (arguing for reform of "hard in, hard out" reality of unionization).

Section 8(a)(2)'s role in limiting pre-recognition framework agreements is consistent with its overall limits on employee voice in the workplace. Narrowing those limits could provide employees with more opportunities for participation and voice at work. But unions, which have traditionally opposed changes to Section 8(a)(2), might also enjoy benefits if they were more willing to entertain reform measures.

The general debate over Section 8(a)(2) and calls for its reform are well-known.[24] This paper will not rehash this discussion; instead, it suggests that Section 8(a)(2) represents another area in which a more cooperative approach could be beneficial to unions—not to mention employees and employers. Unions have strongly objected to attempts to narrow Section 8(a)(2)'s reach, but reconsideration of that stance may be in order.

Surveys have demonstrated that there is an unmet demand for employee voice or participation at work.[25] Employees overwhelmingly want more opportunities to provide input on business operations and to discuss working conditions with their employers. Employers also frequently recognize the value in certain types of employee participation, particularly as the economy relies more on jobs that require independent thinking.[26] For instance, employee participation can improve productivity and employee morale, as well as provide an improved way to deal with workplace grievances[27] As a result, many—although certainly not all—managers have expressed their support for allowing some form of employee voice in the workplace.[28]

Although the desires of employers and employees are not always congruent—an employer may want employee input on production operations but not on working conditions—there is often enough overlap that some increase in employee participation and voice could be achieved. That is, if Section 8(a)(2) did not prohibit most employee participation groups. The

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[24] *See* Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1152-1167 (2007) (describing issue).

[25] *See, e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 32-33, 81-84 (1999) [expand this].

[26] *See* Dau-Schmidt, *supra* note 42, at 804-09 (discussing benefits of employee collective voice); Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L.R. 871, 900 (2007) (stating that employees can provide valuable information to employers); Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 135-39 (1994) (same).

[27] For discussions of possible productivity and related advantages, *see* Hirsch & Hirsch, *supra* note 24 (discussing potential gains); FREEMAN & ROGERS, *supra* note 25, at 131-35 (1999) (same); Barenberg, *supra* note 39, at 885-90, 927 n.826 (same). For possible employee-related benefits, *see* Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 133-35 (1993); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1541 n.69 (2002) (citing Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J.L. & PUB. POL'Y 65, 82-89 (1994)) (safety); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 431 (2000) (safety). For grievance process advantages, *see* FREEMAN & ROGERS, *supra* note 25, at 164-67; Hyde, *supra* note 33, at 152-54.

[28] *See* FREEMAN & ROGERS, *supra* note 25, at 7, 131-35 (describing survey results showing managerial support); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 198-200 (2001). *But see* DAVID I. LEVINE, REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN 63 (1995) ("Many middle- and lower-level managers resist and sometimes sabotage employee involvement" because greater employee autonomy "may be threatening to supervisors and managers").

breadth of Section 8(a)(2), or more specifically the breadth of Section 2(5)'s definition of a "labor organization" that an employer is not allowed to dominate or support, allows for little experimentation—it is largely a choice between traditional union representation or nothing.[29] Because employers will often take the lead in organizing these groups, Section 8(a)(2)'s expansive reach means that these groups can not be created lawfully. The result oftentimes is an unmet demand for employee participation and voice. However, this unmet demand is not as dire as it initially appears.

Despite the potential for an unfair labor practice finding illegality, it appears that employers frequently use employee participation groups that violate Section 8(a)(2)—likely reflecting the potential advantages for employers, as well as the NLRB's weak remedies.[30] There are many different types of these groups and the amount of employee participation and topics they consider, such as: self-managed employee teams and quality circles that focus on production rather than work conditions; quality of work life or employee-action committees that often focus on safety, grievances, and other human resource issues; employee caucuses that promote better work conditions but are often centered on; and profit-sharing groups, like Employee Stock Ownership Plans, that usually like decision-making authority.[31] Many of these groups appear to involve input about working conditions and—perhaps not surprisingly, given that one would expect less hostile employers to be more open to meaningful employee input—employees generally have favorable views of the groups.[32]

Expanding the opportunity for employee participation groups, in addition to removing the specter of illegality on those that currently exist, is challenging but not hopeless. Because many employers also want some form employee voice—so much so that many willingly violate the law to get it—this normal alliances are turn upside down. It is largely unions who oppose reform, while employers are more aligned with the general sentiment of employees. That is not to say that unions and other who oppose weakening Section 8(a)(2) have no justification for their position; the potential harm of company unions and the risk that even more benevolent employee participation groups may create a misleading façade of participation is real.[33] But the unusual

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[29] *See* Estlund, *supra* note 27, at 1546. Some exceptions exist, such as where an employer gives employee groups virtually full decision-making authority over certain topics. *See* Crown Cork & Seal Co., 334 N.L.R.B. 699, 699 (2001). But employers will often be reluctant to delegate to this degree.

[30] *See* Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 747, 776-77 (1999) (describing evidence showing that some employers knowingly operate legally suspect employee participation groups because of weak penalties and low risk of Section 8(a)(2) violation); John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces*, 66 INDUS. & LAB. REL. REV. 142, 151-52 (2013) (showing that approximately one-third of surveyed non-union employees report some form of employer-created representation group); Orley Lobel & Anne Marie Lofaso, *Systems of Employee Representaion: The US Report*, *in* SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY (Roger Blanpain et al., eds., 2012) (citing studies) (manuscript at 5, *available at* http://ssrn.com/abstract= 2218862); FREEMAN & ROGERS, *supra* note 25, at 119, 120 exhibit 5.1; Levine, *supra* note 28, at 7 (citing study). *But see* Kaufman, *supra* note 30, at 753, 777-78 (describing managers who want to avoid Section 8(a)(2) litigation and giving unions an opportunity to file unfair labor practice charges).

[31] Lobel & Lofaso *supra* note 30, at 2224; *see also* Estreicher, *Employee Involvement*, *supra* note 26, at 127 (describing different types of employee participation groups).

[32] *See* Godard & Frege, *supra* note 30, at 153.

[33] *See* Electromation, Inc., 309 N.L.R.B. 990, 992-94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); Estreicher, *Employee Involvement*, *supra* note 26, at 129-33; Alan Hyde, *Employee Caucus: A Key Institution in the Emerging*

alignment between employees and employers on this issue produces a potential for compromise. Unions need to ask themselves how much they really object to Section 8(a)(2) reform. In particular, they should consider whether acceding to some changes in Sections 2(5) or 8(a)(2) could provide benefits that outweigh the feared costs of reform. Those benefits could come in the form of other legislative changes, as well as the ability to promote a more cooperative image and relationship with other labor law actors.

If a compromise on Section 8(a)(2) reform occurred—a political long shot, to be sure—what might it look like? There is general agreement that the prohibition against the most pernicious of company unions, such as sham organizations that employers use to prevent independent unions or to trick employees into believing that they have real representation, should be maintained.[34] But Section 8(a)(2) bans organizations that fall far short of that concern, leaving ample room for a narrower coverage that still respects the provision's central policy concerns.[35]

Unions have opposed narrowing Section 8(a)(2) in part because of their fear that employer-initiated employee participation groups will compete with traditional unions and mislead employees regarding the actual independence of their representation.[36] Those fears are not unfounded, but they may be exaggerated and stand in the way of an opportunity worth pursuing. The risk of employees being misled about the true nature of their representation is a serious concern, but one that could be addressed by adding to a limited reform measure information requirements—such as requiring employers that use employee participation groups to inform employees of the employer's involvement and their right to join and independent union.[37] Moreover, it is difficult to believe that allowing more employer-initiated employee

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System of Employment Law, 69 CHI.-KENT L. REV. 149, 174-76 (1993) (discussing possible rationales of section 8(a)(2)); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1661-62 (1999) (noting that many early twentieth-century employee participation groups were progressive, but other employers created such groups in anticipation of federal labor legislation and in hopes of barring independent unions from the workplace).

[34] For instance, the Republican-introduced TEAM Act would have created a proviso to section 8(a)(2) stating that it is not unlawful:

> for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representatives of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except . . . a case in which a labor organization is the representative of such employees as provided in section 9(a).

TEAMWORK FOR EMPLOYEES AND MANAGERS ACT of 1995, H.R. 743, 104th Cong. (1996). The House and Senate passed the TEAM Act, which President Clinton then vetoed. *See* 142 Cong. Rec. H8816 (1996).
TEAMWORK FOR EMPLOYEES AND MANAGERS ACT of 1995, H.R. 743, 104th Cong. (1996)

[35] *See Hirsch & Hirsch*, *supra* note 24, at 11-58-59; *see* Estreicher, *Employee Involvement*, *supra* note 26, at 150 (proposing change of Section 2(5)'s definition of "labor organization").

[36] *See* Jonathon P. Hiatt & Laurence E. Gold, *Employer-Employee Committees: A Union Perspective*, *in* NONUNION EMPLOYEE REPRESENTATION Nonunion Employee Representation: History, Contemporary Practice, and Policy 196, 498, 507-08 (Bruce Kaufman & Daphne Taras eds., 2000).

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groups would make union density substantially lower than it is currently.[38] To the contrary, there are valid arguments that expansion of these groups could actually lead to greater unionization, although probably not significantly. For instance, employee participation groups might spur more interest in traditional unionization as employees have positive experiences with collective participation in the workplace.[39] As a result, these groups could represent potential organization targets for unions.[40] Non-traditional employee participation groups could also spur unions to improve, which may make them more attractive to employees.[41] Indeed, most other countries with developed labor laws lack Section 8(a)(2)'s prohibition against non-union employee participation groups, yet have union density rates that are greater than the U.S.'s.[42] As a final matter, the reality is that many of these groups already exist,[43] so it is unclear how much advantage flows to unions by keeping the broad but weak Section 8(a)(2) unchanged.

Unions, of course, are well aware of these considerations and still believe that the uncertainties of Section 8(a)(2) reform outweigh the need to change a status quo that does not appear to have hurt them. But the potential benefits of cooperation may be a less obvious or at least, more discounted, factor. In addition to the potential gains resulting from a hypothetical legislative compromise, unions could see benefits flow from a less hostile stance toward employee participation groups. For instance, employers' resistance to unionization could decline if they also have positive experiences with an employee participation group, especially if it provides a counter to their view of unions' negative role.[44]

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[39] *See* Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. Rev. 125, 145 (2003) ("The steel unions and the National Education Association . . . evolved in part from company unions . . . ."); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 831-35 (1994) (discussing pre-NLRA company labor organizations that subsequently developed into traditional, independent unions); Summers, *supra* note 27, at 138 (arguing that employers' ability to fight unionization under current law may be reducing employees' stated preferences for traditional unions and that reducing that hostility may increase the taste for traditional unionization); LeRoy, *supra* note 33, at 1702, 1710-11; *see also* Hyde, *Employee Caucus*, *supra* note 33, at 160 (arguing that work groups might lead to unionization and may allow some form of union representation in workplaces where there is not majority support for the union).

[40] *Cf.* Kaufman, *supra* note 29, at 805-08 (arguing that Canada's union density advantage over the U.S. is due, in part, to traditional, independent unions co-opting employer-initiated work groups).

[41] Estlund, *supra* note 27, at 1544, 1551, 1601 (arguing employee work groups could spur innovation among unions); *cf.* Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 681-88 (2006) (arguing that increased inter-union competition lead to increased union membership).

[42] *See* Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 811-819 (2011) (discussing "coordinated market economies," like Germany and Japan, that involve labor in corporate decisionmaking and noting that German-style codetermination is part of several EU directives); Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, *in* NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 196 (Bruce Kaufman & Daphne Taras eds., 2000); Charter of Fundamental Rights of the European Union art. 27, 2000 O.J. (C 364) 1, 15, *available at* http://ec.europa.eu/justice_home/unit/charte/en/charter-solidarity.html.

[43] *See supra* notes xx-xx.

[44] Employers in countries that encourage or require employee work groups typically have favorable, or at least lack an unfavorable, view of these groups. *See* Summers, *supra* note 27, at 132-33; *see also* CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 177-231 (1988); Levine, *supra* note 28, at 3-4, 115-21. This does not necessarily translate into support for traditional, independent unionization, but it cannot hurt and would likely reduce resistance in many instances.

In the unlikely event that legislative reform is possible,[45] unions need not—indeed, should not—open the door to Section 8(a)(2) reform unconditionally. For instance, narrowing Section 8(a)(2) in exchange for allowing the NLRB to issue fines, which is particularly important in cases like these that do not involve direct financial harm, may be a worthwhile trade for unions. Similarly, strengthening enforcement against unlawful terminations; expanding unions' organizing capabilities, such as increasing access to employees and decreasing election delays; and developing more types of injunctive relief could also be bargaining chips.[46] Some employer groups may be open to these types of trade-offs, especially representatives of the largest employers, which are better able to create and enjoy the benefits of employee groups. This sweet spot may be illusory, but it could be an effort worth pursuing.[47]

If, as is likely in the near-term, legislative reform is unattainable, unions could help implement de facto reform. For employers that are interested in employee input and participation and that are not overly hostile to union involvement, there is a potential compromise to be had. An employer can avoid Section 8(a)(2) liability if its employee group was created or partially run by an outside union or other employee group. The most straightforward means of achieving this is status is voluntary recognition of a union that has agreed to limit its bargaining rights with a pre-recognition framework agreement. That option has its limits, primarily because many employers will not be willing to recognize a union simply to avoid a potential Section 8(a)(2) violation that has little cost. But there are alternatives. For instance, unions or other employee groups could help establish employee work groups at workplaces where there are not collective-bargaining representatives; if the employer does not create an employee group or otherwise unlawfully support it, Section 8(a)(2) is not implicated. Moreover, unions—or an offshoot like Working America—could simply provide information and assistance to employees interested in gaining more input at work. If these employees work for a firm that is sympathetic to increased employee voice, the employer can agree to discuss issues once the group is formed. As long as the employer does not recognize the group as a collective-bargaining representative and does not provide other unlawful support or domination, there will generally be no Section 8(a)(2) issue.[48]

Whether unions rethink their opposition to Section 8(a)(2) reform remains an open question. But they need not go as far as supporting legislation to test the waters. Exploring opportunities to support employee participation groups could provide unions with more control over groups that already exist, remove some uncertainty about the effects of these groups, and provide opportunities for more cooperation with employers. These possible effects, in addition

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[45] An example of unions shifting their legislative priorities to work with employers is immigration reform. Not a perfect comparison, but one that suggests a possible realignment.

[46] Hirsch & Hirsch, *supra* note 24; Estreicher, *Employee Involvement*, *supra* note 26, at 155; Weiler, *supra* note 28, at 189-90, 205-06; *see also* Dau-Schmidt, *supra* note 42, at 825, 827, 830-31 (arguing for requirements of employee representation on corporate board of directors, elected employee committees that consider certain issues, and eliminating exclusive representation requirement).

[47] In a similar vein, unions may have been better off giving up card-check recognition under the Employee Free Choice Act and "settling" for the other important provisions of the bill, such as fines and mandatory first contract arbitration.

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to others discussed, hold promise for unions and near certain benefits for the large of employees who want more participation and voice in their workplaces.

C. Non-Traditional Employee Representation

Given the currently poor prospects for traditional union collective-bargaining, organizations that serve employees through other means may be particularly beneficial.[49] Although generally not an equal substitute for unions' advocacy and influence over working conditions, these organizations can still provide benefits to employees through other means, such as the provision of services, sharing useful employment-related information, and assisting employee attempts to engage in collective activity.[50] Moreover, they might also breathe some new life into organized labor. If the Wagner model of collective bargaining has been failing workers and unions, then seeking alternatives could help both groups.

The problems with traditional organizing and collective bargaining has not gone unnoticed by traditional unions, which have increasingly explored new ways to organize and represent workers. One example is the recognition of the need for organizing efforts that incorporate nontraditional concerns of workers. The Service Employees International Union's (SEIU) successful Justice for Janitors campaign in southern California illustrated this strategy by focusing heavily on the workers' Mexican culture and seeking assistance from local religious and political leaders.[51] The SEIU also used a public relations campaign that took advantage of the fact that many of the janitorial companies' clients were well-known retailers; by leading highly publicized demonstrations and boycotts against clients like Apple Computer, the union was able to exert more pressure on the primary employer than would normally be possible.[52] But a more radical change in strategy may be warranted.

Professor Matthew Bodie has been among those who have argued for unions to adopt a more service-model approach.[53] Under this approach, unions view themselves in large part as

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[49] Hirsch & Hirsch, *supra* note 24.

[50] One limited—and less cooperative—example is coworker.org, which assists worker attempts to organize coworkers to make demands on their employers and, among other things, provides access to similar attempts in the same industry, region, and other divisions. *See* Secunda, *supra* note 4, at 578-581.

[51] *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 5, 224-25 (2004); Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 497 (2002).

[52] *See supra* [text of publicity]; Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-first Century?*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 22 (Phanindra V. Wunnava ed., 2004); *see also* Hyde, *Employee Organization*, *supra* note 51, at 497; *see also* Estlund, *supra* note 27, at 1604-06 (discussing union "corporate campaigns").

[53] *See, e.g.*, U.S. GOV'T ACC. OFFICE, Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification 2 (2007), *available at* http://www.gao.gov/new.items/d07859t.pdf (showing increased use of independent contractors); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. POL'Y J. 187, 223 (1999));

service providers that must convince employees that their services are worth the costs.[54] Bodie has focused his suggestion on traditional collective bargaining, but his argument is equally, if not more so, applicable to the nontraditional employee representation.

One group of employees who are in particular need of assistance are independent contractors. As has been oft-discussed, employers' ability and willingness to classify workers as independent contractors has had an enormous impact on those workers.[55] Aside from the often lower benefits and pay that many employers unilaterally choose to provide those workers, the independent contractor classification also means that most labor and employment laws do not apply. Thus, these workers have no right to collective action or bargaining, as well as any protection against, among other things, discrimination and pay that would violate the minimum wage or overtime rules. Recent efforts made to assist independent contractors show potential options for all workers to improve their working conditions, even in the current economic climate.

One of the higher-profile approaches to service independent contractors has been the Freelancers Union.[56] Started in 1995, this organization has been described as the fastest-growing labor organization in the country, with over 200,000 independent contractors, part-time workers, and temps as members—primarily in New York State but expanding to other areas of the country.[57] The union does not engage in collective bargaining for its members; instead, it provides services to individuals who wish to purchase them (membership is free).[58] Central among those is health insurance, which the union identified as its members' primary concern.[59]

To be sure, the Freelancers Union's lack of traditional collective bargaining and representation limits its ability to change its members' work conditions. In spite of declining union density, unions have remained surprisingly capable of increasing its members' wages,[60] and their role in pursuing grievances on behalf of employees can be immensely important. But, the insurance and other benefits obtainable through the Freelancers Union can make a real difference for independent contractors and other workers who would otherwise not be available to afford them.[61] Also, the union allows members to rate "clients" they have worked for, which

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Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 283 (2006); Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 79-125 (1997) (describing development of employee/independent contractor distinction).

[54] These costs includes dues and potential retaliation by employers.

[55] Mathew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1 (2008).

[56] *See* http://www.freelancersunion.org.

[57] *See* Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES, Mar. 23, 2013.

[58] These services offer much lower costs than individuals could obtain on their own. *Id*.

[59] The union also provides other types of insurance, operates a health clinic, and has a 401(K) plan. *See* https://www.freelancersunion.org/benefits/retirement/index.html.

[60] *See* David G. Blanchflower & Alex Bryson, *Changes over Time in Union Relative Wage Effects in the UK and the US Revisited*, *in* INTERNATIONAL HANDBOOK OF TRADE UNIONS 197, 207-21 (John T. Addison & Claus Schnabel eds., 2003) (concluding that U.S. union wage premium has declined only slightly over time).

[61] The union also has an exchange for member-to-member service discounts.

provides potentially valuable information that these workers would otherwise lack.[62] Moreover, the union has made moves in the political arena that could benefit independent contractors nationwide, such as a push for the Department of Labor to track the number of such workers and a state bill to tighten enforcement of wage theft for freelancers in New York. Neither of these goals have yet to succeed, although the union was able to convince New York City to implement a tax change that saved freelancers up to several thousand dollars a year.[63] This political action, combined with its ability to attract workers with the option to purchase affordable benefits, gives the Freelancers Union and other organization like it an opportunity to improve unions' reputation among the public. The union might also provide an important benefit for firms. A significant cost to being an independent contractor or other non-official employee is the lack of benefits often associated with that arrangement. By permitting these workers to purchase benefits at a much lower price that they could on their own, the Freelancers Union—perhaps ironically—lowers the cost of working under these arrangements. This, in turn, will make the independent contractors and other similar workers even more attractive to firms who are unable or unwilling to provide benefits for those workers.[64]

Traditional unions have also explored the use of the non-traditional employee groups. For instance, the AFL-CIO's "Working America" organization is celebrating its tenth anniversary in 2013. It describes itself as the fastest-growing workers' organization in the country[65] and claims over three million members.[66] Working America does not formally represent workers; instead, its primary goal is to promote relevant political action.[67] For instance, it recently mobilized residents in Albuquerque area to vote for a raise in the minimum wage.[68] It also distributes information on matters such as legal violations, mass layoffs, and offshoring practices about hundreds of thousands of employers, which may help improve employees' ability to offset some employers' opportunistic use of their information advantages.[69] Like the Freelancers Union, Working America also has potential public relations benefits; as more workers and their families become acquainted with the potential benefits of labor organizations, all such groups may rise in the public's estimation. Indeed, the AFL-CIO has

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[62] *See* https://www.freelancersunion.org/client-scorecard/.
[63] *See* Greenhouse, *supra* note 57.
[64] The new ACA could also have a similar effect with regard to health care, but until the premiums under the new health care exchanges are set, it is difficult to determine the law's impact.
[65] It is unclear what Working America, or the description of the Freelancers Union, bases their claims on. *See supra* note 57. Suffice it to say that both groups are in a period of significant growth.
[66] *See* http://www.workingamerica.org/membership/about.
[67] *See* Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* (manuscript at 8, 19, *available at* http://www.nber.org/papers/w11298); Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 387 (2006); Harold Meyerson, *Labor Wrestles with its Future*, WASH. POST, May 9, 2013 (describing Working America's attempt to promote worker activism, rather than securing collectively bargaining contracts or membership dues).
[68] *See* Working America, *40,000 Workers in Albuquerque Get a Raise This Week (You Built That), available at* http://blog.workingamerica.org/2013/01/03/40000-workers-in-albuquerque-get-a-raise-this-week-you-built-that/.
[69] *See* http://www.workingsamerica.org/jobtracker (listing over 400,000 companies); *see also* Amy Joyce, *Labor Web Site Keeps Tabs on Business: Workers Can Check Executive Salaries, Company Violations*, WASH. POST, Nov. 18, 2005, at D3. [Hirsch & Hirsch, *supra* note 24, at nn.43-48]. In 2006, the AFL-CIO also entered into an agreement with the National Day Laborer Organizing Network (NDLON), in part to create more community-based entities "worker centers" that provide services and advocate on behalf of nonunion workers. *See* Michelle Amber, *AFL-CIO, Day Laborers Group Sign Pact to Advance Worker, Immigration Rights*, DAILY LABOR REP., Aug. 10, 2006, at A-4.

been open about Working America's potential to foster support for more formal unionization as employees gain more positive experiences with representational group.[70] This could occur through more generally favorable views of unions or, more likely, by organizing groups of employees who are already members of Working America. One example moving from non-traditional to traditional organizing is the Communication Workers of America's (CWA) WashTech organization. WashTech started as a non-collective-bargaining group that assisted and lobbied for independent contractors and temp workers at Microsoft, but ultimately developed several groups that sought formal status as a collective-bargaining representative.[71]

These non-traditional worker groups are merely a sample of the various types of organizations that may help workers outside of the classic Wagner model of collective bargaining. By removing the emotionally charged, formalistic labor law framework, they have an opportunity to assist workers while maintaining a less antagonistic relationship with employers—and a more favorable reputation with the general public. However, these groups have limits as well. Although the lack of formal collective bargaining will generally improve relationships with employers, the reason is largely because such bargaining is more effective at extracting wages and other benefits.[72] In addition, these groups could have funding difficulties without a steady source of dues or other income.[73] Yet, despite these barriers, it seems that unions and other organizations concerned about workers would benefit from more experimentation with non-traditional assistance. The degree to which these experiments will bear fruit is unclear, but it is highly unlikely that they could make things worse.

CONCLUSION

It is virtually impossible to imagine that unions will ever see their membership return to the levels at its zenith in the 1950s. Yet, workers' need for advocacy and assistance is as strong, if not stronger, now than it was then. Given that the impediments to legislative reform are immense, it is almost certain that we will not see any wholesale labor law changes that could reverse declining union density in the near future.[74] Thus, unions and other groups concerned with working conditions must seek alternative strategies.

One such strategy is to seek more opportunities for cooperation with employers. This cooperation has the potential to lower employer resistance to unionization, increase employee support for unions, and improve the public's perception of labor organizations. None of these benefits are certain and, even if they come to fruition, they are not likely to completely turn the

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[70] *See* Stone, *supra* note 51, at 218 (noting that the AFL-CIO's primary goal was to support possible future organizing efforts). The AFL-CIO also initiated an associate member program that allowed nonunion or unemployed workers to pay reduced dues and enjoy certain privileges of union membership.

[71] *See* Stone, *supra* note 51, at 235; Hyde, *New Institutions*, *supra* note 67, at 390-91.

[72] *See* Secunda, *supra* note 4, at 583-584 (noting that the benefits of these groups may not be meaningful enough to attract workers

[73] *See* Joni Hersch, *A Workers' Lobby to Provide Portable Benefits*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 207 (Richard B. Freeman et al. eds., 2005) (discussing possible problems—including funding goods that are partly public in nature—with organizations such as Working Today, the organization under which the Freelancers Union was formed).

[74] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527-28 (2002).

tide in unions' favor. But expanding cooperation as a compliment to more combative strategies is an idea that warrants more serious exploration by unions.

In addition to more formal union activity, non-traditional employee groups can also play an important role. By supplying services and other benefits to workers outside of the collective-bargaining context, these groups can provide workers with real gains, while avoiding much of the antagonism with employers that are seen when traditional organizing occurs.

The traditional Wagner model of collective-bargaining is working for a declining number of unions and workers. As a result, the attachment to that model needs to weaken. That adversarial model can still play an important role, but by itself, it appears to be failing a growing percentage of the workforce. Workers need and deserve other options, whether through traditional unions that are willing to change or other groups. The global economic headwinds will remain a significant barrier to organizing and other attempts to improve working conditions, but this does not mean that workers are helpless. They may never see the labor movement return to its former strength, but through more cooperative and other strategies, workers should be able to make gains from the precarious position that many of them are now in.