

THE POTENTIAL FOR STATE LABOR LAW: THE NEW YORK GREENGROCER CODE OF CONDUCT

*Matthew T. Bodie**

Recent labor law scholarship has acknowledged the “ossification” of federal labor law.¹ The decline in private sector unionism, coupled with the relatively stagnant body of law surrounding the National Labor Relations Act² (NLRA), has led to a feeling in the field that there is little new under the collective-bargaining sun. Certainly, the National Labor Relations Board (NLRB) has made important changes over the last decade, such as the recognition of graduate students as “employees” for NLRA purposes.³ However, so much has remained the same—and seems likely to remain for the foreseeable future—that labor law academics often seem gloomy for their discipline’s prospects.⁴

* Associate Professor of Law, Hofstra University School of Law. A.B., 1991, Princeton University; J.D., 1996, Harvard Law School. I would like to thank Peter Spiro and the members of the New York University Lawyering Summer Workshop Group—David Zaring, Kerry Abrams, Doni Gewirtzman, Babe Howell, Renee Hutchins, Juliet Stumpf, and Rebecca Hollander-Blumoff—for their comments and support. Thanks to Si Aydiner for his timely and informative research. This essay was inspired in part by Alan Hyde’s remarks at the *Hofstra Labor & Employment Law Journal’s* Twentieth Anniversary Symposium.

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

2. 29 U.S.C. §§ 151–169 (2000).

3. See New York University, 332 N.L.R.B. No. 111 (October 31, 2000). This precedent may soon be cut back or even reversed by the new Board. See Steven Greenhouse, *Yale’s Labor Troubles Deepen as Thousands Go on Strike*, N.Y. TIMES, March 4, 2003, at B1 (“In a case involving New York University, the National Labor Relations Board ruled 28 months ago that graduate teaching students at private universities are employees, but the board is reconsidering that in cases involving Columbia and Brown.”). For further discussion of this issue, see Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1223 (2001).

4. See, e.g., Michael H. Gottesman, In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers, 69 CHI.-KENT L. REV. 59 (1993); cf. Alan Hyde, Employment Law After the Death of Employment, 1 U. PA. J. LAB. & EMP. L. 99, 100–03 (1998) (discussing the decline of collective bargaining and the legal academy’s failure to grapple with it).

One outgrowth of this stagnation has been the increasing importance of employment law. In rough terms, labor law governs the collective-bargaining relationships between employers and the representatives of their employees. The field revolves around the NLRA and its enforcing agency, the NLRB.⁵ Employment law, on the other hand, describes those statutes, regulations, or common law doctrines which cover employees individually. Statutes constitute the bulk of employment law, and the range of such statutes is vast. Title VII of the Civil Rights Act,⁶ ERISA,⁷ and the Fair Labor Standards Act⁸ represent a few of the more important federal statutes, while a myriad of state statutes further supplement the federal programs or add new protections. Many of these statutes were passed in part due to strong support from unions.⁹ Some have argued, however, that these successes in turn reduced the importance of unions to workers.¹⁰ Regardless of the causes, the number of private-sector employees with union representation has dwindled from over a third of the nation's workers to below ten percent.¹¹ As a result, the importance of employment law has only increased, and the aspects of the employment relationship covered by such individually-oriented provisions have continued to climb.¹²

Labor scholars have certainly not felt that labor law doctrine is perfectly adapted to the current environment. Ever since the number of union workers began to decline in the early 1970s, labor law commentators have proposed a veritable avalanche of reforms to the NLRA.¹³ While

5. 29 C.F.R. §§ 101–103 (2003).

6. 42 U.S.C. §§ 2000e–2000e-17 (2000).

7. 29 U.S.C. §§ 1001–1461 (2000).

8. 29 U.S.C. §§ 201–219 (2000).

9. See generally MICHAEL HARPER ET AL., LABOR LAW: CASES, MATERIAL, & PROBLEMS 25 (5th ed. 2003); Michael H. Gottesman, Union Summer: A Reawakened Interest in the Law of Labor?, 1996 SUP. CT. REV. 285, 287–88.

10. See Katherine Van Wezel Stone, The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System, 59 U. CHI. L. REV. 575, 591–93 (1992) (arguing that state legislative and judicial protections for employees have served to replace the New Deal collective bargaining regime).

11. In 2002, the percentage of private sector workers who were represented by unions fell to 8.5 percent. See Bureau of Labor Statistics, Union Members Summary (Feb. 25, 2003), at <http://www.bls.gov/news.release/union2.nr0.html> (last visited Dec. 23, 2003); cf. LEO TROY & NEIL SHEFLIN, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE, FINANCE, DIRECTORY app. A at A-1 (1985) (stating that 35.7 percent of employees in 1953 were represented by unions).

12. For recent examples see Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 300gg–300gg-92 (2000) (requiring *inter alia* that all group health plans limit their period of excluded coverage for preexisting conditions to no more than twelve months); Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387; 29 U.S.C. §§ 2601–2654 (2000) (requiring employers to grant unpaid leave to employees for serious illness or care for a newborn or sick relative).

13. Two of the most prominent, most recent, and most comprehensive efforts are WILLIAM B.

some efforts were made to reform the Act, particularly during the late 1970s, ultimately nothing of significance was changed.¹⁴ Some advocates and academic commentators have argued that the lack of dynamism has contributed to the ongoing decline in union membership.¹⁵ Certainly, the reverse might also be true—the erosion of union political power has made pro-union legislative reform less likely.¹⁶ Whatever the cause and effect might be, the aforementioned “ossification” has frustrated attempts to bring the kind of initiative and creativity to labor law that the field of employment law has enjoyed.

Given the suspended animation of federal labor law, one might expect that reformers would turn to state and local governments to bring their reforms to life. But states have been stifled by a burgeoning federal preemption doctrine, which relegates states and localities to the sidelines.¹⁷ States are permitted to favor collective bargaining when acting as market participants, but they may not use their market power to “regulate” the relationship between labor and management.¹⁸ They cannot penalize activities which are lawful, or even not unlawful under the NLRA, nor can they impose additional penalties against illegal activities.¹⁹ The NLRA’s assumption of the field has left states with little else to regulate, at least from a traditional labor law viewpoint.

However, a development involving some of New York City’s low-paid workers may pave the way for a new approach to state labor law. In 2002, the New York State Attorney General, in an effort to improve working conditions for employees in New York City’s greengrocer establishments,²⁰ developed a Greengrocer Code of Conduct.²¹ The

GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993), and PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990). For a detailed account of some of the criticism and reforms proposed concerning the NLRA, see Estlund, *supra* note 1, at 1532–44.

14. See Estlund, *supra* note 1, at 1535, 1543–44.

15. See, e.g., WEILER, *supra* note 13, at 105–33; Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575, 578–84 (1997).

16. See Estlund, *supra* note 1, at 1540, 1543–44.

17. See *id.* at 1569–79.

18. See *id.* at 1573–74.

19. See *id.* at 1571–73.

20. Greengrocers are small grocery stores that sell basic food and home supplies. They have a smaller selection than supermarkets, but are open later and are more numerous. Unlike convenience stores, they offer fresh produce. In a press release about the greengrocer agreement, the New York Attorney General’s office noted that greengrocers are primarily owned by Korean immigrants, and usually employ between five and fifteen workers, who are generally Mexican immigrants. See Press Release, Office of the New York State Attorney General, *Landmark Code of Conduct to Improve Working Conditions in the Greengrocer Industry* (September 17, 2002), at http://www.oag.state.ny.us/press/2002/sep/sep17a_02.html (last visited Dec. 23, 2003).

Code sets forth minimum terms and conditions of employment for employees, including minimum wages, overtime requirements, sick and vacation days, and days of rest.²² The Code requires that greengrocers attend a state labor law seminar, put up a poster about the Code, maintain payroll records, and allow the Attorney General's office immediate access to those records.²³ If a greengrocer agreed to the Code by December 31, 2002, the state promised to refrain from investigating past violations of state employment laws.²⁴ In addition, greengrocers abiding by the Code would be provided with a Code of Conduct seal to display in their store.²⁵

The Greengrocer Code of Conduct could be considered a creative settlement for violations of a state's employment law. But the Code is more than just a settlement agreement. It is a set of terms and conditions of employment that apply to a specific group of workers. It is an off-the-rack collective bargaining agreement that provides a state seal of approval. It is, perhaps, a new model for state involvement in the collective bargaining process—in other words, a new approach for state labor law.

This paper will discuss the details and the ramifications of the Greengrocer Code of Conduct. Part I will consider the current landscape of state labor and employment law and will discuss the barriers to state labor law, focusing on preemption. Part II will discuss the Greengrocer Code in greater depth. Finally, Part III will discuss how the Code provides a new framework for state labor law activity.

I. A BRIEF OVERVIEW OF STATE LABOR AND EMPLOYMENT LAW

At the beginning of the twentieth century, labels such as “labor law” and “employment law” did not bear their current doctrinal significance. The employment relationship was subject to state common law, particularly agency and contract principles. In the era given its name by *Lochner v. New York*,²⁶ freedom of contract reigned supreme. The Due Process Clause of the Constitution, according to Supreme Court decisions of the time, trumped almost any effort to regulate employment, in-

21. See Greengrocer Code of Conduct (2002) at <http://www.oag.state.ny.us/workplace/workplace.html> (last visited Dec. 23, 2003).

22. *Id.* §§ 1.2-3, I.6, I.15-16.

23. *Id.* §§ 1.5, I.13, I.17, III.5.

24. *Id.* § IV.

25. *Id.* § V.1.

26. 198 U.S. 45 (1905).

cluding minimum wage and child labor laws.²⁷ *Lochner* itself struck down New York state legislation limiting daily employment to ten hours and weekly employment to 60 hours.²⁸ At the same time, employers sought so-called labor injunctions to break up strikes and punish collective action.²⁹ All of this changed, of course, in the 1930s. The Norris-LaGuardia Act³⁰—in conjunction with state-level “little Norris-LaGuardia Acts”—largely eliminated labor injunctions and outlawed “yellow dog contracts.”³¹ The National Labor Relations Act established a framework for collective bargaining between workers and management. And with *West Coast Hotel Co. v. Parrish*,³² the Supreme Court reversed course and permitted state regulation of wages, hours, and working conditions.³³

Thereafter the law of the employment relationship, and particularly its study, has centered not around the common law but instead around the many statutes which regulate some aspect of that relationship. As noted earlier, legal academia has divided those statutes into two rough categories: labor law and employment law. Labor law provisions govern the collective-bargaining relationship between employers and their employees’ representatives.³⁴ Employment law provisions regulate the individual employment contract, usually by requiring or prohibiting certain terms of employment.³⁵ Employment law provisions are sometimes referred to as entitlements or minimum terms, since they require a minimum level of wages, safety precautions, and the like. Labor law, on the other hand, does not generally require a minimum level of benefits. Instead, the parties are free to agree to whatever they want, as long as the rules of the game are followed.

27. See *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 545 (1923), *overruled by* *W. Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937).

28. See *Lochner*, 198 U.S. at 64–65.

29. See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930). A well-known version of such an injunction is the subject matter of *Vegelahn v. Guntner*, 44 N.E. 1077, 1077–78 (1896). For a contrary view of the legitimacy of such injunctions, see Sylvester Petro, *Injunctions and Labor Disputes: 1880-1932*, 14 WAKE FOREST L. REV. 341, 346 (1978).

30. Norris-LaGuardia (Anti-Injunction) Act of 1932, 29 U.S.C. §§ 101–115 (2000).

31. See WALTER E. OBERER ET AL., *CASES AND MATERIAL ON LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 78–80 (5th ed. 2002).

32. 300 U.S. 379 (1937).

33. *Id.* at 386–87, 388, 400.

34. As one labor law text puts it, labor law is “the legal framework governing the organization of workers and the process of collective bargaining” HARPER ET AL., *supra* note 9, at 1.

35. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION & EMPLOYMENT LAW* 1, 936 (2000).

Both federal and state statutes set the ground rules in the employment law arena. The relationship between the federal and state regimes, however, falls into roughly three categories. In the first category, federal law sets the standard, and state law either mirrors that standard or provides background support. For example, the federal Fair Labor Standards Act (FLSA) provides for a minimum wage for all employees and overtime pay for certain types of employees.³⁶ In New York, state law mirrors those requirements; New York requires the same minimum wage,³⁷ as well as overtime for the same types of employees.³⁸ The FLSA encourages state regulation of wages and hours through its saving clause, which permits states to require a higher minimum wage or shorter maximum workweek than the FLSA.³⁹ Courts have differed as to whether the saving clause permits states to provide greater remedies for wage and hour violations than those provided by the FLSA.⁴⁰ Regardless, the FLSA does countenance some role for state and local regulation in its regulatory scheme.

In the second category, federal law not only sets the standard but also occupies the field. For example, the Employee Retirement Income Security Act (ERISA) regulates employee pension and welfare benefit plans. Section 514 of ERISA provides that the statute “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”⁴¹ Both the Supreme Court and academic commentators have noted the broad scope of this language.⁴² ERISA pre-

36. See 29 U.S.C. §§ 206, 207 (2000).

37. See N.Y. LABOR LAW § 652(1) (McKinney 2002). Currently, the rate is set at \$5.15 per hour.

38. See 12 N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2001). The provision is derived directly from federal law. It states: “An employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee’s regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 *et seq.*, the Fair Labor Standards Act of 1938, as amended.” *Id.*

39. 29 U.S.C. § 218(a) (2000) (“No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . .”).

40. Compare *Divine v. Levy*, 36 F. Supp. 55, 58 (W.D. La. 1940) (holding that state remedies cannot exceed FLSA remedies) with *Spieth v. Adasen Distrib., Inc.*, No. 88-1541, 1989 WL 61187, at *2 (D. Ariz. Jan. 24, 1989) (holding that the saving clause allows for greater remedies). For a discussion of this issue, see Michael D. Moberly, *Fair Labor Standards Act Preemption of State Wage Payment Remedies*, 23 ARIZ. ST. L.J. 991 (1991).

41. 29 U.S.C. § 1144(a) (2000).

42. See, e.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (“[P]reemption provisions of ERISA are deliberately expansive. . . .”); JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 496 (3d ed. 2000) (noting that § 514 has “language of remarkable breadth”); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case*

emption has made it quite difficult for states to regulate in the area of pensions or health care. Although recent legislation has created some room for states to maneuver,⁴³ ERISA still dictates most of the regulation in these areas.⁴⁴

Finally, in the third category, state law sets the standards, and federal law is either absent or plays a supporting role. Workers' compensation provisions, for example, are entirely the domain of state law. Federal law only plays a minor role: the Americans with Disabilities Act⁴⁵ and the Family and Medical Leave Act⁴⁶ both provide additional protections for injured or disabled workers, but these benefits complement those provided by workers' compensation. The federal government has a more complex relationship with unemployment insurance, but here, too, the state has the primary role in establishing the type of aid available and in providing the actual benefits.⁴⁷

In contrast, in the realm of state labor law there is really only one regime of state-federal relations. The NLRA is the federal statute that establishes the framework for collective bargaining.⁴⁸ Although the NLRA has no express preemption provision, the Act has been interpreted to have broad preemption effects on state and local activity.⁴⁹ Under the line of cases beginning with *San Diego Building Trades Council v. Garmon*, states are forbidden from regulating activities that are actually or arguably protected activity or prohibited activity under the Act.⁵⁰ Federal preemption was then extended to conduct not explicitly regulated by the NLRA in *Machinists v. Wisconsin Employment Relations*

Study of the Failure of Textualism, 33 HARV. J. ON LEGIS. 35, 36 (1996) (stating that ERISA "broadly preempts state laws that 'relate to' employee benefit plans").

43. See Colleen E. Medill, *HIPAA and Its Related Legislation: A New Role for ERISA in the Regulation of Private Health Care Plans?*, 65 TENN. L. REV. 485, 502-04 (1998) (explaining how HIPAA changed ERISA preemption to allow for state regulation of certain aspects of health care plans).

44. ERISA preemption has even been seen to extend to such areas as the regulation of employee discharge. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-40 (1990) (holding that ERISA preempted a Texas common-law wrongful discharge action alleging that an employer terminated an employee to avoid making pension fund contributions).

45. 42 U.S.C. §§ 12101-12213 (2000).

46. 42 U.S.C. §§ 2601-2654 (2000).

47. See Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335, 340, 344-45 (2001).

48. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959).

49. *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224-26 (1993) (describing the standard under which preemption questions are to be considered).

50. *Garmon*, 359 U.S. at 245.

Commission.⁵¹ Under the *Machinists* doctrine, states may not regulate collective bargaining activities not specifically protected or prohibited by the Act if, in the eyes of the court, Congress intended for these activities to remain unregulated.⁵² Together, these two doctrines have rendered the whole spectrum of collective-bargaining activity largely untouchable to anyone but the federal government.⁵³ Only spheres of traditional state interests, such as regulating violent crimes (at picket sites) or protecting property interests (of employers), are available to state law-making.⁵⁴

Certainly, the preemption doctrines have not entirely removed states from the realm of collective-bargaining. States are free to regulate the collective bargaining process for employees not covered by the NLRA, such as agricultural workers and state government employees.⁵⁵ Under the *Machinists* doctrine, states are also permitted to participate in the collective bargaining process as market participants; for example, a state can require subcontractors to agree to a labor agreement in soliciting bids for a construction project.⁵⁶ However, states are prohibited from using such market power to “regulate” labor relations; for example, states cannot bar employers who have repeat NLRA violations from doing business with the state.⁵⁷ When dealing with private employers in a purely regulatory context, states are left working around the edges of the *Garmon* and *Machinists* doctrines. Preemption doctrine has struck down state efforts to penalize the use of permanent striker replacements⁵⁸ and to limit the scope of trespass laws in labor disputes.⁵⁹ And the scope of the doctrine continues to develop. Last year New York enacted legislation prohibiting the use of state funds or property to assist, promote, or deter union organizing.⁶⁰ However, a federal district court recently found similar legislation in California to be preempted.⁶¹

51. 427 U.S. 132 (1976).

52. *Id.* at 149.

53. See Estlund, *supra* note 1, at 1572–74.

54. See *id.* at 1573–74.

55. *Bldg. & Constr. Trades Council*, 507 U.S. at 226.

56. *Id.*

57. *Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986).

58. See, e.g., *Midwest Motor Express, Inc. v. Int’l Bhd. of Teamsters, Local 120*, 512 N.W.2d 881, 883, 889 (Minn. 1994); *Greater Boston Chamber of Commerce v. City of Boston*, 778 F. Supp. 95, 98 (D. Mass. 1991).

59. See *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 363–66 (4th Cir. 1991).

60. 2002 N.Y. Laws 601 (codified at N.Y. LABOR LAW § 211-a (McKinney 2003)).

61. *Chamber of Commerce v. Lockyer*, 225 F. Supp. 2d 1199, 1205–06 (C.D. Cal. 2002) (discussing Cal. Assembly Bill 1889 (codified at CAL. GOV’T CODE § 16645 (West 2000))). The *Lockyer* appeal is now before the Ninth Circuit. The NLRB has granted its General Counsel permission to argue that the law is preempted. See Press Release, NLRB, Office of Gen. Counsel, Labor

Although states have some power to favor labor law adherents when making their own contracts, overall they are largely limited to following the NLRA's lead when it comes to making labor law. Unlike many areas of employment law, labor law has been largely insulated from state innovation.⁶²

II. THE GREENGROCER CODE OF CONDUCT

A. Background

The greengrocery is a big-city, if not solely a New York City, institution. Greengroceries are small retail food stores that offer a selection of staples at convenient locations for extended hours.⁶³ The name refers to the produce that is offered at these markets, which distinguish them from their suburban convenience-store counterparts.⁶⁴ In addition, an increasing number of greengroceries offer extensive salad bars with both hot and cold foods, in addition to their traditional fare.⁶⁵ Most stores employ between five and fifteen workers for such tasks as stocking the shelves and managing the produce.⁶⁶ Unlike larger chain grocery stores and supermarkets, greengroceries are not owned *en masse*; instead, many greengroceries are individually owned.⁶⁷ A large proportion of greengrocery owners are of Korean descent, while the workforce is

Board Authorizes its General Counsel to Proceed on his Recommendation to Take Position in Ninth Circuit Case That Two Provisions of California Statute are Preempted by NLRA, NLRB Release No. 2493 (May 29, 2003), at <http://www.nlr.gov/press/r2493.html> (last visited Dec. 23, 2003).

62. See Estlund, *supra* note 1, at 1579.

63. See Interview with Patricia Smith, Assistant Attorney General in Charge of the Labor Bureau (August 7, 2003) (forthcoming in 6 REGIONAL LABOR REPORTER (2004)) [hereinafter Smith Interview].

64. *Id.*

65. The Greengrocer Code of Conduct defines greengroceries as “[t]he employers of retail food stores of 15,000 square feet or less.” Green Grocer Code of Conduct, *supra* note 21, at 1. Most greengroceries, however, are significantly smaller than 15,000 square feet. See Smith Interview, *supra* note 63.

66. See Press Release, Office of New York State Attorney General Eliot Spitzer, Spitzer Sues Greengroceries for Labor Abuses (May 2, 2001) (on file with author) [hereinafter May 2001 Press Release].

67. Smith Interview, *supra* note 63. Greengroceries are generally structured as being owned and operated by a corporation. *Id.*

largely of Mexican descent.⁶⁸ There are approximately 2,000 greengroceries in New York City.⁶⁹

In 1999 evidence of potential employment law violations by local greengroceries came to the attention of the Labor Bureau of the New York State Attorney General's Office.⁷⁰ Workers were referred to the Bureau by the Community Labor Coalition of the Lower East Side and by Local 169 of UNITE.⁷¹ The Bureau learned from these workers that they were being paid between \$180 and \$360 for a workweek of 72 hours—twelve hours a day for six days a week.⁷² In other words, the workers were getting between \$2.50 and \$5.00 an hour, with no overtime. These wages were a clear violation of federal and state laws regarding the minimum wage (\$5.15 an hour), as well as overtime (time-and-a-half for all hours worked over forty).⁷³

As its investigation grew, the Labor Bureau learned that these violations were not confined to one or two stores; instead, sublegal wages appeared endemic to the industry.⁷⁴ Other workers slowly began to come forward. The Attorney General's Office first pursued these cases through the traditional investigate-and-settle method.⁷⁵ Since wage-related employment laws require that specific minimum terms be met, the violation is easy to prove with the right evidence.⁷⁶ The remedy is also straightforward: the employer must pay the worker the back wages necessary to meet the legal minimums. Thus, if the evidence leaves little question

68. See Steven Greenhouse, *Korean Grocers Agree to Double Pay And Improve Workplace Conditions*, N.Y. TIMES, Sept. 18, 2002, at B1; Smith Interview, *supra* note 63.

69. See Greenhouse, *supra* note 68, at B1.

70. The Labor Bureau began its life as the representative of the Workers Compensation Board in judicial proceedings. The Bureau still spends a significant amount of its time as counsel to state employment law agencies, but it is also free to pursue violations of state law independently. Smith Interview, *supra* note 63.

71. *Id.*

72. See Press Release, Office of New York State Attorney General Eliot Spitzer, *Greengrocers Settle Labor Abuse Charges (August 30, 2000)*, available at http://www.oag.state.ny.us/press/2000/aug/aug30a_00.html (last visited Dec. 23, 2003); see also Smith Interview, *supra* note 63 (stating that employees had been paid between \$200 and \$300 for a 72-hour workweek).

73. See 29 U.S.C. §§ 206–207 (2000) (FLSA provision); N.Y. Labor Law § 652(1) (McKinney 2002) (New York State provision). The minimum wage for 72 hours of work (including overtime) is \$453.20.

74. Smith Interview, *supra* note 63 (stating that the investigation that began on the Lower East Side of Manhattan continued throughout the city and a pattern of labor violation in the stores became evident).

75. *Id.* (explaining how the Labor Bureau would gather all the evidence before negotiating and provided incentives for the employers to settle).

76. *Id.* (discussing that procuring settlements was not a problem because evidence of the violations was readily apparent).

about the nature and extent of the violations for each worker, the parties are likely to reach a settlement at something close to the full amount of the violation. These sums are paid to the individual workers at each location.

However, proceeding in the traditional manner can also be problematic. If the employer did not keep records of wages paid, then workers must come forward to testify about their wages and hours. Often, low-paid workers are afraid to report violations for fear of losing their jobs. In the case of the greengroceries, some of the Mexican workforce may also lack the proper authorization to work in this country legally.⁷⁷ The potential for deportation lurks in the background for those undocumented workers who decide to make a public complaint. Even under the best scenario, in which workers come forward with written proof or clear recollections of the times, dates, and amounts of their wages, the process of collecting and presenting this evidence can be quite slow.⁷⁸

The Labor Bureau achieved individual settlements with ten to twenty greengroceries between 2000 and 2002.⁷⁹ These settlements ranged from \$30,000 to \$105,000 in back pay per store, with between four to seventeen employees per store receiving money.⁸⁰ These settlements sent a shockwave through the city's greengrocers.⁸¹

Although only a handful of greengroceries had been charged with violations, Attorney General Eliot Spitzer vowed to push for wage compliance throughout the industry.⁸² The grocers were also feeling embattled on other fronts: employees were beginning to organize at a few stores, and unions and community groups were targeting the greengro-

77. The Attorney General did not investigate whether the greengrocer workers had authorization under federal law to work in the United States. As Ms. Smith noted, the issue is irrelevant, since the wage and hour laws apply to undocumented as well as documented workers. See Smith Interview, *supra* note 63.

78. *Id.*

79. *Id.*

80. *Id.*; Press Release, Office of New York State Attorney General Elliot Spitzer, Spitzer and Consul General Announce Settlement of Labor Abuse Cases Against Greengroceries (November 20, 2001), at http://www.oag.state.ny.us/press/2001/nov/nov20a_01.html (last visited Dec. 23, 2003) [hereinafter November 2001 Press Release]; Press Release, Office of New York State Attorney General Elliot Spitzer, Spitzer Continues Efforts to Combat Wage Abuses in Greengroceries (December 13, 2001), at http://www.oag.state.ny.us/press/2001/dec/dec13d_01.html (last visited Dec. 23, 2003) [hereinafter December 2001 Press Release].

81. See Greenhouse, *supra* note 68, at B1.

82. See May 2001 Press Release, *supra* note 66.

ceries for public demonstrations.⁸³ Despite public protests, several of the stores targeted by the Bureau continued to pay illegal wages.⁸⁴

As a result of the public and legal pressure mounted against them, greengrocers began to negotiate with the Labor Bureau to find a more stable solution.⁸⁵ The Korean American Association of Greater New York (KAAGNY) was enlisted to serve as a representative of the greengrocers.⁸⁶ The KAAGNY argued that greengrocers were unaware of the law's requirements; many were recent immigrants who were not familiar with the wage and hour laws.⁸⁷ Thus, as a first step, over 270 greengrocers participated in employment law seminars conducted by the Attorney General's Office.⁸⁸ The Bureau, however, wanted to take a more concrete step to bring greengrocers into compliance. The traditional method of targeting and then settling with individual greengroceries would take too much time and too many attorneys.⁸⁹ Instead of taking each greengrocery separately, the Bureau decided to pursue a more comprehensive approach.⁹⁰ Representatives from Casa Mexico, a non-profit organization representing Mexican workers, and the New York state AFL-CIO were brought into negotiations with the Bureau and the KAAGNY to achieve a forward-looking agreement.⁹¹ After months of negotiations, the sides agreed to the Greengrocer Code of Conduct in September 2002.⁹²

B. The Greengrocer Code Requirements

1. Terms of Employment

The Greengrocer Code of Conduct may appear, at first, to be a streamlined version of the traditional employment law settlement agreement. One of the stated goals of the Code is to "increase labor law compliance by the undersigned employers,"⁹³ and many of the Code's terms

83. See Greenhouse, *supra* note 68, at B1.

84. See November 2001 Press Release, *supra* note 80.

85. See Smith Interview, *supra* note 63.

86. See *id.*

87. *Id.*

88. *Id.*

89. See *id.* The Labor Bureau only has eight attorneys. *Id.*

90. *Id.*

91. See *id.*

92. *Id.*

93. Greengrocer Code of Conduct, *supra* note 21, introductory cmt.

are simply state law requirements. The Code's obligations include paying employees the minimum wage,⁹⁴ paying overtime,⁹⁵ providing at least one full (unpaid) day of rest each week,⁹⁶ and providing meal breaks.⁹⁷ The Code requires the greengrocers to pay their employees every week,⁹⁸ maintain payroll and time records on the premises,⁹⁹ and furnish payroll stubs to employees.¹⁰⁰ In addition, the greengrocers must post a notice concerning these obligations in English, Spanish, and Korean.¹⁰¹ The Code also includes a catch-all provision, requiring the signatories to comply with certain articles of New York state labor and employment laws.¹⁰²

The Code goes beyond the minimum terms, however, with two important provisions. First, greengrocers are to provide at least one work-week of paid vacation to each employee who has worked at the store for at least one year.¹⁰³ Second, employees are entitled to paid sick days: two days of sick leave if they have worked at the store for at least one year, and three days of sick leave if they have worked at the store for at least two years.¹⁰⁴ The Code also notes that these requirements are minimums, not maximums, and states that the undersigned "recognize

94. *Id.* § I.2. The New York state minimum wage is the same as the federal minimum wage. See N.Y. LABOR LAW § 652 (McKinney 2002).

95. Greengrocer Code of Conduct, *supra* note 21, § I.3. New York state requires time-and-a-half for overtime, just like the federal Fair Labor Standards Act. N.Y. COMP. CODES R. & REGS. tit. 12 § 142-2.2 (2001).

96. Greengrocer Code of Conduct, *supra* note 21, § I.6. See N.Y. LABOR LAW § 161 (McKinney 2002).

97. Greengrocer Code of Conduct, *supra* note 21, § I.7. New York law requires that employees receive one-half hour of (unpaid) time for a meal break during the work-day. Workers who begin before 11 a.m. and continue working past 7:00 p.m. are entitled to an additional twenty minute break; workers who work for at least six hours starting after 1 p.m. are entitled to a forty-five minute break. See N.Y. LABOR LAW § 162 (McKinney 2002).

98. Greengrocer Code of Conduct, *supra* note 21, § I.4. See also N.Y. LABOR LAW § 191 (McKinney 2002).

99. Greengrocer Code of Conduct, *supra* note 21, § I.5. See also N.Y. LABOR LAW § 661 (McKinney 2002); N.Y. COMP. CODE R. & REGS. tit. 12, § 142-2.6 (2001).

100. Greengrocer Code of Conduct, *supra* note 21, § I.9. See also N.Y. COMP. CODES R. & REGS. tit. 12 § 142-2.7 (2001).

101. Greengrocer Code of Conduct, *supra* note 21, § I.8. See also N.Y. COMP. CODES R. & REGS. tit. 12 § 142-2.8 (2001).

102. Greengrocer Code of Conduct, *supra* note 21, § I.11. The enumerated New York Labor Law Articles are Articles 4 (regarding employment of minors); 5 (hours of labor); 6 (payment of wages); 7 (general provisions); 19 (minimum wage); 20-A (labor and management improper practices act); 20-C (retaliatory action by employers); and 28 (toxic substances).

103. *Id.* § I.16.

104. *Id.* § I.15. In terms of notice, employees must obtain employer approval at least two weeks before taking vacation, and must notify the employer "as soon as possible" regarding a sick day.

that it is good business practice to motivate employees with increases” in vacation and sick leave.¹⁰⁵ Similar language can be found in the Code regarding increases to the minimum wage and break times.¹⁰⁶

2. Educational Provisions

Greengrocers who sign the Code are required to attend a two-hour educational training session about basic wage, recordkeeping, and safety and health requirements under New York Law.¹⁰⁷ The sessions are conducted by the Attorney General’s office in both English and Korean.¹⁰⁸ In addition, the greengrocers are to allow their employees to attend a two-hour educational session covering similar topics, conducted by the Attorney General and community organizations.¹⁰⁹ The greengrocers are to post notices about the time and location of these sessions; they are also encouraged (but not required) to pay their employees for time spent at these sessions.¹¹⁰

In terms of the Code itself, the signatories are to inform their employees orally that they have signed on to the Code.¹¹¹ They must also provide employees with a written summary of the Code in the employee’s native language and post a summary on the wall in a conspicuous location.¹¹²

3. Monitoring Process

One of the most important facets of the Code of Conduct is the monitoring process outlined in its provisions. Each signatory agrees to submit to unannounced monitoring by an independent company selected by the Attorney General’s Office.¹¹³ The purpose of the monitoring is to

105. *Id.* §§ 1.15, 1.16.

106. *Id.* §§ 1.2, 1.7.

107. *Id.* § 1.17.

108. Smith Interview, *supra* note 63.

109. Greengrocer Code of Conduct, *supra* note 21, § 1.18.

110. *Id.*

111. *Id.* § 1.14.

112. *Id.* § 1.13. These summaries are available at the Attorney General’s website. See Summary of Greengrocer Code of Conduct (English), *at*

http://www.oag.state.ny.us/workplace/final_ggcode_english_short.pdf (last visited Dec. 23, 2003);

Summary of Greengrocer Code of Conduct (Spanish), *at*

http://www.oag.state.ny.us/workplace/final_ggcode_spanish_short.pdf (last visited Dec. 23, 2003);

Summary of Greengrocer Code of Conduct (Korean), *at*

http://www.oag.state.ny.us/workplace/final_ggcode_korean_short.pdf (last visited Dec. 23, 2003).

113. Greengrocer Code of Conduct, *supra* note 21, § III.1.

insure compliance with the Code's provisions, primarily the minimum wage and overtime requirements. The monitor is to have access to all payroll and time records, and shall be able to talk to employees privately for up to fifteen minutes.¹¹⁴ Once the visit has been completed, the monitor is to prepare a brief written report of any violations found.¹¹⁵ If violations are found, then the monitor is to conduct a follow-up visit three weeks later, submitting an additional report of any further violations found.¹¹⁶

The monitor reports directly to the Attorney General's Office.¹¹⁷ However, the monitor is also to provide its reports to the Code of Conduct Committee. The Committee consists of three members: one greengrocer representative, one employee representative, and one Attorney General representative.¹¹⁸ The Committee reviews the monitor's reports and is to prepare a brief annual report summarizing the monitor's activities, including the total number of greengrocers visited and the violations that were found.¹¹⁹ In addition, the Committee can receive complaints about violations of the Code through a toll-free number.¹²⁰ Upon receiving a complaint, the Committee is to determine whether reasonable cause of a violation exists. If such cause exists, the Committee is to notify the Attorney General's Office, who will send the monitor to investigate.¹²¹ However, if there is a recognized employee collective bargaining representative at the particular worksite, the Committee must first notify that representative of the complaint.¹²² If the violation has not been corrected in ten days, the Committee is then to notify the Attorney General's Office.¹²³

The Code takes steps to establish links between the monitor and greengrocer employees. In its first visit to stores with ten or more employees, the monitor will choose a "Code of Conduct employee contact person" after consultation with the store's employees.¹²⁴ Employees are also assured of confidentiality when meeting with the monitor or when

114. *Id.* § III.5.

115. *Id.* § III.8.

116. *Id.*

117. *Id.* § III.2.

118. *Id.* The Code does not specify how these representatives are to be chosen, although the code specifies that actual greengrocer owners or employees cannot serve on the Committee. *Id.* § III.2(a).

119. *Id.* § VI.1. These reports are to be made available to the public. *Id.* § VI.2.

120. *Id.* § III.3. The telephone number is 1-800-729-1180.

121. *Id.* § III.3(a).

122. *Id.* § III.3(b).

123. *Id.*

124. *Id.* § III.6.

making complaints to the Committee.¹²⁵ All monitor reporting and public documentation shall redact employee information unless the worker provides express written consent.¹²⁶

4. Retaliation Protection

The Code requires that employers not discharge, penalize, or in any other way retaliate against employees for making complaints about potential violations of the Code.¹²⁷ The Code also notes that state and federal law prohibits employers from retaliating or discriminating against employees for exercising their right to organize.¹²⁸

5. Non-Binding "Recognitions"

In addition to its required terms, the Code also sets forth a number of aspirational provisions framed as "recognitions" by the employer.¹²⁹ As noted earlier, the Code only requires the payment of the minimum wage. At the same time, however, the Code states that "the undersigned employers recognize that it is a good business practice to motivate employees with regular wage increases."¹³⁰ The Code also states that its employers recognize that paying for time used for meal breaks is a good business practice that helps "build[] employee morale."¹³¹ Other such "good business practices" include motivating employees with additional sick and vacation days, and not discharging an employee unless there is a reason related to job performance.¹³² The Code also mentions the procedures available through the State Employment Relations Board for the resolution of collective bargaining issues.¹³³ These procedures, which include majority authorization agreements and mediation, are encouraged by the Code.¹³⁴ The Code also encourages employers to provide

125. *Id.* § III.7.

126. *Id.*

127. *Id.* § I.10.

128. *Id.* § II.1.

129. *See id.* § II. In the international law context, aspirational but unenforceable treaty provisions are referred to as "soft law," since there are no specified "hard" consequences to disobeying such provisions. For a discussion of "soft law," see Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

130. Greengrocer Code of Conduct, *supra* note 21, § I.2.

131. *Id.* § I.7.

132. *Id.* § II.3. The provision also recognizes, however, that employers "have the right to discipline or discharge employees who are not performing adequately."

133. *Id.* § II.1.

134. *Id.*

their employees of Mexican descent with an unpaid holiday on December 12.¹³⁵ The Code asks that employers attempt to grant this request “as much as is feasible with a minimum of disruption to the store’s daily activities.”¹³⁶

6. Forbearance for Prior Violations

As part of the Code of Conduct, the Attorney General agrees to refrain from investigating signatories for prior civil violations of the state minimum wage and overtime laws.¹³⁷ Along with agreeing to the Code and maintaining good standing under it, greengrocers must also execute an Assurance of Discontinuance with the Attorney General’s Office.¹³⁸

7. Seal of Good Standing

Signatories to the Code are to receive a Code of Conduct Seal, which can be displayed on the store’s window.¹³⁹ The Attorney General’s website is also to maintain a list of greengrocers in good standing under the Code.¹⁴⁰

8. Expiration Date

The Code has a two-year life span.¹⁴¹ Six months prior to expiration there is to be a meeting with the monitor, the Code of Conduct Committee, the Attorney General’s Office, and representatives of the greengrocers and their employees.¹⁴² The meeting’s purpose is to review the effectiveness of the Code and determine whether to renew the Code (with or without modifications) for another two years.¹⁴³

135. *Id.* § II.4. December 12th is the Catholic feast day of Our Lady of Guadalupe, the patron saint of Mexico.

136. *Id.*

137. *Id.* § IV.

138. *Id.*

139. *Id.* § V.1. The Seal can be viewed at http://www.oag.state.ny.us/workplace/ggcode_seal.jpg (last visited Dec. 23, 2003).

140. *Id.* § V.2.

141. *Id.* § VII(a).

142. *Id.* § VII(c).

143. *Id.*

C. *The First Year of the Code*

Thus far, the Code has been successful in implementing its goals. Greengrocers continue to sign on to the Code, even after the initial push for enrollment ended in February 2003.¹⁴⁴ The recently-hired monitor has begun to visit the member stores and has largely found compliance on the minimum wage and overtime requirements.¹⁴⁵ None of the member stores have dropped out of the Code.¹⁴⁶ If greengrocers continue to sign up and comply with the Code's requirements, the Code will have succeeded in completely reshaping the employment landscape for hundreds of greengrocer workers.

III. THE GREENGROCER CODE OF CONDUCT AS A MODEL FOR STATE LABOR LAW

The Greengrocer Code of Conduct is surely an innovative method in attacking the problem of minimum wage and hour violations in the greengrocer industry. But is it really anything more than a series of dressed-up settlement agreements? Is it really a new form of state labor law? And if so, what promise does it hold for the future? These questions are addressed below.

A. *The Code as State Labor Law*

The impetus for the Greengrocer Code of Conduct was the widespread incidence of greengrocer employment law violations. The Attorney General's Office began its investigation based on evidence that greengrocers were paying their employees less than the minimum wage, with no overtime. The core of the Code's terms is basic compliance with state laws regarding the minimum wage, overtime, time-off, and record-keeping. Greengrocers were induced to sign on to the Code, at least in part, by the Attorney General's promise not to investigate past violations

144. As of March 2003, there were 165 greengrocers who had signed on to the code. See Greengrocer Code of Conduct Signatories, at http://www.oag.state.ny.us/workplace/ggcode_store_listing.pdf (last visited Dec. 23, 2003). As of August 2003, there were about 200 signatories. See Smith Interview, *supra* note 63.

145. See Smith Interview, *supra* note 63. Interestingly, the Monitor (A & L Group, Inc.) has found several instances of stores failing to keep proper track of their employees' time. In most of these stores, however, the problem was only one of record-keeping; employees were being fully paid for the time worked. See *id.*

146. One store went out of business after signing the Code, although a greengrocery remains at that location. See *id.*

of signatories. Why, then, isn't the Code just a clever version of an employment law settlement?

The Code has several aspects which take it beyond an ordinary wage-and-hour settlement. In comparing the initial greengrocer settlements with the Code, the first major difference is scope. Settlements represent the closure of a particular case against a particular employer for particular violations of the law. The Code, on the other hand, requires no evidence of guilt on the prosecution's part, and no admission of guilt on the employer's part. Yes, the Code may in effect absolve greengrocers of potential liability for prior acts.¹⁴⁷ But unlike a settlement, which is a specific resolution of a specific set of allegations, the Code only bars the Attorney General from investigating potential prior acts.¹⁴⁸ This may, in effect, give employers a "free ride" out of liability. But it also gives the Attorney General's Office a "free ride" out of the need to develop evidence about every single greengrocer for violations. The ability to proceed on an industry-wide basis, rather than an individual-employer basis, transforms the Code into more than just a settlement. It is instead a blueprint for employee relations for the entire sector.

Second, the Code resembles a collective-bargaining agreement. The Code sets forth minimum requirements for employee terms and conditions of employment. The wage, overtime, time-off, and record-keeping requirements are simply the legally-required minimums.¹⁴⁹ However, these terms are substantially better than the terms the employees had been given prior to the Code's promulgation.¹⁵⁰ Moreover, the Code also requires that employees be given one week of vacation and two to three sick days.¹⁵¹ Instead of simply requiring redress for past violations and future compliance with the law, the Code establishes an industry-wide set of employment terms that go beyond the legal minimum.

Third, most settlement agreements are enforced through a cumbersome, court-oriented compliance process. Once a case has been settled, the employer is often left to its own devices in carrying out the settlement agreement. Employees may endeavor to report violations of the agreement, but compliance can only be compelled through contempt proceedings or additional litigation. The Code, on the other hand, has set

147. *Id.*

148. *See id.* In other words, employees or even other government agencies could probably pursue the prior violations without worry of a collateral estoppel argument.

149. *See supra* Part II; *see also* Smith Interview, *supra* note 63.

150. As the New York Times headline noted, the Code "doubled" the pay of the greengrocer employees. *See Greenhouse*, *supra* note 68, at B1.

151. Greengrocer Code of Conduct, *supra* note 21, §§ I.15–16.

up an internal mechanism for handling and investigating employee complaints. As part of signing on to the Code, employers agree to allow a monitor access to its employees and its records.¹⁵² The monitor is not an occasional spot-checker; it is required to investigate every signatory during the term of the Code.¹⁵³ The monitor then reports to the Code Committee, which is set up to respond to questions or complaints about Code compliance.¹⁵⁴ The Committee not only allows for joint discussion, investigation, and analysis; it also creates an institution through which future agreements can be hammered out.¹⁵⁵ It thus shares similarities not only with a grievance arbitration system, but also with a multi-employer bargaining process. A settlement agreement is seen as an end to a particular litigation process. The Code establishes a future-oriented plan with built-in enforcement and amendment procedures.

Even if the Code moves beyond the realm of a simple settlement agreement, why claim that it represents a new approach to state labor law, rather than employment law? After all, as discussed above, employment law is all about supplying particular minimum terms for employment agreements, and the Code supplies such terms. Admittedly, the Code does not look much like an archetypical labor law. The NLRA establishes a process; the Code establishes an outcome. The NLRB professes to be a neutral umpire on the sidelines; the Attorney General's Office was intimately involved in the negotiating process and ultimately set the final terms. However, the Code is more than just a set of minimum terms to be applied. It establishes a collective relationship between greengrocers and their employees. It establishes a process for complaining about Code violations, and then remedying them. It provides for an independent monitor, accountable to the parties, to insure that the Code is being followed. In other words, it gives greengrocery employees a set of collective rights, and then provides an independent method for enforcing them. In many ways, it establishes a collective-bargaining relationship between a multi-employer group and its employees.

This type of collective-bargaining "regulation" is novel in the realm of labor law. Instead of taking a set of rules and applying them across industries, geographies, and economies, the Code takes a set of provisions and applies them to employers in one city, in one industry. Instead of standing back and waiting for employees to initiate a collective-

152. *Id.* § III.1.

153. *Id.* § III.3.

154. *Id.* § III.3(b).

155. *Id.* § VII (c).

bargaining relationship, the Attorney General's Office stepped in and forced the two groups together. It is a tailored approach to the problems in one particular workplace milieu. Because it deals with employers and employees in a collective relationship, and creates in essence a government-sponsored collective bargaining agreement, it is more than just employment law—it is an interventionist form of labor law.

Thus, the Code is an opportunity for rethinking our approach to labor law. Instead of relying on a single, national set of rules for all employers and employees to follow, states and localities could explore collective approaches to specific industries. Instead of creating a complex system of employer-employee interaction and then taking a step back, states and localities could participate in these interactions, as both mediators and advocates for particular terms and conditions. And instead of assuming that a settlement agreement is the end of the matter, states and localities could establish codes that ensure substantially independent policing while maintaining government oversight. Below are some thoughts about what such codes might need to succeed, and where they might be of most use.

B. The Code as a Model for Future Action

The Code seems to provide a unique way of establishing better working conditions for an entire industry's employees. Is it a one-time phenomenon, or is it a model for a new approach to workplace regulation? It is probably premature to make any definitive predictions. But the following are some thoughts about when and how the Code might serve for future developments.

1. Factors Needed for Future Codes

In looking closely at the background, negotiations, and terms of the Code, one can identify several factors that would be necessary in developing codes in other industries.

a. Widespread Employment Law Violations

The primary purpose of the Code is to bring greengrocers into compliance with the existing employment law. Likewise, the primary incentive for greengrocers to join the Code is to escape liability for past employment law violations. If only a few greengrocers had been out of compliance, individual settlement agreements would have been suffi-

cient to resolve the lawlessness. If greengrocers had paid their workers poorly but within legal limits, there would have been no “hook” to bring them to the Code.

b. A Core of Cooperating Employees

Part of the genius of the Code is that it brings compliance to an entire industry without the need for massive amounts of evidence. However, some evidence of wrongdoing is necessary to get the ball rolling. If employees had not reported wage violations to the Attorney General’s office, and then been willing to testify about them, the Attorney General would have been unable to pursue the initial settlements that provided the concrete threat of further enforcement procedures.

c. Similar Working Conditions Across the Industry

The Code sets uniform terms and conditions for greengrocers across New York City. If employees had varying responsibilities or job titles, or if different neighborhoods had different wages and benefits, then greengrocers would have found it difficult to agree on standard terms for the entire industry.

d. Willing and Able Negotiating Representatives

Both the greengrocers and their employees were represented by ethnic organizations at the Code negotiations.¹⁵⁶ The Korean-American Association appears to have been particularly crucial in representing the greengrocers during talks and then encouraging them to sign on once it was completed.¹⁵⁷ If these ethnic groups had been unavailable, it is hard to imagine who might have been able to broker the Code. The greengrocers did not have an industry-wide organization or representation, and the employees largely were not represented by unions. Technically, employer representatives are more important than employee representatives, since it is employers who sign on to the Code. But employee representatives ensure that workers have a voice in the process and serve to garner public support after the Code is complete.¹⁵⁸

156. See Smith Interview, *supra* note 63.

157. See *id.*; see also Greenhouse, *supra* note 68, at B1.

158. Much more could be written on the legitimacy and accountability of the representatives chosen to negotiate the Code. In the context of the Greengrocer negotiations, the representatives appear to have had the support of their constituent members. Although the employer representatives

e. Consumer support

Public pressure played an important role in convincing employers to sign on to the Code.¹⁵⁹ Demonstrations against the stores certainly took a toll in an industry that needs consumer support. The inclusion of the good standing seal demonstrates that greengrocers saw a benefit to improving their public standing. Because the sheer number of greengrocers, as well as their separate ownership, enables consumers to choose another grocery fairly easily, the grocers had an incentive not to stand out as bad actors.

f. Government Action

The Attorney General's interest in the case was necessary in brokering the deal. The Attorney General's Office not only investigated the violations and pursued legal action, it also originated the notion of the Code, negotiated its terms, and then provided the administration and funding for its operation. The Code could, of course, have been developed and promulgated by greengrocers themselves. In fact, many industries have developed private codes or policies of self-regulation in response to consumer concern or the threat of governmental regulation.¹⁶⁰ However, it is doubtful that many of the greengrocers would have been interested in the Code absent the imminent threat of legal sanction.¹⁶¹ Moreover, the Attorney General's involvement provided more accountability to the ultimate result. A code developed solely by industry players would not have had the legitimacy of the Greengrocer Code. The Attorney General was able to represent both the workers and the public, to some extent, in its ultimate approval of the Code.¹⁶²

were unelected and thus arguably not accountable, the actual decision to sign on to the Code was left up to the individual greengrocer. A stronger argument could be made that, in theory, the employee representatives were unaccountable and thus illegitimate. After all, the employees' actual collective bargaining representatives (for those few employees with collective representation) were left out of the room during negotiations. Again, however, employees at individual stores were left free to bargain through a collective representative for a better deal than the Code offered.

159. See *Greenhouse*, *supra* note 68, at B6 ("For many grocers, improving their relations with the public and with employees is central to their backing the code.")

160. For a discussion of industry self-regulation at the international level, see VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR* (2001).

161. Imminent, of course, being a key concept: violations may exist for years without any legal action being taken by employment agencies or private citizens.

162. In the international context, nongovernmental organizations (NGOs) may be able to assume some of the responsibilities borne by the Attorney General in the greengrocer negotiations. For further discussion of the power of NGOs to effect industry codes of conduct, see Peter J. Spiro,

2. Scenarios for future Codes

Based on these factors, several industries appear to be possible candidates for a Code of Conduct. The following is a brief sketch of these possibilities.

a. New York Laundry Business

The New York Attorney General's Office has begun investigations into employment law violations by small New York City laundry operators.¹⁶³ These businesses share many characteristics with greengrocers: they are small, often with family and immigrant ownership, have small profit margins, and rely on an unskilled immigrant workforce.¹⁶⁴ They would also seem to put stock in their public reputation. At this moment it is unclear whether there are widespread violations in the industry.¹⁶⁵ Moreover, there may not be any ethnic or industry group which could represent the operators in negotiations over a code.¹⁶⁶ But a Code setting forth terms across the industry might successfully serve to bring operators into compliance, while at the same time ensuring that complying firms are not put at a competitive disadvantage.

b. New York Restaurants

The Attorney General's Office has had a few cases involving minimum wage and hour violations by restaurants, particularly with regard to kitchen workers.¹⁶⁷ Such workers are also frequently unskilled immigrant workers, making it easier for restaurants to subject them to sub-legal conditions. Restaurants would certainly be subject to public pressure, as New York consumers are able to choose from a wide variety of restaurants. Thus far, however, it is unclear whether abuses are uniform across the industry, and it would be difficult to find representatives for the myriad restaurateurs in New York.

Accounting for NGOs, 3 CHI. J. INT'L L. 161, 168-69 (2002), and Peter J. Spiro, *New Global Potentials: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996).

163. Smith Interview, *supra* note 63.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

c. Produce Providers

Exploitation of agricultural workers has been endemic to our economy for generations.¹⁶⁸ Recent reports that immigrant workers in Florida tomato and citrus groves are paid sub-legal wages, threatened with violence, and detained against their will demonstrate that something akin to slavery may be taking place in the United States.¹⁶⁹ The actual employers who engage in these practices are far down on the food chain, but they are vital links in the chain that supplies such multi-national brands as Tropicana and Taco Bell.¹⁷⁰ These companies can plausibly (or, at least thus far, legally) distance themselves from the horrendous violations at the ground level. A Code of Conduct for produce providers would create a new method of providing accountability. The Code would instantly signal that a particular provider was in compliance with the law. Such compliance would be much more likely with a rigorous system of monitoring. And, unlike the Greengrocer Code, it may be possible to secure funding for the monitor from the industry itself. If, for example, Tropicana and Taco Bell were paying for monitors to insure that their produce was obtained through legal means, costly federal and state investigations would not be needed. With a rigorous initial effort from state or federal authorities, a code could be put into place that might finally crack the stubborn cycle of agricultural employee abuse.

IV. CONCLUSION

The Greengrocer Code of Conduct is barely a year old. It is too soon to know whether this innovative agreement will successfully transition New York greengroceries from illegal working conditions to a legal and interactive employment relationship.¹⁷¹ However, I hope this discussion prompts further consideration of the Code's progress, as well as thoughts about potential application of the Code's model to other industries. It may prove a real chance for states once again to participate in the creation and application of labor law. And this participation may be the best chance to escape from our current state of labor law stasis.

168. See, e.g., JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

169. John Bowe, *Nobodies*, *THE NEW YORKER*, April 21 & 28, 2003, at 106.

170. See *id.* at 122–24.

171. One important question is whether the Code has affected workers at the large majority of greengrocers who have not signed on to the Code.