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Renewing and Maintaining Union Vitality: New Approaches to Union Growth

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RENEWING AND MAINTAINING UNION VITALITY: NEW APPROACHES TO UNION GROWTH

By Fred Feinstein*

I. The Change of Focus

After decades of declining union density there are indications that at least some unions are getting smarter about their efforts to increase membership. For much of the late 1970s, '80s, and early '90s, the labor movement focused on legislative reform as the primary means of reversing its fortune. Unions viewed the National Labor Relations Act (NLRA) as failing to protect workers' right to organize unions, much less encouraging the process of collective bargaining, the law's stated purpose.[1] Yet notwithstanding the widely recognized shortcomings of the law, repeated attempts to amend the NLRA over the past thirty years failed to garner sufficient support to pass Congress.[2] During the Clinton presidency some labor unions were optimistic that administrative reform and National Labor Relations Board (NLRB) members, who were more supportive of the NLRA's objectives, would enhance the ability of unions to grow. But efforts to strengthen enforcement of the NLRA during the Clinton administration were impeded by the inherent limitations of the law as well as a lack of support from the

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1. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2000), providing:

> It is declared hereby to be the policy -of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. *See, e.g.,* Labor Law Reform Bill, H.R. 8410, 95th Cong. (1977); Double Breasting Bill, H.R. 281, 99th Cong. (1988); Striker Replacement Bill, H.R. 5, 103rd Congress (1993).

Congress and the courts.[3] In the past decade, however, several unions have been developing new strategies to organize under existing law, realizing that to survive they have to figure out ways to grow under the current legal regime. These unions have embraced the need to develop organizing strategies that can succeed under current law because political realities suggest it will be some time before the law is changed.

This article will examine some of the tactics with which unions are experimenting.[4] Part II discusses new ways unions are approaching traditional organizing. Part III examines the changing dynamics of organizing and provides an overview of four types of organizing strategies based primarily on reducing employer opposition to unionization: bargaining to organize; providing positive and negative incentives; building public support for unions; and pursuing local policy initiatives. Part IV provides an overview of new organizational forms that have developed outside of the traditional union model of organizing. It remains an open question whether the new approaches will succeed or will be adopted on a sufficient scale to be considered a "next wave" of organizing.

II. New Approaches to Traditional Organizing: More and Better Organizing

In the early nineties, unions began to recognize that part of what needs to be done to increase union membership is simply more organizing. While the AFL-CIO and many of its affiliates have been frustrated that unions have not increased funding for organizing quickly enough, there is evidence that at least some unions are shifting their resources and attention to organizing.[5] When John Sweeney became president of the AFL-CIO in 1995, he lamented

3. *See* Fred Feinstein, *The Challenge of Being General Counsel*, 16 Lab. Law. 19, 19-41 (2000) (discussing the difficulties in strengthening enforcement of the NLRA while serving as General Counsel).

4. Parts of this article are based on a talk presented November 19, 2002, to the UCLA Institute of Industrial Relations' 2002 Ben Aaron Labor Law Lecture, co-sponsored by the Labor and Employment Law Section of the L.A. County Bar Association and the University of California Institute for Labor and Employment.

5. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 827 (2006); Seth D. Harris, *Don't Mourn — Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. Sch. L. Rev. 303 (2005-2006).

the declining number of American union members and urged unions to devote no less than 30% of their resources to organizing.[6] Several unions have embraced this goal.[7] The AFL-CIO addressed the declining numbers by forming the Organizing Institute, which "recruits, trains, and places . . . people in full-time positions helping workers form and join unions."[8]

Unions are also trying to be smarter about how they conduct traditional organizing campaigns. Some unions are closely examining which traditional organizing approaches work best and why.[9] This examination has been aided by the work of academics like Kate Bronfenbrener, Tom Juravich, and others who have studied the relative success of different organizing approaches,[10] as well as by studies about what is most likely to encourage unions to adopt more effective strategies.[11]

III. Changing the Dynamics of Organizing

A significant new development is efforts by unions to change the environment and conditions under which organizing occurs. Unions tried to reform the NLRA because they believed that under current rules, when employers fight with all the weapons at their disposal, it is difficult, if not impossible, for unions to win an organizing campaign. The inherent power of employers, combined with the potential for delay in the enforcement of NLRA rights and procedures, makes union success in a traditional NLRA election campaign largely dependent on employer mistakes.[12] This is pre-

6. *See* Williams Mullen, *Organizing is Top Priority for AFL-CIO in 2002,* 14 No. 4 Va. Emp. L. Letter 5, May 2002, at 1.

7. Elizabeth Walpole-Hofmeister, et al., *Special Report: Unions Boost Funds, Develop Strategies for Organizing More Workers*, Daily Lab. Rep. (BNA), Aug. 18, 1999, at C-1.

8. *See* AFL-CIO's Organizing Institute, Which Side Are You On?, http://www.aflcio.org/aboutus/oi/ (last visited Jan. 19, 2006).

9. *See id.*

10. *See* K. Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections,* 50 Indus. & Lab. Rel. Rev. 195 (1997). *See, e.g.*, Organizing to Win: New Research on Union Strategies, (K. Bronfenbrenner, et al. eds., 1998).

11. *See, e.g.*, Bill Fletcher Jr. & Richard W. Hurd, *Political Will, Local Union Transformation and the Organizing Imperative, in* Which Direction for Organized Labor? 191 (B. Nissen ed., 1998).

12. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (holding that employees can be compelled to attend company-sponsored anti-union meetings, mandatory speeches, and one on one meetings with supervisors); NLRB v. Gissel Pack-

cisely why unions assert that the law needs to change. Unable to amend the formal rules, unions are trying to break away from traditional ways of organizing and change the patterns and dynamics that have characterized organizing and bargaining in the past.[13] They have been developing more effective leverage and sources of support to influence how employers act. If they can't change the rules, they are trying to influence the attitude and behavior of employers with regard to union organizing and collective bargaining.

An early manifestation of this new approach was the emergence of "corporate campaigns" in the 1980s. Using new forms of economic leverage to influence employer behavior, corporate campaigns applied pressure to convince companies to deal fairly and equitably with unions. The tactic exploited vulnerabilities in a company's political and economic relationships to achieve union goals.[14] Often corporate campaigns included exerting pressure on financial backers to discourage employer resistance to union organizing. Initially used primarily during contract negotiations, corporate campaigns were one response to the declining effectiveness of strikes as an economic weapon.[15]

In recent years, unions have been refining and developing the ways in which they seek to reduce management opposition to union organizing. The primary goals of today's strategies are convincing employers to remain neutral during an organizing campaign, providing greater union access to employees, and establishing alterna-

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ing Co., 395 U.S. 575 (1969) (deciding that employers may make strong statements predicting, but not threatening, the closure of a plant in the event of a successful union campaign); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (holding that unions can only speak with employees outside the workplace, while pro-union employees' ability to speak with their co-workers can be severely restricted as to time and location (not on company time or only in the lunch room)). *See also* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (observing that if employers overstep the law, the length of time needed to remedy the infraction, as well as the weakness of the available remedies, limits the law's practical effectiveness).

13. *See* Walpole-Hofmeister et al., *supra* note 7.

14. *See, e.g.,* U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATION, FINAL REPORT 72 (1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

15. *See, e.g.,* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WORK STOPPAGE DATA, *available at* http://data.bls.gov/cgi-bin/surveymost?ws (last visited Jan. 17, 2006) (illustrating the number of work stoppages over different time periods).

tive recognition procedures. Recognition of a union without an NLRB election is permitted under the NLRA as long as it is based on evidence of majority status.[16] Consistent with this longstanding principle of the NLRA, there are now several different approaches unions are using to encourage employer acquiescence to new ground rules under which organizing and bargaining can proceed. It is not a new strategy, but like many of the strategies described here, unions have intensified their efforts to organize in this manner.

A. Bargaining to Organize

Bargaining to organize is a strategy whereby unions seek to expand recognition within a corporation once some of its employees are organized. Through collective bargaining, a union seeks agreement on employer neutrality, non-NLRB recognition procedures, and union access for future organizing campaigns within the corporation. An example of this approach was the agreement between Verizon and the Communication Workers of America (CWA).[17]

This strategy can raise the legal question as to whether bargaining about recognition issues is mandatory. This is important because a subject deemed mandatory by the NLRB puts a party in a better position to insist that it be addressed at the bargaining table.[18] During the Clinton administration, the NLRB originally held that bargaining about recognition procedures was a mandatory subject. But the U.S. Court of Appeals for the D.C. Circuit reversed in *NLRB v. Pall Corp.*,[19] and it remains to be seen how the NLRB will

16. *See* 29 U.S.C. § 159(a) (2000).

17. *See e.g.,* Press Release, Communications Workers of America, CWA Settlement with Verizon Meets Goals of Preserving Job Security and Health Benefits (Sept. 4, 2003), http://www.cwa-union.org/news/PressReleaseDisplay.asp?ID=385 ("[E]ach April the parties will hold discussions over potential wage increases as well as the broad area of jobs and job security. Only matters that are mutually agreed-to in those talks will be implemented. . .(t)he parties also agreed to work . . . in a process to develop a cooperative relationship built on mutual trust and respect . . . ."); *Verizon, CWA Agree to Contract Terms*, SILICON VALLEY/SAN JOSE BUS. J., Nov. 21, 2001, *available at* http://www.bizjournals.com/sanjose/stories/2001/11/26/daily11.html.

18. *See e.g.*, *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (evaluating an employer's attempt to avoid entering agreements that included subjects within the scope of mandatory bargaining).

19. 348 U.S. App. D.C. 337 (2002).

interpret the court's decision. The issue is likely to get further attention by both the NLRB and the courts.

B. Reducing Employer Opposition: Carrots and Sticks

Unions have tried to provide positive incentives to minimize employer resistance to union organizing. In certain regions of the country, unions have been able to take advantage of political clout to help employers if they agree to be more union-friendly. For example, unions offer employers assistance in acquiring funding, permits, or the award of government contracts if they agree to neutrality. Unions have formed political alliances with developers and other community groups to conditionally support specific projects. The conditions include that the developers agree to community-friendly policies that encompass union neutrality and alternative union recognition procedures. Because these agreements do not depend on a change in labor law, they are insulated from federal preemption concerns.[20] The Los Angeles Alliance for a New Economy (LAANE) was one of the first organizations to promote this approach to development and similar groups have been formed throughout the country.[21] On a national level, organizations like Good Jobs First (GJF) provide assistance and expertise to unions and other community groups in developing strategies that take advantage of union political strength.[22]

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20. *See infra* text accompanying notes 37-39 (discussing federal preemption restriction on state and local laws).

21. See Los Angeles Alliance for a New Economy, A New Vision for Economic Fairness, http://www.laane.org/whoweare.html (last visited Nov. 16, 2005), explaining the organization's mission as:

> Founded in 1993, LAANE is recognized as a national authority on issues affecting the working poor and an innovator in the fight against working poverty. Combining a vision of social justice with a practical approach to social change, LAANE has helped set in motion a broad movement based on the principle that hard work deserves fair pay, good benefits and decent working conditions.

22. *See, e.g.,* Good Jobs First, About Good Jobs First, (on file with the New York Law School Law Review), explaining that:

> GJF is a national leader in providing timely, accurate information to the public, the media, public officials and economic development professionals on best practices in state and local job subsidies. GJF works with a broad spectrum of organizations as they seek to ensure that subsidized businesses are held accountable for family-wage jobs and other effective results.

Procurement and contracting policies that favor responsible employment practices are another example of positive incentives increasingly in use across the country.[23] Instead of "low bid" contracting, these alternative contracting methods typically establish criteria for awarding contracts on the basis of considerations such as past performance, quality, health and safety performance, past compliance with labor law, and ready access to a supply of well-trained workers. States, counties, and municipalities have enacted laws promoting these principles.[24] Responsible contracting laws and procedures improve a union contractor's chance of winning the bid for a government contract and thereby provide positive incentives for contractors to be less resistant to unions.

To make employer neutrality and union access to employees more acceptable, some unions have also utilized "trigger" agreements.[25] When organizing a particular industry in a specific market, unions have offered to make neutrality and access agreements more attractive by committing not to "trigger" the agreement until

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23. *See* Gerard M. Waites, Construction Procurement Practices in the Greater Washington D.C. Metropolitan Area (unpublished report prepared for The Maryland Construction Policy Research Program on file with the New York Law School Law Review).

24. *See, e.g.,* OR. REV. STAT. § 279.029 (2003); CAL. PUB. CON. T. CODE §§ 10160-10169 (2000).

25. I have learned of "trigger" agreements from conversations with union lawyers and organizers, as well as unpublished conference presentations. "Trigger" agreements refer to arrangements that don't come into force until a specified number of employers agree to be bound by the agreement. Thus, for example, a building maintenance contractor might agree to comply with certain terms of an agreement but only after 30% of the building maintenance contractors in the area also agree to the provisions.

The content of the agreements vary. A trigger agreement might include a commitment to be neutral in an organizing campaign or card check recognition, or general understandings about future negotiations if recognition rights are established. An example of how trigger agreements might work is as follows: after 20% of the building maintenance contractors in a specified region sign up, a neutrality agreement becomes effective, after 30% sign up a card check recognition procedure takes effect, and after the union has won recognition at 50%, certain improvements in working conditions can take effect. *See, e.g.,* Press Release, SEIU Texas, Harris County Unpaid Medical Care Increased $1 Billion over 10 years (Aug. 10, 2005), http://www.seiutexas.com/ourlocal/press.cfm?pressReleaseID=1657 (explaining, with regard to trigger agreements, that "[b]ecause the employers are typically sub-contractors whose contracts with building owners can be cancelled on 30 days notice, wage and benefit increases are implemented only when enough of the companies operating in the market have signed the master agreement to ensure that none will be put at a competitive disadvantage").

a specified percentage of employers in the market also adopt such an agreement. Trigger agreements are usually based on the agreement of employers to be less hostile to unions once a specified number of employers in the same industry have also adopted the agreement. Gaining employer acceptance depends on a union's ability to organize employers in particular markets even before it organizes the employers' employees. In recognizing market realities, the trigger concept helps reduce employer resistance to neutrality and access agreements.

In addition to offering friendly assistance, unions have been finding ways to pressure recalcitrant employers into acting in a less hostile manner. Unions have sought to block needed government approval of development projects, building permits, and the award of contracts or funding. They have also been developing community-based campaigns to pressure employers into adopting a more neutral posture toward organizing. One aspect of the AFL-CIO's Voice at Work campaign is forging community alliances to assist organizing by bringing pressure on employers to be less hostile to unions.[26] The goal is to create a dynamic within the community that rewards employers who are accepting of unions and punishes those who are not.

C. Building Public Support for Unions

Part of the union effort to change the dynamics of organizing campaigns has been trying to build broader public support for unions. This has included making the case that unions serve the interests of all workers not only through collective bargaining, but also as effective advocates for needed social reforms. Unions have promoted the idea that the violation and suppression of a worker's right to join a union is no less offensive than support of racial or other forms of workplace discrimination. "Labor rights are human rights" has been a recurrent theme that received added impetus when Human Rights Watch released a report in 2000 finding labor rights in the United States do not measure up to international

26. *See* AFL-CIO, Voice@Work, The Fight for Voice@Work (2005), http://www.aflcio.org/joinaunion/voiceatwork (last visited Jan. 20, 2006) [hereinafter AFL-CIO, Voice@Work] ("[T]he union movement has launched a Voice@Work campaign to help U.S. workers regain the basic human right to form unions to improve their lives.").

human rights standards.[27] One of the primary goals of building public support is to increase the social cost of fighting unionization.

The Voice at Work campaign is an AFL-CIO effort to mobilize support for unions. The purpose of the campaign is "to help U.S. workers regain the basic human right to form unions to improve their lives."[28] The campaign encourages support for specific organizing campaigns and disseminates information about how unions promote broad public interests in order to generate broader support for the labor movement. The Voice at Work campaign also plays a leading role in the campaign for the Employee Free Choice Act (EFCA), an expanded version of past bills to amend the NLRA.[29] The Voice at Work campaign promotes the EFCA not only to build support for labor law reform, but also to increase the public's awareness of the obstacles workers face when organizing unions. Educating the public about the law's failures is part of the campaign to promote public pressure to counter strenuous employer opposition to union organizing. Awareness of the shortcomings of the law helps unions mobilize public criticism of employers who take full advantage the law's shortcomings.

In 2003, the labor movement helped launch American Rights at Work (ARAW), an independent organization dedicated to building support for workers right to organize unions. ARAW's "vision is a nation where the freedom of workers to organize unions and bargain collectively with employers is guaranteed and promoted."[30]

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27. *See generally* LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS WATCH STANDARDS (2004).

28. AFL-CIO, Voice@Work, s*upra* note 26.

29. *See, e.g.,* AFL-CIO, Voice@Work, Employee Free Choice Act, http://www.aflcio.org/joinaunion/voiceatwork/efca (last visited Jan. 19, 2006) (protecting workers' right to choose a union by "requiring employers to recognize a union after a majority of employees sign cards authorizing union representation").

30. American Rights at Work, American Rights at Work: Advancing Democracy in the American Workplace, http://www.americanrightsatwork.org/about/ (last visited Oct. 31, 2005). ARAW describes its mission as follows:

> Since 2003, American Rights at Work has informed the American public about the struggle to win workplace democracy for nurses, cooks, computer programmers, retail cashiers, and a variety of workers who we all depend on every day. Our vision is a nation where the freedom of workers to organize unions and bargain collectively with employers is guaranteed and promoted.

Id.

They have issued reports, commissioned research, and disseminated facts and materials documenting the obstacles workers face when they seek to organize.[31] They have also presented awards to employers who have been supportive of unions and the right to organize.

The Voice at Work campaign, the campaign to promote the EFCA, and the ARAW are all new ways that the labor movement has promoted and encouraged support for unions as part its effort to remove obstacles standing in the way of union growth.

D. Local Policy Initiatives

Enactment of state and local laws has also been an important part of the effort to change the organizing environment. Perhaps the most significant state and local legislation to aid in union growth has been the passage of laws that extend bargaining rights to state and local employees.[32] Unionization of these government employees has been the greatest source of union growth since the 1960s.[33] Collective bargaining laws now cover more than 60% of state and local employees, according to a U.S. General Accounting Office (GAO) report.[34] The decline in union membership would have been far greater had there not been the growth of collective bargaining in the public sector.[35]

Beyond extending coverage to state and local employees, recently unions have been more active in promoting innovative reforms of state, county, and municipal laws that directly or indirectly encourage union growth.[36] The extent to which state and local laws can address issues of labor/management relations is restricted

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31. *Id.*

32. *See* New York State United Teachers, New Member Resources: Collective Bargaining, http://www.nysut.org/newmember/bargaining.html (last visited Nov. 9, 2005).

33. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 6 (2002), *available at* http://www.gao.gov/new.items/d02835.pdf.

34. *See id.* at 5.

35. *See* Harris, *supra* note 5.

36. *See, e.g.,* Media Release, Natalia Kennedy, Brennan Center for Justice, Health Care Expansion Approve by NYC Council (Aug. 17, 2005), http://www.brennancenter.org/programs/Healthcare%20-%20press%20release.html (discussing the Health Care Security Act).

by the doctrine of federal preemption, which limits the ability of states to enact legislation intended to regulate private sector labor relations.[37] States can enact laws that affect the labor relations of employees covered by the NLRA only if such laws further a "proprietary interest" of the state. There are numerous court decisions that grapple with drawing the line between permissible state laws that promote a state's proprietary interest[38] and impermissible state laws that seek to regulate labor relations.[39]

In addition to passing laws that further a state's proprietary interest, states have been enacting other legislation that encourages union growth. Municipalities have passed "card check" union recognition laws for employees not covered by the NLRA and are, therefore, beyond the reach of federal preemption.[40] In New York, Republican Governor George Pataki signed a law providing card check recognition for all non-NLRA covered private sector employees.[41] This followed the example of California, which four years earlier allowed certain public employees to unionize through card check recognition.[42] One of the more far-reaching examples of state legislation leading directly to union growth has been the passage of "agglomeration" laws that change the status of certain

37. *See, e.g.,* Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

38. *See, e.g.,* Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 232 (1993) (holding that "Bid Specification 13.1 constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid project labor agreement"); Chamber of Commerce of the U.S. v. Reich, 83 F.3d 439, 440 (1996) (stating the "government's suggested interpretation of that language [§474 of the NLRA] is inconsistent with the government's concession that the President could not issue an Executive Order that caused a conflict with a prohibition set forth in the NLRA or in other statutes").

39. *See, e.g.,* Chamber of Commerce of the U.S. v. Lockyer, 364 F.3d 1154 (2004) ("[W]e hold that the California statute as written is preempted by the NLRA"); Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 177 L.R.R.M. 2359 (2005) ("[G]rants plaintiffs' motion with respect to their first claim for declaratory relief, and in so doing declares that N.Y. Lab. Law §11-a is preempted by the National Labor Relations Act under the doctrine of Machinists preemption.").

40. *See* Walpole-Hofmeister, et al. *supra* note 7. "Card check" recognition refers to an employer recognizing a union in the absence of an election when the union presents the employer with union authorization cards — that is, cards authorizing the union to represent the employees — signed by a majority of the employees in a bargaining unit.

41. *See* N.Y. CIV. SERV. LAW §§ 206, 207, 212 (McKinney 1999); 4 N.Y. COMP. CODES R. & REGS. §§ 201.1 – 201.12 (2005).

42. *See* CAL. GOV'T CODE., tit. 1, § 3507.1 (2002).

groups of workers from "independent contractors"[43] to "employees"[44] of a state entity. In Los Angeles, California, the conversion of home health care workers to employees of a newly created public entity helped bring about the unionization of more than 70,000 home health care workers.[45] And more recently, Illinois Governor Rod Blagojevich issued an executive order that allowed home child care workers to unionize. As a result, more than 49,000 home child care providers have unionized.[46] The nature and extent of recent municipal policy initiatives needs to be studied further, but such efforts appear to be spreading. As in the past, state and local gov-

43. The term independent contractor is not explicitly defined in the NLRA and courts have relied on common law for drawing the distinction between an employee and independent contractor. Many cases address the independent contractor relationship and a number of different formulas have been adopted by courts to determine whether an individual is an independent contractor or an employee. *See generally* 41 AM. JUR. 2D *Independent Contractors* § 6 (2005). Ordinarily courts have drawn the distinction on a case-by-case basis, looking at indicia such as the presence or absence of a contract, control or lack of control over the employee or independent contractor, the right to hire and discharge persons doing the work, and whether the person doing the work is employed in an independent business among other factors. *Id.*; *see, e.g.*, King v. Sw. Greyhound Lines, Inc., 169 F.2d 497, 498 (1948).

44. *See* 29 U.S.C. §152(3) (2000). The NLRA defines employee as:

> [A]ny employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor . . . .

Id.

45. *See* Press Release, T.J. Michels & M. Watteau, Serv. Employees Int'l Union, 41,000 Michigan Home Care Workers Choose SEIU, Join More than 1.8 Million Workers Uniting to Win (Apr. 21, 2002), http://www.seiu.org/media/press.cfm?ID=1217. Los Angeles passed a law that changed the employment status of home care workers, who had been considered independent contractors, and were compensated primarily through Medicare and Medicaid. A public entity was established to employ home care workers reimbursed through Medicare/Medicaid. The workers, now employees, were allowed to join a union and the union won majority support from the employees. *Id.*

46. *See* Press Release, D. Le & T.J. Michels, Serv. Employees Int'l Union, More than 49,000 Illinois Child Care Providers Choose SEIU As Their Union to Improve Services for 200,000 Children (Apr. 7, 2005), http://www.seiu.org/media/press.cfm?ID=1216 (discussing the effect of this law which gave the health care workers the freedom to form unions for the first time). *See, e.g.,* Stu Schneider, *Victories for Home Health Care Workers: Home Care Workers Get Organized,* DOLLARS & SENSE, Sept. 1, 2003, at 25.

ernments are functioning as laboratories for new approaches to improving workplace conditions and enhancing the prospects for worker organization.

In sum, unions are changing the collective bargaining environment in a number of different ways. First, they are organizing through collective bargaining. Second, they are mobilizing local communities to demand less employer hostility to union organizing. Third, unions are making better use of political leverage in translating political clout into organizing success. This has included enhanced sophistication in identifying employer needs in order to assist employers who are cooperative and punish those who are not. Finally, they also have had success in convincing state and local entities to implement policies that increase opportunities for union growth.

IV. New Organizational Forms

The efforts described thus far have all been directed at organizing traditional bargaining units under the NLRA. Beyond the rebuilding of traditional unions, today there is new energy and attention focused on developing new forms of worker representation, both within and outside of unions. Many of these efforts were the subject of presentations at the Next Wave Organizing Conference.[47]

Some scholars have suggested that diverse organizational forms are not new, but rather they are the reemergence of unions as they looked prior to passage of the Wagner Act. Dorothy Sue Cobble points out that long before the NLRA, there were unions composed of all the workers in a town or all the workers in a trade, such as the butcher, blacksmith, and chimney sweep, or all the workers of com-

47. The Next Wave Symposium was held at New York Law School on January 27-28, 2005. The symposium offered scholarly insights into worker organizing and proposed ways to maximize their effectiveness. *See, e.g.*, Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. Sch. L. Rev. 355 (2005-2006); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. Sch. L. Rev. 417 (2005-2006); Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues,* 50 N.Y.L. Sch. L. Rev. 385 (2005-2006).

mon ethnic background.[48] Unions existed at worksites even if they did not represent a majority of the employees. It was only as the organization of work became more bureaucratic and hierarchical, combined with the passage of the NLRA, that unions evolved into organizations composed of units of workers with majority support at a particular worksite.[49] As today's workplaces increasingly take on characteristics that resemble those existing prior to the Wagner Act, new/old forms of worker organization seem to be re-emerging.

Unions have begun to expand the basis for membership and the quantity and quality of services they provide members. In the eighties, the AFL-CIO instituted associate membership that conferred a limited membership status on workers who signed up for credit cards and other benefits. More recently, the AFL-CIO has formed Working America, a political organization that canvasses, lobbies, and engages in community organizing on behalf of working individuals.[50] In a few short years Working America has grown to more than a million members who are provided information about local and national issues and are encouraged to get involved with campaigns that address workplace issues.[51] AFL-CIO affiliates have also taken steps to develop new forms of membership based on something other than representation of the traditional NLRB certified bargaining unit. For example, the Communications Work-

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48. *See* Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement in* REKINDLING THE MOVEMENT, LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY, 82, 82-96 (Lowell Turner et al. eds., 2001).

49. *Id.*

50. *See* AFL-CIO, Working America, About Working America, http://www.workingamerica.org/about/ (last visited Jan. 20, 2006). Working America is a political organization. *Id.* Its goals include "us[ing] professional research, communication, education, canvassing, lobbying and community organizing to demand that politicians address the priorities that matter most to working people—not just wealthy special interests." *Id.* Working America describes itself as follows:

> Working America, a community affiliate of the AFL-CIO, is a powerful force for working people. With the combined strength of 9 million union men and women and millions of nonunion workers who share common challenges and goals, we fight in communities, states and nationally for what really matters — good jobs, affordable health care, world-class education, secure retirements, real homeland security and more.

Id. See also Lauren Snyder, Organization Profile, *Working America*, 50 N.Y.L. SCH. L. REV. 589 (2005-2006) (providing a description of Working America's organizing and lobbying techniques).

51. *See generally* Snyder, *supra* note 50, at 591.

ers of America (CWA) has instituted associational membership available to workers employed in units without NLRA bargaining rights or to employees in non-standard work arrangements, such as independent contractors.[52] Unions representing professional employees, such as teachers, have been developing member services that facilitate the movement in and out of different employment arrangements.[53] Unions are responding to the needs of their members who seek not only representation with a particular employer, but also assistance in enhancing their employability. The South Bay Central Labor Council, for example, attempted to establish a labor-led temporary employment agency to improve the working conditions of temp industry workers.[54] These are but a few examples of union efforts to broaden the ways in which they represent worker interests and to embrace new ideas of who is a union member.[55]

New forms of worker organization are emerging outside of traditional union structures as well.[56] While there have always been organizations other than unions representing the interests of workers, there appears to be a growing number today. In many cases, these organizations represent workers who do not fit within the shrinking category of employee under the NLRA and perform services that address new workforce needs not traditionally addressed by unions. Such organizations represent contingent workers, independent contractors, and minority caucuses within a particular

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52. The CWA is an affiliate of the AFL-CIO. *See* Communications Workers of America, the Union for the Information Age (2006), http://www.cwa-union.org/.

53. *See, e.g*, American Federation of Teachers, Labor Links, http://www.aft.org/about/laborlinks.htm (last visited Nov. 9, 2005).

54. *See generally* Barbara Byrd & Nari Rhee, *Building Power in the New Economy: The South Bay Labor Council*, 8 WORKING USA 131 (2004) ("Drawing on interviews with labor and community leaders in Silicon Valley . . . to outline[] the work of the South Bay Labor Council and its nonprofit arm, Working Partnerships USA, as one model for labor's efforts to reinvigorate itself.").

55. *See generally* PAUL OSTERMAN, ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOUR MARKET (2001) (discussing "the results of nearly 3 years of sustained deliberation concerning the evolution of jobs and the job market in the United States" conducted in response to concerns over "the large low-wage labor market, the growth of earnings inequality, the difficulty employees have in obtaining voice in the workplace, and [employers'] challenges . . . in obtaining . . . flexibility" as well as the lack of a national debate regarding these concerns) *Id.*

56. *See* Fine, *supra* note 47; Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005-2006).

employer or across employers. The services provided include employment training, legal representation, job search assistance, and language instruction. They also facilitate the availability of health or pension benefits.

In rapidly expanding immigrant communities, where unions have had difficulty organizing in the past, a number of groups have emerged to represent the interests of immigrant and low-wage workers. While these organizations share the common focus of serving the interests of workers, there are often significant differences in their activities, membership, structure, origin, services, and objectives. Some are advocacy groups that promote changes in public policy or serve as labor market intermediaries; several have hiring halls. Others engage in efforts to bargain with employers. Some organizations perform one of these functions while others undertake many such activities. These organizations are based in individual communities or are part of nationwide coalitions. Some focus exclusively on workplace issues while others have broader objectives. Some groups have evolved from traditional community service groups, while others started as faith based organizations. Some are membership-based; others are not.[57] "Worker Center" is a term used to encompass many of the groups that function in low-wage communities. The work of Janice Fine, presented at the Next Wave Organizing Conference, has helped to describe, analyze, and assess the role and importance of worker centers across the country.[58] Some of these organizations function independently of unions, others work closely with unions, and still others affiliate with unions[59]

It is too early to assess the extent and significance of these developments. Yet the internal efforts of unions to redefine membership and the growth of non-union worker organizations suggest the labor movement is seriously considering breaking away from the NLRA-based understanding of what a union is, what it does, and who can be a member. Again, it will take both time and further study to determine the implications for unions of the emergence of

57. *See* Fine, *supra* note 47; Narro, *supra* note 56.

58. *See generally* Fine, *supra* note 47.

59. *Id.*

new worker organizations and the extent to which they suggest a "next wave" of organizing.

V. The Jury is Still Out

Union membership continues to decline;[60] however, there have been notable organizing successes in recent years and a few unions have grown, in part because of new approaches to organizing and a willingness to consider new organizational forms. The forces working against unions continue to be formidable, but some recent responses suggest that unions can grow even in today's hostile legal and political environment.

60. *See* Harris, *supra* note 5 at 303-04 (discussing declining union membership).