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## ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain

Michael C. Duff

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# ALT-LABOR, SECONDARY BOYCOTTS, AND TOWARD A LABOR ORGANIZATION BARGAIN

*Michael C. Duff*<sup>+</sup>

I. SECONDARY BOYCOTTS.....	843
A. <i>Secondary Boycotts and Labor Injunctions</i> .....	843
B. <i>Secondary Boycotts and Civil Damages</i> .....	848
II. LABOR ORGANIZATIONS.....	850
A. <i>Introductory Remarks on the Labor Organization Question</i> .....	850
B. <i>The Labor Organization Analysis</i> .....	853
1. <i>Express Versus Inferred “Dealing With” Purpose</i> .....	854
2. <i>“Dealing With” Purpose Inferred from Protest</i> .....	860
a. <i>Center for United Labor Action</i> .....	860
b. <i>Waugh Chapel South</i> .....	864
C. <i>The Crux of the Statutory Interpretation Problem</i> .....	866
III. TOWARD A “LABOR ORGANIZATION” BARGAIN .....	869
IV. CONCLUSION.....	876

Recently, low-wage, non-union workers have staged noteworthy protests and job actions against allegedly inferior working conditions. Protests against Wal-Mart, strikes against fast food restaurants, and immigration rallies by unauthorized workers offer ready examples.<sup>1</sup> In these protests and job actions, various non-union labor advocacy groups, sometimes collectively denoted as

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1. See, e.g., Raya Zimmerman, *St. Paul: 26 Arrested in Black Friday Protests Over Low Retail Wages*, TWIN CITIES, Nov. 29, 2013, [http://www.twincities.com/ci\\_24625449/st-paul-26-arrested-black-friday-protests-over](http://www.twincities.com/ci_24625449/st-paul-26-arrested-black-friday-protests-over) (describing the march of hundreds on behalf of “janitors and retail employees” in front of a Wal-Mart).

“ALT-labor,”<sup>2</sup> have often organized the involved workers.<sup>3</sup> Whether these kinds of actions represent the leading edge of a broader, discontented precariat—“the most insecure workers in an economy and a much talked about group among labor economists”—remains to be seen.<sup>4</sup> The increase in ALT-labor activity and its evolving coordination, whatever their causes, is evident.<sup>5</sup>

This Article addresses legal problems that might arise from ALT-labor coordination, which occurs when one ALT-labor group protests on behalf of or assists another such group.<sup>6</sup> Imagine, for example, a situation in which OURWalmart members<sup>7</sup> participate in a protest organized by Fast Food

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2. “ALT-labor” groups are “entities outside of the traditional organizing model” that unions typically implement. “*Alt-Labor*”, WORKERCENTERS, <http://workercenters.com/labors-loophole/alt-labor/> (last visited Aug. 24, 2014). These groups formed “[i]n response to declines in popularity and failures to organize workers in the nation’s growing service industries . . . .” *Id.* “The strategies of A[LT]-[I]labor groups resemble those of normal unions and their pre-1930s predecessors[,]” including “[p]rotesting worksites, organizing boycotts, and engaging in ‘wildcat strikes’—unauthorized, intermittent walkouts targeted to cause maximum disruptions to business operations . . . .” *Id.* Because ALT-labor, especially worker centers, actually pre-dates the existence of unions or modern labor statutes, it logically follows that as modern labor law is dismantled, earlier prototypes of collective labor groups are emerging. See David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until they Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & L. LAW 469, 472–74 (2006).

3. Some of the groups operate within an entire industry, such as Restaurant Opportunities Center, the New York Taxi Drivers’ Alliance, and Domestic Workers United. See Josh Eidelson, *ALT-Labor*, AM. PROSPECT, Jan. 29, 2013, <http://prospect.org/article/ALT-Labor>. Others operate on the basis of religious or racial justice motivations. See e.g., *Home*, NEW ORLEANS WORKERS’ CENTER FOR RACIAL JUST., <http://nowcrj.org> (last visited Aug. 24, 2014) (exemplifying a group representing racial interests in the labor community); *Mission*, ARISE CHI., <http://arisechicago.org/> (last visited Aug. 24, 2014) (illustrating a group organized around religious beliefs). The group OURWalmart is an example of a single-employer group, which has staged work stoppages against Wal-Mart. See Josh Eidelson, *Breaking: Wal-Mart Workers on Strike, Defying Firings*, SALON (Oct. 18, 2013, 12:20 PM), [http://www.salon.com/2013/10/18/breaking\\_wal\\_mart\\_workers\\_on\\_strike\\_in\\_florida/](http://www.salon.com/2013/10/18/breaking_wal_mart_workers_on_strike_in_florida/) (identifying the group as a “non-union labor group closely tied to the United Food & Commercial Workers union[.]”). See generally JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006) (providing a brief review of the broad array of worker center structures); Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385 (2006) (discussing new forms of labor institutions).

4. Robyn E. Blumner, *The Precariat and Fair Wages*, TAMPA BAY TIMES, Aug. 2, 2013, <http://web.tampabay.com/opinion/columns/blumner-the-precariat-and-fair-wages/2134471>.

5. As this Article went to print, a national wave of fast food worker strikes reportedly involving thousands of workers advocating a fifteen dollar minimum wage was underway. See Steven Greenhouse, *Hundreds of Fast-Food Workers Striking for Higher Wages Are Arrested*, N.Y. TIMES, Sept. 4, 2014, at B3 (describing the arrest of “nearly 500 protesters” in “about 150 cities nationwide” following sit-ins by many “fast-food workers and labor allies . . .”).

6. See Phil Wilson, *Why Union Members Should be Up in Arms Over “Alt-Labor”*, LAB. RELATIONS INST. (last visited Aug. 24, 2014), <http://lrionline.com/labor-relations-insight-3> (explaining that ALT-labor “groups focus . . . on organizing worker populations independent from companies.”).

7. Per OURWalmart’s website, the group’s mission is “to ensure that every Associate [of Wal-Mart], regardless of his or her title, age, race, or sex, is respected at WalMart.” *About Us*,

Forward<sup>8</sup> at the premises of a fast food restaurant. Imagine further that the OURWalmart members attempt to persuade fast food workers to strike or customers not to enter the restaurant. In such circumstances, OURWalmart could incur serious legal liability under labor law's obscure and complicated "secondary boycott" rules.<sup>9</sup> These rules in essence prohibit "labor organizations" involved in a labor dispute from pressuring "neutrals" to a labor dispute in specific, proscribed ways.<sup>10</sup> Thus, if OURWalmart has a dispute with Wal-Mart, any pressure it applies to a neutral fast food restaurant could be subjected to legal scrutiny.<sup>11</sup>

Secondary boycott complications are made more likely by the recent escalation of non-union ALT-labor activity.<sup>12</sup> Recent fast food worker strikes, led by groups like Fast Food Forward, are a prime example of ALT-labor in action. On August 29, 2013, workers in sixty cities walked off the job, a significant labor development that followed a series of smaller such strikes earlier in that year.<sup>13</sup> The strikes were conducted at McDonald's, Burger King's, and Kentucky Fried Chicken's restaurants, and extended to the Southern United States, historically a region hostile to traditional labor union organizing.<sup>14</sup> The impact of the strikes was mixed: "[s]ome targeted restaurants were temporarily unable to do business because they had too few employees, and others seemingly operated normally."<sup>15</sup> A second wave of similar strikes occurred in about 100

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OURWALMART, <http://forrespect.org/our-walmart/about-us/> (last visited Aug. 24, 2014). The group's members "join together to offer strength and support in addressing the challenges that arise in our stores and our company every day." *Id.*

8. "Fast Food Forward is a movement of NYC fast food workers to raise wages and gain rights at work" which is "part of the national movement of low-wage workers fighting for a better future." FAST FOOD FORWARD, <http://fastfoodforward.org/> (last visited Aug. 26, 2014).

9. See 29 U.S.C. § 158(b)(4)(B) (2006) (designating that forcing workers to participate in strikes can be classified as an "unfair labor practice").

10. See *infra* Part I.A (discussing secondary boycotts).

11. This principle also applies across separate employers within the same industry, for as will be shown, see *infra* Part I.A, the statute very broadly prohibits the pressuring of neutral employers. Thus, if Burger King employees apply pressure to change the labor policies of McDonald's, a secondary boycott problem could arise. As this Article goes to print, fast food workers continue to engage in and plan multiemployer work stoppages within the fast food industry and have even gathered in Illinois for a two-day convention to refine strategies for such coordination. Jessica Wohl, *Fast Food Workers Plan Civil Disobedience in Minimum Wage Fight*, CHI. TRIB., Sept. 2, 2014, <http://www.chicagotribune.com/business/chi-fast-food-strike-20140901-story.html>.

12. See Trey Kovacs, *Big Labor and NLRB Tactics Evolve*, WORKPLACECHOICE (July 30, 2013), <http://workplacechoice.org/2013/07/30/big-labor-and-nlr-tactics-evolve/> (describing the "proliferation" of ALT-labor groups).

13. Atossa Araxia Abrahamian, *U.S. Fast-Food Workers Protest, Demand A 'Living Wage'*, REUTERS (Aug. 29, 2013), <http://www.reuters.com/article/2013/08/29/us-usa-restaurants-strike-idUSBRE97S05320130829>.

14. *Id.*

15. Candice Choi, *Fast-Food Workers Stage Largest Protests Yet*, ASSOCIATED PRESS (Aug. 29, 2013), <http://bigstory.ap.org/article/fast-food-protests-under-way>.

U.S. cities in December 2013.<sup>16</sup> The “days without immigrants” rallies of 2006 provide another example of widespread ALT-labor protest.<sup>17</sup> Immigration issues intensified in the early months of that year following news of a federal legislative proposal that essentially would have classified all employees working without required immigration documentation as felons.<sup>18</sup> In reaction to the proposed legislation, a variety of ALT-labor groups, and others, coordinated and organized mass rallies across the U.S.<sup>19</sup> The participants included authorized and unauthorized workers and various allies and supporters of unauthorized workers.<sup>20</sup> Work in many locations stopped as workers joined the protests while the rallies were underway.<sup>21</sup>

The various campaigns against Wal-Mart represent another well-known area of ALT-labor activity. The “Black Friday” protests, organized by OURWalmart, are probably the most widely known of these campaigns.<sup>22</sup> Finally, there has been a recent groundswell of strike activity by low-wage employees of federal government contractors. For example, the group Good

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16. John Bacon, *Fast-Food Workers Strike, Protest for Higher Pay*, USA TODAY (Dec. 5, 2013, 12:58 PM), <http://www.usatoday.com/story/money/business/2013/12/05/fast-food-strike-wages/3877023/>. As noted in the *New York Times*, businesses are paying attention to ALT-labor activity. See Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES, Jan. 16, 2014, at B1 (claiming that the activities of ALT-labor groups are “start[ing] to get on businesses’ nerves . . .”).

17. See Michael C. Duff, *Days Without Immigrants: Analysis and Implications of Immigration Rallies under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 93, 95 (2007) (discussing the traditional labor law connotations of the rallies).

18. See, e.g., Monica Davey, *For Immigrants and Business, Rift on Protests*, N.Y. TIMES, Apr. 15, 2006, at A1 [hereinafter Davey, *For Immigrants and Business*] (referencing a Bonita Springs, Florida “rally against legislation in Congress cracking down on illegal immigrants”); Monica Davey, *With Calls for Boycott by Immigrants, Employers Gird for Unknown*, N.Y. TIMES, May 1, 2006, at A12 [hereinafter Davey, *With Calls for Boycott*] (making note of “immigration demonstrations around the country . . .”). Attendance at a rally held on March 25, 2006 in Los Angeles was estimated at 500,000 protesters. See Jim Newton, *Villaraigosa Tells Where He Stands*, L.A. TIMES, Apr. 15, 2006, A1 (noting “500,000 people marched in peace . . .”). See also Ines Ferre et al., *Thousands March for Immigrant Rights: Schools, Businesses Feel Impact as Students, Workers Walk Out*, CNN (May 1, 2006, 10:21 PM), <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html> (last visited February 12, 2007) (explaining that “organizers arranged a human chain”).

19. See Ferre, *supra* note 18 (noting that major cities such as New York, Washington, Miami, Chicago, San Francisco, and Atlanta were rally hubs).

20. See Davey, *With Calls for Boycott*, *supra* note 18 (acknowledging that “immigrant rights groups and others were calling on workers and employers to join” the rallies).

21. See Carol McKinley et al., ‘A Day Without Immigrants’, FOX NEWS (May 1, 2006), <http://www.foxnews.com/story/2006/05/01/day-without-immigrants/> (noting that “[p]rotesters boycotted work” in locations “across America”).

22. See Zimmerman, *supra* note 1 (describing that the protesters held marches on Black Friday to garner attention).

Jobs Nation,<sup>23</sup> in conjunction with a group of unions, coordinated a strike in January 2014 against Pentagon contractors.<sup>24</sup>

From the perspective of businesses, the commercial problem presented by non-union ALT-labor protests—particularly coordinated protests involving multiple employers—is identical to that presented by traditional union protests: workplaces may be shut down and customers may be unable to access businesses while the protests are in progress, which directly threatens commercial activity.<sup>25</sup> Public relations considerations also come into play. Typically, ALT-labor protesters claim employers treat them unfairly.<sup>26</sup> The potential for negative public relations in reaction to the protests is real.<sup>27</sup> The negative perception of a business by potential customers, and others in the community, could harm its goodwill or other intangible assets.<sup>28</sup> Nevertheless, some commentators argue that business interests do not care about the disruptions or perceptions labor protests create, because investors do not care.<sup>29</sup> Historically, however, business interests *have* cared about such volatility,<sup>30</sup> and have usually desired the prompt

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23. The group describes itself as “workers . . . employed by private companies through federal contracts, concessions and leases.” *About Us*, GOOD JOBS NATION, <http://goodjobsnation.org/#about> (last visited Aug. 26, 2014).

24. Josh Eidelson, *Breaking: Pentagon Workers Strike Over Poverty Pay*, SALON (Jan. 22, 2014, 9:00 AM), [http://www.salon.com/2014/01/22/breaking\\_pentagon\\_workers\\_strike\\_over\\_poverty\\_pay/](http://www.salon.com/2014/01/22/breaking_pentagon_workers_strike_over_poverty_pay/).

25. From its inception, federal labor policy centered on prevention of such threats to the economy. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 151 (2006) (explaining that employers’ denial of the right of employees to organize can cause “strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . .”).

26. *See* Theodore J. St. Antoine, *Keynote Address: The Moral Dimension of Employment Dispute Resolution*, 86 ST. JOHN’S L. REV. 391, 402 (describing that “the . . . unequal bargaining power” of the parties involved in an employer-employee conflict “implicates moral values profoundly”).

27. This explains why the risk of labor disputes is routinely included as “forward looking information” on major corporations’ financial statements involving future risks and uncertainties. *See, e.g.*, *Investors*, POOLCORP (Nov. 1, 2013), <http://ir.poolcorp.com/profiles/investor/ResLibraryView.asp?BzID=603&ResLibraryID=66095&Category=43> (acknowledging that such statements are allowed under “the safe harbor provisions of the Private Securities Litigation Reform Act of 1995”).

28. James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 775 (2010). Indeed, employers will allege violations of RICO by unions, premised on interferences with employers’ intangible “property,” such as goodwill and reputation. *Id.* at 775–76. However, some scholars question the merit of these claims. *See, e.g., id.* at 776.

29. *See, e.g.*, Brian Solomon, *Memo to the Fast Food Minimum Wage Strikers: Investors Don’t Care*, FORBES (Dec. 5, 2013, 4:46 PM), <http://www.forbes.com/sites/briansolomon/2013/12/05/fast-food-investors-not-scared-of-minimum-wage-worker-strike/> (stating that “investors don’t seem to be particularly scared of [] strikers, nor their chances at getting the minimum wage increase they seek”).

30. For example, the involvement of business lobbyist Richard Berman in the controversy belies the notion that businesses are unconcerned. *See* Greenhouse, *supra* note 16 (noting that

suppression of labor protests.<sup>31</sup> This Article discusses one method business might employ to achieve suppression: bringing legal actions against protestors on the theory that the ALT-labor coordination constitutes unlawful secondary boycotts.<sup>32</sup>

In reality, the dispute between employers and ALT-labor has already begun. On November 16, 2012, Wal-Mart filed an unfair labor practice charge against the United Food and Commercial Workers International Union alleging that the union had engaged in unlawful picketing.<sup>33</sup> Although the theory of unlawfulness differed from the one that will be discussed in this Article,<sup>34</sup> the charge alleged that OURWalmart was a subsidiary, affiliated organization, or agent of the United Food and Commercial Workers.<sup>35</sup> Although the National Labor Relations Board (NLRB) informally resolved the charge without having to reach the substance of the allegations,<sup>36</sup> if the case had been actively litigated, the status of OURWalmart would have needed to be determined; either it was an agent of the union in connection with the conduct complained of, or, alternatively, it was a labor organization in its own right, and therefore independently subject to liability under the National Labor Relations Act (NLRA).<sup>37</sup> This Article discusses the threshold question of whether ALT-labor groups independently possess status as labor organizations under the NLRA in order to determine whether they are capable of engaging in secondary boycotts.<sup>38</sup>

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Berman ran “full-page ads attacking the Restaurant Opportunities Center,” which is “one of the nation’s largest worker centers . . .”).

31. Indeed, the common law conceived of such protest as simple criminal conspiracy. *See Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 112–16 (1842) (rejecting the general view of the time but chronicling its prevalence in the mid-nineteenth century).

32. As discussed further in this Article, ALT-labor liability turns on whether a group is a “labor organization.” If a group is a labor organization, it is capable of violating a variety of labor laws. Therefore, the Article focuses on violations of the National Labor Relations Act (NLRA)’s secondary boycott prohibitions under sections 8(b)(4)(B) and 303 of the NLRA, as amended. *See also* Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 263–71 (2009) (providing an exhaustive discussion of the variety of potential violations).

33. Lawrence E. Dubé, *Wal-Mart Bid To Block ‘Black Friday’ Action Requires Retailer To Prove UFCW’s Objective*, BLOOMBERG LAW, <http://about.bloomberglaw.com/law-reports/wal-mart-bid-to-block-black-friday/> (last visited Aug. 26, 2014).

34. The Wal-Mart charge alleged that the union and its “affiliates” engaged in unlawful “recognitional” picketing under section 8(b)(7) of the NLRA, *id.*, which this Article does not discuss.

35. *Id.*

36. *See* Advice Memorandum from the Nat’l Labor Relations Bd., Case 26-CP-093377 (Apr. 10, 2013), available at <http://www.nlr.gov/case/26-CP-093377>.

37. The NLRA prohibits only “employers” and “labor organizations” from engaging in specified conduct. *See* 29 U.S.C. § 158(a), (b) (2006).

38. A complete taxonomy of ALT-labor groups is beyond the scope of the Article. However, it may be conceded that any group receiving all of its support from one or more labor unions could much more readily be conceived as an agent of the union or unions. It may just as readily be acknowledged that groups receiving no support from unions and engaging in no protest over terms

Part I of this Article discusses secondary boycotts. Because ALT-labor groups cannot violate the secondary boycott provisions of the NLRA unless they are labor organizations, Part II engages in an extended discussion of the surprisingly complicated question of when a “group” is considered an NLRA labor organization subject to the secondary boycott provisions. In light of the complexity inherent in determining whether ALT-labor groups are labor organizations, Part III suggests that the time may be ripe for a “bipartisan” modification of the NLRA’s labor organization definition. Anticipating the objection that no modification of labor law is likely in light of the persistence of legislative gridlock, this Article underscores that employers have badly wanted to modify the NLRA labor organization definition for two decades, and actually achieved a bipartisan modification in 1996, only to see the compromise vetoed by President Clinton.<sup>39</sup> Finally, this Article argues that organized labor may be similarly amenable to compromise on a narrowing of the labor organization definition, particularly given ALT-labor groups’ vulnerability to liability under the secondary boycott provisions, organized labor’s increasing embrace of ALT-labor, and a growing precariat<sup>40</sup> that will not be easily organized using traditional labor organizing principles.

## I. SECONDARY BOYCOTTS

### A. *Secondary Boycotts and Labor Injunctions*

Traditionally, one of the quickest ways for businesses to quash labor protests—besides summarily firing employee activists<sup>41</sup>—was to obtain court-issued labor injunctions.<sup>42</sup> However, the present generation of business leaders, having come of age during docile labor times<sup>43</sup> and without a need to understand traditional labor law, may not realize that obtaining labor injunctions in the federal courts to suspend *peaceful* labor activity of the type presently engaged in by ALT-labor is typically not possible. The Norris-LaGuardia Act of 1932

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and conditions of employment are much harder to think of as a “labor advocacy” group of the kind that it is under discussion in the Article. This Article focuses on groups in the murky middle that engage in some activity traditionally carried out by unions, but are not structured like unions, and do not formally claim to represent employees for purposes of collective bargaining. Even these groups come in a dizzying array. They are big and small, national and local.

39. WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 52 (4th ed. 2004).

40. See *The Precariat*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/us/buzzword/entries/precariat.html> (last updated Feb. 16, 2011) (defining “precariat” as “a social group consisting of people whose lives are difficult because they have little or no job security and few employment rights . . .”).

41. A firing of this sort is now unlawful. 29 U.S.C. § 158(a)(1), (3).

42. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 1 (1930).

43. See Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 24, 2013, at B1 (discussing acceleration of “the long decline in the number of American workers belonging to labor unions . . .”).

broadly prohibits federal courts from issuing such injunctions.<sup>44</sup> An important exception to this rule, however, is that injunctions against “labor organizations” remain available for certain conduct specifically prohibited by the NLRA.<sup>45</sup> Secondary boycotts are an important example of NLRA-prohibited conduct and they are subject to federal court injunction.<sup>46</sup> A secondary boycott<sup>47</sup> has

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44. See Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70, 70 (codified at 29 U.S.C. §§ 101–115) (preventing federal courts from “issu[ing] any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . .”). Many states have in effect “little Norris-LaGuardia Acts.” See, e.g., ARIZ. REV. STAT. ANN. § 12-1808 (2003); COLO. REV. STAT. § 8-3-118 (2012); CONN. GEN. STAT. ANN. § 31-112 (West 2013); HAW. REV. STAT. ANN. § 380-7 (LexisNexis 2010); IDAHO CODE ANN. § 44-701 (2003); 820 ILL. COMP. STAT. ANN. 5/1 (West 2008); IND. CODE ANN. § 22-6-1-6 (LexisNexis 2010); KAN. STAT. ANN. § 60-904 (2013); LA. REV. STAT. ANN. § 23:844 (2010); ME. REV. STAT. tit. 25, § 5 (2007); MD. CODE ANN., LAB. & EMPL. § 4-314 (LexisNexis 2008); MASS. GEN. LAWS ch. 214, § 6 (2005); MINN. STAT. ANN. § 185.13 (West 2006); N.J. STAT. ANN. § 2A:15-5.1 (West 2000); N.M. STAT. ANN. § 50-3-1 (2012); N.Y. LAB. LAW § 807 (McKinney 2002); N.D. CENT. CODE § 34-08-03 (2004); OR. REV. STAT. ANN. § 662.080 (West 2013); 43 PA. CONS. & STAT. ANN. § 206i (West 2009); R.I. GEN. LAWS § 28-10-2 (2003); UTAH CODE ANN. § 34-19-2 (LexisNexis 2011); WASH. REV. CODE ANN. § 49.32.072 (West 2008); WIS. STAT. ANN. § 103.56 (West 2012); WYO. STAT. ANN. § 27-7-101 (2011). This issue has broader applicability under state law, but such considerations are beyond the scope of this Article.

45. See 29 U.S.C. § 160(j), (l).

46. Some commentators focus on the potential for ALT-labor groups to violate the recognitional picketing provisions of the NLRA, especially section 8(b)(7)(C). A full discussion of those provisions is beyond the scope of this Article. As a general proposition, “labor organizations” picketing for recognition or bargaining must comply with a precise regulatory framework or they risk violating the NLRA. See generally *S.F. Local Joint Exec. Bd. of Culinary Workers v. NLRB*, 501 F.2d 794 (1974) (demonstrating how the D.C. Circuit analyzes recognitional picketing cases). However, it may be difficult to characterize ALT-labor groups as possessing the necessary recognition or bargaining object. See 29 U.S.C. § 158(b)(7) (stating that picketing or threatening to picket “any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization” is an unfair labor practice). Protest activity may be protected by the NLRA’s publicity provisos or characterized as “area standards” picketing, which is also protected by the NLRA. See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 207 n.42 (1978) (explaining that “area-standards picketing” was recognized as a right under the NLRA in the 1960s); *Int’l Hod Carriers & Calumet Contractors Ass’n*, 133 N.L.R.B. 512, 512–13 (1961) (stating that the NLRA does not disallow area-standards picketing). From the employer’s vantage, protest activity is more reliably characterized as a secondary boycott. See *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 222–27 (1982) (holding that a union’s refusal to handle goods from the Soviet Union in protest of the Soviet invasion of Afghanistan violated secondary boycott provisions of NLRA). However, if an ALT-labor group is considered a labor organization under the NLRA, it is capable of violating the recognitional picketing provisions of the Act.

47. The term secondary boycott is not defined with precision. Indeed, there were no secondary boycott provisions in the first iteration of the NLRA. However, the Taft-Hartley Act added the initial secondary boycott prohibition to section 8(b)(4)(A) of the NLRA in 1947. *United Food & Commercial Workers Local 1996 & Visiting Nurse Health Sys., Inc.*, 336 N.L.R.B. 421, 423–24 (2001). The Landrum-Griffin Act of 1959 (LGA) closed off certain loopholes to the prohibition, refined the secondary prohibition to its present form, and included the alterations in section 8(b)(4)(B) of the NLRA. *Id.* at 424–25. Further, the LGA independently outlawed a specific form of secondary conduct in which a union and a neutral employer agree that the neutral employer will

traditionally been explained as some “combination to influence *A* by exerting . . . economic or social pressure against persons” with whom *A* deals.<sup>48</sup>

The statutory definition of “boycott” has a specialized meaning that is different than the common conception of a boycott as, for example, a consumer’s refusing to purchase the goods of a company with which he or she has a dispute. A “boycott” is an organized refusal, a collective action, meant to pressure a neutral employer during a labor dispute in any number of ways including by striking, picketing, or “boycotting” the purchase of products or services.<sup>49</sup>

Workers may naturally wish to support the causes of other workers.<sup>50</sup> But American labor law has always sought to prevent general strikes, meaning simultaneous work stoppages of workers “in all or most industries.”<sup>51</sup> Labor organizations are not permitted to expand the “front” of a labor dispute they may have with one employer, known as the “primary” employer, to the premises of a “secondary” or “neutral” employer.<sup>52</sup> If they do, federal courts may grant neutral employers injunctive relief and damages in order to suppress the conduct.<sup>53</sup> Two policies underlie this limitation. The first is containing primary labor disputes to minimize injury to interstate commerce. The second is the notion that it is not fair to allow the pressuring of a neutral employer, which has neither the ability nor duty to control the labor relations of the involved union and the primary employer.

If the NLRB finds that a labor organization engaged in a secondary boycott, it is *required* (in the absence of very prompt settlement) to seek a temporary

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not handle the products of a different employer with whom the union has a primary labor dispute. *See Ets-Hokin Corp.*, 154 N.L.R.B. 839, 844–45 (1965) (explaining that, in that case, unions unlawfully convinced Ets-Hokin to remove another company from a construction project).

48. FRANKFURTER & GREENE, *supra* note 42, at 43. There are, of course, some who object to the whole idea of a secondary boycott on strictly moral grounds. *See, e.g.*, Jonathan H. Adler, *Secondary Boycotts and the Breakdown of Civil Society*, VOLOKH CONSPIRACY (May 3, 2012, 8:32 AM), <http://www.volokh.com/2012/05/03/secondary-boycotts-and-the-breakdown-ofcivilsociety/> (claiming that “substantial risks” accompany secondary boycotts).

49. *See* 520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Local 1, No. 13-1938, slip op. at 11 (7th Cir. July 29, 2014).

50. *See, e.g.*, DANIEL GROSS & STAUGHTON LYND, SOLIDARITY UNIONISM AT STARBUCKS 22, 23 (2011) (characterizing “solidarity unionism” as a movement that passes from one worker to another, and explaining that when Starbucks baristas in New York City went on strike that “[s]olidarity [] poured in from around the world”).

51. *General Strike*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/general-strike](http://www.oxforddictionaries.com/us/definition/american_english/general-strike) (last visited Aug. 28, 2014). This was a central purpose of the Taft-Hartley reforms, *Nat’l Woodwork Mfrs. Ass’n v. N.L.R.B.*, 386 U.S. 612, 623–24 (1967), although it is difficult to conceive of the *early* American state as excessively hostile to any form of strike, JOSIAH BARTLETT LAMBERT, *IF THE WORKERS TOOK A NOTION: THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT* 21–23 (2005).

52. *See* *Douds v. Metro. Fed’n of Architects, Eng’rs, Chemists & Technicians Local 231*, 75 F. Supp. 672, 677 (S.D.N.Y. 1948) (explaining the nexus requirement between the “front” and the picketing union).

53. ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 691–92 (14th ed. 2006).

injunction in federal district court to restrain the conduct.<sup>54</sup> If the court grants the injunction, there are at least two significant consequences. First, all present secondary picketing must cease, and severe sanctions will attach for violations of the injunction.<sup>55</sup> Second, as a practical matter, strikes or any other labor activity will likely be broken by an injunction.<sup>56</sup> If federal courts embarked on a course of enjoining ALT-labor, the probable response of protesting employees—especially those without the benefit of legal counsel—would be to sharply curtail protest activity.

There are two ways that the conduct of a labor organization could possibly violate section 8(b)(4) of the NLRA. First, it is potentially unlawful for a labor organization “to engage in, or to induce or encourage any individual employed by any person . . . to engage in[] a strike or a refusal . . . to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services . . . .”<sup>57</sup> Second, it is potentially unlawful for a labor organization “to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce . . . .”<sup>58</sup> However, for the conduct to be unlawful, it must be coupled with a proscribed object.<sup>59</sup> In the case of a secondary boycott, a violation occurs when any of the aforementioned conduct is engaged in with the object of “forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .”<sup>60</sup>

Thus, to continue with the hypothetical presented at the beginning of this Article, if OURWalmart pickets at a protest organized by Fast Food Forward at the premises of a fast food restaurant with the object of persuading fast food workers to strike, or even with the object of forcing any person to cease doing business with any other business, then OURWalmart is in jeopardy of violating the NLRA’s secondary boycott provision. OURWalmart may argue that it is merely protesting the fact that *all* workers are being paid substandard wages or

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54. 29 U.S.C. § 160(l) (2006).

55. See Ahmed A. White, *The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations*, 11 J. LAB. & SOC’Y 23, 31–33 (2008), available at <http://lawweb.colorado.edu/profiles/pubpdfs/white/White11WUSA.pdf>-(describing-applicable criminal sanctions).

56. See JULIE GREENE, *PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881-1917* 85 (1998) (noting “[m]any [] strikes . . . [are] met with defeat through injunctions handed down by state and federal courts . . . .”).

57. *Id.* § 158(b)(4)(i).

58. *Id.* § 158(b)(4)(ii).

59. Section 158(b)(4) lists four proscribed objects. This Article addresses only the “secondary boycott” object.

60. *Id.* § 158(b)(4)(ii)(B). Some narrow provisos to the rule exist, but most are beyond the scope of this Article.

working in substandard conditions.<sup>61</sup> But unless OURWalmart proceeds with great caution in communicating and investigating the basis for this “area standards” message—that is, a message meant only to communicate facts showing that a particular employer provides pay and benefits that are less than what is normally provided by employers in the local area<sup>62</sup>—the NLRB may deem the activity “secondary” and, therefore, unlawful.<sup>63</sup>

If OURWalmart is, for example, suggesting to workers that they should not go to work, or is persuading customers to boycott a fast food restaurant, a serious “cease doing business” issue arises, for the underlying presumption of this strictly enforced provision is that OURWalmart is surreptitiously pressuring a neutral employer in the hope of indirectly improving working conditions at Walmart.<sup>64</sup> Moreover, the NLRB need only find that *an* object of OURWalmart is to cause some person to cease doing business with any other person in order to establish a violation of the NLRA.<sup>65</sup> Additionally, in some instances a “cease doing business” object simply may be *inferred*. For example, in *International Longshoremen’s Ass’n v. Allied International, Inc.*,<sup>66</sup> the Supreme Court stated, “[w]hen a purely secondary boycott ‘reasonably can be expected to threaten neutral parties with ruin or substantial loss’ . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.”<sup>67</sup> In other words, if the secondary

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61. It might be argued that because OURWalmart would merely be present at what was in effect the lawful primary protest of Fast Food Forward, OURWalmart’s activity would not really be secondary because it would not be trying to affect its own labor conditions through coercion of a neutral employer. Rather, OURWalmart would be attempting to impact the labor conditions of other employers through “solidarity picketing.” Of course, it would all depend on what OURWalmart was doing or saying. However, to the extent the group was engaged in secondary conduct, and had a secondary object, the fact that Fast Food Forward was simultaneously engaging in primary labor protest would not insulate OURWalmart from liability. See *NLRB v. Omaha Bldg. & Const. Trades Council*, 856 F.2d 47, 50–51 (8th Cir. 1988).

62. Under the publicity proviso, a peaceful area standards campaign that uses handbilling or bannering, truthfully advises the public of a labor dispute, that does not have a proscribed secondary object or conduct element such as picketing or disruptive or otherwise coercive non-picketing conduct, implicates First Amendment concerns and does not violate section 158(b)(4). See *Circle Grp., L.L.C. v. Se. Carpenters Reg’l Council*, 836 F. Supp. 2d 1327, 1356 (N.D. Ga. 2011) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583–84 (1988)).

63. *Sheet Metal Workers’ Int’l Ass’n Local 7 & Andy J. Eagn Co.*, 345 N.L.R.B. 1322, 1331 (2005) (“When area standards picketing is involved, the burden is on the union to [] make reasonable inquiry to determine whether . . . the picketed employer is meeting area standards, wages, and benefits. Otherwise, the purported purpose of area standards picketing may be deemed pretextual, and evidence of improper motive found.”).

64. See Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 908 (2005) (describing the structure of a secondary boycott).

65. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 688–89 (1951).

66. 456 U.S. 212 (1982).

67. *Id.* at 224.

activity of OURWalmart resulted in “substantial loss”<sup>68</sup> to the “neutral” fast food restaurant, an unlawful secondary object would likely be presumed.<sup>69</sup>

It must be emphasized that employees may express solidarity for one another’s causes. Thus, the mere presence of ALT-labor group A at a protest function of ALT-labor group B—including, for example, a joint presence at a coordinated ALT-labor rally—does not in itself convert protest to secondary boycott activity. Members of ALT-labor group A may be present and may protest the employment policies of the employer of group B. What ALT-labor group A cannot lawfully do is strike, or “threaten” or “coerce” anyone to “cease doing business” with the employer of ALT-labor group B to effectuate changes to that employer’s employment policies. For, with respect to employer B, ALT-labor group A has no primary labor dispute.<sup>70</sup>

### B. Secondary Boycotts and Civil Damages

In addition to the risk of injunction, the NLRA provides employers with a private right of action for compensatory damages arising from secondary activity

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68. In an earlier case, *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 72 (1964), the Supreme Court held that certain unions did not violate the NLRA when they limited secondary picketing of retail stores to asking customers not to buy the products of firms against which one of the unions was striking. The Court found that consumer picketing of the neutral retailer was permissible unless the picketing was “employed to persuade customers not to trade at all with the secondary employer . . . .” *Id.* at 72. However, the Court later altered that rule by holding that “[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language of the purpose of [NLRA] § 8(b)(4)(ii)(B).” *NLRB v. Retail Store Emps. Union Local 1001*, 447 U.S. 607, 614–15 (1980).

69. This interpretation reads the “object” requirement out of the statute entirely. The conclusion begs the question: are the injured employers truly neutral because the court failed to identify *any* object on the part of the union to do injury to them? The conclusion is actually the fruition of early developments in cases that focused on injuries to neutrals in the context of limited “object evidence.” See, e.g., *NLRB v. Carpenters Dist. Council of New Orleans & Vicinity*, 407 F.2d 804, 806 (5th Cir. 1969) (noting that although the statute requires a “cease doing business” object, an objective to cause “serious disruption of an existing business relationship” is sufficient to satisfy the statutory requirement). The union in *International Longshoremen’s Ass’n* argued there was not a “primary” at all, that the primary-neutral distinction was completely collapsed, and that reference to statutory “neutrals” was a legal fiction. Brief for Petitioner at 28–29, *Int’l Longshoremen’s Ass’n, v. Allied Int’l, Inc.*, 456 U.S. 212 (1982) (No. 80-1663). Whereas in mixed object scenarios a court will find a labor organization engaged in unlawful secondary activity when only one of its objects is proscribed by the NLRA, *Denver Bldg. & Const. Trades Council*, 341 U.S. at 689, the courts have relaxed even that forgiving standard by whittling away its predicate to a skeletal core which requires only the possibility that the fruit of an unlawful object—even an unintended one—be foreseen.

70. See *NLRB v. Ironworkers Local 433*, 833 F.2d 1024, 1024 (9th Cir. 1989) (“To determine whether concerted activity is primary or secondary, it is necessary to ascertain whether ‘the object of [the activity] is to affect the labor policies of th[e] primary employer’ or whether the activity is ‘engaged in for its effect elsewhere.’”). Thus, a violation could arise if, in addition to the presence of ALT-labor group A at employer B’s premises, group A encourages work stoppages, employer boycotts, or engages in any similar conduct with a “cease doing business” object.

that is found to violate section 8(b)(4) of the NLRA.<sup>71</sup> The availability of court-awarded civil damages for section 8(b)(4) violations is an anomaly of the American labor law system in which administrative agencies adjudicate most claims and compensatory damages are unavailable.<sup>72</sup> The NLRA also provides that anyone injured in business or property by a secondary boycott possesses a private right of action for damages.<sup>73</sup> The provision renders any “labor organization” in violation of the secondary boycott prohibition of section 8(b)(4)(B) broadly liable for damages and the cost of any suit resulting from the violation.<sup>74</sup> Employers may recover business losses caused by a labor organization’s peaceful but unlawful secondary activities.<sup>75</sup> Further, the NLRA may arguably act as a kind of protection to ALT-labor because it preempts *state* law actions for damages premised on a peaceful secondary boycott theory.<sup>76</sup> Nevertheless, the NLRA exposes ALT-labor groups to civil liability for damage to business relationships, loss of business profits, idled equipment, and additional personnel required to operate a business during the period of an illegal work stoppage.<sup>77</sup>

Interestingly, to the extent that an ALT-labor group is found to be an agent of a union rather than a labor organization in its own right, there is developing authority that it would not be liable under the NLRA.<sup>78</sup> To consider how this provision might operate, modify some facts of the earlier ALT-labor hypothetical. This time, imagine that Fast Food Forward members appear at a local Wal-Mart in support of an OURWalmart protest. Imagine further that the protest is extremely successful and that many customers decline to cross the ALT-labor picket lines. If a federal district court concluded that a “labor organization” had “threaten[ed], coerce[ed], or restrain[ed] any person engaged in commerce or in an industry affecting commerce”<sup>79</sup> with the object of “forcing or requiring any person to cease using, selling, handling, transporting, or

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71. *Teamsters, Chauffeurs & Helpers Union Local 20 v. Morton*, 377 U.S. 252, 258 (1964).

72. *See* 29 U.S.C. § 160(j) (2006) (allowing the National Labor Relations Board (NLRB) to provide temporary relief it finds “just and proper”).

73. *See* 29 U.S.C. § 187(b) (indicating that anyone injured by unfair labor practices may “recover the damages by him sustained and the cost of the suit”).

74. *See id.*

75. *See Morton*, 377 U.S. at 260 (holding that, although the petitioner’s protest was peaceful, the lower court’s award to petitioner “cannot stand” because of petitioner’s secondary boycott behavior).

76. *See, e.g., Labor-Ready Mid-Atlantic, Inc. v. Tri-State Building & Construction Trades Council Local 667*, No. 2:99-0037, 2001 WL 1358708, at \*1 (S.D. W. Va. Sept. 21, 2001) (holding that the NLRB may assert jurisdiction over claims advanced under state law if the behavior that forms the basis of those claims is “unlawful secondary activity”).

77. However, punitive damages are unavailable. *See COX, supra* note 53, at 771.

78. *See, e.g., Jung Sun Laundry Group Corp. v. Laundry, Dry Cleaning, & Allied Workers Joint Bd.*, No. 10 Civ. 468 (RMB)(JLC), 2010 WL 4457135, at \*1, \*4 (S.D.N.Y. Nov. 1, 2010) (citing *Wild Edibles Inc. v. Indus. Workers of World Local 460/640*, No. 07 Civ. 9225(LLS), 2008 WL 4548392, at \*1, \*3 (S.D.N.Y. Oct. 9, 2008)).

79. *See supra* note 58 and accompanying text.

otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person[.]”<sup>80</sup> the ALT-labor group could be liable for the loss of business occasioned by the action. It might also be liable for other compensatory costs involving items such as personnel modifications, inventory control, and enhanced on site security.<sup>81</sup> Clearly, these costs could escalate and be very difficult to bear by an ALT-labor group.

## II. LABOR ORGANIZATIONS

### A. *Introductory Remarks on the Labor Organization Question*

Secondary boycott prohibitions apply only to labor organizations.<sup>82</sup> Thus, if ALT-labor groups are *not* labor organizations, they are not bound by the NLRA’s secondary boycott provisions and the groups’ peaceful labor protest activities are likely immune from federal court injunctions.<sup>83</sup> Employers and their allies avoid the question of whether ALT-labor groups qualify as labor organizations by arguing that unions are behind ALT-labor and, therefore, ALT-labor should be bound to the same rules that bind labor unions.<sup>84</sup> The role of unions in encouraging ALT-labor is becoming well known,<sup>85</sup> and the AFL-CIO openly acknowledges and embraces the connection between unions and ALT-labor groups.<sup>86</sup> Tellingly, the AFL-CIO underscores that its increasingly formalizing relationship with worker centers began in 2006,<sup>87</sup> the year in which

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80. See *supra* note 57 and accompanying text.

81. See *supra* note 71 and accompanying text.

82. See 29 U.S.C. § 158(b) (2006) (defining practices that constitute “unfair labor practice[s]” when performed by “a labor organization or its agents . . .”).

83. See *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 451 (1987) (holding that, in the absence of specific Congressional authorization to the contrary, federal courts may not issue labor injunctions in peaceful labor disputes).

84. See, e.g., Stefan J. Marculewicz & Jennifer Thomas, *Labor & Employment Law: Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage Under the NLRA and LMRDA*, ENGAGE, Oct. 2012, at 79, 79 (characterizing ALT-labor worker centers as “no different[] than the traditional labor organization”).

85. See, e.g., Richard Berman, *Worker Centers: A Backdoor for Unions*, U.S. NEWS & WORLD REP. (Oct. 14, 2013), <http://www.usnews.com/opinion/articles/2013/10/14/worker-centers-are-just-a-backdoor-for-unions> (exemplifying the actions of the Center for Union Facts to advance knowledge about worker centers).

86. See *Worker Center Partnerships*, AFL-CIO, <http://www.aflcio.org/About/Worker-Center-Partnerships> (last visited Aug. 29, 2014) (acknowledging that “the AFL-CIO has formed partnerships with worker centers and other groups of working people who do not have the legal right to collective bargaining”). Further, the strengthening ties between organized labor and ALT-labor was a primary topic of discussion at a 2013 AFL-CIO convention. See Mark Vorpahl, *At AFL-CIO Convention, Leaders Ask: What Direction for Labor?*, TRUTHOUT (Sept. 11, 2013, 4:55 PM), <http://www.truth-out.org/opinion/item/18769-at-afl-cio-convention-leaders-ask-what-direction-for-labor> (noting that ALT-labor groups were “highlighted at the convention”).

87. *Id.*

the massive “Day Without Immigrants” rallies transpired.<sup>88</sup> Unions consistently provide expertise and counsel to ALT-labor.<sup>89</sup> Still, by historical labor movement standards, the involvement of unions in ALT-labor is complex and vague. Community groups, worker centers, and other non-union advocacy groups often lead the tactics, and almost always the financing, of ALT-labor protests.<sup>90</sup> This does not mean, of course, that ALT-labor is not receiving considerable assistance from unions.<sup>91</sup> But there is substantial evidence that many “activist charitable foundations”<sup>92</sup> have been heavily funding ALT-labor, particularly worker centers.<sup>93</sup> The Department of Labor has also directly funded worker centers.<sup>94</sup>

All of this complexity makes it difficult to agree with the simplistic formulation that “unions are behind” worker centers or other ALT-labor groups. Such funding, moreover, implicates broader civil society protest and nudges the context of ALT-labor slightly away from traditional, unmixed labor activism. For example, it is easier to conceive of an ALT-labor group funded by the Ford Foundation as a social activist group than it is to see a group funded and directed exclusively by the United Food and Commercial Workers International Union as a social activist group.

The inchoate, elusive involvement of unions in ALT-labor—as opposed to their direct, traditional involvement—has multiple explanations. The notoriously high employee turnover rate of low-wage workers<sup>95</sup> makes them especially hard for unions to organize using traditional methods.<sup>96</sup> Workers

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88. See Teresa Watanabe & Joe Mathews, *Unions Helped to Organize ‘Day Without Immigrants’*, L.A. TIMES, May 3, 2006, at B1.

89. See, e.g., *id.* (mentioning that organized labor was instrumental in making the “Day Without Immigrants” march successful). See also Bacon, *supra* note 16 (acknowledging that the Service Employees International Union helped coordinate protests in December 2013).

90. See Jarol B. Manheim, *The Emerging Role of Worker Centers in Union Organizing: A Strategic Assessment* 9–16 (U.S. Chamber of Commerce, Working Paper, 2013), available at <http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011-21-2013.pdf>.

91. The Service Employees International Union, for example, has ramped up financial support to the fast food ALT-labor groups reportedly contributing \$15 million since January 2013. Bruce Horowitz et al., *Fast Food Workers Rally for Higher Wages*, PNJ.COM (May 15, 2014), <http://archive.pnj.com/usatoday/article/9114245>.

92. See *id.* at 13 (exemplifying the U.S. Chamber of Commerce’s use of this phrase).

93. *Id.* Charitable organizations, including notable groups like the Ben & Jerry’s Foundation, the Marguerite Foundation, the Ford Foundation, and the Kresge Foundation, contribute to the worker center movement. *Id.* at 15–20.

94. *Id.* at 21.

95. Arindrajit Dube, T. William Lester & Michael Reich, *Minimum Wage Shocks, Employment Flows and Labor Market Frictions* 17 (Inst. for Research on Labor and Emp’t, Working Paper No. 149-13, 2013), available at <http://www.irle.berkeley.edu/workingpapers/149-13.pdf>.

96. See Molly Korab, *Can Fast-Food Workers Raise Wages With One-Day Strikes?*, NEW REPUBLIC (Aug. 2, 2013), <http://www.newrepublic.com/article/114147/fast-food-workers-one->

often voluntarily depart from a low-wage workplace before they can be organized.<sup>97</sup> Following the Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>98</sup> unauthorized workers fired during traditional union organizing campaigns are not entitled to remedies under the NLRA,<sup>99</sup> which makes immigrant workers understandably reluctant to support a union openly.<sup>100</sup> Given the difficult legal terrain for organizing, unions may be reluctant to devote significant resources to organizing low-wage workers. However, they may be willing to render some lesser level of assistance, especially where outside charitable organizations are contributing to the cause.

Unions may also be better able to face workers in unsuccessful campaigns outside of the traditional labor organizing drive. Low-wage workers seem to understand that the possibility of failure in nontraditional drives is high and that they are involved in a Sisyphean struggle in which they “‘have nothing to lose.’”<sup>101</sup> The probability of success may be understood from the beginning as low, and the union seems less likely to be blamed if it fails.

Sinister explanations abound when there is *any* union involvement in ALT-labor. Commentators assert that unions are using worker centers to insulate themselves from labor law liability.<sup>102</sup> Under the NLRA, unions, as acknowledged labor organizations, are proscribed from engaging in certain conduct.<sup>103</sup> Commentators allege that unions evade such proscriptions by acting through ALT-labor.<sup>104</sup> This curious argument assumes that unions would deliberately expose potential future members to surrogate legal liability.<sup>105</sup> Less

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day-strike-and-future-labor-organizing (“[O]ld labor laws rely on a sense of permanency that isn’t as prevalent today.”).

97. *See id.*

98. 535 U.S. 137 (2002).

99. *See id.* at 151–52 (holding that the NLRB’s jurisdiction is not broad enough to permit it to grant awards to unauthorized workers).

100. *See* Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J. L. & PUB. POL’Y 659, 669 (2012) (indicating that undocumented workers may be unwilling to stand up for their rights).

101. Steven Greenhouse, *A Day’s Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES, Aug. 31, 2013, at A1 (quoting Columbia Professor of Political Science Dorian T. Warren).

102. *See* Kris Maher, *Nonunion Worker Advocacy Groups Under Scrutiny*, WALL ST. J., July 24, 2013, <http://online.wsj.com/news/articles/SB10001424127887429712045786283846775530> (suggesting that unions are blurring the lines between what is an organized union and what is a working center for the purpose of escaping financial filing requirements).

103. *See* 29 U.S.C. § 158(b) (2006).

104. Berman, *supra* note 85 (“[Worker centers’] legal status allows them to dodge all of the financial transparency, governance and organizational regulations established by federal law. There are no officer elections, no annual financial filings with the federal government and no guarantees that they’re acting on behalf of the employees they claim to represent.”). *See also* Marculewicz & Thomas, *supra* note 84 (claiming that ALT-labor groups “avoid the legal duty of accountability to the workers they represent” that is characteristic of unions).

105. The U.S. Chamber of Commerce grapples with explaining this motivation as follows:

In the purest sense, [worker centers clearly functioning as mere surrogates for unions] may not be [] worker center[s] at all, but merely another in a series of secondary

curious is the argument that unions, in acting through ALT-labor, are simply avoiding a purportedly tainted union “brand.”<sup>106</sup> According to this argument, the cause of unaffiliated low-wage restaurant workers is more sympathetic than that of union organizers or supporters.

Whether ALT-labor groups are *de facto* agents of unions is of questionable legal significance. A union may lawfully organize employees and employees may lawfully assist unions. Indeed, the organization and representation of employees by unions are the most basic protected activities under the NLRA.<sup>107</sup> Whether unions provide to employees or receive from employees organizing assistance directly or through intermediaries appears to be immaterial. Employees independently possess NLRA rights to engage in “concerted activities” under the NLRA.<sup>108</sup> They may choose to exercise these rights with the guidance and technical direction of an organization. Union assistance of employees to exercise rights through ALT-labor is the same as any actor helping workers to obtain rights they already possess under the NLRA. “Labor organizations,” however, are regulated under both the NLRA and the Labor-Management Relations Disclosure Act (LMRDA), and are required to operate by certain rules, regardless of the rights possessed by employees.<sup>109</sup> Ultimately, questions of agency only have legal significance when there is a violation of the rules. The more difficult question is whether ALT-labor groups are capable of violating these rules in their own right and not as the agents of unions.<sup>110</sup>

#### B. The Labor Organization Analysis

The question, therefore, is whether ALT-labor groups are “labor organizations.” Under the NLRA, the term “labor organization” is defined as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the

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mechanisms for building alliance structures or appealing for public approbation while obscuring somewhat the union label, presumably because the union strategists find such limiting of transparency advantageous *for some reason*.

Manheim, *supra* note 90, at 35 (emphasis added). A less-tortured argument is that employee participation in alternative forms of employee representation could help individuals develop “political skills and voice functions” that may serve as a precursor to unionization. See Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) Of The NLRA*, 72 S. CAL. L. REV. 1651, 1703 (1999).

106. See Manheim, *supra* note 90, at 35 (claiming that unions need ALT-labor groups to reach new classes of workers).

107. 29 U.S.C. § 157.

108. *Id.*

109. See 29 U.S.C. §§ 158(b), 412, 439, 440.

110. For example, in response to the ALT-labor activities leading up to and planned for Black Friday 2012, Wal-Mart filed charges against the United Food and Commercial Workers Union although the activities in question involved the ALT-labor group OURWalmart, apparently because Wal-Mart was unsure of the legal status of OURWalmart. See Tony Lee, *Walmart Files Charges Against UFCW Union*, BREITBART (Nov. 18, 2012), <http://www.breitbart.com/Big-Government/2012/11/17/Wal-Mart-Files-Charges-Against-UFCW-Union>.

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>111</sup> ALT-labor groups are surely “organizations of any kind,” given that they, in part, attempt to address employee grievances, advancing the cause of employees in labor disputes, and improving employee wages, rates of pay, hours of employment, or conditions of work in *some* manner.<sup>112</sup>

It may not always be as clear, however, that ALT-labor groups have the purpose of addressing these statutorily enumerated work-related issues by “dealing with” employers. *Black’s Law Dictionary* defines “purpose” as “[a]n objective, goal, or end.”<sup>113</sup> Regrettably, the NLRA does not define purpose. Therefore, one is led into the traditional morass of determining whether an “objective, goal, or end” has been happily and explicitly stated or, more problematically, must be inferred from surrounding conduct.

### 1. *Express Versus Inferred “Dealing With” Purpose*

Given that ALT-labor organizations’ charters sometimes define the purpose of the groups as “dealing with” employers,<sup>114</sup> the groups could not easily argue that they did not possess such a purpose. However, explicit acknowledgement of a “dealing with” purpose is not required under the NLRA to establish that a group falls within the definition of a labor organization. In *NLRB v. Cabot Carbon Co.*,<sup>115</sup> the Supreme Court established that the purpose of a putative labor organization may be discovered not only by reference to the organization’s stated purpose, but also by determining what the organization does *in reality*.<sup>116</sup>

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111. 29 U.S.C. § 152(5).

112. See, e.g., *About Us*, *supra* note 7 (providing the homepage of OURWalmart, and describing how the group communicates its mission to Wal-Mart management). The group asks Wal-Mart to listen to its associates, have respect for the individual, recognize freedoms of association and speech, fix its Open Door policy, pay a minimum of thirteen dollars per hour and make full-time jobs available for associates who want them, create dependable and predictable work schedules, provide affordable healthcare, provide every associate with a policy manual, ensure equal enforcement of policy and anti-discrimination rules, provide every associate equal opportunity to succeed and advance in his or her career, and offer wages and benefits that ensure that no associate has to rely on government assistance. *Sign the Declaration*, OURWALMART, <http://forrespect.org/sign-the-declaration/> (last visited Aug. 29, 2014).

113. BLACK’S LAW DICTIONARY 1356 (9th ed. 2009).

114. See, e.g., *Thompson Ramo Woolridge, Inc. & Gen. Teamsters, Chauffeurs & Helpers Local Union No. 298*, 132 N.L.R.B. 993, 994 (1961), *enforced*, 305 F.2d 807 (7th Cir. 1962) (“The best evidence of the purpose of the Association may be found in its charter and bylaws.”).

115. 360 U.S. 203 (1959).

116. *Id.* at 213. The NLRB has underscored this point. In *Electromation, Inc. & International Brotherhood of Teamsters, Local Union No. 1049*, 309 N.L.R.B. 990, 996 (1992), a case in which non-union employee committees were found to be labor organizations under the NLRA, the NLRB stated that “[p]urpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does.” See also *Keeler Brass Auto. Grp. & Puckett*, 317 N.L.R.B. 1110, 1113 (1995) (citing *id.*).

*In Cabot Carbon Co.*, multiple affiliated employers established and supported “employee committees” in several plants.<sup>117</sup> The committees’ explicit purpose was to meet regularly with management to consider and discuss problems of mutual interest, including grievances and handling of “grievances at nonunion plants and departments . . . .”<sup>118</sup> In addition to this explicit purpose, it was also obvious that the established committees made many types of work-related proposals that were actively considered by management.<sup>119</sup> Thus, the Court observed, “[c]onsideration of the declared purposes and *actual functions* of these [c]ommittees shows that they existed for the purpose, in part at least, ‘of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.’”<sup>120</sup> Similarly, it is possible to argue that ALT-labor groups satisfy the “purpose” element when their actual functions demonstrate that they exist—at least partially—for the purpose of dealing with employers, even where their foundational charters or mission statements express no such purpose.

It may be necessary, therefore, to consider whether ALT-labor groups’ actual activities reveal their “dealing with” purpose when no such purpose is explicitly stated. That consideration may allow the NLRB, or a court, to construct the purpose element. However, on occasion, the NLRB argues that a group is *not* a labor organization because there is insufficient evidence to formulate a “dealing with” purpose from the functions and activities of the group, even if the group has explicitly declared a “dealing with” purpose.<sup>121</sup> This overemphasis on inferred purpose can be a distraction when explicit evidence of purpose exists, and thus, no reason exists for inferring a purpose.<sup>122</sup> For example, the Restaurant Opportunities Center of New York (ROC-NY) at one time behaved like a statutory labor organization in that it routinely negotiated with employers on behalf of employees.<sup>123</sup> The NLRB’s Division of Advice found that it was not

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117. *Cabot Carbon Co.*, 360 U.S. at 205–06.

118. *Id.* at 206.

119. *Id.* at 207 (finding the committees “made and discussed proposals and requests respecting many other aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions[.]” and that “Respondents’ plant officials participated in those discussions and in some instances granted the [c]ommittees’ requests”).

120. *Id.* at 213 (first emphasis added).

121. *See, e.g.*, Advice Memorandum from the Nat’l Labor Relations Bd., Cases 2-CP-1073 & 2-CB-20787 (Nov. 30, 2006) [hereinafter Advice Memorandum, Cases 2-CP-1073 & 2-CB-20787] (demonstrating that the NLRB will disregard an entity’s defined purpose when the entity’s activities deviate from that purpose).

122. *See* Duff, *supra* note 17, at 134–36.

123. *See* Duff, *supra* note 17, at 135. *See also* Hyde, *supra* note 3, at 392–94. ROC-NY has recently tempered its claims that it bargains on behalf of employees. However, ROC-NY still supports a “restaurant industry roundtable,” described by the group as “a collaboration of restaurant owners, workers, government agencies, city officials, and ROC-NY.” *The New York City Restaurant Industry Roundtable*, ROC-NY, <http://rocnyc.org/high-road-organizing/nycrir/> (last

a labor organization, however, because “ROC-NY’s conduct has not been shown to constitute a pattern or practice of dealing over time. Rather, ROC-NY’s attempts to negotiate settlement agreements with the [e]mployers here were discrete, non-recurring transactions with each [e]mployer.”<sup>124</sup> One issue with this statement is that the Supreme Court was clear in *Cabot Carbon Co.* that a group need not be collectively bargaining to achieve labor organization status,<sup>125</sup> and a “pattern and practice of dealing over time” is reminiscent of collective bargaining. Even more problematically, whatever an ALT-labor group may be doing functionally is not of greater significance than an explicit avowal of a “dealing with” purpose.<sup>126</sup> Thus, assessing groups’ actions as evidence of purpose should not be controlling.

In the context of broadly inferring a “dealing with” purpose, the NLRB has determined that minimal contacts between a labor “group” and an employer are usually insufficient to establish that the group is a labor organization.<sup>127</sup> The confusion lies in attempting to determine primarily whether *any* bilateral activity between a group and an employer must be demonstrated to show that a group is a statutory labor organization; and, secondarily, what the nature of that bilateral activity must be. For example, recent NLRB authority holds that some “bilateral mechanism” between a putative labor organization and “target” employer must be established before the agency will find that labor organization status exists.<sup>128</sup>

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visited Aug. 29, 2014). The group encourages all New York City restaurants to join the roundtable and “develop strategies that help restaurants take the ‘high road’ to profitability.” *Id.*

124. Advice Memorandum, Cases 2-CP-1073 & 2-CB-20787, *supra* note 121.

125. *Cabot Carbon Co.*, 360 U.S. at 211–12 (“It is therefore quite clear that Congress, by adopting the broad term ‘dealing’ and rejecting the more limited term ‘bargaining collectively,’ did not intend that the broad term ‘dealing with’ should be limited to and mean only ‘bargaining with’ as held by the Court of Appeals.”). One scholar believes that:

worker centers like the Workplace Project, and worker groups like ROC-NY, are quite likely to be statutory labor organizations. They do indeed raise grievances with particular employers on behalf of particular employees. Even if this is not collective bargaining, it is similar to activity that has been held to constitute the activity of dealing with employers. Moreover, it is hard to come up with any compelling policy reason why such groups should be exempt from disclosure requirements, or restrictions such as the thirty-day limit on organizational picketing that bind more traditional unions.

Hyde, *supra* note 3, at 408.

126. For example, ROC-NY previously claimed that, as of 2007, it had engaged in six campaigns against employers for back wages and discrimination claims for food service workers, negotiated a settlement for workers from a Brooklyn deli, and negotiated a settlement with a restaurant involving “compensation for discrimination, paid vacations, promotions, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination.” Duff, *supra* note 17, at 135. The group also previously advertised to employees: “If you are a restaurant worker who has problems with your employer, call us or come by ROC-NY!” *Id.* That message was an explicit admission that ROC-NY existed for the purpose in whole or in part of dealing with employers.

127. Advice Memorandum, Cases 2-CP-1073 & 2-CB-20787, *supra* note 121.

128. See, e.g., *Syracuse Univ. & Teamsters Local 317*, 350 N.L.R.B. 755, 757–58 (2007); *E.I. du Pont de Nemours & Co. & Chem. Workers Ass’n*, 311 N.L.R.B. 893, 894–95 (1993);

The bilateral mechanism must involve exchanges of proposals on NLRA-defined subjects between a labor organization and management.<sup>129</sup> However, the NLRB has stated that “if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.”<sup>130</sup>

This attempted line drawing between a bilateral proposal “pattern and practice mechanism” and statutory “bargaining” is unclear and confusing. Why is it that a statutory labor organization may be found without “bargaining,” but that a “pattern and practice of exchanging proposals over time” implies that a group is a labor organization? There is little indication that the NLRB intends to clarify the distinction. However, the confusion is not solely attributable to NLRB decisions. Rather, there is little difference between collective bargaining and “dealing with” in the applicable statutory scheme. While collective bargaining is usually the negotiation of a comprehensive collective bargaining agreement,<sup>131</sup> bilateral discussions—even over time—may have narrower objectives. The problem, however, is that the NLRA’s definition of “bargaining in good faith” is so broad that it begins to merge imperceptibly with the NLRB’s “pattern and practice” invention. The NLRA makes it in an unfair labor practice for an employer or a labor organization to refuse to bargain in good faith over terms and conditions of employment, and:

requires the parties to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.” This requirement has been interpreted as establishing a general duty between an employer and its employees’ bargaining representative “to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.”<sup>132</sup>

Logically, under *Cabot Carbon Co.*, the NLRB or a court might find that a group is a labor organization even if it does not engage in statutory bargaining as defined above and merely openly expresses the purpose of “dealing with” employers. Equally logically, under the NLRB’s formulation, a group will *not* be found a labor organization *unless* its relationship with an employer amounts to a “bilateral mechanism of pattern and practice over time.”<sup>133</sup> The NLRB’s pattern and practice interpretation has thus far inured to ALT-labor’s benefit in that it has allowed certain groups to escape “labor organization” status because they do not have the necessary durable relationship with any particular

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Electromation, Inc. & Int’l Bhd. of Teamsters, Local Union No. 1049, 309 N.L.R.B. 990, 995 n.21 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

129. *Electromation, Inc.*, 309 N.L.R.B. at 995 n.21.

130. *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894.

131. *See, e.g.*, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 213 (1959).

132. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 182 (2d Cir. 1998).

133. Advice Memorandum, Cases 2-CP-1073 & 2-CB-20787, *supra* note 121.

employer.<sup>134</sup> As a practical matter, a finding of “no labor organization status” implies no liability for ALT-labor groups under any NLRA prohibitions applicable to labor organizations.

However, it is often risky to rely on the NLRB’s statutory interpretations given the reality of hostile appellate review.<sup>135</sup> The tension between the Supreme Court’s discussion and potentially static definition of labor organization status and the NLRB’s discussion and more functional definition of the same is palpable. So long as the NLRB is acting as the prosecutor in deciding, for example, whether an ALT-labor group has a “dealing with” purpose rendering it liable for NLRA violations, it may have discretion whether to issue an administrative complaint.<sup>136</sup> With the exception of the Fourth Circuit’s opinion in *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27*,<sup>137</sup> there is little authority on the question of what labor organization definition or analysis federal courts will apply, and that is where real trouble may lurk for ALT-labor. District court judges may be more inclined to apply *Cabot Carbon Co.*’s potentially more static formulation. The NLRB’s dynamic “pattern and practice over time” formulation, although accepted by the Fourth Circuit, cannot comfortably be regarded as a majority judicial approach to the labor organization question.

One suspects *Cabot Carbon Co.*’s discussion of “pattern and practice” issues throughout the opinion,<sup>138</sup> a discussion which was arguably *obiter dictum*, had the possibly unintended consequence of underemphasizing that the case most strongly turned on its finding of an *express* purpose. To see how this thinking can go awry, imagine a workplace “committee” in which employees clearly participate and which clearly states in its charter that it exists for the purpose of bargaining with the employer in that workplace regarding wages. The statute says nothing about the additional requirement that it actually deal with the employer regarding wages. *Cabot Carbon Co.* does not so hold. Rather, it permits a fact finder to evaluate what the group does as part of the overall

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134. *Id.*

135. See Ellen Dannin, *Hoffman Plastics as Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 394–95 (2009) (explaining that the written labor “law as it is applied today[] is the result of decades of ‘judicial amendments.’”).

136. See *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (differentiating between the powers of the NLRB and those of the NLRB General Counsel); *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (concluding that an agency’s decision not to enforce is unreviewable under the Administrative Procedure Act and the common law of judicial review). However, when a statute contains provisions requiring enforcement action in specified circumstances, a court has meaningful standards to apply concerning a non-enforcement decision and is authorized to undertake judicial review. *Heckler*, 470 U.S. at 833–34.

137. 728 F.3d 354 (4th Cir. 2013).

138. *Cabot Carbon Co.* did not utilize the “pattern and practice” phraseology explicitly. Rather, the case used an analysis functionally equivalent to the NLRB’s later-developed pattern and practice analysis. In other words, *Cabot Carbon Co.* was effectively the progenitor of the analysis.

analysis. It strains credulity to claim that a group does not exist for the reason stated in its founding documents.

The NLRB itself has acknowledged in several cases that it is unnecessary to infer a “dealing with” purpose from “pattern and practice” when it can otherwise be determined;<sup>139</sup> it simply does not apply the principle consistently. In *Coinmach Laundry Corp. & Local 729, Coalition of Democratic Employees*,<sup>140</sup> a representation case, the NLRB upheld without discussion a regional director’s determination that a group started by three employees, and consisting of approximately fifty employees, was a labor organization, although it had unsigned by-laws, never took minutes, was not recognized by any employer or certified by the NLRB, did not negotiate any contracts, did not collect dues from employees, had no income, assets, or paid staff, and operated out of one employee’s house.<sup>141</sup> One employee testified that, “the Petitioner was created to ‘organize, negotiate contracts regarding wages, working conditions, hours of employment . . . [and] grievance procedures.’”<sup>142</sup> That was enough for the regional director to conclude that the organization in question was a labor organization within the meaning of the NLRA,<sup>143</sup> and the NLRB affirmed the static determination.<sup>144</sup>

In support of the decision, the regional director cited a number of cases in which the NLRB found that groups were statutory labor organizations in circumstances where there was no evidence of “pattern or practice” or of the existence of a bilateral mechanism.<sup>145</sup> Each of the cases involved very early organizational efforts and was either a representation case or involved unfair labor practices in nascent organizing drives.

This is logical. At the inception of an organizing drive, there can be no bilateral mechanism or pattern of bargaining with an employer, and in the case of unaffiliated labor organizations, of the kind apparently at issue in *Coinmach*, there is likely no practice of dealing with any employer. NLRB decisions suggest that the NLRB is more willing to look exclusively at express purpose and ignore “pattern and practice” in representational or early organizational cases. The problem is that the decisions establish a principle that the barest

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139. See, e.g., *Coinmach Laundry Corp. & Local 729, Coal. of Democratic Emps.*, 337 N.L.R.B. 1286, 1286 (2002).

140. 337 NLRB 1286 (2002).

141. *Id.* at 1286–87.

142. *Id.* at 1287.

143. See *id.*

144. *Id.* at 1286.

145. *Id.* (citing *Yale New Haven Hosp. & Yale New Haven Hosp. Police Benevolent Ass’n*, 309 N.L.R.B. 363, 363 (1992); *Betances Health Unit, Inc. & Betances Health Unit Staff Ass’n*, 283 N.L.R.B. 369, 375 (1987); *Comet Rice Mills Div. Early Cal. Indus. Inc. & United Rice Workers of Stuttgart*, 195 N.L.R.B. 671, 674 (1972); *E. Dayton Tool & Die Co. & E. Dayton & Hawker Tool Emps.’ Indep. Union of Dayton, Ohio*, 194 N.L.R.B. 266, 266 (1971); *Butler Mfg. Co. & Butler Indep. Union*, 167 N.L.R.B. 308, 308 (1967)).

explicit expression of a purpose to represent employees is sufficient as a matter of law to establish labor organization status.

It is difficult to reconcile *Coinmach* with ROC-NY. The explicit “dealing with” purpose evidence in the latter was much greater than the evidence in the former. Such sharp inconsistency may not go unnoticed by courts in the context of secondary boycotts. Courts in secondary boycott cases may utilize the NLRB’s representational cases to find ALT-labor groups “labor organizations” by virtue of the groups’ express statements of “dealing with” purpose.

## 2. “Dealing With” Purpose Inferred from Protest

Perhaps this much is clear: an ALT-labor protest with no “dealing with” or bargaining purpose and with no “bilateral mechanism” involved should not be adequate in itself to render an ALT-labor group a “labor organization.” The difficulty is that protest may create discussion leading to consideration of how much dialogue would be required to establish a bilateral mechanism or a “pattern and practice” of interaction and consideration of proposals. Assuming, however, an ALT-labor group is *solely* protesting employer practices, its “message” appears more like a unilateral demand and less like any form of bilateral discussion or invitation to engage in bargaining. In the posture of protest, the group’s demand is as much a message to the general public about the targeted employer’s practices as it is a communication to the employer with which it has a dispute.

Courts have previously utilized avoidance canons when interpreting portions of the NLRA that might have rendered predominantly expressive activity unlawful under the statute.<sup>146</sup> Indeed, there are a number of “publicity provisos” built into the statute that operate in practice as a kind of constitutional safety valve.<sup>147</sup> Broadly interpreting the labor organization definition in such a way as to convert social advocacy groups into labor organizations subject to NLRA injunction carries obvious chilling potential. Therefore, courts may in protest contexts interpret the definition of “labor organization” narrowly once it is clear that there is no union activity involved.

### a. Center for United Labor Action

This avoidance rationale may respond to an objection raised by commentator David Rosenfeld: that something akin to protest may in fact be deemed a form of “dealing with.”<sup>148</sup> Rosenfeld recounts the case of *Center for United Labor Action & Sibley, Lindsay & Curr Co.*<sup>149</sup> in which the Center for United Labor Action (CULA), arguably an NLRA labor organization, was found by the NLRB

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146. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576–78 (1988).

147. 29 U.S.C. § 158(b)(4)(i)(B) (2006).

148. Rosenfeld, *supra* note 2, at 485–86.

149. 219 NLRB 873 (1975).

not to be such an organization.<sup>150</sup> The question was of threshold importance because the charging party, Sibley, a retail-clothing store in Rochester, New York, alleged that CULA was engaged in a secondary boycott against it.<sup>151</sup> The primary employer, it was alleged, was Farah Manufacturing, a clothing manufacturer, which was involved in a nationwide labor dispute with the Amalgamated Clothing Workers of America (the ACWA).<sup>152</sup> The charge was filed against both the CULA and the ACWA.<sup>153</sup> The ACWA, an admitted NLR labor organization, quickly and predictably settled the case, after the NLRB found administratively that it had engaged in an unlawful secondary boycott.<sup>154</sup> CULA, which became involved in the labor dispute once it was clear that the ACWA was meeting with little success, declined to settle, and the secondary boycott case went to trial.<sup>155</sup> The question presented was whether CULA was a “labor organization” so as to bring it within the ambit of the NLR’s secondary boycott provisions. The NLRB found that it was not.<sup>156</sup> The decision is explainable by reference to constitutional avoidance principles if it is accepted that there was a *substantial* argument that a putative labor organization was engaging in *predominantly* expressive activity.

What did CULA do? Well, to begin with, unlike much of ALT-labor,<sup>157</sup> CULA defined itself as a defender of unions and as an aggressive supporter of the union cause.<sup>158</sup> It supported union strikes.<sup>159</sup> It engaged in picketing other retailers carrying Farah’s products, participating directly in the union campaign, and across state lines.<sup>160</sup> It even assisted striking employees of other unionized employers involved in wholly separate labor disputes.<sup>161</sup> In sum, it was engaged in a broad variety of activities in these disputes, including representing discharged workers before the state unemployment commission in opposition to

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150. *Id.* at 873.

151. *Id.* at 876.

152. *Id.*

153. *See id.* at 874.

154. *Id.* at 876.

155. *Id.*

156. *Id.* at 873.

157. This is beginning to change in the fast food worker context and one increasingly sees those ALT-labor workers advocating explicitly for a union. For example, in a new wave of rallies, strikes, and protests by thousands of fast food workers on September 4, 2014, the workers carried signs and chanted slogans for “15 and a union.” Seth Freed Wessler, ‘We’re a Movement Now’: Fast Food Workers Strike in 150 Cities, NBC NEWS (Sept. 4, 2014, 4:46 AM), <http://www.nbcnews.com/feature/in-plain-sight/were-movement-now-fast-food-workers-strike-150-cities-n195256>.

158. *Id.* at 877.

159. *Id.*

160. *Id.*

161. *Id.*

an employer's position, and assisting employees at a plant who wanted to unionize.<sup>162</sup>

However, CULA's primary activity was picketing,<sup>163</sup> albeit in a manner that would almost certainly violate the NLRA if it were a labor organization. In connection with the labor organization question, it was quite evident that employees participated in CULA.<sup>164</sup> It was equally evident, however, that despite all of the labor organization-like activity in the record, CULA *never* attempted to negotiate or communicate with Sibley.<sup>165</sup> It had solely engaged in protest activity. The question for the administrative law judge (ALJ) hearing the case was whether by engaging in concerted activities or assisting and persuading employees to do so, CULA was "dealing with" Sibley.<sup>166</sup> Despite finding that CULA's activity rendered it an NLRA labor organization,<sup>167</sup> the ALJ nevertheless refused to find a secondary boycott violation because "such a result tends to warp the structure and distort the policy and purposes of the Act."<sup>168</sup> Sibley argued that such a conclusion would encourage "outside organizations" to engage in secondary boycotts.<sup>169</sup>

Perhaps not surprisingly, the NLRB on appeal did *not* adopt the reasoning of the ALJ insofar as he found CULA to be a labor organization, although it did uphold his finding of no violation.<sup>170</sup> The NLRB concluded that the ALJ erroneously equated support for a "social cause" with the desire to represent individuals in pursuit of a social cause.<sup>171</sup> In rejecting the ALJ's reasoning the NLRB said, "[s]upport for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees."<sup>172</sup>

It might be true that the NLRB majority was applying extra-statutory criteria, or even an incorrect standard altogether, when it additionally opined that "to qualify as a labor organization under our Act the organization must be *selected and designated* by employees for the purpose of resolving their conflicts with employers . . . ."<sup>173</sup> The labor organization doctrine as it exists today does not

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162. *Id.* at 878.

163. *Id.* at 878.

164. *Id.*

165. *Id.*

166. *Id.* at 879.

167. *Id.* Rosenfeld concluded that the ALJ did *not* find labor organization status. Rosenfeld, *supra* note 2, at 487.

168. *Id.* at 879. The ALJ cited the familiar rule of statutory construction that "a thing may be within the letter of a statute and yet not within a statute . . . ." *Id.*

169. *Id.* at 880.

170. *Id.* at 873.

171. *Id.*

172. *Id.*

173. Rosenfeld, *supra* note 2, at 487 (citing *id.*).

support the NLRB's proposition. The gist of the opinion, however, seems to be that defining a labor organization as the ALJ did would embroil the Act in interpretive difficulties. Notably, at that time, the NLRB did not yet have the benefit of labor-specific avoidance canon cases like *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*<sup>174</sup> and *NLRB v. Catholic Bishop of Chicago*,<sup>175</sup> which emphasized in the context of the NLRA that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."<sup>176</sup> To hold that an activist group is a NLRA labor organization merely because it protests repeatedly and employees participate, and thereby to expose the group to civil liability for peaceful expressive activity, appears to activate this principle.<sup>177</sup>

It is worth noting that some commentary on *Center for United Labor Action* at the time of the decision claimed that the case stood for the proposition that almost any group admitting employees to its membership, including broader civil society protest groups, might constitute a labor organization.<sup>178</sup> Even outside the confines of *Center for United Labor Action*, some scholars at that time assumed that all kinds of groups might be labor organizations. For example, one commentator argued in connection with the celebrated case *Emporium Capwell Co. v. Western Addition Community Organization*<sup>179</sup> that the dissident group of minority employees in opposition to the incumbent union in that case was itself probably a labor organization.<sup>180</sup> Such a contention may

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174. 485 U.S. 568 (1988).

175. 440 U.S. 490 (1979).

176. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

177. Notably, the Supreme Court's treatment of speech issues in the context of secondary picketing is far from compelling. Although a full analysis of the foundational case in this area, *Int'l Bhd. of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694 (1951), is beyond the scope of this Article, it is clear the Court did not apply anything approaching "strict scrutiny" to section 8(b)(4) of the NLRA, nor did it hew closely to avoidance canon principles. To expand the doctrine to groups whose labor organization status is unclear may have the effect of reopening decades-old discussions on picketing and speech issues glossed over in the union context. As commentator Charlotte Garden has argued: "the Court has yet to place union speech on the same footing as the speech of other social movements or to present a coherent theory of the First Amendment as it applies to labor speech." Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617, 2647 (2011). ALT-labor may represent a conflation of movements, creating confusion in the courts and, accordingly, promoting unpredictability in litigation.

178. See, e.g., Comment, *Protest Groups and Labor Disputes-Toward a Definition of Labor Organization: Center for United Labor Action*, 17 *WM. & MARY L. REV.* 796, 801-02 (1976) [hereinafter *Protest Groups*].

179. 420 U.S. 50 (1975).

180. See *Protest Groups*, *supra* note 178, at 800 & n.33. The employees engaged in protest activities in a manner that was at odds with the incumbent union in the workplace, and the employees were fired. *Emporium Capwell Co.*, 420 U.S. at 53-55. The Supreme Court ultimately

strike twenty-first century readers as odd. It would seem to follow that the minority dissident group, in addition to being denied the protection by section 7 of the NLRA, may additionally have been capable of violating section 8(b).

*b. Waugh Chapel South*

Perhaps such an avoidance policy was also operating *sub silentio* in the Fourth Circuit's *Waugh Chapel South, LCC v. United Food & Commercial Workers Union Local 27*<sup>181</sup> opinion. In that case, a commercial real estate developer of a shopping center in Anne Arundel County, Maryland planned to lease a storefront unit to Wegmans Food Markets.<sup>182</sup> The United Food and Commercial Workers Union and the Mid-Atlantic Retail Food Industry Joint Labor Management Fund opposed the project because the supermarket was not unionized.<sup>183</sup> A union official allegedly threatened to oppose any future projects of the developer in which the supermarket would be a tenant.<sup>184</sup> Because the union's dispute was with the supermarket, the developer was a neutral party to the labor dispute. The union and the fund subsequently filed fourteen legal challenges to the project.<sup>185</sup> Each of the challenges was dismissed, withdrawn, or mooted by subsequent developments.<sup>186</sup>

The developer, thereafter, sued the union and the fund in federal district court under the NLRA, arguing that the legal challenges filed against it as a neutral party were a sham, and thus a form of secondary boycott.<sup>187</sup> The court held that while sham litigation could violate the secondary boycott provisions of the NLRA and a genuine issue of material fact existed as to whether the union had engaged in such conduct,<sup>188</sup> the court determined that the *fund* was not a "labor organization" subject to the NLRA.<sup>189</sup> The court noted that in order to fall under the NLRA's definition of labor organization, an entity must meet the "dealing with employers" requirement, and that neither the purpose nor the activity of the fund involved "dealing with" employers.<sup>190</sup> In coming to this conclusion, the court cited circuit precedent holding that no labor organization status may be applied in the absence of a bilateral mechanism through which "there is a 'pattern or practice' over time of employee proposals concerning working

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concluded that they were deprived of NLRA protection for acting in derogation of their exclusive bargaining representative. *Id.* at 71–73.

181. 728 F.3d 354 (4th Cir. 2013).

182. *Id.* at 357.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 358.

187. *Id.* at 356.

188. *Id.* at 367.

189. *Id.* at 362.

190. *Id.* at 361–62.

conditions, coupled with management consideration thereof . . . .”<sup>191</sup> The court, in other words, applied the NLRB’s interpretive formulation from cases like *E.I. du Pont de Nemours & Co. & Chemical Workers Ass’n*<sup>192</sup> and *Electromation, Inc. & International Brotherhood of Teamsters, Local Union No. 1049*,<sup>193</sup> and placed significant emphasis on the fact that the fund’s charter explicitly prohibited it from “participating directly or indirectly . . . in union collective activities.”<sup>194</sup>

The conclusion is puzzling because the fund was involved in the alleged sham litigation with the union, and therefore participating directly in union activities in violation of its charter. This was the same litigation that the court said rendered the union potentially liable to a secondary boycott violation.<sup>195</sup>

One could certainly argue that the fund’s actions in violation of its charter made its subsequent characterization of its organizational purposes suspect. It could also be argued that a series of legal actions between the contractor and the fund (an organization in which employees participated) amounted to a bilateral mechanism in which proposals between employer and group were exchanged, such as settlement proposals and demand. Nevertheless, the court concluded that:

the only fact suggesting any interactions between the Fund and an employer concern[ed] the alleged secondary boycott. There is plainly no “bilateral mechanism” when the only alleged contact between an employee entity and management is an unfair labor practice directed against an employer.<sup>196</sup>

It seems reasonable to speculate that the court was anxiously dismissive of the argument that the fund was a labor organization because it faced a difficult question involving whether alleged sham litigation could violate the secondary boycott provisions of the NLRA. On the merits of the case, the court was unsure about the appropriate “sham legal action” standard to apply when multiple instances rather than a single incident of a sham legal action were alleged.<sup>197</sup> In the context of a difficult First Amendment issue involving court access, one suspects the court preferred a “clean” jurisdictional posture. The labor organization issue, had it continued to be pressed by the fund, was not clean. By dismissing the fund, the jurisdictional issue—and potentially an additional constitutional issue—was avoided.

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191. *Id.* at 361 (citing *NLRB v. Peninsula Gen. Hosp. Med. Cent.*, 36 F.3d 1262, 1270 (4th Cir. 1994)).

192. 311 N.L.R.B. 893 (1993).

193. 309 N.L.R.B. 990 (1992).

194. *Waugh Chapel South, LLC*, 728 F.3d at 361.

195. *Id.* at 361–62, 367.

196. *Id.* at 361–62.

197. *Id.* at 363.

### C. The Crux of the Statutory Interpretation Problem

Whether ALT-labor groups are NLRA labor organizations, therefore, appears in practice to be a function of at least three factors: (1) how a particular group explicitly defines its purpose, (2) a fact-finder's inference of "dealing with" purpose drawn from the group's actions, and (3) whether the group's actions arguably permitting an inference of "dealing with" purpose implicate constitutionally-protected conduct.<sup>198</sup> In the NLRB's *Electromation* decision, one NLRB member noted "that *Cabot Carbon*'s rejection of the notion that 'dealing with' is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if 'dealing with' is less than bargaining, what is it more than?"<sup>199</sup> The question has not yet been answered in a satisfactory manner. The risk faced by ALT-labor today is that the lower limits are in flux and could "descend" to the conduct in which it is customarily engaged.

At the heart of the confusion may be a failure to distinguish between "internal" and "external" labor organization applications. The broad labor organization definition was crafted with an eye to internal workplace applications. It was intended to outlaw the internal "company union." The idea was to define labor organization broadly and then, through operation of section 8(a)(2) of the NLRA, to prevent an employer from controlling the organization.<sup>200</sup> The resulting statutory formulation makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."<sup>201</sup>

The question of who can violate the secondary boycott provisions, on the other hand, is a "labor organization" external application of Taft-Hartley, a version of the NLRA that was obviously not in existence when the labor organization definition was initially conceived. The external application arises not in the context of the putative labor organization's internal interaction with employees of a particular employer, but rather in the context of the organization externally interacting with other employers. *Cabot Carbon Co.* and the NLRB's subsequent interpretation of the case in internal application contexts do not speak to that situation. To have any chance of placing the situation in proper statutory context the preferable approach is to consult Taft-Hartley's legislative history.

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198. Eli Naduris-Weissman describes the general interpretive approaches at play in this area as "textualism" and "intentionalism." See Naduris-Weissman, *supra* note 32, at 273-74. This Article proposes classifications that describe in context and somewhat informally what courts and the NLRB appear to be doing with respect to the labor organization definition. Regardless of the classification scheme, the lesson to be drawn is that cases, as a practical matter, may be decided different ways in different contexts. That is the dilemma ALT-labor faces.

199. *Electromation, Inc. & Int'l Bhd. of Teamsters, Local Union No. 1049*, 309 N.L.R.B. 990, 1002 (1992).

200. See *id.* at 992-93.

201. 29 U.S.C. § 158(a)(2) (2006).

In lieu of an exhaustive examination of the legislative history of the Taft-Hartley Act or the LMRDA respecting the labor organization definition,<sup>202</sup> this Article explores roughly contemporaneous court decisions in secondary boycott, “external application” contexts. In *Di Giorgio Fruit Corp. v. NLRB*,<sup>203</sup> a case decided by the D.C. Circuit Court of Appeals a few years after the enactment of the Taft-Hartley Act, the court upheld the NLRB’s determination that a farm workers’ union could not be held liable under the NLRA’s secondary boycott provisions because it was comprised exclusively of agricultural workers not covered under the NLRA.<sup>204</sup> Accordingly, no “employees” participated in the group and, by definition, the union did not qualify as an NLRA labor organization.<sup>205</sup> In the course of the court’s discussion, there was no consideration of the different “external” circumstances to which the labor organization definition was being applied.<sup>206</sup>

Soon after the enactment of the LMRDA in 1959, which amended and tightened the secondary boycott provisions, the D.C. Circuit addressed secondary boycotting in its *International Organization of Masters, Mates & Pilots of America, Inc. v. NLRB*<sup>207</sup> decision. The D.C. Circuit Court of Appeals struggled with whether Masters, the involved putative labor organization, engaged in alleged secondary boycotting and was a statutory labor organization.<sup>208</sup> The NLRB concluded that it was, and applied the secondary boycott provisions to the group, finding a violation.<sup>209</sup> Masters argued that it could not be held responsible for an unfair labor practice as a labor organization because the pilots for whose benefit the secondary boycott had been affected were not employees under the NLRA.<sup>210</sup> However, unlike the situation in *Di Giorgio Fruit*, some of the group’s members were statutory employees,<sup>211</sup> thereby satisfying the section 2(5) statutory requirement that employees must participate for a group to be found a labor organization. After eventually concluding that Masters was a section 2(5) labor organization, the court said,

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202. There was, primarily, great discussion about how labor organizations should be restrained and little discussion about what they, in fact, were. See Marculewicz & Thomas, *supra* note 84, at 80–82. The legislative history of the Taft-Hartley Act shows that some early committee drafts would have permitted an employer to lawfully form an employee committee provided that the employer would only “discuss” workplace issues with the committee. See LeRoy, *supra* note 105, at 1704–05. The proposal was defeated because it was assumed it was merely an attempt to legalize company unions. *Id.*

203. 191 F.2d 642 (D.C. Cir. 1951).

204. *Id.* at 644–48.

205. *Id.*

206. The court sets forth the definition without discussing its legislative origins in the Wagner Act. *Id.* at 644.

207. 351 F.2d 771 (D.C. Cir. 1965).

208. *Id.* at 774.

209. *Id.* at 773.

210. *Id.* at 774.

211. *Id.*

we observe that this characterization of [Masters] as a “labor organization” means simply that that entity, as presently constituted, is such an organization *for all purposes under the Act*. In other words, the use of the term “labor organization” in any section of the Act must apply to [Masters] unless some further language of the section or its legislative history indicates a contrary result.<sup>212</sup>

Cases like *Di Giorgio Fruit* and *Masters* strongly suggest that courts deciding cases around the time of the enactment of the secondary boycott provisions did not view the scope of the labor organization definition as being narrowed in application to secondary boycotts. That is not good news for ALT-labor, because it suggests that courts may find no interpretive reason arising from the statute to narrow the labor organization definition in “external” secondary boycott contexts.<sup>213</sup>

Stefan Marculewicz and Jennifer Thomas identified one explanation for courts’ unwillingness to narrow interpretively the scope of the labor organization definition.<sup>214</sup> As they point out, the LMRDA—which was a substantial amendment to the NLRA directed at, among other things, the corrupt internal practices of unions—arguably broadened the labor organization definition.<sup>215</sup> Some commentators have argued that the definition was narrowed rather than broadened.<sup>216</sup> However, it seems unlikely that the secondary provisions would have been left unmodified if narrowing the definition had been legislatively contemplated, particularly in the course of tinkering with the labor organization definition in one part of the amended statute.

Thus, regardless of the theoretical validity of the contention that the internal origins of the labor organization definition is not easily exportable to external circumstances, courts have not said as much and, to the contrary, seem inclined to adopt a universal statutory definition. This conclusion appears especially troublesome for ALT-labor in the context of section 303 actions. While the NLRB may continue at the administrative level to decline pursuit of section 8(b)(4) violations involving ALT-labor on the “pattern and practice” theory, what the federal courts will do with the labor organization definition in the context of secondary boycott cases is anyone’s guess. Although the courts have been quite clear that individuals may not be sued under section 303,<sup>217</sup> the courts

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212. *Id.* at 777 (emphasis added).

213. There are, of course, many approaches that the court might use in marching through their exegetical mission. *See, e.g.,* Naduris-Weissman, *supra* note 32, at 273–74 (canvassing those methods in the context of the labor organization question).

214. *See* Marculewicz & Thomas, *supra* note 84, at 85.

215. *Id.* Because part of the purpose of the amended statute was to eliminate union corruption, it would not be logical to permit unions with opportunities to escape the labor organization definition. However, broadening respecting internal applications does not ultimately speak to the question of the appropriate scope of the labor organization definition in external applications.

216. *See, e.g.,* Naduris-Weissman, *supra* note 32, at 289.

217. *See, e.g.,* *Schultz v. NLRB*, 284 F.2d 254 (D.C. Cir. 1960).

make no distinction between unions and other kinds of labor organizations. Indeed, there appear to be no cases discussing *Cabot Carbon Co.* or the NLRB's pattern or practice theory in the context of a section 303 action.

If an attorney were representing an ALT-labor group contemplating an arguable secondary boycott, he or she would be unable to predict with confidence whether his or her client would be deemed a labor organization by the NLRB or by a federal district court. The best counsel would probably be that the NLRB would likely not issue an administrative complaint or seek a 10(l) injunction in connection with an ALT-labor secondary boycott. To make that outcome more likely, the attorney should warn against: (1) setting up durable bilateral mechanisms for interacting with employers, (2) establishing any sustained negotiations with specific employers, or (3) focusing on individual companies in broader campaigns.<sup>218</sup> Yet avoiding these three actions would not overcome an explicit statement in the group's charter or mission statements that the group exists for the purpose of dealing with employers over statutory subjects. However, *Cabot Carbon Co.*'s undefined lower limits of conduct for the establishment of labor organization status stands like a shadowy sentry continually calling into question whether the above advice would carry the day. Its lower boundaries could reach all the way to conferral of labor organization status in a section 303 action.

### III. TOWARD A "LABOR ORGANIZATION" BARGAIN

ALT-labor—indeed, all of labor—should understand the considerable risk to nascent labor groups embedded in traditional labor law. Both unions and non-traditional labor advocates have been eager to avoid traditional labor law because of its well-known deficiencies in adequately protecting the exercise of concerted employee rights, especially during traditional representational election campaigns.<sup>219</sup> The question for the labor movement now is not whether it should avoid traditional labor law because of its notoriously inadequate protective shield, but whether the labor movement can avoid labor law as a sword.<sup>220</sup> The simple truth is that traditional labor law imposes significant restraints on labor organizations, including the secondary boycott prohibitions

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218. Eli Naduris-Weissman, *Worker Centers & Traditional Labor Law: How to Stay on the Good Side of the Law!*, LAB. & EMP. COMMITTEE NAT'L LAWS. GUILD 1 (Jan. 2010), [http://nlg-laboremploy-comm.org/media/ProjWkrCtr\\_2010\\_Naduris-W\\_WkrCtrStratGuideLbrLaw.pdf](http://nlg-laboremploy-comm.org/media/ProjWkrCtr_2010_Naduris-W_WkrCtrStratGuideLbrLaw.pdf) (Jan. 2010). See also Thomas Brom, *Solidarity for Later*, CAL. LAW., Dec. 2013., available at [http://www.callawyer.com/clstory.cfm?eid=932277&wteid=932277\\_Solidarity\\_for\\_Later](http://www.callawyer.com/clstory.cfm?eid=932277&wteid=932277_Solidarity_for_Later).

219. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828–30 (2005) (explaining that unions began to avoid the NLRB altogether in the mid-1990s).

220. Rosenfeld, *supra* note 2, at 471 ("As they grow in number and scope, worker centers will have their development and effectiveness arrested by the very problem they were designed to avoid: the regulation of and restrictions on labor organizations under the National Labor Relations Act [.]").

discussed in this Article<sup>221</sup> and the fact that many ALT-labor groups almost certainly fall within the labor organization definition.<sup>222</sup>

However, there is an opportunity for both labor and business. Devised in the 1930s as an important part of the original NLRA, the broad labor organization definition was originally meant to ward off the early 1930s employer tactic of creating puppet, in-house unions to distract employee interest in authentic unions.<sup>223</sup> The statutory strategy was to define labor organizations very broadly and then to strictly prohibit employer involvement in them.<sup>224</sup> The present iteration of ALT-labor may be merely the tip of the proverbial iceberg with respect to people who have simply “had enough” organizing themselves into non-traditional or even unrecognizable kinds of groupings.

In all types of workplaces, non-union employees routinely initiate concerted protest online, and the NLRB has in several cases acted to protect such activity.<sup>225</sup> Imagine a group of cyber protesters who, angry with their company, electronically attempt to persuade other workers employed by other companies—say customers of their company—not to go to work to pressure their company to agree to their demands.<sup>226</sup> The cyber group could be found a labor organization and it might have violated secondary boycott prohibitions.

Even more broadly, one can conceive of low-wage workers as simply the front edge of a rapidly expanding precariat. As commentator Katherine Stone wrote, increasingly “workers are hired on temporary or fixed term contracts, without any hope of regular employment. The new ‘precariat’ move in and out of the labor market, earning low wages when they have work, and putting strains on public welfare and health care systems when they do not.”<sup>227</sup>

Policy makers’ usual reaction to developments such as these is to argue that the regulatory state should become more flexible to accommodate the new

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221. See *supra* Part I.

222. See *supra* Part II.

223. LeRoy, *supra* note 105, at 1654–55.

224. See 29 U.S.C. § 158(a)(2) (2006) (providing it is an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”).

225. See Steven Greenhouse, *Even if it Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1.

226. See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 4 (2000) (hinting at this emerging problem by noting that among the questions that will be considered are the types of economic pressure that may lawfully be brought to bear on all-electronic workplaces). One might add that both the questions of primary and secondary pressure will have to be considered. It is extremely easy to imagine unintentional formation of an electronic, cyber “labor organization” unwittingly “dealing with” an employer and then applying secondary pressure to it.

227. Katherine Van Wezel Stone, *Green Shoots in the Labor Market: A Cornucopia of Social Experiments* 7–10 (UCLA Sch. L., Law-Econ Research Paper No. 14-01, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2383575](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383575). See generally GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011) (explaining how this class of people creates economic instability).

economic reality.<sup>228</sup> However, there is nothing new about this reality. It was the reality of the nineteenth century, a reality that forward-thinking policy makers and an energetic, organized working class was able to alter. The question is whether unions wish to accept a world of flexibility or create a world of stability, as did their forbearers, by assisting pockets of resistance, even if it means risking changes in a statutory regime that has become more talismanic than real.

Unions can diminish concern respecting modification of the labor organization definition by thinking horizontally. The concerns associated with dominated committees—internal employee committees arguably “dealing with” employers respecting conditions of employment—arose during a time when there was some prospect of an intra-workplace struggle, a vertical contest over control of continuing employment. Now, however, unions will be more likely to turn to the business of what might be called “serial organizing.” Serial organizing recognizes that workers will increasingly be moving quickly, from insecure job to insecure job. It makes little sense for a union to expend resources to organize workers in ephemeral workplaces. Rather, organization will most efficiently be undertaken between workplaces, guiding, educating, and “connecting up” workers as they themselves engage in quick, sharp conflicts with their precariat employers.<sup>229</sup>

A recent labor dispute illustrates this idea. On January 28, 2014, a worker at a Whole Foods grocery store in Chicago missed work when she had to stay home with her special needs child because school was cancelled as a result of a snowstorm.<sup>230</sup> The woman and her co-workers, none of whom were represented by a union, believed that they had previously negotiated an attendance policy agreement with their employer that would have excused the woman under its terms.<sup>231</sup> However, the woman was fired, and her co-workers walked off the job in protest.<sup>232</sup> One of the employees interviewed in connection with the job action said,

[w]e’re not “union workers” in the sense that we don’t have a contract—we certainly would like to have one eventually. . . . But the reality is that the union is you deciding with your co-workers to

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228. See, e.g., Stone, *supra* note 227, at 7–10.

229. As this Article goes to print, it appears that the Service Employees International Union (SEIU) is beginning to get the idea. In July 2014, SEIU sponsored a convention of 1200 fast food employees in an expo center west of Chicago. Steven Greenhouse, *Fast-Food Workers Intensify Fight for \$15 an Hour*, N.Y. TIMES, July 28, 2014, at B1. Reportedly, the union has recently injected 15 million dollars into the fast food worker controversies broadly across the industry. *Id.*

230. Josh Eidelson, *That’s Cold, Whole Foods: Polar Vortex Firing Spurs Chicago Strike*, SALON (Feb. 5, 2014, 9:42 AM), [http://www.salon.com/2014/02/05/thats\\_cold\\_whole\\_foods\\_polar\\_vortex\\_firing\\_spurs\\_chicago\\_strike/](http://www.salon.com/2014/02/05/thats_cold_whole_foods_polar_vortex_firing_spurs_chicago_strike/).

231. *Id.*

232. *Id.*

actually join together and exert collective power against the boss.

That's what the essence of a union is.<sup>233</sup>

After the walkout, Chicago Teachers Union President Karen Lewis headlined a supportive rally that was organized by the Workers Organizing Committee of Chicago.<sup>234</sup>

This story illustrates that workers are capable of independent, smaller-scale organizing at their own discrete workplaces and of conceptualizing, in broad terms, collective power. Additionally, unions are capable of connecting with those workers afterwards.<sup>235</sup> However, it also illustrates some of the coordination risks under discussion in this Article. The magazine article from which the story is recounted does not mention the location of the rally, the message of the rally participants, or to whom the message was directed. As discussed above, these inquiries would be critical in assessing whether an employer could allege a secondary boycott.<sup>236</sup>

Some have argued that sections 2(5) and 8(a)(2) should simply be eliminated because the interplay of the provisions leaves employees, as a practical matter, with a choice between unionized participation in workplace governance and no participation at all.<sup>237</sup> Professor Clyde Summers has argued, however, that if section 8(a)(2) were eliminated, it would set the stage for massive employer anti-union campaigns and the establishment of sham unions that employees would be poorly equipped to identify.<sup>238</sup> A similar outcome might be produced, of course, if section 2(5)'s labor organization definition were narrowed in some manner to cover "a certified union" or a "union representing employees," or something of the sort. A narrower definition might mean that employers could establish and dominate non-labor organizations not fitting into the narrower definition, thereby deceiving employees into thinking they have independent representation when they do not.

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233. *Id.*

234. *Id.*

235. *See generally supra* note 220.

236. A press release for a nationwide work stoppage slated for September 4, 2014 issued by the organization "Strike Fast Food," presumably an offshoot or reconfiguration of the Fast Food Forward group referenced in this Article, noted that health care workers were expected to participate in the stoppage. Press Release, Strike Fast Food, Fast Food Workers to Strike Thursday as Fight for \$15 and Union Rights Intensifies (Sept. 2, 2014), *available at* <http://www.commondreams.org/newswire/2014/09/02/fast-food-workers-strike-thursday-fight-15-and-union-rights-intensifies>. It is hard to believe that cross-industry ALT-labor coordination will not increase. *See* Jillian Berman, *Why This Week's Fast Food Protests Are 'History In The Making'*, HUFFINGTON POST (Sept. 4, 2014 9:43 AM), [http://www.huffingtonpost.com/2014/09/04/fast-food-protests\\_n\\_5760882.html](http://www.huffingtonpost.com/2014/09/04/fast-food-protests_n_5760882.html) (noting the new development of low-wage workers from different industries now joining forces).

237. *See, e.g.,* Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHL.-KENT L. REV. 129, 140-41 (1993) (discussing and rejecting the views of those who advocate the sections' elimination).

238. *Id.* at 141.

To contend with this problem, some propose a modified section 8(a)(2) that would ban employers from installing organizations “that purport to function as the independent collective agency of the workers,” but would in all other respects permit business-related employee participation schemes.<sup>239</sup> Such a modification might simultaneously narrow the applicability of section 2(5), possibly having the practical effect of rescuing ALT-labor from secondary boycott liability. However, when considering such modifications, there is no escaping the continuing risk of employee deception engendered by relaxation of the section 2(5) labor organization definition if section 8(a)(2) is simultaneously weakened.

Labor-sympathetic commentators have also argued for the elimination of section 8(b)(4) altogether. Professor Julius Getman has contended, for example that,

[s]ection 8(b)(4) places massive and unique limitations upon the ability of unions to use economic pressure to support each other’s strikes. No one doubts that its repeal would be a great victory for unions and that legislative achievement of this goal has been long sought and almost impossible to achieve.<sup>240</sup>

That may be true, but such a thing seemed practically impossible a decade ago, and is virtually unthinkable in the present ossified reality. Similarly, employers have had an intense interest for over a decade in modifying or abolishing section 8(a)(2) or section 2(5) of the NLRA, or both, and this interest culminated in the passage of the Teamwork for Employees and Management Act (TEAM) in 1995,<sup>241</sup> a bill that was ultimately vetoed by Bill Clinton.<sup>242</sup> While the TEAM Act, or something like it, has had its supporters over the years, it is just as obvious that it cannot pass in the current political environment as it is that secondary boycott liability for unions will not be eliminated.

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239. Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 127 (1994).

240. Julius Getman, *National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 140 (2003).

241. H.R. REP. NO. 104-743, at 1 (1995); S. REP. NO. 104-295, at 2 (1996). Section 3 of the Bill would have amended section 8(a)(2) of the NLRA as follows:

Provided further, that it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.

S. REP. NO. 104-295. Although the Bill would have amended section 8(a)(2), the language would also effectively have amended section 2(5).

242. Rafael Gely, *Whose Team are You On? My Team or my TEAM?: The NLRA’s Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323, 325 n.4 (1997).

It would be hard to argue that the present environment is not more polarized than it was during the Clinton Administration. The surprisingly underdeveloped and unpredictable law surrounding the labor organization definition explored in this Article, and in the work of leading commentators like Eli Naduris-Weismann, leads to the conclusion that some present and future ALT-labor groups may be found to be labor organizations and some may not. However, the likelihood of litigation over the labor organization question is not so unpredictable. As things stand now, it is easy to imagine secondary boycott cases being decided one way at the NLRB and in an entirely different manner in the federal courts, for example in the course of section 303 actions. That kind of uncertainty does not seem desirable for anyone.

Those outside of business circles opposed to unions on policy grounds might also support a re-worked labor organization definition for reasons other than the reflexive rationale that it could increase opportunities for employers to establish participatory committees. A libertarian argument in support of ALT-labor has been under discussion recently: ALT-labor, whatever it is, represents a labor relations model outside the “compulsory unionism” that conservatives and libertarians tend to deride. If we conceive of union unfair labor practices as the Taft-Hartley policy counterweight to exclusive representation and employee-funded unions, ALT-labor is outside that paradigm. It does not enjoy governmental, exclusive representation protection.<sup>243</sup>

In the NLRA regime (as in any functioning political democracy), the majority rules and achieves governmental status, and that is in theory the end of the matter. Any non-majority, non-supporting employee interests are to yield and to support financially the union to the limits of a representational ceiling. As one is often told in discussions of employment at will, one is always “free” to quit.<sup>244</sup> This is a rational, if sometimes scorned, free-rider policy. ALT-labor—though it is hard to speak of it monolithically—appears to be entirely voluntary under any reasonable definition of the term. No employee is required to join or support it as a condition of employment. Arguably, then, it represents a “free market” alternative to unionism, even if it is unclear whether it is an actual alternative since at this early date it has not delivered much more than positive public relations for low-wage workers. Still, such groups seem evocative of a certain nineteenth century élan, a panache that might have been embraced by Samuel Gompers and the “libertarians” of his day.<sup>245</sup> These groups are supported substantially by private money and not in any meaningful way by the State.

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243. Robert VerBruggen, *Why Conservatives Should Love 'Alt-Labor'*, REAL CLEAR POL'Y (Oct. 16, 2013), [http://www.realclearpolicy.com/articles/2013/10/16/why\\_conservatives\\_should\\_love\\_alt-labor.html](http://www.realclearpolicy.com/articles/2013/10/16/why_conservatives_should_love_alt-labor.html).

244. See Benjamin Sachs, *Conservatives, Alt-Labor, and "Coercion"*, ONLABOR (Oct. 22, 2013), <http://onlabor.org/2013/10/21/conservatives-alt-labor-and-coercion/>.

245. Aaron Steelman, *If Only Samuel Gompers Were Alive Today*, CATO INST. (Oct. 28, 1996), <http://www.cato.org/publications/commentary/only-samuel-gompers-were-alive-today>.

Labor advocates will continue to see threats to unions' bargaining exclusivity in attempts to loosen the section 2(5) and 8(a)(2) lockboxes. There are two immediate responses to this concern. First, either unions want to help ALT-labor or they do not. If they want to help, they will have to eventually address the labor organization vulnerability discussed in this Article. Second, if the underlying dynamic of the labor relationship is fundamentally adversarial and inevitable, unions have nothing to fear from non-union participatory schemes. The model cannot lead anywhere under that assumption because, at the end of the day, the boss will not give up anything significantly affecting the bottom line. Once workers are organized in their "action committees," and see what is not happening, they may be more inclined to wonder what happens next, than if they had never been in such a group. Unions might find themselves in a good position to call the participatory bluff and dare management to allow authentic competition between unions and committees. Perhaps unions will find ways to access employees participating in internal groups to help them leverage an ongoing credible threat of independent unionism.<sup>246</sup> This may sharpen unions and employees alike in an even broader "School for Democracy,"<sup>247</sup> and put to rest conservative claims that unions fear competition and insist upon monopoly.<sup>248</sup> Given the overall weakness of labor law, what do unions really have to lose?

The time seems opportune for a compromise. Organized labor and businesses should push jointly for a narrowing of the section 2(5) definition and make certain that the definition means in practice that the now-and-future ALT-labor is not subject to liability under the secondary boycott provisions of the NLRA. Michael LeRoy has proposed the following amendment to section 8(a)(2):

Notwithstanding any other provision of this Section, it shall not constitute or be evidence of an unfair labor practice for an employer to form or maintain a committee in which employees participate to at least the same extent practicable as representatives of management participate to discuss with it matters of mutual interest, including grievances, wages, hours of employment and other working conditions, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to enter into collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the

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246. See LeRoy, *supra* note 105, at 1702 (discussing the Canadian experience and how "employees are able to leverage [] internal democracy with a credible threat to unionize").

247. See Garden, *supra* note 177, at 2657.

248. Countless possibilities exist as to what might be done once the dyadic frame has been loosened or eliminated. For an exhaustive discussion along these lines, see generally Mark Barenberg, *Democracy And Domination In The Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

representative of such employees as provided in section 9(a), this proviso shall not apply.<sup>249</sup>

This language, which essentially keeps intact the broad definition of a labor organization, but partially insulates the employer from violations in connection with it, should be accepted. However, we should go further to clarify that the conceptual structure identified in the language that would seem to include much of ALT-labor—a group that “does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to enter into collective bargaining agreements between the employer and any labor organization”—is similarly insulated from liability under section 8(b)(4)(B).

#### IV. CONCLUSION

The transparent reasons for the emergence of ALT-labor groups are the reality of weak labor law protections for employees and the broad formation of a transient precariat. In this environment, unions have been unable to gain traction. But labor law, with all its weaknesses and maddening irrelevance in certain contexts, has prohibitory dimensions that must not be ignored. For some observers, ALT-labor represents the potential for a reinvigorated labor movement and an energized precariat. For others, ALT-labor represents, at least with respect to low wage workers, an exercise in futility—no amount of pressure, they claim, will force employers to pay wages and benefits that the market simply will not bear. To an observer of labor history, however, ALT-labor is a vulnerable, fragile phenomenon likely to be dealt with—if agitation intensifies—as militant labor has always been dealt with in the United States: suppression through injunctions and civil actions. Secondary boycott prohibitions are an engine that could possibly drive such litigation. Workers flouting secondary boycott prohibitions would be engaging in civil disobedience. Civil disobedience will always have its risks and costs, but defiance in the face of the risk is a course some might choose.<sup>250</sup> However, the risks should be understood. Communicating the nature of the risk is not arguing against its legitimacy.

Nevertheless, the pragmatic conclusion of this Article is that ALT-labor groups would be well advised to disavow in explicit terms any purpose of negotiating with employers. The better course is to train workers in discrete workplaces how *they* can engage in negotiations. Such a disavowal should diminish, but not eliminate, arguments that an ALT-labor group’s purpose is to “deal with” employers. It would have to be followed by conduct from which a

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249. LeRoy, *supra* note 105, at 1708–09. As Professor LeRoy explains, the proposal is an amalgam of sections of the TEAM Act and of a committee proposal arising during the Taft-Hartley deliberations. *Id.* at 1706–07.

250. See, e.g., Steven Greenhouse, *Fast-Food Workers Seeking \$15 Wage Plan Civil Disobedience at Strikes*, N.Y. TIMES, Sept. 2, 2014, at B3 (noting that in September 2014 strikes, “labor organizers plan[ned] to increase the pressure [on employers] by staging widespread civil disobedience and having thousands of home-care workers join the protests”).

“pattern and practice” of interacting with employers was found insufficiently pervasive for a legal fact finder to discover a “bilateral mechanism.” It is reasonable to think that courts will not be quick to equate “pure” protest directed at an employer with a “dealing with” purpose sufficient to create labor organization status, thereby exposing ALT-labor to secondary boycott liability. Thus, ALT-labor should be careful to direct its protest message to the general public wherever possible.

More broadly, “outside” civil society groups are becoming increasingly invested in ALT-labor, which represents one face of the precariat. Restricting ALT-labor conduct that might, if engaged in by a union, violate the NLRA is an altogether different exercise than regulating “industrial strife.” One hopes that such restrictions would be undertaken, if at all, only with the greatest caution and subjected to strict scrutiny. A good way to avoid impacts on the broader civil society is to ensure that ALT-labor is not subjected to the secondary boycott provisions of the NLRA. Whether or not organized labor and business can negotiate some kind of deal that Congress would be willing to accept and enact through legislation, it is in the broader public interest that the government not be permitted to further conflate traditional labor regulation with historically protected speech and protest.

