

Organizing for Structural Change: The Potential and Promise of Worker Centers

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INTRODUCTION

Across America, employers of millions of low-wage workers routinely break wage laws. In Chicago, Los Angeles, and New York City, over 25% of low-income workers do not receive a legal minimum wage.¹ While employers continue to break workplace laws, workers' ability to counter such violations through union organizing has dwindled. The National Labor Relations Act (NLRA) has been ineffective in facilitating union organizing,² and less than 7% of the private sector workforce belongs to a union.³

Partly in response to the diminished power of organized labor, workers' advocates have sought other avenues for advancing workers' rights. Across the country, these advocates have founded hundreds of worker centers — community-based nonprofit organizations that organize workers and advance their interests through several methods, including bringing lawsuits against and protesting individual employers who have violated workplace laws. Worker centers have made strides in increasing the visibility of low-income workers' struggles, and they have won gains for some employees. Despite these efforts, however, violations of workplace laws remain rampant.

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¹ ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 20* (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>. Cf. Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 388–89 (2008) (cataloging wage and hour law violations in low-income industries); RUTH MILKMAN ET AL., *UCLA INST. FOR RESEARCH ON LABOR AND EMP'T, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 2* (2010), available at http://www.ruthmilkman.info/rm/Policy_Reports_files/LAwagetheft.pdf (finding that among 1,815 low-income workers in Los Angeles County, nearly 30% had been paid at a rate below the minimum wage in the work week immediately preceding the survey, and almost 80% of workers who had worked more than forty hours in the work week preceding the survey had not been paid at an overtime rate).

² National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 19 U.S.C. §§ 151–69 (2006)). See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1532–40 (2002); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2685–86 (2008).

³ Economic News Release, Bureau of Labor Statistics, Union Members Summary (Jan. 27, 2012), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

In this Note, I argue that worker centers should shift their focus away from individual cases and individual employers and toward structural changes that will enable centers to increase law enforcement in the short term and raise the floor for workplace regulations in the long term. Though worker centers have experimented with new strategies designed to increase their effectiveness, securing workers' rights requires a wholesale reimagining of center activity. Unions provide a useful template, and in order to increase their effectiveness, centers should look to build worker power by focusing on two sources from which unions have traditionally derived power: political action outside the workplace⁴ and direct economic intervention within the workplace.⁵

Political action should take the form of lobbying for policies that facilitate enforcement of workplace laws. In the short term, workers should focus on lobbying for legislation that increases the likelihood of employer compliance with existing laws, such as legislation that penalizes parties who enter into contracts at rates insufficient to provide for legal wages. A review of worker centers' recent political successes suggests that centers are most likely to be politically successful where their interests align with unions' political goals and in geographic areas where political decisionmakers are receptive to unions' agendas.

Centers should also focus on increasing workers' power to compel compliance with workplace laws by increasing workers' status within the workplace through direct economic intervention. Workers' economic power has traditionally come from their ability to withhold labor.⁶ I argue that centers should organize workers on an industry-by-industry basis and develop cohesion among a sufficient percentage of workers within a given industry and geographic area, such that workers could plausibly threaten not to work under illegal conditions and employers would not be able to find other workers to replace them.

Importantly, though the political and economic action I advocate is primarily aimed at ending violations of workplace laws, compliance with existing laws is only a first step. The larger goal of my proposal is to increase workers' ability to exert their political will and their economic power, such that eventually, workers can "raise the floor" of legal standards within the workplace.

This Note proceeds in four parts. Part I offers a descriptive account of the current state of worker centers. It explains whom worker centers represent, what they seek to achieve, and how they differ from unions. I then

⁴ See, e.g., Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 58 (1983); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 32 (1999).

⁵ See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6 (1984).

⁶ See, e.g., Steve Jenkins, *Organizing, Advocacy, and Member Power: A Critical Reflection*, 6 WORKINGUSA 56, 62 (2002) (arguing that workers can disrupt production).

consider worker centers' current tactics and evaluate which are most likely to bring about structural change.

In Part II, I argue that worker centers should serve as a site for workers to build power through political action. I explain why worker centers are well positioned to build power in this way, offer examples of instances in which worker advocacy groups have achieved political power, and analyze the role of partnerships between advocacy groups and unions in these cases.

Part III considers the ways in which worker centers could build power through economic intervention. It looks first at current efforts of worker advocacy groups to intervene directly in the employer/employee relationship. Then, in considering the challenges of attempting to exert economic power through collective action, Part III addresses the role of the NLRA on worker center activities, and it considers historical examples in which workers acted collectively without the aid of the NLRA's legal protections. Finally, Part III explores the practical and theoretical challenges to inducing cohesive action in the absence of legal structures that would support such action.

Part IV concludes and considers the ways in which building political and economic power among workers could lead to increased worker involvement in crafting and implementing legal standards that govern the workplace.

I. WORKER CENTERS AS SITES FOR BUILDING WORKER POWER

This Part provides a descriptive overview of worker centers and the workers they represent, and it explains how worker centers differ from traditional unions. I then describe common worker center tactics with an eye toward identifying current tactics that could be expanded and modified in order to bring about structural change. Specifically, I argue that among the tactics worker centers currently employ, individual wage and hour suits are least conducive to structural change, and so worker centers should shift their resources away from such suits. In contrast, developing leadership capacity among workers — another focus of worker centers' efforts — is essential for structural change, and so worker centers should continue to devote resources to this project. Finally, I describe the efforts of some worker centers to provide hiring halls. Because these halls can be sites for direct economic intervention, I argue that centers should maintain existing hiring halls and start running hiring halls where none currently exist. This overview and evaluation of current worker center activities lays the groundwork for the prescriptive arguments that follow in Parts II and III.

A. *Worker Centers and the Workers They Organize*

Worker centers are independent community-based nonprofit organizations, usually founded by lawyers and community organizers.⁷ The centers usually operate in fixed physical locations, and they organize low-income workers in small geographic areas around issues of workplace rights and economic justice.⁸ By one estimate, in 2006, there were about 139 worker centers in the United States.⁹ Though the specific goals and activities of worker centers vary, nearly all share the fundamental goal of improving labor conditions for low-income workers.¹⁰

Organizing is at the core of worker centers' efforts. Janice Fine, a leading scholar on worker centers,¹¹ defines organizing as "building ongoing organization and engaging in leadership development [among] workers to take action on their own behalf for economic and political change."¹² Worker centers typically focus their organizing along ethnic lines defined by those groups that are heavily represented in the communities and industries in which centers organize.¹³ These groups often include both legally residing and undocumented immigrant workers.¹⁴ Immigrant workers are disproportionately represented among low-income workers in the U.S.¹⁵ Their dispro-

⁷ Though worker centers may form coalitions, they typically operate independently of one another. See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 242 (2009) ("[W]orker centers mostly operate independently of one another and in a local context . . .").

⁸ See 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). Jennifer Gordon, founder of the Workplace Project, one of the first worker centers in the country, *id.* at 428, is a leading scholar in the study of worker centers. I rely on Professor Gordon's scholarship and on her account of the Workplace Project extensively here.

⁹ Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 421 (2006).

¹⁰ See, e.g., Janice Fine, *A Marriage Made in Heaven? Mismatches and Misunderstandings Between Worker Centres and Unions*, 45 BRIT. J. INDUS. REL. 335, 337 (2007) (explaining that although "[w]orker centres vary in terms of their organizational models, how they think about their mission and how they carry out their work . . . defending workers' rights and trying to improve working conditions in low-wage industries" is one primary goal of their organizing efforts).

¹¹ See, e.g., Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y J. 285, 349 (2009) (citing Fine as "a leading chronicler of the worker center movement").

¹² Fine, *supra* note 9, at 420.

¹³ See, e.g., Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 467 (2006); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 400 (2004).

¹⁴ See, e.g., Fine, *supra* note 9, at 431–32.

¹⁵ One recent study found that though immigrants made up about 11% of the U.S. population, they accounted for 20% of low-income workers. RANDY CAPPS ET AL., *THE URBAN INST., IMMIGRANT FAMILIES AND WORKERS: FACTS AND PERSPECTIVES 1* (2003), available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf.

portionate representation is particularly pronounced in urban areas where worker centers organize.¹⁶

Though organizing immigrant workers may present unique challenges, such as language barriers and fears of legal retaliation, undocumented workers receive largely the same protections under workplace laws as do native workers.¹⁷ Therefore, the strategies I advocate apply similarly to worker centers working with native, legally residing, and undocumented workers. I will discuss in Parts II and III how the strategies for which I advocate may raise particular concerns for undocumented workers.

In a Note arguing that worker centers should use traditional union tactics in order to increase low-income workers' power, a reader might wonder why the solution is not simply for unions to organize these workers. Though an increase in union representation in sectors in which unions are already operating would certainly benefit low-income workers, worker centers can organize workers in industries in which unions do not exist,¹⁸ particularly those industries, such as domestic service, which are excluded from the NLRA's protections.¹⁹ Worker centers also have an organizing advantage because, as community-based organizations, they are familiar with conditions in workers' communities.²⁰ Finally, because worker centers are largely

¹⁶ A recent study of low-income workers in New York, Los Angeles, and Chicago found that of 4,387 workers surveyed, 70% were foreign-born; of these, over half — 55% — were undocumented. BERNHARDT ET AL., *supra* note 1, at 14–15.

¹⁷ See Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 479–83 (2005). The protections of the Fair Labor Standards Act, which governs minimum wages and maximum hours, 29 U.S.C. §§ 206–207 (2006), have been found to apply to undocumented workers, as have the protections of the NLRA. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–94 (1984). An argument for protecting undocumented workers in the same way as native workers, advanced by Justice O'Connor in *Sure-Tan*, is that failing to afford undocumented workers comparable protections would create an incentive for employers to hire undocumented workers, improving the market for undocumented workers, creating an incentive to enter the country illegally, and hurting native workers. See *id.* at 893–94. The exception to the general trend of covering undocumented workers is the rule announced in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), holding that an undocumented worker was not entitled to recover back pay, even if he was fired illegally. *Id.* at 151–52.

¹⁸ In Los Angeles, worker centers have organized in “labor markets where unions are either absent or have lost their density. These workers are at the ‘bottom rung’ of the economic ladder, an area many in the labor movement have labeled as an ‘unorganizable’ sector of the workforce.” Narro, *supra* note 13, at 471. As one scholar explains, workers who are covered by the NLRA may not be targets of union organizing because of “obstacles to achieving exclusive representation in their workplace,” such as “cultural or linguistic divisions among workers, an unstable employer, high turnover rates, or other factors.” Rivchin, *supra* note 13, at 427 n.161.

¹⁹ For example, the NLRA does not apply to farmworkers and domestic service workers, two low-income industries in which worker centers can organize. See Rivchin, *supra* note 13, at 400–01.

²⁰ Unlike unions, which currently organize workers primarily on a workplace-by-workplace basis, worker center organizing tends to be community-based. See, e.g., Nazgol Ghandnoosh, *Organizing Workers Along Ethnic Lines: The Filipino Workers' Center*, in WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY 49, 50 (Ruth Milkman et al. eds., 2010); JENNIFER GORDON, SUBURBAN SWEATSHOPS 161 (2005) (“Latino immi-

independent, they are flexible in designing organizing campaigns and can be nimble in responding to the needs of their members.²¹ It remains the case, however, that unions have advantages that worker centers do not: worker centers have not been able to collect dues systematically, as unions have;²² unions have experience with collective bargaining that most worker centers lack; and unions can influence elections and legislative agendas through political contributions in a way that worker centers cannot.²³ These comparative advantages suggest that worker centers and unions could benefit from collaboration. Indeed, scholars have suggested increased collaboration between the two camps,²⁴ and as the discussion below suggests, such collaboration seems possible and productive in this context.

B. Pursuing Workers' Rights Through Lawsuits

A worker typically comes to a worker center because she has faced exploitation at work — for example, she has not received a paycheck, or has learned that she is entitled to overtime payments that her employer never mentioned — and she is interested in learning whether there are legal remedies. Initially, worker centers responded to workers' concerns by bringing lawsuits against employers.²⁵ In bringing suits, center staff hoped to remedy individual grievances, but they also hoped eventually to bring about structural change by using lawsuits as a mechanism for organizing.²⁶ Center staff imagined that suits would foster organizing in two ways: First, by bringing

grant identity came to be an important common theme for organization.”); Narro, *supra* note 13, at 467; Rivchin, *supra* note 13, at 400.

²¹ See Naduris-Weissman, *supra* note 7, at 242.

²² Though some worker centers have begun collecting dues, most are currently funded by outside grants, unlike unions. Fine, *supra* note 10, at 341 (Worker centers have “small budgets, loose membership structures, improvisational cultures and strategies that are funded by foundation grants.”); see also Fine, *supra* note 9, at 429 (“[T]here is a lot of ambivalence about charging dues and while about 40% of centers say they have a dues requirement, few have worked out systems to be able to collect them regularly.”); Gordon, *supra* note 8, at 434 (describing the Workplace Project’s use of grant funding).

²³ In 2009–2010, the American Federation of State, County, and Municipal Employees (AFSCME) spent \$87.5 million on political campaigns, making it the largest outside spender in the 2010 election. Brody Mullins & John D. McKinnon, *Campaign’s Big Spender — Public-Employees Union Now Leads All Groups in Independent Election Outlays*, WALL ST. J., Oct. 22, 2010, at A1. Indeed, in 2010, three of the top five groups making independent political expenditures were unions — the AFL-CIO, the SEIU, and Services Employees Local 1999. Fred Barnes, *Inside the Republican Money Machine*, WALL ST. J., Sept. 24, 2010, at A23. Unions’ political spending ability was also enhanced by the Supreme Court’s recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). See generally Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012); Case Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75 (2010).

²⁴ See, e.g., Fine, *supra* note 10, at 356; Rivchin, *supra* note 13, at 401.

²⁵ See Gordon, *supra* note 8, at 437 (describing the worker advocacy program, whereby the Workplace Project provided legal “counseling, referrals, and representation” to workers through a weekly clinic).

²⁶ See *id.*

workers who had suffered workplace violations to the center, the staff could enable workers to discuss their experiences with others, and through these discussions, workers would come to see their problems as collective.²⁷ Second, staff members hoped that successful lawsuits would engender a desire to participate in center activities after the suit had ended.²⁸

Centers discovered, however, that the fundamentally individual nature of these lawsuits was not conducive to organizing workers to pursue long-term structural change. Though centers hoped that workers who won backwages from employers would continue to attend center meetings and encourage other workers to join them, workers often saw legal victories as the end of their connection to worker centers.²⁹ Furthermore, because a worker who brings such a suit has usually stopped working for the employer she sues, she is unable to organize other employees within that workplace.³⁰ Center staff had also hoped that by making legal victories public, they could encourage other workers to challenge violations and warn other employers of the consequences of noncompliance, but the nondisclosure clauses typical of settlement agreements frustrated this strategy.³¹ Finally, such suits are resource-intensive, and centers' resources are limited.³²

In order to focus on mechanisms that will bring about structural change — political action and direct economic intervention — worker centers should continue to shift resources away from wage and hour suits, and they should instead refer workers with legal claims to resources outside of the center. Centers can connect workers to outside legal resources by referring workers to legal aid organizations devoted to individual representation or by developing partnerships with law firms that represent clients on a pro bono basis.³³ Centers can also train workers to bring actions pro se in small claims court to recover small amounts of money in cases with few problems of proof.³⁴ None of these solutions is perfect, but in light of constrained resources, worker centers should focus on activities that provide collective, instead of individual, benefits.

²⁷ *See id.*

²⁸ *See id.* at 437–38.

²⁹ *See id.* at 439.

³⁰ *See id.*

³¹ *See id.* at 440–41.

³² *See id.* at 443.

³³ *See* Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1893–95 (2007) (discussing worker centers' collaborations with outside lawyers, such as law school clinical students and faculty, in order to provide legal representation for workers).

³⁴ Justice At Work, a workers' advocacy group based in Boston, Massachusetts, has begun to use this strategy. *See About Justice At Work*, JUSTICE AT WORK, <http://www.jatwork.org/about.php> (last visited Oct. 25, 2012).

C. *Current Initiatives Worker Centers Should Continue*

Recognizing the shortcomings of using lawsuits to spur organizing, worker centers have long engaged in other tactics as well. Centers teach know-your-rights classes to provide workers with information about legal protections to which they are entitled and to help workers learn to identify legal violations at work.³⁵ Centers also engage in protests and public relations campaigns against individual employers whose violations are particularly egregious.³⁶ Wage and hour lawsuits, however, remain a primary means by which centers force employers to comply with workplace laws.³⁷

Worker centers also work to develop leadership capacity among workers in order to build workers' collective power.³⁸ Workers are better positioned than staff organizers to lead organizing efforts for practical reasons — workers are present at the jobsite, so they are better able to plan and carry out collective action by recruiting other workers to join collective efforts.³⁹ Furthermore, though center staff may be more familiar with the types of collective efforts that have succeeded in other workplaces, and thus may possess valuable perspectives on how best to develop strategies for collective action, workers have a “major contribution to make in terms of strategy” because they are closely connected to the conditions of work.⁴⁰ Finally, funding for staff is uncertain and may wane over time.⁴¹ These factors make worker leadership essential for the collective action needed for structural change, and so worker centers should continue to engage in organizing efforts that develop worker leadership.

D. *Creating Mechanisms for Direct Economic Intervention*

The hiring hall is a primary way in which unions have traditionally intervened directly in the employment relationship in order to improve wages and working conditions. Similarly, hiring halls allow worker centers to play an intermediary role between employers and workers and “regulate

³⁵ See Ruth Milkman, *Immigrant Workers, Precarious Work and the U.S. Labor Movement*, 8 *GLOBALIZATIONS* 361, 367 (2011) (“Worker centers routinely provide basic information — both in written form and through educational workshops — to low-wage immigrant workers about their rights under U.S. and immigration law”); see also Gordon, *supra* note 8, at 433–37 (describing the educational workers course at the Workplace Project).

³⁶ See Milkman, *supra* note 35, at 361–62.

³⁷ See, e.g., Fine, *supra* note 9, at 420.

³⁸ At the Workplace Project, for example, staff sought to build worker leadership for large-scale organizing campaigns by encouraging workers to take a lead in running the center's operations. Gordon argues that democratic control within the worker center built workers' “internal power”: that is, their “organizing capacity both on the individual and the group level” based on the construction of “a shared sense of identity and [the development of] a common purpose” GORDON, *supra* note 20, at 143.

³⁹ See *id.* at 141.

⁴⁰ *Id.*

⁴¹ See *id.* at 139–40.

the day-labor market” by “establishing rules governing the search for work and the hiring of laborers.”⁴² Many worker centers in the day labor industry currently run such hiring halls.⁴³

Hiring halls allow for direct intervention in a few ways. First, hiring halls create a site where such intervention could take place by offering a forum where employers and day laborers can set the terms of the day’s work.⁴⁴ Most halls also intervene directly by providing a “job-allocation system (either a lottery, list of available workers, or some other selection mechanism) that imposes order or a hiring queue on the day-labor hiring process.”⁴⁵ In addition, center-run hiring halls “require job seekers and employers to register with center staff,” and they require employers to comply with minimum wage rates.⁴⁶ Finally, halls “monitor labor standards, employer behavior, and worker quality.”⁴⁷

Though center-run hiring halls do not represent a majority of day laborers, they do have a strong presence; about 21% of day laborers nationwide seek work at worker center–run hiring sites.⁴⁸ Because hiring halls can function as a site for direct economic intervention, centers currently running hiring halls should expand their influence over the hiring process within industries in which they work, and centers that do not currently operate hiring halls should develop this function. Part III considers further how centers might do this.

II. INCREASING LAW ENFORCEMENT THROUGH POLITICAL ACTION

In order to reduce employer violations of workplace laws, worker centers must develop the capacity to engage in political action. Unlike a wage and hour suit, which can produce gains only for an individual employee or a small group of employees, political action can result in structural change that improves conditions for all employees by increasing resources for law enforcement and curbing the practices that allow employers to shirk employment laws.

In this Part, I consider the example of the Coalition of Immigrant Worker Advocates (CIWA), a coalition of workers’ groups, including worker centers, that successfully pushed for the passage of a bill designed to reduce law-breaking in some of the industries most plagued by employer misconduct. This Part then addresses the role of unions in that case study and asks whether worker centers could succeed politically if their interests were less

⁴² ABEL VALENZUELA, JR., ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 7 (2006), available at http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at i.

directly aligned with unions' interests. After analyzing the role of unions in the success of the Domestic Workers United campaign, I posit that worker center coalitions can enlist union aid to advance campaigns that do not directly align with unions' interests, so long as those campaigns do not conflict with unions' goals.

A. *Political Success in California*

In 2001, the Maintenance Cooperative Trust Fund (MCTF), a workers' advocacy group founded by the Service Employees International Union (SEIU) and unionized employers in the janitorial contracting industry⁴⁹ developed CIWA, a coalition of labor advocates, including worker centers, dedicated to "improving working conditions and increasing labor-law enforcement in low-wage industries in the unregulated underground economy of Los Angeles."⁵⁰ CIWA formed partnerships with worker centers and legal advocates to educate workers about their rights,⁵¹ and after expanding its influence among workers through organizing and education, CIWA co-sponsored a bill that would make it illegal to enter into contracts whose terms were insufficient to allow contractors to comply with wage laws.⁵² The bill, S.B. 179, which Governor Gray Davis signed into law in October 2003,⁵³ created a private right of action for any employee aggrieved by such a contract; a court could award such an employee damages, injunctive relief, and attorneys' fees.⁵⁴ The law possesses tremendous potential for improving workplace compliance by employers in the context of low-income workers, and it targets those industries, such as garment work and janitorial services, in which wage violations have been rampant.⁵⁵

The Act's other sponsors included labor leaders such as the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the SEIU, the American Federation of State, County, and Municipal Employees (AFSCME), and the California Federation of Labor.⁵⁶ Though the relative influence of CIWA and organized labor on the passage of the bill has not

⁴⁹ Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 353 (2005).

⁵⁰ Narro, *supra* note 13, at 497.

⁵¹ *See id.* at 505.

⁵² *See id.* at 507. The Act applies to any "contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor." CAL. LAB. CODE § 2810(a) (West 2011).

⁵³ Narro, *supra* note 13, at 507.

⁵⁴ CAL. LAB. CODE § 2810(g).

⁵⁵ A recent study of low-income work in Los Angeles found that 57.8% of workers in the garment industry had suffered minimum wage violations in the previous week — more than in any other industry. In building services, including janitorial services, 31.5% of workers had suffered minimum wage violations in the previous week. MILKMAN ET AL., *supra* note 1, at 31.

⁵⁶ SENATE BILL ANALYSIS: S.B. 179, CAL. S. RULES COMM. (2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0151-0200/sb_179_cfa_20030430_114438_sen_floor.html.

been studied, it stands to reason that the support of the SEIU, a significant political contributor to the California legislature, had a large impact.⁵⁷ The unions' support for the bill is easy to understand: contractors who pay their employees at illegal rates undercut the ability of contractors with unionized workforces to compete.⁵⁸

While CIWA's efforts in California provide an example of successful political organizing of low-income workers, the role unions played raises the question of whether low-income workers can be successful without them. It is not surprising that low-income workers' political power greatly benefits from union support: political involvement has long been a hallmark of union activity,⁵⁹ and despite declining density,⁶⁰ unions have become more sophisticated in using their political clout in recent years.⁶¹ In the case of CIWA, the interests of low-income workers aligned with those of unions, so the partnership was natural. But unions' interests and worker centers' interests may diverge: low-income workers, acting collectively, may have political agendas that do not directly advance unions' interests, or they may work in industries, such as domestic work, that are excluded from the NLRA⁶² or are too small or diffuse to be appealing organizing targets for unions, and thus lack the potential to provide unions with new members. The potential divergence of union and worker center agendas raises the question of whether unions will spend money and political capital to support agendas that do not advance unions' organizing aims.

1. *Union Support for Low-Income Workers: New York's Domestic Workers' Bill of Rights Campaign.*

This section considers whether unions will support worker centers' agendas that do not directly advance unions' aims. The example of the Do-

⁵⁷ According to a watchdog group that tracks contributions to the California State Legislature, the SEIU was the single largest contributor to candidate campaign committees of legislators serving in the California state legislature from 2009 to the present. See *Top Contributors*, MAPLIGHT, <http://maplight.org/california/organization> (last visited Feb. 1, 2013).

⁵⁸ See Steven A. Greenhouse, *Illegally in U.S., and Never a Day Off at Wal-Mart*, N.Y. TIMES, Nov. 5, 2003, at A1.

⁵⁹ See generally Schiller, *supra* note 4.

⁶⁰ James B. Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 463 (1994).

⁶¹ Janice Fine, *Community Unions and the Revival of the American Labor Movement*, 33 POL. & SOC'Y 153, 191 (2005) ("Most labor leaders and observers would agree that the signature accomplishment of the new leadership of the AFL-CIO has been improving the effectiveness of labor's political operation, and not new member organizing.").

⁶² Domestic workers and farm workers are both excluded from the NLRA's coverage. Under the NLRA, "[t]he term 'employee' shall . . . not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . ." 29 U.S.C. § 152(3) (2006). As a result, workers in these industries do not receive the NLRA's protections for organizing activities; for example, they are not protected by the NLRA if they are fired for trying to start a union. For a discussion of the exclusion of domestic workers from the NLRA, see Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 58-60 (2000).

mestic Workers' Bill of Rights in New York, which was passed with the help of union support, suggests that worker centers can exert political power even in industries in which unions do not organize.

In the state of New York, more than 200,000 domestic workers provide elder care, childcare, and housekeeping services.⁶³ Seventy-six percent of these workers are not citizens,⁶⁴ and because they work in homes where employer exploitation is hidden from public view, they are vulnerable to workplace abuses. Because the NLRA excludes domestic workers from coverage, domestic workers are not protected if they try to act collectively.⁶⁵ Perhaps unsurprisingly, employers routinely violate domestic workers' rights.⁶⁶

In the 1990s, domestic service workers in New York City began organizing through two worker centers: the Women Workers Project of the Committee Against Anti-Asian Violence and Andolan.⁶⁷ In 2000, these groups joined with Caribbean and Latina domestic workers to form Domestic Workers United (DWU).⁶⁸ DWU led a citywide campaign for domestic workers' rights, culminating in 2003 with the passage of New York City Local Law 33, which "required employment agencies to advise domestic workers and employers about labor rights."⁶⁹ In the wake of this initial victory, DWU began organizing for a statewide Domestic Workers' Bill of Rights.⁷⁰

In pursuing its statewide agenda, DWU sought out partnerships with organized labor, which "became a crucial component of the campaign, mobilizing [union] members to visit with legislators, making solidarity speeches at rallies and press conferences, and overall showing their support

⁶³ Steven Greenhouse, *Legislation Pushed to Require Minimum Wage for Domestic Workers*, N.Y. TIMES, June 1, 2007, at B4; see also DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY (2006), available at <http://www.datacenter.org/reports/homeiswheretheworkis.pdf> [hereinafter HOME IS WHERE THE WORK IS].

⁶⁴ HOME IS WHERE THE WORK IS, *supra* note 63, at 10.

⁶⁵ Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 419 (2012).

⁶⁶ See, e.g., Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 645, 693 (2011) ("Over a quarter [of domestic workers in New York] make less than minimum wage and live below the poverty line, one-third say they have been abused at work, [and] two-thirds say they receive overtime pay rarely or never . . ."); DOMESTIC WORKERS UNITED ET AL., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT (2010), available at <http://www.domesticworkersunited.org/index.php/en/component/jdownloads/finish/3/2>.

⁶⁷ See Shah & Seville, *supra* note 65, at 429.

⁶⁸ *Id.* at 430; see also *About Us*, DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/about> (last visited Oct. 30, 2012).

⁶⁹ See Shah & Seville, *supra* note 65, at 431.

⁷⁰ See *id.* at 432.

for their working sisters.”⁷¹ Legal aid attorneys, organized under the United Auto Workers, and the doormen’s union, SEIU Local 32BJ, were early supporters.⁷² In time, even heavy-hitting union leaders such as Denis M. Hughes, president of the New York State AFL-CIO, and John Sweeney, President Emeritus of the national AFL-CIO, actively lobbied for passage of the Domestic Workers’ Bill of Rights.⁷³

Why would this be? DWU’s legislative agenda did not directly benefit the unions, because the industry neither includes unionized employers who fear low-wage competition nor offers an opportunity to expand union membership. Perhaps unions participated because they were eager to engage DWU’s 2,300 members to assist with unions’ grassroots efforts;⁷⁴ indeed DWU members did canvass in support of the union-supported Employee Free Choice Act.⁷⁵ But organized labor groups in New York include over 2.5 million people,⁷⁶ so it seems unlikely that the addition of a few thousand supplementary canvassers was the principal reason for supporting DWU’s campaign.

Perhaps the unions hoped that though domestic workers could not themselves be union members, DWU’s members could serve as organizers of future union members.⁷⁷ Though privately employed domestic workers are excluded from the NLRA, state-funded home health workers do fall under the NLRA’s protections, and they had been successfully organized elsewhere.⁷⁸ Finally, by the time union leaders publicly advocated for the bill, DWU had secured considerable publicity,⁷⁹ and perhaps unions were eager to participate in a well-publicized effort to advance workers’ rights at a time when media coverage of unions was becoming increasingly negative.⁸⁰ Though the reason for union support of the domestic workers’ campaign is not clear, union participation in this case suggests that at least in some circumstances, unions may support political agendas that do not directly advance their own political aims.

⁷¹ CLAIRE HOBDEN, INT’L LABOUR OFFICE, WINNING FAIR LABOUR STANDARDS FOR DOMESTIC WORKERS: LESSONS LEARNED FROM THE CAMPAIGN FOR A DOMESTIC WORKER BILL OF RIGHTS IN NEW YORK STATE 19 (2010), available at http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-actrav/documents/publication/wcms_149488.pdf.

⁷² *Id.*

⁷³ See, e.g., HOBDEN, *supra* note 71, at 20; Greenhouse, *supra* note 63.

⁷⁴ HOBDEN, *supra* note 71, at 3 (describing the membership of the organization).

⁷⁵ *Id.* at 17.

⁷⁶ *About Us*, N.Y. STATE AFL-CIO, <http://nysaflcio.org/about/> (last visited Oct. 30, 2012).

⁷⁷ The ILO case study contends that DWU’s organizing capacity was essential to the union partnership: “Clinching union support was . . . almost entirely predicated on DWU’s seriousness and ability to organize the workers.” HOBDEN, *supra* note 71, at 20.

⁷⁸ See, e.g., Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337, 347–78 (2006) (describing organizing of home health care workers in California and Illinois).

⁷⁹ See HOBDEN, *supra* note 71, at 14.

⁸⁰ See generally WILLIAM PUETTE, THROUGH JAUNDICED EYES: HOW THE MEDIA VIEW ORGANIZED LABOR 3 (1992); Diane E. Schmidt, *Public Opinion and Media Coverage of Labor Unions*, 14 J. LAB. RES. 151 (1993).

It is conceivable that the political agendas of low-income workers' groups could diverge further from unions' agendas than they did in the case of domestic worker organizing — even so far as to conflict directly with unions' agendas. For example, low-income workers in an urban area might lobby for a municipal ordinance mandating that firms receiving city contracts employ a minimum number of local residents, and a union with few local members might oppose such an ordinance. The literature discussing low-income workers' political power does not offer examples of cases in which low-income workers have successfully advanced political goals in the face of union opposition.

Though this lacuna may suggest that worker centers should engage in political action in industries where their interests align with, or at least do not undermine, those of unions, many workers suffer wage violations in industries that are not appealing for union organizing drives. For example, many of the workers involved with worker centers in Boston, Massachusetts, are employed by small pizza restaurants. Though pizza store owners routinely violate wage and hour laws,⁸¹ the workers are not numerous or concentrated enough to warrant attention by union organizers. As a result, worker centers in these industries might instead turn to economic intervention as a means of bringing about structural change.

III. DEVELOPING CONTROL OF THE LABOR SUPPLY THROUGH ECONOMIC INTERVENTION

Workers traditionally derive the power to make demands on employers, including the demand that employers pay legal wages, from the ability to “disrupt the production of goods and/or services and interfere with profits.”⁸² Low-income, unorganized workers currently lack the ability plausibly to threaten disruption: given the scant and under-enforced protections workers have against termination, and given the high rate of unemployment among both documented and undocumented workers, an employer can easily replace an employee who refuses to work on the terms established by an employer with one who will accept those terms.⁸³ In order to develop worker power through direct economic intervention, then, worker centers

⁸¹ The most egregious example may have been perpetrated by the management at Upper Crust Pizzeria, a chain of pizza restaurants in Boston. After a Department of Labor (“DOL”) investigation revealed that the company had failed to pay its undocumented workers regular and overtime wages, the DOL ordered the company to pay \$350,000 in back wages to more than 100 workers. After the company had delivered the checks, workers complained that they were ordered to return them under penalty of losing their jobs. Jenn Abelson, *The Fault Lines Under the Crust*, Bos. GLOBE, Dec. 5, 2010, at A1.

⁸² See Jenkins, *supra* note 6, at 62–63.

⁸³ *Id.* at 63. (“[W]hile ‘there is power in numbers’ is useful as an inspirational slogan, the truth is that there is social power in sufficient numbers, in certain situations In a workplace, these factors include the ease with which the workers can be replaced by scabs”).

must gain control over the labor supply, and to do this, they must gain control over hiring.

This Part considers the kinds of agreements that worker centers operating as hiring halls could reach with employers. It describes the strictures the NLRA places on exclusive hiring agreements, and it concludes that the NLRA would greatly restrict the activities of any hiring hall operating under such an agreement. This Part goes on to consider a hiring hall model that would not involve an exclusive hiring agreement. This model would avoid the NLRA, but its informality presents other challenges. This Part then considers the ways in which worker centers could appeal to employer and employee self-interest to secure participation by both sides in a voluntary hiring hall arrangement. Finally, this Part considers the practical and theoretical concerns with inducing employee participation in voluntary hiring halls.

A. *Worker Centers as Hiring Halls with Exclusive Hiring Agreements*

The most direct way to gain control over hiring would be to establish industry-wide hiring halls and reach union security agreements — agreements that tie hiring to union participation — with employers, guaranteeing that employers would hire from the halls. Indeed, unions have historically derived the power to make demands on employers from their control over production, which is enhanced as employers' control over hiring is reduced.⁸⁴ Thus, union security agreements have historically strengthened union power,⁸⁵ and similar agreements could strengthen the power of worker center-run hiring halls as well.

Unions' ability to reach security agreements with employers diminished after the passage of the Taft-Hartley Act of 1947. Taft-Hartley amended the NLRA in part by limiting union security agreements between employers and "labor organizations," and its constraints would likely affect worker center activities as well. As enacted in 1935, Section 8(3) of the NLRA had provided that neither the NLRA nor any federal statute "shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein"⁸⁶ The "prevailing administrative and judicial view" was that by allowing employers to condition employment on membership in a "labor organization," the NLRA pro-

⁸⁴ See *id.* at 62–63; see also FREEMAN & MEDOFF, *supra* note 5, at 3.

⁸⁵ See, e.g., Raymond R. Farrell, Note, *Regulation of Union Security Contracts*, 59 YALE L.J. 554, 554 (1950) ("The main purpose of a union security agreement is to increase the union's bargaining power. With greater control over dissident members, and with the employer tied to a union-dominated labor market, the secured union can more forcefully press its demands for better working conditions." (internal citations omitted)); Mark D. Meredith, Note, *From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178, 185–86 (1996).

⁸⁶ NLRB v. Gen. Motors Corp., 373 U.S. 734, 739 (1963) (discussing Section 8(3) of the NLRA and its amendment by the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136).

tected closed shops, union shops, and less restrictive union security agreements.⁸⁷

The Taft-Hartley Act restricted unions' ability to enter into union security agreements in several important ways. First, the Act prohibited closed shop agreements by amending Section 8(a)(3) to allow employers to condition employment on membership in a labor organization only "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later."⁸⁸ The amendment thus eliminated the possibility that hiring could be conditioned on current union membership.⁸⁹ Taft-Hartley also gave states the ability to regulate union security agreements through the addition of Section 14(b),⁹⁰ enabling states to enact "right-to-work" laws proscribing union security agreements, including agency shop agreements.⁹¹ Twenty-three states currently have such laws,⁹² and in these states, neither unions nor worker centers would be able to enforce exclusive hiring agreements. Finally, the Taft-Hartley Act also extended prohibitions on unfair labor practices, which previously covered only employers, to labor organizations. After Taft-Hartley, a labor organization

⁸⁷ *Id.* A "closed shop" agreement is the most restrictive hiring agreement; an employer in a "closed shop" can hire only workers who are union members at the time of hire and who remain union members during their employ. *See, e.g.,* Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57 (1990). Under a "union shop" agreement, applicants need not be union members, but once hired, employees are required to join the union. *Id.* at 57–58. In the less restrictive "agency shop" arrangement, an employer is free to hire any applicant, and employees are not required to join the union after they are hired, but they must contribute an "agency fee." *Id.* at 52 n.5. From 1947 until 1988, the agency fee was typically the same as the union dues amount. *Id.* at 52. However, in *Communication Workers of America v. Beck*, 487 U.S. 735, 768 (1988), the Court concluded that Section "8(a)(3) prohibits [unions] from requiring [nonunion employees] to pay fees for purposes other than those 'germane' to collective bargaining, contract administration, and grievance adjustment."

⁸⁸ 29 U.S.C. § 158(a)(3) (2006).

⁸⁹ *See General Motors Corp.*, 373 U.S. at 740 (After Taft-Hartley, "the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop.").

⁹⁰ Section 14(b) proscribes "the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (2006).

⁹¹ *See, e.g.,* Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 756 (1963) ("[An agency shop] provision conditioning employment upon the payment of sums equal to initiation fees and monthly dues is within the § 8(a)(3) proviso, within the scope of § 14(b), and hence subject to invalidation by state law."); *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (upholding right-to-work laws against constitutional challenge); Dau-Schmidt, *supra* note 87, at 53; Monica Davey, *Indiana Governor Signs a Law Creating a "Right to Work" State*, N.Y. TIMES, Feb. 1, 2012, at A12; Susan Guyett, *Indiana Becomes 23rd "Right-to-Work" State*, REUTERS, Feb. 1, 2012, available at <http://www.reuters.com/article/2012/02/01/us-unions-indiana-righttowork-idUSTRE81018920120201>.

⁹² Davey, *supra* note 91.

cannot “cause or attempt to cause” an employer not to hire an employee in an effort to “encourage . . . membership in any labor organization.”⁹³

Assuming that worker centers constitute “labor organizations” as used in the NLRA, an employee’s commitment to seek work exclusively through a worker center would likely constitute “membership,”⁹⁴ such that an employer could not discriminate with regard to hiring in order to induce such behavior. And the “discrimination” prohibited by Taft-Hartley strikes at the heart of a hiring agreement — an employer discriminates if she “refus[es] to hire [an employee] for an available job”⁹⁵ in order to induce an employee to join a labor organization. Because an employer *cannot* refuse to hire an employee in order to induce her to seek work through a labor organization, a worker center, if deemed to be a labor organization, cannot even enter into *voluntary* exclusive hiring agreements with employers.

It might thus appear that worker centers could avoid the strictures of Section 8 by avoiding activity that would render them labor organizations. According to the NLRA, a labor organization is “any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”⁹⁶ Worker participation is a core element of the worker center mission,⁹⁷ and thus worker centers likely qualify as organizations “in which employees participate.”⁹⁸ The definitional question, then, turns on whether worker centers “exist for the purpose . . . of dealing with employers concerning . . . conditions of work.” Though the Court has read “dealing with” expansively — as broader than mere “bargaining”⁹⁹ — administrative decisions have suggested that “dealing” at least requires an interactive relationship between an organization and an employer, whereby an organization establishes a pattern or practice of proposing changes that an employer, implicitly or explicitly, accepts or rejects.¹⁰⁰

⁹³ 29 U.S.C. § 158(b)(2) (2006). Under Section 8(b)(2), a labor organization engages in an unfair labor practice if it “cause[s] or attempt[s] to cause an employer to discriminate against an employee in violation of subsection (a)(3)”; Section 8(a)(3), in turn, prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” *Id.* § 158(a)(3).

⁹⁴ *See, e.g.*, *Radio Officers Union of the Commercial Tels. Union, AFL v. NLRB*, 347 U.S. 17, 39–40 (1954) (stating that “membership in a labor organization” includes not just paying dues, but also participating in union activities).

⁹⁵ *Id.* at 39.

⁹⁶ 29 U.S.C. § 152(5).

⁹⁷ *See, e.g.*, GORDON, *supra* note 20, at 141; Fine, *supra* note 9, at 420–21.

⁹⁸ 29 U.S.C. § 152(5); *see also* David Rosenfeld, *Worker Centers: Emerging Labor Organizations — Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 513 (2006).

⁹⁹ *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 213 (1959) (explaining that “dealing with” encompasses more than bargaining; employee committees that “undertook the ‘responsibility to’ and did ‘[h]andle grievances [with respondents on behalf of employees] at nonunion plants and departments according to grievance procedure set up [by respondents] for these plants and departments’” dealt with an employer such that it was a labor organization).

¹⁰⁰ *E.I. Du Pont De Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993) (Dealing “involves only a bilateral mechanism between two parties. That ‘bilateral mechanism’ ordinarily entails

Worker centers likely cannot avoid the designation of labor organizations while striving to gain control over the labor supply by channeling hiring through center-run hiring halls. A primary goal of center-run hiring halls is to establish minimum wage rates and workplace standards, and proposing such rates and standards to employers and ensuring compliance would likely qualify worker centers as labor organizations.¹⁰¹ Because of these constraints, worker centers wishing to engage in direct economic intervention will need to find ways to promote worker hiring through center-run halls without relying on exclusive hiring agreements with employers.

B. Worker Centers as Hiring Halls Operating Without Exclusive Agreements

Without exclusive hiring arrangements, worker centers must develop sufficient cohesion among workers such that workers will act collectively in a way that enables them plausibly to threaten to disrupt production and thus obtain the requisite leverage to make demands on employers. Worker centers have not yet achieved this degree of cohesion in any industry.¹⁰²

I argue that in order to achieve such cohesion, worker centers must gain control on two fronts. First, in dealing with employers, worker centers should seek to increase employer participation in center-based hiring by incentivizing participation and by raising the costs of abstaining from hiring through centers. Second, worker centers must reduce the number of workers who seek employment outside of center-run hiring halls. In order to reduce the number of workers seeking employment outside of collectively organized channels, history suggests that centers must first appeal to workers' self-interest and organize workers around common concerns in order to induce workers to join collective efforts voluntarily, and then centers must exert pressure on reluctant workers — workers who would not otherwise join voluntarily — in order to induce them to join.

a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”).

¹⁰¹ Rosenfeld, *supra* note 98, at 493–94, 498 (concluding that by engaging with employers to address workers' grievances, worker centers would be deemed to be “dealing with” employers and thus would be considered labor organizations).

¹⁰² See, e.g., GORDON, *supra* note 20, at 142 (“Even where jobs cannot move, most worker centers do not have anywhere near the critical mass of members required to put pressure on most individual employers, much less across an industry.”); Narro, *supra* note 13, at 469 (“[V]ery few of the worker centers in California have succeeded at large-scale economic intervention in labor markets through worker organizing efforts.”). Smith argues that the premise of “a cohesive group of paid household workers capable of exercising control over a given labor market for domestic services” is “largely academic,” because “the isolation of workers, immigration-related complications, sponsorship concerns, and the self-interest of individual workers are just some of the factors strongly weighing against the likelihood of paid household workers achieving the type of labor solidarity required to exercise monopolistic power in a given area.” Smith, *supra* note 62, at 97.

1. *Changing Employer Hiring Practices Through Informal Mechanisms.*

(a) *Securing Participation Through Appeal to Employers' Interests.*

Hiring halls can appeal to employer self-interest by training and screening employees, thereby providing consistent access to qualified workers without charging employers the fees that temporary work agencies (“temp agencies”) charge for similar services. In this section, I rely in particular on Dorothy Sue Cobble’s account of waitress unions in the twentieth century, which provides a useful model for current worker center organizing. Cobble, a leading historian of low-wage workers in the twentieth century,¹⁰³ observes that waitresses organized employees through a model she terms “occupational unionism.”¹⁰⁴ Unlike traditional industrial unions, which organize workers by worksite on an employer-by-employer basis,¹⁰⁵ occupational unions focus on workers of a given occupation within a region.¹⁰⁶ Worker centers, similarly, have organized employees across worksites on a regional basis.¹⁰⁷ Waitress unions provided staffing for employers primarily through waitress hiring halls.¹⁰⁸ Most waitress unions were small and independently operated, and they raised money from small groups of local members.¹⁰⁹ Furthermore, though occupational unions often took advantage of a pre-Taft-Hartley legal climate that was more favorable toward organizing,¹¹⁰ they also organized successfully through informal measures that worker centers could emulate. The waitress union model is thus instructive for how worker centers could achieve sufficient power to engage in economic intervention today.

A typical arrangement involved an agreement between a waitress hiring hall and an employer, whereby the employer would rely primarily on the

¹⁰³ See, e.g., Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 529 (2006) (citing Cobble as “a leading proponent of occupational unionism”); Peggie R. Smith, *Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 596 (2006) (“The work of Dorothy Sue Cobble is central to any serious examination of the challenge of advancing strategies that can secure representational rights for low-wage service workers.”).

¹⁰⁴ DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 9 (1991).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See, e.g., Fine, *supra* note 9, at 435–36 (describing worker centers that have engaged in direct economic action on an industry-wide, rather than a job-site specific, basis).

¹⁰⁸ See COBBLE, *supra* note 104, at 138.

¹⁰⁹ See *id.* at 131–36.

¹¹⁰ Occupational unions often took advantage of the security agreements that were available before Taft-Hartley: “Many locals secured ‘100 percent’ closed-shop agreements requiring that all employees join the union before being hired and that employers obtain all personnel through the union hiring hall. Hiring halls flourished when backed by such contracts.” *Id.* at 138.

hiring hall for referrals, but if union members were not available, the employer could hire off the street.¹¹¹ Hiring halls also assumed responsibility for consistent staffing — when waitresses missed work, they were required to find substitutes.¹¹²

Waitress hiring halls gained legitimacy and secured cooperation from employers by consistently providing highly skilled workers.¹¹³ Hiring halls trained waitresses through classroom instruction and apprenticeship programs, and they ensured worker compliance with professional standards through peer discipline on the job.¹¹⁴ Waitress unions “restricted . . . membership to those they deemed competent, took responsibility for training new entrants into the industry, and monitored work performance through fines and removal of unacceptable workers from the job.”¹¹⁵ Employers thus worked with waitress unions for the same reason they work with temp agencies today: employers appreciated being able to rely on someone else to provide trained, competent workers.¹¹⁶

Waitress unions also appealed to employer interests by bolstering restaurants’ competitive position: “once employers adopted union standards and hired only union help, the union protected their business interests by attacking ‘unfair’ competition and by encouraging patronage of union houses.”¹¹⁷ Because this practice of primary boycotting and affirmative support is not prohibited under the NLRA, worker centers could encourage employer participation by engaging in such tactics today.

Though the success of hiring halls in other industries suggests that appeal to employer self-interest could induce some employers to hire employees through center-run hiring halls, many employers might still wish to hire outside the halls. These employers might want to preserve autonomy and maintain as much control as possible over the hiring and evaluation process. Alternatively, low-income employers may wish to hire independently in order to continue the practice of paying employees illegal wages. Because it is probable that many employers will not be persuaded solely by appeals to

¹¹¹ See *id.* at 138. It appears, indeed, that appeal to employer interest has been at the heart of successful union hiring halls in a variety of industries. In addition to the construction of waitress hiring halls, hiring halls for domestic workers in the early twentieth century similarly succeeded by appealing to employers’ staffing interests. See, e.g., Smith, *supra* note 62, at 99.

¹¹² See COBBLE, *supra* note 104, at 142. Similar concerns have driven the success of hiring halls in the construction industry, where halls have been able to form exclusive hiring agreements because of an industry carve-out to the NLRA affected by the Landrum-Griffin Act. See, e.g., David J. Lowe, Note, *Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights?*, 81 COLUM. L. REV. 1702, 1704 (1981) (“Since the union knows the laborers, it can refer them according to their skills and experience and thereby achieve a better match of worker and job than could the employer. . . . [R]eliance on the unions . . . assures the employers ready access to an available supply of skilled craftsmen.”).

¹¹³ See COBBLE, *supra* note 104, at 146.

¹¹⁴ See *id.* at 140–42.

¹¹⁵ *Id.* at 120.

¹¹⁶ See *id.* at 146.

¹¹⁷ *Id.* at 146–47.

self-interest, centers must find additional ways to induce reluctant employers to participate.

(b) *Securing Employers' Participation Through Legal Pressure.*

Putting legal pressure on employers through targeted monitoring and industry-wide wage and hour suits¹¹⁸ has two benefits for worker centers. First, such pressure raises the cost of noncompliance, undermining the competitive advantage employers derive from violating hour and wage laws.¹¹⁹ Second, legal pressure may result in agreements with employers to follow workplace laws.

A workers' advocacy group in California, the Maintenance Cooperation Trust Fund (MCTF), illustrates how worker centers could engage in targeted monitoring in order to raise the costs of noncompliance and achieve agreements with employers to comply with workplace laws.¹²⁰ The MCTF operates as a watchdog organization for workplace laws in the janitorial industry.¹²¹ The organization hires former janitors to serve as investigators of workplace violations, and it collects incriminating information about violators for use in large-scale lawsuits or state enforcement actions.¹²²

For example, in 2004, MCTF investigated fifty Target stores and found that "janitors were being paid in cash, a flat rate with no overtime, no payroll taxes, no workers comp."¹²³ The contractor, Global Building Services, was also employing fifteen- and sixteen-year-olds to clean late at night, in violation of California's labor laws.¹²⁴ MCTF referred the case to the U.S. Department of Labor, which conducted a two-year investigation that resulted in a \$1.9 million settlement.¹²⁵ Global Building Services also reached a separate agreement with MCTF whereby MCTF would monitor Global's future compliance with wage and hour laws by "inspect[ing] records and job sites and meet[ing] with workers to determine employer compliance with labor standards."¹²⁶ MCTF agreed that it would not file any complaints against

¹¹⁸ The lawsuits I advocate here differ from the individual advocacy discussed in Part I, in that while those suits sought to redress individual workers' grievances, these suits would be targeted on an industry-by-industry basis with the goal of shutting down all law-breaking employers within a given industry. The aim of these suits is thus structural change rather than individual benefit.

¹¹⁹ See, e.g., Greenhouse, *supra* note 58 (Lilia Garcia, executive director of the Maintenance Cooperation Trust Fund, explained the problem by describing the cost savings employers reap by ignoring legal requirements: "When [they] don't pay taxes, don't pay Social Security and don't pay workers' comp, you have a 40 percent cost advantage.").

¹²⁰ See Estlund, *supra* note 49, at 353.

¹²¹ *Id.*

¹²² *Id.* at 353–54.

¹²³ Steven Greenhouse, *U.S. Wins Back Pay for Janitors*, N.Y. TIMES, Aug. 26, 2004, at A16.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Estlund, *supra* note 49, at 353.

Global as long as it served as a monitor.¹²⁷ Worker centers could employ a similar strategy in order to raise costs for employers who hire outside of center-run hiring halls at illegal rates.

Workers' advocacy groups in New York also provide models of how to use monitoring to procure agreements with employers to collaborate with worker centers in ensuring that they follow workplace laws. In 1998, UNITE Local 169 began organizing workers at approximately 2,000 greengrocer stores, and in the process of organizing, they learned that workers were making as little as \$2.80 per hour and working as many as seventy hours per week.¹²⁸ The Attorney General's Office investigated the claims and brought several successful wage and hour suits.¹²⁹ In 2002, the Attorney General's Office, the Korean American Association of Greater New York, the Korean American Produce Association, the New York AFL-CIO, and Casa Mexico — an organization representing the workers — reached agreement on the terms of a Greengrocer Code of Conduct.¹³⁰

According to the agreement, Korean greengrocers "pledge[d] to comply with federal and state minimum wage and overtime standards and state and federal labor law."¹³¹ Beyond the legal minima, grocers also agreed to "provide employees with sick and vacation days, attend educational training sessions on labor law, allow employees to attend similar sessions, and submit to monitoring of payroll records [by a Code of Conduct Committee, made up of employer, employee, and Attorney General Office representatives]."¹³² In exchange for agreeing to an additional Assurance of Discontinuance of illegal behavior, grocers received assurances that the Attorney General's Office would "exercise its discretion to refrain from investigating civil violations of the minimum wage and overtime laws . . . which occurred prior to the signing of the Assurance."¹³³

The strategies of raising the cost of operating outside of hiring halls through civil lawsuits and monitoring do have limitations. Employers who flout wage and hour regulations may also violate other laws regarding business corporations, and these violations may make employers more difficult to sue and to bind via judgment. For example, after MCTF investigated violations and brought charges against three grocery stores, the parties reached a \$23 million settlement. The offending contractor, Building One Services, then declared bankruptcy, making it more difficult to enforce set-

¹²⁷ *Id.*

¹²⁸ Alan Hyde, *Who Speaks for the Working Poor? A Preliminary Look at the Emerging Tetralogy of Representation of Low Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599, 603–04 (2004); Andrew Jacobs, *New Yorkers & Co; Not a Horn of Plenty*, N.Y. TIMES, Sept. 27, 1998, available at <http://www.nytimes.com/1998/09/27/nyregion/new-yorkers-not-a-horn-of-plenty.html?pagewanted=all&src=pm>.

¹²⁹ Hyde, *supra* note 128, at 603–05.

¹³⁰ *Id.*

¹³¹ *Id.* at 604–05.

¹³² *Id.*

¹³³ *Id.* at 605.

tlements against it.¹³⁴ But as Lilia Garcia, executive director of MCTF, explained, the company was “hardly out of business.”¹³⁵ Building One Services, like similar companies, declared bankruptcy while immediately starting another company to engage in the same business. As Garcia explained, they “do this shell game of changing their names and . . . the principals of that company have now opened up new companies and are operating in different parts of the country.”¹³⁶ Many businesses take the further step of operating a business without incorporating at all: though over 12,000 janitorial contractors do business in California, “only half are registered with the state as legitimate businesses.”¹³⁷ The willingness of employers to violate the laws governing business corporations may limit the effectiveness of worker center monitoring efforts. It is difficult for workers’ advocates to identify and sue unincorporated businesses, and if a business has no identifiable assets, it may be judgment proof. Nevertheless, it remains the case that by forcing companies to engage in tactics such as declaring bankruptcy and reopening, centers could raise the costs of noncompliance, perhaps to such a degree that some employers might find it in their financial interest to hire through center-run hiring halls.

Furthermore, the greengrocer example highlights a limit to the effectiveness of monitoring as an end in itself. Though employers may collaborate with worker centers to insulate themselves from legal liability, the outcomes of those collaborations do not necessarily result in increased worker power. In the case of the greengrocer agreement, the primary outcome was that greengrocers committed to following the law. Though workers who had worked for one year gained two paid sick days and one week of vacation (more than the law requires)¹³⁸ the agreement did not increase the power of employees to demand concessions beyond legal minima in the future. Thus, some may argue that employers will only reach those agreements that serve their financial and legal interests, and thus will not enter into agreements that put in place processes through which workers can demand concessions beyond the legal minima.

¹³⁴ Jennifer Ludden, *Plight of Underpaid and Overworked Janitorial Workers*, NAT’L PUB. RADIO (Sept. 5, 2004), available at <http://www.janitorialwatch.org/wp-content/uploads/09-04-npr-interview.pdf>.

¹³⁵ *Id.*

¹³⁶ *Id.* See also Greenhouse, *supra* note 58 (“[C]ontractors and subcontractors appeared to play a shell game, continually closing down, filing for bankruptcy and reincorporating under different names.”).

¹³⁷ Leonel Sanchez, *Watchdog Group Helps Keep Janitorial Contractors Clean*, SAN DIEGO UNION-TRIBUNE, Jan. 28, 2004, at C1.

¹³⁸ Under the Fair Labor Standards Act, employers are not required to provide paid sick days or vacation days. See generally 29 U.S.C. §§ 201–319 (2006).

2. *Securing Collective Action Among Workers Through Informal Mechanisms.*

In order to gain control over hiring, worker centers must not only approach the problem from the demand side, by inducing employers to participate as discussed above, but also from the supply side, by ensuring that enough workers participate that centers can plausibly threaten disruption of production. Returning to the example of the waitress occupational union, participation by a majority of the labor force was essential to unions' ability to bargain with employers: "[W]aitress locals persuaded the majority of the occupation to seek work first through the union hall, thus making it difficult for employers to hire from any other source."¹³⁹ This section first considers how centers might encourage worker participation in collective action by appealing to workers' economic self-interest and their sense of solidarity with other workers. It then considers how workers unmoved by self-interest might nonetheless be encouraged to join through social pressure.

(a) *Securing Participation by Appealing to Workers' Collective and Individual Interests.*

Developing a group of workers that participate in and lead collective action efforts voluntarily, as a result of their sense of solidarity and individual self-interest, is both practically and theoretically necessary for gaining control over the labor supply. On a practical level, the processes that produce collective action take time and require action at the jobsite, such as talking to other workers and monitoring employer behavior; because workers are on the jobsite every day, they are best positioned to spend this time and engage in this action. Furthermore, a group of workers must voluntarily accept the premise of collective action so that they can enforce this concept with workers initially reluctant to join the effort. On a theoretical level, voluntarily participating workers, rather than center staff, must take the lead in gaining control over the labor supply because the legitimacy of social pressure used to enforce unity among reluctant workers depends on that pressure being exerted by workers rather than organizers. As a report drafted by the National Day Labor Organizing Network (NDLON) explains, if organizers, rather than workers, make decisions, "coordinators become the enemies of the day laborers because they . . . control their conduct [but] do not allow them to participate in the decision-making process [D]emocratic participation . . . eliminates the abuse of authority and guarantees justice and equality in the decision-making processes."¹⁴⁰

¹³⁹ COBBLE, *supra* note 104, at 139.

¹⁴⁰ NAT'L DAY LABOR ORG. NETWORK, BUILDING COMMUNITY: THE COMPONENTS OF A DAY LABOR WORKER CENTER MODEL 6, available at <http://www.ndlon.com/resources/buildingcommunity.pdf> [hereinafter BUILDING COMMUNITY].

Worker centers can develop a group of workers who can lead collective action efforts by appealing to workers' collective and individual interests. The problems workers face on a jobsite are collective in the sense that they are shared among workers and arise from the same root causes. For example, if an employer does not pay overtime wages, all employees suffer, and the causes — the employer's malfeasance and the law's failure to correct the wrongdoing — are common. When workers understand that a problem such as unpaid wages is not unique to a given worker, but is a problem workers face collectively, they develop a sense of shared fate and can seek collective solutions. In securing workers' participation in coordinated action, then, worker centers must identify and appeal to workers' collective interests.

Worker centers have sought to highlight workers' collective problems in an effort to encourage employees to work together to seek solutions to these challenges. Many problems — such as receiving less than the federal minimum wage — are shared by workers across multiple low-paying industries and are thus amenable to collective solutions.¹⁴¹

At the same time, each worker has a deeply personal interest in her own salary. Appealing to this interest, and to other personal interests, such as the need for childcare during the workday, is also essential to encouraging workers to participate in coordinated action. Unions, backed by the NLRA, have famously appealed to workers' self-interest by increasing wages¹⁴² and benefits,¹⁴³ but less formal groups such as occupational unions have also been able to offer these benefits to workers by raising wages through collective demands made outside of the NLRA bargaining process.

Jane Street, head of the Domestic Workers' Industrial Union (DWIU), a domestic worker hiring hall organized in Denver in 1916, explained how a workers' organization operating without an exclusive hiring arrangement could raise wages for its members: "For a number of housegirls to simply own, collectively, a telephone and to use it systematically is to raise wages all over a city. For instance, if you want to raise a job from \$20 to \$30 . . . You can have a dozen girls answer an ad and demand \$30, — even if they do not want to work at all."¹⁴⁴ Raising wages in this way brought a significant

¹⁴¹ See, e.g., GORDON, *supra* note 20, at 165. Waitress unions also secured participation by identifying and solving collective problems. Waitresses faced tangible, immediate problems that were neither unique to individual waitresses nor shared by other crafts, and understanding that their problems were collective led them to seek collective solutions. See COBBLE, *supra* note 104, at 55.

¹⁴² FREEMAN & MEDOFF, *supra* note 5, at 46 ("In the 1970s, the archetypical union wage effect was on the order of 20 to 30 percent.").

¹⁴³ Richard B. Freeman, *The Effect of Unionism on Fringe Benefits*, 34 INDUS. & LAB. REL. REV. 489, 494 (1981) ("[U]nionism is likely to increase the number of [benefits] available to workers and the employer's expenditures on these programs. It is also likely to have sizeable effects on deferred benefits favored by older workers . . .").

¹⁴⁴ Smith, *supra* note 62, at 84–85 (quoting letter from Jane Street to Mrs. Elmer F. Buse (1917), reprinted in *"We Have Got Results": A Document on the Organization of Domestic in the Progressive Era*, 17 LAB. HIST. 103, 105 (Daniel T. Hobby ed., 1976)). The experience of waitress unions confirms the ability of groups acting collectively to raise wages without the

number of workers on board; a sufficient number of workers chose to seek work through the DWIU, rather than traditional temp agencies, that such agencies “experienced a dramatic decline in business.”¹⁴⁵

The Workplace Project in Long Island provides a contemporary example; it sought to raise wages for day laborers by organizing “corner committees,” which established minimum daily wages at the sites where day laborers sought work.¹⁴⁶ These committees enjoyed a brief period of success; after two seasons of organizing, in 1995, “an estimated 150 workers had gone from receiving a daily wage of \$45 to demanding and receiving \$60 a day.”¹⁴⁷ The Workplace Project was not able to set up a permanent organizational infrastructure, and in the absence of consistent leadership enforcing the minimum wage, by 1997, the earlier system of individual bargaining returned.¹⁴⁸

Occupational unions also appealed to workers’ individual self-interest by supplementing wage gains with direct service provision: for example, waitress unions often established sick and death benefit funds,¹⁴⁹ a few local chapters provided child care,¹⁵⁰ and one even established a permanent home for members.¹⁵¹ Worker centers have similarly tied participation to immediately tangible economic benefits, such as the ability to establish bank accounts.¹⁵² Occupational unions also appealed to employees’ immediate interest in finding work by helping them seek employment without paying temp agency fees.¹⁵³ Worker centers with hiring halls can similarly appeal to employees’ desire to avoid agency fees.

(b) *Securing Participation by Reluctant Workers.*

Though developing a group of voluntary participants is essential to gaining control over the labor supply, it is not enough; workers’ social power also depends on ensuring that other workers are not able to undercut group

protections of the NLRA. In response to a 1908 survey, “78 percent of waitress locals nationwide reported having increased the cash wages of unorganized waitresses by more than 10 percent; the other 22 percent reported increases but were unable to estimate the percentage gained.” COBBLE, *supra* note 104, at 118.

¹⁴⁵ Smith, *supra* note 62, at 85.

¹⁴⁶ Fine, *supra* note 61, at 169.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The Workplace Project example thus demonstrates why collective action benefits from worker leadership. Maintaining the daily minimum wage was labor-intensive for center staff, because they had to visit the corners every day to ensure that it was enforced. If workers themselves led the effort, as they did in the case of waitress unions, the monitoring required to maintain a daily wage could be done by workers who were already on the corner seeking jobs themselves.

¹⁴⁹ *Id.* at 132.

¹⁵⁰ *Id.* at 134.

¹⁵¹ *Id.* at 135.

¹⁵² GORDON, *supra* note 20, at 128.

¹⁵³ COBBLE, *supra* note 104, at 139 (“Worker loyalty was achieved through appeals to the employee’s self-interest in avoiding ‘the vampire system’ of high-fee employment agencies . . .”).

standards by seeking employment and negotiating terms independently. A worker center must thus be able to induce reluctant workers who would not otherwise participate voluntarily to seek employment through the center.

The example of the waitress unions again provides a model for inducing reluctant workers to join the hiring hall. Occupational unions induced reluctant waitresses to join the organization using several methods of social pressure.¹⁵⁴ Waitress union members identified themselves by wearing a union button “‘in a conspicuous place’ at all times while on the job,”¹⁵⁵ and forbade members from working with nonunion members.¹⁵⁶ In order to comply with this restriction, members made an effort to organize nonunion workers at job sites.¹⁵⁷ One worker’s experience illustrates the tactic’s effectiveness: “[O]ne of the girls asked me why I wasn’t a union member. So I wanted to know what a union was and she told me; and very sweetly said they wouldn’t work with a non-union girl. So I just marched myself down to the union and joined.”¹⁵⁸ Though this exchange arose in response to a union rule about working with nonmembers, workers could exert this type of pressure in social contexts as well. For example, if a social community were sufficiently tightly knit, a worker might be induced to seek work through a center in order to avoid being socially ostracized by center members.

Waitress unions also took advantage of their members’ relative power within workplace hierarchies to enforce informally union norms. Because the union’s credibility with restaurant employers depended on its workers arriving on time, for example, “Local 6 coffee-shop waitresses decided to punish any woman who was late repeatedly by giving her a back station.”¹⁵⁹ Unlike fines, the tactic of assigning undesirable work depends not on the legitimacy of the union, but on the power of employees relative to each other. Though work hierarchies do not exist within worker centers themselves, worker center members often work together at jobsites where work hierarchies exist. Thus, worker center participants with greater workplace status could use this tactic to induce reluctant workers to seek employment through the worker center.

¹⁵⁴ Much of Cobble’s account concerns tactics occupational unions used to *maintain* union involvement. Workers found to be breaking the union’s rules, for example, could be fined, disciplined in front of their peers, or excluded from future use of the hiring hall. *See id.* at 139–46. Though these methods allowed occupational unions to maintain a level of cohesion that was necessary to maintain control of the labor supply, this type of enforcement is distinct from the types of tactics that occupational unions used to encourage workers to *join* the union. Indeed, the effectiveness of retention practices employed by occupational unions is largely limited to situations in which the union has already gained legitimacy in the eyes of a disciplined worker. I thus focus on the more informal set of tactics occupational unions used to induce workers to join the union in the first place.

¹⁵⁵ *Id.* at 145.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (internal quotation marks omitted).

¹⁵⁹ *Id.* at 142.

Another way to use social pressure to encourage nonmember workers to seek employment through collective channels is to marshal police power where it is available. For example, many day labor centers in California operate in cities where ordinances prohibit workers from soliciting jobs on the street;¹⁶⁰ as a result, the legal machinery could help to channel job-seekers into hiring halls. Worker centers could thus promote cohesion by encouraging police to send day laborers to hiring halls. Though this tactic raises several concerns, discussed below, the NDLON has acknowledged that it may aid the early growth of worker centers: “The participation of the police is necessary and there are ways that this can be effective in the creation and consolidation of a hiring hall without having to violate the rights of any of the sectors of the communities involved.”¹⁶¹

3. *Concerns with Developing Control by Inducing Participation.*

The strategies through which worker centers could induce reluctant workers to participate in collective action raise several practical and theoretical concerns. I will first address the practical concerns — specifically, the diffusion of workers in low-income industries, the potentially limited effectiveness of tactics designed to pressure reluctant workers to participate, and the high level of employee participation that is required for this strategy to be effective. I argue that though these concerns represent formidable challenges, the history of waitress unions’ success suggests that pressure on employees, combined with appeal to employers’ interest, can lead to a sufficient level of control over hiring so as to enable workers to make demands on employers.

I then turn to the theoretical concerns this approach raises. I address these concerns in three categories. The first category involves a set of potential risks so serious that centers should perhaps not engage in the tactics that give rise to them. As an example of this category, centers should refrain from engaging in practices that subject undocumented workers to the risk of deportation. Next, I consider a group of concerns that, despite their seriousness, could be mitigated depending on the specific tactics that centers use to achieve cohesion. This group includes the concern that inducing participation among reluctant workers will undermine organizing. Finally, I consider a theoretical concern raised by one scholar, which I ultimately conclude lacks merit: the concern that collective action among workers undermines workers’ entrepreneurialism.

(a) *Practical Concerns.*

First, given the diffusion of workers across a multitude of worksites in many industries in which centers organize, can centers reach enough work-

¹⁶⁰ See BUILDING COMMUNITY, *supra* note 140, at 7.

¹⁶¹ *Id.*

ers to develop control over a sufficient portion of the labor supply? For example, in the case of domestic service, “[w]orking in clients’ individual homes and with no one workplace in common, home-care workers are hidden and scattered.”¹⁶² This diffusion is present in all casual industries, including day labor, garment manufacturing, and restaurant work.¹⁶³ Currently, worker centers represent only a small percentage of workers within these industries.

The diffusion of workers may be overcome more easily in industries involving publicly visible work. For example, though only a minority of day laborers use official hiring halls, most laborers seek work in public places, and thus worker-organizers can find them.¹⁶⁴ In areas like domestic labor, where workers are hidden from public view, it may be hard for worker-organizers to make contact with reluctant workers. Though worker-organizers may seek contact with these workers through informal networks, these industries may be more resistant to collective action on a scale sufficient to gain control over the labor supply.

Even in industries in which worker-organizers can make contact with a sufficient percentage of the workforce, will the tactics described above effectively pressure workers to act collectively? Though social pressure and pressure on the job may be unpleasant, they may not be so powerful as to force reluctant workers to engage in collective action. Even a few reluctant employees can undermine a collective organizing effort by seeking work on terms that undercut collective demands. Control over the labor supply thus requires participation of a sufficient percentage of workers such that an employer cannot operate without their work. Worker centers so far have not achieved anything near this level of participation.¹⁶⁵

Though these concerns are formidable, waitress unions successfully organized in the face of similar challenges. Waitresses were also diffuse; they worked in small groups for restaurants throughout the cities in which unions organized. Furthermore, because most waitress unions operated outside of the NLRA, they were forced to rely on organizing tactics such as social pressure as well. Waitress unions’ success in spite of these challenges suggests that organizers can achieve sufficient cohesion within particular industries operating in small geographic areas such that they can exert control over the conditions of their work. Waitress unions also depended on the voluntary participation of employers; this feature of their organizing suggests that worker centers cannot gain control of the labor force solely by

¹⁶² Smith, *supra* note 62, at 76.

¹⁶³ See, e.g., VALENZUELA, JR., ET AL., *supra* note 42, at 20 (explaining the transient nature of the day labor workforce; 44% of the workforce has been involved in day labor for less than a year, and only 26% has been involved for more than three years).

¹⁶⁴ See GORDON, *supra* note 20, at 91–96.

¹⁶⁵ The Workplace Project, for example, had a membership of only a couple of hundred in a region with over 300,000 laborers. *Id.* at 112. Further, while approximately 117,600 workers per day seek day labor work throughout the country, only about 21% use worker center hiring halls to do so. VALENZUELA, JR., ET AL., *supra* note 42, at 4.

focusing on the supply side. Instead, following the model of waitress unions, centers can use the limited pressure tactics available to them to achieve cohesion in industries and geographies in which workers are concentrated and identifiable, and they can bolster this effort by inducing employers voluntarily to hire workers through center-run hiring halls.

(b) *Theoretical Concerns.*

(i) *Subjecting Undocumented Workers to Legal Risk: A Concern That May Outweigh the Benefit.*

As described above, many worker center members are undocumented immigrants. Workers' undocumented status raises the theoretical concern that pressure tactics could exploit or reinforce the very powerlessness that worker centers try to overcome. This concern arises in the context of tactics that expose workers to the risk of deportation, such as reporting nonparticipating laborers to police when they seek work on street corners rather than through hiring halls.¹⁶⁶ The extent to which this tactic will expose workers to an actual risk of deportation will vary depending on whether police arrest workers or simply redirect them to hiring halls, but if the approach does expose workers to such a risk, it will undermine worker centers' stated mission of improving conditions for undocumented workers within the U.S. This concern likely outweighs the benefits of employing the police in order to exert pressure to induce participation, and so worker centers operating in areas where a large percentage of the population is undocumented may reasonably choose to forgo these tactics.

(ii) *Undermining Organizing: A Concern Worker Centers Can Overcome.*

An organizing strategy that depends on workers exerting pressure on each other raises the concern that such pressure will undermine the solidarity essential for collective action. As described above, a sense of solidarity is necessary in order to enable workers to take personal risks and make personal sacrifices in order to further collective aims.¹⁶⁷ Pressure tactics create conflicts among workers by pitting worker-organizers against reluctant workers. Furthermore, even acts that cultivate trust and credibility with employers — like recommending competent employees — will involve favoring some employees at the expense of others. This inherent challenge may reduce workers' sense that their interests are shared, and it may indeed distract from the more important conflict between workers' interests and employers' interests.

¹⁶⁶ See, e.g., NARTO, *supra* note 13, at 511–12 n.127.

¹⁶⁷ See, e.g., GORDON, *supra* note 20, at 136–38.

While worker centers should be mindful of this danger, the degree to which it actually threatens organizing efforts is highly contingent on the specific application of pressure. For example, if less-skilled workers are directed to other employment opportunities, promoting more highly skilled workers for appropriate jobs will not necessarily undermine a sense of collective interest. It is difficult to know in the abstract whether the conditions under which these tactics are used will undermine organizing. Thus, fear of undermining organizing should not halt efforts to use pressure tactics to gain control of the labor supply; instead, organizers should engage in the context-dependent inquiry of considering which strategies are most likely to encourage participation without undermining organizing.

(iii) *Undermining Entrepreneurialism.*

Gregg W. Kettles has argued that by establishing hiring halls and providing an alternative to street corner hiring, worker centers in Los Angeles have undermined workers' entrepreneurialism.¹⁶⁸ According to this view, day laborers are independent entrepreneurs who can choose the most favorable physical location from which to seek employment,¹⁶⁹ and they can set the terms of their employment by refusing to work for employers who have a reputation for being unfair.¹⁷⁰ Day labor centers, the argument goes, take these entrepreneurs and make them dependent on the center: "[Centers] risk turning working men into dependents. Waiting for one's turn to work is demoralizing."¹⁷¹

It is undoubtedly the case that collective action requires the sacrifice of one kind of individual freedom: the ability to seek whatever job an employee wants, whenever she wants it. However, because of the power disparity between job-seekers and employers, this freedom does not necessarily produce economic gains for workers. The freedom day laborers have in Kettles's account, for example, is the freedom to stand in large groups on corners, competing with each other for work from potential employers who drive by, on whatever terms employers are willing to offer for that work.¹⁷² The power that employees can develop collectively — the power to set the conditions of employment and earn better wages — leads to a more meaningful economic freedom.

The argument about whether individual entrepreneurship or collective action is more desirable for employees is a fundamental and unresolved debate, and the approach I advocate endorses the position that employees are

¹⁶⁸ Gregg W. Kettles, *Day Labor Markets and Public Space*, 78 UMKC L. REV. 139, 171 (2009).

¹⁶⁹ *See id.* at 176.

¹⁷⁰ *Id.* at 175.

¹⁷¹ *Id.* at 177.

¹⁷² Kettles approvingly describes the scene at a Home Depot parking lot in Los Angeles where "[c]ars frequently entered and exited," and "more than two dozen day laborers chose to stand and solicit work." *Id.* at 176.

better off if they sacrifice some measure of day-to-day self-determination in return for structural power that allows them to determine collectively the conditions of their work, because through this process of collective determination, employees can demand higher wages and benefits in the long term.

IV. CONCLUSION

Worker centers' goal should be to enforce compliance with workplace laws by changing the structural relationship between workers and employers to enable workers to determine the conditions of their employment. Through worker centers, workers can build power through political action and direct economic intervention. Workers have shown a capacity to increase law enforcement through political involvement, but the circumstances conducive to political action, including union collaboration and a politically hospitable atmosphere, may not exist in all industries in which worker centers organize.

Direct economic intervention could thus bolster and supplement political participation by filling a void in geographic areas where politicians are hostile to unions and unlikely to pass legislation explicitly aimed at increasing workers' rights.¹⁷³ Direct economic intervention could also advance worker centers' law enforcement goals in those industries in which unions are not interested in or capable of organizing.

Furthermore, direct economic intervention and political participation may ultimately be mutually reinforcing: If worker centers can organize sufficient numbers of workers to achieve the goal of economic intervention, that organizing capacity alone would enhance worker centers' political effectiveness. Historically, as unions have demonstrated, achieving the level of group cohesion needed to enforce a strike can translate into a united voice at the polls. By moving away from individual representation and toward mechanisms designed to bring about structural change, worker centers can ensure greater compliance by employers in the short term, and ultimately, they may enable workers to raise the floor for legal protections in the workplace.

¹⁷³ For example, the political successes described in this Note took place in New York, Maryland, and California, all states hospitable to organized labor. New York has the highest union membership rate in the country, at 24.1%. Economic News Release, Bureau of Labor Statistics, *supra* note 3. The largest numbers of union members lived in California (2.4 million) and New York (1.9 million). *Id.* Further, New York, California, and Maryland are non-right-to-work states. See, e.g., Steven Greenhouse, *A Gathering Storm Over "Right to Work" in Indiana*, N.Y. TIMES, Jan. 3, 2012, at B1; Megan Poinski, *Unions Rally Against "Right-to-Work" Bill*, MARYLANDREPORTER.COM, Mar. 4, 2011, <http://marylandreporter.com/2011/03/04/unions-rally-against-right-to-work-bill/>. The political success of workers' advocates in those states may thus not translate to right-to-work states and other political climates hostile to organizing.